

## **DEVELOPMENTS IN THE LEGAL FRAMEWORK OF THE SYSTEM**

### **FROM THE SAVING BANKS**

Founded in the early nineteenth century, the Savings Banks were engaged in two areas. They were institutions pursuing both credit and charitable activities in their local communities. During the 1990s they were subjected to profound and radical changes that resulted in a significant reformation of their organisational, legal and institutional structures.

Prompted by the 1st and 2nd Directives on credit, concerning freedom of establishment and banking de-specialisation, the transformation and modernisation process of the Italian banking system gained momentum, and law no. 218 dated 30 July 1990 (the "Amato" law), was passed along with the relevant implementation decrees. Therefore, in accordance with this law, the Savings Banks transferred their banking activities to ad-hoc joint-stock banking companies. (the new Savings Banks). Once this transfer had taken place, the original Savings Banks were converted to Foundations assuming all the socially-oriented and charitable tasks provided for by the statutes of the Savings Banks.

The new joint-stock Savings Banks are business enterprises governed by the civil code and the banking laws. They operate on an equal footing with all other banks operating in the credit sector. Around twenty of them have kept their names. Other Savings Banks, on merging with other banks, changed their original names giving rise to some of the leading Italian banking groups.

### **TO THE FOUNDATIONS**

The Foundations are the entities that spun off the banking assets in accordance with the Amato Law of 1990. Originally, they were controlled by the few regulations outlined in legislative decree no. 356/90, which implemented the principles laid down in legislative decree no. 218/90.

Until 1994 the Foundations were required to maintain majority ownership of the joint-stock Savings Banks. Following the arrival of law no. 474/94, this requirement was repealed and tax incentives were introduced to encourage the Foundations to relinquish their shareholdings (the "Dini" directive in the same year). This fostered the beginning of the process of diversification in ownership which enabled the joint-stock banks to achieve growth and size adequate to the changed market scenario while preserving their roots in local communities.

In 1998, with law no. 461/98 (a.k.a. the "Ciampi" law) and the subsequent implementation decree, no. 153/99, Parliament intended, on the one hand, to create the conditions for the completion of the restructuring process of the banking sector started with the "Amato" law and, on the other, to revise the civil and tax laws in relation to the Foundations. As a result of the reform implemented by the "Ciampi" law, the first stage ended with the approval of their bylaws by the Supervision Authorities

(Ministry of the Treasury, now Ministry of the Economy and Finances), the Foundations are private, non-profit, autonomous entities, based on article 2 legislative decree 153/99.

While the "Amato" law had required that the Foundations should maintain the majority ownership of the joint-stock Savings Banks, the "Ciampi" law established an obligation in the opposite direction: the Foundations were required to relinquish control of the banks. To encourage this course of action the "Ciampi" law included a proviso for the temporary suspension of the Capital Gains Tax on the disposal of the shares. Although this tax measure initially had a limit of four years, with the enforcement of the implementation decree (15 June 2003) it remained effective until 31 December 2005.

By 31st December 2017 of 88 Foundations, 35 no longer held shares in their original spun-off banks, 46 had a shareholding of less than 50%, while 6 of the smaller Foundations – in line with existing legislation<sup>1</sup> – continued to hold a majority of capital shares in their spun off banks. Furthermore, 85 of the 86 Foundations associated with Acri, approving of the Memorandum of Understanding - signed 22nd April 2015 by the Association and the Ministry of Economy and Finance - which aims to optimise the combination of profitability and possible risks when utilising their capital, have accepted the principle of an appropriate change. It particularises that a Foundation should not utilise more than a third of its total assets, either directly or indirectly, on an individual subject, using “fair value” to evaluate the exposure and composition of the said assets. In such an operation, all the financial instruments will be included in the evaluation. The Foundations have three years from the date of the signing of the MoU in which to reduce the amount of excess risk exposure where trading of financial instruments on the financial markets is involved and five years where the financial markets are not involved. In both cases the necessity of safeguarding the capital value will be taken into account as will market conditions and any effects from the transfers that will take place.

At the end of 2001, the law no. 448/01 was included in the Budget for 2002. With this law the Government amended the "Ciampi" reform significantly (article 11), undermining its essential substance represented, on one side, by the private nature of the Foundations and, on the other, by their autonomy. However, when the Foundations had recourse to an appeal court, art.11 of Law no.448/2001 (the Budget in 2002) underwent radical amendments. In fact, the Administrative Court (TAR) of the Lazio region advised that the cited article 11 was unconstitutional and, through ordinance no. 803/2003, presented the case to the Constitutional Court to verify its compliance with the Constitution. The Constitutional Court pronounced sentences 300 and 301 on 29 September 2003, finally clarifying the role and identity of the Foundations of banking origin, which were at long last defined as being composed of private, non-profit, autonomous entities and characterised as fully-fledged "members of the organisation of social liberty".

In short, in 2003 the Constitutional Court:

- recognised that the legal developments started in the 1990s broke the "genetic and functional bond", "a bond that had originally kept the Foundations tied to their original Banks. Moreover, it had changed the legal nature of the former from public entity to a private, non-profit, autonomous entity (article 2, paragraph 1, of legislative decree no. 153/99) whose nature is no longer defined by the controlling interest in the banking company or even by an equity investment in it;"

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<sup>1</sup> A waiver introduced in 2003 (art.4 Law no.143/2003 converted into Law no.212/2003 which substituted para.3 of art.25 of legislative law no.153/99

- approved once and for all the private nature of the Foundations of banking origin, reiterating that they fall within the competence of civil law and that, therefore, legislative responsibility over them rests with the State (article 117, second paragraph, sub-paragraph 1) of the Constitution;
- declared unconstitutional the presence in the governing bodies of the Foundations of representatives from Regions, Provinces, Municipalities, metropolitan Cities (i.e. entities other than the State as per article 114 of the Constitution);
- ruled that, on the contrary, there should be, instead, a prevalence of qualified representatives coming from local, public and private communities;
- classified as unconstitutional the use of administrative acts by the Supervision Authority designed to further reduce the autonomy of the Foundations, e.g. general measures or regulations intended to change the list of sectors where the Foundations can pursue their socially-oriented goals - today there are 21<sup>2</sup>;
- defined the concept of joint control by different Foundations with equity investments in the same bank, indicating that such joint control indeed exists only if such Foundations have entered into a verifiable shareholder agreement;

After the arrival of the crisis in 2008 and, at a time that institutional investors were abandoning the Italian banks, the Foundations, with their strong sense of responsibility, continued to provide support where necessary. When requested for help in a recapitalisation by the Supervising Authorities, with the EBA at the head, the Foundations contributed substantially. Between the years 2008 and 2013 the Foundations responded to the Supervising Authorities' demands for help in strengthening the patrimony, underwriting increased capital to the banks by €7.5 billion.

In the banks the Foundations exercise the economic and administrative rights of share-holders as ordained by the Civil Code. They have no agreements with the unions and no representative of the Foundations can be nominated for a position on any of the controlling bodies of the banks nor on those of their competitors. In the banks the Foundations exercise the economic and administrative rights of share-holders as ordained by the Civil Code. They have no agreements with the unions and no representative of the Foundations can be nominated for a position on any of the controlling bodies of the banks nor on those of their competitors. The law in force at present<sup>3</sup> actually ordains a total incompatibility between the administration of the Foundations and that of the banks

For many years the administrators of the Foundations have refrained from interfering - as indeed they are prohibited from so doing - with the management of the banks. The law in force since the Ciampi reforms <sup>3</sup> (law of mandate, 23 December 1998. no.461 and the following application decree

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<sup>2</sup> Legislative Decree no. 153 of 17/5/1999, article 1, paragraph 1c: Family and related values; Education, learning and training, including the purchase of publishing products for schools; Voluntary activities, philanthropy and charity; Religion and spiritual development; Assistance to the elderly; Civil rights; Crime prevention and public safety; Food safety and quality agriculture; Local development and low income housing; Consumer protection; Civil protection, Public health; Preventive and rehabilitative medicine; Sport activities; Addiction prevention and recovery; Psychic and mental pathologies and disorders; Scientific and technological research; Environmental protection and quality; Art, cultural activities and heritage. To this we add public utility works and infrastructure works following Legislative Decree no. 163 of 12/4/2006, article 153, paragraph 2 and article 172, paragraph 6.

<sup>3</sup> Legislative Decree no. 153 of 17/5/1999 article 4 letter-g added by article 27-quater, paragraph 1, legislative decree 24 January 2012, no.1 to complement the law of conversion 24 March 2012, no. 27

no.153/99) prescribes the total incompatibility between the administrators of the Foundations and the administrators of the banks: presidents, counsellors, auditors, directors and general secretaries of the Foundations cannot sit on any of the boards of the banks or of the banks controlling or participating societies.

Furthermore, since 2012, with the "Liberalisation Decree" (law-decree 24 January 2014 no.1.in coordination with the law of conversion 24 March 2012 no.27, contained "Urgent regulation for competition, development of the infrastructure and competitiveness.") launched by the Monti government, the law introduced an incompatibility also between the roles of the various organs of the Foundations and those of the "management, surveillance, controlling/directing organs of any society in competition with the spun-off banks or any part of their groups." The Foundations of banking origin follow this legislative direction rigorously, applying the prohibition on interlocking directorates as outlined in the criteria defined by the Bank of Italy and Consob for banking establishments ( Article 36 of Legislative Decree no.201/2011).

With regard to the debate as to whether or not the Foundations represent a transmission belt for inserting party members into the governing organs of the banks, over and above the afore-mentioned incompatibility, it must be emphasised that it is untrue that there exists a majority representation of public entities (Council, Provincial, Regional) within the organs of the Foundations. The "Ciampi" reforms and, even more explicitly, sentence no.301/2003 of the Constitutional Court not only prohibited a "Public" majority presence in the governing bodies of the Foundations, but also indicated that any such presence must be in the minority and, frequently, a very small minority, particularly where the associated Foundations were concerned.

The autonomy and impartiality of the Foundations, already envisaged by the Ciampi law, was further reinforced by the adoption of the Charter of the Foundations launched at the National Congress of Acri, held in Palermo in June 2012. The adoption of the Charter by the Foundations associated with Acri is voluntary but binding - all the Foundations have chosen to adhere to it and they are working hard to follow it up. The Charter ensures that decisions made in the fields of governance and accountability, of institutional investment and of capital management will be consistent with their shared values.

With regard to governance, the Charter of the Foundations establishes the incompatibility between having political responsibilities and having a position within the Foundations, as well as putting in place the appropriate measures to determine any temporal irregularity between the cessation of a political activity and the nomination for a position within one of their organs - an irregularity needing to be controlled both on entrance and exit. Regarding the institutional activities, the Charter emphasises the importance of the need to operate within criteria that are economical, efficient and effective, using well-defined parameters for the selection of initiatives deserving to be funded. Where Capital management is concerned, there is need for careful strategic planning for future investment within the criteria of diversification and risk control, in accordance with the objective of generating the income necessary for implementation of the institutional activities, for the continuation of granting funds and to provide the means to maintain initiatives necessary to achieve the intended goals.

Abiding by the Charter, the Foundations can give even more substance to what has already been outlined by the "Ciampi" laws which had defined their nature; the criteria for capital management; the charity activities - the three pillars on which the identity of the Foundations are based and which are still, even now, valid. In Acri, the association which represents the Foundations of banking origin,

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the hope is that Parliament will, at last approve the reforms of the legislation regarding private legal associations (the Law of Private Persons) so that the Foundations of banking origin can once more be seen as being included in the appropriate body of non-profit entities as defined in Chapter 2 of Book I of the Civil Code.

The amendment (Law no.122 30th July 2010) to Article 52 (Law decree no.78/2010) clarifies that the legal supervision of the Foundations of banking origin will remain allocated to the Ministry of the Economy (see Article 10 of Law Decree no. 153/1999 aka the Ciampi Law) until a radical reform has taken place within the sphere of private, non-profit, autonomous bodies (Chapter II of Book I of the Civil Code) resulting in a new appointment to the role of Legal Supervisor. Those Foundations who maintain control, either directly or indirectly, of banking societies will remain under the supervision of the Ministry of the Economy, even after the appointment of a new supervising authority.

The same amendment to Article 52 calls on the Ministry of Finance to provide Parliament, as is required of all such supervising authorities, with a full report (annually and by June 30th) outlining all the activities carried out by the Foundations of banking origin during the preceding year, "with full reference to the activities directed at socio-economic development within the areas local to each Foundation".

In 2016 the tax burden - for direct taxes, on income received, and indirect, such as Irap and Imu - amounted to €354.6 million: €119 million for substitute taxes on investment income; €203 million for Ires; €4 million for Imu and €3 million for Irap.

The taxation on the Foundations of banking origin has continued to grow over time. This increase is the result of the combined effect of:

- the growth in taxation on income from financial investments - from 20% to 26% - in July 2014
- the increase of 20% of the taxation of dividends following the raising from 5% to 77,74 % of the tax base, since the dividend distribution made at the beginning of 2014.

The Foundations of banking origin are allowed (law no.212/2003) to invest a proportion of their capital in property. This proportion, initially fixed at 10% of their capital, was increased to 15% by the modification in article 52 of the Legislative Decree no.78 in 2010.

To help to make the Accounts of the Foundations even more transparent, easier to read and with an overall more uniform structure, Acri has developed a document of Accounting Guidelines for the Associate members. The guidelines were drawn up in accordance with the recommendations made by the Ministry of the Economy and Finance on more than one occasion. The document permits the development of a more uniform system of collecting and displaying accounting data, thus facilitating the Ministry to control and verify the information.

The document "Guidelines for Accounting and Balance Sheets" was organised on the basis of the Treasury Statute/Bill/Act of 19 April 2001, which contained temporary regulations covering the compilation of the Balance Sheets of the Foundations: providing an analysis of the different items displayed and elucidating the contents of each entry; showing the accounting and evaluation criteria used with much other useful information for identifying any connections between the entries.

Regarding the accounting and evaluation criteria used, the document uses for reference, principles outlined in legislative decree no.153 1999, articles 2,421 to 2,435 of the Civil Code, where applicable, and to national accounting principles defined by the OIC. The document will be sent to all the Foundation members requesting them to adopt it, and also copied to the Ministry of Economy and Finance.