

The Committee for Internal Control and Legal Audit Introduced by Art.10 of the Legislative Decree Nr.39/2010 in Italy: Remarks on a Stage of Its First Setting up in Compliance with EU Guidelines

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Abstract

The paper analyzes the transposition into Italian law Directive 2006/43/EC; in particular the establishment of the Committee for Internal Control and the legal audit, governed by Article 41 of the Directive.

JEL classification: M 4, K 33, G 34

1. Foreword

The Art.19 of the Legislative Decree nr.39/2010² has foreseen the setting up of a Committee for Internal Control and Legal Audit inside the bodies having a public interest³ that is supposed to supervise:

- a) the financial information process;
- b) the efficacy of internal control systems, of internal auditing, of risk management if applicable;
- c) the annual review of accounts as well as the consolidated accounts;
- d) the independence of the legal auditor or of the auditing firm , particularly for what concerns the performance of non-auditing services to the body undergoing a Legal Audit of its accounts.

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² Legislative decree dated 27th January 2010 nr. 39 "Enactment of the EC Directive nr.43/2006 concerning the legal review of annual and consolidated accounts, which modifies the EC Directives nr. 78/660 and 83/349, and that abrogates the EC Directive nr. 84/253", published of the Gazzetta Ufficiale of 23rd March 2010 nr.68, Ordinary Supplement nr.58.

³ According to Art. 16 of the Legislative Decree nr.39/2010 are to be regarded as bodies of public interest:

- a) the Italian companies issuing estate securities admitted to negotiation on regulated Italian markets and of the European Union as well as those that have requested said admission to negotiation;
- b) banks;
- c) the insurance companies as under Art. 1, Section 1, Letter u), of the Private Insurance Code;
- d) the companies of re-insurance as under Art. 1, Section 1, Letter cc) of the Private Insurance Code, with legal offices in Italy and the subsidiaries of extra EEC re-insurance companies located in Italy as under Art.1, Section 1, Letter cc-ter) of the Private Insurance Code;
- e) the companies issuing financial tools that, even though being listed on the regulated markets yet, are spread among the public in a relevant way;
- f) the companies managing the regulated marketplaces;
- g) the companies managing the guarantee and compensation systems;
- h) the centralised management companies of financial tools;
- i) the estate brokerage agencies;
- l) the companies managing savings;
- m) the variable capital investment companies;
- n) the payment institutes as under the EC Directive nr. 64/2009;
- o) the electronic currency institutes;
- p) the financial brokers as under Art. 107 of the TUB (single text of banks);

Section 2 of Art.19 further entails that the Committee for Internal Control and Legal Auditing identifies itself with:

- a) the Finance and Tax Expert Board;
- b) the supervisory council in those bodies that adopt the dualistic system of control and administration, as long as the latter is not entrusted with the functions as under Art.2049-terdecies, Section 1, Letter f-bis), of the Civil Code, that is, unless a board has not been set up inside it⁴. at least the components of the same board must be chosen among those who are enrolled in the Register;
- c) the board for controlling the management of bodies that adopt the monistic system of administration and control.

The legal auditor or the auditing company must submit, to the Committee of the internal control, a report about the fundamental issues that came up during the legal auditing and, more specifically, about the outstanding flaws detected by the internal control system related to the financial information process (Section 3 Art.19).

2. The Committee for Internal Control and Legal Audit ex Art.19 of the Legislative Decree nr.39/2010 and Provisions as by Art.41 of the EC Directive nr.43/2006

The Art.19 of the Legislative Decree nr.39/2010 enacts the Art.41 of the Ec Directive nr.43/2006. In such Directive it is underlined how the committees for the internal control and auditing, along with an effective system of internal control, contribute to minimize the financial and operational risks as well as of inobservance of the legislation and they increase the financial information quality and, due to their setting up and working, reference is made to the contents of the Recommendation issued by the European Union Commission dated 5th February 2005, on the role of administrators without executive duties⁵ or of the members of the supervisory council of listed companies and on the committee of the Board of Directors or supervision. The Directive permitted to the Member states that the functions granted to the Committee for internal control and auditing, or to a body which performs similar functions, would be carried out by the administration or control body altogether; as it is hereby considered relevant, the Art.41 of the Directive entails more specifically that: "1. Each body of public interest is provided with a Committee for internal control and auditing. The member states establish whether the committee must be constituted by non-executive members of the administration body and/or by the members of the control body of the body itself, which is undergoing the auditing and/or by the members appointed by the general meeting of shareholders. At least one member of the committee must be independent and have expertise in issues allow that, in bodies of public interest meeting the criteria as under the Article 2, Paragraph 1, Letter f), of the Ec Directive nr.71/2003⁶, the functions granted to the Committee for internal control and auditing are performed by the administration or control body altogether, on condition, at least that, whenever the chairman of said body is a member charged with executive offices, he/she cannot be the chairman of the Committee for internal control and auditing. 2. Except for the liability of the members of the administration, direction or control body as well as that of other members appointed by the general meeting of shareholders of the company undergoing an auditing, the Committee for internal control and auditing has, among other things, been charged with:

- a) monitoring the financial information process;
- b) checking the efficacy of the internal control systems, of internal auditing, if applicable, and of risk management;

⁴ In such a case, the committee is auditioned by the supervisory board about the proposal, as by Art.13 Sec.1 of the Law Decree nr.39/2010 which states that, except for what prescribed under Art.2328, Section 2, Nr. 11), of the Civil Code, the meeting, according to the grounded proposal put forward by the control body, decides the legal review of accounts and determines the remuneration due to the auditor or the auditing firm for the whole duration of the office, along with possible criteria for calibrating said fees all through the time span of office.

⁵ According to the Recommendation, for a "manager with executive duties" it means a member of the administration body of a monistic-structured company currently engaged in the management of the company; for "administrator with non-executive offices" it is meant, instead, a member of the administration body of a monistic-structured company different from an administrator with executive offices.

⁶ EC Directive nr.71/2003 of the EU Parliament and the EU Council of 4th November 2003, related to the prospectus to be published for public tenders or admissions to negotiation of financial tools (GU L 345 dated 31.12.2003,pag.64).

- c) monitoring the legal auditing of the annual and consolidated accounts;
 - d) verifying and monitoring the independence of the auditor and of the auditing company, more specifically for what concerns the performance of additional services to the body undergoing the auditing.
2. In a body of public interest the proposal coming from the administration body and the control body to appoint a legal auditor or auditing.
 3. The auditor or auditing firm submits a report to the Committee for internal control and auditing on the fundamental issues that came up during the auditing process, more specifically, on the outstanding flaws of the internal control with relation to the financial information process.
 4. The Member states may allow for or establish that the legislation, as under paragraphs ranging from 1 to 4, are not to be applied to the bodies of public interest having a body performing similar duties as those of a Committee for internal control and auditing, which was set up and became operational in compliance with the legislation in force in a Member state where it is registered the body undergoing an auditing. In such a case, the body communicates which is the function that performs such functions and discloses its composition publicly".
- On the basis of what abovementioned hereon before as well as what contained under the Legislative Decree nr.39/2010, and having taken into account the functions of the Committee for internal control and auditing, we can soon make the following comparison:

The Directive entails that the Committee for internal control and auditing , among other things, is charged with:	The Legislative Decree nr.39/2010 entails that the Board for internal control and auditing supervises:
- monitoring the financial information process;	- the financial information process
- checking the efficacy of the internal control systems, of internal auditing, if applicable, and of risk management;	-the efficacy of the internal control systems, of internal auditing, if applicable and of risk management;
- monitoring the legal auditing of the annual and consolidated accounts;	-the legal auditing of the annual and consolidated accounts;
- verifying and monitoring the independence of the auditor and of the auditing company, more specifically for what concerns the performance of additional services to the body undergoing an auditing.	- the independence of the auditor and of the auditing company, more specifically for what concerns the performance of additional services to the body undergoing an auditing.

It is to be noted that the prescriptions of the national legislation, which sets up the Committee, reproduces wholly the attributions conceived on a community level; however, the Directive, before detecting the typical elements of such a body (monitoring, controlling, verifying), enables de facto a widening of the attributions by entailing "among others", the performance of other functions. The legislation prescribed under the Legislative Decree nr.39/2010 seems to restraint the activities that the board has to carry out only to the specifically detected functions; however, it is reckoned as possible – for the time being- to integrate the law prescriptions with further attributions which have been considered to be coherent with the aims of the setting up of said body when the latter was formed or, later on, whenever it is regarded as necessary from time to time. Later on, in this contribution, we shall proceed on to an initial analysis of each activity that the Board has been charged to carry out, and to put forward a possible placement of the Committee within the administration and control bodies currently envisaged in our country, as well as within the more complex system of corporate controls, with respect to the national reality.

3. The European Union Recommendation of 15th February 2005: Elements Applicable to the Committee for Internal Control and Auditing

In the abovementioned European Union Recommendation of 15th February 2005 of the Council it is highlighted how the Parliament has asked the Council to put forward some rules aimed at eliminating and preventing conflicts of interests and how it has been underlined the necessity that, in the stock-exchange listed companies there is a board of auditors among whose functions, the supervision of the independence, the objectivity and the efficacy of an external auditor⁷ is included.

⁷ In our country, the legal review of accounts was reformed by the Legislative Decree 39/2010 which modified, among other things, the previous legislation contained in the Civil Code (Art. 2409 and next ones); such an activity, taking into account what set out under Art.14 of the Decree, can be specified as follows:

Actually, the supervisory role of administrators with no executive offices or of the Supervisory Board members is commonly regarded as fundamental in three areas, in which the possibility of arising a few conflicts of interest is particularly high, especially when such areas do not fall within the direct liability of the shareholders: the appointment and the remuneration of administrators and auditing of accounts. The Recommendation then elicits to promote the role of administrators without any executive office in such sectors and to foster the setting up, within the administration and the Supervisory Board, of committees⁸:

- for appointments;
- for payment;
- for account review.

The Recommendation also points out that, as a principle, except for the meeting's powers, only the Board of Directors or the Supervisory Board, on the whole, has a legally recognised power to adopt decisions and, being a collective body, is jointly liable for the enactment of its own duties. The Board of Directors or the Supervisory Board have the power of establishing the number and the structure of committees that the latter considers as useful in order to ease its own office, though such committees, as a principle, must not replace the Board of Directors or the Supervisory Board. As a rule, therefore, the committees for appointments, payments and account reviews, should submit recommendations aimed at preparing the decisions that will be taken up by the Board of Directors or the Supervisory Board themselves. Yet, the Board of Directors, or the Supervisory Board, should not be prevented from mandating part of their decision powers to the committees, whenever reckoned as useful, and whenever this is permitted by the national law, even though the Board of Directors or the Supervisory Board remains wholly responsible for any decision taken within its own scope of competence. Among the responsibilities of the Board of Directors or the Supervisory Board the Recommendations sorts out the responsibility of i) guaranteeing that the financial information along with the other information pertaining to it, shall provide a complete and accurate image of the corporate situation and to ii) verifying the procedures established for risk assessment and management. The Recommendation entails either the creation⁹ of a committee for account review, being set up within the Board of Directors or the Supervisory Board, which shall support the administrative bodies in matters of account control or that such an activity shall be carried out by other bodies, external to the Board of Directors or the Supervisory Board¹⁰. On the basis of such ponderings, the Commission therefore recommended to adopt the necessary measures to introduce on a national level – by means of the most suitable tools – a series of prescriptions related to the role of administrators with no executive offices or members of the Supervisory Board and committees being set up within the Board of Directors or the Supervisory Board¹¹.

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- in the control made during the fiscal year of a regular bookkeeping of corporate accountancy and a correct detection of the management facts in accounting books;
 - in the expression through proper report of a judgement upon the fiscal year balance as well as the consolidated balance sheet, if set out.

⁸ The setting up of committees within Boards of Directors is an opportunity which, only but recently, has been implemented in companies (listed ones), of our country, and this especially “by the historical prevailing of enterprises and corporate groups with steady and concentrated control, in which the institutional investors and the market, make up a rather limited portion of the shareholders”; see CATTANEO, *The Activity of Committees*, in AA.VV. *The Governance of Banks in Italy, Fourth Report on the Italian Financial System*, Edibank, Milano, 1999, 311; the evolution of the financial markets and changes made to the models of administration and control as by former L.D. nr.6/2003 of companies, as well as the development of self-regulation codes, have determined a bigger recourse to the setting up of committees, as better illustrated hereon.

⁹ The European Union points out that the majority of the codes on corporate governance already involve the setting up of the Committee for Internal Audit attributing to it a fundamental role in the assistance to the Board of Directors or of supervision in their performance of such offices, and that, in a few member states, such responsibilities are being attributed, wholly or partially, to bodies external to the Board of Directors or of supervision.

¹⁰ As for the choices made by the national legislator, see what illustrated hereinafter.

¹¹ The Recommendation entailed that the member states are invited to adopt measures necessary for promoting the application of the principles set out in this recommendation within 30th June 2006 and to communicate the measures adopted in compliance

As concerns, generally, the organisation of the committees that have been set up by the Board of Directors or by the Supervisory Board, it is underlined that they must be structured in such a way that a sufficient number of independent administrators with no executive offices, or members of the Supervisory Board, can play an effective role in key sectors, where the possibility that conflicts of interest might arise, is particularly high. The main goal of the committees should be that of increasing the efficacy of the work of the Board of Directors or the Supervisory Board, by guaranteeing that the decisions, they are about to take, are sufficiently sound, together with that of contributing to the organisation of their own work, in order to ensure that said decisions are void of relevant conflicts of interest by setting out recommendations aimed at preparing the decisions which will be taken by the Board of Directors or the Supervisory Board themselves. As a principle, the committees are not to be created with the goal of cutting off the Board of Directors or the Supervisory Board from issues they have been mandated since the administration body keeps on being wholly responsible for those decisions taken within the areas of its own competence. It is hereby referred to what prescribed under Enclosure I of the Recommendation, concerning the creation of a Board for account auditing:

Composition

The Board for account auditing should be made up with only administrators with no executive offices or members from the Supervisory Board. At least the majority of its members should be independent. Role As for what concerns the internal policies and procedures taken by the companies, the Board for account auditing should assist the Board of Directors or the Supervisory Board, at least for the following assignments:

- verifying the integrity of the financial information provided by the company, more particularly by examining the relevance and coherence of the accounting methods used by the company or by its group, there included the criteria for the consolidation of accounts of the group companies;
- re-examine, every year at least, the internal control and risk management systems, so as to guarantee that the main risks, including those connected with the respect of the legislation and the existing regulations, are correctly detected, managed and disclosed publicly;
- ensuring the efficacy of the function of internal account auditing, more especially by adopting recommendations about the selection, appointment, renovation of mandate and replacement of the head of the internal account auditing and on the balance of the service, as well as supervising a correct response from directors to the inspections and recommendations of the board. When the company fails of having an internal account auditing function, the need of setting up one of them should be re-examined every year.

As regards the external auditor appointed by the company, the board for account auditing should at least:

- submit to the Board of Directors or the Supervisory Board some recommendations related to the selection, appointment, renovation of mandate and replacement of the external auditor by the competent body in accordance with the national corporate law;
- check the independence and objectivity of the external auditor, by particularly examining the respect of orientations exiting about the shift of corporate members on the part of the auditing firm as well as on a level of remuneration paid by the company, along with other regulation prescriptions;
- keep on inspecting the nature and the range of services different from the account control provided by the auditor, more particularly through the public disclosure, on the part of the external auditor, of the remuneration paid by the company or by its own group to the company or to the account auditing network, with the goal the prevent the arising of outstanding conflicts of interests. The board should establish and put into force an official policy that specifies, in compliance with the principles and the orientations as prescribed under the EC Recommendation nr. 590/2002 of the Commission, the kind of services different from the account auditing a) excluded, b) included after an examination of the board and c) allowed without asking advice to the board;
- verifying the efficacy of the process of external auditing along with the correct response from directors to the recommendation sent over to them by the external auditor;
- investigating on the reasons that led to the external auditor being fired and adopt some recommendations about the possible necessary actions.

with this recommendation to the Commission, so as the latter can follow the situation closely and, according to it, it can evaluate the possible necessity of adopting further measures.

Functioning

The company should set up a training programme for the new board members for their entrance into the board, as well as further training actions on a regular basis. All members of the board should be provided with, more specifically, some detailed information about the specific accountant, financial and operational characteristics of the company. The managers should inform the account auditing board about the methods used to allocate important and unusual transactions, when different accountant dealings are feasible. As for the latter, special care should be put into the existence and the justification of the activities carried out by the company in the off-shore centres and/or through special structures (special purpose vehicles). The board for account auditing shall decide whether and when the managing director or the chairman of the executive board, the financial director or the directors responsible for finance, of the accountancy and of the treasury department, the internal auditor and the external auditor should join in its meetings. Furthermore, if it is wished for, the board should be able to meet all the competent people without the presence of managers having executive offices or management powers. Both the internal and external auditors, apart from holding an efficient work relationship with the managers, should be free to get a free access to the Board of Directors or the Supervisory Board. To that purpose, the account auditing board will work as the main point of contact for both the internal and external auditors.

The account auditing board should be informed about the work schedules of the internal auditor and should receive reports on the internal auditing or a periodical abstract. The account auditing board should be informed about the scheduled work of the external auditor and should receive a report on the relationships between the independent external auditor and the company as well as the group the latter belongs to by the same external auditor. The board should obtain some prompt information about all issues arisen from the auditing. The board for account auditing should be free to obtain consultancy and external assistance, to the extent that it will deem them necessary to perform its own duties, from experts on legal, accountant issues and others. To that purpose, it should receive adequate financial aids from the company. The board for account auditing should examine the procedure according to which the company respects the law prescriptions in force concerning the possibility for employees to send in reports on alleged serious irregularities that took place within the company, by submitting a report or unsigned notifications to an independent administrator. Moreover, it should also make sure that there are some tools for carrying out independent investigations and proportionate on such issues and that adequate countermeasures shall be taken. The board for account auditing should submit reports to the Board of Directors or the Supervisory Board every six months at least at the time when the annual or six-month financial information reports are approved.

4. The National Experience in matter of Boards within Companies Listed on Regulated Markets and the Necessity of Co-ordination with the New Committee for the Internal Control and Auditing

As concerns the experience in our country, in the field of board setting up within administration bodies, the main point of reference is represented by the provisions contained by in the Self-regulatory Code of the Stock-Exchange Listed companies¹² (hereby referred to as "The Code" for brevity).

¹² The Code has been worked out by a committee for corporate governance, strongly representative of the Italian entrepreneurship and of market stakeholders, with the aim of working out the principles of good governance; the first issue of the latter dates back to 1990 and it underwent revision in 2002; at the light of the evolutionary lines of the best practice, in March 2006 it was published a new edition of the same. Borsa Italiana promotes joining in such a Code for those companies listed on the markets of financial tools it organises.

Such a Code entails¹³, more specifically, that the Board of Directors¹⁴ sets up within its own structures one or more boards with consultancy and proposal functions¹⁵. More particularly, the creation and working of committees within the board of director's structure meets the following criteria:

- a) The committees are made up of not less than three members. However, in the issuing entities whose Board of Directors is constituted by no more than five members, the board can be made up with only two advisors, as long as these are independent;
- b) the duties of each board are established through the deliberation with which they have been set up and they can be integrated or changed through subsequent deliberations made by the Board of Directors.
- c) The function the Codes grants to the various committees can be distributed in a different way or mandated to a fewer number of committees with respect to the planned one, as long as the rules for the composition specified by the Code are respected in turn and the achievement of the underlining targets is guaranteed;
- d) The meetings of each board must be tracked on proper minutes of meetings;
- e) While performing their own functions, the committees have the power of getting access to the corporate functions and information necessary to carry out their assignments, as well as benefiting of the support of external advisors, always respecting the terms drawn up by the Board of Directors; the issuing entity makes adequate financial aids available for the council in order to perform its own assignments, within the limits of the budget approved by the council;
- f) Subjects, who are not members, can take part in the meetings of each committee, if invited by the committee itself, with reference to each issue placed on the agenda;
- g) The issuing body shall provide adequate information, within the scope of the report on the corporate governance, on the setting up and the composition of the committees, on the contents of the office given to them, as well as on the activity really carried out throughout the fiscal year, by specifying the amount of meetings held and the related percentage of participation of each member.

With reference to the difficulty of taking decisions concerning issues that look delicate, also because they are a source of potential conflicts of interests, the Code recommends the setting up of:

- a board for remuneration (Art.7);
- a board for internal control (Art.8), by also defining its composition and its competences;

The Code, besides, recommends to assess the opportunity of setting up a board for appointments (Art.6)¹⁶.

¹³ See Section 5.P.1 of the Self-regulatory Code.

¹⁴ It is reminded that – generally (thus not only for the listed subjects) – the Civil Code, Art. 2381 claims that “ The Board of Directors determines the contents, the limits and the possible ways of exerting the mandate; it can always give instructions to the mandatory bodies and take upon itself those operations falling within the scope of mandates. According to the received instructions, it evaluates the adequacy of the organisational, administrative and accounting asset of the company. When processed, it examines the strategic, industrial and financial plans of the company; it assesses, according to a report written by the mandatory bodies, the general performance of the management “ and that “ The mandatory bodies look after the accounting, administrative and organisational asset is to be consistent with the nature and the size of the company; and they report to the Board of Directors, as well as to the Finance and Tax Expert Board, within the time spans as set out in the Articles of Association and, in any case, every six months at least, on the general performance of the management and its predictable evolution, along with the most outstanding operations, for their size or characteristics, carried out by the company itself or by its subsidiaries”.

¹⁵ More particularly, it is pointed out how an organisational way that can increase efficiency and efficacy of the workings of the Board of Directors, is represented by the setting up, within the latter itself, of specific committees provided with advisory and proposal tasks. Such committees do not replace the Council in achieving its own duties but they can usefully perform a role of instruction – which is translated in putting forward some proposals, recommendations and advice – with the aim of allowing the council itself to adopt its own decisions with a higher level of knowledge.

¹⁶ The three committees correspond, partially at least, to the committees outlined by the Recommendation of the European Union dated 15th February 2005 although the reference to the internal control (Code) turns out to be wider than the activities falling within the scope of the committee for account review (Recommendation). Diversely, it could be expected that such a form of self-regulation (or of “mild law”) was to be born in the plough of the Anglo-Saxon “codes” to which reference has variably been made from time to time both on a European and international level.

The guidelines provided by the Code of Self-discipline concern all three just mentioned boards along with further consultancy boards whose setting up should be reckoned useful by the issuing body¹⁷. Such guidelines are inspired by a principle of flexibility, which takes into account the peculiarities characterising each issuing body (with relation, for instance, to the size and the composition of its own Board of Directors). Bearing in mind the aims of this paper, special care should be given to the analysis of co-ordination problems between the attributions of the internal control and auditing board specified by the current model of self-discipline of the national listed companies (as under the abovementioned Art.8 of the Code) and the attributions of the internal control and auditing board as by ex Art.19 of the Legislative Decree 39/2010 (that, as mentioned before – in the “traditional” models of administration and control – identify themselves with the Finance and Tax Expert Board)¹⁸ within the complex framework of the corporate control system. The Code points out the centrality of the Board of Directors in matters of internal control and the way the latter is responsible for adopting a system to be adequate with the features of the company that shall be taken into account by the mandate management, while carrying out its administration and co-ordination activity (as for this, it is of outmost relevance the continuous information inflow among the governance bodies). Consequently, the Board of Directors is recommended to get organised in such a way as to be able to face such an issue with proper care and an adequate level of accuracy¹⁹. The steering and drive function, on one side, as well as that of controlling the management, on the other, add to the fact that^{20,21} the administrative body, assisted by the internal control committee (or audit committee)

¹⁷ As for instance, a permanent committee for strategies.

¹⁸ The Code underlines how the role of the Committee for Internal Control must be separated from the one granted by the law to the Finance and Tax Expert Board, which is characterised, on the contrary, by an inspecting function mostly ex-post and this because, at the time of the first adoption of the Code already, it was pointed out that, apart from the different performed functions, the Committee for Internal Control is appointed to carry out a few activities whose objective scope is partially coincident with the areas undergoing the monitoring activity of the committee itself with that of the Finance and Tax Expert Board.

¹⁹ To this point of view, a good organisation of works plays a fundamental role, so that the issues connected with the internal control, on the whole, and with the risk management, in particular, are discussed in the Council with the support of an adequate work of preparation. The preparatory activity is typically carried out by the Committee for Internal Control, made up of non-executive administrators, mostly independent (or only independent, in case of an issuing body controlled by other listed companies) which is given consultancy and proposal functions. As for the independent administrator, in compliance with the Self-regulatory Code, it is meant the administrator who does not hold nor has recently held, not even indirectly, with the issuing body or with subjects connected with the issuing body, any relationships being as such that might currently affect the independency of assessment. It is to be noted that, although from the overall asset of the self-regulated predictions, one might infer a sharing of a general concept of independency, and that the definitions and the articulations of such a concept vary significantly; the absence on a level of a unitary approach to the issue of definition reflects itself in “the divergence of the adopted solution and reaches its own most apparent form in the choice of passing on to the board of director as a last chance the definition (as well as the detection) of independency “; see REGOLI, *The Independent Administrators in the European Self-regulatory Codes*, in *Rivista di diritto societario*, 1/2007, 136.

²⁰ See Section 8.C.1. of the Self-regulatory Code.

- a) defines the guidelines of the internal control system²¹, so that the main risks affecting the issuing body along with its subsidiaries turn out to be correctly identified, but also adequately measured, managed and monitored by determining the criteria of compatibility of such risks with a proper and correct management of the enterprise;
- b) finds out an executive manager (as a rule, one of the managing directors) charged with the supervision of the internal control system functions;
- c) evaluates, every year at least, the adequacy, the efficacy and the real functioning of the internal auditing system;
- d) describes, in the report on corporate governance²², the essential elements of the internal auditing system, by expressing its own assessment on the overall adequacy of the governance itself.

²¹ The Self-regulatory Code describes the Internal control system as the ensemble of rules, procedures and organisational structures aimed at allowing for, through an adequate process of identification, measurement, management and monitoring of the main risks, a healthy, correct and coherent running of the enterprise with the targeted goals. An efficient internal system of control contributes to guarantee the safeguard of the company assets, the efficiency and the efficacy of the corporate operations, the trustworthiness of the financial information, the respect of laws and regulations.

The Instructions of Monitoring for banks (Title IV, Chapter 11), describes the relevant issues in the field of internal control system as follows:

“ The system of internal controls is made up of the ensemble of rules, the procedures and the organisational structures that aim at ensuring the respect of corporate strategies and the achievement of these goals:

- efficacy and efficiency of corporate processes (administrative, productive, distributional etc.);
- safeguard of the activity values and protection from losses;
- trustworthiness and integrity of accounting and management activities;
- compliance of activities with the law, the monitoring regulation as well as the policies, the plans, the regulations and the internal procedures.

The controls involve, with different roles, the administrative bodies, the Finance and Tax Expert Board, the Direction and all the staff. They are an integral part of the everyday activity of a bank. A few types can be spotted, independently from the organisational structures they are placed in:

- line controls, aimed at ensuring the correct performance of operations.

They are carried out by the same productive structures (i.e. hierarchical controls) or incorporated in the procedures or performed within the scope of the back-office activities;

- the controls on risk management, whose goal is that of contributing to the definition of the methods of risk measurements, of checking the respect of the limits assigned to the various operational functions and of checking the operational coherence, of each productive area, with the performance risk goal assigned. They are given to structures different from the productive ones.

- the internal review activity, aimed at detecting unusual trends, violations of procedures and of regulations, as well as assessing the functioning of the overall system of internal controls. It is continually, periodically or exceptionally managed, by different structures and are independent from the productive ones, even through some on-the-spot inspections”.

²² The obligation of drawing up a report on the corporate governance and the ownership assets is prescribed under Art. 123-bis of the T.U. F. (as modified by the L.D. 3rd November 2008 nr. 173) bearing Enactment of the EC Directive nr. 46/2006 which modifies the ECC Directives nr. 78/660,83/349, 86/635 and 91/674, relating to, respectively, the accounts: annual accounts of some types of companies, consolidated accounts, annual and consolidated accounts of banks, of other financial institutions and insurance enterprises). According to such an article, it is ruled out that :

«Art.123-bis (Report on Corporate Governance and Ownership Assets).- 1. The report on the management of companies issuing movable values admitted to negotiations in regulated markets contains, in a specific section entitled: “Report on Corporate Governance and Ownership Assets”, detailed information concerning:

- a) The structure of the company capital, including the titles which are not negotiated on a regulated market of a EEC member state, with specification of the various categories of shares and, for each category of share, the rights and obligations connected to it, as well as the percentage of the company capital they represent;
- b) Any restriction to the transfer of titles, as for instance limits to possession of securities or the necessity of obtaining the approval on the part of the company or of other security holders;
- c) The relevant capital shares, either direct or indirect, for example through pyramid-like structures or cross sharing, according to what turns out from the communications made in compliance with Article 120;
- d) If known, the possessors of any security granting special rights of control together with a description of such rights;

By proceeding on to a substantial separation, on a level of internal organisation within the Board of Directors, between the administrators charged with the control and administrators holding a management mandate, within the scope of companies having securities listed on regulated marketplaces, it is therefore possible to detect:

- the components for the internal auditing committee and the chairman of the committee itself;
- the executive administrator charged with the supervision of the internal auditing functioning;
- the officers charged with internal control²³;
- the head officer charged with drawing up the corporate accountant documents;
- the function of internal audit set up within the company²⁴;

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- e) The mechanism of exercise of voting rights planned for a possible system of stocks sharing of employees, when the right of voting is not being exerted directly by the latter;
 - f) Any restriction to the right of voting , i.e. limitations of rights of voting to a specific percentage or to a certain amount of votes, conditions imposed to exert the right of voting or systems in which , with the co-operation of the company, the financial rights connected with the securities are separated from the possession of securities;
 - g) The agreements known by the company according to Art.122;
 - h) The outstanding agreements of which the company or its parent subsidiaries are part of or those they acquire efficacy for, are changed or terminated in cases of modification of corporate control, and their effects, except for when their nature is such that their public disclosure would cause a serious prejudice to the company; such derogation cannot be applied when the company is obliged to communicate said information according to other provisions of law;
 - i) The agreements between the companies and the administrators, the components of the council of management or of monitoring involving indemnities in case of resignation or firing without any fair reason; or if their working relationship comes to an end due to a public offer of purchase.
 - 1) the rules applicable to the appointment and the replacement of the directors and of the components of the management and monitoring council, as well as the change to the Articles of Association, if different from the legislative and regulatory ones applicable in a substitutive way;
 - m) The existence of mandates for capital increases in compliance with Art.2443 of the Civil Code or the power, the directors or the components of the management council are charged with, to issue some sharing financial tools, along with the authorization to buy its own stocks and shares.
 - 2) In the same section of the Report on the Management as by Section 1 some information are reported and they concern:
 - a) The adherence to a behavioural code in matters of company governance promoted by companies operating in regulated marketplaces or by category associations, by expressing the reasons of the possible failure to adhere to one or more than one provisions, as well as the corporate governance practices really applied by the company, apart from the obligations prescribed by the regulatory and legislative rules. The company also specifies where the behavioural code, in matters of corporate governance it adheres to, can be accessed by the public;
 - b) The main characteristics of the management systems of risks and internal control existing in connection with the financial information process, even a consolidated one, where applicable.
 - c) The mechanisms of functioning of the shareholders' meeting, its main powers, the shareholders' rights and their way of exercising them, whether different from those foreseen by the legislative and regulatory law provisions applicable in a substitutive way;

The composition and the functioning of the administration and control bodies and their committees».

²³ . Moreover, the Code actually states that the Board of Directors, upon proposal from the executive administrator in charge of supervising the functioning of the internal control system, and once having heard the advice from the Internal Control Committee, appoints or revokes appointment to one or more than one subject charged with the internal control and establishes its remuneration, in a way coherent with the corporate policies

²⁴ According to the ITALIAN ASSOCIATION OF INTERNAL AUDITORS , the internal auditing is an independent and objective activity of assurance and of consultancy, aimed at improving the organisation's efficacy and efficiency. It gives assistance to the organisation in the achievement of its goals through a systematic professional approach, which generates added value since it is focused to assess and improve the processes of risk management and control, and of corporate governance. The scope of its action – originally limited to inspections of accounting and financial conformity – has expanded today as far as covering areas of great width within the context

- the Finance and Tax Expert Board that, apart from the function prescribed by the T.U.F. (Single Financial Text), is given the functions of the committees for internal control and auditing.

More specifically²⁵, the internal audit committee, apart from assisting the Board of Directors when carrying out the abovementioned duties:

- a) evaluates, together with the director charged with drawing up the accountant corporate documents and the auditors, the correct use of the accountancy principles and, in case of groups, their homogeneity for writing the consolidated financial statements;
- b) upon request of the executive manager duly appointed, it expresses advice upon special aspects pertaining to the identification of the main business risks as well as on planning, enactment and management of the internal audit system;
- c) examines the plan of work drawn up by the officers charged with the inner audit along with the periodical reports they have drawn up;
- d) evaluates the proposals put forward by the auditing firms so as to obtain the management of the related assignment, as well as the plan of work set up for auditing and the results allocated in the report and in the possible letter of recommendations;
- e) supervises the efficacy of the auditing process;
- f) performs further duties that he is given by the Board of Directors;
- g) reports to the Board of Directors, every six months at least, on the occasion of the approval of balance and the six month report upon the performed activity as well as upon the adequacy of the internal audit system²⁶.

of the systemic control, of organisational consultancy, of risk management and of corporate governance. The internal auditor's task is that of providing help to managements at any level—especially the corporate apex though – to ensure an efficient and non-nominal corporate governance, to guarantee an accurate financial reporting, to enact the conditions for constantly maximising the efficiency and efficacy of the organisation; and eventually, to define a valid and efficient system of fraud monitoring.

The abovementioned Instructions of Monitoring of the Bank of Italy assign the performance of the internal auditing activities within banks to an independent function (internal audit) whose purpose is, on one side, to check, even through on-the-spot inspections, the regularity of operations as well as the risk trends, on the other, to assess the functioning of the whole system of internal controls and to bring about, to the attention of the Board of Directors and the top direction, a few possible improvements for the risk-management policies, to the measurement tools and procedures. Within such a scope, the internal auditing function, among other things:

- checks the respect in various operational sectors of the limits established by the mandatory mechanisms along with a full and correct use of the information available in different activities;
- controls the trustworthiness of the information systems, including the systems of automatic data processing and of the accounting detection systems;
- verifies that in the supply of investment services, the adopted procedures shall ensure the respect, more specifically, of the provisions in force in the field of administrative and accounting separation, of customers' estate separation of assets and behavioural rules;
- carries out some periodical tests on the functioning of the operational procedures and of internal control;
- performs some inspections tasks even with respect to specific irregularities, if required by the Board of Directors, the top direction or by the Finance and Tax Expert Board;
- inspects the removal of anomalies found in the operations and in the functioning of controls.

It is fully apparent that what hereinbefore can be easily extended to any type of economic and non-economic actor.

²⁵ See under 8.C.3. of the Self-regulatory Code. The requirements of the Internal Audit Committee specified in the Code represent an open list, that can be enriched with further functions. An important role can be attributed to such a committee while setting up the tasks for guaranteeing the transparency and correctness of operations with their corresponding parts and in the approval of these operations itself.

²⁶ What specified under sub a)-g) constitutes therefore the contents of the "proper" functions attributed by the Self-regulatory Code to the Internal Audit Committee.

It must be clear that the re-allocation of the supervision and proposal tasks on the internal audit action among those granted by the Board of Directors to the audit committee does not constitute mandate: the internal audit committee has to carry out its own task by a faithful and conscious action whose results are illustrated to the administrative body so that the latter can take independent and responsible decisions, which also pertain to the members of the audit committee as components of that administrative body²⁷.

The executive administrator in charge of supervising the functioning of the internal audit system must on the contrary:

- a) take care of the identification of the main corporate risks, by taking into account the characteristics of the activities carried out by the issuing body or by its subsidiaries, and it has them submitted to the Board of Directors' examination;
- b) give execution to the guidelines defined by the Board of Directors by looking after planning, enactment and management of the internal audit system, by constantly verifying the overall adequacy, the efficacy and efficiency: it also deals with the adaptation of such a system to the dynamics of the operational conditions and of the legislative and regulation panorama;
- c) propose to the Board of Directors the appointment, the resignation and the remuneration of one or more than one officers in charge of the internal control;

The officers in charge of the internal control, who are the subjects entrusted with the monitoring activity upon the adequacy, the operating and the good functioning of the internal audit system:

- a) have been appointed to check that the internal audit system is always adequate, fully operational and functioning;
- b) they are not responsible for any operational areas and do not depend hierarchically from any officer responsible for operational areas, including the finance and administration area;
- c) they have direct access to all information useful to perform their duties;
- d) they have available the suitable means to perform their function;
- e) they report their findings to the internal audit committee and to the Finance and Tax Expert Board; moreover, it can be foreseen that they also report to the executive administrator in charge of supervising the functioning of the internal audit system. More specifically, they report on the ways the risk management is being run along with the respect of the plans defined for their management and they express their assessments on the suitability of the internal audit system to achieve an acceptable profile of the overall risks.

The officer in charge of the internal control identifies himself/herself, as a rule, with the officer responsible of the function of internal audit²⁸. Even before setting up the internal control and auditing board, the Code highlights the necessity of co-ordination between the internal audit committee (set up within the Board of Directors) and the Finance and Tax Expert Board and that a few of the attributions of the internal audit committee might be mandated to the Finance and Tax Expert Board.

Particularly, the functions that can be granted to Finance and Tax Expert Board by the internal audit committee are the following (cfr. letters c), d) and e) of criterion 8.C.3 of the Self-regulatory Code):

- examination of the plan of work drawn up by the officers in charge and by the periodical reports they write;

²⁷ It is to be noted that, among the most innovative solutions from the organisational point of view, apart from the committees, the senior (or lead) independent director, a figure originally figured out by the Anglo-Saxon self-regulatory codes. It represents a reference and co-ordination point for the requests and contributions coming from non-executive directors and, more particularly, those who are independent.

²⁸ The Code prescribes that the internal audit function, on the whole or by operational segments, can be granted to subjects external to the issuing body, as long as the latter are provided with adequate professional requirements of independency. To such subjects it can also attributed the role of officers in charge of the internal auditing. The adoption of such organisational choices, is communicated to the shareholders and the market within the report on the corporate governance.

- assessment of the proposals put forward by the auditing firms in order to obtain the management of the related service, as well as the plan of work drawn up for auditing and the results illustrated in the report and in the possible letter of recommendations;
- monitoring the efficacy of account review; and this as long as it takes place according to equivalent ways enabling the Board of Directors to find out an adequate analysis of issues falling within the object of its own responsibility in the workings of the Finance and Tax Expert Board, to be promptly made available to them.

Taking into account what hereinbefore mentioned, it is possible to carry out a significant comparison between the function granted ex lege to the internal audit and account review committee in accordance with what prescribed by Art.19 of the Legislative Decree nr.39/2010 with those "that can be mandated", as shown here above, to the Finance and Tax Expert Board considering the prescriptions set out in the Self-regulatory Code:

Attributions ex Self-regulatory Code to the Finance and Tax Expert Board – The Finance and Tax Expert Board:	Attributions of the committee ex Art.19 Legislative Decree 39/2010 – The Committee supervises:
	-The financial information process;
	-The efficacy of internal audit systems, if applicable, and of risk management;
-Supervises the efficacy of the account review process;	-The legal review of annual accounts and of consolidated accounts;
Assesses the proposals made by the audit firms to obtain the related appointment, as well as the plan of work set up for the review and the results illustrated in the report and in the prospective letter of recommendation;	-The independency of the legal auditor or of the auditing firm , particularly for what concerns the performance of non-review services to the body undergoing a legal audit of its accounts.
-Examines the plan of work set out by the officers in charge of the internal control long with the periodical reports they write;	

From a first reading of what contained under the Art.19 of the Legislative Decree nr.39/2010 (which, as said before, translates into rules of positive law the text of the EC Directive nr.43/2006) it turns out that the supervision on the efficacy of the internal control, of internal review, if applicable, and of risk management, must be given to the internal control and audit committee and, therefore, within the traditional model of administration and control , to the Finance and Tax Expert Board (control body).

The national legislator, with reference to the detection of which subject is to be given the abovementioned specific functions of supervision, could make reference to²⁹:

- the non –executive members of the administration body only;
- the non-executive members and/or the members of the control body of the body itself;
- the members purposely designated by the shareholders' meeting.

In any case, it is specified that at least one member of the committee must be independent and competent in matters of accountancy and/or account review. And, actually, it is foreseen that the internal audit committee (former Self-regulatory Code) "[gives its own advice on specific aspects concerning the identification of the main corporate risks as well as the planning, enactment and management of the internal audit system ", and that the Board of Directors defines "the guidelines of the internal audit system, so as the main risks regarding the issuing body and its subsidiaries turn out to be correctly identified, and adequately measured, managed and monitored, by also determining the criteria of compatibility of such risks with a healthy and correct management of the enterprise" as well as it evaluates "every year at least, the adequacy, the efficacy and the real functioning of the internal audit system".

But let's try to clarify better the contents of the supervision activity of the internal audit and account review committee with respect to what specified under a) of the Art.19 of the Legislative Decree nr. 39/2010. Referring to the Finance and Tax Expert Board, taken into account the provisions contained in the Italian Civil Code and in the T.U.F. (Single Text on Finance) as well as what contained in the provisions specified by the Bank of Italy (as they can be easily extended also to the non-banking enterprises), it seems correct to state that such a body has the responsibility of monitoring on the functions of the overall internal audit system.

²⁹ These were the possibilities contained in the EC Directive nr.43/2006.

Considering the plurality of functions and corporate structures having tasks of duty and control, as previously hinted at, such a body must verify the efficacy of all structures and functions involved in the control system and the adequate co-ordination of the same, by promoting corrective actions on the spotted flaws and irregularities. The control body must make use of the internal controls and functions within the company to carry out the necessary check-ups and inspections and it must receive some adequate periodical information inflows or relating to some specific corporate situations or trends from the latter. The control body is supposed to monitor the adequacy of the management and control of risks. To that purpose, it must have a suitable knowledge of the adopted systems, their real working, together with their capacity of covering any aspect of the corporate reality. Within the scope of the controls on the correct administration, the control body checks and goes deeply into the causes and remedies of the management irregularities, the performance anomalies, the flaws of the accountant and organisational assets. With reference to the legal review of the annual and consolidated accounts there are no elements of special difference with respect to the monitoring on the efficacy of the process of accounting review; more particularly, it is the analysis on the quality of the work done by the auditor with special care given to the contents of the management letter. Furthermore, with reference to the auditor's function, the monitoring, of the committee by former Legislative Decree 39/2010 in relation to the independency of the auditor or the auditing firm, especially for what concerns the performance of non-audit services to the body undergoing a legal review of accounts, it comes very close to what already currently foreseen relating to the attributions of the committee for internal audit that can be attributed to the Finance and Tax Expert Board.

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