

Regulators and Rules.

President Obama's Financial Regulatory Reform vs the European Commission's Draft

by

GIOVANNA DE MINICO*

Summary: 1. A method for interpretation. – 2. Prudential rules: past and future. – 3. Towards a new macro-prudential supervision. – 4. The *deus ex machina* of the systemic crisis. – 5. From consumer-protection to system efficiency? – 6. Final remarks.

1. A method for interpretation.

The State is planning to take action as a first instance regulator and a last-resort supervisor to correct the inability of *laissez faire* to insure that markets combine the profit-making expectations of businesses with those of citizens calling for a wider and more balanced social growth. Hence, public regulation and control become the solutions on which the two most recent reform proposals - set forth in U.S.¹ and in Europe² respectively - have been based. Therefore, I will herein try to make a comparison between these two schemes, since the current global crisis is urging us to a common response. Conversely, countries adopting different and weaker regulations will be more exposed to the future risk of systemic crises: unfair and fraudulent behaviour of the credit industry will be more easily hidden among the folds of complaisant regulations.

At first sight, these two schemes move on a common ground of 'less market and more state'. But a closer look shows, differences, on which the

* Public Law Professor, Law School, University of Naples "Federico II" (since 2001); among other things, visiting professor at the London School of Economics (2008), for a more detailed *c.v.* and her publications see: <http://www.federica.unina.it/corsi/diritto-informazione-e-comunicazione/>. This text is a more meditated and wider version than the speech given to the Conference on "The future of capitalism in Europe Ethics principles Rules", held in Rome, on 23rd June 2009. It is forthcoming in London School of Economics website, Department of Law, Section, dedicated to "Law and Financial Markets Project", directed by R. McCormick: <http://www.lse.ac.uk/collections/law/projects>.

¹ Department of the Treasury, *Financial regulatory reform. A new foundation: rebuilding financial supervision and regulation*, proposed by President Obama to the Congress.

² European Commission, *Communication on "European financial supervision"*, Com (2009) 252 final, 27th May 09, EU website.

success of the reform may depend. A thorough appraisal requires a twofold evaluation of the nature of regulators, and of the rules to be adopted.

2. Prudential rules: past and future.

The U.S. White Paper entrusts the Federal Government with the all-new task of starting off the regulatory process by defining general criteria for future prudential regulation aimed at preventing systemic risks. The Federal will be in charge of setting such criteria out in detailed conduct standards³.

Before probing into the innovative aspects of the U.S. reform, I would consider it useful to briefly recall what a prudential rule is⁴. Prudential rules are aimed at avoiding that a dreaded event takes place, thereby setting out rules of conduct preventing the risk. The precautionary nature is common to all prudential rules and results in the non-occurrence of the dreaded event. In this particular instance, the above-said dreaded event could be the failure of a bank, no longer able to face up to the claims of clients for repayment. Such financial difficulties impacting on the network of credit institutions would end up affecting the whole system, making it eventually collapse.

If this is the risk to be averted, prudential rules will have to offer *ex ante* remedies minimising the above-mentioned risk before it turns into actual damage. Thus, the differences between two legal systems do not concern the function of a given rule, rather the subjective requirements aimed at guaranteeing a prudent and profitable management of money: property limits, working capital ratios or minimum capital requirements. On the basis of such requirements the regulatory asset in different systems might result in a different evaluation of a bank as reliable or unreliable.

Differences in the contents of prudential rules do not alter their technical nature, as confirmed by the fact that legal systems – despite their differences – have them usually defined by an Independent Authority, whose assessment depends strictly on the bank's assets and liabilities. The U.S. reform concerns exactly the rule-maker. It won't be up to the independent authority any longer – that is to say, the Federal Reserve – to determine the amount of liquidity to be used as a guarantee for the bank's repayment obligations. Whereas the federal policy-makers, in the light of their representative and non-technocratic legitimacy, will define the amount of credit to be injected on the financial market on the basis of macro-economic reasons. Such amount shall not respond – at least in part – to the concerns generated by system risks. Although the risk is under control, the Government may consider it appropriate to lower the line of credit, reducing the amount of loans to firms and private clients in order to

³ See the point 1 of the *Financial regulatory reform*, cit, at p.3.

⁴ In the Italian doctrine a punctual study on the objective function of these rules has been made by L. Torchia, *Il controllo pubblico della finanza privata*, Cedam, 1992, part. at pp. 141-144 ss.

implement a strategy aimed at containing the demand for goods and services.

As a result, it would be more appropriate today to find a new name for prudential rules, since they will only in part perform their function to prevent system risks. They will have to comply at the same time with the mandatory economic policy goals defined by the policy-maker.

This new approach of prudential rules – half way between politics and technique, majority decision and impartial assessment – explains the interference of the US Government, a leading actor which will impose the guidelines with which the Federal Reserve will have to comply in the definition of standards⁵, subsequently translated into more detailed rules for the five banking regulators. The latter, as leaders in their respective credit sectors, shall go further by setting rules of action for banks operating in their sectors.

This pyramid-like distribution of regulatory sources appears to be quite well-landed on the first two levels, i.e. the political and the impartial federal ones. A robust – if not immediately apparent – change takes place on third level, involving regulators from different credit segments. These regulators will be fettered by unitary principles and standards and won't benefit any longer from a great regulatory independence. Insofar as this hierarchical distribution of sources goes to the detriment of the self-government of each credit sector, it also guarantees the consistency of the whole regulatory flow of federal political goals. Besides, this solution puts an end to the “shopping for the regulator” on the part of the bank, which shall not be able to choose a regulator over another owing to less intrusive and stringent standards, since they will now become essentially standardised. Likewise, the blameworthy “race to the bottom” involving regulators could be transformed into a virtuous “race to the top” in the interest of depositors⁶. Therefore, criticism on the reform owing to the scarce courage shown in keeping the complex architecture of the credit sector unchanged is certainly true, but it could be argued that the final results are not jeopardized: the moralisation of a race to the bottom thanks to regulatory standardisation. This reform could be considered as a wise combination of boldness and conservatism, an inevitable mix⁷ since it will have to come to terms with the crossed vetoes of banking and insurance lobbies in the Congress, which would most likely oppose a brutal simplification of the controllers' feudalism.

Let's now consider the EU Commission's Draft. The Commission's points to establishing three new European authorities, which shall replace existing ones: elements of a micro-prudential supervision approach. The new European Supervisory Authorities shall define prudential standards of conduct based on the criteria set out by European legislation. Such

⁵ See the Department of the Treasury, *Financial regulatory reform, A new foundation: rebuilding financial supervision and regulation*, cit.: “Our legislation will propose criteria that the Federal Reserve must consider in identifying Tier 1 FHCs”, at p. 10.

⁶ B.Obama, Speech as quoted by the *Financial Times*, *White paper sets out skilful compromises*, 18th June 2009.

⁷ *The Economist*, *New foundation, walls intact*, 18th June 2009, to whom the term: “Curious mix of audacity and timidity”.

standards – legally binding rules – shall come into effect with the Commission’s implied consent (consent by silence). National Regulatory Authorities will go into further detail as regards the definition of these standards, with which the regulated subject will eventually have to comply.

3. Towards a new macro-prudential supervision

There is no point in having strict rules if failure to comply with them goes unpunished. The US plan reorganizes the supervisory system with a special attention to compliance.

To tackle this issue, the scheme stakes primarily on existing parties, who are assigned new roles and responsibilities and creates new institutional figures considered essential to help the former fulfil their tasks.

1) Let’s consider the first step: the end point of the reform is innovating the competences of the Federal Reserve, which will not only be responsible for federal monetary stability, but also for last-resort supervision of credit and non-credit institutions, which may pose a threat to financial stability due to their combination of size and interconnectedness⁸. Such a plurality of competences may be criticised, considering the difficult compatibility between the many missions of the Federal Reserve and the risk of an infringement by this concentration of functions of the principle of separation of powers, as already exposed by the Republicans.

But this issue, when considered in the light of the goals pursued, i.e. eliminating any grey areas in finance, will prove to be a positive attempt at making up for the opacity of markets, since the operator – regardless of its credit, insurance or investment nature – won’t be able any longer to evade the Federal Reserve’s prudential supervision. In other words, the reform does not allow for the legal form chosen to be a dodge not to comply with rules, as it happened in the past.

This issue is well-known also to the EU legal system, since back in 1996 Directive 93/22/EEC had already tried to make up for this drawback by replacing controls *ratione personae* with a purpose-oriented supervision⁹. As a result of that, banks, insurance companies and financial intermediaries were submitted to double controls: first, by national central banks in regard to the compliance with financial stability rules; and secondly, by the Supervisory Authorities of financial markets in regard to the compliance with the contractual rules of fair trade and transparency. Therefore, at least by way of principle, there was a strong correlation between supervisory rules and systems, which mainly depended on the value to be protected and determined roles and responsibilities of one

⁸ The *Financial regulatory reform, A new foundation: rebuilding financial supervision and regulation*, cit., indicates the reasons for whom these subjects are subjected to the direct control of the Federal Reserve: “Whose failure could pose a threat to financial stability due to their combination of size, leverage, and interconnectedness”, at p. 10.

⁹ See: G. De Minico, *Antitrust e Consob. Obiettivi e Funzioni*, Cedam, 1997, especially at pp. 121–133, with several references to public and civil doctrine.

system over the other accordingly. The different implementation of the reform at the national level had, however, watered down the initial rigour, thereby leaving enough room to operators and products (hedge funds, derivatives or near-bank and near-insurance securities) to evade rules and controls taking advantage of their unclear nature.

The aforesaid developments show that the European Commission is fully aware of the problem. Therefore, if the Draft pretended to ignore it or did not face up to it properly, this would probably come as the result of a political choice. As a matter of fact, in the Commission's proposal there is no section devoted *ad hoc* to this issue, only mentioned while establishing three new supervisory authorities¹⁰. And the Draft, in distributing any relevant competences, focuses on the nature of the supervised party, rather than on control purposes, thereby wiping out the Eurosim Directive. It is also true, however, that it would be wrong to draw final conclusions from a Draft, which is by definition too concise. I will therefore defer my judgment until the Commission will put forward a more accurate proposal.

2) In regard to the involvement of new institutional partners, which should assist the Federal Reserve, the US scheme relies on the Financial Services Oversight Council, in charge of monitoring information from different sources, collecting it and providing it to the Federal Reserve. The identification and communication of high-risk situations is considered an auxiliary role in order to help the Federal Reserve to express an unappealable judgement with a full knowledge of the facts.

Besides, the new authority shall also respond to the Federal Government's concern to concentrate in its hands functions, once distributed among central and peripheral regulators. Evidence of that is found in its composition: the Secretary of the Treasury shall be the Chief and his staff shall be based in the Department of Treasury. Therefore, the new authority undertakes to be the main institutional information source of the system, whereby the Government will be able to know in real time what the state of play is thanks to its ability to "facilitate information sharing and coordination, identify emerging risks".

Let's now consider the European Commission's Draft. Here, too, a new authority – i.e. the European Systemic Risk Council¹¹ – is vested with macro – systemic prudential supervision tasks. The Council should also be in charge of collecting information from difference sources, identifying risks and categorising them according to the priority of action. Once listed them, however, it won't be up to the ESRC to decide what to do, rather it will send recommendations and give advice to the individual member States. Thus, the new European Authority will fulfil cross-border preparatory tasks, but at the end of the instruction phase, the decision on

¹⁰ See: European Commission, *Communication on "European financial supervision"*, cit., at p. 8 "At the Eu-level, the three existing Committees of Supervisor would be replaced by three new European Supervisory authorities, i.e., a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities". This part, as others contained in the Draft, reproduces the results of the research work of High-level group of financial supervision in the EU, chaired by J. de Larosière, *Report*, delivered to the president Barroso, 25th Feb. 2009.

¹¹ From now I will quote as ESRC

how to solve the crisis will be fragmented again in a plurality of national decisions. The difference with the solution proposed by the US scheme seems evident, since the federal government is in charge of the process from the instruction to the decision-making phase, with a better protection from any centrifugal pressure exerted at the state level.

However, this is not the only drawback of the European scheme, which shows an additional weakness in regard to the effectiveness of ESRC recommendations. As a matter of fact, EU soft law acts are not considered to be binding¹². Therefore the ability to conform national decisions is essentially dependent on the reasonableness of the advice and the authority of the advisor, without prejudice to the “indirect legal effects”¹³. However, in this particular instance, a more effective solution could have been tried, since vesting authoritative powers on European Independent Authorities¹⁴ is allowed by EU law insofar as acts of an administrative nature are concerned. In other words, only the formulation of abstract generally applicable rules is banned for Authorities, whereas the remedial power to take measures in specific cases is allowed¹⁵. As a matter of fact, from the Meroni ruling¹⁶ to the 2005 Communication by the

¹² The legal literature uses the expression “indirect legal effects” because these acts in principle have no legally binding force, but which nevertheless may have practical effects. On this subject, see: F. Snyder, *Soft law and interinstitutional practice in the European community*, in *The Construction of Europe: essays in honour of Emile Noël*, edited by S. Martin, Dordrecht, Kluwer Academic Publishers, 1994, p. 198; in which the author, even though he denies the binding value to soft law, recognises that “nevertheless may have practical effects”; D. Thürer, *The role of soft law in the actual process of European integration*, in *L’avenir du libre-échange en Europe: vers un Espace économique européen?*, edited by O. Jacot-Guillarmont – P. Pescatore, Zürich, Schulthess Polygraphischer Verlag, 1990, p. 131, in which it is clarified that the soft law is related to “commitments which are more than policy statements but less than law in its strict sense. They all have in common, without being binding as matter of law, a certain proximity to the law or a certain legal relevance”; C.A. Morand, *Les recommandations, les résolutions et les avis du droit communautaire*, CDE, vol. 6, 1970, n. 2, p. 626 ss.

¹³ P. Craig - P. de Búrca, *EU Law. Text, cases, and materials*, 4th ed., Oxford University Press, 2007, p. 86: “Article 249 EC states clearly that recommendations and opinions are to have no binding force. While this precludes such measures from having direct effect, it does not immunize them from judicial process”.

¹⁴ Henceforth with the acronym I.A.

¹⁵ On this problem there are the following contributions: K. LENARTS, *Regulating the regulatory process: “Delegation of powers” in the European community*, in *Eur. l. rev.*, 18, 1993, pp. 23 ss.; X. A. YATAGANAS, *Delegation of regulatory authority in the European Union, The Relevance of the American model of independent agencies*, Jean Monnet Working paper 3/2001; G. MAJONE, *Delegation of regulatory powers in a mixed polity*, in *Eur. l. your.*, 8, 2002, pp. 323 ss.; R. DEHOUSSE, *Delegation of powers in the European Union: the need for a Multi-principals model*, in <http://www.arena.uio.no/events/LondonPapers06/DEHOUSSE.pdf>, 2006; D. GERADIN - R. MUNOZ - N. PETIT (eds.), *Regulation through agencies in the EU*, Edward Elgar, 2005 (see the works of E. VOS and D. GERADIN concerning the delegation of regulatory power and its accountability); D. CURTIN, *Delegation to EU Non – Majoritarian Agencies and Emerging Practices of Public Accountability*, in <http://www.arena.uio.no/events/seminarpapers/2005/CurtinJUNE05.pdf>, 2005; E. CHITI, *Towards a model of independent exercise of community functions?*, in R. CARANTA - M. ANDENAS- D. FAIRGRIEVE (eds.), *Independent Administrative Authorities*, London, 2004, pp. 217-222.

¹⁶ Court of Justice, 13th June 1958 (Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community) Case 10-5, in *ECR* 133.

Commission¹⁷, the number of bans on Independent Authorities has kept growing, without however including any administrative functions. And this is mainly due to the fact that the underlying ratio is to insure a proper distance between the I.A. and political decisions, and not to keep the I.A. separated from administrative functions. The core of the institutional balance is clear: “Policy choices remain for the Commission, implementation is for the agency”¹⁸.

Relying on soft law¹⁹ may appear to have the benefit of preserving the decision-making autonomy of member States. But it is, the less appropriate solution to manage emergency situations needing prompt actions and binding force. Such attributes are definitely lacking in soft law. In the event that a member State failed to follow a given recommendation, the Commission may be required to step in and order the State to abide by it. To attain the ultimate goal – that is solving the crisis – complex and time-consuming procedures proliferate, whereas the final would have been already at hand by adopting a single solution: that is to say vesting the European Authority or the Commission with full powers.

4. *The Deus ex machina of the systemic crisis*

The third point of the US scheme is totally unprecedented even in Europe: the federal Government is identified as the decision-maker of systemic crises. The assessment and the definition of a crisis were once in the discretion of the Federal Reserve, whereas now its contribution is limited to a mere proposal in the more complex decision-making process of a measure subject to approval by the Federal Government²⁰, which shall be entitled to decide for the failure or the bail-out of the bank. Considering that public money will be used, the decision to bail a business out or not must be taken by a politically responsible party. And whichever remedy will be finally chosen, direct impacts and externalities will fall on citizens at large or on the banking system. Possibly, a vast number of people suffering damages or gaining benefits. And in all cases a politically relevant scenario.

¹⁷ European Commission, *Draft Interinstitutional agreement “on the operating framework for the European regulatory agencies”* COM(2005)59 final, in her web side.

¹⁸ The expression was coined by P. CRAIG, *The constitutionalisation of Community administration*, in *Eur. L. rev.*, 28 (6), 2003, p. 849.

¹⁹ An “overall expression” (as said by L. Senden, *Soft law in European community law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 110), but I prefer qualify it in terms of act with juridical relevance, even if reflected (G. De Minico, *La soft law: nostalgie e anticipazioni*, in F. Bassani – G. Tiberi (eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Mulino, 2008, da pp.327 ss.; Id. *A Hard Look at Self-Regulation in the UK*, in *E.B.L.R.*, 1, 2006, pp. 204-207.

²⁰ See *The Financial regulatory reform, A new foundation: rebuilding financial supervision and regulation*, cit.: “In order to improve accountability in the use of the crisis tools, we also propose that the Federal Reserve Board receive prior written approval from the Secretary of the Treasury for emergency lending under its ‘unusual and exigent circumstances’ authority”, at p. 8.

In this particular instance, it is quite easy to make a comparison with the Commission's Draft, since this issue is not at all considered in its agenda. It is a well known fact that in the European institutional architecture there is no unitary and politically responsible reference point. This makes a unitary and supranational answer to cross-border systemic crises impossible. Such an answer is not provided by coordination among the States affected by the crisis, as the Financial Stability Forum suggests²¹. Coordination does indeed assume unitary assessment criteria in regard to a given situation, and may achieve a unitary decision provided that the starting points of the individual member States were not totally opposed. But it is not equivalent to a single decision taken by a politically responsible subject. This confirms the need for a common political decision-maker as a melting pot for European pluralism, which cannot be replaced by concerted actions leaving national political identities unfettered²².

5. *From consumer-protection to system efficiency?*

Finally, the fourth point of the US Plan, in the scope of protection of individual rights. A new authority is established: the Consumer Financial Protection Agency²³, which shall assist consumers by promoting an updated, intelligible, clear and reliable information flow to consumers, thereby allowing them to choose the investment product or line of credit that best suits their needs. We note here that the scheme applies "attention calling"²⁴ method, already tested by the supervisory authorities on financial markets. Public intervention is not aimed at replacing investors in the assessment of a given investment proposal, assuming that this judgment should remain their exclusive responsibility. The authority intervenes before a final contractual agreement is reached in order to create the necessary conditions for well-informed negotiations. This form of public regulation is aimed at offsetting information asymmetry. In order to make up for an information deficit, it sets on the entrepreneur – who would not disclose information essential for deal assessment – the obligation to inform the other party, who could not have access to those data otherwise. The unilaterality of such obligations is the asymmetric

²¹ Financial Stability Forum, *Financial Stability Forum issues recommendations and principles to strengthen financial system*, in www.fsforum.org, in which is clearly said that: "While financial crisis management remains a domestic competence, the growing interactions between national financial systems require international cooperation by authorities" (the italic is mine).

²² K. Lannoo, *A crisis is a terrible thing to waste*, in <http://www.ceps.eu>, in which the author severely criticises the creation of a simple interstate net instead of a single political centre: "This means empowering a strong centre which can, following the principle of subsidiary, effectively and unequivocally act on behalf of the European interest and police national supervisory authorities".

²³ See: *The Financial regulatory reform. A new foundation: rebuilding financial supervision and regulation*, cit., at p. 7

²⁴ In UK literature see: J.McEldowney, *Law and regulation: current issues and future directions*, in M.Bishop-J.Kay- C. Mayer (eds.), *The regulatory challenge*, Oxford, 1995, at pp. 418 ss.

measure aimed at offering equal opportunities to two subjects who originally had unequal starting points.

The law-maker takes care to protect private citizens from surprises, i.e. blind purchases, and this is done with the help of the Authority, which encourages an attitude of disclosure, although taking no part in the information flow it has actually fostered.

The final step of enforcement – i.e. tying up rules with the sanctions envisaged for their infringement – is fully taken care of by giving to the Authority the power to settle disputes out of Court, as well as prosecuting unlawful or irregular information conducts in federal Courts, in conjunction with the Department of Justice.

The US legal system already provides for effective consumer protection through class actions. Nevertheless, it has been deemed necessary not to leave the consumer alone while negotiating a contract. This concern further confirms the fact the solid and comprehensive rules and sanctions are needed to guarantee compliance and effectiveness.

Conversely, the European Draft does not meet this diffused need for protection, even if this would have been the right moment to redraw the entire enforcement system. Enforcement should be aimed at non-compliance with the prudential rules imposed on operators. But the European experience proves that its scope should be extended also to control duties imposed on institutional supervisory agencies.

The former should be designed by a single law-maker, observing the parameters of assurance, inflexibility and timeliness of the sanction. The costs generated by the violation of rules should in all cases be higher than the costs of compliance. Only if this equation is applied by the law-maker, the effectiveness of the rule would be seriously enhanced.

Sanctions will have a surely deterrent effect on any breaches of law if they make the costs of non-compliance higher than those incurred for compliance. But the effectiveness of supervision and controls certainly contributes to the final result. A special attention must be paid when – as in the EU plan - the system multiplies the levels of supervision rather than streamlining them. A sanction must be provided for at each level – i.e. state and supranational – in case controls or supervisory duties are not carried out. If not, the proliferation of agencies shall go hand in hand with a watered-down responsibility, or even with the impossibility of laying on anyone the responsibility for a conclusive decision. This wide concept of enforcement would also call for a cross-border single reference figure for Aquilian liability, to which supervisory Authorities should be subjected in the event of non-fulfilment of their institutional tasks. We are aware of the objections of individual member States, who intend to preserve their full regulatory autonomy in this field. But the concern that different regulations may end up in a prejudice to European citizens by supranational illicit conducts should prevail. Besides, the competition among different legal systems did not start a race for more protective regulations for consumers. On the contrary, it actually degenerated downwards owing to the lack of binding criteria set out by the Union in

regard to the key elements of torts. E.g., the Italian legislation²⁵, not only took action quite late in this connection, but it also ended up protecting the Authorities, thereby guaranteeing them a special and more favourable treatment compared with the general rules under article 2043 of the Italian Civil Code. As a matter of fact, the Authorities shall be held accountable only in the event of torts committed with malice or gross negligence. It seems clear that a violation of the equal protection principle may be found when independent Authorities, having all the necessary tools at hand to be diligent, are actually forced to pay only for glaring mistakes, while any other person may on less favourable grounds be held responsible and be bound to compensation for an offence. Within this hypothetical figure of a European Aquilian liability, the very same concept of damage should be re-examined. It is still tailored only to the compensatory function of the pecuniary damage suffered by the injured party. The measure of damages could more properly be seen as an afflictive sanction whereby the victim shall not only be repaid for the injury, but will also receive a *quid pluris*. We are here considering a case in which the basic mission of the offender was – also – to protect the interests of the injured party. A mere compensation could not be deemed sufficient.

Finally, the EU document could have offered the opportunity to define in European terms the collective protection made possible by class action, which has been ignored by the member States or has received legal definitions different in scope and effectiveness. Also in this case, the US model might be a useful reference point to overcome a twofold limitation. Firstly, the possibility of an action involving the whole category of injured parties, regardless of their appearance before Court, and preferring the opt-out²⁶ system to the opt-in one. Secondly, the type of damage²⁷, which should not be limited to the mere compensation, but should include a *quid pluris* as a sanction imposed on the law-breaker.

In conclusion, the US approach appears to be able – at least, on paper – to restore the trust in financial markets, since it protects the investors' right to know what they are buying – thanks to clear, exhaustive

²⁵ L. 28 December 2005, n. 262, “Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari”, especially art. 24, co. 6 *bis*.

²⁶ According to the US *class action* the so-called *opt-out* system is effective. Owing to the multi-abusive nature of the tort, the action taken by one party goes also to the benefit of others, who become automatically part of the *class* with no need of agreement, and will thereby benefit from any favourable outcomes of the ruling, without prejudice, however, to the possibility to *opt out*. Conversely, the *opt-in* system starts from the opposite assumption, that is to say an explicit agreement will be required from the injured party; if not, the latter will not be included in the action.

²⁷ These are the limitations of the Italian class action (Law no. 244 of 24th December 2007, containing “*Provisions aimed at drawing up the yearly and the long-term state budget – 2008 Budget*”, introducing also class action with article 140 *bis* of the consumer code), which is watered-down compared with the US one, not only for the above-mentioned reasons, but also for the powers of the judge, who would not liquidate damages but just ascertaining them, since quantification of damage would be the responsibility of an arbitration board *ad hoc*. Moreover, our class is not currently available to citizens, since despite the fact this rule has been in place for some time now, its actual enforcement has been apparently put off by the our Government (see. D.L. 1/1/09, n. 78, art. 23, co. 16, in *G.U.*, n.70, 1/7/09). But I won't expand any further on this typically Italian dispute, considering the little interest it may have for foreign readers.

and reliable pre-contractual information – as well as their right to compensatory measures for any unfair damage suffered once the contract is signed. Hence, consumer's protection is considered as an asset in the light of the different and more far-reaching goal of system efficiency, a result which can be achieved only if responsible confidence of investors in the preservation and profitability of venture capital is encouraged²⁸.

6. Final Remarks

The European decision-making uncertainty is the result of institutional weakness, which cannot be solved under present conditions. There is no unitary political decision-maker, which gives voice to a common political interest without being a mere juxtaposition of national egoisms. Until Europe solves the dilemma between aiming to become a unitary political entity or just a condominium or loose alliance of States, regulatory and supervisory powers cannot be concentrated in the hands of a federal executive entity.

Obviously, this oscillation between striving for a common political centre, in line with the model offered by the federal political representation approach, and national centrifugal pressures does not come at zero costs in terms of banking and financial market policies. We, as citizens, will pay the price of this ambiguity, since the inability of Europe to adopt solid and comprehensive regulations may favour the proliferation of a poor quality finance, which will find between the folds of more complaisant rules an opportunity for abuses and impunity.

²⁸ The economic doctrine has rightly posed the equation between “Information efficacy and market efficacy”, on this issue for all see: E. Stighiltz, *Information and economic analysis: a perspective*, in *Economic journal supplement*, 1985, at p. 21.