

Edited by
V. Cantino, P. De Vincentiis, G. Racca

Risk management: perspectives and open issues.

A multi-disciplinary approach



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Preface

Firms and public entities are both exposed to various types of risks that can make actual results quite different from expected results. This is not a news. However various factors heightened the attention paid to this problem in the last decades: the slower pace of economic developments, the greater volatility of financial variables, the new modus operandi of supervising authorities, the birth of new types of risks, the growing strength of retail clientele in defending its rights.

The heightened attention paid to risks stimulated the development of new measurement methodologies, new hedging instruments and new management techniques. In turn this updated tool-case produced profound changes in the organizational behavior and in the management systems of firms and public entities.

This complex and continuously changing phenomenon is the topic explored during the International Conference on Risk Management organized by the Department of management, University of Torino, and held in Torino on 5 and 6 May 2016. The conference adopted an original multi-disciplinary approach that allowed an analysis of the theme from various perspectives. This is what distinguished most the Conference RM 2016 from similar initiatives. In particular, the topic of risk management was analyzed from both a managerial and juridical point of views. Participants discussed the impact of risk management on firms' organization, on corporate governance, on the funding available through the banking systems, on quality control. From a juridical point of view, the phenomena of corruption, fiscal crimes and corporate criminal liability were explored.

The volume includes selected papers – which went through a peer-review process – presented during the Conference, subdivided in seven chapters that represents seven different perspectives on risk management:

- Risk in business and public management
- Risk management and bank financing
- Risk management and corporate strategies
- The integrated management system as a tool for risk management
- Risk management, corporate criminal liability and corporate governance
- Integrity public sector risk management in the public procurement sector
- Risk management and crime tax consequences

As a conclusion to this brief introduction, it is interesting to read an abstract of the two key note speeches which opened the International Conference on Risk Management, delivered by the distinguished proff. Christopher Yukins, The George Washington University (Washington, D.C., USA) and Chris Patel, Macquaire University (Sidney, Australia).

Corruption in Public Procurement: Improving Governments' Ability to Manage the Risks of Corruption¹

Prof. Christopher Yukins, The George Washington University, Washington D.C., USA

To an increasing extent, governments demand that their vendors establish sophisticated risk management systems to contain the risks of corruption. The resulting corporate compliance systems have grown more sophisticated, and remarkably uniform, around the world. Ironically, however,

1 A full version of prof. Yukins' paper is included in Chapter 6 of this volume.

governments' own risk management systems have serious gaps, and too often governments fail to coordinate their own risk management systems with their contractors' parallel efforts. Drawing on examples from the United States and Europe, this paper will argue that governments should mitigate these inherent asymmetries in their management of corruption risk, in part by learning lessons from the compliance systems they require of their contractors, and more broadly by better integrating public risk management efforts with those of the private sector.

Risk Management: An International Accounting Perspective
Prof. Chris Patel, Macquarie University, Sidney, Australia

Globalization and the resulting high level of uncertainties in managing business activities have exposed organizations to new and complex risks which need to be researched and managed. Innovative and holistic social, economic, political and legal perspectives are required to understand and manage both internal and external risks. Globalization focuses strongly on convergence and standardization of systems, policies and practices. I examine risk measurement and management from an international accounting perspective and discuss politics and ethical aspects of global convergence of accounting standards. Risk management theories and practices for corporations are largely based on "trusting" that financial statements and annual reports prepared using International Financial Reporting Standards (IFRS) which are issued by the International Accounting Standards Board (IASB), are comparable, reliable, relevant and therefore can be "trusted". My presentation will ask participants to question such simplistic assumptions by the global standard setters. IASB uses the term "substance over form" to describe the importance of professional judgments in accounting. However, the global standard setters provide no discussion or guidance on various factors and contexts that may influence managers' judgments and decision making both within and across countries. On the contrary, they have assumed that managers' judgments and decisions in various countries are largely consistent, neutral and value-free. I suggest that globalization and convergence are embedded in complex social and political processes that require researchers and practitioners to critically examine contextual environments of countries rather than simply focus on measurement, quantification, simplification and categorization. We need theoretical and methodological perspectives that provide insight into the "minds" of managers and other stakeholders. More holistic judgment and decision making research based on quantitative, qualitative, and both formal and informal sources, will lead to better models and practices to improve business performance and create value. Given the pressure on us to publish in leading international journals and requests by my Italian colleagues, I provide some theoretical and methodological suggestions to improve research. In conclusion, we need risk management theories and practices that move away from narrowly focused capital market approaches and use multi-disciplinary and multi-perspective approaches to explain, predict and provide empirical evidence on this complex and contextualized global environment.

Risk in Business and Public Management

Reputational risk and disclosure practices: comparative evidence from European countries

Authors

- *Simona Alfiero, Ph.D., Assistant Professor, simona.alfiero@unito.it - University of Torino*
 - *Massimo Cane, Ph.D., Assistant Professor, massimo.cane@unito.it - University of Torino*
 - *Paola De Bernardi, Assistant Professor, paola.debernardi@unito.it - University of Torino*
 - *Francesco Venuti, Ph.D., Research Fellow, francesco.venuti@unito.it - University of Torino*
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The purpose of this research is to investigate reputational risk disclosure and also to study which drivers influence companies' decisions on exhibiting voluntarily risk information in their annual reports. The paper is a multi-country study that emphasizes the differences in risk reporting practices, underling various cultural, economic and institutional variables that affect the related content of annual financial reports of a sample of European firms.

The research measures reputational risk information by conducting a content analysis of annual financial reports for a sample of 538 European listed companies (France, Germany, Italy, Spain and United Kingdom). Each report has been manually examined and coded, checking for narrative information about risk disclosure.

Our findings show that public visibility (size and income growth rates) and agency theory relationships (ownership structure) are important in explaining reputational risk disclosure.

Particularly, this paper contributes to the current literature stressing the importance of reputational risk disclosure which is, to the best of our knowledge, quite rare in existing literature.

The evidence of our analysis is relevant not only for scholars, but also for managers and regulators who must be aware of the importance of intelligible, specific and transparent disclosure about reputational risk to create and preserve a sustainable and durable corporate reputation.

Keywords: reputational risk - risk management – voluntary disclosure – content analysis – corporate reputation.

JEL Classification: M14, M42, G32

1 Introduction

Companies operate in a world that is becoming not only more risky, but also more volatile, uncertain, complex and ambiguous. In this context, reputation is undoubtedly a fundamental asset for an entity going concern. The increasingly global and interdependent nature of marketplace and the technological and media revolution makes managing reputation a strategic challenge.

A strong *reputation*, according the resource-based theory, can be a key competitive advantage, which is especially important in today's environment of increasing competition, deregulation, globalization and almost instantaneous flow of information. Reputation may confer advantages in accessing key markets, attracting capital, attracting and maintaining high quality workforce and in maintaining good customer and supplier relationships. This intangible asset can also influence *disclosure practices* and changes in the stock price. A growing academic literature supports this view (Fombrun, 1996; Fombrun and Shanley, 1990; Hammond and Slocum, 1996; Roberts and Dowling, 2002).

According to a study by the World Economic Forum, more than 25 percent of a company's market value is directly attributable to its reputation and specific risks include, firstly, reputational risk and other dangers to brands; secondly, potential loss of market share; thirdly, product boycotts and, lastly, disruption of established business models (World Economic Forum - The Global Risks Report 2016 - 11th Edition, 2016).

More than 80% of executive and non-executive board members from a wide range of industries and regions surveyed by The Economist (The Economist Intelligence Unit, 2014) report that reputational risk arising from unethical corporate behaviours has become a key area of focus. In case of an incident or scandal, board members declared to be more worried about the damages to their company's reputation than about direct financial costs or falling share price. Despite the importance placed on protecting a company's reputation, companies are still focusing their attention and disclosing in their annual report only more traditional risks, such as financial and compliance risk. Nevertheless, devoting time and energy on such easily identifiable and well-understood risks means that others (often new and emerging) will receive inadequate attention, despite being potentially able to seriously damaging a company's reputation.

The need for effective risk management, internal control and transparent risk reporting has become an important corporate governance principle and a predominant issue in business. Since 1987, the AICPA has stated that shareholders are increasingly demanding to include in financial statements more information concerning the risks and uncertainties companies are facing (Schrand and Elliott, 1998). Abraham and Cox (2007) claim that this information can help investors to determine the risk profile of a company and estimate its market value.

Reputation risk is likely to be increasingly critical in the last years, which means companies should continue to improve their capabilities to manage it as a strategic issue, as reported also in other recent studies (Deloitte - Global survey

on reputation risk, 2014), in which board members declare that they are explicitly focusing their attention on reputation risk as a key business challenge.

Why so much emphasis is now put on the management of good corporate reputation and the risks of losing it?

Reputation is an intangible asset that can only be defined by what others perceive, so, if the opinions of customers, employees, analysts, regulators and other key stakeholders shift against a company, the negative impact wrought by a bad reputation can send shock waves through nearly every aspect of the organization – from recruiting the best talent to stock value and consumer opinion – up to and including its ability to survive (A risk Intelligent view of reputation, Deloitte, Risk Intelligence Series, Issue n. 22). It's no wonder that reputation is firmly on the radar of executives and boards that commonly referred to it as the most valuable asset that the company must protect and nurture.

To dig deeper into what European listed companies – following the prior literature (e.g. Marshall and Weetman, 2007) we excluded financial firms to their special nature - are doing to get in front of the critical issue of reputational risk, our study examines, through the analysis of the annual reports of a sample of listed companies, if the disclosure highlights underline an effective management of reputational risk and factors influencing on it.

The sample is made up of 538 non-financial listed firms from five European countries (France, Germany, Italy, Spain and United Kingdom). For each company, we analysed the annual report for the year 2014 focusing on a specific disclosure about reputational risk. The analysis is limited to one year because firm's disclosure policies are expected to remain constant over time (Abrham and Cox, 2007; Botosan, 1997; Hail, 2002). We utilized annual reports, since external investors still perceive them to be a major and credible source of data (e.g. Beattie et al., 2004; Donnelly and Mulcahy, 2008).

The reputational risk information increases levels of disclosure and reduces the possibility of information asymmetries.

Results show that public visibility (size and income growth rates) and agency theory relationships (ownership structure) are important in explaining reputational risk disclosure.

The paper proceeds as follows: theoretical background and review of the prior literature, research design and methodology and then we present the empirical results, discuss conclusions and draw avenues for future researches.

2 Theoretical background and relevant literature

In recent years, the concepts of *risk* and *risk management* have received considerable attention (Power, 2004). In particular, risk may be defined as any event "affecting or potentially affecting the entity's performance and financial position" (Carlon et al., 2003).

Linsley and Shrives (2006) note that, in the pre-modern era, risks were merely considered as negative events, whereas the modern view of risk incorporates both the positive and the negative outcomes of events.

Crouhy et al. (2006) consider risk factors in a systematic way and group risk factors into eight categories: market risk, credit risk, liquidity risk, operational risk, legal and regulatory risk, business risk, strategic risk and reputation risk. Linsley and Shrives (2006) regroup the categories in order to obtain four risk dimensions: financial risk, operational risk, legal, tax & regulatory risk and business risk.

To understand the qualitative distinctions among the types of risks that organizations face, Kaplan and Mikes (2012) research shows that risks fall into one of three categories:

1. *preventable or internal risks*, arising from within the organization, that are controllable and ought to be eliminated or avoided; in general, companies should seek to eliminate these risks since they get no strategic benefits from taking them on and they can be managed through a rules-based control model;
2. *strategy risks*, that a company voluntarily accepts in order to generate superior returns from its strategy and managing those risks is a key driver in capturing the potential gains. They can be managed with a risk-management system designed to reduce the probability that the assumed risks actually materialize;
3. *external risks*, that arise from events outside the company and that lie largely outside the company's influence or control; they cannot typically be reduced or avoided through the approaches used for managing preventable and strategy risks.

Companies should tailor their risk management processes to these different categories. While a compliance-based approach is effective for managing preventable risks, it is wholly inadequate for strategy risks or external risks, which require a fundamentally different approach based on open and explicit risk discussions.

What about *reputational risk*? A risk to reputation occurs when the organisation fails to meet the expectations of a specific stakeholder group. The key to effective reputation risk management is therefore the management of expectations (CIMA, 2007). Stakeholders' expectations are constantly changing and thus reputational risk is dynamic and varies between geographies, groups and individuals. Negative perceptions destabilize the previously assumed strengths of a company – its strategic positioning, technical competence, and the hard financials of performance.

Reputational risk remains one of the more “blurred” risks, considering the difficulty in measuring it as well as a lack of understanding of the situations that can generate this risk. The Board of Governors of the Federal Reserve System (2004) defined reputational risk as “the potential that negative publicity regarding an institution's business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions”.

The term “reputation risk” or “reputational risk” is frequently bandied about as if it was a discrete risk category alongside “financial risk” or “operational risk”.

Reputation risk can be awkward to characterize. For some people, it is a specific risk with clear drivers and tangible business consequences, even if these are hard to quantify. For others, it is a risk of risks that does not exist on a standalone basis. A third perspective is that reputation risk is not a risk at all, simply an outcome of other risks. Indeed, reputation risk most often appears as an amplifier of other risks and corporate vulnerabilities. In turn, however, reputational damage can provoke other risks, thus giving rise to additional challenges (Smith-Bingham, 2014).

Table 1 Types of events giving rise to reputational risk.

Bad conduct	Questionable judgment	Operational shortcomings	External attacks
<ul style="list-style-type: none"> Disreputable exposure to controversial clients or countries Misuse of customer data or information Doing business in an unethical manner Misrepresentation of company position to the market Illegal or fraudulent activities by rogue individuals/groups Workplace violence 	<ul style="list-style-type: none"> Unexpected exposures in non-core markets Unfortunate behavior by company leaders Overly aggressive tax avoidance and other regulatory “bending” Excessive executive compensation Business activities that contradict core brand values Mishandled response to operational/conduct failure 	<ul style="list-style-type: none"> Major product or service quality failure Badly executed business strategy Poor customer relations Non-performance of core infrastructure (including IT) Poor labor standards and approach to labor issues Local or larger disaster caused by the company or its suppliers Business disruption from a natural or man-made disaster 	<ul style="list-style-type: none"> Collateral damage from a peer company incident Incorrect or unfounded rumors and accusations Negative public remarks by politicians/public institutions Protest group opposition to business activities

Source: Smith-Bingham, 2014.

But what is reputational risk precisely? Rayner (2003) suggests that there is no such thing as “reputation risk” – only risks to reputation. In fact, the term of “reputation risk” is a convenient catchall for all those risks, from whichever source, that can impact on reputation.

Reputation risk is driven by a wide range of other business risks that must all be actively managed.

In the 22nd whitepaper in Deloitte’s series on Risk Intelligence (2011), reputational risk is regarded as a “meta risk”, standing at the forefront of key strategic and operations concerns, right alongside new competition, technology failures, talent issues, and changing regulations. Those risks cannot be managed with traditional approaches, but with an “outside-in” perspective, relating enterprise reputation matters to strategic outcomes, value protection and value creation.

The study underlines that reputation, as a “meta risk” is an important factor across all four major risk areas: strategic, operational, financial and compliance.

The peculiarity of reputational risk is its “cross-sectional dimension” so that it cannot be easily reduced to one of the risk categories identified by Kaplan and Mikes (2012).

In his paper, Scandizzo (2011) makes a distinction between internal and external drivers of reputational risk. Internal drivers are those that influence our

ability to perform, financially and/or operationally, according with stakeholders' expectations. The second dimension of reputational risks is the external drivers that stems not directly from our failure to live up to others' expectations, but from other entities' failures that, being mediated, are associated with us in the minds of our stakeholders.

The communication of risk information by companies to stakeholders is one of the points about debate on risk:

1. American Accounting Association/Financial Accounting Standards Board (AAA/FASB) since 1997 has suggested that US companies were providing insufficient risk information within their annual reports. (Schrand and Elliott, 1998);
2. the Institute of Chartered Accountants in England and Wales (ICAEW) published a guide on Risk Management Standard that defines processes, organization structure and objectives, encouraging UK company directors to report upon risks in greater depth;
3. a survey on UK institutional investors supported the AAA/FASB and ICAEW view, as a significant number of respondents agreed that directors needed to provide more detailed risk information rather than generalised statements of risk management policy (Solomon et al., 2000).

In defining risk for this study information in annual reports have been judged to be *risk disclosure* if the reader is informed of any opportunity or prospect, or of any hazard, danger, harm, threat or exposure, that has already impacted upon the company or may impact upon the company in the future or of the management of any such opportunity, prospect, hazard, harm, threat or exposure. This is a broad definition of risk and embraces "good" and "bad" "risks" and "uncertainties". The rationale for the adoption of this definition is that it accords with Lupton's (1999) discussions of how risk is most widely understood (Linsley and Shrides, 2006).

The process of value creation requires risk-taking, but investors like to know the types of risks involved and how these are (or will be) managed (Eccles et al., 2001). As a consequence, they demand a transparent risk disclosure in companies' annual reports. Beretta and Bozzolan (2004) define risk disclosure as "the communication of information concerning firms' strategies, characteristics, operations, and other external factors that have the potential to affect expected results".

To manage reputation effectively, both an understanding of drivers and a method of measuring changes are required. As CIMA reported in its study (2007), the best way to express financial value for reputation is via non-financial or narrative reporting, due to its spurious nature.

Risk disclosure mitigates information asymmetry between management and external shareholders and can have positive effects on the trust and confidence stakeholders have in the firm's management. It may decrease the firm's perceived risk because an open disclosure strategy supposedly results in a better assessment of the firm's future performance. This, in turn, can lead to a decline in the firms cost of capital (Linsley and Shrides, 2006; Abraham and Cox, 2007;

ICAEW, 1999) and to a reduced possibility of financial failure (Beretta and Bozzolan, 2004; Solomon, 2000).

Risk disclosure is therefore an accountability process; in this context, agency theory suggests that effective audit committees reduce information asymmetry between management and outside stakeholders (McMullen, 1996).

3 Research Design and Methodology

Our study can be divided in two steps, one following the other, with two related objectives:

1. starting from the consideration that reputational risk disclosure is a voluntary activity as no accounting laws nor GAAP require this kind of specific risk information, we analyzed the level of its disclosure in annual financial statements of European non-financial listed companies;
2. we investigated the relationship between the reputational risk disclosure and a set of different variables that were significant on risk disclosure in previous studies. In other words we used as regressors variables that in previous studies have already been found significantly correlated with risk disclosure.

Research questions

Given these objective, the general research questions are the following:

RQ1: do European non-financial listed companies disclose reputational risk in their corporate annual financial reporting?

RQ2: what does reputational risk disclosure mainly depend on?

To investigate RQ2 we considered a linear OLS regression model with 8 explanatory variables and 3 control variables.

The independent variables were: firm size, firm growth, firm profitability, firm liquidity, capital structure, ownership structure, book-to-market and share price volatility. The control variables were: country, industry and risk management disclosure. In the following paragraph each variable is explained in details and the expected sign is discussed.

Explanatory variables

We measured firm size (SIZE) with the log of total asset, which is the most frequently adopted measure for the firm dimension. In literature the relationship and the impact of firm size on risk disclosure is still debated. Some studies finds a positive relation, as Linsley and Shrivs (2006) or Abraham and Cox (2007), others find the opposite situation, with a negative relation, as Campbell et al. (2014), while, finally, other literature finds no significant impact at all. We expect the effect of firm size on reputational risk disclosure to be positive as bigger firms tend to have a higher level of attention and perception of their reputation.

RQ2.1: do bigger firms have a higher level of reputational risk disclosure?

According to the classical agency theory and other more recent studies, firms with higher growth (GRW) are likely to have a positive relation with risk disclo-

sure, as there are at the same time greater information asymmetry and higher agency costs (Gaver and Gaver, 1993). Even if a recent paper of Elshandidy et al. (2013) found no evidence of this relation, we expect a positive association between reputational risk disclosure and firm growth, measured as the percentage earnings increase of the current year (with respect to the previous year).

RQ2.2: do firms with a higher profit growth disclose more about reputational risk?

We measured profitability (PROF) with the standard Return On Equity (the ratio between net income and total equity) as in Elshandidy and Neri (2014), expecting a positive relation as in previous literature (Chavent et al., 2006).

RQ2.3: do firms with higher return disclose more about reputational risk?

We measured liquidity (LIQ) with the current ratio (total current assets to total current liabilities) as Marshall and Weetman (2007), that found a positive relation between liquidity and risk disclosure in both US and UK firms.

RQ2.4: do more liquid firms have a higher level of reputational risk disclosure?

We considered firm capital structure (LEV) as leverage ratio (total debt to total equity), even if previous literature provides uncertain results about this factor. Some studies have found a positive influence of leverage on risk disclosure (Dobler et al., 2011; Miihkinen, 2012), while others reported a negative correlation.

RQ2.5: do firms with higher leverage have a higher level of reputational risk disclosure?

More concentrated ownership (OWN), according to classical agency theory, should lead to better management control. On the other hand, this control may also have very high costs. In literature there is an unclear relationship between ownership concentration and information disclosure (Faccio and Lang, 2002; Brammer and Pavelin, 2006; Oliveira et al., 2011; Elshandidy and Neri, 2014). It is also important to underline that different countries have different corporate ownership structures, reflecting also distinctive cultural aspects: more concentrated ownerships in “Mediterranean” countries like Italy and Spain, more dispersed in anglo-saxon countries like UK (Gros-Pietro et al., 2001; Cantino, 2007). This effect has been neutralized using the country as a control variable.

We measured ownership concentration (OWN) using the BVD Independence index that provide a rating ranging from A (“independent companies”: no shareholder with more than 25% of direct total ownership) to D (“Directly majority owned”: one shareholder recorded with more than 50% of direct ownership). Intermediate values are B (no shareholder recorded with more than 50% of direct, indirect or total ownership and one or more shareholders recorded with more than 25% of direct or total ownership) and C (“indirectly majority owned”: no shareholder recorded with more than 50% of direct ownership and one shareholder recorded with more than 50% of total ownership).

RQ2.6: do independent firms (with lower ownership concentration) exhibit higher levels of reputational risk disclosure than directly majority owned companies?

Book-to-market (BtM), measured as the equity book value divided by its market value, following Campbell et al. (2014) and Elshandidy and Neri (2014), can affect positively or negatively the market perception of firm's future growth and, consequently, its risk and its reputation.

RQ2.7: do firms with higher market-to-book value disclose more on risk reputation?

Share price volatility (VOL), measured as the equity price volatility on a 360 days basis (ending at December 26th 2014), is a clear measure of financial risk and, according to previous literature (Elshandidy and Neri, 2014), is found to be negatively related to mandatory risk disclosure, while the effect on voluntary risk disclosure is uncertain. Moreover, markets immediately react to the reputational consequences of some events. According to Bravo (2015), from an agency perspective, the disclosure of value-relevant information reduces the uncertainty about a company and therefore mitigates information asymmetries, affecting stock return volatility. In other words, larger disclosure of reputational risk information may lead to a reduction of stock return volatility. Here a problem of cause-and-effect relationship may arise, hence we assume the following hypothesis:

RQ2.8: do firms with higher share volatility disclose less on reputational risk?

Control variables

We introduced in our model three control variables: the industry/sector, the country where the company is listed and the level of risk management disclosure (measured with the number of times the word "risk management" appears in the annual financial report, weighted by the length of the reports in number of pages).

We control for some effects that arise from the assumption that each sector and industry has its own specificity and peculiarity, both concerning the product and the production processes. We expected that companies of different sectors differ significantly in the reputational risk disclosure from others.

We also expect that a company which presents a high level of disclosure of its risk management activity will also pay more attention on reputational risk than other companies.

Sample and Data

In our research, in order to capture risk and reputational risk disclosure, we used a textual content analysis, which has been largely used in the accounting research literature, particularly for examining social and environmental disclosures (e.g., Guthrie and Parker, 1990; Milne & Adler, 1999; Zeghal and Ahmed, 1990). We adopted this methodology in the current paper mainly because risk disclosures, particularly non-financial types, are largely disclosed qualitatively. Content analysis may capture better than other methods the extent and volume of such qualitative disclosures.

Following previous literature on risk, we drew up a word list including: risk, risk management, reputation*, reputation* risk, reputation* damage, (* indicates that also derivatives and plurals of each word have been included in the re-

search). We also considered Italian, Spanish and French translations, but only if needed for the financial reports that were not available in English.

To answer to our research questions, we selected five European markets: Italy, UK, Germany, France and Spain. As in most of the literature, we completely excluded financial companies from the universe, not only for the nature of their business, but also because they are governed by a strict and specific regulation that also affects their mandatory risk disclosure (for example Basel and Solvency rules for banking and insurance industry).

From the universe of the listed company in these 5 Countries we extracted a random sample of 538. The number of companies chosen from each Country depends on the size of the market (i.e. the sample reflect the total number of companies listed in each country stock exchange).

Table 2 Sample distribution by Country.

<i>Country</i>	<i>DE</i>	<i>ES</i>	<i>FR</i>	<i>GB</i>	<i>IT</i>	<i>Total</i>
Companies	122	38	98	217	63	538
%	22,68%	7,06%	18,22%	40,33%	11,71%	100%

Source: own elaboration.

We collected the data from different sources following different steps:

1. in the first step, economic and financial data of the sample companies were collected from *BvD Amadeus Database*;
2. then, in a second step, for each company we have developed the content analysis with an hand-made data collection in each financial report;
3. the last step was to fill in with the missing financial data and to check for coherences, analyzing directly each company financial statement and, if necessary, both the company website investors' relation section and the official stock exchange website (for different countries).

Descriptive statistics for the variables are provided in table 3.

Empirical model

In order to answer to RQ2 and to investigate on what does reputational risk disclosure mainly depend on, we considered a linear OLS regression model with the 8 explanatory variables and 3 control variables previously listed.

The dependent variable is the reputational risk disclosure, measured with the number of repetition of "reputation* risk", weighted with the "size" of the financial report in terms of pages.

We used equation (1) to regress the 8 explanatory variables, controlling for the country, Industry and risk management disclosure, on reputational risk disclosure.

$$Y_i = \beta_0 + \sum_{n=1}^8 \beta_n X_{n,i} + \sum_{m=1}^3 \gamma_m Z_{m,i} + \varepsilon_i \quad (1)$$

Table 3 Descriptive statistics.

<i>Variable</i>	<i>Mean</i>	<i>Min</i>	<i>Max</i>	<i>St. Dev.</i>
Log tot Assets	5,65	1,83	8,55	1,12
Net income 2014 (th EUR)	270.423	-7.914.917	12.143.408	1.229.986
Net income 2013 (th EUR)	398.361	-2.443.000	71.723.746	3.336.280
Net income GROWTH (%)	-16,08%	-7630,00%	3001,59%	615,81%
ROE 2014 (%)	-2,38%	-837,99%	788,71%	86,85%
Current assets 2014 (th EUR)	3.319.489	68	201.934.000	13.652.386
Current liabilities 2014 (th EUR)	2.524.496	137	110.586.000	9.022.225
Liquidity Ratio 2014	2,30	0,08	66,92	4,02
Leverage 2014	1,94	-9,78	43,42	3,21
B-t-M 2014	7,44	-0,20	1.862,09	94,27
Volatility 2014	0,36	0	1,58	0,20
Reports Pages (n.)	146	18	548	90
N. RISK	137,01	1	691	114,92
N. RISK MANAGEMENT	18,09	0	104	17,55
N. REPUTATION*	2,61	0	52	4,90
N. REPUTATION* RISK	0,49	0	8	1,22

Source: own elaboration.

The model assumes the classical form of a general multivariate linear regression where:

i represents the number of observations (companies), ($i = 1, 2, \dots N$);

Y_i is the vector of the dependent variables (reputational risk disclosure of company i);

$X_{n,i}$ is the vector of the 8 independent variables (or regressors) for company i ;

β_0 is the value of the dependent variables if all the regressors assume nil value;

β_n is the vector of the coefficients of the regressors;

$Z_{m,i}$ is the vector of the three control variables (country, industry and risk management disclosure);

γ_m is the vector of the coefficients of the control variables;

ε_i is the vector in terms of error, for which we assume the standard hypothesis (zero mean, absence of correlation and constancy of the variance).

4 Empirical Results

In order to answer to RQ1 (whether or not European non-financial listed companies disclose reputational risk in their corporate annual financial reporting), we computed how many times words related to reputation (*reputation** and

reputational risk* or *reputational* damage*) appear in the financial reports of the different countries. The results are shown in the following tables.

Table 4 RQ1 – Results of computation of word *reputation*.

N°	DE	ES	FR	UK	IT	TOTAL
0	40	17	53	71	45	226
	32,79%	44,74%	54,08%	32,72%	71,43%	42,01%
1-5	64	7	21	106	18	216
	52,46%	18,42%	21,43%	48,85%	28,57%	40,15%
6-10	15	6	15	28	0	64
	12,30%	15,79%	15,31%	12,90%	0,00%	11,90%
>10	3	8	9	12	0	32
	2,46%	21,05%	9,18%	5,53%	0,00%	5,95%
TOTAL	122	38	98	217	63	538

Source: own elaboration.

Table 5 RQ1 – Results of computation of word *reputational risk* or *reputational damage*.

N°	DE	ES	FR	UK	IT	TOTAL
0	101	23	90	145	59	418
	82,79%	60,53%	91,84%	66,82%	93,65%	77,70%
1-5	20	14	8	63	4	109
	16,39%	36,84%	8,16%	29,03%	6,35%	20,26%
6-10	1	1	0	9	0	11
	0,82%	2,63%	0,00%	4,15%	0,00%	2,04%
>10	0	0	0	0	0	0
	0,00%	0,00%	0,00%	0,00%	0,00%	0,00%
TOTAL	122	38	98	217	63	538

Source: own elaboration.

As it can be seen, in more than 40% of the financial reports of the sample companies the word “reputation*” does not appear and in another 40% it appears less than five times. In less than 6% of the sample, “reputation*” appears more than 10 times.

If we consider the word “reputational risk” (which is obviously a fraction of the previous research), 77,7% of the financial reports do not contain these words at all.

It has to be noted that Spain results are biased due to the presence in many reports of text of a standardized questionnaire, which a check-list of potential risks, among which also “reputation” is named. We partially corrected for this bias, but we do not eliminate the effect at all.

In order to answer to RQ2, the statistics of the regression are displayed in table 6. The R2 is equal to 0,2368 and the multiple R is 0,4866. The analysis of variance (ANOVA) for the entire regression, reported in table 7, with a 95% ($\alpha = 0,05$) confidence level, allows us allow us to reject the null hypothesis (all the coefficients equal to zero) and therefore to state that there is a significant linear relation between the reputational risk disclosure and at least one of the regressors.

Table 6 RQ2 – Regression statistics.

Multiple R	0,4866
R Square	0,2368
Adjusted R Square	0,2208
Standard Error	1,0777
Observations	538

Source: own elaboration.

Table 7 RQ2 – Analysis of variance for the entire regression.

	Df	SS	MS	F	Significance F
Regression	11	189,56	17,23	1,48E+01	3,42E-25
Residual	526	610,94	1,16		
Total	537	800,50			

Source: own elaboration.

Table 8 RQ2 – Results of the regression with respect to each variable.

	<i>Coefficients</i>	<i>St. Error</i>	<i>t-Stat</i>	<i>p-value</i>	
<i>Intercept</i>	-1,927	0,404	-4,770	2,38E-06	
<i>SIZE</i>	0,296	0,053	5,594	3,55E-08	***
<i>GROWTH</i>	0,010	0,004	2,292	0,022	**
<i>ROE</i>	-0,001	0,061	-0,017	0,987	
<i>LIQUIDITY</i>	-6,34E-04	0,012	-0,051	0,959	
<i>INDEPEND.</i>	0,045	0,016	2,831	0,005	***
<i>LEVERAGE</i>	0,015	0,016	0,929	0,353	
<i>B-T-M</i>	-4,17E-04	5,37E-04	-0,776	0,438	
<i>VOLATILITY</i>	-0,140	0,084	-1,675	0,095	*
<i>COUNTRY</i>	0,096	0,037	2,577	0,010	**
<i>INDUSTRY</i>	2,18E-04	9,11E-05	2,390	0,017	**
<i>Risk MANAG.</i>	2,097	0,396	5,298	1,72E-07	***

** Significance at 10%; ** significance at 5%; *** significance at 1%*

Source: own elaboration.

In table 8 the results of the regression with respect to each variable included in the equation are displayed. In particular, among the explanatory variables, the regressors that have been found statistically significant were size (***), net income growth (**), level of independence in ownership structure (***) and the market price volatility (*).

Size of the firm is statistically significant with 99% confidence level and the sign of the coefficient is positive, which means that bigger companies disclose more on reputational risk.

Also net income percentage growth is statistically significant (at 95% confidence) with positive relationship, showing that companies with higher growth rates probably disclose more on reputational risk, even if a cause-effect problem of interpretation may arise.

At 99% is also significant the level of independence, measured as ownership concentration, with a positive coefficient. This result provide empirical evidence that more independent companies tend to disclose more on reputational risk.

Finally, also share price volatility has been found statistically significant with a negative coefficient.

Table 9 RQ2 – Most significant results.

	<i>Expected sign</i>	<i>Result</i>	<i>Significance</i>
FIRM SIZE	\pm	+	***
INCOME GROWTH	+	+	**
INDEPENDENCE	+	+	***
PRICE VOLATILITY	-	-	*

Source: own elaboration.

5 Conclusions

During the last decade reputation has captured an increasing attention not only from academic scholars, but also from managers and practitioners. A company reputation is perceived as a strategic intangible asset that should be carefully monitored and nurtured. Despite this declarations of intents and the growing emphasis on risk management, actually companies seems to be stuck to improve and disclose their action oriented to reputation risk management. While regarding many other risks (mainly financial), great improvement seems to have been made in the last two decades in their management system and disclosure, thanks also, for example, to the evolution and the widespread of internationally accepted classifications and rules, for reputational risk there is still quite a low level of (voluntary) disclosure.

Our major findings could be summarized up in the following points:

1. reputational risk disclosure in annual reports is quite low among listed European non-financial companies as more than 40% of the companies to not even use the word “reputation” in their statements;
2. the situation varies a little bit among European countries and may depend on cultural, legal, social and managerial differences;
3. the level of reputational risk disclosure depends on many different factors. Among them, we found empirical evidence of a statistical relationship between the reputational risk disclosure and the size of the firm, the increase in net income, ownership structure and stock price volatility. The cause-effect relationship is still to be defined and probably is a double-way relationship (for example, firms with higher income growth rates disclose more on reputational risk, but maybe they have high returns thanks also to the superior quality of their disclosure and reports);
4. public visibility (size and income growth rates) and agency theory relationships (ownership structure) are important in explaining reputational risk disclosure.

Several limitations and further improvements could be noted:

1. more variables could be added, mainly focusing on corporate governance;
2. the cause-effect relationship should be investigated more in details;
3. information about reputational risk can be disclosed in many other sources than annual reports and the quality of its disclosure can be meas-

ured not only with a content analysis (looking for specific words chosen a-priori), but also with other methods;

4. this content analysis may not be fair to measure the real reputational risk management activity (as it is strictly limited to its disclosure in annual reports);
5. our study is limited to one single year.

Future research should include other variables (mainly CG) in the regression and also consider a time-series analysis.

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Assessment of credit growth of corporate sector in B&H

Authors

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- *Almir Alihodžić, Associate Professor, almir.dr2@gmail.com. - Faculty of Economics - University of Zenica, 72000, Zenica, Bosnia and Herzegovina (BH)*
 - *Novo Plakalović, Professor, novoplakalovic@gmail.com.- Faculty of Economics - East Sarajevo, University of East Sarajevo, 71420, Republic of Srpska - Bosnia and Herzegovina (BH)*
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A low demand of corporate sector for loans was a consequence of several factors, such as the long-lating stagnation of economic activities in the country, weak domestic demand, low level of personal spending, absence of a significant investment cycle, and others macroeconomic and political factors. Annual growth rates of loans were between 2% and 4% during the 2014. Long-term loans had slightly higher growth rates compared to short-term loans. Therefore, this does not imply the growth of long-term investment as there is no significant recovery of economic activities which are accompanied by the lending activities of commercial banks. Weak lending activities of banks were recorded in the third quarter of 2015 despite the continuation of the downward trend of the average nominal interest rates on loans to households and companies. The main objective of this study is to determine which independent variables in the regression models have an impact on the amount of approved loans granted by banks to corporate sector. The loans growth rate will be observed as a dependent variable, and the growth rate of non-performing loans, the growth rate of operating costs, real GDP growth, consumer price index, deposit growth rate will be used as independent variables.

Key words: Bank loans to corporate sector, factors of bank loans growth, macroeconomic factors of bank loan growth, nonperforming loans.

JEL Classification: G2, G20, G21

1. Introduction

The banking sector is still a dominating sector in the financial system while the remaining part of the financial system is rather underdeveloped. Bosnian financial market is the bank-centred, which means that bank loans are the primary source of financing companies. Orientation of corporate sector to credit financing and underdevelopment of other financing instruments influenced the fact that claims based on conventional and revolving loans constitute the most important items in banks claims to corporate sector. On the other hand, claims based on quarantees, letter of credit and factoring constitute insignificant portion of claims of the banking sector, whereas financing through debt securities barely exists. Slower credit growth in the corporate sector was recorded in few last years. Increase in banks claims on the corporate sector is mostly caused by improved exports activity and recovery of industrial production. On the other hand, weak domestic demand still negatively impacts credit activity in this sector, particularly in activities oriented to the domestic market (Financial stability of the Central bank of the B&H, 2013, p. 31).

In this paper, we try to determine the importance of certain variables on the growth of bank lending in B&H. Credit expansion in B&H was very strong in the period up to the moment spill over of the global economic crisis and the region of Southeast Europe and B&H.

This research is designed and presented in four sections. The first section refers to the introductory considerations, the second part present the relevant literature, the third part describes the theoretical assumption and perceptions the regression model and gives a definition of significant independent variables that affect the loans growth rate alone whereas the last part of the paper discusses the results of research, based on the application of the regression model. This research will test the significance of observed financial variables in the model, where the null hypothesis is the reason why the independent variables do not significantly affect the dependent ones. In this context, it is stated that the observed independent variables have the greatest impact on the growth or decline rate of loans growth rate for the banking sector in B&H.

1.1 Changes of bank loans and deposits in B&H

The stagnating lending activity and a high level of credit risk were the main features of the corporate sector in B&H in recent year. A low demand of corporate sector for loans was a consequence of several factors, such as the long-lasting stagnation of economic activities in the country, weak domestic demand, low level of personal spending, absence of a significant investment cycle, and the overall macroeconomic and political circumstances in the country. (Central bank of Bosnia and Herzegovina, Financial Stability Report, 2014, p 35).

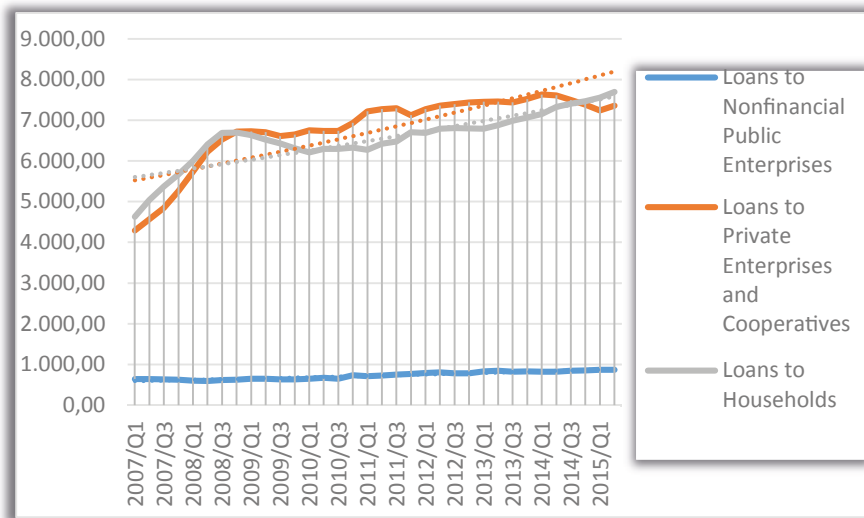


Figure 1 Trend in loans to nonfinancial public enterprises, private enterprises and cooperatives and loans to households for the period: Q1 2007 – Q2 2015

Source: The authors' research based on data available on www.cbbih.ba

Annual growth rates of loans were between 2 and 4% during 2014 year. Long-term loans had slightly higher growth rates compared to short-term loans. Therefore, annual growth rate of long-term loans to private non-financial companies amounted up to modest 2% during the year. The main reason for the decrease in lending activity are the strict conditions for extending new loans contributed a lot to weak lending activities to non-financial companies. Slightly higher growth rates of loans were recorded with households. Annual rate of the growth of the loans to households was on the average around 5.7%, which is significantly higher compared to the growth rates of the loans to private companies (Annual report of the Central Bank of B&H, p. 23).

According to the date of the CBBH, during 2014, 176.5 million BAM of short-term loans and 2.37 billion BAM of long-term loans were extended to the household sector. The amount of new extended loans to household was higher by 11.5% compared to the loans extended in 2013, and it reached the highest level since 2008. Therefore, these data indicate a considerable increase of lending activities in the household sector, but it should be taken into account that the new approved loans include the rescheduled loans approved in the previous years.

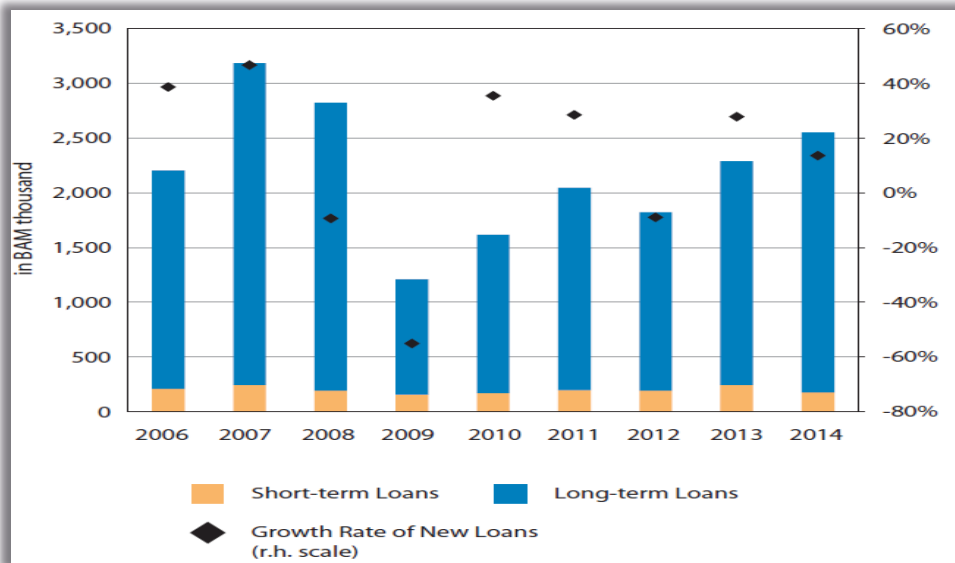


Figure 2 Loans and growth rate of new loans for the period: 2006 – 2014

Source: Central bank of Bosnia and Herzegovina (2014). *Financial stability report*, p. 30., Available on www.cbbih.ba

After a significant growth of the level of non-performing loans in the period between 2009 and 2011, caused by a sudden deterioration of the credit portfolio quality due to the economic crisis, and also the including of E category in the balance sheet records of commercial banks after 2011, no large changes were recorded in the level of non-performing loans in the household sector, either in the absolute amount or in the ration of non-performing to the total loans of households. The rescheduling has an important impact on the decrease of the activation of the loan collection instruments, primarily quarantors (Financial stability of the Central bank of B&H, 2014, p. 30-31.).

2. Literature Review

Some research suggests (Espinoza R. Prasad A. 2010) that in the period 1995-2008 on a sample of 80 banks from the countries of the Gulf Cooperation Council – GCC, the non-performing ratio worsened as economic growth slows and interest rates and risk aversion rises. The applied model shows that the cumulative effects of macroeconomic shocks over a three-year horizon large (Espinoza R. Prasad 2010, p 1). Specific factors related to individual banks related to underwriting and efficiency are also related to future NPLs. Controls on banks efficien-

cy and expansion of the previous balance (the previous dynamic growth in loans) and are important for the growth of NPLs. Return effects of NPLs (bank losses) on slowing growth are also present.

The main objective of macroeconomic tests that increasingly converge with the financial crisis is to establish the structural vulnerabilities in financial systems. The ultimate goal is to score their resilience to shocks and especially the vulnerability of banks due to losses. Banks credit risk increases with the deterioration of the situation and the increase in interest payments as a result of which can be found in many models of credit risk (IMF, 2006).

In contrast to research Levine, Loayza, Beck (2001), Favara shows that the relationship between financial development (the level of liquid liabilities of a banking system and amount of credit issued to the private sector by banks and other financial institutions) and economic growth is weak. This is about the observation of these relationships in the long term. There is a significant impact of credit growth in the real GDP growth and the magnitude of transmission channels through which loans on real activity depend on the specific type of loan (Garcia – M. Escribano, F. Han, 2015) so that the impact of the credit shock in terms of lending corporations influence mainly through investments, and credit shocks to consumer credit should go together with private consumption. Thus, the impact of the credit expansion is seen in this study by analysing the composition of credit portfolio (corporate, consumer and housing credit) on economic growth in emerging market economies. At the same time observe and influence expansion and composition of credit played in diving real GDP growth in the past.

Countries in which there was a good climate for foreign capital inflows are usually alive and in sharp credit expansions. Magud N.Reinhart C, Vesperon E. (2012) analysed the impact of exchange rate flexibility on credit markets during periods of large capital inflows. Bank credit grows more rapidly and its composition tilts to foreign currency in economies with less flexible exchange rate regimes. That is exactly the case in Bosnia and Herzegovina where the regime currency index was a strong factor of influence on the inflow of foreign capital and, as a result, there was a huge credit expansion of loans into domestic sectors in the past. Rapid credit growth has been driven by successful macroeconomic stabilization, robust growth, and capital inflow in transition economies. Financial deepening is both expected and welcome, the recent expansion (to the crisis) appears to have been excessive, as evidenced by widening current account deficits and prudential concerns in some countries. (Duenwald C.Gueorguiev N. 2005).

Very rapid credit expansion over several years is a subject to a significant macroeconomic imbalance, largely fuelled by this rapid credit growth, despite their overall formidable economic performance since the beginning of their transition to market economies. Sirtaine S. Skamnelos I. (2007, p 31.) raises the question of whether the current credit growth is excessive or not. Arguments have been made, in their paper and in literature, in both directions. (Sirtaine S. Skamnelos I. *ibid.*)

3. Methodologies and data analysis

The data used for this study are the official data published by the Central Bank of Bosnia and Herzegovina and Banking Agency of the FB&H and the Banking Agency of the Republic of Srpska, from the period: Q1 2007 – Q4 2015. The research will also use the statistical package SPSS 16.0. The loan growth rate will be observed as a dependent variable. The independent variables are as follows:

GRNPL – The growth rate of non-performing loans;
 GROC – The growth rate of operating costs;
 RGDPG – Real GDP growth;
 CPI – Consumer price index;
 DGR – Deposit growth rate;

The regression model is an equation with a finite number of parameters and variables. Depending on whether a model comprised only one or more variables, there are simple and multiple linear regression models respectively. In addition to a dependent variable and one or more independent variables, each regression model contains a random variable. A simple linear regression model expresses a relationship between the two parameters as follows:

$$Y_i = \alpha + \beta X_i + \varepsilon_i \quad i = 1, 2, \dots, n, \quad (1)$$

where:

Y – dependent variable,
 α β - unknown parameters that need estimate, and
 ε_i – stochastic variable (error distances).

Unlike the simple regression model, the multiple-linear regression model is different in that it comprises two or more independent variables.

$$Y_i = \alpha + \beta_1 X_{i,1} + \beta_2 X_{i,2} + \dots + \beta_j X_{i,j} + \dots + \beta_k X_{i,k} + \varepsilon_i \quad (2)$$

$i = 1, 2, \dots, n.$

Specifically, this model consists of independent variable Y , and K independent variables, which are referred to as: $X_{(i,j)}=1,2,\dots,K.$

This empirical study refers to the loan growth rate of the banking sector in B&H for the period from Q1 2007 to Q4 2015. The data used for this study are the official data (statistical analysis) of the Central Bank of Bosnia and Herze-

govina and Banking Agency of the Federation of Bosnia and Herzegovina (FB&H) and the Banking Agency of the Republic of Srpska.

This study used a multiple-linear regression model that assesses the nature and strength of the bond between a dependent variable, and K independent variables that are marked with $X_{(i, j)} = 1, 2, \dots, K$. Therefore, in this study, loan growth rate of the banking sector in B&H (LGR) is used as dependent variable, and the following ones as independent variables: the growth rate nonperforming loan (GRNPL), the growth rate of operating costs (GROC), real GDP growth (RGDPG), consumer price index (CPI), deposit growth rate (DGR).

Table 1 Descriptive explanation of the variables in the model

Variable	Symbol	Description
Loan growth rate	LGR	The annualized change in total loans from the previous quarter, expressed as a percentage of total loans at the end of the previous quarter.
Growth rate nonperforming loans	GRNPL	Banks nonperforming loans to total gross loans (in %)
The growth rate of operating costs	GROC	Operating costs-to-total earning assets (in %)
Real GDP growth	RGDPG	Real GDP growth
Consumer Price Index	CPI	Consumer Price Index
Deposit growth rate	DGR	The Deposit Growth Rate compares the quantity of deposits held by a financial institution in a given period to the quantity of deposits from an earlier period.

The regression model in this study is presented as follows:

$$(LGR) = \alpha + \beta_1 * (GRNPL) + \beta_2 * (GROC) + \beta_3 * (RGDPG) + \beta_4 * (CPI) + \beta_5 * (DGR) \quad (3)$$

The representativeness of the model will examine calculation of the coefficient of correlation (r), the coefficient of determination (R^2) and adjusted coefficient of determination (\bar{R}^2). There is also an analysis of variance (ANOVA), which will test the significance of observed financial variables in the model, where the null hypothesis is the reason why the independent variables do not significantly affect the dependent:

$$H_0 \dots \beta_1 = 0$$

$$H_1 \dots \beta_1 \neq 0$$

The table below illustrates the descriptive statistics of the example.

4. The research results

Results obtained by regression analysis indicated that the coefficient of correlation is $r=0.65$, indicating that there is a medium strong correlation between the dependent variable, i.e. the loans growth rate – (LGR) and independent variables: the growth rate of non-performing loans (GRNPL), the growth rate of operating cost (GROC), real GDP growth (RGDPG), consumer price index (CPI), deposit growth rate (DGR). The coefficient of determination is $R^2=42\%$, and the adjusted coefficient of determination is $\bar{R}^2=0.32$. The fact shows that this model described 32% of the variations to the independent variables makes the model relatively representative. The significance test also indicates that there is a substantial influence of certain independent variables on the dependent variable. The testing the null hypothesis of significance obtained statistically significant data indicating that there is significant influence of certain independent variables at a significance level of $\alpha=5\%$, and that the empirical F-ratio is (4.32). As for this study, the value of the empirical F-ratio (4.32) is greater than the theoretical value of F-ratio (2.53) for the 5-degree of freedom in the numerator and 30 in the denominator, then we come to the conclusion to reject the null hypothesis that the independent variables have a significant impact on the dependent variable.

Table 2 Regression analysis between the following parameters: GRL, GRNPL, GROE, RGDPG, CPI, DGR in B&H for the period Q1 2007 – Q4 2015

<i>Regression Statistics</i>	
<i>Multiple R</i>	0.647
<i>R Square</i>	0.419
<i>Adjusted R Square</i>	0.322
<i>Std. Error of the Estimate</i>	0.021
<i>Durbin - Watson</i>	0.91

Source: The calculation made by the author (SPSS 16.0)

Table 3 Analysis of variance between the following parameters: GRL, GRNPL, GROE, RGDPG, CPI, DGR in B&H for the period Q1 2007 – Q4 2015

<i>ANOVA</i>	<i>Df</i>	<i>SS</i>	<i>MS</i>	<i>F</i>	<i>Significance F</i>
<i>Regression</i>	5	0.009	0.02	4.323	0.000
<i>Residual</i>	30	0.013	0.00	-	-
<i>Total</i>	35	0.022	-	-	-

Table 4 The matrix of correlation coefficients between the parameters: LGR, GRNPL, GROE, RGDPG, CPI, DGR in B&H for the period: Q1 2007 – Q4 2015

	<i>LGR</i>	<i>GRNPL</i>	<i>GROC</i>	<i>RGDPG</i>	<i>CPI</i>	<i>DGR</i>
<i>LGR</i>	1.000	-0.485	-0.052	0.275	0.203	0.382
<i>GRNPL</i>	-0.485	1.000	-0.158	-0.132	-0.196	-0.093
<i>GROC</i>	-0.052	-0.158	1.000	-0.150	0.131	-0.297
<i>RGDPG</i>	0.275	-0.132	-0.150	1.000	0.044	-0.056
<i>CPI</i>	0.203	-0.196	0.131	0.044	1.000	0.003
<i>DGR</i>	0.382	-0.093	-0.297	-0.056	0.003	1.000

Source: Calculation by Author's (SPSS 16.0)

The coefficient of correlation can take values from -1 to +1. Thus, the resulting ratio shows the strength of the two observed parameters. A value of zero indicates that there is no correlation, while the value of 1.0 indicates the correlation between complete and connected, and the value of -1.0 indicates the correlation between complete and negative. The table above clearly shows that a small number of variables are slightly negatively correlated, and on the other hand, it shows that the small number of observed variables have a positive correlation. Given the case analysis of the influence of independent variables on the dependent variable, and the loans growth rate, it can be seen that the strongest positive correlation was observed between the loans growth rate and the deposit growth rate (0.382). The growth of household and deposit of enterprises cannot be interpreted as the indicator of a better standard of living, but it is mainly a consequence of the uncertainty in terms of the future economic circumstances in the country, and the advantage is given to saving instead of spending. On the other hand, the growth of the deposits of households is the indicator of trust in the banking sector and the decision of households to choose a safer kind of saving compared to investments in securities, despite the continued downward trend of deposit interest rates (Financial stability of the Central bank of B&H, 2014, p. 33).

Also, between the loans growth rate and real GDP growth recorded a positive correlation (0.275). This is quite reasonable and logical, because with an increase in economic activity, this leads to an increase of banking assets, and consequently in increase in lending activity.

Observed, on the other hand, the strongest negative correlation was observed between the loans growth rate and growth rate of non-performing loans (-0.485). This is quite reasonable and logical, because the banks by increasing non-performing loans in their portfolios slowing lending activity and creating a provision in case of default on credit debt. The movement of non-performing loans in the banking sector of Bosnia and Herzegovina for the period: Q1 2007 - Q2 2015 shows a tendency of the linear increase until 2013, and relative in the study by Favara weak reduction to the second quarter of 2015. The high level of non-performing loans at several banks has led to a high share of non-performing

loans at the level of the total banking sector. According to the results of stress tests for 2013, carried out regularly by the Central Bank of Bosnia and Herzegovina (CBB&H), the increase in the loan portfolio is primarily influenced by slow economic activity. On the other hand, the increase in non-performing loans is followed as a consequence of increased interest rates (Central bank of Bosnia and Herzegovina, Financial Stability Report, 2013, pp. 42-43).

Table 5 Regression analysis coefficients between the following parameters: LGR, GRNPL, GROC, RGDPG, CPI, DGR in B&H for the period: Q1 2007 – Q4 2015

<i>Model</i>	<i>Unstandardized Std. Coefficients</i>		<i>Standardized t Coefficients</i>	<i>Sig</i>	<i>Correlations</i>			
	<i>B</i>	<i>Error</i>	<i>Beta</i>		<i>Zero order</i>	<i>Part</i>		
						<i>Partial</i>		
<i>(Constant)</i>	0.031	0.011	-	2.680	0.012	-	-	-
<i>GRNPL</i>	-0.002	0.001	-0.395	-2.691	0.12	-0.485	-0.441	-0.375
<i>GROC</i>	0.001	0.007	-0.015	0.098	0.923	-0.052	0.018	0.014
<i>RGDPG</i>	0.006	0.003	0.240	1.670	0.105	0.275	0.292	0.232
<i>CPI</i>	0.108	0.138	0.112	0.781	0.441	0.203	0.141	0.109
<i>DGR</i>	0.227	0.093	0.363	2.441	0.021	0.382	0.407	0.340

Source: The Calculation made by the Author (SPSS 16.0)

From the table above it is clear that the loans growth rate - the LGR has the strongest positive linear relationship to the deposit growth rate - DGR (0.363), following by real GDP growth rate - RGDPG (0.240), then with the consumer price - CPI (0.112). To its opposite, the weakest linear relationship was observed between the growth rate of non-performing loans - GRNPL (-0.395), the growth rate of operating costs - GROC (-0.015). The most important risk in the banking sector stands out credit risk. This is the risk of default. Despite the rapid expansion of innovation in the financial services sector at the turn of this century, the credit risk is an essential reason for the insolvency of banks, because in modern business conditions over 80% of the bank's balance sheet relating to this segment of banking risk management. In addition to these factors that affect the amount of credit risk should be taken into consideration and decrease the creditworthiness of the borrower, and increase the likelihood that the bank's clients come in no position to fulfil their obligations (Đukic, Đ. 2011, p 22). The high level of non-performing loans at several banks has led to a high share of non-

performing loans at the level of the entire banking sector. At the end of 2007 the share of non-performing loans to total loans amounted to only 3%, whereas at the end of the second quarter of 2015 the share of non-performing loans of total loans amounted to 14.1%. The largest share of non-performing loans in the portfolio of total loans was recorded in 2013, and as of 15.1%.

According to the results of the stress tests for 2013 carried out regularly by the Central Bank of B&H to increase the poor quality of the portfolio is primarily influenced by slow economic activity. While, the increase in non-performing loans is followed as a consequence of increased interest rates (Financial Stability Report, 2013, CBB&H, p 42-43). In the period from the first quarter of 2007 to the second quarter of 2015, there was an average increase in operating costs by approximately 5.18% on a quarterly basis, which indirectly reflected the burden of banks assets in B&H, and in this regard the price increase lending and consequently reduced credit activity.

5. Conclusions

This paper analyses the determinants of the loans growth rate of the banking sector in B&H in the period between Q1 2007 - Q4 2015, using multiple linear regression models. In the quantitative analysis, it is assumed that the loans growth rate of the banking sector in B&H (LGR) is used as dependent variable, and the following ones as independent variables: the growth rate of non-performing loans, the growth rate of operating costs, real GDP growth, consumer price index, deposit growth rate. The null hypothesis was rejected because it was not shown that the independent variables affect the dependent variable.

In the study, we found that there is a very high degree of correlation between GDP growth, which we viewed as an independent variable and rate of credit growth. The major reason for this is the high level of credit risk and monopolistic banks as almost the exclusive source of external funds for financing company in B&H. The movement of GDP has also a high correlation. Even greater correlation is observed between the GDP and the non-performing loans which are quite expected. A significant slowdown in economic growth and long-term recessionary trends in the economy of Bosnia and Herzegovina have influenced that many companies get into trouble and cannot properly service their debts and thus affect the growth of NPLs. Future research on this topic can be expanded depending on the availability of the database, so that the use of more appropriate explanatory variables for a longer period can get a better analysis.

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Accounting and macroeconomic information and systematic risk. Us accommodation and food services and arts, entertainment and recreation industry in the period 2004-2013

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- Kirill Angel, Student PhD, kirillangel@gmail.com. - Universitat Autònoma de Barcelona (UAB)
 - Carlota Menéndez-Plans, Assistant Professor, Carlota.Menendez@uab.cat - Universitat Autònoma de Barcelona (UAB)
 - Neus Orgaz-Guerrero, Assistant Professor, norgaz@uoc.edu. - Universitat Oberta de Catalunya (UOC)
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Purpose: The main objective of this work is to study the connection between the systematic equity risk of American Companies located in the touristic industry and a set of information from the inside of the company and the market during the period of 2004-2013.

Design/Methodology/Approach: The current research considers beta (systematic equity risk) a dependent variable and it is estimated to use the CAPM (*Capital Asset Pricing Model*). After using the technique of panel data and combining 14 financial indicators and 6 macroeconomic parameters. The sample consists of 79 American firms in the tourism sector.

Findings: The results show that the firm size, business growth and three measures of business efficiency influence the equity risk, and two measures are macroeconomic: consumer prices index and Stoxx Europe 50.

Keywords: Assets pricing, Corporate finance, financial accounting, macroeconomic information, tourism.

JEL Classification: G1, M4, Z3

1 Introduction

The cost of capital is a fundamental variable to provide an efficient financial management of the company. There are many decisions and processes that depend on that variable, such as investment feasibility analysis, shares and companies' market value calculation, optimal level of debt determination, etc. The value of the cost of capital influences those decisions and therefore its value should be determined objectively and rationally. The cost of capital is the discount rate in any valuation process and it is obvious that its value making the market value can fluctuate substantially and intentionally.

Damodaran (2012) shows how the cost of capital is determined by the risk level of the analyzed asset, and if what is calculated is the market value of a share, the risk to use is the risk of that action that according to CAPM theory is determined by the systematic risk or beta. While it is true that the beta has been criticized in various articles it is also true that further explanation and utilization is highlighted in the latest edition of Brealey, Myers and Allen (2013) and the works of Wang, Li and Huang (2012), Da, Guo and Jagannathan (2012) and Baele, De Bruyckere, De Jonghe and Vennet (2015) and Babenko, Bought and Tserlukevich (2015). Therefore, the beta is still a valid objective and systematic equity risk measure, which allows to calculate the required minimum return or capital cost of publicly traded shares.

However, not all companies have a beta and therefore knowledge of information which explains the equity risk provides a very useful management tool because it indicates what information should be used to rationally estimate the cost of capital and what information must be observed to anticipate the movements of risk, which have significant influence on the market value of the shares. It shouldn't be forgotten that the main objective of any company is to maximize the market value of their shares.

The main objective of this work is to study the connection between the systematic equity risk of American companies located in the touristic industry and a set of information from inside of the company and the market. We seek to know what information explains the equity risk in order to extract this information to estimate a pattern of behavior, especially for those companies that cannot have a beta, the capital cost of the shares. The financial management is more efficient and correct when the cost of capital calculation is precise and tight.

As the systematic risk is not the same for all sectors of the economy or for all markets, as evidenced by Foster, Kasznik and Sdhu (2012), we decided to study the connection between the beta and the information using data from US market and data businesses in the tourism industry. We studied the American market as the relevant financial market and the tourist industry for its economic relevance, the direct contribution of Travel & Tourism to Gross Domestic Product of US was 2.7% in 2013 and 3.5% in 2014 and contribution to employment was 5,426,500 of direct jobs in 2014, 3.8% of total employment. In addition, the recent work of Park and Jang (2014) consider it necessary to continue investigation, which combines hospitality with finance / accounting disciplines.

For the development of the research, we have used the technique of panel data and we have combined accounting information from the company with macroeconomic information in the independent variables. Although CAPM theory tells us that systematic risk is determined by macroeconomic factors only, studies so far show a statistically significant relationship between risk and information from the company. Kim, Kim and Gu (2012) with their work show that borrowing and growth explains the risk of action with a positive sign while the size shows a negative relationship, Chen (2013) found that the relation between debt ratio and state ownership positively affects systematic risk and Boz Menendez-Plans and Orgaz-Guerrero (2015) show that company size is a variable with a high explanatory power of systematic risk.

The current research considers beta (systematic equity risk) a dependent variable and it is estimated from an OLS between daily returns on stocks and the daily return of Dow Jones stock index, and 14 financial indicators and 6 macroeconomic parameters. The sample consists of 79 American firms in the tourism sector and are the sum of category 71 (Arts, Entertainment and Recreation) and 72 (Accommodation and Food Services) according to NAICS (North American Industry Classification System). We used two dummy variables, the first to separate the sample into two periods, before and after 2008, the year in which the financial and economic crisis started and the second one is to separate sampled companies according to categories of NAICS.

The work developed here provides a breakthrough in research and applying the technique of panel data and using accounting and macroeconomic information together.

The results show that:

- a) The firm size and business growth are explanatory variables of equity risk.
- b) Three measures of business efficiency influence the equity risk.
- c) Two measures are macroeconomic variables with explanatory power, CPI (Consumer Prices Index) and SE50 (Stoxx Europe 50).

The reminder of the article is structured as follows: the first part gives a brief overview of the literature and hypothesis, followed by a data and methodology and the presentation of the findings. Afterwards, results are discussed and a conclusions draw, explained the utility of the results and pointing out limitations of the study.

2 Literature review and Hypothesis

The study of the literature reveals the current concern about the relationship between equity risk and available information. Proof of this interest is the recent work of Babenko, Bough and Tserlukevich (2015), Boz Menendez-Plans and Orgaz-Guerrero (2015), Morelli (2012), Driessen, Lin and Phalippou (2012), Arfaqui and Abaoub (2010), etc. Babenko et al (2015) analyzed the relationship between the systematic equity risk and idiosyncratic cash flow and show that

under the general assumptions firms' conditional betas depend directly on the history of idiosyncratic shocks. Boz et al (2015) show that a combination of accounting and macroeconomic information explains the systematic equity risk. Morelli (2012) explores the relationship between cross-sectional security returns and beta, size and book-to-market equity. Driessen et al. (2012) developed a new econometric methodology to estimate the risk and return of an asset using cash flow data. Arfaoui and Abaoub (2010) studied the influence of risk factors on the local equity systematic risk: such as inflation, trade openness, local investment, budget surplus and financial development.

The study of Ethan, Keener and Sagi (2015) does not focus on studying information explaining the equity risk but shows the importance of risk determination factors for investors as a raw material. The work develops a new methodology for estimating risk factors of oil (energy risk) from equity information and derivative markets. The model shows that the volatility of energy risk is related to GDP and unemployment rate.

Another group of existing literature, which justifies the interest of our research, consists of articles that analyze the determinants of equity risk for a sample of companies in the tourism sector. Here are several recent papers: Boz Menendez-Plans and Orgaz-Guerrero (2015), Park, Kim and Hyuck (2015), Chen (2013), Kim, Kim and Gu (2012), Lee and Jang (2012), Lee and Hooy (2012) and Nicolau and Sellers (2011). The study of a particular sector can provide more accurate results on risk assessment. It should be remembered that the country and industry are important factors of the share valuation process.

Boz, Menendez and Orgaz (2015) show that the equity risk of European food and accommodation sector companies is characterized by business size, gross domestic product, the exchange rate between the euro and the dollar and Dow Jones stock index. Park, Kim and Hyuck (2015) show that the systematic equity risk of companies located in the US restaurant industry is related to the liquidity ratio, the efficiency ratio sales / value of assets, debt ratio and size of business. Chen (2013) found a significant relationship between systematic risk and debt ratio studying a sample of companies in the hotel industry in the Chinese market. Kim, Kim and Gu (2012) analyzed a sample of US hotels and the results show that the equity risk is related to the total average assets, average long-term debt to the total capitalization, and growth rate. Lee and Jang (2012) study the real-estate exposure of US hospitality firms. Research reveals that the systematic equity risk is explained by capitalized lease on property, operating cash flows scaled by the total assets, long-term liability scaled by the total assets and the quick ratio. Lee and Hooy (2012) discussed the airline industry and found that the systematic equity risk is associated with operating debt, for the three samples of North America, Europe and Asia, with growth in European sample, and the size of Asian companies. Nicolau and Sellers (2011) analyzed the variation in the risk to a hotel chain's performance depending to the introduction of a new quality system. The results show that introduction of a quality system increases the risk of higher costs for the investors.

Although it may seem that the tourism sector is widely analyzed, Tsai, Pan and Lee (2011), Law, Leung and Cheung (2012) and Park and Jang (2014) encourage us to continue investigations because it would help practitioners to resolve managerial and operational problems. Park and Jang (2014) said: "As an additional interdisciplinary research topic, risk management issues could be aggregated with finance / accounting studies in the hospitality industry."

Recently submitted articles justify:

- a) The interest to determinants of risk and fundamental variable, which influence the decision within financial management.
- b) The need to analyze the behavior of the relationship between risk and information in specific sectors.

The results of previous investigations help us to establish two hypotheses for investigation:

- a) The information determining equity risk of the tourism industry in Arts, Entertainment and Recreation and Accommodation and Food Services in the US market, may differ from the risk information relevant to European market.
- b) A combination of accounting and macroeconomic information provides a better connection between equity risk and information.

3 Data and Methodology

The analyzed sample consists of 79 American firms in the tourism industry and particularly in the sectors of Arts, Entertainment, Recreation and Accommodation and Food Services. The analyzed period covers the years 2004-2013. Data have been obtained from the Orbis data base (database from Bureau Van Dijk) for all company accounting information and from sites, www.bea.gov (Bureau of Economic analysis), www.bls.gov (Bureau of Labor Statistics) y www.ec.europa.eu/eurostat (Eurostat) for the macroeconomic data and www.stoxx.com and www.yahoo.finance data for stock indices and rates.

The dependent variable of the study is beta (the systematic equity risk of the sampled companies) is estimated by the following regression model:

$$R_{it} = \alpha_i + \beta_{iy}R_{Mt} + \mu_{it} \quad (1)$$

Where:

- i identifies the number of companies in the sample 1.....79
- t represents the number of data used to estimate the beta, 360 days
- y represents the number of scanned fiscal years, 2004...2013
- R_{it} is the return on stock i at a time t
- β_{iY} identifies the beta of stock i in year y
- R_{Mt} identifies profitability of the market portfolio in period t

μ_{it} is the random regression residual, assuming $\mu = 0$ and constant variance

Beta is estimated annually for each of the 79 companies, from daily returns calculated from every year. The market portfolio used to estimate betas is the Dow Jones Industrial Average Index, from which daily returns is calculated according to the equation:

$$\ln(I_t/I_{t-1}) \quad (2)$$

On which:

I_t is the value of the index at the end of the day t

I_{t-1} is the value of the index at the end of day $t-1$

The independent variables used in the research are classified into two categories:

- a) Company information, accounting variables (F).
- b) Market information, macroeconomic variables (M).

First group consists of 16 indicators presented in the following table:

Table 1

Information (F)	Calculation	Reference	Sign
Current ratio (CR)	Current assets/current liabilities	Park and Kim (2015), Brimble and Hodgson (2007)	-/+
Leverage (LV)		Brimble and Hogson (2007), Chen (2013)	
	LV1=total debt/total assets		+
	LV2= long term debt/long term financing		+
	LV3 = long term debt/equity		+
Size (SZ)		Park and Kim(2015)	
	SZ1= natural logarithm of total assets		-
	SZ2 = natural logarithm of number of employees		-
	SZ3= natural logarithm of total assets		-
Growth (GR)	Natural logarithm of total assets at the end of the business year/total assets at the beginning of the same year	Kim, Gu and Mattilla (2002)	+/-

Operating Leverage (OL)	EBIT/SALES	Brimble and Hogson (2007)	+
Cash Flow (CF)			
	CF1 = EBIT+ Depreciation + Financial revenue - Financial expenses ± Debtors ±Stocks ±Creditors	c) Boz, Menéndez-Plans and Orgaz-Guerrero (2015)	d)
	CF2 = CF1 ± Fixed Assets		-
	CF3 = CF2 - Depreciation		-
Income after Taxes (IAT)			-
Earning Before Interest and Taxes (EBIT)		Campell, Polk and Vuolteenaho (2010)	-
Asset Turnover Ratio (AST)	Sales/Total Asset		-
Financial Leverage (FL)	IAT/EBIT	Lee and Hooy (2012)	-

Source: Made by myself

To transform the information presented in absolute terms into relative terms we use four denominators: Total Assets (AT), Financial Expenditures (FE), sales (SL) and book value of equity (BVE). Consequently, the profitability of the exploitation (ROA) and return on shareholder (ROE) is used among the other information.

The information from the company collects accounting information, accurate measures of the money generated as cash flow and efficiency measures as the asset turnover ratio, ROA and ROE.

In the group of market information, we have:

Table 2

Information (M)	Reference	Sign
US Gross Domestic Product (GDP)	Boz, Menéndez and Orgaz (2015)	-
US Harmonized Indices of Consumer Prices (ICP)	Chen (2007)	-
Exchange rate \$/€ (EXR)		
US Unemployment rate (UR)	Boz, Menéndez and Orgaz (2015), Engle, Jondeau and Rockinger (2015)	+
US Unemployment rate-leisure and hospitality (UH)		+
Standard & Poor's 500 (S&P500)		-
Stoxx Europe 50 (SE50)		-

Source: Made by myself

As a control variable, we used two dummy variables, sector (SC) to differentiate the two sectors within the tourism industry and crisis (CR) to analyze the effect on the results of the economic and financial crisis that began in 2008.

For the study we apply the panel data technique which provides more accurate results when period is considered as variable (Hausman and Taylor (1981)) and it is also a technique which is not widely used, Jand and Park (2011) .

We apply the following model:

$$\beta_{i,t} = \alpha_0 + \sum_{f=1}^F \alpha_f (F_{ift}) + \sum_{m=1}^M \alpha_m (M_{mt}) + \mu_i + \varepsilon_{it} \quad (3)$$

Where:

- β_{it} identifies dependent variable of firm i in year t
- α is the correlation coefficient of each indicator
- F is independent variables from accounting information
- M is independent variables from market
- μ represents individual-specific effect
- ε_{it} is error for each firm in any period

At the beginning, we applied the model on the whole sample and then incorporated the dummy crisis (CR) and then the dummy sector (SC).

Ne conclude che la pressione dell'acqua, di per sé, non ha alcuna influenza sul comportamento meccanico del terreno e la chiamò pressione neutra. Al contrario, resistenza e deformabilità dipendono unicamente dallo sforzo efficace, così chiamato proprio per questo motivo. Rendulic (1937) ne fornì in seguito una dimostrazione sperimentale esauriente.

4 Results

4.1 Descriptive Statistics

In the following table, we can see the descriptive statistics

Table 3 Descriptive statistics

Variable	obs	Mean	Std.dev.	Min	Max
β	787	0.202	0.596	-3.705	6.857
SZ1	790	19.179	2.369	6,907	24,323
GR	743	-0.015	0.800	-8.907	5.214
CF3/AT	717	0.242	13.258	-89.05	184.47
ROA	717	0.078	0.467	-1.87	5.777
ROE	717	0.123	1.50	-13.98	19.066
OL	758	0.306	4,745	-19,09	73,062
FL	790	1,173	8,724	-70,70	165,38
AST	717	1,149	1,277	-0,1168	19,98
ICP	790	2.35	1.194	-4	3.8
SE50	790	-0.012	0.271	-0.797	0.194

β (the systematic risk of the overall sample, Arts, entertainment and Recreation and Accommodation and Food Services), SZ1 (firm size = natural logarithm of total assets), GR (growth), Cash Flow3 / Total Assets, ROA (profitability), ROE (return of equity), OL (Operating leverage), FL (Financial Leverage), AST (Asset Turnover), ICP (Indices Consumer Prices), SE50 (Stoxx_Europe_50)

Descriptive statistics tells several things about the analyzed sample:

- a) The average beta of the sample is 0.20, which indicates that the shares of the analyzed sector show high volatility. The standard deviation of the values explains that 68% of sample values have a beta between 0.796 -0.394. The sample data provided mostly negative betas but some of them have a beta value greater than 1.
- b) The average business growth is negative.
- c) The average ROE was 12.3%, although the standard deviation indicates the high scatter in the values.
- d) The average ROA (return on farm) is 7.8%, values dispersion equal to 0.467 that indicates that there are negative returns.
- e) The average value of operating leverage is 0.3064 having high standard deviation for this type of information.
- f) The average value of financial leverage is 1,173, although the standard deviation is very high again.

- g) The average value of the asset turnover ratio, efficiency ratio equals 1,149. The average value of the sample is greater than for unit having the maximum value of 19.98.

Thus, the average tells us that shares of the sample are not very risky, the profitability of the operation is positive and shareholder profitability and efficiency is greater than 1.

4.2 Relationship between systematic risk and information

In the following table, Table IV, we present the best models obtained from the study of the total sample. Models adjusted for autocorrelation and heteroscedasticity. The first model is the result of analyzing the data without dummy variables. The second model is the result of analyzing the sample with the dummy CR and the third model with two dummy variables CR and SC.

Table 4 The best models (all simple)

Model	Accommodation and Food services and Arts, Entertainment and Recreation Industry	Accommodation and Food services and Arts, Entertainment and Recreation Industry more dummy variable	Accommodation and Food services and Arts, Entertainment and Recreation Industry more two dummy variables
Dependent variable	β	β	β
α_0	-0.278 (0.112)	-0.284 (0.105)	-0.263 (0.135)
Independent variables			
SZ1	0.031 (0,000)***	0.031 (0.000)***	0.032 (0.000)***
GR	-0.075 (0.018)*	-0.074 (0.020)*	-0.074 (0.019)*
CF3/TA	-0.003 (0.021)*	-0.003 (0.018)*	-0.003 (0.018)*
EBIT/TA	-0.109 (0.019)*	-0.108 (0.020)*	-0.110 (0.018)*
EBIT/BVE	0.021 (0.105)*	0.020 (0.119)*	0.021 (0.109)*
ICP	-0.063 (0.001)**	-0.049 (0.053)*	-0.063 (0.001)**
SE50	-0.343	-0.336	-0.343

	(0.000)***	(0.000)***	(0.000)***
CR		-0.047 (0.402)	
SC			-0.032 (0.459)
R2	0.2113	0.2141	0.2096
Prob>Chi2	0.000	0.000	0.000
n	714	714	714
Hauman test			
Chi2	9.26	8.58	9.75
Prob>Chi2	0.2346	0.3786	0.2828
	Random effects	Random effects	Random effects

β (the systematic risk of the overall sample, Arts, Entertainment and Recreation plus Accommodation and Food Services)), SZ1 (firm size = natural logarithm of total assets), GR (growth), Cash Flow3 / Total Assets, EBIT/TA (ROA, profitability), EBIT/BvE(earnings/ book value equity), ICP (Index Consumer Prices), SE50 (Stoxx Europe 50), CR (dummy variable financial crisis), SC (dummy variable sector), in parenthesis ($p>t$), ***, **, * denote significance at the 1,5, and 10 percent levels, respectively. Source: self devised

The results tell us that the sample study reveals:

a)The information explaining the systematic equity risk of the investigated tourism industry is a combination of accounting, the company's own information, and macroeconomic information. Hypothesis 2 is confirmed.

b)The business size (SZ1) is a variable with great explanatory power. The sign of the relationship is positive.

c)The investment growth is also an explanatory variable for risk but with negative sign. The higher growth in investment the lower is beta of shares.

d)The CF3 / TA ratio is an accounting variable that explains the equity risk. It is an efficiency ratio measured as the money generated by the activity for each euro invested in total assets. The sign is negative so that means that the higher efficiency business has the less is systematic risk.

e)The profitability (ROA) is also an explanatory variable for equity risk and negative, so that the higher the return on investment is, the less is equity risk and for shareholder.

f)The indicator EBIT / BVE is an enterprise efficiency index for shareholders because it indicates the profit generated from the exploitation of every euro invested by the shareholder. It is a variable with explanatory power of risk but with a positive sign.

g) Information from two market explains the beta of the shares: ICP and SE50. Inflation and the stock index of the European market. Information from both markets have a high statistical significance and sign of the relationship is negative. The shares of US tourism industry show that the higher inflation and increase of SE50, the less is beta. An increase in inflation means an increase in economic activity and an increase in the Stoxx Europe 50 index means good ex-

pectations of the European economy, which translates into a risk reduction of US market share.

h)The dummy crisis is not statistically significant which means that the behaviour of the relationship between risk and information is not different before and after 2008.

i)The dummy sector has no statistical significance that means that both sectors of the sample reflect the same behavior.

Research shows that 7 independent variables (information) explain the risk (5 accounting data and 2 macroeconomic data), financial and economic crisis that began in 2008 has no statistical significance for the study. The data also confirm that the study has some differences compared with data from European companies, Boz, Menendez and Orgaz (2015):

a)The GDP and EXR doesn't play any role in explaining the risk of US stocks .

b)The business growth and business efficiency ratios CF3 / TA and AST (Revenue / Total Assets) are related to the risk.

In both economies the business size has a high explanatory power, always with a positive sign, and the representative index of the reference economy, Europe to US, Europe to US influence the equity risk and the relationship is determined with negative sign.

5 Conclusion

The cost of capital is a very important variable for financial management. The main goal of any business is a calculation of value creation for shareholders, and it depends on the cost of capital or minimum return required by shareholders.

The cost of capital is a variable that depends on the risk and depends on the beta or systematic risk according to the CAPM. Therefore, if we have beta we can estimate the cost of capital scientifically and objectively. Now, what about those companies that do not go public? Could we calculate a beta? In that case, determination of the cost of capital becomes imprecise and susceptible to arbitrary processes.

Knowing which information explains the risk allows observing and analyzing information to estimate the risk of any share and calculate the cost of capital.

As the economic sector is an important factor in the study of the risk determinants, as evidenced by the literature, the study of equity risk in the tourism sector leads to a clearer understanding of what really happens in the whole sector. It leads to more precise and correct results.

The sample study of 79 enterprises in the tourism industry, particularly in sectors 71 (Arts, Entertainment and Recreation) and 72 (Accommodation and Food Services) NAICS (North American Industry Classification System), for the period of US 2004-2013 shows that there is a set of informative variables that explain the systematic equity risk. Thus, the research reveals that:

1)The business size and growth along with three indicators of business efficiency, CF3 / TA, EBIT / TA, EBIT / BVE explain the equity risk

- 2) The Consume Prices and the stock index Stoxx Europe 50 index explain the equity risk
- 3) The financial crisis of 2008 does not alter the behavior of the model
- 4) There are no differences between the two sectors that make up the sample

6 Results Utility

The research results are very useful for tourism enterprises management of the US market as it provides information explaining the equity risk. Knowing such information will facilitate more efficient management and knowledge what information determines the risk can help to quantify the risk objectively without having a beta.

7 Research limitations

The most important limitation is the number of companies and years that make up the sample, although broader sector is analyzed in this work comparing to previous studies.

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Risk management in export compliance: concepts, procedures, and solutions

Authors

-
- *Paolo Pietro Biancone, Full Professor, paolo.biancone@unito.it - University of Torino*
 - *Vahid Jafari Sadeghi, Ph.D. Student, vahid.jafarisadeghi@unito.it - University of Torino*
-

There is a growing consensus that firms' corporate governance influences their ability to export. Corporate governance extremely relies on export compliance as a framework which supports organizations in order to mitigate their risks associated with export, and provides a safe platform for firms to upgrade their position in the world of trade. The objective of the present study is to widen concepts of export control and compliance framework. The paper outlines the general structure of export compliance and presents a comprehensive view of United States of America and European Union as significant powers in the world. The nature of the risks is explained from the point of view of export compliance. In this study, we reached to dual-use risk and money laundering risk as the main problem in EC area. After explaining risks, we deepen on the process of the risk management. The methodology of this study is documenting analysis with inductive approach. Secondary data has been collected through manuals, export compliance related websites, guidelines issued by various regulatory bodies, guidance note suggested by various institutes, legal provisions in legislations of different countries and various research papers were reviewed and their findings were used as a secondary data to develop this paper.

Key Words: Export, Export Compliance, Control, Risk Management, Dual-Use, Money Laundering.

JEL Classification Code: F340, F510, F520, G320, K220

1 Introduction

Internationalization is a way for firms to survive, succeed (Majocchi, Bacchiocchi, & Mayrhofer, 2005) and promote their economic growth (Archarungroj & Hoshino, 1998). Export seems a viable opportunity for all kind of firms, as a simple and quick way to access foreign markets. The west governments rely on the due diligence of exporters to help ensure their national security. Concerns regarding security, homeland and international, as well as the proliferation of weapons of mass destruction and terrorism have heightened. It is through a strong public-sector/private sector partnership that the diversion of dual-use items for harmful and destructive purposes can most effectively be prevented (BIS, 2011).

US export regulations have strict guidelines on the types of knowledge that cannot be shared with non-US citizens and carry harsh penalties for non-compliance that fall equally on the organization in question and its executives who ought to have known better (Avellanet, 2008). Dual-use items are items that have a commercial application and also can be of military, weapons-of-mass-destruction, or terrorist use. Given the breadth of commodities that may be so categorized, as well as the potential for issues with regard to parties to a transaction, it behooves companies in all industries to adopt an export compliance program, and the prescription herein may be applied to all industries that export or plan to export. Failure to comply with U.S. laws and regulations may result in the imposition of criminal and/or civil fines and penalties (Fusco & Llp, 2015). The balance between efficiency and commercial interests on one hand, and national security on the other hand, is a difficult one to strike; another way of looking at this is being part of a larger discussion about promoting innovation while minimizing risks (Samson, 2015).

Firm size matters in business of exporting (Hayakawa, 2014). Small firms are often perceived to lack the means to engage in resource exchanges, to lack sufficient insurance against default in any exchanges in which they do partake, or both (Stinchcombe, 1965). That is why Small firms are more likely to be able to achieve their growth objectives at home relative to larger firms. Thus, large firms with significant domestic market penetration are likely to give a higher priority to exporting (Samiee & Walters, 1990).

All compliance programs are different. As an example, some companies choose to designate a single employee responsible for the administration, performance, and coordination of export and compliance responsibilities. Other companies decentralize these responsibilities throughout the organization, but with corporate oversight to ensure essential compliance standards are maintained. The size, organizational structure, and production/distribution network of an organization are key determinants of where compliance functions and personnel should reside. Many centralize the administration of training, record-keeping, dissemination of regulatory material, notification of non-compliance, and audits. However, the actual screening activities against various government lists (of foreign entities that should be avoided, certain end-use and end-user ac-

tivities, and diversion risk) may be performed by personnel throughout the company (e.g., in sales and marketing, order entry, or shipping) where firsthand knowledge and information of customers is available (BIS, 2011).

2 Methodology

The methodology of this study is documenting analysis with inductive approach. Secondary data has been collected through manuals, export compliance related websites, guidelines issued by various regulatory bodies, guidance note suggested by various institutes, legal provisions in legislations of different countries and various research papers were reviewed and their findings were used as a secondary data to develop this paper.

At first, we seek to present export compliance's concepts and definitions. Two views of export control and compliance, United States of America's view and European Union's view, will be assessed. Then, in order to manage risks associated with export compliance, a framework will be built. Secondary data have a great role in this part.

3 Export Compliance

Export Compliance is a specialized multidisciplinary framework, which provides support to Organizations in Compliance Risk Management, i.e. the risk of legal or administrative sanctions, financial losses or reputation deterioration for failing to comply with laws, regulations and legislation, codes of conduct and good practice ("laws, regulations and rules"). Export Compliance covers all activities of import and export of goods and/or services, tangible and intangible assets (including the transfer of means of payment, that somehow are subject to regulations applicable to transactions between two different states/jurisdictions). The term Organizations refers to all Bodies, companies of any nature, associations, both public and private undertakings that have activities falling within the scope of this Charter. The term Export is also intended as import in a broader sense, as an indissoluble operation (EIFEC, 2016).

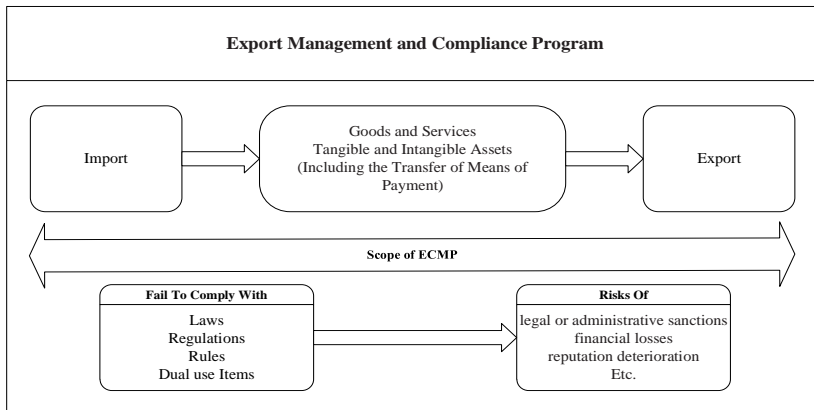


Figure 1 Export Compliance Framework in an Organization (Author)

3.1 Export Control in United States of America

Most export transactions do not require specific approval from the U.S. Government. In order for certain export transactions take place legally, however, an exporter must obtain, in advance, a special export permission called a license. Licenses are required in certain situations involving national security, foreign policy, short supply, nuclear non-proliferation, missile technology, chemical and biological weapons, regional stability, crime control or terrorist concerns. Four U.S. Government agencies have primary export licensing responsibilities: The Departments of Commerce, Energy, State and the Treasury. The majority of exports requiring licenses are either controlled on the Commerce Control List (CCL), administered by the Commerce Department, or the U.S. Munitions List (USML), administered by the State Department. The CCL is used to regulate the export and re-export of items that have commercial uses, but also have possible military applications ("dual-use" items). The USML is used to control the export of defense articles, services and related technologies. The Defense Department is actively involved in the interagency review of those items controlled on both the CCL and the USML. The agencies work together when there is a question about whether a proposed export is controlled on the CCL or the USML. The Energy Department controls nuclear technology and technical data for nuclear power. These agencies collectively review certain proposed dual-use exports. The Treasury Department is responsible for economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations and international narcotics traffickers. Several other federal agencies also have some licensing responsibilities. These are listed on the Commerce Department's website (www.bxa.doc.gov/) along with a brief explanation of each agency's responsibilities. The U.S. Government controls exports on a case-by-case basis, examining

the following factors: the destination, the end-user, the product and the end-use. Those entities handling or servicing the sale of the product may also be a factor. When a company decides to export, it must review the following factors for each transaction (BIS, 2011).

3.1.1 US Export Regulations

The International Import-Export Institute (IIEI, 2016), there are essential regulations in the export compliance process that organization need to comply with them:

- *International Traffic in Arms Regulations (ITAR)*
Companies that manufacture and/or export defense items, services and technologies must comply with specific export regulations designed to control the spread of military technology and capacities to certain designated countries or groups. Exporters are responsible for compliance with the International Traffic in Arms Regulations (ITAR) governing these exports. These regulations are issued by the State Department and administered by the Office of Defense Trade Controls. Extensive civil and criminal penalties are levied against companies and/or individuals who violate export regulations.
- *Export Administration Regulations (EAR)*
Many goods not controlled by ITAR are subject to licensing under EAR. These regulations cover “dual-use” items, services or technologies (which have legitimate commercial applications but could be used in the development or manufacture of conventional weapons or weapons of mass destruction). These regulations are enforced by the U.S. Department of Commerce/BIS and assert control over all U.S. goods anywhere in the world, and all goods in the U.S., no matter where produced.
- *Office of Foreign Assets Control Regulations (OFAC)*
The Department of Treasury’s Office of Foreign Assets Control administers and enforces economic and trade sanctions against targeted foreign countries, terrorism sponsoring organizations, and international narcotics.
- *Other Export Regulations*
In addition to EAR and ITAR, exports from the United States may be subject to regulations administered by other government agencies. The Department of Energy regulates nuclear technology, natural gas and electric power. The Defense Threat Reduction Agency in the Department of Defense develops policies on international transfers of defense-related technology, and reviews certain dual-use export license applications referred by the Department of Commerce. The Drug Enforcement Administration controls the import and export of listed chemicals used in the production of controlled substances under the Controlled Substances Act. The Environmental Protection Agency’s Office of Solid Waste regulates toxic waste exports. The Food and Drug Administration licenses drugs and medical devices. Nuclear

Regulatory Commission Licenses nuclear equipment and materials. And, United States Patent and Trademark Office Administers to patent filing data sent abroad.

3.2 Export Control in European Union

The European Institute for Export Compliance (EIFEC) has the mission to foster international security through managing and promoting the EU EXPORT COMPLIANCE FRAMEWORK. EU-ECF framework provides innovative solutions to the most critical challenges in a global marketplace becoming a very complex arena for businesses to navigate. Major events have produced legislations and regulations at international and national level; the complexity of legal frameworks is shaping the way organizations do their business.

In a globally integrated world, efficient export compliance is only possible with co-operation at a European and international level. The EU Governments rely on the due compliance of exporters to help ensure that all laws are abided (EIFEC, 2016).

The strategic Response is the specialized multidisciplinary EU Export Compliance Framework (EU-ECF) that supports the organization's business objectives, identifies the boundaries of legal and ethical behavior, and establishes a system to alert management when the organization is getting close to (or crossing) a boundary or approaching an obstacle that prevents the achievement of a business objective.

EU-ECF includes:

- The EU Code of Export Compliance (EU-CEC), which set the principles, best practice and Standards for the import/export industry to be adopted by EU and not EU organizations.
- The EU Export Compliance Guide Lines (EU-ECGL) for implementing the EU-CEC.
- The EU Certified Export Compliant Organization certification (EU-C/ECO) to verify the proper EU Export Compliance behaviors and processes.
- The EU Export Compliance Register (EU-ECR) with the purpose to enhance the implementation of EU Export Compliance best practice. A register for organizations and self-employed individuals engaged in EU import/export and policy implementation has been activated.
- The EIFEC Registration Number (ERN) is attributed for the purpose of identifying organizations or persons in order to ensure their traceability on an EU level. This prevents abuse and allows to establish the identity of the Certified Organization in a simple way.
- The EIFEC EC1001 Standards which are series are principles-based standards to help organizations become more accountable, transparent and after all competitive. They address issues affecting governance, export models and organizational strategy, as well as providing operational guidance on export management and stakeholder engagement.

EIFEC by strategic alliance with leading Academic Entities, promotes the culture of sound Export Compliance practice, and accredits third parties to perform and enhance Compliance professional activities.

3.2.1 Principles and Values of Export Compliance

- **Transparency**
All Organizations act and communicate in a transparent manner, in their relation with EU, member states Institutions and all stakeholders, about operating Export Compliance policy, and the economic, financial and legal implications of each activity undertaken (Commitment to Transparency).
- **Compliance**
All Organizations act in conformity and compliance with all EU regulations as well as rules and laws of the EU Member States where business and activity or import and export are having place (Commitment to Export Compliance).
- **Accountability**
All Organizations are deeming to act acknowledging, assuming responsibility for and being transparent about the impacts of their policies, decisions, actions, products and associated performance.
- **Consistency**
All Organizations act consistent with prior acts and statements. Organizations must be consistent in applying the Export Compliance principles, methods, practices, and procedures. Organization will ensure that the same rules and behaviors are followed in all activities being reported. If a change is made to an Export Compliance method, the effects of the change must be clearly disclosed.
- **Effectiveness**
All Organizations undertake to use all its available means, including labor, financial resources, and goods and services either received or created, in such a way as to pursue the Organization's Export Compliance purposes to the highest degree possible.

Businesses that are already exporting or are planning to start exporting need to follow some basic steps to ensure they are compliant with U.S. export regulations. While the following six steps are by no means all inclusive, they should provide companies with a starting point for implementing an export compliance plan (EIFEC, 2016).

4 A Framework for Export Compliance Risk Management

4.1 Introduction

Risk is defined in commercial and business literature as an uncertain event that may impact negatively on the achievement of goals (Ojasalo, 2009). Exports are goods/services which a company supplies to customers abroad, so export risks are understood as events which, with a certain degree of probability, will adversely affect the success of foreign business (Lehmann, Chur, Hauser, & Chur, 2013). Risk management plays a significant role that only transcends risk analysis (Thun & Hoenig, 2011).

In this context, we build a framework which outlines organizations in order to comply with risks related to export compliance. First, the beneficiaries are specified. Next, we explain violations which are reasons of putting the organization in sanction and punishments list. Finally, with regard the history, proportionate sanctions on each kind of risks are presented.

4.2 Beneficiaries

According to EIFEC, Beneficiaries of this framework are including all bodies, organizations, companies, associations, of any nature, both public and private (EIFEC, 2016).

4.3 Constitute Sanction-able Risks

In the context of undertaking foreign trade, firms who are exporting or who are planning to export are subject to risks to comply with regulation in terms of exporting. International trade is affected by, but not limited to, a range of risks about export compliance which failure to comply with them may cause sanction for the organization:

- Risk of Money Laundering
- Risk of Dual-Use Items

4.3.1 Money Laundering

Money laundering is one of the most common transnational crimes in the world which is a crime, justified by the fact that whoever launders money is pursuing a way to legitimize their ill-gotten gains which is accumulated via illegal activities and it allows criminals to enjoy the proceeds of their crime (Baldwin, 2003). The main objective of money laundering is to legitimize income originating from illegal resources or businesses. The bottom line is to change the form of

the money to mask its origin. Money laundering activities undermine economies and destabilize government systems (Yang, 2002). As a result of money laundering, financial markets become corrupted and the public's confidence in the international financial system is eroded. Eventually, as financial markets become increasingly risky and less stable, the rate of growth of the world economy is reduced (Omar, Johari, & Arshad, 2014).

Money laundering tends to allocate dirty money around the world on the basis of avoiding national controls, in that the tainted money tends to flow to countries with less stringent controls. Globalization has also improved the ability of money launderers to communicate, allowing them to spread transactions across a greater number of jurisdictions, thereby increasing the number of legal obstacles that may be put up to hinder investigations. Underground, or parallel, banking systems have also attracted the attention of law enforcement and regulatory agencies (Buchanan, 2004).

4.3.1.1 Process of Money Laundering

As Buchanan (Buchanan, 2004) reported, money laundering includes 3 processes: Placement, Layering and Integration.

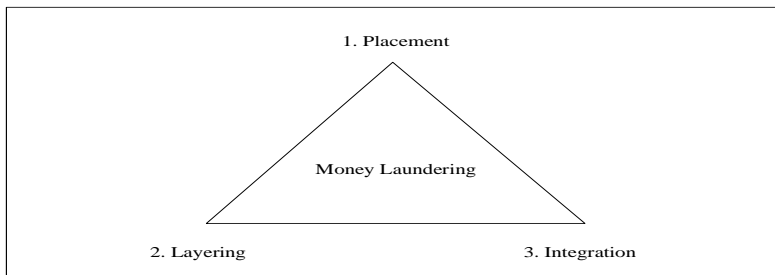


Figure 2 Money Laundering Process (Omar et al., 2014)

I. Placement

The placement stage is accomplished by changing the bulk cash derived from criminal activities into a more portable and less suspicious form by depositing those proceeds into the mainstream financial system. The purpose of placement is to avoid detection by the authorities and remove the cash as far as possible from the proceeds' illegal origins. The laundering mechanism is at its most vulnerable during placement because most illegal activity generates cash profits, which is bulky and difficult to conceal in large amounts.

As a result, the money launderer has to find a solution to move large masses of cash into a more manageable form for introduction into the financial system. Such solutions could include using front corporations to deposit cash or check

cashing businesses to convert cash to negotiable instruments such as traveler's checks, cashier's checks and money orders.

II. Layering

After the funds have entered the financial system, layering, the second stage of the money laundering process takes place. Layering involves creating a web of financial transactions, that in terms of their frequency, complexity and volume often resemble legitimate financial activity. Due to the web of parallel and serial transactions, it becomes increasingly difficult to reconstruct a paper trail. Off-shore financial centers perform an important function in the layering stage. In an attempt to hide its true origins, the funds are often wire transferred into a financial or banking system through offshore accounts. Layering also usually involves two or more jurisdictions.

III. Integration

The final stage of the money laundering process is known as integration. Integration involves reintegrating the washed or cleansed funds with formal sector economic activity. There are a variety of financial instruments used to accomplish this task such as letters of credit, bonds, bank notes, bills of lading and guarantees.

4.3.2 Dual-Use

The Department of Commerce, Bureau of Industry and Security (BIS) has the jurisdiction to oversee dual-use exports that have an impact on the national security of the nation. The term dual-use is used to describe items that have both commercial and military or proliferation applications (Table 1). Certainly not all, or even a large proportion, of biological agents and processing equipment are considered dual-use and listed on the Commerce Control List (CCL) (Orr & Lee, 2009). There are (at least) two levels of intention, i.e. that of the researcher/innovator and that of an end-user. A researcher/innovator may intend one purpose and not imagine that a user might transform the research or innovation for other purposes. Equally, a researcher may have no particular end-use in mind (Williams-Jones, Olivier, & Smith, 2014).

Table 1 Examples of dual-use research and innovation, by academic field

Example	Field	Beneficial use	Malevolent use
<ul style="list-style-type: none"> Nuclear research 	<ul style="list-style-type: none"> Physics Biomedicine 	<ul style="list-style-type: none"> Nuclear energy Radiology 	<ul style="list-style-type: none"> Nuclear weapons
<ul style="list-style-type: none"> Viral research (e.g. H1N1, H5N1) 	<ul style="list-style-type: none"> Biomedicine 	<ul style="list-style-type: none"> Public health (prevention) Biodefence (prevention) 	<ul style="list-style-type: none"> Bioweapons (terrorism)
<ul style="list-style-type: none"> Synthetic biology (e.g. new genes, DNA) 	<ul style="list-style-type: none"> Biomedicine 	<ul style="list-style-type: none"> Biomedicine Genetic enhancement 	<ul style="list-style-type: none"> Bioweapons
<ul style="list-style-type: none"> Nanotechnology 	<ul style="list-style-type: none"> Converging fields: Nanoscience Bioscience Information technology Material sciences 	<ul style="list-style-type: none"> Biomedicine Improved consumer goods 	<ul style="list-style-type: none"> Miniature weapons (Nano-drones) Surveillance society (miniature cameras)
<ul style="list-style-type: none"> Brain imagery and behavior monitoring 	<ul style="list-style-type: none"> Biomedicine Cognitive psychology 	<ul style="list-style-type: none"> Biomedicine Brain scans for criminal behavior 	<ul style="list-style-type: none"> Behavior monitoring and modification
<ul style="list-style-type: none"> Ethnographic profiling and marketing strategies 	<ul style="list-style-type: none"> Social sciences 	<ul style="list-style-type: none"> Improved customer service 	<ul style="list-style-type: none"> Social profiling, marketing, behavior modification

Source: (Williams-Jones et al., 2014)

4.3.2.1 An Ethics of Dual-Use Dissemination

An ethics of dual-use dissemination is important as life scientists may be considered to have a responsibility for what they disseminate in terms of potential harmful misuses, and scientists would need guidance to be able to take such responsibility. Integrating aspects of dual-use dissemination would, in our view, constitute an important contribution to ethical research conduct in the life sciences. Drawing on our discussion, three aspects could be included in such ethics (Kuhlau, Hoglund, Eriksson, & Evers, 2013):

- dual-use awareness, enabling identification of a dual-use dilemma;
- precaution, enabling reflection and cautious behavior in situations where dissemination of knowledge may pose serious risks of harmful outcomes;
- acknowledging conflicting values, prompting a recognition that potential harm in certain research circumstances may outweigh expected benefits.

4.4 Sanctions and Punishments

Failure to comply with each mentioned risks will face the organization with fines and punishments.

4.4.1 Penalties for Money Laundering

The Financial Crimes Enforcement Network (FinCEN) started to levy fines in 2002, and the volume grew quickly from \$0.1 million in 2002 to \$24.5 million in 2003 and finally to \$35 million in 2004. In 2005 ABN-AMRO Bank alone was fined to \$80 million (Takáts, 2011).

In this regard a brief history of penalties related to money laundering (FinCEN, 2016) are as following:

- Any person who fails to comply with any requirement of 31 U.S.C. 5330 or 31 CFR 103.41 shall be liable for a civil penalty of \$5,000 for each violation in an amount up to \$5,000 for each day a registration violation continues.
- Violations of Currency Transaction Rules could result in a fine of up to \$500,000 and ten years in jail.
- Penalties for conducting transactions with prohibited individuals or entities include civil penalties of up to \$250,000 per violation, fines as high as \$1,000,000 and/or jail sentences of up to twelve years.

4.4.2 Sanctions for Dual-Use Items

As in other policy areas, there are currently no international legal standards regarding penalties for export control offences. Somewhat vague requirements can be derived from United Nations Security Council resolutions and from the international treaties regarding biological, chemical and nuclear weapons. Countries have chosen a wide range of criminal and administrative penalties in relation to arms and dual-use trade-related offences (Table 2). A wide range of possible prison sentences is available in different jurisdictions (Bauer, 2014).

Table 2 Options of administrative and criminal penalties

<i>Administrative Penalties</i>	<i>Criminal Penalties</i>
<ul style="list-style-type: none"> • <i>Fines</i> 	<ul style="list-style-type: none"> • <i>Fines</i>
<ul style="list-style-type: none"> • <i>Revocation of licenses</i> 	<ul style="list-style-type: none"> • <i>Prison sentences</i>
<ul style="list-style-type: none"> • <i>Loss of access to trade facilitation privileges</i> 	
<ul style="list-style-type: none"> • <i>Loss of property rights (confiscation)</i> 	
<ul style="list-style-type: none"> • <i>Closure of a company</i> 	
<ul style="list-style-type: none"> • <i>Change of person legally responsible for exports in a company</i> 	
<ul style="list-style-type: none"> • <i>Mandatory compliance training</i> 	

Source: (Bauer, 2014)

Countries have chosen a wide range of criminal and administrative penalties in relation to WMD and dual-use trade-related offences. At one end of the spectrum, the death penalty is currently included in the Malaysian Strategic Trade Act of 2010 for breaches of the act where death is the consequence of the action. A wide range of possible prison sentences is available in different jurisdictions. In Austria, life imprisonment is the maximum penalty for contributing to a nuclear weapon if lives are lost as a result of its actual use. At the other end of the spectrum, fines can constitute a criminal or an administrative penalty, depending on the legal system and the specific provisions regarding this issue. For example, the Republic of Korea (ROK, South Korea) created a special provision of mandatory export control training (referred to as an ‘educational order’), as a possible consequence of violations (Bauer, 2013).

5 Conclusion

This paper has sought to analyze Export Compliance as a great challenge in the world of trade and also find a framework to control its risk.

In this regard, to have a safe export operation, organizations need to comply with the regulation about export compliance. Then, International Traffic in Arms Regulations (ITAR) issued by the U.S. State Department and administered by the Office of Defense Trade Control, Export Administration Regulations (EAR) issued U.S. Bureau of Industry & Security, and the Office of Foreign Assets Control Regulations (OFAC) issued by the Department of Treasury’s Office not only provide a comprehensive information about export compliance and control, but also warn them about the consequences of disobeying from the regulations. European In-

stitute for Export Compliance (EIFEC) is also another organization which aimed to facilitate exporting in terms of export compliance violations.

After defending concepts and responsible organizations, paper built a framework for managing risks related to export compliance. In order to mitigate and control risks resulting in sanctions and punishments, organizations need a framework to find their way. First, the framework identifies beneficiaries, and then it determines constitute risks related to export compliance. Money laundering or in “Dirty Money” (Fan, Lin, & Camera, 2001) is considered as the first violation. Placement, Layering and Placement are steps of the process of money laundering that can be result punishments like imprisonment or monetary penalties. In the other side, Dual-Use Items, products and technologies are normally used for civilian but which may have military applications (EC, 2016), are another violation that will cause sanctions and punishments for organizations. Finally, consequences including punishments and sanctions for non-complying with regulations are presented.

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Operational risk management disclosure in Islamic banks

Authors

- *Paolo Pietro Blancone, Full Professor, paolo.biancone@unito.it. - University of Torino*
 - *Mohammad Ziad Shakhathreh, PhD Candidate, mohammad.shakathreh@unito.it. - University of Torino*
 - *Maha Radwan, PhD Candidate, maha.radwan@unito.it. - University of Torino*
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Islamic banks are vastly growing in a way that makes it highly important to have a unified risk management disclosure standards. This paper aims to explore the various kinds of risk that faces the Islamic financial institutions and in particular Islamic banks. The research focuses on studying deeply the operational risk since it represents one of the risks that is highly elevated in Islamic banks in comparison to their conventional counterparts. Unlike market and credit risk, the operational risk is difficult to evaluate and faces many issues like lack of standardization, measurement, and disclosure as well as the difference among the various regulatory rules in which will be discussed. Our objective is to find the best disclosure practices in financial annual reports and to develop unified operational risk disclosure framework in Islamic banks, where the full annual reports published by banks form the basis of our research. A content analysis is used to compare the disclosure of the operational risk among the different Islamic banks in different countries focusing on the banks that are adopting International Financial Reporting Standards "IFRS" and examining the disclosure quality for the selected sample of banks. Moreover a comparison for the different measurement approaches for calculating capital adequacy that are the basic indicator approach, the standardized approach, and the advanced measurement approach and which one of them is mostly used. We expect our paper to become a benchmark for Islamic banks for preparing their operational risk disclosure.

Keywords: Islamic Banking, Operational Risk, Disclosure, Risk Management, Financial Reporting.

JEL Classification: G21, G28, G32, M41, M48.

1 Introduction

Annual reports of banking institutions provide stakeholders with relevant financial, operational and strategic information. Hence disclosure of information is effective only if (a) it provides information about the risk of the firm and (b) it provides information about the risk management processes of the firm. Khan and Ahmed (2001). The lack of non-financial risk information may mislead investors in their investment decision-making process.

Islamic finance is a vast growing sector that has not taken root solely in Muslim countries but has also spread to non-Muslim countries. It is not serving only Muslims but also it started really to flourish as an ethical non risky attractive financial instrument for Non Muslims in Western countries. It is a system where all the financial transactions are conducted according to the principles of Sharia; which is the legislative framework that regulates all aspects of life for Muslims. These principles differentiate Islamic finance from the conventional finance, Biancone and Radwan (2015). The spread of Islamic finance into Western market demonstrates that it is now being viewed by investors, financial institutions and regulators as a viable alternative to conventional products, Biancone and Shakhathreh (2015).

Despite of the lower risk exposure of the Islamic financial institutions; due to its firm principles like asset based obligation and speculation prohibition; Islamic transactions and institutions nevertheless face unique risks that require a strong and comprehensive management process. The study focuses on one of the most major risk related to transactions which is the operational risk and in particular measuring the quality of its disclosure in the annual financial reports of the Islamic banks. Disclosing the truth is a very important issue in the Islamic context: it applies to businesses and to individuals, Napier (2007). The Quran emphasises the disclosure of truth: "And cover not Truth with falsehood, nor conceal the Truth when you know (what it is)" (Quran, surat al-baqarah 2:42).

Risk management of banks mainly covered market and credit risk whereas gives less concern of operational risk, and there is no formal reporting requirements for operational risk existed. We investigate the reporting of operational risk using a disclosure index, and we provide descriptive statistics to reveal how banks disclose information on operational risk. This allows us to draw conclusions about the development of the extent of disclosure on operational risk over the examined period.

The paper starts with an introduction and then literature review for the concept of risk management as well as an overview of risk management in Islamic banks and the different types of risks. Section 3 gives a deep analysis for operational risk in the Islamic banks. Section 4 sheds the light on the regulatory and capital adequacy requirements. Section 5 explores the operational risk disclosure in the different standards. Section 6 demonstrates the methodology used to measure the quality of the operational risk disclosure in Islamic banks and the developed disclosure index. Section 7 provides an analysis for the findings. Section 8 concludes the paper.

2 Literature review

Gallati(2003)defines risk as a condition in which there exists a possibility of deviation from a desired outcome that is expected or hoped for, or a condition in which there exists an exposure to adversity.

The ISO31000 (2009) defines risk as the effect of uncertainty on objective. This risk has to be managed, assessed and mitigated. And according to , Bessis and O'Kelly (2015) risk are broadly defined as uncertainties potentially resulting in adverse variations of profitability or in losses. Banking regulations, imposing capital charges against all risk, greatly helped the process of risk modelling because they imposed a quantification of several main risk of the bank.

Risk management process is a comprehensive system that includes creating an appropriate risk management environment, maintaining an efficient risk measurement, mitigating, and monitoring process, and establishing an adequate internal control arrangement, Ahmed and Khan (2007).

Risk management is One of the important parts of the decision making process. According to Kallman and Maric (2004) Risk management is a specialized discipline intended to provide decision makers with a scientific method to create the desired variation from an expected outcome at some time.

Risk management operations include risk identification, analysis, measurement, assessment and avoidance, and its objective is to mitigation and minimize of negative effects of the risks.

Risk management in Islamic banks can be defined as a process of management of the risk associated with a business, Islam is not against risk management, it is against the extremity on either side, i.e. not taking risk for fear of making loss only or taking excessive risk by indulging in gambling or speculation (maysir). What Islam promotes is the act of taking calculated risks with the expectation to make gains, Minhas (2014).

Risk management is a developing science throughout the financial services sector. The changing regulatory environment and expectations set challenges firms both in terms of the way they manage their business and also in the ways that they are governed. Islamic financial institutions have these prevailing concerns to contend with combined with more specific encumbrances, Dar and Azmi (2012).

Islamic risk management is different to conventional risk management in some specific areas. Clearly there is one major additional risk – the institution must remain Shari'a compliant, Dar and Azmi (2012).

According to Salem (2013) Islamic banks appear to be more complex as a result of the mix of financing tools replacing conventional loans, the complexity appears clearer when identifying the risk associated with each financing mode.

And according to Makiyan (2008) effective risk management in Islamic banks deserves special attention. However, it has many complex issues that need to be better understand. In particular, the nature of specific risks facing Islamic banks together with the virtually unlimited number of ways available to them to provide funds through the use of combinations of the permissible Islamic modes

of financing – Profit Loss Sharing and non-Profit Loss Sharing – raise a host of issues in risk measurement, income recognition, adequacy of collateral and etc.

The techniques of risk identification and management available to the Islamic banks could be of two types. The first type comprises standard techniques, such as risk reporting, internal and external audit, internal rating and so on, which are consistent with the Islamic principles of finance. The second type consists of techniques that need to be developed or adapted, keeping in mind the requirements for shariah compliance. Hence the discussion of risk management techniques for Islamic banking is a challenging one, Ahmed and Khan (2007).

Islamic banks are constrained in using some of the risk mitigation instruments that their conventional counterparts use as these are not allowed under Islamic commercial law.

As Islamic banks use unique modes of finance, some risks need to be mitigated by proper documentation of products. Gharar (uncertainty of outcome caused by ambiguous conditions in contracts of deferred exchange) could be mild and unavoidable but could also be excessive and cause injustices, contract failures and defaults. Appropriate contractual agreements between counterparties work as risk control techniques, Ahmed and Khan (2007).

The Islamic Financial Services Board IFSB (2005) recognises six major types of risks: credit risk, equity investment risk, market risk, liquidity risk, rate of return risk, and operational risk

Credit risk is most important risk in the banking; it is the risk of counterparty defaulting on payment obligations, Bessis and O'Kelly (2015). Credit risk is generally defined as the potential that counterparty fails to meet its obligations in accordance with agreed terms.

According to Raghavan (2015) market risk is the risk to bank's earnings and capital due to change in the market level of interest rates or prices of securities, foreign exchange and equities, as well as the volatilities of those prices.

Market risk is defined as the risk of losses in on- and off-balance sheet positions arising from movements in market prices i.e. fluctuations in values in tradable, marketable or leasable assets (including Sukuk) and in off-balance sheet individual portfolios (for example restricted investment accounts), IFSB (2005).

Salem (2013) mentioned The component of market risk in Islamic bank are : mark up or benchmark risk, commodity price risk, foreign exchange (FX) risk and equity risk, where the first two are specific to Islamic finance, while the last two are identical to the FX risk and equity risk of conventional banks.

Equity investment risk is defined as the risk arising from entering into a partnership for the purpose of undertaking or participating in a particular financing or general business activity as described in the contract, and in which the provider of finance shares in the business risk, IFSB (2005).

This risk is somewhat unique to Islamic financial institutions, considering that conventional commercial banks do not invest in equity based assets. Equity investments can lead to volatility in the financial institution's earnings due to the liquidity, credit, and market risks associated with equity holdings. Although

there is credit risk in equity-based assets, there is also considerable financial risk: capital may be lost due to business losses, Van Greuning and Iqbal (2008).

Liquidity risk is that risk where a financial institution will not be perceived as having sufficient cash, at one or more future periods in time, to meet such requirements, Matz and Neu (2006).

This risk is interpreted in numerous ways such as extreme liquidity, availability of liquid assets to meet liabilities, and the ability to raise funds at normal cost. This is a significant risk in Islamic Banks, owing to the limited availability of Shariah compatible money market instruments and Lender of Last Resort (LOLR) facilities, Sundararajan (2007).

According to Salem (2013) liquidity risk is referred, which is referred to as inability of liquidations assets to meet short- term obligation. There are two dimensions of liquidity risk: one that deals with the availability of liquid assets and other that focuses on the ability to raise liquid funds at a reasonable cost. The liquidity risk arising from both sources is critical for Islamic banks.

The rate-of-return risk stems from uncertainty in the returns earned by Islamic banks on their assets. This uncertainty can cause a divergence from the expectations that investment account holders have on the liabilities side. The larger the divergence, the bigger is the rate-of-return risk. Another way of looking at this is to consider the risk generally associated with overall balance sheet exposures, in which mismatches arise between the assets of the bank and the balances of the depositors, Van Greuning and Iqbal (2008).

(Basel Committee 2011) defined Operational risk as the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events. This definition includes legal risk, but excludes strategic and reputational risk. However, the Basel Committee recognizes that operational risk is a term that has a variety of meanings and therefore, for internal purposes, banks are permitted to adopt their own definitions of operational risk, provided the minimum elements in the Committee's definition are included.

Operational risk can be include legal risk relates to risks of unenforceability of financial contracts. This relates to statutes, legislation, and regulations that affect the fulfilment of contracts and transactions. This risk can be external in nature (like regulations affecting certain kind of business activities) or internal related to bank's management or employees (like fraud, violations of laws and regulations, etc.),Khan and Ahmed (2001).

3 Operational Risk

Operational risk is inherent in all banking products, activities, processes and systems, and the effective management of operational risk has always been a fundamental element of a bank's risk management programme. As a result, sound operational risk management is a reflection of the effectiveness of the board and senior management in administering its portfolio of products, activities, processes, and systems.

According to Crouhy et.al. (2001) people risk may arise due to incompetence and fraud, technology risk may result from telecommunications system and program failure. Process risk may occur due to various reasons including errors in model specifications, inaccurate transaction execution, and violating operational control limits. Due to problems arising from inaccurate processing, record keeping, system failures, compliance with regulations, etc., there is a possibility that operating costs might be different from what is expected affecting the net- income adversely, Khan and Ahmed (2001).

The Basel Committee on Bank Supervision (2001) has identified seven categories of operational risk associated with:

- i. **Internal fraud:** an act of a type intended to defraud, misappropriate property or circumvent regulations, the law or company policy, excluding diversify/ discrimination events which involve at least one internal party.
- ii. **External fraud:** an act of a type intended to defraud, misappropriate property or circumvent the law by a third party.
- iii. **Employment practices and workplace safety:** an act inconsistent with employment, health or safety laws or agreements from payment of personal injury claims or from diversity/ discrimination events.
- iv. **Client, products and business practices:** an unintentional or negligent failure to meet a professional obligation to specific client (including fiduciary and suitability requirement) or from the nature or design of a product.
- v. **Damage to physical assets:** the loss or damage to physical assets from natural disaster or other events.
- vi. **Business disruption and system failures:** disruption of business or system failures.
- vii. **Execution, delivery and process management:** failed transaction processing or process management from relations with trade counterparties and vendors.

In operational risk identification analysis all major business disruptions that result in operational risk losses initiated from People, Systems and Technology, Policies, Processes and Delivery Failures, Transactions, and/or Internal and External Events should be considered, Akkizidis and Khandelwal(2008). Each operational risk is linked to specific Islamic contract, these contracts plays a pivotal role within the Islamic financial system.

Tabel 1 Types of operational risk in the different Islamic contracts.

<i>Sources of operational Risk</i>	<i>Types of operational risk</i>	<i>Islamic contract</i>
<i>Processes and delivery failures</i>	<i>Process execution: Delivery and process management, management failures, missing legal documentation, unapproved delivery failur.</i>	<i>Istisna Mudarabah Musharabah</i>
<i>People</i>	<i>Unauthorised usage of internal control, corporate governance, authorisation and approvals given to contracts that are not Shariah-compliant. Internal fraud: Intentional misreporting, employee theft , bribes,..etc. External fraud: Robbery, hacking, ..etc.</i>	<i>Murabaha Ijarah Musharakah</i>
<i>System</i>	<i>Internal Programming errors, loss of Information data, etc. External Utility outages such as power cut, telecommunication problems, ..etc.</i>	<i>Salam Istisna</i>
<i>Transaction and Policies</i>	<i>Business Transactions, Data entry errors, Document/ Contract error, Money laundering, producing and sale of unauthorised products that is against the Shariah principles.</i>	<i>Shariah law</i>
<i>External events</i>	<i>Power cut, telecommunication problem Political uncertainties, damage to physical assets, fires. Natural. Bankruptcy of supplier, transportation failures, ..etc.</i>	<i>Ijarah Mudarabah Musharakah</i>

Source, Akkizidis and Khandelwa, (2008)

Operational risk is considered high on the list of risk exposures for Islamic banks. A survey conducted by, Khan and Ahmed (2001) shows that the managers of Islamic banks perceive operational risk as the most critical risk after markup risk. The survey finds that operational risk is lower in the fixed-income contracts of murabahah (cost-plus sales) and ijarah (leasing) and higher in the deferred sales contracts of salaam (agriculture) and istisna (manufacturing).

The greatest losses among all operational risks are the ones that are initiated from the employees' activities and the failures, inefficient, or inappropriate use of IT systems/technology. Financial institutions therefore should pay particular attention to these areas and be able to identify and manage such sources of operational risks, Akkizidis and Khandelwal (2008).

According to, Makiyan (2008) They are Several general factors currently make the operation of Islamic banks riskier and thus less profitable than traditional banks.:

- Underdeveloped or non-existent money markets. Thus, there is a need to establish a systemic liquidity - domestic and international - Islamic money market for Islamic financial institutions which should be compatible with the Sharia.

- Limited availability to access to lender of last resort (LOLR) facilities. This limitation is associated to the prohibition of discount rate. A practical approach to help and solve this issue should be developed for a wider availability of Islamic banks to a reliable money market.

- Legal uncertainties and limited market infrastructure which limit the availability of hedging instruments. The lack of legal framework can raise operational risk and undermine market development. For instance, the question on whether derivatives or future contracts can be utilized to reduce risk of Islamic financial transactions, the answer is still being debated. In this regard, uniformity on religious principles is also an important issue which should be concerned.

Operational risk may arise from various sources: a) The unique activities that Islamic banks must perform. b) The non-standardized nature of some Islamic products. c) The lack of an efficient and reliable Sharia legislation system to enforce financial contracts. Makiyan (2008).

Van Greuning and Iqbal (2008) added to the reasons in which could raise the operational risk in Islamic banks

- Cancellation risks in the nonbinding murabahah (partnership) and istisna (manufacturing) contracts;
- Failure to comply with *Sharia* requirements;

Sharia risk is related to the structure and functioning of Sharia boards at the institutional and systemic level. This risk could be of two types; the first is due to nonstandard practices in respect of different contracts in different jurisdictions, and the second is due to the failure to comply with Sharia rules. Differences in the interpretation of Sharia rules result in differences in financial reporting, auditing, and accounting treatment, Van Greuning and Iqbal (2008).

Sharia non-compliance is an additional risk specific to Islamic Financial institution (IFIs). It can impact the overall reputation of the IFI, and if managed poorly can result in the loss of customers, business, and result in regulatory actions. Sharia non-compliance risk exists in all types of Islamic financial products and there is a reputational risk involved if products do not adhere to the shariah, Minhas (2014).

4 Regulatory and capital adequacy requirement

At the regulatory level, Islamic Financial Services Board (IFSB) has issued "Guiding Principles of Risk Management" that provides guidelines of risk management for institutions offering Islamic financial services. These principles complement the Basel II guidelines of managing various risks by catering to the specific risks arising from Islamic contracts. The first principle of the IFSB guidelines of risk management is a general requirement that indicates that each Islamic financial institution should have "a comprehensive risk management and

reporting process including appropriate board and senior management oversight, to identify, measure, monitor, and control relevant categories of risks and, where appropriate, to hold adequate capital against these risks, Ahmed and Khan (2007).

Some of International Financial Reporting Standards are not applicable to Islamic banks, and issues arise in Islamic finance for which no IFRS exist. In 1990 the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) was created to address this issue and create an adequate level of transparency in the financial reporting of Islamic banks. Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) is an independent industry body dedicated to the development of international standards applicable for Islamic financial institutions. AAOIFI has made a number of important contributions, including the issuance of accounting and auditing standards, Van Greuning and Iqbal (2008), AAOIFI was established in order to provide financial instrument on Islamic worldwide and sharia (Islamic law) requirements. AAOIFI focuses on Islamic institution, but has neither been fully adopted nor been obligatory yet.

According to Sundararajan (2007), The disclosure practices of Islamic Banks are highly varied, and Supervisor's authority to impose disclosure norms is also highly varied. Nevertheless, the AAOIFI Financial Accounting Standards (FAS) – in particular FAS No. 1, which establishes the content of financial statements to be published – provide a sound basis for further developing prudential disclosures. Such further development should have two key purposes:

- Develop consumer-friendly disclosures to inform investment account holders on the inherent overall risks that they face, and the related reserving policies.
- Develop market-oriented disclosures to inform public at large, particularly other professional counterparties, including regulators (who will require more details, not publicly disclosed) on capital, risk exposures and capital adequacy, along the lines of Pillar III of Based II.

Capital adequacy is an important benchmark for the soundness of the financial institutions and it is at the core of the supervisory activities all over the world. The Basel Committee on Banking Supervision has proposed a separate capital requirement for credit and operational risks, believing that operational risks are sufficiently important for banks to devote resources to quantify such risks and to incorporate them separately into their assessment of their capital adequacy, Izhar (2010).

Unlike Basel I, has focused on credit risk, Basel II includes an explicit measure for operational risk. This new capital accord requires all banks to hold adequate capital against potential operational losses. According to the New Basel Capital Accord (Basel II) for assessing capital adequacy for operational risk, there exists three possible capital calculation approaches for the treatment of operational risk under Pillar 1 of Basel II: Basic Indicator Approach (BIA), Standardized Approach (SA), and Advanced Measurement Approach (AMA). The use of these approaches depends on the sophistication of the bank, Abdullah et al. (2011).

The simplest way is the Basic Indicator Approach (BIA), by which the capital charge is calculated as a percentage (alpha) of Gross Income (GI), a proxy for operational risk exposure. Being the most basic approach, its adoption does not require prior supervisory approval. The most advanced methodology is the advanced measurement approaches (AMA), which allows banks to use internal models to calculate their capital requirements. Adoption of the AMA requires prior supervisory approval and involves implementation of a rigorous risk management framework, Committee Basel (2014).

On the other hand the Islamic Financial Services Board (IFSB), it proposed measurement of capital to cater for operational risk in Islamic Financial Services (IIFS) may be based on two approaches, which are in a continuum of increasing sophistication and risk sensitivity: the Basic Indicator Approach and the Standardized Approach. Under the BIA, a fixed percentage of 15% of annual average gross income, averaged over the previous three years, is set side. Under the STA, this percentage varies according to the business lines from 12% to 18%

As starting point for capital calculation, IIFS adopting the BIA are required to adopt international best practices on the management of operational risk. However, to adopt SA, an IIFS will be required to satisfy the supervisory authority that it has achieved sound implementation of operational risk and Sharia non-compliance risk management framework and processes, and has adhered to the business line mapping principles. Supervisory authorities may specify detailed qualifying criteria for SA. IIFS that adopt standardized approaches will not be allowed to revert to the simpler approach (BIA) without the prior approval of their supervisory authority. However, supervisory authorities, at their discretion, may require an IIFS to use a simpler approach for some or all of the operations in case they are not satisfied with an IIFS as regards meeting the criteria for a more sophisticated approach. Afterwards, the IIFS shall not be allowed to revert to the more advanced approach without the prior approval of their supervisory authority, IFSB (2013).

5 Operational Risk Disclosure

Financial disclosure aiming at enhancing transparency and market discipline are presented. Disclosure requirements related to financial statements have traditionally been a pillar of sound regulation. Disclosure is an effective mechanism for exposing banks to market discipline and presenting quality data, enabling reasonable financial risk analysis, Van Greuning and Iqbal (2008).

If shareholders and other interested parties are to be able to understand the risk profile of the firm, they need to receive information about the risks firm faces and how the directors are managing those risks. It is argued that, at present, limited risk disclosure occurs therefore firms are not fully transparent this respect, M. Linsley and J. Shrives (2005).

Accounting standards setters encourage incentives for improved risk management and its disclosure. Both International Accounting Standards (IAS)

and the Statements of Financial Accounting Standards (FASB Statements) contain extensive standards on the treatment of credit risk (IAS 30; FASB Statements 5, 15, 114, and 118), while disclosure on operational risk is not explicitly regulated today, Helbok and Wagner (2006).

In general, the quality of operational risk disclosure is fully compliant, pointing to either a specific section for operational risk in their annual reports or individually developed templates under the existing Basel Framework's Pillar 3 disclosure requirements. However, the BCBS pointed out that these disclosures do not contain sensitive information relating to control gaps or issues, which suggests that they tend to be primarily high-level statements. The Basel Committee surmised that the relative lack of information on the banks' operational risk profile and operational risk management processes may be attributable to inadequate implementation of a disclosure policy that is subject to approval and oversight by the banks' board, KPMG LLP (2014).

Moreover, Sundararajan (2007) has mentioned that operational risks are likely to be significant in Islamic Banks due to specific contractual features and the general legal environment. Specific aspects that could raise operational risks in Islamic banks include the following: (1) The cancellation risks in non-binding murabahah and istisna contracts, (2) problems in internal control systems to detect and manage potential problems in operational processes and back office functions, (3) technical risks of various sorts, (4) the potential difficulties in enforcing Islamic Finance contracts in a broader legal environment, (5) the risk of non-compliance with Shariah requirements that may impact on permissible income, (6) the need to maintain and manage commodity inventories often in illiquid markets, and (7) the potential costs and risks in monitoring equity type contracts and the associated legal risks.

In 2007 the IFSB issued standards called "Disclosures to promote transparency and market discipline for institutions offering Islamic financial services" The purpose of this Standard is to specify a set of key principles and practices to be followed by institutions offering Islamic financial services (IIFS) in making disclosures, with a view to achieving transparency and promoting market discipline in regard to these institutions. The objectives of this Standard are: (a) to enable market participants to complement and support, through their actions in the market, the implementation of the Islamic Financial Services Board's (IFSB) capital adequacy, risk management, supervisory review and corporate governance standards; and (b) to facilitate access to relevant, reliable and timely information by market participants generally, and by investment account holders (IAH) in particular, thereby enhancing their monitoring capacity, IFSB (2007).

With regard to operational risk disclosure An IIFS shall make disclosures regarding its systems and controls, including those for Shariah compliance, and the mechanisms it has in place to safeguard the interests of all fund providers. Furthermore the qualitative disclosure includes Policies to incorporate operational risk measures into the management framework - for example, budgeting, target-setting, and performance review and compliance. Policies on

processes; (a) to help track loss events and potential exposures; (b) to report these losses, indicators and scenarios on a regular basis; (c) to review the reports jointly by risk and line managers; and (d) to ensure Shariah compliance. and Policies on the loss mitigation process via contingency planning, business continuity planning, staff training and enhancement of internal controls, as well as business processes and infrastructures, IFSB (2007).

6 Research methodology

The research used secondary data from the full annual reports of Islamic banks worldwide. The list of the sample banks were derived from Bankscope (world banking information source). The annual reports have been obtained from the banks' websites. The examined sample was filtered to focus on Islamic banks that are using the IFRS accounting standards and the year of examination is 2014.

As the research focuses on the quality of the operational risk disclosure, we have developed a list of best practices disclosure with reference to the AAOIFI, Basel accord, IFSB risk guidelines , IFRS, and the annual report of these banks as the practitioner of disclosure. We have implemented a disclosure index using the content analysis since it is a valid way to describe and make inferences about the characteristics of banks annual reports content and comparing it to the above mentioned standards. The unit of the analysis used are words and sentences for examining the qualitative disclosure while the index is reflecting a checklist of disclosed items in our sample banks in which we can measure the disclosure level. We expect to observe some difference in terms of disclosure from those of the conventional banks, since Islamic banks have a unique risk profile because of the need to have their products Shariah compliant.

The Operational risk disclosure index includes (16) items, which are covering the following qualitative disclosure consist of: Definition, Key procedures to manage operational risk, responsibility, structure, policies, Functions of audit committee and risk committee, Compliance with regulatory, contingency and continuity plans, fraud, ethical and business standards, Training and professional development, capital adequacy measurement, and Requirement for: independent, monitoring, periodic assessment, reporting of operational losses and Risk mitigation. In terms of quantitative disclosure the index include the measurement approach of capital adequacy.

We have used the unweighted method in constructing the disclosure index where the items scores one if it is disclosed and scores zero if it is not disclosed. The disclosure index is calculated as follows:

$$ORDI_N = \sum X_{in} / \sum Y_{in}$$

Where,

$ORDI_N$ = Operational Risk Disclosure Index for bank N

$\sum X_{in}$ = disclosed items by bank N

$\sum Y_{in}$ = full items expected to be disclosed by bank N

7 Research findings:

Using the Bankscope databank to reach our sample where we have set a filter to have all Islamic banks worldwide that are using IFRS accounting standards and setting the annual report of 2014 as the measurement year that we examined the 16 items of the developed disclosure index. The annual reports were all acquired from the banks websites. The sample was concluded as follows: total of available Islamic banks on the database is 191 that was reduced to 99 after imposing IFRS as an accounting standard and finally arrived to 74 after applying the investigation year 2014.

The set of the 74 banks was reduced to be 55 banks; and this was either unavailable published information in the banks websites or unavailability of the English language reports. The 55 banks that compose our sample are distributed among 13 country as follows: Emirates, Bangladesh, Bahrain, United Kingdom, Kuwait, Maldives, Malaysia, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, and Turkey. The average total level of quality of the disclosure index by country was ranging from 63% up to 94% and can be seen in figure(1). Where Oman and Qatar have the highest level while Pakistan has got the lowest level.

As for the total level of quality of the disclosure index over the whole sample by every individual bank regardless of the country was ranging from 50% up to 100% of the disclosure index items as demonstrated in figure (2) where only 6 banks out of 55 have disclosed 100% of the items which is equivalent to almost 10% of the total sample banks.

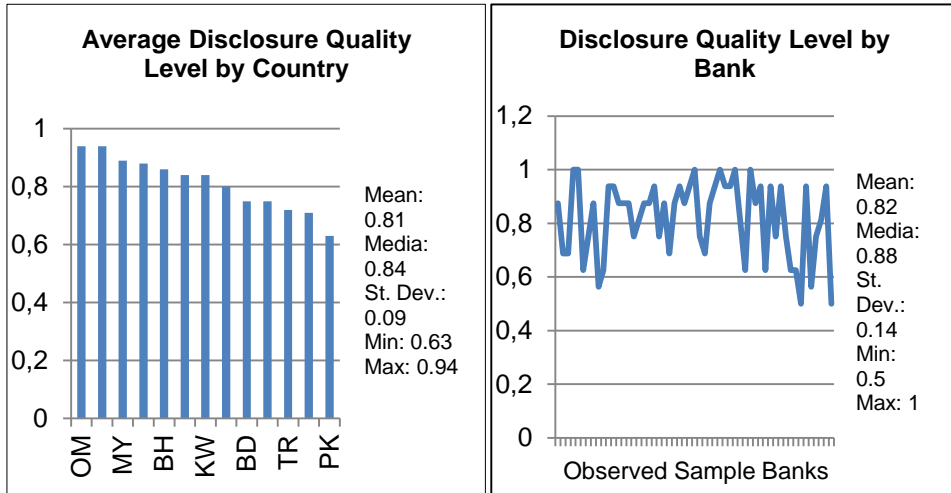


Figure 1

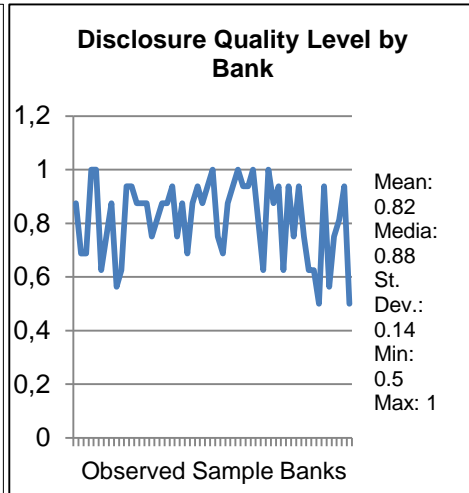


Figure 2

Only one item that was disclosed in 100% of the sample banks which is the brief definition and features of operational risk. While 6 items (key procedures, responsibility & policies, functions of audit & risk committee, reconciliation & monitoring of transactions, periodic assessment & risk identification, and compliance to Basel II or III) were disclosed in more than 90% of the sample banks. Four items (appropriate segregation & independence, requirements for reporting operational losses & proposed remedial action, risk mitigation insuring cost effectiveness, and quantitative analysis & measurement of operational risk) were disclosed in more 80% of the sample. Compliance with regulatory and other legal requirements were disclosed in 76% of the banks, while training & professional development and the ethical business standards were disclosed in almost 60% of the banks. Finally, documentation of control & procedures and the contingency and continuity plans were only disclosed in 50% of the sample banks.

The analysis revealed that 78% of the sample banks use the basic indicator approach for the calculating the operational risk, while 7% has used the standardized approach and 15 % of the sample banks have not disclosed any information regarding the measurement approach. Moreover, only one bank has not disclosed any information regarding its compliance with Basel II or III but on the other hand 8% of the banks disclosed their compliance to Basel III and the majority of the banks (84%) provided that they comply with Basel II. However, 20% of the banks that disclosed their compliance to Basel II have mentioned that they are currently planning and preparing to change their compliance to be according to Basel III.

Other relevant further information that were obtained from the analysis, is that we have noticed that 91% of the banks has disclosed information about

Sharia compliance committee/ board while only 20% have included Sharia non compliance risk to operational risk. On the other hand 67% has included legal risk however only 13% has included the reputational risk under the operational risk. One interesting observation was that 27 % of the sample banks has a separate operation risk committee.

8 Conclusion

In this paper we reviewed the risk management in Islamic bank going through various literature review and we focused on the operational risk disclosure since we noticed that the regulations are mainly covering the market and credit risk. Islamic banks are exposed to unique risks as their operations depends on complex Islamic contracts and sharia principles. As a result the dimension of operational risk exposure is considered relatively higher than credit risk and market risk for Islamic banks as well as it is more sophisticated than in the conventional banks. Disclosure of operational risk is particularly important for banks in the light of the huge losses incurred by a number of financial institutions as a result of the failure operational risk management enabling investors and parties to assess risks and returns of their investments.

We found very few studies that have been conducted on risk management disclosure and thus we tried to study and develop a disclosure index for the operational risk using the content analysis applying it to the full annual report of Islamic banks. This disclosure index checklist included 16 items that are covering the qualitative and quantitative items of operational risk. We measured the quality of the operational risk disclosure by country and by bank using the developed index applied to all Islamic banks worldwide limiting it to banks using IFRS in the annual report of 2014 that composed our sample of 55 banks. We expected to find out special disclosure for operational risk in Islamic banks due to its unique characteristics but the empirical investigation that we applied did not reveal any significant difference and we consider this a serious problem. The empirical result of this research shows the operational risk disclosure in Islamic banks is not connected with Islamic finance, for instance only 20% of the sample have included sharia non compliance risk. Basel regulating principles are effective for banking supervision however there is a concern about its applicability to Islamic banks and this show the urge for standardized regulations that are adapted to the particular nature of Islamic banks where they can link operational risk management methods and operational risk types of each Islamic contract.

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How to face risk management in Italian Smes

Authors

- *Laura Broccardo, Department of Management, University of Torino, 218 bis, Corso Unione Sovietica – IT10134 – Torino (Italy). Ph: + 39(11)6706139. Mail: laura.broccardo@unito.it*
 - *Francesca Culasso, Department of Management, University of Torino, 218 bis, Corso Unione Sovietica – IT10134 – Torino (Italy). Ph: + 39(11)6706014. Mail: francesca.culasso@unito.it*
 - *Elisa Giacosa, Department of Management, University of Torino, 218 bis, Corso Unione Sovietica – IT10134 – Torino (Italy). Ph: + 39(11)6706014. Mail: elisa.giacosa@unito.it*
 - *Elisa Truant, Department of Management, University of Torino, 218 bis, Corso Unione Sovietica – IT10134 – Torino (Italy). Ph: + 39(11)6706139. Mail: elisa.truant@unito.it*
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Market globalisation has quickly turned into a “global crisis” that has affected consumption, industrial production and social welfare, especially in developed countries. In the current framework, value creation has become much more difficult and companies must now face the new and changing risks generated by this competitive environment. In this context it is inevitable that managers must make quick decisions in situations of high uncertainty and risk.

In addition, appropriate managerial tools are relevant in firms’ management, especially for the improvements and growth of firms in this turbulent international scenario. Regarding this topic, mainstream studies in management literature focus more on large firms; however, in some countries such as Italy, small and medium firms play an important role. So, this research investigates management and implications issues with regard to the performance measurement systems linked to risk management systems in Italian SMEs.

In the last years, external context is also creating conditions for institutional changes in management accounting, requiring a strong integration with risk management.

Thus, using survey tool and a sample of 309 Italian SMEs, the aim of this paper is to deeply understand how it is possible to integrate the management control and risk management tools in Italian SMEs. In particular, findings concern both the diffusion of management control and risk management tools. The analysis of management and risk issues are conducted through both the main national and international literature and empirical evidences. Finally, this study contributes to better understanding the behaviour of SMEs with regard to the management and risk control.

Keywords: SMEs, risk management, management control, integration..

JEL Classification: L25, L26, M19

1 Introduction

Small and medium-sized enterprises (SMEs) are generally characterized by simple organizational structure and personalized management where communications and procedures are mostly informal or verbal. They are often family businesses or partnerships controlled by few people who own the business (Jennings and Beaver, 1997). Frequently the owners are also the managers, and despite their having no formal training in management they run the whole enterprise, making all the decisions, financing the business and learning through experience. SMEs, as well as large companies, are subjected to competition, demanding customers and technological innovations. However SMEs, compared to large companies that have the managerial and human resources as well as a more articulated organisational structure, do not have these basic infrastructures on the same scale and are reluctant in managing risks. Frequently SMEs have no structured risk identification; indeed, SMEs assume unaware or unplanned risk exposure to their limited financial resources and control measures implemented to counter risk usually are ineffective (Ntlhane, 1995). Nevertheless the risk management, especially in the current dynamic environment, is becoming a driver for value creation also considering that companies have now to face always new and changing risks. The change in external context is also creating conditions for institutional changes in management accounting, requiring a strong integration with risk management.

It is important that companies make a course of action (Chapman and Cooper, 1983; Verbano and Venturini, 2013) and adopt managerial tools in order to contrast external and internal risks (Henschel, 2008; Scheve, 2006). A careful management of these risks enables companies to preserve the business continuity and create additional value by avoiding or reducing transactional costs (Dickinson, 2001). The purpose is to handle the risk factor, improving business performance and creating value; this approach has been adopted in several field, such as company's management. Enterprise risk management (ERM) , which is a new approach to risk management, fits into this context (D'Arcy and Brogan, 2001). ERM has the goal to identify the risk factors, measure the probability of events verification, and handle exogenous and endogenous risks, with the purpose to eliminate or reduce the negative impacts by using minimum resources (Dickinson, 2001; Halman and Weiden, 1997; Verbano and Venturini, 2013).

Lastly, it should also be highlighted that in literature, the risk management has been considered both an opportunity for the company (thanks to which the company could obtain gains) or a disadvantage (creating losses) from both an expected or unexpected events (Mitroff and Alpaslan, 2003; Mowbray and Blanchard, 1979).

Considering that in the last years it has become increasingly important to integrate management accounting systems with risks, this paper aims at analysing in a sample of Italian SMEs the state of the art of management accounting tools, with particular reference to the risk management systems.

According to Chenhall (2003), we investigated if the selected companies have been using risk management tools that help managers to handle company's risks.

The article is structured as follows: firstly, we provide a literature review on the risk management and on its use in Small and Medium-sized companies, identifying the gap. The research method is then delineated. Next, the findings of the case study are presented and discussed. Finally, the conclusions and implications of the study are set out, along with the limitations of the research.

2 Literature review

2.1 SME phenomenon

SMEs are generally characterized by simple organizational structure and informal communications and procedures. They are often family businesses or partnerships controlled by few people who own the business (Jennings and Beaver, 1997). Frequently the owner are also the manager, even if they have no formal training in management. Successful small enterprises that increase their size often keep their original characteristics (Goh, 2000).

SMEs, as well as large companies, are subjected to competition, demanding customers and technological innovations, but, compared to larger firms, they are generally characterized by a shortage of the managerial and human resources.

Ates et al. (2013) suggest for these kind of firms an appropriate, balanced use of strategic and operational practices and relevant measures to make performance management systems more effective. Therefore, managerial activities such as vision, mission and values development, internal and external communication, change management represent recommended areas for improvement. In the literature, it is often underlined that the managerial capabilities are strictly tied to the use of management accounting tools, but these tools are not so widespread and adopted by firms in the correct way, especially if these firms are of small and medium size (Aram and Cowen 1990).

The following table shows the main characteristics of SMEs, highlighting their strengths and weaknesses.

Table 1 Characteristics of SME.

<i>SMEs</i>	
<i>Strengths</i>	<i>Weaknesses</i>
<ul style="list-style-type: none"> • <i>Ability to respond very quickly to changing market conditions</i> • <i>Waste little time on non-core business activities</i> • <i>Tend to have high employee loyalty</i> • <i>Reflect the commitment and personality of MD/CEO</i> • <i>Likely to deploy improvements quickly and therefore gain rapid benefit</i> • <i>Usually very closely in touch with customer</i> • <i>Potential for excellent internal communications</i> • <i>People are likely to be multi-skilled</i> • <i>Operating an effective ISO9000 compliant quality management system</i> • <i>Training is likely to be very focussed on skills needed to achieve targets</i> • <i>People will usually be aware of how their job impacts on the business.</i> 	<ul style="list-style-type: none"> • <i>Highly vulnerable to slumps in markets</i> • <i>Funding investment is more difficult</i> • <i>Cash flow is crucial</i> • <i>May not have time to look at 'outside world'</i> • <i>May have difficulty getting good suppliers</i> • <i>May be operating an inappropriate quality management system because of customer pressure to be certified to ISO9000</i> • <i>Training budgets are likely to be limited and the wider aspects of people development will probably not be addressed.</i>

Source: Hewitt, 1997.

2.2 Risk management in SMEs

As in the last few years a changing environment and financial crisis have had a strong impact on the business activities (Giacosa and Mazzoleni, 2012), several researchers focused on different events (natural and man-made catastrophic ones) (Mitroff and Alpaslan, 2003) which affect the business.

Every company decision is characterized by a risk factor (Mudiyansele and Jayathilake, 2012). In these terms, risk factor relates to human actions, to the type of company and to each functional area (Dickinson, 2001; Ferrero, 1986).

Several actions could be chosen to prevent and handle the risk factor. The Enterprise risk management (ERM) is a new approach to risk management (D'Arcy and Brogan, 2001): thanks to the ERM, the company identifies the risk factors, measures the probability of events verification, and manages risks, in order to eliminate or reduce their negative impact (Dickinsons, 2001; Halman and Weiden, 1997; Verbano and Venturini, 2013). ERM "is, in essence, the latest name for an overall risk management approach to business risks" (D'Arcy, Brogan, 2001, p 209),

ERM is a process applied during the strategy formulation, with the purpose to identify potential events affecting the company's activities and therefore to protect the company competitiveness (COSO, 2004). For this reason, the board of directors, the managers, and other personnel have to maintain risk within the risk appetite, providing a reasonable assurance in terms of the company's goals achievement. This approach promotes the integration of business areas and transversal risk management and places the control activity of the uncertainty factors within the strategic planning phase (Culasso et al., 2015).

Corporate risk management, business risk management, holistic risk management, strategic risk management and integrated risk management may be considered as a precursor of the ERM.

Some researchers and managers keep describing risk management as a costly compliance exercise (Collier et al., 2006, 2007) because this model, usually implemented to satisfy the legislation on corporate governance and internal control systems, still has difficulty in improving long-term value for companies.

Considering the different lifecycle of the company, it happens that companies into start-up phase often underestimate risks or ignore the risk factors (Smith, 1998): however, a high level of uncertainty is perceived, generating the necessity to make a quick decision process (Frese et al., 2000; Islam et al., 2008).

Many researchers assumed that SMEs are away from adopting ERM, as generally they have a lower endowment of resources in terms of human and financial capital, infrastructures, database information and managerial and technical knowledge (Henschel, 2008; Janney and Dess, 2006; Matthews and Scott, 1995).

In addition, the owner is often involved in the company's management, in the decision-making process (Dickinson, 2001; Watt, 2007) and therefore in risk management activities. This could affect the risk management process, as his attitude in terms of risk management could impact on the company's ability to face risks (Ntlhane, 1995).

Frequently SMEs don't have an explicit map of business risk or, alternately, the risk management is not structured in a systematic and standardized way (Matthews and Scott, 1995).

For SME owner-managers it is important to identify the most problematic areas in managing their small enterprise. By identifying the problem areas, owner-managers can address problems through education, training and information gathering activities (Huang and Brown, 1999).

Smith and Watkins (2012) underline how few SME owners and managers are risk aware and they focus their risk actions on "loss control" programs in areas

of fire, safety, security, health, and quality assurance. In addition owners and managers don't spend enough time in managing risk function, increasing the chance of mismanagement. Moreover, SMEs assume unaware or unplanned risk exposure to their limited financial resources not undertaking structured risk identification. In most SMEs, risks are left unmanaged until they are realized (Ntlhane, 1995).

Ntlhane (1995) highlights that SME owners and managers are not versed in the availability and use of risk reduction techniques (that is, risk elimination/avoidance, reduction, transfer or acceptance) to limit the adverse effects of risks on the enterprise.

Concluding, risk management is one of the major issues for companies even if it is not well-deepened in small and medium-sized enterprises (Blanc Alquier and Lagasse Tignol, 2006). This article, focusing on risk management in a sample of Italian SMEs, contributes to broaden the literature on this topic.

3 The Research Method

3.1 The aim and the research questions

This paper aims at analysing the state of the art of management accounting tools, referring in particular to the risk management system adopted by a sample of Italian SMEs. More specifically, we investigated if the selected companies have been using risk management tools that help managers to face company's risks.

According to Chenhall (2003), we analysed the data through descriptive statistics.

The main research questions are:

RQ1: have SMEs adopted management control tools to support the decision-making processes? More specifically, what are the main tools implemented?

RQ2: among the above mentioned tools, has the company monitored the risks in daily operations?

3.2 The method and the sample

This section provides an overview of the research method and the main sample characteristics.

The research has been conducted through an empirical analysis. As regards the methodology approach, a survey by questionnaire (Corbetta, 1999) was realized, because it allows to achieve a significant amount of data, useful for statistical analysis (Zimmerman, 2001). In particular, the data, both qualitative and quantitative, were collected with an on-line questionnaire, managed by a software.

The survey respondents were employees with skills in Administration and Management Control. The questionnaire, created in June 2014, together with a

letter of presentation and a compilation guide, was sent by mail to the CEO, CFO, and to controller or, in smaller companies, directly to the entrepreneur.

In addition, we also required some information by telephone.

The final document was standardized and structured in three main sections: *i)* general data of the company; *ii)* organizational structure; *iii)* management control organizational aspects and management control tools.

The sample focuses on Italian small and medium enterprises, operating in different industries to avoid the sector influence. The original sample was composed by 3.901 companies; next we made a random and casual selection obtaining 1.800 companies to which send the questionnaire. This study achieved a response rate of 18%, in line with the main literature (Lucianetti, 2006) on the topic; the final sample is composed by 309 Italian companies. The main characteristics of the sample are summarized in the following figure.

Table 2 Characteristics of the sample.

<i>Dimensional features</i>	<i>%</i>
<i>Revenues between 5-10 mln €</i>	<i>43.10</i>
<i>Revenues between 10-20 mln €</i>	<i>29.60</i>
<i>Revenues between 20-50 mln €</i>	<i>27.30</i>
<i>Total</i>	<i>100</i>

Source: personal elaboration.

4 Findings

From the first research question “*R.Q. 1 have SMEs adopted management control tools to support the decision-making processes?*” it emerges that the 84.50% of the sample adopts some managerial accounting tools, while only the 15.20% doesn't use such tools.

Table 3 Management Control tools Adoption.

<i>Adoption of management control tools</i>	<i>Response %</i>	<i>Response Count</i>
<i>Yes</i>	<i>84.8%</i>	<i>190</i>
<i>No</i>	<i>15.2%</i>	<i>34</i>
<i>answered question</i>		<i>224</i>
<i>skipped question</i>		<i>85</i>

Source: personal elaboration.

Next, we have deepened the main management control tools implemented by the SMEs of the sample. The results are shown in the table below.

Table 4 Kind of management control tools adopted.

<i>Kind of management control tools adopted</i>	<i>Response %</i>	<i>Response Count</i>
<i>Activity Based Costing</i>	<i>20.7%</i>	<i>41</i>
<i>Variance analysis</i>	<i>44.9%</i>	<i>89</i>
<i>Ratio Analysis (ROE, ROI, ROS, etc.)</i>	<i>72.7%</i>	<i>144</i>
<i>Balanced Scorecard</i>	<i>15.2%</i>	<i>30</i>
<i>Balanced Scorecard integrated with risk indicator</i>	<i>1.0%</i>	<i>2</i>
<i>Benchmarking</i>	<i>13.6%</i>	<i>27</i>
<i>Budget</i>	<i>78.8%</i>	<i>156</i>
<i>Co-design</i>	<i>3.0%</i>	<i>6</i>
<i>Simplified analytical accounting (without cost centres)</i>	<i>21.2%</i>	<i>42</i>
<i>Accounting cost centres</i>	<i>63.6%</i>	<i>126</i>
<i>Customers satisfaction ratio</i>	<i>25.3%</i>	<i>50</i>
<i>Productivity ratio</i>	<i>40.9%</i>	<i>81</i>
<i>Strategy Map</i>	<i>0.0%</i>	<i>0</i>
<i>Boston Consulting Group Matrix</i>	<i>0.5%</i>	<i>1</i>
<i>Process costing</i>	<i>3.0%</i>	<i>6</i>
<i>ERP system</i>	<i>30.3%</i>	<i>60</i>
<i>Target costing</i>	<i>7.6%</i>	<i>15</i>
<i>Others</i>	<i>5.1%</i>	<i>10</i>
<i>answered question</i>		<i>198</i>
<i>skipped question</i>		<i>111</i>

Source: personal elaboration.

From the previous data it emerges that the more widespread tools are:

- Budget (78.8%)
- Financial Statement Analysis by ratios (72.7%)
- Accounting cost centres (63.6%)
- Variance Analysis (44.9%)
- Productivity ratio (40.9%)
- ERP system (30.3%)

The next table focuses on the diffusion of management accounting systems, highlighting the advanced ones.

Table 5 Diffusion of management accounting systems.

<i>Management control tools</i>	<i>%</i>
<i>None</i>	<i>17.4</i>
<i>Basic</i>	<i>26.8</i>
<i>Good</i>	<i>41.5</i>
<i>Advanced</i>	<i>14.3</i>
<i>Total</i>	<i>100</i>

Source: personal elaboration.

From the previous data it emerged that the advanced management accounting tools are not so widespread within the sample. Indeed the “advanced” tools (Balanced Scorecard, Strategy map and, more generally, business performance models), which are those more oriented toward a long-term time horizon, are adopted only by the 14.3% of the sample.

Focusing on the second research question “R.Q. 2 *among the above mentioned tools, has the company monitored the risks in daily operations?*” we investigated the use of risk tools to support the company management.

Table 6 Adoption of risk management tools.

<i>Adoption of risk management tools</i>	<i>Response %</i>	<i>Response Count</i>
<i>yes</i>	<i>23.9%</i>	<i>52</i>
<i>no</i>	<i>76.1%</i>	<i>166</i>
<i>answered question</i>		<i>218</i>
<i>skipped question</i>		<i>91</i>

Source: personal elaboration.

As it emerged from the previous table, only the 23.9% of Italian SMEs declares to use risk management tools to monitor risks in daily operations. We also investigated the main tools used in risk management activities; the results are presented in the table below.

Table 7 Risk management tools.

<i>Risk management (RM) tools</i>	<i>% based on companies that declared to adopt RM tools</i>	<i>% on total sample</i>
<i>RM tools integrated with management control tools</i>	13.46	2.27
<i>Simple insurance tools to cover risks (i.e. credit risks)</i>	40.38	6.80
<i>Others</i>	46.15	7.77
<i>Total</i>	100	16.83

Source: personal elaboration.

The first category “RM tools integrated with management control tools” refers to the risk systems integrated with the management control; this integration is particularly useful to daily manage the risks affecting the business. One of this tool is for example the balanced scorecard with risk indicators which enables managers to link the strategic goals with day-by-day activities. Unfortunately this category represents only the 13.46% (2.27% on the total sample).

The second category (40.38%, that means 6.8% on the total sample) refers to the use of the tools only to monitor some particular risks, not integrated in the management control model.

Finally, the last category (46.15% that means 7.77% of the total sample) includes the companies that declare to adopt risk management tools to be compliant with the law or the requirements of the holding.

5 Discussion and Conclusions

The research focuses on risk management in SMEs. These type of companies are relevant both in national and international economies; therefore it is fundamental to preserve their competitiveness and their ability to create long-term value in order to guarantee their survival. To do that, the owners and managers of SMEs should be more aware about a mismanagement of business risks. The conducted analysis first of all reveals that the management control is widespread but the tools adopted are not the advanced ones. Indeed, the more widespread tools are: budget, financial statement analysis by ratios, accounting cost centers, variance analysis, productivity ratio. This result underlines how owners and managers pay a lot of attention on day-by-day management without having a long-term vision. Indeed, it is evident how the owner-managers mainly focus on the most problematic areas in managing their enterprise, as underlined by Huang and Brown (1999). This short term orientation doesn't take into consideration the exogenous and endogenous risks that can affect the business actually or in the future. This limit has been also underlined in literature: SMEs don't de-

sign business risk map neither risk management activities are structured in a systematic and standardized way (Matthews and Scott, 1995).

In our sample, we observed that the main obstacle to a strategic management derives from a lack of managerial skills, education and training; furthermore, the owner-manager is mainly focused to enterprises' current activities, losing sight of long-term strategic goals.

Nevertheless, SMEs are becoming aware about the importance to manage risks also using more appropriate and formalized tools. Indeed, approximately a fourth of companies analysed in this research declared to adopt risk management tools. This major attention paid on risk management in the last years is due to the fact that managers have recognized potential benefits such as costs reduction and a best organizational alignment towards the SME's goals, as also highlighted by Smith and Watkins (2012).

Despite this evidence some improvements should be done because the most widespread tools are used: *i)* just to monitor some particular risks, such as the credit risk; *ii)* to be compliant with laws or *iii)* to satisfy holding requirements. Moreover, only the 2.27% of the sample actually manage business risks using risk management integrated with management control tools.

Further researches could extend the analysis including a great number of companies and a comparison with other foreign countries where the SMEs phenomenon is well established.

The research has some theoretical and practical implications because it contributes to extend the literature on risk management in small and medium enterprises and, at the same time, try to raise awareness among managers about the importance to know and control exogenous and endogenous risks that can affect the value creation.

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Corporate financing facing new risks under developing regulatory framework of credit

Authors

- *Giacomo Buchi, Full Professor, giacomo.buchi@unito.it - University of Torino*
 - *Alberto Iodice, Phd Candidate, alberto_iodice@hotmail.com - University of Torino*
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Abstract

Our paper focuses on the impact on corporate lending of recent increase of capital requirements for banking institutions. In this analysis it is difficult to separate between a supply and demand factor in the sense that it is difficult to distinguish between the decrease or increase of lending activity determined by macroeconomic environment developments or by change in regulatory environment through an increase of capital ratios. It is furthermore difficult to understand if higher capital requirements at the end increase or decrease the cost of borrowing for companies, topic very sensible for corporate financing and company strategy in general.

Focusing on company side, it is extremely interesting to understand how the introduction at the European level of new directives, which provide credit institutions with new binding capital requirements compared to the past, and the very accommodative ECB European policy could impact in company financing. The paper analyses how lending activities have developed in a number of significant European banks and how the recent strengthening of the capital ratios have impacted in lending activities. The empirical analysis of the lending in recent years shows that there is a certain recovery of the lending of the major European banks, although in a context of higher capital ratios.

Keywords: corporate lending ,regulation impact, company financing strategy

JEL Classification: G3

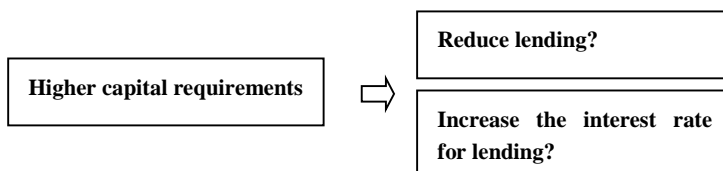
1. Introduction

In this paper we will study the relationship between lending activities to companies and banks capital requirements. We will do this analyzing the literature on the theme, looking at the evolution of the regulatory framework with the new innovative requirements like MREL and TLAC and then we analyze a panel of European bank looking at the lending evolution in the years from 2011 to 2015 and the respectively evolution of capital requirement and RWA and we will comment on the results obtained.

2. Literature review from company point of view

2.1 Mixed effects on company financing of higher capital ratios

Higher capital requirements are at the base of Basel III and the increase of the ratios to risk weighted assets has put pressure on Banks to evolve to new structures of the balance sheets, obtained with the various possible solutions: decreasing risk weighted assets, increase in common equity, increasing in subordinates eligible for the total capital ratio calculation ecc. Resilience to adverse future macroeconomic scenarios has been at the base on the new regulation but higher capital requirements do not arrive with a free charge. Higher capital requires the use of more costly instruments such as the ones mentioned in the paragraph above (strong market momentum for financial subordinated bonds under Basel III). The cost implied in higher capital requirements poses questions on the possibility that higher requirements will force banks to reduce lending activities and increase the interest rate asked for lending causing damages on the lending side to the real economy.



The literature on this point is quite divided and there is not clear univocal relationship between increasing capital requirements, increase cost of lending and diminishing of the quantity of lending.

The main target of Basel III requirements is to improve the stability of the financial sector decreasing the appetite of banks to take risks and in case these risks are anyway taken reducing the possible consequences on the entire system creating buffers for losses, such as CBR,adequate to not cause a contagion in the financial sector.

Risk taking is encouraged by following the desire of banks shareholders which can gain on upside returns but on the other hand are protected by downside risks that are more a depositors concern (Cole et al., 1995; Kane, 1989). Both the authors have analyzed the effect of deregulation, and in particular the elimination of deposit rate ceilings on the savings and loans bank crisis in the US in the 1980s. On the other hand increasing the level of capital required involves more the shareholders to the potential disruptive effect of taking more risks on the banks balance sheets. In this way Banks' incentive to cumulate more risk is limited by the implementation of higher requirements (Furlong and Keeleys, 1989). Also Santos (1999) studying a model of moral hazard between the provider of insurance for deposits, the bank and entrepreneurs found that stricter capital requirements could improve stability of the bank itself not damaging its lending activities. On a similar approach we find the study of Martinez-Miera and Suarez (2014) that affirmed that higher capital requirements could reduce credit and output in calm times but, by reinforcing the last bank standing effect, they could also reduce systemic risk taking. The underlying trade-offs determine the existence of an interior social welfare maximizing level of the capital requirements that could avoid damaging lending activity.

There in on the other hand part of the literature that warns that higher capital requirements turning in lower margins could decrease shareholders value inducing more risk taking activities producing at the end counterproductive effect of capital regulation (Hellman et al., 2000): capital requirements reduce gambling incentives by putting bank equity at risk but they can have the effect harming banks' franchise value encouraging gambling. Then Pareto-efficient outcomes can be achieved by adding deposit-rate controls as a regulatory instrument, since they facilitate prudent investment by increasing franchise values.

Blum and Helwig (1995) underlined that rigid link between bank equity and bank lending may act as an automatic amplifier for macroeconomic fluctuations, inducing banks to lend more when times are good and to lend less when times are bad, thus reinforcing any underlying shocks.

The majority of empirical evidences suggest that higher capital requirements could lead to a lower risk in banks' investment decisions. De Jonghe (2010) points out that higher capital requirements could reduce banks' systemic risk and on the same line of thought Miles et al. (2012) show a reduction of potential banking crisis with higher capital requirements. Also Baker and Wurgler (2013) saw a beneficial effect of capital requirements confirming that the equity of better-capitalized banks has lower systematic (beta) and idiosyncratic risk.

De Hann and Klomp studied capital regulations on both OECD countries (2012) and emerging countries (2015) recording that that stricter regulation and supervision increases the banks' Z-scores, measure to assess banking risk. Notably capital requirements and supervisory control diminish banking risk. In detail the research held on OECD countries found that banking regulation and supervision had an effect on the risks of high risk banks while most measures for banks regulation have no significant effect on low-risk banks.

Other studies belie the theory of strong tie between capital requirements and banks' risks. It is the case of the studies of Barth et al. (2004) in which it does not emerge a strong relationship between stricter capital requirements and prevention of financial banking crisis. So the theory is quite divided if higher capital requirements could lower banking system risk-taking producing safer lending to the economic system. An aspect worth to mention is that banks higher capital levels could absorb losses and as a consequence stricter capital regulations allow to moderate the recurrence of bank bankruptcy (Dewatripont and Tirole, 1994).

2.2 Corporate financing and bank capitalization

The correlation between bank capitalization status and performance of their lending has been shown in literature in the sense that banks that have at the beginning of a certain period a higher level of capital show normally better performance than banks with poor capital in granting loans to corporates and families. Bernake and Lown (1991), studying the data of the recession in the early 1990s saw, even some months before the recession began, there were banks cutting back on lending, sometimes with deleterious effects on retailers and other bank borrowers. They found that demand factors, including the weakened state of borrowers' balance sheets, caused much of the slowdown in lending activity although shortage of equity capital has limited banks' ability to make loans, particularly in the most affected regions of the US. Finally they defined the credit crunch at the beginning of the 90's a capital crunch more than a credit crunch. The "capital crunch" hypothesis has been confirmed more recently from Woo (2003): studying the failure of monetary policy to reactivate Japan's economy motivated that a pervasive shortage of bank capital in the Japanese financial system, studying Japanese bank data in 1997, was one of the main reasons for failure of these policies. Buch and Prieto (2014), studying the evolution of the German economy for the past 44 years found that higher bank capital tends to be associated with higher business loan volume, and they found no evidence for a negative effect. This result holds both for pooled regressions as well as for the individual banking groups in Germany. Theory that seems to be opposite to the widely believed concept that the real costs of increased bank capital reflect in terms of reduced volumes of loans in the economic cycle.

Also Albertazzi and Marchetti (2014), studying credit supply in Italy after Lehman's collapse, found evidence of contraction of credit supply linked to low bank capitalization and scarce liquidity. The borrowers find difficulty in substituting a bank with another and the reallocation of loans of the less capitalized banks away from riskier firms contributed to credit downturn. Nonetheless they found that for smaller less capitalized-banks, the fly to quality of the portfolio was not evidenced while the decrease of loans granted was significant.

Kapan and Minoiu (2013) found similar evidences: strong balance sheets help banks sustain credit to the economy during crises. They focused on the change in bank credit before and after the 2008 collapse of the investment bank Lehman

Brothers and they pointed out that banks that were less reliant on wholesale funding, and therefore less vulnerable to the financial sector shocks of 2007–08, managed to maintain the supply of credit better than other banks. Specifically, Kapan and Minoiu found that a 1 percentage point increase in the share of non-deposit funding led to a decrease in the supply of syndicated credit by between 0.7 and 0.9 percent.

The last studies above show all that reinforced capital requirements could allow banks to be stronger in credit supply even in a negative macroeconomic context. Better capitalized banks can also outpace financial crisis and retain customers relationships. Gambacorta and Mistrulli (2004) evidenced that bank capital matters in the propagation of different types of shocks to lending, owing to the existence of regulatory capital constraints and imperfections in the market for bank fund-raising. Banks with higher capitalization are also better ready to be positively influenced by monetary policy while less capitalized banks are less reactive to monetary policy changes (Kishan and Opiela, 2000).

Jiménez et al. (2012), differentiating among well and bad capitalized banks, found that tighter monetary and worse economic conditions substantially reduce loan granting, especially from banks with lower capital or liquidity ratios; responding to applications for the same loan, weak banks are less likely to grant net loans and at the same time companies cannot offset the resultant credit restriction by applying to other banks.

Also in terms of market share Berger and Bouwman research (2013), empirically examining how capital affects a bank's performance (survival and market share), and how this effect varies across banking crises, market crises, and normal times that occurred in the U.S. over the past quarter century confirmed that capital helps small banks to increase their survival probability and market share at all times (during banking crises, market crises, and normal times). And, last but not least, that capital enhances the performance of medium and large banks primarily during banking crises.

Studies of Admati et al. (2013) confirm that better capitalized banks suffer fewer distortions in lending decisions and would perform better. Admati and firms also that bank equity is not socially expensive, and that high leverage at the levels allowed, for example, by the Basel III agreement is not necessary for banks to perform all their socially valuable functions and likely makes banking inefficient. Higher capital will so allowed to prevent bank failures enhancing financial banking stability (Diamond and Rajan, 2000).

Other studies come to a different result with the ones above not seeing a strict relationship between the capital levels of banks reached before the crisis and banking performance over the crisis period. It is the case of the studies of Huang and Ratnovski (2009) that looking especially to major American banks that appeared highly capitalized just two years before the crisis, saw that the trend was to put at risk their capital in riskier activities in order to produce returns to shareholders. Then higher capital could create incentive to risk taking instead of alleviate those with counterproductive effects. Same conclusions are the ones of Bandt et al. (2014) that looking into French banking system underlined

that on one hand increase in capital ratios reduces banks' systematic risk, on the other hand higher capital ratios lead to a decrease in shareholders' required return on equity, providing evidence in favor of the Modigliani-Miller theorem: the greater cost of capital due to higher capital ratios appears to be mitigated by the decrease in shareholders' expected return on equity.

Bank of International Settlement Macroeconomic Assessment Group (2010) evaluated that an increase of a percentage point in banks capital requirements produces a 1,4% decrease in the total amount of lending. The research has been carried on by means of the Francis and Osborne (2009) approach and employing data of 15 different Countries.

Messonier and Monks (2014) implies the exercise of recapitalization performed by the European Banking Authority (EBA) in the year 2011/2012; what came out as a result of the EBA analysis was unforeseen and demanding for the banks in terms of capital ratios. The new requirements, which derived as a result of the EBA notice, required the banks to provide themselves with a higher capital than the one expected in the transition phase to Basel III.

Furthermore, an empirical analysis involving 250 banks of big dimension operating in the euro area demonstrated the correlation between the raising in the Core Tier 1 ratio (i.e. considering an increase of 1% point) and the lowering of the group's credit growth (i.e. considering an increase of 1 % point, the credit growth lowers of 1,2% point).

An estimation on the macroeconomic scenarios involving the French regulation has been carried on by Brun et al. (2013), focusing on the transition phase from Basel I to Basel II. Such analysis underlines and reveals, jointly with the production and maintaining of 235000 jobs, a cut of 2% points in capital requirements resulting in the growth of 1,5% of total corporate lending, and an increase of 0,5% in the cumulative investment of the banking industry.

The main, relevant purpose of these analysis is to ultimately distinguish the effects of supply from those of loan demand. Moreover, the credit concentration may be created by demand factors, such as the weakening of the budgets of borrowers. However, banks can also reduce their loan supply due to the lack of equity capital, defined as the "supply effect".

Some analysis evidence that there is no obvious effect of capital requirements on macroeconomic variables (Bernanke and Lown, 1991; Berger and Udell, 1994). Shortage of capital has little effect on the loans accessibility. Moreover, no connection occurred between the capital of the bank made to capital ratio and employment rise. Therefore, the most important factor with regard to the economic downturn can be considered the decrease in loan demand rather than the supply of credit.

It is worth to consider that even though evidences generally show that higher capital requirements reduce banking loans, also leading to a deceleration of economic development, the real difficulty and challenge is the clear identification of the effect of the credit supply resulting from the pressure of capital on banks.

With “flight to quality effect” we intend the reduction in the supply of credits towards the borrowers performed by banks (Peek and Rosengren, 1995; Albertazzi and Marchetti, 2010)

About that, Berger and Udell (1994), despite they believe the decrease in the risk profile of the borrowers can provide a rise in the financial stability of the banks, also sustain that higher capital requirements force banks to limit lending to be assigned to the riskiest borrowers. In proving what above described, B. and U. expressly refer to the 1990s, period in which banks reduced their commercial loans and consequently raised their participation in Treasuries bonds.

The financial environment is deeply influenced by the banks credit and this also concerning to the credit given to small companies and businesses; in fact it is difficult for small companies to be financed and therefore to receive any source of funding other than the banking loans (Brewer et al., 1996; Cole et al., 1996). That’s the reason why allowing banks not to lend money to borrowers may be the cause for a stop in the economic development and economic growth (Hancock and Wilcox, 1998). Popov and Udell (2012) showed how small companies result in being more bind in periods in which banks are proven by stricter capital requirements. In their analysis, it is deeply analyzed the loan to small firms given by financial institutions situation of 16 European emerging Countries in the historical period covered by the recent economic crisis, showing the impacts of positive and negative shocks for the firms with higher level of risks and provided with a lower amount of material assets.

Banks also lower the loans to the real estate field in case of capital constrains: the Japanese banking crisis has been considered, by Peek and Rosengren (2000), related to the U.S. building activities affecting the real estate market. Analogously, the UK banks lowered the commercial real estate loan increase by 8% points within one year following the capital regulation changes, facing the increase of 1% point in capital requirements, as defined by Bridges et al. (2014).

Therefore, according to what above mentioned, real estate activity and business activity can both result in a slowdown following the bank capital requirements (Hancock and Wilcox, 1997).

The bank pressure in capital requirements could result in a slowdown of the real economy (Peek and Rosengren, 2000), as provided by practical evidences.

As far as practical argumentation are concerned, the majority of researchers carried out on these themes, evidence demonstrates that one percentage point rising in capital requirements forces bank to lower the entire amount of their short term lending by a range between 1,2 and 4,5% or to lower the credit lending between 1,2 to 4,6 percentage points.

In conclusion empirical evidence is not clear in defining the effect of higher capital requirement on financial stability in every economic context.

3. The impact for companies of the new regulatory framework

In December 2010, with the intent of improving the quality, consistency and transparency of the capital base and boosting risk coverage, the Basel Committee on Banking Supervision (BCBS) published a new global regulatory framework for the international capital standards (Basel III), increasing the requirements established under the previous frameworks (known as Basel I, Basel II and Basel 2.5). After nearly three years, on 26 June 2013, Basel III legal framework was consolidated in the European legal regulation through Directive 2013/36 (CRD IV), which repeals Directives 2006/48 and 2006/49, and Regulation 575/2013 on prudential requirements for banks and investment firms (CRR). The CRR is directly applicable in Member States from 1 January 2014 and repeals those lower-ranking standards that entail additional capital requirements.

The CRR was introduced with a phase-in period that will allow institutions to adapt progressively to the new requirements in the European Union. The phase-in process affects both the new deductions from capital and the instruments and on elements that loose eligibility under the new legislation. The capital conservation buffers (CBR) provided in CRD IV will also be phased-in progressively, starting in 2016 and reaching full implementation just in 2019.

The Basel regulatory framework is based on the so called three pillars. Pillar I determines the minimum capital requirement and allows for the use of internal ratings and models (AIRB Approach) to calculate risk-weighted exposures. The target is to make regulatory requirements more responsive to the risks actually incurred by financial institutions in carrying on their business activities. A system of supervisory review is established by Pillar II, with the intent of improving banks' internal risk management and capital adequacy assessment in line with their risk profile. Lastly, Pillar III deals with disclosure and market discipline.

In December 2011 the European Banking Authority (EBA) published a recommendation that imposed additional capital requirements on the main European banks. These requirements are part of a package of measures adopted by the European Council in the second half of 2011 aimed at restoring stability and confidence in the European markets. The banks included in the sample were required to have a Core Tier 1 capital ratio, calculated according to EBA rules, of at least 9% at 30 June 2012. On 22 July 2013, following the publication of CRD IV and the CRR, the EBA issued a new recommendation, replacing the previous requirements with a capital floor expressed as a monetary amount equivalent to the amount needed in order to meet the 9% ratio at 30 June 2012.

Following the decision of the EBA's Board of Supervisors on 15 December 2014, the floors were abolished and a minimum CET1 ratio of 4.5% was established.

4. Possible threats to corporate financing

Further requirements were implemented more recently. On 3 July 2015, the European Banking Authority (EBA) published the final technical standards on the principle for determining the minimum requirement for own funds and eligible liabilities for bail-in purposes – the so-called MREL. With the MREL introduction, European authorities aim to ensure that banks would have enough liabilities to absorb losses in case of bank's failure. Resolution tools, including the bail-in scheme, can be employed productively and, therefore, shareholders and creditors would absorb losses in case of difficulties of the banks instead of the taxpayers. From this the denomination of bail-in, opposite to the bail-out concept applied so far.

Aimed at ensuring a harmonized application throughout Europe, the EBA sets five criteria for its determination.

The default loss absorption amount is the capital requirement currently applicable to an institution or group. An upward or downward adjustment may take place depending on the Supervisory Review and Evaluation Process (SREP) recommendations coming from European Central Bank which will take into account the idiosyncratic characteristics of each institution,

- The recapitalization amount is the amount necessary to satisfy applicable capital requirements necessary to comply with the conditions for authorization after the implementation of the preferred resolution strategy,

- The Deposit Guarantee Scheme adjustment the MREL may be lowered according to the resolution authority's assessment on the contribution of the deposit guarantee scheme itself in resolution process,

- In order to comply with the principle of No Creditor Worse off than in Liquidation (NCWO), the resolution authority may assess whether senior unsecured debt could be MREL-eligible,

- The resolution authorities should assess whether the level of MREL is sufficient to ensure the conditions for use of the resolution fund and the contribution to loss absorption and recapitalization be not less than 8% of the total liabilities.

The MREL could be seen as the European Union's counterpart to the Financial Stability Board TLAC. However, despite having the same purpose, both ratios are different due to their scope and their definitions. Among others, TLAC is limited to Global Systemic Banks, is based on a common minimum requirement to all G-SIBs, and will not be applicable before 2019. Conversely, MREL applies to all EU banks regardless their systemic footprint, its calibration will be set on a case-by-case basis, and its application will be much earlier, from 1 January 2016 with a transitional period of 48 months so from 1 January 2018.

5. Strong market momentum for financial subordinated bonds

The implementation of the above regulatory framework has given life to new instruments and revitalized the market for subordinated bonds. Financial bonds became a sector in the middle of the stage. Having learned some lessons in the Great Financial Crisis of 2007-2008, banks and insurance companies have been cleaning up their balance sheets, forced by new regulations such as Basel III and Solvency II. While Basel III requires new types of bonds to be issued that offer attractive yields, increased supervision and regulation will substantially lower the risk of default. Basel III framework requires banks to have higher capital buffers to provide protection against unexpected losses both generated from markets or stock of non-performing loans. This has created a whole new market as traditional subordinated bonds have gradually been replaced by new types of capital – particularly hybrid instruments, such as CoCos and ‘Additional Tier 1’ capital, which comply with Basel III requirements. Market expects the issuance of these ‘new-style’ Tier 1 bonds and Tier 2 bonds to endure, as banks will need to comply with the new Basel III capital rules by 2019. As subordinated financial bonds offer a higher spread than senior debt, this offers new opportunities for investors looking for higher yields especially in a context of historically low interest rates. Meanwhile, the risk of default has actually come down as banks’ capitalization buffers have risen a lot in the past years, forced by, or in anticipation of, new regulations and shrinking balance sheets. In Europe, ECB supervision and increased regulation implementation will substantially lower the probability of default as well. Insurance companies have also been boosting their capital reserves to meet the new requirements of the upcoming Solvency II regulations, which came into effect on 1 January 2016. This led to the issuance of ‘Solvency II’ bonds by insurers.

Subordinated bank bonds come with their own specific risks, such as a coupon not being paid, or not being paid back on the expected call date. For ‘Additional Tier 1’ (AT1), for example, there is the risk that the bank’s Common Equity Tier 1 ratio reaches a trigger point by falling below a certain threshold. Normally this trigger is fixed at 5.125% or high trigger at 7%. In that case, the bond must be converted into equity or is written off. This is very likely to result in losses for the investor, so risk management is crucial. As hybrid instruments like AT1 offer attractive coupons, the market perceives risk worth taking in those selective cases where capital buffers are sufficiently above trigger levels. In other words: the market is strongly interested in buying AT1 (or CoCos) if it thinks that the likelihood of the bank falling to the trigger level is very small.

As for the individual bonds, it is important to consider what level of subordination investors are comfortable with. One element to fully scrutinize is the composition of the loan book to see what kind of loan losses the market can expect and to what extent the bank is able to absorb loan losses through its provisioning income. So a bank might have relatively high loan losses, but if it is also earning a high interest margin, it would be able to absorb those loan losses.

Here below we show a table in which we see for some banks the distance between the SREP required level and the CET 1 level. Evaluating the distance allows to assess the likelihood of conversion from AT1 to equity, likelihood that is normally reflected in price, given equal the other characteristics.

6. Empirical Analysis

In order to see empirical evidence or not of the relationship between higher capital requirement and lending activity of European banks, we selected a panel of nine large European commercial banks: Credit Agricole, BNP, Societe Generale, BBVA, Santander, Caixabank, IntesaSanpaolo, Unicredit and Deutsche Bank.

In the selection we for three banks in France, three in Spain, two in Italy and one in Germany. They are the main banking institutions of the respective countries and large banking groups.

We found for the panel the levels of net lending, Risk Weighted Assets and the various capital ratios of the panel (CET1 ratio, total capital ratio and Tier 1 ratio) basing our findings on the various financial statements and Pillar III documents of the credit Institutions.

Here below we reported capital level trends of a panel of European banks from 2011 to 2015 and the evolution of the lending activities for the same banks. From this chart we see how for the whole panel there has seen a strengthening of capital ratios. This strengthening of the indices are closely linked to the new capital requirements. On the other hand, the strengthening of capital requirements is going to be expected stronger in the coming years with new and more stringent requirements to be met such as TLAC and MREL requirements. It is worth to mention in this respect that TLAC requirements will be due for Banks recognized as Global Sifis while for Institutes not recognized as Global Sifis will still be valid MREL requirement. Despite in many jurisdictions even the senior securities will be eligible for the purpose MREL banks are reaching Mrellevels issuing more subordinates that with no interpretative uncertainties are eligible both for MREL and TLAC requirements.

Table 1 Evolution of net lending for the panel of banks (Eurmln)*

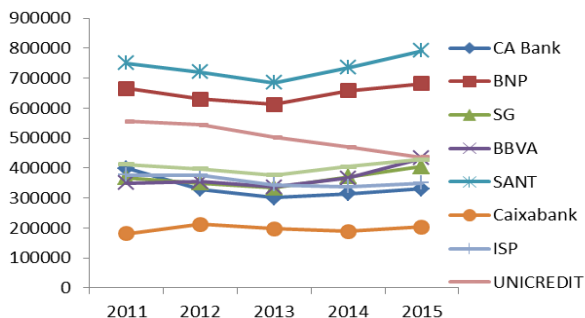


Table 2 Evolution of net lending given value “1” the level at the end of 2011*

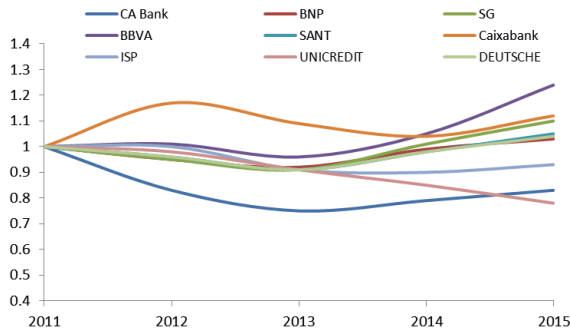


Table 3 Evolution of Risk Weighted Assets for the panel of banks (Eurmln)*

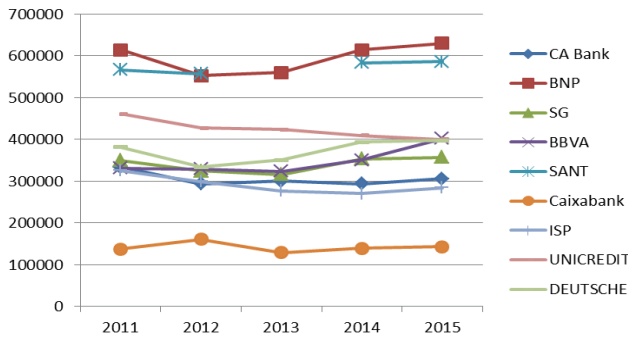


Table 4 Evolution of Risk Weighted Assets given value “1” the level at the end of 2011*

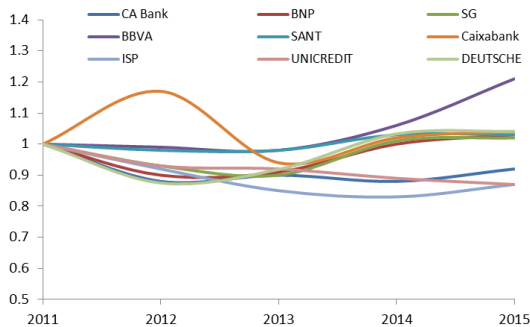


Table 5 Evolution of CET1 ratio for the panel of banks (% of Rwa)*

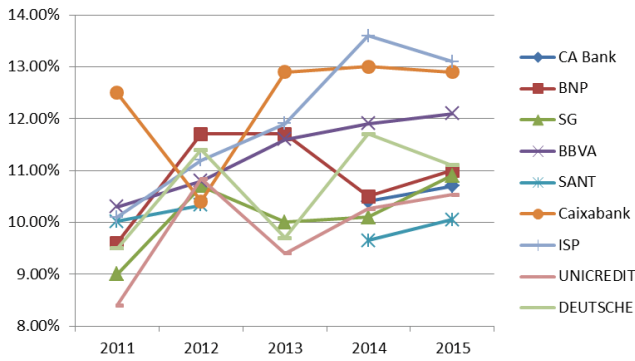


Table 6 Evolution of Tier 1 ratio for the panel of banks (% of Rwa)*

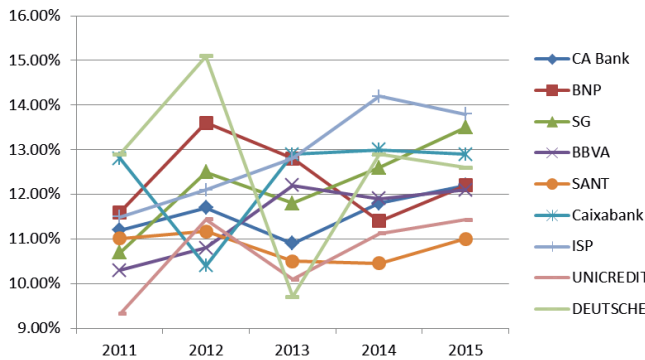
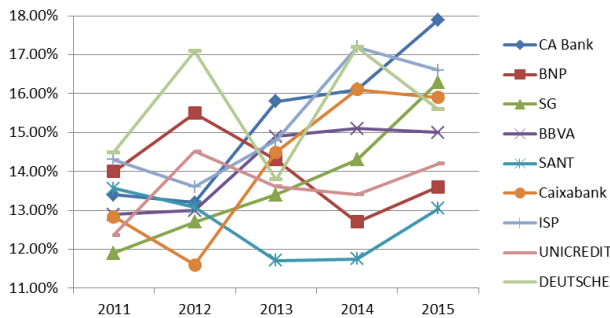


Table 7 Evolution of Total capital ratio for the panel of banks (% of Rwa)*



*Source: Our elaboration on official Financial Statements of the Banks and public disclosure document

7. Results

Looking to the panel we see there is not a dramatic decrease of lending activity consequent to the reinforcing of capital levels. The downturn of lending seems more influenced by economic downturn and lack of loan demand more than from the increase of capital levels. One important aspect is that capital reinforcing is just at the beginning and will last for next years until full implementation of Basel III framework.

In particular impacts of implementation of MREL and TLAC could be relevant in increasing the cost to be compliant with stricter capital requirements for banks and so impacting on lending activity.

On the other hand we see in Eurozone a monetary policy never seen before. After last ECB decisions of launching new TLTROs in the middle of March 2016, Banks will be able to take up funds from ECB auctions up to 30% of the loan stock, excluding lending to the public sector and mortgages, at MRO levels (now 0%) and, if the amount in three years will increase of a modest 2.5%, interest on lending from ECB will be further decreased to -0.4% so at the end Banks will receive money to receive loans from the central bank. Approaching to a "negative interest rate" scenario, lending to corporates will be probably more influenced by other aspects than capital requirements and lending can grow without capital constrain costs. This scenario plays in favor of neutralizing the negative effect of stricter capital requirements in the sense that very cheap or even negative funding would lift-up the problem of costly funding and compensate the higher costs related to the issuance of more costly instruments such as subordinated bond to reach appropriate levels of capital for MREL and TLAC and at the same time reaching the levels required for Basel III requirements fully implementation.

8. Conclusions

From all studies we analyzed we have seen there is not a straight forward relationship between higher capital requirements and diminishing of lending activity. Some studies certify this relationship, other studies underline that, making financial banking system more stable, at the end the higher capital requirements will not affect so much negatively lending activity. This because higher capital requirements would impact in banks' risk appetite and the reduction of risk appetite would impact in more secure lending and buffer against losses and as consequence higher capitalized banks would reduce lending volatility.

On one hand higher capital requirements increase bank cost of equity. Higher cost of equity can be bared by borrowers that would pay higher interest rate on lending activity and selective. This would imply diminishing demand. on this side it is very difficult do differentiate between demand and supply factors.

On our panel of banks we saw not a strict relationship neither. Anyway it would be interesting to further analyze financial data in order to separate demand and supply effect.

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La gestione del rischio clinico: logiche di controllo interno, trasparenza e qualità delle cure

Authors

- *Teresa Capasso, Clinical Risk Management Unit, University Hospital Città della Salute e della Scienza, Corso Bramante 88 – IT 10126 – Torino (Italy). Ph. + 39(11)6335084. Mail: tcapasso@cittadellasalute.to.it*
 - *Giulio Fornero, Clinical Risk Management Unit, University Hospital Città della Salute e della Scienza, Corso Bramante 88 – IT 10126 – Torino (Italy). Ph. + 39(11)6335040. Mail: gfornero@cittadellasalute.to.it*
 - *Daniela Pognant Viù, Clinical Risk Management Unit, University Hospital Città della Salute e della Scienza, Corso Bramante 88 – IT 10126 – Torino (Italy). Ph. + 39(11)6335084. Mail: dpognantviu@cittadellasalute.to.it*
 - *Ida Marina Raciti, Clinical Risk Management Unit, University Hospital Città della Salute e della Scienza, Corso Bramante 88 – IT 10126 – Torino (Italy). Ph. + 39(11)6334478. Mail: iraciti@cittadellasalute.to.it*
 - *Gian Paolo Zanetta, General Director, University Hospital Città della Salute e della Scienza, Corso Bramante 88 – IT 10126 – Torino (Italy). Ph. + 39(11)6335200. Mail: dg@cittadellasalute.to.it*
 - *Enrico Sorano, Department of Management, University of Torino, 218 bis, Corso Unione Sovietica – IT10134 – Torino (Italy). Ph: + 39(11)6706027. Mail: enrico.sorano@unito.it*
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Introduction

Clinical risk management is one of the clinical governance activities for improving health care performance and quality.

Every Local Health Unit must adopt all necessary measures to manage risks, prevent legal cases and reduce insurance costs.

Regulations including the definition of quality, structural, technological and quantitative standards regarding hospital care (Decree Health Ministry, 2 April 2015, number 70) are guidelines to be followed for managing clinical risk; e.g. alert system in case of adverse events, specific training programmes, ongoing evaluation and improvement of clinical activities, health care documentation and communication.

Clinical risk management is therefore part of a broader concept of clinical governance aimed at providing quality, sustainable, and responsible health care service based on the needs of patients.

Objectives

Identify key areas for:

- Ongoing improvement of health care quality
- Reduction of clinical risk
- Identification of processes that can lead to errors/risks for the patient
- Reduction of legal cases.

Re-elaborate the database of all claims for damages presented to the University Hospital Città della Salute e della Scienza in Turin between 2004 and 2014. Data has been organised according to the year when the events took place and not using the year when the claims were presented (important to have data regarding the time of events). Claim reasons have been grouped in macro areas to compare them and understand the dimensions of the phenomenon. In this way, corrective actions in the organisation can be implemented where possible.

Methods

- Creation of a working group including professors of the Management and Economics School of the University of Turin and professionals of Quality, Risk management and Accreditation department of the University Hospital Città della Salute e della Scienza in Turin which evaluated claims.
- Identification of the main medical errors with reference to the literature, existing regulations and activities for the safety of patients carried out in the Local Health Unit (e.g. guidelines, recommendations, procedures);
- Identification of near miss events/claims for damages, categorisation of the various elements according to gravity, frequency and foreseeability, in reference to the year of the event;
- Comparison of data gathered with those in the literature and with the main activity data of the Local Health Unit;
- Evaluation of the recurrence of near miss events/claim for damages, even after the implementation of corrective measures;
- Identification of main areas for action.

Results and conclusions

The analysis carried out emphasises that claims for damages presented in those areas not covered by the recommendations of the Ministry of Health are both quantitatively and economically more relevant compared to those included in the Clinical Risk prevention and management regulated by the Ministry.

This calls for reflection and requires setting a more ambitious goal: to break down the health care process in critical steps to better contain near miss events, additional costs caused by errors, to reduce legal cases and to lower compensation costs and insurance premium.

Keywords: Clinical Risk Management; risarcimenti; contenzioso; eventi avversi; controllo interno, qualità delle cure

1 Introduzione

La gestione del rischio clinico in ambito sanitario costituisce uno degli interventi del governo clinico per il miglioramento della qualità delle prestazioni e la sicurezza delle cure.

La realizzazione delle attività di prevenzione e gestione del rischio clinico rappresenta un interesse primario del Sistema Sanitario Nazionale in quanto consente maggiore appropriatezza nell'utilizzo delle risorse disponibili e per la tutela del paziente.

Ogni azienda sanitaria, nell'ambito della propria organizzazione, è tenuta ad adottare tutte le necessarie soluzioni per la gestione dei rischi, per la prevenzione del contenzioso e la riduzione degli oneri assicurativi.

In particolare, lo standard di riferimento per i presidi ospedalieri per la gestione del rischio clinico dovrebbe configurarsi anche nelle attività indicate nel decreto 02/04/2015, n. 70, Regolamento recante definizione degli standard qualitativi, strutturali, tecnologici e quantitativi relativi all'assistenza ospedaliera.

Recentemente la legge 28 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità) ha disciplinato le procedure per conseguire miglioramenti nella produttività e nell'efficienza degli enti del Servizio Sanitario Nazionale al fine di favorire la corretta ed appropriata allocazione delle risorse e l'erogazione dei Livelli essenziali di Assistenza.

Nell'ambito di queste procedure, gli enti del Servizio Sanitario Nazionale saranno tenuti ad attivare un sistema di monitoraggio delle attività assistenziali e della loro qualità, anche in coerenza con il programma nazionale valutazione esiti, pubblicando entro il 30 giugno di ogni anno i relativi esiti.

Tutte le strutture pubbliche e private che erogano prestazioni sanitarie saranno tenute ad attivare una adeguata funzione di monitoraggio, prevenzione e gestione del rischio sanitario (Risk Management), per l'esercizio dei seguenti compiti:

Attivazione di percorsi di audit o altre metodologie finalizzati allo studio dei processi interni, nell'ambito della messa in sicurezza dei percorsi sanitari;

Rilevazione del rischio di inappropriata nei percorsi diagnostici e terapeutici e facilitazione dell'emersione di eventuali attività di medicina difensiva attiva e passiva;

Predisposizione e attuazione di attività di sensibilizzazione e formazione continua del personale finalizzata alla prevenzione del rischio sanitario;

Assistenza tecnica verso gli uffici legali della struttura sanitaria, nel caso del contenzioso e nelle attività di stipulazione di coperture assicurative o di gestione di coperture auto-assicurative.

Le strutture sanitarie pubbliche e private dovrebbero altresì rendere disponibili, mediante pubblicazione nel proprio sito internet, i dati relativi a tutti i risarcimenti erogati nell'ultimo quinquennio, verificati nell'ambito della relativa attività¹.

In Regione Piemonte il potenziamento della funzione di Risk Management, già prevista nel 2008, è stata ribadita nel corso del 2015. La funzione di Risk management è particolarmente interessata alla conoscenza delle richieste di risarcimento danni per consentire azioni correttive finalizzate alla prevenzione del rischio clinico.

2 Literature review

L'attività di gestione del rischio clinico (Risk Management) si occupa di identificare, prevenire e gestire il rischio di errore in ambito sanitario, con il fine di migliorare la qualità delle prestazioni sanitarie e garantire la sicurezza degli utenti. Questo è il supporto sul quale si deve basare lo sviluppo di una nuova cultura, secondo la quale è necessario passare dalla cultura della colpevolizzazione dell'errore medico caratterizzata da isolamento, omertà, medicina difensiva ad una cultura di analisi trasparente dell'errore, alla ricerca dei punti critici dell'organizzazione, per avviare azioni correttive.

La gestione del rischio clinico si sviluppa in quattro fasi principali:

1. identificazione del profilo del rischio nell'ambito preso in esame, che varia per tipo, struttura, specialità;
2. impostazione e applicazione di misure di prevenzione;
3. attivazione di un sistema di controllo per osservare l'effetto delle eventuali misure di prevenzione applicate;
4. proposte di progressivo miglioramento affinché la prevenzione sia efficace.

3 Metodologia

Con la presente ricerca il gruppo di lavoro ha rielaborato l'elenco di tutte le richieste sanitarie di risarcimento danni pervenute all'AOU Città della Salute e della Scienza di Torino fra gli anni 2004/2014 (dati al luglio 2015), considerando i dati per anno di accadimento e raggruppando le motivazioni delle richieste per macro aree, al fine di effettuare una comparazione fra le stesse ed avere le dimensioni del fenomeno tale da consentire azioni correttive, laddove possibile, anche a livello organizzativo.

Le informazioni utilizzate per l'analisi sono state fornite dalla S.C. Patrimonio e riguardano un periodo di dieci anni (2004-2014).

I dati sono stati presi in considerazione per l'anno di accadimento dell'evento (non in funzione della data di richiesta risarcimento danno) e sono stati elaborati classificandoli per categorie in funzione delle tipologie di richieste: altro, ausili, avulsioni dentarie nel corso di intubazione, danneggiamento/smarrimento protesi, caduta, ritenzione di garze taglienti miscellanea e strumentario chirurgico nel corso di interventi invasivi (corpo estraneo), dispositivi, errore infermieristico, errore medico (diagnosi, procedure chirurgiche, procedure invasive), consenso informato, documentazione clinica, farmaci (farmaci antineoplastici, LASA, po-

tassio, riconciliazione farmacologica), infezione ospedaliera, trasfusione, trauma, lesioni da decubito, lesioni da mal posizionamento sul letto operatorio, identificazione paziente, triage, suicidio, morte materna correlata al travaglio/parto, morte o disabilità permanente di neonato sano di peso >2500 grammi non correlata a malattia congenita, violenze a danno di operatori sanitari, osteonecrosi da bifosfonati, trasporto.

Fra queste evidenziamo quelle corrispondenti alle Raccomandazioni Ministeriali sulla qualità e sicurezza delle cure ed al Manuale sulla Sicurezza in Sala Operatoria pubblicate: protesi, caduta, corpo estraneo, dispositivi, elettrobisturi, consenso informato, farmaci (farmaci antineoplastici, lasa, potassio), riconciliazione, infezione, trasfusioni, lesioni da mal posizionamento, identificazione paziente, triage, suicidio, morte materna correlata al travaglio/parto, morte o disabilità permanente di neonato sano di peso >2500 grammi non correlata a malattia congenita, violenze a danno di operatori sanitari, osteonecrosi da bifosfonati, trasporto.

Sono presenti ulteriori categorie non trattate in modo specifico nelle Raccomandazioni Ministeriali quali: altro, ausili, avulsioni dentarie, errore infermieristico, errore medico (diagnosi, procedure chirurgiche, procedure invasive), documentazione clinica, trauma, lesioni da decubito.

Gli errori medici sono suddivisi in funzione della classificazione fornita dal SIMES² (errore medico scomposto in diagnosi, procedure chirurgiche e procedure invasive).

Per ciascuna categoria individuata, abbiamo analizzato in ordine di gravità, frequenza e quantitativamente con riferimento all'anno di accadimento (i dati sono stati analizzati non secondo il criterio della cassa ma in base all'anno di accadimento dell'evento per poter avere una dimensione reale del fenomeno) le richieste di risarcimento danni pervenute al fine di valutare le possibili azioni di prevenzione del rischio clinico.

Inoltre la classificazione è stata effettuata tenendo conto di: totale casi, casi liquidati, casi aperti, casi respinti, casi archiviati, casi in cui il paziente ha rinunciato a proseguire nell'azione legale, casi in cui si è verificato il decesso del paziente, totale Euro (€) liquidati, totale Euro (€) spese sostenute. Gli importi liquidati non rappresentano un dato attendibile visto l'elevato numero di casi ancora da definire.

4 Risultati

Per dovere di sintesi vengono successivamente illustrati solamente alcuni esempi tra i più significativi.³

4.1 Avulsioni dentarie

Le lesioni dentarie da intubazione tracheale costituiscono la più comune complicazione e la più frequente causa di richieste di risarcimento in ambito anestesilogico.

Nella tabella sottostante (vedi Tabella 1) osserviamo un andamento stabile e contenuto (42 casi in 10 anni) rapportati al numero totale di interventi chirurgici eseguiti nello stesso periodo di tempo. L'incidenza è comunque bassa e sembra essere qualche volta inevitabile per le pregresse condizioni dentoparodontali.

In Azienda è stata applicata una procedura mirata "Prevenzione e gestione di possibili danni odontoiatrici nel corso di procedure anestesilogiche".

Tabella 1

AVULSIONE	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	8	8	0	0	0	0	€ 18.781,29	€ 0,00	€ 18.781,29
2005	7	2	1	4	0	0	€ 4.000,00	€ 11.369,19	€ 15.369,19
2006	5	2	3	0	0	0	€ 9.600,00	€ 1.536,00	€ 11.136,00
2007	3	3	0	0	0	0	€ 9.580,00	€ 540,00	€ 10.120,00
2008	1	1	0	0	0	0	€ 1.300,00	€ 0,00	€ 1.300,00
2009	3	3	0	0	0	0	€ 6.231,50	€ 456,00	€ 6.687,50
2010	1	1	0	0	0	0	€ 1.450,00	€ 0,00	€ 1.450,00
2011	5	2	0	2	0	0	€ 5.880,00	€ 0,00	€ 5.880,00
2012	3	3	0	0	0	0	€ 6.600,00	€ 0,00	€ 6.600,00
2013	2	1	1	0	0	0	€ 1.500,00	€ 0,00	€ 1.500,00
2014	4	2	1	1	0	0	€ 2.550,00	€ 0,00	€ 2.550,00
TOT	42	26	6	7	0	0	€ 67.472,79	€ 13.901,19	€ 81.373,98

4.2 Smarrimento protesi dentarie

Una delle più frequenti richieste di indennizzo è rappresentata dallo smarrimento di protesi dentarie durante lo svolgimento di pratiche diagnostiche terapeutiche. Questo è per lo più dovuto alla mancata identificazione di un luogo ove conservare le protesi durante l'esecuzione di procedure diagnostiche terapeutiche.

Nella Tabella 2 osserviamo dal 2004 al 2014 una riduzione delle richieste di risarcimento per smarrimento protesi e, di conseguenza degli importi liquidati. Dal 2006 la S.C. Q.R.M.A. ha messo in atto una procedura che prevede l'utilizzo di porta protesi e la compilazione di una scheda da allegare alla documentazione infermieristica, inoltre è stato attivato un processo per cui le nuove protesi possono essere fornite direttamente dalla Struttura di Odontomatostologia (Dental School) interna con riduzioni notevoli di costi per l'Azienda (si passa da 12.997,32 € del 2004 a 3.800 € nel 2014) e velocizzazione del processo con minore disagio per il paziente.

Tabella 2

PROTESI	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	10	9	0	1	0	0	€ 12.997,32	€ 0,00	€ 12.997,32
2005	9	7	0	1	1	0	€ 12.703,62	€ 300,00	€ 13.003,62
2006	8	3	2	1	0	0	€ 8.969,91	€ 0,00	€ 8.969,91
2007	6	1	2	2	0	0	€ 263,00	€ 0,00	€ 263,00
2008	5	3	1	1	0	0	€ 6.900,00	€ 0,00	€ 6.900,00
2009	6	5	1	0	0	0	€ 9.901,81	€ 0,00	€ 9.901,81
2010	5	3	1	1	0	0	€ 2.800,00	€ 0,00	€ 2.800,00
2011	3	3	0	0	0	0	€ 4.715,43	€ 0,00	€ 4.715,43
2012	3	3	0	0	0	0	€ 4.590,00	€ 0,00	€ 4.590,00
2013	5	5	0	0	0	0	€ 8.873,00	€ 0,00	€ 8.873,00
2014	3	2	1	0	0	0	€ 3.800,00	€ 0,00	€ 3.800,00
TOT	63	42	8	7	1	0	€ 76.514,09	€ 300,00	€ 76.814,09

4.3 Cadute

Le cadute rappresentano un indicatore importante della qualità del servizio e della garanzia di sicurezza del paziente. In particolare nelle persone anziane, le fratture associate a caduta sono un'importante causa di mortalità.

Fra la casistica analizzata riscontriamo che il numero di cadute segnalate tende ad aumentare (da 318 eventi del 2004 a 646 nel 2014 - vedi Tabella 3) a seguito della emanazione della procedura aziendale e della sempre maggiore consapevolezza della utilità di segnalazione degli eventi avversi da parte dei professionisti; le richieste di indennizzo sono comunque molto contenute; in queste si evidenziano otto decessi, la maggior parte di questi risultano ancora essere aperti, poiché è da dimostrare la correlazione fra il trauma ed il sfavorevole esito.

Per cercare di arginare il problema è stata elaborata una procedura aziendale "Gestione del rischio cadute dei pazienti ricoverati" rivista nel 2009 a seguito dell'emanazione di una specifica raccomandazione ministeriale; questa procedura contiene le misure per la valutazione e la prevenzione del rischio cadute nei pazienti e le modalità da applicare in caso di necessità, viene periodicamente revisionata e viene fatto un controllo a campione sulla documentazione clinica annualmente per verificarne l'effettiva applicazione.

Tabella 3

SEGNALAZIONI CADUTE											
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
TOTALE CADUTE	318	391	203	399	404	503	570	566	580	509	646
RICHIESTE INDENNIZZO	5	4	6	13	14	10	8	13	3	7	13

Tabella 4

CADUTA	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	5	2	3	0	0	1	€ 25.071,61	€ 216,00	€ 25.287,61
2005	4	1	1	2	0	0	€ 8.500,00	€ 5.825,90	€ 14.325,90
2006	6	2	2	2	0	1	€ 12.812,42	€ 8.728,38	€ 21.540,80
2007	13	4	3	6	0	1	€ 14.554,86	€ 6.307,20	€ 20.862,06
2008	14	11	2	1	0	4	€ 325.484,47	€ 6.627,00	€ 332.111,47
2009	10	2	3	5	0	0	€ 44.995,20	€ 2.580,00	€ 47.575,20
2010	8	4	1	3	0	0	€ 7.389,60	€ 0,00	€ 7.389,60
2011	13	8	5	0	0	1	€ 136.438,00	€ 3.945,94	€ 140.383,94
2012	3	3	0	0	0	0	€ 4.590,00	€ 0,00	€ 4.590,00
2013	7	0	7	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	13	0	9	4	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	96	37	36	23	0	8	€ 579.836,16	€ 34.230,42	€ 614.066,58

4.4 Ritenzione di garze, taglienti, miscellanea e strumentario chirurgico nel corso di interventi invasivi (corpo estraneo)

Nonostante non si disponga di dati ufficiali di incidenza ⁴ per quanto concerne la dimenticanza di corpi estranei nelle cavità del paziente nel corso di un intervento chirurgico, si stima che tale fenomeno si verifichi 1 volta ogni 1000 - 3000 procedure chirurgiche all'anno ⁵. A livello Aziendale sono state recepite le raccomandazioni del Ministero della Salute ed è stata emanata una procedura di controllo conteggio di garze, taglienti, strumentario e miscellanea (anno 2005). Audit di controllo vengono eseguiti dalla S.C. Q.R.M.A. sul campo ed a campione nella documentazione clinica.

Tabella 5

CORPO ESTRANEO	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	1	1	0	0	0	0	€ 7.000,00	€ 240,00	€ 7.240,00
2005	5	3	2	0	0	1	€ 184.756,00	€ 2.485,86	€ 187.241,86
2006	6	1	5	0	0	4	€ 7.200,00	€ 13.774,44	€ 20.974,44
2007	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	3	2	1	0	0	0	€ 23.743,71	€ 2.853,00	€ 26.596,71
2009	2	0	2	0	0	0	€ 0,00	€ 0,00	€ 0,00
2010	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2012	1	1	0	0	0	0	€ 1.580,64	€ 0,00	€ 1.580,64
2013	3	0	3	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	22	8	14	0	0	5	€ 224.280,35	€ 19.353,30	€ 243.633,65

4.5 Errore medico

Analizzando le richieste di risarcimento osserviamo che gli errori medici (Tabella 6) in generale possono essere ulteriormente suddivisi in ulteriori sottocate-

gorie (come da indicazioni SIMES): errori verificatisi nel corso di procedure chirurgiche (Tabella 8), di procedure invasive (Tabella 9) e di diagnosi (Tabella 7).

Tabella 6 – Errore medico

ERR. MEDICO	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	10	1	6	3	0	5	€ 200.000,00	€ 48.196,97	€ 248.196,97
2005	6	0	5	1	0	3	€ 0,00	€ 12.036,82	€ 12.036,82
2006	6	1	5	0	0	4	€ 7.200,00	€ 13.774,44	€ 20.974,44
2007	4	0	4	0	0	3	€ 0,00	€ 5.880,00	€ 5.880,00
2008	5	1	3	1	0	2	€ 3.989,00	€ 1.176,00	€ 5.165,00
2009	3	0	2	1	0	0	€ 0,00	€ 1.140,00	€ 1.140,00
2010	5	0	4	1	0	0	€ 0,00	€ 0,00	€ 0,00
2011	4	2	2	0	0	1	€ 2.500,00	€ 342,58	€ 2.842,58
2012	9	2	5	0	2	2	€ 19.829,70	€ 7.316,47	€ 27.146,17
2013	8	0	8	0	0	3	€ 0,00	€ 0,00	€ 0,00
2014	4	0	4	0	0	2	€ 0,00	€ 0,00	€ 0,00
TOT	64	7	48	7	2	25	€ 233.518,70	€ 89.863,28	€ 323.381,98

Tabella 7 – Errore di diagnosi

DIAGNOSI	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	6	2	3	1	0	3	€ 81.115,71	€ 7.714,26	€ 88.829,97
2005	4	1	3	0	0	1	€ 89.792,00	€ 1.560,00	€ 91.352,00
2006	7	4	2	1	0	1	€ 127.618,74	€ 31.233,64	€ 158.852,38
2007	8	0	7	1	0	0	€ 0,00	€ 48.292,00	€ 48.292,00
2008	8	3	3	2	0	2	€ 7.460,00	€ 9.088,54	€ 16.548,54
2009	3	0	2	1	0	0	€ 0,00	€ 1.140,00	€ 1.140,00
2010	9	0	4	5	0	0	€ 0,00	€ 0,00	€ 0,00
2011	13	0	11	1	1	4	€ 0,00	€ 3.355,01	€ 3.355,01
2012	6	0	5	1	0	1	€ 0,00	€ 0,00	€ 0,00
2013	8	0	7	1	0	0	€ 0,00	€ 0,00	€ 0,00
2014	9	0	7	2	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	81	10	54	16	1	12	€ 305.986,45	€ 102.383,45	€ 408.369,90

Tabella 8 – Errore nel corso di procedure chirurgiche

PROC. CHIRURG.	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	17	9	1	4	0	1	€ 312.629,38	€ 32.633,99	€ 345.263,37
2005	25	11	9	4	1	2	€ 468.977,08	€ 80.554,12	€ 549.531,20
2006	24	6	11	7	0	0	€ 162.468,76	€ 19.728,88	€ 182.197,64
2007	21	5	12	4	0	3	€ 719.117,28	€ 16.187,19	€ 735.304,47
2008	18	4	10	4	0	1	€ 850.777,40	€ 8.760,05	€ 859.537,45
2009	22	8	13	1	0	1	€ 123.551,20	€ 9.046,78	€ 132.597,98
2010	24	6	16	2	0	1	€ 2.124.072,66	€ 5.164,87	€ 2.129.237,53
2011	19	3	12	2	2	2	€ 139.853,60	€ 18.379,52	€ 158.233,12
2012	19	3	14	2	0	2	€ 23.894,25	€ 0,00	€ 23.894,25
2013	26	0	25	1	0	3	€ 0,00	€ 0,00	€ 0,00
2014	11	1	10	0	0	0	€ 2.220,00	€ 0,00	€ 2.220,00
TOT	226	55	133	31	3	16	€ 4.927.561,61	€ 190.455,40	€ 5.118.017,01

Tabella 9 - Errore nel corso di procedure invasive

PROC. INVASIVE	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2005	9	3	4	2	0	2	€ 194.787,24	€ 11.116,33	€ 205.903,57
2006	3	0	2	1	0	0	€ 0,00	€ 3.536,00	€ 3.536,00
2007	2	0	1	1	0	0	€ 0,00	€ 11.922,00	€ 11.922,00
2008	2	1	1	0	0	1	€ 54.719,00	€ 11.271,49	€ 65.990,49
2009	2	1	1	0	0	0	€ 600.000,00	€ 50.839,26	€ 650.839,26
2010	1	1	0	0	0	0	€ 10.000,00	€ 0,00	€ 10.000,00
2011	5	0	4	1	0	0	€ 0,00	€ 0,00	€ 0,00
2012	3	1	1	1	0	0	€ 3.000,00	€ 0,00	€ 3.000,00
2013	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	3	0	3	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	31	7	18	6	0	3	€ 862.506,24	€ 88.685,08	€ 951.191,32

4.6 Farmaci

Per errore di terapia⁶ si intende ogni evento prevenibile che può causare o portare ad un uso inappropriato del farmaco o ad un pericolo per il paziente. Tale episodio può essere conseguente ad errori di approvvigionamento, immagazzinamento, conservazione, distribuzione, prescrizione, preparazione, somministrazione, monitoraggio ed uso. L'aumento dei costi non è solo dovuto alla spesa farmaceutica, sempre crescente, ma anche agli errori di terapia.

Il rischio associato all'impiego del farmaco riguarda gli eventi intrinseci quali reazioni avverse, effetti collaterali, e soprattutto gli eventi non direttamente correlati alla natura del farmaco, come quelli dovuti a pessima grafia, abbreviazioni ambigue, scarsa informazione su dosi, modi e tempi di somministrazione.

Fondamentalmente vengono riconosciuti 5 categorie di errore⁷: di prescrizione, di trascrizione/interpretazione, di preparazione, di distribuzione, di somministrazione

Gli errori in terapia farmacologica, possono verificarsi quindi durante tutto il processo di gestione del farmaco in ospedale. Gli effetti dell'errore in terapia possono avere risvolti infausti, ma in molte occasioni possono rimanere "nell'ombra", ed il paziente non si rende conto di averlo subito, per questo il coinvolgimento degli operatori nella segnalazione degli incident reporting risulta essere fondamentale.

Per cercare di contenere il problema all'interno dell'Azienda sono state intraprese alcune iniziative: applicazioni delle indicazioni del Ministero della Salute tramite elaborazione di procedure; elaborazione Scheda Unica di Terapia cartacea ed avviata fase di sperimentazione in alcune S.C. di una scheda informatizzata; audit periodici per il controllo della tenuta dei farmaci eseguite in collaborazione fra Direzione Sanitaria, S.C. QRMA ed S.C. Farmacia; elaborazione di un progetto per l'applicazione della metodologia FMEA/FMECA alla fasi del processo "Moda-

lità di gestione del Farmaco”. Le macrofasi in cui tale attività è stata suddivisa sono la predisposizione della terapia, l’approvvigionamento (ordinario ed in urgenza), lo stoccaggio, la preparazione, e la somministrazione; Progetto “Farmacista di reparto” con il farmacista in corsia che affianca il clinico.

Negli esigui casi in cui è stata presentata denuncia relativa a farmaci antineoplastici evidenziamo problematiche legate allo stravasamento di chemioterapici durante la somministrazione. È stata costruita una procedura “ad hoc” per gestire le problematiche. Per quanto riguarda le categorie farmaci LASA (Look Alike-Sound Alike), la riconciliazione della terapia farmacologica e l’osteonecrosi da somministrazione di Bifosfonati non vi sono mai state richieste di risarcimento danni.

Tabella 10

FARMACI	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	1	1	0	0	0	1	€ 95.000,00	€ 0,00	€ 95.000,00
2005	4	4	0	0	0	0	€ 48.248,80	€ 4.286,40	€ 52.535,20
2006	4	0	2	1	0	0	€ 0,00	€ 1.080,00	€ 1.080,00
2007	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	5	2	2	1	0	4	€ 445.000,00	€ 3.670,50	€ 448.670,50
2009	1	0	1	0	0	1	€ 0,00	€ 0,00	€ 0,00
2010	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2012	2	0	1	1	0	1	€ 0,00	€ 786,50	€ 786,50
2013	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	1	0	0	1	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	20	7	8	4	0	7	€ 588.248,80	€ 9.823,40	€ 598.072,20

Tabella 11

FARMACI ANTINEOPL	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	1	1	0	0	0	0	€ 10.592,00	€ 0,00	€ 10.592,00
2005	1	1	0	0	0	0	€ 3.729,39	€ 200,00	€ 3.929,39
2006	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2007	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2009	1	0	1	0	0	0	€ 0,00	€ 1.200,00	€ 1.200,00
2010	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2012	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2013	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	4	2	2	0	0	0	€ 14.321,39	€ 1.400,00	€ 15.721,39

4.7 Infezioni ospedaliere

Le infezioni ospedaliere sono una delle complicanze più frequenti e gravi dell'assistenza sanitaria. Si definiscono così infatti le infezioni insorte durante il ricovero in ospedale, o dopo le dimissioni del paziente, che al momento dell'ingresso non erano manifeste clinicamente, né erano in incubazione. Sono l'effetto della progressiva introduzione di nuove tecnologie sanitarie, che se da una parte garantiscono la sopravvivenza a pazienti ad alto rischio di infezioni, dall'altra consentono l'ingresso dei microrganismi anche in sedi corporee normalmente sterili. Un altro elemento cruciale da considerare è l'emergenza di ceppi batterici resistenti agli antibiotici, visto il largo uso di questi farmaci a scopo profilattico o terapeutico.

L'OMS, lanciando per il biennio 2005-2006 il progetto "Global patient safety challenge", ha invocato la riduzione delle infezioni nosocomiali, indicando nella prevenzione la strada da seguire per tutelare la salute dei pazienti, evitare voci aggiuntive di spesa, migliorando l'allocazione delle risorse economiche destinate al comparto sanitario. In Italia esistono diversi modelli organizzativi nell'ambito delle Strutture sanitarie: in particolare presso l'Azienda Ospedaliera in cui è stata svolta l'analisi le strutture che hanno competenza nell'ambito delle infezioni ospedaliere è distinta da quella che si occupa di rischio clinico.

Osserviamo nella nostra analisi (vedi Tabella 12) la totalità delle richieste ancora aperte, proprio perché è estremamente difficile sia dimostrare di aver contratto l'infezione che eventuali condotte negligenti imputabili all'organizzazione. A livello aziendale sono state prodotte procedure specifiche per tipologia di infezione al fine di definire i comportamenti corretti ed audit da seguire per prevenirne l'insorgenza.

Tabella 12

INFEZIONE	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	8	2	5	1	0	4	€ 517.491,27	€ 38.232,81	€ 555.724,08
2005	1	0	0	1	0	1	€ 0,00	€ 0,00	€ 0,00
2006	7	4	1	2	0	2	€ 57.289,92	€ 7.488,00	€ 64.777,92
2007	6	3	2	1	0	1	€ 191.300,00	€ 11.920,00	€ 203.220,00
2008	4	0	4	0	0	0	€ 28.775,02	€ 360,00	€ 29.135,02
2009	3	0	2	1	0	0	€ 0,00	€ 0,00	€ 0,00
2010	6	1	3	2	0	2	€ 180.000,00	€ 605,00	€ 180.605,00
2011	6	0	5	1	0	3	€ 0,00	€ 0,00	€ 0,00
2012	7	0	7	0	0	3	€ 0,00	€ 0,00	€ 0,00
2013	5	0	3	2	0	1	€ 0,00	€ 0,00	€ 0,00
2014	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	54	10	33	11	0	17	€ 974.856,21	€ 58.605,81	€ 1.033.462,02

4.8 Lesioni da decubito

Per quanto concerne la prevenzione delle lesioni da decubito l'Azienda è stata attiva nel creare un gruppo di lavoro che dopo attente ricerche ha elaborato nel 2005 un manuale "Prevenzione e trattamento delle lesioni da decubito" rivolto agli operatori ed ai pazienti/familiari. Le indicazioni contenute in questo documento forniscono agli operatori sanitari una guida per seguire i seguenti obiettivi: identificare precocemente i soggetti a rischio, individuare gli interventi preventivi e curativi ed elaborare un piano personalizzato, rivedere la pratica assistenziale, utilizzare i protocolli per la prevenzione e la cura, individuare e predisporre ausili e prodotti idonei.

Assistiamo negli anni successivi alla diffusione del documento alla comparsa di contenziosi (vedi Tabella 13) che, vista l'entità dei ricoveri e la complessità dei casi trattati sono comunque da considerarsi in percentuale pressochè inesistenti.

Tabella 13

DECUBITO	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2005	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2006	1	1	0	0	0	0	€ 22.537,60	€ 540,00	€ 23.077,60
2007	1	1	0	0	0	0	€ 28.000,00	€ 600,00	€ 28.600,00
2008	1	0	1	0	0	0	€ 0,00	€ 1.500,00	€ 1.500,00
2009	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2010	1	1	0	0	0	0	€ 6.644,70	€ 0,00	€ 6.644,70
2011	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2012	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2013	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	4	3	1	0	0	0	€ 57.182,30	€ 2.640,00	€ 59.822,30

4.9 Identificazione paziente

Gli errori di identificazione nelle procedure chirurgiche (del paziente, dell'organo o del lato da operare) sono eventi fortunatamente rari e tuttavia possibili anche nelle migliori condizioni organizzative; la ricaduta di questi errori sul paziente (pensiamo all'asportazione di un organo sano al posto di quello malato) e sull'immagine della struttura, è certamente pesante, tanto che essi sono stati annoverati dal Ministero della Salute tra gli eventi sentinella oggetto di particolare attenzione e monitoraggio.

Nel luglio 2006 il Ministero della Salute, sulla scorta della esperienza di altri paesi in tema di prevenzione degli errori di lato e del protocollo universale della JCAHO, ha elaborato una raccomandazione ufficiale ed un modello operativo di riferimento per garantire la corretta identificazione dei pazienti, del sito e della procedura chirurgica, modello al quale ci siamo ispirati per la creazione di una procedura ad hoc.

Nel 2009 la World Health Organization (OMS) pubblica nel 2008 a prima edizione delle linee guida per una chirurgia sicura "Safe Surgery Saves Lives" (AHRQ 2013) che costituirà la base su cui verrà sviluppata la checklist per la Sicurezza in Chirurgia. Versioni aggiornate delle linee guida, della checklist e del manuale per l'implementazione sono stati pubblicati nel settembre del 2009 (WHO 2013).

L'implementazione di un sistema di verifica sistematico e multilivello come quello oggetto della procedura deve essere accompagnata da idonee modifiche organizzative che prevedano la presenza del chirurgo in reparto in fase preoperatoria per l'acquisizione del consenso e la marcatura del sito chirurgico.

Tabella 14

IDENTIFIC P.TE	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	2	2	0	0	0	0	€ 10.556,83	€ 780,00	€ 11.336,83
2005	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2006	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2007	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2009	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2010	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	1	1	0	0	0	0	€ 8.600,00	€ 0,00	€ 8.600,00
2012	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2013	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	3	0	2	1	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	6	3	2	1	0	0	€ 19.156,83	€ 780,00	€ 19.936,83

4.10 Triage

Il triage, secondo quanto riportato nell'Atto di Intesa Stato Regioni del 17/5/96, è "il primo momento di accoglienza e valutazione di pazienti in base a criteri definiti che consentano di stabilire la priorità di intervento". Il Ministero della Salute a Febbraio 2013 ha emanato la raccomandazione: "Morte o grave danno conseguente a non corretta attribuzione del codice triage nella Centrale operativa 118 e/o all'interno del Pronto soccorso"; in funzione di questa l'azienda ha elaborato una procedura aziendale con lo scopo di ridurre le criticità del processo al fine di aumentare la sicurezza dei pazienti. Dall'analisi dei dati (Tabella 16) osserviamo come a fronte di circa 80.000 passaggi l'anno non è presente nessuna richiesta di risarcimento danni.

Tabella 15

TRIAGE	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2005	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2006	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2007	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2009	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2010	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	1	0	1	0	0	1	€ 0,00	€ 0,00	€ 0,00
2012	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2013	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
TOT	1	0	1	0	0	1	€ 0,00	€ 0,00	€ 0,00

Tabella 16

ATTIVITÀ DI PRONTO SOCCORSO											
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
N. TOT ACCESSI	82564	85462	81529	77569	80821	80940	78237	78351	75242	74795	71997
DI CUI RICOVERATI	14662	14984	14863	14791	15175	15489	15549	15178	15242	14804	14673

4.11 Morte o disabilità permanente di neonato sano di peso >2500 grammi non correlata a malattia congenita

La morte neonatale o la disabilità permanente sono eventi molto gravi che possono essere determinati anche da standard assistenziali inappropriati e richiedono la messa in atto di opportune iniziative di prevenzione. Ad aprile 2014 è stata pub-

blicata una specifica raccomandazione ministeriale in base alla quale è stata redatta specifica procedura aziendale. I dati contenuti nella Tabella 17 riguardano le richieste di risarcimento pervenute a partire da gennaio 2014.

Tabella 17

NEONATI PROBL PARTO	TOT CASI	LIQUIDATI	APERTI	RESPINTI	ARCHIVIATI	DECEDUTI	€ LIQUIDATO	€ SPESE	TOT
2004	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2005	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2006	1	0	1	0	0	0	€ 0,00	€ 0,00	€ 0,00
2007	2	0	2	0	0	0	€ 0,00	€ 0,00	€ 0,00
2008	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2009	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2010	2	0	2	0	0	0	€ 0,00	€ 0,00	€ 0,00
2011	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2012	0	0	0	0	0	0	€ 0,00	€ 0,00	€ 0,00
2013	2	0	2	0	0	0	€ 0,00	€ 0,00	€ 0,00
2014	7	0	7	0	0	5	€ 0,00	€ 0,00	€ 0,00
TOT	15	0	15	0	0	5	€ 0,00	€ 0,00	€ 0,00

5 Conclusioni

Nel 2013 AHRQ (Agency for Healthcare Research and Quality) ha pubblicato il rapporto Making Healthcare Safer II con l'obiettivo di condurre una revisione sistematica della letteratura valutando le evidenze per un ampio numero di pratiche per la sicurezza dei pazienti. Ne sono risultate due tabelle con le pratiche raccomandate e le pratiche fortemente raccomandate per la sicurezza dei pazienti.

Per ogni categoria individuata, nel corso del nostro studio, è stata ricercata la presenza di normativa esistente, indicazioni nazionali, internazionali (pratiche AHRQ) e indicazioni aziendali. Dall'analisi effettuata è risultato che le indicazioni nazionali, internazionali e normative sono state assolute. È stata verificata la presenza di procedure aziendali elaborate appositamente (pur non esistendo indicazioni ministeriali o normative) trattandosi di problematiche rilevanti della specifica realtà (es. procedure avulsioni dentarie). In alcuni casi le procedure in uso sono state emanate prima della pubblicazione delle raccomandazioni ministeriali rilevata la necessità di affrontare determinate problematiche (es. procedura percorso del farmaco, procedura cadute, procedura per la prevenzione delle lesioni da mal posizionamento del paziente sul letto operatorio, procedura per la prevenzione della ritenzione corpo estraneo nelle cavità dei pazienti).

Gli evidenti cambiamenti nello scenario del rischio clinico, dove quotidianamente l'attenzione dei media si focalizza su eventi di malpractice, portano il cittadino e gli operatori sanitari ad avere una maggiore attenzione alla tipologia di interventi da mettere in atto in funzione delle categorie di eventi più frequenti. Il tema è delicato, poiché sotto più punti di vista, è d'obbligo evitare il più possibile il verificarsi di errori. Gli errori portano un danno al paziente in quanto, invece di migliorare il suo stato di salute, lo stesso si ritrova in situazioni di difficoltà che

possono variare fino ad arrivare in estremo al decesso, gravando al contempo sulla collettività un onere legato all'aumentare dei costi.

Il numero degli eventi di richiesta risarcitoria si riduce progressivamente dal 2004 al 2014 poichè, come accennato precedentemente, sussiste la possibilità di chiedere l'indennizzo anche a distanza di anni. Gli eventi possono risultare "aperti" anche per lunghi periodi perché la durata dei processi aumenta anche in funzione della complessità del caso.

Questa metodologia di valutazione della casistica di richieste risarcitorie, attraverso l'analisi dei dati, ha permesso di scomporre il processo di cura nelle sue criticità, per un tentativo contestuale di contenimento globale degli eventi avversi e dei costi aggiuntivi derivanti da errori, di riduzione del contenzioso, delle spese di risarcimento e dei premi assicurativi.

Considerando i punti critici emersi dalle richieste di risarcimento, aumenta la possibilità di intervento a livello organizzativo e sulla formazione/informazione dei implementando il "sistema qualità", al fine di porre i professionisti nelle condizioni di operare in sicurezza e di tutelare il paziente che afferisce presso l'Azienda.

Per raggiungere questo risultato è indispensabile un forte ed esplicito impegno dei vertici aziendali per lo sviluppo del sistema del Clinical Risk Management con il coinvolgimento degli stessi che devono sentirsi parte attiva del processo.

Grazie alla collaborazione multiprofessionale e multidisciplinare dei professionisti interessati, compresi quelli appartenenti alla SC Qualità, Risk Management e Accreditamento, le modifiche organizzative, derivanti dall'analisi dei dati e finalizzate alla prevenzione del rischio clinico, sono viste come un fondamentale strumento per innescare un continuo processo di miglioramento.

Alla luce di quanto emerso si ritiene che l'attività di Clinical Risk Management debba assumere un carattere di "trasversalità" rispetto ai processi gestionali dell'intera Azienda Sanitaria.

I relativi risultati devono essere utili a configurare con maggiore precisione il miglioramento della qualità, nel quadro della contestuale verifica dell'equilibrio economico - finanziario e del rispetto dei parametri relativi a volumi, qualità ed esiti delle cure.

L'attività di controllo di gestione deve essere coerente con il governo clinico dell'Azienda Sanitaria nell'ottica della tutela dei diritti delle persone assistite, dell'efficacia clinica delle prestazioni e dell'equilibrio economico-finanziario.

La possibilità di pubblicare sul sito internet dell'Azienda i dati relativi ai risarcimenti erogati nell'ultimo quinquennio potrebbe contribuire a qualificare ulteriormente la responsabilità sociale di tutte le strutture pubbliche e private in termini di migliore trasparenza dell'azione gestionale.

Endnotes

1. Ddl 28 gennaio 2016, Disposizioni in materia di responsabilità professionale del personale sanitario
2. Sistema Informativo per il Monitoraggio degli Errori in Sanità (SIMES) che ha l'obiettivo di raccogliere le informazioni relative agli eventi sentinella ed alle denunce dei sinistri su tutto il territorio nazionale consentendo la valutazione dei rischi ed il monitoraggio completo degli eventi avversi.
3. Fonte dati tabelle: Database Gestione Sinistri della S.C. Patrimonio, Database Gestione Cadute Presidio Molinette S.C. QRMA – Dati MedTrak Ufficio Statistiche (A.O.U. Città della Salute e della Scienza di Torino)
4. Raccomandazione per prevenire la ritenzione di garze, strumenti o altro materiale all'interno del sito chirurgico” Ministero della Salute, Raccomandazione n. 2, Marzo 2008.
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Risk mitigation through formalised cooperation: preliminary findings on a sample of Italian network contracts

Authors

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- *Maurizio Cisi, Associate Professor, maurizio.cisi@unito.it – University of Torino*
 - *Fabio Sansalvadore, Adjunct Professor, fabio.sansalvadore@unito.it – University of Torino*
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The collaboration between enterprises is a widespread phenomenon in the life of companies. Every company necessarily develops economic relations with other organisations in order to identify the best conditions for carrying out its activities and achieving its objectives. These relationships have different forms and intensities. The inter-relationships can produce market exchanges or collaboration agreements that are more intense, coordinated and organised in the medium to long term.

The agreements may give rise to corporate collaborations or partnerships of companies. While retaining their legal independence and competition, they agree to work together on some activities with the intent to improve their performance, taking advantage of external opportunities offered by the complex environmental evolution. In particular, the research question is focused on business cooperation identified in the Italian context, with a specific agreement represented by the business networks contract.

The objective of this work – inserted in Jel classification L14 – is to evaluate the opportunity to assess whether the risks associated with business performance can be mitigated by strategic cooperation as business networks.

The research of an empirical nature is based on the analysis of a random sample of 100 network contracts from the universe of Italian network contracts to 31 December 2015.

The source of the data is the company records kept by the Italian Chambers of Commerce. The research aims to analyse the content of cooperation agreements like network business contracts in order to assess whether the mitigation of specific risks represents one of the factors that encourage entrepreneurs to participate in these forms of association.

In particular, through accurate analysis of network contracts, we intend to develop specific categories of risk that are intended to be reduced by sharing them. Some types of risk mitigated by the network contract include trade, financial, lack of innovation and environmental risks.

The analysis of the survey sample proposes, therefore, to understand how the desire to combat the negative effects arising from specific business risk is the motivating force for entrepreneurs to give up part of their autonomy in order to improve, through collaboration, the overall performance of the business. Managerial aspects associate, therefore, a natural inclination of the human being to find solutions that can reduce or even eliminate the risks associated with their existence or the economic activities carried out by these entities.

Keywords: network, risk mitigation, cooperation.

JEL Classification: L14

1 Introduction

The cooperation between enterprises is a widespread phenomenon in corporate life (Riparbelli, 1962). Each company develops economic relations with other companies in order to enhance their competitiveness and achieve their goals (Villa, 2006, Bruno and Villa, 2011). These relationships can have different forms and intensity. The inter-relationships may lead to market exchanges, or more intense collaboration agreements, coordinated and organised in the medium to long term (Mancini, 2010).

The many economic crises that have occurred have mostly shown that enterprise collaboration is an essential element underpinning competitiveness, highlighting the need to develop links and inter-organisational relationships with other companies and overcoming individualistic attitudes (Capelli, 2012).

In part, overcoming such attitudes is achieved as companies, particularly SMEs, acquire awareness of a chronic lack of economic growth opportunities and resources which can be found in networking, fundamental opportunities to gain market share, extend and integrate the supply chain, reduce costs, expand their product portfolio and integrate and jointly invest in innovation strategies to improve competitiveness (Barringer and Harrison, 2000, Shaw, 2006 Coltorti, 2009).

The formation of the agreements can lead to collaborations and partnerships between businesses, while maintaining their legal and economic independence, aiming to improve performance by exploiting the opportunities offered by the complex environmental evolution. In fact, they look for effective solutions for inter-organisational cooperation to improve production processes and increase competitiveness, leveraging common practices: sharing knowledge and innovation capacity (Butera, 2001 and 2008); sharing the particular risks among the various partners in order to mitigate any negative consequences.

2 Risk management in company development

Administrative management events, an expression of the constant evolution of the business, are the result of strategic and operational decisions taken by the people who work in it. One of the elements that characterises the company's activities is the presence of future events or the consequences of management decisions made. According to Dezzani (1971), future events relating to corporate activity can be examined under two different profiles: the economic effects resulting from the occurrence of such events and the measurement of the degree of knowledge related to the occurrence of the said events observed.

Future events that characterise corporate life can have an economic impact - directly or indirectly - that influences positively or negatively the company's management. The consensus of the doctrine of business management, national (Zappa, 1927; Ferrero, 1968; Dezzani, 1971; Bertini, 1969) and international (Haynes, 1895; Landry, 1908; Knight, 1921; Hardy, 1923; Lavington, 1925; Brendl, 1933), is that the risk is the possibility that an event of the present may have negative consequences or, in other words, the risk is the possibility of an unfavourable trend in the occurrence of future events.

However, as regards the second aspect, the evaluation of the degree of knowledge related to the occurrence of observed events depends on the degree of knowledge that the company has with regard to future events. Measurement of the degree of knowledge assumes particular importance when we analyse events that are characterised by uncertainty. For these events, there is no knowledge about the effects that result from business decisions. Therefore, there is an absence of knowledge about the effects of that particular occurrence.

The presence of risk is one of the elements implicit in the business system (Ferrero, 1969). Although it is customary to highlight that the risks are the result of choices that have led to the occurrence of certain events, in reality business risks represent a unitary system. The systematic company activity creates a unit of the economic risk despite the plurality of its possible manifestations. The mobility of the business system confers the status of a dynamic system of the risks incumbent on the company itself, and vice versa. Therefore, we need to clarify that it is necessary to analyse the business risk system, since analysis of the individual risk is only an end in itself.

Each individual risk must be connected to the other risks of which the system is composed.

Dezzani stated that the general economic risk, as mentioned above, is configured as an internal risk relating to the company as a whole and an essential element of the company itself. The general economic risk exists because there is a company, that should take on the character of economic efficiency management. This general economic risk therefore represents the synthesis of the special risks of enterprise and reflects the changing evolution.

The specific risks are, therefore, partial manifestations or portions of the general economic risk. Potentially, every single operation of the management repre-

sents a possible source of particular risks. In other words, individual management tasks, whether active or passive, give rise to particular risks that are components in the general business risk system.

From another point of view, the risk is the synthesis of the economic choices made by the economic entity in business management: it corresponds to different behaviours at different risk levels. In this context, therefore, it is the economic entity that defines the strategic choices useful for ensuring the competitiveness of the business complex, undertaking a series of actions intended to counter the business risks by adopting strategies designed to eliminate the cause of the adverse events or to reduce the significance of the effects.

In order to ensure competitiveness or a stable presence in the market and to confront their competitors in the competitive game, the company's activity is to be developed with the objective of achieving and maintaining over time the economic balance, equity and finance. Among these, functional to this study, is highlighting the relationship between business risks and economic balance intended as the stabilised ability to remunerate appropriately the production factors necessary for the operation of the company.

In particular, in carrying out their activities, companies must achieve and maintain over time a balance between the flow of revenues from sales and the stream of costs incurred through the purchases necessary, through developing economically efficient performance.

In the perspective of this study, the link between risk and cost assumes that the revenue stream is basically sufficient against the costs associated with the dynamics of business and market conditions, as well as with variable requirements of remuneration of factors of production both qualitative and quantitative, that are variously bound to the business, in accordance with the changing economic outlook (Ferrero, 1969).

3 One possible form of mitigation of business risk through collaboration: the network contract

The motivations that drive companies to engage in business collaboration are complex and complicated. In particular, we can summarise as the main reason the search for conditions of greater economic efficiency and obtaining greater bargaining power in the market and in the environment in order to improve their balance over time. We assume that collaborating networking companies intend to put in place a series of initiatives that propose the improvement of their economic position through an expansion process based on collaboration while maintaining their legal and economic autonomy, and not on the collaboration according to optical integration in the group.

One of the reasons that may lead to the creation of forms of network collaboration is exogenous factors that are external to the network. These are collaborations arising from the economic, social and cultural reference of the company,

endogenous elements that come from within companies that belong to other networks (Passaponti, 1975).

The amount of resources available (structural, human and knowledge), the market power, the progress and the automation of manufacturing processes, the need for more financial resources, the availability of results of scientific research or of commercial type investigations and the search for new markets are examples of factors that lead to inter-company collaboration also favouring, among other things, diversification of product range with frequent entry into new sectors (Ruffolo, 1967).

Industry collaboration is also an example of how companies can act to put in place a series of events intended to reduce risky behaviours that may be carried out in the future, not just because the partnership aims to act on the double front of achieving revenues and a more flexible production capacity but also in terms of sharing them and making costs and charges related to the acquisition of inputs flexible and elastic, that in other cases would be considered rigid and fixed (Dezani, 1971). From this vantage point, the firms involved in forms of collaboration propose, therefore, to share part of their business risk with a "subject" understood not as a separate legal entity but merely as a centre of allocation of rights and obligations by sharing the risk associated with specific activities with other network partners.

In 2009, specific regulations were introduced into Italian law to support inter-cooperation by formalising the company contract network. Specifically, it is an agreement under which "several entrepreneurs undertake to cooperate in order to increase both individually (and) [...] collectively [...] their innovative capacity and competitiveness in the market".

The network partners commit to each other, based on a common framework program, to work in predetermined forms and contexts with regard to the management of their companies, exchanging information of an industrial, commercial, technical or technological nature or jointly creating one or more activities that are part of each company's business objective. (Rosenfeld, 1996; Gavirneni et al., 1999)

The business networks are used to make both forms of coordination "to read", where the economic activities of each company are coordinated independently, through drawing up a contract and, for more intense forms of coordination, in which participants implement a joint economic activity, or a phase or specific project, within the production process.

The network contract is seen, therefore, as a formalised form of cooperation through which it is intended to improve the operational, economic and financial performance of each partner (Huxham, 1996; Bititci et al., 2004), as well as presenting itself as a useful tool to reduce the possible negative consequences of risky assets through the sharing of certain activities and their effects.

In a network contract the equity risk is not configured because there is no provision of equity with the result that there is no risk of non-return (non remuneration) of the capital provided as equity.

If, on the one hand, it is true that participation in the network contract does not qualify as provision of venture capital, it is also true that agreement to the network contract determines the chance to compete, like the capital of the transferring decision making and activities undertaken within the network. These reasons, however, are not considered sufficient to configure the risks associated with participation in a network such as risks to the asset, and in particular low income, since already highlighted is the lack of risk capital in the strict sense.

In support of the statement, it emphasises, moreover, that what is being discussed is not a corporate entity but a simple contract (network contract) used to regulate a common task by several companies that jointly contribute to the determination of common initiatives.

No equity risks resting in the hands of those who are not owners of the company is bound by constraints of a different type from the transfer of equity capital. It is, in fact, the risks affecting their own production of future wealth in ways different from those that characterise the constraint of full risk that can result in a failure to obtain wealth.

For these reasons, the risks weighing on companies within the network contract, relating to the same contract, have an additional capital nature. In view of the costs incurred for common network activities, there is no certainty of achieving any economic benefit in terms of higher profits.

The risk, therefore, in the network contracts can be analysed from two points of observation. On the one hand, the network collaboration gives rise to new risks for the partners and, on the other, the collaboration has as its main objective the contrast of adverse events associated with risky assets. In particular for network contracts, the positive effects on risk mitigation resulting from joint activities are greater than the negative effects of risks arising from the decision to create partnerships in the network.

In the case of network contracts, the aim of the creation of the partnership is not to eliminate the general business risk, because it is an unavoidable risk inherent in the business activity, but to mitigate particular risks that contribute to the breakdown of the overall risk of the company.

In particular, through participation in network contracts they will seek to mitigate the negative economic consequences arising from specific business risks. Among the actions that can be taken to eliminate the risks, preparatory measures and intervention have to be taken that are intended to create a generic company's ability to react to risky events that may occur in the future. As part of this general attitude of the company to respond to and neutralise their effects, a series of measures can be implemented that are designed to address the business risks by seeking a proper balance between the elasticity of the structure of applications in line with market expectations and rigidity of the corporate structure that comes naturally to every business unit.

In this area, actions can therefore be taken that are designed to act on the formation of the revenue or on cost containment.

The shares of revenues tend to act on the elements that can lead to ups and downs in the revenue stream. In other words, a series of activities designed to stabilise the economic flow resulting from sales may need to be implemented. Decisions can be taken that are designed to make the company's offer more flexible so they can be configured:

- diversification of production;
- access to new markets.

Sector diversification, geographical reference and categories of customers represent a number of examples intended to act in this direction.

In particular, the offer often grows with the network and the ability to compete without there being an increase in the volume of activity that accompanies the expansion of individual companies. Development of activity within certain limits can be achieved by using the existing unused capacity. Moreover, in the long term to support certain production volumes, new investments must be made that are reflected in the structural dimensions of the companies growing them and causing an increase in the return over the investment period. Such production choices increase the fixed costs rather than the variables by configuring a situation that is ill-suited to the demanding requirements of a production that is elastic and adaptable to the changing environment and market conditions.

Intervention in terms of costs tends to mitigate the rigidities that characterise the production structure by attempting to transform inputs into rigid elastic inputs, the use of which changes in response to changes in demand. When continuing with the action intended to impact on the costs, it is necessary to consider the willingness to share with others the charges involved in transactions for which individual companies would lack the resources to commit, or because they are considered too cumbersome and risky in relation to the benefits that can be reflected in the overall revenue (Williamson, 1975; Hart and Moore, 1990). Manoeuvres intended to act on the costs and revenues are increasingly integrated and combined with each other, bringing out the complex nature of business management as well as providing for the management and mitigation of business risks.

The creation of a network contract supports the pooling of resources, whether financial, technical or human, in order to obtain advantages in terms of cost containment for investment and running costs, as well as for controlling risks and timing performance of certain activities and allowing access to the results in the research and development activities not otherwise accessible to businesses, especially SMEs (Mezgár et al., 2000; Antonelli et al., 2006). From this observation profile, containing and mitigating the risks can be understood as the ability to develop economies of scale, accompanying companies towards the efficiency of production processes, logistics and trade.

In the context of the network contract, economies of scale are achieved particularly if:

- plants are increased in size;

- unit costs reduce if the quantity of production increases, due to increased management and worker efficiency;
- funding is obtained with greater ease;
- investment in advertising and marketing is increased.

These activities together offer the reduction and dispersion of business risks. The network aims, therefore, at a limitation of the risks, especially for new businesses, because it makes the separation between the resources invested in the network business and the assets of their members.

Ricciardi (2010) states that under the economic profile of the companies, due to a combination of factors such as economies of scale, networks and learning as against process innovation show an overall reduction in operating costs compared to those incurred in the case where production is carried out in full within each individual company. In this respect, there is a lower incidence of fixed costs resulting in a more flexible cost structure with positive effects on operational risk and, consequently, the company's value. In this situation also, it determines a reduction of the financial risk as it reduces the financial needs of businesses. The share of investments also establishes a division of risk, or at least a reduction. In addition, it also detects faster implementation of the result of the cooperation, producing a risk-spreading technology.

4 The analysis

The objective of this study is to evaluate the ability to understand whether the particular risks associated with the business activities can be mitigated by a strategic cooperation achieved through inter-network contracts. The research aims to analyse the content of the typical, existing Italian network contracts, in order to assess whether the mitigation of specific risks is one of the factors that encourage entrepreneurs to participate in these forms of association.

In particular, through accurate analysis of network contracts, we intend to identify specific categories of specific risks that, through collaboration, network contracts want to tackle. By way of example, some types of risk mitigated with the network contract include commercial, financial, environmental and lack of innovation.

The analysis in question proposes, therefore, to understand how the desire to counteract the negative effects arising from a specific risk represents the impetus for entrepreneurs to concede some of their autonomy in order to mitigate risk and improve, through collaboration, the overall performance of their businesses. In other words, it is necessary to appreciate the natural human inclination for finding solutions that can reduce or even eliminate the risks inherent in any economic activity.

Therefore, our aim is to address the following research questions:

Q1: Are the risks specific to the undertaking mitigated through strategic cooperation such as network contracts?

Q2: Among the aims of the network contract, is there is a specific interest in mitigating business risk?

The study of risk mitigation of relations and forms of cooperation was also carried out by analysing the content of network contracts.

The main steps followed for the development of this project are the following:

- definition of a random sample of analysis;
- collection of actual contracts drafted for each network of selected enterprises;
- study and evaluation of the content of such network agreements;
- systematic analysis, representation and formalisation of the data collected.

The exponential growth of the network agreements – in March 2016, 2699 network contracts are active, involving 13,518 enterprises – has imposed the need to formulate a test sample, given the impossibility of analysing too large a universe in terms of time and necessary resources. It is therefore considered reasonable to restrict the universe of reference by extracting a random sample which offers the advantage of being bias-free (technically, bias or distortion) and allows rigorous assessment of the reliability of the results or, in other words, it allows accurate verification of the relationships between the results provided by the sample and the characteristics investigated in the network contracts population that make it up (Anderson et al., 2010).

To this end, a random sample of 100 network contracts has been extracted through screening, based on the bibliographic database of the Register of Companies of the Italian Chambers of Commerce.

The sample comprised 100 randomly extracted network contracts involving a total of 585 companies, which shows an average number of 5.85 member companies.

The analysis of the study sample, by sector of activity of the companies that comprise it, highlights the results contained in the following table.

Table 1 The sectors of activity of the companies of the sample analysed

Business sector	Number of companies	Percentage of total %
Agriculture	90	15.3%
Trade	60	10.3%
Industry	242	41.4%
Services	166	28.4%
Tourism	17	2.9%
Other	10	1.7%
Total	585	100%

In the relationship between the type of activity carried out by each participant and the work of other network partners to distinguish between horizontal

networks of companies operating in the same field of production or in related areas, and vertical networks between companies linked together according to an optical production or distribution chain also undertaking complementary or interdependent activities, 66% of the networks analysed in the sample falls into the category of horizontal, while the remaining 34% belongs to the vertical model.

The sample considered was therefore able to produce evidence enabling subsequent generalisations about the universe of network contracts. The phases of this research include the application of scientific methodology in the classification of observed facts and integration between inductive and deductive analysis (Mill, 2013; Canziani, 2014), enabling the identification of common traits to define the characteristics of networks and general principles that characterise the collaborative tool analysed.

The decision to carry out probability sampling provided each network contract with the same chance of being chosen (Gobo, 2004) to be part of the sample, due to the randomness of the extractions made through the use of random number generation software. Each extract number was combined with the network contracts listed by progressive date of signing of the creation of the network contract.

This method provides for the selection of the sample according to convenience criteria or practical reasons, for example because the elements to be sampled are more easily accessible, or for cost reasons, or because in a certain area there are volunteers available, etc. A sample of convenience selected with these criteria, although it has the advantage of speed, but subject to a strong bias, can provide little reliable data and can be easily spoiled by systematic errors.

The sample component was analysed in accordance with four different degrees of analysis:

1. explicit presence of risk mitigation as the main reason for entering the network contract;
2. explicit reference in the strategic objectives or network program of the will to mitigate the negative consequences of a risk by means of the express indication of the "risk" word;
3. presence in the strategic goals of any intent to cover a risk, even if not expressed clearly;
4. reading of the strategic objectives in order to classify any risks that are intended to be combated by signing the network contract.

With reference to the degrees of analysis above, the following considerations are highlighted.

None of the 100 network agreements taken as a sample and analysed presents as the main motivation of the collaboration the wish to combat, or at least reduce, a particular common corporate risk to all network partners.

In relation to the explicit reference in the strategic objectives or the network program to some joint initiative designed to alleviate the negative consequences

of a risk with the express indication of the word “risk”, the evidence produces discouraging results.

Among the 100 agreements analysed in only one situation, the strategic objective reveals signs of a clear and expressed will to engage in forms of cooperation in order to counteract a risk.

Having noted the almost complete absence in the strategic objectives of the network contracts of any reference to the desire to reduce the negative consequences of a particular risk of the business, a check has been made for any claim that suggests a willingness by network partners to undertake joint actions to mitigate the specific business risks. This relates to activities and actions that are not expressly performed, and content analysis has changed from objective to subjective. This assessment was a discretion on the part of the writer. Reading and analysis of the strategic objectives and the network program of the contracts making up parts of the samples were, therefore, subject to evaluation by the research team highlighting the following results.

Table 2 Shares “not obvious” risk mitigation in the strategic objectives of the network contracts

	Network contracts	Percentage
There are no joint activities in the strategic objectives that refer to risk mitigation actions	6	6%
In strategic objectives there are common activities that refer to risk mitigation actions	94	94%
	100	100%

In 6% of the cases analysed, among the reasons that led the partners to networking the presence was found of reasons that can be traced back to some initiative to counter specific risks associated with its activities.

In the remaining 94% of the sample, however, the partners highlighted, among the reasons that led them to build the network, the will to engage in common activities, the effects of which allow mitigation of business risks by sharing with each partner part of the negative events associated with the conduct of specific activities.

The analysis is conducted in terms of actions to mitigate the risks associated with the trend of revenue volumes, with reference to the control both of management and of production costs.

Table 3 Common activities designed to mitigate the risks on the revenue side

Type of activity	Number of contracts *	Percentage of total contracts characterised by risk mitigation actions
Diversification in production	17	18.1 %
Diversification in sectors/markets	62	66.0 %

*Multiple answers are possible.

Table 4 Common activities designed to mitigate the risks in terms of costs

Type of activity	Number of contracts *	Percentage of total contracts characterised by risk mitigation actions
Research and Development	48	51.1 %
Production	24	25.5 %
Business/Promotional	63	67.0 %
Logistics management	5	5.3 %
Training	8	8.5 %
Environmental protection	4	4.3 %

*Multiple answers are possible.

5 Findings and discussion

The data emerging from the analysis of the extracted sample allows a trend to be highlighted in terms of common network activities able to mitigate corporate special risks and to provide an initial framework about the link between the network contracts and the general enterprise risk which coordinated a system of specific risks.

In particular, the multilevel analysis performed indicates that the mitigation of specific risks does not represent a widespread motivation that is obvious and exclusive and that leads to the establishment of network contracts. Only one contract mentions the mitigation of specific risks as an element relevant to the decision to enter into the network agreement. In 94% of cases analysed reasons are still present that may be attributed to the partners' intention to achieve a mitigation of specific risks through collaboration. The reasons can be oriented to improve the volume of sales or to carry out actions for cost volume control and limitation.

In terms of actions to mitigate risks related to fluctuations in the revenue flows, as in 66% of the cases analysed, the partners aim to counter the risks associated with the inability to diversify productive sectors or market outlets individually. Less significant, however, are the case studies in which the mitigation of

risks on the revenue side aims to achieve product diversification: only 18% of the analysed contracts show this motivation.

In terms of the motivations that drive the network partners to establish collaborative agreements with the aim of implementing measures designed to absorb the negative consequences of actions that can create effects on the cost structure of the company, the following evidence emerged.

In 67% of the contracts analysed containing specific risk mitigation measures, it is shown that the partners plan to carry out joint initiatives in commercial or promotional areas with the intent to achieve synergy and better performance in terms of sales skills. In about 51% of the contracts analysed however, companies are focused on the implementation of joint research and development activities aimed at containing the risks related to an activity that typically has high uncertainty about the results achieved compared to initial investments. In particular, among the 48 contracts in which this purpose emerges, in 6 agreements the common activities of research and development - with their positive economic effects in terms of spreading risk - is the only motivation that prompted the partners to enter the network contract. In approximately 25% of the cases analysed, joint activities intended to improve the performance in production by proposing to contain their costs. In a small number of contracts, more residual motivations emerge, intended to mitigate the specific risks associated with the management of specific business tasks, such as logistics management, employee training and environmental protection.

However, as regards a first general overview of the activities of network contracts, by empirical evidence emerging from the sample, the formalisation of the cooperation agreements through network contracts is not due to a sole desire to distribute, among the various partner, costs of operational activities and related specific risks nor represent a new and different methods used to counter the company specific risks.

6 Conclusions

Generally in the world of network contracts, the findings of the present analysis confirm the role of the network contract as an instrument designed to regulate the conduct of joint activities aimed at achieving the following common results:

- operational efficiency through action to streamline the value chain activities (Bartezzaghi, Rullani, 2008);
- enhancement of the knowledge possessed by each partner through sharing it with the other partners (Ricciardi, 2006);
- access to tangible and intangible resources under more advantageous conditions than common purchases, including those of a financial nature (Scalera, Zazzaro, 2009);

- internationalisation enabling new market segments to be reached (Resciniti, 2009).

Previously recognised business theory analysed, therefore, that company-specific risks are mitigated through strategic cooperation instruments such as network contracts. However, the analysis of the content of the contracts, in fact, suggests a more detailed reflection. The network contracts, in reality, do not seem geared solely to mitigating business risks specifically but are the expression of the rationalisation initiatives and much wider targeted optimisation in order to share material, human and financial resources, intended to achieve economies of scale adapted to reducing the operating costs of the individual partners.

In other words, the distribution of risk between the partners and the consequent mitigation of company specific risks associated with the possible negative effects of normally operating enterprises represent, therefore, an incidental element meriting further assessment and are not the main proceedings under which the parties will develop a form of strategic collaboration network.

Actually mitigating specific risks – part of the broader corporate risk system – has a positive effect on the evolution of the company, enabling improved overall performance due to the establishment of the best operational conditions that are reflected positively on the economy of management, by thus enabling alleviation of the general business risk.

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Social and environmental risk disclosure in sustainability reporting. What does preliminary evidence suggest?

Authors

- *Laura Corazza, Research Fellow, laura.corazza@unito.it, Department of Culture Politics and Society, University of Torino, 100 Lungo Dora Siena – Torino (Italy)*
 - *Simone Domenico Scagnelli, Associate Professor, simone.scagnelli@unito.it, Department of Management, University of Torino, 218 bis Corso Unione Sovietica – Torino (Italy)*
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Recently, the new European Directive on non-financial disclosure, the American Sustainability Accounting Standard Board (SASB), the Global Reporting Initiative GRI G4 and the International Integrated Reporting Council (IIRC) have stressed the importance of extending the disclosure of ethical, social and environmental risks inside social and environmental reporting. Institutional pressure has been notably increased among organisations, especially those already recognized for their sustainability practice. Given such challenges, the reaction of corporations in providing additional sustainability risk disclosure shall be examined. Our study aims at addressing such issues from an exploratory perspective. We based our analysis on a sample of organisations that in accordance with the new GRI4 guidelines issued related disclosure in 2015. The study examined the reports and provided a risk disclosure metric to be analysed against other relevant variables. Consistently with the recent literature, we found that sustainability leaders provide a significant volume of reporting and that the quality of risk disclosure is significantly influenced by their international presence and their sustainability reporting experience. However, if we consider specific risk related areas of disclosure, only few of them seems to consistently link strategy, measures and disclosure. Moreover, organisations that face high social and environmental risks because of their business sectors behave differently. In conclusion, we aim at demonstrating the level of sustainability reporting usefulness as an external tool for banks, investors, rating agencies, and all the stakeholder interested in those internal processes and mechanisms which can affect corporate performances against risk avoidance.

Keywords: social and environmental risks disclosure, sustainability reporting, GRI4.

JEL Classification: M14, M49

1 Introduction

Accounting scholars and social and environmental researchers have deeply discussed the role of voluntary sustainability and CSR related disclosure, however, few of them have focused on the examination of risk disclosure required by a large set of new reporting guidelines. In order to reduce the risk of corporate “window dressing, innovative research and predictive models are needed. The risk that corporations might produce reports that will be slight, unreal, or “vague semblance of something” especially when the reporting guidelines are requiring very detailed information about risk disclosure, is indeed too high to face.

These issues call for attention and scrutiny, and therefore, our paper aims at providing an exploratory study about the impact of the new guidelines in sustainability reporting with specific attention to risk disclosure.

2 State of the art

Since the last two decades, an increasing number of corporations and businesses are embracing and getting interested on social and environmental issues and sustainability. However, recent business scandals and environmental disasters are emphasizing dislocations with the current model of capitalism and the need of understanding the inherent social nature of markets as well as a better way to forecast and mitigate risks.

A number of sustainability guidance bodies, as well as new standard setters are acting significantly in shaping the boundaries between voluntary and mandatory disclosure in such areas. For instance, the 2014/95/EU Directive mandates larger companies to include social and environmental information in their reports by the end of 2016. In the US, since July 2011 the Sustainability Accounting Standards Board (SASB) provides mandatory industry guidelines for the disclosure of sustainability issues in mandatory SEC companies’ filings. Consistently, in South Africa, the Johannesburg Stock Exchange requires the adoption of integrated reporting since 2011; and several other Countries and Region have followed such behaviours.

If we look at the literature, environmental risk is the area which received most attention from scholars (Matten, 1999; Weinhofer and Busch, 2013). On the other hand also social risk and its effect on firm reputation has been object of several studies (Orlitzky and Benjamin, 2001; Dion, 2013)

Indeed, the links between sustainability and risk management have been addressed by using a precautionary principle approach which account for risk evaluation and evaluation (Som, Hilty, & Köhler, 2009). For instance, an increasing attention has been recently devoted to the sustainability of the supply chain and the issues that can arise, especially within developing countries’ operations (Klassen and Vereecke, 2012; Graetz and Franks, 2015, O’ Sullivan and O’ Dwyer, 2015.). Furthermore, Dobler et al. (2014) were among the first to investigated the relationship between environmental performance, environmental risk and

risk management by finding negative association between environmental performance and environmental risk.

On the other hand, a relevant number of studies focused on the way sustainability disclosure has been carried out by organisations and how guidelines such as those issued by the GRI are applied (Marimon et al., 2012; Legendre and Coderre, 2013; Vigneau et al., 2014, Knebel and Seele, 2015, Michelon et al. 2015).

However, although sustainability disclosure has been broadly studied and investigated, there is little evidence examined risk management related contents within corporate sustainability disclosure practices. It is timely and important to understand how organisations disclose and report about risks. Specifically, the motivation of our study relies in findings preliminary answers to these questions: Are there explicit or implicit references to corporate strategy, tools or procedures within risk disclosure? To what extent the information provided illustrate the attention of the company towards risks and impacts?

3 Research Design

3.1 Sample selection

A sample of sustainability reports has been examined and analysed. The sample has been selected among multinational and large organisations located in Italy that in 2015 have published a sustainability report according to the new GRI4 guidelines. Banks and insurance companies have been excluded, given that financial services organisations are subject to specific financial and market risks, thus resulting to hinder comparability between other industries.

We have selected the GRI4 guidelines as they result to be a substantial effort by the Global Reporting Initiative (GRI, 2014) in order to provide a comprehensive framework, resulting to be relevant and significant for risk management strategies and related disclosure, and not only in the environmental, social and sustainability areas. GRI G4 introduces the materiality concept, requiring organisations to report only what matters and where it matters. Moreover, GRI G4 requires an organisation to determine its boundary during the materiality assessment. Therefore, lack of impact is the only thing that can exclude an entity from its organisation's boundary within GRI G4. Additionally, scope becomes a question about impact, risk and opportunity, and an organisation's boundary might be different for each material topic because the entities the organisations will affect s may be different for every reporting topic.

Our final sample is composed by 30 organisations which have been selected consistently from the GRI sustainability database. Table 1 provides a breakdown of the sample composition by industry and type of disclosure.

Table 1 Sample breakdown by industry and reporting approach.

<i>Organisation Name</i>	<i>Industry</i>	<i>Type of Disclosure</i>	<i>Reporting period</i>
Atlantia	Construction & Real Estate	Integrated Report	2014
Autogrill SpA	Food & Beverage	Sustainability report	2014
Barilla	Food & Beverage	Good for You, Good for the Planet	2014
CNH Industrial NV	Automotive	Sustainability report	2014
Colacem	Construction Materials	Sustainability report	2014
Costa Crociere	Tourism/Leisure	Sustainability report	2014
Edison	Energy	Sustainability report	2014
Engineering	ICT	CSR report	2014
ENI SpA	Energy	Annual report	2014
Expo Milano 2015	Public Agency	Sustainability report	2015
Fastweb	Telecommunications	Sustainability report	2014
FCA Group	Automotive	Sustainability report	2014
Feralpi Group	Metals products	Sustainability report	2013-2014
GTECH plc	Entertainment	Sustainability report	2014
Hera Group	Energy/Utilities	Sustainability report	2014
IGD	Real Estate	Sustainability report	2014
Italcementi Group	Construction Materials	Sustainability Disclosure	2014
Juventus	Tourism/Leisure	Sustainability report	2015
Lavazza	Food & Beverage	Sustainability report	2014
Mondadori	Media	Sustainability report	2014
Piaggio Group	Automotive	CSR report	2014
Pirelli Group	Automotive & Energy	Annual report	2014
Prysmian Group	Equipment	Sustainability report	2014
SABAF	Metals Products	Annual report	2014
Salini Impregilo	Construction	Sustainability report	2014
Snam	Energy/Utilities	Sustainability report	2014
Telecom Italia	Telecommunications	Sustainability report	2014
Terna	Energy/Utilities	Sustainability report	2014
University of Torino	Higher Education	Sustainability report	2014
World Duty Free	Retailers	Sustainability report	2014

3.2 Data Analysis

According to the content of GRI G4-2, G4-14 and G4-EC2 we have prepared a checklist of relevant risk disclosure items. Consistently with previous literature in the field (Sutantoputra, 2009) such items has been scored and weighted in order to achieve a total maximum final score of 10, this score is the proxy for risk disclosure sustainability quality in our study (*SDR score*). Once the final checklist has been prepared, we used it to carry a detailed content analysis of the collected reports (Duriau et al., 2007).

Specifically, in the preliminary stage of our study, we applied descriptive statistics to address the relevant features of our sample. Subsequently, we applied multivariate statistical analysis to understand which items and related variables were significant. Specifically, due to the limitations of some data analysis techniques (i.e. Multiple regression) and the size of our sample, we adopted a Structural Equation Modelling (SEM) (Haenlein and Kaplan, 2004). SEM is a statistical technique that focuses on the analysis of variance, it is designed to simplify the relationships among the variables in order to define and find significant predictors and influences on some endogenous variables of study.

Specifically, there are two common types of structural equation modelling, namely Covariance-Based SEM (CB-SEM) and Partial Least Squares (PLS-SEM). We decided to apply PLS-SEM because, if compared to CB-SEM model resulted to be more suitable for our data. For instance, PLS-SEM methodology can be used when there are no assumptions about data distribution, applications have little available theory, sample sizes are small, and predictive accuracy is paramount (Bagozzi, 1988; Hwang et al., 2010; Wong, 2011).

We used SmartPLS 3.0 software (Ringle et al., 2015) to estimate the path model by means of empirical data. To validate the properties of a construct both measurement and structural models have been analysed simultaneously.

4 Findings and discussion

The first preliminary outcome of this study, is the acknowledgement that the organisations included in our sample, consistently selected from the GRI database, are disclosing sustainability information by different means of corporate report, even if they are all based in Italy. The majority provide such information by issuing a sustainability report, however, a slight minority, and specifically those who achieved several years of experience in sustainability reporting are now including such information in their “financial” annual report. Another slight minority provide sustainability disclosure within an integrated report according to the International Integrated Reporting Council guidelines (IIRC).

A great majority of the organisations in our sample belong to the Energy/Utilities sector, indeed an industry that has often been challenged by its environmental and sustainability outcomes. Another interesting finding is that all the organisations selected are private corporations with the exception of the Univer-

sity of Torino, a public university, resulting to be the first in Italy to have issued a sustainability report according to GRI4.

The average organisation produces a sustainability document which is 150 pages long and it is written in English, however, there are some organisations whose reports are just 18 pages long or just published in Italian, for instance 7 out of 30 (we accounted for the ones linked via the GRI sustainability database).

The majority of the sample (66%) state a “Core” accordance with the GRI G4 guidelines, while a minority state a “comprehensive” accordance, with one corporation not stating anything about its level of adherence. Only 9 organisations have used service provided by GRI in the preparation of their report, and mainly in the areas of materiality disclosure and content indexing.

The presence of an external assurance provider is outlined by the majority of the sample, with a preference for the service of Big 4 accounting firms. However, for the majority of such organisations, the external assurance level has been only described as limited or moderate. Table 2, provides information about the nature of the external assurance provider involved.

Table 2 Number and typology of external assurance provided.

External ASSURANCE	Type of Provider			TOTAL
	Big 4	Quality Cert.	Small Practice	
YES	17	2	3	22
NO	-	-	-	8
TOTAL sample				30

A minor amount of organisations, just 3 of them, requested the opinion of a group of stakeholders or experts for the preparation of their disclosure.

In addition to GRI G4, if we look at further reporting compliance we found that on the one hand, the most reports stated compliance with UNGC (United Nations Global Compact), a sustainability framework for businesses, whose principles relate to areas such as human rights, labour, the environment and anti-corruption. Interestingly, on the other hand, none of the organisations in our sample adopted the sustainability framework developed by the International Finance Corporation (IFC), an entity which is part of the World Bank Group. A large number of organisations resulted to be compliant with CDP’s (Carbon Disclosure Project) reporting framework as well as the ISO 26000 guidance on social responsibility.

Figure 1 provides a chart outlining the guidelines/frameworks adopted by the organisations in our sample, as well as the presence of the opinion from a stakeholder or expert panel.

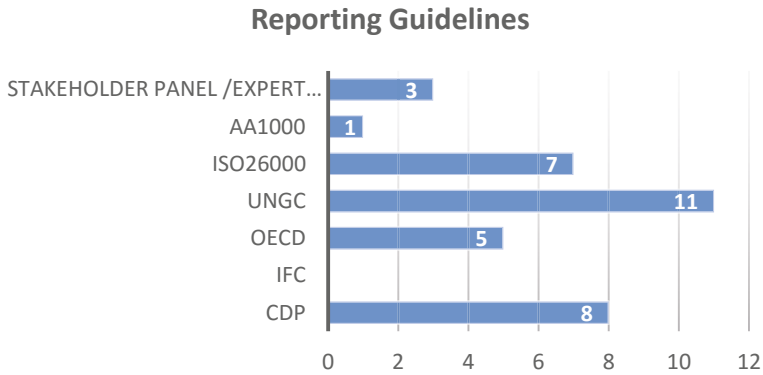


Figure 2 Reporting Guidelines and opinions.

The content analysis of the reports allowed for the computation of a Sustainability Risk Disclosure Score (SRD score) according to the content items presented in the previous section. We analysed the Shapiro-Wilk test for normality, and the *SRD score* resulted to be negatively skewed, and therefore not normally distributed.

The descriptive statistics of the *SRD score* together with the other relevant variables included in the multivariate analysis are provided in Table 3.

Table 2 Descriptive statistics of the main variables of the study.

Variable	Min	Max	Mean	Std. Dev.
<i>SDR score</i>	0	10	6.72	1.25
<i>External Assurance</i>	0	1	0.73	0.45
<i>Nr. of total assured reports</i>	0	13	4.34	2.34
<i>International Presence</i>	0	79	4.24	15.23
<i>% of International revenue</i>	0	0.87	0.13	0.34
<i>Total Years of sustainability reporting</i>	0	15	6.45	2.43

Specifically, we developed a SEM-PLS model according to the relevant features arising from the study. Importantly, the model tested for the effect of the presence of external assurance, international presence, and importantly sustainability experience on the level of risk sustainability disclosure (measured by the *SRD score*), by moderating/controlling for the effect of the industry and level of profitability (ROA).

The analysis of the different variables resulted to have high loadings on their respective construct confirming convergent validity. Moreover all items had low

crossloadings which verified discriminant validity. Additionally, composite reliability indices of all the constructs exceeded 0.8 (Nunnally, 1978) and the Average Variances Extracted (AVE) from the manifest indicators were all higher than the recommended value of 0.5 (Chin, 1998). Overall, the PLS-SEM results attested discriminant validity, convergent validity and reliability of the analysed constructs. Table 3 provides the different indicator loadings, reliability and latent variables' composite reliability and average variance extracted (AVE) scores. The resulting model and its paths are provided in Figure 2.

Table 3 PLS-SEM Variables, analysis of Reliability and Validity scores.

Latent Variables	Indicators	Loadings	Indicator Reliability	Composite reliability	AVE
International Presence	<i>Countries of presence</i>	0.935	0.874	0.8124	0.544
	<i>% of International Revenue</i>	0.815	0.664		
Sustainability Experience	<i>Total Years of Sustainability reporting</i>	0.900	0.811	0.8675	0.6876
	<i>Nr. Of pages</i>	0.785	0.616		
External Assurance	<i>Presence of External Assurance</i>	0.766	0.587	0.9139	0.6393
	<i>Nr. Assured reports</i>	0.753	0.567		

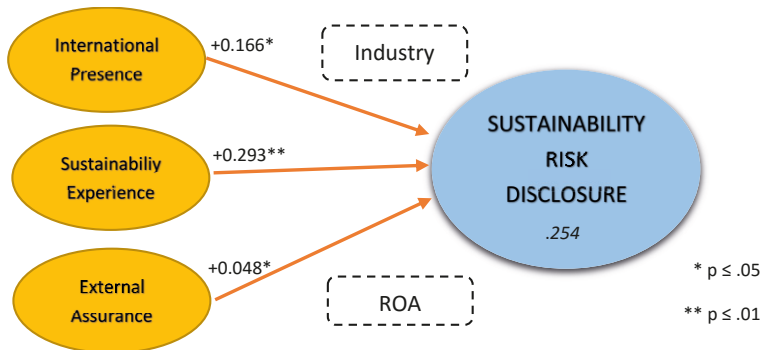


Figure 2 Model paths and coefficients for Sustainability Risk Disclosure.

The model presented in Figure 2, highlights that the latent exogenous constructs significantly explain more than 25% of the variance of our Sustainability Risk Disclosure score (adjusted R² .254). Specifically, the presence of External Assurance does not have a significant effect on the SRD score, while both Inter-

national presence (coefficient of +0.17, $p < .05$) and importantly Sustainability Experience (coefficient of +0.29, $p < .01$) have significant positive influence SRD Score. In other words, more are the number of sustainability reports published during the last twenty years and more likely the organisation could provide higher quality sustainability risk disclosure, the same applies for the international presence which positively affects the level of risk disclosure.

Finally, controlling for industry effects and financial performance of the organisation (average of ROA) didn't provide any significant influence on the PLS model. The latent variables defined in the PLS-SEM model resulted to be discriminant valid, this test has been carried out by checking if the square root of the variables' AVE is larger than the correlation scores between the other latent variables; (Fornell and Larcker, 1981); Table 4 provides the related results of this test.

Table 4 Discriminant Validity Analysis of the PLS-SEM model latent variables.

	International Presence	Sustainability Experience	Assurance	Sustainability Risk Disclosure
International Presence	0.738			
Sustainability Experience	0.074	0.829		
Assurance	0.053	0.061	0.800	
Sustainability Risk Disclosure	0.142	0.276	0.078	Single item construct

5 Conclusions

This paper aimed at providing a preliminary contribution in the sustainability and risk management areas of research. Importantly, we addressed the main sustainability reporting features and related risk disclosure practice of a sample of Italian organisations with worldwide operations. Furthermore, we tested which variables influenced their sustainability risk disclosure, by computing a score based on the content analysis of their latest sustainability report. Our findings show that international presence and sustainability experience are important factors contributing to the quality of risk disclosure in sustainability reporting, on the contrary, the presence of external assurance does not seem to affect risk disclosure quality.

Our study is not free from limitations; above all, we need to increase the size of the sample and control for cross-countries behaviours by including, for instance, other European organisations. The collection of further evidences should

relate to the disclosure of risk management tools, the typology of ethical, social and environmental risks that have been illustrated in the reports and the typologies of social and environmental impact forecasts.

Our research demonstrates the level of usefulness of sustainability reporting as an external tool for banks, investors, rating agencies, and all the stakeholders interested in those internal processes and mechanisms, which can affect corporate performance against risk avoidance.

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Predicting financial distress: evidence from Italian troubled debt restructuring agreements

Authors

- Francesco De Luca, Associate Prof., francesco.deluca@unich.it, University of Chieti-Pescara
 - Martina Malorni, Ph.D., martina.malorni@gmail.com, University of Chieti-Pescara
 - Enrica Meschieri, Ph.D., enricameschieri@gmail.com, University of Chieti-Pescara
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This paper focuses on the ability of accounting ratios to predict the financial distress status of a firm as defined by the Italian Insolvency Law of 2006, which introduced the Troubled Debt Restructuring (TDR) procedure in Italian law. Based on a linear discriminant analysis, we formulate the probability of a firm to file for TDR in one year, as well as other quantitative tools that are intended to measure financial health status. We begin with a test of Altman's Z, Z' and Z'' scores for bankruptcy (1968, 1993, 2000) on the listed Italian companies that filed for TDR. The test results are not satisfying for the TDR prediction. Therefore, we introduce a new score formula based on seven accounting ratios and specific coefficients. A confirmative analysis has also been conducted to validate the predictive accuracy of our score formula.

Keywords: Financial Distress Prediction; Troubled Debt Restructuring; Accounting Ratios.

JEL Classification: G33, G34, F37

1 Introduction and research questions

In Italy, a continuous increase in companies' financial distress has been observed because of the global crisis that dates back to 2007. As a result, there is significant growth in the volume of global restructured debt. Remarkably, in the Italian Civil Code and the national accounting standards issued by the OIC¹, specific provisions on debt restructuring were missing. Recently, several significant legal innovations have emerged. The Law Decree March 14, 2005, No. 35 (converted into Law, May 14, 2005, No. 80) and the Legislative Decree January 9,

2006, No. 5 introduced a new tool to manage company crisis: the *Article 182-bis restructuring agreements* (Di Marzio, 2006).

In Italy, the restructuring agreement is defined as “An operation whereby the creditor (or group of creditors) grants a concession to the debtor in financial difficulties, such that otherwise it would not have agreed” (OIC 6, July 2011). This new pre-insolvency proceeding, which somewhat resembles the pre-packaged plan of Chapter 11 of the U.S. Bankruptcy Code (Altman et al., 2013), is a hybrid method that occurs partially out-of-court and partially in-court and permits a corporate reorganization. The focus is on the agreements between the debtor and the creditors (Chen et al., 1995) to provide a “fresh start”. This “fresh start” provides the company with new opportunities to operate in the market, including new out-of-court restructuring instruments that prevent the liquidation of the company. In particular, restructuring agreements allow debtors to negotiate new conditions with creditors, including the reduction of residual debt or the rescheduling of original reimbursement plans. Recently, these instruments have been widely used especially in negotiations with a group of banks.

Although the bankruptcy reform closely follows a legislative process similar to U.S. legislation, several differences arise. The main difference is the *cram down* rule. According to this rule, as used in U.S. legislation, if a class of creditors votes in favour of the agreement in opposition to one or more classes, the debtor can still seek plan approval based on the process of *cram down*. In contrast, Article 182-*bis* does not include this rule, and it charges the Italian Court with formal supervision that includes approving the restructuring plan and verifying its compliance with the law. Therefore, the Italian Insolvency Law appears generally more rigid than U.S. legislation.

Concerning the definition of financial distress, several authors (Altman, 1968; Gilson et al., 1990; Wruck, 1990; Gilbert et al., 1990; John, 1993; Johnsen and Melicher, 1994; Turetsky and McEwen, 2001) have stated that a signal of financial distress is an unexpected decrease of cash flows from continuing operations. This decrease could be followed by a reduction of dividend payments, technical or loan default, or Troubled Debt Restructuring (TDR).

We consider TDR an “alarm bell” to firms based on liquidity, profitability, leverage, solvency and activity, and it could be accessed by a firm that faces financial distress to avoid potential bankruptcy. The distinction between TDR and bankruptcy does not appear well defined in the current quantitative models. Several authors have forecast corporate bankruptcy and/or TDR procedures and represented them as similar events (Beaver, 1966; Ohlson, 1980; Zmijewski, 1984). Other authors have focused on specifically designed methods to predict financial distress and TDR as a consequence (Gilbert et al., 1990; John and Vasudevan, 1995; Hill, 1996; Turetsky and McEwen, 2001).

In this framework, we extend the extant literature by developing a model to predict financial distress and the consequent TDR request. Therefore, our observations and data collection are focused on the period before the request rather than after its homologation by the Court (Beaver, 1966; Altman, 1968, 2000; Ohlson, 1980; Zmijewski, 1984).

Therefore, this study addresses the following research questions:

- 1) Is it possible to estimate the probability that a firm will file for the TDR procedure?
- 2) Based on this probability, is it possible to create a simple index that describes the financial equilibrium trend by using historical data?

Specifically, we investigate if the accounting ratios introduced by Altman (1968) can forecast the financial distress status of companies.

Several studies have adopted Altman's Z-score model and its revised versions Z' and Z'' (Altman, 1993; Altman, 2000) to explore their ability to predict bankruptcy across European and outside European entrepreneurial contexts and across different industries (Hayes et al., 2010).

Some of these studies have confirmed Z-score validity and its prediction ability. At the same time, other studies have also raised doubts concerning its applicability to other contexts and emphasized the need for its updating according to a new time period and different industries (Begley et al., 1996; Lifschutz and Jacobi, 2010).

Particularly, there are no prior studies on the Italian context with the exception of Altman et al. (2013), which focused on adopting Altman's Z-score for Italian companies subject to extraordinary administration. These authors expressed concerns regarding the model's consistency with the specific features of the Italian environment (Altman et al., 2013, 135).

The present study specifically contributes to the debate by developing a new model that can consider the specific features of TDR procedures in the Italian context. To this end, our statistical analysis is directed to complete the list of accounting ratios adopted in Altman's models and then determine new coefficients for them.

The paper shows how Altman's Z-score model applied to our main and control samples of Italian companies provides inaccurate results. This inaccuracy is mainly because the conditions of financial distress of the companies that file for (or are eligible to file for) TDR procedure are different from the conditions of companies that are approaching bankruptcy. Moreover, the Italian entrepreneurial context is specific regarding the prevalent restriction of the ownership of companies and the relevant role of banks in financing companies.

Our empirical analysis is divided in two phases. In the first phase, a descriptive assessment of the distress phenomenon is conducted by using a multivariate discriminant analysis (MDA). Using the accounting ratios, we obtain the scores of a linear boundary for two groups of firms: "distressed" and "non-distressed". These labels depend on whether the TDR procedure has been filed. Then, we estimate a yearly probability that each firm will file for TDR, using Italian data.

Interestingly, these coefficients will be different from those obtained by Altman (1968, 2000) for the same ratios when bankruptcy is investigated. In fact, Altman's formula has been used to explore the potential for bankruptcy. Instead, TDR is a procedure intended to overcome the financial distress of a company and to regain its health and going concern status. In fact, bankruptcy does not consider the possibility of a firm that continues to operate. With TDR, however, Ital-

ian legislators intended to let a distressed company go down a legally protected path to recover its financial equilibrium. It follows that a financially distressed company presents different features from a company in bankruptcy whose equilibrium condition is almost certainly compromised.

For this reason, in this paper, we focused on the specific features that distinguish financial distress and the companies that request (or are eligible for) TDR.

Therefore, in the first phase, beginning with the original formulation of Altman's Z-score, we sought to create a new function to predict financial distress status, through a more contemporary analysis in a rapidly changing business environment. To this end, we consider two new accounting ratios to be introduced in the score formula because they have a significant ability to represent the financial equilibrium of a company. These two indicators strictly focus on the financial equilibrium of a company in the short term, i.e., the current ratio and the quick ratio.

This study shows that our enriched formula can be useful across different industries and results in a reduced margin of error.

In the second phase, we introduce a novel trend indicator, called M-Index, to calculate the predictive effectiveness of TDR probabilities. Our results show that when accounting ratios worsen and companies become distressed, the probability of TDR increases. Interestingly, we notice that, in contrast, the probability trend of non-distressed companies remains constant.

This study should broadly interest researchers, firms, banks and company advisors. This study contributes to the previous literature by developing a new model to make prompt decisions to help financially distressed companies in restoring financial equilibrium.

The paper is organized as follows. In Section I, we discuss a theoretical framework to examine firms in financial distress with a focus on TDR in Italy. Section II presents our sample, methodology and results. Section III offers some concluding remarks.

2 Resolutions for Financial Distress: the TDR procedure

Several authors have defined the term "financial distress". Gilson et al. (1990) and Wruck (1990) stated that a company is in financial distress when its cash flow is insufficient to meet its current liabilities, and it is often resolved through a private workout or legal reorganization under Chapter 11 of the U.S. bankruptcy code. John (1993) describes distress events as points in time when a firm's liquid assets are insufficient to meet the currency requirements of its contracts. Other authors (Gilbert et al., 1990; Johnsen and Melicher, 1994) compared financial distress with the physical status of a company's health and suggested that there are heterogeneous financial distress characteristics associated with events between corporate health and bankruptcy. Turetsky and McEwen (2001) described financial distress as a series of financial events that reflect various stages of corporate adversity. A commonality among all these authors in defining finan-

cial distress is the unexpected decrease of cash flow from continuing operations as a signal of the onset of financial distress, where firms may use the TDR procedure.

According to the TDR literature, a firm that faces financial distress can use several methods to overcome it, such as voluntary restructuring of its operations (Donaldson, 1990; John et al., 1992), restructuring under the protection of the bankruptcy court (Weiss, 1990), and private restructuring (Gilson et al., 1990). Brown (1989), Giammarino (1989) and Mooradian (1994) state that firms resolve their financial distress in Chapter 11, despite incurring additional bankruptcy costs. In Chapter 11, restructuring is preferable to a workout plan when there are a large number of trade creditors (Gilson et al., 1990). The presence of bank debt is positively associated with the success of a workout plan. Chatterjee et al. (1996) stated that firms filing for Chapter 11 reorganization have more trade credit than firms that attempt workout plans. Several authors (Baird, 1986; Bebchuk, 1988, 2000; White, 1989, 1994; Bradley and Rosenzweig, 1991; Jensen, 1991; Aghion et al., 1992; Kaiser, 1996) contend that Chapter 11 is a debtor-friendly process that grants controlling power to management and fails to liquidate a significant number of economically inefficient firms.

In contrast, Aivazian and Zhou (2012) suggest that Chapter 11 reorganizations tend to boost the operating performances of firms that face temporary profitability problems, and they challenge the contention that Chapter 11 is an inefficient debtor-friendly mechanism. Zhang (2010) states that with protection from Chapter 11, a firm may emerge as a new entity that fiercely competes with industry rivals.

According to most of the authors mentioned above, companies that decide to access TDR procedures are in financial distress, which surely represents an adverse situation but is distinct from bankruptcy. This distinction does not appear well defined in the quantitative literature, where several authors developed models to forecast potential business failure in the Chapter 11 framework (e.g., Beaver, 1966; Altman, 1968, 2000; Ohlson, 1980; Zmijewski, 1984). In Zmijewski (1984), financial distress is considered the act of filing a petition for bankruptcy. Considering financial distress as a different phenomenon from bankruptcy and given the recent increase of TDR requests, our formula could be a reliable financial distress model with consistent predictive power. This formula could be essential in today's business environment and could prevent company failure when possibilities for restoration still exist.

Gilson (1990) defined a firm as financially distressed when it is in default on its debt, bankrupt, or privately restructuring its debt to avoid bankruptcy. In his study, Ohlson (1980) classified "failed firms" as companies that must file for bankruptcy, including Chapter 10, Chapter 11 and other bankruptcy proceedings. For these authors, it seems evident that financial distress and bankruptcy are considered similar. In the literature, a recourse either to Chapter 11 or bankruptcy proceedings are considered similar events.

Few authors focus on the methods specifically designed to predict financial distress and the filing for the TDR procedure as a consequence. John and

Vasudevan (1995) create a model to predict when “good” and “medium” quality liquid firms may restructure their debt out-of-court, when “good” quality non-liquid firms may use a pre-packaged solution, and when “lower” quality (liquid and non-liquid) firms may file for Chapter 11. These authors show that the choice of restructuring method depends on the quality and liquidity of a firm. Hill (1996) emphasizes that an analysis of the resolution of financially distressed firms demands a dynamic methodology because the movement to and from financial distress is a dynamic process. Previous studies of distressed firms have tended to use *ex post* sampling techniques that are not representative of a general population of financially troubled firms (Gilbert et al., 1990). Alternatively, Turetsky and McEwen (2001) group financially troubled firms according to an initial signal, the decrease in operating cash flows, and track them across various distress points. These scholars incorporate the techniques of survival analysis to examine firm longevity. Survival analysis longitudinally tracks firms after a decline in firm health through the subsequent occurrence of dividend reduction, default, or TDR.

From a legislative perspective, we notice a clearer distinction. In U.S. legislation, Chapter 11 is a company reorganization procedure focused on the stipulation of an agreement between debtors and creditors to restore the firm after financial distress. On the contrary, Chapter 7 exclusively concerns bankruptcy. We note that in Italian Insolvency Law, this distinction also appears in *Article 182-bis* and *Article 216 et seq.*, respectively. In fact, the TDR designation was inspired by the U.S. Bankruptcy Code.

3 Data and Empirical Analysis

3.1 Sample Description

Our data were acquired from the Milan Stock Exchange list. The data consist of a panel of 50 companies. These companies have been labelled “distressed” (or “non-distressed”) if they have filed for Article 182-*bis* restructuring agreements (or not). The size of the group of “distressed” firms is 20, which are all of the listed Italian companies that have filed for the TDR procedure during our observation period (2003-2012). The control group comprises 30 companies, and it has been selected to be homogeneous with the distressed companies concerning *size* and *industry*. Regarding the control group size, we have selected a larger number of “non-distressed” firms. This status comprises various levels of economic conditions, and small samples could generate “false positive” cases in the subsequent statistical prediction or classification stages.

Given that the Milan Stock Exchange includes 323 listed companies (at the end of 2012), our sample is representative of 15.2% of Borsa Italiana; 5.8% of our representative sample involves *all* listed companies that have filed for Article 182-*bis* restructuring agreements.

The observations cover the entire period from 2003-2012. Although the reform was effective in 2005, we collected financial data from 2003 to observe the trend of companies' ratios before and after the reform.

The data were obtained from the AIDA-Bureau Van Dick database, and the financial reports of both groups of companies are made under the IFRS.

We have computed many accounting ratios for 2003-2012. These ratios are denoted as X_i , $i=1,\dots,7$. In particular, X_1 denotes a measure of the net liquid assets of the firm, which is calculated as working capital/total assets. X_2 represents profitability through retained earnings/total assets. X_3 measures leverage and indicates earnings before interest and taxes (EBIT)/total assets. X_4 shows the solvency of a firm that involves the market value of equity/book value of total liabilities. X_5 represents a standard financial ratio that shows sales/total assets. X_6 is the current ratio between current assets (cash, cash equivalents, short-term receivables and inventory) and short-term liabilities (payables). X_7 is the quick ratio between total liquidity (cash, cash equivalents and short-term receivables) and short-term liabilities (payables).

The longitudinal nature of our approach is motivated by the fact that filing for the TDR procedure is not viewed as an instantaneous occurrence but an ongoing process, which evolves over a considerable period of time. We assume, moreover, that this process provides signals, which allow the forecasting of future financial TDR filings.

Table 1 summarizes the data by industry classification. Although the macro-industry "Health and Food" shows 0 distressed firms, we include this sector to consider *all* the macro-industries in the Milan Stock Exchange.

Table 1 The Industries Classification of the Sample

<i>Industries</i>	<i>N. firms</i>	<i>Distressed (Group 1)</i>	<i>Non-distressed (Group 2)</i>
<i>Consumer goods</i>	11	7	4
<i>Consumer service</i>	9	4	5
<i>Finance</i>	7	4	3
<i>Health and Food</i>	7	0	7
<i>Manufacturing</i>	5	1	4
<i>Oil and Natural Gas</i>	4	1	3
<i>Technology</i>	7	3	4
<i>Total</i>	50	20	30

This classification is the final sample of the firms that filed for Article 182-bis (20) in Italy and the firms selected as a control group (30). The total sample has been partitioned in seven macro-industries, according to Milan Stock Exchange partitioning.

The group "Distressed" comprises the firms that have filed for TDR from 2005-2012.

The group "Non-Distressed" comprises the firms selected by following a stratified sampling scheme (by size and industry), and they are matched with the distressed firms in the same observation period for every industry.

The category "Health and Food" has been included in the analysis to obtain a cross-industry model, even though there are no distressed firms in this category.

3.2 Altman's Z-scores of the Italian sample: main results

By adopting Altman's Z-score and its revised models (Z' and Z'') to the above-described Italian sample, we obtain the following results. As represented in Table 2, more than 50% of the control sample companies were classified between the distress zone and the grey zone during the observation period. In the distressed group, the companies always seemed to belong to the distress zone during the observation period, with a significant percentage between 75% and 90%.

Table 2 Application of Z score on Italian listed firms

DISTRESS SAMPLE				NON DISTRESS SAMPLE		
Year	Insolvency Area $Z < 1,81$	Grey Area $1,81 < Z > 2,99$	Low-risk Area $Z > 2,99$	Insolvency Area $Z < 1,81$	Grey Area $1,81 < Z > 2,99$	Low-risk Area $Z > 2,99$
2012	90%	10%	0%	49.95%	36.63%	13.32%
2011	90%	10%	0%	49.95%	33.33%	16.65%
2010	90%	10%	0%	43.29%	43.29%	13.32%
2009	100%	0%	0%	56.61%	29.97%	13.32%
2008	95%	5%	0%	53.28%	36.63%	9.99%
2007	100%	0%	0%	46.62%	46.64%	6.66%
2006	90%	5%	5%	49.95%	49.95%	0%
2005	75%	25%	0%	53.28%	36.63%	9.99%
2004	75%	15%	10%	43.29%	46.62%	9.99%
2003	75%	15%	10%	49.95%	36.63%	13.32%

Then, we test the Z'-score for both groups. As shown in Table 3, only 5.3% of "healthy" firms belong to the safe zone, and this emphasizes that most of these firms are classified between the grey and the distress zones. On the contrary, the distressed sample demonstrates the same state of health (*distressed*) from the first to the last year of observation. Therefore, the findings from the Z'-score do not seem to reflect the natural evolution of the health status of the companies.

Table 3 Z' score on Italian firms

DISTRESS SAMPLE				NON DISTRESS SAMPLE		
Year	Insolvency Area $Z' < 1,23$	Grey Area $1,23 < Z' > 2,90$	Low risk Area $Z' > 2,90$	Insolvency Area $Z' < 1,23$	Grey Area $1,23 < Z' > 2,90$	Low risk Area $Z' > 2,90$
2012	80%	10%	10%	36.66%	53.32%	9.99%
2011	85%	10%	5%	33.33%	56.66%	9.99%
2010	80%	20%	0%	33.33%	59.99%	6.66%
2009	90%	10%	0%	36.66%	59.99%	3.33%
2008	90%	10%	0%	29.99%	66.66%	3.33%
2007	70%	30%	0%	29.99%	66.66%	3.33%
2006	70%	30%	0%	26.66%	73.32%	0%
2005	55%	45%	0%	39.99%	53.32%	6.66%
2004	45%	50%	5%	26.66%	66.66%	6.66%
2003	45%	50%	5%	29.99%	66.66%	3.33%

The Z''-score should better fit the Italian entrepreneurial context because it is characterized by the stronger relationship between companies and banks. Table 4 shows that, on average, 97% of the distressed companies are classified in the distress zone even since 2003, and it follows that these companies were constantly distressed during the entire observation period. In contrast, more than 80% of the control sample belong in the distressed area. Therefore, the Z''-score also appears to not be useful to describe the health trend of Italian companies from 2003-2012.

Table 4 Z'' score on Italian listed firms

DISTRESS SAMPLE				NON DISTRESS SAMPLE		
Year	Insolvency Area Z'' < 1,75	Grey Area 4,50 < Z'' > 5,65	Low risk Area 5,83 < Z'' > 8,15	Insolvency Area Z'' < 1,75	Grey Area 4,50 < Z'' > 5,65	Low risk Area 5,83 < Z'' > 8,15
2012	95%	0%	5%	83.32%	9.99%	6.66%
2011	95%	5%	0%	83.32%	13.33%	3.33%
2010	100%	0%	0%	83.32%	6.66%	9.99%
2009	100%	0%	0%	79.99%	13.32%	6.66%
2008	100%	0%	0%	79.92%	16.65%	6.66%
2007	100%	0%	0%	89.99%	6.66%	3.33%
2006	95%	0%	5%	79.99%	19.99%	0%
2005	95%	0%	5%	83.32%	16.66%	0%
2004	95%	0%	5%	76.65%	23.33%	0%
2003	95%	0%	5%	76.65%	16.66%	6.66%

We emphasize that for the listed Italian companies that filed for the TDR procedure beginning in 2006 and the control sample companies, the results are not consistent. In fact, the majority of companies in the distressed group have been classified in the insolvency area since 2003 (75% of the sample), and this is inconsistent with the fact that they did not file for bankruptcy until 2012. At the same time, nearly every company does not belong in the healthy area.

Regarding the control sample, the companies are divided among the three areas without any apparent rational reason.

3.3 Methodology

The statistical analysis has been divided in two steps. In the first step, we derive two discriminant functions through multivariate linear discriminant analysis (MDA): the first function is based on the five original accounting ratios (X_1, \dots, X_5) adopted by Altman (1968, 1993); the second function is based on the five original accounting ratios plus the current ratio (X_6) and the quick ratio (X_7).

In the second step, we use the scores of the linear discriminant analysis to estimate the yearly probability of each firm to resort, in the following year, to Article 182-*bis* restructuring agreements. This probability appears to be fairly new in the field of financial distress literature.

A confirmative analysis has been included to assess the predictive accuracy of this probability. To this end, we introduce a simple measure, called *M-Index*, calculated for each distressed firm. This measure is obtained based on the estimated TDR probabilities calculated near the TDR request. This index should signal the likelihood of financial conditions to worsen, and it could also be considered a predictive tool for the TDR request procedure.

3.4 Linear Discriminant Analysis

The adoption of accounting ratios for financial statement analysis is widely recognized for determining the relative strength and performance of companies. Ratio analysis helps to identify trends over time for one company and to compare two or more companies at one point in time. Ratios usually focus on three key aspects of a business: liquidity, profitability and solvency. The reliability of this type of analysis lies in the reliability of the reported accounting numbers. Therefore, if fraudulent policies are conducted in financial reporting, the accounting ratios are misleading. Nevertheless, we assume that the financial reports of the listed Italian companies, which are included in the present observation, are reliable because they are reviewed by auditing firms and by the authority that regulates the Italian financial market (CONSOB).

To conduct a discriminant analysis, we first use the five ratios suggested by Altman (1968, 1993), which are financial ratios specific to bankruptcy studies. Then, we run the discriminant analysis by adding to the previous five ratios the current ratio (X_6) and the quick ratio (X_7). We assume that the variables used to detect bankruptcy play a key role in explaining financial distress. In our specific case, these ratios should have a high discriminant power for the prediction of filing for Article 182-*bis* restructuring agreements. In our study, the companies that filed for TDR have been labelled “distressed”, whereas the control sample companies have been labelled “non-distressed”.

The number of misclassified observations is reported in Table 5 (a) regarding the five original accounting ratios and in Table 5 (b) regarding the new seven accounting ratios based score.

Table 5(a) Multivariate Discriminant Analysis (MDA) with five accounting ratios (X1,...,X5)

MISCLASSIFIED			
Year	Distressed firms 0	Non Distressed firms 1	TOTAL
2003	8 (40.00%)	6 (20.00%)	12
2004	7 (35.00%)	5 (16.67%)	12
2005	7 (35.00%)	8 (26.67%)	15
2006	3 (15.00%)	10 (33.33%)	13
2007	3 (15.00%)	6 (20.00%)	9
2008	1 (3.33%)	6 (20.00%)	7
2009	2 (10.00%)	1 (3.33%)	5
2010	3 (15.00%)	7(23.33%)	10
2011	3 (15.00%)	5 (16.67%)	8
2012	7 (35.00%)	5 (16.67%)	12

This table presents the linear discriminant analysis by using misclassification rates. The discrimination functions have been calculated for each year by using the entire observation period. Table V (a) reports the number of misclassified firms of the linear discriminant analysis from 2003-2012 for the distressed and non-distressed groups based on the 5 original accounting ratios (Altman, 1968, 1993).

Table 5(b) Multivariate Discriminant Analysis (MDA) with seven accounting ratios (X1,...,X7)

MISCLASSIFIED			
Year	Distressed firms 0	Non Distressed firms 1	TOTAL
2003	6 (32%)	4 (14.00%)	10
2004	7 (36.84%)	6 (20.00%)	13
2005	6 (31.58%)	9 (30.00%)	15
2006	3 (15.00%)	10 (34.42%)	13
2007	3 (15.00%)	5 (16.67%)	8
2008	2 (10.00%)	7 (23.33%)	9
2009	1 (5.00%)	2 (6.67%)	3
2010	2 (10.00%)	3(10.00%)	5
2011	3 (15.00%)	6 (20.00%)	9
2012	7 (36.84%)	2 (6.90%)	8

This table presents the linear discriminant analysis by using misclassification rates. The discrimination functions have been calculated for each year by using the entire observation period. Table V (b) reports the number of misclassified firms of the linear discriminant analysis from 2003-2012 for the distressed and non-distressed groups based on the 7 accounting ratios.

We notice a reasonable discriminant power in both analyses, but as expected, the discriminant power performs better if we consider the seven accounting ratios (Table 5(b)), especially in recent years. This result confirms that the “distressed” labels assume significance mainly in the imminence of their request for TDR. Moreover, the errors reduce over the years because when data of a restructured firm date back sufficiently far from the TDR recourse, the status of “distressed firm” could make little sense and generate a widely biased boundary.

3.5 Developing a TDR Probability Model: S_{it} Score

In the second step of the statistical analysis, we assess the probability of financially distressed companies to file for TDR as a way to avoid failure. This probability is estimated through the explanatory variables. The closest research to our approach is Shumway (2001), who calculates the probability of a business failure event by also using a logistic regression model. In addition, this approach relates to the previous literature pioneered by Beaver (1966) and Altman (1968, 1993, 2000) who introduced several models as measures of bankruptcy risk. The well-known studies of these authors investigate the ability of financial ratios to predict corporate financial distress. Beaver's study (1966) noted that financial ratios can predict the likelihood of bankruptcy. In particular, he confirms that these financial ratios can provide significant information and warning regarding the financial conditions of firms before their liquidation. Subsequently, Altman (1968) developed a model that includes a set of financial ratios that were analysed through MDA to demonstrate the relation between the financial ratios in previous years and at the time of the subsequent bankruptcy.

Our formula of TDR probability associated to the i -th firm at time t is as follows:

$$\hat{P}_{it} = \frac{e^{S_{it-1}}}{1+e^{S_{it-1}}} \quad (1)$$

where e indicates the Euler number, and S_{it} is a score associated with the i -th firm at time t , which is given by the following formula:

$$S_{it} \text{ score} = 0.003X_{1it} + 0.267X_{2it} + 0.663X_{3it} + 0.431X_{4it} + 0.533X_{5it} + 0.147X_{6it} + 0.092X_{7it} \quad (2)$$

where X_{jit} is the j -th variable associated with the i -th firm at time t .

The quantity \hat{P}_{it} is a probability because its value is always between 0 and 1. As it appears clearly from its formulation, given that S_{it} is inversely proportional to the firm's health status, this probability increases with the tendency to file for TDR. The absolute magnitude of \hat{P}_{it} should not be considered because it depends on the number that is added to the exponential value at the denominator, which in our case, is 1. In the subsequent analysis, we will always consider trends or relative values to specifically remove this arbitrary size effect.

The numerical coefficients in the above formula have been obtained from a linear discriminant analysis where the ratios used for each firm are as follows. *a)* For distressed firms, the ratios belong to the year when the TDR was filed; *b)* for non-distressed firms, the ratios are the best ratios over the entire observation period. This approach allows an efficient estimation of the S_{it} score for both the high discriminant potential of the ratios chosen in this manner and the reduction of temporal correlation because the data from different years are compared. A fundamental assumption for our multivariate estimation is the independence of

sample observations, which has rarely been seriously considered in prior studies.

Comparing the S_{it} score formula with the Z-score (Altman, 1968, 1993, 2000), it appears that the same ratios exert a different influence on the formula because of different coefficients. This effect could be explained by noting that financial distress and bankruptcy are different phenomena because these ratios may affect the choice of a company to access TDR procedures without necessarily resulting in bankruptcy. Moreover, the Z-score formula comes from data collection over a one-year interval that is focused only on manufacturing companies, whereas S_{it} is obtained from a multi-year and multi-industry analysis on listed Italian companies. Furthermore, the S_{it} score is calculated to be included in the determination of \hat{P}_{it} that represents the assessment of the probability of TDR for a company. On the contrary, the Z-score formula has been developed to determine a *cut-off* value.

3.5 Effectiveness of TDR Probabilities

In this section, we analyse the predictive accuracy of the TDR probabilities that were introduced in the previous section. Assuming that the TDR request is beneficial to overcome a temporary status of crisis, the analysis of the time series $\hat{P}_{it}, t = 2003, \dots, 2012$ should validate the following two hypotheses.

- *HP 1:* For “distressed” companies, the associated probability should increase until the year of TDR application and then become stationary or even decrease.
- *HP 2:* For “non-distressed” companies, the time series should appear stationary and follow a nearly constant trend over the years.

We investigate these hypotheses as follows.

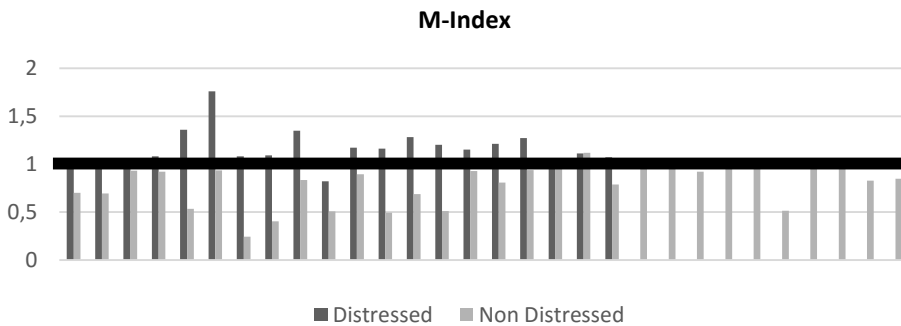
First, we introduce an indicator, M-Index, which is intended to determine whether for a distressed firm, a relative increment of TDR probability should occur in the proximity of the request for TDR. This indicator has the following expression:

$$M_i = \frac{\max(\hat{P}_{i,t_0}, \hat{P}_{i,t_0-1}, \hat{P}_{i,t_0-2})}{\sum_{t=t_{min}}^{t_{max}} \hat{P}_{it}/T} \quad (3)$$

The above index, which is calculated for the i -th distressed firm, is constructed from a ratio whose denominator is the average of TDR probabilities over the observational period. The numerator is calculated as the maximum probability associated with the two years before the restructuring agreements and the year when TDR was effectively approved in court (this year is indicated as t_0). The symbols t_{min} and t_{max} represent the first and last observation years in the analysis. Clearly, the more the probabilities increase before a TDR request, the more likely the indicator is greater than one. Moreover, we selected the years of best

performing ratios for the control sample companies, given that these companies did not file for TDR during the observation period. For these years, we calculated the respective probabilities to obtain the M-Index for the control sample companies.

Therefore, the black bar lines in Figure 1 show the values of the *M-Index* of the distressed sample (the period considered for calculating the denominator is from 2003-2012). This result clearly confirms a strong predictive potential of TDR probabilities in our case because for the *distressed firms*, this indicator is greater than one. The grey bar lines represent the values of the M-Index of the control sample companies. On average, the grey bar lines are almost always below one.



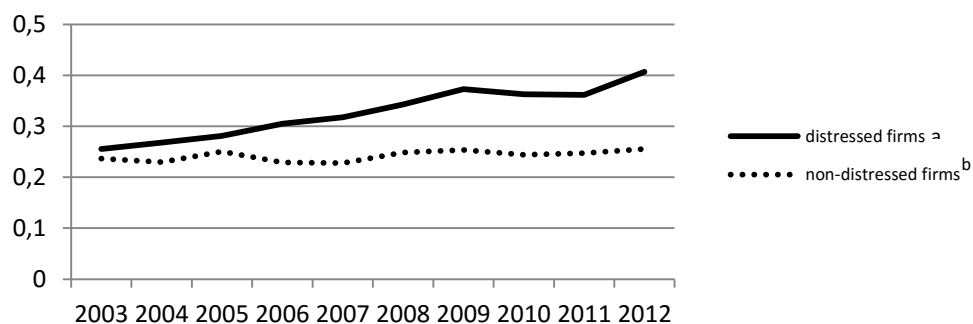
This figure represents the predictive effectiveness of the TDR probabilities for both the "distressed" and "non-distressed" groups. The x-axis includes the TDR average for each firm of the "distressed" group (black bar lines) and the control sample (grey bar lines), whereas the axis of ordinates shows the potential average values.

This indicator is greater than one when the probabilities increase before the TDR request. On the contrary, the values of the sample control are lower than one.

Figure 1 M-Index

Although the *M-Index* is a validation tool that focuses on a single firm, a general view could be gained by calculating the trends of the average of the TDR probabilities for every year for the two groups of firms.

In Figure 2, we represent the two trends. In particular, the continuous line indicates the trend of distressed firms. For a simpler comparison between the two groups, we have not used standardized values.



This figure shows the trends of the average of the TDR probabilities for the two groups.

The x-axis shows the time period analysed from 2003-2012, whereas the axis of ordinates includes the potential average values.

^a The continuous line represents the probability of the distressed firms to request TDR.

^b The dashed line indicates the probability of the non-distressed firms to request TDR.

Figure 2 The Probabilities of TDR

We notice that when the critical period gets closer, the trend of distressed firms increases. Interestingly, we have 16 TDR requests in the last three years (over a total of 20 cases), which is when the trend approached its maximum. In contrast, the dashed line represents the average of the probabilities of non-distressed firms to file for TDR. In this case, we have a nearly constant trend, which provides no cause for concern.

4 Summary and Conclusions

This paper describes the ability of accounting ratios to forecast the probability of a financially distressed firm to file for TDR. To this end, we have constructed a financial “pre-alarm” model to predict the financial distress of listed companies. In this context, we collected the financial data from 2003-2012 for all listed Italian companies that filed for Article 182-*bis* restructuring agreements (20 companies) and a control group of other companies listed in the Milan Stock Exchange (30 companies). Our dataset is a panel covering a period of nine years and is not considered small.

Using the MDA analysis, we have created a simple and efficient discriminant function. Once assured that the adopted seven ratios are informative regarding financial distress, we defined the probability of a TDR filing. Based on this probability, we have also introduced a user-friendly indicator, the M-Index, which can describe the financial equilibrium trend by using historical data.

As a result of our findings, we suggest the application of this model to predict the *financial distress*, not bankruptcy, of firms across different industries.

This study provides tools that could be useful not only to the companies in reorganization but also to banks, creditors and investors, which can evaluate the opportunity to suggest TDR at the correct time.

Endnotes

¹ "Organismo Italiano di Contabilità" is the Italian Accounting Standard Setter.

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The role of institutional investors in propagating 2007 financial crisis in Southern Europe

Authors

- José María Díez-Esteban, Full Professor, jmdiez@ubu.es - University of Burgos (Spain)
 - Jorge Bento Farinha, Assistant Professor, jfarinha@fep.up.pt - University of Porto (Portugal)
 - Conrado Diego García-Gómez, Assistant Professor, conradodiego.garcia@uva.es - University of Valladolid (Spain)
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The 2007 financial crisis has affected Southern European companies (Spanish, Portuguese, Italian and Greek) more than others and a factor that allegedly may have helped this is the greater importance of institutional investors, especially banks. In this context, we study the relation between institutional ownership structure and corporate risk-taking for a sample of non-financial listed companies from Spain, Portugal, Italy and Greece for the period 2001-2014. Our results suggest that the financial deregulation process before the 2007 financial crisis and the favourable macroeconomic scenario encouraged corporate risk-taking in those countries. We also find that the lack of effective control mechanisms on the part of shareholders provided an incentive for investment funds to assume a proactive role of encouraging companies to overinvest in risky projects.

Keywords: Risk-taking, Financial Deregulation, Crisis, Institutional Investors.

JEL Classification: G15, G32, G34

1 Introduction

The entry of a number of Southern European countries (Spain, Portugal, Italy and Greece) in the monetary union at the beginning of the XXI century led to the creation of numerous business opportunities for companies in these countries. At the same time, the deregulation process carried out all over the world and the interest rate policy of the ECB may have facilitated risky investments that, in other situations, would most likely never have been made.

In this scenario, it is possible that international institutional investors may have found a good channel for short-term investments in order to maximize their returns. In fact, during this period, institutional investors became major players in large southern European firms by assuming a more important role as shareholders, and most particularly by influencing investment decisions. Whether institutional investors play an active or a passive role in companies (Bhattacharya and Graham, 2007; Dalton et al., 2003; Ferreira and Matos, 2008) may be a relevant factor for determining the extent to which institutional investor's presence affected or not excessive risk-taking by listed firms prior to the 2007 financial crisis.

In this regard, and as a result of financial deregulation, investment funds, in their active role, may have favoured excessive risk-taking by managers in Southern European firms. Also, domestic banks, which traditionally held a passive attitude within companies in their roles as both shareholders and creditors, may have become aggressive investors, assuming high levels of risk (DeYoung et al., 2013). This possible new proactive attitude of banks as shareholders in these countries can be seen in our view as resulting from the decline in their interest income and as well as from financial deregulation, both of which may have provided an incentive for these institutions to maintain a more speculative position in companies. Therefore, due to their growing influence and the particular characteristics of their investments, institutional investors arguably became major players in the transmission of the crisis to the real economy (Erkens et al., 2012; Manconi et al., 2010)

The fast economic growth –combined with a lack of efficiency of the control mechanisms– helped to inflate a financial bubble that ended up exploding in 2007 (Duca et al., 2010). The effect of the financial crisis has been particularly critical in Southern European countries, whose economies went from being amongst the most dynamic in Europe to, in some cases, having to be rescued by State authorities. As Tong and Wei (2011) found, the decline in stock prices was more severe for firms that were more dependent on external (bank) finance.

The reason why the financial crisis affected so deeply those countries can be traced back to their legal environment. On the one hand, as the corruption indexes show, political institutions are weaker in these Southern European countries than in other European ones. On the other hand, banks play a much more decisive role in companies, as these countries are more bank-orientated (LaPorta et al., 1997).

Hence, it is conceivable that an active role played by institutional investors, especially banks, in Southern European countries, due to the favourable macroeconomic and legal scenario, may have created financial problems in companies by increasing excessively their corporate risk-taking.

Based on these arguments, we investigate the relation between the institutional investor ownership structure and corporate risk-taking. Using a sample of large quoted companies from Spain, Portugal, Italy and Greece for the period 2001-2014, we examine how the changes in institutional factors, carried out in the years leading up to the 2007 financial crisis, may have changed the attitude

of institutional investors in non-financial companies and whether the consequences of the potential mismanagement that followed have had an effect on the institutional investors behaviour in the years following the onset of the crisis. Our results suggest that institutional investors, domestic banks and foreign investment funds have encouraged companies to assume excessive corporate risks due to the favourable environment which was created.

This study contributes to the existing literature in two ways. First, we provide evidence on how financial deregulation and the macroeconomic environment, in recent years, affected the behaviour of institutional investors (Bhattacharya and Graham, 2007). Deregulation may lead to various agency problems since institutional investors use their growing power as shareholders to enhance their short-term profits by increasing corporate risk levels.

Second, we show that financial deregulation has had more harmful effects in countries in which banks or insurance companies are more relevant (traditionally civil law countries). In these countries, banks seem to have followed a pure speculative attitude, moving away from their traditional activity as lenders. Together with their lower level of adoption of modern banking practices, this excessive risk-taking focus has led to a negative impact on the companies in which these banks participate.

The remainder of this paper is organized as follows. Section 2 reviews previous research on the link between institutional investors and corporate governance within an international perspective and formulates our hypotheses. Section 3 describes the sample and variables. Section 4 shows the empirical results and assesses the degree to which our initial hypotheses are confirmed. Section 5 draws our major conclusions and suggests some directions for future.

2 Environment, Institutional Investors and Risk-taking

2.1 Financial Deregulation, Macroeconomic and Legal Scenario

In the years before the 2007 financial crisis, most Western countries carried out a process of financial deregulation. Progressive liberalization of international capital movements and financial market integration were carried out, restrictions on the convergence of activities were eliminated, financial innovations started to become widespread and reforms in the stock, bond and derivatives markets were implemented. Southern European countries were not strangers to this process, as they also implemented liberalization measures¹.

Previous literature has suggested that companies exhibit significantly higher risk-taking behavior in periods of deregulation (Anderson and Fraser, 2000; Saunders et al., 1990). Considering value creation as the main financial objective of companies, the generation of greater competitive advantages that allow these to achieve a higher performance can only be done by taking riskier decisions

(Nguyen, 2011). Consequently, financial deregulation of the early 21st century may have encouraged companies to take riskier decisions.

Moreover, the stock market crash associated with technology-intensive companies in 2000 led to a sharp slowdown in the world economy. In response to this setting, central banks of the major economies implemented expansionary monetary policies that led to a dramatic and prolonged reduction in interest rates, which had a direct impact on financial institutions core business, reducing their profitability². Thus, market innovation allowed financial institutions to create new products, which were encouraged in the context of the new financial deregulation, in order to increase their profitability levels.

In brief, deregulation created new growth opportunities, and the explosion of debt securitization arguably encouraged companies to assume greater levels of risk prior to the crisis (Erkens et al., 2012). Even though managers usually tend to seek lower levels of risk than shareholders (Panousi and Papanikolaou, 2012), deregulation may have created incentives for shareholders such as institutional investors to push executives to invest in riskier activities (DeYoung et al., 2013). Moreover, in periods when credit is readily available and liquidity is high, firms with high external financial dependence can take advantage of more permissive financial conditions (Bruno and Song Shin, 2014).

Thus, our first hypothesis is as follows:

Hypothesis 1: The financial deregulation in the first years of the 21st century had a positive effect on firms' risk-taking.

The deregulation process led to a favourable macroeconomic scenario, especially in Southern European countries. The new growth opportunities created by deregulation led to the GDP of these countries grew at rates never seen before. Thus, in an economic scenario of low interest rates and fast growth in GDP, companies may conceivably have overexploited their investment opportunities by carrying out excessively risky investments.

Nevertheless, although the deregulation process that led to the 2007 financial crisis affected firms worldwide, the consequences in Southern European ones have been especially dramatic. As previous research has suggested, political institutions can have a strong impact on the firms' corporate governance/ownership structure (Boubakri et al., 2013).

On the one hand, the negative effects of the crisis depend on the rights and permissions of the firm's creditors as defined by the country's bankruptcy law. Thus, the legal framework within which a particular firm operates –namely, whether creditors' rights are better or worse protected– helps to determine the extent to which a firm is willing to assume higher levels of risk. Following the law and finance approach, in Anglo-Saxon countries, managers assume the firm's risk of collapse and debt holders are protected by the law; conversely, in the French legal tradition countries (Southern European ones), managers usually do not assume such high responsibilities (La Porta et al., 1997; 1998; 2000; 2002). In this sense, in Southern European countries, where creditors' rights are

stronger in bankruptcy laws, banks can assume higher corporate risk-taking than in common law countries.

On the other hand, under governments characterized by few checks and balances³, corporate ownership concentration is higher, which in turn can lead controlling owners to pressure managers to increase risk-taking (Roe, 2003)⁴.

Consequently, our second hypothesis is split as follows:

Hypothesis 2a: A favourable macroeconomic scenario (low interest rates and fast growth in GDP) have a positive effect on firms' risk-taking.

Hypothesis 2b: Weak political institutions have a positive effect on firms' risk-taking

2.2 Financial Crisis and Corporate Risk-taking

The financial crisis affected Southern European countries (Spain, Portugal, Italy and Greece) as a result of a combination of complex factors, including the financial deregulation of previous years all over the world and the easier credit conditions during the 2002–2007 period to finance the high level of growth of these countries but with the problem of increased corporate risk-taking.

As the progressive liberalization of international capital movements and financial market integration were carried out, restrictions on the convergence of activities were eliminated, financial innovations started to become widespread and reforms in the stock, bond and derivatives markets were implemented. These factors may have jointly helped to forge an enormous financial bubble that eventually exploded. In Southern European countries, governments were unable to repay or refinance their government debt or to bail-out over-indebted banks. Indeed, in a recession period, those firms that benefited more strongly from the previous wide availability of credit were the ones that most suffered the consequences of the crisis (Bruno and Song Shin, 2014).

Thus, in periods of economic crisis, companies suddenly become often more concerned with avoiding bankruptcy (Deephouse and Wiseman, 2000). Then, in these turbulent economic periods, firms can become much more risk-adverse when deciding their investments or, in the case of banks, their lending practices.

Consequently, our third hypothesis is as follows:

Hypothesis 3: The 2007 financial crisis had a negative impact on corporate risk-taking.

2.3 Institutional Investors and Corporate Risk-Taking

There has been a worldwide shift in capital markets from individual investors having the control of firms toward institutional investors playing a central role (Amihud and Li, 2006). Institutional investors are considered outside shareholders that are naturally interested in the financial return of their investments. Nevertheless, the considerable stake they may hold and their focus on financial returns can lead them to take an active part in the governance of the firms in which

they own relevant stakes. Active institutional investors have the potential to efficiently control managers' discretionary decisions if the legal framework for corporate governance enhances this monitoring role whenever such investors hold a large enough stake in the firm. Institutional investors, such as investment funds, often seek to maximize the profitability of their investments regardless of the level of firm control. Many institutional investors also usually have a riskier attitude. So, when companies are controlled by institutional investors, risk-taking can normally reach higher levels. Hutchinson et al. (2015) show a positive relationship between firm risk, risk management policy and performance for firms with increasing institutional shareholdings. These authors also find that when firms are financially distressed, institutional investors engage in actions that promote short-term performance or exit.

The rapid growth of the economies in Southern European countries was an attractive factor for institutional investors that expected high returns on their investments in the companies of those countries. The increase in GDP, in the years leading to the financial crisis in 2007, generated attractive growth opportunities that encouraged investment funds to acquire substantial holdings in these countries' companies. Besides, the scenario of stability of the European Union and the low interest rates further encouraged these investments.

Active investors often only pursue a short-term return when they invest. Due to the nature of their investment, such investors are likely to be more risk-prone than passive ones⁵, encouraging managers to undertake riskier investment projects to maximize their investment in the short-term (Almazan et al., 2005).

However, the deregulation process of the early twenty-first century led to a distortion in the activity of institutional investors (Díez et al., 2014)⁶. The growing weight of institutional investors in the capital of firms shifted the crisis that began in the capital markets to the real economy (Manconi et al., 2010). Financial deregulation prior to the 2007 financial crisis may thus have incentivised investment funds to take an active role, encouraging managers to increase shareholder returns through greater risk-taking. Particularly, institutional investors may arguably have caused many Southern European firms to collapse after encouraging high risk-taking prior to the crisis.

Institutional investors such as investment funds find it optimal to increase risk because they do not internalize social costs of company failures (Erkens et al., 2012). The combination of lack of control, excessive power, and the speculative nature of investment funds, along with their ability to better diversify their investment portfolio, can motivate these to encourage excessive corporate risk-taking in order to obtain short-term abnormal returns.

Therefore, our fourth hypothesis is as follows:

Hypothesis 4: In a period of financial deregulation and high growth opportunities, institutional ownership increases corporate risk-taking.

2.4 Banks' behaviour and Corporate Risk-taking

As noted before, commercial banks are traditionally considered as maintaining a more passive attitude in companies when they are shareholders, as such institutions may have a lending relationship at the same time and presumably may not be interested in encouraging excessive risk-taking on the part of companies (Maury and Pajuste, 2005). We must consider that the influence of banks as institutional investors is more relevant to firms based in civil law countries (La Porta et al., 1997; 1998; 2000) where ownership is highly concentrated and, although a financial deregulation process there has also taken place, creditors' rights are usually well protected.

However, during the process of financial deregulation carried out in most of Western countries, banks took on much the same role as investment funds. The new active attitude of banks as shareholders was the result of the decline in their profitability levels and of financial deregulation, both of which encouraged these investors to maintain a more speculative position in companies.

DeYoung et al. (2013) find that, in the years leading up to the financial crisis, banks tried to exploit new growth opportunities from Southern European firms due to the deregulation process and the explosion of debt securitization. In addition, financial institutions were forced to enter into riskier activities to obtain higher returns because their core business was decreasing in size and/or profitability. Consequently, banks gradually became active investors.

Southern European countries have a civil law environment where typically creditors' rights are stronger and the financial relation between banks and family-owned firm is better protected (LaPorta et al., 1999). Thus, banks do not need to maintain a conservative role and may therefore assume a more aggressive attitude similar to the one that many investment funds play in Anglo-Saxon firms. So, in this case banks have incentives to influence greater levels of corporate risk-taking. When banks consider that their position as lenders is well protected, they have the opportunity to act as active institutional investors. So banks may change their more conservative role when they feel their position as lenders is already well covered.

Therefore, our fifth hypothesis is that:

Hypothesis 5a. In a period of financial deregulation and growth opportunities, when banks are substantial shareholders they become more active investors and increase corporate risk-taking

As mentioned above, the 2007 crisis was more severe for those companies that were more dependent on external finance (Tong and Wei, 2011). In our case, we should not forget that Southern European countries are traditionally considered civil law countries (La Porta et al., 2000), where external finance, especially bank finance, is particularly relevant in their companies.

In this sense, firms with larger external finance needs (bank finance) for their investments and a larger propensity for corporate risk-taking spurred by the availability of liquidity in a favourable macroeconomic scenario, are likely to

witness lower profitability levels and a greater decline in stock prices when hit by the 2007 credit crunch (Bruno and Song Shin, 2014).

Thus, when the economic environment changes drastically due to the bursting of the financial bubble, banks are more likely to resume their traditional conservative role. On the one hand, they may prefer to protect their position as lenders in the company. On the other hand, in the aftermath of the crisis the EU implemented a series of measures aiming at enhancing strict control systems to avoid risk mismanagements, bankruptcies and the collapse of the whole financial system. In this setting banks were also likely to reverse their prior active role as investors and return to their traditional, and more conservative, lending role.

Thus, we propose a second part for our fifth hypothesis:

Hypothesis 5b. In a situation of financial crisis, when banks are shareholders assume a conservative role and reduce corporate risk-taking.

3 Sample, Variables and Empirical Model

Our sample consists of 136 companies from Spain, Portugal, Italy and Greece countries for the period 2001-2014, with a total of 1,153 firm-year observations. We have obtained data from financial statements, on corporate structure and share prices of the firms from THOMSON ONE BANKER database.

Table 1 Composition of the sample by countries.

<i>Country</i>	<i># Firms</i>	<i># Observations</i>
<i>Spain</i>	<i>51</i>	<i>470</i>
<i>Portugal</i>	<i>25</i>	<i>86</i>
<i>Italy</i>	<i>55</i>	<i>550</i>
<i>Greece</i>	<i>6</i>	<i>47</i>
<i>Total</i>	<i>137</i>	<i>1,153</i>

Source: Thomson One Banker database.

For testing corporate risk-taking, we use two alternative measures: market and organizational risk. First, consistent with previous finance literature, we use a measure of risk related to firms' shares (Ignatowski, M. and Korte, J., 2014; Nguyen, 2010; John et al., 2008; Konishi and Yasuda, 2004). Specifically, we assume that a firm's risk is associated with the variance of daily returns⁷. Consequently, we define the variable corporate risk (RISK-M) as the sum of standard deviations of daily stock returns of the company for each year.

Second, motivated by prior work, we use the standard deviation of return on assets in a time period of 3 years to measure the organizational risk (RISK-O). The accounting variables (like the return on assets) approach the organizational risk defined as the uncertainty of a company's income stream (John et al., 2008; Bruno and Song Shin, 2014).

To examine the process of financial deregulation, we have included the variable FD. This is based on the Financial Freedom Index (FFI) provided by the Heritage Foundation. Annually, this institution gives a scoring to each country between 0 and 100. Countries with a higher score are those which have more financial freedom. We use the Heritage Foundation's Financial Freedom Index to examine the financial deregulation process. In our model, the variable FD is defined as the log of FFI scoring for each country and year.

Following Boubakri et al. (2013), Qi et al. (2010) and Stulz (2005), we have included the variable POLCON to examine the relation between political institutions and corporate risk-taking. This variable is based on Henisz's (2010) political constraints index, as a measure of political institutions strength. This index ranges from 0 to 1, with higher scores indicating greater political constraints and hence stronger political institutions.

Macroeconomic scenarios are defined by two variables. Firstly, following Bruno and Song Shin (2014), we have included GDP growth (GDPG) which captures each country's overall growth. It is assumed that higher country-level growth should be associated with higher earnings volatility, and thus higher risk. We have obtained GDP data from the World Bank database. Secondly, we have included 12-month-Euribor rate (EURIBOR) provided by the ECB. By including this variable, we seek to capture the effects of ECB's interest rate policy using a common variable for the four countries concerned.

We analyze the ownership structure by two variables that are informative of the distribution of power among institutional investors. We have considered institutional cumulative ownership of the first five main shareholders of each company and, accordingly, IFUND is the proportion of shares held by investment and pension funds and BANK is the percentage of shares owned by banks.

We use a fourteen years sample to analyse the corporate risk-taking behaviour around the 2007 financial crisis. Therefore, to test the impact of the crisis, we have included a dummy variable (CRISIS) that takes the value of 0 for the period before the crisis (2001-2007), and 1 otherwise.

Our model also includes some control variables which are often used in the literature, the absence of which could mean running the risk of omitted variable biases. Accordingly, we include in the analysis the Market-to-book value of assets ratio (MB), defined as the ratio of the market value of a firm to its book value. Although several different alternative measures of growth opportunities are available (e.g., price-earnings ratios, market-to-book ratios), Adam and Goyal (2008) show that the market-to-book value of assets ratio has the highest informational content with respect to investment opportunities. The market value of the firm is defined as the sum of the equity market value plus the debt book value, as it is commonly defined in current research (Maury and Pajuste, 2005; Vilalonga and Amit, 2006). The rationale is that the higher the market-to-book ratio is, the lower the value attached to the assets in place and, in turn, the higher the value related to growth opportunities and also the higher will be corresponding corporate risk levels.

We also control for the firms' capital structure (LEV), measured as the financial leverage ratio (i.e., debt-to-equity ratio). To account for firm size (Holder-Webb et al., 2009; Udayasankar, 2008), we calculate the log of total assets (LOGAST). Because different industries face different risk levels, we have also included appropriate sectorial dummies. Thus, our model includes industry dummies and year dummies (INDUSTRY and YEAR, respectively).

The empirical model is therefore stated as follows:

$$\text{RISK}_{i,t} = \beta_0 + \beta_1 \text{FD}_{i,t} + \beta_2 \text{POLCON}_{i,t} + \beta_3 \text{GDPG}_{i,t} + \beta_4 \text{EURIBOR}_{i,t} + \beta_5 \text{IFUND}_{i,t} + \beta_6 \text{BANK}_{i,t} + \beta_7 \text{CRISIS}_{i,t} + \beta_8 \text{MB}_{i,t} + \beta_9 \text{LEV}_{i,t} + \beta_{10} \text{LOGAST}_{i,t} + \text{INDUSTRY} + \text{YEAR} + \eta_i + \varepsilon_{i,t}, \quad (1)$$

where i denotes the firm, t the time period, η_i is the fixed-effects term of each firm or unobservable and constant heterogeneity, and $\varepsilon_{i,t}$ is the stochastic error used to introduce possible errors in measurement of the independent variables and the omission of explanatory variables.

4 Results

4.1 Descriptive Statistics

We present in Table 2 the descriptive analysis of the variables used.

Table 2 Descriptive statistics.

Variable	Mean	Std. Dev	Median	Mínimum	Máximum
RISK-M	0.021	0.013	0.019	0.003	0.448
RISK-O	0.051	0.261	0.023	0.000	1.042
FD	3.486	0.286	3.401	2.995	4.094
POLCON	0.395	0.086	0.368	0.213	0.566
GDPG	0.005	0.024	0.009	-0.089	0.066
EURIBOR	0.021	0.010	0.019	0.004	0.039
INVESTFUND	0.062	0.065	0.046	0.000	0.846
BANK	0.008	0.056	0.000	0.000	0.810
MB	2.361	15.830	1.517	-5.606	46.711
LEV	0.673	0.485	0.679	0.031	0.990
LOGAST	21.205	1.809	21.193	17.114	28.289

In Table 3 we present the values for Financial Freedom Index and POLCON respectively provided by Heritage Foundation and Henisz (2010).

Table 3 Financial Deregulation and POLCON values. The table shows the values of FD and POLCON variables

Variable	2001	2005	2009	2014	
FD	Spain	70	70	80	70
	Portugal	50	50	60	60
	Italy	70	70	60	60
	Greece	50	50	50	50
POLCON	Spain	0.484	0.512	0.311	0.368
	Portugal	0.427	0.413	0.407	0.440
	Italy	0.567	0.340	0.333	0.453
	Greece	0.387	0.367	0.413	0.413

The Financial Freedom Indexes (FD) are high enough (except in Greece) to consider that there has been a process of financial deregulation in those countries. For instance, in traditionally considered deregulated countries, the index is close to 80 points. Regarding the POLCON variable, where a high score means stronger political institutions, we must mention that the four countries start from a situation of political stability as the values are between 0.4–0.5 at the beginning of the period in question. Nevertheless, these scores drop drastically with the onset of the financial crisis (except in the case of Greece), revealing the institutional difficulties in these countries.

In the following table we present the values of the main variables of our study in the years before and during the financial crisis:

Table 4 Main descriptive statistics. Mean values by years before and during the financial crisis. The t-value test is the maximum level of significance to reject the null hypothesis of equality of means between both subsamples. *** significant at 99% confidence level; ** 95%; * 90%.

	Pre-crisis	Crisis	Test <i>t</i>
RISK-M	0.017	0.024	-11.13 ***
RISK-O	0.048	0.054	-1.35
FD	3.509	3.462	3.43 ***
POLCON	0.422	0.368	13.62 ***
GDPG	0.023	-0.011	39.10 ***
EURIBOR	0.026	0.016	21.56 ***
INVESTFUND	0.057	0.068	-3.59 ***
BANK	0.011	0.005	2.13 **
MB	2.390	2.331	0.07
LEV	0.629	0.718	-3.78 ***
LOGAST	20.971	21.437	-5.36 ***

Results reported in Table 4 show that there is a significant difference between the average market risk (RISK-M) before and during the crisis (0.017 vs. 0.024) whereas this difference is not substantial for organizational risk (RISK-O) (0.048 vs. 0.054). Moreover, as mentioned before, the mean values of POLCON are higher before the beginning of the financial turbulences.

Ownership variables have different patterns. While institutional ownership becomes more relevant once the crisis has started, bank ownership is lower, probably due to the legal restrictions implemented in those countries and the need to reduce their investments in companies.

4.2 Explanatory Analysis

Our major empirical analysis draws on the results of the descriptive analysis. Tables 5, 6 and 7 report the results from the estimation of equation (1).

Table 5 Results of the estimation of model 1. *** significant at 99% confidence level; ** 95%; * 90%.

	RISK-M					RISK-O
	(1)	(2)	(3)	(4)	(5)	
FD	0.007 ** (0.004)	0.006 ** (0.003)	0.012 *** (0.003)	0.006 ** (0.003)	0.007 ** (0.003)	0.047 (0.021)
EURIBOR	0.896 *** (0.068)				0.643 (1.538)	96.969 [†] (11.132)
GDPG		0.203 *** (0.028)			0.253 *** (0.063)	0.765 (0.397)
POLCON			-0.014 *** (0.004)		-0.033 ** (0.014)	-0.427 [†] (0.087)
IFUND				0.008 ** (0.003)	0.004 * (0.002)	0.098 [†] (0.031)
BANK				0.007 (0.025)	-0.002 (0.003)	-0.328 (0.345)
CRISIS	0.021 *** (0.018)	2.448 ** (1.097)	0.005 *** (0.002)	2.267 ** (0.882)	1.428 ** (0.693)	3.517 [†] (0.389)
MB	-0.001 *** (0.000)	-0.001 *** (0.000)	-0.001 *** (0.000)	-0.001 ** (0.000)	-0.000 (0.000)	0.001 (0.001)
LEV	0.025 *** (0.004)	0.029 *** (0.006)	0.010 ** (0.005)	0.034 ** (0.005)	0.019 *** (0.006)	0.331 [†] (0.021)
LOGAST	-0.002 *** (0.001)	-0.002 ** (0.001)	-0.001 * (0.001)	-0.002 ** (0.001)	-0.002 *** (0.001)	-0.032 [†] (0.005)
INDUSTRY	YES	YES	YES	YES	YES	YES
YEAR	YES	YES	YES	YES	YES	YES
Constant	0.013 (0.018)	-2.411 ** (1.107)	0.020 (0.017)	-2.219 ** (0.894)	-1.374 * (0.702)	-3.745 [†] (0.454)
Wald Test (g.l.)	4,140.5 *** (23)	5,359.6 *** (23)	5,845.8 *** (23)	3,638.6 ** (24)	4,592.19 *** (27)	7,229.5 [†] (27)
m1	-1.43	-2.14 **	-2.02 **	-2.42 **	-2.00 **	-2.07
m2	-1.46	-1.19	-1.33	-1.41	-1.43	-1.59
Hansen Test (g.l.)	52.13 (47)	45.11 (47)	59.49 (47)	48.95 (47)	53.9 (5 (4 7)	58.22 (47)

Table 5 shows the results obtained using the systems estimator generalized method of moments. To facilitate the drawing of conclusions, we have introduced the variables separately and then we have estimated the model with all

variables in column 5. For the dependent variable RISK-O we do not present results variable by variable for not being so prolix, as the results are similar.

In all estimations we have included the FD variable, as the deregulation process is one of the most important determinants in the institutional investors' attitude change. The coefficient of this variable is positive and statistically significant in all cases. This is consistent with the idea that when a country carries out a process of financial deregulation, it creates new growth opportunities that make shareholders more prone to encourage executives to invest in riskier activities. This result confirms our first hypothesis, that the level of a country's financial freedom has a positive effect on firms' risk-taking.

The macroeconomic-legal scenario impact on risk-taking is tested in columns 1-3. With respect to EURIBOR (column 1), the coefficient of this variable is positive and statistically significant, i.e., when companies face higher interest rates they look for higher risk investments that can generate returns higher than the cost of capital (which should increase alongside interest rates). When considering all variables together (column 5) the impact is not statistically significant.

Regarding GDP evolution (column 2), the impact is positive and significant, i.e., companies exploited their investment opportunities by carrying out excessively risky investments prior to the 2007 financial crisis. These results support our hypothesis 2a.

Lastly, the effect of POLCON variable is shown in column 3, where a significant and negative coefficient is observed, not confirming our hypothesis 2.b, in contrast to when all variables are considered (column 5) and a negative and statistically significant coefficient is recorded, not confirming our hypotheses 2b. In hypothesis 2b we postulate that in countries with few political checks and balances, corporate ownership concentration is higher and thus controlling owners tend to pressure managers to increase risk-taking. In our case, the four countries under consideration present a low POLCON index (see Table 3), which should be translated into higher corporate risk-taking. The reason why this political inefficiency is not translated into more risk might be found in the fact that most of the reference shareholders in the four countries are families or financial institutions (Anderson and Reeb, 2003; Barontini and Caprio, 2006; Villalonga and Amit, 2006) which have more difficulties in fully diversifying their portfolio and, thus, may resist to assume higher levels of risk.

In hypothesis 3 we predict that the 2007 financial crisis had a negative on corporate risk-taking. The coefficient for this variable is positive and statistically significant in all cases, which does not confirm our third hypothesis. In terms of market risk, the crisis period may have had a positive impact on corporate risk taking by increasing companies' price volatility, while uncertainty about incomes may have caused operational risk to increase. The fact that our third hypothesis has been distorted prompts us to introduce a separate analysis for the prior and after crisis periods, the results of which are reported in table 7.

To find evidence about how the behavior of institutional investors influences corporate risk-taking, in column 4 – table 5 we separate the impact of both institutional investors on corporate risk-taking.

Regarding investment funds (IFUND), its coefficient is positive and statistically significant. Considering that most of investment funds have an active role (Bhattacharya and Graham, 2007), due to the nature of their investment, these are typically more risk-prone and encourage managers to follow riskier investment to maximize their profits in the short-term. These results are in accordance with what we postulate in our fourth hypothesis.

The impact of the presence of Banks as shareholders on corporate risk-taking is also presented in column 4 and its coefficient is not significant. Again, the impact of the 2007 financial crisis may provoke a different pattern prior and after the crisis in the case of a substantial ownership by banks.

To test the effect of the macroeconomic environment taking into account the negative values of GDP growth recorded during the crisis period, we created a new variable (DGDP) that takes the value of 0 for positive values of GDP growth, and 1 otherwise. We multiplied this variable by (EURIBOR). Secondly, we interacted the three macroeconomic and legal variables considered (GDPG, EURIBOR and POLCON) to test the joint effect of the macroeconomic-legal scenario.

Table 6 Results of the estimation of model 1 by macroeconomic and environment variables. *** significant at 99% confidence level; ** 95%; * 90%.

	RISK-M		RISK-O	
	(1)	(2)	(3)	(4)
FD	0.019 *** (0.004)	0.006 ** (0.002)	0.097 *** (0.025)	0.096 *** (0.024)
EURIBOR	2.737 * (1.443)	0.336 *** (0.099)	165.674 *** (13.524)	128.323 *** (11.090)
GDPG	0.251 *** (0.064)	0.166 *** (0.059)	4.883 *** (0.556)	1.233 *** (0.436)
POLCON	-0.041 *** (0.010)	-0.024 *** (0.009)	-0.705 *** (0.095)	-0.647 *** (0.086)
DGDP*EURIBOR	-0.029 * (0.017)		-0.875 *** (0.121)	
GDPG*EURIBOR*POLCON		13.449 * (7.223)		325.612 *** (58.491)
IFUND	0.013 *** (0.004)	0.019 *** (0.005)	0.089 ** (0.041)	0.106 ** (0.041)
BANK	0.025 (0.029)	0.017 (0.025)	0.286 (0.243)	0.281 (0.232)
CRISIS	0.097 * (0.051)	0.025 *** (0.004)	6.694 *** (0.524)	5.626 *** (0.428)
MB	-0.001 *** (0.000)	-0.001 *** (0.000)	0.001 (0.001)	0.000 (0.000)
LEV	0.011 * (0.006)	0.013 *** (0.005)	0.058 *** (0.020)	0.190 *** (0.021)
LOGAST	-0.002 (0.001)	-0.004 *** (0.001)	-0.022 *** (0.005)	-0.028 *** (0.008)
INDUSTRY	YES	YES	YES	YES
YEAR	YES	YES	YES	YES
Constant	-0.087 (0.064)	0.044 (0.037)	-7.580 *** (0.675)	-6.279 *** (0.632)
Wald Test (g.l.)	4,441.8 *** (28)	4,861.6 *** (28)	2,885.3 *** (28)	2,620.9 *** (28)
m1	-1.45	-2.72 ***	-2.93 ***	-3.28 ***
m2	-1.60	-1.64	-1.50	-0.53
Hansen Test (g.l.)	39.24 (47)	54.47 (47)	50.61 (47)	50.73 (47)

Results reported in table 6 reveal, on the one hand, that the combination of a negative evolution of the GDP and low interest rates (DGDP*EURIBOR) reduce both operational and market corporate risk taking. Then, corporate risk taking behaves alongside GDP growth, whereas the effect of EURIBOR depends on GDP evolution, which explains why the coefficient for EURIBOR in column 5, table 5, is not significant. On the other hand, when considering the joint effect of the macroeconomic-legal environment (GDP*EURIBOR*POLCON), we can observe a positive and significant effect in both risk measures, i.e., the economic and legal situation in the four countries considered favored corporate risk taking.

We present in table 7 the estimation of model 1 distinguishing between the years before and after the 2007 financial crisis.

Table 7 Results of the estimation of model 1 by pre- and after- 2007 crisis periods. *** significant at 99% confidence level; ** 95%; * 90%.

	RISK-M		RISK-O	
	Years of Pre-crisis	Years of After-Crisis	Years of Pre-crisis	Years of After-Crisis
FD	0.002 * (0.001)	0.010 *** (0.002)	0.050 *** (0.014)	0.033 *** (0.013)
EURIBOR	0.361 *** (0.043)	0.147 *** (0.026)	0.965 * (0.523)	35.398 *** (4.151)
GDPG	0.137 *** (0.028)	0.192 *** (0.026)	0.500 * (0.278)	0.248 * (0.147)
POLCON	-0.013 *** (0.004)	-0.024 *** (0.008)	-0.129 ** (0.056)	-0.109 *** (0.035)
IFUND	0.007 * (0.004)	0.004 * (0.002)	0.437 *** (0.103)	0.507 *** (0.089)
BANK	0.051 *** (0.014)	-0.009 ** (0.004)	1.666 *** (0.273)	-0.035 ** (0.016)
MB	0.001 *** (0.000)	0.000 (0.000)	-0.008 *** (0.002)	-0.000 (0.000)
LEV	0.017 *** (0.004)	0.033 *** (0.004)	0.139 *** (0.032)	0.203 *** (0.013)
LOGAST	-0.001 ** (0.001)	-0.006 *** (0.001)	-0.013 * (0.007)	0.022 *** (0.005)
INDUSTRY	YES	YES	YES	YES
YEAR	YES	YES	YES	YES
Constant	0.013 (0.011)	0.103 *** (0.024)	0.061 (0.156)	-0.718 *** (0.095)
Wald Test	1,889.30 *** (19)	1,305.37 *** (19)	219.05 *** (19)	1,016.51 *** (19)
m1	-3.32 ***	-2.55 **	-1.14	-1.52
m2	-0.87	-1.29	0.97	-1.47
Hansen Test	40.59 (41)	45.28 (41)	32.89 (41)	35.92 (41)

If we proceed this way, we can observe that all variables maintain their pattern except bank ownership. Before the beginning of the crisis, banks seem to act as pure active institutional investors promoting corporate risk-taking, but when the scenario changes drastically due to the bursting of the financial bubble, banks are more likely to resume their traditional conservative lending role. This can explain why the coefficient of this variable changes from positive to negative. This result confirms our hypothesis 5a and 5b.

We conduct a series of sensitivity analyses to test the robustness of our results. First, we use systematic and specific risk indicators from the CAPM model as an alternative measure of risk (Fung *et al.*, 2012; Konishi and Yasuda, 2004; Azofra *et al.* (1997)). We have also replaced the estimation based in the 2007 financial crisis by the inclusion of interaction variables. Results are analogous to those discussed above and are not presented for parsimony reasons.

5 Conclusions

We analyze the relation between the institutional investor ownership structure and corporate risk-taking, using a sample of large quoted companies from Spain, Portugal, Italy and Greece for the period 2001-2014. We examine how the deregulation process carried out in the years leading up to the 2007 financial crisis and the favorable macroeconomic scenario may have changed the behaviour of institutional investors in non-financial companies in those countries.

We find that the financial deregulation process that occurred prior to the 2007 financial crisis promoted corporate risk-taking, i.e., the deregulation created new growth opportunities, and the explosion of related debt securitization encouraged companies to assume greater levels of risk prior to the crisis. Specifically, the level of the financial freedom of a country positively affects firms' risk-taking, and countries with more deregulation exhibit higher levels of risk.

Regarding the macroeconomic scenario, our results show that a positive evolution of GDP positively influences corporate risk-taking, whereas the effect of the EURIBOR evolution is not as clear, as it depends on the evolution of GDP. In fact, in periods of economic slowdown, even when accompanied by low interest rates, companies do not engage in aggressive corporate risk taking. Moreover, results also suggest that when political institutions are not efficient enough, companies are not prone to assume excessive risks.

Related to institutional ownership, our results are in accordance with investment funds playing a pure speculative role by motivating managers to assume excessive corporate risk-taking in order to obtain short-term abnormal returns in the capital markets, even during the crisis. In the case of banks, our analysis suggests these have overlooked their traditional lending roles and influenced excessive corporate risk-taking in a critical period of recession with the consequence of many companies going bankrupt. Nevertheless, once the crisis begins, our results suggest banks seem to be more likely to resume their traditional conservative roles due to the new financial and political scenario.

Our research may have promising implications for practitioners, policy makers and academia. Our research is informative for practitioners about how the 2007 financial crisis was transmitted from financial markets to real economy. Policy makers can influence less-risky investment decisions by encouraging the formation of balanced ownership structures in an efficient legal environment where creditors' rights are well protected. Finally, our paper adds to the fertile field of academic research on the factors affecting corporate risk-taking, especially in more financially turbulent periods.

Several directions for future research are apparent. We have limited our scope to the ownership of the reference institutional shareholders, but new research could introduce other reference shareholders. Finally, new research could introduce the role of the board of directors and other internal mechanisms of corporate governance.

Endnotes

¹ Since 2000, the EU has issued several directives in order to liberalize the financial sector and banks' activities as a result of the 1999 Action Plan for Financial Services.

² For example, Euribor dropped from nearly 4% in 2001 to 1.9% in 2005.

³ As mentioned in the introductory section, efficiency of political institutions in Spain, Portugal, Italy or Greece is limited (Henisz, 2010) and the corruption indexes are high in relation to other European and OECD countries.

⁴ Indeed, most of the reference shareholders are also the managers in southern European countries (LeBreton-Miller and Miller, 2013; Brealey, 2012)

⁵ Passive investors are those who maintain a quiet position as shareholders due to their long-term horizon in their investments. Thus, they are supposed not to promote riskier investments.

⁶ For instance, with the repeal of the Glass-Steagall Act provision separating commercial and investment banking, many more financial players were then able to participate in the mortgage market.

⁷ We calculate the shareholder returns through the formula $R_i = (P_t - P_i) / P_i$, P_t being the share price at the end of the day and P_i the initial price. If a share was not listed on any given day, we exclude the data from that day to calculate risk.

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Participation mechanisms in the food risk analysis: effective tools in the pursuit of public interest

Authors

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- *Lara Fornabaio, PhD candidate, lara.fornabaio@unife.it - University of Ferrara*
 - *Margherita Poto, Assistant Professor in Administrative Law, margherita.poto@unito.it - University of Torino*
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The current globalised system has increased the need for participatory components in the decision-making process, suggesting the urge to incorporate public perceptions, values and ways of thinking within the food risk analysis. In the past, the risk assessment and management proceedings applied to the food sector were designed on a science-based approach, aiming to limit the discretionary power of the public administration. This brought to a gap between socio-cultural perception of food hazards and scientific evidence. A new approach should include good administration principles, such as an open and transparent consultation with the stakeholders in the decision-making process, in order to achieve an outcome that does not only mirror the scientific interest but rather reflects the effective public perception.

The present contribution will analyse and assess whether collaborative efforts within the risk analysis proceedings can significantly contribute to the offset of divergent boundaries between public powers and the civil society.

Keywords: Food- Risk analysis - Participatory rights.

JEL Classification: X13, H09, I99, Z99

1 Introduction

The food chain has been stretched so much in the past years that most of consumers do not have any knowledge about the food they eat. The evolution from a model distinguished by the fact that people used to consume what they had produced, to the current one, in which foodstuff seems to grow from supermarkets'

shelves, has created the need of governments' intervention, in order to ensure safety along the entire food chain, as well as to reduce information asymmetries.

As a matter of fact, globalisation and changes within production and processing systems have led to four main consequences, that we can define *technical*, *scientific*, *informational* and *cultural*. The formers – *technical* - deal with the fact that longer and global supply chains drive to an increase of potentially dangerous links along the food chain; *scientific* consequences imply that, in order to produce on a large scale and meet worldwide purchasers' expectations, companies use chemical technologies e.g. for preserving goods, improving taste and colour, adding some peculiar nutritional value. When we refer to *informational* outcomes we are coping with the issue of information gap between producers and consumers, in so far as buyers have been transformed in mere marketing targets, with little or no knowledge of the products they are going to buy; finally, the latter, i.e. *cultural*, consider how abstract the relation we have been building with our food has become, as it is often considered nothing more than an edible object, that we can simply digest or waste. For these reasons, next to traditional risks¹ (Beck, 1992) and dangers² (Szajkowska, 2012) about hygiene, food poisoning, food-borne diseases, consumers are worried about risks related to techno-scientific methods and innovations, such as residue pesticides and genetically modified organisms³.

In this scenario, food safety regulation, taking the place of purchasers' personal evaluation of risk, becomes a crucial public policy tool.

2 Literature review

Risk has many shades. Usually it is scrutinised in three different ways: *risk as a feeling*, *risk as analysis* and *risk as policy*. The former is our instinctive and intuitive answer to danger; the second one refers to a logic and rational process; finally, the latter sheds some light on the conflict between “our ancient instincts and our modern scientific analyses”⁴ (Slovic, Finucane *et al.*, 2004).

The legal definition of *risk* is in Article 3, Regulation (EU) No 178 of 2002 – known as the General Food Law -, which states that it is

a function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard.

While first generation food safety policies relied on line inspection to ensure product quality⁵ (Hoffman, Harder, 2010), during the past decade attention has been paid to *risk analysis*, described - by the same above-mentioned article -, as a procedure that includes three different phases: *risk assessment*, *risk management* and *risk communication*⁶. If the first is a scientifically based process⁷, the second consists in *weighing policy alternatives in consultation with interested parties*⁸; the third, instead, comprises an interchange of opinions and information that occur throughout the whole process, regarding *hazards and risk*, *risk-related factors and risk perceptions*⁹, among interested stakeholders. Actually, the need of a separation between risk assessment and risk management is not a European

choice, because it has been recognised also at international level by the Codex Alimentarius Commission¹⁰. Indeed, Codex standards have been a model for the European law as well as for the national law. In particular, the Codex guidelines highlight the need that food safety regulations have to be advised by risk assessment, which, in turn, has to be based on science, using quantitative and qualitative data, transparently documented. Both at international and at European level, risk analysis is at the core of food regulation and constitutes a set of systematic methods applicable to all food safety acts. As a matter of fact, it might be described as the “empirical” side of a generally science-based system that requires scientific evidence in taking food safety measures. By doing so, the European legislator makes it clear that the favourite way for ensuring a *high level of protection of human health and life*¹¹ and protecting *consumers’ interest in relation to food*¹² has its roots in science¹³.

However, science does not have all the answers. Therefore, when risk assessment is not able to provide a scientific basis that underpins the decision-making process and there are still doubts about harmful effects on human health, the precautionary principle is applied. Measures adopted in this kind of circumstances are provisional and are going to *be reviewed within a reasonable period of time, depending on the nature of the risk [...] and the type of scientific information needed to clarify the scientific uncertainty*¹⁴.

2.1 Risk and administrative law: how to foster transparency in the risk analysis process through good administration principles

The separation between risk assessment and risk management reflects the institutional one between the European Food Safety Authority (EFSA) and the European Commission. The goal behind the mentioned disjunction is to achieve the highest scientific integrity of the risk assessment process, in order to minimize the political pressures that would undermine the objectivity and the credibility of its conclusions. Indeed, it is supposed to make scientific assessment more independent - thus credible - because not leant to preconceived opinions¹⁵ (Gabbi, 2007). Even though it is impossible to completely erase tensions between the political and the scientific level, dialogue and cooperation should inform the entire risk analysis process, as essential elements for taking more effective decisions.

Actually, many have doubts about the role that the scientific advice should play in the decision-making process, as well as they argue on how scientific and policy considerations should interact. As a matter of fact, the relationship between scientific and democratic legitimacy remains contested: on the one hand, scientific truth is not usually built democratically and, on the other hand, ethical and political issues are not decided experimentally¹⁶ (Millstone, 2007). The model the European Union has embraced setting out the General Food Law can still be represented as a science-based system, in so far as it is scientists’ concern

to state what is safe rather than unsafe, while it is up to policy-makers to decide which tools are the most suitable to provide objective scientific advice, taking into consideration also non-scientific elements. The decision-makers seem to still depend on experts' outcomes, despite the numerous attempts carried out by politicians, civic groups and academic scholars to develop participatory mechanisms¹⁷ (Perez, 2007). In this framework scientific experts are seen as credible and objective and their expertise possesses the value to appear far from national interests or special concerns¹⁸ (Gornitzka, Sverdrup, 2011); thus they are deemed as able to provide the European Commission with the information necessary to fulfill its tasks of decision-making, within the risk management phase.

However, this perception might mirror an idealised vision of their expertise, without considering the existing biases that could distort their evaluations¹⁹. Risk analysis is driven by scientific and technical considerations but we should not forget that risk management involves people that need to be protected and warned, hence political and social considerations as well shall be taken into account: too often we have been focusing on people's health, "but not their mental health, their lives but not usually their lifestyles, [...] the physical environment but neither the social values associated with it nor ecological scarcity"²⁰ (Short, 1984).

It is of great importance to always bear in mind that whether a risk is acceptable depends on the cultural context. Particularly, individual considerations that make a risk acceptable are the result not only of personal preferences, but they are also dependent on the acceptability of the context to the individual. Indeed, the creation of public policy in the field of food safety has to reconcile the melting-pot of many European cultures and traditions concerning food.

Traditionally, debates about the role of public policy in facing risk concerns tend to distinguish two different approaches: those who argue that science and expertise have to be the primary basis in the decision-making process and those who reply that, on the contrary, democracy and ethical values should have priority; such conflicts can be described as a science-democracy dichotomy. By relying on science expertise as the exclusive tool, which legitimates the decision-making, we create a gap between society and political participation within the risk governance. Although science plays an essential role within the risk analysis process, the decision-making phase cannot be purely scientific in nature, as science is not a "neutral arbiter"²¹ (Walker, 2003). Thus, a so-called "democratising expertise"²² (Szajkowska, 2012) has been introduced, in order to enrich scientific opinions with social, ethical or economic concerns expressed by civil society. As a matter of fact, the General Food Law itself recognises that in many cases scientific evaluation alone is not enough. Therefore, the "Whereas" n. 19 Reg. 178/2002 introduces "other legitimate factors", meaning other pertinent considerations - such as societal, economic, traditional, ethical and environmental concerns - that can be legitimately taken into account in the risk management phase. Despite this, Regulation (EU) 178/2002 does not provide any indication on how,

and to what extent, these mentioned factors should be included in the risk management process.

Next to this science-democracy dichotomy, there might be a third point of view focusing on the idea that our understanding of the two mentioned concepts "is actually processed through another institutional form which will shape our understanding of risk evaluation problems"²³ (Fisher, 2007). And the institutional form is neither democracy nor science, but rather it is related to the public administration discretionary power. But what is the discretion that risk related policy-making processes enjoy? How can this exercise of discretion be reasonable and non-arbitrary? In fact, we should not confuse discretion with secrecy. It is possible to achieve excellence in public administration only if it is prepared to reflect on past mistakes and discuss them with the public²⁴, in an open and transparent way.

A good example to implement the decentralised actions and the bottom-up participation of the citizens in food-related decisions can be borrowed by the environmental law domain. Environmental law and in particular the above-mentioned application of the precautionary principle to the food system have played a key role in the development of a food safety legal doctrine. The precautionary principle has been adopted in a variety of forms at international and national levels, and it triggered the idea that in any case of lack of scientific evidence, there shall be a safety valve, which provides a grounded motivation to the decision of the public authority. The precautionary principle is applied across an increasing number of national jurisdictions, economic sectors, and environmental areas. It has moved from the regulation of industry, technology, and health risk to the wider governance of science, innovation, and trade. In the aftermath of a series of formative public health controversies, economic calamities, and political conflicts, precaution is nowhere of greater salience or importance than in the field of food safety.²⁵

Last but not least, the precautionary principle works as a safety valve for the good functioning of the risk analysis, if we see it through the lens of the administrative law. The risk analysis is nothing else but an administrative proceeding, requiring that all good administration guarantees are set in place (rule of law, transparency, participation, judicial review). First of all, any administrative act resulting from an administrative proceeding shall be soundly and adequately motivated. And when the motivation of the science does not offer full certainty, the precautionary principle works as a crutch replacement. Though the substance is not completely fulfilled -full scientific certainty is always preferable to general precautionary statements-, still the formal requirements are met. In any EU administrative legal system there is a legal provision stating that all the administrative acts shall be motivated (as for the Italian legal system, the provision is set in Art. 3 L. 241/1990) and the parties have an instrument to appeal that decision, grounding their claim on the insufficient, contradictory or apodictic motivation. This way, precautionary principle offers a guarantee of good administration, both for the decision maker and for the parties: the decision shall be motivated and the parties have the tool to appeal it.

The precautionary principle is not the only example of “legal transplant” from the environmental law domain to the food law. The core of good administration principles that so effectively impacted the European legal culture have all kinship connections to the same family tree of environmental law, so powerfully fostered by the Aarhus Convention (AC). International environmental law and more specifically the procedural guarantees the AC introduced have contributed to re-shape the EU legal order. The AC is structured into three main pillars, dealing with: (1) the right of access to information; (2) the right to participate in decision-making, and (3) the right of access to justice in environmental matters. The pillars reflect the shift in mentality required to the AC parties in terms of opening up the doors of environmental decisions to good administration principles, such as transparency, participation, judicial review. This implied that the connection between environmental protection and human rights had improved at European level, at least from a procedural perspective. These improvements relate to the harmonization of administrative proceedings concerning environmental impact assessments, with an emphasis on the participatory rights conferred to the interested parties in the decision making process²⁶ (Andrusevych, Alge, 2011). As a consequence, the AC’s specific procedural requirements contributed to increase the number of cases decided by the Court of Justice of the European Union (CJEU) on the Convention.

The new set of administrative procedural principles, carried through the channel of the AC and the environmental protection, are now part of the common core of “general principles of European Law”²⁷ (Galetta, Hoffman *et al.*, 2015). If the AC represents the foremost example that contributed to convey these principles within the tissue of the national legal systems, the role played by the European Court of Justice is also extremely relevant, when we consider that the Court qualified those procedural guarantees as part of the constitutional traditions common to the Member States²⁸ (Galetta *et al.*, 2015).

Nevertheless, both the international agreements and the role of the European Courts alone are not sufficient to give visibility and full recognition to these principles: this is the reason why the Policy Department on Citizens’ Rights and Constitutional Affairs (Directorate General for International Policies of the European Parliament) delivered a report in 2015 with the suggestion to include the good administration principles within a regulation that will have the potential to contribute to the objectives of clarification of rights and obligations²⁹ (Galetta *et al.*, 2015). The instrument of a European Regulation on General Principles of EU Administrative Procedural Law will also contribute to simplify the EU law by ensuring that procedures can follow one single rule-book and better regulation by allowing to improve the overall legislative quality³⁰ (Kopric, Musa, *et al.*, 2011).

In conclusion, implementing a core of principles common to all the European administrative proceedings -including the risk analysis procedure- is a priority in progress in the European legislator agenda: the suggestion to include them in the recitals of the regulation on EU administrative procedure testifies their growing importance as solid foundations of a common European tradition based on the rule of law and legality.

3 Methodology

The study focuses on the risk analysis procedure applied to the food sector, regarded as the culture medium for innovative responses coming from the mutual beneficial relationship between technical expertise and best practices in good governance. An integrative approach where science-based decisions are supported by a sound system grounded on the rule of law and its corollaries (transparency, participatory rights and accountability) is functional to better achieve the purposes of both science and good administration, and respectively to reach a satisfactory level of objectivity in the decision-making process and to set up effective regulatory tools to prevent and curb corruption.

A methodology based on the combination of science and governance shall not ignore the role of precautionary principle in gluing them, whereby it requires the commitment of the decision-makers to overcome the problems caused by scientific uncertainty.

The research is conducted mainly on the food risk analysis procedures in the European legal system, though the general principles are consistent with the guidelines suggested at international level by the Codex Alimentarius Commission. This broader perspective frames the research topic in the global administrative law dynamics.

4 Research outcomes

As we pointed out in the previous paragraphs, the conflict between top-down and bottom-up scientific assessment opens up a space to discuss the model of technocratic or democratic governance in food matters. In this paragraph we discuss whether principle of civic science might boost the implementation of good administration principles.

Civic science has been described as the efforts put by scientists, to communicate scientific results to the public³¹ (Bäckstrand, 2003). The term often refers to the attempts made in order to couple science content with societal issues, in the light of a mutual relationship between scientists and general audience³² (Clark, Illman, 2001). Indeed, the relation between science and policy has often been simplified as the one between experts and lay people, where the latter do not have background in scientific matters. Undoubtedly, this is a result of democracies, since their qualifying element is that virtually anyone can be elected or nominated to positions of political responsibility. Although it might occur that an elected politician has scientific knowledge, this is not a prerequisite, as representative democracy does not require any specific skill. It is true, though, that in our modern society the number of scientifically literate people has increased; therefore, treating them as ignorant or uninformed is incorrect as well as ineffective³³ (De Marchi, 2003). Therefore, we should wonder how scientific knowledge and practice can be embedded in the cultural and political context, as well as in societal discourses, trying to answer the question of how, and by what means, it

is possible to give legitimacy to scientific assessment. After all, even the notion of “risk” itself has to be considered in the light of its social environment, as different cultural contexts usually have a different perception of risk³⁴. As Ulrich Beck says, “risk springs from impacts that are rooted in the ongoing industrial and scientific production and research routines. Knowledge about the risks, in contrast, is tied to the history and symbols of one’s culture and the social fabric of knowledge”³⁵ (Beck, 2000).

The rationale behind the attempt to find a response to this kind of concerns in civic science depends on the consideration that it is underpinned by three pillars: *participation*, *representation* and *democracy*³⁶ (Bäckstrand, 2003). Its main aims can be described as the efforts to increase public participation in science and technology decisions, to ensure more adequate representation - especially when it comes to local knowledge - and, by doing so, to foster a democratic governance of science.

In particular, while after the BSE crisis governments started relying on science as a tool to justify political decisions and make them trustworthy, its inflationary use has actually led to an increasing level of uncertainty, since citizens ended up doubting on the legitimacy of experts’ advice. Indeed, as, for definition, science is often provisional and uncertain, we have been assisted to battles among experts and counter-experts and we have seen governments relying on one or another research outcome, in accordance to their interests. This has weakened science credibility and many times has made it appear as instrumental to political choices and far from citizens’ concerns. In this framework, civic science can enhance scientific understanding, tempering the growing disenchantment with scientific experts. Indeed, the traditional model, based on the hierarchy between scientists and non-scientists - where the formers are considered as enlightened people and the latter as ignorant layman - has undermined the confidence in experts’ knowledge. Nurturing communication, as one-level process between the science community and the public, means to promote a deeper awareness of the scientific endeavour, and this is the most useful tool for both restoring public trust in science and, consequently, increasing public participation. Moreover, within a traditional model based on exclusive networks of specialists, civic science tries to detour direction towards the inclusion of local and indigenous knowledge in science debate. It underlines how local knowledge plays a pivotal role not only in identifying and defining problems but also in building the necessary legitimacy to effectively implement policy³⁷ (Fisher, 2000). This perspective is crucial when thinking at the integration of lay-knowledge both in the risk management and in the risk assessment phase, as it takes into account the possibility that science and traditional knowledge, together, support each other with mutual learning.

5 Conclusions

Participation and representation instruments might be able to extend the

principles of democracy to the scientific knowledge production and, over time, lay the foundations for extending the principles of democracy to the scientific knowledge production. Within the environmental risk management, participatory institutionalised practices in the conduct of science, such as consensus conferences, participatory technology assessment, citizen juries and public hearings in science and technology affairs, have already been experienced. A more democratic model recognises the existence of multiple (and occasionally conflicting) forms of expertise, and seeks to accommodate them all through an open and transparent public debate ³⁸ (Durant, 1999). Failing to understand non-scientific issues will affect the success of the implementation and will exacerbate the conflict between the experts and the public. Thus in order to fulfil this gap, it is time to move forward to a more comprehensive science-policy relationship in the food law framework as well, starting from the enhancement of scientists' communicative skills and outreach in order to reach a broader public involvement in science and technology.

Endnotes

1. The definition of risk is traditionally dates back to BECK ULRICH's 1992, *Risk Society: towards a new modernity*, Sage, London, where the author defines risk *a systematic way of dealing with hazards and insecurities*.
2. As SZAJKOWSKA ANNA (2012) writes in *Regulating food law. Risk analysis and the precautionary principle as general principles of EU food law*, Wageningen Academic Publishers, Wageningen, p. 16, "danger is a situation in which something unpleasant or damaging might potentially happen, regardless of our choices".
3. It is of great importance to highlight that talking about food as risk is particularly complex as it requires to take into consideration different viewpoints. Indeed, techno-scientific concerns are usually strictly related to cultural and ethical evaluations, as the example of GMOs clearly shows.
4. SLOVIC PAUL - FINUCANE MELISSA, PETERS ELLEN - MACGREGOR DONALD G. (2004), *Risk as Analysis and Risk as Feelings: Some Thoughts about Affect, Risk, Reason and Rationality*, in *Risk Analysis* Vol. 24, No. 2, p. 1.
5. HOFFMAN SANDRA - HARDER WILLIAM (2010), *Food safety and risk governance in globalized markets*, in *Health Matrix*, Vol. 20, n. 5, p. 19.
6. This articulation has been described for the first time in the, so called, *Red Book*, a 1983 report, by US National Research Science Council, titled *Risk Assessment in the Federal Government: Managing the Process*.
7. Particularly, Article 3(11) GFL sets out that it consists in four steps: hazard identification, hazard characterization, exposure assessment and risk characterisation.
8. Article 3(12) GFL.
9. Article 3(13) GFL.
10. In the Decision of the 22nd Session of Codex Alimentarius Commission, in 1997, it was clearly pointed out the need of such separation "while recognizing that some interactions are essential for a pragmatic approach".
11. Article 6 GFL.
12. Article 1 GFL.
13. Even though on a different level, the idea that political power should be granted to those who actually possess knowledge, hence are aware of what is good for themselves as well as for the

others, can already be found in Plato's *The Republic*. In this viewpoint, Plato's "philosopher king" in contemporary formulation corresponds with the "expert", whose competence raises him upon lay citizens. For a better understanding see PEREZ OREN (2012), *Open Government, Technological Innovation, and the Policy of Democratic Disillusionment: (e-)Democracy from Socrates to Obama*, in *A Journal of Law and Policy for Information Society*, Vol. 9.

14. Article 7 GFL.
15. GABBI SIMONE (2007), *The interaction between risk assessors and risk managers. The case of the European Commission and the European Food Safety Authority*, in *EFFL* n. 3, p. 128.
16. MILLSTONE ERIK (2007), *Can food safety policy-making be both scientifically and democratically legitimated? If so, how?*, in *Journal of Agricultural and Environmental Ethics*, 20, p.484.
17. PEREZ ORAN (2014), *Can experts be trusted and what can be done about it? Insights from the biases and Heuristics Literature*, in ALEMANNO A. – SIBONY A.L. (2015), *Nudging and the Law: a European Perspective*, Hart Publishing.
18. GORNITZKA ASE – SVERDRUP ULF (2011), *Access of Experts: Information and EU Decision making*, in *West European Politics*, 34, p. 59.
19. For instance, without trying to be exhaustive, we can just point out that people seem unable to ignore their prior beliefs when weighing counter-argument and counter-evidence, or that they tend to focus on a specific feature of a problem too early in the reasoning process. For better understanding see PEREZ O., see n. xvii.
20. SHORT JAMES F. JR. (1984), *The social fabric at risk: toward the social transformation of risk analysis*, in *American Sociological Review*, Vol. 49, n. 6, p.711.
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The risk management function: the case of a group of Italian credit cooperative banks

Authors

- *Giovanni Ossola, Full Professor, giovanni.ossola@unito.it. - University of Torino*
 - *Guido Giovando, Associate Professor, guido.giovando@unito.it. - University of Torino*
 - *Chiara Crovini, Ph.D. Candidate, chiara.crovini@unito.it. - University of Torino*
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This study focuses on the analysis of the risk management function of the credit cooperative banks in the North-West of Italy. We analysed all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF), the ICAAP reports and the public disclosure of Pillar III of each bank, as required by Basel II Capital Framework.

Our first aim was to individuate and thus evaluate the process and the activities of the risk management function. In addition, we analysed the output of this process, which is the ICAAP report, in order to underline and demonstrate that the adequacy and compliance of the Corporate Governance with the laws are reflected in the capitalisations of banks. This is the reason why we decided to monitor if credit cooperative banks of the sample were adequately capitalised in 2014 and if they complied with the requirements of Basel II.

Our research is organised as follows: in Paragraph 2, we provide the literature review and in Paragraph 3 there is the theoretical background of the topic presented. The definition of the sample of banks and the methodology are described in Paragraph 4. In this section, we also include the presentation of the research questions and phases of analysis. Our results and discussions are presented in Paragraph 5 and conclusions are in the last part of our research.

Keywords: risk management function, process, credit cooperative banks, ICAAP

JEL Classification: G01, G18, G21, G28, L22,

1 Introduction

Risk is an inevitable element of every bank and insurance company. Risks emerge when such institutions provide their financial services to customers and explicitly when they take risk positions that offer profitable and above-average returns. There is no unique view on risk.

Over the past few decades, after several crunches, there has been an increasing demand for banking supervision at the international level.

The Basel Committee on Banking Supervision in 1988 elaborated the so-called "Basel I", the first step of mandatory regulations of risk assessment.

The following Basel Accord "Basel II" describes a more comprehensive risk measure and minimum standard for capital adequacy and it is structured in three Pillars. Pillar I imposes new methodologies of calculating regulatory capital, thereby mainly focusing on credit risk and operational risk. Pillar II then introduces the so-called Internal Capital Adequacy Assessment Process (ICAAP) and contains guidance to supervisors on how they should review an institution's ICAAP. According to the Committee of European Banking Supervisors (CEBS), banks should calculate an "overall capital number" as an integral part of their ICAAP. This single-number metric should encompass all risks related to different businesses and risk types. Pillar III instead aims at integrating the minimum capital requirements and supervisory review process by developing a set of disclosure requirements which could allow the market participants to evaluate the capital adequacy of an institution.

The third Basel Accord (Basel III) was developed in 2010, in response to the deficiencies in financial regulation revealed by the financial crisis of 2007–08. Basel III is intended to strengthen bank capital requirements by increasing bank liquidity and decreasing bank leverage. It will be implemented in 2019.

Our research focuses on the analysis of the risk management function of the credit cooperative banks of the North-west of Italy in 2014.

We provide a definition of this function and we individuate the role of the Chief Risk Officer.

Consequently, the aim of this research was two-fold. Firstly, by analysing all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF) and the public disclosure of Pillar III of each bank, as required by Basel II Capital Framework, we aimed at individuating and evaluating the process and the activities of the risk management function and in particular we analysed the output of this process, which is the ICAAP report. This last element is linked to the second aim of this study, which is to monitor the impact of risks on banks and in particular on their capitalisations.

This is the reason why we decided to monitor if credit cooperative banks of the sample were adequately capitalised in 2014 and if they complied with the requirements of Basel.

This last element can help us introduce all the limits of this research. First of all, this study represents the first step of a far deeper analysis that can consider other elements related to the Corporate Governance of credit cooperative banks.

Moreover, this research consider a small sample of banks. Therefore this work can be extended to all Italian credit cooperative banks.

The remainder of this study is organised as follows. In Paragraph 2, we provide the literature review and in Paragraph 3 there is the theoretical background of the topic presented. The definition of the sample of banks and the methodology are described in Paragraph 4. In this section, we also include the presentation of the research questions and phases of analysis. Our results and discussions are presented in Paragraph 5 and conclusions are in the last part of our research.

2 Literature review

In 2007-2008 the financial crisis revealed significant new problems in risk assessment and management.

The financial crisis forced a rethink on how banks and regulators approached enterprise risk management (Sawyer and Davidson, 2009).

Both financial crisis and economic theories indicate the need for integrated risk management, also called Enterprise Risk Management (ERM), an integrated measurement and management of all relevant risks in an organization. Risk integration approaches and other tools are useful techniques for companies.

As reported by the Basel Committee, an integrated risk management system should improve management policies and processes in order to better ensure awareness of risks and also to develop the necessary tools to deal with those risks.

Some researchers (Li et. al., 2012; Grundke, 2010; Alessandri and Drehmann, 2010; Böcker, 2008; Kupiec, 2007; Grundke, 2005) concentrated on risk integration mechanisms and on the different approaches adopted by banks in the Basel II Capital Framework.

Other studies analysed the method to measure different types of risk (Politou and Giudici, 2009; Chapelle et. al, 2008; Fantazzini et al., 2008; Embrechts and Puccetti, 2006).

In addition, other researchers have recently analysed the impact of the new capital requirements under Basel III on bank lending rates and loan growth (Khalert and Wagner, 2015).

Some studies focused on the way some financial entities have addressed this moment of global crisis (Crowley, 2015; Costa and Thegeia, 2013; Avdjie et al. 2012; Caprio et al., 2011). Many researchers tried to locate the perimeter within which identify the financial risk and study methods for good management, in accordance with the requirements of Basel (Álvarez and Rossignolo 2015; Angelini, et al. 2011).

A major study found that the systemically important banks of the Euro zone, during the period between 2007 and 2013, were well capitalized with respect to market risk, but they were undercapitalised with respect to the credit and counterparty risks (Kahlert et al, 2015).

As regards the topic of risk management, there are some works about SMEs (Marcelino-Sadaba et.al., 2013; Leopulos et.al., 2007; Blanc Alquier and Tignol, 2006).

Linked to the topic of SMEs, several researchers concentrated on credit co-operative banks, in terms of characteristics and role within the Italian banking sector (Bonfante, 2010; Agostini, 2009; Costa, 2007; Capriglione 2005; Bonfante, 2004; Vella, 2004; Appio, 1996).

The importance of local small banks, such as BCCs, was emphasized in few studies (Usai and Vannini, 2005; Ferri and Messori, 2000).

Our research fits into this framework. In particular we decided to concentrate on the observation of the risk management function of a group of Italian credit cooperative banks.

A credit cooperative bank is a member-owned financial cooperative, democratically controlled by its members, and operates for the purpose of promoting thrift, providing credit at competitive rates and other financial services to its members. Many credit unions also provide services intended to support community development or sustainable international development on a local level.

Credit cooperative banks differ from banks and other financial institutions because those who have accounts in the credit union are its members and owners. In addition, they elect their board of directors in a one-person-one-vote system, regardless of their invested amount. Their mission is "community-oriented" and "serve people, not profit".

Moreover, we monitored the risk management process, by analysing all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF) and the public disclosure of Pillar III of each bank, as required by Basel II Capital Framework.

We thus evaluated also the output of this process, which is the ICAAP report. Thanks to our study we managed to link the topic of the adequacy and compliance of the Corporate Governance with the laws to the capitalisations of the banks of the sample.

3. The Risk Management Function in the Italian Credit Cooperative Banks

The Risk Management function is part of the overall framework of the Internal Control System and it covers an independent position from the internal audit function.

The independent risk management function is a key component of the bank's second line of defence. This function is responsible for overseeing risk-taking activities across the enterprise and should have authority within the organisation to do so.

Key activities of the risk management function should include:

- identifying material individual, aggregate and emerging risks;
- assessing these risks and measuring the bank's exposure to them;
- subject to the review and approval of the board, developing and implementing the enterprise-wide risk governance framework, which includes the bank's risk culture, risk appetite and risk limits;
- ongoing monitoring of the risk-taking activities and risk exposures in line with the board-approved risk appetite, risk limits and corresponding capital or liquidity needs (i.e. capital planning);
- establishing an early warning or trigger system for breaches of the bank's risk appetite or limits;
- influencing and challenging decisions that give rise to material risk;
- reporting to senior management and the board or risk committee on all these items, including but not limited to proposing appropriate risk-mitigating actions.

While it is common for risk managers to work closely with individual business units, the risk management function should be sufficiently independent of the business units and should not be involved in revenue generation.

Such independence is an essential component of an effective risk management function because it has the possibility to have access to all business lines and functions that have the potential to generate material risk to the bank as well as to relevant risk-bearing subsidiaries and affiliates.

Therefore the Risk Management Function has unrestricted access to corporate and external data, necessary for carrying out their duties and, in addition, it can use, to what extent, the services offered by the local Federation and, if necessary, it may require economic resources to carry out its tasks.

The risk management function should have a sufficient number of employees who possess the requisite experience and qualifications, including market and product knowledge as well as command of risk disciplines. The number of employees depends on the complexity of the structure and the dimension of each bank.

In any case, it is supposed that staff should have the ability and willingness to effectively challenge business operations regarding all aspects of risk arising from the bank's activities. Moreover, staff should have access to regular training.

3.1 The Role of the Chief Risk Officer

Italian credit cooperative banks, like large, complex and internationally active banks, have a senior manager (CRO- Chief Risk Officer) with overall responsibility for the bank's risk management function.

The Chief Risk Officer is appointed, after verification of the requirements of the Supervisory Board, and revoked (giving reasons) by the Board of Directors, after consulting the Statutory Auditors (collegio sindacale). The appointment is then communicated to Banca d'Italia. The communication of the appointment is made known, as well as the person appointed, to the entire staff of the Bank,

with a special communication. Any termination of the mandate or of the person shall be immediately reported to Banca d'Italia, with related motivations.

The CRO has primary responsibility for overseeing the development and implementation of the bank's risk management function. This includes the ongoing strengthening of staff skills and enhancements to risk management systems, policies, processes, quantitative models and reports as necessary to ensure that the bank's risk management capabilities are sufficiently robust and effective to fully support its strategic objectives and all of its risk-taking activities.

The Chief Risk Officer is responsible for supporting the board of directors in its engagement with and oversight of the development of the bank's risk appetite and RAS (Risk Appetite Statement) and for translating the risk appetite into a risk limits structure. Therefore the CRO, together with management, should be actively engaged in monitoring performance relative to risk-taking and risk limit adherence. The CRO's responsibilities also include managing and participating in key decision-making processes (e.g. strategic planning, capital and liquidity planning, new products and services, compensation design and operation).

The Chief Risk Officer should have the organisational stature, authority and necessary skills to oversee the bank's risk management activities.

They should be independent and have duties distinct from other executive functions. This requires the CRO to have access to any information necessary to perform his or her duties. They should not have management or financial responsibility related to any operational business lines or revenue-generating functions, and consequently there should be no "dual hatting" (i.e. the chief operating officer, CFO, chief auditor or other senior manager should in principle not also serve as the CRO). In credit cooperative banks, as they are small financial institutions, sometimes resource constraints and dimension may make overlapping responsibilities necessary. Consequently, the Corporate Governance Principles for Banks underline the importance that the roles should be compatible.

Moreover the CRO should report and have direct access to the board or its risk committee without impediment. They should have the ability to interpret and articulate risk in a clear and understandable manner and to effectively engage the board and management in constructive dialogue on key risk issues. Interaction between the CRO and the board and/or other functions should occur regularly.

The CRO's performance, compensation and budget should be reviewed and approved by the risk committee or the board.

4. Methodology

4.1 Research Questions and Phases of Analysis

The present research is based on the following hypotheses:

- H1: the Italian credit cooperative banks, as they are small financial institutions, have a simpler organisation and Corporate Governance model;

- H2: the macroeconomic events, related to the evolution of the market, and the new regulatory policy of the European Central Bank had a huge impact on the organisation of each bank and on the determination of the internal capital.

To reach the goals of this study, we need to formulate two research questions:

- RQ1: do Italian credit cooperative banks have a formalised risk management process? How CRO and employees manage the different kinds of risks?

- RQ2: what is the impact of risks on credit cooperative banks? What about their internal capital adequacy?

The research methodology follows three phases:

a) Phase 1: Methodology. In this phase we define the sample monitored and we also specify that we analysed all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF), the ICAAP report and the public disclosure of Pillar III of each bank, as required by Basel II. In addition we provide some information about the risks monitored in each bank.

b) Phase 2: Observations and findings. It involves an analysis of the information derived from all documents related to the banks of the sample.

With reference to RQ1, we firstly aim at drafting the process of the risk management function and individuating how risks are assessed and managed.

With reference to RQ2, we monitor the impact of risks on banks and on their capitalisation. In particular, we want to demonstrate that in 2014 the amount of Tier 1 and Tier 2 were adequate and that the CET1 equity ratio and the Total capital ratio were respectively higher than 4,5% and 8%.

c) Phase 3: Conclusions and limitations of the research.

4.2 The sample and data

This study focuses on the analysis of the risk management function of the credit cooperative banks in the North-West of Italy.

We chose all credit cooperative banks of Piedmont, Valle d'Aosta and Liguria because they play an important role in the financial system of the North of Italy.

Table 1 shows the banks of the sample.

Table 1 Credit Cooperative banks of the sample

<i>B.C.C. di Casalgrasso e S. Albano Stura</i>
<i>B.C.C. Valdostana</i>
<i>Banca Alpi Marittime Credito Cooperativo Carrù</i>
<i>Banca d'Alba credito cooperativo sc</i>
<i>Banca di Caraglio del Cuneese e della Riviera dei Fiori Credito Cooperativo</i>
<i>Banca di Credito Cooperativo di Bene Vagienna</i>
<i>Banca di Credito Cooperativo di Cherasco</i>
<i>Banca di Credito Cooperativo di Pianfei e Rocca de' Baldi Soc. Coop.</i>
<i>Cassa Rurale e Artigiana di Boves</i>

Source: www.creditocooperativo.it

We analysed all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF), the ICAAP report and the public disclosure of Pillar III of each bank, as required by Basel II Capital Framework.

We individuated and thus evaluated the process and the activities of the risk management function and in particular we analysed the output of this process, which is the ICAAP report. This last element is linked to the fact that the adequacy and compliance of the Corporate Governance with the laws are reflected in the capitalisations of banks.

This is the reason why we decided to monitor if credit cooperative banks of the sample were adequately capitalised in 2014 and if they complied with the requirements of Basel.

3.3 Risks in the Credit Cooperative Banks

Every credit cooperative bank defines the map of the significant risks, which constitutes the framework within which it develops all activities related to the risk measurement, assessment, monitoring and mitigation.

Therefore, it identifies all the risks for which it is or could be exposed, i.e. the risks that could affect its operations, the pursuit of its strategies and the achievement of corporate objectives.

To conduct these activities, every bank takes into account all the risks contained in the list in the Appendix A, Title III, Chapter 1 of Circular 285/13 of Banca d'Italia, evaluating the need for customization in order to better understand and reflect the business and company operations: therefore, primarily the risks to such the institute believes it is not exposed have been eliminated and secondly additional risk factors were identified.

The list of the main risks is the following:

- credit risk;
- counterparty risk;
- market risk;
- operational risk;

- concentration risk;
- risk of interest rate risk arising from non-trading activities;
- liquidity risk;
- residual risk;
- strategic risk;
- reputational risk;
- compliance risk;
- risk of money laundering and funding of international terrorism;
- venture capital risk.

The risks identified are classified into two types:

- quantifiable risks in terms of internal capital, in relation to which the Bank makes use of appropriate metrics of capital absorption measurement. These risks are: credit and counterparty risk, market risk, operational risk, concentration risk and interest rate risk;
- risks which cannot be quantified in terms of internal capital, for which there are not yet strong and shared established methodologies for the determination of capital requirement. In addition a buffer of capital has not determined yet and, in accordance with the Supervisory Provisions, systems are predisposed to control and adequately attenuate these risks: liquidity risk, residual risk, risk of excessive leverage, strategic risk, reputational risk, compliance risk, risk of money laundering and funding of international terrorism and venture capital risk.

5 Findings

5.1 Results

By analysing all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF), the ICAAP report and the public disclosure of Pillar III of each bank we can confirm our first hypothesis. In fact, the majority of banks of the sample belong to Class 3. Banca d'Italia states that in this class there are banks and banking groups with consolidated or individual assets lower than 3,5 billion euros, which adopt only standardised methods for the risk measurement and the determination of the internal capital.

Only Banca d'Alba belongs to Class 2. According to Banca d'Italia, in this class there are banks or banking groups with consolidated or individual assets higher than billion euros, which adopt only standardised methods for the risk measurement and the determination of the internal capital.

Because of these characteristics and the principle of proportionality stated by Basel Committee, these banks determine the overall internal capital according to the simplified approach, called "building block", which consists of adding the in-

ternal capital, related to different types of risks, to the regulatory requirements of Basel II.

With reference to the second hypothesis (H2), all reports indicate that starting from 2014 banks had to modify their organisations and their internal control systems, by developing new processes with the only objectives of assessing and measuring risks in order to adapt to the new Capital Requirements of Basel.

As regards the first research question (RQ1), by analysing all the documents of the banks of the sample, there emerged that the credit cooperative banks of the North-west of Italy have a formalised process for the risk assessment and management. The overall approach is in line with the international best practice and takes inspiration from the Enterprise Risk Management (ERM), presented by the Sponsoring Organisations of the Treadway Commission (Co.S.O.).

The process starts from the definition of the Risk Appetite Framework (RAF), which is the approach, including policies, processes, controls and systems, through which risk appetite is established, communicated and monitored. It includes a risk appetite statement, risk limits and an outline of the roles and responsibilities of those overseeing the implementation and monitoring of the RAF (*Corporate Governance Principles for Banks* - July 2015). The RAF should consider material risks to the bank and it aligns with the bank strategy.

The risk management process is mainly composed of three activities:

- identification of events and risk assessment;
- risk evaluation;
- response to the risk.

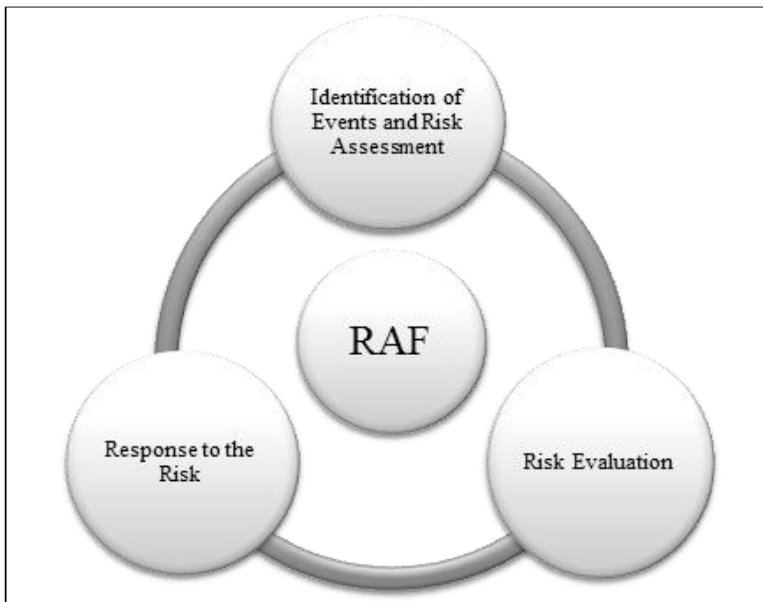


Figure 1 The risk management activities

As mentioned above, one of the most important key element is risk communication. As stated in the Guidelines of the Basel Committee on Banking Supervision, ongoing communication about risk issues, including the bank's risk strategy, is a key tenet of a strong risk culture. A strong risk culture should promote risk awareness and encourage open communication and challenge about risk-taking across the organisation as well as vertically to and from the board and senior management. Senior management should actively communicate and consult with the control functions on management's major plans and activities so that the control functions can effectively discharge their responsibilities.

Information should be communicated to the board and senior management in a timely, accurate and understandable manner so that they are equipped to take informed decisions.

Another element that emerged in our observations of the risk management function is the need for a proper organisation.

Every function and unit are strictly linked with the other and the risk manager officer is the trait d'union among them.

In particular, by analysing the maps of risks, we could monitor how risks are managed in each bank.

Table 2 shows the operational units of the banks of the sample in which the potential damaging events could generate.

Table 2 Risks and Operational Units

Functions Risks	GOVERNANCE BOARDS			OPERATIONAL UNITS									
	Board of Directors	Collegio Sindacale	General Manager	Administrative Direction	Internal Audit	Internal Control	Legal Office	Secretary	Organisational Area	Commercial area	Accounting Area	Finance	Anti-money Laundering Function
Credit risk	X		X									X	
Counterparty risk			X									X	
Market risk			X									X	
Operational risk			X	X			X	X	X		X	X	
Concentration risk	X		X									X	
Risk of interest rate risk arising from non-trading activities	X		X									X	
Liquidity risk	X		X									X	
Residual risk			X				X					X	
Strategic risk	X		X							X			
Reputational risk	X	X	X	X	X	X	X	X	X	X	X	X	X
Compliance risk	X	X	X	X	X	X	X	X	X	X	X	X	X
Risk of money laundering and funding of international terrorism			X										X
Venture capital risk	X		X							X			

With reference to the second research question (RQ2), the impact of risk assessment and management is definitely on the organisation of each bank, as we explained before.

However, the adequacy of the Risk Management Function and the related process reflects on the internal capital adequacy and on the compliance with the requirements of Basel.

By analysing the ICAAP report of these banks, which is the output of the risk management process, we could evaluate if the credit cooperative banks of the sample were able to deal with all the risks included in their RAF and if they had an adequate internal capital.

Table 3 shows that in 2014 all banks of the sample were well-capitalised because the amount of total core capital was adequate. In fact, CET 1 capital ratio, referred to common equity Tier 1 (CET 1), is higher than 5,5% and CET 1 with Additional Tier 1 exceed 4,5%. Moreover, total capital ratio is higher than 8%. In addition, in all banks the Additional Tier 1 is null, consequently in Table 2 we only refer to CET 1 Capital Ratio.

Table 3 Capital Ratios of all banks of the sample

	<i>CET 1 Capital Ratio</i>	<i>Total capital ratio</i>
<i>B.C.C. di Casalgrasso e S. Albano Stura</i>	14,81%	14,85%
<i>B.C.C. Valdostana</i>	12,15%	12,56%
<i>Banca Alpi Marittime Credito Cooperativo Carrù</i>	10,04%	11,86%
<i>Banca d'Alba credito cooperativo sc</i>	9,75%	11,35%
<i>Banca di Caraglio del Cuneese e della Riviera dei Fiori Credito Cooperativo</i>	12,51%	12,53%
<i>Banca di Credito Cooperativo di Bene Vagienna</i>	9,79%	11,33%
<i>Banca di Credito Cooperativo di Cherasco</i>	11,45%	14,50%
<i>Banca di Credito Cooperativo di Pianfei e Rocca de' Baldi Soc. Coop.</i>	12,83%	12,84%
<i>Cassa Rurale e Artigiana di Boves</i>	15,47%	15,48%

Source: www.creditocooperativo.it

5.2 Discussions

Our research and its findings underline that credit cooperative banks of the sample respect all the regulations about the internal organisation and Corporate Governance. They have a separate function which deals with risk management.

They formalised a process that involves all functions and operative units of the bank, in which communication is one of the most important key elements.

As regards the impact of risk assessment and management, we could affirm that risks affect not only the organisational structure of each bank, but they play an important role in the determination of the internal capital, as required by Basel II. However, the banks of the sample in 2014 were well-capitalised and therefore they complied with the regulatory requirements.

6 Conclusions

This study focuses on the analysis of the risk management function of the credit cooperative banks in the North-West of Italy. We analysed all reports, published in 2014, regarding the specific risk policy, the Risk Appetite Framework (RAF), the ICAAP report and the public disclosure of Pillar III of each bank, as required by Basel II Capital Framework.

Our first aim was to individuate and thus evaluate the process and the activities of the risk management function. In addition, we analysed the output of this process, which is the ICAAP report, in order to underline and demonstrate that the adequacy and compliance of the Corporate Governance with the laws are reflected in the capitalisations of banks. This is the reason why we decided to monitor if credit cooperative banks of the sample were adequately capitalised in 2014 and if they complied with the requirements of Basel.

Our research is organised as follows: in Paragraph 2, we provide the literature review and in Paragraph 3 there is the theoretical background of the topic presented. The definition of the sample of banks and the methodology is described in Paragraph 4. In this section, we also include the presentation of the research questions and phases of analysis. Our results and discussions are presented in Paragraph 5 and conclusions in the last part of our research.

This last element can help us introduce all the limits of this research. First of all, this study represents the first step of a far deeper analysis that can consider other elements related to the Corporate Governance of credit cooperative banks. Moreover this research focuses on a small sample of banks. Therefore, it should be extended to all Italian credit cooperative banks.

As regards the possible future developments of this work, it could be interesting to analyse the trend of the internal capital determination in order to evaluate how and if those banks improved their capitalisation during the years.

Another further development of our research could be represented by the comparison between the risk management function of credit cooperative banks with that of listed banks. It could be useful to analyse the risk management process in two different contexts.

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Is financial reporting risk-neutral? A macro-economic perspective

Author

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- *Vera Palea, Assistant Professor, vera.palea@unito.it - University of Torino*
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Accounting is not simply a metric; it is, rather, a calculative practice that shapes the socio-economic environment. Financial reporting affects a great variety of constituencies: not only market actors such as firms, investors, bankers and auditors but also ordinary citizens, employees and states, as financial information serves as a basis for determining a number of rights. This paper challenges the idea that financial reporting is risk-neutral to economy and society. In doing so, it takes IFRS adoption in the European Union as paramount, focusing specifically on fair value accounting, which represents one of the main innovation introduced by European Regulation 1606/2002. It considers risk related to financial disclosure not at a firm, but at a systemic level, highlighting the role of financial reporting in affecting economic development over the long run. It therefore calls for a better understanding of how accounting operate in its institutional structure of economy in order that better accounting systems might be designed. Such an institutional context is provided for the European Union by the Lisbon Treaty, which sets out the constitutional framework and fundamental objectives for the advancement of European society.

Keywords: Financial disclosure, European Union, Fair Value Accounting, Varieties of Capitalism, Lisbon Treaty

JEL Classification: M40, P00, K00

1 Introduction

Financial reporting is usually seen as something very neutral, mechanical and objective, a process that simply measures the economic facts pertaining to a firm, a kind of very boring job specific to accountants. However, this is not exactly the case. Proudhon (1846) used to say that "the accountant is the true economist". Maybe this is a bit excessive, but it gives quite well the idea that financial reporting is a powerful practice that shapes social and economic processes. In fact, financial reporting affects a great variety of constituencies: not only market actors such as firms, investors, bankers and auditors but also ordinary citizens, em-

ployees and states, as financial information serves as a basis for determining a number of rights. It serves, for instance, to set the limit for distributable profits, to elaborate public budget and for tax purposes.

This paper challenges the idea that financial reporting is risk-neutral to economy and society. In doing so, it takes IFRS adoption in the European Union (also EU hereafter) as paramount, focusing specifically on fair value accounting, which represents one of the main innovation introduced by Regulation 1606/2002 adopting IFRS¹. It considers risk related to financial disclosure not from a firm, but from a systemic point of view, highlighting the role of financial reporting in shaping economic and social processes and affecting economic development. It therefore calls for a better understanding of how accounting operate in its institutional structure of economy in order that better accounting systems might be designed (e.g. Cooper and Sherer, 1984).

Furthermore, the recent economic crisis has given rise to a wide criticism on stock market-based globalization. Along these lines, this paper argues that there are fundamental reasons against the wisdom of current attempts to establish a single set of financial reporting standards suitable for all the world. In doing this, it focuses on the European Union and sets the discussion within the framework of the Lisbon Treaty (also 'Treaty' hereafter).

Financial reporting regulation is one of the competences of the European Union, which legislates and adopts those binding acts necessary to pursue the EU's objectives in this field. The objectives of the European Union are set out by the Lisbon Treaty, which provides the constitutional framework of the EU, clearly stating its inspiring values and founding principles. According to the Treaty, the European Union shall work for a sustainable development based on a highly competitive social market economy aiming at full employment and social progress. Social market economy represents the economic and social model on which the European Union has decided to build and shape its own future, and proves that there exists more than one socio-economic model.

This paper raises some concerns about the effects of IFRS adoption on social market economies. It shows that IFRS in general and, more specifically, fair value reporting can have detrimental effects on long-term investments, which have been crucial for gaining and maintaining competitive advantages in many social market economies in the European Union. Fair value reporting is also supposed to exacerbate contagion effects among banks and to amplify procyclicality and credit crunch, with relevant consequences on the resilience of the financial system, which is core for long-term investments in real economy. As a result, current attempts to establish a single set of global financial reporting standards, moreover accommodated to the needs of liberal stock market economies, are not neutral and can harm alternative forms of capitalism. Consistently with this view, the European Union should discuss accounting standards with respect to its fundamental goal of realizing a social market economy. Regulation 1606/2002 should therefore be deeply considered in terms of its ability to match with the EU constitutional setting established by the Treaty.

The remainder of this paper is structured as follows. Paragraph 2 describes the main attempts to establish a single set of global financial reporting standards tailored on the needs of liberal stock market-based economies. Paragraph 3 discusses the main characteristics of social market economy, which has been set out by the Lisbon Treaty as a founding principle of the European Union. Paragraph 4 discusses main concerns about the consistency of IFRS with social market economy, while Paragraph 5 concludes.

2 The Wisdom of a Single Set of International Financial Reporting Standards for All the World

On January 2005, all listed companies in the European Union started using IFRS set out by the International Accounting Standard Board (IASB). IFRS were introduced in the European Union by the European Parliament and Council Regulation No. 1606, 19 July 2002, which mandates IFRS for consolidated financial statements of listed companies, with a member state option to apply IFRS to other reporting entities. A certain number of states - such as Italy, Belgium and Portugal - have extended IFRS to unlisted banks, insurance and supervised financial institutions, while others - such as Cyprus and Slovakia - require IFRS for all firms. Some other states - including Italy, Cyprus and Slovenia - have also extended IFRS to separate financial statements of certain types of firms. There is also a clear intent on the part of the IASB to push to extend IFRS to all unlisted firms, with the purpose of avoiding inconsistency within the accounting practices of individual countries (IASB, 2009).

One of the purposes of mandating IFRS was to standardize accounting language at a European level and to introduce a single set of high-quality global accounting standards that could be recognized in international financial markets. Regulation 1606/2002 is very much focused on capital markets, as is the IASB, the body that issues IFRS. IFRS consider investors to be those most in need of information from financial reports since they cannot usually request information directly from the firm. Moreover, as investors provide risk capital to firms, the financial statements that meet their needs are supposed by IFRS to meet most of the needs of other users, too (IASB, 2010 BC 1.16).

The wide use of fair value accounting under IFRS must be considered in this perspective. Fair value accounting is one of the most important innovations in financial reporting in the European Union, and represents the main difference between IFRS and the former European regulation. Fair value is supposed to provide investors with better information to predict the capacity of firms to generate cash flow from the existing resource base, thereby improving the quality of information for decision usefulness (e.g. Barth et al. 2001). Both the IASB and the FASB have made clear their view that fair value is likely to become the primary basis for financial reporting in the future (Jordan et al. 2013). Along these lines, in 2009 the IASB issued IFRS 9, Financial Instruments, which extends the use of fair value for financial instruments. In 2011, the IASB issued IFRS 13, Fair Value

Measurement, which provides a single framework for measuring fair value. IFRS 13 is the result of a joint project conducted by the IASB together with the FASB, which has however ended up with a passive alignment fair value definition, measurement and disclosure to the US FAS 157.

Consistently with the IASB's focus on investors' interest, mainstream research has largely investigated the effects of adopting IFRS in Europe in terms of their value-relevance to investors or their effects on firms' cost of capital (Palea, 2013 for a review). This kind of research, however, is not exhaustive and comprehensive of all the relevant issues at stake with IFRS adoption in the EU. The current financial reporting environment consists of various groups that are affected by in accounting regulation. Regulation 1606/2002 states that IFRS can be adopted in the EU only if they are conducive to the "European public good". At the time European Regulation 1606/2002 adopting IFRS came into force, the Lisbon Treaty had not been signed yet. A constitutional framework within which analyzing European Regulations was lacking. Nowadays, however, the Treaty is in force and provides us with a definition of what must be intended by "European public good". It therefore represents a broader framework that goes beyond investors' interest, within which financial reporting policies can be discussed in the EU.

3 Social Market Economy as a Founding Principle of the European Union

This paper argues that, as financial reporting is one of the competences of the European Union, financial reporting regulation must be examined within the constitutional framework of the European Union. The constitutional setting of the Union is provided by the Lisbon Treaty, which defines the inspiring values and founding principles on which the Union has decided to build and shape its future. The Lisbon Treaty came into force on 1 December 2009. It was the outcome of a long and lively debate on the future of the European Union, which started in 2001 at the Laeken European Council and was focused on what kind of economic and social model the European Union would pursue. The Lisbon Treaty goes beyond the Maastricht architecture of a simple economic and monetary union, establishing the basis for a new economic, political and social governance. For instance, it enshrined a Charter of Fundamental Rights into the European Union's constitutional order for the first time.

According to the Treaty, social market economy is one of the founding principles of the European Union. In fact, the European Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress" (art. 3 TEU).² Moreover, "it shall combat social exclusion and discrimination, and shall promote social justice and protection" (art. 3 TEU).

There is general agreement that the Lisbon Treaty looked to the Rhenish variety of capitalism in setting the social market economy as a guiding principle for

the European Union (e.g. Glossner 2014). The Rhenish variety of capitalism refers to coordinated market economics, whereas the Anglo-Saxon variety refers to liberal market economics (Hall and Soskice, 2001). These two models have been developed on the basis of United States and western Europe, while further models are of course necessary for other economies.

According to the literature, the defining characteristics of the Rhenish model typical of Germany and the Scandinavian Countries are the consensual - for the most part - relationship between labor and capital, the supporting role of the state, and the availability of patient capital provided by the bank system or internally generated funds. These characteristics have been key in developing a long-term perspective on economic decision-making, high skilled labor and quality products based on incremental innovation, each at the basis of post Second World War Germany's economic success (Hall and Soskice 2001; Perry and Nölke, 2006). The Anglo-Saxon variety of capitalism, instead, is characterized by comparatively short-term employment, the predominance of financial markets for capital provision, an active market for corporate control, and more adversarial management-labor relations. Given these characteristics, the Anglo-Saxon business model is also called stock-market based capitalism.

Specifically, the term 'social market economy' originates from the post-World War II period, when the shape of the 'New' Germany was being discussed. Social market economy theory was developed by the Freiburg School of economic thought, which was founded in the 1930s at the University of Freiburg, and received major contributions from scholars such as Eucken (1951), Röpke (1941) and Rüstow (1932). Social market economy seeks to combine market freedom with equitable social development. Social market economics shares with classical market liberalism the firm conviction that markets represent the best way to allocate scarce resources efficiently, while it shares with socialism the concern that markets do not necessarily create equal societies. According to social market economics, a free market and private property are the most efficient means of economic coordination and of assuring a high dose of political freedom. However, as a free market does not always work properly, it should be monitored by public authorities who should act and intervene whenever the market provides negative outcomes for society. The social dimension is essential not only for society as a whole, but also for the market to work well. Market efficiency and social justice do not represent a contradiction in terms, as is proven by Germany's post-World War II economic miracle (Spicka, 2007).

In a social market economy, public authorities must set out the rules and the framework, acting as the referees that enforce the rules. A strong public authority does not assume a lot of tasks, but a power that keeps it independent from lobbies, for the sake of general interest (Gil-Robles, 2014). Consistently with this view, the Lisbon Treaty contains a 'social clause' requiring the European Union, in conducting its policy, to observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. In order to promote good governance and ensure the participation of civil society, decisions shall be taken as openly and as closely as possible to citizens (art. 15

TFEU). This should prevent the European institutions from being influenced by special interest groups. The Treaty also highlights the importance of social dialogue, which is one important pillar of social market economy (art. 152 TFEU). In fact, social dialogue has proved to be a valuable asset in the recent crisis: it is no mere coincidence that the best performing member states in terms of economic growth and job creation, such as Germany and Sweden, enjoy strong and institutionalized social dialogue between businesses and trade unions (Andor, 2011).

4 Financial Reporting and Variety of Capitalism: Do IFRS Fit for All?

Of course, a single set of global accounting standards would address the needs of international investors who incur costs and time in translating financial statements. Financial reporting, however, is not just a matter of investors. It serves as a basis for determining a number of rights, which affects a great variety of constituencies: not only market actors such as firms, investors, bankers and auditors, but also ordinary citizens, employees and states. Financial statements, for instance, represent the basis to elaborate public budget and for tax purposes. As a result, financial reporting must be considered in a broader perspective, which takes into account its effects on real economy and society.

A thorough review of different research streams provides several warning signs with regard to the disruptive effects of reporting under IFRS on social market economy. As mentioned above, IFRS are very much focused on capital market and therefore optimized for stock market-based capitalism. Fair value reporting as well is considered to be essential for tailoring financial reporting to the information needs of financial markets. From a Lisbon Treaty's perspective, there are two main issues related to fair value accounting that deserve to be investigated in the context of social market economics. The first relates to fair value definition provided by IFRS 13, Fair Value Measurement, and short-termism it may induce with potentially disruptive effects on long-term development. The second relates to the ability of fair value accounting to match with the objective of a financial system less prone to crisis and more resilient, which is at the basis of sustainable economic growth.

According to IFRS 13, fair value is an exit price, i.e. the amount that would be received when selling an asset in an orderly transaction between market participants at the measurement date. Fair value is therefore a spot market price.

There is general agreement that fair value definition as an exit price institutionalizes the shareholder value paradigm in the form of accounting practices (Müller, 2014; Nölke and Perry, 2007; Zhang and Andrew, 2014; Widmer, 2011). It therefore leads managers and investors to consider the firm as a portfolio of assets that must constantly be reconfigured and rationalized in order to maximize shareholder value and, as a result, to demand that every corporate asset is put to its most profitable use as judged by market benchmarks (Boyer, 2007). Since capital markets tend to take a more short-term perspective on profit, sev-

eral concerns can be raised on the consistency of this definition with long-term industrial strategies, which have been - and are still expected to be - key for developing and maintaining the competitive advantage in many EU countries (Nölke and Perry, 2007).

Along the same lines, financial reporting no more consider the value of the employment of assets within the firm and, as a result, do not reflect the future cash flows that the assets may in fact generate. IFRS in general and, more specifically, fair value reporting increase pressure from short-termism, namely from the shareholders' focus on quarterly results and short-range returns on investment (Sally, 1995). Different research streams suggest that short-termism is likely to have destabilizing effects on the social market economies in the long run (Perry and Nölke, 2006). Stockhammer (2004) shows that short-termism accompanied by an excessive focus on shareholder value reduce the rate of capital accumulation in the long term and undermine economic growth. Under the pressure of shareholder value, firms tend not to reinvest gains in their productive assets, but to distribute them to shareholders through dividend payouts and share buy-back (e.g. Crotty, 2005).

Short-termism also leads to more conflictual relationships between enterprise managers, employees and other stakeholders. The IASB emphasizes the role of financial reporting in serving investors in capital markets. Investors in capital markets, however, are not the only stakeholders of a firm. In many countries in Europe where a social market economy applies, shareholder wealth maximization has never been the only - or even the primary - goal of the board of directors. In Germany, for instance, firms are legally required to pursue the interests of parties beyond the shareholders through a system of co-determination in which employees and shareholders in large corporations sit together on the supervisory board of the company (e.g. Schmidt, 2004). Austria, Denmark, Sweden, France, and Luxembourg also have systems of governance that require some kind of co-determination (e.g. Ginglinger et al., 2009). While the specific systems of governance in these countries vary widely, the inclusion of parties beyond shareholders is a common concern. As a result, workers play a prominent role and are regarded as important stakeholders in firms. For this reason, it is common to refer to the Rhenish variety of capitalism also as 'stakeholder capitalism'. With this respect, research now reports evidence of an unequivocal negative impact of shareholder value policies and short termism on industrial relations (e.g. Van der Zwan 2014). Evidence also documents that the shareholder value principle tends to make shareholders and managers rich to the detriment of workers (e.g. Lin and Tomaskovic-Devey, 2013). Take as a whole, recent research presents a picture in which the pursuit of shareholder value is linked to a decline in working conditions and a rise in social inequality for large segments of the population (e.g. Van der Zwan, 2014).

Sustainable economic development requires long-term investment strategies, which in turn need stable financing and thereby a resilient financial system. Financial system in the Continental Europe has always been highly bank-oriented (Bank of Italy, 2013)³, mainly because the backbone of these economies is com-

posed of small- and medium-sized manufacturing firms, which encounter greater difficulties in accessing bond markets than big corporates. Given this crucial role, financial reporting for the banking system has particularly significant consequences on real economy. The European Central Bank (2004), the Banque de France (2008) and the International Monetary Fund (2009) have raised several concerns on the procyclical effects caused by fair value reporting on firms' financing. There is general agreement that during the recent financial turmoil, fair value reporting caused a downward spiral in financial markets, which made the crisis more severe, amplifying the credit-crunch (e.g. Allen and Carletti, 2009; Ronen, 2012). William Isaac (2010), former Chairman of the Federal Deposit Insurance Corporation (FDIC), considers fair value reporting the primary cause of the recent financial crisis. Plantin et al. (2008) provide evidence that mark-to-market accounting injects an artificial volatility into financial statements, which, rather than reflecting underlying fundamentals, is purely a consequence of the accounting norms and distorts real decisions. Damage done by fair value reporting is particularly severe for assets that are long-lived, illiquid and senior, which are exactly the attributes of the key balance sheet items of banks and insurance companies. Stockhammer (2012) also reports that excessive volatility in asset prices increases systemic risk and makes the economy prone to recurring crises. The weakening of bank balance sheets also heightens concerns over the future courses of some markets, the health of banks and, more broadly, the financial system, which results in several runs on banks (e.g. Allen et al., 2009).

Schwarz et al. (2015) argue that there cannot be clearer evidence of fair value involvement in the crisis than the decision taken by both IASB and FASB to allow banks to reclassify, from the third quarter of 2008, certain non-derivative financial assets, which were measured at fair value, to amortized costs under certain circumstances. Jarolim and Öppinger (2012) show that the reclassification option was used quite extensively by the European banks and avoided recognition of losses of almost 900 million euros, on average, per bank. Many more banks could have run into substantial problems if accounting rules had not been amended at the peak of the crisis. De Jager (2014) points out that the existing debate has focused too much on the role of fair value during the crisis, while ignoring its role in masking balance sheet fragility in pre-crisis periods. In such times, fair value accounting leads to banks appearing healthier than they are, facilitating further asset expansion financed by debt. During the crisis, however, banks' deleveraging leads to a downward spiral with forced sales of assets and shrinking balance sheets that significantly impair banks' capability to lend money.

Given the key role of banks in the economy, financial distress in the banking system exert disruptive effects on real economy and employment. With this respect, Dell'Ariccia et al. (2008) report a correlation between bank distress and a decline in credit and GDP. Due to the financial system crisis in 2007-2009, economic activity declined significantly in the European Union and unemployment rose dramatically. All in all, the recent crisis has been the worst since the Great Depression (Allen et al., 2009).

The choice of full historical accounting made by national regulators for domestic GAAP prior to IFRS was consistent with the socio-economic context in the Continental Europe, where banks were primarily concerned with ensuring the securities of their long-term loans to enterprises, and therefore took a relatively cautious view of the future, acknowledging its inherent uncertainty (e.g. Perry and Nölke, 2006). A prudent valuation of assets reassured bankers that there was sufficient collateral to support their loans, and employees that the firm was solvent and stable over time. Evidence shows that rather conservative accounting standards based on the European directives combined with stakeholder corporate governance and bank financing have allowed companies in these countries to follow long-term strategies, such as investing heavily in human resource development. This has been crucial for gaining and maintaining a competitive advantage based on using highly skilled labor to produce high-quality, and often specialized, products (e.g. Sally, 1995; Perry and Nölke, 2006).

5 Concluding Remarks

So far, IFRS have been mandated only for listed companies, i.e. for big corporates. Many initiatives at a European level, however, including Green Paper on Capital Market Union, aim at improving access to risky capital for small and medium-sized enterprises (SMEs). Furthermore, proposals for adopting a lighter version of IFRS for SMEs are quite recurrent (European Commission, 2015). Directives 2013/34 has also aligned to IFRS in some respects, such as permitting fair value for some assets and no more allowing capitalizing research expenditure. There is clear evidence of a dominant trend towards extending IFRS adoption to SMEs, too. This is not a trivial issue, as SMEs are the backbone of the economy and the main job creators in the European Union, representing 99% of enterprises in the EU (Enterprise Europe Network, 2015). Standard-setting is not a marginal matter, yet a complex process that must be carefully thought through.

As mentioned above, a single set of global accounting standards would of course address the needs of international investors who incur costs and time in translating financial statements. However, financial reporting is not just a matter of investors, yet a powerful practice that shapes social and economic processes. It serves as a basis for determining a number of rights and therefore affects a great variety of constituencies. With this respect, academic research has provided some evidence suggesting that IFRS and, more specifically, fair value reporting are likely to affect significantly social welfare.

There is a general agreement that the Lisbon Treaty, in establishing social market economy as a core value of the European Union, looked to the Germany and Scandinavian Countries' experience. In these countries, conservative accounting standards combined with stakeholder corporate governance and bank financing have allowed companies to follow long-term strategies, such as investing heavily in human resource development. This has been crucial for gaining

and maintaining a competitive advantage based on using highly skilled labor to produce high-quality, and often specialized, products (e.g. Sally, 1995; Perry and Nölke, 2006). Mandating IFRS in the European Union goes in exactly the opposite direction. As outlined previously, IFRS institutionalize and spread the shareholder value paradigm in the form of financial reporting practices (e.g. Nölke and Perry, 2007; Widmer, 2011), and reinforce the financialization process by shifting power from managers to markets. Fundamental reasons therefore question the consistency of Regulation 1606/2002, mandating IFRS in the European Union, with the Lisbon Treaty. At the time the IFRS Regulation was issued, the Lisbon Treaty had not yet been signed. Now, thanks to the Treaty, we have a constitutional framework with which to analyze financial reporting policies.

As Miller and O'Leary (1987) note, accounting normalizes and abstracts a "system of socio-political management". The adoption of IFRS, which are shaped on stock market-based capitalism, runs the risk of severely harming social market economies. In addition, recent events have raised several doubts about unregulated free stock market capitalism being necessarily the best way to run economy. The worldwide recession caused by the financial market crisis and excessive credit expansion has indeed shown the fragility of stock market-based capitalism as an economic and political process, highlighting the need for alternative way of doing business.

Taken as a whole, many doubts arise about the capability of fair value accounting to match with the EU's objectives of a social market economy. How, and to what extent, does fair value exacerbate short-termism and thereby threaten the Rhenish variety of capitalism? Is its adoption consistent with a social market economy or does it just suit stock market-oriented economies and, more generally, the Anglo-Saxon variety of capitalism? Shouldn't financial reporting regulation be large enough to accommodate different forms of capitalism and let them compete on a level playing field? Shouldn't the "optimal" design of financial reporting regulation depend on the institutional characteristics of the political and economic systems and on the objectives relevant to society? Still further, is fair value adoption consistent with the purpose to provide stable financing to long-term investors so as to make the European economy more resilient? Wouldn't historical cost better suit European economy based on long-term strategies?

A single set of global financial reporting standards, moreover tailored on the needs of stock market-based capitalism represents a significant monopoly power that harms exiting variety of capitalism and prevents alternative forms from evolving. According to the Lisbon Treaty, the European Union must work in order to pursue a social market economy. All the questions raised above should therefore be carefully addressed in order to assess whether the current financial reporting regulation is really conducive to the economic and social model that the EU has set as its fundamental objective.

Endnotes

1. For simplicity's sake, the term IFRS is used to refer to both the International Accounting Standards (IAS) and to the International Financial Reporting Standards (IFRS). IFRS are issued by the International Accounting Standard boards (IASB), whereas IAS were issued by the International Accounting Standard Committee (IASC) until 2000.
2. TEU is the acronym for "Treaty on the European Union", while TFEU is the acronym for "Treaty on the Functioning of the European Union".
3. In 2012 bank debts represented 31.4% of liabilities in the Euro-zone, in contrast to 14.2% in the US (Bank of Italy, 2013).

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Diversity as richness: the perspectives to change from being a determinant of risk management to become a strategic leverage to the competitive advantage

Authors

- Massimo Pollifroni, Associate Professor, massimo.pollifroni@unito.it - University of Turin (*Corresponding Author)
 - Gheorghe Militaru, Full Professor, gheorghe.militaru@upb.ro - University Politehnica of Bucharest
 - Adrian Ioana, Associate Professor, adyioana@gmail.com - University Politehnica of Bucharest
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The purpose of the study is to offer a theoretical review of the concept of “Diversity” following an approach oriented to Business Economics: in this perspective, the research tries to analysis the conceptual evolution related to the “Diversity”, a path in which it is possible to identify different phases of emerging by the international literature review.

The study tries to give a new meaning to this variable, where the management of the “Diversity” should be able to become a new strategic tool for a company globalized and oriented to Business Ethics. The underlying concepts will be declined in the introduction where the globalization paradigms have been explained following a Business Economics approach, as due premise to the analysis.

By this new point of view, now it is possible to observe the “Diversity” as “Richness”, following a revised managerial perspective to change from being a determinant of “Risk Management” to become a strategic leverage oriented to the “Competitive Advantage” by the “Diversity Engagement”.

Keywords: Corporate Culture, Diversity, Social Responsibility; Business Economics; Labour Management.

JEL Classification: M14, M21, M54

1 Introduction

Today as in the past Business Economics cannot escape from formulating business models that represent prospectively a stimulus to overcome the present critical issues, with domestic and international evidences: a sort of global discomfort, which manifests itself in economic and social aspects, but whose origins have an ethical connotation.

In the light of these evidences, the initial reflection cannot ignore the fact that the same Business Ethics – a concept very closed to the topics concerning the management of the “Diversity” – should necessarily be subjected to an accurate revision, by theorizing and systematizing new doctrinal paradigms of reference declined in relation to markets involved in an increasing process of globalization, that we have defined in previous works as:

«(...) This process – the globalization – is an economic phenomenon that affects especially on the economic integrations and on the social diversities, but it makes also problems for many cultures around the world, because many in-compatibilities have been highlighted between the human relationships and the extreme exploitation of resources, by emphasizing the concept of competitiveness on liberalized markets (Boyer et al., 1996) and many of the current international hostilities are the manifestation of these incompatibilities and these evidences usually are analyzed by the social and economic sciences. (...)» (Pollifroni, 2006).

This statement allows us to understand that it is not possible to develop the topics concerning the management of the “Diversity” without contextualize these concepts to globalization: this approach is proposed in the following paragraph dedicated to present the globalization by Business Economics, in which the starting point of the path is provided by redefining a model of globalization oriented to Business Ethics.

2 Globalization paradigms explained following a Business Economics approach, as due premise to the analysis applied to the management of the “Diversity”

The topics concerning the management of the “Diversity” appear to be strongly related to the theme of globalization of markets: for this reason the paper would like to propose – in this paragraph – a short presentation of the globalization paradigms explained following a Business Economics approach, as due premise to the present analysis. In adherence to Business Economics approach, it is possible to identify four “Business Models”, with reference to the corporate activities of international relocation (or internationalization of business).

They are respectively: a) “Local Company”, b) the “Budded Company”, c) the “Partial relocated Company” and d) the “Hollowed Company”.

The features concerning each model are presented below.

a) “Local Companies”. These enterprises do not realize global strategies; the business continues to be allocated only inside the domestic market; these companies – also so called “Local Players” – suffer passively the international competitiveness; in the long term, these companies may have strong problems of survival resulting from the globalization of markets.

b) “Budded Companies”. These subjects realize full global strategies; these companies actively address themselves to the international competitiveness; new enterprises are created around the world, but the holding (or “Parent Company”) maintains the historical operational structure; this approach does not cause a negative impact in terms of employment.

c) “Partial relocated Companies”. This corporate model realize partial relocation strategies; the companies actively addressing the international competitiveness and the corporate delocalization regards or some corporate functional areas (e.g. production area, finance area, etc.) (Ferrero, 1987), or some business unit, or some business process, etc. This business model has a partial negative impact in terms of employment (with reference to the “Parent Company” geographical area).

d) “Hollowed Companies”. This approach realize full relocation strategies and these companies actively addressing the international competitiveness. In this case the corporate delocalization regards all the corporate functional areas, or all business units, or all business processes, etc. This model has a strong negative impact in terms of employment, because the “Parent Company” becomes a “Hollowed Company”: in other words, the headquarters in the country of origin remains only as an intangible entity with a formal profile exclusively related to the tax and legal purposes.

Continuing the path aimed to identify which of the models previous explained goes towards an ethical model of globalization, it is possible to underline that an organization (profit or not for profit) has an ethical outline when – not only – it respects the laws, but it also manages its own business respecting the interests of the various stakeholders of reference.

From this point of view, then, the concept of Business Ethics is closely related to those concerning the “sustainable development” and the “corporate social responsibility”.

The first issue – regarding the concept of “sustainable development”, introduced in 1987 by the World Commission on Environment and Development (WCED) – is defined as «(...) the economic and social development that doesn't compromise the environment and the natural resources the continuation of human species and the future development depend on (...)» (WCED, 1987: Chapter 2: Towards Sustainable Development). The second concept – concerning the “corporate social responsibility” – is defined by the European Commission as «(...) the voluntary decision to contribute to the progress of the society and to the defence of the environment, integrating social and environmental problems into the corporate operations and the interactions with the stakeholders (...)» (European Commission, 2000). In October 2011 the European Commission published a new policy on “corporate social responsibility”. It states that to

fully meet their social responsibility, enterprises «(...) should have in place a process to integrate social, environmental, ethical and human rights concerns into their business operations and core strategy in close collaboration with their stakeholders (...). The aim is both to enhance positive impacts – for example through the innovation of new products and services that are beneficial to society and enterprises themselves – and to minimize and prevent negative impacts (...)» (European Commission, 2011).

The mentioned concepts – “sustainable development” and “corporate social responsibility” – have two common denominators in the environmental and social sustainability, while the third point of view – the “economic sustainability” – it takes a different meaning depending on the following profile of observation:

- in Economics, “economic sustainability” coincides with the concept of “balanced development” between human needs and resource constraints,
- while in Business Economics, “economic sustainability” is synonymous with “corporate continuity”, a condition that can be only guaranteed with the presence of “corporate profitability”.

In the latter case, the “corporate continuity” can be ensured only by the presence of a constant and continuous “corporate profitability” resulting by an accurate business strategy having a long-term vision and an honest and not greedy dividend policy.

The recalled three-dimensionality, due to the above concepts explained, also offers a direct link to the model of the “triple bottom line”, a theoretical approach proposed and developed in the late '90s by Elkington, in order to recommend to the companies the need to provide a reporting on the three main dimensions of its performance, economic, social and environmental, by a single document intended indiscriminately for investors and stakeholders (Elkington, 1994, 1998; Hubbard, 2009; Manetti, 2006; Savitz, 2006, 2012): this approach has been transposed in the European Parliament Legislative Resolution regarding “disclosure of non-financial and diversity information by certain large companies and groups” (EP, 2014).

Therefore, for defining a model of globalization oriented to Business Ethics, it is necessary that two conditions must be satisfied jointly:

- there must be a constant and continuous attention to the value creation for stakeholders, condition that matches the model of the “corporate social responsibility”,
- and there must be a regular and fair presence of “corporate profitability” for shareholders, a necessary condition to ensure “corporate continuity”, because Business Economics considers the company like a non-contingent entity established to last (Coda, 1985).

Alternatively, it is possible to say that the only exclusive presence of the “corporate social responsibility” does not always guarantee “business continuity” (Herbane, 2010), while the only exclusive presence of the “corporate profitability” does not always guarantee full compliance with the principles of the “corporate social responsibility”.

Unfortunately, the present globalization processes – from which the model of “Local Company” is excluded – tend to emphasize more on “corporate profitability” and less on “corporate social responsibility”, favoring models previously defined as “Partial relocated Company” and as “Hollowed Company”: only in the “Budded Company” paradigm are jointly present the two drivers and this dual presence is the condition (necessary and sufficient) to ensure a model of globalization oriented to Business Ethics.

In other words, the case of the “Budded Company” is included in a paradigm of globalization classifiable as “Fair or Positive”, while the other two cases – “Partial relocated Company” and “Hollowed Company” – represent the alternative paradigm of globalization classifiable as “Unbridled or Negative”.

The “Unbridled or Negative Globalization” paradigm is no longer acceptable for the following reasons: it discriminates economically, socially, environmentally and fiscally; it contrasts with the concept of “sustainable development”; it represents “Business Models” not oriented to Business Ethics and it presents profiles of non-inclusiveness concerning the management of the different aspects of the “Diversity” (issues relevant on “Diversity Management” disciplines).

On this last point, it should be noted that among the different social variables related to “corporate social responsibility” there is the management of the “Diversity”.

The objective of the present analysis is represented by the attempt to give a new meaning to “Diversity”, where the management of the “Diversity” should be able to become a new strategic tool for a company oriented to Business Ethics and – recently – to “Creation Shared Value” approach (Porter et al., 2011).

Drawing inspiration from these premises, the next paragraph is dedicated to explore the conceptual evolution regarding the management of the “Diversity” through a brief international literature review on the topics covered by the research.

3 A brief international literature review on the topics covered by the research

These pages are dedicated to explore the conceptual evolution regarding the management of the “Diversity”: a profound conceptual mutation of the doctrinal approach in which “Diversity” has been affected to a relevant change from being a critical determinant of “Risk Management” (Williams, 1994) to becoming a strategic leverage oriented to “Competitive Advantage” (Porter, 1990).

The initial step regards the “Diversity” conceptualization related to “Risk Management” that began to be studied after World War II. About the origin of the “Risk Management” Dionne wrote (Dionne, 2013):

«(...) Several sources (Crockford, 1982; Harrington and Niehaus, 2003; Williams and Heins, 1995) date the origin of modern risk management to 1955-1964. Snider (1956) observed that there were no books on risk

management at the time, and no universities offered courses in the subject. The first two academic books were published by Mehr and Hedges (1963) and Williams and Heins (1964). Their content covered pure risk management, which excluded corporate financial risk (...)» (Dionne, 2013: 2); while Duncan (1996) tried to define “Risk Management” as: «(...) a systematic process of identification, analysis and response to the project risks, process comprising the risk identification, risk quantification, risk response plan, risk response control sub processes (...)» (Măzăreanu, 2007: 42).

The evolution of the concept of “Risk Management” has acquired over time an increasingly quantitative dimension applied to the corporate dimensions underlined by the current declination “Enterprise Risk Management” (in acronym “ERM”), a concept defined in an “American Institute of Certified Public Accountants” (AICPA)’ publication as:

«(...) Enterprise risk management is a process, effected by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives (...)» (COSO, 2004: 2). In this definition, there are two important elements to observe: «(...) the probability of risk to occur and the potentially lost in case of risk occurring. These helps defining risk exposure. Some of the authors propose the extension of these elements to: the value of asset, threat frequency, threat exposure factors, safeguard effectiveness, safeguard cost and uncertainty (...)». For this definition some authors have introduced a further extension that concerns «(...) the human factor (considering all the aspects related to it: professionalism, skills and abilities, psychological factors), the most incontrollable part of every system (...)» (Măzăreanu, 2007: 46).

Following this new approach – in which the human factors became a variable of the “Enterprise Risk Management” – the potential diversities (regarding, e.g., gender, age, ethnicity, physical and/or mental ability, traditions, customs and traditions, sexual orientations, etc.) may assume a value of positive strategic pulse to put at the centre of an appropriate corporate enhancement strategy.

In this new vision, “Diversity” takes on a configuration of opportunities to be seized and not just that of a risk to be prevented by the methodologies oriented to “Enterprise Risk Management”: the new awareness pertaining to “Diversity Management” can be considered the foundations for a new organizational paradigm (Gilbert et al., 1999).

In order to achieve the objectives set out as a premise, the paper proposes in the next step the definition of the “Diversity Management” through the international literature review that defines this concept as follows:

«(...) Acquiring the necessary knowledge and dynamic skills to manage such differences appropriately and effectively. It is also about developing a creative mind-set to see things from different angles without rigid prejudgment (...)» (Ting-Toomy et al., 2005: 21) and the empirical evidence demonstrates that «(...) a diversity and equality management system (DEMS) contributes to firm performance beyond the effects of a traditional high-performance work

system (HPWS), which consists of bundles of work practices and policies used extensively in high-performing firms (...)» (Armstrong et al., 2010: 977).

In the international literature, most definitions differentiate “Diversity Management” from Affirmative Action (AA) plans and/or Equal Employment Opportunity (EEO) programs. On this topic Pitts says:

«(...) where AA/EEO is mandatory, legal based, short-term and limited, while managing diversity is voluntary, productivity-based, long term and ongoing (...)» (Pitts, 2005: 10).

Following our approach, the paper presents the “Diversity Management” as a direct manifestation of “corporate social responsibility”, in which definition only voluntary actions are relevant: in adherence to this definition, our proposal does not include in the determinants of “Diversity Management” (see previous paragraph) the Affirmative Action (AA) plans and the Equal Employment Opportunity (EEO) programs.

With reference to the contents depth in the previous paragraph – concerning the globalization explained following a Business Economics approach – also the “glocalization” may represent a paradigm of “Fair or Positive” globalization (Dumitrescu et al., 2010; Johannisson, 1994; Khondker, 2004; Robertson, 1994).

It is reasonable to think that the “glocalization” is connected to the “Diversity Management” only in the case in which this strategy is applied to the human resources management.

To better understand the “glocalization”, concept exposed previously, we propose the following definition of the adjective “glocal”:

«(...) According to the dictionary meaning, the term “glocal” and the process noun “glocalization” are “formed by telescoping global and local to make a blend” (The Oxford Dictionary of New Words, 1991:134 quoted in Robertson R., 1995:28). The term was modelled on Japanese word “dochakuka”, which originally meant adapting farming technique to one’s own local condition. In the business world the idea was adopted to refer to global localization (Smith, 2001). According to Robertson, glocalization means “the creation of products or services intended for the global market, but customized to suit the local cultures” (...)» (Pollifroni, 2006: 4).

At this point it is necessary to clear away two potential misunderstandings.

The first issue concerns the distinction between the “Diversity Management” and the strategies of “Business Diversification” that the international literature identifies in two distinct models as follows.

«(...) Two distinct modes of diversification have been identified: unrelated and related. Unrelated diversifiers have been defined as firms that diversify predominantly across industries, while related diversifiers have been defined as firms that diversify predominantly within industries (e.g. Palepu, 1985). Related diversifiers, obtaining economies of scope and synergies, are hypothesized to exhibit higher levels of profitability than unrelated diversifiers. This hypothesis, first supported by Rumelt (1974), has been

confirmed by numerous subsequent studies (e.g. Suzuki, 1980; Christensen and Montgomery, 1981; Bettis and Hall, 1982; Palepu, 1985) (...)» (Cham Kim et al., 1989: 46).

So in some cases the single corporate practice can simultaneously be of interest to the two disciplines “Diversity Management” and the strategies of “Business Diversification” (e.g. this is valid for the “glocalization”, as previously explained), while in other situations this dichotomy is not present (e.g. this is the case of strategies of “Business Diversification” only product oriented).

The second consideration concerns the kinds of companies interested in “Diversity Management”. It should be noted, in conclusion, even if the paper has as main reference to the companies/enterprises (generalizing the sector of profit-oriented organizations), the topics concerning the management of the “Diversity” are relevant also for the public sectors (McDougall, 1996; Pitts, 2005; Soni, 2000) and for the not-for-profit organizations (Anheier, 2000; Smith, 2005; Tomlinson et al., 2010).

After this brief international literature review on the topics covered by the research, the following paragraph presents an analysis of the impact of “Diversity Management” on the corporate strategies, by revisiting some models proposed by international literature on the topics discussed in this contribution.

4 Discussion on the theoretical models proposed in international literature on the subject of “Diversity Management”

The following paragraph is dedicated to theorize the impact of “Diversity Management” on the corporate strategies, by revisiting some models proposed by international literature review on the topics discussed in this contribution.

Drawing inspiration from the previous paragraph, the most important contribute to analysis the impact of “Diversity Management” on the corporate performance can be attributed to Pitts David W. (Pitts, 2005; 2006; Pitts et al., 2009; Pitts et al., 2010): this bibliographic evidence justifies the choice to discuss and explore the Pitt’s contribution in the following pages.

The methodology used by the author in order to ascertain what are the variables of the “Diversity” can explain the company’s performance, is based on a multiple linear regression GLS (Generalised Least Squares) model used as a tool for verification of significance the independent variables and the correct estimate of the regression parameters (β_i) of OLS (Ordinary Least Square) model.

The model used by Pitts presents the following formulation:

$$P_t = \alpha + \beta_1 P_{t-1} + \beta_2 H_t + \beta_3 C_t + \beta_4 R_t + \beta_5 X_t + \varepsilon_t \quad (1)$$

The following meanings are attributed by the author to the symbols used in the previous formula:

- P_t = Performance outcome
- P_{t-1} = Autoregressive term
- H_t = Vector of heterogeneity variables
- C_t = Vector of cultural synergy variables
- R_t = Vector of job satisfaction variables
- X_t = Vector of control variables
- ε_t = Error term

Pitts explained this approach as follows:

«(...) Based on this framework, the appropriate model for quantitative analysis would begin as a basic one with performance, heterogeneity, cultural synergy, retention, and job satisfaction. This model does not take into account the likelihood of interaction between any two variables, nor does it consider any other non-linear specification. These are concerns that should be addressed in future quantitative analysis using this model. There is so little theory on the issue that it is impossible to speculate where the non-linearity and interaction would arise, and data analysis would yield evidence on this point better than poorly cobbled-together ideas from extant research. The model is autoregressive, given the inertial nature of bureaucracy that has been noted and used as a variable in other research (O'Toole & Meier, 1999; Pitts, in press), and this is represented by the P_{t-1} term. This assumes availability of time-series data, an assumption likely to be rejected in most instances, but the idea of the autoregressive term is nonetheless important to the model theoretically. The other independent variables of interest are characterized here as vectors, since they will undoubtedly each contain at least several applicable and necessary variables. I include a vector of control variables in the equation, since it is likely that organizational size, agency mission area, and other variables might have an impact on performance that would confound the impact of diversity management (...)» (Pitts, 2006: 21-22).

Before addressing the discussion on the Pitt's model, it is necessary to make a brief digression on the concept of "Diversity" in terms of conceptual evolution and related classifications; on these topics, Kreitz (2008) wrote:

«(...) Diversity has been an evolving concept. The term is both specific, focused on an individual, and contextual, defined through societal constructs (Moore, 1999). Many current writers define diversity as any significant difference that distinguishes one individual from another—a description that encompasses a broad range of overt and hidden qualities. Generally, researchers organize diversity characteristics into four areas: personality (e.g., traits, skills and abilities), internal (e.g., gender, race, ethnicity, I.Q., sexual orientation), external (e.g., culture, nationality, religion, marital or parental status), and organizational (e.g., position, department, union/non-union) (...)» (Kreitz, 2008: 2-3).

Next to the classification previously enunciated (Gardenswartz et al., 1993; Loden, 1996), the international literature has proposed further alternative models of classification: these approaches are illustrated below very briefly.

Another alternative approach divides the “Diversity” in two clusters, “Primary Diversity” and “Secondary Diversity”:

- the first one – “Primary Diversity” – concerns those differences that refer to items that cannot be changed or - in some cases - may provide a difficult change (e.g. such as ethnicity, mental skills characteristics, gender, etc.),
- while the second one – “Secondary Diversity” – includes aspects that can be changed several times during the human life (e.g. such as organizational role, professional experience, educational background, family status, geographical location, etc.) (Hubbard, 2004; Pelled, 1997; Simons et al., 1999).

Further contributions suggest a dual classification based on the impact of highly and less job-related diversity (Webber et al., 2001) and on the visibility of the phenomenon (Beatty et al., 2006; Osler, 2006).

The latter classification proposed – concerning the visibility of the “Diversity” – can be put in relation to the reputational perception on the external environment induced by the company (Barnett et al., 2006; Helms, 2007; Schettini Gherardini, 2011): an attempt to summarize the different approaches of classification applied to the “Diversity” is offered in the follow Figure 1.

	Diversity With Low Visibility		Diversity With Higt Visibility		
	<u>Diversity Area (a)</u> <u>Layer/Dimension</u> Personality	<u>Diversity Area (b)</u> <u>Layer/Dimension</u> Organizational	<u>Diversity Area (c)</u> <u>Layer/Dimension</u> Internal	<u>Diversity Area (d)</u> <u>Layer/Dimension</u> External	
Diversity Low Job Related			e.g., gender, race, ethnicity, I.Q., sexual orientation, etc.	e.g., culture, nationality, religion, marital or parental status, etc.	Primary Diversity
Diversity Higt Job Related	e.g., traits, skills and abilities, etc.	e.g., position, department, union/non-union, etc.			Secondary Diversity
	Diversity With Low Reputational Impact		Diversity With Higt Reputational Impact		

Figure 1 A synthesis of the different approaches of classification applied to the “Diversity” (Source: Development proposed by the Authors).

At this point, it is possible to connect the different approaches of classification applied to the “Diversity” with the Pitt’s model previously exposed.

With reference to the Figure 1, Pitt’s analysis has a strong position on the left section of the figure, section concerning “Diversity” dimensions with low external impact and low reputational impact: these dimensions concern mainly organizational aspects. In this traditional approach, “Diversity” is to be considered as an internal organizational problem to manage (relevant to the “Diversity Management”): under this point of view, the “Diversity” is handled in terms of better cost optimization.

In the previous approach oriented to the “Risk Management”, however, “Diversity” was studied in terms of containment of the potential risk (r) of financial damages (d) (in terms of higher costs and/or lower revenues) related to the occurrence of the event “ a ” ($p\{a\}$) in the period (t); the quantification of the potential risk have the following formula:

$$r = p\{a\}/t * d \quad (2)$$

Where:

- r = potential risk in the period t related to event “ a ”
- $p\{a\}$ = probability of the event “ a ”, with $0 \leq p\{a\} \leq 1$
- t = period of reference
- d = financial damage

If as shown above is the state of the art, at this point it is possible to formulate a new vision of “Diversity” following a revised perspective to change from being a determinant of “Diversity Management” (recently and before object study of the “Risk Management”) to become a strategic key driver oriented to the “Diversity Engagement”.

This approach tries to draw a “trait d’union” between seemingly distant concepts, as substantially closed (“Diversity Management”, corporate performance and corporate reputation): the external corporate communication of its attention to the diversity (in terms of protection and safeguard) could also represent a tool for potential revenue growth. In this sense, for example, an enterprise could associate the management of its “Diversity” in specific policies oriented to the Cause Related Marketing (in acronym CRM) (Adkins, 2007; Pracejus et al., 2004).

The distinctive element of the proposal is to be found in the internal destination of the CRM revenues, while these practices are usually used for financing external philanthropic purposes. The example shown is just one of many cases that corporate practices could offer using this slogan: “Buy my products because I’m oriented to “Diversity Engagement” policies!”: the positive impacts on the corporate reputation and on business performances (in terms of potential revenue growth) are obvious and intuitive.

5 Conclusion

The aim of the paper was to draw a “trait d’union” between seemingly distant concepts, as substantially closed (as “Diversity Management”, corporate performance and corporate reputation) and the process of analysis has tried to follow – in summary form – as outlined by the main international literature on the subject.

The central part of the article tried to discuss possible alternative approaches to analysis applied to “Diversity”, coming – in the final part – to define a new vision of “Diversity Management” oriented to CRM. The distinctive element of this proposal is to be found in the internal destination of the CRM revenues, while these CRM practices are usually used for financing external philanthropic purposes.

By this new point of view, now it is possible to observe the “Diversity” as a corporate richness, following a revised managerial perspective applied to “Diversity Management”: this new vision presents the “Diversity” from being a determinant of “Risk Management” to become a strategic element oriented to the “Competitive Advantage” by the “Diversity Engagement”.

The future evolution of this contribution will be directed to formulate empirical evidence of the contents exposed previously by a further development of the theoretical model of reference.

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Risk management and healthcare: “*separation*” of revenues and expenditure

Authors

- *Luigi Puddu, Full Professor, luigi.puddu@unito.it, University of Turin*
 - *Christian Rainero, Assistant Professor, christian.rainero@unito.it, University of Turin*
 - *Vania Tradori, Assistant Professor, vania.tradori@unito.it, University of Turin*
 - *Silvana Secinaro, Assistant Professor, silvana.secinaro@unito.it, University of Turin*
 - *Alessandra Indelicato, Research fellow, alessandra.indelicato@unito.it, University of Turin*
 - *Alessandro Migliavacca, Ph.D. Student, alessandro.migliavacca@unito.it, University of Turin*
 - *Valerio Brescia, Ph.D. Student, valerio.brescia@unito.it, University of Turin*
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Italian Regions are the accountable entities for healthcare policies: their activity is not limited to policymaking but includes also management and financing of the Healthcare Public Utilities and services.

This research is intended to point out management and organisation differences between Regions.

A first step will be the creation of a dataset of revenues and expenditures of the Healthcare sector. Second, the co-financing policy will be analysed using comparative grids of in/out-flows of each Region. Third, it will be taken into account the regional fiscal coverage of the balance deficit. The sample is composed of the Italian Regions.

Furthermore, it will be analysed the National and Regional Healthcare System financing (in)-stability, highlighting current cash flows, sources and investments using the “separation” of the Healthcare accounting items in the Balance Sheet.

Latter it will be represented an analysis of the National Health Fund allocation to the Regions.

It will be also conducted a critical analysis of the current allocation formula and it will be proposed a simplified criterion of allocation

Keywords: health deficits - “separation” of revenues and expenditures - health spending

JEL Classification: M48

1 Introduzione

Le Regioni sono l'ente responsabile e di riferimento in materia sanitaria. Oltre a svolgere attività di carattere programmatico e normativo, infatti, le Regioni hanno anche un coinvolgimento diretto sulla gestione e sul finanziamento dei servizi sanitari, strutturati in aziende. Grande attenzione acquisisce la ragioneria pubblica che ha come oggetto tipico le determinazioni e le rilevazioni quantitative delle aziende pubbliche, considerando gli aspetti finanziari, patrimoniali ed economici nell'ambito di un'amministrazione razionale fondata sulla programmazione, l'esecuzione ed il controllo.

Anche a livello normativo si pone l'attenzione intorno alla perimetrazione del bilancio regionale dei flussi finanziari che riguardano la sanità, nonché l'evidenza delle entrate e delle uscite necessarie al fine di sostenere la realizzazione dei livelli essenziali di assistenza e dei servizi.

Gli obiettivi che le Regioni si pongono di raggiungere in ambito sanitario sono sia di natura sanitaria sia riguardanti il mantenimento del pareggio di bilancio tra le uscite e le entrate, distinte per voci tributarie specifiche di cofinanziamento regionale.

2 Le aziende sanitarie: un'analisi della letteratura

2.1 Un approccio antropologico di studio fondato sul bisogno "salute"

Le aziende sanitarie, secondo la teoria aziendalistica, sono volte al soddisfacimento del bisogno "salute" nel suo aspetto generale di diagnosi e terapia, le cui caratteristiche possono essere così individuate (Puddu, 2011; Puddu et al., 2016):

- è un bisogno personale, nel senso che è portato e va soddisfatto soggettivamente per ciascun individuo;
- è un bisogno statisticamente distribuito su gruppi di vaste dimensioni, nel senso che, almeno per le fasi acute e specialistiche, riguarda alcuni individui e non la totalità dei soggetti.

Questo secondo aspetto è determinante, a livello economico, perché la soddisfazione del bisogno avvenga principalmente o attraverso un sistema di finanziamento pubblico, aziende pubbliche sanitarie, o un sistema assicurativo privato con imprese di assicurazione in convenzione con aziende sanitarie.

La distribuzione sociale del bisogno di salute su gruppi di vaste dimensioni richiama una necessità di tutela giuridica che nel nostro Paese è prevista a livello costituzionale¹.

Aspetti peculiari delle aziende sanitarie sono riconducibili a un duplice approccio di osservazione definibile in generale come "modello concettuale" di riferimento e, in particolare, quello gestionale (Anessi Pessina et al., 2013). Il riferimento concettuale (Figura 1.1) riguarda le relazioni di principio, di efficacia e

di efficienza, in cui l'azienda sanitaria deve operare per il soddisfacimento del bisogno sanitario. L'efficacia è la capacità aziendale a soddisfare il bisogno sanitario; mentre l'efficienza richiama, a parità di condizioni di efficacia, la ricerca di elevati livelli di produttività, fornendo più servizi con le stesse risorse o gli stessi servizi con un consumo inferiore di risorse. A livello gestionale le peculiarità dell'azienda sanitaria sono individuabili da un lato nel rapporto con i pazienti, dall'altro alla tipologia di lavoro dipendente. È opportuno, quindi, tradurre gli aspetti di efficacia ed efficienza in variabili chiave (Volpato, Borgonovi et al., 1988) da tenere sotto osservazione per un management finalizzato all'efficacia e all'efficienza. Nel dettaglio, le variabili chiave sono:

- ☒ grado di soddisfacimento dei bisogni (indicatore di efficacia);
- ☒ grado di modificazione dei fini e dei risultati (indicatore di efficacia);
- ☒ grado di impiego delle risorse (indicatore di efficienza).

Nelle aziende sanitarie è presente un'elevata personalizzazione nel rapporto tra medico e paziente che deriva dal carattere personalistico del bisogno di salute. Inoltre, è importante, nel rapporto di lavoro la presenza di *professionals* (per esempio, medici), occupati come dipendenti con remunerazione "a tempo" e non "a prestazione", il che rende possibile e conveniente lo sviluppo dell'attività in forma aziendale, ma comporta il dover affrontare problemi organizzativi di natura complessa per l'inserimento nella struttura di professionisti-dipendenti (Mutlu, 2014)



Figura 1 Modello di riferimento concettuale

2.2 L'amministrazione razionale del management sanitario fondato sul bilancio

Il modello concettuale di riferimento e il modello gestionale si fondano su un più generale schema logico di amministrazione razionale. Il management, definito come gestione organizzata (Ferrero, 1980), si fonda su uno schema logico di amministrazione razionale che trae origine dal medesimo principio che riflette la tradizionale distinzione delle aziende tra imprese, aziende di erogazione e aziende composte. Ci riferiamo al processo di acquisizione-impiego del capitale o di «vita della ricchezza» (Zappa, 1927) o di accumulazione, che è misurato in termini quantitativo-monetari e trova la sua esposizione formale nello strumento del bilancio e della contabilità.

L'amministrazione razionale considera, in termini congiunti, un'analisi tempo-spazio dei fatti amministrativi finalizzata a fornire informazioni quantitativo-

monetarie, raccolte in un modello logico e obiettivo che fa da supporto e guida al processo decisionale (Puddu, 2010 in Airoldi et al.)

In particolare, sotto il profilo temporale, l'amministrazione razionale si articola nelle classiche fasi cronologiche, fra di loro sempre interdipendenti, della programmazione, dell'esecuzione e del controllo. In ognuna delle indicate fasi si producono flussi informativi utili per il processo decisionale e denominati obiettivi, nella programmazione, risultati, nell'esecuzione e scostamenti nel controllo. Ogni azione affinché sia razionale, prima viene creata nel pensiero, poi messa in pratica e, infine, giudicata con riferimento a quanto si sia effettivamente realizzato rispetto a ciò che era dato come obiettivo.

2.3 I modelli di finanziamento della spesa sanitaria in Italia

Il meccanismo di finanziamento è uno degli elementi più complessi e, allo stesso tempo, caratterizzanti dei sistemi sanitari: esso regola i rapporti fra i vari livelli di governo del sistema, come anche le sue regole equitative e, non da ultimo, condiziona l'esigibilità dei diritti. La complessità della materia permette, quindi, di parlare in generale di "sistema di finanziamento".

Con il termine "sistema di finanziamento (Bottari et al., 2013) ci si riferisce, implicitamente, ai sistemi sanitari pubblici, in cui una quota delle risorse provenienti dalla tassazione viene destinata a garantire l'erogazione gratuita o "sussidiata" di prestazioni sanitarie ai cittadini, in modo da rendere le possibilità di consumo sostanzialmente indipendenti da quelle economiche.

Nei sistemi sanitari in cui prevale, o è significativo, l'intervento pubblico sono anche diffusi sistemi di amministrazione dei prezzi delle prestazioni e la definizione di tariffe; nel caso italiano, ad esempio, per ricoveri ospedalieri o prestazioni ambulatoriali specialistiche. Tali prezzi e tariffe sono parte integrante e fondamentale del sistema di finanziamento. In assenza di prezzi di mercato, questo aspetto diviene fondamentale anche nell'analisi dell'andamento economico delle aziende erogatrici di servizi sanitari, in quanto ne condiziona le entrate. Un tema di grande importanza per sistemi in cui l'intervento pubblico comprende l'erogazione diretta di servizi: il caso italiano è paradigmatico, in quanto il ruolo dell'Azienda sanitaria pubblica è centrale nell'assetto dell'intero sistema.

La legge statale determina annualmente il fabbisogno sanitario, ossia il livello complessivo delle risorse del Servizio Sanitario Nazionale (SSN) al cui finanziamento concorre lo Stato. Tale fabbisogno nella sua componente "indistinta" (c'è poi una quota "vincolata" al perseguimento di determinati obiettivi sanitari), è finanziato dalle seguenti fonti:

- 1) entrate proprie delle aziende del Servizio Sanitario Nazionale (ticket e ricavi derivanti dall'attività intramoenia dei propri dipendenti), in un importo definito e cristallizzato in seguito ad un'intesa fra lo Stato e le Regioni;
- 2) fiscalità generale delle Regioni: imposta regionale sulle attività produttive - IRAP (nella componente di gettito destinata al finanziamento della sanità), e addizionale regionale all'imposta sul reddito delle persone fisi-

che – IRPEF. Entrambe le imposte sono quantificate nella misura dei gettiti determinati dall'applicazione delle aliquote base nazionali, quindi non tenendo conto dei maggiori gettiti derivanti dalle manovre fiscali regionali eventualmente attivati dalle singole Regioni;

- 3) compartecipazione delle Regioni a statuto speciale e delle Province autonome di Trento e di Bolzano;
- 4) bilancio dello Stato: esso finanzia il fabbisogno sanitario non coperto dalle altre fonti di finanziamento essenzialmente attraverso la compartecipazione all'Imposta sul valore aggiunto (IVA) (destinata alle Regioni a statuto ordinario), le accise sui carburanti e attraverso il Fondo sanitario nazionale (una quota è destinata alla Regione siciliana, mentre il resto complessivamente finanzia anche altre spese sanitarie vincolate a determinati obiettivi).

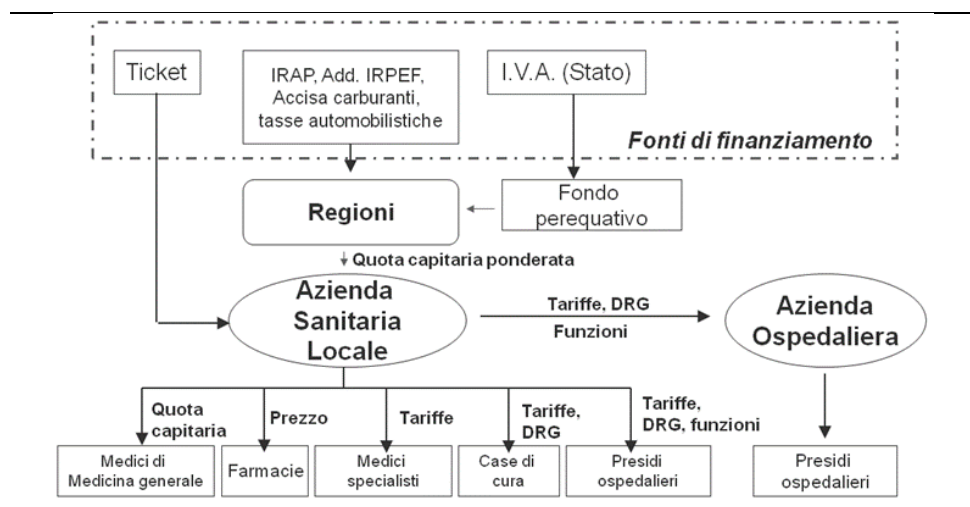


Figura 2 Le fonti di finanziamento delle aziende sanitarie.

Per ogni esercizio finanziario, in relazione al livello del finanziamento del SSN stabilito per l'anno di riferimento, al livello delle entrate proprie, ai gettiti fiscali attesi e, per la Regione siciliana, al livello della compartecipazione regionale al finanziamento, è determinato, a saldo, il finanziamento a carico del bilancio statale nelle due componenti della compartecipazione IVA e del Fondo sanitario nazionale. La composizione del finanziamento del SSN è evidenziata nei cosiddetti "riparti" (assegnazione del fabbisogno alle singole Regioni ed individuazione delle fonti di finanziamento) proposti dal Ministero della Salute sui quali si raggiunge un'intesa in sede di Conferenza Stato-Regioni e che sono poi recepiti con propria delibera dal Comitato Interministeriale per la Programmazione Economica (CIPE).

Le Regioni assegnano, in base a diversi parametri, le risorse finanziarie alle aziende, che le impiegano per garantire ai cittadini l'erogazione delle prestazioni di loro competenza previste dai Livelli essenziali di assistenza.

L'assegnazione delle risorse alle aziende tiene conto della mobilità passiva (cioè i residenti che si curano in strutture di altre aziende sanitarie o Regioni) e della mobilità attiva (nel caso siano state curate persone provenienti dall'esterno dell'azienda).

Le aziende vengono, inoltre, finanziate dalla Regione sulla base delle prestazioni erogate in regime di ricovero (attraverso il costo previsto dai c.d. Diagnosis Related Groups (DRG), Raggruppamenti Omogenei di Diagnosi²) oppure negli ambulatori (attraverso il tariffario delle prestazioni specialistiche e diagnostiche).

2.4 La perimetrazione del bilancio regionale: le entrate e le spese

Il processo decisionale che definisce il finanziamento del Servizio Sanitario Nazionale è articolato su un duplice livello. Da un lato, lo Stato definisce i principi fondamentali, denominati i Livelli Essenziali di Assistenza (LEA), e garantisce le risorse necessarie al loro finanziamento, compatibilmente con i vincoli di finanza pubblica e in condizioni di efficienza ed appropriatezza nell'erogazione delle prestazioni. Dall'altro lato, le Regioni organizzano i propri Servizi Sanitari Regionali (SSR), garantiscono l'erogazione delle prestazioni ricomprese nei LEA e sono l'organo a cui compete la programmazione e la gestione dei servizi sanitari sul territorio.

L'aspetto preminente di tale modello gestionale è la capacità del sistema nel suo complesso di favorire e incentivare le Regioni che assumono comportamenti "virtuosi", volti a perseguire recuperi di efficienza ed efficacia nell'erogazione dei LEA. Tale processo consente, per un verso, un miglioramento strutturale degli equilibri di bilancio, particolarmente importante per le Regioni in disavanzo e, per l'altro, di massimizzare il soddisfacimento dei bisogni sanitari dei cittadini compatibilmente con le risorse destinate alla funzione sanitaria.

La cornice normativa delineata negli ultimi anni ha consentito l'implementazione di un modello di amministrazione del settore sanitario pubblico in grado di perseguire in maniera progressiva ed efficace gli obiettivi sopra indicati.

In materia di attuazione del federalismo fiscale, il decreto legislativo n. 118/2011, concernente l'armonizzazione dei bilanci, rappresenta dal 2012 un ulteriore progresso per i procedimenti contabili nel settore sanitario. Con tale decreto legislativo sono state introdotte le disposizioni dirette a garantire un'agevole individuazione dell'area del finanziamento sanitario attraverso tre provvedimenti distinti. Primo tra essi vi è l'istituzione della Gestione Sanitaria Accentrata (GSA). In seconda battuta, è prevista la trasparenza dei flussi di cassa relativi al finanziamento sanitario, attraverso l'accensione di specifici conti di tesoreria intestati alla sanità. Terzo, nell'ambito del bilancio consuntivo, le Regioni devono rendere e garantire la perimetrazione (i.e., l'esatta individuazione) delle

entrate e delle uscite relative al finanziamento del proprio Servizio sanitario regionale (SSR).

Tale perimetrazione consente la confrontabilità immediata tra le entrate e le spese sanitarie iscritte nel bilancio regionale e le risorse indicate negli atti di determinazione del fabbisogno sanitario regionale standard e di individuazione delle correlate fonti di finanziamento. In tal modo si determina anche un'agevole verifica delle ulteriori risorse rese disponibili dalle Regioni per il finanziamento del medesimo servizio sanitario regionale per l'esercizio in corso.

Specificatamente, devono essere individuate le seguenti voci di entrata: il finanziamento sanitario ordinario corrente (ivi compresa la mobilità attiva programmata per l'esercizio) il finanziamento sanitario aggiuntivo corrente (ivi compreso il finanziamento aggiuntivo finalizzato all'erogazione dei livelli di assistenza superiori rispetto ai LEA); il finanziamento regionale del disavanzo sanitario pregresso; il finanziamento per investimenti in ambito sanitario. A queste fonti di finanziamento si aggiungono le entrate proprie delle Aziende sanitarie e il saldo attivo della mobilità sanitaria (rimborsi al Servizio sanitario regionale relativi a prestazioni sanitarie fornite a cittadini di altre Regioni).

Con riguardo alle spese, devono essere individuate: la spesa sanitaria corrente per il finanziamento dei LEA (ivi compresa la mobilità passiva programmata per l'esercizio); la spesa sanitaria aggiuntiva per il finanziamento di livelli di assistenza sanitaria superiori ai LEA; la spesa sanitaria per il finanziamento di disavanzo sanitario pregresso; la spesa per investimenti in ambito sanitario.

In ogni bilancio regionale è riportato uno schema di raffronto delle suddette entrate e spese (Tabella 1).

Tabella 1 La perimetrazione del bilancio regionale (D.Lgs. 118/2011)

SPESE	ENTRATE
<ul style="list-style-type: none"> • Spesa sanitaria corrente per finanziamento dei LEA • Spesa sanitaria aggiuntiva per livelli superiori ai LEA • Spesa sanitaria per il finanziamento di disavanzo sanitario pregresso • Spesa per investimenti in ambito sanitario 	<ul style="list-style-type: none"> • Finanziamento sanitario ordinario corrente • Finanziamento sanitario aggiuntivo corrente • Finanziamento regionale del disavanzo sanitario pregresso • Finanziamento per investimenti in ambito sanitario • Entrate proprie

Fonte: nostra rielaborazione su dati NSIS.

Tale modello non risponde ai principi della Ragioneria per una Amministrazione Razionale basata sul bilancio, secondo la quale il finanziamento dei servizi sanitari dovrebbe basarsi sui servizi effettivamente prodotti secondo un meccanismo di efficienza in termini di risorse consumate per la loro produzione.

2.5 Le differenti metodologie per il riparto del Fondo Sanitario Nazionale: Regioni a Statuto Ordinario, Regioni a Statuto Speciale e Regione Sicilia.

La metodologia corrente per il riparto del Fondo Sanitario Nazionale (FSN), utilizza come unici criteri per l'attribuzione delle quote tra le diverse Regioni e Province autonome la popolazione residente, la diversa struttura per età e il tasso di mortalità (Rice and Smith, 1999). Il riparto del fondo alle Regioni avviene attraverso il meccanismo della «quota capitaria pesata», cioè un insieme articolato di criteri che vengono applicati alla popolazione delle Regioni e che danno poi luogo al finanziamento che viene assegnato dallo Stato a ciascuna di esse per l'erogazione dei livelli essenziali di assistenza (LEA).

Si chiama metodo della quota capitaria «pesata» perché in esso ogni cittadino non ha peso «uno» (come nel metodo della «quota capitaria secca»), ma ha un peso che differisce da uno e che dipende dai criteri che vengono utilizzati per il riparto. La numerosità della popolazione residente è il principio guida del riparto (cioè: a maggiore popolazione corrispondono maggiori risorse) ma tale valore, per i diversi Livelli Essenziali di Assistenza (LEA), viene modulato, pesato, di volta in volta in funzione degli accordi che intercorrono tra le Regioni stesse (Zocchetti, 2012). Il risultato è una popolazione regionale «pesata» (inferiore, uguale, o superiore, alla popolazione reale in funzione di come giocano i criteri di pesatura adottati) che definisce la quota di partecipazione (più precisamente: di riparto) di ogni regione al FSN.

Il meccanismo della quota capitaria pesata, così come applicato in Italia, è costituito da due momenti: in una prima fase vengono identificati i singoli livelli essenziali di assistenza da finanziare (e le relative quote del fondo a essi assegnate); successivamente, per ogni LEA identificato, vengono definiti i criteri da applicare alle popolazioni delle Regioni (i pesi) (Cislaghi and Zocchetti, 2012). Le Aziende Sanitarie vengono finanziate dalle Regioni sulla base della quota capitaria corretta in relazione alle caratteristiche della popolazione residente, secondo criteri coerenti con quelli indicati dalla legge 662/96, che regola il trasferimento di risorse dal Fondo Sanitario Nazionale alle Regioni. Con l'Accordo dell'8 Agosto 2000, in sede di Conferenza Stato Regioni, sono state riviste le regole del Patto di Stabilità interno, con riguardo sia alle Regioni, sia con riferimento a Province e Comuni (Giannoni, 2015).

Il punto 16 del suddetto accordo prevede che «...le Regioni si impegnano a rivedere i parametri di ponderazione di cui all'art. 34 della Legge 662/96» in base all'accordo sui livelli essenziali di assistenza. In questo contesto il finanziamento basato sulla quota capitaria dovrebbe garantire la realizzazione di un equilibrio tra risorse disponibili ed erogazione di appropriate prestazioni e servizi socio-sanitari attraverso i livelli essenziali di assistenza (LEA) (Costa, 2010).

Attualmente la suddivisione tra le Regioni avviene con modalità distinte per tipologia di Regione (e Province Autonome):

- 1) Le Regioni a Statuto Ordinario concorrono al riparto determinato con la seguente formula

$$\varphi^{it} = \frac{n^{it}}{\sum_i n^{it}} + \frac{n^{it}\beta \sum_j \tau_j^t (x_j^t - x_j^{it})}{R^t} + \frac{n^{it}(s^{it} - s^t)}{R^t} + \frac{n^{it}\gamma^t (p^{it} - p^t)}{R^t}$$

dove i parametri sono così individuati:

- (a) Popolazione residente: $\frac{n^{it}}{\sum_i n^{it}}$ (b) Perequazione capacità fiscale: $\frac{n^{it}\beta \sum_j \tau_j^t (x_j^t - x_j^{it})}{R^t}$
 (c) Fabbisogno sanitario: $\frac{n^{it}(s^{it} - s^t)}{R^t}$ (d) Dimensione geografica: $\frac{n^{it}\gamma^t (p^{it} - p^t)}{R^t}$

- 2) Le Regioni a Statuto Speciale (esclusa la Sicilia) e le Province Autonome di Trento e Bolzano devono provvedere con i propri tributi di scopo (co-partecipazione IVA, IRAP e Addizionale Regionale IRPEF).
 3) La Regione Sicilia beneficia del riparto come al punto 1) per il 50,89% del proprio fabbisogno, mentre per il restante 49,11% provvede con i propri tributi di scopo come al punto 2).

L'elevato e perdurante squilibrio nelle capacità fiscali (squilibri esistenti tra i livelli di spesa e di entrata pro-capite dei diversi territori) delle Regioni ha posto con grande rilevanza nella necessità di attivare gli ingenti trasferimenti perequativi, le risorse necessarie sono finanziate da un fondo perequativo senza vincolo di destinazione, alimentato dalla fiscalità generale e richiesti per garantire l'uniforme erogazione dei LEA. Il fabbisogno sanitario è il livello complessivo delle risorse del Servizio sanitario nazionale (SSN) al cui finanziamento concorre lo Stato.

3 L'approccio metodologico di ricerca ed analisi empirica

3.1 Obiettivi della ricerca

La presente ricerca si pone nell'ottica di:

- 1) analizzare gli equilibri/squilibri di finanziamento del Sistema Sanitario Nazionale e di quello delle singole Regioni, con evidenza dei flussi finanziari sanitari, fonti e impieghi di natura corrente, ottenuti dalla perimetrazione della sanità all'interno del bilancio regionale;
- 2) valutare le diverse modalità con cui avviene il riparto del Fondo Sanitario Nazionale tra le diverse Regioni a Statuto Ordinario, quelle a Statuto Speciale (esclusa la Sicilia) e la Sicilia;
- 3) effettuare un'analisi critica della formula utilizzata nel riparto e proposta di criteri semplificati e trasparenti per effettuare il medesimo.

3.2 Metodologia

È stata condotta un'analisi quantitativa di efficienza del sistema sanitario nazionale articolata come segue:

- a) raccolta di dati di bilancio delle Regioni italiane da diverse fonti e con diverse modalità:
 - bilanci consuntivi pubblicati sui siti internet delle Regioni;
 - consultazioni di *basi dati* ministeriali;
 - somministrazione di un questionario alle Regioni italiane;
- b) costruzione di prospetti di sintesi con l'evidenza delle entrate e delle spese della sanità pubblica regionale;
- c) analisi della spesa sanitaria articolata per funzioni;
- d) analisi delle fonti finanziamento delle sanità regionale;
- e) comparazione tra entrate e uscite per ogni Regione al fine di determinare l'avanzo o il disavanzo della sanità regionale;
- f) analisi critica del modello attualmente applicato per il finanziamento del Servizio Sanitario Nazionale.

3.3 Campione

Il campione di riferimento è rappresentato dalle Regioni italiane (15 a statuto ordinario e 5 a statuto speciale) e dalle due Province Autonome (Trento e Bolzano). I dati presi in esame sono quelli riferiti al 2013, causa indisponibilità di dati aggiornati a dopo il 2013 con riferimento al finanziamento della sanità regionale.

4 I risultati dell'analisi empirica

La necessità di perseguire efficacia ed efficienza è da inserire in un contesto di amministrazione razionale che parte dai bisogni da soddisfare e dalle risorse finanziarie a disposizione. Il punto di osservazione, quindi, il grado di impiego delle risorse, che influenza la dinamica del consumo delle risorse (Volpatto O., 1988).

Nel dettaglio, sono state analizzate e rielaborate le fonti di finanziamento della sanità regionale per l'anno 2013. Una prima rielaborazione effettuata riguarda la spesa sanitaria sostenuta da parte delle Regioni (Tabella 2), che rivelano una sostanziale coerenza con gli importi di finanziamento in entrata (Tabella 3). In particolare, dall'analisi delle entrate emerge una discrepanza tra le Regioni a statuto speciale, dotate di particolari autonomie, e quelle a statuto ordinario. I risultati dimostrano una variegata e diversificata distribuzione dei finanziamenti per Regioni e caratteristiche regionali. Notevole è il divario, anche per tipologie regionali apparentemente omogenee: si valuti, a esempio, il confronto tra Sardegna e Sicilia, in cui il divario è rilevante e non tiene conto solo aspetti di distribuzione legati al bisogno, ma anche di aspetti di autonomia impositiva e normativa.

Si rileva, infine, una incongruenza con gli effettivi bisogni regionali e questo è dimostrato dai risultati di avanzo e disavanzo (Tabella 4).

Tabella 2 La spesa sanitaria regionale (anno 2013 - €/milioni - per rilevanza)

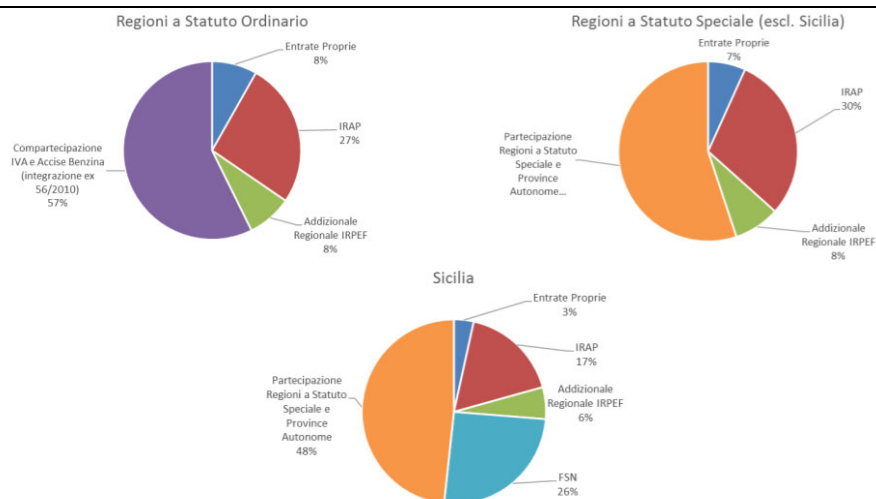
	Acquisti di Beni (3)		Acquisti di Farmaci		Acquisti di Servizi sanitari (4)		Acquisti di Servizi non sanitari (5)		Godimento Beni di Terzi		Personale Sanitario (6)		Personale non sanitario (7)	
Lombardia	2.131	11,49%	1.293	6,97%	7.074	38,15%	1.235	6,66%	161	0,87%	4.577	24,68%	465	2,51%
Lazio	1.408	12,80%	901	8,19%	3.898	35,43%	783	7,12%	82	0,75%	2.585	23,49%	220	2,00%
Campania	1.219	12,59%	861	8,90%	3.142	32,46%	640	6,61%	55	0,57%	2.605	26,91%	201	2,08%
Veneto	1.217	13,53%	583	6,48%	2.783	30,95%	750	8,34%	125	1,39%	2.516	27,98%	226	2,51%
Emilia Romagna	1.207	13,66%	533	6,03%	2.543	28,78%	711	8,05%	71	0,80%	2.758	31,22%	235	2,66%
Sicilia	1.050	12,15%	812	9,40%	2.702	31,27%	398	4,61%	46	0,53%	2.598	30,06%	243	2,81%
Piemonte	1.275	15,30%	609	7,31%	2.348	28,18%	527	6,32%	108	1,30%	2.552	30,63%	281	3,37%
Toscana	1.195	16,84%	414	5,84%	1.632	23,00%	660	9,30%	69	0,97%	2.343	33,02%	177	2,49%
Puglia	1.155	16,40%	622	8,83%	2.273	32,28%	468	6,65%	39	0,55%	1.836	26,07%	147	2,09%
Calabria	462	13,72%	313	9,30%	912	27,09%	159	4,72%	29	0,86%	1.076	31,96%	106	3,15%
Sardegna	518	15,91%	300	9,22%	742	22,80%	256	7,86%	36	1,11%	1.107	34,01%	78	2,40%
Liguria	443	13,94%	221	6,96%	854	26,88%	274	8,62%	33	1,04%	1.013	30,62%	85	2,68%
Marche	475	17,20%	239	8,65%	638	23,10%	159	5,76%	27	0,98%	922	33,38%	69	2,50%
Friuli Venezia Giulia	399	15,87%	190	7,56%	492	19,57%	289	11,50%	27	1,07%	881	35,04%	67	2,67%
Abruzzo	376	15,93%	220	9,32%	569	24,11%	177	7,50%	27	1,14%	714	30,25%	51	2,16%
Umbria	275	16,53%	131	7,87%	317	19,05%	145	8,71%	17	1,02%	576	34,62%	34	2,04%
P.A. Bolzano	152	12,91%	45	3,82%	256	21,75%	60	5,10%	8	0,68%	540	45,88%	52	4,42%
P.A. Trento	139	11,93%	68	5,84%	363	31,16%	88	7,55%	7	0,60%	384	32,96%	37	3,18%
Basilicata	164	15,88%	80	7,74%	263	25,46%	64	6,20%	7	0,68%	353	34,17%	24	2,32%
Molise	89	13,46%	43	6,51%	231	34,95%	40	6,05%	2	0,30%	188	28,44%	10	1,51%
Valle d'Aosta	35	12,15%	18	6,50%	57	20,58%	22	7,94%	7	2,53%	102	36,82%	12	4,33%
Totale	15.384	13,79%	8.496	7,61%	34.089	30,55%	7.905	7,08%	983	0,88%	32.226	28,88%	2.820	2,53%
	Spese generali e amministrative		Altro (8)		Intramoenia		Imposte e Tasse		Oneri Finanziari		Costi Straordinari (9)		Totale	
Lombardia	452	2,44%	524	2,83%	196	1,06%	387	2,09%	7	0,04%	42	0,23%	18.544	100,00%
Lazio	178	1,62%	348	3,16%	98	0,89%	221	2,01%	105	0,95%	176	1,60%	11.003	100,00%
Campania	168	1,74%	403	4,16%	43	0,44%	234	2,42%	19	0,20%	89	0,92%	9.679	100,00%
Veneto	186	2,07%	174	1,93%	96	1,07%	209	2,32%	43	0,48%	85	0,95%	8.993	100,00%
Emilia Romagna	211	2,39%	172	1,95%	105	1,19%	224	2,54%	31	0,35%	34	0,38%	8.835	100,00%
Sicilia	198	2,29%	244	2,82%	39	0,45%	222	2,57%	48	0,56%	42	0,49%	8.642	100,00%
Piemonte	186	2,23%	79	0,95%	98	1,18%	220	2,64%	32	0,38%	18	0,22%	8.333	100,00%
Toscana	167	2,35%	101	1,42%	80	1,13%	189	2,66%	29	0,41%	39	0,55%	7.095	100,00%
Puglia	128	1,82%	103	1,46%	29	0,41%	153	2,17%	13	0,18%	76	1,08%	7.042	100,00%
Calabria	89	2,64%	67	1,99%	9	0,27%	87	2,58%	25	0,74%	33	0,98%	3.367	100,00%
Sardegna	70	2,15%	43	1,32%	13	0,40%	33	1,01%	4	0,12%	55	1,69%	3.255	100,00%
Liguria	54	1,70%	58	1,83%	35	1,10%	84	2,64%	3	0,09%	20	0,63%	3.177	100,00%
Marche	62	2,24%	55	1,99%	32	1,16%	77	2,79%	1	0,04%	6	0,22%	2.762	100,00%
Friuli Venezia Giulia	49	1,95%	15	0,60%	22	0,88%	68	2,70%	0	0,00%	15	0,60%	2.514	100,00%
Abruzzo	60	2,54%	67	2,84%	15	0,64%	59	2,50%	1	0,04%	24	1,02%	2.360	100,00%
Umbria	48	2,88%	61	3,67%	11	0,66%	45	2,70%	2	0,12%	2	0,12%	1.664	100,00%
P.A. Bolzano	21	1,78%	3	0,25%	1	0,08%	36	3,06%	0	0,00%	3	0,25%	1.177	100,00%
P.A. Trento	21	1,80%	15	1,29%	8	0,69%	31	2,66%	0	0,00%	4	0,34%	1.165	100,00%
Basilicata	23	2,23%	14	1,36%	4	0,39%	29	2,81%	0	0,00%	8	0,77%	1.033	100,00%
Molise	17	2,57%	13	1,97%	3	0,45%	15	2,27%	3	0,45%	7	1,06%	661	100,00%
Valle d'Aosta	9	3,25%	1	0,36%	3	1,08%	9	3,25%	0	0,00%	2	0,72%	277	100,00%
Totale	2.397	2,15%	2.560	2,29%	940	0,84%	2.632	2,36%	366	0,33%	780	0,70%	111.578	100,00%

Fonte: nostra rielaborazione su dati SIS.

Tabella 3 Le fonti di finanziamento della sanità regionale (anno 2013 - €/ migliaia)

Regioni	Entrate Proprie (10)	IRAP	Addizionale Regionale IRPEF	Partecipazione IVA e Accise Benzina (integrazione ex 56/2010)	FSN	Partecipazione Regioni a Statuto Speciale e Province Autonome	Totale
REGIONI A STATUTO ORDINARIO							
Lombardia	1.815.118	7.097.818	1.831.164	7.698.863	0	0	18.442.963
Lazio	727.815	3.646.398	927.132	4.937.980	0	0	10.239.325
Campania	324.541	1.334.328	545.586	7.644.617	0	0	9.849.072
Veneto	801.040	2.791.017	789.656	4.708.402	0	0	9.090.115
Emilia Romagna	1.137.635	2.577.932	782.484	4.214.014	0	0	8.712.064
Piemonte	636.735	2.161.013	745.098	4.750.074	0	0	8.292.920
Toscana	774.416	1.941.668	603.683	3.915.316	0	0	7.235.083
Puglia	284.910	926.126	415.381	5.488.581	0	0	7.114.999
Calabria	114.772	107.994	182.961	3.056.834	0	0	3.462.562
Liguria	288.785	749.072	282.368	1.821.351	0	0	3.141.576
Marche	233.621	660.035	225.745	1.801.115	0	0	2.920.516
Abruzzo	197.830	444.509	164.985	1.682.361	0	0	2.489.684
Umbria	206.631	330.610	132.687	1.090.117	0	0	1.760.045
Basilicata	108.061	64.343	61.473	868.596	0	0	1.102.473
Molise	100.267	42.005	35.918	467.125	0	0	645.315
Totale Regioni a S.O.	7.752.177	24.874.867	7.726.321	54.145.347			94.498.713
REGIONI A STATUTO SPECIALE (escluso Sicilia)							
Sardegna	66.652,00	644.193,36	198.422,00	0,00	0,00	2.005.045,84	2.914.313
Friuli Venezia Giulia	228.388,00	766.690,60	215.953,00	0,00	0,00	1.192.628,76	2.403.660
P.A. Trento	87.745,00	348.549,16	90.757,00	0,00	0,00	464.714,95	991.766
P.A. Bolzano	101.483,00	394.819,55	94.709,00	0,00	0,00	365.166,31	956.178
Valle d'Aosta	24.215,00	86.582,09	23.308,00	0,00	0,00	112.270,41	246.376
Totale Regioni a S.P.	508.483,00	2.240.834,77	623.149,00			4.139.826,27	7.512.293,03
Regione SICILIA							
Sicilia	303.621,00	1.512.894,13	488.051,00	0,00	2.235.167,56	4.236.387,89	8.776.122
Totale Italia	8.564.281,00	28.628.596,20	8.837.521,00	54.145.347,24	2.235.167,56	8.376.214,16	110.787.127,15

Fonte: nostra rielaborazione su dati NSIS.

**Figura 3** Le spese della sanità regionale (anno 2013).

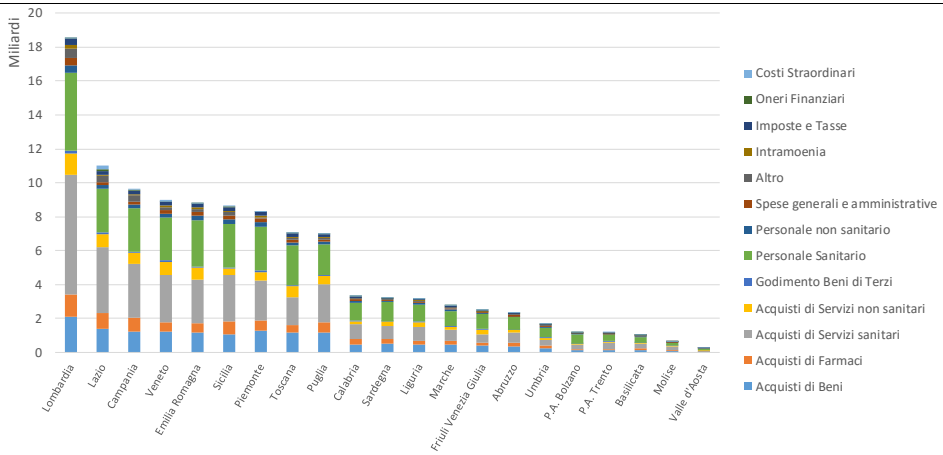


Figura 4 Le entrate della sanità regionale (anno 2013).

Con particolare riferimento all'entrata rappresentata dalla componente tributaria IVA e accise Benzina, si rappresenta che, per l'anno 2013, il 40% del gettito complessivo nazionale è destinato al finanziamento del Servizio Sanitario Nazionale.

$$\frac{\text{IVA e Accise Benzina destinata al finanziamento SSN}}{\text{Gettito Complessivo IVA e Accise Benzina}} = \frac{54.145.347.237}{138.785.060.116} \cong 40\%$$

Tabella 4 Gli avanzi/disavanzi della sanità regionale (anno 2013 - €/migliaia – per rilevanza)

Regioni	Totale Entrate (A)	Totale Spese (B)	Avanzo (Disavanzo) A-B
Campania	9.849.072	9.679.985	169.087
Marche	2.920.516	2.761.822	158.694
Toscana	7.235.083	7.094.687	140.396
Sicilia	8.776.122	8.640.044	136.078
Abruzzo	2.489.684	2.360.251	129.433
Veneto	9.090.115	8.992.917	97.198
Umbria	1.760.045	1.665.016	95.029
Calabria	3.462.562	3.367.832	94.730
Puglia	7.114.999	7.041.489	73.510
Basilicata	1.102.473	1.034.824	67.649
Molise	645.315	662.741	-17.426
Valle d'Aosta	246.376	276.793	-30.417
Liguria	3.141.576	3.175.590	-34.014
Piemonte	8.292.920	8.333.957	-41.037
Lombardia	18.442.963	18.542.584	-99.621
Friuli Venezia Giulia	2.403.660	2.514.709	-111.049
Emilia Romagna	8.712.064	8.835.595	-123.531
P.A. Trento	991.766	1.165.079	-173.313
P.A. Bolzano	956.178	1.176.224	-220.046
Sardegna	2.914.313	3.256.405	-342.092
Lazio	10.239.325	11.002.285	-762.960
Totale	110.787.127	111.580.829	-793.702
Valore medio	5.275.577	5.313.373	-37.795

Fonte: nostra rielaborazione su dati NSIS.

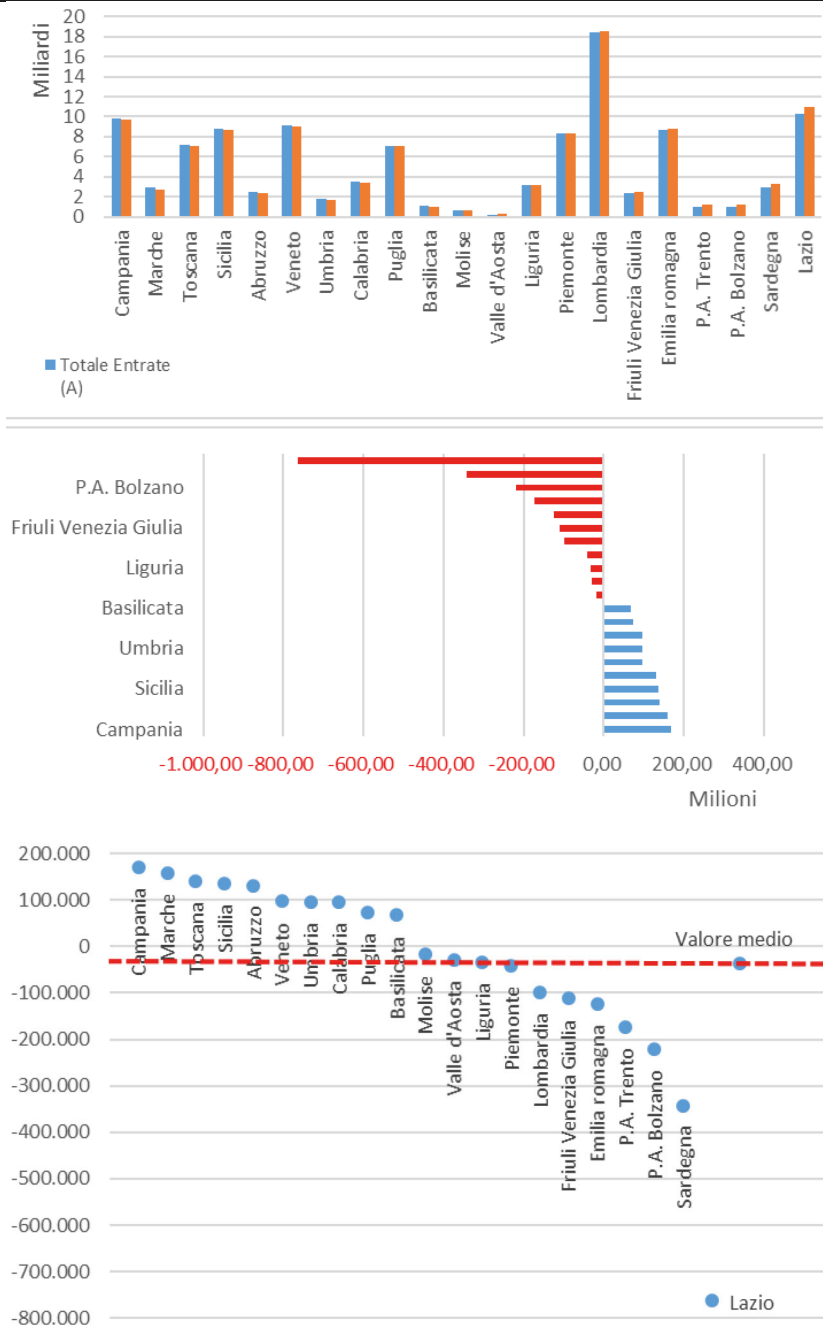


Figura 5 Gli avanzi/disavanzi della sanità regionale (anno 2013).

5 Conclusioni

I dati dimostrano che, nel 2013 vi è un divario marcato tra le Regioni: sono presenti Regioni in forte avanzo (es. Campania), Regioni in forte disavanzo (es. Lazio) e Regioni in sostanziale equilibrio (es. Molise)

Gli avanzi regionali complessivamente ammontano a €/migliaia 1.161.803 e sono prodotti quasi interamente dalle Regioni a Statuto Ordinario del centro sud, ad eccezione del Veneto.

I disavanzi regionali complessivamente ammontano a €/migliaia 1.955.505 e sono prodotti, ad eccezione della Regione Lazio, dalle Regioni a Statuto Speciale (Sardegna, Friuli Venezia Giulia) e dalle Province Autonome di Trento e Bolzano.

Il valore medio del disavanzo è pari a €/migliaia -37.795. Si collocano al di sopra del valore medio le Regioni Abruzzo, Basilicata, Calabria, Campania, Liguria, Marche, Molise, Puglia, Sicilia, Toscana, Umbria, Valle d'Aosta, e Veneto. Si collocano al di sotto del valore medio le Regioni Emilia Romagna, Friuli Venezia Giulia, Lazio, Lombardia, Piemonte, Sardegna e le Province Autonome di Trento e Bolzano.

Gli steps di approfondimento successivi del presente studio sono riferibili all'analisi della perimetrazione anche per gli anni 2014 e 2015, previa disponibilità del dato, e ad un'analisi dell'efficienza e dell'efficacia dei diversi Servizi Sanitari Regionali, in relazione allo stato di salute e del bisogno sanitario in ogni Regione.

Endnotes

¹ Il medesimo aspetto è presente nella Costituzione dell'Organizzazione Mondiale della Sanità.

² Il Sistema DRG permette di classificare tutti i pazienti dimessi da un ospedale (ricoverati in regime ordinario o day hospital) in gruppi omogenei per assorbimento di risorse impegnate. Tale quantificazione permette di remunerare ciascun episodio di ricovero.

³ Costi per acquisto beni sanitari (esclusi i farmaci).

⁴ Costi per attività specialistica, riabilitativa, integrativa e protesica, ospedaliera e altre attività sanitarie.

⁵ Costi per manutenzioni e riparazioni, servizi appalti e altri servizi non sanitari.

⁶ Costi per personale sanitario e tecnico.

⁷ Costi per personale professionale e amministrativo.

⁸ Costi per accantonamenti.

⁹ Costi per minusvalenze, sopravvenienze e insussistenze passive

¹⁰ Ricavi per prestazioni sanitarie e socio sanitarie a rilevanza sanitaria, concorsi, recuperi e rimborsi, compartecipazione alle spese per prestazioni sanitarie (ticket) e altri proventi propri.

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Schedule risk analysis for defence acquisition projects

Authors

- *Abderrahmane Sokri, Abderrahmane.Sokri@drdc-rddc.gc.ca*
 - *Ahmed Ghanmi, ahmed.ghanmi@forces.gc.ca*
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Project scheduling is an important component of project management. In the defence acquisition context, projects usually have extended and complicated schedules that can be affected by various sources of uncertainty. Examples of risks for project schedules include technology readiness, contracting delivery, learning curve estimation, decision delay etc. Handling this uncertainty has been an ongoing challenge for military decision makers for many decades. Schedule risk affects not only the completion time but also the cost and the overall performance of the acquisition project.

In this paper, a comprehensive review of theoretical methods for analyzing schedule risk of defence acquisition projects is discussed and presented. A novel schedule risk analysis approach integrating Monte Carlo simulation, decision analysis and optimization techniques is proposed to determine the expected critical path and completion time of an acquisition project. The approach determines a ranking probability matrix for the different critical paths of the project schedule. The condition that defines a particular critical path ranking as most probable is described in the context of an assignment problem. The most probable critical path is then found by solving the assignment problem using the path ranking probability matrix.

Once the expected critical path is determined, an S-curve is used to portray the schedule risk and to estimate the project schedule buffer for different confidence levels. A case study using a military aircraft replacement project for the Canadian Armed Forces is presented to illustrate the approach. Future work would include the development of a similar approach for cost risk analysis as well as an integrated cost and schedule risk analysis approach for future defence acquisition programs.

Keywords: Schedule risk; Schedule buffer; military; aircraft

JEL classification:M Business Administration and Business Economics

1. Introduction

Defence acquisitions are often complex and large-scale projects with long durations and interrelated activities. Handling uncertainty in these complex projects is a key factor to their success or failure. Project scheduling is an important source of this uncertainty. Schedule overrun (or schedule delay) refers to a situation where a project does not come to completion within the planned period. Cost overrun (or cost escalation) occurs when actual costs exceed previously estimated values (Kaliba, Muya, and Mumba, 2009). The ability to accurately define a project schedule is challenged by uncertainties similar to those encountered in building an estimate of the project cost, namely the impact of technological change, resource constraints, and programmatic obstacles. Schedule risk analysis is the process of associating a degree of confidence with the schedule duration estimate. The combination of defining probability distributions for various task durations and establishing network relationships among the tasks allows one to forecast the probability of meeting the targeted dates of key milestone events.

Uncertainty in project scheduling can occur due to three categories of complications (Kaliba, Muya, and Mumba, 2009; Khodakarami, Fenton, and Neil, 2007): ambiguity (i.e., lack or incompleteness of data), variability (i.e., trade-off between available and required resources), and occurrence of uncertain causal events. Schedule risk has been a persistent concern for defence project managers. Schedule risk would not only affect the completion time but also the cost and the overall performance of the acquisition project. A significant schedule overrun results in detrimental consequences and may lead to project failure. It could hamper the funding profile, generate additional costs, and result in further slippage in schedule. Understanding the key factors of this risk and quantifying its probability and impact could ease these problems and mitigate these costs.

This paper explores challenging issues of handling uncertainty in defence acquisition project scheduling. A state-of-the-art of the best-known techniques and tools for schedule risk analysis is provided. A schedule risk analysis model, combining Monte Carlo simulation and optimization techniques to determine the expected completion time of an acquisition project, is proposed. The model uses an S-curve to portray the schedule risk and to estimate the project schedule buffer for different confidence levels. A case study using a military aircraft replacement project for the Canadian Armed Forces is presented to illustrate the approach. The proposed model would provide decision makers with useful indicators about the expected schedule buffer and potential critical activities. It would also enable them to better handle common causal risks and minimize the consequences of adverse events.

This paper is organized into five sections. Following the introduction, Section 2 provides a comprehensive review of literature on analytical methods for project schedule risk analysis. Section 3 presents the formulation and the underlying assumptions of the proposed schedule risk analysis model. An illustrative example of schedule risk analysis using a defence acquisition project is provided in

Section 4. A summary of contributions as well as future research directions are indicated in Section 5.

2. Schedule Risk Analysis Methods

This section discusses schedule risk analysis methods for defence acquisition projects. In general, there are two main approaches for conducting schedule risk analysis, depending on data availability for the project: Phase driven approach and event driven approach.

2.1 Phase driven approach

The phase driven approach provides a high level assessment of schedule risk using phase level data of historical projects. Using this approach, the project schedule is divided into a number of phases with different distributions of completion times. A confidence interval around the project schedule probability estimate can be built by combining the probability distributions of the phase completion times. Phase completion times can be derived from historical dates marking the beginning and end of project phases. The beginning and end of a phase are associated with the occurrence of some type of events such as a major project milestone. Before a phase completion time distribution can be generated, an appropriate dataset must be selected for use in generating the distribution. This requires the condition that the underlying factors, which contributed to the phase completion times of the historical projects, are similar to those that would be experienced by the project phase under consideration.

The phase driven approach applies econometric techniques to historical data to identify the major schedule drivers of historical projects (Fabrycky and Blanchard, 1990). The schedule drivers are then used in the schedule estimating relationships of the analyzed project. Historical projects that are considered similar enough to be used for comparison are termed analogous. Identification of analogous projects focuses on similarities between the different phases of historical projects and the phases of the project under consideration. Similarities are evaluated in terms of project characteristics that affected the project phase schedules. Examples of project characteristics would include type of equipment, acquisition strategy, system capabilities, and critical technologies. Statistical analysis may be used in order to assist in identifying the project characteristics which are most strongly associated with differences or trends in schedule duration. Additionally, subject matter expertise may also be utilized to identify historical project phases that would be appropriate to use for modeling a given phase of a project. Once a set of phase duration times has been determined, the project schedule distribution can be generated.

A growing body of literature recognizes that a parametric method (e.g., phase driven method) is an effective schedule risk analysis approach. Younossi et al.

(2002), for example, explored the parameters that affect the development phase duration of military jet engine. These authors employed least-squares regression methods to develop a series of parametric relationships for forecasting the engine development time.

2.2 Event driven approach

In contrast with the phase driven approach, the event driven approach provides a detailed assessment of the project schedule risk using stochastic simulation methods. The most common method used in stochastic simulation is Monte Carlo simulation. The approach uses the Critical Path Method (CPM) schedule to determine the project duration. A CPM schedule is a collection of all the activities needed in order to complete a project, where each activity has a predecessor to its start date and a successor from its finish date (Hulett, 2012). The activity duration is determined either based on historical standards or from the advice of subject matter expertise if there is little or no historical data. The largest sum of these durations that form a single continuous path from start to finish defines the minimum time required for the project to be complete and is known as the critical path. It is imperative that the CPM schedule is constantly scrutinized and reviewed to ensure the data used in the analyses is relevant and accurate. Two event driven methods can be used for schedule risk analysis: Activity driver method and risk driver method.

a. *Activity driver method*

The activity driver method is the traditional bottom up analysis of estimating scheduling risk. It places uncertainty on each activity in the schedule, changing the static values to a range of values. This range of possible values or probability distribution, can take on many forms, most typically uniform or triangular distributions. Many tools can be used to establish a probability distribution for the schedule as a whole. There is a growing body of techniques that the activity driver method can use to handle risk and uncertainty. These techniques can be divided into four main categories: (1) Project Evaluation and Review Technique (PERT), (2) Critical chain methods, (3) Bayesian networks, and (4) Simulation models (Purnusa and Bodea, 2013).

Instead of using a single deterministic duration as in CPM, PERT incorporates uncertainty by using three-point estimates (optimistic, most likely, and pessimistic) for each activity. Many researchers have contributed to the extension of PERT. Pritsker (1966) developed the Graphical Evaluation and Review Technique (GERT) for NASA's Apollo program (Cates, 2004). In this technique, activity durations are represented by continuous or discrete variables. Each branch of the project network may be assigned a probability of not being performed during the project (Morris, 1997; Galway, 2004; Cates, 2004). GERT was later enhanced with the ability to integrate cost and resource constraints. Development in GERT also includes Q-GERT that can consider queuing within the analyzed system (Arisawa and Elmaghraby, 1972; Hebert 1975; Pritsker, 1979). Moeller (1972) introduced the Venture Evaluation and Review Technique (VERT). This

time and cost oriented technique provides a more integrated risk analysis. VERT is logically guided by the principle that there is a connection between time, cost, and performance.

Critical Chain Project Management (CCPM) was proposed by Goldratt (1997) as a new project management method. Goldratt (1997) noticed that safety time is spread over the activities rather than being where it is needed the most. This situation would make the planning dynamic ineffective in keeping projects on time and within budget. CCPM strategically removes safety time from individual activities and places it in project buffer (at the end of the project) and feeding buffers (at nodes where non-critical activities feed into the critical chain). It is mainly a mix of the theory of constraints, and Total Quality Management (Leach, 2000). In contrast to CPM and PERT, CCPM does not put emphasis on activity order and scheduling. It focuses on the resources required to execute project activities (Goldratt, 1997; Cates, 2004). The critical path may change and become the critical chain, if the resources required are considered. This method has been used by many top organisations such as NASA in the United States (Hagemann, 2001; Cates, 2004).

A typical weakness of Goldratt's method is its inability to determine the appropriate size for the project buffers. This approach was interpreted as setting the buffers at 50 percent of the unpadding critical chain duration. Many ways of sizing the buffers were suggested in the literature to address this issue. Assuming a standard normal distribution, Newbold (1998), for example, suggested sizing the buffer at two standard deviations of protection (or 90th percentile). This point corresponds to the difference between the worst case and the average duration for each activity. Shou and Yeo (2000) suggested a two-step process to estimate a buffer size. In their process, activities are first divided into four categories according to their level of uncertainty. In the second step, risk attitude of the decision maker is divided into three levels (low, median, and high). The buffers sizes are organized in a double entry table composed of two axes: a vertical axis listing the activity categories; and a horizontal axis comprised of a range of risk attitude levels.

A Bayesian Network (BN) is a directed graph of nodes and arcs with an associated set of probability tables. In this network, each node represents an uncertain variable with a set of states. Each arc represents a causal relationship between variables (Heckerman et al, 1995). Each state has its own probability of occurrence. Two categories of variables are used: (1) marginal probabilities for prior nodes and (2) conditional probabilities for nodes with parents. A marginal probability or prior distribution represents the state of knowledge or prior belief about a given variable. A conditional probability represents the probability of a state given the states of its parent. BN is used in project scheduling by adapting and incorporating the CPM parameters. In contrast to the other techniques, this approach integrates the source of uncertainty and the causal relations between project parameters to inform project scheduling. It can also analyze the trade-off between time and the level of required resources in project activities.

Simulation models use computer representations to investigate the behavior of a dynamic system and forecast the effect of potential changes to it. As a project management method, simulation can virtually mimic a real-world project. The project assessment by simulation technique allows one to repeatedly generate different scenarios (Schyler, 2001) and use different what-if analyses. It can provide numerous critical paths and use diverse probability distributions of the project duration (Purnusa and Bodea, 2013).

b. Risk driver method

The risk driver method is a top-down approach for analyzing risk using stochastic simulations. It is an examination of the most prioritized risks from the risk register (list of risks that have historically had a large impact on projects similar to the current one). This method utilizes known risks to the entire schedule to drive the simulations, rather than placing uncertainty on each activity. The risks drawn from the risk register have two main characteristics: the probability that the risk will occur and the impact in case it does occur. The probability of a risk is often given as a percentage, and the impact as a range of multiplicative factor. The risk driver then applies these risks to the CPM schedule and runs it through a Monte Carlo simulation. This generates a probability distribution and an associated S-curve, which is used to determine the total schedule time.

3 The Model

Two major questions are generally asked about any project (Chinneck, 2009): The first is about the shortest time in which the project can be completed. The second is about the activities that must be finished on time to complete the project in the shortest possible duration. These activities form the critical path (Chinneck, 2009). This section suggests a stochastic approach to objectively identify the most likely critical path and the corresponding completion time. It combines Monte Carlo simulation and optimization techniques to solve a scheduling problem. This approach can be summarized by the following six-step algorithm:

Step 1 – List all activities required to complete the project. In this step, the causal dependencies between the activities are summarized within a work breakdown structure and potential critical paths are identified. A schedule may have a series of concurrent critical paths with varying probabilities of occurrence. A list of near-critical paths may be used to reduce the computation effort.

Step 2 – Apply a probability distribution for the duration of each activity. A three-point estimate (minimum, most likely, and maximum) approach may be used to assess the likely fluctuation of activity durations. Two typical distributions are particularly suitable at this stage: Triangular and PERT distributions.

Step 3 – Run Monte Carlo simulation. Use Monte Carlo simulation to generate multiple schedules. For each iteration of the simulation, the potential critical paths are ranked according to their total durations. At the end of the simulation,

the distribution of each output variable is derived by consolidating the number of possible combinations from all iterations.

Step 4 – Estimate the critical path ranking probabilities: Let p_{ij} be the probability that path i ranks at position j . This probability is generated by dividing the number of times path i is ranked at a position j by the total number of simulation runs. A ranking probability matrix can be used to organize the potential critical path rankings from Monte Carlo simulation.

Step 5 – Derive the risk-adjusted critical path. To derive the risk-adjusted critical path and its probability, let k be the number of potential critical paths and define the variable x_{ij} ($1 \leq i, j \leq k$) as:

$$x_{ij} = \begin{cases} 1, & \text{if path } i \text{ is ranked at position } j \\ 0, & \text{otherwise.} \end{cases} \quad (1)$$

The most probable rankings of potential paths and the corresponding ranking probabilities can therefore be determined by maximizing the following objective function

$$\max G = \sum_{i=1}^k \sum_{j=1}^k x_{ij} p_{ij} \quad (2)$$

subject to:

$$\sum_{j=1}^k x_{ij} = 1 \quad 1 \leq i \leq k \quad (3)$$

The constraints in equation 3 state that each potential path is assigned to only one rank position.

Step 6 - Derive a schedule risk profile. The schedule risk profile can be derived and presented using the cumulative distribution function (CDF) of the project duration T considered as a random variable. The probability of not exceeding a given duration t is given by

$$F(t) = P(T \leq t). \quad (4)$$

The end result of any method of analysis should be a set amount of buffer added to the end of the project to account for any discrepancies that may arise in the project. The buffer is the amount of spare time added to the estimate of total completion time to reduce the risk of not being able to complete a project on schedule. Decision makers typically want a time by which they may be fairly certain the project will be completed by. The S-curve reflects these dates in terms of confidence levels. If the decision makers want a time by which they are certain by a percentage, it is possible to infer a date from the S-curve, as shown in Figure 1.1.

4 Case Study

In this section, the schedule risk analysis method is applied to a military aircraft replacement project for the Canadian Armed Forces. We conducted a risk analysis of the major milestones in the current project schedule of a search and rescue aircraft. The project management officer identified the set of tasks and their interdependencies as well as three point estimates of the task durations. However, to avoid issues with sensitive information, we used illustrative data for the schedule risk analysis in this paper.

4.1 Input Data

The dataset for this example contains a set of 26 tasks of the project schedule. Typical tasks include, for example, the preparation of the procurement documents, requirement foundation documents, release of the request for proposal, in-service support contract documents etc. Tasks are divided into two categories: (1) Standard tasks that require resources and execution time (T1 – T22), and (2) Delays or waiting times associated with some tasks (D1 – D4). Delay tasks involve, for example, waiting time for a senior leadership approval. For each task, Table 1.1 provides the predecessor and successor tasks as well as the minimum, most likely, and maximum durations (illustrative).

We applied the schedule risk analysis method to the aircraft replacement project dataset and identified three potential critical paths (CP1, CP2, and CP3) in the schedule. A critical path should be ruled out if it is clearly dominated by another one in a pair-wise comparison. A critical path is said to be dominated if its maximal completion time is smaller than the minimal duration of another one (Alvarez-Benitez, Everson, and Fieldsend, 2005). Table 1.2 presents the critical path ranking probability matrix (in which probabilities are expressed as percentages) obtained using the schedule risk analysis method for 10,000 simulation runs. The probability matrix can be interpreted as follows: Critical path CP1 (for example) ranked first for 60.12% of the simulation runs, second for 32.49%, and third for 7.52%. The same rationale applies for the remaining paths.

Table 1. Task, Durations, and Dependencies

Task	Description	Duration (months)			Successors
		Minimum	Most Likely	Maximum	
T1	Start	0	0.5	1	T2
T2		1	1.5	2	T3,T5
T3		2.5	3	3.5	T4
T4		0.5	1	1.5	T6
T5		18	20	22	T10
T6		6	7	8	T7
T7		6	7	8	D1,D2,T10
T8		0.5	1	1.5	T10
T9		1	2	3	T10
T10		0	0.5	1	T11
T11		0.5	1	2	T12,T13
T12		1	3	5	T14
T13		33	35	37	T22
T14		2	4	6	T15,T20
T15		3	4	5	D3,T18
T16		1	3	5	D4,T18
T17		2	3.5	5	T18
T18		1	2	3	T19
T19		1	2	3	T22
T20		4	6	10	T21
T21		0.5	2	3.5	T22
T22	Finish	1	2	2.5	T23
D1	Delay 1	0.5	1	1.5	T8
D2	Delay 2	0.5	0.5	0.5	T9
D3	Delay 3	1	1	1	T16
D4	Delay 4	1	1	1	T17

The examination of the ranking probability matrix indicates that the expected order of the potential critical paths and their respective ranking probabilities (highlighted in Table 1.2) are: CP1 (60.12%), CP2 (47.23%), and CP3 (47.80%). Given that CP1 has a high ranking probability (i.e., greater than 60%), its position would unlikely be sensitive to minor changes in the task durations. However, as CP2 and CP3 have comparable ranking probabilities (i.e., 47.23% and 47.80%),

their positions will likely be more sensitive to changes in the task durations. As such, the project manager should primarily focus on path CP1 for schedule risk mitigation but need to pay close attention to critical tasks in paths CP2 and CP3.

Table 2 Critical Path Ranking Probability Matrix

Path Tasks		Rank Position		
		1	2	3
CP1	T1, T2, T3, T4, T6, T7, D2, T9, T10, T11, T13, T22	60.12%	32.49%	7.52%
CP2	T1, T2, T3, T4, T6, T7, D1, T8, T10, T11, T13, T22	8.86%	47.23%	44.68%
CP3	T1, T2, T5, T10, T11, T13, T22	31.02%	20.28%	47.80%

4.2 Schedule risk profile

The project schedule risk analysis was conducted using stochastic simulation. Activity durations are represented by a PERT distribution function. The total project duration is calculated using the Critical Path Method. Figure 1.1 presents the project schedule risk profile. This graph depicts the CDF of the most likely critical path duration. It shows the probability for the project to be completed in less than a given time. For example, the median of the project duration distribution is approximately 61 months. This means that the probability that the project will be completed in less than 61 months would be 50%. The minimum and maximum durations for this project would be 56.86 months and 64.60 months, respectively. The 95% confidence interval for this duration would be [58.70, 63.19].

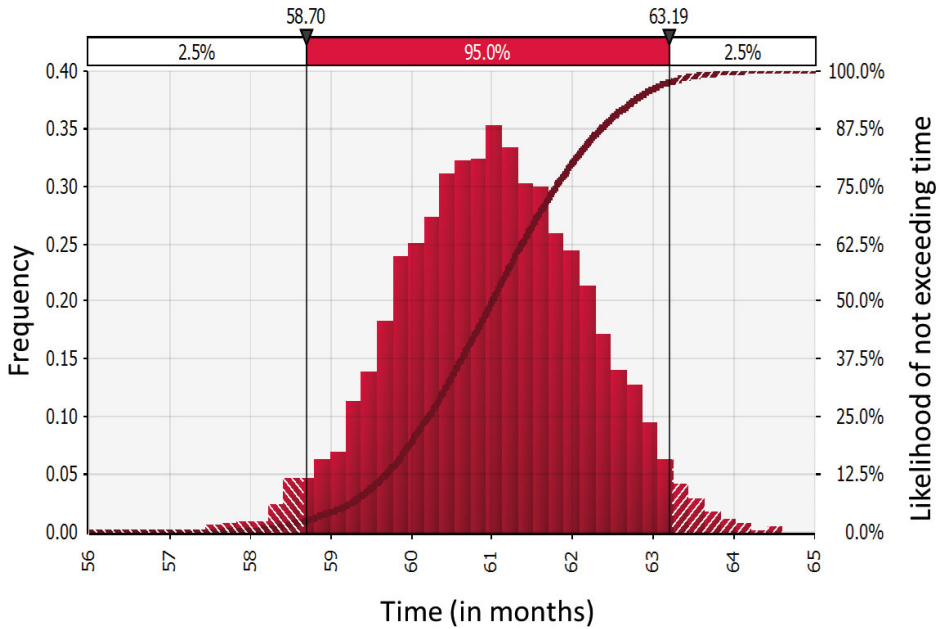


Figure 1 CDF of the total project duration

To evaluate the robustness of the schedule risk profile, a sensitivity analysis was carried out to assess the impact of some key activities on the results. As shown in Figure 1.2, the most critical variable in terms of schedule risk is T13. This activity has the highest impact on the project duration mean. A pairwise association between the project duration and this simulated predictor shows the relative significance of this activity. The correlation coefficient between these two variables is approximately 0.67. Any increase in the activity T13 would be expected to push the project schedule upward. The decision makers should define a strategy to mitigate variability in this activity.

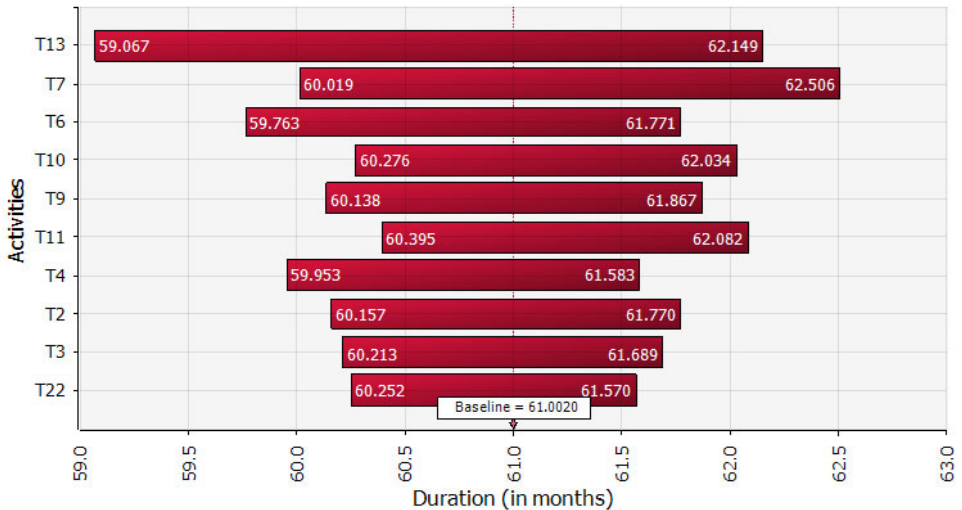


Figure 2 Effects of the the main activities on the project schedule

5 Conclusion

Handling uncertainty in defence acquisition projects has been an ongoing challenge for military forces. The ability to accurately define a schedule for these projects is challenged by their large scale and uncertainties in their interrelated activities.

This paper provided a comprehensive literature review of the best-known techniques and tools for schedule risk analysis. It also suggested a six-step schedule risk analysis approach to analyze the expected completion time of an acquisition project. This new approach combines simulation and optimization. It starts by listing all activities required to complete the project and ends by deriving a schedule risk profile using the CDF of the most likely critical path duration. An illustrative example using a military aircraft replacement project for the Canadian Armed Forces is also presented and discussed.

Further efforts are being undertaken to handle risk and uncertainty in military projects. These efforts include, for example, the ability to integrate time and cost within the same stochastic framework.

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Risk management and performance in public administration, as a way to better monitor the effectiveness and efficiency of processes and administrative procedures

Authors

- *Enrico Sorano, Assistant Professor, enrico.sorano@unito.it - University of Torino, Italy*
 - *Giovanni Lombardo, Professor with contract, giovanni.lombardo@unige.it - University of Genova, Italy*
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The present research aims to assess the readiness of the Italian regional administrations in the field of the risk assessment and the connection of “three-year anticorruption plans” to the “performance plans”. This path is needed to evaluate the application of risk prevention methodologies, which are generally typical in profit companies, also in the PA, as required by the new rules on transparency and anti-corruption and prevention of actions of “maladministration”. The research was conducted on all anti-corruption plans of all Italian regions. Along with documentary analysis were also conducted semi-structured interviews, to validate the quantitative data gathered in the first phase. The research found that, at least, half of the Italian Regions has not made full application of the law, due to lack of preparation in the field, and scarcity of human and financial resources. The authors close the research with the suggestion to use an evaluation path more systemic, which will connect the anti-corruption plans to the variable compensation of managers and employees, in order to obtain the necessary accountability and transparency in each PA and all its subsidiary. This also in order to advantage of the internal organization and, consequently, to achieve efficiency of the services to be donated to the stakeholders of the proper local community.

Keywords: anticorruption - ANAC - risk assessment - risk management - ISO 31000 - performance - ISO 37001.

JEL Classification: D73, D8, H5.

1. Sources, data retrieval and research questions

During the reorganization of the Public Administration (PA) and its subsidiary companies ("Mafia Italian Laws", regarding rationalization and reorganization of accounting system) each PA have to map its processes and activities carried out, and procedures and anti-bribery tools, anticorruption tools and other defenses against maladministration (internal context). PA have also to consider strictly the external context, with other dangerous entities with which the PA operates.

Accordingly, to this, the present study aims to assess the readiness of the Italian regional administrations in the field of risk assessment and the connection of the three-year plans for anti-corruption with performance plans. This path is needed to evaluate the application of risk prevention methodologies that are typical of profit companies also in the PA, as required by the new rules. But also in order to suggest a more systematic path, in order to bring in each PA and its subsidiary accountability and transparency required in the first instance for the internal organization and, consequently, for the efficiency of services devolved to the stakeholders of the proper local community.

2. The theoretical framework

In the international scene, a number of methods for assessing and managing risk are used. Examples are the IRM, AIRMIC, ALARM, the standard AS/NZS 4360: 2004, the Orange Book, the standard COSO - ERM and standard ISO 31000: 2009 (See Manacorda S., F. Centonze, G. Strong, 2014; Brown, AJ, 2008. Kathryn Gordon, Maiko Miyake, 2011; BS 10500, which inspired the UNI ISO 37001- Anti - bribery management systems, draft 2014-5).

The National Anti-Corruption Plan of ANAC suggests the use of the ISO 31000 standard: 2009, as it provides a rigorous approach to identify, evaluate and manage risks.

It is also connected to the Anglo-Saxon BS 10500 standard, from which derives the ISO 37001 draft, specific framework on the subject of anti-corruption in the PA, the principles of Legislative Decree no. 231/01 (organizational models and management and protocols/ procedures/garrisons anti-risk), practices regarding the audit of the MOG and related juridical sentences.

3. Sources, data retrieval and research questions

By collecting data from the National Anti-Corruption Authority (ANAC) and from each Italian Region, the authors conduct an analysis on 2016-2018 Anticorruption Plans, in the light of the definition of corruption considered by ANAC, which has a broad sense, including the concept of "maladministration" or "mis-

management", as other conduct apparently legal, but part of a higher irregular or criminal plan or incorrect use of public money.

Taking data from anticorruption plans (PTPC) issued by each Italian Region, during the years 2012-2016, the object of this paper is to analyze:

(A) the presence of methodology of risk assessment activities and their level, conducted by each institution mentioned, and

(B) the level of connection of these plans with the MBO and performance scheme ("plan of performance", under the Law 150/2009) of each entity.

4. The adopted methodology

From the methodology point of view, authors carry out a check list of variables, taking into consideration the theoretical framework about risk management into PA, literature and similar analysis. After the variables definition, an univariate analysis was performed, with the purpose of controlling the distribution of cases between different modes of variables taken into consideration. It's in progress also a bivariate analysis and a multivariate analysis, with the aim of identifying the relationships between the variables related to the level of adoption or the quality of PTPC and some context variables considered significant (Region, organizational dimension, the year of adoption of PTPC, and so on). The bivariate analysis is conducted through cross-tabulation. In particular, to explore the relationships between variables are calculated conditional distributions percentages, with also a test of statistical significance (chi-square test). Multivariate analysis is conducted through the binomial logistic regression.

The variables considered in the first research question are:

- A. Presence of identification of risks and differentiation into types of risk.
 - 0 = absent assessment.
 - 1 = Identification of only risky events reported in Annex 3 PNA, and summary combination of to the areas of risk.
 - 2 = Identification of only risky events reported in Annex 3 PNA, and summary combination of these individual processes / macro processes. ("0", "1", "2" = not sufficient level)
 - 3 = Definition of a catalogue of the risks broader than the exemplificative one that in Annex 3 (for example, through the analysis of judicial cases) and pair of the risks to the areas of risk.
 - 4 = Definition of a catalogue of the risks broader than the exemplificative one that in Annex 3 (for example, through the analysis of judicial cases) and pair of the risks to the processes / macro processes.
 - 5 = Definition of a catalogue of the risks broader than the exemplificative one that in Annex 3 (for example, through the analysis of judicial cases), combination of the risks to the processes / macro processes and analysis of the causes/ enabler factors of risky events. ("3", "4", "5" = sufficient or good level)

B. Methods of assessment and weighting of risks

- 0 = Absent
- 1 = evaluation according to appendix 5 PNA for risk area
- 2 = evaluation according to appendix 5 for sub-areas of risk and/or macro-processes
- 3 = evaluation according to appendix 5 for macro-processes, with little diversification of the risk exposure (no attribution of risk exposure priority)
- 4 = evaluation according to appendix 5 or other methods with risk weighting of priorities bands
- 5 = advanced methods with the use objective data (eg . Legal data) and diversification evaluation for the process steps and for office.

About connecting PTPC to performance plans (Law 150/2009), which is the second research question, the following indicators have been adopted:

- 0 = Absent and not expected
- 1 = The PTPC reports a generic reference to the need to integrate the two instruments
- 2 = The PTPC reports a specific guidance on the need to integrate the two instruments
- 3 = The PTPC explicit the manner in which the connection between the two instruments is realized
- 4 = The PTPC indicates objectives, indicators, responsible and timing of implementation of the measures; sufficient to enable a meaningful link with the performance plan
- 5 = The PTPC provides evidence of a successful connection with the performance plan (goals and indicators shared between the two instruments)

The quantitative part found by ANAC is also validated by semi-structured interviews, taken by a sample of "qualified witnesses" (Directors of PA and/or CEO of subsidiaries of PA and Anticorruption single authorities).

In detail, were conducted 20 interviews with key informants, representative of regional realities and of subsidiaries from these authorities or municipalities. The method used to process the data of the interviews is based on a "semantic" software that can aggregate the key words spoken by the respondents and then to conduct statistical descriptive analysis on frequencies and certain required concepts.

During the interviews was asked to comment on the quantitative data retrieved, to assess the cost in man hours, time and expertise that are needed to carry on this change in risk assessment methodologies in a PA and to assume some effective and efficient solutions in order to reach an improvement of processes and administrative procedures in an effective and efficient way, this in optical of a decrease in maladministration.

4.1 Results of the study

Regarding the first research question (Which is the level in anticorruption methodology of risk assessment, Conducted by each Italian region?), the analysis on 2016-2016 anticorruption plans shows that:

- 60% of the regional government has an insufficient identification of mal-administration risks and their types (values from 0 to 2), with 20% of cases that are missing entirely.
- 40% of the regions has a sufficient or good identification of the risk of maladministration, only 10% of them have reached the maximum level of evaluation (values between 3 and 5).
- 55% of the Regions has an insufficient explanation of the mode of evaluation and weighting of risks (values from 0 to 2).
- 45% of the regional government has a sufficient or good explanation of how to evaluate and risk weighting (values between 3 and 5).

Regarding the second research question (Which is the level of connection of anticorruption plans with the MBO and performance scheme under the Law 150 / 2009 of each regional entity?), the analysis shows that:

- Around 55% of the Italian regions has not provided a link between the Triennial Plan of the Prevention of Corruption and the Performance Plan from Law no. 150/2009; or, if it did, drew so much generic need to integrate the two instruments;
- The 25 % of the Italian regions began to explain specific indications and ways to connect the two instruments, in particular giving indications for to the process of the corruption risk management.
- Only 20% of Italian regions indicates objectives, indicators, responsible and timing of implementation of anti-corruption measures, such as to allow an effective connection with the Performance Plan, with a tendency to give an empiric verification.

Table 1 Analysis of anti-corruption plans of Italian Regions.

		Last three years available	Council / Board	Presence of identification of risks and types (0-5)	Mode to evaluate and weighting of the risks (0-5)	Connection to an MBO and performance plan 150/09 (0-5)
1	Valle d'Aosta	2016-8	G	2	2	2
2	Lombardia	2016-8	G	4	5	4
3	Piemonte	2015-7	G	2	5	1
4	Friuli VG	2016-8	G	1	1	3
5	Liguria	2016-8	G	4	5	4
6	Toscana	2016-8	G	2	4	4
7	Veneto	2016-8	G	4	3	5
8	Emilia R	2016-8		5	3	3
9	Trentino AA	2016-8	G	0	0	1
10	Umbria	2016-8	G	0	0	0
11	Marche	2016-8	C / G	2	0	1
12	Lazio	2016-8	G	4	3	0
13	Abruzzo	2016-8	C	2	2	3
14	Molise	2014-6	G	1	1	1
15	Calabria	2015-7	C	3	2	1
16	Puglia	2016-8	C e G	4	3	0
17	Basilicata	2015-7		1	1	1
18	Campania	2016-8	G	5	3	-
19	Sicilia	2016-8		0	0	0
20	Sardegna	2016-8	G	0	0	1

Source: authors elaboration on Anticorruption Plans data of Italian Regions

Commenting on the data obtained, the researchers added semi-structured interviews conducted with managers and executives of regional public administrations and managers of subsidiaries by public administrations.

In detail, were conducted 20 interviews with key informants, representative of regional realities and its subsidiaries from these authorities or municipalities. The interviews showed that:

1. as a result of the new rules, temporary increases in cost for advice occurred; this because the PA are not structured nor prepared to conduct risk assessments with methods typical suggested by the anti-corruption (until a few months ago) for private companies.
2. there is a significant need to require appropriate training, at each level (directors, officers, employees, but also especially the personnel devoted to internal audit).
3. it is important to appoint independent body components evaluation (Supervisory Board) which satisfy transversal skills and expertise in risk assessment framework, management, MBO and responsible business conduct, from economically-management point of view but also from a legal point of view. Otherwise it will result absent the connection between an-

ti-corruption plans and plans of performance and variable remuneration of senior management and of all of their employees.

4.2 Comment on data and some policy hints on transparency, performance and legality

The analysis of the data of PTPC and semi-structured interviews conducted with managers of companies participated by the PA, shows that transparency and legality are two fundamental aspects of "social responsibility" in Public Administration.

Administrative transparency is intended as a guarantee of the maximum possible flow of information and documents both inside the government and outside, towards the citizens and final users of the administrative action (stakeholders), therefore it constitutes the instrument more important to guarantee impartiality and the good functioning of public administration and helps to political managers of the institutions, citizens and users to exercise common control of the administrative action (National Action Plan on CSR 2012 - 2014, p. 34).

More specifically it can be expressed as total accessibility, also towards the publication tool on the corporate websites of public administration of the information concerning every aspect of the organization, of the indicators related to business performance and resource utilization for the pursuit of institutional functions, of the results of measurement and the evaluation carried out by the relevant bodies (Legislative Decree no. 27 October 2009, n. 150, art. 11, para 1).

Each government must try to ensure maximum transparency in every step of the performance management cycle (Legislative Decree no. 27 October 2009, n. 150, art. 11, para 3).

In particular, the performance management cycle should be divided into the following phases:

- a) Definition and assignment of the objectives to be achieved, the expected values of the financial statements and their respective indicators;
- b) Link between the objectives and the allocation of resources;
- c) Monitoring during the year in implementation of corrective actions;
- d) Measurement and evaluation of organizational and individual performance;
- e) Use of reward systems according to measurement of criteria of merit;
- f) Reporting of results to the organs of political and administrative policies, to the government leaders, as well as to relevant external bodies, citizens, stakeholders, users and recipients of services (Legislative Decree. n. 150/2009, art. 4, para 2).

Every administration annually is required to take a Triennial Programme for Transparency and Integrity in order to ensure:

- An appropriate level of transparency;

- The legality and development of the culture of integrity (Legislative Decree no. 27 October 2009, n. 150, art. 11, para 2).

In short, it is possible to say that transparency presents two respects:

- A static profile;
- A dynamic profile.

The static profile is the advertisement of data pertaining to public bodies for purposes of social control, the dynamic profile is correlated to the performance (the National Action Plan on Corporate Social Responsibility, 2012-2014, p. 34)

At the same time, with reference to the work of public authorities, it shall have the legality assurance function (Legislative Decree no. 27 October 2009, n. 150, article 1, paragraph 2).

Further legislative action expanded the scope of the concepts described above and in particular:

- The Law of 6th November 2012, n. 190;
- Legislative Decree 14th March 2013, n. 33;
- Determination n. 12 of 28th October 2015, the National Authority Anti-corruption, 2015 update to the National Anti-Corruption Plan.

Law no. 190/2012, which defines the "Measures for the prevention and repression of corruption and lawlessness in the public administration", is expressed in the construction of the Three-Year Plan for the Prevention of Corruption.

Legislative Decree. N. 33/2013, containing the "Reorganisation of the provisions applicable to advertising obligations, transparency and dissemination of information by public authorities", affirms the importance and at same time the obligation to adopt the Triennial Program for Transparency and Integrity.

The determination n.12 of 28th October 2015, in addition to verify the satisfactory implementation of effective prevention corruption measures, highlighted the largely ineffective coordination between P.T.P.C. and the Performance Plan.

When fully operational, there should be consistency between the performance management cycle and the Three-Year Plan for the Prevention of Corruption, of which the Triennial Program for Transparency and Integrity section is qualified.

The construction of the Three-Year Plan for the Prevention of Corruption must therefore be related to the performance plan (provided for in Article. 10, d. Lgs. N. 150/2009), especially with reference to the determination of organizational and individual performance objectives.

In particular, the Performance Plan must be coordinate and integrate with P.T.P.C. in view of the objectives identified by P.T.P.C., linked to the prevention of the risk of corruption, as well as activities (including so-called transverse, and not, measures) to reduce this risk.

Usually we refer as strategic to the objectives set by the P.T.P.C. relative to the risk management process, as outlined and recommended by the National Anti-Corruption Plan, incorporates the signs of the technical standard UNI / ISO 31000: 2010.

The performance cycle become in this way the process that connects planning, setting of goals, measuring of results and evaluating declined performance with reference to the Bodies in their entirety, the business units and individual employees. This process, which involves the political bodies to the various types of stakeholders, relates to the use of a reward evaluation system (Veneto Region, Performance Plan for the years 2014 to 2016 - Update 2015).

It will task to the Independent Evaluation Body (provisions of art. 14, d. Lgs. N. 150/2009) to verify the adequacy between the objectives of the Plan of Performance with those established in the Three-Year Program for Transparency and Integrity.

It may be inferred that the achievement of the results is dependent on the socially responsible behaviour of the public administration, imprinted to the research for the best transparency and prevention of corruption.

Or rather the lack of transparency and legality undermines at the origin to obtain constructive outcomes and of high social value and becomes a reason for scandals in the management of public affairs.

The search for a "balanced development" in the public system, as a path of social innovation, implies that the aspects mentioned above is a prerequisite of any reasoning in terms of efficiency and quality.

The cost recovery must not be good for itself, but functional at-the realization of sustainable development, in which the satisfaction of all stakeholders, the equitable distribution of wealth and full employment will become the polar star of the action and in general of public policies (Sorano 2014).

Legality, transparency and performance become aspects inextricably intertwined.

The transparency of management action in the public sector goes through an increasingly close link between the internal control system and measuring and control of the results achieved.

A formal recognition of procedures creates the conditions for a virtuous relationship between the logic of financing, performance of management and verification of outcomes (Sorano E., 2015).

The social responsibility of the PA is to be found also in how to allocate public resources, in the establishment of public investment programs which will create a more competitive system.

The reorganization of the public administration (taken into account in this regard the accounting harmonization process in progress, intended to distort the scope of action of local and regional authorities), has to promote a culture of legality and public ethics, operating efficiently, but safeguarding assessment and quality of the results and above all meeting the expectations of all "stakeholders".

In the future it will become increasingly important to monitor all administrative acts (including those carried out by the subsidiary companies) and in particular their "process" (just to prevent corruptive episodes), but at the same time also to show transparently the results achieved.

The research of the legality should not be seen as mere compliance with certain obligations, but to become an expression of the concrete realization of those actions oriented by the criteria of efficiency, effectiveness and economy, that are preparatory to the attainment of the good performance of public administration (Farneti G., 2014).

Analysis has revealed a picture still rather fragmented in adapting the provisions on anticorruption regulations and performance. As part of a public action reporting process it must be recalled that a PTPC cannot be reduced to the mere publication of data or explicitation of the entity attributed resources, but we need to advance in the verification of the proper use of money. In this scenario, the authorities should not live the fulfilment of transparency as a formal-bureaucratic requirement, but as a civic duty and accountability, making it visible and verifiable, the decisions, the management activities and the results; ensuring access to information on every aspect of the organization.

It is not sufficient, however, the respect of the parameters and the qualitative and quantitative indicators, it becomes necessary a rigorous attention to managerial behaviour of all those involved, in various capacities, in the decision making and operational process (Sorano E., 2015).

Two are the main roads to follow, taking advantage of the comparisons in these years with the managers and officials of public administration, because transparency becomes the keystone of legality and thus the process of management of corruption risk:

- The implementation of the new internal control system of the Law n. 213/2012, to be made in relation to the control of the activities of public companies, its subsidiaries and the quality of services provided;
- The traceability of the decision-making processes used by employees, guaranteed by adequate documentation that enables every moment replicability (DPR 16 April 2013, n. 62, Regulations of civil servants code of conduct, in accordance with Article 54 the d. lgs. March 30, 2001, n. 165.

6. Conclusions

The research conducted showed that, following the recent anti-corruption standards, these facts occurred in the Italian Regions:

1. Failure to apply in every region the national anti-corruption authority provisions on the risk assessment. Half of Italian regions, in fact, presents in 2016-2018 plans an insufficient risk assessment and a missed link between anti-corruption plan and performance plan. This is due to excessive costs and poor training on risk assessment.
2. A temporary increase in consultancy costs.
3. A need to require appropriate training, at each level (directors, officers, employees, but also especially the staff dedicated to internal audit).
4. The need to appoint the independent organ of evaluation (Italian OIV) with transversal skills and components in risk assessment framework, manage-

ment, MBO and responsible business conduct, from the economic management but also legal point of view.

The results obtained show all lacks into methodology carried out by each regional PA and into their analysis of internal and external context and the lack of links between anticorruption plans and performance plans.

As solution of these lacks might be a new holistic tool of risk management, more connected to the MBO and "plan of performance", which integrates the basic outline suggested by law, as also anticorruption public authority (ANAC) suggests. This path, based on international standards (such as ISO 31000, ISO 37001 and the "theory of organization" applicable to a PA), favors the use of ICT/computer technology, the segregation of duties, and weighted responsibilities borrowed from practice and jurisprudence of responsibility of corporations (Legislative Decree no.231/01), also applicable to all companies owned by PA or "in-house".

Monitoring activities concerning risk management linked to performance becomes strategic for a better government or local authorities, which will be increasingly called to demonstrate their ability to control processes and to prepare the consolidated financial statements.

Reaching systemic and holistic applications and shared paths, people, workers of PA and other players can feel more a part of the organization, in spite of the lack of ownership; free riders are discouraged from proceeding in clever or selfish ways, which bring damage to the PA and to the common good; while those who cooperate can take direct utility in the satisfaction of working with greater well-being and effectiveness and indirect utility as citizens of the community in which they live.

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Supporting sustainability: the role of management control systems in family SMEs

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- *Paola Vola, DISEI Department, University of Eastern Piedmont, 18, Via Perrone – IT28100 – Novara (Italy). Ph: + 39(321)375451. Mail: paola.vola@uniupo.it*
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European countries share a concern about business investment: because of the financial crisis, wealth creation is decreasing and business confidence is weak. At the same time, social problems like unemployment, underemployment, and poverty are increasing.

In this context, the need to promote economic development consistent with social and environmental concerns has drastically emerged.

There is an increasing opportunity to assess value creation from a sustainability standpoint and with a social responsibility approach.

This is what we can define as a “social responsible business model”, based on value creation for stakeholders. In the new context, also the concept of value creation has to be changed from value creation for shareholders to value creation for all stakeholders. Value creation also embed sustainable value (based on a triple bottom line approach), and social responsibility. Since FFs pursue both economic and social objectives, we can say that there is a lot of social responsibility in FFs. Family firms (FFs) seems to be likely to adopt the triple-bottom line paradigm (economic, social, ecological performance) according to their characteristics: literature affirms that additional feature that distinguishes FFs from NFBs is their desire to preserve the family’s socioemotional wealth and the pursuit of non-financial outcomes.

In the EU environment, SMEs (especially family SMEs) not only contribute significantly to the European GDP and employment, but they are also recognized to adopt business models more sensible to social issues and stakeholder needs.

Although sustainability has been discussed in management control literature to highlight the need of sustainability control systems (SCSs), little is known about the mode of integration between SCSs and traditional management control systems in family SMEs.

In order to support SMEs in developing more responsible, innovative and competitive business models, this paper proposes to study the role of sustainability control systems (SCSs). In this article we examine the management control literature and family business literature with the purpose of proposing a sustainable business model. We summarize lit-

erature's orientation, in order to identify the drivers of adoption of SCSs and their role in the business model. Starting from a summary of the main FFs features, we will discuss the following research questions:

- What are the interactions between different forms of social responsibility in FFs?
- How can we transfer the family firms' attitude to social responsibility in a sustainable business model?
- What are main elements of a sustainable business model that can leverage on family firms business model?
- What are different tools, mechanisms, solutions needed to adopt and implement a sustainable business model?

In summation, sustainability and social responsibility challenges are huge and fast growing: family SMEs can reply to these challenges, supporting positive sustainable development outcomes, with more responsible, innovative and competitive business model.

Keywords: sustainability, management control systems, family firms.

JEL Classification: M10

1 Introduction

Over the last decade, literature on corporate sustainability and responsibility has grown, in part in response to the financial crisis and wealth creation's decrease.

Human, social and environmental costs of sustainable company practises, has been amplified by corporate malfeasance (Carroll & Buchholz, 2014).

At the same time, social problems like unemployment, underemployment, and poverty are increasing; income inequalities, industrial pollution and damage to the environment has grown across Western World and developing nations.

In this context, scholars have turned towards sustainability issues in order to investigated how to reverse current trends.

Nowadays, the management of environmental, social, and economic issues has become a key element to company's survival in long term and to the ability to create stakeholders' value (Chrisman, 2000).

According to Karatzoglou (2006), the pursuit of sustainability in business practises has necessitated the integrated management and assessment of corporate economic, environmental and social performances.

Companies are expected, more than before, to account for many aspects of their performance – not just financial or economic results – but also social and environmental performance (Cramer, 2002). Schaltegger et alii (2006) define this paradigm as "Sustainability Performance Management".

For about twenty years, the contribution of firms towards sustainability has been called Corporate Social Responsibility (CSR) (European Commission, 2002).

Although many organizations are devoted to sustainability in their external reporting, there is scarce attention to the role management control systems can play in supporting sustainability within organizations (Durden, 2008; Herzig et alii, 2012).

Since managerial control systems (MCSs) shape actors' practises (Ahrens and Chapman, 2007) and support strategy, the proper implementation of them can push organizations towards sustainability.

Scholars underline the importance of MCSs in strategy-making, as they lead to strategy emergence and the implementation of deliberate strategies (Henri, 2006; Simons, 2000; Otley, 1999).

Literature on strategy shows that efforts to integrate sustainability and strategy should be reflected at some stage within formal control mechanisms (Gond and Herrbach, 2006).

Sustainability has been discussed in management control literature focusing the influence of sustainability control systems (SCSs) on environmental and financial performance (Henri and Journault, 2009, 2010).

Even if scholars (Burgelman, 1991) argue that SCSs can contribute to an effective integration of sustainability within strategy only when they inform MCSs and are not used as autonomous strategic tools, little is known about the mode of integration between SCSs and traditional MCSs.

Gond et alii (2012) underlines the importance of the neglected relationship between MCSs and SCSs and propose to clarify how the two kind of systems are related; at the same time, they analyze how systems together can facilitate the emergence of sustainability at a strategic level and ultimately the integration of sustainability and strategy.

Concretely, the present paper is organized as follows. Literature review is devoted to define the concept of sustainability, in order to convey the conceptual framework. The next section regards the discussion on SCSs tools and their integration with MCSs: this is a key point to permit the strategic and performance management of sustainability by business.

The relationship between family business and sustainability practises is exposed in the next paragraph.

At the end of the paper, the conclusions of qualitative analysis are discussed and directions for future research are highlighted.

2 Literature review

2.1 Sustainability and Corporate Social Responsibility

The end of 20th century has seen an important increase in scientific research on sustainable thinking: the term "sustainable" has become a buzzword which as been interpreted in very different ways (like "green", "eco-efficient", "ethical" and "socially responsible") (Carrol, 1999; Bieker, 2002).

For many years, the contribution of firms towards sustainability has been called Corporate Social Responsibility (CSR) (European Commission, 2002).

According to Carroll (1979), CSR is made by the subset of corporate responsibilities that addresses a firm's voluntary or discretionary relationship with its stakeholders.

Therefore, CSR practises encompass all the initiatives to improve an important aspect for society or the relationship with communities, with non-governmental entities or with non-profit organizations.

Schaltegger and Wagner (2006) argue that this definition of CSR led to the operationalization of CSR in terms of community relations, philanthropic activities, multi-sector collaborations, or volunteer activities, which cover only very limited aspects of the broader definition.

As authors underline, this approach do not integrate core business issues with social and environmental activities and do not consider the general economic relevance of corporate engagement; in this way, CSR activities are confined in a parallel organization of the company, such as CSR department, dealing with non-economic issues, measuring non-economic aspects of performance (Schaltegger and Wagner, 2006; Porter, 2011).

Schaltegger and Wagner (2006) discuss the implications of this approach, underlying three main problems.

Firstly, establishing a parallel organization for social or environmental issues contrast with the basic vision of sustainability that integrate social, environmental and economic issues.

Secondly, sustainable development requires participation and involvement of stakeholders but also of business managers: sustainable business strategy, communication and reporting should be linked with sustainability performance management.

Thirdly, as parallel organizational structures, CSR practises become discretionary activities and could be cut back in period of economic difficulties.

Epstein (2008) exposes that management is continuously looking for tools to identify, manage and measure the drivers of sustainability, as well as systems and structure to improve performance measurement.

Thus scholars (Epstein, 2008; Schaltegger and Wenteges, 2006; Johnson, 2007) propose that sustainability performance measurement has to encompass factors regarding economic, ecological, and social issues.

While management science has widely investigated performance, there is still no generally accepted definition of the concept.

Numerous definitions have indeed been proposed by scholars.

In this study, we propose to refer to the one by Bourguignon (2000): performance is about the achievement of the organizational goals, whatever their nature and their variety.

The traditional vision of performance, focused on short term and financial vision of the company, has progressively been replaced by a more global and inclusive one.

In this study, we define sustainable performance, according to Schaltegger and Wempe (2006), as the performance in all dimensions and for all drivers of corporate sustainability.

2.2 Towards sustainable performance

Elkington (1997) introduces the concept of the “Triple-P Bottom Line”, which includes profit (economic side), planet (environmental side), and people (social side); according to the scholars, companies need to refer to these all three areas if they want to label their business as sustainable.

Even if nowadays there is no consensus, many researches have shown a positive relationship between societal (social and environmental) performance and financial results (Moskowitz, 1972; Chrisman, 2000; Konar and Cohen, 2001; Dentchev, 2004).

In this win-win paradigm, economic, environmental and social aspect of corporate sustainability are, at least partly, in harmony with each other; consequently, management should seek to identify opportunities in which economic, environmental and social corporate objectives can be achieved simultaneously.

Bourguignon (2000) adds that a firm will be performing well if it reaches its objectives.

This consideration lead to a reflection about the importance of strategic performance management. So, once strategy has been formulated and implemented, it is necessary to monitor if the fixed objectives have been met, thus leading firm to a good performance.

Sustainability performance management represents a managerial framework, which, on one hand, links environmental and social management with the business strategy, and, on the other hand, integrates environmental and social information with economic business information and reporting.

2.3 Sustainability Performance Management

Literature recognizes two categories of motivation for implementing performance management, as internal and external reasons.

Among others, Herzig and Schaltegger (2006) indicate that the main external reason is connected to legitimation: the adoption of sustainability performance management allows to legitimate corporate activities, products, and services with environmental and social impact towards stakeholders.

Moreover, it may contribute to increasing corporate reputation and value.

As sustainability reporting activities can be considered a proxy of overall performance, it can be used to indicate a superior prospective performance compared to competitors.

In addition, it allows to anticipate national and international legislative requirements since many countries are imposing mandatory information and reporting on sustainability. In case of compelled information this issue, perfor-

mance management permits institutional compliance (Schaltegger and Burrit, 2006).

The internal reasons that led to performance management regard internal legitimization of sustainability activities: it increase transparency and accountability within the company.

Moreover, it can contribute to support employees' motivation and control of internal processes.

Sustainability performance management, as a system to determine if the company is performing well or not, allows to better understand the determinants of success or failure in achieving objectives (Morse et alii, 2003).

Finally, the introduction of sustainability performance management allows to identify and realize the economic potential of social and environmental activities in terms of cost reduction or revenues increase. This aspect is critical for the corporate engagement into sustainable strategy.

Over the past recent years, many researchers and practitioners have proposed new tools (and adapted those already available) to enable the strategic performance management of sustainability by companies.

This great number of contributions has led to different categories of tools, but nowadays there is no consensus on the definition and classification of tools useful to manage and measure corporate sustainability performance.

Schaltegger et alii (2006) and Gond et alii (2012) present an overview of major tools.

Sustainability tools	Main Features
Green or social accounts in conventional accounting (Christophe, 1995; Schaltegger and Burrit, 2006)	Integrating the cost and revenues related to the firm's activities in favour of environment or society in conventional accounting
Green or social appendices in conventional accounting (Christophe, 1995; Schaltegger and Burrit, 2006)	Explanation of the nature of the cost and revenues related to the firm's activities in favour of environment or society in specific document within conventional accounting
Green, social or sustainability budgets (Ito et alii, 2006; Henri and Journault; 2009; Roth, 2008; Burrit and Schaltegger, 2001)	A plan specifying goals to be achieved in the next year referred also to environmental and social objectives
Environmental, social or sustainability cost accounting (Antheaume, 2004; Gluch and Baumann, 2004; Herbohn, 2005)	Generating information for management planning and control and decision making encompassing also sustainability issues
Sustainability planning (Bonacchi and Rinaldi, 2007)	Long range planning covering a five-ten years period, based on forecast of competitive environment
Balanced Scorecard (Kaplan and Norton, 1992, 1996, 2001; Hockerts, 2001; Bieker, 2002; Fiegge et alii, 2001; Hahn and Wagner, 2002; Schaltegger, 2004; Schaltegger and Dyllick, 2002; Hubbard, 2009)	A set of financial and non-financial indicators to assess the achievement of strategic objectives, including economic, social and environmental dimension
Scandia Navigator (Edvinsson and Malone, 1997)	Performance measurement system focused on intellectual capital; set of measures based on human resources as key element in business value creation
Reward system based on multidimensional performance system (Dutta and Lawson, 2009)	Reward system including sustainability dimension

Figure 1 Sustainability tools – based on Schaltegger alii (2006) and Gond et alii (2012)

3 Discussion

3.1 The Integration of Sustainability into Control Mechanisms

Fiksel et alii (1999) argues that sustainability performance management must be approached as a systematic business process in order to be integrated effectively into company strategic planning and control.

Lasting attempts to integrate sustainability within strategy should be reflected into formal control mechanisms.

Making sustainability an integral part of company's business strategy is the critical key to obtain the bottom-line benefits.

Some scholars (Sebhatu, 2009; Schaltegger, 2006) name them Sustainability Performance Measurement (SPM) while other scholars, such as Gond et alii (2012) and Henri and Journault (2009; 2010) refer to Sustainability Control Systems (SCSs).

Hereafter we will make reference to SCSs as mechanism to encompass the performance of a company in all dimensions of corporate sustainability.

Even if scholars (Burgelman, 1991) argue that SCSs can contribute to an effective integration of sustainability within strategy only when they inform MCSs and are not used as autonomous strategic tools, little is known about the mode of integration between SCSs and traditional MCSs.

Since MCSs shape actor's practises (Ahrens and Chapman, 2007) they can be used to push organization towards sustainability.

Gond et alii (2012) underlines the importance of the neglected relationship between MCSs and SCSs and propose to clarify how the two kind of systems are related; at the same time, they analyse how systems together can facilitate the emergence of sustainability at a strategic level and ultimately the integration of sustainability and strategy.

They propose eight type of organizational configuration, according to the level of integration between MCSs and SCSs.

Results show that companies usually are moving towards sustainability through long paths of integration.

In this paper, we want to discuss if the characteristics of family firms can led them to a natural integration of sustainability.

3.2 Sustainability and Family Firms

Literature on family business, discussing sustainability issue, has identified family firms as organization that encourage long term, socially responsible orientation in dealing with all stakeholders (Le Breton-Miller, Miller, 2015).

Scholars have investigated the relationship between family business and sustainability practises making reference to agency, behavioural agency, stewardship, reputational, institutional, stakeholder and conflict theory.

If, on the one hand, family firms seem to be likely to adopt sustainability practises, on the other hand, some family firms' features seem to interfere to their path towards sustainability.

Features enhancing sustainability practises

Long-term orientation

Family firms are unanimously recognized as long-term oriented; the roots of long-term orientation can be traced in the desire to pass to next generation a healthy business.

In this way firms resist the opportunistic treatment of stakeholders and tend to adopt practises to extend the enduring viability of the business (Berrone, Cruz, Gomez-Mejia, Larraza-Kintana, 2010).

Although authors pointed out that business strategy varied in the extent to which each of sustainability practises was required, they underlined that all of the successful long-lived firms ensured an adequate level of initiatives.

Stewardship

Arrangle et alii (2007) defined family firms as stewards that invest in longer term associations with their stakeholders with the intent of building a strong social capital.

Families, who own businesses are usually well-anchored in their communities, are likely to value, nurture and exploit social capital they have built with customers, suppliers, employees, and community in general.

These kinds of necessity tend to play against the opportunistic and short-term orientation that damage sustainability.

Family values

The personal long term commitment is also a vehicle of family values, connected to, above all, firm's continuity, responsibility towards stakeholders, quality of products and strong links with the territory: these values really distinguish family firms from other enterprises (Aronoff, 2004).

Literature suggests that family businesses, given their intergenerational aspirations, are attached especially closely to community stakeholders (Berrone et alii, 2010); so honouring family values and reputation represents a top priority in family firms.

Agency costs

Agency costs occur when family firms have to manage the risk of opportunism and short-term orientation by non-family managers (Fama & Jensen, 1983; Andreson & Reeb, 2003).

Non-family managers could be tempted to obtain private benefits, exploiting firms' resources that otherwise could be contribute to sustainability.

Scholars notice that public family firms are able to reduce these risks through family involvement and more effective control capacities (Anderson & Reeb, 2003).

In private family firms, family managers are usually aligned with their commitment and are interested into business durability.

Features against sustainability practises

Conflict

In family firms, conflicts occur when family members fail to get along.

The grater the distance between family members in terms of family ties, the greeter the probability of arising conflicts.

In these situations, owners are focused on their own advantage that becomes the priority, neglecting stakeholders and community responsibilities.

Conflicts tend to push the company far from sustainability practises.

Socioemotional wealth (SEW)

According to SEW theory (Gomez-Mejia, Haynes, Nunez-Nickel, Jacobson and Moyano-Fuentes, 2007), family firm owners view their firm as a way to contrib-

ute to the social and emotional well-being of the family; this conservative approach can erode the service to stakeholders (Block, 2012).

Some SEW scholars argue that family, in order to satisfy family's needs, could use firm resources for private benefits; this risk is represented by some negative behaviours such as nepotism and cronyism.

It is plain that this interpretation of SEW is far away from sustainability perspective.

Owner-owner agency-costs

In addition, also family owners could be subject to a specific agency costs: these kind of costs occur to monitor that the more influent and powerful owners do not appropriate firm's resources at the expenses of smaller and less powerful owners.

This conduct represents an inequity for smaller owners and compromise resources that can serve other stakeholders or fulfil social purpose.

As far as concern MCSs, many studies highlighted that family firms are characterized by a lower diffusion of MCSs, because of a widespread entrepreneurship, and strong linkages between the family and the enterprise, at the ownership, governance and management levels, which cause lower agency costs (Schulze et al. 2001).

In family firms, social and individual control systems fit more than the bureaucratic-administrative ones (Moores and Mula, 2000). At the earlier stage of the life cycle of a family firm (the founder or entrepreneurial experience) informal MCSs are used, little planning and coordination activities are run and decision-making processes are centralized by the entrepreneur.

However, successful growth leads to a critical stage, named professionalization, which requires the owner-manager to change his/her entrepreneurial approach and take a more professional one. In this stage of development, the enterprise adopts managerial mechanisms in order to cope with the increased complexity of the environment and the firm (Moores, and Yuen 2001).

The faster the growth and the greater the complexity, the more important the role of such mechanisms. Thus, we can say that the way SP and MCSs are implemented and used by companies may have a great impact on the performance and survival of the family firm in the long term (Dyer, 1996).

4 Conclusions

To summarize discussion, Figure 2 presents a research framework useful to investigate sustainability in family firms.

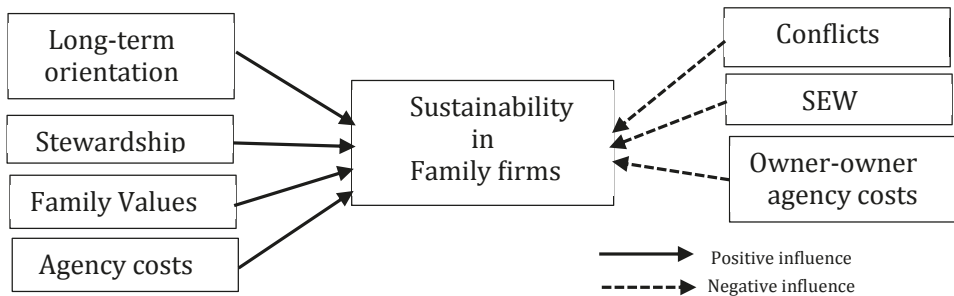


Figure 2 Features influencing sustainability in family firms

As shown below, it is not easy to describe the relationship between family firm's characteristics and their tendency to engage in sustainability practices.

On one side, long-term orientation, stewardship, family values and agency costs have a positive influence. However, the dark side of family firms emerges in terms of conflicts, private socio-emotional wealth and owner-owner agency costs.

A deeper analysis on moderating factors is required to explain the extent family firms will pursue sustainability. In other words, it is important to identify under which conditions family firms are expected to embrace sustainability practices. Such factors regard, for instance, education, ownership structure, managers' (non-family and family) characteristics, board of directors and competitive environment.

As far as concern the MCSs, the path towards professionalization will be critical to their diffusion among family firms.

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Balancing professionalization and entrepreneurship in family SMEs

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- *Paola Vola, DISEI Department, University of Eastern Piedmont, 18, Via Perrone – IT28100 – Novara (Italy). Ph: + 39(321)375451. Mail: paola.vola@uniupo.it*
 - *Lucrezia Songini, DISEI Department, University of Eastern Piedmont, 18, Via Perrone – IT28100 – Novara (Italy). Ph: + 39(321)375451. Mail: lucrezia.songini@uniupo.it*
 - *Chiara Morelli, DISEI Department, University of Eastern Piedmont, 18, Via Perrone – IT28100 – Novara (Italy). Ph: +39(321)375451. Mail: chiara.morelli@uniupo.it*
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This paper aims to investigate the topic of balancing entrepreneurial spirit and professionalization in family businesses. In fact, the capacity to integrate entrepreneurial spirit and attitudes with managerialization of the organizational structure and mechanisms as well as professionalization of people involved in the company is critical for the long term survival and development of family businesses (Mazzola and Sciascia, 2008). This issue becomes relevant when firms grow and/or have to manage generational transition: in these cases complexity increases (firm's growth, involvement of new family members, etc.) so the balance between entrepreneurship orientation and managerialization becomes crucial to family firm's continuity and longevity.

In this article we examine the family business literature with the purpose of proposing a research framework on professionalization in family SMEs and its relationship with entrepreneurship. We summarize literature's orientation toward professionalization, in order to identify the drivers of professionalization and its impact on performance. Then we attempt to identify the main issues that currently dominate the study of family business: for research's purpose, we include only issues that deal with professionalization. More specifically we focus on accounting, governance, human resource management, and succession. There is a large number of contributions on professionalization: however, scholars suggest different approaches to investigate this topic and divergent conclusions about the need of professionalization in family firms' context. Thus, what follows is a discussion of the family business literature's orientation on professionalization issues rather than a review that analyses contents and methodologies of the articles. Literature on family business offers a range of dichotomies between family firms and non family firms: research has shown that family and non family firms differ in terms of goals pursued by owners and managers, more specifically differences regard strategies, structures, systems processes, performance evaluation and compensation, and governance mechanisms (Chua, Chrisman, Bargiel, 2009).

The result of our investigation is represented by a research framework useful to investigate professionalization in family SMEs and its balance with entrepreneurial orientation. This model proposes the determinants of professionalization as previously investigated: firms' growth, governance, succession, accounting (SP/MCSs), and HRM encompassing entrepreneurial orientation. Since the latter is a critical source of competitive advantage for family business (Stewart and Hitt, 2013), it's crucial to integrate it with professionalization and managerialization of the organizational structure. Furthermore, we propose to investigate the impact of professionalization/managerialization on firm's performance because according to literature review this relationship is under-investigated even if it could deserve more insights

Keywords: professionalization, family business, long-term survival

JEL Classification: M10

1 Introduction

This paper aims to investigate the topic of balancing entrepreneurial spirit and professionalization in family businesses. In fact, the capacity to integrate entrepreneurial spirit and attitudes with managerialization of the organizational structure and mechanisms as well as professionalization of people involved in the company is critical for the long-term survival and development of family businesses (Mazzola and Sciascia, 2008).

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In our work we attempt to identify the main issues that currently dominate the study of family business: for research's purpose, we include only issues that deal with professionalization. More specifically we focus on issues such as accounting, governance, human resource management, and succession.

In general, we can notice a large number of contributions on professionalization: however, scholars suggest different approaches to investigate this topic and divergent conclusions about the need of professionalization in family firms' context.

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tion and compensation, and governance mechanisms (Chua, Chrisman, Bargiel, 2009).

Some authors (Giddens and Griffiths, 2006) consider professional management as the crucial difference between family and managerial capitalism. Professional management is typical of managerial firms and corresponds to a rational management: on the opposite, family firms are depicted as an emotional arena. This contraposition led to discuss the need of professionalization for family firms.

If family dynamics and business dynamics demonstrably interact and influence each other, then researchers contend that a synthesis exists between the two, meaning the emergence of a new and unique system identified as a 'family business'. To date, there is no widely accepted definition of family business, as various definitions are reported in the literature.

Earlier research sought to identify family businesses in terms of ownership, management and control structures, and intergenerational transfer. While this provided some insight into the nature of family business, they failed to account for why some firms were identified by their owners or managers as a family business despite meeting any of these criteria.

In this study we ground the definition of family firms on Chua, Chrisman and Sharma (1999); so a family firm is "a business governed and/or managed with the intention to shape and pursue the vision of the business held by a dominant coalition controlled by members of the same family or a small number of families in a manner that is potentially sustainable across generations of the family or families.

This definition encompasses the attitudes and behaviour of both current and future generation toward family business ownership and management, focusing on more than quantitative measures.

The above definition highlights some important features of family firms; first, it is plain that they have to cope with a more complex array of goals than non family firms, including not only economic goals (Chrisman et alii, 2005; Lee & Rogoff, 1996) ; second, in a family firm different generation are potentially involved in management and governance, thus adding complexity to relationships; third, only family firms have to face the intention to preserve ownership across generations.

Considering the continuing vitality of family business model, some authors believe that these firms could be more effective if they professionalize themselves: Martinez, Stor and Quiroga (2007) state that when family firms professionalize their management and governance bodies, they can overcome most of their traditional weaknesses and take advantage of their strengths. On the opposite, Stewart and Hitt, (2013), argue that, in order to preserve "familiness", a critical source of competitive advantage for family business, it is important to understand the modes of professionalization. In fact, professionalization implies to change informal atmosphere of the organization by introducing more formalized systems (Songini, 2006), meaning increased use of quantitative and systematic information collection in the organization.

2 Literature review

2.1 An extensive definition of professionalization

The traditional concept of professionalization identifies professional managers as outsiders (non family and non owners) specifically educated to be managers rather than experts in company's products or markets (Schein, 1983).

The notion of family members as inherently non professional managers that need to be replaced for the firm's growth influenced the dominant literature on professional management and led to view professional managers and family members as mutually exclusive.

Dyer (1989) gives insightful description of the three modes of professionalizing the family firms. (a) to professionalize members of the owner family; (b) to professionalize employees already working in the firm, and (c) to hire professional management. He also explained under which circumstances each of these three way is the most appropriate and depicted professional management as the "rational alternative to nepotism and familial conflicts that plague a family business"; furthermore he stated that professionals "rely on their years of formal training to make rational decisions".

Hall and Nordqvist (2008) outline a limitation in Dyer's work: although they agree that formal competence (education, training, and experience) is important, they underline that it is not sufficient for professional management of family firms; the dominant view of professional managers, in fact, downplays social and cultural dimensions such as values, norms, and meaning of the owner family. Within family business literature these dimensions are recognized as very strong (Habbershorn & Williams, 1999; Zahra et alii, 2004) and influence goals' definition by the family. It because of the variety of relevant dimensions that family firms have to cope with a complex array of economic, social, cultural, and emotional goals. In line with all these considerations, Hall and Nordqvist propose an extended meaning of professional manager, including cultural competence, namely an understanding of the family's goals and meanings of being in business. In this framework, professional management is not just about qualifications, training and education, but it is also about cultural understanding of both the business and the family: according to this view, professional managers and family members can be no mutually exclusive.

2.2 The problem of balancing professional management and entrepreneurial spirit

Among the many reasons why a family firm might want to professionalize its management (hiring outsider managers or professionalizing current managers/owner), the most common reason is the lack of managerial skills within the family, such as marketing, finance, and accounting; these talents are for necessary for business to survive.

It's quite common that as a family business grows, it is likely that the family will no be able to cover all the key positions and have the required skills. In this case, the family will look for outsider managers.

Professionalization may occur when a change in norm and values of business is required. Often leaders of family firms have a paternalistic approach towards their employees thus begin reluctant to make changes themselves, especially regarding profitability and productivity; professional managers, whose values are more consistent with organizational efficiency and achieving higher profits, are allowed to make changes that the family will not make, such as enforcing controls and letting go unproductive employees.

Of course the development of managerial competencies is useful to prepare leadership succession: professional managers can help next generation with training before assuming the leadership; if the founder feels that no one in the family is the right person to run the business, professional management could represent the future leadership of the company, once the entrepreneur has found managers that deserve trust.

Chua, Chrisma and Bergiel (2009) underline that the reluctance of family business owner to leave management entirely to professional non family manager is due both to psychological factor (Kets de Vries, 1985) and to economic basis (agency costs).

2.3 Managerialization as a way to professionalize family SMEs

Family firms' professionalization is associated with the presence of (a) formal strategic planning and managerial control systems, and (b) non family members in boards of directors and management. Usually the presence of non family members – professional managers – leads to the adoption of managerial control systems and strategic planning, because these managerial tools compose the set of professional techniques they are used to. In these cases managerialization of the family firm occurs. Managerialization obviously can be driven also by family members that are professionals and play a managerial role within the family firm.

We consider the managerialization of family firms related to the diffusion of formal managerial mechanisms, such as strategic planning (SP) and managerial control systems (MCSs), on the one side, and human resource management systems (HRMSs), on the other side (Songini and Gnan, 2013b). Research on managerialization of family firms pointed out that they are usually characterized by a lower diffusion of managerial mechanisms, as a consequence of widespread entrepreneurship, and strong linkages between the family and the enterprise, at the ownership, governance and management levels. However, some authors stated that formal mechanisms could help family owned businesses to cope with the interests and problems of both the company and the family, and their specific agency costs (Ward, 1988; Rue and Ibrahim, 1996; Schulze et al., 2003; Songini and Gnan, 2013a).

2.4 What about professionalization in literature?

In light of the number and variety of the issues to be investigated, we make an extensive use of a broad set of theories commonly applied to studies on family firms, such as agency theory (Ross 1973, Jensen and Meckling 1976), stewardship theory (Davis, Schoorman and Donaldson 1997), resource-based view of the firm - RBV - theory. Moreover, theories typical of specific branches of research, such as accounting studies and organization, are also considered, such as: contingency theory (Miller, and Friesen 1984; Moores, and Yuen 2001), organizational control theory (Hopwood 1974, Galbraith 1977), company growth theory (Rostow 1960, Greiner 1972, Normann 1977), legitimacy theory, neoinstitutionalism (Paauwe and Boselie 2003), resource dependence theory and human capital theory.

According to Songini and Gnan (2013a), these main theoretical streams can be classified into two categories: theories which point out the drivers and need of managerialization of family firms, and theories which explain mostly the reasons to avoid it. On the one hand, company growth theory, contingency theory, and agency theory suggest that firms adopt managerialization for various purposes, such as the need to cope with increasing firm's and environmental complexity, the need for the entrepreneur to delegate activities, the need to look for external funding or quotation and so on. Actually, these control mechanisms can enable any firm, even those managed by stewards rather than agents, to make better strategic decisions in light of its environmental and resource circumstances (Ford, 1988; Ward, 1988; Schwenk and Shrader, 1993). In particular, following company growth theory and contingency theory, a firm adopts managerial mechanisms in order to cope with the increased complexity of the environment and the firm (Miller, and Friesen 1984; Moores, and Yuen 2001). The faster the growth and the greater the complexity, the more important the role of such mechanisms. There is also an overall consensus in the literature that the adoption of managerial mechanisms is contingent upon the organizational setting in which companies operate (Gordon, and Miller 1976; Otley 1980; Moores, and Chenall, 1994; Moores, and Mula 2000; Moores, and Yuen 2001). Recently, Songini and Gnan (2013a) outlined that in family firms, distinctive agency conflicts arise from sources other than the classic principal-agent. The authors proposed that the presence of these agency costs highlights the need for family firms to adopt agency cost control mechanisms and to involve non-family members in governance and managerial roles. On the other hand, stewardship theory and organizational control theory agree on the fact that family firms are characterized by a lower diffusion and use of formal managerial mechanisms, than non family ones. Such theories state that family firms can be effectively managed without formal managerial mechanisms and the involvement of non family members. Organizational control theory applied to family businesses points out that social and individual control systems are more suited to these enterprises, due to common shared values and languages, informal relations and kinship ties. Stewardship theory state that managerial mechanisms are not useful for family

firms, as the coincidence between owners and managers reduces the need for disclosure mechanisms towards shareholders, and administrative costs, assures faster decision-making processes, implies long term horizons in strategic and investment decisions, and long term commitment of the family to the family business.

These issues can be intended as professionalization's determinants along with the growth effect.

Based on these features, in the following paragraph we will summarize the main trends in articles dealing with these issues.

3 Discussion

3.1 Firms' Growth

According to literature, firm's growth is a sort of requirement for professionalization.

More in depth, the company growth theory states that a small company progresses through distinct stages as it develops (Greiner, 1972; Churchill & Lewis, 1983; Scott & Bruce, 1987; Irwin, 2000). Successful growth leads to a critical stage, named professionalization, which requires the owner-manager to change his/her entrepreneurial approach and take a more professional one (Deakins, Morrison & Galloway, 2002). Since this stage of the life cycle, family firms tend to adopt formal control mechanisms and to decentralize decision making processes (Moore & Mula, 2000).

As the business grows, managerial competencies become more important (Chittor and Das, 2007). Lin and Hu (2007) developed a model on the relationship between the operating characteristics of a family enterprise and its CEO (family member or not). They found that when the company operations need high managerial capabilities (e.g. when the firm is large and complex), it is more likely that a professional CEO is appointed, while if there is a high opportunity for expropriation of resources, thanks to wide managerial discretion, the family is more likely to appoint a family CEO (Lin and Hu, 2007).

3.2 Governance

The concept of corporate governance is a very broad one; among different definitions, we choose the one Cadbury proposed in 1999: "corporate governance is the system by which companies are directed and controlled". Some authors (Pieper, 2003) observe this definition emphasizes the tasks that corporate governance system needs to fulfill, "to direct" and "to control" the company, where "to control" includes "to account for".

Carver and Oliver (2002) provide additional insights on this aspect: they underline that controlling (anche accounting for) a company means the evaluation

of the management's performance and the monitoring of the progress towards the objectives set by the board.

As Pieper (2003) notices, in the early nineteen-nineties professionalization became increasingly popular in governance studies: as outsider discussion focused mainly on the staffing of the board of directors (BoD) with non family members, professionalization discussion broadened the scope by including outsiders in the top management team bringing professional knowledge and values into the management of the family firms. According to system view, theories on corporate governance include all the actors inside the family firm and their multiple relationships within the governance system (i.e.: relationship between the board and the family; the relationship between the board and the management; and relationship between the board and various stakeholders).

All contributions, applying "board focus" and "system focus" add many valuable insights to corporate governance and make relevant contributions to the field of family business. The need of understanding governance mechanism in family firms is closely tied to find a proper way to improve firms' performance.

The scarceness of studies on the link between governance and performance in family firms (Anderson and Reeb, 2003; Gubitta and Gianecchini, 2001; Mustakallio and Autio; 2002; Gnan and Montemerlo, 2002) does not allow drawing definitive conclusions.

According to Pieper (2003) from literature review emerge that performance is not unconditional because it depends on the degree and means of involvement of the family. Family businesses' success seems due to the level of family influence in the different key governance structure.

So, the question about how and up to what degree of influence the family contributes positively to firm's performance is still open; consequently also the contribution of professionalization to firms' performance can trigger further research, considering the involvement of outsider and/or professional family members.

3.3 Succession

Literature on family firms recognizes the importance of managerialization in smoothing succession's process.

More specifically, SP and MCSs as developmental tools for next generation during succession process by some authors (Kimhi, 1997; Morris, Williams, Allen and Avila, 1997; Lansberg, 1988).

Some scholars stated that SP and MCSs could help the family owned businesses to cope with the interests and problems of both the company and the family (Ward, 1987, 1988, 1991, 2001; Rue & Ibrahim, 1996; Schulze et al., 2003, Vola, 2012). Especially for SP a peculiar role in family firms has been highlighted, due to the fact that it may consider the objectives and strategic programs of both the business and the family (Rue & Ibrahim, 1995, 1996; Sharma et al., 1997; Wortman, 1994; Ward, 1988; Vola 2012). Aronoff (2004) identifies the major keys to the enduring success of family business; he demonstrates that planning is

essential to continuity: a business-owning family has to plan on four different levels simultaneously and interdependently producing a business strategic plan, a leadership and ownership succession plan, a personal financial plan for family members, and a family continuity plan.

Speckbacher and Wentges (2007) stated that owner-managed firms—regardless of firm size—are more centralized and that they make far less use of formalized management control systems. As soon as external (non-family) managers assume positions on the top management team, more formalized management control systems are adopted. A recent research stream focused on the relationship between managerial roles and the adoption of management control systems (Zimmerman 2006; Hartmann et al. 2009) highlighted that ultimately, the top management team takes the decision to adopt formalized management control systems. Moreover, Abernethy et al. (2010) found that the senior management's leadership style is a significant predictor of the use of SP and MCSs.

Thus, we can say that SP, MCSs and non-family managers are interdependent within succession process. However, previous research on the role of such mechanisms and professional managers in the family firm's succession is quite underdeveloped.

3.4 Accounting

Accounting is a wide research field including management accounting and financial accounting. While financial accounting is devoted to produce information for external users (financial statements above all) and is regulated by accounting rules (International Financial Reporting Standards), management accounting aims at providing internal managerial information and is not bound by any formal rules.

Malmi and Brown (2008) proposed a typology which “starts the idea that control is about managers ensuring that the behavior of employees is consistent with the organization's objective and strategy. It is structured around how control is exercised and, as such, it broadly maps the tools, systems, and practises managers have available to formally and informally direct employee behavior”.

This typology encompasses traditional MCSs tools, such as strategic planning (SP), budgeting, financial measurement systems, non financial measurement systems, hybrid measurement systems (Balanced Scorecard), project management, and evaluation and reward, and recent developmental tools, such as sustainable performance measurement (Schaltegger and Wagner, 2006; Figge et al., 2002; Hubbard, 2009)

Usually managerialization is measured by the adoption's degree of MCSs.

Many studies highlighted that family firms are characterized by a lower diffusion of strategic planning (SP) and managerial control systems (MCSs), as a consequence of a widespread entrepreneurship, and strong linkages between the family and the enterprise, at the ownership, governance and management levels, which cause lower agency costs (Schulze et al. 2001; Gnan and Songini, 2003; Songini, 2006). In family firms, social and individual control systems fit more

than the bureaucratic-administrative ones (Moore and Mula, 2000). At the earlier stage of the life cycle of a family firm (the founder or entrepreneurial experience) informal MCSs are used, little planning and coordination activities are run and decision-making processes are centralized by the entrepreneur (Songini and Gnan, 2013 b). However, successful growth leads to a critical stage, named professionalization, which requires the owner-manager to change his/her entrepreneurial approach and take a more professional one. In this stage of development, the enterprise adopts managerial mechanisms in order to cope with the increased complexity of the environment and the firm (Miller, and Friesen 1984; Moore, and Yuen 2001). The faster the growth and the greater the complexity, the more important the role of such mechanisms. Thus, we can say that the way SP and MCSs are implemented and used by companies may have a great impact on the performance and survival of the family firm in the long term (Dyer, 1996).

Some studies found that strategy development and planning have an impact on firm performance (Aram & Cowen, 1990) and growth (Astrachan and Kolenko, 1994; Ward, 1997). Schwenk and Shrader (1993) pointed out that formal planning and control mechanisms are positively correlated with company performance. Other studies founded that the articulation of SP and MCSs can have a positive impact on the performance of family firms (Gnan and Songini, 2003). Brews and Hunt (1991) demonstrated that SP has a positive relation with the overall firm performance. Ward (1988) reported that family businesses tend to have lower performance, due to a limited use of SP.

3.5 Human resource management systems

Contributions about HRM practices in SMEs that explore in-depth family businesses' peculiarities are significantly fewer than those that completely omit family firms' issues (Gnan, Songini, 2013).

Some research tends to confirm a negative correlation between family firm governance and the adoption of professional HRM practices (Fiegenger et al. 1996; Cyr, Johnson, & Welbourne, 2000). In particular family SMEs invest less than non-family SMEs in formal HRM practices: evidence suggests that the overlapping of family relationships, enterprise management and ownership limits the adoption of more formal practices (Koch & De-Kok, 1999).

Therefore the distinctive characteristics of family SMEs, such as the involvement of family members and ties of kinship among its members, are the main reasons for a limited adoption of formalised management systems. Since direct involvement reduces the need for bureaucratic controls, close relationships among family members help the use of informal practices that make up for or add to formal management systems, including traditional HRM practices (Koch & De-Kok, 1999). Consequently, only those human resources that are already known can be considered for staffing purposes and the ability to integrate with the company culture becomes a must for the candidate, even more than professional qualifications (Carrol, Marchington, Earnshaw, & Taylor, 1999).

While in those family SMEs where the owner-manager chooses to delegate some of his/her tasks HRM practices tend to be more formal (Songini and Gnan, 2013b; Harney and Dundon, 2006), as almost all decision-making powers rest with the HR manager. He/she mostly relies on logic and rational analysis rather than on intuition and is mostly impersonal in his/her interactions with others (Dyer, 1989). However, most family businesses do not have a personnel or a HRM department/manager, whose presence is normally associated with formal methods (Songini and Gnan, 2013b; Heneman and Berkley, 1999; McEvoy, 1984; Wagar, 1998). Comparing HRM practices of 133 family SMEs in Northern Ireland with respect to 86 non-family ones, Reid and Adams (2001) revealed that non-family SMEs present a higher presence of a personnel or a HRM department/manager rather than their family counterparts. However, less than 50 per cent of both family and non-family SMEs reported that the head of HR had a sit on the board.

The presence of a HR manager (techno-structure) is positively associated with the adoption of more formal managerial mechanisms. This correlation is true, even though there is a family member in charge of these roles (Songini et al, 2015).

Case studies suggest that employers often associate professional HRM practices with a loss of control over (and flexibility of) the employee relations (Koch and De Kok 1999). This would provide an additional explanation for a direct negative effect of family ownership and management on professional HRM practices (De Kok et al, 2006).

It is yet unclear whether the emphasis on financial performance as an outcome variable in the “HRM - firm performance” studies is enough and sufficient to validate the contribution of HRM. In fact, the performance outcomes of HRM can be captured in a variety of ways. Dyer and Reeves (1995) draw a distinction between:

- Financial outcomes (e.g. profits, sales, market share, Tobin’s q, GRATE)
- Organizational outcomes (e.g. output measures such as productivity, quality, efficiency)
- HR-related outcomes (e.g. attitudinal and behavioural impacts among employees, such as satisfaction, commitment, intention to quit).

As already noted by Kanfer (1994) and Guest (1997), the distance between some of the performance indicators (e.g. profits, market value) and HR interventions is simply too large and potentially subject to other business interventions (e.g. research and development activities, marketing strategies).

4 Conclusions

To summarize, Figure 1 presents a reasearch framework useful to investigate professionalization in family SMEs and its balance with entrepreneurial orientation. This model proposes the determinants of professionalization as previously investigated: firms’ growth, goverance, succession, accounting (SP/MCSs), and

HRM encompassing entrepreneurial orientation. Since the latter is a critical source of competitive advantage for family business (Stewart and Hitt, 2013), it's crucial to integrate it with professionalization and managerialization of the organizational structure.

Furthermore, we propose to investigate the impact of professionalization/managerialization on firm's performance because according to literature review this relationship is under-investigated even if it could deserve more insights.

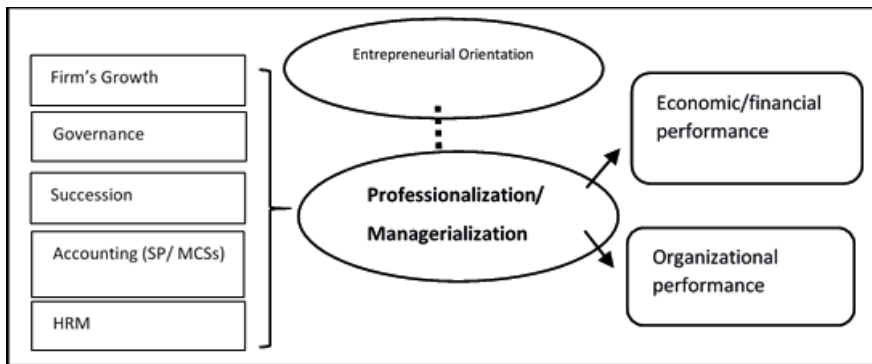


Figure 1 A research framework for professionalization

Since family firms pursue different goals if compared with non family firms, first of all it is necessary to identify the proper meaning of performance; in our model, considering that family firms seek non economic as well as economic objectives, we propose to consider both economic/financial and organizational performance. According to Pieper (2003), the actual link between governance and performance in family business is a barely investigated topic. Literature review revealed only few studies: among them, some studies focus on issues of family ownership and performance while others analyze the link between the governance systems as a whole to family firm performance. Outcomes highlight a positive relationship between family ownership and control and firm performance: this conclusion is more evident for public companies (Anderson and Reeb, 2003). The question about how and up to what degree of influence the family contributes positively to firm's performance is still open; consequently also the contribution of professionalization to firms' performance can trigger further research, considering the involvement of outsider and/or professional family members.

Literature on succession process focuses on the success of the process: this is crucial for the achievement of future performances (economic/financial and organizational).

When family firms need to find a new manager, and family members cannot fill the position, someone already working in the company is usually preferred. This choice is motivated, on the one hand, because looking for external employees involves costly practices, on the other hand, because these workers know how the business works, and already fit into the company's culture and organization. Corbetta (2010) highlighted the potential contributions of the so-called "managers outsiders", such as attention for the interests of stakeholders others than shareholders. They can easily share with the company and ownership their previous experience. According to this author, appointing family members or managers already working for the firm may slow down the process of professionalization, especially if the reasons for their appointment are more "emotional" than objective. Hall and Nordqvist (2008) propose an extended meaning of professional manager, including cultural competence, namely an understanding of the family's goals and meanings of being in business.

Ward (1987) emphasized the characteristics of successful succession process introducing the concept of planning as a condition for a successful and smooth passage. Previous studies have outlined that SP and MCSs have a positive influence on succession process, but they can be effectively introduced into a company only if there is the proper managerial background.

More insights on the process of integrating managerial systems as well as outsiders managers in the family business context could contribute to understand professionalization / managerialization in a better way.

As far as concern literature on MCSs, we can affirm that previous research on the role of managerial mechanisms in family SMEs is quite underdeveloped and does not show a consensus about their impact on organization's performance (Johnson, Daily & Ellstrand, 1996; Dalton et al. 1998, 1999).

Studies on the relationship between HR practices and corporate financial performance show consistent and promising, but also conflicting and weak results (Guest, 2011). As already noted by Kanfer (1994) and Guest (1997), the distance between some of the performance indicators (e.g. profits, market value) and HR interventions is simply too large and potentially subject to other business interventions (e.g. research and development activities, marketing strategies).

Huselid, in 1995, published a ground-breaking paper in the *Academy of Management Journal* in which he demonstrated a correlation between the degree of sophistication of HR-systems and the market value per employee, among a range of publicly quoted companies in the USA. The paper generated admiration, criticism and an abundance of 'me too' research, trying to replicate the proclaimed relationship between HRM and Performance (Paauwe, 2009; Delery and Doty, 1996; Guthrie, 2001; Koch and McGrath, 1996; Wright et al., 2003).

Guest (1999) presented the results of a survey which shows how the number of HR practices and the (resulting) presence of a high involvement climate result in workers reporting a more positive psychological contract and in turn, greater

satisfaction, job security and motivation, as well as lower levels of pressure at work (Guest, 1999, p. 22). Central to these more sophisticated ways of thinking about the relationship between HRM and performance is the idea that HR practices at the organizational level affect the attitudes and behavior of employees at the individual level which, in turn, affect key aggregated level behavioral or HR outcomes, such as labour productivity and turnover which, subsequently, might impact organizational or firm-level outcomes.

The review of literature dealing with the link between professionalization and family SMEs performance revealed several important findings as well as limitations. As far as concern findings, we can summarize that determinants of professionalization can be identified in the proposed model; determinants need to be investigated and managed in order to balance entrepreneurial orientation with managerial view. Moreover, professionalization has an evident impact on performance of family SMEs: the way professionalization affect family SMEs performance need to be deeply analyzed. This gap should be explored in future studies in order to contribute to improving the entrepreneurship field in family SMEs.

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Russian market of collective investments analysis

Authors

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- *Sergey Volodin, Candidate of Sciences (PhD), Senior Lecturer at the Department of Finance, Faculty of Economic Sciences, svolodin@hse.ru – National Research University Higher School of Economics*
 - *Mariia Kuznetcova, student of Faculty of Economic Sciences, mariia.kuznetcova@mail.ru – National Research University Higher School of Economics*
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The article describes proposed by the authors methodology of analysis of the Russian mutual funds. The aim of this methodology is to find out how attractive they are to investors and if they are able to provide the possibility of obtaining higher returns with less risk than the market in general. The study determines what type of fund management (active or passive) is more optimal. It also explains the effectiveness of focusing on past performance of the funds for making future investments. In addition, the ability of the management companies to repeat their past results is analyzed. Moreover, it is shown if it makes sense to focus on management companies that achieved the best results in the past while making decisions about future investments. These and other results achieved in this article reveal the features of the Russian market of collective investments and allow investors to form more competent policy of mutual funds' investments. The methodology proposed by the authors is universal. Its application for the analysis of the other markets of collective investments will allow revealing their features.

Keywords: stock market, mutual funds, investment strategies, return on investment

JEL: C13 G11

1 Introduction

Modern stock market provides investors with a wide range of financial instruments and products that allow increasing of equity capital. Such form of investment as mutual funds has acquired great popularity among investors worldwide. The mutual funds market has developed successfully and number of funds and their value of net assets tend to increase in many countries. The reason for such a development of the market of mutual funds is that they are one of

the most attractive, convenient and easy ways of investing for the majority of citizens. People do not need to have deep financial knowledge in order to use this tool. At the same time, the value of the investment unit is relatively small, that makes the investment option available for a wide range of people.

The general trend of development of the Russian market of mutual funds is observed, too. As elsewhere in the world, in this market, investors also face the problem of choosing the optimal fund. One of the first issues that investor should resolve while choosing a fund is to make a decision between actively and passively managed funds.

With active management, the investor transfers the right to dispose of their savings to managers. These special people periodically make transactions with the Fund for a commission by regularly changing the composition and structure of the investment portfolio in order to earn such a return that is greater than the market index. A classic example is a stock fund. In the case of a passive management, the composition and structure of the investment portfolio is consistent with the composition and structure of the securities, on the basis of which one of the common indexes is calculated. That is why such funds received the name of the index funds. In contrast to active strategies, role of managers lies in maintaining such compliance.

Another important factor that should be taken in the account when choosing between active and passive management is the attitude of the investor towards risk and expectations for return on the fund. Choosing actively managed fund, the investor expects higher returns, but is ready to go on greater market risk. More conservative investors prefer index funds that are not exposed to risks associated with active management. At the same time they do not allow obtaining a significantly different from the return of overall market.

Traditionally it is believed that with active management it is possible to achieve higher returns than with passive one. However, despite the fact that with this type of funds managers pay more attention to development of the investment strategy it does not always lead to results that are better than in case of passive management. Western scholars, analyzing the American stock market, at the end of last century came to the conclusion that on average, active funds cannot beat passive in the long term. For example, M. Gruber [Gruber, 1996] showed that in the period from 1985 to 1994 the average mutual fund was getting 65 basis points less return annually. R. Wermers [Wermers, 2000], analyzing the 20-year period (1975-1994 years), found that the yield of funds comprised of shares got results that were 1% below the capitalization-weighted market index CRSP (this without taking into account operating expenses and other transaction costs, which could inevitably reduce the final yield for the shareholders). Similar trends continue to be at the present stage of development of the stock market of the USA. According to standard & Poor's Indices Versus Active (SPIVA) for 2014, 86,44% of managers of large-cap funds failed to beat the S&P. A similar pattern is observed in the time horizon of 5 and 10 years.²

According to the analysis of specialized literature, the issue of which type of funds management is more effective, active or passive, remains opened for the

Russian market. On the one hand, this is due to the relative youth of this market. On the other hand the reason is in a lack of interest in academic community. However, without information about which type of fund it is more profitable to deposit money, it's extremely difficult for investors to make a competent decision. Nowadays, there is a clear bias towards actively managed funds in the Russian market of collective investments. In the period from 2005 to 2015, the net asset value (NAV) of index funds averaged only 7,5% relative to open-end stock funds. This suggests that investors expect higher returns on actively managed one. But is it really so? The response to this question is one of the goals of this study.

Another criterion of the investment fund choice considered in the study is the preference of a particular company – that is focusing on those that have shown the best results of trade in the past. This criterion is less obvious to investors because these indicators are not as readily available as the return of specific funds, they have to be calculated. However, if the investor sees among the leaders of last year the specific company, of course this affects his choice of fund to deposit money. Therefore, in this study it's also analyzed whether it is possible to use this criterion when selecting a fund and if it produces the best investment in a view of risk-return ratio.

The specificity of this research is that it aims to establish opportunities of getting higher return on a particular fund by using some criteria of choice. Although there are some empirical results in this area, it should be noted that all of them are built on year-by-year comparison of values of return for all funds in general. However, for the private investor such kind of analysis does not reveal whether he will be able to gain more profits by placing money in the best from his point of view mutual funds. This is due to the fact that existing studies typically ignore that investors make particular choice of the fund. Since in reality the investor does not deposit money in all available funds, individual results may be significantly different from the average values on the market.

To solve this problem, the authors have created a methodology aimed at obtaining results with regard to the preferences of investors in choosing the fund in order to analyze mutual funds. This methodology has been applied on the Russian market to determine what type of fund is the best for investors - actively or passively managed, and whether it worth for investors to use this financial tools. In addition, it has also been shown, if the shareholder should focus on the choice of a particular management company to obtain higher yields. The obtained results allowed giving precise answers to the questions that were put. Despite the fact that this methodology has been applied to the Russian market, it can equally be applied to analyze any other national market and also for cross-country comparisons, which suggests its universality.

2 Used data

The annual values of return of the Russian mutual funds over the period from 2005 to 2015 were used in order to carry out the research. For the Russian market this is a maximum period of analysis, because, despite the fact that mutual funds as a segment of the market was formed in 1996, index funds began to appear only from January 2003. At the beginning of 2005 there were registered seven funds, only four of which started to work.

Annual data is more relevant to use for calculations than the monthly one because it is in line with the assessment of investment strategies and not the speculative one. Since all comparisons were performed for the future period, the year 2005 was used only as a base for calculations. The comparisons were performed between 2006 and 2015.

Analyzed data on yields already take into account commissions charged by the management company, the depositary and other entities in the management of the fund. As shown by additional analysis of the amount of discounts and allowances paid by the investor when entering and exiting the fund there are not any significant differences in this indicator for actively and passively managed funds on the Russian market, therefore the analyzed difference of yield between these types of funds was not adjusted for discounts and allowances.

The rankings of the return of equity and index funds (open and interval) provided by the portal investfunds.ru (Cbonds group) were used as a source of information.³

3 Selection criteria of the fund

Such form of collective investment as mutual funds focuses primarily on the ordinary, unskilled investors. Most of them do not have deep knowledge in Finance and they are not able to conduct high-quality, detailed analyses of investment (also portfolio) strategies. Therefore, the main criterion of choice of fund for them may be its performance during the past period. The rankings of mutual funds are accessible to the mainstream investor, so they can actively be used by them.

However, private investor, choosing a fund, focuses not only on its past performance. Another important criterion which is taken into account is the success of specific investment companies. Success factor can be divided into two components. The first one is objective. It can be determined on the basis of the rates of return on the company's funds in the previous period. Other factors are – the image of the management company, its fame, its advertising campaign and other factors. However, the use of these factors while making a choice on a management company is not directly related with the possibility of obtaining higher yields in the future. Regardless of what marketing policy of the company, its funds may be more or less successful. That mostly depends on the professionalism of its managers and their ability to beat the market.

On the other hand, it cannot be argued that marketing and branding factors are totally ignored by investors, because that would mean that they are trying to place their funds only in those funds and management companies, which have shown the highest yield in the past. Therefore, if the investor may use not only the last criterion of profitability but also some others it can be assumed that investors most often choose the funds that do not necessarily have the highest return. They choose among the top ten most profitable in the past funds. Moreover, they orientate on the company, which funds showed greater profitability overall, as a subsidiary factor.

3.1. Whether investors use past performance of the Fund in asset allocation?

In order to understand whether the fact that the fund is in the top ten of last year's profitability ranking is an important criterion and whether or not it is used as a key for investors when choosing a fund, the analysis of dynamics of the fundraising was held. Average values of the raised by actively and passively managed funds money over the period from 2005 to 2015 were calculated. The calculation was made separately for each of the type of funds for each year (n), and for those funds that were among the top ten profitability ranking last year (n+1) (PL. 1). This allowed us to assess whether the funds of the top ten last year ranking have attracted more money than all funds of each type on average.

Table 1 The average size of attracted money by actively and passively managed funds during 2005-2015, mln euro

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Average 2006- 2015
<i>Top-10 stock funds, n+1</i>		12,24	3,43	-3,35	-1,46	2,55	-0,3	-0,17	3,11	-6,28	-0,79	0,9
<i>All stock funds, n</i>	0,19	2,32	-0,09	-0,43	-0,39	-0,13	-0,08	-0,69	-0,27	-0,28	-0,45	-0,05
<i>Top-10 index funds, n+1</i>		3,58	0,14	0,24	-0,15	0	-0,04	-0,29	-0,15	0,17	-0,21	0,33
<i>All index funds, n</i>	0,31	1,88	0,41	0,15	-0,23	-0,28	0	-0,48	-0,46	-0,04	-0,13	0,08

According to the data represented in the table, the mean value of borrowed money by actively managed funds that are in the top ten ranking of profitability of last year equals 0.9 million euro. This is clearly more than the same indicator for all actively managed funds (-0.05 million). The same situation is observed for passively managed funds: fundraising of the top ten ranking of the previous year (0.33 million euro) is clearly greater than average fundraising of all passive funds (0,08 million euro). These results confirm that investors actively use the criterion of the fund's presence in the top positions of the last year ranking of profitability in the case of both types.

The average fundraising of index funds that are in the top ten by return of the previous year does not exceed the average value of borrowed funds for the current year too much. This is due to two factors. First is the fact that index funds own a smaller share of the Russian market of collective investments. Second is

that it makes sense to choose funds from the top ten with the highest return only in case of actively managed funds because index funds do not have a large spread of return and they are closer to the profitability of the market in general.

We can conclude that when investors select a specific fund to deposit their money they use the data on the return of the previous period. This corresponds to both types of the considered funds, but mostly for actively managed one. Therefore, the fact that fund is in the top positions (namely top-10) in the last year profitability ranking can be considered as the main criterion for the general mass of investors that choose in which fund to invest. This criterion will be used as the base for comparison of actively and passively managed funds.

3.2. Do investors deposit more money in those asset management companies, which funds have shown greater return in the previous period?

The same analysis of the total fundraising of each company was held in order to assess whether investors use the criterion of success of all the funds of a particular management company. The average values of the attracted money by actively managed funds were calculated for each company between 2005 and 2015. Index funds were not taken into account, because beating the market is not a goal for its managers and it is not a measure of their professionalism. As in the case of analysis of individual funds, the calculation was made separately for all companies for each year (n), and for those companies that showed top five best results in the profitability ranking in the last year ($n+1$) (table 2). It became possible to estimate, if the companies from the top five ranking of the last year raise more money than all companies on average.

Table 2 The average size of attracted money by asset management companies of actively managed funds during 2005-2015, mln euro

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Average 2006- 2015
<i>Top-5 management companies, n+1</i>		5,43	1,69	-0,79	-0,03	-0,35	0,04	-0,01	-0,12	-0,57	-0,26	0,5
<i>All management companies, n</i>	0,19	1,37	0,27	-0,13	-0,17	-0,06	-0,06	-0,31	-0,19	-0,01	-0,24	0,05

The data presented in table show that the average value of money raised by companies from the top five profitability ranking of last year amounted to 0,5 million euro. That is clearly more than the same indicator for all the companies as a whole (0,05 million rubles). This result confirms that investors of actively managed mutual funds are trying to deposit their money in those companies that were most successful last year (for example, when they select a specific fund from the top-10 ranking of the most profitable funds of the last period). Therefore, this criterion will be used as an auxiliary one to test whether or not it is necessary for investors to apply it.

4. The analysis of the yield of top ten actively and passively managed funds

It was found out that investors focus on funds that have shown the highest yield in the last period and deposit a greater amount of money in them. Then the question arises: is this criterion of selecting a fund feasible and does it allow obtaining a greater return on investment? And what type of fund is more preferable from the point of this criterion - actively or passively managed one?

To answer this question it is necessary to understand why investors tend to choose funds from the top ten profitability ranking shown in the last period. To do this, refer to figure 1, which presents data for annual average return for samples of the top 10 active and top 10 passively managed funds. It can be noticed

that every year actively managed funds from this top show higher returns than all funds of the same type. This tendency is not observed in case of passively managed funds. That is expected and can be explained by the fact that their task is to copy the index and, therefore, their yield is quite close to it. As for actively managed funds, they have much wider investment opportunities, so there are always those that will beat the overall market.

As a result, the average investor can assume that those funds, which are included in the top ten now, are the most successful overall, and investing in those funds can provide approximately the same super-profits in the future. So, without data about the trends of these funds in the future (if they can repeat the last result or not), investors tend to focus on those that currently show the highest yield.

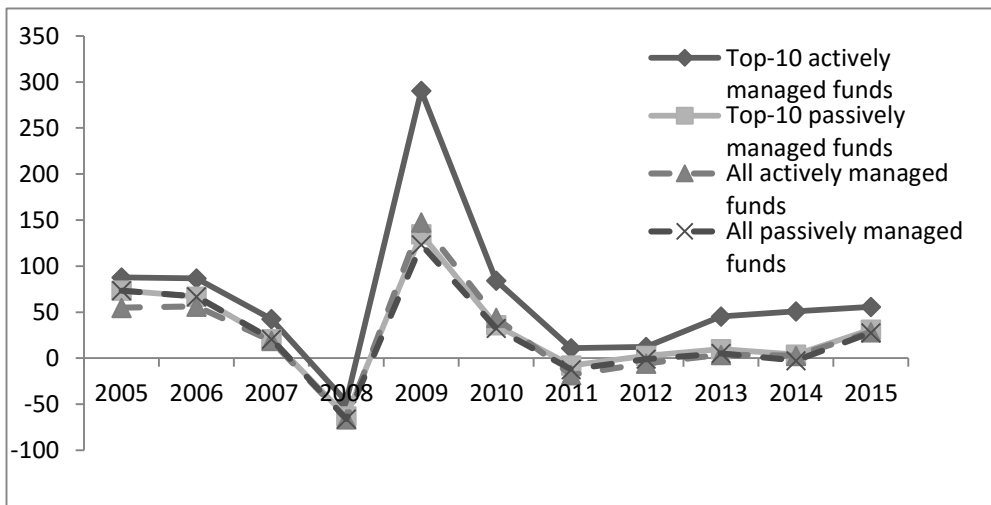


Figure 1 The average yield of actively and passively managed investment funds, %

Table 3 The average yield of top-10 actively and passively managed mutual funds, %

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Average
Actively Managed	87	43	-47	291	84	11	12	45	51	56	63,2
Passively managed	67	21	-63	135	36	-8	3	10	4	31	23,4

However, from an investment point of view, the current high value of return does not represent any guarantees of getting the same yield in the future. In this regard, the information about what level of yield funds from top ten of the current profitability ranking can provide in the future is the most valuable one. Such data will allow determining whether the use of such criteria as the presence of the fund in the top ten is appropriate in terms of obtaining a higher return on investment in the future. The comparison of actively and passively managed funds by this criteria can show which type of fund is more preferable for the investor and whether they are generally give results that exceed market indicators.

To obtain this data, values of average yields for the funds included in last year top ten profitability ranking were calculated for each year of the considered period. The calculation was made separately for active and passively managed funds (table 4). The data shows what level of return investors could expect, if they had to pick funds from dozen of the most profitable last year funds during this time period.

Table 4 The average yield of actively and passively managed mutual funds, %

<i>Year, n</i>	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	<i>Average 2006-2015</i>
<i>n+1, top-10, actively managed</i>		60	26	-70	95	73	-13	3	22	0	19	21,5
<i>n+1, top-10, passively managed</i>		80	20	-67	126	34	-15	2	5	-5	30	20,9
<i>n, all actively managed</i>	55	56	19	-66	148	44	-18	-6	4	3	28	21,1
<i>n, all passively managed</i>	74	67	21	-66	123	32	-12	-1	5	-3	28	19,4
<i>The yield of MICEX index</i>	83	68	12	-67	121	23	-17	5	2	-7	26	16,5

As table 4 shows, the average for top ten actively managed funds exceeds top ten passively managed just by 0.6%. Such excess returns, especially for the Russian market with high volatility, cannot be considered as significant. Despite the fact that managers pay much more attention to the development and implementation of investment strategies of actively managed, it does not result in significantly greater excess in yield. This situation is well illustrated by figure 2.

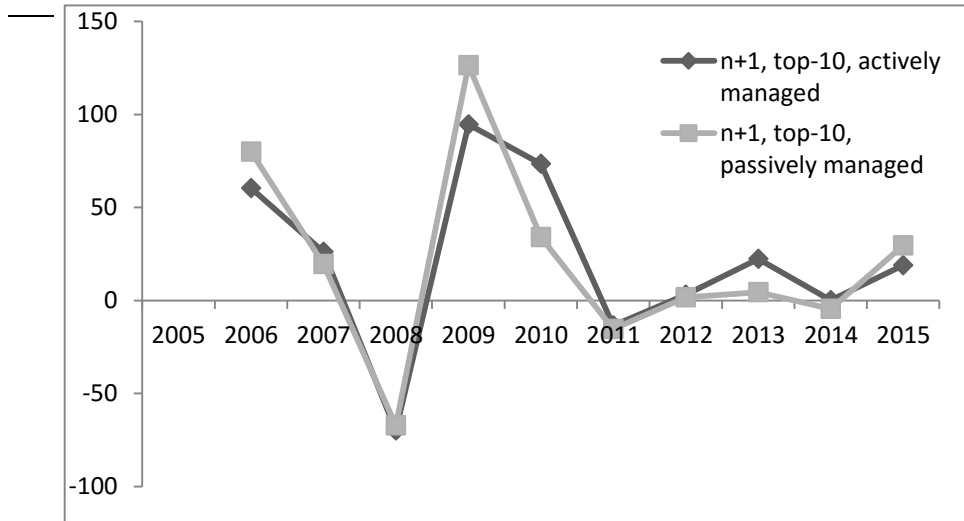


Figure 2 The average yield of actively and passively managed mutual funds of last year top-10 profitability ranking, %

The figure 2 shows that the average returns of actively and passively managed funds of last year top-10 profitability ranking are almost at the same level. Moreover, the unexpected fact is that in post-crisis 2009, on the back of strong growth of the market, index funds have dominated in relation to actively managed ones. This suggests that investing in the most profitable actively managed funds before the beginning of the strong growth of the market cannot provide a higher yield even when there is the best for mutual funds market situation.

As a result, we can conclude that it is virtually impossible to provide significantly higher yields by investing in actively managed funds which showed the highest yield last year in comparison with the investing in the best passively managed funds. That is why the selection of the best actively managed or passively managed funds of the past period are roughly equivalent from the viewpoint of obtaining higher yields in the future.

5. Should investors choose funds from the profitability ranking of the last year in order to get higher return relative to all the funds and the market as a whole?

The calculations allow to make another important comparison: if top ten most profitable funds of the last year provide a greater return relative to all

funds of the same type for each year and if investors should focus on last year's funds, that are in the top position of this kind of ranking, when they select a fund for investment. As can be seen from the table 2, the average yield of the top ten best funds of last year is a little higher than the one for all the funds overall (for actively managed (0.4%) and for funds with passive management (1.5%). However, such a marginal benefit, especially for the actively managed funds, in which case the right choice is the most important, does not suggest, that it is possible to make a clear improvement of investment results by applying this criterion. Most probably, they are approximately equal to the average values for each type of fund and are not able to provide investors with getting fundamentally higher yields.

If we compare results with the returns of the market as a whole (with MICEX index), we can note that the average return of the top ten best funds of last year is clearly higher for both actively (5.0%) and passively (4.4%) managed funds. At the same time, it can be seen that the average yield on actively and passively managed funds is higher than the one for the market (4.6% and 2.9%, respectively). That is why, we can conclude that if investor wants to obtain yield that is higher than the one for the whole market, investment in mutual funds is expedient and may be of interest to them. However, the use of the criterion of investing in funds that showed the highest yield in the previous period does not significantly improve the results, especially for actively managed funds in which case it was mostly expected.

6. Is selecting funds from the first ten in the ranking a correct criterion?

Earlier on the basis of the volume of attracted funds was shown that investors rely on the most profitable top ten of last year when choosing a fund. But over the course of additional calculations, it was found that on the second ten the average size of fundraising was slightly higher than for each type of funds in general. Therefore it was interesting to assess whether the yield of the top ten funds exceeds the yield of the second and third dozens. That is, whether it makes sense for investors to consider the funds more widely, when they focus on the past performance, and to make choices among funds with lower positions, not just from the first ten.

As the standard deviation of the yield of passively managed funds is low, the calculations were made only for active funds in order to answer this question. The results are presented in the table below.

Table 5 The average yield of the second and the third ten of actively managed funds of the last year ranking, %

<i>Year, n</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2013</i>	<i>2014</i>	<i>2015</i>	<i>Average</i>
<i>Second ten</i>	57	18	-69	112	66	-15	-2	17	-3	23	20,4
<i>Third ten</i>	59	14	-64	120	55	-28	-5	15	5	29	20,0

According to the data of table 5, the yield of the second ten actively managed funds of the last year (20,4%) is on average 1.1% lower than the one of the first (21,5%). In case of the third (20,0%) ten, the difference is already equal to 1,5%. Therefore, the choice of funds from the top ten still makes sense and can provide some prevalence on yield to investors. Then the focus on funds of the top ten (not twenty or thirty) can be justifiable. Moreover, to obtain greater than on all actively managed funds yield (21,1%), investors should try to choose funds from the top ten only, since neither the second, nor the third do not provide a greater return in the future. But if we compare with the average yield of all passively managed funds (19,4%), it may be noted that the first, second, and third dozen of actively managed funds from profitability ranking of the last year are able to provide a higher return.

Since the average number of actively managed funds on the Russian market was equal to 168 from 2005 till 2015, the first 30 funds account for a one-fifth (approximately 18%) of their total number. The calculations suggest that even by choosing the funds from the best 18% it is possible to get higher than the average for all index funds in general yield.

At the same time, investments in the top ten actively managed funds of the last year ranking can provide only a relatively small excess of returns compared to passively managed, especially compared to the average value for them. Then we can conclude that the significant advantage of the top ten actively managed funds over index (almost 40 pp – table 3) is almost completely lost. Let's analyze in more details to establish the causes of this situation.

7. The stability of the actively managed funds in top-10 profitability ranking

It was shown that period in comparison to passively managed funds and all actively managed funds in general the top ten actively managed funds are not able to provide significantly higher yield in a future. The same situation is ob-

served for the second and third dozens. The funds that are the most profitable in the current period were not in the top thirty of the last year (have not got to 18% last year profitability ranking). As a result, it is not possible to guess which fund will provide a return that is higher than index funds and any other actively managed funds in the next year. The search area of such funds is even impossible to reduce to top 30 the most profitable in the current period.

What happens to the best funds in the next period of time? Table 6, which presents the results on the percentage of funds moving out of the top ten in the overall ranking of profitability for the next period of time, gives the answer to this question. The data from the table allow us to assess the sustainability of the funds within the top ten and the range of their future returns. It shows what percentage of actively managed funds remains in the top ten by profitability in the next period, how many moves in each next ten (till fifth one) and how many drops below the fifth dozens of ranking.

Table 6 How actively managed funds change their positions in the overall ranking (for the period from 2006 to 2015), %

<i>Year</i>	<i>Funds re- maining in top-10</i>	<i>Funds moved to 2nd 10 of the ranking</i>	<i>Funds moved to 3rd 10 of the ranking</i>	<i>Funds moved to 4th 10 of the ranking</i>	<i>Funds moved to 5th 10 of the ranking</i>	<i>Funds fell below the 50th posi- tion</i>
2006	10%	20%	20%	20%	30%	0%
2007	30%	10%	0%	40%	10%	10%
2008	0%	10%	0%	0%	10%	80%
2009	0%	0%	0%	0%	10%	90%
2010	60%	10%	0%	10%	10%	10%
2011	10%	10%	10%	10%	0%	60%
2012	10%	30%	20%	0%	10%	30%
2013	30%	10%	10%	20%	10%	20%
2014	10%	0%	0%	10%	10%	70%
2015	0%	0%	0%	0%	10%	90%
<i>Average</i>	16%	10%	6%	11%	11%	46%

As it can be seen from the table, the stability of the actively managed funds that are in the highest positions of the profitability ranking is small. The probability that the fund will hold in the top ten, is quite small since only 16% of funds retain their positions for the next year. It is much more likely that the fund will

move from the top ten to the lower positions of the ranking - to the fifth dozen (38%) and even more likely (46%) that it will be a position below fifth dozens.

This fact reflects very well the poor predictability of markets and the instability of even professional asset managers results. Especially strong changes were observed in the periods of decline (2008) and growth (2009) of the market. Broken out in 2007 mortgage crisis in the USA and the crisis of the energy market, served as the basis for a significant price drop on the Russian stock market, resulting in a maximum drop of MICEX index (MICEX) in 2008 amounted to 74%. Then, as the stabilization of the situation on the market started, the index started its reverse recovery, mostly in 2009. According to the data of table 6, it was the most difficult for managers to maintain high results when there were large market fluctuations, resulting in a significant changing of funds' positions in the profitability ranking. So, in 2008, 80% of the funds moved lower than fifth dozens, in 2009 the number raised up to 90%. A similar situation occurred during the market decline in 2011, when 60% of the funds fell below the fifth dozens of ranking. There was a clear trend in 2014-2015, when the Russian market was high volatized and almost all the funds that were in the top ten last year, moved to the next lower fifth.

Because of such substantial next year movements of funds from last year's top ten ranking, it is impossible to provide significantly better returns in the future period than all the funds in general. This indicator does not allow selecting those funds that are able to generate a return significantly above the average for all. And there is not any sense for investors to be guided by it, as the funds that comprise it at the moment, can significantly change their positions inside the ranking of profitability.

If the investor wants to ensure himself in getting higher yields at the expense of this criterion, it is necessary to pay attention to the fact that it is essentially to produce deeper diversification by investing equal amounts in all funds in the top ten. That is the only way to receive higher returns on average. Otherwise, if investor selects only one or a small number of funds from last year's first ten, then significant movements of funds out of it can lead to the fact that the result is considerably different from the one that was expected.

8. Comparison of top-5 most profitable management companies with all the others

As investors look for management companies, which funds showed the highest return in the last period, and place a greater amount of money in them, it is necessary to check whether the use of this criterion when selecting a fund is feasible and allows to obtain a greater return on investment. Special calculations were made for this, the results of which are presented in table 7. Such five asset management companies were taken, all funds of which have shown highest yield. In relation to 64 average total number of companies for the period between 2005 and 2015, five management companies represent almost 8% of this num-

ber that is quite similar to the situation with the choice of dozens of the best funds (6% of 168) characterizes the top of the profitability ranking.

Making year-to-year comparison, it can be noted that the companies from the first five the most profitable ranking allow investors to get a much greater return than the average for all management companies (exceed by 34.3%). In principle, it is not surprising, because in case of active management the companies, which funds' profitability will be significantly above average, can always be found. However, the same as in the case of selecting specific funds, there is a problem for investors to guess the company which funds will become the best next year in order to invest in them this year. As already mentioned, investor can use only past returns of company's funds when trying to determine which companies will be the best next year. Therefore, from the investing point of view, it is much better to see the size of average yield that is possible to get if select the funds of the management companies with the best last year results.

Such a comparison has clearly shown that this criterion does not allow obtaining higher yield than all companies in general show. The average yield (11,1%) that is got by using this criterion is 4,3 pp lower than the average for all management companies (15,4%).

Table 7 The yield of management companies, %

		2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Average
Top 5 companies	<i>n</i>	90	79	25	-43	278	48	-10	17	16	38	49	49,7
	<i>n+1</i>		46	9	-64	66	43	-22	0	11	-3	24	11,1
All the companies		57	46	8	-65	129	28	-22	1	-1	1	29	15,4
Difference			0	1	1	-63	15	0	-1	12	-3	-5	-4,3

As a result, it must be better to not to use the last year yield indicator on the funds of a specific management company when choosing the fund for investing. As in the case of funds, there is no repeatability of last year management results. The yield on funds of the company that was in top-5 last year is below the average for all companies next year. These results suggest that professional asset managers of investment funds fail to show consistent positive results that are above the average and their results will still be below the general level.

Unfortunately, it is impossible to make an accurate comparison of which criterion is more successful in the research – selection from dozens of the best last year funds or selection of funds from the five companies. This is because of the fact that not all the companies provide statements, and that is why these companies were excluded from the calculations. Therefore, the data is incomplete (although the number of excluded companies is fairly small). However, since last

year's dozen allows beating all the funds of the appropriate type and last year's top five management companies do not, there is a high probability that it is possible to assume that the first criterion is better.

9. The comparison of actively and passively managed funds from the perspective of the risk-return ratio

In the earlier analysis of actively and passively managed funds we have used only the year-by-year percentage change of yield. However, in the conditions of dynamically changing it is also necessary to take into account investment risks associated with obtaining yield that is below the expected level due to adverse movements of financial assets' prices. Therefore, in order to assess more precisely what type of fund is most suitable for investment, additional indicators, based on the risk and return ratio were used.

Traditionally, these comparisons are based on such measures as the Sharpe ratio and the coefficient of variation. Both of these coefficient show, which return per unit of risk the asset brings. The higher the value of coefficient on the asset the more investor will get for the accepted risk, and therefore the better is the asset risk-return ratio. In this case, the Sharpe ratio, in contrast to the coefficient of variation, shows if the high risk of an asset is covered by the higher yield minus the risk-free rate, and whether it is more profitable to invest in riskless assets. Values of these coefficients calculated for actively and passively managed funds, as well as the standard deviation of the returns are presented in the table below. In this case, the risk-free rate equals the average yield on 1-year Russian government bonds, which was 6.0% for the period (2005-2015), (this is the short-term government bonds, so they are commonly used as the risk-free rate).

Table 8 Indicators of market risk for mutual funds

	<i>Actively managed</i>	<i>Passively managed</i>
<i>The Sharpe ratio for the top-10, n+1</i>	0,32	0,28
<i>The Sharpe ratio for the top-10, n</i>	0,64	0,34
<i>The Sharpe ratio for all funds</i>	0,34	0,36
<i>CV for the top-10, n+1</i>	0,46	0,39
<i>CV for all funds</i>	0,45	0,48
<i>Standard deviation for the top-10, n+1</i>	47,1	53
<i>Standard deviation for all funds</i>	54,2	50,4

As the data show, investments in the last year's top ten of actively funds bring higher annual return (21,5% against 20.9% in passively managed) and a smaller standard deviation of return (47,1% vs. 53,0%, respectively). Therefore, from the point of view of the Sharpe ratio and the coefficient of variation they have an advantage over passively managed. However, this advantage is rather low: in case of the Sharpe ratio, it is only 0.04 and the coefficient of variation is 0.07. Therefore, although there is some prevalence, it cannot be argued that it is significant. Moreover, it is clearly observed that the advantage of the top ten actively managed funds over the first ten passively managed (year n) is getting almost completely lost if we invest in them in the following year (n+1). The advantage in case of the Sharpe ratio falls from 0.3 to 0.04 and in case of the yield – from 39,8 to 0,6 (table 3 and 4). That is why the first ten of actively managed funds will not show higher yield in comparison to passively managed funds next year. Investors should not rely on this criterion when choosing the type of investment fund.

It can be noted that there is some advantage only in the case of investments in last year's top ten actively managed funds (0,32) compared to all funds of this type in general (0,27). It is formed due to the fact that the standard deviation of last year's top-10 actively managed funds(47,1%) is clearly lower than for all funds of this type (56,1%), and the average yield (21,5%) is higher than that of all actively managed funds overall (21,1 %). Although in this case the advantage is quite small again.

Moreover, if we compare these indicators with yield and standard deviation for the overall market (respectively 16,5% and 50.3% on MICEX), we can see that a lower standard deviation for the investments in the top ten of last year's profitability ranking (47,1%) clearly corresponds to a higher yield (21,5%) than that of the MICEX index. As a result, the prevalence according to the Sharpe ratio in case of investing in the top ten of last year's ranking of actively managed funds

looks more substantial when we compare it to the market as a whole (from 0,21 to 0,32).

Table 9 Summary indicators of risk and return for actively managed funds

	<i>Average return</i>	<i>Standard deviation</i>	<i>Sharpe ratio</i>
<i>Top-10, n</i>	63,2%	88,9%	0,64
<i>Top-10, n+1</i>	21,5%	47,1%	0,32
<i>All funds</i>	21,1%	56,1%	0,27
<i>The excess of the top ten (n) over all funds</i>	42,1%	32,8%	0,37
<i>The excess of the top ten (n+1) over all funds</i>	0,4%	-9%	0,05
<i>MICEX index</i>	16,5%	50,3%	0,21
<i>The excess of the top ten (n) over MICEX index</i>	46,7%	38,6%	0,43
<i>The excess of the top ten (n+1) over MICEX index</i>	5%	-3,2%	0,11

As a general result it can be noted that significant repeatability of the results of last year's top ten actively managed funds is not observed. As shown by the calculations presented in the summary table 9, good results of the top ten funds for the year n , are related to such indicators of risk and return, which are not repeated by the same funds the following year $(n+1)$. Thus, the excess return over the average for all actively managed funds falls from 42.1% to 0.4%. And excess of the Sharpe ratio drops from 0.37 to 0.05. This clearly shows that there is a very low probability that the results of top-10 will repeat next year from the risk and return point of view. Residual excess is extremely small, and is not similar to indicators, that characterize the top ten for each year n . (In this case, a higher standard deviation of return for the top ten at year n should not be considered as a negative factor, since it can be partially explained by the high positive yield, not negative).

At the same time, there is a little improvement of indicators in case of investing in last year's top-10 in comparison with the choice of fund among all observable, therefore this criterion of inclusion of the fund in last year's top ten can be rec-

ommended to investors. However, it is difficult to expect significant improvement of results from usage of it.

10. Focusing on the best management companies when choosing a fund for investment: risk and return analysis

We have described the investment results obtained if the selection criterion is fund's performance in last year's most profitable funds ranking. However, as it was mentioned earlier, investors can also focus on another criterion – the success of management company. The reason to use it is the assumption that the same companies, which showed the best results last year, may show higher results than asset managers from the other companies next year. It was demonstrated above that in practice it is not confirmed. Investors should not rely on this criterion when selecting a fund, if they want to obtain higher yield. However, risk and return indicators have been calculated for this case too (table 10). In general, the results confirmed earlier results: there is not recurrence of past results, shown by the top five companies.

Table 10 Summary indicators of risk and return for companies in case of actively managed funds

		<i>Average return</i>	<i>Standard deviation</i>	<i>Sharpe ratio</i>
<i>Top-5 companies</i>	<i>n</i>	49,7%	86,9%	0,50
	<i>n+1</i>	11,1%	37,2%	0,14
<i>All management companies</i>		15,4%	50,3%	0,19

Thus, the excess return of the top five companies above average in all management companies (34,3%), drops sharply and becomes negative (-4,3%). The same is observed for the Sharpe ratio – the excess of 0,36 drops to a negative value (-0,05). This clearly shows that there is no repeatability of the results achieved by the top five management companies next year from the point of risk-return ratio. The results of investments on the basis of this criterion are even worse than the results of all the management companies in general. Despite the lower value of standard deviation of return (37,2% vs. 50,3%), a higher risk for all management companies is compensated by a higher yield (15,4% vs. 11,1%).

11. Results

It can be concluded that top ten profitability ranking of the last year and the previous results shown by management companies are quite important criteria for investors that choose a particular fund to deposit their money. Investors, expecting that successful results of management will be repeated in the future, are willing to invest in such funds much more money. But as the calculations shown, the choice of funds from the top-10 of last year does not allow to obtain significant advantages in terms of yield and risk-return ratio. Investors should not expect that these funds will repeat high results in the future: next year the results will be approximately equal to the total average for a particular type of fund management.

The comparison of actively and passively managed funds in case of investing in the most profitable funds of the last year and all funds overall has shown a very small advantage of actively managed funds. Although in this case this advantage is very small, so these forms of investments can be considered almost equal on the Russian market. But in general, it is caused not so much by choosing funds from the top 10, as by the fact that in general actively managed funds show better results than the market index. The orientation on top 10 funds of the last year can provide only a slight improvement. In general, the use of this criterion would not make the results of the investor worse, but at the same time would not improve them significantly. When investor uses last year performance of the funds, he will still get approximately the same return on investment as if he made a random selection from all available funds, both active and passive.

At the same time, investing in mutual funds still provide some advantage in comparison with the returns of the overall market, that is why ordinary investors can be recommended to use them. But in this case it is necessary to apply a broader diversification of investments by investing equal shares in a certain amount of funds. This is needed due to extremely low stability of the results of fund management, so they change their positions in the ranking year by year. Since the range of their annual income is very considerable, it is better to invest in all ten funds from the ranking in order to obtain results that characterize this top. As well as in case of investing in other funds, it is necessary to apply a broader diversification to ensure the possibility of obtaining returns greater than the market as a whole. When investing in a small number of funds there is a high risk that the yield will be significantly lower than the overall market.

If the investor decides to use the Russian mutual funds, it should focus not on the best management companies, but on the best last year funds, because in the first case, investors can receive the return which is below the average for all companies. As it turned out, although the sustainability of the results of the best funds is very small, still it is greater than the sustainability of results of the best management companies.

It can be concluded that in general fund managers cannot beat the market consistently and provide repeatable results. Obtaining the super-profit on the fund that exceeds the profit of the market overall can be considered as a random

event. It happens because in case of high volatility of the stock market and a lot of different investment strategies, such fund that beats the market can always be found. Inability of the managers to ensure repeatability of the results confirms the randomness of this process and indicates the impossibility to orient on the past performance of the market of mutual funds in order to get fundamentally better results than all funds in general.

The methodology of the analysis of mutual funds market that is described in this work is universal and can be applied to any other the national market. This will allow obtaining similar conclusions, so investors can better understand the nature of investments in national mutual funds.

Endnotes

- ¹ SPIVA U.S. Scorecard Year-End 2014 / S&P Dow Jones Indices, 2015. URL: <http://www.spindices.com/documents/spiva/spiva-us-year-end-2014.pdf>.
- ¹ Mutual funds rankings according to their yield [electronic resource]: Data Portal Investfunds group Cbonds], URL: <http://pif.investfunds.ru/funds/rate.phtml> (31.12.2016).

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Romanian SME's face-to-face with risk management

Authors

- *Luise Zeininger, PHD Student, luise.zeininger@gmail.com - The Bucharest Academy of Economic Studies*
 - *Sabina Irimie, Professor, sabina.irimie@gmail.com - University of Petrosani, Romania*
 - *Mircea Mihai, PHD Student, mircea.mihai.ro@gmail.com, The Bucharest Academy of Economic Studies*
-

Risk is nowadays part of our daily lives. Every human, every organisation need to take risks to grow and develop. From using a scissors to climbing a ladder, from investing in a new business to hiring a new office manager, from writing an email to payments online every action is defined also by its risks. Managing risks become a priority since effectively managed risks help societies achieve. Not only risks are everywhere but they evolve as the society evolves, often at an even faster pace. Business associated risks are no exception, this is why managers should be prepared to face them.

Our paper presents some of the results on a larger study on the impact of various risk exposures on private companies with the objective to determine the general perception of Romanian SMEs management teams regarding risk. For that matter we developed a questionnaire - as main instrument to collect risk data- as well as an interview protocol - to collect background data. The findings illustrate, from their perspective, the main threats that might affect their business, the main vulnerabilities of their business to those threats and their preferred method of risk management. The results will reveal all those in connection with the type of business, the number of employees as total staff and as number of employees involved in managing risks, the risk assessment process that management team applies, the impact on the company performance and the balance between risks as threats and risks as opportunities.

The questioned SMEs are private entities, some being members of business associations that helped and assisted our research.

Among a number of various conclusions one stands: for effectively monitoring risks, building best practices is key. The findings of our research strongly reflect the accelerating pace of change facing top management of any organisation. To fulfil their commitments to their stakeholders, the top management need to ensure that their organisations are informed, educated and without becoming overwhelmed always risk-focused as taking risks is now a day-to-day business reality.

Keywords: risk, management, risk management, threats, vulnerabilities, opportunities

JEL Classification: G32, L21, M10

1 Introduction

Risk has been a familiar notion in all civilizations and even nowadays linguistic scholars remain divided on the origin of word risk. The most heavily recognized linguistic origins for risk being the Arabic word "risq" and the Latin word "riscum". Over the last few centuries however risk has evolved also as a business concept and ever since it receives great attention. The linkage of risk to cost is profound for businesses as risk does ultimately involve a cost.

In today's world for a CEO or any other top managerial positions is crucial to maintain a diligent overview and understanding on notions such as: risk, threats, and vulnerabilities. There are many accepted ways to define these three terms but is the interactive relationship of all three of these components that combine to create the initial evaluation and recommended action plan for risk management.

A threat is often defined through its effects "something that has the potential to harm assets such as information, processes and systems and therefore harm organizations" (ISO/IEC 27005). Threats therefore can apply to a wide range of aspects such as: behaviour, events or actions, effects etc. Even if a threat can't be linked directly to the cause of a risk it is still possible to define risk using threats.

Linguistically speaking vulnerability could be described as a feature of a system, an asset that may be susceptible to threats. Another way to defining vulnerabilities would be as "flaws in a security system that could be used by a threat to strike a targeted system or asset" (White paper - Risk management, 2009).

Risk itself has many definitions depending on the elements selected to describe it. When linked only to threats risk is defined as "the combination of an asset with a threat capable of damaging that asset" (White paper - Risk management, 2009). When vulnerabilities are also taken into consideration risk is defined as "the combination of an asset, a threat capable of damaging that asset and vulnerabilities exploited by the threat to damage the asset" (White paper - Risk management, 2009). Both definitions do not take into consideration the variable time to describe events, causes or consequences. In a dynamic risk model, in which time plays a role, risk is defined as "the combination of an asset, a type of damage that may occur to the asset and the circumstances in which this damage may occur" (White paper - Risk management, 2009).

Typical risks are mapped to the risk combinations derived from the dimensions of finite, persistent, explicit and implicit. Absolute risks (finite and explicit) are those that are directly observed in the business decision. Obvious examples of absolute risks include market and credit risks. Moving along the finite dimension, one could notice that as risks become more embedded in the business decision and less separable, they become implicit. This is often referred to as operational risks — risks implicit in operations and inherent to the hazards of business. In this case the risks are often finite in observation, but cannot easily be separated from the business decision.

Persistent risks are those that impact a firm over a longer period of time and are not generally observed as one-time events or even with finite exposure. The

selection of any particular industry or strategy will pose a risk. Country risk which refers to operating in a particular country (over another) and technology risk, which refers to using a particular technology (over another) are examples of risks that are explicit in the decision but persistent over a long period of time. Infinite risks are the least desirable and may not linger but are generally embedded in other business decisions. Attacks to a firm's reputation and changes in business law through regulations are especially persistent and implicit, making these infinite risks in the framework.

Why is important to study risk? To identify, accept and control which is precisely the risk management process as defined by Douglas Hubbard. "Risk management is the identification, assessment, and prioritization of risks followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities." (Douglas, 2009, p.46)

Some specialists (Rejda, 2008; Izverceanu & Ivascu, 2012; Zeininger & Irimie, 2015) with similar views defined risk management as the process of identifying loss exposures that the organization is facing and to select the most appropriate techniques for treating each exposure separately; others defined risk management as "a systematic process by which risks are identified, assessed, analyzed, reduced or eliminated in order to achieve the objectives" (Greenfield, 2005).

Our paper adds to the work in this field with an empirical research illustrating the Romanian SME's top manager's perception on risk management.

2 Risk management research

This chapter will briefly describe the methodology, present the questionnaire used and the results.

2.1 Preliminary aspects

Our research, part of a wider study on SME's management and risk management, looks at a complete set of answers out of many received in total. It aims to identify the perceptions of the top managers on what are for their businesses the top 3 threats and vulnerabilities from a given range, identified by other studies as relevant for the geography. The 38 respondents are all on top managerial positions on a variety of sizes of small and medium enterprises SME's from self-employed to large multinational ones.

The target group composition will be analysed considering the size of the company, type of the company and the position within company of the respondent.

Analysis considering the size of the company reveal following structure: 34.2% microenterprises, 39.5% small enterprises and 26.3% medium enterprises. The structure in numbers is as shown below in figure 1.

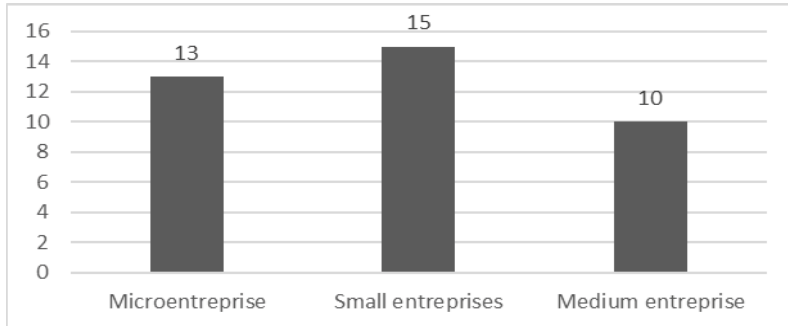


Figure 1. Respondents structure breakdown as per company type

Romanian SME's are very often managed by the owner. We looked at the target group from this point of view and founded that 50% of the respondents are both owners/shareholders and managers, 44.7% are only managers and a little over 5% - 5.3%- are only shareholders. The detailed structure is presented below in figure 2.

The research was based on several hypothesis extracted from verbally questioning the respondents with regard to the topic:

1. The high level of fiscal burden is a major threat for an SME
2. Employee's competence and attitude is a major vulnerability
3. Risk is perceived as having mostly a negative impact.

The main objectives of present research were:

1. Establish which is the highest threat for an SME
2. Establish which is the main vulnerability
3. Establish whether risk is mostly perceived as an opportunity versus a threat.



Figure 2. Respondents structure.

2.2 Research methodology

The research used as main methodology the inquiry. The authors designed and documented a questionnaire that was applied to the target group: top managers working in SME's. The questionnaire, presented below in table 1, has 8 questions, out of which 3 are meant to set the scene, 1 is related to counting staff dedicated to risk management and 4 are questions asking the respondent to set up a classification by distributing 1, 2 or 3 points among the 3 options provided. For questions 4, 5, 6 and 7 a total of all the points awarded was calculated for each option provided.

Table 1 Questionnaire

No.	Question	Answers		
1.	Please indicate the type of your company	Microenterprise	Small enterprise	Medium enterprise
2.	Please indicate your position in company	Manager		Both
3.	Please indicate the number of employees in your company?	<10	<100	>100
4.	Which are the top threats for your company? Please select from examples provided	Ambiguous legal frame	Arbitrary law enforcement	Excessive taxation
5.	Which are top vulnerabilities for your company? Please select from examples provided	Product/ service quality	Employee competence and attitude	Managers competence and attitude
6.	How is risk managed in your organization? Please select from examples provided	Externalization	Increased monitoring and control	Organisational culture change
7.	What is risk impact on your company? Please select from examples provided	Mostly negative; risk is a threat	Mostly positive; risk is an opportunity	Neutral
8.	How many employees are involved in risk management in your company?	0	<10	>10

2.3 Findings - critical analysis

From the over 50 answers only 38 were complete and therefore considered for a full critical analysis. A first observation of quantitative nature is regarding the structure of the group of respondents: half are both shareholders or owners and managers of the company doubling the impact power of their judgement. A second observation also qualitative is that 95% of the respondents are acting top managers.

An in depth analysis of the answers to questions 4, 5, 6 and 7 provides the information we looked on risk perception and risk management.

The highest threat identified by the answers to question 4 is the excessive taxation. With a total of 81 points it is ahead of the 65 points of the threat that came on second place arbitrary law enforcement. The top ends with ambiguous legal

frame that gathered 65 points. A graphic representation of the results is shown below in figure 3.

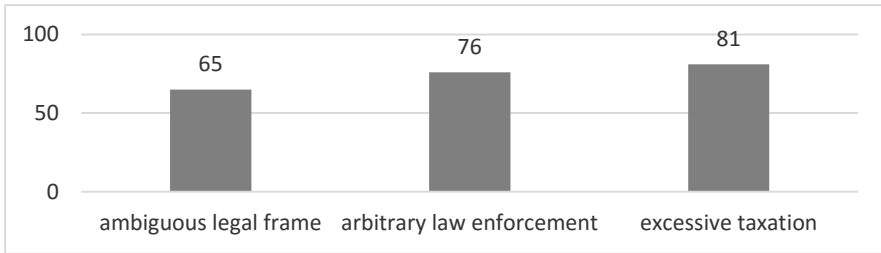


Figure 3. Main threats.

Looking at details of this threat selected, presented below in figure 4, one could notice that half of the respondents have chosen to score this threat with 3, the highest number of points. It is therefore, from their point of view, the threat with the highest impact over the business. Excessive taxation equals lower funds for company's development in all top managers' views and it perpetuates a feeling of injustice difficult to overcome.

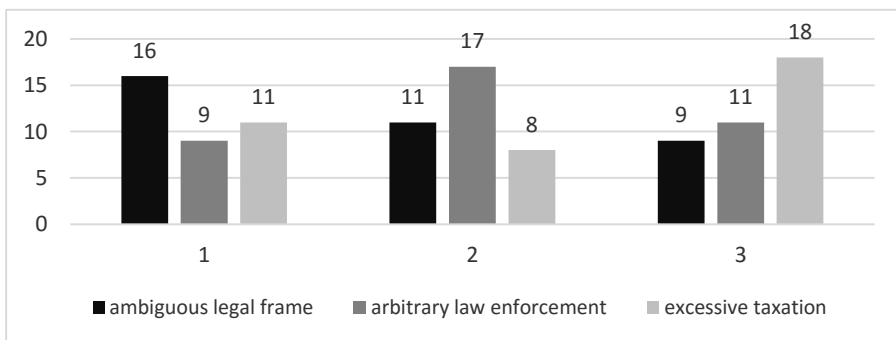


Figure 4. Details of main threats

Arbitrary law enforcement, the second most important threat identified, according to 17 respondents adds to the general insecurity.

Moving on to the answers to question 5, as presented in figure 5, the largest vulnerability identified is the competence and the attitude of managers. This is an interesting finding, reinforcing the leadership trend identified by the authors in previous studies. Exposing this vulnerability already points into the right direction of fighting it. Understanding this vulnerability and trying to cope with it involves efforts of improving the recruitment process, motivation and involvement - it is therefore a cultural change that is needed.

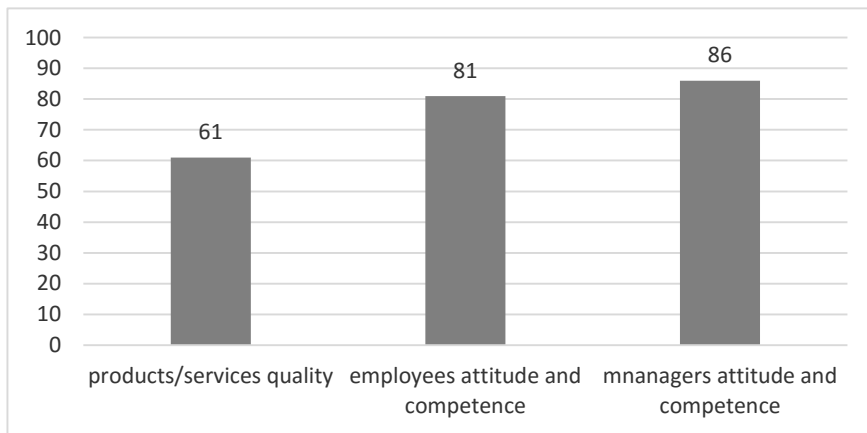


Figure 5. Main vulnerabilities

It came out not too much as a surprise that the products or services are seen as less vulnerable by the vast majority of respondents: 24 out of 38. It reinforces the perceived level of higher products/services provided by SME's - as shown below in figure 6.

When asked to select a risk management option most of the respondents choose the option of increasing monitoring and control - 88 of points- as presented in figure 7.

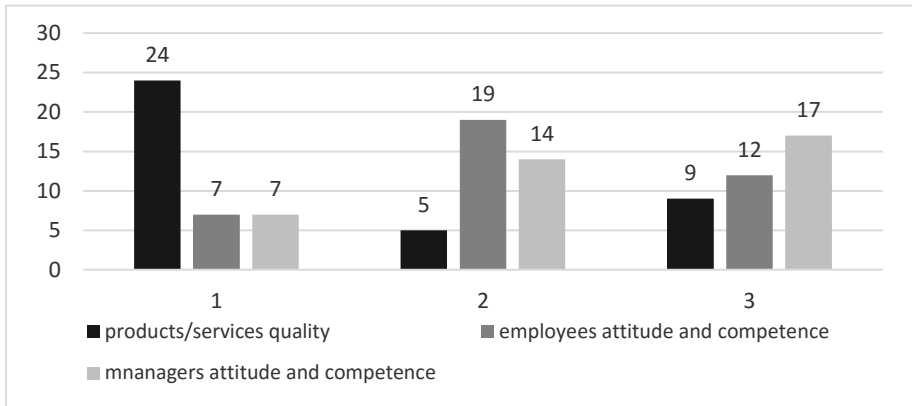


Figure 6. Main vulnerabilities - detailed findings

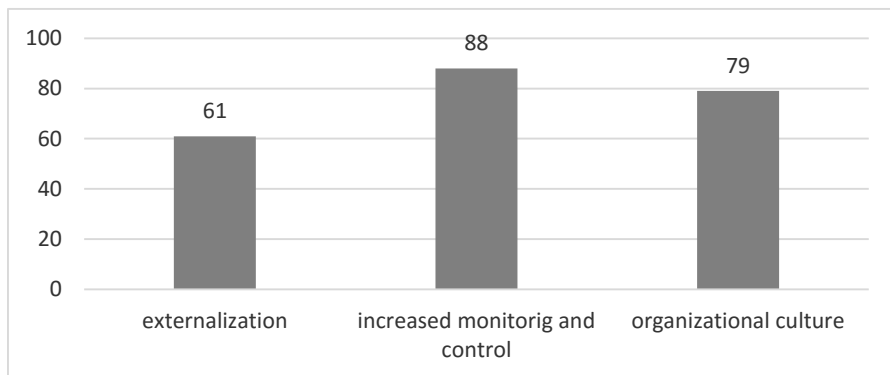


Figure 7. Risk management options

The instinctive solution of keeping risks under control by increased monitoring and control is in line with the negative perception of risks - provided by the answers to question 7 with 88 points to risk as having a negative impact and being perceived as a threat - as shown in figure 8.

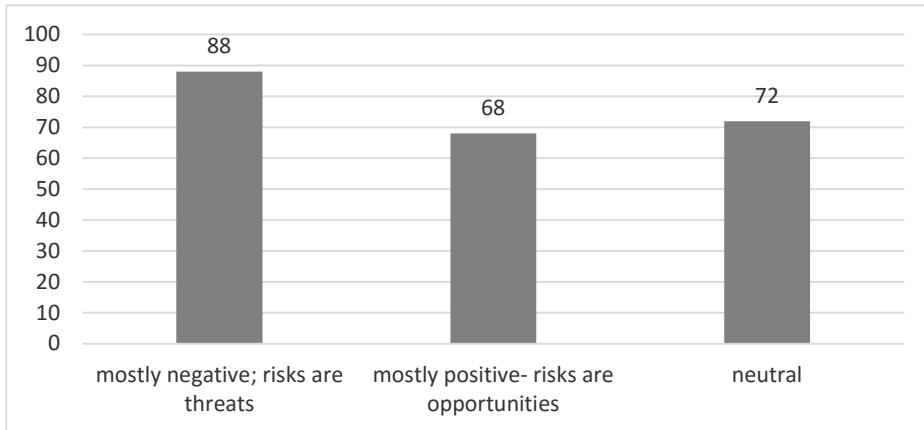


Figure 8. Risk impact

3 Conclusions

Our research aimed to reveal what are the biggest threats for SME's, what their vulnerabilities are and whether top management is prepared to manage risk. In order to narrow the large pallet of possible answers and make it more manageable, the authors provided the respondents with only 3 options to choose from.

The data gathered provides evidence that the fiscal burden is a big threat for an SME and that risk is seen mostly as having negative impact. Romanian SME's are, according to our results, not only struggling with excessive taxation in their fight for profitability but also with a self-imposed negativism related to all risks. Our in depth interviews with the respondents found them to be unprepared and therefore even more vulnerable in front of any type of event.

However our second hypothesis is contradicted by our findings: when it comes to vulnerabilities it is the attitude and competence of managers that outweigh the attitude and competence of employees.

We can conclude that the research, reached its objectives, identifying the highest threat and the highest vulnerability of an SME. It also clearly revealed that risk is not seen as an opportunity. The positive aspect is that with proper training in risk and vulnerabilities management SME's could improve in this respect. Another positive outcome relates to the finding that workers competence and attitude (as vulnerability) correlated with ambiguous legal frame (as threat) could

(and should) be treated by addressing company culture as a nurturing and engaging factor that can reduce the danger of risk manifestation.

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Risk Management and Bank Financing

Efficiency analysis for the risk management of Italian saving banks

Authors

- *Simona Alfiero, Ph.D., Assistant Professor, simona.alfiero@unito.it - University of Torino*
 - *Alfredo Esposito, Ph.D. Student, alfredo.esposito@unito.it - University of Torino*
 - *Ruggiero Doronzo, Ph.D. Student, ruggiero.doronzo@unito.it - University of Torino*
 - *Parisa Madhooshi Arzanagh, Ph.D. Student, parisa.madhooshiarzanagh@carloalberto.org - University of Torino*
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Savings Banks are part of the European banking-sector, which play a leading role in providing the financial support for the recovery and development of the real economy. SBs are supporting, mainly, local investments being born within a context that had as primary objective the aim to support local economies and being the profit just one (not even a core one) of the purposes. Currently they operate under complete commercial principles. We investigate the efficiency of the Italian SBs while the financial crisis and banks scandals are still ongoing. The measurement and evaluation of the achieved efficiency level is one of the key parameters to monitor in order to ensure continuity of business processes and, consequently, a vital tool for risk management activities. The measure of efficiency is the esteem of the Data Envelopment Analysis, a non-parametric method. The analysis covers 37 Italian SBs during the 2012–2014 period evaluating the efficiency of single DMUs. In the second part, we develop comparison and speculations on SBs efficiency when integrate or not into a bank group from which they borrow managerial experiences and corporate policies. The empirical DEA-based results can be taken into account as an early warning for the banking risk evaluation and provide strategic information. To the best of our knowledge, this is the only recent study devoted to the efficiency measurement of the Italian SBs. Moreover, it is the only one that uses the pre-tax profits as a variable able to encompass the traditional operational and non-traditional activities that may have, in years of elevated risks uncertainty, a great economic impact on financial statements. Our study is particularly important because Italian SBs drive the development of local economies focusing on SMEs and families. From a risk perspective, our results can be of special interest to several stakeholders such as bank managers and people of local communities.

Keywords: Saving Banks – Risk Management - Efficiency - Data Envelopment Analysis.

JEL Classification: G32, G14, G21, C61

1 Introduction

The banking sector, although addressed by an elevate criticism plays a crucial role in countries economics and SBs are part of it being fundamental in the economics developments of countries (Gardener et al. 1997). The global crisis and the weak economic recovery belong to what Hansen (1939) defined during the Great Depression as the economic "secular" stagnation therefore, in such period, the follows of efficiency are vital in supporting local economies mainly composed of SMEs and households.

Köhler (1996) underlined the importance of SBs efficiency evaluation stating that, even if they were well distinguished from commercial banks, they must have an efficient management and sound earning capacity being subject to those same competitive forces within the EU banking system. In fact, evolving into full-service banks and JSCs, they are fully commercial competitors, attempting to maximize profits and indistinguishable from commercial bank competitors (Gardener et al, 1997). Focusing on Italy, local SBs had a great influence on small territories while being the driver of local economies development.

The Bank of Italy Report for 2014 (Banca d'Italia, 2014) states that in 2008-2014 period the bank employees and branches decreased by about 17,900 (-5.6%) and 3,400 (-9%) units because of distribution channels such as internet and mobile. Therefore, the measurement and subsequent evaluation of efficiency are the key parameters to monitor aiming to ensure continuity of business processes and, consequently, a vital tool for risk management activities. In fact, ERM objectives are not only company's protection (and its heritage) but also the guarantee of business processes (thus creating value added) continuity.

The debate on risks, in a globally interconnect system, prompt strength by uncontrolled finance and the erosion of prudence and trust. Even the balance sheets of little size SBs have ballooned in pre-crisis years reflecting the risks took by managers. Hence, our study, also live-linked to actuality, addresses two fundamental questions: (1) what is the trend and the level of the Italian SBs relative efficiency during the 2012-2014 period of stagnation? 2) How SBs belonging to banks group performs, in terms of efficiency, when compared to those not part of a bank group? To the best of our knowledge, this is the only recent study devoted to the measurement of the relative efficiency of the Italian SBs.

2 Literature review

Italian studies number on banking efficiency are not high being investigated in nineties with reference to the determinants as scale inefficiencies and regional

disparities (Favero-Papi, 1995 and Resti, 1997), with reference to IT influence (Casolaro and Gobbi, 2007) and Italian cooperative banks (Barra et al, 2013). Other Italian and European scholars compared results obtained in different countries (Lozano-Vivas, 1997) investigating scope economies and efficiency of conglomerates (Casu and Girardone, 2002) but most of them focusing on commercial banks, while fewer examining SBs efficiency.

Bank efficiency level may affect the socio-economic environment when considers the losses deriving by credit deterioration and non-high ethical standards of manager's behaviour allowing risks to turn into bad performances. SBs are good risk-sample because of their management nature and most of the time reflecting the effects of what we use to call "*the hidden variable*": the local political powers influences. In line with that, the efficiency score is however a tool to aid managers to set goals for performances improvement being the local governance structure deeply influencing the risk management framework.

Since the work of Sherman and Gold (1985), considered being the first on banking industry, the DEA has been viewed as a useful tool to measure the relative efficiency of the banks (Berger and Humphrey 1997; Ashton and Hardwick 2000; Fethi and Pasiouras 2010). Furthermore, Berger and De Young (1997), Kwan, and Eisenbeis (1997) states that it is crucial to clearly recognise the concept of bank efficiency analysing it as a determinants of bank's risk. Berger and DeYoung (1997), and Williams (2004) took into account the "bad management" hypothesis and showing that a low levels of efficiency lead to lack of credit monitoring and inefficient control of operating expenses (which has immediate effect on cost efficiency). Typically, declines in cost (and revenue) efficiency are temporally preceding increases in banks' risk due to credit, operational, market and reputational problems. That is, a poor kind of management enhances insolvency risks.

Italian SBs, due to their small size, are risk exposed also when referring to Altunbas et al. (2007) and Sufian (2009) that found that larger size banks are more scale economies efficient. In fact, a bad or distressed financial firm can raise new capital only in good times or with Government aid. The Italian Government chose to formally terminate distress banks and set up new banks without deteriorated debts loans and subordinated debt transferring the high impact socio-economic costs on local territories.

Since the debate on risk is turn on the role of management and efficiency, an interesting dichotomous viewpoints will emerge. Indeed, from a managerial perspective, the role of "*agency theory*" (Eisenhardt, 1989; Jensen and Meckling, 1976) is to be considered when referring to separation of ownership and control thus implying conflicts of interests between managers and shareholders. On the other hand, the "*stewardship theory*" argues that managers are reliable, there are no agency costs (Donaldson, 1990; Donaldson and Preston, 1995), and a significant presence of inside directors in the board should lead to effective and efficient decisions. This latest viewpoint is typically a pre-financial scandals one, therefore, within a paradigm of 10/15 years ago.

Fiordelisi et al, (2010) investigated the impact of efficiency on bank risk finding that efficiency improvements contribute to shore up bank capital levels and that banks lagging behind in their efficiency levels might expect higher risk. Yet, in most social science applications, the theoretically possible levels of efficiency is unknown. Therefore, when referring to efficiency, we can rely on the Extended Pareto-Koopmans Definition where the full (100%) efficiency is attained by every DMU if and only if it is not possible to improve its inputs or outputs without worsening some of its other inputs or outputs.

Using the DEA the relative efficiency of a DMU is rated on the available evidence if and only if the performances of other DMUs does not show that some of its inputs or outputs can be improved without worsening some of its other inputs or outputs. Currently, efficiency can be evaluated using financial ratios, parametric approach and non-parametric approach. Financial institutions, managers and regulators are commonly using financial ratios (Bauer, et al. 1998).

Some academic literature presenting different results by using different methods as Cubbin and Tzanidakis (1998) shows that the mean efficiency DEA score is higher than OLS analysis. Thanassoulis (1993) found that DEA outperforms regression analysis on accuracy of estimates, but that regression analysis offers greater stability of accuracy even if Resti (1997) showed that both scores do not differ substantially. From managerial perspective is better to enhance efficiency by enhance control over the different inputs because of the strict relation to governance.

Berger and Humphrey (1997) reviewed 130 studies of efficiency of financial institutions and classified them following the parametric and non parametric technical approach and Bauer et al. (1998) investigate the stochastic frontier approach (SFA), thick frontier approach (TFA) and distribution free approach (DFA) as the nonparametric DEA, free disposal hull (FDH) showing that DEA is able to provide a better stability. From Casu and Girardone (2002) point of view SFA, DFA and DEA efficiency estimates are consistent with the DEA scores rather than with the SFA.

The main reason for the use of Efficiency Frontier Techniques like DEA lies in requirement of the smallest number of observations and takes into account simultaneously multiple inputs and outputs, compared to ratios where one input is related to one output each time (Thanassoulis et al., 1996). In line with that, Iqbal and Molyneux (2005) found frontier approaches to be superior to standard financial ratios analysis. On the same wave, the report of the Basel Committee (2006) stated that the frontier efficiency measures are better representative in capturing the concepts of “economic efficiency”, “overall economic performance”, and also “operating efficiency” providing a better understanding over traditional ratios, in particular on corporate governance topics. Akhigbe and McNulty (2003) and Drake and Hall (2003) find a significant impact on relative efficiency scores when risk is not accounted for.

3 A brief note on the Italian SBs sector and latest news

Saving Banks started operating in Italy in the nineteenth century as institutions in which the credit and social aspects were living together; roots lie in banking activities geared to socially, civil and economic useful goals. However, at the end of the twentieth century due to sectoral regulatory developments they turn into full joint stock companies. The social and philanthropic role is yet transfer to philanthropic foundations.

At the end of 2014, SBs are about a quarantine who hold 4,345 branches, more than 36 thousand employees, total assets of 206.2 billion, 144.4 billion in direct deposits and 13.4 billion in assets heritage. Currently, groups (which partly belongs to the local territorial Foundations) own SBs to cover the link between the ancient SBs and local communities being in strong proximity to territories.

As widely known the Italian Law Decree 22 November 2015, n. 183 (a.k.a. "*decreto salva-banche*") contains rules to ensure the continuity of financial services offered by four distressed banks (Banca delle Marche, Cassa di Risparmio di Ferrara, Cassa di Risparmio di Chieti and Banca Etruria). Concretely, the decree aims to the complete reduction of the reserves, capital represented by shares, and nominal value of subordinated liabilities, resulting in termination of the related administrative and property rights.

Put it simply, was a *de facto* first application of the bail-in rules, even before the entry into force of the European Bank Recovery and Resolution Directive (BRRD). Interestingly, two out of the four cited banks are SBs. In fact, creditors, such as families and poor countryside people, lose all their money. That is, in the concrete cases, a huge subordinated debt amount was sold to people that were not allowed to have been sold and those who had no financial skills to understand the nature of the business and risk level. A great fraud perpetrated by its managers.

4 Methodology

The measurement of banking efficiency involves the choice of the concept of efficiency, the choice of estimation method and, the definition of the inputs and outputs. DEA is a linear programming technique introduced by Charnes et al. (1978) which utilize multiple inputs and outputs to measure how well a bank performs relative to best ones by converting multiple inputs and outputs of each decision-making unit (DMU) or bank into measurable units.

The measure of efficiency is relate to the use of a minimum number of inputs in order to produce a certain number of outputs or the maximum production of outputs using a certain number of inputs (Fethi and Pasiouras, 2010). Often productivity and efficiency are took as synonyms and that, according to Cooper, Seiford and Zhu (2004), Coelli et al. (2005), and Sherman and Zhu (2006), is not correct because productivity is expressed by the outputs-to-inputs ratio (Lovell 1993).

The efficiency ratios defined by Daraio and Simar “as a distance between the quantity of input and output, and the quantity of input and output that defines a frontier, the best possible frontier for a firm in its cluster (industry)” is able to encompass the issue (Daraio, Simar 2007).

The DEA relies on the Farrell’s work (1957), “The measurement of productive efficiency” that was developed by Charnes, Cooper and Rhodes (1978) coining the term Data Envelopment Analysis and developing the first fractional form of the CCR, the following:

Table 1 The fractional form of the Constant Return to Scale model (CCR)

$Eff_j = Max \frac{u_1 y_{1j} + u_2 y_{2j} + \dots + u_R y_{Rj}}{v_1 x_{1j} + v_2 x_{2j} + \dots + v_I x_{Ij}}$ <p style="text-align: center;">Outputs: y_1, y_2, \dots, y_R</p> <p style="text-align: center;">Inputs: x_1, x_2, \dots, x_I</p> <p style="text-align: center;">Firms: j, k, \dots, N</p> <p style="text-align: center;">Weights: $u_1, u_2, \dots, u_R, v_1, v_2, \dots, v_I$</p> <p style="text-align: center;">with $u_1, u_2, \dots, u_R, v_1, v_2, \dots, v_I \geq 0$</p>	<p style="text-align: center;">subject to</p> $\frac{u_1 y_{11} + u_2 y_{21} + \dots + u_R y_{R1}}{v_1 x_{11} + v_2 x_{21} + \dots + v_I x_{I1}} \leq 1$ $\frac{u_1 y_{12} + u_2 y_{22} + \dots + u_R y_{R2}}{v_1 x_{12} + v_2 x_{22} + \dots + v_I x_{I2}} \leq 1$ <p style="text-align: center;">...</p> $\frac{u_1 y_{1N} + u_2 y_{2N} + \dots + u_R y_{RN}}{v_1 x_{1N} + v_2 x_{2N} + \dots + v_I x_{IN}} \leq 1$
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The definition of Technical Efficiency measurement proposed by Farrell, via a mathematical linear programs, assume that TE is the measure that is able to show how the maximum/minimum amount of output/input obtained from the available inputs/output. It is possible to compare the actual output with the maximum obtainable with the same fittings, as input, and it is the output efficiency or, as per the input efficiency, compare the amount of input used with the minimum necessary to produce the same amount of output. Advantages of DEA relies on the fact that relative weights of variables are not an a priori specification.

Their efficient frontier envelops the limit of a convex polytope created from the space of inputs/outputs, where each vertex is an efficient DMU. The CRS assumption is appropriate when all the banks are operating at an optimal scale and implies that DMU size does not matter for efficiency.

The initial assumption of Constant Returns to Scale (CCR) DEA model was revised to take into account the evaluation of Variable Returns to Scale and scale economies, hence the new-born BCC Model of Banker, Charnes and Cooper (1984) that includes the so-called convexity following constraints to the model.

The assumption of VRS means taking into account the technologically efficiency (based on radial minimization/maximization of all inputs/outputs) because VR score represents the pure technical efficiency (also called managerial

efficiency), while under constant returns to scale is technologically efficient. Table 2 reports the developed CCR and BCC linear model.

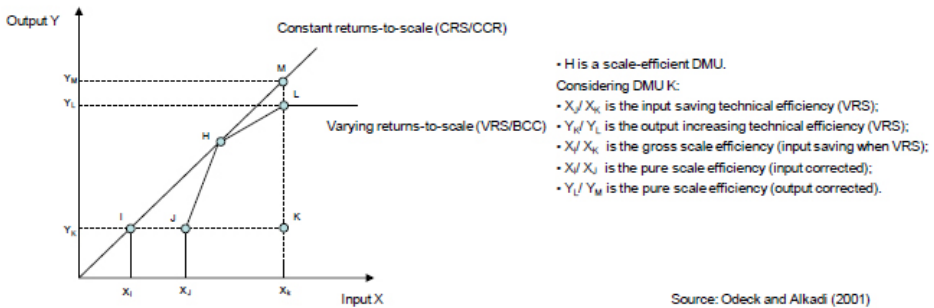
Table 2: Data Envelopment Analysis – CCR and BCC model

(1.1)	(1.2)
<p>CCR Model (Constant Return to Scale)</p> <p><i>Input oriented</i></p> <p>min θ</p> <p>s.t. $\theta x_j - X\lambda \geq 0,$</p> <p>$X\lambda \geq y_j$</p> <p>$\lambda \geq 0$</p>	<p>BCC Model (Variable Return to Scale)</p> <p><i>Input oriented</i></p> <p>min θ</p> <p>s.t. $\theta x_j - X\lambda \geq 0,$</p> <p>$X\lambda \geq y_j$</p> <p>$e\lambda = 1$</p> <p>$\lambda \geq 0$</p>

The efficient DMUs will receive efficiency scores of unity, while others scoring less than unity are inefficient. In other word, the DEA measure is able to capture different nuances of managerial performance providing adjunctive information.

The input-oriented TE is addressed by the question: “By how much can input quantities be proportionally reduced without changing the output quantities produced?”. Coelli et al., (2005) and Drake et al., (2006) stated that “from the perspective of an input-oriented DEA relative efficiency analysis, the more efficient units will be better at minimizing various costs incurred in generating the various revenue streams and better at maximizing profits”.

DEA-CCR and BCC models



Source: Odeck and Alkadi (2001)

Fig. 1 – Visual explanation of DEA CCR and BCC model

Source: Odeck and Alkadi (2001)

The result of the linear program solution is θ^* , the relative efficiency of the firm being a firm efficient where $\theta = 1$. The technical inefficiency as per the subtraction of $1 - \theta^*$ is the averaged distance from the Constant Returns to Scale frontier, includes both managerial, and scale inefficiency. The management is directly responsible of the first being the latter due to banks dimension. However,

in the banking sector, following merger and acquisition strategies, the management is able to deal with these circumstances.

Banker et al. changed the specification of the problem providing the measure of Managerial Efficiency θ VRS adding $e\lambda = 1$ to the program (Banker et al., 1984) (in 1.1 θ is a scalar and λ was a vector of constants). Therefore, the convexity constraints is $e\lambda = 1$ where e is a row vector with all elements unity a λ is a column vector with all elements non-negative and this later combined with the imposed condition of $\lambda \geq 0$ results in the convexity condition on allowable ways in which the observations for the n DMUs may be combined. It is possible to derive a measure of the scale efficiency (Aly et al., 1990, Wheelock and Wilson, 1995) from the ratio of CRS efficiency scores to VRS efficiency scores meaning that is equal to *CRS score / VRS score*. The lower the scale efficiency is, the higher is “the impact of scale size on the productivity of a DMU” (Thanassoulis, 2001).

5 Data specifications and variables

The analysis covers 37 Italian SBs during a three years period. As in Isik and Hassan (2002) among others, we estimate separate annual efficiency frontiers rather than a common frontier across time by allowing an efficient bank in one year to be inefficient in another. The database is the result of data integration from Bankscope - Bureau Van Dijk (2015) and ACRI (Associazione di Fondazioni e Casse di Risparmio S.p.A., as list at 31.12.2014) sources.

Three SBs were not included due to lacks of reliable data. It is worthy to mention that 21 out of 37 SBs belongs to a Bank Group and in addition, other two are themselves head of a group¹. In the first part of the analysis, we evaluate the Italian SBs efficiency and in the second part, we compare results against their being part of a bank group. Table 3 reports the descriptive statistics of variables for the entire sample.

When referring to the needed approach to measure relative efficiency, we must consider that, as decades shows, Italian saving banks shifted from the territorial financial support on development of local economies to total commercial businesses banks that operate under complete commercial principle. In fact, they currently they take in consideration in equal measure both stakeholder values and shareholder value.

The most used approach in banking efficiency measurement is the intermediation approach (Sealey and Lindley, 1977) which considers the bank as intermediators by transforming the production factors into outputs belonging to the earnings sphere.

The aim of intermediation approach is to maximize the market value of the financial intermediary while the purpose of the production approach is to minimize the operating costs. In this light, deposits are view as part of the intermedi-

ation process of taking deposits and subsequently transforming into loans; obviously, deposits are taken into account as an input.

The production approach uses the traditional factors of production of capital and labour to produce the number of accounts of loan and deposit services. In a mix-approach, deposits are likely to be taken into account as both inputs and outputs.

With respect to the banking sector, Milma and Hjalmarsson (2002) reviewed a large literature discussing the different points of views on inputs and outputs consideration while Anouze (2010) presented a table showing that the intermediation approach is the most applied approach followed by the production approach, the value added and financial ratio approaches. However, the combination of mix-approach represents 1/5 of the studies.

Table 3: Descriptive statistics of the Simple (Inputs and Outputs) model variables of the Constant Return to Scale model (CCR) (in millions of €).

Variable		Year	Minimum	Maximum	Average	Standard Deviation
Total Assets	X_1	2014	709	52.203,5	6.462,968	9.527,318
		2013	709,7	50.162,7	6.612,943	9.657,272
		2012	799,7	49.322	6.664,708	10.157,728
Total Operating Expenses	X_2	2014	17,7	976,7	137,249	189,217
		2013	18,5	1.009,9	134,803	193,398
		2012	17,2	1.187,4	142,695	234,762
Impaired Loans	X_3	2014	64,6	4.473	960,873	1.218,421
		2013	30,8	3.895	822,822	1.055,009
		2012	29,2	3.141	609,738	808,504
Loans	Y_1	2014	610,4	37.275,8	4.443,932	6.686,661
		2013	639,1	36.391,9	4.674,408	6.778,418
		2012	670,1	35.128,1	4.827,935	7.017,046
Pre-Tax Profits	Y_2	2014	-793,1	292,6	-18,732	153,549
		2013	-2205,8	251,9	-44,251	374,821
		2012	-205,1	163,2	1,4	48,861
Total Customer Deposits	Y_3	2014	439,8	25.254,9	3.233,827	4.650,518
		2013	409	23.251,8	3.050,808	4.361,448
		2012	410,5	22.018,8	2.857,132	4.201,317

Sources: BANKSCOPE - Bureau Van Dijk (2015); ACRI (2015)

In the consideration of a general literature consensus on banking, managers can be more effective in reducing their costs rather than increasing size (scale economies) or diversifying (scope economies) the input-orientation best follows the reality of this particular sector. However, we took into consideration variables that in our opinion fit to measure the relative efficiency of the Italian SBs, in fact a mix-approach. Therefore, our DEA model consists of three inputs such as total assets, operating expenses (personnel plus other operating expenses) and

impaired loan and three outputs such as loans, customer deposits and pre-tax profits.

On the inputs side, the first input of total assets Bank is a proxy for the bank size. Total operating expenses represents the labour input built as the sum of personnel expenses and other operating expenses. When referring to risk, many take it into account as a proxy for risk the NPLs (Non Profit Loans) (see Berger and De Young 1997; Girardone et al., 2004, Fiorentino et al., 2009; Fiordelisi et al., 2011; Asmild and Zhu 2012).

In our study, the risk variable, proxy, is the use of impaired loans that needs, in any case, to be reduced. From our perspective, NPLs are worthy in order to study the effects of an occurred risk that already has an economic impact on financial statement, however, captured by the pre-tax profits variable.

On the other hand, impaired loans are better in representing the potential risks that are likely to occur and to which a bank expose themselves and stakeholder due to bank managers risk perception as well as moral hazard choices.

That is, a crucial purpose of the management, therefore a real active managerial role is to pursue high standards of loan quality in order to expose the bank to proportional and acceptable risks. With reference to the outputs side we have the total loans variable (as the sum of total customer loans and total other lending) and customer deposits that is considered by many as an input and by other as an output.

In Anouze (2010) review deposit are defined “*problematic*” as per the fact that on 148 applications deposit has been used as an input. He find that only in 48 applications deposits are used as output with the specification that some as Berger and Mester (2003), Mahesh and Rajeev (2008), and Färe et al. (2004), used expenses as one of the inputs and deposits as one of the outputs. Recently a study of Toloo and Tichý (2015) used deposits an output and in the context of the survey made by Toloo et al. (2015) it has shown that deposits can be useful as both inputs and outputs with prevalence on outputs consideration.

Eventually, when considering outputs many scholar considers outputs that belongs to the earnings sphere such as e.g. interest income or non-interest income as per the survey made by Toloo et al. (2015) and Anouze (2010).

In our research we use the pre-tax profits variable as the one that is able to encompass the traditional operational activities and the extraordinary activities that, in years of elevate volatility, may have a great economic impact on financial statements. Moreover, the pre-tax-profit as variable is able to avoid any dichotomy that for subjective DMUs reason (not only on a national basis but also when referring to an international context) could affect the measurement. For the treatment of the pre-tax profits values, we follow the translation invariance approach (Iqbal Ali and Seiford, 1990).

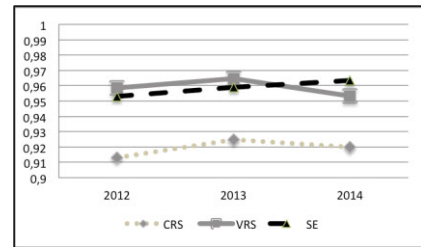
For the abovementioned reason we consider our variable model as an effective one because being able to envelope, in a restrict number of variable, different nuances of SBs financial statements.

6 Results

Table 4 show results for the relative efficiency scores for years 2012, 2013 and 2014 of the entire 37 SBs sample along with the trend graphic.

Table 4: Results of the relative efficiency of the Italian SBs during 2012-2014 period and trend graphic

GENERAL	CRS	VRS	SE
2012	0,9130	0,9584	0,9531
2013	0,9248	0,9647	0,9591
2014	0,9198	0,9532	0,9636
AVERAGE	0,9192	0,9587	0,9586



Over the mentioned three-year the technical efficiency (CRS) and the managerial efficiency (VRS) show an alternate trend while the scale efficiency (SE) presents an increasing trend.

The relative efficiency of the 21 SBs part of a group and of the 16 stand-alone shows the following results:

Table 5: Efficiency results of Italian SBs with respect to their belonging to a bank group.

(2.1) SBs belonging to a bank group				(2.2) SBs NOT belonging to a bank group			
Year	CRS	VRS	SE	Year	CRS	VRS	SE
2012	0,9535	0,9846	0,9688	2012	0,8598	0,9239	0,9324
2013	0,9592	0,9911	0,9678	2013	0,8795	0,9300	0,9475
2014	0,9626	0,9841	0,9775	2014	0,8636	0,9126	0,9453
AVERAGE	0,9584	0,9866	0,9714	AVERAGE	0,8676	0,9222	0,9417

Not surprisingly from our point of view, SBs that belong to a bank group are generally showing a better relative efficiency over the three-year period with a constant increase of the technical efficiency (CRS) and the scale efficiency (SE) while the managerial efficiency (VRS) shows an alternate trend.

Anyway, the efficiency of SBs belonging to a bank group outperforms, constantly, the efficiency of SBs not belonging to a bank group as per the following graphs.

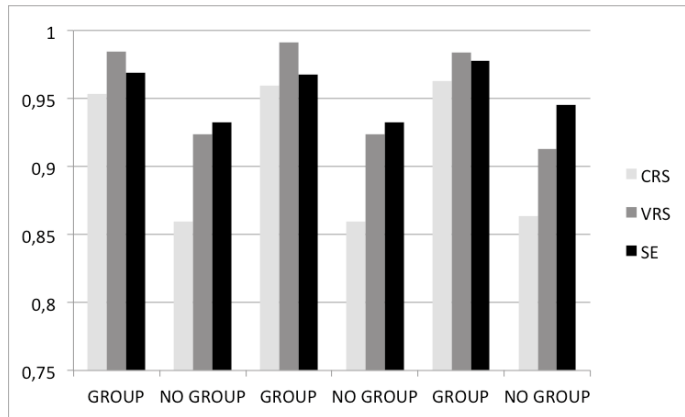


Fig. 1: Graphics showing the relative efficiency of the Italian SBs during 2012-2014 period with respect to their belonging or not to a bank group

For the sake of comparison, it is worthy to furnish, at least for the year 2014 some real parameter. That is, the two SBs recipient of the Italian Law Decree 22 November 2015, n. 183 (the distressed Cassa di Risparmio di Ferrara and Cassa di Risparmio di Chieti as also the well-known Carige) rank respectively 35, 36 and 37 on managerial efficiency (VRS) out of 37 SBs. It seems that the results of our research are in line and strictly linked with the real life.

Indeed, the benefits of being part of a bank groups are evident and this can derive from the integration of enhanced groups' managerial strategic and tactical corporate policies.

In addition, we provide an efficiency overview with respect to Piedmont Region, by aggregating the results of the four stand-alone SBs and identifying the following efficiency results and trend:

Table 5: Efficiency results of the Piedmont stand-alone SBs.

Piedmont SBs	CRS	VRS	SE
2012	0,8656	0,9174	0,9435
2013	0,8676	0,9222	0,9417
2014	0,9051	1	0,9051
AVERAGE	0,8795	0,9465	0,9301

The above results are clearly reflecting the three-year trend and that the efficiency of piedmontese stand-alone SBs is able to outperform the aggregate one the stand-alone SBs but not the one of the whole SBs belonging to a group even if in 2014 they overcome all the other SBs when considering the managerial efficiency (VRS). This is in line with general results and can be took into account as another indirect confirmation.

Conclusions

This study shows the level of relative efficiency of Italian SBs and that the level of SBs belonging to a group is relatively higher to the others in this representing an achievement of revenue maximization risks minimization. In Italy, the specific scandal-driven introduced a new legislation, a sort of appetizer of European bank resolution framework which *de facto* (paired with the Single Resolution Mechanism, SRM) transfers the cost of the crisis to shareholders and holders of other bank liabilities. Italian shareholder and debt owners pays the costs of a bad managerial behaviour.

Objectively, is it a fact that from February 2016 within e.g. Banca Etruria (one of the other two non-SBs recipient of the legislation), the decline of the patrimonial situation was caused by multiple dissipating operations (similarly to other samples) but financial criminal investigation starts also with regards to the previous top management role of the three abovementioned SBs.

All considered, is possible to argue that in the medium and long term, banks wrong policies and managerial behaviour are not representing an effective solution because eroding the most valuable asset: the trust. An equilibrate trade-off, when considering risk and efficiency coupled, will consider both as main driver of managerial activities in order to decrease the level of risks and inefficiencies.

The result of this study can be taken into account as an early warning index for the saving banks, banking risk evaluation and provide strategic information for investors and people of local territories that trusts their local SBs.

That is, managerial responsibility, control and a proper risk approach should be apply by not moving towards a system where management becomes de-facto shifted away from its responsibilities with citizens who are paying not only the losses but also the socio-economic consequences. Managers can be trustworthy but always keeping in mind that a rigorous control of their work and initiatives is the best way to make them feel not free to take unnecessary risks following their personal or political interests.

Endnotes

¹ For the sake of comparability and in order to, anyway, achieve a form of comparison, for five SBs (3 stand-alone) for which we notice a lack of available data for the years under investigation, we shift three financial statements moving its forward of one year and two of two years. Take into consideration that the years under evaluation sees no changes in the economic sector trend, if the missing data for the five troublesome SBs were available, their situation could be only slightly worst for the singular ranking and this also with respect of the research questions.

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A Quantitative model to articulate the banking risk appetite framework (RAF)

Authors

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- *Cinzia Baldan, Associate Professor, cinzia.baldan@unipd.it - University of Padova*
 - *Enrico Geretto, Associate Professor, enrico.geretto@uniud.it - University of Udine*
 - *Francesco Zen, Associate Professor, francesco.zen@unipd.it - University of Padova*
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The present work aims at implementing a quantitative model to articulate the banking risk appetite framework (RAF). The research would like to achieve two main objectives: 1) to build up the risk appetite statement (RAS) as a static 'picture' of the banks' risk profile, 2) to develop a quantitative approach with which to implement the RAF.

First, the authors calculated eight indicators describing the consumption of the banks' capital by the three risks stated in the Pillar I of the 'Basel II' accord. They then assumed the variables would follow a standardised Student's t-distribution; they found out the 99th and the 95th percentile of the distribution as the risk tolerance (RT) and risk limit (RL) levels, respectively. The authors attained the second objective by analysing the variables defined in the first step with a multiple linear regression (OLS).

The main outcomes confirm that the model allows for the generalising of the relation among risks, in terms of capital consumption. The work contributes by enlarging the academic literature about banking risk management; it also contributes by tackling the shortage of regulatory rules; moreover it offers external analysts and regulators a standardised technical instrument with which to analyse the banks' risk appetite profiles.

Keywords: Banks; Credit Risk; Market Risk; Operational Risk; Risk Appetite Framework

JEL Classification: G20, G21, C43

1 Introduction

In 2013 the Financial Stability Board (FSB) published three reports on the topic of risk governance, the first of a general nature (FSB, 2013a), the other two on the founding principles of the so-called RAF (Risk Appetite Framework; FSB, 2011; FSB, 2013b). The last of the three documents should serve on the one hand as a tool for an exchange of ideas and debate among financial institutions (and particularly SIFIs: Systemically Important Financial Institutions) and supervisors; on the other hand, it should provide the former with an easy-to-use tool to support their activities for monitoring and controlling the various classes of risk to which they are exposed. In this setting, the FSB developed a type of guideline – in cooperation with other standard-setters – concerning the key elements that a RAF should contain in order to be effective.

Given the novel content of the above-mentioned requirements and the considerable impact they should have on how banks are managed, this paper further develops a quantitative approach to structure the RAF, suggesting a possible practical application in the light of the detailed recommendations of the supervisors. After some introductory comments to examine the dictates of the currently applicable regulations and identify some of the associated problems (section 2), the authors propose an approach that could be used to adapt to the requirements of these regulations, which could be valuable for management purposes, too (section 3). This approach is then empirically applied to the balance sheets of a number of Italian banking groups (section 4). The last part of the paper (section 5) adds a few considerations prompted by the results obtained.

2 The financial stability board's rules

The outbreak of the financial crisis has obliged operators, researchers and regulators to see the need for banks to formalise an organic reference framework for their global risk management and its timely monitoring and control, in order to avoid them taking risks incompatible with their capacity to absorb and manage them (Counterparty Risk Management Policy Group, 2008; BCBS, 2009 and 2011; Senior Supervisors Group, 2010; FSB, 2013 and 2014; EBA, 2014a). The FSB has responded to this need by drawing up a set of principles that banks should follow in developing their RAF, and national supervisors have been asked to urge financial intermediaries to adopt the proposed guidelines according to criteria of proportionality. The FSB's document was published in November 2013 and is basically organised in two parts, the first containing key definitions and the second describing the roles and responsibilities of businesses' various management functions.

Although the definitions are in line with the sector's standards (ECRS-EMEA, 2013; Bank Governance Leadership Network, 2013) they prompt a few considerations concerning their content. The most important issue concerns the document's failure to explicitly define the concept of risk tolerance, a term used in the

footnotes as if it were synonymous with risk appetite and risk limits. This notion has not been used systematically (and therefore properly defined) by authorities or researchers; however, the concept of risk tolerance has been defined explicitly in a lot of works (KPMG, 2008; The Institute of Risk Management, 2011; COSO, 2012; Protiviti, 2012a).

It is worth adding that risk tolerance was included among the principles of risk management by the Committee of European Banking Supervisors (CEBS, 2010). Risk tolerance is nonetheless a necessary and useful parameter in defining risk monitoring and control methods and should therefore be included in the RAF. Risk tolerance can be identified as the difference existing between maximum assumable risk and risk appetite (analytically: $RT = RC - RA$, where RT identifies the risk tolerance; RC identifies the risk capacity, and RA identifies the risk appetite), so it could be expressed in terms of the maximum allowable deviation from an organisation's risk appetite, according to the supervisory rules established by the Bank of Italy (2006).

The proposed definition of "risk capacity" does contain a sort of hierarchy, requiring compliance first with regulatory constraints, then with limits relating to the operational environment and finally with obligations to depositors, regulators, shareholders, bondholders and so on (Cremonino, 2011).

While the first condition is an easily identifiable "area" and various statistical measures can be used to quantify it in relation to subsequent "boundaries" within which to contain an organisation's risk capacity, there are some doubts as to their measurability and suitability for representing a consistent parameter to take into account when establishing the maximum level of risk assumable. As for the most appropriate risk appetite, this must be stated for single types of risk as well as in overall terms. There are no specifications regarding how to measure the correlations between the risks, i.e. methods for their calibration or recomposition in relation to the continuous variations that might occur in their volume, which could temporarily implicate violations of certain limits; this aspect was emphasised by the Institute of International Finance (2013) in their comments on the FSB's document. Partly in the light of these considerations, the authors feel that this parameter should be expressed in terms of a range of values rather than a single figure.

The guidelines establish that risk appetite be articulated by adopting operational limits (risk limits) for each type of risk and business unit and for different legal entities, counterparty client categories, product lines, or other types of cluster of relevance for a given intermediary. There is no mention of the adoption of any so-called "early warning system", i.e. indicators to use when nearing any risk limits to enable the timely planning and proper implementation of the most suitable management initiatives to return to the desired risk-taking levels (ABI-Bain & Company, 2011; Mc Nish *et al.*, 2013).

Finally, there is the concept of risk profile, or the intermediary's exposure to risk, which is measured in instantaneous terms, using gross and net figures as appropriate. When it comes to recording this parameter, it is emphasised that currently used information technology (IT) systems are sometimes still partially

inadequate for the purpose of promptly and accurately quantifying an organisation's risk profile, especially at banking group level, for different business lines and for different legal entities (BCBS, 2013).

3 Implementation of the RAF

The effects of introducing a quantitative methodology for defining and articulating an RAF that complies with the regulations depend largely on whether a given financial institution has some requirements, i.e. a reference infrastructure, that can favour the onset and positive deployment of the effects deriving from the adoption of this new regulatory approach. The framework should be founded on the following elements: the presence of an adequate risk culture (Ashby *et al.*, 2012; CEBS, 2010; Cortez, 2011); the existence of a significant interdependence between a business's risk management and other processes (strategic planning, internal capital adequacy assessment process (ICAAP), organisation, control systems, etc); the use of effective methods for internal communication and cooperation; the use of sufficiently advanced IT systems.

The FSB document assigns the task of integrating the new parameters in the business's risk culture to the CEO and the CRO.

From the practical standpoint, the successful integration of the content of the RAF in the bank's day-to-day management mainly depends on whether there are already well-established interrelations between governance and risk management activities, i.e. between the risk management function and other company processes such as strategic-operational planning, ICAAP implementation, the organisation of single business lines and so on (Deloach, 2000; COSO, 2004).

After outlining the framework of an organisation's risk objectives, it is important for the frameworks to be reviewed periodically to adapt them to any changes to organisations' strategy and/or market variations. A consolidated aptitude for developing synergies between the various company organs and functions would contribute to the proper definition and gradual fine-tuning of the content of the RAF (Protiviti, 2012b; KPMG, 2011; Guorguiev and Gualerzi, 2013).

The feasibility of precisely identifying the risks assumed by an organisation, with a level of detail sufficient to ensure their effective monitoring, demands an IT infrastructure – or Management Information System (MIS) – adequately focused in order to capture these profiles (intrinsic in the various activities undertaken), not only to satisfy the regulators, but also for the management's purposes. The major international banks' experiences in this area still seem to be partial and rather limited (Bank Governance Leadership Network, 2013).

The different constructs for which the authors were able to schematically illustrate the more specifically quantitative section of the RAF – i.e. the RAS – with reference to a particular type of risk, are shown in the following figure (Figure 1):

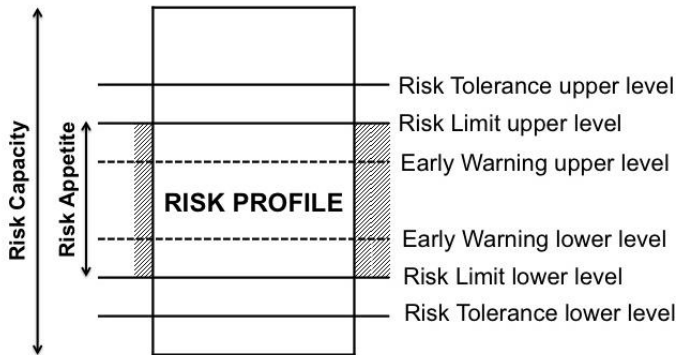


Figure 1 RAS Implementation Scheme

Source: authors' adaptation from ECRS-EMEA, 10 p. 8.

Figure 1 contains the definitions proposed by the FSB, integrated with appropriate additional parameters. Both tolerance thresholds and the early warning values are used and paired upper and lower values are provided in both cases, in the same way as for the risk limits. This is necessary because the intermediary must monitor instances not only of excessive risk-taking (upper level), but also – given its established risk-return objectives – of violations of the opposite thresholds (lower limits) that could prevent it from achieving its expected income results. The ideal position of the risk profile would come in between the two early warning thresholds; for these thresholds to be useful, the range of the risk appetite (defined by upper and lower limits) must be sufficiently broad. It is advisable to distinguish here between the actual risk profile and the target risk profile. In particular, the concept of risk profile in this second sense can be made to coincide with the desired level of risk appetite, while the actual risk profile may not necessarily coincide with the bank's real propensity to take risks. The former may come anywhere within the band defining the risk capacity (or even outside it in extreme cases), the latter, to be consistent with strategic needs, should come somewhere within the established risk appetite band. Whenever the actual risk profile nears or exceeds the limits or tolerance thresholds, various kinds of action must be taken to adjust it.

The layout shown in the diagram in Figure 1 relies on quantities that should be processed consistently with the metrics used in the ICAAP. This means that, in defining risk capacity in relation to a given type of risk, one can use the concept of "capital", a portion of which (i.e. its intermediate levels) can be used to express the RT and RL. To measure risk appetite, one should consider the objective "internal capital" (in absolute terms or as a percentage of the capital available), while the risk profile could be expressed by the internal capital actually allocated. The meanings of the definitions between inverted commas are drawn from

the provisions of the regulations for preparing the ICAAP. With a few adjustments, the proposed reconciliation can be found in ABI–Bain & Company (2011). A problem encountered was about which mechanism to use in deciding reference values for the measurements indicated in the figure and especially for the tolerance threshold and risk limit (and for both aggregates the authors need to set upper and lower levels). For the first indicator, assuming that it can be reconstructed in terms of a maximum allowable “deviation” from the risk objectives, in its definition one can consider the said statistical measure in combination with a dispersion index such as the coefficient of variation, the variance and the standard deviation. Given their relative characteristics, the authors opted for the last of these; an alternative solution might be subjectively to define a maximum percentage deviation from the risk appetite limit established in the light of the board’s expectations. Choosing a dual tolerance threshold entails using measures of variability capable of providing indications of the downside risk, and upside potential type.

The RAF subsequently developed from the RAS (prepared using the proposed parameters) would not only be an effective tool for risk control purposes; with a few simple manipulations, it could also become a useful working reference for the company’s global risk governance. This is confirmed by the fact that one interesting approach involves assessing the positioning of certain key performance indicators (KPIs) aligned with the objectives expressed by the stakeholders in relation to the risk appetite and tolerance thresholds (Hyde *et al.*, 2009; Corbellini, 2013).

It is also worth noting that there are no prior researches using regression models on risk appetite, so the present work could represent a novel approach.

4 Implementation of a Quantitative Model for the RAF

4.1 Methodology

The regulations establish that the RAF should indicate all the types of risk the bank intends to assume, identified from among those of the Pillar I and Pillar II and use them for the purposes of preparing the ICAAP.² The RAF also demands the drafting of an RAS (FSB, 2013): among other things, this document provides a summary of the quantitative measures of the risk that a financial institution is willing to accept, or that it intends to limit, for the purposes of achieving its business objectives.

In this setting, the present work proposes a two steps analysis:

First, the authors developed a quantitative model for drafting an RAS (see also fig. 1) that was applied to the financial statements of 29 Italian banking groups for the period from 2008 to 2014 ($n = 7$).

In the second stage, the resulting RAS outcomes are used to obtain a rough outline of an RAF suitable for use by an internal analyst, but also (and more im-

portantly) by an external analyst interested in knowing the position of financial institutions in terms of their propensity to accept or avoid the main types of risk to which they are exposed.

The research thus proposes to overcome some already identified shortcomings, which are: normative (failure to provide instructions in Pillar III of Basel II for the information deriving from the ICAAP to be communicated to the market); methodological (the lack of a quantitative model for reference in constructing an RAF); and academic (researchers' lack of attention to the topic of banks' RAF).

The approach used to draft the RAS considers three risks regulated as part of Pillar I of Basel II: the counterparty and credit risk, the operational risk, and the market risk. For these three types of risk, the authors considered the specific minimum capital requirements (MCR) that each bank must meet according to the dictates of Pillar I and they examined how they correlate with their Tier 1 and regulatory capital (RC). For each bank, they also considered the minimum total capital requirements (TCR), calculated as the sum of the capital requirements for each type of risk considered. The TCR were likewise placed in relation to Tier 1 and regulatory capital, identifying the overall 'weight' of the risks vis-à-vis the bank's capital. The authors thus aimed to underscore the influence of the MCR on the regulatory capital by specifying tolerance thresholds within which the credit institutions examined should keep these weights. Risk appetite statements drafted in this way would serve the purpose of identifying the banks' current situation in relation to the 'consumption' of their capital by the three types of risk considered.

For each bank (i) and for each year, the authors calculated eight indicators as ratios describing the consumption of the banks' capital by the three risks stated in the Pillar I of the Basel II accord (credit and counterparty, operational, market), with respect to Tier1 ("core capital") and the total regulatory capital (RC):

- total capital requirements/core capital ($TCR_i/Tier1_i$);
- total capital requirements/regulatory capital (TCR_i/RC_i);
- minimum capital requirements for counterparty and credit risk/core capital ($CC_i/Tier1_i$);
- minimum capital requirements for counterparty and credit risk/regulatory capital (CC_i/RC_i);
- minimum capital requirements for operational risk/core capital ($Op_i/Tier1_i$);
- minimum capital requirements for operational risk/regulatory capital (Op_i/RC_i);
- minimum capital requirements for market risk/core capital ($Mkt_i/Tier1_i$);
- minimum capital requirements for market risk/regulatory capital (Mkt_i/RC_i).

The authors assumed the indicators previously calculated as variables to analyse. They then standardised the variables in order to eliminate the outliers (e.g. in case of consolidation processes among banks they observed exceptional levels of capital requirements with respect to the year of consolidation), in particular, they identified the 2008 values for one of the elements of the dataset ("IBL

bank”) as not comparable with the remainder, hence, they excluded them from the analysis.

The authors then assumed the variables followed a standardised Student’s t-distribution. In fact, even if neither credit nor operational risk loss distributions were symmetric, they considered variables made of ratios between the amount of capital required to buffer potential losses and the regulatory capital available (“core” and total). It seemed reasonable to retain that from an “ongoing concern” perspective such ratios are distributed, across many years, following a ‘pseudo-normal’ distribution. In this sense, the Student’s t-distribution seemed to be useful to take into account the different volatility of each banks’ ratio, moreover there was no current evidence of a different distribution of that specific kind of variable, developed ad hoc for the analysis. In detail, they used a standardised Student’s t-distribution, by imposing the same degrees of freedom ($n-1$), while the mean and standard deviation were the specific values calculated for each banking group; and so the distribution captured the fat tails (e.g. in the case of extreme events the authors would expect the percentage of capital consumption to increase as the bank approaches to default). They then determined the lower bound and the upper bound of the confidence interval for mean, fixed at 99% for the risk tolerance (RT), and at 95% for the risk limit (RL). The upper bounds correspond to the upper “risk levels”; the lower bounds correspond to the lower risk levels.

The early warning levels (EW) are calculated as follows (eq. 1–2):

$$EWu_{ij} = RLu_{ij} - 0.2(RLu_{ij} - RLi_{ij}) \quad (1)$$

$$EWl_{ij} = RLi_{ij} + 0.2(RLu_{ij} - RLi_{ij}) \quad (2)$$

Where

EWu_{ij} ; (EWl_{ij}) = Early Warning upper level (lower level) of the i -th bank with respect to the j -th risk, with $i = 1-29$ and $j = 1-3$;

RLu_{ij} ; (RLl_{ij}) = Risk Limit upper level (lower level) of the i -th bank with respect to the j -th risk, with $i = 1-29$ and $j = 1-3$.

The objective of the second step of the analysis was to identify a relation between the different types of risk of the Pillar I (credit, operational, market), in order to obtain an “aggregate” analysis of the risk appetite of each bank. The RAS represents a temporal analysis with which the authors considered the changes of capital consumption across time; these changes are summarised with a sort of risk “picture” with which to compare the annual or periodical results, for each risk and each bank, separately.

From the RAF the authors changed the perspective, by investigating the existence of a relation among the upper levels of risk tolerance, and among the upper levels of risk limits, with respect both to total regulatory capital, and to Tier1.

The relation, if verified, could be usefully implemented to verify, for example, what happens to a certain type of risk when the bank modifies another one; it would also reveal how to change a certain risk exposure without changing the total risk consumption. Since different types of risk are calculated by using different approaches, the authors used the previously determined capital consumption ratios as homogeneous variables not affected by the different quantitative approaches used to estimate the risk exposures. They then developed four equations by using a cross-sectional multiple linear regression (OLS), where the variables (dependent and independent) are the results of the distribution across seven years of observations, as determined above.³ The regression is made “on levels”, rather than on changes, because the variables taken into account are expected to be stationary; a larger time period of observations could be useful to verify the assumption, or to “stationarize” the variables through the use of mathematical transformations.

Equation 3

$$Y_{ToleranceRC_i} = \beta_0 + \beta_{RCC} X_{RCC} + \beta_{RLO} X_{RLO} + \beta_{RMO} X_{RMO} + \epsilon_i$$

$i = 1, \dots, 29$

where

- $Y_{ToleranceRC_i}$ = Risk Tolerance upper level of $\frac{TCR_i}{RC_i}$
- X_{RCC} = Risk Tolerance upper level of $\frac{MCR_{CC}}{RC_i}$
- X_{RLO} = Risk Tolerance upper level of $\frac{MCR_{LO}}{RC_i}$
- X_{RMO} = Risk Tolerance upper level of $\frac{MCR_{MO}}{RC_i}$

Equation 4

$$Y_{ToleranceTier1_i} = \beta_0 + \beta_{RCC} X_{RCC} + \beta_{RLO} X_{RLO} + \beta_{RMO} X_{RMO} + \epsilon_i$$

$i = 1, \dots, 29$

where

- $Y_{ToleranceTier1_i}$ = Risk Tolerance upper level of $\frac{TCR_i}{Tier1_i}$
- X_{RCC} = Risk Tolerance upper level of $\frac{MCR_{CC}}{Tier1_i}$
- X_{RLO} = Risk Tolerance upper level of $\frac{MCR_{LO}}{Tier1_i}$
- X_{RMO} = Risk Tolerance upper level of $\frac{MCR_{MO}}{Tier1_i}$

Equation 5

$$Y_{LimitRC_i} = \beta_0 + \beta_{RCC} X_{RCC} + \beta_{RLO} X_{RLO} + \beta_{RMO} X_{RMO} + \epsilon_i$$

$i = 1, \dots, 29$

where

- $Y_{LimitRC_i}$ = Risk Limit upper level of $\frac{TCR_i}{RC_i}$
- X_{RCC} = Risk Limit upper level of $\frac{MCR_{CC}}{RC_i}$
- X_{RLO} = Risk Limit upper level of $\frac{MCR_{LO}}{RC_i}$
- X_{RMO} = Risk Limit upper level of $\frac{MCR_{MO}}{RC_i}$

Equation 6

$$Y_{LimitTier1_i} = \beta_0 + \beta_{RCC} X_{RCC} + \beta_{RLO} X_{RLO} + \beta_{RMO} X_{RMO} + \epsilon_i$$

$i = 1, \dots, 29$

where

- $Y_{LimitTier1_i}$ = Risk Limit upper level of $\frac{TCR_i}{Tier1_i}$
- X_{RCC} = Risk Limit upper level of $\frac{MCR_{CC}}{Tier1_i}$
- X_{RLO} = Risk Limit upper level of $\frac{MCR_{LO}}{Tier1_i}$
- X_{RMO} = Risk Limit upper level of $\frac{MCR_{MO}}{Tier1_i}$

4.2 Dataset

The model for drafting an ICAAP-compliant RAS was applied to 29 Italian commercial banking groups, comprising the first five groups and all the so-called large institutions, according to the Bank of Italy's (2014) classification. This sample has a market share of 68.95% (calculated on the basis of loans to customers). The authors disregarded credit institutions involved in activities other than those of the commercial banks (e.g. corporate banking, investment banking, etc.) and groups that were in receivership at the time of our analysis. They considered the consolidated financial statements as at 31 December for the years 2008–2014 ($n = 7$). They developed 29 RAS prospects with which to compare the year-end results of each bank and the related risk appetite levels; the research then presents the outcomes of the regression analysis.

4.3 Main Findings

The work now discusses the main evidences emerging from the analysis of the most significant groups.

First step: RAS development

Table 1 RAS for the “Monte dei Paschi di Siena” (MPS) Group (% values)

	TCR/Tier1	TCR/RC	CC/Tier1	CC/RC	Op/Tier1	Op/RC	Mkt/Tier1	Mkt/RC
RiskTolerance Up	133.97	77.61	129.96	75.47	10.70	6.61	6.81	4.20
RiskLimit Up	121.79	72.65	115.56	68.81	9.90	6.21	6.42	4.02
EW Up	112.33	68.80	104.38	63.63	9.28	5.89	6.12	3.88
EW Low	83.96	57.23	70.84	48.12	7.42	4.94	5.22	3.48
RiskLimit Low	74.51	53.38	59.65	42.95	6.80	4.62	4.91	3.34
RiskTolerance Low	62.33	48.42	45.26	36.29	6.00	4.21	4.52	3.16
Values as at 31.12.14	92.28	61.59	77.19	51.52	10.72	7.15	4.38	2.92

Source: authors' elaboration.

Notes:

RiskTolerance Up = upper bound of 99% confidence interval for mean = mean + (t critical value*std error of the mean)

RiskLimit Up = upper bound of 95% confidence interval for mean = mean + (t critical value*std error of the mean)

EW Up = RiskLimit Up - 0.2(RiskLimit Up - RiskLimit Low)

EW Low = RiskLimit Low + 0.2(RiskLimit Up - RiskLimit Low)

RiskLimit Low = lower bound of 95% confidence interval for mean = mean - (t critical value*std error of the mean)

RiskTolerance Low = lower bound of 99% confidence interval for mean = mean - (t critical value*std error of the mean)

Table 1 shows the RAS for the “Monte dei Paschi di Siena” Group (MPS) drafted from an ICAAP-compliant standpoint on the basis of the previously listed indicators.

The MPS is distinctive in that, as at 31 December 2014, it exceeded the upper tolerance threshold for two of the eight indicators concerning operational risk. In fact, the Op/Tier1 and Op/RC ratios show levels of 10.72% and 7.15%, respectively, while the upper tolerance levels are at 10.70% and 6.61%, respectively.

Table 2 RAS for the “IntesaSanPaolo” (ISP) Group (% values)

	TCR/Tier1	TCR/RC	CC/Tier1	CC/RC	Op/Tier1	Op/RC	Mkt/Tier1	Mkt/RC
RiskTolerance Up	83.17	62.91	72.81	54.88	6.65	5.12	4.22	3.54
RiskLimit Up	78.98	60.52	68.90	52.65	6.32	4.91	4.09	3.37
EW Up	75.73	58.67	65.86	50.92	6.07	4.74	3.99	3.24
EW Low	65.97	53.11	56.74	45.73	5.31	4.25	3.68	2.85
RiskLimit Low	62.72	51.26	53.70	44.00	5.06	4.08	3.58	2.72
RiskTolerance Low	58.53	48.87	49.79	41.78	4.74	3.87	3.45	2.55
Values as at 31.12.14	59.06	46.63	50.65	39.99	4.63	3.66	3.61	2.85

Source: authors' elaboration.

Notes: please, see Table 1

Table 2 shows the results obtained in the RAS developed for the “Intesa SanPaolo” Group (ISP). Here one can see a situation that is, in a sense, the exact opposite of the previous case of the MPS Group. The ISP has values for its indicators as at 31 December 2014 falling below its established lower risk tolerance threshold. In particular, the TCR/Tier1 ratio stands at 59.06%, while the lower tolerance threshold is 58.53%; the TCR/RC ratio stands at 46.63%, while the lower tolerance threshold is 48.87%. For operational risk the group's position is also under the lower threshold, both with respect to Tier1, and to RC. For credit risk, in particular, the institution should consider undertaking schemes in the medium- to long term to raise this specific risk profile. The risk containment measures that MPS Group should take are needed to restore its capital solidity; in the case of ISP Group, while it is not urgent to take action in the short term, it would nonetheless be advisable to review their policy for distributing loans, given that an excessive risk containment could negatively affect the institution's global profitability, gradually eroding its ability to remain competitive, and even the margins needed to operate in situations of stress.

Second step: RAF development

Equation 3

Dependent Variable: $Y_{ToleranceRC_i}$ = Risk Tolerance upper level of $\frac{TCR_i}{RC_i}$

Variables	Coeff.	Std. error	t-ratio	p-value
Const	0.0486365	0.0206635	2.3537	0.0268**
CC	0.937785	0.0462536	20.2748	< 0.0001***
Op	0.717661	0.367931	1.9505	0.0624*
Mkt	0.737784	0.210727	3.5011	0.0018***

Significance levels (bilateral test): 0.01***, 0.05**, 0.10*

Dependent Var. Mean	0.740932	Dependent Var. SQM	0.126306
SSR	0.019311	SER	0.027793
R2	0.956768	Adjusted R2	0.951580

Equation 4

Dependent Variable: $Y_{ToleranceTier1_i}$ = Risk Tolerance upper level of $\frac{TCR_i}{Tier1_i}$

Variables	Coeff.	Std. error	t-ratio	p-value
Const	0.0353168	0.0238458	1.4810	0.1511
CC	0.939042	0.0549317	17.0947	< 0.0001***
Op	1.03004	0.450483	2.2865	0.0310**
Mkt	0.810565	0.247749	3.2717	0.0031***

Significance levels (bilateral test): 0.01***, 0.05**, 0.10*

Dependent Var. Mean	0.996552	Dependent Var. SQM	0.271552
SSR	0.030067	SER	0.034680
R2	0.985438	Adjusted R2	0.983690

Equation 5

Dependent Variable: $Y_{LimitRC_i}$ = Risk Limit upper level of $\frac{TCR_i}{RC_i}$

Variables	Coeff.	Std. error	t-ratio	p-value
Const	0.0374536	0.0162524	2.3045	0.0298**
CC	0.945583	0.0381385	24.7934	< 0.0001***
Op	0.845367	0.332394	2.5433	0.0175**
Mkt	0.746204	0.208597	3.5773	0.0015***

Significance levels (bilateral test): 0.01***, 0.05**, 0.10*

Dependent Var. Mean	0.711082	Dependent Var. SQM	0.117291
SSR	0.011430	SER	0.021382
R2	0.970327	Adjusted R2	0.966766

Equation 6

Dependent Variable: $Y_{\text{LimitTier}_i} = \text{Risk Limit upper level of } \frac{TCR_i}{Tier1_i}$

Variables	Coeff.	Std. error	t-ratio	p-value
Const	0.0269389	0.0185567	1.4517	0.1590
CC	0.946736	0.0459066	20.6231	< 0.0001***
Op	1.09649	0.385046	2.8477	0.0087***
Mkt	0.799265	0.255335	3.1303	0.0044***

Significance levels (bilateral test): 0.01***, 0.05**, 0.10*

Dependent Var. Mean	0.944527	Dependent Var. SQM	0.246314
SSR	0.018680	SER	0.027335
R2	0.989004	Adjusted R2	0.987684

The results of the four equations are robust and significant (also tested for heteroscedasticity and collinearity). In particular, they reveal that the total capital consumption is mainly explained by the consumption due to 'credit and counterparty risk' (according to expectations); noticeable is the relevance of operational risk as the 'capital consuming' variable. This last result could be partially due to the way the capital charges for operational risk are computed. In particular, most of the banks of the sample apply the Basic Indicator approach (BIA), or the Standardised approach, where the 'gross income' is the proxy for the scale of business operations and thus the likely scale of operational risk exposure within each of the business lines (BCBS; 2009 and 2011). This could affect the banks' efforts to reduce risk by managing the business lines, and expose them to a considerable capital consumption attributable to operational risk.

The model allows for the generalising of the relation among risks (in terms of capital consumption), so that it could be possible, among others aspects, to infer how to change a specific variable-capital-consuming without changing the total consumption. The inferences should be calibrated with the feasibility of the model with the banks' strategic decisions (e.g. could the operational risk consumption of capital be realistically and rapidly changed? Since the results come from an analysis across banks, is it worth taking into account competitors' risk appetite attitudes or are the RAS prospects adequate for determining the overall risk appetite profile?). Nonetheless, the comparative analysis provided indications about the relation among risks and the corresponding capital consumption for a homogeneous category of banks, which could be of particular use for external analysts.

5 Concluding Remarks

The present work discusses the RAF in terms of a possible practical application of the framework in light of the national and international regulatory recommendations. For this purpose, the work proposed a quantitative model for drafting an RAS using the financial statements of 29 Italian commercial banking groups for the years 2008–2014. The resulting RAS were then analysed with a view to developing a RAF that could be especially useful for regulatory and banking supervisors, and for external analysts interested in knowing a credit institution's position in terms of its propensity/aversion to the main types of risk to which such organisations are exposed.

Our analysis of the single RASs revealed very different pictures and some extreme situations. For instance, one group was found to be exposed to an excessively high total risk for its overall risk profile, which even exceeded its upper tolerance threshold (the maximum allowable deviation from its risk appetite), and consequently pointed to the urgent need for measures designed to reduce the weight of the risks vis-à-vis its capital, coherently with the results and comments of the European Banking Authority (EBA) about the last stress test results (EBA; 2014b). On the other hand, one of the reports identified a group with indicators coming well below the lower tolerance threshold established for the risks it could assume, making it advisable to adopt schemes designed to raise this banking group's risk profile.

The results of the second step of the analysis highlighted as the total capital consumption is mainly explained by the consumption due to 'credit and counterparty risk' (according to expectations); the relevance of operational risk as capital consuming variable was also notable.

The proposed quantitative model for first drafting an RAS and then obtaining a global RAF could be applied effectively to different types of risk, making the necessary adjustments according to the particular features of the profile being examined.² The present contribution could consequently serve as a useful methodological reference for quantifying and solving the numerous problems that will occur in the course of action to comply with the recently introduced requirements, as well as an attempt to overcome normative and theoretical shortcomings identified on the particularly urgent and topical issue of risk management in banks.

Endnotes

¹ For some risk categories (e.g. reputation), but also for all the so-called pure risks in general, it is hard to imagine a bank having a particular “appetite”, since no economic returns can be derived from accepting such risks. In such cases, unless the risks are “quantifiable”, it would be better to define a generic tolerance, expressed in mainly qualitative terms. One should also note that the operational risk numbers from banks (e.g. OpVaR) do often include some “soft elements”; nonetheless, since the authors are taking the capital requirements, as is, from the financial statements for modelling purpose, they implicitly leave it to individual banks to decide what goes into the VaR.

¹ In this research, the regression equations are developed for upper levels of risk tolerance and risk limits because the authors expect banks could be more concerned about high levels of risk than lower ones, following the prudential approach recommended by regulatory authorities. Nonetheless, the model could also be applied to the lower levels of risk tolerance and risk limits: this should especially be done in the case of banks with current levels of risk consumption below the lower limits identified with RAS, in order to avoid reducing their profitability (see, for example, Table 2).

¹ Concerning the liquidity risk, for instance, one could start by considering the “Liquidity Coverage Ratio” (LCR) and the “Net Stable Funding Ratio” (NSFR), but to apply the method described here it would be advisable to consider their respective reciprocals, i.e. the ratio between the volume of net outflows at 30 days and the high-quality (first and/or second tier) cash reserves available over the same period (the LCR), and the ratio between stable loans and stable funding, both measured for periods longer than one year (the NSFR). This approach would enable the risk capacity with which to correlate the other risk parameters to be taken into due consideration

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Forecasting volatility with the VIX index: is it worthwhile?

Authors

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- *Alessio Bongiovanni, PhD Student, alessio.bongiovanni@unito.it - University of Torino*
 - *Paola De Vincentiis, Full Professor, paola.devincentiis@unito.it - University of Torino*
 - *Eleonora Isaia, Associate Professor, eleonora.isaia@unito.it - University of Torino*
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This paper explores the information content and the forecasting power of the VIX index, computed by CBOE. As a benchmark, the forecasting performance of VIX is compared to the Garch (1;1) model and historical volatility. The total period of 20 years taken into consideration (January 1995-December 2014) is split into two sub-periods, precisely before and after March 2006. This is when the trading of option contracts having as underlying VIX index began. By comparing the two sub-periods, we can judge if the information content of VIX increased after becoming a negotiable asset.

The results of the analysis are not clear-cut. The VIX index shows strong information content, but is an upward biased forecast of realized performance. When comparing VIX to Garch and historical volatility, the former is dominant, when the outlier period of the sub-prime crisis is excluded from the sample. The information content of VIX seems unaffected by the event of becoming the underlying of option contracts.

Keywords: VIX, historical volatility, Garch models, forecast ability, information content

JEL Classification: G14, G17

1 Introduction

Estimating volatility is one of the main goals of academicians and practitioners in the financial field. Forecasts of future price variability are needed to make funding or investment decisions, to value financial instruments, and to measure the risk of a portfolio. Not surprisingly a vast empirical and theoretical literature focused on this topic, proposing new methods for estimating volatility or comparing the effectiveness of techniques already in-use. In particular, our work be-

longs to that stream of literature which explores the merits of implied volatility (IV) measures, i.e. volatility measures derived from option prices. From a theoretical point of view, these measures could be superior to other types of estimates because they reflect market expectations instead of deriving from a statistical model or from historical returns. In fact, IV is often indicated as a forward-looking measure. In the following sections we will briefly review the literature on the topic and explain our incremental contribution to this literature (section 2), describe the methodology adopted by the study and the features of the sample (section 3) and present the results of our empirical investigation (section 4).

2 Literature review

As already mentioned above, the literature concerning volatility measurement is rich and extensive. One stream of literature compares various volatility-forecasting methods by pitting one against the other. Typically the expected volatility estimated through different alternative methods is used as independent variable to explain realized volatility, i.e. the dependent variable. The information content and forecasting power of the expected volatility measure are judged by looking at the significance of the beta coefficient and by testing the null hypothesis that the coefficient is equal to 1 and the intercept is equal to zero. The relative forecasting power of different volatility measures are analyzed by including them concurrently in a regression and by comparing the coefficients of the various independent variables.

Poon and Granger (2005) examined 93 studies structured in this way and published during a 20-year period. Their overall conclusion is that option-implied volatility most frequently provides better forecasts than time-series models. Among the most influential empirical studies dealing with option-implied volatility, it is worth mentioning Jorion (1995). Focusing on the currency market, he finds that implied volatility outperforms statistical time-series, even when these are given the advantage of *ex post* parameter estimates. However, IV appears to be a biased volatility forecast. Similarly, Fleming (1998), Ederington and Guan (2002), Szakmary et al. (2003), Corrado and Miller (2005) find that IV dominates historical volatility despite being an upward biased forecast. Shu and Zhang (2003) reach the same conclusion, using four different measures of realized volatility, characterized by increasing complexity. Day and Lewis (1992) find that implied volatilities derived from S&P100 index options contain incremental information when added as an exogenous variable to Garch and E-Garch models, but they are unable to draw precise conclusions as to the relative predictive power of Garch forecasts and implied volatility to *ex post* volatility.

Canina and Figlewski (1993) sharply confute the papers commented so far. Indeed, they find that implied volatility derived from S&P100 index options has no correlation at all with future volatility. However, a few years later, Christensen and Prahbala (1998) strongly criticize the method of this study, attributing the peculiar results reported to a problem of overlapping data that was not ade-

quately managed. By solving the issue, the authors confirm that implied volatility outperforms historical volatility in forecasting future volatility, even providing stronger evidence compared to previous studies. Further confutations are made by Becker et al. (2007) who find that the VIX index does not contain incremental information, when compared to a combination of model-based volatility forecasts. As in the study conducted by Canina and Figlewski (1993), this empirical study presents a problem of overlapping observations. Moreover, they do not directly compare VIX forecasts against any single model-based forecast but to quite a complicated combination that would be difficult to use in day-by-day practice. Thus, the contribution is merely theoretical.

Among the empirical works described, our study is mostly in line with Christensen and Prahbala (1998) and Shu and Zhang (2003). However, we introduce a few variations that represent our specific contribution to this field of literature:

- we contrast implied volatility not only with historical volatility but also with volatility measured through a Garch (1;1) model;
- we do not derive implied volatility from one or more ATM near-to-maturity options, as commonly done in literature, but we directly use the VIX index calculated by CBOE, which is based on OTM options and is characterized by a constant average time-to-maturity of 22 trading days;
- the long and varied period covered by our time series allows to draw some conclusions about the effectiveness of different volatility measurements in different market conditions;
- we provide evidence of the effect of VIX options trading on the information content and effectiveness of the index;
- we check the effect of multi-collinearity when comparing the information value of different volatility measurements, whereas most studies do not directly address the problem.

3 Methodology and sample

As briefly synthesized before, our paper is aimed to explore the information content and the predictive power of the VIX index. We investigate relations between implied and realized volatility and assess whether the VIX index is a better predictor of future volatility, compared to historical volatility measurements.

In the analyses, we use the daily closing prices directly calculated by the CBOE, which represent, as already said, the implied volatilities of S&P500 over the next 30-day period (22 trading days). The time horizon of our analyses is a twenty-year period, from January 1995 to December 2014, divided into two sub-periods, before and after March 2006, which represents the date when the trading of options on the VIX index began. By comparing the two sub-periods, we can judge if the information content of VIX increased after becoming a negotiable asset.

We initially run a univariate regression, considering the realized volatility as dependent variable and the VIX index as independent variable.

$$RV_t = \alpha + \beta Vix_{t-1} \quad (1)$$

With equation (1) we measure the ability of the VIX index, registered in $t-1$, i.e. 22 trading days before, to forecast the realized volatility at time t .

Now two problems need to be overcome: overlapping data (Canina and Figlesky 1993, and Christensen and Prabhala 1998) and possible errors in the realized volatility measurement. To address the first issue, for each period we consider the VIX price of the day following the measurement of the realized volatility, which will be calculated again after 22 trading days.

To manage the second problem we test four different measurements, gradually more accurate, of realized volatility, namely the standard deviation, the Parkinson extreme value estimator (1980), the Roger and Satchel estimator (1991) and the Yang and Zhang estimator (2000), and we run equation (1) for each of the different measurements of realized volatility, considered in turn as dependent variable.

We then compare the forecasting power of the VIX index with other estimation methods based on historical data, in particular with the simple moving average (SMA), the exponential moving average (EWMA) and the Garch (1;1) model. Therefore, to gauge whether historical volatility measurements are weaker predictors than implied volatility estimates, we run the same univariate regression for each predictor, equations (2) (3) and (4), and compare the relative T-statistics, the size of the coefficients and the power of the models.

$$RV_t = \alpha + \beta SMA_{t-1} \quad (2)$$

$$RV_t = \alpha + \beta EWMA_{t-1} \quad (3)$$

$$RV_t = \alpha + \beta GARCH_{t-1} \quad (4)$$

Later, following the main stream of the literature on this topic, we include both implied and historical volatilities in a multivariate regression, estimating the following equations:

$$RV_t = \alpha + \beta Vix_{t-1} + \beta SMA_{t-1} \quad (5)$$

$$RV_t = \alpha + \beta Vix_{t-1} + \beta EWMA_{t-1} \quad (6)$$

$$RV_t = \alpha + \beta Vix_{t-1} + \beta GARCH_{t-1} \quad (7)$$

All estimates are repeated for each of the four realized volatility measures and over the three time horizons described above.

Though the majority of the studies on this topic does not deal with the multicollinearity problem that might arise when the VIX index and a measure of historical volatility are entered in the same model, we prefer to face this issue by

computing and evaluating the Variance Inflation Factors. In fact, a potential imperfect collinearity between these two variables cannot be excluded *a priori*. In this regard, it has to be mentioned that few abnormal observations registered in the heart of the financial crisis—from September 2008 to April 2009—and identified both with the leverage measure and Cook's distance, have been excluded from the regressions in order to reduce the multi-collinearity effect.

Table 1 provides some descriptive statistics for the volatility estimation methodologies used in the following analysis.

Table 1 Descriptive statistics for the entire period 01/1995-12/2014 and for the two sub-period 01/1995-02/2006 and 03/2006-12/2014.

Volatility estimators for the period 01/1995-12/2014					
	Mean	Median	Minimum	Maximum	Standard deviation
VIX	20,54%	19,61%	10,05%	80,06%	8,41%
GARCH	16,24%	14,08%	7,72%	58,65%	7,68%
SMA	16,56%	14,48%	5,39%	80,76%	9,74%
EWMA	16,67%	14,52%	6,09%	74,43%	9,46%
Volatility estimators for the period 01/1995-02/2006					
	Mean	Median	Minimum	Maximum	Standard deviation
VIX	20,29%	20,18%	10,77%	37,52%	6,31%
GARCH	11,66%	10,95%	8,59%	21,75%	2,78%
SMA	15,94%	14,64%	5,84%	44,92%	7,35%
EWMA	16,16%	15,02%	6,14%	40,27%	7,17%
Volatility estimators for the period 03/2006-12/2014					
	Mean	Median	Minimum	Maximum	Standard deviation
VIX	20,76%	17,66%	10,05%	80,06%	10,51%
GARCH	16,51%	13,50%	8,26%	61,28%	9,54%
SMA	17,33%	14,24%	5,39%	80,76%	12,06%
EWMA	17,30%	14,27%	6,40%	74,64%	11,67%

For the methodologies based in historical data the volatility is computed on daily observations and expressed in annualized terms

Despite the critical market phase during the years 2008-2009, mean and median values do not present important differences among the periods analysed, remaining quite similar even when the entire sample is split into two sub-samples. Indeed, the only elements that prove the stressed conditions characterizing the second sub-period are the larger variability of each estimation method

and the maximum values, which are considerably higher. This indicates the abnormal volatility peaks reached by the market.

Furthermore, the higher mean and median values taken by the Volatility Index seem to suggest its tendency to provide a higher measure of market risk, compared to historical volatilities. This evidence could be interpreted in two different ways, precisely, on the one hand, its higher values could indicate better information content in predicting realized volatility than the historical methods but, on the other hand, this could also suggest an overestimation error made by VIX that might incorporate a greater weight given by investors to the occurrence of significant losses, which lead them to quantify a higher measure of future volatility.

4 Results

In order to clearly present our findings, this section is organized in four steps. Starting by using univariate regressions for a comparative study of dominant literature on the topic, we later examine the possible differences in terms of forecasting ability in various market phases, and compare the information content of both VIX and the historical methods by entering them as independent variables in the same regression. The last stage provide some innovations to the previous studies dealing with collinearity problems and the corresponding identification of outliers.

4.1 Comparison with previous literature

We have tested for evidence provided by mainstream literature on the topic. To this end, we first analysed the predictive power of VIX by using different alternative measurement methods for *ex-post* volatility, characterized by increasing levels of complexity. Using the same method, we also analysed the forecasting power of EWMA and Garch-model based volatility. In particular, the following tables only report the results obtained using EWMA but an unreported robustness check made by substituting EWMA with SMA confirms the evidence.

Table 3, 4, and 5, first section, detail the result of this analysis. Basically we find evidence that is consistent with previous literature. First of all, the results indicate positive and statistically significant relations between VIX and realized volatility, proving that it actually contains information about *ex post* volatility. Despite this, with the sole exception of Garch models, when realized volatility is computed by standard deviation, all the estimation methods are biased indicators of the *ex post* measured.

The remarkable values of R^2 in the various regressions in which VIX is used as independent variable indicate its ability to explain a significant part of realized volatility and, compared with the values calculated on the regression based on historical methods, it seems to have a better predictive power. And yet, no clear

relations can be observed between said capacity and the precision of the realized volatility measure as previously supposed.

Focusing on method based on historical data, Garch models have a lower information content than the EWMA, although they should theoretically provide a more accurate estimate as a result of the explicit consideration of the volatility clustering phenomenon. However, it should be considered that the Garch parameters are assumed to be constant for the entire period examined, and this could, therefore, be the principal cause of its lower information content.

4.2 Analysis of predictive power in various market conditions

In order to test for the predictive power of different *ex ante* volatility measurements, we split the 20-year period into two sub-periods characterized by different market climates, and precisely a quiet first one (1995-2006), and a turbulent second one (2006-2015), as specified in comments to the descriptive statistics. The two sub-periods also allow to evaluate the effect of option trading with VIX underlying on its information content.

Some interesting elements can be highlighted by considering Tables 2, 3 and 4, second and third section. First, no significant differences can be observed between the coefficients of determination, although the second sub-period presents a market fall, followed by an explosion of volatility levels that, however, seems to be well captured by VIX. Furthermore, this lack of differences indicates the absence of substantial changes in the market participant's behaviour towards the expected volatility, suggesting that the introduction of VIX option contracts has not actually triggered important changes in relations between implied and realized volatility.

With regard to historical volatilities, both methods are characterized by significant losses in terms of forecasting ability in the first sub-period while, instead, in the second one they are affected by a growth in their forecasting ability that makes the corresponding R^2 more consistent with the VIX one.

The above evidence seems to point out the absence of a predictive method that significantly dominates the others in estimating future realized volatility during the period 03/2006-12/2014 because of the very small differences in R^2 regressions.

Moreover, the dynamics described above suggest that the extreme market conditions could likely have a direct impact on the forecasting ability, with all the historical methods seemingly gaining predictive power, compared to the previous period and to VIX that, instead, shows the same explanatory power across the different periods.

Table 2 Regression models for the different measures of realized volatility, assuming as independent variables the VIX level.

Dependent variables for the period 1995-2014				
	$\sigma_{\text{Dev.std}}$	σ_{Park}	$\sigma_{\text{R\&S}}$	$\sigma_{\text{Y\&Z}}$
Intercept	-0,02343**	-0,0018	0,004458	-0,0007093
	(0,0108)	(0,0086)	(0,0081)	(0,0084)
VIX _{t-1}	0,9202**	0,6701**	0,6231**	0,6799**
	(0,0487)	(0,0387)	(0,0366)	(0,0377)
N	228	227	227	227
R ²	0,6120	0,5708	0,5631	0,5909
F(2,225)	48,57	264,17	334,06	255,36
Dependent variables for the period 01/1995-02/2006				
Intercept	-0,01961	-0,008285	-0,001676	-0,005197
	(0,0146)	(0,0117)	(0,0110)	(0,0113)
VIX _{t-1}	0,8765**	0,7010**	0,6584**	0,7007**
	(0,0687)	(0,0550)	(0,0516)	(0,0531)
N	127	126	126	126
R ²	0,5658	0,5670	0,5680	0,5843
F(2,125)	55,8444	215,998	265,12	213,67
Dependent variables for the period 03/2006-12/2014				
Intercept	-0,01189	0,001873	0,008018	0,002822
	(0,01670)	(0,01325)	(0,01257)	(0,01298)
VIX _{t-1}	0,8913**	0,6533**	0,5989**	0,6639**
	(0,07170)	(0,05690)	(0,05398)	(0,05573)
N	101	101	101	101
R ²	0,6095	0,5711	0,5542	0,5891
F(2,100)	11,64	87,64	116,07	83,88

Standard errors in parentheses, * indicates significance at the 10 percent level, ** indicates significance at a 5 percent level, *** indicates significance at the 1 percent level

Table 3 Regression models for the different measures of realized volatility, assuming as independent variable the exponential weighted moving average (EWMA).

Dependent variables for the period 01/1995-12/2014				
	$\sigma_{Dev.std}$	σ_{Park}	$\sigma_{R\&S}$	$\sigma_{Y\&Z}$
Intercept	0,03543**	0,03950**	0,04142**	0,04041**
	(0,0089)	(0,0069)	(0,0064)	(0,0066)
EWMA _{t-1}	0,7832**	0,5788**	0,5468**	0,5920**
	(0,0463)	(0,0358)	(0,0332)	(0,0347)
N	227	227	227	227
R ²	0,5600	0,5369	0,5467	0,5648
F(2,225)	10,99	110,22	152,39	104,88
Dependent variables for the period 01/1995-02/2006				
Intercept	0,05470**	0,04742**	0,04821**	0,04907**
	(0,0125)	(0,0098)	(0,0089)	(0,0094)
EWMA _{t-1}	0,6481**	0,5397**	0,5219**	0,5482**
	(0,0708)	(0,0552)	(0,0505)	(0,0530)
N	126	126	126	126
R ²	0,4033	0,4355	0,4627	0,4636
F(2,124)	12,45	58,23	77,25	56,43
Dependent variables for the period 03/2006-12/2014				
Intercept	0,03294**	0,03395**	0,03610**	0,03493**
	(0,01322)	(0,01041)	(0,009701)	(0,01010)
EWMA _{t-1}	0,8115**	0,5993**	0,5570**	0,6118**
	(0,06331)	(0,04984)	(0,04646)	(0,04835)
N	101	101	101	101
R ²	0,6240	0,5936	0,5921	0,6179
F(2,99)	4,43	50,88	73,50	48,59

Table 4 Regression models for the different measures of realized volatility, assuming as independent variable the historical volatility computed by a GARCH(1.1) models

Dependent variables for the period 01/1995-12/2014				
	$\sigma_{Dev.std}$	σ_{Park}	$\sigma_{R\&S}$	$\sigma_{Y\&Z}$
Intercept	0,01952*	0,02872**	0,03231**	0,02999**
	(0,0111)	(0,0086)	(0,0080)	(0,0084)
GARCH _{t-1}	0,9016**	0,6603**	0,6172**	0,6716**
	(0,0615)	(0,0477)	(0,0447)	(0,0467)
N	227	227	227	227
R ²	0,4889	0,4602	0,4588	0,4788
F(2,225)	1,56	51,61	74,69	45,96
Dependent variables for the period 01/1995-02/2006				
Intercept	-0,01936	-0,01542	-0,01423	-0,01586
	(0,0230)	(0,0180)	(0,0164)	(0,0173)
GARCH _{t-1}	1,533**	1,287**	1,259**	1,317**
	(0,1920)	(0,1500)	(0,1371)	(0,1441)
N	126	126	126	126
R ²	0,3396	0,3725	0,4048	0,4022
F(2,124)	36,25	11,23	10,59	37,25
Dependent variables for the period 03/2006-12/2014				
Intercept	0,01338	0,01999	0,02355**	0,02090*
	(0,01538)	(0,01212)	(0,01135)	(0,01183)
GARCH _{t-1}	0,9682**	0,7120**	0,6592**	0,7256**
	(0,08058)	(0,06348)	(0,05945)	(0,06200)
N	101	101	101	101
R ²	0,5932	0,5596	0,5540	0,5805
F(2,99)	0,63	20,70	33,15	18,35

4.3 Comparison between the predictive power of the various estimation methods

As third step of our analysis, we placed the Volatility Index against historical and Garch-based volatility to test for a supposed superiority of implied volatility.

Tables 5 and 6 present the results of this analysis. Focusing on the entire period, the values of the VIX_{t-1} coefficients, which range from 0,3739 to 0,9113, are higher than the historical methodology ones, and indicate a better forecasting

ability for volatility derived from option prices. This evidence is validated by two additional elements, first, the coefficient for historical volatility decreases considerably in all measurement methods studied and, furthermore, the effect of R^2 regressions is not such as to justify their inclusion, because they remain substantially unchanged.

These results are also confirmed during the first sub-period 01/1995-02/2006 where the higher forecasting ability of VIX surfaces once again. In particular, this period differs from the entire one only for the slope coefficients of the historical estimation techniques that are not statistically different from zero, thus confirming the superiority of VIX.

The analysis of the second sub-period, instead, provides evidence that differs from the above, with slight differences between Garch and EWMA volatilities. Indeed, for the latter method, the differences in slope coefficients against VIX ones are more notable and are surprisingly higher in all the measurement methods considered, such as produce VIX coefficients that are not significantly different from zero.

The Garch estimates too, in this specific sub-period, retrieve predictive power, although the clear superiority of one estimation method cannot be observed. Order relations are variable and depend on the measuring techniques analysed; moreover, the differences between coefficients is not adequate to argue which presents the better performance.

Hence, the above evidence seems to contradict the evidence that characterizes the entire period and the first sub-period, with results that contrast considerably with those referring to said time intervals. Generally, in this period, which is characterized by extreme volatility values caused by the financial crisis originated by the Lehman Brothers' bankruptcy, the forecasting ability of VIX closely resembles that of the various historical estimation methods and, therefore, it is not possible to judge which of them possesses better predictive power. Only the exponential moving averages seem to dominate the implied volatility.

Finally, it is interesting to underscore the differences between EWMA and Garch models; although the latter methods take in account volatility clustering and the EWMA can be seen as a particular case presented by them, the achieved results suggest the superiority of the latter methods, indicating that the greater weight given to the lagged index return and failure to consider long-term average variance might allow them to obtain better performance in a more variable market phase.

Table 5 Regression models for the different measures of realized volatility, assuming as independent variable the VIX level and the historical volatility computed by the exponential weighted moving average (EWMA)

Dependent variables for the period 01/1995-12/2014				
	$\sigma_{Dev.std}$	σ_{Park}	$\sigma_{R\&S}$	$\sigma_{Y\&Z}$
Intercept	-0,01323	0,00722	0,01496*	0,009609
	(0,0116)	(0,0092)	(0,0086)	(0,0089)
VIX _{t-1}	0,6876**	0,4561**	0,3739**	0,4351**
	(0,1157)	(0,0915)	(0,0857)	(0,0886)
EWMA _{t-1}	0,2269**	0,2099**	0,2444**	0,2401**
	(0,1030)	(0,0815)	(0,0764)	(0,0789)
N	227	227	227	227
Adjusted R ²	0,62	0,5832	0,5822	0,6071
F(3, 224)	34,07	182,74	235,27	179,58
Dependent variables for the period 01/1995-02/2006				
Intercept	-0,01757	-0,005486	0,002497	-0,001501
	(0,0151)	(0,0121)	(0,0112)	(0,0116)
VIX _{t-1}	0,8427**	0,6169**	0,5330**	0,5897**
	(0,1246)	(0,0992)	(0,0924)	(0,0953)
EWMA _{t-1}	0,03215	0,08877	0,1323	0,1172
	(0,1094)	(0,0871)	(0,0811)	(0,0837)
N	126	126	126	126
Adjusted R ²	0,5651	0,5706	0,5772	0,5908
F(3; 123)	36,21	144,39	180	144,2
Dependent variables for the period 03/2006-12/2014				
Intercept	0,01080	0,02042	0,02826**	0,02287
	(0,01842)	(0,01458)	(0,01367)	(0,01417)
VIX _{t-1}	0,3649*	0,2231	0,1291	0,1988
	(0,2135)	(0,1690)	(0,1584)	(0,1642)
EWMA _{t-1}	0,5011**	0,4096**	0,4472**	0,4427**
	(0,1921)	(0,1521)	(0,1426)	(0,1478)
N	101	101	101	101
Adjusted R ²	0,6273	0,5925	0,5865	0,6158
F(3, 98)	10,48	64,56	87,57	63,42

Table 6 Regression models for the different measures of realized volatility, assuming as independent variable the VIX level and the historical volatility computed by a GARCH(1,1) model

Dependent variables for the period 01/1995-12/2014				
	$\sigma_{Dev.std}$	σ_{Park}	$\sigma_{R\&S}$	$\sigma_{Y\&Z}$
Intercept	-0,02294**	-0,001702	0,004625	-0,0005701
	(0,0109)	(0,0086)	(0,0082)	(0,0084)
VIX _{t-1}	0,9113**	0,6530**	0,5942**	0,6558**
	(0,1083)	(0,0859)	(0,0811)	(0,0836)
GARCH _{t-1}	0,009463	0,02104	0,03561	0,02969
	(0,1188)	(0,0943)	(0,0890)	(0,0918)
N	227	227	227	227
Adjusted R ²	0,6117	0,5709	0,5634	0,5911
F(3, 224)	31,76	175,38	221,93	169,6
Dependent variables for the period 01/1995-02/2006				
Intercept	-0,01961	-0,01561	-0,0144	-0,01605
	(0,0188)	(0,0150)	(0,0139)	(0,0144)
VIX _{t-1}	0,8657**	0,6482**	0,5667**	0,6225**
	(0,1085)	(0,0865)	(0,0806)	(0,0832)
GARCH _{t-1}	0,02177	0,1552	0,2694	0,2298
	(0,2457)	(0,1959)	(0,1824)	(0,1883)
N	126	126	126	126
Adjusted R ²	0,5648	0,5692	0,5756	0,5893
F(3,123)	36,16	143,77	179,15	143,5
Dependent variables for the period 03/2006-12/2014				
Intercept	-0,007084	0,005648	0,01217	0,006873
	(0,01678)	(0,01332)	(0,01258)	(0,01301)
VIX _{t-1}	0,5568**	0,3904**	0,3096*	0,3818**
	(0,2088)	(0,1658)	(0,1565)	(0,1619)
GARCH _{t-1}	0,3916*	0,3078*	0,3386*	0,3303*
	(0,2299)	(0,1825)	(0,1723)	(0,1782)
N	101	101	101	101
Adjusted R ²	0,6129	0,5747	0,5623	0,5949
F(3, 98)	8,87	60,46	56,23	58,43

4.4 Analysis of collinearity problems and identification of outliers

In order to conduct a detailed analysis of these singular results that differentiate the second sub-period from the others, we deemed it necessary to study a potential problem of multi-collinearity that could affect the variables when they are jointly analysed in the same regression. To this end, we have examined the Variance Inflation Factors (VIF) for the two different estimation methods during the analysed periods, distinguishing for each one the related VIF with the VIX; the results of which, for brevity, have not been reported. First of all, it is important to underscore the fact that all VIFs are lower than the critical value usually accepted, which is ten.

Only the sub-period 03/2006-12/2014 is concerned by VIFs closer to their critical value, which could point out the presence of a misinterpretation in evaluating the forecasting ability based on the above regression. The evident difference from values recorded in the previous sub-period could likely be related to the existence of some extreme observations that characterize this period, suggesting that they might have a significant influence on the tested relations between the different estimation methods.

In order to reduce the collinearity problem, we have ran a new regression series, which refers to a different sub-sample derived by excluding the outliers identified through the use of the leverage influence measure and Cook's distance applied to the original regressions. Their importance is evident by comparing the VIFs of the same period based on the full samples. Indeed, for all the variables studied, the new sub-samples present considerable reductions in the VIF that halve their values and make them lower than the critical one.

The reductions in VIFs, excluding the volatility peak reached during the years 2008-09, confirm the initial theory that these observations have a significant impact on the relations examined. Table 7 refers only to this last sub-period, showing the results of the new regression run based on the above sub-sample. The new regressions highlight remarkably better performances for VIX than those accomplished in the same sub-period with the full sample. This allows them to dominate both Garch and EWMA volatilities in terms of predictive power, and their contribution becomes statistically non-significant as reported by their considerably low coefficients.

In particular, the latter is the method that presents the larger decrease in its coefficients, underscoring the effect of these extreme observations, especially considering the superiority that surfaced for the EWMA in the full sample, which is completely reversed, excluding the outliers.

These results, which are more consistent with the previous literature, indicate that the volatility implied in the option prices, which directly reflects market expectations, seems to better approximate the actual market movements. This could point out the excellent efficiency of market options considering the greater incidence of institutional investors in it, which should access a wider and better information base and, hence, improve the market forecast, subsequently increasing the predictive power of implied volatility.

Table 7 Regression models for the different measurements of realized volatility for the subperiod 03/2006-12/2014, excluding the outliers

Dependent variables for the period 03/2006-12/2014				
	$\sigma_{\text{Dev.std}}$	σ_{Park}	$\sigma_{\text{R\&S}}$	$\sigma_{\text{Y\&Z}}$
Intercept	0,01214	0,02702*	0,02993**	0,02752**
	(0,01891)	(0,01425)	(0,01273)	(0,01343)
VIX _{t-1}	0,7045**	0,4147**	0,3782**	0,4357**
	(0,2068)	(0,1558)	(0,1392)	(0,1469)
EWMA _{t-1}	0,04052	0,1042	0,1035	0,09344
	(0,1938)	(0,1461)	(0,1305)	(0,1377)
N	95	95	95	95
Adjusted R ²	0,4139	0,3742	0,3931	0,4129
F(3,90)	16,40	95,75	135,64	99,61
Dependent variables for the period 03/2006-12/2014				
Intercept	0,01093	0,02366*	0,02666**	0,02457*
	(0,01798)	(0,01356)	(0,01213)	(0,01279)
VIX _{t-1}	0,7498**	0,4486**	0,4343**	0,4892**
	(0,2074)	(0,1565)	(0,1399)	(0,1476)
GARCH _{t-1}	-0,008319	0,08642	0,05656	0,04738
	(0,2440)	(0,1841)	(0,1646)	(0,1736)
N	95	95	95	95
Adjusted R ²	0,4136	0,3722	0,3897	0,4104
F(3,90)	16,38	95,35	134,72	99,07

5 Conclusion

The main aim of this study is to investigate whether the Volatility index is able to predict future realized volatility and what the corresponding information content is. Consistently with mainstream literature, our results point out that VIX is a biased estimator of realized volatility, although its ability to explain a considerable portion of realized performance allows it to dominate the other methods based on historical data. This evidence is partly true even when the entire 20-year period is split into two sub-periods in which VIX maintains a high and comparable predictive power in each of these. Moreover, despite the option of taking a direct stand in terms of expected volatility by introducing options contracts drawn up based on VIX, the above-mentioned gap points out that the infor-

mation content has not changed significantly, thus proving the absence of incremental information about future volatility in the expectations of investors. By directly analysing the predictive power of VIX against that of the methods based on historical data, the superiority of VIX is confirmed in the entire period and the first sub-period, while the second one is characterized by results that are not as clear. These differences between the two sub-periods prompted us to deepen our analysis in an attempt to explain them. In particular, we found collinearity issues that affect the results in the period 2006-2015, and are basically caused by the presence of some abnormal observations during the most volatile market phase that started in September 2008. Leaving out these outliers, indeed, the relations between implied and historical volatilities returns consistent with the previous studies, showing the better predictive power of VIX.

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A multi-disciplinary financial and accounting framework to outstanding debt assessment and default for lease agreement

Authors

- *Alessandro Migliavacca, Ph.D. Candidate in Business and Management, University of Turin*
- *Mariacristina Uberti, Associate Professor in Financial Mathematics, University of Turin*
- *Luigi Puddu, Full Professor in Accounting, University of Turin*
- *Luisa Tibiletti, Associate Professor in Financial Mathematics, University of Turin*

Italian law lacks in an explicit regulation about lease agreement so many different events during the lifetime of these contracts are inferred by analogy with similar regulated contracts. Most of mooted issues arising in those agreements lie on the border between law and financial calculus and may generate, in certain circumstances, controversies especially in the evaluation of the outstanding debt at a given epoch during the contract lifetime.

One of the most debated and interesting events involves the evaluation of the outstanding debt at a given epoch during the contract lifetime in the Italian legislative framework. Referring to a Peccati's model (1986) which proposes to split the debt into three components (outstanding debt, damages and penalty), Migliavacca et al. (2015) have recently highlighted how this proposed decomposition settlement provides a simple and transparent procedure that is compatible with both financial and accounting perspective. Moreover, Migliavacca et al. (2015b) have extended the previous results showing how the calculation and assessment of the components of the debt turn out to be fruitful in two different contexts: the owed in the course of a lawsuit; the financial accounting and reporting according to some accounting methodologies (In-balance-sheet, such as IFRS, and off-balance-sheet, such as Italian GAAP).

In this paper, given the capability of the proposed approach to provide a decomposition of the credit in a transparent and handle way to use, from both a financial and an accounting viewpoint, actual cases are studied within a multi-disciplinary framework. Moreover the model is generalized taking into account also default interest and with the early termination of the contract closer or further to the maturity date of the lease agreement.

Keywords: Lease Contract, Leasing, Early Termination, Accounting Principles, Financial Approach.

JEL Classification: C02 - C65 - M41

1 Introduction

Most of the events that can occur during the lifetime of a lease contract in the Italian law framework, are inferred by analogy with similarly regulated contracts such as the conditional sales. In particular, the assessment of the lease values must be frequently carried out in the presence of an early termination. Because of the frequency of this particular event, the Italian legislator could be supposed to take action in order to balance all the parts' interests. Up to date it has not, and several issues related to this particular case exist since the 1980s (Hull, 1982; McConnell and Schallheim, 1983; Peccati, 1986; Lease et al., 1990). The problem is current, because there is still not an ultimate solution, even taking into account all the latest judicial decisions. On the opposite, different judges use different approaches, ad hoc created, time by time (Carretta and Nicolini, 2004; Nicolini, 2004)

In the termination of a lease agreement, the same procedures defined for the conditional sale have to be applied. On the one hand, the seller the seller/lessor must return the collected leases. On the other hand, the buyer/lessee must pay a sum composed by: (i) a fair reimbursement (that takes into account the use and the rent of the asset); (ii) impairment compensation; (iii) the contingent depreciation of the asset (both for attrition or normal use); (iv) the major impairment due to an abnormal usage (see, e.g., (Van Horne James, 2002).

The aforementioned components of the debt can be reduced into two shares: (i) a debt for the not paid and not expired instalments (capital share), (ii) a debt (or a provision) for impairment and penalties (damage share).

Some of the most critical issues arising in those agreements appear to be on the edge between law and financial calculus. This may generate controversies, in certain circumstances, particularly when approaching to the estimation of the outstanding debt at a given epoch during the contract lifetime. The main issue for all the different contract typologies, is the definition of a fair evaluation method for the instalments the lessee owes to the lessor (see, e.g., (Van Horne and Wachowicz, 2008)).

By and large, the discount rate defined by the contract in the termination clauses is lower than the contractual discount rate and the prime discount rate. This makes it to include also an amount for the damage compensation and a penalty. The determination of the best-fitted discount rate is a central problem, which must take into account how the Italian legislation defines the damage.

In this paper, we present an evaluation method that presents some critical strengths.

From an accounting and practical perspective, the separation between a capital share and a damage share has several strong points. First, it allows a better definition of the different income losses (extraordinary items, penalties, late payment interests), also because the VAT is only applicable on the capital part of the debt. Second, in the case of a judgment about the penalties and the damage, and a precise quantification of both, a separation of the debt from the provisions is pivotal in order to record them properly in accounting.

From a judicial perspective, the judge can use a scientifically justified method, in order to define precisely if the penalties have to (or can) be reduced. Indeed, the judge (as well as the accountant) is expected to conduct a thorough evaluation of the impairment compensation. Moreover, it is unacceptable to have a compensation higher than the profit the lessor could foresee from the normal minimum payments of the contract.

In this regard, we proposed to carry out the evaluation of the lump-sum debt in an early termination of a lease agreement using a financial model set up by Peccati (1986) that splits up this debt in three components: (i) the outstanding debt, (ii) the claim for damages and (iii) the penalty.

The calculation and evaluation of the separate parts of the debt are relevant not only in the course of a lawsuit, but also from the viewpoint of financial accounting and reporting. Lastly, as pointed out in Migliavacca *et al.* (2015a), depending on the Accounting Principles (Italian GAAP, IFRS) different approaches to the risk disclosure must be taken into account.

In this paper, we broaden the existing studies of Peccati (1986) and Migliavacca *et al.* (2015a; 2015b) in the presence of default interest, in particular when the early termination date is closer or further from the maturity of the contract. An integrated financial and accounting approach is used, coupling financial accounting and reporting in accordance with several accounting methodologies (in-balance-sheet and off-balance-sheet methods). This theoretical multi-disciplinary framework offers new interpretations the controversial points of this subject

The paper is organized as follows. In Section 2, the financial model is presented: in Section 2.1 notation and the outstanding debt assessment of a lease agreement are set up; in Section 2.2 Peccati's credit decomposition model is sketched out. In Section 3, the financial model is integrated with accounting approaches for credit decomposition regarding to accounting methodology of "footnotes only" in Section 3.2 and Accounting methodology of capitalization in Section 3.3. Section 4 exemplifies and Section 5 concludes.

2 The financial model

2.1 Lease agreement: notation and outstanding debt assessment

Let A be the price of the asset referring to a lease agreement and let R_s be the installments due to the lessor by the lessee at maturities t_s , where $t_0 \leq t_s \leq t_n = T$, $0 \leq s \leq n$ with t_0 to and T denote the contract date and the final maturity date, respectively. In this context of financial lease, the last instalment refers to the asset's purchase price agreed to the subscription of the contract to be paid at the expiration T for the exercise of this option.

If i is the *contractual rate* (i.e. the Internal Rate of Return, IRR) implicit in the lease and chosen by the lessor, then the price A is typically determined as the total present value of instalments R_s , $t_0 \leq t_s \leq t_n = T$, at contract date t_0 :

$$A = \sum_{s=0}^n R_s \cdot (1 + i)^{-(t_s - t_0)}$$

In the presence of an early termination of a lease agreement at maturity t_k of the first not paid instalment R_k by the lessee, before the final maturity date T , the evaluation of the outstanding debt at a given epoch t_k during the contract lifetime is given by the present value $V(i)$ at the IRR

$$V(i) = \sum_{s=k}^n R_s \cdot (1 + i)^{-(t_s - t_k)} \quad (1)$$

of the payments still R_s due to the lessor at maturities t_s , where $t_k \leq t_s \leq t_n = T$, $k \leq s \leq n$.

On the other hand, the contractual clauses of a lease agreement provide the calculation of the following present value $V(j)$ at a *rate of resolution* j

$$V(j) = \sum_{s=k}^n R_s \cdot (1 + j)^{-(t_s - t_k)} \quad (2)$$

of the instalments R_s still due to the lessor at maturities t_s .

As noted before, the value $V(j)$ should include the components of credit relating to: (i) a debt for the not paid and not expired instalments (capital share); (ii) a debt (or a provision) L for impairment; (iii) penalties P (damage share).

2.2 Credit decomposition

Referring to Peccati's model (1986), the lump-sum credit $V(j)$ in an early termination of a lease can be split into the previous three components (debt, damages and penalty) by involving not only the contractual IIR but also the most common discount rates gathered on the financial markets.

Since the reference discount rate j for the evaluation of the credit is usually much lower than the contractual rate i , it follows the present value $V(i)$ of payments to the rate i is less than the lump-sum credit requested by the lessor for the early termination of the contract, that is

$$V(i) < V(j).$$

This difference $V(j) - V(i)$ can be interpreted as the sum of the amounts of *compensation for loss* L for the early termination of the contract and *penalty* P . Then the equation (2) turns out to be:

$$V(j) = V(i) + L + P \quad (3)$$

It is interesting to point out how Peccati's model (1986) is capable to decompose in the lump-sum credit $V(j)$ constituting the lessee's credit into three parts: outstanding debt $V(i)$, the impairment compensation and the penalty.

Indeed, the compensation for loss L can be quantified as the amount to be paid at maturity t_k such that the lessor gets the same profit it would have in case of non-interruption of the operation. This amount may, therefore, be estimated as difference between the expected profits and the realized profits by the lessor.

In this regard, the expected profit can be evaluated by taking the *prime rate* p as passive reference rate for calculating the present value of the not paid instalments (about the importance of the choice of the rate see, *e.g.*, Van Horne, 2002 and Van Horne and Wachowicz, 2009). As it is customary, we assume that

$$j < p < i$$

it follows $V(i) < V(p) < V(j)$ and then that the *impairment compensation* is

$$L = V(p) - V(i) \quad (4)$$

So that the penalty is

$$P = V(j) - V(p) \quad (5)$$

thus the *penalty* can be quantified as the difference between the present value of the not paid instalments, evaluated at the official interest rate, and the present value of the same instalments, evaluated with respect to the prime rate.

In this way, substituting equations (4) and (5) into equation (3), the lump-sum credit can be re-written:

$$V(j) = V(i) + [V(p) - V(i)] + [V(j) - V(p)] \quad (6)$$

3 The integrated financial and accounting model

3.1 Accounting approaches for credit decomposition

The examined model also match accounting purposes, which present some divergences depending on the chosen accounting method/theory.

As aforementioned, if the contract ends before the maturity T , with not paid or not expired instalments, the debt $V(j)$ of the equation (2) can be broken down in two components [see equation (6)]:

- a debt for the not paid and not expired instalments (capital share) – let it be $V(i)$ of the equation (1);
- a debt (or a provision) for impairment - L of (4) - and penalties (damage) - P of (5).

The assessment method shown above is suitable for this intent.

According to the literature (Wilkins and Zimmer, 1983, Beattie *et al.*, 2006, Goodacre, 2003, Imhoff and Thomas, 1988, McGregor, 1996), financial leases accounting can be practiced through two main methodologies. The first methodology requires only a disclosure of the lease in the balance sheet footnotes (i.e. Italian Generally Accepted Accounting Principles – OIC 12). The second requires the capitalization of the asset by the lessee (i.e. International Financial Reporting Standard – (IFRS, n.d.)). Both methodologies reflect symmetrical accounts in the lessor financial statement.

In the following we discuss the impact of each methodology on the model.

3.2 Accounting methodology: footnotes only (Italian GAAP)

According to the “footnotes only” approach, both the asset and the debt are recorded in the footnotes and depreciated according to the debt amortization schedule, whilst the instalments are recorded as operating costs. Whatever the termination date, no asset or debt are recorded in the financial statement except from those referring to not paid instalments. A recent modification in the balance sheets regulations excluded the possibility to record footnotes accounts, so the related amounts will be disclosed in the explanatory notes.

Then, in case of termination before the maturity date, from the lessee point of view, the capital share debt is offset by a supervision that is reported in the profit and loss statement (OIC 12, §105.d) for the $V(i)$ amount (plus VAT, where applicable).

If we consider the terminal value in the calculation of the $V(i)$ thus we actually acquire the property of the asset, the amount will be recorded as the cost of the asset, which will be depreciated according to the rules for the specific asset and its economic life. If the terminal value is not considered, no asset will be recorded in the financial statement, because of the return to the lessor.

On an accrual basis, this comprehensive instalment for termination is recorded in the profit and loss statement of the same year.

In the absence of any judicial question, also the penalties and the damage are recorded as a debt. Anyways, a question could be raised over the contractual clauses regulating the penalties. In this case, the judge can reduce the penalty, if its amount is greater than the fair profit that the lessor could expect from the normal execution of the contract. The penalty and the major impairment compensation are recorded as operating costs for the amounts L and P , which are calculated by the equations (4) and (5), respectively. Again, on an accrual basis, it must be recorded in the same year of the termination.

In case of question on the penalties, the amount P must be recorded as a provision for legal risks, together with the judicial cost estimate (OIC 31, §60). This recording is to adhere to the prudence principle of financial reporting and compliant to an accrual basis of accounting – it maintains the cost/provision in the balance sheet of the termination year, even if the related cash flow will be in the next or several years later.

The records for the lessor are symmetrical in the first two cases. If there is a lawsuit for the (re)determination of the penalties, the record will be the same as if there is not; if the penalty will be reduced, an extraordinary item will be recorded at the payment (OIC 12, §51.d). If there are any chances of losing the lawsuit, the lessor must record a provision for the legal costs ((OIC, 2014b), §60).

This method, stated and regulated by the current OIC, might be modified starting from the financial statement 2016, because of a recent reform of Italian law, compliant to the Directive 2013/34/UE. This reform introduced a stronger substance-over-form principle that could bring leases accounting criteria to even out with the internationally accepted (and applied) methodology. Nonetheless, the Directive was adopted without the elimination of a specific clause in the Civil Code, which requires to report in the explanatory notes a scheme summing up the values the contract would generate with the application of the capitalization method. This discrepancy results in an entangled framework of uncertainty on the correct accounting behaviour.

3.3 Accounting methodology: capitalization (applied by IFRS but also by USA GAAP and probably in ITA GAAP from financial statement 2016)

The capitalization accounting methodology for financial leases creates a little more concern in the case of contract termination before maturity. This is mainly due to the natural difference between the contract (financial) amortization schedule and the asset (operative) depreciation and its (potential) impairments.

The IFRS states that “at commencement of the lease term, finance leases should be recorded as an asset and a liability at the lower of the fair value of the asset and the present value of the minimum lease payments (discounted at the interest rate implicit in the lease, if practicable, or else at the entity's incremental borrowing rate)”. Thus, during the execution of the contract the value of the debt (and, in particular, its actualized value) and the value of the asset are unlikely to correspond for the lessor:

1. the asset is systematically depreciated through a predefined schedule, according to the specific accounting rules for the typology of the asset;
2. the debt is amortized according to the contract schedule (which is normally shorter compared to the economic life of the asset and includes a terminal value payment that actually transfers the property).

In contrast with the other methodology, at every termination date before the maturity we will have the following values. First, the depreciated value of the asset will be recorded in the balance sheet, and the related depreciation recorded on accrual basis on the financial statements of the previous years. Second, the residual debt value will be recorded in the balance sheet. Last, several records for the interests paid on the instalments will be recorded in the financial statements of each year of contract.

At the termination of the contract the lessee should pay a debt composed by the $V(i)$, L and P values as aforementioned. So, unless the terminal value is taken into consideration and the property consequently transferred, the asset must be returned to the lessor.

This value has to compensate with the asset fair value (at the termination date) for the entire $V(i)$ amount. The potential difference between the amounts is extinguished by cash payment if the asset value is minor compared with the debt amount or, on the contrary, recorded as a loss in the income statement. The amounts L and P amounts should be extinguished through a standard payment.

Also in this case, the P amount could be questioned before the competent court (depending on the State legislation and the contract clauses) and consequently recorded as a provision.

The model expresses in a clear and transparent way which amounts are imputable to the debt, the damages and penalties and to the consequent recording values, e.g. losses.

4 A numeric example

Hereunder we make use of the following explanatory case. A financial leasing contract is composed by these clauses:

- Duration of the contract: 10 years. Date of the contract Jan. 1st 2016
- First instalment Dec. 31st 2016. Postponed instalments.
- Contractual interest rate: 5%.
- First instalment charge: 20,000
- Further instalment charges: 9,000 (9 years)
- Terminal value: 15,000

It is clear that the minimum payments are equal to 116,000 and the Net Present Value of the instalments is equal to 89,180.50. Assuming a fair value of the asset of 85,000, the Internal Rate of Return is equal to 6%. The asset useful life is 15 years.

We assume also that the market prime rate is equal to 4,71% and the lump-sum termination rate is equal to 4%. We can re-write the rates as follows:

- $i = 6\%$
- $p = 4,71\%$
- $j = 4\%$

The financial plan of the contract is the following.

Table 1 Example financial plan.

Date	Asset	Deprec.	Debt	Instalment	Capital	Interests
31/12/15	85,000	0	85,000		0	0
31/12/16	79,333	5,667	70,099	20,000	14,901	5,099
31/12/17	73,667	5,667	65,304	9,000	4,795	4,205
31/12/18	68,000	5,667	60,221	9,000	5,083	3,917
31/12/19	62,333	5,667	54,833	9,000	5,388	3,612
31/12/20	56,667	5,667	49,122	9,000	5,711	3,289
31/12/21	51,000	5,667	43,069	9,000	6,053	2,947
31/12/22	45,333	5,667	36,653	9,000	6,416	2,584
31/12/23	39,667	5,667	29,851	9,000	6,801	2,199
31/12/24	34,000	5,667	22,642	9,000	7,209	1,791
31/12/25	28,333	5,667	-	24,000	22,642	1,358
31/12/26	22,667	5,667				
31/12/27	17,000	5,667				
31/12/28	11,333	5,667				
31/12/29	5,667	5,667				
31/12/30	0	5,667				

If we suppose that the early termination date on Dec. 31st 2020, computing the previous model we obtain the following amounts.

Table 2 Decomposed outstanding debt.

	Amount	Net of Terminal Value
Net value of the Asset	56,667	
Outstanding debt $V(i)$	$54,833 + 3,289 = 58,122$	46,912.79
Market prime rate debt $V(p)$	60,196,19	48,279.65
Termination rate debt $V(j)$	61,395,31	49,066.40
Damage compensation L	2,073,75	1,366.85
Penalty P	1,199,11	786.76

Considering the case of asset return to the lessor, under both of the accounting methodologies, we record a passive supervision (1,366.85 + 786.76) offset by a debt (2,153.61). If the Penalty is questioned, a provision for the risk will be recorded instead of the debt for the P amount (786.76), while the L amount remains fixed, because calculated with a market rate.

Under the capitalization methodology, we have also to close both the outstanding debt (54,833) and the asset (56,667) accounts, which difference generates a loss that has to be recorded as a supervision. Moreover, the interests for the year (3,289) have to be liquidated and recorded consequently.

Considering the case of asset retaining from the lessee, the outstanding debt will not be compensated by the asset value. Thus, under the “footnotes only” accounting methodology, the asset will be recorded at the value of the remaining capital shares (58,122) which will be depreciated considering a remaining useful life of ten years, and we will record slightly higher damage compensation (2,073.75) and penalty (1,199.11).

Under the capitalization methodology, the asset value will not change and the debt will be increased by the damage compensation and penalties.

Under both methodologies, the penalties can be questioned and it will be recorded in offset to a provision for the risk in trial.

5 Conclusion

In this paper, we examined both the complexity of the matter and the difficulty to face some critical aspects that emerge from the analysis of some actual cases of contracts, in particular when the customer credit must be evaluated because of the early termination during the life of an instalment contract (Van Horne, 2002; Van Horne and Wachowicz, 2009). Moreover, the variability amongst the evaluations and the time span lying between the account recording and the actual debt determination in a trial, may conduct to a consistent gap between what it is disclosed in the financial statement and what it is due after the judicial pronouncement (see, *e.g.*, McConnell and Schallheim, 1983; Slovin *et al.*, 1990).

In this framework, a financial model proposed by Peccati (1986) is involved to carry out the evaluation of the customer credit splitting up the customer credit in three components: outstanding debt, claim for damages and penalty.

This method is proven to be particularly consistent in both of the main accounting methodologies, because those principles requires the best quantification of the two (or three, if the damage is split into penalties and impairment) components.

Given the capability of the proposed approach to provide a decomposition of the credit in an immediate and easy way to use, from both a financial and an accounting viewpoint, presently the deepening of this study will be a matter of singular interest by the analysis of several actual cases, also trying to define what happens in the presence of default interest, and when the termination is closer or further to the maturity date of the lease agreement.

Endnotes

¹ It can be demonstrated that is not restrictive to perform assessments at maturity t_k of the first unpaid instalment.

² Actually, it is the official rate of interest.

³ On a closer inspection, we can say that the P amount is the maximum potential value of the penalty, because the question normally is brought up for its reduction.

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Sistemi di rating interno e credito bancario: da dove proviene la pro-ciclicità'?

Authors

- *Patrizia Pia, Professor, patrizia.pia@unito.it. - University of Torino*
 - *Marina Damilano, Professor, marina.damilano@unito.it. - University of Torino*
 - *Paola De Vincentiis, Professor, paola.devincentiis@unito.it. - University of Torino*
 - *Eleonora Isaia, Professor, eleonora.isaia@unito.it. - University of Torino*
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Gli effetti pro-ciclici della regolamentazione sul capitale è un tema ampiamente dibattuto sia fra gli accademici sia fra le autorità di vigilanza. La questione principale è se le regole di Basilea II, più sensibili al rischio del portafoglio bancario, possano amplificare le fluttuazioni del ciclo economico. Gli studi che si sono occupati specificatamente degli eventuali effetti sull'offerta di credito derivanti dall'adozione dei rating interni sono relativamente pochi e prevalentemente basati su simulazioni. Questo paper, utilizzando i dati relativi alle banche italiane, verifica se l'impiego dei metodi IRB abbia influenzato quantitativamente la concessione dei prestiti nel periodo 2010-2014. L'analisi condotta ha evidenziato una maggiore contrazione del credito da parte delle banche che hanno implementato modelli di rating interno; tale riduzione è stata più consistente per coloro che hanno adottato l'IRB base, piuttosto che quello avanzato, e per le banche più grandi.

Keywords: Credito bancario, Pro-ciclicità, Rating interni, Risk management.

JEL Classification: G21

1.1 Introduzione

La pro-ciclicità dell'attività bancaria, vale a dire la capacità di accentuare le condizioni positive e negative dell'economia durante il normale alternarsi delle fasi congiunturali, attraverso una maggiore o minore offerta di credito, è una

spiacevole conseguenza delle innovazioni normative sull'adeguatezza di capitale delle banche e delle stesse logiche di gestione del rischio di credito. Secondo gli Accordi di Basilea, alla banca che vuole, o deve, affrontare rischi più elevati viene richiesta una maggiore dotazione di capitale. Nelle fasi recessive l'aumento generalizzato della rischiosità dei prenditori di fondi determina crescenti accantonamenti a perdite e maggiori capitali da detenere, non solo a livello di singola banca ma per gran parte di esse. Poiché in queste fasi negative risulta difficile raccogliere nuovo capitale, occorre ridurre i crediti erogati e/o limitare la concessione di nuovi prestiti. La contrazione generalizzata del credito accentua la fase recessiva, aumentando la probabilità di insolvenza dei debitori e le difficoltà delle banche. In merito alla gestione del rischio di credito, la differenza fondamentale fra Basilea 1 e Basilea 2 riguarda l'introduzione di una ponderazione del capitale fortemente sensibile al rischio del portafoglio prestiti detenuto. Il precedente sistema di ponderazione, basato su coefficienti statici attribuiti ad ogni categoria di esposizione, è stato sostituito dall'utilizzo dei rating corrispondenti al merito di credito delle singole controparti. Sono previste due tipologie di ponderazione, a scelta della banca: il metodo standard, basato sui giudizi di rating formulati dalle agenzie riconosciute idonee dalle autorità di vigilanza, ed il metodo dei rating interni (IRB). Quest'ultimo consente alle banche di sviluppare propri sistemi di rating, validati dall'autorità di vigilanza, che, in virtù di un maggior grado di sensibilità e adeguatezza nella valutazione del rischio, permettono un ulteriore risparmio di dotazione patrimoniale³. Le possibili conseguenze pro-cicliche, pertanto, non scaturiscono solo dai crediti in sofferenza (Basilea 1) ma anche dai crediti in bonis (Basilea 2) il cui merito creditizio si è deteriorato. Inoltre, i rating interni comunemente sviluppati dalle banche sono tendenzialmente orientati al modello *point in time* (PiT), che stima la probabilità di default della controparte su un orizzonte temporale annuale (Van Gestel-Baesens 2009 and Saunders-Allen 2010). L'aumento della rischiosità del portafoglio prestiti che si verifica in un periodo di recessione si traduce in un significativo e repentino aumento delle migrazioni delle controparti dalle classi di rating migliori alle classi peggiori. I modelli impiegati dalle agenzie di rating, invece, stimano il rischio di default su un orizzonte temporale che copre l'intero ciclo economico (*through the cycle* TTC). In questo caso i cambiamenti della rischiosità del portafoglio dovuti a effetti ciclici non comportano variazioni immediate, limitando perciò la volatilità nei requisiti di capitale. La variazione dell'offerta di credito, determinata dalla necessità di soddisfare i requisiti di capitale, è stata ampiamente documentata e quantificata dalla letteratura scientifica, tanto che il nuovo accordo Basilea 3 ha previsto un apposito intervento correttivo teso a contenere la volatilità dei requisiti patrimoniali. Le verifiche empiriche sulla pro-ciclicità connessa all'adozione di sistemi di rating più avanzati, invece, sono ancora limitate.

Il presente lavoro si pone l'obiettivo di appurare se, su un campione di 89 banche italiane, durante un periodo di recessione, le banche che hanno implementato sistemi di rating interno, base o avanzato, hanno erogato minor credito rispetto a quanto concesso dalle banche che si sono affidate ai rating standard. L'ipotesi sottostante è che la contrazione del credito in un periodo di recessione

sia più intensa quando vengono adottati sistemi di rating interni che, oltre a basarsi prevalentemente sul modello PiT, risultano più strutturati e più rigidi. La validazione dei rating interni, infatti, comporta l'adozione di una politica di erogazione del credito fortemente connessa agli esiti dei rating formulati internamente, con limitate possibilità di *override*.

Il paper è organizzato nel seguente modo: la sezione 2 sintetizza la letteratura più recente relativa alla pro-ciclicità derivante dai requisiti patrimoniali e dall'implementazione dei rating interni. La sezione 3 descrive il campione utilizzato evidenziando alcune caratteristiche statistiche. Nelle sezioni 4 e 5 sono rispettivamente presentati la metodologia utilizzata e i risultati ottenuti. La sezione 6 conclude con alcune considerazioni.

2.2 Letteratura

La pro-ciclicità del sistema finanziario e la conseguente variazione del credito è un fenomeno endemico, indipendente dai requisiti di capitale (Lowe 2002; Amato e Furfine 2004). Le misure, introdotte a livello internazionale, per assicurare la stabilità finanziaria attraverso il controllo del rischio sistemico impongono alle banche di detenere un livello di capitale che rifletta adeguatamente i cambiamenti che si verificano nel rischio di credito del loro portafoglio. La regolamentazione del capitale dovrebbe incidere sulla stabilità finanziaria sia disincentivando le banche ad assumere rischi eccessivi – anche se le analisi empiriche non sono pervenute a conclusioni unanimesi sull'argomento – sia permettendo alle stesse di assorbire meglio le perdite. Gambacorta e Mistrulli (2004), ad esempio, rilevano che le banche italiane ben capitalizzate hanno potuto preservare il rapporto con i loro clienti assorbendo meglio le temporanee difficoltà dei loro affidati nel periodo 1992-2001. L'analisi di Kapan e Minoiu (2013), condotta su 800 banche appartenenti a 55 paesi durante il periodo 2006-2010, dimostra che a fronte di shocks di mercato le banche con minor leva finanziaria hanno ridotto i loro prestiti in misura inferiore rispetto alle altre. La precedente struttura regolamentare (Basilea 1) è stata progressivamente migliorata proprio per assicurare un legame sempre più forte fra dotazione patrimoniale e attività rischiose (Basilea 2). Le stesse misure però possono accentuare le fluttuazioni dei cicli economici.

Una nutrita letteratura si è focalizzata sull'andamento dell'offerta di credito a seguito di requisiti di capitale più stringenti. Francis e Osborne (2012) rilevano che il gap fra l'attuale e il desiderato capital ratio ha significative conseguenze negative sull'offerta di credito. Aiyar e altri (2014) testano se i requisiti variabili di capitale imposti dal regolatore inglese hanno effetti sull'offerta di credito. Essi mostrano che le banche soggette a vincoli più stringenti contraggono i prestiti. Fraisse e altri (2015), analizzando i prestiti erogati dalle banche francesi nel periodo di transizione da Basilea 1 a Basilea 2, misurano la variazione del credito alle imprese in relazione ai requisiti di capitale e stimano che l'aumento dell'1% di requisito comporta una contrazione dell'8% nei prestiti. Alcuni studi, invece,

identificano una relazione positiva tra requisiti di capitale e offerta di credito. In particolare: Bernanke e Lown (1991) e Berrospide e Edge (2010) per le banche statunitensi stimando l'impatto del capitale sull'andamento dei prestiti rilevando un lieve incremento. Molte analisi pongono l'accento sul fatto che la relazione fra requisiti di capitale e offerta del credito non sia lineare. Albertazzi e Marchetti (2010) evidenziano un irrigidimento dell'offerta di credito solo da parte delle banche italiane con bassa dotazione patrimoniale nel periodo di crisi 2008-2009. Carlson e altri (2013) dimostrano che la variazione del capital ratio esercita maggior impatto sui prestiti quando il livello iniziale è basso piuttosto che quando è elevato. Bridges e altri (2014) utilizzano un ricco set di dati proveniente dalla Banca d'Inghilterra relativo al periodo 1990-2011. Lo studio dimostra che la variazione dei requisiti di capitale determina reazioni eterogenee sull'offerta di credito relativa ai vari settori economici. Negli anni successivi all'aumento dei requisiti di capitale le banche, in media, riducono i prestiti per il settore real estate commerciale e per i mutui alle famiglie. La crescita dei prestiti riprende perlopiù entro tre anni. Durante i periodi di transizione verso requisiti più stringenti l'offerta di credito aumenta, piuttosto che ridursi, per quelle banche che inizialmente erano sottocapitalizzate. Labonne e Lamé (2014) analizzando un database relativo a banche francesi tra il 2003 e il 2011 e le risposte di un sondaggio sul credito trovano che, in media, maggiori requisiti di capitale inducano un aumento del credito. Ma l'elasticità dell'offerta di prestiti dipende dall'intensità dei vincoli posti dai supervisori.

Gli studi che si sono occupati dei possibili effetti sull'offerta di credito derivanti dall'adozione dei rating interni sono relativamente pochi e prevalentemente basati su simulazioni, in quanto i dati reali all'epoca non erano disponibili. Carling e altri (2002) suggeriscono che l'adozione dei rating interni per le maggiori banche svedesi nel periodo 1994-2000 avrebbe aumentato la sensibilità al rischio di credito del capitale minimo e accentuato le tendenze pro-cicliche delle banche. Altman e altri (2005) indicano che gli effetti pro-ciclici di Basilea 2 possono essere più forti quando le banche usano proprie stime di LDG (Advanced IRB). Catarineu e altri (2005) sostengono che le banche preferiscano implementare modelli di rating interni seguendo l'approccio *point in time* perché più preciso, piuttosto che l'approccio *through the cycle*, meno pro-ciclico. Nonostante Basilea 2 (versione 2004) implicitamente richieda l'impiego di un sistema di rating *through the cycle*, Repullo e Suarez (2008) ritengono che l'industria bancaria utilizzi rating interni *point in time* che comportano una dotazione patrimoniale più aderente all'effettiva rischiosità del portafoglio. Il report pubblicato dall'EBA (2013) concernente 60 banche europee che impiegano l'IRB base, osservate da metà 2008 a metà 2012, reputa che l'evidenza di una pro-ciclicità sia debole e che il legame fra requisiti di capitale e ciclo economico non possa essere stabilito. Un confronto internazionale, condotto sui bilanci di 1380 banche di 76 paesi forniti da Bankscope, ha evidenziato che, a livello aggregato, nel periodo di crisi 2007-2012 l'adozione di Basilea 2 non avesse avuto impatto sull'offerta di credito alle imprese. Test successivi però permettono di evidenziare che l'interazione fra implementazione dei nuovi requisiti e grandezza delle banche avesse com-

portato una crescente riduzione di prestiti all'aumentare della dimensione degli offerenti. In particolare, il 20% delle banche più grandi aveva contratto il credito più del 3%. Gli autori imputano questo risultato al fatto che le banche di maggiori dimensioni si siano affidate prevalentemente al metodo dei rating interni piuttosto che a quello standard (Mascia e altri 2015).

3 Descrizione del campione

Il campione è un panel non bilanciato composto da 89 banche commerciali italiane costituite sotto forma di S.p.A che sono risultate operative, senza soluzione di continuità, nel corso del quinquennio 2010-2014.

Si è deciso di restringere l'analisi al campione delle sole banche Spa perché, nonostante la ridotta numerosità dei soggetti osservati, si tratta del gruppo maggiormente rappresentativo della varietà dimensionale del sistema bancario italiano (v. Tab.1). Diversamente, l'analisi dell'intero universo avrebbe comportato l'inclusione delle centinaia di banche di credito cooperativo che per loro natura non utilizzano i metodi IRB, andando ad attribuire un peso eccessivo alle banche minori e di conseguenza a inficiare la significatività dei nostri risultati.

La selezione dei soggetti posti sotto osservazione è stata effettuata partendo dall'Albo delle banche autorizzate ad operare nel nostro paese tenuto da Banca d'Italia. Alla data del 31 dicembre 2014 risultavano iscritte 172 banche S.p.A. Di queste, solo 96 sono state classificate come banche commerciali (intendendo come tali le società con una netta prevalenza dell'attività di raccolta di depositi e concessione di prestiti rispetto ad altre aree di business come l'investment banking, il private banking o il settore parabancario) e riconosciute in piena operatività negli anni compresi tra il 2010 e il 2014 (ossia non sottoposte a procedure di liquidazione coatta o volontaria o in regime di amministrazione controllata). Eliminati, infine, i soggetti che presentavano un andamento anomalo della variabile "crediti" dovuto principalmente alle nuove costituzioni nel corso del quinquennio in esame, si è giunti all'individuazione del suddetto campione di 89 banche, con riferimento alle quali abbiamo rilevato, utilizzando la banca dati Telemaco di Unioncamere e le informazioni disponibili sui rispettivi Websites, le informazioni contabili ed extra-contabili necessarie per effettuare le elaborazioni statistiche e rispondere alla domanda di ricerca.

Prima di evidenziare l'evoluzione temporale delle variabili chiave delle nostre analisi econometriche, può essere utile approfondire la conoscenza delle principali caratteristiche morfologiche delle banche che compongono il panel. A tal fine la tabella 2 offre una fotografia del campione scattata al 31 dicembre del 2014 e posta a confronto con quella dell'intero sistema bancario italiano alla medesima data.

Completa il quadro la figura 1, in cui si pone a confronto la distribuzione percentuale dei requisiti patrimoniali del nostro campione con quella di sistema.

Tabella 1 Le banche del campione: classificazione per dimensioni e complessità operativa(1)

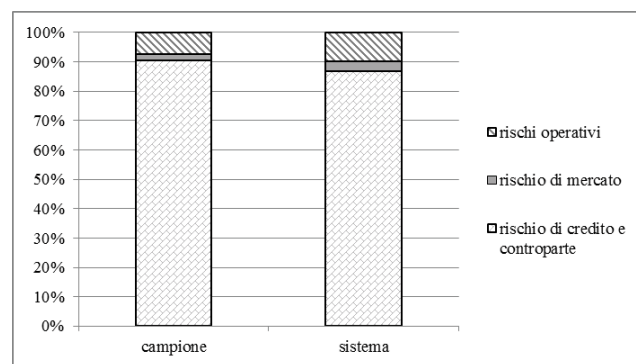
		N.	%	Di cui:		
				N. grandi (TA>30 mld)	N. intermedie (3,5mld<TA<3 0 mld)	N. pic- cole (TA<3,5 mld)
BANCHE DI MAGGIORI DIMENSIONI O COMPLESSITA' OPERATIVA		49	55,06%	5	26	18
Di cui:	primi 5 gruppi	26	29,21%	3	14	9
	altre banche grandi o appartenenti a gruppi grandi	20	22,47%	2	9	9
	banche quotate non grandi o non appartenenti a gruppi grandi	3	3,37%	0	3	0
BANCHE INTERMEDIE		9	10,11%	0	9	0
Di cui:	appartenenti a un gruppo	9	10,11%	0	9	0
	indipendenti	0	0,00%	0	0	0
BANCHE DI MINORI DIMENSIONI O COMPLESSITA' OPERATIVA		31	34,83%	0	0	31
Di cui:	appartenenti a un gruppo	8 (2)	8,99%	0	0	8
	indipendenti	23	25,84%	0	0	23
TOT.		89	100,00 %	5	35	49

Note: (1) La classificazione è stata fatta sulla base del "principio di proporzionalità" (v. Regolamento UE sul Sistema di supervisione unico europeo n. 1024/2013 e Disposizioni di vigilanza per le banche contenute nella Circolare di Banca d'Italia n. 285 del 17 dicembre 2013, 12° aggiornamento); (2) Di cui 1 gruppo assicurativo.

Tabella 2 Il campione vs il sistema bancario italiano: aspetti organizzativi, dimensionali e operativi al 31 dicembre 2014 (dati in milioni di euro)

	Campione	Sistema	Rappresentatività del campione
N. banche appartenenti a un gruppo	66	150	44%
N. banche indipendenti	23	513	4%
N. sportelli	17.931	30.740	58%
N. dipendenti	185.051	299.684	62%
Depositi	683.290	1.369.230	50%
Prestiti	887.018	1.754.322	51%
Sofferenze	98.461	197.127	50%
Crediti deteriorati	178.578	349.763	51%
Totale attivo	1.543.305	2.957.103	52%
Mezzi patrimoniali	135.646	214.210	63%

Fonte: ns elaborazioni su dati Telemaco e Banca d'Italia.

**Figura 1** – Il campione vs il sistema bancario italiano: distribuzione dei requisiti patrimoniali al 31 dicembre 2014(*)

Nota (*): sono esclusi dall'analisi i requisiti patrimoniali per i c.d. "altri rischi"

Come si può notare, le banche commerciali sotto forma di SpA presentano una ripartizione dell'RWA molto simile a quella media di sistema, per quanto sia evidente un'esposizione al rischio di credito e di controparte leggermente più elevata, e queste risultanze non possono che consolidare ulteriormente la validità del criterio prescelto per la selezione del campione ai fini dell'analisi in oggetto.

Passiamo ora a indagare l'evoluzione delle variabili chiave del nostro modello nel corso del quinquennio 2010-2014 con l'ausilio di alcune statistiche descrittive. Innanzitutto i dati di tabella 3 mostrano un andamento del portafoglio crediti in crescita fino al 2012 (+6,5% rispetto a fine 2010) a cui fa seguito un biennio di più netta contrazione (complessivamente -10% nel periodo 2013-2014). Analizzando le singole statistiche descrittive si nota un aumento, seppur lieve, del dato mediano nel 2014 dopo quattro anni di riduzione ininterrotta (che trova ulteriore conferma sia nel maggior valore dell'esposizione minima sia nel minor valore di quella massima) mentre la variabilità del portafoglio crediti rispetto al dato medio mostra un andamento altalenante nel corso del quinquennio, arrivando a toccare il livello più basso nel 2014.

Tabella 3 La variabile dipendente: alcune statistiche descrittive (dati in migliaia di euro)

	2010	2011	2012	2013	2014
Crediti verso clientela:					
esposizione totale lorda	998.461.827	1.007.227.633	1.065.173.625	1.007.807.489	960.968.936
media	12.176.364	11.711.949	12.104.246	11.323.680	11.045.620
mediana	1.895.097	1.790.393	1.735.073	1.674.826	1.780.901
min	29.839	42.756	38.079	34.545	38.842
max	262.865.775	268.146.698	276.852.238	254.614.044	244.507.407
devst	38.597.248	37.646.230	40.391.058	37.215.537	34.940.481
Crediti verso clientela deteriorati:					
esposizione totale lorda	89.475.243	104.302.970	130.517.985	155.529.235	178.578.318
media	1.091.162	1.212.825	1.483.159	1.747.519	2.052.624
mediana	114.075	149.146	193.025	229.015	256.831
min	20	20	0	1.469	3.054
max	26.604.519	31.317.032	39.247.107	45.567.704	48.362.679
devst	3.583.849	4.078.915	5.061.914	5.959.294	6.811.383
Quota del deteriorato sul totale dei crediti verso clientela					
media	7,75%	9,24%	12,15%	15,33%	17,76%
min	0,02%	0,01%	0,00%	1,45%	1,36%
max	26,71%	26,33%	32,12%	40,31%	45,54%
Per memoria: dato di sistema (*)	9,9%	11,2%	13,5%	15,9%	17,7%

Nota (*): Per gli anni 2010 e 2011 il dato di Banca d'Italia si riferisce al solo totale dei gruppi.

Per contro l'andamento dei crediti deteriorati evidenzia un trend positivo nel corso dell'intero periodo analizzato, sia in termini assoluti sia in termini relativi, e tutte le statistiche descrivono un fenomeno in preoccupante crescita.

La figura 2 conclude la descrizione statistica delle suddette banche dal punto di vista dei metodi adottati per la misurazione dell'esposizione al rischio di credito e di controparte e la conseguente allocazione di capitale. Al fine di una corretta interpretazione dei risultati, il grafico rappresenta la distribuzione dei sistemi di misurazione del rischio sul portafoglio totale anziché per numerosità di banche.

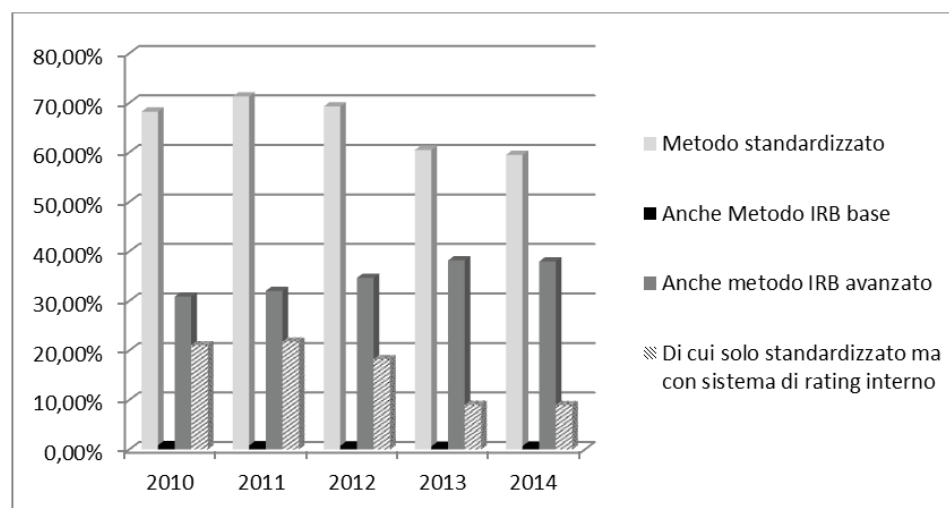


Figura 2 Evoluzione dei sistemi adottati per la misurazione del rischio di credito (dati per quote di portafoglio)

3.3 Metodologia

Per quanto riguarda la domanda di ricerca – ovvero la valutazione dell'impatto di una maggiore "industrializzazione" del processo creditizio sul volume di impieghi della banca – la variabile dipendente utilizzata è la variazione percentuale annua dei prestiti verso clientela. L'ipotesi di lavoro è che, a fronte di metodologie di valutazione del rischio più strutturate e di natura statistico-quantitativa, l'istituto di credito possa diventare più rigido e contrarre maggiormente gli impieghi in un momento di recessione e di crisi macro-economica, quale quello preso in considerazione in questa analisi. La minore considerazione di informazioni *soft* e di aspetti relazionali con la clientela, porterebbe infatti ad una riduzione più intensa delle erogazioni a fronte di un peggioramento dei parametri di solidità e di salute economica dei richiedenti prestito. Questo avver-

rebbe soprattutto per effetto di una serie di automatismi di natura organizzativa e della complessità operativa delle procedure di *over-riding* che dovrebbero permettere, in teoria, di erogare in deroga rispetto alle indicazioni provenienti dai sistemi di *rating* e *scoring* interno.

Le principali variabili indipendenti prese in considerazione sono:

- a) **L'adozione di un sistema di rating interno validato a fini di vigilanza prudenziale:** il segno atteso della variabile è di nuovo negativo. Come ricordato sopra, ci attendiamo infatti che una banca dotata di un sistema strutturato e quantitativo per la misurazione del rischio creditizio possa irrigidire maggiormente le erogazioni in un momento di crisi, a fronte di un peggioramento degli indici economico-patrimoniali della clientela. La variabile è declinata in tre versioni: una *dummy* dove il valore 1 è associato alla presenza di un sistema di rating validato (RAT_VAL); un valore percentuale pari alla quota di esposizione valutata attraverso il metodo IRB, anziché attraverso quello standardizzato (PESO_IRB); due valori percentuali pari rispettivamente alla quota di esposizione valutata con metodo IRB base e con IRB avanzato (PESO_IRB_BASE e PESO_IRB_AV). Gli affinamenti successivi della variabile permettono di rappresentare non solo la presenza di un sistema di rating interno, ma anche l'estensione progressiva del grado di utilizzo e della complessità del metodo IRB a quote crescenti del portafoglio crediti.
- b) **L'adozione di un sistema di rating interno a fini solo gestionali (RATING_SOLOGEST):** il segno atteso della variabile è sempre negativo, con le stesse motivazione già descritte al punto precedente. Ci aspettiamo però che in questo caso la relazione possa essere meno netta, in quanto un sistema di rating non validato può più facilmente contenere una componente qualitativa più intensa o prevedere un minor grado di automatismo nelle decisioni di affidamento.
- c) **Il livello di patrimonializzazione della banca,** misurato attraverso il *total capital ratio*, rilevato nell'anno in corso (TCR) o in quello precedente (LAG_TCR): il coefficiente atteso di questa variabile è positivo, dal momento che banche più patrimonializzate dovrebbero essere più propense a espandere gli impieghi o, quantomeno, a contrarli meno. In alternativa al *total capital ratio*, sempre per rappresentare il grado di patrimonializzazione della banca sono stati utilizzati anche il *tier 1 ratio*, rilevato sia nell'anno in esame (TIER1) sia in quello precedente (LAG_TIER1), e l'*equity multiplier* (EM), calcolato come rapporto fra il totale attivo e il patrimonio netto. Quest'ultimo indicatore, di natura prettamente contabile e indipendente dalla ponderazione dell'attivo, permette di depurare l'effetto del metodo di misurazione del rischio adottato sull'indicatore di patrimonializzazione;

- d) **Il peso delle posizioni deteriorate** sul totale dell'esposizione verso clientela, anche in questo caso rilevato per l'anno in corso (DET) o per quello precedente (LAG_DET): il coefficiente atteso è in questo caso negativo. Ci attendiamo infatti che una banca più oberata di sofferenze e incagli possa diventare molto selettiva, restringendo maggiormente gli impieghi;
- e) **La variazione delle posizioni deteriorate nel corso dell'anno** (DELTA_DET): il coefficiente atteso è negativo dal momento che è ragionevole attendersi che una banca, a fronte di un incremento nella mole di posizioni critiche possa adottare un atteggiamento maggiormente prudentiale nelle nuove erogazioni;

Nelle varie analisi sono state anche testate alcune ulteriori variabili di controllo, quali: la dimensione della banca, rappresentata dal rapporto fra il totale attivo e il valore medio dell'attivo del campione di banche considerato nello specifico anno (ATTIVO_MEDIA), l'appartenenza della banca ad un gruppo (DUMMY_GRUPPO), il livello di redditività della gestione, misurata in termini di *return-on-assets* (ROA), la quota di posizioni deteriorate rettificata (NETTO_LORDO). Inoltre, le regressioni sono state tutte stimate con effetti fissi temporali per tenere conto di una serie di fattori comuni del contesto macroeconomico che hanno condizionato l'attività delle banche considerate nell'arco del periodo temporale – particolarmente impegnativo – preso in considerazione.

4.4 Risultati

La tabella 6 sintetizza i risultati più interessanti delle analisi effettuate. Un primo risultato, in linea con le attese, è la forte correlazione negativa fra il peso delle posizioni deteriorate e il tasso di variazione del portafoglio crediti. E' abbastanza ragionevole, infatti, che una banca oberata di *not performing loans* si trovi a limitare le nuove erogazioni in maniera più intensa rispetto ad una concorrente che presenti un portafoglio complessivamente meno deteriorato, specialmente in un momento di congiuntura economica profondamente negativa. Presenta lo stesso segno negativo ed è fortemente significativa anche la variabile che misura la variazione delle posizioni deteriorate in corso d'anno. Un repentino incremento nelle posizioni problematiche induce quindi la banca a contrarre il credito erogato. Alla riduzione delle nuove erogazioni potrebbe anche sommarsi l'effetto della cessione di quote del portafoglio prestiti attraverso operazioni di cartolarizzazione per recuperare liquidità. Sulla base del database a disposizione, purtroppo, non siamo in grado di distinguere i due effetti.

Per quanto riguarda invece il grado di patrimonializzazione, la variabile non risulta significativa in nessuna delle specificazioni alternative adottate. Questo vale sia se si considerano gli indici regolamentari – *total capital ratio* e *tier 1 ratio* – sia se si utilizza una misura di natura contabile, quale l'*equity multiplier*. La

questione cambia leggermente se, accanto all'indicatore *tout court*, si introduce un elemento quadratico. In questo caso risulta che il grado di patrimonializzazione è correlato positivamente con la variazione del portafoglio di crediti verso la clientela. Il termine quadratico con segno negativo indica però che, al di sopra di un certo livello, l'ulteriore disponibilità patrimoniale non impatta positivamente sulla politica dei prestiti. Si noti peraltro che le statistiche di significatività dei coefficienti sono, per entrambe le variabili, piuttosto ridotte.

Per quanto riguarda l'impatto del metodo di misurazione del rischio adottato, in tutte le specificazioni si conferma come l'adozione di un sistema di rating interno validato sia negativamente correlata con la variazione dei crediti verso clientela. L'effetto è evidente già quando si considera, nella specificazione (1), il fenomeno in maniera dicotomica, opponendo le banche dotate di un sistema di rating interno validato a quelle che invece utilizzano esclusivamente il metodo standardizzato per la valutazione regolamentare dell'esposizione al rischio creditizio.

La relazione diviene più evidente ancora se si considera la quota di attivo valutata rispettivamente con metodo IRB base e avanzato. E' bene infatti ricordare che la valutazione del rischio con metodi interni raramente coinvolge l'intero portafoglio prestiti. Più comunemente una quota dell'attivo è comunque valutata con metodo standardizzato, mentre una parte – che normalmente diviene nel tempo sempre più estesa – viene valutata con metodi interni, dapprima in versione base e successivamente in versione avanzata. Quindi, più che un netto passaggio dal metodo standardizzato a quello IRB, si configura un progressivo grado di sofisticazione dei metodi di misurazione del rischio creditizio, come già commentato in occasione della descrizione del campione. Nelle specificazioni dalla (2) alla (4) si può notare come entrambe le variabili PESO_IRB_BASE e PESO_IRB_AVANZ siano fortemente significative e presentino il coefficiente negativo atteso. L'estensione progressiva della valutazione tramite rating interno a quote crescenti del portafoglio si accompagna – in un contesto di crisi economica – ad una contrazione più intensa delle erogazioni. Osservando il valore dei coefficienti delle due variabili, è possibile notare come l'effetto più forte sia legato al peso dell'IRB base. In altri termini, è il passaggio ad un sistema di rating interno a condizionare in maniera più marcata il comportamento creditizio della banca, mentre l'effetto del grado di sofisticazione dello stesso, benché orientato nella medesima direzione, è meno intenso.

Sempre rimanendo in tema di metodologie di valutazione del rischio, l'adozione di un sistema di rating interno a fini esclusivamente gestionali, senza quindi accedere alla validazione regolamentare, non ha un effetto statisticamente apprezzabile sulla variazione dei crediti verso clientela, benché il coefficiente della variabile presenti il segno atteso in tutte le specificazioni proposte. Per spiegare questa evidenza occorre ricordare che – per poter essere validato – un sistema di rating interno deve essere attivamente inserito nelle procedure orga-

nizzative della banca e non rappresentare un mero strumento di misura del rischio. E' naturale quindi che, in una banca che adotta il metodo IRB, le politiche di erogazione del credito siano strettamente legate alle valutazioni di *credit rating* formulate, mentre in una banca che adotta il sistema solo a fini gestionali, e non regolamentari, il legame possa essere più lasco. In altri termini l'assegnazione del rating, in questi casi, può rimanere maggiormente confinata all'interno dell'area *risk management*, condizionando in maniera meno diretta e meccanica la fase di istruttoria fidi.

Per quanto riguarda le ulteriori variabili di controllo inserite, l'unica che risulta significativa è `ATTIVO_MEDIA`. Il segno del coefficiente è negativo, configurando quindi una contrazione più intensa del credito da parte delle banche più grandi. La verifica del livello di correlazione fra questa variabile e le misure relative alla diffusione dei sistemi di rating interno ha dato risultati confortanti. E' interessante notare come – pur introducendo un controllo sul fattore dimensionale – le variabili relative al livello di sofisticazione del sistema di *credit risk management* continuino a rimanere significative. Sia il valore del coefficiente sia la t-stat rimangono inoltre pressoché invariati. Questo fugge il dubbio che le variabili in questione riflettano fattori puramente dimensionali e che la grandezza della banca, misurata dall'entità complessiva del suo attivo, possa essere il principale fattore determinante del suo comportamento creditizio durante la crisi.

Come verifica di robustezza dei risultati ottenuti, le regressioni sono state ripetute utilizzando come variabile dipendente la variazione dell'esposizione lorda verso clientela, anziché la variazione del solo portafoglio prestiti. Ricordiamo che l'esposizione complessiva contiene anche il portafoglio titoli. I risultati confermano il coefficiente negativo associato alle variabili `IRB_PESO_BASE` e `IRB_PESO_AVANZ`. In questo diventa significativa, con l'atteso segno negativo, anche la variabile `RATING_SOLOGEST`.

Tabella 4 Le determinanti della variazione del portafoglio crediti verso la clientela

	(1)	(2)	(3)	(4)
TCR	0,01 (0,11)			
LAG_TCR		0,003 (0,51)	0,22* (1,75)	
LAG_TCR^2			-0,02* (-1,76)	
LAG_TIER1				0,39* (1,86)
LAG_TIER1^2				-0,02* (-1,86)
DET	-0,62*** (-5,93)			
LAG_DET		-0,40*** (-2,51)	-0,39** (-2,52)	-0,37* (-1,79)
DELTA_DET		-1,42*** (-3,17)	-1,44*** (-3,13)	-1,46*** (-3,09)
RAT_VAL	-0,06*** (-2,69)			
PESO_IRB_BASE		-0,28*** (-3,39)	-0,22*** (-2,60)	-0,20** (-2,36)
PESO_IRB_AVANZ		-0,07*** (-2,87)	-0,06** (-2,30)	-0,06** (-2,30)
RAT_SOLOGEST	-0,02 (-0,74)	-0,02 (-0,94)	-0,01 (-0,59)	-0,016 (-0,76)
ATTIVO_MEDIA			-0,004** (-2,25)	-0,004** (-2,17)
ROA				-0,414 (-0,63)
GRUPPO				0,01 (0,35)
NETTO_LORDO				0,06 (0,28)
N. Osservazioni	341	341	341	341
R quadro	0,159	0,179	0,209	0,219

5.5 Conclusioni

L'adozione di un sistema di rating interno validato risulta negativamente correlata con la variazione dei crediti verso clientela nel periodo 2010-2014. L'effetto è palese sia quando si considera il fenomeno in maniera dicotomica, op-

ponendo le banche dotate di un sistema di rating interno validato a quelle che invece utilizzano esclusivamente il metodo standardizzato, sia quando si considera la quota di attivo valutata rispettivamente con metodo IRB base e avanzato. L'elaborazione econometrica rileva anche che la contrazione di credito è stata più marcata per le banche maggiori.

La letteratura che si è occupata dei possibili effetti sull'offerta di credito derivanti dall'adozione dei rating ha ipotizzato una maggiore pro-ciclicità dei metodi IRB rispetto a quello standard connessa al fatto che i primi seguono prevalentemente il modello PiT, mentre i secondi il modello TTC. Queste considerazioni sono state formulate a seguito di simulazioni, in quanto non erano ancora disponibili dati reali. Il nostro lavoro fornisce un'evidenza empirica della pro-ciclicità dei rating interni. Inoltre, l'utilizzo di un sistema di rating interno a fini esclusivamente gestionali, perciò non validato, non ha un effetto statisticamente apprezzabile sulla variazione dei crediti verso clientela, benché il coefficiente della variabile presenti segno negativo. Questa differenza potrebbe essere spiegata dal ruolo della validazione del rating interno, che risulta più pervasiva, investendo l'intera procedura di erogazione del prestito. In altri termini, con l'adozione di metodi di valutazione del rischio più strutturate e di natura statistico-quantitativa, l'istituto di credito può diventare più rigido e contrarre maggiormente gli impieghi in un momento di recessione e di crisi macro-economica. La minore considerazione di informazioni *soft* e di aspetti relazionali con la clientela, porterebbe infatti ad una riduzione più intensa delle erogazioni a fronte di un peggioramento dei parametri di solidità dei richiedenti. Questo avverrebbe soprattutto per effetto di una serie di automatismi di natura organizzativa e della complessità operativa delle procedure di *over-riding* che dovrebbero permettere, in teoria, di erogare in deroga rispetto alle indicazioni provenienti dai sistemi di *rating* e *scoring* interno.

Endnotes

¹ La principale differenza fra il metodo IRB di base e avanzato risiede nella definizione delle variabili input. Entrambi i metodi si basano sulle stime delle probabilità di default (PD), il metodo avanzato consente anche la stima interna della perdita attesa (LGD), dell'esposizione (EAD) e della scadenza dei prestiti.

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Adjustments in the balance sheets – is it normal this “new normal”?

Authors

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- *Liviu Voinea, Deputy Governor, liviu.voinea@bnro.ro - National Bank of Romania*
 - *Alexie Alupoaiiei, Economist, alexie.alupoaiiei@bnro.ro - National Bank of Romania*
 - *Florin Dragu, Economist, florin.dragu@bnro.ro - National Bank of Romania*
 - *Florian Neagu, Economist, florian.neagu@bnro.ro - National Bank of Romania*
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The adjustments in the balance sheets are one of the “new normal” after the burst of the financial crisis. High level of indebtedness among companies and households calls for a debt re-adjustment towards more sustainable levels. Banks shrink their business in order to cope with the new risk environment. Governments strive to consolidate their accounts, amid modest economic recovery. These debt adjustments might be normal: what goes up must go down. But some questions are brought forward: by how much, how fast, and how to act as a policy maker. To answer these questions, the response of the probability of recession for various levels of indebtedness is investigated, in order to obtain the critical thresholds of debt above which the economic growth and the financial stability might be affected. To this end, data was collected on six distinct debt categories (i.e. households, non-financial corporations, government, private, external, and total) as well as on gross domestic product dynamics. In order to control for the possible effects of other macroeconomic variables, data is also gathered on gross fixed capital formation, households’ consumption, exports and imports, inflation and interest rates, together with government balance and unemployment rates. The sample spans over a 10-year period between December 2004 and December 2014, while the data frequency is quarterly. A series of panel regressions were used in order to assess the effect of debt on economic growth. To this purpose, the marginal response of the dependent variable (i.e. the probability of recession) was calculated for the six debt categories at values that range from 20 to 200 percent of GDP. Moreover, an asset pricing model was also estimated in order to better grasp the effects of debt of economic growth. The results vary quite considerably from one category to the other, but also between the methods used. One important conclusion the results bring forward is that “one size fits all” type of measures or thresholds might not be the most indicated solution as countries can bear various debt levels. Imposing a too restrictive threshold in a country which can support higher debt values can lead to opportunity costs through missed investment possibilities. Conversely, setting a threshold above the one which can be afforded may also have negative effects on economic growth. In a similar

manner, the different sectors investigated in this paper proved to have a contrasting resilience to the different debt levels.

Keywords: debt sustainability, economic growth, threshold determination, panel data, macroprudential objectives.

JEL Classification: H63, E58, C23, F34, F37, G00

1 Introduction

The adjustments in the balance sheets are one of the “new normal” after the burst of the financial crisis. High level of indebtedness among companies and households calls for a debt re-adjustment towards more sustainable levels. Banks shrink their business in order to cope with the new risk environment. Governments strive to consolidate their accounts, amid modest economic recovery.

In some cases, the issue of debt overhang also plays an important role. For instance, companies in their endeavor to pay down debt will overlook possible profitable investment opportunities even though the net income which could be obtained from taking on these projects would facilitate an eventual scale down of their liabilities over time.

In light of this existing literature, the value added of our paper is to grasp, in connection, the indebtedness level of all the sectors (companies, households, government, external, and total) when searching for the critical thresholds. The paper focuses on seven emerging European economies, employing both internal and foreign credit data to study how the probability of recession reacts to a range of debt values in case of the individual sectors (companies, households, and government), as well at various aggregation levels. The study embarks upon a macroprudential perspective, by looking for solutions to reach the intermediate macroprudential objective of preventing excessive indebtedness.

The paper is structured as follows. Section 2 presents the literature review, section 3 deals with the methodology employed in conducting the study. It also contains a description of the data and the variables which form the model. In section 4 the results are presented and interpreted. Finally, section 5 concludes the paper and suggests further research venues.

2 Literature review

In this sense, Koo (2011) argues there are at least two types of recessions. The first one is prompted by the normal business cycle, while the second is de-

terminated by private sector deleveraging or debt minimization (referred to as a *balance sheet recession* and related to the financial cycle). In an attempt to repair their financial standing, companies and households will increase savings and repay the debt they accumulated, which in turn translates into lower consumption and therefore lower aggregate demand. Koo (2011) also mentions that premature fiscal consolidation can prolong the recession, as it can transform in the long-run in even higher public deficits than those which will be required to stimulate the demand in the short-term.

These debt adjustments might be normal: what goes up must go down. But some questions are brought forward: by how much, how fast, and how to act as a policy maker. To answer these questions, the response of the probability of recession for various levels of indebtedness is investigated, in order to obtain the critical thresholds of debt above which the economic growth and the financial stability might be affected.

This idea is not new. Cecchetti et al. (2011) examine debt thresholds for the OECD countries concerning government, household and corporate sectors. Eberhardt and Presbitero (2013) find some support for a nonlinear relationship between public debt and long-run growth across countries, while Neagu et al (2015) identify thresholds for debt service-to-income and loan-to-income ratios in order to decrease the probability of excessive lending.

Reinhart and Rogoff (2010) look at the relationship between real GDP growth and government debt, showing that there is no discernible connection between the two variables up until the debt-to-GDP ratio reaches a threshold level of 90 percent. If public debt continues to grow beyond this value then the median growth rate of these countries will be approximately 1 percentage point below that of countries with lower debt levels.

Baum et al. (2013) investigate the relationship between public debt and economic growth by means of a dynamic-threshold panel model in order to assess the non-linear impact of public debt on economic growth. The authors find a level of public debt-to-GDP of approximately 67 percent up to which debt has a positive and statistically significant impact on GDP growth in the short-run. However, for values surpassing 95 percent, adding more debt influences the economic activity in a negative way.

Furthermore, Caner et al. (2010) also search for a tipping point in public debt level, which when exceeded debt will have a negative influence on the economic growth. By using yearly data, spanning between 1980 and 2008, and a threshold least squares regression model, the authors identify that a level of debt-to-GDP ratio greater than 77 percent will reduce the average annual GDP growth by approximately 0.0174 percentage points for each additional percentage point of debt.

Clements et al. (2003) analyze the impact external debt has on growth in low-income countries and show that a value of external debt beyond 50 percent could have a negative effect on growth.

3 Methodology

The objective of the study is to assess the potential impact of debt on economic growth. To this end, data was collected on six distinct debt categories (*i.e.* households, non-financial corporations, government, private, external, and total) as well as on gross domestic product dynamics. In order to control for the possible effects of other macroeconomic variables, data is also gathered on gross fixed capital formation, households' consumption, exports and imports, inflation and interest rates, together with government balance and unemployment rates. The sample spans over a 10-year period between December 2004 and December 2014, while the data frequency is quarterly. With the exception of interest rate, inflation and unemployment, the rest of the variables are expressed as percentages of GDP.

The information on debt and the other variables was extracted from Reuters, the European Central Bank, the national central banks as well as the national statistics institutes.

The recession event indicator, *i.e.* the dependent variable, is constructed as a binary variable based on quarterly GDP data, which takes the value 1 if the annual economic growth remains in negative territory for two consecutive quarters and 0 otherwise:

$$y_{i,t} = \begin{cases} 1, & \text{if } \Delta GDP < 0 \text{ for two consecutive quarters} \\ 0, & \text{otherwise} \end{cases} \quad [1]$$

Initially, seven countries were considered to enter the regression analysis, but for Poland there were not reported two consecutive quarters of negative growth during the interval December 2004-December 2014. Hence, the dependent variable for this country consists only of zeros which does not allow for the computation of debt thresholds in the panel *logit* estimations.

A multivariate panel *logit* model with fixed effects, building on the specification used by Baum et al. (2013), is then employed to assess the response of the recession probability to various threshold values of debt. In order to control for the effect of other macroeconomic variables, which could also have an impact on growth, the model also includes these potential relevant indicators as established by previous studies on economic growth. Margins effects on the probability of recession were computed in order to gauge how various debt levels will influence the probability, while the other covariates were kept fixed. In order to deal with the issue of heteroscedasticity, all models were run in a robust manner. After the estimation of each of the model specifications below, the ability of the predictions to follow the actual recession variable was checked to further ensure that the models were properly defined. Moreover, the accuracy ratio was computed as to verify that the specifications can accurately discriminate between the two states of the recession indicator.

$$\begin{aligned}
y_{i,t} = & \text{total_debt}_{i,t-4} + \text{gfcf}_{i,t-4} + \text{consum}_{i,t-4} + \text{trade_gdp}_{i,t-4} \\
& + \text{govt_balance}_{i,t-4} + \text{ir_dob}_{i,t-4} \\
& + \text{hicp_all}_{i,t-4} \qquad \qquad \qquad [2]
\end{aligned}$$

The total debt model was estimated by means of a panel regression in which the dependent variable was considered as the one in equation (1). With respect to the regressors, the total debt variable was constructed by adding the liabilities of households, non-financial corporations (both internal and external credit) and those from the public sector (domestic and foreign debt). Other determinants of growth were considered to be the gross fixed capital formation, households' consumption, the economy's openness (measured as the sum of exports and imports divided by GDP), the government balance together with the inflation and interest rates. All the independent variables were used with a lag of 4 quarters. In order to check the robustness of the results, model specifications in which 2 quarters and 8 quarters lag were also run. Further explanatory variables were included in the model as well, but the results do not merit their incorporation. Given the superior predictive ability of the 4-quarter lag model and the increased statistical significance in this case, it was chosen to move forward with this specification (equation (2)).

Similar panel regressions and reliability checks were used for the external debt and private sector debt models (equations (3) and (4)).

$$\begin{aligned}
y_{i,t} = & \text{ext_debt}_{i,t-4} + \text{gfcf}_{i,t-4} + \text{consum}_{i,t-4} + \text{trade_gdp}_{i,t-4} \\
& + \text{govt_balance}_{i,t-4} + \text{ir_dob}_{i,t-4} \\
& + \text{hicp_all}_{i,t-4} \qquad \qquad \qquad [3]
\end{aligned}$$

$$\begin{aligned}
y_{i,t} = & \text{private_debt}_{i,t-4} + \text{gfcf}_{i,t-4} + \text{consum}_{i,t-4} + \text{trade_gdp}_{i,t-4} \\
& + \text{govt_balance}_{i,t-4} + \text{ir_dob}_{i,t-4} \\
& + \text{hicp_all}_{i,t-4} \qquad \qquad \qquad [4]
\end{aligned}$$

For the public sector, the debt variable included both internal and external liabilities. The model also consisted of the unemployment rate, households' consumption, government budget balance, the interest rate and inflation (equation (5)). Similar robustness checks were performed as in the previous cases.

$$\begin{aligned}
y_{i,t} = & \text{gov_debt}_{i,t-4} + \text{unemployment}_{i,t-4} + \text{consum}_{i,t-4} + \text{govt_balance}_{i,t-4} \\
& + \text{ir_dob}_{i,t-4} \\
& + \text{hicp_all}_{i,t-4} \qquad \qquad \qquad [5]
\end{aligned}$$

In order to be able to evaluate the private sector debt at a more granular level, this category was split into households and non-financial corporations' debt.

In case of the latter, debt consisted of both domestic and foreign claims. The regression models in these two cases follow the specifications below (equations (6) and (7)):

$$y_{i,t} = nfc_debt_{i,t-4} + gfcf_{i,t-4} + trade_gdp_{i,t-4} + govt_balance_{i,t-4} + ir_dob_{i,t-4} + hicp_all_{i,t-4} \quad [6]$$

$$y_{i,t} = hh_debt_{i,t-4} + unemployment_{i,t-4} + consum_{i,t-4} + import_gdp_{i,t-4} + ir_dob_{i,t-4} + hicp_all_{i,t-4} \quad [7]$$

In order to cross validate the results, a model-based sustainability approach is also employed, as in Mendoza and Ostry (2007), in order to get further information on those levels of debt which have no negative spillovers for the economic growth. This approach was preferred to the so-called *ad hoc* sustainability analysis promoted by Bohn (2005). Mendoza and Ostry (2007) develop the method described below in order to assess public debt sustainability. Our paper builds on their work and extends it by considering this approach also for the other debt categories.

The foundations of Mendoza and Ostry (2007) model are found in Ljungqvist and Sargent (2004), which starts from the following Euler-type equation:

$$Q_j(s_{t+j}|s_t) = \beta^j \frac{u'(y(s_{t+j}) - g(s_{t+j}))}{u'(y(s_t) - g(s_t))} f^j(s_{t+j}, s_t) \quad [8]$$

where $Q_j(s_{t+j}|s_t)$ denotes the j -periods ahead pricing kernel, β is the subjective discount factor, y is the output produced in economy, g are the expenditures incurred by government, while u' is the marginal utility. At every moment t , the state of economy s_t is given by the combination of y_t and g_t . Because we are living in an uncertain environment, a Markov process is used to model the economy's dynamic, whose transition function between successive states is given by $f^j(s_{t+j}, s_t)$. The main idea underlined by the Euler equation is to equalize the net present value of consumption across consecutive periods. Thus, considering that allowed consumption is resulted from resource constrain $c(s_{t+j}) = y(s_{t+j}) - g(s_{t+j})$, the above equation states that in a general equilibrium environment, $Q_j(s_{t+j}|s_t)$ denotes the stochastic discount factor required to satisfy the Euler condition. In other words, $Q_j(s_{t+j}|s_t)$ shows the incentive for which an economic agent is willing to give up a unit of consumption today in favor of consumption tomorrow.

On the other hand, the related return R_{jt} required to borrow the government j -periods ahead from now (t) is defined as:

$$\frac{1}{R_{jt}} = \beta^j E_t \left[\frac{u'(y_{t+j} - g_{t+j})}{u'(y_t - g_t)} \right] \quad [9]$$

From here on, the notations expressed in terms of states were changed with a temporal notation. From relation [8], alongside with standard budget constraints used in general equilibrium optimization, the following asset-pricing type relationship was defined for the optimal level of debt D :

$$D_{t-1}(s_t) = \tau_t - g_t + \sum_{j=1}^{\infty} \beta^j E_t \left[\frac{u'(y_{t+j} - g_{t+j})}{u'(y_t - g_t)} (\tau_{t+j} - g_{t+j}) \right] \quad [10]$$

where τ_t are the government revenues. By manipulating relations [9] and [10], it is obtained a relation for the optimal debt level D with the same philosophy as the consumption-CAPM model of Lucas (1978):

$$D_{t-1}(s_t) = \tau_t - g_t + \sum_{j=1}^{\infty} \frac{1}{R_{jt}} E_t [\tau_{t+j} - g_{t+j}] + cov_t \left[\frac{u'(y_{t+j} - g_{t+j})}{u'(y_t - g_t)}, \tau_{t+j} - g_{t+j} \right] \quad [11]$$

If the covariance relation from [10] is ignored, then results the so-called *ad hoc* sustainability principle which implies that the optimal debt level is obtained when the initial debt equalizes the expected present value of the primary balance. Basically, the presence of $cov_t[\cdot]$ ensures an interaction between the government and the private sector in the financial markets. A positive covariance between the primary balance and the marginal utility emphasizes a counter-cyclical primary balance. Several studies showed that primary balances are counter-cyclical especially in the case of emerging economies, which means the primary balances usually are growing up in periods of recession.

Mendoza and Ostry (2007) defined the following relation for the data generating process of the primary balance:

$$PB_t = \rho D_{t-1} + \varphi_t + \varepsilon_t \quad [12]$$

where PB_t is the primary balance, ρ is the response of PB_t to the already existing debt level, while φ_t is used to control for other factors that affect the ratio between primary balance and aggregate output. ε_t is a Gaussian homoscedastic martingale sequence process¹ for innovations. In fact, Mendoza and Ostry (2007) uses [12] to test if [10] is valid as a response to Bohn's observation. This is done by checking if ρ is positive and statistically significant. Several empirical studies proved this for developed countries as well for emerging economies.

¹ $E(\varepsilon_t) = 0, E(\varepsilon_t' \varepsilon_t) = \begin{pmatrix} 1 & 0 \\ 0 & 1 \end{pmatrix}$.

More exactly, relations [10] and [11] represent a solvency condition within the sustainability analysis of debt. In that sense, Mendoza and Ostry (2007) derived the following sustainable debt/GDP ratio:

$$E[D_t] = \frac{-\mu + (1 - \rho)cov(1 + r_t, D_{t-1})}{\rho(1 + \bar{r}) - \bar{r}} \quad [13]$$

where r_t is the real interest rate on debt with its long-run mean \bar{r} , while μ is the long run average of the primary balance. More exactly, the two authors defined the sustainable debt as the level of GDP ratio to which it is expected to converge in the long-run under an optimal design. Therefore, for positive long-run mean of the primary balance, as well for a positive covariance between real interest rate and past levels of the debt, the sustainable level it's decreasing in ρ . The inverse relationship between $E[D_t]$ and the response of the primary balance to previous debts can be explained as follows: a large existing level of debt will determine the government to obtain a larger primary balance now, affecting instead its capacity to borrow in the future.

Based on Bohn (2005), Mendoza and Ostry (2007) assumed zero covariance between the real interest rate and the previous debt level, which transforms [13] into:

$$E[D_t] = \frac{-\mu}{\rho(1 + \bar{r}) - \bar{r}} \quad [14]$$

Relationship [14] was then further used in the computation of the expected debt levels viewed as optimal also in the case of private debt. This was possible due to several assumptions implied by the methodology used by Mendoza and Ostry (2007). First of all, because the pricing kernel theory is available for all types of financial assets, the involved formulas can also be applied for private debt. Going further, the approach to which Mendoza and Ostry (2007) resorted makes no links with the characteristics underlined by benchmark debt, namely no references about its structure and maturity. However, the use of the optimal debt formula above for other types of debt also is done somehow *ad hoc*, without a rigorous anchoring in the microfoundations.

In fact, the formula for the optimal debt level derived by Mendoza and Ostry (2007) supposes the calibration of four parameters: the primary balance, the response of the primary balance to existing debt, the real long-run interest rate and, respectively, the real output growth rate. In order to calibrate the model of Mendoza and Ostry (2007) for the various debt categories and countries, the following actions were taken.

The primary balance, in the case of public debt, was considered to be the quarterly difference between public revenues and expenditures. It is important to note in this case that the primary balance it is cleaned of any expenditure made to service existing debt. As such, the primary balance denotes the quarterly need of money for the government to meet its obligations. Based on this idea, a corresponding proxy was constructed for the private sector. More exactly, the

growth rate of private debt was employed as a stand-in for the primary balance. The analogy between the two measures can be expressed as: while the primary balance denotes the government's need for money, the growth rate in private debt denotes the same thing but for the private sector. A positive unconditional mean or the 50th percentile figures for the growth rate of private debt denotes an increasing need for money, in a similar manner to the negative primary balance in case of public debt. The response of the primary balance to existing debt is calibrated on the base of Mendoza and Ostry (2007). In that sense, given the uncertainty surrounding these two parameters, it was decided to construct grids for each of them. More specifically, different scenarios were considered with respect to the simultaneous values recorded by the long-run primary balance, respectively by the response of the primary balance to existing debt. Therefore, the results will be obtained in terms of surfaces. Red or blue bullets are used to indicate the results with the highest likelihood of occurrence in our view. In order to obtain the long-run primary balance, the 50th percentile operator was applied to the underlined empirical distribution. It was observed that between the 50th percentile figures and the sample mean ones are significant differences in some cases. For this reason, the grid for the long-run primary balance was constructed around the values recorded by the 50th percentile and the sample mean.

Related to the second calibrated parameter, a grid for the response of the primary deficit to existing debt was considered, which ranges between 0.025 and 0.04, in accordance with the results obtained by Mendoza and Ostry (2007) for a pool of emerging economies. The long-run interest rate was calibrated by using an Ornstein-Uhlenbeck continuous model for the term structure of interest rates. In our case, the model mentioned was estimated by resorting to the Aït-Sahalia (2011) method, which uses Hermite expansions and polynomials. For the long-run real output growth, the 50th percentile was applied to the largest available sample. In that sense, it was exploited the asymptotic principle while the largest available sample for each case was used in order to reduce the potential for bias phenomenon in the long-run figures.

4 Results

Ne conclude che la pressione dell'acqua, di per sé, non ha alcuna influenza sul comportamento meccanico del terreno e la chiamò pressione neutra. Al contrario, resistenza e deformabilità dipendono unicamente dallo sforzo efficace, così chiamato proprio per questo motivo. Rendulic (1937) ne fornì in seguito una dimostrazione sperimentale esauriente. The present paper employs a series of multivariate panel *logit* regressions in order to assess the evolution of the recession probability for various debt levels. In addition, a general equilibrium model is also used in order to gain a better insight into debt and growth dynamics. These two approaches strive to identify a debt threshold beyond which the economic activity could be affected. To this end, in case of the regression models, the marginal response of the dependent variable (*i.e.* the probability of recession) is

computed for six distinct debt categories whose values range from 20 to 200 percent of GDP. Debt is considered to have an adverse effect on the economic growth when the probability of recession surpasses 50 percent. In the next sub-chapters, an analysis of the results will be conducted for all six debt classes at the aggregated panel level, but also in the context of each individual country included in the study (Table 1). Furthermore, the results of the model-based sustainability approach will also be detailed.

Table 1: Comparative results - Regression model (RM) vs. Asset pricing model (AP)

% GDP	Total Debt		External debt		Government debt		Non-financial corporations debt		Households debt	
	RM	AP	RM	AP	RM	AP	RM	AP	RM	AP
Bulgaria	135	64	140	43	30	21	85	23	30	19
Czech Republic	125	88	55	54	45	34	55	28	30	40
Latvia	140	-	155	-	25	-	65	-	40	-
Hungary	195	46	185	173	90	24	75	41	40	48
Poland	-	148	-	100	-	88	-	8	-	88
Romania	100	175	90	151	45	39	40	48	20	11
Slovenia	135	-	100	-	40		85	-	25	-

4.1. Panel regressions' results

Firstly, the relationship between the probability of recession and total debt is investigated by means of a *logit* model estimated on a panel of seven Central and Eastern European countries. The dependent variable is, of course, the recession event indicator. On the right hand side of the equation, the model includes as regressors, besides total debt, several other macroeconomic factors in order to control for the impact of these variables on economic growth. In case of the total debt model, the panel regression results show that most of the variables' coefficients are statistically significant and have the expected sign. Total debt displays a positive and strongly significant relationship with the probability of recession, a boost in the debt level would materialize in an increase in the probability of an economic downturn. The interest rate, the openness of the economy and inflation also show a direct and statistical significant link to the dependent variable. Even though the consumption coefficient has the expected sign, this variable is not statistically significant, whereas in case of the gross fixed capital formation and the government balance the coefficients' signs are opposite to the expected ones.

Marginal effects are then computed with the scope of assessing the response of the recession probability to several total debt levels, while the other covariates are considered to be fixed. The results show that the probability of economic downturn exceeds 50 percent when the total debt has a value of approximately 140 percent of GDP. Beyond this level, the probability increases more and more rapidly.

When analyzing the regression results for gross external debt, it can be noticed that the majority of the coefficients are statistically significant. The debt variable influences the recession probability in a positive manner, higher levels of debt resulting in a larger probability of an economic contraction. By applying the same marginal effects technique as above will result in an external debt threshold of 120 percent of GDP at which the probability of recession is greater than 50 percent. After this debt level, the odds of economic decline follow a similar pattern as the ones of total debt.

Splitting total debt into private and government liabilities indicates that the public sector has a lower capacity to absorb debt than the former. In case of government debt, the response of the recession probability is swifter with the debt threshold standing at 50 percent of GDP, whereas in case of private sector the warning rate is approximately 90 percent of GDP.

Further disaggregating the private sector liabilities in non-financial corporations' and households' debt shows that the reaction of the dependent variable is more fast in case of households' debt, with the probability of a downturn exceeding 50 percent when the debt level for this category is relatively 30 percent of GDP. For non-financial corporations, the debt threshold is approximately double, having a value of 60 percent of GDP. This stands to show that households' debt could represent an important vulnerability for economic growth if it increases excessively. The developments in this sector merit an ongoing supervision and when there are indications that the levels of debt are heading towards unsustainable values the policy response, either through the activation of a macroprudential instrument or other available measures, should be swift.

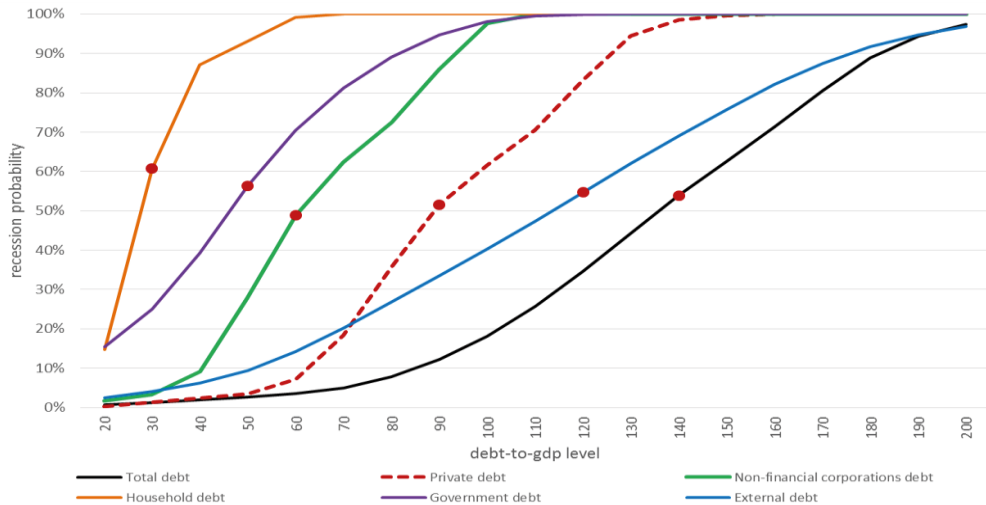


Figure 1: Panel results - the evolution of the probability of recession for various debt levels for Romania

4.2. Country analysis

Marginal effects were computed in order to assess the response of the probability of an economic downturn for several debt values and categories at country level. In this case, results vary quite substantially from one state to the other, although one common denominator throughout all regions seems to be the fast response of the recession probability in case of households' debt. In all countries, the debt threshold for this category does not go beyond 40 percent of GDP in order to register recession probabilities that exceed 50 percent. In countries like Romania and Slovenia, the threshold values lay between 20 and 25 percent of GDP, whereas Latvia and Hungary record the highest levels for households' debt, at approximately 40 percent of GDP.

These results underline once again the need to properly monitor the developments in this sector in order to ensure that debt does not grow in an excessive manner; especially given the importance households' consumption and confidence have in spurring growth in an economy. To this end, Neagu et al. (2015) find that implementing macro-prudential instruments such as caps on DSTI, LTV or LTI can significantly decrease the probability of excessive credit growth or unsustainable lending.

In case of non-financial corporations' debt, the thresholds range from 40 percent of GDP in Romania to 85 percent in Slovenia and Bulgaria. Even though at

aggregate level non-financial corporations seem to have a better ability to cope with higher levels of debt, it is important to keep in mind that developments at the microeconomic level are usually quite heterogeneous. As such, credit institutions should focus their efforts on viable companies with a sound financial standing, while companies that prove to be over-indebted should be assisted in improving their financial position.

In most countries the probability of an economic decline exceeds 50 percent at public debt values that are well below the limit established in the Maastricht criteria (60 percent of GDP), the only exception being Hungary for which the calculated threshold reaches 90 percent of GDP. The most eloquent example for the former is Bulgaria where general government debt has a negative impact on economic growth when its level surpasses 30 percent of GDP. In Romania, the public debt threshold stands at 45 percent of GDP, similar to the one recorded for the entire panel, while the current level of government debt is at 39.9 percent of GDP. In fact, five of the seven countries included in the analysis have public debt thresholds that are situated below 50 percent of GDP.

Caner et al. (2010) argue that the financial crisis and the subsequent sovereign debt crisis have led to a surge in the level of government debt and further increases are to be expected. The authors find that in case of emerging economies a public debt value over 64 percent of GDP can produce important negative effects on the economic growth.

It is therefore necessary to find a proper balance between the level of government deficits, which are ultimately financed either by adding more debt or by increasing taxes on companies and households, and the need to stimulate the economy. The governments could make use of other instruments at their disposal, such as a better management of non-refundable European funds, in order to run key investment projects in transportation, utilities, health or education. Furthermore, additional changes to the public-private partnerships could incentivize the private sector involvement in the investment process and therefore reduce the budgetary effort that would otherwise be required from the government should the project be only undertaken by the public sector.

Another argument for the increased involvement of the private sector is this category's better capability to take on larger amounts of debt than the government. The debt thresholds for the private sector in all countries are well above those determined for the public sector, ranging from 55 percent of GDP in Romania to approximately 110 percent of GDP in states like Hungary, Slovenia or Bulgaria. As shown above, these results are mainly driven by the non-financial corporations' ability to cope with greater level of debt, while in case of households this capacity remains rather limited.

High levels of external debt could also hamper a country's ability to harness growth in a sustainable manner, especially due to the possibility of a shock transmission from the partner states. In most countries, the gross external debt thresholds have relatively high values, with the lowest being registered in Czech Republic (55 percent of GDP). The country that showed the largest capability to

accumulate external debt is Hungary (the estimated threshold is 185 percent of GDP). For the other four countries, the external debt values at which the recession probability exceeds 50 percent fluctuate between 90 percent of GDP (in Romania) and 155 percent of GDP (in Latvia).

Finally, the assessment regarding total debt which is formed of households, non-financial corporations and government sectors reveals a similar pattern to the one registered for external debt. The thresholds in this case range from 100 percent of GDP in Romania to approximately 195 percent of GDP in Hungary. The values for the other four countries are positioned around the threshold recorded at the panel level (140 percent of GDP).

4.3. An asset pricing model-based sustainability analysis

The maximum likelihood estimates for the long-run average real interest rates obtained from the continuous Ornstein-Uhlenbeck model (OUM) were compared to the unconditional means, in order to include the most appropriate variable in the overall model. The calibration of the model was based on the estimates from OUM as long as the standard errors determined the rejection of the null hypothesis of a two-tailed T-test for significance. The null hypothesis of the significance test could not be rejected in two cases: Bulgaria and Czech Republic. In these two instances the unconditional means were used throughout the calibration exercise. For the remaining countries, estimates of the long-run interest rates proved to be significant from a statistical point of view.

The customized version of Mendoza and Ostry (2007) approach was then applied in order to compute the optimal debt levels. With respect to the two grids used in the model, for the response of primary deficit to existing debt level (ρ) the highest likelihood scenario was represented by a value of 0.03, while in the case of the long-run primary balance (μ) it resulted that the 50th percentile had the best fit. The figures for μ in the highest likelihood scenario were empirically derived, whereas ρ was set at 0.03 for the purpose of robustness. The mechanics behind the levels, respectively the shapes of each debt surface can be explained as: the optimal debt level determined by the model is increasing in μ and \bar{r} and decreasing in ρ . As such, the differences between the highest likelihood scenarios from country to country related to the computation of $E[D_t]$ are explained by μ , as well as by the real return exceeding the economic growth. The lowest \bar{r} was recorded in Bulgaria, while Poland registered the highest value. In ascending order of \bar{r} , the other countries classified as follows: Czech Republic, Hungary and Romania. Therefore, given the workings of a stochastic economy as used by Mendoza and Ostry (2007), for comparable figures related to μ , there is an up effect on $E[D_t]$ for countries like Poland or Romania. Furthermore, it is needed to be mentioned that in order to be able to consider $E[D_t]$ as a sustainable debt level it is also necessary to fulfill the condition $E[(1 - \rho)(1 + \bar{r})] < 1$ as Mendoza and Ostry (2007) emphasize. In our calibration exercises, this condition is satisfied for each country when ρ fluctuates within the grid [0.025; 0.04].

If the Maastricht criterion is considered for the public sector as a standard for the optimal public debt value, it can be observed that the calibrated $E[D_t]$, in the highest likelihood scenarios, surpasses that level only in case of Poland. For the other countries, the optimal debt stands firmly below the 60 percent of GDP benchmark. The surfaces calibrated for Romania and Poland show higher non-linearity as compared with the other three countries. Poland and Czech Republic are characterized by values of the long-run primary balance (μ) almost two-times greater than those of Hungary and Romania. Thus, the sustainable level of the public debt calculated for Romania is influenced by the larger \bar{r} when compared to Czech Republic, for example.

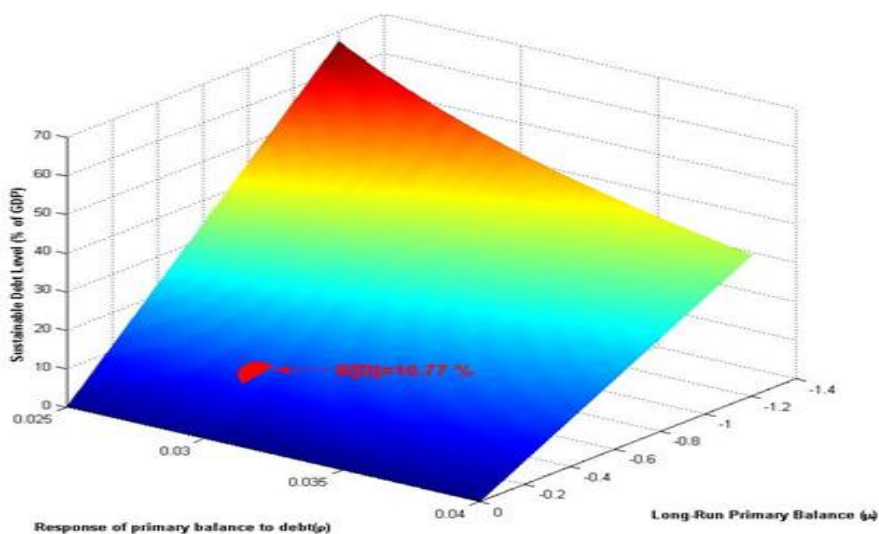


Figure 2: Calibration of the optimal public debt level for Romania.

As it was stated in the methodology section, for the private debt, μ was approximated through the growth rate of debt for each institutional sector. When looking at the variable related to the necessity for financing in the Hungarian non-financial sector, the data infers a decreasing funding pressure. In case of Poland, the unconditional mean operator emphasizes an increasing need for money, while 50th percentile operator reveals the opposite. For this reason, in our highest likelihood scenario for Poland, the unconditional mean operator was used and not the 50th percentile operator. For the other three states, μ has a similar value, but due to differences in terms \bar{r} from country to country, $E[D_t]$ in

case of Romania is more than twice when compared to the optimal debt level for Bulgaria.

If in the previous two cases, the sustainable levels obtained for Romania were among the largest ones in the pool of countries, in case of the household sector, Romania's $E[D_t]$ is the lowest. This fact is explained by the lowest μ among the five considered countries. Czech Republic has the largest calibrated μ , followed by Poland, Hungary and Bulgaria. On the other hand, in terms of optimal level of debt, Poland has recorded the largest figure, while Hungary and Czech Republic classified on the next two positions. In the most likely scenario, Poland's $E[D_t]$ is almost twice than those optimal levels of debt obtained for Hungary and Czech Republic.

For external debt, Hungary registered the largest $E[D_t]$ (around 173 percent), followed by Romania (around 151 percent). In case of the other three countries, much lower figures were recorded for their respective optimal debt levels. More specifically, $E[D_t]$ is around 100 percent for Poland, 54 percent in Czech Republic, while in Bulgaria it stands around 43 percent. The greater $E[D_t]$ figures obtained in case of external debt when compared to the previous three cases are explained by a larger empirical μ . Even though the technical way in which μ was calibrated for the private sector is different from the approach envisaged in case of the public sector, in terms of economic meanings the two instances are relatively similar.

Last but not least, in the most likely scenario for the total debt case, Romania has recorded the largest optimal debt level, being followed by Poland and Czech Republic. At the other end of the spectrum are Bulgaria and Hungary. Conversely, the Czech Republic has the largest μ , with a value relatively close to the one registered by Romania. Although Poland's μ is approximately one third lower than the one observed for Czech Republic, the optimal level of debt obtained for Poland is around 59 percentage points larger compared to Czech-Republic's $E[D_t]$.

5 Conclusions

A series of panel regressions were used in order to assess the effect of debt on economic growth. To this purpose, the marginal response of the dependent variable (i.e. the probability of recession) was calculated for six debt categories at values that range from 20 to 200 percent of GDP. Moreover, an asset pricing model was also estimated in order to better grasp the effects of debt of economic growth. The results vary quite considerably from one category to the other, but also between the methods used. One important conclusion the results bring forward is that "one size fits all" type of measures or thresholds (see for example the 60 percent level of public debt-to-GDP ratio established in the Maastricht treaty) might not be the most indicated solution as countries can bear various debt levels. Imposing a too restrictive threshold in a country which can support higher debt values can lead to opportunity costs through missed investment pos-

sibilities. Conversely, setting a threshold above the one which can be afforded can also have negative effects on economic growth. In a similar manner, the different sectors investigated in this paper proved to have a contrasting resilience to the different debt levels. The developments in the households' sector warrant a constant supervision and when there are indications that the levels of debt are heading towards unsustainable values the policy response should be immediate.

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Risk Management and Corporate Strategies

Communication for preventing reputational risk. McDonald's strategy and its impact on the Italian market

Authors

- *Elena Candelo, Associate Professor, elena.candelo@unito.it - University of Torino*
- *Cecilia Casalegno, Researcher and Lecturer cecilia.casalegno@unito.it - University of Torino*
- *Chiara Civera, Research Fellow, chiara.civera@unito.it - University of Torino*

Some markets, like the fast-food one, are affected by the so-called “industry effect”, which brings with it misperceptions and misjudgements among stakeholders that create difficulties in establishing, modifying and maintaining players’ corporate image. In addition, giant multinational players like McDonald’s – that is going to be hereby investigated - has suffered from certain reputation crises that contributed to increase the weight of those misperceptions. As commonly accepted, communication can contribute to reduce reputation risks and build an improved brand reputation, on the basis of various variables; Corporate Social Responsibility and Sustainability is one of them. The paper investigates, on one hand, the McDonald’s case study with the aim of showing that a communication strategy based on results and measurable performances of CSR is therefore able to prevent reputational risks and maintain a good brand reputation, although well-established perceptions are hard to change. On the other hand, the case study is tested on Generation Z through the focus groups methodology in order to demonstrate which communications are expected to be better perceived in the future and why.

Keywords: McDonald’s, Generation Z, Corporate Social Responsibility, Communication, Brand Perception, Reputational Risk.

JEL Classification: M30

1 Introduction

Over time, McDonald’s has become one of the main symbols and concrete signs of globalization, bringing together cultural, societal and environmental issues, in each of the countries the business has been developing.

Moreover, the fast food sector *per se* can be considered to be suffering of what it is commonly called “industry effect”. Such effect refers to certain rules, behaviours and strategies that assume different meanings and implications when applied to certain industrial sectors. For instance, prejudgments associated with the quality of ingredients and overexploitation of lands are typical of the fast food sector.

As a matter of facts, it is no surprise that McDonald’s business model has been one of the easiest ones and most likely to be attacked and criticized from academics, opinion leaders, consumers and stakeholders in general. Intrinsic reasons can be linked to a fast capitalism growth and/or issues related to resources rationalization, lands and animals exploitation as well as negative environmental repercussions, which have dramatically spread their echo due to a global presence never really experienced before within the food industry.

Following a fast and dramatic expansion out of the American boundaries during the latest ‘60s, the first Italian opening happens in 1985, where the multinational is nowadays present with a substantial number of restaurants and faces everyday a very challenging market, food-culturally speaking.

As is common knowledge, Italy is one of the main food quality country ambassadors all over the world, with highly differentiated products and acknowledged characteristics in raw materials, ingredients and food processing methods. Stakeholders’ perception of Italian food is higher than the average and for this reason, the analysis of McDonald’s communication efforts to manage any reputational risk – perhaps here perceived in a more severe way – and increase the perception of its brand in such market appears as interesting as challenging.

After analysing McDonald’s case study in regards to their communication efforts into the Italian market with a focus on Corporate Social Responsibility contents and strategies, the authors have focused the study on a particular category of stakeholders in order to test theories and investigate their perception towards McDonald’s communication strategies in Italy. Generation Z has been considered, as it represents the most receptive to certain types of communications, according to which transparency, values and interaction matter more than others.

In order to achieve its purpose, the study is articulated into five sections: literature review, literature gap, methodology, results discussion, conclusions and limits of the study.

2 Literature review

Reputation represents, for companies, a core strategic resource (Roberts and Dowling, 2002) that can provide competitive advantages (Jackson, 2004), since manager and academics believe that a favourable reputation has a strong value and represents a powerful asset in pre crisis periods (Coombs and Holladay, 2006).

Like all the other key resources, reputation can be damaged and put under risk, affecting both the chance to profit in the long while, and the positioning of the company.

Risk is connected to the probability that a “crisis” will occur, as manifestation of unexpected events, that might compromise internal and external stakeholders’ perception on the company and its image (Coombs, 2007). The risk for reputation to be damaged brings with it other relevant risks, connected, for instance, to the loss in market shares, dramatic sales decrease, rising of mistrust and confidence from the audience, financial risks, lack of commitment from employees and incapacity to retain good contract condition with suppliers (Webley, 2003; Eccles, 2007).

The reputation of a certain organization is developed not just through the “simple” interaction among the organization itself and its stakeholders, as a output of the continuous interaction (Fombrun and van Riel, 2004). Even what Coombs (2007) considers “secondhand information” (the output coming from the interaction among people, like word of mouth and blogs), represents a cause of reputation formation and this is crucial to understand.

Given the fact that reputation is linked to the quality of relations, that the company establishes with its stakeholders, and implies an alignment between audience’s expectations and company’s actions (Siano et al., 2015), communication can play a crucial role for the creation of a good reputation (Coombs, 2007; Pastore and Vernuccio, 2008). In particular, marketing communication, institutional or corporate, PR, financial and organizational communication can prevent and manage risks related to the reputation and bridge the gap between company’s promises and concrete achievements.

What said above it is totally valid for the more mature generations (pre Baby Boomers, Baby Boomers, Generation X), partially valid for people belonging to the Generation Y, (Montana and Petit, 2008), people described as edgy, urban focused and idealistic (Kotler, 2005). Instead, according to our knowledge, concerning the Generation Z, managerial studies have not been related on the topic this present paper considers, even if this generation appears peculiar as it shows greater interest to the topics at issue, to the concept of interaction and transparency as key elements of communication more than other previous generations. We are talking about a Generation who in most cases is the offspring of Generation X, people are born after 1996 and who are also known as a Generation self-examining. It is also anticipated that while this group will be the most environmentally friendly as compared with their counterparts, they will also have an extremely high level of distrust with corporations and will be more apt to leave

their job and/or career more quickly than Generation Y. (Korean Times, November 13, 2007). In addition, this generation yearns for choice in all processes and/or the perception of choice and desires structure and customization within all they do (Strauss and Howe, 2000). Therefore, the standard performance evaluation executed once per year will not be adequate among this group as these individuals require frequent input from their supervisors (Montana and Petit, 2008).

We are particularly interested to investigate this Generation as the efforts of McDonald's in terms of communication, preventing reputation risk, have been addressed to a embryonic target market which has experienced the first attempts of transformation both regarding products (by augmenting the product lines) and communication (intended also in the relationships between the firm and its customers). Moreover, despite having assisted to the strategic challenge, Generation Z is fully aware of the original characterization of the brand in terms of image, products and distribution formula.

2.1 Literature Gap

Despite the issues of reputation, perception and communication linked together are explored lands as far as academic literature and empirical researches are concerned, little has been written on how to implement a standardized framework for Communication (with a focus on Corporate Social Responsibility) to function as lever to prevent reputational risks and protect and enhance the corporate's image. The present study is part of a broaden research seeking to investigate the use and implication of Communication for preventing, managing and maintaining results against reputational risks at all levels. In particular, the authors are focusing the attention on the use of Communication for a specific multinational company that, over the years, has been hit by several different reputational damages. These damages appear to have impacted negatively both on sales level and the brand image, throughout the whole geographical markets.

Since the current managerial literature doesn't consider Generation Z perception towards worldwide big players, the aim of this paper is to analyse which kind of communications better impact on young stakeholders (consumers and non consumers as well) and then build a framework for a coherent and transparent communication strategy to prevent negative opinions and buzzes and, consequently, further unfavourable repercussions on reputation.

The purpose of the study is to respond to the following research questions:

Q1: considering a history of reputation, how can a re-known multinational company set up their communication strategy more effectively in order to solidify stakeholders' perception? Does CSR matter?

Q2: which communications better impact on Generation Z stakeholders? Does CSR matter?

McDonald's is the chosen case. It represents an interesting case of investigation for exploring and explaining the efforts in communication and the strategies undertaken in order to prevent and/or decrease the damages in reputation

caused by the many intrinsic negative aspects connected to the American giant's core business. Critiques have been developed around the implemented processes damaging lands and territories, the use of substances potentially compromising the quality of both resources and products, until the employment policies. These critiques come from reference communities, researchers, academics, journalists, writers, internal and external clients, associations and environmental groups (Etzioni, 1986; Hawken, 2002; Blythe, 2005; Botteril and Kline, 2007).

3 Methodology

In order to respond to Q1 and Q2, a mixed methodological approach has been adopted. First of all, the case study elaboration will involve a qualitative description of objective information over McDonald's and its Integrated Firm Communication strategies (including Integrated Marketing Communication) adopted in Italy only. The case study will consider both actions (such as products communication, point of sales communication and participation to events) and published documents and records from websites related to the company, company's institutional web site, PR communication, press release, annual reports (Sustainability Reports, Social Reports, Code of Ethics). All the information have been collected through a period of 8 months in 2015. Moreover, the case study is accompanied by interviews to McDonald's Italian managers, who have provided a company's perspective and strategic insights over the developed communications and, eventually, contributed to test the adopted methodology and the managerial implications.

Furthermore, as a second step, the authors have investigated from young stakeholders' perspective, the impact and effectiveness of different kinds of communications on reputation, by using the method of focus group.

In general, the focus group considers a group of individuals that the researchers have previously selected and assembled to discuss in an organized way (Gibbs, 1997) and comment on, from personal experience, the topic that is the subject of the research (Powell, 1996). The focus group reveals its usefulness for the issue under investigation as it is oriented to investigate target market's attitudes and reactions (Carey, 1994) as well as the degree of opinion or consensus on a given topic (Morgan and Kreuger, 1993).

Participants to the focus groups have been asked to discuss around McDonald's case study and a factitious similar business case set up ad-hoc by the authors.

The factitious restaurant, named Etiristo & Co., has been built to function as opposite control case against McDonald's. Its business model is, accordingly, designed with intrinsic sustainable and responsible practices in the sourcing of materials, production, distribution and the approach to the target market. Etiristo & Co. is a local business reality, with no international investments and a brand positioning between a fast food and a traditional restaurant. On the other hand

McDonald's, the principal considered case of fast food chain in our paper, maintains its international positioning together with its "glocal" approach.

In order to facilitate the discussion and the moderation of results, the sample has been divided in two groups, half respondents to the McDonald's case study, and the other half to the factitious one. In particular our sample has been composed by a total of 270 Italian people, consumers and non consumers, aged from 18 to 19 and belonging to the Z Generation as explained above in the paper. Participants have been involved in focus groups to monitor and measure their reactions to McDonald's communication.

Three scenarios have been presented and explained to every 10 people focus group, which consisted in three different communication efforts in three different years: 2012, 2015 and a hypothetic future (2025). The premise has been that it was necessary for all the participants to be aware of both the case histories.

The three scenarios are explained below:

- First scenario: the 2012. McDonald's communication efforts are addressed to report on their ingredients controlled sourcing (Italian meat, for instance) and the introduction of fresh products in the menus. Moreover, in this year strategic future goals in terms of sustainability (both regarding the environment and the society) are more frequent. In a small town near Turin (Piedmont, Italy) a newly concept of fast food restaurant opens its doors to families: Etiristo & Co. From the name to the business model, the restaurant is centred on sustainability, ethics and responsibility, with classical formula of hamburger and chips tailored also on vegans, vegetarians and celiac. The restaurant core business is based on controlled km 0 ingredients and a short supply chain, with physical evidence strictly linked to the territory tradition. Both products (meat, chips, vegetables and fruits) and processes are certified by National and International Standard to guarantee their sustainability.

- Second Scenario: the 2015. This is the year of the Universal Exposition (Expo 2015, Milano) and McDonald's is one of the Official Sponsors of this event with a pavilion to promote its history and the evolution of McDonald's Italia. McDonald's has strengthened its efforts in order to meet emerged society trends concerning a more healthy lifestyle. The green "new" layout is a visual output of this product and communication strategy. On the other hand, the fast food Etiristo & Co. continues its strategy by developing new products according to its business model and the ultimate concerns towards the sustainability. Moreover, its target market is still the Piedmont one.

- Third scenario: the 2025. All the McDonald's restaurants have turned their layout to a more environmental friendly one, sustainable and technological. Consumers could already experienced the "salad bar", the waiting service, the little gyms for their kids. Etiristo & Co has gained the favour of the target, increasing long terms profit. Due to this fact, the management has decided to open new restaurants in Italy and is evaluating a greenfield investment abroad, by maintaining the same business model.

Per each scenario people were interviewed towards their perception as a reaction to the two restaurants different communications. To do that, every group had to rank its level of confidence about the restaurant it had been assigned to. For the purpose, we used a Likert scale going from 0 (being zero the lowest level of confidence) to 5 (being five the maximum level of confidence). Moreover, concerning the 2025 scenario, it is to underline that the sample was asked to imagine a future situation by leveraging on presents results. In this way the future scenario is a projection of present actions and communication (by the restaurants) and feelings.

Moreover, every group has been interviewed on the colours of the McDonald's brand, per each scenario, in order to test the degree of perception towards the evolution of McDonald's brand communication strategy.

4 Results discussion

4.1 McDonald's case study: from Fast Food to Good Food Fast

On the 15th of April 1955 Ray Kroc's - a Multimixer former sales representative for Richard and Maurice McDonald's restaurants chain - fascinated by the business model based on self-service and drive-in, opened the first McDonald's restaurant in Des Plaines, Illinois, believing low-cost hamburgers would have become the future trend in food consumption.

Since its very beginning, the American restaurant imposes itself on the market as entry-level products chain that establishes its success on affordability, convenience and is appealing for the mass market in terms of price, timing and ingredients.

The successful McDonald's formula - based on the newly experience inside the restaurant as a fast food suitable for families and children as well as outside with the innovative McDrive locations - communicates freedom and leads to a quick growth in profits and market penetration.

Therefore, the service standardization and a strategy oriented to the American mass-market brand affirmation converged to the formal birth of McDonald's Corporation - and its "Golden Arches" brand - in 1960, as a company ready to embrace multinational challenges. The Company immediately became the symbol of the American dream by exporting low-cost fast food for a growing target market with similar expectations.

In 1967, with the opening of restaurants in Canada and Puerto Rico, McDonald's begins its expansion outside the American boundaries and introduces new products such as the Big Mac, destined to become part of the core menu until today.

What Ritzer (2004) defines as McDonaldization refers to the set of managerial key principles leading to the Group's success on global markets, which are mainly based on rationalization and standardization. First of all, choice of materials and ingredients that are cost-efficient, necessary to offer low-priced ham-

burgers; secondly, strict controls on the production process and processes standardization in terms of workflow and main core products. Accordingly, the main competitive advantages of a quick expansion in America are to be found in the capacity of meeting a strong demand of fast and cheap food by American baby boomers and working-women during the '60s (Mourdoukoutas, 2013). Moreover, markets opening, integration, and globalization process happening in the '70s along with a standardized and cost-effective business model and a mass marketing communication have facilitated McDonald's growth all over the world.

As a result, in almost 20 years, the American giant is conquering the globe: in 1981 restaurants are opened in Spain, Denmark and Philippines; in 1983 McDonald's counts 7,778 restaurants in 32 countries all over the world. Nowadays, only Europe counts almost 7,000 McDonald's that are evolving towards more complex and tailored forms of fast food restaurants, addressed to meeting different needs and peculiarities of each country.

It is no surprise that, within such fast and impacting growth, the success has exposed McDonald's to critiques impacting negatively on stakeholders' perception; and this is more valid, as mentioned before, in a geographical context such Italy, typical expression of food quality and excellence.

Due to intrinsic characteristics of the products, the service concept and the production processes, following the rules of resource rationalization and globalization, McDonald's business model and communication campaigns have been subjected, over the years, to strong criticisms coming from various sources: reference communities, researchers, academics, journalists, writers, external and internal customers, associations and environmental groups (Etzioni, 1986; Hawken, 2002; Blythe, 2005; Botteril e Kline, 2007). It is possible to affirm that the competitive advantages on which McDonald's business model and communications have been built on have represented, at the same time, limitations, which became more and more evident over the years. That is because of increasing awareness among the audience and public opinion about environmental and nutritional issues as well as sustainability and social responsibility matters, along with a cultural evolution and affirmation of new reference values especially in relation to the food sector.

The paradigms of standardization and globalization have been put under question and highly criticized that they started representing threats for the American multinational and, paradoxically, transforming its strengths into internal weaknesses.

In effect, here are just some of the criticisms connected to such business model: crops and livestock farming standardization have been accused to bring with it the destruction of biodiversity; the promotion and sale of food with an high fat content and sugar that is directed to a young target audience have been criticized to exert devastating nutritional effects (Hawken, 2002). Moreover, the competitive advantage in terms of efficiency is related to the highly criticized monoculture systems, intensive live storms, which cause deforestation and the increment in the use of antibiotics and artificial growth hormones for feeding chickens and cows (Botteril e Kline, 2007).

Similarly, the rationalization of labour force, which, on one hand, has meant substituting human resources in restaurants with technological resources and, on the other hand, has implied the increasing hiring of young people and immigrants with lower salaries, has represented one of the main issues of concerns for the public opinion associated with social problems. Accordingly, on the 24th of August 1986 Amita Etzioni (Professor at George Washington University) in her article "The Fast-Food Factory: McJobs are Bad for Kids", published on the Washington Post, coins the term "McJob", which will become part of the common language in the same year. The author defined the "McJob" as a routine job, supervised and controlled by managers who do not favour self-supervision and do not represent examples to emulate and therefore a job that does not succeed as educational opportunity. The term becomes part of the Oxford Dictionary in the same year (1986) as a synonym of "A low paid job with few prospects" (oxforddictionaries.com).

Clearly, reputational crises rising from strong and widespread opinions over the business model and also from concrete scandals - that the Corporation experienced, for instance, in China - have impacted negatively on stakeholders' perception as well as on economic results.

In response to drops in profit since 1998 (Botteril and Kline, 2007), communication strategies implemented at a global level seemed to have all shifted to include sustainability, ethics and environment as main contents and matters of concerns. Moreover, this appears to represent an alignment to the main global competitors' actions and communications. In America, for instance, McDonald's reputation has been put under risk also by the intense growth of players like Chipotle Mexican Grill (the Mexican chain that has won McDonald's sales over) (Wood, 2014; Wong, 2014), Five Guys and Panera Bread, that are innovating their business models including organic, bio, fresh, healthy and sustainable choices of products in their offer and extensively communicating about this.

It is natural that because of the size of its business, McDonald's was a bit late in responding to such innovation by implementing and, consequently, communicating about sustainability and quality food.

The first formal communication effort proving a shift in the multinational's actions and strategies happens in 2002, with the publication of the first Social Responsibility Report, with the aim of underlying increasing attention towards the environment, ethics and food quality.

In the Report the Group highlights three strategies which they declare to base their business on from that moment onwards: the attention to human resources in terms of salaries and contracts, the focus on consumers in order to guarantee excellence in ingredients and operations, and the growth in profits in regards to the Company and all the partners throughout the supply chain (intermediaries and suppliers). The communication strategy is articulated around 4 macro areas in which McDonald's states to be creating value with honesty, integrity and ethical standards: the Community, the Environment, People (internal human resources and staff), and the Market (intended as suppliers and consumers). Despite the Social Responsibility Report has contributed to formalize the communi-

cation of new values driving the business, audience's perception over the veracity of such information still was not aligned with McDonald's intentions. Some criticisms from the academic community, for instance, are built around the fact that the Report would represent just an attempt of communication in order to merely respond to reputation crises, without representing a concrete shift of actions, goals and strategies (Hawken, 2002).

It is some years later when McDonald's concretely tackles the challenge of a strategic repositioning, modifying marketing and communication levers in crucial markets, where reputation crises have strongly shaped specific needs and expectations around the American multinational's business. Accordingly, embracing a more sustainable route and giving attention to food quality and taste represent the main goals of such strategy, with a strong reshaping of communication.

The starting point of such strategy is represented by the fact that once the multinational developed and achieved a strong capillarity they started thinking more about an adaptation to the reference territory, not by changing the business model, to innovate it instead, and tailor offers and communications, in order to enter consumers' habits all over the world.

The repositioning strategy has started from France in 2008, involving firstly the Mediterranean countries, including Italy, where the need of restoring a more valuable reputation and responding to on-going needs for quality and sustainability have been felt necessary to maintain the growth for the upcoming 10 years.

As reported by the Chief Executive Officer of McDonald's Italy, the repositioning strategy has been set up around more than 10 strategic levers, by re-thinking products, ingredients, service, processes, consumption models, supply chain, workplace, restaurants layout, brand, websites, relations with the local communities. In all these areas, both marketing and integrated communication (institutional or corporate, PR, financial and organizational) have played a key role to gradually and positively modify and affect stakeholders' perception.

Clearly, the implementation of such actions needs time and lots of efforts, especially when it comes to a giant and well-established company like McDonald's.

That is why it is worthy and interesting to point out how this process of repositioning has been integrated with the existent strategies and which communications have been put a stronger accent in order to change stakeholders' perception and in which period of time the expected results can be achieved.

The focus of the paper is put on the Italian market as it is considered very challenging in regards to the new McDonald's strategy and constitutes an example of food culture that has imposed considerable modifications in the multinational's approach to consumers, who are confirming specific and healthy food choices (such as vegetarian, vegan and, bio), and want to see reflection of this in a coherent and transparent communication activity.

The repositioning strategy in Italy has been developed gradually by implementing and communicating one topic at a time in order not to create confusion in stakeholders' minds and it is expected to take more than 10 years to orientate their perception towards McDonald's as a good food fast destination. In particu-

lar, the strategy has been articulated in seven areas, considered key for the Italian audience.

1. Placement/layout: restaurants were originally born in American style, serving cheap and standardized food. The aim of the strategy is to turn them into contemporary, modern, more spacious food destinations, characterized by better aesthetics and new characterizations of food, which is now thought to bring people together, enjoying a longer staying for pleasure and leisure.

2. Integration with the urban context: this concept refers to Corporate Social Responsibility in the sense that restaurants are being renovated to match with their reference environment with less impacting material, with a challenging goal of reusing the oil for transportations and rely on solar panel energy in most of the Italian restaurants. Moreover, plants and flowers are being introduced outdoors within wood decorations. Layout is set up more with restaurant logic than a distributor one, like it was in the past. This change is considered a consistent upgrade addressed to concretely influence perception towards sustainability and community engagement, as it is based on experience.

3. Products and ingredients: the aim of McDonald's is not to modify their core products, instead to extend the line in order to match with specific tastes and local needs. The increase in the use of chicken as well as local and bio ingredients, the reduction in the use of antibiotics, respond to a greater demand from Italian consumers, who would rather sacrifice higher price to being delivered local products.

4. Re-shoring: localization is seek to be achieved by re-shoring the main sources for production. In particular, all the cows are grown in Italy (75% from Amadori, for instance), milk its derivatives come from Brescia and, parmesan is the real Italian "Parmigiano Reggiano".

5. Re-branding: the original red colour as background of the "Golden Arches" of McDonald's logo has been substituted by the green colour with the aim of communicating a change of attitude towards more sustainable practices.

6. New consumption model: the "Cafeteria service" has been introduced in Italy to test its potentials and nowadays McDonald's owns 280 Italian style cafeterias between Italy and abroad placed inside the existent restaurants. The implementation and strong communication about "breakfast at McDonald's" aimed at attracting new consumers and make the current offer more appealing by taking advantage of the exclusive quality coffee McDonald's is serving. The combination of newly introduced products (such as the coffee) with core ones creates a "halo effect" increasing the perception of the existent.

7. Inclusion of CSR contents in communication: communication strategy has been developed around pillars reflecting sustainability and responsibility. First of all, familiar products are implemented and communicated in order to fight junk food perception, especially among younger generations. Secondly, misperceptions related to the "Mcjob" issues are dealt with by communicating a growing attention towards job market and young people employment. The multinational places itself as entry level job place for students and communication is set up around their commitment to the company. The activation of the McItaly Job

Tour (through which McDonald's recruits people in public squares) represents one of the strongest and most concrete communication tools to activate a positive word of mouth and fight the prejudgements of working at McDonald's. Such campaign has taken advantage of the crisis period and high unemployment rate in Italy to communicate that the Company was actually creating more than 1000 job positions per year and that they were one of the biggest employers in Italy. Investments in such communications have been positively reflected also in an increased commitment from people already working at McDonald's. Thirdly and eventually, the focus on young generations well being has driven the Company to communicate over nutritional values and lower the percentage of fat and sugar in their products, with a strong commitment to include in the Happy Meal menus juices, milk and water as core products by 2020.

4.2 Generation Z perception: results from the focus groups

Per each scenario we have asked the different groups to rate their perception towards the two restaurant chains. As the Table 1 shows, the 55% of the analysed sample does not usually consume fast food at all. On the other side, the 36% of the sample asserts to be a strong McDonald's consumer. This shows that the brand McDonald's has a large awareness, because the brand was strongly recognized by every interviewed person.

People in every focus group were tested about the colours of the brand McDonald's and, as shown below (Table 2), few of them have realized that the restaurant layout, together with the background of the brand design, have changed turning from red to green. The interesting result is that people didn't recognize the green background even after the Expo period, in which the logo exposition was huge and frequent.

Concerning the comparison between McDondals' and the factitious case (Etiristo & Co.), it is interesting to underline that the two cases have different business models, histories and brand heritage. First of all, we talk about a global multinational company with a high brand awareness, very known by young people (Generation Z as well) not just as a restaurant, but also as a entertainment and a meeting place. This is the reason why the consumption experience mean is very high; in 2012 the mean is 4 out of 5 and this is due to the fact that teenagers usually perceive McDondals' as place though which they can meet friends without any food concerns. When people grow, their concerns about food and environmental problems grow as well as stated by Montana and Petit (2008) and this is the reason why their consumption experience decreases to 3.1 in 2015. In 2025, McDonald's has shown to the audience its capacity in developing sustainable strategies and in communicating them in a concrete way. This could help its business results and this is shown by the fact that the consumption experience grows to 4 in a phase in which the sample was asked to pretend to have a family and to decide about its health.

From the side of Etiristo & Co., the consumption experience lightly decreases from the beginning of its business (2012) to the 2025, due to the territorial ex-

pansion which could bring to a target dilution and modify the brand identity by adding the international meaning. This could cause the partial lost of sustainable basis of the original business model and this could confuse the target.

On the other hand, what is communicated and how has an impact on the brand reputation and this is proved by the results gathered towards the product communication and the sustainable one. McDonald's results show that the increasing of product perception is incremental among the considered years, passing from 1.4 in 2012 to 2.9 in 2025, whilst it is lightly incremental the perception of the business sustain-ability after the communication of the future activities: promises are not sufficient for the audience, at least they are not enough to effectively increase the sustainability perception by the audience: McDonald's passes from a mean of 2.3 to a result of 2.6 in 2025. Accordingly, the brand perception after being aware of sustainable results reports a major augment from a mean of 2.4 to a mean of 3.8 in 2025. This result shows that tangible results can shape the perception better that promises can do: even in this case the way is long for a multinational company which for years has been carrying on its shoulders the weight of being the industry leader and a symbol of the American business culture. These results are reinforced by those concerning Etiristo: in this case the restaurant maintains its business model, but it obtains a decrease in perception regarding the consumption experience (from 3.5 in 2012 to 3.1 in 2025) when it announces its willing to become an international player. Instead, it is to identify a drop in Generation Z perception towards McDonald's in 2015, when the direct experience in the restaurants still does not reflect, in most of the cases, the communications spread by the American multinational company. In 2025 the expected perception grows, as our interviewed groups recognize that actual changes within the consumption model in the point of sale can happen in favour to more sustainable evidence.

Table 1 2015 Focus group participants.

	Fast Food	McDonald's
Consumers	45%	36%
Non consumers	55%	64%

Source: authors' personal processing.

Table 2 McDonald's brand colours perception during the years.

Brand Colours	Answers 2012	Answers 2015	Answers 2025
Red and gold	92,5%	58,5%	10%
Green and gold	5,5%	41,5%	90%
Blue and gold	2%	-	-

Source: authors' personal processing.

Table 3 Young stakeholder perception evolution in 2012, 2015, 2025.

	2012		2015		2025	
	Mc	Eti	Mc	Eti	Mc	Eti
Product communication	1.4	3.3	1.8	4.5	2.9	4.4
Sustainable communication	2.3	4.1	2.4	4	2.6	3.4
Brand perception after having known sustainable results	2.4	3.5	2.6	3.7	2.8	3.8
Consumption experience	4.2	3.5	3.6	3.5	4.2	3.1

Source: authors' personal processing

5 Conclusions

The analysis of McDonald's communication strategies developed both to manage and respond to reputational risks that are intrinsic and/or independent to the business model, together with the results of the investigation on Generation Z, led us to suggest a rulebook. This can be generally adapted to large multinational companies in the form of restaurant chains operating in the food industry that count long tradition and high market awareness. Two premises are required: first of all, clearly, for these companies reputation is hard to maintain and eventually to drive differently; secondly, results from communication activity are under a longer gestation process.

Accordingly, our research suggests that:

- the stronger the brand awareness and exposition, the longer the strategic repositioning;
- the transformation of soft skills such as sustainability and responsibility into core activities, both concrete and communicated, can turn perception better in the long term;
- it is fundamental to choose one topic of communication at a time, in order not to create confusion in stakeholders' mind, even when the target (for instance Generation Z) is willing to embrace multiple inputs;
- differently from the past, standardization has shifted to new meanings concerning sustainable communication: strategies are required to be shaped according to the cultural environment they refer to. Not all the Countries are in the same stage of understanding and applying CSR and sustainability practices. In particular, Generation Z in Italy appears to be highly committed to CSR and sustainability as drivers in the food industry, especially in a future perspective;
- being CSR and Communication integrated strategically, communication strategy needs to be oriented to report on results and performances rather than promises and values; Generation Z is, in fact, more receptive to achievements that are evident in the point of sale and proved by the media;

- Generation Z is better influenced by coherence and sustainability in communication. The factious case study suggests that changes in a business model, which is sustainable itself and bases its communication on that, requires more prudence. The increase in number of restaurants (for instance related to internationalization strategy) could bring with it issues of different kind. First, attracting a different target with difficulties connected to the coexistence of heterogeneous groups experiencing the same consumption model and could also impact on misperception of a homogeneous communication strategies oriented to sustainability.

Many are the initiatives undertaken to sustain reputation and prevent risks and the perception of those greatly vary among the tested target market, with results showing that marketing and product communication is the most effective.

Both the case study and the focus groups confirm that, in order to see concrete benefits from a repositioning strategy of such giant player, communication efforts have to be implemented for more than a decade at least. However, considering that Generation Z, being born after 1996, does not have a well-established positioning of McDonald's in their minds, given their very young age, it might take less time to create new perceptions. In particular, on one hand, Generation Z is more receptive to changes in communication, on the other hand, it appears to be more judgemental regarding CSR strategies stated by multinational companies.

The research provides a rulebook of best practices over communication for preventing reputational risks, which can be applied to a variety of multinational companies of different industrial sectors, which are facing similar risks of crises to occur as McDonald's.

Further steps of the study will involve the analysis of target market's perceptions and communication strategies in wider geographical areas, possibly comparing McDonald's to other direct competitors.

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La gestione ed il controllo del *reputational risk* come fattore strategico degli indicatori di performance aziendali: l'esperienza di Fiat Chrysler Automobiles

Authors

- *Valter Cantino, valter.cantino@unito.it - University of Torino*
 - *Damiano Cortese, damiano.cortese@unito.it - University of Torino*
 - *Alain Devalle, alain.devalle@unito.it - University of Torino*
 - *Claudia Pescitelli, claudia.pescitelli@unito.it - University of Torino*
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The public and private sector are today, more than ever, called to protect strategic assets among its reputation and image, the crucial elements of its credibility towards internal and external stakeholders. The universe of potential risk factors that these organizations are called upon to manage for their "good governance" is determined by the specific industry sector, and by diverse circumstances that may become – at often a fast pace - a real reputational boomerang. The automotive industry is no exception, and is configured as an area exposed to reputational risk, as the events that affected the sector in 2015 have shown. The need for new approaches and risk management tools to protect this intangible asset are unavoidable. The following paper has considered the FCA Group as a case study. Focusing on the international items used to evaluate corporate reputation, it aims to highlight the policies, the best practices, the performance indicators used to manage reputational risk, the integrated communication strategies based on the CSR, the investment of resources and the expected results. A case-history reputational risks map has been created, including its most important areas. It shows an opening on the correlation among sensitive and proactive approaches implemented by the Group regarding reputational risk and a positive feedback from Socially Responsible Investors (SRI). They analyze the company through environmental and social criteria as indicators of the ability to produce competitive long-term financial returns supported by positive social impacts.

Keywords: reputational risk, comunicazione d'impresa, CSR, sostenibilità, corporate governance, performance, automotive, socially responsible investors.

JEL Classification: M1, M3, M14, M19, M38, M39

1 Introduzione e scopo del *paper*

Sono molteplici gli ambiti d'industria e i settori che sono stati colpiti da crisi operative importanti, le cui dinamiche di svolgimento hanno messo in evidenza come i rischi di natura reputazionale concorrano a generare un effetto moltiplicatore dei danni operativi ed economici. Carol Adams (2015) cita il settore automotive, affermando che le vicende che conseguono a eventi capaci di un'importante ricaduta sul piano reputazionale dipendono da tre errori ascrivibili alla governance e alla cultura aziendale: “*marketing, risk management and internal controls*”. Nel sottolineare le interconnessioni tra questi elementi, l'accademico inglese mette in luce come l'inevitabile conseguenza di un “cattivo” o inefficace governo di questi tre aspetti possa sfociare nella perdita di fiducia e nel danno di reputazione, valori difficili da ricostruire, peraltro attraverso un processo lungo e faticoso. La gestione del rischio, a monte di fatti potenzialmente generatori di situazioni di crisi, è dunque tra i principali elementi operativi funzionali al mantenimento del capitale reputazionale, *asset* intangibile dell'impresa.

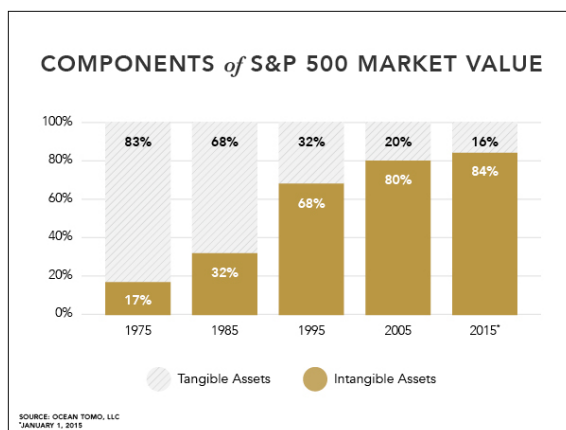


Figura 1 Asset componenti l'indice S&P 500 Market Value. Fonte: Ocean Tomo, 2015 Annual Study of Intangible Asset Market Value

Ocean Tomo, Intellectual Capital Merchant Banc™, nell'edizione 2015 dello studio annuale sul valore di mercato degli *Intangibile Asset*, ha mostrato come la

componente immateriale dell'indice S&P 500 è cresciuto fino all'84% nel 2015, con un incremento di quattro punti percentuali negli ultimi dieci anni.

Tra le fonti che il *Reputation Institute* (2012) individua nel proprio modello risultano centrali: i **comportamenti e la comunicazione dell'organizzazione**, i **prodotti e servizi**, **l'innovazione**, **la responsabilità sociale**, **il luogo di lavoro**, **la performance**, **la governance** e **la leadership**.

In un'ottica di analisi e gestione del reputational risk, nelle imprese globali i modelli di misurazione della performance e della compliance non si limitano ad assolvere a quanto previsto dai primi tre livelli della piramide della Corporate Social Responsibility (Carroll, 1991): *economic, legal, ethical responsibility* per ogni singolo Paese, ma si orientano verso l'apice, ovvero la *Philanthropic Responsibility*: "*be a good global corporate citizen*".

Il *reputational risk* influisce negativamente su cinque categorie di *resource-holder* (Siano et al., 2015): clienti (quote di mercato, fedeltà, *premium price*); dipendenti (incidenza sul capitale umano); fornitori (rischi contrattuali); investitori (rischi finanziari, aumento del costo del capitale, perdita di valore delle azioni); partnership (rischio di perdita di relazioni organizzative).

A fronte di una crisi reputazionale, i costi che l'organizzazione deve sostenere, dal punto di vista economico, si riflettono sul breve, medio e lungo periodo. Anche in ottica di riduzione del rischio aziendale e degli oneri collegati all'avverarsi di scenari negativi, le imprese si dotano di modelli di misurazione della *performance* e della *compliance* del sistema di controllo interno, integrati nelle procedure aziendali (Cantino, 2007) attraverso revisione e monitoraggio, declinati su diversi livelli, interni ed esterni.

Il presente lavoro intende esaminare le strategie e le scelte in tema di *risk management* mediante l'analisi di un'azienda del comparto *automotive*, di cui verranno messi in evidenza le *policy*, le *best practices*, gli indicatori di performance funzionali alla gestione del *reputational risk*, le strategie di comunicazione integrata fondate sulla *Corporate Social Responsibility*, l'investimento di risorse e i risultati attesi (Invernizzi, Romenti, 2012). Il frame teorico di riferimento inquadra la tematica della reputazione aziendale correlandola ai sistemi e alle *policy* di gestione del rischio come espressione della *governance* e della *compliance* e delle relative modalità di comunicazione agli stakeholder di riferimento.

I dati oggetto di analisi sono desunti dai documenti pubblici relativi ai modelli di Governance, CSR e Risk Management dell'azienda analizzata e da interviste ai referenti delle funzioni interessate.

2 Literature review

La reputazione aziendale è definita da Fombrun e Van Riel (1997) come "*actually perceptions of firms held by external observers*". Si tratta di un fattore *firm specific*, una delle risorse più rare e difficili da imitare, poiché è il risultato della storia peculiare dell'organizzazione, delle sue scelte e dei suoi impegni, valorizzati attraverso le attività di comunicazione (Siano, 2012). Per tale motivo, essa

rappresenta un vantaggio competitivo (Porter, 1985; Flatt e Kowalczyk, 2011) e, come indicato da Roberts e Dowling (2002), è funzionale *“to achieve persistent profitability, or sustained superior financial performance”*.

I massimi risultati, in termini reputazionali, derivano dagli asset intangibili, che l'impresa costruisce attraverso investimenti in ricerca, formazione e nel brand (Fombrun e Van Riel, 1997). È di facile intuizione, quindi, l'importanza del *“reputational management”* (Power, 2004) per evitare che condotte errate - o comunque a rischio - dell'azienda ne possano intaccare il capitale reputazionale, conservando, invece, un asset strategico in quanto *“scudo”*, come fattore resiliente (Coombs, 2007; Coombs e Holladay, 2005) soprattutto in momenti di potenziale crisi.

Strettamente correlato alla reputazione aziendale è il tema della Responsabilità Sociale di Impresa, la cui attuazione contribuisce ad alimentarne positivamente la valutazione. Loureiro et al. (2012) mettono in luce, in accordo con la letteratura, come positivi risultati in termini di *Corporate Social Responsibility o Corporate Social Performance* si riflettano sulle performance finanziarie aziendali, abbassando i costi e aumentando la produttività. Se è evidente come il valore percepito dai clienti cresca sulla base della soddisfazione degli stessi rispetto al prodotto, gli autori sottolineano come i risultati legati alle scelte in termini di Responsabilità Sociale di Impresa adottate da un brand automobilistico risultino essere elementi *“that positive influences consumers' evaluations and attitudes toward the firm”*.

Per Rhee (2009) *“perceptual position of a firm's quality, or quality reputation, plays a role in creating a unique set of interests, identities, and judgments, which then motivates or reduces the firm's attention to and search for solutions to potential errors, or product recalls”*. Egli individua, quindi, un legame tra apprendimento rispetto agli errori - nel caso, il richiamo di prodotti non conformi - e reputazione: *“good and poor reputation firms are more motivated than firms with an intermediate reputation to reduce subsequent errors”*. I due estremi della curva che descrive tale relazione sono, dunque, quelle in cui maggiore - in quanto strategico - è l'interesse rispetto a una correzione dell'errore come forma di mantenimento del capitale reputazionale.

Tale elemento risulta riconoscibile nelle *case history* oggetto di studio del presente lavoro, che si riferisce a un gruppo industriale globale che nel tempo ha costruito un modello di *governance* della Sostenibilità le cui azioni si riflettono nella presenza di politiche di riferimento e di *best practice* locali e globali che nel tempo hanno consentito di rilevare benefici per gli *stakeholder* interessati.

Altrettanto in linea è quanto emerge in Mitra (2011): *“institutionalization of CSR within an emerging economy firm is positively associated with its history/heritage, advanced technology adoption/development, and reputation of stakeholder responsibility”*.

L'aspetto identitario, presentato come basilare per la reputazione, è strettamente collegato ai comportamenti di responsabilità sociale e non è dunque limitato al progresso dell'attività di impresa, ma si consolida e si rinnova nelle inizia-

tive che questa intraprende. Approcci virtuosi divengono elementi di positiva accoglienza e, al contempo, amplificatori di elementi già consolidati.

L'attenzione all'impatto ambientale e, in particolare, la spinta verso il "green", peraltro, trovano una ragion d'essere anche nei benefici attesi in termini di reputazione e di profitto (Tognetti et al., 2015; Hofmann et al., 2014). In Salvado et al. (2015) il monitoraggio del livello di sostenibilità è elemento sempre più centrale a supporto delle scelte manageriali ed è discriminante per la competizione in un mercato globale e con standard sempre più rigorosi.

La crescente consapevolezza, da parte degli investitori, riguardo agli ambiti sociali, ambientali, etici (Renneboog et al., 2008) rende ancor più manifesta la centralità di tale attenzione nella valorizzazione del capitale reputazionale su cui si è insistito. La creazione di valore nello scenario economico moderno significa ritorno sugli investimenti, ma anche gestione sostenibile e responsabile del business. Questi due aspetti sono sempre più integrati e interdipendenti, come dimostra la crescente attenzione e focalizzazione del mondo degli investitori alle performance CSR delle aziende quotate.

La crescita, la produttività ed il rischio sono componenti comuni per la maggior parte dei modelli di investitori e, pur essendo difficile determinare il peso del ruolo che svolge la sostenibilità rispetto alle performance dell'azienda, in alcuni casi è stato possibile identificare risultati reali e cambiamenti significativi nelle componenti della redditività provenienti dall'adozione di soluzioni sostenibili.

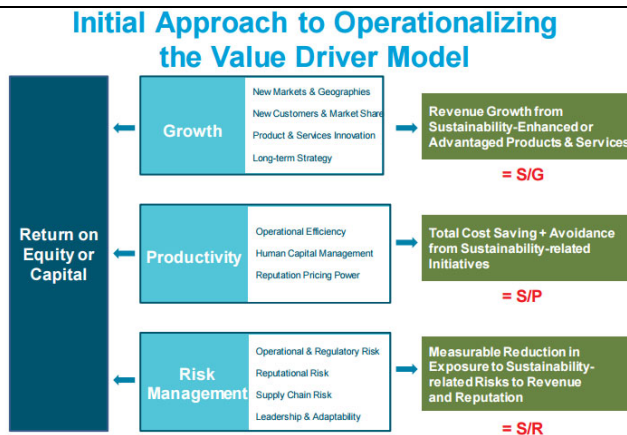


Figura 2 Operationalizing the Value Driver Model. Fonte: Value Driving Model Of UNGC: A Tool To Communicate The Business Value Of Sustainability, 2013

Il modello illustrato dal Report dell'United Nations Global Compact "The Value Driver Model - A tool for communicating the business value of sustainability" si propone di fornire ad aziende ed investitori le indicazioni per le migliori strategie di business possibili, al fine di rispondere alle nuove esigenze di sostenibilità

rispetto all'impatto finanziario misurando tre fattori chiave abilitanti alla crescita, produttività e gestione dei rischi sostenibili.

Nell'item della gestione dei rischi sostenibili si richiede alle aziende di definire le loro metriche critiche in modo che gli investitori possano monitorare i progressi nei fattori di rischio, tra cui quelli reputazionale.

3 L'esperienza Fiat Chrysler Automobiles

"FCA is a global automotive manufacturing group engaged in the development, designing, engineering, assembling, distributing, selling vehicles, as well as in provide automotive services, parts and accessories. The Group operates in approximately 40 countries and commercial relationships with customers in more than 150 countries" - Fonte: 2015 FCA Annual Report, page 31

3.1 Il Risk Management Framework del Gruppo

La gestione del rischio viene considerata all'interno del Gruppo un importante elemento di governance, nonché parte integrante del successo di lungo termine a livello globale. Il Gruppo adotta un approccio integrato alla gestione del rischio alla ricerca del giusto equilibrio tra obiettivi di crescita e di ritorno degli investimenti ed i relativi rischi connessi, al fine di migliorare il valore generato verso gli stakeholder.

Il sistema di controllo interno (il "Sistema") adottato dal Gruppo in tema di Risk Management è basato sul *COSO Framework* (*Committee of Sponsoring Organization of the Treadway Commission Report* - Modello di *Enterprise Risk Management*) e sui principi del Codice di Autodisciplina olandese. Il Sistema è costituito da un insieme di politiche, procedure e strutture organizzative volte ad identificare, misurare, gestire e monitorare i principali rischi a cui il Gruppo è esposto. Il Sistema è integrato all'interno dell'organizzazione aziendale e del modello di corporate governance e contribuisce alla protezione degli asset aziendali nonché ad assicurare l'efficacia e l'efficienza dei processi di business, l'affidabilità delle informazioni finanziarie e la compliance con leggi e regolamenti sia internazionali che del singolo paese di riferimento e con le procedure interne.

I livelli di controllo del Sistema sono tre:

1. *le aree operative*, che identificano e valutano i rischi, stabilendo le azioni specifiche per la loro gestione;
2. *i reparti specifici* responsabili del controllo del rischio, che definiscono le metodologie e gli strumenti per il monitoraggio e la gestione dei rischi;
3. *le funzioni di enterprise risk management*, che facilitano il monitoraggio globale dei rischi e guidano l'analisi degli stessi nell'ambito del *Group Executive Council* - (Consiglio Esecutivo del Gruppo).

Oltre ai tre livelli di controllo sopra citati, i risultati del *COSO process* sono parte integrante del *risk assessment* della funzione di *Internal Audit di Gruppo* sia nella definizione del piano di audit sia nella pianificazione di specifiche verifiche per la

gestione globale del rischio d'impresa secondo il modello *ERM – Enterprise Risk Management*.

La propensione di Gruppo al rischio (*risk appetite*) differisce a seconda della categoria di rischio come illustrato nella tabella sottostante:

Risk category	Category description	Risk appetite
<i>Strategic</i>	Risk that may arise from the pursuit of FCA's business plan, from strategic changes in the business environment, and / or from adverse strategic business decisions.	We are prepared to take risks in a responsible way that takes our stakeholders' interests into account and are consistent with our five year business plan.
<i>Operational</i>	Risk relating to inadequate or failed internal processes, people and systems or external events (including legal and reputational risks).	We look to mitigate operational risks to the maximum extent based on cost / benefit considerations.
<i>Financial</i>	Risk relating to uncertainty of return and the potential for financial loss due to financial structure, cash flows, impairment risk and financial instruments.	We seek capital market and other transactions to deleverage and strengthen our balance sheet, allowing us to unlock value and manage our operations on a consolidated global basis.
<i>Compliance</i>	Risk of non-compliance with relevant regulations and laws, internal policies and procedures.	We hold ourselves, as well as our employees, responsible for acting with honesty, integrity and respect, including complying with our Code of Conduct, applicable laws and regulations everywhere we do business.

Figura 3 Propensione al rischio rispetto alle diverse categorie: Fonte: FCA *Annual Report 2015*

Sono previsti **Comitati di Gestione del Rischio** all'interno delle quattro aree geografiche di riferimento (NAFTA, EMEA, LATAM ed APAC), nel settore dei veicoli di lusso (Maserati), nel settore della componentistica a livello mondiale (Magneti Marelli, Teksid e Comau), i quali sono responsabili di supportare la risk governance utilizzando i focus operativi dei Comitati Commerciali e di Prodotto esistenti (a livello Globale e di Region).

3.2 Le aree della gestione del rischio

Nell'ambito dell'intervento di FCA sulle diverse aree di rischio è possibile identificare *un modello multidimensionale per la gestione e mitigazione dei rischi* legati ai processi aziendali e agli asset del Gruppo. Le categorie di rischio includono: *External, Market, Business Development, Industrial and product development, Purchasing, Manufacturing and logistics, Marketing and sales, Administration planning and control, Financial management, Compliance with external regulations, Compliance with contractual obligations and internal rules and procedures, Information & Communication Technology, External Relations, Human Resources and Organization, Business Continuity and Physical Security*.

L'impatto di questi rischi può essere tangibile – abitualmente quantificato in termini economico-finanziari - o più qualitativo, come nel caso del rischio reputazionale i cui impatti ricadono sulle diverse categorie di *stakeholder* tra cui clienti, *business partner* ed investitori.

I tre principali pilastri del modello di gestione del rischio di FCA sono *l'Enterprise Risk Management "ERM", il Business Continuity Management ed il Management of Pure Risk*.

Enterprise Risk Management

FCA ha adottato nel 2004 un modello definito di “**Enterprise Risk Management**” (ERM). Il modello ERM di FCA si basa sul quadro stabilito dal COSO ed è stato adattato alle specifiche esigenze del Gruppo. E’ stato aggiornato nel 2010 per includere l’esperienza acquisita nel corso degli anni e comprende le *best practice* emerse da un confronto con altri gruppi industriali. In particolare, i “*risk driver*” sono stati riassegnati in nuovi *cluster* per rispondere meglio a esigenze nuove o per sottolineare *issue* significative quali ad esempio il cambiamento climatico, gli sviluppi macroeconomici o le *joint venture*.

Sono stati identificati oltre 50 fattori di rischio che sono stati a loro volta ulteriormente scomposti in 85 eventi potenziali.

Sulla base di un progetto pilota condotto nel 2013, il modello ERM è stato successivamente rivisto per rendere l’analisi dei potenziali rischi:

- *dinamica*, attraverso la valutazione periodica dei principali rischi e relativo follow-up e monitoraggio delle azioni di mitigazione individuate e/o implementate;
- *predittiva*, attraverso un *risk assessment* prospettico;
- *cross-funzionale*, attraverso una valutazione del rischio che coinvolga direttamente le aree di business interessate.

A livello di *Region* e *Sector* sono stati identificati dei Coordinatori dedicati al processo ERM, responsabili della predisposizione, del coordinamento e dello svolgimento di incontri periodici con i responsabili dei segmenti operativi chiave.

L’obiettivo di questi incontri è quello di facilitare la discussione, l’identificazione e la valutazione dei rischi potenziali, così come la formulazione di piani di mitigazione dei rischi stessi.

Il processo di valutazione dei rischi è svolto con un approccio *bottom-up* che inizia quindi nelle singole *business unit*. I *Chief Executive Officer* (CEO), *Chief Financial Officer* (CFO) delle Società ed i *Chief Operating Officer* (COO) di *Region* approvano questi i singoli *risk assessment* definiti ognuno per la propria *Region/Società* di riferimento.

Il team centrale dedicato al processo di ERM, che riporta al CFO di Gruppo, è invece responsabile del coordinamento e del consolidamento dei singoli *risk assessment*. Il *risk assessment* consolidato insieme agli indicatori di rischio individuati per il monitoraggio dei rischi è sottoposto alla validazione del CFO di Gruppo e dall’Executive Council ed è presentato annualmente all’Audit Committee il quale assiste il Consiglio di Amministrazione nella supervisione strategica delle attività di gestione del rischio.

Il modello ERM è stato integrato nel tempo con alcuni *risk driver* che riflettono la sempre maggiore rilevanza in termini di impatti potenziali di fenomeni quali quelli legati al cambiamento climatico e ai rischi legati agli impatti ambientali delle attività produttive del Gruppo.

A partire dal 2014, ad esempio, anche il *rischio deforestazione* è incluso nella mappa dei rischi di FCA, a completamento degli altri rischi a carattere ambientale collegati al fenomeno del cambiamento climatico mondiale.

Business Continuity Management

FCA dispone di un piano di *business continuity* finalizzato a garantire la continuità delle operazioni a seguito di potenziali eventi di natura catastrofica, come ad esempio catastrofi naturali, pandemie, o *cyber*-attacchi. Tale piano include anche la gestione di possibili interruzioni dovute a *disruption* lungo la catena di fornitura. Il processo di gestione della continuità operativa è composto da *quattro elementi principali*:

- *condurre una valutazione del rischio di impresa*, nel corso della quale le strutture e le funzioni sono analizzate in termini di relativa vulnerabilità e potenziale livello di impatto delle interruzioni. Sono presi in considerazione i rischi di reputazione, operativi e finanziari ed è stata sviluppata una "mappa di criticità" per definire le priorità nel piano di continuità operativa;
- *intraprendere una Business Impact Analysis (BIA)* per ogni struttura o funzione, a partire dal più alto rischio. In una BIA tutti i principali edifici, attrezzature, processi, risorse umane, fornitori e sistemi sono identificati e valutati in base alla loro criticità nel raggiungimento degli obiettivi operativi ed è stimato un loro "tempo di recupero" stimato;
- *determinare lo sviluppo di un piano di continuità operativa (BCP)*, che specifica le procedure per il recupero di *business*;
- *testare il BCP*, generalmente attraverso una simulazione.

Nel 2015 è stato sviluppato il BCP per 13 *plant* a più alto rischio negli Stati Uniti, in Canada e Messico. I risultati e le priorità del processo di gestione della continuità operativa nella *region* NAFTA sono rivisti regolarmente da uno *Steering Committee* composto da membri del senior management FCA US.

Il tema della continuità è un fattore di gestione del rischio che FCA prende in considerazione non solo per le attività produttive ma estende anche alle sua attività di carattere amministrativo. FCA Services ha in essere un piano di *Business Continuity*, segue le best practice e i requisiti delle norme internazionali (FCA Services è certificata ISO 27001: 2013) e focalizza l'attenzione sulla sicurezza dei dipendenti e sulla continuità della fornitura dei servizi.

Tutte le attività di *Business Continuity* sono riviste ogni anno dallo *Steering Committee* e da revisori interni ed esterni per garantire il miglioramento continuo dei processi di fornitura dei servizi in il piano di continuità operativa .

Management of Pure Risk

FCA adotta inoltre misure concrete per prevenire quei rischi che potrebbero provocare danni a beni materiali di proprietà del Gruppo causando interruzioni nelle operazioni.

I quattro pilastri della attività di gestione dei rischi puri del Gruppo sono:

- prevenzione degli incidenti o attenuazione dei loro effetti;
- adozione dei più elevati *standard* internazionali per la prevenzione dei rischi;
- minimizzazione del costo del rischio attraverso l'ottimizzazione dei programmi di prevenzione; delle perdite, investimento, auto - assicurazione e trasferimento del rischio;
- centralizzazione e consolidamento delle relazioni con i mercati assicurativi globali.

Le entità di gestione del rischio FCA hanno in carico tutti gli aspetti di rischio puro, dall'identificazione all'analisi ed all'implementazione di azioni di contenimento, compresa la prevenzione delle perdite. Attività specifiche includono il monitoraggio e l'assicurazione contro i rischi puri - come gli incendi o i disastri naturali - e giocano un ruolo centrale nella gestione di eventi che potrebbero influire sul continuità delle operazioni o l'integrità dei beni materiali di oltre 1.000 siti del Gruppo in tutto il mondo.

L'intero processo di gestione del rischio è condotto con la massima trasparenza e competenza tecnica, con il supporto di società di consulenza specializzate nell'analisi del rischio industriale che, attraverso verifiche sul campo, aiutano a garantire un'imparziale, approfondita e continua valutazione del rischio a livello di Gruppo. Le funzioni di gestione del rischio di FCA forniscono un importante contributo anche allo sviluppo sostenibile e un vantaggio competitivo in un contesto economico globale in rapida evoluzione e stimolante. Le principali aree di messa a fuoco includono:

- il perfezionamento degli strumenti esistenti, processi, misure e modelli di rischio per facilitare un'analisi *risk-based* sui rischi emergenti;
- l'integrazione e il consolidamento dei programmi di gestione del rischio
- l'incremento della consapevolezza dei rischi in tutta l'organizzazione
- la creazione di un comitato interfunzionale gestione del rischio, che rivede periodicamente tutte le aree di *Enterprise Risk Management*.

Le funzioni che intervengono nella gestione del rischio di FCA rappresentano una opportunità di incremento della consapevolezza dei rischi in tutta l'organizzazione e forniscono un importante contributo anche all'evoluzione del modello di sostenibilità del Gruppo. In un contesto economico globale in rapida evoluzione, la gestione del rischio determina anche le condizioni per un vantaggio competitivo oggi più che mai imprescindibile: questo anche grazie alla continua integrazione e al progressivo consolidamento dei programmi di gestione del rischio e dei processi di controllo interno.

4 I Reputational Driver e la Case-History Reputational Risks Map

Come anticipato, la ricerca si propone di evidenziare la gestione di alcuni aspetti *reputational-sensitive* all'interno del Gruppo FCA e delle *best practice* messe in atto per la prevenzione del rischio reputazionale. In collegamento ad alcuni specifici *commitment* identificati dal Gruppo nell'ambito del modello di *governance* della sostenibilità sono state analizzate alcune *case-history* ad impatto reputazionale riconducendole alle sette dimensioni chiave dell'indicatore *Rep Track* del *Reputation Institute*. Per quanto tale modello non sia adottato da FCA e non rappresenti uno schema di riferimento interno al gruppo, esso è tuttavia funzionale all'obiettivo di descrizione e analisi del presente lavoro.¹

Tabella 1: Case-History Reputational Risk Map

<i>Dimensioni di analisi</i>	<i>Impegni di sostenibilità di FCA</i>	<i>Related-Risks identified²</i>	<i>Approccio e Case-History a impatto reputazionale</i>
1. Prodotti e servizi	<i>Offer new mobility services that improve the urban mobility experience and provide greater access to affordable solutions.</i> Offrire nuovi servizi di mobilità che garantiscano un maggiore accesso a soluzioni economicamente sostenibili, nonché migliorative della esperienza di mobilità urbana.	Necessità di intercettare e rispondere a nuovi trend e a nuove esigenze di mobilità e comportamenti dei consumatori.	Fornitura della flotta FCA di vetture per “Enjoy” Servizio di car-sharing urbano realizzato da ENI in partnership con FCA e Trenitalia.
2. Innovazione	<i>Continue to offer competitive products that meet the needs of customers worldwide.</i> Continuare a offrire prodotti competitivi capaci di rispondere alle esigenze dei clienti nel mondo.	Necessità di migliorare continuamente i processi di assemblaggio delle vetture e la tracciabilità dei componenti per garantire prodotti di qualità in linea con i migliori standard e le attese del mercato.	New Plant Landscape Nuovo modello di infrastruttura ICT per i processi manufacturing, realizzato in collaborazione con Siemens, che offre vantaggi di tracciabilità dei componenti e qualità del prodotto finale attraverso l'automatizzazione e l'informatizzazione delle operazioni lungo la linea di produzione.
3. Ambiente di lavoro	<i>Strive for a zero accident and injury rate and to maximize employee health and well-being.</i> Tendere ad un tasso zero di incidenti ed infortuni in tutti gli stabilimenti del gruppo a livello globale e massimizzare la salute e il benessere dei dipendenti.	Necessità di valutare continuamente le aree di rischio in ambito salute e sicurezza e di adottare misure di prevenzione del rischio e di promozione del benessere.	World Class Manufacturing Safety Pillar Adozione del World Class Manufacturing negli stabilimenti del Gruppo. Importante elemento competitivo, oltre che leva per la diffusione dei migliori standard di sostenibilità, inclusi quelli relativi alla salute e sicurezza sul lavoro.
4. Governance	<i>Strengthen leadership position in Environmental, Social and Governance aspects.</i> Rafforzare la posizione di leadership del Gruppo in materia Ambientale, Sociale e di Governance.	Necessità di monitorare su base continua il rispetto dei Diritti Umani presso le sedi operative del Gruppo.	Check List dei Diritti Umani del Ruggie Framework delle Nazioni Unite Adozione della check-list per il monitoraggio del rispetto dei Diritti Umani adottata dalla funzione Internal Audit & Compliance.
5. Citizenship	<i>Optimize environmental performance of production processes.</i> Ottimizzare le performance ambientali di Gruppo.	Necessità di garantire un utilizzo responsabile delle risorse idriche in tutte le sedi operative del Gruppo, e con particolare riferimento alle aree esposte a rischio scarsità.	Water Recycling Index Sustainable Water Stewardships del Gruppo dimostrata dal continuo miglioramento delle performance globali sintetizzate dal Water Recycle Index.
6. Performance	<i>Promote social and environmental responsibility among suppliers.</i> Promuovere la responsabilità ambientale e sociale presso i fornitori.	Necessità di monitorare la compliance dei fornitori rispetto agli standard di sostenibilità del Gruppo e di condivisione delle migliori pratiche.	Supplier Sustainability Self-Assessment (SSSA) Utilizzo della matrice di rischio dei fornitori per la definizione di piani d'azione e follow-up di verifica del grado di compliance; iniziative di capacity building presso le WCM Academy del Gruppo.
7. Leadership	<i>Strengthen leadership position in Environmental, Social and Governance aspects.</i> Rafforzare la posizione di leadership del Gruppo in materia Ambientale, Sociale e di Governance.	Necessità di monitorare la composizione del flottante azionario da parte degli Investitori Socialmente Responsabili e di garantire esaustiva e trasparente rendicontazione delle informazioni relative alle performance del Gruppo in tema di Sostenibilità.	Dow Jones Sustainability Index World e CDP Climate Performance Leadership Index Conferma della presenza del gruppo FCA negli indici delle principali agenzie di rating.

Fonte: Elaborazione a cura degli autori da Sustainability Report FCA 2014

4.1 Prodotti e servizi: Fornitura della flotta FCA di vetture per il servizio di car-sharing “Enjoy”

Impegni di sostenibilità di FCA: Offrire nuovi servizi di mobilità che garantiscano un maggiore accesso a soluzioni economicamente accessibili, nonché migliorative della esperienza di mobilità urbana.

Related-Risks identified: Necessità di intercettare e rispondere a nuovi *trend* e a nuove esigenze di mobilità e comportamenti dei consumatori.

Approccio e Case-History a impatto reputazionale

Enjoy è un servizio di *car-sharing* che offre una flotta di veicoli ad alta efficienza per trasporti urbani. È stato lanciato da ENI a Milano alla fine del 2013 in collaborazione con Trenitalia ed FCA che ha fornito più di 1.900 veicoli. Dal 2014, è stato esteso a Roma, Firenze e Torino ed ha fatto registrare oltre 420.000 utenti. Il programma è un servizio di car-sharing che intercetta un importante cambiamento dei trend: sta cambiando l'esperienza valoriale riferita al possesso del veicolo. Con particolare riferimento ad alcuni target di clienti, l'esigenza che prevale sempre più spesso non è la proprietà dell'autoveicolo ma trovare risposta al proprio fabbisogno di mobilità: “qui ed ora”.

Enjoy è basato su una tecnologia che non richiede di riportare il veicolo in uno spazio urbano predefinito, ma permette di lasciare l'auto ovunque all'interno dell'area coperta dal servizio. Esempio unico a livello internazionale in termini di innovazione e sostenibilità, Enjoy utilizza una flotta di Fiat 500 a bassissime emissioni, particolarmente adatti alle mobilità nelle aree urbane. Il progetto “Enjoy: il car sharing”, si è classificato al primo posto del Premio Impresa Ambiente del 2014 per il miglior prodotto con questa motivazione: “L'azienda ha dimostrato di aver sviluppato un servizio di car sharing di nuova concezione denominato “*free floating*” che – diversamente dal *car-sharing* “tradizionale”, nel quale è necessario prenotare l'auto in anticipo e riportarla nello stesso parcheggio da cui si è prelevata – permette l'utilizzo “libero”. È possibile quindi decidere di prendere un'auto in qualsiasi momento, utilizzarla per il tempo che si vuole, per poi lasciarla dove risulta più comodo, all'interno dell'area di copertura. Tutto il sistema è costruito su una applicazione attiva su smartphone basata sul GPS sia dell'utilizzatore che di tutte le auto disponibili nel momento in cui viene richiesto il servizio. Il servizio offerto, è *paperless* (completamente online) e *plasticless* (senza tessere/carte da ricevere o ritirare)”. Recentemente il servizio si è arricchito, in collaborazione con Piaggio, del servizio di *scooter – sharing*.

Enjoy inoltre è un esempio unico di partnership tra un'azienda energetica (ENI), una di trasporti (Trenitalia), un costruttore automobilistico (FCA) ed un costruttore motociclistico (Piaggio). Ciò testimonia - a titolo di esempio - come non esista un solo *business model* sulla mobilità e che la competitività aziendale e il riconoscimento reputazionale sono frutto anche dell'offerta di nuovi servizi innovativi come il *car-sharing* evoluto.

4.2 Innovazione: New Plant Landscape

Impegni di sostenibilità di FCA: Continuare a offrire prodotti competitivi capaci di rispondere alle esigenze dei clienti nel mondo.

Related-Risks identified: Necessità di migliorare continuamente i processi di assemblaggio delle vetture e la tracciabilità dei componenti per garantire prodotti di qualità in linea con le attese del mercato e i migliori standard.

Approccio e Case-History a impatto reputazionale

L'innovazione in FCA svolge un ruolo cruciale nella creazione di valore per il business attraverso l'identificazione di tecnologie emergenti e l'implementazione di nuove idee che si applicano a prodotti e processi. Quello dell'innovazione è un processo incorporato all'interno dell'organizzazione a vari livelli. Per rispondere a un mercato dell'auto che punta alla personalizzazione sempre più spinta del prodotto, la flessibilità delle linee di produzione e la gestione di un numero complesso di informazioni giocano un ruolo cruciale.

New Plant Landscape (NPL) è il nuovo modello di infrastruttura ICT per i processi *manufacturing*, realizzato da FCA in progetti *greenfield* in collaborazione con Siemens, che offre vantaggi di tracciabilità dei componenti e qualità del prodotto finale attraverso l'automatizzazione e l'informatizzazione delle operazioni lungo la linea di produzione. Il sistema consente l'istantanea tracciabilità delle componenti della linea di produzione rispetto al fornitore, rispondendo a un obiettivo di un sensibile miglioramento del sistema qualità ed alla diminuzione delle campagne di richiamo con positivo effetto sulla reputazione.

NPL ha portato le soluzioni ICT più avanzate in diversi stabilimenti del Gruppo, al fine di raggiungere standard di assemblaggio e di qualità di produzione estremamente elevata e innovativa nell'impatto tecnologico e nella qualità di fabbricazione, che consentono il tracciamento dei veicoli e dei componenti in *real time* fino al fornitore che ha prodotto le parti garantendo contemporaneamente un alto livello di sicurezza sul lavoro. Questa nuova infrastruttura è già stata adottata negli impianti di Cassino, Mirafiori, Melfi (Italia), Pernambuco (Brasile) e Guangzhou (Cina) e sarà ulteriormente estesa nei prossimi anni ad altri stabilimenti del Gruppo.

NPL è un esempio tra tanti attraverso i quali la funzione ICT supportano le altre aree di business per promuovere una cultura dell'innovazione, sfruttando, sia le risorse interne sia una rete esterna di fonti di innovazione che comprende le università, i centri di ricerca, le *start-up* innovative e gli stessi fornitori. L'innovazione si conferma come uno dei principali driver della sostenibilità di impresa ed il posizionamento competitivo del Gruppo FCA nel mercato globale deriva anche dalla sua capacità di scambiare e condividere idee, esperienza e *know how*, grazie alla diversità dei propri dipendenti non solo nelle varie funzioni, ma anche tra le varie aree operative regionali.

4.3 Ambiente di lavoro: World Class Manufacturing Safety Pillar

Impegni di sostenibilità di FCA: Tendere ad un tasso zero di incidenti ed infortuni in tutti gli stabilimenti del gruppo a livello globale e massimizzare la salute e il benessere dei dipendenti.

Related-Risks identified: Necessità di valutare continuamente le aree di rischio in ambito salute e sicurezza e di adottare misure di prevenzione del rischio e di promozione del benessere.

Approccio e Case-History a impatto reputazionale

Adottato da Fiat a partire dal 2005 con lo scopo di migliorare il sistema di produzione riducendo gli sprechi, aumentando la produttività e migliorando le condizioni di lavoro, il *World Class Manufacturing* (WCM) non è un progetto ma un programma in continua evoluzione, che “attacca” perdite e guasti lavorando sui processi con l’obiettivo di migliorare la qualità in senso globale attraverso una metodologia strutturata, rigorosa ed integrata che copre tutti gli aspetti organizzativi: sicurezza, ambiente, manutenzione e qualità. Il WCM persegue l’obiettivo del miglioramento continuo dei processi di produzione al fine di garantire la qualità del prodotto, con l’obiettivo di soddisfare o superare le aspettative del cliente.

I progetti sviluppati nell’ambito WCM sono progettati per raggiungere il più ampio impegno dei dipendenti e ridurre sistematicamente le perdite e gli sprechi, con l’obiettivo di raggiungere un livello di zero incidenti, zero rifiuti, zero guasti e zero giacenze. I *tool* vengono studiati nei *WCM Development Center* e customizzati e standardizzati per essere trasferibili a livello globale. Il WCM è stato fondamentale per ridurre il *time to market* con positivi effetti sulla reputazione, anche per via del coinvolgimento delle organizzazioni sindacali.

Nel caso specifico, il *pillar* del WCM che si occupa della sicurezza ha l’obiettivo di contribuire al miglioramento continuo nell’ambiente di lavoro ed alla progressiva riduzione di tutti i rischi oggettivi e comportamentali che potrebbe tradursi in incidenti, infortuni e malattie professionali.

Il principio di base di questo pilastro è che questi obiettivi possono essere raggiunti solo attraverso la definizione di una forte cultura della sicurezza in tutta l’organizzazione e di una forte leadership e coinvolgimento del management nella definizione di obiettivi chiari e misurabili, nonché di una motivazione e partecipazione attiva di tutti i dipendenti. Essi sono infatti coinvolti nel processo attraverso la formazione e le iniziative destinate ad aumentare la consapevolezza della sicurezza, insieme ad un sistema completo per la raccolta di *feedback* e suggerimenti.

Il numero totale di suggerimenti (241 mila nel solo 2015) raccolti attraverso i dipendenti dimostra il livello significativo di partecipazione e l’impegno per la salute e la sicurezza in tutta l’organizzazione. Questo livello di coinvolgimento ha contribuito a sviluppare una cultura di proattività e prevenzione.

I continui investimenti e l’impegno di energie e risorse è necessario per garantire migliori condizioni di lavoro negli stabilimenti FCA nel mondo. Attraverso l’implementazione di un Occupational Health and Safety Management System

(OHSMS), che è certificato secondo lo standard inter-nazionale OHSAS 18001, FCA si impegna ad applicare gli stessi elevati standard di sicurezza in tutto il mondo, anche in quei Paesi dove regolamenti sono meno stringenti.

Attraverso l'applicazione di strumenti e le metodologie forniti dall'OHSMS e dal pillar Sicurezza del WCM, unitamente alla partecipazione attiva dei dipendenti, allo sviluppo di know-how specializzato e ad investimenti mirati, FCA ha ridotto significativamente la frequenza e la gravità degli infortuni sul lavoro: nel 2015, gli indicatori principali sono migliorati per il nono anno consecutivo. L'indice di frequenza è sceso del 20% rispetto all'anno precedente a 0,12 incidenti per 100.000 ore lavorate e il tasso di gravità è sceso del 20% a 0,04 giorni di assenza per 1.000 ore lavorate. In Italia, gli investimenti nella salute e nella sicurezza, in combinazione con altre misure, hanno comportato una progressiva riduzione del livello di rischio attribuito agli stabilimenti FCA dall'INAIL, che ha consentito - come "buon esecutore" - un risparmio di circa 88 milioni di euro nel periodo 2011-2015.

La sostenibilità per FCA è sinonimo anche di ergonomia, salute e sicurezza dell'ambiente di lavoro. Al raggiungimento degli altissimi standard pretesi dal Gruppo ha contribuito anche il *pillar* Sicurezza del WCM, il cui valore è riconosciuto anche dagli analisti di sostenibilità che si occupano di servizi di market intelligence per gli Investitori Socialmente Responsabili. Si tratta di una *best practice* consolidata i cui benefici in termini di mitigazione dei rischi operativi - anche reputazionali - sono riconosciuti da soggetti terzi dal prestigio internazionalmente riconosciuto, quale il caso di *RobecoSAM*, società di investimenti che opera da oltre 20 anni nel settore del *Sustainable Investing*.

4.4 Governance: Check List dei Diritti Umani del Ruggie Framework delle Nazioni Unite

Impegni di sostenibilità di FCA: Rafforzare la posizione di leadership del Gruppo in materia Ambientale, Sociale e di Governance.

Related-Risks identified: Necessità di monitorare su base continua il rispetto dei Diritti Umani presso le sedi operative del Gruppo.

Approccio e Case history a impatto reputazionale

I valori su cui si fonda un'impresa sono importanti quanto i suoi progetti industriali e la sua solidità finanziaria. Per FCA, il Codice di Condotta rappresenta il modo per sviluppare un ambiente di lavoro che incorpori alti standard etici di condotta. Il Codice ha lo scopo di assicurare che tutti i membri del Gruppo FCA agiscano con la massima integrità, rispettando le leggi vigenti. Il Gruppo FCA condivide, e il suo codice di condotta recepisce, i principi della "Dichiarazione universale dei diritti dell'uomo" delle Nazioni Unite ("ONU"), le Convenzioni dell'Organizzazione Internazionale del Lavoro ("OIL") e le Linee Guida dell'Organizzazione per la Cooperazione e lo Sviluppo Economico ("OCSE") per le imprese multinazionali e la legislazione statunitense contro la corruzione di funzionari pubblici stranieri (*Foreign Corrupt Practices Act - FCPA*).

Linee guida, pratiche e procedure, che costituiscono parte integrante del Codice di Condotta sono elaborate per affrontare gli aspetti di ambiente, salute e sicurezza, etica nel *business* e anti-corrruzione, conflitto d'interesse, sostenibilità per i fornitori, gestione del capitale umano, rispetto dei diritti umani, investimenti nella comunità locali, *privacy*, principi per *Green ICT* e *Green Logistic*, coinvolgimento degli *stakeholder*, *Export Control* e *anti-trust*.

Nell'ambito dei principali aspetti di *governance* di FCA relativi alla gestione del *business* in modo etico, trasparente e responsabile, come elemento importante in carico alla funzione *Internal Audit & Compliance* del 2014 è stata prevista un' integrazione rispetto a quanto già indicato dal Codice di Condotta in tema di Diritti Umani, effettuando un'autovalutazione basata sulla **Check List dei Dritti Umani che riassume e declina i Principi del Ruggie Framework delle Nazioni Unite**. L'obiettivo di monitorare continuamente l'effettiva applicazione dei principi del documento delle Nazioni Unite all'interno del Gruppo è un esempio di completa integrazione dei principi di "*good governance*" nei processi di controllo interno e *due diligence*. Le aree coperte da questa autovalutazione includono il rischio per il lavoro minorile e dei giovani, il lavoro forzato, la non-discriminazione, le condizioni contrattuali, la sicurezza sul lavoro, il rispetto delle stesse condizioni previste da FCA anche lungo la *supply chain*.

Altro elemento della *governance* di FCA è il canale di monitoraggio e gestione dei possibili casi di non compliance rispetto ai principi enunciati dal Codice di Condotta: *l'Ethics Helpline*, canale dedicato che consente a tutti gli *stakeholder* (dipendenti, clienti, fornitori e partner) di formulare segnalazioni in ordine a qualunque circostanza, evento e/o azione ritenuti contrari ai principi sanciti dal Codice di Condotta, nonché richiedere consigli e/o interpretazioni inerenti la sua applicazione. *L'Ethics Helpline* di FCA, gestita da una terza parte indipendente, è disponibile e quindi attivabile 24 ore al giorno, 7 giorni su 7.

Le segnalazioni vengono prese in carico dal Responsabile dell'*Internal Audit* di FCA Group e gestite secondo la Procedura Gestione Denunce applicata a tutte le Società del Gruppo in diversi Paesi ove lo stesso opera, nel rispetto delle normative locali applicabili. Per attivare il processo di verifica ed istruttoria dei fatti segnalati, è necessario che la denuncia sia circostanziata, ovvero fornisca elementi oggettivi utili ad individuare la condotta, la Società e le persone coinvolte, nonché le relative responsabilità.

Oltre alla *Ethics Helpline*, ritenuta il canale preferenziale, è possibile formulare eventuali segnalazioni di comportamenti contrari ai principi del Codice utilizzando gli indirizzi contenuti nella *Worldwide Ethics and Compliance Contact List*.

L'adozione di un modello di *governance e compliance* che incorporano i più elevati standard etici, unitamente alla presenza di un Codice di Condotta che si applica a tutte le aree del business e ad ogni livello organizzativo, rappresentano uno dei pilastri di riferimento grazie a cui il Gruppo FCA è riuscito a costruire la sua fiducia e reputazione presso i suoi principali *stakeholders*.

4.5 *Citizenship: Water Management – Sustainable Water Stewardship*

Impegni di sostenibilità di FCA: Ottimizzare le performance aziendali di Gruppo.

Related-Risks identified: Necessità di garantire un utilizzo responsabile delle risorse idriche in tutte le sedi operative del Gruppo, e con particolare riferimento alle aree esposte a rischio scarsità.

Approccio e Case history a impatto reputazionale

La scarsità d'acqua è una delle sfide principali per i governi, le comunità, le imprese e gli individui in diverse aree del mondo. FCA riconosce l'acqua come una delle più importanti risorse naturali da proteggere, tanto che ha elaborato un prospetto di "Linee guida per la gestione delle acque" che si applica a tutte le società del Gruppo. Questo fornisce i principi per la sostenibilità e la gestione dell'intero ciclo dell'acqua e pone enfasi sulla riduzione dei consumi delle risorse idriche soprattutto nelle regioni "water stressed", in cui è una risorsa limitata con possibili criticità per l'ambiente e la popolazione.

FCA ha avviato una mappatura periodica dell'evoluzione della disponibilità delle risorse idriche in tutto il mondo, correlando la quantità di acqua disponibile con quella consumata in ciascuna regione. La valutazione di rischio idrico ha individuato alcuni stabilimenti ubicati in zone *water-stressed* e di conseguenza sono state prese misure appropriate per migliorare il riutilizzo ed il riciclo con importanti variazioni positive nell'ambito del quinquennio 2010-2015. Come risultato dei miglioramenti nella gestione del ciclo delle acque e delle misure adottate per riutilizzare l'acqua nei processi industriali nel 2015 FCA ha ulteriormente ridotto il consumo complessivo di acqua arrivando a risparmiare 3,3 miliardi di m³ di acqua (questo risparmio è stato stimato corrispondere alla quantità di acqua che scorre nelle cascate del Niagara per tre settimane consecutive). I progetti per ridurre la quantità di acqua consumata hanno portato anche ad un complessivo risparmio di circa 2,7 milioni di € nel 2015.

Nel 2015 il *Water Recycling Index* degli stabilimenti FCA nel mondo si è attestato al 98.9%.

4.6 **Performance: Introduzione del Supplier Sustainability Self Assessment - SSSA**

Impegni di sostenibilità di FCA: Promuovere la responsabilità ambientale e sociale presso i fornitori.

Related-Risks identified: Necessità di monitorare la compliance dei fornitori rispetto agli standard di sostenibilità del Gruppo e di condivisione delle migliori pratiche.

Approccio e Case history a impatto reputazionale

In qualità di partner strategici, i fornitori svolgono un ruolo chiave nella continuità delle attività di FCA e contribuiscono in maniera significativa al processo diffuso di *building reputation* del Gruppo. Qualsiasi evento critico all'interno della catena di fornitura espone infatti potenzialmente il Gruppo – direttamente o

indirettamente – a conseguenze negative nell’ambito delle attività produttive, delle performance economiche e ad un livello di immagine sul quale l’impresa ha direttamente solo un controllo parziale. A tal fine la costruzione e il mantenimento di rapporti di collaborazione a lungo termine con i fornitori è un elemento essenziale non solo per garantire la continuità delle operazioni produttive e di servizio, ma anche ai fini della prevenzione efficace e della mitigazione di eventuali dal negativo impatto reputazionale.

Nell’ottica del continuo processo di miglioramento, strumenti di monitoraggio e iniziative di *capacity building* volte a favorire lo scambio di idee e informazioni sono essenziali per promuovere rapporti con i fornitori che siano positivi e reciprocamente proficui.

Con riferimento alla verifica della responsabilità etica, sociale ed ambientale, il *Supplier Sustainability Self-Assessment (SSSA)*, rappresenta il principale strumento di valutazione della conformità del fornitore ai criteri di sostenibilità. Disponibile *online*, ha un triplice obiettivo:

1. comunicare le aspettative dell’azienda alla sua base fornitori;
2. verificare il livello effettivo di attività di sostenibilità all’interno della catena di fornitura;
3. ridurre in modo efficace ed efficiente l’onere derivante dalla molteplicità di informazioni richieste, ricevute dai fornitori.

I risultati vengono poi processati attraverso una *risk map* che permette di assegnare a ciascun fornitore un livello di rischio complessivo e di procedere nel caso con ulteriori attività di verifica, tramite *audit on-site* presso gli stabilimenti dei fornitori. Qualora siano state identificate particolari criticità, al fornitore può essere richiesto di implementare un piano d’azione, e in casi particolarmente gravi, il rapporto con il fornitore può essere sospeso o interrotto.

4.7 Leadership: Dow Jones Sustainability Index World e CDP Climate Performance Leadership Index 2014

Impegni di sostenibilità di FCA: Rafforzare la posizione di leadership del Gruppo in materia ambientale, sociale e di Governance.

Related-Risks identified: Necessità di garantire esaustiva e trasparente rendicontazione delle informazioni relative alla performance di sostenibilità del Gruppo verso i suoi stakeholders e di monitorare in particolare la composizione del flottante azionario da parte degli Investitori Socialmente Responsabili.

Approccio e Case history a impatto reputazionale

Il Gruppo FCA è impegnato a rafforzare e mantenere la sua posizione tra i *leader* per l’ambiente, gli aspetti sociali e di *governance*. Specifici obiettivi sono declinati in tutta l’azienda attraverso l’adozione di alcuni obiettivi prioritari:

- estendere e innovare il dialogo sulla sostenibilità verso un numero sempre crescente di *stakeholder* interni ed esterni al Gruppo nel mondo

- confermare il riconoscimento globale e regionale da parte di terze parti (e.g., analisti di sostenibilità) per le *performance* di sostenibilità del Gruppo
- incorporare annualmente gli obiettivi di sostenibilità nel modello di valutazione della Leadership e della Performance dei dipendenti del Gruppo.

L'impegno del Gruppo per la sostenibilità ha ricevuto negli anni il riconoscimento da diverse organizzazioni impegnate nel valutare e riconoscere le migliori performance di sostenibilità sul mercato. I riconoscimenti da parte di terze parti che godono di credibilità nell'universo degli indici e rating di sostenibilità contribuisce a valorizzare le *best practice* messe in atto dall'organizzazione, e genera un positivo impatto reputazionale nei confronti degli *stakeholder*, in particolare per i Socially Responsible Investors e i Media specializzati in tematiche CSR.

Tra i riconoscimenti ottenuti, nel 2015, FCA è stata inclusa nel DJSI World con un punteggio di 88/100, rispetto a una media di 60/100 delle aziende del settore automobilistico valutate da RobecoSAM, società specializzata in investimenti sostenibili. Accedono al prestigioso indice solo le società giudicate migliori nella gestione del proprio business secondo criteri di sostenibilità in ambito economico, sociale e ambientale. FCA è stata inoltre inclusa nella Climate "A" List dell'iniziativa Climate Change 2015 del CDP e ha conseguito il punteggio di 98/100 per la trasparenza nella rendicontazione. Solo il 5% delle aziende che hanno partecipato all'iniziativa del CDP sul cambiamento climatico è stato incluso nella A List. I risultati sono stati pubblicati nel Global Climate Change Report 2015, che rendiconta i risultati degli ultimi cinque anni delle aziende quotate più grandi al mondo.

Questi risultati confermano FCA nella posizione di azienda *leader* in termini di *performance* integrata tra gli aspetti economici, ambientali e sociali.

5 Reazione tra performance di sostenibilità ed impatto sui Socially Responsible Investors (SRI)

La competitività del Gruppo nel mercato globale può essere espressa anche nei termini della sua capacità di costruire vantaggi competitivi e generare valore nel lungo termine.

I fattori Ambientali, Sociali e di Governance (ESG, Environmental, Social and Governance) hanno visto crescere esponenzialmente la loro materialità e rilevanza finanziaria negli ultimi decenni. Per questo motivo la relazione con gli Investitori e Azionisti è un elemento essenziale non solo del modello di governance di FCA, ma anche del suo approccio alla sostenibilità.

I risultati pubblicati nel Global Sustainable Investment Review 2014 che raccoglie i risultati di studi di mercato condotti da forum di investimento sostenibili provenienti da Europa, Stati Uniti, Canada, Australia, Asia (Giappone escluso) e il Giappone - dimostrano la crescente importanza dei Socially Responsible Investors (SRI).

Dal 2012, il mercato globale degli investimenti sostenibili ha continuato a crescere sia in termini assoluti sia relativi, passando da 13,3 a 21,4 bilioni di dollari a inizio del 2014 (+61%).

FCA mantiene un dialogo costante con gli investitori socialmente responsabili che analizzano quali criteri di investimento anche i fattori di performance ambientali, sociali e di governance. Questi investitori considerano tali fattori come indicatori predittivi della capacità di un'azienda di generare ritorni finanziari competitivi a lungo termine. Nel 2015 è stata condotta un'analisi sui 200 principali azionisti del Gruppo FCA. Tale analisi, condotta da Ipreo -società specializzata in attività di market intelligence - ha mostrato come il 55% di questi investitori sia da considerarsi Highly- o Medium-ESG sensitive. La concentrazione di investitori che possiamo definire come Highly-ESG sensitive tra gli azionisti del Gruppo FCA (33% degli investitori istituzionali presi in considerazione dallo studio) è risultata significativamente superiore rispetto alla media del mercato globale (18%).

Secondo l'analisi inoltre, la performance di sostenibilità del FCA può avere una correlazione diretta con le scelte d'investimento di 35 fondi SRI. Anche gli Investitori Socialmente Responsabili di-mostrano la rilevanza dell'approccio, dell'impegno e dei risultati conseguiti dal Gruppo FCA in ambito di sostenibilità.

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Endnotes

1 Le informazioni riportate sono parte di una selezione effettuata a partire dai *Sustainability Targets* del Gruppo Fiat Chrysler *Automobiles*, pubblicati nel Bilancio di Sostenibilità del Gruppo disponibili su fca-group.com e redatto in lingua inglese. Gli impegni di Sostenibilità riportati in tabella sono stati tradotti in italiano ai fini di questo articolo. Per qualsiasi discrepanza interpretativa fa fede la versione in lingua inglese del Bilancio di Sostenibilità di FCA.

2 L'analisi effettuata in questo *frame* è risultato dell'elaborazione degli autori e non corrisponde a processi FCA in atto rispetto alla gestione del rischio (ERM, BCM, *Pure risk*) descritti in precedenza.

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Model risk management: quantitative and qualitative aspects

Authors

- José Luis Carazo, Partner, Jose.Luis.Carazo@msspain.com - Management Solutions
- Javier Calvo, Partner, Javier.Calvo.Martin@msgermany.com.de - Management Solutions
- Barbara Chiloiro, Senior Manager, barbara.chiloiro@msmex.com - Management Solutions

In recent years there has been a trend in financial institutions towards greater use of models in decision making.

The use of models brings undoubted benefits, including automated and objective decision-making. But using models also involves direct resources costs, development and implementation time, and the risk of trusting the results of an incorrect model (model risk).

Model risk may thus be defined as “the potential for adverse consequences from decisions based on incorrect or misused model outputs and reports.” (OCC-Fed (2011-12)), and may include simplifications, approximations, wrong assumptions or incorrect design process.

Model risk thus defined is potentially significant and has captured the attention of regulators and institutions. In the more advanced cases, this active management has been formulated into a model risk management (MRM) framework that sets out the guidelines for cover all phases of a model's life cycle: development and deployment, use, validation, governance policies, control and documentation by all involved.

This is substantiated by the fact that regulators have started to require such frameworks which are serving as a starting point for the industry.

With regard to model risk organization and governance, regulators do not prescribe a specific framework, but they do address the need to establish a clear distinction between model “ownership”, “control” and “compliance” roles.

Also, regulators emphasize that the fundamental principle in model risk management is “effective challenge”, understood as critical analysis by objective, qualified people who are able to identify model limitations and assumptions, and suggest appropriate changes.

This comprehensive approach to model risk is novel in the industry, and the expected trend for the coming years is that the industry will gradually take it on board and implement the prescribed practices, as the most advanced institutions are already doing.

Keywords: model risk; risk models; model validation; Basel; SR 11-7.

JEL Classification: X13, H09, I99, Z99

1 Model risk definition and regulations

1.1 What is a model?

According to the Fed and the OCC¹, the term “model” refers to “a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates.” It has three components (Fig. 1).

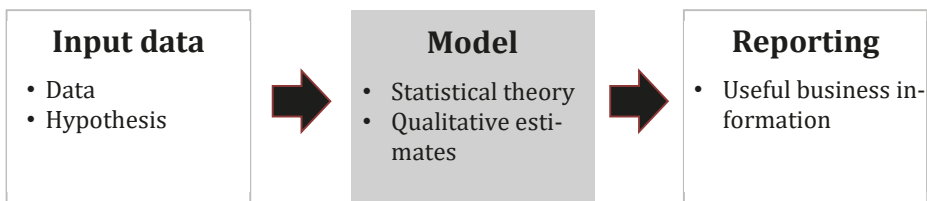


Figure 1 Model components

Always according to the Fed and the OCC, “the definition of model also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature.” This definition includes expert models, among others.

It is, however, for each institution to decide the scope of what should constitute a model and therefore would be affected by model risk and the policies defined in connection with it. This scope will at times be unclear and will require a degree of subjective judgment.

Once the scope has been defined, a decision will also have to be made as to the types of model that are to be analyzed (risk, commercial, etc.).

1.2 Model risk: nature and sources

Models are simplified representations of reality. This simplification is a source of risk that needs to be identified, analyzed and managed like any other risk in an institution, with the particularity that it cannot be removed, only mitigated through critical analysis or “effective challenge”.

Model risk, according to the Fed and the OCC, is defined as “the potential for adverse consequences from decisions based on incorrect or misused model outputs and reports”².

If data deficiencies are explicitly added to this (as they result in incorrect model output), the sources of model risk may be classified into three groups:

1. Data deficiencies in terms of both availability and quality, including data errors, lack of critical variables, lack of historical depth, errors in the feeding of variables or insufficient sample size.
2. Estimation uncertainty or model error in the form of simplifications, approximations, flawed assumptions or incorrect model design. Any of these can occur at any point in model development, from design to implementation, which can lead to erroneous results that are not consistent with the purpose and intended use of the model. They include estimator uncertainty (reflected in the confidence intervals, which are often calculated but tend not to be used), and also the use of unobservable parameters, the lack of market consensus on the model's functional form, and computational difficulties, among others.
3. Model misuse, which includes using the model for purposes other than those for which it was designed, and not re-estimating or re-calibrating the model in a long time.

1.3 Regulatory context

1.3.1 Overview

To date, there are few specific regulations covering model risk, and these regulations tend to be non-specific in both their definition and the expected treatment. In addition to the guidance document issued by the Fed and the OCC, which will be analyzed in detail, there are some regulatory references to model risk that can be characterized into three types (Table. 1):

- Valuation adjustments: these are regulations governing the need to prudently adjust the valuation of specific products (especially derivatives) to cover any potential model risk. Although Basel II already indicated³ the need to make these adjustments, the main regulatory milestone in this direction occurred in 2013 with the publication of the EBA's RTS on Prudent Valuation. This is the only case where the explicit quantification of model risk is covered in the regulations.
- Buffer capital linked to ICAAP⁴: both Basel II in its second pillar and some local regulators⁵ transposing this regulation address the need to hold capital for all risks considered significant by the organization, as part of their internal capital adequacy assessment process (ICAAP). This is also the case in other ICAAP-related processes, such as the U.S. stress testing exercise known as CCAR⁶. However, most regulations either only mention model risk tangentially or model risk can be understood to be included in "other risks".
- Other mentions: this encompasses other minor references to model risk, which treat it as being implicit in other regulatory elements. The most notable case is the Basel Committee's treatment of model risk mitigation

through the application of the leverage ratio, though it does not go further into detail⁷.

Table 1 Main regulatory references to model risk

BCBS	Basel (BCBS): Pillar 2 capital in BIS II is expected to cover “ all relevant risks ”; model risk adjustments are also expected in the valuation of complex products. In BIS III, the leverage ratio is intended, among other purposes, to cover model risk in the calculation of RWAs.
Federal Reserve System	CCAR (Fed): general recommendation by the Fed in the U.S. CCAR exercise for banks to carry a capital buffer for all risks deemed significant by each institution, but without specifying the precise manner.
OCC/FED	Supervisory Guidance on MRM (OCC/Fed): general guidance on model risk management through a framework that covers model development and implementation, use, validation, governance, policy and control, and documentation.
EBA	Prudent valuation (EBA): explicit adjustments for model risk to the valuation of derivatives (model risk AVAs), framed within the prudent valuation standard, on which the EBA issued a consultation document in 2013 and that, if ratified, will come into force in 2015.
Bank of Spain	ICAAP guidelines: institutions need to hold capital for all material risks. CBE 03/08 and 04/11 (Bank of Spain): institutions are required to consider making valuation adjustments for model risk (due to incorrect method and unobservable or incorrect parameters).

1.3.2 Fed and OCC: Supervisory Guidance

The main regulatory milestone took place in 2011-12 with the publication of the Supervisory Guidance on Model Risk Management⁶ by the U.S. regulators. In this document, the concept of model risk and the need for institutions to have a Board-approved framework in place to identify and manage this risk (though not necessarily quantify it) is clearly and accurately defined for the first time.

To achieve this, the standard proposes a set of guidelines or principles for action on model risk, structured by area, which can be summarized as follows:

1. Model risk should be managed like any other risk; banks should identify its sources and assess its magnitude in order to manage it.
2. Model risk cannot be eliminated, only mitigated by good management. A combination of expert modeling and robust validation, while necessary, is not sufficient to eliminate model risk.
3. Consequently, there should be a framework for model risk management (MRM) in place, approved by the Board of Directors.
4. A well supported conservative approach regarding inputs, outputs and model design is an effective tool, but should not be an excuse not to continue to work towards the continuous improvement of models.
5. Prudent use of models may include duly justified conservative approaches, model stress testing, or a possible capital buffer for model risk. However, the regulator also warns that using too many conservative elements may lead to model misuse.
6. There are many sources of model risk and institutions should pay special attention to the aggregate model risk resulting from their combination.
7. While the choice of a suitable organizational model is at the discretion of the institutions, a clear distinction needs to be made between the roles of model ownership, control and compliance; ownership involves knowing the model risk to which the institution is subject; control deals with limit setting and follow-up, as well as independent model validation; and compliance is the set of processes that ensure the ownership and control roles are performed in accordance with the established policies.
8. The Board of Directors is ultimately responsible for the model risk management framework, which it must approve, and should be regularly informed about any significant model risk to which the entity is exposed.
9. The key principle in model risk mitigation is effective challenge: critical analysis by objective parties who are qualified and experienced in the line of business in which the model is used, and are able to identify the limitations and assumptions and suggest appropriate improvements.

In summary, regulators are encouraging institutions to design model risk management frameworks that formalize the criteria to be followed in model development and implementation, ensure their prudent use, establish procedures to validate their performance and define policy governance and applicable documentation criteria. These guidelines cover all phases of a model's life cycle.

2 Elements of an objective MRM framework

2.1 MRM policy

Several international financial institutions have developed a number of key principles for model risk management (MRM), which are summarized and put forward in this section as possible best practices.

All of these organizations believe it necessary to create a MRM framework that should be approved at the highest level and to establish model ownership, control and compliance as the key roles in model risk management.

This framework should be embodied in a written and explicit policy that has been approved by the Board of Directors and includes four main elements (Fig. 2):

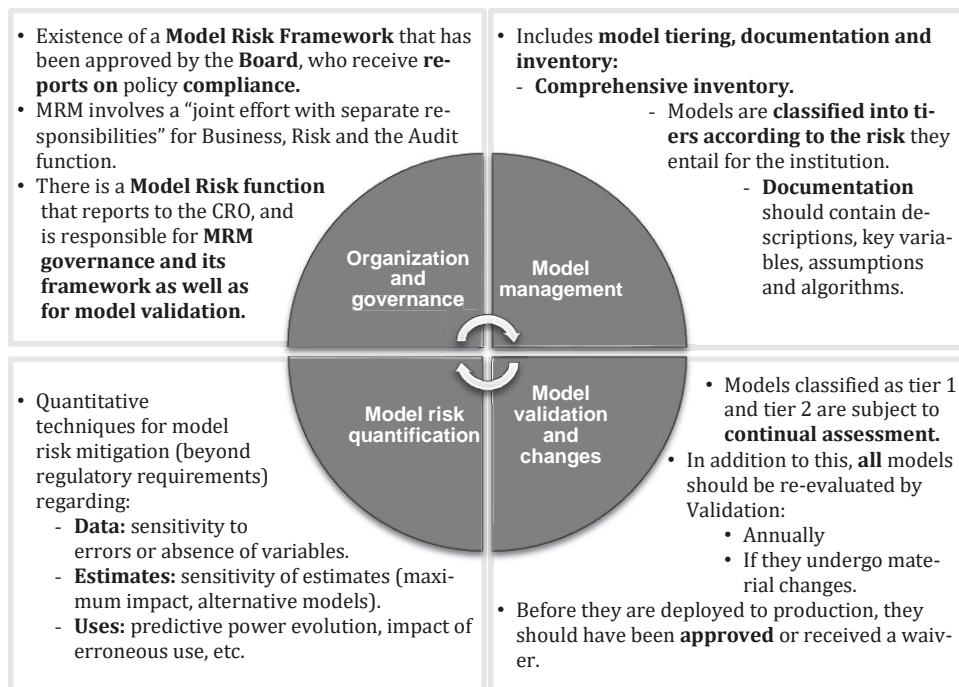


Figure 2 Elements of a policy for model risk management (MRM)

- Organization and governance: description of roles and responsibilities, in particular establishing the Model Risk Management Function (MRM) as a reference for all matters in this area.
- Model management: guidelines on model classification, development, monitoring, documentation, inventory and reporting.
- Model validation and change management: guidelines for the review of models, the approval of changes, and on waivers required for using the model prior to approval.
- Model risk quantification: methodology for model risk estimation, according to its nature and classification.

2.1.1 Organization and governance

The Board of Directors is ultimately responsible for the approval of the MRM framework. Also, the Board should receive regular reports on the implementation of the MRM policy and must be informed of any model risk that may have a material impact on the institution. Thus, best practice puts model risk on the same level as any other significant risk for the institution.

From an organizational viewpoint, MRM is characterized by three components:

- Cross-cutting nature: model risk management affects several areas, including the Business lines, Risk, Finance, Internal Audit and Technology.
- Roles: the MRM policy should define the role of each area in model risk management. Three roles are usually defined:
 - Ownership: this role lies with the model's end-user areas, which are responsible for ensuring the model is properly used as well as for reporting any errors or inconsistencies; this role is normally carried out by the Business lines, Finance or Risk.
 - Control: an area that measures model risk, sets limits and performs monitoring activities. This role is normally carried out by the Risk area or by a specific and independent control function which may include the Internal Validation function.
 - Compliance: an area that oversees compliance with policies by the other two roles. This role is normally fulfilled by the Compliance or the Internal Audit function.

It should be noted that the model development process and those involved in it are not necessarily the same in Europe as in the U.S., where there is a tendency for schemes to be more decentralized and embedded in the Business lines.

- MRM Function: its responsibility is to set up and maintain the MRM framework. In some organizations MRM contains the Internal Validation function (in others these two functions are dealt with by separate units), and therefore approves models and their use as well as managing all model governance-related issues: maintain a global, updated inventory, validating models independently, conducting an annual assessment of all

models in the inventory, preparing and disseminating policy on model risk, etc.

The MRM function tends to have a hierarchical structure with differentiated roles that report to the Model Risk Officer (MRO). The MRM role, usually led by a MRO, often has the final say on the approval of any of the institution's models.

2.1.2 Model management

The MRM framework includes the guidelines that modelers need to consider during the model development process, as well as the key elements for model risk control. Some of the main guidelines are as follows:

1. **Objective and use:** all models should have a clearly explained objective and should be used for the purpose they were designed and approved for; any use outside the uses intended during development has to be expressly approved.
2. **Inventory:** Modelers must declare all models developed for their inclusion in the model inventory and for later validation and follow-up.
3. **Tiering:** all models should be classified according to the risk their use involves for the organization.
4. **Documentation:** all models should be documented with a level of detail proportionate to their tier, and should include a description of the objectives, intended uses, input data, hypothesis and methodology used.
5. **No redundancy:** prior to the development of a model, the modeler should confirm that there is not yet a model that may cover the user's needs.

As regards model development and management components in an MRM framework, there are four key areas: model inventory, tiering, documentation and monitoring.

2.1.2.1 Model Inventory

Banks should have a complete inventory of all existing models in all areas (risk, commercial, finance, etc.), usually supported on a suitable technological tool that keeps track of all changes and versions, with an aim to facilitate model risk governance and management and to keep a record of all uses, changes and the approval status of each model.

2.1.2.2 Model Tiering

It is good practice to classify models according to the risk their use involves for the entity. Among other factors, the thoroughness required in model documentation, the need for validators to approve changes or the frequency and rigor of the follow-up depend on this classification or tiering.

Model tiering is a partially subjective process that seeks to reflect the criteria through an institution estimates the risk of each model. As an example, tiering may depend on the following factors (Fig. 3):

- Materiality, which reflects the economic consequences of a possible error or wrong use of the model.
- Sophistication, which expresses the model's level of complexity.
- Impact on decisions. They are usually classified in three levels:
 - Department, if an error affect one department or area.
 - Institution, if an error would affect several departments.
 - External, if the error may affect the institution's reporting to third parties such as the supervisor, the shareholders, etc.

Each model's tier needs to be duly justified by the model's owner and approved by the MRM function.

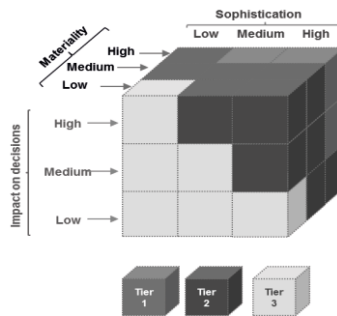


Figure 3 Model tiering example

2.1.2.3 Model Documentation

It is necessary to complete the model's documentation in a comprehensive manner before validation can proceed. The documentation should follow unified templates approved by the MRM function, and it should also ensure the entire model can be replicated by an independent third party, or even transferred to a new modeler for it to be updated or improved without this being a costly process.

A model's documentation should include at least the following:

- Data sources.
- Model methodology report and user's manual.
- Model calibration report.
- Test plan.

- Technological environment and operational risk.

Summing up, documenting models requires a substantial effort by the entity but is key to facilitating the update, follow-up, validation and audit processes, as well as the supervisory review. Consequently, it is receiving increasingly more attention from entities and regulators.

2.1.2.4 Model Monitoring

Finally, it is essential to have a decision-model performance monitoring system in place that allows for the early detection of deviations from target and model misuse in order to take remedial or preventive action.

The follow-up should be carried out with a frequency that is proportional to the model risk, and should consist of a series of alerts and objective criteria that will make it possible to determine when a model needs to be rebuilt, recalibrated or decommissioned. Also, the final user’s feedback is essential in model monitoring, as it is the most effective source for identifying deviations with respect to the model’s expected behavior.

Model monitoring should be comprehensive, in the sense that it should examine any element that participates in the final decision, which can include the following elements, among others:

- Statistical model.
- Decision strategies.
- Expert adjustments.

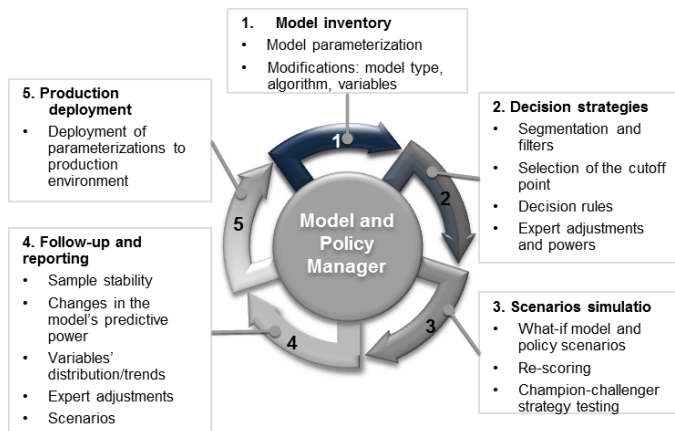


Figure 4 Policies and Models Manager

To this end, it is useful to have tools that cover the entire model follow-up cycle (Fig. 4) and that make it possible to conduct a what-if analysis and to quickly deploy to production all model changes arising from the follow-up observations⁹.

2.1.3 Model validation

Model validation is a key element in model risk mitigation and its purpose is to effectively and independently challenge the decisions made during model development, follow-up and use.

The frequency and intensity of the validation should be proportionate to the risk each model represents, and the validation process and outcome should be fully documented.

According to the regulations and to best practice, the institutions should apply a comprehensive model validation that should comply with a number of principles like thoroughness, independence, also it should cover all aspects of a model as methodology, documentation, etc., and it must be reviewed by Internal Audit.

2.1.4 Model risk quantification

Some organizations are beginning to incorporate specific quantitative techniques in their MRM framework for model risk mitigation purposes. These techniques are applied to:

- Data, through sensitivity to error in variables and even to the absence of key data input for model execution.
- Estimations, by using output sensitivity to the volatility of estimators.
- Use, by monitoring changes in predictive power and other follow-up metrics.

The following section explains how this quantification may be performed, together with an exercise that illustrates its practical application.

3 Model risk quantification

3.1 Model risk quantitative management cycle

Beyond specific aspects required by the EBA for the valuation of derivatives (model risk AVAs¹⁰), it is a fact that model risk quantification is not yet explicitly required by regulators, which is why no significant progress has been made by the institutions in this field so far¹¹.

Notwithstanding the above and, for management purposes, some institutions have started to work on the model risk management cycle from a quantitative perspective, with an aim to support qualitative model risk management as rec-

ommended by the Fed and the OCC regulations. Seen in this light, a model risk quantitative management cycle would comprise three phases (Table. 2):

Table 2 Model risk quantitative management cycle

<i>MR Source</i> <i>s</i>	Identification of sources	Quantification	Mitigation
Data	<ul style="list-style-type: none"> • Data error. • Lack of critical variables. • No historical depth. • Wrongly entered variables. • Insufficient sample. 	<ul style="list-style-type: none"> • Output sensitivity to error/absence for each variable (e.g. maximum impact). 	<ul style="list-style-type: none"> • Data Quality
Estimates	<ul style="list-style-type: none"> • Estimator uncertainty. • Unobservable parameters • Lack of market consensus. • Computational difficulties. • Assumptions do not hold. • Etc. 	<ul style="list-style-type: none"> • Sensitivity to estimators (e.g. maximum impact of variation). • Alternative models. • Market benchmark (e.g. transaction comparison). 	<ul style="list-style-type: none"> • Capital buffer for MR. • Conservative inputs, estimations and outputs. • Model back testing and stress testing.
Uses	<ul style="list-style-type: none"> • Models not re-estimated or re-calibrated for long periods of time. • Models used for purposes for which they were not designed. 	<ul style="list-style-type: none"> • Observe and simulate model decay (predictive power) • Observe and simulate the impact of model misuse. 	<ul style="list-style-type: none"> • Strict governance on the use of models. • Model follow-up tool: <ul style="list-style-type: none"> - Limit setting. - Frequent follow-up. - Decay alerts.

- Identification of model risk sources and classification: data deficiencies, estimation uncertainty or model errors and model misuse.
- Quantification of the model risk inherent to each source (output sensitivity to input variations).
- Mitigation of model risk identified and quantified.

Even though eliminating model risk is not possible, implementing an approach that combines a rigorous risk management structure, as prescribed by the Fed and the OCC, with prudent and detailed quantification such as that described may be an effective strategy to mitigate it.

3.2 Motivation and approach of the study

In order to explain this process, a study composed of three parts (each one coincides with the three model risk sources described) was designed with a view to quantifying this risk in credit risk parameters and models:

- Data deficiencies: in this first phase, the impact of the lack of information in a model’s most predictive variables will be analyzed; for example, a scoring model for consumer mortgages will be used (Fig. 5). To do this, we will reconstruct the scoring model without these variables, and determine the associated decrease in predictive power and its relationship

with the model management outputs: the assumed default (type I error) and the missed potential business or opportunity cost (type II error).

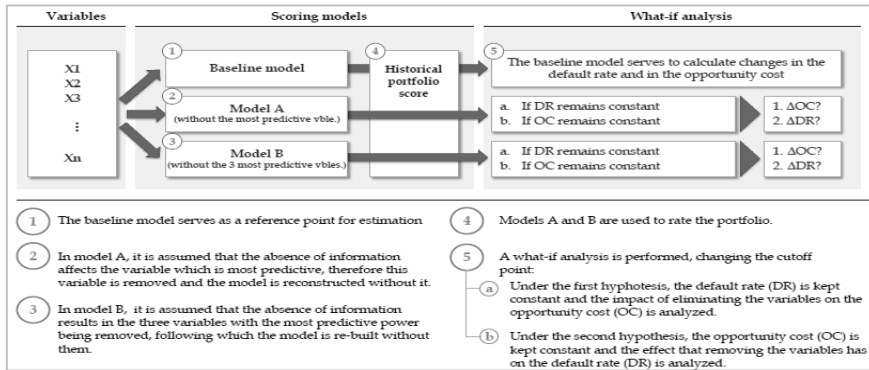


Figure 5 Summarized approach of the first exercise

- Estimation uncertainty or model error: in the second part, the model risk arising from uncertainties in the estimation will be studied (Fig. 6). To this end, the confidence intervals of the estimators obtained from the scoring model, the PD calculation in the calibration and the LGD calculation will be used to describe the normal distributions that characterize these estimators. Various parameter sets will be simulated on these distributions using Monte Carlo and regulatory capital for the portfolio will be re-estimated based on the outcome. This will provide a distribution of the capital requirement for the portfolio, its volatility arising exclusively from the uncertainty in the selection of estimators.

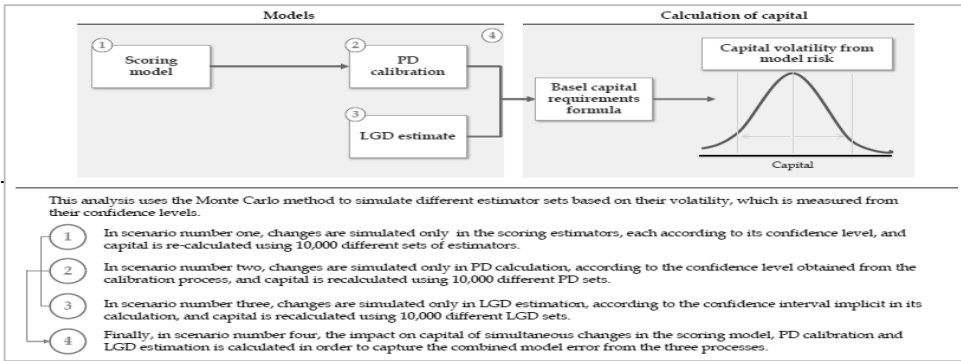


Figure 6 Summarized approach of the second exercise

- Model misuse: finally, the risk arising from a scoring model that was not properly monitored and updated will be analyzed (Fig. 7). To do this, the model’s predictive power at the time of construction will be compared with that shown a year later, and the effect of not updating the model on type I and II errors will be analyzed.

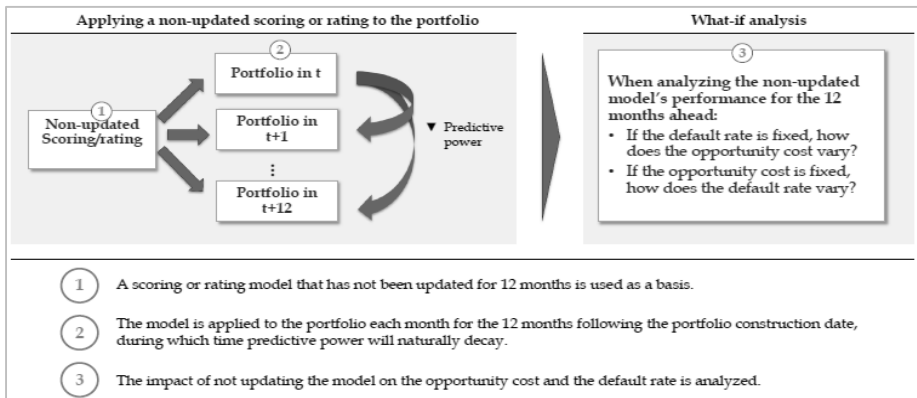


Figure 7 Summarized approach of the third exercise

With this, three real examples of model risk quantification will have been provided to offer a measure of its relevance.

3.3 Main findings

The main findings from this study are the following:

- Data deficiencies: the presence of errors in the three most predictive variables of a scoring model may double the default rate on the balance sheet, or may instead reduce by 40 % the business obtained if the same default rate is to be kept (raise the opportunity cost).
- Estimation uncertainty or model error: quantifying the impact of model estimation uncertainty reveals that the capital requirement for a mortgage portfolio may be underestimated by up to 8% (with a confidence level of 90%), due to model risk [due to the combined effect of uncertainty in the score estimators (4% underestimation if considered in isolation), in PD calibration (7%) and in LGD estimation (2%)], a fact that should be considered and mitigated -if possible- with a conservative approach.
- Model misuse: failure to update a scoring model for 12 months may cause its predictive power to decrease by around 10%. This in turn results in an increase of up to 67% in the default rate, or alternatively, a 15% reduction in the volume of acquired business if the default rate is fixed.

It is therefore desirable to have a MRM framework in place and, where appropriate, develop robust model risk estimation techniques aimed at implementing suitable mitigation techniques.

3.4 Model risk mitigation

As can be seen from the study, quantifying model risk directly is a complex task, and quantitative measures to cover this risk, such as a capital buffer or a provision for loan losses, are not always applicable or make any sense.

The quantification cycle is therefore completed by the possible mitigating actions on model risk that are drawn from this sensitivity analysis. These actions may include the following:

- Data deficiencies
 - Strengthening of data governance.
 - Establishment of a Data Quality function.
 - Introduction of a set of input validation rules and of expert rules on outputs, especially as regards data deficiencies.
- Estimation uncertainty or model error
 - Qualification and experience of the model's validators and modelers.
 - Effective, critical and independent validation of models.
 - Periodic model backtesting and stress test of the model.
 - Academic support or market benchmark.

- Use of alternative models to contrast results.
- Development of complementary analyses that challenge the model.
- Occasionally, provision of a capital buffer for model risk losses.
- Model misuse
 - Rigorous governance of models to include setting limits on their use and expressly validating and approving them for each use.
 - Greater human supervision.
 - Regular model follow-up.
 - Thorough inventory of the institutions' models.
 - Pilot testing before initial deployment to production and after every substantial change for high risk models.

Endnotes

¹ OCC- Fed (2011-12)

¹ Ibid

¹ BCBS (2004-06): "699. Supervisory authorities expect the following valuation adjustments/reserves to be formally considered at a minimum: [...] where appropriate, model risk."

¹ Internal Capital Adequacy Assessment Process

¹ See, for example, Bank of Spain (2008-14)

¹ Comprehensive Capital Analysis and Review

¹ BCBS (2010-11): «16. [...] the Committee is introducing a leverage ratio requirement that is intended to achieve the following objectives: [...] introduce additional safeguards against model risk and measurement error by supplementing the risk-based measure with a simple, transparent, independent measure of risk."

¹ OCC-Fed (2011-12)

¹ In this respect, Management Solutions has the MIR Policies and Models Manager, designed with this architecture and functionality

¹ Model risk additional valuation adjustments (AVAs), detailed in EBA (2013)

¹¹ The capital buffer is an exception in the CCAR exercise in the US, which some entities are implementing

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Internal control & corporate governance index: an empirical analysis of the Italian listed companies

Authors

- *Alain Devalle, Associate Professor, alain.devalle@unito.it - University of Turin*
 - *Valter Cantino, Full Professor, valter.cantino@unito.it - University of Turin*
 - *Fabio Rizzato, Assistant Professor, fabio.rizzato@unito.it - University of Turin*
 - *Alessandro Zerbetto, Ph.D., alessandro.zerbetto@unito.it - University of Turin*
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Abstract

Internal control is defined by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) as “a process, effected by an entity’s board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of better effectiveness and efficiency of operations, better reliability of financial reporting and better compliance with applicable laws and regulations. To achieve these objectives, the organization applies the process of Enterprise Risk Management (ERM) in strategy settings and across the enterprise, in order to identify potential events that may affect the entity, and manage risk within its risk appetite”. Thus, it is possible to highlight the importance of Internal control in the Risk assessment process of a company.

Our research analyzed the corporate governance in the Italian context. In particular, the aim of the paper is to analyze the structure of the Internal Control System (ICS) of the Italian listed companies. We constructed a specific index, called “internal Control and Corporate Governance index” that measures the quality of corporate governance composition. The index construction is based on an in-depth literature review and a selection of the international ICS best practices which were more suitable for the Italian context. Secondly, we have investigated the key variables that influence the structure of the Internal control System in the Italian context.

The sample was made up of the listed companies belonging to the Italian Stock Exchange (FTSE Italia All Share). The composition of the index refers to the year 2013 and in total 159 listed companies were analyzed. For each company we have collected 33 items in order to evaluate the internal control system of a company: for each entity, we investigated 7 independent variables divided into performance, size, shareholders’ composition, for-

eign capital, percentage of state capital, leverage and sector variables. In total, we hand collected 5,247 items (33 items multiplied by 159 entities).

The methodology used to assess the determinants of the quality of corporate governance is based on the OLS regression model consistent with the main literature review (Cerf (1961); Stanga (1976); McNally, Eng and Hasseldine (1982); Chow and Wong-Boren (1987); Cooke (1991 2 1992); Botosan (1997); Depoers (2000); Glaum and Street (2003)). Results show that the adjusted R^2 is equal to 0.300, which is an acceptable value especially when taking into account the nature of the values of the dependent variables (subjective).

Our results suggest that size, state ownership and the presence of several foreign funds in the ownership are significantly and positively related to ICS quality. However, return on assets is significantly and negative related to ICS quality.

In conclusion we can state that the internal control system of the Italian companies is compliant with the international best practices, even if our research suggest some improvements which need to be made.

Keywords: Governance, internal control system, index of disclosure.

JEL Classification: G34

1 Introduction

The separation between ownership and control, and its consequences is a topic that has fueled a huge debate in the last years. Differently from Coase, 1937, who defines firms as a nexus of contracts, where managers act for reaching exclusively shareholders' interests, Jensen & Meckling, 1976 argue that companies require monitoring mechanisms in order to minimize agency costs determined by potential risk of irregular activities carried out from top managers. As a result of agency theory, corporate governance has become one of the most debated topic of the century's last twenty years. During this period, where corporate governance is defined as the way in which suppliers of finance to corporations assure themselves of getting a return on their investment (Shleifer & R. W. Vishny 1997), researchers investigate the link between specific aspect of corporate governance (such as audit committee, independent directors, takeover defenses and minority shareholders protections) and company's market value or performance.

Starting from the new century, great part of literature continues to investigate the relation between corporate governance and firm value, but introducing new methods of aggregating more attributes on an index as a proxy for company's corporate governance quality (Ammann, Oesch, & Schmid, 2010; Bebchuk, Cohen, & Ferrell, 2009; Black, Jang, & Kim, 2006; Brown & Caylor, 2006; Cremers & Nair, 2005; Durnev & Kim, 2005; Gompers et al., 2003; La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 2000). The first work using a corporate governance

index is Gompers et al., 2003, which analyzes the companies listed on U.S. financial market developing a quality index based on twenty-four provisions (called G-index), showing that more democratic firms are more valuable. Later, different studies (Bebchuk & Cohen, 2005; Brown & Caylor, 2006; Cremers & Nair, 2005) use similar indexes to associate firm's level corporate governance and firm's valuation.

However, as well as better corporate governance can lead to increase corporate value or at least, avoid the loss in value due to managers who do not act in shareholders' interests, (Jensen & Meckling, 1976) there is a lack in literature investigating which set of factors can influence the adoption of better corporate governance quality, in countries with strong type-two agency conflict as Italy. In this paper we construct an index, named Internal Control and Corporate Governance index (ICCG index), in order to investigate Italian listed companies searching for which set of factors influence the adoption of good corporate governance practices (Black et al. 2012 claims that country characteristics strongly predict which aspects of governance matter).

The sample was made up of the listed companies belonging to the Italian Stock Exchange (FTSE Italia All Share). The composition of the index refers to the year 2013 and in total 159 listed companies were analyzed. For each company we have collected 33 items in order to evaluate the internal control system of a company: for each entity, we investigated 7 independent variables divided into performance, size, shareholders' composition, foreign capital, percentage of state capital, leverage and sector variables. In total, we hand collected 5,247 items (33 items multiplied by 159 entities).

The methodology used to assess the determinants of the quality of corporate governance is based on the OLS regression model consistent with the main literature review (Cerf (1961); Stanga (1976); McNally, Eng and Hasseldine (1982); Chow and Wong-Boren (1987); Cooke (1991 2 1992); Botosan (1997); Depoers (2000); Glaum and Street (2003)).

The reminder of the paper is organized as follows. Section 2 describes corporate governance functions and laws prescribed in Italian context; Section 3 develops the hypotheses; Section 4 discuss the sample and presents the model; Section 5 includes test, regression analysis and results; Section 6 summarizes the main finding of the study.

2 Background

Italian corporate governance framework and rules have been substantially modified since 1998 with the introduction of the Draghi Law. More in general, Corporate Governance Reforms in Europe have been driven by three factors (Enriques & Volpin 2007). First, Kamar 2006 stated that reforms aimed to make national markets more attractive. Secondly (Ferran 2004) the efforts of the European Union was to institute a common framework of rules. Thirdly many of the corporate governance reforms are a response to national and international financial frauds

and scandals (Enriques 2003). These events have clearly shown the weakness of the worldwide and Italian corporate governance framework for both listed and non-listed companies. Therefore, in order to rectify the situation appropriately, the legislator, has tried to protect minority shareholders of listed companies. However, Italian corporate governance system it is still “considered poor, characterized by an inactive takeover market, weak accounting standards, limited presence of institutional investor and where the legal protection for investors was low” (Buchanan & Yang 2005). Besides, the Italian corporate governance system is characterized by a high degree of direct ownership concentration, both for listed and unlisted companies (Bianco & Casavola 1999; Enriques & Volpin 2007). The Italian corporate governance system may be classified in the Latin sub-group (De Jong 1997). Nevertheless, it has its own unique features, and does not entirely fit into the international standards models (Melis 1999). Finally the Italian corporate governance system is based on pyramidal firm structure. These characteristics emphasize that Italian corporate governance is very far from the Anglosaxon one, considered (La Porta et al. 2000) the strongest system which offering the highest level of legal protection to stockholders.

3 Hypotheses development

As mentioned previously, monitoring mechanisms are implemented to bound agency costs, ensuring to shareholders that managers are acting in their best interest (Jensen & Meckling 1976). These mechanisms are for most part considered by corporate governance. Several studies assert that high quality level corporate governance lead to best performance, or increase firm value (Ammann, Oesch, & Schmid, 2010; Bebchuk, Cohen, & Ferrell, 2009; Black, Jang, & Kim, 2006; Brown & Caylor, 2006; Cremers & Nair, 2005; Durnev & Kim, 2005; Gompers et al., 2003; La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 2000).

However, there is a lack in literature about which set of factors affect implementation of qualitative corporate governance practices, in country with strong type-two agency conflict. Our work want to fill this gap, investigating which group of firm’s characteristics influence a better quality of corporate governance practices in Italy. To achieve this result, we first analyzed international literature, searching for determinants affecting firm level corporate governance. We grouped the determinants into four categories: firm performance, ownership, financial structure and size. By doing so, we considered the particular characteristics of Italian companies as well as political and economic environment.

3.1 Foreign Institutional Investor appeal

According to Shleifer & Vishny 1986 and Karamanou & Vafeas 2005 the presence of blockholders in firm’s ownership positively affect corporate governance processes, introducing an additional monitoring mechanism. McConnell &

Servaes 1990 and Xu & Wang 1999 find that institutional investor appear to be more effective than individual shareholders in monitoring firm's performances. Among these blockholders, Balasubramanian et al. 2010 identifies foreign investors as having a very important role; higher corporate governance is in their interest, and they are able in forcing the achievement of this goal due to the fact that are willing to pay a higher price for equity, exerting greater pressure on managers. Khanna & Palepu 2000 argue that foreign-invested firms are likely insist on higher governance standards and on protection of minority rights. Foreign investors are able to inhibit fraud for Chinese Financial market (Chen et al. 2006). Moreover, Bianchi et al. 2011 report for Italian market, that higher levels of effective compliance to Italian code of Corporate governance (summarizing worldwide accepted good practices of corporate governance) tend to be found in companies with relevant holdings by institutional investors (particularly foreign investors) who participate in general shareholder meetings. Bianchi et al. 2011 claims that foreign investors are able to monitor the firms they invest in, helping to discourage financial fraud and improve the effectiveness of internal control system. Bianchi et al. 2011 find positive relation between effective compliance to corporate governance code and foreign investors participating in annual meeting, for Italian listed companies. We expect higher corporate governance standards for firms registering the presence of foreign investor in corporate ownership.

In this study, in order to investigate factors affecting corporate governance quality, we use the number of foreign funds holding relevant shares of the firm (NUMBERFOREIGNFUND) as a proxy for foreign fund interest in the firm.

H1. There is a positive relation between presence of foreign institutional investors and ICCG index.

3.2 State ownership

Ben Ali & Lesage 2013 shows that audit fees are negatively associated with state ownership in France. This result is consistent with Sun & Tong 2003 research, about the role of state ownership in preventing fraud and expropriation of wealth for minorities. The researchers claim that state representatives should effectively control managers, since in case of failure they may bear reputation costs, improving the quality of monitoring mechanisms. Black et al. 2013 find that fractional ownership held by the state is the most strongly predicting variable of corporate governance quality, proxied by their pooled corporate governance index (pool observations across Brazil, India, Korea, and Turkey, treat the country Corporate Governance indices as if they capture the same underlying construct). In order to avoid reputational costs, we claim that State stake can drive management in introducing higher corporate governance standards. In accordance with Black et al. 2013, we expect a positive relation between state ownership and corporate governance quality.

H2. There is a positive relation between firm's state ownership and ICCG index.

3.3 Family ownership

Dyck & Zingales 2004 shows that ownership is more concentrated in countries in which private benefits of control are greater, or rather countries with weak legal protection of investors like Italy (La Porta et al. 1999). In these countries ownership concentration is an efficient form of governance mechanism in order to control manager activities, but it potentially leaves minority investors unprotected (Shleifer & R. W. Vishny 1997). Indeed, large controlling shareholders could use their influence on management to assure the return on their investment even at expense of minorities' expropriation, defining the type-two agency conflict (La Porta et al. 1999). This assumption is confirmed by Boubakri et al. 2005 and Bai et al. 2004, asserting that concentrated ownership gives to largest shareholders substantial discretionary power to use the firm's resources for personal gain at the expense of other shareholders. Moreover, Hope et al. 2010 argues that it is easier extract private benefits for major family owners, that can strongly influence the board or have the possibility of electing. Several studies show that large shareholders expropriation of minority shareholders wealth is even more achievable when companies record a poor quality of corporate governance and internal control system. For example, Chen & Jaggi 2000 find that family ownership may reduce the independent directors effectiveness in convincing management to disclose more comprehensive information. Cheng & Firth 2006 find weak corporate governance and controls exercised by outside blockholders and independent non-executive directors due to the overwhelming power of executive directors in family firms. Anderson & Reeb 2003 find that for S&P 500 firm, outside directors are more prevalent in nonfamily firms than in family firms. Moreover, the researchers find evidences suggesting that if families seek to entrench themselves and extract private benefits from the firm, the lack of strong external monitors and discipline agents potentially permits them to pursue this path. Conversely, corporate governance and the control system are directed to pursuit the interests of all categories of shareholders, as well as corporate governance deals with the way in which all the suppliers of finance to corporations assure themselves of getting a return on their investment (Shleifer & R. W. Vishny 1997). Thus, in order to maintain the private benefit of control and pursue the return of their investment, large shareholders need a lower quality of corporate governance and internal controls. In accordance with these assumptions, we expect that in family firms the alignment between majority ownership and control is tighter, thus obviating the needs of comply to formal corporate governance practices and disclosure, aimed at protecting all stakeholders.

H3. There is a negative relation between ICCG index and Families ownership

3.4 Interest expenses on Financial debts

As previously mentioned, Jensen 1986 claims that financial leverage influence management choices, thus in companies characterized by high financial debts,

managers have less discretion in using generated cash flows. As a result, non-optimal investments are less probable. As well as leverage can be used as a tool for regulate managers' behavior, inasmuch as missing the debt repay can lead to bankruptcy (Shleifer & R. Vishny 1997), increasing debt level leads to a rise in interest expenses.

Anderson et al. 2004 find that the cost of debt financing is negative related to board independence and audit committee independence, size and meeting frequency. Their study focuses on bondholders' situation and thus on the accounting-based debt covenant interpretation. Specifically, they conclude that bondholders consider the board and audit committee's monitoring effectiveness as a source of greater assurance with respect to the integrity of accounting numbers. Moreover, Bhojraj & Sengupta 2003 provides evidence linking corporate governance mechanisms to higher bond ratings and lower bond yields. Governance mechanisms can reduce default risk by mitigating agency costs and monitoring managerial performance and by reducing information asymmetry between the firm and the lenders. Moreover, Piot et al. 2007 finds empirical findings revealing that corporate governance quality has a significant reducing effect on the cost of debt, whereas audit quality does not. In summary, As well as financial debts are a tool to regulate management behavior, increase the quality of corporate governance is useful in order to mitigate interest expenses. However, improve corporate governance is more useful for more levered firms.

H4. There is a positive relation between firm's interest expenses for financial debt and ICCG index.

4 Sample selection and research design

The previously stated hypotheses are tested using a sample of companies adopting the "traditional"¹² corporate governance system, listed on the Italian Stock Exchange at the end of 2013. In Italy, financial markets are managed by *Borsa Italiana Spa*, that has been part of the London stock exchange group since 2007. This private institution suggest to all listed domestic companies the voluntary adhesion to the *Codice di autodisciplina per le società quotate*, which contains some of corporate governance's international best practices. In addition, bylaw requires for every single company listed on the stock exchange to draft an evaluating document on the degree of compliance with the Code, and disclose it to the market.

4.1 The Sample

The Italian financial market can be divided into specific segments, identified by related indices (FTSE). Our sample was built considering the firms listed on FTSE Italia All-share, the stock index which excludes companies with the lowest capitalization (FTSE Micro Cap). Afterwards, we exclude foreign companies

listed abroad (following Barucci & Falini 2005), because they are subject to different corporate governance and disclosure regulations. In the next table is shown the sample's procedure selection.

Items	N.	% sample
Composition of the FTSE All-Share	211	100%
Listed firms using non "traditional" corporate governance system	(7)	
Foreign listed firms	(3)	
Domestic listed firms with uncompleted or unavailable data	(34)	
Financial (bank and insurance companies, defined by Italian stock exchange)	(17)	
Sample Analyzed	150	

As we can see in the table, the sample was made up of the listed companies belonging to the Italian Stock Exchange (FTSE Italia All Share). The composition of the index refers to the year 2013 and in total 159 listed companies were analyzed. We excluded from the sample companies that did not draw up the consolidated financial statements and companies that do not have a traditional model of corporate governance (dualistic and monistic model). We excluded from the sample, companies that did not draw up the consolidated financial statements and companies that do not have a traditional model of corporate governance (dualistic and monistic model). In order to define the Internal Control & Corporate Governance index, we collected data from corporate governance report, while other informations (for example about Big 4 audit firm or not), were collected from the consolidated financial statements. All these document refer to year 2013.

For the 150 firms of the sample, we gathered hand-collected data from the mandatory documents published on institutional websites. We exclude banks and insurance companies because are subject to different regulations and supplementary controls (for ex. from *Banca d'Italia*¹³).

4.2 Dependent variables: Internal Controls and Corporate Governance index

Like Gompers et al. 2003, (and several other researches creating an own quality index) that developed for the U.S. listed firms a corporate governance index, our Internal Control and Corporate Governance index (from here, IC&CGi) summarizes the formal adoption of every sample's firm to 13 corporate governance provisions. Most part of these practices originate from the Italian code of corporate governance "*Il codice di autodisciplina*", grouping the recommendations suggested by the Italian stock exchange "*Borsa Italiana S.p.a.*". We integrate our in-

dex with others international accepted best practices, like the independence of board's chairman or the composition of the board, with at least 33% of independent directors. We grouped the 13 provisions of our ICCG index in four categories: Board structure, Committee structure, other Control bodies structures and Minority shareholders' representation. The CGI&IC index includes 6 factors that either 1 or 0 depending on whether or not the single firm's governance practice is in line with the provisions analyzed. For remaining 7 factors of the CGI&IC index, we use dummy variable by recoding the values, of which 4 elements (regarding the internal subcommittee) with 4 intervals associated to better level of compliance to the governance practices, others 2 elements (others control bodies) with 3 intervals, and finally 1 element (Minority shareholders' representation) with 5 intervals.

4.2.1 Board of Directors structure

Fama & Jensen 1983 expanded on argued that a higher proportion of independent directors on corporate boards would result in more effective monitoring of boards and limit the managerial opportunism. Beasley 1996; Uzun et al. 2004 found that firms with a high percentage of outside directors reduces the likelihood of financial fraud. Chen & Jaggi 2000 found a positive association between the proportion of independent directors on corporate boards and financial disclosures. Currently, board independence is still considered the core element of corporate governance (Dahya & Mcconnell 2008; OECD 2004). Klein 2002 finds a negative relation between board independence and abnormal accruals. This means that a board composed in majority by independent directors can improve the integrity of financial reporting, and also of the internal control system. (Peasnell et al. 2005) finds that firms with a high proportion of outsiders in the board are less likely to engage in opportunistic earnings management. In our index we assessed the presence of non-executive director and independent director. Accordingly to international best practices, a balanced board of director should be composed by at least half of independent members (for example in Australia, the Australian financial market regulator require that the majority of board members be independent from management). We considered a best practice the case in which more than 33% of Board members are independent. Cortese 2009 reveals that boards of director for listed firms of ASX50, Australian stock index, are composed on average by 80% of non-executive directors. Also ACSI (Australian council of super investor) in a research paper of 2010 (ACSI 2010) analyzing governance best practices for S&P/ASX 100 index in 2009, reveals that since 2005 the presence of non-executive directors are more than 80% of the total directors. We considered a best practice the case in which more than 80% of Board members are non-executive. Other provision like CEO duality (Brickley et al. 1997), presence of Lead Independent director and the independence of the chairman, are recurring topics, considered in different corporate governance issues (Black et al. 2012; Henry 2010). One of the recommendation of Italian code of Corporate governance is the balance of power within the board,

thus the separation between CEO and chairman is advisable. In the case of CEO duality (or the case which Chairman is the person who owns the firm) is suggested to appoint a Lead Independent Director, in order to rebalance the powers within the Board of Director. In UK and US, the dual appointment of chairman and CEO is seen to give too much power to the individual (Jensen 1993). Moreover, the Italian code of Corporate governance consider a best practice the introduction of Lead independent director. We evaluate an higher governance quality the cases in which:

- there is separation between CEO and board's chairman;
- chairman of the board of director is independent;
- lead independent director is instituted.

4.2.2 Board's Committees structure

The importance of sub-committee in the board, has rose in the recent years and is now strongly established. Kesner 1988 claims that most important board decisions originate at the committee level, and Vance 1983 argues that the institution of four board committees (audit, executive, compensation, and nomination committee) can greatly influence corporate activities. Moreover, Klein 1998 finds that overall board composition is unrelated to firm performance but that the structure of the accounting and finance committees does impact performance. Several academic researches argue (Dechow et al. 1996; Beasley 1996) that audit committees were associated with lower levels of fraud. Moreover, Davidson et al. 1998 find that the composition of a firm's compensation committee influences the market's perception of golden parachute adoption. In Italy, the Italian code of corporate governance suggest to every firm listed on Italian stock exchange the institution of four sub-committees, Audit, Remuneration, Nomination and Related Party transaction committees. We evaluated as good corporate governance practice the introduction of every committee suggested by the Italian code of corporate governance.

An audit committee entirely composed by independent directors is an international best practice. In support of this assumption, Klein 2002 find a negative relation between audit committee independence and abnormal accruals. Thus, an audit committee composed in majority by independent directors, can improve the integrity of financial reporting. Krishnan 2005 and others researches on internal controls fields (Bédard et al. 2004; Abbott et al. 2000; Uzun et al. 2004) find that independent audit committees are significantly less likely to be associated with the incidence of internal control problems and reduce the likely of fraud or aggressive financial statement actions. In addition, Italian code of corporate governance suggest to structure the internal board committees using independent directors. In accordance with these assumptions, we considered committees composed entirely of non-executive directors, the majority of whom are independent, two good corporate governance practices.

4.2.3 Other control bodies Adequacy

In compliance with the Italian Legislative Decree 231/2001 listed firms should establish a supervisory body whose primary duty is to ensure the functioning, effectiveness and enforcement of company's Model of Organization. This body is vested with all necessary powers to guarantee accurate and efficient supervision over the functioning of the Organizational Model and Code of Ethics adopted, and compliance therewith, in accordance with the provisions of Art. 6 of Legislative Decree 231/2001. The supervisory body consists of three to five members, appointed by the Board among qualified and experienced individuals, including non-executive Directors, qualified auditors, executives or external individuals. As well as others control bodies, in order to ensure the objectivity of judgment on the suitability of the organizational model adopted by the company and on its effective functioning, we have considered the appointment of independent subjects in the supervisory body a best practice. Moreover, in accordance with Al-Malkawi et al. 2014, we considered the audit from a Big 4 firm, a corporate governance best practice.

4.2.4 Minority shareholders' representation

La Porta et al. 1999 shows that countries characterized by poor investor protection, typically exhibit more concentrated control of firms than do countries with good investor protection. Indeed, widely held corporations are more usual in rich common law countries, where regulations ensure best legal protection of minority shareholders (La Porta et al. 1998). Chemin 2004 argues that in countries with good investor protection, controlling shareholders have less fear of being expropriated themselves in the event that they ever lose control through a takeover, encouraging the sale of shares and the reduction of ownership in order to diversify. In contrast, in countries with poor investor protection, lose the control becoming a minority shareholder may be such a costly proposition in terms of surrendering the private benefits of control. For La Porta et al. 1998, the agency problem in closely held firms is shifted between majority and minority shareholders, with the former having the potential to expropriate wealth from the latter. This is the prevalent situation in Italy (Melis 2000). Until 2005, independent directors were almost always elected from controlling shareholders. But, as well as minority shareholder is the weak subject in countries registering the type two agency conflict, introducing directors ensuring the consideration of minority shareholders' interest lead to an increase in investor protection. This was the assumption that led Italian government to introduce in 2005 the law 262, also known as "law on saving", that required among other provisions, the introduction of at least one director appointed by minorities in the board of directors (by using the mechanism of "voting lists")(Zattoni 2006). After the introduction of 262 law, Bianchi et al. 2011 find higher levels of effective compliance to corporate governance practices for Italian listed companies where minority share-

holders have appointed one or more directors. This fact underline the important monitoring role of minority directors in reducing the type-two agency conflict. In accordance with these assertions, we argue that in companies registering the presence of qualified minorities, the appointment of directors elected by minority shareholders is a strong element of corporate governance.

4.3 Explanatory variables

We regress a number of 10 independent variable, of which 4 as explanatory variables and 6 as control variables. As previously stated, we considered explanatory variables NUMBERFOREIGNFUND as the number of foreign investment funds who hold shares of the company, moreover STATEOWNERSHIP as measuring the percentage of shares held by state and FAMILYOWNERSHIP as the percentage of shares held by family or individuals. In addition, FINANCIALINTEREST represent the ratio between financial interest expenses on total revenues.

We introduced these two last variables (FAMILYOWNERSHIP and FINANCIALINTEREST) in order to study the special features of the Italian context, in which there are many family businesses and (consequently) many entities using financial debts as preferred source to finance investments.

4.4 Control variables

As control variables, we used firm characteristics (firm performances, leverage and firm size) and other variables considered by several studies as potentially affecting corporate governance quality. In particular we treated the following aspects: firm performances, ownership, financial debts and firm size.

4.4.1 Firm performances

Past literature asserts that good corporate governance practices positively affect firm performance (Ammann et al. 2010; Bebchuk et al. 2009; Cremers & Nair 2005; Core et al. 2006; La Porta et al. 2000; Black et al. 2006; Durnev & Kim 2005; Brown & Caylor 2006; Gompers et al. 2003). Black 2001 find a strong positive correlation between firm-level corporate governance and market capitalization in emerging markets. Also Gompers et al. 2003 find a positive correlation between market value and corporate governance practices. While some researches find consistent results using as a proxy of firm market value Tobin's Q and market-to-book ratio (Black 2001; Gompers et al. 2003; Black et al. 2012), Bebchuk et al. 2009 find also a positive and sizeable relation between corporate governance quality and return on assets. Moreover, Klapper & Love 2012 use two different measures: Tobin's Q as a measure of firm's market valuation and return on assets (ROA) as a measure of operating performance. They find a posi-

tive relationship between corporate governance behavior and firm performance, as measured by ROA, consistent with results find in Gompers et al. 2003 (where firms with weaker corporate governance have relatively lower operative profits in the United States).

In this study, in order to investigate factors affecting corporate governance quality, we use return on assets (ROA, measured as ratio between ebit on total assets) as well as return on equity (ROE, measured as ratio between net income on equity) as two proxy for firm performances.

4.4.2 Leverage

Jensen, 1986, claims that financial leverage influence management choices, thus in companies characterized by high financial debts managers have less discretion in using generated cash flows. As a result, non-optimal investments are less probable. In other words, leverage can be used as a tool for discipline managers' behavior, inasmuch as missing the debt repay can lead to bankruptcy (Shleifer & R. W. Vishny 1997). Furthermore, greater use of borrowings improves lenders' monitoring activities (Henry, 2010). Black et al. 2003 and Aggarwal et al. 2009 include in their works measures of firm financial structure as control variables, for monitoring specific firm's financial risk.

4.4.3 National institutional investor ownership

In Italy banks often take large equity positions in firms, including firms to which they made loans. Theoretically, if institutions who are equity holders and lenders to the same firm are more effective monitors. Previous research argues that lenders occupy a unique governance position given their monitoring and control abilities. In particular, the argument has been made that banks have a comparative advantage in monitoring corporations due to their access to inside information. The bank lenders' access to superior information, relative to the information available to bondholders, reduces potential agency costs of debt financing (Fama 1985).

4.4.4 FTSE MIB

As well as firm size, the market capitalization is observed in several studies as having an effect on corporate governance. In Italy, FTSE MIB is the index which aggregate the listed companies belonging to the Italian Stock Exchange registering the high market capitalization. In particular, the index measures the performance of the 40 entities listed on the Italian market that have the highest market capitalization. We expect that the entities belonging to FTSE-MIB influence positively and significantly the adoption of good corporate governance practices.

4.4.5 Firm Size

Past literature finds a relation between firm's size and corporate governance quality. Large companies have to implement better corporate governance practices because they register greater agency problem, which result in greater information asymmetry. In order to contrast those problems, comes up the need to increase the effectiveness of monitoring mechanisms. This hypothesis is confirmed by empirical evidences by Klapper & Love 2004 and Doidge et al. 2004. Moreover, larger firms tend to attract more attention and may be under greater scrutiny by the public, leading to assert that size may affect governance structure (Durnev & Kim 2005). Barucci & Falini 2005 finds for Italian listed firms a positive relation between firm size and some corporate governance best practices, such as CEO and chairman separation, institution of audit and remuneration committee and the appointment of statutory auditors from minority shareholders. Finally, Black et al. 2006 find a positive relation between firm size and corporate governance quality. In this study, we use the natural logarithm of revenue to test the firm size variables.

4.5 Data and methodology

Information and data about the provisions of the IC&CG index were collected from the corporate governance report published by every listed firm on its institutional websites. In order to complete the requested information of IC&CG index (for example, information about Big 4 audit firm or not) we used data provided by firm's annual report. Instead, information about independent variables were gathered from official databases; in particular for ownership structure we used data provided by CONSOB website (the Italian financial market regulator) while for financial data we used Aida - Bureau van Dijk database.

The methodology used in our research is based on the following OLS regression model consistent with the main literature review (Cerf 1961; Stanga 1976; McNally, Eng & Hasseldine 1982; Chow & Wong-Boren 1987; Wallace 1987; Cooke 1991; Cooke 1992; Botosan 1997; Depoers 2000; Glaum & Street 2003):

$$\begin{aligned}
 ICCG_{Index_i} = & \alpha + \alpha_1 ROA_i + \alpha_2 (ROE)_i + \alpha_3 (NumberForeignFund)_i \\
 & + \alpha_4 (StateOwnership)_i + \alpha_5 (FamilyOwnership)_i \\
 & + \alpha_6 (InstitutinalOwnership)_i + \alpha_7 (Leverage)_i \\
 & + \alpha_8 (FinancialInterest)_i + \alpha_9 (Ftse_Mib)_i + \alpha_{10} (Ln_{Rev})_i + \varepsilon_i
 \end{aligned}$$

Where:¹⁴

ROA	=	Return On Asset equal to Ebit on Total assets
ROE	=	Return On Equity equal to Net income on Equity
<i>Number Foreign Fund</i>	=	Number of external foreign found holding Shares
<i>State Ownership</i>	=	State Ownership equal to the total number of share owned by state (or state agency) on total number of shares outstanding
<i>Family Ownership</i>	=	Family Ownership equal to the total number of share owned by a family (or a single person) divided by the total number of shares outstanding
<i>Institutinal Ownership</i>	=	Institutional Ownership equal to the total number of share owned by national institutional investors divided by the total number of shares outstanding
<i>Leverage</i>	=	Ratio between financial debt and total assets
<i>Financial Interest</i>	=	Financial Interest equal to financial interest on the total revenues
<i>Ftse_Mib</i>	=	Firms belonging to the FTSE MIB Index
<i>Ln_{Rev}</i>	=	Natural logarithm of revenue

All the variables are then described.

The variable ROA represents the level of performance registered by the firm, as the ratio of Ebit to Total Assets. The coefficient on ROA (α_1) thus captures the corporate governance level related to firm performance. As prior literature states a positive relation between firm level corporate governance and firm's performance, we expect α_1 to be positive.

The variable ROE represents the level of performance registered by the equity investors, as the ratio of Net Income to Total Equity. The coefficient on ROE (α_1) thus captures the corporate governance level related to firm performance. As prior literature states a positive relation between firm level corporate governance and firm's performance, we expect α_1 to be positive.

Moreover, the test variable for **H1** is NUMBERFOREIGNFUND and represent the foreign investor appeal of a firm, as proxied by the number of foreign funds owning shares of the firm. The coefficient on NUMBERFOREIGNFUND (α_3) thus captures corporate governance level related to firm's financial structure. As H1 states a negative relation between firm level corporate governance and firm's foreign investor appeal, we expect α_3 to be positive. In addition, the test variable for **H2** is STATEOWNERSHIP, and represent the state stake of in the firm, as the percentage of shares owned by the state. The coefficient on STATEOWNERSHIP (α_4) thus captures the corporate governance level related to the state stake of in

the firm. As H3 states a positive relation between firm level corporate governance and state ownership, we expect α_4 to be positive.

In addition, the test variable for **H3** is FAMILYOWNERSHIP, and represent the family or individual stake in the firm, as the percentage of shares owned by family or individuals. The coefficient on FAMILYOWNERSHIP (α_4) thus captures the corporate governance level related to the family or individual stake in a firm. As H3 states a positive relation between firm level corporate governance and family or individual ownership, we expect α_4 to be positive.

The variable INSTITUTIONALOWNERSHIP represents the national institutional investor stake in a firm, as percentage of shares owned by national institutional investor. The coefficient on INSTITUTIONALOWNERSHIP (α_6) thus captures the corporate governance level related to institutional investor stake. As prior literature states a positive relation between firm level corporate governance and institutional investor stake, we expect α_6 to be positive.

The variable LEVERAGE represent the financial structure of a firm, as proxied by the ratio of financial debts to Total Assets. The coefficient on LEVERAGE (α_7) thus captures corporate governance level related to firm's financial structure. As prior literature states a positive relation between firm level corporate governance and firm's financial structure, we expect α_7 to be positive.

In addition, the test variable for **H4** is FINANCIALINTEREST, and represent the cost of financial debts, as the ratio of financial interest expenses to total revenues. The coefficient on FINANCIALINTEREST (α_8) thus captures the corporate governance level related to the cost of financial debts. As H4 states a positive relation between firm level corporate governance and cost of financial debts, we expect α_8 to be positive.

The dummy variable FTSEMIB represents the most important listed firms, as the firm classified in FTSE MIB index, aggregating the most capitalized firms. The coefficient on FTSEMIB (α_9) thus captures the corporate governance level related to firm capitalization. As prior literature states a positive relation between firm level corporate governance and firm capitalization, we expect α_9 to be positive.

The variable LOGREV represents the firm size of a firm, as the natural logarithm of revenues. The coefficient on LOGREV (α_{10}) thus captures the corporate governance level related to firm size. As prior literature states a positive relation between firm level corporate governance and firm size, we expect α_{10} to be positive.

5 Test and Results

5.1 Descriptive statistics

The main items of descriptive statistics are shown below.

	Min.	Max.	Mean	Median	Std. Deviation	25% percentile	75% percentile
ICCG index	0.2440	0.8460	0.5677	0.5580	0.1270	0.4735	0.6670
ROA	-0.6892	0.3017	0.0160	0.0290	0.0955	0.0683	0.0630
ROE	-3.9844	4.8158	-0.0419	0.0339	0.6585	0.0683	0.1204
Number of Foreign Founds	0.00	6	0.9400	1	1.1365	0.00	1.2500
State Ownership	0.00	0.6900	0.0152	0.00	0.1365	0.00	0.00
Family Ownership	0.00	0.8970	0.3977	0.5100	0.2567	0.1262	0.5832
Institutional ownership	0.00	0.4300	0.0265	0.00	0.0574	0.00	0.0300
Leverage	0.00	1.7168	0.3466	0.3060	0.2570	0.1805	0.4539
Financial interest expenses	0.00	0.4290	0.0371	0.0166	0.0610	0.0083	0.0374
FTSE MIB	0.00	1	0.1733	0.00	0.3798	0.00	0.00
Natural logarithm of revenues	0.6900	11.660	5.8583	5.6131	2.0745	4.3207	7.1956

The table illustrates, with regard to the 150 firms observed in the year 2013, the descriptive statistics for the variables under consideration. Data regarding ICCG index show a stable distribution of the 150 firms of the sample. On average, ICCG index reaches a value of 56.8%, a lowest value of 24.4% and a highest of 84.6%. 75% of the observations have ICCG index value lower than 66.70%. This means that in the Italian case the measurement of corporate governance quality is still an important topics, and for this reason is interesting to evaluate which are the main determinants affecting our IC&CG index.

Data on Roa suggest that 25% of firms sample have registered in 2013 a negative value. Moreover, the average value has been 1.6 %, with a lowest value of -68.9% and an highest value of 30.2%. This value, together with ROE registering a mean value of -4.19% shows that in 2013, Italian listed groups' performances are affected by the crisis as well as all over the world.

With reference to the presence of foreign investor funds, descriptive statistics shows that 82 firms out of 150 has a foreign fund holding more than 2 % of total shares. In 37 companies there are two or more foreign funds holding at least 2% of shares (each). Instead, 68 firms have not registered the presence of a relevant amount of share from a foreign fund.

Family Ownership, is based on the presence of a family, an individual, or an intermediate company representing a family, holding a relevant amount of firm shares. Average is about 39.77%. This data provide evidence that Italian stock market is composed mostly of family firms as well as it is coherent with the Italian market

With reference to leverage, we have not found negative values, but we found two firms totally using equity capital as financial source. The Italian listed firms of our sample have a financial structure composed, on average, by 35.26% from financial debts, on the other hands the average weight of equity on total assets is about 28.7%, confirming the widespread conception that Italian companies have one of the lowest level of equity, compared to total assets among the large economies (Melis 2000).

5.2 Regression analysis and results

Next table show the result of the OLS regression.

Dependent variable: ICCGindex				
Explanatory variables	Predicted sign	OLS		
		Beta	Standard error	t-statistics
Constant			0.041	10.773
ROA	+	-0.171**	0.106	-2.145
ROE		0.059	0.015	0.753
NUMBERFOREIGNFUND	+	0.197***	0.009	2.580
STATEOWNERSHIP	+	0.141*	0.080	1.643
FAMILYOWNERSHIP	-	-0.077	0.042	-0.919
INSTITUTIONALOWNERSHIP	+	-0.007	0.172	-0.086
LEVERAGE	+	0.010	0.040	0.124
FINANCIALINTERESTEXPENSES	+	0.148*	0.181	1.695
FTSE MIB	+	0.196**	0.031	2.141
LOGREV	+	0.275***	0.006	2.916
Sample	150			
R-square	0.347			
F-statistics	7,395			

* Significant $p < 0.10$ (two-tailed)

** Significant $p < 0.05$ (two-tailed)

*** Significant $p < 0.01$ (two-tailed)

As we can see from previous table, only some variables strongly influence the Internal Control & Corporate Governance index. In particular, there are two variables that significantly affect the quality of Corporate Governance in the Italian context: the number of foreign funds and the natural logarithm of revenues.

The results show that the presence of foreign funds significantly ($p < 0.01$) and positively ($B = .197$) influence our index. Moreover, the bigger is the number of foreign funds, higher is the quality of corporate governance practices.

In second place, the natural logarithm of revenues significantly ($p < 0.01$) and positively ($B = .257$) influence our index. This is an interesting result, showing that Italian firms registering higher value of revenues have introduced better corporate governance practices. Moreover, the membership to the FTSE MIB index is significantly ($p < 0.05$) and positively ($B = .196$) correlated to of corporate governance quality. The companies belonging to the most important Italian financial index registered an higher quality level of corporate governance, in particular with regard to the presence of non-executive directors, presence of independent directors and CEO duality.

The independent variable Roa is the only one significantly ($p < 0.05$) but negatively ($B = -.171$) correlated with our IC&CG index. This finding refutes our predicted sign, suggesting that firms with higher ROA did not pursue the implementation of the best corporate governance practices. Finally, State Ownership and Financial Interest Expenses positively influence Corporate Governance quality, but with lower significance. In details, state ownership significantly ($p < 0.1$) and positively ($B = .141$) influence our index, as well as Financial interest expenses (registering significant ($p < 0.1$) and positive ($B = .148$) relation).

This means that higher percentage of financial interest expenses on revenues leads to better Corporate Governance quality, in order to represent both controlling and minority interests.

6 Conclusion

This paper examines which factors influence the implementation of good corporate governance practices for Italian companies. The analyzed factors are: proportion of shares held by families, proportion of shares held by the state, number of foreign funds holding shares, firm's debt burden.

We tested the hypothesis of a positive effect of state ownership on corporate governance quality. The results confirm the positive relation between percentage of share held by the state and corporate governance quality. Conversely, with regard to family ownership, we tested the hypothesis of a negative effect on corporate governance quality. The results confirm the negative relation between percentage of share held by families and corporate governance quality, but without a strong and relevant correlation. Instead, considering the number of foreign funds holding shares, we tested the hypothesis of a positive effect on corporate governance quality. The results confirm the positive significant relation between number of foreign funds present in the ownership and corporate governance

quality. Finally, with regard to company level of debt, we tested the hypotheses of a positive effect of burden debt, proxied by financial interest expenses, on quality of corporate governance. The results show a moderate effect on corporate governance quality.

These results show that corporate governance quality for Italian firms is influenced by ownership characteristics, in particular positively by state ownership and number of foreign funds, and negatively by family ownership.

These findings highlight that in Italian framework, foreign investors can play a key role in increasing the control mechanisms and investors protection for companies of which are shareholder. Moreover, a similar (although less important) effect is obtained in companies registering state ownership. These two assumptions can be explained considering that Italian financial market has low investor protection, where only more influential third parties have enough power to defend their interests, significantly affecting the management in order to improve corporate governance quality.

Instead, we registered a negative effect of firm performance, proxied by Return on Assets as a control variable, on corporate governance quality in contrast with evidences provided by literature.

Furthermore, it seems that Italian regulator has not yet been able to impose for family owned firms the introduction of higher corporate governance practices, in order to improve minority shareholders rights. Our results confirm that Italian financial market is still marked by the benefits of control.

Endnotes

ⁱ In Italy, the traditional model of corporate governance is based on the contraposition between Board of Directors and Board of Statutory Auditors. This model split governance and control. The General Assembly appoints governance and control bodies separately, and independence requirements are disciplined by clear rules. Source: CNDCEC

ⁱⁱ Bankitalia or Banca d'Italia, is the central bank of Italy and part of the European System of Central Banks.

ⁱⁱⁱ All the annual data refer to the year 2013

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Approaching the complexity of intangibles – Un Approccio agli intangibili attraverso la Teoria della Complessità

Authors

- *Piero Giammarco Phd student, piero.giammarco@unito.it - University of Torino*
 - *Paolo Pietro Biancone Professor, paolo.biancone@unito.it - University of Torino*
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Today companies have to face competitors from all over the world and can act worldwide, this situation leads to greater and various risks. In order to best manage these risks and win, everyone - managers, employees, stakeholders and goods - must do their work in a coordinated and well-timed way. The authors believe that intangible assets are the critical variables to work on to control and manage company's risks and to reach excellent performance level on the world market. Various theories, as well as many significant market players, focused just on evaluating in different ways the monetary value of intangible assets. To the contrary, in order to manage risks, the theory considers that a mindful management, on intangibles, is the key element on which to concentrate our analysis.

This work describes the application of a model based on the theory of complexity which allows corporate decision makers to act on intangibles in a more impactful way. The model refers to the classification of intangible assets defined in the literature but considers them complex objects composed, in turn, of other complex objects. It partitions these intangibles into many elements and carefully analyses their interactions, as well as the resulting impact on the entire system. This innovative method determines the overall efficiency, effectiveness and, only at the end, the value. This work is an attempt to provide a tool with which companies, can check the current status of the intangibles and manage various risks. The model, furthermore, through different case scenarios, can help manager to perform a forecasting analysis in order to value different risk trends. The model unveils an entire web of connections among many elements that are parts of a wider system of intangibles. It reveals the relations between actions and feedbacks that bind those elements, and allows the manager to decide, in the easiest way, where, when and how to intervene.

Keywords: Theory Complexity, Intangibles, Risk Management.

JEL Classification: G30

1 Introduzione

La crisi economica e la competizione globale hanno, da un lato, modificato ed ampliato la composizione dei rischi che l'impresa può trovarsi a fronteggiare e, dall'altro, hanno evidenziato come la caratterizzazione e la diversificazione possano essere presupposti distintivi per il successo sul mercato.

L'attenzione a questi elementi non è da riferirsi esclusivamente al mondo imprenditoriale infatti, a causa dei loro potenziali effetti sul valore, vede il crescente interessamento dei diversi stakeholder e delle realtà accademiche.

Le imprese quindi, per riuscire a resistere nel mutato scenario, hanno rivolto la loro attenzione alla gestione del rischio e alla gestione degli asset intangibili.

I due sistemi di gestione, hanno diversi tratti in comune, entrambi;

- sono in grado di condizionare il valore dell'organizzazione;
- sono fortemente influenzati dalla cultura aziendale;
- necessitano del coinvolgimento di larga parte dei componenti dell'azienda per potere essere efficaci;
- fanno parte della vita aziendale ed esistono a prescindere dalla loro trattazione esplicita (rischi e intangibili nascono con l'impresa);
- se utilizzati consapevolmente e con coerenza possono tradursi in vantaggio competitivo e, quindi, in valore.

Il rischio è un elemento connaturato all'azienda e, la gestione dello stesso, ha l'obiettivo di evidenziare le future minacce e le possibili opportunità (in questa trattazione, il concetto di rischio, verrà considerato in queste due sue connotazioni) per preservare e aumentare il valore dell'azienda.

Gli asset intangibili possono rappresentare un elemento di grande valore per un'impresa ma, esistendo a prescindere dalla loro "scoperta", la loro gestione e la loro efficacia è fortemente condizionata dal grado di consapevolezza e coesione del collettivo aziendale.

I tratti, mostrati sopra, che evidenziano i punti di contatto tra la gestione del rischio e quella degli intangibili permettono anche di mettere in evidenza i loro collegamenti e come, l'azione sui secondi, possa influire ed aiutare la gestione dei rischi.

I beni intangibili coinvolgono le risorse umane, le capacità organizzative e le competenze relazionali di un'impresa. Tali elementi, fortemente collegati alla capacità di reazione agli imprevisti da parte dell'azienda, sono caratterizzati da un'alta complessità. Il termine "complesso" non deve però essere interpretato come sinonimo di difficile o complicato, esso infatti va riferito a quella che viene definita teoria della complessità. Tale teoria nasce, in primo luogo, per spiegare i sistemi complessi e sottolinea le differenze rispetto ai sistemi complicati. I metodi di decodifica legati ai due contesti presentano profonde differenze di base, le strutture complicate possono essere compresi procedendo ad una suddivisione in parti più piccole dell'oggetto di analisi che, una volta comprese, permettono di capire il sistema più grande (ad esempio, un acceleratore di particelle).

I sistemi complessi, di contro, non possono essere scomposti poiché la loro comprensione, è vincolata all'analisi simultanea di tutte le entità e di tutte le relazioni che intercorrono (ad esempio in una società); risulta quindi indispensabile considerare il sistema nella sua totalità. Ciò non significa che un sistema sia migliore dell'altro ma solo che si tratta di due situazioni diverse e che è estremamente importante riconoscere l'oggetto di analisi e non confondere i due approcci; un errore in tal senso può rendere la gestione impossibile e portare a situazioni paradossali e pericolose.

Gli approcci che in un contesto possono essere vincenti se, utilizzati nell'altro, possono rivelarsi inutili, o addirittura dannosi, arrivando a creare situazioni spesso peggiori di quelle iniziali, circostanze, queste, che Paul Watzlawick definisce "ipersoluzioni" (Watzlawick, 1986).

2 Literature review

2.1 Gli intangibili e il risk management

Gli intangibili sono un complesso di asset che, insieme agli aspetti tangibili, contribuiscono alla definizione degli elementi che caratterizzano un'impresa. Alcuni di loro sono più codificati (come ad esempio i marchi e i brevetti) altri meno ma, il loro coinvolgimento in materia di condizionamento del valore complessivo d'azienda è ormai innegabile (Orlandi, 2003). Il valore di un'impresa, infatti, mostra un duplice aspetto quando dal Book Value si passa al Market Value, due elementi che, in termini di valore, spesso differiscono e, nella loro distanza svelano il valore degli intangibili d'impresa (Lazzarini, 2010).

La stima degli intangibili quindi pur risultando relativamente agevole, in un dato momento nel tempo, è da considerarsi molto complessa se il monitoraggio deve essere eseguito nel corso della vita aziendale (Comuzzi, Marasca e Olivotto, 2009). Questo tipo di attività coinvolge infatti sistemi molto sofisticati il cui impiego necessita la scelta di un modello di riferimento e può richiedere ingenti investimenti e professionalità dedicate (Tonchia, 2009).

2.2 La cultura aziendale e il risk management

Gli intangibili sono collegati a molteplici aspetti della vita organizzativa e, se è vero che la loro stima è condizionata da una moltitudine di variabili connesse al passato, al presente e all'ambiente è anche vero che la cultura organizzativa è un elemento che li connota e che, a sua volta, subisce modificazioni dovute alle loro variazioni (Cravera, 2008).

La cultura del rischio, elemento considerato basilare, per la costruzione di un sistema di risk management, come nel caso degli intangibili, è fortemente legata alla cultura organizzativa intesa come sistema di valori, norme e comportamenti

messi in atto dagli individui all'interno di un'organizzazione (Giorgino e Monda, 2013).

Questi elementi, infatti, condizionano, tra gli altri, la propensione al rischio e al cambiamento dei singoli e dell'intera struttura, rendendo possibile l'adozione di un processo di gestione e monitoraggio dei rischi d'impresa. Una tale predisposizione deve nascere all'interno dei manager, dei gruppi, delle persone e, progressivamente, essere veicolato all'interno della cultura organizzativa per diventare un valore dell'azienda (Weizmann e Weizmann, 2001); solo così sarà possibile non limitare il risk management alla sfera del project management ma estendere le sue potenzialità declinandolo anche in:

- enterprise risk management
- risk management tradizionale
- financial risk management
- risk control

Una tale applicazione permette al sistema di risk management di creare valore, inteso come differenza tra il valore attuale delle perdite future evitate e il minor utile attuale (Floreani, 2004).

2.1 La teoria della complessità

L'estensione dei mercati e l'aumento delle possibili minacce ha costretto le aziende a rivolgere lo sguardo oltre il breve e medio termine, ma ciò ha mostrato la difficoltà di gestire scenari popolati da elementi non legati da casualità e quindi di difficile anticipazione. La complessità quindi sorge come impossibilità di semplificare, come regressione della conoscenza deterministica, come insufficienza della logica (Morin, 2011).

Il problema risiede nella conoscenza parziale del sistema, situazione in cui, comportamenti logici e spinti dalle migliori intenzioni possono portare a risultati disastrosi (Watzlawick, 1986). Occorre dunque dotarsi di un nuovo modo di pensare introducendo un approccio sistemico ai problemi, un'attenta valutazione dei processi di feedback e una modalità error-friendliness (Gandolfi, 2008).

La complessità in ambito manageriale si ricollega con la possibilità di permettere ai sistemi l'auto-organizzazione, con l'agevolazione di una pratica della condivisione, con la creazione di strutture caratterizzate da flessibilità strategica e dotate di una disorganizzazione creativa (De Toni e Comello, 2005)

2.1 Le motivazioni del modello

La letteratura mostra un legame estremamente forte tra teoria della complessità, asset intangibili e risk management e, per le diverse tematiche propone, rispettivamente, nuovi approcci comportamentali, metodologie di valutazione e modelli di gestione.

Lo studio qui presentato intende proporre un modello di gestione che unisca questi tre aspetti e che, al contempo, permettendo un'implementazione in campo

manageriale, possa aiutare nella gestione di un sistema di beni intangibili di natura profondamente complessa che ha significative relazioni con la capacità di gestione dei rischi e con il valore generale dell'impresa.

3 Metodologia

L'utilizzo della teoria della complessità nella gestione degli intangibili e nei conseguenti effetti sulla gestione del rischio impone la precisazione di alcuni concetti.

Un sistema complesso presenta caratteristiche ben definite:

- è composto da numerosi elementi singolarmente identificabili;
- gli elementi presentano interazioni reciproche di varia natura, siano esse sociali, fisiche, economiche, biologiche, legali ecc.;
- si configura come un'entità, con un suo comportamento e una funzione ben definita;
- può inoltre essere chiuso¹ o aperto a influenze esterne.

I sistemi reali, a differenza dei modelli creati per finalità sperimentali, hanno la caratteristica di non essere chiusi poiché questo è ciò che permette loro di attivare il processo di rigenerazione dell'energia e quindi di continuare a sussistere non scivolando nell'entropia². Il processo di rigenerazione dell'energia viene avviato da perturbazioni di origine esterna, alle quali il sistema reagisce attingendo alle proprie strutture per la traduzione e la risposta.

Il disturbo e la confusione derivanti dall'apertura con l'ambiente (a sua volta composto di sistemi complessi) modificano l'equilibrio del sistema che, per non soccombere ricerca, negli elementi esterni, quelli che possono essere integrati e il cui collegamento con le strutture già presenti permetta la rigenerazione dell'intero sistema. Ciò può avvenire grazie alla sua capacità di auto-organizzazione³ che, a fronte di una situazione pericolosa, crea nuove connessioni in grado di riorganizzare gli elementi del sistema in modo più efficace, evolvendo.

Le connessioni tra gli elementi sono riferibili alle interazioni tra le entità del sistema complesso che, modificando gli stati di tutte le sue componenti, arrivano a trasformare l'intera struttura. La teoria della complessità declina le interazioni in azioni e retroazioni sottolineando che ogni interazione tra elementi si compone di due momenti: un effetto di uno sull'altro (l'azione) e, successivamente, un effetto del secondo sulla primo (la retroazione o feedback).

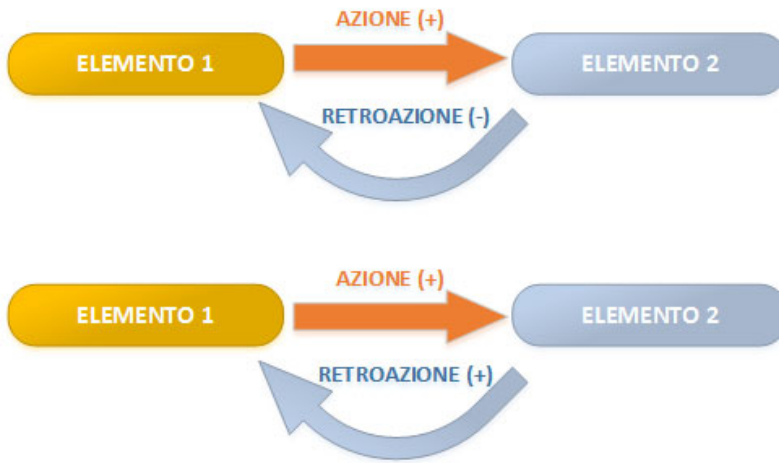


Figura 1 Relazioni: Azioni-Retroazioni

La retroazione può assumere infine valori positivi o negativi⁴ e, in questo modo, il secondo elemento, opera del condizionamento sull'elemento che aveva effettuato l'azione nel senso di un'amplificazione o di un'inibizione e, inoltre, nello stesso tempo, invia azioni su tutti gli altri elementi a lui collegati in un processo di continuo condizionamento reciproco.

Un esempio spesso utilizzato per spiegare questo fenomeno è la dinamica che si instaura tra prede e predatori: l'aumentare del numero delle prede corrisponderà un aumento dei predatori il quale farà scendere il numero delle prede che, di conseguenza, farà diminuire (retroazione negativa) anche il numero dei predatori.

I meccanismi di feedback, all'interno delle relazioni tra gli elementi, giocano un ruolo molto importante, se infatti una retroazione negativa spinge il sistema verso l'equilibrio e una retroazione positiva produce un effetto eccitatorio sul sistema, una continua successione di feedback positivi, senza nessun contro feedback negativo, porterà il sistema verso una situazione pericolosa⁵. Come detto sopra, i sistemi complessi sono composti da numerose entità e da una quantità notevolmente superiore di relazioni con azioni e retroazioni di intensità e valore differenti e che si verificano di continuo.

Un'entità complessa va considerata come una ragnatela nella quale, all'incrocio dei fili, si trovano gli elementi che la compongono, maggiori sono i fili che si collegano ad un elemento più diversificati saranno gli effetti delle sue dinamiche di azione-retroazione; questo tipo di scenario prende il nome di interazioni locali non lineari tra gli elementi⁶. Un sistema complesso può quindi muoversi integralmente verso situazioni di equilibrio oppure di criticità o sperimentare situazioni diverse al proprio interno dove elementi possono auto limitarsi attraverso azioni e retroazioni di segno opposto e elementi possono inserirsi in una dinamica potenzialmente esplosiva.

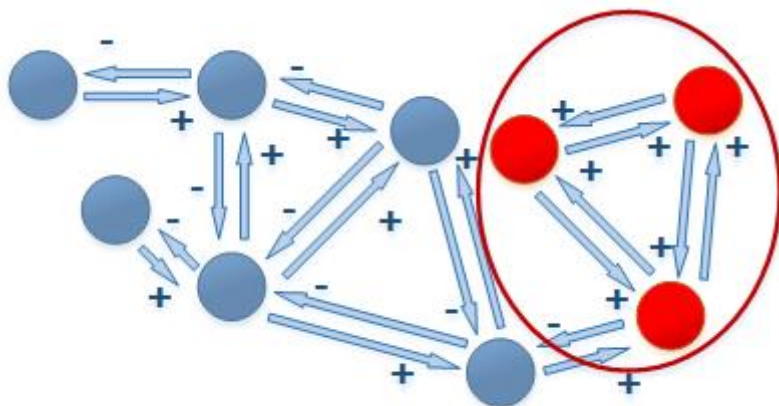


Figura 2 Interazioni locali

Il processo descritto permette la formazione dei cosiddetti fenomeni emergenti⁷, eventi non prevedibili e non governati che, superando i limiti del sistema ne determinano la sostanziale imprevedibilità e ne permettono l'evoluzione.

Questo particolare comportamento permette ai sistemi complessi di poter garantire una buona resilienza, sono cioè in grado di tollerare stimoli interni e perturbazioni esterne evitando di venirne danneggiati inoltre, tendono ad essere molto dinamici e reattivi poiché, pur tendendo all'equilibrio, non lo raggiungono mai.

4 Risultati

La teoria della complessità viene considerata un buon approccio per affrontare la gestione degli asset intangibili poiché essi condividono, con i sistemi complessi, molti tratti caratteristici tra cui:

- presentano legami caratterizzati da interazioni locali non lineari;
- gli asset intangibili intesi come insieme di Capitale Umano, Capitale Organizzativo e Capitale Relazionale sono oggetti complessi che, a loro volta, sono costituiti da altri oggetti complessi;
- si dimostrano adattivi essendo in grado di rispondere ai cambiamenti ambientali e di evolvere al modificarsi degli elementi che li compongono;
- fanno parte di in un ambiente dinamico che è anch'esso un sistema complesso, tutti e tre gli asset intangibili sono sistemi aperti che si condizionano vicendevolmente e vengono condizionati dall'ambiente esterno;
- Il sistema, pur tendendo all'equilibrio è in continuo movimento.

Alla luce delle considerazioni espresse fino a qui si è portati a ritenere con ancor maggior convinzione che la gestione del rischio e gli intangibili abbiano diversi punti di contatto. Un'azienda che gestisce in modo consapevole i propri intangibili infatti, potrà contare su di un collettivo maggiormente pronto a rispondere agli imprevisti, su processi più strutturati, su di un insieme di relazioni in grado di monitorare il market sentiment e gli stakeholder e, in ultima analisi, potrà contare sui precedentemente citati comportamenti emergenti, capaci di cogliere l'opportunità insita nel rischio, per evolvere.

Questo non vuol significare che un sistema di intangibili benché evoluto possa mettere miracolosamente al riparo la realtà aziendale dai futuri rischi rendendo superflue le attività alla base del risk management. Si vuole piuttosto intendere che, laddove sia presente una gestione attenta degli asset intangibili, sarà possibile diffondere in maniera molto più agevole una mentalità in grado di utilizzare le pratiche del risk management e sviluppare un ambiente abituato ad accettare il rischio come componente naturale dell'operare.

L'evoluzione stessa dei sistemi complessi è affidata al continuo confronto con "imprevisti" che mettono in discussione l'equilibrio e costringono l'intera struttura a cercare nuove configurazioni e nuovi paradigmi per continuare ad esistere.

Si è sin qui descritta, tra le altre, la caratteristica di massima imprevedibilità dei sistemi complessi ma gli intangibili, come sottolineato precedentemente, se gestiti in modo consapevole, possono rivelarsi uno strumento di valore e che produce valore.

Un modello per la gestione della loro complessità non deve però far supporre un espediente per aggirare il problema in una rinnovata ottica riduzionista: un sistema complesso non potrebbe essere prevedibile anche se fosse possibile conoscere in modo preciso gli elementi e le leggi di interazione che lo costituiscono. Non ci si pone dunque l'obiettivo di ritornare ad una dinamica lineare di causa-effetto ma piuttosto si cerca di creare uno strumento che permetta di mantenere l'attenzione sull'intera struttura degli intangibili. Ciò è necessario affinché, mentre si considera di intervenire sulle entità che li compongono, si eviti di indirizzare eccessiva attenzione sullo specifico oggetto dell'intervento tralasciando di considerare le dinamiche dell'intero impianto, atteggiamento questo che oltre a poter esporre a pericoli può condurre a scenari di ipersoluzioni.

Le finalità del modello sono duplici:

- da una parte si pone l'obiettivo di rilevare la rete delle relazioni presente tra gli elementi del sistema;
- dall'altro di coadiuvare, chi ha il compito di effettuare interventi che si possano ripercuotere sulla struttura degli intangibili, nella costruzione di scenari con progressione temporale sulla base delle diverse azioni ipotizzate.

Un simile approccio non può che cominciare il suo cammino dall'identificazione e dall'analisi di alcuni elementi alla base della realtà che si sta andando ad analizzare, i pesi e i collegamenti differiscono tra le diverse realtà aziendali, gli

intangibili di un'impresa sono unici, sono il suo tratto distintivo. E' quindi fondamentale che il ricercatore approfondisca gli elementi alla base del sistema da analizzare attraverso ricerche, interviste e indagini storiche tese a ricostruire:

- la situazione attuale e le sue dinamiche;
- le dinamiche intervenute in occasione di particolare eventi;
- la storia dell'azienda oggetto di indagine;
- l'identificazione dei paradigmi su cui il sistema si basa;
- l'identificazione degli elementi e dei sistemi esterni;
- le relazioni che legano le entità (il quadro di riferimento);
- gli effetti del rumore proveniente dagli elementi e dai sistemi esterni.

Queste tematiche sono necessarie per tarare, di volta in volta, il sistema adattandolo allo specifico soggetto. L'intero processo dovrà però sempre essere ricondotto alla suddivisione degli asset intangibili nella loro notazione classica generalmente accettata:

- Capitale Umano
- Capitale Organizzativo
- Capitale Relazionale

Le evidenze emerse dalle indagini precedenti devono essere utilizzate per definire i singoli elementi, che sono alla base dei tre gruppi, e i pesi a loro attribuiti. Lo studio delle dinamiche che legano i tre asset infatti impone di approfondire le analisi all'interno della configurazione del singolo asset al fine di ipotizzarne i sottosistemi presenti e il loro grado di reciproca influenza. Si individuano quindi, pur accettando una discreta semplificazione, un serie di variabili collegabili ai diversi asset.

Tabella 1 Sottosistemi del Capitale Umano

Esperienza	Conoscenze
Buone Pratiche	Motivazione
Attrazione Talenti	Conflitto
Abilità	Creatività
Senso di Appartenenza	Resilienza
Propensione al cambiamento	Collaborazione

Fonte: nostra elaborazione.

Tabella 2 Sottosistemi del Capitale Organizzativo

Know - How (acquisito)	Capacità di gestione finanziaria
Progettualità	Strumenti di vendita

Stile di manageriali Governo (Leadership)	Delega
Cultura aziendale	Organizzazione non scritta
Valori aziendali	Clima
Processi	

Fonte: nostra elaborazione.

Tabella 3 Sottosistemi del Capitale Relazionale

Immagine aziendale interna/esterna	Fiducia degli interlocutori sociali
Reputazione	Credibilità del management
Soddisfazione dei clienti	Fidelizzazione dei clienti
Capacità di dialogo con gli interlocutori sociali	Capacità di gestione dei media verso l'azienda
Comunicazione interna/esterna	

Fonte: nostra elaborazione.

Questi sottosistemi che possono essere considerati come variabili del sistema superiore sono a loro volta sistemi complessi e la loro reperibilità e misurazione risultano ancora alquanto ardue. La valorizzazione di ogni variabile è il frutto delle reciproche interazioni di una serie di elementi presenti in azienda, collegati alle variabili stesse ma caratterizzati da una maggior rintracciabilità. Questi elementi sono emersi dall'analisi precedente attraverso lo studio della storia dell'organizzazione e degli eventi nodali, l'analisi dei bilanci, dell'immagine e della reputazione e la somministrazione di questionari a gruppi selezionati tra la popolazione aziendale. Gli elementi identificabili, come già accennato, non sono da considerarsi universali, ma differiscono a seconda della realtà organizzativa analizzata.

Tabella 4 Variabili individuabili del Capitale Umano

Istruzione	Anzianità media/Turnover
Metodo di lavoro	Assenteismo
Retribuzione media rispetto competitors	Mentoring/Coaching
Attività Time Saving	Numero di Vertenze
Nido	Tasso di iscrizione al sindacato
Centri Estivi	Attività su famiglie dei dipendenti
Diversità culturali	

Fonte: nostra elaborazione.

Tabella 5 Variabili individuabili del Capitale Organizzativo

Know - How (gestione)	Capacità di vendita
-----------------------	---------------------

Capacità di gestire progetti	Clima (Collaborazione/Competizione)
Sistemi informativi	Nuovi prodotti o servizi
Esposizione creditizia	Processi Interni (Snelli/Burocratici)
Formazione (erogata)	Eco-sostenibilità – Eticità
Sistema premiante	Banca del tempo
Contest idee innovative	Navette aziendali/abbonamenti
Orario flessibile	Fondi sanitari integrativi
Part Time	Brevetti
Nuove idee	Spese In Ricerca e Sviluppo

Fonte: nostra elaborazione.

Tabella 6 Variabili individuabili del Capitale Relazionale

Reclami	Canali distributivi
Soddisfazione dei clienti esterni	Comunicazione interna
Fidelizzazione dei clienti esterni	Comunicazione esterna
Conoscenza del Marchio	Accordi di licenza e Franchising
Quote di mercato	Rapporti con i fornitori
Conflittualità sindacale	Attività Social
Valore dei marchi	Riconoscimenti qualità dei prodotti
Promozione	

Fonte: nostra elaborazione.

Una volta individuate le variabili misurabili occorre pesare il loro contributo nei confronti delle variabili dei sottosistemi e concentrare l'indagine sulle dinamiche all'interno dell'asset, ad esempio⁸:

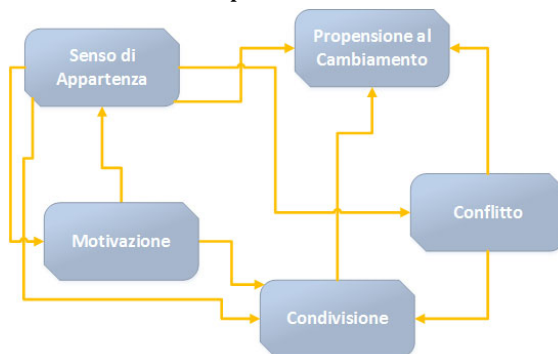


Figura 3 Dinamiche interne all'asset

Una volta compresa la dinamica delle relazioni all'interno del singolo asset occorre indagare le relazioni che intercorrono tra gli asset per rilevare come esse si riflettono sull'intero sistema:

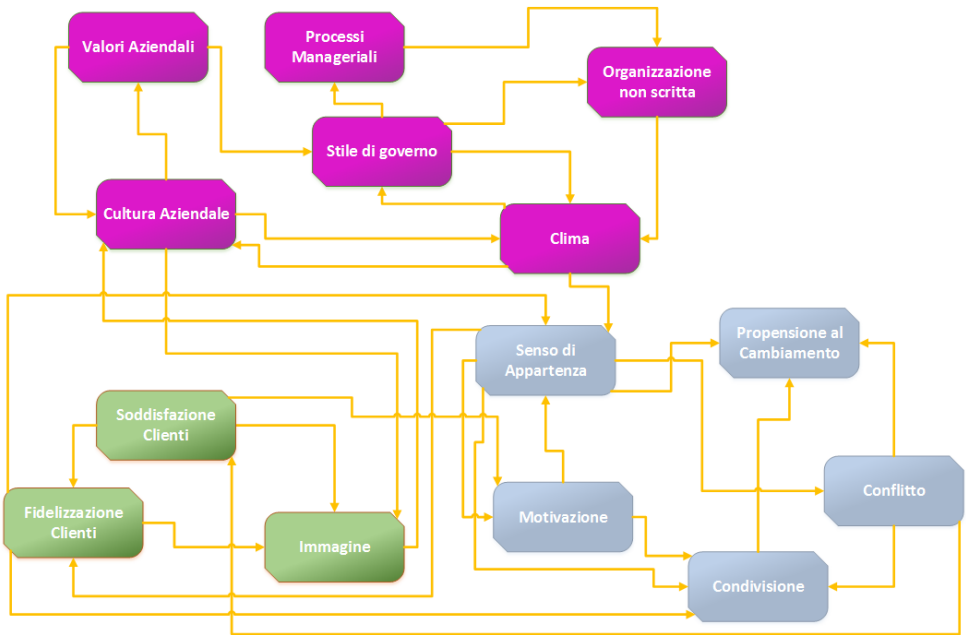


Figura 4 Dinamiche tra gli asset e i loro sottosistemi

Tutte le relazioni devono tener conto del segno (positivo o negativo) e del peso. Nonostante qui si stia analizzando un modello non bisogna dimenticare che, come già ricordato, nel mondo reale, non esistono sistemi complessi chiusi, e che è quindi necessario inserire nello schema anche le perturbazioni esterne e le loro influenze sugli asset, perturbazioni che si trasferiranno sui loro sottosistemi e sulle loro reciproche relazioni.



Figura 5 Perturbazioni esterne

La situazione illustrata evidenzia come, qualunque azione o intervento posto in essere nei confronti di una delle variabili più piccole, si riflette sull'intera struttura. Il modello quindi mantenendo il focus sull'intero sistema permette di evidenziare gli effetti dei singoli interventi permettendo la costruzione di scenari predittivi.

5 Conclusioni

Si può dire, in un'estrema sintesi, che all'aumentare della complessità di un'organizzazione, aumenta la capacità di sopportare il disordine e conseguentemente la vitalità espressa; ciò avviene grazie ad una capacità decisionale maggiormente diffusa che permette agli individui di prendere velocemente iniziative per risolvere problemi contingenti o improvvisi questo senza dover passare attraverso la gerarchia centrale.

I beni intangibili, come più volte accennato, sono in grado di dimostrarsi degli incredibili acceleratori di cambiamento ma, al contempo, possono rivelarsi anche un insuperabile ostacolo. L'errore che spesso viene fatto è considerarli un elemento che può assumere solo un valore positivo, ciò non solo è molto fuorviante ma si potrebbe scoprire esattamente il contrario e che quindi, il loro stato, possa penalizzare il valore dell'impresa. Inoltre, in materia di valore degli intangibili è utile ricordare che questa tematica porta con sé due precisi orientamenti di pensiero. Il primo considera il concetto di valore, collegato agli intangibili al pari di tutti gli altri asset "tangibili" e quindi il suo obiettivo sarà quello di cercare di misurarli per poter, in qualche modo, monitorarlo e, in ultima analisi, inserirlo a bilancio. Il secondo orientamento considera gli intangibili sotto una diversa ottica ritenendoli un insieme di elementi che, se ben gestiti, possono migliorare la gestione dei rischi, caratterizzare in modo unico l'immagine dell'impresa e creare valore per l'azienda verso i suoi mercati di riferimento e verso i diversi stakeholder. Non bisogna considerare questi due approcci come assolutamente inconciliabili ma occorre tenere a mente la grande distanza da una modalità di matrice Tayloristica basata sul bisogno esasperato di controllo e sulla semplificazione e una sistema rivolto alla continua ricerca di conoscenza dove l'efficacia si basa sulla condivisione e sull'accettazione del cambiamento.

Il controllo sul futuro è una chimera che può spingere verso comportamenti non più giustificabili, la strategia aziendale, elemento cardine di un'economia basata su presupposti stabili governata da rigide dinamiche di causa-effetto deve lasciare il posto alla tattica adattiva più consona a situazioni in cui regna la complessità, dove tutto è interconnesso e ad ogni azione conseguono feedback non sempre prevedibili "in questa situazione considerare la strategia come la via ottimale per raggiungere un obiettivo equivale a dotarsi di un paraocchi con cui affrontare il mondo" (A. Cravera, 2008). Un simile scenario obbliga, affinché l'intera struttura possa rispondere adeguatamente, a raggiungere un'intelligenza collettiva e diffusa, capace di comprendere i cambiamenti nelle loro mutevoli forme, di rispondere alle minacce e di attuare gli interventi in modo rapido ed efficace.

Endnotes

- ¹ I sistemi chiusi, non esistono in natura, sono creati per effettuare analisi speculative e operano una riduzione delle realtà, garantendo la loro esistenza attraverso processi di rigenerazione propri e sono soggetti all'entropia (l'origine del termine nasce dall'unione della parola "energia" e con la parola greca "tropè" il cui significato è trasformazione).
- ² Nei sistemi complessi aperti si parla di neghentropia (entropia negativa) esprimendo con tale concetto il superamento dell'entropia dei sistemi chiusi.
- ³ L'auto-organizzazione è un concetto cardine nella teoria della complessità ed è il risultato del concorso di ordine e disordine; il disordine è dato dalla molteplicità di possibilità che il sistema si trova a sperimentare, l'ordine è ciò che si ottiene quando il nuovo equilibrio viene raggiunto, grazie all'aumento del numero di elementi e di relazioni.
- ⁴ I termini "positivo" e "negativo" non assumono valenza di giudizio, ma sono da interpretare come sinonimi di effetti di amplificazione o di inibizione.
- ⁵ La storia e la realtà ci permettono di vedere diversi esempi di sistemi intrappolati in una serie di retroazioni positive: inflazione, faide familiari, escalation agli armamenti, usura.
- ⁶ Un'interazione locale non lineare è definita tale se, tra gli elementi di un sistema:
- ogni elemento condiziona gli elementi più prossimi (locale);
 - molte interazioni avvengono contemporaneamente e le funzioni matematiche che le descrivono non sono lineari (rette) ma, appunto, non lineari (curve).
- ⁷ I comportamenti emergenti si ritrovano molto spesso in situazioni decisamente usuali come nell'andamento del traffico, nelle relazioni umane, nelle borse valori che pur regolando i prezzi dei beni e delle azioni su scala mondiale non hanno un leader che le controlli. I singoli investitori (le entità del sistema) agiscono su un portafogli ristretto di compagnie, seguendo le regole del mercato e, attraverso le loro interazioni determinano la complessità del mercato di borsa nella sua globalità.
- ⁸ Per semplicità verranno rappresentate le sole dinamiche di feedback di rilevante entità inoltre, per privilegiare la leggibilità si è preferito non inserire anche la rappresentazione grafica del feedback che va comunque sempre considerato presente.

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Litigation risk: measure and pricing in M&A transactions

Authors

- *Hubert de La Bruslerie, Professor, hlb@dauphine.fr. - University Paris Dauphine*
 - *Julien Le Maux, Professor, julien.lemaux@hec.ca. - HEC Montreal*
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The purpose of the paper is to propose an original proprietary proxy of a firm's litigation risk. We extend the scope of litigation risk outside of the conflicts with shareholders and the domain of security litigation. We demonstrate that the source of the risk of litigation can be found in the firm's policies and in its management's operational or strategic decisions, even if a sector conditioning effect exists. Based on a sample of 1051 M&A transactions between 2000 and 2013, we provide evidence that the level of litigation risk, at the acquirer's level, has a positive and significant impact on the takeover premium. We also provide evidence that a significant relationship exists between the acquirer's litigation risk and the means of payment.

Keywords: litigation risk, litigation proxy, acquisition premium, means of payment, idiosyncratic risk

JEL Classification: G30

1 Introduction

Litigation risk is an important part of the different domains of risk which a firm is exposed to. In the current period, the notion of a firm's responsibility is gaining importance with the development of Corporate Social Responsibility (CSR). The latter implies consequences in terms of litigation risk. The scope of litigation risk seems larger than the narrow definition limited to the conflicts with shareholders. However, the double question of precise definition and measure of the litigation risk has rarely been addressed in the literature.

A way to answer is to consider the directors' and officers' personal responsibilities. They are exposed to a risk of litigation, which may be covered by personal insurance. In that view, litigation risk is not been measured directly, but indirect-

ly, through the characteristics of the directors' and officers' insurance contracts and their pricing (Baker and Griffith 2007; Cao and Narayanamoorth 2014).

A direct measure of litigation risk originates from Francis et al. (1994), who identify an industry causal effect on litigation risks. Firms belonging to the sectors of biotechnology, computers, electronics, and retail are exposed to litigation in the very restricted sense of security and reporting litigation. This classification is based on the simple fact, evidenced by the authors, that these sectors were exposed to "*a high incidence of litigation during 1988-1992*" (p.144). This analysis is quite old and restricted to US firms. Is it still valid? We can extend the concern and question whether the industry membership method is a sufficient proxy. The sectorial approach seems poor as it ignores the firm's characteristics and introduces a kind of macro-determinism at the firm level. Clustering lawsuits within industry it may be explained by serial behaviors and peers behaviors (Aktas et al., 2011). M&A are events which also seem to cluster within industry. The learning hypothesis explains why competitors or peers may follow the others (Arena and Julio, 2015). Strategic behavior and idiosyncratic choices adds to the previous elements and leads to focus at the firm's level within an industry. Kim and Skinner (2012) question the validity of a pure industry-based proxy. They find that it should definitely be supplemented by firm-specific variables, such as turnover and stock volatility. The latter is a well-known (market) measure of the idiosyncratic risk of the firm.

M&A are shocks and we anticipate that litigation risk is affected after a completed transaction. The situation of the shareholders is changed as they face a new economic project. This is similar to any of the firm's stakeholders. However by itself the acquisition and the merging of two firms may induces new litigation risks. For instance, the acquisition decision may itself stimulate shareholders to complain, or regulation bodies or competitors may raise questions or issues. But in the same time the acquisition may also reduce the litigation risk if an acquirer merges with a conflicting competitor and settles past disputes. We recognize that litigation risk is an endogenous variable. It may explain an acquisition and the terms of the acquisitions. However a M&A transaction may also explain changes i.e. increase of decrease in litigation risk. Acquisitions are not pure exogenous shocks and it may affect the firm's litigation risk level in a much more complex way as if we had considered for instance legal rules changes. We do not address the questions how the litigation risk influence the occurrence of an acquisition, or how the acquisition terms will explain the probability of a future litigation case after a transaction. Looking only at completed transactions our research question is how litigation risk will influence or not the setting of the terms of the transactions, i.e. their premium and means of payment. We claim that the drivers of the association between the litigation risk and the terms of the acquisitions should be found at the firm's level.

The first contribution of the paper is to propose an original proprietary proxy of a firm's litigation risk. We extend the scope of litigation risk outside off the conflict with shareholders and the domain of security litigation. This recognizes that the risk of litigation can find its source in the firm's policies and in its manage-

ment's operational or strategic decisions, even if a sector conditioning effect exists. From a financial point of view, we focus on the consequences of litigation risks more than on its sources. The motivation is that litigation risk appears and develops through many different conflicts possibilities between and within stakeholders. We define the litigation risk as the legal or contractual costs linked to any kind of disputes with any kind of stakeholder. The focus of the paper is to cross that large definition with a specific event in the firm's life, i.e. an M&A transaction. When a firm is acquired it may cause additional or reveal existing litigation risks.

We follow the Amel-Zadeh and Zhang (2015) analysis showing that, in M&As, previous financial restatements are the observable pinpoints of an information risk at the firm's level. As a consequence the delivery of new information is important to external stakeholders and a focus on the pieces of information linked to litigation risk is justified. We consider that the number of public citation of new pieces of information related to the litigation dimension is a relevant proxy of the litigation risk a firm is exposed to. Our empirical methodology refers to the number of citations in the publications recorded by the Factiva database. These citations are those reported in the global domain of "Corporate crime and legal action", independently from the stakeholder or party involved.

We will measure the litigation risk for different given periods of time for a sample of firms involved in M&A deals, as we think that an acquisition is a major event when the two parties should assess each other's risk, in general, and litigation risk, in particular. The nature of litigation risk (and of any risk) is to be *ex ante*. For instance, the litigation risk is uncertain as long as the Court decision is pending. Using our proxy, we can question whether the litigation risk is random, for instance, linked to a complaint from a plaintiff who sues the firm for any reason. Alternatively, some firms belonging to given sectors are systematically exposed to complaints and disputes. If the management's decisions are systematically borderline or repeat themselves, the litigation risk may have a stable component. This is also the case if a sectorial effect conditions the decisions and business practices. The question of systematic litigation risk exposure is relatively uncommon in the literature.

Litigation risk, when a M&A transaction occurs, is privately assessed by the parties. It should impact the terms of the transaction. The litigation risk may, for instance, lower the price paid. This question is complex: In an acquisition operation, we need to consider two litigation risks, that of the acquirer and that of the target. The second contribution is to show that the risk of litigation is effectively priced in M&A terms. This question has also not been addressed in the literature yet.

We show that litigation risk has a stable component at the firm's level and is an idiosyncratic feature of the firm that has a relatively stable component. A M&A transaction may change the level of litigation risk as per se it introduces new risk ensuing either from the transaction terms or imported from the target firm. We confirm the hypothesis that the litigation risk is priced in the M&A terms and influence the choice of means of payment.

The paper is organized in the following way. Section 2 will present the literature. Section 3 will elaborate the hypotheses and develop the methodology to build a measure of the litigation risk. Section 4 describes the results and analyses the determinants of the premiums and the means of payment through a multivariate test. A conclusion will follow.

2 Literature review

The concept of litigation risk has been explored in some contributions, mostly empirical and mostly in the fields of auditing and accounting. When considering the litigation risk, Francis et al. (1994), Simunic and Stein (1996), and Taylor, Simon et al. (1999) refer to the likelihood that a company will be sued by its shareholders over issues related to financial reporting. Shareholders may ask the judicial system to sanction companies and executives for disseminating financial information that does not faithfully represent the company's wealth (Bhagat and Romano 2005).

Francis et al. (1994) study firms' communication policies, in relation to their exposure to litigation risk, over the period 1988–1992. They show that companies in sectors exposed to a high litigation risk – such as technology, computers, electronics, and retailing – delay the announcement of poor financial results, rather than announce them ahead of time. Consequently, managers quickly inform the public of favourable events, but usually defer announcements of unfavourable information.

The law literature (Krishnan et al., 2012; Krishnan and Masulis, 2013) considers mainly shareholder litigation risk and class actions outcomes after an acquisition. The scope of litigation risk is here narrowly defined to one type of litigation risk. From a financial perspective what imports are the economic consequences of litigation risk to shareholders.

In finance, litigation risk has been analyzed looking at shareholders' situation within an initial public offering (IPO) framework. According to the so-called litigation risk hypothesis, IPO firms underprice their new issues to deter potential lawsuits. Lowry and Shu (2002) report that 6% of the US firms that went public between 1988 and 1995 were sued in class actions. Such pursuits lead to important settlements, averaging 10% of the IPO proceeds, and they engender important indirect litigation costs, such as damaged reputations. The authors provide evidence that firms with a higher litigation risk underprice their IPOs by a greater amount as a form of insurance and that larger underpricing lowers expected litigation costs. Hanley and Hoberg (2012) confirm the hedge purpose against litigation risk of IPO underpricing. They analyse IPO prospectuses using word content algorithms. On the other hand, Zhu (2009) finds evidence against the litigation risk hypothesis, and Keloharju (1993) shows that underpricing occurs even in countries where litigation risk is not a concern.

If litigation risk partially explains the IPO process, this has less commonly been tested in the M&A context. Krishnan et al. (2012) look at M&A litigation

cases mostly based on overpayment to target's shareholders (or managers). This is opposed to Le Maux and Francoeur (2014) findings. Looking at a sample of 808 M&A transactions in Europe between 1998 and 2011, they provide evidence that lower premiums are associated with litigation risk. Block premiums are significantly reduced when target companies belong to sectors associated with higher litigation risk.

Amel-Zadeh and Zhang (2015) analyze financial restatement and support the information risk approach. They show that firms who have restated their financial reports will less likely become takeover targets and that their deal value is lower if a transaction occurs. Gande and Lewis (2009) examine the probability for a firm to be exposed to class action lawsuits. They find that an industry effect exists, but that some firms are involved in a recurring litigation activity with third parties and that litigation risk has some stable component. A problem of endogeneity between litigation risk and market price has been identified by Salavei et al. (2013). Restatement will enhance litigation risk but high previous litigation risk increase the probability of restatement.

3 Hypotheses and measure of the litigation risk

3.1 – Hypotheses

Assuming that litigation generates an information risk to appraise the firm's situation, we use the number of public citations of the firm in the domain of litigation as a proxy of its litigation risk. The literature refers to litigation risk as strongly influenced by the sector environment (Francis et al. 1994). Besides, litigation risk is also a characteristic of a firm. It may be a consequence of idiosyncratic managerial choices with regard to stakeholders (Kim and Skinner 2012). The two explanations can cumulate. Our first hypothesis will identify whether litigation risk is conditioned by the sector and whether the level of litigation risk is a characteristic of a firm.

H₁(a) : Litigation risk is determined by a sectorial effect

H₁(b) : Litigation risk is an idiosyncratic risk

Litigation risk is one aspect of the global economic and contractual risk of the firm. If the two previous hypotheses are valid, we can question whether litigation risk is a stable component of the firm's risk. If litigation risk is macro determined by the sector exposure, it has a stable component, as the industry and technology determinants are stable. If litigation risk is micro determined at the firm level, it can be a random noise or a stable policy that has a long-term component.

H₂: Litigation risk has a stable component.

When the firm completes a M&A transaction, the risk exposure of the newly merged firm changes. The litigation risk of the target adds to the litigation risk level of the acquirer. A M&A transaction develops in a double asymmetry of in-

formation framework. At the theoretical level, this variable is crucial to set the terms of the acquisition (Hansen, 1987; Eckbo et al., 1990). The acquirer is exposed to an information asymmetry when he considers the risk of the target's assets and of their future profitability. Symmetrically, the target's shareholders are facing a risk when they consider the synergies and gains announced by the acquirer. We stand in the well-known "double lemon" effect for both sides of the transaction.

H₃: After a M&A, the new litigation risk is expected to increase, as the newly merged firm will partly cumulate the litigation risk of both the acquirer and the target and new additional litigation linked to the transactions.

Litigation risk is identified at the acquirer's level by the acquirer who knows it better than the target's managers and shareholders. On the other hand, the litigation risk of the target is only surmised by the acquirer. So, the asymmetric situation with regard to litigation risk will condition the terms of an acquisition, i.e. its premium and means of payment. This relation is expected to be strong if the litigation risk has an idiosyncratic component (see H1(b)), because this is private information. If the litigation risk is sector-determined, it is public information known in the market, so the asymmetry in information is lower. Therefore, asymmetry in litigation risk will contribute to explain the terms of a M&A transaction. A strong asymmetry in the litigation risk, with a target more risky in that domain than the acquirer, will induce a lower premium and a means of payment that is more oriented toward share payments, as a share payment is an insurance mechanism (Le Maux and Francoeur 2014).

H₄ : Relative asymmetry in litigation risk will influence the terms of the transaction. A target with important litigation risk will ceteris paribus be paid with lower premiums and more shares.

3.2 – Measure of the litigation risk

Our methodology develops a proprietary proxy of the litigation risk by referring to the number of citations in the Factiva database. We focus on mergers and acquisitions, which are major events in the life of a firm. Using the Factiva database, we collect the number of publications mentioning either the acquirer or the target firm to assess the specific level of litigation risk. A litigation risk exists if a firm can be sued by any third party:

- The target's shareholders, if they think that they have been underpaid, refuse to bring their stocks. As they stay minor investors of the target, they claim for expropriation; also, the acquirer's shareholders can also complain that the acquisition was overpaid and sue the management.
- Third parties, such as competitors because of potential market abuses after the acquisition.
- Consumers, suppliers.
- The government or the justice system, because regulations or laws may have been violated in the process.

The litigation risk may cover very different allegations in the large field of Corporate Crime/Legal Action (initiated, pending or closed). It covers:

- Class action/settlements
- Industrial/corporate Espionage
- Out-of-Court agreements/settlements
- Regulatory breach
- Securities Fraud (including insider dealing)

We compute the number of publications related to these subjects in the Factiva database that are associated with the name of the acquirer and the name of the target firm. Factiva follows more than 8000 publications around the world. These citations are published in English, French, German, Italian, and Spanish because of the worldwide nature of the sample. Web news and other multimedia channels are not considered. Duplicate publications are eliminated from the sample.

The number of publications in any language throughout the world signals that the reputation of the firm is more or less associated with litigation, legal or judicial problems for any reason. We compute the number of citation linked to a conflict irrespectively if it signals a beginning the continuation or the settlement of a dispute. We paradoxically consider the new or a settlement of a conflict as an increase in a firm's litigation risk. If the dispute is settled, its financial consequences become effective. Positive or negative cash flows impact the firms' financial situation. What was expected or provisioned gains certainty. The litigation risk measure is a global appraisal of ex ante, following and final pieces of information for a firm exposed to litigation conflicts and cases. The number of citations in publications has been calculated over three yearly periods for the acquirer:

- The year N before the announcement; this period ends at the announcement date of the M&A operation;
- The year before the acquisition announcement, year N-1;
- The year after the announcement, N+1;
- Looking at the target firm, we add the year N before the acquisition announcement.

We do not consider the period after the announcement of the target company for the following reasons: (i) it may have been merged with the acquirer and is no longer listed, (ii) even if it continues to be listed, it is controlled and (generally) consolidated, so its litigation risk is no longer idiosyncratic, but is combined with the litigation risk of the new consolidated group. We also compute the average number of public citations for the 2 years, N-1 and N, before the announcement. By comparing the number of citations after and before the acquisition we are able to follow the change in the litigation risk level linked to the event.

4 Results

The deals considered were from the Thomson Financial database and over the period 2000–2013. The transactions were filtered according to the following rules:

- Only completed deals
- Minimum value of 50 million USD
- Target and acquirer are publicly listed firms
- Targets are located either in Europe or in North-America
- Acquirers are only from Europe or North America
- Targets and acquirers exclude financial firms, governments, and agencies
- Acquisitions are paid only in cash or shares (or a mix of the two).

The basic sample includes 1051 transactions. These restricted criteria were chosen to identify significant transactions at the acquirer level.

When considering our global sample of 1051 M&A transactions, we calculate the average number of litigation citations over the three years, N-1, N, and N+1, and the same for the target firm before the transaction. Table 1 shows that, globally, the litigation risk of the target firm is lower.

Table 1 Average number of litigation citations in Factiva

	LIT N-1	LIT N	LIT N+1	TAR_LIT N
Mean	39,54	44,32	55,57	13,27
Std dev.	99,38	113,06	121,70	69,51

LIT_N: number of citations the acquirer during the year of the transaction ending at the announcement date; LIT_N-1: number of citations of during the previous year; LIT_N+1: number of citations of during the year following the M&A transaction; TARG_LIT_N: number of citations the target during the year of the transaction ending at the announcement date

We calculate the average of the number of citations in the year of the transaction (LIT_N) and the number of citations the year before (LIT_N-1). The resulting LIT_AV variable shows an average number of litigation items of 42 citations. However, the standard deviation is very large, showing a very extreme situation with low or null litigation risk on one end and extremely important litigation risks at the other end. It is highlighted by a very low median of 6 items for the LIT_AV variable, with almost 25% of the sample showing a null number of litigation citations.

We compute the absolute increase in the number of litigation items LIT_N+1, compared respectively with LIT_N and the average over the two previous years, LIT_AV. The number of items increases by 11 (comparing the following year with the year immediately preceding the transaction, DELTA_ABS1) and 13 (comparing the following year with the two years preceding the transaction, DELTA_ABS2), respectively. The magnitude of the increase is very similar to the level of the litigation risk of the target in the year before the acquisition meas-

ured by TARG_LIT_N (13 items, see Table 1). After winsorizing, the increase is lower. It is statistically significant and will support our hypothesis H3. The litigation risk of the new consolidated group increases through the M&A process. The new litigation risk at year N+1 seems to cover the two merged litigation risks. We test whether the variation in litigation risk over the following year, N+1, is equal to the level of the target litigation risk. This pure mechanical addition hypothesis is not rejected (z-test of a zero difference, p: 0.33). However this does not strictly support the pure mechanical addition hypothesis. It simply says that the increase in litigation risk after a transaction is globally not different from the level of the target's litigation risk. But the elements of litigation risk may not add 1 to 1 with those of the acquirer. We can have situation of limited import of the target's element of litigation risk, combined with the outbreak of new litigations conflicts ensuing the transaction. A test of the purely mechanical addition is given by the correlation between the variation of the litigation risk of the acquirer through the acquisition and the litigation risk of the target. The correlation between DELTA_ABS2 and TARG_LIT_N is positive but not perfect (+0.36; p: 0.00). Moreover, in 35% of the cases, the acquirer's litigation risk has decreased after the acquisition. The eventuality of decreasing litigation risk identifies that a large range of idiosyncratic managerial choices exists to lower or to partially offset the risk after the operation at the firm level.

Table 2 Variations in the litigation measure between after and before a completed M&A

	DELTA_ABS1	DELTA_ABS2	winsorized DELTA_ABS1	winsorized DELTA_ABS2	DELTA_REL	ASY_LIT
Mean	11.25	13.633	9.02	10.56	2.43	0.92
Z-test	0.00	0.00	0.00	0.00	0.00	0.80

DELTA_ABS1: difference LIT_N+1 minus LIT_N; DELTA_ABS2: difference LIT_N+1 minus LIT_AV; winsorizing 2.5%-97.5%; DELTA_REL is the ratio LIT_N+1 over LIT_AV; ASY_LIT is the ratio TARG_LIT_N over LIT_AV; Z-test are tests versus 0 for the DELTA_ABS1 and DELTA_ABS2 variables and versus 1 for the DELTA_REL and ASY_LIT variables

DELTA_REL is the relative increase in the litigation risk, LIT_N+1 over LIT_AV. A figure above 1 means an increase. The data are truncated between 0 and 2 because of possible null denominators. It shows an increase, with a litigation risk that is doubled at the individual level. The litigation asymmetry is measured by the ratio of the target litigation measure at year N, TARG_LIT_N, over the acquirer's litigation risk for the same period, LIT_N. Its average value is 0.92, showing that both firms have similar litigation risk exposure just before the acquisition. A z-test shows that this ratio is not different from 1.

We identify a stable or a random component in litigation risk by looking at the autocorrelation in the numbers of citations over time. The autocorrelation is strong and demonstrates a stable component. The firms with high(low) litigation risk show high(low) litigation risk in the following periods. The firms that are borderline or are litigation risk-takers still remain the same. They tend to choose

target firms that are also risky. The correlation between LIT_AV and TARG_LIT_N is positive (+0.32) and the non-parametric rank correlation shows similar results. This stable component of litigation risk at the firm level demonstrates the idiosyncratic characteristics of litigation risk at the acquirer's level. Even within a litigation-risky sector a moderately risky firm may idiosyncratically stay at its level. We cannot accept a pure sectorial determination of litigation risk. These specific choices are illustrated when the M&A occurs. The correlation is lower, meaning that a highly (weakly) exposed firm will not systematically chose a highly (weakly) exposed target. This is also coherent with out-of industry diversification where the correlation of the target litigation risk with the acquirer's is lower.

We can conclude that the litigation risk has sectorial effect support (hypothesis H1(a)), which adds to a strong firm-specific component in the litigation risk at the firm level (H1(b)).

4.1 – Determinants of litigation risk and of the terms of the acquisition

Table 3 presents the determinants of the litigation risk proxy. In any regression, the sector dummies are globally and strongly significant. This appears when considering levels or variations of the litigation risk. This confirms the results in Table 3 by evidencing a strong sector influence, where some are more risky than others in terms of litigation risk. The country effect is significant in explaining the level of the level of the litigation citation score (see Table 3-Panel A). However these macro conditioning variables should be combined with firm's specific features. The previous year litigation risk level, LIT_N, shows a strong autoregressive component as identified in the univariate tests, (see Equation (1)). The variable explaining the idiosyncratic litigation risk are persistent feature of the firm. This is why in Equations (2) to (5) we consider directly these characteristics. The level of the firm's litigation risk, LIT_AV, is explained by the size of the acquirer firm, measured by its sales, LN_SIZE, and by the size of its net assets (see Equation (1)). The size effect is not proportional but more than proportional. The larger a firm, the larger its litigation risk level. In a not reported test we use the square of LN_SIZE as explaining variable instead of LN_SIZE; it is positive and highly significant. The variable year is a deterministic trend; it which is significant and demonstrates an overall increase in litigation items and a global increasing pressure by the legal environment. The variable ACQ_EU in Equation (2) is a dummy for EU acquiring firms compared to American firms. It is positive and significant. Contrary to what may be expected, the litigation risk is higher in Europe. This is explained by the larger definition of litigation risk we used. In Europe the litigation risk may has a larger scope with many union and labor conflicts, environmental suits, legal suits, anti-competition cases initiated by the EU institutions. In the US the litigation risk is more centered on financial suits and shareholders contests. The number of litigation citations increases because of multiple media channels multiplied due to the different languages used in Europe; English medias cumulate with French, German, Italian and Span-

ish ones if the subject involves an European firm. In Equation (3), instead of the location of the acquiring firm, we use the DUM_C_LAW variable to feature the common law context of the acquiring firm. This refers to Canada, the UK and the USA and corresponds roughly to non-European countries. The only difference results from acquiring firms coming from the UK. This dummy variable is strongly negative featuring that the litigation risk level seems lower in common law countries for similar reason as the ones above mentioned. At that stage we cannot discriminate if the relevant difference is between European and American countries or between common law vs. civil law countries. The two features are combined. In Equations (5) and (6) the countries effect is very relevant to explain the difference in litigation risk levels.

Table 3 Determinants of the Acquirers Litigation risk

Panel A										
Dependent	(1) LIT_N		(2) LIT_AV		(3) LIT_AV		(4) LIT_AV		(5) LIT_AV	
	Coeff.	p-val.	Coeff.	p-val.	Coeff.	p-val.	Coeff.	p-val.	Coeff.	p-val.
Constant	-1934.86	0.05**	-6185.60	0.00***	-6049.55	0.00***	-6774.38	0.00***	-6358.71	0.00***
LN_SIZE	4.82	0.00***	9.36	0.00***	8.72	0.00***	9.92	0.00***	9.15	0.00***
YEAR	0.94	0.06**	3.04	0.00***	2.99	0.00***	3.34	0.00***	3.12	0.00***
ACQ_EU	11.04	0.02**	16.40	0.00***						
ACQ_NET_ASS	20x10 ⁻⁴	0.00***	35x10 ⁻⁴	0.00***	35x10 ⁻⁴	0.00***	37x10 ⁻⁴	0.00***	35x10 ⁻⁴	0.00***
LIT_N-1	0.57	0.00***								
DUM_C_LAW					-17.94	0.00***				
Dummy sect	YES		YES		YES		NO		YES	
Sector F-test	2.44	0.00***	3.85	0.00***	3.60	0.00***			3.64	0.00***
Dummy country	NO		NO		NO		YES		YES	
Country F-test							3.49	0.00***	2.84	0.00***
R ²	0.55		0.48		0.48		0.44		0.48	
N	775		775		775		775		775	

Panel B Dependent	(1)		(2)		(3)		(4)		(5)		(6)	
	DELTA_REL		DELTA_REL		DELTA_REL		DELTA_REL		ASY_LIT		ASY_LIT	
	Co- eff.	p-val.	Co- eff.	p-val.	Co- eff.	p-val.	Co- eff.	p-val.	Coeff.	p-val.	Co- eff.	p-val.
Constant	117.4 9	0.09*	6.85	0.15	3.39	0.02**	5.33	0.00** *	0.83	*	1.90	*
LIT_TARG_N	0.15	0.06*										
LN_SIZE	1.28	0.42			0.06	0.35	0.04	0.61				
ACQ_EU												
TRANS_VAL	0.00	0.29			0.00	0.51	0.00	0.44				
ACQ_TOT_ASS	24x1 0.4	0.08*							- 6.29x10- 6	0.01**		
TARG_EU	-4.66	0.33										
SAME_SECT	3.13	0.51			0.27	0.35	0.25	0.38				
DUM_C_LAW	-202	0.76	0.76	0.03**					-0.03	0.88		
CHALLGD	8.57	0.28			-0.36	0.28	-0.38	0.26				
TARGET_SALES	-0.00	0.15			0.00	0.58	0.00	0.69				
ASYMMETRY WITHIN_AMERI CA					-0.20	0.17 0.00** *	-0.18	0.20			0.77	0.00** *
TARG_TOT_ASS									6.27x10- 6	0.00** *		
ASY_LIT			0.30	0.00** *	0.37	0.00***	0.37	0.00** *				
Dummy sect	YES	0.00**	YES	0.00**	YES	0.00**	YES	0.00**	NO		YES	
Sector F-test	1.61	*	2.68	*	3.52	*	2.86	*			0.92	0.53
Dummy country	NO		NO		NO		YES	0.00**	NO		YES	
Country F-test							3.41	*			0.14	0.99
R ²	0.07		0.07		0.08		0.08		0.07		0.07	
N	957		1050		931		931		1014		986	

Litigation is measured by the number of citations in the Factiva data base mentioning the firm's name in the domain of litigation; ACQ_EU: Dummy equal to 1 if the acquirers is located in 7 European countries; ACQ_NET_ASS: Total net assets of the acquired the year before the transaction, total accounting assets minus debt (millions \$); ACQ_TOT_ASS: Total assets of the acquired the year before the transaction (millions \$); ASY_LIT: Relative litigation risk ratio between the target and the acquirer at year N, ratio TARG_LIT_N over LIT_AV; ASYMMETRY: Information asymmetry measures by the target net assets over the acquirers' net assets (Eckbo et al. 1990); CHALLGD: Dummy equal to 1 if the transaction has been challenged; CROSSB: Dummy for cross-border acquisition between the EU and the Americas; DELTA_ABS2: Absolute variation of number of litigation citations after compared to before the M&A transaction, difference LIT_N+1 minus LIT_N; DELTA_REL: Relative variation of number of litigation citations after compared to before the M&A transaction, ratio LIT_N+1 over LIT_AV; DISEQ: Disequilibrium in the acquisition between offer and supply of shares measured by the difference between the percentage of the target capital acquired in the deal and the percentage of share sought as declared at the announcement of the acquisition; DUM_C_LAW: dummy for common law countries, i.e. Canada, the UK and the USA; DUM_HIGH_REL: Dummy to measure higher relative increase in litigation risk after compared to before the transaction, set to 1 if the ratio DELTA_REL is greater than 1.5; DUM_TARG_HIGH_RISK: Dummy for highly risky target compared to the acquirer's litigation risk, set to 1 if the TARG_LIT_N over TARG_N is above 1; DUM_TOE:

Dummy variable equal to 1 if toehold exists before the acquisition; LIT_N: Number of litigation citations of the acquiring firm over one year before the transaction; LIT_AV: Average of the number of litigation citations for years N and N-1 with N the one year period before the announcement of the acquisition; LN_SIZE: Logarithm of the acquirer's total sales in the year preceding the transaction; SAME_SECTOR: Dummy equal to 1 if the acquire and the target belong to the same industry sector; TARG_EU: Dummy equal to 1 if target is located in the EU; TARGET_SALES: Target sales over the last year preceding the transaction (millions \$); TOEHOLD: Percentage of target share held by the acquirer before the acquisition; TRANS_VAL: Transaction value (millions \$); WITHIN_AMERICA: Dummy for transaction where the acquirer and the target firms are American (The US and Canada); YEAR: Time trend using the year number; Dummy sectors: 14 dummy variables according to the SIC sector classification; robust covariance estimate adjusted for heteroscedasticity)

The absolute variation in litigation risk before and after the acquisition, DELTA_ABS (see Panel B), shows no clear determinants in the regressions (1) and (2). The main explaining variable is the litigation risk level of the target firm, LIT_TARG_N. A positive relationship means that the target's litigation risk cumulates, at least partly, with the acquirer's litigation risk. Equations (1) to (3) show that an average 15% of the litigation risk is "imported". The hypothesis of a cumulative mechanism of litigation risks is not strongly supported. Sector dummies are significant, meaning that the variation in litigation risk is also conditioned by the sectors. Equation (2) highlights that the size of the target firm, ACQ_TARG_ASS, will enhance the new litigation risk after the acquisition. This target characteristic as influencing the absolute variation at the acquirer's level, suggests that we should look at the relative variation of the litigation risk. This is done in Equations (3) to (6), where the dependent variable DELTA_REL is the proportional increase in litigation risk afterward, compared to beforehand. It also shows no clear determinant linked to the transaction. The acquirer's marginal litigation risk will not increase(decrease) due to the characteristics of the deal such as its size, same sector target firms, or challenged bids. The asymmetry in litigation risk (ASY_LIT) is highly significant in Equations (4) to (6). It shows that the relative weight between the target's and acquirer's litigation risks before the acquisition will result in a proportional increase in the litigation risk after the transaction. This demonstrates that the target's litigation risk does not offset during the transaction but should be taken into account to set the acquirer's future litigation risk. As a consequence, rational managers and investors would expect a rise in litigation risk after a transaction. Knowing this feature they may revise the terms of the offer to target's shareholders. The only other relevant variable is WITHIN_AMERICA. This means that a M&A will per se increase litigation risk if it occurs in the US or in Canada. This is the systematic risk of a lawsuit following a M&A because of class actions and systematic lawsuits by lawyers in the US. As a conclusion the hypothesis (3) is supported by the data as the proportional increase in litigation risk through the transaction is at least partly explained by the level of the target's litigation risk. However what imports is the relative litigation weight of the target firm. Relatively more risky targets will involve a higher percentage increase of the future acquirer litigation risk.

Asymmetry in litigation risk, ASY_LIT (see Equations (7) and (8)), is itself totally explained by the relative size of the two firms' total assets. Of course, the estimated signs are opposite. In Equation (7), the relative ratio of litigation risks

increases with the target's size and decreases with the acquirer's size. Equation (8) is very parsimonious and shows that the relative litigation risk is strongly correlated with the global asymmetry of information between the two firms. This can be expected, as the litigation risk is part of the global information asymmetry risk as measured with the ASYMMETRY variable. The main driver of the gap in litigation risk is idiosyncratic and refers to the managerial choice of the target firm by the acquiring firm. However, the relation is not a pure 1:1 relationship. Even if we remove any constant, the estimated coefficient is only 0.82, and the R-squared value is low, meaning that, the relative litigation risk is not redundant compared to the asymmetries of information between the two firms. Litigation risk has some specific characteristics different from those of information asymmetry. Relative litigation risk is not influenced by sector conditioning, neither by a country effect. When a transaction occurs, gaps in litigation risk are largely random at the firm's level and not endogenously determined by the sectors or the country of the acquiring firm.

4.2 – Is litigation risk priced in premium?

We refer to the results of the multivariate regression explaining the premium paid. Here also, the sector effect is strongly significant, with very different average premiums between sectors. The level of litigation risk at the acquirer's level, LIT_N and LIT_AV, appears significant, and will go along an increased premium. This underlines the fact that the terms of the acquisition should be agreed by the target's shareholders. They are sensible to litigation risk-exposed acquirer's, and will ask for a larger premium and more cash payment.

The variable DUM_HIGH_REL signals an important increase in litigation risk after the acquisition. It shows a significant negative sign. A strong increase in the (future) litigation risk (for instance resulting from the addition of part of the target's own litigation risk or resulting from anticipated new litigation cases) is anticipated in the premium and decreases it. To assess the future increase in litigation risk imported from litigation risk-exposed targets, we use the DUM_TARG_HIGH_RISK variable. This dummy flags situations where the litigation risk level of the target before the acquisition is larger than the litigation risk level of the acquirer. The relative asymmetry in the litigation risk between the two firms is significant and negative. Relatively risky target firms are identified, and this will lower the premium paid by the acquirer.

Outstandingly strong litigation asymmetry (i.e. when the litigation risk of the target is larger than that of the acquirer as captured by the DUM_TARG_HIGH_RISK variable) will strongly impact the premium paid: In such cases, the premium is down by 10%. This supports our hypothesis H4. An asymmetric litigation risk is priced with a lower premium but this influence is not linear, as particularly important asymmetric litigation risk is more highly priced.

We conclude that litigation risk is priced in a specific deal when the asymmetry between the two firms is high as identified by the ASY_LIT variable. This

phenomenon is reinforced when the target's litigation risk becomes stronger than the acquirer's.

5 Conclusion

Our results support the enlarged definition of litigation risk at the firm's level. Focusing only to shareholder litigation risk seems too narrow as the litigation risk introduced by a specific experimental event, i.e. a completed acquisition, has many possible sources. The enlarged perimeter we use is relevant and we show that litigation is linked with the financial considerations of an M&A transaction. Our original proxy of litigation risk allows us to clearly identify a sector effect wherein some industries are more risky, in terms of litigation, than others. In addition to a sector effect, the major characteristic of litigation risk is that it is idiosyncratic and depends heavily on the firm's economic data, such as its size (Kim and Skinner 2012).

We also confirm our hypothesis that litigation risk is stable and appears as an idiosyncratic feature of a firm. However, the litigation risk changes when a major event occurs. This is what happens after the completion of a M&A transaction. Then, the litigation risk of the target partly cumulates with the litigation risk of the acquiring firm. The litigation risks of both the acquirer and the target firms are, among other variables, strong determinants of the terms of the transaction (Krishnan and Masulis 2012). We confirm the hypothesis that the litigation risk is priced in a M&A transaction and also influences the means of payment.

Our paper opens the way to empirical studies in the domain of litigation risk. The proxy we propose can be used to question whether litigation risk influences the major financial decisions of firms, such as financial leverage decisions. We can also mention the issue of reverse causality which is not addressed in this paper and is opened: a possibility may exist that damaging or wrong financial decisions, such as too low acquisition price may trigger disputes and change the litigation risk level of the firm.

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The currency and commodity risk management in a strategic perspective in a multinational company

Authors

- *Roberto Schiesari, Adjunct Professor, roberto.schiesari@unito.it - Department of Management, University of Torino*
 - *Dino Corgnati, Ferrero Group Chief Risk Officer, dino.corgnati@ferrero.com - Ferrero S.p.A.*
 - *Carlo Salomone, Head of AITI NW Delegation, carlo.salomone@long-way.org - Italy Association of Corporate Treasurers*
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Abstract

Firm value is influenced by financial risks: which consist in unexpected and sudden changes of foreign exchange rates and commodity prices in many direct and indirect ways. Measuring and managing risks exposure is important for reducing firm's vulnerabilities from major economic and financial changes, adversely affecting profit margins and asset values both in size and in their volatility

Risk Management (RM) has become a critical issue in current globalization environment and for continuous quest for greater and sustainable returns. Whilst most companies now see risk as a key strategic issue, risk is normally treated tactically and piecemeal. In this article, the authors argue that an integrated and proactive approach allows companies to perform better in managing risks and thus in achieving strategic targets

The paper will show how RM function should comply with Strategy and long term planning, as well as annual budgeting using the case-study methodology.

This implies constantly monitoring currency and commodity risks and timely applying proper hedging instruments, under a unified RM policy and an integrated multi-country approach.

From an organizational point of view, we will give relevant criteria of how to structure RM function and how to set up action guidelines to achieve its goals

Keywords: Risk Management. Currency and Commodity risk policy. Strategic approach, Hedging strategy.

JEL Classification: (G320): Corporate Finance, Financial Risk

1 Introduction

In business, there are always risks to be considered from the company's point of view. However, as companies enter the global market and become multinational firms, a whole new world of opportunities, challenges and problems opens up, which means that the risks multinational firms face are more and wider than those faced by domestic firms.

To create shareholders' value, it is imperative that companies do not neglect the risks inherent to the business in an international environment, but instead adopt proper strategies for identification and management of international business risks.

There are several types of international business risk factors, but the currency and commodity risks are crucial for companies' competitiveness. Currency and commodities prices fluctuations are a global phenomenon, and therefore it affects all companies around the world involved in international business. The related risks can be either long-term or short-term and can affect the company's cash flow, financial result and firm valuation directly.

The dynamic and highly competitive business environment in recent times has seen numerous debacles, from natural disasters to financial crisis, not forgetting frauds and scandals. This has brought to the lime-light RM, a discipline that has in the past focused on mostly hazardous risks, and is most recognized in the finance and insurance sectors. All these; including the numerous measures taken to mitigate the current and emerging risks, have given governments, businesses and stakeholders a new view of the environment; the risk environment.

The intervention by what is considered the evolutionary discipline of the traditional RM, known as Enterprise Risk Management (ERM), takes a new and holistic approach towards the management of risk.

The recession has forced businesses to place more focus on the management of risks relating to all aspects of their businesses. Such management is broadly defined as "Enterprise Risk Management" ERM, which describes the set of activities that businesses undertake to deal with all the diverse risks that face it in a holistic/strategic/integrated method. These risks include financial, strategic, operational, hazardous, and compliance risks, spanning through the organization. Many of such risks have significant impact on the profitability, effectiveness, and reputation of business enterprises.

In the 21st century, there are several checkpoints that have considerably driven the need for enterprise RM, which today is referred to as drivers of ERM, this includes increase in the following:

- Greater transparency (Corporate Governance)
- Financial disclosures with more strict reporting and control requirement
- Security and technology issues
- Business continuity and disaster preparedness
- Focus from rating agencies
- Regulatory compliance (laws and regulations)
- Globalization in a continuously competitive environment

Multination companies take RM very seriously: as shown by several surveys, RM is ranked by financial executives as one of their most important objectives. Given its real-world prominence, one might guess that the topic of RM would command a great deal of attention from researchers in management and finance, and that practitioners would therefore have a well-developed body of wisdom from which to draw in formulating hedging strategies.

It is therefore of great importance for businesses to take advantage of making appropriate strategic-decisions on uncertain outcomes, as at worst it would cut-down losses due to disaster and at best, improve profitability in cases of opportunities. The sources of uncertainties with adverse effects (the probability of which is defined as risk) are described as due to the volatility, complexity and heterogeneity of risk; the impact of external events (such as customer preferences, competitors' strategies, prices fluctuations and so on), the response to external events (such as compliance to policies, regulations, development of strategies, and so on), and the behaviour of employees is as well crucial.

2 Corporate Risk management: literature review, approach and methods

Interest in enterprise RM has continued to grow in recent years. More and more organizations have implemented or are considering ERM programs and consulting firms have established specialized ERM units. Unlike traditional RM where individual risk categories are separately managed in risk "silos," ERM enables firms to manage a wide array of risks in an integrated, enterprise-wide fashion. Academics and industry commentators argue that ERM benefits firms by decreasing earnings and stock-price volatility, reducing external capital costs, increasing capital efficiency and creating synergies between different RM activities (Miccolis and Shah, 2000; Cumming and Hirtle, 2001; Lam, 2001; Meulbroek, 2002; Beasley, Pagach and Warr, 2006). More broadly, ERM is said to promote increased risk awareness, which facilitates better operational and strategic decision-making. Despite the substantial interest in ERM by academics and practitioners and the abundance of survey evidence on the prevalence and characteristics of ERM programs (see, for example, Miccolis and Shah, 2000; Hoyt, Merkley and Thiessen, 2001; Kleffner, Lee and McGannon, 2003; Liebenberg and Hoyt, 2003; Beasley, Clune and Hermanson, 2005), there is an absence of empirical evidence regarding the impact of such programs on firm value. The absence of clear empirical evidence on the value of ERM programs continues to limit the growth of these programs.

According to one industry consultant, Sim Segal of Deloitte Consulting (2007), corporate executives are "justifiably uncomfortable making a deeper commitment to ERM without a clear and quantifiable business case."

The holistic approach that characterizes the present trend of RM, referred to in some text as enterprise-wide RM, enterprise RM (ERM), strategic RM, or inte-

grated RM, is aimed at dealing with uncertainty for the organization (Monahan, 2008).

The rationale behind this approach is that value is maximized when the decision-makers sets strategy and objectives to strike an optimal balance between growth and return goals, and the related risks, and efficiently and effectively allocate resources in pursuit of the entity's objectives. Barton (2002) stated that the goal of this new approach is to create, protect, and enhance shareholder value by managing uncertainties that could influence the achievement of organizational objectives.

Enterprise RM differs from the more traditional approach, frequently described as the "silo" approach, where risks are often managed in isolation. An ERM approach seeks to strategically consider the interactive effects of various risk events with the goal of balancing an enterprise's entire portfolio of risks to be within the stakeholders' appetite or tolerance for risk. ERM takes an enterprise-wide focus by strategically looking at risks in a coordinated, consistent manner. The ultimate goal is to ensure that the value of the enterprise is preserved and even enhanced.

Executives first learning about ERM often share an initial concern that it requires implementation of a separate new system or infrastructure, but most ERM adopters argue that infrastructures already in place can often be leveraged efficiently.

The ERM approach to RM began to emerge in the late 1990s. Early adopters recognized that changes in technology, globalization, corporate financing, and numerous other risk drivers were increasing the complexity and volume of risks. They also began to realize that traditional approaches were no longer effective ways to identify, assess, and respond to the growing array of risks across a complex enterprise.

Now ERM has become a hot topic, representing more than just another management fad. In fact, as Patrick Stroh wrote in the July 2005 Strategic Finance article "Enterprise Risk Management at United Health Group":

"ERM is quickly becoming the new minimum standard, and it may well be the key to survival for many companies." It offers significant opportunity for competitive advantage, providing value well beyond mere compliance with regulatory expectations."

This shift in RM trends led the Committee of Sponsoring Organizations of the Treadway Commission (COSO) to develop a conceptual framework for enterprise RM. Enterprise Risk Management—Integrated Framework, released in 2009, defines enterprise RM as follows:

"Enterprise risk management is a process, effected by an entity's board of directors, management, and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives."

A core element of ERM is that risks and strategy are aligned. As management examines various strategic alternatives, it also evaluates them to determine the

impact on the enterprise's total risk profile. Once strategy choices are made, management identifies risk responses, assigns accountabilities, and monitors implementations in a coordinated and integrated approach to ensure the objectives are met. Thus, ERM is integral to strategic planning and performance assessment.

Any organization that is in existence today is performing some form of RM—mere survival suggests that some degree of risk oversight is in place. The challenge for organizations, however, is that the process for managing the complex portfolio of risks can often be ad hoc and informal, leading to an incomplete understanding of the entity's top risk exposures affecting key objectives, including a lack of understanding of strategic risks. When RM is underdeveloped, the concepts surrounding "risk" and "risk management" may be ill-defined leaving management with little basis but to assume that its leaders are in agreement about what constitutes risk for the organization, and that those risks are well understood across the organization and being managed to acceptable levels. Boards of directors can be left wondering whether the organization's RM processes are effectively identifying the organization's key risk exposures affecting key strategies and objectives.

Attention placed on RM and the role of the board in risk oversight is leading to reminders about the importance of the fundamental relationship between risk and reward. As they consider how this risk/reward relationship is managed, boards are realizing that the level of management's investment in infrastructure and formal processes for managing and monitoring the return side of the risk/return relationship is fairly robust. In most situations, management has designed and implemented complex and sophisticated processes to identify, measure, and monitor performance through a variety of systems, processes, and tools. Examples of the level of investment in the return side infrastructure include formal processes and procedures surrounding strategic planning, forecasting tools and modeling, and financial reporting and accounting systems, among others. So, the level of management's investment in monitoring the return side of performance is often explicit, formal, and complex.

The challenge of having a focus on narrow concerns, a fragmented approach toward RM has its solution in the understanding of the wider scope of risks being faced (Jablonowski, 2009). Establishing, maintaining, and implementing a new approach having:

- an organisation-wide awareness of RM;
- the channels for communication of risks;
- the methods, tools and practices for managing risk;
- the ways to measure operational and financial risk;
- the organisational risk map;
- the risk financing mechanisms;
- the measurements of RM effectiveness.

It is therefore right to say that the implementation of ERM strategically implies that, if effective, it helps ensure, with reasonable assurance, that with the

understanding of the complete array of risks that an entity faces, it can best achieve its strategic, operations, reporting and compliance objectives.

3 Risk Factors in Ferrero Group global expansion

3.1 Ferrero Group key figures

Ferrero International S.A. is the parent company of the Ferrero Group, comprising seventy-five consolidated companies, with twenty-four production plants, of which three operate within the framework of the Social Enterprises. Ferrero products are present directly or through authorized distributors in over 160 countries.

The Group closed the financial year 2014 with a consolidated turnover of 8,412 million Euros, indicating an increase of 3.9% from the previous period. Manpower is over 32 thousand personnel.

Despite the difficulties faced internationally, this growth is the result of an extraordinary dynamism in the development of new markets: the sales of Ferrero products have matched and in some cases even improved from previous years' results in Asia, Russia, United States, Canada, Brazil, Mexico and Turkey. The markets of the Middle East are also in a phase of strong growth.

The results achieved in the core markets of the UK, Poland and Germany were good and in some cases excellent. Whilst those achieved in the principle markets of south Europe were substantially stable or slightly down, due to the effects of the economic crisis.

The Group's result this year, against a substantially stable operating income, presents an improved financial result, with a profit before tax of 907 million Euros (+14.2% compared to last year).

The new investments made by Ferrero during the last financial year came to 537 million Euros, of which 458 million (5.4% of sales) was used to strengthen the Group's industrial and production activities, mainly in Italia, Germany, Canada, India, Brazil, Mexico and China.

As regards main trends relevant to RM; in last 5 years the operational weight in foreign emerging markets rose approximately from 25% to 32% of total Group figure, with a significant increase of risk related factors (volatility of currency rates and commodity prices, uncertainty of macro-economic variables and trends - GDP growth, inflation, unemployment, etc.).

4 Commodity risk management

A list of main agricultural, food and other commodities in Ferrero Group industrial processes include flours from various vegetables, hazelnuts, sugar, milk, palm oil, cocoa, electrical energy, gas, aluminum, plastic packaging.

Commodity risk will be focused here on two critical factors for some strategic goods: producers' local concentration and lack of a financial market (only direct "physical" deals)

4.1 Geographical concentration of producers

For three commodities highly represented in the dose of Ferrero products there is a very high concentration of producers in specific and limited areas of the globe.

Approximately 75% of Hazelnut global production is located in Turkey, 70% of Cocoa total production in Central-west Africa (Ivory coast, Ghana, Cameroon, mainly) and 80% of Palm Oil one in south east Asia (Indonesia, Malaysia, Thailand).

Any agricultural, political, or weather critical event may cause relevant problems to the prices and even to supply flows.

4.2 Hazelnut: a very complex strategic exposure

Hazelnut risk shows some addition critical features that affect the Group at strategic level.

Ferrero Group is the most intensive user of this kind of commodity being the first buyer worldwide of the product: so a smooth supply process of hazelnuts is vital. But as previously mentioned, contrary to other commodities, there is not a reference financial market, and thus only spot deals are used while the set of hedging instruments available for other quoted commodities are not available.

With reference to the currency, prices are negotiated in Euros, with implied price quotation according to EUR-TRY rate. Supply invoices are issued in Euro, so while from an accounting point of view the currency risk does not appear, it is indeed hidden in the price component.

So the full EUR costs are subject to EUR-TRY rate volatility. A lack of risk hedging may then significantly affect production costs and gross profit, while this could well not happen to Ferrero competitors due to their lower exposure to this commodity.

5 Risk and growing penetration into emerging markets

Long-term strategic trend of the Group shows a growing expansion of presence in emerging markets, both on local production side (new plants) and distribution.

In 2011 25% of Group turnover came from emerging markets, while in 2015 the corresponding share is 32%. In other words, one third of Group performance depends on markets having a higher degree of uncertainty than developed ones.

More specifically, the factors underpinning financial risks are:

- High volatility in economic growth: instability of spending power.
- High inflation rate.
- High volatility of exchange rate, and a medium/long term depreciation trend against the main currencies (USD, EUR, GBP, JPN).

Figure 1 shows the exchange rates against EUR of some currencies related to commodities supplies, from March 2013 to March 2014

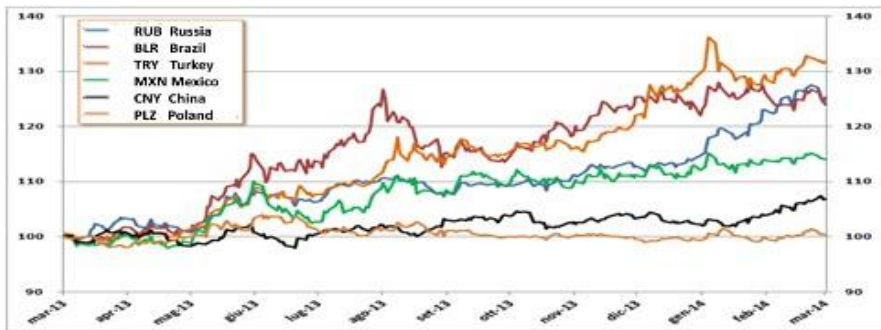


Figure 1 Exchange rates against EUR

- Positive correlation of economy inflation and currency depreciation rates in medium-long term
- High cost of carry (interest rate differential) for currency risk hedging
- Sudden strong currency depreciation (“bounces”) after relatively stable periods

Figure 2 shows two “bounce points” of EUR-RUB rate from 2008-01 to 2014-01 linked to a yearly 6,3% inflation CAGR in RUB markets.

So the strategic attitude of the Group is an increased attention to hedging risk related to operations in emerging markets. The following chapters will outline the main components of currency RM.

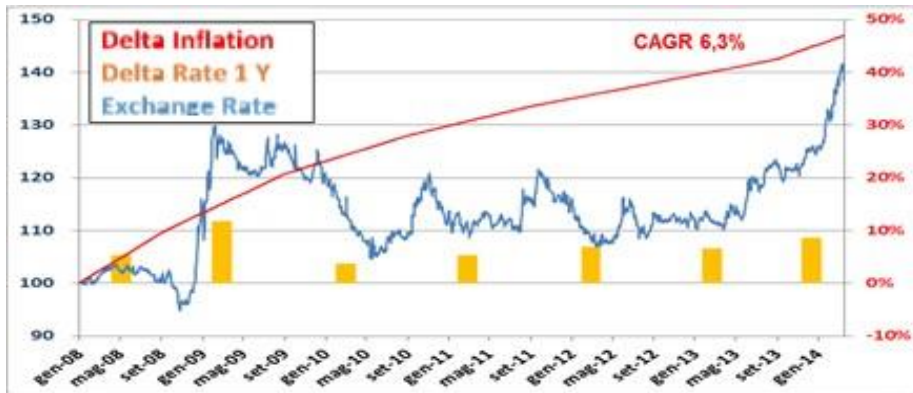


Figure 2 “Bounce points” of EUR-RUB exchange rate

6 Currency exchange rate risk management

Ferrero Group exchange rate RM is implemented through the following components:

- Group policy: to hedge exchange rates in a time horizon consistent with yearly budget, that states the target exchange rates to achieve.
- RM centralization: obtain a Group-wide view in order to perform Group consistent risk analysis and hedging of net exposures
- RM organizational structure: centralization of RM implies adequate decision power attribution to central unit, and timely information flows from local entities; so organizational chart is consistently affected.
- Balancing of long and short position in foreign currencies: so that to match and offset opposite sign gross positions
- A details set of rules and procedures regarding the choice and use of hedging instruments: hedging is bound to achieve Group policy goals, not to play the market

6.1 Risk management policies

The guidelines of Group RM policy are:

- to keep consistent to the flows of the budget timeframe, which is set as the first year of the medium-term Group strategic plan
- to guarantee a currency rate at least equal to the Standard exchange rate, which has to be set at real market conditions

- to ensure a zero impact of exchange rates volatility on Profit&Loss account.

Considering a hedging timeframe that starts 6 months before the yearly budget, so with a hedging horizon from 6 to 18 months.

Being Ferrero Group a non-listed entity, its RM policy appears to be much more flexible than policies of listed entities with same attitude to risk, regardless the accounting rules. The difference is due to less formal compliance requirements for the Group.

With this reference, in full compliance with the above policy, centralized RM may well take positions that could be in itself defined as speculative, according to accounting rules.

6.2 Risk concentration, organizational structure and duties

To achieve risk centralization within the Group, each operating company that bears a position subject to currency risk will reverse the position through inter-company hedging contracts to Central Risk Management entity, thus fully hedging its position risk.

The Central Risk Management entity receives such intragroup hedging transactions, as a risk clearing house, and can compensate and eliminate opposite sign positions. Thus only the net balance is subject to hedging operations in the market, with bank counterparts.

In term of organizational structure, Central Risk Management entity is a unit within Financial Operations & Analysis, that reports to Group Finance office, at the same level of Central Treasury Coordination unit.

In detail Central Risk Management entity includes the following operating offices, with specific segregated duties:

1. Front Office:
Performs the choice of hedging instruments and executes the operations interacting with bank counterparts worldwide
2. Middle Office:
Monitors risk exposures, risk balancing situation and operations, currency correlations and counterparty risks
3. Back Office:
Monitors the Operational risk and performs bookkeeping tasks (accounting, mark-to-market evaluations for Reporting, bank contracts and confirmations, etc.)

6.3 Risk detection

Currency risk detection start from the mapping and trend analysis of more than 40 currency pairs.

Yearly amount of traded currency pairs exceeds 10 bio EUR. But also so called exchange "hidden risks" are relevant.

Some types of such risks are:

- Contracts referring to EUR values, but with prices indexed to EUR-USD rate (e.g. price of “inside Easter egg surprises” is linked to CNH)
- Contracts in EUR or USD for commodities quoted at international exchanges that operate in foreign currencies (e.g. palm oil quoted at Kuala Lumpur exchange in Malaysian Ringgit)
- Contracts in EUR as regards invoicing and settlement, but with commodity price quoted in local currency (hazelnuts price linked to EUR-TRY rate)

The above set of positions with cross currency pairs and hidden exchange risks are treated as the Group currency risk portfolio, which doesn't match with the pure accounting position, but reflect the real inherent currency risk.

6.4 Risk neutralization strategy and practices

Considering the above mentioned currency risk portfolio, risk neutralization strategy includes the following steps:

1. Balancing same currency opposite short and long positions at Group level, so with a comprehensive point of view that may match a long position in a subsidiary with a corresponding short position within another subsidiary
2. The resulting net balance, still to be hedged, will be (partially) covered by balancing short and long positions through correlated currencies (e.g. long exposure in AUD with short exposure in CAD, monitored in real-time). Figure 3 shows the correlate trends of AUD and CAD - EUR exchange rates, enabling the above mentioned balancing.
3. Hedging the remaining unbalanced position by means of derivative instruments. The point will be dealt with in the following chapter.

7 Derivatives: rationale and management

According to Group policy, the use of derivatives is bound, as the other hedging practices, to ensure a zero impact of exchanges rates volatility on Profit & Loss account. Therefore, a detailed operating procedure for derivatives use has been set up and maintained, that includes the following steps:

1. Analysis of Exchange rate market scenarios
2. Hedging strategy elaboration
3. Choice of the proper hedging instrument
4. Obtaining a competitive instrument pricing from counterparties
5. Order and Execute the operation
6. Stress testing of the ongoing operation

Next paragraphs will outline steps 1 to 3.

7.1 Scenario analysis and strategy evaluation

Exchange rates result from different sets of factors, of which the most relevant are, in an approximate timeline from long to short term.

Table 1 Factors for scenario analysis

Long-Term	purchasing power parity trend of factor productivity	foreign debt comparative economy growth
Medium-Term	monetary policy balance of trade Mergers&Acquisitions Portfolio flows	fiscal policy interest rate differential direct investments
Short-Term	speculative positioning option market technical analysis	risk appetite market sentiment

The resulting picture helps forming expectations and leads to alternative hedging strategies. A relatively quick evaluation of each strategy outcome is performed through appropriate IT tools performing result simulation and giving monitoring information of the ongoing operations

7.2 Choice of instruments

The choice of hedging instruments is closely linked to expectations and to the adopted strategies.

The instruments currently used can range from the most simple forwards to the combinations of options bought and sold both vanilla style and path dependent style. In the following paragraph two examples of the latter instruments will be explained

7.3 Hedging examples with derivatives

Case 1: Cocoa price hedging has been performed using a Double-up accumulator, in GBP on London Stock Exchange (see Figure 4).

The spot price level suggests a possible upper bounce expectation within a range anyway lower than previous maximums. This instrument allows a cocoa purchase on a daily basis with a 8% discount versus spot, with a Knock Out clause (stop of purchases) higher than the previous maximum, and a double up

clause that would double the amounts to be purchased in case the spot at maturity is lower than the discounted price. The expectation is of accumulating purchases at significant discount in a variable amount within zero and twice the notional.



Figure 4 Double up cocoa accumulator

Case 2: Also in this case a path dependent instrument has been selected: the accumulator strategy allows to buy a variable combinations of forward TRY purchases and TRY call option purchases, in a range from 1/3 to 90% of total notional amount. The strategy has been chosen in order to try to maximize the hedging Optionality feature, based on an expectation of a relatively strong currency, at a lower level than the fade level clause. The amount and exchange rate level of future TRY purchases are known and sure, the uncertainty is only in the combination of options and forwards, so to minimize the possibility of overhedging in case of falling hazelnuts prices, as shown in figure 5.



Figure 5 EUR/TRY strategy

A relatively quick evaluation of each strategy outcome is performed through appropriate IT tools performing result simulation and giving monitoring information of the ongoing operations.

8 Hedging operations and accounting: some topics

8.1 Currency rate hedging in Profit & Loss account

In order to properly align the RM function activity to the long term strategy implementation, a suitable reporting system has to be set up both in terms of actual results tracking and of appropriate target settings.

The RM activity affects the Profit & loss account at different levels and from many point of views. The zero comprehensive impact has to be measured considering all the different impacts and the different point of views, either accounting or extra-accounting

These impacts are in particular evident in exchange rate variances in sales; exchange rate variances in cost of goods sold, both measured with reference to the budget Standard rates. To these impacts also all the Financial Result impacts have to be added up: realized FX gains and losses and all the hedging operations results, which cannot be reported in the Operating Result

But, as the RM activity includes also the hidden risks, an extra accounting measurement of the implied currency impacts has to be performed in order to get the complete picture of the overall currency impact: so in the price variances of the purchasing prices of commodities, the currency component must be detected and added up.

8.2 Currency RM activity in a medium / long term strategic view

When RM function successfully guarantees the yearly zero impact, the first step of the long term strategy has been reached.

The following step is to align the pricing policies in higher inflationary markets so as to make up for the expected currency depreciation implied in the high interest rate differential.

The task of the RM function is to support evidence of such long term relationship between local inflation and currency trend, to foster commercial strategies apt to keep the pace with currency depreciation, reflected in the yearly restatement of Standard rates at a generally lower level.

In a long term perspective, the standard exchange rates are expected to be set at an increasingly depreciated level: the RM function can only protect from FX fluctuations on a short term (one year) horizon, while the Standard rate adjustment in the following years can only be offset by appropriate pricing policies in the local markets (see Figure 6).

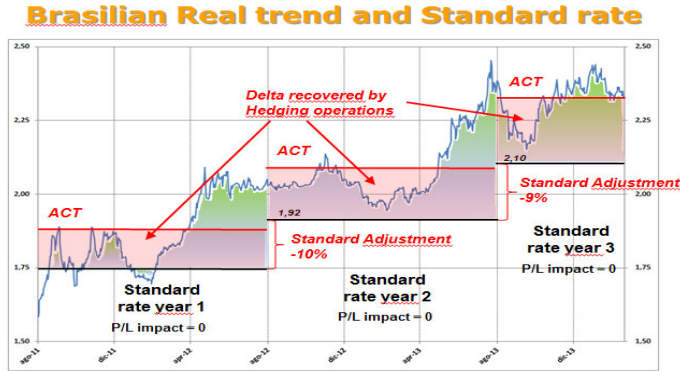


Figure 6 Brazilian BRL trend and standard rate

9 Conclusions

Using a case study approach, this paper focuses on corporate RM practices of a large multinational company whose primary goal is protect from internal and external events that would cause financial distress or make a firm unable to carry out its investment strategy (middle-long term view), while mitigate variations in corporate cash flows or value (short term view) is a side effect.

The key elements of RM policy analysed in the paper are:

- Outline of risk-related context: reference markets and underlying macroeconomic figures and trends (inflation, balance of payments, GDP, currency rates, etc.); risk exposures (FX and commodities), detection of hidden risks, analysis and choice of risks to hedge and not to hedge.
- RM function organization: centralization (through intercompany hedging contracts; re-invoicing flows; choice of settlement currency of intercompany contracts; currency-indexed contracts) in a central Legal Entity managed by a Group RM multi-functional team.
- Implementation of Group strategy in RM operations: matching commodity short positions with FX long exposures; correlation management.
- Choosing the right hedging instrument and strategy: a derivative strategy example.

The implementation of the above RM policy and operation guidelines has shown a significant trend towards a complete neutralization of currency fluctuation impacts (near-zero comprehensive impact on P/L account), including the

commodity price effect in its original currency. The consistent achievement of a zero P/L impact of hedging activities guarantees the alignment between RM results with Long Term strategy and objectives.

By reducing risk and expected costs of financial trouble, RM can also help a firm to achieve its optimal capital and cost structure. In fact, besides increasing corporate borrowing capacity, reduction of downside risk encourages comparative advantages in bearing certain financial market risks, consequent on information coming from normal business activities. Although such information may lead some firms to speculate on commodities or currencies, it is advisable a “selective” hedging, within a sustainable strategy.

The identification of market dynamics (including detection of hidden risks), an appropriate approach and re-design of RM policy, and a clear reading system of final results in the financial statements are all together necessary for a RM activity consistent with the long term strategy of steady growth with robust margins also in very turbulent contexts. More generally, the paper indicates that firms’ strategies may benefit from the re-consideration of their currency and commodity RM policies, changing and strengthening their competitive advantages.

The analysis of the case study outlines how the topic of RM in a holistic and strategic perspective would represent a great deal of attention from researchers in management and finance, and that practitioners would therefore have a well-developed body of wisdom from which to draw in formulating hedging strategies.

Finally, the empirical evidences highlight strategic areas of research and emphasize the role of qualitative research in corporate finance.

Future research trajectories could consider a benchmark analysis within comparable multinational companies to strengthen strategic and operative suggestions highlighted in the paper relating to changes and improvements in corporate rules, structure and processes.

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Triathlon Events

Authors

- *Małgorzata Miśniakiewicz, Professor, misniakm@uek.krakow.pl - Cracow University of Economics*
 - *Jacek Łuczak, Professor, jacek.luczak@ue.poznan.pl - Poznan University of Economics and Business*
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The analysis of the world of sports may show the growing importance of amateur participation. However, some sports events (marathons, half-marathons and triathlon events) possibly should be seen as at least semi-professional due to their difficulty and the necessity for intense trainings. In the last several years the number of running and triathlon events has been dynamically increasing. The popularity cannot be understood as a mere fad as the effort required within preparations for such contests is extraordinary. Such participation entails a new life style and amounts to a sign of a major change of people's habits.

In light of the above mentioned the very fact of occurrence of an event cannot be enough to call it an organizational success. Nowadays the organizational expectations are growing in the face of the professionalization of sports events. Despite the attractiveness of local runs we may observe the centralization of events into cycles, substantial sponsors, triathlon corporations functioning as patrons of local undertakings.

The quality of the projects (e.g. sports events) is connected to compliance with specific criteria. Before establishing the scope of runners' and triathlons' satisfaction, though, it is necessary to define model quality criteria for an event. These criteria will be diverse and dependent on the specified event as well as runners' profile. The next step is the risk identification as the basis of the risk management.

The article deals with closely interrelated topics - the quality of sports events, participant satisfaction as well as risk identification and management of the events. In this regard participants who make systematically preparations determine the organization of events. On the other hand, the events are necessary to achieve the participants' planned results.

The verification of the quality of sports events and participant satisfaction requires establishing the complete scenario of the research - defining objectives, theses and hypotheses. The basis for that is risk identification realized from the point of view of event owners and

agement (including sports events) and presents the research conducted in a focus group whose aim was to identify the key risks for a successful sports event (a long-distance run, a triathlon contest).

Keywords: risk identification; risk management; customer satisfaction; triathlon event quality; quality management in sport; risk management in sport.

JEL Classification: M10, M12, M50

1 Introduction

Marathon and triathlon events have surged in number and participation in the last few years, and their popularity is growing in Poland in different social groups, both among young people and the elderly. Running is one of the easiest accessible forms of exercise, however, the distance of it is something that matters. Running events as all of sport categories provide structured opportunities to test performance goals, interact with other enthusiasts, celebrate physical accomplishment and thanks to it improve health, body condition and stamina. It should also provide an attractive and at the same time safe spectacle for fans, support and promote charitable projects, promote the city, its surroundings and region, lead to the development of sports sponsorship (Budner 2014).

Due to the necessity of a system approach to preparation for competing in such events, we talk about the professionalization of amateur running sport events in Poland. Similarly, an increase in the number of runners is reflected by the increase in the number of running events in which they may participate. Such events include long-distance races: 10 km, half marathons (21.095m) and marathons (42.195 m) organized in various Polish cities, all year round. This is evidenced by statistics and public calendars posted on websites devoted to running. In the past few years the number of running events grew by as much as 20-25% yearly [Waškowski 2014]. For example, in 2015 in Poland there were 88 marathons held, in which 46 600 people managed to completed the run (an increase of 8.9% compared to 2014). For 2016 there are 95 marathons and as many as 70 triathlon planned in Poland.

more frequently than anything is seen as a crucial element of planning economic activity, managing projects and even making decisions in our private lives [Jajuga 2007, p.9]. Among numerous definitions we make an assumption that risk is a statement that something may go wrong, or an undertaking whose result remains unknown. [Kendall 2000, p. 54].

On this basis we can formulate two definitions describing risk:

Risk understood in the negative way (risk as a threat). In this approach risk denotes the possibility of obtaining an unexpected effect.

Risk understood in a neutral way (risk as a threat and an opportunity). In this approach risk denotes the possibility of obtaining an effect different from the intended one [Jajuga 2007, p. 9; Kaczmarek 2008, p. 257].

Authors of the present paper understand risk as the possibility of an event's failure related to participant's dissatisfaction. In general the authors do not focus on business risk of a triathlon event, however, while commenting the results some attention has also been paid to quality determinants linked with the budget available for organizers.

Risk is an integral part of any events, including sport activities, especially so demanding as a long distance run, and a run in combination with swimming and cycling like in the case of triathlon [Helms 2011]. That is why risk management is a fundamental component of managing an event and one of the primary responsibilities of the event's organizers. Unfortunately, it is often ignored or misunderstood, particularly by inexperienced planners, because they are unaware of their insufficient knowledge in some aspects, i.e. they do not know what they do not know. The same situation occurs with inexperienced participants of sports events.

What are the functions of risk management within the overall field of events management and the tools to perform these functions effectively? [Lieberman 2012].

Any event carries risks that are both known and unknown to the organizer and a sports event participant. While event directors are responsible for assuring the safest conditions possible, participants have an equally important responsibility to ensure activity readiness. While the management of known risks seems like an obvious step in the event planning process, there are additional responsibilities that race directors should take into account risks that cannot necessarily be anticipated.

There are many risks that are known to race directors such as hazards along the course, traffic, terrain, or obstacles, as well as participant management - giving proper instructions (run only along designated course routes), enforcing age parameters, and equipment requirements such as proper footwear. [Murphy 2009].

running race, considering that the activity area encompasses several kilometers rather than being neatly contained within a field or court. Participant injury or emergency plans should be carefully outlined and documented in advance and should contain the indication of kinds of first aid equipment that will be provided as well as aid locations, the ways of equipment transportation, if needed, to a particular location on the course etc.

Weather conditions involving heat, cold, or precipitation have unique considerations that should be addressed. Not only should event directors make special provisions to reinforce course safety or participant aid during adverse weather conditions (such as providing extra water on the course in hot conditions), but participants should also be made aware of any special needs brought about by such conditions (such as informing participants of water locations). [Murphy and Connors 2008].

Other risks in amateur sports events cannot be as easily known or anticipated by their directors. Such unknown risks include a participant's knowledge of his or her own health. Most deaths during marathons are the result of congenital heart conditions that participants themselves were not aware of. Other considerations of unknown risk include the fitness and readiness levels of participants. This element is especially important given the increasing emphasis on running as the activity for all ages and abilities. Event participants should be made aware of the risks of vigorous exercise as well as the specific risks associated with the race distance. Participants should also acknowledge that they are adequately prepared to the best of their knowledge. This information should be made available in participant waivers and should be re-stated during a pre-run briefing before the event start. [Gosling 2011].

Furthermore, run directors should consider the appropriateness of liability insurance coverage for their specific event. Race directors should check with their organization's legal counsel to determine their specific insurance needs. [Santana-Cabrera and Santana-Martín 2015].

All recreation organizations should engage in a continual process of examination and review of their existing events and risk connected with it to ensure that the environment is safe for participants, officials, volunteers and spectators. [Nerurkar 2012]

A failure to assess the risks involved in events can be disastrous as a result of:

- Loss of reputation;
- Financial loss;
- Damage to facilities;
- Injury to participants;
- Over-stressed workers;
- Loss of equipment;

stage the event.

The feasibility analysis should aim to identify any risks such as:

- The sufficiency of lead time (years, months, weeks) to organize the event;
- The date of the event and whether it clashes with any other events that may significantly affect the success of the event;
- The budget and whether the event can be run without incurring a loss;
- The degree of support that can be gained from the community, government, and parent bodies;
- The sufficiency of resources such as equipment, manpower, finances and facilities;
- The environmental impact and whether the event may cause a disturbance to surrounding community, and cause traffic congestion, waste, noise, and lighting spillage;
- The legal considerations such as permits, landholders permission, alcohol licensing, fundraising regulations.

In addition to the abovementioned, there need also to be a thorough examination of risks to human safety as sports events are inherently hazardous. It is the first and foremost duty of all event directors to implement strategies to ensure the safety and well-being of all event-goers. This responsibility even extends to a consideration of the risks involved if parents who are spectating fail to keep control of small children. For example, small children may be injured in the spectator stands by running and jumping from aisle to aisle, step to step and seat to seat. [Stokell 2014].

Risks to health and safety associated with events include:

- Surfaces that are not even, slippery, or have potholes, and which may cause participants or spectators to trip, slip and fall;
- Projectiles that are used during an event including balls, pucks, discuss, javelins;
- Obstructions that people may run into or hit the head on;
- Food hygiene and health safety;
- Competitive aggression resulting in brawls, abuse, harassment.

Accidents resulting in an injury are frequent in events, and event organizing committees will not be held responsible provided that a reasonable attempt to identify risks has been made, and strategies have been put in place to mitigate these risks. In short, the event organizing committee needs to be seen to have done a reasonable job in risk management. [Fitzgerald 2014]

A risk management plan is an essential aspect of planning any event.

It identifies all the potential risks that may arise from holding an event and then lists the steps event organizers will take to reduce or mitigate identified risks.

- cause damage to equipment, infrastructure or the event site, or
- harm the future of the event organizing committee and event itself.

Surely many risks are out of the event organizer's control. In this case it is important that the risk management plan details who is responsible for coordinating the safety of every person and what should be done if something that is out of the control of the event organizer occurs.

A risk assessment should consider:

- existing risks of the site;
- risks the event creates;
- external risks that the event organizer has little control over but may need to be managed at the event.

A risk assessment of the event site embrace considering the following questions:

- Will there be moving vehicles near the event site and could this pose a risk to pedestrians?
- Is there anything on the site that could become dangerous if there is inclement weather?
- Is there a body of water on or near the event site?

A risk assessment of the event and all proposed activities involves the following issues:

- Will there be a jumping castle or carnival rides at your event and how will the safety of event guests be ensured when on or near rides?
- Is there infrastructure being brought onto the event site? Who will ensure it is safely secured?
- Are you bringing vehicles on site and if so how will you manage the safety of people who are setting up near vehicles?

A risk assessment of all external risks includes considering the following questions:

- In the event that an evacuation of the event site is required who is responsible for ensuring that all people are calmly and safely moved?
- Are the likely guests at your event at a higher risk of requiring emergency services? If so have you advised local emergency services?

A complete risk management process before the event should include:

- The initial risk assessment;
- The developed Risk Control Plan;
- An Emergency Management Plan;
- Traffic Management Plan – where applicable;
- Waste Management Plan – where applicable;
- Site safety induction checklists – for staff working on the event or site.

It is important to remember that every event is different and has different resources available.

3 Research characteristics

Authors of the present article conducted preparatory research which according to the assumed plan should precede proper research planned for 2016. The aim of the research was the identification and evaluation of the significant of risk factors related to organizing and participating in a triathlon cycles held in Poland over the period of 2012-2015. The research allowed carrying out initial risk factor assessment of the identified risk factors. Consequently, it will enable the improvement of preparing sports events.

The research was planned and realized in three stages:

Identification of risk factors linked with organizing and participating in a triathlon event

Verification of risk factors and grouping

Assessing the significance of risk factor groups and conclusions.

The identified risk factors were grouped and assessed. Therefore, the following elements were subjected to assessment:

- Relevance of a given factor;
- Belonging to a specific group of risk factors;
- Significance of individual risk factor groups.

Within the first stage of the research all risk factors were identified on the basis of professional literature and the authors' experience. Risk factors were also grouped for the sake of clarity and enabling effective work for experts.

The research was conducted in the group of 10 experts, among whom 5 were representatives of organizers and 5 were representatives of participant in a triathlon cycle of events. Due to their experience they realized research tasks with the use of the Delphi method. The authors of the present paper prepared a list of risk factors and grouped them with the use of the Ishikawa diagram. In such a form the materials were distributed among the research participants who shared their opinions – they confirmed the significance of some risk factors or described them as inadequate. They also placed stress on some elements as well as additional risk factor groups. After due modifications the material was sent to the participants once again. With some experts remarks were exchanged several times.

The third stage of the research was the assessment of significance from the point of view of risk resulted from separate risk groups. The assessment was realized with the use of the ABCD Suzuki method. Due to the fact that the focus group included representatives of organizers and participant of triathlon events, we may state that the research results indicate their common view within this scope. Therefore, the results undoubtedly will be important for both interested parties because of their interests.

of specific risk factors (not only in reference to groups which are stipulated).

4 Characteristics of the research method

The cause-and-effect Ishikawa diagram is a graphical method which allows order occurring irregularities and mutual connection of the causes with the use of a chart. It is often used in a more general way in order to arrange the causes of a problem or issues linked with a given subject. Its essence is the graphical presentation of the analysis of mutual interrelations of causes at the root of a specific problem [Smith 1998]. It works perfectly in teamwork when combined with other quality management tools and techniques, e.g. brainstorm. It is said to be a hierarchizing tool whose main aim is to support locating the cause of a problem of our interest. The Ishikawa diagram is often called a fishbone diagram because of its graphical appearance. It is important to indicate interrelations within cause groups which is realized on the basis of standard groups, or individual groups which are dependent on the specificity of the analyzed matter. In the case of the present research the Ishikawa diagram was used in order to depict all risk factors mapped out on the basis of professional literature and the authors' experience. Subsequent versions of the diagram were prepared on the grounds of the results of sessions carried out with the use of the Delphi methods. [Łuczak, Matuszak-Flejszman 2007, p. 60-63]

The Delphi method is an expert method [Kędzior, Karcz 2007, p. 120], which may be used in order to develop long term forecasts relating to a selected problem or a phenomenon [Stępowski 1977]. The Delphi methods belongs to the group of research methods and opinion analysis. Due to the preparation of a scenario for future event in the course of the research it is also seen by some specialists as heuristic method [Antoszkiewicz 1990, p. 212-223; Lisiecki 1997, p. 110; Mikołajczyk 2002, p. 105]. In professional literature there are several types of the Delphi method mentioned, *inter alia* SEER, PROBE, SOON [Głowacka 2000]. The Delphi method was invented in 1950s', however, it is difficult to attribute this achievement to a single person [Łuczak 2008, p. 218-219]; some sources indicate O. Helmer and N. Dalkey from RAND Corporation. [Łuczak 2008, p. 218-219] The method as created as a result of increasing interest in statistical opinion analysis popularized in 1960s'.

The Delphi method consists in sending questionnaires to experts who are supposed to share their opinion about the expected course of actions. During research the identity of experts is not revealed, they must not communicate with one another which eliminates authority influence and persuasion. Furthermore, the most radical opinions are rejected which boosts the impartiality and objectivity of research results. Contrary to brainstorm, in the Delphi method group

All participant of the research were asked to assess the significance of risk factor groups which was realized with the use of the ABCD Suzuki analysis. This method is a very simple and commonly used (in particular in the works of Japanese quality groups) tool which allows defining the significance and caliber of specific causes. The basic assumption of this method is active participation of a carefully selected team of session participants so as they can present the full within a given scope together. Team members should be specialists in their fields, know the analyzed problem from their practice. Moreover, they should be properly trained in the area of applying quality management tools and techniques as well as they ought to be motivated to work [Łuczak, Matuszak-Flejszman 2007, p. 60-63]. The application of the method consists in the individual assessment of factors, in the case of the present research the assessment related to risk factor groups in the context of organizing triathlon contests. After having realized the individual assessment a collective assessment form is prepared. In the present case the 1-10 scale was used where a higher number means bigger significance of a given factor group.

5 Research results

The first stage of the research was defining risk factors for the success of a triathlon contest as well as risk factors relating to participant satisfaction on the basis of professional literature. Thus, dozens of sources, monographs, papers as well as mainly elaborations, reports and comments linked with sports events, including legal requirements related to organizing mass sports events, were analyzed. The result of the work was presented to expert evaluation. First, the experts verified risk factor groups and their component elements. As a result of this stage, 13 groups and over 100 risk factors were identified:

- **Medical safety** (demanding medical certificates, participant declaration, accessibility of medical help points, accessibility of ambulances, medical consultation possibility, medical support on the swimming course);
- **Organization straight before the contest** (access to transition zones, deposit, toilet accessibility, organization of the start area, accessibility of information, assuring protection from unfavorable weather conditions, possibility of taking a shower, a parking lot);
- **Swimming course** (time measurement, attractiveness of the course, number of participants hindering the swim, width of the course, water cleanness, water temperature, division into starting waves, comfortable start);
- **Cycling course:** time measurement, attractiveness of the course, number of participants hindering the ride, technical support, width of the course in light of the number of participants, surface quality;

- the completed distance, information about the time;
- **Transition areas:** distance to cover a given stage, difficulty of finding your rack space, ample space for a bike and other items, organization assuring even chances for all participants, access to toilets;
 - **Organization of the post-race zone:** accessibility for non-participants, beverages, catering in the finish area, organization of the finish area, possibility of massage, pools with water, access to showers, access to the deposit;
 - **Organization of distributing start packages and expo:** accessibility of volunteers, information accessibility, number of exhibitors during the expo, location;
 - **Personal data protection:** unambiguity of information within the scope of data security, demanding participant declaration, free access to data, possibility to modify and cancel;
 - **Post-race information:** photographic/video services, information about next contests,
 - **Participation costs:** admission, traveling costs, costs related to the necessary outfit, accommodation costs before and/or after the run;
 - **Packages and medals:** a start package, the price of the package, a rich package, a rich package/reasonable admission, a bib, a medal, designing the medal;
 - **Participant self-organization:** satisfaction from the preparation of the run, conscientious realization of the training plan, presence of relatives, favorable weather, festive atmosphere, big number of participants, popularity of the run, support from measurement devices (e.g. a watch, a heart rate monitor, a pedometer, GPS), mood and attitude (independent of the run), listening to music during the run, adequacy of outfit for the weather conditions, using mobile applications during the run, using energy gels, using isotonic beverages, diet prior to the run).

Expert opinions were based on the data presented in the form of the Ishikawa diagram. Consequently, there were a dozen or so versions of the analysis. Next, factor groups were evaluated in the context of their significance with the use of the Suzuki method – first by each expert individually and then their assessments were gathered in the collective form. Figure 1 shows the results of the third stage of the research.

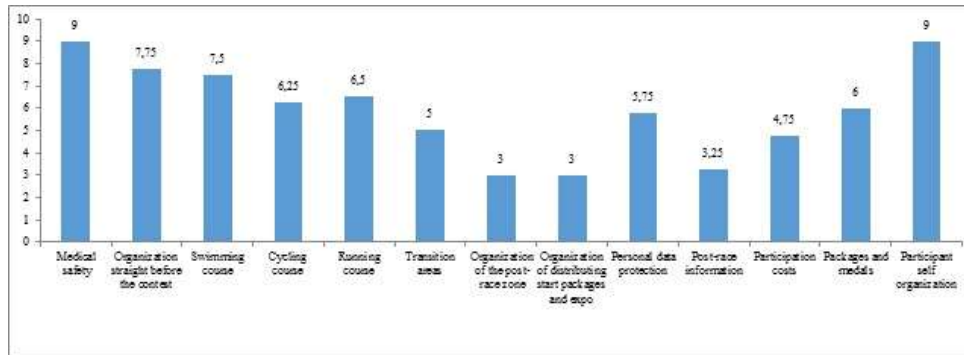


Figure 1 Assessment of risk factor groups relating to triathlon events (Source: own research)

Among factor groups with the biggest uncertainty we include medical support and participant factors. The former received the top value from almost all representatives of organizers which is surely linked with the sense of responsibility. However, despite the fact that triathlons did not take this aspect for granted, they did not consider it overly significant. Event participants gave top values to participant factors. It stems from the fact that they take part in the events mainly for realizing their own goals, and thus, their realization is seen by them as mostly the matter of their performance

5 Conclusions

The present paper presents the results of research conducted in the context of triathlon event risk assessment. In light of the planned global research conducted among organizers and participants the presented research may be seen as preparatory and trial. The research indicated the most significant factors, i.e. safety factors and participant factors, including the realization of training plans, diet, motivation etc.

The proper research will aim at assessing the significance of risk factors, and not only risk factor groups. In addition, the results of the presented research unequivocally prioritize the organization of triathlon events.

prehensive and will have to be addressed at a more personalized and detailed level for each particular event.

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The Integrated Management System as a Tool for Risk Management

ESG (CSR) criteria and risk indicators in credit assessment and probability of default evaluation

Authors

- *Giovanni Lombardo, Research Fellow, giovanni.lombardo@unige.it. - University of Genova*
 - *Novella Talà, Research Fellow, novella.tala@dime.unige.it. - University of Genova*
 - *Silvano Cincotti, Full Professor, silvano.cincotti@unige.it. - University of Genova*
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Abstract. The study investigates the relationship between responsible business conduct and financial performances. Within the risk management, the analysis takes into account the responsible actions (according to environmental, social and governance, “ESG”) affecting the riskiness of the enterprises from a creditworthiness improvement and probability of default reduction perspective.

Specifically the study regards the small, medium and large enterprises of the Italian manufacturing sector. The enterprises considered took part in European funding which envisaged rewards schemes for the stakeholders adopting responsible business conduct according to the definition OECD and COM/681/2011/CE. Cluster analysis and regression analysis, carried out using empirical database, point out that for small enterprises there are positive correlation between ESG and debt ratio, number of local unit and employees; for medium enterprises there is a robust correlation between ESG and ROI as well as code of ethics, risk assessment and improved company structure. In the large enterprises the ESG behaviors are connected to the increase of the internationalization, the relocation of production, the use of the business welfare and the risk assessment in order to reduce the institutions’ administrative responsibility.

Economically and financially speaking, the large enterprises ESG-oriented have improved performances according to ROA, ROI, ROS, ROE indicators, long-term debt and debt ratio.

Keywords: probability of default (PD) - Basel agreement - CSR - risk assessment - risk management - ISO 31000, bank.

JEL Classification: A13, G2

1 Introduction

The concepts of “Responsible Business Conduct” (RBC, taken from OECD Guidelines for multinational enterprises), ESG (Environmental, Social & Governance issues) and Corporate Social Responsibility (CSR, as specified into COM/681/2011/UE) are considered into this research as drivers of a better financial risk assessment of companies. These concepts are related to SMEs and large companies, into process of credit assessment linked to the Basel rating and the evaluation of their probability of default.

Banks and financial institutions, in fact, when has to evaluate management practices in the credit rating process, increase the attention about assets, securities, lending, loans and mortgages, balance sheets but also intangibles assets and possible claims about environment and social aspects; especially if these aspects might contribute to decrease cash flows in the long run and/or the stakeholder (or customer) retention.

The concept of “risk” related to ESG aspects is also the mainstream of the new Directive 2014/95/EU of the European Parliament and of the Council as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

An holistic management model, which takes into account also CSR or ESG criteria, might be the winner strategy in the path towards a better value-creation assessment. And in this field the research proposes the following research question:

1. Are there correlations between companies' ESG (CSR) risk-oriented and financial performance? (If so, can we underline some kind of them?).

The final objects and aims of the paper are (1) to demonstrate a positive correlation between ESG (CSR) practices and economic performance, also considering the company's riskiness; (2) to identify better financial conditions which the banks can propose to companies into loans contract or in other operations, where was estimated a less probability of default.

To reach the aims, we will analyze the best practice of Italy in the development of such a platform for measuring a strategic, innovative, socially and environmentally oriented competitiveness aimed at determining the impact of companies on society, linked with an European database which contains all balance sheet of SMEs and big corporation.

2 The relation between responsible business and financial sector

Lots of studies highlight the advantages to be a socially responsible company: increased reputation and trust of partners, lower costs related to workers and company management, increased productivity of human resources, lower contributions for insurance against industrial injuries, improved safety in the work-

place, more sales and customer loyalty, lower costs of supply, growth of the total value of the company in terms of intangibles (e.g. Berman et al., 1999; Christmann, 2000; Graves & Waddock, 2000; Griffin & Mahon, 1997; Margolis & Walsh, 2001; Moskowitz, 1972; Richardson et al., 1999; Rochlin & Christoffer, 2000; Russo & Fouts, 1997; Wood & Jones, 1995).

Nevertheless, in the relation between businesses and the financial and public system (Banks, Mutual Guarantee Societies and Guarantee Funds, Local Government), CSR practices do not automatically lead to a positive evaluation by e.g. the financial institutions.

Therefore, the proposal of a CSR platform mapping companies' actions and providing CSR indicators for MNEs and SMEs, leads to recognize CSR practices as signs of credit capability, value production and company's riskiness. The CSR platform, whose first goal is to drive companies towards a sustainable competitiveness, serves also as an instrument to detect the main risky areas of companies' value chain and operations. Socially responsible companies in fact, besides producing higher ROE and turnover per worker, they are less subject to market volatility, affected by external shocks (Webley & More, 2003; Wood & Jones, 1995).

In the "overriding procedure" the financial sector, according to the "Basel Capital Accord", began to consider not only the quantitative data taken from financial reports, but also "collaterals", or qualitative components hugely affecting the "risk" factor in the specific sectors of activity.

The adoption of some specific CSR practices (mainly qualitative components) leads also to diminish risks such as a negative impact on cash flows, or worse relations with major stakeholders and strategic partners. A socially responsible leadership is more likely to perform as follows: by lowering absenteeism and turnover, it lowers training costs; by increasing employees' loyalty, it reduces strikes and disputes arising for unfair competition (Fombrun & Shanley, 1990; Zyglidopoulos, 2002; McWilliams & Siegel, 2001); by increasing involvement of local communities and consumers, it leads to lower risks of boycotts and litigations; finally bettering health and safety conditions, it diminishes injuries and social costs (Barney & Hansen, 1994; Nahapiet & Ghosal, 1998; Waddock & Graves, 1997).

An environmentally responsible leadership, adopting procedures and plans for managing crises, or insurances against the environmental risks, reduces costs and losses in case of specific problems in this area (Godfrey, Merrill & Hansen, 2009). Lastly, considering the risks along the supply chain, socially responsible companies controlling the supplier from an ethical point of view (e.g. adopting codes of conduct, safety standards etc.) contribute to limit risks related to safety and the interruption of production, thus providing financial institutions with a higher guarantee of their activity.

3 ESG (CSR) Italian Platform and data sources

The effort to encourage responsible business at regional level lead to develop a mix of compliance requirements and voluntary measures, often difficult to evaluate because of their incomparability. In 2012, the Italian government (including the Ministry of Economic Development, Labor and Agriculture, the Italian Regions, OECD-Italian National Contact Point and the Italian institute against industrial injuries (INAIL)) started a project aimed at creating a common scheme willing to sustain innovative socially responsible oriented firms. The project, lasted in 2014, produced a very simple online checkboard tool, through which SMEs –but also MNEs- can proceed with a self-assessment, obtaining a CSR diagnosis. One of the best result of this tool is to help SMEs to recognize if they are already a CSR oriented company. Very often SMEs are unaware of what they are doing, the so called “implicit CSR” (Matten and Moon, 2008) or “sunk CSR”. The second result of the platform is that SMEs, recognizing their CSR profile, improve their attractiveness facilitating their involvement in the supply chain of sustainable MNEs.

The tool unifies CSR indicators for MNEs and SMEs, regional standards, INAIL standard, GRI-4, SA8000 certification scheme, ISO 26000 Standard, OECD Guidelines, UN Global Compact principles, in a unique platform, capable to evaluate in depth the positive externalities of business, their social and environmental performances and the respect of requirements included in tenders and call for funding (e.g. the EU funding program 2014-2020).

The final framework recognizes six strategic areas of CSR actions:

- Business organization and administration (governance and business model);
- People and Work Environment;
- Clients, Customers, Consumers;
- Suppliers;
- Natural environment, local community and relation with the Public government;
- Innovation and competitiveness.

For small, medium and large firms (excluding only the micro enterprises), a set of specific indicators, namely indicators for the “management of major risks”, identify five major areas of sector-specific risk:

- food industry and agriculture;
- Building, construction and manufacturing;
- Pharma;
- Business facilities, finance, banking, insurances;
- Utilities (energy, water, electricity, gas, waste recycling).

The entire system helps companies of different size to test their CSR areas, through a material evidence: the platform provides information for firms suggesting how they can provide a “proof” of their CSR behavior (internal documents, corporate statement, policies etc.); this, in turn helps the banks to check the material evidence of a CSR practice. Moreover, the platform provides con-

crete indications to banks to find sustainable issues into SMEs (Porter and Kramer, 2006; Porter and Kramer, 2011; Crane et al., 2014).

The main feature of this platform is to link environmental and safety issues to the concept of risk. Risks' analysis, in fact, cannot forget indicators affecting the natural environment or health & safety, according to the sector of activity. An assessment that does not take into account the environmental and social aspects, could not figure out if a company has managed well its own risk. Any action related to ethical and sustainable business process at higher risk, may:

1. limit the risks of the event that cause a negative impact on cash flow, such as a fine or other penalty tax, economic fine or temporary interdiction;
2. limit the possibility of abandonment of the company, by some of its strategic partners;
3. limit forms of contrast (boycott).

Regarding information taken from platform, data of about 3000 companies were collected by (1) the Italian CSR platform of indicators, who collects national tenders where there are awards for companies reaching a minimum level of CSR. The platform has been developed by the Italian government in order to map companies' CSR actions and to recognize CSR practices in terms of signs of credit capability, value production and company's riskiness; and by (2) "AIDA Bureau Van Dick European database", containing all balance sheets and economic/financial indicators of European big and SMEs companies.

From all ESG platform criteria were extracted only few kpi that, more than other, show the risk profile of the company, from the operative and managerial perspective. A qualitative analysis was carried out, by focus groups and Delphy methodology, with a sample of qualified witness taken by 4 big international banks, 3 public administration, 10 listed enterprises, 20 SMEs of main sectors and 2 universities. This research found 27 ESG kpi operational-risk related, as follows in the next table.

Table 1 ESG kpi operational-risk related

Safety at work
1. Safety initiatives, in addition to legal obligations according to models of integrated prevention (SGS). (Eg. Whistleblowing.
2. Rate in the year of at least 1 training course in the field of health and safety at work, in addition to those required by law, specific of its productive sector
3. Realization of new best practices to improve the health and safety at work validated by Public Administration & Ministry of Labour & Social Policy
4. Contract clauses about compulsory reporting and collection of injuries of contractors and subcontractors (for activities carried out within his production process) and taking it into account the identification of the measures of prevention and protection. Such provisions shall be systematic and methods of data collection should be formalized in some way, for example with a procedure (including informatics one).
5. Design and / or construction and / or purchase of ergonomic work tools, with the cooperation of the employees and Unions
6. Voucher or medical benefits for the diseases in risk and related to activities, beyond the legal obliga-

tions
7. The company use, for scheduled maintenance of equipment, machinery or plant, a company specialized for specific equipment, machinery and equipment
8. Monitoring plan and instrumental improvement compared to the current regulations, on exposure levels of workers to one or more chemical, physical and biological systems through automated monitoring or through the assignment of monitoring, with specific contract or specialized companies.
9. Using healthy building materials
10. Adoption of a procedure for the systematic collection and analysis of information about malfunctions and / or on the breaks occurred on the machines, systems and individual equipment
Governance, communication
11. Presence of CSR manager (Possibly independent or subordinate only to BoD or CEO)
12. Presence of environmental report and / or social or integrated reporting <IR>
13. Presence of company on open platforms of discussion (Internet forum web blogs, if moderated) or Improvement in relations with outside world, as part of collaborations for innovation; or projects with universities and other research organizations
Environment & waste
14. Monitoring of Energy consumed, % energy used from renewable sources, rate of energy consumption, rate of renewable energy consumption (scoring if there is an improvement compared to the previous year)
15. Installation of devices that allow savings in water, energy, and/or reducing direct/indirect emissions
16. Rating of consumption and CO ₂ impacts, water, other emissions and fuel consumption; energy emissions produced Score when improved compared to last year
17. Packaging recovery or other forms of saving on materials and energy produced at customers, in addition to legal obligations. (scoring if there is an improvement compared to the previous year)
18. Plan to reduce packaging
19. Use of eco-packaging / eco packaging
Compliance & certifications
20. Presence requirements of "Rating of Legality" Antitrust (advanced level, two stars)
21. Presence of anti-corruption procedures or "Protocol legality" Prefecture agreements with "Third Sector" or Anticorruption Plan
22. Application of HSE rules in foreign branches
23. % of suppliers that have adhered to standards and participation in networks, ISO26000 and SA8000 and Global Compact (scoring if there is an improvement compared to the previous year)
24. UNI ISO 14001 application
Supply chain
25. Presence of sustainable suppliers (Minimum level of n° of suppliers: 25% in large companies, 20% in medium enterprises; 10% in small businesses) or evaluation of the most important suppliers (those with greater impact on the value chain)
26. Monitoring of compliance, from suppliers, of their code of conduct or plan for human rights, through visits to the suppliers themselves, interviews with managers and employees
27. Definition of fair contractual terms, such as reduction of prices charged by manufacturers, reducing delivery times, just-in-time to eliminate cost of inventory management, penalties for delays in deliveries etc., provided so specifically prevent the adoption of such practices as: <ul style="list-style-type: none"> • Setting of excessive hours during periods of demand peak; • Remuneration under minimum defined in nat. legislation;

- Objectives of production to meet other urgent delivery;
- Opposition to the establishment of trade unions, to prevent workers from asserting their rights.

Specifically, the enterprises considered belong to manufacturing sector. This sector includes textile, mechanical, electronic and construction industries which are subject to social and environmental impacts unlike the companies operating in the tertiary and services sector. In fact, those have a long supply chain and keep indirect contacts with the raw and semifinished material suppliers. The intermediary buyers monitor the productions which take place in the country having inadequate protection of human rights and insufficient laws in the area of environmental protection.

4 Methodology

Cluster analysis is a technique to partition a set of objects into clusters, in such a way that the profiles of objects in the same group are very similar and the profiles of objects in different groups are quite distinct.

In this study the Clustering method used is k-Means which divides data into k mutually exclusive clusters. This technique assigns each observation to a cluster by minimizing the distance from the data point to the mean location of its assigned cluster. Each cluster in the partition is defined by its member objects and by its centroid, or center. The centroid for each cluster is the point to which the sum of distances from all objects in that cluster is minimized. K-Means computes cluster centroids differently for each distance measure.

Figure 1 presents the data of the database relating to the large enterprises organized in 3 clusters.

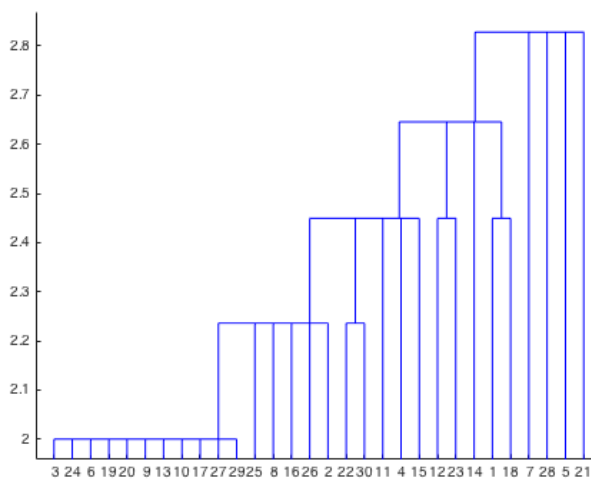


Figure 1 Dendrogram relating to large enterprises

The cluster analysis, carried out separately for databases presented in the previous section, allowed to classify the observations into three clusters; for every cluster was computed the mean of the “CSR indicators” and the mean of each of the variables belonging to the classes “statistics”, “economic indicators” (see first column Table 1). Later, multiple linear regression analysis was performed between “CSR indicators” and all variables.

The Table 1 shows the correlation coefficients, which indicate how well data fit the model, resulting from the analysis regression for small, medium and large enterprises.

Table 2 Correlation coefficient between “CSR indicators” and all variables for small, medium and large enterprises.

Variables	r(SE) Small Enterp.	r(ME) Medium Enterp.	r(LE) Large Enterp.
turnover	-0,3212	0,0375	0,5538
export	0,0141	-0,2959	0,9994
age	-0,8298	0,4309	-0,3913
employees	0,5741	0,6659	0,5733
subsidiaries	0,9788	-0,8162	0,9586
gender	0,1921	-0,6575	-0,9871
part time	0,2481	0,9933	0,7231
empl.not stabiliz	-0,5302	0,4387	-0,3029
code of ethics	0,2061	0,9696	0,9996
Eco & financial variables			
EBITDA	-0,0129	0,3107	0,5084
EBITDA/VENDITE	-0,3908	0,0748	-0,0645
ROA	-0,8590	-0,8196	0,9104
ROI	0,0573	0,8899	0,8674
ROS	-0,9240	-0,0595	0,7799
ROE	-0,1967	-0,8342	0,7965
extra costs/extra earnings (%)	-0,6007	0,6759	0,8753
long run debts	-0,1385	0,2623	0,8753
indeb. ratio	0,6358	0,1071	0,9197
debt/equity ratio	0,1804	0,5710	-0,9636

Source: Authors' elaboration from DIME-Businessethics.it-Italian NPC OEDC database

5 Results

Firstly the research allowed to identify ESG indicators related to the enterprises' operational risk management. The indicators arose from a study carried

out by listed companies and SMEs, banks, financial worker and private equity funds as well as business owners and university researchers.

The results point out that:

Regarding the small enterprises, if the local units increase therefore increase responsible business actions implemented. Here, the enterprises, small in accordance with the European definition, have relocated activities and use branch and storage for accomplishing transfers and manufacture of detail.

We are speaking about the enterprises that monitor their environmental impacts, according to the CO₂ emissions and have a large number of employees. Indeed, we can observe that there is a moderate correlation between CSR and personnel. That is in accordance with the structure company theory since companies, having a growing size, adopt well-structured processes, procedures, protocols and trained staff.

It is worth noting that CSR are implemented, with particular attention, by the small and young enterprises and the start up. This outcome points out that the new generations of business owners have greater sensitivity to the issue.

Regarding the correlation between CSR and economic performance, it is worth noting that CSR increases therefore the leverage increases also.

This evidence shows that small enterprises vigilant in monitoring their impacts, obtain funding so maintain a creditworthiness in the long run.

However, this results don't translate into economic performance, since there aren't correlations between CSR and the fundamental indices related to the return on investment or equity. Consequently, the analysis suggests that the medium enterprises, amongst the small, need to invest for expanding therefore keep profits and assets for funding themselves.

Moreover, there is a moderate correlation between CSR and temporary employees. This bring to mind that these enterprises stabilize the condition for employees improving the conditions for fundamental stakeholders to the detriment of the profit

From the perspective of risk management, this means that they have less likely to lose strategic stakeholders; but, in the long term, this feature could translate into continuous cash flow.

Concerning the medium enterprises, the analysis shows that the operational return on investment (ROI) rises according to the responsible business conduct growing. Within the risk management, this data is critical in fact, from the point of view of the bankers, the increase of the probability of return of the cash flow and the decrease of the probability of boycott by enterprises' stakeholders are related to the "core business" management.

In this regard, it is worth remembering that the financial institutions, such as Generali SGR, Intesa Sanpaolo Bank, UNEP, Caisse des Depots, evaluate the risk related to ESG investigating the relationship between CSR and companies' core business, in order to business riskiness and the application of suitable anti-risk safeguards.

In medium enterprises, CSR increases according to the decrease of ROE indicator and the increase of debt/equity ratio; these outcomes point out that medi-

um enterprises search for capitals of a third party and use their capitals for their investment plans.

However, the features of these enterprises point out strong positive correlation between the increase of CSR and the increase of the number of employees, such as those use flexible forms of work and part-time. Regarding medium enterprises increases the adoption of code of ethics. Within the risk management, these results suggest that:

- a. The most sustainable enterprises have well-structured business organization, with a division of the tasks within the value chain. There are core activities and support activities monitored by qualified owner. These features reduce the overlap of the tasks and the riskiness.

In fact, business processes are more monitored, avoiding a centralization of functions and keeping a "segregation of duties", which is the main rule for evaluating the organizations' riskiness.

- b. The most sustainable enterprises formalize the ethical codes implementation. Indeed, those represent a fundamental safeguard within the organizational and management models. The models exempted the responsibility risk assume a constant risk assessment regarding business processes within the OECD legal standard concerning anti-corruption and social and environmental risk mitigation.

In Italy these standards have been adopted by Legislative Decree no. 231/01, whereas in Germany, France, Portugal, United Kingdom and USA are in force equivalent regulation in order to inserting ethical safeguard and CSR for decreasing operational risks.

- c. The medium enterprises paid to social responsible management use part-time. This result point out that they have particular focus on reconciliation of work-life balance and work.

Within the risk management, it is fundamental the monitoring business welfare and well-being of the employees in order to dissuade strategic employees who could move to the competitor.

Regarding medium enterprises having several branches, we can note that there is a high negative correlation between CSR and local units. This outcomes points out that unlike other enterprises, the medium enterprises don't manage in a ethical way transfers and processes in comparison with those keeping only branch or centralized activities. Might be they are more focused on local community where is situated the headquarter.

Within risk management and according to brakers, this issue advises to take care in the assessment of the medium enterprises having several branch; in particular where there could be risk of pollution or risk of transport of dangerous substances.

Regarding large enterprises, the analysis shows a robust positive correlation between CSR and Export. This means that the companies devoted to the evaluation and management of the processes related to ESG appeals to the foreign partners and the supply chains social and environmental oriented.

This result is linked to the other positive correlations between CRS and number of local units; number of employees using part-time; adoption of the code of ethics and risk assessment for prevention of the institutions' administrative responsibility.

Here, again, the large enterprises devoted to CSR have safe management of transfers among local units; employees protected; well-structured processes related to operational risk assessment and code of ethics within the operational management and into supply chain.

We can observe that for those enterprises "CSR oriented" ROA, ROI, ROS and ROE raise, according to the increase of the ESG management. The same remark is valid for EBITDA that records a smaller increase.

Another issue of considerable interest is the correlation between CSR and core business.

It is interesting to recall the British Petroleum case: the company caused an environmental disaster, neglecting the safety monitoring of the undersea pipelines and the adoption of health and safety standards.

This instance points out that as regards the assessment of risk, it is fundamental the ethical criteria implementation in relation to "the core business" instead of philanthropic initiatives.

Regarding financial organization and balance sheet, these enterprises have a trend of increasing of the long-term-debt and the "debt ratio"; therefore, these companies have an increased creditworthiness, so they can invest in research and development, new projects, innovation and external expansion. The robust negative correlation between CSR and debt/equity ratio confirms that these enterprises are solid so they support a structure with themselves equity.

6 Conclusions

This paper investigates the relationships, not yet deeply studied in the literature, between Corporate Social Responsibility (CSR) indicators, risks management and capability in order to increase trustworthiness within the credit rating processes.

Due to the interlinkage between CSR, finance and risk, the assessment that banks carry out to calculate the probability of default - based on Basel standards - includes fields which are specifically monitored through some CSR or ESG indicators, linked to environmental, social or security risks.

As a result, it is possible to use specific CSR indicators as an acknowledgment of the companies' capabilities to create value and have a low risk of default. Consequently, sustainable companies are more likely to obtain:

- a. an interest rate on loans/financings which is lower than the market rate, and which is rewarding in comparison to what other non-CSR companies and customers are able to obtain;
- b. lower spread;
- c. lower fees on services;

- d. a longer time period for repaying financing in comparison to the usual time fixed by the bank, having in this way a longer lapse of time to repay disbursed funds.

Therefore, the use of qualitative, relational, intangibles-related and environmental indicators linked to the risk assessment of companies, improves also the application of the Basel rating formula.

In conclusion, exploiting the positive interlinkage between CSR and finance and risk, the banks can calculate the probability of default - based on Basel Standards - including fields monitored through some CSR or ESG indicators. This approach allows to understand the companies' capabilities to create value and demonstrate low risk of claims, fines and default.

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Risk management: a proposal for the practice of the “New” ISO 14001: 2015

Authors

- *Giuseppe Martino Nicoletti, Full Professor, giuseppe.nicoletti@unifg.it. - University of Foggia*
 - *Alfredo Ernesto Di Noia, Research Fellow, alfredo.dinoia@unifg.it. - University of Foggia*
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Abstract. Over twenty years of history of standardization of environmental management systems (EMS) have not been enough to slow the worsening of environmental problems. The same 2004 revision of ISO 14001 has failed to grasp the urgency of the necessary changes, so that certified organizations could make a meaningful contribution to limit their environmental impacts. Instead, this need is clearly highlighted by the 2015 version of the same standard, in which the emphasis is placed firmly on the “environmental protection”, as opposed to the previous approach that targeted the “pollution prevention”. This new approach takes the form in the adoption of three key concepts that characterize the implementation of the new EMS: to operate in the “Life Cycle Perspective”, to analyse the “context” of the organization, to integrate in EMS of the “risks and opportunities” to the environment and to the organization.

The objective of this paper is to understand how much some highlights of risk management introduced by ISO 14001:2015 were already perceived as “important” by organizations certified in the previous version of the standard.

The study analyzes the results of a survey conducted by administering a questionnaire to all the ISO 14001:2004 certified organizations of the province of Foggia (Apulia region, Italy). The analysis was carried out using a consolidated multi-criteria methodology, called “Analytic Hierarchy Process” (AHP). The survey results show that aspects closely related to the “risk management” are generally rated as minor, with the exception of “substitution of materials harmful to the environment with other more environmentally friendly”. It should be emphasized that the results are relevant to the type of companies surveyed. Therefore, the AHP, allowing all the stakeholders to assess the degree of understanding of the elements of risk management, if properly used, could better guide the “decision makers” in strategic decision-making aimed at “managing” the identified risks.

Keywords: Environmental Management System, ISO 14001, Risk Management, Analytic Hierarchy Process, Benefits.

JEL Classification: M14, Q56, C44.

1 Introduction

In recent decades, the environmental crisis worsened. It is generated mainly by a huge industrial development, with a widespread disinterest in adopting an appropriate culture of “Corporate Social responsibility” (CSR) and related management tools capable to deal with the serious environmental problems created. In particular, the business community has not properly managed the “critical issues” related both to the depletion of natural resources and environmental damages caused by production activities, on a global and local level, through the whole value chain, from raw material procurement to products used by final consumers, until the “end of life”. Among the CSR strategies to solve critical issues, there was an option for the firms to implement an environmental management system (EMS), by adhering to voluntary standards, such as “ISO 14001” certification and EMAS registration. This accession could meet the need of those companies really concerned about managing environmental issues generated by their production processes through the adoption of appropriate instruments able to face them in a more rational and systematic manner.

These tools have taken shape after the decisions taken at the Earth Summit (United Nations Conference on Environment and Development), held in Rio de Janeiro in 1992. Indeed, the European Union introduced Emas registration (Council Regulation no. 1896/1993), and the International Organization for Standardization (ISO) has adopted the ISO 14001:1996 certification of the EMS.

The latter was particularly focused on “pollution prevention” approach. After eight years, the ISO adopted the ISO 14001:2004 standard. It represented a “limited” review with “marginal” innovations compared to the first version of 1996. This standard did not change the conceptual approach and did not consider the evolution of the relationship enterprise-environment. Hence, after twenty years of the adoption of the first standard, it was a real need making some radical changes in ISO 14001. This, in order to respond to the serious and urgent global and local environmental issues (such as climate change and the degradation of ecosystems) which started to arise and the need, as consequence, to manage with proper tools.

Furthermore, this need for change arose from the widespread awareness of the new strategic role of “environmental pillar of sustainability” that the EMS took on enterprises, by da Fonseca (2015), as a “driving force for Sustainable Development and value creation”, by Sebhatu and Enquist (2007). This review process ended September 2015 with the publication of the new standard ISO 14001:2015. It reflects the knowledge acquired by the ISO that market changes in recent years have involved technology, organisation, marketing and logistics, and, above all, that they have become increasingly rapid and were affected by significant alterations in environmental conditions.

A great novelty is represented by a shift from a “pollution prevention” toward a more inclusive approach of “environmental protection” in order to include the concepts of precaution, mitigation and restoration.

In addition, the new ISO 14001:2015 has been articulated in response to the request to have a common structure to simplify the integration of different standards in the same organization (according to the *“High Level Structure for Management System Standards”*).

A fundamental aspect of the new approach has taken shape in the introduction of three key concepts:

- management following the approach of “Life Cycle Perspective” (LCP);
- analysis of the “context” of the organization.
- integration in EMS of the “risks and opportunities to the environment and to the organization”.

In the analysis of environmental aspects and assessment of their significance in relation to the activities, products and services, and their environmental impacts, the new standard adopts the LCP approach, recognizing it as a fundamental conceptual and methodological approach to the development of the EMS. This inclusion aims to overcome the limitations that were manifested in the adoption of the standard in previous versions. The new ISO 14001 adopts a flexible approach but addressed open to all production processes (and their environmental impacts) which happen inside and outside a “production site” of the organization. Indeed, the LCP take in consideration all phases, upstream and downstream of production, from design to “end of life” of products/services, regardless of where you place these phases, and the subjects that fall under the responsibilities (which in most cases they aren't in organization). However it is not necessary the application of “*LCA full*” methodology, but it might be possible decide to conduct a LCA study in simplified form (Screening LCA, even with secondary data) or another LCA study commensurate to the company departments involved (for example to design the “Life Cycle Design”), like in Vv.Aa. (2015).

With regard to the second key concept, the new standard attributed to “organizational context” a nature with many dimensions, and oriented to respond to needs and expectations of stakeholders, in order to enhance the role of the system as a tool for management of the wider sustainable development issues (therefore also economic and social). In this meaning, context analysis has expanded beyond the physical and natural conditions of the external environment (air, water, soil, climate, etc.), additional multiple senses: cultural, social, political, legal, financial, technological, economic, competitive, regulatory, etc. Therefore, context analysis also affects the internal dimension to the organization (activities, products and services, strategic directions, policies, corporate culture, skills) and other dimensions relating to space and time. This allows you to identify the issues, needs and expectations of the context to be assessed in terms of relevance for the purposes of their impact on the achievement of “intended outcomes” of the EMS² to define, if essential, even some changes in the system.

In connection with the third key concept, it has been introduced a process of identification, evaluation and management of “risk” as “central” activities of the

EMS. This meets the need dictated by all management systems from *High Level Structure* adopted by ISO, which implied to introduce similar concepts, amongst which “risk”, so as to strengthen the connections with other ISO management systems (ISO 9001 for quality and ISO 26000 for CSR). Indeed, in the new ISO 14001 the theme of risk becomes a fundamental assumption, which allows to set the correct planning and definition of effective actions in terms of prevention and mitigation. Therefore, the adoption of “risk management” approach responded to the need that was shown in previous years to further integrate the EMS with the operation of the business and with the definition of the enterprise strategic directions.

The concept of “risk” is no longer associated as in the previous rule, only “implicitly” to the definition of the significance of environmental impacts, but is understood as “effect of uncertainty on objectives”, by Vv.Aa. (2015). This uncertainty in generating gaps than expectations generate negative or positive effects that identify, respectively, the emergence of a “risk” or an “opportunity”. This highlights an important element in the new standard: the risk concept no longer refers only to a negative meaning. In relation to the recipients, on “*risks and opportunities*” may relate to the environment, in terms of impacts in the “strict sense”, and the organization when you generate consequences for non-compliance obligations even in the wider management and business logic (for example designing new products with environmental features for competitive reasons, or improvement/worsening reputation and corporate image).

As a result, the identification of “*risks to the environment and risks to the organization*” descends from the feedback of the presence of uncertainty resulting from the comparison of the combination of activities and environmental aspects, with their environmental impacts and compliance obligations, like in Vv.Aa. (2015). The *risk to the environment* may cover an array of categories of global environmental impacts whose identification may be facilitated through the use of existing literature related to various methods such as LCA and Environmental Footprint (EF), and can include, for example, global warming, the depletion of water resources, eutrophication, acidification, etc. In addition, to these categories of impact we must add the local impact assessment (visual, acoustic, etc.).

Instead, the risk to the organization might depend on to a twofold type of disrespect of the obligation of compliance: of a legislative nature and of compliance with the requirements of the standard. In the first case, the risk of non-compliance could lead, for example, to the imposition of a sanction or other administrative consequences until the closure of the activity. With reference to the second type of compliance requirement, the new standard raises the threshold of the commitment of the Organization and embraces other different types of risk, from those of market and financial, to those resulting from serious accidents at facilities, and, again, those for loss of image and reputation, etc. Another central aspect to highlight is that the risk to the environment and risk to the organization are in a constantly “iteration”. This means that if the organization identifies in the step of the environmental review new harsh environmental impacts which before had not been considered or overlooked, it will have to “feedback” the risk

assessment process back to the analysis of the context and to considerations of stakeholders, to see if there are any new consequences in terms of risk to the organization. So, in order to avoid incorrect management of risks, the organization defines and describes them, linking them to the situation/specific event expected and conditions (normal, abnormal and emergency) in which they can arise.

Ultimately, the identification of “risks and opportunities” in the new standard becomes a central node that covers the critical points of the EMS. They can be identified in relation to environmental aspects, compliance obligations, other issues of context analysis or other needs and expectations of interested parties. These inputs are considered “explicitly” in evaluating the significance of environmental aspects (which in the new rule can be “negative” and “positive”). This process enable to define a EMS properly planned, implemented and maintained.

The new standard, while acknowledging the centrality in EMS of the identification process and assessment of “risks and opportunities”⁶, has not introduced a unique methodology. On the contrary, it has left organizations the possibility of adopting a “proper” methodological and operational approach, with the choice of an “integrated” approach, or “separated”. Indeed, the standard did not establish a requirement for formal risk management (for example application of ISO 31000 standard) or a documented risk management process. The “Guidance on the use of this International Standard” (in the same new standard) explicit that the organization has the responsibility “to select an appropriate method consisting of a simple qualitative process or a full quantitative risk assessment” (A.6.1.1).

In the new standard, the choice, that might depend on the context in which the organization operates, is entrusted to those who have the leadership. Indeed, they are tasked to plan the actions to be taken in relation to the significant environmental aspects and compliance obligations and “risks and opportunities”, associated with both, in order to achieve the “intended outcomes” of EMS. Therefore, in the new standard the figure of representative of management disappears, but is regulated the role of such “leadership” exerted by Top management. It has an obligation to support managerial roles involved in various capacities in the functioning of the EMS in order to supply “leadership” to assignments received. This novelty was introduced to fill a “deficiency” that manifested itself very often when the “environmental managers” were not perceived to be adequately “authoritative” in the relationship with the managers of other business functions (such as the design, purchasing, manufacturing, etc.) or the same top management. The latter plays a strategic role in the adoption of the EMS and among the many responsibilities (such as making available adequate resources), it must, first and foremost, understand, support and participate actively in the processes related to this adoption.

In order to make compatible environmental policy objectives with business strategic direction, context and the organizational business processes. The radical innovations of the new standard will result in changes likewise radical and complex, in the *modus operandi* of already certified organizations. This will mean for these organizations (or for those who wish to adopt that standard for the first time) the need to acquire skills and to define adequate “practices” to develop a

new awareness in top management that fosters the adaptation of the EMS to the requirements of the new standard.

The objective of this paper is to understand how much some highlights of risk management introduced by ISO 14001:2015 were already perceived as “important” by organizations formerly certified in the previous version of the standard. The study analyzes the results of a survey conducted by administering a questionnaire to all the ISO 14001:2004 certified organizations of the province of Foggia (Apulia region, Italy). The analysis was carried out using a consolidated multi-criteria methodology, called “Analytic Hierarchy Process” (AHP).

2 Literature review

The main benefits derived from implementation of ISO 14001 have been extensively analyzed in the literature as reported by Tarí, Molina-Azorin and Heras (2012). These authors highlight a wide range of analysis that covers 14 kinds of perceived benefits. However, only three were most mentioned in the literature: the profitability, efficiency and (logically) environmental performance.

In this paper, it was decided to conduct a survey that considers the wider range of benefits analyzed in study by Scipioni, Mazzi and Vecchiato (2013).

Subsequently, the authors proceeded to regroup the benefits according to their opinions and keeping in mind the analysis performed by Hillary (2004).⁴

The proven methodology of AHP was adopted to establish the ranking of the perception of importance of the benefits because it allows you to develop the necessary level of sensitization and training in top management required by the new ISO 14001:2015, like in Franco (2015) and Va.Aa. (2015). This process enabled is related to the dissemination of knowledge on specific aspects of the EMS as the benefits, costs, expectations, like by Petroni (2001).

The chance for top management to decide its own methodology for the assessment of “risks and opportunities” is provided by new standard (ISO 14001:2015).

The AHP methodology has a literature developed over thirty years by Saathy (1980) (1982) (1983) (1994) (2008). The specific methodology adopted in this paper has been developed into a large literature by Chin, Chiu and Rao (1999), Petroni (2001), Pun and Hui (2001), Sambasivan and Fei (2008), Di Noia and Nicoletti (2015). This literature on the application of the AHP methodology to analyze and organize in hierarchy the “critical success factors” with its perceived benefits and costs of the implementation of the EMS.

3 Methodology

The overall objective of the paper is the understanding of some aspects of risk management transposed in “new” ISO 14001:2015 by studying of the level of

perception of importance manifested by certified organizations in the earlier version of the 2004 in the province of Foggia.

The research model presented below provides a description of the realized survey and methodology AHP adopted. In this model, the identification of the hierarchy of benefits and, among them, the selection those who were considered directly related to the aspects of "risks and opportunities", within the meaning of the "new" ISO 14001, was developed "iteratively" by amalgamating available literature (see par. 2) and through discussions among the authors, like Petroni (2001).

3.1 Survey on ISO 14001: 2004 certified organizations

The study analyzed the results of the survey, which involved (also) the detection of perceptions of importance attributed by environmental managers (or their delegates) to the economic, organizational and environmental benefits derived from environmental certification ISO 14001:2004.

This survey was conducted between January and March 2014 by administering specific questionnaire to organizations certified ISO 14001:2004 in the province of Foggia. The questionnaire was elaborated taking into account the literature (see par. 2). In particular, it has taken into account the study of Scipioni, Mazzi and Vecchiato (2013).

The organizations surveyed were 61 and were available in the database of Accredia in February 2014. It was possible to contact 58 (95%) of them and submit the questionnaire to 48 (80%). The response rate was 31%.

The respondent organizations are all of a private nature, and most small (82%). The sector most presented is "Food products, beverages and tobacco" (18%). The organizations of the areas of "Non-metallic mineral products", "Hotels and restaurants", "Transport, storage and communication" and "Other services" are represented to a lesser extent (12%). Finally the least represented sectors (6%) are "Textiles and textile products", "Aerospace", "Electricity Supply", "Installation, conduction and servicing of equipment", "Logistics: transport, storage and forwarding" and "Engineering services".

In addition, most organizations are holding another certification (34% ISO 9001 certification) and also 14% Emas registration.

3.2 Application of the AHP

Analytic Hierarchy Process (AHP) is a well known and very powerful "multi-criteria method", used to solve complex problems through their organization into hierarchy stratified according to a scale of relative importance (Table 1). The application of AHP method in this study was divided into four steps:

- problem definition and goal determination (level "1") with organization into hierarchy from the authors (Figure 1);

- data collection (it was administered an “on line” questionnaire to environmental managers, or their representatives of certified organizations, which have awarded the degree of relative importance of the benefits and *criteria* and *attribute* of respective Level “2” and Level “4”; while the authors performed the pairwise comparison of the degree of importance of the *sub-criteria* of Level “3” and its *attribute* groupings of Level “4”; both comparisons were made as per Table 2);

-data analysis (it has used *Expert Choice* ® software, developed by Forman, Saaty, Selly and Waldron (1983));

- results analysis (in Table 3 show up the percentages assigned to the level “2”, to the levels “3” and “4” the ranking of normalized weights of pairwise comparisons of benefits hierarchy depending consistency ratios⁵ - considered “acceptable” if ≤ 0.1 ; finally, it presents the ranking of “Global Priority Weight” of attributes of the level “4”).

Table 1 The fundamental scale of absolute numbers

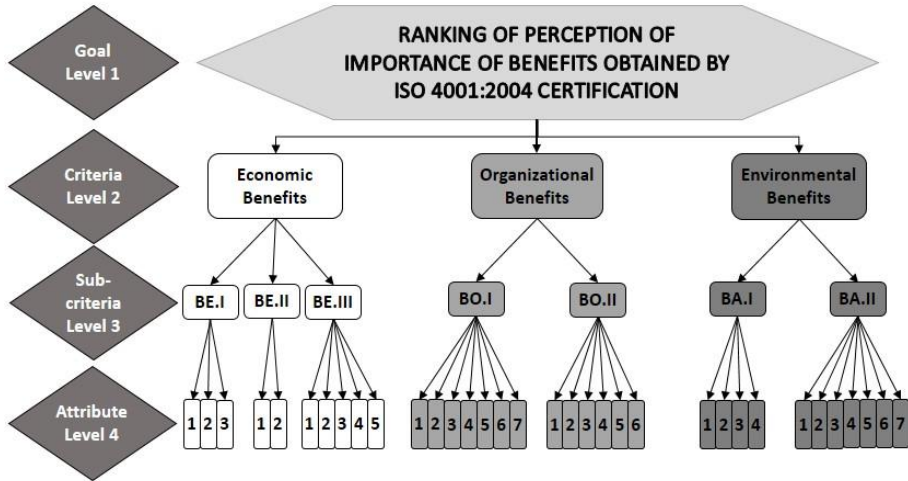
Intensity of Importance	Definition	Explanation
1	Equal Importance	Two activities contribute equally to the objective
3	Moderate importance of one over other	Experience and judgement slightly favour one activity over another
5	Essential or strong importance	Experience and judgement strongly favour one activity over another
7	Very strong or demonstrated importance	An activity is favoured very strongly over another; its dominance demonstrated in practice
9	Absolute importance	The evidence favouring one activity over another is of the highest possible order of affirmation
2. 4. 6. 8	Intermediate values between the two adjacent judgement	When compromise is needed

Source: Pun and Hui (2001), Saaty (2008)

Table 2 Pairwise comparison judgement of degree of importance regard AHP scale

Degree of importance	Very important	Important	Moderately important	Unimportant	Information not available
Very important	1	3	5	7	9
Important	-3	1	3	5	7
Moderately important	-5	-3	1	3	5
Unimportant	-7	-5	-3	1	3
Information not available	-9	-7	-5	-3	1

Source: own elaboration



Legend: BE.I. Reduction of "resources" costs; BE.I.1. Reduction of the cost purchases of raw materials and semi-finished products; BE.I.2. Reduction the cost of water consumption; BE.I.3. Reduction of energy costs; BE.II. Reduction of waste and scrap cost; BE.II.1. Reduction of waste management cost; BE.II.2. Reduction of production scraps; BE.III. Finance and market opportunity; BE.III.1. Banking and/or insurance benefits; BE.III.2. Reduction of sanctions; BE.III.3. Obtaining financing; BE.III.4. Turnover increase; BE.III.5. Facilitating relationships with customers; BO.I. Improved "External Relations"; BO.I.1. Benefits for public procurement; BO.I.2. Greater competitiveness in the market; BO.I.3. Facilitation of authorization; BO.I.4. Improvement of the relationship with controlling bodies; BO.I.5. Improvement of the relationship with the local population; BO.I.6. Improvement of the relationship with suppliers; BO.I.7. Improvement of the relationship with customers; BO.II. Improving the "internal organization"; BO.II.1. Rationalization of the production process; BO.II.2. Greater staff motivation; BO.II.3. Reduction of environmental accident risk; BO.II.4. Organization of environmental activities; BO.II.5. Regulatory compliance; BO.II.6. Reduction of criminal and civil risks; BA.I. Reduction of consumption resources; BA.I.1. Reducing the consumption of raw materials; BA.I.2. Reducing water consumption; BA.I.3. Reduction in consumption of electricity; BA.I.4. Reducing other fuel consumption; BA.II. Reducing "emissions"; BA.II.1. Municipal waste reduction; BA.II.2. Reduction of hazardous waste; BA.II.3. Reduction of noise pollution; BA.II.4. Decrease of air emissions; BA.II.5. Reduction of waste water; BA.II.6. Reduction of spills in the soil and subsoil; BA.II.7. Substitution of materials harmful to the environment with other more environmentally friendly.

Figure 1 Benefits hierarchy of ISO 14001:2014 certification

Table 3 Percentage for criteria (Level “2”), normalized weight of combined judgement for benefit hierarchy and consistency ratios for sub-criteria (Level “3”) and attribute (Level “4”), and ranking of global priority weight (%)

Level 2 Criteria	%	Level 3 Sub-criteria	%	Level 4 Attribute	%	Global Priority Weight (%)	Rank	Consistency Ratios (%)			
BE	9	BE.I	63.70					0.04 (*)			
				BE.I.1	63.70	3.65	8	0.04	0.02		
				BE.I.2	25.83	1.48	18		0.02		
				BE.I.3	10.47	0.60	24		0.02		
				BE.II	25.83				0.04 (*)		
						BE.II.1	25	0.58	26	/	0.01
						BE.II.2	75	1.74	15		0.02
				BE.III	10.47					0.04 (*)	
						BE.III.1	28.61	0.27	30	0.04	0.02
						BE.III.2	7.80	0.07	34		0.02
						BE.III.3	21.25	0.20	32		0.03
						BE.III.4	8.53	0.04	33		0.04
						BE.III.5	33.80	0.32	28		0.01
BO	43	BO.I	25					/			
				BO.I.1	2.89	0.31	29	0.09	0.03		
				BO.I.2	28.62	3.08	10		0.03		
				BO.I.3	13.91	1.50	17		0.01		
				BO.I.4	12.64	1.36	19		0.02		
				BO.I.5	5.58	0.60	24		0.01		
				BO.I.6	6.31	0.68	23		0.01		
				BO.I.7	30.06	3.23	9		0.03		
				BO.II	75				/		
						BO.II.1	37.49	12.09	2	0.09	0.01
						BO.II.2	28.73	9.27	4		0.01
						BO.II.3	3.56	1.15	20		0.01
						BO.II.4	9.05	2.92	12		0.01
				BO.II.5	14.69	4.74	6	0.02			
				BO.II.6	6.48	2.09	13	0.02			

BA	48	BA.I	75					/		
				BA.I.1	51.24	18.45	1	0.07	0.02	
				BA.I.2	29.16	10.50	3		0.02	
				BA.I.3	8.52	3.07	11		0.03	
				BA.I.4	11.08	3.99	7		0.04	
				BA.II	25				/	
				BA.II.1	3.37	0.40	27	0.09	0.01	
				BA.II.2	16.93	2.03	14		0.03	
				BA.II.3	1.93	0.23	31		0.02	
				BA.II.4	14.06	1.69	16		0.02	
				BA.II.5	7.23	0.87	22		0.02	
				BA.II.6	9.19	1.10	21		0.03	
				BA.II.7	47.28	5.67	5		0.03	
		Total					100			

(*) Consistency ratio of pairwise comparison of BE.I. BE.II e BE.III.

Source: own elaboration

3.3 Benefits associated with the concept of "risk" of new ISO 14001

The authors selected the following types of benefits, more directly (and immediately) associated with the concept of "risk" of the new standard, by following a general criterion in order to test the search model developed.

The types of benefits related to "risks and opportunities" have been identified and regrouped according to the "risks to the environment" and the "risks to the organization", and as part of this typology according to regulatory compliance and compliance with standard (Table 4).

Table 4 Benefits directly (and immediately) associated with the "risk" of new ISO 14001

Risks	Benefits	Ranking
i) risks to the environment	BA.II.7. Substitution of materials harmful to the environment with other more environmentally friendly	5
ii) risks to the organization:		
- regulatory compliance	BE.III.2. Reduction of sanctions	34
	BO.II.5. Regulatory compliance	6
	BO.II.6. Reduction of criminal and civil risks	13
- compliance with standard	BO.II.3. Reduction of environmental accident risk	20

Source: own elaboration

4 Results

The survey results show that aspects closely related to the “risk management” are generally rated as minor, with the exception of “substitution of materials harmful to the environment with other more environmentally friendly” (5th place). With regard to the “risks to the organization”, among the risks to regulatory compliance, the “regulatory compliance” was ranked 6th place, “reduction of criminal and civil risks” in the 13rd place and the “reduction of sanctions” in last place (34th).

Instead, in relation to compliance with the new standard, the “decrease risks of environmental accidents” was ranked 20th place. However, it should be emphasized that the results are relevant to the type of companies surveyed.

5 Conclusions

The research model tested in this paper allows the analyze of selected risks that are deemed (immediately) linked to “risk management” in the “new” ISO 14001.

With this model, if, for instance, we evaluate the “risks and opportunities” in the analysis of the context and the needs and expectations of interested parties, in accordance with the ISO 14001:2015, detectable by survey, some other benefits could be taken into account: “Turnover increase” (33th place), “Greater competitiveness in the market” (10th place), “Improvement of the relationship with controlling bodies” (19th place), “Improvement of the relationship with the local population” (24th place), “Improvement of the relationship with suppliers” (23th place) and “Improvement of the relationship with customers” (9th place).

This shows how the analysis of the classification defined with this model can provide the opportunity to top management to gain insight on the level of perception of the importance of the respondents.

In this sense, the top management, to which the new version gives the “leadership” for the implementation of EMS, could decide appropriate modifications of the system, starting from the activation of new stages of communication and listening to sensitize the staff and stakeholders to ensure efficient adoption in accordance with the new standard.

The limits of application of the model proposed in this paper consist, on the one hand, the lack of prior consultation with the organizations surveyed for the purposes of the definition of the potential benefits and, on the other hand, the limited number of organizations participants. Therefore, in order to overcome these limitations in the implementation of the proposed research model according the new standard, organizations must be activated in a process of prior consultation and continuous over time in order to modify or integrate the “risks and opportunities” to be monitored taking into account simultaneously of existing literature, the experience of “old” environmental managers, of the analysis of the

experts (consultants and researchers) and of the qualified representatives of interested parties.

This process requires the involvement of all the top management (in addition to the staff involved from EMS), those who exercise “leadership”, since in the new ISO 14001 disappears the figure of the representative of top management.

From an operational point of view, the model can be implemented through the creation of a particular “focus groups”, as part of the “analysis of context”, thus turning it into a “practice” with related documentation in the EMS of the new standard.

Therefore, the AHP, allowing all the stakeholders to assess the degree of understanding of the elements of “risk management”, if properly used, could better guide the “decision makers” in strategic decision-making aimed at “managing” the identified risks

Endnotes

¹ For “Full LCA” refers to a methodology for calculating the environmental footprint of a product/service in its life cycle, based on a objective process to identification and quantification of energy and materials used and waste products, from extraction to processing of raw materials, the production, transport, distribution, use, recycling and final disposal.

² The “intended outcomes” are also a new concept that relates to the need to identify the “final results” to which the EMS tents and is finalized. These “intended outcomes” are “basic” (such as regulatory compliance) and “additional” (as the definition of business binding targets for environmental issues

³ As for evaluating the significance of environmental aspects, for the adoption of the LCP and to define how to meet compliance obligations.

⁴ Hillary (2004) makes a division between internal and external benefits. In the first category regroups the organizational, financial and personal attributes and among those external regroups the commercial environmental and communications attributes.

⁵ The calculation of “consistency ratio” is necessary because decision makers are often inconsistent in their judgements. “The overall consistency ratios of pairwise comparison judgement matrices at all levels is well within the value of 0.10 as recommended by Saaty, which implies that all evaluators are consistent in assigning relative scales” as Saaty and Vargas (1994).

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The European certification schemes as a warranty tool and enhancement to high quality food production: the Piedmontese PDO cheeses

Authors

- *Giovanni Peira, Assistant Professor, giovanni.peira@unito.it. - University of Torino*
 - *Erica Varese, Assistant Professor, erica.varese@unito.it. - University of Torino*
 - *Alessandro Bonadonna, Assistant Professor, alessandro.bonadonna@unito.it. - University of Torino*
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Abstract. Introduction: the high quality foodstuff covered by the *National Economy of Taste* is being severely threatened by distortions of the facts in the system, which are also anti-economic, such as commercial fraud. Indeed, in some more serious cases, such frauds may even turn into food alerts, running the risk of causing serious injury to the consumers' health. The European Union has implemented a set of tools targeted at reducing the risk of food crises, thanks to the food safety and commercial fraud legislation, with the implementation of some Food Quality Certification Schemes. Objectives: this research has two objectives, one is the assessment of the efficacy of the quality systems as a tool against counterfeiting and a means to contain the more general phenomenon of food commercial fraud e.g. Agro-piracy and Italian Sounding. The other is the dissemination of the fact that these systems may also be applied to achieve positive economic results. Data and Methods: this study analyzed the Protected Designation of Origin of Piedmontese cheeses. The data was collected in collaboration with the authorities for the control and protection of products bearing the PDO denomination. Results: the resulting data emphasized how the implementation of quality systems into the Piedmontese dairy supply chain bore fruit in terms of advantages to the sector, involving both business and quality. The control activities within the PDO system are a useful tool to fight the commercial/health fraud phenomena. Conclusions: food quality is one of main objectives the European Union set within the sphere of multifunctionality in agriculture. Therefore, it is of particular importance that the rural development programmes make contributions linked to the implementation of the European quality systems.

Keywords: Food fraud, PDO, Cheese, Piedmontese

JEL Classification: L66; M21, Q11; Q13; Q18

1 Introduction

The last thirty years have witnessed numerous cases of food frauds and food alerts. Consequently, the serenity of the European consumers have been undermined from both a safety and economical point of view.

As is common knowledge, food fraud means the production, detection, commerce, sale and/or delivery of foodstuffs that do not meet the requirements established by law. The latest tendency is to distinguish between a safety fraud, a potentially dangerous action for the health of the consumer and a commercial fraud, an action that produces illegal income to the detriment of the consumer.

There are three kinds of phenomenon of food product alteration: *alteration* in terms of the natural degenerative phenomenon of the composition and organoleptic characteristics of a product due to an incorrect preservation method; *adulteration* i.e. detraction or addition of some components of the food; *sophistication* i.e. total or partial modification of food, due to a total or partial replacement of some components of the product with others at a lower price (Peira et al., 2014; Varese, 2016).

At a European level, the Bovine Spongiform Encephalopathy (BSE) disease, commonly known as “Mad Cow” disease, is the most important, regulated (EC Regulation n. 1760/2000) and maybe overestimated (Ellis et al., 1992; Billette De Villemeur et al., 1992; Will et al., 1996; Weber et al., 1997; Wehl and Roos, 1999) case among the food alerts. However, some alert cases i.e. dioxin (Loeber et al., 2011; Verbeke, 2001; Nemery et al., 2002; Banati, 2011), bacteria (Cantoni et al., 2003; Bevilacqua et al., 2006; Nogarol et al., 2013), additives (Commission Decision, 2003; Tateo and Bononi, 2004) and flu (Babakir-Mina et al., 2007) are a clear example of potential food risks (RASFF, 2015).

This paper aims at the assessment of the efficacy of the European quality systems, both as a tool against food fraud and as an economic tool to achieve positive results.

2 Literature review

In the course of time, the European Union has modified the food quality and food safety regulations in an attempt to gain the confidence of the consumers again, after it having been greatly reduced by the numerous food scandals. The English language uses two terms to translate the Italian term “sicurezza alimentare”. One is “food security” which is built on three pillars i.e. food availability, food access and food use and the other, “food safety” which is the fourth pillar i.e.

the warranty of healthy and safe food. The World Food Summit of 1996 defined “food security” as existing

“when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life” (WHO, 1996)

After, Amartya Sen defined “food security” as

“Food security [is] a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life” (FAO, 2003)

The European Union imposes strict production requirements and guarantees high quality standards for food safety in the EU market. The first objective of European food policies is the safeguarding of public health, but also the protection of the economy and the environment. Indeed, the environmental footprint may influence food production and the EU is the biggest world producer of food and beverages (European Commission 2000). As to food safety, the European Parliament has adopted both horizontal regulations, where the articles are relevant for all foodstuffs and vertical regulations, that are applicable on single products e.g. the aforementioned EC Regulation No. 1760/2000.

The recent European food policy contemplates the full supply chain and considers all stakeholders in the sector, from feed and seed to the table. The regulation development has produced the EC Regulation No. 178/2002 “laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety” and the “hygiene package” in 2004 (EC Regulation Numbers 852, 853, 854 e 882/2004 etc.).

2.1 The European Quality Systems

The European Union offers three different kinds of tool for the enhancement of typical products and beverage aimed at safeguarding the European consumer both from diseases and ensuring true information and communication. The wine sector is regulated by the CMO Wine (EC Regulation No. 479/2008) that also defines the denominations as to Quality Wines Produced in Specified Regions; the spirits sector is regulated by the EC Regulation No. 110/2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks; the other food products are regulated by the EU Regulation No. 1151/2012 on quality schemes for agricultural products and foodstuffs.

This work is dedicated to the typical cheese productions in Piedmont and in this context only the EU Regulation No. 1151/2012 is presented. This regulation, also called “quality package”, is the result of an intensive collaboration between food quality stakeholders and the EU. The Green Papers (European Commission,

2008; European Commission, 2011) and the “Improving communication on agricultural product quality” (2009) and the following regulations have allowed for the definition of the modern strategies set-up to develop the food sector and to ensure true information for the European consumer.

The “quality package” confirms the food quality schemes i.e. Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Speciality Guaranteed (TSG) and introduces the new labelling schemes, named Optional Quality Terms, dedicated to “mountain product” and “product of island farming”.

For the purpose of this study, it is necessary to emphasize the quality schemes that have a high tie with the territory and, therefore, shown under the definition of PDO and PGI on “quality package”:

“ ‘designation of origin’ is a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.” (EU Regulation No. 1151/2012, Article 5.1)

and

“ ‘geographical indication’ is a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area.” (EU Regulation No. 1151/2012, Article 5.2)

2.1.1. Counterfeit, Agro-piracy and “Italian sounding”

The European “quality package” enhances the high quality production of foodstuffs and their tie with the territory, but it is also a useful tool to fight counterfeit and agro-piracy. Over time, the typical products and the European food style have seduced the world’s consumers and the economic success that followed intensified the food fraud phenomenon i.e. counterfeit, agro-piracy and, for the Italian case, the “Italian sounding” approach i.e. something that seems to be Italian but it is Italian-like.

Nowadays counterfeiting and agro-piracy have become a widespread phenomenon with a global impact (Varese and Caruso, 2011). What is the difference between counterfeiting and agro-piracy? Though these two terms are generally used as synonyms, the enforcement section of an agreement on intellectual property rights, negotiated in the World Trade Organisation (WTO), known as the TRIPS Agreement (Agreement on the Trade-Related aspects of Intellectual Property Rights), contains the following definitions:

“Counterfeit trademark goods shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation”.

This can be interpreted as being something made in imitation of something else with the intent to deceive. Counterfeit goods are unauthorized imitation of branded goods.

“Pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.”

Piracy consists in an illegal copy of something that already exists. It is an unauthorized exact copy (and not a simple imitation) of an item covered by an intellectual property right. In order to clarify the phenomenon, according to the Green Paper “Combating counterfeiting and piracy in the single market” (European Commission 1998), this article consider that concept of counterfeiting and agro-piracy will cover

“all products, processes and services which are the subject-matter or result of an infringement of an intellectual property right (trade mark or trade name, industrial design or model, patent, utility model and geographical indication), of a copyright or neighbouring right (the right of performing artists, the right of producers of sound recordings, the right of the producers of the first fixation of films, the rights of broadcasting organization), or of the “sui generis” right of the marker of a database. This wide scope will make it possible to cover not only the case of products which are copied fraudulently (“fakes”), but also the case of products which are identical to the original but which are made in the Community [European Union] without the rightholder’s consent, such as products resulting from an exceeding of the production run authorized by the rightholder”.

Moreover, some authors (Sirotti Gaudenzi, 2010) state that there is a relationship of “*genus ad speciem*”: piracy is a kind of counterfeiting.

A particular kind of Italian food fraud is the phenomenon of “Italian sounding”. In this case, some non-Italian foodstuffs have a recall to Italy and Italian style cooking, without meeting the requirements to do so, in order to take advantage of the “made in Italy” brand e.g. “Parmesan” in place of “Parmigiano Reggiano” (Cembalo et al. 2008).

In any case, the marketing of such goods and indeed all goods infringing intellectual property rights, does meaningful damage to law-abiding manufacturers, traders and to right-holders, as well as deceiving and in some cases endangering, the health and safety of consumers (Varese and Bonadonna, 2012).

2.2 Piedmontese IG food production

Piedmont is a very rich territory in typical food products and currently it could even enhance the local Economy of Taste as an economic tool. The food system has gone in two different directions over the last two decades. On the one hand, the regional food value chains have been oriented to the implementation of quality food systems; on the other, both the food operators and the consumers have changed the meaning of *food quality*.

The Piedmontese Economy of Taste (Peira et al., 2016) is divided into GI food products, GI wines and spirits, Traditional food Products and Organic products. The first category is made up of 20 Geographical Indication (GI) products, 13 of them are PDO products and 7 PGI products. The ISMEA database shows that the whole GI production value amounted to 196 million Euro in 2011, versus 134 million Euro in 2006; in 2011 the enterprises involved were 2,881. The latest data (ISTAT, 2013) showed a reduction in the number of enterprises (2,689) and an agricultural useful surface of 4,933 hectares. The Wine and spirit sector includes 58 PDO wines, 16 of them are DOCG and 42 DOC and 4 European denominations for spirits i.e. “Grappa di Barolo”, “Grappa Piemontese/Grappa del Piemonte”, “Genepi del Piemonte” and “Genepi des Alpes - Genepi delle Alpi”. There are 341 Traditional Food products on the National List of PAT and there are also 1,998 enterprises and 28,876 hectares involved in Organic production.

3 Aim, materials and methods

This study analyzed the Protected Designation of Origin of Piedmontese cheeses. In this case, the 6 Piedmontese PDO cheeses selected were Bra, Castelmagno, Murazzano, Raschera, Robiola di Roccaverano, Toma Piemontese. The necessary element for inclusion in the study is that the production phases must be carried out exclusively in the Piedmont area. That is why Gorgonzola, Taleggio and Grana Padano were excluded. There will be a short description of the 6 cheeses included.



BRA. Description. Cow’s milk cheese, which can be supplemented with sheep’s and/or goat’s milk, half-fat, pressed, with a soft and hard texture, medium mature and mature, cylindrical in shape with straight sides. **Geographical area.** The entire territory of the province of Cuneo and the adjacent commune of Villafranca Piemonte in the province of Torino, forming a continuous area. **Background.** The cheese, historically produced in the province of Cuneo, is named after the commune of Bra, where, tradi-

tionally, most of its market lies. Over time the product has retained its original characteristics due to an established production technique. **Production method.** The curds, obtained from semi-skimmed milk, coagulated with calf's rennet at a temperature not higher than +32°C, undergo cutting twice and are then pressed in suitable moulds, dry salted twice and are left to ripen for a medium length of time.



CASTELMAGNO. Description. Half-fat cheese made from cow's and/or sheep's and goat's milk added in small quantities, pressed and semi-hard, containing herbs, ripened, cylindrical in shape with straight side. **Geographical area.** Communes of province of Cuneo which form a continuous area. **Background.** Historically the cheese was always made within the confined mountainous area, defined by the production regulations, retaining unchanged its original characteristics due to the particularly restricted area. **Production method.** The curds, obtained from semi-skimmed milk with rennet added at a temperature of between +35 and +38°C, are pressed in suitable moulds. The product is dry salted and sent to mature for a few months in cool and humid natural caves.



MURAZZANO. Description. Cheese made from sheep's milk which can be supplemented with cows' milk, full fat, uncooked, cylindrical in shape with straight sides. **Geographical area.** Communes of the province of Cuneo, forming a continuous area. **Background.** Historically made within the area defined by production regulations, the name of the cheese refers to the commune of Murazzano where most of it is made. Over time the product has retained its peculiar characteristics acquired due to the environment found in the Piedmont region. **Production method.** The curds, obtained from whole milk with addition of calf's rennet, coagulate at a temperature of +37°C, are dry salted and are left to ripen for a short time.



RASCHERA. Description. A half-fat, soft cows' milk cheese which can be supplemented with sheep's and/or goats' milk, pressed, medium-mature and cylindrical or rectangular in shape with straight sides. **Geographical area.** The entire province of Cuneo. **Background.** The cheese, which is historically found in the territory of the province of Cuneo, is named after Lake Raschera in the area overlooking Monregalese, where the cheese was originally produced; the cheese has retained its original characteristics due to its being made by an established technique. **Production method.** The curd, obtained from semi-skimmed milk coagulated with calf's rennet at a temperature of not more than +30°C, is pressed in suitable moulds, is dry salted twice and matured for a medium length of time.



ROBIOLA DI ROCCAVERANO. Description. Cows' milk cheese with added goats' and sheeps' milk, uncooked, cylindrical in shape with slightly edged straight sides. **Geographical area.** The communes of the provinces of Asti and Alessandria, forming a continuous area. **Background.** Etymologically, this cheese of very ancient origin, as confirmed by references dating back to the medieval period, contains both the Latin name "robium" which refers to the reddish colour of the outside of the curds and the name of the village of Roccaverano in the Asti region where the product originated, made by specific techniques which have been



retained in line with established local practices. **Production method.** The curds, obtained from semi-skimmed milk with rennet added, are allowed to mature naturally in a suitable environment for a few days.

TOMA PIEMONTESE. Description. Cows' milk semi-cooked cheese, divided into two types, whole milk and semi-skimmed milk, ripened for a longer or shorter time depending on the dimensions, cylindrical in shape with straight or almost straight sides with slightly convex base.

Geographical area. The entire territory of the provinces of Novara, Vercelli, Biella, Torino e Cuneo and adjacent communes of the province of Asti and Alessandria, forming a single geographical area. **Background.** The etymology of the name derives from the traditional name of the cheese produced in the relevant area of production, consisting mainly of mountainous zones and foothills. Over time, the local customs, varying from valley to valley in the region, resulted in two different types of cheese historically distributed on the consumer market. Given the long tradition of the product, the specific characteristics of the "Toma" cheese were outlined in the Ministerial Decrees of 24.11.1964 and 16.9.1977, which were followed by the D.P.M.C. of 10.5.1993, introducing production and product-naming regulations regarding the name of origin "Toma piemontese". **Production method.** The curd, obtained from whole or semi-skimmed milk with calf's rennet added, is cut twice into fine pieces, then it is placed into suitable vats and is salted, pressed and ripened in appropriate premises.

Source: extrapolated from the EUROPEAN COMMISSION. DOOR - AGRICULTURE AND RURAL DEVELOPMENT. <http://ec.europa.eu/agriculture/quality/door/list.html> (04.03.2016)

The following data were collected in collaboration with the authorities for the control and protection of products bearing the PDO denomination: Assopiemonte, INOQ, Regione Piemonte.

4 Results

The data obtained in the survey enabled us to better understand the situation of Piedmontese PDO cheese chain. This chain involves several stakeholders i.e. livestock farmers, milk collectors, producers, cutters and ripeners.

A total of 878 livestock farmers were involved in the production of the six Piedmontese PDO cheeses: - 16.46% in the period 2008/2014, 79 producers, 98 in 2010, 21 cutters (Bra, Raschera and Toma Piemontese), 21 milk collectors (Bra, Raschera and Toma Piemontese) and 109 ripeners in 2014. The highest number of livestock farmers (365) producers (20) and ripeners (30) are involved in the production of *Toma Piemontese*. The Raschera PDO chain is the most complete as it involves 235 livestock farmers, 16 producers, 11 cutters, 9 milk collectors and 24 ripeners.

Table 1 Quantities of Piedmontese PDO cheeses from 2008 to 2014

Quantities (tonnes)	2008	2009	2010	2011	2012	2013	2014
Bra	762	937	783	726	705	725	654
Castelmagno	197	216	227	223	228	196	213
Murazzano	21	16	16	13	13	14.5	14.79
Raschera	780	745	836	801	720	751	775
Robiola di Roccaverano	84	88	109	104	99	98	100
Toma Piemontese	1077	1048	1065	978	1088	1001	999

Source: Internal elaboration from data provided by Assopiemonte, INOQ, Regione Piemonte (2015)

This study analyzes the economic trends of six Piedmontese PDO cheeses, between 2008 and 2014. The certified Bra PDO production is quite stable, at over 700 tonnes, with the exception of 2014 when the production dropped to 654 tonnes. Only in 2009, did the certified production pick up and reach over 900 tonnes (Table 1).

Whilst, the production of Castelmagno increased to reach a peak of 228 tonnes, between 2008 and 2012 and went back to 196 tonnes in 2013, which was similar to the amount produced in the years 2007 and 2008. It then increased again in 2014. Castelmagno production is lower than the other Piedmontese cheeses. Indeed, it is a very high quality niche foodstuff, as only selection ingredients and skilled craftsmanship are used, meaning that this cheese necessitates more time and attention than a less precious one.

Murazzano production is less than the others, mainly because it is less well-known outside its territory, even if it is greatly appreciated in its area of origin. The quantities produced and marketed decreased over time, to a record low over the study period of 16 tonnes in 2009, which did not change in 2010. This downward trend continued throughout 2011-2012, when there was a production of 13 tonnes. However, the following two years witnessed an inversion of this trend with a recovery of the certificated output, which reached 14.79 tonnes in 2014. There was a rather fluctuating trend for Raschera production, although the quantity produced came close to that of the Bra production. Robiola di Roccaverano was also produced in small quantities (Table 1). Indeed, the certified production in 2008 - 2009 was less than 90 tonnes, which then took an upward trend to reach 109 tonnes in 2010. The production then stabilized at about 100 tons over the following 4 years. This placed it at the same level of Castelmagno as the only foodstuffs which recorded an increase in their certificated quantity over the period under study. Last but not least we observed that Toma Piemontese had the highest production up until 2011, when there a slow decreasing trend set in, which rose in 2012 an then dropped again to a low peak 2012 of 1,088 tonnes, before leveling off at slightly lower levels, in 2013 2014.

Table 2 Average producer prices of Piedmontese PDO cheese 2008 – 2014

Average producer prices (€/kg)	2008	2009	2010	2011	2012	2013	2014
Bra	5.85	5.50	5.80	6.55	6.70	6.90	6.90
Castelmagno	12.00	11.80	11.70	12.00	12.50	13.00	13.00
Murazzano	11.00	11.50	11.50	11.50	11.50	11.50	11.50
Raschera	5.80	5.30	5.70	6.50	6.50	6.70	6.70
Robiola di Roccaverano	11.42	11.07	11.36	11.38	11.79	12.30	11.32
Toma Piemontese	5.30	5.00	5.40	5.90	6.10	6.40	6.40

Source: Internal elaboration from data provided by Assopiemonte, INOQ, Regione Piemonte (2015)

Another economic aspect of the analysis that came to light was that of the average producer prices of these cheeses (Table 2). All the Piedmontese PDO cheeses, excluding the Robiola of Roccaverano, had a higher average origin price in 2014 than in 2008 (Table 2). The highest producer price was observed for Castelmagno, followed by the Robiola di Roccaverano which had reached its highest price in 2013. Whilst the price of the Murazzano remained stable at 11.50 €/kg from 2009 to 2014. The Bra and the Raschera had a more or less constant trend between 2008 and 2010, which then reached 5.80 €/kg and 5.70 €/kg over the following three years until arriving at 6.90 €/kg Euro and 6.70 €/kg respectively in 2014. Lastly, the Toma Piemontese fluctuated over the whole study period, even if it did show an increase in price between 2009 and 2014 (Table 2).

Table 3 Wholesale sales of Piedmontese PDO cheeses 2008 – 2014

Wholesale sales (Mio euro)	2008	2009	2010	2011	2012	2013	2014
Bra	4.458	5.154	4.541	4.755	4.724	5.003	4.513
Castelmagno	2.364	2.549	2.656	2.676	2.850	2.548	2.769
Murazzano	0.231	0.184	0.184	0.150	0.150	0.167	0.170
Raschera	4.520	3.950	4.770	5.210	4.680	5.030	5.190
Robiola di Roccaverano	0.959	0.974	1.238	1.184	1.167	1.205	1.132
Toma Piemontese	5.710	5.240	5.750	5.770	6.640	6.410	6.390

Source: Internal elaboration from data provided by Assopiemonte, INOQ, Regione Piemonte (2015)

The wholesale sales is yet another economic aspect of the Piedmontese cheese market (Table 3). Murazzano was the only cheese which had a lower price in 2014 than in 2008. The underlying factors in this situation is the fact that this was produced in the smallest quantity. Castelmagno reached its highest price in 2012, but maintained a stable trend over time of about 2.5 Mio Euro per year. Bra reached its peak price of over 5.1 Mio Euro in 2009 and then dropped

slightly in 2011, to level off in 2012. The year 2013 witnessed a price increase, reaching 5 Mio Euro in 2013, which then levelled off in 2014, to 4.5 Mio euro.

Whilst Raschera had a fluctuating trend: after the lowest peak in 2009, due to both a reduced production and the high producers' prices. In 2011 the price was over 5 Mio Euro, before dropping in 2012, due to a reduction in the quantity produced. It rose to over 5 million in 2013 and levelled off in 2014 (table 3).

An unexpected finding was the fact that Robiola di Roccaverano increased its sales when it increased its prices and the quantity produced, between 2008 and 2010. Whilst the wholesale sales dropped to 1,1 Mio Euro in the period 2010-2014.

Lastly, there an inverse trend to that reported for Toma Piemontese for Toma Piemontese wholesale sales. Indeed, in 2009, they dropped along with the producers' prices only to increase again in 2010 and 2012, in line with an increase in both the producers' price and quantities produced. Once again the sales trend followed the production trend in 2013-2014, when production dropped (Table 3).

The research was completed by including a comparison between of the average consumer prices (Table 4) for Piedmontese PDO cheeses to retail sales (Table 5). Castelmagno had the highest average consumer prices although they were slightly unstable compared to the average producer prices. This was due to fluctuating quantities put onto the market which was uncontrolled and, therefore, led to a devaluation of the price per kilo.

Table 4 Piedmontese PDO cheese value according to the average consumer prices (retail) (2008 - 2014)

Average consumer prices (€/kg)	2008	2009	2010	2011	2012	2013	2014
Bra	12.11	11.34	11.11	11.76	12.07	11.76	11.38
Castelmagno	24.31	25.81	25.61	25.77	26.25	25.64	25.74
Murazzano	17.90	17.68	18.00	18.00	18.00	18.00	15.67
Raschera	15.45	14.78	14.80	15.52	16.18	15.16	15.20
Robiola di Roccaverano	17.82	17.47	17.76	17.78	18.19	18.70	17.72
Toma Piemontese	10.91	10.83	10.15	11.00	11.11	10.40	10.25

Source: Internal elaboration from data provided by Assopiemonte, INOQ, Regione Piemonte (2015)

The Murazzano followed with a stable price of 18 €/kg between 2010 and 2013. There was then a decrease in the average consumer price which reached 15.67 Euro in 2014. The average consumer price of Robiola di Roccaverano increased over the period between 2009 and 2013.

The average consumer price of Bra fluctuated over time. Interestingly, it was the only cheese that showed an increase in its average price in 2008. Lastly, the Raschera and Toma Piemontese had discontinuous prices in the period under study, which reached a peak in 2012. The data show that Castelmagno is the only cheese which recorded an average higher price in 2014 than in 2008.

Table 5 Consumer sales of Piedmontese PDO cheeses 2008 – 2014

Consumer sales (Mio Euro)	2008	2009	2010	2011	2012	2013	2014
Bra	9.224	10.620	8.699	8.538	8.509	8.522	7.443
Castelmagno	4.789	5.575	5.813	5.747	5.985	5.025	5.483
Murazzano	0.376	0.283	0.288	0.234	0.234	0.261	0.232
Raschera	12.050	11.010	12.370	12.430	11.650	11.380	11.780
Robiola di Roccaverano	1.497	1.537	1.936	1.849	1.801	1.833	1.772
Toma Piemontese	11.750	11.350	10.810	10.760	12.090	10.410	10.240

Source: Internal elaboration from data provided by Assopiemonte, INOQ, Regione Piemonte (2015)

The Bra reported the highest consumer sales with 10.6 Mio Euro in 2009, due to the increase of the quantity sold and went back to 7.4 Mio Euro in 2014. There was a consumer sales difference of 1.7 Mio Euro between 2008 and 2014. The difference between the consumer and wholesale sales doubled in 2008 and 2009, whilst in the following years, the gap reduced to 3 Mio Euro by 2014. Castelmagno reached a stable value over time, thanks to the compensation of prices or that is there was an inverse trend, while the average consumer prices decreased the volume of sales increased. In 2014, the consumer sales were higher, reaching about 0.6 Mio Euro more than 2008. The consumer sales almost doubled compared to the producer sales over the study period analyzed.

Murazzano consumer sales decreased, as the production dropped between 2008 and 2012. It rose slightly, then arrived at its lowest peak of 0.23 Mio Euro, in 2014. The gap between the consumer and wholesale sales diminished from 144,900 Euro (2008) to 84,500 Euro (2012), which then took an upward trend to reach 94,250 Euro in 2013 and levelled off at 61,670 Euro, in 2014.

Raschera consumer sales fluctuated over time and were about 300,000 Euro less in 2008 than in 2014. The difference between the consumer and wholesale sales tripled between 2008-2011 then doubled between 2013-2014.

Robiola di Roccaverano consumer sale increased between 2008 and 2010, as the production increased then reduced until to 2014 where it was higher than in 2008. The consumer and wholesale sales were quite stable and remained at a level of 600,000 Euro over the whole study period.

Lastly, Toma Piemontese consumer sales were lower in 2014 than in 2008 by about 1.3 Mio Euro, as production was low and prices dropped. The consumer and wholesale sales doubled in 2008 and 2009 then fell by about 4 Mio Euro in 2014.

5 Conclusions

The “trip” the Economy of Taste took, led to the rediscovery of territorial deep-rooted typicalities, emphasizing the specific local identity that combines a

significant economic weight to abstract features of its cultural heritage. Moreover, the research brought to light, not only the diversification, but also the variety and identity of the foodstuffs produced in the Italian Regions. Therefore, the ECC regulations on production and commercialization use the definition, “easily obtainable” and “specific character”, which mean “the feature, or set of features which clearly distinguish/es an agricultural product or foodstuff from other similar products or foodstuffs, belonging to the same category” (Regulation ECC n. 2082/92, Art. 2).

In this sense, *typical foodstuff* is taking on its own peculiarities, which differ from the definition of *specialty*, which reduces the value attributed to the brand itself, whilst accentuating the intrinsic value of the product. Indeed, each product has its own unique characteristics, both from a qualitative point of view and the established image. This means that the consumer is willing to pay more for these goods than for others and searches the market for what he/she wants, declining to accept any kind of substitute (Peira 2014; Cerquetti 2010).

The territorial roots merge with the traditions, culture, history and geography of Italy. The intersection of social and economic relationships both determine and define the Italian food products as *cultural* goods, constituting a testimony to the historical value of the national heritage (Bortolotto 2007). From an economic standpoint, although it is not always possible to distinguish a good quality product from one that is not so good, on the basis of the difference in price alone, there is a clear distinction in quality, which is not always known to the *general public* (MIBAC 2007). This makes protecting and developing the sub-culture of local food products a must.

The data obtained in the survey enabled us to better understand the situation of Piedmontese PDO cheeses, also taking into consideration the fact that the national and regional milk sector is going through a difficult period. Indeed, the elimination of the monitoring tools, at a European level, has plunged the Italian dairy sector into a state of *semi-coma* that will surely lead to major *life saving* changes in this sector. It must also be born in mind that, in order to limit the negative effects caused by the new EU structural paradigms, Piedmont has implemented a number of project initiatives, such as the request for registration of Ossolano PDO (Regione Piemonte, 2002; Zeppa et al., 2003), which would constitute the seventh geographical indication of exclusively Piedmontese dairy produce and the introduction of “noble milk” (Renna et al., 2014) which has sensory organoleptic characteristics superior to those of conventional fresh milk.

The European food quality systems, which are controlled by selected third parties, by definition should allow for greater protection from harmful phenomena such as food piracy and counterfeiting. These measures, at least for the Piedmontese foodstuff sector, seem to have worked well. However, conversely, these problems have not all been solved satisfactorily for other geographical indications. Some exceptions to this rule include Mozzarella di Bufala Campana PDO (Camera dei Deputati, 2013). Unfortunately, delicate questions such as illegal economic flows obtained from some geographical indication products, may

represent a target of interest also for those organizations that generate large capital, as they need to invest in profitable activities which are legally recognized (EURISPES, 2016).

Lastly, it is useful to remember that, so as to reduce and then illuminate such aforementioned phenomena on food fraud, the well-established public control activities, carried out by *Ispettorato Centrale della Tutela della Qualità e Repressione Frodi dei Prodotti Agro-Alimentari* (ICQRF, 2015) and other organizations e.g. *Nuclei Antifrodi Carabinieri/Comando Carabinieri politiche agricole e alimentari* (NAC), there are also now the selected third parties who carry out severe product control. The Italian institutions involved in this action plan also provide for a budget of several million Euro for the implementation of a promotional campaign against “Italian sounding” in the United States and Canada and the creation of a brand that can identify the product unequivocally as being “Made in Italy” (MIPAAF, 2015).

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**Risk Management,
Corporate Criminal Liability
and Corporate Governance**

Le problematiche connesse alla responsabilità amministrativa delle persone giuridiche alla luce dei principi affermati dalle Sezioni Unite della Corte di Cassazione

Authors

- *Ezio Domenico Basso, Public Prosecutor, eziodomenico.basso@giustizia.it - Court of Oristano*
 - *Franca Antenucci, Lawyer, info@avvocatoantenucci.it*
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Questo contributo analizza il ruolo centrale che la giurisprudenza della Corte di Cassazione svolge, e potrebbe svolgere, nel processo di applicazione dell'art. 25 *septies* d.lgs. 8 settembre 2001, n. 231, che ha esteso l'ambito applicativo della disciplina ai reati di omicidio colposo e lesioni colpose gravi o gravissime commessi con violazione delle norme sulla tutela della salute e sicurezza sul lavoro, con particolare riferimento all'analisi dei principi introdotti dalla sentenza delle Sezioni Unite della Corte di Cassazione n. 38343 del 24 aprile 2014 depositata in data 18 settembre 2014 c.d. sentenza "Thyssen".

Attraverso l'analisi del dettato normativo dell'art. 25 *septies* d.lgs. n. 231/2001, introdotto dall'art. 9 l. 3 agosto 2007, n. 123 e riformulato dall'art. 300 d.lgs. 9 aprile 2008, n. 81, e l'analisi del panorama degli orientamenti delle Sezioni Unite della Corte di Cassazione ante sentenza Thyssen, si mette in luce la problematica relativa all'ingresso dei delitti colposi nel catalogo dei reati costituenti presupposto della responsabilità degli enti.

Passando a soffermarsi sul dettato normativo dell'art. 5 d.lgs. n. 231/2001, si esamina la regola di imputazione oggettiva dei reati dell'ente, secondo la quale si richiede che essi siano commessi nel suo "interesse" o "vantaggio".

Si mette, inoltre, in luce la problematica relativa all'individuazione, nei reati colposi, dei due criteri di imputazione della responsabilità dell'ente dell'interesse o del vantaggio dettati dall'art. 5 d.lgs. n. 231/2001, con particolare riferimento alla questione della compatibilità logica tra la non volontà dell'evento, che caratterizza gli illeciti colposi, ed il finalismo che è sotteso all'idea di interesse.

Si evidenzia, infine, l'interpretazione svolta dalle Sezioni Unite della Corte di Cassazione nella sentenza n. 38343/2014 secondo la quale – conformemente alla volontà del legisla-

tore nazionale – i concetti di interesse e vantaggio, nei reati colposi di evento, vanno riferiti alla condotta e non all’evento antigiuridico.

La comparazione tra il dettato normativo di cui all’art. 25 *septies* d.lgs. n. 231/2001 ed i principi introdotti dalla sentenza delle Sezioni Unite della Corte di Cassazione c.d. “Thyssen” mette in luce la sussistenza della responsabilità amministrativa degli enti in presenza di reati di omicidio colposo e lesioni colpose gravi o gravissime commessi con violazione delle norme sulla tutela della salute e sicurezza sul lavoro.

Keywords: responsabilità amministrativa degli enti; reati-presupposto; *novum* giurisprudenziale; reati colposi; criteri dell’interesse e del vantaggio.

JEL Classification: K22

1 Introduzione

Questo contributo analizza il ruolo centrale che la giurisprudenza della Corte di Cassazione svolge – ed in futuro certamente svolgerà in termini ancora più marcati – nel processo di applicazione dell’art. 25 *septies* d.lgs. n. 231/2001, che ha esteso l’ambito applicativo della normativa originariamente prevista anche ai reati di omicidio colposo e lesioni colpose gravi o gravissime commessi con violazione delle norme sulla tutela della salute e sicurezza sul lavoro: nel fare ciò, particolare rilievo verrà – e non potrebbe non essere – riservato ai principi introdotti dalla sentenza delle Sezioni Unite della Corte di Cassazione n. 38343 del 24 aprile 2014 depositata in data 18 settembre 2014 c.d. sentenza “Thyssen”.

La previsione della responsabilità amministrativa degli enti oggetto della disciplina del D. lgs. n. 231/2001 ha costituito una innovazione nella sfera del diritto punitivo ed è stata oggetto, dalla sua introduzione, di un copioso e stimolante dibattito, periodicamente rinnovato e rinvigorito dalle numerose modifiche all’impianto originario del decreto in questione che, nel corso degli anni, ha visto estendersi il novero delle fattispecie criminose che fungono da presupposto per l’applicazione delle norme in tema di responsabilità amministrativa delle persone giuridiche e che annovera, ora, un’ampia casistica, totalmente svincolata da quella che era la ratio primigenia della volontà del legislatore: è indubbio, infatti, che si è passati da situazioni in cui chiaro era l’intento di andare a colpire quelle ipotesi delittuose dove – a fronte dell’instaurazione fittizia della persona giuridica in capo a soggetti individuati con il solo scopo di fungere da “*homme de paille*” per convogliare sulla loro persona le responsabilità penali conseguenti a condotte illecite – il vero, evidente ed unico scopo era quello di consentire all’ente di lucrare indebitamente ed impunemente il profitto del crimine (cfr. artt. 24 e 25 d.lgs. n. 231/2001), ad altre in cui i concetti di “interesse” e vantaggio” che l’art. 5 d.lgs. n. 231/2001 pone come requisiti indefettibili per il riconoscimento della

responsabilità amministrativa della persona giuridica è più sfumato e, di conseguenza, di più difficile percezione.

In tale contesto, indubbiamente rilevante e significativo è stato anche lo sforzo compiuto dalla giurisprudenza, volto a concretizzare l'applicazione della nuova normativa.

Pur non essendo possibile in questa sede, in ragione della predetta vastissima produzione e della loro estraneità rispetto a quelle che sono le finalità di questo nostro intervento, effettuare una sintesi completa di tutti i contributi che hanno coinvolto teoria e prassi del d.lgs. n. 231/2001, è nostro interesse rivisitare, in termini il più possibile approfonditi e completi, la problematica relativa all'ingresso dei delitti colposi nel catalogo dei reati costituenti presupposto della responsabilità degli enti, come disposto dal dettato normativo dell'art. 25 *septies* d.lgs. n. 231/2001, introdotto dall'art. 9 l. n. 123/2007 e riformulato dall'art. 300 d.lgs. n. 81/2008.

Prima di procedere all'esame della predetta problematica introduzione, è necessario soffermarsi, seppur brevemente, ad analizzare il tema – lungamente dibattuto in giurisprudenza – della natura della responsabilità dell'ente.

La giurisprudenza più attenta ha da subito evidenziato la particolarità della natura del nuovo sistema sanzionatorio, affermando la valenza esclusivamente amministrativa della responsabilità da reato¹.

E', al contrario, orientata in senso penalistico altra parte della giurisprudenza, la quale², prendendo spunto e rimarcando l'architettura normativa complessa del nuovo istituto, che ha segnato l'introduzione nel nostro ordinamento di un innovativo sistema punitivo per gli enti collettivi, dotato di regole apposite quanto alla struttura dell'illecito, all'apparato sanzionatorio, alla responsabilità patrimoniale, ha incentrato la sua attenzione su un profilo particolare della normativa in questione che, nel caratterizzarla rispetto al restante panorama normativo, ne esalta la finalità di efficace strumento di controllo sociale.

Secondo tale indirizzo, in altri termini, il sistema sanzionatorio previsto dal d.lgs. n. 231/2001 fuoriesce dagli schemi tradizionali del diritto penale, per così dire "nucleare", prevedendo una responsabilità della persona giuridica aggiuntiva e non sostitutiva di quella della persona fisica che, nel rimanere impregiudicata e non scalfita certamente dalla novella legislativa, resta regolata dal diritto penale "comune". Il criterio di imputazione del fatto all'ente è la commissione del reato "a vantaggio" o "nell'interesse" del medesimo da parte di determinate categorie di soggetti.

Altro filone giurisprudenziale³ ha ritenuto invece che il d.lgs. n. 231/2001 abbia introdotto un *tertium genus* di responsabilità rispetto ai sistemi tradizionali di responsabilità penale e di responsabilità amministrativa, prevedendo un'autonoma responsabilità dell'ente in caso di commissione, nel suo interesse o a suo vantaggio, di uno dei reati espressamente elencati da parte di un soggetto che riveste una posizione apicale, sul presupposto che il fatto-reato è fatto della società, di cui essa deve rispondere.

E questa è, da ultimo, la tesi accolta dalla Corte di Cassazione nella sentenza Thyssen, laddove questo concetto emerge chiaramente da un passo della stessa

ove si può leggere che: “*Il sistema normativo introdotto dal d.lgs. n. 231 del 2001, coniugando i tratti dell’ordinamento penale e di quello amministrativo, configura un «tertium genus» di responsabilità compatibile con i principi costituzionali di responsabilità per fatto proprio e di colpevolezza*”⁴.

Nell’affermare tale principio, la Corte ha poi ulteriormente chiarito, in tema di responsabilità dell’ente derivante da persone che esercitano funzioni apicali ed in punto onere della prova in ordine alla sussistenza della suddetta responsabilità, che, mentre grava sulla pubblica accusa l’onere di provare l’esistenza dell’illecito in capo all’ente e dei requisiti fissati dall’art. 5 d.lgs. n. 231/2001, a quest’ultimo incombe l’onere, con effetti liberatori, di dimostrare di aver adottato ed efficacemente attuato, prima della commissione del reato, modelli di organizzazione e di gestione idonei a prevenire reati della specie di quello in concreto verificatosi.

I diversi orientamenti interpretativi, cui si è fatto cenno poc’anzi, si collocano indubbiamente nell’ambito di disquisizioni di carattere prevalentemente teorico, posto che è apparso, comunque, evidente a tutti gli operatori del diritto che il sistema sanzionatorio, di cui si discute, costituisce indubbiamente un tratto di novità – e, nel momento della sua introduzione, anche di “rottura” – con il sistema previgente e tradizionale di imputazione della responsabilità, un corpus normativo di peculiare impronta, un *tertium genus* (come opportunamente evidenziano le Sezioni Unite della Corte di Cassazione), un sistema che – come chiaramente si evince dalle considerazioni della Relazione che accompagna la normativa in esame – coniuga i tratti dell’ordinamento penale e di quello amministrativo nel tentativo di contemperare le ragioni dell’efficienza preventive con quelle, ancora più ineludibili, della massima garanzia.

In tal senso, e sotto un profilo squisitamente storico, il d.lgs. n. 231/2001 ha indubbiamente rappresentato, come già si è succintamente cercato di evidenziare in precedenza, l’epilogo di un lungo cammino volto, da un lato, a contrastare il fenomeno della criminalità di impresa, attraverso il superamento del principio, insito nella tradizione del diritto penale italiano e che affonda le sue radici già nel diritto romano, in forza del quale *societas delinquere non potest*, e, dall’altro, ad omogeneizzare la normativa interna a quella internazionale di matrice prevalentemente anglosassone, ispirata al pragmatismo giuridico⁵.

Così considerato, il sistema punitivo definito dal d.lgs. n. 231/2001, seppur con le contraddizioni che verranno nel prosieguo evidenziate, supera ed ha superato le censure di legittimità costituzionale sollevate.

E’ infatti da escludere che, così come delineato, il complesso normativo in esame violi il principio della responsabilità per fatto proprio, sancito, a livello costituzionale, dal disposto dell’art. 27, comma 1, cost., in forza del quale “la responsabilità penale è personale”. Il reato commesso dal soggetto inserito nella compagine dell’ente è sicuramente un reato “proprio” anche della persona giuridica, in forza del rapporto di immedesimazione organica che lega il soggetto all’ente, ma, dal punto di vista dei criteri di imputazione della responsabilità penale, rimane pur sempre un reato “proprio” del soggetto agente, rispetto al quale scatta la pretesa punitiva dello Stato con l’irrogazione di una sanzione criminale.

Questa sorta di “doppio binario” della responsabilità – penale per un verso e rivolta ad una persona fisica ed amministrativa per un altro ed imputabile alla persona giuridica – scaturente da un unico ed identico fatto storico, emerge chiaramente da alcuni, significativi, passi di pronunce giurisprudenziali. Nell'affrontare una censura di legittimità costituzionale sottoposta al suo vaglio, la Suprema Corte ha, infatti, avuto sancito la manifesta infondatezza della “*questione di legittimità costituzionale dell'art. 5 d.lgs. 8 giugno 2001, n. 231, sollevata con riferimento all'art. 27 Cost., poiché l'ente non è chiamato a rispondere di un fatto altrui, bensì proprio, atteso che il reato commesso nel suo interesse o a suo vantaggio da soggetti inseriti nella compagine della persona giuridica deve considerarsi tale in forza del rapporto di immedesimazione organica che lega i primi alla seconda*”⁶.

La giurisprudenza di merito è giunta, invece, alla medesima conclusione, evidenziando come “*in relazione al d.lgs 231/01 la volontà del legislatore, come traspare sia dalla legge delega sia dal decreto delegato, era quella di introdurre una nuova forma di responsabilità, tipica degli enti: di natura amministrativa, con garanzie procedurali che richiamano quelle processualpenalistiche e con sanzioni innovative, in quanto non assimilabili né alle pene né alle misure di sicurezza. Con la conseguenza che, così definita la natura della responsabilità, non possono porsi questioni di legittimità costituzionale, in particolare in relazione al supposto conflitto con l'art. 27 cost.*”⁷.

Chiara ed inequivocabile è, pertanto, l'affermazione di una piena compatibilità della normativa in esame con i superiori principi costituzionali in materia di imputazione della responsabilità penale alle persone fisiche, ed altrettanto in termini chiari ed inequivocabili è da escludere che il sistema violi il principio di colpevolezza. Secondo il sistema punitivo previsto dal d.lgs. 231/2001 l'indagine sulla riprovevolezza riguarda l'ente e non il soggetto che per esso ha agito.

Nel pronunciarsi su questo specifico profilo, la giurisprudenza di legittimità ha, infatti, avuto modo di affermare, ripetutamente ed in termini perentori che è “*manifestamente infondata la questione di legittimità costituzionale dell'art. 5 d.lgs. n. 231/2001, sollevata in riferimento agli artt. 3 e 27 cost., in quanto la responsabilità dell'ente per i reati commessi nel suo interesse o a suo vantaggio non è una forma di responsabilità oggettiva, essendo previsto necessariamente, per la sua configurabilità, la sussistenza della cosiddetta “colpa di organizzazione” della persona giuridica*”⁸.

Tramontato – o quantomeno superato – il dogma *societas delinquere non potest* ed evidenziato come, ad onta del nomen iuris, la nuova responsabilità, nominalmente amministrativa, dissimula la sua natura sostanzialmente penale, si evidenzia come i reati presupposto individuati dal d.lgs. 231/2001 rappresentano l'espressione di scelte non individuali ed autonome, ma strumentali rispetto agli obiettivi societari.

In tale ottica con la normativa in esame si è cercato di aggredire le cause strutturali degli infortuni sul lavoro ed è stata perciò avvertita la necessità di introdurre temperamenti volti a riaffermare un bilanciamento degli interessi contrapposti presenti nelle strutture complesse ed a proporre modelli di recupero

della legalità attraverso il contenimento del rischio di lesione dei beni giuridici oggetto di tutela.

Si deve quindi considerare che il legislatore, orientato dalla consapevolezza delle connotazioni criminologiche degli illeciti ispirati da organizzazioni complesse, ha inteso imporre a tali organismi l'obbligo di adottare le cautele necessarie a prevenire la commissione di alcuni reati, adottando iniziative di carattere organizzativo e gestionale: tali accorgimenti vanno consacrati in un documento, ossia in un modello che individua i rischi e delinea le misure atte a contrastarli.

Non aver ottemperato a tale obbligo fonda il rimprovero, la colpa d'organizzazione: è quanto ha avuto modo di porre da subito in luce la Corte di Cassazione già nella sentenza n. 27735 del 18 febbraio 2010⁹, secondo la quale è evidente che la responsabilità dell'ente si fonda sulla colpa di organizzazione.

Sul punto, ribadendo a "tinte forti" il concetto, si è poi chiaramente espressa la giurisprudenza di legittimità nella veste di massima autorevolezza rappresentata dall'intervento delle Sezioni Unite sul caso Thyssen, confermando che *"in tema di responsabilità da reato degli enti, la colpa di organizzazione, da intendersi in senso normativo, è fondata sul rimprovero derivante dall'inottemperanza da parte dell'ente dell'obbligo di adottare le cautele, organizzative e gestionali, necessarie a prevenire la commissione dei reati previsti tra quelli idonei a fondare la responsabilità del soggetto collettivo, dovendo tali accorgimenti essere consacrati in un documento che individua i rischi e delinea le misure atte a contrastarli"*¹⁰.

Posta tale premessa teorica, inquadrata la natura della responsabilità della persona giuridica ed individuato lo specifico fondamento della suddetta responsabilità in presenza di reati imputati al soggetto agente a titolo di colpa, può essere intrapresa la disamina dei criteri di imputazione oggettiva previsti dal d.lgs. n. 231/2001.

L'art. 5 d.lgs. n. 231/2001 detta la regola di imputazione oggettiva dei reati all'ente e, nello stesso tempo, fissa i limiti dell'attribuibilità del fatto anche alla persona giuridica: da un lato, si richiede, infatti, che il reato non solo sia riconducibile ad un soggetto apicale o subordinato all'ente, ma che lo stesso sia commesso nell'"interesse" o a "vantaggio" dell'ente stesso; dall'altro, la norma è chiarissima nel prevedere, all'ultimo comma, che l'ente non risponde del reato se l'autore dello stesso ha agito "nell'interesse proprio o di terzi".

Sul punto, la giurisprudenza è pacifica nell'affermare che, in perfetta aderenza al dettato normativo, *"in tema di responsabilità amministrativa dell'ente, può affermarsi l'assenza di responsabilità soltanto quando si accerti l'«interesse esclusivo» di terzi o di persone fisiche. L'assenza dell'interesse rappresenta, dunque, un limite negativo della fattispecie"*¹¹.

In senso conforme ha statuito il Tribunale di Torino, secondo il quale *"In tema di responsabilità di ente societario per violazione delle norme sulla sicurezza nei luoghi di lavoro, nonostante che il primo comma dell'art. 5 d.lgs. n. 231/2001 proponga in modo apparentemente alternativo i due criteri («... nel suo interesse o a suo vantaggio ...»), tuttavia, il comma secondo dello stesso art. 5 prevede che l'ente non risponde se il reo ha agito «... nell'interesse esclusivo proprio o di terzi»; ne*

consegue che, mancando l'interesse, anche solo concorrente, dell'ente, è del tutto inutile l'eventuale esistenza del solo vantaggio"¹².

L'impostazione prevalente, ispirata anche dalla Relazione governativa di accompagnamento del decreto legislativo, opta per una lettura orientata nel senso che i due criteri di imputazione dell'interesse e del vantaggio si pongano in rapporto di alternatività.

Si ritiene, infatti, che il criterio dell'interesse esprima una valutazione teleologica del reato, apprezzabile *ex ante*, al momento della commissione del fatto, secondo un metro di giudizio marcatamente soggettivo. Come è stato osservato dalla prevalente dottrina, il concetto di "interesse" esprime un legame finalistico tra il reato e un risultato che attraverso il medesimo ci si propone di raggiungere. L'accertamento di tale requisito non è sovente semplice, in quanto occorre svolgere una valutazione, come detto, *ex ante* per accertare se il reato si colloca all'interno di una politica di impresa finalizzata a raggiungere determinati risultati attraverso condotte illecite dei propri dipendenti.

Il criterio del vantaggio è stato, invece, ammantato da una connotazione essenzialmente oggettiva, come tale valutabile *ex post*, sulla base degli effetti concretamente derivati dalla realizzazione dell'illecito: l'esistenza di un vantaggio pone, infatti, minori difficoltà di accertamento, in quanto occorre semplicemente valutare *ex post* se l'ente abbia tratto un beneficio dalla commissione del reato.

La "tesi dualistica", pur in presenza di pronunce di segno contrario, collocabili, peraltro, in un periodo temporale antecedente la pronuncia delle Sezioni Unite, è stata accolta dalla giurisprudenza maggioritaria¹³ e trova conferma nella sentenza Thyssen, secondo la quale *"in tema di responsabilità da reato degli enti, i criteri di imputazione oggettiva, rappresentati dal riferimento contenuto nell'art. 5 d.lgs. n. 231/2001 all'«interesse o al vantaggio», sono alternativi e concorrenti tra loro, in quanto il criterio dell'interesse esprime una valutazione teleologica del reato, apprezzabile «ex ante», cioè al momento della commissione del fatto e secondo un metro di giudizio marcatamente soggettivo, mentre quello del vantaggio ha una connotazione essenzialmente oggettiva, come tale valutabile «ex post», sulla base degli effetti concretamente derivati dalla realizzazione dell'illecito"*¹⁴.

Con particolare riferimento al concetto di vantaggio, poi, un contributo importante in ordine alla sua esatta definizione proviene dalla giurisprudenza di merito, che, più volte, ha avuto occasione di soffermarsi sulla problematica della individuazione del concetto di vantaggio conseguito dall'ente, affermando che *"al fine di ascrivere all'ente il reato di lesioni colpose commesse in violazione delle norme a tutela della salute e della sicurezza dei lavoratori è necessaria la prova che la condotta del soggetto apicale fosse soggettivamente diretta ad avvantaggiare l'ente o abbia comunque oggettivamente comportato un beneficio per lo stesso, ad esempio in termini di risparmio dei costi o dei tempi di lavorazione"*¹⁵.

Sempre con particolare riferimento al concetto di vantaggio, si segnala, inoltre, una significativa decisione della Corte di Cassazione che fornisce una nozione molto estesa di vantaggio, in quanto, andando ad individuarlo pure in una situazione in cui si riscontra un ritorno in termini positivi della condotta criminosa in capo al soggetto agente e non esclusivamente in capo alla persona giuridica in

nome e per conto della quale questi ha agito, si amplia indubbiamente l'ambito di operatività della norma in questione: si legge, infatti, testualmente che *“ai fini della configurabilità della responsabilità dell'ente, è sufficiente che venga provato che lo stesso abbia ricavato dal reato un vantaggio, anche quando non è stato possibile determinare l'effettivo interesse vantato ex ante alla consumazione dell'illecito e purché non sia contestualmente accertato che quest'ultimo sia stato commesso nell'esclusivo interesse del suo autore persona fisica o di terzi. In definitiva, perché possa ascrivere all'ente la responsabilità per il reato, è sufficiente che la condotta dell'autore di quest'ultimo tenda oggettivamente e concretamente a realizzare, nella prospettiva del soggetto collettivo, «anche» l'interesse del medesimo”*¹⁶.

Il percorso interpretativo di ampliamento del concetto di vantaggio – e, conseguentemente, della sfera di operatività della norma in esame – trova un ulteriore contributo in senso estensivo in un'altra pronuncia di merito che si spinge fino a ricomprendervi il vantaggio indiretto. Secondo una apprezzabile decisione del Tribunale di Milano, infatti, il *“requisito dell'interesse o vantaggio dell'ente, quale criterio di imputazione oggettiva della responsabilità dell'ente stesso, può essere integrato anche dal vantaggio indiretto, inteso come acquisizione per la società di una posizione di privilegio sul mercato derivante dal reato commesso dal soggetto apicale. Nondimeno, proprio la natura di criterio di imputazione della responsabilità riconosciuto dalla legge richiede la concreta e non astratta affermazione dell'esistenza di un tale interesse o vantaggio, da intendersi rispettivamente come potenziale o effettiva utilità, ancorché non necessariamente di carattere patrimoniale, derivante all'ente dalla commissione del reato presupposto”*¹⁷.

2 Metodologia

Considerata la scelta operata dal legislatore di identificare i predetti concetti di interesse e di vantaggio quali criteri di imputazione oggettiva dei reati all'ente, occorre ora soffermarsi sulla circostanza, di assoluto interesse, che l'art. 25 *septies* d.lgs. n. 231/2001, introdotto dall'art. 9 l. n. 123/2007 e riformulato dall'art. 300 d.lgs. n. 81/2008, ha dato ingresso ai delitti colposi nel catalogo dei reati costituenti presupposto della responsabilità degli enti, senza modificare i criteri di imputazione oggettiva previsti dall'art. 5 della norma in esame, per adattarli alla diversa natura di tale categoria di illeciti: è indubbio, infatti, che, *ictu oculi* ed in base a quelli che sono i canoni ermeneutici di applicazione delle norme fondanti la responsabilità penale per colpa, il percorso giurisprudenziale di cui si è dato, seppure per sommi capi, poc'anzi conto, e che ha portato ad elaborare un concetto di interesse e, soprattutto, di vantaggio, connotato da una potenziale ampia sfera di operatività della norma, potrebbe non trovare una immediata ed “indolore” applicazione quando il reato presupposto, fondante la responsabilità amministrativa della persona giuridica, viene imputato al suo autore a titolo di colpa e non di dolo.

Questo è – e non può non essere – il vero snodo cruciale della tematica sottesa a questo nostro contributo: la compatibilità tra la commissione di un reato colposo e la previsione dell'affermazione di una responsabilità amministrativa dell'ente per tale fatto di reato.

Pur non essendo possibile in questa sede effettuare una sintesi completa di tutti i contributi che hanno coinvolto teoria e prassi del d.lgs. n. 231/2001, appare, però, di interesse e di importanza imprescindibili rivisitare *funditus* la questione relativa all'ingresso dei delitti colposi nel catalogo dei reati costituenti presupposto della responsabilità degli enti.

Attraverso l'analisi del dettato normativo dell'art. 25 *septies* d.lgs. n. 231/2001 e l'analisi del panorama degli orientamenti delle Sezioni Unite della Corte di Cassazione ante sentenza Thyssen, sarà possibile mettere in luce la problematica relativa all'ingresso dei delitti colposi nel catalogo dei reati costituenti presupposto della responsabilità degli enti.

Singolare è stata, innanzitutto, l'occasione scelta dal legislatore per introdurre nel nostro panorama normativo un istituto di così forte ed innovativo impatto, ossia la responsabilità amministrativa della persona giuridica conseguente alla commissione di un delitto punito a titolo di colpa: la Legge n. 123/2007, infatti, recava quale rubrica "*Misure di tutela della salute e della sicurezza sul lavoro e delega al Governo per il riassetto e la riforma della normativa in materia*", ossia conteneva ai sensi dell'art. 76 cost. quei "principi e criteri direttivi" attendendosi ai quali il Governo andò ad emanare le norme contenute in quello che sarebbe diventato il Testo Unico in materia di prevenzione degli infortuni e di igiene e sicurezza sul lavoro, cioè il d.lgs. n. 81/2008; in tale contesto l'art. 9, che ha introdotto nel corpo del d.lgs. n. 231/2001 l'art. 25 *septies* ed ha esteso l'ambito applicativo della disciplina ai reati di omicidio colposo (art. 589 c.p.) e lesioni colpose gravi o gravissime (art. 590 c.p.) entrambi commessi con violazione delle norme sulla tutela della sicurezza sul lavoro, successivamente riscritto dall'art. 300 d.lgs. n. 81/2008, così dispone: "1. *In relazione al delitto di cui all'articolo 589 del codice penale, commesso con violazione dell'articolo 55, comma 2, del decreto legislativo attuativo della delega di cui alla legge 3 agosto 2007, n. 123, in materia di salute e sicurezza sul lavoro, si applica una sanzione pecuniaria in misura pari a 1.000 quote. Nel caso di condanna per il delitto di cui al precedente periodo si applicano le sanzioni interdittive di cui all'articolo 9, comma 2, per una durata non inferiore a tre mesi e non superiore ad un anno.* 2. *Salvo quanto previsto dal comma 1, in relazione al delitto di cui all'articolo 589 del codice penale, commesso con violazione delle norme sulla tutela della salute e sicurezza sul lavoro, si applica una sanzione pecuniaria in misura non inferiore a 250 quote e non superiore a 500 quote. Nel caso di condanna per il delitto di cui al precedente periodo si applicano le sanzioni interdittive di cui all'articolo 9, comma 2, per una durata non inferiore a tre mesi e non superiore ad un anno.* 3. *In relazione al delitto di cui all'articolo 590, terzo comma, del codice penale, commesso con violazione delle norme sulla tutela della salute e sicurezza sul lavoro, si applica una sanzione pecuniaria in misura non superiore a 250 quote. Nel caso di condanna per il delitto di cui al prece-*

dente periodo si applicano le sanzioni interdittive di cui all'articolo 9, comma 2, per una durata non superiore a sei mesi".

Il reato di omicidio colposo, previsto dall'art. 589 c.p., si realizza quando si cagioni, per colpa, la morte di una persona e, ai sensi del comma 2 della suddetta norma, è aggravato qualora il fatto sia commesso con violazione delle norme per la prevenzione degli infortuni sul lavoro. In tal caso:

- il bene giuridico tutelato è la vita umana, che viene protetta sia nell'interesse dell'individuo che nell'interesse della collettività;
- il soggetto attivo è chiunque sia tenuto ad osservare o a far osservare norme di prevenzione o protezione e sia, pertanto, titolare della cosiddetta "posizione di garanzia": datore di lavoro, dirigente, preposto (anche di fatto), responsabile del servizio di prevenzione e protezione, medico competente e, da ultimo, anche il lavoratore;
- la condotta colposa consiste nel cagionare la morte o nel non impedire che la stessa avvenga per effetto dell'inosservanza di norme antinfortunistiche e sulla tutela dell'igiene e sicurezza e della salute sul lavoro, di regolamenti, di ordini e procedure aziendali, di norme tecniche, oltre che per negligenza, imperizia ed imprudenza (art. 43 c.p.);
- l'elemento soggettivo consiste nella colpa specifica, ossia nell'inosservanza di norme precauzionali (previste in particolare dalle norme e dai regolamenti in materia di sicurezza e salute sul lavoro) volte ad impedire gli eventi dannosi, ma anche nella colpa generica, ossia l'imprudenza, l'imperizia, la negligenza.

Speculare è la struttura del reato di lesioni personali colpose, previsto dall'art. 590 c.p., che, nelle ipotesi aggravate del comma 2 (contemplante i casi di lesione grave e gravissima secondo la definizione e la casistica disciplinate dall'art. 583 c.p.), risulta ulteriormente circostanziato in termini di inasprimento della pena qualora le suddette lesioni risultino essere state cagionate, come per l'omicidio colposo, dalla violazione delle norme per la prevenzione degli infortuni sul lavoro, ed identiche sono le considerazioni in ordine al bene giuridico tutelato, al soggetto attivo, all'essenza della condotta colposa ed alla natura dell'imputazione a livello di elemento psicologico del fatto.

L'introduzione dei reati di natura colposa previsti e puniti dagli artt. 589 e 590 c.p. nel novero dei reati presupposto di cui al d.lgs. n. 231/2001, senza che fosse prevista dal legislatore una mutazione dei criteri di imputazione oggettiva della responsabilità degli enti, ha fatto, pertanto, sorgere il problema della compatibilità logica tra la non volontà dell'evento, che caratterizza gli illeciti colposi, ed il finalismo che è sotteso all'idea di interesse e di vantaggio e che presuppone, nel soggetto agente come nella persona giuridica che dalla condotta di questi tragga beneficio, una chiara intenzione a livello di volontà di perseguire il risultato criminoso in relazione al quale la condotta è posta in essere: infatti, i concetti dell'interesse e del vantaggio come sopra delineati, se ben si sposano con un reato di natura dolosa, altrettanto sono di difficile e non immediata compatibilità se riferiti ad un reato di natura colposa, ossia ad una condotta in cui, per definizione, l'evento conseguenza della prima non deve essere voluto dall'agente.

Appare, in tal senso, arduo (se non impossibile), da un lato, sostenere che un omicidio commesso con violazione di regole antinfortunistiche sia stato realizzato “nell’interesse” di un ente, così come appare parimenti di non evidente ed automatica percezione la relazione che intercorre tra una condotta colposa, nei termini dianzi succintamente descritti, con l’intenzione di trarre dalla stessa un vantaggio nel significato del concetto che, in relazione alle fattispecie di delitti dolosi presi in considerazione dal D. lgs. n. 231/2001, giurisprudenza e dottrina hanno nel corso degli anni enucleato: diventa, infatti, difficoltoso sostenere che un infortunio sul lavoro arrechi un “vantaggio” all’ente per la semplice ragione che sono gli svantaggi (danno reputazionale, procedimento penale, costi per l’eventuale risarcimento del danno alla parte lesa, etc.) ad essere di gran lunga superiori all’unico possibile vantaggio (se esistente), derivante dal risparmio per il mancato acquisto di presidi antinfortunistici.

A questo quadro, già di per sé abbastanza intricato, va ad aggiungersi l’ulteriore considerazione che le condotte integranti gli estremi dei reati di cui agli artt. 589 e 590 c.p. possono consistere anche in omissioni: in altri termini, essendo i reati di omicidio colposo e lesioni personali colpose classificabili nella categoria dogmatica dei “reati omissivi impropri” o “commissivi mediante omissione”: in altri termini, potendo questi illeciti consistere sia in un *facere* che in un *non facere*, i concetti di interesse e vantaggio diventano, almeno a livello teorico ed astratto, non solo difficilmente individuabili, ma, anche e conseguentemente, difficilmente compatibili con i requisiti strutturali sui quali il d.lgs. n. 231/2001 fonda la responsabilità amministrativa della persona giuridica.

Questa singolare situazione, per la quale nei reati colposi di evento sembra ben difficilmente ipotizzabile un caso in cui l’evento lesivo corrisponda ad un interesse o vantaggio dell’ente, ha, pertanto, indotto a ritenere che, in mancanza di un esplicito adeguamento normativo, la nuova, estensiva, disciplina sia sostanzialmente inapplicabile: secondo questa prima teoria, cioè, l’applicazione del sistema del d.lgs. n. 231/2001 ai reati colposi sarebbe possibile solo in presenza di una riforma che modifichi i criteri di imputazione oggettiva per i predetti reati.

La tesi opposta ha, invece, ritenuto che occorra adottare una interpretazione adeguatrice della normativa ed occorra, quindi, riferire i concetti di interesse e vantaggio alla sola condotta dell’autore del reato, lasciando fuori da tale valutazione l’evento.

E’ quello che sostiene in termini assolutamente univoci e consolidati la giurisprudenza, sia di merito che di legittimità. Si legge, infatti, nella sentenza del 10 gennaio 2013 del Tribunale di Torino che “nel caso di commissione di un reato colposo, il requisito dell’interesse o vantaggio deve essere riferito non all’intera fattispecie di reato, comprensiva dell’evento lesivo, ma alla sola condotta violativa delle norme antinfortunistiche”¹⁸.

In senso conforme ha deciso la Corte d’Assise di Torino, chiarendo che “quando gravissime violazioni della normativa antinfortunistica ed antincendio e colpevoli omissioni sono caratterizzate da un contenuto economico rispetto al quale l’azienda non solo ha interesse, ma se ne è anche sicuramente avvantaggiata, sotto il profilo del considerevole risparmio economico che ha tratto omettendo

qualsiasi intervento, oltre che dell'utile contemporaneamente ritratto dalla continuità della produzione, in caso di omicidio colposo da infortunio sul lavoro collegare il requisito dell'interesse o del vantaggio dell'ente non all'evento bensì alla condotta penalmente rilevante della persona fisica corrisponde ad una corretta applicazione dell'art. 25 *septies* d.lgs. n. 231/2001¹⁹.

Con riferimento alla compatibilità logica tra i delitti colposi e i criteri di imputazione oggettiva della responsabilità come definiti dalla normativa in esame, la tesi predetta ha avuto, inoltre, il merito di evidenziare che *“le fattispecie colpose di omicidio e lesioni personali conseguenti a violazioni di norme antinfortunistiche sono perfettamente compatibili con la struttura della responsabilità degli enti forgiata dal d.lgs. n. 231/2001 sul paradigma di una responsabilità, in limine mista penale-amministrativa, per c.d. colpa d'organizzazione che si realizza nella mancata previsione e/o prevenzione di tali fattispecie al pari di quelle dolose di cui agli artt. 24 ss. medesimo decreto”*²⁰.

Il percorso ermeneutico operato dalla giurisprudenza nel senso di ritenere immediatamente applicabili i principi strutturali della responsabilità amministrativa degli enti anche a fronte della commissione di reati colposi, senza la necessità di un intervento a livello normativo che adattasse la disciplina previgente alla particolare natura dell'imputazione della responsabilità penale per colpa, trova il suo sbocco ed il suo approdo di maggior rilievo dal punto di vista dell'autorevolezza (e della vincolatività) della pronuncia nel 2014 con la nota sentenza Thyssen delle Sezioni Unite della Corte di Cassazione che ha accolto in toto la seconda tesi sopra esaminata ed ha statuito chiaramente come il problema di compatibilità logica debba essere risolto in sede interpretativa.

Con la predetta decisione la Suprema Corte ha evidenziato come l'interpretazione letterale della norma porterebbe, infatti, alla radicale caducazione di un'innovazione normativa di grande rilievo, ossia dell'affermazione della responsabilità amministrativa anche a fronte della commissione da parte dei soggetti contemplati nelle lett. a) e b) del comma 1 dell'art. 5 d.lgs. n. 231/2001 ed alla “sconfessione” di una chiara volontà del legislatore di procedere in questa direzione, come ribadito dal d.lgs. n. 7 luglio 2011, n. 121, con il quale è stato introdotto nel corpo del d.lgs. n. 231/2001 l'art. 25 *undecies* che ha esteso la responsabilità dell'ente a diversi reati di matrice ambientali, integranti addirittura ipotesi contravvenzionali, punite, quindi, a titolo di colpa.

Ed in tale senso, con molta incisività ed altrettanta perentorietà, la Corte ha proseguito evidenziando come l'unica alternativa, l'unica possibile lettura della norma – compatibile con un legislatore “razionale” e che assicuri alla stessa un effettivo campo applicativo – sia quella secondo la quale i concetti di interesse e vantaggio, nei reati colposi di evento, vanno di necessità riferiti alla condotta e non all'esito antigiusuridico.

Tale soluzione – sempre secondo la Corte – non determinerebbe alcuna difficoltà di carattere logico: *“è ben possibile che una condotta caratterizzata dalla violazione delle disciplina cautelare e quindi colposa sia posta in essere nell'interesse dell'ente o determini comunque il conseguimento di un vantaggio”*. Di questo assioma la Corte di Cassazione è perfettamente convinta, fin quasi ad as-

surgerla ad una sorta di “petizione di principio”, laddove, nell’immediato prosieguo della motivazione, nel ribadire il proprio orientamento utilizza, una locuzione, riferita alla scelta interpretativa adottata (“*oltre ad essere logicamente obbligata e priva di risvolti intollerabili dal sistema*”), che, da un lato, la fa quasi apparire come “imposta” ed ineludibile e, dall’altro, non può non dare ulteriore fiato e corda a quelle censure di ordine sistematico che sottolineano l’ontologica incompatibilità tra i presupposti fondanti la responsabilità amministrativa delle persone giuridiche ed i principi costituzionali e codicistici della responsabilità per colpa.

Ed in questo “disegno” di difesa ad oltranza dell’opzione interpretativa accolta, la Suprema Corte prosegue affermando che essa “*non ha nulla di realmente creativo, ma si limita ad adattare l’originario criterio di imputazione al mutato quadro di riferimento, senza che i criteri d’iscrizione ne siano alterati*”.

Pertanto, “*l’adeguamento riguarda solo l’oggetto della valutazione che coglie non più l’evento bensì la condotta, in conformità alla diversa conformazione dell’illecito; e senza quindi alcun vulnus ai principi costituzionali dell’ordinamento penale*”.

Ed ecco, allora, che, in questa sorta di improprio ragionamento logico-deduttivo di stampo filosofico, la conclusione a cui pervengono i Giudici delle Sezioni Unite è se non imposta, abbastanza scontata e si legge nello snodo successivo dell’argomentare motivazionale, laddove si afferma testualmente che “*tale soluzione non presenta incongruenze: è ben possibile che l’agente violi consapevolmente la cautela, o addirittura preveda l’evento che ne può derivare, pur senza volerlo, per corrispondere ad istanze funzionali a strategie dell’ente. A maggior ragione vi è perfetta compatibilità tra inosservanza della prescrizione cautelare ed esito vantaggioso per l’ente*”.

A questo profilo si accompagna quello, altrettanto rilevante e fonte di forti discordanze interpretative, concernente la possibilità di individuare un profitto confiscabile nel reato colposo. Sul punto la disamina operata dalla Corte di Cassazione è indubbiamente completa ed esaustiva, frutto di una ricostruzione rigorosa e sistematica dell’istituto in questione.

Il dato di partenza è costituito da una ricognizione della precedente giurisprudenza di legittimità, in forza della quale, alla luce del disposto dell’art. 240 c.p., “*il ‘profitto’ va tenuto distinto dal ‘prodotto’ e dal ‘prezzo’ del reato, e va individuato in qualsiasi ‘vantaggio economico’ che costituisca un ‘beneficio aggiunto di tipo patrimoniale’ che abbia una ‘diretta derivazione causale’ dalla commissione dell’illecito*”. In tale contesto, ribadita l’imprescindibilità “*della stretta derivazione causale del profitto dal reato*”, alla nozione di “*vantaggio economico*” non va, però, “*attribuito il significato di ‘utile netto’ o di ‘reddito’, indicando essa invece un beneficio aggiunto di natura economica*”.

Preso atto di quello che è l’orientamento consolidato della giurisprudenza di legittimità in materia di sequestro preventivo finalizzato alla confisca ex art. 322 ter c.p., di confisca diretta relativamente ad ipotesi di reati fiscali e/o tributari e di confisca per equivalente, il ragionamento della Corte di Cassazione si sposta, anche in questo caso – analogamente a quanto abbiamo visto in precedenza con

riferimento ai concetti di “interesse” e di “vantaggio” –, sul terreno della conformazione della nozione di “profitto” confiscabile alla particolare natura dei reati colposi.

Palese è, anche in questo contesto, lo sforzo che i Giudici della Suprema Corte affrontano per cercare di “ritagliare” un ambito applicativo effettivo e concreto (e non solo teorico e virtuale) al concetto di confisca, quale sanzione conseguente all’illecito amministrativo prevista dalla lett. c) dell’art. 9 d.lgs. n. 231/2001, così come delineata dal successivo art. 19 d.lgs. n. 231/2001, che la individua nel “prezzo” o nel “profitto” del reato.

Evidente è, infatti, la non perfetta ed automatica trasposizione di istituti e di concetti conformati su fattispecie delittuose di matrice dolosa, in cui è scontata nell’intenzione del soggetto agente la fruizione di un “ritorno economico” – in termini di prezzo o profitto – dalla sua condotta illecita, con ipotesi di responsabilità colposa dove, essendo *in re ipsa* esclusa la volontà dell’evento, deve, altrettanto automaticamente, non configurarsi in capo all’autore della medesima l’intento di fruire di un vantaggio dal compimento dell’attività delinquenziale.

Preso atto, pertanto, di un “andamento estensivo della giurisprudenza in tema di profitto”, in forza del quale nel linguaggio penalistico “il termine ha assunto sempre un significato oggettivamente più ampio rispetto a quello economico ed aziendalistico”, non essendo “*mai stato inteso come espressione di una grandezza residuale o come reddito di esercizio, determinato attraverso il raffronto tra componenti positive e negative del reddito*”, in ossequio anche a strategie internazionali di contrasto efficace alla criminalità economica ed organizzata, la Corte di Cassazione introduce una prima “forte” affermazione di principio, laddove in termini perentori stabilisce che “*tale generale ordine di idee deve essere ripreso ed ampliato*”, in quanto “*è da rimarcare che l’idea di profitto non può non essere conformata in guisa che sia coerente con le caratteristiche della fattispecie cui si riferisce*”: è, fatte le debite differenze, lo stesso schema argomentativo adottato per pervenire a quella definizione interpretativamente “adeguata” dei concetti di interesse e vantaggio che assicuri un’applicazione effettiva e concreta della disciplina della responsabilità amministrativa della persona giuridica a seguito della commissione di fattispecie di reato punite a titolo di colpa. E che questo sia il percorso argomentativo da seguire ne è conscia la stessa Corte di Cassazione, laddove si premura di ribadire che “*si è visto, per ciò che riguarda i reati colposi di evento, l’imputazione oggettiva dell’illecito penale all’ente si fonda sull’interesse o vantaggio riferito alla condotta e non all’evento*”.

Così posti i termini della questione, la conclusione del ragionamento operato dalla sentenza Thyssen è, ovviamente, nel senso di pervenire, anche in questo caso, ad una lettura del combinato disposto degli artt. 9 comma 1, lett. c), e 19, comma 1, d.lgs. n. 231/2001 “adattata” alle peculiari caratteristiche dei reati colposi, che permetta, di conseguenza, di ritagliare al suddetto disposto normativo uno spazio applicativo significativo, facendo ricorso a quella interpretazione “adeguatrice” delle norme che ne assicuri compatibilità e operatività senza dover ricorrere ad un intervento correttivo a livello di previsione normativa.

Fatte queste premesse, certamente chiaro è il passaggio della motivazione sul punto della sentenza in esame: *“con riguardo ad una condotta che reca la violazione di una disciplina prevenzionistica, posta in essere per corrispondere ad istanze aziendali, l'idea del profitto si collega con naturalezza ad una situazione in cui l'ente trae da tale violazione un vantaggio che si concreta, tipicamente, nella mancata adozione di qualche oneroso accorgimento di natura cautelare, o nello svolgimento di una attività in una condizione che risulta economicamente favorevole, anche se meno sicura di quanto dovuto”*.

Altrettanto chiara è, infine, la conclusione del percorso argomentativo: *“qui si concreta il vantaggio che costituisce il nucleo essenziale dell'idea normativa di profitto”* e che si pone come presupposto per l'applicazione a carico dell'ente della sanzione della confisca; è, pertanto, da ritenersi corretta, nel pensiero della Suprema Corte, l'individuazione del profitto quantomeno nel risparmio di spesa inerente all'impianto aziendale, oltre che nella prosecuzione dell'attività funzionale alla strategia aziendale, ma non conforme ai canoni di sicurezza.

3 Risultati e conclusioni

Traendo le fila delle nostre argomentazioni, non possiamo esimerci da una considerazione che, da quanto fino ad ora rimarcato, emerge in termini netti ed indubbiamente enfatizzati dai principi introdotti dalla sentenza delle Sezioni Unite della Corte di Cassazione sul caso Thyssen e che non vuole – e non deve – essere certamente intesa come una “censura” all'operato della Corte di Cassazione: una indubbia “forzatura” del dato normativo contenuto nell'impianto originario del d.lgs. n. 231/2001, imposta dalla necessità di pervenire a pronunce di affermazione della sussistenza della responsabilità amministrativa degli enti in presenza di reati di omicidio colposo e lesioni colpose gravi o gravissime commessi con violazione delle norme sulla tutela della salute e sicurezza sul lavoro, ossia in presenza di fattispecie di reato punite a titolo di colpa.

Se, infatti, lodevole ed espressione di un intendimento volto ad assicurare una risposta “forte” dell'ordinamento di fronte a fatti tragici di inaudita gravità, quali quelli oggetto del giudizio sfociato nella sentenza delle Sezioni Unite che in queste pagine abbiamo analizzato, è lo sforzo operato dai Giudici della Suprema Corte di “adattamento” del corpo normativo previgente alle modifiche nel medesimo introdotte con la previsione di casi di responsabilità amministrativa di enti conseguenti alla commissione di reati puniti a titolo di colpa, altrettanto innegabile è la constatazione che la scelta “necessitata” ed “obbligata” di pervenire a questa interpretazione “adeguatrice”, frutto di una lettura del dato normativo certamente “dinamica” e non improntata a schemi concettuali rigidi ed obsoleti, discende inevitabilmente ed innegabilmente da tale contingenza, ossia dall'inserimento nel corpo normativo originario del d.lgs. n. 231/2001, strutturato su fattispecie di reato di stampo prettamente doloso, di casi di responsabilità amministrativa conseguenti a reati di matrice colposa, che fanno riferimento a principi di imputazione della responsabilità penale diametralmente ed ontologicamente inconci-

liabili con quelli sottesi a situazioni caratterizzate dalla intenzionalità della condotta.

Endnotes

- ¹ Cass. pen., S.U., 23 gennaio 2001, n. 34476, Deloitte & Touche, in CED Cassazione, rv. 250347; Id., 30 gennaio 2014, n. 10561, Gubert, *ivi*, rv. 258647; nello stesso senso Cass. pen., 25 gennaio 2013, n. 21192, Barla, *ivi*, rv. 255369; Id., 25 giugno 2013, n. 42503, Ciacci, rv. 257126.
- ² Cass. pen., S.U., 27 marzo 2008, n. 26654, Fisia Impianti, in CED Cassazione, rv. 239922-923-924-925-926-927.
- ³ Cass. pen., 18 febbraio 2010, n. 27735, Scarafia, in CED Cassazione, rv. 247665-666; Id., 9 luglio 2009, n. 36083, Mussoni, *ivi*, rv. 244256.
- ⁴ Cass. pen., S.U., 24 aprile 2014, n. 38343, in Rivista231.it.
- ⁵ Cass. pen., S.U., 27 marzo 2008, n. 26654, *cit*.
- ⁶ Cass. pen., 18 febbraio 2010, n. 27735, in CED Cassazione.
- ⁷ Ass. Torino, 14 novembre 2011, in Società, 2012, 1, 100.
- ⁸ Cass. pen., 18 febbraio 2010, n. 27735, *cit*; *conf. Id.*, 7 giugno 2011, n. 28731.
- ⁹ Cass. pen., 18 febbraio 2010, n. 27735, *cit*.
- ¹⁰ Cass. pen., S.U. 24 aprile 2014, n. 38343, *cit*.
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- ¹³ Cass. pen., 20 dicembre 2005, n. 3615, D'Azzo, in CED Cassazione, rv. 232957; Id., 28 novembre 2013, dep. 2014, n. 10265, Banca Italease s.p.a., *ivi*, rv. 258577; Id., 22 maggio 2013, n. 24559, House Building s.p.a., *ivi*, rv. 255442.
- ¹⁴ Cass. pen., S.U. 24 aprile 2014, n. 38343, *cit*.
- ¹⁵ App. Brescia, 14 dicembre 2011, in Rivista231.it.
- ¹⁶ Cass. pen., 4 marzo 2014, n. 10265, in Rivista231.it.
- ¹⁷ Trib. Milano, 28 aprile 2008, in Foro ambrosiano, 2008, 3, 329.
- ¹⁸ Trib. Torino, 10 gennaio 2013, in Rivista231.it.
- ¹⁹ Ass. Torino, 14 novembre 2011, *cit*., e anche in Giur. it., 2012, 907, con nota di C. Limone, *Infortuni sul lavoro e omicidio doloso*.
- ²⁰ G.i.p. Milano, 8 marzo 2012, in Giur. merito, 2012, 1899.
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Regole di *governance* delle società di capitali, responsabilità dei componenti dell'organo gestorio e modelli organizzativi

Author

- *Oreste Cagnasso, Full Professor, oreste.cagnasso@unito.it - University of Torino*
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Le regole di *governance* delle società per azioni hanno subito all'interno dell'ordinamento italiano e di quelli dell'Unione Europea, nonché dello stesso ordinamento comunitario, una profonda evoluzione. In particolare l'individuazione dei doveri degli amministratori è stata oggetto di interventi, che hanno accentuato, da un lato, la rilevanza della diligenza richiesta, parametrandola al ruolo ed alle competenze dei singoli gestori, e, dall'altro, hanno posto l'accento sull'attività istruttoria e preparatoria di ciascuna scelta gestionale.

Come risulta chiaramente dal dettato dell'art. 2381 c.c., nonché dall'art. 2403 c.c., nell'ambito delle s.p.a. sussiste l'obbligo della creazione e dell'applicazione di assetti organizzativi adeguati; anzi è lo stesso legislatore a sottolinearne il rilievo, laddove impone al collegio sindacale la vigilanza sull'osservanza non solo della legge e dello statuto, ma anche sul rispetto dei principi di corretta amministrazione, individuando tra di essi, in particolare, l'adeguatezza degli assetti (art. 2403, primo comma, c.c.).

Il d.lgs. n. 231/2001 prevede, al fine di evitare la cosiddetta responsabilità amministrativa-penale della società, la creazione di modelli organizzativi e gestionali idonei a prevenire i reati indicati, il cui ambito è stato via via notevolmente esteso nel tempo. I modelli in questione rappresentano quindi uno strumento di esenzione per la società dalla responsabilità. Costituiscono altresì un antecedente rispetto all'obbligo di adozione di assetti adeguati, espressamente introdotto con la riforma societaria e quindi a decorrere dal 1° gennaio 2004.

Il presente scritto ha per oggetto l'esame del tema – di grande rilievo operativo – concernente l'obbligatorietà dell'adozione di tali modelli. La soluzione affermativa, accolta dalla giurisprudenza e dalla dottrina, si fonda, almeno in parte, su un'analisi del dato normativo, che offre quantomeno degli elementi di giudizio in questo senso, pur non contenendo un'esplicita indicazione.

Ma è soprattutto la prospettiva in cui inserire oggi l'attività gestoria e i conseguenti doveri e responsabilità degli amministratori a indurre ad una soluzione positiva. Invero sia la di-

ligenza richiesta, sia l'obbligo di creare procedure adeguate, all'interno del quale si colloca anche la predisposizione dei modelli organizzativi, inducono a ritenere che gli amministratori abbiano un preciso obbligo in tal senso. D'altra parte occorre osservare che l'enfasi del legislatore sulla previsione del rispetto dei principi di corretta amministrazione non può non estendersi all'obbligo di eliminare, con la predisposizione dei modelli organizzativi, il rischio per la società di subire le sanzioni previste dal d. lgs. 231/2001.

Keywords: *corporate governance*; società di capitali; modelli organizzativi; organo gestorio; responsabilità.

JEL Classification: K22

1 I principi di *governance* della s.p.a.

Le regole di *governance* delle società per azioni hanno subito, all'interno dell'ordinamento italiano e di quelli dell'Unione Europea, nonché dello stesso ordinamento comunitario, una profonda evoluzione. In particolare l'individuazione dei doveri degli amministratori è stata oggetto di interventi, che hanno accentuato, da un lato, la rilevanza della diligenza richiesta, parametrando al ruolo ed alle competenze dei singoli gestori, e, dall'altro, hanno posto l'accento sull'attività istruttoria e preparatoria di ciascuna scelta gestionale.

2 Regole di *governance* e creazione di assetti organizzativi adeguati nell'ambito della s.p.a.

Come risulta chiaramente dal dettato dell'art. 2381 c.c., nonché dall'art. 2403 c.c., nell'ambito delle s.p.a. sussiste l'obbligo della creazione e dell'applicazione di assetti organizzativi adeguati; anzi è lo stesso legislatore a sottolinearne il rilievo, laddove impone al collegio sindacale la vigilanza sull'osservanza non solo della legge e dello statuto, ma anche sul rispetto dei principi di corretta amministrazione, individuando tra di essi, in particolare, l'adeguatezza degli assetti (art. 2403, comma 1, c.c.).

2.1 Le innovazioni introdotte dalla riforma societaria

Mentre nel sistema codicistico originario la delega di potere gestorio presentava una disciplina unitaria, oggi le nuove regole racchiuse nell'art. 2381 c.c. concernono la normativa applicabile alle società per azioni non quotate dotate del sistema tradizionale di amministrazione e controllo. Nel caso di società per azioni quotate, di società per azioni che abbiano adottato il sistema dualistico o quel-

lo monistico e di società a responsabilità limitata, le disposizioni contenute nell'art. 2381 c.c. debbono essere coordinate con i "differenti scenari" in cui le stesse vanno ad inserirsi, nonché con le norme particolari dettate nei vari contesti e con il silenzio riservato dal legislatore all'istituto nel caso della società a responsabilità limitata.

La disciplina anteriore alla riforma e quella attuale presentano numerosi punti di contatto in ordine alla costituzione, alla struttura, ai poteri degli organi delegati e per alcuni profili le nuove regole rappresentano semplicemente l'espressa codificazione di soluzioni interpretative già acquisite.

Per altro verso e sotto altri aspetti assai significative sono le innovazioni. In primo luogo, esse concernano la responsabilità dei deleganti e dei delegati e la disciplina del flusso di informazioni dai secondi ai primi. Inoltre notevoli sono anche le innovazioni in ordine al contenuto della delega, anche se il legislatore non pare aver pienamente attuato le direttive della legge delega dirette a restringere sensibilmente l'ambito dei poteri delegabili.

Nell'ambito della società per azioni inoltre la delega di potere gestorio si inserisce in uno scenario in parte modificato (la rigida ripartizione di competenze tra assemblea e amministratori; i parametri della responsabilità di questi ultimi) e in parte totalmente nuovo (i sistemi alternativi a quello tradizionale di amministrazione e controllo).

2.2 La creazione e la valutazione degli assetti

Un profilo di notevole rilievo è espresso dalle regole contenute nel terzo e nel quinto comma dell'art. 2381 c.c.: "il consiglio di amministrazione valuta l'adeguatezza dell'assetto organizzativo, amministrativo e contabile della società"; "gli organi delegati curano che tale assetto sia adeguato alla natura e alle dimensioni dell'impresa".

Indubbiamente, come risulta da tale norma e da quella - l'art. 2403 c.c. - che individua i poteri attribuiti all'organo di controllo, spetta agli amministratori il compito - e si tratta di innovazione di notevole interesse e di profilo di grande rilievo - di curare l'assetto organizzativo, amministrativo e contabile della società. In presenza di organi delegati, la predisposizione degli assetti compete ad essi, mentre la valutazione di adeguatezza spetta al consiglio di amministrazione.

2.3 Le responsabilità

Della gestione delegata sono responsabili in primo luogo i componenti degli organi delegati. Tuttavia le innovazioni in ordine ai criteri di determinazione della diligenza richiesta agli amministratori non potranno non valere anche per questi ultimi, aumentandone, sotto certi profili, il rilievo. Infatti il legislatore fa riferimento, nel delineare il grado di dirigenza richiesta, tra l'altro, alla natura dell'incarico.

Inoltre i delegati – e questo è sicuramente un’innovazione di notevole portata – non solo sono obbligati a fornire le informazioni richieste dei delegati, ma hanno un dovere di costante informazione (relativo al generale andamento della gestione, alla sua evoluzione, alle operazioni di maggior rilievo della società e delle controllate) nei confronti del consiglio di amministrazione e dell’organo di controllo (collegio sindacale, consiglio di sorveglianza, comitato per il controllo sulla gestione). Il legislatore prevede, quindi, un flusso istituzionalizzato di informazioni dei delegati all’organo amministrativo ed a quello di controllo. E ancora: i delegati – come tutti gli amministratori – debbono informare gli organi ora indicati dell’esistenza di un loro interesse in un’operazione. In tal caso l’amministratore delegato ha anche l’obbligo di astenersi dal compiere l’operazione “attribuendola” alla competenza del consiglio.

L’art. 2392 c.c., nella sua originaria formulazione, prevedeva l’obbligo per gli amministratori delegati di vigilare sul generale andamento della gestione. Oggi il nuovo testo della norma non riproduce tale regola, ma il terzo comma dell’art. 2381 c.c. stabilisce che il consiglio valuta il generale andamento della gestione. E’ stata però introdotta un’importante innovazione, diretta a delineare con precisione i limiti da tale obbligo: la valutazione avviene, infatti, sulla base della relazione degli organi delegati. Quindi il dovere di valutazione sul generale andamento della gestione è riferito alle informazioni fornite dai delegati. Tuttavia i deleganti non possono assumere una mera posizione passiva: dal momento che – come dispone l’ultimo comma dell’art. 2381 c.c. – sono tenuti ad agire in modo informato, possono richiedere ai delegati ulteriori informazioni ed anzi debbono richiederle quando ciò sia imposto appunto dall’obbligo di agire in modo informato.

Prima della riforma si dubitava in ordine al soggetto legittimato a richiedere informazioni ai delegati (il consiglio o i singoli amministratori) ed alle modalità con cui il corrispondente obbligo deve essere adempiuto dai delegati stessi (in consiglio o anche al di fuori di una riunione consiliare). La nuova norma risolve tali problemi, attribuendo il potere di informazione a ciascun amministratore e disponendo che le informazioni debbono essere fornite in consiglio.

La disciplina relativa alla circolazione delle informazioni tra deleganti e delegati sembra quindi articolarsi su due piani. Un primo piano – di base e costante – che prevede un obbligo di informazione – secondo certe modalità e con un contenuto determinato – dai delegati nei confronti dei deleganti. Un secondo piano – di carattere integrativo e con modalità variabili caso per caso – che prevede il potere-dovere dei deleganti di richiedere ulteriori informazioni ai delegati.

Inoltre il consiglio – come si è già osservato – deve in ogni caso valutare la congruità degli assetti disposti di delegati (nei limiti e sulla base delle informazioni ricevute) ed esaminare i piani strategici, industriali e finanziari predisposti dai medesimi.

Il legislatore impone al consiglio il dovere di intervento per evitare atti pregiudizievoli – o attenuarne le conseguenze – posti in essere dai delegati. A tal fine spettano al consiglio rilevanti strumenti sanzionatori, desumibili dalle modalità di nomina dei delegati e del carattere sovraordinato del consiglio rispetto ad es-

si. Revoca della delega; emanazione di direttive, compimento di atti in luogo dei delegati, revoca di atti posti in essere dai delegati (poteri questi ultimi che trovano fondamento nella competenza concorrente del consiglio rispetto a quella attribuita ai delegati); revoca dei delegati costituiscono appunto gli strumenti sanzionatori utilizzabili dal consiglio per adempiere al dovere di intervento.

Il legislatore prevede espressamente sia la facoltà di impartire direttive nei confronti degli organi delegati, sia quella di avocare a sé operazioni rientranti nella delega (con ciò sancendo altresì espressamente il carattere concorrente della competenza consiliare).

Con la nuova disciplina si ripresenta quindi negli stessi termini il problema di conciliare la responsabilità dei delegati con la loro soggezione alle direttive impartite dal consiglio (problema risolto con il ritenere che i delegati possano – e debbano – disattendere le direttive, la cui esecuzione potrebbe comportare il sorgere della loro responsabilità).

2.4 Organi delegati, consiglio e assetti

Come si è osservato, il legislatore affida agli organi delegati il compito di creare assetti organizzativi amministrativi e contabili adeguati. Si tratta pertanto di attribuzione conferita *ex lege* agli organi delegati, indipendentemente da un'espressa previsione in tal senso contenuta nella deliberazione consiliare di nomina.

Un primo dubbio interpretativo si pone con riferimento al presupposto di tale norma: è evidente come in caso di delega globale (oppure di una pluralità di deleghe parziali ma tali nel loro insieme da avere carattere pieno) non si pongano problemi al proposito. Ma qualora l'oggetto della delega sia circoscritto, occorre ritenere che anche in tal caso l'attribuzione ai delegati ricomprenda la creazione degli assetti organizzativi?

Una prima risposta potrebbe essere nel senso che anche la competenza relativa alla creazione degli assetti verrebbe spezzata e quindi ai delegati competerebbe il compito di creare gli assetti in funzione dell'ambito della delega. Ma pare assai difficile configurare la possibilità di frazionare la creazione degli assetti, che rappresentano invece necessariamente una realtà unitaria che concerne l'intera gestione.

Ciò posto, le alternative possibili sono o nel senso che ai delegati spetti la competenza relativa alla creazione degli assetti, oppure che tale compito, in presenza di una delega parziale, rimanga al consiglio.

Un secondo problema concerne la possibilità di derogare alle norme di legge con la conseguente attribuzione al consiglio del compito di creare gli assetti pur in presenza di una delega piena.

Fermo restando, come si è già osservato, che in ogni caso spetta al consiglio valutare le regole organizzative elaborate dai delegati, alla domanda sono state date risposte opposte, ritenendosi che la delega abbia carattere necessario oppure che il consiglio sia arbitro nel fissare il perimetro della medesima.

Questa seconda soluzione appare più coerente con la disciplina tradizionale della delega e con la “logica” che sembra permeare la medesima, caratterizzata da ampi margini di autonomia: pertanto il consiglio, come può avvalersi o non dello strumento della delega, così potrebbe decidere l’ampiezza della medesima.

La prima soluzione, per contro, sembra forse più coerente con i principi di *corporate governance* e con la circostanza che gli organi delegati appaiono essere i soggetti più idonei a creare le regole di procedura che governano la vita societaria e l’attività di gestione dell’impresa.

Nel caso di una pluralità di organi delegati si pone il problema relativo alla ripartizione delle competenze tra di essi in ordine alla creazione degli assetti e all’elaborazione dei piani, potendosi dubitare, nel silenzio dell’atto di delega, se occorra il consenso unanime di tutti i delegati o della loro maggioranza.

3 Regole di *governance* e creazione di assetti organizzativi adeguati nell’ambito della s.r.l.

Come è noto e come è stato ampiamente sottolineato dalla dottrina, il legislatore, nel disciplinare l’amministrazione nell’ambito della società a responsabilità limitata, ha previsto alcuni profili relativi alla struttura e al funzionamento con carattere fortemente innovativo rispetto a quelli paralleli concernenti la società per azioni: nel contempo sotto altri aspetti ha scelto di non prendere posizione. L’interprete deve quindi affrontare il delicato problema dell’individuazione dei criteri da utilizzare per colmare tali “silenzi”.

3.1 I principi di *governance* della s.r.l.

Invero, è stato lucidamente sottolineato da Angelici (2007), la realtà imprenditoriale conosce vari “modelli” di gestione: sul presupposto di una sostanziale compenetrazione tra soci e amministratori è configurabile e largamente diffusa la figura del manager socio; d’altra parte, laddove si verifichi una separazione tra soci e amministratori, viene in considerazione quella del manager professionale. Tendenzialmente la prima ipotesi è caratteristica delle piccole-medie imprese societarie, la seconda delle medie-grandi imprese.

Il ruolo e la posizione degli amministratori nell’uno e nell’altro caso sono ovviamente differenti, dal momento che l’amministratore socio gestisce “affari” anche propri, mentre il manager professionale gestisce ovviamente “affari” altrui, con una differente propensione al rischio.

E’ quindi plausibile che la disciplina dell’una e dell’altra fattispecie sia differente.

Alla luce di tali considerazioni si può ritenere che il “silenzio” della normativa in tema di società a responsabilità limitata, dal momento che tale tipo societario è tendenzialmente applicabile alle minori imprese, debba essere “riempito” non utilizzando le regole proprie della società per azioni, ma semmai quelle dettate in

tema di società di persone. Fermo restando, tuttavia, il ricorso alla disciplina della società per azioni laddove la società a responsabilità limitata venga utilizzata da imprese di medio-grandi dimensioni sul modello del “manager professionale”: in tal caso e solo in tal caso troverebbe applicazione la normativa costruita per la società per azioni. In altre parole, il silenzio del legislatore consentirebbe, secondo questa prospettiva, l'utilizzo di norme differenti in relazione al modello in concreto assunto dalla società a responsabilità limitata.

Tale soluzione presuppone, tuttavia, che la disciplina dettata per la società per azioni sia “correlata” al modello dell'impresa medio-grande caratterizzato dalla figura del “manager professionale”. Il che è indubbiamente vero per alcune norme, ma non sembra, a mio avviso, valere con riferimento ai principi fondamentali della *governance* propria della società per azioni.

Invero, come la s.r.l. è utilizzabile con riferimento ad un ampio spettro di ipotesi concrete e quindi tanto dalla società di modeste dimensioni, quanto da quelle con caratteri della grande impresa (fermo restando il solo limite che deve trattarsi di società chiuse), così la società per azioni costituisce sì l'unico tipo fruibile dalla società aperta, ma può essere utilizzata anche da società medio-piccole. Quindi la disciplina della società per azioni, pur essendo tendenzialmente destinata ad imprese medio-grandi, vale anche nell'ipotesi di società per azioni medio-piccole.

Ma c'è di più: i principi fondamentali della *governance* della società per azioni hanno contenuto “aperto” e paiono adattabili in relazione ai vari contesti che siano destinati a disciplinare. Così la regola in tema di diligenza, ancorata al parametro della natura dell'incarico, e quindi del ruolo assunto dall'amministratore e dell'oggetto e delle dimensioni dell'impresa sociale, ancorata, altresì, alla competenza, intesa in senso soggettivo e quindi applicabile in ogni caso; così per i principi di corretta gestione sociale; così per il canone dell'agire in modo informato e non in conflitto di interessi.

In particolare, e il profilo a mio avviso assume un carattere fondamentale ai fini del presente discorso, i principi di corretta gestione, come lo stesso legislatore si esprime nell'art. 2403 c.c., si sostanziano soprattutto nella creazione di assetti organizzativi adeguati alle dimensioni dell'impresa. Si tratta pertanto di un obbligo il cui contenuto è rapportato alle singole situazioni: si tratta di un obbligo, inoltre, che pare connaturale con la gestione di qualsiasi impresa.

I principi fondamentali di *governance* sono poi strettamente correlati al regime di responsabilità limitata e costituiscono una sorta di “contraltare” dello stesso.

Alla luce di queste considerazioni mi pare che il vuoto normativo proprio di alcuni aspetti della disciplina della *governance* della società a responsabilità limitata debba essere riempito applicandosi i principi propri della società per azioni, che, data la loro elasticità, consentono di adattarne il contenuto ai vari modelli in concreto assunti dalla società.

Se si muove da tale presupposto il ruolo degli amministratori, anche in presenza di soci gestori, assume una posizione di assoluto rilievo.

3.2 La delega nell'ambito delle s.r.l.

La delega di potere gestorio non è evidentemente compatibile con il regime di amministrazione disgiunta; forse potrebbe esserlo con quello di amministrazione congiunta; sicuramente lo è in caso di formazione del consiglio di amministrazione (qualunque siano poi le modalità adottate per il suo funzionamento).

Si tratta di istituto, sia pure non previsto nell'ambito della società a responsabilità limitata, ammissibile anche con riferimento a tale tipo?

L'amplissima autonomia concessa ai soci nel modellare la disciplina degli amministratori induce a ritenere che il quesito debba avere una risposta positiva. In particolare la possibilità del ricorso al regime di amministrazione disgiunta comporta a maggior ragione l'ammissibilità della delega in caso di costituzione del consiglio di amministrazione (e forse in ipotesi di amministrazione congiunta).

Occorre, tuttavia, esaminare se, anche con riferimento alla società a responsabilità limitata, valgano i limiti previsti per la società per azioni, tenuto conto della sua maggior flessibilità.

Nell'ambito della società a responsabilità limitata (e forse a maggiore ragione, data la posizione dei soci) pare necessaria, al fine di consentire la delega, l'autorizzazione contenuta nell'atto costitutivo o in una decisione dei soci. La delega non può avere ad oggetto le competenze inderogabilmente attribuite al consiglio di amministrazione dall'ultimo comma dell'art. 2475 c.c. e può assumere le modalità fissate per la società per azioni.

3.3 Assetti adeguati ed s.r.l.

Dopo aver constatato che il legislatore della riforma non ha dettato regole con riferimento a vari e rilevanti profili della *governance* della s.r.l. e dopo aver concluso nel senso che, nonostante ciò, la delega di potere gestorio trova applicazione anche con riferimento a tale tipo di società, sia pure in presenza di alcuni soltanto dei possibili modelli di amministrazione, pare possibile affrontare il tema relativo all'applicabilità della disciplina concernente gli assetti organizzativi adeguati prevista per la s.p.a. e, in caso affermativo, ai limiti ed alle modalità di estensione di essa.

Al proposito pare opportuno prendere le mosse dal primo interrogativo, che rappresenta il punto di partenza dell'indagine, concernente l'obbligatorietà o meno della predisposizione di assetti organizzativi, amministrativi e contabili nell'ambito delle s.r.l.. Come già rilevato, e come risulta chiaramente dal dettato dell'art. 2381 c.c., nonché dall'art. 2403 c.c., nell'ambito delle s.p.a. sussiste l'obbligo della creazione e dell'applicazione di tali assetti, anzi è lo stesso legislatore a sottolinearne il rilievo, laddove impone al collegio sindacale la vigilanza sull'osservanza non solo della legge e dello statuto, ma anche sul rispetto dei principi di corretta amministrazione, individuando tra di essi, in particolare, l'adeguatezza degli assetti (art. 2403, comma 1, c.c.). Pertanto gli amministratori

di s.p.a. sono tenuti ad osservare legge e statuto ed a rispettare i principi di corretta amministrazione: in posizione preminente tra essi si collocano la creazione e l'applicazione di assetti adeguati. La stessa regola vale anche per gli amministratori di s.r.l.? Oppure, con riferimento a quest'ultima, la creazione degli assetti non risulta obbligatoria?

3.4 Obbligatorietà della creazione di assetti adeguati nell'ambito della s.r.l.

All'interrogativo concernente l'obbligatorietà o meno della predisposizione di assetti organizzativi adeguati nell'ambito della s.r.l., tenuto conto del silenzio al proposito del legislatore, è possibile fornire una delle tre seguenti risposte.

Una prima soluzione potrebbe essere nel senso dell'assenza di un simile dovere e ciò in particolare alla luce della mancanza di indicazioni espresse al proposito da parte del legislatore.

Una seconda possibile risposta, esattamente opposta alla precedente, potrebbe essere nel senso della sussistenza dell'obbligo, attraverso l'estensione, sia pure con i necessari limiti e correttivi, delle norme dettate in tema di società per azioni.

Ma sarebbe anche adottabile un'ulteriore soluzione, di carattere intermedio, che limiti l'obbligo ai casi in cui risulta necessaria la presenza di un organo di controllo o del revisore e quindi oggi all'ipotesi in cui la società sia tenuta alla redazione del bilancio consolidato; controlli una società obbligata alla revisione legale dei conti; sia tenuta alla redazione del bilancio di esercizio in forma ordinaria. Tale soluzione potrebbe trovare un aggancio normativo nel quinto comma dell'art. 2477 c.c., in cui si prevede che, nel caso di nomina di un organo di controllo, anche monocratico, si applicano le disposizioni sul collegio sindacale previste per le società per azioni. Tra esse, come si è già osservato, vi è l'art. 2403 c.c., che prevede appunto la vigilanza sugli assetti organizzativi. Se si accogliesse tale tesi, sussisterebbe una sorta di binomio: presenza necessaria dell'organo di controllo – obbligo di creazione di assetti adeguati. Rimarrebbe il dubbio se tale obbligo sussista anche qualora venisse scelta l'opzione di nominare un revisore (o una società di revisione).

La prima soluzione non pare accoglibile in quanto, almeno con riferimento all'ipotesi della presenza obbligatoria dell'organo di controllo, il rinvio alla disciplina della s.p.a., e quindi in particolare alla norma fondamentale che elenca le competenze dei sindaci, esclude che vi sia un vero e proprio vuoto normativo e sembra per contro chiaramente presupporre la sussistenza dell'obbligo di redigere gli assetti adeguati.

Anche la soluzione per così dire intermedia, pur avendo una certa sua razionalità, crea una serie di problemi relativi alla precisa individuazione dell'area di obbligatorietà della creazione degli assetti e soprattutto pare poco persuasiva, tenuto conto della rilevanza di questi ultimi. In altre parole, se può essere comprensibile che il controllo "esterno" sia necessario solo in presenza di s.r.l. "sopra

soglia”, pare difficile ipotizzare che la creazione di assetti adeguati costituisca un obbligo limitato a tale ambito.

Vari argomenti sembrano, per contro, giustificare la sussistenza dell’obbligo in questione in ogni caso di s.r.l., così come tale obbligo sussiste in ogni caso di s.p.a.. Si tratta invero, a mio avviso, di una regola non correlata ai caratteri tipologici dell’uno e dell’altro modello societario, ma alla *governance* di una società caratterizzata dal regime della responsabilità limitata.

Pare particolarmente significativa, come si è richiamato più volte, l’enfasi data dal legislatore a tale regola nel contesto dei principi di corretta amministrazione. Ciò posto, come sembra molto difficile ipotizzare che i principi in esame non valgano per i gestori di s.r.l., così pare molto difficile ipotizzare che l’applicazione di tali principi non comprenda la regola sugli assetti.

D’altra parte sia i principi di corretta amministrazione sia conseguentemente l’obbligo di creare assetti adeguati rappresentano parametri di fondamentale rilievo al fine di individuare i presupposti della responsabilità degli amministratori di s.p.a.: tenuto conto della presenza dell’azione sociale di responsabilità anche nel contesto della s.r.l., sembra arduo ipotizzare che valgano parametri differenti.

D’altra parte lo stesso legislatore stabilisce che gli assetti debbono essere adeguati tenuto conto delle dimensioni dell’impresa e quindi si tratta di procedure adattabili alle diverse realtà ed ai diversi contesti in cui la s.r.l. può essere chiamata ad operare. Il loro contenuto quindi può ridursi a regole di carattere elementare in presenza di micro imprese o assumere la portata e complessità rese necessarie dalla dimensione medio-grande dell’impresa societaria.

In conclusione, anche nella s.r.l., a mio avviso sussiste l’obbligo della creazione di assetti organizzativi, amministrativi e contabili adeguati alle dimensioni ed alla natura dell’impresa.

Particolarmente significativa infine la previsione contenuta nell’art. 13 dello schema di disegno di legge recante “Delega al Governo per la riforma organica delle discipline della crisi di imprese e dell’insolvenza”, approvato dal Consiglio dei Ministri nel febbraio 2016. La norma ora richiamata prevede l’introduzione di una serie di modifiche al codice civile e in particolare “il dovere dell’imprenditore e degli organi sociali di istituire assetti organizzativi adeguati per la rilevazione tempestiva della crisi e della perdita della continuità aziendale”. L’obbligo di istituire assetti adeguati viene quindi imposto sia all’imprenditore individuale sia agli organi sociali e quindi nella prospettiva di un dovere di portata generale. La norma pertanto conferma, da un lato, l’obbligo anche per le s.r.l. di istituire assetti adeguati per la rilevazione tempestiva della crisi e, dall’altro, sembra presupporre anche con riferimento al tipo sociale in esame il dovere di predisporre comunque gli assetti organizzativi adeguati di cui all’art. 2381 c.c.

4 I modelli organizzativi e gestionali

Il d.lgs. n. 231 del 2001 prevede, al fine di evitare la cosiddetta responsabilità amministrativa-penale della società, la creazione di modelli organizzativi e gestionali idonei a prevenire varie ipotesi di reato, il cui ambito è stato via via notevolmente esteso nel tempo. I modelli in questione rappresentano quindi uno strumento di esenzione per la società dalla responsabilità. Costituiscono altresì un antecedente rispetto all'obbligo di adozione di assetti adeguati, espressamente introdotto con la riforma societaria e quindi a decorrere dal 1° gennaio 2004.

Un profilo – di grande rilievo operativo – concerne l'obbligatorietà dell'adozione di tali modelli. La soluzione affermativa, accolta dalla giurisprudenza e dalla dottrina, si fonda, almeno in parte, su un'analisi del dato normativo, che offre quantomeno elementi di giudizio in questo senso, pur non contenendo un'esplicita indicazione.

Ma sono soprattutto la prospettiva in cui si inserisce oggi l'attività gestoria e i conseguenti doveri e responsabilità degli amministratori a suggerire ad una soluzione positiva. Invero sia la diligenza richiesta, sia l'obbligo di creare procedure adeguate, all'interno del quale si colloca anche la predisposizione dei modelli organizzativi, inducono a ritenere che gli amministratori abbiano un preciso obbligo in tal senso. D'altra parte occorre osservare che l'enfasi del legislatore sulla previsione del rispetto dei principi di corretta amministrazione non può non estendersi all'obbligo di eliminare, con la predisposizione dei modelli organizzativi, il rischio per la società di subire le sanzioni previste dal d.lgs. n. 231/2001.

Occorre ricostruire, da un lato, il profilo relativo all'obbligatorietà della creazione dei modelli, dall'altro quello concernente le modalità di esecuzione di tale obbligo e le conseguenze in caso di mancato adempimento. In un'ottica ulteriore occorre tener conto delle conseguenze derivanti non solo dalla mancata adozione dei modelli, ma anche da un loro insufficiente contenuto o da una loro inidoneità rispetto alle finalità che debbono perseguire. Parimenti occorre verificare le conseguenze di un loro omesso aggiornamento.

Particolare rilievo assume infatti l'aspetto soggettivo e quindi la precisa individuazione dei soggetti o degli organi a cui quest'ultimo compete.

5 L'obbligatorietà dei modelli organizzativi e gestionali: premessa

Come si è già osservato, l'art. 6 d.lgs. n. 231/2001 prevede che, se il reato è stato commesso da persone che rivestono funzioni di rappresentanza, di amministrazione o di direzione, nonché da persone che esercitano, anche di fatto, la gestione o il controllo, l'ente non risponde se prova che l'organo dirigente ha adottato ed efficacemente attuato, prima della commissione del fatto di reato, modelli di organizzazione e di gestione idonei a prevenirlo e che è stato affidato ad un organismo dell'ente il compito di vigilare sul funzionamento e l'osservanza

di tali modelli e di curarne il loro aggiornamento. Stando quindi al dato ricavabile da tale norma, non sussiste un obbligo per l'ente di adottare i modelli e di creare l'organo di vigilanza, ma un onere volto appunto ad andare esente dalla responsabilità amministrativa-penale. Tuttavia ciò non esclude la sussistenza in ogni caso di obblighi in capo agli amministratori derivanti dall'applicazione dei principi di corretta gestione e, almeno in certi casi, dal dovere di adottare i modelli in esame. La prima sentenza che afferma la responsabilità degli amministratori per i danni subiti dalla società a causa della mancata adozione dei modelli è Trib. Milano, 13 febbraio 2008, n. 1774, mentre in ordine al profilo concernente le conseguenze della violazione dei modelli si è pronunciata Cass. pen., SS. UU., 18 settembre 2009, n. 38343, in *Società*, 2015, 215, per cui "la condotta, con la quale gli organi apicali di una società, per omettere uno o più reati, violano le prescrizioni del modello organizzativo, predisposto per la prevenzione dei reati rilevanti per la responsabilità amministrativa delle società, deve essere fraudolenta e consistere non nella mera violazione delle predette prescrizioni, ma in un'attività ingannevole, falsificatrice, obliqua, subdola per essere idonea ad esentare una società dalla responsabilità amministrativa imputabile".

Pare opportuno al fine di esaminare la posizione degli amministratori, in primo luogo precisare l'ambito dell'indagine, che riguarda le società per azioni non quotate e, per le ragioni illustrate nelle pagine precedenti, le s.r.l.. Per quanto concerne le società quotate e le società vigilate (banche, intermediari finanziari) sussiste un obbligo in ogni caso di adozione dei modelli. Così lo stesso discorso vale nei casi in cui la disciplina normativa preveda l'obbligo della creazione dei modelli nel caso di società in mano pubblica.

In secondo luogo occorre, al fine di rispondere alla domanda di fondo sull'obbligatorietà per gli amministratori della creazione dei modelli, individuare con precisione i vari doveri che fanno loro capo, distinguendo quelli per così dire di carattere preliminare, da quelli derivanti dalla stessa adozione dei modelli.

Può essere utile ancora sottolineare, fermo il collegamento sopra illustrato tra gli assetti adeguati ed i modelli di organizzazione e gestione, la differente prospettiva in cui si collocano gli uni e gli altri. Come è stato efficacemente rilevato da Maugeri (2015), "malgrado sia consueto in dottrina istituire un nesso tra l'adozione dei modelli e il canone di adeguata organizzazione dell'impresa, non mancano precise differenze funzionali tra i due complessi disciplinari. Infatti, mentre il protocollo di cui all'art. 6 d.lgs. n. 231/2001 esplica la propria efficacia esimente solo se idoneo, appunto, a prevenire reati della specie di quello verificatosi e quindi a minimizzare il relativo rischio, le scelte concernenti la conformazione e il concreto funzionamento della struttura organizzativa, amministrativa e contabile della società ai sensi dell'art. 2381 c.c. hanno per scopo la gestione del rischio finanziario, nel presupposto quindi di una sua sistematica assunzione, non invece di una sua riduzione al minimo". In altre parole, l'idoneità del modello dev'essere valutata non quale strumento per "gestire" il rischio necessariamente assunto e connaturale all'esercizio dell'impresa, ma per ridurre al minimo il rischio del compimento di determinati reati, che dev'essere appunto evitato o quanto meno contrastato nel più efficace modo possibile. Occorre al pro-

posito distinguere, come è stato ancora osservato da Maugeri (2015), il rischio giuridico dal rischio economico: mentre il secondo è connaturale all'esercizio dell'attività di impresa, il primo "costituisce un vero e proprio limite esterno" all'agire dell'organo amministrativo. Invero il rischio economico non può che essere "accettato", mentre quello giuridico, e cioè l'eventualità "che una condotta imputabile all'ente societario integri una violazione di norme di legge / regolamentari o una lesione di posizioni soggettive" (così si esprime Maugeri) non può essere accettato o, se inevitabile, deve essere limitato al massimo.

6 Individuazione e valutazione dei rischi

L'obbligo a cui in ogni caso è tenuto l'organo gestorio è quello di individuare i rischi relativi alla commissione di reati indicati dal legislatore, o, in altre parole, di procedere alla loro "mappatura". Si tratta evidentemente dello svolgimento di un'attività istruttoria diretta a cogliere il livello di rischio relativo alle varie fattispecie di reato. Ovviamente occorrerà tener conto del singolo caso concreto e quindi dei caratteri della società ed in particolare dell'attività svolta e di ogni altra modalità che possa assumere rilievo a tale fine.

"In questa fase – scrive Demuro (in corso di pubblicazione) – si dovranno individuare quelle attività nel cui ambito astrattamente potrebbero integrarsi i reati presupposto, valutando quindi il livello di rischio e la conseguente potenziale responsabilità della società. Dovranno essere individuate le relative aree aziendali, le modalità di gestione delle stesse e le procedure già previste nell'ambito di un'area di rischio nonché il livello di controllo dei rischi emersi".

Una volta individuati i rischi occorrerà valutare appunto quale sia il loro livello.

Sulla base di questa rilevazione l'organo gestorio dovrà verificare se, al fine di prevenire efficacemente il compimento dei reati, risulti quanto meno opportuno predisporre i modelli di organizzazione e gestione che possano porre al riparo la società dall'applicazione delle sanzioni previste dal legislatore. Si tratta in sostanza di valutare il rischio di responsabilità *ex d.lgs. n. 231/2001*.

Si tratta certamente di un compito di particolare rilevanza e delicatezza. Come rileva Demuro, "se dall'istruttoria risulta che i rischi di integrazione dei reati presupposti sono limitati o improbabili si formalizzerà un'apposita deliberazione in merito alla non sussistenza di un rischio 231 o, eventualmente, che questo possa essere considerato accettabile, qualora quest'ultimo criterio possa essere ritenuto utilizzabile correttamente per il rischio in questione. In ogni caso, è corretto ritenere che un'adeguata (e oggettiva) valutazione debba essere posta alla base della scelta di non adozione del modello organizzativo".

7 L'adozione dei modelli. La loro idoneità

In presenza di un rischio rilevante scatta l'obbligo dell'adozione dei modelli. Come prevede il legislatore, devono essere idonei a prevenire i reati.

Quali sono i parametri che consentono di formulare tale giudizio? Al proposito la dottrina che si è occupata del tema ha espresso posizioni differenti, che presuppongono particolari prospettive del legislatore nel formulare l'art. 6 sopra richiamato. Ci si è spinti fino ad invocare una sorta di "funzionalizzazione" dell'obbligo, diretto in sostanza ad affidare agli enti la creazione di presidi adatti ai singoli casi concreti intervenendo là dove il legislatore non è in grado di "avventurarsi". In tale ottica i modelli avrebbero una funzione in senso lato pubblicistica.

Si tratta di una prospettiva che sembra andare oltre le intenzioni del legislatore e lo stesso dato testuale e sistematico. In effetti la creazione dei modelli è diretta semplicemente ad eliminare o attenuare il rischio della responsabilità dell'ente (della società), così come la creazione di assetti adeguati è volta a consentire in particolare la gestione dei rischi.

Piuttosto nella valutazione in ordine alla scelta se adottare o meno i modelli dovrà tenersi conto non del rapporto costi-benefici (costi collegati all'adozione dei modelli e efficacia degli stessi nella prevenzione), quanto piuttosto del grado di rischio della commissione dei reati. Tale conclusione sembra coerente con l'obiettivo di porre una barriera al rischio della responsabilità amministrativa-penale.

Come si è rilevato da Demuro, "è innegabile che la prassi operativa emersa dall'entrata in vigore del d.lgs. n. 231/2001 ha registrato in molti casi delle procedure standardizzate, attente molto più ai *reports* che alle effettive esigenze della società, con mappature dei rischi superficiali e, paradossalmente, in taluni casi effettuate su attività distanti dall'effettiva attività esercitata".

Il contenuto dei modelli può certamente ispirarsi ai codici di comportamento elaborati dalle associazioni di categoria rappresentative degli enti, ma, evidentemente, non può appiattirsi sugli stessi, limitandosi a recepirli. Infatti debbono essere costruiti tenendo conto del singolo caso concreto e, quindi, come si è già osservato, dei caratteri dell'attività posta in essere.

Particolare rilievo può assumere nella costruzione del modello la previsione di sanzioni applicabili non solo nel caso di integrazione di un reato presupposto, ma anche in quello di violazione delle procedure indipendentemente dalla responsabilità dell'ente.

Infine l'organo gestorio dovrà provvedere a che i codici di comportamento vengano via via aggiornati tenendo conto dell'evoluzione sia della disciplina sia dell'attività posta in essere dalla società e delle caratteristiche di quest'ultima.

La creazione dei modelli comporta poi, come stabilito dall'art. 6 d.lgs. n. 231/2001, la nomina dell'organo di vigilanza.

8 La posizione degli organi sociali

Dall'insieme delle regole contenute nell'art. 6 e di quelle previste negli artt. 2381 c.c. e 2403 c.c. in tema di assetti, si può ritenere che gli obblighi di mappatura dei rischi, valutazione del loro livello, scelta se adottare o meno i modelli, creazione di questi ultimi facciano capo all' "organo direttivo" (così si esprime l'art. 6), da intendere come organo dirigente e, in particolare, in applicazione dell'art. 2381 c.c., organo delegato. Invero non sembra accoglibile la tesi che riferisce la formula organo dirigente al solo consiglio di amministrazione, pervenendo quindi alla conclusione della non delegabilità dell'adozione dei modelli; sembra più coerente interpretare tale formula alla luce dell'art. 2381 c.c. e quindi come riferita sia al consiglio, sia agli organi delegati.

Spetteranno poi al consiglio la valutazione dei modelli; all'organo di vigilanza la vigilanza appunto sulla loro applicazione ed il loro aggiornamento; al collegio sindacale (o al sindaco unico nella s.r.l.) un compito ulteriore di vigilanza. Come è noto, poi, il collegio sindacale può assumere anche il ruolo di organo di vigilanza e quindi concentrare in esso i poteri-doveri di controllo.

9 Il vaglio dell'autorità giudiziaria

In caso di violazione dei doveri sopra indicati i componenti degli organi sociali assumono la conseguente responsabilità. Particolarmente delicato è il discorso relativo all'ambito del vaglio da parte dell'autorità giudiziaria dell'idoneità dei modelli a prevenire i reati. E' stato osservato al proposito in dottrina come l'interprete si trovi ad un "bivio" che presenta elementi di incertezza e di "imbarazzo": da un lato, occorre tener conto della fondamentale regola costituita dalla *business judgement rule*, dall'altro, della possibile presenza di un sindacato che possa valutare il merito delle determinazioni degli amministratori con rischio per la libertà di impresa.

E' lo stesso legislatore a prevedere che i modelli debbono essere idonei e quindi ad imporre una valutazione in tal senso da parte dell'autorità giudiziaria. D'altro lato sussiste la fondamentale regola della *business judgement rule* che costituisce un limite alla sindacabilità degli atti posti in essere dagli amministratori collegata all'ambito di discrezionalità funzionale all'esercizio di un'attività di impresa.

Non pare infatti che sia possibile ritenere che tale limite valga solo per l'attività gestoria e non per l'attività organizzativa. Pertanto – così scrive Maugeri (2015) – "l'adempimento del dovere di dotare la società di assetti adeguati si candida a beneficiare dello stesso regime disciplinare e delle medesime difese processuali cui è soggetta ogni altra decisione imprenditoriale degli amministratori". "Sarebbe, infatti, agevole osservare al riguardo che il dovere specifico di imprimere un assetto organizzativo adeguato alla struttura aziendale costituisce pur sempre espressione del generale obbligo di corretto e diligente esercizio del potere di amministrazione nelle s.p.a. e, andando oltre la dimensione tipologica

azionaria, di quei principi di corretta gestione societaria e imprenditoriale (art. 2497, comma 1, c.c.) che permeano di sé in realtà l'intero sistema del diritto dell'impresa" (Maugeri 2015).

Invero "un conto è la decisione concernente l'opportunità di assumere il rischio di violare norme imperative a fini di profitto – la cui legittimità deve escludersi in radice –, altro è la decisione relativa al tipo di modello e di misure da adottare per la prevenzione di quelle violazioni: decisione che, condividendo la medesima natura organizzativa di quelle relative alla materia degli assetti di cui all'art. 2381 c.c., deve farsi rientrare parimenti nel campo applicativo della *business judgement rule*" (Maugeri 2015).

Come è stato ancora recentemente osservato da Luciano (2016) in ogni caso la regola della *business judgement rule* e quindi della discrezionalità amministrativa vale anche per la creazione degli assetti adeguati e pertanto anche dei modelli organizzativi.

In altre parole gli amministratori sono tenuti a svolgere con la diligenza qualificata di cui all'art. 2392 c.c. l'attività di individuazione dei singoli rischi derivanti dalla commissione di reati e quindi complessivamente del rischio per la società di sanzioni amministrative-penali. In caso di violazione di tale obbligo saranno naturalmente responsabili. Individuato correttamente il rischio per la società ex art. 2381 c.c., gli amministratori saranno obbligati ad adottare i modelli, a meno che tale rischio sia da valutare come molto limitato.

Nella creazione dei modelli, così come nell'individuazione degli assetti adeguati, il vaglio da parte dell'autorità giudiziaria, rispettivamente dell'idoneità e dell'adeguatezza, non potrà non tener conto della discrezionalità insita nella gestione e nell'organizzazione dell'impresa. Discrezionalità naturalmente "vincolata", in quanto l'attività degli amministratori deve essere diretta a raggiungere l'obiettivo della prevenzione e presuppone l'obbligo di tener conto di tutti gli elementi rilevanti del caso concreto.

10 Le responsabilità

La mancata adozione dei modelli di gestione e di organizzazione o la loro idoneità possono costituire fonte di responsabilità per gli amministratori verso la società in presenza del presupposto della sussistenza di un danno della stessa. Pertanto deve essere posto in essere un reato rilevante ai fini del d.lgs. n. 231/2001 e deve essere irrogata la sanzione amministrativa-penale. Il danno consiste appunto nell'obbligo della società di versare tale somma.

In particolare la società, scrive Sfameni (2007), potrà esercitare "azioni di responsabilità, sia a titolo di rivalsa nei confronti dell'autore del reato, sia a titolo risarcitorio nei confronti dell'organo amministrativo e dell'organo di controllo, per violazione del dovere di corretta amministrazione e di vigilanza sull'adeguatezza dell'assetto organizzativo".

Pertanto la semplice mancata adozione dei modelli o la loro inidoneità di per sé non rappresenta motivo di responsabilità per gli amministratori. Come si è già

osservato, discorso diverso vale nel caso in cui siano previste sanzioni disciplinari per la mancanza o l'inidoneità dei modelli.

La responsabilità degli amministratori sarà sussistente anche nel caso in cui venga adottato un modello idoneo dopo l'integrazione del reato al fine di ridurre la sanzione ai sensi del secondo comma dell'art. 12 d.lgs. n. 231/2001. Infatti in tal caso non viene meno la responsabilità dell'ente, ma potrebbe essere ridotto l'ammontare della sanzione.

Nell'individuare le varie ipotesi di responsabilità degli amministratori occorre ovviamente tener conto dei doveri sopra illustrati e del loro contenuto. Infatti la mancata adozione del modello potrebbe dipendere da una non corretta rilevazione dei rischi o da una non corretta valutazione della loro rilevanza, così da indurre l'organo gestorio a non adottare il modello.

La responsabilità poi potrebbe derivare, lo si è già osservato, dall'adozione di un modello non idoneo. A tal proposito, richiamando i rilievi di cui al paragrafo precedente, il vaglio dell'autorità giudiziaria incontrerà il limite costituito dalla discrezionalità insita in ogni scelta, sia gestionale, sia organizzativa, da parte degli amministratori. Potrà altresì sussistere una responsabilità per la mancata attuazione o l'insufficiente attuazione del modello o per l'omesso "aggiornamento" del medesimo.

Particolare rilievo assume poi il profilo della "distribuzione della responsabilità" tra consiglio e organo delegati. Al proposito, come si è già osservato, normalmente spetterà a questi ultimi il compito della "mappatura dei rischi" e dell'individuazione della loro rilevanza, mentre competerà al primo (o sarebbe opportuno che comportasse) la scelta dell'adozione dei modelli. Questi ultimi saranno normalmente predisposti dall'organo delegato e dovranno essere oggetto di valutazione da parte del consiglio.

Sulla base di tali presupposti può trovare soluzione il problema della "distribuzione di responsabilità": è evidente la sussistenza della responsabilità dei delegati per le competenze ad essi affidate e dell'intero consiglio per le attribuzioni spettanti a quest'ultimo. Per contro, occorre verificare quando i deleganti possano essere ritenuti responsabili per l'attività dei delegati.

Al proposito non possono che valere le regole generali previste nell'art. 2381 c.c. Pertanto, come si è già rilevato, i deleganti sono responsabili nei limiti delle informazioni ricevute dai delegati. Tuttavia debbono agire in modo informato e quindi debbono vagliare tali informazioni per verificarne la completezza e la coerenza, con il conseguente dovere di richiedere ulteriori informazioni qualora quelle ricevute appaiano lacunose o contraddittorie.

Nel caso in cui emergano profili di responsabilità dei delegati, il consiglio dovrà adottare gli opportuni provvedimenti, in particolare sostituendosi ai delegati o impartendo loro direttive vincolanti.

Applicando tali regole al caso in esame, il consiglio dovrà operare la scelta in ordine all'adozione o meno dei modelli sul fondamento della "mappatura" e della valutazione dell'intensità dei rischi operata dai delegati. Ciò comporta che il consiglio esamini criticamente l'operato dei delegati e i risultati raggiunti e richieda,

in presenza di lacune, incongruenze, dubbi, tutti i chiarimenti del caso, le eventuali ulteriori informazioni, gli eventuali supplementi di istruttoria.

Analogo discorso vale anche in ordine alla valutazione dei modelli predisposti dai delegati, che dovrà fondarsi su un esame critico delle informazioni e dell'attività da loro svolta.

Qualora il consiglio non avesse tenuto conto di tutte le informazioni ricevute o non avesse "agito in modo informato" analizzandole criticamente e richiedendo le necessarie ulteriori informazioni, la responsabilità dei delegati verrà estesa ai deleganti. Analoga conclusione vale anche nel caso in cui i deleganti, in presenza di un operato dei delegati non conforme alle regole di diligenza e correttezza, fossero rimasti inerti, senza adottare gli opportuni provvedimenti correttivi.

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Risk management and corporate criminal liability in the new discipline of Market Abuse between 2014/57/UE Directive and UE 596/2014 Regulation and in the new discipline of private corruption crime

Author

- *Alice Caputo, Adjunct Professor, aliccept@alice.it - Second University of Naples*
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Recent 2014/57/UE directive and UE 596/2014 regulations are innovating the discipline of Market Abuse in the European Union, introducing important changes to harmonize the contrast of Market Abuse conducts inside European Union Member State. In the same time, several national criminal code and international convention are introducing the private corruption crime, with new perspectives for the corporate criminal liability in the economic national and international transaction. Now, in fact, there is the need of transparent, efficient, effective based on genuine competitive and investor trust internal market inside European Union. The first part of this paper aims to analyze the relevant impact introduced by these new discipline of market abuse and private criminal corruption on risk management and corporate criminal liability with a particular regard to compliance model (like Model *ex d.lgs. n. 231/2001*). The second part of this paper aims to investigate the important harmonization process of corporate criminal liability regulation in the European Union with the affirmation of European criminal liability in the Market abuse contrast and the international sensitization on private corruption crime.

Keywords: Market abuse, European Union, Private corruption crime, Risk management, Corporate criminal liability.

JEL Classification: K22

1 Introduction

Recently, there are many news about market abuse and corporate criminal liability. These news are challenging the limits of risk management and corporate criminal law. In particular, on June 2014 the market abuse regulation, called MAR and the directive on criminal sanction for market abuse, called CSMAD, together know as MAD II, were approved.

These two new European legislative acts, Directives 2014/57/UE and Regulation EU 596/2014, will replace the existing market abuse directive, so called MAD I, from July 2016.

Obviously, also MADII prohibits market abuse on EU regulated markets.

Market abuse encompasses trading in financial instruments on the basis of inside information, the improper disclosure of inside information and the manipulation of market prices through practices such as the dissemination of rumors or the conducting of certain trades in related instruments.

But the Directive 2003/6/EC of the European Parliament and of Council of 28 January 2003 on insider dealing and market manipulation appeared full of shortcomings. The possible reason of these shortcomings was surely searched in the important financial crisis of 2008. In fact, discussion about replacing the existing market abuse directive began as far back as the end of 2008. So, the European Commission began consulting about the reform of market abuse discipline in the UE law.

In particular, the analysis of "*Lavosère group*" charged to value preventive and dissuasive efficacy of market abuse national frameworks is very negative. There is the requirement to strengthen European normative on market abuse because there is the requirement of European intern market more transparent, efficacy, ethic, competitive and based on investors trust.

These important aims require clear rules to reduce normative complexity for market operators and to eliminate the difference of discipline on market abuse created by Directive 2003/06/CE among Member States.

The new discipline on market abuse in European Union framework has important consequences on risk management because now European market abuse framework is very precise and pressing, so the grey space to elide normative rules is grip.

Now, forum shopping phenomenon, diffused with precedent discipline for the different legislative frameworks in Member States, is at stake, because Regulation Mar and directive CSMAD will create harmonious space.

Moreover, several national criminal code, like Italian code, and international convention are introducing the private corruption crime, with new perspectives for the corporate criminal liability in the economic national and international transaction.

Now, in fact, there is a great need of transparent, efficient, effective market based on genuine competitive and investor trust inside European Union.

The first part of this paper aims to analyze the relevant impact introduced by these new discipline of market abuse and private criminal corruption on risk

management and corporate criminal liability with a particular regard to compliance model (like Model ex d.lgs. n. 231/2001).

2 Market abuse framework in MAD II

With the publication of regulation Mar and the directive MAD II market abuse discipline is now very innovative. In particular, new rules expand the application space of market abuse framework, strengthening power of vigilance of Authority provided. Also, the criminal sanctions regulated by directive MAD are reinforced by afflictive measures provided to serious crime. About administrative sanctions, regulation MAR provides that Member States can't introduce administrative sanctions when, for the same violations is provided criminal sanctions.

One of the aims of new market discipline is, in fact, the harmonization of market abuse discipline among European State Members. A unique framework for the same need: financial and corporate crime contrast, in particular in the form of relevant conducts to market abuse crime. So Regulation MAR introduces common disposition to market sounding. Market sounding is the activity of intermediary that must explore the availability of clients about possible offers of issuing or of another on primary or secondary market.

Common disposition are also provide for whistleblowing: indications of suspect violations of authority and for the publication of privileged information, included the discipline of rumours. The new European reform about market abuse considers the past events connected to manipulation of interest rate Libor and Euribor, providing that also the manipulation of reference value (benchmark) must be considered object of administrative or criminal sanctions. In fact, in direct response to the Libor rigging scandal of summer 2012, MAR includes provisions relating specifically to the calculation of benchmarks.

MAR prohibits insider dealing, improper disclosure of inside information and market manipulation. It, also, unlike MAD I, prohibits attempted insider dealing and market manipulation. This represent another significant extension of the market abuse regime.

Insider dealing is committed a person in possession of inside information uses that information in deciding whether or not to acquire or dispose of a financial instruments to which that information relates. Crucially, a person who transacts while in possession of inside information in the transaction. As a new addition to the market abuse regime, MAR provides that making decisions to cancel or amend existing orders for financial instruments on the basis of inside information counts as insider dealing. As well as prohibiting attempted insider dealing for the first time, MAR also introduces indirect and accessory insider dealing offences that come into play where a person possessing inside information uses it to recommend or induce another person to acquire or dispose of financial instruments. In these circumstances, if that other person knows or ought to know that recommendation or inducement is based on inside information, he too will have committed insider dealing.

Improperly disclosed insider information regard a person that divulges this information to any other person, except if such disclosure is made in the normal course of this employment, profession or duties.

Market manipulation is the practice of interfering in the free and fair operation of a market to create a misleading impression in an attempt to gain a market advantage. MAR provides that 9 broad types of activity/behavior can constitute market manipulation in relation to financial instruments and spot commodity contracts.

This list of 9 types of market manipulation is non exhaustive list of indicators that authorities shall take into account in determining whether a person has committed the market abuse that employs false or misleading signals or fictitious devices, deceptions or contrivances. The burden of enforcement of Mar is shared between market operators, issuers, employees and competent authorities.

In this context, it is import to consider Model 231 like practices to introduce a good compliance in the business reality.

Now, there is a precise provided for market abuse crime. On one hand, it is require strong control in the risk valuation in the mapping of risk management in the single firm to realize the Model 231.

On the another hand, now it is clear what are market abuse conducts and there is a good possibility to control the ruling class and employment behavioral to assure an ethic compliance for economy, and in particular for financial market. In fact, we must observe that if there is a Compliance instrument as Model 231 but a clear and precise legislative framework lacks, it will be possible to continue in no ethic behavior for economic operator in the business life of every firm.

Moreover, we consider that regulation MAR is immediately efficacy in every single member State. That is a good progress to economic responsible way.

3 Private corruption crime

“What’s legal is bigger in my view than what’s illegal. There aren’t a lot of people breaking the law. You don’t need to break the law. The laws are written in a way can operate very corruptly within the law for a very long time?” (Jack Abramoff 2011).

It is the same question and the same problem that we are met in the case of market abuse. In several situations, in a legislative framework there is the possibility to do illegal conducts that aren’t illegal for the law. It is a common paradox, diffused in complex situations. For example, the private corruption for many years it is not consider a crime for several reasons.

The principal motivation is surely that private sphere is a space where not is necessary to intervene. But in the last time, this reason is not enough. The effects of corruption in international and in national commercial contracts are very serious. So, it is beginning a long way of the criminalization of corruption in international business transaction and in national business.

Now the contractual and non contractual consequences of contracts tainted by corruption as well as the rules of private international law that come into play are very considered. There is a private area of corruption that require a public intervention with a criminalization process.

So, there are many international conventions that discipline the private corruption in commercial contracts and exchanges, like the Convention of Merida 2003.

In fact, corruption is a key element in economic performance and a major obstacle to poverty alleviation and development.

For several years, important contracts, public contracts, public infrastructure are awarded with tangents and money. For several years corruption, events regarded big international society that corrupted public functionary of another State to pursue private and personal interests have been tolerated. In many cases it is considered normal.

Now, there is a reversing. Within this context and also encouraged by international and regional bodies, several countries, particularly members of the European Union, have recently reformed their legal framework to ensure a more coherent and clear approach to punishing private corruption. Recent rules thus aim at criminalizing active and passive corruption within the private sector, committed by any employee in a breach of duty to gain an advantage for him/herself or a third party.

Recently, in 2012, also in Italian legal system has been introduced the crime of private corruption in the criminal code. Prior to the enactment of the anti corruption law, the Italian civil code criminalized offences that caused damage to the company and were performed by managers, directors, executives responsible for the preparation of the corporate accounting documents, statutory auditors and liquidators who following the giving or promise of a benefit, act, or mot to act in breach of the duties relating to their office. The offence however didn't cover undue advantages cases committed by lower level staff, even if those occupied function at high risk of corruption. Moreover, the offence was not prosecutable ex officio, but only on request by the affected party. The new law close some of these loopholes. The offence has been amended to also cover individuals who do not have managerial roles. In addition, specific relevance is now given not only to the breach of duties relating to the offenders office but also to the violation of loyalty duties. Moreover, the new law allows for the ex officio prosecution in cases where the offence has caused a distortion in competition.

It is interesting to underline that now the new offence of private corruption has been included in the list of crimes which may entail corporate liability. Companies can be liable, if they have not adopted adequate preventive measures in their corporate compliance structures, for the crime of corruption between private persons. Obviously, in the next years we can see how the law will be implemented in practice. In fact, now the enforcement of these rules is still rather weak and very few case of private corruption have been actually prosecuted.

But the way is open and a good legislative framework about private corruption is the start of ethic vision in the economic affairs among private operators.

4 The harmonization of criminal liability for economic crime, market abuse and private corruption, in the UE

There is an understanding that countries would benefit from a specific law regulation corruption in the private sector. Firstly, it would leave less space for loopholes and increase predictability for companies operating in the country. Secondly, it may help raise awareness on the social costs of private corruption, contributing also to increase business ethics. In addition, in order to build strong corporate integrity, there should be no differentiation between corruption in the private and public sector. There are less information about the impact of laws criminalizing private to private corruption given the limited number of prosecutions and convictions.

So, a coherent and clear legal framework would permit to persecute corruption in the private sector and would also function as a deterrent to employees behaving dishonestly.

In the UE level, the need of private to private corruption criminalization is mandatory to signatories to the Council of Europe's Criminal law Convention on Corruption. According to the Convention, each Party shall adopt such legislative or other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

The European Union has also criminalized corruption through the Council Framework Decision of 2003 on combating corruption in the private sector. According to the decision, active and passive corruption in the private sector must be considered a criminal offence in all member states.

In particular. The legal framework should also cover the liability of legal person in cases when corruption is committed for their benefit by an individual acting on behalf of the company, without excluding the possibility to prosecute the natural person involved. As of 2011, only nine countries had fully transposed all elements of the offence as required by the European Council Decision 2003, including Belgium, Bulgaria, Czech Republic, France, Ireland, Cyprus, Portugal Finland and the United Kingdom. In the last period, other countries, like Italy, Slovenia and Croatia, have reformed their legal framework and are now considered fully compliant.

There is a good uniformity of legal framework in UE space for many State members. It is necessary to permit a uniform responsibility in the corporate criminal liability in several State Members in the UE. In particular, in the risk management consideration, now in Italy we must consider the criminalization of private corruption and the relevance of this crime for the liability of legal person according to d.lgs. n. 231/2001. So, the important harmonization process of corporate criminal liability regulation in the European Union with the affirmation of European criminal liability in the Market abuse contrast and the international

sensitization on private corruption crime permits to research a common criminal answer to fight the corruption phenomena.

In fact, the new legislative dispositions have been introduced in the UE law and in the national legal framework with the instrument of regulation, in particular UE 596/2014 regulation, that is directly applicable in every Member States in the UE. This is a significant aspect of risk management and corporate liability in UE space: it is beginning an uniformity in the legal discipline of economic crime, as market abuse and corruption crime, among Member States that can assure a same valuation of the risk management and of criminal relevant conducts in the European Union. This avoids the forum shopping phenomena: the possibility that a conduct connected to market abuse or private corruption can be no criminal relevant in a State encouraging the transfer in this Member State. Moreover, now it is more clear what must be considered relevant to commit market abuse or private corruption. In the same time, about market abuse, now there is also, with the Directive of 2014, the possibility to give uniformity in criminal or administrative sanctions.

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Sanctioning criminogenic organizations

Author

-
- *Javier Cigüela Sola, Associate Professor, jciguelas@uao.es - University Abat Oliba CEU*
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Given the need to control and prevent the risks produced by criminogenic organizations, the article explores, from a theoretical perspective, which should be the nature of the intervention of criminal law on those entities. Two have been the options opened to criminal theory: (i) first of all, blaming organizations as done with individuals; (ii) Second, addressing security measures to organizations where a relevant degree of dangerousness have been proved by the crime itself. The first option treats collective entities as true agents (holistic/collectivist model), and the second one treats them as “mere objects” (individualistic model). The article offers a third via: considering organizations as “meta-subjects”, located somewhere in between “true agents” and “mere objects”, I argue that certain organizations can be held “structurally responsible” (not guilty) for crimes committed by their members, only when the crime can be connected to a structural deficit of the organization itself. It will be explained, at last, which should be the legal requirements for such structural responsibility, in this case dissociated from retribution, guilt or subjective imputation ideas, and connected to other rules and principles that are more suitable for collective entities

Keywords: organization; structural responsibility; compliance; distributive justice; prevention.

JEL Classification: L20

1 Why organizations matter to criminal law?

The economic and social crisis occurred in the latest decade, whose dimension and consequences are still to be calibrated, has driven collective guilt issue to the center of the philosophical and juridical debate. The crisis itself has been deeply connected to a certain type of criminal conducts, such as political corrup-

tion, bank fraud and other economic crimes, where organizations played a very important role (Jurkiewicz, 2012). In these years we have read a lot of studies, articles and other publications pointing indeed to the defective character or organization of certain institutions, public and private, as the main cause of our current crises: following this tendency, there are many sociologists and psychologists talking these days about “evil”, “perverted” or even “criminal organizations” (Jurkiewicz, 2012; Hetzer, 2015).

Somehow, the question of collective guilt always resurfaces in historical moments where criminal phenomena don't seem to be explainable only from an individual perspective (the willingness or motivation of the individuals), but also requiring structural perspective, that means: how certain contexts favor criminal behaviors (Cigüela, 2015). That was the case of the crimes committed by totalitarian regimes during the first half of the twentieth century, where collective guilt appeared as a possible explanation or response to the mass crimes perpetrated within various state structures, and that is case today. In the social sciences, the structural or collective dimension of criminal activity has been widely studied. In political philosophy, for example, H. Arendt (1973) described widely how totalitarian criminality was made possible by a context where “ideological manipulation”, “blind obedience” and “bureaucratic domination” were ruling social relations. In her words, these context made possible that “terribly normal” men “could commit their crimes” in circumstances in which there was “practically impossible to know or feel that they were doing wrong” (1963). Soon after, her arguments were confirmed by Milgram (1974) in experimental psychology, and decades of criminological investigation have already settled the following idea: when individuals commit crimes in highly structured contexts, their behavior can not be easily explained from an individualistic perspective, since in their motivation there are factors that are beyond their inner disposition, that lie in the structural conditions where individuals act (Jäger, 1985).

As argued before, the ability of organizations to influence on the conduct of its members has become nearly self-evident in recent decades. Only by considering the magnitude of our current crises it seems clear that the political-economical criminality surrounding it has a structural/systemic component, and therefore we say that if States, markets or big corporations had been better organized and controlled, many of these crimes would have been prevented.

The aim of this article is two explore how can law –philosophy of law and criminal law, mainly – conceptualize the organizational factor of contemporary criminality, in order to better prevent it. In this regard, it will be explained which is the “ontological status” of organizations (what is an organization)², and then which should be its responsibility³.

2 Organizations: ¿true subjects or risky objects?

The traditional and already old discussion of collective criminal guilt has moved permanently between two big paradigms: the one where organizations

are considered as true subjects, with its own will and intention; and the other one where organizations are considered as mere objects or instruments serving individual objectives. The discussion was alive already in the 19th century, in the debate between Gierke's and Savigny's theories on legal persons, but nowadays it's still far away from being solved. Being so, it's worth here to make some remarks on the way we understand collective entities nature, and therefore collective responsibility.

2.1 Personifying organizations: the intentional and the functionalist paradigm

As regards contemporary thinking, considering collective entities as "true agents" or "real subjects" has been done by means of two major paradigms: (i) the "intentional-philosophical paradigm", developed by authors such as French (1996) or Pettit (2009) and very influential in the Anglo-Saxon world; and the "sociological-functionalist paradigm", developed mainly by continental authors, such as Bottke (1995), Heine (1995) and Lampe (1994) in Germany, and S. Bacigalupo (1998) and Gómez-Jara (2005) in Spain, following some ideas of Luhmann's "theory of systems". Both approaches are widely known among penal thinkers, and both try to justify that organizations are indeed differentiated entities as regard its members, capable of acting intentionally and being guilty for the influence they could have on its members crimes.

The "philosophical-intentional paradigm" extends the agency capacity to collective entities by extending the concept of intentionality. Thus, it is said that in every organization, above the individual members, there are a set of rules and decision processes that drives us to understand what happens in the company not as the result of individual intentions, but as the externalization of collective intentionality (French, 1996). The organizational system, consisting in the functional structure and corporate policy, synthesizes individual actions and decisions into a new intentional subject, the organization itself, separated from its members, with its own "desires and reasons for doing what it does". In the words of Pettit (2001), there is a true process of "collectivizing reason" in complex organizations. Thus, when managers vote on board, or when employees sell corporate products, they do not act as individuals but as members of an organization who is "imposing" them its will and objectives. A prove of this phenomenon would be phrases like: "I did not want to, but it was a policy of the company"; or "I wish I could not do it, but I have to comply with the rules of the company".

In the "sociological-functionalist model", leaving aside many nuances, the life of the organization is described by the concept of "autopoiesis": thanks to the decision-making processes and collective memory, the organization becomes an autopoietic system, with its own identity (identified as "organizational culture"), and capable of breaking the normative expectations put on it (Luhmann, 2001: 39 ff.; Bottke, 1995: 49). What happens in organizations is understood, in this approach, as the result of the needs of the organization itself; and the fact that

decisions are presented as “occurrences” or “decisions” of the managers only implies a “mystification” orientated to give an appearance of rationality and controllability to phenomena that are actually beyond individual control. In the words of Luhmann (2001), “the personal contribution to the decision-making process is, in practice, very overrated”.

At the ground of both approaches, in addition, there are references to social communication, that is, to the way in which corporations are perceived by society. French (1996: 146), for example, states that the evidence by which corporations are moral actors lies in the fact that in social and linguistic practices we attribute them reasons to do what they do. We say, for instance, that “Samsung has implemented a compliance *in order to* avoid a penalty”, or that “McDonalds has brought out a new product *in order to* conquer a new market”; in both cases, the words “in order to” are the linguistic expressions of corporate intentionality. In the “sociological paradigm”, meanwhile, the argument supporting collective subjectivity is that companies have an increasing social role, even bigger than individuals, and to that extent a “faulty collective organization” questions social order as much as a “defective individual behavior” does (Gómez-Jara, 2005). In simple words: people don’t only support the necessity of taking individuals to jail for economic crimes, but they also feel it necessary to make the corporation itself “suffer”, in such case by means of an economic sanction.

This way of turning organizations into a new intentional subject, and therefore supporting their capability to respond for crimes, manifest at least two problems. First of all, by supporting the idea that organizations are truly subjects, capable of unitary intentions, we have necessarily to admit that its members are, when acting for the corporation, nothing more than automatons, “parts” of a “whole” that is the corporation itself (Hasnas, 2009). This is clearly expressed by French (1996: 246), by saying that “the only way for the corporation to achieve their desires or goals is the activation of personnel occupying different positions”. Here the word “activation” is enough illustrative of how problematic the argument is. Thus, collective intention or collective guilt could only be supported by eliminating or mitigating in a big extent individuality, by considering individual as a mere part of a bigger body, the organizational one, who move its members towards collective goals. But this is controversial in terms of criminal law reasoning, which is mainly based on the idea that regarding certain basic personal duties, one cannot abdicate its responsibility in benefit of an alleged collective reason (Jakobs, 2002: 569). The well-known defense of Eichmann was unreasonable precisely according to that point, because his argument of “I was just executing orders” describes a situation of submission and slavery very far away from reality. On the other hand, the argument could be discussed for the case of subordinate employees, who sometimes act as “blind tools” of the system; but when we talk about managers the argument is particularly absurd, since being them the ones who decide company policy, and being the enterprise policy what “submits” individuals agents, what we would have to accept is something as strange as managers submitting themselves when acting for the organization (Cigüela, 2015)

The second problem is of logical type, and has to do with the “argumentative jump” from the level of social communication – what “is said” or “thought” by society – and the level of criminal responsibility. It is said that criminal organizations are “true and independent subjects” because we usually attribute them intentions; however, we also attach intentions to children, computer systems, or the “law” itself, and we don’t therefore consider them subjects of criminal responsibility. Other persistent argument supporting collective criminal responsibility is based on the idea of the relevance of organizations in terms of social and economical discourses and politics (Gómez-Jara, 2005); but here there is another jump from what happens in the “social or political level” and what should happen in the “normative one”. It is also clear that criminal law can’t be a mere reflection of the social imaginary, and that, on contrary, it should be a limit and a counterbalance for its punitive aspirations; we could imagine, for example, a social trend of public opinion to consider the parents of a terrorist as responsible for its son’s crime, or a racial group to be considered responsible for the crimes of its members, and we will very reasonably deny that this social discourses should have any consequence or reflection in criminal law (Cigüela, 2015).

2.2 Objectifying organizations: the security measures model and the vicarious responsibility model

On the other side of the discussion, there are those who consider organizations as “objects”, as mere instruments serving the interests of the shareholders and administrators. Criticized for its “individualistic” tendency (which is not always true), this perspective denies every social or ontological status to the collective entity, by supporting several arguments: on the first hand, that organizations are only “fictional” realities, only existing for law purposes, unable to offer a “real measure” of subjectivity (von Freier, 1998); on the second hand, corporations would also lack a “body and a soul” to communicate with, in other words, there wouldn’t be in the collective entity a cognitive or volitional center to which we could attribute the decision making processes (Köhler, 1997: 562; Velasquez, 2003); on the third hand, it is said that the organization is no more than the aggregation of its members subjectivities, and that every time we try to explain why things happen in the interior of the entity, we will end up in decisions or actions of the members itself, specially the administrators (Schünemann, 2008: 431).

This way of considering collective entities usually drives to two different responsibility models. The first one is the “vicarious” or “transference model”, by which the responsibility attributed to organizations is based not in the actions or intentions of the organization itself (since it lacks the capacity for such things), but on a *transference* made from the actions or intentions of the administrators (Hirsch, 1995). The second model would be the traditional “security measures model”: the organization that favored crime is here considered a “dangerous” or “risky” object, and therefore it should hold up the imposition of certain measures

which are orientated to reduce its dangerousness (Otto, 1993; Schünemann, 2008).

In my opinion, this perspective is also (at least partially) mistaken in its description of collective entities, at least as regards complex organizations: if the “collectivist model” is wrong to consider organizations as *more than they are*, as moral and unitary subjects, this other “objectifying models” are wrong to consider organizations as *less than they really are*, as mere objects or instruments unable to offer a significant meaning to social life. As I will argue in the next point, organizations are not equivalent to individuals, in the sense that they lack the capabilities to be considered “moral agents”, but they are also not reducible to “pure objects”, since they can develop projects and a “way of social being”, in a sense that mere objects couldn’t do.

3 Organizations as Meta-subjects: approaching a structural responsibility model

3.1 Collective organizations: between actors and “mere things”

Advocates of the “collectivist models” make the mistake of giving the organization a status that they do not have – that of moral agent–; others fall, however, in the reverse mistake, by saying that the organization is a “mere thing”, a “purely instrumental” being unable to offer anything beyond its members individuality. In one case the approach errs by *excess* – personifying excessively the organization –, and the other errs by *default* – objectifying it excessively –. In my opinion, collective organizations do not develop an autonomous and moral identity, but they do have a social consistency and a “reality” by its own: they exist as a result of projects that emerge from the joint action of men, and their use of technology and organization (Lampe, 1994; Cigüela, 2015). If individuals own the power of “action”, organizations own the power of “inter-action”, that is, the capacity provided by the organization to do things that single individuals could not, so as to have an influence on the behavior of the individuals who join it. To that extent we say that collective subjects are not reducible to mere instruments, since instruments or objects lack the power of “inter-action” and the possibility of developing a project – an object stay as it already is, while you never know what and organization will become –.

In that vein, organizations of a certain level of complexity neither constitute “moral agents” nor “pure objects”; they are actually “Meta-subjects”, that is, subjects composed of multiple subjects, as well as of communicational, informational and normative processes, where the performance of individuals generates over time a “way of being”, a collective structure, which can have an influence in the commission of crimes by their members (Cigüela, 2015).

The relationship between organizations and criminality is given by certain “structural factors” – located in the “inter-action context” –, which can whether

prevent crimes or incentivized them. These factors originate themselves through a cumulative, progressive and diffuse process, with the joint action of multiple members, present and old administrators, but also employees. We call them “criminogenic factors” when they incentive criminality, and they can adopt, in fact, various forms: be of a technical nature, for example when there are failings in the computer, machinery or safety systems of the organization; they can be organizational, when there are failures in the distribution of functions, the communication/information processes or in the control standards; and they can have a human nature, when they have to do with habits that have been generated by action and repetition, or with speeches, ideas and clichés that have been fostering a culture of crime (for example: “the boss is always right”; “I only execute orders”; “other companies does the same”, “the don’t pay me to question the orders”, etc.).

It is true that these factors are caused by the decision or action of one or usually several members, but once the faulty individual action –the act that sets the precedent for generalized bad habit, or the decision to implement a wrong system – gets in touch with a wrongful “inter-action context” and with a multiplicity of people, there is a risk of a repetition/expansion effect, which is not always predictable and attributable to that original actor (Ricoeur, 1996). For example, the superior who gives the order to carry out unlawful conducts can anticipate the consequences of the performance of his subordinates; but, perhaps, in contact with a faulty organizational system, such behavior is imitated and repeated for a long time by many people, becoming an habit and generating harmful results that could not have been foreseen by who originally gave the order, which may even have abandoned the organization. In that sense we say that those factors are dependent of the members – the company administrators can modify them, sometimes with difficulties –, but we also say that they are separated from them, since they can survive changes in personnel, and they have a real and effective influence on behavior (Jäger, 1985).

Classification 1.3.1

Types of organizations according to its relation to criminality

According to the degree of influence on individual crimes we can make a typological classification of structures, including: (i) preventive structures, those properly organized, with communication and training processes orientated towards law compliance; (ii) neutral structures, those where there are no active mechanisms of training and awareness for crime prevention, although a minimum standard of organization and information on duties and legal risks is fulfilled; (iii) non-controlling/facilitating structures, those that, without encouraging the commission of crimes, they do not have adequate systems of control and prevention; (iv) incentivizing structures, those where individuals are actively encouraged by economic or psychological pressure, to earn money for the corporation at the expense of the commission of criminal offenses (for ex.: banks where employees are pressured to sell sophisticated financial products to unsuitable people); (v) disenabling structures, extreme case where the level of structure, organization and

psychological pressure is so intense that individuality is virtually inexistent (for ex.: totalitarian states, slavers companies or sects, where individuality is partially annulled).

Sometimes the structural defect co-explaining the offense may be traceable back to the action/omission of one or more individuals: in such cases individual responsibility will be sufficient to cover the unjust given by the offense. At other times, surely frequent in complex crimes, the structural defect will not be traceable to specific individual unfair, either because the size and complexity of the organization makes it difficult to bear the whole crime on one or more persons shoulders, or also because the structural defect was caused over a long time and their personal origin is vague and indeterminate. In such cases individual responsibility leaves a space unfilled, corresponding to what the organization's influence on the crime, and this will require a differentiated responsibility for the entity itself.

3.2 Collective organizations: between actors and “mere things”

In the first part of this article I argued why it's not possible to attribute a subjective responsibility to organizations, at least in the way how we usually think about criminal responsibility: if collective entities are not true moral and autonomous subjects, then it's not possible to consider them guilty for their member's crimes. Their responsibility should be, therefore, of another type, in accordance to their special identity as “Meta-subjects”, and clearly separated from the notions of “blame” and “reproach” (Cigüela, 2015).

The type of responsibility I propose is called a “structural responsibility”, attributable to those organizations (companies, political parties, unions and other associations with a minimum of complexity) within which an individual committed a crime that could be co-explained because of the influence of structural defects in the organization itself, generating an “objective/structural unjust” that would remain if we only prosecute the guilty individuals.

First of all, this responsibility has nothing to do with “guilt semantics”; on contrary, it's related to the open concept of *responsibility* (“Verantwortung”), as developed by contemporary philosophy (Jaspers, 1998; Arendt, 1999). Responsibility is flexible enough to fit with the specific identity of collective entities. The content of *responsibility* is different from the one of *guilt's* concept, it's less moralized and less individualized, and therefore more suitable for organizations. In this regard, it's not possible to declare someone guilty (in this case an organization) for events or facts that emerged from other's actions (in this case its successive members); but it may be possible to argue a certain responsibility of the organization for those actions, as long as we give no moral meaning to it, that is, as long as we put no blame or reproach on the organization itself (Arendt, 1999). So, for example: it is problematic to affirm, in political terms, that the citizens are guilty for their governors choices, or, in criminal law terms, that a political party is guilty for the corruption acts of its administrator, but it makes more sense to

argue that those collectives are, to some extent, responsible for those events – when certain requirements are fulfilled, of course–.

Moreover, the responsibility is *structural* in opposition to *personal*, which means that the relationship of organizations with crimes doesn't fulfill the form of a "subject committing a crime personally", but rather of a "context providing the structural conditions for a crime to be committed (by someone capable)". The organization, thus, will not respond for committing a crime by its own, it will respond for having acquired the form of a context of criminal opportunity for the individuals who operate on it; and although it's not a "true penal subject", it can be held responsible because it is a "Meta-subject", identifiable by law as a "legal person", that is: as a "imputation center", in the sense of Kelsen.

3.3 Structural responsibility requirements

As argued, structural responsibility is attributed to a legal person, in cases where one of its members committed a crime that could be co-explained because of "defective structural factors" located in the organizations itself, factors that could have been avoided with a correct compliance in the corporation. The requirements of such responsibility must obey to that same logic, and therefore they will pursue two objectives:

- (i) On a first level, that we could call the "objective part", the corporation should have exceeded the *permitted risks* in its activity: so, there will be no responsibility for damages connected to structural risks that were under the permitted risks level, such as legalized and administratively controlled activities. On the other hand, a "structural connection" must be proven to exist between the organizational deficiency and the individual criminal action; in other words, the individual crime should be an "actualization" or "demonstration" of the organizational defect. That means also that, even if there are structural defects in the entity, but unconnected with the concrete crime that is being judged, there will be no structural responsibility for it (it could be imposed, at least, a security measure in order to adjust that defect). In this objective part the *compliance program* has a very important role: if the compliance was correctly implemented, according to legal requirements, then the structural risk connected to the crime will be understood as a "permitted risk", and therefore the organization won't bear any responsibility for it.
- (ii) On a second level, where responsibility is "individualized" to the legal person in concrete, the sanction should be *graduated* taking into account the *seriousness* of the structural defect (a defect that affects life or physical integrity rights is more serious than another defect that affect property rights), and also the *degree of influence* of these defects on the crime itself (incentive and favor are more serious than a lack of control).

As mentioned, it is not possible to connect the influence that the organization could have on the crime to a guilty violation of the entity itself; what the organization “offers” as a basis for its responsibility is an “objective/structural unjust”, constituted by the set of organizational factors that incentivized or favored crime, in cases where those defects can’t be traceable to individual wrongdoings (Cigüela, 2015). Thus, criminal law judges the structural deficiencies of the organization as an “objectively wrongful” state, that should give rise to a negative consequence (*sanction*), which is orientated to motivate the managers to adjust their organizations to legal requirements. This “unjust” is *objective*, as opposed to personal, because it is real and it exists located in the context of interaction, but it wasn’t generated *personally* by the corporation, but rather by its members progressively and altogether (Kluszczewski, 2008: 190; Robles Planas, 2011; Silva Sánchez, 2013: 283). It is also *accessory* and *incomplete*, because it’s only prosecutable when this structural unjust manifests itself in the crime of the individual; therefore, the “wrongful state” of the organization is not enough to impose a sanction to the organization itself.

Example 3.3
The two levels of unfairness in an organizational crime

So, when we analyze a crime committed by a member of an organization, taking advantage of or influenced by its structural defects, we see two levels of unfairness: the personal/individual, and the objective/structural. For example, when a member of a financial corporation, following instructions or a general habit on the entity, press clients to contract sophisticated financial products that couldn’t be understood by them, we are in front of a crime with two levels of unfairness: an individual/subjective unjust, corresponding to the specific conduct for which the individual is held guilty; and a structural/objective unjust, corresponding to the criminogenic context of economic pressure provided by the organization to its members, as a risk that would remain if we only prosecute the individual level.

In short, the organization can only interact with the social world through its members (Cigüela, 2015), and therefore it can’t be blamed personally or subjectively for the crime; however, when the crime takes place and a connection to a structural deficiency and a lack of compliance is proven, the organizations itself can be held co-responsible for the crime in the terms that have been explained. The goal of this responsibility is to force the corporation’s managers to modify the corporate structure and re-orientate it towards compliance.

3.4 The sanction: ¿criminal, pseudo-criminal or administrative?

It still remains the question of the basis of the sanction imposed to the legal person, given the fact that here the basic criminal law principle, the guilt principle, is not working as a legitimation of the legal consequence (as we have argued, it is possible to attribute a responsibility to the organization, but not to consider it guilty for the crime). However, the fact that the corporate sanction couldn’t

find its basis in the guilt principle doesn't mean that it can't find a justification in another one –as the canonists argued: “*punitur sine culpa, non tamen sine causa*” (Maihold, 2005: 164). The foundation of this corporate sanction, different from the individual's one, lies in the idea of *distributive justice*; more specifically, the equitable distribution of responsibility for the conflict. When the organization has provided a favorable environment for the crime, it is justified to impose to the entity a negative consequence according to the degree of its influence in the conflict, that means: proportionate to its share. Thus, the sanction is not a “proper punishment”, since the organization lacks – in the famous terms of Coffee (1991) – a “body and a soul” to punish. Here we are in front of another type of legal consequence, where the main objective is not a “blaming communication” but a re-distribution process: law judges as risky and dangerous the “organizational context” that favored crime – says “this must not continue” – and imposes a sanction seeking to make the legal entity structurally responsible and to motivate its administrators to fulfill compliance requirements (Cigüela, 2015).

In addition to the distributive justification, the penalty fulfills preventive purposes, although in a different way from the individual case. By sanctioning the organization it occurs what has been called «reflexive or indirect prevention» (Dan-Cohen, 2010; Teubner, 1983): law intervenes directly on the organization – by imposing a fine, or by imposing certain controls on its activity – in order to motivate indirectly their managers to re-structure the organization towards compliance (special prevention). Meanwhile, the intervention has an reflection effect on the managers of other corporations, who are encouraged to do the same in their business if they don't want to suffer the same consequences (general prevention). The message is: “organize your corporations so that it doesn't incentivize crime, otherwise a sanction will be imposed on the organization itself, in addition to the one that may correspond to individuals for their personal unjust”. Punishing the organization is therefore a preventive enforcement that is added to individual responsibility, and its justification have been widely provided by the advocates of collective guilt models: since it is very difficult to trace what happens in the organization to individual responsibilities, it is sometimes preferable and necessary to refer the defective organization to the legal entity itself.

The latter means, however, that the sanction is something different from a “penalty”, but neither is reducible to a “security measure”, since its foundation lies not only in the dangerousness of the organization, but there is also an attribution of responsibility to the entity itself. In another words, here the entity is not considered a mere dangerous object, that should be controlled or closed; here there is a certain recognition of the organization as a “Meta-subject”, whose project could be declared lawful or unlawful, and as an “imputation center” where law could address duties and sanctions (of course, as a *medium* to motivate its members, the only ones who are able to be stimulated by law). The practical consequence here is that, unlike what happens with security measures, although the organization has ceased to be dangerous at the time of trial, it will still be de-

clared accountable for its influence on the crime –in this case in an attenuated form.

Of course, this structural responsibility and its corresponding sanction are closer to administrative law consequences than to criminal law penalties, precisely because administrative responsibility requirements are less individualistic, and more flexible. However, it is a verifiable fact that criminal justice system is becoming increasingly complex (Pérez del Valle, 2016), integrating very different tools –from security measures to prison penalties–, and also addressing its different consequences to subjects of various kinds –underage people, adults and now legal persons–. So, today’s penal system is not constituted only by what is known as “nuclear criminal law”; on contrary, it has been expanding and incorporating new subsystems, which are not criminal law in a strict sense, but participate to some extent of the same purposes or principles; so, just as happened decades ago with “security measures” or with “juvenile criminal law”, it’s possible to add a new sub-system, the “legal persons responsibility subsystem”, clearly differentiated from nuclear criminal law, with its own rules and principles.

4 Conclusion

In this article it has been argued that organizations could be described as “Meta-subjects”, subjects that are composed by multiple subjects (its members), which can develop a way of being that emerges from the inter-action of its members, and suitable in between moral agents and mere things. They differ from moral agents in their lack of certain capacities, basically in their incapacity to originate by themselves an act or a social event, and to control by themselves what they become; but they differ also from mere objects and instrumental realities, since organizations are able to develop a way of being with social significance, and they constitute projects that can be objectively valued as lawful or unlawful.

Being so, organizations can’t be held guilty, because guilt principle implies individualization and reproach, and therefore it is not suitable with organization’s identity; in other words, “guilt” was made for “individual subjects” with certain properties and characteristics, not for “Meta-subjects”. But, at the same time, they could bear something else than a simple security measure, since they are something more than a dangerous object. This other type of responsibility according organizations identity has been described as a *structural responsibility*, attributed to those organizations that favored or incentivized a crime in their inside, generating a “structural/objective unjust” that would remain by only prosecuting individual offenders. The legitimation of this type of responsibility would lie in *distributive justice criteria*, since it is reasonable to make the organization co-responsible for the conflict, when the organization itself offered the criminogenic context that favored or incentivized crime. This type of responsibility, whose principles clearly differ from criminal law, can be integrated into the

criminal system only in a separate subsystem, clearly dissociated from the conceptual frame of individual guilt.

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Controlling the control environment. how to reduce risk through sharing policies and collaboration

Authors

- *Silvia Cornaglia, Professor, cornaglia@societas.biz - Scuola Piccatti Torino*
 - *Roberto Frascinelli, Professor, studio@frascinelli.it - University of Torino*
 - *Annamaria Roncari, Professor, anna.roncari@studiomarchisio.com - Scuola Piccatti Torino*
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Organizations are made of people and of relationships between people; people are continuously learning in their interaction and are able to coordinate and act together to develop sustainable solutions. This is, however, only under certain conditions: fraudulent conduct or otherwise dystonic with business objectives will often compromise their realization and these behaviors are largely unpredictable. In the light of these considerations, this paper aims to provide some ideas to give content to supervisory duties, suggesting that if supervising focuses on the environment control it will greatly reduce the likelihood of dystonic behavior and facilitate the production of evidence about the real will of the enterprise risk prevention. Referring to Elinor Ostrom studies, we propose the use, inside organizations, of the same variables that succeed in contexts described by US scholar: existence of a common interest, transparency in the negotiation, information sharing, commonality of context and of the basic rules of social interaction. We also take into account the fact that the relationship between humans is regulated by the “mirror” system, present in our brains, which enables individuals to recognize with their body the intention of the other, potentially making every individual cooperative. This means that the collaborative capacity is genetically part of human beings. It does not mean, however, that in every situation, every person is inclined to cooperate, being present in humans also competitive and conflicting drives. An adequate control environment supervision solves, at least in large part, this contradiction, limiting the risk of fraudulent behaviors.

Keywords: Corporate Governance, Risk Management, Control Environment.

JEL Classification: L20

1 Introduzione

L'apertura di molti procedimenti giudiziari a carico dei componenti degli organi di controllo societari deriva da una mancanza di chiarezza in merito al contenuto dei doveri di vigilanza, che viene diversamente interpretato dalla dottrina e dalla giurisprudenza prevalenti generando una situazione paradossale nella quale il mero verificarsi di un fatto di cattiva amministrazione rischia di essere comunque considerato indice di omessa vigilanza.

In questo scenario, il presente lavoro vuole contribuire a una proposta programmatica a sostegno della tesi secondo la quale gli organi di vigilanza devono occuparsi *in primis* dell'ambiente di controllo, dove si radica la reale prevenzione dei rischi di ogni natura. Vigilando sull'ambiente di controllo, sosteniamo, si presidia l'origine dei comportamenti disfunzionali, minimizzando il rischio della loro messa in atto; d'altro lato, si massimizza l'efficienza dei controlli, concentrandoli "a monte", sul ruscello che sgorga dalla sorgente anziché su una foce molto ramificata. Nel tempo, auspichiamo che tale evidenza venga presa in considerazione dagli organi inquirenti e giudicanti, in modo che anche la loro valutazione possa concentrarsi maggiormente sulla qualità della vigilanza piuttosto che sull'esistenza di un rischio residuo che non può essere azzerato.

A sostegno di questa tesi daremo conto dell'indagine sulla costruzione di istituzioni funzionanti, imperniata sulla protezione dei beni comuni, sulla scia degli studi del premio Nobel Elinor Ostrom, mettendola in relazione con l'utilizzo sempre più frequente di "pratiche collaborative" per gestire conflitti attuali e potenziali, tra i quali quelli emergenti nel processo di definizione delle regole e, a monte, nell'individuazione delle aree a rischio e delle modalità di mitigazione. Richiameremo inoltre i più recenti studi in ambito neuroscientifico, i quali mettono in luce alcune caratteristiche e modalità di funzionamento del cervello umano che danno ragione delle evidenze sperimentali assunte a riferimento.

2 Literature review

Il presente lavoro si inserisce nella scia dell'evoluzione che, culminando premio Nobel a Daniel Kahneman nel 2002, ha messo progressivamente in crisi il paradigma dell'*homo economicus* perfettamente razionale, che basa le proprie scelte su analisi costi – benefici oggettive e universali. Cogliendo alcuni dei numerosi spunti offerti dagli studi sulla dinamica delle decisioni e, soprattutto, sulla definizione e sul rispetto delle regole, abbiamo seguito quelli da cui le nostre riflessioni sono state più direttamente influenzate nel pensare all'organizzazione aziendale e al rischio che i comportamenti posti in essere dalle persone che ne fanno parte non siano coerenti con gli indirizzi strategici che i leader intendono perseguire. Muoveremo dalle evidenze proposte dagli studi di Ostrom a partire

dal 1990, per leggerle alla luce del contributo di Giacomo Rizzolatti dell'Università di Parma (Rizzolatti 2006) e della sua *équipe*, che nel 1995 ha scoperto l'esistenza dei *neuroni specchio* nel cervello umano e arrivare a dare ragione dell'efficacia di alcune proposte pragmatiche per la risoluzione di importanti conflitti di interessi, proposte che infine proveremo a riportare nei contesti aziendali che sono oggetto della nostra attenzione.

In sintesi Ostrom, nel suo *Governing the Commons* del 1990, sostiene la capacità delle comunità di auto organizzarsi per la protezione di una risorsa comune, necessaria alla sopravvivenza e al benessere dei suoi componenti, evitando l'*overharvesting* che ne comporterebbe, in breve tempo, la distruzione.

Questo meccanismo, sosteniamo, può funzionare anche nelle organizzazioni, esse stesse "risorsa collettiva" da proteggere, in quanto promuovono interessi comuni a una pluralità di individui: remunerazioni più alte e migliori condizioni di lavoro per gli aderenti a un sindacato; una legislazione più favorevole per gli imprenditori appartenenti a una associazione di categoria; prezzi più elevati per i membri di un cartello; risultati economici adeguati a remunerare tutti i fattori della produzione per chi lavora nell'impresa e con l'impresa. Partiamo quindi dal presupposto che una organizzazione opera per l'interesse comune di coloro che ne fanno parte.

Osserviamo l'impresa da questo punto di vista: più soci mettono insieme risorse economiche e spesso il proprio lavoro per ottenere una remunerazione, conseguibile solo unendo le forze; nello svolgimento dell'attività d'impresa, essi intercettano e coinvolgono altri gruppi di interessi: i dipendenti e le loro famiglie; la comunità sociale ed economica che mette a disposizione le risorse; i clienti e i fornitori; i finanziatori; le comunità locali e il territorio dei luoghi in cui stabilisce le sedi produttive, commerciali e amministrative.

In questo panorama, è facile che la competizione fra i gruppi di interessi renda difficile il perseguimento dell'obiettivo comune, a causa delle differenze di punti di vista, motivazioni e aspettative e questo può compromettere la stessa sopravvivenza dell'impresa; il dilemma del prigioniero suggerirebbe che la cooperazione non è possibile, mentre vediamo molte imprese funzionare bene e a lungo. Vogliamo esplorare questa capacità di successo per aiutare i nostri clienti a ottenerlo e i nostri colleghi a vigilare efficacemente sull'assetto organizzativo che lo determina.

2.1 Governare il bene comune

Governing the Commons muove dalla critica nei confronti delle teorie dominanti sul governo dei beni collettivi: la proposta della soluzione statalista (il Leviatano), da un lato, e, dall'altro, il mercato, la privatizzazione *tout court*. Secondo Ostrom non ci si trova di fronte a un unico problema con un'unica soluzione, ma a una molteplicità di problemi diversi (le cui differenze dipendono da aspetti culturali ed emotivi, oltre che dalla natura del bene e dalla struttura sociale della comunità che deve governarlo) i quali, proprio per le profonde differenze che li distinguono, non possono che richiedere soluzioni diverse: pertanto, definire

l'assetto istituzionale adatto è un processo lungo e faticoso, foriero di conflitto prima che di composizione. E' un processo che richiede informazioni affidabili e diffuse sul contesto specifico e una base di regole sociali condivise. Ostrom lo studia sul campo e rende conto di soluzioni praticate con successo o insuccesso, indagando le ragioni di tali risultati: dalle esperienze esaminate deduce le variabili chiave che accrescono o imbrigliano la capacità di risolvere questo tipo di problemi. Raramente le istituzioni, osserva, sono totalmente pubbliche o totalmente private. La maggior parte delle istituzioni in grado di capacitare le persone a raggiungere risultati soddisfacenti nonostante la tentazione, sempre presente, di *free riding* e *overharvesting* sono "ricche combinazioni" di componenti "*private-like*" e "*public-like*". Il mercato stesso è frutto di un positivo gioco di tali variabili, più che una soluzione definita a un problema di governo: esso può funzionare perché esistono istituzioni pubbliche che lo permettono.

Le molteplici soluzioni possibili si distribuiscono in un *continuum* fra i due estremi e dipendono dalle persone e dai contesti: l'interazione fra le persone genera sempre, infatti, strutture sovra-individuali che *emergono*, in modo spesso imprevedibile, dall'interazione stessa; condizionate dal portato biologico ed esperienziale dei soggetti coinvolti e dal modo con il quale esso si combina con le variabili del contesto, si tratta di strutture le cui proprietà «non sono in alcun modo desumibili da quelle degli individui o dei processi che fluiscono tra loro» (Gallino, 1998): pertanto, più che di soluzioni da applicare, si deve parlare di variabili che favoriscono il funzionamento delle soluzioni *emergenti*, e che favoriscono l'emergere di soluzioni *sostenibili*.

In pratica, una soluzione per il governo di una risorsa comune consiste in un sistema di regole che ne presiedono l'utilizzazione. Ostrom analizza molti casi concreti, individuando, in effetti, alcune variabili che sono sempre presenti nelle soluzioni che hanno successo. Un esempio fra i tanti riguarda i pescatori del villaggio turco di Alanya, i quali, dopo un decennio di sforzi vani per regolamentare la pesca in modo da non compromettere la riproducibilità della loro risorsa vitale, intorno alla metà degli anni Settanta del secolo scorso arrivarono finalmente a condividere un sistema efficace di regole, che nessuna autorità esterna avrebbe potuto definire e far rispettare altrettanto efficacemente, in quanto necessitanti di una profonda conoscenza dell'area marina di riferimento e dei flussi migratori dei pesci. In sintesi: i) ogni anno, a settembre, si preparavano due elenchi, quello dei pescatori autorizzati a esercitare nell'area e quello delle zone di pesca; ii) a ogni pescatore veniva assegnata una zona, che era la zona in cui avrebbe piazzato le reti nel primo giorno di pesca; iii) da settembre a gennaio, ogni giorno, ciascun pescatore si spostava verso est nella zona immediatamente adiacente a quella occupata il giorno precedente; da gennaio a maggio lo spostamento quotidiano si invertiva, e ogni giorno i pescatori si spostavano verso ovest. Questo sistema garantiva pari opportunità a tutti di pescare nelle zone migliori, tenendo conto dello spostamento dei pesci durante le migrazioni stagionali. Ciascun pescatore, obbligandosi a rispettare le regole, minimizzava il rischio di essere penalizzato o di dover mettere in campo risorse eccessive per conquistare ogni giorno il proprio spazio di pesca contendendolo agli altri.

Questo non significa che nessuno cercherà mai di aggirare le regole per avere più degli altri: «*Accidents do happen, and rules get broken, even by players who were intending to follow the rules*». Una volta definite le regole, come si può garantire che esse vengano rispettate? Ostrom nota come l'aver contribuito alla definizione delle regole aumenta la propensione a farsene custodi, innescando meccanismi di sanzione "sociale" più efficaci e meno costosi di un *enforcement* esterno, il quale rappresenta una istanza successiva. Affidare la decisione a un soggetto esterno è compatibile con l'*empowerment* dei contendenti. Essi possono, infatti, coinvolgere nei sistemi di *enforcement* gli stessi membri della comunità in potenziale conflitto come scegliere di rivolgersi a una autorità esterna (il "saggio" della comunità, un arbitro, un giudice); la prima soluzione, però, implica maggiori *chance* di comporre le controversie in modo soddisfacente per tutti.

Il controllo più efficace è quello messo in atto dentro l'ambiente da controllare e questa è proprio la tesi che intendiamo sostenere in merito alla prevenzione dei rischi nelle organizzazioni.

In sintesi, nella visione di Ostrom: i) le regole vengono definite con il contributo sostanziale di coloro che dovranno applicarle, che negoziano in buona fede per raggiungere un risultato soddisfacente e sostenibile e ne diventano custodi; ii) può essere previsto, nella fase di definizione delle regole, l'intervento di un arbitratore, con compiti di *facilitazione* e *capacitazione*: l'arbitratore domina un metodo, ma non ha necessariamente conoscenza del contesto; egli fa emergere gli interessi, aiuta nella comunicazione, mette in evidenza i punti di contatto, aiuta a formalizzare la soluzione condivisa.

Tutti questi elementi si ritrovano anche nella *pratica collaborativa*, sulla quale torneremo nella formulazione della nostra proposta. Si tratta di una metodologia per la risoluzione dei conflitti fuori dai tribunali che, nata nel 1990 negli Stati Uniti e applicata inizialmente alle controversie familiari, si è diffusa in tutto il mondo trovando applicazione in molte altre tipologie di conflitto, anche societario ed endo-organizzativo.

2.2 Biologicamente sociali

Il raggiungimento dei risultati raccontati da Ostrom richiede capacità di cooperazione da parte dei componenti della comunità chiamati a definire le regole e altrettanta competenza collaborativa per far sì che esse vengano rispettate. Indagare i meccanismi di funzionamento delle relazioni e le condizioni di efficacia rispetto agli obiettivi delineati rappresenta quindi un passaggio fondamentale per poter proporre modelli organizzativi adeguati a perseguire interessi comuni.

Il titolo di questo paragrafo richiama quello di uno studio molto articolato e approfondito (Turri 2012) che muove dalla scoperta, nel 1995, dell'esistenza, nel cervello umano, dei *neuroni specchio*, la cui presenza ci rivela che gli esseri umani sono progettati per comprendere le intenzioni degli altri, informandoci del fatto che il nostro *sistema motorio* imita costantemente gli atti che vediamo compiere dai nostri simili, decodificandone le intenzioni prima ancora che ne diventiamo consapevoli. Se una persona afferra un bicchiere e io la sto osservando, in

qualche punto del mio cervello ci sono dei neuroni che riproducono lo stesso gesto e se uno sconosciuto incrociato per strada ha paura, io comprendo, osservandolo, che prova questa emozione, perché nel mio corpo si attivano gli stessi neuroni che si attivano nel suo e che consentono la manifestazione della paura. Al pari delle azioni, infatti, anche le emozioni risultano immediatamente condivise: la percezione della paura, del disgusto, dello stupore altrui attivano le stesse aree della corteccia cerebrale che sono coinvolte quando siamo noi stessi a provare paura, disgusto, stupore.

Inoltre il cervello, durante l'apprendimento e nel corso di tutta la vita, è sottoposto alla stimolazione di ambienti diversificati, in cui viene a contatto con persone, oggetti, opere d'arte, rappresentazioni teatrali, letteratura, cinema e quanto più numerosi e vari sono gli stimoli, tanto più la capacità di comprendere, discernere e agire sarà ampia e duttile. Perché, grazie alla *plasticità cerebrale*, quando osserviamo gli altri imitandoli nel nostro sistema motorio, il nostro cervello viene "tracciato" da questa relazione e si modifica fisicamente, rendendoci a tutti gli effetti persone diverse da quelle che eravamo un momento prima di entrare in relazione; e siccome siamo continuamente in relazione con il mondo – con le altre persone come con gli oggetti – il nostro cervello viene continuamente modificato e ci troviamo in costante evoluzione.

La scoperta del meccanismo specchio risolve la questione riguardante la formazione della nostra personalità e cioè se essa sia frutto di una codificazione presente fin dalla nascita o se i nostri genitori, gli amici, i parenti, gli insegnanti, l'ambiente scolastico e lavorativo, i contesti culturali in cui siamo cresciuti e abbiamo vissuto, il libri che abbiamo letto e i film che abbiamo visto facciano sì che siamo come siamo. Ogni essere umano è soprattutto il prodotto della propria esperienza e delle relazioni che ha avuto. In questo senso meccanismo specchio e plasticità cerebrale hanno fornito un nuovo paradigma del funzionamento della mente umana dal quale partire per ridisegnare la visione del portato della relazione fra le persone: i) la condizione genetico – biologico – fisiologica subisce, per effetto della plasticità cerebrale e sin dai primi mesi nel ventre materno, delle modificazioni che sono determinate dagli stimoli sensoriali e poi anche dal contesto educativo, sociale, culturale; ii) le modificazioni della condizione biologico – fisiologica vengono, almeno in parte, riconosciute cognitivamente e questo contribuisce ad approfondirle e radicarle (Turri, 2010).

La nostra relazione con gli altri è quindi molto più profonda di quanto siamo in grado di percepire: ne veniamo continuamente modificati, in modo irreversibile, come la pietra scavata dalla goccia che trasforma il paesaggio, il quale continuerà a evolvere senza che la pietra possa mai più tornare la stessa. Se poi la relazione implica un coinvolgimento emotivo, l'intensità è maggiore e le tracce lasciate nel cervello saranno più profonde e meno facilmente modificabili.

Tutto questo ha grande rilevanza, come si può intuire, per il governo delle organizzazioni, è determinante nell'emersione di comportamenti favorevoli od ostativi al perseguimento dei valori e degli obiettivi che la leadership intende portare avanti. Anche il pensare e meditare su fatti ed eventi sviluppa le connessioni fra neuroni e modifica le connessioni preesistenti: promuovere la riflessio-

ne e il confronto su esempi positivi, ad esempio, può stimolare l'emulazione dei comportamenti di cui si è discusso. Ecco quindi che nella definizione, nella cura e nella vigilanza riguardanti gli assetti di una organizzazione, elementi quali la qualità delle relazioni, l'esempio, il confronto, assumono importanza determinante. Il meccanismo specchio è la modalità con la quale percepiamo un altro individuo e traccia la nostra memoria, condizionandoci nell'agire futuro: pertanto, ad esempio, un clima positivo, in cui sperimentiamo ogni giorno attenzione e cura per la nostra persona, ci predisporrà ad avere altrettanta cura e attenzione per gli altri, rendendo conseguentemente più fluida e orientata al risultato l'interazione organizzativa. Grazie alla plasticità cerebrale, infatti, interazioni ripetute, emozioni provate a lungo o più volte approfondiscono le tracce mnestiche e tracciano con maggiore profondità il nostro divenire.

Inoltre il meccanismo specchio consente di comprendere, e quindi di imitare, anche l'intenzione di colui che osservo, ovvero la finalità dell'azione che egli sta compiendo. Il cervello umano sembra infatti contenere un vero e proprio *vocabolario di atti motori* (Rizzolatti, 2006), i cui vocaboli sarebbero rappresentati da popolazioni di neuroni: alcuni di essi indicano lo *scopo* generale dell'atto (afferrare, lanciare); altri la *modalità* con cui un atto motorio specifico può essere eseguito (presa di precisione); altre, infine, la *segmentazione* dell'atto in una sequenza di movimenti elementari (per afferrare: tendo il braccio, apro la mano, chiudo la mano intorno all'oggetto).

Il funzionamento del meccanismo specchio ha messo in evidenza che il ruolo fondamentale nella comprensione degli altri lo svolge il sistema motorio – responsabile sia del controllo dei muscoli sia della regolazione dei movimenti delle varie parti del corpo – nel senso che sono i neuroni preposti al sistema motorio e chiamati *neuroni motori* che incorporano la capacità di comprendere il significato delle azioni nello stesso istante in cui vengono compiute (Turri, 2010).

2.3 Culturalmente individualisti

Molti etologi evuzionisti osservano come il paradigma dell'egoismo – e con questo l'individualismo – sia sterile e porti all'estinzione: questo punto di vista sembra confliggere con il successo del paradigma che è parso prevalere nella evoluzione del modello capitalista tra gli anni settanta del novecento e i primi anni duemila. E' risultato infatti evidente come, per quanto l'essere umano sia risultato biologicamente un "noi" e non un "io", a livello sociale operino meccanismi che inibiscono la collaborazione e promuovono l'individualismo.

E' vero che lo sviluppo dei contesti sociali ha creato maggiore spazio (per gli esseri umani rispetto alle altre specie animali) per la collaborazione, come anche è stato favorevole il lungo periodo necessario per rendere la prole indipendente e in grado di generare. E' peraltro anche vero che l'ulteriore evoluzione degli stessi contesti sociali genera maggiori occasioni di isolamento e conflitto, anche esasperato (si pensi all'attualissimo confronto con il "diverso da noi").

La ricerca di opportunità individuali, esasperata da strutture organizzative aziendali di matrice tayloristica e fordista che non da molti anni sono state mes-

se seriamente in discussione¹, ha minato progressivamente la solidarietà e la collaborazione. L'individualizzazione degli obiettivi, insieme al timore per la differenza esasperatosi negli ultimi anni, minano alla base l'apertura verso l'altro esasperando l'individualismo.

Mauro Magatti (2012) osserva, a partire dagli anni settanta e sulla scia della critica sessantottina ai principi del management storico (autorità, ordine, gerarchia, razionalizzazione ed efficienza) una istanza di "liberazione" intesa in chiave individualistica (Taylor, 1999). In quegli anni, secondo Magatti, «il capitalismo ha elaborato la promessa di un'autorealizzazione concepita in termini prettamente individualistici, che lega l'autenticità alla performance», aprendo di fatto a una nuova normatività.

Troviamo una conciliazione e spunti per la composizione tra natura sociale e istanze individualiste nella già citata opera di Turri (2012), in cui l'autrice esplora la natura dell'individualismo contrapposto alle caratteristiche biologiche degli esseri umani. Punto di partenza della riflessione è il pensiero di Edith Stein, la quale individua nella comunità il luogo in cui l'individuo esprime una personalità sovraindividuale, «che può essere ovviamente sempre minacciata dalla disgregazione e dal contrasto quando i suoi membri si estraniavano da essa o si utilizzano reciprocamente non come persone ma come oggetti, perché vengono a mancare le *motivazioni comuni*».

L'adattamento evolutivo e la relazione fra individui vedono la coesistenza di istanze competitive e cooperative: la collaborazione fra organismi della stessa specie è infatti necessaria, ma viene messa in campo solo in determinate situazioni e in presenza di alcuni specifici elementi di contesto. E' utile fare riferimento al concetto di *deme*, utilizzato dal neodarwinismo. Per *deme* si intende una popolazione locale di organismi della medesima specie che appartengono alla stessa unità riproduttiva (ovvero che si incrociano tra di loro) e che condividono un distinto *pool genico*; quando un *deme* rimane isolato per lungo tempo dalla popolazione di cui fa parte, può evolvere in una sottospecie o in una specie distinta da quella di partenza. Gli individui sono potenzialmente in conflitto fra loro e in conflitto con le altre specie, ma, cooperando per l'accoppiamento, nell'accudimento della prole e nella difesa dalle minacce esterne (per affrontare le quali è necessaria invece l'istanza conflittuale), contribuiscono all'evoluzione specie. Allo stesso modo, gli individui sono potenzialmente in competizione e in conflitto gli uni con gli altri, e questo indipendentemente dal fatto di entrare in relazione mediante il meccanismo specchio, che non implica di per sé consonanza di motivazioni e intenzioni, ma solo reciproca comprensione e riconoscimento. Quando alcuni individui, in un contesto favorevole, esprimono giudizi, preferenze, valori compatibili o affini a quelli di altri individui si genera *simpatia* e cessa il conflitto: in tal caso è possibile che questi soggetti coordinino reciprocamente la loro azione, in modo da realizzare progetti condivisi, costruendoli e gestendoli insieme in un contesto comunemente accettato. E' quello che accade nei *setting* studiati da Ostrom: la condivisione di motivazioni comuni, anche molto concrete come la salvaguardia di una risorsa vitale, spinge le persone a collaborare nella progettazione di un sistema di regole che sia sostenibile e proficuo per

gli obiettivi che esse vogliono raggiungere. Ed è anche il tipo di situazione che si deve creare nell'organizzazione e sul quale gli organi di controllo dovrebbero esercitare la propria vigilanza.

2.4 Pratiche collaborative

Nel 1990 un avvocato matrimonialista di Minneapolis di nome Stuart Webb comunicò ai giudici che non avrebbe più adito i loro tribunali per sostenere le ragioni dei suoi clienti, frustrato dalla consapevolezza di non poter realizzare davvero il loro interesse in un sistema giuridico in cui chi era legittimato a decidere non poteva avere tutte le informazioni che sarebbero state necessarie per assumere una determinazione che potesse tenere adeguatamente conto dei bisogni dei contendenti. Webb si era reso conto di quanto poco risolutiva poteva essere la decisione di un giudice "lontano" di fronte a problematiche complesse e multiformi, che il più delle volte comportavano scontentezza in entrambe le parti, frustrazioni che sarebbero sfociate in nuovi ricorsi.

Nei nostri sistemi legali le parti che si ritengono lese si rivolgono a un avvocato affinché li assista nel sostenere i loro "diritti"; l'avvocato si avvale della consulenza di altri professionisti se lo ritiene necessario. La pratica collaborativa prevede invece che l'avvocato affianchi il cliente nella ricerca di una soluzione che lo vede protagonista della definizione insieme alla controparte, con il supporto di professionisti neutrali per facilitare la comunicazione e dirimere le questioni rilevanti. Questo in quanto la definizione della lite coincide con la pianificazione del futuro di ciascuna parte e solo le parti fanno, per quanto non sempre con immediata piena consapevolezza – di qui la necessità di un supporto/facilitazione – quale sia il futuro migliore per loro.

L'impresa è un continuo processo di pianificazione che coinvolge molte persone e quindi il luogo ideale per applicare la pratica collaborativa.

3 Metodologia

La nostra analisi vuole essere spunto per una ricerca, più che indagine compiuta e definitiva. Ci siamo proposti di mettere insieme le evidenze raccolte sul campo per cercare riscontro ad alcune tesi che ci sembravano convincenti, ancor più se, pur appartenenti a campi di indagine apparentemente distanti fra loro, lette congiuntamente (e proprio in questo approfondimento congiunto consiste forse il passo in più che proponiamo).

Abbiamo cercato, nel nostro lavoro quotidiano con le imprese, riscontri concreti circa il fatto che persone non in accordo – almeno in partenza – su giudizi, valori, preferenze, possono lavorare insieme per portare a termine progetti condivisi in un contesto comunemente accettato e che possono farlo efficacemente solo in presenza di determinate condizioni: quelle individuate da Ostrom nelle comunità che sono riuscite ad auto organizzarsi con successo, ovvero trasparen-

za, condivisione delle informazioni, interesse comune sottostante, conoscenza del contesto.

Abbiamo analizzato le diverse componenti degli ambienti di controllo, così come definiti dai principali modelli di *risk management*: codice etico formale o informale, divisione del lavoro, attribuzione dei ruoli e delle responsabilità, stili di leadership, coesione del management, cura delle competenze e della formazione del personale

L'obiettivo che ha mosso la nostra ricerca è estremamente pratico: proporre un approccio alla vigilanza sugli assetti organizzativi che sia al contempo efficiente ed efficace e le evidenze raccolte, sintetizzate nell'ultimo capitolo del presente studio, danno ragione all'idea che la cura e la vigilanza sulle componenti dell'ambiente di controllo permette di ottenere risultati migliori nella prevenzione dei rischi, in particolare per quanto riguarda il rischio di frode e, più in generale, il rischio che vengano posti in essere comportamenti illegali.

4 Risultati

Di seguito riportiamo le principali caratteristiche dell'ambiente di controllo riscontrate nelle imprese di successo, quelle in grado di affrontare in modo più efficace i rischi, sia in fase di prevenzione che in quella di mitigazione, ma soprattutto in grado di prevenire comportamenti distonici rispetto al raggiungimento degli obiettivi di lungo termine.

4.1 Competenza collaborativa

Pratiche collaborative attraversano le nostre giornate dal risveglio quotidiano, quando ordiniamo un caffè al bar di prima mattina e questo ci viene servito, fino a quando, con i nostri commensali, ci passiamo i piatti durante la cena e poi decidiamo, magari, quale film guardare insieme e dove: in alcuni casi condividiamo l'obiettivo (guardare un film), in altri no (io desidero bere un caffè, il barista vuole vendermelo), ma la condivisione dell'esito finale ci induce a mettere in campo insieme ad altri le risorse necessarie per portare a termine il compito o il progetto.

Le organizzazioni di successo sono quelle in cui si riscontra una buona *competenza collaborativa*, che consiste nella capacità di provocare convergenza di motivazioni anche in assenza di *simpatia*, intesa quest'ultima come consonanza di interessi e valori: le persone lavorano per i propri obiettivi individuali, che possono essere diversi (lo stipendio, la gratificazione professionale, la socialità dell'ambiente), ma sono in grado, grazie a una adeguata architettura organizzativa, a meccanismi operativi efficaci, alla condivisione delle informazioni, alla cura per le competenze alla formazione, di sintonizzare le proprie intenzioni per contribuire insieme alla realizzazione del progetto d'impresa.

L'osservazione sul campo ci conduce così a formulare una proposta per lo sviluppo della competenza collaborativa, nelle organizzazioni come tra i professionisti che le assistono; i professionisti infatti, soprattutto nell'ambito del sistema dei controlli, possono giocare un ruolo importantissimo nel capacitare i loro clienti, facendo sì che il metodo collaborativo possa essere efficacemente applicato a tutti i casi di conflitto di interessi.

La competenza collaborativa si sviluppa a partire dall'allenamento, possibile grazie alla plasticità cerebrale, del sistema specchio e mediante l'applicazione di metodi avanzati di negoziazione: un grande punto di attenzione dovrà quindi riguardare la propensione dell'impresa a erogare formazione non solo tecnica e a organizzare frequenti momenti di condivisione e di confronto.

4.2 Comunicazione trasparente

Quanto più l'organizzazione "esce" dai propri confini evolvendo verso strutture a rete² e internazionalizzandosi, tanto maggiore deve essere la prontezza e la capacità di reagire agli stimoli, che diventano sempre più numerosi al crescere dei rapporti di reciproco condizionamento fra le variabili che favoriscono il raggiungimento degli obiettivi: risorse e capacità disponibili, attese di performance, ambiente esterno, modelli di gestione modalità di comunicazione.

Da una *shareholder view*, nella quale le decisioni di governo erano sviluppate prevalentemente nell'interesse della proprietà, si è passati negli anni a una *stakeholder view*, caratterizzata invece dalla centralità delle correlazioni tra le condizioni di successo di un'impresa e l'equa composizione delle attese degli *stakeholder*.

Si tratta di un'evoluzione molto rilevante, in quanto la competenza collaborativa non dovrà più essere messa in campo solo all'interno del perimetro organizzativo. Si afferma un importante cambiamento del focus della responsabilità d'impresa, dalla concentrazione sul breve periodo, espressivo della salvaguardia di un preminente interesse dei conferenti il capitale di rischio, al coinvolgimento, nella valutazione, di una pluralità di soggetti, i quali, motivati dalla protezione di una risorsa comune, condividono l'obiettivo finale mantenendo sotto controllo l'azione dei soggetti responsabili del raggiungimento degli obiettivi.

In altre parole, le imprese giocano nel *setting* di Ostrom con il ruolo di uno degli "individui" chiamati a definire regole di interazione nell'ambito di una comunità – spesso molto ampia dal punto di vista della distribuzione geografica e composita per quanto riguarda tipologie di soggetti e culture coinvolti – di cui sfruttano le risorse umane e materiali, restituendo occupazione e socialità. In questo scenario assumono grande importanza le modalità di comunicazione, con le quali le imprese, nel rispetto dei vicoli normativi (rendiconti obbligatori, come il bilancio annuale), proiettano verso l'esterno un'immagine di sé.

All'informativa obbligatoria (*mandatory disclosure*) si aggiunge sempre più frequentemente una *voluntary disclosure*, utile a costruire il rapporto di fiducia necessario alla collaborazione. Tanto la comunicazione obbligatoria quanto quella volontaria riflettono la cultura e i valori dell'organizzazione e li rendono conoscibili da parte dei soggetti con cui si relaziona.

Anche in questo campo si nota come la condivisione di regole efficaci di comunicazione (ovvero tali da agevolare i rapporti fra portatori di interessi) debba partire dal basso, da una negoziazione tra l'impresa e i soggetti con i quali essa si relaziona: l'imposizione di norme rigide per la redazione del bilancio infatti, ha dimostrato di non poter garantire, di per sé, trasparenza e buona fede. Il fatto che sempre più spesso l'impresa comunichi al di là di quanto strettamente richiesto dalle norme di legge è indice del fatto che per sopravvivere e prosperare deve farlo, in quanto i soggetti con i quali condivide le risorse e gli interessi, tanto all'interno quanto all'esterno della organizzazione, lo richiedono; questo comporta un ulteriore rischio, in quanto l'eventuale incoerenza tra valori dichiarati e valori praticati verrà più facilmente messa a nudo e in questo caso la condivisione di intenti e motivazioni si sgretola.

E' conseguentemente sempre maggiore l'esigenza di recuperare il valore della trasparenza, per restituire efficacia alla comunicazione d'impresa; gli *stakeholder*, ormai generalmente dotati di spiccata sensibilità e senso critico, non possono più essere "addomesticati" con informative societarie orientate alla volontà di "non comunicare", molto frequenti nel passato non troppo remoto³.

Solo integrando l'informativa obbligatoria in un progetto di comunicazione globale coerente al proprio interno e con l'ambiente circostante, che evidenzii obiettivi eticamente corretti e condivisibili si può migliorare la coesione interna ed esterna provocando quella convergenza di motivazioni che abbiamo visto essere a fondamento dei risultati dell'impresa. La qualità della comunicazione diventa così un ulteriore elemento di attenzione per chi vigila sull'ambiente di controllo: coerenza e trasparenza riflettono un sistema adeguato di prevenzione di comportamenti fraudolenti e di conflitti con i portatori di interessi potenzialmente dannosi per i risultati aziendali.

La cultura della trasparenza, elemento indispensabile per cementare la fiducia, diventa un valore da tutelare e da diffondere. L'informazione assumerà le caratteristiche di valore aziendale nel momento in cui assolverà alla funzione di dare risposte vere, concrete, chiare ed esaustive alle domande poste dai diversi interlocutori e adeguate alla capacità di questi ultimi di recepire positivamente i messaggi ricevuti, partecipando a un progetto comune in un contesto condiviso, come i pescatori di Alanya.

Si genera in questo modo uno scambio virtuoso, una cooperazione che nel tempo consoliderà la competenza collaborativa così importante per lo sviluppo della organizzazione in termini di valore sociale ed economico.

5 Conclusioni

5.1 Il rischio di corruzione / frode nelle organizzazioni e il sistema dei controlli

Per "organizzazione" si può intendere un insieme ordinato e collegato di par-
to in un tutto; l'organizzazione è tale in quanto, appunto, sistema "organizzato"
in modo funzionale al contenimento dell'incertezza, focalizzato quindi sulla pre-
venzione del rischio. Nel contesto normativo attuale è rilevante il dovere

dell'impresa (e conseguente responsabilità degli amministratori) di organizzarsi per prevenire i rischi, ovvero gli eventi che potrebbero compromettere la realizzazione degli obiettivi strategici.

Le strutture organizzative devono essere adeguate agli obiettivi da perseguire: si tratta degli assetti del *management* e del personale direttivo, corredati dal complesso delle direttive e delle procedure stabilite per garantire che il potere decisionale sia assegnato ed effettivamente esercitato a un appropriato livello di competenza e responsabilità in correlazione alla dimensione dell'impresa e alla natura dell'attività svolta⁴.

La gestione del rischio, quale fondamentale funzione di *governance* in un'ottica preventiva, rappresenta per l'azienda la base della strategia necessaria al mantenimento di una posizione di equilibrio economico e finanziario, condizione indispensabile per il permanere nel tempo dell'azienda stessa.

Il rischio è incertezza, stato derivante dall'assenza di informazioni utili alla previsione di un evento, riguardanti tanto la probabilità di accadimento quanto le possibili conseguenze; gestire il rischio significa pertanto ridurre l'incertezza (probabilità di accadimento), ma anche mitigare le conseguenze nel caso in cui l'evento negativo si verifichi, se non è stato possibile azzerare la probabilità che questo accada. Ne discende, come obiettivo, l'eliminazione / riduzione / mitigazione degli accadimenti dannosi, in particolare – per il perimetro della presente indagine – relativi al compimento di illeciti, ovvero atti posti in essere da una persona (condotta soggettiva) che cagionino danno all'azienda; la prevenzione efficace inibisce la percezione del potenziale attore del reato di poter eludere il sistema dei controlli o sfruttare la debolezza del sistema stesso e, al contempo lo rende consapevole dell'esistenza di un meccanismo sanzionatorio certo e severo.

Infatti, la principale leva di prevenzione dei reati sono le persone, di cui le direzioni aziendali devono valorizzare le capacità, le competenze e le esperienze, partendo dal presupposto che in molti sono disposti a difendere il bene comune che l'azienda rappresenta.

Dietro a ogni frode o atto di corruzione ci sono persone che perseguono interessi individuali, interessi che l'organizzazione può scoraggiare, grazie all'esempio di altre persone che mettono le proprie competenze al servizio degli interessi della stessa organizzazione e a meccanismi sanzionatori adeguati e funzionanti.

Ne discende il rilevante ruolo che rivestono il contesto organizzativo e la cultura aziendale, i quali dovranno rendere evidente che, in presenza di effettivi controlli dissuasori, l'azione illegale dovrà essere valutata come rischiosa e non conveniente; i soggetti apicali dovranno alimentare un ambiente culturale etico coerente con gli obiettivi, anche economici, da perseguire, rapportandosi alla struttura aziendale attraverso un sistema di regole e deleghe di funzioni semplici, comprensibili e logiche.

Va rilevato che spirito di corpo, soddisfazione personale e fedeltà hanno sempre caratterizzato la componente umana che è parte sostanziale di ogni organizzazione. L'esperienza e la storia però insegnano che proprio lo spirito di corpo, la soddisfazione e la fedeltà sono leve potenzialmente utilizzabili anche al fine di

perseguire obiettivi diversi da quelli propri dell'organizzazione. Questo è proprio il senso dell'attenzione all'ambiente di controllo: contenuti ed efficacia della leadership, esistenza di leader paralleli, riscontro dei valori effettivamente perseguiti dalle persone.

Va ancora osservato che i comportamenti difensivi propri di ogni organizzazione permettono anche che le persone divengano incapaci di rilevare l'errore o il comportamento illecito in quanto le regole che caratterizzano l'organizzazione portano a evitare di affrontare le conseguenze, e, quindi, continuare ad agire con indifferenza, evitando di confrontarsi con i propri referenti gerarchici. Questi comportamenti difensivi recano un considerevole danno all'organizzazione e devono essere prevenuti: rinviamo al paragrafo conclusivo sintetici per suggerimenti in merito.

Da tutto quanto sopra consegue che se una organizzazione vuole perseguire gli obiettivi prefissati deve poter fare affidamento sulle capacità di apprendimento / formazione, sulla competenza e sul senso di giustizia / eticità ei propri membri. L'etica è la componente principale dell'ambiente di controllo, che non può esaurirsi nella sottoscrizione di un codice.

La capacità di apprendimento permette di rendere evidenti gli errori e quindi procedere alla loro correzione, specie se complessi oppure "imbarazzanti", mentre la competenza rappresenta il valore di saper risolvere problemi in forma stabile e nel contempo rendere possibile alla stessa organizzazione di affrontarli nel corso del tempo. La capacità di apprendimento si radica ne codice etico.

L'errore, specie quando è volontario, porta all'inefficienza in contrapposizione ai principi sui quali si basa l'organizzazione: di proposito detti principi vengono (in genere) dissimulati con apparento e conformi processi di difesa onde così evitare ai membri dell'organizzazione difficoltà, pericoli o anche solo imbarazzo.

5.2 Spunti per una proposta programmatica

La riflessione proposta in queste pagine si articola intorno alle seguenti affermazioni: i) ogni impresa (più in generale ogni organizzazione) è un *bene comune* per le persone che la possiedono, che la governano e che vi lavorano; ii) uno degli obiettivi perseguiti dalla riforma del diritto societario del 2006 è la *sostenibilità* nel tempo delle imprese condotte in forma societaria, rispetto alla quale gli assetti organizzativi devono essere funzionali; iii) l'organizzazione è composta *in primis* da *persone* e da *relazioni* tra le persone; iv) le persone, in virtù delle relazioni e grazie alle proprietà del cervello umano, *apprendono* costantemente, ridefinendo continuamente equilibri sulla spinta delle motivazioni proprie e altrui.

Ci sono tornate utili alcune evidenze messe in luce dalle neuroscienze, tra le quali il fatto che le persone sono strutturalmente costituite da relazioni e costantemente in relazione con gli altri e con un contesto (meglio: con oggetti in relazione fra loro all'interno di un contesto, costituito dagli oggetti stessi e dalle relazioni fra di essi); le relazioni con le altre persone e con gli oggetti modificano

istantaneamente e continuamente le connessioni neuronali e questo avviene per il tramite del sistema motorio (Rizzolatti, 2006; Turri, 2010 e 2012). Ne consegue che: i) l'essere umano è potenzialmente cooperativo, in quanto il suo cervello, rispecchiando il sistema motorio dell'altro, ne riconosce le intenzioni; ii) l'essere umano apprende dalle relazioni con gli altri e con gli oggetti, in quanto, come si è detto, tali relazioni modificano la struttura delle connessioni neuronali; iii) l'essere umano apprende dagli altri esseri umani per imitazione, in quanto il suo sistema motorio riproduce gli atti che vede compiere riconoscendone anche la finalità prima che questi siano portati a compimento.

L'ambiente di controllo, di cui ci siamo occupati, è luogo di composizione di un paradosso, laddove l'impresa, necessariamente contesto di cooperazione, allo stesso tempo non può essere luogo di convergenza automatica di motivazioni per i diversi gruppi di interessi coinvolti nella sua conduzione. D'altra parte, la mancanza di condivisione del piano aziendale da parte di uno o più portatori di interessi è uno dei rischi maggiori che l'impresa deve affrontare, potendone compromettere il buon fine vanificando la robustezza delle ipotesi, la correttezza dei calcoli e perfino le capacità manageriali.

La realizzazione del piano d'impresa richiede la ricerca di un equilibrio fra istanze antagoniste o apparentemente tali (un esempio fra tutti, il più banale: la massimizzazione del profitto e la crescita delle retribuzioni dei dipendenti), in un continuo processo di negoziazione dal quale dipende la sopravvivenza nel lungo periodo.

In questo scenario, abbiamo portato avanti una visione della cura e vigilanza sugli adeguati assetti organizzativi focalizzata sui seguenti aspetti: i) meccanismi di convergenza delle motivazioni e competenza collaborativa; ii) scambio fluido delle informazioni; iii) coesione intorno ai principi etici dichiarati e identificazione delle persone nei valori aziendali proposti dai documenti ufficiali. Aggiungiamo l'importanza di ruoli chiari e rappresentati in un organigramma e della coincidenza tra organigramma formale e ruoli agiti nella sostanza.

Ulteriore elemento di attenzione è la modalità con la quale sono definite le regole, che condiziona la propensione delle persone a rispettarle. Le regole, infatti, non producono di per se stesse comportamenti prevedibili: «esse sono artefatti linguistici, non possono che essere interpretate» e condividono tutte le problematiche «che caratterizzano ogni fenomeno basato sul linguaggio» (Vitale, 2010). Per questa ragione nei modelli proposti da Ostrom le regole più efficaci sono quelle elaborate da coloro che dovranno applicarle. Ovvero da coloro che hanno la migliore conoscenza del contesto e delle relazioni che lo caratterizzano.

Infine, abbiamo sottolineato l'importanza di favorire lo sviluppo della competenza collaborativa e di una comunicazione trasparente tanto all'interno dell'organizzazione quanto verso l'esterno.

Accidents happen and rules can be broken, ma adeguati controlli sugli elementi indicati ne riducono di molto la probabilità. Per questo sosteniamo che non sia corretto valutare gli assetti partendo dagli incidenti, ma che si dovrebbe invece avere maggiore attenzione per l'ambiente di controllo in cui si sono prodotti: an-

che l'ambiente di controllo più adeguato non può infatti azzerare il rischio, ma lavorare bene su di esso significa adoperarsi davvero per minimizzarlo.

Endnotes

- ¹ Di per sé il taylorismo non implica necessariamente individualismo: anzi, si tratta del primo sistema cooperativo in ambito industriale, in quanto implica una divisione del lavoro funzionale al raggiungimento di un obiettivo comune. E' anche vero, però, che la ricerca dell'efficienza ad esso connotata, abbinata all'automazione industriale, ha portato a una parcellizzazione del lavoro esasperata, in cui ciascun individuo non poteva che essere concentrato sulla propria produttività, perdendo di vista il senso dello sforzo collettivo.
- ² Le strutture organizzative a rete sono articolazioni ad elevato tasso di *outsourcing*, in cui molte attività *non core* vengono delegate a fornitori esterni.
- ³ Cfr GROSSMAN S, HART O., 1980: «*there are sanctions for lying but non sanctions for non-disclosure*».
- ⁴ Con riferimento ai principi generali di organizzazione, secondo la circolare della Banca d'Italia n. 288 del 3 aprile 2015, Titolo IV, *Disposizioni di Vigilanza per gli intermediari finanziari*, «il presupposto di un governo completo e funzionale è l'esistenza di una organizzazione aziendale adeguata per assicurare la sana e prudente gestione [...] e l'osservanza delle disposizioni [...] applicabili».

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La rilevanza penale delle valutazioni nel reato di falso in bilancio e la recente disciplina UE in materia di criteri di valutazione (d.lgs. n. 139/2015 attuativo della direttiva 2013/34/UE)

Author

- *Alberto de Sanctis, Criminal Lawyer - Partner "de Sanctis Scicolone Avvocati Associati" - Member of the "d.lgs. n. 231/2001 Committee" of the Order of Chartered Accountants in Turin*
 - *Luca Piovano, Accountant - Partner "Studio CMFC" - Member of the "d.lgs. n. 231/2001 Committee" of the Order of Chartered Accountants in Turin*
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Obiettivo del presente *paper* è quello di analizzare la recente normativa italiana in tema di false comunicazioni sociali. La legge n. 69/2015 ha infatti modificato radicalmente la disciplina penale in materia di falso in bilancio. La nuova formulazione degli articoli 2621 e 2622 codice civile e l'introduzione degli articoli 2621 *bis* e 2621 *ter* hanno ridisegnato l'ambito applicativo del reato in senso apparentemente più rigoroso e maggiormente punitivo (non esiste più l'ipotesi contravvenzionale ma solo un delitto a pericolo concreto, non è richiesto il dolo intenzionale, sono abolite le soglie di punibilità, la procedibilità è di regola d'ufficio, le pene sono più severe).

La nuova formulazione, però, ha riaperto una questione interpretativa nodale che sembrava definitivamente superata con la riforma del 2002: le valutazioni contenute nel bilancio hanno rilevanza penale se giudicate non rispondenti al vero? L'obiettivo del presente studio è quello di trovare una soluzione interpretativa accettabile.

La questione, nella sua essenzialità, si pone nei seguenti termini.

Con la riforma del 2002 la condotta penalmente rilevante consisteva nell'esporre in bilancio "*fatti materiali non rispondenti al vero, ancorché oggetto di valutazioni*". Sembrava così superato il dibattito dottrinale sviluppatosi precedentemente quando la norma penale

prevedeva l'elemento materiale dell'esposizione di "*fatti non rispondenti al vero*" senza alcun riferimento esplicito alle valutazioni.

La locuzione "*ancorché oggetto di valutazioni*" è stata eliminata con la riforma del 2015 che ha aggiunto il requisito della "rilevanza" che si affianca alla "materialità" del fatto. Tale modifica per "amputazione" della norma penale non poteva non avere effetti.

Ad oggi la Corte di Cassazione si è infatti espressa con due orientamenti diametralmente opposti: le valutazioni non hanno più rilevanza penale, le valutazioni mantengono la rilevanza penale che avevano prima della riforma (la locuzione "*ancorché oggetto di valutazioni*" avrebbe avuto la funzione di dare un'indicazione esegetica per certi versi superflua).

Nel frattempo, nell'agosto del 2015 pochi mesi dopo la modifica della norma penale che risale a maggio, è stato emanato il d.lgs. n. 139/2015 che ha modificato il codice civile nella parte dedicata al bilancio d'esercizio per uniformare i criteri di valutazione nei Paesi appartenenti all'Unione Europea in conformità alla direttiva 2013/34.

Viene introdotto il principio di "rilevanza" secondo il quale non occorre rispettare gli obblighi in tema di rilevazione e valutazione quando la loro osservanza abbia effetti insignificanti ai fini di dare una rappresentazione veritiera e corretta. Inoltre, aspetto ancora più pregnante ai fini penalistici, la riforma sottolinea la centralità della nota integrativa che deve illustrare i criteri di rilevazione e valutazione delle voci di bilancio indicate nello stato patrimoniale e nel conto economico.

Occorre trovare un'interpretazione idonea a superare la dicotomia "valutazioni/fatti" che rischia di diventare un "mito incapacitante" foriero di derive applicative irragionevolmente repressive (quando la valutazione è erronea o imprudente, rilevante da un punto di vista civilistico ma non fraudolenta) ovvero irrazionalmente permissive (valutazioni prive di fondamento logico ed in palese violazione dei criteri di valutazione che si sostanziano in fatti falsi dolosamente rappresentati).

La centralità della nota integrativa, rafforzata dal d.lgs. n. 139/2015, può rappresentare una possibile soluzione. È rilevante penalmente la valutazione falsa quando vi è discrasia tra il criterio di valutazione indicato nella nota integrativa e la singola voce di bilancio espressa nel dato numerico. Peraltro, essendo imposto dall'art. 2423 c.c., così come modificato dal d.lgs. n. 139/2015, anche l'omessa e chiara indicazione nella nota integrativa del criterio di valutazione utilizzato può assumere rilevanza penale

Keywords: false comunicazioni sociali; bilancio; valutazioni; criteri; nota integrativa.

JEL Classification: K22

1 I termini della questione: modifica legislativa per “amputazione” e rilevanza penale delle valutazioni “false”

La legge n. 69/2015 ha profondamente modificato la struttura dei reati di false comunicazioni sociali e – apparentemente – ha esteso l’ambito oggettivo della rilevanza penale e certamente ha aggravato le conseguente sanzionatorie.

Si può affermare che la novella legislativa ha trasformato il falso in bilancio in un reato di pericolo concreto: è stato introdotto l’elemento oggettivo della concreta idoneità dell’azione od omissione ad indurre in errore.

Inoltre, rispetto al passato, gli art. 2621 e 2622 c.c. assumono entrambi la veste di delitti procedibili d’ufficio (l’art. 2621 c.c. ante riforma era una contravvenzione mentre l’art. 2622 c.c. era procedibile a querela).

In questa prospettiva si potrebbe sostenere che la riformulazione delle due fattispecie incriminatrici in termini di reato di pericolo, ancorché concreto, abbia determinato – peraltro secondo le intenzioni programmatiche del legislatore – un potenziamento della tutela penale.

Tuttavia, esprimere un giudizio in questo senso significherebbe trascurare la valutazione della struttura oggettiva delle nuove fattispecie societarie.

Secondo la vecchia disciplina contenuta negli artt. 2621 e 2622 c.c. la falsità poteva pacificamente riguardare non solo i fatti ma anche le valutazioni presenti in un bilancio.

L’oggetto della falsa informazione era rappresentato da “*fatti materiali non rispondenti al vero ancorché oggetto di valutazioni*”. Tale espressione, pur nella sua intrinseca contraddittorietà lessicale, conteneva espressamente un richiamo alle valutazioni, che potevano quindi assumere rilevanza ai fini dell’integrazione della fattispecie.

L’indubbia rilevanza penale delle valutazioni di bilancio era del resto confermata dalla previsione di una soglia punibilità avente ad oggetto proprio le “*valutazioni estimative*” (art. 2621, comma 4, c.c. e art. 2622, comma 8, c.c.).

Sul piano oggettivo, il cardine attorno al quale sono strutturate le nuove fattispecie di false comunicazioni sociali è rappresentato esclusivamente dalla nozione di “*fatti materiali*”, essendo infatti scomparso dalla formulazione letterale delle norme qualsiasi richiamo ad aspetti valutativi.

Il nuovo art. 2621 c.c. punisce infatti l’esposizione di “*fatti materiali rilevanti non rispondenti al vero*” ovvero l’omissione di “*fatti materiali rilevanti la cui comunicazione è imposta dalla legge*”. L’art. 2622 c.c. tipicizza le medesime condotte con riferimento alle società quotate, sebbene non in termini assolutamente sovrapponibili all’art. 2621 c.c. atteso che nella condotta di esposizione non compare il riferimento alla “rilevanza” dei fatti materiali (“*espongono fatti materiali non rispondenti al vero*”).

La novella legislativa ha inoltre soppresso integralmente la disciplina delle soglie punibilità ed in particolare quella relativa alle “*valutazioni estimative*”.

Peraltro, prima della riforma del 2002 il sostantivo “*fatti*” non era abbinato all’aggettivo “*materiali*” e parte della dottrina e la giurisprudenza prevalente in-

vocava proprio la mancata codificazione del concetto di materialità per giustificare la rilevanza penale anche delle valutazioni.

L'attuale scelta di tipizzare l'oggetto del falso in bilancio in relazione ai soli "fatti materiali" eliminando, con una drastica "amputazione" del riferimento alle valutazioni, ha inevitabilmente creato una frattura in dottrina ed in giurisprudenza che può provocare gravi incertezze nell'applicazione della norma penale.

2 Il d.lgs. n. 139/2015 e la nuova disciplina del bilancio d'esercizio delle società di capitali

Nell'analizzare la portata della nuova disciplina del falso in bilancio è necessario considerare preliminarmente le novità introdotte dal d.lgs. 18 agosto 2015, n. 139, in merito alla disciplina del bilancio d'esercizio.

Con la pubblicazione sulla Gazzetta Ufficiale n. 205 dello scorso 4 settembre del d.lgs. n. 139/2015, è infatti stata data attuazione alla direttiva europea 2013/34/UE "relativa ai bilanci d'esercizio, ai bilanci consolidati e alle relative relazioni di talune tipologie di imprese, recante modifica della direttiva 2006/43/CE e abrogazione delle direttive 78/660/CEE e 83/349/CEE, per la parte relativa alla disciplina del bilancio di esercizio e di quello consolidato per le società di capitali e gli altri soggetti individuati dalla legge", le cui disposizioni entrano in vigore dal 1° gennaio 2016 e si applicano ai bilanci relativi agli esercizi finanziari aventi inizio a partire da quella data.

Gli obiettivi dell'intervento legislativo consistono essenzialmente nella riduzione e semplificazione degli oneri amministrativi, con particolare riferimento alle piccole imprese, e nel miglioramento della chiarezza e comparabilità dei bilanci.

Il d.lgs. 139/2015 è quindi intervenuto con riferimento a:

- i documenti che compongono il bilancio;
- i principi di redazione del bilancio;
- il contenuto dello Stato patrimoniale e del Conto economico;
- i criteri di valutazione;
- il contenuto della Nota integrativa;
- il bilancio delle imprese di minori dimensioni e
- la relazione di revisione.

Tralasciando gli aspetti di carattere più specifico, è utile ai fini della presente analisi soffermarsi sulle novità introdotte con riferimento ai principi di redazione del bilancio.

Il d.lgs. 231/2001 ha dato riconoscimento normativo al principio di rilevanza introducendo il seguente nuovo comma 4 dell'art. 2423 c.c.: "Non occorre rispettare gli obblighi in tema di rilevazione, valutazione, presentazione e informativa quando la loro osservanza abbia effetti irrilevanti al fine di dare una rappresentazione veritiera e corretta." Qualora ciò accada, viene previsto che nella nota integrativa debbano essere illustrati i criteri con i quali si sia data attuazione a tale disposizione.

Con le modifiche introdotte all'art. 2423 *bis* c.c. si è inoltre chiarito il principio di prevalenza della sostanza sulla forma. Viene infatti modificato il numero 1) dell'articolo 2423 *bis* c.c., il quale – nella formulazione previgente – prevedeva che la valutazione delle voci dovesse essere fatta, tra l'altro, tenendo conto della funzione economica dell'elemento dell'attivo o del passivo considerato. Eliminando tale inciso ed inserendo il nuovo numero 1 *bis*) si è così chiarito che la valutazione delle voci deve invece essere fatta tenendo conto della sostanza dell'operazione o del contratto.

Affinché il bilancio possa essere fornire una rappresentazione veritiera e corretta degli eventi di gestione si rende infatti necessario determinare e comprendere gli aspetti sostanziali di ognuno di tali eventi e non solo i suoi aspetti formali.

Il d.lgs. 139/2015 ha inoltre ampliato l'informativa da fornire in Nota integrativa in modo da migliorare ulteriormente la portata informativa del documento di bilancio.

La Nota integrativa, anche in considerazione delle modifiche introdotte agli schemi di bilancio, assume pertanto un ruolo sempre più centrale nell'informativa e nell'illustrazione delle poste di bilancio, rappresentando l'elemento essenziale attraverso cui giungere ad una rappresentazione veritiera e corretta dei fatti di gestione.

3 Regole di *governance* e creazione di assetti organizzativi adeguati nell'ambito della s.r.l.

La tesi dell'abrogazione parziale della norma penale in relazione al falso estimativo è stata sostenuta in giurisprudenza in due sentenze della Sezione V^a della Corte di Cassazione (16 giugno 2015, n. 33774; 08 gennaio 2016, n. 6916).

I sostenitori della tesi abrogativa trovano terreno fertile nella formulazione della nuova fattispecie penale che ha modificato per sottrazione la precedente struttura normativa cancellando il riferimento ai fatti "*ancorché oggetto di valutazioni*".

In estrema sintesi, è opportuno ripercorrere il sentiero legislativo che ha portato all'ultima versione del reato.

Prima della riforma del 2002, l'elemento oggettivo del reato era ancorato genericamente ai "fatti" non rispondenti al vero. Non vi era alcun riferimento esplicito alle "valutazioni" ma non vi erano nemmeno riferimenti alla "materialità" o alla "rilevanza".

In quel quadro normativo si sviluppò in giurisprudenza il prevalente orientamento favorevole ad affermare la rilevanza penale delle valutazioni e quindi di quelle voci del bilancio che prevedono necessariamente dei "giudizi" e delle "previsioni" suscettibili di contenere delle false rappresentazioni della realtà economica della società. In effetti, non è agevole distinguere dove si esaurisce la descrizione del fatto e dove inizia la sua valutazione (per esempio: immobilizzazioni, magazzino, crediti): il bilancio è la sintesi di fatti e valutazioni. Del resto, in

una prospettiva di unicità dell'ordinamento giuridico, potrebbe considerarsi implicitamente richiamato dalla norma penale l'art. 2426 c.c. che disciplina proprio le valutazioni nel bilancio di esercizio.

Il passaggio successivo fu la riforma del 2002 che esplicitò ciò che in pochi mettevano in dubbio: oggetto materiale del reato non sono solo i fatti oggettivi o "materiali" ma anche i fatti oggetto di valutazione. L'inserimento della locuzione "ancorché oggetto di valutazioni" venne inteso come un momento di definitiva chiarezza in un percorso interpretativo già abbastanza consolidato, salvo alcune voci dissenzienti che in dottrina continuavano a sostenere l'esclusione delle valutazioni dall'ambito operativo della fattispecie.

Secondo le due sentenze della Corte di Cassazione qui in commento la scelta legislativa di escludere il richiamo esplicito alle valutazioni non può rimanere priva di conseguenze interpretative. Nel diritto penale, come è noto, l'interpretazione letterale è il primo passaggio ermeneutico nella lettura della norma e la sua "amputazione" non può considerarsi come una scelta "superflua" ed insignificante.

Del resto, il primo disegno di legge, prevedeva la falsità delle "informazioni", sostantivo che avrebbe consentito di ampliare di molto l'area semantica e quindi l'ambito operativo della tipicità penale. Infatti, la valutazione di un fatto è certamente un'informazione ma difficilmente può considerarsi autonomamente un fatto.

Inoltre, tale interpretazione trova sicuri ancoraggi di ordine sistematico. Il legislatore, quando ha voluto, ha mantenuto la rilevanza penale delle valutazioni. L'art. 2638 c.c. continua infatti a punire i medesimi soggetti attivi (gli amministratori, i direttori generali, i dirigenti preposti alla redazione dei documenti contabili societari, i sindaci e i liquidatori di società) dei reati di cui agli artt. 2621 e 2622 che, nelle comunicazioni dirette alle autorità pubbliche di vigilanza, "espongono fatti materiali non rispondenti al vero, ancorché oggetto di valutazioni".

Non si può, peraltro, trascurare il riferimento alla "materialità" del fatto che, orfano del richiamo alle "valutazioni", fissa più facilmente la tipicità ad un significato "fattuale" e non estimativo. La sentenza n. 6916 è molto efficace nello sviluppo del sillogismo interpretativo sulla "materialità":

"(...) osserva la Corte come la discussione relativa all'effettiva incidenza della recente riforma sulla punibilità dei falsi valutativi non possa prescindere dal dato certo e ineludibile dell'eliminazione dal testo normativo del preesistente riferimento alle valutazioni.

Invero, ritenere questo dato irrilevante presuppone necessariamente che quel riferimento possa essere considerato come sostanzialmente superfluo nel complessivo significato della previgente formulazione della norma.

Ciò impone tuttavia di verificare quale fosse l'esatto contenuto da attribuire a quel testo nel suo richiamo ai "fatti materiali ancorché oggetto di valutazioni" e segnatamente, all'effetto combinato dei predicati "materiali" e "oggetto di valutazioni" sulla definizione dell'estensione denotativa di un termine, quello di "fatti",

che compariva isolatamente nella ancora precedente formulazione della norma incriminatrice, ed alla funzione svolta a questi fini dalla locuzione "ancorché".

Sul punto, occorre chiarire che a queste problematiche non era stata attribuita, tutto sommato, particolare rilevanza nella individuazione delle condotte punibili in base alla normativa previgente. E ciò costituisce in realtà la migliore dimostrazione della generalizzata consapevolezza di una sostanziale elisione reciproca dei due predicati, per effetto della quale l'identificazione del riferimento oggettuale di tali condotte rimaneva conclusivamente affidato al più ampio significato del concetto di "fatti", comprendente anche le valutazioni.

Ne discende che al predicato della materialità dei fatti occorre conferire valenza opposta all'inclusione delle valutazioni fra i fatti stessi, operazione ermeneutica quest'ultima, peraltro, non incoerente con la significazione letterale del termine "materiale".

Ed invero, quest'ultimo, in effetti, non è leggibile solo come contrario a quello di "immateriale", ma contiene anche un'accezione riconducibile all'oggettività dei fatti, in quanto tale estranea ai risultati valutativi.

Peraltro, occorre anche ricordare che, nei primi commenti alla riforma del 2002, era stato evidenziato come la previsione di materialità avrebbe di per sé escluso le valutazioni dai fatti punibili, se il successivo e per certi aspetti contraddittorio accenno normativo alle valutazioni stesse non le avesse espressamente reintrodotta nell'ambito operativo della condotta. Orbene, la diversa opzione interpretativa del termine "materiale" quale sinonimo di "rilevante", tratta dalla realtà anglosassone, trova un ostacolo difficilmente superabile proprio nella riforma qui esaminata, e in particolare nella precisazione per la quale la condotta deve riguardare "fatti", oltre che "materiali", anche "rilevanti". Ne consegue che la detta precisazione sarebbe superflua ove quest'ultimo fosse il senso da assegnare all'attributo della materialità.

Deve ritenersi pertanto che il senso complessivo del riferimento normativo all'esposizione di "fatti materiali, ancorché oggetto di valutazioni" era dunque tutt'altro che contraddittorio. Detto altrimenti, quello che si voleva intendere era che il falso punibile potesse ricadere anche su dati contabili costituenti il risultato di valutazioni, purché le stesse fossero state svolte partendo da fatti materiali, riferiti a realtà economiche oggettivamente determinate."

Peraltro, la Corte cerca di allontanare false preoccupazioni circa la sostanziale abrogazione della fattispecie, qualora venisse accolta la tesi dell'esclusione delle valutazioni, secondo il sillogismo forse un po' semplicistico in forza del quale gran parte delle poste di bilancio, essendo oggetto di valutazioni, sarebbe esclusa dall'ambito operativo del reato consentendo quindi di confezionare bilanci sostanzialmente falsi ma senza rischi penali.

Rimangono, infatti, riconducibili alla nozione di fatto le seguenti poste di bilancio: i ricavi falsamente incrementati, i costi non appostati, le false attestazioni di esistenza di conti bancari, l'annotazione di fatture emesse per operazioni inesistenti, l'iscrizione di crediti non più esigibili per l'intervenuto fallimento dei debitori in mancanza di attivo, la mancata svalutazione di una partecipazione in una controllata della quale sia stato dichiarato il fallimento e l'omessa indicazio-

ne della vendita o dell'acquisto di beni o dell'esistenza di un debito per il quale sia in atto un contenzioso nel quale la società è soccombente, l'iscrizione all'attivo di crediti derivanti da contratti fittizi, da fatture relative ad operazioni inesistenti o da fatture da emettere in violazione dei criteri sulla competenza.

Peraltro, la sentenza in commento è molto attenta a distinguere le valutazioni espressione di discrezionalità del redattore del bilancio dalle situazioni in cui, attraverso l'associazione di un valore numerico ad una determinata realtà, "si fornisce di fatto una rappresentazione difforme dal vero della stessa realtà materiale". Ciò accade quando "il valore numerico sia esposto con modalità che ne escludono la percepibilità come esito di una valutazione, e siano pertanto idonee ad indurre in errore i terzi sulla stessa consistenza fisica del dato materiale".

Tale ultimo argomento anticipa, per alcuni aspetti, la tesi che con questo scritto intendiamo sostenere e che si pone come una "terza via" nel contrasto dialettico "fatti-valutazioni": ciò che rileva non è la valutazione ma il criterio di valutazione chiaramente esplicitato nella nota integrativa che consente ai terzi una lettura "critica" e consapevole del bilancio.

Infatti, nel caso concreto, la Corte conclude circa la rilevanza penale del valore delle quote di partecipazione indicato in bilancio nel suo prezzo di acquisto sottraendo l'esistenza di un contenzioso tra la società cedente e la cessionaria in ordine all'effettivo valore di vendita che avrebbe imposto una svalutazione del credito. La voce di bilancio è valutativa ma ciò che rileva penalmente non è la valutazione ma aver sottaciuto elementi di fatto (contenzioso) nonché il sillogismo valutativo (nesso logico tra contenzioso e valutazione) che avrebbe consentito al lettore del bilancio di comprendere la reale consistenza patrimoniale del credito.

Non mancano ulteriori argomenti, anche sistematici, a favore della tesi della parziale abrogazione.

Nella previgente versione del reato era prevista una soglia di punibilità proprio in relazione alle "valutazioni estimative", a riprova della coerenza di una scelta normativa volta a punire le valutazioni false "tollerando", almeno da un punto di vista penalistico, quelle falsità non particolarmente significative da un punto di vista quantitativo.

4 La tesi della permanenza della rilevanza penale delle valutazioni

La tesi giurisprudenziale secondo la quale la riforma non avrebbe cambiato alcunché in ordine alla rilevanza delle valutazioni, sostenuta dalla stessa Sezione V della Corte di Cassazione (12 novembre 2015, n. 890), si fonda su un'indagine testuale, logico-sistematica e teleologica del tutto antitetica.

Sotto un profilo letterale la locuzione "ancorché oggetto di valutazioni" sarebbe del tutto superflua. Era superflua quando c'era, è superflua adesso che non c'è più. Avrebbe avuto in passato una "finalità ancillare, meramente esplicativa e chiarificatrice del nucleo sostanziale della proposizione principale". In effetti, quando la norma era strutturata senza alcun riferimento alle valutazioni, e cioè

prima della riforma del 2002, erano in pochi a dubitare della rilevanza penale delle valutazioni.

Sul versante logico-sistematico, la sentenza è convincente nell'analisi del requisito della materialità e della rilevanza. La qualificazione "materiale" richiama una nozione tecnica di origine anglosassone ("materiality") riconducibile al significato di "essenzialità" e concretezza. La rilevanza sarebbe sostanzialmente un sinonimo rafforzativo e coerente con la direttiva 2013/34/UE (recepita dal d.lgs. n. 139/2015) che definisce "rilevante" lo stato dell'informazione "quando la sua omissione o errata indicazione potrebbe ragionevolmente influenzare le decisioni prese dagli utilizzatori sulla base del bilancio di esercizio".

Pertanto, il concetto giuridico di "fatto materiale rilevante" sarebbe perfettamente compatibile, in questa prospettiva, con le valutazioni.

La pronuncia appare meno convincente quando si sforza di individuare una presunta chiarezza nella volontà legislativa che, a prescindere da quello che si evince dai lavori preparatori in cui effettivamente emerge una volontà contraria all'abrogazione del falso valutativo, non sembra affatto chiara nella sua reale estrinsecazione normativa:

"In funzione della ricerca di momenti di conferma – in prospettiva teleologica – non può, poi, essere privo di significato l'inserimento sistematico delle nuove false comunicazioni sociali in un testo normativo anticorruzione (*L. 27 maggio 2015, n. 69*, recante disposizioni in materia di delitti contro la pubblica amministrazione, di associazioni di tipo mafioso e di falso in bilancio), ad eloquente riprova della presa d'atto, da parte del legislatore, del dato esperienziale che il falso in bilancio è ricorrente segnale di determinati fenomeni corruttivi, spesso in ragione dell'appostazione contabile di false fatturazioni intese a costituire fondi in nero, destinati al pagamento di tangenti o ad altre illecite attività. Di talché, escludere dall'alveo dei falsi punibili quello valutativo significherebbe frustrare le finalità della legge, volte a perseguire ogni illecita attività preordinata ad alimentare o ad occultare il fenomeno della corruzione".

Quest'ultimo passaggio è espressione di una lettura di politica del diritto alquanto discutibile perché il legislatore avrebbe coerentemente potuto modificare il falso in bilancio in modo maggiormente repressivo (la pena più alta, la maggior estensione della procedibilità d'ufficio, l'eliminazione dell'ipotesi contravvenzionale a prescrizione breve) contemperando tale scelta con una riduzione dell'ambito applicativo ai soli "fatti materiali". In sintesi: maggior rigore ma nel contesto di un diritto penale inteso come *extrema ratio* con parallela rilevanza civilistica delle valutazioni errate o non prudenti.

Il d.lgs. n. 231/2001 prevede, al fine di evitare la cosiddetta responsabilità amministrativa-penale della società, la creazione di modelli organizzativi e gestionali idonei a prevenire varie ipotesi di reato, il cui ambito è stato via via notevolmente esteso nel tempo. I modelli in questione rappresentano quindi uno strumento di esenzione per la società dalla responsabilità. Costituiscono altresì un antecedente rispetto all'obbligo di adozione di assetti adeguati, espressamente introdotto con la riforma societaria e quindi a decorrere dal 1° gennaio 2004.

Un profilo – di grande rilievo operativo – concerne l’obbligatorietà dell’adozione di tali modelli. La soluzione affermativa, accolta dalla giurisprudenza e dalla dottrina, si fonda, almeno in parte, su un’analisi del dato normativo, che offre quantomeno elementi di giudizio in questo senso, pur non contenendo un’esplicita indicazione.

Ma sono soprattutto la prospettiva in cui si inserisce oggi l’attività gestoria e i conseguenti doveri e responsabilità degli amministratori a suggerire ad una soluzione positiva. Invero sia la diligenza richiesta, sia l’obbligo di creare procedure adeguate, all’interno del quale si colloca anche la predisposizione dei modelli organizzativi, inducono a ritenere che gli amministratori abbiano un preciso obbligo in tal senso. D’altra parte occorre osservare che l’enfasi del legislatore sulla previsione del rispetto dei principi di corretta amministrazione non può non estendersi all’obbligo di eliminare, con la predisposizione dei modelli organizzativi, il rischio per la società di subire le sanzioni previste dal d.lgs. n. 231/2001.

Occorre ricostruire, da un lato, il profilo relativo all’obbligatorietà della creazione dei modelli, dall’altro quello concernente le modalità di esecuzione di tale obbligo e le conseguenze in caso di mancato adempimento. In un’ottica ulteriore occorre tener conto delle conseguenze derivanti non solo dalla mancata adozione dei modelli, ma anche da un loro insufficiente contenuto o da una loro inidoneità rispetto alle finalità che debbono perseguire. Parimenti occorre verificare le conseguenze di un loro omesso aggiornamento.

Particolare rilievo assume infatti l’aspetto soggettivo e quindi la precisa individuazione dei soggetti o degli organi a cui quest’ultimo compete.

5 La possibilità di un terza via: rilevanza penale della falsa o omessa rappresentazione nella nota integrativa dei criteri di valutazione utilizzati

La questione sulla rilevanza penale delle valutazioni è stata da ultimo rimessa alle Sezioni Unite con ordinanza n. 9186/16 emessa dalla Sezione V[^].

In attesa della pronuncia del Supremo Collegio, riteniamo utile condividere e sviluppare la tesi secondo la quale il giudizio sulla falsità del bilancio non dovrebbe tanto concentrarsi sull’esito numerico della singola posta ma sulle modalità con le quali si è giunti a quel determinato esito. L’aspetto fondamentale sarebbe quindi verificare l’eventuale discrasia tra criterio di valutazione descritto nella nota integrativa e valutazione effettuata in concreto¹.

In particolare, la discrasia può esprimersi in almeno due modalità alternative:

- 1) si afferma in nota integrativa che la valutazione è effettuata utilizzando un determinato criterio e lo stesso viene in realtà disapplicato nella determinazione del dato aritmetico indicato in bilancio;
- 2) si afferma in nota integrativa che la valutazione è effettuata utilizzando un determinato criterio ed invece se ne utilizza un altro, sottaciuto, nella determinazione del dato aritmetico indicato in bilancio.

Ancorché non esplicitata puntualmente, tale tesi è implicitamente contenuta nella seconda sentenza dell'orientamento "abrogativo" (08 gennaio 2016, n. 6916) nella parte in cui si riconosce la rilevanza penale dell'omessa esplicitazione del criterio utilizzato per la valutazione.

In questa prospettiva, non si può tacere che la norma incriminatrice contiene anche una condotta omissiva consistente nella mancata indicazione di "fatti materiali rilevanti la cui comunicazione è imposta dalla legge sulla situazione economica, patrimoniale o finanziaria della società". Il bilancio è composto da situazione patrimoniale, conto economico e nota integrativa. Le tre "fonti" di rappresentazione del bilancio devono tra loro necessariamente integrarsi, non possono essere considerate come entità autonome prive di una loro interessenza.

Si aggiunga, come specificato nel precedente paragrafo 2, che il d.lgs. n. 139/2015, attuativo della direttiva 2013/34/UE, ha modificato in modo particolarmente significativo le disposizioni in materia di bilancio. In particolare è stato introdotto il quarto comma dell'art. 2423 c.c.: "non occorre rispettare gli obblighi in tema di rilevazione, valutazione, presentazione e informativa quando la loro abbia effetti irrilevanti al fine di dare una rappresentazione veritiera e corretta. Rimangono fermi gli obblighi in tema di regolare tenuta delle scritture contabili. Le società illustrano nella nota integrativa i criteri con i quali hanno dato attuazione alla presente disposizione".

Si rafforza, quindi, il ruolo centrale della parte "narrativa" e "metodologica" del bilancio. Pertanto, non solo la scorretta ma anche l'omessa indicazione nel bilancio – se supportata dal necessario dolo – dei criteri di valutazione utilizzati nella situazione patrimoniale così da non consentire la comprensione del dato aritmetico può rilevare anche da un punto di vista penalistico.

Come esercizio applicativo, può essere presa in considerazione la situazione di fatto oggetto del giudizio della sentenza n. 890/16, favorevole alla tesi della permanenza della rilevanza penale delle valutazioni. La posta di bilancio considerata "falsa" era rappresentata da crediti "incagliati", la cui inesigibilità sopravvenuta era chiaramente emersa nel corso del giudizio di merito. La nota integrativa, nella parte citata dalla Corte di Cassazione, così descrive il criterio di valutazione utilizzato: "i crediti ed i debiti sono valorizzati al valore di realizzo, in quanto, per ciò che concerne i crediti, si tratta di uno stock fisiologico dovuto alle normali tempistiche di pagamento e non vi sono dubbi sulla solvibilità delle ditte nostre debentrici".

E' evidente che nel caso in esame il problema non è la valutazione dei crediti ma la discrasia tra quanto indicato nella nota integrativa e la valutazione effettuata in concreto. A voler ipotizzare una nota integrativa "trasparente" in cui vengono indicati gli elementi di fatto presupposto della valutazione (es.: ritardo nei pagamenti, eventuali contestazioni del credito, ridotta solvibilità del debitore), i criteri di valutazione utilizzati e le ragioni dell'omessa svalutazione dei crediti, il bilancio "ottimistico" potrebbe avere una rilevanza civilistica per la presenza di valutazioni inattendibili ed insostenibili ma non assumerebbe rilevanza penale. Inoltre, ci sarebbe da dubitare circa la sussistenza dell'ulteriore elemento oggettivo del reato consistente nella concreta idoneità ad indurre altri in errore.

6 Possibili ipotesi di rilevanza penale delle valutazioni

Sulla base delle considerazioni fin qui esposte, ipotizzando che la terza via considerata nel precedente paragrafo 5 possa rappresentare un'efficace sintesi fra la nuova disciplina del falso in bilancio e la nuova disciplina del bilancio d'esercizio, è possibile esemplificare alcune condotte rientranti nella sfera di applicazione del falso in bilancio.

E' evidente come ricadano nella sfera di applicazione le casistiche già elencate nella Sentenza della Corte di Cassazione n. 33774 del 2015. Rilevano quindi i casi in cui vengano esposti in bilancio ricavi "gonfiati" o derivanti da operazioni inesistenti, oppure non vengano registrati costi effettivamente sostenuti. Rileva l'omessa inclusione nei documenti di bilancio di conti correnti intrattenuti dalla società o la mancata eliminazione di crediti ormai definitivamente inesigibili per il fallimento del debitore.

Ulteriori casistiche sono rappresentate dall'omessa indicazione in bilancio dell'avvenuta vendita o dell'avvenuto acquisto di beni o, ancora, la mancata svalutazione di una partecipazione nonostante l'intervenuto fallimento di tale società. Certamente rileva anche l'omessa indicazione di un debito derivante da un contenzioso nel quale si sia stati definitivamente dichiarati soccombenti.

Appare quindi evidente dalla lettura di tali esemplificazioni come la Corte di Cassazione, già nella citata Sentenza n. 33774 del 2015, ritenga che la valutazione di qualcosa di inesistente o l'attribuzione di un valore ad una realtà insussistente non possa che ritenersi esposizione di un fatto materiale non rispondente al vero.

A tali ipotesi possono aggiungersene altre sulla base delle considerazioni esposte nel precedente paragrafo 5, di seguito elencate seguendo l'ordine con cui vengono rappresentate in bilancio.

Con riferimento alle immobilizzazioni immateriali può ad esempio rilevare l'iscrizione di un costo in misura superiore rispetto a quanto oggettivamente sostenuto, con lo scopo di sovrastimare l'attivo patrimoniale. Può inoltre rilevare la contabilizzazione di una quota di ammortamento calcolata in modo differente da quanto illustrato nella Nota integrativa.

Medesima ipotesi di falso in bilancio può essere rappresentata per le immobilizzazioni materiali e finanziarie, ove il criterio di iscrizione in bilancio enunciato nella Nota integrativa non corrisponda con quanto indicato nello stato patrimoniale. Il mantenimento fra le immobilizzazioni materiali di un cespite ormai ceduto, o resosi inutilizzabile, può altresì rappresentare ipotesi di falso in bilancio. Così come il mantenimento in bilancio del valore di una partecipazione in impresa ormai cessata o di un titolo senza mercato.

Ulteriore ipotesi è rappresentata dalla stima delle rimanenze di magazzino. Seppur l'iscrizione in bilancio delle rimanenze si basi essenzialmente su un procedimento di carattere valutativo, si può sostenere che rappresenti falso in bilancio l'iscrizione di quantità significativamente superiori rispetto a quelle effettivamente in magazzino o l'iscrizione di un valore determinato con criteri differenti da quelli indicati in Nota integrativa, con l'evidente scopo di alterare i valori

di bilancio. Qualora nella Nota integrativa venga indicato quale criterio di valutazione, ad esempio, il costo medio ponderato ma nel procedimento di valutazione delle rimanenze venga invece utilizzato il prezzo di vendita, appare evidente la finalità di alterare dolosamente il valore di bilancio. Rappresenterebbe invece un aspetto di carattere meramente valutativo la scelta del criterio di valutazione, sicché non rappresenterebbe un'ipotesi di falso in bilancio l'aver scelto il criterio del LIFO piuttosto che quello del FIFO o del costo medio, sempre che la scelta effettuata venga adeguatamente decritta nella Nota integrativa.

Con riferimento all'iscrizione dei crediti, già la Sentenza della Corte di Cassazione n. n. 33774 del 2015 ha elencato fra i casi rilevanti il mantenimento di importi ormai divenuti oggettivamente inesigibili. A tale casistica si può aggiungere la stima del fondo svalutazione crediti attraverso l'utilizzo di criteri differenti rispetto a quelli riportati in Nota integrativa. Qualora venga indicato che il fondo svalutazione crediti è determinato tenendo conto in modo analitico della situazione del singolo debitore ma nella sua determinazione numerica non si tenga conto, ad esempio, di contenziosi in corso con alcuni clienti, è possibile ipotizzare di ricadere nell'ipotesi di falso in bilancio.

Illustrando i criteri di valutazione dei crediti per imposte anticipate viene solitamente specificato nella Nota integrativa che tali attività vengono rilevate in presenza di ragionevole certezza del loro futuro recupero, comprovata da una pianificazione fiscale per un ragionevole periodo di tempo che prevede redditi imponibili sufficienti per utilizzare le perdite riportabili e/o dalla presenza di differenze temporanee imponibili sufficienti ad assorbire le perdite riportabili. Qualora emerga dai documenti aziendali una previsione di perdite anche negli esercizi successivi, appare evidente nel caso in esame che l'iscrizione in bilancio dei crediti per imposte anticipate sia basata su asserzioni oggettivamente false.

I fondi per rischi e oneri rappresentano una posta di carattere preminentemente valutativo. Nonostante ciò, si possono ipotizzare alcuni casi in cui anche tali poste possano essere rappresentative di un falso in bilancio. Così come già evidenziato per i casi precedenti, qualora i criteri per lo stanziamento di tali fondi illustrati in nota integrativa non corrispondano con quelli effettivamente utilizzati si ricade nell'ipotesi di falso in bilancio.

Qualora vengano ad esempio sottaciuti una serie di contenziosi con elevata probabilità di risultare parte soccombente, senza alcuno stanziamento a copertura dei rischi derivanti, è possibile ipotizzare di ricadere nell'ambito di applicazione della normativa sul falso in bilancio. Qualora invece in nota integrativa vengano compiutamente illustrate le motivazioni per le quali, seppur a fronte dell'esistenza di tali contenziosi, si ritenga di non stanziare un fondo rischi, specificandone esaurientemente le motivazioni, si è fornita una informativa veritiera e corretta, incorrendo tutt'al più nella casistica di bilancio errato ma non falso.

Allo stesso modo, la consapevole e dolosa omissione circa lo stanziamento di un fondo imposte differite può costituire un ulteriore caso di falso in bilancio, così come la mancata iscrizione di un debito di importo certo e determinato.

Con riferimento, infine, ai costi e ai ricavi, già nella Sentenza della Corte di Cassazione n. 33774 del 2015 si è fatto esplicito riferimento ai casi di iscrizione di ricavi o costi fittizi o alla loro mancata iscrizione.

7 Conclusioni

Considerando quanto fin qui esposto, possiamo ritenere ragionevole che il giudizio sulla falsità del bilancio si basi, per le poste di carattere prettamente valutativo quali quelle esemplificativamente riportate nel precedente paragrafo, non tanto sui valori delle singole poste, quanto sulle ipotesi poste a base della loro determinazione. Il giudizio del terzo sulla falsità del bilancio si può così fondare su un dato oggettivo, rappresentato dalla non conformità fra il metodo di valutazione espresso in Nota integrativa e il metodo effettivamente utilizzato per la redazione del bilancio. Viene dunque sanzionato il comportamento di chi voglia, coscientemente e dolosamente, far credere di aver utilizzato i criteri di prudenza e ragionevolezza avendoli in realtà non utilizzati.

Sarebbero invece esenti da falsità i casi in cui i criteri di valutazione siano compiutamente illustrati in Nota integrativa ed effettivamente utilizzati, seppure questi possano aver portato i redattori del bilancio ad una errata valutazione di alcune poste di bilancio. La trasparenza circa i criteri adottati e la completezza dei documenti di bilancio, seppure viziati da stime errate, potrebbero consentire di ricadere nella ipotesi di bilancio errato e non in quelle, penalmente rilevanti, di bilancio falso.

Endnotes

¹ C. SANTORIELLO, *Il nuovo falso in bilancio*, Torino 2016, 146 ss.; Id., *Rilevanza penale della valutazione di bilancio. Poche parole per riportare ordine in un dibattito "isterico"*, in *Archivio Penale*, 2015, n. 2.

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La responsabilità penale e civile dei componenti degli organismi di vigilanza

Authors

- *Guglielmo Giordanengo, Lawyer - Partner "Studio Giordanengo Avvocati Associati", guglielmo.giordanengo@studiogiordanengo.it*
 - *Federico Restano, Honorary Fellow at University of Torino - Lawyer - Partner "Studio Tosetto, Weigmann e Associati", federico.restano@studiotosetto.it*
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Per effetto dell'entrata in vigore della responsabilità amministrativa degli enti di cui al d.lgs. n. 231/2001 i modelli organizzazione e di gestione giocano un ruolo decisivo nelle *policy* di *risk management* delle realtà imprenditoriali di medie e grandi dimensioni.

L'efficacia del sistema delineato dal d.lgs. 231/2001 è fortemente condizionata dalle modalità con cui *concretamente* i componenti degli organismi preposti a vigilare sul funzionamento e sull'osservanza dei modelli (ODV) svolgano il loro compito. Partendo dall'assunto per cui il regime delle responsabilità connesse ad un incarico possa avere un effetto diretto sul grado di diligenza e di efficacia dell'azione dell'incaricato, assume interesse la ricerca degli esatti confini delle responsabilità penale e civile dei componenti degli ODV.

Sul piano dell'indagine penalistica, il lavoro si prefigge di rimarcare l'assenza dei presupposti per enucleare una responsabilità penale in concorso dei componenti degli ODV rispetto alla commissione dei reati presupposto da parte dei soggetti in posizione apicale o dei soggetti sottoposti all'altrui direzione e coordinamento (in altri termini, l'impossibilità di configurare una posizione di garanzia in capo ai componenti degli ODV).

Dopo essersi occupati dell'individuazione dei doveri che gravano sui componenti degli ODV e dei poteri ad essi riconosciuti, il lavoro analizza – sul piano dell'indagine civilistica – i presupposti della responsabilità civile nei confronti della società (senza trascurare di verificare la configurabilità di una responsabilità verso i terzi).

Assume interesse anche la particolare ipotesi di attribuzione delle funzioni proprie dell'ODV ad un organo di controllo nelle società di capitali (collegio sindacale, consiglio di sorveglianza, comitato per il controllo della gestione), con conseguente "innesto" della responsabilità in parola sulla disciplina propria di detti organi.

La tematica viene poi affiancata da un'analisi della responsabilità civile degli organi sociali (consiglio di amministrazione e collegio sindacale, avendo riguardo al sistema tradizionale

di gestione) per il caso in cui la responsabilità dell'ente derivi da *deficit* organizzativi dei modelli di organizzazione e controllo.

Keywords: Organismo di vigilanza; responsabilità penale; posizione di garanzia; responsabilità civile; grado di diligenza.

JEL Classification: K22

1 Introduzione

Per effetto dell'entrata in vigore della responsabilità amministrativa degli enti di cui al d.lgs. n. 231/2001 i modelli organizzazione e di gestione giocano un ruolo decisivo nelle *policy* di *risk management* delle realtà di imprenditoriali di medie e grandi dimensioni.

L'efficacia del sistema delineato dal d.lgs. n. 231/2001 è fortemente condizionata dalle modalità con cui *concretamente* i componenti degli organismi preposti a vigilare sul funzionamento e sull'osservanza dei modelli (Organismo di Vigilanza o, d'ora in avanti, anche soltanto ODV) svolgono il loro compito. Partendo dall'assunto per cui il regime delle responsabilità connesse ad un incarico possa avere un effetto diretto sul grado di diligenza e di efficacia dell'azione dell'incaricato, assume interesse la ricerca degli esatti confini delle responsabilità penale e civile dei componenti degli Organismi di Vigilanza.

Ed infatti, se l'assenza di un sistema di sanzioni rischia di trasformare in una *sine cura* il compito di chi siede in seno agli organismi di vigilanza (con evidenti inefficienze sia per il sistema, sia per il singolo imprenditore che sopporta i costi connessi alla redazione, adozione e implementazione dei Modelli organizzativi), una non idonea perimetrazione dei profili della responsabilità rappresenterebbe un evidente disincentivo, per i soggetti professionalmente più preparati, ad assumere incarichi nell'ambito degli Organismi di Vigilanza

2 Le funzioni e i poteri dell'Organismo di Vigilanza

L'esame della responsabilità penale e civile dell'Organismo di Vigilanza *ex* d.lgs. n. 231/2001 deve necessariamente essere preceduta, seppur brevemente, dall'individuazione dei caratteri strutturali dell'organismo stesso, con particolare riferimento alle funzioni ed ai poteri ad esso attribuiti.

Ancorché apparentemente semplice, tale compito è tutt'altro che agevole.

In prima battuta, occorre osservare che le indicazioni fornite dal legislatore sono assai scarse e non consentono di comprendere la natura di tale organo di

controllo, né, tantomeno, di individuare con precisione quali siano gli obblighi e le responsabilità allo stesso facenti capo (Baudino, Santoriello, 2009).

Il d.lgs. n. 231/2001 non si cura, infatti, di dedicare alla disciplina dell'Organismo di Vigilanza alcun articolo, gravando le sole disposizioni previste, tra il resto, agli artt. 6 e 7, del compito di fungere da unico riferimento normativo.

Tali disposizioni, tuttavia, non possono ritenersi esaustive: l'art. 6, comma 1, lett. b) si limita, infatti, ad accennare alla funzione di esimente accordata, oltreché all'adozione di un modello organizzativo, all'individuazione di un "*organismo dell'ente dotato di autonomi poteri di iniziativa e di controllo*" al quale viene affidato "*il compito di vigilare sul funzionamento e l'osservanza dei modelli di curare il loro aggiornamento*". La lettera d) del medesimo comma aggiunge, poi, che tale esimente opera allorché non vi sia stata "*omessa o insufficiente vigilanza da parte dell'organismo di cui alla lettera b)*."

Non compare dunque alcuna definizione precisa dei compiti e dei poteri dell'Organismo di Vigilanza, fatta eccezione per l'obbligo di "*vigilare*", appunto, sull'attuazione e sull'aggiornamento del modello organizzativo previsto dallo stesso art. 6.

Sul punto, l'art. 7 non fornisce alcuna indicazione dirimente, ma, sempre riferendosi soltanto indirettamente all'attività dell'ODV, prevede semplicemente che per un'efficace attuazione del modello occorra "*una verifica periodica e l'eventuale modifica dello stesso quando sono scoperte significative violazioni delle prescrizioni ovvero quando intervengono mutamenti nell'organizzazione o nell'attività*".

L'evidente indeterminatezza e disorganicità del dettato normativo ha imposto all'interprete di farsi carico, di fatto, della "creazione" della disciplina dell'Organismo di Vigilanza, con conseguente incertezza in merito all'individuazione delle responsabilità sussistenti in capo a quest'ultimo.

Tale incertezza risulta ancor più acuita da due ulteriori disposizioni, rispettivamente previste al comma 4 ed al comma 4 *bis* dell'art. 6 d.lgs. n. 231/2001, a fronte delle quali è consentito, da un lato, che gli Enti di piccole dimensioni possano affidare i compiti dell'Organismo di Vigilanza direttamente all'organo dirigente – così il comma 4 – e dall'altro, che tali funzioni, nelle società di capitali, possano essere svolte "*dal collegio sindacale, dal consiglio di sorveglianza e dal comitato per il controllo della gestione*" – così recita il comma 4 *bis*, di introduzione piuttosto recente –.

Sul punto, desta particolare perplessità questa seconda disposizione, la disciplina della quale risulta completamente priva di indicazioni di coordinamento con le regole previste dal codice civile e dalle leggi speciali per i controlli societari (Mongillo, 2015).

In particolare, a seguito dell'emanazione delle nuove norme di comportamento per le società quotate, che impongono al Collegio Sindacale di acquisire informazioni da parte dell'Organismo di Vigilanza in merito al funzionamento ed all'osservanza del Modello, qualora venisse applicato l'art. 6, comma 4 *bis*, d.lgs. n. 231/2001 e, dunque, l'attività di ODV fosse affidata al Collegio stesso, la com-

mistione delle posizioni sarebbe tale da rendere impossibile la distinzione tra i due ruoli, con conseguente pericolosa confusione delle rispettive responsabilità (Ghini, 2015).

Nel tentativo di colmare il sostanziale vuoto normativo lasciato dal legislatore del 2001, dottrina e giurisprudenza hanno elaborato alcuni requisiti minimi che l'Organismo di Vigilanza deve possedere nell'esercizio della sua attività: autonomia, indipendenza, continuità di azione, professionalità e onorabilità (Baudino, Santoriello, 2009). Tali requisiti sono stati recepiti dalle Linee Guida elaborate dalle principali associazioni di categoria, alle quali, tuttavia, la più recente giurisprudenza, con la nota sentenza c.d. *Impregilo*, attribuisce scarso rilievo, ritenendo che la conformità alle *best practices* non possa vincolare il giudice nella sua valutazione della sussistenza delle responsabilità ex d.lgs. n. 231/2001 (cfr. Cass. pen. 30/1/2014 n. 4677, *C.E.D. Cass.* 257988).

3 La responsabilità penale dei componenti dell'Organismo di Vigilanza ex d.lgs. n. 231/2001

Esaurite le necessarie premesse di ordine sistematico e chiarito che, con riferimento alla natura ed alle funzioni attribuibili all'ODV, l'interprete deve muoversi su un terreno incerto, si può ora volgere l'attenzione alle possibili ipotesi di responsabilità penale che possono interessare i componenti dell'Organismo di Vigilanza.

Come sostenuto da autorevole dottrina (Santoriello, 2015), occorre in primo luogo effettuare una distinzione tra le ipotesi di responsabilità che afferiscono alle fattispecie previste dal d.lgs. n. 231/2001 e quelle invece riferibili alle altre che, ancorché non richiamate dal decreto in argomento, possono interessare i componenti dell'ODV.

Con riguardo ai reati presupposto previsti dal d.lgs. n. 231/2001, ferme restando le ipotesi di concorso ex artt. 110 ss. c.p. che, con specifico riferimento alle fattispecie di reato proprio, potranno configurarsi quale concorso dell'*extraneus*, parte della dottrina ritiene sussistente in capo ai membri dell'ODV una specifica posizione di garanzia dalla quale discenderebbe la responsabilità penale per l'omesso impedimento degli illeciti previsti dal decreto medesimo (Panagia, 2008).

Tale orientamento è ragionevolmente rimasto isolato, per i motivi che seguono.

Occorre, in prima battuta, accennare brevemente alle regole riguardanti la posizione di garanzia, richiamando, a tal proposito, il dettato normativo dell'art. 40, comma 2, c.p., il quale prevede che "*non impedire un evento giuridico che si ha l'obbligo giuridico di impedire equivale a cagionarlo*".

Sul punto la Suprema Corte è intervenuta con numerose sentenze: in particolare, pare utile qui richiamare la recente pronuncia attraverso la quale la stessa Corte ha avuto modo di chiarire che, affinché trovi applicazione tale disposizione, occorre che il soggetto interessato sia dotato "*degli adeguati poteri di impedire*

eventi offensivi di beni altrui affidati alla loro tutela", altrimenti la posizione di garanzia non può ritenersi sussistente (cfr. Cass. pen., 20 febbraio 2008 n. 22614, C.E.D. Cass. 239902).

Anche nell'ambito di operatività del d.lgs. n. 231/2001, dunque, per poter ritenere sussistente in capo all'Organismo di Vigilanza la responsabilità penale, ex art. 40, comma 2, c.p., per i reati *ivi* previsti, occorrerebbe individuare la fonte del relativo obbligo giuridico di impedire l'evento ed i necessari poteri di intervento (De Nicola, 2015).

Alla luce della normativa vigente, tuttavia, tali elementi non possono essere ritenuti sussistenti in capo all'ODV: a quest'ultimo è, infatti, attribuibile il solo obbligo di vigilare sul corretto funzionamento ed aggiornamento del Modello e non quello di impedire la commissione dei reati presupposto (Centonze, 2009), né emerge da alcuna disposizione l'individuazione di poteri atti ad impedire la commissione degli illeciti stessi.

Non potrebbe essere diversamente.

L'Organismo di Vigilanza non può, infatti, ingerirsi nella *governance* dell'Ente per il quale opera né, tantomeno, può sostituirsi all'organo dirigente al fine di porre in essere quanto necessario ad evitare la commissione delle ipotesi delittuose. Non si può pertanto prospettare la responsabilità penale dell'ODV per fatti sui quali non può in alcun modo intervenire (Santoriello, 2015).

Quanto sin qui argomentato deve essere ulteriormente approfondito alla luce della eterogeneità delle fattispecie richiamate dal decreto in parola.

Con riferimento alla commissione di alcune di tali ipotesi, infatti, sono sorti particolari dubbi interpretativi ai quali, ancorché siano stati tutti risolti nel senso di escludere la sussistenza della responsabilità penale dell'ODV, pare opportuno fare cenno.

In primo luogo, tali dubbi sono sorti con riferimento ai reati di lesioni gravi o gravissime ed omicidio colposi, commessi con violazione delle norme poste a tutela della salute e della sicurezza nei luoghi di lavoro, ipotesi richiamate all'art. 25 *septies* d.lgs. n. 231/2001.

A tale proposito, occorre evidenziare che il quadro normativo relativo alla disciplina di cui al d.lgs. n. 231/2001 è stato ampliato dalla disposizione prevista all'art. 30 d.lgs. n. 81/2008 (c.d. T.U. sicurezza), il quale, al comma 4, prevede che l'Ente debba dotarsi di un "*sistema di controllo sull'attuazione del medesimo modello e sul mantenimento nel tempo delle condizioni di idoneità delle misure adottate. Il riesame e l'eventuale modifica del modello organizzativo devono essere adottati, quando siano scoperte violazioni significative delle norme relative alla prevenzione degli infortuni e all'igiene sul lavoro, ovvero in occasione di mutamenti nell'organizzazione e nell'attività in relazione al progresso scientifico e tecnologico*".

Sulla base di tale disposizione, letta in combinato disposto con l'art. 16 d.lgs. n. 81/2008 in materia di deleghe datoriali, vi è chi ha sostenuto che l'ODV, svolgendo un ruolo determinante nell'attuazione del modello, qualora realizzasse un comportamento negligente con riferimento al precipuo obbligo di vigilare sulle procedure adottate al fine di evitare la commissione dei reati poc'anzi richiamati,

risponderebbe in concorso con il datore di lavoro del reato verificatosi (Baudino, Santoriello, 2009).

Tale orientamento non può, tuttavia, essere condiviso: anche in questa specifica ipotesi, infatti, non sussiste in capo all'ODV alcun potere di intervento sul quale fondare l'esistenza della relativa posizione di garanzia.

Tutt'al più, è ravvisabile in capo all'ODV l'obbligo di suggerire l'eventuale modifica dei protocolli 231 in materia, prestando particolare attenzione a non offrire al datore di lavoro soluzioni che comportino una valutazione nel merito, tale da determinare quest'ultimo nella scelta di mantenere (ovvero di sostituire in una certa specifica modalità) la procedura stessa. In tale ultima ipotesi, infatti, il comportamento posto in essere dall'ODV potrebbe essere ritenuto penalmente rilevante quale contributo causale capace di sostanziare un'eventuale contestazione per i reati de *quibus* a titolo di concorso ex art. 113 c.p. (Santoriello, 2015).

Altri dubbi interpretativi sono sorti altresì con riferimento alla responsabilità penale dell'Organismo di Vigilanza per i reati societari, richiamati all'art. 25 *ter* d.lgs. n. 231/2001.

In particolare, con riferimento a tali ipotesi si è ventilata la possibilità di applicare l'estensione soggettiva prevista dall'art. 2639, comma 1, c.c.

Tuttavia, l'ambito di operatività della disposizione poc'anzi richiamata impone che tale estensione soggettiva operi soltanto, per ciò che concerne i reati societari, allorché l'agente svolga senza formale investitura, ma in maniera continuativa e significativa, le funzioni degli amministratori, sindaci, dirigenti preposti alla redazione dei documenti contabili e liquidatori.

Sul punto, preme sottolineare che l'Organismo di Vigilanza, con riferimento all'attività svolta nell'ambito del suo mandato, non pone in essere "di fatto" funzioni appartenenti ad altri, ma svolge la propria attività in virtù delle disposizioni previste dallo statuto dell'Ente, dal d.lgs. n. 231/2001 e dal modello organizzativo (Gargarella Martelli, 2009).

Nemmeno in tali ipotesi, dunque, è ravvisabile la sussistenza di una responsabilità penale in capo ai membri dell'Organismo di Vigilanza.

Esaurite le necessarie valutazioni afferenti agli illeciti previsti dal d.lgs. n. 231/2001, occorre svolgere alcune considerazioni in merito alle fattispecie penali previste da altre disposizioni di legge.

In particolare, occorre fare riferimento alla normativa antiriciclaggio introdotta con il d.lgs. n. 231/2007.

L'art. 52 del citato decreto annovera l'Organismo di Vigilanza ex d.lgs. n. 231/2001 tra i soggetti titolari dell'obbligo di "*vigilare, ciascuno nell'ambito delle proprie attribuzioni e competenze, sull'osservanza delle norme in esso contenute*".

Tale normativa, speciale rispetto al d.lgs. n. 231/2001, fornisce dettagliate indicazioni in merito all'adozione dei protocolli destinati a prevenire la violazione della normativa antiriciclaggio tali per cui i compiti dell'Organismo di Vigilanza paiono più specifici: alla luce di tali disposizioni si ritiene, infatti, che l'ODV non debba semplicemente vigilare sull'adozione di generici protocolli volti a prevenire i reati in materia di antiriciclaggio, ma debba constatare l'effettiva adozione

delle procedure aventi le caratteristiche delineate dallo stesso d.lgs. n. 231/2007 (Romolotti, 2008).

Il legislatore ha accordato alla normativa in argomento particolare rilevanza, prevedendo in capo all'ODV specifici obblighi di comunicazione all'Autorità competente dei fatti che possano integrare la violazione delle disposizioni previste dallo stesso d.lgs. n. 231/2007.

Non soltanto, la violazione di tale obbligo costituisce autonoma fattispecie di reato prevista all'art. 55 d.lgs. n. 231/2007 punita con la reclusione fino ad un anno e con la multa da 100 a 1.000 euro.

Alla luce di tutte le considerazioni sin qui svolte, tale previsione risulta essere l'unica fattispecie penale direttamente rivolta all'Organismo di Vigilanza, non essendo ravvisabile in capo a quest'ultimo alcuna posizione di garanzia volta all'impedimento dei reati presupposto di cui al d.lgs. n. 231/2001.

4 La responsabilità civile dei componenti dell'Organismo di Vigilanza ex d.lgs. n. 231/2001

Anche il tema della responsabilità civile dei componenti dell'Organismo di Vigilanza risente della carenza di una puntuale disciplina normativa: conseguentemente, il *côté* civilistico dell'analisi deve essere condotto sulla scorta dei principi generali.

Un punto di partenza certo dell'indagine è rappresentante dall'impossibilità – largamente condivisa dalla dottrina – di qualificare l'Organismo di Vigilanza quale vero e proprio *organo* dell'Ente, con la conseguenza di dover sussumere il rapporto tra i componenti dell'Organismo di Vigilanza e l'Ente vigilato al paradigma del rapporto contrattuale (Montalenti, 2010, 842).

Dunque, all'Organismo di Vigilanza non risultano applicabili – né direttamente, né in via analogica – le norme afferenti le azioni di responsabilità promosse nei confronti dell'organo di gestione o dell'organo di controllo delle società di capitali o degli altri enti sottoposti alla responsabilità amministrativa ex d.lgs. n. 231/2001.

La dottrina maggioritaria ritiene che gli obblighi che fondano simile responsabilità contrattuale (così come il conseguente regime di responsabilità) siano i medesimi, sia per i componenti c.d. esterni dell'ODV (ossia professionisti cui sia attribuito l'incarico) sia per i componenti c.d. interni dell'ODV, ossia soggetti già legati da un rapporto con l'Ente (ad es. rapporto di lavoro subordinato, cfr. De Stefanis, 2010). Non è mancato invece chi ha dato maggior rilievo all'ipotesi in cui il componente dell'Organismo sia al contempo dipendente dell'Ente, dovendosi in tal caso sovrapporre alla disciplina in parola, quella giuslavorista (si pensi, ad esempio, alla responsabilità disciplinare verso il dipendente, Antonetto, 2008).

4.1 La natura contrattuale della responsabilità dell'Organismo verso l'ente e la responsabilità connessa alla mancata adozione del modello

Se appare agevole affermare che la responsabilità del componente dell'Organismo di Vigilanza sia una responsabilità da inadempimento contrattuale (De Stefanis, 2010, 333), decisamente più complicata è l'esatta individuazione delle obbligazioni che i membri dell'Organismo assumono nei confronti dell'Ente, atteso che – come abbiamo visto – il d.lgs. n. 231/2001 affida all'Organismo di Vigilanza il compito di vigilare sul funzionamento e sull'osservanza dei modelli e di curare il loro aggiornamento.

Nella prassi l'accettazione della carica non è accompagnata dalla sottoscrizione di un documento contrattuale, che specifichi dettagliatamente doveri e obblighi dell'Organismo. Dunque, la fonte negoziale primaria degli obblighi dell'ODV (chiamata ad integrare il laconico dettato normativo) è rappresentata dalle previsioni del singolo Modello 231 adottato dall'ente.

Ne discende una prima evidente incongruenza. In un simile contesto, il Modello – infatti – assurge al contempo a fonte degli obblighi di vigilanza in capo all'Organismo e ad oggetto dell'analisi dell'Organismo stesso. Dunque, chi siede in seno all'Organismo sarà tenuto a seguire le indicazioni contenute nel modello, ma non potrà limitarsi ad una loro pedissequa ed acritica applicazione, dovendone costantemente monitorare l'"aggiornamento" (Berti, 2012).

Proviamo a chiarire questa affermazione.

Nel suo momento genetico, il Modello è adottato dall'organo amministrativo dell'Ente [cfr. art. 6, comma 1, lett. a), d.lgs. n. 231/2001, "*l'organo dirigente ha adottato...*"]. Con riguardo al paradigma della S.p.A. (nel sistema tradizionale), l'adozione del modello rientra quindi nelle funzioni e responsabilità proprie del consiglio di amministrazione e, in particolare, nel dovere degli amministratori delegati di curare l'assetto amministrativo, organizzativo e contabile della società (art. 2384, comma 5, c.c.), cui si affianca il dovere – proprio del consiglio delegante – di valutarne l'adeguatezza (art. 2384, comma 3, c.c.).

È stato correttamente osservato che l'adozione del modello non rappresenta un dovere, ma una facoltà rimessa alla valutazione dell'organo gestorio (Montalenti, 2010), il quale potrà però essere chiamato a risarcire la società per le conseguenze che potessero derivare dalla mancata adozione dello stesso (Buonocore, 2009). E così, in un noto precedente, il Tribunale di Milano ha accertato la responsabilità dell'organo amministrativo in relazione alle sanzioni comminate alla società ai sensi del d.lgs. n. 231/2001 (si legge nella sentenza "*per quanto attiene all'omessa adozione di un adeguato modello organizzativo, da un lato, il danno appare incontestabile in ragione dell'esborso per la concordata sanzione e, dall'altro, risulta altrettanto incontestabile il concorso di responsabilità di parte convenuta che, quale Amministratore Delegato e Presidente del C.d.A., aveva il dovere di attivare tale organo, rimasto inerte al riguardo*", cfr. Trib. Milano, 12 febbraio 2008, in *Giur. Comm.*, 2009, II, 177).

Analogamente, la mancata adozione del modello potrà determinare una responsabilità del collegio sindacale, chiamato anch'esso a vigilare

sull'adeguatezza dell'assetto amministrativo, organizzativo e contabile della società (art. 2403 c.c.).

Dunque, l'adozione del Modello è responsabilità dell'organo amministrativo che vi provvederà con l'ausilio dei propri consulenti (il cui operato sarà vagliato sulla scorta degli ordinari parametri della responsabilità professionale).

Nel suo momento pratico-operativo, il Modello diviene tuttavia oggetto dell'analisi e del vaglio dell'Organismo, il quale – ai sensi dell'art. 6, comma 1, lett. b) d.lgs. n. 231/2001 – è chiamato a curarne l'*aggiornamento*. Non pare potersi aderire ad un'interpretazione riduttiva dell'obbligo di aggiornamento: l'aggiornamento del Modello (ossia la verifica della sua "attualità" a seguito, ad esempio, dell'evoluzione dell'Ente e della sua attività d'impresa) pare infatti presupporre necessariamente una valutazione di adeguatezza del modello, che i componenti dell'Organismo possono essere chiamati a svolgere sin dall'accettazione della carica (cfr. le riflessioni di Giavazzi, 2012). Si noti poi che l'Organismo deve *curare* l'aggiornamento del modello: la scelta lessicale farebbe propendere per un obbligo di provvedere in prima persona a detto aggiornamento (così come gli organi delegati *curano* l'assetto organizzativo dell'Ente, mentre quelli delegati ne *valutano* l'adeguatezza, cfr. art. 2384 c.c.). Non spetta tuttavia all'Organismo il compito di modificare direttamente il Modello e, pertanto, pare maggiormente convincente un onere – in capo all'Organismo – di segnalare all'organo gestorio degli interventi necessari ed opportuni.

4.2 La disciplina della responsabilità contrattuale verso l'Ente

Il perimetro delle obbligazioni che gravano sui membri dell'Organismo di Vigilanza presenta dunque contorni sfocati. Ci troviamo di fronte ad un regime di responsabilità *a geometria variabile* che, solo nelle sue linee essenziali, è individuato dal d.lgs. n. 231/2001 (vigilanza sul funzionamento e sull'osservanza dei modelli e sul loro adeguamento). Un maggior dettaglio può essere tracciato dal Modello, il quale tuttavia – ancorché adottato – non potrà essere acriticamente e pedissequamente applicato dall'Organismo, ma dovrà essere oggetto di analisi e vaglio da parte di quest'ultimo.

Giunti a queste conclusioni, sono evidenti le ragioni pratiche che inducono la dottrina ad affermare che la responsabilità dell'Organismo deve essere valutata caso per caso, sulla scorta delle peculiarità delle singole fattispecie (quasi ci si trovasse innanzi ad una "obbligazione senza prestazione").

Un tratto comune delle singole fattispecie che possono presentarsi all'interprete può essere individuato nel presupposto fattuale della responsabilità, ossia nella intervenuta comminatoria, a carico dell'ente, delle sanzioni pecuniarie o interdittive previste dal d.lgs. n. 231/2001.

Nulla quaestio ove la responsabilità amministrativa dell'ente consegua alla mancata adozione del modello o alla mancata nomina dell'Organismo (non sarebbe immaginabile alcuna responsabilità dell'ODV). Al di fuori di dette ipotesi, la responsabilità presuppone che il modello adottato non sia adeguato ovvero che vi sia stata omessa o inadeguata vigilanza da parte dell'Organismo.

La prima ipotesi si risolve nel tema, di cui abbiamo già detto, della sussistenza di un obbligo di valutazione dell'adeguatezza del modello in capo all'Organismo: abbiamo visto che una simile valutazione appare implicita nel dovere di curare l'aggiornamento del Modello (ancorché non spetti concretamente all'ODV il compito di intervenire).

La seconda ipotesi (omessa o inadeguata vigilanza) appare – nella prospettiva dell'Organismo – maggiormente critica, trovandosi di fronte ad una ipotesi in cui la responsabilità amministrativa dell'Ente risulta conseguenza diretta ed immediata dell'omessa o inadeguata vigilanza da parte dell'Organismo.

Lo scenario sarebbe il seguente: gli amministratori hanno adottato il Modello e nominato l'ODV, il Modello è risultato adeguato ma la responsabilità è derivata dal fatto che l'Organismo non abbia adeguatamente vigilato. È evidente che, in un simile contesto, la motivazione adottata dal Giudice penale – ancorché non vincolante per il Giudice civile chiamato a giudicare della responsabilità risarcitoria dell'Organismo – rappresenterebbe una statuizione in grado di condizionare pesantemente le sorti dell'azione civile.

In una simile circostanza, pare che la responsabilità civile dell'Organismo possa essere scongiurata solo ove si provi che l'omessa o inadeguata vigilanza non dipenda da colpa dell'ODV (ad esempio, nel caso in cui siano stati frapposti ostacoli da parte dell'organo all'attività dell'Organismo ovvero l'organo gestorio abbia ignorato le richieste di informazioni dell'ODV).

Sotto il profilo della verifica del nesso causale tra condotta dell'Organismo di Vigilanza ed evento dannoso, deve ritenersi che l'Ente, nel richiamare la responsabilità dell'ODV, non sia tenuto a provare che, in presenza di una vigilanza efficace dell'Organismo, non si sarebbe verificato il reato presupposto. Sul piano causale, l'onere probatorio pare meno impegnativo, dovendosi dimostrare che, in presenza di una condotta più diligente, non vi sarebbero stati i presupposti per negare alla società l'esimente di cui all'art. 6 d.lgs. n. 231/2001, anche in presenza di reato. Volendo proporre un'esemplificazione, l'Ente potrà invocare con successo la responsabilità dell'Organismo non già provando che, in caso di vigilanza, si sarebbe impedita la commissione del reato presupposto; invero, l'Ente potrà limitarsi a provare che una vigilanza più attenta da parte dell'ODV avrebbe consentito all'Ente – nonostante la commissione del reato – di andare indenne dalla responsabilità amministrativa ex d.lgs. n. 231/2001 (si vedano le riflessioni di Berti, 2011).

Anche alla luce dell'osservazione ora svolta, si può apprezzare la centralità dell'esatta individuazione dell'onere di diligenza richiesto all'Organismo: si tratta infatti di comprendere quando (ancorché sia stato commesso il reato presupposto) la vigilanza dell'ODV possa essere ritenuta adeguata.

Anche in questo caso occorrerà far ricorso alle clausole generali. In particolare, troverà applicazione il secondo comma dell'art. 1176 c.c.; pertanto si avrà riguardo non già al canone della diligenza del buon padre di famiglia, ma al più severo canone della diligenza professionale (da valutarsi – dispone l'art. 1176, comma 2, c.c. – con riguardo alla natura dell'attività esercitata).

Risulta discussa invece la possibilità per l'Organismo di invocare il disposto dell'art. 2236 c.c., che – ai fini della responsabilità professionale – afferma che il prestatore d'opera risponda solo nelle ipotesi di dolo e colpa grave (Montalenti, 2010). Detta possibilità è stata negata da chi ha evidenziato che detta limitazione non potrebbe applicabile al regime dettato dal d.lgs. n. 231/2001 (Antonetto, 2008).

Dalla natura contrattuale discende la possibilità di applicazione del disposto dell'art. 1225 c.c., per cui il risarcimento è limitato al danno "prevedibile". Sotto questo profilo, non pare potersi negare – una volta individuata una colpevole violazione degli obblighi gravanti sull'Organismo – la risarcibilità degli importi pagati a titolo di sanzione (Baudino, Santoriello, 2009). Accanto a detti importi è stata ipotizzata anche la possibilità per l'Ente di porre a carico dell'Organismo gli importi pagati nei confronti dei terzi a causa della commissione del reato presupposto (in questo senso la dottrina citata da Antonetto, 2008). Si tratta di un'affermazione da valutare con prudenza, atteso che – come abbiamo detto – l'Organismo può essere chiamato a rispondere della "mancata tenuta" del Modello (ossia dell'esimente di cui all'art. 6 d.lgs. n. 231/2001), ma non della commissione del reato.

La pretesa risarcitoria potrà trovare un contemperamento ove l'ODV riesca a dimostrare un comportamento negligente in capo all'Ente vigilato. È stato osservato infatti che l'Organismo di Vigilanza non ha una responsabilità diretta in merito all'adozione del Modello (che è invero adottato dall'organo gestorio). Ove, dunque, si rinvenissero carenze nel Modello adottato dall'organo gestorio, l'Organismo di Vigilanza che non abbia provveduto a rilevare detta inadeguatezza non potrà essere considerato responsabile in via esclusiva, ma potrà invocare un concorso di colpa del danneggiato ex art. 1227, comma 1, c.c. In altri termini, potrà essere opposto all'Ente danneggiato il contegno negligente dei propri amministratori (Baudino, Santoriello, 2009). Considerazioni simili sono state fatte proprie nel precedente del Tribunale di Milano afferente alla responsabilità da mancata adozione del Modello. Si legge nella motivazione della sentenza: "*in concorso con l'azione dannosa del convenuto si è posto, come concausa dei lamentati danni, anche il comportamento della società attrice (art. 1227 c.c.), la quale, per lungo tempo ed attraverso l'azione collusoria di tutti gli altri suoi organi sia decisionali (di diritto o di fatto) che di controllo, ha, prima, creato un sistema di «fondi neri» per finanziare illecite attività ed ha, poi, svolto ampiamente tali attività, beneficiando dei correlativi risultati, tutto senza azionare la responsabilità degli altri soggetti collusi. Avuto riguardo, quindi, alle peculiarità del caso di specie, giudica il Collegio che tali concorrenti responsabilità di parti convenute ed attrice abbiano avuto un'efficienza causale paritaria (50% e 50%) nella produzione del lamentato danno*" (Trib. Milano, 12 febbraio 2008).

Maggiormente complesso appare l'individuazione del danno risarcibile in caso di applicazione delle misure interdittive di cui all'art. 13 d.lgs. n. 231/2001. In questo, in applicazione dei principi generali in materia di danno da inadempimento contrattuale, risulterebbe risarcibile tanto il danno emergente, quanto il lucro cessante. Si è tuttavia rilevato che, in ragione della possibilità per l'Ente di

evitare la sanzione interdittiva attivandosi in conformità all'art. 17 d.lgs. n. 231/2001 (la c.d. riparazione delle conseguenze del reato, attraverso il risarcimento del danno, l'eliminazione delle carenze organizzative e la messa a disposizione del profitto del reato ai fini della confisca), l'Organismo potrebbe invocare il disposto dell'art. 1227, comma 2, c.c. Come noto, la norma prevede che il risarcimento non è dovuto per i danni che il creditore avrebbe potuto evitare usando l'ordinaria diligenza: ne consegue che l'Organismo inadempiente potrebbe eccepire che, con l'ordinaria diligenza, l'Ente avrebbe potuto scongiurare la misura interdittiva attivando la riparazione delle conseguenze del reato (Baudino, Santoriello, 2009).

4.3 La disciplina della responsabilità extracontrattuale verso i terzi e l'attribuzione delle funzioni proprie dell'Organismo di Vigilanza all'organo gestorio o all'organo di controllo

L'assenza di una *posizione di garanzia* in capo all'Organismo di Vigilanza e l'impossibilità di far assurgere l'ODV a vero e proprio organo dell'Ente, preclude – secondo un'impostazione ormai largamente condivisa – la possibilità per i terzi danneggiati dal reato presupposto di promuovere un'azione risarcitoria nei confronti dell'Organismo, vuoi invocando la tutela aquiliana, vuoi invocando una applicazione analogica della responsabilità degli organi verso i terzi (ad es. art. 2395 c.c.).

In altri termini, la circostanza che i doveri che gravano sull'Organismo di Vigilanza siano funzionali alla verifica del funzionamento dei Modelli, senza alcun potere di intervento diretto sull'attività imprenditoriale, esclude che i terzi possano individuare in capo all'Organismo di Vigilanza un obbligo di impedire l'evento dannoso che rappresenterebbe il presupposto di una pretesa risarcitoria extracontrattuale (Cardia, 2012, Baudino, Santoriello, 2009; Berti, 2012).

Abbiamo visto il rilievo che viene attribuito alle circostanze che l'Organismo di Vigilanza non sia un organo dell'Ente e che ad esso non risultino applicabili le norme che disciplinano la responsabilità degli organi gestori o di controllo. Vi è da domandarsi se a differenti conclusioni si possa giungere allorché le funzioni dell'ODV siano attribuite – negli enti di piccole dimensioni – all'organo gestorio (ex art. 6, comma 4 d.lgs. n. 231/2001) ovvero – nelle società di capitali – al collegio sindacale, al consiglio di sorveglianza o al comitato per il controllo interno (ex art. 6, comma 4 *bis*, d.lgs. n. 231/2001).

Non pare che una simile sovrapposizione di funzioni possa condurre ad un regime unitario di responsabilità. L'organo amministrativo o di controllo investito delle funzioni di ODV continuerà a rispondere degli inadempimenti agli obblighi tipici delle proprie funzioni secondo la disciplina ad esse applicabili, mentre risponderà per gli inadempimenti alle funzioni di ODV secondo le regole sopra delineate.

Detta soluzione (che sul piano pratico potrebbe aver scarso rilievo atteso che i doveri degli organi sociali risultano più gravosi rispetto a quelli dell'Organismo,

tanto che – potremmo dire – la responsabilità dell’organo “assorbe” quella dell’Organismo di Vigilanza) pare trovare conferma nella circostanza che lo statuto di responsabilità dell’organo gestorio vale – avendo riguardo alla disciplina delle S.p.A. – per i doveri imposti agli amministratori dalla *legge* e dallo *statuto* e, quindi, non per quelli che trovano una diversa e autonoma fonte, come nel caso di designazione dell’amministratore a ODV (arg. ex art. 2392 c.c.).

5 Conclusioni

In conclusione, attesa l’evidente indeterminatezza della disciplina relativa alle responsabilità sussistenti in capo all’Organismo di Vigilanza, derivante dall’emanazione di una normativa assai scarna, è auspicabile un preciso e chiarificatore intervento legislativo sul punto.

In merito, si resta pertanto in attesa dei lavori della Commissione per il contrasto alla criminalità economica istituita nel marzo del 2016 in seno ai Ministeri della Giustizia e delle Finanze allo scopo precipuo di studiare adeguate modifiche del d.lgs. n. 231/2001.

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Rapporti fra “assetti organizzativi” e “modelli di organizzazione e gestione” ex d.lgs. n. 231/2001

Author

- *Maurizio Irrera, Full Professor, maurizio.irrera@uniupo.it - University of “Piemonte Orientale”*
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L'Autore esamina analogie, differenze e profili di interrelazione fra l'obbligo per le società di munirsi di “assetti adeguati”, previsto dagli artt. 2381-2403 c.c., e quello di dotarsi di idonei “modelli di organizzazione e gestione”, ai sensi del d.lgs. n. 231/01.

L'analisi prende le mosse dalla verifica di come sotto il profilo delle finalità perseguite dai distinti sistemi normativi, l'ambito di operatività della predisposizione di “assetti adeguati” ricomprenda quello dei modelli organizzativi, essendo finalizzati, i primi, ad assicurare complessivamente un'efficace gestione d'impresa, i secondi solo a scongiurare la responsabilità amministrativa dell'ente in caso di commissione di uno dei reati previsti dal d.lgs. n. 231/01. Per altro verso, si pone in luce come gli obblighi relativi all'adeguatezza degli assetti riguardino una platea di società ed enti più ristretta rispetto a quella tenuta a dotarsi modelli organizzativi. Ulteriore oggetto d'analisi è costituito, inoltre, dalle caratteristiche che devono possedere gli assetti, per essere “adeguati” e i modelli organizzativi per essere “idonei” a soddisfare gli obiettivi perseguiti dalle rispettive discipline. Particolare rilievo è inoltre riservato all'esame dei soggetti chiamati a predisporre gli assetti ed i modelli organizzativi e di quelli tenuti a vigilare rispettivamente su adeguatezza ed idoneità degli stessi.

Risultati e conclusioni: L'ultima parte dello studio è dedicata a verificare se, ed entro quali limiti, dall'esame delle rispettive discipline si possa stabilire che, nell'ambito del moderno diritto societario, assetti e modelli costituiscono due momenti di uno stesso fenomeno: baluardo della corretta *governance* e parametro di riferimento della diligenza degli organi di gestione e controllo.

Keywords: società, *governance*, assetti, responsabilità amministrativa enti.

JEL Classification: K290

1 Introduzione

1.1 Elementi di novità dell'obbligo di costituzione di assetti adeguati

L'obbligo – introdotto per le società per azioni di diritto comune dalla riforma del diritto societario negli artt. 2381 e 2403 c.c. – di dotarsi di assetti organizzativi, amministrativi e contabili adeguati costituisce “la novità più ‘nuova’ della recente riforma delle società di capitali, capace (...) di mutare i ‘fondamentali’ di un tema centrale come quello della responsabilità dell’impresa e per certi versi dei gestori di un’impresa” (Buonocore, 2006).

L'obbligo degli assetti adeguati manifesta l'emersione sul piano giuridico di acquisizioni consolidate delle scienze aziendalistiche (Irrera, 2005). Da tempo, ormai, la dottrina aziendalistica (Bianchi, 2016) sottolinea l'importanza essenziale e, comunque, strategica che l'organizzazione aziendale ha per il successo dell'attività d'impresa: il controllo di gestione, la proceduralizzazione delle varie fasi dell'attività, l'integrazione dei processi, il *risk management* rappresentano i vari tasselli di cui si compone l'organizzazione aziendale. La novità è costituita dal fatto che oggi la presenza di assetti adeguati costituisce un obbligo giuridico e non più soltanto una buona pratica manageriale.

1.2 Principi generali sui modelli organizzativi ex d.lgs. n. 231/2001

Quasi coevo alla riforma del diritto societario è il d.lgs. n. 231/2001 che – come è noto – ha introdotto nell'ordinamento interno la responsabilità delle persone giuridiche, delle società e delle associazioni per gli illeciti amministrativi dipendenti da reato: una responsabilità di natura amministrativa degli enti che va a sommarsi a quella della persona fisica che ha commesso il reato. I partecipanti all'ente, i soci della società o dell'associazione non sono più estranei – almeno con riguardo ai profili economici – al procedimento penale per i reati commessi a vantaggio o nell'interesse dell'ente. A sua volta tale circostanza determina – con tutta evidenza – un forte interesse degli *stakeholders* al controllo della regolarità e della legalità dell'operato degli enti.

L'art. 6 del d.lgs. n. 231/2001 introduce una forma di esonero della responsabilità dell'ente, qualora quest'ultimo – nel corso del procedimento penale contro le persone fisiche che hanno commesso il reato – sia in grado di dimostrare di aver “adottato ed efficacemente attuato, prima della commissione del fatto, modelli di organizzazione e di gestione idonei a prevenire reati della specie di quello verificatosi”.

La legge non impone all'ente di dotarsi dei modelli in esame, ma l'averli è funzionale all'ottenimento dell'esimente in caso di reati rientranti nel novero di quelli indicati, commessi nell'interesse o a vantaggio dell'ente. La mancata adozione dei modelli, dunque, non espone ad alcuna sanzione l'ente, ma lo lascia “scoperto”, dal punto di vista della responsabilità amministrativa, per gli illeciti

compiuti da amministratori e dipendenti. La presenza di modelli idonei è, in altri termini e in buona sostanza, necessaria se si vuole godere dell'esimente.

Gli elementi caratterizzanti i modelli in questione sono descritti nell'art. 6, comma 2, d.lgs. n. 231/2001; essi sembrano integrare un classico esempio di sistema di gestione dei rischi ovvero, mutuando un'espressione comune in campo economico-aziendalistico, di *risk management* che si articola, in buona sostanza, in due fasi: da un lato, l'identificazione dei rischi, e dall'altro, la creazione di specifici protocolli ossia procedure in grado di contenere ad un livello accettabile il rischio. La prima attiene, appunto al processo di individuazione in concreto delle aree aziendali e dei settori di attività in cui si potrebbero verificare i rischi (ovvero i reati che comportano la responsabilità dell'ente) e le modalità attraverso le quali i fatti di reati possono essere commessi; la seconda riguarda la progettazione di un sistema di controllo idoneo ad evitare – con buona approssimazione – che il rischio paventato si renda attuale.

Il sistema contenuto nel d.lgs. n. 231/2001 è ispirato all'esperienza anglo-americana. Nel 1991 negli Stati Uniti viene varata dalla *U.S. Sentencing Commission* una riforma molto profonda che ruota intorno ad un *carrot-stick-approach*, ossia alla previsione di altissime pene pecuniarie (il bastone) ed alla contemporanea previsione della riduzione delle stesse (la carota), anche oltre l'80%, per le società che si siano dotate di programmi di autoregolamentazione (i cosiddetti *compliance programs*), tesi ad introdurre nell'impresa comportamenti improntati a *standards* elevati di etica individuale.

Il punto di riferimento essenziale in materia sono le *Federal Sentencing Guidelines* destinate alle persone giuridiche, emanate appunto nel 1991, il cui approccio si fonda – lo si è appena rilevato – su un sistema preventivo-premiale: "l'esperienza nordamericana dimostra che il diritto penale, per esercitare un'efficace funzione preventiva nei confronti dei reati commissibili dalla persona giuridica, deve entrare nell'impresa, invadere le sue strutture interne di autoregolamentazione, condizionare la loro formazione ed il loro modo di essere" (De Maglie, 2002).

Il fondamento dogmatico della colpevolezza della persona giuridica nel diritto statunitense risiede, in via principale, nella cosiddetta colpa di organizzazione: ossia un deficit organizzativo che ha reso possibile la commissione del reato; "la persona giuridica è (...) colpevole se si dimostra che i dirigenti hanno omesso di adottare misure che si sono rilevate insufficienti per la prevenzione dei delitti" (De Maglie, 2002).

1.3 Assetti e modelli organizzativi: necessità di un raffronto

A prima vista i due impianti normativi ("assetti organizzativi", da un lato, e "modelli organizzativi", dall'altro) appaiono distinti tra di loro e non esiste alcun espresso richiamo legislativo dell'uno all'altro. In realtà, entrambi i sistemi rispondono ad una medesima logica, ossia la procedimentalizzazione dell'attività d'impresa, la creazione di un sistema di controlli basato sull'individuazione e sul-

la gestione dei rischi; rappresentano entrambi – soprattutto e in sintesi – l'emersione sul piano giuridico di acquisizioni dalle scienze aziendalistiche.

Sembra dunque utile un confronto più stretto e stringente tra i due impianti normativi a beneficio di una lettura e di una comprensione più profonda del sistema di *corporate governance* che il legislatore ha voluto disegnare attraverso tali importanti tasselli: gli assetti organizzativi ed i modelli organizzativi (Abriani, 2009)

2 Le finalità ed i soggetti

2.1 Le rispettive aree di operatività degli obblighi di predisposizione degli assetti e dei modelli organizzativi

Assetti e modelli occupano aree non coincidenti; i modelli di organizzazione e gestione sono, infatti, previsti con l'intento circoscritto di prevenire la commissione di determinati reati e nel caso in cui il fatto venga comunque commesso, con il fine di evitare la responsabilità amministrativa (patrimoniale) dell'ente.

Il catalogo dei reati presupposti, contenuto negli artt. 24-25 *duodecies*, del d.lgs. n. 231/2001, si è ampliato nel corso degli anni in modo molto consistente, abbracciando un *range* diversificato e talora non perfettamente coerente di fattispecie penali anche di carattere colposo: si va dai reati societari agli abusi di mercato; dai delitti contro l'industria ed il commercio a quelli in materia di violazione del diritto d'autore; dai reati ambientali a determinati gravi reati colposi commessi con violazione delle norme sulla tutela della salute e sicurezza sul lavoro; dai delitti informatici a numerosi delitti contro la pubblica amministrazione; costituisce reato presupposto anche l'impiego di cittadini di paesi terzi il cui soggiorno è irregolare. Non mancano poi fattispecie che presuppongono di regola forme di criminalità organizzata: associazioni a delinquere anche di tipo mafioso, riciclaggio, ricettazione, impiego di denaro, beni o attività di provenienza illecita, antiriciclaggio.

Vi sono, infine, reati che dal punto di vista operativo sembra complicato immaginare, come compiuti da società commerciali: le pratiche di mutilazione degli organi genitali femminili, la riduzione in schiavitù, i reati pedo-pornografici, la tratta di persone e l'acquisto e l'alienazione di schiavi.

La netta sensazione è che il legislatore – spinto da esigenze contingenti – abbia creato un contenitore dentro il quale ha collocato e continua a collocare fattispecie molto eterogenee tra di loro.

Ad ogni buon conto l'area occupata dai modelli organizzativi non può che riguardare i reati-presupposti che, pur ampliati sino a ricomprendere attività che tradizionalmente vengono ricondotte a quelle della cosiddetta impresa illecita, costituisce comunque uno spazio circoscritto.

Viceversa, l'area degli assetti è sicuramente più vasta costituendo essi – come si è scritto – il presidio avanzato (Cavalli, 2002) dell'intera corretta gestione so-

cietaria. Gli assetti coprono tutta l'attività dell'impresa e non solo quella che può costituire il presupposto di uno dei reati del catalogo contenuto nel d.lgs. n. 231/2001.

L'area più estesa, ma anche in parte più incerta nei suoi confini, dovendosi rapportare ad una clausola generale quale quella della corretta amministrazione (Montalenti, 2016), è quella degli assetti organizzativi che sono chiamati a "coprire" tutti i profili della gestione dell'impresa, mentre lo spazio ricoperto dai modelli organizzativi è più circoscritto essendo rapportato a fattispecie numerose, ma tipiche quali quelle penali.

Il *focus* dei modelli concerne – in altre parole – specifici comportamenti idonei ad evitare determinati reati; per contro, gli assetti sono l'esplicitazione di un più generale dovere di corretta amministrazione.

2.2 Soggetti tenuti alla predisposizione di assetti e di modelli organizzativi

Con riguardo all'ambito soggettivo, viceversa, il rapporto tra i due sistemi si inverte: gli assetti organizzativi sono previsti in alcuni ordinamenti settoriali (banche, assicurazioni, intermediari finanziari, società quotate) e, a seguito della riforma del diritto societario, anche per le società per azioni di diritto comune, mentre i modelli organizzativi concernono un numero di soggetti molto più vasto: enti forniti di personalità giuridica, società e associazioni anche prive di personalità giuridica, mentre sono esclusi lo Stato, gli enti pubblici territoriali, gli altri enti pubblici non economici e gli altri enti che svolgono funzioni di rilievo costituzionale.

L'obbligo degli assetti è da ritenersi estensibile secondo la migliore dottrina (Cagnasso, 2016), anche alle società a responsabilità limitata, in considerazione del fatto che i principi di corretta amministrazione, di cui gli assetti rappresentano la declinazione, rappresentano una clausola generale che impronta perlomeno tutte le società di capitali.

Nonostante tale estensione dell'ambito soggettivo degli assetti non vi è dubbio che l'ambito dei modelli sia più ampio, ricomprendendo anche le società di persone e soprattutto gli enti con o senza personalità giuridica disciplinati dal *Libro Primo* del Codice civile.

3 I contenuti

Sul piano dei contenuti i due sistemi normativi si presentano in veste completamente differente: l'una riccamente dotata di informazioni ed indicazioni; l'altra, viceversa, paradossalmente silente.

In relazione ai modelli organizzativi il d.lgs. n. 231/2001 individua una serie di caratteri, che il legislatore chiama "esigenze", a cui gli stessi devono uniformarsi. In particolare, viene richiesto che essi individuino le attività nel cui ambi-

to possono essere commessi reati; prevedano specifici protocolli diretti a programmare la formazione e l'attuazione delle decisioni dell'ente con riguardo ai reati da prevenire; indichino le modalità di gestione delle risorse finanziarie idonee ad impedire la commissione di reati; stabiliscano obblighi di informazione nei confronti dell'organismo deputato a vigilare sul funzionamento e l'osservanza dei modelli; introducano un sistema disciplinare idoneo a sanzionare il mancato rispetto delle misure indicate nel modello.

In altri termini, il legislatore traccia, seppure in modo indiretto attraverso l'elenco delle esigenze che deve soddisfare, il contenuto minimo del modello i cui capisaldi paiono consistere – come si è anticipato – in un sistema di gestione dei rischi, in un sistema di gestione delle risorse finanziarie ed, infine, in un sistema sanzionatorio per l'eventuale violazione delle misure previste.

Viceversa, gli assetti organizzativi, amministrativi e contabili sono privi – sul piano dei contenuti – di un preciso dato normativo: ciò si spiega con la rituale retrosia del legislatore a dare immediatamente spazio – sul piano giuridico – ad acquisizioni derivanti dalle scienze economico-aziendali; è già capitato in passato che il legislatore apparisse prudente, quasi restio a recepire diffusamente istituti di derivazione tecnica. L'evoluzione della disciplina concernente il bilancio appare paradigmatica in proposito; il codice di commercio del 1882 dedicava alle funzioni ed al contenuto del bilancio una sola disposizione (l'art. 176) ed anche tale norma si limitava ad assegnare al bilancio la funzione di “dimostrare con evidenza e verità gli utili conseguiti e le perdite sofferte” ed a richiedere la distinta indicazione, nel bilancio, del “capitale sociale realmente esistente” e della “somma dei versamenti effettuati e di quelli in ritardo”. È solo con il codice civile del 1942 e soprattutto con l'attuazione della IV direttiva comunitaria avvenuta nel 1991, che il bilancio ha assunto – sul piano dei contenuti, indicati direttamente ed espressamente dal legislatore – un ampio rilievo.

È comprensibile – derivando la materia da acquisizioni consolidate delle scienze economico-aziendali – che per il giurista la formula “assetti organizzativi, amministrativi e contabili” possa essere priva di una propria capacità di rappresentazione; ciò peraltro non legittima – come sta accadendo – che le riflessioni in ambito gius-commercialistico riguardino spesso il principio dell'adeguatezza degli assetti e non – in primo luogo – gli assetti. Si tratta di una forma di strabismo; è come discettare sulla clausola generale della chiarezza in assenza delle norme che disciplinano la struttura ed il contenuto del bilancio o discorrere di verità e correttezza senza le norme che fissano i criteri di valutazione delle diverse poste di bilancio.

In altri termini, è fondamentale interrogarsi sul contenuto degli assetti (Irre-*ra*, 2011). Sul tema si può ragionevolmente sostenere che il primo ed indefettibile elemento costitutivo degli assetti sia rappresentato da un chiaro “Organigramma aziendale”, rappresentato graficamente, da cui emergano ruoli e funzioni dei vari soggetti. A tale documento occorre accluderne un altro che, comunemente, si definisce “Compiti e responsabilità” nel quale sono descritti – appunto – le principali aree di competenza delle varie funzioni aziendali: il documento – tradizionalmente denominato mansionario o più (modernamente) funzio-

gramma – è chiamato ad esporre, in modo quanto più possibile analitico, le competenze di ciascuna area funzionale, individuando all'interno di ognuna di esse il soggetto responsabile e l'eventuale ulteriore articolazione. La descrizione dei compiti e delle linee di responsabilità è quanto mai opportuna perché consente di individuare eventuali carenze funzionali o, al contrario, inefficienti sovrapposizioni. Vi è, infine, un terzo documento, di regola denominato "Deleghe e Poteri", nel quale vengono precisate – appunto – le eventuali attribuzioni di poteri esterni alle diverse funzioni: si deve trattare di un documento coerente con le deleghe e le procure depositate presso il registro delle imprese, idoneo a rappresentare in modo chiaro quali siano i soggetti che hanno la cosiddetta firma sociale e quale sia l'ambito di estensione della firma medesima.

"Organigramma aziendale", "Compiti e Responsabilità", "Deleghe e Poteri" sono tre documenti che (al di là della variabile complessità dei medesimi, in diretta correlazione con la natura e la dimensione della società) rappresentano il *minimum* di assetto organizzativo. Vi sono poi – sempre nell'ambito dell'assetto organizzativo – le procedure; la predisposizione di "assetti" significa – in buona sostanza ed in generale – una procedimentalizzazione dell'organizzazione aziendale. Più in concreto, attraverso le singole procedure si regolamentano nel dettaglio le diverse fasi dell'attività d'impresa; anche la complessità e la numerosità dei vari processi è strettamente correlata alla natura e alle dimensioni dell'impresa. Vi possono essere realtà nelle quali (il riferimento è alle piccole/medie imprese) non vi sono processi formalizzati o i medesimi riguardano solo alcuni profili; al crescere dell'impresa corrisponde un parallelo e necessario incremento delle procedure; vi possono (e vi debbono) essere processi che descrivono tutte le singole fasi e sotto-fasi dell'attività.

In sintesi, le procedure consentono di stabilire chi fa chi e cosa, a partire proprio da ogni singolo processo aziendale. Ovviamente, la procedimentalizzazione permette, poi, di effettuare controlli di "allineamento" e di regolarità più efficienti.

Con riguardo all'assetto amministrativo e contabile il *focus* è costituito dal possesso di strumenti idonei a consentire una corretta, completa, tempestiva e – soprattutto – attendibile rilevazione dei fatti contabili; è necessario che i sistemi contabili siano in grado di elaborare *budget* e previsioni, con riferimento sia all'ordinaria attività di impresa, sia ai possibili esiti di investimenti consistenti.

Non debbono, da ultimo, essere trascurati gli aspetti finanziari ovvero la capacità per l'impresa di possedere idonei flussi monetari al fine di sostenere e garantire la continuità aziendale.

Sulla base delle considerazioni che precedono non sfugge la circostanza che il contenuto concreto degli assetti possa desumersi – almeno sul piano della struttura di riferimento – da quello dei modelli organizzativi.

4 I ruoli

Con relazione ai ruoli il rapporto tra assetti organizzativi e modelli organizzativi si inverte.

Il d.lgs. n. 231/2001 si limita a stabilire che la competenza per la creazione dei modelli, nonché per l'efficace attuazione degli stessi, spetta all'*organo dirigente* mentre un apposito organo (l'*organismo di vigilanza*) è chiamato a vigilare appunto, sull'osservanza del modello (Balzarini, 2016).

Gli artt. 2381 e 2403 c.c. prevedono dal loro canto che gli organi delegati *curino* gli assetti, che il consiglio di amministrazione li *valuti* e che il collegio sindacale *vigili* sul loro concreto funzionamento: si tratta di un dato normativo più ricco rispetto ai modelli.

Il tema più controverso – in tema di assetti – è quello concernente l'intestazione *ex lege* dell'obbligo di curare gli assetti in capo agli organi delegati. L'argomento assume particolare rilievo nel caso di delega speciale ossia di una delega circoscritta da parte del consiglio di amministrazione agli organi delegati. Considerato che gli assetti rappresentano un coacervo di documenti (organigrammi, funzionogrammi, ect.) e procedure la cui "costruzione" esige un disegno unitario, una *mens* unica, un obbligo da esercitarsi in modo unitario e mai la sommatoria di decisioni parziali provenienti da soggetti diversi è da ritenersi che l'obbligo concernente la creazione degli assetti, anche in casi di delega circoscritta, compete comunque ai delegati.

Altro tema riguarda il rapporto tra il collegio sindacale deputato a "vigilare" sugli assetti e il consiglio di amministrazione a cui è attribuita la "valutazione" degli stessi. Ciò che sul punto pare caratterizzare l'attività del consiglio rispetto a quella del collegio sindacale è la facoltà di formulare direttive e quindi di orientare la costruzione degli assetti, per contro la vigilanza attribuita ai sindaci sembra rivolta in particolare alla verifica dell'efficienza, giorno per giorno, degli assetti nella realtà della singola impresa (Policaro, 2016). In questo senso depone la previsione specifica – per il solo collegio sindacale e non per il consiglio di amministrazione – dell'obbligo di vigilare sul "concreto funzionamento degli assetti". Tale circostanza non esclude – ovviamente – che la valutazione di adeguatezza formulata dal consiglio non debba anche riguardare il modo nel quale, ad esempio, le procedure vengono poste in essere. La valutazione è un'attività che sembra caratterizzata dalla discontinuità e dal particolare atteggiamento che assume l'elemento temporale; si tratta cioè di un compito che presuppone un giudizio complessivo, *una tantum* sulla base delle informazioni volta per volta ricevute, nonché *ex post*, ossia riferito ad una "costruzione" già realizzata. La vigilanza, invece, sembra riferirsi in modo più intenso ad un'attività ininterrotta, senza soluzione di continuità, da esercitarsi – sul piano temporale – "durante" e non *a posteriori*. In sintesi, vi è da ritenere che l'attività del consiglio – con riguardo agli assetti – debba essere orientata soprattutto all'individuazione della strategia complessiva, mentre quella dei sindaci debba dirigersi in modo più netto verso i profili relativi al funzionamento e quindi alla loro efficacia (Irrera, 2005).

Tornando ai modelli organizzativi vi è da ritenere che l'espressione "organo dirigente", anomala se posta in relazione con l'ordinamento societario, indichi gli amministratori giacché questi si trovano nella posizione più adatta per valutare la complessiva organizzazione aziendale e, di conseguenza, i rischi a cui la stesso va incontro. In effetti, la formula generica si è probabilmente resa necessaria in considerazione del fatto che la norma ha un ambito soggettivo molto più vasto, essendo rivolta oltre che alle società anche agli enti con personalità giuridica, nonché alle associazioni prive di personalità giuridica, nei quali i gestori potrebbero assumere, di volta in volta, denominazioni differenti. Sempre in tema di modelli organizzativi occorre segnalare che il legislatore ha introdotto una significativa novità nel contesto del d.lgs. n. 231/2001: all'art. 6 è stato aggiunto – infatti – il comma 4 *bis* che espressamente prevede che "nelle società di capitali il collegio sindacale, il consiglio di sorveglianza e il comitato per il controllo della gestione possono svolgere le funzioni dell'organismo di vigilanza". Come si è appena osservato, analoga funzione di vigilanza spetta al collegio sindacale con riguardo all'adeguatezza degli assetti. Pertanto, ove si adotti la soluzione oggi espressamente consentita dal legislatore del 2011, il collegio sindacale, oltre a svolgere i propri compiti tradizionali fissati dal codice civile, avrà anche l'ulteriore dovere di vigilare sui modelli creati ai sensi del d.lgs. n. 231/2001. In tal modo, da un lato, viene confermato il ruolo cardine del collegio sindacale nel sistema dei controlli interni; dall'altro, laddove vi sia contiguità tra le mansioni, l'attribuzione allo stesso delle funzioni di organismo di vigilanza consente di evitare rischi di duplicazione o sovrapposizioni nell'attività di vigilanza, contenendo i costi, senza peraltro che vada persa l'effettività ed efficacia dei modelli di gestione ed organizzazione aziendale (Laghi, 2016).

Sotto quest'ultimo profilo, affinché il sistema sia in concreto sempre efficiente, pare necessario osservare che vi sono attività d'impresa i cui rischi non paiono facilmente ponderabili e sorvegliabili dai sindaci che hanno una professionalità strettamente connessa a materie economico-giuridiche e, difficilmente, si destringano con pari capacità in altri settori, quali possono essere quelli dei reati ambientali ovvero quelli legati ad attività sanitarie. In questo senso, il progressivo ampliamento delle categorie di reati presupposto ai sensi del d.lgs. n. 231/2001 può rendere complicata l'immedesimazione in un unico soggetto, *id est* il collegio sindacale, dei due ruoli.

5 I caratteri: adeguatezza e idoneità

In relazione al tema dei caratteri che gli assetti, da un lato e i modelli, dall'altro lato, debbono possedere, il legislatore utilizza le espressioni "modelli idonei" ed "assetti adeguati" che appaiono equivalenti: "idoneità" è infatti sinonimo di "adeguatezza". Oltre a ciò l'organo deputato al controllo con riguardo agli assetti, vigila sul "concreto funzionamento", con riguardo ai modelli vigila sul "loro funzionamento e ne cura il relativo aggiornamento": anche sotto questo profilo sembra che le formule siano ulteriormente equiparabili.

L'adeguatezza pare essere divenuta clausola generale e criterio di valutazione di qualificato adempimento, un principio di corretto adempimento di portata generale (Meruzzi, 2016), nonché, come è stato osservato, una delle caratteristiche giuridiche dei modelli organizzativi insieme alla idoneità ed efficacia, dunque fonte di integrazione dei contenuti espressi dai modelli (Berti, 2012).

Sul tema dell'adeguatezza degli assetti si è di recente espresso, in una sorta di documento programmatico sulle norme di comportamento del collegio sindacale, il Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili individuandone una serie di elementi caratterizzanti. In particolare, si è osservato che il concetto di adeguatezza implica la creazione di una struttura compatibile alle dimensioni della società nonché alla natura e modalità di perseguimento dell'organo sociale, ponendo particolare attenzione alla "separazione e alla contrapposizione di responsabilità nei compiti e nelle funzioni, alla chiara definizione delle deleghe o dei poteri di ciascuna funzione nonché alla costante verifica da parte di ogni responsabile sul lavoro svolto dai collaboratori".

In generale, e premesso che l'art. 2381 c.c. si limita a prevedere un'adeguatezza degli assetti in ragione della natura e dimensioni dell'impresa, si è osservato che non sono concepibili assetti universalmente validi; d'altro canto, dal d.lgs. n. 231/2001 si deduce che un modello è idoneo nel momento in cui soddisfa una serie di esigenze individuate dall'art. 6, che, a loro volta, comportano l'introduzione di procedure operative e sistemi per il monitoraggio dei rischi da reato e la giurisprudenza di merito ha decretato l'inidoneità del modello laddove le regole in esso contenute siano state formulate in modo generico ovvero non siano risultate modulate sulle caratteristiche dell'ente (Irrera, 2009)¹.

6 Conclusioni: un sistema integrato?

L'indagine svolta ha consentito di far emergere disarmonie, ma anche interferenze tra i due apparati normativi che paiono permettere l'integrazione reciproca.

Sotto il primo profilo viene in rilievo un elemento fortemente distonico: i modelli sono meglio individuati dal legislatore, mentre sugli assetti è silente, ma gli assetti hanno un raggio di azione decisamente più ampio tant'è che i modelli si traducono in assetti facenti parte dell'organizzazione complessiva dell'impresa (Galletti, 2006).

D'altro canto, lo studio sinottico degli istituti ha fatto affiorare interrelazioni fitte tra i due sistemi: in primo luogo, il rafforzamento tra profilo societario ed imprenditoriale e l'applicazione, con valenza giuridica, di criteri e regole elaborati nell'ambito delle scienze aziendalistiche, che si concretizzano nella procedimentalizzazione di ogni fase di attività e nella valorizzazione dell'impresa in quanto fenomeno organizzativo. Questo comune terreno di matrice aziendalistica, fondato sull'analisi dei processi e dei correlativi rischi, su cui si sono innestati i modelli e gli assetti, rappresenta il principale "collante" che induce l'interprete ad una valutazione unitaria dei medesimi.

La comunanza di ispirazione aziendalistica insieme alla comunanza di struttura determinano la tendenziale coincidenza di impianto e contenuti tra i due sistemi: in entrambi i casi si tratta di adottare procedure operative interne, integrate e coordinate, che migliorino l'efficienza della gestione riducendo la discrezionalità nelle varie fasi del processo in atto. Questo schema presuppone che tutta l'organizzazione aziendale, in ogni sua fase, sia consacrata in un procedimento il quale, a sua volta, sia oggetto di una preventiva valutazione in ordine alla sua adeguatezza ed idoneità, nonché di un costante monitoraggio in relazione al suo concreto funzionamento ed aggiornamento.

Modelli e assetti paiono integrare, in definitiva, momenti di uno stesso fenomeno: baluardo della corretta *governance* nelle società di capitali e parametro di riferimento per la valutazione della diligenza/responsabilizzazione degli organi di gestione e controllo. In tale quadro, gli assetti adeguati, così come i modelli organizzativi, ovvero la presenza di un funzionante sistema idoneo a consentire una verifica preventiva di efficienza, efficacia ed anche legittimità delle scelte di gestione, possono giocare un ruolo decisivo nell'individuazione di un solido criterio a cui ancorare la responsabilità degli organi sociali.

Il processo di *decision-making* appare allora di tutto rilievo nell'attribuzione della responsabilità. In altri termini, le scelte di gestione che abbiano causato danni al patrimonio della società comporteranno la responsabilità degli amministratori qualora il processo di *decision-making* sia risultato "difettoso"; qualora – invece – si constati la presenza e il funzionamento di idonei assetti e modelli, gli amministratori andranno esenti da responsabilità sul piano sia civile, sia penale (Abriani, 2009; Galletti, 2006)².

In altre parole, e per concludere, sembra potersi affermare con ragionevole certezza che anche nel nostro ordinamento "the due care standard in corporate law is applied to the decision-making process and not to its result. Even though a decision made or a result reached is not that of the hypothetical ordinarily prudent person, non-liability will attach as long as the decision-making process meets the standard" (Hansen, 1986)

Endnotes

¹ Sul punto v. Trib. Milano, 20 settembre 2004, in *www.rivista231.it*, in cui le regole del modello non differenziavano la formazione per quei dipendenti addetti ai settori a rischio; Trib. Bari, 18 aprile 2005, in *www.rivista231.it*, in cui i modelli copiavano quelli di altre società del gruppo pedissequamente e non risultavano dunque idonei rispetto alle caratteristiche specifiche della società di riferimento. L'idoneità del modello deve essere valutata *ex ante* con il c.d. criterio della prognosi postuma, collocandosi idealmente nella realtà aziendale nel momento in cui si è verificato il reato: v. App. Milano, 28 giugno 2012, in *www.rivista231.it*.

² In proposito, v. Trib. Milano, 13 febbraio 2008, in *Giur. comm.*, 2009, II, 177, nonché in *Nuovo dir. soc.*, 2009, n. 2, 10, con nota di Irrera che ha condannato al risarcimento del danno l'amministratore di una società di capitali, priva del modello ex d.lgs. n. 231/2001, per l'importo che la società stessa ha dovuto corrispondere in termine di sanzione pecuniaria per la responsabilità da illecito amministrativo dipendente da reato.

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Modello 231 e organismo di vigilanza nel quadro della *corporate governance* e del sistema dei controlli societari(*)

Author

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- *Paolo Montalenti, Full Professor, paolo.montalenti@studiomontalenti.it - University of Torino*
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Il *paper* analizza la disciplina del d.lgs. n. 231/2001 che ha introdotto la responsabilità amministrativa della persona giuridica e dettato una specifica disciplina del modello di prevenzione dei reati.

L'autore affronta il tema nel quadro della più ampia materia del sistema dei controlli.

Esamina i diversi problemi aperti in tema di qualificazione e composizione dell'ODV, di prevenzione dei reati nei gruppi, di coordinamento con le altre istanze di controllo.

Formula alcune proposte di riforma..

Keywords: Modello 231; ODV; Sistema dei controlli; Assetti organizzativi; Gruppi società.

JEL Classification: K22

(*) Il *paper* riprende un mio precedente scritto: P. Montalenti, *Il modello "231" e l'organismo di vigilanza nel sistema dei controlli societari: un quadro di insieme*, Prefazione, al volume AA.VV., *Modello organizzativo D.lgs. 231 e organismo di vigilanza. Guida operativa*, Torino, Eutekne, 2013, p. 19 ss.

I

1 Il modello 231 nel sistema dei controlli interni nelle società di capitali, architrave della *corporate governance*

Il “modello 231” – e cioè «i modelli di organizzazione e di gestione idonei a prevenire reati», e precisamente i “reati presupposto” della responsabilità amministrativa dell’ente previsti dal d.lgs. 8 giugno 2001, n. 231, – è materia che si inserisce nel più ampio quadro della *corporate governance*, e, in particolare, del sistema dei controlli interni.

I controlli interni nelle società di capitali¹ rappresentano uno dei pilastri fondamentali, se non l’architrave, della struttura della *corporate governance* negli ordinamenti dei paesi industriali avanzati.

In Italia la materia è stata oggetto di plurimi interventi: dalla separazione tra controllo di legalità e controllo contabile nelle società quotate, con la L. 216/1974, all’introduzione della vigilanza sui principi di corretta amministrazione e sull’adeguatezza degli assetti organizzativi in capo al collegio sindacale di società quotate, con il testo unico della finanza nel 1998, alla disciplina della c.d. responsabilità penale della persona giuridica – il d. lgs. n. 231/2001 – all’estensione al collegio sindacale nelle non quotate di poteri analoghi a quelli dell’organo di controllo di società quotate con la riforma societaria del 2003, alla disciplina antiriciclaggio (d.lgs. 21 novembre 2007, n. 231) sino all’intervento sul comitato per il controllo interno e la revisione contabile, di cui all’art. 19, d.lgs. 27 gennaio 2010, n. 39 e alle modifiche in materia di organismo di vigilanza 231.

Il quadro si compone, poi, per le società quotate, di ulteriori tasselli normativi e regolamentari: si pensi alle competenze del collegio sindacale in tema di regole di governo societario [art. 149, comma 1, lett. c *bis*], t.u.f.] e alle competenze del dirigente preposto alla redazione dei documenti contabili in materia di “adeguate procedure amministrative e contabili” per la formazione del bilancio (art. 154 *bis*, comma 3, t.u.f.), introdotte dalla legge sulla tutela del risparmio (l. 28 dicembre 2005, n. 262), alle disposizioni regolamentari nei settori vigilati, al Comitato per il controllo interno previsto dal Codice di Autodisciplina di Borsa Italiana, nella versione aggiornata del 2011.

Ed è paradigmatico con quale attenzione, e costanza, operatori e studiosi stiano formulando quantomeno da un decennio riflessioni, valutazioni, proposte.

2 Il concetto di controllo: l’evoluzione. Merito, correttezza, legalità

La partizione concettuale tradizionale in tema di controllo – controllo di legalità (formale e sostanziale), controllo di merito – merita una rivisitazione sistematica.

Il controllo di merito, e cioè il controllo sull'opportunità e la convenienza economica dell'attività (e/o dei singoli atti o operazioni) di gestione, spetta ai soci nei confronti del consiglio di amministrazione e a quest'ultimo, come plenum, nei confronti dei delegati. Si tratta di un controllo in forma di potere di indirizzo, di condizionamento e anche di contrapposizione antagonistica, con la revoca dell'amministratore o della delega, non già di sorveglianza e verifica in funzione di eventuali iniziative sul terreno della responsabilità.

Infatti il merito della gestione, e cioè il contenuto delle scelte manageriali è assistito – il punto è pacifico anche nel nostro ordinamento – dalla c.d. *business judgment rule*: le operazioni gestorie degli amministratori non sono sindacabili, né dal collegio sindacale né dal comitato audit né dai revisori né dal giudice, se non in caso di manifesta irrazionalità.

Vi è poi il controllo sul rispetto dei principi di corretta amministrazione, la verifica, cioè dell'osservanza delle regole tecnico-aziendalistiche – istruttorie, procedurali, decisionali – che concretano (arg. ex art. 2403, comma 1, c.c.) la diligenza professionale del buon amministratore (cfr. art. 2392, nuovo testo). Controlli che sono affidati, con compiti differenziati, sia all'organo di gestione come *plenum* sia all'organo di controllo. (cfr. art. 2381, comma 3, art. 2403, comma 1, c.c., art. 149, comma 1, t.u.f.; art. 149, comma 4 *bis* e comma 4 *ter*, t.u.f.).

Elemento centrale del controllo sulla correttezza gestoria è rappresentato dal controllo sull'adeguatezza degli assetti organizzativi, cioè il controllo sull'idoneità dell'intero sistema di funzionigramma e di organigramma e in particolare del sistema procedurale di controllo, dal monitoraggio dei rischi (c.d. funzione di *risk management*) alla verifica del rispetto delle regole normative, primarie e secondarie (c.d. funzione di *compliance*).

La terza "sottocategoria" è rappresentata dal controllo di legalità (cfr. art. 2403 c.c.).

In conclusione il concetto di controllo pare oggi doversi più analiticamente scomporre in tre subfattispecie:

- (i) controllo di merito
- (ii) controllo di correttezza gestionale e di adeguatezza organizzativa e amministrativa
- (iii) controllo di legalità (formale e sostanziale).

Un assunto deve essere in ogni caso ribadito con chiarezza: il controllo si emancipa dall'accezione tradizionale di "verifica *ex post*" (derivato del diritto amministrativo) e si evolve in elemento coesistente dell'esercizio dell'impresa e del potere amministrativo.

In altri termini il controllo non è estrinseco ma intrinseco alla funzione gestoria; in chiave assiologica la nozione dovrebbe evolvere da una concezione del controllo come "costo" all'idea del controllo come "opportunità".

Di là dalle formule, questa "mutazione sistematica" e la conseguente nuova ricostruzione teorica del concetto di controllo segnano un'evoluzione profonda di cui la pratica ma forse ancor più la dottrina non hanno ancora colto appieno significato e potenzialità.

In termini sintetici il sistema e la *best practice* si evolvono da una visione del controllo come mera “funzione punitiva”, ancorché, auspicabilmente, anche di deterrenza, ad una concezione del controllo come funzione fisiologica della gestione, che si innesta cioè nell’esercizio del potere amministrativo come strumento di indirizzo e di correzione permanente della direzione degli affari verso l’obiettivo di un pieno rispetto delle regole vigenti.

Il che si riflette, come meglio dirò, in una nuova tipologia di rapporti interorganici che merita, a mio avviso, una “messa a punto legislativa”.

3 Controllo diretto e controllo indiretto

Deve altresì introdursi una distinzione che non trova un riferimento normativo specifico ma che ha una rilevanza cruciale nella realtà operativa dei controlli, ovvero la suddivisione del controllo tra controllo diretto e controllo indiretto. Una bipartizione che incrocia trasversalmente organi e funzioni e che vede però, nella tipologia economico-sociale, la netta prevalenza dei controlli indiretti sui controlli diretti.

Ciò deriva, è indubbio, anche dalla oggettiva complessità della grande impresa moderna nella quale il potere di amministrazione, sia pure gerarchicamente organizzato, è fortemente articolato e diffuso, per cui ben si può affermare che anche la “direzione suprema degli affari” si estrinseca, da un lato, in linee direttrici generali, dall’altro nella verifica dell’efficienza e dell’efficacia dell’azione di altri soggetti (organi delegati, alta dirigenza, *managers*, responsabili di settore, amministratori di società controllate ecc.).

Analogo fenomeno si verifica nelle procedure di controllo – e il tema è di particolare rilevanza proprio nella materia “231” – per cui molte istanze procedono non già ad atti di ispezione e di controllo diretto bensì ad atti di accertamento presso le “istanze inferiori” volti a verificare il corretto svolgimento delle procedure di controllo e l’adeguatezza degli assetti organizzativi di cui le procedure stesse sono parti integranti.

Il sistema si presenta cioè come una sorta di “piramide rovesciata” che ricomprende l’insieme delle funzioni di controllo indiretto e che poggia sul vertice, anch’esso rovesciato, dei controlli diretti su cui si regge, in definitiva, l’intera architettura.

I controlli indiretti, proprio perché molteplici articolati e diffusi, contengono in sé maggiori risorse di *feedback* e quindi di “autocorrezione”, ma, proprio perché si fondano sui controlli diretti (i c.d. “controlli di linea”), rischiano anch’essi un “*default a catena*” in caso di carenza o di inefficacia di questi e richiedono quindi un apposito presidio attraverso l’istituzione di un appropriato sistema di “controllori dei controllori”.

4 Controllo e vigilanza

Si deve altresì distinguere tra controllo e vigilanza.

I due concetti non sono, a mio parere coestensivi. Il controllo evoca strumenti di verifica più pervasivi; di contro la vigilanza deve essere intesa come attività di sorveglianza generale e, di regola, indiretta. Si pensi, ad esempio, alla funzione di *internal auditing* ripartita tra amministratore delegato, con funzioni, dunque, di controllo in senso proprio e presidente, con funzioni, dunque, di supervisione sintetica.

Deve peraltro rilevarsi che il legislatore predica allo stesso verbo oggetti diversi che caratterizzano, con declinazioni diverse, la condotta.

Ad esempio il collegio sindacale “vigila” sull’“osservanza” della legge e dello statuto [art. 2403, cod. civ.; art. 149, comma 1, lett. a), t.u.f.], mentre il consiglio di amministrazione (nelle quotate) “vigila” sul “rispetto effettivo” delle procedure (art. 154 *bis*, comma 4, t.u.f.): espressione, quest’ultima, che sembra evocare un controllo più pervasivo.

Gli organi delegati, invece, e il dirigente preposto, “attestano” anche “l’effettiva applicazione”: espressione che pare alludere ad un controllo ancor più immediato e diretto.

Non vi è dubbio che tracciare una linea di demarcazione tra attività di verifica che presentano elementi di forte contiguità non è agevole; rimane tuttavia il fatto che tra controllo e vigilanza non vi è perfetta sovrapposizione. La rilevanza della distinzione risiede in particolare nel concetto di vigilanza che non può essere interpretato in termini di attività di ispezione diretta e diffusa ma che, come si è precisato, deve essere inteso come funzione di sintetica e generale sorveglianza sulle aree, peraltro ampie e articolate, oggetto dei poteri-doveri dell’organo di controllo: questione cruciale ai fini della equilibrata ricostruzione dei profili di responsabilità.

Il tema si pone anche in materia di “231”: la prova liberatoria per l’ente consiste nel provare che «*l’organo dirigente ha adottato ed efficacemente attuato prima della commissione del fatto, modelli di organizzazione e di gestione idonei a prevenire reati della specie di quello verificatesi*».

Pare a me evidente che la prova dell’ “efficace attuazione” ben può consistere nella prova di aver deputato funzioni e soggetti adeguati alla predisposizione di procedure, sistemi di verifica e *follow up*: un’attuazione – dunque – anche in forma indiretta.

5 Il dovere di vigilanza sugli assetti organizzativi e il modello 231

Con la riforma del diritto societario è venuto meno il dovere generale di vigilanza sulla gestione di cui al testo previgente dell’art. 2392 c.c., fonte di indebita

attribuzione di responsabilità oggettive agli amministratori: sul punto non si può che plaudere al legislatore.

Il dovere di vigilanza non è tuttavia scomparso: ha assunto declinazioni diverse adeguatamente circoscritte nell'oggetto, appropriatamente disciplinate nella forma, opportunamente coordinate nell'attuazione.

La disposizione specificamente dettata in materia stabilisce infatti, in primo luogo, che il consiglio di amministrazione "sulla base delle informazioni ricevute" valuta l'adeguatezza dell'assetto organizzativo, amministrativo e contabile della società (art. 2381, comma 3) e quindi anche sull'adeguatezza del modello 231.

Questa disposizione sembra, ad una prima lettura, circoscrivere il poterdovere di vigilanza sulla gestione da parte del consiglio come *plenum* alla disamina della relazione ad esso fornita dagli organi delegati.

E' ben vero il contrario, non solo nel senso che dovrà richiedersi, come si è detto, un supplemento di informativa ogni qualvolta se ne constati l'insufficienza, ma altresì nel senso che il consiglio dovrà accertarsi che siano espressamente precisate le caratteristiche dei modelli organizzativi e delle procedure, le verifiche in concreto effettuate per valutarne l'adeguatezza, gli eventuali difetti riscontrati, i miglioramenti adottati.

In conclusione: l'informativa non può limitarsi ad affermazioni apodittiche, dovendo, per contro, consentire al consiglio una valutazione in concreto dei sistemi adottati, delle procedure seguite per verificarne l'efficienza e l'efficacia, della correttezza e dell'idoneità, dunque, delle metodologie di organizzazione e di controllo poste in essere, attraverso, ad esempio, una sintetica esposizione dell'operato del sistema di controllo interno e dei suoi preposti. Non solo: è vero che gli amministratori non possono procedere ad atti individuali di ispezione, ma possono certamente proporli e deliberarli come collegio.

Questa conclusione non costituisce una mera articolazione o specificazione "aziendalistica" dei doveri degli amministratori, bensì l'assegnazione al dovere di vigilanza e alla conseguente responsabilità in caso di omissione di un ruolo centrale nel rapporto tra *plenum* e delegati.

In conclusione la valutazione dell'adeguatezza del sistema organizzativo - e, quindi, anche sul modello 231 - sulla base delle informazioni ricevute non esclude, anzi può invece, in casi particolari, imporre, che gli amministratori debbano richiedere informazioni ulteriori e/o proporre in deliberazione ulteriori indagini e verifiche (al fine, se del caso, di proporre e deliberare i provvedimenti correttivi che è ragionevole esigere da un buon amministratore).

6 Sistemi di controllo e "231": un esempio

In conclusione credo che si possa affermare che - pur nelle inevitabili contiguità - le categorie logico-giuridiche elaborate dal legislatore e dalla dottrina possano trovare, se razionalizzate, pratica applicazione nell'operatività ancorché sempre più complessa dell'impresa: merito, legalità, correttezza sono le compo-

menti in cui si articolano le decisioni degli amministratori e su cui si svolge, con soggetti e discipline differenziati, la funzione di controllo.

Un esempio può chiarire la rilevanza applicativa delle diverse categorie così come ricostruite, in un tentativo di inquadramento sistematico.

Si pensi ad una operazione di partecipazione ad un appalto internazionale.

Il controllo di merito concerne la convenienza dell'operazione, in termini di espansione del mercato, di redditività immediata o di redditività prospettica ed è assistito dalla *business judgment rule*.

Il controllo di legalità si appunterà sul rispetto delle normative interne (disciplina societaria e contrattuale, regolamento su operazioni con parti correlate, eventuali maggioranze statutarie qualificate, poteri di rappresentanza, ecc.) e dell'ordinamento straniero (normativa sugli investimenti esteri, normativa ambientale, normativa giuslavoristica).

Il controllo di correttezza dovrà verificare se siano state adottate le procedure informative e istruttorie tipiche in questa categoria di operazioni (perizie di *merchant bank* indipendenti, *financial planning*, *due diligence* e così via).

Con particolare riferimento al d.lgs. n. 231/2001 si dovrà verificare, in particolare in relazione alla tipologia dell'operazione che tutte le procedure *antibribery* siano state rispettate.

E i diversi organi dovranno esercitare la propria funzione di *controllo in forma diretta* – così, ad esempio, l'amministratore delegato –; in forma di *valutazione decisionale* – così il consiglio di amministrazione se l'operazione è di competenza collegiale – oppure di *informazione*, anche attiva, in caso di competenza degli esecutivi; in forma di *vigilanza*, se del caso ispettiva, dell'organo di controllo; di *supervisione informativa* sul rispetto delle regole di correttezza da parte del comitato audit di amministratori indipendenti.

7 La disciplina antiriciclaggio

La disciplina antiriciclaggio (d.lgs. n. 231/2007) si innesta anch'essa nel complesso reticolo della normativa sui controlli, articolandosi su alcune linee direttrici, che possono così sintetizzarsi.

Si individuano in primo luogo i soggetti destinatari della disciplina (Capo III, artt. 10 ss.): intermediari finanziari, professionisti, soggetti affini; produttori e commercianti di oggetti preziosi.

Si enucleano poi le operazioni, in cui, essenzialmente, l'uso del denaro – o del denaro per importi superiori a una determinata soglia [15.000,00 euro: cfr. art. 15, commi 3 e 4; art. 16, comma 1, lett. a) e b)] – costituisce elemento di sospetto di riciclaggio.

Si statuiscono, infine, i diversi obblighi procedurali: gli obblighi di verifica della clientela (artt. 15 ss.), semplificati (artt. 25 ss.) e rafforzati (artt. 28 ss.); gli obblighi di registrazione (artt. 36 ss.); gli obblighi di segnalazione (artt. 41 ss.), assistiti da un serio apparato sanzionatorio (artt. 55 ss.).

Le numerose regole organizzative e procedurali, in cui la disciplina antiriciclaggio si articola, si incardinano nel più generale alveo sistematico che, come si è detto, rappresenta una delle linee portanti dell'architettura di *governance* dell'impresa societaria, e cioè l'obbligo di dotarla di assetti organizzativi adeguati (cfr. art. 2381, commi 5 e 3, c.c.).

La legittimazione alla segnalazione di operazioni sospette – con espressa esenzione dal segreto professionale e dalle connesse responsabilità – è ancorata alla clausola generale di buona fede (cfr. art. 41, comma 6.).

Si tutela inoltre il principio di riservatezza sull'identità delle persone e dei professionisti che effettuano la segnalazione (cfr. art. 45, commi 1 e 2).

La normativa primaria si articola poi in disposizioni specifiche (art. 37) sull'archivio unico informatico (completato dalle norme secondarie di Banca d'Italia: art. 37, comma 7), sul Registro per i professionisti e i revisori contabili (art. 38), sulle procedure di esame delle operazioni (art. 42, comma 1), sull'adeguata formazione del personale (art. 54).

Il legislatore ha infine assegnato un ruolo specifico sia agli organi di controllo endosocietario (cfr. art. 52) sia alle autorità di vigilanza che devono espressamente verificare «l'adeguatezza degli assetti organizzativi e procedurali» (art. 53).

Un sistema “programmaticamente” organico assistito da sanzioni sia penali (art. 55) sia amministrative, in particolare in tema di “Organizzazione amministrativa e procedure di controllo interno” (art. 56).

Un ulteriore tassello nel “reticolo” dei controlli.

8 Il d.lgs. 27 gennaio 2010, n. 39: il comitato per il controllo interno

Il legislatore, nell'intervento legislativo di attuazione della direttiva comunitaria in materia di revisione legale dei conti, ha reso ancor più complesso il quadro sinora delineato, in particolare sotto il profilo dei rapporti tra il collegio sindacale e il comitato per il controllo interno (ora anche “di gestione dei rischi”) previsto, per le società quotate, dal Codice di Autodisciplina.

Infatti il d.lgs. 27 gennaio 2010 n. 39, che ha dato attuazione alla Direttiva 2006/43/CE relativa alla revisione legale dei conti annuali e dei conti consolidati, ha dettato per gli enti c.d. “di interesse pubblico”, all'art. 19, una disposizione specifica in tema di controllo interno.

La norma stabilisce che il «comitato per il controllo interno e la revisione contabile» «si identifica», nel modello tradizionale, con il collegio sindacale; nel modello dualistico con il consiglio di sorveglianza a meno che ad esso siano attribuite funzioni strategiche [art. 2409 *terdecies*, comma 1, lett. f *bis*]), nel qual caso il comitato deve essere costituito al suo interno; nel sistema monistico con il comitato per il controllo sulla gestione.

Di là dalla singolarità della formulazione legislativa – “il comitato ... si identifica con ...” – ritengo che le nuove disposizioni non abbiano introdotto un nuovo

organo, ma abbiano, per contro, ampliato (o precisato) le funzioni dell'organo di controllo (collegio sindacale, consiglio di sorveglianza – o comitato costituito al suo interno, comitato per il controllo sulla gestione).

Si deve poi osservare che diverse competenze introdotte con la riforma, ancorché apparentemente “nuove” sono, a mio parere, ricomprese, pressoché *in toto*, nelle funzioni degli organi di controllo.

Ad esempio la vigilanza su il “processo di informativa finanziaria” è, a ben vedere, una specificazione del controllo sul rispetto della legge, delle regole di correttezza gestionale e dell'adeguatezza degli assetti organizzativi.

La vigilanza sull'“efficacia del sistema di controllo interno, di revisione interna, se applicabile e di gestione del rischio”, in ragione di quanto poco sopra argomentato, ben può ritenersi ricompresa – ancorché utilmente precisata come competenza espressa – nella vigilanza sugli assetti organizzativi, di cui controllo interno e gestione del rischio costituiscono un segmento procedurale, di complessità graduata in ragione delle caratteristiche dimensionali e operative dell'impresa.

Per quanto riguarda poi la vigilanza sull'indipendenza del revisore, con particolare riferimento ai non *audit services*, può dirsi, nuovamente, che si tratta del controllo su di una, sia pur specifica, disposizione di legge: la novità della disposizione consiste, quindi, nell'imporre una verifica precisamente individuata nell'oggetto, che può, allora, richiedere atti di ispezione espressamente dedicati.

Il punto più critico è, a mio parere, rappresentato dalla funzione di vigilanza su “la revisione legale dei conti annuali e dei conti consolidati”.

Ritengo che l'interpretazione della nuova disposizione debba essere rigorosamente restrittiva e che non possa dunque reputarsi surrettiziamente reintrodotta una competenza contabile in capo al collegio sindacale.

In altre parole l'organo di controllo dovrà sì esercitare una vigilanza specifica in materia, ma limitandosi ad una supervisione sintetica e meramente procedurale sulla conduzione dell'attività di revisione.

Si tratta, in ogni caso, di materia che richiede, a mio avviso, come preciserò nelle conclusioni, un'opportuna revisione legislativa.

9 Il Codice di Autodisciplina: centralità della gestione dei rischi

Il Codice di Autodisciplina (l'ultima versione è del luglio 2015), apporta un significativo contributo in questa materia, fornendo una soluzione ai problemi di sovrapposizione e di coordinamento che il “reticolo” dei controlli imponeva, come da tempo ebbi modo di sottolineare.

Il Codice, precisa, anzitutto, che il sistema di controllo interno è anche sistema di gestione dei rischi, focalizzando così molto opportunamente e in coerenza con le indicazioni comunitarie l'oggetto primario delle procedure e delle strutture organizzative di *monitoring*.

Si prescrive altresì che il sistema sia “integrato nei più generali assetti organizzativi e di governo societario”. La precisazione non è meramente lessicale ma esprime per contro la necessità che il sistema di controllo non sia una procedura organizzativa “*a latere*” o “*ex post*” bensì un elemento coordinato e omogeneo all’intero assetto organizzativo dell’impresa. Il sistema si emancipa da una concezione per così dire “sanzionatoria” per configurarsi invece come elemento della “conduzione dell’impresa coerente con gli obiettivi aziendali” e come strumento di attuazione del principio di corretta gestione, sotto il profilo della completezza informativa e procedurale che si estrinseca nella “assunzione di decisioni consapevoli”.

Le diverse funzioni coinvolte – “l’amministratore incaricato del sistema di controllo interno e di gestione dei rischi”, il comitato controllo e rischi, il responsabile della funzione di *internal audit*, gli altri ruoli e funzioni aziendali, il collegio sindacale – sono espressamente contemplate con una puntuale specificazione dei ruoli.

Si consente la composizione del comitato con amministratori non esecutivi, in maggioranza indipendenti, ma la regola primaria, se pur derogabile, è ora nel senso che gli amministratori debbano essere tutti indipendenti.

Il comitato deve rendere un “parere” sull’intero sistema e, oltre ad assolvere compiti di valutazione e di informazione (cfr. art. 7, comma 1), “valuta – ecco la novità – con cadenza almeno annuale il piano di lavoro predisposto dal responsabile della funzione di *internal audit* e ne “monitorea l’autonomia, adeguatezza, efficacia ed efficienza”.

L’amministratore incaricato verifica l’evoluzione del sistema, può chiedere verifiche *ad hoc* e riferisce tempestivamente al comitato problemi e criticità.

Il Codice contiene una nuova prescrizione di significativo valore sia sistematico sia operativo disponendo che «l’emittente prevede modalità di coordinamento tra i soggetti sopra elencati al fine di massimizzare l’efficienza del sistema di controllo interno e di gestione dei rischi e di ridurre le duplicazioni di attività».

Si vuole così molto opportunamente indicare la strada per tentare di superare, attraverso – riterrei – un apposito regolamento, il problema del coordinamento tra organi e delle duplicazioni dei compiti, che, come preciserò nelle conclusioni, è, a mio parere, il nodo centrale in questa complessa materia.

In fondo la conoscenza in concreto delle realtà aziendali può condurre a superare quelle inefficienze da sovrapposizioni e quelle «aporie da reticolo» (di contro alle «sinergie di sistema») di cui il legislatore primario non si è, ad oggi, fatto carico.

La legislazione bancaria e la legislazione assicurativa sono state, e sono anticipatrici di soluzioni, in parte poi estese alla regolamentazione delle società quotate e anche delle società azionarie di diritto comune, in parte fonte di soluzioni che possono orientare le *best practices* in materia².

II

10 Il d.lgs. 231/2001: profili generali

Le funzioni di controllo ora passate in rassegna si intersecano con i compiti dell'organismo di vigilanza *ex d.lgs. n. 231/2001*³.

La materia si collega del resto, strettamente, alla tematica degli assetti organizzativi. Infatti, in linea di principio, la predisposizione del modello 231 è, tecnicamente, un onere: la sanzione per la mancata adozione, in base alla legge speciale, può essere comminata *ex post*, come sanzione amministrativa, in caso di perpetrazione del reato nell'interesse dell'ente.

Vero è anche però che l'art. 2381 impone agli amministratori di dotare la società di assetti organizzativi adeguati: là dove il rischio da reato, e quindi il rischio di sanzione per la società, non sia insignificante, la mancata predisposizione del modello – come ha sancito il Tribunale di Milano – costituisce anche un inadempimento agli obblighi degli amministratori di predisporre assetti organizzativi adeguati.

Il legislatore è intervenuto in materia con la legge di stabilità 2012 (l. 12 novembre 2011, n. 183), che all'art. 14, comma 12, ha modificato l'art. 6, d.lgs. n. 231/2001, inserendo il comma 4 *bis* ai sensi del quale «*nelle società di capitali il collegio sindacale, il consiglio di sorveglianza e il comitato di controllo della gestione possono svolgere le funzioni dell'organismo di vigilanza...*».

La norma ha suscitato reazioni opposte.

Prescindendo dalle posizioni ispirate a mero corporativismo, credo che il legislatore abbia operato una condivisibile scelta di fiducia nei confronti della maturità e ragionevolezza dell'autonomia privata.

Saranno infatti gli operatori che, in ragione delle dimensioni dell'impresa, della tipologia dei rischi, della complessità dell'attività, della specificità differenziale oppure invece della analogia rispetto alla tipologia e alle procedure di verifica e di vigilanza dell'organo di controllo, sapranno valutare se la "concentrazione" possa essere una soluzione semplificatrice, pur senza diminuzione dell'efficacia dei controlli oppure invece se la "separazione" garantisca una migliore specializzazione e quindi una maggiore puntualità di intervento rispetto alla concreta configurazione della società e dell'impresa.

Si deve però sottolineare che l'autonomia privata dovrà valutare con particolare attenzione se, considerata la complessità dell'impresa, la tipologia dei rischi da reato, le caratteristiche dei controlli necessari non impongano piuttosto di mantenere l'ODV come organo distinto al fine di una vigilanza più "specialistica" e, quindi, più efficace.

Pena il rischio che il modello di prevenzione non sia considerato efficace.

Di là dai profili penalistici, la disciplina del modello 231 e dell'ODV suscita non pochi problemi interpretativi.

11 I modelli di organizzazione

In primo luogo vi è da chiedersi se i modelli di organizzazione e di gestione idonei a prevenire i reati (art. 6), coincidano con le adeguate strutture di controllo interno di cui al testo unico della finanza e all'art. 2381, comma 5, c.c. La risposta credo debba essere negativa anche se, come si è anticipato meglio si dirà ne sono parte integrante, ed è in questo senso che si sono orientate le associazioni di categoria, nell'elaborazione di *guidelines*⁴ specifiche per la costruzione di modelli di prevenzione dei reati, seguendo la specifica indicazione legislativa (art. 6, comma 3).

Un punto di intersezione è altresì rappresentato dall'evoluzione dei "sistemi di responsabilità societaria" da *responsabilità diretta a responsabilità per omessa vigilanza*.

In questa prospettiva la nuova disciplina fornisce una duplice indicazione.

In primo luogo «l'organo dirigente» deve aver «adottato ed efficacemente attuato modelli di organizzazione e di gestione idonei a prevenire reati».

Inoltre il «compito di vigilare sul funzionamento e l'osservanza dei modelli e di curare il loro aggiornamento» deve essere affidato «a un organismo dell'ente dotato di autonomi poteri di iniziativa e di controllo» [art. 6, comma 1, lett. b)].

Ecco dunque la necessità di stabilire se l'adozione del modello costituisca una competenza necessariamente collegiale, o se invece, come ritengo possibile, possa essere delegata ad alcuni o uno degli amministratori. In questa seconda ipotesi il consiglio di amministrazione sarà tenuto ad una sorveglianza per così dire di secondo grado: sull'operato degli amministratori delegati, in prima istanza, sull'operato dell'«organismo» deputato al controllo [art. 6, comma 1, lett. b)], in seconda istanza.

L'introduzione di questo nuovo «organismo» solleva l'interrogativo se esso si configuri come un vero e proprio "organo societario" e, in ogni caso, come si configuri la responsabilità dell'organismo stesso in rapporto con la responsabilità degli amministratori e dei sindaci.

12 ODV: profili di qualificazione

L'attribuzione di «autonomi poteri di iniziativa e di controllo» [art. 6, comma 1, lett. b)] potrebbe far propendere per la prima alternativa. Ma la soluzione non convince. L'istituzione dell'ODV è, tecnicamente, un onere, non un obbligo e ciò non consente di qualificarlo come organo societario, che non può essere "opzionale", anche se, come meglio si dirà, l'adozione del modello e la costituzione dell'ODV possono configurarsi come obbligo derivato dal dovere generale di dotare la società di assetti organizzativi adeguati. Non ritengo in ogni caso che la responsabilità del consiglio di amministrazione possa ritenersi esclusa sulla base della mera istituzione dell'ODV, ma ritengo che essa sia, tuttavia, circoscritta al più tenue *standard* della responsabilità per omessa vigilanza sull'operatività «dell'organismo» oppure, ove l'istituzione di quest'ultimo sia stata demandata

all'amministratore delegato (o al comitato esecutivo), per omessa vigilanza sull'esercizio del dovere di vigilanza da parte dell'amministratore delegato nei confronti dell'organismo.

In punto poi di imputazione di responsabilità civile si ripropone il delicato problema della riconoscibilità di responsabilità parziarie, con il superamento delle inefficienze da *deep-pocket* conseguenti ai vincoli di solidarietà⁵.

13 La composizione dell'ODV. Efficacia, competenza, imparzialità, indipendenza

Il tema è lasciato all'autonomia privata. Tuttavia, poiché l'organismo è parte del modello, anche sotto il profilo della sua composizione si deve valutare l'idoneità a prevenire i reati contenuti nel *Katalog* del d.lgs. n. 231/2001.

Esso deve allora rispondere, a mio parere, a requisiti di efficacia, di competenza, di imparzialità e di indipendenza.

La dimensione dell'impresa rileva in punto di numerosità dei componenti. Soltanto dimensioni minori, in termini di fatturato, di articolazione del gruppo, di tassi di rischio meno elevati – si pensi invece a settori quali gli appalti pubblici o lo smaltimento dei rifiuti – consentono l'*organo monocratico*; diversamente deve preferirsi l'*organo collegiale*, per gli evidenti vantaggi in termini di articolazione del lavoro e di ponderazione nelle valutazioni.

Quanto alla composizione è da preferirsi, a mio avviso, la composizione mista di *inside* (amministratore indipendente o sindaco o responsabile del controllo interno) e di esterni (consulenti)⁶.

La composizione mista di interni (preferibilmente "indipendenti") e di esterni consente infatti, a mio parere, di raggiungere un equilibrio apprezzabile tra conoscenza dell'impresa – e quindi maggiore idoneità ad individuare e controllare le aree di rischio più rilevanti – e indipendenza dalla struttura che rafforza l'autonomia e l'imparzialità dei controlli e dei giudizi.

Deve escludersi l'idoneità a farne parte degli amministratori esecutivi o di dipendenti in staff all'amministratore delegato. Ma non pare neppure adeguata, in linea di principio, fatte salve realtà particolari, ad esempio di enti con dimensioni ridotte, la soluzione di ODV composti totalmente da consulenti esterni: il componente "interno", se dotato di sufficiente grado di indipendenza, è anche più avvertito della realtà aziendale e maggiormente in grado di focalizzare le aree di rischio.

L'indipendenza, a mio parere, deve essere caratteristica dell'*organismo nel suo complesso*, non necessariamente di ogni suo componente, come qualcuno ha sostenuto⁷.

Nessun indice normativo specifico autorizza una lettura così restrittiva, anche perché il concetto di indipendenza è, nel nostro sistema, nozione polisemica quanto meno nella diversa declinazione che essa assume con riferimento ai sindaci, da un lato, agli amministratori dall'altro lato.

Mi pare invece forzato discendere dal dato testuale – “organismo” – un necessario incardinamento strutturale dello stesso nell’organizzazione dell’impresa, che non trova fondamento testuale, salva l’ipotesi, ovviamente, in cui l’ODV “coincide” con l’organo di controllo.

La riferibilità all’ente si esaurisce nella “preposizione alla funzione” che può essere attribuita anche ad un organismo composto di soggetti esterni, fermo restando che, essendo l’ODV parte di un modello, cioè di un segmento di organizzazione dell’impresa, esso dovrà opportunamente porsi in relazione operativa con le funzioni aziendali rilevanti al fine di verificare l’efficienza e il rispetto del modello stesso.

L’attribuzione delle funzioni di ODV all’organo dirigente, ad esempio al consiglio di amministrazione, è consentita per gli enti «di piccola dimensione» (art. 6, comma 4), sulla cui entità potrebbero prospettarsi interpretazioni assai divergenti.

Queste indicazioni sembrano, almeno in parte, confermate dalla prassi.

Da una ricerca condotta da ASSONIME⁸ risulta che, nelle quotate, l’ODV ha natura collegiale nel 94% dei casi, di regola – nell’80% dei casi – di 3 membri; la percentuale di ODV con componenti soltanto interni (amministratori e dirigenti, ma anche sindaci) è pari al 55%, mentre gli ODV a composizione mista sono soltanto il 16%.

14 Nomina; durata in carica; revoca; responsabilità

La nomina spetta al Consiglio di Amministrazione, perché all’assemblea non possono più attribuirsi competenze gestionali di là da quelle stabilite per legge.

Nelle società chiuse può prevedersi l’autorizzazione assembleare (*ex art.* 2364, n. 5, c.c.) ed eventualmente il parere favorevole del collegio sindacale.

Nelle società a modello dualistico la nomina dell’ODV può affidarsi alternativamente al consiglio di gestione o al consiglio di sorveglianza oppure al primo subordinatamente all’autorizzazione del secondo.

Per quanto riguarda la *durata* in carica è preferibile la nomina per un periodo temporale determinato, ad esempio per un triennio o comunque per un periodo pari alla durata in carica dell’organo gestorio.

Anche la *revoca* dell’organismo non è espressamente disciplinata. Ove si ritenesse di applicare analogicamente le norme relative al contratto d’opera intellettuale o al contratto d’opera o all’appalto di servizi, si dovrebbe concludere nel senso che l’ente ha diritto di recedere unilateralmente dal contratto, anche in assenza di giusta causa, corrispondendo spese e compenso maturato (*arg. ex art.* 2237, art. 2227 e art. 1671 c.c.).

Si potrebbe però fare riferimento al contratto di mandato sostenendo che, ma l’illusione non pare così agevole, dalla natura del rapporto deve evincersi l’irrevocabilità dell’incarico, in applicazione analogica dell’articolo 1723 cod. civ., fermo restando che la revoca dell’incarico sarebbe pur sempre legittima anche se in concreto prevenuta dal deterrente, per il vero non particolarmente grave, del-

la responsabilità per danni, salvo che ricorra una giusta causa. Si potrebbe anche tentare di sostenere che il mandato è stato in questo caso conferito non tanto nell'interesse del mandatario (tesi che sembra davvero improponibile) bensì nell'interesse di terzi, e cioè i partecipanti dell'ente, i creditori, i terzi in generale e che quindi la revoca del mandato *ex art. 1723*, comma 2, può avvenire soltanto per giusta causa.

Questa interpretazione potrebbe essere corroborata in base all'argomento che gli organi societari di controllo sono revocabili solo per giusta causa anche se, come è noto, ciò vale per il collegio sindacale (art. 2400, comma 2, c.c.) ma non per il consiglio di sorveglianza per cui è prevista soltanto la maggioranza qualificata (art. 2409 *duodecies*, comma 5) e neppure per il comitato per il controllo sulla gestione.

In conclusione, anche il tema della revoca dell'ODV avrebbe potuto essere espressamente affrontato dal legislatore.

Nei gruppi non pare necessario istituire, come già si è detto, ODV in tutte le società senza possibilità di deroga; necessaria è invece la previsione di procedure di raccordo tra ODV delle capogruppo e ODV delle controllate.

Per le società di gruppo di minori dimensioni possono anche contemplarsi organi monocratici, eventualmente composti dal medesimo soggetto, ma un'articolazione di gruppo – così come avviene per gli organi societari di controllo – pare necessaria per impedire possibili rimproveri di inidoneità del modello per un eccesso di concentrazione di poteri che aumenta i rischi di “cattura” dei controllori e di *default* nei controlli.

15 Poteri e responsabilità

In tema di competenze dell'ODV l'incertezza è davvero elevata.

Nell'esperienza pratica, a fronte del silenzio legislativo, si riscontrano infatti interpretazioni variabili e oscillanti.

Le funzioni dell'ODV devono invece ricostruirsi in relazione all'inserimento dell'organo in uno specifico segmento organizzativo costituito dal “modello” – a sua volta articolato in procedure, mappature dei rischi, codice etico, sistema sanzionatorio – diretto alla prevenzione dei reati.

L'ODV, di conseguenza, non è investito di una sorta di potere di supervisione trasversale e di carattere generale su tutti i settori e le funzioni dell'organizzazione d'impresa che possano essere in qualche misura investiti da fatti di reato.

Deve invece sussistere una correlazione stretta tra potere-dovere di controllo e reati da prevenire ai sensi e per gli effetti del d.lgs. n. 231/2001.

Ad esempio, in materia di bilancio l'ODV non può ritenersi investito di una sorta di funzione generale di revisione di “secondo grado”; dovrà, per contro, anche in relazione alla tipologia dell'impresa, individuare le aree della formazione del bilancio in cui potrebbe essere più probabile la realizzazione di fatti di reato.

Così in società di costruzioni che operino nel campo degli appalti pubblici, il controllo sulle procedure dei rapporti con la P.A. dovrà essere particolarmente attento.

Così in società in cui il magazzino sia rapidamente deperibile l'ODV dovrà concentrare l'attenzione sulle procedure di verifica della consistenza del medesimo.

Il controllo ben può essere di "secondo grado", realizzato cioè attraverso specifiche richieste di informazione alla struttura aziendale, ai preposti del controllo interno, al comitato audit, al collegio sindacale.

Argomentando analogicamente dalle norme sul collegio sindacale relative allo scambio di informazioni, con i soggetti incaricati del controllo contabile (art. 2409 *septies*) e con gli organi di controllo delle controllate (art. 2403 *bis*, comma 2), si può anzi concludere che lo scambio informativo è doveroso, e che da ciò consegue un obbligo di riunioni periodiche, senza vincoli di numero, ma almeno una volta per esercizio, anche al fine di evitare che il legittimo affidamento sui controlli altrui non si traduca in un generalizzato "conflitto di competenza negativa".

La responsabilità dei componenti dell'ODV deve essere riportata ai canoni della *responsabilità professionale del professionista* piuttosto che alla responsabilità di amministratori e sindaci, e limitata dunque, al dolo e alla colpa grave (arg. ex art. 2236 c.c.).

16 L'istituzione del modello 231: onere e obbligo?

In linea di principio la predisposizione del modello 231 è, tecnicamente, un onere: la sanzione per la mancata adozione, in base alla legge speciale, può essere comminata *ex post*, come sanzione amministrativa, in caso di perpetrazione del reato nell'interesse dell'ente.

Vero è anche però che l'art. 2381 impone agli amministratori di dotare la società di assetti organizzativi adeguati: là dove il rischio da reato, e quindi il rischio di sanzione per la società, non sia insignificante, la mancata predisposizione del modello – come ha sancito il Tribunale di Milano⁹ – costituisce anche un inadempimento agli obblighi degli amministratori di predisporre assetti organizzativi adeguati.

17 D.lgs. n. 231/2001 e gruppi di società: la responsabilità non si estende oltre i confini del singolo ente

La responsabilità amministrativa "di gruppo", cioè della controllante (o della controllata), qualora un reato sia commesso da esponenti dell'una nell'interesse dell'altra, non è prevista dal legislatore.

Si potrebbe essere tentati di colmare il vuoto normativo interpretando estensivamente il combinato disposto di cui agli artt. 5, comma 1, e 7, commi 1 e 2, d.lgs. n. 231/2001.

Più precisamente si potrebbe immaginare di sostenere che «l'ente (società controllata)» è «responsabile per i reati commessi nel suo interesse o a suo vantaggio» «da persone che» (in quanto esponenti della società controllante che esercita attività di direzione di gruppo) «esercitano anche di fatto la gestione e il controllo dello stesso» [art. 5, comma 1, lett. b)]. Reciprocamente si potrebbe giungere a ritenere che «l'ente (società controllante)» è «responsabile per i reati commessi nel suo interesse o a suo vantaggio» «da persone (che in quanto esponenti della società controllata sottoposta alla direzione di gruppo della controllante sono) sottoposte alla direzione o alla vigilanza di uno dei soggetti di cui alla lettera a)» (in quanto esponenti della società controllante esercente la direzione di gruppo).

La lettura estensiva, dovrebbe in ogni caso fondarsi sulla relazione di controllo, *rectius* sull'esercizio della direzione unitaria, non già sull'abuso della stessa. In altri termini se si accogliesse l'idea che «gestione e controllo» e «direzione e vigilanza» sono rapporti funzionali predicabili, mediamente, anche alle persone giuridiche, non si potrebbe arbitrariamente restringere l'applicazione della norma sanzionatoria alle ipotesi di abuso: la fisiologia del gruppo, in definitiva, dovrebbe fondare l'applicazione estensiva della disciplina, non la sua deviazione patologica.

Ma la lettura estensiva non convince. Le disposizioni di cui all'art. 5, lett. b) e all'art. 7, comma 1, d.lgs. n. 231/2001 si riferiscono a persone fisiche sottoposte alla direzione e alla vigilanza di altri soggetti a loro volta persone fisiche, non a società sottoposte a direzione e coordinamento.

Una diversa interpretazione urterebbe contro il divieto di applicazione analogica di norma (sicuramente) eccezionale.

L'interpretazione accolta trova del resto ulteriore conferma nel dettato normativo: l'art. 5, comma 1, lett. a), prevede espressamente che la funzione apicale rilevante può essere svolta non soltanto nell'ente ma anche in «una sua unità organizzativa dotata di autonomia finanziaria e funzionale». Da ciò si evince che il legislatore ha inteso sì ricomprendere espressamente nel perimetro dell'ente le divisioni aziendali autonome, ma soltanto esse, al fine di evitare il dubbio che si potesse equipararle ad enti collegati ma soggettivamente separati (quali le società controllate).

In altre parole l'espressa inclusione delle unità operative interne all'ente conferma, a contrario, che enti con soggettività distinte, ancorché in qualche modo collegati all'ente, vuoi da relazioni di partecipazione vuoi da relazioni gestionali, sono esclusi dal perimetro di rilevanza della responsabilità penale.

18 Modelli di prevenzione dei reati e gruppi di società

Altro è dire, sul terreno “argomentativo”, che nella predisposizione del modello, ai fini della migliore prevenzione dei reati nei singoli enti-società, debba essere tenuta in considerazione la dimensione del gruppo, senza che per questo debba venire meno la soggettività separata di tutte le singole società agli effetti dell’applicazione della disciplina della responsabilità amministrativa, che non può “risalire” dalla controllata alla capogruppo.

La predisposizione di sistemi di controllo di gruppo e di codici etici di gruppo risponde del resto ad una prassi consolidata⁹: pare, anche sotto questo profilo, inevitabile che i modelli organizzativi di prevenzione dei reati siano plasmati sulla realtà del gruppo.

Dall’assunto secondo cui l’istituzione dell’ODV non si configura tecnicamente come obbligo e che la disciplina dell’attività di coordinamento è sì disciplina societaria ma anche dell’impresa (come si evince, oltre al resto, dalla previsione di un criterio di corretta gestione non solo societaria ma anche imprenditoriale: art. 2497, comma 1, c.c.) credo che possa trarsi la conclusione che, nei gruppi, non è aprioristicamente configurabile siccome necessaria l’istituzione di tanti ODV quante sono le società del gruppo ma possano istituirsi ODV nelle società più importanti da coordinarsi con l’ODV della capogruppo a cui possono affidarsi i compiti di vigilanza non solo relativi alla capogruppo stessa ma anche relativi ad altre società del gruppo. Più precisamente si tratterà di un medesimo ODV che, proprio in quanto non qualificabile come organo societario, svolgerà la sua funzione per più società; l’ODV della capogruppo svolge una funzione di coordinamento ma non in quanto ODV di gruppo – qualificazione che urta contro il sistema di soggettività separate su cui si fonda il d.lgs. n. 231/2001 – bensì come ODV (della capogruppo) che, in ragione della dimensione del gruppo, opera per il migliore funzionamento degli ODV delle singole società.

Il tema merita un approfondimento.

19 Interesse di terzi, interesse di gruppo e responsabilità dell’ente. Rilevanza di un coordinamento di gruppo per la prevenzione dei reati

La disciplina in materia di responsabilità amministrativa della persona giuridica, prevede un’ipotesi tipizzata di esclusione della responsabilità in ragione dell’interesse perseguito dal soggetto apicale.

Più precisamente l’art. 5, comma 2, prevede che «l’ente non risponde se le persone indicate nel comma 1° hanno agito nell’interesse esclusivo proprio o di terzi».

Da ciò consegue che se il soggetto apicale ha agito esclusivamente, e non anche, nell’interesse di un ente terzo rispetto all’ente con cui intercorre il rapporto

di amministrazione, di rappresentanza, di direzione, a quest'ultimo non può essere ascritta la responsabilità amministrativa.

Argomentando a contrario dalla accolta tesi della "responsabilità atomistica", si dovrebbe allora dedurre che ove l'apicale agisca nell'interesse, esclusivo, della controllante la responsabilità della controllata sarebbe esclusa.

Ciò che pare però controvertibile è la configurabilità di un agire nell'interesse, esclusivo, appunto, della controllante. La fattispecie potrebbe ipotizzarsi nella mera e remota ipotesi di un abuso conclamato di direzione unitaria, così esorbitante dal paradigma della correttezza gestionale, societaria e imprenditoriale, da concretare un vero e proprio atto di dominio, di autocratico imperio della controllante nei confronti dell'apicale della controllata al fine di coartarlo o di indurlo al compimento di atti che non configurino in alcun modo un potenziale risultato anche parzialmente positivo (cioè un interesse o un vantaggio) per la controllata, ma si risolvano invece, per quest'ultima, in atti del tutto estranei alla propria sfera di interesse.

Nella realtà economica l'ipotesi pare confinata, se non nel caso di scuola, in un'area di marginalità. Pare invece più plausibile, e corrispondente alla casistica prevalente, l'ipotesi in cui l'interesse perseguito è anche l'interesse della controllante oppure l'interesse di gruppo, inteso come interesse comune alla controllante e alle società controllate.

Questa lettura della norma speciale (l'art. 5, comma 2, d.lgs. n. 231/2001 è corroborata dalla innovata disciplina dei gruppi, *rectius* dalla direzione e coordinamento di società).

Il riconoscimento della legittimità della direzione unitaria (nei limiti della correttezza gestionale), la "canonizzazione" dell'interesse di gruppo, anche con pregiudizio dell'interesse della controllata nel limite dei vantaggi compensativi¹¹, la statuizione della presunzione di sussistenza della direzione unitaria in presenza del controllo, consente di affermare che la distinta personalità giuridica delle società del gruppo non consente di affermare, per ciò solo, che l'agire nell'interesse della controllante significa, per ciò solo, agire nell'interesse esclusivo di terzi.

Vero è anche però che, come è stato convincentemente sostenuto¹² nessun ragionamento presuntivo può essere effettuato sulla base della mera esistenza del rapporto infragruppo, che l'agire nell'interesse della capogruppo o nell'interesse di gruppo deve essere provato in concreto e che ciò non consente, in ogni caso, di estendere la responsabilità alla capogruppo, ma soltanto di valutare se l'interesse perseguito sia effettivamente un interesse esclusivamente terzo.

Da quanto sopra discende una prima conclusione: nell'ambito del gruppo, e in particolare là dove vi sia direzione e coordinamento di gruppo, è interesse della società controllata vigilare affinché l'interesse di gruppo sia correttamente perseguito in quanto il *reato commesso nell'interesse della capogruppo non può, per ciò solo, essere qualificato come reato perseguito nell'esclusivo interesse di terzi*.

Sotto un diverso ma speculare profilo, di ordine più propriamente civilistico, la società capogruppo ha un interesse proprio, e concreto, a vigilare affinché nel-

la controllata non si verificano reati nell'interesse o a vantaggio della controllata stessa, ma neppure – per le ragioni suesposte – nell'interesse del gruppo o della capogruppo.

Infatti le conseguenze dell'iscrizione alla controllata di fatti rilevanti sul piano della responsabilità amministrativa, in particolare l'irrogazione di sanzioni pecuniarie o di provvedimenti interdittivi, che possono incidere in misura pesantemente negativa sul patrimonio della controllata, si riverberano indirettamente o possono riverberarsi sul valore della partecipazione.

Nei limiti precisati si può quindi concludere che, fermo restando il carattere "atomistico" della responsabilità amministrativa delle persone giuridiche, vi è un interesse sia della società capogruppo sia delle società controllate a che la prevenzione dei reati sia oggetto di presidi specifici a livello di gruppo.

20 Assetti organizzativi e gruppi di società. I regolamenti di gruppo come strumento di *governance* anche in relazione al d.lgs. n. 231/2001

La riforma del diritto societario ha elevato, come già si è osservato, i principi di corretta amministrazione a clausola generale di comportamento degli amministratori (cfr. art. 2403 c.c.), prima espressamente contemplata soltanto per le società quotate [arg. ex art. 149, lett. b), t.u.f.].

Il rispetto delle regole, anche tecniche e non solo giuridiche, di buona gestione è, dunque, oggi, norma di diritto comune.

Inoltre il paradigma degli *assetti organizzativi adeguati*, assurge a canone necessario di organizzazione interna dell'impresa, sul piano gestionale, amministrativo e contabile, e, conseguentemente, a direttrice fisiologica dell'attività, strumento di tracciabilità dei processi, criterio di valutazione della responsabilità di amministratori, dirigenti e controllori.

Dalle considerazioni sinteticamente poco sopra svolte sul carattere ormai sistematico della disciplina del gruppo discende poi che l'adeguatezza degli assetti organizzativi non può essere circoscritta alla società-isola, ma deve essere considerata necessariamente nella dimensione di gruppo.

In altri termini se è vero che l'attività di direzione e coordinamento è legittima ma deve essere esercitata entro il limite della correttezza gestionale societaria e amministrativa (arg. ex art. 2497, comma 1), se è vero che amministrazione, controllo, flussi informativi, rappresentazione contabile, relazione sulla *governance*, non si esauriscono nei ristretti confini della singola società ma investono direttamente e immediatamente la dimensione del gruppo, è anche vero allora che anche gli assetti organizzativi trascendono il perimetro delle singole persone giuridiche ed assumono rilevanza di gruppo.

Ed è in questo contesto, dunque, che il modello di prevenzione del reato, come segmento della più ampia fattispecie degli assetti organizzativi, non può prescindere dalla dimensione del gruppo. Senza poter entrare qui nei dettagli

dell'articolazione operativa dei modelli, mi limito a segnalare come, a mio avviso, un utile strumento di coordinamento, anche ai fini del d.lgs. n. 231/2001, possa ravvisarsi nel regolamento di gruppo.

III

21 Il problema: il coordinamento tra istanze e organi di controllo

La materia dei controlli societari richiede, a mio parere, una razionalizzazione normativa.

Oltre ad eliminare le sovrapposizioni di funzioni, che, pur operando, in parte come forme di cooperazione sinergica si configurano, per plurimi profili, come vere e proprie duplicazioni, è necessario fornire una soluzione al problema centrale sia sul terreno del riassetto sistematico di una sezione complessa e articolata dell'ordinamento societario sia sul piano della concreta operatività della gestione.

E il problema centrale consiste, a mio avviso, nell'individuare regole efficaci per il coordinamento tra organi e funzioni, questione peraltro strettamente connessa al tema delle sovrapposizioni.

Gli operatori si chiedono, infatti, come introdurre un nesso funzionale e operativo che conduca ad omogenea se pur articolata unità i diversi segmenti che compongono l'intero meccanismo dei controlli e cioè i rapporti tra funzioni (le diverse fattispecie di controllo) e organi ad esse deputati (sindaci, revisori, amministratori indipendenti, amministratori di minoranza, *leading independent director*, comitato audit, preposto al controllo interno, responsabile dei documenti contabili, organismo di vigilanza, responsabile antiriciclaggio, ecc.). Problema che si acuisce nei settori vigilati – banche e assicurazioni – ove si aggiungono le norme speciali, primarie e secondarie, e le Istruzioni dell'Organo di Vigilanza.

Abbiamo visto che la normativa primaria, la disciplina regolamentare, il Codice di Autodisciplina, la prassi aziendale hanno additato linee direttrici e soluzioni operative.

Ma il quadro regolatorio rimane, a mio parere, frammentario e meritevole – ribadisco – di razionalizzazione.

22 Proposte di riforma: la società per azioni

Le proposte di modificazione legislativa della disciplina della società per azioni che mi sento di suggerire sono le seguenti:

- (i) attribuire espressamente all'organo di controllo – collegio sindacale, comitato di controllo all'interno del consiglio di sorveglianza, comita-

- to per il controllo sulla gestione o nelle società quotate, se previsto dallo Statuto, comitato controllo e rischi – la funzione di coordinamento di tutte le istanze di controllo interno alla società;
- (ii) prevedere che le procedure e le modalità di coordinamento tra organi e funzioni di controllo siano disciplinate da un apposito regolamento adottato dal consiglio di amministrazione;
 - (iii) prevedere l'obbligo periodico – ad esempio trimestrale – di relazione al consiglio di amministrazione da parte dell'organo di controllo sul funzionamento del sistema di controllo e sulle risultanze dei controlli effettuati anche ai fini di eventuali decisioni di intervento correttivo da parte dell'organo gestorio.

23 Segue. Le società quotate e di interesse pubblico

Per le società quotate (e di interesse pubblico) si può ragionare su alcune ulteriori ipotesi di lavoro:

- (i) come consente la Direttiva, prevedere che, negli enti di interesse pubblico, lo statuto può attribuire la funzione di comitato per il controllo interno e la revisione legale (art. 19, d.lgs. n. 39/2010) anziché al collegio sindacale (o all'organo equivalente) al comitato controllo e rischi previsto dal Codice di Autodisciplina o, se la società non è quotata, a un comitato di amministratori indipendenti;
- (ii) limitare le competenze in materia di procedure del dirigente preposto alla redazione dei documenti contabili societari alla predisposizione di adeguate procedure amministrative e contabili per la formazione dei bilanci;
- (iii) affidare invece alla società di revisione, oltretutto, ovviamente, il controllo dei conti, la verifica di adeguatezza delle procedure stesse;
- (iv) attribuire al preposto al controllo interno la verifica sul rispetto effettivo delle procedure amministrative e contabili, oggi assegnato invece al dirigente preposto, nell'ambito del controllo sul rispetto delle procedure interne, in senso ampio;
- (v) prevedere che nel modello dualistico lo statuto debba obbligatoriamente stabilire le funzioni di alta direzione attribuite al consiglio di sorveglianza; introdurre l'obbligo di istituire il comitato per il controllo interno e la revisione legale nell'ambito di questo organo; statuire espressamente che i rapporti tra consiglio di gestione e consiglio di sorveglianza siano disciplinati da un regolamento interno.

24 La “231”: problemi aperti

Come si è segnalato – dal punto di vista “civilistico” – i problemi che il d.lgs. n. 231/2001 ha lasciato irrisolti sono numerosi: area di applicazione dei modelli e

dimensione dell'impresa, eventuale "attestazione" dei modelli, rilevanza dell' "attestazione" ai fini della prova liberatoria, applicazione della disciplina e/o introduzione di eventuali regole speciali nei gruppi di società e nei contratti di rete; in relazione all'ODV il legislatore è silente sulla composizione, la nomina, la durata, la revoca.

E' opportuno un intervento di riforma?

Il dibattito è aperto

Endnotes

¹ In argomento mi permetto di rinviare, anche per ampi riferimenti, al mio ultimo lavoro in materia: P. MONTALENTI, *Amministrazione e controllo nella società per azioni: riflessioni sistematiche e proposte di riforma*, in *Riv. soc.*, 2013, 42 ss. Segnalo alcuni altri recenti lavori in cui ho trattato il tema degli assetti organizzativi e del sistema dei controlli: *I controlli societari: recenti riforme antichi problemi*, in *Banca borsa tit. cred.*, 2011, I, 535; *Sistemi di controllo interno e corporate governance: dalla tutela delle minoranze alla tutela della correttezza gestoria*, in *Riv. dir. comm.*, 2012, II, 243 ss.

Precedentemente si vedano *Consiglio di amministrazione e organi delegati: flussi informativi e responsabilità*, in *Società*, 1998, 899 ss.; *Corporate Governance, consiglio di amministrazione, sistemi di controllo interno: spunti per una riflessione*, in *Riv. soc.*, 2002, 803 ss.; *L'amministrazione sociale dal testo unico alla riforma del diritto societario*, in AA.VV., *La riforma del diritto societario*, Giuffrè, Milano, 2003, 65 ss.; *La società quotata*, in *Trattato di diritto commerciale*, diretto da G. Cottino, vol. IV, t. 2, Cedam, Padova, 2004, 227 ss.; *La responsabilità degli amministratori nell'impresa globalizzata*, in *Giur. comm.*, I, 2005, 435 ss.; *Il sistema dei controlli interni nelle società di capitali*, in *Società*, 2005, 294 ss.; *Gli obblighi di vigilanza nel quadro dei principi generali sulla responsabilità degli amministratori di società per azioni*, in *Liber amicorum Gian Franco Campobasso*, Utet, Torino, 2006, Vol. 2, 832 ss.; *Sui controlli societari: funzioni da semplificare*, in *Il Sole 24-ore*, 27 novembre 2007.

² Ho trattato questa materia in due scritti a cui mi permetto di rinviare il lettore: P. MONTALENTI, *Il sistema dei controlli interni nel settore assicurativo*, in *Assicurazioni*, 2013, 193 ss.; ID., *Amministrazione e controllo nella società per azioni tra codice civile e ordinamento bancario*, cit.

³ Mi permetto di rinviare, anche per i riferimenti, al mio *L'organismo di vigilanza (d.lgs. 231/2001): profili di diritto societario*, in P. MONTALENTI, *Società per azioni, corporate governance e mercati finanziari*, Milano, 2011, 203 ss., ove anche altri riferimenti, in parte ripreso in questo scritto. Sul tema vedi da ultimo R. SACCHI, *L'organismo di vigilanza ex d. lgs. n. 231*, in *Giur. comm.*, 2012, I, 851 ss.

⁴ Si vedano ad esempio le *guidelines* di CONFINDUSTRIA, *Linee guida per la costruzione dei modelli di organizzazione, gestione e controllo. Ai sensi del decreto legislativo 8 giugno 2001, n. 231, 7 marzo 2002* (aggiornate al marzo 2014).

⁵ Ho affrontato il problema in *Responsabilità civile e mercato finanziario: organo di controllo e false informazioni da prospetto*, in *Analisi giuridica dell'economia*, n. 1, 2002, 255 ss. e ora in *Le agenzie di rating: appunti*, in AA.VV. *Le agenzie di rating*, Atti del Convegno di Salerno, 8-9 novembre 2012, a cura di A. Principe, Giuffrè, Milano, 2014, 389 ss. Ma vedi già gli spunti di G. PALMIERI, *Responsabilità per omessa o insufficiente vigilanza: si affievolisce l'immunità della pubblica amministrazione*, in *Foro it.*, 2001, I, c. 1142 e A. PERRONE, *Falsità del prospetto e responsabilità civile della Consob*, *ivi*, 19.

⁶ Soluzione diffusa nella prassi e si veda altresì CONFINDUSTRIA, *Linee guida per la costruzione dei modelli di organizzazione, gestione e controllo*, cit., 55 ss.

- ⁷ Per un esame delle diverse ipotesi si veda P. SFAMENI, *Responsabilità da reato degli enti e nuovo diritto societario: appunti in tema di doveri degli amministratori ad organismo di vigilanza*, in *Riv. soc.*, 2007, 155.
- ⁸ ASSONIME, *Analisi dello stato di attuazione del Codice di Autodisciplina delle società quotate (Anno 2008)*.
- ⁹ Cfr. Trib. Milano, 13 febbraio 2008, n. 1774, reperibile sul sito www.confindustria.it.
- ¹⁰ Non estranea, tra l'altro, alla normativa secondaria: si veda, ad esempio, l'art. 57, del Reg. Intermediari n. 11522/98 e s.m., se pure ora non più riprodotto nell'ultima versione.
- ¹¹ Sul punto mi permetto di rinviare al mio *Direzione e coordinamento nei gruppi societari: principi e problemi*, in *Riv. Soc.*, 2007, 317 ss. e, ante riforma, *Conflitto di interessi nei gruppi di società e teoria dei vantaggi compensativi*, in *Giur. comm.*, 1995, I, 710 ss.
- ¹² Da M. RIVERDITI, *La problematica posizione dei gruppi societari nella disciplina del d. lgs. 231/2001*, in *Responsabilità penale e rischio nelle attività mediche e d'impresa (un dialogo con la giurisprudenza)*, a cura di R. Bartoli, University Press, Firenze, 2010, 607 ss., in ottica penalistica, con ampi riferimenti di dottrina.

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Corporate criminal liability and corporate governance

Author

Anna Toniolo, Ph.D Candidate, anna.toniolo@unitn.it - University of Trento

Risk management has recently been defined (by Carlo Amatucci) as the “Achilles’ heel” in Italian firms corporate governance. Nonetheless a number of legal changes have been effected in the spirit of address this issue. Notably there are two models of corporate compliance that go in this direction: the compliance programs introduced by Legislative Decree no. 231/2001 and the adequate organizational structure demanded for corporations by article 2381 of Italian civil code. Indeed they should be considered as two representation of the same risk management system, which is structured in two stages: at first risks identification, at second creation of effective compliance programs able to limit risks. Adequate organizational structure and 231 organizational Model are strictly connected: they both show the need for “proceduralization” economic activity stages in order to prevent violations of law. They both embrace the principle of prevention through organization. The paper will show an important consonance between the two models. Accordingly to the Legislative Decree no. 231/2001, in criminal law area, the company could be not liable for a crime if the offense occurred despite an effective program to internally detect illegal activity in a timely manner. Consistently, in civil law area, the board of directors could be liable to the company for breach of duty of care if it fails to ensure an adequate organizational structure *ex* article 2381 c.c. Moreover an Italian Court (Tribunale di Milano, 13/02/2008) convicted a director in civil law area for not adopting the 231 organizational Model. In this way the consonance has become interference.

The remainder of this paper will explore another connection between 231 organizational model and corporate governance field. It concerns the special body that, in accordance with the Legislative Decree no. 231/2001, has to supervise the adoption of the 231 Model: the ODV. The possibility, explicitly provided by the legislator, that the Board of auditors would be appointed as ODV has been welcomed with some reasonable degree of skepticism. Nevertheless this paper will explain how the attribution of this function to the Board of auditors would be consistent with the goal of making it the landmark of internal controls, avoiding a dangerous and inefficient fragmentation of internal control system.

Keywords: corporate criminal liability, corporate governance, internal control, risk management.

JEL Classification: K22, K14

1 Adequate organizational structure and Model 231

Legislative Decree no. 231/2001 (hereinafter the “Decree”) has built a model of responsibility of entities for offences committed for their benefit where organisational failures represents a prerequisite for liability itself. The Decree creates a specific connection between crime and organisation: an adequate organisational model in crime prevention (hereinafter also the “Model 231”) can insulate the entity from responsibility.

Model 231 shows interferences and consonances with the managing directors’ duty, Under Article 2381 of the Italian Civil Code (hereinafter “ICC”), to take care that the organization of the company – from the managerial, administrative and accounting viewpoints – is adequate for its size and activities.

Adequate organizational structure and Model 231 should be considered as two representation of the same risk management system, which is structured in two stages: at first risks identification, at second creation of effective compliance programs able to limit risks. Despite both criminal and corporate laws consider the same issue, they address the matter differently. That said, an interesting question is how these differing approaches can be reconciled. To answer the above question this paper will underline consonances and interferences between these compliance programs.

1.1 Consonances: prevention through organization

For what concerns consonances, both the Model 231 and the adequate organizational structure in company law show the need for “proceduralization” of economic activity stages in order to prevent violations of law. They both embrace the principle of prevention through organization. With regard to the Model 231, from an economic point of view, due to the Decree is now the corporation that has to internalize the negative externalities of the productive process. The Decree hypostatizes an “organizational fault” for which the company is held accountable. Consistently, the Italian company law reform of 2003 has provided a new way of thinking the enterprise: it encourages and sometimes requires the organization of the enterprise through the adoption of routines and procedures that improve efficiency and allow the traceability of management actions.

This reflects a broad shift in legislator preference from *ex post* discovery of norm violation to *ex ante*, prevention, and self-discovery via internal systems of compliance that secure organizational conformity. The accent is on compliance

as a preventive strategy that should encourage organizational learning and responsibility.

Thus, both civil and criminal legislation are now seeing the value of preventive policing and improved government detection methods. And the fact that under certain circumstances it is possible to charge firms both criminally and civilly, surely encourage companies to have in place policies and procedures that improve management accounting systems. The clear message is that companies, since they are exposed to many risks, need to introduce compliance programs as a part of a suite of “adequate procedures”, to mitigate any potential liability under both the Decree and the ICC.

1.2 Interferences: the liability systems

The duty of the company’s managing directors/members of the executive committees ex article 2381 ICC to take care that the organization, managerial and accounting schemes are suitable for the company’s nature and size encompasses also the duty to adopt an organizational model adequate to prevent the commission of crimes, pursuant to Article 6, paragraph 1, lett. a, of the Decree. This means that whether the managing body does not adopt the Model 231 not only it is not possible to exclude the liability of the legal entity under the Decree; but also the directors may be jointly responsible towards their company for the damage caused by the violation of article 2381 ICC. This is what has expressly established the case law. In a 2008 case¹, the first concerning this issue, the court considered a director liable ex article 2393 ICC for the damages suffered by the company as a result of its lack of adoption of the Model 231, provided that the failure to adopt the Model 231 implicated the imposition of sanctions on the company held liable in a criminal process for the violation of the Decree.

It must be highlighted that this interference does not necessary involve just the delegated bodies, but it may also include the board of directors and even the board of auditors. Indeed, the non-executive members of the board of directors have a supervisory duty towards actions taking by the managing directors/executive committees, and in particular the duty to evaluate the suitability of the organizational scheme, on the basis of the information received. Consequently the non-executive members of the board could remain jointly liable with the managing directors/members of the executive committees in case of not adoption of the Model 231. Similarly the board of auditors has the duty to oversee the compliance with the principles of correct management and notably on the adequacy of the organizational, administrative and accounting schemes followed by the company, as well as their proper functioning. Thus, in case of failure to adopt the Model 231 by the board of directors, statutory auditors could be jointly and severally liable with directors under Article 2407 ICC for the omission of the directors, because the damage would have not occurred whether they supervised pursuant to the duties of their office.

This is a strong interference between Criminal Law and Company Law: the violation of a criminal law rule may imply the contractual responsibility for

breaches of the ICC duties. At the same time, in this way organizations have a stronger incentive for compliance with both civil and criminal rules.

1.3 Consonances and interferences: compliance programs contents

It is possible to find both consonances and interferences looking at the content of these compliance programs.

For what concern the company law, Article 2381 does not say anything about adequate organizational structure requirements.

On the contrary, according to the Decree organizational models must have a number of requirements. Specifically, as stated by article 6, they have to: identify the activities in which offenses might be committed (“risk assessment”); provide for specific protocols aimed at planning and implementing decisions concerning crimes’ prevention; find the way to manage financial resources in order to prevent crimes’ commission; provide information duties towards the supervisory body; introduce a disciplinary system suitable for sanctioning the breaches of compliance programs rules. This means that Italy is one of the country (with Chile, Australia, UK, etc.) where the lawmaker has established basic elements and characteristics of compliance programs. Nonetheless, often the courts do not consider sufficient compliance programs, even if they have been implemented by following the lawmaker’s provisions. The fact that a compliance program fulfills with the regulation of the general aspects of compliance is not enough. That is because the main issue concerning Model 231 is the adequacy of preventive models set up by corporations and their evaluation by the courts. In other words, the problem of the compliance programs is the risk of their cosmetic use. Practical experience shows that companies treat compliance programs as a kind of “window-dressing” instead of promoting effective adoption and implementation of preventive models tailored to their specific risks. This is the reason why cases where compliance programs have insulated a company from liability because judges found its organizational model to be adequate are rare. More often the judiciary’s approach seems to be connected with the idea that the commission of the offense is the evidence of the inadequacy of the model. So that, for the compliance programs to be taken into account it is necessary that they suit specific needs and characteristics of the company, and more importantly they have to be effectively applied. As it has been underlined, they should be a “tailor-made solution” (Selvaggi, 2012).

In this prospective, the interference with company law could be useful. As we said, Article 2381 ICC does not say anything about adequate organizational structure requirements. Nevertheless, the regulatory deficit is filled by gleaning from both the secondary regulation of important special sectors (banking law, insurance law, listed companies law, etc.) and some common knowledge of business economics. Thus, organizational schemes mean the presence of an accurate organizational chart that explains in detail function, powers and delegations of signature within the company. Administrative schemes are procedures to ensure the proper management in all its stages. Accounting schemes refers primary to

the system of control of the company's accounts. These are now common knowledge in business economics that allow understanding what organizational, administrative and accounting schemes are, but they do not establish when these schemes are adequate. The concept of the "adequacy of the company's organizational, administrative and accounting structure" implies a large spectrum of meanings, it is a vague notion. But this is not a deficiency; rather indeed it is the main characteristic of the duty to ensure the adequacy of the company's organizational, administrative and accounting structure. Because it means that this duty can be painted in different hues grounded on the interests and concerns, which will prevail with respect to a given case. Case law will always propose various criteria in order to guide the interpretation of this rule, because the duty to ensure the adequacy of the company's organizational, administrative and accounting structure must be evaluated with respect to the specific case. And this is accurate, considering that judges have to decide whether company's organizational, administrative and accounting schemes are adequate not generally or in the abstract, but for the nature and size of that specific company.

The same reasoning should apply also with regard to the compliance programs under the Decree. It is not necessary that the lawmaker intervenes and specifies the terms of the compliance program to ensure legal certainty and minimize vague language. Because this vague language allow judges to evaluate not only whether the model was consistent with the general requirements of the Decree but also whether it included measures adapted to suit specific needs and characteristics of the company. So, also regarding Model 231 it is necessary an evaluation based on the specific case, considering the adequacy of the model as the goal to reach in order for the company to be insulated from liability.

2 The Supervisory Body and the internal control system

The Supervisory Body is the corporate body in charge of overseeing and supervise the functioning and compliance of the Model 231, in order to exempt corporate entities from liability laid down in the Decree. This mechanism of exemption from liability shows the importance of the existence of this body and its pivotal role in the preventive control system. Nonetheless, the law provisions of the Decree regarding creation and functioning of the Supervisory Body are absolutely vague about its structural characteristics and, for what concerns companies, they omit any relation to the ICC rules about internal controls. The legislator simply states that an organ of the entity takes charge of the models' functioning and observance, and takes care of the models' updating [Article 6, paragraph 1, letter b) of the Decree]. Then, in order to make the Supervisory Body effectively compliant with this functions, the Decree requires it to: possess "autonomous powers of initiative and control" [Article 6, paragraph 1, letter b) of the Decree]; receive information concerning "sensitive" activities [Article 6, paragraph 1, letter d) of the Decree]. It has been widely highlighted that a high level of indeterminacy of contents characterizes these provisions. It is likely that the legislator

meant to enable the economic operators to opt for the organizational solution that were more suitable for the dimension and the organizational complexity of their company. Seemingly, the idea was flexibility and not vagueness. Nonetheless this language has turned out to be vague and has raised a multitude of issues concerning all the most significant aspects of the new organ of control. The present paper will deal with the issues about the structure and composition of the Supervisory Body, and its relations with other control organs, and with the internal control system.

2.1 The requirements of the Supervisory Body

In the absence of specific indications by the legislator, the basic requirements that the Supervisory Body has to satisfy have been inferred from the functions assigned by the Decree, and then the judges have interpreted them. These requirements are: autonomy and independence; expertise; continuity of action.

The requirements of autonomy and independence imply that the Supervisory Body has to be exempted from operational tasks. Indeed, these tasks would involve it in the managing activities undermining its impartiality. Moreover the autonomy and independence require no overlaps between controller (: the Supervisory Body) and controlled (: company executives). More precisely, autonomy means the absence of hierarchical links, interferences, and any relation with any component of the legal entity, but especially with the organs holding the management powers (: board of directors and high level personnel). Independence implies no conditioning on both economic and personal levels: the Supervisory Body cannot be subject to any other corporate body or structure; and it must have an adequate budget in order to carry out its professional tasks. In short, it has to be equipped with adequate powers and resources. Besides, independence requires the absence of conflict of interests between the body members and the company and family ties with the corporate organs and the managing powers. Lastly, independence would be enhanced whether the Model 231 provided for hypothesis of incompatibility and forfeiture of the members, and for requirements of integrity/good repute.

Thus, for granting the effective autonomy and independence of the Supervisory Body, it is necessary to: confer to it a top ranking position in the hierarchical structure of the entity; allow it to directly report to the leading administrative body, that is the board of directors.

Expertise means that the members of the body must have appropriate competences in order to carry out their functions in an efficient way. The case law has clarified that it is necessary to verify the specific competence of each member, while a generic reference to the CV of the member it is not enough. Then there should be a multidisciplinary competence within the Body. According to the Guidelines drafted in terms of Article 6, paragraph 3 of the Decree by the Confederation of Italian Enterprises (Confindustria)³, the case law, as examples of competence, referred to: “statistical sampling; analysis of techniques and risk assessment; control measures (such as authorization procedures; contrasting

mechanisms of tasks; etc.); flow-charting of procedures and processes for the identification of points of weakness; elaboration and evaluation of the questionnaires; methods for the detection of fraud". Then it is strongly recommended that at least one of the members possesses legal knowledge, starting from criminal law.

Continuity of action requires – in order to grant an efficient implementation of the Model – the presence of a structure dedicated to the supervision over the Model 231, without any operational task.

2.2 Structure and composition of the Supervisory Body

Considering these requirements and the function of the Supervisory Body, doctrine and practice have tried to identify the best structure and composition of the body. Particularly they have tried to find out whether it is more advisable to create *ex novo* an *ad hoc* structure, or to use an already existing body, or to outsource the function.

About opting for outsourcing the Supervisory Body's tasks, the governmental Report attached to the Decree seems to rule out this possibility. The report indeed stated that the entity has to set up an in-house structure, in order to avoid that the companies turn to crooked bodies, and to create an effective organizational fault of the entity. Also the doctrine and the Guidelines drafted by Confindustria reject the outsourcing option.

The second hypothesis is the identification of the Supervisory Body with an organ or a supervising function already existing in the entity. In the Italian traditional corporate governance model, the organ in charge of controlling managing activity is the Board of Statutory Auditors. The option consisting in overlapping the Supervisory Board with the Board of Statutory Auditors has been strongly refused, from the beginning, by both case law, and prevailing doctrine and main employer associations. The exclusion of the Board of Statutory Auditors from the bodies that could perform the activities entrusted to the Supervisory Body is based basically on three reasons. The first one is the lack of "continuity of action", that is required from the Supervisory Body, and that would not characterized the board of auditors. The second one, favored in particularly by the Italian Banking Associations (ABI)'s Guidelines, is that the Board of Statutory Auditors appears to not be endowed with the autonomous powers of initiative and control which the Decree expressly refers to. The third one is that its activity can be subject to control under the Decree – as underlined also Confindustria in its Guidelines updated to 2008 – thus there would be a dangerous overlapping between controllers and controlled.

So said, the prevailing solution both in doctrine and practice has been the third hypothesis: creation of an *ad hoc* body within the entity. The composition of this organ can be monocratic or collective, but the latter option is considered preferable especially in the more complex corporate structures. Moreover the corporate best practice has indicated as the most appropriate solution a mixed composition, with both internal members and external members. As regards in-

ternal members, operational staff must be excluded. On the contrary, internal members could be: responsible of the internal auditing; responsible of the compliance function; risk managers; non-executive and independent directors; auditors (against the opinion of a minority part of the doctrine that see a conflicts of interests arising from the hiring of a double function by the auditor). Concerning external members, they should respect requirements of professionalism and independence, and their autonomy must be evaluated on a case-to-case basis.

2.3 Law no. 183 of 12 November 2011 and the overlapping with the the board of auditors

In this framework, a recent law provision (Law no. 183 of 12 November 2011), the very first providing indications as to the structure of the Supervisory Body, has introduced a new paragraph 4 *bis* of Article 6 of the Decree, which expressly allows the overlapping between the board of auditors and the Supervisory Body.

The original reform project even stated the identification between the two bodies, unless contrary provision by the company. In the final approved version of the new paragraph 4 *bis*, instead, the identification is optional: the article establishes that the Board of Statutory Auditors (or corresponding organ of control depending on the governance model adopted) can perform the tasks of the Supervisory Body.

This legislative innovation seems consistent with a view granting a correct and effective exercise of the supervisory functions especially in the framework of organizations. Indeed, the criticism by doctrine and practice about the identification of the Supervisory Body with the board of auditors, not only have been put in perspective by the new law provision, but in any case they do not seem well-founded.

For what concern the “continuity of action”, it does not characterized the activity performed by the board of auditors only if the requirement is meant as the need of an organ full time-dedicated to the supervision over the Model. But accurate doctrine has highlighted that the requirement of a full time-dedicated structure is just a misinterpretation arising from a single judiciary decision⁴. The following case law has never mentioned the need of a full time dedicated body, neither it is required from the Decree, or from the governmental Report attached to the Decree. Furthermore it is not essential for the effective functioning of the supervisory activity, and a full-time dedicated organ looks also like an unrealistic hypothesis. The continuity of action should be interpreted as the need that the Supervisory Body’s members perform just controlling and supervising task, they must not perform operational, managing and executive tasks. According to this interpretation, the board of auditors is perfectly able to carry out the tasks of the Supervisory Body with the continuity required by the Decree. Obviously, continuity of action means also that the Supervisory Body must work with a frequency adequate to allow identifying anomalies that could turn into offences timely.

But under Article 2404 of the ICC, the board of auditors must meet at least every ninety days, and, after the company law reform, the company's by-laws may provide that the meetings can take place by means of telecommunications. Thus, in case of identification of the board with the Supervisory Body, a statutory integration could for example intensify the board meetings granting an appropriate continuity of action, as suggested by Confindustria in its Guidelines.

Regarding the claimed lack in the Board of Statutory Auditors of autonomous powers of initiative and control, this criticism can be easily discredited. At first, the absence of any operational responsibility characterized how the board of auditors is organized and how it carries out its tasks. Secondly, the ICC provide for strict requirements of professionalism and independence of the statutory auditors. It provides also for hypothesis of incompatibility and forfeiture, aims at preventing conflicts of interests of the statutory auditors. In other words, the circumstances under which people may not be appointed as statutory auditors (and if appointed will forfeit their office) are basically those where auditors' independence from the management body is likely to be hampered. Furthermore the statutory auditors' independence is also protected by Article 2400 ICC with a provision whereby auditors may be removed for justified cause only, and a court decree must approve the resolution of removal after hearing the auditor concerned. Finally, the board of auditors is maybe the only organ really independent also from the information and operational viewpoint. According to Article 2403 *bis* ICC, indeed, not only each statutory auditor has the power to make inspections and perform acts of supervision at any time; but also the board as a whole may request information from the directors on the progress of the company transactions or on specific business activities. Not least, the board of auditors has broad powers to take action if the outcomes of its supervision and investigation result in the detection of frauds or irregularities.

About the potential presence of conflict of interests because the activity of the board of supervisor may be subject to control under the Decree, this possibility has been already and clearly excluded by the governmental Report attached to the Decree. The Report indeed expressly stated that auditors are not among the "leading person" for whose offences the legal person could be held liable. It is true that after the Decree entered into force, there has been a progressive enlargement of the list of the offenses whose commission can be attributed to the legal entity. In some of these new offences the board of auditors may have an active role (a few corporate crimes and market abuse). But the same problem could arise from many others component of an *ad hoc* body. For example non-executive directors can be the perpetrators of some of the offences encompassed by the Decree and also independent directors are involved in the management activity. Nonetheless, especially the Italian Banking Association (ABI) has always considered the presence of non-executive and independent directors in the Supervisory Body as a positive circumstance. The contrary position derives from an idea of independence that is misleading, since it considers the Supervisory Body as a "monolithic subject". Instead, about the conflict of interests, it is necessary an evaluation based on the specific case. Only in front of an actual conflict of in-

terest evaluated on a case-to-case basis the interest auditor should be excluded from the Supervisory Body.

2.4 The Board of Statutory Auditors as the Supervisory Body: advantages for the internal control system

Not only, as explained, there are no more reasons for refusing the overlapping of the Supervisory Board with the Board of Statutory Auditors. But also there are many advantages in this identification.

At first the identification grants an improvement of internal resources and a saving of costs, because allows a simplification and a rationalization of the internal control system, and avoids useless reduplications and organizational disfunctionalities. In addition, a certain overlapping of functions between the board of auditors and the Supervisory Body already emerges from company law. After the company law's reform of the 2003, Article 2403, paragraph 1 ICC entrusts the board of statutory boards with the task of overseeing the compliance with the principles of correct management and notably on the adequacy of the organizational, administrative and accounting schemes followed by the company, as well as their proper functioning. And as we said in the forming chapter, the adoption of a Model 231 suitable to prevent the commission of wrongdoings in the development of the business activity is necessary for accomplishing properly the duty of correct management.

Second, the Board of Statutory Auditors it is maybe the only organ that could grant an effective functioning of the supervisory activity. Indeed, it has a key role in the control of the business management and in the supervision over law abidance and compliance, as it has the duty to oversee the compliance of internal controls and the administration's activity. And for performing the Supervisory Body's functions efficiently it is convenient, if not necessary, establishing that its members are subjects close to the management. Only in this way they can interact with the top management and other corporate bodies in order to request and acquire documents, make inspections, and detect in a timely manner the violations of the model. This is the reason why the requirements of autonomy and independence cannot be meant in the strict sense, according to the prospective of the "criminal" viewpoint. On the contrary it is fundamental to keep in consideration the "independence-knowledge trade-off" (Kershaw 2009) that the company law teaches us. That is, when focusing on composition and structure issues, we must not forget that independent components of the Supervisory Body are however required to possess necessary knowledge and experience to be effective. The broader the definition of independence the more difficult it becomes to find members who know and understand the company and its industry.

And third, the Supervisory Body's activity of providing information can be effectively performed only whether "flows of information" to and through the Supervisory Body are effectively provided for. It is fundamental to ensure that the Supervisory Body is informed enough to monitor effectively. But for granting an

efficient gathering of information from the Supervisory Body, it is necessary again a certain degree of “closeness” to the management. And again the board of auditors is maybe the only body that can ensure adequate information flows. As we said the board may request information from the directors on the progress of the company transactions or on specific business activities. Furthermore, Article 2405 ICC strengthens the information flow between the board of auditors and the other bodies providing that auditors must attend the shareholders’ meetings, the executive committee meetings, and the board of directors’ meeting. Moreover, according to Article 2429 ICC, the directors have to communicate to the board of auditors both the draft financial statements and the report of the board of directors at least thirty days before the date set for discussion at the shareholders’ meeting.

The Bank of Italy, in a recent Report about internal controls (Banca d’Italia, *Relazione definitiva sull’analisi d’impatto*, june 2013), has summarized the advantages deriving from the overlapping of the Supervisory Board with the Board of Statutory Auditors. According to the Bank of Italy it allows: an increasing of the internal controls system’s efficiency; more efficient flows of information between company’s bodies; a decrease of the problem of redundancy regarding subject appointed for internal control activity; the enhancement of the key role of the board of auditors in the internal control system, consistently with the actual trend of the legislator; a better interactions between social bodies, and more in details between controlling bodies and managing bodies.

These are the reason why, despite of the reasonable degree of skepticism that welcomed the overlapping, it is now supported also by Confindustria, Assonime (that is an important association among joint stock companies), and as we said Bank of Italy.

Creating *ex novo* an *ad hoc* structure remains a good option under the Decree, even tough its supervisory capacity to detect violations often may be limited and not timely. Notwithstanding, from the company law perspective this option worsens a serious problem that has emerged in larger companies, especially listed companies: redundancy regarding subjects appointed for internal control activities. To the extent that on the 5 may 2014 the president of the “*Commissione nazionale per la società e la borsa*” (Consob, that is the public authority responsible for regulating the Italian securities market) has underlined the need of a simplification of the internal control systems, since the results of this redundancy are: overlapping of competences, overloading and inefficiencies. Indeed, currently there are too many organs of control. In addition to the board of statutory auditors and the supervisory body, we can mention the Audit Committee, the internal auditing function, the compliance function, the executive officer in charge of drafting financial documents, the risk manager, etc.

This is a fundamental issue, because for a long time the Supervisory Body has been perceived as an “alien” (Marchetti, 2016) by company law. Finally, the new disposition, which allows the overlapping with the board of auditors, forces commentators to link the Supervisory Body to the companies’ internal control systems that now lie at the very center of governance thinking and practice.

Thereby, problems relating to the internal control system in company law overlaps with those in respect of the supervisory body regulated by the Decree. Addressing the issue of the Supervisory Body's integration in the internal control system, the Code of Corporate Governance of the Italian Stock Exchange¹ has stated that it is essential for the company establishing an efficient coordination within the subjects appointed for internal control activities in order to improve the efficiency of the internal control system and of the risk management. And the Code of Corporate Governance of the Italian Stock Exchange, but also Assonime, and many commentators agree that the Supervisory Body should be at the top of the hierarchical structure of the internal control system and it should have the duty to coordinate this structure. In this perspective this overlap between the Supervisory Body and the board of auditors creates opportunities, enabling greater efficiency and coordination in the internal control systems. Indeed, it has already been noticed that the overlapping implies a simplification of the structure of the internal control system, avoiding overloading and inefficiencies. Furthermore, the overlapping places the operational substance of control of the Model 231 within organizations themselves, with a corresponding "responsibilization" of the board of auditors that is consistent with its key role in internal control activities.

From these different viewpoints it is clear that appointing the board of auditors as Supervisory Body it is the only option in line with an efficient internal control systems meant as a core feature of organizational governance, as a signal of a certain kind of organizational duty, as a way of governing the management of risk (Power, 2010). This is the only option granting a perfect connection between risk-management, company criminal liability and corporate governance.

Endnotes

¹ Tribunale di Milano, 13 febbraio 2008, in *Giur. Comm.*, 2009, II, 177.

² The *Codice di autodisciplina delle società quotate* was drafted by a Committee promoted by the Italian Stock Exchange (Borsa Italiana S.p.a.) and high level representatives of the Italian corporate world.

³ Guidelines for the creation of organization, management and control models pursuant to Legislative Decree n. 231/2001, approved on 7 March 2002, updated to March 2014, in www.confindustria.it.

⁴ G.i.p. Trib. Roma, 4 aprile 2003, in *Cass. pen.*, 2003, IX, 2803.

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Il ruolo dei modelli organizzativi e dell'organismo di vigilanza nelle indagini preliminari nei confronti dell'ente

Authors

- *Paolo Venero, Accountant, vernero@studioverneromanavella.it - Studio Venero-Manavella & Associati*
 - *Maria Francesca Artusi, Lawyer, artusi@studioverneromanavella.it - Studio Venero-Manavella & Associati*
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Obiettivo del presente articolo è quello di analizzare il ruolo dei modelli organizzativi adottati ai sensi del d.lgs. n. 231/2001 e le possibili e opportune reazioni dell'Organismo di Vigilanza (nominato ai sensi del medesimo decreto) a fronte della possibilità o della notizia di indagini connesse alla contestazione della responsabilità dell'ente per la commissione di un reato a suo interesse o vantaggio.

A fronte del procedimento previsto dal "decreto 231" per l'accertamento di tale responsabilità, risalta l'esiguità del tempo a disposizione dell'ente per costituire un'efficace linea difensiva, soprattutto tenendo conto della possibilità di applicare stringenti misure cautelari interdittive. A mente di quanto stabilito dall'art. 6 d.lgs. n. 231/2001, la difesa dovrà necessariamente indirizzarsi verso l'affermazione di un'adeguatezza del modello organizzativo adottato, delle misure preventive attuate, delle procedure formalizzate e dell'efficace informativa fornita ad apicali e sottoposti.

Un ruolo centrale sarà, inoltre, rivestito dalla corretta attività svolta dall'Organismo di Vigilanza, parte essenziale dell'efficace attuazione dei modelli e interlocutore privilegiato per il reperimento e la ricostruzione del materiale probatorio.

Keywords: *corporate governance; modelli organizzativi; organismo di vigilanza; indagini.*

JEL Classification: K22

1 Premessa: prevenzione mediante organizzazione

Il diritto penale economico è entrato nell'era della *compliance*¹. I c.d. *compliance programs*, quale forma di auto-regolamentazione societaria, sono divenuti uno dei pilastri della disciplina penale delle attività economiche².

Il legislatore – nazionale e internazionale – vuole incoraggiare le imprese ad adottare strutture di organizzazione aziendale e di prevenzione dei rischi e, a tal fine, ricollega all'adozione di tali sistemi una serie di conseguenze normative favorevoli.

Anche in Italia, i modelli di organizzazione hanno assunto un ruolo nell'ambito del diritto penale dell'impresa, in particolare attraverso l'emanazione del d.lgs. n. 231/2001.

Fin dalla sua introduzione, l'ambito applicativo di tale decreto è stato esteso a comprendere nuove categorie di illecito e, per conseguenza, sempre più frequenti sono state le verifiche giudiziali nei confronti dell'effettiva e adeguata adozione di sistemi di organizzazione gestione e controllo³.

Nel disegnare il ruolo di tali modelli e nel valutare l'efficacia della c.d. *self-regulation* va, tuttavia, tenuto presente che, se è corretto improntare l'organizzazione aziendale verso una "zero tolerance", non è invece possibile immaginare il raggiungimento di un "rischio zero". Nessuna teoria economica o approccio scientifico, matematico o pragmatico al rischio è mai riuscito ad eliminare in radice tutti i rischi connessi al *management*⁴.

Da un lato, dunque, sarà opportuno mettere a punto tutte quelle misure utili e necessarie alla prevenzione degli illeciti, con una particolare attenzione a far sì che tali misure siano fatte proprie dalla realtà dell'impresa (informazione e formazione dei dipendenti e "top level commitment"). Allo stesso tempo, però, la *self-regulation* deve darsi anche degli strumenti di reazione rispetto all'accadimento dell'illecito.

Può allora essere interessante analizzare il ruolo del modello organizzativo "231" – in Italia, *compliance program* per eccellenza – nel caso in cui si sia verificato un fatto alla cui prevenzione era volto il modello stesso.

2 Oltre la prevenzione, l'affronto dell'emergenza-reato

Nella disciplina della responsabilità amministrativa degli enti, l'adozione di modelli organizzativi dotati dei requisiti richiesti dall'art. 6 d.lgs. n. 231/2001 svolge sia la funzione di introdurre una modalità di inversione dell'onere della prova, sia quella di innescare meccanismi processuali quali la sospensione o la revoca delle misure cautelari, la modalità di determinazione delle sanzioni e la loro possibile conversione.

Nel caso in cui un illecito si sia effettivamente verificato, l'ente può trovarsi in due differenti situazioni:

1. Avere già adottato un modello organizzativo, di cui allora si dovrà dimostrare l'adeguatezza e l'efficace attuazione, nonostante il suo apparente fallimento nel caso concreto.
2. Non avere ancora adottato un modello di organizzazione gestione e controllo e pertanto decidere se adottarne uno *post-factum*.

Per quanto riguarda la prima ipotesi – di cui si dirà meglio nel prosieguo della trattazione – i modelli, adottati *ante factum*, costituiscono un elemento impeditivo della responsabilità dell'ente, allorché ricorrano le ulteriori condizioni costituite dall'affidamento dei poteri di iniziativa e controllo a un organo dell'ente dotato di autonomi poteri (*id est*, Organismo di vigilanza) e dalla sufficiente vigilanza di tale organo di controllo (artt. 6 e 7 d.lgs. n. 231/2001).

Il modello va, inoltre, valutato in relazione alla sua capacità di reazione all'inosservanza delle regole in esso steso stabilite⁵. In tal senso si parla, infatti, di "elusione fraudolenta" [art. 6, comma 1, lett. c)]⁶.

Con riferimento alla seconda ipotesi, basti qui ricordare che il modello organizzativo adottato successivamente alla commissione di un illecito può incidere sul procedimento come:

- circostanza attenuante della sanzione pecuniaria [art. 12, comma 2, lett. b)];
- modalità di riparazione delle conseguenze del reato cui consegue esclusione delle misure interdittive (art. 17);
- causa di sospensione o conversione delle sanzioni interdittive in sanzioni pecuniarie (art. 78).

Anche in questo caso resterà centrale la valutazione della sua adeguatezza, sebbene "*pro futuro*".

Ciò che va tenuto a mente è che il modello organizzativo riveste un ruolo anche nel caso in cui un reato si sia malauguratamente verificato, nonostante si debba dare atto che nell'esperienza giurisprudenziale italiana parrebbe vigere il sillogismo per cui, se si è verificato un reato, il modello dimostra da sé la sua inadeguatezza.

2.1 Le innovazioni introdotte dalla riforma societaria

Un ente può venire a conoscenza dell'esistenza o della potenziale esistenza di indagini a proprio carico attraverso vie differenti:

- al verificarsi di un illecito al suo interno;
- alla notizia di un'indagine avviata nei confronti di uno dei suoi dipendenti o apicali per uno dei reati rilevanti ai sensi del d.lgs. n. 231/2001;
- a seguito della notizia formale dell'iscrizione di un procedimento a proprio carico.

Già nella fase iniziale del procedimento è possibile una "reazione" dell'ente volta ad evitare il prosieguo dello stesso o, comunque, a predisporre un'adeguata linea difensiva.

Per meglio comprendere i possibili *steps*, può essere utile una breve ricognizione sulla disciplina delle indagini preliminari nei confronti di una persona giuridica.

Il quadro normativo di riferimento per la disciplina del processo agli enti è fondata su rimandi generali alle norme del codice di procedura penale, previsti all'interno dello stesso d.lgs. n. 231/2001.

In forza dei richiami operati dagli articoli 34 e 35 del decreto citato si ricava la disciplina applicabile con riferimento al pubblico ministero e alla polizia giudiziaria (artt. 51-59 c.p.p.); all'individuazione dei soggetti e alla finalità delle indagini preliminari (artt. 326 e 327 c.p.p.); all'indagato (artt. 60-73 c.p.p., in quanto compatibili e con l'esclusione di quelle che presuppongono l'indagato persona fisica, quali gli artt. 67,70,71,72 e 73 c.p.p.); al difensore (artt. 96-108 c.p.p.); alle indagini difensive (art. 327 c.p.p.); al giudice (art. 328 c.p.p. per quanto attiene specificamente alle indagini preliminari).

La disciplina delle indagini preliminari nei confronti dell'ente rappresenta dunque un procedimento ibrido, frutto della combinazione delle citate clausole generali di richiamo alle norme del codice di rito, con norme specifiche contenute nella sezione V del d.lgs. n. 231/2001.

Sul piano procedurale, le indagini preliminari nel processo agli enti seguono una sequenza che prende l'avvio con l'annotazione della notizia di un illecito amministrativo (art. 55) e giunge a due possibili conclusioni alternative: l'atto di esercizio dell'azione relativa all'accertamento della responsabilità dell'ente (art. 59) ovvero l'archiviazione (art. 58).

La scelta del legislatore è stata quella di connettere i tempi dell'indagine nei confronti dell'ente a quelli relativi alle investigazioni per il reato presupposto, al fine di conferire maggiore effettività al principio del "*simultaneus processus*" previsto all'art. 38. Connessione che, tuttavia, non tiene conto della possibile discrasia temporale tra il momento dell'iscrizione del reato presupposto e il momento dell'annotazione dell'illecito amministrativo.

L'art. 57 del decreto in esame disciplina la c.d. "informazione di garanzia" che viene comunicata all'ente "indagato". Ritenendo applicabile l'art. 369 c.p.p. tale comunicazione deve indicare le norme di legge che si assumono violate, la data e il luogo del fatto, l'invito a nominare un difensore di fiducia, l'invito a dichiarare o eleggere un domicilio per le notificazioni, l'avvertimento che per partecipare al procedimento deve costituirsi nelle forme dell'art. 39 capoverso.

Anche se non espressamente menzionata, esiste la possibilità di sottoporre ad interrogatorio l'ente tramite il proprio rappresentante legale; costui si sottoporrà quindi ad interrogatorio per conto dell'ente, con tutte le facoltà e i diritti riconosciuti all'imputato, come ad es. la facoltà di non rispondere⁷. Se così è, si vedrà a breve come in tali casi possa divenire centrale il ruolo dell'Organismo di vigilanza e dei flussi informativi tra questo e gli organi societari.

Di particolare interesse ai fini della presente trattazione sono le possibili cause dell'archiviazione. Queste possono essere classificate in dirette, se connesse all'illecito amministrativo in quanto tale, e derivate, se connesse al reato presupposto. Le cause di archiviazione dirette derivano dalla struttura binomica

dell'illecito e ineriscono ad elementi, ulteriori rispetto al reato presupposto, richiesti per la responsabilità dell'ente. Ed è proprio in questo ambito che può rilevare la valutazione sull'adeguatezza dei *compliance programs* e la loro efficace attuazione, nonché la verifica della loro fraudolenta elusione.

2.2 Il grande rischio delle misure cautelari interdittive

Nel caso in cui ricorrano gravi indizi che collegano l'ente al reato commesso e un concreto pericolo di reiterazione dell'illecito (basti pensare alla sicurezza sul lavoro o ai reati ambientali), possono essere ordinate delle misure cautelari nei confronti dell'ente stesso.

Il d.lgs. n. 231/2001 non prevede una disciplina *ad hoc* per il contenuto delle misure interdittive applicabili in via cautelare, operando, viceversa, una sostanziale sovrapposizione tra queste e le misure interdittive irrogabili in sede di condanna.

L'art. 45 d.lgs. n. 231/2001 stabilisce, infatti, che, ove ne ricorrano i presupposti, il pubblico ministero può richiedere l'applicazione quale misura cautelare di una delle sanzioni interdittive di cui all'art. 9, comma 2, del medesimo decreto⁸.

Lo scopo del procedimento cautelare è quello di anticipare tali misure interdittive ad una fase preliminare del procedimento. La relazione governativa che accompagna il d.lgs. n. 231/2001 precisa come tale previsione risponda alla necessità di interrompere operazioni illecite o comunque indurre l'ente a riparare quelli che vengono considerati atteggiamenti di grave disorganizzazione operativa⁹.

Evidente appare allora l'urgenza per l'ente di dimostrare di essere in grado di darsi una adeguata *self-regulation*. I criteri di applicazione delle misure sono, infatti, ispirati più al fine di risanamento dell'azienda rispetto alla situazione illecita, che al fine propriamente punitivo.

Tanto è vero che l'art. 49 prevede che l'irrogazione della misura possa essere sospesa, qualora l'ente chieda di poter realizzare gli adempimenti cui la legge condiziona l'esclusione delle sanzioni interdittive. Più specificamente, tale sospensione può essere disposta dal giudice se l'ente chiede di poter realizzare gli adempimenti cui la legge condiziona l'esclusione di sanzioni interdittive a norma dell'art. 17. Tali adempimenti consistono:

- (i) nel risarcimento integrale del danno da parte dell'ente e nell'eliminazione delle conseguenze dannose o pericolose del reato ovvero nell'essersi comunque efficacemente operato in tal senso;
- (ii) nell'eliminazione delle carenze organizzative che hanno determinato il reato mediante l'adozione e l'attuazione di modelli organizzativi idonei a prevenire reati della specie di quello verificatosi;
- (iii) nell'aver messo a disposizione il profitto conseguito ai fini della confisca.

In sostanza, l'ente nei cui confronti è stata applicata una misura cautelare interdittiva può richiedere la sospensione per essere messo nella condizione di

realizzare quelle condotte di carattere riparatorio e ripristinatorio indicate dall'art. 17, la cui corretta attuazione avrà come effetto l'inapplicabilità, nell'eventuale sentenza di condanna, delle sanzioni interdittive.

A seguito della sospensione, le misure cautelari interdittive possono essere altresì revocate, anche d'ufficio, ove ricorrano i requisiti normativamente richiesti. Se invece le esigenze cautelari risultano unicamente attenuate, il giudice, su richiesta del pubblico ministero o dell'ente, sostituisce la misura con un'altra meno grave ovvero ne dispone l'applicazione con modalità meno gravose o per una minore durata.

Per evidenziare la possibile interazione tra misure organizzative e provvedimenti giudiziari, basti pensare alle complesse vicende connesse al procedimento avverso l'Ilva di Taranto, ove si sono succeduti diversi interventi normativi, in cui si è voluto attribuire una valenza esimente al "piano di intervento" attuato dalla società¹⁰. A tale proposito il GIP di Taranto – con ordinanza del 14 luglio 2015 – aveva sollevato diverse questioni di legittimità costituzionale, proprio in relazione alla possibilità di "sterilizzare" per un anno gli effetti di un provvedimento cautelare di sequestro, sulla base dell'unilaterale adozione di un piano di adeguamento alla normativa sulla sicurezza del lavoro, in assenza di significativi controlli di carattere giurisdizionale o da parte di organi pubblici competenti in materia.

La configurazione di un efficace modello di organizzazione gestione e controllo può, dunque, essere elemento decisivo nella valutazione del pericolo di reiterazione di illeciti.

D'altra parte, però, va ricordato che non vale il ragionamento contrario: il legislatore non ha, infatti, previsto alcuna applicazione automatica di misure cautelari nel caso di accertata mancanza o inidoneità del modello organizzativo, escludendo quindi che da tale situazione possa derivare sempre, su base presuntiva, un pericolo di reiterazione di illeciti. Sarà sempre il giudice a dover accertare l'esistenza in concreto di tale pericolo. E in relazione all'adozione del modello organizzativo, la valutazione verterà sulla concreta rispondenza di questo rispetto alle esigenze di prevenzione esplicitate nel provvedimento cautelare¹¹.

Il rapporto che la legge instaura tra la realizzazione degli adempimenti previsti e la rinuncia alla cautela dovrà essere valutato, di volta in volta, in funzione del fatto avvenuto e del rischio di recidiva, con particolare riguardo quella che dalla giurisprudenza viene definita "personalità" dell'ente¹².

In particolare, la società deve essersi efficacemente adoperata a risarcire integralmente il danno e ad eliminare le conseguenze dannose o pericolose del reato, adottando le misure idonee previste dall'art. 17 d.lgs. n. 231/2001¹³.

Come si è già accennato, a tali fini rileva anche l'adozione di modelli "post factum": l'ente che ha posto in essere tardivamente le condotte previste dall'art. 17 può richiedere, a norma dell'art. 78, la conversione della sanzione amministrativa interdittiva in sanzione pecuniaria. In questi casi, tuttavia, sarà parzialmente differente l'ambito di operatività e di incisività del modello adottato. Questo non potrà non tener conto della concreta situazione che ha favorito la commissione dell'illecito, al fine di eliminare le carenze organizzative che hanno reso possibile

il reato: in altre parole, esso dovrà essere espressamente calibrato sulle carenze organizzative che hanno favorito la commissione del reato. Per conseguenza anche la valutazione del giudice sulla sua idoneità verrà formulata non solo in termini prognostici ed ipotetici, ma anche in considerazione del dato fattuale desumibile dalla prospettazione accusatoria.

Vale ancora la pena ricordare che, ai sensi dell'art. 45, comma 3, in luogo della misura cautelare interdittiva, il giudice può nominare un commissario giudiziale per un periodo pari alla durata della misura che sarebbe stata applicata. Il commissariamento giudiziale – disciplinato dall'art. 15 d.lgs. n. 231/2001 – viene quindi disposto, in via sostitutiva, allorché si debba applicare la sanzione dell'interdizione dell'attività, o la corrispondente misura cautelare, se sussiste almeno una delle seguenti condizioni:

a) l'ente svolge un pubblico servizio o un servizio di pubblica necessità la cui interruzione comporterebbe un grave pregiudizio alla collettività;

b) l'interruzione dell'attività dell'ente può provocare, a causa delle dimensioni e delle condizioni economiche del territorio, ripercussioni sull'occupazione.

Una volta accertata la sussistenza di uno dei due presupposti, il giudice, con sentenza, dispone la prosecuzione dell'attività dell'ente da parte di un commissario, indicandone i compiti e i poteri con particolare riferimento alla specifica area in cui è stato commesso l'illecito. In tali casi sarà il commissario a curare l'adozione di modelli organizzativi idonei a prevenire la commissione di reati della specie di quello verificatosi, ovvero, in caso di previa esistenza di un modello, a dover interagire con l'Organismo di vigilanza, come meglio si vedrà nel paragrafo 3.

2.3 L'adeguatezza dei modelli organizzativi

Attraverso i sintetici *focus* effettuati è possibile apprezzare come, nel sistema della responsabilità da reato degli enti collettivi, un ruolo centrale sia attribuito ai modelli di organizzazione gestione e controllo idonei a prevenire reati della stessa specie di quello verificatosi.

Il d.lgs. n. 231/2001 introduce una tecnica di controllo della criminalità di impresa del tutto nuova, che affida all'organo giudicante una valutazione dell'adeguatezza organizzativa dell'ente¹⁴.

Tuttavia, elaborare una nozione univoca di "adeguatezza" appare problematico data la mancanza di riferimenti normativi specifici, la molteplicità dei criteri che possono essere utilizzati e la necessità di calarsi di volta in volta nelle diverse realtà a cui tale concetto è riferibile.

Tale valutazione avrà necessariamente un "carattere relativo", dal momento che non è possibile immaginare un assetto adeguato ideale e universalmente valido: esistono modelli di "assetto organizzativi adeguati" fra i quali l'imprenditore deve scegliere tenendo presenti innanzitutto i parametri indicati nell'art. 2381 c.c. (ovvero dimensioni e natura), oltre agli altri criteri che si riterrà di applicare per giustificare la scelta operata¹⁵.

In ogni caso, va tenuto presente che i *compliance programs* hanno una natura necessariamente “dinamica” e devono essere regolamentati in modo tale da poter prontamente “reagire” al verificarsi di determinate circostanze, quali: (i) delle modifiche normative; (ii) delle modifiche della struttura societaria o aziendale; (iii) la necessità di implementare o modificare il sistema dei controlli interni; (iv) e il verificarsi di violazioni che hanno dimostrato l’inefficienza, l’ineffettività o l’inadeguatezza del modello stesso.

Si è già fatto cenno al fatto che mancano delle indicazioni precise sui caratteri essenziali di un modello funzionale a scriminare effettivamente un “reato 231”. La giurisprudenza, salvo rari casi, si è limitata fino ad ora ad affermare la non idoneità o la non adeguatezza, senza fornire elementi ulteriori che possano indirizzare gli operatori verso una più efficace *compliance*.

A tale proposito, sono interessanti talune pronunce di merito, ove si precisa che il modello organizzativo adottato da una società partecipante a gare di appalto per la realizzazione di opere pubbliche non può essere considerato idoneo a prevenire reati contro il patrimonio pubblico e, dunque, ad evitare in astratto l’applicazione di una misura cautelare, qualora non dedichi specifica considerazione all’area operativa dell’azienda nella quale sarebbe stato commesso il reato-presupposto per il quale si procede e qualora non garantisca effettiva autonomia e indipendenza all’organismo di controllo e non preveda, in deroga all’art. 2388 c.c., una maggioranza qualificata del consiglio di amministrazione per la sua modifica¹⁶. La stessa pronuncia ha affermato che l’organismo previsto dall’art. 6 d.lgs. n. 231/2001, per essere funzionale alle aspettative, deve essere dotato di indispensabili poteri di iniziativa, autonomia e controllo, mentre non dovrà avere compiti operativi che, facendolo partecipe delle decisioni dell’ente, potrebbero pregiudicarne la serenità di giudizio al momento delle verifiche. È auspicabile inoltre – a giudizio del Tribunale – che si tratti di un Organismo di vigilanza formato da soggetti non appartenenti agli organi sociali, da individuare, eventualmente ma non necessariamente, anche in collaboratori esterni, forniti della necessaria professionalità, che vengano a dar vita effettivamente a quell’organismo dotato di autonomi poteri di iniziativa e di controllo. Specie per gli enti di dimensioni medio-grandi, si impone una forma collegiale, così come una garanzia di continuità di azione.

Altrettanto interessante è il caso di una verifica con esito positivo sull’adeguatezza del modello in senso formale (“*il ponderoso modello organizzativo adottato dal nuovo amministratore unico ...può essere senz’altro considerato valido ed adeguato nella parte dedicata all’identificazione dei rischi di realizzazione di illeciti ed all’elaborazione delle procedure volte a prevenire tali pericoli*”), tuttavia non accompagnato da una corretta traduzione sul piano organizzativo e sostanziale (nella specie, il non allontanamento dalla compagine sociale dell’amministratore imputato e recidivo e la non corretta composizione dell’Organismo di vigilanza)¹⁷.

Indicazioni nel merito erano state elaborate anche nel noto caso Impregilo, ove tuttavia la Cassazione¹⁸ ha rovesciato le valutazioni sull’adeguatezza del sistema adottato dalla società operate dai giudici di primo e secondo grado.

3 Il ruolo dell'OdV nella difesa dell'ente

Parlando di *compliance* e di prevenzione degli illeciti non ci si può esimere da alcune domande fondamentali: chi deve regolare? come regolare? chi e come deve controllare¹⁹?

In altre parole, laddove esiste un sistema di regole deve esistere anche qualcuno che sia responsabile della vigilanza sul rispetto di esse.

Nell'ambito della "responsabilità 231" – e nei limiti di un controllo di secondo o terzo livello – tale compito è attribuito ad un "*organismo dell'ente dotato di autonomi poteri di iniziativa e di controllo*": l'Organismo di vigilanza (OdV).

Senza addentrarsi nelle attribuzioni specifiche di tale organismo, ai fini della presente trattazione appare interessante un affondo sulla possibile e/o opportuna attività dell'OdV nel caso di indagini nei confronti dell'ente.

Un primo dato che emerge è l'esiguità del tempo a disposizione dell'ente per costruire una linea difensiva, soprattutto in relazione all'applicazione delle misure cautelari²⁰. Come si è visto la difesa potrà indirizzarsi verso l'affermazione di un'adeguatezza del modello organizzativo adottato, delle misure preventive attuate, delle procedure formalizzate e dell'efficace informativa fornita ad apicali e sottoposti.

Elemento centrale sarà, allora, rivestito dalla corretta attività svolta dall'Organismo di vigilanza. In particolare, questo può assumere un ruolo chiave nella predisposizione della difesa processuale attraverso la messa a disposizione dei verbali delle riunioni, della programmazione e dell'effettuazione dei controlli che competono a tale organismo (c.d. di secondo o terzo livello), dei *reports* e dei flussi informativi con gli organi sociali. Si rileva, pertanto, la necessità di un archivio aggiornato e strutturato che garantisca la tracciabilità delle attività svolte in seno alla società.

Il buon funzionamento dei flussi informativi sarà proprio una delle fonti principali a cui attingere per dimostrare l'efficace attuazione del Modello e l'adeguatezza dell'attività svolta dall'OdV. Le verifiche verteranno, infatti, anche sul passaggio di informazioni, fluido e trasparente, tra i diversi organi sociali e tra questi e l'Organismo di vigilanza, come presidio di prevenzione per la commissione degli illeciti o delle frodi in genere.

Altrettanto importante è la previa predisposizione di un "piano di vigilanza" che calendarizzi le verifiche e i controlli, sia dal punto di vista temporale che dal punto di vista delle aree, dei processi aziendali e dei reati-presupposto presi in considerazione.

Secondo la medesima prospettiva, sono essenziali i "*working papers*" dell'Organismo di vigilanza, così come quelli di ciascuna area aziendale, che devono costituire patrimonio comune per lo scambio di informazioni tra i diversi organi di controllo.

Rispetto alla vigilanza dovuta ci si può allora chiedere cosa accada se, durante dei controlli a campione, venga individuata una possibile condotta fraudolenta o potenzialmente illecita; e in questi casi quale debba essere la reazione posta in essere dall'OdV. Va, in proposito, ricordato che i membri dell'Organismo di vigi-

lanza non rivestono alcuna posizione di garanzia in relazione alla commissione di illeciti penalmente rilevanti (ad esempio, per mancato controllo). Allo stesso modo, questi non hanno alcun obbligo di denuncia normativamente previsto nei casi di conoscenza della commissione di un illecito. La responsabilità di costoro resta, dunque, eventualmente quella civilistica nascente dal mandato ricevuto dalla società a cui ineriscono.

Va poi tenuto presente che, allorquando venga effettivamente comminata una misura cautelare interdittiva, esiste uno specifico illecito previsto dall'art. 23 d.lgs. n. 231/2001 che punisce chiunque, nello svolgimento dell'attività dell'ente stesso, trasgredisca agli obblighi o ai divieti connessi alla misura attuata. Inoltre, se l'ente trae un profitto rilevante da tale trasgressione saranno applicabili ulteriori sanzioni. Per tale ragione, l'Organismo di vigilanza sarà interessato anche da una verifica sul rispetto della misura comminata, o meglio, sull'efficace prevenzione di una violazione di tale misura.

Proprio in relazione all'applicazione delle misure cautelari, un giudice di merito²¹ si è spinto a includere, tra gli elementi concreti attraverso cui valutare la corretta organizzazione di un ente "recidivo", la composizione dell'Organismo di vigilanza. Nel caso di specie, la sua natura monocratica è risultata idonea "a pregiudicare l'efficacia concreta della sua azione di monitoraggio", che "considerati i trascorsi molto negativi della società" avrebbe dovuto essere "assidua ed assai penetrante".

Sempre con riguardo alle misure cautelari, si è detto che, in luogo dell'applicazione della misura, è possibile che sia nominato per l'ente un commissario giudiziale, nel cui compito rientra "l'adozione e l'efficace attuazione dei modelli di organizzazione e controllo". In tali circostanze, vi sarà, altresì, un'esigenza di coordinamento di questo soggetto con l'Organismo di vigilanza in carica.

4 Conclusioni

Giungendo alle conclusioni, si può evidenziare come il tema trattato – di carattere molto tecnico e settoriale – possa aprire lo sguardo ad un'analisi di politica criminale di più ampio respiro.

Giungono, infatti, da più parti delle istanze di modifica dei criteri di ascrizione della responsabilità da reato degli enti, di rivisitazione dell'istituto dell'Organismo di vigilanza, di ricalibratura dei presupposti della confisca e del connesso sequestro preventivo²².

In particolare, dovrebbe essere rivisitato il ruolo "scriminante" del modello organizzativo, sia da un punto di vista del suo accertamento processuale (inversione dell'onere della prova), sia nel chiarimento degli elementi-chiave che ne fondino l'adeguatezza e l'idoneità. Medesimo discorso può valere per la strutturazione e l'attività richiesta all'Organismo di vigilanza.

Il sistema italiano è attualmente un ibrido, oggi reso ancor più complesso da tutta la tematica legata alla c.d. anticorruzione che ha ampliato a dismisura la

possibile rilevanza dei modelli organizzativi (quantomeno nel settore dell'azionariato pubblico) e che si sta muovendo verso l'inserimento di obblighi di segnalazione ("whistleblowing") anche all'interno dello stesso d.lgs. n. 231/2001.

A fronte di un diritto penale economico sempre più orientato ad una prospettiva di prevenzione/premialità e alla luce delle esperienze del diritto internazionale, comunitario e comparato, non si può che auspicare una riflessione più profonda sulla natura stessa della responsabilità degli enti.

Endnotes

- ¹ Mutuando il titolo del volume *El Derecho Penal Económico en la Era Compliance*, a cura di J.L. Gómez Colomer - L.A. Zapatero - A.N. Martín, 2013, Tirant lo Blanch, Valencia.
- ² V. MONGILLO, *Il 'sacchetto d'oro' e la 'spada inguainata': l'interazione pubblico-privato e il peso degli 'incentivi' in un recente modello di compliance anticorruzione*, in www.penalecontemporaneo.it.
- ³ MCDERMOTT, WILL & EMERY, *Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives*, in www.mwe.com.
- ⁴ G. TONDI, *Risk management, auditing and compliance. A summary report regarding italian SMEs*, in *La responsabilità delle società e degli enti*, 2016, n. 1, 374-405.
- ⁵ T.E. EPIDENDIO, *Il Modello organizzativo 231 con efficacia esimente*, in *La responsabilità delle società e degli enti*, 2010, n. 4, 149-160.
- ⁶ Sul tema dell'elusione fraudolenta, si veda in particolare Cass. pen., 30 gennaio 2014, n. 4677, secondo cui l'aggiramento del modello non può consistere nella mera violazione delle prescrizioni ivi contenute, bensì deve concretizzarsi in una condotta "ingannevole, falsificatrice, obliqua, subdola".
- ⁷ P. IELO, *Le indagini preliminari nel procedimento di accertamento della responsabilità degli enti*, in *La responsabilità delle società e degli enti*, 2012, n. 2, 87-101.
- ⁸ Art. 9 comma 2: "Le sanzioni interdittive sono: a) l'interdizione dall'esercizio dell'attività; b) la sospensione o la revoca delle autorizzazioni, licenze o concessioni funzionali alla commissione dell'illecito; c) il divieto di contrattare con la pubblica amministrazione, salvo che per ottenere le prestazioni di un pubblico servizio; d) l'esclusione da agevolazioni, finanziamenti, contributi o sussidi e l'eventuale revoca di quelli già concessi; e) il divieto di pubblicizzare beni o servizi".
- ⁹ Relazione governativa al d.lgs. n. 231/2001, par. 1.7.
- ¹⁰ Cfr. d.l. 5 gennaio 2015, n. 1, convertito con modificazioni dalla l. 4 marzo 2015, n. 20; d.l. 4 luglio 2015, n. 92, decaduto per mancata conversione (ma gli effetti del decreto sono stati fatti salvi dalla l. 6 agosto 2015, n. 132); e appunto la l. 132/2015.
- ¹¹ Cfr. Cass. pen., 9 febbraio 2016, n. 11209, in *Banca dati Dejure*.
- ¹² Cfr. Trib. Parma, 22 giugno 2015, in www.neldiritto.it/. Si vedano anche Cass. pen., 5 maggio 2015, n. 18634, in www.aodv231.it/, e Id., 18 dicembre 2013, n. 51151, in www.altalex.it/.
- ¹³ Cass. pen., 3 marzo 2016, n. 8854, in www.rivista231.it.
- ¹⁴ P. IELO, *Compliance programs: natura e funzione nel sistema della responsabilità degli enti*, in *Resp. soc. e enti*, 2006, n. 1, 101.
- ¹⁵ R. FRASCINELLI - P. VERNERO - M.F. ARTUSI - B. PARENA, *Il sistema dei controlli e il principio di affidamento dell'impresa moderna*, in *La responsabilità delle società e degli enti*, 2014, n. 4, 241-261.
- ¹⁶ Trib. Roma, 4 aprile 2003, Finspa, in *Dir. e prat. soc.*, 2005, n. 10, 90.
- ¹⁷ Trib. Parma, 22 giugno 2015, cit.

- ¹⁸ Cass. pen., 20 novembre 2014, n. 3307, in *Banca Dati Dejure*.
- ¹⁹ M.F. ARTUSI, *L'efficacia delle sanzioni per la corporate governance*, in *Resp. soc. e enti*, 2014, n. 1, 137-147.
- ²⁰ L'art. 47 del d.lgs. n. 231/2001 stabilisce che "sull'applicazione e sulla revoca delle misure cautelari (...) provvede il giudice che procede". Costui "fissa la data dell'udienza e ne fa dare avviso al pubblico ministero, all'ente e ai difensori. L'ente e i difensori sono altresì avvisati che, presso la cancelleria del giudice, possono esaminare la richiesta dal pubblico ministero e gli elementi sui quali la stessa si fonda". L'avviso della fissazione dell'udienza può essere comunicato all'ente fino a 5 giorni prima la data della stessa e la difesa dell'ente ha la possibilità di depositare una memoria fino a 3 giorni prima di tale ultima data (secondo il combinato disposto del medesimo art. 47 e dell'art. 127 c.p.p.).
- ²¹ Si tratta della pronuncia Trib. Parma, 22 giugno 2015, cit.
- ²² In tal senso si può dare atto della proposta avanzata dall'Associazione dei componenti degli organismi di vigilanza ex d.lgs. n. 231/2001, "Proposta di riforma del D.lgs 8 giugno 2001 n. 231", 9 marzo 2016, consultabile su www.aodv231.it.

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La centralità dei flussi informativi nell'approccio al "risk management" e alla "criminal corporate responsibility": applicazione pratica all'attività dell'organismo di vigilanza

Authors

- Paolo Venero, Accountant, venero@studioverneromanavella.it - Studio Venero-Manavella & Associati
 - Benedetta Parena, Accountant, parena@studioverneromanavella.it - Studio Venero-Manavella & Associati
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A seguito della riforma del diritto societario del 2003, le tradizionali tecniche aziendalistiche sono entrate a tutti gli effetti nel sistema normativa italiano, con particolare riguardo al parametro degli "adeguati assetti organizzativi". Il sistema dei controlli e la *best practice* evolvono, quindi, da una visione del controllo come mera "funzione punitiva" ad una concezione del controllo come funzione fisiologica della gestione confluendo quindi a pieno titolo nella *governance* delle società. Obiettivi del presente *paper* sono *i)* evidenziare la correlazione esistente tra il sistema di controllo interno e il "*risk assessment*"; *ii)* descrivere le principali caratteristiche degli adeguati assetti organizzativi; *iii)* evidenziare la centralità dei flussi informativi sia per consentire l'"agire informato" che compete agli amministratori, sia per garantire il buon funzionamento del sistema dei controlli. Ciò vale in particolare nell'ambito dell'attività dell'Organismo di Vigilanza (OdV) in relazione ai modelli organizzativi adottati ai sensi del d.lgs. n. 231/2001.

Keywords: *corporate governance*; modelli organizzativi; organismo di vigilanza; flussi informativi; principio di affidamento.

JEL Classification: K22

1 Introduzione

La riforma del diritto societario introdotta nell'ordinamento italiano dal d.lgs. n. 6/2003 ha elevato il format degli "adeguati assetti organizzativi" quale necessario parametro cui deve misurarsi l'organizzazione interna dell'impresa, portando le tradizionali tecniche aziendalistiche al rango di diritto comune. Il sistema dei controlli e la *best practice* evolvono, quindi, da una visione del controllo come mera "funzione punitiva" ad una concezione del controllo come funzione fisiologica della gestione confluendo a pieno titolo nella *corporate governance* societaria.

La *corporate governance*, definibile come "*the way in which companies are directed and controlled*"¹, è un insieme organico di strutture (decisionali e di controllo), regole (norme, regolamenti, codici di condotta), processi di intermediazione tra gli interessi degli *shareholders* e degli *stakeholders* e processi di gestione dei singoli organi finalizzato a: (i) bilanciare gli interessi dei soci di controllo, della struttura manageriale e degli *stakeholders*; (ii) creare valore economico in una prospettiva di medio lungo termine; (iii) minimizzare tutti i rischi a cui è esposta l'impresa; (iv) favorire la distribuzione equa del valore creato tra i diversi interlocutori sociali.

L'impostazione di un efficace ed efficiente sistema di governo contribuisce alla riduzione dei rischi – sia per quanto riguarda i reati-presupposto previsti dal d.lgs. n. 231/2001, sia con riferimento alle frodi aziendali in genere – intervenendo sulle principali aree-chiave della *corporate governance*, portando benefici alla società in termini di presidio dei rischi connessi all'operatività gestionale e al funzionamento degli organi di amministrazione e controllo.

Come definire e gestire il rischio? Il rischio è definibile come la combinazione delle probabilità di un evento e delle sue conseguenze. Qualunque iniziativa venga intrapresa determina il verificarsi di eventi e conseguenze che potrebbero rappresentare possibili benefici ovvero minacce. Il *risk assessment* è il processo volto ad assicurare l'individuazione, l'analisi e la gestione dei rischi aziendali, mentre il *risk management* è il processo attraverso il quale affrontare i rischi legati all'attività con lo scopo di ottenere benefici durevoli nell'ambito di ogni attività. La base di un buon *risk management* è l'identificazione e il trattamento dei rischi cui la società è esposta, conferendo il massimo valore sostenibile ad ogni attività aziendale.

Alla luce di quanto sopra, si può quindi notare la stretta relazione che viene a crearsi fra il sistema di gestione dei rischi e il sistema dei controlli interni. La suddetta relazione è evidenziata in particolare nel *CoSO ERM (Committee of Sponsoring Organizations Enterprise Risk Management)* che ancor oggi è uno dei più diffusi *standard* in tema di *enterprise risk management* e sistemi di controllo interno. In base ad esso "*la gestione del rischio aziendale è un processo, posto in essere dal consiglio di amministrazione, dal management e da altri operatori della*

*struttura aziendale; utilizzato per la formulazione delle strategie in tutta l'organizzazione; progettato per individuare eventi potenziali che possono influire sull'attività aziendale, per gestire il rischio entro i limiti del rischio accettabile e per fornire una ragionevole sicurezza sul conseguimento degli obiettivi aziendali"*²

I processi e le attività che si intersecano in modo complementare con il sistema di controllo interno possono dunque essere così individuati: (i) pianificazione: processo di analisi e decisione che conduce alla definizione degli obiettivi di lungo e breve periodo e alla progettazione degli strumenti gestionali per realizzarli; (ii) organizzazione: concretizzazione degli strumenti di gestione adeguati nella struttura organizzativa, nei meccanismi operativi e nel sistema informativo; (iii) controllo della gestione: monitoraggio delle attività, confronto continuo con quanto stabilito in sede di pianificazione, analisi degli scostamenti, proposta di azioni correttive per raggiungere i risultati programmati in tutti gli ambiti.

Occorre inoltre evidenziare una distinzione che, pur non avendo un riferimento normativo specifico nel nostro ordinamento, riveste un ruolo decisivo nel sistema dei controlli: la bipartizione tra controllo diretto e controllo indiretto. Una suddivisione che tocca trasversalmente organi e funzioni differenti e che, nella realtà economico-sociale, si risolve nella netta prevalenza dei controlli indiretti sui controlli diretti³.

Ciò deriva anche dalla oggettiva complessità della grande impresa moderna nella quale la *governance* è fortemente articolata e si estrinseca, altresì, nella verifica dell'efficienza e dell'efficacia dell'azione di altri soggetti (organi delegati, alta dirigenza, *managers*, responsabili di settore, amministratori di società controllate ecc.).

I controlli indiretti, sebbene dotati di meccanismi di "autocorrezione", portano con sé il rischio di un "default a catena" in quanto ultimamente fondati sui controlli diretti (i c.d. "controlli di linea"). Analogo fenomeno si verifica nelle procedure di controllo – e il tema è di particolare rilevanza proprio nella materia "231" – per cui molte istanze procedono, non già da atti di ispezione e di controllo diretto, bensì da atti di accertamento presso le "istanze inferiori" volti a verificare il corretto svolgimento delle procedure di controllo e l'adeguatezza degli assetti organizzativi di cui le procedure stesse sono parti integranti. Il sistema si presenta, cioè, come una sorta di "piramide rovesciata" che ricomprende l'insieme delle funzioni di controllo indiretto "e che poggia sul vertice, anch'esso rovesciato, dei controlli diretti su cui si regge, in definitiva, l'intera architettura"⁴.

2 Adeguati assetti organizzativi, sistema di controllo interno e Modello 231: sovrapposizioni o sinergie?

Come anticipato nel precedente paragrafo, l'adeguatezza degli assetti organizzativi è oggi elemento essenziale dell'organizzazione interna societaria.

Data la mancanza di riferimenti normativi specifici, non esiste una nozione univoca di "adeguatezza". Dal punto di vista letterale il termine "adeguatezza" ha diversi significati ("commisurare", "comparare", "ragguagliare"), ma non appare

mai pienamente autosufficiente, richiamando sempre la necessità di un rapporto con un altro elemento (categorie, grandezza, valori) che possono essere rappresentate dalla “natura” e dalle “dimensioni” dell’impresa⁵. Diverse fonti normative citano il principio di adeguatezza, fra le quali esemplificativamente si possono annoverare:

- l’art 2381 5^a comma c.c., secondo cui: “(...) *Gli organi delegati curano che l’assetto organizzativo, amministrativo e contabile sia adeguato alla natura e alle dimensioni dell’impresa (...)*”
- l’art 2381 3^a comma c.c., secondo cui: “(...) *Il consiglio di amministrazione (...) sulla base delle informazioni ricevute valuta l’adeguatezza dell’assetto organizzativo, amministrativo e contabile della società (...)*”;
- l’art. 2403 c.c. dispone che: “*Il collegio sindacale vigila (...) in particolare sull’adeguatezza dell’assetto organizzativo, amministrativo e contabile adottato dalla società sul suo concreto funzionamento*”;
- il d.lgs. n. 385/1993 (t.u.b.), il cui art. 53, comma 1, lett. a), come modificato dal d.lgs. n. 72/2015, stabilisce che “*la Banca d’Italia, emana disposizioni di carattere generale aventi ad oggetto: a) l’adeguatezza patrimoniale (...)*”;
- il d.lgs. 58/1998, il cui art. 149 stabilisce al comma 1, che “*il collegio sindacale vigila: (...) c) sull’adeguatezza della struttura organizzativa della società per gli aspetti di competenza, del sistema di controllo interno e del sistema amministrativo contabile nonché sull’affidabilità di quest’ultimo nel rappresentare correttamente i fatti di gestione; d) sull’adeguatezza delle disposizioni impartite dalla società alle società controllate, ai sensi dell’art. 114, comma 2; (...)*”;
- il d.lgs. n. 231/2001, recante la “*Disciplina della responsabilità amministrativa delle persone giuridiche*” che prevede l’esonero da responsabilità della società qualora abbia adottato ed efficacemente attuato (i.e. adeguatamente) il Modello Organizzativo;
- la Norma di comportamento 3.4 del Collegio Sindacale, emanata dal Consiglio Nazionale dei Dottori Commercialisti ed Esperti Contabili, rubricata “*Vigilanza sull’adeguatezza e sul funzionamento dell’assetto organizzativo*”, che definisce come adeguati gli assetti che presentano una struttura compatibile alle dimensioni della società e alla natura e alle modalità di perseguimento dell’oggetto sociale.

Il sistema risulta quindi essere “adeguato” quando permette la chiara e precisa indicazione dei principali fattori di rischio aziendale e ne consente il costante monitoraggio e la corretta gestione. Più precisamente la struttura organizzativa sarà ritenuta adeguata quando: si sia tenuto conto delle dimensioni della società e della natura dello scopo sociale; sia stato redatto l’organigramma aziendale con evidenziate le aree di responsabilità; la direzione della gestione sia di fatto esercitata dagli amministratori; esista una chiara documentazione riportante direttive e procedure aziendali e ne sia; stata fatta opportuna divulgazione; il personale sia dotato di adeguata competenza per svolgere le mansioni affidate; la programmazione (e cioè l’organizzazione ottimale dei fattori della produzione esi-

stenti o di immediata acquisizione) avrà come riferimento il budget d'esercizio; la pianificazione (e cioè lo sviluppo della struttura aziendale) avrà come riferimento il *business plan*⁶.

Articolazione necessaria, e fulcro degli adeguati assetti organizzativi, amministrativi e contabili è il sistema di controllo interno, snodo cruciale dell'articolazione del potere d'impresa e delle regole di responsabilità⁷. Come abbiamo visto nel paragrafo precedente esso rappresenta l'insieme delle regole, delle procedure e delle strutture organizzative volte a consentire l'identificazione, la misurazione, la gestione e il monitoraggio dei principali rischi cui la società è esposta; in tal senso i flussi informativi costituiscono una componente essenziale del sistema di controllo interno.

Il sistema di controllo coinvolge ciascun organo sociale per le proprie competenze (Consiglio di Amministrazione, Collegio Sindacale e Revisore Legale dei conti). Vengono altresì attratti e coinvolti nel sistema dei controlli interni anche gli altri ruoli e funzioni aziendali che, in relazione all'assetto organizzativo vigente, hanno specifici compiti in tema di controllo interno e gestione dei rischi, articolati in relazione alle dimensioni, complessità e profili di rischio dell'impresa.

Nel novero dei profili di rischio cui l'impresa è soggetta, è opportuno citare il d.lgs. n. 231/2001 che ha introdotto nell'ordinamento italiano la responsabilità amministrativo-penale degli enti facendo rientrare nel sistema dei controlli interni l'Organismo di Vigilanza (di seguito anche "OdV"). Detto organo, cui sono affidati i compiti previsti dall'art 6 del d.lgs. n. 231/2001, dovrà analizzare – anche al fine di un eventuale aggiornamento del modello stesso – ogni area aziendale per individuare in quale di esse possa sussistere la probabilità che uno degli illeciti ex d.lgs. n. 231/2001 possa essere commesso. In seno a questa analisi risiede infatti la valutazione delle procedure attualmente in essere nella società nonché l'analisi del sistema di controllo, permettendo in tal modo di porre in evidenza eventuali carenze da colmare. L'attività condotta dall'OdV permette, da un lato di creare un *trait d'union* tra l'adeguatezza dell'assetto societario e l'adeguatezza del Modello Organizzativo, entrambi volti a migliorare la *compliance* aziendale nell'attività di riduzione dei rischi; dall'altro di rafforzare il sistema di controllo interno, permettendo una maggiore diffusione della cultura del controllo all'interno della società. Cultura che diviene non solo uno strumento per la prevenzione della commissione di illeciti, ma anche uno stimolo per il miglioramento continuo/periodico dell'assetto organizzativo e operativo della società.

Così come i Modelli Organizzativi adeguatamente ed efficientemente adottati rappresentano una delle condizioni per l'esclusione della responsabilità della società, l'osservanza degli adeguati assetti organizzativi, amministrativi e contabili rappresenta una delle condizioni necessarie per scongiurare azioni di responsabilità nei confronti degli amministratori e dei componenti del Collegio Sindacale; in tal modo vi sarà coerenza fra i requisiti di adeguatezza dei Modelli organizzativi e i requisiti di adeguatezza dell'assetto organizzativo, amministrativo e contabile permettendo di accertare la responsabilità esterna col medesimo criterio

previsto per l'accertamento della responsabilità interna (ovvero degli amministratori e dei sindaci)⁸.

Anche a fronte di quanto sopra, secondo la dottrina dominante i Modelli Organizzativi vengono oggi sistematicamente ascritti a quelle norme del diritto societario (ed in particolare ai citati terzo e quinto comma dell'art. 2381 c.c. ed all'art. 2403 c.c.) che sanciscono il principio di "adeguatezza nel governo societario".

3 La centralità dei flussi informativi

La globalizzazione dei mercati ha dato crescente importanza dello sviluppo tecnologico che ha messo a disposizione delle imprese sistemi integrati in grado di supportare la gestione per processi, di rendere disponibili le informazioni aziendali in tempo reale consentendo di automatizzare una serie di operazioni nell'ambiente informatico. L'informazione e la comunicazione rappresentano pertanto una chiave fondamentale per delineare un sistema di controlli idoneo a supportare il processo decisionale di conduzione e di verifica degli obiettivi aziendali.

I sistemi informativi permettono di dare un'utilità all'informazione sia a livello operativo che strategico, di fondamentale supporto al management nel suo ruolo di guida dell'impresa, permettono di definire la qualità e l'utilità delle capacità e delle idee di conduzione manageriale⁹. Il documento OCSE¹⁰, aggiornato a settembre 2015 (che statuisce i principi in tema di *corporate governance*) sul tema dell'informazione (e della trasparenza) nel governo societario riporta quanto segue: *"Un rigoroso regime di diffusione dell'informazione, che favorisca una vera trasparenza, costituisce un principio fondamentale della sorveglianza delle società tramite meccanismi di mercato e condiziona la capacità degli azionisti di esercitare con piena cognizione di causa i propri diritti. L'esperienza dei Paesi dotati di mercati azionari sviluppati e attivi mostra che la diffusione dell'informazione può anche essere un potente strumento per influire sul comportamento delle società e tutelare gli investitori. Un rigoroso regime di diffusione dell'informazione può aiutare ad attrarre i capitali e a conservare la fiducia sui mercati finanziari. Al contrario, uno scarso rigore in questo settore e il ricorso a pratiche poco trasparenti rischiano di favorire comportamenti contrari all'etica e di incidere negativamente sull'integrità dei mercati a scapito non soltanto della società e dei suoi azionisti, ma anche dell'economia nel suo complesso. Gli azionisti e gli investitori potenziali devono potere attingere ad un flusso regolare di informazioni affidabili, comparabili e sufficientemente particolareggiate per poter valutare la gestione e prendere decisioni informate sulla valutazione e sulla detenzione di azioni, nonché sull'esercizio dei corrispondenti diritti di voto. Una informazione insufficiente o poco chiara può compromettere il buon funzionamento dei mercati, incrementare il costo del capitale e risultare in una inadeguata allocazione delle risorse"*.

3.1 Flussi informativi: strumento per *la corporate governance* e per il *risk assessment*

Il concetto di “obbligo di informativa” discende da diverse fonti normative ed in particolare l’art 2381, commi 3 e 6, c.c. prevede per gli amministratori l’agire in maniera informata. L’informativa endosocietaria ha la funzione di lubrificare gli ingranaggi costituiti dagli organi sociali e dalle funzioni aziendali; occorre quindi prestare attenzione all’interazione ed al coordinamento delle varie aree¹¹. Il dovere informativo diventa particolarmente decisivo in presenza di *warning*, che rappresentano delle anomalie della gestione, dell’organizzazione e della documentazione sociale in grado di generare il sospetto che sia stato compiuto o possa essere compiuto un fatto o atto illecito dannoso per la società¹².

Inoltre, nell’abito delle società quotate, l’art. 150, comma 1, del d.lgs. n. 58/1998 (t.u.f.) prevede che gli amministratori riferiscono tempestivamente, secondo le modalità stabilite dall’atto costitutivo e con periodicità almeno trimestrale, al Collegio Sindacale sull’attività svolta e sulle operazioni di maggior rilievo economico, finanziario e patrimoniale effettuate dalla società o dalle società controllate; in particolare, riferiscono sulle operazioni nelle quali essi abbiano un interesse, per conto proprio o di terzi, o che siano influenzate dal soggetto che esercita l’attività di direzione e coordinamento. L’art. 151, commi 1 e 2, d.lgs. n. 58/1998, così come modificato dal d.lgs. n. 37/2004, prevede che i sindaci possano, anche individualmente, procedere in qualsiasi momento ad atti di ispezione e di controllo, nonché chiedere agli amministratori notizie, anche con riferimento a società controllate, sull’andamento delle operazioni sociali o su determinati affari. Il Collegio Sindacale può scambiare informazioni con i corrispondenti organi delle società controllate in merito ai sistemi di amministrazione e controllo ed all’andamento generale dell’attività sociale.

Nella materia che si sta trattando, può essere utile un riferimento anche alle *Federal sentencing guidelines*¹³ statunitensi che prevedono, affinché possa configurarsi un effettivo ed efficace *compliance program* (programma che è stato ragionevolmente redatto, attuato ed imposto per prevenire e reprimere condotte criminose), la necessità di un monitoraggio e di un sistema di *reporting* sui fenomeni rilevati. L’organizzazione deve, dunque, avere adottato misure ragionevoli, volte ad ottenere l’effettiva aderenza agli *standard* ed introducendo e pubblicando un sistema di segnalazioni che consenta al personale di riferire di casi di violazione di norme, senza timore di ritorsioni.

Infine, l’art. 54 *bis* d.lgs. n. 165/2001 così come modificato dal d.l. n. 90/2014, prevede un’apposita tutela volta ad incentivare le segnalazioni da parte dei dipendenti pubblici (c.d. “whistleblowing”). Tale tematica ha assunto in Italia una maggiore rilevanza in funzione della normativa anticorruzione (l. 190/2012), nonché in seno alla stessa responsabilità degli enti, per la quale è in esame in Parlamento un disegno di legge sull’inserimento nell’art. 6 del d.lgs. n. 231/2001 di specifici obblighi di segnalazione¹⁴.

3.2 Flussi informativi e e d.lgs. n. 231/2001

Come si relaziona il sistema dei flussi informativi come sopra identificato con il Modello Organizzativo e con l'attività che deve porre in essere l'OdV? Il d.lgs. n. 231/2001, all'art 6 lett d), prevede obblighi di informazione nei confronti dell'OdV senza introdurre tuttavia delle regole specifiche, lasciando pertanto ampio spazio all'autonomia privata.

Se ben strutturati i flussi informativi permettono all'OdV una migliore individuazione dei rischi connessi alla struttura e all'attività effettiva dell'ente; tale organo può in tal modo fornire elementi conoscitivi utili all'organo amministrativo, o al soggetto da questo delegato, per orientare le scelte gestionali in questo ambito. L'attività dell'OdV rileva anche nei confronti degli altri organi di controllo, potendo fornire utili informazioni a supporto dell'azione di vigilanza che a questi compete¹⁵.

Le linee guida Confindustria, aggiornate a marzo 2014, sottolineano che: *“l'obbligo di informazione all'Organismo di Vigilanza sembra concepito quale ulteriore strumento per agevolare l'attività di vigilanza sull'efficacia del Modello e di accertamento a posteriori delle cause che hanno reso possibile il verificarsi del reato”* pertanto *“è da ritenere che l'obbligo di dare informazione all'OdV sia rivolto alle funzioni aziendali a rischio reato e riguarda: a) le risultanze periodiche dell'attività di controllo dalle stesse posta in essere per dare attuazione ai modelli; b) le anomalie o atipicità riscontrate nell'ambito delle informazioni disponibili”*.

Ne consegue che gli obblighi di informativa dovranno essere tanto più intensi quanto più si è più prossimi alle aree di rischio: essi dovranno essere adempiuti con cadenze periodiche e potranno scattare in presenza di *red flags* che vengano evidenziati nel corso delle attività svolte¹⁶.

L'obbligo di informativa, pertanto, è concepito quale (i) mezzo per incrementarne l'autorevolezza; (ii) ulteriore strumento per agevolare l'attività di vigilanza sull'efficacia e adeguatezza del Modello Organizzativo, (iii) elemento rafforzativo del principio che considera la carenza di informazioni come un indice di pericolosità attribuendo ad un efficiente flusso informativo una fisiologica capacità di attuazione dei rischi di reato; (iv) quale mezzo di accertamento a posteriori della cause che hanno reso possibile il verificarsi del reato.

Avendo riguardo all'Organismo di vigilanza è possibile classificare i flussi informativi secondo la tipologia: flussi indirizzati all'Organismo di Vigilanza; flussi provenienti dall'Organismo di Vigilanza. Ovvero secondo la periodicità: flussi attraverso i quali i referenti delle aree sensibili riferiscono periodicamente all'Organismo di Vigilanza; flussi al verificarsi di particolare eventi.

Va ancora osservato che la tipologia e la periodicità dei flussi informativi nei confronti dell'OdV devono essere strettamente correlati alle dimensioni dell'Ente e all'attività effettivamente svolta; inoltre dovranno essere caratterizzati per “provenienza” (dai referenti di area aziendali a rischio di reato o dalle funzioni di audit o dagli apicali) e per “criticità/anomalie” riscontrate in sede di accertamento delle cause di non conformità; in quest'ultimo caso l'OdV potrà in essere specifici e diversificati flussi informativi.

Nella costruzione dei sistemi informativi e dei relativi canali dovrà essere preliminarmente evidenziata la specifica realtà aziendale e la conformità con le previsioni del Modello Organizzativo, in particolare: se le procedure sono “mutuate” dai sistemi di gestione adottati in azienda i responsabili delle aree sensibili dovranno trasmettere il *report package* del sistema di gestione corredato di uno specifico rapporto informativo, e dovranno inoltre essere trasmesse all’OdV le risultanze dell’attività di monitoraggio, del riesame della Direzione e degli audit interni, nonché comunicate le azioni correttive apportate alle individuate situazioni di non conformità; se le procedure sono il frutto di regole che l’azienda si è data per gestire i propri processi senza ricorrere a specifici sistemi di gestione, per una periodica reportistica ci si dovrà riferire alla realtà operativa dell’azienda considerando il rapporto fra i responsabili delle aree sensibili e le procedure/sistemi di controllo esistenti al fine di poter comunicare periodicamente i riscontri ottenuti a seguito delle verifiche interne.

Le citate linee guida Confindustria, inoltre, specificano che *“le informazioni fornite all’Organismo di Vigilanza mirano a consentirgli di migliorare le proprie attività di pianificazione dei controlli e non, invece, ad imporgli attività di verifica puntuale e sistematica di tutti i fenomeni rappresentati. In altre parole, all’OdV non incombe un obbligo di agire ogni qualvolta vi sia una segnalazione, essendo rimesso alla sua discrezionalità (e responsabilità) di stabilire in quali casi attivarsi. Guardando anche alle esperienze straniere e in particolare alle Federal Sentencing Guidelines statunitensi e ai relativi Compliance Programs, l’obbligo di informazione dovrà essere esteso anche ai dipendenti che vengano in possesso di notizie relative alla commissione dei reati, in specie all’interno dell’ente, ovvero a «pratiche» non in linea con le norme di comportamento che l’ente è tenuto a emanare (come visto in precedenza) nell’ambito del Modello disegnato dal decreto 231 (i cd. codici etici). Si precisa, infine, che la regolamentazione delle modalità di adempimento all’obbligo di informazione non intende incentivare il fenomeno del riporto di rumor interni (whistleblowing), ma piuttosto realizzare quel sistema di reporting di fatti e/o comportamenti reali che non segue la linea gerarchica e che consente al personale di riferire casi di violazione di norme all’interno dell’ente, senza timore di ritorsioni. In questo senso, l’Organismo di vigilanza assume anche le caratteristiche dell’Ethic Officer, privo però dei poteri disciplinari che sarà opportuno allocare in un apposito comitato ovvero, nei casi più delicati, in capo al Consiglio di Amministrazione”*.

In ogni caso l’OdV deve mantenere la propria natura di organo di controllo di “secondo/terzo livello” e quindi le informative che riceve, dovranno essere il risultato di un preventivo filtro rappresentato dall’azione di vigilanza “di primo/secondo livello”.

3.3 Flussi informativi e principio di affidamento

Strettamente connessa alla tematica dei flussi informativi è quella attinente al c.d. “principio di affidamento”, che entra in gioco in tutte quelle attività e funzioni svolte da una pluralità di persone, permettendo a ciascun soggetto di confidare

che il comportamento dell'altro (in diversi casi ad esso gerarchicamente sottoposto e di cui sono noti e/o verificati i requisiti professionali e personali di idoneità per lo svolgimento del ruolo cui è preposto) sia conforme alle regole di diligenza, prudenza, perizia e professionalità.

In base a tale principio il soggetto che interagisce con altri è autorizzato a confidare sull'osservanza delle regole cautelari da parte degli altri soggetti, purché siano preventivamente appurate le competenze professionali di costoro in relazione al ruolo di volta in volta ricoperto. Pur non avendo espresso riconoscimento legislativo, il principio in parola è divenuto uno strumento – anche giuridicamente – imprescindibile nella realtà moderna fondata su una *società del rischio* (*Risikogesellschaft*).

Esso, infatti, corrisponde, da un lato, ad un'esigenza di utilità sociale, dall'altro, anche ad una logica giuridica, poiché è del tutto razionale (*rectius*, ragionevole) che il nostro ordinamento si fondi sulla plausibile presunzione che i consociati conformino il loro comportamento ai precetti giuridici piuttosto che sull'opposto pregiudizio di una loro generalizzata inosservanza.

Evidentemente devono sussistere dei limiti a tale presunzione di conformità, in quanto vi sono circostanze in presenza delle quali, non appare ragionevole in concreto l'affidamento sull'altrui osservanza delle regole cautelari e dunque si riespande in capo ai soggetti ultimamente responsabili l'obbligo di prevenire l'altrui comportamento concorrente con il proprio nella produzione del pericolo per il bene giuridico.

La giurisprudenza italiana ha talvolta dato rilievo al principio di affidamento¹⁷ definendolo come quel principio "*in forza del quale il soggetto titolare di una posizione di garanzia, come tale tenuto giuridicamente ad impedire la verificazione di un evento dannoso, può andare esente da responsabilità quando questo possa ricondursi alla condotta esclusiva di altri, (con)titolare di una posizione di garanzia, sulla correttezza del cui operato il primo abbia fatto legittimo affidamento*"¹⁸.

I limiti di tale principio sono stati altrettanto chiaramente richiamati da quelle pronunce che hanno stabilito che esso non è invocabile sempre e comunque, dovendo contemperarsi con il concorrente principio della salvaguardia degli interessi del soggetto nei cui confronti opera la posizione di garanzia. Tale principio, infatti, per assunto pacifico, non è invocabile allorché l'altrui condotta imprudente, ossia il non rispetto da parte di altri delle regole precauzionali imposte, si innesti sull'inosservanza di una regola precauzionale proprio da parte di chi invoca il principio¹⁹.

In altri termini, non può invocarsi legittimamente l'affidamento nel comportamento altrui quando colui che si affida sia in colpa per avere violato determinate norme precauzionali o per avere omesso determinate condotte e, ciononostante, confidi che altri, che gli succede nella posizione di garanzia, elimini la violazione o ponga rimedio all'omissione²⁰.

Il principio di affidamento ha dunque sia la funzione di temperare l'operatività delle c.d. posizioni di garanzia, sia di fondare l'accertamento della "*culpa in eligendo*" e della "*culpa in vigilando*", collegandosi al principio costituzionale di colpevolezza sancito dall'art. 27 cost.²¹.

È possibile individuare un'applicazione concreta del principio in esame nella figura del dirigente preposto alla redazione dei documenti contabili societari di cui all'art. 154 *bis* t.u.f. Detta figura è stata introdotta dalla c.d. legge sulla tutela del risparmio all'interno di un più ampio ventaglio di misure dirette a rafforzare l'attendibilità dell'informazione al pubblico di natura finanziaria (su cui fanno affidamento sia gli investitori, sia i risparmiatori), in risposta agli scandali finanziari dei primi anni 2000²². Interessante è comprendere se l'attività che tali dirigenti pongono in essere sia destinata (soltanto) agli amministratori, con particolare riferimento al consiglio di amministrazione oppure abbia una valenza (altresì) esterna, mirata a fornire la medesima garanzia/affidamento al pubblico ovvero agli investitori e ai risparmiatori.

Stante la sussistenza della prima finalità, va ricordato che la responsabilità ultima della veridicità del bilancio, permane comunque in capo agli amministratori. Tuttavia, la funzione di garanzia delle attestazioni richieste dalla legge al dirigente preposto non si esaurisce all'interno degli assetti organizzativi della società, avendo "intrinsecamente" una rilevanza anche esterna che rende "comprensibile" la responsabilità espressamente prevista per il dirigente preposto a fianco di quella degli amministratori, dei sindaci, del direttore generale nella nutrita serie di disposizioni come noto contenute nel codice civile, nel codice di procedura civile e nel codice penale, ai sensi di quanto elencato nell'art. 15 l. 262/2005²³.

Il principio di affidamento, fondandosi in prevalenza su controlli di tipo indiretto può presentare una certa fragilità: nel caso di un default dei controlli cd. "di linea" (ovvero dei controlli diretti) l'intero sistema di controllo rischierebbe di essere messo in discussione.

Per salvaguardare l'efficacia del sistema di controllo interno, è quindi necessario monitorare la correttezza del suo funzionamento. L'acquisizione di elementi probatori sulla sua efficacia richiede l'effettuazione di procedure di conformità sulla struttura e sulla continuità di applicazione dei controlli. Tra le procedure di conformità sono incluse esemplificativamente: la periodica disamina dei cicli aziendali al fini di verificare direttamente il rispetto della legge, dello statuto e l'adeguatezza del sistema organizzativo ed il suo funzionamento; l'effettuazione di interviste e l'osservazione diretta, per verificare se le funzioni svolte corrispondono a quelle assegnate; le verifiche sui documenti giustificativi delle operazioni, per verificare la loro corretta autorizzazione, formazione, interpretazione, registrazione; il *check* di alcune procedure di controllo, per verificare se sono state correttamente eseguite. Nonostante tutti gli accorgimenti possibili (ad esempio i Piani di Audit e/o i Test dell'OdV), resta il fatto che l'affidabilità dei vari passaggi è elemento necessario e ineliminabile della struttura dei controlli.

4 Conclusioni

Il filosofo olandese Bernard Mandeville nel suo scritto "La favola delle api" del diciottesimo secolo scriveva: *"Il vizio è tanto necessario in uno stato fiorento*

quanto la fame è necessaria per obbligarci a mangiare". Antica provocazione o attuale realtà?

A seguito delle gravi crisi economico-finanziarie degli ultimi anni e delle inefficienze che si sono manifestate agli occhi di tutti, il diritto dell'impresa è oggi spinto a dotarsi di maggiori e più adeguati strumenti di organizzazione e di prevenzione degli illeciti.

Proprio i casi di frode e di commissione di reati che si sono succeduti negli anni hanno focalizzato sempre più l'attenzione delle imprese sui meccanismi idonei a prevenire o comunque a ridurre il rischio di accadimento di determinati fenomeni criminali. In ambito internazionale numerosi studi hanno evidenziato come una effettiva debolezza nel sistema di controllo aumenta la probabilità di errori e/o frodi²⁴. D'altronde è ormai acclarato che nell'impresa il rischio di illecito è inversamente proporzionale all'adesione del *management* al sistema di valori rappresentato dalla legge²⁵. La guida "*Managing the Business Risk of Fraud: A Practical Guide*", sviluppata da un team internazionale e utilizzata come riferimento per l'implementazione di un sistema di gestione del rischio di frode aziendale, prevede un modello di gestione basato su alcuni principi tra i quali, in questa sede, è interessante evidenziare: (i) l'attivazione di un programma di *fraud risk governance* come parte di una struttura di *governance* e (ii) l'implementazione di un sistema di *reporting* e di flussi informativi che fungano da input alle attività di investigazione e che aiutino ad attivare azioni correttive.

In ambito nazionale, il legislatore ha introdotto vari strumenti che, pur rispondendo a principi di tutela di interessi fra loro diversi, hanno la comune finalità di ridurre il rischio di commissione di un illecito, fra i quali il più volte citato d.lgs. n. 231/2001 e, da ultimo, la Legge 190/2012 (normativa anticorruzione e trasparenza). Entrambi questi provvedimenti individuano quale criterio di imputazione soggettiva la c.d. colpa di organizzazione e adottano un sistema di allocazione/esenzione della responsabilità sulla base di una deficienza organizzativa desumibile dalla mancata adozione di adeguati modelli di prevenzione e protezione. Secondo questo schema i piani anticorruzione, come i *compliance programs* 231, giocano il ruolo di "organizzazione dell'organizzazione" quali strumenti di reazione per ridurre il rischio che si verifichino illeciti²⁶.

La frode rappresenta sempre più una grave minaccia e quindi un rischio per le aziende, in termini economici, gestionali e reputazionali, sino al punto di comprometterne l'efficacia dell'organizzazione e quindi il *business*²⁷.

In una logica evolutiva dei *compliance programs* ed ampliandone gli orizzonti, pare opportuno guardare al ruolo della *security* nelle imprese a 360 gradi, implementando l'organizzazione verso un vero e proprio "sistema antifrode". Questo va considerato in modo unitario ed integrato con l'*enterprise risk management* e la *corporate responsibility* in quanto elementi portanti di un moderno sistema dei controlli.

Seguendo tale impostazione, si evidenzia con ancora più consapevolezza la centralità dei flussi informativi. In particolare, lo stesso passaggio di informazioni, fluido e trasparente, può fungere da presidio di prevenzione per la commissione degli illeciti o delle frodi in genere. E ciò vale, a maggior ragione, tenendo

presente gli strumenti tecnologici oggi a disposizione delle imprese, in cui, di fatto, le informazioni necessarie sono già tutte presenti. Data l'esistenza di tali sistemi informatici, sarebbe necessario un *upgrade* degli stessi al fine di rendere tracciabile l'evoluzione storica delle informazioni e creare dei "warnings" di segnalazione volti a semplificare e rendere più efficiente l'attività degli organi di controllo.

Endnotes

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The capital of culture: a value that creates value as *driver* of economic and social development

Author

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- *Barbara Veronese, adjunct Professor, barbara.veronese@unito.it - University of Torino*
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In the current economic context, the changes and the consequences generated by globalization, outsourcing and related economic phenomena, involve renewed organizational, innovation and management challenges, as well as an appropriate approach to the treatment of corporate risk.

Having established that the traditional vision of the economy based solely on profit seeking is now deemed inadequate, the present working paper takes into account the economic value that must be acknowledged to the factor "Culture", to be understood as incentive for seeking new opportunities for innovation, consolidation and growth, representing an economic development driver, even long-term, not only for the attitude of this sector to generate new business opportunities, but also and mostly for its ability to affect the approach and the way of doing business involving not only the directly and immediately affected actors, but extending the obtainable effects to the entire social fabric (we can think, for instance, to: the protection of the environment; the health of employees; the commitment in the field of sustainability; responsible innovation; supply chain partnerships; corporate social responsibility; interest in the local territory, etc.).

Not be forgotten, also, the aspect of the culture of legality, as ethical respect of the rules, useful conduct, in the economic sense, for the community, for citizens and for the State, too.

The Enterprise System should be invested in this key role, to meet each other and interact with culture thanks to the ingredients represented by increasingly targeted knowledge, creativity, innovation and research, even trying to catalyse and accelerate new technology and digital processes in support of identifying innovative trends and new business opportunities.

Only by encouraging and believing in the potential of the knowledge, it will be able to produce wealth and, at the same time, innovate the idea of entrepreneurship.

In this context, a crucial role is what intangible capital of the firm appears to be invested, consisting of the sum of human, organizational and relational assets, which allow each un-

dertaking to qualify, strengthen and protect its corporate image, enhance its assets, optimize operational efficiency, contribute to the spread of social responsibility, promote and improve good business and organizational practices and participate in networks of enterprises engaged on common and/or shared issues.

The use of culture is also to be understood as the linchpin in conducting a fair activities of Enterprise Risk Management, which mind not only to methods for the prevention, control, mitigation and management of operational risk, but goes beyond for the creation and preservation of that substrate of values constituent the firm's reputation, which the known beneficial effects which may relapse on access to credit, on the acquisition and retention of skilled labor and, still, on the welfare of the territory and, in general, on a series of positive externalities that reverberate its good outcomes even outside the business environment that generated them.

Keywords: Culture, creativity, intellectual property, intangible assets, reputational risk.

JEL Classification: K22

1 Introduction

In today's economic reality, the sudden changes that have occurred and are still running and so too the repercussions generated by the processes of globalization, the international reorganization of industrial production and the economic phenomena that affect them, require renewed organizational innovation and management challenges, as well as the proper approach to the risk management, to be adopted either in an internal corporate perspective that in an external relational one.

In this context, it can be considered outdated and no longer adequate, the traditional vision of the economy and undertaking where the only firm institutional task was to "make profit."

We can not longer limit to fulfill only the interests of the stockholders who hold the owner's control, but also must look after the legitimate interests of which appears to be holder the wider audience of stakeholders, referring to all those who commonly have to deal with enterprises.

In this perspective, it is given to observe how, in recent years, the economic value recognized in culture has assumed a role of utmost importance¹, also as a resource for sustainable economic growth, for innovation and cohesion, in the hope of overcoming the actual global crisis period, even if it appears to be necessary to understand that it goes far beyond the economy considered alone, because his strength is the ability to involve the entire social structure².

Within the deep change taking place, development economy looks not only to the out-and-out business, but it also tends to encourage the so-called relationship economy, directed to the production of value, but making use of the equip-

ment of cultural capital, in whose forms of expression can, for example, a glimpse profiles of care of relationships, attention to the image and business credibility, to the customer and to the information relating the product and/or service, the ability to share objectives and organization³, all also with a view to strengthening the reputation, with a varied approach according to the different geographical areas; can be observed, for example, a creative template for innovation with particular emphasis on the technological aspects typically spread in the countries of Northern Europe and North America, while the creative processes own facts by the countries of the Mediterranean area, by the Latin American and Asian countries (and sometimes in some African State) will mainly focus on a creativity model aimed at supporting the social quality.

1.1 General overview

As regards the objective of this paper, I wish to point out the meaning and importance, that here, we want to assign to the term “culture” which, in its various declinations, there is understood as a means of production of other market goods and not.

Closely linked to culture is, furthermore, the concept of creativity, referring to the complex process of innovation joining the ideas, skills, information, instructions and inputs of the production processes of goods and/or services, technology, management of creative and cultural proceedings, to be considered as a source of intermediate consumption in the production process itself.

In the framework outlined, it emerges as the culture can provide the specific skills, working methods, creativity, imagination and, definitely, each suitable capacity to adapt and implement those skills that – in the economic system – are to play a role of comparable importance than, for instance, the scientific skills and technological ones.

There is no doubt that in today’s post-industrial economy, creativity is a key element to feed innovation, where we know that consumers and users are increasingly hammered by a market full of products and services, with similar prices and performances.

On an economic ground, traditionally, the answer offered for trying to increase the competition was mostly based on the strategy of relocating, shifting the manufacturing activities abroad, playing in the fall in production costs, doing mainly hinge on significant contraction of charge for labor.

Today, with good reason, it is gathering more and more consensus the alternative represented by the promotion of competition and growth, based primarily on the solid and optimal use of culture and creativity.

Moreover, it is known that the competition creates not only greater technical and economical knowledge, but also – and at the same time – the need for increasingly higher quality and differentiation.

Basically, we can say that today the distinctive competition parameter is based essentially on the intangible capital dimension generated by creative peo-

ple and by their abilities, the ideas and processes, in other words by the “creativity”.

Precisely for this reason, in order to concretely allow flourishing of culture and creativity, it is decisive the exploitation of assets constituent the so-called “Intangible capital”, especially in Europe – and, in it, in particular in Italy – which owns and has been fortunate to have a huge cultural heritage, with past and present creators and an unquestioned dynamism of knowledge, in its various facets.

In our country, culture and economy are, sadly, actually traveling almost constantly distinct⁴, although the two values need each other. And today, this need is increasingly perceived in practice.

It is also true that the factor “culture” – to be understood as the *fil rouge* or leitmotiv that links and crosses various issues, including: the *sharing economy*, the *crowdfunding*, the economic and environmental sustainability, the social responsibility, the adoption of the so-called “good business practices” or best practices – would require subsidies, or other alternative interventions to support innovation and growth, to be disseminated to all and that the economy “considered by itself, in the absence of a cultural background and appropriate policy, it would not build nothing really durable⁵.

What expressed is, after all, be confirmed by a comparative view of the phenomenon – leading us to observe what is happening beyond domestic boundaries – shows that, today, only those who invest in view of the “Enterprise-culture” system gets the best results.

This teaching is, in fact, already been taken up by other European countries, especially from those more competitive on the topic of digital manufacturing, which are working more and more with researchers and artists of all the themes of innovation with order to support economic development, not leaving out other important issues, such as social, environmental, etc.

Looking even further ahead, we think, for example, on the way at the time taken by Japan before, and countries of the Far East constituting the “Four Tigers” (Taiwan, Singapore, Hong Kong and South Korea), then, if the rapid development which has allowed the high performances also in terms of competitiveness has proven to be based not only on strong economic fundamentals and high investments, but also to make use of the very important role and contribution of cultural factors such as the specialized human resources, environmental and customer protection, the protection of intellectual and industrial property that have spurred, among others, technological innovation and export orientation.

In Italy, however, it still tends to make a purely instrumental use of the culture, even if it starts to make its way – at least in some areas – the knowledge that the overrunning of the economy in contiguous sectors, ranging from the right to the study of social phenomena, from the environment until marketing, allows the activation of profitable networks of exchanges and collaborations between economists and researchers of different disciplines, although related, implying the necessary inclusion in the analysis of intangible and subjective variables.

It would, however, need a step further, perhaps more bold, which could give way to a radical change of policies that allows to channel the creative potential in original business projects and, above all, to give space to cultural production that, today, in Italy, has a very little value, all not leaving alone the singular undertakings actually affected, but supporting them with adequate facilities and support resources.

If only we align to the European agenda, it would definitely doable and workable.

Moreover, the objective of the European Union to promote the development and the growth of knowledge, causing the U.E. may become “the company’s most competitive and dynamic knowledge in the world, while generating sustainable economic growth, greater social cohesion, better employment levels” had already been promoted since March 2000 in the European meeting in Lisbon, where the European Council set out priority objectives to make Europe’s knowledge-based economy, more competitive, more cohesive, inclusive, innovative and socially sustainable (by that agenda is, then, born the also called Lisbon strategy, which formally ended in 2010, to be, later, redefined in the new role of “Europe 2020”).

2 Culture and knowledge in the risk treatment. The reputation

It is known that the rate of development of a country and the degree of maturity of its business are also measured in terms of the level of risk management adopted, that allow to assess the objective sustainability of the activity to the exposure to risk and its potential impact compared to the creation and distribution of corporate value, namely the ability of a company to prevent, govern and properly manage risk and, thus, reduce the likelihood and incidence of events of loss and/or damage, in a perspective of research and of maximization of wealth management.

In practice, it must be taken into account not only the operational and inherent risk of the considered activity, but also the context in which the firm ranks and those with which it interacts, with the knowledge that estimating the risk is extremely difficult to assess, while it is, however, well known that it is quite easy to underestimate, with the serious consequences that may ensue.

In the context described, it highlights the key role that culture and knowledge hold.

In effect, only the development of an appropriate “corporate culture” – founded on the core value of transparency, that leverages the knowledge emerged also in order to avoid repetition of the wrong practices of the past, it seeks new and strengthen communications within the enterprise and between itself and the outside world – could immunize, at least in part, from the injurious effects achieved by the risk, translating, thus, existing threats into opportunities for development and optimal management.

By now, can be observed more and more frequently that alongside the correct approach to the significant operational risk in the identification, evaluation or assessment, monitoring of business processes aimed at the prevention, control and mitigation of risk, great importance is recognized to the role of culture, that, in the specific context in question, must be understood as the creator of “visibility” of the enterprise, namely the definition and sharing of all those concrete ways in which the same manages the potential risks building, in this way, a real path of trust, in which knowledge represents an important source of innovation, closely related to the development of intellectual capital, giving certainty and increasing, among others, the propensity to adopt new technologies by encouraging operators to seize the existing opportunities for growth⁶, with the aim of creating shared value, including through the advancement of economic and social conditions of the community where it operates.

When using the term “knowledge” refers to that public good “not rival” (whose consumption by an individual does not prevent the simultaneous use by another), “no bypass” (because it can’t prevent the use by consumers) and “cumulative”, having regard to its suitability to generate positive externalities.

Now we know the great value to be attributed to the reputation and trust, which are the main assets that underpin the development of many activities.

When talking about reputation, it must refer to that total value, resulting from the sum of a number of determining factors, such as: the prestige, good name, respectability, the ability to be compliant with respect to a plurality of regulatory systems⁷, the ability to stay on the market, trust, reliability, respect and the ability to ensure defined product standards.

Reputation is to be understood as synonymous of credibility, integrity, honoring of the commitments, ultimately the regard in which it enjoys with the community and with the Authorities, including supervisory ones, which means – in the overall perspective – the general awareness of a given company’s ability to create wealth not only for its shareholders but – in a sense much more extensive – going to comprise also all those who are stakeholders.

Today, in the socio-economic context defined as “knowledge society” in which we are living, culture, knowledge, their communication and sharing are the basic tools of development and business that, if properly managed, allow the escape or however, to mitigate the exposure to reputational risk – considered in advance not measurable – which may impact on the company’s image, that means on the representation that the undertaking offers himself and on strategic choices concerning the interaction of business and the content of its products and services.

As mentioned, the reputation, perceived today as a true real value, must be considered based on a jumble of conducts and relationships that the company should adopt – both to internal and external parties – in the creation of the fiduciary relationship, centered on adoption of organizational solutions in support of the strategies chosen and with reasonable consistency with existing standards systems of rules, to the relevant communication and interpretation.

In the context described, in which the pervasive and transversal impact showed that the risk of reputation can occur at different levels of activity, it un-

derlines the crucial importance of the cultural factor, which it must be seen as the pivotal impulse that leads to the constant looking for techniques, strategies and organizational processes to be adopted within each business unit to enable improved management and identity and corporate image communication.

Browsing, from the point of view of quality, some techniques can be adopted – although not yet the same as well-established and explored – we can stop to observe the articulation and the importance of the role entertained by internal controls to check, for example, the quality of production, internal relations, the characteristics of the work environment, quality of management, and the indication of the requirements regarding the good governance, the establishment of best practices at the enterprise level, the adoption of measures to ensure the quality of management, leadership and sustainability, social responsibility, the support to the innovative nature of the company and, again, the adoption of appropriate technical metrics to ascertain the perceived quality of products and services, conducts of approach marketing, brand valuation, etc.

It is, therefore, established that the acquisition and preservation of reputation – intended as a driving factor for the success and affirmation of enterprises – must be based on a proper process of enterprise risk management that must take his best strategic weapon based on culture and on knowledge, the costs of which should be understood in their real significance of the acquisition of confidence from the public and customers, as well as real opportunities, to be understood in broadly meaning, acquisition of market quotas; less difficulty in raising venture capital and a trend decline in the relative cost; lower cost of capital supply market conditions, both domestic and international; reducing exposure to competitive pressures; ease of attract, acquire and retain qualified human resources, etc.

3 Applications

The culture factor should be understood as a new business and growth opportunity, representing an economic development driver, even long-term, not only for the attitude of this sector to generate new business opportunities, but also for the ability to affect the approach and the way of doing business (we can think to: the protection of the environment; the health of employees; the commitment in the field of sustainability, responsible innovation, supply chain partnerships; corporate social responsibility; etc.⁸).

Only then, it will be able to produce wealth and, at the same time, to innovate the idea of industrial activity, trying to achieve more and better results, both in terms of profitability and strategic management.

It is necessary, therefore, to believe and invest in the culture, understood in its broadest sense to be as: artistic heritage and beauty; industry and cultural and creative activities; enterprise culture and ethics; all factors of which the “Bel Paese” certainly does not lack, approach that leads us to consider not only new

professional opportunities offered by a sector far less traveled than others, but also the opportunities for growth in terms of multidisciplinary and interchange.

Do not forget, also, the other meanings of culture; of all, the culture of legality, or respect of ethical rules, conduct useful, as well as having the function of educating, has a definite socio-economic impact for the community, for citizens and for the State.

It is known that the human mind is, by nature, basically insensitive to ethics reasons, careful to only utility reasons. This is why we must act to pass the importance of legality, doing become aware that a small personal sacrifice can lead to enormous benefits for the community, if everyone is willing to do its part and his duty. Not to mention that by this conduct endorsed by the ethically correct entrepreneurs could achieve very positive effects, also in terms of image and reputation (we have already been widely discussed about this concept in the previous section 2., specifically about the treatment of reputational risk management in the conduct of a desirable Risk management activities).

The Enterprise System should be invested in this key role, which consists in meeting each other and interact with culture thanks to the ingredients represented by the creativity, innovation and research in a multidisciplinary approach and exchange, also trying to catalyze and accelerate new processes in support of the search for innovative trends and business opportunities.

We can find different spheres of possible intervention in order to enhance the undertaking organization: from environment to work (the latter also includes the protection of the health of its employees; by the company to the market; until the government and the management of the company.

As said, the culture with the creativity are relevant factors having the ability to contribute to growth, competitiveness, increase – both in quantitative and qualitative terms – employment, sustainable development, innovation in economic and social life of the country.

And Italy can only compete with that knowledge, not having sufficient raw materials or advanced basic research, in addition to the further obstacle of the high cost of labor that excludes any form of competition, in terms of pure price, with emerging countries.

In addition, within the expanded framework of the European Union, it should be emphasized the contribution that culture makes to the promotion of European integration, contributing to developing a sense of belonging, and disseminating the democratic and social values.

Today, can be observed also the timid tendency to the strengthening of relations between economy and culture, due to several reasons, including: the increase of knowledge in producing content, whose most significant manifestations are represented by the development of innovative activities and research, by the dominance of the services and from the relief accorded to the intangible components and to the symbolic value of industrial goods.

As seen and highlighted, purpose of this working paper is to point out and explore, even in comparative perspective, the basic role held by the commercial law area known as “Intellectual Property”, intended as a cultural initiative that

could allow every undertaking to qualify, strengthen and protect its corporate image, enhance its assets, optimize operational efficiency, contribute to the spread of social responsibility, promote good business and organizational practices and participate in business networks engaged on common and/or sharable issues.

Among them: the creation of value through new product models or service that relate to the exploitation of raw materials and to the link with the territory and with the “*Made in Italy*”, observable factors to encourage in all the leading sectors of our national economy, particularly the food and fashion industry; the value of rewards to recognize the good behavior of entrepreneurs that promote quality policies and recognition of products, focusing on the so-called “Corporate Social Responsibility”, in addition to those that by operating in the network, in the also called marketplace, promote, define and share best practices and a counterfeiting on internet governance of struggle with the aim of making the web an honest market and guarantor of the consumer.

The analysis takes also deepen the circumstance that the adoption of certain practices should enable the company to be able to apply for obtaining the so-called score of “legality rating”, that is the system of premiums for organizations that respect laws and the different rules in general, assigned by the Antitrust Authority for competition and the market, until his promotion in terms of assessment for the access to bank credit and/or the granting of loans, as well as recognition of value on the tender of the Public administration, including European ones (see, also, the Horizon 2020 program).

The knowledge economy, which although is having to resolve the troubling dilemma between social interests on one hand and private interests of market balance, on the other hand, must work to create value with the knowledge, which can only be understood which shared item that, on one hand, push in the direction of the growth of the company’s competitiveness and, at the same time, incentives for the advancement of economic and social conditions of the communities where it operates.

3.1 Action on culture and intangible capital

In the application framework outlined, there who does not see the position and the primary role held by intangibles, that means those stocks of knowledge present in the enterprises resources both internally (such as competencies, skills, abilities, etc.) and externally (image, trademarks, customer satisfaction, etc.) that generate flows of creation of new sustainable competitive advantages and shared value.

The also-called “Shared value”⁹ is, in fact, the one created by any enterprise using policies and operational practices that increase competitiveness, affecting the productive and innovative processes also of other realities which exploit the profitability through learning, sometimes even purely spontaneous¹⁰, making at

the same time also advancing the economic and social conditions of the communities and the territory in which it operates.

Mind that, this is not merely a process of redistribution, but the company's ability to generate profits with the competitive position assumed, making use of the resources and their skills, and so creates economic value through the creation of social value, encouraging, also with the strengthening of territorial identity, for example, in the also called cultural districts.

In this framework, the company's intellectual capital is a combination of human, organizational and relational resources and activities, among which can be identified: the know-how for the realization of products and internal processes of the organization; the knowledge, skills, abilities, experiences and attitudes which are to be bearers those who, in various capacities, working within the enterprise; the R&D activities, without forgetting the fundamental importance of the relationship capital, that means the set of organizational practices, procedures, data bases constituting the foundation of organized and integrated relationships in the business system with all stakeholders such as: customers, suppliers, partners, public institutions, Authorities, etc.

The creation and proper exploitation of all the resources and enterprise intangible assets for transforming the interweaving of material financial and human resources, in a system capable of creating value not only for the reality directly involved, but also for all subjects external stakeholders and, in any case, directly and potentially affected.

Today, as part of the production of the enterprise knowledge related to the quality and vitality of its action, the transparency and reliability of its results, the management and consistency of the prospective plans, the culture of its management, a significant relief is due to the digital economy, the networked production innovation and technology transfer that is transforming significantly the relationships – both internal and external – of companies, innovating in a sudden business models based on mobile devices, social networks, cloud services and other constantly evolving technologies.

4 Conclusions

Before closing and confirming the importance of the capital of knowledge in innovation process interesting the current era, it seems important to also mention the phenomenon known as "Lean Thinking" that is the industrial philosophical instrument with Japanese origins to seeking the best organizational innovation for growth, economic and social development of enterprises, aiming to create increasing value for the customer and to gradually reduce waste.

The logic of thinking "lean" is a real cultural approach based on a set of methods, techniques and operational practices to improve the performance and tools you need to overcome the crisis and boost competitiveness.

In this context, intellectual property rights – with the aim to push and encourage creativity and innovation – are a key element of exploitation, as well as competitive consolidation now recognized universally.

On a similar basis of thought, it was articulated this working paper, which looking at the present period of continuing economic and financial crisis, highlights one of the best weapons usable in practice represented by the spread and the appropriate use of corporate culture, belonging largely hinges on the enhancement and protection of the intangible assets, which, undoubtedly, can be a plus for companies, especially for those of *Made in Italy*, as well as the foundation for the future sustainability of the same activities.

The asset “corporate knowledge” must also be seen as a tool to promote wide-ranging a new relationship/communication between all stakeholders, enabling the creation of a transparent and constructive dialogue in order to overcome the information asymmetries and represents the reference point for reviewing and evaluating of great depth issues, such as internationalization, technological and organizational innovation, training, relations with the credit system, and so on.

Endnotes

¹ Cfr. in Europe, the interest that the Community institutions and, in particular, the European Commission – General Directorate for Education and Culture – manifested in this matter from the beginning of 2000 when, alongside the stated guidelines in Agenda Lisbon, commissioned an interesting study on the economy of culture built by KEA European Affairs, in years 2005/2006.

² Cfr. W. SANTAGATA, *Economia della cultura*, in *XXI Secolo, Enciclopedia Treccani*, 2009, www.treccani.it, in the context of which the A. identifies as a component of the term “culture” even the creation of ideas, since they considered an eminently intellectual property; also he argues that creativity also holds the role and problem solving skills, thus making reference to the process that can reproduce and pass on to future generations, reason by which also comes the essential problem of the protection of intellectual property rights. The A. also points out how “culture” constitutes “a formidable resource for promoting economic development at local level”, intended as a form of quality development based on the sustainability of its growth.

³ See S. BERTI - C. RONCA, *Come condividere la cultura della gestione del rischio tra impresa e finanza*, Foundation Adriano Olivetti, *Working Paper on Knowledge Society*, n. 04/2012, note 48.

⁴ In Italy, the first signals of curiosity for these topics can be identified only since the nineties of the last century, as evidenced by W. SANTAGATA - G. SEGRE - M. TRIMARCHI, *Economia della cultura: la prospettiva italiana*, y. XVII, 2007, n. 4, 409 ss., in www.host.uniroma3.it, who point out that, as regards the intellectual property, the city of Turin, at the national territorial level, is elected as the venue, with doctrinal productions related to authoritative names, such as Santagata, Segre, Cuccia, Russo.

⁵ See C. RONCA, *Il Capitale Intellettuale e il suo Report: una nuova cultura per sostenere i processi di innovazione e la competitività delle imprese e dei loro sistemi*, Foundation Adriano Olivetti *Working Paper on Knowledge Society*, n. 1/2012, in www.fondazioneadrianoolivetti.it.

⁶ Entrepreneurship has to do with the way in which resources are generated and, then, used on its premises, cfr. di H. STEVANSON - E. GUMPERT, *The Heart of Entrepreneurship*, in *Harvard Business Review*, 1985.

- ⁷ In the present context, standardization is a key source of innovation, because – implying and imposing certain behaviors – creates learning needs and develops opportunities for improvement through the production of knowledge.
- ⁸ It should be noted, in this subject, the interesting and recent project adopted by the Chamber of Commerce of Turin with the Public Prosecutor at the Court of Turin, in collaboration with the Association Reseau Entrepreneurs Piedmont, Free Piedmont and Slow Food in terms of legality in business activities that, in the year 2016, should develop in a series of thematic technical meetings for the purpose of construction of the also called “Kits for the legality” to sharing the values of corporate responsibility and a code of ethics as a useful tool to foster an healthy, conscious and forward-looking entrepreneurship. For more information see in www.csr.unioncamere.it, Portal of the Corporate Social Responsibility of the Chamber System.
- ⁹ Cfr. M. E. PORTER - M. R. KRAMER, *Creating shared value – How to reinvent capitalism – and unleash a wave of innovation and growth*, in *Harvard Business Review*, January-February 2011.
- ¹⁰ Cfr. AA. VV., *Economia e Società della conoscenza: le sfide in atto per imprese e territori. Intangibili di Comunità: i beni collettivi della conoscenza tra impresa e territorio*, Foundation Adriano Olivetti, *Working Paper on Knowledge Society*, n. 7/2013.

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**Integrity Public Sector
Risk Management:
Public Procurement Sector**

Corruption in Public Procurement: Improving Governments' Ability to Manage the Risks of Corruption

Author

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- *Professor Christopher Yukins, Lynn David Research Professor in Government Procurement Law, Co-Director, Government Procurement Law Program, cyukins@law.gwu.edu - The George Washington University, Washington D.C.*
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To an increasing extent, governments demand that their vendors establish sophisticated risk management systems to contain the risks of corruption. The resulting corporate compliance systems have grown more sophisticated, and remarkably uniform, around the world. Ironically, however, governments' own risk management systems have serious gaps, and too often governments fail to coordinate their own risk management systems with their contractors' parallel efforts. Drawing on examples from the United States and Europe, this paper will argue that governments should mitigate these inherent asymmetries in their management of corruption risk, in part by learning lessons from the compliance systems they require of their contractors, and more broadly by better integrating public risk management efforts with those of the private sector.

Keywords: government contracts, public procurement, public policy, risk-management, compliance system

JEL Classification: D21, D23, H42, H57

1 Introduction

Governments must manage a wide range of corruption risks in procurement, to ensure that public funds are spent as intended and the procurement process itself maintains its competitive integrity. As part of that public risk management, more and more public institutions are requiring that their vendors institute corporate compliance systems to mitigate corruption risk. Those corporate compliance systems are advancing rapidly around the world, and are remarkably uniform across jurisdictions. At the same time, however, governments' own risk management systems remain fragmented and immature, often ill-suited to address common corruption risks in procurement.

To address these problems, this paper proceeds in four parts. Part II discusses why governments manage corruption risk in procurement, to ensure sound performance, maintain legitimacy and bolster vendors' confidence in the integrity of the procurement process itself (Bolton, 2008)¹. Part III describes how governments require their vendors to manage corruption risk, often as part of a broader effort, across the economy, to institute corporate compliance systems. Drawing on those corporate compliance models, Part IV asks whether governments could use those same corporate compliance strategies -- the strategies governments demand of their own contractors -- to reduce corruption risks. That, in turn, suggests specific steps that governments might take, drawing on corporate compliance models to address recurring corruption risks in public procurement. Part V, the conclusion, offers closing reflections on a possible way forward, recognizing that risk management in corruption is a vitally important, rapidly developing field.

2 Why Governments Manage Corruption Risks in Procurement

Governments and public institutions manage corruption risk (Racca-Yukins, 2014)² for at least three reasons (Yukins, 2013; Calleja 2013)³:

- *Performance risk:* Corruption almost always results in poor performance -- projects compromised or delayed because officials who select contractors, or monitor their performance, have been corrupted.
- *Reputational risk:* Corruption threatens the legitimacy of any government and its leaders; regardless of performance risk, therefore, governments typically work aggressively to contain the reputational risk caused by corruption in procurement.
- *Fiduciary risk:* When governments are entrusted with public funds for procurement, by taxpayers or others, the governments owe a fiduciary obligation to ensure that the funds are properly spent. If corruption diverts those funds, there is a fiduciary risk,

even if that diversion presents no performance or reputational risks (Soreide - Gröning - Wandall, 2016)⁴.

Historically, governments have managed these risks in procurement largely through internal measures and enforcement actions against corrupt contractors. Since the 1990s, however, governments have increasingly relied on contractors to assist in mitigating corruption risks in procurement, by requiring that their vendors institute corporate compliance systems (Pathak, 2013)⁵.

These compliance requirements largely took shape outside public procurement. Thus, for example, in 1991 criminal sentencing guidelines prepared by the U.S. Sentencing Commission became effective, which promised reduced sentences if corporations and other organizations -- in public procurement markets or otherwise -- instituted compliance systems consistent with the guidelines (Desio, 2004)⁶. The U.S. Sentencing Commission guidelines helped set a benchmark for the corporate compliance requirements that were imposed on U.S. federal contractors in 2008 (West - Richard, - Manos - Brennan - Barsalona - Koos - Meene, 2009)⁷, and then on corporations in general under the UK Bribery Act of 2010 (Bonneau, 2011)⁸. In 2014, the European Union adopted these same standards -- styled "self-cleaning" standards (Matjan, 2013)⁹ -- in its procurement directives. Under Article 57 of the current EU procurement directive 2014/24/EU¹⁰, for example, a contractor that has been excluded from procurement opportunities because of past corruption may "self-clean" so that it can be considered, again, for future awards (Priess, 2014; Swick - Priess - Yukins, 2016)¹¹.

Nor have the corporate compliance standards been limited to the United States and the European Union. Brazil (Arrieta, 2014)¹² and Mexico (Robinson, 2013)¹³ have adopted requirements for corporate compliance, for example, as part of broader anti-corruption laws. International institutions such as the UN Office of Drugs and Crime (UNODC), the World Bank (Williams, 2007; Deming, 2010)¹⁴ and the Organisation for Economic Co-operation and Development (OECD)¹⁵, among many others, have also endorsed very similar corporate compliance standards¹⁶, which are discussed in greater detail below.

Before turning to the corporate compliance standards, it is important to emphasize what they are *not*: requiring that corporations, and most specifically contractors, institute compliance measures does *not* mean that a government has abdicated its own duty to fight corruption. Governments instead require compliance measures because they recognize that corporations can be effective allies in the fight against corruption, and that corporations' own compliance efforts, even if driven solely by self-interest, can be harnessed in the public interest. Put another way, governments do not require contractors to institute compliance measures because governments blindly trust contractors, but because governments recognize that thoughtful contractors may well institute anti-corruption measures anyway, as a means of reducing their own risks. In this light, governments' corporate compliance requirements are arguably simply a means of shaping and directing private contractors' own efforts to identify, and contain, corruption risks in public procurement markets.

3 How Governments Require Vendors to Manage Corruption Risk: Common Corporate Compliance Requirements

As noted, the compliance systems required of contractors are remarkably uniform around the world¹⁷, although the descriptions of those requirements may vary from jurisdiction to jurisdiction:

1. *Code of Conduct*: A corporation's compliance system will be built around a code of conduct¹⁸, which employees are expected to review and understand. The code of conduct, which typically also includes a plain statement of the firm's values and ethics, provides the baseline for compliance efforts.

2. *Knowledgeable Leadership*: It is vitally important that the firm's leadership, including its chief executives and its governing board, understand, endorse and help implement the firm's compliance efforts¹⁹. As is discussed below, a firm's compliance system is in many ways a formal mechanism for moving information "up" inside the company, to senior decision makers who are best positioned to assess the legal, performance and reputational risks posed. Unless senior leadership is integrally involved in compliance efforts, therefore, the compliance system will likely fail.

3. *Regular Training*: Because a compliance system is built on a body of rules, those rules must be regularly conveyed to those inside the firm, and, as appropriate, to agents and others working for the firm²⁰. Training also affords an opportunity to convey the ethical principles that guide the firm; while less concrete than rules, those principles help fill gaps when employees encounter problems (new forms of corruption, for example) that are not, strictly speaking, addressed by existing rules.

4. *Excluding Risky Personnel*: A firm is only as sound as its employees, and so corporate compliance requirements typically demand that firms screen for, and exclude, prospective employees that pose corruption risks for the company, based (for example) on past convictions or misconduct²¹.

5. *Internal Discipline*: To ensure that its compliance system is effective, a firm must discipline those who breach the rules, and applaud those who comply²². This means, in practice, disciplining employees who violate anti-corruption rules *and* their supervisors, if the supervisors' lax oversight contributed to the problem.

6. *Internal Reporting Mechanisms*: As noted, a compliance system is in many ways an information transmission system -- a means to ensure that rules and standards are understood down through the ranks, and a mechanism (such as a "hotline") so that information on corruption can be passed up through channels.

7. *Auditing and Review*: A sound compliance system requires regular review and auditing, either internally or by outsiders, to ensure that

the system is identifying and addressing corruption risks that arise, and to make recommendations for improvement²³.

8. *Adjusting to Risk*: The compliance program should be adjusted to risks²⁴. This may mean strengthening the program to address new risks if, for example, the firm is entering new markets with more acute risks of corruption.

What is probably most remarkable about these elements is that they are largely the same, the world over. As the U.S. Securities & Exchange Commission (SEC) and the U.S. Department of Justice recognized in their joint guidance under the Foreign Corrupt Practices Act, compliance system requirements are generally uniform in jurisdictions around the world²⁵. This uniformity reflects ongoing communication and cooperation between jurisdictions and enforcement officials, and is driven in part by multinational firms' expressed preference for uniform standards which will allow those firms to reduce transaction costs by establishing uniform worldwide compliance systems (Harms, 2000)²⁶.

For governments, contractors' compliance system present a dual opportunity. First, governments can benefit from compliance systems directly, because they reduce corruption risk and result in information on corrupt behavior that may be provided, on a voluntary or mandatory basis, to government enforcement officials. Second (and less obviously), corporate compliance systems provide a sort of benchmark or measure, which governments can use to assess their own anti-corruption efforts (Koker - Harwood, 2015)²⁷. International experience shows, however, that governments have not fully understood, or drawn upon, the lessons that corporate compliance systems can provide.

4 Assessing Governments' Own Risk Management Systems

Although governments now regularly require companies to institute compliance systems, outlined above, governments too seldom draw lessons from those compliance systems. Element by element, these corporate compliance systems bear lessons -- important lessons -- for governments that are seek to reduce the risks of corruption in procurement.

4.1 Codes of Conduct

Governments understand, of course, that (much like companies) they need to reduce risk in procurement by instituting codes of ethics to guide their employees' conduct; indeed, the UN Convention Against Corruption (UNCAC) explicitly calls for such guidance in its article on procurement (Yukins, 2009)²⁸. What governments often fail to do, however, is what corporations already do: integrate their codes of conduct with their trading partners, and (if possible) harmonize codes of conduct across borders to reduce costs and enhance enforcement.

4.1.1 Integrating Codes of Conduct with Trading Partners

Governments, like their contractors, should ensure that their codes of conduct are better integrated with their trading partners' codes and compliance systems. Governments require this of their contractors: the UK Ministry of Justice, for example, specifically calls for contractors to coordinate their compliance efforts, as appropriate, with "associated" persons²⁹, and contractors regularly work to integrate their suppliers into their compliance systems³⁰.

Unlike their contractors, however, governments do relatively little to coordinate their codes of conduct -- their laws and regulations on ethical conduct -- with their suppliers. In the U.S. federal system, for example, the government does not provide its contractors with specific guidance on how to ensure that their employees comply with federal anti-corruption laws. Instead, contractors are expected to derive codes of conduct that "mirror" the federal rules. Thus, for instance, because federal ethics rules generally bar gifts worth over \$20³¹, contractors are expected to develop ethics systems that reflect that limit. The federal government's procurement rules do not say so, however; contractor codes are instead expected to incorporate and reflect the federal ethics rules. This gap in cooperation favors the large, well-established contractors which understand how to structure their compliance rules (an anti-competitive problem)(Yukins, 2015)³², and it makes it less likely that contractors will implement effective compliance systems (a corruption risk).

The solution, it seems, is to integrate the government and contractor compliance codes. This is normal in the private sector, where firms in a supply chain often must compare and reconcile their compliance codes. One possible way forward would be for governments to publish proposed compliance codes for their contractors; the codes could mirror the government's special requirements, and could serve as a starting point for contractors' own codes. In the United States federal system, the government regularly provides draft language of this type in other areas where contractors need to integrate their operations with the government's; it would not be out of the ordinary for the government to provide guiding models for ethics codes, to help integrate the public and private efforts in anti-corruption³³.

4.1.2 Making Codes of Conduct More Uniform Across Borders

Another area of needed improvement is *uniformity* in government ethics codes (Harrington, 2013)³⁴. In the United States, for example, ethics codes can vary wildly from jurisdiction to jurisdiction. In Connecticut, it is illegal to provide gifts of over \$10 to a state employee³⁵; in the federal government, the limit is \$20, and in Hawaii a state employee must report any gift over \$200³⁶. This confusing welter of rules makes compliance by the private sector very expensive, and, at the extreme, can discourage enforcement by public agencies that recognize the somewhat arbitrary nature of bizarrely divergent rules.

The solution, again, is to look to corporate compliance in the private sector, which stresses *uniformity* to reduce implementation costs and enhance internal compliance. Multinational corporations regularly build compliance systems that span borders, which need to be understood and complied with in many jurisdictions and cultures. Multinational firms are able to maintain this consistency in compliance strategies in part because different nations, as they adopted compliance requirements internally, drew from international models and standards for compliance -- in no small part because multinational corporations and international organizations³⁷ themselves urged a consistent set of compliance standards.

Taking a page from the compliance story, governments could adopt more uniform ethics standards for their procurement officials. Efforts to harmonize ethics rules for procurement need not fail simply because of local differences in norms and criminal laws (Fox-Healey, 2014; Kelley, 2012)³⁸. In both public procurement systems and private corporations, it is common to develop a separate, stricter set of ethics rules for those involved in procurement³⁹, because of the more acute risks posed in procurement. Where it is not possible to conform local ethics rules to international norms, therefore, it may be easier to draft and adopt ethics rules specifically for procurement which more closely follow broadly accepted international practices -- which, in turn, will mean that vendors entering that procurement market will encounter more familiar and workable ethics rules. Taken together, these efforts to harmonize ethics rules in procurement across borders could reduce compliance costs and enhance enforcement, and thus make it easier to manage the corruption risks inherent in every procurement system.

4.2 Knowledgeable Leadership: Vertical Integration in Risk Management

Another important lesson for governments from private compliance efforts is that it is essential to move information on corruption “vertically,” quickly and efficiently. A sound compliance system typically ensures that a company’s senior leadership learns of corruption failures quickly and efficiently, so that the firm’s leaders can assess the risk and order remedial action. That is not always true, however, of public anti-corruption systems.

Under the European Union’s current procurement directive 2014/24/EU, for example, Article 57 provides that individual agencies are to assess vendors for possible exclusion, based on past corrupt actions. Unlike the World Bank (Williams, 2007)⁴⁰, Nigeria (Williams-Elegbe, 2012)⁴¹, the United States⁴² and other countries, the European directive does not contemplate a debarment process, through which a more senior official would assess a vendor for exclusion across a procurement system; instead, the European directive describes a much more fragmented and decentralized process, one in which corruption (and its performance and reputational risks) will be assessed by relatively low-level officials, again and again. Probably no sound corporate compliance system would assess

corruption risks in this *ad hoc*, highly decentralized way; nor, optimally, should a public procurement system. A better approach would be to ensure that information on corruption risks (Hostetler, 2011)⁴³ moved smoothly to a more senior level of government, where a broader exclusion decision -- a debarment, if appropriate -- could be made.

4.3 Integrating Training with Private Counterparts

Another area of possible improvement in managing corruption risk in public procurement lies in *training*. Through training, an enterprise works to ensure that applicable laws and corporate policies are understood, and will be followed. Corporate compliance training is not, it should be emphasized, limited to a corporation's own employees; firms often extend training to other companies in their supply chains, either on their own initiative or because of a legal requirement⁴⁴. In California, for example, all major retailers and manufacturers (those with worldwide sales over US\$100 million) must make efforts to eradicate slavery and human trafficking from their direct supply chains⁴⁵. This means extending compliance training in anti-slavery and human trafficking laws beyond employees, to include supply chain partners. As a practical matter, this allows retailers and manufacturers to integrate their anti-corruption efforts with others in their supply chains. Governments could do the same, and include private sector suppliers in their anti-corruption training, so that both public and private officials can understand, together, the legal and ethical obligations they share.

4.4 Integrating Training with Private Counterparts

The discussion above focused on broader institutional lessons that governments might learn from corporate compliance systems. The lessons may carry to the more granular level, as well -- governments may be able to learn strategies from private compliance systems for excluding "risky" personnel, prone to corruption. Under the Federal Acquisition Regulation, for example, vendors are required to make "[r]easonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct."⁴⁶ The question, then, is whether public procurement systems can take a similar approach, to exclude vendors run by individuals who pose special corruption risks.

This question -- how to exclude contractors run by executives who have shown themselves to be untrustworthy in the past -- is a recurring headache for contracting authorities. It is more common for anti-corruption enforcement efforts to focus first on corporations, and individual managers, executives, or board members may not be targeted; even if they are, it may be difficult for contracting officials to gather information on those enforcement efforts. While the focus is changing in the U.S. federal enforcement regime, and new emphasis is

being put on holding senior individuals accountable⁴⁷, it can still be difficult for procurement officials to gather information efficiently on senior personnel who may pose corruption risk.

The risk mitigation solution, it seems, is one typically used in the private sector: to identify caches of relevant data, and to make that information more readily available. One way to do that would be to clarify the bases for debarment or exclusion in publicly available databases. In the United States, for example, debarment officials must have clearly established grounds for debarring an individual. Those bases for debarment are not, however, set forth in the excluded person's listing on www.sam.gov, the public repository; nor is the list of excluded parties readily searchable by a simple name search⁴⁸. This means that information on persons found guilty of corrupt behavior, while compiled in the U.S. government, is not readily available for risk mitigation efforts outside the enforcement agencies themselves.

4.5 Integrating Contractors Into a Public Disciplinary Regime

The next step in public risk mitigation looks to bridge the gap between public and private compliance systems. Traditionally, public and private anti-corruption compliance regimes stood largely separate. Thus, for example, while conscientious contractors in the U.S. federal system honored the gift limit of \$20, if a contractor ignored those ethics limits -- if, for example, a "bad" contractor regularly gave federal officials gifts worth over \$20 -- the disciplinary punishment fell largely on the federal officials, not the contractor, unless the contractor was criminally prosecuted for bribery, was found non-responsible (non-qualified) (Warnock, 2012)⁴⁹, or was debarred -- all of which were severe measures, and therefore unlikely. There was, in other words, no *direct* means of extending the federal compliance regime's disciplinary regime to its contractors. This limited the effectiveness of the federal compliance regime. More broadly, it reflected a blind spot common in government compliance regimes: the government can discipline its employees for ethical infractions, but has difficulty disciplining outsiders to enforce its ethics rules.

This gap between public and private regimes was eased in the U.S. federal system when the Federal Acquisition Regulation was amended to require that when contracting officials assess an offeror's *past performance* -- an essential element of U.S. award evaluations -- the contracting officials must take into consideration the vendor's history of integrity and business ethics (Schooner, 2001)⁵⁰. This means, in practice, that any vendor likely to seek a future award (any vendor, really) has a strong incentive to conform, among other things, to federal ethics rules, or risk receiving a poor past performance evaluation and lose future awards. The gap between public and private compliance regimes was narrowed, therefore, by making compliance an evaluation factor for future contract awards; by doing so, the federal government helped reduce the risk of corruption in procurement.

4.6 Encouraging Reports of Corruption

Another weakness in public compliance regimes lies in failing to fully incentivize potential whistleblowers who could disclose corruption. This contrasts with the private sector, which is often required to establish effective channels for communication, such as “hotlines,” as part of a corporate compliance system⁵¹. In the public sector, in contrast, reporting tends to be much more *ad hoc*, and potential whistleblowers (both inside and outside the government) often have little incentive to risk reporting misconduct.

To ease this problem, policymakers in the U.S. federal system have instituted both protections and incentives for whistleblowers. Under the False Claims Act, for example, whistleblowers are protected from retaliation, and they may receive a share (up to 30 percent) of the federal government’s ultimate fraud recovery (which, with penalties, can amount to many millions of dollars) (Nicolaou, 2011)⁵². These protections and incentives in effect make whistleblowers an integral part of the federal compliance regime, and help to narrow the government’s exposure to corruption risk.

4.7 Auditing and Review by Civil Society

Another way to narrow corruption risk in public procurement is to encourage active oversight by civil society. The United States here provides an adverse counterexample; in the U.S. procurement system, audit and oversight is left largely to government officials (inspectors general, government auditors and the Comptroller General, for example) (Cox, 2010; Anechiarico - Jacobs, 1995)⁵³, and civil society has little (if any) formal role in reviewing anti-corruption measures in the federal procurement system. That is not, however, necessarily the best approach. In many nations, civil society plays formal, legally recognized role in monitoring procurement. (Panth, 2010; Cadapan-Antonio, 2007; Zagaris - Lakhani Ohri, 1999)⁵⁴ Government agencies’ reluctance to make their procurement processes transparent is part of the reason that civil society is excluded, and it is important to recognize that this reluctance can be caused, in part, by government officials’ fear of embarrassment. A better course may be to recognize that civil society review can be highly beneficial in stemming corruption in procurement, and to weigh, honestly and openly, the costs and benefits of allowing more transparent review by members of civil society (DeAses, 2005)⁵⁵.

4.8 Adjusting Public Compliance Systems to New Risks

Another possible improvement in public anti-corruption compliance systems would be to make it easier for governments to adjust to new corruption risks. Public compliance systems tend to be inflexible, and when a government encounters new corruption risks (as, for example, the U.S. government encounte-

red in Afghanistan), the system's failure to adjust can lead to serious corruption failures (Paschal, 2012)⁵⁶. To remedy this problem, it is important to recognize that anti-corruption compliance is, at its heart, an attempt to mitigate the severe agency problems that can distort outcomes in any procurement system (Engelbert - Reit - Westen, 2012)⁵⁷. While the principal (the government) may seek optimal outcomes, the self-interest of agents (the contracting officials and the contractors themselves) can distort those outcomes (Racca - Cavallo Perin, 2013; Jurich, 2012; Yukins, 2010)⁵⁸. Those distortions are amplified by corruption, and traditional mitigation strategies -- monitoring and sanctioning mechanisms⁵⁹ -- may fail under extreme and adverse circumstances, such as a war zone where corruption is endemic. The answer, it seems, is not merely to rely on traditional anti-corruption strategies, but to recognize that if the goal is to optimize public outcomes, the problem must be addressed in a unique social and political context (Williams-Elegbe, 2012; Dahms - Mitchell, 2007)⁶⁰, which may present other, non-traditional means of mitigating the risks, and distortions, of corruption (Decarolis - Giorgiantonio, 2015)⁶¹. Drawing on examples from the private sector, which has been very versatile in developing new strategies in response to new corruption risks, governments may benefit by taking a broader view of possible solutions to new risks of corruption.

5 Conclusions

As this brief essay reflects, government anti-corruption compliance systems can draw many lessons from the private compliance regimes that the governments themselves helped establish. Public and private compliance systems are not always aligned of course; the victim compensation which is emerging as part of the "self-cleaning" required of European private contractors⁶², for example, is an area where public and private interests are more likely to collide. In general, however, lessons learned from private corporate compliance systems are likely to prove quite useful, as governments work to manage the risks of corruption in procurement.

Endnotes

- ¹ See, e.g., Phoebe Bolton, *The Public Procurement System in South Africa: Main Characteristics*, 37 Pub. Cont. L.J. 781, 792 (2008) (“Corruption is harmful to the procurement process because it lessens the confidence that honest contractors and the public at large have in the Government. It leads to the slackening of competition for public contracts and lessens the Government’s ability to obtain the best value for its money.”).
- ² See generally Gabriella M. Racca & Christopher R. Yukins, *Steps for Integrity in Public Contracts*, in *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant 2014) (Gabriella M. Racca & Christopher R. Yukins, eds.).
- ³ See, e.g., Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int’l L. Rev. 219, 226 (2013) (discussing types of risk); Antoinette Calleja, *Procurement Beyond Award: On the Integration of Governance Principles When Executing Public Private Partnerships*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 294, 297-98 (2013) (“Corruption in public procurement can become manifest in various forms, for instance by giving or offering bribes, through fraud, collusion and manipulation. . . . Corruption can for instance give way to unnecessary projects being procured, poor quality work, and unjustified requests for variation orders leading to unjustified expenses or expensive work being made. . . . Notwithstanding the fact that corruption erodes public trust, corruption costs the public purse significant amounts. The European Commission estimates a yearly loss The value lost to corruption in public procurement is estimated at 20-25% of the public contracts’ value.”).
- ⁴ See, e.g., Tina Sóreide, Linda Gröning & Rasmus Wandall, *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, 16 Chi. J. Int’l L. 523, 529 (2016) (discussing fiduciary risk in diversion of World Bank funding from intended purposes).
- ⁵ Harsh Pathak, *Corruption and Compliance: Preventive Legislations and Policies in International Business Projects*, 3.2 Tribuna Juridica 136 (Dec. 2013) (discussing rise in international anti-corruption efforts).
- ⁶ See, e.g., Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 Wake Forest L. Rev. 559 (2004).
- ⁷ 73 Fed. Reg. 67064 (2008); see, e.g., Joseph D. West, Diana G. Richard, Karen L. Manos, Christyne K. Brennan, Joseph A. Barsalona, Philip Koos & Richard J. Meene, *Contractor Business Ethics Compliance Program and Disclosure Requirements*, 09-5 Briefing Papers 1 (Thomson Reuters 2009).
- ⁸ See, e.g., Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 Colum. J. Transnat’l L. 365 (2011).
- ⁹ See, e.g., Roman Majtan, *The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int’l L. Rev. 291 (2013).
- ¹⁰ Paragraph 6 of Article 57, Directive 2014/24/EU, provides regarding self-cleaning (with emphasis added): 6. Any economic operator that is [excluded] in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure. For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal

offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision. An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

¹¹ See, e.g., Hans-Joachim Priess, *The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive*, 2014 Pub. Proc. L. Rev. 112; Brenda Swick, Hans-Joachim Priess & Christopher Yukins, *International Procurement Developments in 2015: Structural Reforms to International Procurement Laws*, 2016 Gov't Con. Year in Rev. Briefs 3 (Thomson Reuters 2016).

¹² See, e.g., Lindsay B. Arrieta, Note, *Taking the Jeitinho Out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law*, 44 Pub. Cont. L.J. 157, 173 (2014).

¹³ Allie Showalter Robinson, *Developments in Anti-Corruption Law in Mexico: Ley Federal Anticorrupción En Contrataciones públicas*, 19 L. & Bus. Rev. Am. 81, 89 (2013) ("An additional component of the LFACP is focused on encouraging companies and individuals to create 'olicies and procedures for self-regulation, internal controls, and ethics programs in order to promote and develop a compliance culture within their organizations.'").

¹⁴ See, e.g., Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 Pub. Cont. L.J. 277, 299 (2007); Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 Int'l Law. 871, 885 (2010) ("an effective compliance program has the added benefit of enhancing an entity's ability to secure, either directly or indirectly, opportunities with multilateral lending institutions").

¹⁵ See, e.g., OECD, UNODC & World Bank, *Anti-Corruption Ethics and Compliance Handbook for Business* (2013) (setting forth standards for corporate compliance systems), available at <http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>.

¹⁶ In joint guidance issued on enforcement of the Foreign Corrupt Practices Act, the U.S. Department of Justice and the U.S. Securities and Exchange Commission outlined common requirements for compliance systems, from many nations and international organizations. That guidance by the U.S. government confirms the harmonization, internationally, of standards for compliance systems, standards which are discussed in more detail below. See U.S. Department of Justice & U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 57-65 (2012, revised 2015), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

¹⁷ See, e.g., U.S. Department of Justice & U.S. Securities & Exchange Commission, *supra* note 15, at 63 ("There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.").

¹⁸ The U.S. Sentencing Commission's guidelines for organizations state that, in establishing an effective ethics and compliance system, the "organization shall establish standards and procedures to prevent and detect criminal conduct." U.S. Sentencing Commission, *Sentencing Guidelines Manual* §8B2.1 (2015), available at <http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8>. Per the accompanying explanatory notes, the "formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization." *Id.*

¹⁹ Section 8B2.1 of the U.S. Sentencing Commission guidelines, *supra* note 17 states at paragraph (b)(2):
(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

²⁰ See, e.g., U.S. Department of Justice & U.S. Securities and Exchange Commission, *supra* note 15, at 59 ("Compliance policies cannot work unless effectively communicated throughout a company.").

²¹ The rule governing contractor compliance systems in the U.S. federal procurement system calls for, regarding the need to exclude risky personnel: "Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct." 48 C.F.R. § 52.203-13(c)(2)(1)(B), FAR 52.203-13(c)(2)(1)(B). The U.S. Sentencing Commission guidelines state: "The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." U.S. Sentencing Commission, *supra* note 17 §8B2.1(b)(3).

²² The UK Ministry of Justice guidance implementing the UK Bribery Act states that senior managers should communicate the following in supporting an ethics and compliance policy:

a commitment to carry out business fairly, honestly and openly

a commitment to zero tolerance towards bribery

the consequences of breaching the policy for employees and managers

for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)

UK Ministry of Justice, The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010), at 23 (2011), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

²³ The contract clause on contractor compliance systems in the U.S. federal government requires, 48 C.F.R. 52.203-13(c)(2)(ii)(C), FAR 52.203-13(c)(2)(ii)(C):

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

²⁴ The UK Ministry of Justice guidance on effective compliance systems, *supra* note 21 states, at 25: “The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.”

²⁵ See the discussion *supra* note 15.

²⁶ See generally Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 *Cornell Int'l L.J.* 159, 175 (2000) (discussing efforts by the International Chamber of Commerce to encourage business codes of conduct).

²⁷ See, e.g., Louis de Koker & Kayne Harwood, *Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia*, 37 *Sydney L. Rev.* 217, 218 (2015) (article compares “the customer due diligence (‘CDD’) measures that banks are required to implement to prevent money laundering and terrorism financing with the general supplier due diligence practices and processes of Australian government agencies”).

²⁸ UNCAC Art. 9(e) (“Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”); see, e.g., Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the Uncitral Model Procurement Law*, 36 *Pub. Cont. L.J.* 307, 310 (2007) (discussing procurement elements of UNCAC).

²⁹ The UK Ministry of Justice guidance, *supra* note 21. at 16, explains that liability under the UK Bribery Act could extend to a firm’s subcontractors, as “associated persons,” “to the extent that they are performing services for or on behalf of a commercial organisation.”

³⁰ Training under compliance systems required by the Federal Acquisition Regulation is to be provided to “the Contractor’s principals and employees, and as appropriate, the Contractor’s agents and subcontractors.” 48 C.F.R. § 52.203-13(c)(1)(ii), FAR 52.203-13(c)(1)(ii).

³¹ 5 C.F.R. § 2635.204(a); Office of Government Ethics, *Employee Standards of Conduct*, <https://www.oge.gov/web/oge.nsf/Employee%20Standards%20of%20Conduct>

³² See, e.g., Christopher R. Yukins, *Mandatory Disclosure: A Case Study in How Anti-Corruption Measures Can Affect Competition in Defense Markets* (2015), paper presented at the conference “Ethical Dilemmas in the Global Defense Industry,” Center for Ethics and the Rule of Law, University of Pennsylvania Law School, Apr. 16, 2015 (publication forthcoming).

³³ The state of Connecticut, for example, publishes a guide on state ethics codes for contractors. See Connecticut Office of State Ethics, *Guide to the Code of Ethics For Current or Potential State Contractors*, at 6 (2007), available at http://www.ct.gov/ethics/lib/ethics/guides/contractors_guide_final07.pdf. This is a good example of a public guide that simplifies, and harmonizes, contractors’ efforts to adapt to a government’s ethics requirements.

- ³⁴ Cf. Alexandra R. Harrington, *Conflicting Trends: Lessons from Current Evaluative Mechanisms in International and Regional Anti-Corruption Systems Regarding Conflicts of Interest*, 4 Geo. Mason J. Int'l Com. L. 186, 191 (2013) (discussing variances in ethics codes).
- ³⁵ Conn. Gen. Stat. § 1-79 (e) (16); see Connecticut Office of State Ethics, *supra* note 33, at 6.
- ³⁶ Hawaii Rev. Stat. §84-11.5.
- ³⁷ See, e.g., UN Office of Drugs & Crime, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (2013), available at https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf.
- ³⁸ See, e.g., Thomas Kelley, *Corruption As Institution Among Small Businesses in Africa*, 24 Fla. J. Int'l L. 1, 6 (2012) ("Corruption is so engrained in the culture of Nigerien society, including its business sector, that at present it supplies the logic and the rules that most businessmen live by."); Eleanor M. Fox & Deborah Healey, *When the State Harms Competition-the Role for Competition Law*, 79 Antitrust L.J. 769, 785 (2014) (discussing diverging anti-corruption laws).
- ³⁹ See, e.g., UN Office of Drugs & Crime, *supra* note 37, at 39 (detailing policies for particular risk areas).
- ⁴⁰ See, e.g., Sope Williams, *supra* note 14.
- ⁴¹ See Sope Williams-Elegbe, *The Reform and Regulation of Public Procurement in Nigeria*, 41 Pub. Cont. L.J. 339, 357 (2012) (Nigerian Bureau of Public Procurement holds authority list disqualified suppliers and service providers).
- ⁴² See 48 C.F.R. Subpart 9.4, FAR Subpart 9.4.
- ⁴³ Cf. Courtney Hostetler, *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011) (discussing methods for better sharing information on procurement corruption in World Bank projects).
- ⁴⁴ See, e.g., *supra* note 29 and accompanying text.
- ⁴⁵ California Civil Code § 1714.43.
- ⁴⁶ 48 C.F.R. § 52.203-13(c)(2)(ii)(B), FAR 52.203-13(c)(2)(ii)(B).
- ⁴⁷ Memorandum from Deputy Attorney General Sally Quillian Yates, U.S. Department of Justice, Sept. 15, 2015, <https://www.justice.gov/dag/file/769036/download>.
- ⁴⁸ An example helps to illustrate the problem. According to the U.S. Department of Justice, on July 2, 2014, a U.S. federal district judge sentenced Vernon J. Smith III, age 61, of Edgewater, Maryland, to 42 months in prison, followed by three years of supervised release, for conspiring to defraud the United States, including fraud involving federal contracts. See U.S. Department of Justice, *Edgewater, Maryland Man Sentenced To 42 Months In Prison For Defrauding SBA And IRS Of More Than \$7 Million* (July 2, 2014), available at <https://www.justice.gov/usao-md/pr/edgewater-maryland-man-sentenced-42-months-prison-defrauding-sba-and-irs-more-7-million>. While the Justice Department's press release on the conviction and sentencing is readily available on an Internet search of the defendant's name, the exclusion record, buried in the federal government's database at www.sam.gov, is available only on a specific name search within the database. In other words, there would be no way for a German contracting official to know that the Mr. Smith was excluded for corruption unless the contracting official knew (as U.S. contracting officials know) to search for Mr. Vernon's name in the federal database. And even once a contracting official located Mr. Smith's debarment record in www.sam.gov, there would be no substantive information there on the bases for debarment -- nothing in the public database states why, exactly, Mr. Smith has been indefinitely excluded from federal contracting.
- ⁴⁹ See John Bryan Warnock, *Principled or Practical Responsibility: Sixty Years of Discussion*, 41 Pub. Cont. L.J. 881 (2012) (discussing U.S. federal process for determining non-responsibility).

- ⁵⁰ 48 C.F.R. § 42.1501(a), FAR 42.1501(a). For a discussion of how past performance was incorporated into the federal procurement system during the Clinton administration, see, for example, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 656-57 (2001).
- ⁵¹ See, e.g., 48 C.F.R. § 52.203-13(c)(2)(ii), FAR 52.203-13(c)(2)(ii) (“At a minimum, the Contractor’s internal control system shall provide for . . . [a]n internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.”).
- ⁵² See, e.g., U.S. Department of Justice, *The False Claims Act: A Primer*, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf; John T. Nicolaou, Survey, *Whistle While You Work: How the False Claims Act Amendments Protect Internal Whistleblowers*, 2011 Colum. Bus. L. Rev. 531 (2011).
- ⁵³ See, e.g., Major Timothy M. Cox, *Promoting Integrity from Without: A Call for the Military to Conduct Outside, Independent Investigations of Alleged Procurement Integrity Act Violations*, 66 A.F. L. Rev. 225, 238 (2010) (discussing U.S. agency oversight); see also Frank Aneciarico & James B. Jacobs, *Purging Corruption from Public Contracting: The “Solutions” Are Now Part of the Problem*, 40 N.Y.L. Sch. L. Rev. 143, 144 (1995) (discussing New York City’s procurement system, and noting that the “dilemma is that in trying to corruption-proof public contracting, corruption controllers mire the process in red tape, undermining the government’s capacity to carry out essential goals and, ironically, creating new opportunities for corruption and fraud”).
- ⁵⁴ See, e.g., Myrish T. Cadapan-Antonio, *Participation of Civil Society in Public Procurement: Case Studies from the Philippines*, 36 Pub. Cont. L.J. 629 (2007); Sabina Panth, *Three Examples of Procurement Monitoring by Civil Society* (May 5, 2010) (blog entry), <http://blogs.worldbank.org/publicsphere/three-examples-procurement-monitoring-civil-society>; Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 Law & Pol’y Int’l Bus. 53, 80 (1999) (“the World Bank has permitted NGOs and concerned citizens to become more involved in the monitoring of its financing projects”).
- ⁵⁵ Cf. Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 Pub. Cont. L.J. 553, 562 (2005)(discussing UN proposals for international monitoring body to stem corruption in procurement).
- ⁵⁶ See, e.g., Major Marlin D. Paschal, *Getting Beyond “Good Enough” in Contingency Contracting by Using Public Procurement Law As A Force to Fight Corruption*, 213 Mil. L. Rev. 65 (2012).
- ⁵⁷ See Annika Engelbert, Nina Reit & Laurence Westen, *Procurement Methods in Kenya - A Step Towards Transparency?*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 162 (2012) (“Public procurement is vulnerable to corruptive acts because it deals with asymmetrical buyer-seller relationships, important contract amounts, and complex and hence often nontransparent procedures.”).
- ⁵⁸ See, e.g., Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63 (2010); James Jurich, *International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 242, 244 (2012); Gabriella M. Racca & Roberto Cavallo Perin, *Material Amendments of Public Contracts During Their Terms: From Violations of Competition to Symptoms of Corruption*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 279, 293 (2013) (“Whenever delivered quality is shattered by opportunistic behaviour at the execution stage, transparency and non-discrimination principles are betrayed, since an incorrect execution undermines the competition principle put in place among competing bidders in the selection phase.”).

⁵⁹ See, e.g., Christopher R. Yukins, *supra* note 27, at 81.

⁶⁰ See, e.g., Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* 9 (Hart 2012); Andrea Dahms, Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 Am. Crim. L. Rev. 605, 627 (2007) (noting that the World Bank and the International Monetary Fund “are also trying to control fraud and corruption by evaluating corruption levels when designing development assistance strategies and implementing anti-corruption projects.”).

⁶¹ See, for example, this discussion of how local circumstances have shaped responses to corruption in procurement in Italy:

In particular, given the dissimilarity of constrictions affecting the action of contracting authorities, it is clear that a local regulation may help the contracting authorities to respond better to the structural factors of their own geographical area. For example, while in some regions of the south the presence of criminal associations makes the risk of corruption the main constraint to the effective functioning of the procurement system, in some regions of the centre and the north the high levels of association between firms would suggest that here the main risk is collusion between them. Economic theory illustrates how, in the face of these two types of risk, the optimal structure of the public procurement system should be completely different. However, local regulations can have heavily distorting effects on competition in the award of public contracts and hence come to increase the costs for contracting authorities and cause a deterioration in the allocation of resources.

Balancing these elements of the trade-off is a complex task, but . . . the choice of the Italian parliament (made necessary also by EU Law requirements) has been quite clear: to grant Regions and other local authorities a certain flexibility to adapt to the needs of their local territories, but making sure this does not translate into a limitation of competition.

Francesco Decarolis & Cristina Giorgiantonio, *Local Public Procurement Regulations: The Case of Italy*, 43 Int'l Rev. L. & Econ. 209, 215 (2015).

⁶² See European Directive 2014/24/EU, Art. 57(6) (“the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct”).

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I processi di risk-assessment e risk-management e la responsabilità delle stazioni appaltanti.

Author

- *Elena Demichelis, Dottoranda di ricerca, elena.demichelis@unito.it. – Università degli Studi di Torino*

Il paper si propone di analizzare i rapporti tra i processi di risk-assessment e risk-management e la responsabilità delle stazioni appaltanti, in particolare il rimedio del risarcimento per equivalente del danno patito dai partecipanti a una gara pubblica interessata da episodi di corruzione intesa in senso ampio.

Costituiscono oggetto di analisi il quadro normativo, gli orientamenti giurisprudenziali e dottrinali, anche internazionali e di alcuni Stati membri dell'Unione Europea, in materia di elementi costitutivi della responsabilità dell'amministrazione aggiudicatrice; in particolare il possibile rilievo del verificarsi di episodi di reato e dell'(in)efficacia del sistema di prevenzione e contrasto della corruzione, ai fini della condanna della stazione appaltante al risarcimento del danno.

In Italia, in applicazione della recente disciplina di prevenzione e di contrasto della corruzione, le amministrazioni sono tenute ad assicurare la legalità delle procedure di gara e la qualità della spesa pubblica tramite l'adozione di strumenti organizzativi che sembrano riconducibili a processi di analisi e gestione del rischio.

Ai fini della condanna della stazione appaltante al risarcimento del danno, è necessario accertare che l'amministrazione abbia violato il principio di correttezza, al quale sembra riconducibile anche il fondamentale principio dell'integrità che vieta l'esercizio del potere pubblico e l'utilizzo delle risorse al fine di ottenere vantaggi privati.

In occasione del contenzioso relativo agli appalti Expo 2015, il giudice amministrativo di primo grado ha condannato la stazione appaltante al risarcimento del danno sulla base della considerazione che il verificarsi di comportamenti penalmente rilevanti prova l'inefficacia del sistema di prevenzione e contrasto alla corruzione.

La responsabilità della stazione appaltante sembra configurabile ogni qualvolta l'organizzazione pubblica non disponga di un adeguato sistema di prevenzione e contrasto della corruzione e l'interesse privato assuma rilievo nella decisione amministrativa oltre i limiti in cui ciò è consentito.

Le procedure di valutazione e gestione del rischio di corruzione, quali strumenti organizzativi volti a garantire il rispetto della legalità e dei principi di correttezza e integrità, sembrano assumere rilievo nell'accertamento della responsabilità della stazione appaltante, ai fini della condanna al risarcimento del danno.

JEL Classification: K10, K40

Keywords: Liability; Damages; Public Contracts; Risk Management.

1 La responsabilità precontrattuale della stazione appaltante per comportamento scorretto.

Per responsabilità precontrattuale della stazione appaltante si intende la responsabilità per violazione dei principi e delle norme che regolano l'attività dell'amministrazione aggiudicatrice nella fase che precede l'affidamento e la conclusione del contratto, definita "dell'evidenza pubblica" e assimilabile alle trattative tra privati.

L'evoluzione del rapporto tra pubblica amministrazione e cittadino ha contribuito a ritenere applicabili all'attività procedimentale della pubblica amministrazione i parametri di buona fede e correttezza¹ (G. M. Racca 2012), tradizionalmente riferibili ai soggetti giuridici di diritto privato.

È pacifico che nei rapporti tra soggetti privati, i principi di buona fede e correttezza vietino alle parti di una trattativa di porre in essere condotte idonee a ingenerare un legittimo affidamento, poi deluso, in ordine alla conclusione del contratto.

L'applicazione dei principi di correttezza e buona fede nei rapporti con la stazione appaltante permette di attribuire rilevanza al comportamento complessivo delle amministrazioni per accertare eventuali scorrettezze. Ciò anche a prescindere dal giudizio sugli atti della procedura avente ad oggetto la valutazione della legittimità degli atti di gara, tradizionalmente ritenuto presupposto necessario all'accertamento della responsabilità. La condanna della stazione appaltante al risarcimento del danno è configurabile anche nelle ipotesi in cui i provvedimenti amministrativi adottati dall'amministrazione sono conformi alla disciplina che li regola, ma sono stati emanati nel contesto di un comportamento in contrasto con le regole di correttezza e buona fede (G. M. Racca 2012). A titolo esemplificativo, è stata condannata al risarcimento del danno la stazione appaltante che, dopo aver aggiudicato l'appalto, ha adottato un provvedimento legittimo di revoca degli atti di gara e dell'aggiudicazione per carenza della necessaria copertura finanziaria deludendo gli affidamenti ingenerati nell'impresa dagli atti di gara poi revocati².

È noto che, tradizionalmente la condanna della stazione appaltate al risarcimento del danno è subordinata alla dimostrazione della colpa dell'amministrazione, ossia della non scusabilità dell'errore imputabile all'organizzazione pubblica.

Di recente, in conformità alla giurisprudenza del giudice europeo³ sembra doversi escludere la rilevanza dell'accertamento della colpa: la Corte di Giustizia, infatti, pare aver affermato che la responsabilità della stazione appaltante è subordinata esclusivamente alla dimostrazione della violazione dei principi e delle norme che regolano la fase dell'evidenza pubblica. Gli interpreti, ancora oggi, paiono non avere adottato posizioni univoche sul punto⁴.

In materia di contratti pubblici, qualora sia stata accertata la responsabilità e non sia possibile il subentro dell'operatore economico nel contratto concluso, l'amministrazione può essere condannata al pagamento di una somma di denaro di valore equivalente al pregiudizio subito, come espressamente previsto dai principi vigenti in materia, a livello nazionale ed europeo⁵.

Il danno risarcibile "per equivalente" si compone del lucro cessante, che corrisponde al mancato guadagno conseguibile con l'esecuzione del contratto e del danno emergente, ossia della perdita patrimoniale subita per aver partecipato alla gara inutilmente⁶. La giurisprudenza non ha individuato una soluzione univoca in merito alla liquidazione del mancato guadagno. L'operatore economico che dimostra la spettanza dell'aggiudicazione talvolta è tenuto a provare l'utile effettivo conseguibile dal contratto non eseguito, anche a mezzo di presunzioni o di perizie contabili⁷. È criticato in giurisprudenza⁸ e in dottrina (L. Prosperetti; G. M. Racca, 1998) l'orientamento giurisprudenziale che quantifica il lucro cessante nel 10% dell'importo a base d'asta come ribassato dall'offerta dell'impresa⁹, in forza dell'applicazione di un criterio equitativo¹⁰. La giurisprudenza prevalente¹¹ in via equitativa riduce l'ammontare del danno risarcibile qualora l'impresa ricorrente non fornisca la prova di non aver conseguito (in via attuale o potenziale) altri guadagni per non aver potuto impiegare le proprie risorse nell'esecuzione di altri contratti. Nelle ipotesi in cui la decisione dell'amministrazione in merito all'aggiudicazione dell'appalto non risulta pienamente sindacabile dal giudice, il danno risarcibile è ridotto in ragione delle probabilità di vittoria del danneggiato¹², calcolabili in base al numero dei partecipanti¹³ ovvero alla dimostrazione di circostanze idonee a porre il danneggiato in condizione di risultare vincitore¹⁴.

La giurisprudenza riconosce anche il risarcimento del c.d. danno curriculare, ossia il pregiudizio sofferto dall'operatore economico che non ha potuto menzionare nel proprio curriculum l'esecuzione dell'appalto non aggiudicato (A. Police, S. Cimini), sulla base della considerazione che l'esecuzione del contratto è funzionale all'incremento della competitività dell'appaltatore sul mercato¹⁵. Alcune pronunce subordinano la risarcibilità del danno curriculare alla dimostrazione della spettanza dell'aggiudicazione, altre decisioni condannano l'amministrazione anche qualora la prova non sia raggiunta (R. Giovagnoli; S. Me-reu).

Il danno emergente, costituito dalle spese di partecipazione alla gara, di regola, viene risarcito solo nelle ipotesi in cui il ricorrente non fornisce la prova che sarebbe risultato aggiudicatario. Se è accertato che il ricorrente avrebbe conseguito l'aggiudicazione dell'appalto, il rimborso delle spese di partecipazione è negato, poiché si ritiene che le spese sostenute per la partecipazione alla procedura siano costi che l'operatore economico avrebbe sopportato anche in caso di aggiudicazione¹⁶. Una simile ricostruzione è criticata dagli interpreti che evidenziano che il rimborso delle spese di partecipazione dovrebbe negarsi se e nella misura in cui manca la prova del danno ovvero perché la voce di danno risulta assorbita dal risarcimento del lucro cessante (G.M. Racca 2003; F. Duncan, F. Lichère; S. L. Arrowsmith, J. Linarelli and D. Wallace; C. H. Bovis; F. D. Busnelli; A. Reich, O. Shabat)¹⁷; anche nelle direttive europee è prevista esplicitamente la risarcibilità delle spese di partecipazione, qualora risulti provata la "possibilità concreta di ottenere l'aggiudicazione"¹⁸.

1.1 La rilevanza della corruzione nell'accertamento della responsabilità precontrattuale della stazione appaltante.

Al principio di correttezza sembra riconducibile anche il fondamentale principio dell'integrità, non espressamente previsto dalla disciplina in materia, ma essenziale a garantire la legalità delle procedure e la qualità della spesa pubblica (G.M. Racca – R. Cavallo Perin)¹⁹. Il concetto di integrità può essere definito quale esercizio del potere e utilizzo di risorse, in conformità a finalità predefinite, nell'interesse pubblico²⁰.

L'integrità delle organizzazioni pubbliche è minacciata quando l'interesse privato assume rilievo ai fini della determinazione del contenuto delle decisioni amministrative oltre i limiti in cui ciò è consentito. Si tratta di comportamenti riconducibili alla nozione di corruzione in senso ampio²¹, così definita in quanto riferibile anche a condotte prive di rilevanza penale, ma potenzialmente idonee a compromettere l'integrità dell'organizzazione.

Come noto, in Italia, la corruzione è rilevata come sistemica e nel settore degli appalti pubblici, interessa tutte le fasi del ciclo del contratto pubblico (A. Von Bogdandy, M. Ioannidis; G. M. Racca 2013; G. M. Racca – C. R. Yukins) e richiede una risposta "*articolata ed anch'essa sistemica*"²², che non sembra poter prescindere dal risarcimento del pregiudizio subito dagli operatori economici cui è stato impedito di aggiudicarsi l'appalto affidato ed eseguito dall'impresa scelta da un'organizzazione pubblica "corrotta".

Se il principio di integrità è riconducibile al principio di correttezza, anche i comportamenti che costituiscono una minaccia per l'integrità dell'organizzazione sono rilevanti ai fini del risarcimento del danno, perché qualificabili come condotte contrarie a correttezza.

Pertanto, i comportamenti penalmente rilevanti sembrano assumere rilievo anche in altri settori del diritto (R. Cavallo Perin, G. M. Racca; F. Peirone): se le norme del codice penale non regolano l'agire delle organizzazioni pubbliche, il

loro mancato rispetto può assumere rilevanza quale violazione dei principi cui deve conformarsi l'attività amministrativa (F. Peirone)²³.

In questo senso, la giurisprudenza francese del *Conseil d'Etat* sembra attribuire rilevanza al verificarsi di ipotesi di conflitto d'interessi penalmente rilevanti quale violazione dei principi di imparzialità e parità di trattamento degli offerenti che comporta l'invalidità dell'atto amministrativo (P. Cassia ; M. Degoffe ; F. Peirone)²⁴.

In Italia, in occasione delle vicende giudiziarie relative agli appalti Expo 2015, il T.A.R. Lombardia, Milano, ha statuito che il verificarsi di ipotesi di condotte penalmente rilevanti dimostra un inescusabile “fallimento del sistema dei controlli e della scelta dei funzionari da proporre a garanzia della trasparenza di una pubblica gara”²⁵ idoneo a fondare la responsabilità della stazione appaltante per *culpa in vigilando* e *in eligendo*.

2 La disciplina prevenzione e di contrasto della corruzione e dell'illegalità nella pubblica amministrazione e i processi di analisi e gestione del rischio.

La consapevolezza maturata a livello internazionale e nazionale, dell'ampiezza della diffusione e della gravità degli effetti del fenomeno corruzione, in particolare sulle economie e sulla crescita, ha portato a prendere in considerazione l'adozione di strategie di prevenzione. A livello nazionale, è stata adottata la disciplina di prevenzione e di contrasto della corruzione e dell'illegalità nella pubblica amministrazione²⁶, allo scopo di garantire l'integrità, l'efficienza e l'efficacia dell'azione amministrativa in linea con le strategie suggerite dalle istituzioni internazionali²⁷.

Il sistema di prevenzione delineato dalla disciplina italiana trova un precedente nell'ordinamento statunitense (C.R. Yukins; J. Arlen)²⁸ e strumenti analoghi sono previsti in Italia in materia di responsabilità giuridica degli enti (C. Piergallini; M. Pelissero)²⁹ con riferimento alle imprese private.

L'attività di prevenzione coinvolge la pubblica amministrazione quale organizzazione e sembra riconducibile a metodologie e strumenti di analisi e gestione del rischio (E. Bivona, M. Scinicariello; G. M. Racca, 2015 C).

Nel linguaggio comune il termine “rischio” è riferito alla minaccia di un evento futuro, incerto e negativo; nel linguaggio scientifico il significato del termine varia a seconda della disciplina: nei processi aziendali, rientrano nella nozione di rischio sia eventi positivi, che negativi che incidono sulla realizzazione degli obiettivi dell'organizzazione (A. Floreani; E. Bivona, M. Scinicariello), anche se di regola se ne accoglie un'accezione restrittiva, in senso negativo (E. Bivona, M. Scinicariello)³⁰.

Ai fini della definizione delle nozione di rischio è necessario individuare l'organizzazione e gli obiettivi della stessa (A. Floreani; E. Bivona, M. Scinicariello). Con riferimento alla pubblica amministrazione (E. Bivona, M. Scinicariello)

l'applicazione delle logiche di analisi e gestione del rischio alla prevenzione della corruzione presuppone l'individuazione di obiettivi quali integrità, trasparenza, efficienza ed efficacia dell'agire e quale rischio il verificarsi di ipotesi in cui l'interesse privato assume rilievo ai fini della determinazione del contenuto delle decisioni amministrative, oltre il limite entro cui ciò è consentito.

I processi di analisi e gestione del rischio, in conformità a quanto previsto dagli standard internazionali (E. Bivona, M. Scinicariello)³¹, si articolano in fasi che sembrano corrispondere a quelle del sistema di prevenzione delineato dalla disciplina italiana. L'elaborazione dei piani triennali di prevenzione della corruzione delle pubbliche amministrazioni (P.T.P.C.) è preceduto dall'analisi del contesto (settori, uffici e attività), identificazione e classificazione degli eventi rischiosi (E. Bivona, M. Scinicariello).

Il sistema delineato dalla disciplina italiana individua quale *risk manager* il responsabile della prevenzione della corruzione³² al quale spettano l'adozione di iniziative e le responsabilità per il buon funzionamento del sistema di prevenzione. Di regola al responsabile della prevenzione della corruzione è attribuito anche il ruolo di responsabile della trasparenza, stante la necessità di integrare gli strumenti per la prevenzione della corruzione e le misure per la trasparenza. La gestione del rischio di corruzione sembra non poter prescindere dall'operare in sinergia con le iniziative che le amministrazioni intendono attuare per garantire la trasparenza e il controllo esterno degli amministrati (G. M. Racca, R. Cavallo Perin)³³. Il responsabile è selezionato dall'organo d'indirizzo politico tra i dirigenti amministrativi di ruolo di prima fascia, all'esito di una procedura di valutazione da condursi sulla base di criteri individuati dalla legge (G. M. Racca, 2015, C). Si tratta di un funzionario di livello apicale all'interno dell'ente in grado di coinvolgere tutti i livelli dell'organizzazione; l'onere attribuito al funzionario è piuttosto significativo in quanto è un incarico aggiuntivo, non retribuito che implica responsabilità giuridica pendente nei confronti dell'incaricato (G. M. Racca, 2015, C). È imprescindibile l'impegno dell'intera organizzazione nella promozione e valorizzazione dell'analisi e gestione del rischio, da realizzarsi con l'adozione di linee guida e standard di riferimento, iniziative per la diffusione "della cultura del rischio" anche attraverso la formazione del personale (E. Bivona, M. Scinicariello).

L'efficacia della pianificazione presuppone professionalità e personale di cui le amministrazioni nazionali sono spesso carenti. In alcune realtà comunali l'attività di pianificazione si traduce nella "copia integrale" dei piani adottati da altri enti o di quanto contenuto nella normativa (G. M. Racca, 2015, C)³⁴.

L'eterogeneità delle amministrazioni e degli enti destinatari della disciplina anticorruzione richiede una differenziazione nella valutazione del rischio e degli strumenti di contrasto (G. M. Racca, 2015, C)³⁵.

Il mero adempimento dell'obbligo non assicura la trasparenza e la prevenzione (G. M. Racca, 2015, C), nell'individuazione delle aree di rischio³⁶ e degli obblighi di pubblicazione ulteriori rispetto a quelli previsti dalla legge è opportuno che l'organizzazione adotti soluzioni differenziate con riferimento alle specificità del contesto geografico e alle peculiarità dei partecipanti alle procedure di gare

indette dall'amministrazione (G. M. Racca, 2015, C). In questa direzione va indirizzato l'operato dei responsabili della trasparenza e della prevenzione della corruzione in un contesto di circolazione e trasferimento di *best practices* tra amministrazioni assimilabili per dimensioni e attribuzioni (F. Di Cristina) per individuare *benchmarks*³⁷ nell'analisi dei fabbisogni e nella determinazione della qualità e quantità dei beni e servizi messi a gara. La definizione dei *benchmarks* sembra utile anche a individuare le violazioni dei canoni di buon andamento, nella segnalazione di eventuali scorrettezze da parte dei pubblici funzionari, attraverso il *whistle-blowing*³⁸ e dei cittadini, controllori esterni della qualità della spesa pubblica (G. M. Racca, 2015, C).

2.1 I protocolli di legalità e i patti di integrità quali strumenti di *risk management*.

Un'efficace gestione degli misure di *risk assesment* può risultare utile a favorire lo sviluppo di professionalità adeguate all'adozione di misure di *risk management*, come i protocolli di legalità e i patti di integrità³⁹. Si tratta di strumenti contrattuali, fonte di obblighi e sanzioni ulteriori a quelle legali, a tutela della correttezza nei rapporti tra la stazione appaltante e gli offerenti (G. M. Racca, 2015, C)⁴⁰.

Tali strumenti contrattuali sono frutto dell'esperienza internazionale di contrasto alla corruzione negli appalti pubblici, ad integrazione della documentazione di gara a garanzia dell'integrità e della trasparenza non solo del procedimento ad evidenza pubblica, ma anche della fase dell'esecuzione⁴¹.

Con l'inserimento dei protocolli di legalità all'interno dei bandi o delle lettere di invito, la partecipazione alla gara pubblica è subordinata all'accettazione del protocollo di legalità e all'adempimento degli obblighi ivi contenuti e definiti dalle parti, tra i quali l'obbligo di denuncia in caso di commissione di reati (concussione, estorsione subite e corruzione attiva) (F. Saitta)⁴². In caso di inadempimento, la stazione appaltante può escludere dalla gara l'operatore economico inadempiente o risolvere il contratto eventualmente già stipulato. In forza delle previsioni del protocollo di legalità la stazione appaltante può anche essere tenuta ad adottare un patto d'integrità (G. M. Racca, 2013 e 2011), che vincola l'amministrazione e gli offerenti al rispetto di standard comportamentali ulteriori a quelli legali⁴³. L'effettività delle regole di comportamento è garantita dalla previsione di sanzioni assimilabili, nel loro funzionamento, alla clausola penale in quanto comminate a prescindere dall'accertamento giudiziale dell'entità del pregiudizio subito⁴⁴. Alla violazione del patto può conseguire l'esclusione da una singola gara o da tutte le gare bandite dalla stazione appaltante per un periodo di tempo determinato oppure l'incameramento della cauzione, il risarcimento del danno liquidato forfettariamente, nonché la risoluzione del contratto se è intervenuta l'aggiudicazione⁴⁵. I patti di integrità, infatti, producono effetti anche durante la fase esecutiva, assicurando il rispetto del diritto alla correttezza nei rapporti tra imprese offerenti e tra queste e la stazione appaltante (G. M. Racca, R. Cavallo Perin)⁴⁶ in una fase disciplinata dal diritto privato e tradizionalmente ri-

levante esclusivamente nei rapporti tra stazione appaltante e operatore economico aggiudicatario (S. Treumer; V. Cerulli Irelli).

3 L'inefficacia del sistema di analisi e gestione del rischio e la responsabilità precontrattuale della stazione appaltante.

In Italia, in giurisprudenza è stato affermato che l'inescusabile "fallimento" del sistema a garanzia della trasparenza di una procedura di aggiudicazione⁴⁷ assume rilievo nel giudizio di accertamento della responsabilità precontrattuale della stazione appaltante.

Nel caso di specie, la condanna al risarcimento del danno è l'epilogo del contenzioso amministrativo sorto contestualmente all'avvio del procedimento penale per la contestazione dei reati di corruzione e turbativa d'asta dell'appalto pubblico per la progettazione ed esecuzione dei lavori delle architetture di servizio per l'evento Expo 2015. In sede penale, sono state emesse misure cautelari nei confronti di pubblici funzionari della stazione appaltante⁴⁸.

Nella procedura di gara è stato adottato un protocollo di legalità che obbligava l'offerente a denunciare l'eventuale dazione di tangenti a pena di esclusione dalla gara o revoca dell'aggiudicazione e risoluzione automatica del contratto eventualmente concluso⁴⁹. Nel caso di specie, l'accordo corruttivo, quindi, è rilevante non solo in sede penale, ma anche ai fini della prosecuzione del rapporto contrattuale tra la stazione appaltante e l'impresa aggiudicataria (F. Peirone)⁵⁰.

A seguito dell'avvio delle indagini penali, le imprese non aggiudicatrici, seconde classificate, hanno chiesto alla stazione appaltante di sciogliere il contratto sottoscritto con l'impresa aggiudicataria; la stazione appaltante si è rifiutata⁵¹ e le imprese hanno proposto ricorso dinanzi al giudice amministrativo domandando l'annullamento degli atti di gara e il risarcimento del danno. L'impresa aggiudicataria resistente ha eccepito la improcedibilità del ricorso, perché tardivo. Il giudice⁵² ha respinto l'eccezione e ha annullato l'aggiudicazione in forza dell'accertamento della violazione del protocollo di legalità. In esecuzione della sentenza, la stazione appaltante avrebbe dovuto procedere alla risoluzione del contratto e ad affidare l'appalto pubblico al ricorrente.

La decisione di annullamento è stata riformata dal giudice di secondo grado, che ha accolto l'eccezione respinta in primo grado e ritenuto tardivo il ricorso per l'annullamento dell'aggiudicazione. Nella motivazione della sentenza di secondo grado, inoltre, si afferma che vizi dedotti dai ricorrenti, evincibili da circostanze riconducibili alla commissione di fatti corruttivi nello svolgimento della procedura di gara, non sono qualificabili come vizi di legittimità normativamente previsti e tradizionalmente esclusivamente riferibili ed emergenti dall'esame dell'attività procedimentale e provvedimentale dell'amministrazione⁵³.

Il giudizio risarcitorio, pendente dinanzi al giudice di primo grado, si è concluso con una sentenza di accoglimento: il giudice ha ritenuto che la legittimità

dell'aggiudicazione, accertata nel giudizio d'appello, non escludesse l'"illiceità della gara"⁵⁴, accertata in sede penale con sentenze di condanna⁵⁵ e il conseguente risarcimento del danno ingiusto sofferto dai ricorrenti. Nella decisione, si legge che il risarcimento del danno per equivalente nel caso di specie opera quale rimedio subordinato all'affidamento del contratto, impraticabile a fronte dell'intervenuto "commissariamento" dell'appalto da parte dell'Autorità Nazionale Anticorruzione⁵⁶.

Il giudice richiama la fattispecie della *culpa in vigilando o eligendo*, ancorchè la giurisprudenza prevalente escluda la rilevanza dell'elemento soggettivo nell'accertamento della responsabilità. Ciò sembra dimostrare le perduranti incertezze della giurisprudenza nazionale nella definizione della portata della giurisprudenza europea che esclude la rilevanza dell'elemento soggettivo (G.M. Racca, S. Ponzio, 2015).

L'ammontare del danno risarcibile è limitato al solo danno c.d. curriculare; è stata esclusa la risarcibilità del mancato guadagno, per l'insindacabilità delle valutazioni della stazione appaltante ed è stato negato il rimborso delle spese di partecipazione, ritenute costi che l'operatore economico avrebbe sostenuto anche se fosse risultato aggiudicatario.

Endnotes

¹ Art. 1337 e ss. Cod. Civ. It.

² Cons.di St. ad. plen., 05 settembre 2005, n. 6, in Foro it. 2009, 3, III, 124, DeG - Dir. e giust. 2005, 39, 99, Dir. e Formazione 2005, 1632, Riv. amm. R. It. 2005, 9, 1008. La giurisprudenza, invece, sembra ritenere configurabile la responsabilità precontrattuale per scorrettezza, solo nelle ipotesi in cui la stazione appaltante adotta atti legittimi, ma pone in essere un comportamento non conforme a correttezza; se, invece, è accertata l'illegittimità degli atti di gara, la responsabilità è qualificata extracontrattuale e trova fondamento nella necessità di riparare il danno conseguente alla lesione dell'interesse legittimo. (F. Trimarchi Banfi)

³ Corte Giust. UE, 30 settembre 2010, C-314/2009, Stadt Graz c. Strabag AG, in Racc., 2010 I-08769.

⁴ Tra le tante, nel senso dell'irrelevanza dell'accertamento della colpa: Cons. St., sez. VI, 04 settembre 2015, n. 4115, in Foro Amministrativo (II) 2015, 9, 2268 (s.m); *contra* Cons. St., sez. IV, 12 febbraio 2014, n. 674 in Foro amm. 2014, 2, 443 (s.m).

⁵ Artt. 30 e 124 c.p.a. e dell'art. 2, comma primo, lett. c) e comma quinto, della direttiva 89/665, come modificata dalla direttiva 66/2007.

⁶ Art. 1223 e ss. Cod. Civ. It.

⁷ Tra le tante: Cons. St. sez. IV, 12 giugno 2014, n. 3003, in www.giustizia-amministrativa.it; Id., 13 dicembre 2013, n. 6000 in Foro amm. CdS 2013, 12, 3415 (s.m). T.A.R. Catania, sez. IV, 13 novembre 2015, n. 2616, in Redazione Foro amministrativo 2015, 11.

⁸ Tra le tante: Consiglio di Stato, sez. V, 8 novembre 2012, n. 5686 in www.giustizia-amministrativa.it; ID., 13 giugno 2008 n. 2967 in www.giustizia-amministrativa.it.

- ⁹ Tra le tante: Cons. St., sez. VI, 13 gennaio 2012, n. 115 in www.giustizia-amministrativa.it; Id., sez. V, 05 luglio, 2012, n. 3940 in www.giustizia-amministrativa.it. T.A.R. Palermo sez. III, 18 settembre 2014, n. 531, in *Foro Amm.* 2014, 2, 706.
- ¹⁰ Art. 1226 Cod. Civ. It. Il criterio è desunto in via interpretativa dall'art. 345, l. n. 2248 del 1865 All. F., poi recepita nell'art. 122 del d.p.r. n. 554/1999 e, successivamente, nell'art. 134 del d.lg. 163/2006.
- ¹¹ Tra le tante: Cons. St., sez. V, 27 marzo 2013, n. 1833, in *Foro Amm.* CdS, 2013, 3, 746; Id., 20 aprile 2012, n. 2317, in *Foro Amm.* C.d.S., 2012, 4, 956.
- ¹² Cons. Stato Sez. VI, 18 dicembre 2001, n. 553, in *Urb. e App.*, 2002, 6, 700, con nota di A. Susca, Il risarcimento del danno da perdita di chance; T.A.R. Lazio, Latina, Sez. I, 12 gennaio 2015, n. 24, in www.giustizia-amministrativa.it.
- ¹³ Cons. St., VI, 3 aprile 2007 n. 1514; Cons. St., sez. IV, 6 luglio 2004, n. 5012.
- ¹⁴ Cass. civ., sez. lav., 3 marzo 2010, n. 5119, in *Giust. civ. Mass.* 2010, 3, 319.
- ¹⁵ Cons. St., sez. VI, 11 gennaio 2010, n. 20; id., sez. VI, 21 maggio 2009, n. 3144.
- ¹⁶ Cons. St., 12 giugno 2014, n. 3003; id., sez. V, 2 dicembre 2013, n. 799; T.A.R., Lazio, sez. III, 2 febbraio 2011, n. 974.
- ¹⁷ Cons. St., sez. IV, 17 febbraio 2014, n. 744; Cons. St., sez. VI, del 11 gennaio 2010; id., Sez. V, 13 giugno 2008, n. 2967; Cons. giust. amm. Sicilia, 22 giugno 2006, n. 315.
- ¹⁸ L'art. 2, comma 7, della direttiva 92/13/CEE
- ¹⁹ Libro Verde sulla modernizzazione della politica dell'UE in materia di appalti pubblici per una maggiore efficienza del mercato europeo degli appalti COM (2011)15.
- ²⁰ In tal senso, l'Organizzazione per la cooperazione e lo sviluppo economico (OCSE) definisce l'integrità come *"the use of funds, resources, assets and authority according to the intended official purposes, to be used in line with public interest"*, in *Public Governance Reviews, Implementing the OECD Principles for Integrity in Public Procurement Progress since 2008*, Annex A pag. 115.
- ²¹ AUTORITÀ NAZIONALE ANTICORRUZIONE (ANAC), Piano Nazionale Anticorruzione, 2013. p. 13. La corruzione in senso ampio è definita quale *'abuse of power for private gain'* nell'EU Anticorruption Report, 2014, on line: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf. Cfr. anche United Nations Convention against Corruption, Council of Europe anti-corruption legal instruments, inclusa Resolution (97) 24 on the twenty Guiding Principles for the fight against corruption e le raccomandazioni No. R (2000) 10 *on codes of conduct for public officials* e No. R (2003)4 *on common rules against corruption in the funding of political parties and electoral campaigns*. Sul concetto di "maladministration", cfr. S. CASSESE.
- ²² La Corte dei conti, discorso di apertura dell'anno giudiziario 2013, 5 febbraio 2013; PCM, Dipartimento della funzione pubblica, Piano Nazionale Anticorruzione, 11 settembre 2013. Presidenza del Consiglio dei Ministri e Ministero per la pubblica amministrazione e la semplificazione, La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma. Rapporto della Commissione per lo studio e l'elaborazione di proposte in tema di trasparenza e prevenzione della corruzione nella pubblica amministrazione, 2012.
- ²³ Si veda TAR Lombardia, Milano, 20 aprile 2015, n. 974, in www.giustizia-amministrativa.it; Cons. St., Sez. IV, 20 gennaio 2015, n. 143 in *Foro Amministrativo (II)*, fasc.7-8, 2015, pag. 1945.
- ²⁴ CE 25 juin 2004, *Ministre des affaires étrangères, de la coopération et de la francophonie*, req. N° 263404; CE 27 juill. 2001, *Société Degrémont, Syndicat intercommunal d'assainissement et de protection de l'environnement de Toulon La Valette La Garde Le Pradet*, req. N° 232820, Lebon 413.
- ²⁵ TAR Lombardia, Milano, 20 aprile 2015, n. 974, in www.giustizia-amministrativa.it.

²⁶ Art. 1 della legge 190/2012.

²⁷ OECD integrity review of Italy: reinforcing public sector integrity, restoring trust for sustainable growth, OECD 2013, pag. 42 e ss., on line: www.funzionepubblica.it che prevede espressamente l'adozione di una specifica disciplina normativa e tra gli standards internazionali cita: "G20 Action Plan on Corruption, the United Nations Convention against Corruption [UNCAC], the Council of Europe's civil and criminal law conventions on corruption, and OECD corruption-related principles", si veda AUTORITÀ NAZIONALE ANTICORRUZIONE (ANAC), Piano Nazionale Anticorruzione, 2013. p. 17.

²⁸ UNITED STATES, United States Federal Sentencing Guidelines, 1st November 1991, 18 U.S.C. §§ 1365 (f) - 1801; 42 U.S.C. §§ 1129(a) - 14133; 49 U.S.C. § 31310.

²⁹ D. lgs. 231, n. 2001, art. 6, c. II.

³⁰ Committee of Sponsoring Organizations of the Treadway Commission - COSO, *La gestione del rischio aziendale. ERM, Enterprise risk management: un modello di riferimento e alcune tecniche applicative*, ed. italiana a cura di Associazione Italiana Internal Auditors e PricewaterhouseCoopers, Il Sole 24 ore, Milano, 2006.

³¹ Enterprise Risk Management proposto dal COSO del 2004, l'ISO 31000 dell'International Organization of Standardization del 2009 e l'AS-NZS 4360:1999, 2004 e 2009 - Standards Australia e Standards New Zealand.

³² L. 190/2012, art. 1 comma 7.

³³ Una sezione del Piano triennale di prevenzione della corruzione è costituita dal programma triennale per la trasparenza e l'integrità, ai sensi del D.lgs. 14 marzo 2013, n. 33, art. 10, c. 2. D.lgs. 14 marzo 2013, n. 33, art. 10, c. 2. Presidenza del Consiglio dei Ministri, Dipartimento della Funzione Pubblica, Circolare 14 febbraio 2014, n. 1; CIVIT, Delibere n. 50 del 2013; n. 6 del 2013; n. 2 del 2012; n. 105 del 2010. Il programma triennale per la trasparenza e l'integrità e il Piano triennale di prevenzione della corruzione possono essere pertanto predisposti quali documenti distinti, purché sia assicurato il coordinamento e la coerenza tra i contenuti degli stessi.

³⁴ Piano triennale di prevenzione della corruzione del Comune di Mesagne (Provincia di Brindisi), 18 settembre 2014, <http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.comune.mesagne.br.it%2Fdownloads%2FPiano%2520triennale%2520di%2520prevenzione%2520della%2520corruzione.pdf&ei=6ONBVYKQNYLmUpbngOgK&usg=AFQjCNHEpZjiExV4aNsvApKVvcVR1E2ESg&bvm=bv.92189499,d.d24> - Piano triennale di prevenzione della corruzione del Comune di Carpino (Provincia di Foggia), 31 gennaio 2014, http://www.comunecarpino.it/files/piano_triennale_prevenzione_corruzione.pdf.

³⁵ Commissione UE, Relazione della Commissione al Consiglio e al Parlamento europeo relazione dell'Unione sulla lotta alla corruzione, 3 febbraio 2014, COM2014, 38 final, 22 e ss.; Governo Italiano, Ministero per la pubblica amministrazione e semplificazione, *La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma. Rapporto della Commissione per lo studio e l'elaborazione di proposte in tema di trasparenza e prevenzione della corruzione nella pubblica amministrazione*, 22 ottobre 2012, Roma, 29 ss.

³⁶ L. 6 novembre 2012, n. 190, art. 1, c. XVI, tra le misure obbligatorie in materia di appalti pubblici, "i procedimenti di scelta del contraente per l'affidamento di lavori, forniture e servizi, anche con riferimento alla modalità di selezione prescelta ai sensi del Codice dei contratti pubblici relativi a lavori, servizi e forniture di cui al decreto legislativo 12 aprile 2006 n. 163".

³⁷ TRANSPARENCY INTERNATIONAL, *Corruption and Waste in the Health system*, novembre 2013, 72.

³⁸ Cfr OECD, OECD Foreign Bribery Report. An analysis of the crime of bribery of foreign public officials,

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³⁹ L. 6 novembre 2012, n. 190, art. 1, c. XVII.

⁴⁰ Tra le tante: Cons. St., Ad. Plen., 4 maggio 2012, n. 8; Cons. St., V, 27 ottobre 2014, n. 5283; Cons. St., VI, 12 giugno 2012, n. 3428. Protocollo di intesa tra Ministero dell'Interno e Autorità Nazionale Anticorruzione, Prime linee guida per l'avvio di un circuito collaborativo tra ANAC-Prefetture-UTG e Enti locali per la prevenzione dei fenomeni di corruzione e l'attuazione della trasparenza amministrativa, 15 luglio 2014; si veda: Cons. St., Sez. IV, 20 gennaio 2015, *cit.*

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⁴² Onu, Convenzione delle Nazioni Unite per il contrasto alla corruzione, Art. 8.

⁴² Protocollo di Legalità tra Prefettura - U.T.G. di Milano e Expo 2015 S.p.A., 13 febbraio 2012. Cons. giust. amm. reg. siciliana, ord. n. 534 del 12 settembre 2014, in Riv. It. Dir. pubbl. comunitario, 1, 2015, p. 244 ss.

⁴³ Cons. St., sez. V, 31 agosto 2015, n. 4042; Cons. St., sez. V, 18 aprile 2012, n. 2232. Oecd, Integrity in Public Procurement: good practice from A to Z, 2007, p. 158.

⁴⁴ Cons. St., sez. IV, 22 settembre 2014, n. 4733; Cons. St., sez. V, 9 settembre 2011, n. 5066.

⁴⁵ Il Patto d'Integrità del Comune di Milano, 12 giugno 2002 prevede l'esclusione del concorrente inadempiente dalle procedure concorsuali bandite dal Comune per 5 anni. Cons. St., sez. IV, 22 dicembre 2014, n. 6302; Protocollo d'Integrità di Roma Capitale, 27 gennaio 2015; Patto d'Integrità del Comune di Palermo, 22 giugno 2006; Codice Etico del Comune di Torino, 28 gennaio 2003, Art. 8, co. 2; Patto d'Integrità del Comune di Bologna, 8 ottobre 2014, Art. 4.

⁴⁶ Commissione UE, Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, COM(2014) 38 final, 3 February 2014, p. 31.

⁴⁷ TAR Lombardia, Milano, 20 aprile 2015, n. 974, in www.giustizia-amministrativa.it e <http://www.lexitalia.it/a/2015/52031>.

⁴⁸ Tribunale Ordinario di Milano, Direzione Distrettuale Antimafia, Ordinanza cautelare, 6 maggio 2014, n. 1015/2011, R.G.G.I.P., Proc. Pen. N. 948/11 RG N.R.

⁴⁹ Protocollo di Legalità tra Prefettura-U.T.G. di Milano - Expo 2015 s.p.a., Art. 4, c. 1, § iii, c. 2 e Schema di contratto per l'affidamento dell'appalto concernente la redazione della progettazione esecutiva e l'esecuzione dei lavori afferenti al sito per l'Esposizione Universale del 2015, Art. 8, co. 1, lett. c.

⁵⁰ Cons. St., Sez. IV, 20 gennaio 2015, n. 143.

⁵¹ Expo 2015 S.p.a, determinazione 4 giugno 2014 del Vice-direttore Construction & Dismantling Division.

⁵² T.A.R. Lombardia, Milano, sez. I, 9 luglio 2014, n. 1802.

⁵³ Cons. St., Sez. IV, 20 gennaio 2015, n. 143 *cit.*. Nella motivazione della sentenza di secondo grado, inoltre, si afferma che vizi dedotti dai ricorrenti, evincibili da circostanze riconducibili alla commissione di fatti corruttivi nello svolgimento della procedura di gara, non sono qualificabili come vizi di legittimità

normativamente previsti e tradizionalmente esclusivamente riferibili ed emergenti dall'esame dell'attività procedimentale e provvedimentale dell'amministrazione

⁵⁴ TAR Lombardia, Milano, 20 aprile 2015, n. 974, in www.giustizia-amministrativa.it

⁵⁵ Si cita: Tribunale penale di Milano, 27 novembre 2014, n. 14/3725.

⁵⁶ AUTORITA' NAZIONALE ANTICORRUZIONE – nota 10 luglio 2014, *Richiesta di straordinaria e temporanea gestione della società' maltauro spa con riferimento all'appalto relativo alle "architetture di servizio" afferenti al sito per l'esposizione universale del 2015 (art. 32 d.l. 24 giugno 2014 n. 90)*

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Transnational Information Exchanges between EU Member States' Contracting Authorities to Reduce Risks and Ensure Integrity in Cross-Border Public Procurement

Author

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- *Anna Malandrino, Ph.D., University of Turin, malandrino.anna@gmail.com*
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The objective of this paper is to investigate how the cross-border exchange of information between contracting authorities can help to reduce risks and achieve integrity in public procurement. This is particularly true when economic operators participate in award procedures carried out by contracting authorities established in other Member States of the European Union. Indeed, information exchanges allow removing doubts surrounding the authenticity of documents submitted by an economic operator, therefore making it possible to evaluate correctly the suitability of both the tenderer and the tender. Such evaluation could not be ensured if contracting authorities were left alone to gather relevant information, due to practical and linguistic obstacles.

Data were gathered through legislation in place as well as documents related to the application of the EU information exchange system in the public procurement sector. The adopted method implied a first phase for exploration of legislation, a second phase for the analysis of the documents related to the implementation of information exchanges in the public procurement sector and a third phase for elaboration of future perspectives.

The results emerged from research led to the evaluation of the extent and implications of the use of cross-border information exchanges. Devices like the Internal Market Information System (IMI), applied to the public procurement sector, lead to overcome linguistic barriers, as well as to reach a degree of simplification of the exchange of information that helps inter-administrative communication and in turn the gathering of information which is helpful for the purpose of ensuring compliance with rules and integrity in public procurement procedures.

As the implementation of such systems in public contracts is recent, the conclusions of this paper deal with the perspective and implications that exchange of information may have in the future, including the building of a common heritage of knowledge and information that in turn may foster the spread of cross-border joint procurement, at the same time improving integrity in public contracts.

Keywords: Administrative Law, Administrative Cooperation, Information Exchange, Cross-Border Procurement, Public Procurement, Integrity

JEL Classification: K20, K23

1 Cross-Border Cooperation and Information Exchanges between Public Administrations to pursue the Internal Market

The administrative cooperation is one of the three profiles through which the ‘administrative question’ becomes significant in the European Union’s primary law¹. The remaining two profiles are respectively related to the characteristics of the European administration, which has to be «open, efficient and independent»², and the right to good administration³. In particular, EU Member States’ administrative cooperation may be regarded as a specific modality through which the European integration accomplishes its own path.

Administrative arrangements are one of the possible ways of expression of consensual power exercise by public administrations⁴. Agreements between public administrations have been defined as operational conventional mechanisms inspired, on the one hand, by the logics of spontaneous coordination between public entities holding formally distinct but substantially interfering competencies, and on the other hand by the voluntary collaboration between the same administrations. Using the original author’s words, we refer to

«meccanismi operativi di tipo convenzionale ispirati, per un verso, alla logica del coordinamento spontaneo fra soggetti pubblici titolari di competenze formalmente distinte, ma comunque sostanzialmente interferenti, e, per l’altro, a quella della volontaria collaborazione reciproca fra gli stessi» (Bassi N., Gli accordi fra soggetti pubblici nel diritto europeo, 2004, pag. 2)

The administrative cooperation between Member States started after the adoption of the Treaty of Rome establishing the European Economic Community (EEC). Namely, forms of transnational cooperation were provided between national customs services in order to achieve the progressive elimination of custom duties and quantitative restrictions between Member States⁵, as it was functional to free movement of goods. The first measures in this regards were adopted soon

after the entry into force of the Treaty, thus establishing a ‘method of administrative cooperation’ related to the use of a ‘movement certificate’⁶ that was completed few years after⁷. This system provided the admission in the importing Member State of goods coming from another Member State upon presentation of a supporting document released by the customs services of the exporting Member State⁸. Member States had to give each other mutual assistance in relation to controls on the authenticity of certificates and the correspondence of the respective contents with what indicated in exportation documents⁹.

Following the adoption of the Treaty of Maastricht, a further intensification of administrative cooperation between Member States occurred. Within the so-called first pillar of the European Community¹⁰, in order to ensure the good functioning of the Internal Market¹¹, a network of competition authorities was established in order to enforce EU competition rules¹² and protect consumers¹³. Such cooperation could be developed first of all through information exchanges, either upon request by national authorities¹⁴ or automatically¹⁵, with the possibility that requesting authority’s public officials assisted the requested one in information-seeking investigations¹⁶. After the entry into force of the Treaty of Lisbon, forms of transnational administrative cooperation were established also between national supervisory authorities in the field of insurances, prevalently resting on information exchanges as exceptions to the official secrecy obligation that such authorities’ public officials have to fulfil¹⁷.

2 The Internal Market Information system (IMI) as a tool to transnationally connect national public authorities

In order to guarantee controls related to the provision of services in the Internal Market and to support information exchanges between national administrations, the Commission established the *Internal Market Information System* (IMI)¹⁸, an electronic multi-language database to which national authorities adhere¹⁹.

The IMI was first launched in 2008, in order to help national administrations to fulfil obligations under the Services Directive and make the recognition of professional qualifications possible²⁰. Anyway, one of the main characteristics of the IMI is flexibility, as this tool has been adapted to other policy areas with no or little effort²¹.

Some EU legal instruments, further to the previously seen ones, impose on national public authorities obligations of transnational cooperation in the form of information exchanges, to facilitate which the IMI is specifically designed. In this regard, one peculiarity is the lack of interdependence between such legal instruments, as national authorities using the IMI to comply with cooperation obligations arising from one of such instruments do not have to take into account rules in force in other fields, unless required²².

The principles governing the use of the IMI include reusability in different policy areas, easiness to adapt to existing organisations, simple agreed proce-

dures, multilingualism, user friendliness, data protection and the absence of IT costs for users²³. All of these principles but in particular reusability are now allowing thinking of the extension of the IMI to other sectors, including also the use of IMI in cross-border public procurement, that to the end of this paper is here intended as public procurement procedures in which economic operators from other Member States submit their tenders²⁴.

Through the IMI, public administrations are able to find the right authority to contact in another country, to communicate with them using pre-translated sets of standard questions and answers and to follow the progress of the information request through a tracking mechanism. Each Member State shall nominate a national IMI coordinator (NIMIC) and can nominate further coordinators at regional level or for individual legislative areas²⁵. Such coordinators are *inter alia* responsible for monitoring requests sent by coordinated authorities²⁶.

Several cooperation procedures are in place within the IMI, involving two or more Member States' administrations and, where required, European Commission experts. Such procedures are one-to-one exchanges upon request, repositories populated by competent national authorities with different degrees of accessibility by either selected authorities or the whole IMI community, one-to-many exchanges in the form of notifications of new events, pieces of information or actions that have been taken²⁷. If we take into account the first procedure, for example, public administrations can submit information requests to other Member States' administrations to check the validity of qualifications for professionals wanting to practice in their country. The same applies to the provision of services, where public administrations can verify information about a foreign company or person wanting to provide a service in their country.

3 Theoretical reflections upon the existence of a public procurement sectorial administrative union

Before focusing on the technical issues concerning the use of information exchange between contracting authorities with the aim of reducing risks in public procurement, a theoretical question comes at stake with regard to the interpretation of cooperation between such authorities. The definition of 'sectorial administrative union' (*«unione amministrativa di settore»*²⁸) helps us circumscribing the problem. A 'sectorial administrative union' is a multi-level administrative system that is specifically aimed to the implementation of European sectorial rules and involves all the forms of cooperation provided by individual legislative acts in a specific sector. Indeed, some authors pointed out that the basis for the establishment of a sectorial administrative union is exactly the objective of implementing European sectorial rules, thus implying that the EU systematically guides the administrative activity. The same literature orientation excludes that the public procurement activity carried out by national administrations is a direct implementation of EU rules, on the contrary interpreting such activity as merely conditioned by the European Union law²⁹.

If we considered public procurement an activity which is functional to national public administrations' interests, but whose carrying out in compliance with the European principles and rules is also directly functional to the Internal Market integration as it is aimed to assure fair competition, we could define cooperation in this field as a sectorial administrative union. In effect, all the elements that the legal literature³⁰ ascribes to the definition of 'sectorial administrative union' – namely the decision-making autonomy of each cooperating administration, the interaction between such administrations' decisions, the superordination position held by the European Commission as well as the substantial and procedural prescriptions by the supranational level – can be found in cooperation between contracting authorities aimed to collect information to correctly choose the best economic operator in an award procedure.

Based on such considerations, a distinction may be drawn between cooperation involving public administrations that carry out procurement activities as an instrumental task (e.g. City Councils) and cooperation encompassing those entities that conduct public procurement procedures as their core functions (e.g. professional central purchasing bodies). Indeed, only these latter can be considered as directly implementing EU law on public procurement, and especially those rules promoting the aggregation of public contracts. In fact, the other ones' procurement activity is merely conditioned by EU public procurement rules, which do not impact on the core functions of those entities³¹.

Another distinction can be drawn. Two forms of cooperation between contracting authorities are in place at present. The first one is cooperation with the aim of awarding joint public contracts. This kind of cooperation is always spontaneous, as at present there are no provisions at the EU level obliging contracting authorities to aggregate public contracts, although such aggregation is strongly encouraged. The second one is cooperation to avoid making mistakes in awarding a certain public procurement contract to a certain economic operator, when such mistakes may be caused by a non-adequate knowledge of standards and legislation in place in the Member State the economic operator comes from or of documents concerning the economic operator itself or its tender. Relevant provisions concerning information exchanges seem to establish an obligation on contracting authorities to provide assistance when requested, although apparently they do not have any duty of requesting information. Now, while in the first case (joint procurement) there could be uncertainty upon the existence of a sectorial administrative union, information exchanges surely fall within administrative cooperation as provided in EU primary law, which is intended as a tool for Member States to effectively implement EU rules³², as there is an obligation imposed by the EU on contracting authorities, although it is set only with regards to the entity receiving the request.

4 The application of the IMI to the Public Procurement Sector

Exchanges of information between contracting authorities established in different Member States, no matter to what extent they are entitled to conduct procurement procedures, are one of the innovations introduced by the 2014 Directives on public procurement and are supported by the *Internal Market Information System (IMI)*. In fact, with the aim of protecting the right of establishment and freedom to provide services³³, the IMI has been extended to public procurement through a pilot project that promotes information exchanges in order to check financial and technical capacity of bidders and their respect of environmental and quality standards³⁴.

Therefore, contracting authorities receiving offers submitted by economic operators established in other Member States can request such States to provide information with the aim to verify bidders' suitability, e.g. by asking to confirm the authenticity of the document attached by the economic operator to prove absence of conviction by final judgment³⁵. Verification could involve also the offer itself, for example by asking to confirm the authenticity of the national rules attached by the economic operator³⁶.

More generally, the application of IMI in the public procurement field implies exchanges in relation to several pieces of information, to be made while ensuring their confidentiality. At the subjective level, information exchanges deal with exclusion grounds, databases containing relevant information on economic operators, official lists of approved economic operators and the other means of proof regarding suitability of the economic operator. At the objective level, i.e. regarding the offer, information exchanges focus on technical specifications, labels, test reports, quality assurance and environmental management standards, as well as evidence and documents to explain the price or costs proposed in the tender where tenders appear to be abnormally low³⁷.

In particular, the exchange of information regarding databases containing relevant information on economic operators, has been provided in order to make verifications on information provided by economic operators through the European Single Procurement Document (ESPD). In this way, the IMI complements the e-Certis tool, a European Commission information system that helps users to identify the different certificates and attestations frequently requested in procurement procedures, and includes templates of national certificates that are used for cross-border public procurement³⁸. Member States shall make available and up-to-date a complete list of databases containing relevant information on economic operators, which can be consulted by contracting authorities from other Member States. In fact, further information concerning such databases must be exchanged through the IMI³⁹. The availability of databases, in turn, can make award procedures quicker while reducing burdens on enterprises, as when such databases exist and can be easily consulted by other Member States' administrations, economic operators shall not be required to submit supporting documents or other documentary evidence⁴⁰. This is due to the fact that the 2014

public procurement Directive, in order to simplify the award procedure, provides that contracting authorities shall accept the European Single Procurement Document (ESPD), which is a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled⁴¹.

The provisions of the public procurement Directive concerning information exchanges between Member States originate from the need to ensure an effective administrative cooperation to the aim of carrying out award procedures in cross-border situations⁴². The pilot project that was launched to apply the IMI to public procurement allows contracting authorities to manage exchanges based on simple and unified procedures that try to overcome linguistic barriers⁴³. Such project lies upon the provision of a short factsheet that introduces this tool⁴⁴, as well as an apposite form that makes clear what kind of questions may be posed by contracting authorities⁴⁵.

At this stage, the application to IMI to public procurement is being experimented in order to test the suitability of such system for exchanges between contracting authorities in the exercise of their procurement functions. The extension of the IMI to many policy areas through pilot projects has the advantage to reduce costs that would stem from the design and implementation of a completely new IT tool⁴⁶. On the other hand, the usage of IMI in public procurement cannot be regarded as compulsory yet. What is compulsory, as previously said, is just the exchange itself independently on the technical tool used.

As to the Italian legal system, the draft Code of Public Contracts, which should implement the 2014 EU Directives on public procurement and concessions by 18 April 2016, provides a specific body called '*Cabina di Regia*' (a steering committee), to be established at the *Presidenza del Consiglio dei Ministri* (Italian Prime Minister's Office). This office, whose composition and functioning have to be regulated by the adoption of a further decree⁴⁷, should be a reference point in order to ensure cooperation and mutual assistance between Member States, in particular through the exchange of information⁴⁸.

5 Implications of the Cross-Border Information Exchange between Contracting Authorities for Integrity in Public Contracts

The first consequence that the IMI entails is the removal of doubts surrounding the authenticity of a document or certificate provided by a tenderer. Of course, this has major repercussions on integrity in public procurement, since it leaves less space to illicit agreements between the contracting authority and the economic operator intentioned to provide a false document in order to achieve some sort of gains. In order to make effective the removal of risks concerning the conclusion of a fraudulent agreement between the administration and the enterprise, the public official in charge of the exchange of information in each public

administration should be distinguished from the public official responsible for carrying out the public procurement procedure, this way pursuing the separation of duties recommended by the OECD in order to enforce integrity in public contracts⁴⁹. In fact, it is unlikely that the exchange of information could be effective if it is left to the person responsible for the administrative procedure for acquisition of supplies, services and works, since such exchange of information should be a means in order to control not only the integrity of the economic operator, but also the integrity of public officials interacting with them and in charge of conducting administrative procedures.

The IMI has also the objective to check that a company has the required technical specifications (fulfilling national standards, labels, conformity assessments, etc.) or is suitable for carrying out the relevant contract. A lack of the characteristics required to properly execute the public procurement contract, if discovered after the award, could lead to fraudulent agreements between the contracting authority and the winning economic operator. For instance, this agreement may have as its object a lower-than-due performance of the contract, with gains for both the underperforming economic operator and the acquiescent public official. In this case, earlier-stage ignorance about the suitability of the economic operator to perform the contract may change easily to deliberate fraud after the award.

The most obvious connection between the IMI system and integrity in public procurement is inherent to the function performed by it concerning the verification that a company does not fall under any grounds for exclusion such as having been convicted for fraud. The major advantage of the IMI system in this context is that it eliminates barriers to the acquisition of information owned by other Member States. It may prove difficult, indeed, to gather such kind of information, while the IMI system provides a standard form that public administrations could send every time a foreign economic operator submits a bid in a public procurement procedure.

The IMI can also help to contrast the possible side effects of the introduction of the European Single Procurement Document. Indeed, the IMI is also designed to confirm the information from a previously submitted European standardised self-declaration of a tender. While allowing the rapid conduction of the procurement procedure that is achieved through self-declarations, the IMI provides a sort of efficient safety net, as it prevent contracting authorities to accept tenders submitted by economic operators that have provided false information, but it does so in a speedy manner as the standardized form already provides a relevant item.

Finally, under a slightly different perspective, information exchanges through the IMI between different Member States' administrations can be considered an auxiliary tool to strengthen joint cross-border procurement. Indeed, from an operational point of view, knowledge of other countries' legal systems can encourage public administrations to stipulate transnational agreements to jointly award public contracts according to one of the models provided by the 2014 public procurement Directives⁵⁰. Joint procurement in turn helps with the alloca-

tion of risks related to the award procedure among the contracting authorities involved. Such redistribution is particularly useful when we deal with the acquisition of innovative goods, services or works, which imply a higher level of risk⁵¹.

Endnotes

¹ Regarding the right to good administration, see ZITO A. (2002), *Il 'diritto ad una buona amministrazione' nella Carta dei diritti fondamentali dell'Unione europea e nell'ordinamento interno*, in Riv. it. dir. pubbl. comunit., fasc. 2-3, 425. Concerning the three profiles of the 'administrative question', see CHITI E. (2010), *Il Trattato di Lisbona*, in Giorn. Dir. Amm., 3, 221 et seq.

² TFEU, Art. 298, Para. 1: «In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration».

³ Established under Art. 41 of the Charter of Fundamental Rights of the European Union: «1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language».

⁴ See GAROFOLI R., FERRARI G. (2013), *Manuale di Diritto Amministrativo*, Neldiritto, Roma.

⁵ Treaty establishing the European Economic Community, signed in Rome on 25 March 1957, Art. 10, Para. 2: «The Commission shall, before the end of the first year after the date of the entry into force of this Treaty, lay down the methods of administrative co-operation to be adopted for the application of Article 9, paragraph 2, taking due account of the need for reducing as far as possible the formalities imposed on trade».

⁶ *Decisione della Commissione del 4 dicembre 1958 relativa all'uso di un certificato per la circolazione delle merci fra gli Stati membri* (not available in English).

⁷ *Decisione della Commissione del 5 dicembre 1960 relativa ai metodi di cooperazione amministrativa per l'applicazione dell'articolo 9, paragrafo 2 del Trattato che istituisce la Comunità Economica Europea* (not available in English).

⁸ *Decisione della Commissione del 5 dicembre 1960, Art. 1: «Le merci che rispondono alle condizioni richieste per l'applicazione delle disposizioni del Trattato relative all'abolizione progressiva, tra gli Stati membri, dei dazi doganali e delle restrizioni quantitative, nonché di tutte le misure di effetto equivalente, sono ammesse, nello Stato membro d'importazione, al beneficio di tali disposizioni, su presentazione di un titolo giustificativo rilasciato, a richiesta dell'esportatore, dalle autorità doganali dello Stato membro d'esportazione».*

⁹ *Decisione della Commissione del 5 dicembre 1960, Art. 10: «Gli Stati membri, allo scopo di assicurare una corretta applicazione delle disposizioni della presente decisione, si prestano mutua assistenza per quanto concerne il controllo dell'autenticità dei certificati e della conformità delle indicazioni che vi risultano con quelle dei corrispondenti documenti d'esportazione».*

¹⁰ For an up-to-date explanation of the pillar-based structure of the European Community stemming from the Treaty of Maastricht, see *ex multis* FRAGOLA M. (2010), *Il trattato di Lisbona: che modifica il trattato*

sull'Unione europea e il trattato della Comunità europea; versione ragionata e sistematica per una consultazione coordinata degli articoli alla luce dei Protocolli e delle Dichiarazioni, Giuffrè, Milano, 13.

¹¹ Relevant TEC provisions in the field of competition were Articles 81-83.

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Wh. 15: « The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States».

¹³ See Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Wh. 1: «The Council Resolution of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market (3) acknowledged that a continuing effort is required to improve cooperation between administrations and invited the Member States and the Commission to examine as a matter of priority the possibility of reinforcing administrative cooperation in the enforcement of legislation».

¹⁴ Regulation (EC) No 2006/2004, Art. 6, Para. 1-2: «1. A requested authority shall, on request from an applicant authority, in accordance with Article 4, supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur. 2. The requested authority shall undertake, if necessary with the assistance of other public authorities, the appropriate investigations or any other necessary or appropriate measures in accordance with Article 4, in order to gather the required information».

¹⁵ Regulation (EC) No 2006/2004, Art. 7, Para. 1-2: «1. When a competent authority becomes aware of an intra-Community infringement, or reasonably suspects that such an infringement may occur, it shall notify the competent authorities of other Member States and the Commission, supplying all necessary information, without delay. 2. When a competent authority takes further enforcement measures or receives requests for mutual assistance in relation to the intra-Community infringement, it shall notify the competent authorities of other Member States and the Commission».

¹⁶ Regulation (EC) No 2006/2004, Art. 6, Para. 3: «On request from the applicant authority, the requested authority may permit a competent official of the applicant authority to accompany the officials of the requested authority in the course of their investigations».

¹⁷ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Art. 65: «Article 64 shall not preclude the exchange of information between supervisory authorities of different Member States. Such information shall be subject to the obligation of professional secrecy laid down in Article 64».

¹⁸ Commission Decision of 12 December 2007 concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data, Wh. 4: «IMI is intended to support legislative acts in the field of the Internal Market that require the exchange of information between Member States administrations, including Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (3) and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications».

¹⁹ Decision COM/2006/3606 of 14 August 2006 on the third revision of the IDABC Work Programme 2005 - 2009.

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- ²⁰ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI'), Brussels, 21 February 2011, COM(2011) 75 final, 3.
- ²¹ European Commission, *Factsheet: What is IMI?*, available on the IMI website at http://ec.europa.eu/internal_market/imi-net/_docs/library/fact_sheet.pdf
- ²² European Commission, *Factsheet: What is IMI?*, available on the IMI website at http://ec.europa.eu/internal_market/imi-net/_docs/library/fact_sheet.pdf
- ²³ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI'), Brussels, 21 February 2011, COM(2011) 75 final, 3.
- ²⁴ European Commission, DG Internal Market and Services, Cross-Border Procurement Above EU Thresholds, March 2011, available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf
- ²⁵ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI'), Brussels, 21 February 2011, COM(2011) 75 final, 4.
- ²⁶ Technical instructions to understand how this such monitoring must be carried out can be found in European Commission, *How to monitor the requests of your coordinated authorities?*, available at http://ec.europa.eu/internal_market/imi-net/_docs/training/how-to-monitor-requests.pdf
- ²⁷ European Commission, *Factsheet: What is IMI?*, available on the IMI website at http://ec.europa.eu/internal_market/imi-net/_docs/library/fact_sheet.pdf
- ²⁸ DE LUCIA L. (2011), *Cooperazione e conflitto nell'Unione amministrativa europea*, in Riv. it. Dir. pubbl. com., fasc. 1, 13 et seq.
- ²⁹ See TORRICELLI S. (2015), *L'europeizzazione del diritto amministrativo italiano*, in DE LUCIA L., MARCHETTI B. (a cura di), *L'amministrazione europea e le sue regole*, Il Mulino, Bologna, 247-272.
- ³⁰ DE LUCIA L. (2011), *Cooperazione e conflitto*, cit., 13 et seq.
- ³¹ TORRICELLI S. (2015), *L'europeizzazione del diritto amministrativo italiano*, in DE LUCIA L., MARCHETTI B. (a cura di), *L'amministrazione europea e le sue regole*, Il Mulino, Bologna, 247-272.
- ³² TFEU, Art. 197: «1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States. 3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union».
- ³³ TFEU, Art. 56, Para. 1: «Within the framework of the provisions set out below, restrictions on freedom

to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended».

³⁴ See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 86 (Administrative cooperation), Para. 3: «To test the suitability of using the Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 for the purpose of exchanging information covered by this Directive, a pilot project shall be launched by 18 April 2015».

³⁵ European Commission, *Public Procurement Information Request*, Point I, available in 23 EU official languages at http://ec.europa.eu/internal_market/imi-net/_docs/data_protection/pp_en.pdf

³⁶ European Commission, *Public Procurement Information Request*, Point II A, available in 23 EU official languages at http://ec.europa.eu/internal_market/imi-net/_docs/data_protection/pp_en.pdf

³⁷ Directive 2014/24/EU, Art. 86 (Administrative cooperation), Para. 1-2: «1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 42, 43, 44, 57, 59, 60, 62, 64 and 69. They shall ensure the confidentiality of the information which they exchange. 2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection rules provided for in Directive 95/46/EC of the European Parliament and of the Council and Directive 2002/58/EC of the European Parliament and of the Council». See also the corresponding provision under Art. 102 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

³⁸ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI'), Brussels, 21 February 2011, COM(2011) 75 final, 9.

³⁹ Directive 2014/24/EU, Art. 59, § 6: «Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article».

⁴⁰ Directive 2014/24/EU, Art. 59, § 5, first sub-para.: «Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system».

⁴¹ Directive 2014/24/EU, Art. 59, § 1, first sub-para.: «At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions: (a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded; (b) it meets the relevant selection criteria that have been set out pursuant to Article 58; (c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65».

⁴² Directive 2014/24/EU, Wh. 128, sentences 1-3: «Effective administrative cooperation is necessary for

the exchange of information needed for conducting award procedures in cross-border situations, in particular with regard to the verification of the grounds for exclusion and the selection criteria, the application of quality and environmental standards and of lists of approved economic operators. The exchange of information is subject to national laws on confidentiality. Hence, this Directive does not entail any obligation for Member States to exchange information that goes beyond what national contracting authorities can access».

⁴³ Directive 2014/24/EU, Wh. 128, sentences 4-5: «The Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council (20) could provide a useful electronic means to facilitate and enhance administrative cooperation managing the exchange of information on the basis of simple and unified procedures overcoming language barriers. A pilot project should consequently be launched as soon as possible to test the suitability of an expansion of IMI to cover the exchange of information under this Directive», as well as the corresponding statement under Wh. 134, sentences 2-3 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on pro-curement by entities operating in the water, energy, transport and postal services sectors and re-pealing Directive 2004/17/EC.

⁴⁴ See European Commission, *IMI can help you handle European tenders*, available at http://ec.europa.eu/internal_market/imi-net/docs/extention/public-procurement-flyer_en.pdf

⁴⁵ See European Commission, *IMI can help you handle European tenders*, available at http://ec.europa.eu/internal_market/imi-net/docs/extention/public-procurement-flyer_en.pdf

⁴⁶ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, *Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI')*, Brussels, 21 February 2011, COM(2011) 75 final, 5.

⁴⁷ Italian Draft Code of Public Contracts approved by the Italian Council of Ministers on 3 March 2016, Art. 212, c. 5: «*La composizione e le modalità di funzionamento della Cabina di regia sono stabiliti con decreto del Presidente del Consiglio dei ministri, da adottare, di concerto con il Ministro delle infrastrutture e trasporti, sentita l'ANAC e la Conferenza unificata, entro tre mesi dall'entrata in vigore del presente codice*».

⁴⁸ Italian Draft Code of Public Contracts approved by the Italian Council of Ministers on 3 March 2016, Art. 212, c. 4: «*La Cabina di regia è la struttura nazionale di riferimento per la cooperazione con la Commissione europea per quanto riguarda l'applicazione della normativa in materia di appalti pubblici e di concessioni, e per l'adempimento degli obblighi di assistenza e cooperazione reciproca tra gli Stati membri, onde assicurare lo scambio di informazioni sull'applicazione delle norme contenute nel presente decreto e sulla gestione delle relative procedure*».

⁴⁹ OECD (2008), *Enhancing Integrity in Public Procurement: a Checklist*, 19-20, available at <http://www.oecd.org/gov/41760991.pdf>

⁵⁰ The main joint cross-border procurement models can be summarised as recourse to central purchasing bodies, occasional joint procurement by contracting authorities that remain structurally separated and procurement carried out by a joint entity under EU law representing a form of structured cooperation. See Directive 2014/24/EU, Art. 39: «1. Without prejudice to Article 12, contracting authorities from different Member States may act jointly in the award of public contracts by using one of the means provided for in this Article. Contracting authorities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State. 2. A Member State shall not prohibit

its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State. In respect of centralised purchasing activities offered by a central purchasing body located in another Member State than the contracting authority, Member States may, however, choose to specify that their contracting authorities may only use the centralised purchasing activities as defined in either point (a) or in point (b) of point (14) of Article 2(1). 3. The provision of centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located. The national provisions of the Member State where the central purchasing body is located shall also apply to the following: (a) the award of a contract under a dynamic purchasing system; (b) the conduct of a reopening of competition under a framework agreement; (c) the determination pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task. 4. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also, to the extent set out in the second subparagraph of Article 33(2), award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines: (a) the responsibilities of the parties and the relevant applicable national provisions; (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts. A participating contracting authority fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States. The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts. 5. Where several contracting authorities from different Member States have set up a joint entity, including European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council (30) or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States: (a) the national provisions of the Member State where the joint entity has its registered office; (b) the national provisions of the Member State where the joint entity is carrying out its activities. The agreement referred to in the first subparagraph may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards».

⁵¹ Directive 2014/24/EU, Wh. 73: «Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint public procurement, contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts. In order to allow contracting authorities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects in-

volving a greater amount of risk than reasonably bearable by a single contracting authority, those difficulties should be remedied».

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Risk-management as a compliance tool for addressing corruption in public contracts

Author

- *Franco Peirone, Ph.D., franco.peirone@unito.it - University of Torino*

The presented paper aims to analyze and evaluate the impact of the new Italian legal framework against corruption within the public sector. The innovative tools therein introduced are based on a compliance organizational model directed to prevent corruption through risk-assessment and risk-management process. Considering the public contracting as a strategic area for economic development and how hugely is affected by corruption, these tools should be further exploited for developing long-period anti-corruption strategies in contracting authorities. The paper firstly addresses the emerging of compliance culture and mechanisms as derived from the United States legal framework - as corporations' commitment to prevent, detect and respond to internal misconducts, according to the Sentencing Guidelines of 1991 - and internationally widespread through international conventions against corruption. Subsequently the Italian implementation of the compliance tools is examined, in a first stage by a corporate and criminal law perspective, as an exemption to corporate criminal liability as settled through legislative decree n. 231 of 2001. After a decade new emphasis has been set on compliance tools within the new Italian anti-corruption regulation - law n. 190 of 2012 - which has provided the implementation of the compliance model in the public sector for ensuring integrity, efficiency and transparency in managing public resources through anti-corruption plans. These plans are in turn part of a complex anti-corruption strategy ruled by a national plan against corruption that coordinates all the anti-corruption actions in the Italian public sector. In this framework the risk-assessment and the risk-management process have been combined with the traditional administrative law bonding tools, such as code of conducts and disciplinary measures, in an organizational compliance model for fighting corruption. The review of the anti-corruption plans carried on by the Anti-corruption National Authority has showed that the risk-assessment and risk-management process have not been sufficiently developed, thus undermining the overall effectiveness of the anti-corruption strategy. Nonetheless, the adoption of these anti-corruption plans represent a chance for enforcing integrity and efficiency in contracting authority by adopting tools that could identify risks and prevent misconducts in public contracting. While the risks in this area are well-known the risk-management tools are still poorly developed. In this perspective the anti-

corruption plans shall comprehend smart and innovative risk-management tools for preventing and responding to public contract corruption, such as further transparency measures, tailored integrity tools during the award phase and additional controls on execution phase. To this ends a re-shaping of the contracting authorities institutional capacities and a specific training for public contract officials are needed. Particularly the most advanced anti-corruption strategies shall be found in central purchasing bodies that have the needed financial and human resources to carry on public contracts in compliance with transparency, integrity and efficiency. The methodology for this paper is essentially case-based, relying on the analysis of the anti-corruption plans adopted by public administrations and on the National Anti-corruption Authority evaluation. The legislative and regulatory sources are also addressed such as the anti-corruption and compliance systems literature, at the international, supra-national and national levels.

Keywords: Compliance Programs; Integrity; Risk-management; Public Contracts; Corruption.
JEL Classification: K140; K230; K400.

1 Legal perspectives on risk-management as a corporate compliance tool against corruption.

1.1 The introduction of risk-management within the U.S. corporate compliance program model.

The use of risk-management tools - broadly intended as comprehensive of risk-assessment tools - for legal purposes dates formally back from the adoption of the U.S. Sentencing Guidelines in 1991¹. These guidelines for judges, settled for criminal law ends - in terms of equity, proportionality and uniformity of criminal fines to corporations - has had long-time effects also in re-building corporations business, giving, by a legal perspective, real bite to risk-management process.

According to the U.S. criminal law, corporations could be hold accountable for crimes committed by their employees. The traditional form of corporate criminal liability² provides that criminal conducts committed by employees within the scope of the employment³ and, though the case law is not constant, for the benefit of the corporation⁴ may be ascribed to the corporation they belong to. However, under the system established by the Guidelines⁵, a corporation may receive a reduced sentence or even be absolved for corporate criminal liability if it demonstrates to have exercised due diligence to prevent criminal conducts, particularly by having adopted and enforced an effective compliance program apt to prevent, discover and punish misbehaviors⁶. The Guidelines have outlined an abstract model a compliance program for fostering its adoption⁷. This model has a flexible structure and it is composed by general principles and specific requirements to be observed. As general principle, a compliance program must be reasonably structured, implemented and enforced for being considered effective

in preventing, discovering and punishing criminal conducts. As a consequence, the commission of a crime within the corporation shall be exceptional and unforeseeable⁸.

To reach this end, due diligence must be exercised in planning and enforcing the compliance program. The centrality of the due-diligence has been made clear in the Caremark⁹ case: it is mandatory for the corporate's managers, even if no sign of criminal conducts has been sought in the business, to adopt an effective compliance program, as a direct derivation of their duty of due diligence toward the corporate they work for. After Caremark, the compliance program is not anymore just as a discretionary tool of corporate law: it is rather a fulfillment of the federal law provision in defining the criminal corporate liability.

Looking at the specific requirements to be observed, the Guidelines mention seven minimum requirements that a compliance program should have in order to prove the due diligence in adopting it and its – potential – effectiveness: (i) the corporation must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing criminal conducts; (ii) specific individual(s) within high-level personnel of the corporate must have been assigned overall responsibility to oversee compliance with such standards and procedures; (iii) the corporation must have used due care not delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the due diligence, had a propensity to engage in illegal activities; (iv) the corporation must have taken steps to communicate effectively its standards and procedures to all employees and other agents; (v) the corporation must have taken reasonable steps to achieve compliance with its standards, by utilizing monitoring and auditing systems designed to detect criminal conduct by its employees and publicizing a reporting system whereby employees could report criminal without fear of retaliation; (vi) the standards must have been consistently enforced through appropriate disciplinary mechanisms; (vii) after an offense has been detected, the corporation must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses¹⁰.

During the Guidelines review of 2004, the requirement of the periodical asset of the risk of criminal conducts has been added to these seven¹¹. This new requirement means the need of a survey, based on inquiries, on the chance that criminal conducts shall take place in the overall corporate business (risk-assessment). This survey should take into account, beyond the seriousness of the potential offences and their effects on the corporate business, the whole corporation transgression history, not limited to judicial proceedings. The corporate business areas for risk-assessment are usually identified by internal surveys, but also by joint corporate initiatives¹², federal statutes¹³ and judicial mandates¹⁴. The risk-assessment overall aim is to evaluate the suitability that a certain type of employees commit a certain type of criminal conduct - through a congruity test - and the chance that it happens - through a probability test. This activity must be periodic and repeated and shall be conducted with a dynamic approach that is geared toward past as well as future business. Interestingly, it has been stated

the risk-analysis should be extended also to the branches acquired, since the corporation could be held liable also for criminal conducts committed in the business acquired even before its incorporation. The due diligence requires indeed that the achievement of an effective compliance a program shall overcome business acquisitions goals.

Following this survey, a corporation should take all the necessary measures and procedures to reduce the identified risks and prevent criminal conducts that may arise from these risk-areas (risk-management). The purpose of the risk-management process is to determine what types of counter-measures to misbehaviors the compliance program should address, once the risk-assessment analysis has detected the most serious risks, by evaluating the efficacy of the ongoing compliance tools and the relative emphasis to be placed upon them. For example, if the risk-assessment reveals that the possibility of misbehaviors seems to exist primarily due to employee uncertainty over the operative legal requirements, extra focus should be placed on training programs and communication of the compliance tools. The risk-management measures adopted within the compliance program shall work as compliance tools, ensuring the compliance with the law and ethics within the corporation organization and activity (tools as code of conduct and training programs) and helping in detecting, signaling and sanctioning the relative infringements (tools as monitoring and auditing mechanisms, the whistle-blowing channels and the disciplinary system).

The use of the risk-assessment and risk-management process within compliance programs has gone beyond their relevance to assess the corporate criminal liability. The U.S. Government law has started to use the compliance model as a benchmark for evaluating economic operator's reliability in governmental contracts (Yukins, 2008). Indeed, the implementation of a compliance program - comprehensive of risk-assessment and risk-management process - is now required *ex lege* by the U.S. Federal Acquisition Regulations as a mandatory element for a governmental contractor¹⁵. Particularly, the evaluation of the effectiveness of the compliance program is part of the contracting authority determination of a contractor's reliability, called responsibility. Within the U.S. public contract system, the assessment of the contractor's responsibility is done at the end of the awarding process: if the contractor does not shown a satisfied records of integrity and ongoing corporate compliance tools it will be excluded from the contract procedure. The contracting authority evaluation regards the overall contractor's responsibility, including the effectiveness of the compliance program, in line with the "subjective" perspective in awarding public contracts of the U.S. legal framework.

Moreover, the lack of a compliance program exposes corporations to the risk of being suspended or debarred from public contracting¹⁶. Here the compliance programs come back again, since corporations lacking of adequate legal and ethical standards, ensured by a compliance program, seriously undermines the overall integrity of the public contract system and shall thus be kept away.

Both in criminal and public contract law, U.S. corporations have been indeed pushed to adopt standards and procedures to avoid inwards criminal conducts in

order not to be prosecuted according to the principle of the corporate criminal liability and not being excluded and debarred from the public contract market, complying with the model of good corporate as settled by the Guidelines and the Federal Acquisition Regulations.

1.2 The global trend towards corporate compliance program and the Italian implementation.

The corporate compliance model has been adopted in several countries outside the U.S. (such as U.K.; Germany; Spain; Sweden; Japan, Australia) and within different legal areas. The compliance programs have been mostly implemented to constitute an organizational defense for mitigating the punishment in criminal corporate liability or even in assessing whether to bring charges against the corporation or not where the criminal prosecution is discretionary, such as in UK. Beyond the simple reproduction of the U.S. legal framework tools, the worldwide spread of compliance programs is the outcome of two main different trends.

Firstly, they have been the results of the several international conventions and initiatives against corruption providing that economic operators shall adopt corporate compliance tools in order to join the fight against corruption and the overall promotion of integrity. The United Nation Convention against Corruption enlists, among the tools for fostering integrity within private sector, the use of compliance programs and internal controls by economic operators¹⁷. This concept has been lately expressed as tenth principle of the United Nations Global Compact initiative¹⁸ as corporate commitment to reform their organizations and business according to ethics and law through compliance tools. The OECD Working Group on Bribery in International Business Transactions¹⁹ has recommended to Member countries to adopt compliance tools for corporations for preventing and detecting bribery, establishing to this end specific corporate principles on how combating foreign bribery²⁰. Particularly, the risk-management process has been addressed as an anti-corruption corporate compliance tool by the OECD Good Practices on Internal controls, ethics, and compliance²¹. Similarly, the Task Force on Anti-Corruption and Transparency has stated that the set-up of robust compliance programs for private companies is one of the most urgent business-driven actions against corruption²². Last, the International Chamber of Commerce provides guidelines - called Rules on Combating Corruption - on how fighting corruption within corporations and therein it is suggested to adopt compliance tools such as risk-management proceedings for this purpose²³.

Secondly, the worldwide diffusion of corporate compliance programs is due to the extra-territorial enforcement of the U.S. Foreign Corrupt Practices Act: this statute allows the U.S. authorities to prosecute companies for having committed foreign bribery even if they are not U.S. companies nor have their headquarters in the U.S. territorial jurisdiction, being enough they have resorted to the U.S. securities exchange, by falling within the scope of the notion of "issuer"²⁴. The threat to be internationally prosecuted by the U.S. Foreign Corrupt Practices Act,

as is happening more and more frequently²⁵, had pushed even non- U.S. companies to adopt those compliance programs that, according to the U.S. statute, operate as a corporate defense tool. In this international landscape also the most notorious national guidelines on corporate criminal liability, such as the FCPA Guidance's Ten Hallmarks of Effective on Compliance Program (2012) and the UK Bribery Acts' Six Principles of an Adequate Procedures compliance program (2010) are frequently followed by companies worldwide for addressing risk-management within corporate compliance programs.

Ten years after the adoption of the U.S. Guidelines, the corporate compliance trend has arrived in Italy that has developed an its own compliance program model for legal persons, such as corporations, in order to regulate corporate criminal liability²⁶. The Italian legal framework broadly recalls the Guidelines approach to compliance programs and what they should entail.

The legal criterion adopted to attribute corporate criminal liability to legal persons works on two tracks: if the criminal offence benefiting the legal person was committed by one of its employees the corporate criminal liability is excluded if an effective compliance programs has been adopted and enforced²⁷; whereas, instead, a representative of the legal persons has committed a criminal offence benefiting the legal person, the corporate criminal liability charge will be almost automatic, unless further and stricter compliance measures have been met, particularly that the adopted compliance program is monitored by an external subject and that the offender has fraudulently violated the compliance control mechanisms²⁸. To work as a corporate defense tool, the compliance program must, among other things, be based on risk-assessment and risk-management process²⁹. Concerning the risk-assessment process, the legal person has to assess the nature and extent of its exposure to potential internal and external risks of corruption and other specific criminal offences (enlisted within the legislation) on its behalf by persons associated with. The risk-management phase will instead concern the adoption of the needed counter-measures to deal with the identified risks and to make the compliance program apt to effectively work as a corporate defense.

In practice, however, the Italian implementation of the model has substantially failed: the legal tools for supporting the model (codes of conducts; training programs; auditing reports) have been poorly realized; the list of criminal conducts to be avoided have been instead extended too large and, as a consequence, corporations cannot focus on typical white-collars crimes such as bribery and therefore the statute did not reach a serious deterrence effect. Many Italian corporations have moreover just copied a standard compliance and ethic program without adapting it to their specific needs. Last, within the Italian legal framework, the compliance model has been solely used as a defense to corporate criminal liability while there has not been any effort to stimulate and recognize it as a proof of governmental contractors' reliability.

2 Scope, methodology and implementing tools of risk-management within Italian public administrations.

2.1 The Italian public sector anti-corruption strategy in the compliance perspective.

After a decade the compliance program model has re-appeared in Italy through the new legal framework against corruption in the public sector.

Compliance programs have been settled within public administration as anti-corruption plans in order to fight corruption inwards them and foster the goals of efficiency, integrity and transparency in the public sector.

Public administrations anti-corruption plans are parts of a complex anti-corruption strategy ruled by a Anti-Corruption National plan that is supposed to coordinate all the anti-corruption initiatives in Italy³⁰.

This strategy has been mainly realized through developing in public administrations corporate compliance tools such as risk analysis, performance controls, internal auditing alongside with a reinforcement of the administrative devices such as code of conducts, disciplinary measures, principle of honor and discipline in a compliance program-like structure called anti-corruption plan. Compliance programs have then faced a double phenomenon of legal transplantation, being implemented from the private sector to public sector and from U.S. legal framework to the Italian one, with several critical consequences. Particularly it has been settled a different liability regime, since, within the public sector, if an act of corruption or another offence has been committed, the employee appointed as responsible for preventing corruption and nor the overall organization (the public administration) will be held liable, under several forms of liabilities, unless, as in the private sector, an effective compliance program has been adopted and enforced. Instead, the risk-assessment and the risk-management process are substantially the same; nonetheless the efforts in developing these compliance tools, also thanks to the guidelines adopted by the Anti-Corruption National Authority, have been more extended and have contributed to better define the scope, the methodology and the implementing tools of such process within the public sector.

According to the several statues composing the anti-corruption strategy adopted by the Anti-Corruption National Authority, the risk within the public administrations to be identified and later addressed through risk-assessment and risk-management process is the corruption-risk which should be intended as broader than the mere risk of a criminal conduct of bribery. The risk of corruption is rather meant according to the administrative law and it encloses any situation of violation of administrative laws and principles or the anti-corruption plan provisions.

The risk-assessment - the evaluation of risks of corruption within the public administration organization and activities - should be realized throughout an assessment of incidence and probability, corresponding to the relevance of corrup-

tion on the outcome of the administrative process and the likelihood that event of corruption could take place therein. The Anti-Corruption National plan has remarkably already identified the main areas into which realize the risk-assessment and the risk-management activities, dividing between “mandatory” risk-areas and “further” risk-areas, where the formers are identified by the Anti-Corruption National Plan itself as needed of risk-management process, while the latters are let to the public administrations discretion whether to include or not. The mandatory risk-management areas are identified with (i) the process regarding the selection and the career advancement of public officials; (ii) the process of public awarding of works, goods and services and any other public purchase; (iii, iv) the process regarding the adoption of administrative acts, whether with economic effects or not, which increase the rights of the beneficiaries.

Interestingly the anti-corruption legal framework address the same areas as subjected to duty of transparency that is itself considered as a risk-management measure: indeed, transparency is a typical counter-measure against the risk of corruption since it allows to easily identify the law infringements and let a large number of subjects able to point out and report them. The Anti-Corruption National plan defines the transparency a cross-risk-management tool that shall be implemented in each area subjected to risk-assessment, be it general or specific. Particularly transparency has been implemented as a risk-management tool through setting and reorganizing the duties of publications pending on public administration and establishing that, on request of the citizens, the information that should have been published according to the law and instead lack may be ordered to be published by the administrative judge. More specifically, the Anti-Corruption National plan addresses the citizens “right to know” as one of the main risk-management measure meaning that public administrations should carefully consider the citizens requests in risk-assessment process in order to assess which typologies of information are required at most to be made public responding to a need of transparency.

The risk-assessment and the risk-management areas and process appear already strictly connected in the legislative framework. In this perspective, the risk-management process consists in adopting and enforcing specific counter-measures against the current risks of corruption in the administrative proceedings as came to light during the risk-assessment phase.

2.2 The outcomes of the Italian public administration risk-management process for the 2012-2015 period.

The Anti-corruption National Authority has carried out a review of the public administrations anti-corruption plans adopted for the period 2012-2015³¹: these plans are adopted on a three-year basis and are subjected by a periodical review by the highest level of the anti-corruption system for evaluating their effectiveness. The Anti-Corruption National Authority has particularly found a lack of

adequate risk-assessment process and, as a consequence, poor developed risk-management tools³².

Within the Anti-Corruption National Authority evaluation a key-element for assessing the effectiveness of the risk-assessment process has consisted in the accuracy of the analysis of the external and internal context of the public administration, that has been considered substantially lacking everywhere. Also due to this cause, within the update of the Anti-Corruption National plan³³ the division between the risk-assessment areas have changed from “mandatory” risk-areas to “general” risk-areas and from “further” risk-areas to “specific” risk-areas. The terminological change seems directed to push public administrations to identify their own risk-assessment needed areas and then develop specific risk-management tools and not just relying anymore solely on those identified by the Anti-Corruption National plan. Both the areas of risk-assessment, general and specific, are therefore now intended as “mandatory” and the only distinction remains that the general areas are applicable to all public administration since they are presumed to always bear a relevant risk of corruption inwards, while the specific areas depend from the identification by the public administration according to its own size and activity, but mandatory as the general ones.

In this context public contract corruption represents perhaps the most relevant area. Corruption has particularly become a debating-issue in the Italian public contract area due to its dimension and spread in the public sector³⁴. By a legal point of view, public contract corruption poses multiple risks to be addressed, since it undermines the effectiveness of the services delivered to the citizens who obtained lower-than-expected and lower-than promised performances (performance risk) as well as the citizens’ trust in Government activity for having dealt with dishonest economic operators (reputational risk) and the spending of public resources as intended (fiduciary risk). With specific regard to the public contract area, the Anti-Corruption National Authority remarks have pointed out the need of adopting more and advanced specific risk-assessment and risk-management tools than the one provided within the legal framework and the Anti-Corruption National plan³⁵.

Concerning the risk-assessment it seems that the risk-area to be monitored should be the whole public contract cycle, instead of the stricter definition of the Anti-corruption National plan of public awarding of works, goods and services. This would entail a risk-assessment process concerning not only the awarding phase but also the previous ones of the definition of needs, the market-analysis, the pre-award phase, and the following execution phase and the performance-control. In addressing the whole public contract cycle area as needed of risk-assessment, the tracking of the specific risk events shall take in consideration the international³⁶ and national³⁷ guidelines which have identified the risks for integrity in public contract area (such as collusion among economic operators, discriminatory criteria in the awarding, overpayment in the execution phase) as well as the symptoms from which gathering the existence of these risks (such as cover or repetitive bidding, lack of participation, unnecessary variation in public contract execution). In this regard the best practices in anti-corruption plans

seems consisting in those public administrations that have specifically identified the typical and recurring element of the criminal behaviors in public contracts in the geographical area they rule, and further, the socio-economic circumstances which may favor them such as the touristic appeal of the region which may foster the uncontrolled building³⁸ or unforeseeable events such as the immigration crisis which calls for emergency public procurement for food-supplies³⁹.

With regard to the risk-management phase, the same distinction now takes place among general risk-management tools and specific risk-management tools. The formers are identified by the Anti-Corruption National plan itself and represent a minimum to be adapted to each public administration specific organization and activities, both as typology of counter-measures and their respective contents. The risk-management general measures are represented by: the administrative transparency; the code of conduct; the public officials rotation; the rules on conflicts of interest; the framework on office and out-of-office assignments; the appointment of managerial tasks after specific tasks; the provision of incompatibility for managerial positions; the rules governing the revolving-doors phenomenon; the prohibitions on forming selection board and assigning tasks to personnel with criminal conviction against the public administration; the whistleblower defense; the training of public officials; the introduction of the integrity pacts within public contracts; the civic engagement actions against corruption⁴⁰.

To these general measures the National Anti-Corruption Plan adds an illustrative lists of which could be the specific risk-management measures, such as further controls on administrative proceedings and the use of electronical tools for carrying them out⁴¹. Also the risk-management phase has been considered poorly realized within the anti-corruption plans for the period 2012-2015: according to the Anti-Corruption National Authority only in the 37,72% of cases the risk-management measures have been adopted in compliance with the risk-assessment outcomes and could be evaluated as effective and more advanced than the one provided in the legal framework⁴². Within certain public administration of little size, such as small municipalities, the adoption of risk-management tools has been a mere reproduction of the legal provisions⁴³ or even, the full copy-and-paste of the anti-corruption plan of another public administration⁴⁴, thus totally failing in adopting and enforcing specific risk-management measures.

The most frequent risk-management measures adopted within the anti-corruption plans have regarded the training of public officials, the enforcement of cod of conducts and the prevision of public officials rotation. The adoption of integrity pact within the public contract area is, instead, one of the most rare. It is therefore self-evident that, at the moment, the public administrations anti-corruption plans had a little impact in fostering integrity in public contract area since the general measures expressly regarding the public contracting are scarcely adopted⁴⁵. Even more rarely specific and further risk-management tools have been developed for public purchases. The Anti-Corruption National Authority feedbacks for a greater specificity in developing risk-assessment and risk-management tools shall be used for elaborating new strategies for public pur-

chasing. Particularly, these strategies shall take in account the reference market and the usual economic operator behaviors for preventing public contract corruption through designing and developing the public purchasing process which can maximize the integrity and the efficiency of genuinely competing bidder.

3 Addressing corruption in public contracts through innovative risk-management tools.

3.1 The implementation of transparency measures, codes of conduct, integrity pacts and controls on the public contracts execution phase within the anti-corruption plans.

Transparency is considered a risk-management tool since it allows a widespread control on public administration organization and activities. The publication of further data - comparing to those one that are mandated to be public according to the regulatory framework - represent a key element of an effective anti-corruption plan and can represent an useful tool for enforcing integrity, through a greater monitoring in public purchases⁴⁶. The publication of further data should regard each stage of the public purchasing process: the traceability of the whole administrative process ensures indeed the correctness of the awarding authority activity and the integrity of the whole public contract process, as affirmed at the international and European level⁴⁷. Particularly the increase of transparency serves to ensure a greater participation of economic operators and therefore a larger competition in the awarding phase and a larger monitoring in the execution phase (Racca - Cavallo Perin - Albano, 2011). To this end the anti-corruption plan adopted by the City of Milan is remarkable, since it has proceeded to publish the tender documents for services concession even if it was not required at the time by the legal framework⁴⁸. Even if transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption, the publication of the public contract information should be developed with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements.

Integrity pacts and codes of conduct have been widely recalled within the anti-corruption plans but few of them contain significant innovation comparing to the ones provided by the legal framework. The integrity pact substantially requires to economic operators involved in government contract to act with integrity, particularly by preventing and disclosing corruption. If they fail, the awarding authority is allowed to exclude bidders or terminate the government contract once awarded. The exclusion of the bidders on the integrity pacts grounds - made on contractual basis - have been considered complying with the law⁴⁹ and proportionate to the end of combating corruption even if they limit participation in tenders⁵⁰ while the overall application of the integrity pact model is still questioned when other Government measures are enforced for safeguarding public

contract integrity⁵¹. The anti-corruption plans of the City of Rome⁵² and of the Ministry of Economics and Finance⁵³ provide that the relative integrity pacts will be included in each public purchase made by themselves and all the joint, controlled and participated organizations, significantly extending their subjective application. As a further measure for increasing public contract integrity, the Anti-Corruption National Authority may provide assistance and surveillance to specific public purchases⁵⁴ or to the general purchasing activity⁵⁵ of a requiring awarding authority through a convention. Also the integrity provisions contained within the codes of conduct have acquired a large relevance within the anti-corruption plans, providing exclusion of the bidders if, within a public contract procedure, they infringe the code of conduct relevant clauses, as, for example, those regulating the conflicts of interest. Just like the integrity pact, the effectiveness of the code of conduct is still doubtful. Even if their application to public contract procedures is unquestioned, the case law has stated that they may sanction solely situations of current conflicts of interest and not organizational conflicts of interest, as the U.S. legal tradition they come from instead provides⁵⁶. Last, with regard to the risks of corruption within the execution phase, the anti-corruption legal framework highlights the need of monitoring the contractual modifications, which can hide a corruptive agreement between the bidder and contracting officer allowing late contract modification for ensuring an extra-payment to the former. To prevent these misbehaviors, the contract modification over a certain threshold must be communicated to the Anti-Corruption National Authority⁵⁷ and, as outlined within the anti-corruption plans of the municipality of Turin⁵⁸, adopting contract modification requires an additional justification and the whole procedure is subjected to further controls from different offices.

3.2 Further steps for fighting corruption public contracts through anti-corruption plans.

There are several further steps that could be adopted to fight corruption and foster integrity in the whole public contract cycle through the public administrations anti-corruption plans.

Firstly, at the very beginning of the whole public contract cycle, it should be done a risk-assessment process by collecting, through specialized data-bank, all the information on the range of products, works and services available in the reference market. The same should be done with regard to information on the potential suppliers that could help public purchasers in better addressing what to buy and how to buy⁵⁹. Through the tool of the preliminary market consultation⁶⁰, as a risk-management measure, public administrations should be capable to determinate whether the market wherein they will purchase has characteristics that make collusion or corruption more likely and any other trend that may affect competition. In front of these circumstances the anti-corruption plans may desirably coordinate the purchases with other public sector buyers who have recently purchased similar products, works or services: to this end an occasional

joint procurement could be developed⁶¹. This contractual tool allows the recourse to other public purchasers that will prepare and manage procurement procedures on behalf and for the account of the requiring public administration. The chance for delegating part of the public purchase will permit a competition among public administration in being the most suitable public purchaser in carrying out, for example, awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system, the reopening of competition under a framework agreement.

Secondly, to foster this competition among public administrations it is needed to develop public officials' competences through specific capacity-development training programs for forming a cadre of a professional acquisition workforce with proper legal, economical and technical skills. Interestingly, to this end training programs within the anti-corruption plans are considered as a mandatory activity and not subjected to the public sector budget constraints⁶².

Thirdly, transparency, as a risk-management measure, should be also enforced through the use of electronic tools that can greatly simplify the public purchases. Particularly the electronic bidding favors to immediately identify the symptoms of collusion and corruption as decreasing the chance to adopt discriminatory treatment in favor or against certain economic operators. To this end the new European legal framework on public contracts expressly provides the adoption of the European Single Procurement Document (ESPD)⁶³, which will be managed in electronic form, for ensuring bidders' compliance with the relevant selection criteria. The implementation of these electronic tools requires high professional competences as well as adequate technological resources that could be particularly found in central purchasing bodies, which are mandate to make use of these electronic tools⁶⁴. Moreover, e-procurement is particularly well suited to supporting centralized purchasing activities due to the possibility they offer to re-use and automatically process data and to minimize transaction costs (Racca, 2016).

Fourthly, the market consultations, the capacity development programs and the use of electronic tools could also help in designing the tender process for increasing the potential participation of genuinely competing bidders as a risk-management measure against corruption and collusion. Competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. Participation can be facilitated if public administration reduce the costs of bidding, through adopting e-procurement tools⁶⁵ and devising ways of incentivizing SMEs to participate, by dividing large contracts into lots⁶⁶, both on a quantitative basis, making the size of the contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specializations involved, to adapt the content of the contracts more closely to the specialized sectors of SMEs, according to the risk-assessment results.

Fifthly, risk-management measures could also be implement as a long-period public purchase strategy for realizing public contracts more in compliance with integrity and efficiency. The integrity and the efficiency of the public contract

process depend on transparency that, however, should not be confused with predictability. Indeed predictable, repetitive and numerous public contracts schedules and unchanging quantities bought can facilitate collusion while, on the other hand, higher value and less frequent purchases opportunities increase the bidders incentives to compete and the public administrations overall savings. To this end aggregating public contracts could again work as a risk-management measure so as to vary the size and timing of tenders. This implies that where a central purchasing body can use an overall register of public administrations - such as local authorities in a geographical area that are entitled to recur to the public contracts the central purchasing body concludes - its framework agreements are usable for individual or repetitive purchases for all of them⁶⁷. In view of the large volumes purchased, such techniques may help increase competition and avoid the risks of corruption as revealed within the geographical area and the reference market of the public administrations.

Endnotes

¹ United States Federal Sentencing Guidelines, 1st November 1991, 18 U.S.C. §§ 1365 (f) - 1801; 42 U.S.C. §§ 1129(a) - 14133; 49 U.S.C. § 31310.

² *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909); *Commonwealth v. Proprietors of New Bedford Bridge*, in 68 Mass., (1854); *People v. Corporation of Albany*, 539 NY. Sup. (1834).

³ *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319,323, 324 (D. Conn. 2007), aff'd, 555, F.3d 303 (2nd Cir. 2009); *United States v. Basic Construction Co.*, in 711 F.2d, (1983), p. 572.

⁴ *United States v. Gold*, in 743 F. 2d, (1984); *Hanson v. Bradley*, 298 Mass. 371, 10 N. E. ad 259, (1937).

⁵ U.S.S.G. § 8 Introductory Comment.

⁶ U.S.S.G. § 8 C2.5 (f).

⁷ U.S.S.G. § 8 B2.1.

⁸ U.S.S.G. § 8 A1.2 Comment (n3) (k).

⁹ *Caremark Intern. Inc. Derivate Litigation*, 698 A.2d 959 (Del. Ch. 1996).

¹⁰ U.S.S.G. § 8 A1.2 Comment (n3) §§ (k1) – (k7).

¹¹ U.S.S.G. §8 B2.1 (c).

¹² Compliance and ethics Program Guidance for Pharmaceutical Manufactures issued in April 2003 by the Department of Health and Human Service's Office of Inspector General.

¹³ 31 U.S.C. § 5318(h).

¹⁴ Letter from U.S. Department of Justice, 14th January 2011, to Eric A. Dubelier, Reed Smith LLP, in *United States v. Depuy, Inc.*, DCC (2011) Cr 099,34.

¹⁵ 73 Federal Register, §§ 67064-67093, especially § 67067, 12th November 2008. Particularly the rule has required that federal government contractors have to establish written codes of business ethics and conduct (within 30 days); and within a period of 90 days to exclude risky personnel from their organizations (undertake reasonable efforts not to include and individual whom due diligence would have exposed as having engaged in bad conducts) undertake business ethics awareness and compliance programs within their organizations, establish internal control system to facilitate timely discovery of cases of breach of codes of conduct and to ensure corrective actions in such cases, and conduct periodic reviews and adjustment.

¹⁶ F.A.R. 4.703. Another step in the compliance model has consisted in requiring federal contractors to self-report criminal behaviors, F.A.R. 52.203-13(b)(3). The failure to report these violations has also been added as a ground for suspension and debarment, F.A.R. 9.406-2(b)(1)(4), 9.407-2(a)(8)

¹⁷ United Nations, United Nations Convention against Corruption, Art. 12 (2) lett. b, f., 9th December 2003; UNODC, An anti-corruption Ethics and Compliance Program for Business: A Practical Guide (2013).

¹⁸ United Nations, Global Compact Tenth Principle, 24th June 2004

- ¹⁹ OECD Anti-Bribery Convention, Art. 12, 21th November 1997
- ²⁰ OECD Good Practice Guidance, 18th February 2010.
- ²¹ OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance, 2009.
- ²² B20 Mexico Task Force on Improving Transparency and Anti-Corruption: Immediate Actions and Decisions for Los Cabos, Principle B, 17th June 2012.
- ²³ ICC, Rules on Combating Corruption, 2011.
- ²⁴ U.S.C. 15, § 78dd-1, 3 (a).
- ²⁵ *SEC v. AB Volvo*, Civ. A. No. 08-CV-00473 (D.D.C. 2008); SEC Litigation Release No. 20504 (Mar. 20, 2008); *EC v. Akzo Nobel, N.V.*, Civ. A. No. 07-CV-02293 (D.D.C.); SEC Litigation Release No. 20410 (Dec. 20, 2007); *SEC v. Chandramowli Srinivasan*, Civ. A. No. 1:07-CV-01699 (D.D.C.).
- ²⁶ D.lgs. 8 June 2001, n. 231.
- ²⁷ Art. 7, d.lgs. 8 June 2001, n. 231.
- ²⁸ Art. 6, c. 1, lett. a, b, c, d, d.lgs. 8 June 2001, n. 231.
- ²⁹ Art. 6, d.lgs. 8 June 2001, n. 231.
- ³⁰ Law n. 190, 2 November 2012, art. 1, c. 4, lett. c.
- ³¹ ANAC, *Rapporto sullo stato di attuazione e la qualità dei piani di prevenzione della corruzione nelle amministrazioni pubbliche 2015-2017*, 16 December 2015.
- ³² See also, Transparency International Italia, *Curiamo la Corruzione*, April 2016, p. 11.
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The use of e-procurement and contractual terms and conditions for the risk assessment and risk management in the public procurement cycle

Author

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- *Matteo Pignatti, Ph.D., University of Torino, matteo.pignatti@unito.it*
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Public-public cooperation is a tool to promote efficiency and integrity in the pursuit of the value for money for the public entities and makes it possible to process and elaborates the information available, allowing to detect anomalies that may constitute a waste of public resources due to the abuse of public power in order to obtain private benefits (realizing a system indicator of risk – redflags) or collusion between economic operators (bid rigging). These analyzes allow to enhance civil servants accountability and provide a means to identify areas and activities most exposed to risks (risk assessment - eg. the improper use of extensions and renewals of public contracts - see. Italian Anticorruption Authority, report 4 November 2015), defining legal tools to ensure the correct behavior in public contracts. Transparency and quality of information make effective the external audit that can be supported by the use of IT tools. European and Italian Law define organizational models for aggregation of demand by public purchasers (Central Purchasing Bodies – CPB). The professional skills of these organisational models can ensure the efficiency and integrity in public contracts.

The article aims to analyze the ways in which highly professionalised contracting authorities may use the tools provided by the European and national law on public contracts in the design of procurement documents as a tool for the risk assessment and management (in the relevant markets). The article points out the role of "end-to-end" eProcurement as a risk assessment tool to ensure the integrity and the best value for money in public contracts. The contractual activity of the central purchasing bodies allows to describe the strategic use of contractual tools (as framework agreement and dynamic purchasing system) and of the contractual terms and conditions for the efficiency and integrity of the public procurement cycle as a means of risk management against misconduct of civil servant and economic operators involved in the contractual activity.

The research methodology includes an analysis of the contractual terms and conditions used by central purchasing bodies and the manner of use of IT tools to ensure the efficiency and integrity of the public procurement cycle on the basis of the European and national legal framework and the case law.

Keywords: Public Procurement, eProcurement, Best value for money, Transparency, Integrity, Corruption.

JEL Classification: F13, H57, K20, K23

1 Introduzione

I contratti pubblici rappresentano un valore pari a 1881,7 miliardi di Euro in Europa (nel 2014) di cui 172,6 riferiti all'Italia²³⁷ (con esclusione dei contratti pubblici conclusi nei c.d. settori speciali ed in quello della difesa). La necessità di rendere maggiormente efficiente la funzione acquisti ed evitare discriminazioni tra gli operatori economici ha spinto l'Unione Europea a intervenire nel contrasto alla corruzione intesa in senso ampio come qualsiasi forma di abuso da parte di un soggetto del potere a lui affidato al fine di ottenere vantaggi privati²³⁸.

L'esistenza di differenti livelli di *performance* nell'attività contrattuale degli Stati Membri²³⁹ evidenzia come una piena efficienza del Mercato Interno possa essere ancora perseguita mediante la riduzione degli sprechi derivanti dal mancato sviluppo di tecniche e strumenti contrattuali volti a favorire la concorrenza nei singoli mercati di riferimento (ad es. mediante gli appalti elettronici e aggregati)²⁴⁰.

Il contesto Italiano si caratterizza per un valore medio dei contratti molto basso²⁴¹ e per una ripartizione geografica della spesa effettuata prevalentemente a livello locale²⁴² (Pajno, 2015). Tali circostanze evidenziano la necessità di assicurare un controllo efficace sul settore dei contratti pubblici tale da assicurare l'adeguatezza nell'attività contrattuale quale elemento necessario per garantirne integrità che, intesa quale "*use of funds, resources, assets and authority, according to the intend official purposes and in line with public interest*"²⁴³, incide direttamente sull'efficienza dell'attività dell'amministrazione pubblica (Racca – Yukins, 2014).

La riduzione delle inefficienze derivanti dalla cattiva gestione della "funzione acquisti" (*passive waste*), e dai fenomeni di corruzione (*active waste*) coinvolge l'intero *public procurement cycle* dalla valutazione dei fabbisogni al termine dell'esecuzione del contratto.

La mancata definizione dei fabbisogni e della programmazione dell'attività contrattuale²⁴⁴ evidenzia l'assenza di una strategia contrattuale da parte delle amministrazioni aggiudicatrici e comporta il rischio di una incompleta o imprecisa predisposizione della documentazione di gara e favorisce forme di collusione tra gli operatori economici presenti all'interno del mercato rilevante (Di Cristina, 2012)²⁴⁵. Il ricorso a procedure negoziate e ad affidamenti diretti, la manca-

ta osservanza degli obblighi in materia di qualificazione delle imprese, l'utilizzo distorto delle varianti in corso d'opera al fine di far aumentare i costi possono essere la conseguenza di "*payments to exercise discretionary powers in favor of briber*" (Ackerman, 1999).

In entrambi i casi la mancanza di trasparenza e l'inadeguatezza delle strutture che si occupano della funzione acquisti rende complesso il monitoraggio sulla correttezza e l'efficienza dell'attività contrattuale e comporta lo spreco di risorse pubbliche.

Le Direttive UE del 2014 in materia di contratti pubblici evidenziano la necessità di contrastare gli sprechi derivanti da situazioni di conflitto di interesse e dalle pratiche illecite²⁴⁶ ed estendono l'utilizzo di strumenti di *eProcurement* e delle tecniche di aggregazione della domanda. Tali strategie oltre a favorire l'apertura del mercato interno rendono possibile una maggiore cooperazione amministrativa²⁴⁷ tra le amministrazioni aggiudicatrici degli Stati membri e l'efficienza dell'attività contrattuale tramite lo sviluppo di forme di cooperazione tra amministrazioni aggiudicatrici (anche di carattere transfrontaliero e transnazionale)²⁴⁸ e strumenti giuridici efficaci nella valutazione e gestione del rischio di corruzione.

2 Gli strumenti di eProcurement nella valutazione dei rischi e nella definizione delle strategie di gara.

Il principio di trasparenza deve essere garantito in tutte le differenti fasi del *public procurement cycle* (ciclo dell'appalto pubblico), dalla definizione dei fabbisogni sino al completamento dell'esecuzione del contratto, assicurando controlli diffusi da parte degli operatori economici che partecipano alla procedura e, più in generale, di tutti i cittadini e della società nel suo insieme (Arena, 2006; Racca, 2013; Gardini 2014) ed evitando che il suo utilizzo distorto favorisca la collusione tra gli operatori economici (Albano – Nicholas, 2016).

La trasparenza²⁴⁹ e la pubblicità costituiscono il presupposto dell'imparzialità e della non discriminazione tra operatori economici favorendo attraverso la messa a disposizione delle informazioni una più ampia partecipazione alle procedure di selezione del contraente e dunque lo sviluppo della partecipazione e della concorrenza che assurge a presupposto essenziale per la qualità delle prestazioni oggetto del contratto²⁵⁰.

La trasparenza rende possibile, inoltre, le verifiche della correttezza formale e sostanziale dei procedimenti di selezione del contraente, in relazione alla definizione di specifiche tecniche e requisiti di partecipazione non discriminatori, all'individuazione del contraente. Occorre prevedere anche il monitoraggio della corretta esecuzione del contratto e l'efficace contrasto ad eventuali inadempimenti.

In tale contesto la trasparenza non è solo il presupposto dell'apertura della concorrenza nel mercato interno, ma si pone altresì a fondamento di un monito-

raggio sul corretto impiego delle risorse pubbliche e della qualità delle prestazioni. I dati e le informazioni raccolte e rielaborate possono consentire di evidenziare anomalie dell'attività contrattuale delle amministrazioni aggiudicatrici rendendo possibile la valutazione dei rischi nei differenti mercati rilevanti e nell'attività contrattuale delle amministrazioni pubbliche. Risulterebbe possibile l'elaborazione di un vero e proprio *rating* della *performance* e della *reputation* degli operatori economici, capace di favorire l'individuazione dei requisiti più adeguati per la partecipazione alle gare in tal modo attenuando le attuali forme di garanzia di fideiussione bancaria o assicurativa come noto molto costose²⁵¹.

L'effettività di tale sistema presuppone un innovativo utilizzo degli strumenti elettronici interoperabili, aggiornati dalle amministrazioni pubbliche, che possono contribuire al rafforzamento dell'integrità delle amministrazioni e ridurre i rischi legati alla corruzione così bilanciando i costi che l'implementazione di una più ampia trasparenza comporta per amministrazioni aggiudicatrici e operatori economici²⁵².

Nell'ordinamento giuridico italiano, sin dal 1997, sono stati enunciati volti ad assicurare l'efficienza, l'efficacia e l'economicità nelle amministrazioni pubbliche evidenziando al contempo le esigenze di informatizzazione dei procedimenti e degli atti amministrativi²⁵³. Già più di vent'anni or sono, si prevedeva in legge che *"gli atti amministrativi adottati da tutte le pubbliche amministrazioni sono di norma predisposti tramite i sistemi informativi automatizzati"*²⁵⁴, tuttavia "ciò che è mancato del diritto astratto è la sua ferma e concreta applicazione, che può essere oggi notevolmente facilitata dalle innovazioni tecnologiche" (Racca, 2014a).

Trasparenza e nuove tecnologie costituiscono elementi essenziali della politica dell'UE per la modernizzazione delle amministrazioni pubbliche in cui il "cittadino" assume "una relazione funzionale al conseguimento del bene comune mediante un'azione amministrativa trasparente, efficiente ed economica" (Piras, 2015).

Nell'ordinamento giuridico italiano si è affermato il dovere delle pubbliche amministrazioni di "assicurare" la trasparenza²⁵⁵, intesa come accessibilità totale delle informazioni concernenti l'organizzazione e l'attività delle pubbliche amministrazioni²⁵⁶, mediante strumenti tecnologici che garantiscano accessibilità, completezza e semplicità di consultazione²⁵⁷. La trasparenza può essere attuata con la pubblicazione di *"tabelle riassuntive liberamente scaricabili in un formato digitale standard aperto che consenta di analizzare e rielaborare, anche a fini statistici, i dati informatici"* che assicura un significativo strumento di conoscenza per l'individuazione ed il contrasto dell'illegalità, ma che può altresì favorire il superamento di sprechi ed incapacità con possibile orientamento delle scelte pubbliche verso la semplificazione e l'innovazione del processo di acquisto (Racca, 2011; Id., 2010).

La comparazione dei dati rende possibile l'individuazione di anomalie nell'attività delle amministrazioni pubbliche.

Un portale unico relativo alle gare potrebbe consentire il monitoraggio sulla selezione del contraente e sull'esecuzione anche da parte di terzi (università, imprese, associazioni, cittadini, social witness e azioni di *civic engagement*), con un

controllo che pare potersi estendere anche al rispetto dei principi etici da parte dei funzionari pubblici e che specificano gli obblighi costituzionali di adempimento delle funzioni pubbliche attribuite con disciplina e onore e al servizio esclusivo della Nazione (Racca, 2009; Carloni, 2016). Le violazioni potrebbero comportare anche sanzioni reputazionali, con riprovazione sociale e che potrebbero costituire efficace deterrente e strumento di prevenzione della corruzione (Racca – Cavallo Perin, 2014).

La necessità di assicurare elevati standard di integrità deve essere riferita a tutti i soggetti (*stakeholder*) che intervengono nell'attività contrattuale anche mediante protocolli di legalità, *ethics and compliance programs*, una disciplina sul conflitto di interessi adeguata, forme di controllo interno ed esterno generalizzati corredati delle relative sanzioni al fine di garantire integrità ed efficienza nei contratti pubblici (Giani, 2014; Romeo, 2014).

Tali previsioni paiono favorite dalla recente disciplina di attuazione delle Direttive UE del 2014 in materia di contratti pubblici che dispongono "l'unificazione delle banche dati esistenti nel settore presso l'Autorità Nazionale Anticorruzione (ANAC)"²⁵⁸, con esclusione della banca dati centralizzata di cui alla Banca dati nazionale degli operatori economici gestita dal Ministero delle infrastrutture e dei trasporti²⁵⁹.

Il rafforzamento e potenziamento del ruolo dell'ANAC è volto a rendere più efficaci le funzioni di vigilanza dell'Autorità, a promuovere e sostenere le migliori pratiche e facilitare lo scambio di informazioni tra stazioni appaltanti (Racca, 2015a). Il graduale passaggio a procedure di scelta del contraente interamente gestite in maniera digitale, può consentire la raccolta delle informazioni necessarie ad una più efficace attività di valutazione dei rischi (oltre che alla riduzione degli oneri amministrativi per la partecipazione alla procedura di scelta del contraente).

In tale senso, la standardizzazione dei documenti e delle informazioni richieste dalle amministrazioni aggiudicatrici agli operatori economici, semplifica la partecipazione alle procedure di scelta del contraente e la comparazione delle informazioni. Tali attività risultano utili in un sistema come quello Europeo in cui la prevenzione dei rischi nella procedura di gara si basa sulla moralità degli operatori economici che entrano in rapporti con l'amministrazione verificata sulla base di cause di esclusione determinate (Yukins, 2015, anche in rapporto al sistema US di *debarment*; Gordon – Racca, 2014; Williams-Elegbe, 2012). L'introduzione del documento di gara unico europeo²⁶⁰ pare rispondere a tali necessità rendendo possibile un *benchmarking* sugli operatori economici a livello europeo (Priess, 2014).

Il documento di gara unico europeo costituisce un'"autodichiarazione dell'operatore economico che fornisce una prova documentale preliminare in sostituzione dei certificati rilasciati da autorità pubbliche o terzi"²⁶¹ che viene reso sulla base di un formulario predisposto dalla Commissione UE e che sarà reso disponibile in tutte le lingue²⁶² ed in formato elettronico (Arrowsmith, 2014)²⁶³. In tale contesto i certificati e le informazioni riferiti ai requisiti di partecipazione degli operatori economici possono essere reperite dalle amministrazioni aggiudicatrici.

ci direttamente accedendo a una banca dati nazionale (ove esistente e disponibile gratuitamente)²⁶⁴. Gli Stati membri garantiscono che le informazioni concernenti i certificati e altre forme di prove documentali introdotte in *e-Certis* e stabilite dalla Commissione siano costantemente aggiornate (Semple, 2015)²⁶⁵.

L'utilizzo di strumenti di *eProcurement* consente di raccogliere informazioni sugli operatori economici anche gli acquisti di importo inferiore alle soglie UE ove l'affidamento diretto del contratto (per le procedure di importo inferiore a quarantamila euro) non consente la raccolta e l'elaborazione dei relativi dati (Della Cananea, 2007)²⁶⁶.

Nell'ordinamento giuridico italiano opera il Mercato Elettronico della Pubblica Amministrazione – MEPA. Il MEPA, istituito²⁶⁷ nell'ambito delle procedure telematiche di acquisto quale strumento volto a favorire gli approvvigionamenti di beni e servizi di importo inferiore alle soglie di rilevanza europea e la sua gestione era stata affidata dal Ministero dell'economia e delle finanze a Consip S.p.A (Bertini – Vidoni, 2007). Le gare telematiche²⁶⁸ erano state individuate quale strumento per facilitare la partecipazione delle PMI nel mercato degli appalti pubblici (Casalino, 2015)²⁶⁹. Il regolamento di esecuzione ed attuazione del codice dei contratti pubblici²⁷⁰ ha successivamente esteso la possibilità di realizzare un "mercato elettronico" a qualsiasi stazione appaltante o centrale di committenza²⁷¹. Il MEPA realizzato dalla centrale di committenza nazionale (Consip S.p.A.) oggi "è un mercato digitale in cui le Amministrazioni abilitate possono acquistare, per valori inferiori alla soglia comunitaria, i beni e servizi offerti da fornitori abilitati a presentare i propri cataloghi sul sistema"²⁷². Tale strumento consente acquisti telematici basati su un sistema che attua procedure di scelta del contraente interamente gestite per via elettronica e telematica, nel rispetto dei principi di trasparenza e semplificazione delle procedure, di parità di trattamento e non discriminazione.

La centrale di committenza nazionale (Consip S.p.A.) periodicamente definisce con appositi bandi le tipologie di beni e servizi e le condizioni generali di fornitura. Nell'ambito di tali bandi vengono abilitati gli operatori economici che risultano titolari dei requisiti di qualificazione richiesti e le relative offerte vengono pubblicate nei rispettivi cataloghi elettronici che garantiscono l'aggiornamento delle informazioni. Il Mercato Elettronico della Pubblica Amministrazione consente alle amministrazioni pubbliche di effettuare "ordini diretti" ovvero di contattare alcuni degli operatori economici registrati all'interno del Mercato Elettronico della Pubblica Amministrazione mediante una "richiesta di offerta". La prima modalità di acquisto si qualifica come procedura in economia che permette di fruire delle caratteristiche dei beni e servizi offerti alle condizioni contrattuali indicate nei singoli bandi e visualizzabili sui cataloghi on line senza necessitare di ulteriori rilanci competitivi. I cataloghi elettronici del MEPA non si qualificano come offerte indicative rese disponibili a titolo informativo, bensì possono essere configurate come delle offerte pubbliche di vendita che contengono tutti gli elementi essenziali per la conclusione del contratto e hanno l'efficacia di un'offerta al pubblico rivolta alle amministrazioni aggiudicatrici²⁷³. L'ordine della singola amministrazione fa sorgere il rapporto contrattuale con

l'operatore economico alle condizioni indicate, con l'insorgere delle conseguenti obbligazioni per entrambe le parti.

La "richiesta di offerta" è una procedura di scelta del contraente informale che permette, nel rispetto della disciplina prevista per gli acquisti di importo inferiore alle soglie UE²⁷⁴, di negoziare prezzi e condizioni migliorative o specifiche dei prodotti/servizi già presenti sui cataloghi elettronici (e quindi riferiti a bandi già attivati)²⁷⁵. In tale ipotesi viene svolto un confronto concorrenziale richiedendo ai fornitori abilitati di presentare anche diverse e ulteriori offerte personalizzando la prestazione contrattuale sulla base di specifiche esigenze della singola amministrazione aggiudicatrice (es.: tempi di consegna, servizi di assistenza e manutenzione particolari, caratteristiche tecniche specifiche o condizioni economiche più favorevoli)²⁷⁶.

La "richiesta di offerta" consente alle amministrazioni pubbliche di scegliere se invitare alla procedura tutti gli operatori economici abilitati o di individuare il numero e gli operatori economici da invitare alla procedura²⁷⁷. In questo caso la singola amministrazione deve indicare le specifiche condizioni richieste, nonché i criteri sulla base dei quali si intende valutare le offerte che verranno inviate mediante la piattaforma. Ove siano consultati più operatori economici abilitati, il sistema informatico di negoziazione del mercato elettronico predispone automaticamente una graduatoria²⁷⁸. Il contratto, concluso attraverso modalità informatiche e mediante l'utilizzo della firma elettronica, individua quali parti l'operatore economico selezionato e la singola amministrazione pubblica. Quest'ultima risulta l'unico soggetto responsabile per lo svolgimento della procedura di "richiesta d'offerta"²⁷⁹.

La centrale di committenza nazionale non diviene parte del rapporto contrattuale e non interviene nelle transazioni tra fornitori e le amministrazioni pubbliche. A tale soggetto è riconosciuto un potere di controllo circa il rispetto del corretto utilizzo degli strumenti di *eProcurement*²⁸⁰, la cui violazione può comportare per il fornitore la "sospensione dell'abilitazione per un periodo di tempo variabile tra 1 e 12 mesi, al risarcimento degli eventuali danni subiti da Consip e/o da terzi"²⁸¹, nonché integrare la fattispecie di reato di turbata libertà del procedimento di scelta del contraente²⁸². Ove resi pubblici, i dati raccolti attraverso il MEPA sugli acquisti degli enti locali costituiscono un importante elemento per innovare il modello organizzativo della "funzione acquisti" e definire adeguati strumenti di prevenzione e contrasto dei rischi nell'attività contrattuale dell'amministrazione pubblica.

Gli enti locali, per gli acquisti di importo inferiore alle soglie europee, sono soggetti ad un obbligo di ricorrere al MEPA o ad altri mercati elettronici (istituiti ai sensi dell'art. 328 del regolamento di esecuzione ed attuazione del codice dei contratti pubblici) o agli strumenti informatici messi a disposizione dalla centrale di committenza regionale di riferimento per lo svolgimento delle relative procedure²⁸³. La violazione di tali obblighi comporta la nullità dei contratti eventualmente stipulati e un illecito disciplinare, nonché la responsabilità amministrativa del funzionario pubblico²⁸⁴. Gli enti locali sono stati talvolta considerati legittimati a non ricorrere al MEPA in caso di acquisti di beni e servizi per un im-

porto tale da consentire l'affidamento diretto²⁸⁵ e sulla base dell'esigenza di garantire l'economicità e l'efficienza dell'attività amministrativa.²⁸⁶

In tale contesto, lo svolgimento di una gara informale di "richiesta di offerta" di importo inferiore alle soglie di rilevanza europea (realizzata mediante il MEPA in cui i partecipanti sono invitati dalla stessa amministrazione aggiudicatrice ed ove trovano applicazione unicamente i principi dei Trattati UE²⁸⁷) deve essere distinta dalle "attività di centralizzazione delle committenze"²⁸⁸ (Racca, 2012), volte all'acquisto di beni e servizi o alla aggiudicazione di appalti pubblici e alla conclusione di accordi quadro in favore delle amministrazioni pubbliche (Racca, 2014b).

L'utilizzo di strumenti informatici per la presentazione di offerte di beni e servizi, successivamente raccolte in cataloghi elettronici resi disponibili online, potrebbe consentire di configurare tale strumento come sistema dinamico di acquisizione²⁸⁹ per gli acquisti di uso corrente delle amministrazioni pubbliche, favorendo la concorrenza e la partecipazione (anche transfrontaliera) e riducendo il rischio connesso alla frammentazione abusiva di contratti di valore inferiore alle soglie europee.

Il richiamato obbligo per i comuni non capoluogo di provincia di ricorrere a forme di aggregazione della domanda e l'attività delle relative strutture organizzative, deve essere coordinato con le nuove disposizioni europee che attribuiscono particolare rilievo ai modelli di aggregazione transnazionale della domanda pubblica e di aggiudicazione di appalti pubblici congiunti da parte di amministrazioni aggiudicatrici ubicate in diversi Stati membri, che consente di superare barriere giuridiche che ancora impediscono la realizzazione del mercato interno²⁹⁰, secondo una prospettiva che richiede organizzazioni pubbliche professionali e capaci di accogliere la sfida dell'innovazione degli appalti pubblici (Racca, 2014a; Ponzio, 2014).

3 Le clausole e le condizioni contrattuali nella gestione dei rischi

La garanzia della trasparenza, della concorrenza e dell'oggettività della selezione e della qualità delle prestazioni richiedono l'evoluzione delle strutture organizzative e delle professionalità delle amministrazioni aggiudicatrici (Cavallo Perin - Racca, 2010; Racca - Cavallo Perin - Albano, 2011)²⁹¹.

L'elevato numero di amministrazioni aggiudicatrici (Cottarelli, 2014)²⁹², la mancanza di cooperazione tra le stesse e la ridotta capacità di gestire procedimenti amministrativi complessi²⁹³, rendono il settore dei contratti pubblici fortemente frammentato (sia in relazione alle amministrazioni aggiudicatrici, sia in relazione alle gare²⁹⁴) (Racca, 2008), soggetto a inefficienze e condotte illecite (Albanese - Antellini Russo - Zampino, 2016).

In tale contesto risultano altresì complesse le attività di valutazione e gestione dei rischi legati alla *maladministration* (Mattarella, 2007)²⁹⁵ in quanto i singoli

centri autonomi di acquisto non sempre dispongono delle risorse necessarie e delle professionalità adeguate a perseguire gli obiettivi di efficienza e qualità che si qualificano come strategici a livello nazionale, europeo ed internazionale. Inoltre il loro numero elevato rende difficoltose e poco efficaci eventuali forme di controllo esterno.

Organizzazioni efficienti ed efficaci possono favorire il corretto e integro esercizio del potere contrattuale pubblico garantendo un impiego efficiente e razionale delle risorse pubbliche (McKeen, 2014). Le tecniche di centralizzazione delle committenze e gli strumenti giuridici per l'aggregazione della domanda, ove correttamente utilizzati, possono consentire di riqualificare la spesa pubblica mediante la riduzione dei costi. La maggiore professionalità di strutture specializzate può rendere possibile una efficace attività di *risk assessment* e *risk management* mediante il corretto utilizzo degli strumenti informatici e la definizione di clausole e condizioni contrattuali idonee a disincentivare condotte scorrette da parte dei funzionari pubblici e degli operatori economici.

L'interesse pubblico alla riqualificazione della spesa pubblica comporta una riorganizzazione della "funzione acquisti" (Racca, 2014a) che pare favorire il ricorso a modelli organizzativi altamente qualificati capaci di garantirne l'integrità e quindi l'efficienza nei contratti pubblici mediante strategie di gara adeguate ai mercati di riferimento e di consentire la corretta applicazione delle condizioni contrattuali in sede di gestione dell'esecuzione della prestazione contrattuale (Albano - Zampino, 2013) evitando distorsioni dell'esito della procedura di scelta del contraente. La connessione dell'aggiudicazione con l'esecuzione esclude che, con modifiche sostanziali e varianti, sia possibile tradire l'esito del confronto concorrenziale attuato in sede di gara. L'Autorità Nazionale Anticorruzione ha provato come in numerosi casi l'impresa aggiudicataria recupera in sede di esecuzione esattamente il ribasso proposto in gara²⁹⁶. Tale casistica evidenzia come nell'intero *public procurement cycle* si possano verificare inefficienze (connesse sia a condotte qualificabili come *active waste*, sia come *passive waste*) la cui prevenzione e contrasto richiede professionalità e responsabilizzazione dei funzionari pubblici.

L'attribuzione all'Autorità Nazionale Anticorruzione della gestione di un apposito sistema di qualificazione delle stazioni appaltanti, "teso a valutarne l'effettiva capacità tecnica e organizzativa, sulla base di parametri obiettivi" è anche esso ispirato a "criteri di qualità, efficienza, professionalizzazione delle stazioni appaltanti"²⁹⁷ realizzando una "simmetria tra parti di un rapporto contrattuale" che consenta di evitare la "cattura" dell'amministrazione pubblica da parte degli operatori economici (Racca, 2016), e dia continuità a quanto previsto in tema di riduzione delle stazioni appaltanti e "soggetti aggregatori"²⁹⁸.

Modelli organizzativi altamente qualificati deputati alla "funzione acquisti" risultano maggiormente idonei all'utilizzo di mezzi elettronici e possono favorire la correttezza dell'attività contrattuale mediante l'utilizzo di strumenti quali l'accordo quadro ed il sistema dinamico di acquisizione (Albano - Dini - Spagnolo, 2008).

Il passaggio da un modello di contrattazione tradizionale ad un sistema di aggregazione richiede la riorganizzazione strategica della domanda pubblica ed il coordinamento tra amministrazioni pubbliche (Racca, 2014a). La specializzazione di reti di centrali di committenza su particolari settori merceologici consente di concludere accordi quadro (anche riaprendo il confronto competitivo nei casi in cui l'accordo quadro contenga tutte le condizioni contrattuali²⁹⁹) reciprocamente messi a disposizione di ambiti territoriali più ampi (Yukins, 2008; Arrowsmith, 2014; Semple, 2015).

L'accordo quadro consente di essere concluso con uno o più operatori economici (Albano – Nicholas, 2016). In quest'ultimo caso, è garantita la continuità della fornitura/ servizio, senza dover procedere ad una nuova procedura di gara, anche ove (quale conseguenza del comportamento scorretto tenuto in fase di gara o in sede di esecuzione) intercorra la risoluzione con uno degli stessi. In tali circostanze un elevato livello di concorrenza nel singolo mercato di riferimento riduce il rischio di collusione, in sede di rilancio competitivo, tra gli aggiudicatari dell'accordo quadro.

La possibilità di lasciare alcune condizioni contrattuali "aperte" può rendere possibile il loro adattamento alle peculiarità di particolari contesti favorendo l'efficienza del singolo contratto di appalto specifico concluso nell'ambito dell'accordo quadro.

In tale contesto la definizione strategica di lotti (basata su accurate analisi di mercato e delle informazioni in precedenza raccolte nelle banche dati) può consentire la valutazione dei rischi relativi al singolo mercato rilevante e la definizione delle condizioni contrattuali maggiormente idonee per la loro gestione in sede di gara e nella fase di esecuzione della prestazione contrattuale.

Un'attenta articolazione in lotti merceologici e territoriali può costituire un incentivo alla partecipazione anche da parte delle piccole e medie imprese favorendo l'ingresso nel mercato di riferimento di nuovi operatori economici. In tale prospettiva l'ingresso di nuovi operatori economici nel mercato può consentire di superare possibili situazioni di elusione e distorsione della concorrenza fino a quel momento esistenti.

L'assenza di un obbligo giuridico di acquisto, che caratterizza l'accordo quadro, consente di superare eventuali inefficienze derivanti dall'esito della procedura di scelta del contraente e riscontrate solo in sede di esecuzione mediante la scelta di non concludere appalti specifici nell'ambito di tale accordo quadro senza comportare un contezioso giurisdizionale e dare vita a conseguenti richieste risarcitorie.

La previsione di clausole volte a prevenire e gestire il rischio derivante da situazioni di conflitti di interesse e delle frodi consente di individuare in via contrattuale obblighi in capo all'operatore economico di adottare misure necessarie per garantire che non sussista un conflitto, reale o potenziale e possibili frodi (neanche con i propri dipendenti) imponendo, agli operatori economici, oneri di comunicazione e riconoscendo, all'amministrazione aggiudicatrice, il diritto di risolvere il contratto³⁰⁰.

Le clausole contenute nell'accordo quadro possono prevedere obblighi direttamente in capo all'aggiudicatario e volti a garantire una cooperazione con l'amministrazione aggiudicatrice³⁰¹, la raccolta e l'archiviazione delle informazioni,³⁰² forme di audit e monitoraggio sull'esecuzione ad opera sia dell'amministrazione aggiudicatrice, sia di soggetti ad essa esterni ed indipendenti riducendo l'eventuale inadeguatezza della singola amministrazione alla verifica circa il rispetto delle condizioni contrattuali e l'applicazione, ove ne ricorra il caso, delle penali previste.

Il medesimo effetto è prodotto dall'utilizzo di atti quali i patti di integrità ed i protocolli di legalità che nell'ordinamento giuridico italiano assumo un valore contrattuale (Giani, 2014; Romeo, 2014)³⁰³.

Il mancato rispetto degli obblighi (posti in capo all'aggiudicatario ed ai funzionari pubblici coinvolti nell'attività contrattuale) ove non rispettati possono comportare, quale sanzione, la risoluzione del contratto senza ulteriori oneri per l'amministrazione responsabilizzando maggiormente l'aggiudicatario ed i funzionari pubblici che operano nell'attività contrattuale.³⁰⁴ In caso di condotte scorrette la risoluzione del contratto può essere accompagnata dalla possibilità riconosciuta all'amministrazione "di adottare le misure ritenute necessarie, secondo la ragionevole opinione dell'Autorità". Il recupero delle somme riferite ai "danni diretti subiti da parte dell'Autorità a seguito della risoluzione" del contratto a causa del comportamento tenuto dall'operatore economico o dai suoi dipendenti³⁰⁵, comprensive dell'eventuale danno all'immagine³⁰⁶, ne costituisce un esempio.

Per alcune tipologie merceologiche l'utilizzo del sistema dinamico di acquisizione (Albano – Nicholas, 2016, ove tale strumento è considerato come un accordo quadro sempre aperto al mercato)³⁰⁷, rende possibile l'ingresso di nuovi operatori economici in qualsiasi momento garantendo una concorrenza effettiva e riducendo i rischi derivanti da comportamenti collusivi tra le imprese. L'apertura del sistema dinamico di acquisizione per tutta la sua durata consente all'amministrazione di prevedere condizioni di funzionamento del sistema (definendole fin dall'origine) capaci di rendere possibile un intervento della stazione appaltante anche sulle condotte tenute dalle imprese nell'ambito dell'intero sistema e dei singoli contratti di appalto conclusi al suo interno (consentendo di prendere in considerazione anche la performance delle imprese in sede di esecuzione). L'obbligatorio utilizzo di strumenti informatici durante l'intero sistema dinamico di acquisizione rende possibile la raccolta di informazioni sul mercato rilevante e sugli operatori economici presenti al suo interno, la cui elaborazione può consentire la definizione di strategie contrattuali capaci di prevenire e contrastare i rischi nei contratti pubblici.

Gli effetti prodotti da clausole e condizioni contrattuali capaci di garantire una maggiore integrità nella funzione acquisti sono aumentati dall'attività di centralizzazione delle committenze che consente la loro standardizzazione in ambito nazionale (mediante la loro effettiva applicazione da parte delle singole amministrazioni aggiudicatrici che concludono contratti di appalto specifico nel suo ambito).

Strutture di aggregazione della domanda pubblica come le centrali di committenza che possono assicurare un più ampio utilizzo degli strumenti contrattuali quali gli accordi quadro, oltre ad un innovativo uso degli strumenti elettronici per rafforzare la trasparenza, e l'*accountability* nell'intero ciclo del contratto pubblico e assicurare controlli diffusi da parte dei cittadini sulla qualità della spesa pubblica.

I recenti interventi del Consiglio di Stato paiono introdurre nell'ordinamento giuridico italiano previsioni volte a consentire alle stazioni appaltanti la possibilità di recedere unilateralmente dai contratti pubblici stipulati³⁰⁸ e la rinegoziazione dei contratti già stipulati³⁰⁹ per assicurare l'interesse pubblico al "perseguimento di economie di scala ed alla omogeneità dei costi delle forniture e dei servizi, commissionati da pubbliche amministrazioni tramite un centro specializzato per i loro approvvigionamenti con inerente contrattazione centralizzata, in capo a una figura, organizzativa (oggi la Consip S.p.A.) istituita per un tale scopo" (Manganaro, 2014)³¹⁰. L'indirizzo seguito del Consiglio di Stato evidenzia l'esigenza di tutelare l'interesse pubblico alla riqualificazione della spesa pubblica attraverso una riorganizzazione della "funzione acquisti" che favorisca il ricorso a modelli organizzativi altamente qualificati capaci di garantirne l'efficienza e l'integrità.

Le nuove norme europee favoriscono le forme di cooperazione tra amministrazioni aggiudicatrici anche a livello transfrontaliero e transazionale consentendo una più ampia diffusione delle informazioni (relative al mercato ed agli operatori economici),³¹¹ delle prassi maggiormente idonee a garantire l'integrità e l'efficienza³¹² anche mediante la definizione di documenti di gara con clausole standard applicabili in tutti gli Stati membri.

La messa a disposizione di attività di "centralizzazione delle committenze" (cioè di accordi quadro aggiudicati individualmente ovvero in sinergia tra centrali ubicate in differenti Stati Membri) è di stimolo all'apertura del mercato interno e consente alle amministrazioni pubbliche italiane di trovare un'alternativa alle centrali nazionali (considerati gli obiettivi di *spending review*) e, al contempo, obbliga queste ultime a confrontarsi in un mercato europeo, aprendo anche in Italia ad una competizione tra amministrazioni aggiudicatrici ed in ultima analisi ad un confronto tra gare sugli stessi prodotti nel contesto europeo (Cavallo Perin, 2014). Tali strutture possono garantire una maggiore adeguatezza di risorse al fine di garantire l'utilizzo di strumenti informatici interoperabili durante l'intero *public procurement cycle* e la definizione di condizioni contrattuali capaci di garantire l'integrità e l'efficienza dell'attività contrattuale dell'amministrazione pubblica tenendo conto delle caratteristiche dei differenti mercati di riferimento.

Endnotes

²³⁷ EU Commission, Public Procurement Indicators 2014, 2 febbraio 2016, <http://ec.europa.eu/DocsRoom/documents/15421?locale=it>.

²³⁸ Piano Nazionale Anticorruzione, 2013.

²³⁹ EU Commission, report accessibile in http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm.

- ²⁴⁰ *Ibid.*, ove tra i criteri per valutare la performance dell'attività contrattuale degli Stati Membri sono presi in considerazione il livello di aggregazione della domanda, la qualità delle informazioni.
- ²⁴¹ 1.200.000 euro per i lavori; 2.000.000 per i servizi; 1.300.000 per le forniture.
- ²⁴² La spesa imputabile al centro pari a circa il 40%.
- ²⁴³ OECD, *Recommendation of the Council on Public Procurement*, 2015, accessibili in <http://www.oecd.org/gov/ethics/Recommendation-on-Public-Procurement.pdf>
- ²⁴⁴ AVCP, 6 novembre 2013, Determinazione n. 5, Linee guida su programmazione, progettazione ed esecuzione del contratto nei servizi e nelle forniture.
- ²⁴⁵ AGCM, Vademecum per le stazioni appaltanti, volto all'Individuazione di criticità concorrenziali nel settore degli appalti pubblici, 18 settembre 2013, http://www.agcm.it/component/joomdoc/allegati-news/Delibera_e_Vademecum.pdf/download.html
- ²⁴⁶ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8594.
- ²⁴⁷ Trattato sul Funzionamento dell'Unione Europea, art. 197.
- ²⁴⁸ European Economic and Social Committee on "fighting corruption in the EU: meeting business and civil society concerns" (2016) <http://www.eesc.europa.eu/resources/docs/qe-02-15-754-en-n.pdf>
- ²⁴⁹ Qualifica la trasparenza come bene pubblico.
- ²⁵⁰ Sull'art. 97 Cost. come fondamento del principio di trasparenza: Cons. Stato, VI, 30 gennaio 2007, n. 362, in *Foro amm. CDS*, 2007, 226. C. giust. Ce, IV, 13 settembre 2007, C-260/04, Commissione Ce v. Italia, in *Foro amm. CDS*, 2007, 2367, Corte giust. CE, I, 18 novembre 1999, in C-275/98, Unitron Scandinavia A/S v. Ministeriet for Fodevarer e Landbrug og Fiskeri, in *Foro it.*, 2000, IV, 109.
- ²⁵¹ White list possono essere realizzate per consentire alle pubbliche amministrazioni di reperire informazioni sull'affidabilità degli operatori economici.
- ²⁵² S. SCHOONER, relazione al Symposium dell'OECD: *Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement*, 2006. Cfr. anche OECD, *Integrity in Public Procurement. Good Practice From A To Z*, 2007, 29.
- ²⁵³ Cfr. da ultimo: OECD, *Recommendation of the Council on Public Procurement*, 2015, *cit.*
- ²⁵⁴ L. 12 febbraio 1993, n. 39, art. 3, c. I.
- ²⁵⁵ L. 6 novembre 2012, n. 190, art. 1, c. XVI, lett. b). L. 4 marzo 2009, n. 15, art. 4, c. VI. Cfr. Costituzione italiana, art. 117, c. II, lett. m), ove è attribuita allo Stato la competenza legislativa esclusiva nella "determinazione dei livelli essenziali delle prestazioni concernenti I diritti civili e sociali che devono essere garantiti su tutto il territorio nazionale".
- ²⁵⁶ D.lgs. 14 marzo 2013, n. 33, art. 1.
- ²⁵⁷ L. 6 novembre 2012, n. 190, art. 1, c. XV, in cui si individuano altresì i criteri di "facile accessibilità, completezza e semplicità di consultazione" cui deve improntata la pubblicazione delle informazioni; cfr. anche il c. XXXII, in cui si prevede la trasmissione dei dati all'Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture, la quale provvede alla pubblicazione nel proprio sito web "in una sezione liberamente consultabile da tutti i cittadini". In caso di mancato adempimento all'obbligo di comunicazione è prevista la trasmissione alla Corte dei conti dell'elenco delle amministrazioni inadempienti.
- ²⁵⁸ L. 28 gennaio 2016, n. 11, art. 1, lett. q).

- ²⁵⁹ L. 28 gennaio 2016, n. 11, art. 1, lett. z). Cfr. la bozza di nuovo codice dei contratti pubblici, 3 marzo 2016, art. 81.
- ²⁶⁰ Direttiva UE, 2014/24, art. 59.
- ²⁶¹ Regolamento di esecuzione (UE) 2016/7, 5 gennaio 2016, che stabilisce il modello di formulario per il documento di gara unico europeo.
- ²⁶² Direttiva UE, 2014/24, art. 61, par. 3.
- ²⁶³ Direttiva UE, 2014/24, art. 59, par. 2.
- ²⁶⁴ Direttiva UE, 2014/24, art. 59, par. 5.
- ²⁶⁵ Direttiva UE, 2014/24, art. 61, par. 1.
- ²⁶⁶ D.lgs. 12 aprile 2006, n. 163, art. 125.
- ²⁶⁷ L. 27 dicembre 2006, n. 296, art. 1, c. 450.
- ²⁶⁸ Il DPR n. 101 del 2002, art. 11, comma 5, assegna al Ministero dell'Economia e delle Finanze e al Dipartimento per l'Innovazione e le Tecnologie della Presidenza del Consiglio dei Ministri il compito di predisporre, anche attraverso proprie concessionarie, un Mercato Elettronico cui tutte le P.A. possano accedere. Con tale presupposto il Ministero dell'Economia e delle Finanze ha dato incarico a Consip di realizzare il Mercato Elettronico della P.A..
- ²⁶⁹ Corte dei conti, Sez. centrale di controllo sulla gestione delle Amministrazioni dello Stato, adunanza congiunta, 16 maggio 2013, Deliberazione n. 3/2013/G.
- ²⁷⁰ D.P.R. 5 ottobre 2010, n. 270, art. 358.
- ²⁷¹ D.P.R. 5 ottobre 2010, n. 270, art. 328, c. I.
- ²⁷² Cfr. <https://www.acquistinretepa.it/opencms/opencms/main/programma/strumenti/MePA>.
- ²⁷³ Art. 1336, c.c.
- ²⁷⁴ D.lgs. 12 aprile 2006, n. 163, artt. 124 e 125. Ove si richiede che per servizi o forniture di importo pari o superiore a quarantamila euro e fino alle soglie europee, l'affidamento mediante cottimo fiduciario avviene nel rispetto dei principi di trasparenza, rotazione, parità di trattamento, previa consultazione di almeno cinque operatori economici.
- ²⁷⁵ Acquisti in rete, *Manuale d'uso del Sistema di E-procurement per le Amministrazioni MEPA - Procedura di Acquisto tramite RDO - Offerta Economicamente più vantaggiosa*, accessibile in https://www.acquistinretepa.it/opencms/export/sites/acquistinrete/documenti/Guide_e_manuali/MePA-Procedura_di_RdO_-_Offerta_economicamente_piu_vantaggiosa.pdf e al prezzo più basso, accessibile in https://www.acquistinretepa.it/opencms/export/sites/acquistinrete/documenti/Guide_e_manuali/Mercato_elettronico-Procedura_di_RDO_al_Prezzo_piu_basso.pdf, 21 gennaio 2015.
- ²⁷⁶ Cons. St., V, 22 ottobre 2014, n. 5202.
- ²⁷⁷ Acquisti in rete, *Manuale d'uso del Sistema di E-procurement per le Amministrazioni MEPA - Procedura di Acquisto tramite RDO - Offerta Economicamente più vantaggiosa*, cit., 39 e al prezzo più basso, cit., 30. La scelta dei fornitori abilitati da invitare può avvenire sia sulla base di una combinazione di Bandi/Categorie riferiti all'oggetto di fornitura o per aree geografiche (regione della sede legale e/o regione di consegna a catalogo). Consip S.p.A., *Regole del sistema di e-procurement della pubblica amministrazione*, giugno 2014, accessibile in https://www.acquistinretepa.it/opencms/export/sites/acquistinrete/documenti/Modello_Fun

zionamento/Regole_Sistema_E_Procurement_PA_15_luglio2014.pdf, art. 50.

²⁷⁸ D.P.R. 5 ottobre 2010, n. 270, art. 328, c. V, ove si precisa che “il contratto è stipulato per scrittura privata, che può consistere anche nello scambio dei documenti di offerta e accettazione firmati digitalmente dal fornitore e dalla stazione appaltante. La stazione appaltante procede nei confronti dell’esecutore alle verifiche circa il possesso dei requisiti previsti e della cauzione definitiva di cui all’articolo 113, del codice, e, nel caso siano stati consultati fornitori abilitati, a rendere noto ai controinteressati l’esito della procedura”.

²⁷⁹ Consip S.p.A., *Regole del sistema di e-procurement della pubblica amministrazione*, cit., art. 8 e art. 46.

²⁸⁰ Consip S.p.A., *Regole del sistema di e-procurement della pubblica amministrazione*, cit., art. 38.

²⁸¹ Consip S.p.A., *Regole del sistema di e-procurement della pubblica amministrazione*, cit., art. 55. Cfr. anche: Acquisti in rete, *Manuale d’uso del Sistema di e-procurement per Amministrazioni – MEPA Linee guida all’utilizzo del Mercato Elettronico*, 19.

²⁸² *Ex art. 353-bis c.p.*, introdotto ad opera dell’art. 10, l. 13 agosto 2010, n. 136.

²⁸³ L. 27 dicembre 2006 n. 296, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)*, art. 1, c. 450, ove si afferma che “le altre amministrazioni pubbliche di cui all’articolo 1 del decreto legislativo 30 marzo 2001, n. 165, per gli acquisti di beni e servizi di importo inferiore alla soglia di rilievo comunitario sono tenute a fare ricorso al mercato elettronico della pubblica amministrazione ovvero ad altri mercati elettronici istituiti ai sensi del medesimo articolo 328 ovvero al sistema telematico messo a disposizione dalla centrale regionale di riferimento per lo svolgimento delle relative procedure. Cfr. anche d.l. 6 luglio 2012, n. 95, cit., art. 1, c. 7, convertito in l. 7 agosto 2012, n. 135 che fa salva la previsione contenuta nella legge finanziaria 2007.

²⁸⁴ Cfr. anche: Cons. St., III, 27 marzo 2014, n. 1486.

²⁸⁵ D.lgs. 12 aprile 2006, n. 163, art. 125. Importo pari a 40.000 Euro per beni e servizi.

²⁸⁶ Circa la possibilità di derogare agli all’obbligo di acquisto mediante il MEPA per gli enti locali cfr.: Corte dei Conti - sez. regionale di controllo per la Liguria, Deliberazione 10 novembre 2014, n. 64/PAR. conformi Corte dei Conti - sez. regionale di controllo per la Toscana 30 maggio 2013 n. 151 e Corte dei Conti - sez. regionale di controllo per l’Emilia Romagna 17 dicembre 2013 n. 286, ove i principi generali di economicità e di efficienza dell’azione amministrativa sono ritenuti idonei a “mitigare l’obbligo di ricorrere ai mercati elettronici ogni qualvolta il ricorso all’esterno persegua la ratio di contenimento della spesa pubblica insita nelle varie norme”. Contra Corte dei Conti - sez. regionale di controllo per le Marche 27 novembre 2012, n. 169 e 25 marzo 2013 n.17; Corte dei Conti - sez. regionale di controllo per la Lombardia 26 marzo 2013, n. 112, ove si ritiene che sussista un obbligo di ricorso ad un mercato elettronico (sia esso quello della pubblica amministrazione, ovvero quello realizzato direttamente dalla stazione appaltante o dalle centrali di committenza) “al fine di garantire la tracciabilità dell’intera procedura di acquisto ed una maggiore trasparenza della stessa, con conseguente riduzione dei margini di discrezionalità dell’affidamento e la possibilità, da parte di imprese concorrenti che riescano ad offrire prezzi più convenienti, di aderire ai medesimi mercati”. Corte dei Conti - sez. regionale di controllo per il Piemonte 23 maggio 2013 n. 211, in cui viene chiarito che tale obbligo viene meno “nell’ipotesi di indisponibilità o inidoneità dei beni presenti su tali mercati a sod-

disfare le esigenze dell'ente locale richiedente”.

²⁸⁷ Cfr. Cons. St., 22 ottobre 2014, n. 5202, circa l'obbligo di ricorrere all'attività svolta dalla centrale di committenza Consip S.p.A. (ex art. 15, c. 13, lett. d) del D.L. 6 luglio 2012 n. 95 convertito in legge 7 agosto 2012 n. 135), anche alle Aziende Sanitarie e la legittimità dell'operato dell'Amministrazione che, recedendo da procedura indetta ex art. 125 del D.Lgs. n. 163/2006 ha proceduto, ancora nella fase della valutazione delle offerte, a rivolgersi alla piattaforma Consip, nella fattispecie, del MEPA, ricevendo un servizio ivi presente e giudicato non identico ma sostanzialmente affine ed equivalente e comunque conforme alle proprie esigenze.

²⁸⁸ Cfr. la definizione contenuta nella Direttiva UE 2014/24/UE, art. 2, n.ro 14. Tale nozione riprende le attività ricondotte dalle Direttive attualmente in vigore (Direttiva 2004/18, art. 1, p.to 10) alla centrale di committenza.

²⁸⁹ Direttiva 2014/24/UE, *cit.*, art. 34.

²⁹⁰ Direttiva 2014/24/UE, considerando n. 73.

²⁹¹ Commissione UE, *A report on the functioning of public procurements markets in the EU: benefits from the application of EU Directives and challenges for the future*, 3 febbraio 2004, in http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf; Commissione UE, *L'atto per il mercato unico. Dodici leve per stimolare la crescita e rafforzare la fiducia. “Insieme per una nuova crescita”*, COM(2011)206definitivo, 13 aprile 2011, in http://ec.europa.eu/internal_market/smact/index_it.htm.

²⁹² Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture, *Segnalazione ai sensi dell'art. 6, comma 7, lettera f), del decreto legislativo 12 aprile 2006, n. 163, 12 gennaio 2012*, n. 1, ove venivano individuati un milione e duecentomila contratti posti in essere da circa 37.000 stazioni appaltanti, che, a loro, volta si organizzano in oltre 60.000 centri di spesa.

²⁹³ PwC rapporto realizzato per la Commissione UE e l'OLAF, *Public Procurement: costs we pay for corruption. Identifying and reducing corruption in public procurement in the EU*, 2013.

²⁹⁴ Svolgendo procedure di scelta del contraente di importo inferiore alle soglie di rilevanza europea o restringendo la durata temporale dei contratti.

²⁹⁵ Presidenza del Consiglio dei Ministri e Ministero per la pubblica amministrazione e la semplificazione, *La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma. Rapporto della Commissione per lo studio e l'elaborazione di proposte in tema di trasparenza e prevenzione della corruzione nella pubblica amministrazione*, 2012. Commissione UE, *Relazione dell'Unione sulla lotta alla corruzione. Allegato sull'Italia*, 3 febbraio 2014; Commissione UE, *La lotta contro la corruzione nell'UE*, 6 giugno 2011, COM(2011) 308 final, 12 e 13; PricewaterhouseCoopers, *Report per la Commissione EU Identifying and reducing corruption in Public Procurement in the EU*, 30 giugno 2013.

²⁹⁶ ANAC, *Relazione annuale 2014*, 2 luglio 2015, 113

²⁹⁷ L. 28 gennaio 2016, n. 11, *cit.*, art. 1, lett. bb).

²⁹⁸ D.l. 24 aprile 2014, n. 66, *Misure urgenti per la competitività e la giustizia sociale*, art. 9, *Acquisizione di beni e servizi attraverso soggetti aggregatori e prezzi di riferimento*, convertito in l. 23 giugno 2014, n. 89;

D.lgs. 12 aprile 2006, n. 16, art. 33, c. IIIbis. Ai sensi dell'art. 1, c. 169, della l. n. 107 del 2015, la disposizione si applica alle gare bandite dal 1° novembre 2015. Cfr. ANAC, comunicato del Presidente del 10 novembre 2015, relativo all'entrata in vigore dell'art. 33, c. 3-bis del d.lgs. n. 163/2006 e il comunicato del Presidente del 2 dicembre 2015; ANAC, Determinazione, 23 settembre 2015, n. 11, Ulteriori indirizzi interpretativi sugli adempimenti ex art. 33, comma 3-bis, decreto legislativo 12 aprile 2006 n.163 e ss.mm.ii.; ANAC, Determinazione 25 febbraio 2015, n. 3, Rapporto tra stazione unica appaltante e soggetto aggregatore (centrale unica di committenza) – Prime indicazioni interpretative sugli obblighi di cui all'art. 33, comma 3-bis, d.lgs. 12 aprile 2006, n. 163 e ss.mm.ii.

²⁹⁹ Direttiva 2014/24, art. 33, par. 4.

³⁰⁰ NHS framework agreement for the supply of goods, <https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services>, 36.

³⁰¹ *Ibid.*, 33-34.

³⁰² *Ibid.*, 35, in cui si prevede l'obbligo per l'aggiudicatario di detenere le informazioni relative al contratto per un periodo minimo di 6 anni (o superiore, ove previsto dalle condizioni contrattuali). Tale termine può essere esteso a 21 anni ove le informazioni detenute siano rilevanti per un procedimento giurisdizionale.

³⁰³ TAR Lombardia, Milano, 9 luglio 2014, n. 1802.

³⁰⁴ NHS framework agreement for the supply of goods, *cit.*, 25.

³⁰⁵ *Ibid.*, 36.

³⁰⁶ L. 14 gennaio 1994, n. 20, art. 1, come modificato dalla l. 6 novembre 2012, n. 190, art. 1, c. 62.

³⁰⁷ In Italia il sistema dinamico di acquisizione ha trovato utilizzo in gare caratterizzate da un elevato numero di lotti, come ad esempio in relazione all'acquisto di farmaci.

³⁰⁸ d.l. 6 luglio 2012, n. 95, recante disposizioni urgenti per la revisione della spesa pubblica con invarianza dei servizi ai cittadini, art. 1, c. 13, convertito con modificazioni in l. 7 agosto 2012, n. 135. La disposizione prevede il pagamento delle prestazioni già eseguite oltre al decimo delle prestazioni non ancora eseguite, ove i parametri delle convenzioni stipulate da Consip S.p.A. siano migliorativi rispetto a quelli del contratto stipulato e l'appaltatore non acconsenta ad una modifica delle condizioni economiche tale da rispettare il limite di cui all'articolo 26, comma 3 della legge 23 dicembre 1999, n. 488.

³⁰⁹ D.L. 24 aprile 2014, n. 66, art. 8, c. 8, lett. a), convertito con modificazioni dalla l. 23 giugno 2014, n. 89.

³¹⁰ Cons. St., III, 29 luglio 2015, n. 3748, in www.giustizia-amministrativa.it; Cons. St., VI, 17 marzo 2014, n. 1312, in www.giustizia-amministrativa.it. Ove il Collegio afferma che una volta formalizzate le convenzioni da parte della centrale di committenza nazionale, che dovrebbero assicurare parametri di maggiore convenienza, ogni altra forma di contrattazione è dichiarata nulla (art. 1, c. 1, d.l. n. 95 del 2012) e solo in via transitoria - per i contratti stipulati prima della data di entrata in vigore del ricordato D.L. n. 95 del 2012 (conv. dalla l. 7 agosto 2012, n. 135) - si attribuisce appunto al contraente pubblico il diritto di recesso in questione, con successiva adesione alla convenzione Consip, ove l'appaltatore non ac-

consenta a modificare in senso conforme le condizioni contrattuali (con pagamento comunque, in caso di non adesione di detto appaltatore, delle prestazioni già eseguite e di un decimo di quelle da eseguire: art. 1 cit., c. 13). Secondo il Consiglio di Stato, “costituisce, pertanto, esercizio di un potere a carattere contrattuale dell'Amministrazione - in forza di una clausola contrattuale inserita ex lege, a norma dell'art. 1339 c.c. - e non espressione di una potestà pubblica, che sarebbe in sé estrinseca al sinallagma contrattuale, l'esercizio del diritto di recesso, che la legge riconosce nella situazione anzidetta”. Ne consegue che, nel caso di specie, l'appello deve essere dichiarato inammissibile per difetto di giurisdizione, ai sensi e per gli effetti dell'art. 11 del Codice del processo amministrativo, con declaratoria della cognizione del giudice ordinario sulla questione.

³¹¹ *Ibid.*, 36 and 39.

³¹² Comitato economico e sociale europeo, *Lotta alla corruzione nell'UE: rispondere alle preoccupazioni delle imprese e della società civile*, pubblicato in G.U.U.E. del 15 gennaio 2016, C 13/63.

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Risk Management and Crime Tax Consequences

La nozione di fatture per operazioni inesistenti e i connessi profili probatori tra processo penale e processo tributario

Authors

-
- *Alberto Franco, Ph.D., alberto.franco@unito.it – Department of Management, University of Torino*
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The objective of the paper is to analyse the definition of invoices for non-existent transactions, the related offences of issuing and using such invoices, as provided by Italian crime tax legislation (law n. 74/2000), and the links between crime tax law and tax litigation. The paper analyses the crime and tax jurisprudence on the notion of “invoices for non-existent transactions” as defined by article 1 of the law n. 74/2000 and focuses on the differences of the proof regimes in these two legislations. Moreover, particular attention is dedicated on the possible use of proofs collected in the crime tax law investigations for tax litigation purposes even in a context in which tax litigation and criminal trial are reciprocally independent.

Keywords: false invoices, crime tax law, tax litigation.

JEL Classification: K1, K34

1 Introduzione

Il presente contributo è volto ad esaminare la nozione di fatture per operazioni inesistenti, nonché la nozione di operazioni simulate recentemente introdotta dai provvedimenti legislativi emanati nel 2015¹, ed i profili probatori circa la dimostrazione dell'esistenza (o inesistenza/simulazione) delle operazioni, con particolare riferimento al rapporto tra procedimento penale e processo tributario nella valutazione circa l'esistenza o meno delle operazioni.

La dimostrazione circa l'esistenza delle operazioni da parte del contribuente in presenza di contestazioni da parte dell'Amministrazione finanziaria costituisce infatti un tema particolarmente problematico, e suscettibile di investire non solo i profili relativi alla determinazione del reddito del contribuente, ma anche il profilo penale tributario. Proprio da questa duplice valenza della problematica (ovverosia, nella determinazione del reddito e nella configurabilità di reati tributari) emerge il possibile contrasto, soprattutto con riferimento al profilo probatorio, tra il processo tributario e il processo penale.

Tali temi appaiono particolarmente significativi nell'ambito del *risk management*, in ragione del fatto che, come si vedrà meglio nel prosieguo, da un lato occorre determinare su chi ricade l'onere probatorio per l'accertamento dell'esistenza (o dell'inesistenza) delle operazioni, e dall'altro anche il contribuente che non pone in essere alcune violazioni può incorrere in responsabilità per le violazioni commesse dal proprio fornitore².

Nel prosieguo, pertanto, dopo aver esaminato la definizione di fatture per operazioni inesistenti, si analizzerà il regime della prova per tali operazioni, per poi successivamente effettuare alcune considerazioni in merito al rapporto tra giudicato tributario e penale in merito.

2 Le nozioni di inesistenza e di simulazione delle operazioni

La nozione di fatture e altri documenti per operazioni inesistenti è innanzitutto una nozione di tipo penale tributario, in quanto contenuta nell'articolo 1 del D.L. 10 marzo 2000, n. 74. Tale nozione è rilevante in ambito penale per la possibile configurazione di due reati tra loro simmetrici:

- (i) Il reato di dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni inesistenti, di cui all'articolo 2 del citato D.L., secondo il quale è punito con la reclusione da un anno e sei mesi a sei anni chiunque, al fine di evadere le imposte sui redditi o sul valore aggiunto, avvalendosi di fatture o altri documenti per operazioni inesistenti, indica in una delle dichiarazioni relative a dette imposte elementi passivi fittizi;
- (ii) Il reato di emissione di fatture o altri documenti per operazioni inesistenti di cui all'articolo 8 del D.L., secondo cui è punito con la reclusione da un anno e sei mesi a sei anni chiunque, al fine di consentire a terzi l'evasione delle imposte sui redditi o sul valore aggiunto, emette o rilascia fatture o altri documenti per operazioni inesistenti.

Con riferimento alla definizione di fatture o altri documenti per operazioni inesistenti, in base alla norma sopra citata si intendono come tali *“le fatture o gli altri documenti aventi rilievo probatorio analogo in base alle norme tributarie, emessi a fronte di operazioni non realmente effettuate in tutto o in parte o che indicano i corrispettivi o l'imposta sul valore aggiunto in misura superiore a quella reale, ovvero che riferiscono l'operazione a soggetti diversi da quelli effettivi”*³.

Se si esamina la definizione appena riportata, si evince chiaramente come sia fondamentale esaminare innanzitutto cosa si intenda per “operazione”, dopodiché esaminare in quali circostanze la stessa sia caratterizzata da “inesistenza”.

Nell’ambito della norma in esame, la definizione di “operazione” ricomprende non solo i rapporti definiti come tali ai fini dell’IVA (*i.e.*, cessioni di beni e prestazioni di servizi), bensì, più in generale, qualsiasi rapporto a contenuto economico rilevante ai fini delle imposte sui redditi e dell’imposta sul valore aggiunto (Della Valle, 2015); per cui tale definizione risulta, nella sua ampiezza, relativamente semplice (sebbene presenti ancora alcune criticità, come ad esempio la questione se siano o meno rilevanti le operazioni interne ad un medesimo soggetto quali quelle tra casa madre e stabile organizzazione).

Più complesso appare invece il tema dell’inesistenza. Infatti, sulla base del tenore letterale della norma si possono individuare due possibili profili di inesistenza (totale o parziale) delle operazioni oggetto di fatturazione:

- (i) inesistenza oggettiva, che si ha nell’ipotesi in cui l’operazione non è mai stata posta in essere, e quindi tale operazione non esiste *in rerum natura*. In altri termini, sono operazioni che “vivono unicamente in una dimensione cartolare” (Della Valle, 2015);
- (ii) inesistenza soggettiva, in cui l’operazione è stata posta in essere (e quindi esiste) ma vi è divergenza tra la rappresentazione documentale e la realtà, in quanto tale operazione è stata realizzata tra soggetti diversi da quelli risultanti dalla documentazione fiscale (*i.e.* il destinatario della fattura, o l’emittente, o financo entrambi sono diversi dal vero).

Se la definizione di operazioni inesistenti non è stata mutata con la recente emanazione del Decreto legislativo 24 settembre 2015, n. 158, tuttavia tale Decreto ha introdotto una ulteriore fattispecie di operazioni per così dire non veritiere, ovverosia le “operazioni simulate”. Infatti, il decreto citato ha introdotto la lettera *g-bis* al comma 1, la quale prevede che per “operazioni simulate oggettivamente o soggettivamente” si intendono “*le operazioni apparenti, diverse da quelle disciplinate dall’articolo 10-bis della legge 27 luglio 2000, n. 212, poste in essere con la volontà di non realizzarle in tutto o in parte ovvero le operazioni riferite a soggetti fittiziamente interposti*”. Tale categoria di operazioni, anche alla luce del fatto che la definizione sopra riportata appare invero poco chiara, sembra essere suscettibile di sovrapporsi alla categoria delle operazioni inesistenti; difatti, sembra evidente che l’operazione simulata oggettivamente presenta tratti molto simili all’operazione oggettivamente inesistente (in tutto o in parte) e allo stesso modo che l’operazione simulata soggettivamente appare molto simile alle operazioni soggettivamente inesistenti (Iorio, Ambrosi, 2015).

Il confine tra le fattispecie di “operazioni inesistenti” e di “operazioni simulate” appare quindi piuttosto incerto, anche se tale problematica è parzialmente mitigata dal fatto che il reato di “dichiarazione fraudolenta mediante altri artifici” di cui all’articolo 3 del D.L. 74/2000, che appunto richiama la nozione di operazioni simulate quale presupposto, si applica fuori dei casi compresi nel delitto di dichiarazione fraudolenta mediante uso di fatture per operazioni inesistenti⁴.

Per quanto concerne l'inesistenza oggettiva, si potrebbe forse ipotizzare che il legislatore abbia inteso ricomprendere nelle operazioni simulate le operazioni affette da inesistenza giuridica, ovvero sia le operazioni materialmente avvenute ma che risultino essere il compimento di un negozio giuridico apparente diverso da quello realmente intercorso tra le parti (il negozio dissimulato) (Donato Toma, 2013), mentre la categoria delle operazioni oggettivamente inesistenti sarebbe costituita solamente dalle operazioni materialmente inesistenti⁵.

Più arduo appare invece il tentativo di estendere tale ricostruzione anche per la dicotomia operazioni soggettivamente inesistenti – operazioni soggettivamente simulate, in quanto le aree di sovrapposizione tra le due fattispecie sembrano financo più marcate rispetto alle operazioni oggettivamente inesistenti/simulate. Infatti, parte della dottrina rileva come la definizione di “operazione soggettivamente simulata” sia parzialmente sovrapponibile a quella (preesistente) di “operazione soggettivamente inesistente”, ed anzi che, presente l'una, si dovrebbe ritenere configurata anche l'altra, e viceversa (Imperato, 2015).

3 Operazioni inesistenti (o simulate) e onere della prova

Sia nel caso in cui l'Amministrazione finanziaria contesti al contribuente di aver posto in essere una operazione inesistente o simulata (ovvero, che il contribuente avrebbe dovuto conoscere l'inesistenza o la simulazione di un'operazione), è necessario chiedersi su quale parte (contribuente o Amministrazione finanziaria) gravi l'onere della prova.

Tale questione investe principalmente due questioni:

- (a) su quale parte gravi l'onere probatorio;
- (b) in cosa consista l'onere probatorio da soddisfarsi al fine di dimostrare l'esistenza (per il contribuente) o l'inesistenza (per l'Amministrazione finanziaria) dell'operazione.

Relativamente al primo punto, ovvero sia a come si ripartiscano gli oneri probatori rispetto all'accertamento di fatture per operazioni (in tutto o in parte) inesistenti o simulate, in via di principio sono possibili due soluzioni opposte: si può sostenere che sia il contribuente a dover provare l'esistenza dell'operazione, o al contrario che sia l'Amministrazione finanziaria a doverne provare l'inesistenza.

Gli orientamenti più recenti in materia della Corte di Cassazione sembrano invero indicare una soluzione “intermedia”, e generalmente collegata strettamente con la fattispecie concreta. Ciò è peraltro pienamente giustificabile dal fatto che, come rilevato in dottrina, qualora il principio dell'onere della prova venisse applicato rigidamente dal giudice non consentirebbe, in molti casi, di perseguire finalità di giustizia sostanziale (Ingrao, 2008). Pertanto, è da escludere che il problema dell'onere della prova possa essere univocamente risolto dal legislatore in modo astratto, senza consentire al giudice di tener conto delle particolari situazioni che presenta la controversia, anche alla luce del fatto che il prin-

cipio dell'onere della prova non può non essere interpretato in funzione dei principi della "parità delle armi" e dell'"imparzialità del giudice" ex art. 111 della Costituzione (Ingrao, 2008).

Infatti, è orientamento consolidato che, a fronte di una specifica contestazione dell'Amministrazione finanziaria, il contribuente debba provare l'esistenza dell'operazione su cui si fonda la detrazione o la deduzione. Ciò significa quindi che deve essere innanzitutto l'Amministrazione finanziaria a muovere una contestazione specifica circa l'inesistenza dell'operazione⁶. Ciò premesso, i più recenti orientamenti tendono a ripartire l'onere probatorio secondo il c.d. principio di vicinanza della prova, intendendo per quest'ultima l'attribuzione dell'onere probatorio alla parte il cui compito resta ragionevolmente più semplice per la maggior facilità a disporre dei mezzi di prova⁷.

Più in dettaglio, sulla base di quanto sopra rappresentato e di altre rilevanti pronunce giurisprudenziali, l'orientamento complessivo della Suprema Corte in tema di onere della prova circa l'esistenza delle operazioni è così schematizzabile (Marcheselli, 2010):

(i) in primo luogo, il contribuente può beneficiare della detrazione/deduzione se sono assolti gli obblighi formali di documentazione e registrazione;

(ii) per disconoscere la detrazione/deduzione, non è sufficiente che l'Ufficio affermi di non credere alla documentazione;

(iii) anche se l'Ufficio fornisce elementi a corredo della sua affermazione sulla non corrispondenza della documentazione ad operazioni effettive, il contribuente può fornire ulteriori prove contrarie.

Con riferimento al secondo punto, ovverosia in cosa consista l'onere probatorio al fine di affermare l'esistenza o l'inesistenza (o financo la simulazione) di un'operazione, è del tutto evidente la ragionevolezza degli orientamenti sopra descritti, secondo cui, si ribadisce, non è sufficiente che l'Ufficio affermi di non credere alla documentazione: l'Ufficio deve fornire una prova ragionevole del suo assunto (ovverosia, dell'inesistenza dell'operazione), o quantomeno demolire l'efficacia probatoria degli elementi addotti dal contribuente, sulla base dei dati acquisibili ed acquisiti in esito ad una attività diligente di istruttoria – salvo chiaramente il fatto che da altre circostanze ed elementi ulteriormente addotti dal contribuente non emerga nuovamente la verosimiglianza dell'esistenza dell'operazione oggetto di contestazione.

A conferma di quanto sopra esposto, si consideri inoltre il consolidato orientamento della Corte di Cassazione (tra cui *ex multis* la sentenza 21 agosto 2007, n. 17799) che richiede all'Amministrazione finanziaria un rigore ben maggiore rispetto a quanto da questa addotto – tant'è vero che anche la Suprema Corte, nell'esaminare come si ripartisca l'onere probatorio tra Amministrazione finanziaria e contribuente non afferma che quest'ultimo debba sempre provare l'effettiva esistenza della operazione, ma che tale prova è necessaria «*qualora l'Amministrazione fornisca validi elementi, anche meramente presuntivi purché specifici, atti ad asseverare che alcune fatture sono state emesse per operazioni inesistenti*». Tale impostazione si rinviene anche in una recentissima sentenza

della Suprema Corte, secondo cui di regola non spetta al contribuente provare che l'operazione è effettiva, ma spetta all'Amministrazione, che adduce la falsità del documento, provare che l'operazione oggetto della fattura in realtà non è mai stata posta in essere; tuttavia, tale prova può ritenersi raggiunta da parte dell'Amministrazione finanziaria qualora essa fornisca validi elementi, che possono anche assumere la consistenza di attendibili indizi idonei ad integrare una presunzione semplice *ex art. 2727 c.c.*, per affermare che alcune fatture sono state emesse per operazioni in tutto o in parte fittizie, e in tal caso farà carico al contribuente l'onere di dimostrare l'effettiva esistenza delle operazioni contestate⁸.

Inoltre, è importante osservare come l'onere della prova in capo al contribuente in caso di contestazione dell'Amministrazione finanziaria sia da graduarsi in misura diversa a seconda che l'inesistenza contestata dall'Amministrazione finanziaria sia oggettiva o soggettiva.

Infatti, nel caso di inesistenza oggettiva, qualora l'Amministrazione finanziaria fornisca elementi validi per affermare l'inesistenza dell'operazione il contribuente non potrà chiaramente beneficiare della detrazione dell'IVA e della deduzione del costo a meno che egli non dimostri l'effettiva esistenza dell'operazione contestata.

Parzialmente diverso è invece il caso delle operazioni soggettivamente inesistenti: se in via di principio vale quanto sopra affermato per le operazioni oggettivamente inesistenti, è pur vero che tale impostazione è mitigata dagli orientamenti espressi dalla Corte di Giustizia dell'Unione Europea in materia di diritto alla detrazione dell'IVA, come si vedrà meglio nel prosieguo.

3.1. (Segue) Onere della prova e frodi carousel. La "buona fede" del contribuente

Le considerazioni sopra effettuate sono applicabili anche con specifico riferimento al caso delle c.d. frodi carousel (le quali, a seconda delle modalità concrete di effettuazione, possono essere inquadrare nella fattispecie delle operazioni soggettivamente inesistenti o simulate)⁹; in tali operazioni, è importante sottolineare che i profili probatori circa l'esistenza dell'operazione non investono tanto il fornitore del bene, ovvero sia l'emittente della fattura il quale è evidentemente consapevole della discordanza tra l'operazione effettivamente posta (o non posta) in essere natura e quanto rappresentato nei corrispondenti documenti, bensì il soggetto cessionario. Per la loro peculiarità, e per i numerosi interventi sul punto della Corte di Giustizia dell'Unione Europea, tali operazioni meritano di essere considerate separatamente.

Difatti, in base alla giurisprudenza comunitaria al cessionario può essere negato il diritto alla detrazione dell'IVA relativa a tali operazioni se egli sapeva o avrebbe dovuto sapere che l'operazione invocata a fondamento del diritto alla detrazione si iscriveva in un'evasione commessa dal fornitore o da un altro operatore intervenuta a monte nella catena di fornitura¹⁰. In altri termini, quindi, an-

che il soggetto cessionario non partecipe della frode IVA può beneficiare della detrazione dell'IVA assolta, tuttavia tale diritto alla detrazione viene negato se e solo se l'Amministrazione finanziaria dimostra che il cessionario era nelle condizioni, usando la diligenza esigibile, tenuto conto della prassi degli affari, di rendersi conto della provenienza del bene da una catena dove l'IVA era stata evasa (o sarebbe stata evasa).

Occorre quindi chiedersi innanzitutto quale sia il livello di diligenza richiesto in capo al cessionario la verifica delle operazioni "a monte". Secondo la Corte di Giustizia UE, il cessionario è tenuto a fare ciò che è *ragionevole e proporzionato* per assicurarsi della correttezza del fornitore; in altri termini, l'Amministrazione finanziaria deve esigere dal cessionario non che questi ponga in essere tutti i controlli possibili, ma solamente quelli normalmente utilizzati e utilizzabili nella prassi commerciale (Marcheselli, 2013), ovverosia, ad esempio, l'effettuazione di visite presso la Camera di Commercio, le ricerche sul fornitore effettuate *on line*, etc. Di conseguenza, se in base a tali elementi acquisiti dal cessionario non risultano anomalie, si può ragionevolmente ritenere che al cessionario non possa essere negata la detrazione nel caso in cui il fornitore sia partecipe di una frode carosello, in quanto per beneficiare della detrazione dell'IVA al cessionario non può che richiedersi unicamente la normale diligenza applicabile ai rapporti commerciali, e non certo di sostituirsi all'Amministrazione finanziaria nell'accertamento della posizione fiscale del fornitore.

Dal punto di vista pratico operativo, se si esaminano gli elementi addotti dall'Amministrazione finanziaria per negare la diligenza del contribuente, pur in una casistica evidentemente molto vasta è possibile suddividere tali "indici di anomalia" in tre macro-categorie: il prezzo ribassato rispetto al mercato, le anomalie relative alla soggettività del fornitore, e le anomalie relative alle modalità di effettuazione delle operazioni¹¹.

Un primo indice di anomalia si ha nel caso in cui il prezzo significativamente inferiore al normale prezzo di mercato, in quanto tale circostanza può essere indizio di un'operazione quantomeno inusuale. Pur non essendo ovviamente possibile stabilire un rapporto causa-effetto tra prezzi ribassati e frodi IVA (si pensi, ad esempio, al ribasso dei prezzi dovuto ad una strategia commerciale aggressiva, ad esigenze di liquidità del fornitore etc., ovverosia a tutti i casi in cui l'operazione si configura semplicemente come un "buon affare" per il cessionario), tale anomalia può essere particolarmente rilevante, ed indicativa di possibili irregolarità ai fini dell'IVA, in alcuni settori quali il commercio di autoveicoli e motoveicoli, in cui vi è un elevato valore unitario dei beni.

Una seconda categoria di indici di anomalia riguardano invece quelle relative alla soggettività del fornitore, e si hanno ad esempio nel caso in cui i dati della Camera di commercio non collimano, oppure quando una ricerca *online* mostra elementi di sospetto o financo non mostra molti elementi. Ad esempio, se dalle risultanze della Camera di Commercio la società che si propone come fornitore risulta di recente costituzione, non dispone di sito internet ed i suoi amministratori, in base ad una ricerca sui principali motori di ricerca, non risultano aver

precedenti esperienze lavorative nel settore, potrebbe essere consigliabile effettuare un approfondimento circa tale potenziale fornitore.

Una terza categoria è relativa invece agli indici di anomalia che possono verificarsi in relazione ai rapporti commerciali con il fornitore, quali le consegne, le negoziazioni, le modalità di pagamento etc., in quanto rapporti commerciali particolarmente difforni dalle normali prassi del settore possono senz'altro essere elementi indicativi (anche se, si ribadisce, non conclusivi) di operazioni suscettibili di rientrare in un meccanismo di frode carosello.

4 L'utilizzo nel procedimento e nel processo tributario delle risultanze ottenute nel processo penale

Nella prassi operativa è frequente (se non fisiologico) che, a seguito di una contestazione dell'Amministrazione finanziaria al contribuente circa l'inesistenza, soggettiva od oggettiva, di una operazione, traggano avviso due distinti procedimenti: uno penale, per i reati di emissione di fatture, oppure di dichiarazione fraudolenta mediante utilizzo di fatture per operazioni inesistenti, ed uno tributario.

E' noto che, a seguito dell'entrata in vigore del D. Lgs. n. 74/2000, è escluso qualsiasi rapporto di pregiudizialità tra i due procedimenti, i quali sono ora del tutto autonomi¹²: il legislatore infatti, soprattutto con gli articoli 20 e 25 del Decreto citato, ha inteso limitare il più possibile le interferenze tra processo tributario e processo penale prevedendo l'instaurazione di due procedure parallele sugli stessi fatti, anche sacrificando il principio di economia processuale e correndo il rischio di giudicati contrastanti (Ciarcia, 2013).

E' tuttavia innegabile che il giudicato penale, pur non avendo efficacia vincolante nel processo tributario, costituisce comunque un elemento valutabile dal giudice di merito nell'esercizio dei suoi poteri di controllo e di esame del materiale indiziario probatorio (Ciarcia, 2013). Preliminarmente, occorre tuttavia tener presente due differenze nei regimi probatori tra il processo penale e quello tributario, ovverosia

- (i) le limitazioni ai mezzi di prova stabilite per il processo tributario dall'articolo 7, comma 4, del D. Lgs. 546/1992: infatti, nel processo tributario non sono ammessi il giuramento né la prova testimoniale;
- (ii) il fatto che nel processo tributario costituiscano prove anche presunzioni semplici prive dei requisiti prescritti ai fini della formazione di tale prova nel processo penale (e nel processo civile).

Ciò consente di affermare che la rilevanza del giudicato penale nel processo tributario debba essere valutata caso per caso, sulla base dei mezzi di prova che hanno condotto alla sentenza del giudice penale. Difatti, è vero che il giudice tributario, in virtù del "doppio binario" tra processo penale e processo tributario, non potrà mai estendere automaticamente gli effetti di una sentenza penale nell'ambito tributario; tuttavia, se la sentenza del giudice penale è fondata su mezzi di prova ammessi nel processo tributario, quali le prove documentali, non

si vedrebbe la ragione per negare efficacia al giudicato penale (dovendosi semmai chiedere se tale efficacia sia vincolante per il giudice tributario o meno). Ciò è del resto conforme all'orientamento della Corte di Cassazione (sentenze n. 10269 del 2005 e n. 12577 del 2000), che esclude autorità di cosa giudicata alla sentenza penale ma al contempo afferma che il giudice tributario può legittimamente fondare il proprio convincimento sulle prove acquisite nel giudizio penale, purché proceda ad una propria ed autonoma valutazione degli elementi probatori.

Le considerazioni appena svolte appaiono di sensibile importanza anche per la problematica che si esamina in questa sede, ovvero sia la dimostrazione da parte del contribuente (e, tipicamente, del cessionario o del soggetto che riceve la prestazione di servizi) circa l'esistenza delle operazioni contestate dall'Amministrazione finanziaria.

Sembra infatti fuor di dubbio che l'inapplicabilità della prova testimoniale al processo tributario costituisca un limite rilevante in quei casi in cui si deve accertare, in sostanza, una situazione di fatto quale l'effettuazione o meno di una operazione¹³. Infatti, tale divieto, ritenuto peraltro anacronistico da autorevole dottrina (Cipolla, 2009), non osta al fatto che le dichiarazioni testimoniali (quali i verbali di testimonianze acquisite in altri processi) o paratestimoniali (quali le dichiarazioni raccolte dagli uffici tributari e dalla Guardia di Finanza sia in veste di polizia tributaria che di polizia giudiziaria) siano utilizzabili (Cipolla, 2009)

- (a) dall'Amministrazione finanziaria in funzione propulsiva ed orientativa delle indagini fiscali (e solo insieme ad altri e ben più qualificati elementi possono legittimare l'emissione dell'avviso di accertamento)¹⁴, e
- (b) dal contribuente, in base al principio costituzionale di "parità delle armi" processuali, il quale può avvalersi di dichiarazioni scritte di terzi (a condizione, chiaramente, che sia possibile identificare il soggetto che ha reso la dichiarazione).

Del resto, nonostante il divieto di prova testimoniale, è noto come nell'accertamento e nel processo tributario sia frequente l'impiego delle dichiarazioni rese da terzi, e ciò nonostante non siano espressamente regolate dalla legge né con riferimento alla loro tipologia, né con riferimento alle loro modalità di acquisizione (Cipolla, 2005). Pertanto, le dichiarazioni di terzi (sia quelle raccolte dall'Amministrazione finanziaria, sia quelle raccolte direttamente dal contribuente) non possono che qualificarsi come "prove atipiche", in ragione del fatto che, pur avendo un contenuto paratestimoniale, sono raccolte con modalità del tutto diverse dalla testimonianza giudiziale (Cipolla, 2005).

Pertanto, specie nei casi in cui si discute sull'esistenza o inesistenza soggettiva di un'operazione, sia l'Amministrazione finanziaria sia il contribuente potranno utilizzare le dichiarazioni testimoniali rese nel processo penale, ma esse non saranno nessun caso un mezzo di prova dell'operazione¹⁵, bensì costituiscono una c.d. prova atipica, ed in quanto sono ammissibili ma inidonee a costituire piena prova in ragione della loro stessa natura: a seconda dei casi, la loro efficacia dimostrativa sarà non quella delle prove propriamente dette, ma quella degli indizi o degli argomenti di prova, e la loro valutazione è rimessa al prudente ap-

prezzamento del giudice tributario (e, in un momento logicamente e cronologicamente anteriore, dell'Amministrazione finanziaria) (Cipolla, 2009).

4.1. (Segue) L'utilizzabilità ai fini tributari delle intercettazioni acquisite nel procedimento penale

Sullo stesso piano delle dichiarazioni rese da terzi possono collocarsi anche le intercettazioni telefoniche e ambientali, le quali rappresentano una importante fonte di prova nel procedimento penale.

In particolare, tale mezzo di prova è particolarmente rilevante in quanto "*una comunicazione intercettata può ad esempio far emergere in maniera palese l'inesistenza o la reale natura di una certa operazione, la riconducibilità effettiva di una certa attività ovvero di un complesso di operazioni ad un soggetto piuttosto che al formale intestatario o gestore, la piena consapevolezza da parte di taluno dell'illeceità di certe transazioni altrimenti non comprovabile, la reale localizzazione di una determinata attività rispetto a quella dichiarata e moltissime altre circostanze di evidente impatto fiscale*" (Screpanti, 2006). Tuttavia, l'utilizzo delle intercettazioni disposte in sede penale ai fini tributari potrebbe incontrare un limite aggiuntivo rispetto alle dichiarazioni di terzi: difatti, l'art. 270, comma 1, del codice di procedura penale prevede che i risultati delle intercettazioni non possono essere utilizzati in procedimenti diversi da quelli nei quali sono stati disposti.

Ci si chiede quindi se la limitazione posta dalla norma appena citata comporti l'inutilizzabilità nel processo tributario delle intercettazioni. Tale problema non è peraltro l'unico: infatti, come già esposto *retro* la tutela del contribuente non può prescindere dal rispetto del principio di parità delle posizioni processuali, e se tale parità, in sede penale, è garantita dal contraddittorio dibattimentale, nel processo tributario tale possibilità è preclusa, stante il divieto di prova testimoniale.

Relativamente al primo dei due problemi, ovverosia il fatto che l'art. 270 c.p.p. precluda l'utilizzabilità delle intercettazioni ai fini del procedimento e del processo tributario, secondo la Corte di Cassazione l'articolo in parola, in quanto norma processuale, non sarebbe applicabile nel processo tributario (che è retto da regole strutturalmente diverse da quello penale) e pertanto non sussisterebbe alcun divieto di utilizzo dei risultati delle intercettazioni all'interno del procedimento tributario¹⁶.

Ciò nonostante, la questione non sembra essere definitivamente risolta. Anzi, è meritevole di considerazione un orientamento dottrinale che, al contrario, tenderebbe ad affermare l'applicabilità dell'art. 270 c.p.p. anche al processo tributario, in ragione della sua *ratio* e in virtù di considerazioni di ordine sistematico. Difatti, in base all'articolo in parola le intercettazioni sono utilizzabili anche in altri procedimenti, ma solamente ove si proceda per fattispecie criminose che prevedono l'arresto in flagranza. Ciò implicherebbe quindi che l'utilizzo delle risultanze delle intercettazioni è limitato ai reati più gravi, e conseguentemente il

legislatore ne esclude la loro utilizzabilità in procedimenti di minor rilievo. Perciò, *a fortiori*, le intercettazioni non dovrebbero assumere alcun rilievo probatorio al di fuori dei processi penali che, per definizione, preservano interessi ancora meno rilevanti che non quelli per i delitti meno gravi (Marcheselli, 2009; Armella-Di Luciano, 2013). In questa prospettiva, pertanto, l'art. 270 c.p.p. “è la norma che disciplina quali interessi pubblici possano prevalere sulla riservatezza, indicando il punto di equilibrio nei soli procedimenti volti all'accertamento dei più gravi reati” (Marcheselli, 2009).

Con riferimento al secondo problema, occorre stabilire se l'acquisizione incondizionata e completa delle risultanze derivanti dal procedimento penale e selezionate dagli accertatori sia in via di principio suscettibile di violare il diritto di difesa del contribuente ed il principio del giusto processo, fondato sulla parità delle parti. E' necessario infatti considerare che nel processo tributario, in quanto prettamente documentale, non potrebbero trovare ingresso le garanzie previste dall'ordinamento penale, laddove in quest'ultimo le dichiarazioni assunte da terzi in fase di indagine sono comunque sempre sottoposte in sede dibattimentale al vaglio di attendibilità da parte del giudice, e le risultanze delle intercettazioni di comunicazioni sono valutate, nel contraddittorio dibattimentale, insieme agli altri elementi raccolti (Armella-Di Luciano, 2013). Difatti, non potendo evidentemente il giudice tributario escutare i testimoni, diviene particolarmente problematico valutare l'attendibilità delle intercettazioni raccolte in sede penale, con un sensibile rischio che queste vengano utilizzate non quale mero indizio idoneo (non *ex se*) a formare il libero convincimento del giudice, bensì con un valore probatorio *de facto* ben maggiore, con il rischio quindi di ledere i diritti del contribuente (Armella-Di Luciano, 2013).

Infine, occorre ricordare che (sempre per il citato principio di “parità delle armi” processuali) le intercettazioni telefoniche e ambientali potranno anche essere utilizzate dal contribuente, il quale potrà avvalersi delle risultanze di intercettazioni suscettibili di mettere in dubbio la fondatezza della pretesa dell'Amministrazione finanziaria, e chiederne pertanto l'acquisizione anche nel processo tributario (Fontana, 2010).

5 Conclusioni

Nel presente contributo si è tentato di illustrare la nozione di operazioni inesistenti nonché, senza pretesa di completezza, alcune tra le principali problematiche relative alla dimostrazione dell'esistenza (o dell'inesistenza, o simulazione) delle operazioni, per esaminare in un secondo momento quali siano i mezzi di prova che, in relazione a tali operazioni, dal processo penale possano fare ingresso nel procedimento e nel processo tributario.

Da quanto sopra rappresentato sembra possibile osservare che, nonostante il sistema tutt'ora vigente preveda una reciproca autonomia tra vicende accertative e processuali tributarie e procedimento penale, tali procedimenti appaiono,

con riferimento alla circolazione del materiale istruttorio, molto più connessi in realtà rispetto a quanto ci si potrebbe attendere (Di Siena, 2014).

Con riferimento al tema della dimostrazione dell'esistenza o meno delle operazioni, tale "ibridazione" tra i due procedimenti appare in via di principio positiva, in quanto, a prescindere dal differente rilievo probatorio, sarebbe difficilmente giustificabile, in un'ottica di sistema, che l'accertamento di una situazione di fatto (peraltro particolarmente difficile da dimostrare con le sole evidenze documentali, tipiche del processo tributario) venga condotto sulla base di elementi del tutto differenti nei due procedimenti. In prospettiva futura, tuttavia, sarà di particolare rilevanza la tutela del contribuente con riferimento all'utilizzo da parte dell'Amministrazione finanziaria di prove particolarmente "sensibili" quali le intercettazioni telefoniche e ambientali operate in sede di indagine penale. Ciò a maggior ragione se si considera che l'*information technology* mette oggi a disposizione degli organi inquirenti la possibilità di accedere ad un gran numero di dati; si pensi, ad esempio, alla intercettazione delle email e dei sistemi di messaggistica. Sembra quindi porsi sempre di più, con riferimento a tali prove atipiche, una esigenza di tutela del contribuente, sia perché questi elementi sono difficilmente acquisibili *motu proprio* dal contribuente (ed anzi, è ragionevole supporre che essi siano per lo più raccolti dagli organi inquirenti), sia perché gli stessi sono difficilmente confutabili stante il divieto di prova testimoniale. Pertanto, se ai dati ottenuti tramite intercettazioni o pratiche analoghe venisse di fatto attribuito un "peso" eccessivo da parte del giudice tributario, vi sarebbe il rischio concreto di una compressione del diritto di difesa del contribuente e di una deroga, di fatto, al principio della "parità delle armi" processuali.

Endnotes

¹ Ci si riferisce, in particolare, al D. Lgs. 24 settembre 2015, n. 158.

² Quest'ultimo caso può verificarsi anche in relazione a beni che provengono da una o più operazioni di c.d. "frode carosello", come si vedrà nei successivi paragrafi, per cui il contribuente è tenuto, in taluni casi, a porre in essere alcune attività per verificare la correttezza delle operazioni "a monte" e poter fondatamente invocare la sua buona fede.

³ Per semplicità espositiva, nel prosieguo si farà unicamente riferimento alle fatture, ciò nonostante le considerazioni esposte valgono anche per gli "altri documenti aventi rilievo probatorio analogo in base alle norme tributarie".

⁴ La norma appena citata prevede infatti che "*fuori dai casi previsti dall'articolo 2 [ovverosia, appunto, i casi di dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni inesistenti], è punito con la reclusione da un anno e sei mesi a sei anni chiunque, al fine di evadere le imposte sui redditi o sul valore aggiunto, compiendo operazioni simulate oggettivamente o soggettivamente ovvero avvalendosi di documenti falsi o di altri mezzi fraudolenti idonei ad ostacolare l'accertamento e ad indurre in errore l'amministrazione finanziaria, indica in una delle dichiarazioni relative a dette imposte elementi attivi per un ammontare inferiore a quello effettivo od elementi passivi fittizi o crediti e ritenute fittizi [...]*".

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- ⁵ In tal senso deporrebbe peraltro anche il fatto che la definizione di operazioni inesistenti riguardi, appunto, le operazioni “non realmente effettuate”, ove l’avverbio “realmente” potrebbe avere la funzione di confinare tale fattispecie all’inesistenza materiale delle operazioni.
- ⁶ Ciò è confermato anche dalla Corte di Cassazione nella sentenza 21 agosto 2007, n. 17799, laddove la Suprema Corte afferma in sintesi che la tesi dell’onere del contribuente di dimostrare l’esistenza dell’operazione sarebbe “palesamente errata”, e “assurda” sarebbe altresì l’affermazione secondo cui tutte le fatture si presumono false salvo prova contraria.
- ⁷ Tale principio è peraltro riconducibile all’articolo 24 della Costituzione, che connette al diritto di azione in giudizio il divieto di interpretare la legge in modo da renderne impossibile o troppo difficile l’esercizio, come ben si evince dalle sentenze Corte Costituzionale 21 aprile 2000 n. 114, e Cass. Sez. Un., 10 gennaio 2006, n. 41.
- ⁸ Corte di Cassazione, sentenza 4 marzo 2016, n. 4335.
- ⁹ La qualificazione delle frodi carosello come operazioni soggettivamente inesistenti ricorre con notevole frequenza negli arresti della Corte di cassazione; contra Marcheselli A. (2013), secondo cui “*tale soluzione appare largamente insoddisfacente. Quantomeno nelle formulazioni generalizzanti e, ad avviso di chi scrive, non sempre compiutamente argomentate che è dato riscontrare in alcune pronunce*”.
- ¹⁰ Si vedano al riguardo le sentenze *Kittel* (causa C-439/04) e *Recolta Recycling* (causa C-440/04). Per un approfondito esame della giurisprudenza della Corte di Giustizia in materia si rinvia, *ex multis*, a Cerioni F. (2014), La prova della frode fiscale relativa all’imposta sul valore aggiunto e della “mala fede” del contribuente nella giurisprudenza europea e nazionale.
- ¹¹ Marcheselli A. (2013) suddivide tali indici in due categorie, ovverosia le anomalie relative al prezzo e le anomalie relative al fornitore, includendo in quest’ultima anche le anomalie relative alle trattative, alla consegna etc. che invece nel presente contributo costituiscono una terza categoria autonoma.
- ¹² E’ opportuno rilevare come il sistema anteriore al D.l. n. 74/2000 fosse invece basato sulla pregiudizialità nel diritto processuale penale-tributario. Per un approfondimento si veda De Mita E. (2006), e il recente contributo di Tabet G. (2015)
- ¹³ Difatti, come rileva Cipolla G.M. (2009) “*In non pochi casi, ancora, la prova testimoniale si presenta quale unico mezzo idoneo a ricostruire gli eventi del passato: la simulazione di un contratto, la non abitualità dell’esercizio di un’attività economica, il sostenimento delle spese di mantenimento dei beni assunti a fatti noti dal redditometro, l’inerenza o meno di un bene all’attività economica, sono altrettanti enunciati fattuali non sempre dimostrabili attraverso altri mezzi di prova*”.
- ¹⁴ In tal senso si è espressa la Corte Costituzionale che, con la decisione n. 18 del 12 gennaio 2000, ha ritenuto non fondata la questione di legittimità costituzionale circa il divieto della prova testimoniale nel processo tributario, ma ha allo stesso tempo affermato che il divieto di prova testimoniale non comporta di per sé l’inutilizzabilità, in sede processuale, delle dichiarazioni di terzi eventualmente raccolte dall’Amministrazione finanziaria nella fase procedimentale. Ciò poiché tali dichiarazioni hanno comunque il valore probatorio degli elementi indiziari, e pertanto possono concorrere a formare il convincimento del giudice ma non sono idonei, da soli, a costituire il fondamento della decisione.
- ¹⁵ Esse infatti nascono, come osserva Cipolla G.M. (2005), con un’efficacia probatoria già depotenziata rispetto alla prova testimoniale, in quanto, diversamente dalla testimonianza, sono assunte senza il controllo giudiziale, senza il contraddittorio delle parti e senza la fissazione di appositi capitoli; a ciò l’Autore aggiunge inoltre il fatto che, quando tali dichiarazioni sono rese a funzionari dell’Agenzia delle Entrate o sono raccolte dalla Guardia di Finanza, specie quando agisce in veste di polizia giudiziaria, non si può non considerare lo stato di pressione psicologica in cui il dichiarante si viene a trovare.

¹⁶ Tale orientamento è stato espresso dalla Suprema Corte nelle sentenze 7 febbraio 2013, n. 2916 e 23 febbraio 2010, n. 4306.

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Costi e proventi connessi a reati

Author

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- *Alessandro Giovannini, Ordinario di diritto tributario, Università di Siena*
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The paper analyze the regime of costs and proceeds deriving from crimes. In particular, the author firstly examine the regime of such costs in light of the Constitution and tax law, and in the second part of the paper the new legislation on costs and proceeds deriving from criminal activities is analysed, focusing on several problems that may affect the application of such legislation.

Keywords: costs, proceeds, crime law, crime tax law

JEL Classification: K1, K34

Parte I I costi di reato secondo la Costituzione e il diritto tributario

1 I costi di reato e il loro regime reddituale: premessa e riferimenti normativi

È mia convinzione che i costi di reato non possano essere considerati alla stregua di elementi giuridici rilevanti per la determinazione della ricchezza da assoggettare a prelievo. Ed è mia convinzione che questa conclusione si imponga per la forza dei principi posti a fondamento dell'ordinamento.

A questi si conformava il comma 4-*bis* dell'art. 14 della legge 24 dicembre 1993, n. 537, introdotto dall'art. 2 della legge 27 dicembre 2002, n. 289, che disponeva la non deducibilità integrale di siffatti costi¹.

L'art. 8, comma 1, del d.l. 2 marzo 2012, n. 16, convertito dalla legge 26 aprile 2012, n. 44, invece, modificando quella originaria disciplina, ora dispone che “non sono ammessi in deduzione i costi e le spese dei beni o delle prestazioni di servizio direttamente utilizzati per il compimento di atti o attività qualificabili come delitto non colposo per il quale il pubblico ministero abbia esercitato l'azione penale”.

Il comma 2 dell'art. 8, appena richiamato, stabilisce, poi, che “ai fini dell'accertamento delle imposte sui redditi non concorrono alla formazione del

reddito oggetto di rettifica i componenti positivi direttamente afferenti a spese o altri componenti negativi relativi a beni o servizi non effettivamente scambiati o prestati, entro i limiti dell'ammontare non ammesso in deduzione delle predette spese o altri componenti negativi. In tal caso si applica la sanzione amministrativa dal 25 al 50 per cento dell'ammontare delle spese o altri componenti negativi relativi a beni o servizi non effettivamente scambiati o prestati indicati nella dichiarazione dei redditi”.

Queste modifiche sono state giustificate - si legge nella relazione governativa di accompagnamento al decreto legge e nella circolare esplicativa dell'Agenzia delle entrate 3 agosto 2012, n. 32/E - con la necessità di conformare il sistema al principio costituzionale di capacità contributiva².

2 I due corni del dilemma tra Azzecagarbugli e don Rodrigo: la nozione di costo per il diritto tributario e il titolo giuridico del prelievo sui frutti del reato

Io credo che le disposizioni del d.l. n. 16 del 2012 arrechino, in realtà, un preoccupante *vulnus* ai principi costituzionali di ragionevolezza, coerenza e non contraddizione, al principio di solidarietà e ai criteri e alla funzione di riparto del carico impositivo, che danno corpo al principio di capacità contributiva contemplato nell'art. 53 Cost. Che fondino, insomma, un sistema aporetico, contraddittorio e antinomico.

Opinione, la mia, dunque, radicalmente diversa dalla tesi solennemente proclamata in sede legislativa, che richiama, come ho appena ricordato, proprio l'art. 53 per giustificare la doppia modifica normativa.

Non so dire se queste contorte e vischiose disposizioni siano lo specchio della confusione concettuale che da tempo alberga nella legislazione tributaria. Sono memore, però, di un insegnamento: che nella città di Azzecagarbugli viveva don Rodrigo e che l'uno, leguleio di miserabile doppiezza, era commensale dell'altro, dal ghigno malvagio. E di questo v'è certezza, stando al Manzoni, ovviamente.

Ebbene, di fronte a questo confuso scenario normativo vi è una sola via maestra da seguire: rivalutare la trama unitaria intessuta dalla Costituzione e conformare ad essa l'interpretazione delle singole disposizioni, sia di rango costituzionale, sia di fonte primaria.

Se si condivide questa scelta metodologica, la ricerca deve anzitutto soddisfare una doppia, simmetrica esigenza: individuare la nozione di costo accolta dal diritto tributario e poi, privilegiando un'interpretazione costituzionalmente orientata dell'art. 14, comma 4, delle legge n. 537 del 1993 dedicato alla tassazione dei frutti del reato, la reale natura e l'effettivo titolo giuridico di questa forma di prelievo.

Solo dopo aver posato questi mattoni e dato all'edificio del ragionamento una qualche stabilità, la ricerca si potrà soffermare - come avverrà nella Parte II - sulle disposizioni introdotte dal d.l. n. 16, le quali, come ho accennato,

presentano numerosi profili critici, che è doveroso portare allo scoperto ed illuminare col faro dei principi.

3 Il principio costituzionale di solidarietà e il criterio di riparto del carico impositivo come espressione del vincolo redistributivo: il fondamento giuridico della indeducibilità dei costi di reato

Muovo dal primo corno del dilemma, ossia dalla nozione di costo. In altri studi spero di essere riuscito a dimostrare come un fatto idoneo a manifestare forza economica nella realtà pregiuridica possa non costituire oggetto di identica valutazione sul piano del diritto. Non tutti i fenomeni astrattamente sintomatici di quella forza possono essere elevati a fattispecie giuridica e la circostanza che essi emergano sul terreno economico non è sufficiente affinché la legge li recepisca per come originariamente si manifestano o che li recepisca assegnando loro una connotazione positiva. La rilevanza di quegli elementi deve essere sorvegliata e confrontata col ventaglio dei principi che innervano l'ordinamento e solo quelli che si conformano a questi possono entrare nel procedimento di astrazione della realtà legale e formare oggetto di qualificazione positiva³.

Ho già scritto anche che la divaricazione tra qualificazione economica e qualificazione giuridica non è superabile invocando le norme su competenza e inerenza, secondo il dettato dell'art. 109 del testo unico delle imposte sui redditi: questi criteri intervengono soltanto a posteriori, dopo cioè che i singoli componenti economici hanno superato il vaglio di conformità e per questa via sono stati elevati a fattispecie giuridica e in particolare a fattispecie giuridica suscettibile di produrre effetti favorevoli per il contribuente.

Ebbene, mi pare innegabile che parlare di costo in diritto tributario significhi invocare una categoria direttamente vincolante la determinazione dell'obbligazione d'imposta: riconoscere o negare natura reddituale ad un elemento economico si riverbera, per forza di cose, sulla dimensione quantitativa del presupposto impositivo e sull'ammontare del debito d'imposta correlato.

Assegnare rilevanza reddituale ad una spesa o, al contrario, negarle siffatta natura, significa, detto in maniera semplicissima, diminuire o aumentare l'imponibile e, per converso, imporre al suo possessore una minore o maggiore contribuzione. Attribuire spessore giuridico ad un elemento economico, pertanto, è operazione che finisce per trasferire sulla collettività l'onere corrispondente a quell'elemento in ragione della correlata riduzione del debito d'imposta; al contrario, non riconoscerlo nella sua dimensione reddituale, non grava la collettività del correlato onere perché non concorre alla determinazione dell'imponibile e dell'imposta.

Se il discorso si arrestasse qui, sembreremmo trovarci di fronte a strade ricostruttive antitetiche, sguarniti, per di più, di una sicura bussola di

orientamento. Approfondendo l'analisi, invece, questa antitesi e questa assenza si dimostrano solo apparenti.

Sono il principio di solidarietà contemplato nell'art. 2 della Costituzione e la dimensione della legalità dell'ordine costituito - iscritta, questa dimensione, in tutte le norme fondamentali della Carta e riassunta nell'art. 54, a conclusione della sua prima parte - che consentono di superare quell'apparente contrasto e di colmare quell'apparente assenza.

Il principio di solidarietà è parametro interpretativo del concorso obbligatorio alle spese pubbliche e fondamento dei principi redistributivi e di riparto dell'imposizione e, proprio per questo, consente, da un lato, di individuare il beneficiario finale di una parte di quella ricchezza nello Stato, inteso come Stato-persona e Stato-collettività; da un altro, di guardare al tributo come al principale strumento attuativo del riparto ossia, per riprendere l'appropriata espressione utilizzata da L.V. Berliri, di attribuire alla legge d'imposta la "tipica funzione - ch'è funzione giuridica - di *legge di ripartizione*"⁴.

Riparto che non può che essere commisurato alla ricchezza espressa dalla somma algebrica dei suoi elementi positivi e negativi, che unitamente la costituiscono e la misurano secondo le regole del diritto. Ma quando gli elementi negativi sono timbrati dal marchio penale, la loro espunzione dalla dimensione reddituale è la naturale conseguenza del principio solidaristico, al quale non può che riferirsi quello di capacità contributiva.

Se non fosse così, invero, otterremmo un effetto tanto ingiusto quanto irrazionale: il ribaltamento del costo del reato sulle spalle della collettività.

Sebbene strumentale, quel costo, ad una attività espunta dall'ordine costituito e preordinata scientemente ad ostacolare ed anzi a contraddire il progresso materiale e spirituale della società - al quale soltanto invece, ai sensi dell'art 4 della Costituzione, devono orientarsi funzioni e attività dei privati - la sua deduzione produrrebbe un effetto, per un verso, favorevole al reo, per un altro e specularmente, sfavorevole alla collettività, venendo così vulnerati criteri e funzione di riparto dei carichi impositivi.

Provo ad esporre questi concetti in termini diversi, nella speranza di chiarire definitivamente il mio pensiero. Vi è una connotazione primaria e ineliminabile che, in diritto, deve accompagnare il costo: esso non può mai realizzare interessi qualificati negativamente dall'ordinamento, non può essere, cioè, esso stesso il mezzo o lo strumento di un reato, mentre deve sempre soddisfare interessi che la collettività assume positivamente come propri e che l'ordinamento riconosce come tali.

Solo questo tratto distintivo, radicato nella dimensione della legalità, legittima la riconduzione del costo tra i componenti reddituali degni di apprezzamento, perché solo questa connotazione - lo ribadisco - può giustificare il ribaltamento sui consociati del corrispondente onere, equivalente al minor carico impositivo determinato, appunto, dalla deduzione del costo⁵.

Questo il cuore dell'intero discorso: attribuire rilievo giuridico ad un elemento economico che è "servito" o "destinato" a commettere un reato - secondo le espressioni utilizzate dall'art. 240 del codice penale - si trasforma in

un'operazione di trasferimento sulla collettività del relativo valore. Sarebbe questa, insomma, a restarne "incisa" e ogni consociato finirebbe per sopportarne una frazione, seppur millesimale. Il che, francamente, ripugna alla coscienza, ancor prima che all'ordinamento⁶.

4 Costi illeciti e attività lecita: la struttura dei reati e il loro elemento economico

A questa ricostruzione si potrebbe opporre, d'acchito, un'obiezione. Si potrebbe dire - per usare un linguaggio semplificato - che non tutti i costi sono uguali e tentare di sostenere che, per questo motivo, quelli che s'inseriscono in un'attività lecita possono essere dedotti. Essi perderebbero la loro originaria antiggiuridicità in quanto elementi strumentali alla produzione di un reddito di per sé lecito, giacché riconducibile ad una fonte lecita: l'attività, appunto⁷.

Questa prospettiva è dotata di indubbia forza suggestiva, ma si rivela errata se tra costo e reato vi è immedesimazione, ossia se la fattispecie penale assume ad elemento costitutivo un componente economico o finanziario, traducibile, appunto, in "costo", oppure se questo è legato al reato da un nesso di causalità o viene in considerazione come antecedente materiale necessario alla sua realizzazione. In tutte queste ipotesi la connotazione lecita dell'attività è irrilevante per "trasformare" il costo di reato in elemento di reddito apprezzato positivamente dalla legge.

Ad esempio, nei delitti di corruzione disciplinati dagli artt. 318 e 319, cod. pen., il denaro erogato al pubblico ufficiale è strumento commissivo e fatto materiale marchiato da antiggiuridicità. Oppure, nel delitto di ricettazione previsto dall'art. 648, il denaro rappresenta il "corrispettivo" per l'acquisto della *res* furtiva e quindi è di per sé parte integrante del fatto punito. E lo stesso si deve dire per numerosissime altre fattispecie, da quella del reato d'usura (art. 644) a quella del reato di truffa (art. 640), a quella di dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni oggettivamente inesistenti o mediate altri artifici, in relazione agli elementi passivi fittizi (artt. 2 e 3, d.lgs. n. 74 del 2000).

Qui la connotazione di liceità dell'attività non può reagire sui delitti, così da dequalificarli a componenti strumentali allo svolgimento dell'attività medesima, e non può, conseguentemente, trasformare gli elementi economico-finanziari costitutivi della fattispecie penale in costi fiscalmente rilevanti. Non è soltanto una questione di rispetto della struttura dei reati ad imporre questa soluzione, ma, in termini assai più profondi, è il rispetto che si deve ai principi costituzionali, come ho fin qui cercato di dimostrare.

Per i reati di contrabbando il discorso, nella sostanza, non cambia. In alcuni di essi, come quello relativo a tabacchi lavorati esteri, disciplinato dall'art. 291-*bis* del testo unico in materia doganale, l'acquisto è uno degli elementi costitutivi del reato. Per l'art. 301, poi, in tutti i casi di contrabbando è prevista la confisca come misura obbligatoria, vuoi delle cose che servirono o furono destinate a

commettere il reato e delle cose che ne sono l'oggetto, vuoi del prodotto o del profitto. Ciò dimostra, per altra via, ossia per il tramite della disciplina delle misure avocative, come al costo collegato all'oggetto del reato non possa essere riconosciuta dignità di componente deducibile, riproducendo da quello l'antigiuridicità oggettiva.

L'ordine di concetti ora sposato può valere anche per le ipotesi nelle quali il costo, pur non coincidendo direttamente con un elemento della fattispecie, trova nel reato la sua causa o è ad esso legato da un nesso causale. Così, nel delitto di vendita di prodotti industriali con segni mendaci (art. 517) o in quello di fabbricazione e commercio di beni realizzati usurpando titoli di proprietà industriale (art. 517-ter), i costi collegati ai prodotti venduti e quelli riferibili alla loro fabbricazione si pongono come antecedenti materiali necessari alla realizzazione del reato.

Radicalmente diversi sono i casi, invece, nei quali tra costo e reato non vi è immedesimazione o diretta correlazione, e i casi nei quali solo indirettamente il costo di reato si inserisce nell'attività.

Così, nell'ipotesi di impiego "in nero" di personale straniero privo di permesso di soggiorno, il datore di lavoro è punito con la reclusione e con la multa; e nel caso di violazione delle disposizioni antinfortunistiche e in materia di sicurezza, è punito con arresto o ammenda.

Indipendentemente dalla disciplina introdotta dal d.l. n. 16, le fattispecie di reato ora richiamate non hanno un "costo" tra i propri elementi costitutivi, eppure ad esse si possono in qualche modo ricondurre quelli corrispondenti alle retribuzioni corrisposte ai lavoratori o agli oneri di sicurezza derivanti dalla normativa contro gli infortuni sul lavoro. Tali costi, però, oltre a non essere annoverabili, come detto, tra gli elementi costitutivi dei rispettivi reati, neppure rinvergono in questi la loro causa, trovandola piuttosto nella prestazione del lavoratore e nel rapporto di lavoro in quanto tale. Qui il costo origina non dal reato ma da un parallelo vincolo giuridico, in sé rilevante e protetto dagli artt. 36 e 38 della Costituzione, direttamente collegato all'attività d'impresa, la cui qualificazione lecita consente non tanto di far degradare il reato a fatto irrilevante per la determinazione del reddito, quanto di constatare che quel rapporto giuridico è strumento attuativo dell'attività stessa, non scalfito, in questa sua dimensione, dall'antigiuridicità dei comportamenti puniti, che ad esso, infatti, rimangono strutturalmente estranei.

Discorso simile si può fare per i costi collegati ad operazioni soggettivamente inesistenti, tipiche delle frodi c.d. carosello. Anche qui il costo non origina direttamente dal reato di "dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni inesistenti" di cui all'art. 2 del d.lgs. n. 74 del 2000, ma si collega ad un ordine di relazioni negoziali reali, ad operazioni esistenti, viziati in punto soggettivo⁸.

Questa impostazione può essere estesa anche ai c.d. costi "in nero" relativi a maggiori ricavi non dichiarati, integranti il reato di infedele dichiarazione ex art. 4, d.lgs. 10 marzo 2000, n. 74. Quei costi non vengono in considerazione come elementi costitutivi del reato, ma originano da rapporti da esso distinti, che come

tali, se strumentali ad attività lecita, possono acquisire rilievo e produrre componenti negativi apprezzabili fiscalmente, conformemente alle regole sulla tassazione del reddito d'impresa⁹.

Ebbene, tirando le fila del discorso, se reato e costo costituiscono fattispecie unitaria, la liceità dell'attività non può sovrapporsi alla qualificazione penale e far degradare i reati a meri fatti, riconducibili, appunto, all'attività come categoria di sintesi. Invece, se il costo non è elemento costitutivo o elemento intrinseco diretto della fattispecie penale o non è a questa avvinto da un nesso causale, ma discende da un diverso e separato ordine di relazioni giuridiche, l'attività si eleva a fattispecie la cui qualificazione positiva è in grado di ricomprendere quelle relazioni e rendere irrilevante la macchia penale dei fatti che le accompagnano, connotando i costi relativi come fiscalmente deducibili.

E a queste conclusioni, come ho cercato di dimostrare in altri lavori, si poteva ed anzi si doveva giungere in via interpretativa ancor prima della modifica introdotta dal comma 1 dell'art. 8 del d.l. n. 16 del 2012.

5 La nozione di costo per il diritto tributario

Le considerazioni fin qui svolte agevolano la soluzione del primo quesito posto all'inizio: che cos'è il costo per il diritto e in particolare per il diritto tributario e qual è la sua nozione.

È possibile, a questo punto, fornire la risposta: il costo è la manifestazione di valore misurata finanziariamente di un bene o servizio, sostenuto per il perseguimento di interessi connotati positivamente dall'ordinamento, funzionali ad un'attività d'impresa o di lavoro autonomo o ad altra attività, anche non in atto, lecita nell'oggetto e nel fine; interessi che trovano in siffatta attività causa e titolo giuridici esclusivi, ovvero che trovano in attività, atti o fatti estranei alla dimensione impositiva, ma ugualmente qualificati positivamente, causa e titolo concorrenti, come si deve dire per le spese relative a beni e servizi ad uso promiscuo.

6 Brevi cenni alla concezione antropologica ed a quella collettivistica del diritto di proprietà nella tassazione

Alle cose finora dette sarebbe forse possibile opporre una notazione critica, per così dire, di principio, della quale intendo farmi carico. Da esse sembrerebbe emergere una contraddizione tra due diverse dimensioni del prelievo: quella sociale o collettivistica e quella individuale. Si potrebbe affermare che il risultato al quale giunge la tesi proposta è la conseguenza di una scelta volta ad offrire prevalenza, sul piano della costruzione dei rapporti tra norme costituzionali, a quelle tese a tutelare gli interessi collettivi, a scapito di quelle poste a presidio dei diritti dell'individuo: si preferirebbe garantire la collettività piuttosto che la

proprietà privata, la quale, mediante il prelievo "maggiorato" dal costo non dedotto, verrebbe in qualche modo pregiudicata.

E' la stessa contrapposizione, nel nocciolo, che caratterizza gli studi di teoria generale tra diritti sociali e diritti liberali, come ricordato anche da Francisco Javier Ansuátegui Roig nelle belle e illuminanti pagine di un suo recente libriccino¹⁰. Contrapposizione, del resto, che "impasta" molti dei discorsi giuridici e anche molti dei discorsi che attengono al diritto tributario.

Nel nostro caso, però, il contrasto descritto sarebbe giuridicamente sbagliato per due ordini di motivi. Anzitutto, la dimensione individuale del diritto di proprietà, garantita dall'art. 42 Cost., va declinata nelle altre dimensioni che la Costituzione assegna a quel diritto ed in primo luogo nella dimensione sociale o collettivistica.

La concezione antropologica della proprietà come diritto supremo, che nella speculazione di John Locke affonda le sue radici più profonde, è infatti rifiutata dalla nostra Carta. E se qui potrebbe affacciarsi a sostegno della deducibilità dei costi di reato è solo perché si tenderebbe a parcellizzare, a frammentare la lettura della Costituzione, isolando gli artt. 42 e 53 dal contesto della tavola valoriale che la Costituzione stessa ci propone, compiendo, così, un errore interpretativo tanto grossolano quanto ideologicamente orientato.

7 L'equivoco persistente sulla reale natura del frutto economico del reato assoggettato a prelievo. Il tributo come strumento con finalità avocativa extra tributaria e l'art. 25, ultimo comma, come suo referente costituzionale

La contrapposizione in discussione è giuridicamente sbagliata, tuttavia, per un motivo più radicale, che ci porta, dritti dritti, al secondo ordine di problemi, indicato in apertura del lavoro, sul quale è essenziale soffermarsi: la reale natura e l'effettivo titolo giuridico del prelievo disposto dall'art. 14, comma 4, delle legge n. 537 del 1993

Per semplificare il ragionamento riprendo il discorso dalla concezione antropologica della proprietà. La protezione che questa tesi intenderebbe garantire alla ricchezza - seppure di fonte illecita - mediante la deduzione dei costi, affonda le radici nel fatto che la legge n. 537 qualifica quella ricchezza come reddito. Questo modo di concepire il reddito, però, è frutto di una "spirale" di fraintendimenti concettuali che è necessario spezzare definitivamente.

Quello che si vuole proteggere, in realtà, non è configurabile come reddito secondo i parametri costituzionali e neppure secondo quelli del testo unico contenuto nel d.P.R. n. 917 del 1986: se conseguito nell'esercizio di un'attività reato e dunque radicalmente illecita nell'oggetto e nello scopo, è e rimane, da qualunque prospettiva del diritto lo si voglia osservare, il prodotto, il prezzo o il profitto del reato stesso, giacche fuori dall'ordine costituito.

Questo profilo risulta chiarissimo e di immediata percezione in diritto civile¹¹. Dal punto di vista del diritto tributario il discorso sembra, almeno apparentemente, più complesso, ma è solo una aporia concettuale a renderlo percepibile in questi termini, giacché lo si infarcisce di considerazioni che nulla hanno a che fare col rigore del diritto e dei suoi principi.

La ricchezza proveniente da un'attività criminale è priva di titolo giuridico e pertanto non può divenire, per il rispetto che anche la tassazione deve alla dimensione della legalità, presupposto d'imposta¹². L'antigiuridicità dell'attività rompe il legame tra fonte e reddito disposto dagli artt. 1 e 6 del testo unico delle imposte sui redditi, legame che non può contraddire ed anzi deve per forza conformarsi al superiore principio di coerenza della qualificazione dei fatti e degli effetti giuridici, principio che trova radice e parametro, proprio, nella legalità¹³.

Insomma, gli artt. 2 e 53 collegano il dovere di concorrere alle spese pubbliche bensì ad una capacità contributiva segno di capacità economica, ma a condizione che quella capacità economica sia espressiva di una ricchezza prodotta da fonti qualificate positivamente, espressione anch'essa, cioè, della dimensione della legalità, pilastro di tutto l'ordinamento.

Qui riaffiora la differenza di prospettiva fra scienza economica e scienza giuridica. La prima considera la fonte in quanto produttiva di una ricchezza valutabile in sé e scorge in questa ricchezza un elemento passibile di tassazione indipendentemente da altre considerazioni; la seconda guarda o dovrebbe guardare alla fonte con ad un bene giuridico, il quale è tale perché si identifica od è sorretto da un titolo che gli conferisce tutela, un titolo giuridico, appunto.

L'esito è evidente: mentre per l'economia è reddito qualsiasi ricchezza esprima una capacità economica, indipendentemente dal titolo che la legittima, per il diritto è il titolo che, dando alla fonte dignità giuridica, costituisce dato essenziale anche per la qualificazione di quella capacità economica.

Non è vero, quindi, che l'art. 53 è indifferente alla dimensione della legalità: proprio perché specchio della solidarietà, esso non può che essere specchio anche di questa dimensione e dunque e per converso non può che espungere le attività reato, seppure produttive di ricchezza sul piano economico, dal presupposto del tributo.

A petto di attività timbrate penalmente, allora, parlare di tutela della proprietà o del loro frutto economico è privo di fondamento. Solo il titolo giuridico, infatti, rende legittima così la qualificazione della fonte come la qualificazione della ricchezza, e rende contestualmente legittima l'apprensione da parte dello Stato di una porzione di quella ricchezza sotto forma di imposta.

La conclusione in punto di qualificazione del prelievo disciplinato dall'art. 14 della legge del 1993, pertanto, non può che essere questa: in quanto esso cade su ricchezze prive di titolo, perché né esse, né la loro fonte possono essere qualificate alla stregua di bene giuridico¹⁴, la funzione che assolve è per forza diversa da quella delle prestazioni patrimoniali imposte ex art. 53. In altre parole, giacché con esso si pretende di colpire ricchezze prodotte nell'esercizio di attività espunte dalla dimensione della legalità e non espressive di libertà

costituzionalmente garantite *ex art. 41*, la funzione che si realizza, in realtà, è confiscatoria, seppure limitata ad una parte soltanto di quelle ricchezze.

Il referente costituzionale di questa funzione è non più il primo comma dell'art. 53, ma l'ultimo comma dell'art. 25, che sorregge e giustifica le misure patrimoniali avocative, sia di matrice penale, sia di stampo amministrativo.

Del resto, per superare questa conclusione sarebbe infruttuoso invocare il fatto che il comma 4 dell'art. 14 condiziona la tassazione alla mancata adozione dei provvedimenti di sequestro o confisca, o almeno la rende possibile se tali provvedimenti non sono già intervenuti. Questa argomentazione, apparentemente suggestiva, è in realtà ingannevole, perché, mischiando concetti ed istituti tra di loro strutturalmente diversi, ovvero, da un lato, misure coercitive di stampo penale e, dall'altro, presupposto e obbligazione d'imposta, tenta di dar legittimazione ad una scelta che, invece, proprio per questa commistione, si dimostra ancor più debole e incoerente.

Infatti, un conto sono le misure avocative di fonte penale, la cui mancata assunzione impedisce di recidere la relazione tra "cose" del crimine e potere di fatto esercitato illegalmente dal reo su di esse¹⁵; altra cosa è voler giustificare, per il tramite della loro non adozione, la trasformazione di quel potere di fatto in potere di diritto e la conversione di quelle "cose" da elementi di reato a elementi qualificati positivamente, suscettibili di integrare la nozione di presupposto e radicare l'obbligazione d'imposta.

Il ragionamento, così impostato, non regge già a fil di logica: le "cose" del crimine rimangono tali da qualunque prospettiva le si osservi, solo che, se avocate per mezzo del processo penale, esse vengono interamente acquisite alla collettività, se assoggettate allo strumento del prelievo di cui all'art. 14, la loro avocazione, pur sempre confiscatoria, non potrà che essere parziale.

8 Il "diritto vendicativo" e lo strabismo interpretativo sui frutti del reato e sui relativi costi

Non voglio correre il rischio di equivoci, sicché compio subito una precisazione che ritengo essenziale per la prosecuzione dell'indagine.

Sulla fattispecie qualificata come d'imposta si possono senz'altro innestare effetti giuridici funzionali al raggiungimento di finalità extra tributarie e nulla vieta che alle previsioni che contrappuntano il procedimento tributario si guardi come a strumenti in grado di perseguire finalità in qualche modo sanzionatorie. Solo che, se si intraprende questa via, occorre imprimere al sistema connotati coerenti e quindi abbandonare, almeno nella ricostruzione interpretativa, il riferimento all'art. 53.

Se si respinge l'idea di considerare il prelievo sui frutti di attività reato come misura parzialmente confiscatoria, la tassazione "al lordo" è conseguenza inevitabile per i motivi che ho esposto fin qui¹⁶. Se si continuano ad inforcare i vecchi occhiali, cioè, occorre prendere atto che l'asimmetria che si registra nella determinazione della base imponibile discende non dalla irrilevanza reddituale che si

assegna ai costi riferibili ad atti o attività qualificabili come delitto non colposo, per stare alla recente riformulazione del comma 4-*bis* dell'art. 14, ma dalla scelta di voler configurare quei frutti come reddito e qualificare il prelievo come tassazione in senso proprio.

Il diritto è vendicativo: se forzato in *apicibus*, ricambia l'offesa non consentendo di essere rimesso in squadra nemmeno con opere di ingegneria interpretativa.

Quel che intendo dire, in definitiva, è che a questa apparente stortura non si può porre rimedio rendendo deducibile quello che non può di per sé avere positiva dignità giuridica, e ciò al fine di considerare espressione di una capacità contributiva "effettiva" un profitto che, pur colpito dal prelievo per *factum principis*, non si può neanche considerare apprezzato favorevolmente dall'ordinamento e sul quale quel prelievo realizza, in verità, un'ablazione non contributiva ma punitiva, confiscatoria.

L'asimmetria che si osserva nella determinazione dell'imponibile non discende dall'irrilevanza assegnata ai costi. Piuttosto essa è conseguenza di una sorta di strabismo interpretativo, indotto da una lettura del comma 4 dell'art. 14 separata dalla rete dei principi che lo circonda.

Questa distonia, invece, cessa di esistere se si accoglie la tesi qui proposta e si accetta di connotare il prelievo alla stregua di avocazione confiscatoria, seppure parziale.

Parte II La nuova disciplina sui costi di reato e sui "ricavi" dell'impresa criminale

9 La nuova disciplina sui costi di reato: la gradazione della gravità degli illeciti, la dimensione economica della ricchezza come prevalente sulla dimensione giuridica e l'irrilevanza dell'antigiuridicità dell'impresa criminale e dei suoi frutti: note introduttive

Le osservazioni che precedono consentono di tornare ad indagare le disposizioni introdotte dal d.l. n. 16 del 2012¹⁷.

Già ho detto che, per me, la nuova disciplina si pone in contrasto coi principi costituzionali di ragionevolezza, coerenza e non contraddizione, col principio di solidarietà e coi criteri e la funzione di riparto del carico impositivo, che danno corpo al principio di capacità contributiva contemplato nell'art. 53 Cost.

Quanto al primo comma dell'art. 8 il contrasto è dimostrato dal fatto che esso finisce per assegnare, di riffa o di raffa, rilievo giuridico positivo a "costi" che tali, invece, non possono essere qualificati per il diritto, come dimostrano, secondo me, le cose fin qui dette.

Per quanto riguarda, poi ed in particolare, le operazioni oggettivamente inesistenti di cui al secondo comma dello stesso art. 8, il discorso è ancor più preoccupante perché la norma è portatrice di un doppio abbaglio: il primo discende dalla forza prevaricatrice che si è inteso riconoscere ad uno dei due piani del ragionamento: a quello economico rispetto a quello giuridico; il secondo rispecchia la scelta di relegare in un cantino la dimensione di antigiuridicità dell'attività e dei suoi risultati economici, creando un vero e proprio cortocircuito all'interno del sistema.

La cosa che più desta perplessità, però, è che si tenta di ammantare queste scelte - come si legge nella relazione governativa di accompagnamento e nella circolare dell'Agenzia delle entrate, già richiamate - di una costituzionalità che, invece, è per forza ad esse estranee, come ho già tentato di spiegare nella Parte I di questo lavoro e come proverò ad argomentare nelle pagine successive.

10 I costi "non direttamente" funzionali al reato e le operazioni soggettivamente inesistenti. L'idea infondata della "misurazione" della gravità dei reati sulla base della loro qualificazione e dell'elemento soggettivo

In relazione al primo comma dell'art. 8 mi sembra di poter dire che esso si preoccupa di allentare il rigore della precedente normazione, mantenendo,

comunque, limiti alla deducibilità: i costi, per essere dedotti, non devono essere direttamente collegati a beni o servizi utilizzati per il compimento di atti o attività qualificabili come delitto non colposo. Detto semplicemente, solo i costi indirettamente sostenuti per il compimento di delitti dolosi sono deducibili, ovvero i costi, anche se diretti, sostenuti per il compimento di delitti colposi o preterintenzionali o reati contravvenzionali¹⁸.

La scelta si potrebbe giustificare con la residualità e scarsa gravità delle ipotesi ammesse: sono infatti rari e di minore disvalore giuridico - si potrebbe chiosare - i delitti connotati dall'elemento soggettivo della colpa o le contravvenzioni di matrice economica i cui profitti, stando all'art. 14, comma 4, della legge n. 537, possano acquisire rilievo reddituale.

Si potrebbe pure osservare, a giustificazione ulteriore della decisione legislativa, che i costi non direttamente utilizzati per la commissione di delitti dolosi - la cui deduzione è ora espressamente ammessa - si riferiscono a fattispecie specifiche ed in particolare a quella di operazioni soggettivamente false, nella quale non viene in contestazione l'esistenza ed ammontare dell'operazione medesima, ma solo il suo profilo soggettivo. E si potrebbe infine rilevare che operazioni siffatte, nonostante la previsione dell'art. 1, lettera a), del d.lgs. n. 74 del 2000, già potevano forse essere escluse, seppure con qualche forzatura, dal delitto di cui all'art. 2, favorendo un'interpretazione di questa disposizione appuntata sugli elementi economici costitutivi della fattispecie¹⁹.

Dare giustificazione alla nuova norma impostando il ragionamento in questo modo, però, lascia l'agro in bocca. Quel che non convince non è tanto la pretesa di voler legare la deducibilità dei costi alla loro connessione diretta o indiretta alla fattispecie di reato²⁰, quanto di volerla modulare, quella deducibilità, alla maggiore o minore gravità del reato sulla base della qualificazione che di esso offre la legge penale - delitto o contravvenzione - e sulla base dell'elemento soggettivo astrattamente richiesto per la sua commissione - dolo o colpa.

Non è esatto, infatti, collegare la gravità del reato alla sua sola qualificazione alla stregua di delitto o di contravvenzione, reputando il primo, di per sé, più grave del secondo. Questo modo di ragionare - come insegna la dottrina penale²¹ e come significativamente riconosciuto nella circolare della Presidenza del Consiglio dei Ministri del 5 febbraio 1986 - è sbagliato ed è estraneo alla storia e alla logica del codice penale: la distinzione sostanziale tra delitti e contravvenzioni non sta tanto nella diversa gravità dell'illecito, quanto nella diversità degli interessi e dei diritti tutelati: interessi di carattere preventivo-cautelare o concernenti il regolare svolgimento di attività sottoposte a un potere amministrativo, per i reati contravvenzionali; interessi o diritti c.d. naturali o collegati ad esigenze primarie della collettività e dello Stato, per i delitti.

E neppure è corretto affermare che la maggiore o minore gravità tra le due forme di illecito sta nell'elemento soggettivo della condotta. La dimostrazione più lampante è offerta da delitti gravissimi (si pensi all'omicidio) per la cui realizzazione è sufficiente che la condotta sia caratterizzata da colpa. Se ben si riflette, l'abbassamento, per così dire, della soglia dell'elemento soggettivo da

dolo a colpa può denunciare la presenza di un interesse o di un diritto da proteggere ancor più importante nella scala valoriale dell'ordinamento.

Sofismi da giuristi, si potrebbe osservare. Direi, piuttosto, fondamenti del diritto e anche del diritto tributario.

Pure a voler seguire la diffusa credenza che la gravità dell'illecito si possa determinare in ragione della tipologia del reato e in virtù dell'elemento soggettivo proprio della condotta, questa modulazione, comunque, non può essere presa in considerazione per ammettere o non ammettere la deduzione di elementi economici che, in ogni caso, rimangono macchiati dall'antigiuridicità della fattispecie che li esprime.

Sebbene riferibili a contravvenzioni o a delitti colposi, essi, se dedotti, finiscono ugualmente per ricadere sulla collettività e questo non risponde ad un criterio di ordine, equità e ragionevolezza del sistema, per come risultanti dai principi costituzionali esaminati nella Parte I di questa indagine.

Il fatto che essi, costi, siano riconducibili ad illeciti reputati, seppure erroneamente, minori, non può modificare l'interpretazione di quei principi, né può giustificare una loro più "morbida" lettura. Se le regole fondanti non sono rispettate, la lettura "ammorbida" va abbandonata: accoglierla o ergersi a suoi chierici sono atteggiamenti che non rendono un buon servizio né al diritto, né alla collettività, ma che consentono solo di conservare in seno al sistema un varco dai contorni crepati, impossibile da giustificare secondo il rigore che è proprio alle categorie del diritto.

Vi è un principio basilare e storicamente accreditato: l'unitarietà della qualificazione dei fatti colpiti dalla pena in ragione del giudizio di disvalore dei comportamenti. Unitarietà del disvalore che non può essere considerata irrilevante per il diritto tributario. Di conseguenza, la gradazione modulata tra delitti e contravvenzioni, tra dolo e colpa, introdotta dal d.l. n. 16, non si può pretendere di ammantarla con la forza dei principi costituzionali: se vi è il timbro penale, gli interessi della collettività, siccome tutti improntati alla legalità, non possono piegarsi all'interesse del singolo - di ottenere la riduzione del debito d'imposta mediante la deduzione del costo - né, per lo stesso ordine di motivi, i membri della collettività possono "condividere" col reo quel costo. Non lo permette l'art. 2 e non lo permette l'art. 53 della Costituzione, i quali non formulano gradazioni della legalità, né legittimano giudizi interpretativi di tal genere, anche ricorrendo al principio della ragionevolezza.

D'altra parte, alla novella non si potrebbe garantire coerenza neppure argomentando che la non deducibilità dei soli costi direttamente riferibili ai delitti dolosi ha natura pseudo sanzionatoria. Qui bisogna intendersi su una questione di fondo: non solo, per le cose fin qui dette, una qualificazione siffatta è priva di fondamento giuridico, ma se la giustificazione della deducibilità, nelle ipotesi ammesse dalla nuova normazione, si fa risalire all'esigenza di garantire "effettività" alla capacità contributiva sulla quale cade il prelievo, non si comprende il motivo per cui quella stessa esigenza non dovrebbe essere soddisfatta per le ricchezze provenienti da delitti dolosi, per i quali, invece e correttamente, la legge continua a predicare la non deducibilità dei costi relativi.

11 I costi creati con operazioni oggettivamente inesistenti e la detassazione dei corrispondenti elementi positivi di reddito: sul rapporto tra ordinamento ed anti giuridicità dell'attività di reato e sulla nozione giuridica di reddito

Rimane da esaminare il secondo comma dell'art. 8, che contiene un testo - lo dico senza infingimenti - vischioso ed opaco.

Esso riflette un doppio equivoco, riguardante, in primo luogo, la dimensione di anti giuridicità delle fattispecie e delle condotte alle quali si pretende di collegare l'effetto favorevole dell'esclusione dal prelievo degli elementi positivi; in secondo luogo, la nozione di reddito rilevante per il diritto e, di conseguenza, quella di capacità contributiva effettiva.

L'equivoco sul rapporto tra ordinamento e dimensione di anti giuridicità della fattispecie consiste nel ritenere che lo stesso ordinamento possa ed anzi debba farsi carico del comportamento di chi si pone oltre i suoi confini e debba intervenire su quella scelta per collegarvi effetti apprezzabili positivamente.

Così non può essere. Il fatto è che nell'intraprendere un'attività per se stessa illecita ed anzi tale da meritare la sanzione penale, il soggetto si pone volontariamente fuori dall'ordinamento inteso come complesso di regole che disciplinano la convivenza civile. Il suo comportamento, pertanto, non è suscettibile di produrre nessun effetto giuridico che si collochi nell'ambito di un regolamento di interessi apprezzabili positivamente, né, come ho detto, l'ordinamento può farsi carico di rendere conforme a quel regolamento il frutto di un'attività esercitata al solo fine di infrangerlo, a danno della collettività e dei suoi interessi.

La cicatrice dell'anti giuridicità, come disposto dal codice penale e dal codice civile, è indelebile e neppure la prescrizione del reato o la sua estinzione per altra via, al pari dell'estinzione della pena, sono in grado di rimuoverla, così da trasformare il fatto penalmente qualificato in fatto apprezzato favorevolmente dall'ordinamento²². Insomma, se espunto dall'ordine costituito, quel medesimo fatto non può rientrarvi sotto mentite spoglie per produrre effetti positivi e contrari a quelli che la sua vocazione iniziale gli attribuisce. Di questo l'ordinamento non può farsi carico, pena il disfacimento dei principi.

Il secondo abbaglio concettuale che per me sta dietro alla nuova disciplina attiene alla nozione giuridica di reddito. Per darne dimostrazione rinuncio momentaneamente alla mia prospettazione interpretativa dell'art. 14, comma 4, della legge n. 537: fingo di credere che il prelievo lì disciplinato sia davvero disposto a titolo contributivo e dunque che il prodotto, profitto o prezzo del reato siano davvero qualificabili come reddito.

Non scopro una nuova America affermando che il reddito, per il diritto, è un'entità puramente convenzionale, sganciata dalla sua dimensione fisica e perfino dalla sua rappresentazione economica.

Esso, infatti, non ha né la materialità di una sacca piena di monete sonanti che si possono contare una ad una, non essendo una *res*; né la stessa consistenza di valore che nel pre giuridico esprimono i "mezzi" strumentali alla sua

rappresentazione. Per il diritto, piuttosto, il reddito coincide con la raffigurazione che gli offre l'ordinamento nel rispetto dei principi costituzionali.

E non affermo niente di nuovo neppure se osservo che il "possesso del reddito", quale presupposto delle imposte personali, non esige una relazione materiale con la ricchezza. La relazione che si pretende è di natura esclusivamente giuridica: il reddito si considera posseduto quando la legge ritiene che tale situazione si possa dire realizzata, indipendentemente dalla sua esistenza nella realtà e dalla sua consistenza e disponibilità monetaria e pure al di là dalla nozione di possesso dettata dall'art. 1140 del codice civile.²³

Per convincersi che le cose stiano in questi termini è sufficiente ricordare come, ad esempio, la titolarità dei crediti sia elemento sufficiente per ritenere integrato il presupposto dell'IRPEF o dell'IRES rispetto alla categoria del reddito d'impresa e rispetto ad alcune tipologie di rendite finanziarie.

Il requisito di effettività degli elementi positivi di reddito, pertanto, va interpretato secondo queste regole, non secondo quelle economiche, anche per le imprese illecite: se si ritiene che l'attività criminale produca reddito d'impresa alla stessa stregua di un'impresa lecita - come sembrerebbe imporre una lettura formalistica del comma 4 dell'art. 14 - i ricavi si devono ritenere prodotti sulla base delle regole generali che informano questa categoria. E proprio come accade per quelli delle imprese lecite, la loro determinazione deve seguire le regole della competenza ed obiettiva certezza (art. 109 T.U.), le regole contabili previste dal d.P.R. n. 600 del 1973, le normali metodologie di accertamento e le ordinarie regole probatorie.

Gli elementi positivi, dunque, si devono conformare alle evidenze documentali che l'amministrazione reperisce nella sua attività istruttoria e la loro determinazione si deve ordinare alla normale dialettica che successivamente contrappunta la fase procedimentale e quella processuale.

12 Segue: la materia imponibile dimostrata dalla sua rappresentazione cartolare e la forza giuridica delle prove

D'altra parte, che la determinazione debba avvenire su base documentale e che il carattere fittizio dell'operazione sia, a questo specifico fine, elemento ininfluenza, è dimostrato in maniera inequivoca dall'art. 21, comma 7, del d.P.R. n. 633 del 1972. Per questa disposizione, se viene emessa fattura per operazioni inesistenti, ovvero se nella fattura i corrispettivi delle operazioni o le imposte sono indicate in misura superiore a quella reale, l'imposta è ugualmente dovuta per l'ammontare corrispondente a quello indicato in fattura.

Questo dato di diritto positivo, pur rispondendo anche ad una logica applicativa interna del tributo, offre comunque testimonianza del fatto che il prelievo può legittimamente cadere su elementi bensì inesistenti nella realtà pregiuridica, ma che il diritto reputa esistenti perché dichiarati tali dal soggetto che li ha realizzati o perché così risultanti dalla loro rappresentazione documentale o contabile.

Il punto è questo: l'esistenza del fatto espressivo della materia imponibile, per l'art. 21 ora ricordato, è data per provata dalla rappresentazione cartolare che di esso viene offerta, non in ragione di un suo riscontro nella realtà oggettiva, pregiudiziale od economica. Ed anche la sua connotazione illecita, a questo fine, è irrilevante.

Per le imposte sui redditi il discorso non può cambiare. L'art. 53 della Costituzione, infatti, ha disposto la capacità contributiva a criterio unitario di riparto della contribuzione, quale che sia il tributo di riferimento. E anche l'effettività, per la forza di questa disposizione, è connotazione unitaria dei presupposti impositivi. Pure i componenti positivi di reddito, allora, se comprovati documentalmente o altrimenti provati, si devono qualificare come effettivi.

E' la forza rappresentativa della prova, quale strumento che per il diritto connota di effettività elementi della realtà pregiudiziale, a condurre a questa conclusione²⁴ e, per quanto ci interessa, sono le regole generali sul reddito d'impresa, applicate proprio per il tramite delle prove, a qualificarli tali, divenendo irrilevante non solo o non tanto la loro illiceità, quanto la loro inesistenza materiale, almeno fino a quando tale inesistenza, spogliata della sua veste pregiudiziale, entra nel mondo del diritto per l'operare, ancora una volta, delle prove²⁵.

13 A proposito di "affrancamento" dei costi illeciti, di "cartiere", di "pizzo" e di "mafia SPA": la non imposizione dei ricavi

Le osservazioni che precederono sarebbero sufficienti, secondo me, per considerare già dimostrata l'irragionevolezza della norma in commento e la sua contrarietà ai principi fondamentali, ad iniziare dall'art. 3 della Carta.

Mi faccio carico, tuttavia, per evitare il perdurare di equivoci, di esaminare nel dettaglio il secondo comma dell'art. 8, ipotizzando a questo esclusivo fine - lo ripeto - che il provento, il profitto o il prodotto del reato siano correttamente qualificabili come reddito e che il prelievo corrispondente sia attuato a titolo contributivo²⁶.

Le ipotesi interpretative che si possono formulare sono due. La prima: che la norma consenta un affrancamento dei costi esposti in dichiarazione, relativi ad operazioni oggettivamente inesistenti, attraverso l'automatica detassazione di componenti positivi per importo corrispondente. La seconda: che la disposizione sia stata costruita in funzione di soggetti che svolgono soltanto operazioni oggettivamente inesistenti: le c.d. "cartiere". Che essa, a fronte di componenti positivi reputati fittizi perché conseguenti a consimili operazioni, abbia voluto commisurare la tassazione per l'impresa criminale alla parte eccedente i costi che i beneficiari delle fatture false hanno bensì dedotto, ma che non avrebbero potuto dedurre in forza del comma 4-bis dell'art. 14 della legge n. 537.

Entrambe le ipotesi non si possono ritenere conformi alla Costituzione.

Nel primo caso la violazione dei suoi principi sarebbe addirittura lampante: a dispetto dello sforzo del legislatore di rivestire la norma coi panni dell'art. 53, essa, se interpretata in quel modo, si tradurrebbe in nient'altro che in un condono mascherato. Non potendo smaccatamente contraddire il principio di indeducibilità dei costi per delitti dolosi, fissato nel comma 1, il comma 2 dell'art. 8 finirebbe per attribuire loro bensì rilievo favorevole, ma in via obliqua, ammettendo la detassazione di componenti positivi per pari importo ed introducendo a questo fine, con un'operazione anch'essa di mascheramento, l'obbligo di pagamento di una misura pecuniaria, che però sarebbe una vera e propria questua.

La seconda ipotesi, quella della "cartiera", merita maggiore attenzione, anche perché più rispondente, forse, alla reale volontà degli estensori della disposizione.

Si può anzitutto ipotizzare che in sede di accertamento emergano elementi positivi non dichiarati per fatture relative ad operazioni inesistenti e si riscontri l'avvenuto pagamento del falso debito da parte del beneficiario delle fatture stesse, senza una successiva retrocessione a questi delle somme corrispondenti.

Se la "cartiera" ha ricevuto il pagamento della fattura e non vi è stata retrocessione, come nel caso ipotizzato, la somma corrispondente costituisce profitto del delitto di cui all'art. 8 del d.lgs. n. 74 o di altro delitto, perché l'"utile" dell'impresa criminale coincide, proprio, con quella somma.

Il caso non è di scuola: esempio inequivoco è il "pizzo" pagato alle mafie e che queste "fatturano" all'impresa taglieggiata simulando cessioni di beni o prestazioni di servizio di vario genere. Esso, quindi, finisce per coincidere col profitto del delitto che rimane definitivamente acquisito alla stregua di "utile" dell'attività.

Ora, sebbene si sostenga che il quarto comma dell'art. 14 dispone un prelievo a titolo contributivo, mi domando come si possa seriamente affermare che la detassazione di quel tipo di reddito si conformi ai principi costituzionali ed anzi sia da questi prescritto.

Non ne faccio una questione morale, ne faccio una questione di stretto diritto positivo. L'equivoco sul rapporto tra ordinamento e dimensione di anti giuridicità della fattispecie, del quale ho detto poc'anzi, sta proprio qui ed è qui che emerge in tutta la sua evidenza. E l'equivoco è ulteriormente rafforzato dal fatto che un'applicazione siffatta della norma finisce per svuotare integralmente il quarto comma dell'art. 14, determinando una sorta di implosione del sistema.

I dubbi, però, non sono solo questi: se alla base della nuova disposizione vi fosse davvero un disegno come quello descritto, saremmo costretti a vedere nello Stato un correo nella veste di finanziatore delle imprese criminali. Infatti, mentre l'operazione esposta nella falsa fattura è sicuramente inesistente, il "componente positivo" ottenuto dalla "cartiera" o dalla "mafia SPA" non è inesistente, anzi, nella logica, quantunque distorta, del comma 4 dell'art. 14 della legge n. 537, esso si deve qualificare alla stregua di componente reddituale effettivo. Cosicché, in quella logica, escluderlo dalla tassazione in misura corrispondente ai costi non deducibili significherebbe, alla fine, addossare sulle

spalle della collettività il finanziamento di un'attività criminale, dietro semplice pagamento di un obolo.

Esattamente il contrario di quanto vogliono gli artt. 2 e 53 della Costituzione ed esattamente il contrario di quanto solennemente proclamato nella relazione governativa.

Sebbene il "senso fatto palese dal significato proprio delle parole secondo la connessione di esse" (art. 12 delle "disposizioni sulla legge in generale") renda senz'altro possibile la ricostruzione prospettata, voglio credere, tanto sarebbero lividi gli scenari che si aprirebbero, che l'interpretazione del secondo comma dell'art. 8 del d.l. n. 16 non possa essere questa e che l'ipotesi fin qui indagata non possa essere quella che aveva in mente il legislatore.

14 Segue: la "retrocessione" del denaro "sporco", il prezzo del reato e la irragionevole disciplina di favore per le imprese criminali. - Le ipotesi ulteriori che si affacciano sono ugualmente insoddisfacenti

Si potrebbe pensare che, a fronte del pagamento del falso debito, in sede di accertamento si verifichi che la "cartiera" abbia retrocesso "in nero", in tutto o in parte, le somme originariamente ricevute, oppure che la stessa "cartiera" abbia ottenuto soltanto un corrispettivo, a mo' di prezzo, non equivalente alla somma risultante dalla falsa fattura, ma commisurato ad una percentuale dell'operazione.

Vi potrebbe essere, poi, un'ipotesi ulteriore, seppure più rara e fantasiosa: che la "cartiera" abbia presentato la dichiarazione dei redditi, assumendo le false operazioni da essa stessa svolte alla stregua di elementi positivi di reddito, e che in sede di verifica si accerti che quelle operazioni non rispondono alla realtà.

I casi prospettati divergono tra loro sul piano della condotta, oltre che su quello economico. Dal punto di vista del diritto tributario, però, queste divergenze non possono legittimare la detassazione automatica degli elementi positivi, invece imposta dal comma 2 dell'art. 8.

Giacché l'impresa criminale si deve ritenere equiparata, per il comma 4 dell'art. 14, all'impresa *tout court*, i ricavi da essa prodotta non possono che essere quelli documentalmente attestati. Solo in seconda battuta l'avvenuta retrocessione del denaro "sporco" o la percezione del solo prezzo del reato possono venire in considerazione come fatti incidenti sul presupposto dell'IRPEF, secondo le regole generali sulle prove.

Ragionando col rigore del diritto questa soluzione non deve destare perplessità ed anzi dimostra come il secondo comma dell'art. 8 sia, per i casi da ultimo prospettati, norma in realtà inutile: la "corretta" rappresentazione dei ricavi, in dette ipotesi, avrebbe potuto essere già ottenuta facendo buona applicazione delle regole, valevoli per tutti gli imprenditori, sui poteri istruttori, sulla determinazione del reddito e sulle prove intese - si è già visto - quali mezzi

di "avveramento" della realtà pregiuridica. Coticché, se l'impresa criminale avesse dimostrato la mancata "riscossione" della fattura o l'avvenuta retrocessione del denaro, questi fatti avrebbero potuto essere configurati come produttivi di sopravvenienze passive *ex art.* 101, comma 4, del testo unico delle imposte sui redditi, e la tassazione avrebbe potuto ricadere solo sul prezzo eventualmente ricevuto o trattenuto per l'esecuzione del reato.

Se questa prova contraria non fosse stata data, invece, la determinazione del reddito avrebbe dovuto seguire le risultanze documentali o bancarie, ovvero le altre prove acquisite al procedimento, comprese quelle extra contabili e presuntive, secondo le ordinarie regole, cioè, dettate dalla legge sull'accertamento per tutti i contribuenti.

Quello che voglio dire è che, pure in questa dimensione avulsa da una corretta lettura giuridica dei principi costituzionali e delle nozioni di reddito e di costo, la norma in commento, senza nessun motivo giuridicamente apprezzabile, finisce paradossalmente per introdurre un trattamento probatorio di favore per l'impresa criminale rispetto all'impresa lecita: se la illiceità dell'attività si vuole considerare connotazione irrilevante, non può poi riemergere sotto mentite spoglie per consentire deroghe alle regole generali di accertamento e determinazione degli elementi positivi e per condurre ad una loro detassazione automatica, *ex lege*.

15 La somma pretesa per la detassazione: la sua formale qualificazione come sanzione e la sua effettiva configurazione come misura d'accesso alla determinazione dell'imponibile svincolata dalle regole ordinarie

Le osservazioni svolte convincono, secondo me, della plausibilità dei dubbi di costituzionalità, sollevati fin dall'inizio, della nuova normazione.

Dubbi che appaiono ancor più stringenti se si considera la previsione, espressa dallo stesso secondo comma dell'art. 8, che collega la non tassazione dei componenti positivi al pagamento di una sanzione determinata tra un minimo del 25 e un massimo del 50 per cento dell'ammontare dei costi illeciti dichiarati.

Al di là della sua formale qualificazione, penso che questa misura non possa essere configurata alla stregua di sanzione. Anzitutto perché, se davvero fosse tale, avremmo una patente violazione del principio del *ne bis in idem* sostanziale, quanto mai vincolante alla luce della più recente giurisprudenza della Corte di giustizia²⁷ e della Corte EDU²⁸.

Ma anche a voler tralasciare questo profilo, vi è un motivo ulteriore e risolutivo che non consente di configurare quella obbligazione alla stregua di obbligazione sanzionatoria. Continuando a seguire l'interpretazione del secondo comma dell'art. 8 da ultimo prescelta - quella della "cartiera" per intendersi - lo strano bicefalismo che emerge da questa lettura porta allo scoperto un dato indiscutibile: che tale obbligazione non trova titolo nella violazione compiuta dal soggetto a favore del quale opera la detassazione - la "cartiera" appunto - ma nel fatto da altri realizzato, ossia nell'indicazione in dichiarazione del costo da parte del destinatario della fattura falsa.

In parole molto semplici, siccome la somma rinviene la sua giustificazione sostanziale nella violazione compiuta da un soggetto diverso da quello al quel viene imputata l'obbligazione di pagamento, non vedo come questa possa essere ricompresa nel novero sanzionatorio.

Si potrebbe pensare, allora, di collocarla tra le misure risarcitorie e riferirla al danno erariale alla cui produzione la "cartiera" ha concorso. Questa strada, però, oltre a presentare asperità per il fatto che il suo ammontare varia tra un limite minimo e un limite massimo²⁹, è contraddetta dallo stesso comma 2 dell'art. 8: se la verità fosse questa, al risarcimento, per così dire, aggiuntivo rispetto a quello ordinario garantito dagli interessi moratori, dovrebbe essere chiamato anche chi ha prodotto materialmente e direttamente il danno, ossia il soggetto che in dichiarazione ha indicato il costo inesistente, e non soltanto il concorrente. Ma così non è, e dunque riesce difficile, se non impossibile, assegnare a quella misura finalità risarcitoria, almeno volendo seguire un ordine ricostruttivo che abbia l'ambizione della razionalità.

È possibile che il reale fondamento di questa misura sia lo stesso, nel nocciolo, di quello che sorregge le leggi di "condono" e più esattamente le leggi di definizione agevolata dell'imponibile. L'obbligazione pecuniaria che si pretende, pur sganciata da una libera scelta, a me sembra preordinata, puramente e semplicemente, ad aprire il portone alla detassazione dei ricavi: a derogare alle ordinarie regole sulla prova e sulla determinazione dell'imponibile in sede di accertamento, come spero di aver già chiarito nel paragrafo precedente. E questo elemento avvalorava ulteriormente i dubbi di legittimità che circondano l'intera trama normativa.

Disposizioni come quelle qui commentate non rappresentano mai conquiste di civiltà: perché il progresso o l'adeguamento sia effettivo occorre ordine, onestà intellettuale e coerenza, altrimenti, con la maschera della modernità, si rischia di alimentare il disfacimento del diritto, di fare del diritto strame. I principi sono l'antidoto a questo rischio.

Endnotes

¹ La non deducibilità dei costi, nel vigore della originaria formulazione dell'art. 14, comma 4-bis, era considerata illegittima da FALSITTA, *Spunti critici e ricostruttivi sull'errata commistione di simulazione ed elusione nell'onnivoro contenitore detto "abuso del diritto"*, in *Riv. dir. trib.*, 2010, I, 349 ss.; MARONGIU, *Abuso del diritto o abuso del potere?*, in *Corr. trib.*, 2009, 1076 ss.; TESAURO, *Indeducibilità dei costi illeciti: profili critici di una norma di assai dubbia costituzionalità*, in *Corr. trib.*, 2012, 426 ss.

² Condividono questa giustificazione CAPOLUPO, *La nuova disciplina dei costi da reato*, in *Il fisco*, 2012, 2253; e, seppure in termini più sfumati, FRANSONI, *Indeducibilità dei costi da reato ed eterogenesi dei fini*, in *Rass. Trib.*, 2012, 1427; DI GIOVINE, *L'ineducibilità dei costi da reato ed il raddoppio dei termini per l'accertamento fiscale: il punto di vista del penalista*, ivi, 2012, 1383 ss. Si distacca da questa logica, avanzando puntuali notazioni critiche, CARINCI, *La nuova disciplina dei costi da reato: dal superamento del doppio binario alla dipendenza rovesciata (con diversi dubbi e numerose incongruenze)*, ivi, 2012, 1439.

³ Per ulteriori riferimenti e approfondimenti, se si vuole, GIOVANNINI, *Il diritto tributario per principi*, Milano, 2014, 10 ss., 35 ss., 49 ss., 242 ss., 263 ss., e prima ID., *Principi costituzionali e nozione di costo nelle imposte sui redditi*, in *Rass. Trib.*, 2011, 609 ss.; ID., *Costo e sanzione nel reddito d'impresa*, in *Riv. dir. trib.*, 2002, I, 875 ss.; ID., *Provento illecito e presupposto dell'imposta personale*, Milano, 2000, *passim*.

⁴ L.V. BERLIRI, *La giusta imposta*, con prefazione di Einaudi, ristampa, Milano, 1975, 35.

⁵ Ancorare la rilevanza giuridica del costo all'art. 2, Cost., risponde ad un ordine di concetti che, per la verità, sorregge anche altri istituti disciplinati in positivo dal diritto tributario. Ho in mente specialmente la normazione sugli oneri deducibili e quella sulle detrazioni per carichi di famiglia o per la produzione del reddito, istituti la cui struttura concettuale si informa, nel nocciolo, agli stessi principi che ho cercato di illustrare fin qui. Il fatto che deduzioni e detrazioni comportino un minor debito impositivo per il singolo e una minore contribuzione per lo Stato, si giustifica proprio in funzione di interessi e diritti protetti dall'ordinamento e ritenuti meritevoli di particolare considerazione in forza di una loro "preselezione" normativa. Ed è proprio per agevolare e incentivare la loro realizzazione che tutti i consociati sono chiamati ad assumersi porzione di quegli oneri, come espressione di un inderogabile dovere di solidarietà sociale ed economico.

⁶ Rimangono determinati le lucide pagine di L.V. BERLIRI, *La giusta imposta*, cit., 33 ss.

⁷ Questa distinzione è stata recentemente ripresa da CARACCIOLI, *Il ripristino delle pregiudiziali nella nuova disciplina dei costi da reato*, in *Riv. dir. trib.*, 2012, 567 ss.

⁸ Sebbene l'art. 1, lettera a), del d.lgs. n. 74, possa ostacolare la esclusione del delitto di cui all'art. 2, il d.l. n. 16 - lo vedremo meglio nella seconda Parte - non reagisce direttamente su questo aspetto, ma si limita a rendere deducibili i costi, proprio come si sostiene qui, con un'interpretazione che poteva essere adottata anche prima della riforma del 2012. Oggi, però, se quest'ultimo profilo è normativamente consacrato, si deve registrare una strana schizofrenia dell'ordinamento: da un lato si legittimano *aper-tis verbis* quei comportamenti in termini reddituali, rendendo irrilevante il profilo soggettivo dell'inesistenza delle operazioni; da un altro si continuano a punire in maniera severissima proprio quegli stessi comportamenti.

⁹ Sempreché risultanti da elementi certi e precisi ai sensi dell'art. 109, comma 4, lettera b), del testo unico delle imposte sui redditi.

¹⁰ JAVIER ANSUÁTEGUI ROIG, *Rivendicando i diritti sociali*, Napoli, 2014.

¹¹ Qui non ripeto le considerazioni che ho già svolto in altri lavori a dimostrazione di questa affermazione. Sia consentito rinviare a Giovannini, *Provento illecito e presupposto*, cit., 70 ss., 87 ss., 151 ss.

¹² La teoria del titolo elaborata in relazione al concetto di bene giuridico contribuisce a chiarire il ragionamento. Il termine bene in senso giuridico può essere assunto nel significato di oggetto della tutela giuridica e il titolo, in questo contesto, è lo strumento che accorda protezione al bene nel quale confluiscono gli interessi che il diritto ha recepito come propri (fondamentale PUGLIATTI, *Beni e cose in senso giuridico*, Milano, 1962, 16 ss., 25 e 26). Fra titolo giuridico e dimensione della legalità, dunque, intercede una relazione inscindibile: solo il bene oggetto di tutela si può considerare conforme agli interessi apprezzati positivamente dall'ordinamento, sicché, quando su questo grava un giudizio di segno opposto consacrato in una norma penale, il titolo giuridico neppure è concepibile. Di conseguenza, se l'attività, intesa come fonte del reddito (oppure l'atto o il fatto intesi in tal modo), non si radica su un titolo, essa non può essere qualificata come bene e neppure la ricchezza che ne è il frutto si può qualificare in quei termini: solo quella proveniente da un bene giuridico, infatti, si può considerare espressione di un titolo in punto di acquisizione, disponibilità e godimento e si può qualificare reddito nella dimensione costituzionale dell'art. 53.

¹³ Diverso è il discorso che si deve fare quando un singolo atto o fatto si inserisce nell'ambito di un'attività lecita nell'oggetto e nello scopo, perché, in questa ipotesi, il pregiudizio penale riflesso su alcuni componenti positivi di reddito cessa di rilevare come tale. Il fatto reato che si innesta in un'attività lecita, infatti, degrada a semplice componente di una fattispecie sovraordinata, che assorbe la illiceità dei singoli fatti o

atti produttivi di ricchezza, fattispecie alla quale il diritto riferisce efficacia propria, conforme alla qualificazione che la sorregge. Non sostengo che il fatto reato, siccome dequalificato a semplice componente di una fattispecie complessa, si trasformi, sol per questo, in fatto conforme al diritto: la sua indole illecita permane inalterata di fronte alla legge. Certo è, però, che siffatta natura non rileva immediatamente per la nascita dell'obbligazione d'imposta, dato che questa non si salda a quel fatto o ai singoli fatti, ma all'unità di sintesi la cui liceità è sufficiente per la nascita di un effetto che sottende l'esistenza di un titolo giuridico conforme all'ordine legale: l'attività lecita, appunto. Radicalmente diversa è l'ipotesi in cui il fatto reato coincide con la fonte-attività. In questa circostanza è l'illegalità della fonte che impedisce l'integrazione della nozione di presupposto d'imposta. La difformità dell'attività ai principi costituzionali, secondo il giudizio tradotto nella normazione penale, recide il collegamento tra fonte e reddito, legame che è elemento qualificante della nozione suddetta. La difformità tra quest'ipotesi e quella in cui l'illiceità colpisce una singola modalità di realizzazione del presupposto o un singolo componente positivo di reddito non è difficile da percepire. Mentre il reato che si innesta su un'attività lecita viene, per così dire, assorbito in questa, che, come categoria sintetica, amalgama o fonde tutti gli atti preordinati al raggiungimento di uno scopo unitario lecito, il reato che si identifica con un'attività ad oggetto o finalità vietate non è separabile dalla fonte: reato e fonte coincidono con la fattispecie che si pretende di elevare ad elemento costitutivo del presupposto. È giocoforza, dunque, che il fatto qualificato dal diritto penale non possa esser visto come strumento di realizzazione del presupposto.

¹⁴ Su questi concetti, si veda *retro*, nota 9.

¹⁵ Su questi concetti, cfr. per tutti e molto chiaramente NUVOLONE, *Il possesso nel diritto penale*, Milano, 1942, *passim*, ma specie 87 ss.

¹⁶ Asimmetria solo parzialmente e improvvidamente mitigata dalla legge del 2012, come tra poco tenterò di dimostrare in positivo.

¹⁷ Per comodità espositiva, le ricordo nuovamente. Ai sensi del primo comma dell'art. 8 "non sono ammessi in deduzione i costi e le spese dei beni o delle prestazioni di servizio direttamente utilizzati per il compimento di atti o attività qualificabili come delitto non colposo per il quale il pubblico ministero abbia esercitato l'azione penale". Il comma 2 dell'art. 8, stabilisce, poi, che "ai fini dell'accertamento delle imposte sui redditi non concorrono alla formazione del reddito oggetto di rettifica i componenti positivi direttamente afferenti a spese o altri componenti negativi relativi a beni o servizi non effettivamente scambiati o prestati, entro i limiti dell'ammontare non ammesso in deduzione delle predette spese o altri componenti negativi. In tal caso si applica la sanzione amministrativa dal 25 al 50 per cento dell'ammontare delle spese o altri componenti negativi relativi a beni o servizi non effettivamente scambiati o prestati indicati nella dichiarazione dei redditi".

¹⁸ Cfr. CARACCIOLI, *Il ripristino delle pregiudiziali nella nuova disciplina dei costi da reato*, già cit.

¹⁹ Mi pare si orienti in questo senso, richiamando una mia ricostruzione sulla struttura dei reati in generale, MARCHESELLI, *Frodi fiscali e frodi nella riscossione IVA, carosello tra onere della prova, inesistenza e inerenza*, in *Dir. prat. trib.*, 2012, I, 1335 ss., specie 1360 ss.

²⁰ Scelta corretta, infatti, i cui risultati si potevano già conseguire con un'interpretazione della struttura dei reati, come ho detto nel precedente paragrafo 4 della Parte I di questo lavoro.

²¹ Per tutti cfr. PADOVANI, *Diritto penale*, Milano, 1999, 96 ss.

²² Come si è già accennato, l'illiceità penale produce di per sé un *vitium possessionis*, che si pone "più indietro, all'origine" (*factum infectum fieri nequit*), in quanto concernente l'oggetto, la causa e il modo di acquisizione (cfr. NUVOLONE, *Il possesso nel diritto penale*, cit., specie 301 ss.).

²³ Sulla nozione di reddito e su quella di possesso, esiste una letteratura molto vasta. Tra i fondamentali

contributi, QUARTA, *Commento alla legge sulla imposta di ricchezza mobile*, Milano, 1917, I, 130 ss.; A.D. GIANNINI, *Il concetto di reddito mobiliare nel diritto tributario italiano*, in *Riv. pol. ec.*, 1935, 397 ss. e 592 ss.; VANONI, *Osservazioni sul concetto di reddito in finanze*, in *Opere giuridiche*, vol. II, Milano, 1962, 351 ss.; EINAUDI, *Saggi sul risparmio e l'imposta*, Torino, 1941, 356 ss.; GRIZIOTTI, *I concetti giuridici dogmatici di reddito di ricchezza mobile e di capacità contributiva*, in *Riv. dir. fin. sc. fin.*, 1941, II, 71 ss. Tra i contributi più recenti, RINALDI, *L'evoluzione del concetto di reddito*, in *Riv. dir. fin. sc. fin.*, 1981, I, 401 ss.

²⁴ Per tutti, VERDE, *Prova*, in *Enc. dir.*, XXXVII, Milano, 1988, 579 ss.

²⁵ Sono costretto, per garantire chiarezza al ragionamento, a far cenno ad un'argomentazione che sarà sviluppata nelle prossime pagine. Il passaggio dal pregiuridico al giuridico, al quale mi sono adesso riferito, si può realizzare in forza dell'art. 101, comma 4, del T.U. delle imposte sui redditi, dedicato alle sopravvenienze passive. Per l'operare di questa previsione l'inesistenza pregiuridica potrà affacciarsi nel modo del diritto alla stregua di "mancato conseguimento di ricavi" ed acquisire, con questa veste, rilievo reddituale, secondo le regole generali sulle prove.

²⁶ Per me non è così, come ho chiarito nelle pagine precedenti: quel prelievo è riportabile non all'art. 53 Cost., ma all'art. 25, ed ha dunque natura confiscatoria, seppure in misura parziale rispetto al frutto economico del reato.

²⁷ Cfr. sent. n. 617 del 26 febbraio 2013, con riferimento all'art. 50 della Carta dei Diritti Fondamentali dell'Unione Europea.

²⁸ Mi riferisco alla sent. Grande Stevens e altri vs. Italia, del 4 marzo 2014, sulla quale cfr. GIOVANNINI e MURCIANO, Il "ne bis in idem" sostanziale impedisce la doppia sanzione per la medesima condotta, in *Corr. trib.*, 2014.

²⁹ La vecchia sopratassa, nella struttura della legge n. 4 del 1929 e fino all'introduzione degli interessi moratori con la legge n. 29 del 1961 in materia di tasse e imposte indirette sugli affari, assolveva quasi certamente ad una funzione risarcitoria. Il suo ammontare, però, era determinato applicando una percentuale fissa e normalmente moderata all'imposta evasa, non era determinato in misura variabile tra un limite minimo a un limite massimo, come invece accadeva per la pena pecuniaria, che infatti rivestiva funzione schiettamente afflittiva.

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La tassazione dei proventi derivanti dall'attività illecita strumentale: spunti di riflessione sui rischi fiscali connessi dall'innesto di fatti o atti illeciti nell'esercizio di attività economiche lecite.

Author

- *Cesare Simone, Dottorando di Ricerca in Scienze Giuridiche, cesare.simone@unifg.it - Università di Foggia - Siena*

La disciplina relativa alla tassazione ai fini delle imposte sui redditi dei proventi derivanti da attività illecita (l. 24 dicembre 1993, n. 357) – introdotta sull'onda di esigenze contingenti e non priva di conseguenti criticità sotto il profilo dell'inquadramento sistematico – incontra il persistente interesse della dottrina e della giurisprudenza. La rilevanza di questa disciplina per la funzione del *risk management* impone l'esatta individuazione di qual è il fattore di rischio associato alla stessa e, conseguentemente, una preliminare distinzione che attiene all'incidenza della disciplina medesima relativamente, da un lato, alle cosiddette imprese illecite (quelle, cioè in cui l'illiceità connota l'attività in sé e, quindi, le diverse ipotesi di impresa criminale contraria all'ordine pubblico o al buon costume); dall'altro lato, invece, alle ben distinte ipotesi in cui si assiste al fenomeno dell'innesto di singoli atti o fatti illeciti strumentali all'esercizio di un'attività lecita che sono privi di rilievo ai fini della qualificazione del reddito come "reddito di impresa" e possono presentare diversi gradi di rilevanza quanto alla entità del reddito medesimo. È proprio in questa seconda ipotesi che l'argomento dell'attività illecita suscita numerosi interrogativi nell'ambito di una riflessione dei rischi di gestione inerenti al profilo tributario. La funzione strumentale dell'attività illecita determina l'inserimento del provento dell'atto o fatto nell'organizzazione dell'impresa lecita. Come osservato dalla dottrina "l'illecito strumentale può determinare una utilità marginale per l'impresa", utilità che "costituisce, innegabilmente, un profitto da reato". Nell'ambito della funzione strumentale si possono individuare, poi, dei casi anche di c.d. "apparente strumentalità", nei quali, cioè, l'atto illecito non si pone come elemento direttamente produttivo di autonome componenti reddituali allo stesso direttamente riconducibili, ma risulta inserito nella generale attività di impresa concorrendo in via mediata alla determinazione del risultato. In tutti questi casi, ferma re-

stando la funzione del *risk management* in ordine alla integrazione della fattispecie di reato in sé, è dato rilevare l'emersione di uno specifico "rischio fiscale", non quando l'attività illecita determina un risultato positivo tassabile (configurandosi, questo come obiettivo, piuttosto che come "rischio" dell'illecito), ma quando la disciplina - di cui alla l. 357 del 1993 - determini una diversa qualificazione dell'incremento patrimoniale realizzato con conseguente esclusione di taluni regimi impositivi di (anche parziale) esenzione o esclusione. Un'ipotesi - certamente anche da vagliare criticamente - effettivamente realizzatasi nella realtà nel caso del reato di truffa ai danni dello Stato commesso dall'amministratore della società al fine di ottenere illecitamente il contributo pubblico in applicazione della legge 488/92 il quale (contributo) sembrerebbe essere stato assoggettato a un regime di tassazione diverso e autonomo (e forse anche ulteriore) rispetto a quello "proprio" di tali componenti reddituali (Cass. Sez. trib., sent. 23.09.2013, n. 25467). La prospettiva d'indagine descritta suggerisce alcuni spunti di riflessione e, in particolare: *i*) il concorso dell'illecito strumentale nella determinazione del reddito d'impresa indipendentemente dall'applicazione dell'art. 14 della l. 357/93; *ii*) il ruolo degli strumenti penalistici; *iii*) il rapporto tra procedimento penale ed accertamento tributario; *iv*) gli effetti della restituzione volontaria del provento da reato ai fini fiscali

Parole chiave: attività, illecito, provento, tassazione, rischio.

JEL Classification: K1, K34

1. Premessa.

La disciplina relativa alla tassazione ai fini delle imposte sui redditi dei proventi derivanti da attività illecita (l. 24 dicembre 1993, n. 357 recentemente modificata dalla l. 208/2015¹), introdotta sull'onda di esigenze contingenti e non priva di conseguenti criticità sotto il profilo dell'inquadramento sistematico in contra il persistente interesse della dottrina² e della giurisprudenza³.

La formulazione dell'art 14, comma 4, della l. 537/93, che, per certi versi, poteva sembrare "alquanto generica e, soprattutto, superflua"⁴, in realtà, supera le incertezze di dottrina e giurisprudenza in merito all'imposizione dei proventi illeciti ed indirizza l'interprete (effetto ancora più evidente accogliendo la tesi della natura di interpretazione autentica della norma), in quanto il precetto normativo prevede che "devono intendersi ricompresi" nelle categorie di reddito di cui all'art. 6, comma 1, del TUIR i redditi derivanti da fatti, atti o attività qualificabili come illecito civile, amministrativo e penale.

L'irrilevanza del carattere illecito del provento richiama il principio generale di "neutralità" fiscale dell'illiceità del fatto per cui "l'eventuale non conformità di atti o attività alle norme in vigore - o comunque ai valori tutelati dall'ordinamento - è, in sé, irrilevante ai fini dell'applicazione delle norme tributarie"⁵, riconoscendo ai fini della tassazione - secondo la nozione economica di reddito⁶ - qualsivoglia manifestazione di ricchezza (lecita o illecita) espressione di capacità contributiva. Ne discende la possibilità di recuperare a tassazione i risultati economici delle cosiddette imprese illecite (quelle, cioè in cui l'illiceità

connota l'attività in sé e, quindi, le diverse ipotesi di impresa criminale contraria all'ordine pubblico o al buon costume).

Il significato comune del termine provento esprime "una entrata, un utile economico che un ente o un privato ricavano da qualsiasi fonte di guadagno"⁷, quindi, un incremento del patrimonio di colui che lo percepisce, sebbene, sotto il profilo tributario, "non ogni incremento"⁸ (o decremento) del patrimonio può rilevare - allo stesso modo - ai fini della determinazione del reddito.

Il reddito di impresa si determina apportando al risultato del conto economico - che rappresenta la "risultante attiva o passiva di una rilevazione contabile redatta a fini civilistici"⁹ - le variazioni in aumento o in diminuzione secondo i criteri fissati dal Titolo II del TUIR.

Nella determinazione del reddito di impresa - indipendentemente dalla previsione di una puntuale disposizione come l'art. 14, l. 537/93 - possono concorrere alla formazione della base imponibile i risultati economici realizzati dall'innesto di singoli atti o fatti illeciti strumentali all'esercizio di un'attività lecita, in quanto il provento illecito non si distingue da quello illecito. Pertanto, i fenomeni criminali - strumentali all'esercizio dell'attività di impresa - non assumono una autonoma rilevanza ai fini del trattamento fiscale (assenza di un "provento illecito" - "provento da reato") e, quindi, risultano assoggettati a tassazione secondo la disciplina ordinaria relativa ai redditi di impresa.

2. L'illecito strumentale: i diversi piani di partecipazione del provento illecito nei risultati economici dell'impresa lecita.

Il processo di gestione dei rischi di impresa è finalizzato a ridurre i fattori di incertezza che possono incidere in termini di variazione del *cash flow*. Il possibile vantaggio che può derivare dalla riduzione del margine di variazione del flusso di cassa si riflette sugli azionisti su due diversi piani: *i*) il valore di mercato dell'impresa/azioni; *ii*) la propensione da parte dei creditori a finanziare l'impresa¹⁰.

Appare evidente che il prelievo fiscale dell'utile o del provento illecito non rappresenta per il soggetto passivo di imposta un fattore di rischio o, quantomeno, non lo è più di quanto si possa attribuire ad altri eventi connessi alle dinamiche dell'attività di impresa.

Il punto di contatto fra il *risk management* e la tassazione dei proventi da reato si può cogliere in tutte quelle ipotesi in cui dall'accertamento dell'illiceità dell'atto, fatto o attività da cui deriva il provento corrisponde, a carico del soggetto beneficiario dell'illecito (impresa lecita), una decurtazione patrimoniale a titolo di imposta che emerge come alterazione/modificazione dell'ordinario trattamento fiscale di una componente del reddito di impresa.

In queste particolari ipotesi il recupero a tassazione dei proventi da reato rappresenta un evento che può costituire un rischio da "identificare, valutare,

gestire e sottoporre a controllo economico¹¹ attraverso strumenti tecnici, organizzativi e gestionali relativi all'attività di *risk management*.

In questa prospettiva di indagine si inserisce il fenomeno dell'illecito strumentale che si caratterizza per l'innesto di atti, fatti o attività illecite preordinate a "promuovere"¹² l'esercizio dell'attività di impresa con l'effetto di concorrere ai risultati economici rilevanti ai fini del reddito di impresa¹³.

Il tentativo di ricomporre le molteplici forme delle attività strumentali all'esercizio di impresa assume come presupposto comune la circostanza che l'atto o il fatto possa determinare, in favore del soggetto destinatario, "un vantaggio economico di diretta e immediata derivazione causale dal reato"¹⁴ di possibile "misurazione"¹⁵.

L'impossibilità di assoggettare autonomamente a tassazione i risultati economici imputabili all'attività illecita funzionale all'esercizio dell'impresa dimostra, senz'altro, una peculiarità della fattispecie in esame e, comunque, un limite applicativo dell'art. 14, comma 4, della l. 537/93, perché il reato "può restare distinto, anche se strumentalmente collegato"¹⁶.

3. Il "rischio fiscale" rilevante ai fini dell'attività di *risk management*.

La peculiarità dell'illecito strumentale - sotto il profilo dell'assoggettamento a tassazione - è rappresentata dalle due ipotesi di partecipazione del contribuente derivante dal reato all'esercizio di un'attività di impresa: *i*) l'assenza di un provento illecito autonomo sebbene il vantaggio derivante dall'attività illecita concorre alla formazione del reddito di impresa; *ii*) l'impossibilità di attribuire all'utilità derivante dal reato (per determinate fattispecie) un apporto economico ai fini della determinazione del reddito¹⁷.

Nell'ambito della funzione strumentale si possono individuare, poi, anche dei casi di "apparente strumentalità", nei quali, cioè, l'atto illecito non si pone come elemento produttivo di autonome componenti reddituali, allo stesso direttamente riconducibili, ma risulta inserito nella generale attività di impresa concorrendo in via mediata alla determinazione del risultato.

In tutti questi casi, ferma restando la funzione del *risk management* in ordine alla integrazione della fattispecie di reato in sé, è dato rilevare l'emersione di uno specifico "rischio fiscale", non quando l'attività illecita determina un risultato positivo tassabile (configurandosi, questo come obiettivo, piuttosto che come "rischio" dell'illecito), ma quando e se la disciplina di cui alla l. 357 del 1993 determini una diversa qualificazione dell'incremento patrimoniale realizzato con conseguente esclusione di taluni regimi impositivi di (anche parziale) esenzione o esclusione.

Un'ipotesi - certamente da vagliare criticamente - esaminata dalla giurisprudenza di legittimità riguarda il caso¹⁸ del reato di truffa ai danni dello Stato commesso dall'amministratore della società al fine di ottenere illecitamente un

contributo pubblico in applicazione della legge 488/92, il quale (contributo) sembrerebbe essere stato assoggettato a un regime di tassazione diverso e autonomo (e forse anche ulteriore) rispetto a quello "proprio" di tali componenti reddituali.

Nel caso citato, l'Amministrazione finanziaria - a seguito della condanna pronunciata con sentenza penale di primo grado (non impugnata dall'amministratore della società) - recuperava a tassazione, ai fini delle imposte dirette, l'importo complessivo erogato e percepito indebitamente dalla società a titolo di contributo statale (ai sensi della l. 488/1992).

L'avviso di accertamento veniva emesso in forza dei fatti accertati e delle prove acquisite nel processo penale a carico dell'amministratore della società, in quanto l'erogazione del contributo statale - regolarmente contabilizzato - risultava richiesto sulla base di operazioni (oggettivamente) inesistenti e, quindi, imputato - in modo difforme dalla realtà - per l'esercizio dell'attività economica della società.

L'ipotesi contraddistinta come "apparente strumentalità" riguardava la concessione di un contributo pubblico che secondo la prassi contabile doveva essere imputato in bilancio in conto capitale e qualificato, sotto il profilo fiscale, come sopravvenienze improprie il cui apporto economico rileva con la redazione del bilancio di fine esercizio.

Tuttavia la pronuncia della Corte di Cassazione, accogliendo la tesi dell'Amministrazione finanziaria, confermava il recupero a tassazione dell'intero importo erogato a titolo di contributo, poiché "doveva essere computato fiscalmente come reddito imponibile"¹⁹.

4. Conclusioni.

La tassazione dei proventi illeciti strumentali può suggerire alcuni spunti di riflessione rispetto all'attività di *risk management* in tutte quelle ipotesi in cui delle componenti del reddito d'impresa - per effetto dell'illiceità del provento da cui derivano - risultano sottoposte ad un regime fiscale difforme e/o derogatorio rispetto ai normali criteri previsti nel sistema del reddito di impresa.

Tale considerazione muove dalla constatazione che il normale prelievo fiscale del provento da reato (strumentale all'esercizio dell'attività lecita) non rappresenta un fattore di rischio per l'impresa, poiché il provento illecito - così come il provento lecito - concorre alla formazione della base imponibile.

La breve analisi svolta solleva un interrogativo di portata generale in merito alla possibilità che il carattere illecito del provento possa comportare deroghe alle regole afferenti alle singole componenti reddituali (ricavi, plusvalenze, sopravvenienze, etc.) con l'effetto di diversificare il trattamento fiscale di una medesima fattispecie in funzione della valutazione circa la liceità o illiceità del provento.

A tal proposito, si osserva che rispetto ad una nozione così ampia come quella dell'illecito, l'art. 14, comma 4, l. 537/93, non introduce una nuova categoria di

reddito da fatto illecito e, quindi, non viene superato il principio di tassatività dei redditi imponibili; infatti, l'interprete deve effettuare una complessa operazione di qualificazione del reddito di provenienza illecita secondo le regole ed i criteri stabiliti dal TUIR.

L'interrogativo formulato sollecita un interesse rispetto ai regimi fiscali di (parziale) esenzione di determinati componenti positivi del reddito di impresa come ad esempio: *i*) la deroga prevista dall'art. 87 del TUIR (plusvalenze esenti o *participation exemption*) rispetto alle partecipazioni societarie e ai titoli ad esse equiparati; *ii*) il trattamento riservato ai versamenti in denaro o in natura eseguiti a fondo perduto o in conto capitale che non si considerano sopravvenienze attive (ex art. 88, c. 4, del TUIR). Inoltre, il regime di favore può riguardare anche le regole relative ai componenti negativi del reddito e, in particolare, il regime di deducibilità degli interessi passivi come l'applicazione dell'art. 96, c. 2, del TUIR per quanto attiene l'individuazione delle operazioni da considerare ai fini della misurazione del risultato operativo lordo (ROL) e, quindi, la possibilità di escludere dal calcolo quei proventi di provenienza illecita.

La breve elencazione è diretta a segnalare delle criticità da definire attraverso il contributo della prassi amministrativa e giurisprudenziale, nonostante, il collegamento sistematico e funzionale previsto dall'art. 14, comma 4, l. 537/93 con altri strumenti di contrasto predisposti dal codice penale attraverso il sequestro o la confisca penale dei proventi illeciti.

Endnotes

¹ L'art. 1, l. 28.12.2015, n. 208 in vigore dal 1 gennaio 2016 ha introdotto all'art. 14, comma 4, l. 24 dicembre 1993, n. 537 la seguente modifica: «In caso di violazione che comporta obbligo di denuncia ai sensi dell'articolo 331 del codice di procedura penale per qualsiasi reato da cui possa derivare un provento o vantaggio illecito, anche indiretto, le competenti autorità inquirenti ne danno immediatamente notizia all'Agenzia delle entrate, affinché proceda al conseguente accertamento».

² FALSITTA, *Proventi da attività illecite (dir. trib.)*, aggiornamento 2001, Roma, 1987, p. 1 che evidenzia come sia attuale: «Il problema dell'assoggettabilità a tassazione dei proventi derivanti dalle attività illecite, pur essendo stato affrontato in vari momenti da numerosi studiosi del diritto finanziario, è ancora ben lungi dall'aver trovato una soluzione pienamente soddisfacente e pacificamente accolta da tutti gli scrittori»; BORIA, *La nozione di reddito ed il regime dei proventi illeciti nel sistema delle imposte dirette*, Riv. dir. trib., 2015, I, p. 3 e ss.

³ L'intervento della giurisprudenza in materia di tassazione dei proventi illeciti si registra già a partire dalla sentenza della Corte di Cassazione di Firenze, 25 marzo 1871, in Giur. It., 1871, XXIII, parte II, col. 849.

⁴ Espressione utilizzata da SALVATI, *I proventi illeciti e la disciplina positiva comunitaria e interna*, in Rass. trib., 4/1999, p. 1099.

⁵ Così FEDELE, *Imposizione fiscale od ablazione sanzionatoria per i proventi illeciti?*, in Rass. trib., 1999, p. 1622. Si veda PARLATO, *Presupposti e limiti di tassabilità dei proventi derivanti da attività illecite*, in Studi in onore di Victor Uckmar, Padova, 1997, II, p. 931 e ss.

- ⁶ A.D. GIANNINI, *Elementi di diritto finanziario*, Milano, 1945, p. 200 e ss.; Id., *Istituzioni di diritto tributario*, Milano, 1951, p. 32 e ss.; COCIVERA, *Guida alle imposte dirette*, Torino, 1956, p. 394 e ss.; FORTE, *Sul trattamento fiscale delle attività illecite*, in Riv. dir. fin., 1952, p. 119.
- ⁷ AA.VV., *Provento*, in Diz. Enc. ital., IX, Roma.
- ⁸ RUSSO FRANSONI CASTALDI, *Istituzioni di diritto tributario*, Milano, 2013, p. 258.
- ⁹ Così TINELLI, *Il reddito d'impresa nel diritto tributario*, Milano, 1991, p. 189; ZIZZO, *Regole generali sulla determinazione del reddito d'impresa*, in Giur. sistem. dir. trib., Torino, p. 476.
- ¹⁰ FORESTIERI, *Risk management – Strumenti e politiche per la gestione dei rischi puri dell'impresa*, Milano, 1996, p. 11, evidenzia il duplice risultato attribuibile al risk management: «I punti discussi in precedenza indicano il possibile vantaggio determinabile dal risk management, attraverso gli effetti sul livello e sul rischio del cash flow, sul valore di mercato dell'impresa (delle azioni). Gli stessi argomenti possono essere usati per sostenere la tesi che il risk management rafforza la finanziabilità dell'impresa; sarebbe cioè il presupposto per una riduzione del rischio percepito dai possibili creditori».
- ¹¹ Così, FORESTIERI, *Risk management – Strumenti e politiche per la gestione dei rischi puri dell'impresa*, Milano, 1996, p. 4.
- ¹² Espressione utilizzata da FEDELE, *Imposizione fiscale od ablazione sanzionatoria per i proventi illeciti?*, in Rass. trib., 1999, p. 1628, che in nota 14) evidenzia il collegamento tra atti ed attività illecite con riguardo alla seguente ipotesi: «derivazione da attività (di impresa, ad esempio) in sé lecite, ma favorite, promosse, coadiuvate da attività penalmente illecite (il reddito deriva dall'attività d'impresa, da cui il reato può restare distinto, anche se strumentalmente collegato».
- ¹³ In tal senso, GIOVANNINI, *Provento illecito e presupposto dell'imposta personale*, Milano, 2000, p. 110; DELLA VALLE, *Ancora in tema di imponibilità dei proventi derivanti da attività illecita*, in Dir. prat. trib., 1991, p. 647 e ss.
- ¹⁴ Cass. SS.UU., 27 marzo 2008, Fisia Italimpianti.
- ¹⁵ Sulla necessità di misurare l'apporto economico dell'attività illecita secondo le diverse accezioni si veda MARCHESELLI, *Le attività illecite tra fisco e sanzioni*, Padova, 2001, p. 300, che rispetto alle violazioni dello statuto dell'imprenditore - violazioni contabili e tributarie - rileva: «Se è vero che esse, indirettamente, incidono (in senso normalmente meliorativo) sulla capacità di concorrenza dell'imprenditore e, pertanto, a stretto rigore, potrebbe misurarsi l'efficacia reddituale della commissione degli stessi, è anche vero che si tratta, in concreto di misurazioni di disagevolissima effettuazione».
- ¹⁶ FEDELE, *Imposizione fiscale od ablazione sanzionatoria per i proventi illeciti?*, in Rass. trib., 1999, p. 1628.
- ¹⁷ E' proprio rispetto a questa seconda ipotesi che rileva l'attività di verifica dell'amministrazione finanziaria diretta alla ricerca dei costi indeducibili, in base agli attuali strumenti normativi (ex art. 14, comma 4 bis, l. 537/93), - da recuperare a tassazione - imputabili direttamente alla commissione del reato non intervenendo, invece, sui costi connessi alla successiva attività lecita¹⁷ Si veda, PROCOPIO, *La c.d. riforma dei costi illeciti e la sua aderenza ai principi di capacità contributiva*, Dir. prat. trib., 2012, p. 547 che esamina il caso di somme versate per l'aggiudicazione di un appalto: «Si ipotizzi che un imprenditore abbia corrisposto delle somme (*rectius*, tangenti) per aggiudicarsi un appalto; se è vero che tali costi sono da considerarsi indeducibili, è innegabile che da una interpretazione logico-sistematica, anche in "chiave" di lettura costituzionalmente orientata, i successivi costi per l'adempimento contrattuale dell'appalto non potrebbero che risultare deducibili atteso che trattasi indiscutibilmente di una

attività (l'appalto) pienamente lecita».

¹⁸ Cass. Sez. trib., sent. 23.09.2013, n. 25467.

¹⁹ Cass. Sez. trib., sent. 23.09.2013, n. 25467.

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Tax good governance, new rules in spanish and Italian law .

Authors

- José A. Rozas, Tax Law Full Professor, jarozas@ub.edu- University of Barcelona;
 - Maria Pia Nastri, Tax Law Associated Professor, mariapia.nastri@unisob.na.it- University of Naples Suor Orsola Benincasa;
 - Enza Sonetti, Ph.D. Candidate, enzasonetti@gmail.com, University of Naples Suor Orsola Benincasa and University of Barcelona.
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Nowadays, Italian and Spanish tax and corporate/company laws are changing in order to implement the OECD's so-called "cooperative compliance" tax management policies (adempimento collaborativo, cumplimiento cooperativo). One of the new tax policies in this sense, mandates that members of the Board must get directly involved in the design, implementation, management and control of corporate tax policies strategies and proceedings. In this vein, these new national regulations try to add tax compliance and risk prevention to the specific diligence and oversight duties of the Board. Up until now, these policies have been particularly developed in other countries, and have only been recently introduced to Italy and Spain. It must be pointed out that, in this context, there is a key role to be played by the principle of legitimate taxpayers' expectations, defined or understood herein as that necessary trust which must guide relations between taxpayers and the relevant tax authorities or collection agencies. This principle has a fundamental relevance as it can act as the foundation of a support structure for voluntary compliance and thus help to prevent tax litigation. The methodology used to draft this paper is that of first analysing the new "tax good governance" regulations introduced in Spain and Italy, and then the benchmarking of them with the experiences of other countries that have been active in this field, with a particular reference to The Netherlands. The paper's objective is to demonstrate the importance of cooperation between taxpayers and tax authorities as an instrument to prevent unnecessary tax risk and reduce resource-intensive tax litigation. The expected result is to evidence the fundamental role of cooperative compliance instruments to extend them to all categories of taxpayers (e.g. both corporates/business and individuals).

Keywords: Cooperative compliance-diligence duties of board members- Legitimate expectation - Tax risk prevention - Tax good Governance.

JEL Classification:K1 K34.

SUMMARY: 1.- The Spanish regime governing “tax good governance”; 2.- The system of collaborative fulfillment and monitoring of fiscal risk in Italy; 3. The new cooperative paradigm: the protection of legitimate expectation; 3.- A few expectations concerning these regulations.

1. - The Spanish regime on “tax good governance”¹ (by José A. Rozas)

Since the middle of the last decade, a new public management tax policy – the so called “cooperative compliance” in the official documents of its main sponsor, the OECD’s Forum of tax administrations²- has been changing national tax authorities’ strategies for combatting tax fraud all over the world.

Probably the most active tax authorities in this area have been the Australians, with their now famous “pyramid approach”³, the British, characterized by their “tax risk management approach”⁴, and the Dutch, who have developed a specific tax monitoring system, known as “horizontal monitoring”⁵.

The core idea of this tax policy (cooperative compliance) is to create a new framework relationship between tax authorities and taxpayers, as well as the latter’s representatives, based no longer on adversarial confrontation, but rather on mutual trust⁶. One of the strategies in this sense is to introduce tax good governance within corporate Boards of directors. This is accomplished by adding tax compliance duties, and fiscal policy, to the topics covered or falling under a corporate manager’s fiduciary duties (generally considered duties of care, loyalty and good faith). Considering public governments or the state as corporate stakeholders, to payment of taxes due would be part of the company (and thus board’s) corporate social responsibility.

There is, thus, a clear link between commercial & company law and tax law, as regards this point, aiming at a common goal, the same purpose: to prevent tax fraud by increasing a good corporate management practices. This tendency is part of a more general tax policy, “co-operative compliance” that, probably not by coincidence, uses a term, “compliance”, which in Criminal law has been long used to identify organizational decision-making procedures at the corporate level to prevent risk and thus avoid the incurring of criminal liability by companies and/or their top-level management.

British, American, Dutch and Australian law had each already taken steps in this direction during this past decade. In particular, from 2005 on, Dutch tax law has been developing a sort of general tax compliance system, the so-called “horizontal monitoring”, based on a self-tax-control-system implemented by the corporation itself and its tax-related service providers who are affiliated with the system, due to their key role in assuring the system’s practical functionality. Under a covenant signed between the Dutch tax authorities and the specific corporate Board of directors (or its tax practitioners/representatives) the corporation agrees, through the setting up of an internal system, the “Tax Control Framework”, that such will be supervised by the tax authorities, and that this system will carry out the ongoing tax control/monitoring activities.

In addition, Spanish Corporate law has begun to head in this direction, through the Corporation Government reform Act (31/2014, of 3rd December).

This Act modifies the Corporation Act (RDL 1/2010 of 2nd July), establishes new specific duties regarding tax matters for (at least for now) those Corporations listed on the Spanish Stock Market. These obligations have been outlined in the Schedule that governs the fiduciary duties of listed companies' Boards of Directors (Sect.2nd, Ch. VII, Tit. XIV of RDL 1/2010).

In fact, therein are enumerated those director fiduciary duties that cannot be delegated to other by the Boards of Directors (art 529.ter RDL 1/2010):

<p><i>"b) La determinación de la política de control y gestión de riesgos, incluidos los fiscales, y la supervisión de los sistemas internos de información y control.</i></p> <p>(...)</p> <p>f) <i>La aprobación de las inversiones u operaciones de todo tipo que por su elevada cuantía o especiales características, tengan carácter estratégico o especial riesgo fiscal, salvo que su aprobación corresponda a la junta general.</i></p> <p>g) <i>La aprobación de la creación o adquisición de participaciones en entidades de propósito especial o domiciliadas en países o territorios que tengan la consideración de paraísos fiscales, así como cualesquiera otras transacciones u operaciones de naturaleza análoga que, por su complejidad, pudieran menoscabar la transparencia de la sociedad y su grupo.</i></p> <p>(...)</p> <p>i) <i>La determinación de la estrategia fiscal de la sociedad."</i></p>	<p>"b) Determining the control and risk management policy, including tax liabilities, and monitoring of internal information and control systems.</p> <p>(...)</p> <p>f) Approving investments or transactions of all kinds with, by their amount or special characteristics, are strategic or have a special tax risk, unless their approval corresponds to the general shareholders' meeting.</p> <p>g) Approving the creation or the acquisition of shares in special purpose entities or those established in countries or territories considered tax havens, and any other transactions or operations of a similar nature whose complexity might undermine the transparency of the company and its group.</p> <p>(...)</p> <p>i) The definition of the fiscal strategy of the company."</p>
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In the same vein, for these listed companies, and in the context of their own obligations regarding the Audit Committee -composed exclusively of non-executive director advisors- specific duties on tax duties monitoring have also been provided for (Article 529. quaterdecies RDL 1/2010):

<p>"b) Supervisar la eficacia del control interno de la sociedad, la auditoría interna y los sistemas de gestión de riesgos, incluidos los fiscales, así como discutir con el auditor de cuentas las debilidades significativas del sistema de control interno detectadas en el desarrollo de la auditoría.</p> <p>(...)</p> <p>g) Informar, con carácter previo, al consejo de administración sobre todas las materias previstas en la Ley, los estatutos sociales y en el reglamento del consejo y en particular, sobre:</p> <p>(...)</p> <p>2. ^o la creación o adquisición de participaciones en entidades de propósito especial o domiciliadas en países o territorios que tengan la consideración de paraísos fiscales y (...)"</p>	<p>"b) Monitoring the effectiveness of internal control systems of the company, internal audit systems and risk management, including those relating to taxes, and discussing with the auditor any significant weaknesses in the internal control system detected during the audit.</p> <p>(...)</p> <p>g) Reporting, prior, to the board on all matters under the Law, Statues and in the Board Regulations and in particular on:</p> <p>(...)</p> <p>2nd - the creation or acquisition of shares in special purpose entities or those established in countries or territories considered tax havens and (...)"</p>
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Finally, listed companies must include in their corporate annual report, which is a legal requirement (under Art. 540 RDL 1/2010), information about:

<p>"e) Sistemas de control del riesgo, incluido el fiscal (...)"</p>	<p>"e) Risk control systems, including tax risk (...)"</p>
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All of these tax control measures, for stock-market listed corporations, must be approved at the first general meeting of shareholders held for the approval of financial statements after the entry into force of the reform (i.e., January 2015).

Nor does the establishment of these specific duties of diligence on tax matters represent a "Copernican" or truly fundamental change in the matter and neither is yet of general application, since, for now, their impact is still limited to publicly-listed corporations.

However, their inclusion implies a first step of our company law –this regime has been proposed and promoted not by the Treasury Secretary, but rather by the Economy Ministry- in a certain direction, one that has already been success-

fully developed in other Countries. This new step/ new direction is expected to undergo extraordinary development and have a significant impact on the legal regime of corporation tax liability and on Boards of directors as well.

2. - The system of collaborative fulfillment and monitoring of fiscal risk in Italy (by Maria Pia Nastri)

In recent years the tax compliance has become an ever more pressing need for companies, especially for the larger ones also operating in multinational context, which are often subjected to risk control requirements due to proper fulfillment of tax obligations. In fact, for large companies, the tax risk, defined as pecuniary damage in the strict sense, is coupled with the so-called reputational risks that could be added for the violation of tax legislation⁷.

The OECD, in recent years, *ut supra*, dictated a series of recommendations on ways and means of improving and strengthening the relationship between tax authorities and taxpayers, basing their relationships on dialogue, trust and cooperation, rather than contradictory conflicts.

In order to build a better relationship between tax authorities and enterprises, the Italian legislation (as other European countries) tried to boost some forms of ongoing dialogue, even before the fiscal deadlines. The collaborative performance is one of the cooperation mechanisms in line with the guidelines of the OECD report "Cooperative Compliance - a framework". This report shows in fact the central importance of the Tax Control Frameworks (TCF) in multinationals for systematic management of tax risk. A Tax control system framework should therefore not only ensure the tax authorities of the veracity of tax returns but also the transparency of the taxpayer, both fundamental elements of the cooperative compliance. In this context the Decree of August 5, 2015, n. 128 - containing provisions on legal certainty in relations between tax authorities and taxpayers - introduced in our tax system the regime of collaborative compliance (*adempimento cooperative*). This tool tends to realize a new kind of relationship, with less conflicts and more cooperation, between tax authorities and taxpayers, according to the OECD recommendations and to the experiences of other countries that have anticipated Italy in introducing similar schemes with positive results.

The Italian Tax Revenue Agency on June 25, 2013, in anticipation of the enabling act, had already launched a pilot project called "collaborative compliance Regime", addressed to the so-called large taxpayers⁸. The goal of the project was to identify, together with the taxpayers, a new report that would allow an evolution of the present tutoring with the directions of the OECD. This new model had to realize a cooperation between tax authorities and taxpayers for transactions that presented greater tax risks or that might give cause for elusive interpretations by the administration⁹. In the implementation of the Article 6 of Law 23/2014, the government delegated the adoption of a series of legislative de-

crees in order to achieve a more equitable and transparent tax system, through new forms of preventive communication between companies and the tax administration as well as the adoption of structured business systems management and control of the tax risk¹⁰. With the Legislative Decree no. 128/2015, Art. 3 to 7, laying down rules on legal certainty in relations between tax authorities and taxpayers, a new organization has been introduced into our system called: "Collaborative regime of compliance"¹¹. The access to this scheme during the first application was limited to taxpayers with a turnover or revenues is not lower than ten billion Euros¹². Subsequently the possibility of extending the regime to taxpayers who achieve a turnover or revenues not lower than one hundred million euro or belonging to groups of companies was provided¹³.

The institution of the collaborative compliance has been established in order to promote the adoption of forms of communication and cooperation based on enhanced mutual trust between tax authorities and taxpayers also encouraging the prevention, decrease, and quick resolution of disputes on tax matters¹⁴. It should be noted that the chance of joining the collaborative performance is dependent upon the fulfillment of certain requirements and it is discretionary. It should be also clarified that taxpayers must provide for an effective internal system for identifying, measuring, managing and controlling the fiscal risk, in order to enter the system¹⁵.

An effective internal control system substantially reduces the checks for absence of information errors regarding data and documents in relation to the various company purposes. Thus, the document checks on the accounting records, as well as the administrative control for the possible budget certification become simpler. The presence of an effective internal control system is designed to provide a reliable support for the Tax Agency in managing relations with the taxpayer. Therefore the system, if properly set up to monitor the fiscal risks, should guarantee the veracity of the information and data provided by the taxpayer and also the compliance of his operations with the tax regulations. The new tax compliance system makes as a basis for discussion an effective internal control system and a collaborative and transparent conduct of the taxpayer with communications to the Agency in order to reduce and control tax risks, with particular reference to transactions that may fall in the so-called by OECD "aggressive tax planning".

The internal system should enable the company a preventive self-assessment of tax risk, which could achieve a clear and transparent relationship with the tax authorities by eliminating or reducing the tax risk. The Tax Agency will have to assess, on the basis of the principles of reasonableness and proportionality, the control system adopted by the taxpayer and examine with priority situations likely to generate significant tax risks, responding promptly to requests of taxpayers; The taxpayers who adhere to the regime will be able, through an abbreviated procedure of tax ruling, propose a question on the application of tax provisions relating to concrete cases in order to avoid tax risks. The Tax Agency

within fifteen days must, after having evaluated the content of the application and suitability of the documentation, answer to the question within forty-five days. The taxpayer, in case of taking a different behavior from that indicated in the question, will be required to notify the Agency.

It should also be noted that the Tax Agency will also have to regularly publish on its corporate website the updated list of transactions, the structures and schemes deemed to be of aggressive tax planning, following the 12th BEPS' initiative about "mandatory disclosure systems". In this way a tax context of certain and stable environment is encouraged, based on communication and transparency in relations between tax authorities and taxpayers and on specific procedures aimed at simplification of tax compliance.

It seems clear that a reorganization of the potential risks identification, as well as of the proper interaction with other company stakeholders, is needed. Obviously also the financial companies' administration needs to reorganize the internal activities in order to fulfill the new role required by the modified legislation. The responsibility for the management and / or for the tax risk control should be given to the governance bodies¹⁶. The taxpayer, if taking a different behavior with respect to the prescribed one, will be required to notify the Agency. The legislator, with the introduction of this instrument, aimed at promoting a practical co-operation between tax authority and taxpayers giving a rewarding character to the new instrument in favor of the companies. Joining the collaborative compliance regime reduces the administrative sanctions to the half (and in any event not more than the minimum prescribed by law), and also their collection is suspended until the end of the investigation¹⁷. The Tax Agency in case of complaint for tax offenses, is required to notify the Prosecutor's Office; if, however, the taxpayer has adhered to the regime, the same agency should provide all relevant information regarding the tax risk control system adopted by the taxpayer himself. Add to this that companies choosing to join the scheme will not be required to provide a guarantee for the payment of tax refunds, both direct and indirect. It is then of particular note, under the profile of the image and reputation, the publication on the Agency's institutional site of the Companies joining the regime of collaborative fulfillment. The tax authorities, on the other hand, will benefit from a significant reduction in assessment costs and a deflationary effect on the litigation, although the actual application results in a reorganization of the Tax Law structure and a rapid implementation of the system also to taxpayers with turnover of 100 million (in anticipation of the next few years). It has also to be underlined that the Law no. 23/2014 provided the introduction of certain provisions, with which it was intended to broaden the tax authority tutoring also in favor of smaller taxpayers, who have not yet been implemented, because the tax compliance is particularly difficult for the smaller companies. Unfortunately, in this respect it is sad to admit that Italy still does not encourage private economic initiative, nor does simplify administrative requirements; tax burdens and the related costs lead not only a major impact on business productivity, but also a certain propensity to tax evasion¹⁸.

The company expectation is to be able to rely generally on a clear, stable and efficient tax system, in order to contain the costs of compliance. It is therefore evident that the application of the new system will allow the companies to achieve a higher standardization of compliance mechanisms¹⁹. It seems clear that the efficiency of this regime must be based on neutrality and independence criteria in order to protect not only the interests of the taxpayer, who may thus legitimately hope to tax compliance, but also the Tax Agency, which will benefit of lower expenses in terms of inspections and higher tax revenues, in view of a renewed relationship with the taxpayer.

The introduction of the new collaborative compliance regime opens, then, a new horizon in Italy in relation to the realization of tax compliance: if it is true that the dialogue and prevention constitute the necessary tools to achieve the objective in terms of cooperation between tax authorities and taxpayers, the sanctions will no longer find application losing their relevance.

3. - The new cooperative paradigm: the protection of legitimate expectation (by Enza Sonetti).

As referred in the paragraphs above, OECD directives on tax cooperative compliance²⁰ have pressed many legal systems – including Italy- to set out a new meaning of the relationship between tax administration and taxpayers, with particular reference to the hypothesis that this is a large enterprise. The idea of a prior cooperation, in which the parties can dialogue before comply with tax obligations, plays an important role in the reduction of tax law uncertainty that is one of the most important obstacle to the voluntary compliance of taxpayers and to enterprises tax planning activities²¹. In particular, these systems have as aim to encourage voluntary compliance, preventing from tax avoidance and tax litigation, but the replacing the confrontational model by a cooperative one, has to be followed by the identification of a new rule that could lead this new relationship.

In this context, it must be pointed out the relevant role of the principle of legitimate expectation as guarantee for both taxpayers and tax administration. Some scholars, have pointed out that legitimate expectation is something different from law certainty to whom belongs²². The “legal certainty” should be considered as a general category identifying a temporal and spatial rule’s feature that prescribes coherence and predictability of rules’ consequences and asks for an identifiable and clear legislative process. It belongs to almost all existing legal systems²³ and to it could be ascribed different meanings: it can be read as the right to fair trial within a reasonable time, as prohibition of retroactivity or of “*ne bis in idem*”. Among these different meanings, has a particular importance the principle of legitimate expectations theorised by German law under the name of *Vertrauensschutz*²⁴ and foreseen by different fields of law. It may be considered as the ‘predictability aspect’ of the principle of legal certainty”²⁵.

The transposition of a typical principle of civil law in a field like the public one, in which contractors are not on equal footing, represent a guarantee to every parties of tax relationship. The principle, is indeed direct to limit the discretion of public administration preventing from retroactive interpretation of the rules and to keep taxpayers from invoke legitimate expectations to justify avoiding aims. Moreover, the principle protect the taxpayers' expectations that have originated from tax administration instructions or answers or from a reasonable interpretation of the rules²⁶.

Legitimate expectation should have a relevant role in a context of cooperation between taxpayer and tax administration in the way it may be the measure of the necessary trust that has to conduct this relationship and reduce tax law uncertainty. The principle, together with good faith, should be the key to evaluate the liability of the cooperating taxpayer, especially of the enterprises, that so often, try to contend with the multitude of tax laws relating to their tax planning activities.

The Italian taxpayer's rights Statute, provides for this principles under a positive rule of law²⁷: art. 10 is entitled "protection of good faith and legitimate expectation" and it foresees that the relations between taxpayers and tax administrations are based upon the principles of cooperation and good faith²⁸. The principle provides for an obligation of cooperation and good faith and it is not only willing to protect the taxpayer who has a genuine right to fairness and clarity by tax administration: indeed, it does not allow to use it as cause of liability exclusion for tax avoidance behaviours disguised as a misunderstanding of the rules. The "good faith" imposed by art. 10 must be understood in an objective sense from which derives a mutual fairness obligation between the parties²⁹. Even other legal systems foresee the legitimate expectation, but this is often considered as general principle of law³⁰.

In cooperative compliance systems, the guarantee of protection of good faith affects not only the beginning and the development of the relationship, but also the consequence depending on voluntary or involuntary infractions. The Italian taxpayer's rights statute, in the same art. 10, regulates the relation between taxpayers and tax administration through the specific point of view of trust and good faith in the application of penalties and interests³¹. The main idea of this norm is to exempt from penalties and default interest if the taxpayer complies with instructions contained in acts of tax administrations, even if subsequently changed, or if the behaviour appears in place because of facts directly resulting from delays, omissions or errors of the administration³². In this sense, this norm is willing to protect the "trust" put by the taxpayer in tax administration authority, in the way that this last can influence compliance behaviours. In addition, paragraph 3, protect taxpayer's good faith and legitimate expectations in case of uncertainty of tax law, preventing from the application of administrative penalties if the infraction depends on objective regulatory

uncertainty about the interpretation and application of tax law³³. Thus, if the violation results in a mere formal breach without any tax liability, the administrative tax penalties will not be applicable *ex post*. Other legal systems provides for rules exempting from liability in case of infractions due to an adaptation to the solutions provided by tax authorities or if the breach of law occurs in a cooperative proceeding and it turns in an error within acceptable margin³⁴ or, lastly if the infractions has an reasonable excuse³⁵. For example, Spanish tax system protect good faith of taxpayers foreseeing at art. 179. d) of General tax law an exclusion liability clause, according to which, taxpayer will not be considered liable and no penalties will be applied when he acted with due care in comply with tax obligation. Moreover, the same norm, protect the expectations of taxpayer, providing for a liability clause exclusion when he has referred to a reasonable interpretation of the rule or if he has adapted himself to.

Thus, in other words, the legitimate expectation and the good faith would be not only the instruments to analyse the infraction committed by the taxpayer that has been determined by an objective condition of uncertainty or by an ambiguous instruction, but also the key to reading the renunciation of the State to its collection interest in reason of the absence of a damaging aim. By this point of view is easier to understand how it can works as interpretative standard in cooperative framework: if there is no guilty, if the taxpayer showed his hand to tax administration in advance, the possibility of an error should be treated in the same manner, that's to say assuming his good faith or the honesty of his expectations.

The cause of exclusion liability mentioned above are all based on the same basic assumption: the protection of the taxpayer that in good faith and with trust, voluntary comply, cooperate. The new relationship between taxpayer and tax administration, introduced by different regulations, in Italy, Spain and so many other countries, needs a guideline able to express the trust that has to characterise a cooperating - no more confrontational- relationship, especially if the taxpayer is a firm that contribute to the development of the society in which works.

The legitimate expectation and the good faith in a cooperative relation, could be the instruments to measure the due diligence request to taxpayers who work side by side with tax administrations, to determine the penalties to apply -or not to apply- in case of infractions, encouraging voluntary compliance.

This will be the way to put a dividing line between taxpayers who comply and those who prefer to get out of cooperation mechanisms and to build a fair tax system in which is guarantee proportionality, and so, justice.

4. - Some expectations about these regulations (by José A. Rozas)

The exposed regulations are not the first specific Spanish or Italian rules about the Board of directors' duties and liability regarding tax matters. Since 1963, in the Spanish case, for instance, there has been established specific tax liability for corporate managers (arts. 41-43 of Tax General Code 58/2003), which has been modified and reinforced several times (during this past decade) in order to combat tax fraud by involving the Board of directors in tax policy decisions.

In Italy the provision of an internal control system adapted to the law decree 231/2001 model, to whom refers the new regulation on cooperative compliance as alternative to the tax control framework, can exempt societies from liability for crimes if they can demonstrate that it has been adopting before the commission. Nevertheless, it is necessary to point out that this model does not refer to tax crime.

The key point is to understand that, from now on and in the future, the fiduciary duty of corporate managers, in the tax field, is no longer to pay as few taxes as possible, but rather to pay taxes due at the right time according to applicable law. This approach treats governments as legitimized representatives of the people, as well as corporate stakeholders, and holds that the payment of taxes due is an ordinary duty of corporate accountability.

There is no doubt that there are weak and unclear boundaries between the concepts of tax mitigation, tax avoidance and tax evasion. No one will be able to decide, once and for all, when "substance" might prevail over "form", when there is no other "business purpose" for a corporate transaction or contract other than that of saving taxes. However, perhaps, something is changing with these specific fiduciary duties on tax matters for Boards of directors. From now on, it probably will be assumed that they (as directors) have a duty not to cheat tax authorities on such questions, but rather must cooperate (*co-operare*, from Latin, work together) with them, to comply with tax obligations in a reasonable way. The tax risk control/monitoring would no longer be solely a public task, but rather also a corporate task as well.

The new Spanish and Italian regimes, here exposed, around the so called "co-operative compliance" framework – fiscal fiduciary duties for listed companies' Boards of Directors, and the *adempimento cooperativo* procedure – are based on the legitimate expectation as rule principle of the relationships between taxpayers and tax authorities. In fact, both regulations are good examples of how are changing the tax relationships, from an adversarial paradigm - a prospective control made by tax authorities and often closed with litigation- through a cooperative paradigm on a trusty pre-filled relationship, within a mutual exchange of information and a self-control, by the taxpayers, of tax risks.

Endnotes

- ¹ A preliminary Spanish version of this section has been published as a post on the *Institut Transjus blog* (University of Barcelona Law School) (<https://transjusblog.wordpress.com/2015/06/30/la-politica-fiscal-en-los-consejos-de-administracion/>).
- ² OECD: *Co-operative Compliance: A Framework – From Enhanced Relationship to Co-operative Compliance*, Paris, 2013 (<http://www.oecd.org/ctp/administration/Co-operative-Compliance-Preliminary.pdf>).
- ³ BRAITHWAITE, V.: *Defiance in taxation and governance. Resisting and Dismissing Authority in a Democracy*, Edward Elgar, Cheltenham (USA), 2009, 365 pp.
- ⁴ FREEDMAN, J., LOOMER, G.T. y VELLA, J.: “Corporate Tax Risk and Tax Avoidance: New Approaches”, *British Tax Review*, n. 1, 2009, pp. 74-116.
- ⁵ STEVENS COMMITTEE (COMMITTEE HORIZONTAL MONITORING TAX AND CUSTOMS ADMINISTRATION): *Tax supervision – Made to measure*, 2012, 163 pp.
- ⁶ In the Spanish fiscal literature, CALDERÓN CARRERO, J.M., QUINTAS SEARA, A.: *Cumplimiento cooperativo y Buena gobernanza fiscal en la era BEPS*, EY/Thomson Reuters Civitas, Cizur Menor, 2015, 323 pp.
- ⁷ In the US the Sarbanes Oxley Act of 2002, reaffirmed that an effective tax risk management is a key issue not only for corporate governance, but also for the reputation defense of large companies on the market and their relations with institutions (so-called corporate responsibility). The stakeholder’s evaluation is affected, in fact, by the perception of its degree of compliance with present regulations.
- ⁸ Pilot project of the Tax Agency of 25 June 2013.
- ⁹ In this first test phase the candidate enterprises had to present certain characteristics: have gained the status of “large taxpayer”, have adopted models of organization and management referred to ‘art. 6 of Legislative Decree. N. 231/2001 or have adopted a tax risk system of management and control (so-called Tax Control Framework). They should also possibly be part of a multinational group, have joined other cooperative forms of compliance in other jurisdictions, have activated ruling of international standards, or have adhered to the regime of documentary charges relating to transfer pricing. Out of 84 applications, the Tax Law agency had selected 14 subjects and with them they launched the comparison work on the characteristics of the internal control system and the tax risk management, see FERRONI, B.: *Lo schema di decreto delegato sul nuovo regime di adempimento collaborativo*, in *Fisco*, 21, 2015, p.2021.
- ¹⁰ SANTORO, A. – LUPI, R. - MANZITTI, A. :*Ricchezza non registrata e pianificazioni fiscali aggressive: in che consiste la “cooperative compliance” della delega fiscale?* in *Dial. Trib.* 2014; LENOTTI, M.: “*Co-operative compliance nella delega fiscale e nel progetto pilota dell’Agenzia delle entrate*”, in *Corr. Trib.* 2014 p.1627; LEONE, F. – BALDASSARRE, B.: “*Co-operative compliance*”: verso un nuovo rapporto Fisco-contribuente, in *Amministrazione & Finanza*, 8, 2015, p. 23.
- ¹¹ MELILLO, C.: *Regime di adempimento collaborativo e monitoraggio del rischio fiscale: incentivi, semplificazioni e oneri*, in *Dir. Prat. Trib.*, 6, 2015, p. 10963.
- ¹² LEONE, F. –BALDASSARRE, B.: *Co-operative compliance: verso un nuovo rapporto Fisco-contribuente*, in *Amministrazione & Finanza*, 8, 2015, p. 23. GALLO, F.: *Brevi considerazioni sulla definizione di abuso del diritto e sul nuovo regime del c.d. adempimento collaborativo*, in *Dir. prat. Trib.*, 6, 2014, p. 947.
- ¹³ From a procedural standpoint the companies fulfilling the prescribed requirements that intend to be admitted to the collaborative scheme have to submit electronically their application, using a specific model; the tax office, once confirmed that the necessary requirements have been satisfied, will communicate the admission to the scheme within the next one hundred and twenty days. This scheme will apply in the tax period during which the request has been sent and will be automatically renewed if the

taxpayer's decision to not remain in the system is not expressly disclosed. The Tax Agency will justify measures which may exclude the taxpayer from collaborative compliance for the loss of the requirements or for dereliction of duty laid down in Article 5. The taxpayers who join the scheme can propose a question through a simplified procedure on the application of tax provisions relating to concrete cases in order to avoid tax risks. The Tax Agency, within fifteen days must, after evaluating the content of the application and suitability of the documentation, answer to the question within forty-five days.

¹⁴ Art. 3 D. Lgs. 5 of august 2015 n.128.

¹⁵ CANTON, G. – MEULEPAS, M.: *Cooperative compliance e tax control framework: strumenti di certezza fiscale preventiva*, in *Amm. & Fin.* 3, 2014, p. 37; VALENTE, P.: *Tax governance ed erosione della base imponibile: modelli di gestione del rischio fiscale*, in *Fisc. & Comm.intern.*, 11, 2013, p. 5.

¹⁶ It has to be pointed out that the Italian Legislative decree of June 8th 2001 n. 231 on administrative liability of company representatives already dealt with the specific risks in relation to the responsibility of entities. But the decree didn't deal at all with tax risk: "the bank may take this approach even with reference to the oversight of the risk of non-compliance with tax regulations, which requires at least: (i) the definition of procedures given to prevent circumvention or infringement of this legislation and to diminish the risks related to circumstances that could include abuse of the law, in order to minimize both sanctions and bad reputation arising from the incorrect application of tax legislation; (ii) checking the adequacy of these procedures and their suitability to realize the objective of preventing the non-compliance risk".

¹⁷ ALBANO, G.: *Regime dell'adempimento collaborativo. un modello per la gestione del rischio fiscale*, in *Corr. trib.*, 2015, n. 35, p. 2653.

¹⁸ AZZOLLINI, V.- GARGIULO, G. – LUPI, R.: *La "cooperative compliance": una legge manifesto in mezzo al guado*, in *Dial.Trib.*, 4, 2015, p. 401.

¹⁹ FERRONI, B.: *Lo schema di decreto delegato sul nuovo regime di adempimento collaborativo*, cit.p. 2021.

²⁰ See for all OECD: *Co-operative Compliance: A Framework – From Enhanced Relationship to Co-operative Compliance*, 2013, cit.

²¹ The reasons why taxpayers comply have to be distinguished depending on the type of these because there is not one element that influence in the same way individuals and firms but one of the most influential factors in complaining behaviour is surely the certainty of the law that will be applied to the operation put on place by taxpayers

²² In EU tax law, the principle has been used by the European Court of Justice in customs matters and other fields to balance the relationship between taxpayer's expectations and tax administrations interest to tax revenues certainty. The European Court of Justice, notwithstanding has used themselves – and still does it- as synonymous, by a substantive criteria. See Court of Justice EU cases 3 December 1998, C-381/97, *Belgocodex*, Racc. p. I-8153, p. 26, and 26 April 2005, C-376/02, *Goed Wonen*, Racc. p. I-3445, p. 32; 21 June 1988, C- 257/86, *Commissione/Italia*, p. 12; 16 December 1976, C- 33/76, *Rewe*, p. 5; 16 December 1976, C- 45/76, *Comet*, pp. 17- 18, in Racc. p. 2043; 10 July 1997, C-261/95, *Palmisani*, in Racc. p. I-0000, p. 28; 10 December 1975, cases from 95/74 to 98/74, 15/75 and 100/75, *Union nationale des coopératives agricoles de céréales e a./Commissione e Consiglio*, pp. 43-45, in Racc. p. 1615; and 1st February 1978, C- 78/77, *Lühns*, p. 6 in Racc. pp. 169.

²³ The reaserch of the basis and characteristics of legal certainty (*certezza del diritto, sécurité juridique, seguridad jurídica and rechtssicherheit*) is one of the most analysed issues of legal doctrine and jurisprudence in every legal systems by the different schools of legal thought. See HART, H.: *Il concetto di diritto*, Torino, 1961; RAZ, J.: *The Authority of Law*, Oxford, 1979; R. DWORKIN, *Law's Empire*, Cambridge 1986;

RAITO, J.: *The Principle of Legal Certainty in EC Law*, Springer Netherlands, 2003; VALEMBOS, A.L.: *La constitutionnalisation de l'exigence de sécurité juridique en droit français*, Paris, 2005; GARZÓN VALDÉS, E.: *Seguridad jurídica y equidad*, en *Derecho, ética y política*, Madrid, 1993; PÉREZ LUÑO, A.: *La seguridad jurídica*, Barcelona, 1991; HIERRO SÁNCHEZ PESCADOR, L.: *Seguridad jurídica y actuación administrativa*, in *Documentación administrativa*, n. 218.219, 1989, p. 198 ss; SÁINZ DE BUJANDA, F.: *Reflexiones sobre un sistema de derecho tributario español*, in *Hacienda y Derecho*, III, Madrid, 1963 p. 330; GARCÍA NOVOA, C.: *El principio de seguridad jurídica en materia tributaria*, Madrid, 2000; MARONGIU, P.: *Dal diritto amministrativo al diritto tributario: la tutela dell'affidamento nell'ordinamento tributario tedesco*, in BODRITO, A.- CONTRINO, A.- MARCHESSELLI, A.: *Consenso, equità e imparzialità nello Statuto dei diritti del contribuente. Studi in onore del prof. Gianni Marongiu*, Torino, 2012, pp. 300 ss.

²⁴ DELLA VALLE E., *Affidamento e certezza del diritto tributario*, in *L'ordinamento tributario italiano*, collana diretta da FALSITTA G. e FANTOZZI A., Milano, 2001, p. 77.

²⁵ RAITO, J.: *The principle of legal certainty in EC law*, Kluwer Academic, 2003, in PORTUOSE - O. GOUGH - J. TANEGA, *The principle of legal certainty as a principle of economic efficiency*, in *European Journal of Law and Economics*, 2014, pp. 1-26.

²⁶ Economic and social changes often determine uncertainty in tax law that may causes infractions depending on a voluntary or involuntary misinterpretation of tax rules. It is not difficult to understand that tax law has an inherent complexity due to its necessary connection to the other fields of law and its technical rigidity. Moreover, the uncertainty is the result of the case law regulatory process that is one of biggest obstacle to the knowledge of the rules to be applied to taxpayers' transactions. In Italy, Spain and in other European countries, that complexity is also the result of the numerous laws enacted under delegate power in tax matters and of law decrees often used to comply with the restriction imposed by the European stability and convergent programme. Another characteristic of tax law that determines uncertainty is what has been called "normative inflation" that identifies the continuous, rapid and sometimes contradictory tax legislative changes that make difficult the identification of the rule to apply in each case. The complexity of tax law affects taxpayer expectations about law stability and knowability: in this context have a relevant role doctrine and jurisprudence that can give a meaning clear and unequivocal to the rules. Tax law uncertainty may influence enterprises' fiscal planning abilities, particularly if they have a small or medium dimension or if they are lacking of a tax department in charge of predicting business operations' tax consequences. Indeed a tax department is normally expensive and challenging and only big enterprises have it on their organisation chart. An internal instrument able to prevent from tax infractions, tax penalties that are often disproportionate, and consequentially in charge of dialoguing with tax administration, plays a very significant role in enterprises' development. See LOGOZZO, M.: *L'ignoranza della legge tributaria*, Milano, 2002, pp. 67 ss.

²⁷ Law 27 of July 2012, n. 212, in G. U. 31 of July 2012 n. 117.

²⁸ MARONGIU, G.: *Lo Statuto dei diritti del contribuente*, Torino, 2008, pp. 120 ss.

²⁹ DELLA VALLE, E.: *cit.*, p.133 ss.

³⁰ See, for Spanish literature, DÍAZ RUBIO, P.: *El principio de confianza legítima en materia tributaria*, Valencia, 2012.

³¹ STEVANATO D., *La non punibilità delle violazioni meramente formali nello Statuto*, in BODRITO, A.- CONTRINO, A. - MARCHESSELLI, A.: *Consenso, equità ed imparzialità nello Statuto dei diritti del contribuente*, Giappichelli, Torino, 2012, pp. 522 ss.

³² SAMMARTINO, S.: *Le circolari interpretative delle norme tributarie emesse dall'amministrazione finanziaria*, in *Studi in onore di Victor Uckmar*, vol. II, Padova, 1997, pp 1077 ss.

- ³³ DEL FEDERICO, L.: *Le garanzie dello Statuto in tema di illecito tributario*, in MARONGIU, G.: *Lo statuto dei diritti del contribuente*, Torino, 2004, pp. 33 ss.
- ³⁴ In Dutch system the “Horizontal monitoring”, foresees a material limit of errors not to exceed permitted to the taxpayer that has apply to the compliance programme. See GRIBNAU, H.: *Horizontal Monitoring: Some Procedural Tax Law Issues*, Tilburg University (the Netherlands), Fiscal Institute and the Center for Company Law; Leiden University, January 21, 2015, in AA.VV., *Tax Assurance*, R. Russo (ed.), Deventer: Kluwer 2015, p.183 ss.
- ³⁵ The causes of liability exclusion referred above existing in Italian and Spanish tax systems, seem to have an equivalent in the so-called “reasonable excuse” foreseen by the British tax system. In this latter case, even if it has not been included in a positive legal provision, the reasonable excuse is generally used by the HMRC taking a restrictive view of this concept as “something unexpected or outside your control that stopped you meeting a tax obligation”. It could be argued that the liability for tax violations does not depend on a rule of law that typifies the infringements *ex ante* but it is the result of a subsequent evaluation that takes into account external factors to the will of the taxpayer. See MALCOLM, J.: *The UK Tax System: An Introduction*, Spiramus press Ltd, 2009, and MASS, R.W.: *Guide to Taxpayers’ Rights and HMRC Powers*, Bloomsbury, 2014, pp. 374-380.

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