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Per un rinnovo della specificità operativa bancaria

Illla Sabbatelli

Per un rinnovo della specificità operativa bancaria*

(For a renewal of the banking operational specificity)

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ABSTRACT [En]:

The work aims to search for the growth opportunities offered by the crises, first and foremost by the pandemic which has certainly accelerated the digitalization process. Digital innovation has radically changed the banking and financial market by increasing the phenomenon of disintermediation, the change in banking operations ensued. Similarly, the 2016 reform of cooperative credit banks, although criticized and needing improvements, renewed their operability and the mutuality model, confirming the cooperative credit banks as banks capable of responding to the widespread needs of the community and the civil economy.

Keywords: crisis, opportunities digitalisation, operations, BCC

ABSTRACT [It]:

Il contributo mira a ricercare le opportunità di crescita offerte dalle crisi, in primis dalla pandemia che ha sicuramente accelerato il processo di digitalizzazione. L'innovazione digitale ha mutato radicalmente il mercato bancario e finanziario aumentando il fenomeno della disintermediazione, con la conseguenza del cambiamento dell'operatività bancaria. Allo stesso modo, la riforma del 2016 delle banche di credito cooperativo, seppur criticata e necessitante di miglioramenti, ha rinnovato la loro operatività e il modello di mutualità, confermando le BCC come operatori capaci di rispondere ai bisogni diffusi della collettività e dell'economia civile.

Parole chiave: crisi, opportunità, digitalizzazione, operatività, BCC

1. CRISI E NUOVI MODELLI DI OPERATIVITÀ

Le crisi che si sono succedute negli ultimi anni pongono al giurista, fra le tante, la questione di verificare come, e con quali modalità, si sia rinnovata l'operatività bancaria. Ciò al fine di individuare sia le specifiche modalità della stessa, sia i possibili scenari dell'azione degli organi di supervisione in una prospettiva, anche se non l'unica, di prevenzione delle crisi. In tale contesto di indagine, interessanti spunti di riflessione vengono offerti dalla tesi elaborata da Schumpeter della «distruzione creativa», secondo la quale il «processo di mutazione industriale rivoluziona la struttura economica dall'interno, distruggendo senza sosta quella vecchia e creando sempre una nuova»[1]. Le crisi, in tale ottica, sarebbero delle tempeste distruttive che creano opportunità di crescita[2].

L'emergenza sanitaria causata dal COVID-19 ha sconvolto il sistema economico accelerando in modo dirompente il processo di transizione dei mercati[3], compreso quello bancario e finanziario[4], nell'era digitale[5]; transizione da tempo sollecitata dagli organi di controllo[6]. Le difficoltà operative poste dal distanziamento sociale hanno portato all'aumento della fruizione dei servizi del credito, delle assicurazioni e della finanza in modalità remota e, in generale, un cambio di passo sia nel sistema dei pagamenti, sia in quello dell'intermediazione creditizia. Ciò ha costituito una tempesta distruttiva nel senso appunto di opportunità, nella prospettiva di un passaggio definitivo verso la digitalizzazione che, se in un primo momento è stata solo necessitata, ora configura un processo consapevole di una nuova operatività, strumento imprescindibile per modernizzare il mercato bancario e finanziario e renderlo più efficiente, performante e competitivo.

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[1] Cfr. SCHUMPETER, *Capitalism, Socialism and Democracy*, Londra, Routledge, 1994 [1942], p.82 ss.

[2] Si pensi, all'opportunità creatasi a causa della pandemia di utilizzare le risorse dell'Unione per avviare riforme volte a realizzare un'economia più verde e più attenta alle tematiche ambientali, sociali e di *governance* (ESG). Sul punto cfr. CAPRIGLIONE, *L'industria finanziaria italiana dopo la pandemia*, in *Rivista Trimestrale di Diritto dell'Economia* 2021, n.1, p. 1 ss.

[3] Cfr. RUBINO DE RITIS, *Gli effetti della pandemia sull'economia digitale*, in *giustiziacivile.com,* 2020, n. 3, pp. 50 ss.; MIGLIONICO, *Finanza del debito e crisi pandemica*, in *Rivista Trimestrale di Diritto dell'Economia,* 2021, n. 1, p. 136 ss.; SABBATELLI, *Covid 19 e disintermediazione bancaria e finanziaria*, in *Covid 19: emergenza sanitaria ed economia*, a cura di Rossano, Bari, 2020, p. 143 ss.; VISCO, *Intervento del Governatore della Banca d'Italia Ignazio Visco presso l'Associazione Bancaria Italiana in occasione della Assemblea degli Associati,* Roma, 6 luglio 2021, al sito *www.abi.it.* Sul COVID-19 come acceleratore delle contraddizioni democratiche, cfr. MONTEDORO, *Intervento*, *Emergenza COVID-19 e regolazione dell'economia*, Webinar, Università Sapienza, 11 giugno 2020, al sito *www.uniroma1.it*

[4] Cfr. BATTELLI, *Le nuove frontiere dell'automatizzazione contrattuale tra codici algoritmici e big data: gli smart contracts in ambito assicurativo, bancario e finanziario,* in *Giust. Civ.*, 2020, n. 4, p. 681 ss.

[5] Cfr. CAPRIGLIONE, *La finanza UE al tempo del coronavirus*, 31 Marzo 2020, al sito *www.apertacontrada.it*; BROGI, *Emergenza COVID-19 e regolazione dell'economia*, Webinar, Università Sapienza, 11 giugno 2020, al sito *www.uniroma1.it.*

[6] Sulla necessità di accelerare il processo di innovazione tecnologica si esprimevano da tempo sia la Banca d'Italia sia la Consob, cfr. Barbagallo, *Fintech and the future of financial services*, Università Cattolica del Sacro Cuore, Milan, 23 July 2018, al sito *www.bancaditalia.it;* AA.VV., *Lo sviluppo del FinTech,* Quaderni Consob, marzo 2018*,* al sito *www.consob.it;* Banca d'Italia, *Considerazioni finali 2019,* 29 maggio 2020, p. 15, al sito *www.bancaditalia.it.*

Sotto il profilo degli assetti di mercato, la disciplina emergenziale ha attribuito un ruolo cruciale al sistema bancario e finanziario chiamato a rispondere con immediatezza al nuovo fabbisogno di capitali e alle richieste di finanziamento[7]; al contempo, l'esigenza di corrispondere con rapidità alla richiesta di liquidità (necessaria per realizzare in maniera efficiente gli obiettivi prefissati), ha reso indispensabile alcuni adeguamenti dei processi operativi per i quali l'innovazione tecnologica è stata decisiva.

Se ne deduce che la transizione digitale nel mondo del credito è ormai irreversibile; l'innovazione tecnologica consente di sviluppare forme di finanziamento "disintermediate"[8] che assicurano maggiore tempestività nell'erogazione, *credit scoring* più accurato[9], maggiore inclusione finanziaria[10]. Ne è prova la circostanza per cui il *crowdfunding* si sta affermando sempre di più nell'ambito della cd. scala dei finanziamenti per le start-up e le imprese nella fase iniziale di attività, costituendo una valida alternativa ai prestiti bancari non garantiti[11].

La digitalizzazione ha lanciato una sfida fondamentale al mondo dell'intermediazione bancaria e finanziaria tradizionale, e si sta assistendo ad un processo di graduale integrazione - e non sempre necessariamente di scontro-, tra la *FinTech industry* e la tradizionale industria finanziaria[12]. I modelli operativi e di business ereditati dal Novecento non funzionano più. L'ingresso di nuovi operatori nel mercato, dalle start up Fintech alle Big Tech, e lo sviluppo di modelli di offerta innovativi[13] hanno spinto gli operatori tradizionali a rivedere i propri assetti organizzativi, soprattutto con riferimento alla loro presenza fisica e al disegno dei sistemi informativi[14] (anche attraverso alleanze strategiche con le nuove realtà del Fintech) e a cercare – sollecitati anche dagli organi di controllo - nuove modalità di svolgimento dell'attività bancaria.

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[7] Cfr. CIRAOLO, *Finanziamenti di piccolo importo assistiti da garanzia pubblica (art. 13, comma 1, lett. m), decreto Liquidità), diniego di credito e responsabilità della banca*, in *Rivista di diritto bancario,* 2021, n. 2, pt. 1, p. 313 ss.; RUMI, *Profili della garanzia SACE dopo il Decreto "Liquidità"* in *Il diritto dell'economia,* 2021, n. 2, p. 267 ss.; ROSSANO, *La valutazione del merito creditizio nel Decreto Liquidità: nota a margine di due ordinanze ex art. 700 c.p.c.*, in *Rivista Trimestrale di Diritto dell'Economia*, 2020, n. 2, p. 132 ss.

[8] Cfr. VISCO, *Intervento Finale*, Webinar, su "La transizione digitale nel credito", 22 aprile 2021, al sito *www.bancaditalia.it*

[9] Cfr. AMMANNATI, GRECO, *Piattaforme digitali, algoritmi e "big data": il caso del "credit scoring*, in *Rivista Trimestrale di Diritto dell'Economia,* 2021, n. 2, p. 290 ss.; MINNECI, *La verifica del merito creditizio: una valutazione a sua volta sindacabile?*, in *Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 3, supplemento n. 2, p. 353 ss.; SABBATELLI, *Covid 19 e merito di credito*, in *Rivista Trimestrale di Diritto dell'Economia* , 2020, n. 5, pp. 60 ss.

[10] Cfr. RABITTI, *Intelligenza Artificiale e finanza,* in *Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 3, supplemento n. 2, p. 301.

[11] Cfr. MOZZARELLI, *L'equity crowdfunding in Italia. dati empirici, rischi e strategie*, in *Banca Borsa Titoli di Credito,* 2019, n. 5, I, p. 650 ss.; PANCALLO, *Il* digital lending*: la "disumanizzazione" della filiera del credito* in *Rivista Trimestrale di Diritto dell'Economia* 2021, n. 3, supplemento n. 2, p. 398 ss.

[12] Più in generale, sui possibili scenari evolutivi innescati dalle relazioni tra banche e *FinTech firms*, cfr. BCBS, *Sound Practises. Implications of fintech developments for banks and bank supervisors*, febbraio 2018, *p.* 15 ss., al sito *www.bis.org*; SCHENA, TANDA, ARLOTTA, POTENZA, *Lo sviluppo del FinTech. Opportunità e rischi per l'industria finanziaria nell'era digitale*, in CONSOB, *Quaderni FinTech*, n. 1, 2018, p. 85 ss.

[13] Cfr. RABITTI, *Intelligenza Artificiale e finanza, ult. op. loc. cit.;* VITA, *L'Intelligenza Artificiale: organizzazione bancaria e prospettive regolamentari,* in *Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 3, supplemento n. 2, p. 427 ss.

[14] Cfr. VISCO, *Intervento Finale*, Webinar, su "La transizione digitale nel credito *cit.*, p. 2.

L'innovazione tecnologica si intreccia così con il diverso fenomeno della disintermediazione[15] che ha modificato radicalmente la morfologia del mercato bancario e finanziario italiano. Il modello bancocentrico è tramontato aprendo la strada ad un *agere* che spesso è svolto al di fuori delle regole bancarie[16] e che propone forme alternative alle tecniche consolidate dell'intermediazione creditizia quali quella mobiliare e assicurativa, imponendo la ricerca di nuovi equilibri complessivi.

In generale, il FinTech[17] ha sottratto spazi di intervento all'attività bancaria, ridimensionata a causa di una regolazione divenuta troppo stringente[18]; di ciò è conseguenza anche il mutato ruolo del comparto assicurativo che è riuscito ad assumere ormai una posizione centrale negli assetti di sistema.

In concreto, e a mero titolo esemplificativo, si pensi all'*Open banking*[19], paradigma che si concretizza in "una maggiore disarticolazione" della catena del valore dell'intermediazione finanziaria in più segmenti, ciascuno dei quali è occupato da soggetti in grado di offrire specifici prodotti e/o servizi basati sulle nuove tecnologie digitali, disintermediando appunto gli operatori tradizionali"[20]. O si pensi ancora alla disintermediazione della raccolta bancaria realizzabile con la valuta digitale di Stato[21], fattispecie nella

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[15] Cfr. MIGLIONICO, *Disintemerdiazione e digitalizzazione della moneta nel mercato finanziario*, in *Liber Amicorum Guido Alpa*, Padova, 2019, p. 525 ss.; PIERSANTI, *La disintermediazione bancaria*, in *Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 1, p. 87 ss.; PITRUZZELLA, *FinTech e i nuovi scenari competitivi nel settore finanziario, creditizio*, in *Bancaria*, 2018, n. 6, 23 ss.

[16] Cfr. CAPRIGLIONE, *Nuova finanza e sistema italiano*, Torino, 2016, p. 7 ss. p. 52 ss.; MC MILLAN, *La fine delle banche. Il denaro, il credito e la rivoluzione digitale*, Milano, 2019, p. 55 ss.; LEMMA, "*Banking" e "shadow banking" al tempo del Covid-19: riflessioni nella prospettiva del "Market" in "Crypto-Assets (MICA*), in *Rivista di diritto bancario,* 2020, n. 4, pt. 1, p. 851 ss.

[17] Sul Fintech in generale, *ex multis*, cfr. ALPA, "*Fintech": un laboratorio per i giuristi*, in *Contr. E impr.*, 2019, p. 377 ss.; AA.VV., *Fintech: diritto, tecnologia e finanza*, a cura di Lener, Roma, 2018; AA.VV. *Fintech. Introduzione ai profili giuridici di un mercato unico tecnologico dei servizi finanziari*, a cura di Paracampo, Torino, 2017; AA.VV. *Fintech fra dati e concentrazioni* in *Fintech: Diritti, concorrenza, regole,* a cura di Finocchiaro e Falce, Bologna, 2019; LAGARDE, *A Regulatory Approach to Fintech*, IMF Finance & Development, 2018, al sito *www.imf.org*;; MINTO, *FinTech and the "Hunting Technique: how to Hit a Moving target*, in *Open Review of Management, Banking and Finance*, maggio 2017; ARNER, BUCKLEY, BARBERIS, *A Fintech and Regtech Overview: Where we have come from and Where we are going,* in ARNER, BUCLEY, BARBERIS (eds.), *The RegTech Book,* 2019.

[18] Cfr. MACCABIANI, *An empirical approach to the Rule of Law: the case of Regulatory Sandboxes*, in *Osservatorio sulle fonti,* 2020, n. 2, p. 19 ss.

[19] Cfr. ARGENTATI, *Le banche nel nuovo scenario competitivo. FinTech, il paradigma dell'Open banking e la minaccia delle big tech companies*, in *Merc. conc. reg.*, 2018, p. 453 ss.; FALCE, *Databases rights in the open (banking) system. An out-of-the-box competition law perspective,* in *Orizzonti del diritto commerciale,* 2021, n. 1X, p. 405 ss.; GIROMPINI, *PSD2 e Open Banking. Nuovi modelli di business e ruolo delle banche,* in *Bancaria*, 2018, n. 1, 70 ss.; MILANESI, *A New Banking Paradigm*: The State of Open Banking in Europe, the United Kingdom, and the United States, 2017, TTLF Working Papers, p. 159 ss.; ZACHARIADIS, OZCAN, *The API Economy and Digital Transformation in Financial Services: The Case of Open Banking*, SWIFT Institute Working Paper No. 2016-001, p. 10 ss.

[20] Cfr. CIRAOLO, *Open Banking, Open Problems. Aspetti controversi del nuovo modello dei sistemi bancari aperti*, in *Rivista di diritto bancario,* 2020, n. 4, pt. 1, p. 613. L'interesse degli intermediari verso l'open banking è assai rilevante, ne è prova la circostanza per cui il 27% delle iniziative innovative e il 44% degli investimenti complessivi effettuati dagli intermediari hanno riguardato quest'area, cfr. BANCA D'ITALIA, *Relazione Annuale 2021*, Roma 31 maggio 2022, p. 211.

[21] Cfr. GRAZIANI, *Yuan digitale*, *Usa verso il veto all'uso su google e Appl pay*, in *Il Sole 24 Ore,* 3 giugno 2022, p. 22.

quale l'apertura di un "conto digitale" direttamente con la banca centrale consente appunto di by-passare l'intermediazione delle banche[22].

Ne è conseguita una significativa trasformazione dell'operatività bancaria con ovvie ricadute sotto il profilo della definizione di adeguati assetti metodologici applicabili da parte degli organi di controllo nella conduzione della vigilanza sul nuovo comparto operativo, anche alla luce dell'emersione di modelli di business eterogenei e a volte lontani dalle intenzioni originarie del legislatore[23]. Non è certo possibile prevedere come si riorganizzeranno i mercati, ma "la capacità di innovare rapidamente e di costruire modelli di attività in grado di essere riprodotti su scala crescente appare un fattore decisivo per sostenere la concorrenza"[24].

Ciò posto, va tuttavia precisato che non sarebbe corretto pensare che i canali digitali possano sostituire completamente quelli tradizionali dal momento che i medesimi non sono adatti a coprire tutte le esigenze dei clienti che preferiscono ancora - perlomeno in Italia e soprattutto per i servizi e i prodotti più complessi - recarsi presso gli sportelli dove possono usufruire di attività di consulenza personalizzata e specializzata[25].

Delineato questo quadro d'insieme, è necessario allora chiedersi quali siano gli interessi espressi da questi nuovi assetti. Sotto questo profilo, è noto come l'efficacia e l'efficienza in un'ottica di law and economics siano sempre stati i termini di riferimento per la valutazione dell'effettività dell'ordinamento bancario e finanziario rispetto alla "capacità di orientare l'operatività e gli scambi di mercato verso punti di equilibrio"[26]. Ma oggi tale convincimento sembra destinato a cadere.

Nonostante, infatti, il modello di riferimento dei mercati sia ancora quello indicato dalla teoria economica classica, non può trascurarsi di considerare che sono state definitivamente raccolte nuove istanze quale, ad esempio, quella della sostenibilità, nuova frontiera della regolazione e della supervisione[27]. Sono emersi nuovi obiettivi e nuove sensibilità, con il grande rilievo attribuito ai fattori ESG[28] che hanno individuato un "green Keynesian approach"[29] e che richiedono necessariamente la

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[22] Cfr. FAVARO, *La valuta digitale della Banca Centrale tra funzione monetaria e tutela del risparmio*, in *Rivista Trimestrale di Diritto dell'Economia*, 2020, n. 2, p. 330 ss.; MEZZACAPO, *La nuova "crypto-attività" e infrastruttura finanziaria globale "Libra": analisi della fattispecie e profili regolamentari nel diritto dell'UE*, in *Diritto della banca e del mercato finanziario,* 2020, n. 1, pt. 1, p. 35 ss.

[23] Cfr. BANCA D'ITALIA, *PSD2 e open banking: nuovi modelli di business e rischi emergenti*, 2021, p. 16.

[24] Cfr. VISCO, *ult. op. cit.*, p. 2.

[25] Cfr. KPMG, *Evoluzione dei modelli distributivi bancari*, 2021, p. 2, al sito *www.KPMG.com.it.*

[26] Cfr. LEMMA, *Intelligenza Artificiale e sistemi di controllo,* in *Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 3, supplemento n. 2, p. 322.

[27] Cfr. ANNUNZIATA, LAMANDINI, *"Questo nodo è avviluppato": divagazioni sulla regolazione del mercato finanziario*, in *Giur. comm.*, 2022, n. 1, p. 46.

[28] Cfr. COMMISSIONE EUROPEA, *Piano d'azione per finanziare la crescita sostenibile*, 8 marzo 2018, al *sito www.europa.eu.int*; ONU, *Principles for Responsible Investment*, al sito *www.unpri.org*; DI FAUSTO*, Investimenti sostenibili: analisi empirica e tradizionale dei fattori ESG, in Rivista Trimestrale di Diritto dell'Economia*, 2021, n. 1, supplemento, p. 32 ss.; LOCCI, *Brevi riflessioni in materia di fattori ESG e informativa non finanziaria nella crisi da Covid 19*, in Rivista Trimestrale di Diritto dell'Economia, 2020, n.1,

revisione critica di pregresse ortodossie, l'abbandono di dogmatismi e il ridimensionamento di vecchi canoni.

L'incorporazione nella regolazione di queste nuove finalità – che certo non coincidono con gli obiettivi di efficienza economica – apre a una nuova dimensione valoriale di attenzione a fattori sociali, che supera le forme del capitalismo avanzato, prendendo atto della deriva di quest'ultimo. Si individuano così i presupposti di un'innovativa «concezione del rapporto tra razionalità economica ed etica dell'azione, tra sviluppo dell'impresa e scienze moderne[30], che fa guardare con favore alla possibilità di un valido intreccio tra società civile e processo economico.

2. LA RINNOVATA SPECIFICITÀ OPERATIVA DELLE BANCHE DI CREDITO COOPERATIVO

In tale contesto, allora, è imprescindibile fare riferimento a quelle realtà creditizie i cui criteri ordinatori, incidendo sulle logiche operative cui sono ispirate, rendono possibile alle stesse di allontanarsi dalla stringente finalità della massimizzazione del profitto prima richiamata. Ed invero, in tali enti creditizi prevale l'intento di conformarsi a criteri redistributivi*,* con l'obiettivo della crescita della comunità locale: mi riferisco alle banche di credito cooperativo.

Si tratta di tema oggetto dell'assai criticata e ancora dibattuta riforma del 2016 (la l. n. 49) che, come è noto, ha creato i gruppi bancari cooperativi modificando radicalmente la morfologia della categoria[31]. Tale riforma è stata rivista nel 2018 dal decreto "Milleproroghe" (d.l. n. 91)[32] con risultati non del tutto soddisfacenti rispetto a quelle che erano le aspettative, ossia ridisegnare una riforma coerente con gli

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supplemento, p. 124 ss.; MAZZULLO*, "Disclosure" e "sustainable finance*". Dall'informazione del cliente alla conformazione del mercato, in *JusOnline*, 2020, n. 6, p. 220 ss.; SABATINI, *Finanza sostenibile e obblighi di disclosure sugli investimeti Esg: Gli impatti per le banche,* in *Bancaria*, 2020, n 1, p. 10 ss.

[29] Cfr. HARRIS*, Green Keynesianism: Beyond Standard Growth Paradigms*, Working paper no. 13-02, February 2013 *Global development and environment institute*, al sito *www.citeerx.ist. psu.edu*; TIENHAARA, *Green Keynesianism and the Global Financial Crisis,* London, 2018, p. 35 ss.

[30] Cfr. CAPRIGLIONE, *Etica e finanza in tempi di crisi,* in AA.VV., *Banche ed etica*, a cura di Sabbatelli, Padova, 2013, p. 3 ss.; MACCHIAVELLO, *Possono esistere "banche etiche"? La nuova definizione normativa di "operatori di finanza etica e sostenibile" tra interesse sociale, scopo di lucro e normativa bancaria post-crisi*, in *Rivista Trimestrale di Diritto dell'Economia,* 2019, n.1, p. 188 ss.; GUZZETTI, *Etica del risparmio e sviluppo*, in *Iustitia,* 2018, n. 4, pt. 2, p. 561 ss.; RUINI, *Presentazione* a AA.VV., *Finanza impresa e nuovo umanesimo*, a cura di Capriglione, Bari, 2007, p. 9.

[31] Cfr. BODELLINI, *Attività bancaria e impresa cooperativa*, Bari, 2017; SABBATELLI, *La riforma delle banche di credito cooperativo*, Bari, 2017; SALERNO, *Il governo delle banche cooperative*, Milano, 2013.

[32] Cfr. CAPRIGLIONE, *La riforma delle BCC al vaglio del nuovo Governo*, in *dirittobancario.it,* giugno 2018; MACRI', *Bcc e mutualità alla luce dell'introduzione del gruppo bancario cooperativo,* in *Giur. comm.,* 2019, n. 5, p. 867 ss.

obiettivi socioeconomici espressi dai territori e con la tradizione operativa che caratterizza le BCC: in sostanza recupere il localismo e riequilibrare l'impronta centralista dell'impianto originario[33].

Ed è proprio questa loro specificità operativa fissata dagli artt. 35 e 34 del TUB, norme che individuano un'operatività prevalente nei confronti dei soci[34] e nei territori di insediamento[35], che ha da sempre distinto le BCC dagli altri operatori del credito[36], in una visione di convinto pluralismo della soggettività bancaria[37], strumento a tutela della libertà di iniziativa economica e della concorrenza-

Ciò posto, la domanda che ne consegue è se la riforma del 2016 possa essere letta alla luce della tesi della distruzione creativa. In sostanza, c'è da chiedersi se la tempesta che si è abbattuta sul credito cooperativo – perché di tempesta si è trattato – abbia creato opportunità di crescita per le BCC. E ancora - per quello che interessa in particolare la presente indagine – rileva l'interrogativo riguardante le condizioni per un rinnovo dei principi che sono alla base del paradigma della loro specialità operativa, ossia il mutualismo e il localismo[38]. A mio avviso la risposta a tali domande è affermativa.

Certamente la riforma avrebbe dovuto essere scritta in maniera differente: in un'ottica di maggiore conservazione dell'autonomia decisionale e strategica delle singole banche aderenti ai gruppi e di maggiore rispetto delle loro peculiarità in termini di modelli organizzativi e di *business* utilizzando magari

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[33] Cfr. CAPRIGLIONE, *Per un nuovo "trade off" tra localismo e stabilità,* in *Rivista Trimestrale di Diritto dell'Economia,* 2018, n.3, supplemento, p. 4 ss.; SEPE, *I nodi irrisolti nell'assetto del credito cooperativo, tra localismo e mutualità*, in *Rivista Trimestrale di Diritto dell'Economia,* 2019, n. 1, p. 52.

[34] Cfr. BLANDINI, *Localismo e ricorso al mercato di capitali delle banche di credito cooperativo nell'ultimo atto della riforma del diritto societario (con notazioni sparse sugli eccessi di delega del d.lgs. 28 dicembre 2004, n. 310)*, in *Banca borsa tit. cred*., 2005, I, p. 675 ss.; OPPO, *L'essenza della cooperativa e studi recenti*, in *Diritto delle società, Scritti giuridici*, II, Padova, 1992, p. 501; PELLEGRINI*, Commento sub art. 35 TUB,* in *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, diretta da Capriglione, tomo I, Padova, 2018, p. 365 ss.; PAOLUCCI, *Commento all'art. 35 T.u.b.*, in *Codice delle Cooperative*, a cura di Paolucci, Torino, 2005, p. 411 ss.; PRESTI, *Dalle casse rurali ed artigiane alle banche di credito cooperativo*, in *Banca borsa tit. cred*., 1994, p. 179 ss.; VERCELLONE, *Cooperazione e imprese cooperative*, in *Noviss. Digesto*, 1959, vol. IV, p. 822 ss.

[35] Cfr. ACCETTELLA, *Il gruppo bancario cooperativo come gruppo societario obbligatorio,* in *Banca borsa tit. cred*., 2019, n. 1, p. 35 ss.; CAPRIGLIONE, *Imprenditorialità bancaria e cooperazione di credito,* in *Banca borsa tit. cred.,* 1982, I, p. 582 ss.; MANCINELLI, PELLEGRINI, *Commento sub art. 34 TUB,* in *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, cit., tomo I, p. 356 ss.; URBANI, *Le nuove forme della territorialità nella disciplina secondaria delle banche di credito cooperativo*, in *Rivista Trimestrale di Diritto dell'Economia,* 2019, n.1, p. 118 ss. In particolare, sull'esplicazione del localismo da parte dell'art. 34 del TUB e delle Istruzioni di Vigilanza della Banca d'Italia, cfr. OPPO, *Credito cooperativo e testo unico sulle banche*, in *Le banche. Regole e mercato*, a cura di Amorosino, Milano, 1995, p. 30 ss.

[36] Cfr. CABRAS, *La specificità delle banche di credito cooperativo,* in *Vita not*., 1997, 58 ss.; COSTI, *I profili giuridici della mutualità nella riforma del credito cooperativo,* in *Banca impr. soc.,* 2017, p. 321 ss.; CIOCCA, *Riforma delle banche cooperative: riassetti organizzativi e possibili equilibri di potere*, in *Banca borsa tit. cred*., 2018, I, p.22 ss.; COSSU, *L'obiettivo della ripatrimonializzazione nella riforma delle banche di credito cooperativo*, in *Riv. soc*., 2017, p. 697 ss.; SANTORO, *Conclusioni,* in *Nuove opportunità e sfide per le banche di credito cooperativo: la riforma del 2016*, a cura di Cardarelli, Torino, 2017, p. 379 ss.

[37] Cfr. AZZI, REGGIO, *Biodiversità bancaria: quelle piccole (utili) grandi BCC*, in *Cred. coop*., 2015, n. 12, p. 12 ss.; NIGRO, *Pluralismo istituzionale e pluralismo funzionale delle imprese bancarie nelle prospettive di riforma*, in *Credito e moneta*, a cura di Mazzoni e Nigro, Milano, 1982, p. 187 ss.; SUPINO, *Soggettività bancaria assetti patrimoniale regole prudenziali*, Milano, 2017, p. 53 ss.; TROIANO, *I soggetti operanti nel settore finanziario, in Manuale di diritto bancario e finanziario,* a cura di Capriglione, Padova, 2019, p. 365 ss.

[38] Cfr. CARILLO, ROSSANO, PENNACCHIO, *Gli effetti della riforma del credito cooperativo sulle disparità economiche regionali,* in *Rivista trimestrale di diritto dell'economia*, 2018, n. 3, p. 122 ss.

– come si dirà in seguito – un modello di coordinamento differente da quello del gruppo cooperativo paritetico ex art. 2547 *septies* cc.[39].

Sta di fatto però che indietro non si torna e, nonostante le autorevoli sollecitazioni per un intervento legislativo di revisione della legge n. 49 del 2016[40], gli assetti del mondo del credito cooperativo sono quelli delineati da quest'ultimo provvedimento. E con questi assetti oggi il giurista si deve confrontare; restando impregiudicata, peraltro, la questione di aspirare a modifiche normative che migliorino il vigente sistema disciplinare.

Detti assetti - lasciando inalterato quello che in letteratura viene definito il "fatto cooperativo" (capitale variabile e democrazia sociale) [41] - prefigurano la sovrapposizione della "disciplina bancaria" a quella della cooperativa,[42] in linea con quanto è dato riscontrare nella regolazione della società cooperativa *tout court*, nella quale il "pendolo dalla causa cooperativa si è spostato alla causa societaria"[43]. Per tal via si è creata una sinergia fra elementi di mutualità ed elementi di lucratività[44], "un "arricchimento della causa sociale" [45] che forse a sorpresa ha consentito, o comunque non ha impedito, alle BCC di avere nel 2021, - ovviamente con un peso minoritario sui numeri totali -, le migliori *performance* dell'intero sistema nella raccolta e nella gestione delle sofferenze[46] (oltre a più patrimonio e meno reclami dei clienti)[47]. Con la precisazione che tale risultato è stato raggiunto nonostante i notevoli costi sostenuti dalla categoria per adeguarsi al nuovo modello di gruppo.

In tal modo è proseguito il *trend* positivo che ha caratterizzato il periodo pandemico, nel quale il mondo del credito cooperativo ha svolto un importante ruolo nel sostenere famiglie e imprese[48]. Si pensi all'attività di erogazione dei finanziamenti garantiti dallo Stato per i quali le BCC hanno stanziato un

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[39] Cfr. SANTAGATA, "*Coesione" ed autonomia del Gruppo Bancario Cooperativo,* in *Nuove opportunità e sfide per le banche di credito cooperativo: la riforma del 2016*, a cura di Cardarelli, Torino, Giappichelli, 2017, p. 113 ss.; ID, *Il gruppo paritetico*, Torino, 2001, TONELLI, *La riforma delle BCC del 2016: nuove (?) forme di integrazione tra imprese cooperative bancarie e vecchi sistemi*, in *Nuove opportunità e sfide per le banche di credito cooperativo: la riforma del 2016*, a cura di Cardarelli, Torino, 2017, p.128 ss.

[40] Cfr. CAPRIGLIONE, *Una triste storia bancaria, un appello per non morire. Un impegno del governo,* in *Rivista trimestrale di diritto dell'economia,* 2019, n. 1, p. 51 ss.

[41] Cfr. FAUCEGLIA, *Il futuro della società cooperativa: la fine dell'umanizzazione e la scelta dell'efficienza*, in *Giur. comm.,* 2019, n 4, p. 576; FORTUNATO, *Patrimonio, capitale e mutualità (a margine del saggio di Umberto Belviso*), in *Giur comm., Quaderni*, 2017, n. 412, p. 13 ss.

[42] Cfr. BODELLINI, *op. cit*., p. 20 ss. dove si rintraccia anche un'ampia letteratura sul punto; SALERNO, *op. cit*., p. 31 ss.

[43] Cfr. FAUCEGLIA, *op. cit.,* p. 582.

[44] Cfr. OPPO, *Le banche di credito cooperativo tra mutualità, lucratività e "economia sociale",* in *Riv. Dir. Civ*., 1996, 1, 463 ss., spec. 473 ss.; ACCETTELLA, *op. cit*., p. 877 ss.; MACRI', *op. cit.,* p. 879 ss.

[45] Cfr. SCIARRONE ALIBRANDI, *Alcune ipotesi ricostruttive in merito alla riforma delle BCC,* in *Rivista trimestrale di diritto dell'economia*, 2018, n. 3, supplemento, p.177.

[46] Cfr. SABBATELLI, *Crediti deteriorati e banche di credito cooperativo*, in *Rivista Trimestrale di Diritto dell'Economia,* 2019, n. 2, supplemento, p. 103 ss.

[47] Cfr. BANCA D'ITALIA, *Dati 2021 delle BCC e delle casse rurali, a confronto con quelli del sistema*, 4 aprile 2022. V. anche BANCA D'ITALIA, *Relazione annuale 2021*, Roma 31 maggio 2022, p. 161, al sito *www.bancaditalia.it.*

[48] Cfr. DELL'ERBA, GATTI, *Le iniziative del Credito Cooperativo per l'emergenza e la ripresa dell'Italia. Le azioni di Federcasse, Audizione, Commissione Parlamentare d'inchiesta sul sistema bancario e finanziario*, Roma, 20 luglio 2020, al sito *www.federcasse.it.*

importo complessivo di oltre 3,1 miliardi di euro, con una percentuale dell'89% di somme erogate sulle richieste totali ricevute confermando la loro attitudine anticiclica[49].

I dati di BI al 31 dicembre 2021 mostrano che per gli enti creditizi in parola gli impieghi alle imprese, a confronto con quelli del sistema bancario nel suo complesso, sono cresciuti del 3,6% rispetto all'1,00%, e quelli alle famiglie dell'8,3% rispetto al 4,6%[50]. È ben vero che - complici gli strumenti di politica monetaria della BCE (come i programmi di acquisti netti di assets PEPP e APP) e, in generale, di tutte le facilitazioni temporanee pandemiche - il 2021 è stato un anno positivo per tutto il comparto bancario italiano, ma i dati prima riferiti sono assai significativi proprio alla luce del fatto che si collocano nel periodo post riforma del settore[51]. Analizzando ancora i dati di BI, emerge, infatti, come le BCC si stiano sempre più qualificando, nel rispettivo ambito territoriale di competenza, nel perimetro da sempre privilegiato della loro azione che è quello delle PMI, cuore del settore produttivo italiano, in aree strategiche dell'economia nazionale quali l'artigianato, il turismo e l'agricoltura.

Non va sottovalutato un altro fattore: la riforma delle banche popolari[52]. Con molta probabilità, il rafforzamento della posizione sul mercato delle BCC risente delle ricadute dell'intervento legislativo del 2015 che ha di fatto permesso alle BCC di "occupare i territori" che prima erano delle grandi popolari[53], le quali hanno gradatamente ridotto il loro interesse localistico operando altre scelte strategiche, con possibili deflussi operativi nei settori prima citati.

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[49] Cfr. DI COLLI, GIRARDI, *Restrizione creditizia durante la crisi del 2008-2009 e il ruolo anticiclico delle Banche di Credito Cooperativo*, in *Quaderni di ricerca del credito cooperativo*, 2012, n. 3, p. 8 ss.; RUGOLO, *Il ruolo (di nuovo) anticiclico delle banche di credito cooperativo. Brevi riflessioni a margine dell'emergenza epidemiologica covid-19*, in *Persona e Mercato,* 2021, n. 1, p. 160 ss.; MAGGIOLINO, *Appunti sul ruolo delle banche ai tempi del COVID-19*, in *Rivista delle Societa'*, 2020, n.1, p. 527 ss.; MACRI', *op. cit*., p. 869 ss.; ROSSANO, *Spunti di riflessione sulle misure a sostegno delle imprese nella normativa emergenziale, in COVID-19 emergenza sanitaria ed economica*, a cura di Rossano, p. 68 ss.

[50] Cfr. BANCA D'ITALIA, *Dati 2021 delle BCC e delle casse rurali, a confronto con quelli del sistema*, al sito *www.bancaditalia.it*

[51] Cfr. BANCA D'ITALIA, *Relazione Annuale 2021*, cit., p. 211.

[52] Cfr. AA.VV., *La riforma delle banche popolari*, a cura di Capriglione, Padova, 2015; ANNUNZIATA, *La pronuncia della Corte di Giustizia dell'Unione Europea (CGUE) del 16 luglio 2020 sulle banche popolari*, in *Rivista delle società,* 2020, n. 4, p. 1259 ss.; CARLIZZI, *Osservazioni intorno alla riforma delle banche popolari*, in *Riv. dir. comm. e dir. obbl*., 2016, n. 1, p. 43 ss.; CORVESE*, Commento al d.l. n. 3/2015. Parte prima: La riforma delle banche popolari,* in *Dir. banca e merc. finanz*., 2016, n. 30, II, p. 7 ss.; FIENGO, *Il riassetto della disciplina delle banche popolari,* in *Giur. comm*., 2016, n. 2, I, p. 234 ss.; GARGIULO, *La disciplina delle banche popolari. Dalle origini alla riforma della legge n. 33/2015*, Milano 2015; MAZZINI, *La riforma delle banche popolari,* in *Dir. banca e merc. finan*., 2015, n. 2, II, p. 39 ss.; MIRONE, *Statuto delle banche popolari e riforma del credito cooperativo*, in *Giurisprudenza commerciale,* 2019, n. 2, pt. 1, p. 211 ss.; ONADO, *Proporzionalità va cercando che è sì cara ... Dalla riforma italiana delle banche popolari alla questione delle banche locali, oggi*, n *Mercato concorrenza regole,* 2021, n. 1, p. 127 ss.; RICCIARDELLO, *La riforma delle banche popolari nella legge di conversione del d.l. 24 gennaio 2015, n. 3 tra capitalismo ed esigenze di vigilanza uniforme*, in *Banca impr. soc*., 2016, n. 1, p. 141 ss.

[53] Cfr. GRECO, *La crescita a sorpresa delle BCC, nel 2021 meglio delle altre banche,* in *Repubblica, Affari e Finanza*, 4 aprile 2022.

3. LA MUTUALITÀ DOPO LA RIFORMA DEL 2016

L'osservazione dei dati indica quindi che le BCC nonostante la riforma non hanno perduto il loro impegno operativo, superando le difficoltà ad esse rivenienti da una sostanziale *eterogestione*[54] posta in essere dalle capogruppo. Esse hanno rinnovato il loro legame con le realtà territoriali, proponendosi come sostenitori dell'economia zonale, limitando quindi le ricadute negative su quest'ultima causate prima della pandemia e ora della guerra.

Sul piano delle concretezze si sta delineando un rapporto più complesso e più "moderno"[55] non solo con il territorio di competenza e con i soci, ma anche con le aree di non competenza e con i soggetti estranei alla compagine sociale (grazie all'autonomia statutaria concessa dall'art. 35, TUB, sotto il controllo di BI)[56]. Questo processo di rinnovamento dell'operatività si realizza in una duplice modalità.

La prima vede le BCC impegnate ad estendere la loro operatività anche ad imprese più grandi di quelle cui ordinariamente si rivolgono; ciò, favorendo nel contempo la crescita dimensionale delle imprese già loro clienti[57]. La sfida che le banche in parola devono affrontare è quella di attivarsi con i cluster delle imprese innovative e con le società dell'area Fintech, tenendo conto dei punti di sovrapposizione/interazione che si rinvengono tra siffatte tipologie soggettive[58].

In secondo luogo rileva la circostanza che le BCC stanno ricercando prodotti bancari nuovi e adeguati sempre più "calzanti ai bisogni diffusi della comunità e dell'economia civile"[59], nell'ottica di intendere in modo nuovo la mutualità, vale a dire come mutualità di sistema[60]. Si è passati, in sostanza, da una mutualità intesa come gestione di servizio in favore dei soci, riferita allo scambio mutualistico realizzato nell'ambito sociale di ciascuna BCC, a una mutualità di sistema da riferirsi allo scambio e al vantaggio mutualistico (realizzato da ciascuna BCC in quanto aderente ad un gruppo) che si riflette e si espande alle compagini sociali dell'aggregato cui appartengono; ciò nel contesto di un più ampio rafforzamento del nesso con le formazioni e le imprese sociali nel loro complesso[61], con iniziative verso il terzo settore e di matrice ESG[62].

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[54] Cfr. CAPRIGLIONE, *Una triste storia bancaria, un appello per non morire. Un impegno del governo,* in *Rivista trimestrale di diritto dell'economia*, 2018, n. 3, supplemento, p. 579; MICHIELI, *La nuova direzione e coordinamento del gruppo bancario di credito cooperativo alla luce della l. 49/2016, in Giur. Comm.*, 2018, n. 3, p. 453 ss.; SACCO GINEVRI, *La nuova regolazione del gruppo bancario*, Milano 2017, passim; SEPE, *Il gruppo bancario cooperativo: tra autoriforma e neodirigismo, una nuova dimensione del credito cooperativo*, in *Rivista trimestrale di diritto dell'economia*, 2015, n. 4, supplemento, p. 81 ss.; SANTAGATA, *Coesione ed autonomia nel Gruppo Bancario cooperativo*, in *Banca borsa tit. cred.*, 2017, I, p. 445 ss.

[55] Cfr. SCIARRONE ALIBRANDI, *op. cit.,* p. 175.

[56] Sul ruolo dello Statuto, cfr. BODELLINI, *op. cit.*, p. 143 ss.; MAIMERI, *Gli statuti delle banche di credito cooperativo: profili di vigilanza,* in *Le banche di credito cooperativo: un modello tra mercato e mutualità*, Atti del Convegno, Lecce, 2001, passim; CASTIELLO, *Le istruzioni delle Banca d'Italia emanate ai sensi dell'art. 35, comma 2, T.U.*, in *Codice commentato delle banche di credito cooperativo*, a cura di Castiello, Roma, 1995, p. 478 ss.; PELLEGRINI, *Commento sub art. 35 TUB*, *cit.,* p. 197 ss.

[57] Cfr. MACRI', *op. cit.*, p. 867.

[58] Cfr. MASERA, *La (non) proporzionalità della sorveglianza bancaria nell'UE: problemi e prospettive,* in *Rivista trimestrale di diritto dell'economia,* 2020, n.1, p. 77.

[59] Cfr. SCIARRONE, *op. cit.,* p. 176.

[60] Cfr. SEPE, *I nodi irrisolti nell'assetto del credito cooperativo, tra localismo e mutualità*, cit., p.75.

[61] Sulla necessità di "*un'economia migliore per avere una società migliore*", si è espresso il Premio Nobel Edmud Phelps, ospite il 2 giugno 2022 del Festival dell'economia di Trento, cfr. BUFACCHI, *Phelps: ripensare l'economia, i governi creino nuova visione*, in Il Sole 24 ore, 3 giugno 2022.

[62]Cfr. RINALDI, *Bcc Iccrea, microcredito e ambiente per crescere. La spinta sul territorio*, in *Corriere della Sera,* 18 giugno 2022, p. 40.

Va da sé che questa seconda prospettiva vede le BCC - e in generale le banche di piccola dimensione - come veicolo di crescita circolare e di strumento di inclusione finanziaria; ipotesi di recente confermata anche dalla *World Bank* che ha collocato attraverso la sua istituzione finanziaria, *l'International Finance Corporation (IFC)*, una nuova categoria di obbligazioni sociali (dopo green bond, social bond e sustainability bond), il Gender bond, stabilendo che il denaro raccolto dal prestito obbligazionario fosse distribuito a banche e intermediari finanziari locali tenuti poi ad impegnarlo in determinate attività a favore delle donne[63].

Pervenendo ad una prima conclusione, non può sottacersi che la carica innovativa oggi riscontrabile nell'azione delle BCC potrebbe essere potenziata ove il raccordo operativo tra le medesime avvenisse all'interno di un modello aggregativo IPS[64] (che peraltro era quello inizialmente proposto da Federcasse)[65]. Orienta in tal senso la felice sperimentazione di tale modello in numerosi Paesi UE (Germania, Austria, Spagna, Polonia)[66]: da questa emerge, infatti, che la peculiare formula di coordinamento operativo tra i partecipanti ad un 'sistema di tutela' - affiancata dalla possibilità di un supporto finanziario conseguibile da questi ultimi in situazioni di crisi non tracimate in dissesto - consente che lo sviluppo della categoria avvenga nel contesto di un'autonomia gestionale correlata alla differenziazione soggettiva che lo schema ordinatorio di cui trattasi conserva tra tutti gli aderenti.

Sotto il profilo della vigilanza, non vi è dubbio che questa debba essere "incisiva, non omologante"[67], ragione per cui sarebbe auspicabile sia il superamento dell'equazione che discende dal dettato dell'art. 40 del Reg. 806/2014 in virtù del quale le BCC sono *significant* solo perché affiliate al Gruppo bancario cooperativo, sia l'individuazione di nuove regole che tengano conto della specificità di tale modello aggregativo[68]. Ciò consentirebbe alle BBC di godere di una regolamentazione più adeguata alle loro strutture organizzative e ai loro modelli di *business*, e quindi di requisiti prudenziali meno stringenti, con ovvie ricadute positive in termini di costi. Per tal via si preserverebbe la biodiversità bancaria, punto di forza dell'intero sistema finanziario[69]. Allo stesso modo, superando una visione disillusa circa il valore dell'attuale conformazione del fenomeno del credito cooperativo, la categoria in parola troverebbe un punto di equilibrio, avrebbe più margini per percorrere quella via prima delineata di un rinnovato, più moderno e inclusivo legame con il territorio e con l'economia civile, offrendo al mercato un'operatività che sia sempre "promozionale"[70], ma che possa competere ad armi pari e in modo efficiente in mercati sempre più diversificati dal punto di vista della soggettività, più digitalizzati e sempre meno intermediati.

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[63] Cfr. MONTI, *Bond di Genere, dalla Banca mondiale una nuova asset class*, in *Il Sole 24 Ore,* 24 maggio 2022.

[64] Cfr. ACCETTELLA, *op. cit.,* p. 51 ss.; COSTI, *Il gruppo cooperativo bancario paritetico*, cit., p. 379; LAMANDINI, *Il gruppo bancario paritetico: profili di diritto societario e antitrust*, in *Banca borsa tit. cred*., 2003, I, p. 388; SEPE, *Il gruppo bancario cooperativo: tra autoriforma e dirigismo, una nuova dimensione del credito cooperativo*, in *Rivista Trimestrale di Diritto dell'Economia*, 2015, n. 4, supplemento, p. 84 ss.; ROSSANO, PENNACCHIO, *Modelli di integrazione alternativi ai gruppi bancari cooperativi*, in *Rivista Trimestrale di Diritto dell'Economia*, 2018, n.3, p. 105 ss.; TROIANO, *La riforma delle bcc e i sistemi di tutela istituzionale*, ibidem, p. 181 ss.

[65] Cfr. SABBATELLI, *op. cit*., p. 111 ss., in part. nota n. 67.

[66] Cfr. SABBATELLI, *op. cit*., p. 70 ss., in part. nota n. 20.

[67] Cfr. MASERA, *ult. op. cit*., p. 84; ANGELINI, *Proporzionalità nella Regolamentazione*, Roma, 30 settembre 2020, p. 1, al sito *www.bancaditalia.it.*

[68] Risoluzione Buratti, C.7/00668 (7-00668); cfr. FEDERCASSE, *Audizione di Federcasse davanti alla VI Commissione Finanze della Camera in merito al cd. "Decreto Buratti"*, Roma, 14 luglio 2021, al sito *www.federcasse.it.*

[69] Cfr. ANGELINI, *op. cit.,* p. 2.

[70] Cfr. FAUCEGLIA, *op. cit*., p. 574.

REPUTATIONAL RISK MANAGEMENT IN FINANCIAL INSTITUTIONS, AN INTEGRATED APPROACH

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Reputational Risk Management in Financial Institutions, An Integrated Approach*

(Gestione del rischio reputazionale nelle istituzioni finanziarie, un approccio integrato)

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ABSTRACT [En]:

Reputation risk is generally understood as the risk arising from adverse perception of an institution by its stakeholders. In the financial services industry, the aftermath of the global financial crisis has seen a proliferation of non-financial risks and amongst these, reputation risk is one topic that has grown in prominence, with headlines around the world highlighting its importance. This paper assesses reputational risk from a financial institutions perspective and lays down a basic framework through which reputational risk can be assessed and managed.

Keywords: Reputational Risk, Financial Institutions, Banking, Regulations, Supervision

ABSTRACT [It]:

Il rischio reputazionale è generalmente inteso come il rischio derivante dalla percezione negativa di un'istituzione da parte dei suoi stakeholder. Nel settore dei servizi finanziari, le conseguenze della crisi finanziaria globale hanno visto una proliferazione di rischi non finanziari e, tra questi, il rischio reputazionale è un argomento che è cresciuto in risalto, con titoli di tutto il mondo che ne sottolineano l'importanza. Questo lavoro valuta il rischio reputazionale dal punto di vista delle istituzioni finanziarie e stabilisce un quadro di base attraverso il quale valutarlo e gestirlo.

Parole chiave: Rischio Reputazionale, Istituzioni Finanziarie, Banche, Normativa, Vigilanza

1. BACKGROUND

The Oxford English Dictionary 2010 defines reputation as "*the beliefs or opinions that are generally held about someone or something*". So, to extend it Reputational Risk is the potential loss or damage that occurs to an

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organization's reputation which causes people to doubt their previously held belief. In a recent document The Basel Committee for Banking Supervision (BCBS) have defined reputational risk as "*the risk arising from negative* perception on the part of customers, counterparties, shareholders, investors, debtholders, market analysts, other relevant parties or regulators that can adversely affect a bank's ability to maintain existing, or establish new, business relationships and continued access to sources of funding"

In order to estimate reputational risk, it is necessary to make a distinction between its internal and external drivers. This distinction is particularly relevant as it also refers to our ability, or lack thereof, to influence or manage such drivers. *Internal reputational-risk drivers* influence an institution's ability to perform activities in conformance with its stated mission and shareholder objectives and expectations. In addition, it impacts performance of duties related to legal, regulatory, environmental, social, and corporate governance related activities. In all these cases, a failure within the institution may negatively impact upon stakeholders' perceptions, with consequent damage to reputation and subsequent loss of business. For example, Barclays had its reputation tarnished to a large extent because it played a particularly prominent role in supporting Apartheid in South Africa. In the late 1970s to early 1980s one couldn't cross a single UK university campus without being confronted with posters calling for a boycott of Barclays over its involvement in the apartheid regime. Placards were plastered everywhere, and many protesters took their anger to the streets. The boycott worked and by the mid- 1980s the bank's share of the UK student market nearly halved to 15 per cent. Barclays pulled out of South Africa in 1986 because it couldn't afford to lose any more students / future customers and certainly couldn't afford further damage to its reputation.

In recent times the advent of social media has added a layer of complexity and velocity to managing reputational risk that was unthinkable not so many years ago. Social networks have provided the means for financial institutions which are notoriously media shy to build a brand personality, directly engage with customers, and gain real-time insights on their brand. The drawback, however, is the speed at which a reputation can be put on public trial. All it takes is for one customer or employee to upload a photo, with or without proper context, and a seemingly innocuous situation can turn combustible. Within moments that photo is making its way around the globe for users of social media platforms to draw their own conclusions, possibly harming the brand in the process. The damage potential is significant. According to the World Economic Forum, more than 25% of a company's market value is directly attributable to its reputation. While it may be tough to stop a social-media meltdown once it's in motion, there are plenty of ways an institution can prevent the event from happening in the first place.

On the other hand, *external reputational - risk drivers* stem not so much directly from an organisations failure to live up to others' expectations, but more from failure of related entities or via association. The most obvious example of this risk is when the actions of some members or an event affect the reputation of an entire category. Bankers across the globe saw their collective reputation tarnished as a consequence of financial crisis in 2008. It must be noted that financial institutions are intrinsically linked to the enterprises, projects, activities they choose to finance, sponsor or support. As it creates a relationship with another party, the subsequent behaviour of this party, over which the financial institution may have little or no influence, becomes a potential source of reputational risk. For example, an investigation revealing that an oil and gas company has breached environmental regulations in a major drilling project may lead to substantial reputational exposure for the bank that happened to finance that project. This is regardless of the fact that it had, in practice, no direct control over the management of the project. A recent example can be the Ukraine crisis where a number of brands have exited the Russian market or suspended sales to disassociate themselves from Russia as a country fearing harm to their reputation and consumer backlash. Global investment banks Goldman Sachs and JPMorgan Chase became the first American Banks in the recent crisis to decide withdrawing from Russian Federation.

Each economic sector, regardless of the parties involved, has its own potential for reputation exposure given stakeholders' perception of its impact on the environment (for example, nuclear energy, oil drilling and mining), and on social and moral issues (for example, weapons, alcohol and tobacco, gambling). For instance, the European Bank for Reconstruction and Development (EBRD) identifies a number of sectors of investments where projects could result in future environmental and/or social impacts that require a formalized and participatory assessment process carried out by an independent third party. Along the same lines, some sectors are simply excluded from financing as listed under the Environmental and Social Exclusion List. Environmental Social and Corporate Governance (ESG) is taking on an even greater significance and financial institutions in particular are now investing heavily in initiatives that tackle climate change and have ramped up financing in projects that looks towards building a more sustainable and resilient future.

2. EMPIRICAL RESEARCH AND LITERATURE REVIEW

There is ample evidence that when a company's reputation suffers a blow it translates into real and painful consequences. *Cummins, Lewis, and Wei (2006)*[71] analysed the impact of operational events on the market value of banks and insurance companies covering the period 1973–2003. They concluded that not only that there is a strong negative stock price reaction to announcements of such events, but also that the market value of loss was many times larger than the operational loss reported. *Gillet, Hubner, and Plunus (2010)*[72] analysed 154 events covering the period 1990–2004 and found significant negative returns at the announcement date of the loss. Some studies in particular show that, when the announced loss is related to internal fraud, the market value impact is much larger, suggesting a strong reputational impact. For example, in a study conducted by *Perry and De Fontnouvelle (2005)*[73] relating to operational losses at financial firms over the period 1997–2004, it was found that market value falls were twice as much if it was related to a case of internal fraud compared to an external one. Finally, *Fiordelisi, Soana, and Schwizer (2010)*[74], analysing a sample of 163 listed companies over the period 1994–2008, concluded that fraud as an event type generated the largest reputational damage for a financial institution.

Recent studies on the reputation risks pertaining to banks focus their attention on the topic of corporate social responsibility (CSR). *Fatma, Rahman, and Khan (2015)*[75] determine in this process both the direct and indirect influences on CSR activities on the reputation of the bank. *Chomvilailuk and Butcher (2013)*[76] examine the comparative influence of CSR on customer satisfaction in various cultural areas of Australia and Thailand and determined that new CSR initiatives had a significant influence on the reputation of the banks. *Marinkovic and Obradovic (2015)*[77] state, among other things, that trust has the greatest influence on customers' emotional responses, followed by social bonds and image. The

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connection of the trust and customer relationship was also addressed in *Dahlstrom, Nygaard, Kimasheva, and Ulvnes (2014)*[78].

3. REPUTATIONAL RISK AND IMPACT ON FINANCIAL INSTITUTIONS AND CENTRAL BANKS

A recent global survey has rated damage to reputation as one of the top risks for financial institutions globally but shockingly half the respondents admitted that they were not prepared for it. Hard-earned reputation can be surprisingly fragile in this globalized, interconnected marketplace and more so for global financial institutions, as the trust and confidence that underpin them can be irrevocably damaged by a momentary lapse of judgment or even by an inadvertent remark by a member of staff. Therefore, reputational risk has always been the most difficult risk to manage compared with other types of financial risks and given the increasing importance of credibility it has become one of the most cardinal themes in recent times. As a result of this from a traditional non formal approach, banks and financial institutions across the globe are now in the process of formally integrating reputational risk into their overarching enterprise-wide risk frameworks. Examples of incidents which can affect reputation are numerous. They can include failure of the institution to protect confidential data, misrepresentation of facts in public, prospective analytical weaknesses leading to development and implementation of wrong policies, problems in key IT Systems (TSB Bank in United Kingdom had their reputation tarnished because of their IT systems failure which locked out millions of customers from accessing their bank account and the UK regulator had to step in) or even poor business continuity planning. Some well-known examples of Reputational Risks impacting global financial institutions have been highlighted below:

Goldman Sachs: A recent example of reputation a premier financial institutions reputation being heavily tarnished comes in the form of Goldman Sachs involvement in the IMDB Scandal. 1MDB was created by the government of Malaysia to promote economic development in the country through global partnerships and foreign direct investment, and its funds were intended to be used for improving the well-being of the Malaysian people. Instead, approx. 2.7 billion dollars were misappropriated and siphoned off. The siphoned funds were then used to buy luxury assets and real estate, including hotels, a private jet, art by Picasso and Monet, and to finance Hollywood films. The investment bank pleaded guilty for its role in the scandal and admitted criminal liability for US Foreign Corrupt Practices Act

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violations and the US Department of Justice (DOJ) laid down a penalty of 2.9 billion dollars as part of a coordinated resolution with criminal and civil authorities in the United States, the United Kingdom, Singapore, and elsewhere.

Credit Suisse: Credit Suisse Chief Executive Tidjane Thiam who had made the Swiss Investment Bank profitable again was forced to quit in March 2020 after an investigation found the bank hired private detectives to spy on its former head of wealth management Iqbal Khan after he left for arch-rival UBS. The bank repeatedly tried to play down the episode as an isolated incident. Within a year of this their new CEO Mr Horta-Osorio who was the former chief executive of Lloyds Banking Group and Santander had to resign once he came under the spotlight over reports he breached coronavirus quarantine rules twice in 2021.

HSBC and Others: In 2012, HSBC Holdings' agreement to pay a $1.9 billion fine points to a lack of adequate control processes in compliance and anti-money laundering. HSBC got implicated in the scandal where 881 million US Dollars relating to various drug cartels including Mexico's Sinaloa cartel and Colombia's Norte del Valle cartel were laundered. Other banks including ING, Barclays, and Credit Suisse have in the past have all paid fines for facilitating transactions with rogue nations such as Iran, Libya, Sudan, and Myanmar in violation of sanctions.

Citigroup: In September 2004 the *Financial Services Agency (FSA), the Japanese regulator*, ordered Citigroup to close its private banking business in the country following "serious violations" of national banking laws. An investigation found that there was inadequate local internal controls and lack of oversight and the bank had failed to prevent suspected money laundering. Citigroup's then chief executive, Charles Prince, visited Japan in October 2004 in an attempt to repair the company's tarnished image. He pledged to improve oversight, change the management structure, increase employee training on local regulations, and set up an independent committee to monitor progress. But in the same month French retailer Carrefour decided to end Citigroup's tenure as a financial adviser on the sale of its Japanese operations to prevent its own reputation from being tarnished by association and Citi lost out on a potential deal worth 10 billion yen.

So could it have been handled differently?

In all the above cases there were tangible losses. Citi lost a valuable mandate, Goldman and HSBC had to pay a huge fine and Credit Suisse suffered a drop in its stock prices and had their risk rating downgraded. The obvious question which arises every time after an incident has happened is whether it could have been handled differently. Whether a better response could have resulted in a different outcome. An incident which can be quoted in this regard relates to Sun Trust Bank a Fortune 500 US

banking institution. In 2004, SunTrust headquartered in Atlanta, disclosed that due to an accounting oversight, it had to restate its corporate earnings. Because of accounting errors, they had overbooked the allowance for loan and lease losses, and therefore underreported earnings, for the first two quarters of 2004 by approximately $22 million. This led to a delay in the release of its third-quarter earnings statement. Within hours, SunTrust issued a press release announcing the accounting irregularities and the release stated that its audit committee, with the assistance of an independent law firm, would begin a review and initiate lines of communication with independent auditors about the errors. In short, the institution addressed the issue immediately, communicating openly with the public and its customers. Though this newsworthy event cast a negative light on SunTrust's reputation, overall, it did not hurt the organization's franchise value. Initially, the market and public perception were critical of the accounting issue, and SunTrust's shares fell 1.12% (less than $1 dollar to $69 per share); however, because the organization's board and senior management were proactive in addressing the issue quickly, the stock price loss (and financial statement gain, in this case) was manageable, and reputational risk was controlled. This is a perfect case of how proper Senior Management response to a potentially damaging event can go a long way in alleviating fears in minds of shareholders and thereby keep the image of a corporation intact in front of general public.

Reputational Risk and Central Banks / Regulators

A Central Bank's core duty has always been the sustainable development of a nation's economy. Over the years and across different geographies, their role has evolved to cater different socio-economic needs and today although there are numerous differences between central banks around the world, they are commonly the lenders of last resort and lynchpins of economic stability. Thus due to the nature of job, central banks have since long-established wide array of policies, procedures, and instruments to ensure good governance, fair supervision, effective compliance, and internal controls across national financial jurisdictions. Such tools, amongst other things, have established confidentiality and integrity of information, the physical security of people and premises, and the continuity of critical business processes. But this has also brought in big risks and the current economic environment featuring integrated financial markets, digital web-centric information systems, rise of social media have made reputation one of the most vulnerable assets for them.

The 2007 collapse of "Northern Rock" is one of the most talked about stories of UKs economic crisis. Surprisingly though at the start of the year in January 2007, Northern Rock was one of the most talked about success stories of UK banking sector and wrote 1 in 5 mortgages in UK. Its pre-tax profits had risen 27% on the previous year and it had 10 years of uninterrupted growth since its conversion to a bank. But behind this success, was its more or less complete reliance on wholesale markets funding, as

its main business model was bundling its loans together and selling them to institutional investors. However, this reliance on wholesale funding made the Northern Rock severely vulnerable to external shocks and in August 2007 when global liquidity freeze hit financial markets Northern Rock faced severe cash crunch with liquidity across markets drying up. The bank told the FSA (erstwhile UK Regulator) that it was in trouble and a message was passed to the Bank of England (BOE). The possibility that the BOE might need to act as lender of last resort was raised, but instead it was decided to find a buyer for the bank. A sale fell through on September 10, and it was agreed that emergency funding should be provided. However, news of this emergency funding leaked out and customers, gaining their facts mainly from press coverage and leaked stories began to withdraw its funds and a run on the bank commenced. This was only stopped on September 17, when the government had to announce an unprecedented guarantee for all existing deposits in the troubled organisation. In part this crisis was probably aggravated by Northern Rocks reluctance to approach BOE immediately after facing liquidity crunch due to the associated stigma linked to it. But even from the regulator's perspective, BOEs crisis management approaches were not at all adequately coordinated and did not sufficiently address the reputational risk dimension of the case. The public, clearly fearing the worst, participated in a run on the bank that which perhaps could have been avoided if the communication from BOE would have been better. BOE s reputation suffered hugely during this period and well as the LIBOR Crisis subsequently in 2008.

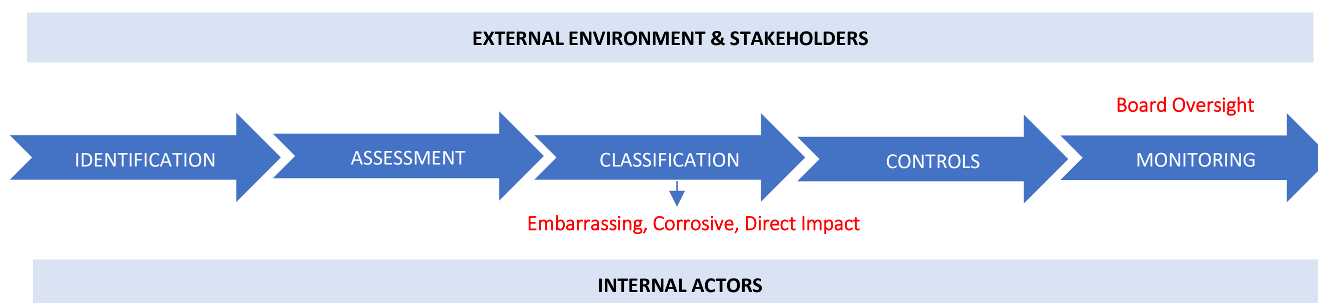
4. INTEGRATED REPUTATIONAL RISK MANAGEMENT (IRRM)

Reputation is an intangible element which makes it very difficult to assess or even have a framework to manage it. In below section an attempt has been made to formalise a framework for managing and accessing reputational risk. There are no right or wrong answers when we talk about reputation, and it must be said that it differs across culture and countries in terms of what would definitely impact reputation. The goal is towards creating an Integrated Reputational Risk Management (IRRM) framework, which can help draw a baseline for where a financial institution sits within the perception of its stakeholders, and in comparison, to direct competitors, comparable organisations, and the sector as whole. Once this baseline is established, variations from the norm can be tracked. It must be remembered that an institution can only act on things it is aware of and so the more risks it knows about or can anticipate the more prepared it can be. Forward-thinking companies are putting this idea into practice with IRRM which connects the dots between reputational risk and other types of risks - insurable, non-insurable, strategic, and operational – so it can understand what they are facing, how everything interrelates, and what parts of it is more impacted than others. For example, in a Bank

branch client facing advisors has more probability of impacting reputation due to poor customer service (which is an operational risk) vis a vis back office clearing team.

Through a proper IRRM framework an institution can get unobstructed insight and view of different types and sources of reputational risks which is difficult to achieve with traditional risk management, which is often siloed, decentralized, and focuses primarily on hazard risks. The level of insight is increasingly important as reputational risk becomes more complex today because institutions doesn't have to be directly involved in situations where the brand takes a hit and as explained earlier in this paper sometimes it's just guilt by association. The social media universe does not discriminate between the brand, its partners, vendors, or third parties. The following illustration lays out the different blocks of the *IRRM Framework*.

Table 1: Integrated Reputational Risk Management (IRRM) Framework



Step 1: Identification of Sources of Reputational Risk

Identification of Reputational Risk includes assessing external factors and undertaking a scenario analysis based self-assessment. From internal perspective the scenarios can be based on past actual incidents and from external side the technique would be gathering data from social media, print news, online and broadcast channels. Financial institutions can to some extent analyse the thoughts and feelings of their different stakeholders based on experiences and with advancement of machine learning and connected intelligence tools, it is possible to mine data stream to identify sentiments and topics that pose potential risk. This can help build a picture of the biggest risks the institution can face, prioritised by current impact and severity. One can then model the impact each type of risk could have in the aftermath of a negative event. Furthermore, using the same analysis techniques, institutions can analyse the reputational risks and profiles of competitors and peers to understand where their risks sit in comparison. It must be remembered that one of the key triggers of reputational risk is being negatively differentiated from sector peers and detailed data analysis helps in identification of these themes before it becomes an issue. For example, post 2008 crisis most of the US Banks which needed government support took a hit on their reputation in comparison to JP Morgan who escaped the crisis unscathed.

This not only bolstered JP Morgan's brand but many clients moved their relationship to JP Morgan from its competitors thereby giving a boost to their bottom-line.

While identifying sources of reputational risk it would also be worthwhile to focus on credible scenarios where misalignments between performance and expectations can negatively impact business performance and objectives. It should be noted that the identification of scenarios and their quantitative assessment is a process that requires discipline, both in implementing the methodology and in assessing the results. Assumptions need to be consistent across the spectrum of risks considered, expert opinion should be sought widely, allowing for sanity checks and peer-group comparison. Scenarios should be updated to reflect changes in practices and business environment and, at the very least, subject to a yearly review and validation. Another important consideration that should be made is that reputation impact and losses, may last well beyond the usual one-year horizon and perceptions take time to change, or to change back. Hence, the results of scenario analyses based on the indicators discussed below needs to be interpreted in light of the possible and likely persistence of adverse consequences over more than one year.

From a financial institution's perspective, exposure to reputational risk can evolve over time as political, legal, social, or environmental circumstances change. Therefore, the practice of assessing the gap between an institution's performance and stakeholder's expectations (through regular independent audits) should be part of the overall risk management process. All results should feed into an annual assessment that should be reported to the board alongside proposals for relevant action plans. **Table 2** below illustrates a list of actual scenarios which have impacted a financial institution including a Central Bank in last 20 years.

Table 2: Reputational Risk Potential Scenarios

Stakeholders	List of Scenarios	Potential Impact
Government National Regulators General Public Customers Digital Media Print Media Analysts Existing	1. An Insider trading racket unearthed within an investment bank. A Bank is found guilty of assisting money laundering. 2. Confidential data gets published/leaked before due date.	- Negative Media coverage which runs for days and is featured in national and international news channels. The Bank faces heavy penalties and fines leading to shareholders voting out the board. - Institution has to defend itself against class action lawsuits based on the premises of deliberate leakage of

Stakeholders	List of Scenarios	Potential Impact
Employees Potential Employees Unions/Trade Bodies Suppliers Local government Charities	3. A Central Bank employee loses sensitive document which is found by general public/media. 4. A Central Bank implements a policy that penalizes general public and leads to widespread protests. 5. High ranked employee of an investment bank is arrested for accepting bribes/kickbacks or for misconduct. 6. A Bank is found to be unfair in its selection process. 7. A Bank does not honour its existing contract with suppliers 8. A Bank fails to conform to best practice in its environmental footprint 9. A Bank suffers material loss	information which benefitted a small group of individuals - Questions are raised regarding the safety of the institution, and the country Finance Minister receives written questions from MPs or from the Treasury - Leads to financial market uncertainty, with implied volatilities in price of equities, commodities, and credit default swaps. FTSE / Stock Exchange crashes and international Institutional investors withdraw funds from the country. - Questions are raised regarding the integrity of the institution leading to resignation of the Chief Executive which in turn leads to turmoil. - Meritorious students no longer apply for positions leading to dearth of qualified technical personnel. - High-profile suppliers (providers of key IT services and other specialized consultants) no longer bid for the bank's business and the bank has to select second-best partners with negative consequences on its business plans.

Stakeholders	List of Scenarios	Potential Impact
	(suicide, accidental death, injury to staff) due to extreme high work pressure, negligence, and inadequate Business Continuity Planning.	- NGOs Mount a high-profile campaign that results in the loss of trust amongst general public and international community. - Negative Media coverage highlighting long working hours. Fines and Penalties from government under health and safety act.

Step 2: Assessment & Classification of Reputational Risks

Once the Scenarios (the List of scenarios in Table 2 can act as guidance in terms of what should be the type of incident criteria financial institution can consider) are identified along with any past incidents the next step is assessment cum measurement of the risks. The identified list of Scenarios is assessed and using quantitative techniques the probability of each incident occurring is determined and categorised in a scale of 1-5 (5 being the highest). This is then multiplied by the impact / severity upon occurrence (which is again categorised in a scale of 1-5 with 5 being Most Severe). Based on the "*Probability of Occurrence X Severity_Scores*" one can arrive at a cumulative risk score which is then ranked and then be classified under the RED AMBER GREEN (RAG) Schema which can be substituted with more topical classification as shown below in Table 3. This is a standard risk assessment technique which is used globally across operational risk stripes.

Table 3: Reputational Risk Classifications

Embarrassing (GREEN)	Corrosive (AMBER)	Direct Impact (RED)
Minor Issues which is a source of embarrassment. Examples can include minor publication errors, poor customer handling which does not become a trend, sending incorrect wrong information to regulators, publishing an insensitive advertisement which has to be taken down etc	Something which would chip the reputation and cause semi-permanent damage for example handling the Bank of England's handling of Northern Rock and LIBOR Crisis.	Directly impacting strategic priorities of an institution leading to severe reputational damage and loss of revenue/market share. For example – HSBC Holdings' agreement to pay a $1.9 billion fine for being found guilty of Money Laundering charges

The last step in this exercise is to link the buckets to a financial parameter (i.e., in terms of share price / loss of earnings/loss of market share/loss of customers/fines/penalties/debarment) if the actual incident materialises which varies across financial institutions depending on size and types. It must be remembered that an Embarrassing Incident can quicky morph into a Corrosive or an incident with Direct Impact in absence of immediate actions or if proper mitigating controls are not implemented leading to trends. An example would be repeated customer service failures in a retail bank which is subsequently noted by media and flashed in national newspapers leading to the regulators stepping in and taking punitive actions. The whole exercise should be conducted and updated at least annually to build an accurate and consistent assessment of the control environment the institution is maintaining vis a vis the risks. In addition, the team responsible for Reputational Risk should update the Board on the effectiveness of the control environment surrounding reputational risk to ensure proper oversight and governance.

Step 3: Controlling Reputational Risk

When Tony Hayward became CEO of BP, in 2007, he vowed to make safety his top priority (Harvard Business Review). Among the new rules he instituted were the requirements that all employees use lids on coffee cups while walking and refrain from texting while driving. Three years later, on Hayward's watch, the Deepwater Horizon oil rig exploded in the Gulf of Mexico, causing one of the worst man-made disasters in history. A U.S. investigation commission attributed the disaster to management failures that crippled "the ability of individuals involved to identify the risks they faced and to properly evaluate, communicate, and address them." Hayward's story reflects a common problem. Despite all the rhetoric and money invested in it, risk management is too often treated as a compliance issue that can be solved by drawing up lots of rules and making sure that all employees follow them. Many such rules, of course, are sensible and do reduce some risks that could severely damage a company. But rules-based risk management will not diminish either the likelihood or the impact of a disaster such as Deepwater Horizon, just as it did not prevent the huge reputational damage and lack of trust all financial institutions had to face post the 2007–2008 credit crisis. Therefore, Reputational Risks cannot be managed through a rules-based control model and instead institutions need an integrated controls approach designed **to a)** reduce the probability that the assumed scenarios will actually materialize and b) to improve the institutions ability to manage or contain the risk events should they occur. This needs to be undertaken keeping in mind the changing world and social media influence.

From internal perspective the key is for an institution needs to identify misalignments between its core values and behaviour of its employees and take steps to correct the misalignment. This can be done

through training programmes, making sure the corporate code of conduct is understood well not only by the employees but also by in- premise contractors and third parties. External reputational risks arise from events outside the company and are beyond its influence or control. Because institutions cannot prevent such events from occurring, the top management must focus on identification (they tend to be obvious in hindsight) and mitigation of their impact. Institutions should tailor their control management techniques with appreciation of the scenarios and events of different categories.

Step 4: Monitoring Reputational Risk

Effective online reputation risk management requires observation, speed, and data selection. In todays connected world every financial institution needs to listen to what customers are talking about, monitor what competitors are doing, and predict where the overall industry is going. This helps to shed light on to what degree an institutions products or services are performing locally and globally. High Ratings in certain reviews websites like Trustpilot has become paramount to managing an institutions brand. Even a few negative reviews can leave a bad impression in minds of prospective customers and hence many companies have voluntarily started to directly answer to reviews in these websites. A continuous flurry of complaints can lead to a trend and so it's always better to act immediately to have a better chance of avoiding any crisis or controversy by catching it in early stages. From a Senior management perspective, it is very important to have a strict oversight of all reputational risk incidents impacting the institution throughout the year. In recent years many Banks have introduced a Reputational Risk Committee who are responsible for monitoring these risks which is a step in the right direction. It is essential an institutions enterprise risk management framework is adequate, and it is integrated with the reputational risk management framework.

5. CONCLUSION

For any financial institution a clear and comprehensive reputational risk policy statement, either as part of its enterprise risk management policy or on its own, needs to be endorsed (and regularly reviewed) by their board of directors. Departmental Senior Managers and staff being the primary line of defence needs to take responsibility for the implementation of this policy, guided by the top management and the Risk Compliance + Internal Audit team forming the second /third line of defence. The following observations can be made from the above discussion and they may also serve as points of departure for future work.

- In financial services industry where key relationships are based on trust and confidence, reputation is an asset, albeit intangible, of fundamental importance.
- Notwithstanding its undeniable peculiarities, reputational risk should be addressed within the same kind of comprehensive governance framework as other risks more so in context of growth of social media and consumer power.
- Active reputation risk management can significantly contribute to safeguarding and increasing the market value of an institution, by means of prevention and limitation of reputation losses, and preparing measures for generating a reputation gain at the same time.
- Identification, assessment, monitoring and reporting of reputational risk should be attempted systematically, even though monetary quantification, risk pricing, hedging or insurance sometimes remain difficult to achieve due to the nature of the risk.

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LA RIVOLUZIONE TECNOLOGICA NEL SETTORE DEI SERVIZI FINANZIARI: UNA SFIDA PER IL LEGISLATORE TRA FONTI DEL DIRITTO E DINAMICHE SOCIALI

Marco Boldini

La rivoluzione tecnologica nel settore dei servizi finanziari: una sfida per il legislatore tra fonti del diritto e dinamiche sociali*

(Technological revolution in the financial services sector: a challenge for the regulator among sources of law and social dynamics)

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ABSTRACT [En]:

This paper analyses the dynamics and the evolving strategies adopted in regulated markets as a consequence of the impact of technological innovations in the financial sector, and how different jurisdictions are striving to find the right balance between the development of innovation and competition on one hand, and the high level of protection expected and utmost necessary to protect consumers on the other side.

Keywords: Financial regulation, *FinTech*, *RegTech*, *regulatory sandbox*, public law, comparative lw, United Kingdom, Italy, European Union

ABSTRACT [It]:

Il presente contributo analizza le dinamiche e le strategie evolutive adottate nei mercati regolamentati, quali conseguenza dell'impatto avuto dalle innovazioni tecnologiche nel settore finanziario, e come differenti giurisdizioni si stiano adoperando per trovare il giusto bilanciamento tra sviluppo dell'innovazione e della concorrenza da una parte, e l'elevato livello di protezione previsto ed oltremodo necessario a tutela dei consumatori, dall'altra.

Parole chiave: Regolamentazione finanziaria, *FinTech*, *RegTech*, *regulatory sandbox*, diritto pubblico, diritto comparato, Regno Unito, Italia, Unione Europea

1. INTRODUZIONE

Nel condividere l'opinione espressa da autorevole dottrina[1], secondo la quale la finanza rappresenta un costrutto giuridico, si ritiene che il bisogno di una continua regolamentazione risulti incessante. Se infatti gli attori economici privati fossero lasciati liberi di auto-regolarsi, non sarebbe possibile proteggere adeguatamente gli investitori, come le recenti crisi finanziarie, ed in particolar modo la nota crisi legata ai mutui *subprime* del sistema bancario emersa nel 2008, hanno reso evidente[2].

Pertanto, la finanza necessita di essere regolamentata, alla luce del fatto che ciascuna transazione operata attraverso i mercati finanziari, viene regolata da accordi che richiedono un vincolo giuridico affinché, ricorrendo alla legge, possano essere resi effettivi ed esecutivi. In altre parole, poiché le attività finanziarie esplicano i propri effetti in un ambito molto sensibile quale quello della sfera patrimoniale individuale, è necessario che gli investitori siano portati ad agire nei mercati finanziari, con la sicurezza della garanzia offerta da un atto giuridico vincolante di fronte al potere pubblico giurisdizionale, quale tutela degli interessi che mirano a realizzare attraverso la loro partecipazione ai mercati finanziari.

Tradizionalmente, l'approccio del legislatore nei confronti dei mercati finanziari è di fatto oscillato tra due visioni: una rigida regolamentazione da un lato, un approccio di *laissez faire* dall'altro. Questo bipolarismo è il risultato di complessità ataviche del settore finanziario e della costante evoluzione dei prodotti offerti dal settore industriale. Quel concetto giuridico che abbiamo detto essere la finanza, si basa infatti su un'osmosi collaborativa tra i mercati finanziari ed il settore industriale, tale per cui se da un lato quest'ultimo si serve della finanza per garantirsi le risorse necessarie alla propria operatività – ha quindi in questo senso un interesse proprio nel rivolgersi agli investitori -, offre al contempo degli *assets* attraverso i quali gli investitori cercano di realizzare i propri interessi economico-finanziari. Allo stesso tempo proprio in ragione di questa operatività calata in un contesto concorrenziale nel quale si esplica l'attività del settore industriale, questo si pone come culla di elezione per lo sviluppo di strumenti sempre più innovativi e tecnologici con i quali la finanza, e perciò la regolamentazione che essa comporta, si trova necessariamente a confrontarsi sia nel contesto di osmosi collaborativa di cui si è detto, sia a maggior ragione quando si tratti di porre dei freni alla realizzazione degli interessi che si creano tanto in capo all'industria quanto ai principali attori finanziari e che spesso promanano effetti negativi verso le classi meno accorte di investitori.

In ragione di quanto appena detto ed in considerazione dell'intrinseca sensibilità all'innovazione ed allo sviluppo da parte del settore industriale, questo si erge a maggior promotore di quelle trasformazioni in

*Il presente contributo è stato approvato dai revisori.

[1] K. PISTOR, *A Legal Theory of Finance*, in *Journal of Comparative Economics*, Vol. 41, n. 2, 2013, Columbia Public Law Research Paper n. 13-348 ed anche J. DESAUTELS-STEIN, *The Market as a Legal Concept*, 2012 (60) in *Buffalo Law Review* pp. 387,492.

[2] In questo senso si veda E. BARUCCI, *Crisi finanziaria e tutela del risparmiatore,* in *Consumatori, Diritti e Mercati*, n. 3, 2010.

campo economico le quali hanno generalmente un profondo impatto nel mondo giuridico[3] e, per questa ragione, un adeguamento attento dell'impianto normativo è indispensabile, specialmente se dovessimo dare per appurato che il giuspositivismo ed il normativismo giuridico debbono considerarsi inadeguati ad affrontare le sfide del nuovo millennio, data la rapidità dell'evoluzione economica e tecnologica e dei suoi immediati risvolti sui fondamentali costrutti sociali[4].

A questo proposito vale la pena notare come la trasformazione dei mercati finanziari, faccia parte di un più ampio cambiamento, in corso a livello globale, del processo regolamentare. Già nei primi anni '90, importanti autori come Ost e Van Der Kerchove[5] si erano espressi in modo critico mettendo in discussione la tradizionale impostazione regolamentare che si caratterizzava per un assetto gerarchico e piramidale (*Stufenbau*) delle fonti del diritto costruite e legittimate sulla base di una norma fondamentale (*Grundnorm*), così come proposto dal giurista e filosofo austriaco Hans Kelsen[6]. Secondo i due autori la tradizionale impostazione dell'attività normativo-regolamentare risulterebbe anacronistica rispetto ai tempi ed alle esigenze di una società multiforme in seno alla quale maturano esponenzialmente nuove esigenze rispetto alla regolazione delle quali non può porsi in un puro stato di soggezione. Commentando le osservazioni espresse da Ost e Van Der Kerchove, Carlo Amirante[7] ha scritto che il processo legislativo-regolamentare si stia muovendo da una visione appunto "piramidale" verso una visione "reticolare" o "orizzontale" la quale coinvolge differenti interpreti del tessuto sociale ed economico. A questo proposito può rilevarsi che – come suggerito da Paolo Grossi – la complessità della società moderna può difficilmente ~~essere catalogata in codici com~~posti da norme rigide[8].

[3] Come ha magistralmente evidenziato Carlo Amirante in uno dei suoi più celebri lavori, *Dalla forma Stato alla forma mercato*, l'aspetto legale rappresenta un momento fondamentale del processo economico, e siccome le problematiche economiche non sono mai semplicemente tecniche, ridurle al solo aspetto tecnico significherebbe svalutare il ruolo delle istituzioni parlamentari. C. AMIRANTE, *Dalla forma stato alla forma mercato*, Giappichelli Ed., Torino, 2008 p. 26.

[4] Si noti il fondamentale contributo di S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato,* 2009, Torino: Einaudi Editore.

[5] F. OST e KERCHOVE (VAN DER) M., *De la pyramide au réseau?: Pour une théorie dialectique du droit*, Bruxelles, *Facultés Universitaires Saint Louis*, 2002, in M. VOGLIOTTI, *Saggi sulla globalizzazione giuridica e il pluralismo normativo,* Giappichelli Ed., Torino, 2013, pp. 29 e ss.
I due autori commentano come dalla concezione "piramidale", ci si stia muovendo ad una concezione "deregolatoria" nel senso che la regolamentazione si attua, in senso orizzontale, per mezzo di una rete di relazioni.

[6] H. KELSEN, *La dottrina pura del diritto*, R. TREVES (a cura di), Einaudi, Torino, 1952 (dal 1967 col titolo "Lineamenti di dottrina pura del diritto").

[7] Nella sua opera, *Dalla forma Stato alla forma mercato, op. cit.*, Carlo Amirante analizza in modo perspicace gli effetti della globalizzazione sulle istituzioni e sul sistema legale di uno Stato, sottolineando la nuova dimensione dello Stato-mercato, ovvero, la forma di mercato in cui lo Stato ed i suoi originali protagonisti sono posti in una posizione funzionale e, in definitiva, subordinata alle regole ed esigenze del mercato stesso.

[8] P. GROSSI, *Oltre la legalità*, 2020, p. 136, Roma-Bari: Editori Laterza. In uno dei suoi ultimi lavori, sottolinea come la società post-moderna stia abbandonando l'impostazione legale illuminista - caratterizzata da un rigido e gerarchico assolutismo giuridico, nel quale il potere sovrano si pone come unico detentore dell'iniziativa legale, mentre alla società è attribuito il ruolo passivo di "piattaforma" nella quale si esplica ed applica il potere sovrano - in favore di un approccio dinamico dalle tipiche caratteristiche del sistema legale medievale, fondato sull'analisi giuridica dell'evoluzione storica della società e dei suoi usi e costumi. In queto senso, analizzando il principio di legalità, l'autore scrive: "*Il principio di legalità era,*

Davanti a queste trasformazioni, pertanto, un approccio di tipo "piramidale" rischierebbe di risultare anacronistico, o quanto meno non idoneo a cogliere il dinamismo della società, così come la pluralità delle fonti, gli attori ed i processi relazionali coinvolti. Ancora, secondo il pensiero di Grossi, le caratteristiche dell'approccio "reticolare" consistono (*i*) nella «realizzazione di un'unità giuridica nel rispetto delle diversità interne; (*ii*) in un intenso rapporto dialettico tra l'unità giuridica e le diversità individuali; (*iii*) nella valorizzazione del compito dei giuristi nella produzione della legge (essendo questa pane per i giuristi e non per i politici) e, prima di tutto, della scienza giuridica, per la sua capacità di tracciare principi armoniosi e senza confini»[9], di modo che l'attività di regolamentazione si qualifichi come attività "inventiva" nel tenore etimologico di trovare, scoprire per mezzo dell'osservazione.

La disputa su quale delle due soluzioni giuridico-regolamentari nel contesto dei mercati finanziari sia la più adeguata, si è protratta a lungo. Questa disputa trae origine dal fatto che lo slittamento da una visione "piramidale" ad una "reticolare" del sistema delle fonti, coinvolge appunto l'intero apparato normativo, tanto rispetto alle norme di rango primario (Costituzione, legislazioni comunitarie, leggi dello Stato e sue articolazioni) quanto di rango secondario e regolamentare (come le delibere di Comitati ministeriali o i regolamenti delle Autorità di Vigilanza nazionali). Negli ultimi anni, a seguito di una fase di "iper-regolamentazione" volta a mitigare i rischi per gli investitori, non sono mancati alcuni tentativi volti ad un approccio meno invasivo, attraverso il coinvolgimento di attori di mercato, consultazioni pubbliche e l'adozione di misure di secondo e terzo livello nel coordinamento con le associazioni di settore. La ragione che ha spinto ad un approccio più "leggero" risiede nel fatto che la regolamentazione dei mercati finanziari deve tener conto, oltre che della riduzione dei rischi e protezione degli investitori, anche della promozione della concorrenza e della crescita economica.

Dagli anni '80 del secolo passato fino alla fine del primo decennio del terzo millennio, l'iper-regolamentazione dava l'impressione di essere, almeno per quanto riguarda l'Europa ed il Nord America, l'approccio comunemente seguito nella regolamentazione finanziaria – nel tentativo di mitigare i rischi dovuti a crisi e scandali finanziari[10] – nel recente passato, timidamente nei primi anni 2000 e con maggiore urgenza a seguito della crisi finanziaria globale del 2007/2008, invece, specialmente al fine di incoraggiare lo sviluppo e l'utilizzo di nuove tecnologie nel settore finanziario, si è fatto strada un approccio regolamentare innovativo, come quello che caratterizza le *Sandboxes* regolamentari o i regimi pivotali. In questo senso, è un dato di fatto come il Regno Unito, e ne sono

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infatti, sorretto da una sola finalità: la creazione da parte dello Stato di un diritto legislativo espressione della sua volontà, né letto né inventato altrove. Con un ulteriore ed essenziale punto fermo: al di là di questo v'era solo il vasto territorio dell'irrilevanza giuridica, una complessa realtà socio-economica trasformabile in diritto unicamente mediante un atto di volontà dello Stato […] Il principio di legalità realizzava perfettamente il più rigido monismo giuridico e indicava chiaramente l'unico itinerario possibile per arrivare alla creazione del diritto".

[87] P. GROSSI, *op. cit.*

[88] P. MEHRLING, *Essential Hybridity: A Money View of Law and Finance for Foreign Exchange,* in *Journal of Comparative Economics*, no. 41 (2), 2013, pp. 355-363.

prova i pioneristici interventi adottati nei confronti delle nuove tecnologie di cui a breve si parlerà, abbia sempre avuto un approccio all'avanguardia con istituti flessibili ed innovativi, anche grazie al contesto giuridico offerto da un sistema di *Common Law,* tradizione che ha storicamente respinto il mito di un dettame giuridico rigido, favorendo piuttosto un sistema flessibile, rivelatosi il perfetto/perfettibile incubatore per soluzioni innovative, adattabile alle continue sfide poste dallo sviluppo del tessuto socio-economico[11].

La necessità di un sistema flessibile è oggi ancora più evidente nel settore delle nuove tecnologie applicate alla finanza, il così detto "*FinTech*", dove è chiara la consapevolezza per cui norme rigide risulterebbero inefficaci e dannose in quanto reticenti all'assimilazione di nuove tecnologie, rischiando così di rallentare lo sviluppo dell'intero settore. Con il termine FinTech, ci si riferisce ad un'ampia gamma di servizi finanziari, bancari o assicurativi caratterizzati in generale dall'integrazione tecnologica nei processi aziendali al fine di permette un'efficiente gestione ed offerta dei servizi stessi nei confronti dei consumatori, attraverso l'utilizzo di piattaforme ed interfacce digitali, caratterizzate per loro natura da rapidità ed efficienza nonché in grado di implementare sistemi informatici tali da garantire un elevato grado di trasparenza e sicurezza per gli utenti. Si tratta di una rivoluzione tecnologica e permanente che ha già cambiato e cambierà ulteriormente il modo di fare finanza[12]. Questo fenomeno ha origini recenti ed è strettamente collegato alle evoluzioni tecnologiche e digitali le quali, entrate in maniera sistematica e dirompente tanto nei meccanismi aziendali quanto nella quotidianità della collettività sociale, garantiscono un facile accesso al settore dei servizi finanziari ad una vasta schiera di soggetti. L'utilizzo delle nuove tecnologie nei settori bancario, finanziario ed assicurativo da una parte offre numerosi vantaggi ma, allo stesso tempo, inserendosi o creando contesti nuovi, pone numerosi interrogativi sui quali i legislatori di tutto il mondo sono chiamati a fare chiarezza, onde evitare che un utilizzo in mala fede di questi strumenti possa generare altrettanti svantaggi e problemi, soprattutto nei confronti dei consumatori, quanti sono i vantaggi apportati in termini di efficienza operativa, concorrenziale e facilitazione nell'accesso al mercato. Contestualmente e per le stesse ragioni, insieme al FinTech si è sviluppato un meccanismo di gestione del processo regolamentare dell'industria finanziaria basato su sistemi di monitoraggio, reportistica e *compliance* nell'utilizzo delle nuove tecnologie ed a beneficio soprattutto delle imprese operanti in settori altamente regolamentati, che prende il nome di RegTech. Prima ad esprimersi usando questo termine, la Financial Conduct Authority ("FCA") ha definito il Reg Tech come un sottoinsieme del FinTech che applica le nuove tecnologie al fine di aiutare a superare le sfide regolamentari nei servizi finanziari tramite la gestione di dati e l'identificazione dei requisiti

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[11] Per una visione d'insieme sul sistema costituzionale britannico di Common Law si veda A.V. DICEY, *Introduzione allo studio del diritto costituzionale. Le basi del costituzionalismo inglese,* il Mulino Editore, Bologna, 2003.

[12] R. KALIFA, *The Kalifa Review of UK Fintech*, 2021, p. 2, HM Treasury.

normativi in modo più efficiente ed efficace rispetto alle capacità esistenti[13]. In pratica il RegTech trova applicazione nel mondo imprenditoriale cercando di semplificare i processi, garantire flessibilità operativa, identificare in anticipo possibili problematiche ed ottenere una riduzione dei costi gestionali. In questo senso, l'obiettivo principale del *RegTech* è quello di bilanciare la promozione dell'innovazione digitale, unitamente alla protezione dei clienti e della stabilità dei mercati. Come rilevato magistralmente da Guido Alpa «*la tecnica guidata dalla scienza ha introdotto una nuova rivoluzione, per l'appunto una rivoluzione digitale, e il diritto ha dovuto rincorrere le scoperte scientifiche e le applicazioni tecniche ai rapporti economici, per poter compiere le scelte più opportune che non potevano essere affidate ai tecnici ed agli scienziati*"»[14].

Le *Sandboxes* regolamentari sono un fulgido esempio del nuovo approccio nella regolamentazione del fenomeno *FinTech*, rappresentando uno strumento in mano alle imprese attraverso il quale queste possono accedere ad un ambiente protetto nel quale beneficiare di alcune esenzioni dal regime tradizionale, al fine di testare la qualità, la sicurezza e la maturità del proprio prodotto, prima della commercializzazione. Altrimenti, infatti, imbrigliando nuove realtà, per loro natura *disruptive*, in rigidi schemi normativi, si rischierebbe di soffocare il mercato *FinTech* e scoraggiare, conseguentemente, soprattutto i giovani imprenditori[15].

Come sarà meglio spiegato nel prosieguo del testo, la *sandbox* è uno strumento di cui diversi legislatori nazionali si stanno dotando in risposta alle difficoltà riscontrate nell'analisi del fenomeno FinTech e nell'elaborazione di un sistema di regole che permetta tanto di proteggere gli utenti del mercato finanziario quanto di promuovere l'evoluzione tecnologica dei servizi finanziari. In particolare, l'ambiente della *sandbox* permette l'instaurarsi di un dialogo e lo scambio di idee tra soggetti regolatori e soggetti regolati nei settori finanziari. Questo dialogo è accompagnato poi da uno studio empirico rappresentato dall'analisi dei modelli di *business* e dallo sviluppo si sistemi imprenditoriali innovativi nell'ambito di un contesto protetto e parzialmente deregolamentato, che permetta di capire lo stato dell'arte dei servizi FinTech in modo da cogliere in anticipo gli ulteriori possibili futuri sviluppi. In poche parole, con la *sandbox* il legislatore invita le imprese a prendere parte ad una fase di test, rinunciando all'applicazione delle rigide regole applicabili nello specifico settore, per prendere coscienza di come le imprese stesse intendono esprimersi nel nuovo contesto digitale. Un rapporto *do ut des* dove le autorità si astengono dall'applicazione dei propri poteri sanzionatori, permettendo alle imprese di sviluppare nuovi servizi in relativa libertà, mentre il legislatore e le stesse autorità ricevono un "capitale informativo" che gli permetterà di gestire il non arginabile fenomeno del FinTech.

[13] Testo consultabile sul sito di FCA.

14 G. ALPA, *FinTech: un laboratorio per i giuristi*, in *Contratto e Impresa*, Vol. 35, n. 2, 2019, pp. 377-385.

[15] B.G. CARRUTHERS, *Law, Governance, and Finance: Introduction to the Theory and Society special issue*, in *Theory and Society* n. 49, 2020, pp. 151–164.

Il presente lavoro si divide in tre parti. La prima parte offre una panoramica sull'importanza del contesto legale e giuridico in relazione alla natura del fenomeno finanziario e dei mercati nei quali lo stesso esplica il proprio ruolo, così come un resoconto dei prevalenti approcci interpretativi alla regolamentazione finanziaria. La seconda parte, invece, approfondisce le soluzioni e gli interventi regolamentari adottati dalle diverse giurisdizioni per la regolamentazione del fenomeno *FinTech*, attraverso il coinvolgimento, a diversi livelli di produzione ed implementazione regolamentare, dei differenti attori operanti nel settore, al fine di adattare il contesto normativo alle esigenze ed alle opportunità offerte dalla moderna finanza. Per concludere, la terza parte è dedicata ad un'analisi della *Sandbox* regolamentare, allo scopo di evidenziare i benefici che questo strumento porta tanto alle imprese quanto alle autorità di settore nella loro attività di regolamentazione, e fornire una panoramica sui differenti modelli adottati ed in corso di adozione da parte di diverse giurisdizioni.

2. I MERCATI FINANZIARI INTESI COME UN "COSTRUTTO GIURIDICO"

Come ha intuito ed espresso Katharina Pistor nel suo *Legal Theory of Finance*[94], i mercati finanziari sono dei costrutti giuridici: ogni transazione che ha luogo nei mercati si basa su dei contratti, dalla compravendita di titoli, alla sottoscrizione di prodotti derivati sulla concessione di finanziamenti. Ciò significa che tutte le transazioni finanziarie necessitano di essere implementate secondo termini giuridico-regolamentari e condizioni concordate nei principali accordi i quali, pertanto, devono essere conformi all'ambiente legale nel quale, caso per caso, si trovano, allo scopo di assicurare un'adeguata efficacia esecutiva. Il diritto, infatti, gioca un ruolo decisivo non solo nell'impostare i termini degli accordi oppure offrire un perimetro entro il quale le parti possano negoziare ma anche, e soprattutto, serve ad assicurare adeguati rimedi e protezione nel caso siano commesse delle infrazioni.

Per soddisfare un così pregante bisogno di supporto verso i mercati finanziari, i legislatori susseguitisi nel corso degli anni e nelle diverse giurisdizioni, hanno adottato differenti approcci. Questi approcci variano dal "non fare nulla" – il che può risolversi in un atteggiamento permissivo o decisamente restrittivo, a seconda del contesto – ad un cauto permissivismo – attraverso la specifica analisi del singolo caso, con riferimento a differenti settori ed attori finanziari, in uno sperimentalismo strutturato – come, ad esempio, le *sandboxes* regolamentari – fino allo sviluppo di nuovi e specifici contesti regolamentari, come si sta verificando principalmente nell'Unione Europea.

Se accettiamo che i mercati finanziari siano dei costrutti giuridici, una completa deregolamentazione – che può essere desiderabile in alcune occasioni specie a causa dell'inadeguatezza degli strumenti legali

[94] K. PISTOR, *A Legal Theory of Finance*, *op. cit.* p. 317.

tradizionali – non sembra tuttavia per nulla auspicabile[95]. Non è immaginabile l'assenza di regole e, perciò, la deregolamentazione potrebbe al più qualificarsi come assenza di regole specifiche e, quindi, il ricorso all'applicazione delle tradizionali norme civilistiche, oppure potrebbe condurre ad una delega implicita del processo regolamentare a soggetti diversi dal legislatore e dalle autorità di vigilanza[96], come associazioni di categoria oppure gli stessi intermediari finanziari. A questo proposito, sono numerose le iniziative assunte, in particolar modo nel Regno Unito e nell'Unione Europea, sul presupposto che, al momento, la migliore strategia per bilanciare la necessità di regolamentazione da una parte con le spinte dell'innovazione tecnologica dall'altra, risieda in un ravvicinato ed osmotico dialogo tra i legislatori, le autorità di vigilanza ed i differenti attori e partecipanti coinvolti nei mercati finanziari.

In alcuni settori, ad oggi, è largamente diffusa l'adozione di un quadro regolamentare molto complesso e sofisticato mentre altri approcci sono stati drasticamente superati (es. lo scambio di titoli nei mercati regolamentati segue regole simili in differenti Paesi in tutto il mondo), mentre in altri settori, come quelli che hanno a che fare con l'applicazione delle nuove tecnologie alla finanza, è ancora evidente l'alternarsi dei diversi approcci. Infatti, solo a partire dalla seconda metà dello scorso decennio è diventata popolare nell'Unione Europea l'adozione di regole comuni rispetto ai principali esempi di *FinTech* (come lo scambio di *crypto-assets* o finanziamenti tramite *crowdfunding* - anche al fine di superare i differenti approcci adottati dagli Stati Membri - nelle quali sono incluse regolamentazioni specifiche ed iniziative di studio ed analisi, con il principale obiettivo di supportare, con la giusta cautela, lo sviluppo delle tecnologie nell'ecosistema della finanza e la conseguente crescita finanziaria ed economica. A questo proposito la Commissione Europea ha proposto un "Pacchetto per la Finanza digitale" composto da quattro proposte di Regolamento molto importanti. Le prime due sono dedicate alle crypto-attività, il MiCA (*Markets in Crypto-Assets Regulation*) ed il regime pilota (*pilot regime for market infrastructures based on DLT).* La terza, il Regolamento DORA, è dedicata alla sicurezza del settore finanziario, mentre la proposta sull'intelligenza artificiale è stata presentata il 21 aprile 2021. Nel settore della raccolta del risparmio a mezzo di *crowdfunding* il Regolamento 2020/1503 sui prestatori europei di servizi di *crowdfunding* alle imprese è entrato in vigore a novembre 2021.

[95] C. KRÖNKE, *Sandkastenspiele – Regulatory Sandboxes"aus der Perspektive des Allgemeinen Verwaltungsrechts*, Juristenzeitung (JZ), 76, Heft n. 9, 2021, pp. 434-443. L'idea dell'autore è incline alla possibilità di regolamentare la tecno-finanza ricorrendo agli strumenti offerti dal diritto pubblico, in particolare dal diritto amministrativo. In quest'ottica, i nuovi strumenti regolamentari, come ad esempio la *sandbox*, risulterebbero compatibili con il contesto legale esistente.
[96] K. PISTOR, *A legal Theory of Finance*, *op. cit.* p. 325.

3. DALLA REGOLAZIONE DEI MERCATI FINANZIARI ALLA "REGTECH"

Negli scorsi anni, a seguito di alcuni scandali finanziari che hanno drasticamente evidenziato l'inadeguatezza delle regole esistenti, l'approccio che è apparso risultare predominante è senz'altro quello dell'iper-regolamentazione dei mercati finanziari[97].

Ad esempio, come conseguenza della crisi finanziaria globale del 2008, il *Dodd-Frank Wall Street Reform and Consumer Protection Act* del 2010 ("*Dodd-Frank Act*"), ha posto i mercati regolamentari statunitensi sotto la supervisione di un'autorità di vigilanza, mentre in Europa, la revisione della cornice normativa della MIFiD è stata al centro del programma della Commissione Europea per proteggere gli investitori dai nuovi rischi, attraverso la previsione di maggiori garanzie. Oltre la MIFiD II, sono state adottate dall'Unione Europea altre nuove misure (es. la Direttiva AIFM sui fondi di investimento alternativi[98], il nuovo "Regolamento Prospetto"[99], il Regolamento *Benchmark*, il Regolamento EMIR[100]) sia per revisionare ed emendare le regole esistenti, sia per regolare settori – come quelli dei fondi alternativi, dei *Benchmark* e dei derivati - non ancora regolati. Il risultato finale è stato un mercato altamente regolamentato. Tutte queste iniziative si sono rese necessarie quando è diventato evidente che la categoria degli investitori, specialmente quelli definiti *retail*, fosse eccessivamente esposta alle conseguenze dell'agire delle grandi istituzioni finanziarie le quali, in assenza di specifici obblighi, ponevano in essere condotte eccessivamente discrezionali e non trasparenti, basate sul tradizionale approccio imprenditoriale della *Shareholder Maximization Theory*[101] e quindi agendo esclusivamente nell'ottica del proprio profitto, che hanno portato a bolle speculative difficilmente prevedibili ed estremamente difficili da arginare.

Ad ogni modo, è all'interno del perimetro delineato dalle regole imposte dalle autorità pubbliche (legislatori ed autorità di vigilanza), che gli attori del mercato privato conducono i propri affari: i mercati finanziari, infatti, sono essenzialmente un ibrido: *né uno Stato né un mercato, pubblico o privato, ma sempre e necessariamente entrambi*[102].

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[97] P. MEHRLING, *Essential Hybridity, op. cit.*

[98] La AIFMD, *ad es.* Direttiva 2011/61/EU del Parlamento Europeo e del Consiglio dell'8 giugno 2011 sui gestori di fondi alternativi di investimento e le Direttive di modifica 2003/41/EC e 2009/65/EC ed i Regolamenti (EC) N. 1060/2009 e (EU) N. 1095/2010.

[99] Regolamento (EU) 2017/1129 del Parlamento Europeo e del Consiglio del 14 giugno 2017 sul prospetto da pubblicarsi quando i valori mobiliari siano offerti al pubblico o ammessi alla negoziazione sui mercati regolamentati, in abrogazione della Direttiva 2003/71/EC.

[100] Regolamento (EU) n. 648/2012 del Parlamento Europeo e del Consiglio del 4 luglio 2012 sui derivati OTC, controparti centrali e repertori di dati sulle negoziazioni.

[101] M. FRIEDMAN, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits,* in The New York Times, 1970.

[102] P. MEHRLING, *Essential Hybridity, op. cit.*

Questa è una delle ragioni per le quali, tradizionalmente, anche il settore privato è stato coinvolto nel processo di regolamentazione dei mercati finanziari. Durante la fase di iper-regolamentazione subito successiva alla crisi finanziaria emersa nel 2008, sono state seguite diverse strade per conciliare tanto le esigenze pubbliche quanto quelle private, nel tentativo di inserire gli attori dei mercati finanziari nel processo di regolamentazione: la partecipazione di questi attori alla creazione e definizione del perimetro regolamentare nel quale gli stessi conducono i proprie attività, permette di superare il tradizionale dualismo tra l'interesse pubblico e quello privato.

Una strategia tradizionale al fine di coinvolgere le entità finanziarie nella definizione delle politiche regolamentari, consiste nella promozione, principalmente attraverso le associazioni di settore ed associazioni specializzate, delle così dette "migliori pratiche" e "linee-guida", spesso accreditate dalle autorità nazionali competenti.

Un esempio di queste pratiche è dato dal "Codice di *Corporate Governance*" emanato dalla Borsa Italiana, il mercato finanziario italiano. L'adozione e la conformità al Codice di *Corporate Governance* è su base volontaria per le società italiane quotate, ma gli emittenti che lo adottano debbono specificare, nel proprio *Report* sulla *Corporate Governance,* le precise raccomandazioni dalle quali si sono discostati e, per ognuna, spiegare come, perché, e sulla base di quali motivazioni la società non sia potuta essere conforme.

Altre iniziative simili sono state lanciate in Italia da Assogestioni, l'associazione di categoria delle società italiane di gestione del risparmio, la quale negli ultimi anni ha adottato linee-guida sui principali aspetti della regolamentazione finanziaria come, ad esempio, la gestione del conflitto di interessi – sia da una prospettiva contrattuale quanto gestionale -, la migliore esecuzione ("*best execution*") degli ordini dei clienti tra le previsioni degli accordi per la gestione di portafogli, e gli incentivi previsti dalla AIFMD e dalla MIFiD II. Linee-guida di tal guisa, accreditate dalla stessa Consob[103] – la Commissione italiana per il mercato e la borsa, autorità di vigilanza del mercato finanziario italiano -, offrono una metodologia molto pratica per guidare le imprese nel processo interno di adozione delle stesse, e portano al risultato per cui le imprese che risultino essere conformi a dette liee-guida, sono da considerarsi conformi alla cornice giuridica applicabile, nel suo complesso.

Tra gli altri esempi di iniziative sponsorizzate da entità private ed accettate come "migliori pratiche" nei mercati su scala globale, rientra l'iniziativa lanciata dall'Associazione internazionale sugli *Swaps* ed i

[103]Tra le altre attività, la CONSOB ha il compito di: a) verificare la trasparenza e la correttezza dei comportamenti degli operatori al fine di salvaguardare la fiducia e la competitività del sistema finanziario, la tutela degli investitori, il rispetto della normativa finanziaria; b) vigilare al fine di prevenire e, ove necessario, sanzionare eventuali comportamenti scorretti; esercita i poteri concessi dalla legge affinché siano fornite agli investitori le informazioni necessarie per effettuare scelte di investimento consapevoli; c) operare per garantire la massima efficienza delle negoziazioni, assicurando la qualità dei prezzi nonché l'efficienza e la certezza delle modalità di esecuzione dei contratti conclusi nei mercati regolamentati.

Derivati ("ISDA"), un'organizzazione privata che ha riunito i più importanti emittenti e *brokers* di strumenti derivati. L'associazione ha giocato un ruolo molto importante nella creazione di questi mercati, creando contratti standardizzati, adottati in diverse giurisdizioni in tutto il mondo. Inoltre, ISDA non promuove solamente l'adozione di "migliori pratiche" ma esercita anche una certa pressione sui legislatori per stimolarli nell'adattare le cornici giuridiche ai propri accordi (in particolare nel settore dell'insolvenza e della crisi d'impresa) e forzando, in questo senso, lo stesso processo legislativo.

L'attività di *lobbying* portata avanti dalle associazioni mercantili è una pratica comune nel contesto dei mercati finanziari, ed in alcuni casi è addirittura formalizzata con specifici processi di coinvolgimento, attraverso consultazioni pubbliche o il dialogo sia con le autorità nazionali competenti - le quali devono adottare le misure così dette di "secondo livello", es. gli atti normativi che implementano le leggi primarie attraverso regolamenti e raccomandazioni - sia a livello europeo (per esempio da EFAMA, l'associazione di categoria delle società di gestione patrimoniale).

Il dibattito su quale degli approcci menzionati per regolare la finanza – dalla deregolamentazione alla iper-regolamentazione e la "*soft law*" – sia il più efficace, non è ancora sopito a causa dell'esigenza di regolare una nuova tendenza: l'applicazione della tecnologia al mondo della finanza.

Il *FinTech* ("tecnologia finanziaria") è un termine utilizzato per descrivere l'applicazione delle nuove tecnologie - come ad esempio la *Blockchain*, gli *smart contracts*, ed i "registri tecnologici distribuiti" o *Distributed Ledger Technology* (DLT) – nel settore della finanza, e che cerca di migliorare ed automatizzare l'offerta e l'uso dei servizi finanziari. Il *FinTech* viene utilizzato per aiutare le imprese ed i consumatori/investitori a gestire con maggiore efficienza le proprie operazioni ed i propri processi finanziari, grazie all'utilizzo di *software* ed algoritmi utilizzati dai dispositivi digitali.

In particolare, l'uso delle tecnologie nel settore della finanza, conduce ad un duplice risultato: da una parte, permette l'offerta di servizi e prodotti tradizionali attraverso nuovi canali (si pensi all'accesso ai servizi bancari tramite siti internet ed applicazioni, al commercio online) in un processo conosciuto come "trasformazione digitale", mentre dall'altra parte consente di creare servizi e prodotti nuovi, alcuni simili a servizi già esistenti (si pensi al *crowdfunding*), altri decisamente più innovativi, come nel caso dei *Crypto-assets* e dei servizi rilevanti connessi.

La tecnologia sta pertanto trasformando i mercati finanziari in tutto il mondo, generando nuove opportunità da un lato, ma anche nuovi rischi (si pensi al rischio tecnologico, alla sicurezza informatica, alla resilienza operativa) dall'altro. I regolatori sono obbligati a sviluppare nuovi approcci al fine di regolamentare il *FinTech* ("*RegTech*") bilanciando i benefici dell'innovazione e la consequenziale crescita finanziaria, con le esigenze di stabilità dei mercati finanziari e di protezione dei consumatori/investitori.

Al fine di regolare il *FinTech*, i legislatori in tutto il mondo stanno valutando e testando differenti approcci, i quali mutano da una totale deregolamentazione, senza alcuna modifica della cornice regolamentare esistente volta all'inclusione delle nuove attività, fino a regolamentazioni studiate appositamente e specificamente per il *FinTech*.

In particolare, dove i legislatori optino per fornire regole specifiche alle attività del *FinTech*, possono essere adottati modelli differenti. Come è stato ricordato in precedenza, l'applicazione della tecnologia al settore della finanza può portare sia all'offerta dei servizi tradizionali per mezzo di strumenti innovativi sia allo sviluppo di servizi e prodotti nuovi. Queste differenti tendenze richiedono regole differenti, *rectius* approcci regolamentari differenti. Infatti, mentre rispetto alla prima ipotesi può rivelarsi sufficiente una semplice revisione delle regole già in vigore, nella seconda delle ipotesi, invece, può rivelarsi necessaria l'adozione di nuove e più specifiche regole. Ancora, non sempre risulta possibile distinguere con esattezza e con facilità tra un servizio completamente nuovo ed un nuovo modo di offrire un servizio tradizionale e, pertanto, viene spesso adottato un approccio intermedio tra le due ipotesi.

Ad esempio, nell'Unione Europea, all'interno del "Pacchetto per la finanza digitale", la Commissione Europea ha dichiarato di voler adottare diverse misure, sia allo scopo di revisionare ed emendare i Regolamenti in materia bancaria e finanziaria (ad esempio le regole MIFiD, al fine di includere nella lista degli strumenti finanziari alcuni *crypto-assets* aventi caratteristiche particolari, come ad esempio i *security-token*), sia di adottare nuove regole, come la proposta per un Regolamento sul commercio di *crypto-assets* (MiCA) - una serie di regole innovative applicabili a talune categorie di *crypto-assets*, agli emittenti ed agli offerenti di servizi ad essi relativi - per alcuni aspetti simile alle regole MIFiD e per altri simili a quelle del "Regolamento Prospetto".

Inoltre, alcune misure sono già state adottate a livello di Unione Europea, come il Regolamento (UE) 2020/1503 sui prestatori europei di servizi di *crowdfunding* alle imprese, un esempio di prima mano di come il nuovo fenomeno, con l'aumento dei capitali raccolti attraverso i portali web, susciti il bisogno di un nuovo armamentario di regole, disegnate specificamente per le caratteristiche del nuovo servizio, pur nel rispetto dei principi generali e delle tradizionali garanzie di legge a tutela degli investitori.

La nascita del *FinTech* ha quindi reso evidente come i tradizionali approcci normativi fossero anacronistici e non in grado di cogliere l'essenza stessa dei nuovi fenomeni – giuratamente non sussumibili nelle tradizionali fattispecie[104] – nonchè l'impossibilità di adeguare progressivamente e

[104] Si pensi, a titolo esemplificativo, al dibattito tuttora in corso sulla possibilità di assimilare le *crypto*-valute, come i *bitcoin*, alla moneta ovvero agli strumenti o prodotti finanziari, dibattito che ha visto in Italia susseguirsi alcune pronunce della Corte di Cassazione (sentenza n. 26807 del 25 settembre 2020, richiamata dalla più recente pronuncia n. 44337 del 30 novembre 2021) e che, a livello europeo, ha trovato parziale risposta con la proposta di Regolamento sul mercato delle *crypto*-attività (MiCAR).

tempestivamente la normativa alle evoluzioni tecnologiche e di mercato: la lentezza del procedimento legislativo tradizionale, infatti, rischia di comportare un perenne ritardo nell'adeguamento della cornice regolamentare, rispetto a quanto avviene sui mercati, alle tecnologie utilizzate, ai prodotti e servizi offerti, con i rischi che ne conseguono.

4. UN NUOVO APPROCCIO PER LA REGOLAMENTAZIONE DEL FINTECH: LE SANDBOXES REGOLAMENTARI

A partire dal 2016, si sta diffondendo in quasi tutto il mondo un approccio nuovo che sembra alleggerire il processo di regolamentazione dei mercati finanziari[105]: l'introduzione delle "*sandobxes* regolamentari", e cioè di cornici normative create *ad hoc* all'interno delle quali alle imprese è permesso offrire i propri servizi, beneficiando temporaneamente di un regime regolamentare caratterizzato da importanti esenzioni dalle disposizioni più rigide e stringenti che troverebbero altrimenti applicazione per il caso specifico sotto il regime tradizionale ovvero, per usare le parole di Ringe e Ruof, « *un terrendo di gioco sicuro in cui sperimentare, fare esperienza e 'giocare' senza dover affrontare le severe regole del 'mondo reale*» [106]. Infatti, una delle conseguenze dell'iper-regolamentazione dei mercati finanziari, è senz'altro quella per cui la maggior parte dei servizi relativi a transazioni finanziarie sono soggetti a norme molto rigide per cui le imprese che intendano prestare detti servizi, necessitano dell'autorizzazione delle autorità nazionali competenti, le quali svolgono un ruolo di vigilanza e sorveglianza sulle imprese stesse. L'accesso alla *sandbox* regolamentare invece permette alle imprese, a certe condizioni, di esercitare attività soggette a riserva, beneficiando di un regime più permissivo.

La nascita di nuove tecniche di sperimentazione nell'area *FinTech* risponde all'esigenza di offrire forme di regolamentazione in grado di sottrarre i nuovi fenomeni digitali al *far west* del mercato – e della deregolamentazione - ma allo stesso tempo in grado di garantire una regolamentazione snella, capace di evolversi agevolmente, sia nelle tempistiche che nei contenuti, come appunto fanno i mercati stessi[107].

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[105] D. A. ZETZSCHE, R.P. BUCKLEY, J. N. BARBERIS and D. W. ARNER, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, in *Fordham Journal of Corporate & Financial Law*, 2017. Per una panoramica generale sull'argomento, si veda in particolare: M. ATTREY, e al., *The role of sandboxes in promoting flexibility and innovation in the digital age,* policy note No.2 of the Going Toolkit, 2020, pp. 1-26; E. CORAPI, *Regulatory Sandbox nel Fintech?,* in E. CORAPI e R. LENER (a cura di) *I diversi settori del Fintech. Problemi e prospettive*, Wolters Kluwer, Milano, 2019, pp. 13-29; N. EBERLE, *Die Regulatory Sandbox –(K)ein Modell fur Deutschland?,* in *Legal Revolutionary*, 2020, pp. 175-179; C. KRONKE, *Sandkastenspiele, op. cit.*; R. PARENTI, *Regulatory Sandboxes and Innovation Hubs for FinTech*, in Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, pp. 8-62; D. QUAN, *A Few Thoughts on Regulatory Sandboxes*, in *Stanford Center on Philanthropy and Civil Society*, 2021; ESAs, Joint Report on FinTech: *Regulatory sandboxes and innovation hubs*, Joint Committee (JC), 2018, p. 74.

[106] W. G. RINGE e C. RUOF, *Regulating Fintech in the EU: the Case for a Guided Sandbox,* 2020, in *European Journal of Risk Regulation*, p. 11.

[107] T. PARACAMPO, *FinTech between Regulatory Uncertainty and Market Fragmentation. What are the Prospects for the Technological Single Market of Financial Services?,* in *Studies in Law and Economics* (Studia Prawno-Economiczne), n. 110, 2019.

In altri termini, il fine delle *regulatory sandboxes* è quello di favorire l'innovazione, posto che se da un lato il suo assoggettamento alle ordinarie disposizioni normative e regolamentari rischierebbe di soffocare o rallentare il processo evolutivo del settore finanziario, dall'altro l'assenza di regolamentazione equivarrebbe ad un atto di arrendevole rinuncia da parte del legislatore, lasciando importanti lacune nell'ordinamento in ambiti come quelli della tecno-finanza sempre più incisivi e lasciando altresì spazi per l'arbitraggio normativo se non per veri e propri comportamenti antigiuridici, lesivi di quegli interessi tipicamente tutelati dall'ordinamento.

Le *sandboxes* regolamentari *FinTech* sono state introdotte di recente in diversi Paesi in tutto il mondo[108]. In Europa, il primo Paese ad implementarle è stato il Regno Unito dove, da quando l'iniziativa è stata lanciata per la prima volta, il regime della *sandbox* ha subito un articolato processo evolutivo, aggiornandosi a "versioni" sempre più avanzate[109]. Qui, lo strumento della *sandbox* è stato introdotto per la prima volta nel 2015, grazie ad un'intuizione pionieristica della *British Financial Conduct Authority* (FCA), ed ha avuto un enorme impatto positivo nei settori di interesse, del quale hanno beneficiato in particolar modo le *start-up* sperimentali, avendo avuto modo di testare numerose iniziative ad alto tasso innovativo ed allo stesso tempo di crescere senza trascurare la *compliance* regolamentare. La *sandbox* regolamentare è stata resa operativa a scaglioni, permettendo l'accesso alle imprese durante specifiche finestre temporali.

Proprio in quest'ottica di continua evoluzione, nel 2020, il Cancelliere britannico ha incaricato Ron Kalifa (OBE) di condurre una *review* indipendente con lo scopo di identificare le aree del settore *FinTech* nel Regno Unito, suscettibili di ulteriori miglioramenti. Il lavoro condotto da Kalifa ha portato a sintetizzare nella *review* una moltitudine di raccomandazioni tra le quali, in particolare, emerge la necessità che la struttura regolamentare, legata alla *sandbox*, sia indirizzata verso un ulteriore stadio di evoluzione. Più precisamente, a tal fine, è stata promossa la creazione di una "*scalebox*" *FinTech* con l'obiettivo di fornire un supporto, su base continuativa, alle imprese *FinTech* in crescita, proseguendo nella direzione già individuata e tracciata dalla versione più risalente della *regulatory sandbox*. Alla luce delle indicazioni fornite dalla *Review*, nell'agosto del 2021, la *sandbox* regolamentare è stata resa accessibile in modo continuo, permettendo alle imprese di fare richiesta per l'accesso durante tutto l'anno[110].

Queste caratteristiche hanno reso il Regno Unito un ambiente commerciale e giuridico accogliente e stimolante per tutti gli operatori del settore *FinTech*. Tuttavia, siccome gli strumenti innovativi proposti

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108 Per una interessante analisi sull'argomento si veda J. J. GOO e Y. H. HEO, *The Impact of the Regulatory Sandbox on the Fintech Industry, with a Discussion on the Relation between Regulatory Sandboxes and Open Innovation*, 2018, in *Journal of Open Innovation. Technology, Market, and Complexity*, pp. 1-18.

109 D. QUAN, *A Few Thoughts on Regulatory Sandboxes*, *op. cit.*

110 R. KALIFA, *The Kalifa Review of UK Fintech*, 2021, HM Treasury.

si sono dimostrati così efficaci, molte altre giurisdizioni a livello internazionale hanno cercato di emulare gli approcci d'oltre manica per lanciare le proprie iniziative, con la conseguenza che per rimanere altamente competitivo in questi settori, il Regno Unito è chiamato a prendere importanti e rapidi provvedimenti «al fine di assicurare che la propria offerta rimanga leader sul mercato»[111].

Sulla scia degli eccellenti risultati osservati nel Regno Unito, il Parlamento Europeo, in una risoluzione del 17 maggio 2017, ha sollecitato l'introduzione di un regime di prova, raccomandando alle autorità competenti di «permettere ed incoraggiare la sperimentazione controllata delle nuove tecnologie per i nuovi ed esistenti partecipanti ai mercati», specificando inoltre che «un tale ambiente controllato di sperimentazione, potrebbe assumere la forma e lo spazio di una sperimentazione normativa ("*sandbox*") per i servizi *FinTech* che abbiano un potenziale effetto positivo, e porti con sé un'ampia varietà di partecipanti ai mercati; sperimentazione che è già stata introdotta con successo in diversi Stati Membri» [112].

Seppure un quadro comune europeo relativo alla *sandbox* regolamentare sembra ancora lontano dall'essere realizzato, ciononostante la Commissione Europea, sollecitata dal Parlamento europeo e dal Consiglio, ha delineato il *FinTech* Action Plan[113], nel quale compaiono finalmente a livello europeo l'istituto della *regulatory sandbox* e degli *innovation hubs* come nuovi facilitatori dell'innovazione tecnologica, sulla base di un'analisi non solo di mercato ma anche comparativa. La Commissione, inoltre, ha garantito la stessa dignità alle iniziative proposte in alcuni Stati Membri, soprattutto sottolineandone la legittimità legale e che «*le autorità nazionali competenti sono obbligate ad applicare le norme rilevanti dell'Unione Europea nel campo dei servizi finanziari, che tuttavia prevedono un margine discrezionale per concerne l'applicazione dei principi di proporzionalità e flessibilità ivi consacrati. Ciò potrebbe apparire di fondamentale rilevanza nel settore dell'innovazione digitale*» [114]. Anche in Italia, nel 2021, sono state aperte delle prime finestre temporali per presentare domanda di accesso al nuovo regime sperimentale della *sandbox* regolamentare per il *FinTech* che, nei prossimi mesi, permetterà di capire se e in che estensione il mercato italiano potrà trarne effettivo beneficio.

Le condizioni per l'ammissione alla *sandbox* regolamentare, pur essendo differenti per ciascuna giurisdizione, presentano tuttavia elementi comuni[115]. Precisamente, per partecipare ad una *sandbox*, le

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[111] *Ibid.*

[112] Parlamento Europeo, Risoluzione del 17 maggio 2017 sulla tecnologia finanziaria*: The Influence of Technology on the Future of the financial Sector*, (2016/2243(INI).

[113] Commissione europea, *Comunicazione al Parlamento europeo, al Consiglio, alla Banca Centrale Europea, al Comitato economico e sociale europeo e al Comitato delle Regioni - Piano d'azione per le tecnologie finanziarie: per un settore finanziario europeo più competitivo e innovativo*, 2018, COM 109.

[114] Commissione europea, Comunicazione al Parlamento europeo, al Consiglio, alla Banca centrale europea, al Comitato economico e sociale europeo e al Comitato delle regioni - Piano d'azione per le tecnologie finanziarie: verso un settore finanziario europeo più competitivo e innovativo, 2018, COM 109.

[115] BAKER MCKENZIE, *International Guide to Regulatory Fintech Sandboxes,* 2020.

imprese devono in genere dimostrare che le loro attività nei settori bancario, finanziario ed assicurativo, abbiano una risonanza economica e caratteristiche innovative rispetto ai mercati di riferimento. In alcuni casi, inoltre, possono essere richiesti requisiti più specifici, come l'AuM sotto certe soglie, il *target* della clientela, una precisa struttura organizzativa interna.

Il beneficio principale delle *sanboxes* regolamentari è rappresentato dal fatto che consentono alle imprese di sperimentare direttamente sul mercato, quindi verso il cliente finale, prodotti e servizi innovativi, offrendo la possibilità di comprendere meglio le esigenze dei consumatori e preparare la propria attività commerciale all' ingresso nel mercato in via definitiva. Inoltre, le imprese non solo si avvantaggiano di regole meno rigide ma, essendo sottoposte alla continua sorveglianza delle autorità competenti, evitano il rischio di infrazioni o di incorrere in sanzioni relative alle attività esercitate ed ai servizi prestati.

Nel frattempo, anche i legislatori ed i regolatori hanno la possibilità di vagliare l'efficacia del contesto regolamentare e di adottare un approccio collaborativo volto al dialogo con i principali attori dei mercati. In quest'ottica i poteri sanzionatori, che nell'esperienza giuridica hanno da sempre rappresentato un elemento "essenziale" nell'indirizzare le attività degli attori finanziari, ed allo stesso tempo un deterrente rispetto all'assunzione di comportamenti lesivi ai danni degli investitori - così come, in ultima analisi, ai fini della tutela della stabilità e confidenza dei mercati finanziari -, sono ora stati rimpiazzati da un reciproco dialogo ed un amichevole aiuto, volti all'analisi, definizione ed attuazione di iniziative concrete volte a promuovere e sostenere la concorrenza e, contemporaneamente, assicurare adeguate garanzie a tutela dei consumatori. Il dialogo aiuta a comprendere fino in fondo la trasformazione digitale in atto nei mercati finanziari, per quanto riguarda la prospettiva dei regolatori/legislatori, mentre permette agli operatori del settore di lanciare sul mercato delle attività che altrimenti sarebbero state intralciate dalle regole in vigore.

Da ultimo, le *sandboxes* regolamentari favoriscono l'armonizzazione – seppure con alcune eccezioni dalle regole ordinarie – e pertanto offrono alle imprese costi legali e di conformità inferiori. Va però notato che le *sandboxes* non conducono ad una totale eliminazione di questi costi poiché proprio per essere ammessi a partecipare ad una *sandbox*, presentando la relativa domanda, è necessario soddisfare alcuni requisiti per i quali si richiedono delle approfondite attività preparatorie e di *compliance*. Volendo prendere ad esempio la recentissima realtà italiana, per la proposizione della domanda oltre, ovviamente, una dettagliata ed analitica descrizione del progetto, anche nel contesto della stessa sperimentazione, è necessaria una serie di adempimenti volti all'analisi per quanto riguarda, tra le altre cose, le misure da adottare a presidio dei rischi, gli strumenti a tutela degli utenti - come garanzie od assicurazioni - le forme di comunicazione al pubblico e l'eventuale garanzia per responsabilità verso gli utenti, le varie forme di impatto che il progetto potrebbe avere a diversi livelli, e tutta una serie di requisiti tanto strutturali – forma della società, composizione e caratteristiche dei suoi organi - quanto

informativi e documentali, che rendono la domanda per l'ammissione alla *sandbox*, molto simile ad una tradizionale domanda di autorizzazione alle autorità di vigilanza nazionali.

Soffermandoci sul contesto italiano, si sottolinea come il decreto MEF n. 100/2021[116], nel rimarcare l'impostazione "reticolare" che sta prendendo piede nel settore della regolamentazione finanziaria, abbia per la prima volta istituzionalizzato tramite delle apposite interlocuzioni, il dialogo tra le autorità di vigilanza italiane (CONSOB, Banca d'Italia e IVASS) da una parte e gli operatori finanziari dall'altra, al fine di raccogliere le istanze, le esigenze e le evoluzioni in atto nel settore *FinTech.* In questo contesto, per la prima volta in via ufficiale, il legislatore ha manifestato di comprendere come, in particolar modo in certi settori, gli obiettivi oggetto della sua azione non possano essere realizzati senza una piena comprensione dei fenomeni sociali che si susseguono ad una velocità sempre più sfuggente rispetto alle tradizionali tempistiche democratico-parlamentari, e di come questa comprensione non sia realizzabile senza la condivisione delle conoscenze e l'utilizzo delle competenze di quei soggetti che in modo dinamico prendono parte ed in certi casi guidano le rivoluzioni sociali ed economiche. In questo senso, la tipica impostazione antagonistica tra regolatori e regolati viene meno in favore di un rapporto che mira a costruire un rapporto cooperativo basato sulla prevenzione piuttosto che sulla sanzione.

Sempre in questo contesto si inquadra l'istituzione del Comitato *Fintech* – un comitato inter-istituzionale - le cui attribuzioni giocano un ruolo fondamentale nell'impostazione complessiva dell'approccio al fenomeno *FinTech* da parte dell'Italia. Il Comitato, infatti, osserva e monitora l'evoluzione del *FinTech* a livello nazionale, europeo ed internazionale, al fine di individuare gli obiettivi, definire i programmi e porre in essere le azioni per favorire lo sviluppo del *FinTech* - anche mediante la promozione ed il supporto di interventi di semplificazione amministrativa o la formulazione di linee guida e migliori prassi -, agevolando il contatto degli operatori del settore con le istituzioni e con le autorità - anche attraverso studi, analisi, organizzazione di tavoli di confronto e audizioni di operatori del settore *FinTech -,* e formulando, al Governo ed alle competenti autorità europee, le proposte di intervento normativo ritenute opportune.

Ancora, in alcuni regimi è permesso alle imprese di accedere alle *sandboxes,* al fine di richiedere alle autorità competenti di essere sottoposte a specifiche regole e beneficiare così di esenzioni individuali studiate per ciascun soggetto richiedente. Ciò, per quanto rappresenti un beneficio tangibile per le imprese, conduce ad una non generale armonizzazione, e quindi ad alcuni rischi in ordine ad una concorrenza sana e leale tra imprese e – da ultimo ma non meno importante – ad inferiori garanzie per la protezione dei clienti.

[116] Decreto Ministeriale 30 aprile 2021, n. 100 Regolamento di attuazione dell'articolo 36, commi 2-bis e seguenti, del decreto legge 30 aprile 2019, n. 34 cosiddetto "Decreto Crescita", convertito, con modificazioni, dalla legge 28 giugno 2019, n. 58, recante la disciplina del Comitato e della sperimentazione delle FinTech.

5. CONCLUSIONI

L'esigenza di regolamentazione dei mercati finanziari è strettamente collegata alla natura della finanza, la quale, nasce e si sviluppa tra le maglie di un contesto giuridico-regolamentare ma che, essendo estremamente sensibile ai mutamenti del contesto sociale, necessita di regole sostanziali e procedurali (di esecuzione) continuamente aggiornate ed in grado, attraverso schemi contrattuali definiti, di regolare ogni tipologia di transazione. I mercati finanziari sono strettamente collegati al settore industriale e, pertanto, le innovazioni tecniche che si sviluppano e trovano fertile applicazione in quest'ultimo, finiscono necessariamente per riversarsi nel contesto dei mercati finanziari, sia rispetto all'ambito della gestione nei processi d'impresa quanto nello sviluppo e nelle modalità di offerta di prodotti finanziari che abbiano un *appeal* tecnologico tale da attrarre un sempre maggior numero di potenziali investitori. Quando si pensa però al mondo della finanza, non possono che venire in mente eventi economico sociali, anche della storia più recente, che frenano gli impulsi derivanti dagli sviluppi tecnologici a causa della sfiducia mista a paura che si è creata in seno agli investitori, soprattutto a causa di comportamenti spesso poco corretti da parte delle istituzioni finanziarie che, con il senno di poi, sono state lasciate troppo libere nella propria iniziativa economico-finanziaria.

Questo, insieme all'obiettivo di fornire le adeguate garanzie alla platea di investitori al fine di proteggerli dai rischi emersi dai recenti scandali finanziari, ha favorito il processo di iper-regolamentazione dei mercati. Se la previsione di norme cogenti è certamente un fattore positivo per ridurre i rischi e migliorare la protezione dell'investitore, allo stesso tempo rappresenta un impedimento per lo sviluppo di nuove attività, e pertanto di rallentamento della crescita economica in generale.

La necessità di trovare il giusto equilibrio tra queste due differenti tendenze è stata tradizionalmente oggetto del dibattito su quale sia l'approccio più efficacie per regolare il settore finanziario. Inoltre, il momento attuale, culla della digitalizzazione finanziaria, ha reso la discussione ancora più importante siccome, sebbene via sia l'esigenza di mitigare i nuovi rischi derivanti dall'uso degli strumenti digitali, allo stesso tempo c'è preoccupazione rispetto al fatto che troppi gravami regolamentari sulle imprese, scoraggino lo sviluppo di un mercato che, almeno in questa prima fase, risulta ricco di potenzialità. Inoltre è importante tenere a mente che la complessità della società moderna, accentuata dalle frenetiche evoluzioni tecnologiche, ha spinto verso nuovi lidi quell'atteggiamento normativo-regolamentare che già dai primi anni '90 del secolo scorso, stava abbandonando la visione piramidale delle fonti del diritto di kelseniana memoria, per orientarsi ad un atteggiamento definito "orizzontale" in grado di coinvolgere nel processo legislativo-regolamentare una platea di soggetti ulteriori rispetto al legislatore o ai regolatori, sulla considerazione pratica per cui un maggior livello informativo ed una migliore sintesi dei diversi interessi in gioco, comporti un risultato più efficiente, veloce e completo in ambito normativo-regolamentare.

Quindi, dopo decenni di iper-regolamentazione, a partire dal secondo decennio del nuovo secolo, è iniziato ad emergere un atteggiamento regolamentare più "leggero" caratterizzato anche dal coinvolgimento di entità private nel processo di regolamentazione e dall'introduzione di regimi sperimentali, come quello delle *sandbox* regolamentari.

Le *sandboxs* regolamentari per il *FinTech* rappresentano uno strumento molto interessante dal momento che permettono alle imprese, specialmente *start-up* ed imprese indipendenti al di fuori dei grandi gruppi bancari - e pertanto spesso non in grado di sopportare elevati costi di *compliance* - di sviluppare la propria iniziativa imprenditoriale, beneficiando di esenzioni rispetto all'ordinario regime regolamentare. Allo stesso tempo, la continua sorveglianza da parte delle autorità nazionali competenti è in grado di garantire una protezione adeguata agli investitori ed alla stabilità dei mercati. Le *Sandboxes* regolamentari potrebbero risultare uno strumento indispensabile per gli imprenditori emergenti al fine di accedere ai mercati, come ha già dimostrato l'esperienza del Regno Unito e – ci si augura – come presto dimostrerà l'esperienza del nuovo regime italiano.

Sulla scorta delle riflessioni sopra svolte, si può affermare che l'esperienza della *sandbox*, in particolare quella del Regno Unito – ben raffigurata dalla Kalifa *Review* – e in Italia – ancora in una fase di gestazione – ha comunque reso evidente agli interpreti del settore alcuni limiti dell'approccio ad essa legato. Se alcuni limiti, finanche rischi, sono legati alla stessa natura e caratteristiche delle *sandboxes* – un'armonizzazione parziale, la riduzione (piuttosto che l'eliminazione) dei costi di *compliance* e dei rischi collegati – altri dipendono piuttosto dal modo in cui queste sono state, ovvero non sono state, regolate nei diversi ordinamenti. Si consideri, ad esempio, la mancanza di armonizzazione a livello europeo e di conseguenza l'impossibilità, per alcune operazioni, di travalicare i confini nazionali.

Questo quadro normativo frastagliato ed eterogeneo rischia di favorire pratiche di *forum shopping* e di arbitraggio regolamentare, a causa dei diversi approcci e regimi adottati dalle autorità nazionali. Aspetto questo quasi paradossale in un settore, come quello del *FinTech*, in cui l'essenza transnazionale richiede un *level playing field* assoluto tra tutti i *players*, con conseguenze potenzialmente gravi per lo sviluppo uniforme del mercato comune. Si pensi ad esempio alle ipotesi - non irrealistiche – in cui in uno Stato membro venisse adottato un approccio permissivo nei confronti di particolari innovazioni tecnologiche applicate alla finanza mentre in un altro Stato membro lo stesso modello di business non potesse godere di altrettanto favore. Di fatto, l'adozione su base nazionale di regimi normativi derogatori delle regole ordinarie (di derivazione europea), sempre più diffusa ed estesa a quote di mercato più ampio, rischia in concreto di minare l'armonizzazione del mercato unico e la sua stessa essenza.

Ed è fuori discussione che su questi ultimi aspetti varrà senz'altro la pena porre una particolare attenzione da parte degli interpreti e degli operatori dei mercati, al fine di identificare le soluzioni che permettano di migliorare un sistema che è, come dimostrato dall'esperienza del Regno Unito, un valido

strumento per il settore del *FinTech* e, in generale, per tutti quei mercati caratterizzati da elevati livelli di innovazione, tale da permettere alla cornice giuridico-regolamentare di stare al passo con i dirompenti cambiamenti introdotti dalle nuove tecnologie digitali.

THE DIGITAL FINANCE PACKAGE: A NEW OPPORTUNITY FOR UNITARY REGULATION OF CRYPTO-ASSETS?

Claudia Marasco

The digital finance package: a new opportunity for unitary regulation of crypto-assets?*

(Il Pacchetto di Finanza Digitale: una nuova opportunità di regolamentazione unitaria dei crypto-assets?)

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ABSTRACT [En]:

This article aims to assess profiles related to the Digital Finance Package, the most recent European disciplinary proposal on crypto-assets, highlighting their criticalities. The changing nature of these instruments and the limited scope of the European regulation suggest that the draft governance documentation is not suitable to respond exhaustively to the wide exigencies on the market of crypto-assets.

Keywords: *Digital Finance Strategy – MiCA – Regime Pilot - Crypto-assets – regulatory limits*

ABSTRACT [It]:

Il presente lavoro intende mettere in luce l'esistenza di alcuni profili di criticità relativi al Pacchetto di Finanza Digitale, che costituisce la più recente proposta disciplinare europea sui crypto-assets. La natura mutevole degli strumenti e l'approccio circoscritto della disciplina europea, infatti, suggeriscono che il progetto non sia idoneo a rispondere esaustivamente alle esigenze disciplinari diffusamente avvertite.

Parole chiave: Strategia per la finanza digitale – MiCA – Regime Pilota – Crypto-assets – limiti normativi

1. INTRODUCTION

Crypto-assets appeared on the global economic scene as a-legal phenomenon and, at first, supervisory authorities were only concerned about the identifyication of the economic risks steaming from their

adoption[117]. At a closer look, the success of these assets derived from a free operating environment not governed by guarantor authorities and third parties' control, which contributed to the wide adoption of crypto-assets. Within this context, the lack of a regulatory definition and an intrinsic value has allowed, at the onset of this technology, for crypto-currencies to circulate freely on the network, even though these did not exist in rerum nature, according to a system that could be defined as *anarchic* but not *ex se* illicit.

The marginal role that use of crypto-assets played in the general economy justified the wait-and-see position adopted by legislators; nevertheless, the diffusion of this phenomenon, in terms of concreteness, has increased significantly over time. Sector authorities at the various levels of operability can no longer underestimate it[118] as a result. On one hand, the convertibility of certain cryptocurrencies with 'real' money allows to purchase goods, real or virtual, even of considerable value. On the other, cryptocurrencies became a new business for FinTech [119]. The European Parliament recently highlighted that crypto-assets could play also a significant role in the integration process of the Capital Markets Union[120].

These considerations strengthened the urge to prevent possible misuses of these instruments by users, considering that the absence of adequate regulation could facilitate the pursuit of illicit or criminal

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*Il presente contributo è stato approvato dai revisori.

[117] See ECB, *Virtual Currency schemes*, published on the website www.ecb.europa.eu, on October 2012, which already highlighted the systemic risks for the money and financial market; EBA, *Notice for consumers on virtual currencies*, published on the website www.eba.europea.eu on 12 December 2013; but also Banca d'Italia, *Avvertenza sull'utilizzo delle cosiddette "valute virtuali,* published on the website www.bancaditalia.it on 30 january 2015. For a more in-depth analysis of the warnings issued between 2012 and 2015 by the supervisory authorities, see also L. PELLEGRINO, *Le valute virtuali nella prospettiva delle autorità di vigilanza comunitarie e nazionali*, published on 28 May 2015 on the webside www.dirittobancario.it.

[118] In particular, 2017 was a "watershed year" for cryptocurrencies. Their combined market cap went from $ 15 billion in January to more than $ 600 billion by the end of the year, making cryptocurrencies a headline news throughout 2017 (*ex multis,* see H. HORSLEY, *The Year Crypto Became a New Asset Class*, published on the website www.coindesk.com on 30 december 2017). This growth is due to the so-called ICO boom, which will be discussed later: hundreds of tokens were launched without regulation and, therefore, in a completely decentralized system. Therefore, only since 2017 regulators have begun to realize both the potential of this technology for financial markets and the extent of the risks involved. In general, regulators felt intrigued by blockchain technology, but they weren't equally interested in Bitcoin as a cryptocurrency per se. A typical saying was: "Blockchain will stay; Bitcoin may vanish". In its 2018 Fintech Action Plan, the European Commission recognized, for the first time, that crypto assets had become a worldwide phenomenon and a promising new type of financial asset; however, their high volatility, fraud, operational weaknesses and vulnerabilities posed many risks. Only then, in the 2018 Fintech Plan, did the European Commission admit for the first time that it was necessary to assess the adequacy of the EU regulatory framework for cryptocurrencies. See A. FERREIRA, P. SANDNER, *Eu search for regulatory answers to crypto assets and their place in the financal markets' infrastructure*, in *Computer Law&Security Review*, n. 43, 2021, p. 5.

[119] *Ex multis*, see italian Report by VI Commissione permanente (Finanze), Parlamento, published on the website www.documenti.camera.it, on 13 maggio 2021, p. 33.

[120] European Parliament Resolution of 8 October 2020 with recommendations to the Commission on *Digital Finance: emerging risks in crypto-assets — regulatory and supervisory challenges in the area of financial services, institutions and markets* (2020/2034(INL)). Parliament highlighted the importance of digital finance in the integration process of the CMU, also given the push due to the prolongation of the Covid-19 pandemic.

interests[121]. Meanwhile, the possibility of using these instruments for investment or financing purposes, as an alternative to the banking channel, gradually encouraged national and international regularators to take a position on the matter.

Although the normative framework on stnadard financial assets is para-national in nature, cryptocurrencies make it difficult to create governance instruments at local level. While local regulators should still investigate the creation of laws, this approach alone risks to be unable to address the international nature of exchanges using the new technology, which increases the speed of international transactions thus weakening the scope and applicability of local laws.

2. THE CURRENT FRAMEWORK OF CRYPTO-ASSETS ON THE EUROPEAN LANDSCAPE

The scope of this digital transformation impacts contemporary society as a whole. Therefore, public and private actors at various levels are faced with the difficulties of abscribing these new phenomena to unitary categories. In fact, crypto-instruments are profoundly different from established paradigms.

At first, supranational supervisory authorities limited themselves to providing warnings. Instead, legislators have attempted to regulate the emerging FinTech phenomena on a national level[122].

For instance, the Swiss Financial Market Supervisory Authority (FINMA) defined a specific form of crypto-asset circulation (the Initial Coin Offering – ICO -) and then inaugurated a taxonomy distinguishing crypto-assets into payment tokens, security tokens and utility tokens[123].

In 2017, the AMF (l'Autorité des marchés financiers), echoing the Swiss tripartition, observed that tokens could hardly fall into categories of financial instruments, as defined by the Code Monétaire et Financier. Subsequently, in 2019, the legislator opted for a special regulation of token offerings, inserting a new chapter in the Code Monétaire et Financier[124]. It should be applicable only to the so-called jeton d'usage (i. e. the utility token), which does not qualify as a financial instrument.

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[121] With reference to the offenses committed in Italy, supervisory Authority evidenced that, among 276 investigations relating to illegal phenomena via the Internet, the first 22 cases of abusive conduct referring to the marketing of cryptocurrencies were already noted. CONSOB, *Relazione per l'anno 2018*, published on 31 march 2019 and available on the website www.consob.it.

See, also, Cass. Pen. II section, 25 September 2020, n. 26807, with a note by L. SANTONI, *Operazioni in criptovalute e abusivismo finanziario: Nota a Cass. Pen. II sez., 25 settembre 2020, n. 26807*, in *Riv. Dir. del Risparmio*, 2, 2021, p. 1 ff.

[122] For the following examples see A. ZETZSCHE, F. ANNUNZIATA, D. W. ARNER, R. P. BUCKLEY, *The Markets in Crypto-Assets Regulation(MICA) and the EU Digital Finance Strategy*, EBI Working Paper Series, n. 77, 2020, p. 203 ff.

[123] FINMA, *Practical Guide for the treatment of requests concerning subjection with reference to initial coin offering*, published on 16 february 2018, on the website www.finma.ch/it/news/2018.

[124] www.amf-france.org/en_US/Acteurs-et-produits/Societes-cotees-et-operations-financieres/Offres-au-public-de-jetons-ICO.

In 2018, Malta adopted specific rules applicable to certain types of tokens[125], while Liechtenstein issued the Token and Trusted Technology Service Provider Act (TVTG), dedicated to the so-called *trustworthy technologies*. It deals with many of the central aspects of cryptocurrency regulation, introducing minimum standards for service providers based on these technologies[126].

In this context, Italy has been among the first countries in Europe to adopt specific rules dedicated to DLT and smart contracts. In fact, it transposed the Fourth Anti-Money Laundering Directive[127] and issued the Decreto Semplificazione (D.L. 135/2018), even if this intervention merely limited itself to definitional aspects (Article 8-ter Decree-Law 135/2018). However, italian "financial products" definition, pursuant to Art. 1(1)(u) Testo Unico 58/98 (T.U.F.) seems to include certain types of tokens. In fact, "financial products" includes "financial instruments", as well as any other form of investment of a financial nature. Therefore, the Financial Intermediaries Supervisory Authority, at the end of a public consultation in 2019, suggested an ad-hoc regulatory approach to utility tokens, that cannot be compared to pre-existing financial instruments. This refers to crypto-assets that incorporate the entitlement to a future supply, either a good or a service tha has been already delivered or will be delivered by the issuer [128].

It is apparent that national authorities are realising the importance of regulating crypto-assets: these could attract capital and contribute to the economic growth of individual countries. Nevertheless, these legislative initiatives are highly fragmented and, in some respects, also of uncertain application. In fact, there are interpretative criticalities regarding the reconstruction of crypto-assets legal nature, dipending on the profound inhomogeneity they can present themselves on the market. These approaches, from time to time, can be seen as timid attempts to orient the interpreter more broadly, to individual concrete cases. Nevertheless, they fail to fill the disciplinary gaps related to the specific characteristics of each crypto-activity[129]. This hinders the full realisation of a digital single market at the European level.

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[125] www.ccmalta.com/news/malta-Blockchain-crypto-legislation.

[126] https://impuls-liechtenstein.li.

[127] Through D.lgs. 25 may 2017 n. 90, *Attuazione della direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo e recante modifica delle direttive 2005/60/CE e 2006/70/CE e attuazione del regolamento (UE) n. 2015/847 riguardante i dati informativi che accompagnano i trasferimenti di fondi e che abroga il regolamento (CE) n. 1781/2006*.

[128] See CONSOB, *Le offerte iniziali e gli scambi di cripto-attività - Rapporto finale*, published on 2 January 2020 and available on the website www.consob.it.

[129] Indeed, already in 2014, a study by the European Commission entitled published in October 2014, submitted to the Member States their proposals for a unitary framework of the phenomenon. The document had the merit of illustrating a vast number of possible qualifications of a specific virtual currency, i.e. bitcoin, also evaluating its effects with respect to the potential current activities related to it; however, it did not prove sufficient to provide a definitive solution to the question, since it was not possible, at that time, to reach the consensus of the Member States on the tax regime to be applied, in practice, to transactions in virtual currency. See European Commission, Group on the future of VAT, VAT treatment of Bitcoin, 23 October 2014.

The cross-border nature of cryptocurrencies could hamper regulatory harmonisation in the EU[130]. Hence, the European Supervisory Authorities pointed out their concern about divergent national approaches to crypto-assets in the EU and the emergence of national customised regulations. Also the Bank for International Settlements (BIS) acknowledged that the continuing growth of these products and trading platforms may increase concerns regarding financial stability and risks for banks[131].

In light of the concerns raised by sector authorities, the European legislator is supporting a unified regulatory approach. For this purpose, the European Commission mandated EBA and ESMA to assess the applicability and appropriateness of the current EU regulatory framework for financial services[132].

The results of the prior consultation confirmed the existence of multiple risks to investors. Moreover, they reported a very composite asset landscape based on DLT technology[133] and this causes significant classifying difficulties. In fact, the doctrine distinguishes between two categories of tokens: native tokens and derivative tokens. The former (in which cryptocurrencies such as bitcoin and tokens issued on the occasion of Initial Coin Offerings - ICOs - are distinguished) consists of tokens created directly on the blockchain[134] and existing only in the DLT reality; the latter derive from a process of transforming real assets (such as bonds) into tokens[135]. So these can take on different guises depending on their specific characteristics.

As regards the technology, "native" assets generally use a permissionless DLT[136], whereas derivative assets generally employ a permissioned DLT[137]. It implies, however, the intervention of certain parties who are responsible for controlling the network[138].

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[130] ESMA, *alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements*, published on 17 november 2017 on the website www.esma.europa.eu; ESMA, *Own Initiative Report on Initial Coin Offerings and Crypto-Assets*, published on 19 october 2018 on the website www.esma.europa.eu.

[131] See Bank of International Settlements, *Statements on crypto- assets*, newsletter published on 13 march 2019 and available on the website www.bis.org.

[132] See Action Plan 2018 contained this request. We refer to the Communication from the EU Commission, entitled: *FinTech Action Plan: for a more competitive and Innovative European Financial Sector*, published on 8 march 2018 and available in www.lex.europa.eu.

[133] See ESMA, *Advice on 'Initial Coin Offerings and Crypto-Assets,* published on January 2019, available on www.esma.europa.eu; EBA, *Report with advice for the European Commission*, published on 9 january 2019 on the website www.eba.europa.eu.

[134] This refers to a validation system based on cryptographic keys explained by S. NAKAMOTO, *Bitcoin: A Peer-to-Peer electronic Cash System*, in www.bitcoin.org. See also V. GUPTA, *The Promise of Blockchain is a World Without Middlemen*, in *Harvard Business Review*, 6 march 2017; M. PILKINGTON, *Blockchain Technology: Principles and Applications*, in Research Handbook on Digital Transformations, edited by F. Xavier Olleros and Majlinda Zhegu, Cheltenham, 2016, in www.ssrn.com; V. BUTERIN, *On Public and Private Blockchains*, in www.blog.ethereum.org.

[135] This process is known as tokenization, understood as "*the digital representation of real (physical) assets on distributed ledgers, or the issuance of traditional asset classes in tokenised form*". OECD, *The tokenisation of Assets and Potential Implications for Financial Markets, OECD Blockchain Policy Series*, 2020, available in www.oedc.org.

[136] We refer to a system that guarantees the certainty of exchanges and transactions, without the need for a central authority, through mechanisms for creating widespread consensus, such as the blockchain.

To learn more about the concept of permissionless DLT, see V. GUPTA, *The promise of Blockchain*, *op. cit.*

[137] See R. AUER, C. MONNET, H. SONG SHIN, *Permissioned distributed ledgers and the governance of money*, in BIS Working Papers n. 924, p. 2.

European authorities interest focused precisely on permissioned derivative tokens. In fact, they are considered interesting for developments in the financial markets, because of european and national regulations[139]. Therefore, ESMA emphasised the possibility of subjecting such assets to the pre-existing regulations on financial instruments and investor protection. As we will see, this consideration has consequences on the european disciplinary action.

3. THE FINANCIAL DIGITAL PACKAGE: A REGULATORY TURNING POINT…

Following public consultations[140], the regulator considered it appropriate to concretely provide a single framework for crypto-activities. For this purpose, the European Commission invoked Article 114 TFEU, which empowers the Union to draw appropriate provisions for the convergence of the legislation of Member States to cater for the establishment and function of the internal market[141]. The European regulator realised that, in this context, speed of action is essential to satisfy regulation requests and to prevent the dangerous preconditions for regulatory arbitrage by single EU member states. In light of this, the Commission published a new Strategy for Digital Finance[142]. It consists of a Pilote Regime for markets infrastructures based on distributed ledger technology; of the proposal for a regulation for the market in cryptoassets (Markets in Cryptoassets, also referred to as MiCA or MiCAR) [143] - and finally of the DORA (Regulation on Digital Operational Resilience for the Financial Sector): *i.*

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[138] About the difference between permissioned e permissionless DLT, see ESMA, *Report on The Distributed Ledger Technology Applied to Securities Markets* published on 7 february 2017 on the website www.esma.europa.eu; in doctr. F. ANNUNZIATA, *Distributed Ledger Technology e mercato finanziario: dalle prime posizioni ESMA alle ultime proposte*, in M.T. PARACAMPO (a cura di), *FinTech*, Giappichelli, Torino, 2017, p. 329 ff.

[139] The above mentioned ESMA Report, says: "*permissioned DLTs have a number of advantages compared to permissionless systems when it comes to governance issues, scale or the risk of illicit activities, which makes them more suitable for securities markets*". ESMA, Report on the distributed ledger Technology, op. cit.

[140] In particular, the Commission carried out a public consultation between 19 December 2019 and 19 March 2020 (in www.ec.europa.eu) and a public consultation on the initial impact assessment 19 December 2019 and 16 January 2020 (Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets (MiCA) SWD (2020) 380). Furthermore, the Expert Group on Banking, Payments and Insurance (EGBPI) was consulted on two occasions (www.ec.europa.eu/info/publications/egbpi-meetings-2020_en); as well as a series of dedicated webinars EU framework for crypto-assets, as part of the Digital Finance Outreach 2020 ("DFO") series of events (May 19, 2020).

[141] As mentioned, the European Parliament recently underlined the importance of digital finance in the integration process of the CMU, also in light of the Covid-19 pandemic.

[142] This is the Communication from the European Commission called *Financial Stability, Financial Services and Capital Markets Union, "Communication on Digital Finance Package*, published on 24 September 2020 on the website www.ec.europa.eu. The document identifies four priority objectives: removing regulatory fragmentation in the single market, adapting the EU regulatory framework to foster digital innovation, promoting a data protection strategy and finally, promoting the development of the digital operational resilience of the financial system.

[143] It is included in the *Proposal for a Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive* (EU) 2019/1937 COM (2020) 593 final.

e. a regulatory proposal that aims to increase the resilience of the digital financial sector in relation to cyber risks and cyber threats[144].

With the Pilote Regime, the Commission aims to enable market participants to use DLT, creating a testing system. Economic operators and regulators can gain operational experience in the field of crypto-assets in order to identify possible use cases and to guard against related risks. The hope is to make the crypto market more contestable, facilitating broader access by consumers and providers.

With MiCA[145], the Commission aims to overcome the current regulatory fragmentation. In this way, MiCA intends to regulate stablecoins and crypto-assets other than traditional financial instrument categories and to supervise the functioning and risks involved in the crypto market, at a single European level.

The importance of the MiCA is twofold: first, it represents the EU's attempt to assume its competence in regulating the entire cryptocurrency ecosystem in Europe as part of the goal of establishing the digital single market. In order to prevent further divergences between national regulatory regimes, it seeks to introduce maximum harmonisation in this area by taking due account of the needs of industry stakeholders as expressed through public consultations. Second, and perhaps more importantly, the Commission's proposal represents a unique opportunity for the EU to set global standards, attract innovation, support the business community and position the EU digital economy at the forefront as a competitive participant in the global cryptocurrency industry.

To this end, the MiCA prepares instruments that ensure transparency in the crypto market and sets strict standards for issuers and crypto-asset service providers who wish to operate within the single European market. These requirements include minimum capital, asset safekeeping and liquidity management.

4. FOLLOWS. … WITH LIGHTS AND SHADOWS

While recognising the laudable effort of the European legislator, the regulatory intervention described above does not appear to provide a definitive answer to all the uncertainties associated with the crypto world. In fact, at a closerlook, it aims to regulate only a small segment of the reference sector: the absence of a predetermined and certain classification of crypto-activities operating on the market persists. This inevitably leads to uncertainty in the application of European regulations.

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[144] See European Commission (2020) *Proposal for a regulation of the european parliament and of the council on digital operational resilience for the financial sector and amending Regulations* (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014. COM/2020/595 final.

[145] A "satellite" proposal is then linked to this proposal, aimed at introducing some adjustments to the existing rules on market infrastructures: the *Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology* (COM / 2020/594 final), available on the website www.eur-lex.europa.eu.

In this direction, the circumstance that the MiCA generically refers to the crypto-assets market, but concretely addresses only the issuance and admission to trading platforms of certain specific categories of tokens, which are included in the previously defined group of native crypto-assets. This refers to utilities and hybrids tokens[146], which would be the only species substantially lacking in pre-existing regulation. However, given the recent orientation that recognises the nature of security tokens to hybrids, MiCa turns its attention to utilities only[147].

The European Commission aims at identifying crypto assets not governed by existing financial regulations and definying their position in the regulatory framework. Instead, it leaves a large number of crypto-assets out of its intervention perimeter and especially it ignores bitcoin. As a result, there is a serious risk of neglecting the most dynamic core of the sector. In fact, the principle of technological neutrality adopted by the Commission in the aforementioned regulation requires the nature of single token must be verified on a case-by-case basis. This means that the issuer declares the nature of emitted or traded crypto-asset and thereby determines whether it is subject to the application of the regulation[148].

It is obvious that this circumstance does not make it possible to overcome, *ex ante*, the state of uncertainty about the nature of the instrument and to provide adequate investor protection.

Hence, it is already possible to appreciate the perplexities around the proposed legislation.

Actually, even the Pilote Regime reveals a rather limited scope of application compared to the broader needs it could have met. It only addresses the phenomenon of tokenization of certain limited types of financial instruments on the secondary market alone. This, in order to create a regulatory sandbox[149] for the purpose of testing innovative technological and financial proposals. This tool would support

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[146] In particular, art. 2 provides that the MiCa does not apply in the event of "(a) financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU; (b) electronic money as defined in Article 2, point (2), of Directive 2009/110/EC, except where they qualify as electronic money tokens under this Regulation; (c) deposits as defined in Article 2(1), point (3), of Directive 2014/49/EU of the European Parliament and of the Council49; (d) structured deposits as defined in Article 4(1), point (43), of Directive 2014/65/EU; (e) securitisation as defined in Article 2, point (1), of Regulation (EU) 2017/2402 of the European Parliament and of the Council".

[147] As regards the emissions of ICOs, at least 4 different types of tokens would be distinguishable: 1) the so-called currency / payment; 2) investment / security / financial; 3) utilities; and 4) the hybrids. Cfr. F. MATTASSOGLIO, *Le proposte europee in tema di crypto-assets e DLT. Prime prove di regolazione del mondo crypto o tentativo di tokenizzazione del mercato finanziario (ignorando bitcoin)?,* in *Riv. Dir. banc.*, apr/giu 2021, p. 413 ff.

[148] Art. 17 of the MiCA provides that the issuers of utility tokens must also submit, together with the notification of the white paper, a declaration relating to the fact that the crypto-asset offered cannot be considered: "(a) a financial instrument as defined in Article 4 (1), point (15), of Directive 2014/65 / EU; (b) electronic money as defined in in Article 2, point 2, of Directive 2009/110 / EC; (c) a deposit as defined in Article 2 (1), point (3), of Directive 2014/49 / EU; (d) a structured deposit as defined in Article 4 (1), point (43), of Directive 2014/65 / EU ". Art. 16, with reference to asset-referenced tokens, instead requires that, for the purpose of issuing authorization, also "*(d) a legal opinion that the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits*".

[149] For learn more on best practices and, in particular, on regulatory sandboxes, see M.T. PARACAMPO, *From regulatory sandboxes to the network of innovation facilitators between experimental decentralization and European sharing*, in *Riv. dir. banc.*, n. 2, 2019, p. 219 ff.

financial innovation[150]. Indeed, there is a known risk that EU Member States will lose FinTech market share if the imposed regulatory landscape is too difficult to manoeuvre or imposes a disproportionate regulatory burden on FinTech market players. This would discourage the use of FinTech rather than facilitate it[151]. Hence, the regulatory approach through prior controlled experimentation seems appropriate.

Therefore the Commission adopted the best practices methodology, which had been recommended to the competent authorities by the European Parliament[152] with regard to FinTech and which was also used with regard to the proposed European regulation on artificial intelligence. As has been correctly noted, "The regulatory sandbox forms one piece of a hugely challenging regulatory jigsaw puzzle whose enigmatic parts are not static, but evolving"[153]. His invention addresses the need for regulators to understand new technological developments. This is advisable in order to avoid an inappropriate approach to the regulation of emerging technologies.

Through the initiatives in question, the Commission intends to ensure, at the same time, legal certainty, support for innovation, the protection of each part involved and the integrity of the market, in compliance with the general competition regime and market stability.

However, as will be said, the goal has not yet been achieved.

5. CONCLUSIONS

The MiCA regulatory project has recently obtained the approval of the Internal Commission for Economic and Monetary Affairs (ECON) [154], which, among other things, is responsible for the coordination of economic policies, as well as for safeguarding budgetary and financial stability in the EU. However, it rejected the proposal to adopt a phase-out plan for the transition from Proof-of-Work to the adoption of more sustainable consensus protocols such as Proof-of-Stake[155].

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[150] On the opportunities resulting from the adoption of a regulatory sandbox see CEPS-ECRI, *The Future of Retail Financial Services. What policy mix for a balanced digital transformation? Report of a CEPS-ECRI Task Force*, February 2017, available on www.ceps.eu.

[151] See D. AHERNE, *Regulatory Lag, Regulatory Friction and Regulatory Transition as FinTech Disenablers: Calibrating an EU Response to the Regulatory Sandbox Phenomenon*, in *European Business Organization Law Review,* published on 21 July 2021, pp. 395 – 432.

[152] See European Parliament in its resolution of 17 May 2017 on *Financial technology: the influence of technology on the future of the financial sector* (2016/2243(INI)). Indeed, this suggestion was endorsed by the Sound Practices of the Basel Committee. See Basel Committee on Banking Supervision, *Sound Practices. Implications of fintech developments for banks and bank supervisors*, published on the website www.bis.org on February 2018.

[153] See D. AHERN, *Regulatory Lag, Regulatory Friction and Regulatory Transition op. cit.* p. 396 ff.

[154] On March 14, 2022, the Commission voted on the MiCA regulation proposal, which achieved 31 consensus, 4 votes against and 23 abstentions. See www.quifinanza.it/innovazione/crypto-la-economic-and-monetary-affairs-committee-approva-il-mica.

[155] This is a validation procedure that is based on a liquidity constraint with a guarantee function and not on the resolution of algorithms, which is already foreseen for Ethereum in the course of 2022. To this end, some amendments provided for a

This latest decision demonstrates the importance of constant dialogue with stakeholders, in this context, without which the context of the European Union's crypto-activities would have been altered. This would have had serious repercussions on the single European market to the exclusive advantage of non-EU operators: in fact, investments would have decreased and there would have been the risk of capital flight to countries with less stringent regulation than the European one. In light of these considerations, it is of the opinion that the Commettee adopted a favorable position for the development of the digital market. It is indicative of the urgency felt by the regulator to intervene. It is no coincidence that this body is composed of members of the European Parliament, so it is likely that the result expressed by it antipates the position that the forum will take at first reading.

Nonetheless, it cannot be overlooked that European regulatory interventions are still partial to the challenges posed by the globalization of financial markets.

It is in fact of the opinion that the legislative policy choices adopted up to now discount the difficulties deriving from the priority logic of national law and the consequent ones of harmonizing such heterogeneous disciplines in the logic of pursuing a single market. In particular, the extreme difficulty of jointly delineating the notion of financial instrument and that of currency is noteworthy[156].

It goes without saying, therefore, that these critical issues are a harbinger of risky uncertainties, which will need to be adequately and urgently addressed by regulators at various levels. Indeed, the debate cannot even be confined to the European market, taking into account the global nature of the phenomenon. In fact, at an international level, regulatory proposals of a global nature are being discussed. The numerous papers published by the IFM, which argue that the changes underway affect all countries of the world, orient in this sense[157].

We therefore ask ourselves whether it is no longer effective to opt for more broadly applicable regulatory solutions, which are able, at the same time, to respect technological innovation and provide minimum guarantees to operators, stemming Westphalian-type law systems. The appropriateness of resorting to the international agreement or the application of general principles of the international market adapted to the methods of the digital market could be investigated.

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sort of ban on crypto service providers (exchanges and trading platforms managers) versus non-ESG-compliant virtual currencies.

[156] Consider, in this sense, the wide freedom left to the Member States to transpose the Dir. 2014/65/UE (also MIFID II).

[157] See R. SAHAY, K. BEATON, *The Promise of FinTech: Financial Inclusion in the Post-COVID-19 Era*. IMF Departmental Paper No. 20/09, p. 11.

NEW HORIZONS OF DERIVATIVE CONTRACTS SUBSCRIBED BY LOCAL AUTHORITIES. A COMPARATIVE ANALYSIS

Claudia Milli

The new horizons of derivative contracts subscribed by local authorities. A comparative analysis.*

Commentary on the decision of 12 October 2021 of the Commercial Court (Financial List division) of the High Court of Justice of England and Wales.

(I nuovi orizzonti dei contratti derivati stipulati dagli enti locali. Un'analisi comparatista.
Commento al provvedimento del 12 ottobre 2021 della Commercial Court (Financial List division) della High Court of Justice of England and Wales)

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Neutral Citation Number: [2021] EWHC 2706 (Comm)

Case No: FL-2018-000003

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT: FINANCIAL LIST

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 12/10/2021

Before:

MRS JUSTICE COCKERILL

Between: Deutsche Bank AG London **Claimant**

- and –

Comune di Busto Arsizio **Defendant**

Sonia Tolaney QC and Rupert Allen (instructed by **Allen & Overy**) for the **Claimant**

Paul Downes QC and Kevin Pettican (instructed by **Pietro Gatto**) for the **Defendant**

Hearing dates: 12 July 2021 – 29 July 2021

Approved Judgment

ABSTRACT [En]:

According to the doctrinal debate and active jurisprudence, swap contracts are featured by the problems related to its structure, legal nature and possible application of the penalties depending on the lack of essential elements. The work is the result of an analysis of the current jurisprudence both in the English and Italian system. Moreover, contractual aspects regarding the swaps are explored with respect to the functions of public bodies.

Keywords: interest rate swap - local authorities - mark-to-market - probabilistic scenarios - implicit costs.

ABSTRACT [It]:

Il presente lavoro è frutto di un'analisi della giurisprudenza ad oggi dominante sia nel sistema inglese che in quello italiano. I contratti di swap sono stati oggetto di profonde considerazioni dottrinali e protagonisti di un intenso dibattito giurisprudenziale circa la loro struttura, la natura giuridica e la possibile applicazione della sanzione di nullità a causa dell'eventuale mancanza di elementi essenziali. Saranno poi esplorati gli aspetti salienti della capacità contrattuale in materia di swap per quanto riguarda gli enti pubblici locali.

Parole chiave: *interest rate swap* - enti locali - *mark-to-market* - scenari probabilistici - costi impliciti.

1. INTRODUZIONE

1. This is a case concerning certain swaps entered into by the Defendant ("Busto"), a small Italian local authority, in mid 2007. Its contractual counterparty was the Claimant, the well-known international bank Deutsche Bank ("DB"). The swaps were governed by English Law. 2. At the time of contracting, the swaps, which included swapping fully variable rate obligations for those with a collar and floor, were anticipated to be beneficial to Busto (to the tune of over €7.3 million by today's date as regards the principal exchange element). But of course in 2008 the world changed. The swaps have not proved beneficial. In this case Busto says that it is not bound by them – in particular that it lacked capacity to enter into them. 3. The history of local authorities and swaps in the courts is now a fairly long one and punctuated by a number of judgments exploring the capacity of different sorts of local authorities in a variety of jurisdictions (See for example "Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets" by Braithwaite Current Legal Problems 2018 71(1) 369.). 4. Here, in very broad terms, the issues before the Court concern the interplay between, on the one hand, a variety of legislative sources of Italian Law, including Articles of the Italian Constitution and

*Il presente contributo è stato approvato dai revisori.

Civil Code; and on the other hand, a recent decision of the Joint Civil Divisions of the Italian Court of Cassation/Supreme Court – decision 8770/20 Banca Nazionale Del Lavoro S.p.A v Municipality of Cattolica ("Cattolica"). 5. Busto says that the result is that as a matter of Italian law (as it is now to be understood post Cattolica): i) Principles of Italian administrative law (Article 119 of the Italian Constitution and mandatory rules of Italian public finance) limit the powers of Busto as an Italian local public body, so that Busto lacked the capacity to enter the swap transactions with the consequence that they are void; and/or ii) To the extent that it was within the legal power of Busto to enter the swap transactions at all, Busto could only do so if the swap transactions were approved by Busto's City Council (pursuant to Article 42(2)(i) of the Consolidated Code of Local Bodies). Since the City Council did not approve the swap transactions, they are void. 6. DB disputes these propositions. In very broad terms it says that Cattolica does not offer as much of a legal road block as Busto would argue; and that even if it does, on the facts of this case there is no basis for finding that capacity was lacking or that the relevant rules for approvals were not complied with. It seeks a declaration that Busto is bound by the terms of the swap transactions. 7. There are also numerous additional points and fallback positions on both sides 8. In addition to its defence to the Bank's claim, Busto has a counterclaim for restitution of the net sums paid by Busto to the Bank. As of 30th June 2020, the stream of payments between the parties had produced a negative balance for Busto of €3,840,166.74 and €99,136.88 in respect of the two swaps. 9. If the swap transactions are void and unenforceable, the Bank claims that Busto's restitution counterclaim is governed by English law and raises defences of limitation and change of position. Busto's position is that its restitution counterclaim is governed by Italian law, but even under English law the Bank's defences have no merit. 10. If the swap transactions are void, the Bank raises a fallback case based on Article 1338 of the Italian Civil Code. Busto's position is that there is no merit in the Bank's claim under Article 1338 as: (i) Busto did not know and could not reasonably have been expected to know of the nullity of the swap transactions at the time that they were entered into in 2007; and (ii) in any event, the Bank cannot establish that it relied without fault on the validity of the swap transactions in circumstances where the Bank was in a far better position than Busto to know the swaps were void.
(..omissis..)
Part 1: Background Factual Background 12. DB is incorporated in Germany with a branch in London. It is part of the Deutsche Bank Group of companies. In 2007, at the time of the events giving rise to this dispute, the Bank operated in Italy through an Italian subsidiary of the Deutsche Bank Group, namely Deutsche Bank S.p.A. DB has operated in the Italian local authorities' market since 1980. 13. Busto is the local municipal authority for the city of Busto Arsizio in part of the Province of Varese in Lombardy, Northern Italy. It is a small city with approximately 83,000 residents. 14. Mr Downes QC for Busto has repeatedly emphasised that this is a case about a small local authority acting for a small number of real people and that the sums in issue here are very meaningful to them. He pointed out that in 2007 Busto had revenues of €47,293,616, of which €30,551,749 represented tax revenue collected from its local citizens, and €16,741,867 represented transfers from the Italian State. In 2007, Busto's total expenditure on social and educational services for the year was €12,404,123. 15. In 2007, Busto had outstanding borrowing from various lenders which amounted to €72.8 million, 57% of which was at a variable interest rate. The final repayment date on these loans was on 30 June 2031, however the repayments were structured such that the principal amounts due were heavily concentrated between 2007 and 2014. In particular, as at 2007 Busto's repayment profile required 52% of its outstanding borrowing to be paid over the next 6 years up to the end of 2013, whilst repayment of the remaining 48% would be spread out over the next 18 years. 16. Busto had previously entered into an interest rate swap with Banca Monte dei Paschi di Siena ("MPS") in 2002 ("the 2002 Swap"), under which Busto

would pay a variable interest rate to MPS whilst receiving a fixed interest rate in return (the relevant terms are set out in more detail below at paragraph 56). While there was some suggestion in passing that there might be a question over the validity of this swap, that formed no part of the pleaded case, and I assume that swap was valid. The City Council and City Board 17. This case raises some issues about the government structure in relation to Italian local authorities. In particular there is an issue about whether approval of the relevant swaps fell to the City Council or the City Board. 18. Busto's City Council is the democratically elected body of the municipality. In 2007 it had 30 members. Broadly speaking, it was common ground that the role of the City Council within the municipal administration is to set overarching policy and guidelines. It is then for the City Board and the administrative departments to implement that policy. The role of the City Council is to make policy and set guidelines, and would not generally extend to the entry into contracts. It was the evidence of Prof. della Cananea that the separation of responsibility for policymaking, on the one hand, and policy implementation and managerial activity, on the other, was a fundamental distinction in Italian administrative law. 19. The City Board is the executive political body and it is therefore entitled to exercise political discretion in its own right. It is not democratically elected but is made up of up to twelve individuals appointed by the Mayor (who also chairs the Board). The Mayor is democratically elected in direct elections. Busto also has various administrative departments, each with a Director at its head. 20. As set out in Busto's Municipal Bye-Laws, the City Council has the decision-making powers that are provided by Article 42 of Legislative Decree No. 267 of 2000 (also referred to as "the Consolidated Code of Local Bodies"). Those provide that: i) The City Council is responsible for all matters bearing on the financial position of the authority. For example, Article 42(2)(b) is concerned with the budgets (and changes to the budgets); Article 42(2)(f) is concerned with the introduction of taxes and regulations concerning taxes; Article 42(2)(h) concerns the taking out of loans, credit facilities and bond issuances; Article 42(2)(i) concerns expenditure which commits the budgets of the authority for subsequent financial years ; and Article 42(2)(j) is concerned with real estate purchases and disposals. ii) Both the City Council and the City Board are responsible for "political-administrative guidance" (Article 8(1) and Article 14(1)).
(..omissis…)
The problem 21. On 2nd April 2007, the City Council passed resolution no. 32/2007 ("the City Council Resolution"), by which it approved Busto's budget for 2007, its multi-annual budget for 2007-2009 and also the Forecast and Planning Report for 2007-2009. 22. That Report identified a cashflow problem being faced by Busto at that time: "For many years the Municipality of Busto Arsizio was able to substantially maintain fiscal pressure unchanged, but in the meantime, the gap between income and expenses has widened considerably, also because of lower transfers from the State. Therefore, on the one hand, income continued to increase at an 'unchanged' rate, while on the other, the cost of staff and utilities, in addition to the increase given by the rate of inflation, resulted in a significant increase in current expenses of more than EUR 4,000,000.00" 23. That passage went on to set out four measures which were "set for 2007" in order to solve the problem. One such measure was for "use of financial instruments that are useful for debt restructuring through a swap on interest and principal." 24. The Report went on to discuss possible methods of debt restructuring, including: "the application of the derivative instruments (swaps) covered by the Decree of the Minister of Economy and Finance No. 389/03, under which debt may be managed through the application of derivative instruments to change the structure of interest rates." 25. After further discussion of such swaps, the Report goes on to state that: "It is considered appropriate to use the above strategies to achieve the maximum economic and financial benefits, but especially with regard to renegotiation and derivative transactions, one should seek the support of a financial advisor who, free of charge, will assist the Administration in the implementation of these strategies."(..omissis…)

The Cattolica decision 120. There is one Italian case which is of huge importance in the context of this case. It is the Cattolica decision. It has formed a central plank of the arguments as to capacity. It is also highly relevant to three specific substantive areas (which Busto say go to capacity and Deutsche Bank say – if they exist – do not constitute limits on Busto's capacity): i) The question of whether the mark to market and probabilistic scenarios were required to be provided by DB to Busto; ii) The question of whether there is a divide between hedging and speculation; iii) The question of whether there is a requirement that the City Council approves such transactions. 121. A detailed account of the case is therefore vital. 122. In 2003 and 2004, the Italian Municipality of Cattolica (a small town and comune in the Province of Rimini, Italy), purported to enter three interest rate swap transactions with Banca Nazionale Del Lavoro S.p.A ("BNL"). By their terms, the three swaps were to run until 2016, 2023 and 2024 respectively. The swaps were governed by Italian law. They were not ISDA Master Agreement swaps. 123. The first two swaps (the second swap being an amendment of the first) contained "upfront clauses" under which the Municipality of Cattolica was paid €315,000 in respect of the first swap and €655,000 in respect of the second swap. The third swap (like the two swaps in issue in the present case) did not involve any upfront payment by BNL to the Municipality. None stated MTMs, probabilistic scenarios or referred to underlying loans. 124. Cattolica's City Council passed a resolution dated 27 March 2003 that established a "guideline" appointing the competent bodies to verify the possibility of improving the Municipality's liability management, including using swaps. Thereafter, there was a second resolution of the City Board dated 14 May 2003 and relevant officers (in respect of the first swap), and executive decisions in respect of the others. There was no decision by the City Council approving the terms of the swaps themselves. First Instance: Case No. 5244/2009: The Court of Bologna 125. The Municipality of Cattolica commenced proceedings before the Court of Bologna seeking a decision that the three swap transactions were null and seeking an order for the return of payments made pursuant to the three (void) transactions. The claim was made based on, inter alia, Article 119(6) of the Italian Constitution, and Article 42(2)(i) of the Consolidated Code of Local Bodies. 126. The claim of the Municipality was dismissed at first instance by the Court of Bologna. In summary (and to the extent relevant to the present dispute), the Court found that the three swap contracts could not be considered as forms of indebtedness - with the consequence that Article 119 of the Italian Constitution and Article 42(2)(i) of the Consolidated Code of Local Bodies were not breached. On Appeal to Court of Appeal of Bologna: Case No. 734/2014 127. The Municipality of Cattolica appealed. The seven grounds of appeal relied upon by the Municipality are set out at paragraphs 2.1 to 2.7 of the judgment of the Court of Appeal of Bologna. In summary they were: i) The up front clause transformed the "pure" swap into a mixed cause contract; ii) The guideline passed by the City Council did not have the requisite content under Article 42(2)(i) and Article 192 of the Consolidated Code of Local Bodies; iii) The contracts did not contain any indication of the underlying "swapped" loans; iv) Swaps were permissible only in respect of simultaneous and not pre-existing loans; v) The contracts did not comply with the provisions of Ministerial Decree No 389; vi) The Municipality was not a qualified investor; vii) The consequence of the Municipality not being a qualified investor was that the contracts were void since there was no mention of the Municipality's statutory right of withdrawal. 128. The Court of Appeal allowed the Municipality's appeal. In doing so, the Court of Appeal of Bologna found, inter alia that: i) There had been a breach of Article 42(2)(i) of the Consolidated Code of Local Bodies because the swap transactions could only lawfully be entered into by the Municipality if they were approved by a decision of the City Council. Since there had been no such decision, the swaps were void; ii) There had been a breach of Article 119(6) of the Italian Constitution because there was actual or potential indebtedness inherent in the three swap transactions and the Municipality had not resorted to this indebtedness for the purpose of financing investment

expenditure; iii) There had been a breach of Article 1346 of the Italian Civil Code because none of the three swap contracts contained a specific reference to the underlying loans in respect of which the swap contracts were executed. 129. In reaching its conclusions on Article 119(6) of the Italian Constitution and Article 42(2)(i) of the Consolidated Code of Local Bodies, the Court of Appeal of Bologna: i) Upheld the claim by the Municipality that, because of their aleatory nature, all three swaps constituted a form of actual or potential indebtedness for the authority; ii) Added that none of the three swaps contained a determination of their value when executed (the 'mark to market'), which careful and meritorious case law of the lower courts held was "an essential element thereof and thus constituting its required typical purpose/function [causa tipica] (rational and thus measurable degree of uncertainty [alea] which must necessarily be made explicit, regardless of its hedging or speculative function)"; iii) Observed that the fact that the law provision expressly categorising the upfront as indebtedness (Law No. 133 of 2008) came into effect after the swap contracts in issue were entered did not mean that the upfront payments could not in any event be interpreted as indebtedness. 130. BNL sought to appeal the judgment of the Court of Appeal of Bologna. In 2020 the Joint Civil Divisions of the Italian Supreme Court delivered a landmark judgment dismissing BNL's appeal. The Supreme Court 131. On 23rd October 2018, the First Civil Division of the Italian Court of Cassation/Supreme Court (to which I refer as the Supreme Court) made an Interlocutory Order referring BNL's appeal to the First President for him to consider assigning it to the Joint Divisions of the Supreme Court for determination. 132. Having summarised the issues raised by the appeal, the First Civil Division stated the following at paragraph 12 of the Interlocutory Order: "This Court believes that the issues above are of great importance …: apart from being of great relevance from a practical point of view, due to the concrete effects that the adopted solutions will have in the context of the litigation on derivatives between local bodies and financial intermediaries (a litigation that often involves very large sums of money), they relate to matters on which the Court of Auditors, in both its jurisdictional and administrative articulation, and the Council of State, have given conflicting responses. Therefore, the relevance of these issues arises from a scenario of serious uncertainty as it results from the decisions of the various judicial bodies that have dealt with them in auditing, accounting liability and self- protection matters. This Court is obviously aware that in the case before it there are subjective rights involved, which were absent in the cases brought before the Court of Auditors and the Council of State; nonetheless, it thinks that there is a need to avoid in the future conflicting judgments by the first section of the Supreme Court on a fundamental topic for the interest of the local bodies and the banking and financial intermediaries, on which the signalled disagreements have already had an impact." 133. It follows that the decision in Cattolica in the Supreme Court is a decision of that court sitting in joint divisions. I accept that one reason for that unusual course was a desire to resolve uncertainty. I accept that other Italian courts would give it particular weight; and I do likewise. 134. At paragraph 4.1 of the Supreme Court's decision the Court noted that the first three grounds of appeal raised two questions: "that were closely connected and crucial for assessing the validity of swap contracts entered into in general by Municipalities: a) the question of whether the assumption of the obligation by the local entity entering into the contract, involving the named derivative, could be categorised as indebtedness intended to finance non-investment expenditures; and b) the question of determining the body required to authorise such a transaction (which, in this case, was regulated by the city council by means of mere "guidelines")." 135. It then went on at paragraph 4.2 to note that the issues referred were: "a) "whether the swap, particularly the swap that included an upfront – and not governed (based on when it became effective) by Italian Law No. 133 of 2008, which converted Italian DecreeLaw No. 112 of 2008 – constitutes, for the local entity, a transaction that results in indebtedness to finance noninvestment expenditures pursuant to Article 30, paragraph 15 of Italian Law No. 289 of

2002"; and b) "whether the execution of the related contract falls within the authority reserved for the City Council, since it entails an expenditure decision that affects budgets for subsequent financial years, pursuant to Article 42, paragraph 2, letter i) of the T.U.E.L."." 136. The decision however ranges much wider than these two narrow issues. 137. The substantive part of the Supreme Court Judgment (under the heading Reasons for the Decision) consists of 10 sections. These provide in summary as follows: i) Section 1 sets out the five grounds of appeal against the Court of Appeal judgment relied upon by the bank; ii) Section 2 sets out the ground of the Municipality's conditional cross-appeal. That has no relevance to the issues in this action; iii) Section 3 refers to the Interlocutory Order and the issues raised by it; iv) Section 4 contains an analysis of the "topic of derivatives", with a particular focus on the interest rate swap (IRS). The section of the judgment also describes certain market concepts, most significantly mark to market; v) Section 5 of the judgment considers the function/purpose of a swap; vi) Section 6 of the judgment addresses "the validity of the contractual instrument that contains" the swap; vii) Section 7 of the judgment begins: "After these necessary preliminary clarifications, we can proceed with examining the issue (which is the basis of the questions posed by the division that referred the matter to these Joint Divisions) relating to the execution of derivatives, swaps and IRSs by public entities in general and local entities in particular". Section 7 of the judgment then goes on to address the constitutional and statutory framework that governs the entry into derivative contracts by Italian local authorities, explaining how that statutory framework has changed over time; viii) Section 8 of the judgment begins by stating: "The Court notes that the aforementioned changes in the law, while turbulent and not always linear, make it possible to conclude that, even during the period that Article 41 of the 2002 Budget Law was in effect and, thus, until 2008 (the year the legislature imposed more stringent limits on entities' ability to enter into derivatives) the contractual power of local entities had clear limitations"; ix) What is being addressed at Section 9 of the Supreme Court's judgment is highly controversial between the parties and is a specific topic of expert evidence. It begins as follows (at paragraph 9): "However, that does not fully solve the problem brought to the attention of these Joint Divisions, since we must – within the ambit of the path theoretically admissible – determine whether other limits exist on the lawfulness of those contractual types for the Public Administration" x) Section 10 of the judgment addresses the two remaining grounds of appeal. This section of the judgment is introduced by the court stating (at paragraph 10): "However, that does not fully solve the problem brought to the attention of these Joint Divisions, because of the remaining grounds (1 and 2) of the appeal, which involve the problem of the indebtedness of public entities and the authority to decide in relation to the same". 138. These latter three sections are highly controversial and are dealt with separately below. Section 8 139. At paragraph 8.1, immediately following its statement that the contractual power of local entities had clear limitations, the Supreme Court states: "Above all, to be permissible, the derivative had to be financially cost effective, since entering into speculative derivatives was prohibited". In the same paragraph, the Supreme Court cites the decision of the Italian Constitutional Court in Decision No. 52/2010 as clarifying that the prohibition on entering speculative contracts can be attributed, in the first instance, to paragraphs 4 and 6 of Article 119 of the Constitution which, respectively, impose the constraint of financial balance and require that indebtedness be for the purposes of investment. 140. At paragraph 8.2 of the judgment (having just stated that to be permissible a derivative had to be financially cost effective), the Supreme Court states this: "Derivative contracts, because they are aleatory, could not per se be entered into by the Public Administration, because their aleatory nature is highly inconsistent with the rules relating to public finance and they introduce variables that are not compatible with the fixed nature of expenditure commitments. Therefore, we must conclude that the law provisions examined above, which contemplated those possibilities, only allowed what, normally, would be prohibited, with the result that

those provisions were, above all, exceptional and had to be narrowly interpreted, having made the derivatives concluded by the public administration as contracts expressly provided for by the law, as opposed to the unnamed ones entered into by private parties (despite they belong to the same, very broad genus). " 141. At paragraph 8.3, the Supreme Court states: “Hence, in light of the legal and axiological framework outlined above, we can arrive at a first conclusion, namely: Recognition of the Administration’s capacity to conclude derivative contracts, based on the law in effect until 2013 (when Italian Law No. 147 of 2013 precluded that possibility) and the distinction between hedging and speculative derivatives, based on the criterion of the different degree of risk of each of them, meant that only in the first could a local entity be said to have capacity to enter into them.”
(..Omissis)
The Issues 170. The following summary of the issues is based on that given by DB in opening and was not controversial. 171. The principal issues which arise for determination at trial are as follows: i) Given that Italian local public bodies have general civil law capacity, what are the consequences of this for their capacity to enter into contracts under Italian law? ii) Did the Transactions comply with the requirements of Article 3 of the Decree? iii) Was Busto’s entry into interest rate derivative contracts such as the Transactions subject to any of the following alleged requirements as a matter of Italian law: a) That the Transactions be for “hedging” rather than “speculation” (Cattolica Section 8); b) That a statement of the initial MTM, “probabilistic scenarios” and/or “hidden costs” of the Transactions be included in the written contracts or in Busto’s resolution approving the Transactions (Cattolica Section 9); and/or c) That the Transactions be approved by the City Council (Cattolica Section 10). iv) Are any such requirements properly characterised as a matter of English private international law as limits on Busto’s capacity to contract? If not, how are they properly to be characterised as a matter of English law and, as a result of this, to what extent (if at all) is Italian law of any relevance? v) To the extent that any such requirements are of any relevance to the validity of the Transactions, were they complied with? vi) If any requirement for City Council approval is properly characterised as an issue of authority (rather than capacity), and this requirement was not complied with, did Mr Fogliani have ostensible authority to enter into the Transactions and/or were the Transactions ratified by the City Council? vii) If the Transactions are void: a) What is the proper law of Busto’s claim for restitution? b) If Busto’s claim for restitution is governed by English law, does DB have a limitation defence and/or a change of position defence? viii) In relation to the alternative claims under Article 1338 of the Italian Civil Code: a) Is this claim governed by Italian law? b) If so, is Busto liable to DB under Article 1338 (or vice versa) and, if so, in what amount? Part 2: The Determinative Issues 172. Although the arguments as to speculation engage the first controversial section of Cattolica it is analytically easier to commence with the section 9 issues which engage with the question of general civil law capacity. Capacity absent Cattolica 173. The position on capacity absent Cattolica was not the focus of much debate. For Busto it is Cattolica which is the key. However, it is right, before moving onto what Cattolica says on this subject, to consider what the position would be absent that decision. 174. The starting point, putting Cattolica to one side, is that it is common ground that Italian local authorities have general civil law capacity. 175. The next stage is a consideration of what Article 119 means. Again it is not controversial that this involves a fairly ordinary process of statutory interpretation. As might be expected the Italian Law experts agreed that wording was of primary importance in the absence of ambiguity. 176. Derivative contracts are not explicitly prohibited by this provision; but nor are they explicitly permitted. One then looks to the wording. The wording of Article 119 might fairly be described as permissive: “shall have financial autonomy ….shall have independent financial resources, … shall enable Municipalities … to fully finance the public functions assigned to them… They may resort to indebtedness only for the purpose of financing investment expenditures…”. 177. This wording seems

enough to discount one possible argument, namely that Article 119 on its true construction means that derivative contracts are not permitted at all, because the Article does not explicitly allow them. This is equivalent to the way that the House of Lords approached the Local Government Act 1972 in Hazell. That conclusion is supported by the fact that Article 41 of the Budget Law of 2002 does explicitly mention “derivative transactions” for the first time in the context of the “public finance coordination framework mentioned in Article 119 of the Constitution”. As Busto acknowledged in opening, Article 41 is therefore implicit support for the proposition that Article 119 does in some way countenance derivative transactions. 178. Further the reason Mr Fogliani sent the email mentioned at paragraphs 50 and 74 above was that Article 1, paragraph 737 of Law 296/2006, required that proposed derivative contracts be transmitted to the Ministry of Economy and Finance prior to the execution of the contracts. That is only consistent with derivative contracts being permissible – at least to some extent. On any analysis therefore we are not in Hazell territory. 179. The only two sub-paragraphs of Article 119 upon which Busto relies in its pleaded case as imposing limits on the capacity of Italian local public bodies to enter into derivative contracts are Article 119(4) and Article 119(6). What is said is that: “Article 119(4) imposes a requirement of financial balance, and Article 119(6) imposes a requirement that any indebtedness be solely for the purpose of investment expenditure”. 180. I note here that in terms of the structure of the argument the limitations relied upon appear clearly to refer just to those provisions and the reasoning in the Cattolica judgment – hence the centrality of that case to Busto’s argument.
(..omissis..)
Capacity and Section 9 of Cattolica 206. One issue to which Cattolica is central is the question of whether Section 9 of Cattolica is concerned with the capacity of Italian local public bodies to enter into derivative contracts or, as DB says, is concerned with the requirements of a valid contract under Article 1325; Article 1343; Article 1346 and Article 1418.2 of the Italian Civil Code that it must have a determined or determinable object ("oggetto") and a valid/lawful "causa" and the disclosure requirements that exist under Italian civil law. It was this debate which underpinned the differing approaches of the parties to expert evidence, with DB putting this question in the hands of Professor Perrone and Busto in the hands of Professor della Cananea. 207. Busto's position - by reference to the wording “However, that does not fully solve the problem brought to the attention of these Joint Divisions, since we must – within the ambit of the path theoretically admissible – determine whether other limits exist on the lawfulness of those contractual types for the Public Administration” - is that Section 9 of Cattolica is at least in significant part concerned with the capacity of local authorities to enter derivatives contracts. This is quite clear at [74] of Professor della Cananea's first report where he says that he has "no hesitation" in saying this. He says that there is a caesura between the civil law aspects and those dealing with administrative law and public finance. Specifically, he says that Section 9 of the judgment imposes further limits on the contractual power of a local authority beyond the requirement that the derivative be financially cost effective/non-speculative set out in Section 8 of the judgment. Busto sees the Supreme Court’s analysis up to and including paragraph 9.8 as directed towards grounds 3, 4 and 5 of BNL’s grounds of appeal looking at the civil law aspects through the perspective of the rules of public finance. Thus, Professor della Cananea says one sees the threads of this analysis are being brought together by the Supreme Court in paragraph 9.8 of the judgment where grounds 3, 4 and 5 are dismissed. 209. In closing Mr Downes emphasised the need to focus on paragraph 9.8 of Cattolica, which he submitted was not really susceptible of being read as going to civil law issues rather than capacity; and the support which is found for Busto’s approach in the official Massima Ufficiale [official maxim] that was published by the Italian Supreme Court in order to explain the decision in Cattolica. 210. He emphasised that the importing of concepts from public law into

private law (and vice versa) is not unheard of in this jurisdiction. For example, in Braganza v BP Shipping Ltd [2015] UKSC 12 (a case concerning the limits on the exercise of a contractual discretion), the law of contract can be seen to be borrowing from public law, e.g. in relation to a requirement that the discretion not be exercised in a way that is Wednesbury unreasonable. He also contended that the approach of DB rendered it necessary to read down or reject large parts of the rest of the Cattolica decision. Discussion 211. I conclude by a clear margin that this section is not concerned with capacity and that despite the clarity and force with which Busto's arguments were presented, DB's arguments are to be preferred. 212. The starting point is that Section 9 of the Cattolica decision is not concerned with either of the issues specifically referred to the court. Those questions were, as noted above: "a) "whether the swap, particularly the swap that included an upfront …. constitutes, for the local entity, a transaction that results in indebtedness to finance non-investment expenditures pursuant to Article 30, paragraph 15 of Italian Law No. 289 of 2002"; and b) "whether the execution of the related contract falls within the authority reserved for the City Council, since it entails an expenditure decision that affects budgets for subsequent financial years, pursuant to Article 42, paragraph 2, letter i) of the T.U.E.L."." 213. It is clear – indeed it is common ground between Professor Perrone and Professor della Cananea - that in the Cattolica case the Supreme Court "considerably expanded the perimeter of the appeal brought before them". One therefore has to have careful regard to what exactly the Court was deciding and upon what it was effectively commenting. 214. It is therefore important to track through what the Court is doing at particular places in the judgment. It is clear that the capacity limits which the Supreme Court considered to apply to the execution of derivative contracts by local public bodies specifically are directly addressed in sections 7 and 8. Each section starts with a wording which makes this very clear. Section 7 starts with this introduction: "… we can proceed with examining the issue … relating to the execution of derivatives, swaps and IRSs by public entities in general and local entities in particular". Section 8 starts by noting that "the contractual power of local entities had clear limitations". That then leads to its "first conclusion" on speculation, which I address below. 215. One therefore needs to have clear focus both on the start of section 9 and how it proceeds. Section 9 starts with the following introduction: "However, that does not fully solve the problem …, since we must – within the ambit of the path theoretically admissible – determine whether other limits exist on the lawfulness of those contractual types, for the Public Administration". There was considerable evidence directed to the question of what was meant by "other limits" as well as to the wording "the ambit of the path theoretically admissible". 216. As a matter of simple language, "other limits" at least suggests that something qualitatively different is being considered – though it gives no hint as to what those different limits are. While there was a difference of opinion on this, with Professor della Cananea saying that "a literal and systemic reading of 9 shows that the court is still in the realm of capacity. They have not moved to other issues, and that is confirmed by paragraph 9.8.", I found the evidence of Professor Perrone on this to be more robust. 217. In particular: i) Professor Perrone's evidence appeared to regard the relevant section of the judgment overall, as well as microscopically; ii) His analysis in his report was clearly reasoned; iii) In contrast Professor della Cananea's evidence appeared to have a tendency to seize on a small passage without regard for the surrounding, and then (see above as regards the statutory interpretation arguments) to seize on other matters whose relation to the argument were not clear to support it. 218. And indeed, in cross-examination Professor della Cananea accepted that "They are making a point that even within hedging derivatives there are certain requisites which must be respected". In other words, he recognised that this section deals with the civil law requirements as they apply to swaps. That conclusion sits perfectly within the framework of a logical reading of the bridge between paragraphs 8.3 and 9: paragraph 8.3 terminates with a conclusion about capacity ("only in the first case could a local entity be said to have capacity to enter into them"); that

then leads into the wording at the start of section 9 which identifies the need to determine whether "other limits" exist – that itself strongly suggests the limits being considered are qualitatively different to the issue of capacity. 219. The next assistance, which dovetails with these points, is given by the next paragraph of the decision, paragraph 9.1. That states: "There is still no solution for the general problems relating to the definiteness (or determinability) of the object [oggetto] of the contract." This terminology seems to be a clear indicator that what is being considered is a question of validity under the general civil law. This is because there is, pursuant to Articles 1325, 1346 and Article 1418 of the Civil Code a requirement for a determined or determinable object ("oggetto") as a pre-requisite for the validity of any contract under Italian law, regardless of whether the contracting parties are public or private bodies. The reference to "oggetto" is not casual or passing: there are further references in paragraph 9.2 and in paragraph 9.8. 220. The question then becomes whether the provisional indication that the Court is considering general civil law issues in this passage is one which makes sense, both in terms of what is said, and in terms of such an issue being one of relevance to a contract of this sort and issues such as the ones arising in this case. That is because if a reference to civil law validity questions were nonsensical in either context that would obviously indicate that that was not what the Court was doing at this point. 221. A reading of the judgment, and a consideration of the expert evidence, makes quite clear that such an approach is not nonsensical at all. 222. As for the reading of the judgment, it makes perfect sense in the context of a civil law issue. As a matter of Italian civil law, a contract has to have a cause ("causa") and an object ("oggetto"). One can readily see that questions might arise as regards swaps contracts viewed through this lens. How one defines the object of the contract will have a knock-on effect on the other components of the analysis and the result. What the judgment on its face is doing here is to consider these points, concluding that the object of a derivative contract is "the degree of uncertainty [alea]" and that a contract will not fulfil the civil law oggetto requirement, unless the risks can be "precisely determined" by the parties. 223. Furthermore in circumstances where the derivative contracts in Cattolica were governed by Italian law, it is only natural that Italian civil law requirements for a valid contract would be considered in that case. 224. All of this is the more so given the juridical backdrop to Cattolica. In 2013 the Court of Appeal of Milan in decision no. 3459/2013 ("Gommeservice"), a case involving a derivative contract entered into by a small private firm, considered the question of civil law requirements in that specific context. It did not raise any issue of capacity. In so doing it considered an academic article by an Italian contract law scholar, Professor Maffeis, which focussed on the requirements for derivative contracts to be valid under Italian contract law. Professor Maffeis' paper was not concerned with derivatives entered into by Italian local public bodies. The Gommeservice decision was published in late September 2013 – hence after Cattolica at first instance. 225. However, after the decision in Gommeservice, the civil law requirements of a valid derivative contract were heavily debated amongst Italian legal scholars and in the case law, as explained by Prof. Perrone. The reasons for the controversy were because it had been widely accepted by Italian legal commentators and case law that derivative contracts are not properly to be characterised as being analogous to wagers, which is the starting point of what is known as "the rational bet theory". 226. The Gommeservice decision was then referred to in passing in the decision of the Court of Appeal of Bologna in its decision in Cattolica. "We also briefly note that none of the contracts include the determination of their current value at the time of stipulation (the "mark to market"), which careful, consolidated case-law on the merits (see [Gommeservice]) considers to be an essential element thereof and which forms part of its standard cause (a rational reasoning and which can therefore be measured), which must be specified, …" 227. The passage is brief but plainly deals with cause/causa – and hence civil law requirements. It was not stated to be related in any way to the issues of administrative law that were considered elsewhere in the judgment. 228. It was common ground that at paragraph 9.7 of the

Cattolica decision the court is reflecting the approach of the Court of Appeal of Bologna in Cattolica. 229. One can therefore trace the arguments of civil law through in the background to Cattolica in the Supreme Court; and given the debate which I have noted it would make perfect sense for the Supreme Court to deal with that issue.
(..omissis..)
The post-Cattolica cases 252. To the extent that it is necessary to do so, I do also conclude that further support for this analysis can be found in the decisions of lower courts since the decision of the Supreme Court in Cattolica. 253. It was submitted for Busto that the only cases that are of any real assistance to the court are cases involving swap transactions entered into by Italian local authorities. But this is arguing from the assumption that Busto is correct. To test the parties' approaches it must be right to look more broadly. It would naturally be of great interest if (as is agreed not to be the case) there was a local authority case where swaps were not upheld on the ground of capacity, citing paragraph 9.8 of Cattolica. But it is also of interest, and logically of relevance, if that passage of the judgment has been considered to be relevant outside the world of local authority transactions 254. Nor do I consider that, in the context of the very specific issues in this case, one can take anything of note from the fact that there is no post-Cattolica case involving an Italian local authority in which the swap transactions have actually been upheld. 255. Professor Perrone identified eight decisions in which section 9 of the Cattolica decision has been applied and opined that the court in each of them treated the issue as going to the general civil law requirements for a valid contract - the causa and oggetto aspects - and not as raising any issue of capacity of local public bodies. Not all of these were the subject of detailed evidence, but it is worth dealing briefly with the ones which were discussed in depth. 256. The decision of the Tribunal of Pavia dated 16 September 2020 is now not particularly controversial. It concerned derivative contracts between the Province of Pavia and Intesa SanPaolo. The court in that case referred to "the ongoing debate in academic legal circles and in the courts … about whether MTM is an essential element of the contract". It also referred to the Gommeservice decision. The court then specifically relied on the Cattolica decision as a reason for adopting the approach in Gommeservice in relation to the civil law requirements for a valid contract. The Court does not mention any limits on the public body's capacity in the judgment. Busto accepts that the court declares the invalidity of the swap on the basis of principles of Italian contract law. 257. Although there is reference to paragraph 9.8 of Cattolica it seemed to me on following the evidence, and again on reverting to the decisions after the close of the case, that the flavour of the case is very much one concerned with the civil law requirements, that it approached paragraph 9.8 in line with my conclusions above – in other words as expressing a conclusion on civil law requirements (albeit in the particular context) and that its conclusion flows from its consideration of the civil law issues. Professor della Cananea himself accepted in his evidence that the decision deals with civil law requirements for a valid contract. 258. The other authority to which much reference was made was the decision of the Court of Appeal of L'Aquila which refers to both causa and oggetto and to the contracts being void under Article 1418(2) of the Civil Code. There is at the same time reference to the local authority's status, in that having noted the Supreme Court's requirement that mark to market, probabilistic scenarios and hidden costs be provided, the Court of Appeal observed that "[t]hese parameters have to be complied with all the more when a swap is entered into by a local authority, which under the regulations as recalled above, until 2013 could enter into Interest Rate Swap contracts, providing they were hedging and never speculative derivatives, thus with the purpose of hedging bond loans or debts". But that wording "all the more" is, as Professor Perrone noted, a giveaway that what is being considered is something not confined to local authorities; hence it is the civil law question of validity. 259. A similar approach can be seen in decision no. 24/2021 of the Court of Appeal of Ancona. That was a case involving a private

company, but the Court referred to the Cattolica decision and stated (at [4]): "Nor can it be argued that the significance of this decision is limited to the public administration sector when it deals with derivatives. All commentators argued for the general scope of many of the statements contained in the aforementioned decision, which, moreover, already qualifies as such on a first reading." 260. Professor della Cananea saw the decisions in these cases very much through the prism of his own reading of Cattolica, with considerable focus on paragraph 9.8 of that decision. However, his reasoning was at times hard to follow, since at the same time he did accept – as on the wording of those decisions he had to - that the reasoning dealt with the civil law requirements for a contract. It was also not clear why, if he were correct as to his approach to Cattolica, the Ancona court (dealing with a dispute with a private company) should consider the decision in Cattolica. He accepted that this court's decision effectively says that section 9 of Cattolica is not limited to public bodies. 261. The Tribunal of Milan in its decision of 4 May 2021 seems to interpret Cattolica as being a public finance case. However, it is clear that it was not argued in that case that the swaps were null and void and consequently the decision is of little relevance in the present context. 262. Although I give no weight to the academic commentaries in reaching my decision (since they can plainly have no precedential value and time constraints meant that they were not the subject of cross-examination) I gain some encouragement from the fact that it seems that the most dominant academic approach to section 9 of the Cattolica decision is in line with that conclusion. DB referred me to articles by Calabrese, Natoli, Poli, Cusomano and Tucci. Busto sought to strike back by reference to some articles coauthored by Professor Perrone and Mr Danusso. I did not find these articles particularly easy to follow. On the whole I would tend to accept the submission that while deprecating the approach of the court generally, so far as regards section 9 they suggest that the decision is potentially of broader application. Thus Professor Perrone refers to the possibility that the decision might "retroactively affect any derivatives entered into, at any time, by both financial and non-financial entities", while Mr Danusso refers to the case applying "private law requirements". However (i) this approach appears to be a discussion point (the dangers of Cattolica if given a broad reading) and (ii) this approach is not that of the academic majority. 263. The conclusion that section 9 of the Cattolica decision is concerned with the elements of a valid contract under Italian civil law, not the capacity of Italian local public bodies, is highly significant in the context of this dispute. This is because if the question is one of material validity, not capacity, the question of the proper law of the contracts becomes relevant. The Transactions are expressly governed by English law. The material validity of the Transactions is therefore to be determined under English law. It follows that any requirements as to material validity set out by the Court in Cattolica (in relation to contracts governed by Italian law) are inapplicable to the Transactions. 264. I should deal briefly with Busto's backup case, which was to say that if it is not clear that paragraph 9.8 of Cattolica is concerned with the capacity of an Italian local public body, then it is at least possible to read paragraph 9.8 of Cattolica in this way and that it is highly unlikely that the Italian courts would read down Cattolica, thereby opening the way for Italian local authorities to circumvent these same rules by simply choosing foreign law. The answer to this is that it is not a question of reading down but of correct interpretation and I conclude that DB's is the correct interpretation by a clear margin. Accordingly this backup case does not arise. 265. It follows that Busto's defence based on section 9 of Cattolica fails. Formal requirements 266. For completeness however (and while it is strictly speaking contingent) I should deal here with the substance of that defence. Had I concluded otherwise as to the nature of the issue, such that the requirements in section 9 had to be considered, I would have concluded that the Court did not lay down any hard and fast rule. 267. The emphasis here is on the apparent dichotomy between the fact that the Supreme Court suggested that on the facts of the Cattolica this would require the parties to be aware of "the mark to market criterion, probabilistic scenarios and the "hidden costs"" and its

emphasis elsewhere on the "case by case" approach which would only make sense if there were no hard and fast rule. In my judgment this is what the Court was really saying: the ultimate objective is to enable the counterparty to make an informed assessment of risk. This is what underpins some quite detailed discussion of the different types of swaps at Part 4, and an analogy to consumer investment transactions at [9.4-5] which would not be applicable to all swap transactions. It also reflects the fact that the question of mark to market is first raised at [4.7] in relation to the consideration of "non-par" swaps in which an upfront is paid (as it was in two out of the three swaps in Cattolica). I therefore conclude that the rule is stated in 9.7 when the court says clearly that the analysis must be determined “on a case-by-case basis, using a practical approach”. 268. That approach makes perfect sense since it is a question of fact whether the parties to a contract are able to make an informed assessment of risk and what information they require to carry out that assessment. Further, were Busto correct and all of (i) MTM; (ii) probabilistic scenarios and (iii) hidden costs required to form part of the transaction documents in all cases this would be a surprisingly formalistic, inefficient and impractical position. The unattractiveness of that submission was underlined by Professor della Cananea’s evidence that an Italian local public body could not even be expected to be aware of this requirement. 269. In this case I conclude that, were it relevant, Busto was in a position to make an informed assessment of risk and had available the information required to carry out that assessment. The first point is that the transaction was not particularly complicated: i) The Mirror Swap cancelled out the effect of the 2002 Swap and entirely removed Busto’s exposure to the risks of rising interest rates above the threshold in the 2002 Swap. It did not present risks for Busto in any meaningful sense; ii) The principal exchange element of the Cash Flow Swap was also essentially straightforward and risk free. Busto simply received fixed principal exchange amounts from DB from 2007 to 2013 and paid the same amount to DB from 2014 to 2031. This was easy to comprehend and did not involve any uncertainty from Busto’s perspective as to cash flows; iii) The risks of the interest collar element of the Cash Flow Swap were the most complex – but still essentially elementary. They were clear and straightforward for Busto to evaluate and understand. It was explained to Busto that its interest costs would only vary within the maximum rate of the cap and the minimum rate of the floor. Thus, if interest rates fell below the floor rate, Busto would not benefit. This was obvious. 270. Secondly, these indications are supported by a consideration of the material which Busto had available to it. The simulations sent by DB to Busto on 29 June and 5 July 2007 provided Busto with the forward rates on each payment date through to 2031, and projections of the cost of the proposed revised principal repayment profile based on the forward curve, bearing in mind the collar structure of the Cash Flow Swap. DB also informed Busto in the Term Sheet that the initial MTM of the Cash Flow Swap was positive to DB and therefore negative to Busto. 271. Thirdly Busto had the time and resources to make an informed decision. The timeline demonstrates that there was ample time, there was lots of negotiation and Busto had its own well qualified expert committee. Here it is worth bearing in mind that the reports of the Cattolica case do not make it clear what was sent - or whether that was a case where the bank was dealing with a professional investor. The consumer legislation quoted in that case tends to suggest it was not. 272. Fourthly, this was not Busto's first experience of swaps – it had prior experience of the swaps market via the 2002 Swap and Busto was classified as a qualified investor. 273. Finally, though perhaps strictly speaking irrelevant for the purposes of deciding whether Busto had the material available to enable it to make an informed assessment of risk, the evidence shows Busto doing just that: i) City Board resolution no. 417/2007 stated that “the interest rate [would be] parameterised at the Euribor rate inserted within a maximum and minimum oscillation corridor” under the Cash Flow Swap; ii) It was clear from her evidence that Ms Marino fully understood how DB’s proposals worked and in particular that, under the Cash Flow Swap, the minimum rate that Busto would pay was the floor rate and it would not benefit if interest

rates fell lower; iii) Ms Marino's evidence was also that that she understood that the forward projections showed a comparison of the expected cost to Busto of its existing borrowing and on the basis of a re-profiling of its principal repayment profile and an interest rate collar with assumed floor and cap rates; iv) Professor Zucchetti and Ms Criscuolo (the external members of the Expert Committee with specialist expertise in relation to derivatives) explained each of the banks' proposals and their analysis to Ms Marino and Mr Fogliani; v) It was also Ms Marino's evidence that the Expert Committee as a whole (including Ms Marino) discussed the merits of each proposal; vi) Ms Marino also said that she and Mr Fogliani would have taken the opportunity to ask Professor Zucchetti and Ms Criscuolo about anything she did not understand. She accepted that she would not have signed the Expert Committee's report unless she understood and agreed with it; vii) The Expert Committee's report (which was annexed to City Board resolution no. 398/2007): a) Described the economic effects of DB's proposal in some detail; b) Specifically identified that the floor rate was "rather high" relative to the forward curve - and Busto successfully negotiated a reduction in the floor rate with DB as a result; c) Confirms that Busto fully understood DB's proposals and formed the view (based on the analysis of Professor Zucchetti and Ms Criscuolo) that the DB proposal was the most advantageous which Busto had received. 274. In those circumstances, I conclude that Busto was able to make an informed assessment of risk, and had the information required to carry out that assessment. To the extent that it is relevant I would also conclude that it carefully made an informed assessment of the risk Cattolica and Speculation Section 8, speculation and capacity 275. The second set of questions to which the Cattolica decision is relevant is that of whether Busto lacked the capacity to enter into speculative transactions. Professor della Cananea's opinion is that at the relevant time Italian local authorities were not permitted to enter into derivatives contracts which were speculative in nature. 276. DB implicitly accepted that Cattolica was difficult for it on the law here, though it pointed out a number of what it regards as infelicities in that judgment. For example it noted that the Court in Cattolica identifies no express prohibition, nor any other basis in law, for this conclusion, does not attempt to define what is meant by "speculation" in this context or offer guidance as to how the characteristics of a "speculative" contract might be identified: it is simply asserted that a distinction is to be drawn "based on the criterion of the different degree of risk". 277. Ultimately it seems to me that what the Supreme Court says in this regard is clear. At paragraph 8.3 it says in terms: "Hence, in light of the legal and axiological framework outlined above, we can arrive at a first conclusion, namely: Recognition of the Administration's capacity to conclude derivative contracts, based on the law in effect until 2013 (when Italian Law No. 147 of 2013 precluded that possibility) and the distinction between hedging and speculative derivatives, based on the criterion of the different degree of risk of each of them, meant that only in the first could a local entity be said to have capacity to enter into them" 278. Whether that conclusion is correct or not is not in my view a matter for this Court. I accept this paragraph dubitante. I have expressed above a view on case 52/2010 which might be said to sit ill with the summary given by the Court in the Cattolica judgment. There is no clear consideration in Cattolica of how the general civil law capacity of local authorities impacts on the analysis. I would also tend to accept the argument that the assertion in paragraph 8 that the changes in the law set out in section 7 "make it possible to conclude" that "the contractual power of local entities had clear limitations" is rather hard to follow. The "difficult" sentence at the tail of paragraph 9.8 ironically also to some extent suggests that the Court did not regard itself as having set down a rule on speculation. 279. However while these points may well be the subject of argument in future before the Italian Courts, as matters stand it seems to me that the Supreme Court has spoken on this point; and that regardless of the fact that there is no doctrine of precedent other courts are - at least in the medium term while debate works itself out - likely to feel themselves constrained by the clarity of the wording by the country's most senior court. 280. I

therefore conclude that as these matters stand, as a matter of Italian Law local authorities may only enter into derivatives contracts if they are for hedging – and not if they are speculative. Are these contracts speculative? 281. This point became highly contentious in closing, with arguments about the burden of proof and whether aspects of the case sought to be advanced by Busto were properly in play. 282. The case as pleaded was this: that the speculative and/or aleatory nature of the Transactions meant that the Transactions did not comply with the limits or constraints explained in Cattolica on Busto's capacity to enter into such transactions. In the Further Information this was particularised thus: "The Transactions were speculative in that they involved the purchase of a financial instrument (viz the swaps) at an implied cost referable to the mark to market value at the time of acquisition. In relation to the interest rate aspect of the instruments, their value lay in the hope that they would turn out to have been worthwhile. In that sense they were speculative. In the premises the future value of the swap instruments was entirely dependent on uncertain future market movements." 283. This was met by a plea denying that the Transactions were speculative and asserting that they were "entered into for the purposes of hedging the Defendant's liability under existing indebtedness and thereby managing the costs of the Defendant's borrowing". This plea was advanced by reference to the City Board decision number 398 of 10 July 2017. In other words, DB said: "No, the Board says it is for hedging". 284. No rejoinder followed to this plea. In the List of Common Ground and Issues the focus was firmly on the issues of Italian law; the factual aspects of those issues were dealt with in very broad terms at Issues 4 and 5: did the Transactions comply with anyrequirements of Article 119 that applied to them, if not in what respects and what are the legal consequences? There was no suggestion that financial experts were necessary. 285. The pleading as to "speculativeness" was therefore broad and elementary. The pleading does not identify any features of the cash flow swap which were said to make the transaction speculative. In particular it does not plead that a negative MTM would make the borrowing speculative; MTM was identified only as going to the informed decision aspects, in partnership with probabilistic scenarios and hidden costs. 286. It follows that no positive case was pleaded in relation to speculation and hedging. 287. In opening Busto trailed the possibility of an intention to go wider. At paragraph 93 it was said that Busto "accepts that the dividing line between what is speculative and what is a hedge will rarely be clear cut. Most transactions will have elements of both. However, where the dividing line in terms of local authority finances is to be drawn is a matter of policy, and in that sense is a matter for the Italian legislature and the Italian Courts" (suggesting that the answer to the dividing line lay in the authorities – the line which appears from the pleaded case). However that was followed by an indication that Busto intended to show that the Transactions did have a speculative element (unidentified). 288. That approach was further trailed in oral opening. And in closing Busto's case was clearly said to be that by its plea of hedging, DB had advanced a positive case, which entitled Busto to put any positive case on speculation, essentially by way of response. 289. Further, it was suggested by Busto in closing that the question of speculation was effectively decided in Hazell; this was in reliance on Lord Ackner at 45F – 46A. However (i) as noted above the analysis on that question has probably moved somewhat under English law in the succeeding years and (rather more importantly) (ii) the case on the dividing line between speculation and hedging is in this case one of Italian Law. It is as impermissible for me to superimpose English Law concepts of hedging as it would be to impose an English Law understanding of the capacity/validity divide. 290. As to the actual case on speculation, Busto's argument extended both to that pleaded case, and a case which developed via the evidence. 291. In terms of the general approach Busto urged me to reach back into Hazell, if not adopting the test, at least adopting a similarly sceptical approach. It placed great emphasis on the inherently speculative nature of swaps as described in Hazell (which it says resonates with the Cattolica approach) and submitted that the claim by the Bank that the Mirror Swap and the Cash Flow Swap were non-

speculative and simply hedging must be carefully scrutinised by the court (as in Hazell). This is said to be particularly so given that the true nature and effect of a swap may not be immediately apparent, even to experienced bank employees, such as Ms Villa. 292. This was then echoed in Busto's more specific case, which also drew on Hazell, contending that there were strong parallels between the interim strategy adopted in Hazell and the Bank's case on the Mirror Swap in the present proceedings. 293. I do not consider that this argument by reference to Hazell has much effect in circumstances where it is accepted that the Italian law approach is not on a par with that in Hazell, as noted above. While there may be similar resonances my focus needs to be on Italian Law. Further this argument was undercut by the fact that (as I have found above) the 2002 Swap has to be assumed to be valid; which was not the position in Hazell. 294. So far as the more general case goes, Busto's pleaded case takes an extreme position that a transaction will be speculative merely because the value or final outcome is uncertain. This would apply to any derivative contract (and indeed to any decision to borrow at a floating rate instead of a fixed rate, or vice versa). It is manifestly wrong to give the concept of speculation such a broad reading, not least because Article 3 of the Decree and even Cattolica recognises that some derivatives are permitted; and Busto actually accepts that derivatives are not precluded by Italian Law. 295. Accordingly limiting matters solely to the pleaded case, Busto's argument here must fail. 296. This then brings me to the new or extended case advanced by Busto.
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Determination and matters for consequential argument 365. It follows that I conclude that: i) The Transactions complied with the requirements of Article 119; ii) Article 42 paragraph 2(i) of TUEL is not applicable, but in any event the Transactions complied with the provisions of Article 42 paragraph 2(i) of TUEL by virtue of Resolution number 32 of 2 April 2007; iii) The Transactions are valid and binding on Busto and are enforceable in accordance with their terms. 366. In essence, therefore DB's claim succeeds. There do however remain issues as to the terms of the declarations sought, the determination of the sums due and outstanding and interest. These if not agreed will require to be determined at a consequentials hearing. Part 3: Contingent Issues The other TUEL issues 367. These questions therefore only arise on a double contingency (i.e. if I am wrong as to whether City Council approval was needed and also as to whether if it was needed, it was given). I deal with them only for completeness. Status of the resolutions of the City Board and Mr Fogliani.
368. So far as concerns the consequence if (i) City Council approval were necessary and (ii) it had not been given, there is a vibrant debate to be had as to whether that consequence should be annullability and not nullity. 369. The issue is particularly tricky because on the face of it the merits of the point appear to lie with DB; but there is no doubt in this case that Cattolica goes the other way. Professor Torchia gave it as her clear opinion that Cattolica is in this respect wrong. Professor della Cananea agreed that "as a general rule" relative incompetence results in annullability (not nullity), and that the "traditional" approach to breach of Article 42(2) would be treated as "a breach of the rules of internal competence" (i.e. relative incompetence) and that the result of this is that administrative acts adopted in breach of Article 42(2) would be treated as annullable (not a nullity). 370. This is a point which I do not have to decide. Had the point arisen I would, with considerable hesitation (bearing in mind what I have said above about the approach to foreign law), have concluded that despite what is said in Cattolica the correct position as a matter of Italian law is that a breach would result in relative incompetence i.e. annullability. 371. For this double contingency the briefest of reasons will suffice: i) Cattolica is not the starting point; the backdrop of the law prior to Cattolica is clear and in DB's favour, as noted above; ii) Even in the Court of Appeal in Cattolica this line appeared to be followed with no reference to voidness but reference to "potential annulment". That is plainly a reference to annullability; iii) The Supreme Court decision does not engage with the previous law or explain what would on its face be a

significant change. While clearly expressed the relevant part appears to be a statement in passing. There is no suggestion in the judgment that any issue was even raised as to the consequences of a breach of Article 42(2), let alone any explanation for any departure from the traditional approach; iv) While very great respect is due to the Supreme Court's decision, there is no doctrine of precedent in Italian Law and the academic views, together with Council of State decision 2810/2018 (albeit not exactly on point), gives sufficient basis to conclude that the Italian courts would probably not follow Cattolica on this point. 372. The result of this is that the relevant acts of the City Board and Mr Fogliani are thus effective in law unless and until they are set aside. Professor della Cananea accepted that an annullable administrative act is valid and effective and that the public body is therefore bound by it once the time limit for challenging it in the administrative court or taking self-redress procedures has passed. A limit on capacity 373. Similarly, I accept the submission that Article 42(2) is not a limit on capacity. The contrary was not separately argued in closing Ratification 374. The starting point is that for this point to arise one must assume that the Transactions breached Article 42(2)(i) of TUEL but that (as I have contingently found) the consequence is annullability not voidness. 375. The first question is that of which law is applicable to these issues. Busto were not unnaturally keen for the matter to be considered as a matter of Italian law given that (i) Professor Torchia accepted in her first report that the subsequent resolutions did not amount to ratification as a matter of Italian administrative law and (ii) in the joint memorandum of Professor Perrone and Professor Alibrandi they agree that ratification is not available as a matter of civil law in the case of a void contract. I accept that were the proper law to be Italian Law Busto would win this argument (for brevity on this extremely contingent point: essentially for the reasons given by Busto). 376. However, matters are by no means so favourable to Busto if, as DB contends, the applicable law for any ratification argument is English Law. 377. It is common ground that in the conventional case the putative law of the contract (here English Law) will also govern questions of the scope of the agent's authority including ancillary questions of ostensible authority and ratification, see Dicey & Morris on the Conflict of Laws 15th Ed. at Rule 244. 378. But Busto contends that there is an important rider which is applicable where authority and capacity coincide – i.e. where the limit on authority is derived from a limit within the relevant body's constitution. Thus, it points to Bowstead & Reynolds on Agency 22nd Ed., paragraph 12-021, where the authors state: "There can be little doubt that if there are public law restrictions on an agent's authority, as in the case of public officials, these should be effective as against the law governing the main transaction. As regards public officials, it seems to be accepted that constitutional and other public restrictions of a disabling nature on their actual authority should be effective, and the interpretation of such restrictions is a matter for the law imposing them; although in the absence of clear evidence the court falls back fairly easily on English interpretation techniques, at least where the governing law of the main transaction is English, and similarly estoppel, apparently under English law, has been applied to later conduct relevant to earlier authorisation. The reluctance of English law to find apparent authority in public officials has recently been applied in the context of foreign officials". 379. This would also seem to be consistent with the "internationalist" approach referred to in Haugesund. However, it appears that this argument is slightly off point; we are not here concerned with public law restrictions on an agent's authority. 380. Further Bowstead and Reynolds paragraph 12-019 notes that "where there is no question of lack of power, the matter is likely to be one of authority only and governed by the law applicable to that topic", by reference to Law Debenture Trust v Ukraine [2018] EWCA Civ 2026; [2019] Q.B. 1121. 381. In reply, Mr Downes tacitly accepted the applicability of that passage and simply submitted by reference to PEC v Asia Golden Rice Co [2014] EWHC 1583 (Comm) that there might be a carve-out where it would be unfair to do so, and that on that basis it would be unfair to fix the principal with the chosen law of a contract that the principal did not enter

into. However, that authority does not provide full support for this argument. At [75] of PEC Andrew Smith J went no further than to say: "I also have sympathy with his submission that the general principle stated in Dicey, Morris & Collins would not be applied if it resulted in distinct unfairness or there were other strong reason for modifying it. An obvious example might be if an agent chose a law unconnected with the contract simply to clothe himself with authority." 382. The situation to which he refers is not the situation in this case. It follows that in my judgment to depart from the default position would be unjustified in this case. The question of ratification would (if it arose) therefore fall to be considered by reference to English Law. 383. So far as English Law is concerned, Busto's case on the law was notably understated, with broad allusion to ratification requiring an unambiguous act coupled with informed consent. No reference was made to the authorities cited by DB to the effect that: i) The question whether an intention to adopt a contract as binding should be inferred from silence depends on whether it is the only reasonable conclusion to draw in the circumstances. ING Re (UK) Ltd v R&V Versicherung AG [2006] EWHC 1544 (Comm) at [161]; ii) There is no legal requirement that the principal must be aware of his agent's lack of authority before the principal can be taken to have ratified a contract. The key is knowledge of the material facts: Bowstead paragraph 2-067, which in turn cites Brown v InnovatorOne plc [2012] EWHC 1321 (Comm) at [856-7]; SEB Trygg Holding AB v Manches [2005] EWCA Civ 1237, [2006] 1 WLR 2276 at [43]. 384. Is there sufficient material to satisfy the test on that basis? DB relied on: i) The City Council's recognition of the Transactions in the budget and the supplemental notes to the budget in every year from 2008; ii) The City Council permission to Busto to make the payments due under the Transactions from 2007 through to June 2020; iii) The absence of adoption of any administrative self-redress procedures to annul the resolutions of the City Board or the decisions of Mr Fogliani within the time allowed by Article 21-nonies of Law 241/1990 by Busto; iv) As regards the latter DB says these are particularly striking given that, as noted in the factual section of this judgment, Busto retained Brady Italia in early 2009 to investigate the legitimacy and validity of the Transactions and it produced a further report on the Cash Flow Swap in 2012, but Busto did not raise any issues with DB. 385. I accept the submission that these matters are sufficient to make out a case of ratification as a matter of English Law. Busto's conduct in these regards is wholly inconsistent with Busto now taking the position that Mr Fogliani did not have authority to enter into the Transactions on behalf of Busto because they had not been approved by the City Council. 386. I therefore conclude that if ratification had arisen, the proper law is English law and the requirements of ratification would be made out. Ostensible authority/Contractual estoppel 387. I deal briefly with this point largely because it raises an issue of law in an area of considerable interest which is not replete with authority. 388. This was an argument taken fairly lightly by DB and rather more seriously by Busto. 389. DB relies upon the terms of the ISDA Master Agreement, in particular the contractual representations and warranties set out in section 3(a)(ii) ("Powers"), section 3(a)(iii) ("No Violation or Conflict"), section 3(a)(iv) ("Consents"), section 4(b) ("Maintain Authorisations"), and section 4(c) ("Comply with Laws") of the Master Agreement (as amended by the Schedule). 390. DB contends that these representations survive any voidness of the swaps themselves because the Master Agreement is a framework agreement which did not entail any binding commitment for Busto to incur expenditure that needed to be budgeted for in future years and did not necessarily involve Busto entering into any derivative contract with DB which would (on Busto's case) require City Council approval. 391. It therefore submits that: i) Article 42(2)(i) of TUEL cannot require City Council approval of the Master Agreement and Schedule; ii) The City Board authorised Mr Fogliani to enter into the Master Agreement and Schedule by decision no. 417/2007 of 17 July 2007; iii) Busto is therefore bound by the express contractual representations and warranties that it gave to DB in the Master Agreement including the terms which specifically confirmed Mr Fogliani's authority to enter into the Transactions

on behalf of Busto. 392. DB contends (i) that these representations and warranties in the Master Agreement are sufficient to establish a contractual estoppel which prevents Busto from denying that Mr Fogliani was duly authorised, and (ii) that estoppel arises without the need to establish reliance by DB. 393. Busto argues that it is logically impossible (and "bootstraps") for a local authority to represent (sufficient to give rise to some form of estoppel) that a transaction is within its capacity as a means of evading what would otherwise preclude its entering into the transaction. 394. Reliance was placed by Busto on the trenchant observation of Harman J in Rhyl Urban District Council v Rhyl Amusements Ltd [1959] 1 WLR 465 that: "Accepting the view… that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power… It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel. That point, I think, can be shortly disposed of.'" 395. Busto also pointed to the judgment of Tomlinson J in Haugesund, rejecting an argument based on estoppel at paragraphs 170-172: "[170] At para 35 above I set out the representations which are attributed to Haugesund in the ISDA Master Agreement. ... Wikborg Rein contends that these representations form the basis of an estoppel by representation pursuant to which the municipalities are, as against Depfa, precluded from denying that the swap agreements imposed on them valid and binding obligations. In the alternative, Wikborg Rein contend that the municipalities owed to Depfa a tortious duty of care in making the representations as to their power to enter into the agreements and that they made the misstatements negligently, so that in consequence Depfa has a cross-claim in damages against the municipalities to the extent of its inability to recover in contract or in restitution. … Both of these arguments must in my view fail on the simple ground pointed out by Professor Graver that "there can be no power under administrative law for public bodies themselves to create new powers by representing that they have such powers". Unsurprisingly Professor Graver's evidence was not challenged. Mr Mitchell distinguishes between a power to enter into a contract and the power to make a statement independently of contract. I agree that the concepts are different, although the representation here is made in connection with the making of the contract and, insofar as negligent misstatement is concerned, liability is only established if there is a relationship "equivalent to contract" – cf per Lord Devlin in Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465 at 530, [1963] 2 All ER 575, [1963] 3 WLR 101. However the answer to Mr Mitchell's point is given by Professor Graver. It was given too by Harman J in Rhyl UDC v Rhyl Amusements Ltd … where he pointed out that arguments of this sort which might avail against "private people" cannot prevail as an answer to a claim that something has been done by a statutory body without it having the capacity so to do." 396. In opening DB relied on Standard Chartered Bank v Ceylon Petroleum. In that case, Hamblen J held that representatives of CPC had ostensible authority to enter into the relevant transactions in that case in light of, inter alia, a representation in an ISDA Master Agreement that CPC had power to execute the Master Agreement and any Confirmation and had taken all necessary action to authorise that execution. It says that Busto made similar representations to DB in the express terms of the Master Agreement. 397. However Standard Chartered was a case where the argument was purely one of ostensible authority, and the judge relied on matters (such as the statute which created CPC and specific acts of the Board) which went well beyond the ISDA Master. 398. The main authority deployed by DB in closing was that of Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm) in which Andrew Smith J considered a challenge to five disputed contracts entered into by a Dutch social housing association based on a lack of capacity. It was common ground that Vestia had capacity to enter into the ISDA Master Agreement framework contract; the dispute was limited to some but not all of the transactions Vestia entered into under it. 399. In respect of three of them ((i) transactions 3, 4 and 5; (ii) transactions 7 and 8; and (iii) transaction 9), the Judge found them

to be ultra vires. Credit Suisse then advanced three further arguments: estoppel, warranty and misrepresentation. 400. In particular Credit Suisse sought to rely on two "Additional Representations" that Vestia had given in the ISDA Master Agreement: i) First, the "compliance representation" – that its entry into and performance of its contractual obligations was and would be in compliance with its articles, financial rules and any other applicable laws or regulations; and ii) Second, the "hedging representation" – that it was entering into each transaction purely for the purpose of hedging its exposures and not for the purpose of speculation. 401. At [300] of the judgment the Judge held that these were intended to take effect as contractual undertakings as well as representations. 402. Credit Suisse then argued that both the Master Agreement and these Additional warranties/representations estopped Vestia from contending that the transactions were void. As regards the Master Agreement itself, the Judge rejected this argument at paras 304-305, citing the line of argument upon which Busto now relies and going on: "[304] …. Mr Howe accepted that this is so in the case of local authorities or other public bodies, but submitted that Vestia are in a different position because, though they operate in the field of social housing, they are a private entity.

[305] Professor Dorresteijn's evidence was that Vestia and other SHAs "are not part of the governmental organisations", and I accept this. But I do not consider that this assists Credit Suisse, or that Vestia could have extended their contractual capacity by representing (by contract or otherwise) that they have powers which they do not have or that it is within their powers to make a contract when it is not. A contract that is ultra vires the powers of a company is void, and it cannot be validated: see Chitty on Contracts (31st ed, 2012) vol 1 at paras 9-020 and 9-024, citing the judgment of Russell J in York Corp v Henry Leetham & Sons [1924] 1 Ch 557, 573, 22 LGR 371, 94 LJ Ch 159: "An ultra vires agreement cannot become intra vires by means of estoppel, lapse of time, ratification, acquiescence, or delay". Although this was said in the context of the capacity of a local authority, the editors of Chitty clearly understand it to be a wider statement of principle, and I agree. The same is said by the editors of Spencer Bower, The Law relating to Estoppel by Representation, (4th ed, 2004) at para VII.6.1: "nor [can] a company become entitled by estoppel to exceed its statutory powers or those given to it by its memorandum of association". The position relating to companies incorporated under the Companies Acts is illustrated by Ashbury Railway Carriage and Iron Co v Riche, (1875) LR 7 HL 653, 44 LJ Ex 185, 24 WR 79 and Great North-West Central Ry v Chamlebois [1899] AC 114, 68 LJPC 25, 79 LT 35. In my judgment the representations in the Master Agreement and the Management Certificate do not enable Credit Suisse to argue that Vestia are estopped from disputing that the ultra vires contracts were within their capacity or from disputing the authority of Mr de Vries and Mr Staal to make the ultra vires contracts." 403. The Judge went on to accept the alternative argument that the Additional Representations in the Schedule to the Master Agreement gave rise to an estoppel. At [307-309] he considered that the doctrine of contractual estoppel could apply an agreement about a state of affairs in the future. At [312-318] he decided that the representations could apply to ultra vires transactions. 404. At [319], Andrew Smith J considered whether Credit Suisse's reliance on these Additional Representations fell foul of the principle in Rhyl UDC: "Would the Additional Representations so interpreted be inconsistent with a policy or principle of law that an entity cannot expand its own capacity by estoppel or contract? In my judgment they would not be. I readily accept that an entity cannot achieve what it has no power to do simply by stating or promising that it has the power, and that underlying the doctrine of ultra vires is a policy of protecting the public: see Hazell v Hammersmith and Fulham LBC, [1992] 2 AC 1, 36F/G per Lord Templeman. But there seems to me no reason that a legal entity should not in a valid contract undertake that the contract will not be used as a vehicle for purported transactions that are invalid because they are outside their capacity. Credit Suisse are not making a claim under the ultra vires contracts and in this part of their claim are not

asserting that they are valid. Their argument is that they are entitled to enforce the Master Agreement as if the ultra vires contracts were valid." 405. Andrew Smith J therefore concluded that it was not inconsistent with the Rhyl case or its underlying policy for Credit Suisse to make a claim for estoppel or breach of warranty based on the Additional Representations in the Master Agreement, as opposed to claiming under the ultra vires transactions themselves. 406. The consequence was that Vestia was contractually estopped from disputing its liability to Credit Suisse under the Master Agreement on the grounds that the ultra vires contracts were made without capacity and authority, or alternatively that Vestia was liable in damages for breach of warranty: [320]-[322]. 407. Interesting as this argument is had the point arisen, I should have been unwilling to conclude that a contractual estoppel arose in this case. The doctrine is one which has been established on a very narrow basis and has yet to receive endorsement from the Supreme Court. There are some expressed concerns in the academic commentaries about its principled basis and capacity for uncontrolled growth (See, for example, Braithwaite "The origins and implications of Contractual Estoppel" LQR 2016 pp 120- 147, Leeming "Receipts Clauses and "contractual estoppel" revisited" LQR 2018 pp 171-76, Wilken and Ghaly, Law of Waiver, Variation and Estoppel, 3rd edn, at pp.90– 91 and 315). It is right therefore to look at any development which would cut across a line of authority on such a fundamental question as capacity with some care. 408. Here I would see sufficient grounds for caution. In Vestia it was common ground that the ISDA Master Agreement was within the capacity of the entity, which was not a public body but a private entity. In Vestia the representations within the Master Agreement were still regarded as not capable of giving rise to a contractual estoppel. The particular conclusion upon which the argument within Vestia is built is a very particular one, derived from certain specific "Additional Representations" which did not exist in this case. While DB contended that there were similar representations (i) they were not additional representations, but ones within the main Master (ii) they were not the same as the representations in Vestia and no time was spent establishing an equivalency and (iii) the building block of establishing them as contractual warranties which formed part of the analysis in Vestia was not done here. Although DB placed reliance on my judgment in BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA at [176]-[184] as stating that the distinction was not significant that strikes me as an over-reading of a passing line within that judgment, which was not part of the determinative reasoning. 409. Further, coming back to basics, on their face the representations relied on are referable to the "Transactions" - which are defined as transactions that the parties have entered into or anticipate entering into. It logically follows that to the extent that the transactions are void for want for capacity they do not fall within the definition of "Transactions". The restitution claim 410. These issues would only arise if the Transactions were void. Busto's restitution claim is for €3,840,166.74 (i.e. the net sum paid to DB under the Transactions). 411. The first issue which was raised was that of applicable law, the candidates again being Italian and English Law, with DB arguing for English Law, despite the decision of Walker J in Dexia Crediop SpA v Comune di Prato [2016] EWHC 2824 (Comm) at [159]-[172]. Had it been necessary to decide this point I would have concluded that this authority was distinguishable. While I would not necessarily place the same weight as did DB on the technical survival of the ISDA Master Agreement, there is force in the submissions that: (i) that choice of law would retain weight under the Haugesund approach of adopting the putative applicable law to determine the civil law consequences of a lack of capacity on the validity of a contract; and (ii) the facts of this case are also distinguishable from Dexia because Dexia was an Italian bank, whereas DB acted through its London branch. The place of enrichment in this case would therefore also be England. Overall, therefore, despite the existence of certain ties to Italy, I would conclude that the closest and most real connection for the putative Transactions was with England. 412. That would then have led into limitation and change of position arguments under English Law (which it was common ground

would not exist under Italian Law). There was little controversy that if English Law governed, all the payments made by Busto under the Mirror Swap were made outside the limitation period; leading to a sum of €99,136.88 being time barred. 413. As for change of position, this was used to found a claim for hedging costs. DB contended that their hedging costs were over €4 million, and thus outweighed Busto's restitution claim. 414. There are two problems with DB's contingent claim on this basis. The first is that there are two first instance decisions in which it has been held that payments made under hedging contracts did not give rise to a change of position defence: Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 4 All ER 890 at 948-949 and South Tyneside MBC v Svenska International plc [1995] 1 All ER 545 at 558-569. 415. There is plainly a very interesting debate to be had on another occasion as to these authorities. For present purposes I can briefly indicate that in the light of Foxton J's recent decision in School Facility Management Ltd v Governing Body of Christ the King College [2020] EWHC 1118 (Comm) at [470]-[478], where the academic criticisms of those cases are carefully considered, and other cases where the defence of change of position was upheld also examined, I would not have been minded to follow these judgments. 416. The second however is more substantial. It is the lack of evidence on this point. This claim effectively hinged on a single, rather terse, internal DB email sent on 18 July 2007 which was not explained in any detail by anyone who was a party to it. There seemed also to be a tension between that approach and the credit approval documents which contained a suggestion that any hedging would only be for US$10 million. Aside from this the case on hedging rested on the evidence of Mr Tarczynski, who was ultimately not called. Mr Tarczynski was not an employee of the Bank at the time the Bank alleges that it entered the hedging arrangements, and hence had no first-hand knowledge of the Transactions in this case or the alleged hedging arrangements. In substance, Mr Tarczynski sought to give evidence as to what he believed the Bank would have done based on his experience as a hybrid options trader in the interest rate trading department at Lehman Brothers. 417. At the PTR there was a lively dispute about the contents of this statement with Busto contending that Mr Tarczynski's evidence contained inadmissible opinion evidence. I largely concurred with that submission, with the result that a revised draft was served in order to cure this defect. The contents of the draft remained contentious, though no detailed argument was addressed to it in circumstances where the statement was withdrawn. 418. Ultimately it seemed to me that Busto's submission that the evidence on this point was insufficient to prove the hedging arrangements, was correct. Article 1338 419. Finally, I will touch on the alternative claims under Article 1338 of the Italian Civil Code, which provides: "A party who knows or should know the existence of a reason of invalidity of a contract and does not give notice to the other parties is bound to compensate for damages suffered by the latter relying, without fault, on the validity of the contract." 420. The first question is whether this claim is governed by Italian law. As to this there was no contest that Italian law applied to this claim. Busto did not advance a positive case for any other law. 421. The principal issue between the parties in relation to the Article 1338 claims was whether either of Busto knew or ought to have known of the alleged grounds of invalidity now relied upon by it (i.e. alleged non-compliance with Italian public finance laws and/or Article 42(2)(i) of TUEL) and, if so, whether DB was "without fault". 422. DB relied on a general principle of Italian law that a public body, such as Busto, is required under Italian civil law to know of any fact, event or administrative measure that is a requirement of any law applicable to it as a public body or any transaction which it purports to enter, unless it is impossible to have such knowledge. 423. I was not attracted by this line of argument. It rests on an assertion that Busto was under an absolute duty to know the law. I was not persuaded that the authorities relied upon to establish that proposition did so; they rather seemed to support a more conventional negligence/diligence test. Absent that absolute duty on the facts it is hard to see how it can be said that Busto "ought to have known" that the Transactions were invalid. And, while I was not persuaded that

the arguments as to DB's "incomparable experience" had any legal significance, there would certainly seem to be an oddity if there is no absolute duty for those involved in a small local authority to be in the position where they ought to have known more than a group of professional specialists with extensive specialist legal advice. 424. Further the "incomparable experience" would have had a significance at the next stage – whether there was reliance by DB "without fault". In circumstances where the burden is on DB to establish this aspect, and the evidence suggests not only their general level of knowledge, but a failure to take specific advice at the time, I would have found that this hurdle was not cleared. 425. On any analysis therefore the Article 1338 claim would have failed. 426. But in any event for the reason I have already given I would have found that the quantum of DB's claim was not proved.

2. FACTUAL BACKGROUND

The judgment under comment offers some significant insights regarding the essential elements of derivative contracts, governed by English law, in those cases where one of the contracting parties is a public entity. Moreover, subject of consideration will be the consequences of the systematic nature of a declaration of nullity of contracts in which the mark- to- market, probabilistic scenarios and implicit costs are missing. In this light, is relevant the jurisprudential debate in which the United Sections of the Italian Supreme Court and the High Court of Justice in London are at the antipodes. The phenomenon has been the subject of numerous pronouncements exploring the capacity of local authorities[158], in different jurisdictions[159], concerning the principles that govern the activities of local authorities in contractual matters, such as good faith and autonomous decision-making. In this regard, numerous interpretative doubts have been raised as to whether local authorities should have recourse to derivative finance operations[160]. In this sense, the objective of this contribution is to explore the concurrent evolution of the derivatives market and of the law around the capacity of local authorities to participate in them. The concept of *derivative*[161] refers to a category of negotiation, to which the contractual figure under consideration in this study belongs: the interest rate swap[162]. In particular, the decision under

[158] See J.J. GARGAN, *Consideration of Local Government Capacity*, in *Public Administration Review*, vol. 41, no. 6, 1981, pp. 649–58.

[159] See, J. BRAITHWAITE, *Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets*, in *Current Legal Problems*, Volume 71, Issue 1, 2018, pp. 369–402.

[160] Cf. D. ROSSANO, *Gli swap e la gestione della finanza pubblica nella giurisprudenza civilistica e della Corte dei conti*, in *Rivista corte dei conti*, n. 3/2019, pp. 1-2.

[161] The term, as stated, originates from the English language: the adjective "derivative" indicates a financial instrument which is based on another elementary instrument and the value of the first depends on that of the second (see, among many others, R. W. KOLB, *Financial derivatives*, Cambridge, 1996).

[162] *Swap* means "give something in exchange for something else. See, in this regard: A. S. HORNBY, *Oxford Advanced Learner's Dictionary of current English*, Oxford, 1990, *voice Swap*. Further helpful references on swap include I. PAPPE, *The Ins and Outs of Swap Transactions*, 15 *CAN. BUS. L.J*, 1989, p. 158.

The origin of this legal category is generally traced back to the Anglo-Saxon world (Cf. A. CIRILLO, *Nifs, Swap ed Options. Operazioni Bancarie innovative*, Padova, 1990, p. 8). In reality, its origins are even further back in time, traces of it can be seen in a very remote age, as far back as 2,000 B.C.. The first fixed-term contracts date back to Mesopotamia, the cradle of civilization. Agreements of a similar nature would then have followed in the civilizations of the ancient Greeks and Romans (for an extensive discussion from the historical point of view, see: M.B. HORAT, *Financial futures e opzioni*, Milano, 1992, pp. 17-18, 115; D. WINSTONE, *Financial derivatives. Hedging with futures, forwards, options and swaps*, London, 1995, p. 60 ff; E.J. SWAN, *Building the global market: a 4,000-year history of derivatives*, London, 2000; R.K. SUNDARAM, S.R. DAS, *Derivatives: principles and practice,* New York, 2010, p. 57). See, for more, G. PETRELLA, *Gli strumenti finanziari derivati. Aspetti tecnici, profili contabili e regime fiscale*, Milano, 1997, p. 4.

review concerns several derivative contracts, governed by English law[163], subscribed in 2007 by the Municipality of Busto Arsizio[164], whose contractual counterpart was the international bank, *Deutsche Bank*. More specifically, this involved a *Mirror Swap* derivative contract to offset the effects of a previous derivative contract entered with an Italian credit institution and a *Cash Flow Swap* derivative contract aimed, on the other hand, at managing part of the indebtedness[165] and the swaps of the Italian Municipality. In 2013, the Italian Municipality began making payments under the *Cash Flow Swap* and, in 2018, the total of its payments exceeded the total amount paid by the Bank. Therefore, in December 2020, the Municipality decided not to make any further payments claiming, in support of its decision, that the contracts were not legitimate, under Italian law. Consequently, no further payments were made in the period between December 31, 2020, and June 30, 2021. The Bank appealed to the Commercial Court to have declared, *inter alia*, that the Municipality could enter the swaps in question and that such contracts were fully valid and binding on both parties. The Municipality maintained that it was not bound by the swaps since, based on what was affirmed in the *Cattolica* decision[166], Italian local authorities cannot enter transactions that do not indicate the mark-to-market, the probabilistic scenarios, and the implicit costs of the derivative. The Municipality also argued that it was up to the City Council to approve the swaps, which, in this case, did not occur. The defensive statements of the Municipality start, therefore, from the position that the case in question should be regulated based on Italian law, arguing that the principles of Italian administrative law[167] limit the powers of the Municipality understood as a local public body. Therefore, the latter could not enter the swap transactions, with the consequence that they are to be considered null. In the context outlined, the High Court referred to the *Cattolica* case whose decision issued by the Italian Supreme Court of Cassation formed the central basis of the arguments regarding the contractual capacity of local authorities. This ruling affirmed that, at the time of the facts, the bargaining power of local authorities had obvious limits. Moreover, to be admissible, the derivative had to be economically advantageous, as the stipulation of speculative derivatives was forbidden. The Supreme Court of Cassation, recalling the sentence of the Italian Constitutional Court n. 52/2010, points out that the prohibition of speculative contracts is attributable to paragraphs 4 and 6 of art. 62 of the Italian Constitution. Those paragraphs respectively impose the constraint of financial equilibrium and require that borrowing be aimed at investment. The sentence referred to by the High Court of Justice goes on to state that derivative contracts, since they are uncertain, could not be entered into by the Public Administration. The aleatory nature of such contracts is strongly in contrast with the rules relating to public finance. This nature introduces variables that are not compatible with the fixed nature of expenditure commitments, recognizing the exceptional nature of such contracts to be interpreted, in their application, in a restrictive manner. In the decision under review, the Commercial Court, accepted the Bank's request and fully rejected the Municipality's arguments. The English Court, from an analysis of the constitutional provisions regarding the borrowing capacity of Italian local authorities, held, *inter alia*, that it is not possible to deduce any type of limitation for such authorities to enter derivative contracts,

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[163] In fact, the relevance of Italian law tends to disappear if the contract is governed by English law and provides for the exclusive jurisdiction of the English judge, as is usually the case for contracts governed by the ISDA Master Agreement: for a more detailed examination of the point A. PERRONE, *A Decision of the Highest Court Shakes the Italian Derivatives' Market*, in *40 Futures and Derivatives Law Report*, n. 8, September 2020, p. 12.

[164] See, for further details, paragraph 56 of the decision of the *Commercial Court*.

[165] See V. LEMMA, *The derivatives of Italy*, in *Law and Economics Yearly Review*, 2013, p. 1.

[166] Decision of *Sezioni Unite della Suprema Corte di Cassazione n. 8770/2020 del 12 maggio 2020*. See also paragraphs 120 and following of the decision in commentary.

[167] Concerning article 119 of the Italian Constitution and the mandatory rules of Italian public finance. In *Cattolica'*s decision at Paragraphs 10.2 and 10.3 we read that where the swap contract provides for an upfront payment to the local authority, that will be indebtedness («Amounts received as an upfront constitute indebtedness for purposes of public accounting law and Article 119 of the Italian Constitution»). In the same decision, we read «In regard to the municipal body that is required to authorise the use of IRSs, prevailing legal scholars and case law have, rightly, held that the City Council has this authority».

including speculative ones. At this point, for a correct legal framework of the topic, it is appropriate to recall the regulations on the subject, both in English[168] and Italian law[169].

3. THE INTEREST RATE SWAP CONTRACT IN THE ENGLISH LEGAL SYSTEM

Derivatives trades can occur either through exchanges or over-the-counter (OTC)[170]; parties to these agreements have fewer choices regarding underlying assets, settlement amounts, maturity dates, and other contractual terms[171]. Regardless of their type, a fundamental characteristic of derivatives is long-term risk[172]; in fact, regulators often say that they want to curtail risky practices, but this is a vague proposition when dealing with parties that quite literally trade in risk. A well-functioning derivatives market is thus concerned with mitigating unwanted risks[173]. It is a well-known fact that English local authorities were the first to exchange their fixed interest rates with banks after the financial *élites* had deliberately initiated a political debate about whether local authorities should use these new instruments. However, in 1991, the House of Lords declared municipal exchanges *ultra vires*. The capacity to subscribe contracts means different things in the context of natural persons and statutory bodies. The rules around the capacity of natural persons flow from the overarching principle of freedom of contract[174]. Differently from person, statutory bodies may only act within the capacity that they have been given[175]. In this sense, the first case that analysed the interaction between notions of freedom of contract and the regulation of local government finances was *Hazell v Hammersmith & Fulham*[176], in 1992, in which the validity of a series of interest rate swap contracts entered by the local authority in the financial years ending 1987 and 1988 was challenged. Specifically, the case concerned whether the local authority could subscribe interest rate swap contracts. From this decision emerged that a local authority «is not a sovereign body and can only do such things as are expressly or impliedly authorised by Parliament», and so, any actions beyond those powers will be *ultra vires*. Moreover, in this case, contracts subscribed in *ultra vires* way will be null[177].

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168 See paragraphs 84 and following of the judgment under review

169 See paragraphs 109 and following of the judgment under review.

170 Cf. DEUTSCHE BÖRSE GRP., *The global derivatives market: an introduction*, 10, 2008, see the full text in te site of the Deutsche Börse Group - Derivatives market (deutsche-boerse.com)

171 See S. GRIFFITH, *Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation*, *98 MINN. L. REV.*, 2014, pp. 1291-1297.

172 Cf. DEUTSCHE BÖRSE GROUP, *The global derivatives market: an introduction,* cit, p. 25.

173 *Ibidem.*

174 Cf. J. BRAITHWAITE, *Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets*, cit. p. 23.

175 *Ibidem*, page 372 «Accordingly, a person of full capacity can make the contracts they like subject only to piecemeal regulation, for example in cases of undue influence, illegality or fraud. The starting point for a statutory body, such as a company, a building society, or a local authority (including a borough council) is different».

176 This is one of the leading cases on the point in 1988 where the district auditor claimed to have generated revenue from swap agreements. Immediately after this allegation and before the UK courts declared that swap agreements were beyond the jurisdiction of the LA, UK and international financial institutions launched a massive lobbying campaign for legal clearance (retrospective). However, the banks' campaign failed. This collapse of bank power is puzzling because banks and money intermediaries wielded considerable structural and instrumental power at the time and even the banks' governor, the Bank of England and Lord Robin Leigh-Pemberton supported this legal authorization. Moreover, banks and money intermediaries unanimously favoured this law and had privileged institutional access to the Bank of England.

177 The exact consequences of the nullity for the different parties involved will depend on the facts of the case. In the context of a company, the classic statement of the position is found in *Rolled Steel Products (Holdings) Ltd v British Steel Corpn*, case [1986] Ch 246 (CA), pp. 304-305 (Browne-Wilkinson LJ).

The regulatory structure for derivatives instruments in the United Kindom has «its own history»[178]. In the English legal system, by a broader strategy of deregulation[179] of the financial sector, known as the *Big Bang*[180], the Financial Services Act of 1986 sanctioned the guarantee of enforceability of OTC derivatives[181], including speculative ones. This act was then confirmed in the subsequent Financial Services and Markets Act of 2000 and accompanied by a more favourable regulatory regime, under the precise control of the Financial Services Authority[182].
The main instrument through which the private transnational regulatory regime is implemented in the OTC derivatives market is the Master Agreement of International Swaps and Derivatives Association (from now on ISDA).
The first model, developed in 1987 and known as the ISDA Interest Rate and Currency Exchange Agreement, was the subject of an ambitious revision process that led to the publication of the 1992 ISDA Master Agreement. This model is still in use today with the more updated 2002 ISDA Master Agreement[183].
Thus, the background on credit enhancement in swap contracts is large part based on information issued by ISDA[184]. Despite, about essential aspects of those contracts, we have collateralization[185] and

[178] J.V. MARKHAM, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom and Japan*, in *Brooklyn Journal of International Law*, 2003, p. 319.

[179] On this process of public deregulation, cf. T. BÜTHE – W. MATTLI, *The New Global Rulers: The Privatization of Regulation in the World Economy*, in *Princeton University Press*, 2011; J.P. CULLEN, *Deregulation and the Power of Private Surveillance in Markets*, in *Poznan University of Economics Review*, 2009, pp. 19-38.

[180] Reform package was adopted by the Thatcher government to push for sudden deregulation of the City's financial markets to increase global competitiveness. The package of reforms reached its peak in the years 1994 and 1995, in a wake of significant change proposed for the gilt borrowing and lending market and the sterling market in general, when the Bank of England released its Autumn 1994 paper, calling for consultations with the various market participants to change the existing market structure. Before its introduction, stock borrowing and lending in the gilt market were available only to gilt-edged market makers, the so-called GEMMs, who could only deal through approved intermediaries known as *Stock Exchange Money Brokers,* the SEMBs. After the introduction of the open gilt market, all market participants could borrow and lend gilts. For more details, see M. CHOUDHRY, *The Repo Handbook*, Oxford, Elsevier Science, 2010, p. 3.

[181] The FSA was motivated by Margaret Thatcher's government towards deregulation and European harmonization of the financial market. Two parts of the FSA were drafted to remove the effect of the Gaming Act 1845: Section 63 of FSA provides as follows: «(1) No contract to which this section applies shall be void or unenforceable because of – (a) section 18 of the Gaming Act 1845, section 1 of the Gaming Act 1892 or any corresponding provisions in force in Northern Ireland…
(2) This section applies to any contract entered into by either or each party by way of business and the making or performance of which either party constitutes an activity which falls within paragraph 12 Schedule 1 of this Act or would do so apart from Parts III and IV of that Schedule». Paragraph 33 of Schedule 1 of FSA states: «In determining for this Schedule whether anything constitutes an investment or the carrying on of investment business section 18 of the Gaming Act, shall be disregarded». The expectation of the lawmakers is that there should not be any legal uncertainty on trading in derivatives: «The lawmakers thus seemed to be on the same side as the fast-burgeoning derivatives market. It did not seem likely that legal technicalities would be allowed to stand in the way of its growth». See, on that, R. MCCORMICK, *Legal Risk in the Financial Markets*, 2nd ed, in *Oxford University Press*, Oxford, 2010.

[182] Cf. D. AWREY, The FSA, *Integrated Regulation, and the Curious Case of OTC Derivatives*, in *University of Pennsylvania Journal of Business Law*, 2010, p. 1.

[183] For a greater understanding of how a Master Agreement is negotiated, P.C. HARDING, *Mastering the ISDA Master Agreements 1992 and 2002: A Practical Guide for Negotiation*, London, 2010. On the Credit Support Annex, C.A. JOHNSON, *A Guide to Using and Negotiating OTC Derivatives Documentation*, New York, 2005.

[184] For information regarding common market practices, see P. COLLIN-DUFRESNE, B. SOLNIK, *On the term structure of default premia in the swap and LIBOR markets*, in *Journal of Finance 56*, 2001, pp. 1095–1115.

[185] Collateral plays a pivotal role in financial markets. It may be legally defined as an asset owned by a borrower to which a security interest has been attached to provide security to a lender, which entitles the latter to seize and liquidate the asset in the event the borrower defaults, see International Capital Market Association, *A Guide to Best Practice*, in *European Repo Market*, 2017, p. 94.

mark-to-market[186]. Their use is nearly universal. There is no precise date at which mark-to-market and collateralization became prevalent, although there is historical evidence that systematic collateralization began in the late 1980s and by the early-to-mid 1990s was widespread.
This is the background to the Final Report of the Legal Risk Review Committee (1992) which, in paragraph 22, provides that, «If markets in this country [United Kingdom] are to continue to flourish and innovate as successfully as they have in the past, participants must be as certain as they can be that what they are doing will be upheld by the law».
The *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*[187] contrasted with the *Hazell* ruling. This fact caused serious concern among financial institutions and foreign banks, which had subscribed transactions with local authorities in good faith, without considering that a technical rule such as the *ultra vires* doctrine could undermine the credibility of a transaction deemed legitimate. Therefore, in this and other cases[188] - such as *Kleinwort Benson Ltd v Lincoln City Council*[189] - this position has been consolidated, with the result that the transactions have been cancelled. However, over time, the approach of the English Courts to this issue has changed. As further emphasized by the criticisms to the *ultra vires* doctrine have led to incremental legislative reforms, such as the Localism Act 2011[190], which introduced a «general jurisdiction power» described as «fundamentally shifted the central presumption in this area of law»[191].
In what could be termed the *second wave* of cases, capacity issues have been raised regarding local authorities in many jurisdictions. These include the *Haugesund Kommune case and another v Depfa ACS Bank*[192] and several other cases involving Italian local authorities. The interaction between *ultra vires* and conflicts of law has generated novel problems for the English courts. The issue concerned the definition of capacity for the purpose of the relevant conflicts of law rule.
Determining the law which applies to a dispute about the binding nature of the decisions of a local authority falls outside the Rome Convention[193] and is therefore governed by the English Common Law.
Ultimately, a line is often drawn between speculation and hedging, although it is an elusive and unsatisfactory distinction. This is analysed in *Standard Chartered Bank v Ceylon Petroleum Corpn*, a case in

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[186] R. LITZENBERGER, *Swaps: Plain and fanciful*, in *Journal of Finance*, 1992, pp. 403–417.

[187] Case [1996] AC 669. As we see in paragraph 95 of the decision under commentary, «Lord Goff noted that: "I wish to record that [the House of Lords decision in Hazell] caused grave concern among financial institutions, and especially foreign banks, which had entered into such transactions with local authorities in good faith, with no idea that a rule as technical as the ultra vires doctrine might undermine».

[188] The *first wave* of lawsuits that followed *Hazell* raised other grounds on which authorities challenged the legitimacy of their operations in other contexts. Sometimes these challenges were considered unattractive. As *Peter Gibson LJ said in Stretch v West Dorset CC* (11 November 1997): «I would dismiss this appeal. I do so with little satisfaction. It seems to me to be unfair that, when public bodies misunderstand their powers to enter commercial transactions with unsuspecting members of the public, those bodies should be allowed to exploit their own mistakes to escape the unlawful bargains they have subscribed. For a local government to assert the illegality of its actions is an unattractive position to adopt. It is more surprising when, as in this case, the transaction in question is as trivial as a lease of a building; and the local government, by taking the position against the public with whom it or its predecessor has contracted, thus takes away from that public a portion of the consideration for entering the lease».

[189] Case [1999] 2 AC 349.

[190] And more, The Explanatory Note to the 2011 Act states that the general power of competence «may be used in innovative ways ... unlike anything that a local authority–or other public body–has done before or may currently do».

[191] Professor *Hieronymous* of the University of Illinois, expert on derivates topic. See paragraph 101 of the decision under comment.

[192] Case [2012] QB 549. In which Norwegian local authorities had entered swaps to make profits that could be used to improve local services.

[193] Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L266, 1) (the 'Rome Convention'), given force in the UK by the Contracts (Applicable Law) Act 1990.

which a law firm entered swaps to hedge against a rise in oil prices and later challenged the validity of the swaps when oil prices collapsed[194].
In conclusion of this paragraph, we can affirm today's global derivatives market is unrecognizable compared to that of thirty years ago when the *Hammersmith* case subscribed its 592 ill-fated swaps[195]. It's possible to affirm that cases have become more complex since the *Hazell* era.
This explains why a mutation of the original problem continues to generate difficult legal problems for the English courts. The traditional difficulties associated with *ultra vires* disputes, such as the challenge of evaluating whether an authority's powers extend to new types of economic activities.

4. THE INTEREST RATE SWAP CONTRACT IN THE ITALIAN LEGAL SYSTEM

Under Italian law, the Consolidated Law on Financial Intermediation, introduced by Legislative Decree no. 58 of 24 February 1998, regulates the concrete functioning of the derivatives market, and defines certain types of contracts[196]. The provision includes, among financial instruments, futures contracts[197], swaps[198], options[199], and contracts for differences[200], as well as other instruments involving a cash

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194 Case [2011] EWHC 1785 (Comm). The case involved *Ceylon Petroleum*, a Sri Lankan's state-owned company which bought crude oil in the international market and imported it to the country for refining and retailing. It was exposed to volatile fluctuations in oil price from 2003 to 2008. In 2007 CP began to enter oil derivative transactions with Standard Chartered Bank (from now on, the Bank). The arrangement of the derivative transactions where the Bank was required to make payments to CP when oil prices were high. On the other hand, CP had to make payments to the Bank if the oil price fell below an agreed floor. In late August 2008 oil process began to fall rapidly and the result was CP was in debt under the derivative transactions and it owed the Bank money. The Bank's claim was about US$ 161 million. CP raised the issues of lack of capacity, authority, and illegality in its defence and counterclaimed alleging breach of duty and contract and misrepresentation. Central to its defencee and counterclaim was the issue that the derivative transaction was predominantly speculative in nature. Hamblen J described the difficulty of the oil derivative transaction as one which involved the physical settlement of the purchase of oil which had included a paper position in derivatives to hedge against the price. Citing with approval a report from an expert witness on derivatives who said: «...at the extreme ends of the spectrum it is clear what is hedging and what is speculating. In the middle of the spectrum, there is a grey area where the same action can be hedging or speculation depending on the context, including the party's intention. The existence of a physical position makes it more likely that any particular action involves hedging».

195 Cf. J. BRAITHWAITE, *Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets*, cit., p. 23.

196 Article 1, paragraph 3 of Legislative Decree no. 58 of 1998 (T.U.F.) defines "derivative financial instruments" as those indicated in paragraph 1-bis and 2 of the same articles, in letters d), e), f), g), h), i) and j).

197 See, P. MESSINA, *Le operazioni finanziarie nel diritto dell'economia*, diretto da E. PICOZZA ED E. GABRIELLI, in *Trattato di diritto dell'economia*, Cedam, 2011, p. 209.

198 Is useful to report a recent definition of the Swap given by the judgment of the Court of Appeal of Florence, sec I, 16/12/2019, no. 3034 which states that «The swap scheme (literally "exchange"), as typified by the commercial practice borrowed from the Anglo-Saxon world, gives rise to a derivative obligatory relationship, in the sense that the negotiated economic value "derives" from the trend of the value of an underlying asset found at a certain maturity or in a certain period of time, according to a mathematical function that, linking the value of the derivative to the underlying, determines the economic result of the exchange relationship (pay-off). The underlying can be of the most varied nature and so, depending on the market parameter assumed, there can be swap contracts: a) on interest rates (interest rate swap), on currencies (currency swap), on goods (commodity swap), on credit risk (credit default swap), etc.. In each case, the practical purpose pursued by the contracting party may be speculative (trading) or hedging with respect to a related obligatory relationship». Again, on the swap contract in general, among many contributions, cf. B. INZITARI, *Swap*, in *Contr. impr.*, 1988, 598 ss.; R. AGOSTINELLI, *Le operazioni di swap e la struttura contrattuale sottostante*, in *Banca borsa*, 1997, I, 123 ss.; M. IRRERA, *Swaps* (sez. comm.), in Dig. disc. priv., X, Utet, 1998, p. 314; G. CAPALDO, *Profili civilistici del rischio finanziario e contratto di swap*, Giuffrè, 1999, p. 92.

199 See J. HULL, *Options, futures, and other derivatives*, Boston, 2015. And more, J Madura, Financial Markets and Institutions, 12th edn, Cengage Learning, 2018, p. 7; W ARRATA, *A Bernales and V Couder, 'The Effects of Derivatives on Underlying Financial*

settlement determined concerning securities, currencies, interest rates, yields, commodities, indices, or measures[201]. The derivative instrument most frequently used by Italian local authorities, as already mentioned, is the interest rate swap. This instrument provides, for the reciprocal commitment of the parties to pay each other, at pre-established dates, the interest produced by the same sum of money, taken as an abstract reference, called notional, for a given period[202].
In the Italian legal system, the interest rate swap contract falls within the category of exchange contracts and is of an aleatory nature[203]. In this kind of contract, the debtor transfers to the creditor the risk connected with the upward or downward variation in the interest rate. This is a contract with a synallagmatic structure and a commutative cause, in which the performance that one party owes to the other is determined by a parameter to which the parties themselves refer in the contract. This contract, in Italian law, is considered as atypical under art. 1322 of the Civil Code. Its essential elements are those foreseen under article 1325 of the Civil Code, which are foreseen under penalty of nullity *ex* article 1418 paragraph 2 of the Civil Code[204].
About the uncertain nature (*alea*) of those contracts, the case-law referred to by the High Court deduces the character of aleatory from the normative data. The exclusion of the applicability of article 1933 of the Civil Code[205] finds space within the limits in which the lawmaker considers the legal nature of the derivative. If the contract is rated as an authorized bet, may involve the application of the *gaming exception*[206]. Moreover, the uncertain nature of the swap does not affect the validity of the agreement concluded with a professional intermediary. In this last case an interest rate swap contract cannot be terminated due to supervening excessive onerousness[207].

Markets: Equity Options, Commodity Futures and Credit Default Swaps' in *M Balling and Ernest Gnan (eds), Fifty Years of Money and Finance: Lessons and Challenges*, Larcier 2013, p. 445.

200On this point, sentence of Corte di Appello di Bari, marzo 21, 1924; Corte di appello di Milano, giugno 20, 1923; Corte di appello di torino, 18 March 1924, in *Riv.dir.comm.,* 1925, II, p. 183, with commentary by M. ROTONDI, *Contratti a termine e differenziali sui cambi*; critical on this point also L. LORDI, *Pagamento per causa illecita in contratti differenziali su valuta estera*, in *Riv. dir. comm. e del dir. gen.obbl*., 1927, I, 101. An overview of the legislative policies of those years relating to the financial sector is also offered by V. SALANDRA, *Il c.d. mercato fittizio dei cambi*, in *Riv. dir. comm*., 1928, p. 97.

201 Derivatives are valued based on an underlying financial instrument. Futures, forwards, and swaps are all derivatives characterized as having linear payoffs. The valuation of the derivative will move one for one with increases or decreases in the underlying asset. The outstanding notional amount of these instruments is huge, and their various structures reflect some of the most creative thinking in finance in J. HILL, *FinTech and the Remaking of Financial Institutions*, in *Academic Press*, 2018, 207-219.

202 See, for further information: Cass. Civ., Sez. Un., 12 maggio 2020, n. 8770, (specifically, point 4.5).

203 The prevailing doctrine configures the uncertainty of typical aleatory contracts as an essential moment of the synallagma which conditions it *ab initio*. In this sense, see: R. SACCO, *Il contratto*, in *Trattato di dir. civ.*, diretto da F. VASSALLI, Torino, 1975, VI, tomo II, p. 988; G. AULETTA, *Risoluzione del contratto per eccessiva onerosità*, in *Riv. trim. dir. e proc. civ*., 1949, p. 170; P. BUFFA, *Di alcuni principi interpretativi in materia di risoluzione per eccessiva onerosità*, in *Riv. dir. comm*., 1948, II, p. 910.

204 In this sense, *ex multis*, cf. Trib. Torino, 24 aprile 2014 n. 2976, as well as the majority of Authors (see M. IRRERA, *Domestic currency swap: un nuovo contratto atipico?,* in *Foro pad*., 1987, II, p. 122).

205 Trib. Lanciano, 6 dicembre 2005, in *Giur. comm.*, 2007, II, p. 131.

206 Pursuant to article 1933 of the Italian Civil Code: «Non compete azione per il pagamento di un debito di giuoco o di scommessa, anche se si tratta di giuoco o di scommessa non proibiti. Il perdente, tuttavia, non può ripetere quanto abbia spontaneamente pagato dopo l'esito di un giuoco o di una scommessa in cui non vi sia stata alcuna frode. La ripetizione è ammessa in ogni caso se il perdente è un incapace». In English language, literally «No action for the payment of a gambling or wagering debt shall compete, even if the gambling or wagering is not prohibited. The loser, however, may not repeat what he has voluntarily paid after the outcome of a game or wager in which there has been no fraud. Repetition shall be allowed in any case if the loser is an incapacitated person».

207 Game and bet are aleatory (uncertain) contracts for excellence. If the game and the bet are prohibited, the transaction is illegal and no right arises in favour of the winner, who is also required to return what the loser has possibly paid. If, however, the game is lawful, the winner has no action, but the loser cannot repeat what he voluntarily paid. For further details see A. TORRENTE, P. SCHLESINGER, *Manuale di diritto privato*, Giuffré, 2013.

In conclusion, on this point, the Court of Cassation referred to by the English judge starts from the assumption that, by article 23, paragraph 5 of the TUF[208], «derivative financial instruments are not subject to art. 1933 of the Civil Code». In this sense, derivatives would not fall within the category of tolerated bets, insofar as irrational, but within that of authorized bets, provided they can be defined as *rational*.
According to the Court, in the *Cattolica* pronouncement, the causal justification of the interest rate swap contract can be found, more than in the exchange of payment flows[209], or in the interest concretely pursued by the contracting parties, in the bet itself, which would be qualified as authorized only to the extent that it can be defined as rational[210].
Recent Italian case law[211] identifies the following essential elements of derivative contracts, born in the financial sphere and not yet standardized, which must be defined during the negotiation of the contract. These elements are, in the first place, the trade date; the notional principal amount, which is not exchanged between the parties, and serves solely for the calculation of interest; the effective date, from which interest begins to accrue (normally two working days after the trade date); the maturity date of the contract; the payment dates, i.e. the dates on which the interest flows are exchanged; and, finally, the different interest rates to be applied to the said capital[212].
The High Court of Justice, in the judgment under review, confirmed the inapplicability of the principles expressed by the *Cattolica* decision to contracts governed by English law. On the other side, the Supreme Court of Cassation once again returned to the validity of the IRS, firmly reiterating the orientation of the *Cattolica* case law, thus, following an opposite approach to that of the Commercial Court.
It should be noted that the Italian United Sections of the Supreme Court defined the mark-to-market as the estimate of the actual value of the contract at a certain date. Even if, in the abstract, the mark-to-market does not express a concrete and current value, but a financial projection. The mark-to-market is, therefore, technically a value and not a price, a theoretical monetary quantity calculated for the hypothesis of termination of the contract before the natural term. This is a method of valuing financial assets that recognizes the value that they would have in the event of renegotiation of the contract or termination of the relationship before its natural expiry[213].
Therefore, the Italian Supreme Court, with the above-mentioned sentence, has ruled that the mark-to-market is a decisive element for the formation of the client's consent. This element must be indicated at the time of the conclusion of the contract as it is likely to determine the investor's consent regarding the distribution of the risk and the costs of the contract, especially if the counterparty is not a

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[208] See G. ALPA, sub art. 23, in *Commentario al Testo Unico delle disposizioni in materia di intermediazione finanziaria*, diretto da G. ALPA e F. CAPRIGLIONE, Padova, 1998, p. 256.

[209] As supported from F. CAPUTO NASSETTI, Profili Civilistici dei Contratti “Derivati” Finanziari, Milano, 1997, p. 54. Id., *I contratti derivati finanziari*, Milano, 2011, p. 23; E. PAGNONI, *Contratti di Swap*, in GABRIELLI - LENER (a cura di), *Trattato dei contratti*, vol. II, Torino, 2011, p. 1405; R. DI RAIMO, *Interest rate swap teoria del contratto e nullità: e se finalmente dicessimo che è immeritevole e tanto basta?*, in *Rass. dir. civ.*, 2014, p. 317. In case law: Trib. di Milano, 28 gennaio 2014, n. 978.

[210] This is the theory of the so-called “causa in concreto”, a notion developed in doctrine and established in jurisprudence with the judgment of the Corte Cass., 8 maggio 2006, n. 10490, which abandoned the notion of the “abstract cause”, understood as the economic-social function of the contract. That gave it official recognition by defining it as the synthesis of the real interests that the contract is intended to achieve, and that is as the individual function of the single, specific contract, regardless of the single abstract contractual stereotype. It is understood that this synthesis must concern the contractual dynamic and not the mere will of the parties. In the doctrine, see: A. TUCCI, *La negoziazione degli strumenti finanziari derivati e il problema della causa del contratto*, in *Banca borsa tit. cred*., 2013, p. 68; and more, as a case law, see: Corte d’Appello, 3 maggio 2013, n. 141.

[211] Cf. sentence of Tribunale di Roma, 8 gennaio 2016 n. 212.

[212] Thus textually, Cass. Civ., Sez. Un., 12 maggio 2020, n. 8770, cit., (paragraph 4.5).

[213] *From a regulatory point of view, this method is regulated by art. 203 of the Consolidated Finance Act, which describes it as the replacement cost of derivatives and other transactions indicated therein for the purposes of art. 76 of the bankruptcy law, and art. 2427-bis, paragraph 1, no. 1, of the Italian Civil Code, for which the fair value must be indicated for each category of derivative in the notes to the financial statements.*

professional client. Hence, from this point of view, any communication of the mark-to-market during the execution of the contract could not make up for the lack of initial agreement on this value; the generic formulation of calculation criteria or the indication of measurement standards that refer to market quotations by intermediaries does not integrate the agreement on the mark-to-market element. The mark-to-market, as well as the mathematical formula for determining its calculation, is an essential element of the IRS contract[214]. Its omission makes it impossible to measure the risk taken, with the consequence that the contract is null and void due to the indeterminably of the object. The identification of the mark-to-market is considered essential to quantify the risk assumed by the contractual parties. In this way, its omission does not qualify the negotiation as rational, entailing the unworthiness of the cause of the interest rate swap contract[215].
The context in which the issue is inserted saw two positions that were as clear-cut as they were distinct from each other. Part of the jurisprudence holds that the mark-to-market becomes part of the object so that its omission affects the requirement of the determinability of the object and leads to the nullity of the entire contract for the combined provisions of articles 1346 and 1418, paragraph 2, of the Civil Code; on the other hand, there is no lack of jurisprudence[216] to the contrary which considers that the mark-to-market exceeds the object of the swap contract and its omission cannot lead to a declaration of nullity due to indeterminability of the object.
The probabilistic scenarios are the probable scenarios of the final counter value of the invested capital and, as such, can offer a summary of the possible outcomes of the investment net of the applied costs, in a logic of informative transparency on the risk profile of non-equity investment products[217].
The probabilistic scenarios assume the investor's risk neutrality, thus starting from an unrealistic assumption: no one is indifferent to the risk of an unforeseen alteration in the trend of rates. Hence the limited usefulness of probabilistic scenarios for forecasting the value of derivative contracts at a future date and, indeed, the possibility that they may be misleading if retail investors do not fully understand the implications of the *risk-neutral* assumption[218]. In the light of the paradigm introduced by MiFID II[219], these rules make it difficult to implement the practices that characterized the *derivatives season* in the early 2000s[220]. The adequacy rule is specified by the stringent European guidelines on client profiling and the need to define the target market. It aims to verify the existence of conflicts of interest, prepare scenario analyses, and assess the cost structure. This is done by the product governance discipline[221]. The purpose of this discipline is to exclude the possibility of an indiscriminate proliferation of derivative contracts with non-financial counterparties.
About implicit costs, there is a problem if there is no original agreement on the mark-to-market because if there is agreement on the latter, the costs turn out to be included in the financial value and,

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214 Cf. Tribunale di Bari, 7 gennaio 2019.

215 See Corte d'Appello Milano, Sez. I, 25 settembre 2018, n. 4242. The Corte d'Appello of Milano, with two pronouncements issued by two different sections, shows the confusion into which jurisprudence still falls when it finds itself having to bring back to the traditional civil law categories (and contractual) contracts that give rise to complex financial operations, such as swaps. Once having clarified in the introduction the typological elements of the swap, excludes that the mark-to-market is a structural element of the contract and, however, does not exclude that its indeterminably may have significant consequences, leading to the gratuitousness of the withdrawal from the contract.

216 Cf. Corte d'Appello di Milano, Sez. III, 27 dicembre 2018, n. 5788.

217 See CONSOB, *Un approccio quantitativo risk-based per la trasparenza dei prodotti non-equity. Quaderni di Finanza*, n. 63, aprile 2009, respectively 14 e 1.

218 In this thermes, L. GIORDANO - G. SICILIANO, *Real-world and risk-neutral probabilities in the regulation on the transparency of structured products, Quaderni di Finanza,* n. 71, agosto 2013, 5 e 28.

219 Well recived system by, R. LENER, *Conflitti di interesse nella prestazione dei servizi di investimento e del servizio di gestione collettiva*, in *L'attuazione della MiFID in Italia*, a cura di R. D'APICE, Bologna, 2010, 10. Because of concerns regarding the practical application of certain requirements for investor classification cf. F. CAPRIGLIONE, *La problematica relativa al recepimento della MiFID*, in *La nuova direttiva MiFID*, a cura di M. DE POLI, Padova, 2009, 21.

220 Governed by Article 54 Delegated Regulation (EU) 2017/565.

221 Article 21, paragraph 2-bis, TUF; articles 64 and 65 Consob Regulation, 15 February 2018, no. 20307.

therefore, are not implicit. In this way, the investor ignores whether and to what extent the probabilities to the advantage of the intermediary are justified by the implicit costs. Since it is not a question of exchange, but a bet, it is physiological that the remuneration of the bettor who has arranged the bet is included in the distribution of the risk[222]. Rational hazards ensure the lawfulness of the broker's probable compensation and hold the investor accountable, eliminating the question of the lawfulness of implied costs.
In conclusion, the Supreme Court has also highlighted how the failure to indicate the requirements established by *Cattolica* does not integrate a violation of information obligations, but affects the essence of the contract itself, determining its nullity. Therefore, the principles of the *Cattolica* decision have a general scope and are applicable both to derivative contracts entered by credit institutions with public bodies and to those entered with private individuals.

5. CONCLUSION

In light of the proposed considerations, it emerges how the position of the Hight Court tends to emphasize that even if the above requirements were relevant, requiring disclosure of the mark-to-market, probabilistic scenarios and implicit costs of the derivative would be *overly formalistic*. Indeed, the analysis on the actual assessment of risk by the bank's counterparty in derivative contracts would, according to the *Cattolica* decision, as interpreted by the English court, require a case-by-case approach. The Commercial Court's decision indicates that -from the English Courts' point of view- derivative contracts governed by Anglo-Saxon law, even if concluded with an Italian subject, do not need the contractual validity requirements called for by the *Cattolica* ruling.
Therefore, the English Court's orientation creates not a few problems by contrasting with the Italian Court, in the execution of derivative contracts governed by English law, especially for intermediaries operating in derivative contracts.
It is evident the risk of serial litigation with the establishment of decisions that may lead to the nullity of the derivative contracts currently pending between banks and companies, due to the lack of indication of the mark-to-market, probabilistic scenarios and implicit costs.
In addition, the declaration of nullity of the contract entails, based on banking prudential regulations, in fact, the need to cover the relative exposure to the client, as happens in the hypothesis of impaired receivables. Therefore, precious capital resources would be absorbed at a historic period in which they must be, instead, destined to support credit capacity.
It is to be hoped that, in addition to achieving a more precise regulation on the topic of this paper, a solution will be found as soon as possible to prevent the consolidation of the line of jurisprudence brought forward by the United Sections in the *Cattolica* pronouncement.
It is therefore getting closer and closer to the occurrence of a «scenario potenzialmente catastrofico»[223], until a middle position that sees a meeting point aimed at balancing on the one hand the excessive formalism in the Italian jurisprudential declaratory of contractual nullity and the opposite orientation of the English Hight Court is reached.
In the United Kingdom legal system, significant problems have arisen since the ceased to be a member state of the European Union and, consequently, Community legislation can no longer be applied to it

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[222] See D. MAFFEIS, *Homo oeconomicus, homo ludens: l'incontrastabile ascesa della variante aliena di un tipo marginale, la scommessa legalmente autorizzata (art. 1935 c.c.)*, in *Contratto e impr*., 2014, p. 856. In a completely different perspective, he observes that the lack of information could be considered only as a defect of consent, not as a quality of the contract, S. PAGLIANTINI, *I derivati tra meritevolezza dell'interesse ed effettività della tutela: quid noctis?,* in *Eur. dir. priv*., 2015, p. 401.
[223] *Ibidem.*

and its citizens[224]. The uncertainty brought about by *Brexit* is having and will continue to have a major impact on the derivatives market in the European Union[225].
Now, however, the impact of *Brexit* on derivative contracts is still unpredictable[226].
Indeed, in such a scenario, it is possible that a court other than the UK courts, despite the parties' choice, could assert jurisdiction over the dispute relating to the execution of an OTC derivative contract, with all the consequences that this entails from a regulatory point of view.
On the aspect of the disputes about *ultra vires* actions by statutory bodies in the UK, mounting criticisms of this doctrine have resulted in incremental legislative reforms affecting numerous types of statutory body. The position for local authorities is less clear-cut than that for companies, but the 2011 Act has fundamentally shifted the central presumption in this area of law. The traditional and unchecked version of the English doctrine of *ultra vires*, seen in full force in the *Hammersmith* litigation, remains as relevant as ever in the modern derivatives market. Obviously, history, on this topic, is not over yet.

[224] This result was reached after a long journey that began with the *Referendum*, held on June 23, 2016, in which the British citizens voted to leave the European Union, thus initiating the withdrawal process, according to Article 50 of the Lisbon Treaty, which ended with an agreement on the Withdrawal of the United Kingdom from the European Union, signed on October 17, 2019, and entered into force on February 1, 2020. For an in-depth discussion, see www.concilium.europa.eu. For an analysis of the causes that led to *Brexit*, see H.D. CLARKE – M. GOODWIN – P. WHITELEY, *Brexit,* Cambridge, 2017; A. G. ARNORSSON – ZOEGA, *On the causes of Brexit*, in *European Journal of Political Economy*, 2018, 301-323; J. MATTI – Y. ZHOU, *The political economy of Brexit: explaining the vote*, in *Applied Economics Letters*, 2017, pp. 1131-1134. On the other consequences of *Brexit,* we note A. PETTIFOR, *Brexit and its Consequences*, in *Globalizations*, 2017, pp. 127-132; WW. CHANG, *Brexit and its economic consequences*, in *World Econ.*, 2018, pp. 2349– 2373.

[225] In 2019, according to a first annual report from the European Securities and Market Authority, this market reached a total outstanding notional amount of €681 trillion and OTP contracts still accounted for most of this amount (92%). The remaining 8% is in exchange-traded derivatives (ETDs). See, in this regard, EUROPEAN SECURITIES AND MARKET AUTHORITY (ESMA), *Annual Statistical Report on EU Derivatives Markets,* 2020, see the full text on the site of the ESMA

[226] See M. AHMED, *Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*, in *European Business Law Review*, 2016, pp. 989-998.

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