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FINANCIAL MARKET REGULATORS AND CRISIS OF PANDEMIC

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Summary

The pandemic has affected all sectors of economy and finance. Having outlined the characteristics of the financial market regulatory authority, the question arises as to the role it should play in this context. Given that the authority is not an expression of popular sovereignty, the conclusion is that it cannot take action to counter the crisis generated by the pandemic, as it cannot define its own autonomous political and economic guidelines.

Introduction

Economic regulators have the task of making the right of economic freedom effective[2].

The role assigned to the economic regulatory authorities is to ensure "the mere efficiency of the markets"[3], thereby rendering the right of economic freedom effective [4].

A prerequisite for economic freedom is that competition is guaranteed and, even more importantly, that there is legal certainty. The legal system entrusts

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[1] The opinions expressed are personal and in no way involve Consob.

[2] Merusi F. Il potere normativo delle autorità indipendenti [The regulatory power of independent authorities]. In: L'autonomia privata e le autorità indipendenti [Private autonomy and independent authorities]. A cura di G. Gitti, 2009, p. 48.

[3] Bruti Liberati E. La regolazione indipendente dei mercati Tecnica, politica e democrazia [Independent Market Regulation Technology, Politics and Democracy]. Torino, Giappichelli, 2019, p. 201.

[4] Merusi F. 2009, p. 48.

independent regulatory authorities with the fulfilment of both conditions. The independent authorities therefore take on the role of arbitrators. Their function is technical and their power is, likewise, technical and not political. In order to protect their technical function, the legal system recognises the independence and autonomy of the regulatory authorities. Functional independence is closely linked to structural independence, and both are instrumental to the exercise of their function.

Recognition of the dual independence, functional and structural, creates a delicate balance on which these authorities are based, requiring them to strictly respect the scope of their competences. This is all the truer in view of the exclusion, by definition, of these authorities from the circuit of political representation. Regulatory authorities cannot, by derogation from the principle of popular sovereignty, formulate their own political guidelines.

Legal certainty guarantees both the orderly functioning of the financial market and its development by enabling market participants to foresee the consequences of their actions and, in the event of disputes, to take calculable decisions[5].

The calculability of judicial decisions is based on the existence of a case, to which the judge refers when deciding the dispute[6]. The judge's action consists in relating the concrete case to the facts and applying the consequences that the legislator himself has already foreseen when the event occurs[7]. When this logic is abandoned, i.e., the principles of formal law are not respected, the decision is entrusted to the judge's discretion, allowing him not to apply the law in a formal and egalitarian manner[8].

"A law, impoverished or emptied of abstractness, i.e., incapable of anticipating future cases (and therefore of reducing them to typical figures and patterns of probability), is an incalculable law, which is outside the expectations of any kind of capitalism"[9].

A precondition, therefore, for the full exercise of economic freedom is the certainty of the rules[10]. The task of independent regulation is to guarantee that economic operators "have at their disposal rules which are adequate on a technical-economic level, defined in advance and tend to be stable (or at least predictable) in their evolution"[11].

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[5] Trimarchi M. Stabilità del provvedimento e certezze dei mercati [Stability of the measure and market certainty]. Dir. amm., 2016, p. 323, il quale rinvia a M. Weber, Economia e società, III, Sociologia del diritto [Economy and Society, III, Sociology of Law], Milano, Giuffrè, 1980, p. 189.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Irti N. Capitalismo e calcolabilità giuridica (letture e riflessioni) [Capitalism and legal calculability (readings and reflections)]. Riv. soc., 2015, p. 812.

[10] Di Benedetto M. L'economia sociale di mercato e le sfide del diritto amministrativo [The social market economy and the challenges of administrative law]. Sociologia, 2009, p. 127.

[11] Bruti Liberati E. 2019, p. 206.

A condition, on the other hand, for the exercise of the right to economic freedom is that the market players are placed on an equal footing in "participating in that encounter between rights that is legally called contradictory and economically competitive"[12,] that is, that they are guaranteed "equality of arms". In other words, that they are guaranteed "equality of arms"[13.] The main task of the regulatory authorities is, in fact, "to replace all or part of the negotiating acts of the private parties who take part, or should take part, in the competitive debate when they do not express themselves spontaneously"[14]. This type of activity is properly called regulation[15].

Economic regulation, therefore, stems from the attempt to correct market failures "with intervention instruments and corrective measures of an authoritative (or command and control) nature"[16], where failures represent those situations in which the deregulated market is not able, with the sole instruments of private law, to adequately protect the interests of the community[17].

The function of regulation thus presupposes the superiority of the market over the State, so that it is the intervention of the State that must be justified and not the exercise of economic freedom by virtue of the principles of the civil code and common law[18]. From this conception of the State-market relationship derives the principle of proportionality on the basis of which the regulator must use as corrective instruments, among those theoretically possible, those that have the least impact on the freedom of enterprise[19].

The choices to which the Regulatory Authorities are called, therefore, are not free in the sense that they are aimed at guaranteeing the preservation, in relation to a specific activity, "of a given set of interests, which already includes objectively established values and aims"[20]. In fact, "the object of power – the competitive market – is always and in any case predetermined by the legal system"[21].

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[12] Merusi F. op.cit., p. 48.

[13] Schlesinger P. Il "nuovo" diritto dell'economia [The "new" economic law]. In: L'autonomia privata e le autorità indipendenti [Private autonomy and independent authorities]. A cura di G. Gitti, 2009, p. 55.

[14] Merusi F. 2009, p. 48.

[15] Ibid.

[16] Clarich M. Alle radici del paradigma regolatorio dei mercati [The roots of the market regulation paradigm]. Riv. reg. mer., 2020, p. 231.

[17] Ibid.

[18] Clarich M. 2020, p. 233.

[19] Ibid.

[20] Lazzara P. La regolazione amministrativa: contenuto e regime [Administrative regulation: content and regime]. Dir. amm., 2018, p. 347; Guarino G. Le Autorità Garanti nel sistema giuridico [The Guarantee Authorities in the legal system]. In: Autorità indipendenti e principi costituzionali, Atti del Convegno di Sorrento [Independent Authorities and Constitutional Principles, Proceedings of the Sorrento Conference], 30 maggio 1997, Padova, 1999, p. 41.

[21] Merusi F. 2009, p. 49.

Therefore, the intervention of the regulatory authorities cannot have any other purpose than restoring the violated *par condicio* competition[22].

Any other intervention is not a regulation but "public intervention in the economy", which has different objectives and must be justified on the basis of different rules from those which grant powers to the regulatory authorities[23]. Regulation presupposes that the market is governed by free competition and is therefore not subject to economic policy assessment[24].

It is not possible for the regulatory authorities to formulate their own political guidelines by way of derogation from the principle of popular sovereignty.

This view is confirmed by the well-known judgment of the European Court of Justice of 22 January 2014, Case C-270/12[25]. In that judgment, it is stated that it is not permissible to attribute to bodies not provided for by the Treaties a "discretionary power entailing wide freedom of assessment and capable of expressing, by the use made of it, a genuine economic policy". On the other hand, only "clearly circumscribed executive powers, the exercise of which, for that reason, is subject to strict control on the basis of objective criteria" are conferred on such bodies.

In the case of independent authorities, there is a consistency between their structure, which is technical and independent, and their function, which is technical and free of political choice[26].

The function to which they are called is to "identify and appreciate complex technical facts, the reconstruction of which includes questionable elements, or to identify the technical solution that achieves the best balance between the many interests involved, also taking into account the overall functioning of the system"[27].

The regulatory authorities, contrary to the recent opinion of the Italian Constitutional Court[28], do not operate according to administrative discretion, i.e., they do not make political choices – they do not decide to what extent to satisfy one interest to the detriment of another[29].

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[22] Ivi, p. 48.

[23] Ibid.

[24] Lazzara P. 2018, p. 343.

[25] Cfr. Bruti Liberati E. 2019, p. 127.

[26] Torricelli S. Per un modello generale di sindacato sulle valutazioni tecniche: il curioso caso degli atti delle autorità indipendenti [Towards a general model for reviewing technical assessments: the curious case of the acts of independent authorities]. Dir. amm., 2020, p. 100.

[27] Torricelli S. 2020, p. 99.

[28] Corte Cost., No. 13/2019, "The fact that the Authority is a party to the proceedings reflects, moreover, the nature of the power conferred on it: a discretionary administrative function, the exercise of which entails weighing the primary interest against the other public and private interests at stake. In fact, the Authority, like all administrations, is the bearer of a specific public interest, namely the protection of competition and the market (Articles 1 and 10 of Law No. 287 of 1990), and is therefore not in a position of indifference and neutrality with respect to the interests and subjective positions that come into play in the performance of its institutional activity (see, to this effect, Council of State, Special Commission, Opinion No. 988/97 of 29 May 1998)".

[29] Torricelli S., 2020, p. 101.

On the contrary, they operate on the basis of technical discretion, – the technical duty to decide how to allow each involved interest the maximum possible satisfaction in compliance with the constraints imposed by the legal system[30].

In the technical decision, it is not up to the assessor to define how much to affect the interests involved as this is only the effect of the technical duty to decide[31].

The *raison d'être* of the Regulatory Authorities is, as we have seen above, to re-establish a level playing field for competition, since they are not involved in defining the structure of interests, – this is the task of the legislative body and, more generally, of politics. This is because popular sovereignty, the cardinal principle of democracy, "requires (also) that the choices involving political discretion and entrusted to the various levels of administration are the expression of the political direction defined by the politically representative bodies"[32].

Instead, by definition, the independent regulatory authorities are excluded from the circuit of political representation[33].

The character of independence has been accentuated by the new model of regulatory authority that has been introduced by the European Union legislator since 2009. It should be mentioned that the regulatory approach to the market[34] was called into question following the financial crisis of 2008. At the same time, however, there has been a "consolidation of the model of the regulatory authorities", the tangible signs of which are the extension of functions and the establishment of European regulators[35].

The model of the networks composed of national regulators has been replaced "through the institution of 'stable platforms of collaboration' that revolve around European agencies with legal personality and a statute of common independence both towards national governments and towards the Commission and the other European institutions"[36]. The European legislator also lays down rules specifically designed to protect the organisational and decision-making autonomy of regulators[37]. Thus, members of the regulatory authorities are prohibited from

[30] Torricelli S., 2020, p. 101.

[31] Ibid.

[32] Bruti Liberati E. Regolazione dei mercati, tutela dell'affidamento e indipendenza dalla politica. Riflessioni a partire dai lavori di Nicola Bassi [Market regulation, protection of trust and independence from politics. Reflections from the work of Nicola Bassi]. Rivista della Regolazione dei Mercati, 2017, p. 237.

[33] Ibid.; Id. 2017, p. 76.

[34] Clarich M. 2020, p. 230 and ss.

[35] Ramajoli M. Consolidamento e metabolizzazione del modello delle Autorità di regolazione nell'età delle incertezze [Consolidation and metabolisation of the Regulatory Authorities model in the age of uncertainties]. Riv. reg. mer., 2018, p. 171.

[36] Turchini V. I mercati di settore europei verso una regolazione realmente indipendente [European sector markets towards truly independent regulation]. Riv. trim. dir. pubbl., 2020, p. 781; Bruti Liberati E. 2019, p. 64.

[37] Bruti Liberati E. 2019, p. 65.

"soliciting or accepting instructions" in the performance of their duties, with a corresponding explicit prohibition for political bodies and, in general, for third parties, whether public or private, to issue such instructions[38].

Consequently, in the event that instructions are issued by a political body in violation of the aforementioned explicit prohibition, the authority receiving them must simply ignore them, since the "contrary nature of any political act to European law certainly entails the right/duty of the authorities to disregard it when exercising their powers"[39].

In the context of the matters covered by the aforementioned prohibition, the national legislator cannot interfere with the activity of the independent regulator[40]. Similarly, the Government may not interfere in the technical-discretionary activity of the authorities, "while it may adopt general policy guidelines that the authorities themselves must adequately consider in the exercise of their political-discretionary powers"[41].

In order for independence to be true, the body must be autonomous, i.e., it must have legal personality, the power to organise its own structure and find the financial resources necessary to achieve the mission entrusted to it by the founding law[42].

Legal personality represents the basis on which an autonomous body can be built, even if, as has been pointed out, its absence does not particularly affect independence "because if it is true that legal personality in itself guarantees a certain independence from the state administration, it is also true that autonomy depends on the power actually attributed to subjects even without legal personality"[43].

Financial dependence, it is evident, represents a possible lever that gives those holding the "purse strings" the power to condition the will of the financially dependent subject. The importance of financial autonomy as an instrument of guarantee for the full exercise of its mandate by the regulatory authorities has also been recognised by the Court of Justice. The Court has, in fact, ruled that national regulations affecting the financing of independent authorities are unlawful if they

[38] Ibid. See, with reference to the European Securities and Markets Authority (ESMA), EU Reg. 1095/2010, Article 42, which states "When carrying out the tasks conferred upon them by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body. Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks". The same article is provided for with reference to the European Banking Authority (EBA) in Reg. EU 1093/2010 and, with reference to the European Insurance and Occupational Pensions Authority (EIOPA), in Reg. EU 1094/2010.

[39] Bruti Liberati E. 2019, p. 85.

[40] Ivi, p. 91.

[41] Bruti Liberati E. La regolazione indipendente dei mercati Tecnica, politica e democrazia, cit., p. 106.

[42] Ivi, 122; Merusi F. e Passaro M. Le autorità indipendenti, il Mulino, 2011, p. 73 and ss.

[43] Merusi F. e Passaro M. 2011, p. 74.

do not allow the independent regulatory authorities to carry out their institutional functions correctly[44].

The external, technical and independent aspect that characterises regulatory authorities is, as we have seen, closely linked to the very essence of the authorities, i.e., the functions that the legal system assigns to them. Consequently, as long as the legal system confers the functions described above on the authorities, their structural independence must also be guaranteed. The independence enjoyed by the regulatory authorities requires, however, that they exercise their activities within the framework strictly reserved to them by law. Functional autonomy, i.e., their duty to take technical decisions, is not an intrinsic quality of the authority that can be used for purposes other than those for which it was established.

The technical nature of the regulatory authorities must be referred to their function and not to their competences. In no way, as argued above, does the technical nature of the regulatory authorities legitimise them in defining their own political direction, which differs from that defined by the bodies expressing popular sovereignty. Similarly, the regulatory authorities, relying on their technical expertise, cannot be involved in the definition of political policy. In accordance with the same principle of popular sovereignty, it is not acceptable for enhanced participation in the procedure for the formation of the act to legitimise the definition of a policy that differs from that formulated by the democratically elected bodies.

The COVID-19 epidemic has generated a significant deterioration of the Italian economic-productive fabric[45], affecting both the financial structure of companies, generating a liquidity crisis, as well as the capital structure, generating a need for capital. In the face of these needs, the economic fabric has been unable to recover in the short term from the damage inflicted by the crisis. These circumstances have made Italian companies particularly vulnerable to foreign competition.

The European Commission, given that the aforementioned situation is also common to other EU Member States, introduced a temporary derogation from the rules on State aid in its Communication "Temporary framework for State aid measures to support the economy in the current COVID-19 emergency" in order to allow action to support the liquidity and recapitalisation of companies.

The pandemic has affected all sectors of the economy and finance but, for all the above reasons, the regulatory authorities cannot take action to counter

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[44] CJ 28 July 2016, Case C-240/15; 19 October 2016, Case C-424/15.

[45] Schema di decreto del Ministro dell'economia e delle finanze, sentito il Ministro dello sviluppo economico, recante "Requisiti di accesso, condizioni, criteri e modalità degli interventi del Patrimonio Destinato" ai sensi dell'articolo 27, comma 5, del decreto legge 19 maggio 2020, No. 34, convertito, con modificazioni, dalla legge 17 luglio 2020, No. 77 [draft decree of the Minister for the Economy and Finance, after consultation with the Minister for Economic Development, on "Access requirements, conditions, criteria and modalities of the interventions of the Assigned Heritage" pursuant to Article 27, paragraph 5, of Decree-Law No. 34 of 19 May 2020, converted, with amendments, by Law No. 77 of 17 July 2020. 77]. Available: www.camera.it [viewed 01.09.2021.].

the crisis generated by the pandemic as they cannot define their own independent economic policy guidelines.

Conclusion

In no way does the technical nature of the regulatory authorities legitimise them in setting their own political guidelines that differ from those defined by the bodies that express popular sovereignty. The regulatory authorities, relying on their technical expertise, cannot be involved in the definition of political policy. The set of powers vested in the regulatory authorities is an expression of "technical duty" and not of "political power".

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