The second pillar of the Banking Union

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Abstract

Il presente contributo indaga il secondo pilastro dell'Unione Bancaria – il Meccanismo di risoluzione unico – e i suoi elementi, il Comitato unico e il Fondo di risoluzione unico. Con riferimento al primo, si affronta la questione della sua base legale, sorta durante la fase costitutiva, mentre con riferimento al secondo l'attenzione si concentra sul processo costitutivo, recentemente avviato e ancora *in fieri*. Si analizza inoltre la situazione del Fondo di risoluzione nazionale – oggi divenuto compartimento – in seguito al suo intervento nell'ambito della risoluzione delle quattro banche. È infine effettuata una disamina del processo decisionale del Meccanismo di risoluzione unico e del rapporto tra aiuti di Stato e Fondo unico.

1. The Banking Union project and its second pillar: the *Single resolution Mechanism* (*SRM*). With Directive no. 2014/59/EU (so-called *Bank Recovery and Resolution Directive*, *BRRD*) of 15 May 2014 the legislations of all European Union's Countries have been harmonised, in order to arrange the path for that transition – that already took place in the United States in 2008, with the *Dodd Frank Act* - «*from bail-out to bail-in*», borrowing the title of a famous article published on *The Economist*[1]. The outbreak in the United States of the 2007 subprime crisis produced the failure of some of the most important intermediaries. The historic decision made by the American authorities to let *Lehman Brothers* fail gave birth to a new season of the managing of the

[1] The article, titled «*From bail-out to bail-in*» and published on *The Economist* of the 28 January 2010, is signed by the then *CEO* of the investment bank *Credit Suisse*, Paul Calello.

banking crisis: the unsustainability of the costs of the taxpayer-funded bail-outs (better known as *bail-outs*) became undeniable causing, amongst the other things, an improper socialisation of the crisis' costs and a growth of the moral hazard of the intermediaries.

The *BRRD* required Member States to implement the new rules on the managing of the banking crisis: amongst these rules is worth mentioning the introduction of the new resolution procedure. Furthermore, the Directive required the setting up, in each Member State, of bank resolution funds, which have the task to provide financial support to the resolution tools.

Two months after the issuance of the Directive, Regulation (EU) no. 806/2014 of 15 July 2014 (so-called *Single resolution Mechanism* Regulation, Srm Reg.) was adopted: therefore, the second pillar of that ambitious project known as Banking Union was built. The single resolution mechanism has to be considered together with the structure previously introduced by Regulation (EU) no. 1024/2013 of 15 October 2013 (so-called *Single supervisory Mechanism* Regulation, Ssm Reg.), which established in the euro area a single supervisory mechanism (*Ssm*) managed by the ECB, in cooperation with the national supervisory authorities[2] and which represents the first pillar of the Banking Union. The framework is completed by a third pillar, the «*European Deposit Insurance Scheme* (*EDIS*)», not completed yet: as of today it only exists the harmonisation of the national legislations achieved with Directive no. 2014/49 (EU) of 16 April 2014, recently implemented in Italy with Legislative Decree no. 30/2016[3].

The Srm Regulation – as the one on the *Single supervisory Mechanism* –is applicable only to the Eurozone, although, as the latter, it

[2] According to this framework, the ECB is entrusted with the direct supervision of the so-called *more significant banks*, namely those that, on the basis of some elements (*i.e.* dimension, importance for the economic system of the European Union or for that of the Member State, relevance of the cross-border activities) shall be deemed to be "significant". On the other side, the national authorities are entrusted with the supervision on all the other banks, even though the ECB can always take the task up when specific conditions are met.

[3] In November 2015 the European Commission proposed a Regulation, but the proposal is still under discussion.

envisages an opt-in possibility for the non-euro area countries[4]. The opportunity of two parallel tracks, for both the supervision and the resolution, with the concentration of both functions, had already been underlined in 2012 by the Report of the then President of the European Council Herman Van Rompuy, «*Towards a Genuine Economic And Monetary Union*»[5]. In fact, once that the ECB had been entrusted with the supervision of the intermediaries of the euro area countries – at least of those more significant – a similar concentration was deemed as being necessary also with regard to the resolution.

Therefore, a Single resolution authority - the *Single Resolution Board* (*SRB*) – and a common Fund – the *Single Resolution Fund* (*SRF*) – were set up for the Eurozone.

One of the central issues that the regulators had to face when building the single resolution mechanism was that of its legal basis. The same problem did not arise with reference to the assignment to the ECB of the supervisory functions that took place with the Ssm Regulation: article 127 (6) TFEU in fact states that «*the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions […]*».

The same cannot be said with regard to the resolution tasks, because of the lack of a provision similar to Article 127 (6) TFEU. Therefore it has been decided – with a controversial decision[6] - to build the new single resolution

[4] Regulation no. 1024/2013 ("Ssm Reg."), in fact, envisages the possibility for non-euro area countries to voluntary join the mechanism (so-called "opt-in"). Article 2 Ssm Reg. defines "participating Member State" as a «Member State whose currency is the euro or a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7». Article 7 provides that the ECB and the national competent authority may establish a close cooperation by means of close cooperation agreements in accordance to this article. Article 4 of Srm Reg. states that «Participating Member States within the meaning of Article 2 of Regulation 1024/2013 shall be considered to be participating Member States for the purposes of this Regulation»: it follows that the scopes of the two Regulations are the same.

[5] The complete text of the report may be found at the following web address: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf

[6] Already in 2013, the German Ministry of Finance Schäuble, in a letter published on the *Financial Times* titled «*Banking union must be built on firm foundations*», had underlined his

mechanism on Article 114 TFEU, which empowers the European Parliament and the Council, after consulting the Economic and Social Committee, to adopt the measures for the approximation of the Member States' provisions in order to protect the internal market.

The legislation of the Regulation integrates, for the Eurozone, that of harmonisation provided by the *BRRD*, which, as known, introduced a new procedure for the banking crisis' managing: the resolution. This procedure may be defined as an insolvency/restructuring procedure (GARDELLA 2015) aimed at, among the other things, ensuring the continuity of the institution's critical financial and economic functions[7]. The resolution is triggered when some specific circumstances are met[8] and it includes a structured toolkit: the *sale of business*, the *bridge bank*, the *asset separation tool* and the *bail-in*. Especially the latter, by empowering the *Single resolution Board* (on which see paragraph 2) to recapitalize the institution under resolution through the write down of the capital instruments and/or the write down or conversion into equity of the unsecured debts, introduces a model based on the bail-in of the banks and perfectly embodies the overcoming of the *bail-out* model.

1.1 The public interventions in the new framework. With the introduction of the *BRRD* first and of Srm Reg. after, the spaces for a public intervention in the context of banking crisis have been overwhelmingly reduced. The forms of public intervention allowed are essentially linked to the need to guarantee the financial stability when systemic crisis take place. Consequently, it is admitted – under strict conditions[9] - the activation of the so-called

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perplexities on the setting up of a *Srm* without a previous amendment of the Treaties, stressing that «*while today's EU treaties provide adequate foundation for the new supervisor and for a single resolution mechanism, they do not suffice to anchor beyond doubt a new and strong central resolution authority*».

[7] See Article14 (2) (a) Srm Reg.

[8] Pursuant to Article 18 Srm Reg., in order to trigger the resolution procedure the following conditions need to be met: (i) the entity is failing or is likely to fail; (ii) there is no reasonable prospect that any alternative measure for the entity would prevent its failure within a reasonable timeframe; (iii) the resolution is necessary in the public interest.

[9]Among the various conditions that need to be met, it is worth mentioning: the previous contribution of the stockholders and the creditors of the entity through a loss absorption and a recapitalisation of at least 8% of the total liabilities of the entity as calculated at the moment of

“government stabilisation tools”: essentially the public equity support tool and the temporary public ownership tool.

Another form of public intervention is that of Article 18 (4) Srm Reg.[10]. One of the conditions for triggering the resolution is the failure or the risk of failure (see footnote no. 8) of an entity. Among the elements that suggest the existence of a failure or of its risk it is included the circumstance that an extraordinary public financial support is required. Therefore the default rule is that anytime the entity needs this kind of support, it has to be deemed as failing or likely to fail.

This notwithstanding, the same article envisages some exceptions to this rule. This is the case when the public support is granted in order to remedy to a «serious disturbance in the economy of a Member State and preserve financial stability» and takes any of the following form: (i) a State guarantee to back liquidity facilities provided by central banks in accordance with the central banks’ conditions (that is to say, in order to guarantee the so-called Emergency liquidity assistance - *ELA*); (ii) a State guarantee of newly issued liabilities; or (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity. This last form of support is activated in order to face capital shortfalls established in tests such as the stress tests and it is consequently designed to carry out a *precautionary recapitalisation*.

These forms of public interventions – conditioned to the authorisation pursuant to State aid rules - are in any case limited solely to the solvent entities.

A first application of these instruments took recently place in Italy, with Legislative Decree no. 237 of 23 December 2016. The decree was issued in order to face the difficulties of some Italian entities, including Monte dei Paschi di Siena[11].

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the resolution; and the prior or final approval under the European Union State aid framework (see Article 37 (10) *BRRD*).

[10] The provision corresponds to that of Article 32(4) *BRRD*.

[11] The stress test held in the last July by the European Banking Authority showed the risk of a severe impact on the capital of Monte dei Paschi of an adverse scenario, under which, according to the results of the test, in 2018 might be registered a -2,2% CET1.

To this purpose it has firstly been authorised the concession, until the 30 June 2017, of State guarantees of newly liabilities issued by Italian banks[12], although only after the previous favourable decision of the European Commission[13].

It has further been allowed the State irrevocable guarantee in order to integrate the collateral provided by Italian banks for the guarantee of the *ELA* granted to them by the Bank of Italy[14].

It is eventually provided the possibility for the Italian Ministry of the Economy and Finance to subscribe for or purchase, within the 31 December 2017, the shares issued by Italian banks or by Italian companies holding bank groups[15]: in this case the intervention of the State may be required by an entity that has the need to strengthen its capital after that stress tests showed adverse scenarios.

Together with Legislative Decree no. 183/2015 (which was eventually converted into Law no. 208/2015, best known as «legge di stabilità 2016») concerning the resolution of four Italian banks started the last year (on which see paragraph 3.2), Legislative Decree no. 237/2016, represents – even though with reference to the aspect of the extraordinary public financial support – another case of application of the new framework in Italy.

2. A single resolution Authority: the *Single resolution Board* and the issue of its legal basis. The first problem that arose during the setting up of a single resolution authority was that of the subject that should be entrusted with the new powers: that is to say, had a new subject to be built or should the powers be conferred to an existing one?

Shortly after the evaluation of the possibility of their conferral to the EBA,

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The Legislative Decree was recently converted into law with some amendments by Law no. 15 of the 17 February 2017.

[12] The liabilities have to satisfy all the features listed in Article 2 Legislative Decree no. 237/2016, such as, for instance, an issuing date subsequent to that of the entry into force of the decree; the repayment in a lump sum and a fixed interest rate.

[13] See Articles 1 and following Legislative Decree no. 237/2016.

[14] See Articles 10 and following Legislative Decree no. 237/2016.

[15] See Articles 13 and following Legislative Decree no. 237/2016.

to the ESMA and to the Commission and after a first proposal according to which they were to be conferred to the ECB (BOCCUZZI 2015) it has been decided to set an *ad hoc* subject up; a new subject which would have acquired the legal form of a "European Union agency[16]".

Consequently it emerged the problem of the legal basis that had to be used in order to build this new subject[17]. It has been seen (see paragraph 1) that the single resolution mechanism is based on Article 114 TFEU: therefore the single resolution authority had to be built on that legal basis too. But according to many, this would have been in contrast with the case law of the Court of Justice and, more specifically, with the so-called *Meroni doctrine*[18]. According to this jurisprudence– which had a huge success and still today exerts a powerful influence, although less than it used to do in the past – it is incompatible with the Treaties the attribution to organisms not envisaged in the Treaties - *sub specie* agencies – of responsibilities that include the exercise of wide discretional powers, on the base of the more general principle according to which an Institution cannot delegate to another subject higher powers than those conferred to the Institution itself.

The size of the powers attributed to the *SRB* seemed to be conflicting with this orientation. However, a more recent judgment, significantly defined as «*mellowing Meroni*» (PELKMAS, SIMONCINI 2014), contributed to redefine the subject, partially correcting the historical leading case *Meroni*.

[16] The agencies may be defined – as reported by the institutional website of the European Union - as entities which «*have been set up by the EU to perform technical and scientific tasks that help the EU institutions implement policies and take decisions*». They are set up through acts of secondary legislation and are entrusted with very specific tasks.
Today there are many agencies spread all over Europe carrying out various tasks (relating, for instance, to the environment, fishing, security, defence). Among the most important agencies, it is worth mentioning the EBA (the European Banking Authority) and the ESMA (the European Securities and Markets Authority).

[17] The problem of the European agencies is the lack in the Treaties of a provision which specifically deals with their setting up, so that traditionally it has been made reference to Article 352 TFEU (concerning the so-called "implicit powers" or, with another incisive expression, the "flexibility clause"). However, it was underlined that not always the building of European agencies followed this path. On the contrary, it has been ubiquitous for the building process to be grounded on Article 114 TFEU (TRIDIMAS 2009)

[18] See 9-56 *MERONI vs. ALTA AUTORITÁ, Court of Justice, 13 June 1958*.

It is the judgment[19] in which the United Kingdom weakened the powers[20] - based on Article 114 TFEU – of the *ESMA*. For what is relevant here, the Court of Justice established that the conferral of powers – powers that, in this specific case, could only be used under "exceptional circumstances"- to subjects not envisaged in the Treaties, ought to be considered legitimate insofar as the powers are « *precisely delineated and amenable to judicial review*».

This notwithstanding, the *Meroni doctrine* still exists (FERRAN 2014) and is still applicable, although in a more moderate version: this requires one to raise the question as to whether or not the single resolution authority lies on a safe legal basis, above all with regard to the wide powers conferred to it. A great part of the answer depends, however, on the degree of intensity that the jurisdictional control on these powers will have and on how precisely they have been defined (FERRAN 2014) [21].

The Single resolution Board (or simply, the Board) – provided with legal personality[22] - is composed of a president, four executive members and a member appointed by each participating Member State and which represents their national resolution authorities[23]. The Board may meet in plenary or executive session. During the former session the general decisions are adopted and the general activities are carried out (*e.g.* adoption of the Board's annual work program for the following year; adoption and monitoring of the annual budget of the Board; decision on the use of the Fund, if its intervention is above the threshold of EUR 5 billion; always with reference to the Fund, it decides on the need to raise extraordinary *ex post* contributions, on the voluntary borrowing between financing arrangements, on alternative financing means and on the mutualisation of national financing arrangements). On the other hand, during

[19] Court of Justice, 22 January 2014, United Kingdom vs. Parliament and Council, C-270/12

[20] The specific case concerned the power of *ESMA*, under Article 28 Reg. no. 236/2012, to prohibit short selling activities under exceptional circumstances.

[21] For a deep analysis of this issue, see ZAVVOS G.S., KALTSOUNI S., (2014) "*The Single Resolution Mechanism in the European Banking Union: legal foundation, governance structure and financing"* in HAENTJENS M., WESSELS B. (edited by), (2015) "*Research Handbook on Crisis Management in the Banking Sector", Edward Elgar Publishing Ltd, Cheltenham, UK*.

[22] Article 42 (1) Srm Reg.

[23] Article 43 (1) Srm Reg.

the executive sessions are taken the decisions concerning the management of the resolution: for example, the preparation, evaluation and approval of the resolution plans of the entities that have to be considered "significant" pursuant to *Ssm* Regulation and those of the entities for which the ECB took the supervision up; or the determination, with reference to these entities, of the minimum requirement for own funds and eligible liabilities[24].

The Board also owns the Single resolution Fund (on which see the following paragraph)[25]. With reference to its use – and, more generally, in order to ensure the respect of the legislation on State aids also during a resolution procedure – the Board has to respect a specific procedure (see paragraph 4).

3. The framework of the Regulation 806/2014 on the *Single resolution Fund* (*SRF*). The *BRRD* Directive required Member States to set resolution financing arrangements up which, in almost all Member States, were built as resolution funds[26], notwithstanding the fact that the Directive allows, as an alternative, the establishment of resolution financing arrangements through

[24] So-called MREL requirement. It is the minimum of liabilities that can be written down or converted through a *bail-in* and that the entities are required to maintain.

[25] Article 67 (3) Srm Reg.

[26] A resolution fund was established in Spain, through the *Ley 11/2015 de recuperación y resolución de entidades de crédito y empresas de servicios de inversión*, approved by the Spanish Parliament in June 2015 and which took the place of the former law, the Ley 9/2012, which had been approved shortly after the *Financial Assistance Programme* granted to Spain by the Eurogroup in July 2012.
Also Austria decided to set a resolution fund up: this happened with the *Bundesgesetz über die Sanierung und Abwicklung von Banken* (BaSAG), paragraphs 123 and following, which specifically deal with the Austrian resolution fund (*Abwicklungsfonds)*.
A fund was built also in Slovenia, by establishing at Article 5 of the *Bank resolution authority and Fund Act* (ZOSRB) of 17 December 2014 that the Bank of Slovenia had the burden to build it (which it actually did in March 2015). The same choice was made by Germany, where a fund (then adapted to the new framework) funded by the German banking system already existed thanks to the *Restrukturierungsfondsgesetz*. Moreover, a resolution fund with registered office in Budapest was set up in Hungary (so-called *Szanálási Alap*, *SzA*). Italy too decided to establish a resolution fund. (see paragraph 3.2).
Outside the Eurozone it is interesting the Swedish choice: in fact in Sweden a fund (the *stability fund)* already exists since 2008, with the specific task to provide financial support to the Swedish government's interventions for banks. When the Directive had to be implemented, it was decided to transfer a part of the resources of the *stability fund* to the newly born *resolution reserve* which, therefore, represents the instrument through which Sweden implemented the provisions on the resolution financing arrangements. Moreover, the former contribution to the stability fund (the so-called "stability fee") was suppressed and a "resolution fee" introduced.

mandatory contributions from institutions, but not held through a fund controlled by resolution authorities.

Even with reference to the resolution funds, Srm Reg. required a centralisation process: to this purpose it required the building of a Single resolution Fund (Articles 67 and following Srm Reg.)[27].

For what concerns the *SRF*'s financial means it is set a target-level – to be reached within 2024 - equal to, at least, 1*%* of the covered deposits of all credit institutions authorised in all of the participating Member States.

According to the official data on covered deposits, the financial means would therefore amount to roughly EUR 55 billion. Notwithstanding the fact that some commentators deem this amount satisfying (GROS 2014)[28], many others consider it insufficient, underlining that during the financial crisis many banks needed financial support for much more than EUR 55 billion[29]: for example *Hypo*, which received a financial assistance for approximately EUR 100 billion (HUERTAS, NIETO 2014).

As the *Brr* Directive with reference to the national funds, Srm Reg. envisages several contribution mechanisms to the Single Fund. There are, for instance, the so-called ordinary *ex ante*[30] contributions, which contribute to the achievement of the target-level. For the cases of insufficiency of the ordinary contributions, extraordinary *ex post* contributions are provided[31]. Furthermore, it is possible for the Board to contract borrowings or other forms of support for the

[27] The need of a single fund already emerges by Recital 19 Srm Reg., where it is stressed that a Single resolution Fund is an «*essential element without which the SRM could not work properly*», because if the funding of resolution were to remain national «*the link between sovereigns and the banking sector would not be fully broken*». Furthermore, the Single resolution Fund helps to ensure «*a uniform administrative practice in the financing of resolution*», avoiding «*the creation of obstacles for the exercise of fundamental freedoms or the distortion of competition in the internal market due to divergent national practices*».

[28] The commentator evaluated that the financial means of the Fund would be sufficient even to face systemic crisis that would take place in small or medium-sized countries, such as Portugal or Ireland, underlining that in the worst moment of the financial crisis Spain required and obtained by the ESM EUR 60 billion, which is slightly higher than the target-level of the Fund.

[29] According to the official data, since the start of the financial crisis, the European countries provided to the banks in financial difficulties approximately EUR 671 billion for recapitalizations and 1288 billion in guarantees.

[30] Article 70 Srm Reg.

[31] Article 71 Srm Reg.

Fund[32]. If the *ex ante* contributions are not sufficient, the *ex post* ones not immediately accessible, and the alternative funding means are not immediately accessible on reasonable terms, the Board shall decide to make a request to voluntarily borrow for the Fund from resolution financing arrangements within non-participating Member States[33].

However, Srm Reg. does not provide the full framework on the *Single Resolution Fund*. Its setting up was in fact criticized by some States – Germany, for example- which argued for the impossibility of using the Srm as a legal basis for a single fund and, above all, for the regulation of general profiles such as that of the transfer of the contributions from the national funds to the single fund. What worried mostly was the funding of *SRF*: Article 114 TFEU seemed a too weak legal basis for the regulation of this thorny profile, above all if it is borne in mind that Article 114 (2) TFEU expressly excludes fiscal provisions from its scope of application.

Following these observations, the euro area countries decided, during the European Council of 18 December 2013, to negotiate and conclude an intergovernmental agreement on the functioning of the *SRF*. Notwithstanding the fact that the European Parliament kept on rejecting an intergovernmental approach to the issue (BUSCH 2015), in the night between 19 and 20 March accepted the idea to follow this path. After several difficulties, it was eventually decided to regulate the most discussed profiles through an intergovernmental agreement (BOCCUZZI 2015), best known as IGA Agreement, which provides for the transfer of the financial means from the national funds - initially organised as compartments - to the *SRF*.

3.1 The IGA Agreement and the framework on the national compartments. The IGA Agreement was reached on 21 May 2014 and is signed by 26 Member States. Its entry into force was subject to the previous ratification, approval or acceptation by a number of States representing, at

[32] Article 73 Srm Reg.
[33] Article 72 Srm Reg.

least, 90% of the total amount of weighted votes of all the Member States participating to the *Ssm* and to the *Srm*: this happened in November 2015. The mutualisation mechanism (see *infra*) started on 1 January 2016.

Through the Agreement the Parties undertake to transfer to the Single resolution Fund the contributions collected at a national level pursuant to the *BRRD* and to the Srm Reg.[34].

The Single resolution Fund, in fact, is initially composed of compartments, one for each contracting Party. It is set a period (the “transitional period”) throughout which the compartments will be merged: the transitional period shall last until the target-level of the *SRF* is reached (see paragraph 3), but in any case it cannot last more than eight years (therefore until 2024)[35]. As the transitional period will expire, the national compartments will be completely emptied of their financial means which, in the meantime, will have been transferred to the *SRF.*

Each contracting State pledges to transfer the contributions collected at a national level pursuant to Articles 69 and 70 Srm Reg. The transfer shall take place by 30 June of every year.

The compartments do not have a standard “size”: this is equal to the totality of contributions payable by the institutions authorised in each of their territories pursuant to Articles 68 (which refers to Article 100 *BRRD*) and 69 Srm Reg.[36].

The percentage of financial means to be mutualised varies throughout the transitional period. For the first year (2016) 40% of them has already been transferred. For the second year (2017), another 20% is being added, so that 60% will be reached. The last 40% will be mutualised in the following six years (2018-2024) at a fixed percentage, equal to approximately 6.67% per year (that is to say, the last 40% is equally divided throughout the last six years).In this way, no later than in 2024, the national compartments will be completely emptied.

[34] Article 3 IGA Agreement.
[35] Article 1 IGA Agreement.
[36] Article 4 IGA Agreement.

However, during the transitional period it might arise the need to make use of the financial resources of the Fund. For such cases the Agreement provides a structured mechanism of progressive involvement of the various compartments in the resolution.

Pursuant to the general principle, the costs of a resolution shall be firstly borne by the national compartments of the States where the institution or group under resolution are established[37]. If these resources are not sufficient the Board shall use those of all the other compartments[38]. If this is not enough yet, the Board will make use of all the other financial means of the compartments directly interested by the resolution[39]. If other resources are needed, the interested parties will collect and transfer to the Fund extraordinary contributions[40].

3.2. The case of the Italian resolution fund: the resolution of the four banks. With Legislative Decree no. 180 of 16 November 2015, Italy has implemented the *BRRD*. In order to fully implement the Directive, the Bank of Italy, with Measure dated 18 November 2015[41] established the National Resolution Fund, which, starting by the 1 January 2016, became a compartment of the *SRF* pursuant to the IGA Agreement.

However, before becoming a compartment, the National Resolution Fund was called to financially support the resolution of four Italian's banks (*i.e.* Banca Etruria, Banca Marche, CariChieti e CariFerrara) already placed in compulsory administrative liquidation and placed under resolution

[37] See Article 5 (1)(a) IGA Agreement. During the first year, recourse shall be had to all the financial means available in the interested compartments; during the second recourse shall be had to the 60% and 40% respectively, whereas during the subsequent years the availability of the financial means in the interested compartments shall decrease annually by 6.75%.

[38] See Article 5 (1)(b) IGA Agreement. During the first and second year of the transitional period, recourse shall be had to the 40 % and 60 % respectively of the financial means available, while during the subsequent years, the availability of the financial means shall increase annually by 6.75%.

[39] See Article 5, (1)(c) IGA Agreement.

[40] See Article 5, (1)(d) IGA Agreement. The Board may also exercise its power to contract for the Fund borrowings or other forms of support when the *ex ante* contributions are not sufficient and the *ex post* ones are not immediately accessible.

[41] Measure of the Bank of Italy no. 1226609 dated 18 November 2015.

pursuant to the new European framework[42].

The resolution procedures of the four banks required an intervention (equal to approximately EUR 3.7 billion) of the National Fund: given that at that moment it had just been established, there had been no time to collect the ordinary contribution.

For this reason the Bank of Italy stipulated a bridge loan - granted at market conditions - for the Fund from a pool of banks (Intesa SanPaolo, Unicredit and UBI), for a total amount of EUR 4 billion, divided into three tranches, of EUR 2.4 billion, 1.6 billion and 100 million (this latter undrawn)[43]. The first tranche was repaid in full on 21 December 2015 using ordinary and extraordinary contributions, which in the meantime had been collected. The contributions collected in 2015 - both ordinary and extraordinary ones - amount to EUR 2.4 billion, 588 million of which represents the ordinary contributions[44].

The second tranche must be repaid within 18 months of the date of stipulation[45].

[42] The resolution was triggered pursuant to Measures of the Bank of Italy dated 21 November 2015 and approved the next day by the Ministry of Finance and Economy. The Measures provided the losses absorption by means of a *bail-in*, although not a "full" one (only the shares and the subordinated bonds have been written down, whereas the unsubordinated bonds and the deposits were fully protected). Moreover, four bridge-banks were set up: all the rights, assets and liabilities of the entities under resolution were transferred to them. Furthermore, all the non-performing loans were transferred from the bridge banks to a *bad bank* (only one for the four banks), REV Gestione Crediti S.p.A.

[43] The loan was stipulated pursuant to Article 78(1)(c) Legislative Decree no. 180/2015. Intesa SanPaolo e UBI stipulated a partial assignment of the loan (approved by the Bank of Italy) to, respectively, Banca Monte dei Paschi di Siena and Banco Popolare.
The Fund's resources aimed at:
a) covering the deficit arising from the assignment of the assets and liabilities of each bank under resolution to the corresponding bridge bank (approximately EUR 1.7 billion);
b) making a capital contribution to the bridge banks (approximately EUR 1.8 billion);
c) making a share capital contribution to the bad bank REV Gestione Crediti SpA (approximately EUR 136 million).

[44] The data are reported by the Annual Report of the National Resolution Fund dated 28 April 2016.

[45] The Cassa Depositi e Prestiti S.p.A. is obligated to intervene (for a maximum amount of EUR 1.7 billion) if the Fund's resources are not sufficient to meet its debt service obligations for the second and third tranches of the loan. Furthermore, it should be borne in mind that some financial resources should also derive from the selling process of the four good banks, although the sale on the market is uncertain, at least for what concerns the *quantum*. The selling process recently seemed to come to an end: few months ago Banca d'Italia accepted the purchase by UBI of three of the four good banks (*i.e.* Nuova Banca Marche, Nuova Banca Etruria and Nuova Cassa di Risparmio di Chieti). The other one (Nuova Cassa di Risparmio di Ferrara) should be

If the Fund's financial resources prove to be insufficient, Law Decree no. 183/2015 allows authorities to collect from the banks "additional contributions" for the National Resolution Fund, in the amount determined by the Bank of Italy within the overall limit - which includes the contributions paid into the Single Resolution Fund - stipulated in Articles 70 and 71 of Srm Reg. For 2016 only, this limit has been increased to twice the annual amount of the contributions calculated in accordance with Article 70 of Srm Reg.

The issue of the additional contributions has recently been addressed by Legislative Decree no. 237 dated 23 December 2016 (converted into law by Law no. 15 dated 17 February 2017, see paragraph 1.1). The Decree has further specified the circumstances under which the banks can be required to make this kind of contribution and also the concrete ways by which the Bank of Italy can require them[46]. With reference to the first profile it is specified that the additional contributions may be collected in order to cover the obligations, losses, costs and any other kind of burden or liability of the National Resolution Fund anyway linked to the Measures of resolutions and to their amendments. Therefore, it is clarified that also amendments to the Measure of resolution, insofar as they originate losses or liabilities for the Fund, can justify the collection of additional contributions.

The Legislative Decree sets a time limit for the determination, by the Bank of Italy, of the amount of the additional contributions: no later than two years after the additional contributions' reference year. Moreover, the decree envisages the possibility for the Bank of Italy to set a deadline - not exceeding five years - for the payment of the contributions, although it shall communicate to the banks on an annual basis the amounts due.

It is also specified that the burden sharing criteria of the additional

sold to Banca popolare dell'Emilia Romagna. However, it is worth mentioning the fact that the amount to be paid for the purchase is still uncertain.
For details, see the following web address: http://www.ilsole24ore.com/art/finanza-e-mercati/2017-01-19/ok-bankitalia-ubi-le-tre-banche-064143.shtml?uuid=AEhS6ND&refresh_ce=1
On the current financial situation of the National Resolution Fund and on its legal status, see MOSCO G.D., *"I Fondi di risoluzione*", report at the conference held at LUISS University on 5 December 2016.

[46] See Article 25 Legislative Decree no. 237/2016.

contributions are those established by the Single Resolution Board with reference to the contributions owed to the Single Resolution Fund.

Eventually it is worth saying that the introduction of the additional contribution was necessary. If it is considered that the National Resolution Fund already became a compartment of the *SRF* (see *supra*) and that therefore part of the financial means has to be transferred to the single fund pursuant to the framework already analysed (see paragraph 3.1), it goes without saying that there are not many financial means left that may be used in order to repay the loans.

4. The decision-making process in the *SRM*. Another profile of the *SRM* worth mentioning is the particular mechanism designed in order to trigger the resolution procedure, especially when the resolution scheme includes the use of the *SRF.*

Because of the perplexities risen with reference to the legal basis on which the Board lies (see paragraph 2), during the setting up of the *SRM* the debate was focused on both the identification of the subject to which the final decision on the triggering of the resolution ought to be conferred and, more generally, on the decision-making process (BOCCUZZI 2015).

The balance struck is the source of a particularly articulated procedure, which involves three different European Institutions (the ECB - in its role as Supervision authority -, the Commission and the Council) and the Single resolution Board.

The Board is entitled to decide whether a bank has to be placed in resolution. However, the ECB has a significant driving force, as long as it shall assess, after consulting with the Board, the evaluation of one of the conditions for the resolution (*i.e.* the failure or the probability of the entity to fail)[47]. To this end, anytime that deems the condition met, the ECB shall communicate it

[47]See Article 18 (1)(2) Srm Reg. It is specified that this assessment may be made by the Board in its executive session (on which see paragraph 2), but only after having informed the ECB of its intention and if the ECB, within three days of receipt of that information, does not make such an assessment.

without delay to the Commission and to the Board.

The Board shall adopt the resolution scheme: in this context it has a certain range of discretion, above all with regard to the definition of the concrete aspects of the resolution procedure and to the choice of the resolution tools.

At this point, the main procedure in joined by a sort of "*sub-procedure"*, which involves the Commission and the Council. The Board, in fact, shortly after the adoption of the resolution scheme, shall transmit it to the Commission which, within 24 hours from the transmission, may either endorse it or object to it with regard to its discretionary aspects.

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest of the resolution procedure and/or propose an approval or objection to a significant modification of the amount of the *SRF*, if the resolution scheme involves its use.

In this last case, if the Council has approved the proposal of the Commission for modification of the resolution scheme, and also if it has objected on its discretionary aspects (see *supra*), the Board shall, within eight hours, amend the resolution scheme in accordance with the modifications required. Moreover, if the resolution scheme provides for the exclusion of certain liabilities from *bail-in*[48] and, therefore, involves an intervention of the SRF, the Commission may prohibit or require amendments to the proposed exclusion, setting out adequate reasons based on a violation of the requirements laid down in Article 27 Srm Reg. (concerning the *bail-in* and the discretionary exclusions), and on those laid down in delegated Regulation no.

[48] It is the case of the so-called discretionary exclusion.
Under the demanding circumstances specified in Article 27(5) Srm Reg. the Board can decide to totally or partially exclude some liabilities from the *bail-in* tool. In such cases the level of write-down or conversion not applied to the excluded liabilities is normally transferred to other liabilities (in any case in compliance with the *no creditor worse off principle*, under which no creditor shall incur greater losses than would have been incurred if the entity placed under resolution had been wound up under normal insolvency proceedings). However, if the losses are not passed to other creditors, a contribution from the Fund is admitted under the conditions laid down in the Article.

860/2016 of the European Commission[49].

Furthermore, it should be considered that the Commission is in any case previously involved in the resolution procedure when the resolution scheme provides the use of the *SRF*. Behind this, lies the assumption that the interventions of the Fund might turn into State aid.

This idea had already been highlighted in 2013, in the European Commission Communication on support measures in favour of banks in the context of the financial crisis, where it is expressly stated that «State aid in the form of interventions by a resolution fund will be assessed under this Communication in order to assess its compatibility with the internal market»[50]. Therefore, notwithstanding the fact that the *SRF* is funded through private resources (*i.e.* contributions of the banking system) and notwithstanding the fact that it is triggered - not by a State, but - by an agency (the Board) [51], its interventions might *de facto* give rise to distortions of competition.

Consequently, it is provided[52] that if the resolution action involves the granting of State aid pursuant to Article 107 (1) TFEU or, above all, *SRF* aid, the adoption of the resolution scheme cannot take place until the moment as the Commission has adopted a decision concerning the compatibility of such aids with the internal market[53]. To this purpose, when the Board has the intention to trigger the *SRF*, it shall notify it to the Commission, including in the notification all of the information necessary in order to enable the Commission to assess the compatibility of the use of the Fund with the internal market.

More specifically, the Commission shall evaluate whether the

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[49] It is the delegated Regulation that the Commission issued for the implementation of Article 44(1) *BRRD* and that further specifies the circumstances under which an exclusion of liabilities from *bail-in* in necessary.

[50] The full text of the Communication can be found at the following web address: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0730(01)&from=EN

[51] It is in fact stated that, even if pursuant to Article 7 Srm Reg., when the resolution procedure concerns non-significant banks the national resolution authorities are those empowered with the adoption of the resolution scheme, the competence is anyway taken up by the Board if the resolution scheme provides for a *SRF* intervention.

[52] Article 19 Srm Reg. («State aid and Fund aid»).

[53] It is worth noticing that, differently from what has been said above with regard to the obligation of the Board to transmit the resolution scheme to the Commission, in this specific case the Commission is already involved in a preliminary phase (*i.e.* even before the adoption of the resolution scheme by the Board).

intervention of the Fund is likely to favour the beneficiary or any other enterprise in such way to be incompatible with the internal market: the assessment is carried out through the use of the criteria established for the application of State aid rules as enshrined in Article 107 TFEU.

If the Commission has serious doubts as to the compatibility of the intervention of the *SRF*, it shall open an «in-depth investigation » (see par.19 (3) (3) Srm Reg.), which may be concluded with a positive or negative decision (to be published in the Official Journal of the European Union), or with a decision establishing conditions, commitments or undertakings in respect of the beneficiary. The decision may also lay down obligations on the Board, the national resolution authorities or the beneficiary, including the appointment of a trustee. The Commission can also conduct further investigations when it has serious doubts as to whether its decision is being complied with.

It can be observed that the procedure is structured and complex, at least for the number of subjects involved, so that someone talked about «cumbersome» (BOCCUZZI 2015). However, above all with reference to the cases of intervention of the *SRF*, if it is considered that distortions of competition might be a consequence of its improper use, the involvement of the Commission seems inevitable.

5. Some final remarks. The adoption of the *BRRD*, by harmonising the national legislations, represents a central step in the management of the bank crisis. The Srm Regulation went further: as seen, it added a fundamental element to the Banking Union project.

Of course there are some uncertainties. For example the issue of the sufficiency of the financial means of the *SRF.* Or that of the decision-making process of the resolution procedure (especially when the *SRF* is triggered), which, already particularly structured in theory, might become much more articulated in the concrete experience.

Moreover, as recently pointed out[54], it will be necessary the setting up of a common backstop to the *SRF* and this could be achieved in the short term through a credit line from the European Stability Mechanism (ESM) to the Single Resolution Fund.

Doubts may also be raised with regard to the attribution of wide, discretionary powers to an agency (the *Single Resolution Board*): as already observed (see paragraph 2) a lot depends on how deep and intense the judicial review on them will be.

Only the experience will allow to solve these doubts, but it is undeniable that the Srm Reg. deserves the credits for having determined in the banking crisis area that transition - that already took place, thanks to the Ssm Reg., with reference to the banking supervision - from a scheme of harmonisation and mere cooperation among authorities to a centralised mechanism.

Above all, as observed (FERRAN 2014), an important transferral of powers from the national to the *supra*-national level took place. Furthermore, although not completely broken, that «perverse tangle» (BOCCUZZI 2015) between banking risk and sovereign risk was at least weakened.

These are progresses that until few years ago were simply unimaginable: that is why, although it may be improved and notwithstanding the weaknesses, the new framework can be considered a step forward, therefore deserving to be warmly welcomed.

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