



# Recent Developments in Italian Corporate Governance

**Avv. Dott.ssa Cecilia Carrara**

(LUISS, Roma)

**Einführung: Prof. Dr. Christian Armbrüster**

In Zusammenarbeit mit dem Fachbereich Rechtswissenschaft der Freien Universität Berlin



# Recent Developments in Italian Corporate Law

**5 November 2012**

**Avv. Dr. Cecilia Carrara (LUISS)**

Freie Universitaet Berlin

# Sources of Italian Corporate Law

# Binding:

- Constitution
- EU-Treaty
- EU-Regulations and Directives
- Italian Civil Code (*Codice Civile*)

## Non-Binding:

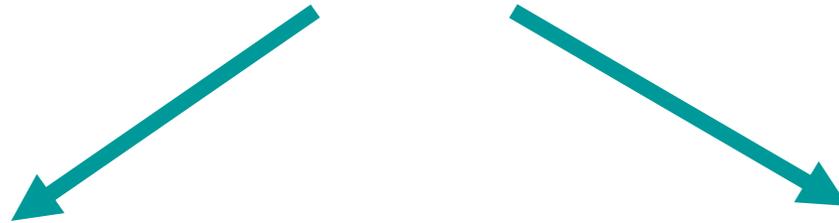
- Interpretation of scholars and case-law
- Corporate Governance Code

# The Corporate Governance Code

- applicable to listed companies
- best practice
- principle of “comply or explain”
- implementation monitored by Borsa Italiana

(available on the web site *[www.borsaitaliana.it](http://www.borsaitaliana.it)*)

# The Italian Companies



**CORPORATIONS**

**PARTNERSHIPS**

# Corporation

- plurality of bodies
- principle of majority
- limited shareholder rights
- limited/ no personal liability of the shareholders
- Main corporate kinds: S.p.A. and S.r.l.

# Partnership

- no plurality of bodies foreseen
- every shareholder has unlimited management power
- consent of all shareholders required
- personal liability of the shareholders

## Partnerships

- Società semplice
- Società in nome collettivo (s.n.c.)
- Società in accomandita semplice (s.a.s.)

## Corporations

- Società per azioni (s.p.a.)
- Società a responsabilità limitata (s.r.l.)
- Società in accomandita per azioni (s.a.p.a)

# *La società per azioni*

# Main Features

- main format for medium to large companies
- established through articles of incorporation and registration
- minimum share capital is €120,000
- three different regimes of management possible

# Regimes of Management

Since reform of the law in 2003:

Shareholders may decide which regime to choose:

**Traditional  
Regime**

**Dualistic  
Regime**

**Monistic  
Regime**

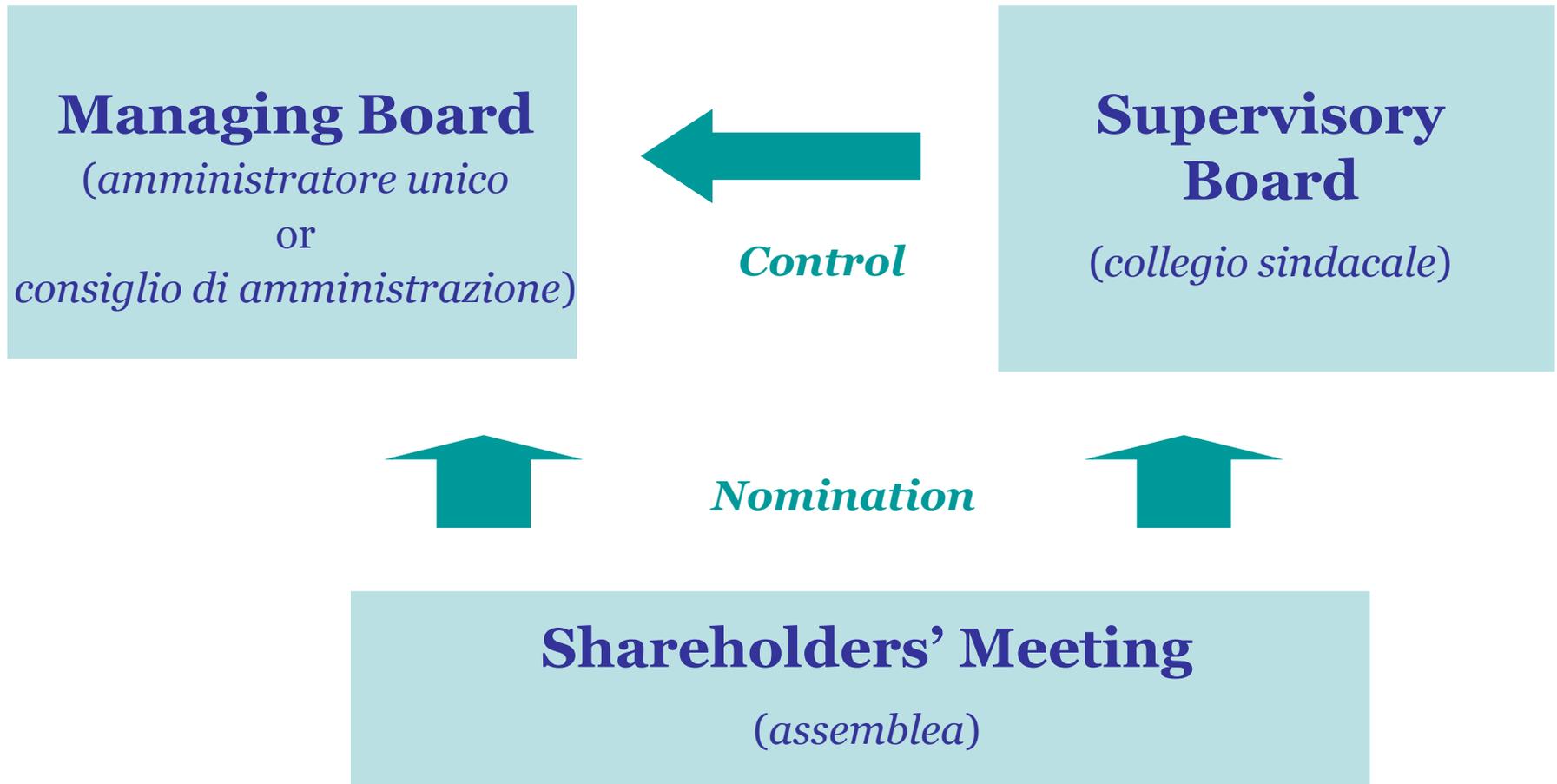
# The Traditional Regime



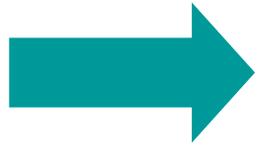
*Two-tier horizontal board structure*

Shareholders elect two boards, one with managerial functions and the second with supervisory functions (“*collegio sindacale*”).

Used by 95 % of the Italian Companies.

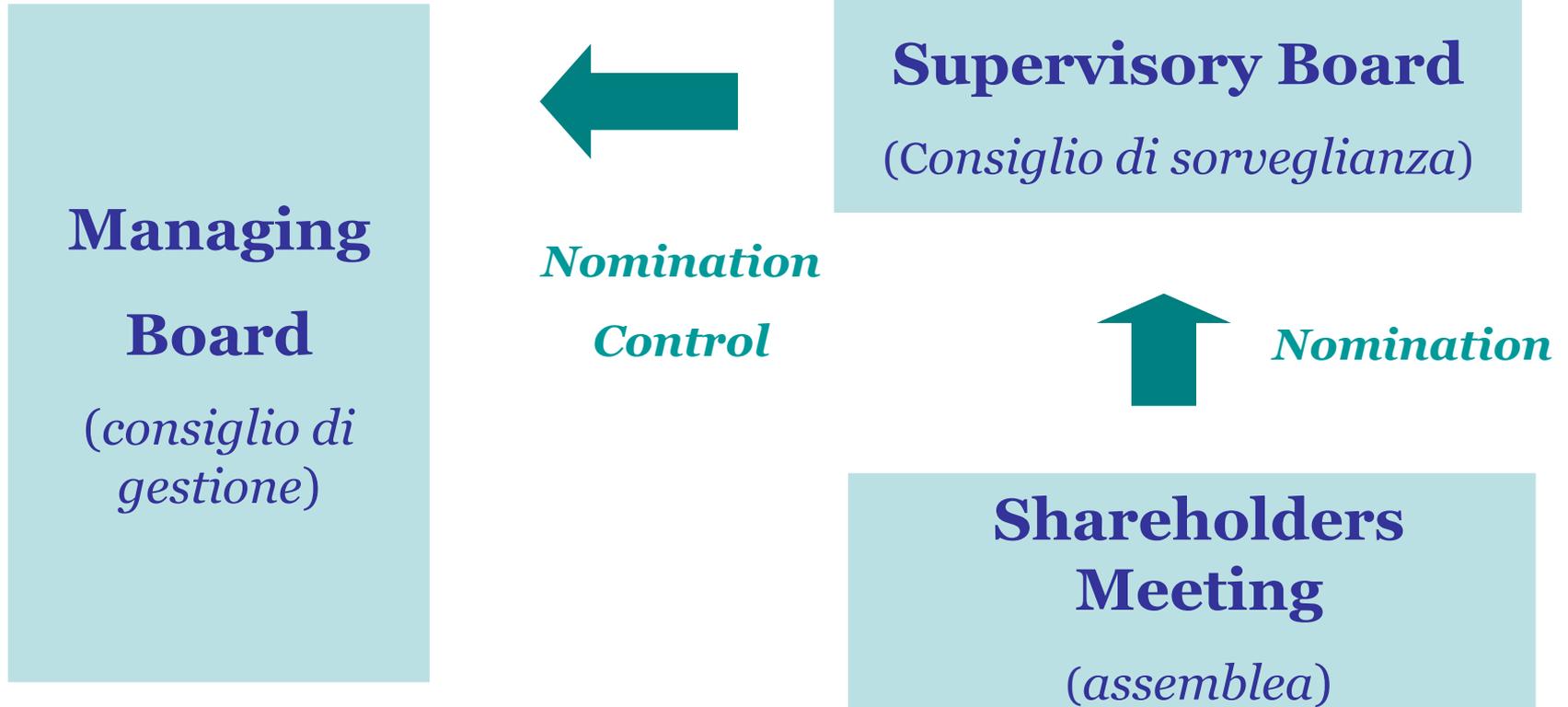


# The Dualistic Regime

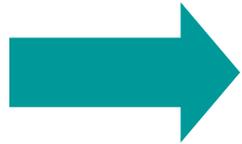


*Two-tier vertical board structure  
inspired by German Law*

Shareholders elect one board with supervisory functions which in turn elects a second board with managerial functions



# The Monistic Regime



*One-tier board structure*

Shareholders elect one single board which “contains” a supervisory committee.



# The executive bodies of the S.p.A.

# Managing Board

- at least one director
- “*amministratore unico*” or “*consiglio di amministrazione*”
- nomination depends on regime (*see above*)
- not required to be professionals
- possibility to establish internal committees (e.g. “*comitato esecutivo*”)

# Rights and Obligations

- exclusive competence to manage the company
- deliberation on all matters except from those reserved to the shareholders' Meeting
- representation of the company
- financial statements
- liability towards company and third parties

# Supervisory Board

## Traditional

*collegio sindacale*

- 3 or 5 + 2 substitutes
- at least one shall be registered accountant
- others shall be registered professionals

## Dualistic Model

*consiglio di sorveglianza*

- at least 3
- at least one shall be registered accountant
- others do not mandatorily need to be professionals

## Monistic Model

*comitato interno*

- for open companies at least 3
- at least one shall be registered accountant
- honorability and competence provided under articles of corporation

# Rights and Obligations

- control of the management
- right to intervene in board and shareholder meetings
- right to initiatives
- right to information

# The Shareholders' Meeting

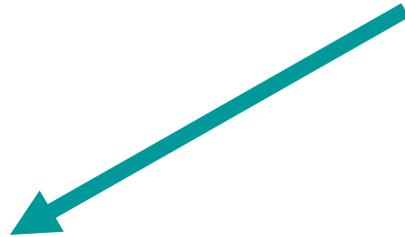
- all shareholders
- forming the common will of the company in the matters reserved for the shareholders' meeting
- nomination of the managing board/ supervisory board (depends on regime, see above)

# Recent important reforms

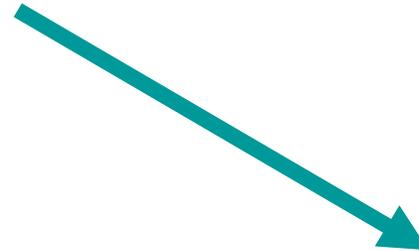
- “Pink quotas”
- Reinforcement of the role of independent directors/special rules for transactions between related parties
- Remuneration of directors
- Reform of the controlling/internal auditing body (*collegio sindacale*) to simplify the governance and minimize the costs

# The Italian Law on women's quotas

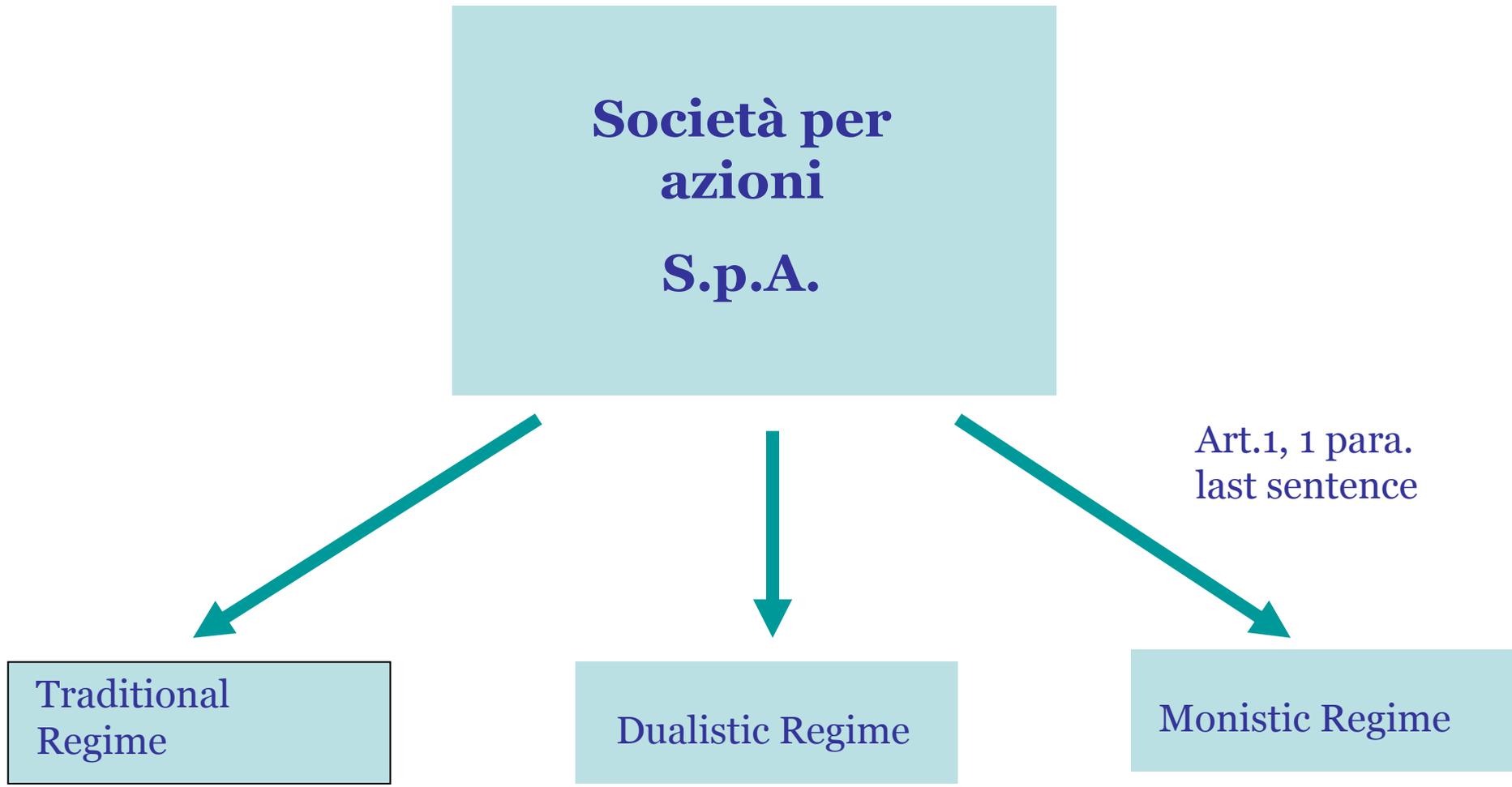
# Applicable to:



**Società per Azioni  
S.p.A.**



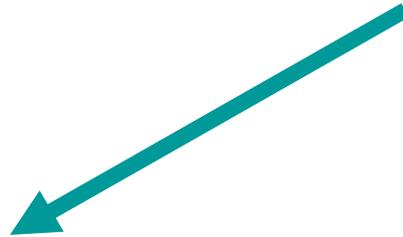
**company  
controlled by  
public  
administration  
(Art. 3)**



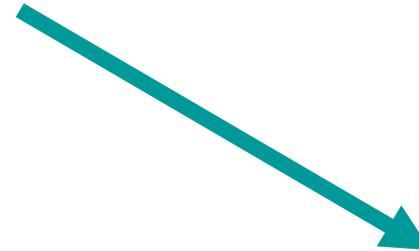
# Company controlled by public administration

- public administration holds majority of votes in the Shareholders' Meeting
- or
- public administration holds sufficient votes to exercise dominant influence in the Shareholders' Meeting

# Applicable to:



**Managing Board**

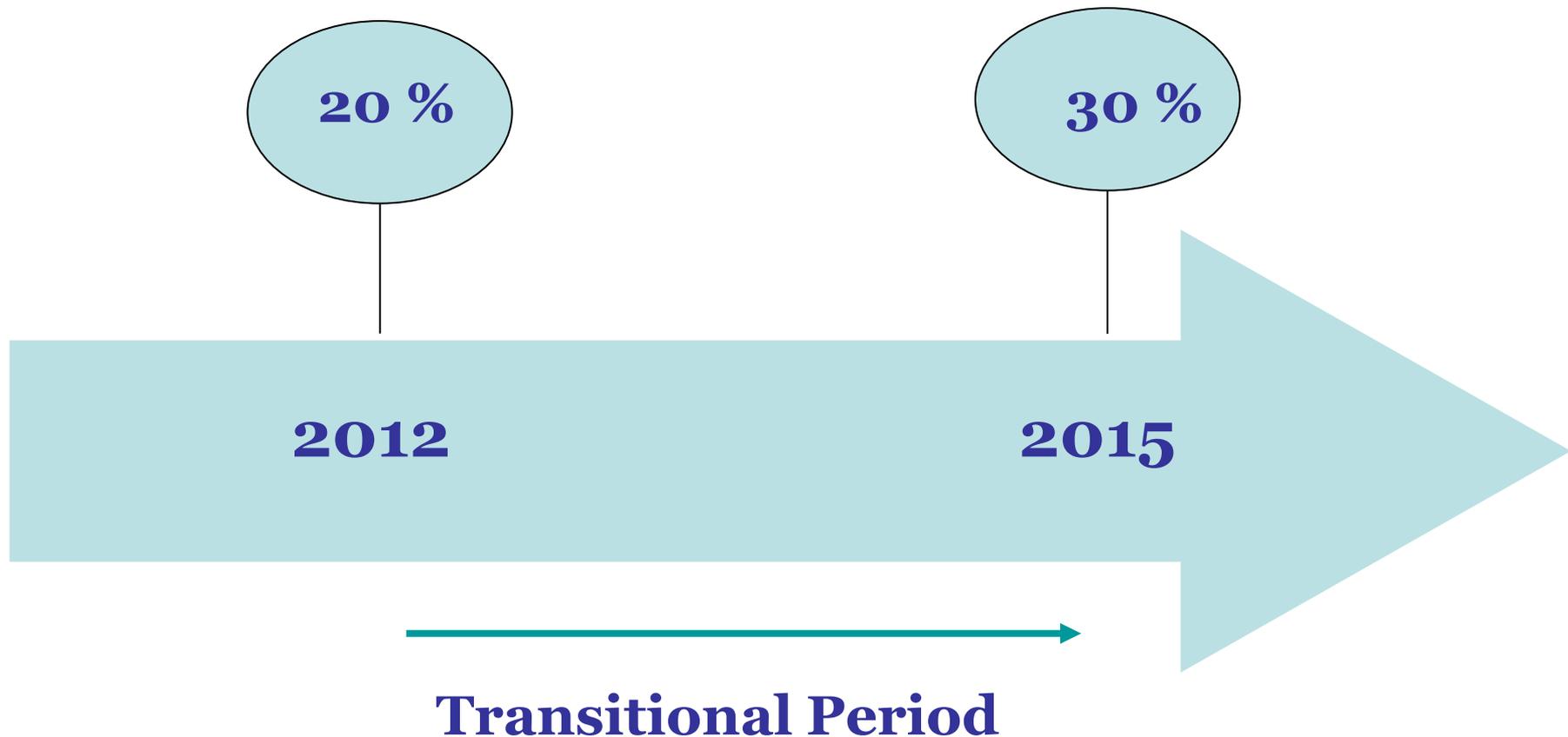


**Supervisory Board**



provided, that  
more than 3  
members

# Quotas and Transitional Period

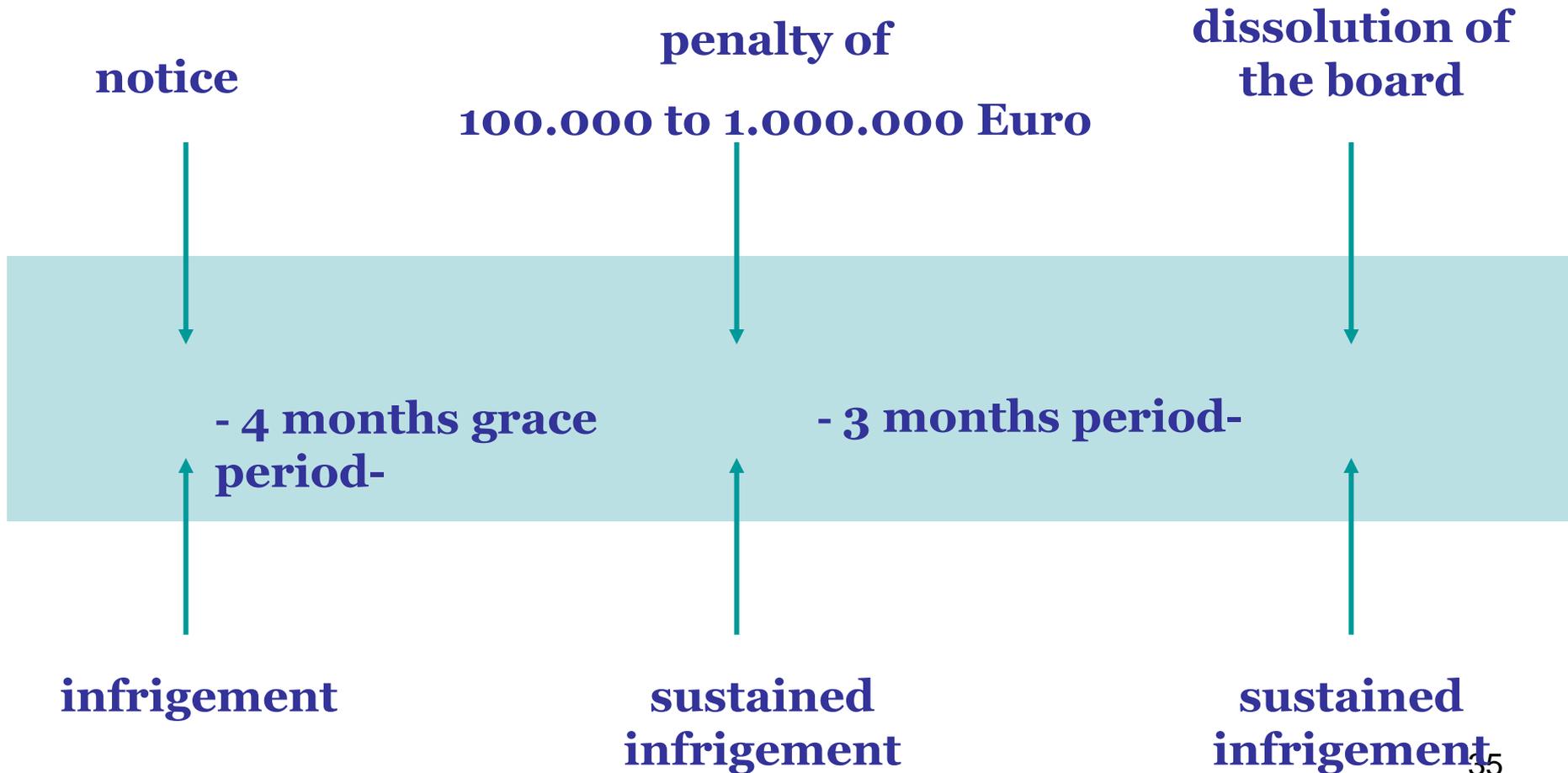


# Supervision

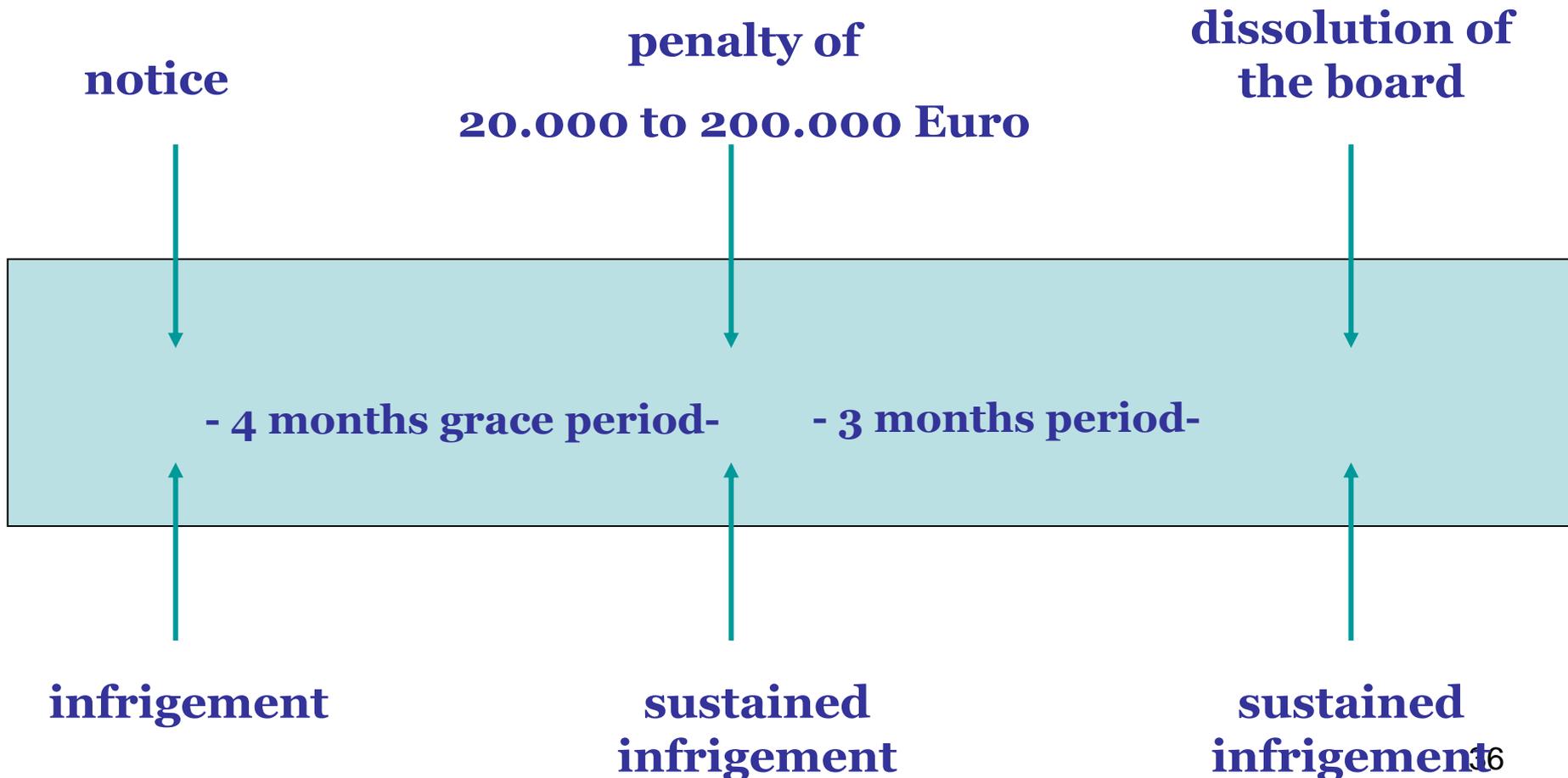
By the “*Commissione Nazionale per la Società e la Borsa*” (Consob)”

The CONSOB is the public authority responsible for regulating the Italian securities market.

# Procedure and Penalties Managing Board



# Procedure and Penalties Supervisory Board



# Temporary Nature

**The law is meant to be temporary,  
applicable for 9 years**

## General Principles concerning remuneration policies of the directors of Italian listed companies

As regard Italian listed companies, the instruments proposed by the European Recommendations concerning the remunerations of directors of listed companies have been introduced in Italy through the implementation of rules at different level:

- provisions of law;
- regulations;
- the code of corporate governance.

## Corporate Governance Code of listed companies

The “**Corporate Governance Code**” contemplates certain provisions concerning the directors’ remuneration.

Comply or explain rule: with reference to each fiscal year, Italian listed companies shall publish a report on the corporate governance and shareholding structure in which, pursuant to article 123-*bis* of Legislative Decree no. 58/1998, they shall declare whether they adhere to the Corporate Governance Code or illustrate the reasons why they do not adhere to one or more provisions contemplated therein.

## Remuneration Committee

- Article 6 of the Corporate Governance Code (as amended on December 2011) introduces a remuneration committee (the “**Remuneration Committee**”) having preliminary investigation and proposal functions towards the board of directors in relation to the determination of remuneration policies.
- The Remuneration Committee shall be composed of: (i) independent directors or, alternatively, (ii) non-executive directors, the majority of which shall be independent.
- Upon the Remuneration Committee’s proposal, the board of directors shall define the remuneration policy of directors and managers having strategic responsibilities.

### The Remuneration Committee:

- submits proposals or gives opinions to the board of directors concerning the remuneration of executive directors and directors having particular offices and the determination of the performance goals connected to the variable component of the remuneration to the board of directors and verify the actual achievement of the performance goals;
- recommends that the remuneration policy provides limits for the variable components of the remuneration.

The chairman or a member of the Remuneration Committee should attend the annual shareholders’ meeting and refer to the shareholders on the exercise modalities of its functions.

## Report on remuneration

On December 23, 2011 Consob published the resolution no. 18049 which amended the Issuers' Regulation (*Regolamento Emittenti*) in order to implement the new remuneration rules provided by article 123-ter of the Financial Consolidated Act.

Article 123-ter of the Financial Consolidated Act: listed companies, at least 21 days before the yearly shareholders' meeting for the approval of the financial statements, shall make a report on remuneration (the “**Report**”) available to the public.

Such provision has been implemented by article 84-*quater* of the Issuers' Regulation, which has been introduced by Consob resolution no. 18049/2011.

The Report will be divided into two sections:

- the first section of the Report shall illustrate the company's remuneration policy of the members of the board of directors, general managers and managers having strategic responsibilities with reference to, at least, the next fiscal year and the procedures adopted for implementing such policy;
- the second section of the Report shall illustrate (i) each item of the remuneration and (ii) in details, the remunerations actually paid, for whatever title and in whatever form, to the directors and managers during the fiscal year (in nominative form for the members of management and supervisory bodies and general managers and in aggregate form for the managers having strategic responsibilities).

The Report shall be approved by the board of directors.

The shareholders' meeting shall resolve – with a non binding vote - on the first section of the Report and the results of such vote shall be made available to the public.

## General principles concerning remuneration policies in the Italian banking sector

EU Directive 2010/76/EC (the so called “CRD III Directive”) introduced harmonized and detailed rules governing remuneration policies in the banking sector.

On March 2011 the Bank of Italy issued specific rules concerning the remuneration and incentive policies and practice related to banks and banking groups (the “**B.I. Provisions**”) pursuant to article 53 and 67 of Legislative Decree no. 385/1993.

The B.I. Provisions focus their attention on incentive systems related to the internal and external networks of the banks:

if the bank avails itself of a network (*e.g.*, financial promoters, employees, collaborators) of another intermediary which is authorized to provide services and investment activities, the said intermediary shall be responsible for the correct definition of the remuneration policies of the aforesaid network.

## According to the B.I. Provisions:

- a clear informative note concerning the remuneration and incentives policies and practices that the intermediary intends to adopt shall be submitted to the previous assessment of the ordinary shareholders' meeting;
- the ordinary shareholders' meeting shall approve the remuneration policies in favor of supervision, management and control corporate bodies and employees and the remuneration plans based on financial instruments (e.g., stock options plans);
- the remuneration shall be split into a fixed quota and a variable quota;
- the relation between the fixed quota and the variable quota shall be properly balanced, taking into account the features of the intermediary and the personnel categories;
- the banks shall determine *ex ante* the limits of the incidence of the variable quota on the fixed quota of the remuneration.
- Any derogation to the above rules, (which is admitted only in exceptional cases) shall be previously approved by the supervisory bodies of the bank and promptly submitted to the shareholders' meeting and the auditing body.

# Remuneration policies in the insurance sector

The general rules and principles governing the remuneration policies in the insurance sector are those provided by the Directive and the relevant implementing rules.

On June 9, 2011 the Italian Supervisory Authority for the insurance sector (*Istituto per la Vigilanza sulle assicurazioni private e di interesse collettivo* - “**ISVAP**”) issued the regulation no. 39 (the “**Regulation**”) concerning the remuneration policies of insurance companies pursuant to article 5, paragraph 2 and article 191, paragraph 1, lett.(c) of Legislative Decree no. 209/2005 (the “Italian Insurance Code”).

According to the “home country control” principle, the Regulation will apply to insurance and reinsurance companies with registered office in Italy and, to the extent it is consistent with their organization, to the branches of insurance and reinsurance companies with registered office in a Third-State.

## General rules provided by the Regulation:

- By-laws: the insurance company's by-laws shall contemplate a provision according to which the ordinary shareholders' meeting shall approve the remuneration policies in favour of the corporate bodies and personnel.
- The board of directors: shall (i) define and review periodically the remuneration policies to be approved by the ordinary shareholders' meeting and (ii) be in charge of the correct implementation of the said policies.
- Remuneration committee (for insurance companies having a more complex structure): it is composed by non-executive directors (who are mostly independent directors pursuant to article 2387 of the Italian civil code) and cooperate with the board of directors.
- Conflict of interests: if the insurance company avails itself of external auditors for the determination of remuneration policies, the board of directors or the Remuneration Committee (if appointed) shall verify that the external auditors do not perform simultaneously other consulting activities in favour of the directors or other subjects involved in the decisional process.

## Remunerations policies of insurance companies: (i) directors' remuneration

- Variable component: a correct balance between the fixed and the variable component of the remuneration shall be ensured and maximum limits for the variable component shall be envisaged.
- Non-executive directors: the payment of variable remuneration components shall be envisaged only in exceptional cases, to be properly justified, and shall represent a non-significant part of the remuneration.
- Payment of the variable component: shall be subject to the achievement of objective performances to be measured on a long term basis.
- Malus and claw back clauses: insurance companies shall be entitled not to pay or request the reimbursement of any amount paid. The purpose of such clauses is to avoid the payment of remunerations which are not justified by permanent and actual results or are obtained as a consequence of a fraudulent or gross-negligent conduct.
- Early termination of the mandate: the amount due by the insurance company shall be subject to quantitative limits so that any amount paid by the insurance company is linked to the realized performances.

## (ii) remuneration of auditing bodies and personnel

- Statutory auditors, members of the supervisory board and the management supervisory committee: the remuneration shall not be linked to performances or based on financial instruments.
- Personnel: the main provisions concerning the directors' remuneration policies shall apply to the personnel in compliance with the specific rules applying to the employment relationship.
- Responsible officers and the highest level personnel of the internal audit functions: the remuneration shall be appropriate to the level of responsibility and the commitment relating to their role.

## Verification of the remuneration policies

- The implementation of the insurance companies' remuneration policies shall be subject, at least on a yearly basis, to verification by the internal audit functions, each of them according to its respective competence.
- The shareholders' meeting of the insurance company shall be informed, on a yearly basis, of the outcomes of the internal audit functions' verifications.
- Specific *ex ante* and *ex post* separate informative obligations of the board of directors towards the shareholders' meeting concerning the corporate bodies and the personnel and their respective roles and functions.
- The board of directors shall inform on a yearly basis the shareholders' meeting on the implementation of the remuneration policies.

# Protection of competition and personal crossed participations in credit, insurance and financial markets

Article 36 of Law Decree no. 201/2011, converted with amendment by Law no. 214/2011, introduced an incompatibility regime for the holders of offices in the management, supervision and control bodies and the representatives of companies or group of companies operating in the credit, insurance and financial markets.

Such subjects are forbidden to assume or exercise similar offices in competing companies or group of companies.

The holders of incompatible offices may opt for one of the said offices within 90 days from the date of the relevant appointment. After the 90-day term, the above-mentioned subjects shall automatically cease from all the incompatible offices.

The disqualification from office shall be declared by the competent bodies of the companies or group of companies within the 30<sup>th</sup> day subsequent to the expiration of the 90-day term or the day when they are aware of the breach of the prohibition.

In the event of inactivity of the abovementioned bodies, the disqualification shall be declared by the competent supervisory Authority (as the case may be, the Bank of Italy, Consob and/or ISVAP).

## Simplification of the internal auditing system in the S.r.l./S.p.a.

- The S.r.l. has always the choice between a sole auditor and a body of 3
- In the S.p.a. the kind of internal auditor depends on certain quantitative parameters: the sole auditor is possible if for 2 consecutive years the company has not:
  - i. assets > 4.4. mln Eur
  - ii. Proceeds from sales/services > 8.8 mln Eur
  - iii. > 50 employees