Deposit guarantee schemes and bank crisis management: legal challenges arising from the actual EU legal framework

Irene Mecatti*

Contents*:

1. *No one ever said it would be this hard: the Covid-19 crisis*

The coronavirus crisis is often compared to a natural disaster or, as European Commission president Ursula von der Leyen called it, an "external shock" befalling our society from the outside. But pandemics do not come from nowhere. They develop under social conditions and are associated with specific forms of metabolism between humans and nature. In parallel, following the "natural disaster" analogy, the economic adversities resulting from this crisis can hardly be attributed solely to the virus and the measures adopted to contain it. Rather, the pandemic — like the bursting of the subprime crisis on the US financial markets in 2007 — reveals existing vulnerabilities and crisis inclinations.

The Corona crisis is, however, fundamentally different from the Global Financial Crisis of 2008-2009 for at least four reasons. *First*, while the latter was triggered by the bursting of the subprime mortgage bubble in the US and spread from the financial markets to the so-called real economy, the actual crisis does not come from the banking sector, but from a virus, or rather from the containment measures necessary to prevent its spread worldwide. *Secondly*, the Corona crisis, differently from the previous one, does not affect mainly the banking-financial area (and indirectly the real economy), but is a human, health and economic crisis all at the same time. *Thirdly*, central banks have been much quicker to provide liquidity to the market (Gstädtner 2020; Bush 2020; EBI 2020; Lannoo 2020; Gorstos 2020c) – having learned their lesson the last time. *Last but not least*, the European banks have entered the Covid-19 crisis more capitalized and with better liquidity compared to in 2007-08 (EBA 2020; ECB 2020a; Angeloni 2020).[1] As a consequence, banks are meant to play

***** Senior Researcher in Business Law; Adjunct Professor of Business and European Banking Law – Department of Law – Siena University

*Some paragraph titles are freely inspired by the song "The Scientist" (Coldplay).

a fundamental role in keeping the real economy afloat. To that end, EU regulators have adopted a set of measures to encourage banks to make full use of the flexibility embedded in the EU's prudential and accounting framework (so called Banking package – EC 2020), [2] so that banks can fully support citizens and companies during this pandemic by providing funding.

Nevertheless, the current economic shock poses several serious risks for the financial sector, as well (BCBS 2020; Enria 2020; Carletti, Claessens et al., 2020). For example, there could be weaker banks, including those that entered the crisis with existing idiosyncratic problems or those heavily exposed to the sectors more affected by the crisis, and whose capital ratios might not suffice to handle the upcoming challenges. Furthermore, the impact from other risks, such as the increase of NPLs at a faster pace than in the previous crisis, must be considered (Ringe 2020; Bodellini and Lintner 2020; Angeloni 2020). Given that many banks across the Eurozone are still holding NPLs from the past (EBA 2019b), and the ability to dismiss them will be

---

[1] According to the EBA 2020, the common equity tier 1 (CET1) ratio rose from 9% in 2009 to nearly 15% as of Q4 2019, including a management buffer above overall capital requirements and Pillar 2 Guidance (P2G) of on average about 3% of risk weighted assets (RWAs). In addition to the ample management buffers, the capital related measures put in place by EU regulators to mitigate the effects of the crisis will free up roughly 2% of RWAs. Similarly, prior to the pandemic outbreak, banks' liquidity coverage ratios (LCR) were on average close to 150%, significantly above the regulatory minimum.

[2] The banking package consists of: *1)* a legislative proposal for a Regulation amending Regulation (EU) No. 575/2013, as amended (CRR) to make a number of "quick-fix" targeted adjustments to address specific needs arising from the Covid-19 crisis; it has been followed by Regulation (EU) 2020/873 amending Regulations (EU) No. 575/2013 and (EU) 2019/876, in OJEU, L 204, 26 June 2020, pp. 4-17. The proposed amendments aim at implementing some changes to maximize the capacity of credit institutions to lend and to absorb losses related to the Covid-19 pandemic, while still ensuring their continued resilience; *2)* an Interpretative Communication which sets out a number of recommendations for banks and supervisory authorities confirming and further clarifying the guidance already provided to credit institutions by the Commission itself, the ECB, the EBA, the ESMA, the Committee of European Audit Oversight Bodies, the Basel Committee on Banking Supervision (BCBS) and other authorities on making full use of the flexibility embedded in certain EU accounting and prudential rules. Moreover, on March 19, 2020, the European Commission adopted a Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, allowing, *inter alia*, State guarantees for loans taken by companies from banks to ensure that banks continue to provide loans to support the economy (EC, *Communication on Temporary Framework for State aid measures to support the economy in the current COVID-19* outbreak, 2020/C 91 I/01, C/2020/1863, in OJEU C 91I , 20.3.2020, pp. 1–9 and following communications (EC, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, C/2020/2215, in OJ C 112I of 4.4.2020, p. 1; *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, Brussels, 8.5.2020 C (2020) 3156 final; *Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, 2020/C 218/03, 2.7.2020, C/2020/4509, in OJ C 218, pp. 3–8). On these measures, see Brescia Morra 2020; Gortsos 2020a-b; Morais 2020; Wymeersch 2020; Bodellini and Lintner 2020; Nicolaides 2020. See, moreover, the weekly update made by the EBI at ebi-europa.eu.

disrupted by the Covid-19 outbreak, European banks will most likely experience further losses in the near future.[3]

In view of potential incoming crisis and considering the essential role that banks are expected to play in the imminent future, it is crucial to ensure that "every bank is resolvable and just as importantly, that every bank remains resolvable" (König 2020a). But, it is known, resolution is for the few, not the many (König, 2020b): in the Eurozone, only less than 100 out of a total of about 4,000 banks will benefit from resolution (De Aldisio et al. 2019; Gelpern and Veron 2019; ECB 2020b), while the others will have to be liquidated through the not yet harmonized applicable national insolvency procedure[4] (EC 2019; Baudino et al. 2018; Binder et al. 2019; Buckingham et. al. 2019; Deslandes et al. 2019). However, the liquidation does not always proceed in an orderly way, in particular when it is not possible to quickly find a buyer of the business. In this case, the continuity of the banks' main functions is disrupted with negative externalities at a regional level or for a specific market sector (Restoy, Vrbaski et al. 2020). Therefore, as regards less significant banks – LSIs–[5] (and significant ones not subject to resolution, as well),[6] it is important to prevent the insolvency and, when it is not possible to avoid the liquidation, to enforce and speed the procedure in order to keep the good assets of the bank (e.g. through the sale of the business) and, not less relevant, to "contribute to a fairer competitive landscape" (König 2020). In a nutshell, the Covid-19 crisis highlights a strong need of effective bank crisis management regimes.

In this context, the EU framework works, but at the same time there are shortcomings that prevent it from fulfilling the aims of both the resolution regime and the banking union (BU). These challenges were also discussed before the Corona crisis. However, as the actual crisis will likely further stress the pre-existing flaws that will come back to the fore as soon as the economy recovers and the supportive

---

[3] Recent estimates project a capital shortfall in European banks of up to 600 billion euros in a severe scenario, and around 143 billion euros in a moderate scenario (Schularick, Steffen and Tröger 2020).

[4] Article 32.b, Directive 2019/879, which revised the BRRD (BRRD2). See also BIS 2020.

[5] The LSI sector is composed of more than 2,400 institutions that are relatively small in size and mainly characterised by a traditional lending-oriented business model; almost all national LSI sectors are, to varying degrees, affected by low profitability and business model issues (ECB 2020).

[6] Being "significant" does not necessarily mean that a bank would be considered eligible for resolution under the BRRD. In fact, although Veneto, Latvian and Luxemburg banks were deemed by the ECB as "significant institutions", their failure was not likely to result, according to the SRB, in significant adverse effects on the financial stability of their respective countries of establishment or of other Member States. Therefore, the banks have been wound up (see SRB 2017a-b; 2018a-b). The SRB's approach to set a "high standard" for the public interest assessment (PIA) follows recital 45 BBRD: "A failing institution should in principle be liquidated under normal insolvency proceedings." The SRB has further explained its approach to PIA (SRB 2019).

monetary and fiscal measures will be lifted. Then, the Covid-19 storm should be the occasion to face and overcome the challenges arising from the actual legislation, to prevent another financial crisis and finally achieve a strong BU. Using an expression of a paper released during the pandemic (Ringe 2020), while early 2020 was the time for emergency measures, now "it is time for lawyers" to address the numerous legal challenges posed by the current regime shooting up "like mushrooms from all sides" (Ringe 2020) after the Covid-19 crisis. Among those, this paper will focus on the role of DGSs in both preventing banking crises and financing resolution and liquidation, with an important basic premise: this work does not intend to flesh out all the limits arising from the DGS framework. Its more modest intention is to raise awareness of the need to implement some changes that will make a successful crisis management more feasible. In this context, the paper will take into account certain proposals made by the EBA (2020) in a recent opinion regarding: 1) the potentially different consequences for DGSs depending on their legal status and/or governance structure (the *Tercas* case); 2) the legal implications coming from the DGSs' intervention and the FOLTF assessment; 3) the use of DGS funds for interventions other than pay-out and the "least cost criterion" combined with the super priority rule. In the last part, brief attention will be given to some proposals relating to the harmonization of the liquidation regime for smaller banks.

2. *Oh take me back to the start: the role of DGSs in preventing and managing banking crises*

It is generally accepted that DGSs play a fundamental role in the financial safety net[7] in three ways: *1)* they prevent bank runs by assuring depositors they will have immediate access to their insured funds even if their bank fails (deposit pay-out); *2)* they avoid banks' disorderly liquidation through a variety of measures (capital support, guarantees, etc.); and *3)* they preserve depositors' access to covered deposits in the context of insolvency proceedings finance, by means of transfer of assets and liabilities and deposit book transfer.

The above roles are replicated in the Directive 49/2014 (DGSD), which distinguishes:

a) compulsory measures (Article 11(1)(2)), namely the reimbursement of depositors and the financing of resolution according to Article 109 BRRD. Both measures are subject to conditions: the pay-out is guaranteed up to a maximum of €

[7] On the functions and public-policy objectives of DGSs, see, *inter alia*, World Bank Group 2019; Gortsos 2019, 2012; IADI 2014; Beck 2003; Demirgüç-Kunt and Huizinga 1999; Calomiris and Gorton 1990; Diamond and Dybvig 1983.

100,000 per depositor in case of a bank failure (covered depositors); the DGS contribution to resolution is capped at the lower of the loss that the DGS would have suffered if it had paid out the covered deposits in a liquidation, net of recoveries it would have made from its subrogated claims in the insolvency. In the event of bail-in, however, the DGS funding may not be greater than the amount by which covered deposits would have been written down in order to absorb the losses had the covered deposits been included within the scope of bail-in and been written down to the same extent as creditors with the same level of priority under normal insolvency proceedings. Moreover, the contribution should not exceed 50% of the DGS target level under the DGSD (Article 109 BRRD);[8]

b) "alternative measures"[9] aimed at preventing the failure of a credit institution, which may be activated only, among other conditions,[10] if "the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS" (Article 11(3)(c)DGSD);

c) other "measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned" (Article 11(6) DGSD).

While measures under *b)* are undertaken before the application of resolution or insolvency proceedings, those *sub c)* are adopted within the bank liquidation. In this sense, it is better to name the first type "*preventive measures*" and the second ones "*alternative measures*" (EBA 2020).

Therefore, the DGSD allows a DGS "to go beyond a pure reimbursement function and to use the available financial means in order to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts."[11] However, despite the broad mandate formally set out by the

---

[8] Member States may introduce a cap higher than 50% by taking into account the specificities of their national banking sector (Article 109 (5) BRRD).

[9] It is up to Member States to introduce this kind of measure (Article 11(3) DGSD) and not all of them have implemented this option, such as the one stated in Article 11(6) DGSD (CEPS 2019; EFDI 2019).

[10] Article 11(3) DGSD adds the following conditions: (i) the resolution authority has not taken any resolution action; (ii) the DGS has appropriate systems and procedures in place for selecting and implementing alternative measures and monitoring affiliated risks; (iii)) the use of alternative measures by the DGS is linked to conditions imposed on the member institution that is being supported, involving at least more stringent risk monitoring and greater verification rights for the DGS; (iv) the use of alternative measures by the DGS is linked to commitments by the credit institution being supported with a view to securing access to covered deposits; (v) the ability of the affiliated credit institutions to pay the extraordinary contributions to DGS is confirmed in the assessment of the national competent authority.

[11] See recital 16 DGSD.

Directive, the feasibility of the failure prevention instruments is somehow restricted by the current legal framework. More specifically, constraints to the use of preventive and alternative interventions derive from the combination of the DGSD, the BRRD and the Banking Communications 2013.[12] Given that in practice the deposit pay-out rarely occurs, the recalled constraints have *de facto* deprived the DGSs of an essential and primary function without, as I will soon turn to, substantially achieving the principal objectives of the resolution and State aid framework (preventing moral hazard, ensuring the orderly market exit of insolvent intermediaries without systemic repercussions, weakening the doom loop).

3. *Preventive measures: State aid rules and the governance of DGSs*

The adoption of preventive measures by a DGS is subordinate to the respect of State aid rules.[13] This provision brings under EC control *ex* Article 107 TFEU,[14] all the interventions different from the compulsory ones. In the well-known Tercas case,[15] the EC held that interventions alternative to pay-out constitute State aid when the public authority exercises actual control over the operations of the DGS. Then, the Commission included the Italian guarantee schemes' preventive and alternative intervention within the perimeter of the potential "suppliers" of State aid, as two conditions were met: *1)* the State was in a position to control the DGS and to exercise a dominant influence over its decisions and operations (*imputability to the State*); *2)* there was an actual public control over the use of the DGS's resources, despite the fact that the DGS was private and financed by its members (*public resources*).[16] It is

---

[12] EC, Communication on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis, OJEU 2013/C 216/01.

[13] See recitals 3 DGSD and 55 BRRD; Banking Communication 2013, paras. 63-64.

[14] On the 'Temporary Framework' which allows Member States to grant State aid to combat the effects of Covid-19 (fn 2), see Nicolaides 2020; Brescia Morra 2020b.

[15] EC, *State aid SA.39451 (2015/C) (ex 2015/NN) - State support to Banca Tercas – Italy*, Brussels, 27 February 2015. The FITD alternative intervention, authorized by the BoI in July 2014, entailed the following measures: 1) a non-repayable contribution of €265 million to cover the negative equity of Tercas; 2) a guarantee of €35 million (for three years) to cover the credit risk associated with certain exposures of Tercas towards [...]; 3) a guarantee of € 30 million to cover part of the possible additional cost and losses (of €60 million) associated with the tax treatment of the non-repayable contribution of €265 million'. On the *Tercas* case, see Argentati 2015; Stanghellini 2016; Boccuzzi and De Lisa 2016; Boccuzzi 2016; Vitale 2019; Vignini 2019, 2020; Nicolaides 2019a-b; Werner and Caramazza 2019; Brescia Morra 2019; Mecatti 2020a-b.

[16] These principles were held by the EC in previous (although recent) cases: 61/2009, *Rescue and restructuring of Caja Castilla-La Mancha*, OJ C 289, 26.10.10, 1; SA.33001 (2011/N) - *Denmark - Part B - Amendment of the Danish Winding up Scheme for credit institutions*, C(2011) 5554 final, para. 40; SA.34255 (2012/N), *Caja de Ahorros del Mediterráneo (CAM) – Spain Restructuring of CAM and Banco CAM,* C(2012) 3540, para. 77; SA.37425 (2013/N) – *Poland – Credit Unions Orderly Liquidation Scheme*,

not possible in this paper to focus on this important decision and its annulment by the General Court.[17] I would just emphasize that – such as stated also by the EBA (2020) – the ruling in the *Tercas* case could have an impact on the legal statutes and/or governance of DGSs. In fact, the General Court did not exclude the application of the State aid law, but alighted that the EC did not give evidence of actual control exercised by the Italian Republic over the FITD's preventive intervention.[18] This means that the organizational and decision-making independence of a DGS, never deemed relevant by the EU law,[19] is nowadays a condition for using preventive measures.

Then, as regards the "imputability to the State" condition, all the EU DGSs that have a "public governance" and in general provide authorizing powers attributed to

---

C(2014) 1060 final, paras. 44-53; more recently, see case SA.48287 (2017/N) – *Croatia, Prolongation of the resolution scheme for small credit institutions with total assets below EUR 1.5 billion*, C(2017) 4384 final, paras. 5-10. On the meaning of "state resources" see Nicolaides 2018.

[17] Judgment of the General Court (Third Chamber, Extended Composition) of 19 March 2019, *Italian Republic and Others v European Commission*, Joined Cases T-98/16, T-196/16 and T-198/16, ECLI:EU:T:2019:167. For comments on this decision see Grossule 2019; Bonfatti 2018; Brescia Morra 2019; Maccarone 2019; Asimakopoulos 2019; Igan et al. 2019, 63; Nicolaides 2020; Mecatti 2020a-b. At the moment of writing, the judgment before the ECJ is still pending (appeal brought on 29 May 2019 by the European Commission against the judgment delivered on 19 March 2019 in Case T-98/16, T-196/16 and T-198/16, *Italy and Others v Commission*, Case C-425/19).

[18] See paras. 67 and 161, *Tercas*. Therefore, all the jurisprudence relating the "imputability to the state" will apply: see *Commission v France*, C- 290/83 [1985] ECR 439, para. 14; *Italy v Commission*, C-305/89, 1991] ECR I-1603, paras. 12-13; *France v Commission*, C-482/99, ECLI:EU:C:2002:294, para. 56; *Stardust Marine*, Case C-482/99 [2002] ECR I-043397, paras. 50-59 C-482/99 *Stardust Marine* [2002] ECR I-043397, paras. 50-59; *Deutsche Bahn AG v Commission of the European Communities*, Case T-351/02, 5 April 2006, para. 103; see also C-126/91 GEMO [2003] ECR I-13769, para. 24.

[19] Neither the previous Directive 94/19, nor the DGSD settle general governance rules, leaving it up to Member States to decide about the legal status of DGSs and the rules governing their relationship with the competent authority. Moreover, in the past, the EC never considered the governance of DGSs to be a decisive aspect in the evaluation of the compatibility of preventive/alternative interventions with State aid rules: see the *Banesto* (EC press release IP/94/1226 del 15/12/1994) and *Sicilcassa* (Commission decision of 10 November 1009, C (1999) 3865, OJCE, L 256/21, 10.10.2000) cases.

external and public authorities[20] will have to be reformed[21] if they want to freely undertake preventive interventions. In this sense, it would be desirable that Member States attribute to the DGSs a private legal status. The private model would result in both autonomous decision-making and executing process – which is *conditio sine qua non* to avoid the application of the "imputability to the State" requirement, and prevents moral hazard, as it eliminates public intervention expectations (World Bank Group 2019).

The "public resources" assessment deserves more elaboration. The EC has actually stated that alternative interventions were granted by the Italian State, although provided by private banks, for two reasons: first, the membership to the Italian DGS (FITD) was not voluntary, but compulsory, since participating banks were obliged to be members in order to be licensed; and, second, the contributions to the DGS were *de facto* "mandatory and determined by law up to a predetermined level."[22] The General Court, for its part, merely argued that the decision to intervene was taken by a common decision of all the DGS' members to allow such voluntary interventions,

---

[20] The following DGSs have a "public" governance: 1) The French Fonds de Garantie des Dépôts et de Résolution, despite being qualified as a «personne morale de droit privé » (art. L312-9, Code monétaire et financier), is managed by bodies whose members are economic ministers (see Articles L312-12/13); 2) The Spanish Fondo de Garantía de Depósitos de Entidades de Crédito, where the managing body of the DGS is composed of :«un representante del Ministerio de Economía y Competitividad, uno del Ministerio de Hacienda y Administraciones Públicas, cuatro designados por el Banco de España y cinco por las asociaciones representativas de las entidades de crédito adheridas, en los términos previstos reglamentariamente» (art. 7, Real Decreto-ley 16/2011, de 14 de octubre, por el que se crea el Fondo de Garantía de Depósitos de Entidades de Crédito). It is up to the FROB to decide the amount of alternative interventions (art. 3, Real Decreto-ley 16/2011); 3) In Croatia, the Resolution Authority and the DGSs are merged in one body, the State Agency for Deposit Insurance and Bank Resolution (DAB). The DAB is governed by a Board whose members are appointed by the Croatian Government. The Minister of Finance is the President of the Board; 4) The DGS managed by the Central Bank (Intervention Act 2012); 5) In the U.K. (Banking Act 2009), members of the Financial Service Compensation Scheme are "liable to removal from office, by the Regulators (with the approval of HM Treasury in the case of the Chairman)" (FSCS Articles of association), that is the Financial Conduct Authority and the Prudential Regulation Authority; 6) also the Irish DGS is managed by the National Central Bank (S.I. No. 516/2015 - European Union - Deposit Guarantee Schemes - Regulations 2015, part. 2). As regards the foreign DGSs, see IADI 2019.

[21] This does not imply though to eliminate the 'involvement' of supervisory authorities, being functional to the oversight activity and expressly stated by the DGSD (Articles 3, 4, 8, 10, 11 and 13).

[22] See nt 16. Recently, the EC has been more flexible in authorising the recapitalisation of Nord LB (*State aid: Commission concludes that recapitalisation of German NordLB is market conform*, Press Release, 5 December 2019, athttps://ec.europa.eu/commission/presscorner/detail/en/IP_19_6684). The EC's green light is controversial as the Nord Lb is a state owned bank, such as are all the banks participating to the *Institutional Protection Scheme of the Savings Banks Finance Group – S-Group* (introduced by the *Germany's Deposit Guarantee Act* - Einlagensicherungsgesetz, 3.7.2015) which participated in the rescue plan. On this case, see Choulet 2019; Veron 2020; Garicano 2020. During 2019 and after the General Court decision, the FITD intervened with preventive measures in favour of Banca del Fucino, Banca Carige and Banca Popolare di Bari (FITD 2020; Dias, Deslander et al. 2019).

and that it was included in the articles of association of the DGS. Thus, the Court concluded that the intervention was not attributable to its legal obligation to reimburse depositors and, therefore, the necessary liquidity for the intervention was voluntary and *ad hoc* given by the participating banks.[23]

Again, it is not possible in this paper to focus on this point in depth. Suffice it to say that the Court's argument is incorrect. In fact, the compulsory nature of the membership and contributions to a DGS comes from EU law,[24] with the peculiarity that, under the previous Directive 94/19/EC, the determination of methods and timing of contributions were left to the discretion of the individual Member States.[25] In other words, the financial resources destined to Tercas were not deliberated according to a statutory provision on a voluntary and contingent basis, but they were due to the (compulsory) membership and contribution to the FITD, imposed by both EU and Italian law.[26] In reality, it is the starting assumption of the Court, in terms of equivalence between mandatory membership/contribution and public resources, that is open to criticism. DGSs are not bodies founded by the State for the purpose of granting financial support to banks in distress,[27] but they are imposed by EU law and have the twofold scope of protecting depositors[28] and financing resolution (compulsory interventions).[29] Moreover, "where permitted under national law", the available financial means should be used "in order to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts."[30] Hence, DGSs cannot be considered as bodies established by the State to administer aid to banks during crises. The mandatory membership and contribution

---

[23] See para. 154, *Tercas*.

[24] Article 4(1)(3) DGSD and Article 3(1) directive 94/19. It is also stated that a credit institution authorised in a Member State, shall not take deposits unless it is a member of a scheme officially recognised in its home Member State. Thus, the membership to a DGS is a condition to undertake the banking activity.

[25] As regards the European DGSs before the DGSD, see Ayadi and Lastra 2010.

[26] Under Directive 94/19/EC, whilst the administrative fees were annually paid by the member banks (*ex ante* contributions), the former FITD Statute (art. 21) stated that the financial means needed for the interventions (irrespective of the type of the measure) had to be transferred only when requested by the Fund (*ex post* contributions).

[27] According to the ECJ, it is possible to identify a State aid when the support is "granted directly by the State or by public or private bodies established or appointed by that State" (Case C-345/02 *Pearle BV et al*., para. 34; Case 57/86 *Greece v Commission* [1988] ECR 2855, para.12, *PreussenElektra*, para. 58, and Case C-126/91 GEMO [2003] ECR I-0000, para. 23), "with a view to administering the aid" (Case C-305/89, Italy v Commission [1991] ECR I-1603, paras. 12-13; Case C-482/99, *Stardust Marine*, para. 23; Case 78/76 *Steinike & Weinlig v Germany* [1977] ECR 595, para. 21; Case 290/83 *Commission v France* [1985] ECR 439, para. 14; Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, para. 35).

[28] Recital 14 DGSD.

[29] Recital 15 DGSD.

[30] Recital 16 DGSD.

is not imputable to the Italian State (such as any other Member State), but derives from the EU law. Moreover, the DGS funding is provided by private banks.[31] In conclusion, it is not possible to identify in this case a State aid according to Article 107 TFEU.[32] It is therefore desirable that General Court's judgement be rectified by the ECJ on this matter, also in order to prevent analogous legal challenges relating the use of the resolution funds.[33]

4. Running in circles: preventive measures and the FOLTF assessment

In its recent opinion, the EBA (2020) stated that "[t]he EU framework should be clarified to the effect that the use of DGS funds in line with Article 11(3) does not in itself cause the determination that the institution is failing or likely to fail…". The EBA stressed a crucial challenge arising from the current crisis management discipline, the consequences of which have been experimented by the Italian banking system in late 2015, with reference to the crisis of the so-called "four banks" (Cariferrara, Banca Etruria, Banca Marche and Carichieti).[34] But let's start from the legal framework.

Article 32(4) BRRD identifies four "failing or likely to fail" (FOLTF) scenarios, which may apply cumulatively or alternatively (Grünewald 2017; Tröger 2017; Ringe 2018; Ventoruzzo, Sandrelli 2019): (i) the bank infringes or is about to infringe requirements of authorisation to an extent that would justify its withdrawal, including due to a significant capital shortfall; (ii) the bank is or is about to become balance-sheet insolvent; (iii) the bank is or is about to become cash-flow insolvent; and (iv) the bank requires extraordinary public financial support, with a few exceptions. With specific reference to point (iv), if the use of DGS funds for failure prevention were to be considered – termed by the EC as "extraordinary public support" – this measure to

[31] No State aid is granted when the funds are private or come from private banking (European Commission, State aid NN 36/2008, *Denmark - Roskilde Bank A/S*, Brussels, 31 July 2008 C(2008)4138 final).

[32] A measure is not imputable to the State if it is imposed by EU law, without leaving any discretion to the State (C-460/07, *Sandra Puffer*, para. 69; T-351/02, *Deutsche Bahn AG v Commission*, para. 102).

[33] Both the BRRD (recital 55) and SRMR (Article 19(1) equate the DGSs and resolution funds interventions as regards the application of the State aid rules. Hence, also the use of resolution funds' resources might raise the issue of the "imputabilty to the State." On the application of State aid rules to the SRB and the NRAs, see Zavvos and Kaltsouni 2015; Iftinchi 2017; Mecatti 2020a-b.

[34] The resolution of the four banks is regulated by Law Decree n. 183/2015, anticipated by Legislative Decree n. 180/2015 which implemented the BRRD. The banks were resolved by transferring their "healthy parts" to bridge banks and by putting their troubled assets in a bad bank. These plans, which were approved by the European Commission (http://europa.eu/rapid/press-release_IP-15-6139_en.htm), included the burden sharing for shareholders and subordinated bond holders (*write down*). Since the application of the bail-in was not yet in force, the resolution did not involve senior bondholders and depositors. On the resolution of the four banks, see Banca d'Italia 2015; Barbagallo 2015; Mecatti 2016; Scipione 2017; Bodellini 2018; Deniz Igac et al. 2019.

prevent failure would, paradoxically, require the authorities to deem that the institution was failing or likely to fail. Then, a bank that might be brought back to going concern status by a DGS's intervention would illogically either (a) be subject to the resolution framework (such the four Italian banks), or (b), if there is no public interest, be "wound up in an orderly manner" in accordance with the applicable national law. Then, if the use of DGS resources for failure prevention are meant to be, as the EC held, "extraordinary public financial support", the preventive measures – even worse, the proposal to undertake them – will lead, paradoxically, the authorities to deem that institution is "failing or likely to fail" and, as a consequence, to apply either the resolution or the liquidation.[35] This knock-on effect[36] brought, due to the *Tercas* case, the Italian RA to subject the "four banks" to resolution, despite the fact that the FITD's preventive intervention would have restored their status as going concerns and limited the applicable write-down.[37] For the above reasons, it is necessary to clarify the EU framework stating that the use of DGS funds for preventive measures would not itself cause the FOLTF assessment. This clarification would be consistent with the broad mandate conferred to the DGSs by the DGSD[38] and would remove an important obstacle to an orderly management of the bank in crisis.

5. *Constraints resulting from the financial cap and the super priority rule*

Both preventive and alternative interventions are capped. More specifically, the former can be undertaken if "the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS" (Article 11(3)(c) DGSD), while the latter only if "costs borne by the DGS do not exceed the net amount of

[35] According to the Chair of the SRB (König 2018, but see also EBA 2020), in the absence of common banks' insolvency laws, the "failing or likely to fail (FOLF) assessment does not automatically link to the criteria for insolvency/liquidation. Only by raising national bank insolvency procedures to a common standard we can clarify the line between resolution and insolvency and eliminate wrong incentives." In reality, the revised BRRD (art. 32.b, Directive 2019/879) clearly states that where the RA considers that the conditions for resolution are met but there is no public interest, the Member States shall ensure that the failing entity is "wound up in an orderly manner in accordance with the applicable national law." On this point, see also Binder et al. 2019.

[36] Nicolaides (2020) refers to this result as the "kiss of death" for a bank.

[37] If the FITD intervention was not qualified as State aid and, as a consequence, the valuation of the NPLs was made according to prudential criterion (and not following the market investor principle), the subordinated bondholders would have suffered a sacrifice of 31%, through a FITD's financial support of € 3.2 billion, less than the National Resolution Fund's initial one (3.7). Moreover, as the write-down hit mainly bank debts held by retail investors who were victims of mis-selling, the Italian legislator was induced to adopt several compensatory measures, some of which are clearly inconsistent with the structure and mandate of the FITD, while others even rely on public financial support (see Mecatti 2020a-b).

[38] On the other hand, the BRRD itself distinguishes DGSs and resolution funds from the "extraordinary public financial support" (recital 55), so that the assimilation made by the EC is clearly arbitrary.

compensating covered depositors at the credit institution concerned" (Article 11(6) DGSD).[39] The aim of the cap is twofold: to protect the DGS from bearing more losses than it would have incurred by paying out covered deposits and to prevent it from being depleted by a single bank failure. The last goal is also connected with moral hazard, as the restriction of the DGS's intervention prevent clients, managers and creditors of the bank to rely on DGSs for the protection of depositors. However, the cap at the costs of pay-out net of recoveries is particularly restrictive as it has to be applied with the super-preference of covered deposits.[40] Then, as the DGS is subrogated to the preferred claims of covered depositors,[41] it will have a big recovery rate in the bank liquidation. This might not only impede the use of preventive and alternative interventions (De Aldisio et al. 2019; Baudino et al. 2019; Restoy, Vrbaski et al. 2020; Garicano 2020), but also reduce the amount of the DGS contribution to resolution,[42] as it is likely (although not certain) that the DGS will bear zero or very low costs in case of liquidation.

These weaknesses in the EU framework have not gone unnoticed. The main proposals that have been made to address these issues are the following: *a)* to increase the ability of DGSs to undertake measures other than reimbursement; *b)* to create a common framework for transferring assets and liabilities in liquidation (IMF 2018; König 2019 and 2020b; Angeloni 2020)[43]; *c)* to harmonize EU insolvency

[39] This complies with IADI Core Principle 9, which specifies that where the legal framework enables the DGS to use of its funds for purposes other than liquidation, the cost of such measures shall not be higher than the cost of a payout of insured depositors in liquidation, net of expected recoveries. The financial cap applies to the majority of DGSs (for a survey, see Baudino et al. 2019).

[40] Article 108(b)(i) BRRD refers to "covered deposits", which are defined under Article 2(1) BRRD as "covered deposits as defined in point (5) of Article 2(1) of the DGS Directive." The position of these deposits within the national insolvency ranking is not the same: in some Member States, such as Latvia and Croatia, these claims are ranked above all (or almost all) other preferred claims. In a larger number of Member States, however, namely Italy, Denmark and France, they are one of the lowest ranked of all preferred claims (see Buckingham et al. 2019).
In addition to these, Article 108 (a)(i)(ii) introduces another priority for two types of non-eligible deposits, such as (i) deposits for natural persons and small and medium- sized enterprises (SMEs) exceeding the coverage levels of the DGSD and (ii) deposit that would be eligible if they were not made through branches located outside the Union of institutions established within the Schemes (DGS). These two will enjoy priority over ordinary liabilities, but shall be subordinated to eligible deposits and DGS subrogating in their position.
Union.

[41] Article 9(2) DGSD which replaced Article 11, directive 19/94.

[42] Under the BRRD (recital 110) and Article 109(1), a DGS must contribute cash to fund resolution measures that preserve the access of covered depositors to their deposits. However, its participation is limited to the amounts that it would be required to pay out to covered depositors if the bank in question had been would up under normal insolvency proceedings.

[43] The transfer of assets and liabilities instead of a piecemeal liquidation would reduce destruction of value and ensure a level playing field for creditors (IMF 2018; Croitoru, Dobler et al. 2018; Veron 2019; De Aldisio et al. 2019; Mecatti 2020a-b).

regimes (Nieto 2016; Bénassy-Quéré et al. 2018; Deslandes and Magnus 2018; Binder et al. 2019; Scholz 2019; Fioretti, Francova et al. 2019) or, at least, some essential parts (Buckingham et al. 2019; CEPS 2020), [44] as national winding-up proceedings will be the most frequently used procedures to handle FOLTF banks also in the context of the current Covid-19 crisis. The latter might be a goal in the long term (König 2020a), as it is an extremely complicated process which will require time and very strong joint commitment within Member States (Garicano 2020). [45] As a first step, it would be more feasible to work on the first two proposals. I therefore outline below some general considerations on their suitability.[46]

As regards point *a)*, in addition to the recommendations expressed above (relating to the governance of the DGSs), there are three main issues that should be considered: *1)* the reform of the deposit preference; *2)* the increase of the deposit insurance threshold; and *3)* the method of assessment of the least cost.

1. It has been suggested to replace the current super-priority of covered deposits with a general depositor preference, according to which "covered and non-covered deposits rank senior to other liabilities, but *pari passu* with each other" (Restoy, Vrbaski et al. 2020). This proposal, inspired by the US regime,[47] is

---

[44] In this regard, the EU Directive 2017/2399 that harmonizes the ranking of unsecured debt instruments in the bank insolvency hierarchy is an important step, as it contributes to the alignment of creditors' hierarchy in both resolution and liquidation (Binder et al. 2019). However, it does not provide a general depositor preference rule (see recital 16, Directive 2017/2399) based on a tiered approach, such as suggested by the ECB (2017).

[45] Member State have different rules for bank insolvency, both relating to the applicable procedure and substantial requirements (Binder et al. 2019). As regards the liquidation of credit institutions, some countries introduced a specific regime (e.g. Italy), whilst others subsume them under commercial law. Moreover, liquidation features differ relating to the priority of claims, creditors' and other stakeholders' rights within the procedure. The concept of "insolvency" is also not the same (Baudino et al. 2018); this may lead to a situation where a bank meets the FOLTF assessment but is not insolvent under the national framework; moreover, these differences increase complexity of applying the NCWO safeguard under the resolution framework (Restoy, Vrbaski et al. 2020). In general, the lack of alignment affects the consistency, efficiency and coherence of both European and national systems at the moment an institution gets into trouble (Fioretti, Francova et al. 2019).

[46] I will not focus on the introduction of the European deposit insurance scheme, as it is a more general topic which requires a deeper study and is beyond the limits of this paper. On the EDIS, see the Commission's proposal for a European Deposit Insurance Scheme (COM(2015) 586 final); moreover see Quaglia 2018; Gelpern and Veron 2019; Restoy, Vrbaski et al. 2020; Brescia Morra 2019; Huertas 2019; Restoy 2019; Fioretti, Francova et al. 2019; EUROFI SECRETARIAT 2020; Bauerschmidt 2020; Tümmler and Thiemann 2020.

[47] As regards the depositor preference in the US regime, see Danisewicz, McGowan et al. 2018; Baudino, Gagliano et al., 2018; De Aldisio et al., 2019; Binder et al., 2019; Velpern and Veron 2019; Davis 2020. The FDCI has great experience in resolving troubled banks, acting as insurer, supervisor and receiver. During the subprime crisis, the FDCI managed the resolution of failed insured depository institutions (IDIs) mainly through the Purchase and Assumption Procedure (P&A), instead of the liquidation one (Majnoni D'Intignano, Dal Santo and Maltese 2020). In fact, the use of deposit pay-out is more costly due

straightforward: under a rational point of view, the super-preference for covered deposits is not necessary to assess the main objectives of deposit insurance (just satisfied by deposit protection and by the simple deposit preference – IADI 2014; Danisewicz, McGowan et al. 2018), and at the same time, may boost bank runs of uncovered depositors in stress situations (Restoy, Vrbaski et al. 2020; Davis 2020). Moreover, this reform will result in more DGS funding and will increase potential losses borne by the DGS; consequently, it will strengthen the opportunity to finance resolution and to use preventive and alternative measures. However, must be highlighted that this modification might be useless in the case of financing the sale of business of banks with large amounts of uncovered deposits (Restoy, Vrbaski et al. 2020). In this kind of transaction, it is indeed desirable to transfer both covered and uncovered deposits, since the entire "package" is more attractive to a buyer. The DGS will cover the transfer deficit to an extent proportional to the amount of liabilities included in the agreement: the greater are the latter, the broader will be the contribution required of the DGS.[48] Then, due to the financial cap, if the ratio of uncovered deposits is large, it will be likely that the DGS intervention will be not feasible. Moreover, within the resolution, in order for the sale of the business to work for medium-sized banks with a large amount of uncovered deposits, it will be necessary on the one side, to have sufficient assets to be backed and, on the other, an amount of liabilities, satisfying the eligibility criteria for MREL,[49] which would remain in the residual entity. Then, in this circumstance, the calibration of MREL should weight the size and composition of the balance sheet and, more specifically, the amount of uncovered deposits held. As a consequence, despite the increase of DGS funding, some banks with a sale of business resolution strategy "may need non-negligible amounts of MREL – above minimum regulatory capital – to support that strategy" (Restoy, Vrbaski et al. 2020).

2. Another proposal is to increase the level of protection of deposits from € 100,000 to € 200,000, similarly to what happened in the US (De Aldisio et. al., 2019).[50] This reform would balance the least cost criterion as a condition for preventive and alternative interventions, by reducing the DGS recovery rate in the bank liquidation. However, a higher insurance threshold would require raising the

---

to the introduction of the national depositor preference instead of the super priority one and to the increase of the deposit protection from $ 100,000 to $250,000 (FDCI 2017; 2019).

[48] For more details, see the examples made by Restoy, Vrbaski et al. 2020.

[49] As a consequence of Covid-19, the SRB (2020) modified MREL's policy in the light of the Banking Package.

[50] In the US, the target size of the Deposit Insurance Fund managed by the FDIC is 2% of covered deposits and the threshold has recently increased from $100,000 to $250,000 (FDIC 2019; Deslandes et al., 2019).

amount of the DGS's available financial resources; at the same time, it would also increase the contributions to the schemes. Hence, striking the right coverage is a very complex issue, as the limit has to be credible enough to minimize the risk of runs on banks and, at the same time, not to undermine market discipline (IADI 2014).[51] Therefore, the proposed reform – considered not necessary by the EBA (2020) - shall be anticipated at least by an impact study to determine the appropriate amount by which to increase the threshold and the suitable timeframe to reach the proposed new target level for the DGS (De Aldisio et. al., 2019).

3. As a third option, it has been suggested (EFDI 2019; Restoy, Vrbaski et al. 2020; Mecatti 2020a-b) to introduce additional flexibility in the assessment of the costs of payout to the DGS, according to Article 11(3) and (6) DGSD. This possibility is strictly connected to the issue of whether they might be considered only direct costs, or indirect, as well, and, in the latter case, what is an "indirect cost" (EBA 2020).

In reality, the proposed flexibility is embedded in the DGSD itself, where it states that "it is desirable not only to make provision for reimbursing depositors but also to allow Member States sufficient flexibility to enable DGSs to carry out measures to reduce the likelihood of future claims against DGSs" (recital 3), aimed "to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts" (recital 16). Hence, the DGSD with the expression "adverse impacts," recalls the concept of "indirect costs", namely "the costs of the failure of a credit institution to the economy as a whole and its adverse impact on financial stability and the confidence of depositors" (recital 3).

This flexibility has been used, *inter alia*,[52] by Italy in its transposition of the Directive.[53] Notably, the FITD Statute specifies that the cost of the preventive measure shall not exceed "the cost that Fund should bear to undertake other kinds of intervention provided by the Statute. To this end, the Fund shall consider also the effects that the bank's compulsory liquidation could have on the other banks in distress and on the general system";[54] as regards alternative measures, it states that the relative costs shall not exceed the cost that the Fund should bear "to reimburse depositors, as reasonably foreseeable based on the information available at the time

[51]Empirical research demonstrates that more generous deposit insurance schemes in terms of coverage are more likely to suffer from moral hazard (Demirgüç-Kunt and Levine 2000; Demirguc-Kunt and Detragiache 2002; Anginer and Demirguc-Kunt 2018).

[52] Also Portugal and Denmark provide a more flexible calculation of the least cost criterion (Restoy et al., 2020; CEPS 2019).

[53] See Legislative Decree n. 30/2016 which modified Articles 96 ff. of the Consolidated Law on Banking (Legislative Decree 385/1993).

[54] Article 35(4) FITD Statute and similarly Article 35 FCG Statute.

of the intervention,"[55] taking again into account "the effects that the bank compulsory liquidation could have on the other banks in distress and on the general system."[56] It is therefore desirable that DGSs, by using the flexibility given by the DGSD, include indirect costs (as contagion effects or other externalities determined by the liquidation of the bank) in the least cost assessment.

As regards the perimeter of the "indirect costs", since the DGSD gives to the schemes a margin of discretion in evaluating the kind of costs, not only should it be difficult to formulate and agree to rules in this regard, but it would also probably not be efficient as the assessment might vary from case to case according to a number of unforeseeable variables. Moreover, as the real economic effects of winding-up will usually take time (*rectius* years) to materialize and will depend on mostly unforeseeable factors,[57] it will be extremely difficult in such circumstance to predict the DGSs' hypothetical recovery rate. In this regard, although it might be helpful to list relevant indirect costs, it would be neither useful nor effective to circumscribe an exhaustive set of costs to be taken into account within the relative valuation, as any crisis management strategy entails discretion and independence. After all, as far as the DGSs have an autonomous decision making process, the risk of violating the least cost criterion due to an excessive discretion is remote, as it is very unlikely that member banks would undertake the most expensive intervention, even more so if we consider that the advantages of measures different from pay-out are not confined to a simple cost-savings, but they coincide with the enhancement of deposit protection and the banking system reputation as a whole.[58]

6. DGSs and orderly liquidation

Coming to point *b)*, it is generally accepted that the liquidation procedure entails several negative externalities. First, the interruption of the bank's critical functions could potentially destabilize its counterparties and, more broadly, the banking and financial system and, possibly, jeopardize its geographical area of operation, too. Second, the DGS's capacity of reimbursing depositors in the case of liquidation is limited. The DGSD (Article 10(2)(6)) establishes a target level of 0.8% of

---

[55] The rationale of two different parameters (other kind of intervention provided by the Statute/reimbursement of depositors), which can also be found in the DGSD (Article 11(3) and (6)), is coherent with the different timing of the interventions: the preventive one is activated when the going concern may be recovered, whilst the alternative one is applicable when the insolvency procedure has yet determined a large part of disruptive effects.
[56] Article 34, FITD Statute.
[57] The same challenges arise from the NCWO assessment within the resolution (Tröger 2017; Binder 2016; Ventoruzzo and Sandrelli 2019).
[58] See para. 98, *Tercas*.

deposits of the amount of its members covered deposits (to be reached by 2024), but it also allows for a country to establish a lower target of 0.5% of deposits upon the Commission's approval.[59] This means that if the bank in question is a retail one and, even worse, significant but not subject to resolution,[60] the immediate funds required to the DGS to cover the deposits would put all member banks under pressure (generating systemic concerns), due to the need for ex-post contributions to replenish the DGS. Third, also assuming that the DGS resources are sufficient to reimburse covered depositors, the impact to the real economy from a haircut to uncovered deposits would be critical (Asimakopoulos 2019). Then, the transfer of business is arguably the most suitable strategy for facilitating an orderly market exit for failed small and medium-sized banks (IMF 2018; De Aldisio et al., 2019; Restoy, Vrbaski et al. 2020).

Its use, however, is currently restricted both in resolution and liquidation. In fact, whilst the sale of business is a harmonized tool under the BRRD, not all the Member States provide liquidators with the power to perform transfers of assets and liabilities (Buckingam et al. 2019; Binder et al. 2019), just as not all the Member States introduced DGS alternative measures (Restoy, Vrbaski et al. 2020). Moreover, the use of such instrument under the BRRD is subject to strict limits, so that shareholders and creditors absorb a minimum amount of losses where resolution funds are used to finance the transfer, while there is not this kind of limit within the liquidation procedure, although, as stated above, important restrictions to a DGS's funding may derive from application of the least cost criterion, EU state aid rules and super-priority.[61] It is true that on several occasions, the EC (pre-)authorised the DGSs' alternative interventions within the insolvency procedure, thus preserving the going concern's business value. However, in such cases, the DGSs' interventions –

[59] While some countries went beyond the 0.8% target level (Bulgaria, Estonia, Greece, Croatia, Luxemburg, Malta, Poland, Romania), others (France and Liechtenstein) took advantage of the exemption provided by Article 10(6). On this data, see EBA 2019 a-b.

[60] On this point, see Asimakopoulos 2019, who recalls the Veneto banks case, highlighting that at the end of 2016, the combined balance sheet of the two institutions amounted to € 28.1 billion and the available DGS funding amounted to approximately € 0.5 billion.

[61] If a DGS alternative measure is meant a State aid, it has to be complemented by a burden sharing which has the same limit of the write-down tool (see paras. 40-43, Banking Communication 2013). In this respect, Article 11(3) DGSD states that "the DGS shall consult the resolution authority and the competent authority on the measures and the conditions imposed on the credit institution." However, DGSs lack the power to write-down on their own (Article 59, BRRD); thus, it would be appropriate to clarify the roles and responsibilities of each player involved in managing the entire intervention (EBA 2020; EFDI 2019).

considered (not always correctly) as State aid – were granted only to non-viable small banks with total assets below € 3 billion.[62]

To overcome the negative effects listed above, it has been proposed to introduce a common framework for the transfer of assets and liabilities in liquidation, applicable to small and medium-sized banks (De Aldisio et al. 2019; Restoy, Vrbaski et al. 2020). In other words, NRAs should be allowed to start (an administrative) liquidation when a bank is failing or likely to fail and the public interest test is not met, and to appoint a liquidator to execute the transfer through a competitive sale process in order to maximize the sale price. The suggested procedure is very similar to the "orderly liquidation" regulated by the Banking Communication 2013,[63] with the difference being that the authority in charge of authorizing and monitoring the liquidation would not be the EC, but the NRA. It has also been suggested to introduce tools similar to those used in resolution (e.g. the bridge bank) in the insolvency context (De Aldisio et al. 2019).

The above proposals are straightforward under a structural point of view, as they will create a common administrative insolvency procedure among Member States. However, this kind of reform will not overcome the numerous challenges arising from the lack of harmonization of crucial aspects of bank insolvency, such as the hierarchy of creditors and depositors and the triggers for insolvency/resolution procedures.[64] Moreover, with regard to the DGS alternative intervention, a structural reform, although necessary, would not address the constraints arising from the least

[62] See State aid SA.50640 (2018/N) – *Italy – Liquidation scheme for small banks*, C(2018) 2295 final. According to para 84 of the 2013 Banking Communication 2013, the EC authorized (until 12 April 2019, prolongable) a liquidation scheme, where the FITD (and eventually the FCG) facilitate, through alternative interventions and after the application of the burden sharing, the acquisition of the activities of a failing bank by a viable purchaser. The Scheme has been applied to Banca Sviluppo Economico s.p.a. (Banca Base - CT) in compulsory liquidation (see Banca d'Italia 2018; FITD 2018); moreover, it has been used also in in Poland (SA.51482 2018/N), Croazia (SA.48287 (2017/N), Denmark (SA. 54807 2019/N) and Ireland (SA. 54724 (2019/N).

[63] See para 65 ff.

[64] On the different regimes of FOLTF (and insolvency) assessment and creditor hierarchy and within the EU, see Buckingam et al. 2019 where it is alighted that, with respect to triggers, national differences may arise relating to the possibility considering far-seeing elements (i.e., that the bank is likely to become balance sheet or cash flow insolvent) or to the withdrawal of the banking licence (that, in some cases, is the only possible ground for initiating bank insolvency proceedings). Moreover, in some Member States, insolvency can be set off on the basis of a specific public interest assessment. As regards the creditor hierarchy, the paper shows that, despite the recent attempts to harmonise banks' liabilities ranking in the context of insolvency (see ft 44), some divergent areas among national insolvency laws still exist, in particular with reference to preferred ranking for unsecured deposits not held by natural persons or SMEs, provided by some Member States, which rank above ordinary unsecured debt, but still below unsecured deposits held by natural persons and SMEs. On these issues see also Restoy, Vrbaski et al. 2020; König 2019.

cost principle and its combination with the super priority rule. Thus, institutional reforms have to be combined with substantial reforms.

7. Concluding remarks

The DGS legal framework comprehends a complex system of rules which, combined with the BRRD and the Banking Communication 2013, restrict the possibility of using private banking resources to prevent and/or manage banking crises. These constraints arise mainly (but not only), on the one side, from the State aid rules and, on the other, from the combination of the application of the super-priority rule combined with the least cost principle.

The integration process started with the creation of the BU and its future evolution after the Covid-19 crisis, requires a critical consideration on the use of State aid rules. A rigorous application of the (new) State aid discipline does not seem appropriate in the case of use of DGS funds because, as we have seen, it blocks them from fulfilling their traditional function of preventing and managing banking insolvency.

More specifically, as regards the "imputability to the state" requirement, there is a need to amend the Banking Communication 2013 by differentiating among DGSs with public and private legal status and/or governance structures. The latter should be excluded from the application of the State aid rules, due to their autonomy in decision-making. Moreover, with reference to the "public resources" requisite, it would also be desirable for the ECJ to reform both the EC and the General Court decisions, stating that no State aid is granted when the resources come from private banks, due to obligations (DGS membership and financing) imposed by EU law, and not by the Member States. This is a crucial point, as it might also bias the legal qualification of national resolution funds. In this context, it is also necessary to distinguish between "extraordinary public financial support" and "use of DGS funds", clarifying that the use of DGS resources for interventions other than pay-out would not itself cause the FOLTF assessment.

With respect to the super-priority rule, the modification of the depositor preference would result in more DGS funding both in resolution and liquidation. However, this reform might still be unsatisfactory to fund the sale of business of mid-sized banks, as the wider the set of liabilities to be encompassed in the transfer – e.g., the case of a mid-size bank with a significant amount of uncovered depositors – the larger the contribution required from the DGS to support the sale will be. On the contrary, the more restricted the transfer, the greater the liabilities left to the insolvent bank will be, with consequent negative effects for the creditors not allocated to the acquirer institution. Thus, when the resolution strategy of this kind of institution is the sale of business, the abrogation of the super-priority will not prevent the DGS from incurring the application of the financial cap (least cost principle embedded in the NCWO principle). As a consequence, the greater the number of uncovered depositors, the larger the required MREL will be upstream, and, downstream the DGS contribution to resolution. In this complex situation, which generates numerous and adverse constraints to the discretionary choices of the competent authorities (Brescia Morra 2019a), it is crucial to guarantee broad flexibility in the assessment of the costs of pay-out to the DGS, with the possibility to consider direct and indirect costs. This option is contained in the DGSD and it is coherent with the wide mandate conferred to DGSs.

Last but not least, the proposed common administrative insolvency procedure and the enhancement of instruments available for managing the crisis will obviously help, but this reform shall be accompanied by the harmonisation of substantial key aspects of bank insolvency regimes, and complemented with a more centralised and uniform decision-making process which shall not see the EC as the "de facto crisis-management and resolution authority at the EU level" (Almunia 2013; Schillig 2019). But this (along with the EDIS) is another story, or rather I hope it will be another, but this time positive, consequence of Covid-19.

Bibliography

Almunia J., *Banking crisis, financial stability and State aid: The experience so far*, speech delivered in Brussels, 8 March 2013, at https://www.bruegel.org/2013/03/banking-crisis-financial-stability-and-state-aid-the-experience-so-far/;

Angeloni I., *Beyond the Pandemic: Reviving Europe's Banking Union*, CEPR, London, 2020, at voxeu.org;

Anginer D., Demirguc-Kunt A., *Bank Runs and Moral Hazard A Review of Deposit Insurance*, *WBG Policy Research Working Paper* 8589, September 2018;

Argentati A., *Sistemi di garanzia dei depositi e crisi bancarie: c'è aiuto di Stato?,* in *Merc. conc. reg.*, 2015, 2, p. 315;

Asimakopoulos I.G., *Making Retail Banks Resolvable*, EBI Working Paper Series n. 19, October 2019, at ssrn.com/abstract=3471187;

Ayadi R., Lastra R., *Proposals for reforming deposit guarantee schemes in Europe*, in *Journal of Banking Regulation*, Vol. 11, 3, 2010, p. 210;

Banca d'Italia, *Informazioni sulla risoluzione delle crisi di Banca Marche, Banca Popolare dell'Etruria e le Lazio, Carichieti e Cassa di Risparmio di Ferrara*, 22 novembre 2015, at bancaitalia.it;

Banca d'Italia, *Comunicazione Banca sviluppo economico s.p.a. in l.c.a.*, 27 April 2018, at www.bancaditalia.it/compiti/risoluzione-gestione-crisi/fondi-risol-crisi/2018/comunicazione-20180427/index.html;

BIS, *Effects of Covid-19 on the banking sector: the market's assessment*, BIS Bulletin, May 2020;

Barbagallo C., Camera dei Deputati, Sesta Commissione Finanze, *Indagine conoscitiva sul sistema bancario italiano, audizione del Capo del Dipartimento Vigilanza Bancaria e Finanziaria Banca d'Italia*, Roma, 9 dicembre 2015, at www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2015/Barbagallo-09122015.pdf.;

Barbagallo C., *Cassa di risparmio di Ferrara, Banca delle Marche, Cassa di Risparmio della Provincia di Chieti Banca Popolare dell'Etruria e del Lazio*, Commissione Parlamentare di inchiesta sul sistema bancario e finanziario. Legge 12 luglio 2017, n. 107, Roma 12 dicembre 2017, 5 at www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2017/Barbagallo-12122017.pdf.;

Basel Committe of Banking Supervision, *Measures to reflect the impact of Covid-19*, April 2020;

Baudino P., Defina R., Fernández Real J.M., K. Hajra, R. Walters, *Bank failure management– the Role of deposit insurance*, FSI insight n. 17, August 2019, at https://www.bis.org/fsi/publ/insights17.htm;

Baudino P., Gagliano A., Rulli E., Walters R*., How to Manage Failures of non-Systemic Banks? A Review of Country Practices, Financial Stability Institute*, FSI Insights on Policy Implementation n. 10, October 2018, p. 9 at www.bis.org/fsi/publ/insights10.htm;

Beck T., *The incentive compatible design of deposit insurance and bank failure resolution – concepts and country studies*, in Policy Research Working Paper 3043, May 2003, at http://documents1.worldbank.org/curated/en/708011468751566166/pdf/multi0page.pdf;

Bénassy-Quéré A., Brunnermeier M.K., Enderlein H., Farhi E., Fratzscher M., Fuest C., Gourinchas P., Martin P., Pisani F., Rey H., Véron N., Weder di Mauro B., Zettelmeyer J., *Reconciling Risk Sharing with Market Discipline: A Constructive Approach to Euro Area Reform*, Center for European Policy Research Policy Insight No 91, January 2018;

Binder J.H., Krimminger M., Nieto M.J., Singh D., *The Choice between Judicial and Administrative Sanctioned Procedures to Manage Liquidation of Banks: A Transatlantic Perspective*, in *Capital Markets Law Journal*, 14, 2, 2019, p. 178;

Binder J.H., *The position of creditors under the BRRD*, *Commemorative Volume in memory of Professor Dr. Leonidas Georgakopoulos*, Bank of Greece's Center for Culture, Research and Documentation, 2016, p. 37, at ssrn.com/abstract=2698086;

Boccuzzi G., De Lisa R., *The Changing Face of Deposit Insurance in Europe: From the DGSD to the EDIS Proposal*, in XXI *Rapporto sul Sistema Finanziario*, *The Changing Face of Banking*, Ass. Rosselli, 2016, p. 7, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850459;

Boccuzzi G., *The New European Framework for Banking Crisis Management. Will it be Enough?*, *Open Review of Management*, Banking and Finance, 1, 2016, p. 22 at https://openreviewmbf.files.wordpress.com/2017/03/openreviewmbf_2_1_2016_.pdf;

Bodellini M., Lintner P., *The impact of the Covid-19 pandemic on credit institutions and the importance of effective bank crisis management regimes…*, in *Law and Economics Yearly Review*, vol.9, I, 2020, p. 182;

Bodellini M., *To Bail-In, or to Bail-Out, that is the Question*, in *Eur Bus Org Law Rev*, 19, 2018, p. 365;

Bonfatti S., *Crisi bancarie in Italia 2015-2017*, in *Riv.dir.banc.*, 2018, I, p. 247, at rivista.dirittobancario.it;

Brescia Morra C. (2019a), *The New European Union Framework for Banking Crisis Management: Rules versus Discretion*, in *European Company and Financial Law Review*, vol. 13, 4, 2019, p. 363 at https://doi.org/10.1515/ecfr-2019-0013;

Brescia Morra C. (2019b), *The Third Pillar of the Banking Union and Its Troubled Implementation*, in M. Chiti and V. Santoro (Eds.), *The Palgrave Handbook of European Banking Union Law*, Springer, 2019, p. 393;

Brescia Morra C. (2020a), *Lending activity in the time of coronavirus*, in C. Gortsos and W-G. Ringe (Eds.), *Pandemic Crisis and Financial Stability*, EBI, Frankfurt, 2020, p. 391;

Brescia Morra C. (2020b), *Gestione delle crisi bancarie e aiuti di Stato. Alla ricerca di un difficile equilibrio*, in *Banca, impresa e società*, 2020, p. 191;

Brescia Morra C., *The Relationship between the Single Resolution Fund and the national Deposit Guarantee Scheme*, in E. Barucci. M. Messori (a cura di), *Towards the European Banking Union. Achievements and Open Problems*, Perugia, 2014, p. 45;

Buckingham S., Atanasova S., Frazzani S., Véron N., *Study on the differences between bank insolvency laws and on their potential harmonisation*, Final Report to the EC, November 2019, at https://www.bruegel.org/wp-content/uploads/2020/06/191106-study-bank-insolvency_en.pdf;

Calomiris C.W., Gorton B.G., *The Origin of Banking Panic Models: Facts, and Bank Regulation*, in *Financial Markets and Financial Crises*, 1991, p.109;

Carletti E., Claessens S., Fatás A., Vives X., *The bank business model in the post-Covid-19 world*, 18 June 2020, at https://voxeu.org/article/bank-business-model-post-covid-19-world;

CEPS, *Options and national discretions under the deposit guarantee scheme directive and their treatment in the context of a European deposit insurance scheme*, November 2019, at https://op.europa.eu/it/publication-detail/-/publication/de0f5ee8-0c44-11ea-8c1f-01aa75ed71a1;

Choulet C., *Does the Support of an IPS Constitute State Aid?*, EcoFlash, 29 April 2019, at economic-research.bnpparibas.com.;

Croitoru O. M., Dobler M., Molin J., *Resolution Funding: Who Pays When Financial Institutions Fail?*, IMF Technical Notes and Manuals No. 2018/01, August 2018, available at www.imf.org;

Danisewicz P., McGowan D., Onali E., Schaeck K., *Debt Priority Structure, Market Discipline, and Bank Conduct*, in *The Review of Financial Studies*, Volume 31, Issue 11, November 2018, p. 4493;

Davis K., *Regulatory changes to bank liability structure: implications for deposit insurance design*, in *Journal of Banking Regulation*, 2020, 21, p. 95;

De Aldisio A. – G. Aloia – A. Bentivegna A. Gagliano – E. Giorgiantonio - C. Lanfranchi – M. Maltese, *Towards a framework for orderly liquidation of banks in the EU*, in Banca d'Italia, *Notes on Financial Stability and Supervision*, n. 15 August 2019, at bancaditalia.it/pubblicazioni/note-stabilita/2019-0015/Note-stabilita-finanziaria-n15.pdf;

Demirgüç-Kunt, A., Detragiache E., *Does deposit insurance increase banking system stability? An empirical investigation*, in *Journal of Monetary Economics*, 49(7), 2002, p. 1370;

Demirgüç-Kunt A., Huizinga H., *Market Discipline and Financial Safety Net Design*, *World Bank Policy Research Working Paper* No. 2183, 1999, p. 2, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=629175;

Deslandes J., Dias C., Magnus M., *Liquidation of Banks: Towards an 'FDIC' for the Banking Union?*, *In-depth Analysis*, February 2019, at https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2019)634385;

Deslandes J., Magnus M., *Further harmonising EU insolvency law for banks? A resolution perspective*, EP Briefing, April 2018, at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614514/IPOL_BRI(2018)614514_EN.pdf;

Diamond D., Dybvig P.*, Bank runs, deposit insurance and liquidity*, in ournal of Political Economy, Vol. 91, No. 3, 1983, p. 401;

Dias C., Deslander J., Magnus M., *Recent measures for Banca Carige from a BRRD and State Aid perspective* (European Parliament Briefing, 2019), February 2019, at https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2019)624413;

EBA, *The EU banking sector: first insights into the Covid-19 impacts*, EBA/REP/2020/17, May 2020;

EBA (2019a), *Deposit Guarantee Schemes data*, 17 June 2019, at https://eba.europa.eu/regulation-and-policy/recovery-and-resolution/deposit-guarantee-schemes-data;

EBA (2019b), *Risk Dashboard – Data as of Q4 2019* (14 April 2020), at eba.europa.eu/sites/default/documents/files/document_library/Risk%20Ana lysis%20and%20Data/Risk%20dashboard/Q4%202019/882137/EBA%20Da shboard%20-%20Q4%202019.pdf;

EBI, *Report on the 'Pandemic Crisis-related' Economic Policy and Financial Regulation Measures, International, EU and Euro Area Levels* (standing as of 31 July 2020), at ebi-europa.eu;

EC, *Coronavirus response: Banking Package to facilitate bank lending- Supporting households and businesses in the EU*, 20 April 2020;

EC, *Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)*, Brussels, 30.4.2019 COM(2019) 213 Final,

ECB (2020a), *Euro area banking sector resilient to stress caused by coronavirus*, ECB analysis shows, Press release, 28 July 2020;

ECB (2020b), *Risk Report on Less Significant Institutions*, 30 January 2020, at https://www.bankingsupervision.europa.eu/ecb/pub/html/ssm.lsiriskreport202001~48ecda4549.en.html;

ECB, *Opinion of the European Central Bank of 8 March 2017 on a proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy* (CON/ 2017/6), OJ C 132/1 of 26 April 2017;

EFDI, *Deposit guarantee schemes' alternative measures to pay-out for effective banking crisis solution*, EFDI State of Play and Non- Binding Guidance Paper, November 2019;

Enria A., *The Coronavirus crisis and ECB Banking Supervision: Taking Stock and Looking Ahead*, Oxford Business Law Blog, 3 August 2020, at https://www.law.ox.ac.uk/business-law-blog/blog/2020/08/coronavirus-crisis-and-ecb-banking-supervision-taking-stock-and;

EUROFI SECRETARIAT, The Protection of Deposits in the EU: Pros and Cons and a possible way forward, April 2020 at www.eurofi.net/wp-content/uploads/2020/04/the-protection-of-deposits-in-the-eu_pros-and-cons-and-a-possible-way-forward_zagreb_april2020.pdf;

FDCI, *Crisis and Response: an FDCI History, 2008-2013*, Washington, 2017, at www.fdic.gov/bank/historical/crisis/crisis-complete.pdf;

FDIC, *Resolutions Handbook*, as revised in January 2019, available at www.fdic.gov;

Fioretti P., Francova O., Hesketh M., Mascher N., Strauch R., Vancompernolle F., *Completing Banking Union to support Economic and Monetary Union*, ESM Discussion Paper 7, October 2019, at https://www.esm.europa.eu/publications/completing-banking-union-support-economic-and-monetary-union;

FITD, *Relazione e bilancio 2018*, www.fitd.it/Pubblicazioni/Relazioni_annuali;

FITD, *Relazione e bilancio 2019*, at www.fitd.it/Pubblicazioni/Relazioni_annuali;

Garicano L., *Two proposals to resurrect the Banking Union: the Safe Portfolio Approach and the SRB*, paper prepared for the ECB Conference on "Fiscal Policy and EMU Governance", Frankfurt, 19 December 2019, at bruegel.org;

Gelpern A., Veron N., *An Effective Regime for Nonviable Banks: US Experience and Considerations for EU Reform*, July 2019, at europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2019)624432;

Gortsos C. (2020a), *The application of the EU banking resolution framework amidst the pandemic crisis*, in C. Gortsos and W.G. Ringe (Eds.), *Pandemic Crisis and Financial Stability*, EBI, Frankfurt, 2020, p. 361;

Gortsos C. (2020b), *The EU policy response to the current pandemic crisis through the lens of the Eurogroup Report of 9 April 2020: overview and assessment*, 14 April 2020, at https://ssrn.com/abstract=3579010;

Gortsos C. (2020c), *The Response of the European Central Bank to the Current Pandemic Crisis: Monetary Policy and Prudential Banking Supervision Decisions*, *EBI Working Papers Series* No 68, 21 July 2020, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650370;

Gortsos C., *The Role of Deposit Guarantee Schemes (DGSs) in Resolution Financing*, *EBI working paper* n. 37/2019, 4, at ssrn.com/abstract=3361750;

Gortsos C., *Fundamentals of Public International Financial Law: International Banking Law within the System of Public International Financial Law*, Schriften des Europa-Instituts der Universität des Saarlandes - Rechtswissenschaft, Nomos Verlag, Baden-Baden, 2012, p. 90;

Grünewald S., *Legal challenges of bail-in*, in *ECB Legal Conference* 2017. *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, p. 287 at www.ecb.europa.eu/pub/pub/legal/html/index.en.html;

Howarth D., Quaglia L., *The Difficult Construction of a European Deposit Insurance Scheme: a step too far in Banking Union*, *Journal of Economic Policy Reform*, 21, 3, 2018, p. 190;

Huertas T., *Completing the Banking Union*, *SAFE White Paper* No. 63, September 2019, at www.econstor.eu/bitstream/10419/203452/1/1677248416.pdf;

IADI, *Deposit insurance surveys*, 2019, at www.iadi.org/en/core-principles-and-research/deposit-insurance-surveys/;

IADI, *Core Principles for Effective Deposit Insurance Systems*, 2014;

Iftinchi V., *State aid and the financial sector: the evolution of the legal framework of State aid law*, in *Research Handbook on State Aid in the Banking Sector*, in F.C. Laprévote, J. Gray, F. De Cecco (Eds.) Edward Elgar Publishing, 2017, p. 54;

Igac D., Moussawi H., Tieman A.F., Zdzienicka A., Dell'Ariccia G., Mauro P., *The Long Shadow of the Global Financial Crisis: Public Intervention in the Financial Sector,* IMF Working Paper WP/19/164, July 2019;

IMF, *Euro Area Policies / Financial Sector Assessment Program /Technical Note: Bank Resolution and Crisis Management*, International Monetary Fund, Country Report No. 18/232, July 2018;

Karel L., *Banking between two crisis*, SUERF Policy Brief, No 19, July 2020, at suerf.org;

König E (2020a), *Bank resolution: Future challenges in Europe*, BrieFin #4: Resolution, June 2020, at ebi-europa.eu;

König E. (2020b), *Completing the crisis management framework: a centralized administrative liquidation tool for banks*, April 2020, srb.europa.eu/en/node/972;

König E., *A common set of rules for liquidation for small and medium-sized banks*, Eurofi article, 23 September 2019, at https://srb.europa.eu/en/node/835;

König *E.*, *European Parliament ECON Committee Hearing - Speech*, 28 March 2018, at srb.europa.eu/en/node/508;

Majnoni D'Intignano G., Dal Santo A., Maltese M., *La gestione delle crisi bancarie da parte della FDIC: esperienza e lezioni per la Banking Union*, in Banca d'Italia, *Note di stabilità finanziaria e vigilanza*, No 22, agosto 2020, at https://www.bancaditalia.it/pubblicazioni/note-stabilita/2020-0022/index.html;

Mecatti I. (2020a), *L'organizzazione dei sistemi di garanzia dei depositanti in funzione degli interventi alternativi per la prevenzione e la gestione della crisi delle banche*, in *Banca, impresa e società*, 2020, p. 217;

Mecatti I. (2020b), *The role of Deposit Guarantee Schemes in preventing and managing banking crises: governance and least cost principle*, in publishing in *The European Company and Financial Law Review*;

Mecatti I., *Il decreto salva banche*, in M. Chiti and V. Santoro (Eds.), *L'Unione bancaria europea*, Pisa, 2016, p. 585;

Morais L.S., *The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities*, in C. Gortsos and W-G. Ringe (Eds.), *Pandemic Crisis and Financial Stability*, EBI, Frankfurt, 2020, p. 265;

Nicolaides P., *The Corona Virus Can Infect Banks Too. The Applicability of the EU Banking and State Aid Regimes*, in *European State Aid Law Quarterly*, vol. 19, Issue 1, 2020, p. 29;

Nicolaides P. (2019a), *The Boundary between State and Private Resources*, 9 April 2019, available at http://stateaidhub.eu/blogs/stateaiduncovered/post/9479 ;

Nicolaides P. (2019b), *Ten Years of State Aid to Financial Institutions: Is There Still a Serious Disturbance*, in European State Aid Law Quarterly, Vol. 2019, Issue 2, 2019, p. 121;

Nicolaides P., *State Aid and EU funding: Are they compatible?*, IN-DEPTH ANALYSIS, April 2018, at http://www.astrid-online.it/static/upload/ipol/ipol_state-aid_eu-funding.pdf;

Nieto M.J., *Bank Resolution and Mutualization in the Euro Area*, *European Economy Banks, Regulation, and the Real Sector*, 2016.2, p. 131, at https://www.researchgate.net/publication/311588545_Bank_Resolution_and_Mutualization_in_the_Euro_Area;

Restoy F., Vrbaski R., Walters R., *Bank failure management in the European banking union: What's wrong and how to fix it*, FSI Occasional paper n. 15, July 2020, at www.bis.org/fsi/fsipapers15.pdf;

Restoy F., *How to Improve Crisis Management in the Banking Union: a European FDIC?,* SUERF Policy Note No 102, September 2019, p. 5;

Ringe W-G., *COVID-19 and European banks: no time for lawyers*, in C. Gortsos and W-G. Ringe (Eds.)*, Pandemic Crisis and Financial Stability*, edited by, EBI, Frankfurt, 2020, p. 43;

Ringe W-G., *Bank Bail-in Between Liquidity and Solvency*, in 92 *Am. Bankr. L.J.*, 2018, p. 299;

Santoni G., *Tre interrogativi sull'operazione di salvataggio delle quattro banche*, in *Riv. dir. banc.*, 11, 2016, 1 at rivista.dirittobancario.it;

Schillig M*., BRRD/SRM, corporate insolvency law and EU state aid – the trifurcated EU framework for dealing with banks in distress*, in G. Lo Schiavo (Eds.), *The European Banking Union and the Role of Law*, Elgar, Cheltenham, 2019, p. 238;

Scholz O., *Position paper on the goals of the banking union*, Bundesfinanzminister non-paper, November 2019, at http://prod-upp-image-read.ft.com/b750c7e4-ffba-11e9-b7bc-f3fa4e77dd47;

Schularick M., Steffen S., Tröger T. H., *Bank capital and the European recovery from the COVID-19 crisis*, *SAFE White Paper* No. 69, 2020, June 2020, at https://safe-frankfurt.de/fileadmin/user_upload/editor_common/Policy_Center/SAFE_White_Paper_69.pdf;

Scipione L., *Crisi bancarie e disciplina degli aiuti di stato. Dalla prospettiva europea all'attuazione nell'ordinamento italiano. Elementi di confronto e spunti di riflessione*, in *Innovazione e diritto*, 2017, p. 184;

SRB, *Minimum Requirement for own funds and eligible liabilities (MREL). SRB Policy under the Banking Package*, Brussels, 2020, at srb.europa.eu/sites/srbsite/files/srb_mrel_policy_2020.pdf;

SRB, *Public Interest Assessment: SRB Approach*, July 2019, at srb.europa.eu/sites/srbsite/files/2019-06-28_draft_pia_paper_v12.pdf;

SRB, *Decision concerning the assessment of the conditions for resolution in respect of ABLV Bank Luxembourg SA*, 23 February 2018, at https://srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-10_ablv_lux_non_confidential_version_final.pdf;

SRB*, Decision concerning the assessment of the conditions for resolution in respect of ABLV Bank*, AS, 23 February 2018, at srb.europa.eu/sites/srbsite/files/decision_srb-ees-2018-09_ablv_lv_non_confidential_version_final_0.pdf;

SRB, *Decision concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A.*, 23 June 2017, at srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf;

SRB, *Decision concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A.*, 27 June 2017, at srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf;

Stanghellini L., *The Implementation of the BRRD in Italy and its First Test: Policy Implications*, in *Journal of Financial Regulation*, 2016, 2, 158;

Tröger T. H., *Too Complex to Work: A Critical Assessment of the Bail-in Tool under the European Bank Recovery and Resolution Regime*, *SAFE Working Paper* No. 179, 2017, at papers.ssrn.com/sol3/papers.cfm?abstract_id=3023184;

Tümmler M., Thiemann M., *Beyond Moral Hazard Arguments: The Role of National Deposit Insurance Schemes for Member States' Preferences on EDIS*, *SAFE White Paper* No. 72, August 2020, at https://safe-frankfurt.de/publications/pub-details-startseite/publicationname/beyond-moral-hazard-arguments-the-role-of-national-deposit-insurance-schemes-for-member-states-pre.html;

Ventoruzzo M., Sandrelli G., *Oh Tell Me The Truth About Bail-In: Theory and Practice*, *ECGI Law Working Paper* No 442/2019, at papers.ssrn.com/sol3/papers.cfm?abstract_id=3343324&download=yes;

Veron N., *Banking regulation in the Euro Area: Germany is different*, 27 May 2020, at www.bruegel.org/2020/05/banking-regulation-in-the-euro-area-germany-is-different;

Veron N., *Taking stock of the Single Resolution Board*. In-Depth Analysis requested by the ECON committee, Brussels, March 2019 at www.europarl.europa.eu/RegData/etudes/IDAN/2019/634393/IPOL_IDA(2019)634393_EN.pdf;

Vignini A., *State Aid Control in the Banking Sector and the Single Resolution Mechanism*, in R. D'Ambrosio (eds), *Law and Practice of the Banking Union and of its governing institutions (Cases and Materials)*, Banca d'Italia, *Quaderni di ricerca giuridica*, No 88, April 2020, p. 401;

Vignini A., *State Aid and Deposit Guarantee Schemes. The CJEU Decision on Tercas and the role of DGSs in banking crises,* in Banca d'Italia, *The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17)*, *Quaderni di ricerca giuridica*, No 85, May 2019, p. 9;

Vitale G., *The General Court's Ruling in Tercas: Between Imputability of the Aid to the State and Use of State Resources*, in *European Papers*, Vol. 4, 2019, n. 3, p. 895 www.europeanpapers.eu/;

Werner P. and Caramazza M., *State Aid or Not – This Is the Question*, in *European State Aid Law Quarterly*, vol. 18, 4, 2019, p. 519;

World Bank Group, *Bank Regulation and Supervision after the Global Financial Crisis*, *Global Financial Development Report 2019-2020*, at www.worldbank.org/en/publication/gfdr);

Wymeersch E., *The COVID-19 crisis and financial regulation*, in C.V. Gortsos and W-G. Ringe (Eds.), *Pandemic Crisis and Financial Stability*, EBI, Frankfurt, 2020, p. 63;

Zavvos G.S., Kaltsouni S., *The Single Resolution Mechanism in the European Banking Union: Legal foundation, governance structure and financing*, in M. Haentjens and B. Wessels (Eds.), *Research Handbook on Crisis Management in the Banking Sector*, Elgar, Cheltenham, 2015, p. 117.