

# **Bank foundation – a symbiotic legal institution at the crossroad of banking system and non-profit sector**

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## **Abstract**

*In the context of the development and omnipresence, in Europe, of the non-profit sector and due to the diversification of the legal entities that are involved in the configuration of the third sector, an legal analysis of the foundation of banking origins, is very appealing.*

*Throughout this study we aim to point out key moments in the evolution of this particular figure, mainly in the Italian legislation. Nevertheless, we intend to identify the legal nature of the foundation of banking origins in order to draw a line between banking and philanthropic activities.*

**Keywords:** *foundation of banking origins, non profit sector, Italian legislation, corporate foundation.*

**JEL Classification:** K39

## **I. Diachronic aspects of banking foundations**

In the Italian legal system, the creation of banking foundations has not been the consequence of the legislator's particular concern, but the effect of the process of reorganization and privatization of banking institutions. We refer mainly to savings banks. Originally, they were charitable institutions which did not operate in the banking system. Their establishment took place in the late 18th century, in the context of philanthropic ideas` flowering among the wealthy. There were thus benevolent associations aiming to promote and support disadvantaged groups and to encourage savings. Their numerical development led to the possibility of identifying a primary typology.

In regard to the founder and to the legal nature of the property, there are two main categories:

- Associative savings institutions, which were established throughout private contributions;
- Savings institutions based on foundation's framework, created at the initiative and with the participation of a public entity or a charitable institution<sup>2</sup>.

The propose of the activity and the inner organization outlines three types of savings institutions:

- Associations aiming to conduct banking activities, namely collecting savings;
- Charitable foundations that had only administrative bodies;

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<sup>2</sup> Marcello Clarich, Andrea Pisaneschi, *Le fondazioni bancarie. Della holding creditizia al`ente non profit*, Societa editrice Il Mulino, Bologna, 2001, p. 20-21.

- Corporate foundations, originally associations, in which although the congregation of members had limited powers, it had the prerogative of appointing a part of the administrators<sup>3</sup>.

The patrimony had a purely formal purpose, that of gaining the confidence of prospective depositors. Savings institutions had, mainly, a depositary function.

Subsequently, savings institutions started using the money that was deposited, operating similar to banks, investing and speculating on the financial market. Therefore, the banking-financial character of their activity became predominant. As a result, the control of the state has increased. From this moment on, the savings institutions were perceived as public banking institutions.

By Law no. 218/1990 – known as Amato reform, savings institutions based on the associative pattern were transformed into joint stock companies and the saving banks whose capital owners could not be individualized, into joint stock companies managed by banking foundations. The assets were transferred, *ope legis*, to the joint stock company. Therefore, the foundations of banking origins had to act on two different levels: according to the traditional pattern of the saving institution and as a non-profit entity. Nevertheless, the foundation was to cease any other banking activities except those connected to its participation in the management of joint stock company<sup>4</sup>.

The aim of this particular law was to harmonize the Italian legislation with the European legal framework and to establish the premises of financial parity<sup>5</sup>. The Law no. 218/1990 came into force at a time characterized by the abandonment of banking activity and the focus on non profit sector. The effect of such trend was a lower efficiency and competitiveness of the banking system<sup>6</sup>.

Amato reform has created confusion regarding the nature of the activity and the purpose of banking foundations. The foundation's reason to be is diametrically opposed to that envisaged by the banks, but the profits from the financial activity served, however, as a means of funding the activities of the foundation.

It had been argued that this change has led to a minimization of the foundation's primary role. However, legislative instruments seemed insufficient in the struggle to separate the banking company from the foundation of banking origins<sup>7</sup>.

The legal framework subsequent to the Law no. 218/1990 tried to outline the differences between these two entities. Thus, Law no. 356/1990 has established the banking foundations are ought to operate on non profit sector, such as scientific

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<sup>3</sup> Fabio A. Roversi Monaco, *Le fondazioni casse di risparmio*, Maggioli Editore, 1998, Dogana (Repubblica di San Marino), p. 68.

<sup>4</sup> Marcello Clarich, Andrea Pisaneschi, cited work, p. 29-36.

<sup>5</sup> Carlo Borzaga, *Da dove vengono e dove vanno le fondazioni di origine bancarie* in *Le fondazioni bancarie. Un patrimonio alla ricerca di uno scopo*, a cura di Carlo Borzaga e Fabrizio Caffagi, Meridiana Libri, Roma, 1999, p. 5.

<sup>6</sup> Pierpaolo Ferrari, *La gestione del patrimonio delle fondazioni bancarie italiane. Un confronto con la realita europea e statunitense*, in "Studi e note di economia", no. 2/2000, Florenta, p. 6.

<sup>7</sup> Carlo Borzaga, cited work, p. 8.

research, education, art, health, to provide assistance and protection to vulnerable social groups.

The conclusions of the 13th report on banking foundations<sup>8</sup>, from 2007, seem to demonstrate, with figures, that they are present in various non-profit domains, namely:

- Arts, culture - 524.2 million euros, of which 176.7 million euros were used in order to preserve and enhance the architectural and architectural assets (theaters, castles, palaces, towers, churches, etc.);

- Research - 247 million euros, of which 82.8 million euros were intended for research and development on natural sciences and technology and 76.3 million euro for medical research (making a scientific-technological park, supporting institutional activities of Mario Boella Institute of Information Technology and Telecommunications Association for the year 2007);

- Education and training - 206.6 million euros, of which the primary and secondary education was allocated 80.8 million euros and 67.8 million euros for higher education;

- Volunteering, philanthropy and charity - 178.7 million;

- Local development - 177.6 million euros.

The situation that the Italian legislator had to face in the `90s is not completely new. Over the years, there have been embraced two solutions in such circumstances:

- The identification of a legal person, which becomes the owner of the property;

- The creation of ad-hoc institution, public or private, with or without profit purposes<sup>9</sup>.

While the Italian legislator converted a public institution into a private non-profit legal entity, in the United Kingdom we can witness the reverse process. It is the case of *building societies*, created as mutual funds for housing. In the 1980s, they had the monopoly over housing loans. Shortly after, banks were given this prerogative<sup>10</sup>. This led to an unprecedented financial decline of the first<sup>11</sup>. A legal metamorphosis was needed. Therefore, *building societies* were transformed into public companies. As an effect, the property was transferred, free of charge, proportional to the effective transactions. In other words, mutual funds were turned into banks, under the provisions of the Building Societies Act of 1986.

The foundations` role was major even in other countries, such as post-war Germany. A notorious dispute in the 1950s between Germany and Saxony concerned the Volkswagen factory. In the early 1960, a compromise solution was

<sup>8</sup> *Tredicesimo Rapporto sulle fondazioni di origine bancaria*, Supplemento al no.1/2009 della Revista „Il risparmio”, Associazione di fondazione e di casse di risparmio SpA, p. 85-86.

<sup>9</sup> Carlo Borzaga, *cited work*, p. 9.

<sup>10</sup> Building Societies Association, *Building Societies and Other Types of Organization*, p. 1, document available online at <http://sub.jscpu.com/jpkc/swyy/pdf/9.7.2.3Building%20societies%20and%20other%20types%20of%20organisation.PDF>, view on the 20.08.2012.

<sup>11</sup> Carlo Borzaga, *cited work*, p. 9.

found: to transform the private company into a public one, listed on the German Stock Exchange. The money thus collected was used in order to create the patrimony of the foundation<sup>12</sup>.

In the United State, foundations of banking origins are included in the generic category known as *corporate foundation*. This is not a hybrid between the American banking tradition and philanthropy, but a product of the symbiotic development between banks and third sector.

Diachronically, the first central bank was established in 1781 by the Congress, according to the plan of Robert Morris. It was named the Bank of North America, with headquarters in Philadelphia. This is considered to be the precursor to the U.S. Bank<sup>13</sup>. This bank was created in order to save the state capital through lending and monetary flow assured by issuing debt securities<sup>14</sup>. More and more financial institutions were founded over the years, so in 2012, according to the Federal Insurance Corporation statistics, in the U.S. operate over 6,000<sup>15</sup>.

However, the banks` instability and incapacity to adapt to social needs led, inevitably, to the emergence of numerous organizations with a strong social character. Due to the inability of public bodies to meet the community`s needs, their number increased.

The first American foundations are related to well-known personalities from the business sector. In 1905, Andrew Carnegie created one with the primary purpose of investing in education<sup>16</sup>. In 1913, John Rockefeller Foundation was born in order to promote the welfare of people in the world<sup>17</sup>, and in 1932 Henry Ford established a foundation serving science, education and charity<sup>18</sup>.

Banks have responded to this reality by creating, much later, their own foundations. A leading figure is the Bank of America Charitable Foundation. It is actually a corporate foundation. In other words, it works as a foundation belonging to a for-profit corporation. The main functions were non-profit activities and the promotion of the corporation`s image on the market<sup>19</sup>. One of the most important programs of the Bank of America Charitable Foundation is supporting people and families who have a stable workplace in buying a house<sup>20</sup>. According to the Foundation Center`s statistics, Bank of America Charitable Foundation is the third

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<sup>12</sup> <http://www.volkswagenstiftung.de/foundation/history.html?L=1>, viewed on the 18.08.2012.

<sup>13</sup> Matthew S. Clarke, *Legislative and Documentary History of the Bank of the United States: including the original Bank of North America*, compiled by M. St. Clair and D. A. Hall, Gales and Seaton, Washington, 1832, p. 2-13.

<sup>14</sup> Janet Wilson, *The Bank of North America and Pennsylvania Politics: 1781-1787*, p. 3, in „The Pennsylvania Magazine of History and Biography”, Vol. 66, No. 1/1942.

<sup>15</sup> <http://www2.fdic.gov/hsob/HSOBRpt.asp>, viewed on the 21.08.2012.

<sup>16</sup> <http://www.carnegiefoundation.org/about-us/foundation-history>, viewed on the 18.08.2012.

<sup>17</sup> <http://www.rockefellerfoundation.org/who-we-are/our-history/1913-1919>, viewed on the 18.08.2012.

<sup>18</sup> <http://www.fordfoundation.org/about-us/history/>, viewed on the 18.08.2012.

<sup>19</sup> Ginevra Cerrina Feroni, *Fondazioni e banche, modelli ed esperienze in Europa e negli Stati Uniti*, G. Giappiachelli Editore, Torino, 2011, p. 192.

<sup>20</sup> *Ibidem*, p. 194.

among the most generous investors by the end of fiscal year 2010 (197.954.354 USD)<sup>21</sup>.

In American legal system, corporate foundations are legal entities, tax exempted, with close ties to the parent corporation and, in the overwhelming majority of cases, it is entirely funded by the corporate in order to conduct charitable activities<sup>22</sup>.

The reasons for establishing such a foundation, except the founder's personal motivation, are diverse, but they circumscribe to the following advantages:

- Philanthropy, supporting art and culture;
- Tax incentives;
- Reputation in the community;
- Increased credibility and investors confidence in the services provided;
- Ensuring a steady flow of donations from the company;
- A positive image of the employer in the collective perception of employees<sup>23</sup>.

## II. Legal foundation of banks – controversy

The legal nature of the foundation of banking origins in Italy seems, at first sight, controversial. Originally, the savings institutions based on the foundation's pattern were public entities. Law no. 218/1990 had established the possibility of both savings banks and assimilated credit institutions, which were not collecting public savings, to convert or merge with other entities from the same type. Thus, there were created joint stock companies operating on the credit market. The management of the former deposit houses was transferred to these new entities, in order to fulfill the original purpose of public credit institutions<sup>24</sup>. The banking foundation managed the newly joint stock company, to the activity of which it was depending. As a result of the transformation, the foundation became the owner of the bank patrimony.

The controversy on foundations' legal nature remained actual due to the provisions of the Decree – Law no. 356/1990 according to which the new foundations had “full public and private legal capacity”.

The Law no. 461/1998, known as the Ciampi Law and Decree no. 153/1999 intended to solve this issue. According to Law no. 153/1999, article 2 “banking foundations are legal entities of private law, non-profit, with full autonomy and asset management. They have exclusively purposes of public interest and promote economic development in accordance with their statutes”.

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<sup>21</sup> <http://foundationcenter.org/findfunders/topfunders/top50giving.html>, viewed on the 19.08.2012.

<sup>22</sup> Christine M. Petrovits, *Corporate-Sponsored Foundations and Earnings Management*, p. 3, available online at [http://www.newyorkfed.org/research/conference/2004/governance\\_papers/Petrovits\\_Foundation\\_EM.pdf](http://www.newyorkfed.org/research/conference/2004/governance_papers/Petrovits_Foundation_EM.pdf), viewed on the 18.08.2012.

<sup>23</sup> David A. Shevlin, *A Legal Guide to Corporate Philanthropy*, in „The Exempt Organization Tax Review”, Vol. 55, No. 3/2007, p. 281-283.

<sup>24</sup> Giorgio Pagliari, *Le fondazioni bancarie - profili giuridici*, dott. A. Giuffrè Editore, Milan, 2004, p. 8.

However, the doctrine was reluctant to embrace the private nature of banking foundation. Some authors have argued that, in fact, the Law no. 218/1990 has operated a formal privatization<sup>25</sup> of public banking institutions.

The representatives of the Association of bank foundations and savings institutions in Italy - ACRI, taking into consideration the original objectives of the savings banks, stated that Amato reform had been a means of separating the financial system from charity, dichotomy that was already present in the case of savings banks<sup>26</sup>.

At first sight, the legal nature of current banking foundations seems to be undoubtedly non-profit, if we take into consideration the final destination of the finances. According to Decree no. 153/1999, their main sectors of intervention are:

- Family and related values, growth and training of young people, education, instruction and training, including the purchase of publications for schools, volunteering, philanthropy and charity, religion and spiritual development, assistance to the elderly, civil rights;
- Crime prevention and public safety, ensuring food and agricultural quality and local development, consumer protection, civil protection, public health, preventive medicine and rehabilitation, sports, prevention and recovering addicts, pathology and mental illness;
- Scientific and technological research, environmental protection and quality assurance;
- Arts and cultural assets<sup>27</sup>.

Therefore, the legal nature of the foundation of banking origins in Italy, at least formally, seems to have been clarified. Under Law no. 112/2002 foundations became private entities with a special legal regime. This interpretation is assumed even by the Italian Constitutional Court in the Decision no. 300 from 2003<sup>28</sup>.

Trying to include the banking foundation in the category of public or private institutions has shortcomings as the banking foundation nature is mixed. Regarding its civil features, it must be mentioned that the banking foundation is governed by the provisions of the Italian Civil Code<sup>29</sup>. On the other hand, both the means of drawing up and justifying the balance sheet and the accounting management are complied with the Civil Code<sup>30</sup>. Moreover, the decisions of the

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<sup>25</sup> Matteo Cosulich, *Le casse di risparmio e le fondazioni bancarie tra pubblico e privato, Due questioni di fine secolo*, dott. A. Giufree editore, Milano, 2002, p. 221; Giulio Panzanelli, *Le fondazioni bancarie*, G. Giappiachelli Editore, Torino, 2005, p. 148.

<sup>26</sup> [http://www.acri.it/3\\_fond/3\\_fond0002.asp](http://www.acri.it/3_fond/3_fond0002.asp), viewed on the 19.08.2012.

<sup>27</sup> Decree - Law no. 153/1999, art. 1 par. (1) lett. (c bis), published in the Official Gazette of Italy, no. 125/31.03.1999.

<sup>28</sup> The order is available on <http://www.cortecostituzionale.it/actionPronuncia.do>, viewed on the 21.08.2012.

<sup>29</sup> Giovanni Iudica, Paolo Zatti, *Language and Rules of Italian Private Law.. An Introduction*, Third edition, Casa editrice dott. Antonio Milani, Padova, 2010, p. 30.

<sup>30</sup> According to Decree - Law no. 153/1999, art. 9 par. (1) the foundation`s balance sheet is composed of the documents prescribed by art. 2423 Italian civil code.

foundation can be disputed according to civil procedure and not to administrative regulations.

In terms of the institutional bodies' composition, Law no. 153/1999, article 4 par. (4) lett. (G) provides that the persons belonging to the foundation's organizational triad (governing body, control and management) should act with professionalism and honor. The Italian legislator does not require the participation of the state in the life of the foundation. However, in practice, the appointment of the members of the governing bodies is the responsibility of public institutions. For example, Biella Foundation is managed by councilors appointed by the Church, the local government of the province, the local Chamber of commerce, industry and handicraftsmen. Members of the management body of Lombardy Foundation are also nominated. Therefore, the State has a significant role in deciding upon the composition of the foundation's management and control structures. Finally, it should be noted that the patrimony of the saving institutions based on foundation pattern was formed, as it was mentioned in the first part of this study, as a contribution of public entities or charitable institutions. Both had a public legal nature.

### III. Banking Foundation between banking and non-profit

In Italy there are 88 banking foundations, of which 82 were originally savings banks and 6 were public credit institutions<sup>31</sup>. Of these, only 70 foundations have a variable number of shares in the banks or in the joint stock companies.

As a result of the application of Law no. 218/1990, the control of public banks by the foundations was plenary<sup>32</sup>. Due to Ciampi Law, the power of the foundation has diminished. The influence of the foundation is diverse and it has its legal roots either in the agreement between the partners, or in the right to appoint the majority of directors or in holding most of the votes of the General Assembly or appointing or revoking the administrators only with its permission<sup>33</sup>.

For the nonprofit purposes, foundations of banking origins may invest assets in various domains. The revenues thus obtained are used in fulfilling the statutory objectives. The law prohibits the foundation to finance, provide or subsidize activities, directly or indirectly, to for-profit entities<sup>34</sup> or companies, except social cooperatives and instrumental companies. In accordance to the foundation purposes, it may operate in other sectors than those permitted only indirectly, throughout an instrumental company. The foundation is controlling the activity of the instrumental company either due to the number of shares held or based on the fact that the company belongs to the foundation<sup>35</sup>. Exceptionally, the

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<sup>31</sup> Pierpaolo Ferrari, cited work, p. 6.

<sup>32</sup> Roberto Bottiglia, *Le fondazioni bancarie - missione, ruolo istituzionale e partecipazione agli assetti proprietari del sistema creditizio*, Casa editrice dott. Antonio Milani, Padova, 2003, p. 325.

<sup>33</sup> Decree - Law no. 153/1999, art. (6) par. (3).

<sup>34</sup> In Italian legal system, the law no. admits the existence of *de facto* associations and therefore grants them with limited legal capacity, even though this entities do not have legal personality.

<sup>35</sup> Decree - Law no. 153/1999, art. (1) lett. (h).

law sets up a maximum of 15% of assets which can be invested in real estate, other than those held by the instrumental company<sup>36</sup>.

It is worth mentioning that the joint stock companies should not be confused with instrumental companies. The last ones are used as a means of achieving the goals of the foundation. Nevertheless, only the joint stock company and the banking foundation are the successors of the Italian savings banks.

Is the stock joint company independent from the foundation? In regard to who prepares and presents the company's balance sheet, the answer is negative. In other words, the foundation keeps both its balance sheet and that of the stock joint company.

However, Law no. 448/2001, art. 11 par. (7) provides the incompatibility between management and leadership positions in foundation and similar functions held in banks and financial institutions controlled by the foundation.

There is no doubt that in the historical and legal context in which Amato Law came into force, newly established foundations controlled the banking company. However, the report of A.C.R.I. for the year 2011 points out that only 14 banking foundations have more than 50% of the shares in banks<sup>37</sup>, which shows a decreasing participation in joint stock companies. This is also a big step towards the independence of stock joint company.

We witness, therefore, a strong tendency of separating the foundation from the joint stock company, in most cases. However, in some situations, the company is still depending on the foundation's management.

### Conclusions

All in all, both the foundation of banking origins and the joint stock company appeared on the Italian legal scene at the same time. On one hand, foundations that are shareholders control the company. This, inevitably, creates a strong bond. On the other hand, from the dividends, the foundation funds its non-profit purposes. However, the non-profit sector followed a different path from the banking system. A symbiosis of more than 20 years has been evolving naturally throughout the independence of the foundation.

In the U.S., financial institutions have established foundations that are, in most cases, entirely funded by the bank and which are active in non-profit sector.

In Romania, we can identify a legal entity similar to banking foundations. Still in a country where the demand for social and cultural support exceeds the objective capacity of the state to provide, the question arising is whether it would be appropriate to create such a legal figure? Ordinance no. 26/2000, article 15, par.

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<sup>36</sup> Art. 7 par. (3bis) Law no. 448/2001 published in the official Gazette of Italy no. 301/24.12.2001. Before the legal modification of Law no. 448/2001 by Decree – Law no. 78/2010, the admitted percentage was 10%.

<sup>37</sup> *Diciassettesimo rapporto sulle fondazioni di origine bancaria*, anno 2011, document available at [http://www.acri.it/5\\_edit/5\\_edit\\_files/pageflip/acri\\_17Rapp.asp?IDrivista=101](http://www.acri.it/5_edit/5_edit_files/pageflip/acri_17Rapp.asp?IDrivista=101), viewed on 24.08.2012.



(1) regarding associations and foundations, defines the foundation as “the legal entity created by one or more persons, on the basis of a legal act *inter vivos* or upon death, having a permanently and irrevocably heritage affected to achieving a goal of general interest or, where appropriate, communitarian”. Romanian legislation does not distinguish between natural or legal persons, so both can act as a founder. Therefore, we believe that under current regulations, there is no impediment for banks to establish foundations. Furthermore, we consider that this would be a great step towards the partial reduction of the state’s burden which is insignificantly shared and in too few sectors with legal entities without patrimonial purpose.

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