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Nature and aims of the Bank of Italy's action in the evolution of contracts in banking and finance

Address by the Director General of the Bank of Italy
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1. Premise

It is a great pleasure for me to accept the invitation to give this introductory report to the advanced course in European civil law, organized by the Law Faculty here at the University of Bari as part of the Robert Schuman Action for 1999-2000.

"Written contract", "right of withdrawal", "transparency of terms", "total cost of credit" — these expressions, once technical terms used only by the narrow circle of experts on private civil law, have become familiar; thanks to the mass media, they are part of current usage.

This underscores the social impact of the great legal and, more significantly, cultural transformation of banking and finance in recent years, the fallout on contract law and the increasingly complementary interrelation between special legislation and the general law of contracts.

The causes of the change are many, and a specific inquiry into them is beyond the scope of my remarks today. But it can be said that the contribution of European Community law has been fundamental.

The removal of barriers to competition, the single European market with its basic traits of minimum harmonization and mutual recognition, and the expansion of the sphere of private economic initiative have redefined the environment and the forms in which enterprise is conducted, and banking and financial enterprise in particular.

The principal avenue of evolution has been the universal application of the private corporate model and the introduction of laws on contract transparency and consumer credit. Yet it has also come about increasingly through the entrepreneurs' own independent contractual activity, in an environment in which competition embraces the domestic and international comparability of contract forms.

The Italian Civil Code allows significant disparities in the degree of contractual autonomy between the law governing "company contracts" (Article 2247 ff.) and "contracts in general" (Article 1321 ff.), or between Book Five ("Labour") and Book Four ("Obligations").

With specific reference to "joint stock companies", the law on company contracts is highly imperative and cogent, with pervasive "general conditions" that significantly limit the autonomy of enterprises to establish their own by-laws. This is the source of the movement, within Italian law, to modify these rules, to simplify company law in order to give entrepreneurs a degree of autonomy at least comparable with that found in other legal systems.

These goals inspire the work of a study committee for the reform of company law formed at the Ministry of Justice, in which the Bank of Italy participates.

By contrast, under general contract law the parties have very ample contractual autonomy. Article 1322 of the Civil Code states that the parties can "freely determine the contents of the contract" in their economic interests, including "contracts that are not of the types that are particularly regulated", as long as such interests are lawful and worthy of legal protection. Through this clause, the Italian economy has been enriched by a host of contract types not expressly provided for: leasing, franchising, swaps; financial products most of which can be treated as "derivatives" contracts.

In this broader framework, no law school programme can do without international comparative studies. European law, and especially contract law, which governs the business of civil society, is increasingly an integral part of our national legal heritage.

Accordingly, let me express my profound appreciation of the University of Bari's decision to be among the very few Italian universities to take part in this valuable EU initiative with a specific course on European civil law.

I shall speak today on the role played by the Bank of Italy in setting the rules on mass customer contracts in banking and finance: the Bank's action has not only been consistent with the basic evolution of Italian and European law but has at times anticipated their development.

2. The rule of informed consent

In designing the Civil Code in 1942, the main concern in contract law was the freedom of the contractual parties; less attention was paid to safeguarding competition and to consumer protection. Given that a very large part of the economy was in the control of monopolies and oligopolies, consumers frequently had no choice but to agree to the terms set by the firm; the only alternative was not to sign the contract.

The development of mass production and merchandising already required serial contractual methods, with inevitably standardized contracts and, eventually, totally impersonal sales techniques.

The Civil Code sanctioned the legal effectiveness of standard conditions of contract prepared by one party that were known or knowable to the other party with ordinary diligence. The sole

limitation was the requirement of specific citation and double signature on so-called "vexatious clauses" in contracts, forms and formularies.[1]

It has been recognized that specific approval in writing of vexatious clauses is insufficient to protect the other contracting party in markets that are not competitive, where the consumer has no real possibility of choice between alternative offers of goods and services.

In such circumstances, then, the protection afforded by the Civil Code was merely formal, not effective; it was of little use to the consumer.[2] In markets open to competition and featuring sufficient transparency, however, the Code's safeguards do foster the protection of the weaker party, increasing his responsibility.

3. The 1936 Banking Law

When the Civil Code was enacted, the banking and financial industry was no exception to the general situation outlined above. In the chapter on banking contracts, the Code simply ratified and classified the main types of contract then in use, in practice leaving ample space to be "filled" by banking associations.

There was a banking cartel. In order to eliminate "useless or harmful forms of competition"[3] it set ceilings on borrowing rates and floors for lending rates, and exacted fines for infractions.

The Banking Law gave to the Inspectorate for the Defence of Savings and for the Exercise of Credit (subsequently to the Bank of Italy), subject to a resolution of the Committee of Ministers, the power to intervene on interest rates and on banks' terms for customer deposits and current accounts.[4]

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[1]Civil Code, Articles 1341 and 1342.

[2]With specific reference to contracts in banking, see Maisano, *Trasparenza e riequilibrio delle operazioni bancarie - La difficile transizione dal diritto della banca al diritto bancario*, Milan, 1993, p. 23 ff.

[3]This was the expression used in Stefani's communiqué of 6 July 1918; the key passages are cited in D'Angelo and Mazzantini, *Trattato di tecnica bancaria*, Milan, 1972, 1, p. 208, footnote 129. The interbank agreement was concluded on 29 June 1918 by Banca di Sconto, Banca Commerciale, Credito Italiano and Banco di Roma not so much to "create peaceful relations between the banks as to eliminate all competition between them that could benefit the public" (P. Sraffa, "La crisi bancaria in Italia" in Cesarini and Onado (eds.), *Struttura e stabilità del sistema finanziario*, Bologna, 1979, p. 191.

[4]Banking Law of 1936, Article 32.1b). Letter c) assigned to the credit control bodies also the power to discipline "charges for various banking services".

The drafters of the Constitution of the Republic recognized the cartel, albeit with reservations,[5] as peforming the function of attenuating competition in order to protect the stability of the banking system.[6]

The Bank of Italy always refrained from exercising its power of intervention on interest rates under the 1936 Banking Law.[7]

On the working of the cartel, Luigi Einaudi as Governor of the Bank of Italy noted the lowering of deposit rates and the rise in lending rates and observed that these variations "have grave effects, which I herewith set forth as a series of question marks. Is it in the general interest for savings ... to be offered ever more miserly remuneration? To say that the return on saving can be reduced to little or nothing ... just because customers content themselves with little or nothing is tantamount to attributing clear monopoly status to the cartel. Is it in the interests of the banking system to diffuse the opinion that little or nothing is given because the banks have so agreed? It is evident that in order to justify its existence the cartel must appeal to other reasons, in the general interest."[8]

Einaudi's words imply a position of less than wholehearted endorsement of the cartel.

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[5]The Economic Committee of the Constituent Assembly had this to say: "For these reasons the Committee is of the opinion that if the banking cartel may appear legitimate in a system of price setting and in a closed economy not affected by international economic factors, it is in no way legitimate in a system of prices freely determined by the interplay of market forces. If our economy were to return to the market economy model, the banking cartel would become an anachronistic privilege accorded to a form of economic activity that has no reason of substance to claim ..." (*Rapporto della Commissione Economica presentato all'Assemblea Costituente*, IV, Credito e assicurazione, I, *Relazione*, Rome, 1946, Chapter III, § 24, p. 157).

[6]*Ibid*., Chapter I, § 12 (significantly entitled "Rules governing the exercise of credit for the purpose of avoiding harmful forms of competition") and Chapter III, §§ 19-27. These latter paragraphs were included in a sub-chapter entitled "The cost of money and the banking 'cartel' ".

Chapter III argues that "the necessity for the banking 'cartel' was felt initially not for the purpose of better exploiting market conditions by banks that wanted to gain a situation of privilege but for the purpose of protecting banks from a market situation in which the imbalance between money demand and supply so exacerbated competition for funds as to constitute a danger to the normal existence even of properly managed banks. By safeguarding their economic equilibrium the banks sought to use the 'cartel' agreement to protect the savings entrusted to their care and thus, beyond their corporate interest, they also acted in the general interest" (p. 129).

[7]It is true, however, that the entry into force of the law resulted in making the "cartel" a sort of public institution (Costi, *L'ordinamento bancario*, Bologna, 1994, p. 524). Until 1952 its rate was the basis of proposals for binding measures taken by the Committee of Ministers and the Credit Inspectorate. "Where the 1936 Banking Law had empowered the Credit Inspectorate to issue provisions in this matter, in 1937 the 'cartel' rate, now in effect for lending rates as well, became a measure taken by the Inspectorate and issued at the proposal of the Confederation of banks" *Rapporto della Commissione Economica presentato all Assemblea Costituente*, p. 131). The Committee of Ministers resolution making observance of the cartel rate obligatory is dated 18 April 1936 (Biscaini and Cotula, "Il cartello interbancario in Italia" in Banca d'Italia, *Bollettino del Servizio Studi*, July-December 1980, p. 379. And although the Interministerial Committee for Credit and Savings issued no resolutions on the banking cartel after 1952, the cartel survived on a voluntary basis until 1974 (*ibid*., p. 383). On these issues see A. Patroni Griffi, *La concorrenza nel sistema bancario*, Naples, 1979, p. 120 ff., p. 238 ff.

[8]Banca d'Italia, *Adunanza generale ordinaria dei partecipanti*, Rome, 29 March 1946 (annual report for 1945), "Relazione del Governatore", pp. 35-36.

The Bank of Italy's attention to efficiency and to competition was intensified and extended to spheres other than the contractual.

In 1967 Governor Guido Carli, speaking of banking concentration, stated that "The central bank will remain responsible for such changes in the structure of banking firms as may be necessary for the latter to hold their own in the face of increasingly direct competition with the banks of foreign countries, where mergers have taken place precisely with view to enhanced efficiency."[9] He returned to the subject a few years later, confirming "that we are watching this process closely and that it is not regarded as being contrary to the public interest provided that it does not jeopardize a banking structure capable of preserving a high degree of internal competition."[10]

The competition-fostering use of a number of the powers conferred on the Bank of Italy is evidenced by a good many measures, permitted by the flexibility of the 1936 law, to increase banks' efficiency by superseding regulatory constraints and limitations, which had resulted in significant market segmentation.

In the seventies, the first branching plan authorized the opening of large numbers of branches in the areas where loans and deposits were most highly concentrated. At the same time a resolution of the Interministerial Committee for Credit and Savings, enacting a proposal of the Bank, abolished the general ban on the simultaneous presence in a municipality of different banks in the same institutional category.

Beginning in 1980, a thorough-going reform of banks' by-laws, promoted and encouraged by the credit authorities, brought the structure of publicly owned banks closer to the modern, competitive arrangements of the joint stock company, opening shareholding to private parties and easing the many constraints on business operations. The geographical limits on banks' operations were removed. Short-term banks were permitted to do business, albeit within limits, in the medium and long-term segments as well.

The gradual intensification of banking competition was accompanied, over the years, by profound innovations in legislation on contracts, in the purposes and techniques of the central bank's regulatory activity on contracts in banking and in the self-regulation of the banks.

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[9]Banca d'Italia, *Report for the Year 1966*, 31 May 1967 (abridged English-language version), "Excerpts from the Governor's Concluding Remarks", p. 140.

[10]Banca d'Italia, *Report for the Year 1969*, 30 May 1967 (abridged English-language version), "Excerpts from the Governor's Concluding Remarks", p. 188.

4. Community law

The "European passport," introduced on the strength of EC directives consistent with the guidelines of the 1985 white paper, gave firms access to the markets of other member countries, thus increasing the degree of "subjective competition".

Antitrust rules barring firms from acting in restriction of economic competition, a principle enshrined in the EC Treaty, have provided the main instrument for guaranteeing "objective competition".

The opening of the European economic area has been accompanied by more incisive Community consumer protection policy to ensure that in the course of free competition, the most efficient, innovative firms will prevail.

Article 3 of the Treaty of Amsterdam on European Union envisages both the creation of "a system ensuring that competition in the internal market is not distorted"[11] and "a contribution to the strengthening of consumer protection".[12]

Article 153 further establishes that "the Community shall contribute to the attainment of a high level of consumer protection through" measures adopted "in the context of the completion of the internal market" and "specific action which supports and supplements the policy pursued by the Member States to protect the ... economic interests of consumers and to provide adequate information" to them. These provisions do not prevent Member States from maintaining or introducing more stringent protective measures provided that they are compatible with the Treaty.

Community action to protect bank customers has been patterned after the initiatives that gave rise in 1973 to the European consumer charter and later to the 1985 directives on producers' responsibility and deceptive advertising.

However, it was not until the Single European Act (1987) that consumer protection was taken as a strategic aim and made a linchpin of the construction of the internal market: "The Commission, in its proposals ... concerning ... consumer protection, will take as a base a high level of protection" (Amsterdam Treaty, Article 95.3).

This path led to the directive on consumer credit, which is one of the most important consumer protection measures in the field of banking and finance.[13]

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[11] Article 3.1g).

[12] Article 3.1t).

[13] Directive 87/102/EEC, amended by Directives 90/88/EEC and 98/7/EC. On the development of Community initiatives in matters concerning consumer protection, see Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", in Banca d'Italia, Documenti, no. 514, March 1996, p.6.

In the belief that "the provision of information on the cost of credit ... can make it easier for the consumer to compare different offers",[14] special importance attaches to the requirement that advertisements, offers and contracts should indicate the annual percentage rate of charge (APR), i.e. the total cost of the credit to the consumer expressed as an annual percentage of the amount of the credit granted.[15] It is also worth noting the requirement to reduce consumer credit contracts to writing and to give consumers a copy of the contract.[16]

The user of banking and financial services benefits from much more general protection in the subsequent directive on unfair terms in consumer contracts,[17] which also applies to the financial sector, albeit with the derogations it establishes with respect to standard market practices.[18]

5. The development of Italian law

Merely mentioning the foregoing principles and specific rules shows how Community law has influenced the development of Italian banking and financial law. It nonetheless appears an

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For an analysis of Community consumer credit law, see A.M. Carriero and Castaldi, "Le direttive comunitarie sul credito al consumo", in *La nuova legge bancaria*, Ferro-Luzzi and Castaldi (eds), Milan, 1996, III, p. 1795ff.

[14]Directive 87/102/EEC, fifteenth recital.

[15]*Ibid.* Articles 1.2e), 3 and 4.2.

[16]*Ibid.* Article 4.1.

[17]Directive 93/13/EEC.

[18]Consider: the possibility given to intermediaries to terminate or alter contracts of indeterminate duration where there is a valid reason, albeit without prejudice to consumers' right of withdrawal; the possibility given to intermediaries to modify interest rates unilaterally, again without prejudice to consumers' right of withdrawal; and the right granted to the parties to provide for prices to be determined at the time of delivery or when the contract is executed.

For the general aspects of the application of the Community-law-based provisions of Article 1469-*bis* ff of the Civil Code concerning unfair terms, see R.E. Arena, "La Direttiva comunitaria 93/13 sulle clausole abusive. Suo recepimento nell'ordinamento italiano con particolare riferimento alla disciplina dei contratti bancari", in *Giur. mer.*, 1998, IV, p. 156ff.; Bonzanini, "Le nuove clausole vessatorie e i contratti bancari: tutela dei consumatori e fretta legislativa", in *Banche e banchieri*, 1996, p 582ff.; Buonocore, "La Direttiva comunitaria del 5 aprile 1993 sulle clausole abusive nei contratti stipulati con i consumatori e la disciplina della trasparenza nelle operazioni di intermediazione finanziaria (leasing, factoring e credito al consumo)", in *Scritti in onore di Luigi Mengoni*, Milan, 1995, II, p. 1421ff.; Dolmetta, "Dal Testo unico in materia bancaria e creditizia alla normativa sulle clausole abusive", in *Scritti in onore di Luigi Mengoni*, cit., p. 1451ff.; Fortunato, "I contratti bancari: dalla trasparenza delle condizioni contrattuali alla disciplina delle clausole abusive", in *Dir. banca merc. fin.*, 1996, I, p. 14ff.; Granata, "Contratti bancari e clausole vessatorie alla luce della legge 52/96", in *Bancaria*, 1996, no. 9, p. 56ff.; Maimeri, "Clausole abusive e norme bancarie", in *La nuova disciplina dell'impresa bancaria*, Morera and A. Nuzzo (eds), Milan, 1996, II, p. 165ff.; Pellarini, "L'impatto delle Direttive comunitarie sulle clausole abusive dei contratti delle banche e degli altri intermediari finanziari", in *Risparmio*, 1996, p. 641ff.; Romagnoli, "La protezione dei consumatori tra novella e disciplina dei contratti bancari e finanziari", in *Giur. comm.*, 1998, I, p. 396ff.; Salanitro, "La Direttiva comunitaria sulle clausole abusive e la disciplina dei contratti bancari", in *Scritti in onore di Luigi Mengoni*, cit., p. 1665ff., and the writings of Alpa ("Il controllo amministrativo delle clausole abusive"), G. Carriero ("Banca d'Italia e controllo delle clausole abusive") and Bucci ("I riflessi sui contratti finanziari della direttiva CEE n. 93/13"), in *Investimento finanziario e contratti dei consumatori - Il controllo delle clausole abusive*, Alpa (ed.), Milan, 1995.

oversimplification to consider the changes that have occurred as having been prompted exclusively by Brussels. The causal link between the introduction of some specific national provisions, such as those on consumer credit, and Community law (Directive 87/102/EEC in the case in question) is clear. But there is no such causal link for other equally important provisions, such as those on banking transparency or the contracts used in securities business, which have been governed since 1992 by the law on investment firms.

The Italian Parliament has moved in parallel with Community law but has also provided bank customers with a level of protection that in some respects is higher than that established in the relevant directives.

The law on the safeguarding of competition and the market[19] and those on consumer credit and banking transparency[20] (both of which were consolidated in the 1993 Banking Law) established a legal framework for the market, providing, *inter alia*, for anti-competitive agreements to be null and void and for the transparency of contracts, that ultimately benefits consumers.

In establishing the aims of supervision, the 1993 Banking Law puts the objectives of competition and efficiency on the same footing as the overall stability of the financial system in a strictly complementary relationship. In this way legislative force is given to the guidelines of the Bank of Italy's action, which, since the seventies, has worked to ensure the stability of the financial system without hindering, indeed fostering, competition, seen as a prerequisite of efficiency.

In 1998, following the implementation of the Investment Services Directive, the Consolidated Law on Financial Intermediation has radically altered the rules governing financial intermediaries and companies that raise funds in the capital market. The protection of investors has become an explicit objective of supervision.

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[19]Law 287 of 10 October 1990.

[20]Laws 142 of 19 February 1992 and 154 of 17 February 1992.

Law 154/1992, to the drafting of which the Bank of Italy contributed, is based on the principles laid down in the directive on consumer credit but extends their application far beyond what is provided for in the directive itself, as regards both its contents and the persons covered. In fact the law applies to all contractual relationships between banks and their customers, regardless of the category to which the latter belong.

On the regulation of banking transparency, see Clarizia, "Trasparenza delle operazioni di servizi bancari e finanziari e obblighi di informazione", in *Riv. it. leasing*, 1992, p. 213ff.; Giordano, "La trasparenza delle condizioni contrattuali nella nuova legge bancaria", in *Riv. soc.*, 1993, p. 1234ff.; R. Lener, "Forma contrattuale e tutela del cliente nella disciplina della trasparenza bancaria", in *La nuova disciplina dell'impresa bancaria*, cit., p. 189ff.; Maisano, *op. cit*., p. 132ff.; Majello, "Problematiche in tema di trasparenza delle condizioni contrattuali", in *La nuova legge bancaria*, Rispoli Farina (ed.), Naples, 1995, p. 153ff.; Merusi, "Obblighi e sanzioni nella legge sulla trasparenza bancaria", in *Scritti in onore di Alberto Predieri*, 1996, II, p. 1065ff.; E. Minervini, "La trasparenza delle condizioni contrattuali (contratti bancari e contratti con i consumatori)", in *Banca e borsa*, 1997, I, p. 94ff.; and A. Nigro, "La nuova disciplina sulla trasparenza bancaria", in *Dir. banca merc. fin*., 1993, p. 571ff.

For a recent article on consumer credit, see G. Carriero, "Il credito al consumo", in Banca d'Italia, Quaderni di ricerca giuridica della Consulenza legale, no. 48, Rome, October 1998.

The new provisions aimed at protecting investors can be divided into two broad categories. The first comprises the measures intended to enhance the awareness of consumers and make them responsible for their consent: disclosure, transparency of contractual terms and correctness on the part of firms. The second concerns the rules intended to achieve a better balance in the relationship heteronomously by impinging directly on the content of contracts and making some terms and conditions null and void or ineffective.[21]

Transparency is present in all the phases of bank-customer relations: in the precontractual phase the rules on advertising make it easier to compare different offers of products and services; when agreements are concluded, the obligation to reduce contracts to writing permits full knowledge of the terms and a check on their correspondence with those advertised; in the performance of contracts, the obligation to provide periodic information and notify adverse changes ensures that customers have full knowledge of circumstances different from those originally agreed and the possibility to withdraw from agreements.[22]

The statutory provisions intended to achieve a better balance in contractual relationships include the articles of the 1993 Banking Law concerning the automatic integration of contracts,[23] the maximum commissions for the placement of government securities,[24] the nullity of clauses referring to usage,[25] value dating,[26] and some specific aspects of consumer credit.[27]

Another statutory provision acting in the same direction is that of the Consolidated Law on Financial Intermediation giving customers the right to withdraw from contracts for the management of investment portfolios at any time.[28]

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[21]Most of the regulations referred to in Chapter I of Title VI of the 1993 Banking Law and the investment services conduct of business and transparency rules contained in Chapter II of Title II of the Consolidated Law on Financial Intermediation fall within the first category. See G. Carriero, "Norme di protezione dell'utente di servizi bancari e finanziari: taluni effetti economici", in Banca d'Italia, *Studi in materia bancaria e finanziaria - 1996*, Quaderni di ricerca giuridica della Consulenza legale, no. 47, Rome, December 1997, p. 31.

[22]Law 108 of 7 March 1996 provides, among the preventive instruments for the fight against usury, measures intended to increase the transparency of the activities of authorized intermediaries, such as the obligation to affix notices on their premises open to the public showing the classification of transactions subject to monitoring and the corresponding overall average quarterly effective interest rates (Article 2.3). Article 16.4 of the law on usury makes the provisions on contractual transparency of the 1993 Banking Law applicable to credit brokers.

In view of the inclusion of the foregoing provisions, the law on usury has been examined "in the broader context of consumer protection" (Armao, "La normativa in materia di usura fra tutela dei consumatori e disciplina di prevenzione: prime considerazioni", in *Riv. giur. del mezzogiorno*, 1996, p. 696).

On the role of the Bank of Italy in the fight against usury, see D'Ambrosio ("Il ruolo della Banca d'Italia nella lotta al riciclaggio ed all'usura", in Banca d'Italia, *Studi in materia bancaria e finanziaria - 1996*, cit., p. 85ff.) and Sforza (*Riciclaggio, usura, monitoraggio fiscale*, Naples, 1998, *passim*).

[23]Legislative Decree 385/1993, Articles 117.7 and 124.5.

[24]*Ibid.* Article 116.2a).

[25]*Ibid.* Articles 117.6 and 117.7.

[26]*Ibid.* Article 120.

[27]*Ibid.* Article 125.

[28]Legislative Decree 58/1998, Article 24.1d).

In the investment services field, the need to prevent conflicts of interest made it necessary to establish a more cogent set of transparency rules. The need for compliance with the principles of due diligence and proper conduct has led to rules bearing on business conduct and imposing limitations on intermediaries concerning, *inter alia*, their internal organization.

The protection of customers in the courts has been strengthened by the provision that places the burden of proof on the intermediary in actions for damages.[29]

More generally, proper conduct and transparency in contractual relationships in banking and finance constitute an expression of the constitutional principle of protecting savings (Article 47 of the Constitution). These values have also been embodied in Law 281/1998 on the rights of consumers and users, which, among other things, recognizes consumers' and users' associations and the National Council of Consumers as having important powers.[30]

6. The action of the Bank of Italy

Competition and the protection of savers are two cornerstones of supervisory action; they are constantly referred to in action concerning contracts in the banking and financial fields.

It is worth noting in this connection that in his first Concluding Remarks Governor Ciampi stated that the task of supervision was that of "regulating bank competition in order to keep it healthy".[31]

In 1981 and 1988 white papers were published on the ownership structure of credit institutions in the public sector. Both summarized ideas that had been widely debated within the Bank of Italy in the preceding years, both were intended to promote the adoption in the banking

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An important equalizing effect is also produced by many of the provisions on unfair clauses introduced by Article 1469-*bis* ff of the Civil Code, implementing Directive 93/13/EEC. As an example, it is worth recalling the presumption of unfairness of clauses limiting the actions or rights of consumers where the other party fails to perform and of those that exclude or restrict the validity of claims for set off or pleas of inadimplenti non est adimplentum by consumers (Article 1469-*bis*, third paragraph, subparagraphs 2, 3 and 16, of the Civil Code).

[29] *Ibid.* Article 23.6. See Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", cit., pp. 13-14.

[30] Consumers' associations that are sufficiently reliable and representative are an important spur to the efficiency of the market and all the actors involved therein, since they now have important rights, such as that of reporting anti-competitive behaviour to the Antitrust Authority (Article 12.1 of Law 287/1990), of requesting restraints on the use of unfair terms (cf. Articles 7.2 and 7.3 of Directive 93/13/EEC and Article 1469-*sexies* of the Civil Code) and, more generally, of applying to the courts to prevent acts or behaviour that is against the interest of consumers or users to order the remedy and elimination of the injury incurred thereby and the publication of the court's ruling in one or more daily newspapers (Law 281/1998, Article 3.1).

On Law 281/1998, see Alpa, "La legge sui diritti dei consumatori", in *Corr. giur.*, 1998, p. 997ff.; De Nova, "I contratti dei consumatori e la legge sulle associazioni", in *Contratti*, 1998, p. 545ff.

[31] Banca d'Italia, *Report for the Year 1979*, p. 177.

market of the legal form of the joint stock company (*società per azioni*), with private-sector shareholders. This model was seen as better suited to performing an entrepreneurial activity and meeting domestic and foreign competition.

The shift during the eighties from a system of supervision based on the issue of case-by-case administrative authorizations to one based on objective rules laid down in advance, coupled with operating ratios,[32] served to put competition between the various types of credit institution on a more equal footing.

In a hearing before the Finance Committee of the Chamber of Deputies to examine some bills on banking transparency in 1988,[33] the Governor expressed a favourable opinion on the introduction of a streamlined legislative framework that would take into account and exploit the links between protecting bank customers, increasing competition and enhancing the efficiency and stability of the system.

The link between competition and the protection of banks' customers is a close one.

A credit system operating in a competitive environment is driven to behave in an efficient manner that reduces the cost of intermediation to the benefit of the economy as a whole.

The rules on the transparency of contractual terms and conditions can make it easier for customers to make an informed choice between the offers of different intermediaries, help to reduce the income deriving from a dominant position, and encourage banks to adopt more efficient and competitive organizational arrangements.[34]

The link between competition and the protection of savers emerges clearly also when one considers that in an economy with a low level of competition the need for transparency and a fairer balance in contractual relationships is usually felt less strongly.

Even when banking supervision was directed primarily towards the stability of the system it protected the users of banking and financial services. The protection was indirect and partial, however, since it was not concerned directly with either the cost or the legal aspects of banking products.

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[32]Banca d'Italia, *La tutela della concorrenza nel settore del credito*, 1992, pp. 38-39.

[33]For a discussion of the various bills on banking transparency, see A.M. Carriero and Castaldi, "Trasparenza delle condizioni contrattuali - Il processo di formazione della disciplina", in *La nuova legge bancaria*, cit., III, p. 1788ff.

[34]It has been noted that transparency, narrowly defined as an increased flow of information to customers, enhances the comparability of products, while the provisions aimed at achieving a fairer balance in contractual relationships reduce the excess income deriving from a dominant position and stimulate improved efficiency (Dolmetta, "Normativa di trasparenza e ruolo della Banca d'Italia", in Banca d'Italia, *Fondamento, implicazioni e limiti dell'intervento regolamentare nei rapporti tra intermediari finanziari e clientela*, Quaderni di ricerca giuridica della Consulenza legale, no. 49, Rome, March 1999, p. 21).

The improvements in efficiency brought by the increase in competitiveness permit a higher level of protection of savers; they encourage greater competition between the suppliers of banking and financial products and services.

In a competitive environment standardization, far from limiting customers' choice of terms and conditions, helps them to determine the most important features of products and services and to compare different offers.[35]

Now that the major inequalities in the contracts used in the mass banking market have been removed, it is necessary to limit the use of legislative provisions to supplement contracts. An excess of "paternalistic" provisions can hinder the diversification of contractual products, thereby holding back innovation and producing distortions in competition, freedom of choice, the price of contracts and the differentiated distribution of costs according to the reliability of the customer.[36]

7. Competition, sound and prudent management, transparency of contracts

Today the objectives of efficiency and competitiveness of the financial system rank with stability. The assignment of the Bank of Italy as guardian of the public interest in all three objectives[37] is a basis for coordinated action that exploits synergies and yields informational economies from the simultaneous performance of different functions.

The complementary relationship between stability and competitiveness is now widely acknowledged. An insufficient commitment to corporate efficiency can affect stability; on the other hand, strong competition spurs intermediaries to efficiency, precludes their passing the costs of inefficiency on to customers and induces them to cut costs.

The 1993 Banking Law provides for the manner in which the instruments of supervision are to be used, laying down that supervision is to be performed having regard to "the sound and prudent

[35]It is argued that in the regulation of transparency "the flow of information ... can be configured either as a mass of information items (usually detailed) to be transmitted to customers, who then have to organize and sift them themselves, or else as a result, hence the APR" (Dolmetta, "Normativa di trasparenza e ruolo della Banca d'Italia", cit., p. 16).

[36]Paternalistic rules have been defined as those "whose common denominator consists in the 'privation or ... substantial reduction of individuals' freedom of choice by the law to ensure a particular form of protection of individuals, or a whole category of individuals, from acts contrary to their interest'" (G. Carriero, "Norme di protezione dell'utente di servizi bancari e finanziari: taluni effetti economici", cit., p. 33), with reference to Kronman "Paternalism and the law of contract", in *92 Yale Law Journal*, 1983, p. 763ff., and citing Cosentino, "Il paternalismo del legislatore nelle norme di limitazione dell'autonomia dei privati", *Quadrimestre*, 1993, p. 120.

[37] De Vecchis, "La tutela degli interessi protetti dalle norme sulle concorrenza nell'ordinamento italiano", in Banca d'Italia, *Studi in materia bancaria e finanziario*, 1996. p. 16.

management of the persons subject to supervision, to the overall stability, efficiency and competitiveness of the financial system".[38]

Sound and prudent management, a complex concept, is explicated in the Bank's 1993 Annual Report: "Sound and prudent management refers to the degree of risk aversion of the persons subject to supervision. The possibility of passing on to depositors (or the public) a large part of the costs of failures may induce financial intermediaries to take excessive risks; rules discouraging such behaviour are necessary. Sound management refers to the need for intermediaries to operate according to standards of full functional efficiency with respect to corporate objectives — generally, earnings — and proper conduct of business. The use of elastic terms reflects the impossibility of defining optimal behaviour once and for all; it is up to the banks in the first place to behave in ways that accord with the rules just described ... ".

The formula "sound and prudent management" fuses together the system's objectives, supervisory action and intermediaries' behaviour; it synthesizes the values of stability, efficiency, integrity and proper functioning of the financial system.[39]

The 1993 Banking Law makes transparency of contracts an obligation for banks and financial intermediaries. The Bank of Italy is assigned to verify compliance with the rules and given specific powers of supervision and inspection (Article 128).

Two provisions are significant from the perspective of consumer protection: the "relative nullity" clause, which customers can invoke for the infringement of certain provisions on transparency and consumer credit, and the rule empowering the Bank of Italy to determine whether the names of contracts and securities are consistent with their content, for the protection of customers and the certainty of legal relations.

The credit authorities are charged with issuing detailed technical rules on advertising.

This legislative framework strengthens the protection of consumers of financial services, adding the safeguards of administrative provisions to those provided by the Civil Code.

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[38] On the purposes of supervision as envisaged by financial legislation now in force, see Amorosino, "La funzione amministrativa di vigilanza sullle banche nel nuovo t.u. delle leggi in materia creditizia, in Amorosino (ed.), *Le banche - Regole e mercato*, Milan, 1995, pp. 81ff; Cerulli Irelli, "La vigilanza regolamentare", in Morera and Nuzzo (eds.), *La nuova disciplina dell'impresa bancaria*. Milan, 1996, I. pp. 47ff.; Desario, "Audizione presso la VI commissione permanente della Camera dei Deputati sulla 'Vicenda Gruppo Ferruzzi'", Banca d'Italia, *Documenti*, no. 417, July 1993, particularly pp. 4ff; Lamanda, "Le finalità della vigilanza", in Ferro-Luzzi and Castaldi (eds.), *La nuova legge bancaria*, I. pp. 157ff.; Napoletano, "La vigilanza sugli intermediari, in Di Noia and Razzante (eds.), *Il nuovo diritto societario e dell'intermediazione finanziaria*, Padua, 1999, pp. 3ff.

[39] Desario, "Solidaritietà ed etica nella finanza: rapporto tra sistema finanziario e Terzo settore", Banca d'Italia, *Documenti*, no. 558, March 1997, p. 9.

The recent amendments to the 1993 Banking Law extend to matters of transparency the Bank of Italy's general power to propose resolutions for adoption by the Credit Committee.[40] This is an example of the full-circle procedure typical of banking legislation, which entrusts the Bank of Italy with powers of initiative while also assigning it to prepare the secondary legislation whose application it will subsequently supervise. The experience of banking supervision has shown this to be a functional mechanism; in the course of supervision it is possible to acquire the knowledge that is vital in order to be able promptly to adapt the rules to a changing economy and the operational needs of intermediaries.

8. Rules on competition and the credit market

With the antitrust law,[41] which extended to the banking industry the rules applicable to every other kind of enterprise, the Bank of Italy has assumed *de jure* as well as *de facto* the job of preventing conduct harmful to competition in the banking market. It is empowered not only to prohibit concentrations that reduce freedom of competition and to forbid the abuse of dominant positions, but also to apply the rules on understandings in restraint of competition in order to repress collusive or pre-emptive practices. The Bank has the requisite instruments to avert the abuse of dominant positions both among intermediaries and in the sphere of bank-customer relations.[42]

Since the law's entry into force, the Bank of Italy has concluded ten investigations of understandings potentially harmful to competition; in the majority of cases the agreements were appropriately modified while the investigation was still under way.[43]

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[40]Article 127.3.

[41]Law 287 of 10 October 1990.

[42]See Desario, "Il testo unico in materia bancaria e creditizia: la nuova configurazione del controllo di vigilanza", *Economia italiana*, no. 2, 1994, p. 159; Bertolotti, "Illegittimità di norme bancarie uniformi (NBU) per contrasto con le regole antitrust ed efffetti 'sui contratti a valle': un'ipotesi di soluzione ad un problema dibattuto", *Giur. it.*, IV, 1998, c. 345; Ghezzi, "L'applicazione della disciplina antitrust nei settori bancario, assicurativo e dell'informazione nel 1994", *Concorrenza e Mercato*, no. 3, 1995, p. 141; Gyselen, *EU Antitrust Law in the Area of Financial Services: Capita Selecta for a Cautious Shaping of a Policy*, Fordham Corporate Law Institute 329, 1996; Marchetti, "Accordi interbancari e disciplina antitrust. Note sui provvedimenti emessi nel 1994", *Concorrenza e Mercato*, p. 371; F. Parrella, "Disciplina antitrust nazionale e comunitaria, nullità derivata e nullità delle clausole dei contratti bancari a valle", *Dir. banca merc. fin.*, I, p. 507; Polo and Grillo, "La standardizzazione dei contratti bancari", *Concorrenza e Mercato*, 1997, p. 293; G. Rossi, "Effetti della violazione di norme antitrust sui contratti tra imprese e clienti: un caso relativo alle 'norme bancarie uniformi'", *Giur. it.*, 1998, II, c. 212; Ubertazzi, *Concorrenza e norme bancarie uniformi*, Milan, 1986.

[43]Desario, "Indagine conoscitiva sui recenti incrementi dei tassi di interessi sui mutui fondiari", hearing before the Chamber of Deputies, Rome, 21 October 1999, mimeo, pp. 8-9 (English-language version, "Inquiry into the recent increases in mortgage lending rates").

One-way, generalized changes in the prices of financial products and services are examined to assess whether the intermediaries' decisions are consistent with market trends and were made in compliance with the rules on competition.

In 1996, following generalized changes in interest rates, the banks' pricing policies were scrutinized. The findings of the inquiry excluded the need to impose sanctions, since the rate changes were consistent with the new conditions of the money and financial markets; the changes were uniform neither in size nor in timing.

A particularly important investigation was opened in 1994 on the Uniform Banking Rules prepared by the Italian Bankers' Association for its members. The Bank of Italy's action resulted in the exclusion from the Uniform Banking Rules of the anti-competitive clauses that determined the content of contracts in a way that precluded or substantially limited the scope for product diversification.

The restoration of contractual autonomy made it possible for competition also to develop on the terrain of contractual content, which can spur banks to tailor their products to customers' specific needs.[44]

The Bank of Italy demanded changes in the Uniform Banking Rules and ordered the Bankers' Association to inform its members that "the Uniform Banking Rules constitute a mere guideline without binding power or value as recommendation, so that every member is free to adopt them or not and to make any modifications deemed appropriate".[45]

Two investigations are currently under way. The so-called "exchange gouging" investigation involves the Italian Bankers' Association for recommending to its members a pricing system for the exchange of euro-area currencies based on a fixed charge plus a percentage commission. That into the so-called "group of friends of banking" involves 13 of Italy's largest banks, which allegedly engaged in a systematic exchange of information on the volume and prices of various banking services that could serve for the coordination of marketing policies.[46]

[44]Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", p. 5
[45]Bank of Italy Measure no. 12 of 3 December 1994.
[46]Desario, "Indagine conoscitiva sui recenti incrementi dei tassi di interessi sui mutui fondiari", p. 5 (English-language version, "Inquiry into the recent increases in mortgage lending rates).

9. Secondary legislation on transparency of contracts

An important piece of the legislative framework is Article 117.8 of the 1993 Banking Law, which empowers the Bank of Italy to "establish that certain contracts or securities, designated by a particular name or on the basis of specific qualifying criteria, shall have a standardized content" and lays down that contracts and securities which do not conform are null and void.[47]

This links customer protection with the need to reinforce certainty of legal relationships, without abridging the principle of contractual freedom. The parties remain free to stipulate whatever contract they like, provided they do not identify it with the names that the Bank of Italy has reserved for contracts or securities having a different content.[48] The aim is not to impose specific contractual contents, but to enhance product comparability by facilitating comprehension of the economic and legal implications.[49] The function of Article 117.8 implies that it is to be invoked above all in cases where intermediaries' contractual autonomy fails to ensure that customers can fully comprehend services and compare products.[50]

In exercising this power, the Bank of Italy has defined the minimum characteristics of bank bonds, certificates of deposit and savings certificates. In particular, it has determined that floating rate certificates may only be linked to financial parameters calculated by objective criteria.[51] It has also clarified that the characteristics specified are "minimum", and that "typification" does not preclude banks' issuing other fund-raising instruments.[52] A similar step has been taken with regard to commercial paper and investment certificates, which may be issued by non-banks within limits set by the Credit Committee.

In placing securities, banks are required to deliver a copy of the rules to the purchaser and to provide specific information likely to enable customers to reach better informed decisions, such as the existence of the interbank deposit protection fund and the right of one of the contracting parties to early redemption.[53]

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[47]For an analysis of transparency and the role of the Bank of Italy, see Banca d'Italia, *Fondamenti, implicazioni e limiti*.
[48]Desario, "Il testo unico in materia bancaria e creditizia: la nuova configurazione del controllo di vigilanza", p. 165.
[49]Contents different from those prescribed can be freely stipulated provided names or qualifying criteria distinct from those of other products are adopted. The aim is to ensure that financial innovation develops in a proper manner, without confusing customers as to reciprocal rights and obligations.
[50]Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", p. 5.
[51]Istruzioni di vigilanza, Titolo V, Capitolo 3, sezione III.2.
[52]Istruzioni di vigilanza, Titolo V, Capitolo 3, sezione I.1.
[53]Istruzioni di vigilanza, Titolo V, Capitolo 3, sezione VI.

New provisions were recently adopted with the aim of increasing the transparency of debt securities issued by banks and highlighting the related risks. Issuers must make an analytical fact sheet available to the public on their premises.[54] The fact sheet must clearly state the features of the issue and the risks of the operation, in particular that the subscriber may find it difficult to dispose of securities not listed in regulated markets. The new provisions dovetail with those issued by Consob, the Companies and Stock Exchange Commission, concerning trades made in trading systems organized outside of regulated markets.[55] The formalities involved may coincide with those necessary for subsequent listing.

10. Self-regulation: the Code of Conduct of the banking and financial sector

The supervisory instructions state that "the provisions on transparency establish principles and minimum rules. They are an effective instrument of competition and customer protection when coupled with conduct on the part of intermediaries inspired by proper practices in transactions with customers. To this end, formal compliance is not enough, especially where less well-informed customers are concerned; it is necessary to respect the rules of professional ethics based on the criteria of good faith and correctness in business relations".[56]

Self-regulation is therefore clearly encouraged, in the conviction that it can bring an effective improvement in relations between intermediaries and consumers and enhance the reputation of individual intermediaries.[57]

Publicizing of conditions, transparent behaviour, good faith and correctness in business dealings serve the objectives of fairness, protection of the weaker party and market efficiency.[58]

Positive results are possible only if intermediaries' convinced adherence translates into correct "customer assistance", an effective tool of competition.

Under the drive of greater competition, trade associations are tending to attenuate their role of guardians of the corporate interests and are promoting self-regulatory codes that translate the

[54]Bank of Italy Measure of 30 July 1999, published in the *Gazzetta Ufficiale* of 19 August 1999, no. 194.
[55]Consob Communications 98097747 of 24 December 1998 and DM/99057703 of 26 July 1999.
[56]Istruzioni di vigilanza, Titolo X, Capitolo 1, sezione I.1.
[57]On self-regulation in the financial markets, see Capriglione, "Amministrazione e autoregolazione del mercato finanziario", *Riv. dir. civ.* 1996, II, pp. 9ff.
[58]Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", p. 11.

criteria of good faith and correctness and the principles enshrined in law into transparent rules and consistent business practices.

The outcome is a multi-tier system of rules founded on legislation and enriched by administrative provisions that in turn expressly recognize the role of self-regulation.

Self-regulatory codes set out a general model for conduct. They can contribute significantly to the correct functioning of markets, provided that the principles and rules they establish are actually applied, become essential canons of corporate culture and put relations between undertakings and consumers on a mutually satisfactory footing.[59]

The Code of Conduct promoted by the Bankers' Association in 1996 and adopted by the banking and financial industry, which aims to improve trust between banks and customers, is a key element in the current process of self-regulation.[60] The Code dictates criteria of conduct with which member banks are expected to comply in their overall relations with customers and in the performance of some of their main functions (raising funds, granting credit, collection and payment services and investment services).

Some issues addressed in the Code are: informing customers about the products and services offered, including reference to the composition of secondary expenses and fiscal obligations; help in

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[59]Ibid., p. 8.

[60]The Code was approved by the Executive Committee of ABI on 13 December 1995 and circulated in its Circular, *serie Legale*, no. 6 of 22 January 1996.

Associazione Nazionale degli Agenti di Servizi Finanziari (ANASF, National Association of Financial Services Agents) and Assoreti have also adopted codes of self-regulation.

The Code adopted by Assoreti also aims to apply principles of correctness and good faith to protect the reputations of both individuals offering investment services on a door-to-door basis and their customers (Tofanelli, "L'etica nell'attività di offerta fuori sede: il Codice di comportamento Assoreti", in *Bancaria*, 1997, no. 9, p. 57ff) although the Code does not in itself confer rights to the latter (Article 2).

The Assoreti Code is intended to prompt effective control by member firms over the operations of financial salesmen, and envisages not only the obligation to oversee salesmen (Article 11) but also the latters' joint liability with the former to the Association in regard to the actions of salesmen who violate the Code, whenever the member firm has "objectively and knowingly benefited from the conduct of its salesman or of third parties" acting jointly with him, even if there was no immediate economic benefit (Article 4). On this point the Code is paralleled in the code of ethical self-regulation of ANASF, which defines the rules of conduct of financial salesmen.

The Assoreti Code broadens the range of rules to be complied with when offering investment services on a door-to-door basis beyond that of legislation, envisaging sanctions for violations of the Code whenever it is violated, "even if the deed does not amount to an illicit act according to the terms of the Statue and the Supervisory Authorities have not taken any action in regard to it" (Article 2.3).

Assoreti has also produced a Code of Supervision over the activity of financial salesmen, based on the Code of Conduct; this lists "indicators of possible anomalies and tools of intervention that, albeit within a private regulatory framework, may help to promote a form of preventive supervision" (Presentation of the Code of Supervision over financial salesmen).

On the question of the offer of investment services, the secondary provisions issued by Consob provide for the adoption of internal codes of conduct "including those adopted by category associations covering the services offered" (Article 58 of Consob Resolution no. 11522 of 1 July 1998).

ensuring that each clause of the contract is fully explained; delivery of a blank copy of agreements; special indication of the effects of annulling agreements.

With regard to the delicate activity of granting credit, the Code provides for a commitment to "follow criteria of transparency in the procedures for assessing applications for loans, with a view to ensuring that customers can follow the progress of their applications".

Further rules are intended to provide information on commercial opportunities and alternatives offered; the nature and risks of transactions in securities; and the procedures to be followed by clients for the cancellation or early repayment of loans.

The Code also envisages the adoption of internal procedures for the "swift and proper" treatment of customers' complaints; informing customers how to set the procedure in motion; and the assessment of possible organizational and regulatory measures to avoid a repetition of complaints.

11. The banking Ombudsman

An additional feature of self-regulation is the banking Ombudsman, who offers an out-of-court procedure to settle disputes as an alternative to the courts.[61] This institution represents a significant contribution to reducing conflicts between banks and customers; it helps to contain pending lawsuits; it offers an alternative to the costs and delays of judicial processes, which often exceed the possible benefits of winning a case, especially for small customers.[62]

At Community level, the Directive on consumer credit envisages that member states "promote the establishment of appropriate bodies to receive complaints concerning credit agreements or credit conditions and to provide relevant information or advice to consumers

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It is finally worth mentioning the sanctions envisaged in the Assoreti Code of Conduct, which help to ensure the effectiveness of ethical rules through the possibility of giving notice of sanctions adopted - which may even include suspension or expulsion - to members or, in more serious cases, publishing them in one or more national newspapers.

[61] ABI Circulars, *serie Tecnica R* - no. 3 of 1 February 1993 and *serie Legale* no. 41 of 16 November 1998.

Also on this subject, see Pratis, "L'Accordo interbancario del 1993 per l'istituzione dell'ufficio reclami degli enti creditizi e dell'Ombudsman bancario nell'ambito della tutela del consumatore. Raffronto con analoghi sistemi di altri Paesi della CEE", in *Banca e borsa*, 1994, I, p. 215ff; Bernini, "Metodi alternativi di composizione delle liti nei servizi bancari e finanziari - Esperienze a confronto", Padua, 1996, p. 143ff; Criscuoli, "Il banking Ombudsman", *Quaderni di Banca e borsa*, no. 12, Milan, 1989; G. Carriero, "L'Ombudsman garante della correttezza bancaria", in *Le fonti di autodisciplina*, edited by Zatti, Padua, 1996, p. 201ff; Groppi, "Ombudsman pubblico, privato, bancario: dalla Svezia del 1809 all'Italia del 1994", in *Bancaria*, 1994, no. 5, p. 16ff; S. Maccarone, "Le esperienze europee di Ombudsman bancario", in *La banca e l'arbitrato*, edited by Riolo, Roma, 1994, p. 33.

[62] Desario, "La tutela del consumatore: il ruolo dell'autoregolamentazione", cit. p. 17.

regarding them"[63]; the Commission's Recommendation on the transparency of banking conditions applied to cross-border financial transactions recommended the establishment of independent bodies to resolve consumer complaints[64]; the Directive on cross-broder credit transfers requires the putting in place of adequate and effective procedures to deal with complaints and claims and possible disputes between customers and intermediaries[65]. Finally, another Recommendation of 1998 laid down the principles that should inspire these bodies for the out-of-court settlement of disputes: the independence of deliberating bodies; transparency in the proceedings and functioning of decision-making bodies; respect for the principle of *audi alteram partem*; streamlined and low-cost procedures; legality of decisions; freedom to choose out-of-court procedures until disputes arise; consumer representation.[66]

The data indicate increasing recourse to the Ombudsman; the ceiling within which the body can act has recently been doubled to 10 million lire, and the provisions of the 1998 Recommendation have been implemented.[67] The success of this initiative could be enhanced by broadening its range of operations and by providing consumers with more information concerning its aims and functioning, given that the procedure is free, informal and straightforward. Decisions must be taken within 90 days, without prejudice to the right to instigate legal proceedings, either while awaiting the Ombudsman's decision or after it has been given.

12. The tendency of court decisions

Controls by administrative authorities and self-regulation tend to contain conflicts between intermediaries and consumers, leaving only the more difficult cases to the courts.

[63]Directive 87/102/EEC, Article 12.1 (c).
[64]Commission Recommendation of 14 February 1990 on the transparency of banking conditions applicable to cross-border financial transactions, no. 90/109/EEC, annex, principle no. 6.
[65]Directive 97/5/EC of the European Parliament and Council of 27 January 1997 on cross-border credit transfers, Article 10.
[66]Commission Recommendation of 30 March 1998, no. 98/257/EC, on the principles applicable to bodies responsible for out-of-court settlements of disputes involving consumer issues.
[67]The Chairman of the Banking Ombudsman has reported "a continual increase in the number of complaints referred to the Ombudsman" (Banking Ombudsman, "Relazione sull'attività svolta nel semestre dicembre 1998-maggio 1999", Rome, June 1999, p. 33). In the six months mentioned there was a rise in the number of complaints of 34.67 per cent (*Ibid*., statistical table on p. 35); in the six months from 1 June to 30 November 1998 there had been a rise of 11.6 per cent over the previous half-year (Banking Ombudsman, "Relazione sull'attività svolta nel semestre 1 giugno-30 novembre 1998", Rome, December 1998, statistical table on p. 19).

Court decisions have revealed doubts concerning the effective scope of some provisions: in particular, the decision regarding the uncertainty of the possibility for trustees to obtain copies of documents relating to banking transactions engaged in by a bankrupt[68], which was resolved by recent amendments to the Banking Law (Article 119.4).

Recent decisions by the Court of Cassation have asserted the nullity, citing Article 117.6 of the Banking Law, of clauses in banking agreements that allow compound interest to be charged in derogation of the Civil Code (Article 1283).[69] In declaring such clauses nul the Court noted that "the so-called uniform banking rules laid down by the banking association (...) are not of a regulatory nature, but only contractual, in the sense that they are proposals for general contractual terms addressed by the association to member banks (whose validity with regard to specific, not unimportant, aspects was nonetheless recently called into question by the supervisory authorities, in the light of Community and internal legislation on competition)".[70]

The declarations of the Supreme Court indicate a change in the cultural and legal climate. The explicit reference to the effects of competition on the validity of uniform banking rules reveals an awareness of the interaction between the right to competion and contractual equity.

In the light of the possible economic impact of such disputes, the Legislators intervened to clarify matters. The Interministerial Commitee for Credit and Savings was charged with establishing the procedures and criteria for calculating compound interest, while ensuring that lending and deposit rates on current account operations are calculated with identical frequency intervals (Banking Law, Article 120.2).

13. Conclusions

The single currency, financial innovation, the development of information technology and globalization are exposing Italian banks to keener competition, affecting not only prices for customer services but each single component of them.

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[68]This possibility was affirmed by the Court of Cassation on 22 May 1997, no. 4598 and, earlier, by the Milan Court on 2 May 1996, *Contra*, Trib. Ferrara 12 June 1995.

[69]Court of Cassation, 16 March 1999 no. 2374 and 30 March 1999, no. 3096, both in *Foro it.,* 1999, I,c. 1153ff..

For comments on the two decisions by the Court of Cassation, of differing tenor, see Cabras, "Conto corrente bancario e anatocismo tra diritto e pregiudizio", in *Bancaria,* 1999, n. 7-8, p. 36ff; Costanza, "Anatocismo: la svolta della Cassazione", in *Giust. civ.,* 1999, I. p. 1585ff; Dolmetta and Perrone, "Risarcimento dei danni da inadempimento di obbligazioni di interessi e anatocisomo", in *Banca e borsa*, 1999, II, p. 408ff; Ginevra, "Sul divieto di anatocismo nei rapporti tra banche e clienti", *ibid*., p. 401ff; Moscuzza, "L'anatocismo nel contratto di conto corrente ordinario e nel contratto di conto corrente bancario", in *Giust. civ., 1999, I. p. 1588ff;* Palmieri and Pardolesi, in *Foro it*., 1999, I, p. 1153ff; Sforza, "Anatocismo: nuovi orientamenti giurisprudenziali", in *Mondo bancario*, 1999, n. 4, p. 80ff.

[70]Court of Cassation, 16 March 1999, no. 2374.

Conduct that respects principles of transparency and correctness enhances the reputation of intermediaries and strengthens their customers' trust.

Uncertainties concerning the services offered and scant assistance to customers increase transaction costs, generate disputes and may damage the image of intermediaries and the entire financial system.

The broadening and strengthening of self-regulation and category-level initiatives to establish ethical rules and encourage the out-of-court settlement of customer complaints are to be recommended.

The Bank of Italy exercises powers of supervision aimed at ensuring the sound and prudent management of intermediaries, overall stability and an efficient and competitive financial system partly by urging transparency and correctness in the behaviour of banking and financial firms.

I am convinced that the freedom of enterprise - in terms of creative, productive and innovative functions, distributive procedures and diversification of supply - is an important factor for competition that is essentially beneficial both for enterprises and for savers-investors.

The establishment of a culture of competition in a context of correctness is an objective that cannot be achieved in complex economies only through measures taken by the administrative authorities. What is needed is a convinced and united effort by institutions, enterprises, citizens' and consumers' advocacy organizations.