[Open Review of Management, Banking and Finance](https://openreviewmbf.org)

«They say things are happening at the border, but nobody knows which border» (Mark Strand)

Bank Recovery and Resolution: An Italian Point of View

by **Vittorio Santoro**

Abstract: The author examines the main legal aspects of the Single Resolution Mechanism as provided by the Directive no. 59 of 15 May 2014 and the Regulation no. 806 of 15 July 2014. After finding a definition tailored on the term "resolution", the author pays particular attention to some important aspects as: recovery plan, preventive measures, early intervention measures and the resolution. As regards the latter one, the author examines especially all resolution instruments like the "sale of business tool", the "bridge institution tool", the "asset separation tool" and the "bail-in tool" noting in particular the effects of the application of those tools on stakeholders and their impact on the Italian banking legal system. Finally, considering the drastic nature of the last tool, the author put in the light an important doctrinal debate, i.e. the compatibility of that tool (and more generally the provisions of the Directive) with the article 47 of the Italian Constitution.

1. The SRM (*Single Resolution Mechanism*), as the second pillar of the EU banking union, complements the first pillar, the SSM (*Single Supervisory Mechanism*)[1]. Agreement concerning the third pillar, an EU deposit guarantee system, is still lacking.

The SRM is regulated by two distinct but coordinated documents: 1) Directive no. 59 of 15 May 2014 (henceforth the "Directive"), which establishes a framework for the recovery and resolution of credit institutions and investment firms, and 2) Regulation no. 806 of 15 July 2014 (henceforth the "Regulation"), which establishes the rules and a single procedure for the resolution of credit institutions and some investment firms.

A brief terminological/conceptual remark should be made to start with: both the title and the text of the Directive and Regulation use the term "resolution" mechanisms. What does this mean? The term "resolution" expresses a linguistically obscure concept. Reference to an English dictionary does not help (this is the language in which the documents were drawn up and, above all, the language of international agreements involving the *Financial Stability Board*, in the context of which the idea and use of the term first arose). In English "resolution" means to "solve or settle a question", or to "adopt regular or secure way of…": in other words, find a way of overcoming (or preventing) banking crises – thus it is a generic term used to express many things at once. Returning to the Italian, "risoluzione" means to resolve a complicated and complex situation. In everyday language it is used to express "clarification, explanation"; in juridical language, "termination", but with reference to a contract. In medicine it means having overcome the acute phase of an illness. The word in Italian does not correspond to its use by the EU legislator, except if interpreted in the medical sense: the process of recovery following an illness, i.e. a crisis. On the other hand the term "risanamento", used in conjunction with "risoluzione", also recalls a medical term and corresponds to recovery.

The only help comes from the Directive itself, which in art. 2 (under "Definitions"), § 1, no. 1, states that "resolution" means "the application of a resolution tool (…) in order to achieve one or more of the resolution objectives". Aside from the tautological nature of this definition, the important aspect to understand is that, by referring to the subsequent arts. 37, § 9, and 31, § 2, the legislator intends to clarify that "resolution" designates the set of tools necessary to prevent and overcome a crisis. These tools have some characteristics that we are familiar with, as they recall those used in the extraordinary administration or compulsory winding-up of banks. However, it should immediately be pointed out that the framework drafted by the EU legislator is far more complex.

In any case, the Directive introduces minimum harmonisation rules that must be respected by all EU Member States in order to resolve and, to a certain extent, prevent crises involving banks and certain other intermediaries. Crisis management is entrusted (under art. 3, § 3, of the Directive) to the so-called "resolution authority", which must be a public administrative authority. This task can also be performed by national central banks (ministries, etc.). However, should the body also be entrusted with banking supervision, the offices charged with resolving the crisis must be operationally independent, to avoid conflicts of interest between supervisory functions. In particular, Member States must guarantee operative independence of the functions of resolution and supervision.

Nonetheless, regarding the eighteen countries in the eurozone and the other countries that adhere to the system voluntarily, the Regulation sets down the centralization of the decision-making process regarding resolution, entrusting it to a "Single Resolution Board" (hereafter "Board") established pursuant to art. 42 of the Regulation. This Board cooperates with the Council, Commission and with the national resolution authorities (art. 1 of the Regulation), within the framework of the single resolution mechanism. In the eurozone the Board will act as a national authority, but benefit from the collaboration – in other words use the staff and structures – of the designated authorities of each State. Regarding Italy, it is reasonable to presume that the designated authority will be Banca d'Italia but, given the requirement of independence between the function of supervision and that of "resolution" (art. 3, § 3, of the Directive), the central bank will have to at least organize a dedicated independent internal management. The Board will also manage the Single Resolution Fund[2], which will have a liquidity of 55 billion euros within ten years, with annual contributions from the institutions supervised amounting to 5.5 billion Euros. This fund should, first and foremost, constitute a deterrent against speculative behaviour in the credit and financial markets; secondly, it will ensure the uniform, and therefore pro-competitive, management of resources to ensure the stability of the system.

The EBA also plays a significant regulatory role in the prevention and resolution of banking and financial crises.

The Directive and Regulation apply to: banks established within the EU; financial institutions and entities established within the EU as subsidiaries of banks or investment firms; financial holding companies established within the EU; in some cases also the subsidiaries of entities established or located outside the EU (from hereon I will only refer to banks, but the regulations apply to all of these).

The purpose of both measures is to prevent bank insolvencies, or at least minimize the negative effects of insolvencies when they do occur, while preserving the functionality of the system, e.g. by guaranteeing liquidity, trust in solvency, guaranteed compliance in relation to the payment system: in short, stability. The EU legislator was prompted to take this kind of action to rectify the mistakes and shortcomings in the system, highlighted by the harsh lesson of the financial crisis, but also to encourage more virtuous behaviour among operators, in order to avoid the moral hazard that derives from the relative certainty that the State can be relied upon to help when a crisis arises.

Concerning the first matter, it should be noted that the legislator has placed the systemically important banks at the centre of attention. This begs the question of whether the other institutions are left to their own devices, thus suspending supervisory intervention concerning Italy, for example. Indeed, alarm bells have already been rung by the cooperative banks who, on 17 October 2013 before the 6th Standing Committee (Finance and Treasury) of the Italian Senate, expressed their concern that also "for local banks (…) the resolution measures in the event of a crisis will be decided by the SRB [in Brussels], in exactly the same way as for the systemically important banks under the supervision of the ECB. Analogously, the contributions of local banks will be paid directly into the European Resolution Fund, like those of the systemically important banks. Regarding the principle of proportionality, there is therefore a clear lack of coherence between the two mechanisms."

Concerning the second matter, it is important to underline that, in my opinion, the intention to prevent taxpayers' money from being used to save banks marks a drastic change for the Italian banking and finance system, which will imply a review of our regulations, even at the constitutional level, but I will come back to this later.

2. The Directive and Regulation work on two levels: the prevention of crises and crisis resolution, which implies or may imply the total or partial liquidation of the institution.

The first preventive measure takes the form of "recovery plans" that the supervised institutions themselves are required to prepare, under art. 5 § 1 of the Directive. As specified in the Directive, this is a governance arrangement that all credit and financial institutions are required to implement. The content of these plans is roughly outlined by Section A of the Annex to the Directive. However, while, on the one hand, art. 5 refers to the guidelines that the EBA will have to issue on this matter by 3 July 2015, on the other hand it provides two significant pieces of information: the plans will not be able to rely on public financial intervention, and referral to the central bank (rediscount, open market operations) will only be allowed as long as suitable assets are provided as collateral, according to parameters to be established – again – by the EBA (art. 5 § 4 and 10). The plans must be approved by the competent authorities: for Italy this means the European Central Bank. The latter will forward the plans to the resolution authority – in Italy's case the Board (when the SRM has been fully implemented in the eurozone) – so that it can identify "any actions that may have a negative impact on the institution's capacity for recovery". If gaps are found, the Board will make appropriate recommendations to the competent authority.

It is important to that the previsions of the recovery plan play a role, even when the conditions for the institution's subsequent resolution arise. In fact, in this case the resolution authority is required to take the measures included in the plan into account and apply them, unless it deems them insufficiently effective in comparison to other alternative solutions.

As can be seen, the system is a complex one, in which the EBA, competent authorities and resolution authorities play different roles. Greater simplicity would have also helped the supervisory bodies act more quickly to resolve problems emerging from crises.

3. What's more, it is not enough for the banks and other supervised institutions to prepare recovery plans: the resolution authority itself is required to draw up a preventive recovery plan, which it submits to the other supervisory authorities and the supervised institutions themselves (art. 15, § 1 of the Directive). Moreover, if it identifies impediments to the achievement of the plan, it enjoys significant powers of intervention, which ultimately censure the management choices of the institutions supervised. In this context, art. 17, § 5 of the Directive states, amongst other things, that supervised institutions can be required to limit their exposures; to divest themselves of, limit or suspend specific activities or business lines; to change the institution or group's management structure; or to issue financial instruments in response to asset requirements.

The above list is both partial and generic. Nonetheless, it already hints at the broad interventional authority that I feel constitutes a return to the past in many ways (at least in relation to Italy's experience), or in other words a large scale return to interventional supervision. On the other hand, although the supervisory authorities have always exercised moral suasion to induce banks and other supervised institutions to accept more suitable solutions to ensure stability, even when formally lacking the abovementioned powers, it is of no little importance when the legislator, and this time the EU legislator, endows an authority with such broad formal powers. It remains to be seen, in the light of effective practice, how "invasive" these powers will be; for now suffice it to observe that the exercise of these powers does not need to be justified by the onset of a crisis, nor the imminent risk of a crisis breaking out, but by the fact that this bank or that institution is deemed unfit to face a hypothetical crisis.

4. In a crescendo of interventional powers, art. 27 of the Directive provides for "early intervention measures", which range from requesting the implementation of mechanisms foreseen by the institution in its recovery plan to more drastic measures, such as the removal of upper management and administrators, based on conditions that seem to me to closely coincide with those of extraordinary administration in Italy (including the condition of administrative irregularities and the violation of laws or regulatory or statutory provisions) (art. 28).

However, in contrast to extraordinary administration in Italy, the appointment of a temporary administrator is only a possibility, to be implemented in the worst cases and with respect for the principle of proportionality. Another, not insignificant, difference is that the temporary administrator can either substitute or work alongside the institution's own administrators (art. 29).

Among the early intervention measures another worth mentioning is the resolution authority's power to write down capital instruments or convert them into shares or other relevant capital instruments (art. 59 of the Directive). In reality these measures have a twofold purpose, as they can be used both with a pending resolution procedure (which we shall come back to later), or independently and prior to one, in the presence of the conditions provided for under art. 59. This occurs, for example, when the institution's economic situation is unsustainable, or public financial aid is necessary.

Thus, this measure can be adopted either preventively or during a resolution procedure and, in either case, adheres to the principle of the internationalization of losses. These must be incurred, first and foremost, by the holders of tier 1 primary capital instruments, then, in order of priority, by holders of additional tier 1 instruments and, following on, holders of tier 2 instruments. The latter instruments in turn can be either written down or converted into tier 1 instruments.

5. This brings us, at last, to the most serious hypothesis for the implementation of the resolution procedure regulated by Title IV (arts. 31 et seq.) of the Directive.

In this context, the EU legislator first specifies the objectives of "resolution". In reality it seems to me that the identification of the objectives goes beyond resolution alone and constitutes a general justification of the whole Directive; this impression is reinforced by a reading of the initial recitals of the Directive.

In any case, the objectives are listed in art. 31, as follows:

1. a) to ensure the continuity of critical functions;
2. b) to avoid significant adverse effects on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

(c) to protect public funds by minimising reliance on extraordinary public financial support;

(d) to protect depositors covered by Directive 94/19/EU and investors covered by Directive 97/9/EC;

(e) to protect client funds and client assets.

The EU legislator does not explicitly state whether these objectives are all to be considered on the same level or whether, instead, they are listed according to a precise order of priority. The second hypothesis seems more plausible to me.

Note, in fact, that the objectives a) and b) complement each other and represent the ultimate reason for the legislation: preserving the functioning and stability of the credit/financial system is crucial. This confirms a constant and traditional aim of credit and financial systems in developed countries. To achieve it, they have squandered immense resources during periods of crisis.

The innovation lies, instead, in the fact that the EU legislator has decided that a limit to public spending for this type of intervention must be set[3].

Lastly, the protection of covered deposits is guaranteed within the limit of the deposit guarantee scheme's capacity to intervene and, in any case, will not weigh on public finances but on the schemes themselves. The protection of "client funds and client assets" will be guaranteed only if they are separate funds from those of the institution under resolution, while transferred funds, with the obligation of repayment, run the risk (as we shall clarify later) of being decimated.

In fulfilling its resolution-related tasks, the authority must comply with a series of principles laid down under art. 34 of the Directive, i.e.:

(a) the shareholders of the institution under resolution bear first losses;

(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings…;

(c) management body and senior management of the institution under resolution are replaced, except in those cases when the retention of the management body and senior management, in whole or in part, as appropriate to the circumstances, is considered to be necessary for the achievement of the resolution objectives;

(d) management body and senior management of the institution under resolution shall provide all necessary assistance for the achievement of the resolution objectives;

(e) natural and legal persons are made liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the institution;

(f) except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;

(g) no creditor shall incur greater losses than would have been incurred if the institution or entity …. had been wound up under normal insolvency proceedings in accordance with the safeguards…;

(h) covered deposits are fully protected;

The principles listed above under letters *a*), *b*), *f*), *g*) and *h*) express the idea, underlying the whole Directive, that losses must be internalized, or in other words borne by the institution under resolution. At the same time, they constitute the other aspect of the key objective, as mentioned above, according to which public funds are to be safeguarded. However, from the point of view of recovery, penalization of the institution through its shareholders and holders of "quasi capital" alone may clearly not be sufficient: it may also be necessary to penalize the institution's creditors, financers, providers and employees. In relation to these figures it is no longer correct to speak of internalization. On the other hand, even if penalized, these categories, with the exception of depositors protected for up to a hundred thousand euros per deposit, will not suffer losses greater "than would have been incurred if the institution […] had been wound up under normal insolvency proceedings". The rule seems to be clear and provide a sufficient level of protection, but remains difficult to apply in practice, given the evident difference between real liquidation and the preventive simulation of liquidation. This difference will certainly lead to numerous disputes, which will impact the financial statement of the bridge institution and of any end purchaser of the assets and liabilities of the institution under resolution. The result will be diminished legal and bookkeeping clarity and inefficiency in the use of this tool.

Letters *c*), *d*) and *e*), in turn, penalize the administrators and managers. This choice is correct and appropriate, but will require the adaptation of domestic systems to ensure the existence of relevant practical consequences in terms of deterrents to bad behaviour or a too-great propensity for risk on the part of administrators and other managers[4].

6. The condition for resolution is failure or the imminent risk of failure; this means a situation in which either: 1) the bank violates, or is likely to violate the requirements for maintaining its authorization; 2) its assets are, or are likely to be in the near future, less than its liabilities; 3) it is unable, or is likely to be unable in the near future, to be able to pay its debts as they fall due; 4) it needs extraordinary public financial aid[5]. This list reveals first that the concept of failure includes, but does not coincide, with the state of insolvency, and second, for the same reason, that failure as an objective condition for resolution has some aspects in common with the conditions for the compulsory administrative liquidation of banks.

In any case, both the supervisory authority and the resolution authority have the task of ascertaining the state of failure.

When the Directive is implemented, the appropriateness of the state of insolvency being independently ascertained by a judicial authority, as traditionally occurs in Italy in the case of compulsory liquidation, will need to be reassessed. It seems to me that it would be better to accept this independent assessment, given the consequences connected to this judicial assessment in the Italian insolvency system, especially in relation to criminal proceedings and the application of revocatory measures. This solution is not only appropriate but is also supported by clear indications deriving from the Directive. It is worth reiterating that art. 34 of the Directive states that natural persons (first of all administrators and other holders of functions within the institutional organization) will be held liable in relation to their responsibility for the failure of the institution, in compliance with the law of their Member State, under civil or, what interests us here, *criminal* law (my italics).

Article 34 also establishes that no creditor should incur losses greater than he would have if the bank had been wound up under normal insolvency proceedings. To achieve this result it is essential to be able to apply revocatory measures where the conditions arise.

In any case, as the resolution procedure involves multiple and contrasting interests, the EU legislator has deemed it appropriate that the resolution authority, before initiating resolution proceedings (and equally before beginning to write down the value of capital instruments, or before converting credit instruments into capital), must ensure that a person independent of any public authority and of the institution supervised carries out "a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity" (art. 36, § 1 of the Directive). The intention of ensuring that third party interests are not unjustifiably damaged by public "resolution" measures is commendable.

In reality the doubt remains that the EU legislator has provided an excessive level of protection for civil rights. He will have done so, on the one hand, without ensuring the independence of judgments, given that the independent assessors will nonetheless be designated by the "resolution" authority, and, on the other hand, while introducing an element of delay and complexity to a procedure that in itself already involves too many actors on the stage. Indeed, having realized this problem, the legislator himself, in the subsequent paragraph of the same article (36), affirms that the resolution authorities themselves may carry out a provisional valuation.

The resolution authorities, under art. 35, § 1 of the Directive, have the power to appoint a special manager to substitute the management body of the institution under resolution. The initial macroscopic difference from Italy's compulsory liquidation, in which the appointment of special commissioners is a necessary step (art. 81 Consolidated Banking Law – in Italian "TUB"), is evident. At first glance the actions of this special manager would seem to be more bound by the instructions of the resolution authorities than those of Italy's special commissioners are bound by the instructions of the Banca d'Italia.

This impression is not based on a reading of the provisions, as the text of art. 35, § 4 is very similar to that of art. 84, par. 3 of the TUB. The first states that "Resolution authorities may set limits to the action of a special manager or require that certain acts of the special manager be subject to the resolution authority's prior consent", while the second states "The Banca d'Italia may issue instructions for the execution of the procedure and establish that some categories of operations or acts require its authorization…"

It is, instead, based on the consideration that the resolution authorities are the only ones with the powers necessary to apply the so-called resolution instruments, under arts. 37 et seq. of the Directive, while the tasks of the special manager are mainly related to implementation (art. 35, § 3 of the Directive).

7. The resolution tools available to the resolution authorities in resolving crises are essentially four. They are in part similar to those already known in Italy, in part completely new. Before describing them, it should be added that, in the eurozone, the Board also has access to the Single Resolution Fund. While this is not a fund for bailing out banks, as set up to "ensure financial stability and not absorb losses or provide capital to the institution under resolution", under exceptional circumstances and the condition that the bank's internal resources are used first (totalling no less than eight percent of the bank's liabilities and own funds), the Board can use the Fund for salvage purposes, and therefore as an accompanying measure alongside resolution tools.

In any case, the latter are:

1) the "sale of business tool" (art. 38 of the Directive).

2) the "bridge institution tool" (art. 40 of the Directive).

3) the "asset separation tool" (art. 42 of the Directive).

4) the "bail-in tool" (arts. 43 et seq. of the Directive).

1) The sale of business tool can be applied in two ways. The first is well known in the Italian banking system, as it broadly coincides with the so-called sale of assets and liabilities; the second consists in the direct sale of shares and other instruments of ownership which, evidently, belong to shareholders and the other holders of the right of ownership.

Effectively implying the expropriation of holders' instruments, this is justified by the abovementioned principle that shareholders incur the first losses, although their sacrifice – as stated in the previous paragraph – must be legitimized in advance by a transparent valuation and by public interest in avoiding normal insolvency proceedings, in order to ensure the continuous functioning of the credit and financial market. Some commentators have claimed that the Italian system does not grant such broad powers, but it is worth recalling that Italy's anti-Mafia legislation (see, in particular, art. 41, par. 6 of the anti-Mafia code[6]) grants broad powers regarding the management of company holdings confiscated from organized crime.

The legitimacy of this authoritative intervention and the expropriation of property rights could be questioned in relation to the Convention on Human Rights, which Italy (like the other EU Member States) adheres to. Although external to the European system, regarding pertinent aspects this Convention constitutes its juridical basis. In this context, it should be recalled that art. 1 of the First Additional Protocol to the Convention on Human Rights states, amongst other things, that "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest …". It is too early to be able to refer to the case-law of the Court of Human Rights, which is the competent body for the application of the provision; however, it is reasonable to presume that the Court will argue in the same way as it did in the Grainger case, when a Northern Rock shareholder complained of having his shares unjustifiably expropriated under the UK's special legislation issued to save the bank in question.

In the Grainger case the Court did not, in principle, rule against the expropriation of shares, but it interpreted the abovementioned provision as a reasonable compromise between the right to possession and public interest. In fact, the judges stated that: "The Court observes that it is well established in its case-law that any interference with the right to the peaceful enjoyment of possessions must, indeed, strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (…) there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure applied by the State".

In reality the Court says more than this, as it deliberately does not enter into the merits of the choice between the private interest and public interest, in consideration of the following circumstances: 1) due to their more intimate knowledge of the situation "the national authorities are in principle better placed than the international judge to appreciate what is in the public interest"; 2) a certain level of discretion must also be granted to national authorities regarding the appraisal of public interest, which can be assessed considering "measures of economic reform or measures designed to achieve greater social justice", up to the point of justifying the reimbursement of shares for less than their full market value.

Lastly, the Court observed that public intervention alone prevented Northern Rock from failing: as the aim of this bailout was to protect the stability of the UK's financial system, the shareholders could not expect to benefit from such support without also bearing the negative consequences (for them) of the government's help.

It is therefore reasonable to presume that European norms would also pass the scrutiny of the Court of Human Rights, as those of the UK system have.

2) The bridge institution, instead, is an entirely or partly publicly owned temporary body, set up to administrate the shares and "other instruments of ownership" of a bank in a situation of crisis. To give effect to this mechanism, the resolution authority has the power to transfer to the bridge institution both shares and other instruments of ownership issued by one or more institutions under resolution, or all or part of the assets, rights and liabilities of one or more institutions under resolution.

As this tool is temporary, the bridge institution ceases to exist, for example, following a merger, or the sale of all shares and other instruments of ownership to a third party, as well as following (insolvency) liquidation.

3) The asset separation tool permits the resolution authority to transfer the assets, rights and liabilities of an institution under resolution or bridge institution to one or more management vehicles.

This transfer is conducted through a vehicle, better known in some countries as a "bad bank". This has already been experimented in Italy, in order to manage the bad assets of certain institutions: the bailout of the Banco di Napoli in the 1990s is a case in point.

4) The bail-in tool is the most innovative, to the extent that the Directive will be adopted from 1 January 2015, but the provisions adopted to comply with the bail-in regulations will be applicable "at the latest" (!) from 1 January 2016 (art. 130 of the Directive). This tool was experimented during the recent banking system crisis in Cyprus.

The bail-in tool lets the shareholders and some categories of the failing institution's creditors to incur appropriate losses and, in any case, makes them liable for an appropriate part of the costs of failure: the same two considerations regarding the legitimacy of the "sale of business" tool apply here too. To this end the resolution authority has the power to reduce, or even cancel out, the value of capital instruments, as well as the power to write down the value of credit or even convert it into capital instruments (art. 63 of the Directive). As a consequence, the institution under resolution should make a full recovery and meet the requirements for authorization to operate.

The example of Cyprus shows that the bail-in tool works when the majority of the social costs are offloaded outside the economy of the country in question: in the case of Cyprus, in fact, the costs were borne by rich investors from foreign countries (non-EU) – mostly Russian citizens. The result was so drastic that it triggered a diplomatic row with Russia. The efficacy of this tool if used in a larger country, where the savings undergoing the haircut are mainly those of nationals, is uncertain.

Considering its drastic nature, the compatibility of this tool (and more generally the provisions of the Directive) with art. 47[7]of the Italian Constitution is subject to debate.

I would like to mention the recent opinions of two diverging but authoritative scholars regarding art. 47 of the Constitution. One (Spada) observes that the norm does not intend "to protect «anonymous» investors from the risk of investment (which would lead to the constitutionally unacceptable outcome of socializing risks undertaken in the exercise of the individual freedom of economic initiative!)" (p.212); thus, based on Spada's interpretation, this provision has the sole purpose of favouring informed choices on the part of investors and ensuring the fairness of intermediaries. The other scholar (Vella) maintains that operators now have an obligation of "responsibility" in relation to the client "to the extent, perhaps forcing the matter a little, of [prompting] a review of the constitutional law in order to qualify «public savings» as an «inviolable right»" (p. 220).

The contrast between these two opinions is mitigated if we maintain, as I believe we should, that art. 47 of the Constitution, precisely because it refers to "savings in all forms", allows for differentiated forms of protection regarding those savings: this could cover naïve saving, typically by (small) depositors in a bank, whose right to the reimbursement of funds is inviolable; while other increasingly risky, and therefore more lucrative, forms of investment would enjoy a lower level of protection, aimed more at what Spada calls boosting investor awareness. We may add the observation that the contents of art. 81 of the Italian Constitution have been substituted, so it now reads: "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle" and that this article constitutionally justifies the aim laid down by art. 31, § 2, letter c) (and considering art. 45) of Directive no. 59/2014, intended to protect public funds by reducing the recourse to public finances to bailout failing banks to a minimum. We may even ask whether an inversion of priorities, exactly in Spada's sense, has already been constitutionalized.

In principle, therefore, the European regulations could be considered to comply with the Italian constitutional system, as long as they rigorously safeguard against naïve investment (but can the protection of deposits only up to a hundred thousand euros really be called a rigorous safeguard?). They must, in any case, provide a minimum level of guarantee, such as through transparency regulations, even regarding the riskiest forms of investment.

* This paper has been written within the research project "Financial Markets Regulation and Corporate Governance", financed by the Italian Department for University and Research.

[1] The SSM attributed supervisory powers over all banks in the euro area to the ECB. In practice the ECB directly supervises the largest banks, which are deemed systemically important (approximately one hundred and twenty), while national authorities will be responsible for the direct supervision of other banks, although ultimate responsibility lies with the ECB.

[2] See the Regulation Report, p. 14 et seq.

[3] In fact this rule was followed to the letter in the Scandinavian countries during the 1990s crisis.

[4] On this point see also the following paragraph.

[5] In contrast, a lack of liquidity does not, in itself, constitute failure.

[6] Legislative Decree no. 159 of 6 September 2011.

[7] 1. The Republic encourages and safeguards savings in all forms. It regulates, co-ordinates and oversees the operation of credit.

2. The Republic promotes house and farm ownership and direct and indirect shareholding in the main national enterprises through the use of private savings.

Author

Vittorio Santoro is Full professor of Commercial Law in the University of Siena. He is member of the Italian banking A.D.R. "Arbitro Bancario Finanziario". He is in the Editorial Board of "Diritto della banca e del mercato finanziario" and in the Editorial Advisory Board of "Banca, borsa e titoli di

credito". He is member of the Scientific Commitee of "Banca, Impresa e società" and of "Ianus".

This entry was posted on 15/02/2015 by openreviewmanagementbankingandfinance in Banking and tagged Banks, recovery, resolution, SRM, SSM.
https://wp.me/p5r4Oe-1Y
Next post
Create a free website or blog at WordPress.com.