Совет законодательно назначаемых аудиторов — это орган, приспосабливающийся к специфическим особенностям Италии, или модель защиты в традиционной системе корпоративного управления?

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Аннотация

Совет законодательно назначаемых аудиторов в Италии всегда являлся особенностью национальной системы контроля за деятельностью компаний. Недавно произошли существенные изменения в его коллегиальной сущности, поскольку законодательный орган представил человека, который будет единственным законодательно назначаемым аудитором для компаний с ограниченной ответственностью (итальянская аббревиатура *S.r.l.*).

Попытка устранить Совет законодательно назначаемых аудиторов частично удалась благодаря введению единовластного аудиторского органа, но в первую очередь за счет сокращения числа юридических лиц, которые законодательно обязаны иметь орган мониторинга (контроля) [1]. Итальянские законодатели подогнали национальную систему контроля под систему контроля, принятую в других странах мира, не усиливая при этом значимость роли аудитора, которая требует большого профессионального мастерства и предполагает значительную ответственность за защиту интересов стейкхолдеров (заинтересованных сторон).

Кроме того, совершенно очевидно, что сравнение значимости коллегиальности и отдельного законодательно назначаемого аудитора явно не в пользу последнего; группа профессионалов значительно более эффективно осуществляет надзор за законностью бизнеса во всем многообразии и сложности его деятельности, лучше исправляет ошибки директоров и противостоит корпоративным претензиям акционеров.

Ключевые слова: корпоративное управление; Совет (законодательно назначаемых) аудиторов; аудит.

Is the Board of Statutory Auditors an Italian Parasitic Body or a Safeguard Model in the Traditional Corporate Governance System?

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Abstract

The Italian Board of Statutory Auditors has always been our peculiarity in the company's control system. The Board has recently lived a profound upheaval in its collegial essence as a legislature body has introduced the figure of the sole statutory auditor for the limited liability companies (the Italian acronym is S.r.l.).

The Italian attempt to abolish the Board of Statutory Auditors has partially succeeded, thanks to the introduction of a monocratic auditing body, but, first of all, because of the reduction of the entities which must have the monitoring body according to the law [1]. The Italian legislator has adapted the system to the system of controls accepted by the rest of the world not by enhancing the value of a role that requires great skill and involves huge responsibility to protect the stakeholders.

There is also no doubt that there is the value of collegiality, compared to that of the sole statutory auditor; a set of professionals is vastly more effective in overseeing the legality in all facets of the business complexity, in correcting the mistakes of directors and in opposing corporate claims of shareholders.

Keywords: Corporate Governance; Board of Statutory Auditors; Auditing.

Italian Traditional Corporate Governance

Corporate governance defines the system and the rules for the management and control of the entity. The system forms a cornerstone of the business model of the company, aimed at supporting the relationship of trust with stakeholders and to contribute to the achievement of business results, creating sustainable value in the long run [2–8].

In Italy the majority of businesses adopt a *traditional* corporate governance system, which sees the company's management by the Board of Directors and the supervisory functions assigned to the Board of Statutory Auditors[1]. An external auditing firm carries out the statutory audit [9–14].

In this framework, the Board of Directors, which is responsible for managing and verifying the existence of the necessary controls to monitor the performance of the company (in his or through special committees with proposing and consulting), is accompanied by another body, which is attributed independent responsibilities and powers and appointed based on professional qualifications, and independence as prescribed by law. Corollary compared to the control duty is the possibility of challenging the decisions of the Board of Directors (Art. 2388 and Art. 2391 of the Italian Civil Code).

The Board of Statutory Auditors is the body responsible for monitoring compliance with the law and the articles of incorporation, respect the principles of good administration and also the adequacy of the internal control and risk management; in the other words, pursuant to Art. 2403, subpar. 1 of the Italian Civil Code, the supervision regards the organizational, administrative and accounting issues, as well as the procedures for effective implementation of the corporate governance regulations, which the company adheres. It is also required to give a reasoned opinion to shareholders in relation to the appointment, dismissal and determination of the compensation, appointment of the statutory audit.

As part of its activities, the auditors may demand from the internal audit function to make

[1] The Italian Board of Statutory Auditors should not be confused with the other institution of Statutory External Auditor (or Auditing Firm), whose activities in some cases may be delegated by the Internal Board of Statutory Auditors.

assessments on specific operating areas or company operations.

Furthermore, the Italian Legislative Decree no. 39/2010 gives the Board of Statutory Auditors the role of committee for internal control (and eventually also of statutory audit) with the task of overseeing the financial reporting process, the effectiveness of internal control systems, internal audit and risk management, the audit of the annual and consolidated accounts and the independence of the auditing firm (if external). In this context, the Board of Statutory Auditors evaluates the proposals, the work plan and the results set out in the auditors' reports and any management letters [15–20].

The role of statutory auditor requires interpersonal skills not common and deep expertise in corporate and tax law, in the enterprise contracts, in the budgetary and statutory audit and so on. It is a prestigious role, as the practitioner can enforce all his skills and become a guarantee of reliability for the company, for management, for members and all those who interact with the company.

The reality shows that companies that have a Board of Statutory Auditors are subject to bankruptcy to a much lesser extent than the others, because they are better organized, better managed and better policed, this also because the board intervenes during the decision process.

Certainly not all entities can bear the cost of a supervisory body composed of a plurality of subjects, but the answer to this indisputable problem is not diluting. Instead of fixing the duty of the Board of Statutory Auditors to the kind of firm or its capital, which parameters are entirely irrelevant for these purposes, it is necessary to refer to the *size* in terms of turnover, number of employees, debt, procurement of managed entities, *i.e.* socially relevant issues. If a company takes on dimensions that transcend mere economic value for the owners, the controls should be strengthened.

For smaller entities that require a limitation of liability, however, the counterpart could be the obligation of the Statutory Audit, perhaps with a minimum designed specifically content. It might be preferable here the institution of the "one auditor".

Board of Statutory Auditors. Operating Rules

The Board of Statutory Auditors usually work in a collegial form and must meet at least every 90 days, also through telecommunication means, if this is provided for in the articles of incorporation. The Board of Statutory Auditors meets regularly and the quorum is constituted with the presence of the majority of statutory auditors. The decision is taken by a majority vote. Each meeting must give verbalization. The minutes should indicate the key issues concerning to the facts under discussion, including the presence of any dissenting statutory auditors in the resolution, which have the right to have the reasons for their dissent. The participants must sign the minutes.

As above-mentioned, the accountability function of the Board of Statutory Auditors is expressed essentially towards the directors, but does not end with them. The Board of Statutory Auditors has indeed the power to control even regarding the shareholders' assembly. The auditors are obliged to attend the meetings, under penalty of disqualification from office in case of absence without just cause (art. 2405 of the Italian Civil Code). The statutory auditors also may challenge the resolutions when they conflict with the Law or the articles of incorporation (art. 2377, I subparagraph, Italian Civil Code). The Board of Statutory Auditors has also the obligation to apply to the Court, together with the Board of Directors, the mandatory reduction of capital due to losses in the event that the Assembly has not acted on the occasion of financial statement for the year following to which occurred the loss of over a third (art. 2446, II subparagraph, Italian Civil Code).

In the exercise of the control function, the statutory auditors have powers of investigation both individual, both collegial. They, in fact, at any time, even individually, may carry out inspection and control acts. Collegially, however, they may request information from the directors on the entity performance or on specific business (Art. 2403, III and IV subparagraph, Italian Civil Code).

Given the breadth of the duties of the Board of Statutory Auditors, it is clear that the correctness check is to take place on principles and not daily administration, nor on the regular, true and correct representation of each single fact of management, made by employees. It would not be conceivable that the Board of Statutory Auditors was operating a concrete assessment of every single fact about the social activity, assessing the correctness from the point of view of both statutory, both fiscal.

The Italian National Council of Chartered Accountants and Accounting Experts, *CNDCEC*, made comments and proposed amendments regarding Art. 4 of A. C. bill 3671-bis (June 2016) of the comprehensive reform of the crisis disciplines corporate and insolvency [21, 22].

In particular, it was emphasized the need to coordinate the provisions relating to alert procedures and assisted settlement of the crisis with that Art. 13, co. 1, letter. b) amending the Civil Code, which promises "the entrepreneur's obligation and of the governing bodies to establish appropriate organizational structure for the early detection of the crisis and the loss of going concern, as well as to work towards the early adoption of one of the instruments by law for ending the crisis and the recovery of going concern".

The *CNDCEC* rightly exposed some doubts about the actual success in the alert process, in the crisis of individual companies or companies in which the law does not provide for the filing of financial statements and does not establish the obligation of the organ appointing control or a statutory auditor. In these entities the fulfilment provided for in Art. 13 of the A.C. bill 3671-bis would fall mainly on the entrepreneur or administrative organ that, in the absence of a professionally qualified to monitor the adequacy of the structure and to immediately detect inefficiencies, could continue to manage disregarding the urgent need for rapid action as a function of the alert; the choice to report inefficiency body in charge of resolution of the crisis is entirely discretionary.

In light of these considerations, it should be considered the possibility of introducing a mandatory supervisory body for all corporations (except for the start-up phase), and the presence of an auditor in all other social types. This is in opposition to what was held by the Italian legislature in the field of simplification and rationalization of costs for the company, however small, in favour of a greater assurance to the community and to coping in the risk of economic and financial crisis.

Legitimacy Control or Even of Merit

The doctrine, concerning the width of the control of the Board of Statutory Auditors, discusses whether it is exclusively of *legitimacy*, or even of *merit* [11–17, 20, 23]. In particular, there is the problem if the task of monitoring the company's administration, will be resolved in a mere finding of legality, even substantially, or even in a substantive control over discretionary choices of directors. Given the wording of article 2403 of Italian Civil Code, it appears safe to assume that the control experienced by the statutory auditors must be designed even to the "merit" of the administration, in order to verify the quality of management options.

In other words, the Board of Statutory Auditors, in ensuring compliance with the principles of proper management, it should ensure that the conduct of directors is due to administrative actions according to the normal standards of evaluation. Maladministration would imply, in fact, a violation of diligence by the directors, compliance with which the Board of Statutory Auditors has a duty to be vigilant.

It follows that the control imposed on the Board of Statutory Auditors, as its principal duty, on the one hand, in the case of ordinary and physiological performance of company, should be concise and to interest the overall performance of operations; in other cases, especially in presence of suspects and news that give rise to doubts on the regularity of the management, will be analytical and penetrating. Sometimes it is the legislator himself who identifies cases where the Board of Statutory Auditors should put in place specific and careful control activities. A typical example is expressly governed by Art. 2408 of the Italian Civil Code, which provides for the power of each shareholder to report the facts that it deems objectionable to the Board of Statutory Auditors, who must take account of the complaint in the report for the assembly.

Moreover, if the complaint is made by shareholders representing one twentieth of the share capital or a fiftieth in the companies that make use of venture capital market, the Board of Statutory Auditors should investigate without delay the denounced facts and present its conclusions and any proposals to the shareholders' meeting. If, in the performance of his duties, the Board of Statutory Auditors deems reprehensible actions particularly serious and there is an urgent need to provide, he will have the obligation, provided the Chairman of the Board of Directors, to convene the assembly.

Elements of assessment are shown in *table 1*.

In the following by way of example you can see the most significant supervisory activities (*table 2*).

Table 1

Elements of Assessment

Elements of assessment	Description
Wideness and complexity of the assignment *The supervisory activity planning takes account of factors specific to the size and other characteristics of the company*	
Functions of the Board of Statutory Auditors The supervisory activity planning takes into account the following elements: • administrative body configuration and structure of the system of mandates; • conduct of the former supervisory role art. 2403 commercial code; • conduct also of the statutory audit; • conduct also of the former Legislative watchdog function Legislative Decree N. 231/2001; • conducting business in replacement of directors; • carrying out surveillance activities on extraordinary or important social tasks; • conduct of the committee acting as internal control and audit pursuant to Legislative Decree. N. 39/2010	
Characteristics, organization and functioning of the Board of Statutory Auditors The supervisory activity planning takes into account the following elements: • composition of the panel (e.g., specific skills of auditors) and any proxies for the performance of specific activities; • procedures for carrying out of the supervisory board [e.g. Use of auxiliaries and employees and / or specific software; • for the meeting mode (e.g., data transmission); • information provided by the company and by the previous auditors	
Relations with other bodies and social functions The supervisory activity planning takes into account the following elements: • time and resources to the acquisition and exchange of information with other bodies and social functions; • periodicity or number of meetings with other social functions and organs (*e.g.*, administrators, directors, statutory auditors, supervisory body, any committees, safety officers)	

Table 2

Supervisory Activities and Planning Controls

Date	Contents regulatory activity	People invited	Required documentation and / or examined
	Verifies compliance with law and articles of association and the respect of the principles of good management *(Italian Rules of conduct of the Board of Statutory Auditors 3.2 and 3.3)* • Administrative organ Acquisition of information on the progress of social operations and / or business related to _____ [specific case] made by the company and / or its subsidiaries, with specific comments. • Acquisition by the managing directors [and / or: the general manager], during meetings held [or: every six months; or: according to the established in the statutes] of the general performance information for management and the business outlook, as well as on the most significant transactions in terms of size or characteristics, carried out by the company and its subsidiaries, with their observations on the basis of information acquired [specify the specific observations, as well as any violations, irregularities or reprehensible encountered]. [Possibly: Meetings with the statutory auditors of _____ subsidiaries (or: exchange of information with the statutory auditors of the subsidiaries _____) with observations on the data and received relevant information]. [If applicable: Information regarding Acquisition implementation of corporate governance rules and transactions with related parties, with observations on the data and documentation received].		

Table 2 continued

Date	Contents regulatory activity	People invited	Required documentation and / or examined
	Monitoring the adequacy and functioning of the organizational (*Italian Rules of conduct of the Board of Statutory Auditors 3.4)* • Acquisition by the administrative and corporate functions in charge of information and verification regarding: ○ or articulation of the various corporate functions, with their skills and powers; ○ or existence of different levels of authorities and responsibilities; ○ or adequacy of staff in relation to the professional skills necessary for the proper performance of the duties entrusted also through the following ways: ➢ Interviews with staff; ➢ Documentation provided by the company; ➢ Direct observations of procedures; ➢ Consultation of any of the procedures manual; ➢ Behaviour observation and comparison with the provisions in the procedure; ➢ Interviews with legal, tax, labour, other. • Carrying out the test and control procedures on the effective functioning of the organizational		
	Monitoring the adequacy and functioning of the administrative and accounting system (*Italian Rules of conduct of the Board of Statutory Auditors 3.5 and 3.6)* • Acquisition by the administrative and corporate functions in charge of information and verification about the adequacy and functioning of the administrative and accounting system, its reliability in correctly representing management. • Review of business documents. • Meetings with the party in charge of statutory audit, with observations on the relevant information received. • Meeting with the head of the internal control system, with observations on the relevant information received. • Carrying out the test and control procedures on the nature of the administrative and accounting operations		
	Discussion of the draft financial statements ended __/__/__, (*Italian Rules of conduct of the Board of Statutory Auditors 3.7)*		
	Preparation of the Report *ex* art. 2429 c.c. (*Italian Rules of conduct of the Board of Statutory Auditors 7)*		
	[If necessary: Making acts aimed inspections and monitoring the collection of information or the acquired information verification (*e.g.* As a result of complaints by members or the risk of breaches feedback, irregularities or reprehensible)] (*Italian Rules of conduct of the Board of Statutory Auditors 5 and 6)*		
	[Possibly: Issuance of opinions and proposals (*e.g.* A reasoned proposal for the appointment of the statutory audit)] (*Italian Rules of conduct of the Board of Statutory Auditors 8)*		

Table 3 shows the main kinds of activity by the Board of auditors.

Conclusion

The law requires that the statutory auditor role are being conducted with the diligence of a professional who is well aware of the specific assignment, taking into account the specificity of business. The law outlines a system that accepts the functions and the duties and the powers conferred to the expert; having said that, there are more dutiful obligations that the Board of Statutory Auditors should be put in place in specific cases, with significant burden on the amount and quality of work.

Table 3

Activities by Board of Auditors

Kind of activity	Used resources description of activity performed	Number hours used
Meeting of the Board of Statutory Auditors		
Verifies compliance with law and the statute		
Supervising compliance with the principles of proper administration		
Monitoring the adequacy and functioning of the organizational		
Monitoring the adequacy and functioning of the internal control system		
Monitoring the adequacy and functioning of the administrative and accounting system		
Supervision order to the financial statements, the consolidated financial statements and management reports		
Participation in the meeting of shareholders, to the special meetings of shareholders, the shareholders' meetings of bondholders and securities holders		
Attendance at meetings of the Board, the Executive Committee or other committees		
Meetings with the statutory auditors of the subsidiaries		
Inspection records and control		
More information flows made with the different organs and social functions		
Consideration of the draft budget and report to the shareholders		
(If any) Detection of reprehensible facts and pursuant to art. 2408 and 2409 of the Civil Code		
(If any) Liability Actions		
(If any) Opinions and proposals of the Board of Statutory Auditors		
(If any) of the supervisory board activities in the extraordinary social operations and other significant transactions		
(If any) of the supervisory board activities in corporate crisis		
(If any) Conduct of the statutory audit		
(Possible) Conduct of the supervisory body function under Legislative Decree N. 231/2001		
TOTAL		

It is therefore appropriate, if not essential, that the Board of Statutory Auditors, before accepting appointment, carefully evaluate the real chance to fulfil it with the diligence above-mentioned, that is, in ways that are appropriate to the difficulty of the engagement.

The Italian rules of conduct of the Board of Statutory Auditors define the limit for the number of assignments to a level of twenty positions, while not being absolute, in the sense that the professional, through a responsible self-assessment, may decide to put his own crossbar far below. Ultimately, it is left to the sensitivity of the professional, the evaluation of establishing the degree of diligence and commitment required to do the task adequately, placed the importance of the role and

of the profession reputation. Anyway, the corporate governance code of ethics is governed by the principle "comply or explain" and not from modest personal ethics.

The behaviour of the statutory auditors is one of the few professional activities not subject to constant monitoring by the Order (association), as is the cause of incompatibility, continuing education and so on.

The auditors should be held annually to fill out the check list showing the number of offices held, the dedicated staff resources, the time absorbed, the remuneration received for each assignment, the actual independence from the company where he holds the position, stating also name of the firm or the professional who provides consulting or draw up the financial statements and tax returns report.

The Art. 2407, subpar. 2 of the Italian Civil Code states that the members of the Board of Statutory Auditors shall be civilly "jointly and severally liable with the directors for the acts or omissions of these, when the damage would not have occurred if they had supervised in accordance with the obligations of their office".

The liability of the members of Boards of Statutory Auditors is united and unlimited, in the sense that to each member, the company and the creditors, usually through the bankruptcy trustee, may require the entire chargeable to give managers and auditors, normally not currently calculated on the basis of discretionary method of insolvency deficit, which has become residual, but with the correct criterion of "net equity of the period" (cf. Italian Court of Cassation, judgment no. 9100/2015).

The principle of united and unlimited liability, as required by law, it is quietly accepted also by the jurisprudence. This led, recently, the Supreme Court (cf. Italian judgment no. 25178/2015) to believe "hat the action of responsibility should not necessarily be brought against all directors and auditors, but may be brought against only one or a few of them, without the need arises to integrate contradictory to others, in view of the autonomy and severability of relations with each of the joint and several co-obligors"; and, it must be added, of the possibility (often only theoretical for the one who is called to respond in the first instance) to activate the right of recourse against the other members of Board of Statutory Auditors and of Directors.

This provision seems totally unreasonable, because to pay could be one of the least guilty, holding harmless those who actually carried out acts of mismanagement, and in addition, can cause relevant insurance problems to the statutory auditor. However, the insurance policies to cover damages charged to the supervisory board, generally, contains the following clause "in the case of united responsibility or solidarity with other subjects not insured, the insurance operates only for the amount of damage caused directly by the insured, based on the gravity of his guilt, while it is excluded from the guarantee obligation for compensation arising from the mere bond of solidarity".

This contractual provision can be detrimental to the interests of statutory auditor attacked by liability action, since if the court seised assume to the member of the Board of Statutory Auditors also the damage caused shares to other components of the same, under the passive solidarity principle by Art. 2407, subpar. 2 of the Italian Civil Code, the coverage would be limited to the share of responsibility charged to the sole statutory auditor.

Following the Italian Court of Cassation's judgment no. 23581/2015, according to which "the joint responsibility of each competitor to the offense does not exempt the judge, when there has been an appropriate application of assessment by the person authorized for the purpose of distributing responsibilities among subjects debtors", in a similar direction is deciding for some years also the jurisprudence. In addition, the Milan Court has ruled out the responsibilities of the deputy took office (following the death of the member in charge). The exclusion from the liability action was caused, on the one hand, by the failure transcript as a full member at the Business Register at the Chamber of Commerce, and the other, by the failure of the alternate concrete participation in the meetings of the new college.

Likewise ruled was another member of the Board of Statutory Auditors took office four months before the bankruptcy, the assumption that "the new statutory auditor, just took office, should require a reasonable time to take proper cognizance of the complex situation of the company at whose control, accounting and management, it was called".

In conclusion, with the sincere hope that, as in many other European legal systems [9, 10, 19, 21, 24 and the concerning doctrine], even in Italy the

responsibility of statutory auditors-external auditors is limited to a multiple of their compensation, at the moment it seems to be accepted with pleasure this sort of case law that, if it will consolidate, will provide at least a small bulwark in respect of liability actions required to member of the Board of Statutory Auditors. The sincere hope of the above, however, seems to fade away, by the imminent implementation of EU Directive 2014/56/EU, which will not change Art. 15 of Legislative Decree no. 39/2010 and this surely represents a missed opportunity.

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