Enforcing Rules on Related Party Transactions in Italy: One Securities Regulator's Challenge

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Abstract

In the wake of the corporate scandals of the early 2000s, Italian policymakers tackled tunnelling via related party transactions (RPTs) by enacting a three-layer regime: a statute setting the goals of a regulation (transparency, and substantial and procedural fairness of RPTs); a regulation enacted by the financial markets authority (Consob), which defines the “principles” for achieving those goals; and individual companies’ internal codes which implement those principles. As a consequence of that approach, Consob was entrusted with two challenging functions: first, to spell out those principles and, second, to enforce the new regime. Consob designed a flexible regulatory framework where, in addition to a set of mandatory provisions, various default ones and some opt-in rules were made available. The core provisions, on the one hand, require immediate disclosure on material transactions to improve market scrutiny, and, on the other, bolster internal governance mechanisms, by granting independent directors veto power on material RPTs. As for Consob’s role in enforcement, which is the focus of this chapter, we first describe the formal and informal powers that Consob can use to prevent tunnelling via RPTs and how, in the first years after the RPT Regulation came into force, Consob prioritized such goals both in its strategic plans and its internal organization choices. Then, we report two cases to illustrate how the regulator’s timely action, particularly requests for additional disclosure, can encourage companies to adopt better practices and improve RPT terms. At the same time, the analysis of substantial issues (e.g. if the RPT is substantially fair) has made actual enforcement trickier, leading Consob to prefer soft rather than formal powers. Our tale, though, has no happy ending. We show how, after a few years of zealous enforcement of the RPT rules, Consob has become less aggressive in its (somewhat isolated) fight against tunnelling.

Keywords: Corporate Governance, Corporate Law, Disclosure, Independent Directors, Italy, Public Enforcement, Related Party Transactions, Securities Regulation, Self-Dealing, Tunneling

JEL Classifications: G34, K22

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Final draft

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Abstract

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Luca Enriques was a Commissioner at Consob in the years when the Regulation on Related Party Transactions was consulted upon and enacted. Marcello Bianchi was, at that time, head of the Regulatory Impact Assessment Unit and, between 2011 and 2014, the head of the Corporate Governance Unit in charge of enforcing the Related Party Transaction Regulation. We wish to thank Rossella Signoretti, Rolf Skog, Tobias Tröger, and participants to the Oxford Workshop and the Frankfurt Conference on The Law and Finance of Related Party Transactions for helpful comments and suggestions, and Enrico Goitre for his excellent research assistance.

Introduction: the Italian RPT rules enforcement system as a case study

For decades, Italy has been a poster child for concentrated-ownership, investor-unfriendly corporate governance systems. Moreover, due to the inadequacy of substantive law rules and the ineffectiveness of enforcement mechanisms,[3] dominant shareholders of Italian companies have traditionally valued control very highly, preserved it through widespread use of pyramids and non-voting shares,[4] and, consistent with high estimates of private benefits of control in the empirical literature,[5] extracted value to the detriment of minority shareholders by various means, including related party transactions (RPTs). A number of high-profile corporate scandals throughout the decades, such as Banca Privata in the 1970s, Ferfin in the early 1990s, Cirio and Parmalat in the 2000s,[6] and more recently SAI-Fondiaria, have provided rich anecdotal evidence of minority shareholder expropriation.

The sheer scale of the abusive RPTs within the Cirio and Parmalat groups in the run-up to their insolvency prompted policymakers to identify such transactions as deserving a, more stringent regime. The decision was made to entrust Consob with the power to issue implementing rules on RPTs. After a long period of gestation, Consob's rules came into force in January 2011. Consob designed a flexible regulatory framework where, in addition to a set of mandatory provisions, various default ones and some opt-in rules were made available. The core provisions (a) require immediate disclosure of material RPTs to improve market scrutiny; and (b) bolster internal governance mechanisms by granting independent directors veto power on RPTs. How companies would make use of the flexibility offered by the new framework, especially in shaping the new rules' scope, and how independently independent directors would prove to behave would thus be key to the new framework's success.

But, in a country where private enforcement still has hardly any role to play in the prevention of tunnelling,[7] Consob's enforcement record would be at least equally important for the overall effectiveness of the new regime. This chapter focuses on Consob's experience in policing tunnelling under the new framework. It can be best understood as a case study of the role of securities regulators in the enforcement of a key component of a jurisdiction's regime for listed companies with a controlling shareholder.[8]

A well-developed literature exists on the importance of strong public enforcement of securities regulation for the development of capital markets.[9] Attempts have been made to infer strength from quantitative characteristics, such as resources and outputs (in the form of sanctions) or from easy-to-code legal variables.[10] But, of course, other important factors are harder to measure, and lend themselves only to qualitative analyses or, as in this chapter, case studies. Two such factors are

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[3] See Enriques (2002) and Ferrarini-Giudici (2006) emphasizing bad enforcement mechanisms as the cause of corporate scandals in Italy.

[4] Bianchi et al. (2001); Faccio and Lang (2002). Deviations from the one-share-one-vote principle have become less common over time (Bianchi and Bianco (2007)), but the practice was recently revived in 2014 after new rules allowing for tenured voting shares (that is, shares granting double voting rights to those holding them for at least two years) were introduced: about 15% of Italian listed companies now provide for such mechanism in their bylaws (Consob (2017)).

[5] Zingales (1994); Nenova (2003); Dyck and Zingales (2004).

[6] See Onado (2003); Ferrarini and Giudici (2006).

[7] See Enriques (2002) and (2009).

[8] See generally Djankov et al. (2008) and Bebchuk and Hamdani (2009).

[9] See Jackson and Zhang (2018) for a survey.

[10] See Jackson and Roe (2009).

the intensity of a regulator's sense of mission and its overall effectiveness in preventing abuses committed by controlling shareholders. As this study shows, by focusing on two RPT cases where Consob used its formal and informal intervention powers to push parties into improving the terms of RPTs for (minority) shareholders, enforcement output in the shape of formal sanctions can underestimate both zealousness and effectiveness. Relatedly, it is difficult to measure one regulator's commitment to pursuing its investor protection goal and its propensity (or hopefully lack thereof) to yield to the inevitable market and political pressures. More precisely, a regulator cannot be simply assumed to remain immune to (politicians and) strong blockholders' pressure for an accommodating attitude towards tunnelling. Furthermore, a regulator's commitment may well fade away with time. As this chapter shows, Italy is a case in point: after a few years of zealous enforcement of the RPT rules, Consob de-prioritized them and became much less aggressive in its fight against tunnelling.

This finding leads us to ask whether, as Joseph Stalin would have put it, there can be commitment to investor protection on the part of *one* single institution operating in a wider setting that is arguably still quite oblivious or indifferent to investors' concerns. Or, as Lev Trotsky would have it, would a "permanent revolution" reshaping all corporate governance institutions be needed to overcome the resistance of ever-powerful dominant shareholders? If Italy's experience with the first years of enforcement of the RPT rules is any indication, a Trotskian view of corporate governance reforms should prevail.

1. "*Armiamoci e partite*:" [11] the 2004 amendment and its implementation by Consob

In the aftermath of the corporate scandals of the early 2000s, Italian policymakers recognized the limited ability of the existing legal framework to protect investors when conflicts of interest between majority and minority shareholders arise. The corporate law reforms of 2004-05 consequently entrusted Consob with more specific regulatory powers in the area of listed companies' corporate governance, specifically with regard to RPTs, which Consob was delegated to regulate. In addition, the Italian legislator provided for specific rules regarding the composition of listed companies' boards, especially by extending to all listed companies the so-called slate voting system ("voto di lista") for the appointment of board members, thus allowing minority shareholders to pick at least one director.[12]

In detail, the Italian Securities Regulator was given the power to issue general principles regarding the transparency and the procedural and substantial fairness of RPTs.[13] Companies would then implement those principles by adopting their own internal codes on RPTs. The result was a three-layer system where the Civil Code set the general goals, the Securities Regulator established the principles for achieving those goals, and companies defined the actual procedures to be followed when dealing with related parties. In part, however, Consob moved away from the strictures of issuing only general principles on RPTs. In fact, Consob has traditionally had the power to require companies,

[11] A popular Italian expression that literally translates as "let's arm ourselves, you go to war."
[12] Law 28 December 2005, No. 262. Until then, and since 1992, minority-elected directors were mandatory in privatized companies (i.e. listed companies previously wholly owned or majority controlled by the Government or local authorities). See Law Decree 31 May 1994, No. 332, as finally amended by Law 30 July 1994, No. 474.
[13] See Article 2391-II, Civil Code, as introduced by Legislative Decree 28 December 2004, n. 310.

their boards of auditors, and their blockholders, whether on an *ad hoc* basis or via general rules, to provide information to Consob itself or to the general public about any corporate matter that may be relevant for market participants. Based on such powers, the RPT rules, while still leaving some scope for discretion in defining the scope of the new rules via opt-out provisions, are quite precise as to which RPTs have to be immediately disclosed.

The advantages of this arguably complicated framework are three-fold. First, by referring to a Consob regulation, it left the door open for more stringent solutions than the self-regulatory ones in force at the time,[14] which powerful dominant shareholders may have succeeded in preventing lawmakers from improving upon. Second, in a corporate landscape that had always placed very little emphasis on conflicts of interest within corporations, the idea of an internal code to be enacted by the board within a framework allowing for some discretion improved the chances that the new rules would be internalized as the board's own rather than as yet another source of top-down compliance obligations. Finally, by providing for well-defined rules on disclosure, Consob at least made sure that markets came to know the frequency and extent of the phenomenon.

The outcome was a set of rules that, on the one hand, greatly enhanced RPTs' transparency (see Box 1) and, on the other, gave unprecedented powers to independent directors.

Box 1 – More sunlight

The new ongoing disclosure requirements for RPTs have given a better sense of the significance of self-dealing in Italian listed companies. In the three years after the new rules came into force (2011-13), Italian companies published an average of 80 RPT *ad hoc* disclosures per year. In 2014-16, this number fell to nearly 50 circulars per year, possibly due to some changes in the ownership structure of Italian listed companies[15]. Overall, in the 2011-16 period, 392 circulars on material RPTs were issued by Italian listed companies, with an average of 65 RPTs per year. That compares with an average of 25 RPTs per year in the six years before the introduction of the new regulation, at a time when the criteria for ad hoc disclosure of RPTs were only qualitative and defined in such a way as only to cover unusual transactions.[16]

The change in the disclosure rules seems to have affected the nature of RPTs disclosed as well. About two-thirds of RPTs disclosed in the 2006-10 period concerned transactions with companies controlled by, or under the significant influence of, the relevant listed company, while

[14] Since 2002 the Italian Corporate Governance Code provided for some best practices to be followed (on a comply-or-explain basis) when dealing with related parties. The board of directors was tasked with defining ex ante the procedural steps to be followed when entering into significant RPTs and, on an on-going basis, of approving such transactions. Such internal rules would identify which RPTs had to be submitted to full board approval and require an opinion from the board's audit committee. In addition, the Code recommended that one or more independent directors be entrusted with a role in RPT negotiations and in the selection of the independent experts, if any were appointed. See Assonime and Emittenti Titoli (2007). See also Consob (2008) and Bianchi et al. (2011) for negative assessments of how companies had implemented these Code recommendations.

[15] The number of pyramids in Italy has decreased over the last years, mostly because of intra-group mergers of companies in the pyramid or of sale of control transactions affecting listed subsidiaries. See Consob (2017).

[16] Before the entry into force of the new RPT Regulation, Art. 71-II of the Consob Regulation on Issuers, as amended in 2002, required immediate disclosure only for RPTs that were capable of jeopardizing the company's asset base or impairing the completeness and fairness of the issuer's information to the market, due to their content, terms, conditions or timing of realization.

those transactions accounted for only 10% of the RPTs disclosed in the 2011-16 period. If we focus our attention on arguably the most dangerous transactions, namely those entered into with controlling shareholders or directors, the number of disclosed RPTs increased from less than 10 per year under the old regime to about 60 per year under the new one.

According to Consob data,[17] material RPTs are more often entered into by smaller companies and financial ones. If we break the sample into cases of asset, cash-flow and equity RPTs (adapting Atanasov et al.'s taxonomy of tunnelling (2008)), the majority of RPTs entered into in the 2011-16 period were cash-flow RPTs, and most commonly financing arrangements. About one material RPT out of four involved the transfer of major assets. Finally, one transaction out of five could be labelled as an equity RPT, i.e. transactions enabling the related party to rearrange her or his ownership claims over the firm, such as the issuance of new shares to the related party, mergers and other transactions that may increase the insider's rights to the company's cash-flow. The controlling shareholder or shareholders exerting significant influence over the company were most frequently on the other side of RPTs. Nearly 11% of all transactions were entered into with subsidiaries or associate companies and 5% with a (non-shareholder) director or her or his businesses.

Additionally, the new regime has provided us with a sense of the frequency with which material RPTs are entered into in the ordinary course of business and at arm's length. While issuers may decide to omit their *ad hoc* disclosure, which most have chosen to, they still have to report each of them to Consob. In 2011-2016, 163 ordinary RPTs were reported, 57% of which were entered into by companies in the FTSE MIB market index comprising large caps.

Drawing inspiration from the UK Listing Rules[18], Consob required prompt disclosure of "material" RPTs, where materiality has been defined according to precise quantitative thresholds.[19] Instead of following the UK model of majority–of-the-minority approval,[20] Consob looked at the U.S. experience of special committees and enlisted independent directors to review the fairness of RPTs[21], with the assistance, at the company's expense, of one or more independent experts of their choice. More precisely, for "material" RPTs a watered-down version of special committee involvement in RPTs was enacted: disinterested independent directors were to be involved from the beginning of the negotiations (meaning that such directors are to be promptly informed about the negotiations and can give their own advice on how to conduct them). In addition, they were granted veto power over the

[17] See Consob (2017).
[18] See Davies (2018).
[19] The regulation introduced a materiality threshold to be defined with reference to the size of the transaction relative to the company's. Consob Regulation's Annex 3 identifies three ratios, the most relevant of which is the one between the transaction's value and the company's market capitalisation.
[20] Which per se is no guarantee of procedural or substantial fairness. See Enriques (2015) and Rock (2018).
[21] While there is a wide, unsettled debate on whether independent boards in general are a force for good, even critics of such a model are ready to recognize that independent directors "have generally succeeded in performing [the] limited, straightforward function of vetting conflicted transactions:" Macey (2008), 54. For a review of the empirical evidence on independent directors and the challenges of measuring their impact on firms' performance see e.g. Klausner (2018).

transaction, while approval by the board is subject to such directors agreeing that the transaction is in the company's best interest and that its terms are substantially fair.

2. Enforcing the RPT Regulation

The RPT Regulation was the first serious attempt by Italy's policymakers to tackle the main corporate governance problem in a country with concentrated ownership, namely tunnelling.[22] On paper, the RPT Regulation greatly improved matters from the viewpoint of minority shareholders. But how effective has the law been in practice? To answer this question, we focus here on public enforcement and look into how the legal framework enables public actors, specifically Consob, to ensure compliance with the regulatory framework and to react to misbehaviour, and we also look into how the resulting powers have been used in practice.

The underdevelopment of private enforcement in Italy justifies our focus on Consob: private enforcement actions, while not unheard of, have been quite rare. On the other hand, while public prosecutors and the courts, both civil and criminal, do occasionally play a role in tackling tunnelling, this is only for egregious or prominent cases that have attracted media attention.

The virtual absence of (formal) private enforcement has various drawbacks. First of all, the positive feedback loops of having both forms of enforcement are lost: when both institutional mechanisms work, private parties' initiatives spur the public enforcer into action, and vice versa. As Cox et al. (2003) put it with reference to the U.S. experience: "high levels of private litigation can prompt public enforcers to be more active themselves: prosecutors and the SEC risk public criticism if they cannot show that they are doing as much as the private bar. Increased public enforcement, in turn, spurs private litigation that piggybacks on the evidence unearthed." Second, the predominantly public nature of enforcement in this area makes it more exposed to the risk that media and/or political pressures will guide or hinder regulators' actions. Lastly, centralized formal enforcement as a whole becomes a dependent variable of the relevant regulator's potentially short-lived priorities: even in the absence of changes to the regulatory framework, intertemporal variations of seemingly trivial staff allocation decisions can have a strong impact on the law in action.

2.1. Consob's powers vis-à-vis RPTs

In policing tunnelling within the new framework of rules, Consob can rely on both formal and informal *ex ante* enforcement powers, in addition to the power to impose sanctions for misbehavior *ex post*.[23] First of all, it has the power to request companies, their internal bodies (the board of directors and the board of auditors[24]) and holders of stakes higher than three percent of the share capital to communicate information to Consob itself and to order its disclosure to the public. When RPTs are disclosed well before they are finalized, for instance because EU rules require their immediate disclosure as price-sensitive information, Consob may intervene while the RPT is being

[22] Bebchuk and Hamdani (2009).

[23] For a taxonomy of enforcement powers distinguishing between ex ante and ex post enforcement and between formal and informal powers see Armour (2009).

[24] In Italy, the functions of the audit committee are traditionally performed by the "collegio sindacale," a separate body within the corporation, appointed by the general meeting. See *e.g.* Enriques (2002).

negotiated to ensure that the public is fully informed about the transaction. That is typically the case with parent-subsidiary mergers. When it exercises the power to request additional disclosures, Consob also has the opportunity to exercise its informal powers of moral suasion. In fact, the power to request information can be used to nudge the company into adopting better practices. For instance, when Consob asks the issuer to inform the public about the reasons why it has chosen to do things in a certain way, which may be contrary to the spirit of the regulation or simply not in line with Consob's (and investors') expectations, the issuer is basically arm-twisted to upgrade its practices.

Ex post enforcement powers mainly comprise, first, the power to impose a fine on the issuer for failing to comply with disclosure requirements (including those specifically addressing RPTs) or to follow through on Consob's requests for information. Second, they include the power to fine board of auditors members[25] for failings in their duty of oversight on both the consistency of the internal code with the Consob Regulation and on its application to specific RPTs. More precisely, board of auditors' members have a general duty to inform Consob of *any* managerial "irregularity" they may find,[26] which includes, but is not limited to, violations of RPT rules. At the same time, no sanctioning power for violations of RPT rules exists *vis-à-vis* directors, executives or related parties, which clearly cripples Consob's ability to deter abuse. Not only can Consob not sanction those making the decision to enter the RPT or profiting therefrom, it is also the case that violations of the rules aiming to ensure the substantial and procedural fairness of RPTs can only be reacted upon if there is proof that the board of auditors violated their duties in carrying out their monitoring activity over compliance with the internal procedures, including RPT ones. This sort of second-order offense is not only more difficult to sanction, but it also reduces deterrence because the sanction falls upon marginal players (the board of auditors' members) within a company's power structure.

Ex post enforcement powers are not only narrow in scope but they are also hampered by the standard-based nature of the RPT Regulation. Only a few aspects of the procedures can be assessed according to a binary, black-or-white approach (compliant/non-compliant). More often, it is a matter of *how* procedures have been deployed and of whether a given shade of grey should be qualified as black or white. For instance, independence is hard to define other than by exemplification, independent directors' "timely" involvement in the negotiations of an RPT is context-specific, and the "interest of the company" to enter into an RPT is a hazy concept on which even insiders can have contrasting views.

Making assessments on matters such as these, and especially with reference to the question of whether board of auditors' members were negligent, as events unfolded, in failing to take action (e.g. by informing Consob about irregularities), implies great discretion and therefore a higher risk that courts will qualify actions differently than Consob. In addition, setting the bar too high for members of the board of auditors may lead to negative self-selection for the role.

[25] In Italy, 95% of listed companies have a board of auditors, the remaining 5% having opted for a two-tier (where the functions of the board of auditors are carried out by the supervisory board) or a single-tier board system (where the functions of the board of auditors are carried out by the board's audit committee). When companies opt for such alternative governance systems, Consob's sanctioning powers apply to supervisory board and audit committee members, respectively.
[26] Article 149, para. 3, Legislative Decree 24 February 1998, No. 58.

More generally, Consob's enforcement record shows that it much more commonly enforces rules on disclosure than those on procedural fairness. Transparency rules have been frequently enforced both *ex ante* (via requests for integration of disclosures) and *ex post* (sanctions). In the 2011-16 period, Consob requested *ad hoc* disclosures with regard to one in every five material transactions, focusing, in particular, on information about the contents of the opinions of the independent committee and the independent advisor with a view to including the methodology and the assumptions underlying them. About three out of four sanctions in the same period were imposed for failure to disclose an RPT or for the insufficient supply of information thereon. Arguably, transparency on RPTs has substantially increased (see also Box 1), enhancing market monitoring of such transactions, which is also a result of Consob's enforcement activity.

On the other hand, the enforcement of substantive (as opposed to disclosure) rules is trickier. For instance, monitoring whether rules requiring that RPTs are "substantially fair" requires the regulator's assessment of a company's best interest. That is clearly a difficult task for anyone, but especially for the regulator because, with some exceptions (such as when a minority shareholder – usually an activist hedge fund – puts pressure on it), it operates in a non-adversarial framework. That, together with the fact that only board of auditors' members can be fined for (failure to monitor) violations of procedural rules, can explain the regulator's preference for the use of soft rather than formal powers when it comes to enforcement of more substantive rules. Indeed, formal sanctions have been levied only in a few exemplary cases and in relation to rather formal breaches of procedural rules, while the exercise of Consob's soft powers has led in some cases to enhancing the substantial fairness of the transaction.

2.2. The years of enforcing zealously

If only because of the magnitude of the phenomenon, enforcement of the new rules was bound to become core business for the Italian securities regulator. Consob developed specific strategic policies and adopted organizational changes to better deploy its resources in this area. More precisely, Consob's Strategic Plan for 2010-12[27] envisaged an ambitious action plan for "Monitoring related-party transactions and corporate governance mechanisms." According to that plan, Consob would develop an analytical model to assess the corporate governance arrangements of listed companies, *inter alia*, with a view to ensuring compliance with the procedures for RPTs. In 2011, an organizational overhaul saw the setting up of a Corporate Governance Division. The new Division's mission was, *inter alia*, to monitor compliance with RPT rules. For that purpose, a dedicated unit, the Internal Controls and Shareholder Rights Protection Office, was created.

The Strategic Plan for 2013-15[28] then confirmed Consob's focus on RPTs, prioritizing supervision of larger listed companies (i.e. blue-chips belonging to the FTSE MIB index) and of a sample of smaller companies considered a greater risk in terms of expropriating minority shareholders, identified as such according to a risk-based model. The plan also targeted some specific

[27] See Consob (2010).
[28] See Consob (2013).

aspects of the new rules, namely whether companies would make sound use of exemptions for routine transactions and how they assessed directors' independence.

2.2.1. Case studies: Parmalat and Fonsai/Unipol

To give a sense of how Consob interpreted its role as a formal and informal enforcer of RPT rules, we now look into three conspicuous RPTs, all involving Italian blue-chips. These cases, two of which relate to the same company, provide an illustration of how, with RPT rules being by necessity characterized by standard-like provisions rather than bright-line rules, the public enforcer must be able and willing to question issuers' own assessments of substantive issues such as directors' independence, the company's interest in entering into a transaction and the substantive fairness thereof. Not only is strong commitment to do so on the part of the regulator needed, but also a sense of being entitled to such second-guessing, which may dangerously resemble administrative intrusion into private companies' affairs.

The RPTs selected here required Consob to focus on two main critical issues. The first was the actual independence of the independent directors deciding on the transaction and the advisors supporting them.

Independent board members play a key role in the approval process for RPTs. The problem is that the only real proof of independence is in the pudding. Yet, companies qualify directors as independent *ex ante*, based on their relationships with the company and its related parties. More precisely, most companies base their evaluation of independence on the *criteria* identified by the Italian Corporate Governance Code. The Code, in turn, spells out a number of situations which preclude the qualification of a director as independent. However, on the one hand, the Code vaguely defines such situations through qualitative concepts (like "the absence of *material* economic or financial relationship with the issuer"). On the other, it explicitly states that the whole board's assessment of independence must be made on a case-by-case basis, giving prevalence to "the substance over the form" of the relationships and holding that unmet specific independence *criteria* can be judged irrelevant in an individual case providing an adequate explanation is given. Hence, board discretion is very broad in finding independence and, in boards like those of Italian companies in which independent directors seldom represent a majority, the risk is high that the board will err on the side of Type 1 errors, i.e. that not-really independent directors will be qualified as such.

Frequent instances of companies' assessments of independence proving troublesome have included where a director was also a partner of a law or consultancy firm that has the company (or a related party) as a client. Here, the issue is how to define the materiality of those relationships, especially in cases where the director is not directly involved in that client's matters. Relatedly, the independence of external advisors supporting independent directors can be hard to assess. This is particularly the case with larger issuers, which are likely to have had some business relationship with many of the main advisors, such as investment banks and Big-Four audit firms.

The second critical issue raised by the case studies is the involvement of independent directors in the negotiations and, more generally, the timing and the quality of information provided to them and to other non-executive directors about the terms of the transactions, especially in the case of complex and extended negotiations.

For material RPTs, independent directors have to be involved in the negotiations in a timely fashion. The greater the time lag between the start of the informal negotiations between the company and the related party and the independent directors' involvement, the less possible it will be for them to leverage their veto right to obtain better terms or explore alternative arm's length transactions.[29] In addition, the word "involvement" leaves scope for diverse and quite broad interpretations of the role of independent directors: the weakest such involvement entails receiving timely updates on how negotiations proceed, while the strongest involvement entails sitting at the negotiating table, expressing their views and signalling that they will veto the transaction if their advice is ignored. The two cases below highlight how the lack of timely and appropriate information in transactions of high complexity, especially when their terms are modified shortly before their final approval, can hamper the effectiveness of independent directors' assessment.

2.2.1.1. Cashing out at Parmalat

The "new" post-bankruptcy Parmalat SpA was listed on the Stock Exchange in 2005. Following the debt-for-equity swap involving its many bank creditors and bondholders, it was floated as a dispersed ownership company. Throughout the years, in addition to profitably selling dairy products, the company hoarded a cash pile of more than 1 billion euro through bankruptcy-related actions against old Parmalat creditors. Management was hesitant about how to use the cash pile, which attracted activist hedge funds and potential acquirers.

In 2011, Lactalis, a French competitor, successfully launched a leveraged takeover bid for Parmalat's shares, ending up with 83 percent of them.[30] Its declared intention was to develop industrial synergies, but it was clear to all that it had its eyes on the cash pile.

A few months after the acquisition, a major RPT between Lactalis and Parmalat was announced.[31] The transaction consisted of a cash-pooling contract, whereby Parmalat transferred all of its cash to a holding company of the Lactalis Group (which was highly leveraged) in exchange for fixed interest of around 3%.[32]

In accordance with the RPT Regulation, Parmalat's board approved the transaction pursuant to the rules requiring a binding opinion by a committee composed of independent non-related directors[33].

[29] See Enriques (2015).
[30] Filippetti, Oddo (2011).
[31] Parmalat S.p.A. (2011a).
[32] Parmalat S.p.A. (2011b).
[33] La Gazzetta di Parma (2011).

Following publication of the required circular, Italian media immediately scrutinized the transaction's fairness. They identified the cash-pooling arrangement as the first step in the direction of exploiting Parmalat's cash pile to assuage the financial needs of the dominant shareholder.[34]

This was the first case in which Consob was called to give substance to its enforcement role *vis-à-vis* RPT rules. It did so by, first of all, making extensive use of its power to mandate *ad hoc* disclosures. It repeatedly[35] intervened to require Parmalat to complete the information provided to the public with regard to:

- the outstanding consolidated debt of the Lactalis Group (unknown to the public, because, in contravention to European rules, the French non-listed group had not made its balance sheet publicly available): this was considered material for the market's assessment of the risks that Parmalat would incur once it became a party in the group-wide cash-pooling arrangement; and
- Parmalat's own interest in entering into the transaction and how the cash-pooling arrangement would compare with the alternatives available for the use of Parmalat's cash.

Those requests were the very first signal of the activist role that Consob was ready to play by using its *ad hoc* disclosure powers. In this specific case, Consob considered information beyond the contours of the transaction itself to be relevant. It also helped to focus directors' minds not only on whether the terms of the transaction were fair, but also on whether the company had any "interest" in entering into the transaction, thereby requiring the board and the independent directors to consider possible alternative transactions and/or counterparties.

Furthermore, in the letter setting out its information requests,[36] Consob clarified its expectation that Parmalat would consider any future decision on whether to back out of the cash-pooling contract as, itself, an RPT, which would therefore be subject to the application of the procedural and disclosure requirements of the RPT Regulation. By conveying this expectation through a formal letter requesting additional information, Consob leveraged its formal powers to strengthen its informal, moral suasion powers. Ultimately, Parmalat later followed Consob's recommendation.[37]

Only a few months later, the cash-pooling contract, a second large RPT between Parmalat and Lactalis, revealed the whole strategy underlying the acquisition. The cash-pooling contract was actually just the starter, with the main course being Parmalat's purchase of Lactalis Group's American subsidiary (LAG) from its parent.[38] Parmalat used most of the cash pile (around 900 million euro, out of 1.2 billion) to pay for the acquisition.[39]

[34] La Repubblica (2011a).
[35] Consob (2011); Parmalat S.p.A. (2011c). As regards the press, see, *inter alia*, Il Sole 24 Ore Radiocor (2011); Il Sole 24 Ore (2011); La Repubblica (2011b); Montanari (2011); and Sideri (2011).
[36] Consob (2012a).
[37] Parmalat S.p.A. (2012a); Il Sole 24 Ore Radiocor (2012a).
[38] Longo (2012); Ponziano (2012).
[39] Parmalat S.p.A. (2012b); Parmalat S.p.A. (2012c); Il Sole 24 Ore (2012a); Ansa (2012); Reuters (2012a); Galbiati (2012); Il Giornale (2012).

As was the case in the cash-pooling contract, Consob made extensive use of its information request powers, by requiring Parmalat to provide information to the market in addition to what the company disclosed in the required circular. In this case, the requests concerned:

- the consistency of the transaction with the medium- and long-term strategy that Parmalat had only recently announced, which prioritized expansion in European markets rather than in American ones; [40] and
- the details of the methodologies adopted by the independent financial advisor to evaluate the transaction terms' fairness and the reasons for neglecting the results of some of the methodologies.[41]

In addition, Consob requested that the board update its own evaluation, taking into account all, rather than some, of the evaluation methods that the advisor had identified. The opinion originally rendered by the independent directors committee and enclosed to the circular had in fact been picked and chosen among them. [42]

These requests signalled an expanding role for Consob in the oversight of RPTs: Consob would focus not only on the fairness of the transaction's terms but also on its consistency with the information about corporate strategy that the company itself had provided to the market. This was a move that, to some degree, put Consob in the position of second-guessing a company's strategy.[43] In addition, Consob signalled that it would expect independent directors not to rely blindly on the advisor's opinion.

What pushed Consob to also focus on the fairness opinion was the financial advisor's conflict of interests, which was considered so relevant as to jeopardize the advisor's independence, because it was immediately clear that Lactalis would have used the proceeds from the transaction to pay its creditors, including the advisor.[44] As a matter of fact, the financial advisor was an Italian bank (Mediobanca), who was exposed for about 400 million euro to Lactalis, having financed the Parmalat acquisition.[45]

In order to collect more information about how those conflicts of interest had affected the selection of the advisor and the contents of its opinion, Consob carried out an on-site inspection at Parmalat and asked Mediobanca to provide evidence of all communications between its staff and Parmalat and Lactalis before its selection.[46]

The evidence subsequently collected confirmed that Lactalis itself (the counterparty in the RPT) took an active role in the selection of Mediobanca and that Lactalis put pressure on Mediobanca to justify a high acquisition price as fair.[47] As a consequence, in parallel with its *ex ante* enforcement of disclosure rules as the transaction negotiations unfolded, Consob's office in charge of supervision

[40] Consob (2012b); Massaro (2012).
[41] Consob (2012c).
[42] Consob (2012c); Parmalat S.p.A. (2012d); La Repubblica (2012a).
[43] Il Sole 24 Ore Radiocor (2012b); Livini (2012).
[44] Consob (2012d); Parmalat S.p.A. (2012e); Agenzia Giornalistica Italiana (2012).
[45] Pons (2012a); Bennewitz (2012).
[46] La Repubblica (2013a); Parma Today (2013).
[47] Sottocornola (2013); Bia (2013a); La Gazzetta di Parma (2013).

started a formal enforcement action against Parmalat's board of auditors for not having properly supervised the company's compliance with its own internal rules on RPTs.[48] The criticisms focused in particular on the board of auditors' acquiescence regarding:

- the selection of the financial advisor, despite its conflict of interests;
- the failure by both the independent committee and the board of directors to evaluate the company's interest in entering into the transaction and to consider alternative transactions to develop Parmalat's business using its cash pile; and
- the independent committee's over-reliance on the advisor's opinion, despite its inaccuracy and incompleteness.

While the first two charges led to a fine for the board of auditors' members, the sanctioning body of Consob (the Commission itself) resolved not to sanction them for the third charge.[49] According to the Commission, the opinion of the RPT Committee could not be deemed to be in contrast with the "substantial procedural fairness" standard, because it was sufficiently motivated. In other words, the Commission deferred to the RPT Committee's reasoning.

An important role in securing the enforcement of RPT rules in the Parmalat case was played by an activist hedge fund, Amber Capital, which held a minority stake in Parmalat and had appointed one director pursuant to Italian rules granting minority shareholders representation on the board.[50] Amber Capital exerted significant pressure on the board and Consob itself after the cash-pooling contract had been entered into, and drew media attention to the LAG transaction.[51] The clamour for the case, to which the foreign status of Lactalis also contributed, created a favourable context for public enforcement not only by Consob but also by the public prosecutor, who in Italy has the power to file a complaint before civil courts in order to detect, and take measures to remedy, serious irregularities in the management of a company. Acting upon a complaint filed by Amber Capital and based on a report on the transaction by Consob,[52] Parma's public prosecutor alleged that the board had mismanaged the company in the LAG acquisition and called upon the Court to dismiss the whole board, appoint a judicial administrator taking the board's place and nullify the LAG transaction.[53]

The Parma Tribunal issued two decrees (on 28 March[54] and 11 November 2013[55]) by which it appointed an administrator with specific executive powers ("*Commissario ad acta*") and required the Parmalat board to: (a) ascertain possible clues of untruthfulness and/or unreasonableness in the data gathered in the context of the vendor's due diligence; and (b) replace the Chairman of the RPT Committee for his lack of independence, due to his previous role as a member of the board of auditors of several companies of the Lactalis Group. In addition, it required one director and the whole board of auditors not to attend board meetings, until their replacement at the next general meeting. As for the selection of the financial advisor (Mediobanca), the Court found irregularities in the appointment

[48] Reuters (2012b); Ansa (2013a).
[49] Consob (2013b); Il Fatto Quotidiano (2014); Il Resto del Carlino (2014); Il Corriere della Sera (2014).
[50] Verlicchi (2012).
[51] Reuters (2013a); La Repubblica (2012b); Ansa (2016); Bia (2016).
[52] Bassi (2012); Meletti (2013); Riccio (2017); Perri (2015).
[53] Reuters (2013b); Bia (2013b); Consob (2013c); Di Biase (2013).
[54] Parma Tribunal (2013a); Il Fatto Quotidiano (2013); La Repubblica (2013b).
[55] Parma Tribunal (2013b); Reuters (2013c); Bia (2013c).

procedure, finding evidence, first, that some members of the board and of the RPT Committee provided Mediobanca with confidential information to facilitate its successful pitch for the advisory role on the transaction and, second, that Mediobanca lacked independence due to its financial relationships with Lactalis.[56]

The Court entrusted the special administrator with the task of providing an opinion on the transaction's procedural and substantial fairness. Consistent with Consob's views emerging from its information requests, the special administrator held that LAG had been overpriced by approximately 16% ($150 million) and found Mediobanca's fairness opinion incomplete and inaccurate.[57] Under pressure from both the Court and Consob, LAG and Parmalat agreed in May 2013 to a $130 million reduction of the purchase price by giving execution to the reverse earn-out clause provided for in the original acquisition contract.[58] Later, with its second decree (11 November 2013), the Parma Court confirmed that serious irregularities had occurred in the acquisition transaction but raised doubts about its effective harmfulness, taking into consideration both the actual reduction of the purchase price and the "indisputable positive financial effects" of the transaction for Parmalat.[59] Finally, the Court ordered the Parmalat board to replace the former chair of the RPT Committee, who had resigned as chair but was still a member of the board, and ordered that two directors and the board of auditors pay the legal costs of the procedure.[60] Those measures were confirmed, in the second instance, by the Bologna Court of Appeal (26 May 2014) that nevertheless declared it did not need to further pronounce on the substance of the case, concluding that there had been no actual damage to the company and that nine board members appointed by Lactalis had been dismissed (a condition sufficient, according to Art. 2409 of the Civil Code, to stop the proceedings).[61]

3.2.1.2. The Fonsai-Unipol merger

In 2012, Unipol, a financial conglomerate, gained control of virtually insolvent Fondiaria-Sai (Fonsai), the second largest Italian insurance company in Italy, by purchasing a majority of the shares in Premafin, which in turn held the majority of Fonsai shares.[62] Unipol's plan was to integrate its own insurance business with Fonsai's through a four-way merger of Fonsai (of which it held a majority of shares), Premafin, listed subsidiary Milano Assicurazioni, and Unipol Assicurazioni, an insurance company wholly owned by Unipol.[63] The merger was an RPT both for Fonsai and for Milano

[56] Evidence of these elements came from Consob's report for the public prosecutor, from on-site inspection by the public prosecutor and from the investigations of the *Commissario ad acta*. See also Bia (2013d); Ansa (2013b); Luciano (2013).
[57] Manaresi (2013a); Manaresi (2013b); Manaresi (2013c); Gerosa (2013).
[58] La Repubblica (2013c); La Stampa (2013); Consob (2013d); Parmalat S.p.A. (2013a); Parmalat S.p.A. (2013b).
[59] Parma Tribunal (2013b).
[60] Parma Tribunal (2013b); Reuters (2013c); Montanari (2013).
[61] La Repubblica (2014a); Verlicchi (2014).
[62] Before the entry into force of the RPT Regulation, a timely disclosure of RPTs was required only under specific conditions. See footnote 16. See also Unipolsai Assicurazioni S.p.A. (2012a); Sabbatini (2012a).
[63] Fornovo (2011); Mangano (2011); Bocconi (2012a); Di Biase (2012a); Unipolsai Assicurazioni S.p.A. (2012b); Fornovo (2012).

Assicurazioni because it involved their controlling company (Premafin) and a sister company (Unipol Assicurazioni).[64]

The planned merger was critical in various respects. From Unipol's perspective, the merger was an essential part of the rescue transaction: Unipol made it clear that unless the merger went through under the proposed terms, it would back off from the deal, making it possible that Fonsai would have to enter bankruptcy proceedings.[65] Yet, a competing rescue transaction had been put on the table by two private equity funds, Clessidra and Sator.[66] Given that this transaction was an alternative to the deal with Unipol, a case could be made that, even in the absence of *Revlon* duties under Italian law, Fonsai should at least evaluate the competing bid jointly with the Unipol proposal pursuant to RPT procedures.[67] Furthermore, Fonsai was at the heart of a complex network of ownership and financial links involving some of the main financial institutions in Italy (Mediobanca, Generali and UniCredit), which were directly or indirectly involved in the transaction, implying that the conflicts of interests were plentiful.[68] Finally, the terms of the merger depended mainly on the exchange ratios of the shares of the different companies involved, the value of which had to be estimated on the basis of complex methodologies,[69] especially because Unipol Assicurazioni was not only non-listed, but also held large amounts of financial derivatives on its balance sheet.[70]

The supervisory activity of Consob focused on all of these issues mainly through the intensive use of its powers to request information.

A main focus of Consob's information requests was the composition of the Committee in charge of issuing the binding opinion on the transaction: its members had been appointed by the new controlling company, Unipol, just after the acquisition of the majority of Fonsai shares.[71] Consob questioned, in particular, the independence of the Chairman of the Committee, who was, in fact, a lawyer affiliated to a law firm with strong business relationships with UniCredit, which in turn was both a blockholder and a large creditor of Fonsai.[72] The board of Fonsai had declared his independence despite those relationships.[73] This evaluation was the result of a perfunctory but formally consistent application of the Corporate Governance Code criteria, insofar as the Code's list of affiliations that may affect a director's independence does not mention those with blockholders (other than controlling shareholders) or with creditors.[74] But, clearly UniCredit's interests were unlike those of any other typical shareholder, especially in light of its position as creditor of a company on the verge of insolvency.[75]

[64] Sabbatini (2012b).
[65] Di Biase (2012b); Manacorda (2012).
[66] Bocconi (2012b); Puledda (2012); Pons (2012b); Faieta (2012); Montanari (2012).
[67] Pons (2012c).
[68] Pons (2012d); Bragantini (2012).
[69] Bocconi (2012c); Bocconi (2012d).
[70] Dilena (2012a); Vanuzzo (2012); Puledda (2013a); Galvagni (2014).
[71] Unipolsai Assicurazioni S.p.A. (2012c).
[72] Conti (2012).
[73] Unipolsai Assicurazioni S.p.A. (2012d).
[74] Il Sole 24 Ore (2012b); Dilena (2012b).
[75] Pons (2012e); Di Molfetta (2012); Penati (2012).

Consob forced Fonsai to disclose the reasons underlying the independence assessment by the board and questioned its accuracy, arguing that an in-depth analysis of the professional links between the board member and UniCredit, whose role was considered by Consob to be equivalent to that of a controlling shareholder, had not been undertaken.[76]

Although the Fonsai board stood by its assessment,[77] under pressure from Consob the Chairman of the RPT Committee resigned from the board.[78] In its new composition, the Committee restarted the analysis of the transaction to avoid any possible influence from previous conflicts of interest.[79]

Fonsai was later fined by Consob for failing to satisfy Consob's disclosure requests, and more precisely for having failed to disclose that the board knew of the professional links between the Chairman of the Committee and UniCredit even before Consob's pressure and that the board should thus have considered their relevance for the independence assessment.[80]

Consob also asked Fonsai to integrate the information provided in the RPT disclosure document in order to give the market further material on which to assess the merits of the transaction. In particular, Consob asked for a better description of the economic assumptions and evaluations underlying the terms of the transaction and the procedures adopted for effective involvement of the RPT Committee.[81]

Both aspects were particularly relevant to ensure compliance with RPT rules in the specific circumstances of the case. Due to the large number of companies involved and the uncertain value of some of their assets, there was a real risk that the RPT Committee would be relegated to a rubberstamping role. One of its members did raise this concern in the RPT Committee and abstained from the final Committee resolution over the transaction, after complaining about the short notice for the decision in the light of the amount and complexity of the information to be considered. The Committee's assessment of the transaction was made even more difficult by Unipol's decision, just before the approval of the transaction by the Committee, to distribute an extraordinary dividend to its shareholders, thereby changing the terms of the transactions on the table until that point.[82] Despite the abstaining director's objections and the fact that negotiations had dragged on for months, the RPT Committee decided not to grant itself more time to evaluate the transaction in light of the change in Unipol's assets base following the dividend distribution. [83]

To address those issues, Consob asked the Fonsai board to provide further information about the advisors' opinions, describing, for each of the methodologies adopted, the range of values estimated and the criteria used to identify the transaction price with respect to those values.[84] It also requested the Fonsai board of auditors to disclose its opinion about the timing of the involvement of

[76] Il Sole 24 Ore (2012c).
[77] Unipolsai Assicurazioni S.p.A. (2012e).
[78] Unipolsai Assicurazioni S.p.A. (2012f); Libero Quotidiano (2012).
[79] Unipolsai Assicurazioni S.p.A. (2012g).
[80] Consob (2013e); Scozzari (2013).
[81] Unipolsai Assicurazioni S.p.A. (2012h).
[82] Unipol (2012g); Unipol (2012h).
[83] Unipol (2012g); Puledda (2013b); Milano Finanza (2012).
[84] Unipol (2012h); Pons and Puledda (2012).

the RPT Committee in the different phases of the transaction negotiations and approval, and whether the effects of the dividend distribution by Unipol were duly considered in the terms of the transaction approved both by the RPT Committee and the board.[85]

To conclude, Consob's activism prompted the company to remove the potentially colluded Chairman from the RPT Committee, which arguably ensured greater independence. Consob's requests to provide enhanced disclosures about the advisors' opinions would seem to have led to an improvement of substantial fairness, because the final exchange ratio was more favourable for Fonsai. Yet, overall, some doubts about the substantial fairness of the transaction remain, mainly due to the rushed approval of the final terms after the dividend distribution by Unipol, which compromised at least some of the improvement in the exchange ratio, although both the RPT Committee, with the exception of one member, and the board of auditors, in response to Consob's request, confirmed the fairness of the final terms. In addition, the value of Unipol's derivative instruments as reported in Unipol's balance sheet remained an open issue. Indeed, the Turin public prosecutor started an investigation regarding market manipulation against Unipol: his charge was that the value of the derivative instruments included in its balance sheet had been overestimated in order to determine a better exchange ratio for Unipol shares in the merger. At the time of writing, the case is still open.[86]

3. Epilogue

The cases described above reveal how a public enforcer's timely action as events unfold, especially through the broad use of the power to require additional disclosures, may lead to significant improvement of RPT terms. More generally, they illustrate how a public enforcer can use its wide powers more effectively to protect minority shareholders and prevent their expropriation. For at least three years, Consob displayed a pro-active stance, as shown in section 3.2.

Unfortunately, this stance appears to have been short-lived. The emphasis on RPTs in the 2013-15 Strategic Plan[87] was nowhere to be found in the 2016-18 Strategic Plan[88], which does not even mention RPTs or conflicts of interest. It simply contains a generic reference to the need to improve the governance of Italian listed companies.

Human resources policies in the same period reflected the decline in Consob's commitment to effective oversight of RPTs. When the Corporate Governance Division was created, its staff comprised employees with both a legal and an economic or financial background. But within five years of its establishment, its staff count had dropped by 20% (from 51 to 41) and lawyers took the intellectual lead within the unit, signalling Consob's intention to favour a more formal approach to compliance and enforcement.

With inputs down and a change in priorities, output dipped as well. According to the available public information, both the number of information requests and the number of sanctions

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[85] Unipol (2012h).
[86] Il Sole 24 Ore (2014); La Repubblica (2014b); Ferrarella (2014); Mincuzzi (2014); Lorenzetti (2017); Ricca (2017).
[87] Consob (2013).
[88] See Consob (2016).

for violations of RPT rules reached their peak in 2013[89]. The turning point was apparently the decision by the Commission to reject a staff proposal to impose fines for RPT rules violations in a high-profile case involving Telecom Italia (hereafter, TIM), a blue-chip then *de facto* controlled by Telefonica SA. In short, TIM had issued mandatory convertible bonds via a private placement reserved for institutional investors and Telefonica.[90] Despite knowledge that Telefonica would be offered the bonds and would be willing to purchase them, the transaction had not been treated as an RPT.[91] According to the Italian media,[92] at the beginning of 2014 Consob started a sanctioning procedure against TIM for its failure to apply procedural and disclosure rules on RPTs,[93] but no sanction appears to have ever been levied for such violations. This missing final element of the enforcement activity of Consob in this case, unlike the Parmalat and Fonsai cases described above, may have had a signalling effect to the market, weakening Consob's informal supervisory powers, effectiveness of which relies on the credibility of the threat of formal sanctioning for violations.

In summary, Consob's zeal in enforcing RPT rules has declined over time, in terms of organizational arrangements, strategic priorities, ongoing supervision, and sanctions levied. Why that was the case remains a matter of speculation, because Consob does not have to disclose its rationale behind individual decisions not to sanction alleged violations, such as in the TIM case. Nor has there been any formal or informal public justification for the general change in its approach.

One possible explanation may relate to the change in the composition of the Commission itself: during 2013, the Commission lost its only two members with a financial and securities market background. The subsequently exclusively legal background of the three remaining Commission members until 2016 may have encouraged a minimalistic approach to RPT Regulation enforcement, given its members' increased sensitivity to the formal boundaries of supervisory powers, which implied less inclination to use moral suasion, on the one hand, and greater aversion to the risk of succumbing to litigation, on the other. This more prudent attitude was in stark contrast with the innovative and pro-active way in which Consob had used its powers to enforce RPT rules previously. It was also in line with prominent legal scholars-practitioners' assessments of Consob's practice of using its disclosure and moral suasion powers to prompt independent directors to evaluate the corporate interest in entering a specific transaction as *ultra vires*.[94]

Yet, one may speculate that the composition of the Commission was just a small, contingent part of a broader picture of unresolved systemic institutional and cultural weaknesses. As one of us wrote at a time when there was still no clear sign that Consob's zeal would decline:

> "even fervent enforcement by a committed securities regulator, backed, as it may, by law reforms tightening RPT rules, can reveal itself to be no more than a flash in the pan […] where either no social norm against tunnelling exists (i.e. where "don't engage in tunnelling" is not,

[89] The average per year number of Consob's enforcement actions (defined as including both information requests and sanctioning procedures) was 16 in the 2011-13 period, with a peak of 21 in 2013, while it was 12 in the following three years.
[90] Telecom Italia S.p.A. (2013a); Iotti (2013); Mangano (2013); Olivieri (2013a); Corriere Comunicazioni (2013a).
[91] Camera (2013); Il Sole 24 Ore Radiocor (2013); Corriere Comunicazioni (2013b); Milano Finanza (2013).
[92] See Rebaudo (2013); Corriere Comunicazioni (2013c); Olivieri (2013b); Reuters (2013d); Montanari (2015).
[93] Consob (2013e); Telecom Italia S.p.A. (2013b); Consob (2013f); Telecom Italia S.p.A. (2013c); Consob (2013g).
[94] See Bianchi (2016) and Marchetti (2016). See also Montalenti (2015). All of these authors are at the same time academics and practitioners.

> broadly speaking, a specification of the prohibition on theft) or market players do not themselves effectively demand high compliance rates and strict enforcement."[95]

In other words, for a regulatory framework against tunnelling to be effective across time, the general attitude toward tunnelling (social norms) and support (both ideological and technical) from market actors play a key role. Arguably (and, admittedly, speculatively), it may have been the case that, as the memory of egregious scandals such as Parmalat and Cirio faded away, market players failed to internalize legal constraints on tunnelling as social norms. Furthermore, tunnelling, like corruption in politics and excessive government deficits, may have simply retaken its place as just another fact of life according to Italian public opinion. If that is indeed what has happened, then the vanguard regulator was always likely to retreat quickly.

[95] Enriques (2015).

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