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THE GREENWASHING PHENOMENON IN LIGHT OF RECENT EMPIRICAL EVIDENCE. THE PROPOSED GREEN CLAIMS DIRECTIVE

Diego Rossano

The greenwashing phenomenon in light of recent empirical evidence. The proposed green claims directive*

(*Il fenomeno del greenwashing alla luce delle recenti evidenze empiriche. La proposta di direttiva green claims)*

Diego Rossano,

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ABSTRACT [En]:

The purpose of this analysis is to offer some insights on the ongoing process of the ecological transition; more in particular, attention is drawn to the phenomenon of so-called greenwashing and the consequences that may arise from behaviours that are not aimed at finding a balance between development needs and respect for the environment.

Keywords: greenwashing; sanctions; behaviour; ecological transition; development.

ABSTRACT [It]:

Lo scopo della presente analisi è quello di offrire alcuni spunti di riflessione in merito al processo di transizione ecologica in atto; in particolar modo, viene posta l'attenzione sul fenomeno del cd. greenwashing e le conseguenze che possono derivare da condotte che non siano volte alla ricerca di un equilibrio tra esigenze di sviluppo e rispetto dell'ambiente.

Parole chiave: greenwashing; sanzioni; comportamenti; transizione ecologica; sviluppo.

1. FOREWORD

With this contribution, we intend to offer some insights on the phenomenon of so-called *greenwashing* and in particular on the consequences of behaviour that is not led by the need for a balance between economic development and respect for the environment.

To this end, it must first be noted that the process of ecological transition currently underway has been accelerated by the recent pandemic crisis which, as is argued by the literature on this matter, has acted "*as a catalyst in highlighting the limits of a legal and economic system in which the idea of well-being, which suffered as a result of advanced capitalism, has taken on a negative connotation*"; the search for "*new ways of life"* is thus correlated with the need to adopt "*virtuous behaviour aimed at fixing the damage of the pandemic*"[1]. The reference to behaviour that embodies a commitment to the Green *Deal* is clear and thus also to the so-called green transformation that has become emblematic of a "*recent political experiences and initiatives*"[2] .

This new reality introduces features of significant innovation with respect to the past, oriented towards the protection of human rights to be realised through decision-making processes and behaviour marked by criteria that conserve the environment and ensure full social development[3] .

The pursuit of these objectives appears, moreover, to be intrinsic to the plan called *Next Generation EU,* which is, as is well known, the main legislative measure of Europe's reaction to the pandemic crisis. In this regard, it is worth recalling that the latter is based on the provisions of Article 122 TFEU in which the concept of solidarity is expressed in competitive terms, allowing Member States in particularly difficult economic conditions to benefit, albeit within certain limits, from a plan of financial assistance agreed with the European Union[4] .

As has already been pointed out elsewhere[5] , the measures contained therein do not, however, appear to fully respond to calls for an equal distribution of obligations among EU countries, despite reflecting a conditionality model inspired by a partially different logic than in the past, with them now being aimed at "*maximising the effectiveness of national investment policies around common strategic objectives of both growth and social and economic development*"[6].

This approach, adopted by the European legislator, appropriately declined in a solidaristic key that is, in any case, more heartfelt than in the past, is probably intended to orientate future interventions on the subject, prefiguring itself as abstractly suitable for pursuing, also, the instances of efficiency and competitiveness imposed by the market[7] .

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*Il presente contributo è stato approvato dai revisori.

[1] See F. CAPRIGLIONE, *Emergenza coronavirus e finanza sostenibile,* in AA.VV., Covid-19 emergenza sanitaria ed economica**.** Rimedi e prospettive, a cura di D. Rossano, Milano, 2020, page 20.

[2] See M. PASSALACQUA*, Green deal e transizione digitale verso un diritto eventuale*, in AAVV., *Diritti e mercati nella transizione ecologica e digitale*, Studi dedicati a Mauro Giusti, a cura di Passalacqua, Milano, 2021, p. 29.

[3] See F. CAPRIGLIONE, *Clima energia finanza una difficile convergenza*, Milano, 2023, p. 67.

[4] See G. CENTURELLI, *Verso un futuro migliore: azioni nazionali ed europee sulla politica di coesione per riparare il tessuto sociale, disattivare gli squilibri causati dalla crisi Covid-19 e rilanciare l'economia*, in *Rivista giuridica del Mezzogiorno*, 2020, p. 723.

[5] Let us refer to D. ROSSANO, *Solidarietà e stabilità economica nella refininizione del patto di stabilità e crescita*, in *Riv. trim. dir. econ.*, suppl. n. 1/2023, p. 133.

[6] Thus, S. GIUBBONI, *Crisi pandemica e solidarietà europea*, in *Quaderni Cost.*, 1, 2021, p. 219, according to whom, with difficulty, a derogation - objectively circumscribed and temporally delimited - to the pivotal rule of strict conditionality is gaining ground, which remains the fulcrum - subject, first and foremost, to the watchful and interested vigilance of the *Bundesverfassungsgericht.*

[7] The considerations of W. STREECK, *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva*, in *Stato e Mercato,* 1, 2000, p. 22, still appear topical, according to which social cohesion is sought through equal opportunities and not through equal results; and the traditional concepts of solidarity are permeated with a bourgeois spirit - of efficiency and

This assumption is confirmed by the fact that the National Recovery and Resilience Plan (NRP), implementing the *EU's Next Generation,* provides for an articulated technical procedure whereby the Member States must advance the economic resources. These latter are required to implement the approved growth projects, undertaking to submit a request to the Commission twice a year for reimbursement of the financial contribution. This repayment of the sums already paid is, however, subject to the European Authority's verification of the achievement of the objectives set.

If the expected results are not achieved, according to Regulation (EU) 2021/2041, reimbursement may be suspended, pending the adoption by the Member State concerned of the "*measures necessary to ensure the satisfactory achievement of the targets and objectives*" (Art. 24(6) of the Regulation). It follows that, should Italy fail to adopt the required structural reforms (in the areas of digitalisation and innovation, ecological transition, infrastructures for sustainable mobility, inclusion and cohesion, health), it could lose the right to obtain reimbursement of the resources already deployed, being also forced to return what has already been obtained (Article 24(9) of the Regulation)[8] .

A first conclusion can therefore be drawn. It is necessary to establish a *pactum fiduciae* in the financial sector between the EU countries in order to implement the necessary reforms to increase *green* investments; this objective is also envisaged in the *Next Generation EU* plan, first, and then in the *NRP*. Of course, achieving these goals implies identifying the factors that, by affecting financial dynamics, are capable of counteracting sustainability risks. Therefore, it becomes indispensable *in subiecta materia,* as will be said, to identify the instruments that prevent so-called *greenwashing* and thus the circumstance that market companies adopt communication strategies aimed at presenting as eco-sustainable certain activities whose negative environmental impact is carefully concealed.

2. GREENWASHING: THE OUTCOMES OF STATISTICAL SURVEYS

Significant in this respect are the results of the fact-finding survey conducted by the EU Commission and national consumer protection authorities, according to which in 42% of the cases analysed there was reason to believe that the claims made by companies on *green issues* were *exaggerated* and potentially constituted unfair business practices under EU law[9] . Also significant in this regard is the global survey coordinated by the

self-sufficiency - that emphasises the importance of individual effort and collective investment in competitiveness at least as much as social guarantees for minimum levels of reward or consumption.

From another point of view, it seems appropriate that each sector of intervention should be the recipient of different administrative procedures and rules, as it is desirable to have a body of rules that takes into account the specificities of the context in which they operate (on this point, see L. TORCHIA, *Il sistema amministrativo italiano e il Fondo di ripresa e resilienza,* 2020, available at https://www.irpa.eu/il-sistema-amministrativo-italiano-e-il-fondo-di-ripresa-e-resilienza/).

[8] On this point, see G.F. DAVANZATI, *Le debolezze del Piano Nazionale di Ripresa e Resilienza***,** in *Montea e credito,* 2022, vol. 75, n. 297, p. 78 s.

[9] See the press release published on 28 January 2021 on the EU Commission's website entitled Greenwashing': Screening of websites reveals that half of all green claims are unsubstantiated.

Competition *and Market Authority* (CMA), the competition regulator in the UK, in collaboration with the *International Consumer Protection and Enforcement Network* (ICPEN), an international consumer protection network, which found that 40% of online green claims could be misleading for consumers[10] . These statistics must be reconciled with those made public at the Consob conference entitled "*Sustainable Investments. Knowledge, attitudes and choices of Italian investors*"[11], according to which Italians' interest in sustainable investments dropped in 2022. As stated in the Greenwashing 2023 report, in fact, in 2021 interest in *green* investments was 17%, while in 2022 it stood at 15%, although 48% of those interviewed (57% in the previous year) declared themselves willing to invest in ESG (Environment, Social, Governance) financial products only if the returns were equal to or even higher than those offered by non-sustainable investments[12] .

It can be deduced from this that, on the one hand, despite the efforts made in the EU, the interest in investing in the *green* sector is closely linked to the profit margins offered to customers; on the other hand, it can be deduced that the success of the entire intervention plan prepared by the competent European authorities on the subject depends on the ability to counter the widespread phenomenon of *greenwashing*. In the prospect of giving rise to an efficient and stable market, it therefore becomes an objective of primary importance not to relegate the pursuit of '*green*' goals to a mere advertising slogan by identifying appropriate modes of intervention capable of ensuring the expected results.

Furthermore, the danger that the imposition of mere '*green*' information obligations on companies is reduced to *de facto* compliance with a mere formal protocol is further supported by the statistical data published by the EU Commission according to which a significant number of environmental claims (53.3 per cent!) provide *vague, misleading or unfounded* information on the environmental characteristics of products in the EU and in relation to a wide range of product categories offered[13] .

Indications of certain interest, on this point, come from the jurisprudence[14] according to which, in keeping with the disciplinary framework of reference on the subject (art. 12 of the Code of Self-Discipline of Commercial Communication), commercial communications that evoke benefits of an environmental nature, must be based on truthful, relevant, and scientifically verifiable data. Hence the importance that information and the way it circulates and is processed by so-called *inexperienced* persons assumes in this context.

According to the aforementioned case law, the communication intended for such a purpose, when presenting an environmental benefit, must make it possible to clearly understand to which aspect of the product

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[10] See UK Government*, Global sweep finds 40% of firms' green claims could be misleading*, 2021.

[11] Consob, "Investimenti sostenibili. Conoscenze, attitudini e scelte degli investitori italiani".

[12] Available at: https://ambientenonsolo.com/il-rapporto-greenwashing-2023/#:~:text=In%202023%20the%20France%20has,%20carbon%20hydride%20(or%20a%20dication.

[13] European Commission, Environmental claims in the EU: Inventory and reliability assessment Final report, 2020.

[14] Cf. the decision of the Court of Gorizia of 26 November 2021 in *Il dir. ind.,*4, 2022 with a note by A. PISTILLI, *Il green-washing tra pubblicità ingannevole e pratica commerciale scorretta: quando può dirsi dirsi atto di concorrenza sleale?*, p. 381 ss., and in *Ambiente&Sviluppo,* 6, 2022, with a note by A. QUARANTA, *La retorica verde e le comunicazioni ingannevoli: il greenwashing per la prima volta al vaglio del giudice di merito*, p. 403 ss.

or activity advertised the claimed benefits refer, hence the inadequacy of information based on mere reference to phrases in common use, devoid of any real significance for the purposes of product characterisation and differentiation.

The importance of providing consumers with correct information on the *green* characteristics of the products offered is also reflected in the *Green Claims Code* issued in 2021 by the UK *Competition Markets Authority,* which is based on six key points according to which the claims provided by companies must: i) be truthful and accurate; ii) be clear and unambiguous; iii) contain all relevant data; iv) contain fair and meaningful comparisons between goods or services; v) consider the entire life cycle of the product or service; vi) be substantiated.

In the same sense, the proposal for a European directive *on so-called green claims* of March 2023 seems to be moving in the same direction. It aims to combat false environmental claims with the objective of guaranteeing investors reliable, comparable, and verifiable information to enable them to make sustainable decisions and reduce the risk of *greenwashing.* This proposal, moreover, takes due account of the growing phenomenon of so-called *green trademarks*, which consists of the use of signs recalling environmental quality values within the word and/or figurative part of the trademark[15] .

3. CONCLUDING REMARKS

The Greek philosopher Aristotle, in one of his aphorisms, stated: *"if love prevailed on earth, all laws would be superfluous"*. In the light of what has been said overhead and on the basis of the above-mentioned statistical data, it is clear that in the economic/financial field, operational logics are mostly oriented towards the accumulation of profits and are detached from the protection of the numerous other interests that characterise the exercise of market activity[16]. Hence the need for a decisive intervention on the part of the legislator in this matter, called upon to take action by ensuring that *green* information is correct and not misleading, and is conveyed in such a way as to ensure truly informed investment choices. Naturally, in the above context, it will be the regulator's responsibility to prevent *greenwashing* phenomena by setting up an efficient sanctioning system[17] .

On this point, the proposal for a directive referred to above authorises the Member States to choose from among existing mechanisms under consumer protection legislation, it being understood that the sanction

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[15] On this point, see the study Green EU trademarks 2022 Update presented in February 2023 by the E.U.I.P.O. (European Union Intellectual Property Office). As is explicitly stated in the Explanatory Memorandum accompanying the proposed *Green Claims* Directive, during the open public consultation on this measure, more than a quarter (27%) of the respondents indicated "the proliferation and/or lack of transparency/understanding/reliability of sustainability logos/trademarks for products and services" as a major obstacle to consumer empowerment for the green transition.
As reported in the specialist press (https://ntplusdiritto.ilsole24ore.com/) based on this criterion, applications were rejected by the E.U.I.P.O. for European trademarks considered descriptive, namely 'Greenline', 'Carbon green', 'Ecoperfect' and 'Ecodoor'.

[16] See F. CAPRIGLIONE, *Clima energia finanza una difficile convergenza*, cit., p. 58.

[17] Expressing the need for a solid sanctioning system to be set up in the EU on this matter, A.M. PANCALLO, *La trasparenza bancaria nella transizione ad un mercato sostenibile,* Bari, 2022, p. 116, who suggests the introduction of so-called punitive damages that would have a strong deterrent effect.

must depend on the nature, seriousness, extent and duration of the infringement, the character (intentional or negligent) of the conduct engaged in, the financial capacity of the responsible party, the economic benefits derived from the infringement and from any previous infringements or other aggravating factors (Articles 13 to 20 of the proposal for a directive). According to Article 17 of the aforementioned proposal, Member States will have to ensure that the sanctions include, *inter alia*: (i) fines; (ii) confiscation of the proceeds received by the trader from a transaction with the products concerned; (iii) temporary exclusion, for a maximum period of 12 months, from public procurement procedures and from access to public funds, including tendering procedures, grants and concessions. In any case, the maximum amount of the sanctions should be dissuasive and equal to at least 4% of the trader's total annual turnover.

The proposal for a disciplinary system denotes awareness of the fact that a financial investment, in order to be adequate to the expectations of individual investors, cannot disregard the correct presentation of certain information regarding the *green* purposes of the operation put in place. What emerges is a scenario characterised by a new way of evaluating investments, in conjunction with a sanctioning apparatus defined in such a way as to dissuade companies from embarking on strategies based on *eco-bugs*.

At the present, the identification of the sanctions applicable to the phenomena of *greenwashing* requires a difficult hermeneutic work of the regulatory framework of reference on the subject capable of grasping the peculiarities of the concrete case under assessment. This is confirmed by the conclusions reached by the Court of Gorizia in 2021, which, in fact, were not unanimously accepted in doctrine[18] . In the opinion of the judges, advertising messages that induce in the consumer "*a green image of the company without giving an account of what company policies allow greater respect for the environment and effectively reduce the environmental impact of the products*"[19] , integrate the extremes referred to in Article 2598, number 3 of the Italian Civil Code, which classifies as unfair the conduct of those who *"directly or indirectly use any other means that do not comply with the principles of professional fairness and are likely to damage the company of others"*. Notwithstanding anything else, it must be emphasised here the complexity of tracing back to atypical acts of unfair competition the conduct engaged in, to which must be added the further difficulty of proving that such conduct is contrary to the rules of professional correctness and capable of damaging the company of another.

Similar perplexities arise with reference to the orientation according to which *greenwashing* could also generate extra-contractual liability; doubts motivated by the difficulty connected with proving the damage suffered (as well as the existence of the psychological element).

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[18] Cf. A. PISTILLI, *Il green-washing tra pubblicità ingannevole e pratica commerciale scorretta: quando può dirsi di atto di concorrenza sleale?*, cit., pages 381 ff., according to whom, among other things, the Court makes a confusing representation of the institutions of misleading advertising and unfair commercial practices.

[19] In the present case, on the one hand very generic advertising claims were contested, such as 'natural choice, environmentally friendly, the first and only micro-fibre that guarantees eco-sustainability throughout the production cycle, ecological micro-fibre'; on the other hand, certain concepts reported in the advertising campaign are contradicted by the very composition and derivation of the fabric, advertised as a natural fibre but not having this nature.

From another point of view, the Antitrust Authority may invoke in this matter the powers attributed to it pursuant to Article 27 of the Consumer Code, but even in this case it must be borne in mind that the latter presides over the control of compliance with market rules, thus safeguarding interests of a general nature and not purely private interests.

In conclusion, it can be said that, faced with a situation such as that described above, which is often characterised by uncertainties and doubts as to interpretation, the priority problem arises of providing for precise information obligations to which is correlated the need to outline a clear (and defined *a priori*) reference sanctioning framework on the subject; this is because it is necessary to find the appropriate remedies to eliminate or, at least, limit the critical aspects highlighted. The success of the measures proposed within the EU depends on how they will be transposed and detailed within each European State's legal system. Should they prove ineffective, it will be necessary to take note of the above statistics and deduce that sustainability is just an advertising 'slogan'.

DRAFT LAW NO. 843 OF 31 JANUARY 2023 AND THE DISTORTING EFFECT ON THE ITALIAN NPLS MARKET

Patrizio Messina

Draft Law no. 843 of 31 January 2023 and the distorting effect on the Italian NPLs market*

(*La proposta di legge n. 843 del 31 gennaio 2023 e l'effetto distorsivo sul mercato italiano)*

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ABSTRACT [En]:

The Italian Npls market faces scrutiny due to a proposed law under examination by the VI Finance Commission of the Italian Parliament. The draft law grants debtors the right to extinguish assigned debt positions under certain conditions, causing concerns in the sector. The Bank of Italy has highlighted potential negative impacts, emphasizing the risk of market distortion. If approved, the proposal could affect existing agreements, destabilize the management of non-performing loans, and raise constitutional legitimacy questions, as well as potential conflicts with the NPLs European directive.

Keywords: NPLs market; non-performing loans; Bank of Italy; risk of market distortion.

ABSTRACT [It]:

Il mercato degli NPLs in Italia è al centro dell'attenzione a seguito della proposta di legge in discussione presso la VI Commissione Finanze del Parlamento italiano. La proposta prevede il diritto del debitore di estinguere, in determinate condizioni, posizioni debitorie assegnate, generando preoccupazioni nel settore. La Banca d'Italia ha evidenziato gli impatti negativi, sottolineando la possibile distorsione del mercato. La proposta, se approvata, potrebbe influenzare accordi già conclusi e destabilizzare il sistema di gestione e recupero dei crediti in sofferenza. Inoltre, essa solleva interrogativi di legittimità costituzionale e potenziali conflitti con la Direttiva NPLs.

Parole chiave: mercato degli NLPs; crediti non-performing; Banca d'Italia; rischio di effetti distorsivi nel mercato

*Il presente contributo è stato approvato dai revisori.

La versione italiana del in italiano del saggio qui proposto è stata pubblicata sul sito www.dirittobancario.it nel corso del mese di settembre del 2023.

SOMMARIO: 1. Background on the non-performing loans market - 2. Discipline and Scope- 3. The Bank of Italy intervention– 4. First systemic remarks

1. BACKGROUND ON THE NON-PERFORMING LOANS MARKET

In the last few weeks, press articles (such as "Sole 24 Ore Plus" dated 12 August 2023 "Npl. Sui crediti inesigibili la palla ora passa a Urso. Il Mimit pronto al decreto"; "la Repubblica" dated 15 August 2023 "Ricomprare i debiti deteriorati, un decreto per famiglie e Pmi"; and "Bloomberg" dated 24 August 2023 "Italy's New Rules on Bad Loan Sales Could Be Another Blow to Investors") have given renewed focus to the examination, currently underway at the VI Finance Commission of the Italian Parliament, of the draft law entitled "Disposizioni per agevolare il recupero dei crediti in sofferenza e favorire e accelerare il ritorno in bonis del debitore ceduto" issued for parliamentary consultation on 31 January 2023 (hereinafter, the "Draft Law"). Such renewed attention stems from the provisions of the Draft Law, as well as those of other similar draft laws proposed in the past (e.g. draft law No. 788 of 2018 and draft law No. 414 of 2022 (the latter – equivalent to the Draft Law – similarly assigned to the VI Finance Commission on 14 March 2023, but not yet examined)), having been examined by the Italian Council of Ministers in the course of its drafting work during the month of August on Law Decree No. 104 of 10 August 2023 (the so-called "Omnibus Decree"), in which the abovementioned measures were supposed to be included. Amongst others, opposition parties additionally presented draft law No. 1246 of 23 June 2023 entitled "Disposizioni per favorire la definizione transattiva delle posizioni debitorie classificate come crediti in sofferenza o inadempienza probabile", likewise assigned to the VI Finance Commission on 1 August 2023. This proposal, which has not yet been examined, despite differing from the Draft Law in certain respects (e.g. the parties involved, the timeframe), is nonetheless based on the same principle as the Draft Law, as it provides for the debtor's right of option to repurchase its debt according to pre-determined conditions.

However, these measures have not at present been included in any decree and, according to what is reported by leading newspapers, they will be re-discussed by the Italian government and possibly translated into law or included in the 2023 Budget Law. Moreover, in order to discuss these measures, also given the complexity of the matter, it is noted that the convening of a technical table for the current month of September (the "Technical Table") is under consideration.

As further detailed below, the measures under examination would give the debtor, in the event of the assignment of the relevant receivables, the right to extinguish – under certain conditions – one or more of the assigned debt positions, this also to the detriment of transactions already concluded and based on binding agreements (with obvious repercussions also on the whole capital market).

It is worth pointing out that the Draft Law has alarmed sector operators and the capital market, concerned by the impact that the measures in question could have on the non-performing loans market, characterized (i) by a high volume of non-performing loans under management (over EUR 300 billion of gross portfolio value); (ii) the intervention of multiple players (originator banks, credit assignee companies, servicing

companies, rating agencies, assigned debtors, investor entities (national, including also Italian banks and small local investors, and international)), each of which has its own interests; (iii) by complex transactions based on complex valuations (carried out by all the parties involved), in which the purchase of NPLs is often carried out through securitisation transactions and purchase tenders; (iv) from the close interaction with the capital market (e.g. securitisation transactions with ABS securities placed on the market - including, for example, transactions with senior ABS securities covered by an Italian State guarantee (hereinafter, the "GACS Transactions")).

If the Draft Law were to be approved, it would have a distorting impact on the NPLs market, not least by affecting already established private arrangements with the risk of destabilizing the management and recovery system of such receivables, which in most cases is entrusted by the assignees of such non-performing receivables to specialized professional operators (i.e. servicing companies) under management contracts (i.e. servicing agreements). The Draft Law would affect the operativity of servicing companies, with legal and commercial effects on existing servicing agreements, resulting in serious damage and affecting one of the strategic sectors of the Italian system. In this regard, it should be noted that the receivables servicing market as well as the Italian credit collection market (which involves more than 1000 companies) has grown enormously in Italy in recent years, with more than 35 merger and acquisition transactions involving such operators (including acquisitions and joint ventures) having been carried out from 2008 to 2022. In addition, it is estimated that (as of today) the top 7 servicing companies manage nearly €300 billion (in terms of gross book value) of nonperforming receivables.

2. DISCIPLINE AND SCOPE

The Draft Law would seemingly grant the debtor, in the event of the assignment of the relevant receivable by banks or financial intermediaries, the right to extinguish one or more of the assigned debt positions by paying to the assignee the purchase price of the relevant receivable (to be calculated pursuant to the provisions of article 2 of the Draft Law), increased by 20% or 40% (as the case may be) (hereinafter, the "**Discharge Payment**"), up to a maximum limit of Euro 25,000,000.00 (calculated on the nominal value of the assigned loan) (hereinafter, the "**Option**"), provided that the assignment took place by 31 December 2022 (which would obviously negatively affect transactions already concluded and the agreement entered into thereunder between private parties).

Upon payment of the debt, the automatic deletion of the non-performing debt position from the Central Risk Register of the Bank of Italy would then then granted. More specifically, the Option would apply to receivables:

1. whose debtor is a natural person or an SME;

2. whose assignor is a bank, or a financial intermediary registered in the register referred to within Article 106 of the Italian Consolidated Banking Act – thus excluding the applicability of the provisions of the Draft Law to assignments made by securitisation vehicle companies established pursuant to Law No. 130/1999 (the "**Law 130**");

3. classified as "*impaired*" (including, therefore, also probable defaults or "*unlikely to pay*") between 1 January 2018 (2015, on the other hand, pursuant to draft law No. 414/2022) and 31 December 2021;

4. transferred – including as a part of securitisation transactions – by banks or financial intermediaries by 31 December 2022.

In order to allow the exercise of the Option, the Draft Law provides for a general obligation of the assignor and the assignee – without specifying, however, on whom this obligation actually falls – to notify the relevant debtor of the transfer and the price paid, within 10 days from such transfer (or, in the case of transfers that have already occurred, 30 days from the entry into force of the Draft Law) (the "**Notice of Transfer**") and, failing that, the assignee would be unable to proceed with enforcement or precautionary actions on the debtor's assets.

In other words, the assignor and the assignee involved would be burdened with the onerous obligation of notifying a considerable number of assigned debtors – especially considering the volumes of the NPLs receivables transactions– of the assignment, with practical and economic impacts of no little importance.

In addition, pursuant to the Draft Law the debtor would, within 30 days of receipt of the Notice of Assignment, have to notify in writing:

- the will to exercise the Option; and,
- the commitment to make the Discharge Payment within 90 days (or a different term agreed between the parties), on the basis of terms that appear evidently insufficient, if considered in relation to parties that are already in default and that would likely be unable to find the sum necessary to cover the Discharge Payment within 90 days.

3. THE BANK OF ITALY INTERVENTION

The impact that the measures under discussion would have on the non-performing loan market have already been highlighted by the Bank of Italy which, in its memorandum of 18 March 2020 (updated as of 30 September of the same year) in relation to draft law No. 788 of 2018, warned the legislator about the possible distorting effects that such measures could generate.

In particular, the Bank of Italy had already noted that, *inter alia*, such measures could:

- expose the assignee to a long period of uncertainty – pending the debtor's exercise (Or not) of the Option – before being able to consider the purchase transaction "stable" (especially considering that it is not possible to make forecasts on the number of debtors effectively exercising the Option);
- cause higher costs (than those estimated) to be borne by the assignees and deriving from the fulfilment of disclosure obligations to the large number of assigned debtors (even higher in securitisation transactions);
- have distorting effects on the debtors' behaviour, which may be induced to strategic defaults by considering it more convenient not to pay the debt while taking advantage of the Option at a later stage.

In light of these considerations, the Bank of Italy suggested excluding from the regulatory framework assignments of receivables already entered into in order not to *"[…] alter considerably the negotiating balance – and,*

in particular, the pricing structure – of transactions already completed" and to avoid, in the context of securitisation transactions, the lowering of the value of receivables consequent to the exercise of the Option could alter "*[…] the risk/return profile of the securities issued, penalising subscribers and compromising the reputation of this market in Italy*".

4. FIRST SYSTEMIC REMARKS

The above considerations form the basis for our first systemic remarks:

i. Knowledge of the non-performing loans market

From a reading of the Draft Law, as well as from the preamble to draft law No. 414/2022, it appears desirable that the legislator further investigates the real characteristics nd operating methods of the non-performing loans market.

As previously mentioned, the purchase of non-performing receivables, often carried out through securitisation transactions, is based on valuations, assumptions and pricing models that consider various elements (*e.g.* recovery prospects, loan management costs, the status of the receivables (how it has been managed, anyguarantees backing it, etc.). The combination/modelling of these items (and further items analysed by investors during the due diligence phase) determines not only the price offered by the investors for the purchase of the receivable, but also the drafting of the business plan that reflects the expectations and the timeframe for the recovery of the receivables forming part of the portfolio.

It is evident that the provision under discussion, together with its retroactive effect, completely compromises the analyses carried out by investors by introducing an element (certainly of no little importance), which if known *ab origine* by the investowould have led to a different determination of the price or to a different organisation of

the recovery activities.

Moreover, it should not be disregarded that both assignors and assignees, although bearers of different (but not necessarily opposing) interests, do not act on unequal positions, and to reduce the discussion to investors who, as stated in the explanatory memorandum of Draft Law (*Disegno di Legge*) No. 414/2022, "*[...] take advantage of it, with profit margins that could be defined as usurious*", appears extremely simplistic.

The assignee, in fact, is selected by the assigning parties – generally in the context of a competitive procedure in which several bidders participate – precisely on the basis of the best possible offer, formulated, moreover, also taking into account of the relevant costs necessary to evaluate the receivables, being a complex and delicate operation that requires time, due diligence, and know-how. It is not understandable, therefore, how profit margins can be defined as usurious, which on the contrary reflect the difficulties of managing the individual portfolio, as well as the costs of analysing the same.

In addition, it is necessary to consider that the selling banks, far from being crushed by investors, have a wide margin of appreciation in choosing the purchaser,considering that such portfolios are offered to several investors, leaving banks free to choose the highest bidder. Moreover, it should be borne in mind that, in practice, such sales only take place when the bank considers the terms offered to be advantageous, and it is not uncommon for certain sales procedures to end uncompleted.

Finally, the provisions regarding the notification requirements associated with the exercise of the Option also appear to be inconsistent with the market. As previously highlighted, the non-performing receivables market is characterized by the presence of a high number of debtors (and concentrated in single transactions). It would seem impossible, therefore, to assume that servicers would be able to communicate the price of the relevant receivable to all debtors in just 30 days, especially considering that very often, certain contact details, to which to make notifications or communications, arenot available to servicers. In addition, there would be considerable costs involved in this activity.

ii. Aspects of constitutional legitimacy

The Draft Law – although it would seem to refer also to future assignments – currently involves only assignments of receivables that have already taken place, thereby affecting consolidated private agreements. This would obviously require an examination of the compatibility of the provisions under consideration with the principle of non-retroactivity of laws. This principle – which is expressly sanctioned only with reference to criminal laws – is, however, also accepted in other sectors of our legal system, although in a mitigated manner, being substantiated by the balancing, in the event of the enactment of retroactive laws, of the constitutionally relevant interests of the community with the general principle of reasonableness, equality and the protection of the legitimate expectations of private parties.

On the other hand, it is precisely the principle of legitimate expectations that plays a pivotal role in the promulgation of retroactive laws, particularly in light of the growing importance attributed to it by the Italian Constitutional Court, which is increasingly closer to the European Court of Human Rights (which, precisely on the basis of such principle, has always had a less permissive attitude towards retroactive laws). This legal concept - defined by the Italian Constitutional Court as a "*fundamental and indispensable element of the rule of law*" (Cort. Cost. No. 16, Jan. 24, 2017) – should be construed as the citizen's right to legal certainty, including the holding of agreements made in the context of private negotiating autonomy, which cannot be compromised by the application of legislative measures that affect the negotiating balance of agreements entered into by private investors, in the face of high investments and their expected returns.

Moreover, the limitation of the applicability of the provisions only to certain active parties (banks or financial intermediaries – thus excluding securitisation special purpose vehicles), as well as to passive parties (only certain categories of debtors), gives rise to unjustifiably discriminatory treatment contrary to the fundamental constitutional principles of our legal system.

iii. (Retroactive) impacts on transactions and the capital market

Leaving aside constitutional driven assessments, the retroactive application of such measures would affect, as repeatedly mentioned, already consolidated transactions , and based on the assessments set forth above (*i.e.* recovery prospects, purchase price, value of individual receivables), would represent a significant risk for the relationships between the parties thereunder as well as for the market of nonperformin lloans, with even more complex effects when taking into account that loans may have been re-transferred by the assignee.

These effects, already particularly distorting in themselves, would be far worse if considered in the

context of transactions involving the capital market. It is not infrequent, in fact, that ABS securities – issued in the context of securitisation transactions aimed at financing the purchase of receivables – are intended to be placed on the market (as, for example, also in GACS Transactions).

It is therefore clear that the regulations under discussion, applying to transactions thathave already taken place, would completely overwhelm private agreements, in addition to obviously rendering the valuations carried out by investors completely out of date, and with potential impacts also on the ratings attributed to the ABS securities and on the business plans of such transactions.

In addition, the issue of coordinating the measures under discussion with the regulations on GACS transactions will be certainly critical. At present, in fact, about one-third of non-performing loans have been sold by banks as part of securitisation transactions assisted by the guarantee of the Republic of Italy, which may be required to repay any cash losses – if such losses have an impact on the senior tranche of ABS securities issued in the context of the transaction – and deriving specifically from the exercise of the Option and the consequent collection of an amount lower than the recoveries expected in the business plans.

Moreover, the business plan itself would undergo – due to the exercise of the Option – a downward adjustment of no small importance, diminishing the expected recovery prospects with an obvious impact on the senior tranche of the ABS securities, jeopardising the possibility of their repayment (with significant costs borne by the state, due to the trigger of the relevant guarantee), as well as the rating attributed to them.

These fears would seem to be supported by the results of some simulations (so-called back testing) carried out on the GACS Transactions by market participants, assuming the entry into force of the considered provisions.

iv. Impact on servicing companies

As previously highlighted, in most cases, non-performing receivables are not managed directly by the assignee, but by specialized servicing companies (so-called servicers) which, in the name and on behalf of the assignee, pursuant to servicing agreements, outline - based on their experience - the guidelines, methods and objectives of recovery. All this, in practice, translates into a business plan drawn up, based on certain assumptions, by the servicing companies in order to identify, among other things, the expected value (so-called target) of recovery for each assigned receivable.

The consistency of the recovery action put in place by the servicing companies through the business plan is of primary importance to these companies, also considering that the commercial agreements usually do not allow any amendment to the business plan.

Indeed, on the basis of such a view, failure to comply with the same could lead to negative contractual and commercial consequences for servicers: first and foremost, the application of lower commission bases and - in case of serious deviations – the revocation of the mandate. It is clear that the retroactive nature of the considered measures makes it extremely complex for servicing companies to meet the contractual commitments and the proposed business plan, with possible negative effect on the business profitability and impact on employment.

v. Impact on debt behavior and on the "*Italian system*"

In conclusion, as also reiterated by the Bank of Italy, the negative repercussions that the "regularisation" brought by the Draft Law could have on the perception of the reliability and attractiveness of the 'Italian system' should not be ignored. Firstly, because debtors, precisely in view of this "regularisation", could be induced to strategic defaults that would make it more convenient not to fulfil the debt contracted and to access, at a later date, the benefit of the Option.

Secondly, because an indiscriminate "regularisation" in favour of all defaulting debtors, without identifying reward criteria that include only debtors actually deserving of protection (*e.g.* because they are truly destitute), could discourage potential investors from taking action in the Italian non-performing loans market. Such progress, achieved also thanks to the huge investments made by national and international players on the capital market, could suffer a serious setback caused by the distorting impact that the rules under review, for the reasons repeatedly reiterated, would have on the emergence of new assignment transactions (a pivotal tool for de-risking operations).

At the same time, these measures, if also applicable to future assignments, could jeopardise the virtuous system of reducing the stock of non-performing loans and the consequent trend of improvement in regulatory ratios undertaken in recent years by Italian banks. This progress, achieved also thanks to investments made by national and international players in the capital market, could suffer a serious setback determined by the distorting impact that the rules in question, for the reasons repeatedly stated, would have on the emergence of new transactions de-risking operations.

Finally, the negative effect that the automatic cancellation from the so-called *Centrale Rischi* would have on the credit-granting market, is not to be left out. This register, kept by the Bank of Italy, allows lenders to evaluate the possible borrowers of a loan more carefully, avoiding casual concessions to individuals with low creditworthiness. The cancellation envisaged by the Draft Law – which would originate from the simple Discharge Payment – would distort the purposes of the *Centrale Rischi*, not only because of the instantaneous timing with which it would intervene, but also because it would provide data that is not entirely truthful. In fact, a debtor cancelled because of a Discharge Payment would appear as a reliable debtor, even though such debtor has not fully discharged its debt.

vi. Contrasts with the NPLs Directive

The need to reform the non-performing receivables sector has led the European legislator to promulgate Directive (EU) 2021/2167 of the European Parliament and of the Council (the "**NPLs Directive**"), to be transposed by Member States by 29 December 2023, which, as highlighted in the relevant "recitals", has as its main objectives "*to enhance the development of secondary markets for NPLs in the Union while ensuring further strengthened protection of borrowers, in particular of consumers*". The regulations under consideration would not appear to be in line with what is provided for and envisaged by the NPLs Directive, since on one hand, for the reasons set out above, they do not contribute to the development of the secondary market for non-performing receivables, making it much more difficult and unstable, and on the other, they even seem to go beyond the debtor protection

provisions of the NPLs Directive which, while providing for disclosure to assigned debtors, does not mention any obligation for a repurchase transaction (or option).

vii. Comparative experiences: the Greek example

The reformist intent animating the Italian legislator is not new on the European scene, as other regulatory experiences demonstrate. In this regard, for example, one can look with interest to the Greek market, not only for certain legislative similarities (think of the discipline of HAPS (state guarantee on securitised securities)) but also for therelevance of the non-performing receivables market in the country.

In particular, the Greek legislator has provided for the obligtion to submit - under certain conditions and only with reference to "consumer" debtors - a proposal to settle the debt through an appropriate transaction that, unlike the measures in the Draft Law, is not tied to an amount *a priori* decided by the legislator, but based on industry standard terms (*e.g.* specific portfolio credit policy, investors' instructions) and on the servicers' own operativity, which, through the servicing activities, aim to maximise recoveries based on the net book value of the receivables.

viii. Coordination of the measures under review with insolvency, judicial and extrajudicial proceedings

Article 4 of the Draft Law provides for transitional provisions and, in particular, measures of coordination with any judicial or extrajudicial proceedings, which have just been notified or are already pending at the date of entry into force of the rules in question. Basically, if the transferee, on the date of the entry into force of the Draft Law, has already served the debtor with a writ of summons or a first out-of-court document, the Option may be exercised within thirty days from the date of service.

However, if such time limit has expired or the court or out-of-court proceedings are already pending, the fixed percentage making up the Discharge Payment shall increase to 40%.

On closer inspection, however, the provision would appear not to regulate the cases in which the debtor is subject to insolvency proceedings. If, in fact, the Option is exercised dring such proceedings - assuming that this is permitted under the current Draft Law - it could create situations of uncertainty and unequal treatment among the various creditors.

In light of such considerations, it is evident that the Draft Law, if approved, would lead to evident practical problems (in addition to relevant problems of legal coordination), with material impact on the Italian non-performing loans market.

Naturally, a reformist intervention in the non-performing receivables market could be desirable, but in a different way, and first and foremost by having a clear understanding of its characteristics as outlined in this paper. In particular, even in the context of the measures that will be adopted to transpose the NPLs Directive, considering different assumptions and prerequisites, intervention in favour of natural persons might be desirable, provided that such new measures (i) will relate to loans provided for the purchase of the first home within a certain limited amount, and (ii) will be applicable – as suggested by the Bank of Italy – to future transactions, avoiding to overwhelm transactions already completed with distorting effects on the underlying market.

In this context, it is suggested to note that, the so-called Budget Law 2020 (Law of December 27

December 2019, No. 160), already introduced - through the addition of paragraph 8-*bis* to Article 7.1 of Law 130 - the so-called "social value" securitization in order to smooth the way for the debtor to lease real estate subject to a mortgage guarantee on the related nonperforming receivables. Such legislation, which as of today seems to have never been used, through appropriate amendments and additions could be the starting point for introducing an effective solution into the Italian legal landscape, with remedial and structural effects, to facilitate debtors who are natural persons in difficulty.

THE NEW PARADIGM FOR THE FINANCIAL INDUSTRY IN THE TECHNOLOGICAL ERA

Anna Maria Pancallo

Il nuovo paradigma dell'industria finanziaria nell'era della tecnologia*

(The new paradigm for the Financial Industry in the Technological Era)

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ABSTRACT [En]:

This contribution aims to examine the automation systems already prevalent in the current market and the potential application of artificial intelligence models in the financial sector. The articole will take into account the examination of the challenges, highlighted in the relevant literature, caused by the increasing dehumanization of the financial industry. In this contribution, we will focus on various existing robo-advisor models, categorized based on the structure of the relationship between the intermediary and the client, as well as the level of human interaction with the machine. With regard to banking crises, it is essential to evaluate the specific contribution that artificial intelligence could provide to intermediaries and competent supervisory bodies in identifying the most effective measures to activate at the first signs of difficulties in credit institutions.

In conclusion, it can be stated that artificial intelligence can serve as a valuable support tool for regulatory authorities in banking and finance, ensuring the proper functioning of markets. Therefore, the financial industry should embrace the ongoing technological change with enthusiasm, adapting, among other things, existing operational systems to those of the new generation of digital automation. Naturally, achieving this goal implies that the European legislator formulates clear, precise, and appropriate rules to ensure the primacy of humans over machines.

Keywords: Artificial intelligence; automation; Robo-advisor; crisis

ABSTRACT [IT]:

Con il presente contributo si intendono analizzare i sistemi di automazione già diffusi nell'attuale contesto di mercato, nonché i modelli di intelligenza artificiale che potrebbero essere adoperati in ambito finanziario. Va da sé che tale indagine non può prescindere dalla verifica delle criticità, evidenziate dalla letteratura in materia, causate dalla crescente disumanizzazione dell'industria finanziaria.

Da tale premessa, volendo circoscrivere il campo di indagine alla disciplina in materia di consulenza finanziaria e delle crisi bancarie, si è inteso in primo luogo soffermarsi sui diversi modelli di *robo advisors* esistenti, catalogati a seconda dell'articolazione del rapporto tra l'intermediario e il cliente, nonché del livello di interazione umana

con la macchina. Con riguardo alle crisi bancarie, si è ritenuto di valutare, in particolare, il contributo che l'intelligenza artificiale potrebbe fornire agli intermediari e agli Organi di supervisione competenti nell'identificazione delle misure migliori di altre da attivare ai primi segnali di difficoltà degli istituti creditizi.
In conclusione, può dirsi che l'intelligenza artificiale può rappresentare un valido strumento di supporto per le Autorità di controllo in materia bancaria e finanziaria utile ad assicurare il corretto funzionamento dei mercati. Sicché, l'industria finanziaria deve accogliere con entusiasmo il cambiamento tecnologico in atto, adeguando, tra l'altro, i sistemi operativi già esistenti a quelli di automazione digitale di nuova generazione. Ovviamente, il conseguimento di detto obiettivo implica che il legislatore europeo elabori regole chiare, precise e adeguate a garantire il primato dell'uomo sulla macchina.

Parole chiave: Intelligenza artificiale; automazione; consulente finanziario robotizzato; crisi.

SUMMARY: 1. Introduction – 2. The Future of Robo-Advisors: Between Automation Mechanisms and the Use of Artificial Intelligence – 3. Bank Crisis Management and Digital Innovations: Chimera or Possibility? – 4. Conclusions

1. INTRODUCTION

The financial market serves as a privileged vantage point for scrutinizing the progress of technological innovation. On various occasions, the financial industry has anticipated changes that later impacted the real economy[1]. This contribution aims to analyze the prevalent automation systems in the current market context, along with the models of Artificial Intelligence applicable in the financial domain. This investigation necessarily includes an examination of the challenges arising from the increasing dehumanization of the financial industry. Focusing on the field of financial consultancy and bank crises, we delve into this study.

To commence this analysis, it is pertinent to evoke novels, particularly within the science fiction genre, depicting the catastrophic impacts of technological innovations on humanity. Not only fiction writers but also eminent scholars have prophesied this (tragic) outcome. For instance, in 1995, Jeremy Rifkin wrote a volume titled "The End of Work," asserting that "in the years ahead, increasingly sophisticated technologies and software will bring our civilization ever closer to the myth of a world without workers[2]." To prevent Rifkin's prophecy from materializing and to avert potential dehumanization, it is crucial to ensure that AI becomes a supportive tool for humans rather than a replacement.

*Il presente contributo è stato approvato dai revisori.

[1] See F. CAPRIGLIONE, *Brevi note sul crowdfunding*, in *Rivista Trimestrale di Diritto dell'Economia*, vol. 2, 2023, 118 ss.; G. ALPA, *L'intelligenza artificiale. Il contesto giuridico*, Modena, 2021, 115 ss.

[2] See J. RIFKIN, *La fine del lavoro. Il declino della forza lavoro globale e l'avvento dell'era post-mercato*. Italian edition, Milano, 1995, 115.

The day when intelligent robots coexist with humans on Earth may not be far off. Hence, understanding how to regulate this phenomenon is imperative[3].

2. THE FUTURE OF ROBO-ADVISORS: BETWEEN AUTOMATION MECHANISMS AND THE USE OF ARTIFICIAL INTELLIGENCE

As mentioned earlier, among the digital automation systems already in use in the financial market, the so-called robo-advisor is noteworthy. Depending on the relationship between the intermediary and the client, as well as the level of human interaction with the machine, three categories of robo-advisors can be identified. The common feature among all these models is the use of operation mechanisms based on automation systems.

Specifically, the distinctive features of each model can be outlined as follows: in the standalone or pure robo-advisor system, it is anticipated to directly interact with the client, excluding any human intermediation between the machine and the investor; in the hybrid or cyborg model, the digital element combines with the human, alternating in various phases of the process; finally, the robo-for-advisors is a tool supporting consultants in delivering services to their clientele[4].

Regarding the regulation of this phenomenon, it is noteworthy that the current European regulations do not distinguish the obligations, such as informational ones, of robo-advisors from those of traditional consultants, adhering to the principle of technological neutrality[5]. Concerning informational obligations, ESMA has clarified on multiple occasions, most recently in the Guidelines on "some aspects of the MiFID II suitability requirements," that, when a client interacts with an automated consultant, it is advisable to ensure compliance with certain "additional" obligations. These might include the degree and extent of human involvement in the service and, particularly, the ability and methods to interact directly (and exclusively) with the human consultant[6].

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[3] The Artificial Intelligence Act establishes a regulatory framework for AI use within the EU. Additionally, the AI Act envisages the creation of an AI Office and a National Supervisory Authority within member states. The reference is made to the Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain legislative acts of the Union, COM(2021) 206 final, April 21, 2021. Specifically, this legislative proposal categorizes AI systems based on their level of risk. Additionally, the text of the Directive regulating AI responsibility is also in the process of being defined. Considering that the mentioned legislative texts are still in a "gestation" phase, it is premature to pass judgment, but it is certainly positive that the legislator has recognized the need to regulate AI, choosing risk and responsibility as cornerstones of its legislation.

[4] See AA., VV., *La digitalizzazione della consulenza in materia di investimenti finanziari*, in *Quaderni Fintech*, Consob, gennaio 2019, 9.; R. LENER, *La "digitalizzazione" della consulenza finanziaria. Appunti sul c.d. Roboadvice, in Fintech: diritto, tecnologia e finanza*, (a cura di) LENER, in *I Quaderni di Minerva Bancaria*, Editrice Minerva Bancaria, Roma, 2018, 46.

[5] EU PARLIAMENT, *Committee on Economic and Monetary Affairs, Report on Fin-Tech: the influence of technology on the future of the financial sector*, (2016/ 2243(INI), 28.4.2017, n. 4-6.

[6] See ESMA, *Orientamenti su alcuni aspetti dei requisiti di adeguatezza della MiFID II*, 03 aprile 2023, ESMA35-43-3172, avaible at the following link https://www.esma.europa.eu/sites/default/files/2023-04/ESMA35-43-3172_Guidelines_on_certain_aspects_of_the_MiFID_II_suitability_requirements_IT.pdf. Also see D. ROSSANO, *Il robo-advice alla luce della normativa vigente*, in *Liber Amicorum Guido Alpa*, (a cura di) Capriglione, 2019, Padova, 369 ss.; R. LENER, P. LUCANTONI, *Regole di condotta nella negoziazione degli strumenti finanziari complessi: disclosure in merito agli elementi strutturali o sterilizzazione, sul piano funzionale, del rischio come elemento tipologico e normativo?,* in *Banca, borsa e tit. cred.*, 2012, 369 ss.

Consider, for instance, the administration of the so-called MiFID questionnaire, necessary, as known, to delineate the investor's characteristics. This obligation, for an intermediary utilizing a robo-advisor, essentially translates into creating a form for completing the mentioned questionnaire and generating an investment recommendation based on the client's input and the characteristics of the products available in the market. Taking the pure robo-advisor model as an example, it is evident that the questionnaire is, in fact, the only tool the automated consultant can use to connect with the investor and understand their real inclinations and risk tolerance.

The question at this point is not so much about fulfilling the informational obligation as it is about the actions associated with and dependent on the administration of the said questionnaire. For example, a pure robo-advisor would likely struggle to respond to a query by providing the specific information necessary for the client to dispel their doubts, especially when dealing with a retail investor. The same holds true for the possibility that a purely automated consultant can perceive the hesitations, understand the difficulties, and alleviate the investor's anxieties.

Notably, ESMA encourages intermediaries to implement mechanisms for neutralizing customer biases, whether offering traditional advisory services or, more so, when financial advice is entirely or partially automated[7]. Analyzing the automated models prevalent in the market reveals that current automated systems are incapable of correcting the cognitive distortions of the investors availing advisory services.

Therefore, considering that the automated consultant is not programmed to address such queries, one must question whether the intelligent robo-advisor could do so. Some scholars argue that the use of AI in robo-advisory could bring several benefits, significantly improving portfolio structure[8]. Conversely, others contend that the use of AI could be discouraging for users due to the complexity of these systems, potentially hindering the widespread adoption of robo-advisors[9].

Indeed, the potential applications of artificial intelligence are diverse; for instance, they could enable the development of risk profiles that better align with reality. As the adoption of MiFID did not mandate Member States to use standardized questionnaires, the lack of foresight in this regard leads to non-uniformity in results. AI could play a crucial role in making results more consistent, even with different questionnaires[10].

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7 See D. ROSSANO, *Le «tecniche cognitive» nei contratti di intermediazione finanziaria. Valutazione dei rischi finanziari ed indicazioni delle neuroscienze*, Napoli, 2011, in part. 35 s.

8 See A. ROSSI e S. UTKUS, *Who benefits from robo-advising. Evidence from machine learning*, 2019, available at the following link https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552671; BIANCHI e BRIERE, *Robo-advising for small investors*, 2021, Université Paris-Dauphine Research Paper No. 3751620, available at the following link https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3751620#

9 See K. PATEL e M. LINCOLN, *It's not magic: Weighing the risks of AI in financial services*, Centre for the Study of Financial Innovation Working Paper, 2019, available at the following link https://consilium-eureka.primo.exlibrisgroup.com/discovery/fulldisplay?vid=32CEU_INST:32CEU_VU1&docid=alma991700489904371&context=L&lang=en.

10 See N. MARINELLI e C. MAZZOLI, *Profiling investors with the mifid: current practice and future prospects, 2010*, Research Paper avaible at the following link https://www.ascosim.it/public/19Ric.pdf.

It is essential to question whether the use of artificial intelligence can be a protective tool for the investor, ensuring expediency in market operations. One must also consider whether the inherent AI system could serve as a safeguard, possibly eliminating the obligation to resort to the written form of the advisory contract. Abolishing this obligation, as outlined in financial legislation, would signify a legislative shift justified by the algorithmic mechanism already programmed to meet protective requirements[11].

Moreover, artificial intelligence could be attributed additional powers, not only concerning investor protection but also market integrity. For instance, as outlined in Article 40 of MiFIR, ESMA is empowered to prohibit or limit the distribution of certain products that may jeopardize the pursuit of the aforementioned protective goals. AI systems could support the authority in exercising this power and serve as a comprehensive control tool for the choices made by ESMA, possibly limiting the discretion of the authority itself[12].

Considering the potential applications described above, it becomes necessary to question whether some form of public control of the algorithm is needed. A sort of algo-test authority that would allow authorities, perhaps by creating a dedicated section within one or more existing authorities, to oversee the mathematical-computational formula developed by programmers and adopted by intermediaries in their systems.

Attempting to borrow a question posed by Prof. Capriglione, are these the new boundaries of financial supervision? In responding to this question, Prof. Capriglione notes that "in the EU, in the last decade, authorities have recognized the need to activate adequate forms of control over the algorithmic process, understanding the necessity of subjecting the definition of correct regulatory prescriptions to the identification of appropriate intervention measures."[13]

At this point, a partial conclusion can be drawn. The adoption of innovative tools in this context assumes a paradigmatic function for the financial industry. Therefore, it is not possible to exclude a priori the significant contribution that AI-based systems could offer. In this perspective, the hope is that the market will embrace robo-for-advisors instead of pure robo-advisors. Indeed, one wishes to avert what authoritative doctrine has aptly termed "the dictatorship of the algorithm."[14]

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[11] See G. ALPA, *L'intelligenza artificiale. Il contesto giuridico*, Modena, 2021, 63; M. MAUGERI, *Smart Contracts e disciplina dei contratti. Smart Contracts and Contract Law*, Bologna, 2021; D. DI SABATO, *Gli smart contracts: robot che gestiscono il rischio contrattuale,* in *Contratto e impresa*, n. 2/2017, 392; F. DI GIOVANNI, *Attività contrattuale e Intelligenza Artificiale*, in *Giur. it.,* 2019, 1677.

[12] See M. ATZORI, *Tecnologia Blockchain E Governance Decentralizzata: Lo Stato È Ancora Necessario? (Blockchain Technology and Decentralized Governance: Is the State Still Necessary?),* 1, 2015, available at SSRN: https://ssrn.com/abstract=2731132; E. BRYNJOLFSSON, *Big AI can centralize decision-making and power, and that's a problem*, in *Missing links in ai governance*, 2023, 65, available at the following link link https://sustainabilitydigitalage.org/featured/wp-content/uploads/missing-links-in-ai-governance-unesco-mila.pdf#page=71; M. GIRAUDO, E. FOSCH-VILLARONGA, G. MALGIERI, *Competing Legal Futures*, 1, 2023, avaible at the following link link https://ssrn.com/abstract=4499785.

[13] This sentence was uttered by Professor Capriglione during his presentation at the conference held at the "Unitelma" University in Rome on May 19, 2023, as part of a symposium titled "Regulation and Financial Supervision in the Digital Era."

[14] See S. RODOTÀ, *Il diritto di avere diritti,* Roma-Bari, 2012, 398 ss., see also 408.

However, it follows that if, until now, the consultant had to understand the alchemical combinations of the offered products, from now on, as indicated in the mentioned ESMA Guidelines, they must also become experts in software and data processing to govern the machine. Regarding this, however, a clarification concerning independent financial consultants under Article 18 bis T.U.F. and (probably) financial consulting companies under Article 18 ter T.U.F. is necessary. Both consultants could encounter difficulties in adopting the mentioned technological innovations. While independence is the distinguishing feature of both entities, it cannot be said that they possess a structure complex enough to cope with the technological advancements of the market, unlike the intermediaries under Article 18 T.U.F. What could happen to these consultants if they fail to apply the aforementioned technological innovations? Perhaps, this would be one of the first "responses" to Rifkin's theory?

3. BANK CRISIS MANAGEMENT AND DIGITAL INNOVATIONS: CHIMERA OR POSSIBILITY?

As previously mentioned, the second part of this contribution is dedicated to a sector that (for the moment) does not seem to have been affected by the digital revolution: the management of banking crises[15]. In this case as well, the goal of the analysis is to try to verify whether automated models and/or artificial intelligence can support or replace human intervention[16]. Therefore, it has been considered to assess the contribution that artificial intelligence could provide to intermediaries and competent supervisory bodies in identifying the best measures to activate at the first signs of difficulties for credit institutions.

Hence, technological innovations could, first and foremost, be applied to the preparation of preventive measures contained in recovery plans and resolution plans. As known, through these plans, intermediaries carry out the strategic planning of their activities. More specifically, by preparing the recovery plan, the intermediary identifies the program of interventions to be implemented in the event of a significant deterioration in its financial and economic situation. This measure must be prepared during the physiological phase of banking activity, thus hypothesizing a potential deterioration. It should be noted that the relevant regulations emphasize

[15] Reference is made to the provisions contained in Directive No. 2014/59/EU (Bank Recovery and Resolution Directive, commonly known as BRRD), transposed into Italian law following the entry into force of legislative decrees No. 180 and 181 of November 16, 2015. It is also worth noting that on April 18, 2023, the European Commission published a series of proposals to reform the current regulatory framework on the management of bank crises and deposit protection systems (known as the "Crisis Management and Deposit Insurance Framework" or "CMDI"), available at the following link: https://finance.ec.europa.eu/publications/reform-bank-crisis-management-and-deposit-insurance-framework_en. Certain aspects of the proposal will be analyzed below.

[16] See K. ZHAILYBAYEVICH e A. HAMAD, *Development of a Predictive Intellectual Model for Predicting the Financial Crisis in Banks*, in *Proceedings of the Second International Conference on Applied Artificial Intelligence and Computing*, 2023, 661 ss.; G. LOIACONO, E. RULLI*, ResTech: innovative technologies for crisis resolution*, in *Journal of Banking Regulation*, 2022, 227 ss.; GBD. SWANKIE, D. BROBY, *Examining the Impact of Artificial Intelligence on the Evaluation of Banking Risk*, 2019, 61 ss.

the need to regularly update the recovery plan[17].

On the other hand, resolution plans are drafted by the competent authority and must contemplate the actions to be taken in the event that the intermediary is in a situation that makes it possible to initiate the resolution procedure. As authoritative doctrine has stated, in recovery plans, "measures useful to remedy liquidity or organizational deficiencies must be indicated. In contrast, in resolution plans, the Authority competent for them, collaborating continuously with the interested credit institution and with the supervisory body, must carry out the so-called resolvability assessment."[18]

At this point, to connect the rules governing banking crises with those governing Artificial Intelligence, it is necessary to focus on the predictive capabilities of the latter. Indeed, AI relies on machine learning systems which, in turn, are based on the assumption that computer networks can learn from themselves continuously. To understand the phases that make up the machine learning process - and, therefore, in practice, how the algorithm is built - it is necessary to analyze the definition of Tom M. Mitchell, who states: "A program is said to learn from experience (E) with respect to some class of tasks (T) and performance measures (P) if its performance in the task (T), as measured by (P), improves with experience (E)."[19]

Therefore, to develop an algo-recovery plan, it will first be necessary to define the task (T), which in this case consists of preparing a recovery plan. The performance measure (P) is determined by the accuracy of the model, i.e., the reliability and accuracy of the indications provided by it; for the model to be accurate, a set of known and reliable data (E) must be available[20]. The model analyzes this information, collects new data, and processes them to make a prediction.

Thus, for the realization of an algo-recovery plan, AI will have to make a series of "evaluations" that concern, for example, the analysis of the causes that could determine the situation of deterioration, hypothesizing future scenarios taking into account current conditions. AI could, therefore, constantly verify the actions taken by governance bodies during the physiological phase of banking activity. Additionally, the algorithmic system could be assigned the task of systematically updating the plan.

So far, recovery plans have been discussed, but it would also be possible to create an algo-resolution plan. In this case, it is worth noting that the Authority has a vast repertoire of knowledge, and the model could, therefore, be based on a broader spectrum of data, consequently elaborating particularly precise and reliable

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[17] See D. ROSSANO, *La nuova regolazione delle crisi bancarie*, Torino, 2017, 72 ss.; M. PELLEGRINI, *Piani di risanamento e misure di early intervention*, in *Federalismi.it*, n. 2, 2018, 2 ss.; V. TROIANO, *Recovery plans in the context of the BRRD framework*, in Open *Review of Management, Banking and Finance*, 2015, vol. 2, spec. 49 ss.

[18] See D. ROSSANO, last, 74.

[19] See T.M. MITCHELL, *Machine Learning*, New York, 1997, 22.

[20] For the preparation of an algo-recovery plan, it is necessary to provide a set of known initial data (the dataset) to the system. The model, in turn, is programmed to correctly process new data, not yet known or even not yet occurred. The predictive capacity of the system lies precisely in its ability to interact with new situations. These learning modalities aim to minimize the loss function, which is the difference between what the system predicts and the actual data. See H. KISSINGER, E. SCHMIDT, D. HUTTENLOCHER, *The Age of AI and our human future,* Boston, 2021, throughout.

predictions. Through the use of such systems, algo-resolution plans would not only be particularly accurate but also much more uniform among themselves, thus ensuring that the same decisions are made in similar conditions.

It is also necessary to ask whether AI can represent support for the supervisory authority in the early intervention phase. As known, the adoption of early intervention measures significantly changes the structural framework of the bank. These measures are resorted to at the first signs of crisis[21], and the Authority is granted the power to: apply what is provided in the recovery plan, examine the situation to elaborate an intervention program, convene the shareholders' meeting, and decide on the modification of the company's strategy; replace or remove one or more members of the management body of the institution[22]. It is questioned whether, for the adoption of such measures, the Authority can make use of AI support, which, in fact, penetrates into the decision-making autonomy of the institution. Above all, it needs to be asked whether the expelled administrators could accept this decision as they would if this choice depended solely on human beings.

Regarding the early intervention phase, it is important to consider recent proposals to modify the regulations governing the management of banking crises[23], where it is stated that the "internal sequence between early intervention measures, the removal of managers, and the appointment of temporary administrators"[24] should be removed. Since the Proposal foresees that these measures share the same indicators, for the choice of the institute to apply, the Authority must take into account the principle of proportionality[25]. The algorithmic codification of future provisions would be simpler, as these measures, as mentioned, can be activated when the same assumptions arise, while, on the other hand, the adoption of the aforementioned principle of proportionality, which presupposes the careful evaluation of the specific case, could be more complex[26]. True, the above-mentioned principle has an ancient history and often guides the public Authority in the exercise of its

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[21] More specifically, these measures can be applied in the event of a violation or a risk of non-compliance with prudential requirements by the banking institution.

[22] More in general regarding early intervention measures, see D. ROSSANO, last, 77 ss.; see F. CIRAOLO, *La Banca d'Italia ed il potere di rimozione degli esponenti aziendali tra vigilanza prudenziale e disciplina della crisi*, in *AGE*, 1, 2016, 51 ss.; A. ANTONUCCI, *I poteri di removal degli esponenti aziendali nell'ambito del Single Supervisory Mechanism*, in *AGE*, 1, 2016, 39 ss.

[23]It refers to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU concerning early intervention measures, conditions for resolution, and the financing of the resolution action on April 18, 2023, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0227. For references to the legislative reform package, see note No. 23.

[24] Compare. Detailed illustration of the individual provisions of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU, ibid., 13.

[25] Compare. Recital No. 6 of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU.

[26] See ex multis, S. COGNETTI, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Torino, 2010; N. EMILIOU, *The principle of Proportionality*, in *European Law*, London, 1996; D. GALETTA, *Il principio di proporzionalità*, in RENNA e SAITTA (a cura di), *Studi sui principi del diritto amministrativo*, Milano, 2012, 389 ss.; SANDULLI, *La proporzionalità dell'azione amministrativa*, Padova, 1998; G. SCACCIA, *Il principio di proporzionalità*, in AA.VV., *L'ordinamento europeo*, (a cura di) MANGIAMELI, Milano, 2006, 225 ss., 230.

powers. Therefore, the algorithm would have a vast amount of data ("E" in Mitchell's theory) on which to base itself to suggest to the supervisory authority which measure is most suitable for achieving the goal.

Furthermore, consider the exceptionally serious asset losses that, when they arise, the bank is considered insolvent, as well as the serious asset losses that represent one of the prerequisites for invoking Extraordinary Administration. Well, doctrine has reiterated on several occasions that it would be appropriate to provide certain indices since the concrete definition of such losses is left to the discretion of the Authority. In the absence of defined normative parameters, considering also what the jurisprudence has stated about serious asset losses and, therefore, that it is not possible to resort "to a pre-established objective parameter, assumable in all situations," it is worth asking whether AI would be able to identify the exact measure of such losses. Certainly, if AI were entrusted with such a task, it could provide some solution. Although in the absence of predetermined parameters, the algorithm could base its response solely on case studies.

A similar discussion may also apply to the resolution procedure and administrative liquidation. Well, as known, in this context, the presence or absence of public interest is decisive. The scope of this phrase varies depending on the circumstances; moreover, it is a general clause and, as such, endowed with a certain elasticity. As authoritative doctrine has stated, in the legislation currently in force, the legislator has not provided precise indications regarding the prerequisites for the manifestation of public interest, effectively entrusting extensive discretionary power to the Authorities. In fact, this principle is not strictly linked to the size of the intermediary under consideration.

Moreover, consider the exceptionally severe capital losses, upon the occurrence of which the bank is deemed to be in distress[27], as well as the serious capital losses that constitute one of the prerequisites for invoking Extraordinary Administration[28]. Indeed, scholars have reiterated on several occasions that it would be advisable to establish certain indices since the concrete definition of such losses is left to the discretion of the Authority. In the absence of defined regulatory parameters, taking into account what jurisprudence has stated about serious capital losses, namely that it is not possible to resort to "a pre-established objective parameter, assumable in all situations,"[29] one might wonder if AI would be able to identify the exact measure of such losses. Certainly, if AI were entrusted with such a task, it could provide some solution. Although in the absence of predetermined parameters, the algorithm could base its response solely on case studies[30].

A similar discourse may apply to the resolution procedure and compulsory administrative liquidation. Well, as is known, in this context, the decisive factor is the presence or absence of public interest. The scope of

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[27] See E. RULLI, *Accertamento giudiziale dello stato di insolvenza. Commento all'art. 82 T.U.B.*, in AA.VV., in *Commentario al testo unico delle leggi in materia bancaria e creditizia*, (diretto da) Capriglione, Milano, 2018, 1150

[28] See D. ROSSANO, *Prime riflessioni sulla sentenza del Tribunale UE sul caso Carige: tra formalismo giuridico e realtà fattuale*, in *Rivista Trimestrale di Diritto dell'Economia*, 2, 2022, 67 ss.; A. CARDUCCI ARTENISIO, *L'accertamento giudiziale dell'insolvenza di banca in liquidazione coatta amministrativa: i criteri*, in *Banca borsa tit. cred.*, fasc. 4, 2002, 500 ss.

[29] See TAR Lazio, 7.5.1997 n. 685, con nota di E. GALANTI, *Un'interessante sentenza del Tar Lazio su alcuni aspetti procedimentali e sostanziali della liquidazione coatta delle banche*, in *Banca borsa tit. cred.*, II, 1998, 234.

[30] See N. IRTI, *Un diritto incalcolabile*, Torino, 2016, *passim.*

this term varies depending on the circumstances; after all, it is a general clause and, as such, endowed with a certain elasticity. As authoritative doctrine has stated, in the legislation currently in force, the legislator has not provided precise indications regarding the conditions under which public interest manifests itself, effectively entrusting extensive discretionary power to the Authorities. Indeed, this principle is not strictly tied to the size of the intermediary under consideration.

In this regard, it is worth noting that the aforementioned proposal to amend the legislation on bank crises proposes to clarify certain aspects of the term "public interest," specifying its contents. Through this proposal, the European legislator aims to reduce the discretion of the Authority, thus ensuring greater uniformity in the application of the principle. One wonders, therefore, if artificial intelligence can transform a general clause into an algorithm. It is legitimate to ask if artificial intelligence can, in general terms, translate a principle into a sequence of algorithms, and specifically, a term like "public interest," whose perimeter is so rarefied. Of course, the proposed amendments mentioned could contribute to defining its contents, although it is believed that the renewed formulation of the principle may not be fully conclusive, even for the purposes of this investigation. What is certain is that AI could support the Authority in the decision-making phase by analyzing cases in which either procedure has been used, examining their impact on the market, and comparing the case under the Authority's examination with precedents.

4. CONCLUSIONS

In conclusion, it can be said that artificial intelligence could serve as a valuable tool to assist banking and financial regulatory authorities, contributing to ensuring the proper functioning of markets. Naturally, there should be some form of coordination between them, the AI Office, and national authorities, whose establishment is envisaged in the AI ACT.

Therefore, the financial industry must embrace the ongoing technological change enthusiastically, adapting existing operating systems to next-generation digital automation. Achieving this goal, of course, implies that the European legislator formulates clear, precise, and adequate rules to ensure human primacy over machines[31].

Moreover, it is legitimate to wonder whether, in order to translate a principle or rule into algorithmic terms, artificial intelligence must first equip itself with consciousness. Many are trying to provide answers to such questions[32]. For the purposes of this investigation, it might be useful to keep in mind one of the questions posed by Alan Turing, which concerns the ability to recognize whether one is interacting with a machine or a

[31] See N. ABRIANI, G. SCHNEIDER, *Diritto delle imprese e intelligenza artificiale. Dalla Fintech alla Corptech*, il Mulino, 2021, *passim*; G. FINOCCHIARO, V. FALCE, *Fintech: diritti, concorrenza, regole. Le operazioni di finanziamento tecnologico*, Bologna, 2019, *passim*.

[32] See U. RUFFOLO, G. AMIDEI, *Intelligenza Artificiale e diritti della persona: le frontiere del "transumanesimo", in Intelligenza Artificiale e diritto*, numero monografico a cura di GABRIELLI e RUFFOLO, in *Giur. it.*, 2019, 1658 ss.; L. FLORIDI, *La quarta rivoluzione. Come l'infosfera sta trasformando il mondo*, Milano, 2017, *passim*.

human[33]. Indeed, it can certainly be affirmed that interaction with a machine is quite different from interaction with a human, and, for the time being, the risk of confusion between the two seems to be averted.

In this regard, Giacomo Leopardi's words in the "Proposal for Prizes Made by the Academy of the Syllographs" in 1824 remain particularly relevant, where the poet stated that "*modern men proceed and live, perhaps more mechanically than all those of the past... now it is not men but machines, one might say, that deal with human affairs and perform the works of life.*" Well, in the age of technological innovation, there is a warning that humans must keep in mind to avoid any form of oppression: continue to learn and preserve one's ethical sphere. Only in this way can humans continue to do human things.

[33] See A. TURING, *Computing machinery and intelligence*, Mind, Volume LIX, Issue 236, 1950, 433 ss., available at the following link https://doi.org/10.1093/mind/LIX.236.433

THE MANDATORY CONTRACTUAL CLAUSES AND THE OVERSIGHT FRAMEWORK IN DIGITAL OPERATIONAL RESILIENCE FOR THE FINANCIAL SECTOR

Matteo Pignatti

Le clausole contrattuali obbligatorie e il quadro di vigilanza nell'ambito della resilienza operativa digitale per il settore finanziario*

(*The mandatory contractual clauses and the Oversight Framework in digital operational resilience for the financial sector*)

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ABSTRACT [En]:
Technological innovation is a factor affecting the economy and takes its own characteristics in the financial sector. The co-dependence (or dependance) on the ICT sector entails risks for the stability of the European system and for European sovereignty itself. Digital operational resilience for the financial sector is a means of protecting the underlying legal-economic interests.
The knowledge of the ICT sector's reference market (operating for the financial activities) is an essential element in defining risks and managing them for the proper functioning of the financial sector and the safeguard of investors (consumers).
However, these instruments do not seem sufficient to ensure a balanced relationship between the financial sector and the ICT sector.
The Digital Operational Resilience (DORA) legal framework makes use of mandatory contractual provisions and the definition of a supervisory framework to try to rebalance the relationship between the parties while still highlighting the concerns related to dependence on critical third-party ICT service providers, especially when established in a third country.

Keywords: financial sector; ICT; contract provisions and third parties; oversight framework.

ABSTRACT [It]:
L'innovazione tecnologica è un fattore che influisce sull'economia e assume caratteristiche proprie nel settore finanziario. La co-dipendenza (o dipendenza) dal settore delle tecnologie dell'informazione e delle comunicazioni comporta rischi per la stabilità del sistema europeo e per la sovranità europea stessa. La resilienza operativa digitale per il settore finanziario rappresenta un mezzo per proteggere gli interessi giuridico-economici sottostanti.
La conoscenza del mercato di riferimento del settore delle tecnologie dell'informazione e delle comunicazioni (operante per le attività finanziarie) è un elemento essenziale nella definizione dei rischi e nella loro gestione per

il corretto funzionamento del settore finanziario e la salvaguardia degli investitori (consumatori).
Tuttavia, tali strumenti non sembrano sufficienti per garantire una relazione equilibrata tra il settore finanziario e quello delle tecnologie dell'informazione e delle comunicazioni.
Il quadro giuridico della Resilienza Operativa Digitale (DORA) utilizza disposizioni contrattuali obbligatorie e la definizione di un quadro di supervisione per cercare di riequilibrare la relazione tra le parti, evidenziando comunque le preoccupazioni legate alla dipendenza da fornitori critici di servizi ICT di terze parti, specialmente quando situati in un paese terzo.

Parole chiave: settore finanziario, Tecnologie dell'Informazione e delle Comunicazioni; clausole contrattuali e terze parti; quadro di supervisione.

SUMMARY: 1. The digitalisation of financial sector. The resilience of the European Single Market and the challenges of globalisation - 2. The characteristics of the market for the provision of ICT services to the financial sector - 3. The Risks in outsourcing ICT services in the financial sector and their management - 4. The role of the mandatory contractual clauses and the e Oversight Framework in digital operational resilience for the financial sector.

1. THE DIGITALISATION OF FINANCIAL SECTOR. THE RESILIENCE OF THE EUROPEAN SINGLE MARKET AND THE CHALLENGES OF GLOBALISATION.

The regulation of the financial sector has undergone many changes over the years in order to respond to different needs of the social and economic context (such as the harmonisation of national legal systems in the Internal Market, the organisation of an integrated organisational system, supervision - macro and micro-prudential -), entailing the need to balance the stability of the sector, its competitiveness and the protection of investors and consumers[1].

The digital transition is part of a context in which innovation entails the need to adapt and make the Internal Market competitive at international level, helping to define a digital single market for financial services[2] and, at the same time, fostering technological progress in the European economy[3].

*Il presente contributo è stato approvato dai revisori.

[1] See A. BROZZETTI, *Il diritto europeo della banca e della finanza tra passato e futuribile*, in *Riv. trim. dir. dell'economia*, 2023, 6 et seq.; C. RUOCCO, *Finanza digitale: opportunità, profili di attenzione e ruolo della supervisione finanziaria*, in D. ROSSANO (eds. by) *La supervisione finanziaria dopo due crisi. Quali prospettive*, CEDAM, Padova, 2023, 181 et seq.

[2] EU Commission, *Comunication on a Digital Finance Strategy for the EU*, 24 September 2020, COM(2020) 591 final.

[3] On Technological sovereignty see: EU Commission, 2021 *Strategic Foresight Report. The EU's capacity and freedom to act*, 8 September 2021, 4; European Innovation Council, *Statement to accompany the launch of the full EIC*, annex I, *Statement on Technological Sovereignty*, 18 March 2021; F. CAPRIGLIONE, *Diritto ed economia. La sfida dell'intelligenza artificiale*, in *Riv. trim. dir. eco.*, 2021, 3, 4 et seq.; B. CELATI, *La sostenibilità della trasformazione digitale: tra tutela della concorrenza e "sovranità tecnologica europea"*, in *Riv. trim. dir. eco.*, 2021, 3, 252 et seq.; G. FINOCCHIARO, *La sovranità digitale*, in *Dir. pub.*, 2022, 809 et seq.

In the financial sector, the widespread use of ICT services[4], amplified by the effects of globalisation (further accelerated also by the health emergency – COVID-19), eliminated the territorial dimension of markets[5] and also unbound legal relationships from the individuality of the parties involved, allowing operators in the sector to create complex legal relationships involving several parties, some of which do not come into direct contact with each other[6].

The need to expand the boundaries of financial organisations' activities, in order to compete in the globalised marketplace and reduce operating costs, made ICT tools an integral part of the financial services business to the point of generating a relationship of dependence, making the Union's financial ecosystem (...) inherently co-dependent on certain services[7]. This co-dependence has produced various phenomena relevant to economics law.

These factors have not only simplified activities in the financial sector (when properly used), but have also affected the spread of the economic effects (positive or negative) resulting from them in the market.

While measures of generalised transparency may be necessary to reduce information asymmetries, the availability of large amounts of information (big data) (even if 'privileged') and of tools capable of analysing it has altered the balance in a market for the pursuit of opportunistic goals. This is how the availability of data and information and the ability to process them takes on a relevance of its own that requires specific caution in order to avoid distorted uses and to direct the market and technology towards the pursuit of common European interests and positive externalities (e.g. through the enhancement of ESG performance)[8].

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[4] The value of the TIC market was estimated at over USD 5 trillion in 2019. Its growth confirms the increasing relevance of technology in today's society and the financial sector is the world's largest user of ICT, accounting for 20 % of total ICT spending. See e European Economic and Social Committee, *Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Finance Strategy for the EU'*, 24 February 2021.

[5] N. IRTI, *L'ordine giuridico del mercato*, Bari, Laterza, 2003, 21. Today, the market does not coincide with the territory of one or more states, but appears as a space detached from a defined territorial scope, extending the legal and economic relations among the parties involved.

[6] A. M. PANCALLO, *Il digital lending: la "disumanizzazione" della filiera del credito*, in *Riv. trim. dir. dell'economia*, 2021, 398 et seq., in which reflections of technological innovation are analysed with particular reference to the phenomenon of digital lending, taking up G. OPPO, *Disumanizzazione del contratto?*, in *Riv. dir. civ.*, 1998, I, 525 et seq.

[7] European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, 31 Jannuary 2022, where some issues on digitisation of the financial sector are addressed: increasingly fragmented and non-integrated value chains; platforms and financial product offerings; risks for groups operating in different sectors by integrating different activities. Section 4, within Recommendation 1, draws attention to possible dependency relationships. See also: European Banking Authority, *Report on the use of digital platforms in the eu banking and payments sector*, 2021, 33 e s., on the dependency relationships with third-party ICT service providers.

[8] F. CAPRIGLIONE, *Clima energia finanza. Una difficile convergenza*, Utet, Milano, 2023, 178-179; F. RIGANTI, *L'insostenibile leggerezza dell'essere (sostenibili). Note brevi sul rischio nelle banche alla luce dei principi ESG*, in *Riv. trim. dir. dell'economia*, 2022, 185 et seq.

The use and constant evolution of ICT tools[9] reflects on the interests that the legal order is called upon to protect by defining a legal framework capable of responding effectively to the management of new technological tools in the financial sector[10]. Interconnected macroeconomic events pose new challenges, and new risks[11], highlighting the importance of the resilience of the financial sector as an element on which market relience is based[12].

The trust that the market and investors place in financial organisations is an element that characterises and constrains the choices of legal entities operating in the sector. This trust affects the reliability of the financial institution, reflecting and amplifying its effects on the stability of the European financial sector.

This is how the outsourcing of technical functions to third parties and the interdependence of ICT systems affects relience in the financial market, assuming relevance in several issues[13] (affecting the stability and integrity of the Union's financial system).

While it may enable goals to be achieved within the market (through the acquisition of specific know-

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9 "*Around half of EU banks (covering both corporate and retail segments) have reported that most of their customers (75%-100%) primarily use digital channels for daily banking activities. (...) In the area of Artificial Intelligence (AI), more than 70% of EU banks use AI at least in some areas of activities. Its use is more widespread in creditworthiness assessment and credit scoring, fraud detection, commercial profiling and clustering of clients or transactions, AML/CFT being more wide-spread. An increased use of chatbots or similar solutionsis being noticed. We also see that many financial entities focus on optimisation of internal processes and introducing digitalisation in order to increase efficiencies and cut their operating costs*", see: J. M. CAMPA, *Operational resilience in EU financial services*, keynote speech at the 14th Financial meeting organised by Expansion, cit.

10 *Ex multis*: N. CASALINO, *La digitalizzazione del settore finanziario*, in M. PELLEGRINI (eds. by), *Diritto pubblico dell'economia*, CEDAM, 2023, 337 et seq.; R. BASKERVILLE – F. CAPRIGLIONE – N. CASALINO, *Impacts, Challenges and trends of Digital Transformation in the Banking Sector*, in *Law and Economics Yearly Review*, 2020, 341 et seq.; G. Alpa, *Fintech: un laboratorio per i giuristi*, in *Contratto e Impresa*, 2019, 377 et seq., also in G. FINOCCHIARO - V. FALCE (dir. by), *Fintech: diritti, concorrenza, regole*, Bologna, 2019; A. MIGLIONICO, *Innovazione tecnologica e digitalizzazione dei rapporti finanziari*, in *Contratto e Impresa*, 2019, 1376 et seq.

11 See: Parlamento UE, *Relazione recante raccomandazioni alla Commissione sulla finanza digitale: rischi emergenti legati alle criptoattività - sfide a livello della regolamentazione e della vigilanza nel settore dei servizi, degli istituti e dei mercati finanziari*, 2020; Banca d'Italia, *Comunicazione in materia di tecnologie decentralizzate nella finanza e cripto-attività*, 15 giugno 2022; M. RABITTI, *Le regole di supervisione nel mercato digitale: considerazioni intorno alla comunicazione Banca d'Itlia in materia di tecnologie decentralizzate nella finanza e cripto-attività*, D. ROSSANO (eds. by) *La supervisione finanziaria dopo due crisi. Quali prospettive*, cit., 345. See for example the case related to the accounting negligence of the financial services company Wirecard. D. McCrum, *Wirecard made this short seller right but not rich*, in *Financial Times*, 15 July 2020; The Economist, *Germany's regulator bans short-selling in Wirecard*, 23 February 2019.

12 On 'digital operational resilience', see EU Regulation, 2554/2022, art. 3, par. I, p.to 1), where it is defined as "the ability of a financial entity to build, assure and review its operational integrity and reliability by ensuring, either directly or indirectly through the use of services provided by ICT third-party service providers, the full range of ICT-related capabilities needed to address the security of the network and information systems which a financial entity uses, and which support the continued provision of financial services and their quality, including throughout disruptions"; EU Commission, *Explanatory memorandum to the Proposal for a EU Directive amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341*, COM(2020) 596 final, 24 September 2020.

13 Basel committee on banking supervision, *The joint forum, outoircung in financial services*, 2005; EBA, *Guidelines on outsourcing*, 14 December 2006; EBA, *Orientamenti in materia di esternalizzazioni*, 25 February 2019; ESMA, *Orientamenti in materia di esternalizzazione dei servizi cloud*, 10 May 2021.

how), it can also create distortions (through misuse or distorted use of ICT tools or due to external interference).

Recent crises have also highlighted how the use of ICT systems has the capacity to multiply and rapidly propagate throughout the financial system the negative effects associated with financial sector risks that can spread across sectors and geographic boundaries and have the potential to evolve into a systemic crisis, where confidence in the financial system is eroded due to the disruption of functions that support the real economy, reaching a level that the financial system cannot withstand.

In order to avoid such risks and to prevent adverse events from taking on a systemic character, the EU Commission has adopted a comprehensive package of measures for digital finance[14] that are intended as a first step towards the harmonised management of the digital transition in the financial sector.

The European rules on digital operational resilience for the financial sector (DORA)[15] is part of this framework and provides for the definition and constant updating of systems, protocols to manage cyber risks[16], the identification of roles and responsibilities in the functions carried out by the financial operator using ICT tools[17], the stable control of data management (to prevent data corruption, loss and ensure confidentiality)[18], the identification of points of failure[19] (including through digital operational resilience tests[20]) and the management of risk events to ensure continuity through appropriate backup plans[21] and procedures is combined and linked

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14 On Digital Finance Package see EU Commission, *Communication on a Digital Finance Strategy for the EU*, 24 September 2020; EU Commission, *Communication on a Retail Payments Strategy for the EU*, 24 Septetmber 2020. The European strategy consists of four acts on: crypto-assets (EU Regulation 1114/2023, on crypto-asset - MiCA, as digital representations of values or rights that can be transferred or stored electronically through a technology that supports distributed recording of encrypted data - distributed ledger technology - DLT (EU Regulation 858/2022); the harmonisation of key requirements on digital operational resilience (also amending the existing financial services directives, mostly to bring the regulation on operational risk and risk management requirements in line with the new DORA regulation, and to update the definition of "financial instrument" to include instruments issued using DLT technology (EU Directive 2022/2556, amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 with regard to digital operational resilience for the financial sector). In addition to these acts, there is also the regulation on fair and contestable markets in the digital sector (EU Regulation, 1925/2022, Digital Markets Act - DMA), and the proposal for harmonised rules on artificial intelligence (Artificial Intelligence Act), for a directive on the adaptation of non-contractual liability rules to artificial intelligence.

15 European Economic and Social Committee, *Opinion on the '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*', 24 February 2021, p.to 2.4, in which the "Digital operational resilience" is defined as "the capacity of firms to ensure that they can withstand all types of disruptions and threats related to Information Communication Technologies (ICT). The ever-increasing dependency of the financial sector on software and digital processes means that ICT risks are inherent in finance. Financial firms have become targets of cyberattacks, which result in serious financial and reputational damage to consumers and firms. These risks need to be well understood and managed, especially in times of stress".

16 EU Regulation, 2554/2022, Art.7.

17 EU Regulation, 2554/2022, Art.8.

18 EU Regulation, 2554/2022, Art.9.

19 EU Regulation, 2554/2022, Art.10.

20 EU Regulation, 2554/2022, Artt.24-27.

21 EU Regulation, 2554/2022, Artt.11 e 12.

with the management of computer incidents in cooperation and coordination with the Supervisory Authorities (European and national)[22].

In this context, relations with third-party ICT service providers are identified as an autonomous risk category[23], the regulation of which defines forecasts that affect the legal relations between the financial sector and the ICT sector (by placing contractual constraints) and in terms of surveillance, seeking to rebalance the relationship of dependence of operators in the sector on third-party ICT service providers, particularly where they are qualified as 'critical'[24] or established in third countries[25].

The use of third parties makes the legal-economic environment of the financial sector more complex. European regulations do not impose rigid ceilings or strict restrictions on the use of ICT service providers in order not to adversely affect the sector's economic activity by limiting its contractual freedom. Rather, they seek to identify tools, such as risk analysis and risk management, stress tests, supervisory activities, attention to contractual content with third-party ICT service providers, and liability regimes, to balance the balance of power and dependence between the two sectors in order to protect the interests of investors and the European system.

However, it is complex to correctly balance the multiple interests that come into play. The impossibility of restricting the contractual freedom of financial firms (by limiting the possibility of outsourcing relevant or critical activities) is reflected in the constraints posed by the European provisions on management of legal relations among financial sector operators and ICT service providers.

This is how the need for financial operators to resort to external parties for the development and management of ICT services (on which the sector now depends) takes on a particular focus for economic law, requiring the analysis and assessment of the new risks that are created, the settlement of organisational and contractual models that take them into account, and the provision of supervisory constraints and responsibilities for the governing body of financial operators. These instruments, applied to the financial sector on the basis of a proportionality (declined in general[26] and in specific terms) in relation to legal relations with third-party ICT service providers[27], should constitute a means of reconciling multiple needs without jeopardising the safeguard of savings.

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[22] EU Regulation, 2554/2022, Artt.17-23. In the European context, the reference is to the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Banking Authority (EBA).

[23] EU Regulation, 2554/2022, Artt.28-45.

[24] EU Regulation, 2554/2022, Art.3, par. I, p.to 23.

[25] EU Regulation, 2554/2022, Art.3, par. I, p.to 24.

[26] EU Regulation, 2554/2022, Art.4, par. I, where digital operational resilience for the financial sector applies "taking into account their size and overall risk profile, and the nature, scale and complexity of their services, activities and operations".

[27] EU Regulation 2554/2022, Art. 28, par. I, lett. b), where the management of third-party cyber risks by financial entities takes into account: "(i) the nature, scale, complexity and importance of ICT-related dependencies, (ii) the risks arising from contractual arrangements on the use of ICT services concluded with ICT third-party service providers, taking into account the criticality or importance of the respective service, process or function, and the potential impact on the continuity and availability of financial services and activities, at individual and at group level.".

In this context, the article aims to analyse the links between digital operational resilience, the provisions aimed at identifying and managing risks, and the characteristics of the sector for the supply of ICT services to financial operators, as well as how rules on mandatory contractual constraints and oversight framework affect it.

The analysis aims to point out the critical issues related to relationships among between financial operators and ICT third party service providers and the purposes for which the mandatory contractual clauses and the supervisory framework are aimed in the context of digital operational resilience for the financial sector.

2. THE CHARACTERISTICS OF THE MARKET FOR THE PROVISION OF ICT SERVICES TO THE FINANCIAL SECTOR

The relations between the financial and the ICT sector have grown over the years as a consequence of multiple factors. Digitalisation has enabled access to new markets that were previously unreachable, made data accessibility and the use of new computing capabilities possible. More recently, the increasing use of Big data and AI made it possible to capitalise on the opportunities offered by digitalisation.

Moreover, fragmentation of financial value chains incentivise firms to pursue new forms of partnership or groups that offer customers both financial and non-financial services. Some of these groups, including BigTechs, already have a relatively strong presence in the payments sector and have the potential to gain market share quickly in other financial services because of their large consumer base[28]. Groups combining different activities incorporeted financial services to other business, and these companies concentrating their activities mainly in North America, China, India or Latin America in an accelerating process of change[29].

Software and application services sector, ICT consulting and direct process management and cloud computing services are the more common used ICT services by the financial oeprators. The ICT service sectors that commonly fall within the critical and important functions of the financial sector include: network infrastructure services, data centre services.

ICT services offered to financial operators are constantly evolving. Some cloud providers are offering tailored financial services-specific cloud solutions that enable new capabilities such as customer onboarding, profiling and engagement, regulatory compliance assessments, or data encryption that will unlock personal data

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[28] European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, cit., p.to 21, in which is also reported that "these same groups, whose core competencies lie mainly outside of financial services, may use partnerships to create additional layers on top of existing financial infrastructures, leveraging their network effects and data collection superiority to create 'one-stop-shops' for retail products and services".

[29] Financial Stability Board, *BigTech Firms in Finance in Emerging Market and Developing Economies; Market developments and potential financial stability implications*, 2020, 2, as 'large technology companies with extensive customer networks; it includes firms with core businesses in social media, internet search, software, online retail and telecoms'.

previously considered too sensitive for analytical purposes[30].

While cloud computing has the potential to reduce technology infrastructure costs, concentration[31] and data management, risks are high[32].

In the same way, open finance, highlights the importance of data-driven innovation and data flows within the EU, and Distributed Ledger Technology (DLT) introduced new cooperation models (e.g., industry consortiums working on DLT implementation) with partners not within the financial sector regulatory perimeter[33]. These developments continue transforming the way financial products and services are provided (e.g. see the mixed activity business models enabled by ICT[34]) and make data management supervision complex.

The same technical knowledge about the use of ICT tools also entails FinTech-related know-how (from algorithms applied to the financial sector, to distributed ledger technology - DLT pilot scheme - and blockchain, to cloud computing, machine learning, and artificial intelligence)[35] and further information asymmetries that are reflected in the economy and fuel the markets' dependence on technology.

ICT firms have historically and primarily been active in the EU market as ICT providers to financial institutions (e.g. as third-party service providers, and fall within the scope of the DORA legislative proposal); aside from their core business of tech services like cloud services, they have penetrated selected financial sector market segments, such as retail payments, via the provision of infrastructure as the interface between financial institutions and end users. Overall, only a limited number of BigTech group companies are currently holding licences to carry out financial services activities in the EU, with eight known to have subsidiary companies carrying out regulated financial services[36].

In the EU insurance and securities markets, the presence of BigTech is even more scarce, with only a handful of players having launched specific products[37]. European banks already state that 65% of them have

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30 Some insurers are teaming up with cloud providers to build digital healthcare platforms, enabling virtual health and well-being services (e.g., self-assessment and prevention tools, a teleconsultation interface, a digital document vault, home care services) or cybersecurity initiatives aiming to improve the cyber-resilience and reduce the cyber-risk of small and medium sized businesses.

31 Financial Stability Board, *FinTech and market structure in financial services: Market developements and potential stability implications*, 14 February 2019, 16 et seq.

32 European Banking Authority, *EBA report on Big Data and Advanced Analytics*, 2020.

33 European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, cit., 53.

34 Financial Stability Board, *BigTech Firms in Finance in Emerging Market and Developing Economies Market developments and potential financial stability implications*, 12 October 2020, 2 et seq.

35 V. LEMMA, *FinTech Regulation: Exploring New Challenges of the Capital Markets Union*, Palgrave Macmillan, Cham, 2020; Id., *Solidarietà e regolazione dell'innovazione finanziaria*, in *Riv. trim. dir. dell'economia*, 2023, 83 et seq.

36 European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, cit., 29.

37 International Banking Federation, *Big Banks, bigger techs? How policy-makers could respond to a probable discontinuity*, July 2020, 19 et seq.

contractual partnerships or outsourcing contract with BigTech companies[38].

Understanding the characteristics of the markets for the provision of ICT services to the financial sector is necessary for the analysis of the risks associated with these services and the role of contractual arrangements and the supervisory framework.

Four main approaches can be observed toward a financial institution's platform development. The in-house development by the relevant financial institution or group company, the partnerships among consortia of financial institutions, the partnerships between financial and non-financial institutions (technology companies – FinTech), and the outsourcing to, and reliance on, third-party technology companies.

The circumstance that most European systemic financial institutions use financial technology services provided by companies from third countries (US and China)[39] that have a dominant position in certain ICT services (such as the cloud) exposes the Single Market to a dependency that is not only more technological, but also generates effects on financial operations and political relations. The European Digital Operational Resilience (DORA) framework may prove insufficient in situations where the characteristics of the ICT service provider market is such as to constrain the financial sector (e.g. in the case of a limited number of ICT providers, outside the EU, or in case of commercial agreements, corporate constraints or situations of control and material linkage among possible providers).

3. THE RISKS IN OUTSOURCING ICT SERVICES IN THE FINANCIAL SECTOR AND THEIR MANAGEMENT

Based on the experiences of other sectors (e.g. in relation to the regulations on the administrative liability of legal persons, companies and associations, including those without legal status[40]), risk analysis[41] is aimed at reducing the information asymmetry between the parties, trying to prevent the possibility of this affecting the contractual balance (entailing a technological lock-in and a 'capture' of the legal entities that carry out their

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[38] J. M. CAMPA, *Operational resilience in EU financial services*, keynote speech at the 14th Financial meeting organised by Expansion, 10 October 2023, available in *https://www.eba.europa.eu/sites/default/documents/files/document_library/Calendar/EBA%20Official%20Meetings/2023/Jos%C3%A9%20Manuel%20Campa%20keynote%20speech%20at%20the%2014th%20Financial%20meeting%20organised%20by%20Expansion/1063659/JM%20Campa%20speech%20on%20digitalisation%20and%20DORA%20at%2010-10-2023.pdf*. See also: Financial Stability Board, *FinTech and market structure in financial services: Market developments and potential financial stability implications*, 14 February 2019; Id., *BigTech Firms in Finance in Emerging Market and Developing Economies Market developments and potential financial stability implications*, cit.

[39] R. MASERA, *L'Europa, l'unione europea e l'eurozona: crisi e proposte di soluzione*, in *Riv. trim. dir. dell'economia*, 167, which point out how China, with some of the most important Fintech Companies in the world, challenge the US leadership in Digital Finance and to the role of the dollar at the centre of the international financial system. For an analysis of the Italian legal order: Consob, *FINTECH: Profili di attenzione e opportunità per gli emittenti e il risparmio nazionale*, 6 luglio 2021. Si v. anche: K. TRAUTMANN, *EU-DORA regulation as a result of cloud computing adoption by the financial services industry*, in *Journal of International Banking Law and Regulation*, 2023, 38(5), 155-161.

[40] D.lgs. 8 giugno 2001, n. 231.

[41] EU Regulation, 2554/2022, Artt.5-16.

activities in the financial market) and to foresee in advance, through risk management, the mechanisms and measures (organisational and managerial) to be adopted to reduce the time in which the effects of a realised cyber risk may affect financial activity.

The risks associated with cyber security and its vulnerability may take several nature.

Regulatory risks constitute a general category (thus going beyond services provided by third-party providers and the financial sector), but they take their own peculiarities in a context in which national economic interests stand in the way of European ones in a framework in which the 'Single Market' is only one of the players involved in the wider global market (in which relate a plurality of legal systems). The harmonisation of relevant concepts and technical rules can be an element in the development of the European market and be relevant to avoid possible opportunistic distortions within it (also at international level). Legislative disparities and uneven regulatory or supervisory approaches at the national level (of which the EU DORA regulation is a first step towards harmonisation) in the prevention and management of cyber risks represent obstacles to the functioning of the internal market for financial services and affect the activity of financial entities operating on a cross-border basis[42].

Many of the principles and requirements set out in the Digital Operational Resilience proposal are already contained within sector-specific standards, guidelines and soft law acts[43] (which can be further elaborated in national legal systems), it will however be necessary to ensure consistency between the Digital Operational Resilience proposal and the requirements set out in existing guidelines also in other sectors (such as e.g. bank sector[44]) or in approved and pending EU regulatory acts (such as the proposed EU regulation on Artificial Intelligence, which identifies the level of 'risk' as a distinguishing factor within the framework). banking) or in approved and pending EU regulatory acts (such as the proposed EU regulation on Artificial Intelligence, which

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[42] European Economic and Social Committee, *Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Finance Strategy for the EU'*, cit., p.to 3.7; European Economic and Social Committee, *Opinion on the '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'*, cit., p.to 4.1.2, in which to provide "clarity to firms, particularly to those operating across borders", it asks for "ensuring that definitions and terms are consistent and avoiding duplications, overlaps and different interpretations of how to meet similar regulatory expectations in different jurisdictions". For these reasons, the EESC recommends that EU policymakers amend the definition of operational resilience to be consistent with the Basel Committee on Banking Supervision (BCBS) definition and to ensure that it is the leading regime applicable to EU financial institutions to avoid the risk of contradictions with others.

[43] Such as those developed by EBA and EIOPA, as well as ESMA's draft guidelines, which are subject to consultation. On outsourcing of services, see the dichotomy, in terms of scope, between 'outsourcing' and 'third-party service'. Digital Operational Resilience only refers to 'third-party ICT services' with regard to the core principles for the proper management of third-party ICT risks (Chapter V), while the scope of the EBA Guidelines on outsourcing is based on a definition of outsourcing that implies that the activity is performed on a recurring or continuous basis (par. 26). The EBA Guidelines also provide a list of exceptions that are not considered to fall within the scope of outsourcing (par. 28).

[44] Basel Committee on Banking Supervision - BCBS, *Principles for operational resilience*, 6 November 2020.

identifies the level of 'risk' as a distinguishing factor within the framework)[45] in order to achieve complete harmonisation (between economic sectors and legal systems) and avoid opportunistic behaviour within the European Union.

The acts that the EU Commission will be called upon to approve (in 2024), may constitute an important element of harmonisation of concepts, technical rules[46] and documents[47] in the European market, the desirability of which can only be highlighted today.

This harmonisation could positively impact on the fragmentation of the value chain for financial services (due for several reasons, including as a result of the growing reliance of financial institutions on services provided by technology companies or with the emergence of FinTechs that occupy niche positions in the market) in terms of consumer protection and cross-border financial activities.

This methodological wish would seem to be further justified by the horizontal risk management approach adopted in the Digital Operational Resilience framework for the financial sector and compatible with the need to avoid overlapping concepts, duplications and coordination problems between European rules on new relevant technologies also in the context of outsourcing of relevant services[48] that could generate obstacles to the functioning of the single market, to the detriment of market participants and financial stability[49].

The need to harmonise the legal system of the financial market (if not at an international level at least in the Single Market) must be balanced with the need to guarantee flexibility to a discipline that concerns a sector that is constantly evolving and in which the law must include and adapt to technical applications in economic relations in which third parties also operate.

The possible outsourcing to 'third-party providers of ICT services', by virtue of technical reasons, balances the freedom of economic initiative (It. Const., Art. 41) with constraints and controls of a public nature

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45 Proposal for a EU regulation laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, 21 aprile 2021.

46 EU Regulation, 2554/2022, Art.15, with reference to the harmonisation of cyber risk management tools, methods, processes and policies (by 17 January 2024); Art. 18, in relation to the classification of ICT-related incidents and cyber threats (by 17 January 2024); Art. 26, in relation to advanced testing of ICT tools, systems and processes based on threat-driven penetration testing (by 17 July 2024); Art. 28, in relation to the policy for the use of ICT services in support of essential or important functions provided by third-party providers, as part of the strategy for cyber risks from third parties (by 17 January 2024); Art. 30(V), in relation to the technical rules related to ICT functions included in contracts between financial sector actors and third-party ICT service providers (by 17 July 2024); Art. 41, in relation to the harmonisation of the conditions under which surveillance activities can be performed (by 17 July 2024).

47 EU Regulation, 2554/2022, Art.20, with regard to the harmonisation of templates and contents for reporting (by 17 July 2024); Art. 28, with regard to standardised templates register information on contractual arrangements for the use of ICT services provided by third-party providers, including common information for all contractual arrangements for the use of ICT services (by 17 January 2024).

48 G. SCHNEIDER, *La proposta di regolamento europeo sull'intelligenza artificiale alla prova dei mercati finanziari: limiti e prospettive (di vigilanza)*, in *Resp. civ. e prev.*, 2023, 1014 e s.; ARNER-BUCKLEY-ZETSCHE, *Open Banking, Open Data e Open Finance: Lessons from the European Union*, in Jeng (a cura di), Open Banking, Oxford, Oxford University Press, 2022, 147 e s.

49 EU Regulation, 2554/2022, Wh. N. 9.

deriving from the need to protect savings and guarantee financial stability (It. Const., Art. 47) and constitutes an element of risk that affects the financial sector in an autonomous and differentiated manner.

The circumstance whereby dependence on the ICT tool turns into dependence on third parties, whose greater knowledge of technological dynamics can lead to distortions and alterations in the financial market, is the basis for risk analysis and management.

This is how the pre-contractual phase with third parties becomes fundamental. A meticulous pre-contractual analysis should focus on the risks associated with the use of ICT tools managed by third-party providers (the identification of essential or important functions, the analysis of the corporate relationships of such parties and possible conflicts of interest, the management and security of data and possible IT risks, the implementation of appropriate tests to verify the functionality and resilience of the systems adopted)[50], together with cooperation and constant networking with the supervisory authorities, constitute prodromal elements that underpin the diligent management of activities by financial market operators and their responsibilities.

The European regulation subdivides the risks associated with contractual relationships with third parties, making an initial distinction on the basis of the characteristics of the ICT service provider, the object of the contractual services and the manner in which they are provided (in order to also be able to assess the consequent effects of the automatisms of ICT tools). On the basis of the subjective relationship, third-party ICT service providers are thus distinguished from 'critical' ICT[51] third-party service provider[52]. The latter can be further classified, if the conditions are met, between third parties that provide their activities within the scope of corporate control relationships and within groups of companies[53].

The distinction takes on further relevance where the 'critical' supplier (or subcontractor[54]) is established in a country outside the European Union[55].

The declination given to the criteria identified to qualify a supplier as "critical" is symptomatic of a concern that the dependence of financial sector operators on ICT companies is amplified by "concentrations" of ICT suppliers[56] and that such situations (not allowing the entity operating in the financial market to perform

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[50] EU Regulation 2554/2022, Art. 3, par. I, p.to 5, 'ICT risk' are qualified as "any reasonably identifiable circumstance in relation to the use of network and information systems which, if materialised, may compromise the security of the network and information systems, of any technology dependent tool or process, of operations and processes, or of the provision of services by producing adverse effects in the digital or physical environment". See also: Financial Stability Board, *Enhancing Third-Party Risk Management and Oversight. A toolkit for financial institutions and financial authorities*, 4 December 2023, 15.

[51] EU Regulation 2554/2022, Art. 3, par. I, p. 19.

[52] EU Regulation 2554/2022, Artt. 3, par. I, p. 23, 31 et seq.

[53] EU Regulation 2554/2022, Art. 3, par. I, p. 25, 26 and 27, which distinguishes between the notions of 'subsidiary and 'parent undertaking' and of 'group' by referring to the rules on the annual accounts, consolidated accounts and related reports of certain types of undertakings (EU Directive 2013/34).

[54] EU Regulation 2554/2022, Art. 3, par. I, p. 28, in which is defined the ICT subcontractor established in a third country.

[55] EU Regulation 2554/2022, Art. 3, par. I, p. 24.

[56] EU Regulation 2554/2022, Art. 3, par. I, p. 29, concerning the ICT concentration risk, and Art. 29, on preliminary assessment of ICT concentration risk.

its essential functions or absorb consequent financial effects) reflect negatively on the stability of the European financial system[57]. The impact of possible dysfunctions related to the use of ICT tools, the systemic nature of financial entities, the level of dependence on the ICT services provided in relation to essential functions, and the degree of substitutability of the third-party provider highlight the attention to the continuity of the financial sector's activities and the need for special precautions in order to prevent dysfunctions of one provider from spilling over to the entire European financial system.

This is how the circumstance that a 'critical' ICT third-party service providers is established in a third country, and the dependence of the financial sector is no longer only towards the ICT sector (or a single economic operator) but towards the economies that control the latter, entails additional precautions inherent in the desire to guarantee an autonomy and independence of the European financial system from external actors (in close connection with the concept of European sovereignty that is being defined).

Outsourcing of ICT services also entails access to sensitive information and financial data by third parties[58]. If these data are not handled securely, possible security breaches may lead to opportunistic behaviour (even outside the Single Market) and affect the stability of the sector, even indirectly (as a consequence of the limited reliability of the European system).Increasing contractual relationships between financial operators and ICT companies could create additional complexity where third-party providers could exploit their infrastructure and superiority in data collection through forms of interconnection.

Operational risks, related to technical problems or disruption of activites provided by third-party vendors and the need to replace an ICT service provider, may directly affect the activities of financial institutions (causing transaction delays, data loss or disruptions in services to customers) by affecting business continuity. Aligning data response and recovery tools following cyber incidents with the Financial Stability Board's - Cyber Incident Response and Recovery (CIRR) forecasts seems essential to ensure consistency in measures.

The constant evolution of technology and the need to correct, update tools, methodologies and software increases these risks.

The risks of dependence, concentration or lock-in on one (not easily substitutable) or more third-party suppliers (closely related to each other) for the relevant services and for the business continuity of the financial institution also make the ICT services market susceptible to events capable of impacting negatively on the stability of the financial system, affecting the way in which big data is managed and processed and/or generating, and distorting competition[59]. Recourse to the same supplier for several services increases the effects of

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[57] EU Regulation 2554/2022, Art. 31, par. II.

[58] European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, cit., p.to 121 et seq.

[59] European Supervisory Authorities, *ESAs Report on the landscape of ICT third-party providers in the EU*, 19 September 2023, whose analysis shows a relevant market of around 15,000 suppliers providing ICT services to around 1,600 financial entities included in the survey sample (including insurance companies). According to the analysis, the most in-demand suppliers are also those that tend to provide services in support of the largest number of essential or important functions, and the

dependence of the financial operator on the supplier itself, placing the latter in a dominant position in the market (also making it possible, in the presence of a limited number of ICT suppliers for specific contractual services, to reach agreements for the division among them of the relevant market). Where several players in the financial sector use the same supplier or where there are corporate interdependencies between them, conflicts of interest may arise. In relation to specific ICT sectors, the limited number of possible third-party ICT suppliers may place them in a strong contractual position vis-à-vis the financial operator, reducing their ability to provide contractual conditions proportionate to the type of service and risk. Particular attention is also paid to the possible participation of one or more players from the financial sector in the share capital of the ICT service provider or the use of companies that are part of groups.

Additional risk factors concern possible subcontracting agreements and subcontracting chains, which make surveillance activities complex (also in terms of analysing corporate relationships), especially when they are concluded with third-party ICT service providers established in a third country[60].

The possibility of such events occurring generates an autonomous risk that affects the reputation of the financial operator and the entire European system, adversely affecting investor confidence. Any problems related to data security or the performance of ICT services by third parties can seriously damage the reputation of a financial institution. This risk affects the reputation of the financial operator and the entire European system by negatively affecting investor confidence. Any problems related to data security or the performance of ICT services by third parties can seriously damage the reputation of a financial institution.

Risk analysis and risk management is the responsibility of the financial operator's governing body, which, as part of its tasks related to the effective and prudent management of the business, is called upon to approve the 'information technology risk management framework'[61], which contains the operator's policy for the use of ICT services provided by a third-party provider and the establishment of appropriate corporate communication channels to obtain information on contractual relationships with third-party providers and changes thereto[62]. These elements form the framework of a 'strategy for third-party IT risks' based on supplier differentiation (not only to reduce the incidence of individual risks, but also the underlying balance of power of ICT dependency) and periodic risk reviews by the operator's management body[63].

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difficult substitutability of ICT suppliers providing activities in relation to essential functions. See also: European Banking Authority, *Report on the use of digital platforms in the EU banking and payements sector*, 21 September 2021; E. PALMERINI - G. AIELLO - V. CAPPELLI - G. MORGANTE - N. AMORE - G. DI VETTA - G. FIORINELLI - M. GALLI, *Il FinTech e l'economia dei dati. Considerazioni su alcuni profili civilistici e penalistici. Le soluzioni del diritto vigente ai rischi per la clientela e gli operatori*, 2018, 35 et seq.; J. M. CAMPA, *Operational resilience in EU financial services*, cit., 4.

60 EBA, *Raccomandazioni in materia di esternalizzazione a fornitori di servizi cloud*, 28 marzo 2018, 11 et seq.

61 EU Regulation, 2554/2022, Art.5, par. II. The ICT risk management framework is specifically regulated in Article 6. If the circumstances apply, see also Art. 16 on the simplified framework.

62 EU Regulation, 2554/2022, Art.5, par. II, lett. h) e i).

63 EU Regulation 2554/2022, Art. 28, par. II. The strategy for cyber risks from third parties involves the management body constantly and periodically monitoring risks identified in connection with contractual agreements for the use of ICT services to support essential or important functions.

4. THE ROLE OF THE MANDATORY CONTRACTUAL CLAUSES AND THE E OVERSIGHT FRAMEWORK IN DIGITAL OPERATIONAL RESILIENCE FOR THE FINANCIAL SECTOR

The dependence of the financial sector on the ICT sector has led the EU market to provide instruments to rebalance this relationship externally.

EU rules, in the context of relations with third-party ICT service providers, seems to identify the contract and surveillance as the two tools with which to balance the multiple interests in the relationship and rebalance the dependence of the financial sector on the technology sector by acting respectively on 'essential and important' functions through the contract and on the activities of 'critical' third-party providers (through surveillance).

The contract (understood as the act in which the legal interaction between the parties is governed[64]), in written form, due to its greater adaptability (compared to an official act) intends to manage the condition of dependence of the financial sector by identifying the minimum elements and obligations that must be governed by contracts for the provision of ICT services[65]. The contract, which binds the financial operator and the company that provides ICT services, becomes the instrument called upon to guarantee proportionality and reasonableness in the balancing of the different interests at stake[66], and which finds in the preliminary risk analysis and definition of management methods the central moment of defining roles and responsibilities.

The definition of contractual clauses is, however, also a consequence of the risk analysis (and in particular the risk of concentration[67]), the provisions of which are guided by the requirements of the DORA regulation[68]. On the basis of the principle of proportionality, the minimum essential elements to be governed by contracts with third-party ICT service providers are supplemented by further constraints related to the provision of services to support critical or important functions[69].

The essential elements of contracts with third-party ICT service providers are closely linked to the need to guarantee the financial operator control over the security and proper operational management of the financial activity[70]. Additional obligations are therefore envisaged in relation to suppliers operating in connection with

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64 European Supervisory Authorities, *ESAs Joint European Supervisory Authority response to the European Commission's February 2021 Call for Advice on digital finance and related issues: regulation and supervision of more fragmented or non-integrated value chains, platforms and bundling of various financial services, and risks of groups combining different activities*, cit., p. 40, recalling the types of acts regulating relations in cooperation between the financial sector and ICT: "partnerships, joint ventures, outsourcing and sub-contracting, mergers and acquisitions".

65 EU Regulation 2554/2022, Art. 30.

66 M. RABITTI, *Due diligence sulla sostenibilità e digitalizzazione della catena del valore: l'apporto di blockchain e smart contracts*, in *Riv. trim. dir. dell'economia*, 2023, 172.

67 EU Regulation 2554/2022, Art. 29.

68 EU Regulation 2554/2022, Art. 28, par. IV.

69 EU Regulation 2554/2022, Art. 30, par. III.

70 This includes a clear description of the services covered by the contract, the service performance levels, and the place of performance (also in the context of EU information management and storage), the terms of any subcontracting

essential or important functions. The impact of these activities on the financial performance, soundness and continuity of the operator's financial services justifies an "aggravated" regime that imposes contractual provisions to provide for additional constraints on the third-party ICT service provider, up to and including the obligation to guarantee a transition period as part of the exit strategy of the contractual relationship[71].

One profile of attention concerns subcontracting contracts which, where authorised and inherent to essential or important functions, involve a specific analysis of the benefits and risks that may arise from such subcontracting (particularly in the case of an ICT subcontractor established in a third country) and chains of such contracts[72].

The surveillance activity appears to be aimed at reconciling both the possible asymmetry of information and the relationship of dependence that can exist between finance and ICT in order to protect the pre-eminent interests of stability of the European financial system (by virtue of European sovereignty operating in an international economic context) and to safeguard investors (by virtue of the relationship of trust that is being protected)[73].

Surveillance therefore intervenes in support of risk analysis and management (in terms of prevention)[74] and of contractual activities with third-party ICT service providers (as an institutional guarantee tool), and takes on a particularly incisive role in relation to "critical" third-party providers[75] with which the European Supervisory Authorities - ESAs (and the one identified as the a Lead Overseer), establish a direct relationship[76]. The a Lead Overseer, directly identified by the ESAs on the basis of criteria relating to the ICT services provided by the third-party provider (such as systemic impact, importance of financial entities, dependence on the services

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contracts, and the management of information and data (also in relation to cases where the third-party provider is unable to provide the service.

71 EU Regulation 2554/2022, Art. 30, see the relationship between the par. II and par. III. E.g. obligations to assist the financial operator, to work with public authorities and resolution rights, are supplemented by the mandatory report to the third party provider, to implement and test contingency operational plans, to participate and cooperate with the financial operator in TLPT tests, unconditional rights of access and cooperation in inspections and audits, and contractually define exit strategies through the definition of a mandatory transition period.

72 EU Regulation 2554/2022, Art. 29, II, in which the provisions of bankruptcy law applicable in the event of the bankruptcy of the third-party ICT service provider are identified as particular points of attention, as well as any restrictions relating to the urgent restoration of the financial entity's data and, if the provider or subcontractor is established in a third country, compliance with EU data protection law.

73 J. M. CAMPA, *Operational resilience in EU financial services*, cit., 5.

74 M. RABITTI, *Le regole di supervisione nel mercato digitale: considerazioni intorno alla comunicazione Banca d'Itlia in materia di tecnologie decentralizzate nella finanza e cripto-attività*, D. ROSSANO (a cura di) *La supervisione finanziaria dopo due crisi. Quali prospettive*, cit., 343 et seq.

75 EU Regulation 2554/2022, Artt. 31-44.

76 See Art. 31, par V, in which is provided the direct notification to the third-party ICT provider of its qualification as "critical" (It must inform the financial operator to which it provides ICT services); Art. 3, par. XIII, in which is required to the critical third-party ICT provider to notify to the a Lead Overseer directly of any changes in the management structure of the subsidiary established in the EU; Art. 33(I), in relation to the tasks of the a Lead Overseer, the latter is identified as the "main point of contact for critical third party ICT service providers"; Art. 35, in relation to the direct exercise of the a Lead Overseer's powers over the critical third party provider.

provided by the third-party provider and degree of substitutability)[77] they intend to gain an in-depth and comprehensive understanding of the relationships in the individual ICT service provision sectors. In this context, the quantitative and qualitative indicators proposed by the ESAs referring to eleven suggested criticality criteria and their respective levels of relevance are of interest (as an anticipation of the criteria that may be supplemented by the EU Commission)[78]. Co-operation[79] and co-ordination[80] of the activities of the European Supervisory

[77] EU Regulation 2554/2022, Art. 31, par. II. Criteria to be further supplemented by the EU Commission by 17 July 2024 (see par. VI)

[78] European Supervisory Authorities, *Joint European Supervisory Authorities' Technical Advice to the European Commission's December 2022 Call for Advice on two delegated acts specifying further criteria for critical ICT thirdparty service providers (CTPPs) and determining oversight fees levied on such providers*, [78] EU Regulation 2554/2022, Art. 30, see the relationship between the par. II and par. III. E.g. obligations to assist the financial operator, to work with public authorities and resolution rights, are supplemented by the mandatory report to the third party provider, to implement and test contingency operational plans, to participate and cooperate with the financial operator in TLPT tests, unconditional rights of access and cooperation in inspections and audits, and contractually define exit strategies through the definition of a mandatory transition period.

[78] EU Regulation 2554/2022, Art. 29, II, in which the provisions of bankruptcy law applicable in the event of the bankruptcy of the third-party ICT service provider are identified as particular points of attention, as well as any restrictions relating to the urgent restoration of the financial entity's data and, if the provider or subcontractor is established in a third country, compliance with EU data protection law.

[78] J. M. CAMPA, *Operational resilience in EU financial services*, cit., 5.

[78] M. RABITTI, *Le regole di supervisione nel mercato digitale: considerazioni intorno alla comunicazione Banca d'Itlia in materia di tecnologie decentralizzate nella finanza e cripto-attività*, D. Rossano (a cura di) *La supervisione finanziaria dopo due crisi. Quali prospettive*, cit., 343 et seq.

[78] EU Regulation 2554/2022, Artt. 31-44.

[78] See Art. 31, par V, in which is provided the direct notification to the third-party ICT provider of its qualification as "critical" (It must inform the financial operator to which it provides ICT services); Art. 3, par. XIII, in which is required to the critical third-party ICT provider to notify to the a Lead Overseer directly of any changes in the management structure of the subsidiary established in the EU; Art. 33(I), in relation to the tasks of the a Lead Overseer, the latter is identified as the "main point of contact for critical third party ICT service providers"; Art. 35, in relation to the direct exercise of the a Lead Overseer's powers over the critical third party provider.

[78] EU Regulation 2554/2022, Art. 31, par. II. Criteria to be further supplemented by the EU Commission by 17 July 2024 (see par. VI)

[78] European Supervisory Authorities, *Joint European Supervisory Authorities' Technical Advice to the European Commission's December 2022 Call for Advice on two delegated acts specifying further criteria for critical ICT thirdparty service providers (CTPPs) and determining oversight fees levied on such providers*, 29 September 2023. Some minimum materiality thresholds are proposed, where possible and applicable. These minimum materiality thresholds constitute a minimum requirement above which the criticality assessment must be carried out.

[79] *Ex* Art. 16 of EU Regularion N. 1093/2010, n. 1094/2010 and n. 1095/2010. See EU Regulation 2554/2022, Art. 32, par. VII, that provides for the ESAs to issue (by 17 July 2024) , guidelines on the cooperation between the ESAs and the competent authorities covering the detailed procedures and conditions for the allocation and execution of tasks between competent authorities and the ESAs and the details on the exchanges of information which are necessary for competent authorities to ensure the follow-up of recommendations pursuant to Article 35(1), point (d), addressed to critical ICT third-party service providers'. See also Artt. 48 and 49 on the cooperation between the Lead Overseer and the ESAs with the competent national independent administrative authorities, respectively.

[80] EU Regulation 2554/2022, Art. 34. See also Art. 35, par. II e IV in relation to the lead Overseer 's coordination with the joint surveillance network.

Authorities within a common network is a decisive factor in identifying possible critical third parties[81]. An individual surveillance plan (specific to each critical third party provider) is also adopted on the basis of a common surveillance protocol[82].

In this organisational framework of surveillance, the most problematic situation (from the point of view of risk to European interests) appears to be the critical third-party supplier based in a third country. This condition complicates the relationship between the ESA and the critical third-party supplier, making inspection activities and the imposition of possible sanctions (e.g. on transparency and access) difficult (if not impossible)[83]. The need to ensure the effectiveness of oversight activities and the possible absence of a cooperative relationship with financial supervisors in third countries entails the need (for the third-party provider) to ensure a commercial presence in the EU through the establishment of a subsidiary within 12 months of its designation as 'critical'[84]. This measure, however, may not be sufficient to guarantee the objectives of the surveillance activity, requiring the conclusion (by the ESAs) of special cooperation agreements with the authorities of third countries in order to make it possible to acquire information and exercise inspection functions[85].

In order to perform the functions provided for by the DORA regulation, the lead supervisory authorities are endowed with powers of investigation, inspection and recommendation, the non-fulfilment of which may entail the adoption of administrative sanctions (penalties for late payment quantified on a daily basis and parameterised to the average daily turnover achieved worldwide by the third-party supplier), also following an adversarial procedure with the representatives of the critical third-party supplier.

Administrative sanctions of an economic nature are in addition to reputational sanctions (public disclosure of the penalties imposed[86] or in the event of failure to respond to the recommendations made[87]) and contractual sanctions imposed by the European framework (independent national administrative authorities are granted the power to require a financial operator to temporarily suspend or terminate its contract with a critical third-party ICT supplier until the risks identified in the recommendations made to a critical third-party supplier have been remedied[88]).

A final reference concerns the analysis of the legal liability regime. The responsibility of the financial

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81 The ESAs collect data on contracts concluded by financial operators with third-party ICT service providers, and can also access the full information register (Art. 28, par. III), transmit them to the Oversight forum (art. 31, par. X). G. SCHNEIDER, *La proposta di regolamento europeo sull'intelligenza artificiale alla prova dei mercati finanziari: limiti e prospettive (di vigilanza)*, in *Resp. civ. e prev.*, 2023, 1014 et seq., in which a coordination of supervisory activities is also envisaged with IA.

82 See the relationship between Art. 33, par. IV and Art. 34.

83 See the combined EU Regulation 2554/2022, Art. 35, par. I and VI.

84 EU Regulation 2554/2022, Art. 31, par. XII and XIII.

85 EU Regulation 2554/2022, Art. 36, where the limits of the ESAs' powers and the minimum content of administrative cooperation agreements are also regulated.

86 EU Regulation 2554/2022, Art. 35, par. X.

87 EU Regulation 2554/2022, Art. 42, par. II.

88 EU Regulation 2554/2022, Art. 42, par. VI. On the duty of Member States to confer powers on national administrative authorities, see Art. 50.

operator's management body constitutes the 'guiding principle'[89] (as an assessment of the adequacy of the provisions contained in the strategy for third-party cyber risks and of the contractual clauses governing the relationship with third-party ICT service providers) of digital operational resilience for the financial sector. In addition to this, there are also the responsibilities of the employees of the management body and the latter's role in digital resilience governance, as well as the contractual responsibilities of the third-party ICT service provider.

[89] UE Regulation, 2554/2022, Wh. N. 45 and Art. 5, par. II.

THE CRIME OF MONEY LAUNDERING REFERRED TO IN ART. 648 BIS OF THE CRIMINAL CODE IN THE ERA OF DIGITALIZATION

Valentino De Angelis

Il reato di Riciclaggio di cui all'art. 648 bis c.p. nell'era della digitalizzazione*

(The crime of Money Laundering referred to in art. 648 bis of the Criminal Code in the era of digitalization)

Valentino De Angelis

Avvocato

ABSTRACT [En]:

The issue, briefly, has the goal to highlight the characteristics of the case referred to in art. 648 *bis* of the Criminal Code, as well as the difficulties of application and interpretation, widely encountered, not only in the context of the Italian legal system, but also at the European level, following the evolution of the so-called "Criminal Code". digital system.

Keywords: Economic criminal law; banking crimes; digital system; anti-money laundering.

ABSTRACT [It]:

Con il presente contributo si vogliono, sommariamente, evidenziare le caratteristiche della fattispecie di cui all'art. 648 bis c.p. nonché le difficoltà applicative ed interpretative, ampiamente, riscontrate, non solo nell'ambito dell'ordinamento italiano, ma anche a livello Europeo, a seguito dell'evoluzione del cd. sistema digitale.

Parole chiave: Diritto penale dell'economia; reati in materia bancaria; sistema digitale; antiriciclaggio.

SOMMARIO: 1. Il reato di cui all'art. 648 bis c.p.: la tradizionale concezione normativa - 2. Criptoattività, criptovalute e la speculare configurabilità del delitto di riciclaggio; 3. Conclusioni

1. IL REATO DI CUI ALL'ART. 648 BIS C.P.: LA TRADIZIONALE CONCEZIONE NORMATIVA

Il nostro legislatore, con il passare degli anni, ha dovuto affrontare non poche difficoltà strettamente connaturate alla evoluzione, per certi versi paradossale, dei comportamenti umani volti, in punto di disvalore giuridico, a originare figure di reato del tutto nuove nonché portatrici, come logica conseguenza, di esigenze politico-criminali improntate ad arginare la proliferazione materiale di condotte riprovevoli.

Come è facilmente intuibile, ogni singola fattispecie di reato, così come contemplata dal nostro codice penale, presenta delle peculiari caratteristiche in forza delle quali si giunge ad affermare che, per l'azione posta in essere dall'autore materiale, si è configurata una determinata ipotesi di reato piuttosto che un'altra; purtuttavia, nel contesto generale, il legislatore, in molti casi, dovendosi, in qualche modo, adeguare ad una struttura logico comportamentale dell'agire umano nella quale ha colto, non solo, la chiara e netta esigenza di contrastare condotte che, per la loro peculiare natura, meritano di essere sanzionate con l'applicazione di specifiche pene, quale espressione naturale del potere legislativo, ma anche l'inevitabile assoggettamento di tale potere al giogo della metamorfosi socio-comportamentale, ha sviluppato la tendenza alla creazione di figure di reato ad ampio spettro applicativo.

Tanto premesso, l'attenzione va posta sulla figura di reato, oggetto di trattazione, della quale, prima di giungere alla analisi delle potenziali e diversificate configurazioni che verranno trattate nel paragrafo che seguirà, vengono, qui, evidenziati i precipui tratti che la rappresentano.

L'art. 648-bis c.p., nel prevedere e disciplinare il delitto di "Riciclaggio", sanziona la condotta di colui che, fuori dei casi di concorso nel reato, sostituisce o trasferisce denaro o altre utilità provenienti da delitto non colposo, ovvero compie in relazione ad essi altre operazioni, in modo da ostacolare l'identificazione della loro provenienza delittuosa. Il delitto è inserito nel titolo XIII del libro secondo del codice penale, relativo ai delitti contro il patrimonio ed in particolare nel capo II avente ad oggetto i delitti contro il patrimonio mediante frode. Tale fattispecie di reato, come poc'anzi evidenziato, può manifestarsi attraverso diverse condotte votate a celare la provenienza illecita dei proventi del reato presupposto. Il delitto di riciclaggio presenta non poche problematiche, in particolare quella incentrata sull'individuazione del bene giuridico. Sul punto vi sono diversi orientamenti dottrinali.

Secondo un primo orientamento tale delitto verrebbe, naturalmente, collocato nell'ambito dei reati che intaccano il patrimonio; ciò verrebbe giustificato non solo dalla sua stessa collocazione ma anche dal fatto che con il riciclaggio i beni, quale oggetto del cd. reato presupposto, continuerebbero ad essere distratti dal patrimonio del legittimo proprietario. Il riciclaggio, dunque, dovrebbe essere ricondotto in quella che viene definita come categoria dei "delitti di perpetuazione di una precedente condotta antigiuridica"[1].

Il concetto di patrimonio, secondo questa prima impostazione dottrinaria, non deve più essere inteso in modo stazionario ma piuttosto secondo un'accezione prettamente propulsiva.

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* Il presente contributo è stato approvato dai revisori.

[1] S. MOCCIA, *Tutela penale del patrimonio e principi costituzionali*, p. 134, Cedam, Padova 1988, secondo cui "in sostanza, i fatti di perpetuazione di una situazione antigiuridica si connoterebbero di dannosità sociale, perché con l'ulteriore trasmissione del processo illegittimo o si surroga la posizione illegittima dell'autore del reato presupposto o si fornisce a quest'ultimo un sostegno non tollerabile dal diritto e, in ogni caso, si rende più intenso il danno al soggetto passivi". Si veda ancora S. MOCCIA, *Impiego di capitali illeciti e riciclaggio. La risposta del sistema penale italiano*, p. 745, in Rivista italiana di diritto e procedura penale – ISSN 0557-1391, secondo cui-in prospettiva *de lege ferenda*- le fattispecie di favoreggiamento reale, ricettazione, riciclaggio e reimpiego andrebbero inserite nell'ambito di un titolo dedicato ai reati contro il patrimonio, all'interno di un capo che contenga ipotesi di perpetuazione di una situazione antigiuridica.

Secondo un diverso orientamento, il bene giuridico individuato, e soggetto a tutela, si identifica nell'amministrazione della giustizia. Questo rappresenterebbe una logica conseguenza sorta a seguito dell'allora modifica del 1990 che portò a qualificare il reato di riciclaggio come un solido scoglio all' identificazione della provenienza illecita dei beni.

Secondo un'ulteriore dottrina, il delitto di cui all'art. 648 bis c.p., in verità, si ergerebbe a reato plurioffensivo in quanto, oltre all'amministrazione della giustizia e al patrimonio, risulterebbero, oltremodo, tutelati l'ordine pubblico, l'ordine economico, il risparmio/investimento e la concorrenza[2].

Volgendo l'attenzione sulla cd "condotta tipica" del delitto di riciclaggio va rappresentato che la predetta, secondo il dettato normativo, si articola attraverso tre specifiche condotte: 1) sostituzione; 2) trasferimento; 3) compimento di altre operazioni.

Analizzando la condotta sostitutiva giova mettere in luce che essa risulta caratterizzata, strutturalmente, da due fasi, una prima fase a natura ricettiva, la seconda a natura di scambio. Di norma la condotta sostitutiva verte su condotte finalizzate esclusivamente ad una ripulitura materiale e non anche giuridica.

Passando al secondo tipo di condotta, il trasferimento, risulta utile evidenziare due diverse interpretazioni circa la diversa lettura che viene data a tale concetto. Secondo una prima lettura, il trasferimento, circoscrivendolo ad una concezione giuridica, va identificato nel passaggio di proprietà di determinati beni da un individuo ad un altro. Secondo una diversa lettura, nell'ambito del cd. trasferimento rientrerebbero anche le vere e proprie attività materiali raffigurate da meri spostamenti fisici di beni da un luogo ad un altro[3].

L'ultima delle condotte che dà vita alla condotta tipica del delitto di riciclaggio è rappresentata dalla condotta "altre operazioni". Con tale espressione si vogliono indicare tutte le possibili attività finalizzate ad impedire l'identificazione della provenienza illecita dei beni. Anche qui, in particolare sulle possibili attività ostative all'identificazione della provenienza illecita, si è espressa la dottrina ritenendo che, nel novero delle "altre operazioni", rientrino anche quelle forme di riciclaggio non sostanziatesi in una dazione di contraccambio, ad es. estinzione di un debito, oppure attività dirette alla cd. ripulitura materiale non sostitutiva, ad es. trasformazione di gioielli in metallo prezioso, ed infine attività di ripulitura giuridica non connaturate a trasferimenti di natura negoziale, basti pensare al falso in bilancio etc.[4].

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[2] M. ANGELINI, *Il reato di riciclaggio (art. 648-bis c.p.). Aspetti dogmatici e problemi applicativi*, Torino, 2008, 28, secondo cui l'art. 648- bis c.p. tutelerebbe una dimensione macroeconomica "richiamando così direttamente l'ordine economico e l'ordine pubblico". Conforme G. MARIA FLICK, *La repressione del riciclaggio e il controllo dell'attività finanziaria*, in Riv. it. dir. proc. pen., 1990, 1261, secondo cui la lotta al riciclaggio è una forma di tutela dell'ordine pubblico e dell'ordine economico. Si sostiene in particolare che la ricollocazione nei mercati finanziari di ingenti ricchezze di provenienza illecita inquinerebbe l'economia, il mercato, la libera concorrenza, e l'affidabilità degli intermediari finanziari.

[3] G. DONADIO, *commento sub art. 648-ter. 1*, in G. LATTANZI- E. LUPO (a cura di), Codice Penale, rassegna di giurisprudenza e di dottrina, Giuffrè, Milano, 2015, 592. *Contra* A. CASTALDO – M. NADDEO, *Il denaro sporco. Prevenzione e repressione nella lotta a riciclaggio*, p. 126., Cedam, Padova, 2010.

[4] Cfr. Cass. pen., Sez. II, 21 settembre 2016, n. 46321, (rv. 268401), in Ced Cassazione. Secondo cui "integra l'elemento oggettivo del reato di riciclaggio di un bene mobile registrato di provenienza delittuosa non solo l'alterazione o soppressione dei suoi elementi identificativi, ma anche la completa trasformazione della sua identità fisica e funzionale".

Il delitto di riciclaggio, per come è stato redatto, conduce, inevitabilmente, ad ipotizzare che ci si trovi dinanzi ad una norma imperniata da più fattispecie in quanto il mero porre in essere una o più condotte vietate, risulterebbe sufficiente ad integrare la fattispecie di reato.

Una questione particolarmente discussa è se il delitto di riciclaggio delinei un reato a forma libera o piuttosto un reato a forma vincolata. La dottrina e la giurisprudenza optano per la configurabilità del reato a forma libera; il motivo è dettato dal fatto che, accanto alle due condotte tipiche, sostituzione e trasferimento, vi è un'ulteriore condotta "innominata" mediante la quale verrebbe punito "chiunque compie in relazione al denaro, beni o altre utilità operazioni, in modo da ostacolare l'identificazione della loro provenienza delittuosa". Secondo una diversa impostazione il delitto di riciclaggio si presenterebbe come reato a forma vincolata in quanto rileverebbero le due condotte tipiche, dianzi indicate, e una innominata, altre operazioni, tutte strettamente connaturate ad una modalità operativa, la condotta, cioè, deve essere posta in essere in modo da realizzare un ostacolo circa la provenienza illecita del bene.

Considerando che, da un verso, la nozione di "altre operazioni" quale condotta "innominata" porterebbe a sanzionare condotte finalizzate ad ostacolare l'identificazione della provenienza illecita dei beni, dall'altro non tutte le operazioni di ripulitura risultano idonee ad integrare il reato di riciclaggio.

Infatti, la dottrina identifica il cd. "ostacolo" come qualsiasi mezzo antitetico allo svolgimento di una data azione o esplicazione di una specifica facoltà il cui effetto negativo si estrinseca nel ridurre la portata di tale azione o facoltà o nel ritardarne il compimento.

Pertanto, nell'ambito del riciclaggio, l'ostacolo deve essere opposto all'autorità inquirente ovvero agli altri soggetti a cui sono demandate funzioni di controllo.

Tuttavia, la nozione di ostacolo risulta essere molto ampia e di non facile interpretazione non essendovi, almeno *prima facie,* determinati criteri che possano confutarne l'effettiva sensibilità da determinare, conseguenzialmente, l'integrazione del reato.

Naturalmente il concetto di ostacolo deve comunque risultare nettamente contrassegnato da una specificità propria. Ciò per evitare che vi possano essere delle sovrapposizioni di significato sul concetto di ostacolo tra le varie fattispecie di reato.

Dunque, quello che si vuole bloccare con il delitto di riciclaggio non è il mero arricchimento ingiustificato, originato dall'acquisizione di un bene di derivazione illecita da reato, ma piuttosto l'originarsi fruttuoso dei proventi del reato. Il tutto in linea con la Convenzione di Strasburgo dell'8 novembre 1990 sul riciclaggio, ratificata con la legge 1993 n. 238, che attraverso l'art.6 imponeva ad ogni Stato di predisporre tutte le misure necessarie finalizzate a prevenire e sanzionare il "riutilizzo" dei beni illeciti, ove fosse, chiaramente, indirizzato ad un'attività di occultamento e di dissimulazione della provenienza illecita da reato.

Prima della riforma del 1990 l'oggetto materiale del reato di riciclaggio era rappresentato dal solo denaro.

Oggi, dopo la predetta riforma, l'oggetto materiale ricomprende, oltre il denaro, anche beni e altre utilità. Lo scopo della riforma fu/è quello di ampliare considerevolmente la fattispecie, inserendo, al suo interno, tutto quello che in assoluto può essere riciclato. Da ciò si può desumere che è sorta una nozione omnicomprensiva

ricomprendente, beni immobili, metalli preziosi, diritti di crediti e altrettanti beni già facenti parte del patrimonio dell'autore del reato presupposto[5].

Quindi, si potrà, pacificamente, configurare l'ipotesi del reato di riciclaggio non solo quando vi sia un accredito sul conto corrente del riciclatore il quale provvede a dare in cambio il corrispondente in denaro, ma anche in una prestazione corrispettiva di una qualche utilità consistente in un'attività o servizio.

Così come si potrebbe configurare un'ulteriore ipotesi di riciclaggio a seguito di sostituzione o trasferimento di denaro o cose mobili in cambio di beni immobili e la sostituzione dell'intestazione di beni immobili con denaro o altri valori[6].

Orbene, tutto questo ci fa comprendere come, con il passare degli anni, dall'introduzione del delitto di riciclaggio, anno 1978, con l'ausilio delle modifiche, ampliative, apportate a tale fattispecie, si è giunti, nell'epoca odierna, a dover, inevitabilmente, fare i conti con una potenziale evoluzione normativa dettata in particolare dall'espansione del cd. sistema digitale che è divenuto causa generatrice di vaste e stratificate perplessità circa la configurabilità del delitto di riciclaggio così come configurato e la necessità parallela di introdurre nuovi profili dommatici di interesse.

Il riciclaggio rappresenta infatti un fenomeno *poliedrico*, dai contorni sempre più sfumati, riferito in maniera sempre più condivisa alle organizzazioni criminali che ne sfruttano le potenzialità illecite connesse all'uso di internet ed ai servizi oramai ampiamente diffusi *di home banking*.

Recenti studi hanno dimostrato come esistano fasi di riciclaggio interamente digitale rispetto alle quali le possibilità di accedere ad un controllo del cd. Lavaggio del danaro sporco sono assolutamente scarse[7].

Tale problematica verrà dunque trattata nel paragrafo seguente.

2. CRIPTOVALUTE, CRIPTOATTIVITÀ E LA SPECULARE CONFIGURABILITÀ DEL DELITTO DI RICICLAGGIO

Giova, in via preliminare, prima di addentrarsi nella tematica che verrà trattata nel presente paragrafo.

porre ulteriore attenzione sul concetto di "valuta".

Il concetto di "valuta", come è noto, nella prassi linguistica ed economica, viene adoperato sinonimicamente a quello che viene utilizzato fisicamente, ovvero la cd. moneta nelle sue diverse forme, metallica e cartacea.

Dal punto di vista giuridico, tale concetto, tende a mutare in tutti quei casi in cui si fa riferimento a fatti e/o atti connaturati, vuoi per le loro peculiarità, vuoi per le loro diversità, ad un'autonoma e precipua disciplina giuridica.

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[5] L. DELLA RAGIONE, *Struttura della fattispecie*, in V. MAIELLO- L. DELLA RAGIONE (a cura di) *Riciclaggio e reati nella gestione dei flussi di denaro sporco*, Giuffrè, Milano, 20018, cit., passim.

[6] F. MANTOVANI, *I delitti contro il patrimonio*, Cedam, 2014 cit., passim.

[7] Si veda E. SIMONCINI, *Il Cyberlundering: La "nuova frontiera" del riciclaggio*, in Riv. trim. dir. pen. econ., n. 4, 2015

Orbene, la valuta è caratterizzata da un duplice veste: la prima come strumento atto a regolamentare i cd. rapporti di natura economica e finanziaria che posso sorgere sia tra individui appartenenti allo stesso Stato che tra i predetti ed individui di uno Stato estero; la seconda lo identifica come "bene" suscettibile di interessi negoziali. Ora, in merito alla prima veste va osservato che la disciplina trova risoluzione in quelle che sono le regole proprie dell'ordinamento valutario, in particolare le norme relative a rapporti giuridici che danno vita a movimentazioni di capitali fra soggetti che risiedono nel medesimo Stato e quelli che non vi risiedono nonché attraverso un'apposita organizzazione generata dallo Stato per garantire il corretto funzionamento del sistema valutario; la seconda veste, invece, identifica la valuta come un oggetto destinato all'attuazione di negoziazioni, individuando, al contempo, la natura della prestazione che un soggetto deve riconoscere ad un altro.

La disciplina valutaria deve essere interpretata come un chiaro e netto intervento dello Stato nell'ambito economico diretto a regolamentare le movimentazioni di capitali fra soggetti residenti nello Stato di appartenenza e soggetti, a qualsiasi titolo, non residenti. Ciò porta a comprendere, inoltre, come il contenuto di una siffatta disciplina sia intrisa da una certa relatività, potendo essere oggetto di eventuali modifiche dettate da esigenze finalizzate a tutelare l'economia e la finanza pubblica.

Ciò premesso, giova, oltremodo, osservare come l'evoluzione della legislazione valutaria si estrinsechi quale diretto riflesso di una politica sempre più indirizzata verso una più che ampia liberalizzazione degli scambi commerciali.

Passando alle tematiche oggetto di trattazione, è opportuno interrogarsi, in primo luogo, su cosa siano le cd. criptovalute. Attualmente, nell'ordinamento italiano, non risulta ancora del tutto possibile predisporre una concisa definizione né prevedere una vera e propria regolamentazione che individui precipuamente ciò che possa rientrare nell'alveo descrittivo delle cd. criptoattività.

Una prima nozione è stata elaborata dal D.lgs. n.90 del 2017 ed inserita nella legge antiriciclaggio[8]. Dunque, questa cd. "valuta virtuale" non sarebbe altro che la "rappresentazione digitale di valore, non emessa da una banca centrale o da un'autorità pubblica, non necessariamente collegata a una valuta avente corso legale,

[8] La lotta al riciclaggio in ambito europeo è disciplinata da cinque Direttive. La prima ha imposto a imposto a banche e intermediari finanziari gli obblighi di identificazione della clientela, di registrazione dei dati e delle operazioni sospette, nonché di segnalazione alle autorità delle operazioni sospette di riciclaggio. La seconda ha esteso l'ambito di applicazione della disciplina antiriciclaggio anche alle attività di case da gioco e case d'asta, alle attività di commercio di metalli e pietre preziose nonché ai liberi professionisti. La terza ha introdotto un dovere di collaborazione attiva anche di assicurazioni e professionisti nella prevenzione al riciclaggio. La quarta ha ad oggetto la disciplina dei rischi del sistema finanziario e il coordinamento delle attività di prevenzione e vigilanza. La quinta, di recente introduzione, ha ampliato la portata della normativa antiriciclaggio includendovi anche i prestatori di servizi di cambio tra valute virtuali e valute legali, i prestatori di servizi portafoglio digitale, i galleristi e i gestori di case d'asta e gli antiquari, chiamati ad operare una collaborazione prooattiva. In Italia, già prima dell'adozione della V Direttiva, come si vedrà nelle pagine seguenti, era stato già previsto un sistema di regolamentazione dei cambia-valute virtuali. Si veda L. TROYER-MONICA ZANCAN, Giurisprudenza e attualità Giurisprudenza e attualità in materia di diritto penale d'impresa, in Riv. dott. comm., n. 3, 1 giugno 2018, p. 521 e S. DE FLAMINNEIS, *Gli strumenti di prevenzione del riciclaggio*, in Dir. pen. cont. – Riv. trim., 5, 2017, p. 259 ss.

utilizzata come mezzo di scambio per l'acquisto di beni e servizi e trasferita, archiviata e negoziata elettronicamente".

La definizione, sopra richiamata, risulta, in verità, poco esaustiva e ciò ha condotto a dubitare sulla natura giuridica delle valute virtuali. Nel corso degli anni numerose e diverse sono state le letture proposte della norma. Invero, le critiche erano, in particolar modo, incentrate sull'incertezza del regime giuridico da attribuire ad esse. I primi contributi vennero forniti dalla giurisprudenza di merito. Il primo contributo venne dato dal Tribunale di Brescia il 25 luglio del 2018 e il secondo, mediante decreto, dalla Corte di Appello di Brescia il 24 ottobre del 2018, interventi entrambi dedicati al tema dell'uso delle criptovalute nell'ambito societario. Secondo il Giudice di primo grado di Brescia le criptovalute devono qualificarsi come "beni". Al contrario, la Corte d'Appello ritiene che le criptovalute vadano intese similarmente alla "moneta". Entrambe gli interventi presentano profili di debolezza.

Orbene, il considerare le criptovalute come un bene giuridico ha sollevato non poche e paradossali perplessità in quanto l'attribuzione di diritti di esclusiva sui beni immateriali, di norma, viene, nettamente, regolata, nel nostro ordinamento, da un principio di stretta tipicità. Ciò non può significare altro che il diritto sul bene immateriale esiste solo se esiste una norma che lo riconosca e nel caso delle criptovalute una norma non si rinviene, o meglio si rinviene, ma in alcun modo riconosce che un'informazione o un numero sia, a tutti gli effetti, un bene giuridico immateriale.[9]

Non risulta, in alcun modo, agevole equiparare le criptovalute alla "moneta". La ragione è data dal fatto che non rientrano in nessuna delle svariate ricostruzioni offerte dalle diverse norme che si occupano della valuta[10].

Sarebbe, di gran lunga, preferibile parlare di "bene" verificando se siffatti beni siano, o meno, riconducibili nell'ampia categoria dei cd. "prodotti finanziari", identificati dall'art. 1, comma 1, lett. *u*) del T.U.F. come "gli strumenti finanziari e ogni altra forma di investimento di natura finanziaria", giustificando, in tal senso, la riconoscibilità, nell'ipotesi comune, delle criptovalute aventi funzioni di "investimento a natura finanziaria"[11].

Quanto esposto non può circoscriversi al solo concetto di valute virtuali, ma va, ampiamente, esteso all'intero settore delle criptoattività, di cui le criptovalute rappresentano la tipologia più significativa e diffusa.

È bene ricordare che il concetto di criptoattività è particolarmente articolato e mellifluo, perché tende a manifestarsi attraverso un conglomerato di "entità" declinabili secondo una pluralità di modalità, che possono riconoscere, ai titolari, diritti estremamente diversi, anche non direttamente riferibili a interessi di natura non finanziaria. Le criptovalute vengono, comunemente, denominate come *currency token*, ovvero criptoattività la cui precipua funzione consiste nell'essere adoperate per pagare servizi o per acquisire altri beni. Beneficiando della

[9] In De Jure – Banche dati editoriali GFL.

[10] Cfr. A. LIVI, *Le criptovalute nella giurisprudenza, ne I diversi settori del Fintech*, a cura di E. CORAPI – R. LENER, Milano, Wolters Kluwer, 2020, 111 ss.

[11] Cfr. R. LENER, N. LORENZOTTI, *Virtual Currency Regulation in Italy, in The Virtual Currency Regulation Review.Law Business Research* Ltd.5, 2022, 174 ss.

cd. "catena decentrata", differiscono, logicamente, dalle vere e proprie valute, in quanto non possiedono una speculare "circolazione legale" né tantomeno risultano essere oggetto di emissione ad opera di istituzioni finanziarie centrali.

È utile rappresentare che, in quest'area, sono, notoriamente, diffusi i cd. *bitcoin*, le c.d. *stablecoin*. Sono delle figure in cui si possono rinvenire i tratti tipici del denaro, quale mezzo di scambio, conservazione del valore e unità di conto.[12] Le criptovalute vengono, abitudinariamente, impiegate come strumento di pagamento, ove vi sia una loro accettazione, con funzione solutoria, da entrambe le parti di una transazione. Per questa ragione vanno, oltre che intese, anche qualificate come "strumento di pagamento privato" o, anche, da un punto di vista atecnico, come "valuta privata", il cui valore è connaturato all'offerta e alla domanda nell'ambito del mercato di riferimento.

Una sottocategoria, delle criptovalute, che sta acquisendo sempre maggiori spazi è delineata dalle citate *stablecoin*. La funzione di una simile sottocategoria è quella di mantenere un prezzo "stabile", in ragione del suo legame con una specifica valuta.

Va quindi osservato che un primo tentativo volto a regolamentare, in Italia, altre figure di criptoattività, crypto-asset, e più in generale la tecnologia "a registri distribuiti", Distributed Ledger Technology o DLT, lo si deve all'art. 8 ter del decreto legge 14 dicembre 2018, n. 135, c.d. Decreto Semplificazioni, e a quelle che sono state le prime definizioni, in esso contenute, di smart contract e *DLT*.[13]

In verità, il legislatore aveva delegato l'Agenzia per l'Italia Digitale affinchè emanasse un apposito regolamento di attuazione indicando degli standard specifici che le dianzi DLT avrebbero dovuto adottare per generare gli effetti di una registrazione temporale elettronica nonché un processo di identificazione, mediante il quale, gli *smart contracts* avrebbero adottato per essere "riconosciuti". Tuttavia, il regolamento non ha, tutt'ora, visto la luce.

Più di recente, occorre tener conto di quanto previsto nel c.d. Regolamento MICA[14] per il tramite del quale il legislatore europeo ha definito un quadro uniforme di regole in materia di criptoattività.

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12 B. GEVA, *Cryptocurrencies and the Evolution of Banking, Money and Payments, in Brummer, Cryptoassets: Legal, Regulatory and Monetary Perpectives*, 2019, 12 ss.

13 I commi 1 e 3 dell'articolo 8-ter del Decreto Semplificazioni affermano che le DLT sono tecnologie e protocolli informatici che utilizzano un registro «condiviso, distribuito, replicabile, simultaneamente accessibile e architetturalmente decentralizzato su basi crittografiche». Siffatto registro è tale da consentire la registrazione, la convalida, l'aggiornamento e la conservazione dei dati (sia liberamente che tutelati da ulteriori mezzi crittografici). Esso consente a ciascuno dei suoi partecipanti di verificare tali dati. I dati così caricati non possono essere modificati o alterati in alcun modo. Il caricamento di documenti tramite DLT ha gli effetti di validazione temporale elettronica ai sensi dell'articolo 41 del regolamento (UE) 910/2014.Inoltre, il comma 2 dell'articolo 8-ter del Decreto Semplificazioni definisce smart contract il software operante su una DLT, la cui esecuzione vincola automaticamente due o più parti e che produce gli effetti che le parti hanno definito prima dell'esecuzione. Si ritiene che gli smart contract soddisfino il requisito della forma scritta a condizione che gli utenti siano identificati attraverso un processo di identificazione conforme alle linee guida emanate dall'Agenzia nazionale per la digitalizzazione.

14 Pubblicato nella Gazzetta ufficiale dell'Unione europea del 9 giugno 2023 il Regolamento (UE) 2023/1114 relativo ai mercati delle cripto-attività (crypto-asset), c.d. Regolamento MiCA o solo MiCAR (Markets in Crypto-assets Regulation).

Oggi ciò che ha consentito di effettuare un'indagine sulle diverse figure di criptoattività è la prassi, di cui anche il legislatore ha tenuto conto nell'individuazione delle fattispecie indicate nel MICAR.

Infatti, sono state individuate, oltre alle criptovalute, anche i token di investimento in cui vi rientrano i token azionari, di debito e i c.d. *security token*, ed infine i *token* di utilità.[15] *Mox*, i token di investimento sono criptoattività che riconoscono e, dunque, conferiscono ai titolari diritti economici, tra i quali, principalmente, il diritto al dividendo, e/o di *governance*, come il diritto di voto, sulle società emittenti. Naturalmente, essi, sono strutturati anche secondo uno schema di sottoclassi e per la precisione in: 1*) equity token*, se vengono riconosciuti ai titolari diritti analoghi a quelli che normalmente verrebbero riconosciuti agli azionisti; 2) *token* di debito, quando risultano uniformabili alle obbligazioni; e, infine, 3) i *security token*, categoria residuale al cui interno sono presenti tutte le altre tipologie di token che vengono, di norma, offerte al pubblico.

I *token* di utilità, invece, si identificano nei cd. cripto-asset in forza dei quali vengono conferiti ai loro possessori delle utilità funzionali, come il diritto di ottenere un prodotto o, nella maggior parte dei casi, il diritto di accedere ad uno specifico servizio o addirittura di vedersi riconosciuto un mero sconto sul prezzo di un prodotto o servizio. In un'ottica funzionale, i token di utilità possono pacificamente ergersi come rappresentazione sulla DLT di un "diritto del consumatore" rispetto a un prodotto offerto dall'emittente.

La Consob, in un suo Rapporto finale del 2 gennaio 2020, ha disconosciuto l'utilizzo della tecnologia DLT come strumento atto a produrre una definizione qualificante la categoria delle criptoattività in quanto alcune tipologie, rientranti nel concetto di criptoattività, sono potenzialmente passibili di diversificate costruzioni. Quello che andrebbe, concretamente, accertato è se gli investment token possano assumere le vesti di strumenti, o prodotti, finanziari, con la conseguente applicazione della relativa disciplina e, in particolare, delle regole in materia di prospetto informativo.

La questione è senz'altro scabrosa. Invero, ciò che merita di essere stigmatizzato è che i token di utilità non rientrano nella disciplina finalizzata a regolamentare i mercati finanziari, né in quella del mercato bancario, in quanto non assumono le forme né di uno strumento di pagamento, né le forme di un investimento finanziario. Attualmente, in Italia, emettere utility token risulta, in *prima facie*, possibile senza la relativa pubblicazione di un prospetto e senza l'esigenza di ottemperare a specifici requisiti, fatto salvo il rispetto della disciplina preventiva del riciclaggio. Va da sé che per tutti gli altri token, intrisi di certa "versatilità", si impone di dar vita ad un'analisi delle singole fattispecie in ossequio a quelle che sono le definizioni generali di "strumenti finanziari" e "prodotti finanziari" dettate dal Testo Unico della Finanza[16].

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[15] Si veda P. HACKER, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, in *European Company and Financial Law Review*, 2018, 12, anche S.L FURNARI - R.A. LENER, Contributo alla qualificazione giuridica dell'offerta al pubblico di utility token (anche) alla luce della proposta di regolamento europeo sulle criptoattività, in *Bocconi Legal Paper*, 16, 2021.

[16] Cfr. Hacker, Thomale, Crypto-Securities Regulation: Speak, If You Can: What Are You? An Alternative Approach to the Qualification of Tokens and Initial Coin Offerings, in Bocconi Legal Studies Research Paper No. 2636561, 2019; Boreiko, Ferrarini, Giudici, Blockchain Startups and Prospectus Regulation, in European Business Organization Law Review, 20, 2019.

Tanto premesso, un profilo interpretativo, di estremo interesse, può essere tratto dall'inquadramento nel delitto di riciclaggio, di cui all'art. 648 *bis* c.p., della materiale apprensione dei cd. Bitcoin attraverso i sistemi digitali. Secondo numerosi autori, il delitto previsto e disciplinato dall'art. 648 bis c.p. costituisce, senza margini di dubbio, il principale rischio nettamente connaturato all'utilizzo dei cd. bitcoin[17].

Tale questione, di grande rilevo, venne affronta una prima volta nel Rapporto del 2013 dell'Unità di Informazione finanziaria per l'Italia, U.I.F., in cui la Banca d'Italia annunciò che erano stati messi in moto accurate investigazioni sul potenziale rischio di riciclaggio e finanziamenti di natura terroristica mediante i bitcoin.

Lo stesso direttore della U.I.F. corroborò l'esigenza di attuare tali indagini a seguito di alcune segnalazioni ricevute e vertenti su anomale compravendite internazionali[18]. La stessa Autorità Bancaria Europea. E.B.A., congiuntamente alla Banca Centrale di Francoforte e all'Autorità Europea di vigilanza sui mercati, E.S.M.A., ha notevolmente stigmatizzato il rischio delle monete virtuali[19].

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17 Si veda, tra i vari, U. BECHINI – M. C. CIGNARELLA, *Antiriciclaggio -compravendita di immobili – pagamento del prezzo in bitcoin*, Quesito antiriciclaggio n. 3/2018, in Not., 20 marzo 2018. Secondo gli AA. Ogni acquisto di un immobile pagato in bitcoin dovrebbe essere oggetto di una segnalazione antiriciclaggio. Questo in ragione della natura intrinsecamente anonima della moneta virtuale. Conforme R. BOCCHINI, *Lo sviluppo della moneta virtuale: primi tentativi di inquadramento e disciplina tra prospettive economiche e giuridiche*, in Dir. inform., n. 1, 2017, p. 46. Secondo l'Autore i bitcoin potrebbero consentire ai riciclatori di spostare fondi illeciti in maniera veloce, economica e discreta. Tale nuova tecnologia informatica permetterebbe a qualsiasi utente di trasferire moneta, a velocità quasi istantanea, nonché a bassissimo costo, nel più perfetto anonimato virtuale e in assenza di una qualche minima tracciabilità. Dello stesso avviso S. CAPACCIOLI, *Criptovalute e bitcoin: un'analisi giuridica*, Giuffrè, Milano, 2015, p. 251, secondo cui i bitcoin, quale mezzo anonimo, criptato e affidabile per il trasferimento di fondi tra le parti, possono rappresentare uno strumento interessante per gli attori dell'economia illegale sommersa.

18 Si veda Unità di Informazione Di informazione Finanziaria Della Banca Di Italia, Rapporto Annuale 2013, n. 6, maggio 2014, p. 34. Secondo L'UIF il valore dei bitcoin è estremamente volatile ed espone gli utilizzatori a significativi rischi di speculazione. Inoltre, non vi sarebbero garanzie o forme di controllo che tutelino i clienti o le società che gestiscono i bitcoin. Si aggiunge che le operazioni in bitcoin, pur registrate in appositi database consultabili in rete, non consentano di identificare i soggetti intervenuti nelle transazioni, facilitando così lo scambio di fondi in forma anonima e l'utilizzo di tale strumento di pagamento nel contesto dell'economia illegale. Secondo l'UIF, poi, nel corso del 2014 sono pervenute alcune segnalazioni di operazioni sospette relative ad acquisti o vendite di valute virtuali, ritenute "opache" in ragione del profilo soggettivo del cliente, della natura delle controparti spesso estere, ovvero delle modalità di realizzazione delle operazioni tramite, ad esempio, l'utilizzo di contante o di carte di pagamento. Preoccupazioni confermate il 19 aprile 2016, in sede di audizione alla Commissione Finanze della Camera dei Deputati. In questa occasione, Claudio Clemente, direttore dell'UIF, ha sostenuto che i rischi di riciclaggio possono derivare da canali informali e innovativi, non ancora sottoposti a regolamentazione. È il caso delle valute virtuali, es. i bitcoin, che, pur non essendo moneta legale o elettronica, sono utilizzate come mezzo di pagamento. In argomento, si veda altresì Banca Di Italia, Avvertenza per i consumatori sui rischi delle valute virtuali da parte delle Autorità europee, 19 marzo 2018. Conforme Banca Di Italia, Rapporto sulla stabilità finanziaria, n. 1 aprile 2018.

19 In una comunicazione del 12 dicembre 2013, l'Eba ha segnalato una serie di rischi connessi all'utilizzo dei bitcoin. Preoccupazioni confermate in data 4 luglio 2014, in un parere indirizzato al Consiglio dell'Unione Europea, alla Commissione e al Parlamento europeo. Nel documento vengono sottolineati i rischi connessi all'utilizzo delle valute virtuali e illustrati i benefici potenziali. Successivamente, in data 11 agosto 2016, l'Eba ha pubblicato un nuovo parere indirizzato alla Commissione Europea, contenente sette proposte di regolamentazione.

Tale problema è stato, concordemente, affrontato dalla Procura generale di Roma[20]. Secondo il Procuratore generale, i bitcoin non consentono di individuare una chiara e limpida tracciabilità e, come un cavallo di Troia, facilitano, con il loro impiego, la proliferazione di attività dirette al riciclaggio di denaro, al finanziamento terroristico, alle mafie e ai traffici illeciti. Invero, nel caso in cui vi dovesse essere un trasferimento di bitcoin, non sarebbe possibile intravedere una qualche forma di garanzia al fine di individuare, prontamente, quella che è la reale identità dei soggetti coinvolti.

I bitcoin, dunque, non sono altro che strumenti, facilmente, adoperabili da parte di criminali, terroristi, finanzieri e evasori. Sulla stessa linea d'onda ritroviamo anche il Gruppo d'azione finanziaria, la Financial action task force, Gafi-Fatf, un organismo intergovernativo indipendente atto a valorizzare lo sviluppo e la promulgazione di politiche poste a salvaguardia del sistema finanziario globale contro il riciclaggio, il finanziamento del terrorismo e la proliferazione di armi[21].

Il riciclaggio si presenta come una fattispecie dotata di diverse sfaccettature e fortemente legata ad una struttura criminale di tipo organizzativo. È un fenomeno attraverso il quale un individuo, o altra entità, mira, artatamente, a oscurare la fonte illegale o l'illegale utilizzo di redditi larvando gli stessi in modo da farli apparire legittimi. Sono tre i momenti rappresentativi del riciclaggio: 1) il placement, attività che si sostanzia nel collocare i proventi illeciti nel mercato[22]; 2) il *layering*, ovvero attività diretta a mascherare la provenienza illecita del bene[23]; e, infine, 3) *l'integration*[24], attività atta a reinserire la ricchezza ripulita nel mercato finanziario. Fino agli anni ottanta, e prima ancora delle riforme modificative, il delitto di riciclaggio presentava una struttura bifasica ovvero due soli momenti: il *money laundering*, attività prettamente indirizzata a dissimulare l'origine illecita dei beni e la *recycling*, identificativa di una condotta finalizzata alla rimessioni in circolo dei capitali. Con l'evoluzione dei sistemi informatico/digitali sono sorte nuove modalità destinate a riciclare proventi illeciti; infatti, si suole parlare di *cyberlaundering* per indicare quelle attività di riciclaggio che prendono vita tramite internet. Il fenomeno si diffuse, alla fine degli anni 90, per effetto delle nuove tecnologie adattate al settore dell'attività bancaria e finanziaria. Ciò consentii di effettuare transazioni di ricchezza transfrontaliero, senza l'ausilio di intermediari istituzionali.

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20 Si veda E. QUARANTINO, Allarme del Pg di Roma, da bitcoin rischi riciclaggio e terrorismo, in Ansa.it, 9 luglio 2014.

21 Si veda Financial Action Task Force, Virtual Currencies Key Definitions and Poten al AML/CFT Risks, giugno 2014. Si veda A. MINCUZZI – R. GALULLO, Bitcoin, *Il riciclaggio invisibile di mafie e terrorismo internazionale*, Ilsole24ore.it, 7 febbraio 2017.

22 Riguardo alla prima fase del riciclaggio, ossia il placement, si veda A. M. STILE, *voce Riciclaggio e reimpiego di proventi illeciti*, in Enc. giur. Treccani, Roma, 2009, p. 4, secondo cui, nella fase in commento, si verifica l'allontanamento del denaro o dei beni di origine delittuosa dallo scenario del crimine, mediante una loro collocazione provvisoria che renda difficoltoso individuarne l'origine e ne consenta la successiva pulitura.

23 Riguardo alla seconda fase del riciclaggio, ossia il layering, si veda P. MAGRI, *I delitti contro il patrimonio mediante frode*, Cedam, Padova, 2007, p. 444. Secondo l'Autore i trasferimenti elettronici costituiscono il metodo più moderno e insidioso di riciclaggio. Le transazioni elettroniche, infatti, sono veloci e garantiscono un rilevante anonimato, anche in considerazione del fatto che il numero di operazioni che quotidianamente vengono effettuate su scala globale è enorme.

24 Riguardo alla terza fase del riciclaggio, ossia l'integration, si veda A. M. STILE, op. cit., secondo cui la fase dell'integrazione consiste nel reimpiego dei proventi ripuliti nei circuiti economico-finanziari legali.

Una serie di operazione che, prima della nascita di un siffatto sistema, potevano essere effettuate solo fisicamente presso gli appositi nonché preposti sportelli bancari. Attualmente, attraverso un dispositivo fisso o mobile, ovvero un computer portatile o smart/phone, è possibile effettuare tali tipi operazioni mediante un apposito servizio denominato home banking.

Il *cyberlaundering* può assumere due forme: in primo luogo come "riciclaggio digitale strumentale", in secondo luogo come "riciclaggio digitale integrale".

La prima forma prende piede quando una sola delle tre fasi viene realizzata digitalmente. Si configura, per esempio, una ipotesi di placement digitale nel cd. *smurfing,* ovverosia il segmentarsi di somme da riciclare nell'oceanica attività di transazione al fine di mascherare l'operazione di ingresso nel sistema raggirando le regole di reporting. Una ipotesi di *layering* è ravvisabile nell'utilizzo della cd. "smart card" ossia una tipo di carta di credito ricaricabile e monouso. L*'integration*, invece, si configura, comunemente, nel commercio elettronico, anche attraverso l'acquisizione di metalli e pietre preziose[25].

Nella forma del "riciclaggio digitale integrale", invece, ogni fase, oggetto di un processo di lavaggio del denaro sporco, si realizza tramite la modalità on line. Quindi, il denaro, essendo stato oggetto di tale attività riciclatrice, risulterebbe disponibile già nella sua forma digitalizzata rendendo le relative procedure di *laundering* approssimativamente più semplici e veloci.

Sulla scorta di quanto sinora trattato una particolare attenzione deve dedicarsi, perché si configuri tale fattispecie, all'acquisto dei bitcoin mediante il denaro di provenienza illecita secondo lo schema del cd. riciclaggio digitale integrale.

In questa particolare ipotesi, il denaro, che viene impiegato per il relativo acquisto, essendo già digitalizzato non comporta alcun passaggio dal mondo fisico al mondo virtuale. Ciò che si ha è solo la mera sostituzione del denaro digitale con i cd. bitcoin. Ciò che va osservato, nonostante le numerose difficoltà riscontrabili in un sistema digitale di tale portata, è il passaggio da un bene fungibile ed evasivo come il denaro ad uno infungibile, intriso di trasparenza e verificabilità, come i bitcoin.

Quindi, nella forma del "riciclaggio digitale integrale", l'acquisizione di bitcoin con l'impiego di denaro, avente una provenienza illecita, non produce difficoltà ostative circa l'individuazione della provenienza illecita del bene[26]. Nel caso de quo, invero, l'intera operazione risulta tracciata. Con l'acquisto dei bitcoin non si origina

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[25] Si veda E. SIMONCINI. Secondo l'Autore il "riciclaggio digitale integrale" è rappresentato da quel procedimento in cui tutte le diverse fasi del procedimento di lavaggio del denaro sporco vengono realizzate on line. Nel cyberlaundering integrale, in particolare, il riciclaggio inizia con "l'inserimento nel circuito legale dell'economia di capitali di provenienza illecita che già risultano disponibili su conti on line allo "stato digitale", senza la necessità di alcun contatto materiale tra il riciclatore ed il contante".

[26] Si veda V. MAIELLO, *Il riciclaggio: fenomenologia ed evoluzione della fattispecie normativa*, in V. MAIELLO – L. DELLA RAGIONE, p. 6, secondo cui: "il riciclaggio di maggiore consistenza non può che avvalersi di strumenti ben più sofisticati, quali complesse operazioni finanziarie di copertura. Gravi pericoli sono stati paventati anche con riferimento alle transazioni in monete virtuali, come i bitcoin, in quanto avvengono nell'anonimato dell'utente. È però possibile osservare, sdrammatizzando, che nel momento in cui i bitcoin sono scambiati in una valuta ufficiale l'intermediario identifica l'operatore, ed è perciò possibile risalire all'indietro attraverso i vari passaggi compiuti dal denaro".

alcun tipo, benché evidente, di attività occultatrice. Comunemente l'acquisizione viene remunerata attraverso un bonifico o con carta di credito, consentendo, all'autorità preposta, di risalire all'illecito presupposto con estrema facilità. Inoltre, nel caso di cambio-valute virtuali, così come previsto dalla recente normativa antiriciclaggio, d.lgs. 25 maggio 2017 n. 90, l'identificazione dell'utente è obbligatoria. La particolarità dei bitcoin è l'essere registrati sulla "blockchain", ovvero un meccanismo di database avanzato che permette la condivisione trasparente di informazioni all'interno di una rete aziendale; tale meccanismo consente una piena visibilità di tutte le vicende che interessano ogni singola unità a costo zero e permanentemente. Un simile sistema, dotato di una indubbia trasparenza, consente di ottenere, una volta individuato un bitcoin sospetto, tutte una serie di notizie sui suoi possibili utilizzatori, sin dall'origine della "blockchain".

Tuttavia, in molti casi, gli autori del riciclaggio sono abili nel far ricorso a degli espedienti al fine di occultare il provento del reato. Infatti, potrebbero, ad esempio, caricare del denaro di provenienza illecita su delle carte di credito prepagate, cd. *prepaid cards*, effettuando, in tal modo, gli acquisti di moneta virtuale in perfetto anonimato. Va precisato, però, che, in una simile ipotesi, l'operazione occultatrice dei proventi illeciti non si verifica con l'acquisto di moneta virtuale, ma piuttosto, come primo atto, con l'utilizzo delle *prepaid cards*. L'utilizzo delle *prepaid cards* suole identificarsi in quella tipica operazione di *layering* digitale; in altri termini, se l'utente adopera le carte prepagate, il problema non sono i bitcoin, bensì le carte di credito prepagate.

Ciò vale anche nell'ipotesi in cui si adoperi una società *off shore*, la quale, dopo aver racimolato un gran numero di provviste di provenienza delittuosa, converte le stesse in bitcoin mediante degli *exchangers* sottratti agli obblighi antiriciclaggio. In tal senso, tale operazione avverrebbe, primariamente, su indirizzi intestati alla stessa persona giuridica e, secondariamente, trasmigrati su molteplici portafogli virtuali appartenenti ad altrettanti schermi societari, giungendo, infine sul cd. *wallet* della persona fisica la quale procede alla conversione e, logicamente, alla riemersione nel circuito delle valute aventi corso legale. A rigor di logica, il problema, anche in tale ipotesi, non sono i bitcoin ma la società *off shore*.

L'operazione riciclatrice si sostanzia nel momento in cui i proventi illeciti vengono racimolati dalla società che opera in uno Stato non tracciabile. È questo che, quale fulcro del problema, pone non pochi ostacoli circa l'attività di accertamento della provenienza illecita dei beni e non il semplice acquisto dei bitcoin.

La pura conversione del denaro in moneta virtuale non comporta nessuna attività dissimulatoria in quanto vi è una chiara e trasparente tracciabilità. La moneta virtuale sembrerebbe assumere le sembianze del famoso cavallo di Troia. Infatti, se ogni singolo riciclatore decidesse di investire un gran numero di capitali in bitcoin rischierebbe di attirare a se, inevitabilmente, le attenzioni degli organi di polizia.

Più che ergersi come ostacolo all'accertamento dell'illecita provenienza delittuosa della *res*, i bitcoin, all'opposto, consento di disvelare attività illecite.

È utile figurare che vi è stato uno studio condotto da Agipronews in collaborazione con il Politecnico di Milano in cui si è dimostrato che l'utilizzo dei bitcoin, per finalità illecite, risulta di gran lunga più rischioso rispetto all'uso del denaro elettronico o dei trasferimenti bancari. Si è stigmatizzato, ampiamente, che i bitcoin,

non solo, rappresentano una delle monete più tracciabili, ma che tutte le relative transazioni, siano esse lecite o illecite, sono perfettamente visionabili a costo zero e permanentemente.

Giova, inoltre, rappresentare che è stato redatto un report dalla cd. Elliptic[27], società dedicata ai rischi delle criptovalute, e dal *Center on Sanction and Illicit Financing*, programma della *Foundation for Defense of Democracies*, ente non profit dedito alle questioni incentrate sulla politica estera e sulla sicurezza nazionale[28].

Lo studio, attraverso un'accurata analisi di un ristretto quantitativo di transazioni verificatesi tra il 2013 e il 2016, ha potuto riscontrare vastissime tendenze a realizzare attività illecite con l'ausilio dei bitcoin.

Nonostante ciò, gli esperti hanno potuto affermare che le vaste quantità di operazioni illecite, poste in essere con i bitcoin, risultano molto scarne; non a caso la percentuale individuata corrisponde solo all'1% di tutte le transazioni entrate negli appositi servizi di conversione.

Il report ha, naturalmente, predisposto determinate tecniche informatiche perché si possano identificare le movimentazioni dei cd. bitcoin sospetti: la prima si identifica nella bitcoin forensic e la seconda nella bitcoin intelligence. Con la prima tecnica si suole indicare "l'utilizzo di strumenti statistici per aggregare le transazioni e identificare gli utenti"[29]; con la seconda tecnica si vogliono indicare tutte quelle operazioni di monitoraggio della blockchain con il chiaro scopo di individuare gli indirizzi potenzialmente soggetti a riciclaggio[30] nonché fornire una percentuale probabilistica connessa ad ogni specifica transazione[31].

Attualmente numerose aziende, specializzate in questo settore, si sono attivate con spirito collaborativo offrendo attività di consulenza alle autorità preposte. Tra le più spiccano la Neutrino S.r.l., azienda che si occupa principalmente di calcolare i rischi di riciclaggio legati ad ogni singola transazione in bitcoin e la Blockchain Intelligence Group di Vancouver che svolge le identiche attività della Neutrino s.r.l.[32].

Tutti questi studi, applicati al caso de quo, potrebbero assumere le vesti della migliore scienza ed esperienza in grado di escludere la pericolosità di una simile condotta.

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[27] Elliptic è una società che si occupa della diffusione delle criptovalute nel mondo della finanza. Per garantire questo progetto, i suoi fondatori stanno combattendo una battaglia contro le attività illegali realizzate con le monete virtuali. Questo soprattutto per impedire ai criminali di minare gli ideali su cui sono costruite le criptovalute.

[28] La Fondazione per la difesa delle democrazie, FDD, è un ente no profit, fondato nel 2001, che si occupa di politica estera e di sicurezza nazionale. Nel corso degli anni la FDD ha organizzato numerosi eventi per sostenere la ricerca politica, per promuovere una educazione alla democrazia, nonché per combattere il terrorismo.

[29] Si veda S. CAPACCIOLI, *Criptovalute e bitcoin*, cit., p. 264, secondo cui potrebbero essere svolte sulla blockchain due tipologie di indagini: a) live analysis, ovvero accesso alla blockchain, analisi della stessa e tracciamento degli indirizzi, al fine di prevenire condotte criminose; b) Post mortem analysis, ovvero individuazione di un determinato utente, dopo la scoperta di una transazione sospetta.

[30] Ibidem

[31] Ibidem

[32] P. DAL CHECCO, *Nasce il Blockchain Intelligence Group Japan*, in Bitcoinforensics.it, 27 aprile 2017.

Secondo quanto affermato dalla dottrina[33], il cd. pericolo si manifesterebbe quando, a seguito di una prognosi postuma *ex ante*, secondo il dettato della migliore scienza ed esperienza, risulti probabile che dalla condotta ne derivi, come conseguenza, l'evento lesivo.

Alla luce dei dati sin qui forniti, illustrati ed esaminati non è possibile ravvisare una sostanziale esistenza di un pericolo in quanto non è, allo stesso tempo, possibile discernere ostacoli capaci di ostacolare l'accertamento della provenienza delittuosa del bene.

3. CONCLUSIONI

A conclusione di questa breve disamina sulla esistenza di un legame tra l'utilizzo dei bitcoin e la configurabilità del delitto di cui all'art. 648 bis c.p. è utile osservare come in altri ordinamenti e precisamente in quello statunitense siano intervenute pronunzie di segno contrario relativamente al rapporto tra riciclaggio e bitcoin, affermando e negando la sussistenza della fattispecie incriminatrice in base alla scelta di definizione dei bitcoin quale strumento di pagamento o meno.

Il riferimento è a due pronunzie delle corti statunitensi che si sono occupate di vicende processuali note che hanno dapprima affermato la natura di moneta dei bitcoin (Corte distrettuale degli Stati Uniti del 2014) ritenendo che gli stessi possano essere facilmente acquistati in cambio della valuta ordinaria e vengono utilizzati per effettuare transazioni finanziarie per cui viene affermato che essi sono atti a porsi quale strumento di riciclaggio : e che successivamente hanno ritenuto (Corte della Florida case 20923 del 2016) che la cessione dei bitcoin non configuri illeciti non essendo questi moneta dello Stato o un bene equipollente e non in grado di produrre transazioni finanziarie che sono solo quelle che hanno ad oggetto strumenti di pagamento.

Sebbene nel nostro ordinamento il delitto di riciclaggio abbia una portata più estesa rispetto alla sola moneta, sarebbe comunque importante pervenire ad una definizione tipizzata del bitcoin e stabilire se esso costituisca un bene diverso dalla moneta ed interamente virtuale.

Ciò consentirebbe di escludere il delitto di riciclaggio nel caso di acquisto di moneta virtuale attraverso operazioni interamente digitalizzate così come consentirebbe di rivalutare il bitcoin e renderlo al contrario di quanto oggi si sostiene quale strumento sostitutivo della moneta per creare un sistema finanziario che privo della moneta si avvalga di strumenti di circolazione digitale, interamente tracciati e trasparenti.

Una visione questa sicuramente avveniristica ma non improbabile se si osservano i cambiamenti che il progresso ha prodotto con l'avvento delle nuove tecnologie.

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[33] In generale, sul pericolo, si veda, tra tanti, S. ALEO, *Il denaro e il pericolo nel reato*, Nuovagrafica, Catania, 1983; F. ANTOLISEI, *L'azione e l'evento nel reato*, in Riv. pen., 1932, p. 88, 177 ss.; G. AZZALI, *Osservazioni sui reati di pericolo*, in E. DOLCINI-C. ENRICO PALIERO (a cura di), Studi in onore di Giorgio Marinucci, Giuffrè, Milano, 2006, p. 1335; A. BELL, *Pericolo e incolumità pubblica*, Maggioli, Rimini, 2015, *passim*.

Ai sensi di quanto previsto dal *Regolamento per la classificazione delle riviste nelle aree non bibliometriche* (Approvato con Delibera del Consiglio Direttivo n. 42 del 20/02/2019), si dichiara che il presente fascicolo è stato ultimato il 29 dicembre 2023.