

## Financial market regulators and the pandemic crisis

The role assigned to the economic regulatory authorities is to ensure "the mere efficiency of the markets", thus making the right of economic freedom effective. A prerequisite for the effectiveness of economic freedom is legal certainty. A condition, on the other hand, for the exercise of the same freedom is that competition is ensured. Both are entrusted by the system to independent regulatory authorities. The independent authorities are therefore the guarantors of the game rules and their function is of a technical nature. The set of powers they hold is therefore technical and not political. The independence and autonomy that the legal system accords to regulatory authorities are necessary for the exercise of these powers. Structural independence is closely linked to functional independence. Both are crucial for the achievement of the mandate given to independent regulatory authorities by law.

This recognition of dual independence, both functional and structural, creates a delicate balance, on which these authorities are based, which requires them to strictly observe the framework of their competences. This is especially true in consideration of the exclusion, by definition, of these authorities from the circuit of political representation. Regulatory authorities, derogating from the principle of popular sovereignty, cannot formulate their own political guidelines.

A prerequisite for the full exercise of economic freedom is the certainty of the rules. This principle is a cornerstone of economic legislation. The main purpose of the special legislation for the Italian stock exchange in 1913 was precisely 'to ensure compliance with the rules of the game, creating certainty in the conditions of negotiation and public confidence'.

On the other hand, for the exercise of the economic activity it is necessary that market players are put in condition to "participate in that encounter between rights which is legally called adversarial and economically competitive". The legislator, having established that contractual autonomy is not sufficient to guarantee the exercise of the right to economic freedom, introduced regulatory authorities. The main task of these authorities is, in fact, "to replace in whole or in part the bargaining acts of private individuals who participate, or should participate, in the competitive race when these do not take place spontaneously". This type of activity is properly called regulation.

Economic regulation arises, therefore, from the attempt to correct market failures "with intervention instruments and corrective measures of an authoritative (or command and control) type", 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.

The choices to which the Regulatory Authorities are called, therefore, are not free in the sense that they are aimed at safeguarding, in relation to a given activity, "a determined set of interests, which already includes objectively established values and aims". In fact, "the object of the power - the competitive market - is always and in any case predetermined by the law". Therefore, the intervention of the regulatory authorities cannot have any other purpose than to restore the breach of *par condicio* competitiveness. Any other intervention is not regulation but 'public intervention in the economy', which has different objectives and must be justified on the basis of different rules from those that grant powers to the regulatory authorities. Regulation presupposes that the market is governed by free competition and, therefore, economic policy assessments are extraneous to it.

In the instance where the authority takes political-discretionary choices, in the absence of an express legislative provision, its acts are censurable in court. In the event that there is a specific legislative authorisation conferring to the authority the duty to take political-discretionary choices, however, the same authority shall follow the possible acts of political guidance. In the event that there are no such acts, the authority will have to order the interests at stake by appealing to the reference legislation. In fact, it is not possible for regulatory authorities to formulate their own political guidelines by way of derogation from the principle of popular sovereignty.

The legal system, therefore, attributes to the regulatory authorities the role of guarantors of the correct performance of certain sectors, regulating and controlling the activities of operators. More generally, independent authorities are guarantors of the rules of the game, called upon to intervene in the presence of complex technical facts by adopting solutions that guarantee, given the constraints imposed by the legal system, the greatest possible satisfaction of the various interests involved.

In no way its technical features justify the regulatory authorities in outlining their own political guidelines to differ from those defined by the institutions 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 of the regulatory authorities is an expression of 'technical duty' and not of 'political power'.

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