

ABSTRACT

THE CONTROVERSY ON CONSOB'S SANCTIONING MEASURES

The stimulus for a reflection on the controversy concerning CONSOB's sanctioning measures springs from a desire to clarify the major issues underlying the main *ex-post* enforcement system of financial intermediation law, in view of the jurisprudential decisions. The system was completely entrusted to the enforcement powers of CONSOB after the abolition of the previous dual system shared with the Ministry of the Economy and Finance.

Today, the process concerning the party responsible for illicit behaviour is increasingly resolved only at the outcome of the judicial stage: something which was once a mere eventuality has now become the constant feature of a framework characterised by a rigorous degree of punitivity.

The recent introduction of legislative decree 104/2010 (Administrative Trial Code) has deeply innovated the regime of contestability of the acts of independent administrative authorities and of the relative sanctioning measures. Realisation of the latter, which was previously entrusted to the Courts of Appeal throughout the country, is now entrusted to the exclusive jurisdiction of the administrative judge and to the imperative functional competence of the Regional Administrative Court of Lazio. This jurisdiction extends with regard to pecuniary sanctioning measures. Following the aforesaid reorganization, the administrative judge has now become the new *rex* of economic-financial controversies since he has now taken away from the ordinary judge a large part of the disputes which had previously been his responsibility. The new impugnation framework is still *sub judice* at the time of writing, since a judgement on the Constitutional legitimacy is still pending with regard to the Constitutional compatibility of the devolutionary arrangement contained in the Administrative Trial Code. As the possible outcomes are unknown and the criticisms are understandable on the part of the doctrine which is against a sudden change of the previous quite efficient tried and tested contestation system, there is need for reflection on the role of the administrative judge to decide on the sanctioning measures under examination, in view of the available trial instruments and institutions. The national administrative judge is an integral part of a broader jurisdictional network consisting of the European Court of Justice and the European Court of Human Rights. The controversy instituted before each of these courts will offer the opportunity to test the robustness of the principles governing sanctioning powers, for a revisitation of their proceedings methods of explication where breakdowns are found, and in order to outline a clear picture of acceptable and unacceptable behaviours on the part of those who operate in boundless financial markets.

The study has also highlighted the peculiar connotations taken on by the principle of substantive legality, given the multilevel arrangement and multi-compartment provenance of its sources, some of which were initially devoid of cogent power because they belonged to the sphere of soft law, but which now inspire legislation at both EU and national level. The respect for the principle of procedural legality, with the observance of the cross-examination and the separation between preliminary hearings and decision-making functions, is an indispensable precept for the legitimate exercising of CONSOB's powers and a guarantee of its very accountability. A comparative analysis has shown how these principles have been implemented in other systems of long-standing financial tradition (the USA, UK and France). In general, the foreign models examined appear to be inspired by a logic that is not just punitive-retributive, but is also a deterrent-given the presence of certain institutions which tend to privilege compromise settlements, committal proceedings cooperation, an easing of proceedings, and the direct compensation of investors damaged by deviant behaviours. Some of these features characterise the sanctioning model adopted by CONSOB as guarantor of competition and the market, and in part have inspired the legislator in the very recent adoption of law 217/2011 which came into force in the very concluding stages of the present study.

In the delegation criteria enunciated in article 6, par. 2, letter *l*), of this law and which act as guidelines for its subsequent implementation by the government, it is possible to see an evolutionary profile of the sanctioning measure in the financial sector. In order to pursue the easing effects of the controversy, legislation has introduced the extension of the *favor rei* principle in case of *ius superveniens*, the reduced measure payment and other “lightening instruments” (including forms of settlement), as well as “commitments”, borrowed from article 14-*ter* of antitrust law 287/1990 for violations of an organisational and procedural nature, envisaged in the discipline of intermediaries and markets.

In the innovations envisaged by law 217/2011 there are elements indicating a revisitation of CONSOB's sanctioning powers in terms which are more promotional of the law and conformational of market operators' conducts than of a punitive-retributive kind. Underlying this is the question of which is the best way to implement *ex-post* enforcement in the field of financial infringement on the part of an Authority to which previous laws attributed – more than to any other supervisory Authority in the financial field – broad powers of regulation, control and investigation on a vast array of intermediaries, markets, issuers and other subjects even extraneous to these.

The present writer is of the opinion that a sanction must always incorporate an instrument of guarantee of the actuality of law and so the fundamental connotations of belonging to the realm of punitive measures should not be altered. In this view, while, on the one hand, one should positively welcome institutions that enable forms of direct recovery of investors damaged by deviant behaviours or forms of cooperation (indeed, not envisaged by the delegated law), with rewarding effects for the transgressor, in view of an ascertainment of more

insidious infringements; on the other, the dissuasive and afflictive scope of the overall repressive framework entrusted to CONSOB should not be diminished. One should also bear in mind that plans to reform Community laws with regard to MIFID, Transparency and Market abuse are geared to the harmonisation of sanctioning disciplines, with a view to measures – in each member state – characterised by features of effectiveness, proportionality and dissuasion in order to avoid dangerous phenomena of normative arbitrage.

The task entrusted to the delegated legislator is thus a very delicate one. In providing for the concrete implementation of the delegation criteria of law 217/2011, the government should try to achieve the aforesaid adaptation. However, should modifications be introduced with a view to generalised forms of plea bargaining or cash settlement, then the easing produced with regard to trials and procedures would pay the price of perceiving a basically bland sanctioning system geared to the advance payment of reduced-rate sanctions, with respect to the limits of the edictal frameworks, that transgressors make allowances for and perhaps even consider amortizable. Therefore, we should avoid the risk that the implementing legislation could facilitate moral hazard behaviours on the part of market operators, which could lead to damaging effects on the credibility of the whole enforcement system entrusted to CONSOB.