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DOTTORATO DI RICERCA IN DIRITTO DEGLI AFFARI
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ESERCIZIO DEL CREDITO E DELEGA “ESTERNA”
NELLA SOCIETÀ BANCARIA

(abstract)

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ABSTRACT

Starting point of this analysis are the rules, embodied in the bylaws of banking companies, about the delegation, out of the board of directors, of deliberative powers concerning the credit's exercise.

Our purpose is to verify the consistency of the above rules with the vigilance regulation and with the law of stock companies.

We start with identifying which activity can be delegated, i.e. the "decision on credit", chosen by the banking company and concerning the way of exercising the credit, assuming the relevant risk and reaching its economic goal.

The so called Basel 2 new standard for the risk evaluation and bank's liability for the abusive exercise of credit confirms the discretion of this company's choice.

Having defined the subject of the delegation, we identify who, inside the banking company, can take the "decision on credit", and point out the special role of the board of directors.

We single out the limits of the delegation of this decision within the board: these limits are embodied i) in the vigilance regulation, which reserves the decision about the internal rating models to the board and set out special constraints for co-operative banks, and ii) in art. 136 of Testo Unico Bancario, that decrees unanimity for the "decisions on credit".

Apart from these limits, our analysis of the above rules points out a general possibility of delegation, out of the board of directors, of the "decision on credit". This is confirmed by the usual procedure.

Then we study the consistency of this "external" delegation with the law of stock company, in particular in the light of art. 2380- *bis*, par. 1, codice civile, which reserves the enterprise's management to the board, and of art. 2381, par. 2, codice civile, which restricts delegation only to the board's directors.

Starting from our analysis of the typical hypotheses of administrative power's attribution out of the board, and of the full power of attorney attributed to third parties, we conclude that an "external" delegation is admissible only if it doesn't imply that directors renounce their administrative power.

The “external” delegation, as an organizational structure for exercising the enterprise, can be distinguished from contractual forms of outsourcing, which can’t have any “decision on credit” as subject.

Considering the residual room of possible delegation outside the board, we find out a quantitative-qualitative criterion to identify, as “decision on credit” which can be delegated, the less discretionary ones, and those not being important choices for the bank.

In conclusion we also distinguish different kinds of subjects which the delegation can be conferred to, and make some short comments on the question of the delegant’s and delegate’s responsibility.