

## ABSTRACT

The topic of the transactions with related parties is now recognized to be one of the most significant issue in the system of *corporate governance*<sup>1</sup> adopted by each company and, moreover, follows 2 separate issues: on the one hand, the manner in which administrators take decisions concerning transactions with related parties; on the other hand, the manner of representation in the budget for these transactions and, more generally, entertained reports.

The second aspect is part of the more general information transparency of transactions with related parties, subject of regulatory Consob.

The evolution legislation provides for the adoption of rules that ensure transparency and correctness of substantive and procedural transactions with related parties by the organs of administration of listed companies, and waiting Consob indicate general principles, listed companies are provided with “guidelines”, which fix the rules to facilitate the collection of information to give proper representation in budget of transactions and relations with related parties

In the course of relations between related parties are very frequent, noted that enterprises play part of their activities through subsidiaries or associated companies and acquire interests in other companies for the purpose of investment or business reasons.

Relations with related parties may have an effect on the patrimonial-financial situation and operating results of the enterprise, as can be effected transactions of fees different from those among independent enterprises, or transactions that are not independent companies.

The operating results and patrimonial-financial position can be influenced by relations with all correlative counter-parties even if they don't occur with the same transactions.

The mere existence of report can be enough to affect enterprise's transactions with other parties, for example a subsidiary may discontinue its relations with a commercial counter-party from the time of the acquisition by the parent company of another subsidiary that plays the same activity of previous counterparty.

The legislator with d.lgs. 28.12.2004 n. 310 introduced in civil code discipline of transactions with related parties which, in the past, was only provided in the Consob's secondary doctrine and in self regulatory codes of listed companies.

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<sup>1</sup> Banca of Italy, at 4 march 2008, issued new *Disposizioni di vigilanza in tema di organizzazione e governo societario delle banche*, and at pag. 4 (*Sistemi di amministrazione e controllo e progetto di governo societario. Linee applicative, lett. b*), specifies that management's plan must: “*descrivere le specifiche scelte attinenti alla struttura organizzativa (compiti, poteri e composizione degli organi aziendali; sistema delle deleghe; regime di controllo contabile; sistemi di incentivazione e remunerazione; flussi informativi), ai diritti degli azionisti (in materia di recesso, quorum deliberativi dell'assemblea e per l'impugnativa delle delibere assembleari e consiliari, rappresentanza, etc.), alla struttura finanziaria (categoria di azioni e limiti alla loro circolazione strumenti finanziari partecipativi, patrimoni destinati, etc), alle modalità di gestione dei conflitti di interesse (ad esempio, operazioni con parti correlate, obbligazioni degli esponenti aziendali, etc).*”

It is a discipline designed to identify situations of possible “danger”, because are “marred”<sup>2</sup> by the suspicion that transactions with related parties might be inspired by not only of social interest, so that from a systematic basis, the rule must be placed next to the discipline of clashing interests.

Reform of the legislature, however, doesn’t offer a definition of “*related parties*” neither of “*transactions with related parties*”.<sup>3</sup> It’s necessary to get to secondary sources that regulate the subject and, by the way, are indicated: Consob Communications 14.5.1999 n. 11071, art. 71 bis, as well as, international book-keeping principles.

Regarding the indications of element that integrate forecasting transactions with related parties, the recall to the international book-keeping principle refers to any transfer of resources or bond among related parties, regardless of whether they agreed that it was a compensation.

If has been made transactions classifiable as transactions with related parties, the book-keeping principle provides that must be pointed out, about the balance, which nature have enterprises’ relations with these parties, and particularly: **A)** the quantity of transactions in absolute value or percentage; **B)** the absolute value or percentage of balance; **C)** prices policy adopted referring to these transactions.

On the base of the forecasts of the IAS 24 if, therefore, from a side, we can suppose that transactions object of information, to the sense of art. 71 bis, they also assume importance for the balance, on the other hand it is to be considered that not they necessarily exhaust the category of transaction with related parties to represent in the same budget.

We could find the necessity to include in such document, even though in united form, information on further relationships with related parties, also where such relationship do not influence individually on operational results and on financial position, but produces remarkable effects in their complex.

The international book-keeping principles do not regulate the substantial correctness of the transaction, neither modalities with which the transaction is decided, but they are dealt only with the information that the issuers are kept to furnish here in a different perspective from the one just considered.

The dispositions Consob are dealt only with the transparency of transactions in relation to the Market; on the contrary the Law of quoted company provides that the rules of management derive

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<sup>2</sup> Expression from P. FERRO-LUZZI, *Le innovazioni alla disciplina societaria: obbligazioni e operazioni con parti correlate*, in *Bancaria*, 2004, p.47.

<sup>3</sup> C. SOTTORIVA, *Commento al d.lgs. 28 dicembre 2004, n. 310*, in *Società*, 2005, p. 208; R.MORO VISCONTI, *Operazioni con parti correlate*, in *Impresa c.i.* 2003, p. 1535; F. DI SABATO, *Diritto delle società*, Milano, 2005, p. 569; A. BLANDINI, *Società quotate e società diffuse*, in *Trattato di diritto civile del CNN*, diretto da P. Perlingieri, vol. V. 10, Napoli, 2005, p. 318.

from self-regulation; these rules do not seem proper to guarantee a suitable level of protection for the minority shareholders.

The discipline has underlined the lacking in effectiveness type of sanctions of reputation; on the contrary it could have been right to impose expressly the insertion in the statutes of internal rules, dictated, with the purpose to make the transgressions easily to ratify from judicial authority.<sup>4</sup>

Moreover, the elements of “substantial” and “procedural” correctness have not a precise definition in the Law.

The transactions with related parties, following the l. 28.12.2005 n. 262, have found entry in the t.u.b. , and particularly to the art. 53 and 136.<sup>5</sup>

The legislator’s interest for relationships among banks and connected parties rises in direct connection with results of *Indagine sui rapporti tra il sistema delle imprese, i mercati finanziari e la tutela del risparmio*<sup>6</sup> , which try to subdue companies’ transactions, and particularly those of the banks, to fit dispositions to guarantee transparency and correctness, above of all if there is a clashing interests, or counterparty is able to have an improper influence on the decisional trial.

Parliamentary Commissions thought it was necessary:” .....*promuovere e, se necessario, imporre la trasparenza dei rapporti di partecipazione al capitale bancario e dei rapporti di finanziamento che legano reciprocamente le banche e le imprese loro azioniste, ed eliminare il conflitto di interesse nel quale versa l'imprenditore che, azionista della banca, sia anche prestatore di credito da parte della stessa, precludendo a tale soggetto, quando l'esposizione debitoria ecceda una data soglia rilevante, la possibilità di esercitare qualsiasi influenza sulle decisioni riguardanti le scelte d'indirizzo e la gestione della società bancaria*”.

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<sup>4</sup> L. ENRIQUES, *Codici di corporate governante, diritto societario e assetti proprietari: alcune considerazioni preliminari*, in *Banca Impresa e Società* 2003, p. 97 ss. German system, on the contrary, devotes many laws to regulate transactions with correlative parties, also if doesn't give to shareholders the right. It seems that german laws aim to appear like ethic rules and have been made not for the Courts but to be the sanctions ' foundations.

<sup>5</sup> New dispositions given by Banca of Italy, recalled at. N.1, specify: (at sect. 2.1 *Organi con funzioni di supervisione strategica e di gestione*) “ *tenuto conto della disciplina civilistica in tema di interessi degli amministratori per i sistemi tradizionale e monistico (artt. 2391 e 2409 – noviedecies, comma 1, c.c.), le banche adottano, nell'ipotesi di attribuzione al consiglio di sorveglianza della funzione di supervisione strategica, idonee disposizioni statutarie che assicurino adeguata trasparenza e sostanziale correttezza nell'assunzione delle deliberazioni riguardanti operazioni per le quali i consiglieri di sorveglianza abbiano interessi, per conto proprio o di terzi. In tali circostanze i consiglieri devono dare notizia di tale interesse, precisandone la natura, i termini, l'origine e la portata. La deliberazione deve inoltre adeguatamente motivare le ragioni e la convenienza per la società dell'operazione.*”. Taking for granted the duties ‘pursuance of banks and risk activity to associated subject of art. 136 e 53 t.u.b. At sect. 2.2. called “*Organo con funzione di controllo*”, *si precisa che:”Nell'ambito dei controlli sulla corretta amministrazione, l'organo di controllo verifica e approfondisce cause e rimedi delle irregolarità gestionali, delle anomalie mandamentali, delle lacune degli assetti organizzativi e contabili. Particolare attenzione andrà rivolta al rispetto della regolamentazione concernente i conflitti di interesse*”; and then “*si richiamano al riguardo sia le disposizioni codicistiche di cui all'art. 53 e 136 del TUB. Assumono rilievo inoltre le disposizioni sui conflitti di interesse nella prestazione di attività e servizi di investimento contenute nel Regolamento attuativo dell'art. 6, comma 2 bis, del t.u.f.i.*”.

<sup>6</sup> The recalled document has been passed by Commissioni riunite Finanza (VI) e attività produttive, commercio e turismo (X) della Camera dei Deputati il 18 marzo 2004.

The art. 153 t.u.b. have to object the discipline of exposition able to produce a risk of credits character towards counterparties able to condition the decisional trial of the banks or groups or, also, of the connected parties. The recalled rule, therefore, allows according to part of the discipline, to affirm that it constitutes a specification of the paragraph 1, lett. b) of the same article, that allows the authorities of control to emanate dispositions in subject of containment of the risk in its different configurations.<sup>7</sup>

The objective profile of the art. 53 t.u.b. is represented by assumption of “risk activity”, therefore, relationships, are not included in this aforesaid profile, also if they take a risk assumption for the bank, as for instance the obligation assumed by credit corporation to guarantee the capital invested in the patrimonial management, or in case of relationship of not financial nature as the relationships among related parties.

The cases could be regulated by art. 53 subpar. 4 quarter t.u.b., which disciplines clashing interests among banks and subjects outlined in the paragraph 4 of the same rule.<sup>8</sup>

Art. 136 t.u.b. instead , in the regulating obligations assumed by the banking exponents, foresees that the finished transactions with money, goods or the guarantee of the bank or company of the advantage group for the management direction, control men in charge, or for subjects to the same associated, is submitted to a specific evaluation of the organs of management and control of the bank, with the purpose to prevent clash that could be between the interest of the bank or company of group and the different interests of which the business exponent can be carrier.

To the light of this *ratio* , transactions that reenter within application of the rule are constituted by contractual relationships in which it assume importance the subjective qualities of counterparty and, also only in the abstract, is possible a clash with interests of the bank, a risk that rule intend to avoid.

The art. 136 t.u.b. , different from art. 53, recalls expressly the duties provided by civil code about managers interests and transactions with correlative parties.

The listed regulations just put in evidence transactions’ peculiarity, but any of them gives settlement.

Under a reconstructive outline we can recall also, art. 98, subpar.. 3, lett. b) of t.u.i.r. (dpr 22.12.1986 n. 917) about *thin capitalization*, according to “*si considerano parti correlate del socio*

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<sup>7</sup> R. BASSO, *La vigilanza sulle banche*, in *Diritto delle banche e degli intermediari finanziari*, a cura di E. Galanti , *Trattato di diritto dell’economia* , vol. V, directed by E.Picozza and E. Gabrielli, Padova, 2008, p. 559. Author says that regulation of art. 53 par. 4 t.u.b. can not be applied only to credit vigilance, but also when the exposure to an associated subject is not able to endanger of an extreme assets’ concentration to the same subjects or a group of connected subjects.

<sup>8</sup> R. BASSO, *Op. cit. ibidem*. Author says that although this rule considerers the decision risk to be marred, this risk is not in relation to have credit risks about bank assets but, more generally, is in relation to necessity to save the sound and prudent bank management.

*qualificato le società da questi controllate ai sensi dell'art. 2359 c.c. e se persona fisica anche i familiari di cui all'art. 5, comma 5 del T.u.i.r.”*

In the recalled definition is evident a sending back to civil notions, but in every case also the fiscal legislator has individualized a notion “like” the ones provided in primary and secondary regulations. Despite the little convincing formulation of the norm of the code, and the absence of a regulation intervention from the Consob, we can affirm that say is possible to draw a definition of transactions with related parties making combined principle of different rules.

Each examined rule underlines a particular aspect of the discipline of transactions with related parties, allowing, therefore, the reconstruction of a definition, but above all of a regulation type unitary, in relief that norm of special sector (like t.u.b.) contain express calls to code discipline in the theme of transactions with related parties, as the general principles (correctness, transparency, information duty...) express that allow to reduce to unity the notion of transactions with related parties.

The transactions with related parties, therefore, put in evidence 2 remarkable aspects, that can be synthetized in the informative transparency toward the Market and in the rules or management company pertaining to the substantial conditions to which the transactions are concluded.