I

PhD THESIS DECLARATION

The undersigned

SURNAME	Riso
FIRST NAME	Antonio Luca
PhD Registration Number	1466556

Thesis title:

Crisis Management and Resolution in the Banking Union

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

PhD in	International Law and Economics
Cycle	XXV
Candidate's tutor	Professor Giorgio Sacerdoti
Year of thesis defence	2014

DECLARES

Under his/her responsibility:

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

1) that, according to Italian Republic Presidential Decree no. 445, 28th December 2000, mendacious declarations, falsifying records and the use of false records are punishable under the Italian penal code and related special laws. Should any of the above prove true, all benefits included in this declaration and those of the temporary embargo are automatically forfeited from the beginning;

2) that the University has the obligation, according to art. 6, par. 11, Ministerial Decree no. 224, 30th April 1999, to keep a copy of the thesis on deposit at the "Bilioteche Nazionali Centrali" (Italian National Libraries) in Rome and Florence, where consultation will be permitted, unless there is a temporary embargo protecting the rights of external bodies and the industrial/commercial exploitation of the thesis;

3) that the Bocconi Library will file the thesis in its "Archivio istituzionale ad accesso aperto" (institutional registry) which permits online consultation of the complete text (except in cases of a temporary embargo);

4) that, in order to file the thesis at the Bocconi Library, the University requires that the thesis be submitted online by the candidate in unalterable format to Società

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

NORMADEC (acting on behalf of the University), and that NORMADEC will indicate in each footnote the following information:

- thesis (*thesis* title)

  Crisis Management and Resolution in the Banking Union

- by (candidate's surname and first name)

  Riso Antonio Luca;

- defended at Università Commerciale "Luigi Bocconi" – Milano in (year of defence) 2014;

- the thesis is protected by the regulations governing copyright (Italian law no. 633, 22nd April 1941 and subsequent modifications). The exception is the right of Università Commerciale "Luigi Bocconi" to reproduce the same for research and teaching purposes, quoting the source;

- **only in cases where another declaration has been undersigned requesting a temporary embargo**: the thesis is subject to a temporary embargo for (indicate duration of the embargo) ……… months;

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

5) that the copy of the thesis submitted online to NORMADEC is identical to the copies handed in/sent to the members of the Thesis Board and to any other paper or digital copy deposited at the University offices, and, as a consequence, the University is absolved from any responsibility regarding errors, inaccuracy or omissions in the contents of the thesis;

6) that the contents and organization of the thesis is an original work carried out by the undersigned and does not in any way compromise the rights of third parties (Italian law, no. 633, 22nd April 1941 and subsequent integrations and modifications), including those regarding security of personal details; therefore the University is in any case absolved from any responsibility whatsoever, civil, administrative or penal, and shall be exempt from any requests or claims from third parties;

7a) that the PhD thesis is not the result of work included in the regulations governing industrial property, was not produced as part of projects financed by public or private bodies with restrictions on the diffusion of the results, and is not subject to patent or protection registrations, and therefore not subject to an embargo.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Date ___31/01/2014____

SURNAME	Riso
FIRST NAME	Antonio Luca

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

List of Acronyms and Abbreviations

APEC	Asia-Pacific Economic Cooperation
Asian crisis	Financial Crisis which affected many Asian States in 1997
Bail in	Regulatory tool, by means of which losses are imposed to certain categories of uninsured/unsecured creditors, while a different treatment is reserved to creditors having the same standing, by way of derogation to the *pari passu* principle
Bail out	Injection of public funding in institutions which have solvency problems
BCBS	Basel Committee on Banking Supervision
BoE	Bank of England
BIS	Bank for International Settlement
CBRG	Cross-border Bank Resolution Group
CGFS	Committee on the Global Financial System
CPSS	Committee on Payment and Settlement Systems

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CMGs	crisis management groups
CRD IV	Capital Requirement Directive IV (Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013)
CRR	Capital Requirement Regulation (Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013)
DGSs	Deposit Guarantee Schemes
D-SIBs	Domestic Systemically Important Banks
ECB	European Central Bank
ECOSOC	United Nations Economic and Social Council
ELA	Emergency Liquidity Assistance
EMU	European and Monetary Union
EU	European Union
Euro Area	The EU Member States, whose currency is the euro
FSAP	Financial Sector Assessment Programme (conducted by the IMF/World Bank)

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

FSA	Financial Services Authority (former single authority in charge for prudential supervision in the UK)
FSB	Financial Stability Board
FSF	Financial Stability Forum
FSF Principles	Principles for Cross-border Cooperation on Crisis Management of the FSF
G-6/7/8	Informal groupings of industrialised States which started gathering (in formats of 6, 7 and later also 8 Members) subsequent to a first meeting in Rambouillet in 1975
G-10	Group of Ten (States), which was established in 1962 on the occasion of the negotiations for a credit arrangement to the benefit of the IMF, the General Arrangements to Borrow (GAB)
G-20	Informal grouping of 20 States, plus representatives of the EU, which succeeded in September 1999 the G-33 established following the G-7 of Cologne in 1999
GAB	General Arrangements to Borrow of the IMF
GDP	Gross Domestic Product

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Great (Financial) Crisis	The Crisis started in 2007-2008
G-SIFIs	Global SIFIs
IAIS	International Association of Insurance Supervisors
IASB	International Accounting Standards Board
IBRD	International Bank for Recovery and Development
IFIs	International Financial Institutions
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISSBs	International Standard Setting Bodies
ITO	International Trade Organisation
Key Attributes	FSB, Key Attributes for Effective Resolution Regimes for Financial Institutions
LOLR	Lender Of Last Resort
MPE	Multiple Point of Entry
NCBs	National Central Banks
NIFA	New International Financial Architecture

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

OECD	Organisation for Economic Co-operation and Development
RRPs	recovery and resolution plans
ROSCs	Reports on the Observance of Standards and Codes (conducted by the IMF/World Bank)
SIFIs	Systemically important financial institutions
SIFI Framework	‘Reducing the moral hazard posed by systemically important financial institutions - FSB Recommendations and Time Lines’
SPE	Single Point of Entry
SSM	Single Supervisory Mechanism
SSM Regulation	Council Regulation (EU) No 1024/2013 of 15 October 2013
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
TBTF	Too Big To Fail

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

WTO	World Trade Organisation

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Table of Contents

Introduction 1

Chapter I – The International Dimension of Crisis Management and Resolution 13

1. International Standards for Crisis Management and Resolution 13

2. The Architecture of the Global economic Governance 17

2.1. The developments in the international financial governance after the collapse of the Bretton Woods order 17

2.2. The rise of informal groupings 21

2.3. On the role of the IMF 25

2.4. On the role of the BCBS and standard setting bodies 27

2.5. On the role of the FSB 29

3. International principles in the field of crisis management and resolution.......... 33

3.1 General considerations 33

3.2 Development of a coordinated policy strategy for crisis management........ 37

3.3. Policy analysis concerning SIFIs and the TBTF.. 41

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3.4. International standards for resolution 51

4. Conclusive remarks 64

Chapter II – Financial Crisis Management from the Single Market to the Banking Union 71

1. Crisis Management in the EU: from the Single Market to the EMU 71

1.1. The EMU and the Single Market 71

1.2. Competition and Financial Stability 74

1.3. Central banking and Supervision 79

1.4. Central banking and LOLR 82

2. The Brouwer Reports 92

2.1. The First Brouwer Report 92

2.2. The Second Brouwer Report 95

2.3. Crisis Management tools in the Brouwer Report II 100

3. MoUs-based Crisis Management 106

3.1. The 2003 MoU 107

3.2. The 2005 MoU 108

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3.3. The 2008 MoU 110

4. The Impact of the Crisis on the EU framework 115

4.1. The Delarosiére Report 115

4.2. The First Communication on Cross-Border Crisis Management 118

4.3. Reactions to the First Communication and Further Developments 123

4.4. Impact of the Crisis on the State Aid Regime 126

5. The Sovereign Debt Crisis 130

5.1. Vicious circle between banks and a sovereign 130

5.2. The Greek Crisis 131

5.3. The Irish case 134

5.4. The Spanish case 135

5.5. The Cypriot Case 136

6. The need for a European ‘safety nets’ 137

Chapter III – Main features of the Resolution Framework in the Banking Union 143

1. Towards a genuine EMU 143

1.1. The Four Presidents Reports 143

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3.2. The 29 June 2012 Euro Area Summit 146

3.3. Commission's Proposals 147

3.4. Interim Report and further developments 152

3.5. The Joint German-French Proposal 157

3.6. Final steps to the establishment of a Banking Union? 158

2. Status of the legislative procedures 161

2.1. The DGS Directive 161

2.2. The Resolution Regime 162

2.3. Perspective legislative developments... 164

3. Basic principles of the Resolution Framework 167

3.1. Resolution in the Single Market and in the Banking Union 167

3.2. Principles and Objectives 169

3.2. Eligible liabilities 172

4. The Single Resolution Board.. 174

4.1. Nature of the SRB 174

4.2. Legal Constraints to the Establishment of a Single Resolution Board 175

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4.3. Decision-making in the SRB 182

4.4. Tasks 183

5. The Resolution Procedure 184

5.1. Early Intervention 184

5.2. The resolution scheme 187

5.3. Compliance with State Aid 189

5.4. Implementation of the Resolution Scheme 190

6. The Single Resolution Fund 192

6.1. Sources of Funding 192

6.2. Use of the SRF Funds 194

6.3. The Role of the IGA 195

7. The Development of a Fiscal Backstop 197

7.1. The Commitment to Develop a Common Backstop 197

7.2. The ESM Direct Recapitalisation Instrument 198

7.3. The ESM framework 199

8. Conclusive remarks 202

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

8.1. An incomplete Framework 202

8.2. Impact of Newly Developed International Principles on the European Scenario 203

8.3. The Development of an European Approach 206

8.4. The impact of the Fiscal Crisis in the Design of the New Framework 210

8.5. Interaction with the current EU Legal Framework 213

8.6. Crisis Management: a Flaw of the EMU or a Need of the Single Market? .. 215

8.7. Implications for an Optimal Design for Crisis Management in the Banking Union 224

8.8. Outcomes of the Policy Debate on the European Framework 230

Conclusions 237

Bibliography 243

Books 243

Articles appearing in edited volumes 246

Journal Articles 248

Other sources 251

Legal acts 262

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Case-law 265

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A chi in questi anni mi ha sostenuto

con devota tolleranza, amore e fiducia.

A chi ha condiviso i miei sforzi quotidiani,

e alla mia famiglia.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Introduction

The present work intends to deal with the management and resolution of financial crises in the context of the European Banking Union. As in any research, the work needs to be driven by a meaningful objective and purpose, and to be confined within a properly delimited scope, in line with the pursued objective.

The world is currently struggling to come out from the most terrific crisis for almost a century, since the one of 1929 which would have prepared the ground for the advent of dictatorial regimes and a World War. In the 'developed world' unemployment has increased at unbearable levels which substantially affected the possibility for citizens to carry out their life plans, while part of the wealth available to the population prior to the advent of the crisis has simply vanished.

The impact of the crisis has been particularly severe in Europe, so much that the institutional framework to which the continent bound itself after the world to prevent the insurgence of new conflicts and create the best conditions for development and growth, has been put into question: whereas the objectives that the European Union (EU) was expected to reach have been effectively achieved, increasing parts of the European population seem to have forgotten such important legacy of the European integration process, and start looking at the latter as an impediment to the

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

improvement of their material life conditions, and to their democratic participation to the democratic process.

The above shows the importance of financial crises, which can go well beyond their significance in the economic field, and concern even the bases of a democratic society.

From a policy point of view, in the present context it is thus particularly important to analyse whether it is possible to minimise – ideally exclude – the possibility that similar crises occur and, in the case where such rises occur, how, under which conditions and to which extent the negative impact they produce can be limited.

An Italian economist considered more than a century ago[1] that, while many think that a crisis is similar to a burning fire in so that a great quantity of wealth literally vanishes during the crisis, the truth is that a crisis is more similar to the eruption of a volcano, because the destruction of wealth took place before its effects are shown in the form of a crisis. Thus, consistently with this interpretation, the real crisis management would be the one which happens far from the sight of the public, and which consists in preventing that the volcano erupts and that crises show up and produce their effect.

The above observation has some merit, and in an ideal world the control of crises should simply consist in preventing them. This line of thought stands in particular

---

[1] M. Pantaloni, Scritti Varii di Economia, Rome, 1925, 65.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

behind the concept of ‘supervision’ (or ‘oversight’, depending on the context), i.e. a public function entrusted to a certain subject, with a specific mandate to prevent a certain risk to materialise. Hence the centrality of supervision in the public debate, in policy actions and in the doctrine when the moment comes to analyse the reasons of a crisis, and to study the countermeasures to prevent a similar one to occur again. Thus, it is not possible to consider crises, their management and resolution without considering the key role of supervision in preventing their occurrence. In the same vein, however, a system exclusively based on supervision without proper crisis management arrangements would simply be ill-suited, because in spite of all the rational arguments and studies which have been developed to better understand crises and their dynamics, in fact crises do happen, and relatively often also.

The above consideration leads to the fundamental question on why this happens, and what can be defined as a crisis, in the end. A vast literature exists in economics regarding the nature of crises, their categorisation, their dynamics and their historical manifestations. A classic approach in this field is the one followed by C. P. Kindleberger[2], who built on the previous work of H. Minsky. In this model, the idea of crisis is related to the relationship between indebtedness and the expectations on the production of future income and wealth. Accordingly, at the beginning of a crisis would be a ‘displacement’, consisting in an external, exogenous shock to the

[2] C. Kindleberger, R. Aliber, Manias, *Panics and Crashes – A History of Financial Crises*, 5th ed., Hoboken, 2005.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

macroeconomic system which produced expectations resulting in anticipated profits opportunities. A boom is then fuelled by an expansion of credit, for which the banking system is responsible in the first place, and even more so where the banking system provides a substantial part of the funds needed by non-financial companies, like in Europe: this argument is connected to the above observation that the best form of crisis management would in fact be its prevention, and thus the control on the supply of credit by the banks (and by other suppliers thereof) is a central policy issue, which is embedded in the concept of supervision. Following the model, expectations call in the race for profits 'outsiders' attracted by high yields (the 'manias'), whose intervention drives prices up, and at some point above what would be the 'fair value' if a rational pricing approach was followed. At some point, though, the number of new entrants in the market balances the number of those exiting the market: at that point in time the upwards rally of prices stops, and those in the market start to exit to maximise the unrealised gain. As this is a common reaction in the market, the result is a 'herding effect': the rapid increase in supply severely affects the prices, and market participants run to the exit, thereby driving the price down even further. A period of 'financial distress' follows, as the economy as a whole, and certain operators in particular, have difficulties in servicing their obligations: the run is towards liquidity then, and the price of less liquid assets is driven down, thereby forcing to market exit and bankruptcy the most leveraged operators. Certain failures, in particular when involving the banking sector, determine a sudden crisis of trust which leads to panics, and

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

therefore to irrational behaviours such as fire sales which only tend to aggravate the situation, which may ultimately led to a crash. In this context the provision of liquidity to the system is key in avoiding that a liquidity crisis may result in a solvency crisis. The provision of liquidity for these purposes is generally deemed as a function performed in the public interest, therefore it is entrusted to and performed by public authorities, in the first place central banks – in line with the classic theory of the *lender of last resort* developed by Baring, Thornton and Bagehot in the first half of the XIX century[3] – and alternatively (or ultimately) by fiscal authorities.

Albeit essential, this provision of 'emergency liquidity' is seen as a danger to the stability of the system, as awareness by the market of a form of implicit coverage of the downside risk could act as an incentive to irrational behaviours which further fuels the development of 'manias' or bubbles ('moral hazard'). A 'constructive ambiguity' on the terms for the concession of such liquidity supports is the basic tool used to contain phenomena of moral hazard, though it is not considered as sufficient by many.

The debate on the use of this essential tool for the management of a financial crisis is thus among those who argue in favour of limiting the use of such tool as much as possible, in order to limit moral hazard and thus prevent the occurrence of crises, and

---

[3] See, ex multis, V. Gaspar, Bagehot and Coase Meet the Single European Market, in D. Evanoff, G. Kaufman, J. LaBrosse (eds.), International Financial Stability – Global Banking and National Regulation, 2007, 243.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

those who are more concerned about the need to have powerful tools in place in case a crisis occur.

This debate, if broadened in terms, can be extended to the whole range of tools for the management of financial crises. The management of a crisis, as a concept, by necessity implies that the allocation of losses deriving from the burst of the bubble does not follow what would be the normal path, but is smoothened by external subjects which intervene to spread losses across time or parties others than those which would be otherwise directly concerned.

This work clearly follows this line of argumentation, in favour of the establishment of a strong set of tools available to public authorities to contain the development of a crisis and its effects, once the crisis has burst out. This is related to the observation that in spite of the developments achieved in supervision and crises prevention, cognitive biases in the end lead to the '*this time is different*' syndrome, whereby authorities in charge of controlling and market participants are convinced of the effectiveness of the system to such an extent that they do not realise the risk of a crisis materialising: hence prevention of crises is in a way triggered by its success and by the excess of trust which it implies. Against this background the role of crisis management will remain key at least as long as the 'this time is different' cognitive bias is eliminated: which is quite clearly close to impossible, because by supposing that the bias has been eliminated the 'this time is different' bias has already produced its effects. The above is however without prejudice to the need to have all the necessary safeguards in place

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to prevent both crises and moral hazard. The problem of moral hazard is particularly relevant with banks, because, as highlighted above, they have a 'catalyst function' which can both amplifies the run-up to bubbles and determine, with the exit from the market, the spread of panic and the sudden burst of the bubble which may ultimately lead to a crash.

In order to minimise the risk that the crisis of a bank turns into a crisis of the whole system, such crisis needs to be 'orderly resolved': such orderly resolution needs not to follow in full the rules which apply to insolvency, as a minimum to preserve the value and the function of the 'systemic parts' of the troubled bank, which in various forms are considered as worth surviving the liquidation of the rest of the credit institution. Besides this objective of preventing the destruction of value and of systemic parts of the firm, the orderly resolution of a bank, by allowing the exit from the market of firms which assumed an excessive amount of risk, also introduces in the banking system a powerful element of market discipline, thereby allowing to minimise the problem of moral hazard and the 'Too Big To Fail' (TBTF) problem, which is a particular form of moral hazard developed by those entities (and in particular banks) which rely on an implicit guarantee which should shield them from the risk of exiting the market, by virtue of their systemic importance.

The orderly resolution of a bank is usually coupled by Deposit Guarantee Schemes (DGSs), whose function is to partially shield depositors from the losses which they would otherwise incur as a consequence of the banking crisis: albeit a form of

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

protection of smaller depositors is certainly present in the design of DGSs, and one of the policy grounds standing behind the development of such tools, their main purpose is however to protect the general interest, insofar as their presence – at least as long as their credibility is safeguarded – is intended to avoid the occurrence of a 'bank run' of depositors, once these learn that their bank could be in a situation of financial distress: due to the nature of the banks' balance sheets, characterised by short-term liabilities against less liquid assets (such as loans, typically), a liquidity crisis, if not properly managed, and especially if burst by a bank run, may evolve in a solvency crisis and thus trigger the exit of the bank from the market, with a much higher social cost.

In view of the above, in the context of a banking crisis, a broad distinction may thus be drawn between those interventions which affect a bank on an 'on-going concern basis', which can be defined as crisis management in proper terms, and the 'crisis resolution', which implies that at least a part of the bank is to be liquidated (on a 'gone concern' basis): as the purpose of both actions is to 'manage' a crisis once occurred, the reference to 'crisis management' in this work is meant to also encompass 'crisis resolution', unless differently specified. In both cases, though, the intervention – albeit intended to reduce the overall cost of the crisis for the society as a whole – heavily impacts on property rights and ex ante determined rules, also by recurring to appropriation powers. This, together with the existence of a general interest in the matter, implies the need for such arrangements to be regulated by law, and to rely on a solid legal framework. The great importance that the legal framework for the

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

management of a crisis has in this process naturally leads to changes of such framework in order to have better arrangements in place the next time that a similar crisis occurs: for some reason, though, the way crises affect the financial architecture in this respect has been scarcely studied[4], and this work, by observing almost ‘in real time’ the impact of the Great Financial Crisis (this term will be used in the book to refer to the financial crisis which started in 2007-2008 and has not finished yet) on the legal framework for crisis management and resolution of the European Union, is a modest attempt to give a contribution in this respect.

The above analysis naturally led to discuss about banking crises. It should be however noticed since the outset that banking crises are not the only type of financial crises. One of the criticisms raised towards the ‘narrative’ of financial crises firstly elaborated by Minsky is that it would not take into account of a proper classification of crises, being too much focused on a prototype which is proper of the banking crisis[5]. The analysis of crises thus also tries to build on the historical examination of precedent cases or on their quantitative analysis[6]. Different methods lead however to similar results in terms of classifications. In broader terms, besides banking crises inflation, currency, fiscal and financial market crises[7] exist. What they all have in common is

---

[4] See Y. Cassis, Crises and Opportunites – The Shaping of Modern Finances, Oxford, 2011, 3.

[5] C. Kindleberger, R. Aliber, Manias, *Panics and Crashes*, cit., 33.

[6] With reference to the Great Financial Crisis of 2007-2008, see C. Reinhardt. K. Rogoff, *This Time Is Different*, Princeton, Oxford, 2009.

[7] See for example the classification in C. Reinhardt, K. Rogoff, *This Time*, *cit.*, 4 ff.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that these crises are violent adjustments, whereby an indebtedness excess is resolved via the distribution of losses through the decrease in the real internal (inflation crisis) or external (currency crisis) value of the currency, or in the nominal value of the debt issued by sovereigns (fiscal crisis) or by privates (financial markets crisis).

In view of such considerations, for the purposes of this work the classical narrative of crises can still be held valid, and consistently banking crises can be considered as the paradigm of financial crises: hence the use which will be done in this work of 'crises' and 'financial crises' to directly refer to banking crises, unless differently specified.

In addition, these crises are often interconnected, and it is rather difficult to draw a line between the different categories. In the context of the European Union, in particular, the recent crisis, which had initially been imported from the USA – where it originated as a financial markets crisis – rapidly resulted in a banking crisis and a fiscal crisis, mutually intertwined.

The impact of the current crisis on the legal framework of the European Union has been such, to initiate an unprecedented change not only in the financial architecture and in the legal framework for banking resolution, but also in the architectural structure of the European Union as such. A vast consensus matured in particular on the idea that the extent and the depth of the crisis in the European Union was largely due to the link between the two components of such crisis – i.e. the connection between the banking and the fiscal crisis, or, as it is more commonly referred to, the link between

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the banks and the sovereign – so that breaking the link between these two components should have been the key objective of the policy response. Consistently with this approach, the policy decision undertaken in the EU was to supplement the European Monetary Union (EMU) with an European Banking Union (EBU), based on the centralisation at the European level of three functions aimed at preventing (supervision) or managing and resolving (resolution and DGSs) banking crises.

While the delimitation of the scope of this work to crisis management and resolution has been already explained above, the reason for confining the research to banking crises within the banking union is closely connected to the will and need to take into account the importance of this development, consisting in the establishment of an entirely new framework.

Against this background, and within the limits of the scope of the research, as narrowly defined above, this work will try to explore in which way the recent crisis has affected or may affect in the close future the institutional framework of the European Union and of the banking union in particular, whether the changes introduced to the legal framework are consistent with the premises embedded in the nature of the crisis and in its effects, and to which extent the changes to the legal framework entail a substantial change in the capacity of the European Union to manage and resolve its financial crisis.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In line with the scope and the purposes defined above, the work is organised as follow. In Chapter 1, developments at international level are analysed, with the aim to understand to which extent the EU policy choice were influenced by international trends (and what is connected instead to the peculiarities of the EU situation), and what is the room for manoeuvre for EU policy makers within the remit of the policy guidelines agreed at international level.

Chapter 2 analyses the developments of a legal framework for crisis management since the outset of the Single Market to the outset of the Banking Union. In this context the importance of a crisis management framework as a component of the single market is highlighted. It is thus maintained that the aim should not be to design a framework for the management of banking crises which does not entail the following occurrence of a fiscal crisis, but rather to establish a framework where the 'nationality' of troubled banks is simply irrelevant for the purposes of their treatment under a common crisis management framework. The full effectiveness of a framework which leaves wide margins for national differentiations in the management of crises is questioned.

Against the background developed in Chapter 2, the main features of the resolution framework – currently still under discussion – are briefly examined in the following chapters. Chapter 3 in particular deals with concrete rules which are being developed in the legal framework at European level. In particular, an overview is presented of the current projects concerning the Draft Resolution on a Single Resolution Mechanism (SRM).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Chapter I – The International Dimension of Crisis Management and Resolution

1. International Standards for Crisis Management and Resolution

The Great Crisis which started in 2007-8, and which cannot be considered as concluded yet, has been global in size and scale. For anyone wanting to analyse how this crisis, as well as those which may and will follow, has been and should be managed and resolved, it would make sense to preliminarily address the geographical scope of such analysis: whereas the latter could be limited, for various purposes, to the level of a single jurisdiction – at national or regional level – it is however important to acknowledge whether such limited scope is to be considered as a mere subset of a more complex issue, or whether it deserves being treated separately by virtue of specific and distinctive features which are proper of the selected issue.

Crisis management and resolution in the European Banking Union are characterised by a number of distinctive features which are linked to the peculiarity of the institutional framework of the European Union: in fact it may be argued, and it is argued in this work, that the entire Banking Union was primarily conceived as the European way to address the issue of crisis management and resolution in the European Union (EU) or, more properly, within the European and Monetary Union (EMU). The analysis of the developments of crisis management and resolution at the international level, against

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the context described above, can be useful also for the purposes of this research for different reasons.

Even if the management of crises in the Euro Area has its own features and specificities, which relate to the complex (and incomplete) institutional architecture of the European Union, nonetheless the policy actions determined at EU level need to be in line with and follow up to the broader strategies which are decided at a global level. An analysis of the level of detail of the international framework and of the kind of boundaries it imposes is useful for better understanding the range of action and the limited range of options available for the EU policy action.

Contrary to other players who participate in the international architecture, the EU (and even more so the Euro Area) is not a national State, but a regional organisation (or a subset thereof) which needs to find ways to develop and implement policy strategies and actions at a level which is in between the international and the national level, not only as an intermediate layer of governance, but also from the point of view of the binding capacity of the tools which are used, which are looser at the international level and legally binding at the national one. In this context, the EU has been also in the past an interesting experiment, insofar as it has developed further at regional level policies which were only loosely designed at the international level: the architecture of the EU itself, at least at its inception, could be seen as a reproduction and an improvement on a smaller scale of the Bretton Wood model. Conversely, solutions envisaged at the international level have been often developed in response to problems which were

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

particularly acute in Europe: again, this is partly the case for the Bretton Wood system and, which is more of concern for this research, in the case of the recent crisis.

Chapter II will be devoted to the analysis of those peculiarities and distinctive features of the EU institutional framework which have brought about a specific approach to crisis management and resolution. Nonetheless, it is important to recognise the international nature and dimension of the issue at stake. Against this background it should be wondered whether and to which extent a response has been developed at international level, and if such a response was not sufficient, why it was the case.

What emerges clearly from an analysis of the crisis and of the policies chosen to manage it at international level – and even more so at European level – is the increasing difficulty for polities to continue granting financial stability in accordance with schemes which had proven being well functioning until now: in case of a crisis, in fact, the role of the sovereign was meant as that of a ‘provider of (financial) stability of last resort’. Such ‘provision of financial stability’ entailed in most cases a direct bail-out intervention by the sovereign to rescue ailing firms in order to prevent the widespread of panic in the financial markets. Such ad-hoc interventions, however, are extremely costly, and such costs increase with the increase in size of the relevant financial firms (or sectors *tout court*) to be rescued in proportion to the size of the relevant economy, which is even more the case when the size of the relevant economy is shrinking due to an economic recession, and when the latter is combined with a widespread financial crisis. In developed countries the capacity of intervene in such

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

circumstances is further reduced, especially if compared with what used to be the capacities available some decades ago, by steadily decreasing growth rates, an ageing population – which contributes to a more extensive welfare State requiring already in normal circumstances higher levels of public expenditures – and higher level of public indebtedness, all factors which reduce the leeway for contributions from the public purse[8].

Against this background, thus, a general agreement raised among members of the international community on the need to decrease the level of public funding necessary to manage and resolve financial crises, and conversely find different sources of funding to deal with such problem. This shift, whose need has been exacerbated in the European Union by the institutional framework of the EMU in particular, clearly emerges also from the policy actions undertaken at international level.

---

[8] In the immediate aftermath of the start of the financial crisis a stream of economic researches on the relationships between public debt and economic growth was initiated by the authors Reinhardt and Rogoff, who had already given an influential analysis of the crisis in their book *This time is different - Eight Centuries of Financial Folly*, Princeton University Press, 2009. In their paper *Growth in a Time of Debt*, in *American Economic Review: Papers & Proceedings 100*, May 2010, 573, the same authors proposed a 90% threshold for the ratio public debt/GDP, above which such debt would not be sustainable. Since then, the existence of a correlation between higher debt ratios and lower growth rates seems to have been empirically proved, whereas the existence of such 'thresholds' has been challenged. Nonetheless, this stream of work has had a deep influence on policy-making in the aftermath of the crisis.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

2. The Architecture of the Global economic Governance

2.1. The developments in the international financial governance after the collapse of the Bretton Woods order

The Great Financial Crisis which started in 2007-2008, besides heavily affecting the international economic system, stressed the strong deficiencies of the international governance structure which had been developed until then for the management of the international economy. The Crisis has shown being global in its nature, and a response to the crisis has been sought at the same level: the irruption on the scene of the crisis triggered an immediate need for a strategy for crisis management, institutions in place to elaborate and implement such strategy, and eventually crisis management measures and powers. The development of the events highlighted that all of this was lacking.

In the aftermath of World War II, the quest for a global economic order had produced an attempt to provide a comprehensive structure for international economic and financial Governance in the context of the s.c. Bretton Woods system, which had proven at least partially successful, until it entered an irreversible crisis started in the early ‘70s[9].

---

[9] It should be noted that at the time the primary concern in view of designing global governance arrangements was international monetary stability, while since then there has been a gradual shift towards financial stability: in the meanwhile, however, it has become clearer that the two concepts are strictly intertwined. See A. Viterbo, *International Economic Law and Monetary Measures – Limitations to States’ Sovereignitiy and Dispute Settlement*, Elgar International Economic Law, Cheltenham, Northampton, 2012, p. 32.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The Bretton Woods architecture for the governance of the international financial system had been developed having in mind the problems which were underlying the economic crisis of the ‘30s, which preceded World War II and contributed to exacerbate tensions and unbalances which paved the way to the war. In particular, considering the role that protectionism had had at the time to strengthen the recession and foster nationalisms, a consensus rapidly developed on the idea that the new order should have been based on the principle of free trade, which would have been the cornerstone of the new system, over which the International Trade Organisation would have presided. The ITO, however, never came to life, mainly for the opposition of the communist bloc, and its role was thus not entrusted to any international institution, at least until when the World Trade Organisation (WTO) was established. The original design included two other international organisations, in order to embed in three different institutions three basic functions of economic policy: allocation stabilisation and redistribution[10], for each of which the ITO, the International Bank for Recovery and Development (IBRD)[11] and the International Monetary Fund (IMF) would have been respectively responsible. In particular, while the IBRD’s mission was to use financial assistance to foster development in those countries less benefiting of the new system, the IMF main aim should have been to grant monetary stability, especially in

---

[10] See T. Padoa-Schioppa, ‘The IMF in Perspective’, in Truman, Edwin (eds), *Reforming the IMF for the 21st century*, Washington DC, Peterson Institute for International Economics, 2006, p. 513.

[11] A Group which also includes the World Bank.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

its 'external dimension', i.e. exchange rate stability, which was thought as being an essential precondition for granting the regular conduct of cross-border trade. These institutions, in the original design, would have been comprised under the 'Bretton Wood umbrella institution', i.e. the United Nations Economic and Social Council (ECOSOC)[12].

Against this background, the role of the IMF was to grant the proper functioning of a par-value system based on fixed exchange rates, and for this purpose monitor on the development of current account unbalances – connected to trade flows – which would have triggered tensions on the exchange rates. The international financial system was therefore considered as exclusively instrumental to the proper functioning of international trade, while the concept of stability in the financial field tended to coincide with monetary stability. Besides a cultural and 'ideological' bias, a reason underlying such approach was the limited importance and size of cross-border financial activities. Therefore no scope and meaning was seen for financial regulation at international level, this regulatory activities being perceived as more properly allocated at the national level: the main aim of national financial regulation, thus, from an international perspective was to handle possible temporary disequilibria ultimately affecting the monetary flows of the relevant countries: thus, while the free movement of goods was a basic concept of the new system, on the contrary the free movement of

---

[12] See Norton, NIFA-II or 'Bretton Woods-II'? The G-20 (Leaders) summit process on managing global financial markets and the world economy – quo vadis?, in Journal of Banking Regulation, 2010, 11, 263.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

capital was not, and capital controls belonged to the set of tools which could legitimately be used to address monetary unbalances[13].

The crisis of the Bretton Woods system started in 1971, following the declaration on the end of the convertibility of the US dollar[14], exchange restrictions were dismantled in many countries which maintained convertible currencies and capital controls were removed in many industrialised countries[15]. Following the end of the Bretton Woods system, other attempts to design an institutional framework for the global economic governance[16] did not prove as successful. In this context, a practice started, to try to achieve some form of coordination of economic policies which had become and remained mainly national, in informal groupings, such as the G-10[17] and the G-6,

---

[13] See A. Viterbo, *op. cit*., p. 63-67.

[14] Following the suspension of dollar convertibility in August 1971, the countries of the Group of Ten (G-10) concluded the s.c. Smithsonian Agrrement, under which the dollar was devaluated and new parities among currencies were agreed. The new arrangements lasted until 1973. See also A. Viterbo, *op. cit*., p. 65-66.

[15] *Ibid.*, p. 102.

[16] See, e.g., on the New International Economic Order, G. Sacerdoti, ‘Nascita, affermazione e scomparsa del Nuovo Ordine Economico Internazionale’, in *Problemi e Tendenze del Diritto Internazionale dell’Economia – Liber amicorum in onore di Paolo Picone*, A. Ligustro, G. Sacerdoti (eds), Editoriale Scientifica, Napoli, 2011, pp. 127-152.

[17] The G-10 was a Group which had been established in 1962 on the occasion of the negotiations for a credit arrangement to the benefit of the IMF, the General Arrangements to Borrow (GAB). This gathering provided an informal forum to Central Bank Governors and Finance Ministers to discuss matters, not only related to the GAB, of common concern.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

which would have soon become the G-7, and much later the G-8[18]. This form of informal coordination, was particularly well-suited to accompany a global trend, started in the early ‘80s on the impetus of the American and British leaderships at the time, towards a reduction in size and powers of the Governments in the economic and financial field, while liberalisations and more *laissez-faire* were pursued in favour of the private sector.

These policies have been seen among the possible causes of the Great Crisis started in 2007-2008: as a logical reaction, in the immediate aftermath of the start of the crisis a certain consensus raised globally on the need to re-regulate the economy, and in particular the financial sector. In the absence of a more structured institutional architecture at international level, National States pursued more intrusive Government-based policies at national level, which could only be coordinated in those informal groupings which had been originated by the crisis of the Bretton-Wood system, thus relatively loosely and mainly on the basis of soft law and political agreements[19].

2.2. The rise of informal groupings

---

[18] The first meeting of the six most industrialised countries in the world at the time (USA, Japan, Germany, France, UK, Italy) was held in Rambouillet in 1975. Later in 1976 Summit Canada joined what would have become known as the G-7. Only in 1998 also Russia joined what would have then be the G-8.

[19] See G. Sacerdoti, *op. cit*., p. 151.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Following the crisis of the Bretton Wood system, as mentioned above, the 'traditional' architecture of international organisations was replaced by a more flexible and informal system of political summit meetings. Such organisational arrangements were in particular functional to overcome the principle of formal equality among national States in the international arena: this applied in particular to decision-making processes, as such summits allowed to avoid equality of votes, and voting at all at the moment of taking a decision, while also allowing to select a more restrict number of States admitted to the decision-making process, on the basis of criteria relating to the economic size of such States[20].

The criterion of economic size was again important to trigger a change in the composition of the main forum for policies discussions and decision, which became a G-20 in order to increase the representativeness of this arrangement, at least on the basis of the economic size criterion, even though such increased representativeness of the new institutional arrangement does not shield it completely from criticisms raised from those who nonetheless see in such self-selected meetings an infringement of a

---

[20] M. Vellano, 'Verso il superamento del principio della parità formale degli Stati nel governo dell'economia mondiale', in *Problemi e Tendenze del Diritto Internazionale dell'Economia – Liber amicorum in onore di Paolo Picone*, A. Ligustro, G. Sacerdoti (eds), Editoriale Scientifica, Napoli, 2011, pp. 163.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

democratic principle of equal representation on an equal footing of all national States[21].

The predecessor of the G-20, the G-7, became the cornerstone of a new international architecture in the '90s, starting already from the Napoli and Halifax summits in 1994 and 1995[22]. In 1997, at the APEC meeting in Vancouver, an interim group of Central Banks Governors and Finance Ministers representing 22 countries (the G-22) was created to deal with the Asian crisis of the time, which would have been later replaced by a broader G-33, to finally leave the floor to the G-20 in 1999[23]. The mandate of the G-20 was to be an informal forum of finance ministers and central bank governors to promote open and constructive discussion between industrial and emerging-market countries on key issues related to global economy stability: but no priority of the G-7 over the G-20 (or *viceversa*) emerged from this new institutional framework[24]. From

---

[21] M. Vellano, *op. cit*., p. 164. See also Norton, *NIFA-II*, cit., 276, according to which behind the concept of 'representation' there is often an issue of legitimacy and North-South relationships. See also A. Cooper, *The G20 as an improvised crisis committee and/or a contested 'steering committee' for the world*, in *International Affairs*, 86, 3, 741–757, May 2010.

[22] See Norton, *NIFA-II*, cit., 272-273.

[23] The Group consisted of the G-7 plus other 15 countries. The G-33 was formed in view of the G-7 of Cologne in 1999. The G-20, as the successor of the G-22/G-33 was finally established in September 1999: it should be noticed that such G-20 was in fact composed of representatives of 19 countries, plus representatives of the EU Presidency (if not a G-7 Member) and of the ECB, in representation of the EU. In addition, also four representatives of the IMF and the World Bank were included. See Norton, *NIFA-II,* cit. 276.

[24] See Norton, *NIFA-II,* cit. 277-278. However, while G-7 was at the Leader level, thus retaining the role of primary global economic policy formulator, the G-20, it its composition at ministerial level, would have dealt with tasks more closely related to financial stability.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the G-7 Summit of Cologne, as reported more in detail below, also the FSF, the predecessor of the FSB, would have stemmed out, as a technical level coordinating the work of International Standard Setting Bodies (ISSBs) together with official institutions such as the IMF and the World Bank, and reporting to the G-7 and later the G-20, which from the Washington meeting in 2008 onwards would have started meeting in Leaders composition also. The G-20 rose in this way as some sort of 'steering committee' in times of crises[25].

Such informal institutional framework – or rather institutional patchwork –based on a network of standard-setting bodies of various nature, besides not reflecting any democratic principle both in membership selection and in decision-making processes, also gave proof of not being able to effectively prevent and manage the crisis, nor to safeguard financial stability at international level. Global financial stability – to be meant as a situation where the financial system is able to support economic growth, prevent imbalances, assess and manage risk and withstand crises – has been interestingly presented by some as an international public good, i.e. a good which, at international level, has the distinctive feature of being enjoyed not only by the producer, which is in turn not remunerated for these 'positive spillover': thus its production and enjoyment is subject to the 'free-riding problem', and consequently its under-provision is both a risk and, when materialising, a clear evidence of governance

[25] See A. Cooper, *The G20*, cit.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

failure[26]. Such observations supported in particular the criticism of those who argue against the role of these informal summits such as the G-7 or the G-20, and advocate for a more incisive role of proper international organisations based on democratic legitimation, mandate and decision-making processes, such as, in particular, a reformed IMF[27].

2.3. On the role of the IMF

After the end of the Bretton Woods system, based on a par value system of fixed exchange rates, the role of the IMF had to change[28]: such change took place with the adoption in 1976 of the Second Amendment to the Articles of Agreement of the IMF, under which surveillance, lending and technical assistance became the main tasks of the IMF[29].

With particular reference to the surveillance function, the Second Amendment of the IMF Articles of Agreement introduced in Article IV thereof an explicit reference to financial stability, whose underlying necessary conditions development is considered a

---

[26] For a review of the literature on financial stability as an international public good, and the reason for a stronger role of international organisations such as the IMF, see A. Viterbo, op. cit., pp. 7-35.

[27] Ibidem.

[28] Initially the role of the IMF was not designed to deal with such related but not monetary matter, as financial stability. See Norton, *NIFA-II,* cit. 264.

[29] See respectively Article IV, Article V, Section 3, and Article V, Section 2(b) of the IMF Articles of Agreement. See also A. Viterbo, op. cit., p. 67.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

'principal objective'[30] of the international monetary system. Accordingly, each Member State committed to 'seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions'[31]. In turn, the IMF was entrusted with the task to 'oversee the international monetary system in order to ensure its effective operation, and … oversee the compliance of each member with its obligations'[32].

On the basis of this mandate, in the aftermath of the Asian crisis the Financial Sector Assessment Programme (FSAP) was launched, as a joint initiative with the World Bank; since 2010 FSAP are a regular and mandatory part of the Fund's surveillance for Member States with systemically important financial sectors[33]. Under Article VIII, Section 5 (a), of the IMF Articles of Agreement, the IMF is empowered to require Member States to be furnished 'with such information as it deems necessary for its activities': a limit is however provided in Article VIII, Section 5 (b), according to which Member States are 'under no obligation to provide such detail that the affairs of individuals or corporations are disclosed'. In spite of such limitation of the IMF power

---

[30] IMF Articles of Agreement, Section 1.

[31] IMF Articles of Agreement, Section 1 (ii).

[32] IMF Articles of Agreement, Section 3 (a).

[33] FSAP are conducted solely by the IMF for advanced economies. Otherwise FSAP are composed by two parts, whereby the IMF is competent for the financial stability assessment, and the World Bank for financial development assessment. See IMF, 'IMF Expanding Surveillance to Require Mandatory Financial Stability Assessments of Countries with Systemically Important Financial Sectors', Press Release No. 10/357, 27 September, 2010.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to require information, which clearly limits the possibility for the IMF to carry out at international level tasks which could be compared to micro-prudential supervision, the conduct of FSAPs represent today perhaps the most important verification exercise on the resilience of national (and in the case of the EU, regional) financial systems under a financial stability viewpoint, at international level.

2.4. On the role of the BCBS and standard setting bodies

Following the demise of the Bretton Wood system, cross-border financial activities grew rapidly in the '70s, e.g. in the s.c. 'Eurodollar market'. While the ability of national States and of the IMF to provide effective governance arrangements to the international financial system was decreasing, financial intermediaries (mainly banks) took advantage of the new scenario, characterised by looser controls on cross-border capital flows. As a consequence, the role of central banks, which were better placed to follow the developments of financial intermediaries' cross-border activities, increased in importance. Against this background, the central bank Governors of the G-10 established the Basel Committee on Banking Supervision (BCBS)[34], whose Secretariat

---

[34] After the end of the managed exchange rate system in 1973, in June 1974 the German bank Herstatt was found having foreign exchange exposure amounting to three times the capital of the bank, whose license was withdrawn with heavy losses for other international banks outside Germany Franklin National Bank The reaction to these crisis was the establishment of the Committee, which was initially named as 'Committee on Banking

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

was hosted by the Bank for International Settlement (BIS)[35], as a response to the insolvency of some international banks.

The BCBS was thus established by G-10 States as a response to a crisis, and as a crisis prevention tool, in order to minimise for each State's banks the risk of illiquidity or insolvency of counterparty banks licensed in other countries. Gradually the BCBS became the body entrusted with the task to develop financial standards of general application to the world's banking system[36], beyond the scope of the G-10 jurisdictions, and the prototype of international standard-setting bodies (ISSBs).

The successful example of the BCBS was later followed by other international standard-setting bodies which were established often as a reaction to a financial crisis (the Mexican and Asian crises in the '90s in particular), and which are also in the large majority hosted by the BIS. The rise of these organisations is connected to the absence of an international organisation in charge for granting a level playing field with regard to international financial regulation: the approach of such standard setting bodies is

---

Regulations and Supervisory Practices'. See A. Viterbo, *op. cit.*, p.102 ff, as well as the BIS website at the following address: http://www.bis.org/bcbs/history.htm.

[35] Curiously, the BIS was originally meant to be dismantled under the original design of the Bretton Woods institutions. See Norton, *Nifa-II*, cit., 264 and 270.

[36] Particularly noteworthy are the adoption of the Basel Accord in 1988, of the s.c. Basel II Accord in 2006 and the s.c. Basel II Framework in 2010, which have become the international standard for the capital adequacy of banks.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

however based on soft law standards, whose implementation is decentralised at national level.

Such implementation is voluntary, and based on the authoritativeness of the relevant ISSB, which explains the implementation also in jurisdictions which are not represented in such bodies: the process of voluntary implementation is however strongly supported also by market incentives and risk assessment based on the observance of financial standards, and by official pressure tools such as the IMF surveillance[37]. Admittedly, this approach, albeit flexible and quick in the adoption of new rules, lack effective mechanisms for enforcement and sanctioning, besides being focused on crisis prevention.

2.5. On the role of the FSB

In October 1998, the Finance Ministers and Central Bank Governors of the G-7 mandated the Governor of the Deutsche Bundesbank at the time, Hans Tietmeyer, to 'consult with other appropriate bodies and to consider with them the arrangements for cooperation and coordination between the various international financial regulatory and supervisory bodies and the international financial institutions interested in such matters, and to put to us expeditiously recommendations for any new structures and

---

[37] See A. Viterbo, *op. cit.*, p. 107-109.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

arrangements that may be required'[38]. The Tietmeyer report concluded for the establishment of a new body, the Financial Stability Forum (FSF), which 'should meet regularly to assess issues and vulnerabilities affecting the global financial system and to identify and oversee the actions needed to address them. The Forum would report to the G-7 Ministers and Central Bank Governors. It would replace the series of ad hoc groups that have been convened by the G-7 over the past few years with a view to strengthening the international financial system'[39].

At the London Summit of April 2009, the G-20 established the Financial Stability Board (FSB) as the successor to the FSF and having a broader membership basis, including central governors, finance ministers and heads of supervisory or regulatory agencies of the G-20 States[40], as well as representatives of ISSBs (BCBS, CGFS, CPSS, IAIS, IASB, IOSCO), international organisations (IMF, World Bank, BIS, OECD) and of the ECB and European Commission.

The primary objective for which the FSB was established, is 'to coordinate at the international level the work of national financial authorities and international standard setting bodies (ISSBs) in order to develop and promote the implementation of effective

---

[38] H. Tietmeyer, 'Report on international cooperation and coordination in the area of financial market supervision and surveillance', 11 February 1999, p. 1.

[39] *Ibid*., p. 5.

[40] And in addition Hong Kong, the Netherlands, Singapore, Spain and Switzerland. Each member States is allocated a number of representatives on the basis of its economic size, the maximum number of representative for a State being three.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

regulatory, supervisory and other financial sector policies [and] in collaboration with the international financial institutions, … [to] address vulnerabilities affecting financial systems in the interest of global financial stability'[41].

The objective attributed to the FSB as well as its broad membership give a clear indication on the mandate it has been entrusted with, to act as a common forum for discussion and an 'umbrella body'[42] for coordination of the various players of the international financial governance. In particular, the vertical relationships with ISSBs, which in the new design of the financial system governance architecture are meant to report to the FSB[43], emerges clearly from the FSB's tasks, which also include to 'promote and help coordinate the alignment of the activities of the ISSBs to address any overlaps or gaps and clarify demarcations in light of changes in national and regional regulatory structures relating to prudential and systemic risk, market integrity and investor and consumer protection, infrastructure, as well as accounting and auditing'[44], and, in order 'to address regulatory gaps that pose risk to financial stability, develop or coordinate development of standards and principles, in collaboration with the ISSBs and others, as warranted, in areas which do not fall

---

[41] Charter of the Financial Stability Board, Article 1.

[42] See A. Viterbo, *op. cit.*, p. 117.

[43] Charter of the Financial Stability Board, Article 6(3).

[44] Charter of the Financial Stability Board, Article 2(2).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

within the functional domain of another international standard setting body, or on issues that have cross-sectorial implications'[45].

Member States participating in the FSB, in turn, have committed to implement such international financial standards, and take part in implementation monitoring of agreed commitments, standards and policy recommendations[46], while the FSB is mandated to periodically report on the degree of adherence by the Members to these commitments and the evaluation process[47].

As for the relationship with international financial institution, in this case the FSB Charter more generically provides that these international organisations 'participate as Members in the FSB in accordance with their respective legal frameworks and policies'[48]. With reference to the IMF, the latter and the FSB bilaterally convened that the IMF has responsibility for surveillance of the global financial system, while the 'elaboration of financial sector supervisory standards and coordination across the various ISSBs is the principal task of the [FSB]'[49]: interestingly enough, this delimitation of competences seem to mirror the distinction at national level between

---

[45] Charter of the Financial Stability Board, Article 2(3).

[46] Charter of the Financial Stability Board, Article 6(1) (c) and (e).

[47] Charter of the Financial Stability Board, Article 6(2).

[48] Charter of the Financial Stability Board, Article 6(4).

[49] See the joint letter to the G-20 Ministers and Governors of 13 November 2008 by the IMF Managing Director S. Strauss-Kahn and the FSF Chairman M. Draghi.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the tasks of supervision and regulation, which at international level seem to be entrusted to the IMF and the FSB respectively.

Finally, the mandate of the FSB also includes specific tasks, among which it is worth highlighting, for the purposes of this research, the task to 'support contingency planning for cross-border crisis management, particularly with respect to systemically important firms'[50].

3. International principles in the field of crisis management and resolution

3.1 General considerations

As mentioned above, the primary objective of a properly functioning governance arrangement for the global financial system should be the provision of financial stability, which includes in particular the capacity of the system to withstand and effectively handle financial crises.

Policy tools available in an ideal governance toolkit in the field of financial stability could be classified in three categories: crisis prevention, crisis management and crisis resolution[51].

---

[50] Charter of the Financial Stability Board, Article 2(1) (g).

[51] On this categorisation see A. Viterbo, op. cit., p. 27.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The first category is in particular connected to two policy domains which, albeit distinguished, are closely interconnected, i.e. regulation and supervision. In the field of regulation, as also briefly analysed above, an informal institutional framework for coordination at international level had been in place for a considerable time at the beginning of the crisis, and was used to quickly design an effective regulatory response to the reasons underlying the crisis[52]. Supervision, albeit more at a national level, is also involved in this reform process, both for the need to catch up with the developments in the regulatory field, and due to the cultural change which has led to consider more carefully the possibility of a more 'intrusive' role of public agencies in controlling the financial market. The second stream of development has also determined some changes in the institutional structure of supervisors: in particular, a new function of macro-prudential supervision has been developed and entrusted to competent authorities – usually central banks – in several jurisdictions, while a new trend towards the reallocation of (micro-prudential) supervisory tasks within central banks seems to have started, at least in Europe[53]. Reforms in the field of regulation and

---

[52] The effectiveness of the policy responses in the regulatory field can only be proven *ex post*, once the world will have been confronted with the next financial crisis, on the basis of the intensity of the time span until such crisis will have been produced, of the size and intensity of such crisis, as well as of the tools available to address it at that point in time.

[53] A brief overview of some relevant changes in the institutional structure of supervision will be provided in Part V below. At this point, however, it would be useful to highlight that, besides the case of the conferral of specific competences in the field of supervision to the ECB in the context of the Banking Union, it deserves being highlighted that also in the United Kingdom, which strongly contributed with the establishment of the FSA

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

supervision, however, fall outside of the scope of the present research, to the extent they are not directly relevant for the provision of tools designed mainly to address crises.

The policy tools designed for addressing crises, after these have emerged, are those included in the two categories mentioned above as crisis management and crisis resolution. The distinction between the two categories is not so clear-cut, and also partially varies, also depending on whether such classification is applied to the international level or rather to the internal level of each national (or, as relevant, as e.g. in the case of the EU, regional) jurisdiction. In broad terms, however, a line of separation between the two categories can be drawn on the basis of the fact that crisis management tools are used in those cases when the crisis is deemed as being a condition due to a temporary malfunctioning of the system, which can be reverted as soon as the ineffectiveness of the system is addressed, while crisis resolution tools are reverted to when there is a certain awareness that the solution of the problems underlying the relevant crisis will not significantly help in re-absorbing the losses, and these need to be allocated to stakeholders in the most efficient way. Such proposed distinction between the two categories is naturally blurred, because also crisis management measures can often entail, to some extent, some degree of losses for some of the stakeholders, and likewise resolution interventions do not always necessarily

---

to starting the trends towards centralised single financial supervisors outside the central bank, has in the meanwhile brought back the prudential competences of the FSA inside the BoE.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

imply the impossibility to go back to the situation existing before the crisis (e.g. with regard to the existence of the involved entities) once the losses have been allocated. In addition, it may happen that the activation of crisis resolution tools follows the recourse to crisis management measures, and that crisis management interventions accompany the activation of crisis resolution tools.

On the basis of this distinction, it is however possible to allocate some of the policy tools activated in the aftermath of the recent crisis in one of the two categories. More in particular, recapitalisation of financial institutions and other bail-out measures[54], the recourse to the resources of deposit guarantee schemes[55], as well as financial assistance provided by international lenders[56] (typically, but not only, the IMF) to States and even the fiscal stimulus programmes these activated to prevent the spillover of the financial crisis to the real economy could be included in the category of "crisis management measures". Special insolvency regimes to address the insolvency of systemically important (cross-border) financial institutions and mechanisms designed to manage the debt restructuring of sovereigns are to be more properly included in the category of crisis resolution tools: if nothing else, the allocation of the two sets of tools in two different categories in useful to immediately capture that, whereas some tools or practices had been developed in time in the field of crisis management, the toolbox for

---

[54] See Chapter III below on this issue in the context of the EU.

[55] See Chapter IV below on this issue in the context of the EU.

[56] See Chapter III below on the role of the ESM in the context of the EU.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

crisis resolution was basically to be built up at the inception of the crisis, both at the international but also at the national level. The crisis was in fact unprecedented in so that, never before since the establishment of a global financial system after World War II, the world had been confronted with the need to handle the restructuring of the (sizeable) sovereign debt of 'developed States', and to cope (at the same time) with the crisis of 'too-big-to-fail' financial intermediaries, whose activities were spreading across nations and continents. These unprecedented needs required unprecedented responses, which explains why the development of crisis resolution tools has been the main focus at international level. In Europe equal importance has been given also to crisis management policies, due to the compelling need to bring at the EU level tools and schemes which were only existing at the national level, therefore not being able to capture the genuinely EU- (or at least Euroarea-) wide dimension developed by financial markets in Europe in the last decades[57].

3.2 Development of a coordinated policy strategy for crisis management

---

[57] A policy option could have been, rather than adapting the governance structure to the European nature of the financial market, to disregard such nature and force a segmentation and re-nationalisation of financial markets in Europe. Such policy option has been on the table and strongly advocated for by some, and it also inspired some of the first crisis management interventions during the crisis, which prior to a public intervention required the segmentation of cross-border institutions into legal entities, whose geographical scope of action would coincide with national borders.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In the immediate aftermath of the financial crisis, in November 2009, G20 leaders – for the first time in the history of G20 – were summoned in Washington by the US President to try to organise a coordinated policy response on a global level[58]: the focus of such meeting was however on the need to stabilise financial markets and support economic growth, and of a policy response based on closer macroeconomic cooperation to restore growth[59], whereas with specific reference to the reform of financial markets, Finance Ministers were tasked also to review the role of International Financial Institutions (IFIs) and to the define the scope of systemically important institutions and determining their appropriate regulation or oversight[60]. Policy objectives were further detailed in an 'Action Plan' which was intended to be followed up closely in the forthcoming years by the G20 members: among them, in the perspective of enhancing sound regulation, a review of resolution regimes and bankruptcy laws in light of recent experience by national and regional authorities was envisaged in the medium term, to ensure that such regimes permit an orderly wind-down of large complex cross-border financial institutions[61].

---

[58] See G20, 'Declaration – Summit on Financial Markets and the World Economy', 15 November 2008, p.1: 'to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems'.

[59] Ibid., p. 6 and 7.

[60] Ibid., p. 9.

[61] Ibid, under the 'Action plan to Implement Principles for Reform'.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

At the London meeting of April 2009, whereas it was agreed to establish a new FSB as a successor of the FSF[62], which was mandated to undertake joint strategic reviews of the policy development work of the international Standard Setting Bodies, set guidelines for, and support the establishment, functioning of, and participation in, supervisory colleges, including through on-going identification of the most systemically important cross-border firms, as well as to support contingency planning.

In the occasion of the London Summit the FSF presented its last deliverables, before leaving the floor to the newly established FSB: among them in particular the FSF principles for cross-border crisis management ('FSF Principles'), which the G20 agreed to implement immediately[63]. In the FSF Principles the objective of financial crisis management is clarified, as 'to seek to prevent serious domestic or international financial instability that would have an adverse impact on the real economy'[64]. At the same time, the FSF Principle specified that while pursuing such objective, authorities are requested to be mindful of the impact interventions may have on the public purse, and, as far as possible, promote private sector solutions and use public sector interventions only when this is necessary to preserve financial stability, as well as maintain a level competitive international playing field[65].

---

[62] G 20, 'London Summit, Leaders' Statement', 2 April 2009, p. 15.

[63] See G 20, 'Declaration on Strengthening the Financial System', 2 April 2009.

[64] See FSF, 'Principles for Cross-border Cooperation on Crisis Management', 2 April 2009, p. 1.

[65] Ibid.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Albeit the FSF Principles have an international perspective on the issue, they provided a clear definition of crisis management as an action aimed at (i) preventing serious financial instability, (ii) using public resources only when necessary, and (iii) maintaining a competitive playing field. The FSF Principles went however further, in defining the standards for domestic authorities, whose competence was recognised together with the need for international cooperation, to be developed in line with the home country principle[66], a cornerstone of international cooperation in the closely connected field of banking supervision. Against this background, the FSF Principles contain a set of standards to be used by competent authorities in preparing for financial crises, and in managing such crises, respectively. With regard to the preparation for financial crises, FSF Principles require home authorities, among other things, to coordinate meetings at least annually to consider together the specific issues and barriers to coordinated action[67], to share relevant information[68] to strongly encourage firms to maintain contingency planes and procedures for use in a wind-down situation and regularly review them, as well as maintain robust, up to date funding plans, to be

---

[66] Ibid, p. 2, according to which home authorities should lead work with the key host authorities to look at the practical barriers to achieving coordinated action in the event of a financial crisis involving specific firms, for every cross-border bank identified by the FSF as having or going to have a core supervisory college.

[67] Ibid., p. 4.

[68] Where permitted by legal frameworks and confidentiality issues, at minimum on the firm's group structure, the interlinkages between the firm and financial system, the firm's contingency funding arrangements, and potential impediments to a coordinated solution stemming from the legal frameworks and bank resolution procedures. Cfr. ibid., p. 6.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

reviewed by competent authorities[69]. As for the management of a financial crisis, in addition to the above, the FSF Principles require authorities to strive to find internationally coordinated solutions, drawing on information, arrangements and plans developed ex-ante, and, where a fully coordinated solution is not possible, to discuss as promptly as possible national measures with other relevant authorities[70].

3.3. Policy analysis concerning SIFIs and the TBTF

In September 2009 the issue of systemically important firms (SIFIs), also referred to as 'too big to fail' (TBTF) issue[71], rose as an item of primary importance in the global agenda. G20 Finance Ministers and Central Bank Governors at the London meeting on 4-5 September 2009 reaffirmed their commitment to strengthen the financial system and in particular to achieve a stronger regulation and oversight for systemically important firms, a requirement on systemic firms to develop firm-specific contingency plans, the establishment of crisis management groups for major cross-border firms to strengthen international cooperation on resolution and strengthening the legal framework for crisis intervention and winding down firms[72]. The Pittsburgh summit of

---

[69] See ibid. p. 8 and 9 respectively.

[70] See ibid. p. 11 and 14 respectively.

[71] See FSB, 'Progress and Next Steps Towards Ending "Too-Big-To-Fail" (TBTF) - Report of the Financial Stability Board to the G-20', 2 September 2013.

[72] G 20, 'Declaration on further Steps to Strengthen the Financial System', 4-5 September 2009, p. 2.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

24-25 September 2009 followed suit. In that occasion G 20 leaders agreed to develop resolution tools and frameworks for the effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in the future and that ‘systemically important financial firms should develop internationally-consistent firm-specific contingency and resolution plans’, while authorities should establish crisis management groups for the major cross-border firms and a legal framework for crisis intervention as well as improve information sharing in times of stress, and the FSB was tasked to propose by the end of October 2010 possible measures including more intensive supervision and specific additional capital, liquidity, and other prudential requirements[73].

In March 2010 also the BCBS contributed to the international effort in developing an effective policy response to the financial crisis, by means of a Report produced by its Cross-border Bank Resolution Group (CBRG)[74], which has been used as a basis for further work in this field by other players. Such CBRG Report contains in particular some Recommendation which would have become a benchmark for crisis resolution frameworks: accordingly, in particular, these frameworks should minimise the impact of crises on the financial system by including tools such as bridge financial

[73] G 20, ‘Pittsburgh Summit – Leaders’ Statement’, 24-25 September 2009, p 13.

[74] BIS, ‘Report and Recommendations of the Cross-border Bank Resolution Group’, March 2010. The Report, whose development followed up to the mandate of the BIS to the CRBG in 2007, was also meant to complement the FSB’s Principles for Cross-Border Cooperation on Crisis Management of 2 April 2009 (see the CBRG Report at page 8).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

institutions, transfer of assets and liabilities as well as business operations to other institutions; they should also cater for convergence and coordination at international level, and aim both at reducing complexity and planning in advance for orderly resolution[75]. In this respect, the Report rightly highlighted that actions taken to resolve cross-border institutions during the crisis tended to be ad hoc, and were based on a high level of reliance on (implicit or explicit) public support to "too big to fail" institutions, which should be reduced, also by moderating or eliminating the notion of "too big to fail" in itself[76]. An interesting point from a legal viewpoint which was clearly identified in the CBRG Report is that legal systems are not generally designed to resolve groups composed by several separate legal entities[77], which is instead the normal set up for large financial organisations, both at international and domestic level. From a perspective of international coordination in crisis management, the CBRG Report pointed out that legal frameworks for crisis resolution are usually designed to limit losses of domestic stakeholders, which is most notably connected to the lack of an international agreement on the sharing of the fiscal burden originating from financial crises, as in any case improved resolution tools, also in the opinion of the BIS, cannot eliminate the need for governmental support, albeit temporary in nature, to provide for an orderly resolution of (international) financial institutions[78].

---

[75] See BIS, 'Report and Recommendations' cit., pp. 1 to 3.

[76] Ibidem, p. 3.

[77] Ibidem, p. 4.

[78] Ibidem, see in particular p. 6 and pp. 16-22.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

This policy objective translates often in national preferences for certain legal arrangements which are captured in the CBRG Report under the “territorial or ring fencing[79] approach”, as opposed to the “universal approach”, to which reference is generally made when insolvencies procedures are based on the law of a single country, generally the one where the failing institution has its head office: the experience in the European Union[80], however, showed that even where the latter approach is followed by the legal framework, competent authorities recurred to different resolution measures to protect the interests of national stakeholders[81]. Against this background, the CBRG Report did not express a preference for one of the two approaches, while however stressing the role that convergence could play for the purposes of coordination, especially in the absence of ex-ante agreements on the sharing of the fiscal burden in case of crises, as more consistent approaches to early intervention and triggering for intervention could provide a more predictable framework for planning and cooperation[82]. The CBRG Report also prospects in alternative the possibility to lay

---

[79] Under the concept of “supervisory” ring-fencing, according to the CBRG Report, are included measures such as the imposition of asset pledge or asset maintenance requirements, as well as limitations to transactions with foreign counterparties through subsidiaries, in order to ensure that sufficient assets are available in the jurisdiction in the case of failure of the institution, or even to inter-affiliate transactions as such, in order to prevent contagion.

[80] It should be noticed that within the European Union, insolvencies of credit institutions are based on the universal principle under the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

[81] See CBRG Report, cit., p. 17.

[82] See CBRG Report, cit., p. 20.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

down a comprehensive universal framework for crisis to be enshrined in an international treaty, which should provide for the harmonisation of several requirements which does not seem plausibly achievable in the short term[83]. In view of these constraints, the CBRG Report ultimately recommended to entrust national authorities with appropriate tools to intervene in case of crisis, including being able to resolve groups composed of several legal entities and planning in advance for crisis resolutions and contingency plans, while striving for reaching a certain level of convergence, information sharing and mutual recognition of crisis resolution measures[84].

The establishment of a new global framework based on an international treaty which would oblige countries to defer to the resolution of financial institutions to the authorities of the country where such institution has the head office was presented as the 'first best' option also by the IMF in its report[85], as opposed to the 'de-globalization' of financial institutions, which would be logically at the other extreme of the range of possible options, in the continuing absence of effective coordination at international level. Also in the case of the IMF, however, the establishment of an international treaty is not considered as a feasible option in the short term, therefore

---

[83] Ibidem.

[84] See CBRG Report, cit., Part IV.

[85] IMF, 'Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination', 11 June 2010. Such Paper followed up to the calls from G20 leaders at London and Pittsburgh summits, and built on the work of the BIS.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the suggested approach – a ‘middle ground approach’ – is to enhance coordination among national authorities, in line with one of the options envisaged by the CBRG Report[86]. The IMF went however further, by enriching the proposed framework for coordination of additional ‘optimal’ features: these in particular also included the identification of a set of coordination standards and the establishment of principles which would guide the burden-sharing process. With reference to the coordination standards, the IMF pointed out that coordination is only possible insofar as involved authorities have confidence in each other: whereas the presence of a robust supervisory framework in the jurisdictions concerned is an essential precondition, other elements which are specific to the resolution framework regard the principle of non-discrimination against foreign creditors[87], a strengthened intervention framework[88],

---

[86] See in particular IMF, ‘Resolution of Cross-Border Banks’, cit., p. 15.

[87] With specific reference to Deposit Guarantee Schemes, in some country exist a s.c. domestic depositor preference principle, which is based on the location of the depositor and is openly against the non-discrimination principle. See IMF, ‘Resolution of Cross-Border Banks’, cit., p. 19.

[88] Including: early intervention authority, i.e. common triggers allowing authorities to take action well before insolvency, powers enabling authorities to unilaterally restructure the various claims of an institution, the unilateral power to transfer assets and liabilities, the authority to provide bridge financing and to assume public ownership on a temporary basis. See IMF, ‘Resolution of Cross-Border Banks’, cit., p. 20.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

appropriate creditor safeguards, including the 'no worse off principle'[89], as well as robust and harmonised rules on priority[90].

Also building on the works carried out in previous summits, by international standard-setting bodies and the FSB, the G20 further elaborated on its agenda for reforms of the financial sector in Toronto in June 2010: there the G20 stated that such agenda would have consisted of four pillars: a strong regulatory framework, effective supervisions, resolution and peer review[91]. With particular reference to the 'resolution pillar', the G20 expressed in Toronto its commitment to 'design and implement a system where [authorities] have the powers and tools to restructure or resolve all types of financial institutions in crisis, without taxpayers ultimately bearing the burden'; the FSB was mandated to consider and develop concrete policy recommendations to this effect[92].

[89] These powers in particular would potentially interfere with private contractual and property rights, which would require specific safeguards: in particular the IMF suggests that creditors should not be left worse off in the resolution than if the firm had been left failing. See IMF, 'Resolution of Cross-Border Banks', cit., p. 21.

[90] If such rules are not harmonised, the authorities in host countries could have a strong incentive not to cooperate with the home authority and seek for a domestic solution. See IMF, 'Resolution of Cross-Border Banks', cit., p. 21.

[91] G 20, 'Toronto Summit – Leaders' Statement', 27 June 2010, pp 17-21

[92] G 20, 'Toronto Summit', cit., p. 21. In that occasion the G20 also agreed that the financial sector should make a fair and substantial contribution towards paying for any burdens associated with government interventions, where they occur, to repair the financial system or fund resolution, and reduce risks from the financial system.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In October 2010, the G20 Seoul Summit dealt more closely with proposals for the solution of the TBTF[93], to be based on the principle that no firm should be too big or too complicated to fail and that taxpayers should not bear the costs of resolution[94]. In this context the FSB presented its 'SIFI Framework'[95], which addresses the "too-big-to-fail" issue by reducing the probability and impact of SIFIs failing. The SIFIs Framework includes a set of recommendations for improving the authorities' ability to resolve SIFIs in an orderly manner, without exposing tax-payers to loss, while maintaining continuity of their vital economic functions. Three elements emerged as the cornerstones of the FSB SIFI Framework: firstly, the policy framework should include a requirement that SIFIs have higher loss absorbency requirements; secondly, a robust resolution framework for SIFIs should be in place, so that their resolution could be considered a viable option[96]; and thirdly, appropriate processes should be in

---

[93] According to the G 20, 'the "too-big-to-fail" problem arises when the threatened failure of a SIFI leaves public authorities with no option but to bail it out using public funds to avoid financial instability and economic damage. The knowledge that this can happen encourages SIFIs to take excessive risks and represents a large implicit public subsidy of private enterprise'. See G 20, 'The Seoul Summit Document', 12 November 2010, pp. 30-31.

[94] See G 20, 'The Seoul Summit Document', p. 30.

[95] FSB, 'Reducing the moral hazard posed by systemically important financial institutions - FSB Recommendations and Time Lines', 20 October 2010.

[96] According to the SIFIs Framework, to do this, national resolution regimes must, as a basic starting point, provide the authorities with the tools to intervene safely and quickly to ensure the continued performance of the firm's essential financial and economic functions, including un interrupted access of depositors to their funds wherever they are located, and to transfer and sell viable portions of the firm while apportioning losses, including to unsecured creditors, in a manner that is fair and predictable and so avoids panic or destabilization of financial markets. See in particular SIFIs Framework, Part III.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

place to monitor implementation and follow-up to at national level. While the first objective regards more directly the field of regulation and supervisions, and entails *de facto* a derogation to the 'ordinary' rules applicable to other financial institutions[97], in the field of resolution the SIFIs framework clearly affirmed, once more, that resolution frameworks should be designed in such a way to 'make feasible the resolution of any financial institution without taxpayer exposure to loss from solvency support while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in their order of seniority'[98]. The reference to the order of seniority of unsecured and uninsured creditors was particularly important, as it set clearly as a standard that the burden of resolution should be primarily borne by the private sector, that in spite of moral hazard arguments the allocation of losses should be pre-set, clearly foreseeable, and such not to include insured and secured creditors[99]. From an 'organisational' point of view, the

---

[97] In particular, the SIFIs Framework proposes that the greater losses absorbency capacity 'could be drawn from a menu of viable alternatives and could be achieved by a combination of a capital surcharge, a quantitative requirement for contingent capital instruments and a share of debt instruments or other liabilities represented by "bail-inable" claims, which are capable of bearing loss at the point of non-viability, i.e. within resolution, thus enabling creditor recapitalisation and recovery while maintaining vital business functions'. See SIFIs Framework, cit., part II, p. 7.

[98] SIFIs Framework, cit., part III, p. 12.

[99] The SIFIs Framework also specified that national authorities should consider restructuring mechanisms to allow recapitalisation of a financial institution as a going concern by way of contractual and/or statutory (i.e., within-resolution) debt-equity conversion and write-down tools, as appropriate to their legal frameworks and market capacity, while at the same time financial institutions should be resolvable in an orderly manner and

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

FSB envisaged a more 'structured' involvement of national authorities in the process: their mandate in particular should be designed in such a way to require that they are obliged to contribute to effective cross-border cooperation mechanisms[100], and their senior representatives are involved in the peer review process. On this last point, it should be noticed that the SIFIs Framework envisaged the establishment of a Peer Review Council, comprising senior members of the relevant national authorities having G-SIFIs[101] operating as home or host in their jurisdictions, with a mandate to assess and report annually to the FSB on the implementation of the SIFIs Framework at national level (including of additional loss absorbency requirements), on the effectiveness of the G-SIFIs recovery and resolution plans and on the overall consistency of national G-SIFIs policy measures[102]. With reference to the review

without taxpayers' solvency support under the applicable resolution regimes: see SIFIs Framework, Part III, p. 14 and 17.

[100] More in detail, points 15 and 16 in Part III of the SIFIs Framework specify that jurisdictions should provide resolution authorities with the capacity in law to cooperate and to share information across borders, and thus eliminate those provisions in national laws that hamper fair cross-border resolution such as depositor priority rules that give preferential treatment to domestic depositors, or that trigger automatic action in the domestic jurisdiction as a result of official intervention in another jurisdiction, while reserving the right to act on their own initiative in the absence of effective cooperation and information sharing. Also, the mandates should be designed in such a way that, when resolving a SIFI, home authorities should take into account the effects on host countries. For each G-SIFI, there should be institution-specific cooperation agreements between relevant home and host authorities, which should provide for clarity as regards the roles and responsibilities of home and host authorities in planning for and managing the resolution of the institution.

[101] With term 'G-SIFIs' reference is made to Global Systemically Important Financial Institutions. With reference to the banking sector, see BCBS, 'Global systemically important banks: Assessment methodology and the additional loss absorbency requirement - final document', November 2011.

[102] See SIFIs Framework, cit., part VI, p. 44.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

process, it should also be noticed the role that the SIFIs framework envisages for the IMF and the World Bank, which should assess the national implementation of the SIFIs Framework in the context of their FSAP exercises[103].

3.4. International standards for resolution

A comprehensive set of standards for resolution was finally delivered by the FSB in October 2011, to provide guidance for the development of effective resolution regimes including both ‘stabilisation options’ that achieve continuity of systemically important functions by way of a sale or transfer of the shares or of the business (or part thereof) to third parties, and ‘liquidation options’ for an orderly closure and wind-down of the concerned institutions, serving the objective to ‘make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions’; this should also include ensuring continuity of systemically important financial services and payment, clearing and settlement functions, protecting depositors and ensuring rapid return of segregated

---

[103] See SIFIs Framework, cit., part I, p. 4. In this respect, see also point 36 of the G 20 Seoul Summit Document, whereby leaders committed to incorporate at the national level the new standards and principles into relevant legislation and policies, while agreeing that at the global level, international assessment and peer review processes should be substantially enhanced in order to ensure consistency in implementation across countries and identify areas for further improvement in standards and principles; in this regard, G 20 leaders recognised the value of the FSAP jointly undertaken by the IMF and the World Bank, and the FSB's peer review as means of fostering consistent cross-country implementation of international standards.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

client assets, allocating losses to firm owners and unsecured and uninsured creditors in a manner that respects the hierarchy of claims, not relying on public solvency support and not creating expectation on this, avoiding unnecessary destruction of value, and ensuring that non-viable firm can exit the market in an orderly way[104].

As for the scope of resolution regimes, according to the Key Attributes this should include any financial institution that could be systemically significant[105], and require that at least all domestically incorporated G-SIFIs have in place recovery and resolution plans (RRPs), are subject to regular resolvability assessments and to institution-specific cross-border cooperation agreements.

Special attention is dedicated in the Key Attributes to the role and powers of resolution authorities. In particular, a resolution authority[106] with operational independence should be established in each jurisdiction and, where there is more than one resolution

---

[104] FSB, 'Key Attributes for Effective Resolution Regimes for Financial Institutions', October 2011, Preamble. The FSB Key Attributes identify 12 essential features which should be part of the resolution regimes of all jurisdictions, relating to: scope, resolution authorities, resolution powers, set-off, netting, collateralisation, segregation of client assets, safeguards, funding of firms in resolution, legal framework conditions for cross-border cooperation, crisis management groups (CMGs), institution-specific cross-border cooperation agreements, resolvability assessments, recovery and resolution planning, access to information and information sharing (See also ibid., Foreword).

[105] This should include holding companies of a firm, non-regulated operational entities within a financial group or conglomerate that are significant to the business of the group or the conglomerate and branches of foreign firms. See the Key Attributes, cit., pp. 1.1 and 1.3.

[106] Such resolution authority should in particular pursue financial stability, protect depositors, avoid unnecessary destruction of value and duly consider the potential impact if its resolution actions on financial stability in other jurisdictions. See 'Key Attributes', cit., p. 2.3.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

authority, one should be designated as lead authority, in order to allow a better coordination with other jurisdictions[107]. The trigger for the initiation of resolution, the 'point of non-viability', is indicated by the Key Attributes as the time 'when a firm is no longer viable or likely not to be longer viable, and has no reasonable prospect to become so'[108]. The wide range of resolution powers[109] envisaged in the Key Attributes is particularly important, as it constitutes a benchmark against which any national resolution regime can be assessed for adequacy: resolution authorities should thus have the legal and operational capacity to apply one or a combination of the envisaged resolution powers, also to parts of the concerned institution, while at the same time initiating wind-down operations of operations which are not assessed as critical, if appropriate[110].

---

[107] Resolution authorities, when applying resolution powers to individual components of a financial group located in their jurisdiction, are also required to take into account the impact on the group as a whole and on financial stability in other affected jurisdictions (see in particular p. 3.9).

[108] The resolution regime should include clear standards or suitable indicators of non-viability, as well as provide for timely and early entry into resolution before a firm is balance-sheet insolvent and before all equity has been fully wiped out: see 'Key Attributes', cit., p. 3.1.

[109] According to the Key attributes, the following powers should be included: to remove and replace the senior management and directors, appoint an administrator to take control of and manage the concerned firm, operate and resolve the firm, including the power to purchase or sell assets, write down debts and take any other action necessary to restructure or wind down the firm, override rights of shareholders of the firm in resolution, establish temporary bridge institutions, separate asset management vehicles, carry out bail-in, temporarily stay the exercise of termination rights, impose a moratorium with a suspension of payments to unsecured creditors and customers. See in particular p. 3.2.

[110] See in particular the Key Attributes, cit., p. 3.8. The Key Attributes also require that the exercise of resolution powers should not trigger statutory or contractual set-off rights, or constitute an event that entitle any

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Among the resolution powers three in particular, which would have been later also referred to as 'tools', are defined in the Key Attributes: the power to transfer of assets and liabilities, which should not require the consent of any interested party, nor constitute a default or termination event; the power to establish a bridge institution, which should take over certain critical functions of the firm under resolution, including the power to establish the terms and conditions under which the bridge institution should operate, the power to reverse, if necessary, assets and liability transfers to the bridge institution, and to arrange the sale or wind down of such institution; the power to carry out bail-in within resolution, in conjunction with other resolution powers, to ensure the viability of the firm following the bail-in. The power to carry out the bail-in, in particular, according to the Key Attributes should enable resolution authorities to write down equity or other instruments in a manner that respects the hierarchy of claims in liquidation, convert into equity or other instruments of ownership of the firm under resolution all or parts of unsecured and uninsured creditor claims, and upon entry into resolution convert or write down any contingent convertible or contractual bail-in instruments[111].

---

counterparty to exercise contractual acceleration or early termination rights. Should this be the case instead, the resolution authority should have the power to stay temporarily such rights. See the 'Key Attributes', cit., pp. 4.2. and 4.3, as well as Annex IV.

[111] See Key Attributes, pp. 3.5 and 3.6.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

An important safeguard which is set out in the Key Attributes is the "no creditors worse off" principle, pursuant to which no creditor should suffer more losses than she would have otherwise suffered under ordinary insolvency proceedings. Accordingly, whereas some flexibility, under certain reasons, should be granted to resolution authorities to depart from the *pari passu* principle (i.e. the equal treatment of creditors belonging to the same class), resolution powers should however be exercised in such a way to respect the hierarchy of claims[112], and creditors should have a right to compensation in the case where they do not receive as a minimum what they would have received in the case of a liquidation of the institution under the relevant insolvency regime.

In line with the principle of "no creditor worse off" the Key Attributes envisage an important role for the involvement of the private sector in the funding of resolution, so that resolution authorities are not only constrained to rely on public ownership or bail-out funds: the necessary funding is therefore expected to be contributed in the first place by shareholders and uninsured creditors, and, where necessary, from the financial system as a whole: for this purpose, appropriate resolution funds or arrangements for ex-post recovery, to be contributed to by the generality of financial

---

[112] In such a way that equity should absorb losses first, and no losses should be imposed on senior debt holders until subordinated debt (including all capital instruments) has been written-off entirely. See Key Attributes, p. 5.1.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

institutions, should be in place in each jurisdiction[113]. Against this background, under the Key Attributes public funding could be made available only under strict conditions for the minimisation of moral hazard, including the exhaustion of private sources and the allocation of losses and costs to equity holders, unsecured and uninsured creditors and to the financial industry on an ex-post basis, while the possibility to place firms under temporary public ownership should only be considered, if necessary, as a last resort option, if any at all[114].

Another essential element of the framework for resolution envisaged in the Key Attributes relates to cross-border cooperation, which is self-evident, considering also that this document was originated to organise a global response to the issue of G-SIFIs crises. The Key Attributes identify three main features of resolution regimes for this purpose: conditions in the legal frameworks, establishment of crisis management groups (CMGs) and of institution-specific cross-border cooperation agreement. As for the conditions in the legal frameworks, national legislation should not hinder the appropriate exchange of information with other relevant authorities[115], nor include the automatic trigger of procedures as a consequence of resolution or insolvency procedures in another jurisdiction, but rather provide the capacity for the resolution

---

[113] See Key Attributes, cit., pp. 6.1 to 6.3.

[114] See Key Attributes, cit., pp. 6.4. and 6.5.

[115] See Key Attributes, cit. p. 12. Jurisdictions should also require that firms maintain Management Information Systems that are able to produce information on a timely basis, see Ibid.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

authority to be empowered and encouraged to cooperate with foreign resolution authorities and to give effect to foreign resolution measures, either by way of mutual recognition or by taking measures under domestic law which support and are consistent with the measures taken by the foreign home resolution authority; additionally, national legislation should not discriminate against foreign depositors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable[116]. Against this background, home and key host resolution authorities of all G-SIFIs should maintain CMGs, including not only resolution authorities, but also relevant supervisors, central banks, ministries of finances and authorities responsible for guarantee schemes, to facilitate the management and resolution of cross-border financial crises, and act as contact point, also vis-à-vis the FSB and the FSB Peer Review Council with respect to progress in coordination and information sharing, recovery and resolution planning, and the resolvability of the relevant G-SIFI[117]. To allow for proper work of the relevant authorities involved in the context of CMGs, the Key Attributes also require that for all G-SIFIs institution-specific cooperation agreements between home and host authorities involved in the planning and crisis resolution are in place; these agreements should in particular establish objectives and processes for cooperation within the CMGs, define roles and responsibilities, set out

[116] See Key Attributes, cit., p. 7.

[117] See Key Attributes, cit., p. 8.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

processes for information sharing and coordination in the development of RRPs as well as in the conduct of resolvability assessment[118].

Other essential elements of the Key Attributes are Resolvability assessments and Recovery and Resolution Planning. The Key Attributes request resolution authorities, in coordination with the relevant CMG, to regularly conduct resolvability assessments 'at least for G-SIFIs', with a particular focus on the extent to which critical financial services and payment, clearing and settlement functions can continue to be performed, the nature and extent of intra-group exposures, the capacity of the firm to deliver sufficiently detailed information and the robustness of information sharing arrangements, while resolution or supervisory authorities, should have the necessary powers to require the adoption of measures to improve the resolvability of firms, where appropriate[119]. With reference to RRPs, which need to be kept updated by supervisory and resolution authorities regularly, at least annually[120], one distinctive element which emerges as distinctive against the background of other standards in the

---

[118] See Key Attributes, cit., p. 9 and Annex I, for more details.

[119] See Key Attributes, cit., p. 10 and Annex II: accordingly, a SIFI is "resolvable" if it is feasible (i.e. implying the necessary legal powers for the resolution authorities) and credible (i.e. implying that the application of resolution tools would not five rise to adverse broader consequences for the financial system and the real economy) for the resolution authorities to resolve it in a way that protects systemically important functions without severe systemic disruption and without exposing taxpayers to loss. The objectives of resolvability assessments are to make authorities and firms aware of the implications of resolution for systemic risk, identify factors and conditions affecting the effective implementation of resolution actions, and help determine the specific actions necessary to achieve greater resolvability.

[120] See Key Attributes, cit., p. 11.10.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Key Attributes is the wider scope: jurisdictions are in fact required to put in place an on-going process for recovery and resolution planning, covering as a minimum 'domestically incorporated firms that could be systemically significant or critical if they fail', whereas the scope of such standards is usually restricted – as a minimum – to G-SIFIs[121]. In the case of recovery plans, supervisory and resolution authorities are required to ensure that the relevant firms maintain such a plan, to identify options to restore financial strength and viability under severe stress[122]; responsibility for developing and maintaining such plans lies with the firm's senior management, while authorities should review them as part of the supervisory process[123]. Resolution plans, responsibilities for which lies with authorities instead[124], are intended to facilitate the effective use of resolution powers with the aim of making the resolution of any firm 'feasible without severe disruption and without exposing taxpayers to loss', and should include, among other elements, also actions to protect insured depositors and clear options or principles for the exit from the resolution process[125]. The home resolution

[121] See Key Attributes, cit., p. 11.1. Recovery and resolution plans are treated more in detail also in Annex III to the Key Attributes.

[122] See Key Attributes, cit., p. 11.5. In Annex III of the Key Attributes, p. 3.1, among such measures are also included actions to strengthen the capital situation, possible sales of subsidiaries and spin-off of business units, possible voluntary restructuring of liabilities through debt-to-equity conversion, measures to secure sufficient and diversified funding.

[123] See Key Attributes, cit., Annex III, p. 1.6.

[124] See Key Attributes, cit., Annex III, p. 1.9.

[125] See Key Attributes, cit., p. 11.6. In Annex III, p. 4.1, essential elements of resolution plans are further specified and should also include: regulatory thresholds and legal conditions that provide grounds for the

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

authority, in coordination with all members of the CMGs, should lead the development of resolution plans ‘at least for G-SIFIs, while host resolution authorities may maintain their own resolution plans for the firm’s operations in their jurisdictions, subject to the need to coordinate with the home authority to ensure consistency between the plans[126].

The Key Attributes, together with the BCBS Paper on G-SIBIs[127] and the FSB Paper on Intensity and Effectiveness of SIFI Supervision[128], were presented as part of a package of policy measures to address systemically important financial institutions[129], including also the publication by the FSB of an initial list of G-SIFIs, which received the endorsement from the G20 leaders in Cannes[130], which also committed to implement such framework of measures[131] and extend it also to domestically

---

initiation of official actions as well as scope for authorities’ discretion, the range of sources available for resolution funding the process for disbursements by deposit insurance funds and other insurance schemes, the processes for preserving uninterrupted access to payment.

[126] See Key Attributes, cit., p. 11.8-9.

[127] BCBS, ‘Global systemically important banks: updated assessment methodology and the higher loss absorbency requirement’, October 2011.

[128] FSB, ‘Intensity and Effectiveness of SIFI Supervision – Recommendations for enhanced supervision’, 2 November 2010.

[129] FSB, ‘Policy Measures to Address Systemically Important Financial Institutions’, 4 November 2011.

[130] G 20, ‘Communiqué: G20 Leaders Summit’, p. 28: “We are determined to make sure that no financial firm is "too big to fail" and that taxpayers should not bear the costs of resolution. To this end, we endorse the FSB comprehensive policy framework, comprising a new international standard for resolution regimes, more intensive and effective supervision, and requirements for cross-border cooperation and recovery and resolution planning as well as, from 2016, additional loss absorbency for those banks determined as global systemically important financial institutions (G-SIFIs)”.

[131] G 20, ‘Cannes Summit Final Declaration – Building Our Common Future: Renewed Collective Action for the Benefit of All, 4 November 2011’, p. 26 ss.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

significant institutions[132]. This commitment was further reiterated in 2012 at the G20 meetings in June 2012 in Los Cabos, where also the works on D-SIBs by the BCBS was fully supported[133], and in April 2013 in Washington[134]. In July 2013 the FSB supplement the Key Attributes with further practical guidance for relevant authorities on the design of recovery triggers[135], on the development of effective resolution strategies[136] and on the identification of critical functions[137], while in August 2013 the FSB launched a consultative document on an assessment methodology of Resolution Regimes in national jurisdictions, which would serve as a benchmark for the purposes

---

[132] See in this respect BCBS, ‘A framework for dealing with domestic systemically important banks’, October 2012.

[133] G20, ‘Leaders Declaration, Los Cabos, Mexico’, June 19, 2012, p. 41-42: in that occasion G20 Leaders reiterated their commitment to make their national resolution regimes consistent with the FSB Key Attributes of Effective Resolution Regimes so that no bank or other financial institution is “too big to fail”, and to this end, also supported the on-going elaboration of recovery and resolution plans and institution-specific cross-border cooperation agreements for all G-SIFIs. They welcomed progress on developing a set of principles as a common framework for the identification of, and policy measures relating to, domestic systemically important banks (D-SIBs) and asked Finance Ministers and Central Bank Governors to review recommendations in these areas at their meeting in November.

[134] G20, ‘Communiqué – G20 Meeting of Finance Ministers and Central Bank Governors Washington DC’, April 19, 2013, p. 12, whereby leaders committed to undertake the necessary legislative steps to implement resolution powers and tools consistent with the FSB's Key Attributes of Effective Resolution Regimes, including the legal basis for cross-border cooperation and coordination.

[135] See FSB, ‘Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Recovery Triggers and Stress Scenarios’, 16 July 2013.

[136] See FSB, ‘Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies’, 16 July 2013.

[137] FSB, See FSB, ‘Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services’, 16 July 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of peer reviews and IMF-World Bank FSAPs and ROSCs[138]. In this respect, in April of the same year the FSB had published a report on the implementation of the Key Attributes[139], including a first thematic peer review[140], from which emerged that CMGs had been established for all G-SIFIs, whereas two different approaches for resolution planning had been followed: the 'single point of entry' (SPE) and the 'multiple point of entry' (MPE), the difference among the two being on whether resolution powers are applied at the top of the relevant firm's structure by a single resolution authority (in the case of the SPE) or by two or more resolution authorities to multiple parts of the relevant group (in the case of the MPE): both approaches in the opinion of the FSB will in any case require a high degree of coordination among involved authorities[141]. The relevant RRPs are expected to be subject to the Resolvability Assessment Process to be conducted by the FSB, and whose focus will also be on other important elements, such as the adequacy and appropriateness, both in scale and scope, of funding arrangements (mainly privately-sourced) currently relied

---

[138] FSB, 'Assessment Methodology for the Key Attributes of Effective Resolution Regimes for Financial Institutions - Consultative Document', 28 August 2013.

[139] FSB, 'Implementing the FSB Key Attributes of Effective Resolution Regimens – how far have we come? – Report to the G20 Finance Ministers and Central Bank Governors on progress in reforming resolution regumes and resolution planning for globally systemically important financial institutions (G-SIFIs), 15 April 2013.

[140] See FSB, 'Thematic Review on Resolution Regimes – Peer Review Report', 11 April 2013.

[141] See FSB, 'Implementing the FSB Key Attributes of Effective Resolution Regimens – how far have we come?', cit., Para. 2.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

on in the various jurisdictions[142]. The FSB recognised in September 2013 that much has been done until now, but part of the framework addressing the TBTF issue still needs to be further developed at the international level and implemented in the various jurisdictions[143]. At the meeting in September 2013 in St. Petersburg G20 leaders recognised that structural banking reforms can facilitate resolvability and called on the FSB, in collaboration with the IMF and the OECD, to assess cross-border consistencies and global financial stability implications[144], which could lead in the next future to further developments in this field[145].

---

[142] See in particular FSB, 'Implementing the FSB Key Attributes of Effective Resolution Regimens – how far have we come?', cit., Para. 3.1 (8).

[143] See FSB, 'Progress and Next Steps Towards Ending "Too-Big-To-Fail" (TBTF) - Report of the Financial Stability Board to the G-20', September 2013, in particular pages 3 to 5. Measures to be developed by the FSB in particular include the development of information sharing mechanisms in coordination with relevant standard-setting bodies, the preparation of proposals on the adequacy of G-SIFI loss absorbing capacity in resolution and for contractual or statutory approaches to prevent large-scale early termination of financial contracts in resolution or to be implemented, whereas progress is expected in the various jurisdictions with reference to the completion of necessary legislative reforms and of removal of obstacles to cross-border resolution, the improvement of the resolvability of firms' structures and operations, the study of domestic structural measures that are complementary to an effective SIFI Framework, and the implementation of policy measures for D-SIBs.

[144] See G20, 'G20 Leaders' Declaration – Saint Petersburg Summit', 5-6 September 2013, p. 68.

[145] With specific regard to the European Union, see in particular : High-level Expert Group on reforming the structure of the EU banking sector chaired by Erkki Liikanen, 'Final Report', Chapter 5. See also ECB, 'Bank Structural Reform – Position of the Eurosystem on the Commission's Consultation Document', p. 3, whereby the Eurosystem in particular supports the proposal on possible additional separation of activities conditional on the RRPs.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4. Conclusive remarks

The description of the developments at international level in the field of crisis management and resolution allows to draw some preliminary remarks, which offer a useful insight in the need which follow from this premises at the level of national or supranational jurisdictions, such as the European level. The international community has since the outset of the crisis developed a set of standards: both the process underlying and the substance of these rules are innovative elements.

As for the process, it is noted that several actors are involved in this peculiar procedure for production of rules: among them agenda setters (such as the G-20), standard-setters (as the BCBS and, to some extent, the FSB), international monitors (such as the IMF, the World Bank and, to some other extent, the FSB). At the bottom of this structure, national (or regional) authorities remain in charge for granting compliance with and implementation of such rules. This process, rather than being the outcome of an organic design, is the result of voluntary coordination among the various actors involved in it. Questions have been raised both on the legitimacy of the whole process, as discussed above, and on its effectiveness. With reference to the latter, the issue at stake is the nature of the new rules as 'soft law', which ultimately needs to rely on the collaboration of national and regional jurisdictions for its effectiveness, given that legally binding powers are currently not entrusted to the international actors in the process. The whole process thus relies on a broad distribution of responsibilities among actors which engage in cycles of reciprocity and retaliation, led by positive

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

incentives, such as lower funding costs for jurisdictions complying with international standards and their financial institutions, and negative incentives such as the risk for incompliant jurisdictions that both sovereigns and financial institutions are excluded from international financial markets[146]. The mechanism described above clearly shows its limits at least against those actors which have fewer reasons to fear the consequences of 'retaliations' and other negative effects which may derive from non-compliance. On the one hand, this is connected to the issue of legitimacy: the whole process is designed in such a way to promote convergence with the model of 'stronger countries', which have less of an incentive to promote international standards which are far from those applied domestically. On the other hand, also convergence to the model proposed by 'stronger' countries is not in itself a guarantee of the fact that, in the case of a crisis, such countries will follow those rules, at least at international level.

This consideration leads to the second issue, i.e. the substance of the rules which have been developed. As a preliminary remark, it should be noticed that such rules are primarily addressed to G-SIFIs. It is however plausible to imagine that these developments will by necessity influence the whole financial system (and the work on D-SIBs proves that), even though a certain differentiation among players which are active on a cross-border scale and those whose activity is mainly domestically focused

---

[146] See C. Brummer, Soft Law and the Global Financial System: Rule-Making in the Twenty-First Century, 2012, and E. Ferran, K. Alexander, Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board, in ELR, 751-776.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

cannot be excluded. From the analysis conducted above, three main streams of rules can be identified. A first set of rules directly concerns the involvement of public sources in the funding of crisis resolution and management mechanisms: the principle emerged in this respect is that recourse to public funding should be limited as much as possible – ideally excluded – and activated only under the recurrence of certain requirements, and in particular the exhaustion of private resources and the existence of a threat for financial stability. A second set of rules regard the involvement of private sources in the funding of crisis resolution and management mechanisms: in this respect it should be noticed that uninsured depositors and unsecured creditors should contribute to such funding, once equity has been wiped out, from which it could be symmetrically derived that secured creditors and insured depositors should always be excluded: for those cases where private sources of funding are not sufficient, recourse should be done to a contribution by the financial industry as a whole, also on an ex-post basis. This set of rules is particularly interesting for the effects which it may produce on the funding arrangements of financial institutions, or at least in the pricing of the different sources of funding. As a consequence, availability of 'bailinable' instruments might drastically decrease over time, unless these actions are complemented by robust intervention also in the fields of regulation and supervision. This issue is however not clear at the moment and by necessity some degree of discretion for supervisory authorities will be needed: it is noteworthy to observe that, in order to further improve the resolvability of financial institutions and banks in

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

particular, several works promote the possibility to carry out structural measures on the system, and in this context ‘retail banking’, variously denominated, is promoted as a tool to increase such resolvability. Having this in mind, it is plausible to think that the funding basis of these entities would rely more broadly on insured depositors than other entities currently do, at least in the absence of specific regulatory incentives and requirements acting in an opposite sense. On the other hand, a change in the funding basis of a bank deriving from the rapid decline in uninsured depositors and unsecured creditors could in the future be a proxy for the deterioration (at least in the market’s view) of the underlying soundness conditions on a bank, which may urge supervisory authorities to take action or not, also depending on the reliability of the information available to the market. Finally, a last set of rules emerging from the work conducted at international level regards more closely the institutional arrangements required to allow ad-hoc cooperation in case of crises concerning international financial institutions, which is even more important in a field which necessarily require a wide degree of discretion.

The possibility for such a framework to effectively work in times of crisis will need to be tested in practice. In spite of the complex framework which has been developed, and in the absence of legally binding powers and tools, the implementation of the framework will entirely depend on the willingness of concerned authorities to comply, and ultimately on the incentives that such authorities have to do so. The process for the development of these rules has largely been modelled on the one which has been in

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

place and proved to work well in the field of banking supervision: but the set of incentives which applies to supervision remarkably differs from the incentives for authorities in charge of crisis management and resolution. The action of supervisors is necessarily conducted and projected over a longer-term horizon: the considerations referred to above on the access of financial institutions (and sovereigns) to international markets and to better terms and conditions of funding can indeed play a crucial role as an incentive to the actions of supervisors. By definition, instead, crisis management and resolution are carried out in a much more restricted time horizon, and actions are more deeply influenced by short-term interests. This observation is crucial, insofar as crisis resolution and management authorities, as supervisors, are accountable to national constituencies, but it is more likely that the interests of those constituencies can align in the long-term, than they can in the short-term. In the case where the savings of citizens are at risks, the pressure on policy makers to intervene is huge. If a country is 'strong' enough to disregard the consequences of non-compliance, its authorities could have an incentive to assess that the fear of the market could become panic and lead to a threat to the whole system, so that the contribution of private creditors could be reduced, and an intervention of the public purse would be justified. Following in this reasoning, in order to reduce the entity of the public purse disbursement, incentives would be in place to ring-fence the assets of the concerned institutions and, as a consequence, reduce cooperation with other authorities. While these strong incentives would be in place in any crisis, it should be borne in mind that

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

even one isolated case of incompliance, in a condition of widespread crisis, could ultimately result in a beggar-thy-neighbour policy action, and as such be sufficient to undermine the whole framework. Provided that capitals are free to move, these would naturally flow to those jurisdictions offering better conditions in terms of protection of private creditors (a form of *forum shopping*, in a way), and the only available countermeasures available to concerned jurisdictions would be either some form of limitation to the outflow of capitals (again a form of ring-fencing), or a “race to the bottom” (in terms of compliance with international standards) which would imply a generalised disregard of the international framework. It follows from the above that these risks are particularly exacerbated in those situations where the capitals are freer to move across jurisdictions, and where the imposition of restrictions to this freedom is more difficult to pursue, as it is the case within the European Union.

Against a higher degree of freedom for the movement of capitals, the European Union is endowed with the possibility to base its response to financial crises on legally binding instruments. Recourse to this possibility has been made in the European Union to different extents, but it is interesting to observe that the different elements of the framework which has been developed by the EU mirror to a certain degree the above mentioned streams of rules which can be identified in the international framework. Whereas the next Part will offer a general overview on the Banking Union, its rationale and its development, Chapters III will address more specifically the issues of public funding, private funding and institutional arrangements of the system.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Chapter II – Financial Crisis Management from the Single Market to the Banking Union

1. Crisis Management in the EU: from the Single Market to the EMU

1.1. The EMU and the Single Market

The international developments regarding crisis management and resolution at international level have deeply influenced the policy debate and choices undertaken at European level since the beginning of the Great Crisis in 2007-2008, especially in the design of the tools available to relevant authorities to address financial crises, in particular with reference to resolution. Also in the European context, a key role is played by those factors of crisis management and resolution which have been identified as the three mainstreams of work in the international policy debate, i.e. (i) the rearrangement and decrease in size of public funding, (ii) the symmetrical rearrangement and increase in importance of private funding, and (iii) the improved coordination among concerned authorities. Each of these three issues has assumed in the European context a specific meaning and significance, due to the peculiarities of a complex institutional framework, which has been developed to serve two – distinguished in scope, but partly overlapping – areas of cross-border integration which have grown deeper than anywhere else in the world: the single market and the Economic and Monetary Union (EMU). The deeper degree of cross-border integration

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

is an element which explains why these issues have become so urgent and topical, to raise to the top of the European policy agenda since the outset of the crisis.

Within the single market, financial – *lato sensu*, and in particular, for the purposes of this work, credit – institutions are free to provide services and establish branches across borders on the basis of the s.c. *home country control* principle[147]. Thus, the single market is by now more similar to a domestic environment than to an international arrangement, in view of all the freedoms that it provides. However, while the single market entails an active competition policy stirred by the European Commission[148], some disciplinary functions connected to the provision of financial services such as regulation and supervision remain typically exercised within a national context and have been carried out only to a lesser extent at the European level. By virtue of the *home country control principle*, to a greater freedom for credit institutions corresponds thus a greater degree of (cross-border) responsibilities for national *home country* authorities. This principle brought about a certain misalignment between incentives and mandates of national authorities – which remained accountable

---

[147] See *amplius* below.

[148] See T. Padoa Schioppa, Regulating Finance – Balancing Freedom and Risk, Oxford, 2004, 37.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to national constituencies – and the scope of their action, which is potentially extended to the whole single market[149].

The overlap between the Single Market and the EMU underlies thus a further element of complication, i.e. an incomplete alignment of incentives, mandates and legal frameworks applicable to the various actors concerned which are part of both or one of the two frameworks. Member States with a derogation, which have not joined the currency union, still retain in the toolkit for intervention in case of a crisis the possibility to recur to their National Central Banks (NCBs) as a Lender of Last Resort (LOLR): such option is heavily constrained within the narrow limits of the ELA which can be granted by Eurosystem NCBs for Member States within the EMU, to which is thus precluded the possibility to 'freely' revert to the provision of central bank money to address excesses of debt in the management of a financial crisis[150].

In turn, financial crises heavily affecting an institution established in a Member State which is part of the EMU could result in an overburden for the fiscal budget of such

---

[149] It should observed that, in fact, the scope of the single market is even wider than that of the EU as such, in view of the Agreement on the European Economic Area (EEA) between the EU and EFTA States (Iceland, Norway, Liechtenstein), as also shown in the case of failure of Icelandic banks.

[150] It should be noticed indeed that, whereas the primary objective to maintain price stability, as set out in Article 2 of the ESCB Statute, applies to all ESCB NCBs, including those of UK and Denmark, the requirement under Article 18.1 of the ESCB Statute to conduct credit operations with credit institutions and other market participants on the basis of 'adequate collateral' does not apply to NCBs of a Member State with a derogation pursuant to Article 42.1 of the ESCB Statute. These considerations are however without prejudice to the possible application of Article 123 TFEU or other provisions of the Treaties, as relevant. The ELA is analysed more in detail in Part V, together with the role of the ECB in the Banking Union.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

State, especially in those cases where the financial system of the relevant State is oversized in respect of the relevant Member State's GDP, and consequently in an asymmetrical shock for the Euro Area economy impinging on the single monetary policy. The potential contrast between the EMU and the single markets in the terms illustrated above could represent an incentive to promote policy options which limit cross-border financial activities. This may be particularly true in those cases when crises related to these activities may ultimately create negative spill-overs for the EMU as a whole. Such an approach would however be in contrast with the purpose of the single market.

1.2. Competition and Financial Stability

For a large time span – since the Crisis of 1929 at least – a key idea underlying the legislative reforms adopted in most countries was that competition should be constrained in the banking and financial industry, due to the positive spillover effects deriving from a condition where banks enjoyed extra profits in an oligopolistic environment. The underlying assumption was that in such an environment individual banks are better equipped to absorb losses and the banking system as a whole has at all times sufficient resources to organise a rescue of an ailing bank – in the rare event

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

where, in spite of the extra profits, this happened – thereby granting the stability of the whole system[151].

The objective of financial stability is however only one in a range of public interests, which also includes depositor protection and competition policy: the institutional framework of the EU (until the Great Financial Crisis), characterised by the absence of a single supervisor and by the presence of a single authority competent for stimulating competition also in the banking industry – i.e. the European Commission – has produced a situation, biased towards competition more than any other previously experimented solution[152]. The recent developments in the institutional architecture of the EU seem to go in the direction of a realignment of these policy functions, which should however not take place at the detriment of competition policies. Both the establishment of a single (internal) market and of an economic and monetary union are among the fundamental objectives and obligations laid down in the Treaties for its signatories[153] – the Member States – and for the EU itself.

---

[151] Limitations to competition included, e.g., rationing of banking licenses, regulatory segmentation between banking activities (i.e. commercial and investment banking), geographic segmentation of the markets. See T. Padoa Schioppa, *Regulating Finance*, cit., 33.

[152] See T. Padoa Schioppa, *Regulating Finance*, cit., 37 and 83.

[153] See Article 3, respectively paragraphs 3 and 4 of the Treaty on the European Union (TEU). The obligation for Member States with a derogation (i.e. those whose currency is not – yet – the euro) to fulfil 'their obligations regarding the achievement of economic and monetary union', as set out in Article 140 of the Treaty on the Functioning of the European Union (TFEU), is subject to a positive assessment of the Council on the fulfilment by the concerned Member State with a derogation of the necessary conditions on the basis of the criteria further

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In the long term, the tension between the single market and the EMU, in the design of the Treaties, should be reabsorbed by means of the progressive inclusion of all Member States – which are without exceptions members of the single market – in the EMU[154]. Until then, however, the institutional framework of the EU will be based on 'concentric circles' of integration, the inner circle being the EMU, progressively enlarging, and the outer one being the single market[155].

The influence of the Great Crisis on the institutional framework of the EU has been such, to ultimately create a third circle which is ideally placed between the two, and this circle is the Banking Union: the nature and the features of this 'intermediate circle' – in particular for the purposes of crisis management and resolution – are treated in this work.

Well before the inception of the Great Financial Crisis there was already awareness of the importance of crisis management for the institutional design of the EU, and

---

specified in Protocol No. 13 of the TFEU. Protocols 15 and 16 of the TFEU grant an exemption from the obligation to adopt the euro to the United Kingdom and Denmark respectively.

[154] With the aforementioned exception of the UK and Denmark, unless these Member States decide to request the exemption granted to them under the relevant Treaty Protocols to be lifted.

[155] From another perspective, the framework has been also seen as composed of three 'distinct legal and geographical entities': the ECB, responsible for monetary policy (within the geographical scope of the Euro Area); the European Union, responsible for regulation (whose geographical scope coincides with the single market); and the national authorities, responsible for supervision (with a national scope). See T. Padoa Schioppa, *Regulating Finance – Balancing Freedom and Risk*, Oxford, 2004, 119.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

reflection on this policy issue even preceded the development of the first – in chronological order – of the 'concentric circles' mentioned above: the single market.

The issue of crisis management is indeed clearly touched upon in the White Paper of 1985. Such White Paper had been prepared by the Commission in view of the establishment of the single market. Crisis management was considered in the context of the liberalisation of financial services, which is linked to the liberalisation of capital movements. In the spirit of the White Paper, such liberalisation should have been achieved via a minimal coordination of rules. The latter would have served as a basis for a mutual recognition guided by the principle of home country control. In order to implement such principles in the field of credit institutions, in the opinion of the Commission 'the measures to be taken at Community level when it comes to reorganising or winding up an institution in case of crisis' were to be coordinated[156].

Following up to such determination, the Commission presented in 1985 a proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the reorganization and the winding-up of credit institutions[157]. Such proposal included within a consistent framework provisions on reorganisations measures, winding-up and deposit guarantee schemes, all based on the principles of

---

[156] See Commission of the European Communities, 'Completing the internal market – White Paper from the Commission to the European Council', COM(85) 310 final, June 1985, in particular p. 104, third indent, and more in general pp. 101 to 104.

[157] COM (85) 788 final, OJ C 356/55 of 31.12.1985.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

mutual recognition and of the home country control. Despite the proposal on crisis management had preceded the proposal of the Commission regarding the harmonisation in the field of banking supervision[158], the latter would have been approved and become known as the 'second banking directive'[159] well in advance of the approval of any other measure concerning crisis management[160]. Interestingly, this is a pattern which seems similar to the one followed also in the occasion of the current legislative developments: in the context of the current crisis, the establishment of a banking union was led by the urgency to manage the current crisis. The two pillars of an European framework for the management of banking crises were deemed to be a resolution framework and a deposit guarantee scheme at European level. As a precondition to the establishment of such crisis management framework, the European leaders saw the need to establish a single framework for the supervision of credit institution, which was named as the third pillar, and has been the first and only one to

---

[158] COM (87) 715 final, OJ C 84/1 of 31.3.1988.

[159] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ L 386/1, of 30.12.1989.

[160] Following an amendment of the original proposal (see COM(88) 4 final, OJ C 36/1 of 8.2.1988) only in 2001 would have been adopted Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions. With reference to Deposit Guarantee Schemes, the Commission issued a Recommendation in 1986 to solicit the cooperation of Member States on a voluntary basis: see in particular Recital 5 of Commission Recommendation of 22 December 1986 concerning the introduction of deposit guarantee schemes in the Community (87/63/EEC), OJ L 33/16 of 4.2.1987. A Directive on Deposit Guarantee Scheme would have been adopted in 1994: see Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ L 135/5, 31.5.1994.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

be finalised to date[161]. The need for some form of fiscal backstop support, albeit widely recognised, has not been officially recognised as an additional pillar of a banking union.

Crisis management was instead not considered as a necessary component of the EMU. At the time, the draftsmen of the Maastricht Treaty preferred not to lay down any specific rule in this respect. The reason underlying such a choice was probably to preserve a certain degree of 'constructive ambiguity'. Such constructive ambiguity, according to some, can be considered as desirable to contain moral hazard in the context of crisis management[162].

1.3. Central banking and Supervision

The establishment of a common central bank for the EU determined a quantum leap in the level of integration among Member States – in particular those having adopted the single currency – with a direct impact on the need to arrange a common management

---

[161] See Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63 of 29 October 2013 (the 'SSM Regulation').

[162] Such ambiguity has also been described as a 'calculated obfuscation for political purposes', see R. Lastra, 'The Role of the European Central Bank with regard to Financial Stability and Lender of Last Resort Operations', in C. Goodhart (ed), *Which Lender of Last Resort for Europe?*, 2000, 203-204. The silence on this point has been interpreted by some as a sign of a desire to assign to the ECB responsibilities with regards to the LOLR function, whereas it has been interpreted by other as a sign that such competence should remain at national level: see R. Lastra, *Legal Foundations of International Monetary Stability*, Oxford, 2006, 306.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of financial crises. Even though the ECB was established as a central bank responsible primarily for monetary policy without direct responsibilities in the field of banking supervision[163] a central bank is 'naturally' responsible for financial stability, which is 'a land in between monetary policy and prudential supervision'[164].

The emphasis for central banks to grant (or rather restore) price stability can be considered as a direct consequence of the collapse of the Gold Standard, as such event was followed by an acceleration in inflation. Previously maintaining price stability was only one of the three main purposes of central banks, together with providing financial support to their government – e.g. at time of war – and maintaining financial stability[165].

As it has been rightly noted, ensuring confidence in paper money and (later) in the relationship between central bank money and commercial bank money were always two sides of the same coin, and always entrusted to the same institution in the past. Such institution was attributed three functions mirroring the three economic functions of money, as a means of payment, as a unit of account and as store of value. The first

---

[163] This is without prejudice both to the possibility to extend the range of competences in the field of prudential supervision by activating the enabling clause contained in Article 127(6) TFEU, and to the competences in the field of financial stability, also in an advisory role, under Articles 127(4) and (5) TFEU and Articles 25(1) and (2) of the ESCB Statute.

[164] T. Padoa Schioppa, *Regulating Finance – Balancing Freedom and Risk*, Oxford, 2004, 93 and 109. See also R. Lastra, *Legal Foundations*, cit., 302.

[165] C. Goodhart, Which Lender of Last Resort, cit., 3.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

public function entrusted to the institution responsible for the currency was to maintain price stability: such function is related both to money as a unit of account and as a store of value. The second function, i.e. operating and supervising payment systems, refers to money as a means of payment. The third function, i.e. maintaining financial stability, or rather the stability of banks, is connected to money as both a means of payment and a store of value[166].

For centuries money had two anchors: gold – or another commodity – and the power of the State. First the demise of the gold standard implied that the gold anchor was abandoned. In Europe, with the advent of the EMU, the single currency was also left disconnected from a State, thereby creating an entirely new and unprecedented type of monetary order[167].

A similar novelty was the abandonment of the coincidence between the areas of jurisdiction and banking supervisions. The rise of paper money as a more convenient means of payment than commodity currency (i.e. gold), and later of commercial bank money as a convenient substitute for banknotes and coins, have ultimately led to an environment where *fiat money* is totally disconnected from the value of an underlying anchor commodity. This development ultimately made monetary policy possible, but at the same time and inevitably, made banking supervision necessary: ensuring

[166] T. Padoa Schioppa, EMU and Banking Supervision, in Which Lender of Last Resort, cit., 16.

[167] T. Padoa Schioppa, *Regulating Finance*, cit., 75.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

confidence in paper money and the stability of the relationship between the latter and commercial bank money were thus considered as twin public functions, both aimed at ensuring public confidence in a currency which has no more an intrinsic value[168].

Despite a certain recent international trend towards separating the supervisory functions from the central bank, the latter continues in any case to be involved in the supervision of the banking system at large. This is mainly due to the role of the banking system as creator of (commercial bank) money, provider of payment services, manager of savings stocks and counterparty of central bank operations[169].

1.4. Central banking and LOLR

Albeit central banks and banking supervisors can be kept at arm's length under normal circumstances, the nature of banking crises – which are close to monetary stability, payment systems integrity and liquidity management – requests by them to act together in crisis situations, and this state of affairs was not changed by the introduction of the euro as a currency detached by the State and managed by a central

---

[168] See T. Padoa Schioppa, *Regulating Finance*, cit., 76 and 95.

[169] See T. Padoa Schioppa, *Regulating Finance*, cit., 76.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

bank – the ECB – which was not involved (at least until now) in banking supervision[170].

The role of central banks is key in the management of financial crises, as to them pertains one of the most effective tools which are used to tackle such crises: the s.c. lending of last resort (LOLR). Besides the injection of *taxpayers' money* into ailing or insolvent institutions, and the injections of *private money* by other banks or market participants, a classical tool for intervention has been the use of *central bank money*, in particular in LOLR operations, hence the particular importance of central banks in crisis management[171]. The lack of credible alternatives to the central bank as provider of immediate extra liquidity in its role as LOLR is a decisive argument for supporting both separation and combination under one roof of central banking and supervision[172]. Those advocating for the separation of the two functions highlight the risk of a conflict of interest between monetary authorities, wishing higher interest rates on the one hand, and regulatory authorities, wishing lower rates to avoid adverse effects on the banking system, on the other hand. In this respect it has been observed that the conflict of interest between monetary and regulatory objectives is of an order of magnitude less important than conflicts between monetary (or regulatory) objectives and political

---

[170] See T. Padoa Schioppa, EMU and Banking Supervision, in Which Lender of Last Resort, cit., 15 and 24.

[171] See also T. Padoa Schioppa, *Regulating Finance*, cit., 89.

[172] See C. Goodhart, D. Schoenmaker, 'Institutional Seperation Between Supervisory and Monetary Agencies', LSE Financial Markets Group Special Paper No. 52, 1993.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

imperatives: whereas admittedly the counter-cyclical effects of macro (monetary) and the pro-cyclical effects of micro (regulatory/supervisory) policy tend to conflict, so that supervisors could be under pressure to relax regulations under recession, it is however noted that separation would leave supervisors 'under the thumb of politicians'[173]. Those advocating for the combination of the two functions, besides recalling the importance of payment systems for central banking, in particular note that due to the lack of alternative to the central bank as provider of high-powered money, the central bank is inevitably involved into rescue operations, which is not avoided by a formal separation.

The need for a LOLR is inherent in modern monetary systems, due to two features of theirs: fractional reserve banking and governmental monopoly of legal tender issuance[174]. The LOLR function is primarily to prevent credit crises to become monetary crises[175], and the LOLR aim is thus to prevent short-term credit instabilities

---

[173] See C. Goodhart, D. Schoenmaker, *Institutional Seperation*, *cit*.

[174] See T. Humphrey, R. Keleher, 'The Lender of Last Resort: A Historical Perspective', in *Cato Journal*, 1984, 276. The monopoly of legal tender issuance implies that the central bank is the ultimate provider of currency, thereby the guarantor of deposits-to-currency convertibility. On the need for a LOLR also in the absence of a currency board having the monopoly of legal tender issuance, see however G. Caprio et al., 'The Lender of Last Resort Function Under a Currency Board – The Case of Argentina', World Bank Policy Research Working Paper No. 1648, 1996.

[175] In case of a banking crisis, there is a sudden increase in the demand for the safest asset, i.e. currency. If the latter is not sufficiently provided, this may determine a shock in the money supply, ultimately leading to a monetary crisis. By preventing credit crises to become monetary crises, the central bank prevents negative externalities which are connected to monetary instability and which affect the real economy. See *ibidem* p. 277.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

from affecting longer-term monetary objectives[176]. The term 'LOLR' stems from the definition made by Sir Baring in 1797 of the Bank of England as a *dernier resort* from which all banks could retain liquidity in times of crisis[177]. The theoretical foundations of the LOLR function were laid down by Thornton[178] in 1802 and refined by Bagehot in 1873[179]. Both Thornton and Bagehot had been heavily influenced by the crises of their respective times, but the set of principles which they proposed for LOLR has remained valid and been followed consistently until now.

Accordingly, the central bank acting as LOLR should, in the first place, lend to banks which are illiquid but solvent[180]. The solvency of the beneficiary bank, in spite of its illiquidity, would determine the nature of such lending as short-term[181]. However, the possibility for central banks nowadays to effectively distinguish between insolvency and illiquidity has been challenged: with developed money and interbank market, other financing sources dry up when there is a perception in the market that the relevant

---

[176] *Ibidem*, 281.

[177] F. Baring, *Observations on the Establishment of the Bank of England*, 1797. It has been noted how, ironically, in 1995 the Bank of England failed to activate its LOLR and rescue the bank – Barings – founded by Sir Baring. See Lastra, *Legal Foundations*, cit., 223.

[178] See H. Thornton, *An Enquiry into the Nature and Effects of the Paper Credit of Great Britain*, London, 1802. According to T. Humphrey, R. Keleher, *The Lender of Last Resort*, cit., 288, Thornton saw LOLT as essentially a monetary rather than a banking function, the LOLR's overriding objective being the prevention of panic-induced declines in the money stock, which could in turn produce depression in the level of economic activities.

[179] See W. Bagehot, Lombard Street A Description of the Money Market, London, 1873.

[180] See R. Lastra, 'Lender of Last Resort, an International Perspective', in *International and Comparative Law Quarterly*, 1999, 342.

[181] Ibidem.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

institution has insolvency problems, especially considering that reverting to the LOLR implies higher costs of funding[182]. Also the theory that LOLR would be temporary in nature and deposit insurance would intervene in case of failure is challenged by practice, whereby there is often a continuum between the LOLR and the DGS intervention[183]. In these cases, LOLR extension, while delaying the closure of a bank, *de facto* entails a replacement of uninsured deposits with LOLR funding, thereby shifting costs to the taxpayer[184]. This argument has been used to advocate for the elimination of the LOLR *tout court*[185]. It does not seem politically viable though to let fail all banks which are in need of LOLR, and much has also to do with the definition of 'fail'[186]. However, any extended lending, committing taxpayer's money, should be granted by fiscal authorities[187]. This is particularly important in view of the widespread consideration of LOLR capacity as unlimited. At the outset of the LOLR function, the central bank could indeed generate cash without limits, but the size of losses it could absorb was limited by its free capital[188]. The central bank did not

---

[182] See C. Goodhart, 'Myths about the Lender of Last Resort', in *International Finance*, 1999, 343. See also R. Lastra, *Lender of Last Resort*, cit., 346.

[183] See Lastra, *Lender of Last Resort*, cit., 347.

[184] Ibidem.

[185] See A. Schwartz, 'The Misuse of the Fed's Discount Window', in *Federal Reserve Bank of St Louis Review*, 1992, 58.

[186] See C. Goodhart, *Myths*, cit., 356.

[187] See A. Campbell, R. Lastra, 'Revisiting the Lender of Last Resort', in Banking and Finance Law Review, 2009, 453-497.

[188] See C. Goodhart, D. Schoenmaker, *Institutional Seperation*, cit., 5.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

however usually engage in rescue operations alone, but rather acted as a *primus inter pares* organising and leading a joint rescue largely financed by associated commercial banks; the structural changes determined by deregulation and competition, ultimately resulting in the collapse of the cartelised banking clubs, reduced the viability of such an option: this, together with the scale of funding necessary, far beyond the limits of the central bank's own resources, left no choice but to turn to the taxpayer's deeper pocket[189]. Governments, however, cannot impose foreign creditors to accept payments in domestic liabilities, nor create foreign currency: hence, if they cannot borrow additional high-powered money on international money market, they also need to turn to an international LOLR, typically the IMF[190]. Albeit the euro is the domestic currency of the Euro Area national Governments, it could be argued that the same reasoning applies to these Governments *mutatis mutandis*, as they cannot create euro in the same way Governments normally cannot create foreign currency[191]. A LOLR role similar to the one of the IMF can be thus advocated, within the EMU, for the ESM[192].

---

[189] Ibidem, 6-8.

[190] See C. Goodhart, *Myths*, cit., 349.

[191] *Ibidem*, 351.

[192] There is no reason in theory preventing the LOLR role to be undertaken by the home or a foreign government, or by an international institution. See also G. Caprio et al., 'The Lender of Last Resort", cit.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A second classical principle of LOLR is that lending should be at higher rates[193] than those that the beneficiary institution would have been granted under normal market conditions. Albeit often reference is made to 'penalty rates', which would be functional to limiting the problem of 'moral hazard', it should be noted that the rates on LOLR could however be lower than those applicable in conditions of distress[194].

Thirdly, LOLR lending should be granted on the basis of adequate collateral, valued at pre-panic prices[195]. Fourthly, the central bank should make clear its intention to lend in advance[196].

Finally, the LOLR role should be discretionary, and the central bank should assess the risk of contagion, the LOLR's responsibilities being to the entire market and not to a specific institution[197].

The difference between the current practice and the theoretical principles exposed above has led to question the limits of the LOLR's scope, and the border between LOLR and ordinary monetary policy, which is especially relevant in those contexts where the attribution of the LOLR function to the central bank, as in the case of the

---

[193] See T. Humphrey, R. Keleher, *The Lender of Last Resort*, cit., 300.

[194] See C. Goodhart, *Myths*, cit., 341.

[195] See Lastra, *Lender of Last Resort*, cit., 342.

[196] See Lastra, *Lender of Last Resort*, cit., 342.

[197] See Lastra, *Lender of Last Resort*, cit., 342.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ECB, is not crystal clear[198]. Nonetheless, it should be highlighted that the distinction between lending to an individual institution (LOLR) and ordinary monetary operation is simple, practical and self-evidently justifiable[199].

In the EU context, specific delimitations of the LOLR function derive from the interaction with the State aid framework and the competence of the ECB as LOLR in the EMU. The provision of LOLR liquidity entails a certain degree of benefit for the beneficiary institution: hence the possible relevance of State aid. In this respect it has been noted that State aid rules should not apply to Eurosystem operations, as such operations are carried out under the relevant provisions of the ESCB Statute, and the ESCB Statute provisions rank at the same level in EU law as the provisions in the Treaty regarding State aid. Thus, ESCB Statute provisions should prevail pursuant to a speciality criterion[200]. The competence of the ECB to carry out such operations within the Eurosystem has not been clearly defined in the ESCB Statute, nor in other legal acts. It has been argued that the competence of the ECB would derive from the fact that the LOLR function is a core central banking function, which directly pertains to

---

[198] See A. Campbell, R. Lastra, 'Revisiting the Lender of Last Resort', cit.

[199] See C. Goodhart, *Myths*, cit., 344.

[200] As an EU Institution, the ECB should however respect – to the maximum extent possible – EU law provisions concerning State aid. See M. Grande, *Decentralisation of State Aid Control in the Banking Sector*, in C. Ehlermann, M. Everson (eds.), *European Competition Law Annual 1999 – Selected Issues in the Field of State Aids*, Antwerpen, 2001, 542. See contra: M. Lastra, *Legal Foundations*, cit., 310.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the monetary functions of the ECB[201]. Nonetheless, it should be noted that in practice the function of LOLR within the Eurosystem has been carried by the NCBs, as a non-ESCB related function[202].

The exercise of the function of LOLR within the EMU, whose scope and competence were not clearly spelled out in the Maastricht Treaty in line with the deliberate 'ambiguity' of draftsmen mentioned above, attracted much attention and criticism since the outset of the EMU[203]. It should be however noticed that much of such criticism was due to a certain degree of misunderstanding of the LOLR function in a context such as the EMU and of the underestimated capacity of the Eurosystem to act in case of need[204]. In addition, the importance of the LOLR function in the context of

---

[201] See R. Smits, 'The Role of the ESCB in Banking Supervision', in *Legal Aspects of the European System of Central Banks – Liber Amicorum Paolo Zamboni Garavelli*, Frankfurt am Main, 2005, 205.

[202] Such function has not been 'regarded as being part of the functions of the ESCB', and has therefore been considered as one of the 'functions other than those specified in [the ECB] Statute' which NCBs may perform on their responsibility and liability, unless the Governing Council objects, pursuant to Article 14.4 ESCB Statute. See ECB, *ELA Procedures (the procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank with regard to the provision of ELA to individual credit institutions)*, 17 October 2013, available on the website of the ECB.

[203] Such ambiguity raised criticism mainly due to the alleged absence of a clear and transparent mechanism to act in emergency situations which would in turn generate uncertainty in the markets and hence new risks. See e.g. D. Begg et al., *The ECB: Safe at Any Speed? – Monitoring the European Central Bank 1*, CEPR, 1998; R. Lastra, *Legal Foundations*, cit. 316; IMF, 'International Capital Markets – Developments, Prospects, and Key Policy Issues', September 1998, 106. T. Padoa Schioppa provided an answer to such criticism both in *EMU and Banking Supervision*, in *Which Lender of Last Resort*, cit., 26-28, and in *Regulating Finance*, cit., 89-91.

[204] T. Padoa Schioppa provided an answer to such criticism both in *EMU and Banking Supervision*, in *Which Lender of Last Resort*, cit., 26-28, and in *Regulating Finance*, cit., 89-91 and 124. Thereby it is argued that, besides bank runs which are more unlikely thanks to DGSs, the case where a LOLR would be more useful would

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

possible crises at EMU-wide level has probably been overvalued by the doctrine in comparison with other relevant issues, such as: the wider function of liquidity provisions[205], the other tools of crisis management and resolution (referred to above as *taxpayers' money* and *private money*), and the relationship between the LOLR function and these tools[206].

By any means, the issue of the LOLR function played a key role in the academic and policy debate on the optimal allocation of regulators' responsibilities on preventing and managing banking crises in the EU, which has been however designed as fully

---

be those, where there is a rapid outflow of uninsured interbank liabilities. Due to the breadth and depth of such market, even more so on a European rather than national scale, and to the information available to counterparties, probabilities would be rather low, that the interbank market dries up for a single illiquid but insolvent counterparty, in the absence of a systemic crisis. Thus, if a bank does not have access to the inter-bank market, nowadays chances are high that such bank is insolvent and there would be no scope for a LOLR intervention also under the classical Bagehot's interpretation of the LOLR function. Conversely, if the liquidity crisis is systemic in scope, the Eurosystem is well equipped to respond by using the tools available under its monetary policy competence, as it has been successfully proven after the start of the recent Great Financial Crisis. Another cited example of this kind of the approach is the set of actions undertaken by the US Federal Reserve in response to the stock market crash of 1987. This kind of actions, entailing recourse to collateralised intraday or overnight credit or to auctions of extra liquidity to the market as a cover to liquidity shortfalls, is called 'market operations approach' to LOLR The issue of LOLR will be dealt more in depth in Part V below.

[205] Not all liquidity injections aimed at preventing the spreading of a liquidity problem relate to a crisis: the occasions in which liquidity injections occur once a crisis has already erupted are actually rarer than others in which central banks perform their role in the field of financial stability, with the aim of preventing crises, by means of ordinary liquidity provisions, or even standard-setting in the field of payment systems and communications. See T. Padoa Schioppa, *Regulating Finance*, cit., 124.

[206] See C. Kahn and J. Santos, *Institutional Allocation of Bank Regulation*, in D. Mayes, G. Wood (eds.), *The Structure of Financial Regulation*, London, New York, 2007, 195-200.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

decentralised[207]: whereas this allows for a better accountability at national level, such system needed to entirely rely on the existence of a coordination network among the authorities involved[208], even though the arrangements for organising such coordination among the different relevant actors involved in crisis management[209] have not been a priority until the recent Great Financial Crisis.

2. The Brouwer Reports

2.1. The First Brouwer Report

Concerns on the appropriateness of the framework for crisis management started to rise since the outset of the EMU. On 11 September 1999, at an informal meeting of the Ecofin in Turku the EFC was requested to check whether existing supervisory and regulatory structures in the EU could safeguard financial stability: for this purpose an

---

[207] The blurring of borders between different activities in the world of finance offered three possible choices in the debate on the structure of financial agencies after the establishment of the EMU: between a sectoral and a functional approach; between a centralised and a decentralised setting in Europe, and between the model of the single supervisor and a model based on different authorities: the latter choice acquired particular importance in the policy debated, due to the dominance of the 'functional approach', and of the 'deferred nature' of the decentralisation, due to the normative framework enshrined in the Treaties. See D. Masciandaro, *Comment: Allocating Financial Regulatory Powers: the Twin Views*, in D. Mayes, G. Wood (eds.), *The Structure of Financial Regulation*, London, New York, 2007, 213-214.

[208] M. Nieto, Comment: the Debate on the EMU Institutional Framework for Dealing with Banking Crises, in D. Mayes, G. Wood (eds.), The Structure of Financial Regulation, cit., 209-210.

[209] See C. Kahn and J. Santos, *Institutional Allocation of Bank Regulation*, in *The Structure of Financial Regulation*, cit., 199 ff. for possible criteria on the allocation of responsibilities within the system.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ad hoc working group, chaired by the Dutch Deputy Governor Brouwer was established under the aegis of the EFC, and released a report in 2000 (the 'Brouwer Report I'), which did not deem any change to the institutional structure as necessary, while however recommending some enhancements for the practical functioning of the institutional arrangements, including 'strengthening the co-operation between supervisors and central banks, with a view to ensure that if the emergence of financial problems at a major group may have contagion effects in other EU-countries, this is reported to the relevant authorities of the countries concerned'[210].

The Brouwer Report I also provided a brief analysis of the crisis management framework, whereby it was noted that, if measures undertaken by supervisors in the early stages of a situation of financial distress concerning individual institutions do not have the desired effect in time and the difficulties of the concerned institution potentially threaten the confidence in the financial system as a whole, different crisis management instruments can be deployed, including: orchestrating or at least encouraging a purely private sector solution, such as organising take-overs or facilitating liquidity support by the private sector by providing information (whereby it would be for the supervisor to provide information, and for the central bank to provide a transitional financial arrangement); the provision by the central bank of liquidity to

---

[210] See EFC, 'Report on Financial Stability', Economic Papers, No. 143, May 2000 (EFC/ECFIN/240/00-EN FINAL), 8.4.2000, 4 and 7-8.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the system as a whole; the intervention of the government when the solvency of the concerned institution is at risk.

Another issue addressed by such Report was that of moral hazard, i.e. the incentive for financial institutions to take on additional risks when a financial support is available: in this respect the Report considered that moral hazard can be reduced where the liquidity support can be clearly separated from the provision of risk capital, thereby limiting the moral hazard to the mismanagement of liquidity risk, taking also into account the strict limitations, under the EU legal framework on State aid, for the provision of capital support by Governments.

The report also observed that – depending on the tool considered as most effective in the specific circumstances, either the central bank, the supervisory authority, the Deposit Insurance Fund or, in extreme cases the ministry of finance of the home country of the parent of the group, would take the lead of rescue operations. This however would not automatically imply that the home country of the parent institution should bear all the risks or the costs of rescue operations: remarkably, the Report did not expand on whether and how such risks and costs would have been shared and by whom otherwise.

Finally, the Report also noted that, for the cases where an ailing institution is not rescued, effective rules on DGSs and winding-up are crucial: whereas a Directive on DGS had been adopted in 1994, a proposal on the winding-up of credit institutions was

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

on the table since 1988 at the time the Report was written, thus the Report recommended to quickly advance on this issue[211].

2.2. The Second Brouwer Report

As a follow-up, the EFC ad-hoc group delivered a second Report (Brouwer Report II)[212] focused on crisis management. This Report, in the first place, provided a definition of Crisis management, as ‘the set of actions that can be taken by authorities aimed at containing a financial crisis and avoiding potentially disruptive effects on the financial system or the real economy’ and of ‘financial crisis’ as ‘any situation in which a financial institution (or a number of financial institutions) is not able for whatever reason to meet its obligations, which may disturb the proper functioning of the financial system’[213].

The Report, which confines its scope to taking stock of the institutional arrangement at the time in the field of crisis management, noticed that beyond private sector solutions, the public authorities have several instruments to address crises, ranging from granting financial support to the liquidation of troubled financial institutions: this Report is

---

[211] The Directive on the winding-up of credit institutions, as recalled already above, would have been adopted in 2001.

[212] EFC, ‘Report on Financial Crisis Management’, Economic Papers, No. 156, July 2001 (EFC/ECFIN/251/01-EN-Final), ‘Brouwer Report II’.

[213] See Brouwer Report II, p. 3.1.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

noteworthy in so that realise that the analytical background underlying the move to the Banking Union (with the exception of a comprehensive concept of resolution, including the bail-in tool in particular) had already been developed, at the highest level of the EU institutional framework, well in advance of the start of the Great Financial Crisis and of the development of policy responses to the latter at international level.

The Report, in particular, separately addressed the different steps of crisis management, and the policy measures available under the framework of the time to address a crisis. With regard to crisis management, the Report identified the areas of crisis prevention[214], identification and information exchange[215], coordination and

[214] In the area of crisis prevention, the Brouwer Report II recognised the key role of micro- and macro-prudential supervision, recalling, with reference to the latter, the coordination role performed at the time at European level by the BSC. In this respect It is noteworthy that macro-prudential supervision, which would have been identified at international level, and in Europe in the Delarosiére Report, as the 'missing piece' in the supervisory institutional framework, was clearly identified and attributed as a responsibility to the Banking Supervisory Committee (BSC) of the ECB which would have been later replaced by the ESRB (European Systemic Risk Board), in order to grant an effective performance of macro-prudential supervision in Europe. among possible pre-emptive actions were in particular mentioned in the Report constraints to asset growth, calls for capital injections, pressures for restructuring, requests to downsize some areas of business and the like. In the implementation of these instruments, supervisory discretion exists in the EU countries.

[215] The Brouwer Report II identifies two closely interrelated areas are key at the outset of the crisis: the identification of the crisis as such, and the exchange of information in this respect, which is necessary both prior to the identification to make it possible, and subsequently to allow coordination among concerned authorities. Since the main source of information is the firm itself, its management information system should generate sufficiently detailed information in a timely and reliable manner. Three categories of information are identified: information that should be readily available to supervisors, information that may not be available when problems emerge, but which supervisors and central banks are likely to require in the course of the crisis, and information that enables the relevant authorities to assess the impact of the emergency situation on other financial institutions and markets.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

decision-making, whereas the policy measures available which the Report identifies were in line with the latest policy developments, i.e. private sector solutions, winding down, and public intervention tools; additionally, the Report also considers liquidity support measures, and competitive implications of the above mentioned measures. In the area of information exchange, the Report noted that ‘in an integrated financial area it may be difficult, if not impossible, to identify *a priori* exactly the systemic implications of a crisis at a major financial institution’: in this respect the Report proposed to increase the recourse to ‘contingency procedures’[216], resembling to some extent the more modern Recovery and Resolution Plans (RRPs). The Report also noticed that the relevant EU directives at the time did not impose an obligation for information sharing in crisis situations[217] and that information sharing thus entirely

[216] The Brouwer Report II (see p. 4.4) suggested that ‘major financial institutions should perform stress tests and have contingency procedures, addressing their liquidity needs and funding options, capital needs, downsizing options and potential spillover effects particularly within their own groups, in specific crisis scenarios. […] These contingency procedures should be shared regularly with the firms’ main supervisors and the directly concerned central banks. Clearly, the impact of an emergency at an internationally active financial institution will extend beyond the jurisdiction of one supervisor. In order to be effective, crisis management then entails co-operation between the relevant authorities’.

[217] The Brouwer Report II (see p. 4.4) also noticed that such Directives also did not provide for the content and timing of the information to be exchanged in such circumstances, thereby allowing for discretion for the national authorities, whose willingness to inform their counterparts in time would then be crucial. The Report thus observed that supervisors should be proactive in raising material issues and concerns with central banks and other authorities involved. As financial problems deepen, the frequency and scope of information flows need to increase, and likewise the number of authorities involved rises.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

relied on cooperative arrangements between the competent authorities belonging to different geographical jurisdictions[218].

The Report acknowledged that such arrangements, known as Memorandum of Understanding (MoUs), did not address the issue of crisis management and thus suggested that procedure for information exchange , including issues such as the type of information that might be needed, who can produce the information and to whom this can be provided, should be agreed upon in advance.

The above clearly leads to (cross-border) coordination, to avoid any mutual inconsistencies in their policies, at least each time that a crisis threatens the stability of the financial system in several countries[219]: again the need to advanced preparation was stressed, as due to the shortness of time in an emergency, crisis management efforts should not be burdened by consultations on coordination and decision-making.

In this respect the Report highlighted a point which is still of clear importance now: coordination in crisis situations differs from the coordination on a going-concern basis,

---

[218] It is noteworthy that the Report referred in particular to some MoUs as an example, including those of Dexia and Fortis. The developments regarding those banks in the amidst of the Great Financial Crisis gave a proof of the effectiveness of such arrangements.

[219] The Brouwer Report II (see p. 4.5) acknowledged that a crisis at a large financial institution could be assumed to have cross-border effects because of the integration of financial markets world-wide, and more specifically in the euro area as a result of the introduction of the single currency, the monetary policy framework and the set-up of systems for large value cross-border payments in euros. The Report also noticed that at the time the degree of integration within the euro area differed among various market segments, the most integrated being the unsecured interbank deposit market and the derivatives markets.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

because in a crisis situation also non-supervisory authorities are involved, possibly even in the role of coordinators, where appropriate[220].

Coordination among authorities by necessity leaves the ground to decision-making, at a certain point, and in this respect the Report highlighted the issues of responsibility for and initiative in decision-making with respect to crisis management[221]. Particularly in the case of involvement of more countries, even in case where a coordinator is

---

[220] The Brouwer Report II (see p. 4.5) separately addressed the involvement of supervisors, central banks, and other authorities. For supervisory authorities, the Report envisaged a key role in the initial stages of the crisis, in particular with referece to the identification of the crisis and to the information exchange, but also subsequently when decisions on policy actions are taken. An early involvement was also envisaged for central banks, since they can assess possible systemic implications, particularly in the case of (potential) liquidity problems arise or destabilisation of financial markets, as they bring into the assessment information derived from their monetary policy operations, oversight and market surveillance. In addition, the Report notices that central banks may have to take decisions and initiate appropriate actions to safeguard the integrity of the payment systems that they oversee, or to suspend or exclude counterparties in monetary policy operations. Other authorities, such as the ministry of finance and the DGSs may also become involved, and thus should be informed in a timely manner. Finance ministries need to be informed about any developments that might put public money at risk or have serious stability or macroeconomic implications. Depending on how the crisis unfolds and what decisions need to be taken, each authority contributes differently: in this context, the Report highlights the central role that the coordinating supervisor could take in convening the relevant parties, act as the central point for gathering information and for communication, also with the public, if needed.

[221] Remarkably, the issue of decision-making is entirely on the table after a decade, as stated in Recital 2 of the draft Regulation establishing of a Single Resolution Mechanism and a Single Bank Resolution Fund (reference is made to the Interinstitutional File: 2013/0253 (COD) in the compromise version 14754/13 of 15 October 2013): 'divergences in national resolution rules between different Member States and corresponding administrative practices and the lack of a unified decision making process at Union level for the resolution of cross-border banks contribute to this lack of confidence and market instability, as they do not ensure certainty and predictability as to the possible outcome of a bank failure. Resolution decisions taken at the national level may lead to distortions of competition and to the undermining of the internal market'.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

identified, the Report noticed that responsibilities of the authorities involved did not change by virtue of the complication entailed by the cross-border dimension[222].

2.3. Crisis Management tools in the Brouwer Report II

With regard to the policy responses available to the authorities, already at the time the Report clearly spelled out the principle whereby the private sector should be involved as much as possible in the resolution of a crisis, and private solutions should prevail whenever possible[223]: in this regard the Report identified several options, including the

---

[222] In the absence of specific references to crisis management in the EU Directives at the time, the Brouwer Report II made reference to the presumption in international banking supervision of responsibility for the home country authorities with regard to decisions on crisis management, at least regarding an individual institution and its branches. The principle of home country responsibility could also be found in the DGSs Directive and the draft – at the time – EU directive on the reorganisation and winding-up of credit institutions. The Report also noticed that the principle of home country control is not directly applicable to foreign subsidiaries, as the host country authorities are obliged to treat these as domestic institutions with their own legal identity, being in fact, with reference to such subsidiaries, the home authority. Due to internationalisation, the Report acknowledged that more financial institutions were systemically relevant in host countries, and cooperation between the home and host country authorities would thus be needed, but the interests of such authorities are not necessarily similar. In specific cases, for example, the systemic impact of the distress at a financial institution in the home country can be relatively small, but considerable in a host country. Situations can then arise where the home country authorities estimate the risks of allowing the bank to fail as limited, whereas the failure would create systemic risks in the host country. Having clarified these possible shortcomings, the Report however only suggested, in case such problems arose, that the home country authorities should consult the host country authorities in the decision-making process, and that such consultation could be arranged in the relevant MoU.

[223] According to p. 6.2 of the Brouwer Report II, 'if, despite preventive arrangements, a crisis at a financial institution occurs, a private sector solution should prevail, whenever possible', whereby such a solution could entail facilitating private sector liquidity support, finding strategic investors for the troubled firm, selling off

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

winding down of an institution in trouble. Policy measures to try to limit or contain the crisis should have been considered only if these options were deemed to be impossible or had been exhausted, although the Report also recognised that some of these options may be more difficult to implement in a cross-border context than at the national level, especially because their activation would entail a certain degree of coordination of the authorities involved in the amidst of an actual emergency situation[224].

In the field of private sector solutions, defined as 'those solutions implemented by private firms without claiming public or central bank money', it should be admitted though that the analysis at the time was less articulated than the one underlying the most recent policy developments: only two types of solutions were envisaged, i.e. predetermined mechanisms aimed at preventing spillover effects of financial crises[225]

---

parts of it or a take-over. The Report also suggested that, where an arrangement among private firms was precluded by conflicts of interest, public authorities may act as honest broker, and, when these private solutions were deemed insufficient or impossible, the winding down of the institution concerned should follow.

[224] See Brouwer Report II, p. 5.1 and 5.2.

[225] In this respect, however, an example recalled by the Brouwer Report II was remarkable, and could have been an interesting suggestion but was not followed up: the Liquidity Consortium Bank (*Liquiditäts-Konsortialbank* or '*Liko Bank*') in Germany. The Liko Bank is a private limited company, in which all major domestic banking associations, represented by certain banks, as well as the Bundesbank participate. The Liko Bank may provide liquidity assistance to basically solvent banks that encounter sudden liquidity problems, with the objective of assuring their payment transactions. The possibility to extend this model at the level of the EU or of the Euro Area was not further explored, neither in this Report, nor in subsequent policy papers, in spite of the clear resemblances between the institutional frameworks of the Bundesbank in Germany and of the Eurosystem, the latter having been modelled on the former.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

and *ad hoc* mechanisms, such as a merger or acquisition (capital infusion) or rescue operations, which may be considered when an emergency surfaces[226].

The Report highlighted in particular, with reference to the private sector solutions as defined in the Report itself, the role of relevant authorities as *honest broker*, which is especially important when a solution, as in most crises, needs to be sorted out under time constraints. This role of honest broker is important to promote a solution and cover for potential information asymmetries[227], thus the Report reminded that such role is particularly well-suited for the central bank or the supervisor, as both authorities have relevant information on institutions that may be able to participate in the rescue of the troubled firm, and that the central bank, in addition, may provide a transitional financing arrangement, but should take the aforementioned risks into account.

Liquidity support measures are another policy measure identified by the Report as available for authorities to address a crisis: in this respect the Report highlighted the

---

[226] With reference to ad hoc solution, the Brouwer Report II noticed that (i) these solutions have a higher probability of success when the maximum exposures of the financial institution in trouble are clear and the potential losses are not too large for the related entities, (ii) in order to allow for such an ad hoc solution, much effort is necessary to determine the prospective losses, as well as to solve practical issues, possibly in the form of protracted negotiations with shareholders and large creditors, and (iii) when the ailing financial institution is an internationally diversified group, a joint effort of the authorities involved may be needed.

[227] The Brouwer Report II, p. 5.2, highlights that honest brokering is particularly expedient, since private parties generally do not want to share information with competitors, but may be willing to inform a neutral third party: the honest broker is then in the position to design a constructive and acceptable solution and reinforce commitment amongst all parties involved. However, the Report recalls that honest brokering may carry some risks, as it may be interpreted as implying moral suasion, thus undermining market discipline, and as a commitment to subsequent official support if the brokering proves ineffective.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

importance of the provision of emergency liquidity assistance (ELA), either to an individual financial institution or to the market as a whole, which was acknowledged as an instrument almost invariably in the hands of the central bank.

Within the Eurosystem, the Report observed a general agreement that ELA, unlike regulation, supervision and adequate risk management within financial institutions, should not be seen as a primary means of safeguarding financial stability, but that nevertheless, where required, the necessary mechanisms were in place, subject to two main guiding principles, ie: (i) that the provision of ELA to individual illiquid institutions, if and when appropriate, is primarily a national responsibility and national arrangements continue to apply, thus the costs and risks would be fully borne at the national level; and (ii) that any potential liquidity impact deriving from the provision of ELA is to be managed in a way consistent with the maintenance of the appropriate single monetary policy stance.

In the field defined as 'public intervention' the Report included the funds of DGSs[228] – improperly, considering that the DGSs should be funded by the 'insured' banks, either

[228] Whereas DGSs were originally conceived to prevent bank runs, the Brouwer Report II takes note that in a number of EU countries they can also be involved in the restructuring of ailing banks, sometimes even in the provision of liquidity support. The Report also notices that the existence of deposit insurance funds may, however, not be enough to prevent or stop bank runs and to stabilise the financial system: in that case, the government could consider making a public announcement providing for full protection of depositors.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

on an ex ante or an ex post basis – and recapitalisation interventions[229]. In relation to the aforementioned solutions, the Report highlighted potential implications from a competitive perspective.

The Report also noticed that crisis management measures may have competitive implications, and that in the field of competition policy, the EU and national regimes coexist, but EU rules prevail over national laws.

Finally, the Report noticed that winding-down of the trouble institution is the ultimate solution in those cases, when other crisis management measures are not applied: in those cases the close-down procedures are to be activated under the relevant insolvency laws. In this context it was clear in the Report that the winding-down of a large and complex financial institution creates potential for disruption, especially to market functioning and liquidity, thus authorities should ensure that the winding-down, or the significant restructuring of a major financial organisation, is managed in an orderly manner.

---

[229] The Brouwer Report II notices that often, prior to the sale of the recapitalised bank (or shares thereof) rehabilitation of assets may be necessary, entailing the creation of an asset management company, which purchases and manages the impaired assets of the troubled institution. This company can either be in private or public hands, with the latter more likely if there is a threat of a widespread systemic crisis. Both to limit moral hazard (by forcing shareholders to bear the firm's losses) and to restore the profitability of the concerned institution, the Report notes that Government might require, in change for public support, a restructuring of the troubled institution, such as the closure or liquidation of non-viable parts of the firm.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The report also referred in this context to ‘ring-fencing procedures’, as a means which, together with liquidity support to other firms or the market generally, may be needed to contain the repercussions of the crisis, but the potential scope of application of such measures seems confined in the Report a gone-concern basis.

Against the background of the extensive overview provided in the Report, remarkably the conclusive recommendations of the latter are quite limited in scope. Besides calling upon competition authorities to maintain timely and robust procedures for considering the competitive implications of crisis management measures, the Report’s envisaged solutions to the shortcomings of the EU institutional framework in the field of crisis management were mainly limited to the enhancement of information exchange procedures among concerned institutions[230]. Enhanced information sharing

[230] The final Recommendations of the Brouwer Report II (6.3) included in particular the following: (i) supervisory authorities should ensure that the management information systems of financial institutions and groups are able to generate accurate information on their financial position at short notice. Importantly, major institutions should perform stress tests and have contingency procedures, addressing specific crisis scenarios, which should be shared regularly with their main supervisors and the directly concerned central banks; (ii) in a crisis situation, all authorities likely to be involved should be informed in a timely manner. Any remaining legal impediments to the exchange of information among supervisors, with central banks, overseers of payment systems and bodies administering deposit-guarantee schemes, both cross-border and cross-sector, should be removed; for the major financial institutions, including conglomerates, which are domiciled in the EU, agreement should be reached on the coordinating supervisor and its responsibilities including information gathering and communication, particularly in crisis situations; (iii) supervisory authorities should further develop MoUs to deal more concretely with issues related to crisis management. Procedures for information exchange when a major financial institution runs into trouble should be agreed upon in advance, whilst recognising the interests of other authorities involved and allowing for the necessary flexibility to cope with each specific case.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

arrangements should have been achieved by means of MoUs to be developed by supervisory authorities, but also through the improvement of the management information systems of financial institutions and groups. In addition, remarkably, despite the introduction of the euro was seen as an element which would have increased the integration in the single market, no major distinction was envisaged for jurisdictions within and without the Euro Area for the purposes of crisis management.

3. MoUs-based Crisis Management

The Brouwer Reports identified as main components of a crisis management procedure, and at the same time as main areas for improvement in the EU context, information exchange and coordination among concerned authorities, the latter being particularly important for the preparation of policy responses, in particular as both responsibility for and initiative of decision-making were envisaged remain at national level, but their allocation should have been allocated on the basis of ex-ante planning to avoid this to become an issue for discussion under time urgency in a crisis situation. In line with these conclusions, the EU started developing a crisis management framework based on ex-ante coordination arrangements, mirroring the principle used in the supervisory domain of the ‘home country control’.

The relevant fora, such as the BSC and the GdC, could be requested to describe the main elements for such procedures.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3.1. The 2003 MoU

In March 2003, via a Press Release of the ECB[231] was publicly announced that the banking supervisory authorities and the central banks of the EU had agreed on a MoU – also expressly meant to follow up to the Browuer Report II – on high-level principles of cooperation in crisis management situations, aiming to enhance the practical arrangements for handling crises at the EU level, in consideration of the role of a smooth interaction between supervisory and central banking functions to facilitate an early assessment of the systemic scope of a crisis and contribute to effective crisis management. Remarkably, according to the Press Release, the MoU's 'principles and procedures deal specifically with the identification of the authorities responsible for crisis management, the required flows of information between all the involved authorities and the practical conditions for sharing information at the cross-border level' while being 'consistent with the necessary flexibility of action of each of the authorities involved'.

Finally, the MoU also recognised that in crisis situations the range of potentially concerned authorities – including Ministries of Finance and deposit insurance funds, securities and insurance supervisors in the case of crises involving these financial sectors, as well as third-country authorities in the case of crises originating or having

---

[231] Press Release of 10 March 2003, available on the website of the ECB.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

an impact outside the EU – would have been much broader than that of the signatories of such MoU, and thus could be considered as a contribution to other cooperation arrangements that might have been implemented or developed in the future involving other relevant authorities.

3.2. The 2005 MoU

In December 2004, the Ecofin[232] decided that in 2005, in order to improve the arrangements for crisis management, a proposal for a MoU on crisis management and a crisis simulation exercise should have been developed in cooperation with representatives of the central banks and supervisors. Such MoU was concluded in May 2005[233], and was meant to complement the MoU of 2003, while having a partly different scope: while the 2005 MoU also included the role of EU Finance Ministries, the 2003 MoU related to cooperation between EU banking supervisors and central banks only, and also dealt with stages of detection and activation of specifically supervisory and central banking tools in financial crises.

[232] Council of the European Union, Press Release of the 2628th Council Meeting – Economic and Financial Affairs, Brussels, 7 December 2004, 15150/04 (Presse 339).

[233] Memorandum of Understanding on cooperation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis situations of 14 May 2005.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The 2005 MoU, in spite of the inclusion of Finance Ministers among signatories, expressly recalled the principles of (i) the firm's owners'/shareholders' primary financial responsibility, (ii) the need for creditor vigilance, and (iii) the primacy of market-led solutions to solve a crisis situation in individual institutions. Similarly to the 2003 MoU, the 2005 MoU – which, it is worth recalling, as the other MoUs was a non-legally binding tool[234] – consisted of 'a set of principles and procedures for sharing information, views and assessments, in order to facilitate the pursuance by these authorities of their respective policy functions and preserve the overall stability of the financial system of individual Member States and of the EU as a whole'.

The MoU also included arrangements for the development, at the national and EU level, of contingency plans for the management of crisis situations, along with stress-testing and simulation exercises.

In October 2007, the Ecofin[235] called on the need to take further steps, at the EU and national level, to develop the arrangements for cross-border financial stability within

---

[234] The MoU expressly defined itself as 'a non-legally binding instrument for setting forth practical arrangements aimed at promoting cooperation between authorities in crisis or potential crisis situations without overriding their respective institutional responsibilities or restricting their capacity for independent and timely decision-making in their respective fields of competence, notably with regard to the conduct of day-to-day central banking and supervisory tasks, as set out in national and Community legislation'.

[235] Council of the European Union, Press Release of the 2822nd Council meeting – Economic and Financial Affairs, Luxembourg, 9 October 2007, 13571/07 (Presse 217).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the EU. In this case time is of essence[236]: whereas in October 2007 the whole idea of a 'crisis of the euro area' was far from having materialised, Europe had just experienced with the collapse of Northern Rock in the UK what had probably been the first bank run since the crisis of the '30s: this episode was fortunate to some extent, as it had basically no cross-border implication, but sounded like a ring bell, for the case where such implications could materialise, especially in such a cross-border integrated area as the EU[237].

3.3. The 2008 MoU

---

[236] It should be however recognised that the Ecofin conclusions had been preceded by a EFC Report of 5 September 2007 (ECFIN/CEFCPE(2007)REP/53990).

[237] A comment of C. Goodhart on the Northern Rock case deserves being quoted in this respect: 'The developed world, and especially its financial regulators, have been fortunate that there has been no failure of a bank, nor other financial institution, involving significant cross-border consequences, at least so far. Northern Rock, IKB and Sachsen were all primarily domestic. Since the only funding available for recapitalisation remains domestic, no one knows how the loss burden arising from the failure of an international, cross-border financial institution might be handled […] The problem of how to handle cross-border financial failures in a world of national fiscal and legal competences is understood, but not resolved. Dirk Schoenmaker and I put forward the idea of countries committing in advance, ex ante, to some particular scheme of burden sharing. Some have found that too difficult to accept. Again within the European context, in the early 1990s, I took part in an exercise to expand the EU's federal fiscal resources, one use of which could have been for the purpose of financing crisis management. But that too was turned down flat by several large member countries. I have done my best to provide answers to this conundrum; and it has not been good enough. Are there other potential answers, or do we have to wait for a bad experience to teach us better?'. See C. Goodhart, *The Regulatory Response to the Financial Crisis*, in F. Bruni, D. Llewellyn (eds.), *The Failure of Northern Rock: a Multi-Dimensional Case Study*, Vienna 2009, 169-170.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

To address the risk, the Ecofin invited the EFC to prepare by 2008 a new MoU, including common principles, a common analytical framework and common practical guidelines for crisis management[238], including the following: the objective of crisis management is to protect the stability of the financial system in all countries involved and in the EU, and not to prevent bank failures. Primacy will always be given to private sector solutions, thus shareholders will not be bailed out and creditors and uninsured depositors should expect to face losses.

The use of public money to resolve a crisis can never be taken for granted and will only be considered to remedy a serious disturbance in the economy. If public resources are involved, direct budgetary net costs are shared among affected Member States on the basis of (a) equitable and balanced criteria, which take into account the economic impact of the crisis in the countries affected and (b) the framework of home and host countries' supervisory powers. Policy actions in the context of crisis management will preserve a level playing field, and any public intervention must comply with EU competition and state-aid rules.

While the conclusion of a new MoU did not seem to be a quantum leap in the policy response to a possible cross-border crisis, the Ecofin also invited the Commission to (i)

---

[238] The Ecofin limited the scope of application of these principles to cross-border financial crises, involving at least one banking group which (i) has substantial crossborder activities and (ii) is facing severe problems which are expected to trigger systemic effects in at least one Member State; and (iii) is assessed to be at risk of becoming insolvent.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

increase information rights of host countries; (ii) include in the mandate of supervisory authorities the task to cooperate within the EU; (iii) analyse the feasibility of reducing barriers to cross-border transfer of assets while defining appropriate safeguards for entities transferring the assets, and of revising rules for the winding-up of banking groups to include joint insolvency proceedings for cross-border groups while providing sufficient safeguards to all stakeholders of the group or its part being reorganised or wound-up; (iv) improve the interoperability of DGSs; and (v) clarify when a major banking crisis could be considered by the Commission such as to provoke a *serious disturbance of the economy* within the meaning of Article 87(3)(b) of the EC Treaty (now Article 107(3)(b) TFEU) and State aid rules, and streamline procedures focusing on how state aid enquiries under such critical circumstances could be treated rapidly.

A new MoU[239], more extensive and comprehensive than the preceding ones, was concluded in June 2008. Besides further expanding the principles set out in the aforementioned Ecofin conclusions, such MoU also developed issues such as the cooperation arrangements and the activation of procedures and responsibility for coordination in a cross-border crisis. As for cooperation arrangements, these were primarily based on *Domestic Standing Groups* (DSGs), which would have included all

---

[239] Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on Cross-Border Financial Stability, 1 June 2008.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

national authorities concerned, while parties sharing specific cross-border financial stability concerns were invited to consider the establishment of *Cross-Border Stability Groups* (CBSGs) based on *Voluntary Specific Cooperation Agreements* (VSCAs). As for the activation of procedures, the 2008 MoU recognised a leading role to the National Coordinator within DSGs, and to the Cross-Border Coordinator within CBSGs: as a rule, the latter would coincide with the National Coordinator in the home country. As a first step in crisis management, the MoU identified the 'crisis alert': any party becoming aware of a crisis situation should have informed the National Coordinator in the home country, which would (i) conduct a crisis assessment, (ii) activate crisis management networks, and (iii) coordinate communication.

In the crisis assessment phase, the 2008 MoU envisaged for the Group Supervisor or the home country central bank or the Eurosystem, as appropriate, to assess the systemic implication of the crisis, and then gather data which could be useful to define a private sector solution of the crisis, or which could be used as a basis for possible public intervention at a later stage[240].

While the Cross-Border Coordinator was identified by the 2008 MoU as responsible for establishing contacts with the private sector and the coordination of subsequent

---

[240] In this context, the 2008 MoU proposed in particular four criteria on which the burden-sharing could have been based, concerning for each involved country of (i) the share of deposits, (ii) the share of assets; (iii) the share of revenue flows, and (iv) the share of payment system flows.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

policy actions that follow the initial assessment, also the central banks and public sector functions were considered.

With regards to Central Banks, the MoU recognised two options for intervention: the management of liquidity crises, involving where necessary the ELA, and subject to inform the competent Finance Minister, in line with the existing national framework; and the management of wider crisis relating to the liquidity conditions of a market to the functioning of payment or securities settlement systems, or resulting in a disruption to a particular financial market, whereby Central Banks overseeing those markets and systems, and the Eurosystem/ECB where appropriate, were to coordinate among themselves and closely cooperate with competent Financial Supervisory Authorities.

With regard to other public sector functions, the 2008 MoU envisaged an early involvement of Finance Ministers, in order to allow the home country Finance Minister to make a proposal for burden sharing among Member States involved – in line with the criteria which are set out in the MoU – where public resources were needed for the resolution of the crisis, subject to compliance with State aid rules.

In view of the above, it must be recognised that the 2008 MoU was a generous attempt to address in a comprehensive manner a strategy for the management of a cross-border crisis within the EU. However, if fell short from achieving a definitive solution to the problem.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Whereas the sequencing of the actions required to prepare a policy response was more clearly identified, as well as responsibilities in the various processes for the authorities concerned, the MoU, also due to its lack of legally binding effects, did not provide for exact consequence in the recurrence of pre-determined triggers, leaving rather still much scope to the discretion, and thus to the willingness to cooperate, of the various subjects involved.

4. The Impact of the Crisis on the EU framework

4.1. The Delarosiére Report

Following the start of the Great Financial Crisis, in October 2008 the European Commission established a High-level working group chaired by Jacques Delarosiére, to give advice on the future of European financial regulation and supervision, and the final Report[241] which it delivered in February 2009 was indeed the basis for future legislative works undertaken by the EU in the following years. The Delarosiére Report dealt with the issue of crisis management in the EU, having particular regard to the framework for dealing with distressed banks, DGSs and burden sharing.

---

[241] High-Level Group on Financial Supervision in the EU – Chaired by Jacques Delarosiére, 'Report', Bruxelles, 25 February 2009.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

With regard to the framework for dealing with distressed banks, the Delarosiére Report observed that, whereas crisis management should be kept at national level for domestic banks, the situation is difficult to handle for cross-border institutions at EU-level, because of different supervisory, crisis management and resolution tools as well as different company and insolvency laws: in particular the different ranking of creditors among Member States was mentioned, as well as the difficulty to mobilise assets from one entity to another within the same group, even when it would be crucial to maintain the a group as a single entity.

The Delarosiére Report dealt quite extensively with the weaknesses of the DGSs regime, which had proven being a major shortcoming in the regulatory framework at the outset of the crisis in Europe[242]. In particular, the Delarosiére Report highlighted the need for EU legislation to require all Member States to apply the same amount of DGS protection for each depositor, as opposite to the minimum coverage approach in

---

[242] Particularly after the collapse of Lehman Brothers, in Autumn 2008 a wave of panic in the market put the liquidity of credit institutions under pressure, and in order to prevent massive bunk runs, some Member States started a race to the top with regard to the amount covered by DGSs under national legislation. For example, when the crisis deteriorated, many depositors shifted money in the UK from British banks to branches of Irish banks in the UK, since Ireland had unilaterally introduced unlimited deposit guarantees. This led to a severe and abrupt draining of liquidity from the British banks, making them very vulnerable. Reference to this episode is made in European Commission, 'Deposit Guarantee Schemes – Frequently Asked Questions', MEMO/10/318, 12 July 2010, which accompanied the proposal for a recast of the DGSs Directive. In addition, there had also been the case of the collapse of the Icelandic banks, whereby the competent (Icelandic) DGSs had not paid out depositors outside Iceland, with major consequences in particular in the UK and in the Netherlands.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

force at the time[243], while also noting that host supervisory authorities should be able to inquire whether the home country DGS has sufficient funds to comply with its obligations[244]. In addition, the Report expressed a preference for ex-ante funding solutions, while objecting to a pooling of DGSs at EU level, and to a harmonisation of rules concerning the involvement of DGSs in crisis management[245].

Finally, the Delarosiére Report also touched upon the issue of burden sharing: the Report noticed in particular that the issue is extremely complicated mainly due to the difficulty to find an agreement on an ex-post basis. The legal framework of the time[246]

---

[243] The Delarosiére Report (see p. 133) saw in particular two major flaws in this approach: first, in a situation where a national banking sector is perceived as becoming fragile, there is the risk that deposits would be moved to the countries with the most protective regime, thus weakening banks in the first country even further; second, in the same Member State the customers of a local bank and those using the services of a third country branch could enjoy different coverage levels, which cannot be reconciled with the notion of a well-functioning Single Market.

[244] The Delarosiére Report (see p. 137) made in this case specific reference to the Icelandic case: the risk to be addressed, in the own words of the Report, is in this case that a supervisory authority could 'allow some of its banks to mushroom large branches in other EU countries, whilst the home Member State is not able to honour the deposit guarantee schemes which are inadequate for such exposures'. The wording used is interesting, as it attaches a direct obligation to the home Member State, whilst the DGS Directive (94/19/EC) – subject to compliance with the requirements set out in the DGS Directive concerning the introduction and the recognition of a DGS – expressly excluded any such liability, albeit in a Recital (No. 24): '*Whereas this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised*'.

[245] See also Recommendation 14 of the Delarosiére Report.

[246] One may argue that a change would take place, to some extent at least, with the activation of the direct recapitalisation by the ESM.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

did not leave any choice but to resolve a crisis at national level, or agree on a cross-border, though improvised, *ad-hoc* solution: against this background, the Report advocated for more detailed (and ex-ante agreed) criteria for burden-sharing, than those enshrined in the MoUs until then[247].

4.2. The First Communication on Cross-Border Crisis Management

In October 2009, the European Commission presented a Communication on an EU Framework for Cross-Border Crisis Management in the Banking Sector[248]: the Commission acknowledged that the crisis had exposed the EU's lack of an effective crisis management for cross-border financial institutions, to such an extent that when an unprecedented action to recapitalise and guarantee banks became necessary in autumn 2008, some form of coordination at European level was possible only thanks to the agreement of Member States on an ad-hoc basis.

The purpose of the Commission's Communication was thus to consider measures to achieve two distinct objectives: (i) to ensure the harmonisation of tools available to

---

[247] The Delarosiére Report proposed in particular (see p. 142 and Recommendation 15) to recur to one in a list of criteria, or a combination thereof, which to a large extent resemble those proposed in the 2008 MoU, except for the additional criterion of the 'division of supervisory responsibility'.

[248] Commission of the European Communities, 'Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee, the European court of Justice and the European Central Bank – an EU Framework for Cross-Border Crisis Management in the Banking Sector', Brussels, 20.10.2009 COM(2009) 561 final (the 'First Commission Communication').

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

national supervisors both to identify problems in banks at a sufficiently early stage and to intervene to restore the health of the institution or group, or prevent further decline, and (ii) to make it possible for cross-border banks to fail without serious disruption to vital banking services or contagion to the financial system as a whole[249]. Therefore, the measures covered by the First Commission Communication covered three different areas: early intervention, resolution, insolvency. This categorisation, which was to some extent an innovation if compared to previous works, as also analysed above, would have deeply influenced future legislative works and would have had in particular an impact on the institutional allocation of competences among authorities.

Under the term 'early intervention', the Commission identified the tools and powers which should be available to supervisors, and advocated thus for the reinforcement of those already entrusted to supervisors under the harmonised discipline of the time[250] with several additional measures, including in particular the power to require the preparation in appropriate cases (e.g.: SIFIs) of 'firm-specific contingency and resolution plans' (or 'living wills', as they were also called) and the submission of a

[249] See the First Commission Communication, p. 2.1.

[250] Reference is made in particular to Article 136 of the CRD in force at the time (Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)), which attributed to the supervisor several tools to address situations of incompliance with prudential requirements of a credit institutions at an early stage, including requiring to: hold own funds in excess of the minimum level; reinforce governance arrangements, processes, mechanisms and strategies; apply a specific provisioning policy or treatment of assets in terms of own funds requirements; restrict or limit the business, operations or network of credit institutions; reduce the risk inherent in the activities, products and systems of credit institutions.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

group restoration plan, to change the management of a bank, or to appoint a representative with the particular objective of restoring the financial situation of an institution[251].

In the context of early intervention measures, the Commission also considered the potential role of intra-group asset transfer as a means to manage liquidity positions and in some cases help stabilise entities in a developing crisis, while however recognising upfront the numerous legal issues related to such an option, which would ultimately contravene the principles of limited liability and separate legal entities within a group[252].

Most of the analysis in the First Commission Communication however focused on the framework for Crisis Resolution. The Communication acknowledged the limits of a framework harmonised for the resolution of branch-based groups, while the banking

---

[251] As analysed in Part I, the introduction of similar tools was discussed at the same time at global level. Ultimately the number of powers available to supervisory powers in the context of early intervention has much increased under the CRD IV (see in particular Article 104 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC).

[252] Under p. 3.2. of its Communication, the Commission in particular acknowledged that In principle, in all Member States asset transfers must be made for fair consideration, irrespective of whether they are between affiliated or unconnected entities, and Transfers of assets that are not made on purely commercial terms may detrimentally affect creditors and minority shareholders of the transferor.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

market in the EU was (and is) mainly organised through subsidiaries[253], which in turn provides incentives to Member States for ring-fencing of national assets[254]. In line with such analysis, and bearing in mind the inability of the 2008 MoU to provide a sufficient or useful basis for cooperation among Member States, the Communication prospected the application of a coherent resolution framework to cross-border banking groups, including thus parent entities and their subsidiaries.

For this purpose the Commission considered two options, of an enhanced coordination of measures continuing to apply at national level, and an integrated resolution of groups by a single resolution authority[255]. In all cases, the Commission advocated for a clear harmonisation of the objectives of bank resolution, which should be to ensure

---

[253] In the case of subsidiaries, the relevant 'home country' is the country where the subsidiary, being a separate legal entity, is incorporated.

[254] The First Commission Report (p. 4.1.) in particular recognised that Member States' incentives to coordinate and refrain from ring-fencing national assets during a cross-border crisis are limited by their need to protect the interests of national stakeholders (including creditors, taxpayers and the deposit guarantee scheme): if insolvency law is national, domestic authorities have a legitimate – as well as a strong political – interest to ring-fence the national assets of an ailing bank in order to protect national deposits and maximise the assets available to the creditors of the national entity. However, the Report also highlighted that any agreement on limiting the rights of Member States to ring-fence the local assets of a cross-border banking group will depend critically on the existence of adequate, fair and legally compliant arrangements between Member States for burden-sharing of any subsequent losses that a banking group as a whole - including its foreign subsidiaries – might incur.

[255] See the First Commission Report, p. 4.7, whereby it is also noted that a cooperation and coordination framework would fail to reflect the reality of the integrated EU banking sector that has developed within the single market: separate entity resolutions, indeed, even if coordinate would not lead to the most effective result. It is worthy noticing that, albeit legislative works are not concluded yet, it seems that both options could coexist under the regulatory framework emerging from the Crisis, respectively under the BRRD (the draft Directive on Bank Recovery and Resolution) and under the SRMR (the draft Single Resolution Mechanism Regulation).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that losses fall primarily on shareholders and junior and unsecured creditors rather than on governments and taxpayers, thereby allowing – legally, but also politically and economically – any bank to fail, whatever the respective size, while maintaining financial stability, the continuity of services and the integrity of payment systems[256].

In order to achieve such objectives, under the harmonised framework several resolution tools should be made available to resolution authorities, including the power to transfer all or part of a bank's assets and liabilities to another entity (a 'bridge' or a 'bad' bank) and to facilitate or effect a private sector acquisition of the failing bank or its business[257].

Also, the Commission pointed out the importance of the recurrence of clear 'threshold conditions', that must be met before the powers of intervention are triggered. Of key importance for an EU resolution regime is that these threshold conditions are clear, in order to allow intervention to take place at the appropriate stage, and sufficiently rigorous to ensure that intervention measures which interfere with the rights of stakeholders are justified[258].

---

[256] See the First Commission Report, p. 4.2.

[257] It is interesting to notice that, whereas the one of the objectives of the whole framework was that the cost of the resolution process should have been borne primarily by creditors different than depositors (to a large extent with international standards which were developing at the same time to shift the burden on uninsured depositors and unsecured creditors), 'bail-in' was not mentioned as a separate tool yet.

[258] See the First Commission Report, p. 4.4.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

With regard to the funding of resolution procedures, the First Commission Communication – consistently with the aforementioned analysis and the international developments – primarily pointed to the private sector, privately on the basis of ex-ante arrangements: in this context reference was made to DGSs which were properly qualified as private sector arrangements, differently than it had previously been the case, e.g. in the Delarosière Report.

Finally, the First Commission Communication also touched upon the need to reform insolvency law, with particular regard to the possibility to allow a more integrated treatment of corporate groups in insolvency, which could eventually replace the otherwise applicable national regimes.

4.3. Reactions to the First Communication and Further Developments

The Commission launched a public consultation on its First Communication which was in the meanwhile endorsed by the Ecofin[259]. Among the various responses which were advanced in the context of the public consultation it is worthy briefly recalling the position expressed by the Eurosystem[260]. The latter in particular focused on several

---

[259] See Council of the European Union, ‘Press Release of the 2981st Council meeting Economic and Financial Affairs’, Brussels 2 December 2009, 16838/09 (Presse 352).

[260] See ECB, ‘Commission Communication on “an EU Framework for Cross-border Crisis Management in the Banking Sector”: Eurosystem’s Reply to the Public Consultation’,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

legal obstacles to be more carefully considered both in the field of early intervention and resolution.

With regard to early intervention, the Eurosystem in particular highlighted the risks connected to envisaged solution of intra-group asset transfers, in view of possible contagion risks which may derive from such operations, as well as the legal obstacles arising from company and insolvency law (in addition to ring-fencing measures possibly undertaken by supervisors), to such an extent that '*any regime that would seek to facilitate binding intra-group asset transfers would be challenging from a legal perspective*'[261].

With reference to bank resolution, the Eurosystem stressed the need for an effective resolution framework to also deal with the problem of the bank counterparty's termination rights under contractual rights, including with reference to financial collateral arrangement, whereby a change in the discipline may thus reveal necessary[262], as also in the field of company law, including with reference to the takeover discipline, whose normal requirements may at least delay or increase the costs of a crisis management intervention[263].

---

[261] See the Eurosystem's Reply, cit., p. 2.

[262] The Eurosystem in particular reminded that Directive 2002/47/EC on financial collateral arrangements did not permit any delay against non-defaulting counterparties exercising netting and close-out rights.

[263] The Eurosystem made in particular reference to the case of Fortis, when the required consent of the shareholder's meeting caused a delay of the rescue operation, while the ECJ case-law (C-441/93 Panagis Pafitis

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

With regard to the establishment of a single authority in charge for resolution of cross-border banks, the Eurosystem highlighted the difficulties which such authority may encounter in dealing with as many legal frameworks as the jurisdictions involved in the absence of a single 'resolution code', prospecting thus the possibility to rather establish a European body for coordination of the national authorities involved in the resolution process.

While not being directly connected to the public consultation on the First Commission Communication, an IMF Working Paper on 'Crisis Management and Resolution for a European Banking System'[264] was published in the same period: due to its more 'technical' approach, such document could consider solutions which may not seem realistic at the time, but which hold still valid few years after it was issued, with some of the solutions envisaged which in the meanwhile entered the mainstream policy debate or were *tout court* incorporated in legislative proposals. The IMF Working Paper in particular was based on three pillars: the establishment of a single 'European Resolution Authority', of an European Deposit Insurance and Resolution Fund to be pre-funded by the industry, and a s.c. '28th regime' legal framework for cross-border banks.

---

and Others v. Trapeza Kentrikis Ellados A.E. and Others [1996] ECR I-1347) did not allow any scope for exception to such requirement.

[264] W. Fonteyne et al., 'Crisis Management and Resolution for a European Banking System', IMF Working Paper WP/10/70, March 2010.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4.4. Impact of the Crisis on the State Aid Regime

As mentioned already in the course of this work, at the very heart of the European integration process lies the Single market. Two policies areas in particular have been used in time by the Commission to forge the Single Market as we know it: competition and State aid.

In both areas, at least until the beginning of the Great Crisis, the Commission managed to avoid that the banking sector could enjoy of a 'special status', thanks to which it could escape from the application of the rules generally valid for other economic sectors[265].

Particularly important, in the context of crisis management, was the approach of the Commission not to grant a 'special status' to the banking sector for the purposes of the application of the EU State aid regime, considering the importance of public support in the management of financial crises.

---

[265] In CaseC-172/80 Zuchner v. Bayerische Vereinsbank AG [1981] ECR 02021, in particular, p. 6, the ECJ clarified that banks should not be considered as undertakings 'entrusted with the operation of services of general economic interest within the meaning of Article 90(2) and thus not subject, pursuant to that provision, to the EC competition rules'.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Before the start of the financial crisis, the Commission assessment of State aid was based on Article 87(1) TCE, now Article 107(1) TFEU, and on the Community guidelines on state aid for rescuing and restructuring firms in difficulty[266].

On this basis, while recognising the sensitivity of financial markets and the special features of banking[267], the Commission subjected credit institutions to the same rules applicable to other undertakings, such as, in particular, the 'private market investor test', whereby it should be shown that the State in its capacity of investor would act as a private investor would. From this followed the requirement for the beneficiary institution to present a restructuring plan, showing a reasonable forecast on the return on the State investment, such as to be acceptable to a private investor[268]. Thus rescuing and restructuring could be compatible with the State aid regime upon fulfilment of four requirements: (i) that the aid would restore the viability of the credit institution, (ii) that the aid would be proportionate and not exceed what is strictly necessary, (iii) that distortive measures on competition should be reduced to the minimum, and (iv) measures should be taken to compensate competitors as much as possible[269].

---

[266] OJ C 244/02, 1.10.2004.

[267] See 95/547/EC: Commission Decision of 26 July 1995 giving conditional approval to the aid granted by France to the bank Crédit Lyonnais, OJ L 308/92, 21.12.1995.

[268] See A Lista, *EU Competition Law and the Financial Services Sector*, p. 238-240, Oxon-New York, 2013. See also L. Hancher, 'Bailouts in the Financial Sector: The Compatibility with the EU State Aid Rules', in P. Delimatsis, N. Herger (eds.), Financial Regulation at the Crossroads, 2011, 123.

[269] See Comission Decision 95/547/EC, cit., p. 3.2.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The treatment of financial crises under a State aid perspective could not be immune to the tidal wave of the Great Crisis. Article 107(3)(b) TFEU, pursuant to which 'aid to make good damage caused by natural disasters or exceptional occurrences' is considered compatible with the internal market, became the new legal basis on which the Commission policy in this field would have based, with regard to the banking sector, since the start of the Great Crisis onwards: previously it had not been considered as an appropriate legal basis in order to restrict the discretion of public authorities and thereby avoid moral hazard issues[270].

On this new basis, the Commission started adopting in 2008 a series of Communications which would have changed the landscape of State aid in the field of banking.

The first tool used by the Commission to give guidance on the compatibility of State aid was the Banking Communication[271], which allowed the provision of guarantees on the liabilities of credit institutions, the establishment of recapitalisation schemes and criteria for a controlled winding-up, subject to the Commission's approval of the relevant schemes, for a period of six months, which could be extended up until two years[272].

---

[270] See A. Lista, *EU Competition*, cit., 241.

[271] Communication from the Commission - The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270/8, 25.10.2008.

[272] See A. Lista, *EU Competition*, cit., 245.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The Banking Communication was soon followed by the Recapitalisation Communication[273], following the recommendations received by the ECB[274], trying to achieve a balance between the needs of financial stability, ensuring lending to real economy and dealing with the risk of insolvency[275].

The framework was then completed by the Impaired Assets Communication[276], setting out the conditions to relieve banks' balance sheets from bad assets, and the Restructuring Communication[277],outlining how the Commission intended to use competition rules to foster financial stability, and the role in this context of 'burden sharing', i.e. the contribution of shareholders and creditors.

The stress on burden sharing and the need to involve more the private sector has been increased in the last piece of the new State aid framework in the banking sector, i.e. the new Banking Communication of 2013[278]. In the field of burden-sharing the new Communication requested indeed, as a condition for the compatibility of State aid with

---

[273] Commission Communication Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. Adopted on 5 December 2008 OJ C 10/2, 15.1.2009.

[274] ECB, Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, 20.11.2008.

[275] A. Lista, EU Competition, cit., 247.

[276] Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector Official Journal C 72/1, 26.03.2009.

[277] Communication from the Commission, The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rule, OJ C195/9, 19.8.2009.

[278] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216/1, 30.7.2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the internal market, that subordinated debt, excluding insured and uninsured deposits, and other forms of senior debts, must in principle be converted or written down before State aid is granted, when a credit institution fails to meet minimum capital requirements, albeit an exception is provided for those cases when such measures would endanger financial stability or lead to disproportionate results[279].

The above shows how much the crisis impacted on a key element of the European Union legal regime, and the importance that State resources had to avoid the melt-down of the financial system: the involvement of State finances in the rescue of the financial sector was however such to endanger in turn the stability of States' finances, and the reduction of such involvement, also for the future, has become a priority in the policy agenda of the EU.

5. The Sovereign Debt Crisis

5.1. Vicious circle between banks and a sovereign

The problem of the potential interaction between the financial sector and the fiscal situation of Member States in an institutional environment such as the one of the European Union had been covered in the doctrine already prior to the start of the crisis. The theory of the s.c. 'financial trilemma' explained particularly well the tension

[279] Ibidem, see in particular pp. 44-45.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

which would have endangered the stability of the whole system in the course of the Great Crisis: i.e. the incompatibility between the policy objectives of financial stability and financial integration, when leaving the competence for preserving financial stability at national level[280].

The crisis revealed very soon how the problems of banks in the euro area can spill over to sovereigns and vice versa. In 2008 and 2009, Member States rescued banks unable to finance themselves on the interbank market. This, in turn, had considerable impact on public deficit and debt. Deteriorating fiscal situation raised doubts about creditworthiness of the countries and, as a consequence, their rating dropped and borrowing costs increased. Since the euro area banks held a large share of debt issued by their domestic government, the quality of assets on their balance sheet worsened.

Such scenario took place in several euro area Member States.

5.2. The Greek Crisis

In late 2008, at the outset of the global financial crisis, Greece had the highest general government debt-to-GDP ratio[281] and the highest general government deficit-to-GDP

[280] See D. Schoenmaker, *Governance of International Banking – The Financial Trilemma*, Oxford University Press, 2013.

[281] Source: Eurostat, table on the general government gross debt in the EU Member States (1995 – 2012).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ratio[282] in the euro area. The country continued to be the worst EU fiscal performer in 2009 too, with a deficit-to-GDP ratio amounting to nearly to 16%. Such development of public finances triggered doubts of financial markets about ability of Greece to meet its obligations. Credit rating of the country was steadily being downgraded and bond yields spreads in the euro area widened.

Greece had been subject to an excessive deficit procedure since April 2009. In December 2009 the ECOFIN Council adopted a decision on the non-compliance of Greece with recommendations addressed to the country at the outset of the excessive deficit procedure. In addition, the Council criticised Greece for unsolved shortcoming regarding public finance statistics.[283] As a response, the Greek government submitted to the Council a plan to reduce its deficit below 3% by 2012.

Since the commitment of the Greek government to undertake fiscal consolidation was not convincing sceptic lenders, the euro area partners tried to mitigate the confidence crisis by promises to back their fellow, if necessary. Already in February 2013, the Member States whose currency is the euro declared that they 'would take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole'[284]. One month after, the euro area leaders made their promise more specific;

---

[282] Source: Eurostat, table on the general government deficit/surplus in the EU Member States (2001 – 2012).

[283] Press release from the Council meeting, Economic and Financial Affairs, 2 December 2009.

[284] Statement by the Heads of State or Government of the European Union on Greece made after their informal meeting in Brussels on 11 February 2010.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

and declared to stand ready to provide to Greece bilateral loans with non-concessional interest rates, should the country have difficulties to borrow at financial markets[285]. Further details of (still potential) financial aid to Greece, such as duration of the programme, the amount to be lent by the euro area in the first year and the pricing policy, were announced by the Eurogroup on 11 February 2010.

Although the declarations of the euro area leaders on their readiness to financially back Greece should have calmed the markets, further downgrading of its credit rating made Greece unable to borrow from private investors. On 23 April 2010 Greece officially requested activation of the financial support mechanism. Following the negotiations on the programme containing strict conditionality of the loan extension, the Euro group announced that the first disbursement of a total of 110 billion EUR[286] would have taken place already before 19 May 2010.

Financing of the first Economic Adjustment Programme for Greece was based on bilateral loans provided to Greece by euro area Member States. However, the developments of the next month indicated that this financial package would not suffice. In July 2011, Heads of State or Government of the euro area agreed to support a new programme for Greece, relying also on the IMF participation and the voluntary

---

[285] Statement by the Heads of State and Government of the euro area of 25 March 2010. Pursuant to this statement, Greece would receive a loan also from the International Monetary Fund. However, the European financing was supposed to constitute the major part of the package.

[286] Euro area member states undertook to contribute to this amount by the amount of 80 billion EUR, of which up to 30 billion in the first year.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

contribution of the private sector[287]. Private sector involvement (PSI) was seen an important step to reduce Greek debt to GDP ratio[288]. The Second Economic Adjustment Programme received green light from the ECOFIN in March 2012. This time, the Eurozone contribution to the financial support was not provided directly by Member States, but via European Financial Stability Facility. The second programme was accompanied by a PSI based on a debt exchange with significant haircut[289]. More than 95 % of the eligible bonds have been exchanged.

5.3. The Irish case

After the burst of a property bubble Irish banks, which were exposed to a great extent to construction business, suffered significant losses. The Government intervened to solve not only liquidity shortage, but also solvency problems of major Irish banks. Rescue measures consisting of guarantees, recapitalisation and a State loan scheme constituted large public expenditure.

While in 2007, the Irish debt-to-GDP ratio of 24,9% was far below the limit set by the Stability and Growth Pack, the next year it almost doubled and in 2009 exceeded

---

[287] Statement by the heads of State or Government of the euro area and EU institutions of 21 July 2011.

[288] Euro Summit statement of 26 October 2011.

[289] This action triggered downgrading of Greek Credit rating to default levels.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

60%[290]. The bail-out was not the only element responsible for worsening the fiscal position of Ireland; tax revenues dropped mainly due to crisis of the construction market and rising unemployment implied more expenses on social allowances. However, ailing banking sector absorbed a large proportion of public expenditure, "... according to IMF (2011) ... nearly amounted to 40 per cent of GDP, in other words about half of the increase in the debt ratio"[291]. In late 2010, when Ireland requested financial assistance from the EU, further funds were needed to strengthen the banking sector[292].

The financial support to Ireland was granted through different financing arrangements: from the Union mechanism (EFSM), from the – at the time – newly established euro area safety net (EFSF), from the United Kingdom, Sweden and Denmark on the basis of bilateral agreements, and from the IMF. Ireland itself contributed to the programme through the Treasury and the National Pension Reserve Fund.

5.4. The Spanish case

[290] Source: Eurostat, table on the general government gross debt in the EU Member States (1995 – 2012).

[291] Merler S., Pisani-Ferry J., 'Hazardous tango: sovereign-bank interdependence and financial stability in the euro area' in *Banque de France, Financial Stability Review*, No. 16 , April 2012

[292] See Article 3(5) of Council implementing decision on granting Union financial assistance to Ireland of 7 December 2010 and paragraph 6 – 20 of the Memorandum of Economic and Financial policies. Paragraph 12 of the Memorandum expressly provides as follows:"While we expect that, in a restructured system, banks will be able to raise capital in the market, we recognise that the higher standards may imply that, in the short run, public provision of capital will be needed for banks that are deemed to be viable".

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Relatively low pre-crisis level of Spain's debt-to-GDP ratio started rising with necessary bail-outs of banks. Although the government introduced austerity measures and successfully decreased the deficit, in mid-2012 Spain encountered difficulties to access financing in financial markets. The described circumstances led Spain to formally request the Eurogroup for financial assistance to recapitalise its credit institution. The assistance received from the EFSF was later taken over by ESM. The existing rules did not allow for direct bank recapitalisation by the EFSF/ESM, but the financing was channelled to the ailing financial institutions via the *Fondo de Reestructuración Ordenada Bancaria* representing the Spanish government.

5.5. The Cypriot Case

Fear of spillover from troubled banks to fiscal situation of Cyprus was strengthened by relatively huge dimension of financial sector in comparison with the annual GDP of this small country. Moreover, exposure to Greek debt made Cypriot banks suffer due to the Greek PSI. Following Cyprus's application for EU intervention, negotiations with troika extended over months due to hesitation on the side of the beneficiary to accept the terms of the programme which included elements of bail-in through one-off levy on deposits[293].Agreement on the final terms of Economic Adjustment

[293] See Statements by the Eurogroup and the Eurogroup President, made respectively on 16 and 18 March 2012.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Programme, “tailor-made” to the “specific case of Cyprus”[294] was found only a year later.

6. The need for a European ‘safety nets’

Soon after the first fiscal crisis took place, it was clear that Greece was not the only euro area member State experiencing fiscal troubles. Therefore, the Eurozone leaders decided to issue to the financial markets a decisive signal that, if needed, the currency block would be ready to grant financial support to other members with unsustainable general government debt.

On 9 May 2010 the ECOFIN Council[295] decided on a package of measures to preserve financial stability in the euro area. The Member States hoped that the measures, intended as a safety net to be activated as necessary, would renew confidence of financial markets in creditworthiness of the countries hit by the debt crisis.

In line with the above decision, the Council adopted a Regulation (EU) No 407/2010 of 11 May establishing a European financial stabilisation mechanism[296] (EFSM) based

---

[294] See Statement of the Eurogroup President on Cyprus of 25 March 2013.

[295] Formation of the Council of the European Union dealing with economic and financial affairs.

[296] OJ L 118 , 12/05/2010, p. 1.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

on Article 122(2)[297] of the TFEU. This mechanism allowed the Union to grant a loan or a credit line to a Member State experiencing, or seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control. In particular, the Commission would borrow up to 60 billion EUR in financial markets or from financial institutions and lend them to beneficiary Member States. Borrowing costs incurred by Commission would be borne by beneficiaries.

In addition, euro area Member States committed to stand ready to procure further funds to restore financial stability in the euro area via a special purpose vehicle. On 7 June 2010 the euro area Member States established the European Financial Stability Facility (EFSF) as a temporary[298] means to provide financing to euro area Member States in financial difficulties. The EFSF is a public limited liability company *(société anonyme)* governed by Luxembourgish law which raises funds necessary to finance the beneficiaries by issuing debt instruments guaranteed by the shareholder Member States. Heads of state or government of the euro area soon decided to widen the scope of ESFS's activities and increase the guarantees, initially limited to 440 billion EUR, to 780 billion EUR.

---

[297] This Article allows the Council to grant, on the proposal from the Commission and under certain conditions, Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused, *inter alia,* by exceptional occurrences beyond its control.

[298] The ESFS was authorised to engage in financing programmes and enter into loan agreements only until 30 June 2013, but it continues existing until financial assistance provided to the euro area Member States and instruments issued by the ESFS has been repaid (see Article 4 of the ESFS Articles of Incorporation).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Both instruments were designed to be made available to the applicants only subject to strict conditionality laid down in a Memorandum of Understanding concluded between the Member State concerned and the Commission, typically including commitments of the beneficiary to observe budgetary discipline and undertake various reforms aimed at enhancing competitiveness and stimulating growth.

In October 2010, the European Council agreed on a permanent crisis mechanism which should be established to safeguard the financial stability of the euro area as a whole. EFSF was no Treaty-based mechanism, but rather a as a company established by Euro Area Member States which was allowed to lend to beneficiary Member States only until 30 June 2013. EFSM, on the other hand, was a Union mechanism with rather limited funding capacity. At the time of their establishment, the Treaty did not contain any suitable legal basis for the creation of a permanent crisis mechanism for Member States in the monetary union. Therefore, the European Council held that the Treaty should be changed to that effect. Article 122(2) of the TFEU was not considered to be an adequate legal basis, since the new mechanism should not serve to individual Member States, but to the euro area as a whole.

The European Council decided[299] that the relevant amendment to the TFEU should be adopted via simplified revision procedure[300] – a novelty introduced by the Lisbon

[299] Conclusions of the European Council of 16 – 17 December 2010.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Treaty – and should take account of the features envisaged for the new mechanism by the Eurogroup[301]. The Eurogroup planned the new European Stability Mechanism (ESM) to provide financial assistance on the basis of a unanimous decision of the Eurogroup finance ministers and according to the rules of current EFSF, as adapted to take into consideration possible participation of private sector creditors whose claims would be subordinated to those of the ESM. The amendment was adopted on 25 March 2011[302] and entered into force on 1 May 2013, after the approval thereof by the last Member State. At the same time, the European Council adopted a Term Sheet on the ESM[303]. The ESM was established as an international financial institution by an intergovernmental treaty (hereinafter the 'ESM Treaty') signed on 2 February 2012 and enter into force on 27 September 2012. In other words, although the Treaty amendment was triggered by the need to provide for a legal basis for the set up of the permanent crisis mechanism, the ESM Treaty in the end entered into force before the TFEU amendment. This was subsequently 'cleared' by the Court of Justice which

---

[300] The procedure, laid down in Article 48(6) of the TEU, allows the European Council to amend any provision of the Part III of the TFEU by a unanimous decision after consultating the European Parliament, the Commission and, in a specified case, also the Eupean Central Bank. However, the amendment may not increase existing competencies of the Union. The decision may only enter into force after it has been approved by the Member States.

[301] Statement by the Eurogroup on 28 November 2010.

[302] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

[303] Annexed to the European Council conslusions, 24 – 25 March 2011.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ruled that 'the right of a Member State to conclude and ratify that [ESM] Treaty is not subject to the entry into force of Decision 2011/199/EU'[304].

Albeit the ESM has served as an essential instrument to support the management of the fiscal crisis in the euro area, the limits of its governance, in particular with reference to the need for unanimity of its decision[305], the limit imposed to the resources available and a certain lack of flexibility in the range of tools available for action, highlighted the need for the development of different instruments to grant a better management of financial crises in the future. The only viable solution, given such premises, would have thus been a framework shifting the burden for the management and the resolution of future crises on the private sector, on the basis of *ex ante* arrangements.

---

[304] See case C-370/12 Thomas Pringle vs Government of Ireland of 27 November 2012, in particular paragraph 184 thereof.

[305] With the partial exception provided under Article 4(4) of the ESM Treaty.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Chapter III – Main features of the Resolution Framework in the Banking Union

1. Towards a genuine EMU

1.1. The Four Presidents Reports

At a meeting on 26 October 2011, the Euro Summit[306] tasked the President of the European Council, in close collaboration with the President of the Commission and the President of the Eurogroup, to identify possible steps to strengthen the economic union and make it commensurate with the monetary union, with a focus on further strengthening economic convergence within the euro area, improving fiscal discipline and deepening economic union[307]. Following the request of the Eurosummit, a first interim report was delivered in December, whose last chapter was dedicated to 'strengthening the existing crisis mechanism', and thus mainly devoted to the arrangements which had been put in place to address the crisis of sovereign debt: however, with particular reference to the ESM, whose Treaty was at the time in the

[306] The Euro Summit is an informal meeting of the Heads of State and Government of the Member States whose currency is the Euro. The first of such meetings was called in Paris by the French President on 12 October 2008, to agree on a swift common response to the crisis at its outset. Following summits were held in May 2010 and during 2011. In the meeting of 26 October 2011 the institutional format of the Euro Summit was sketched for the first time (see Annex I to the Statement, pp. 1-3). The institutional framework of the Euro Summit was finally enshrined in Article 12 of the Treaty on Stability, Competiveness and Growth.

[307] See Euro Summit Statement, Brussels 26 October 2011, pp. 34-35.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

course of being finalised[308], the interim report suggested that it should have been adjusted to make it more effective, also through the introduction of the possibility for the ESM to directly recapitalise banking institutions and to have itself the necessary features of a credit institution[309].

On 26 June 2012 a report on the way towards a genuine EMU, prepared by the President of the European Council Herman Van Rompuy in close cooperation with the Presidents of the Commission, the Eurogroup and the ECB (hence known as the 'Van Rompuy' or the 'Four Presidents' Report), was submitted to the European Council[310]. Such report envisaged that a 'genuine' EMU should be based on four key building blocks: an integrated financial framework, an integrated budgetary framework, an integrated economic policy framework, and a strengthened democratic legitimacy and accountability.

The integrated financial framework, in particular, was meant to ensure financial stability 'in particular in the euro area' and minimise the cost of bank failures to European citizens: to achieve this objectives, in the context of such framework

---

[308] After a first version of the Treaty was signed by Ministers of Finance of the Member States of the Euro Area on 11 July 2011, a second definitive version was signed by Ambassadors of the same States on 2 February 2012.

[309] See: 'Towards a stronger Economic Union – Interim Report', 6 December 2011, p. 18.

[310] See: European Council, the President, 'Towards a genuine Economic and Monetary Union', Report by President of the European Council Herman Van Rompuy, Brussels 26 June 2012. The report has been prepared in close cooperation with the Presidents of the Commission, the Eurogroup and the European Central Bank, and is hereby also referred to as the 'Report of the four presidents'.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

responsibility for supervision would have been elevated to the European level, and common mechanisms to resolve banks and guarantee customer deposits would have been provided for. Despite the establishment of an integrated financial framework was identified as the first of the four building blocks for a ‘genuine EMU’, the text of the report seems to clearly show how its draftsmen had clear in mind that the structural shortcomings in the institutional framework for financial stability revealed by the crisis did not regard the Euro area only, although being particularly important for the euro area given the deep interdependences resulting from the single currency: indeed the report recommended that any action aimed at addressing these shortcomings should also aim at preserving the unity and integrity of the single market, while allowing for specific differentiations between Member States within and without the euro area on certain areas of the framework, with reference to certain aspects primarily linked to the functioning of the EMU, ‘rather than to the single market’[311].

According to the Four Presidents Report, the integrated financial framework would have been achieved firstly by creating a single European banking supervision system where the European level would have ultimate responsibility.

Following this step, the Report envisaged the introduction ‘for banks overseen by the European supervision’ of an European deposit insurance scheme to supplement national schemes and of an European resolution scheme, to be funded by the same

---

[311] See p. II.1. of the Four President Report of 26 June 2012, cit..

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

banks thereby protecting tax payer funds, which would provide assistance in the application of resolution measures to non-viable institutions.

While also envisaging the institution of a common resolution authority responsible for both the deposit and the resolution fund, the Report reminded that 'the credibility of any deposit guarantee scheme requires access to a solid financial backstop', and consequently suggested that, as regards the euro area, the ESM could act as the needed fiscal backstop.

3.2. The 29 June 2012 Euro Area Summit

On 29 June 2012, the Euro Area Summit concluded that, in order to break the link between banks and sovereigns, it looked forward to the Commission's proposals for the activation of Article 127(6) TFEU, and the attribution of supervisory competences to the ECB. As the Summit held that the establishment of the SSM for the euro area had become a matter of utmost urgency, it called for the adoption of the new legislation by the end of 2012. Against this background, the Euro Area Summit also affirmed that, following the establishment of a Single Supervisory Mechanism, the ESM should have the possibility to recapitalise banks directly, subject to appropriate conditionality, including compliance with state aid rules, which should be institution specific, sector-specific or economy-wide.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The European Council endorsed the proposal at its meeting on 28 – 29 June 2012 and requested the four Presidents to develop a 'specific and time-bound roadmap' on details and a specific schedule for the achievement of the proposed reforms of the EMU, taking into account the statement of the Euro Area Summit and the plans of the Commission to present legislative proposals, while also further analysing which changes would have required as a precondition a Treaty amendment[312].

3.3. Commission's Proposals

The Commission presented to the European Parliament and the Council the proposal for a Regulation establishing the SSM[313] in September 2012, together with another draft Regulation[314], mainly aimed at enabling the European Banking Authority (EBA) to carry out its tasks also in relation to the ECB and to adapt voting modalities within the Board of Supervisors of EBA, as well as a 'a Roadmap towards a Banking

---

[312] See European Council, 'European Council – Conclusions', Brussels, 29 June 2012, p. II.4.

[313] Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/511 final, 12 September 2013.

[314] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 12 September 2012, COM/2012/0512 final.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Union'[315] accompanying the two proposals above. In such 'Roadmap' the Commission highlighted that shifting supervisory competences would have been a key part of a more comprehensive process, to be completed with the establishment of the remaining pillars of the banking union, namely the already proposed Directives on Deposit Guarantee Schemes (DGS)[316] and on Bank Recovery and Resolution (BRR)[317], whose adoption, together with the SSM Regulation, the Commission suggested to be achieved by the end of 2012.

In the design of the Commission, the adoption of the two proposed Directives would have paved the way for the next Commission's legislative initiative on a single resolution mechanism to resolve banks and to coordinate the application of resolution tools to banks inside the banking union. Also, to avoid the risk of fragmentation of the single market due to different supervisory practices applied inside and outside the SSM, the Commission highlighted then need to achieve the completion of the regulatory programme for the development of a 'single supervisory handbook'

---

[315] European Commission, Communication from the Commission to the European Parliament and the Council – A Roadmap towards a Banking Union', Brussels, 12 September 2012, COM(2012) 510 final.

[316] Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes (recast), COM (2010) 368 final.

[317] Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM(2012) 280 final.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

including the substantive rules applicable in this field to the whole EU, thus also to the Institutions acting inside the banking union[318].

In October 2012, the Four Presidents released an interim report[319]. Such Report highlighted that the process towards a deeper EMU should be fully compatible with the Single Market, rather than being seen in opposition to the latter: subsequent to the introduction of the single currency the financial integration of Member States within the Euro Area has deepened, while supervision and crisis management remained organised along national lines. As a consequence of this, the interim report highlighted the increased costs of financial crisis support for taxpayers and the risks for financial stability deriving from the absence of common bank resolution tools, which hampered effective crisis management. Furthermore, the interim report observed that the crisis has brought about a fragmentation of the euro area financial market, with adverse implications for credit conditions, while the establishment of an integrated financial framework was considered in the interim report as necessary for the achievement of a genuine EMU.

The European Council restated in October 2013 its commitment to follow up to the indications which had been put forward in the interim report, while stressing the need to respect the integrity of the Single Market, calling for the approval of the legislative

---

[318] See in particular p. 2 of the Roadmap, cit.

[319] European Council, the President, 'Towards a genuine Economic and Monetary Union, Interim Report' (the 'Interim Report'), Brussels, 12 October 2012.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

proposals presented by the Commission, and mandating the Euro Group to draw up the exact operational criteria that will guide direct bank recapitalisations by the ESM[320].

In a Communication adopted in November 2011[321], the Commission presented in broader terms its view of what should constitute a 'genuine EMU'. One of the starting points of the Commission's analysis is that the inception of the EMU had determined a deepening of financial integration implying opportunities for portfolio differentiation by also accelerated transmissions of shocks cross-borders[322], thus the clear inadequacy of crisis management mechanisms was largely responsible for the negative effects of the crisis on the concerned economies, ultimately coinciding, at least partly, with a reversion of the integration progresses which had been achieved with the advent of the EMU: in the absence of such a mechanism, response of national authorities based on national interest resulted in a re-fragmentation of financial markets, leading to remarkably different financing conditions for businesses and households with similar profiles, based exclusively on their location in different euro area Member States[323].

As the Commission put it: 'anachronistically, more than 50 years after the foundation of the European Union, the crisis of confidence appears to be reinstating the constraining power of national borders, questioning the Single Market and threatening

[320] European Council, 'European Council – Conclusions', Brussels, 19 October 2012.

[321] European Commission, 'A blueprint for a deep and genuine economic and monetary union – Launching a European Debate', Brussels, 28 November 2012, COM(2012) 777.

[322] See European Commission, 'A blueprint', cit., 3.

[323] See European Commission, 'A blueprint', cit., 9.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the achievements and as yet unfulfilled aspirations of Economic and Monetary Union'[324].

As for the main elements of the Crisis and Management framework within the Banking Union, this Commission's Communication is largely in line with other policy papers analysed up until now, both with regard to the principles and the structure of such framework. In particular, in the Commission's view such framework should rely on a single resolution mechanism and on the financial backstop provided by the ESM through the possibility to activate the direct recapitalisation of credit institutions, as well as on the following principles: the need for resolution should be reduced to the minimum, in case of intervention of the single resolution mechanism shareholders and creditors should bear the costs before any external funding is granted, and any such funding should come from the banking industry, rather than from the taxpayers[325].

An important contribution of the Commission was the development of the concept of 'fiscal capacity' for the Euro Area, and a common issuance of short-term government bonds with 1-2 years maturity (the 'Euro bills')[326], which had been touched upon also in the interim Report of the Four Presidents[327], especially considering the possible implication in a crisis management perspective. To maximise public trust in a crisis

---

[324] See European Commission, 'A blueprint', cit., 10.

[325] See European Commission, 'A blueprint', cit., 18.

[326] See European Commission, 'A blueprint', cit., 27-31 in particular.

[327] See the 'Interim Report', cit., 4-6.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

management and resolution mechanism, the Commission observes that a credible and powerful backstop is needed, and this element could be facilitated by the development of an ‘Euro Area safe asset’, and thereby the possibility to jointly borrow all the funds needed to cope with any crisis. Moreover, the Commission also notes that while the fragmentation of the financial markets hinders the transmission mechanisms of the single monetary policy, a new safe asset for the Euro Area would be a powerful tool against such fragmentation and a strong support to financial stability, as not only it would ensure a supply of liquidity to Member States[328], but would also would also greatly facilitate the liquidity management of financial institutions and thereby reduce their strong home (government bonds) bias. It should be highlighted however that such institutional innovation was envisaged by the Commission in the medium-long term, due to the need of a Treaty change for this purpose[329].

3.4. Interim Report and further developments

---

[328] Given the short maturity, the Commission notices that such financial instruments could be designed in such a way to be consistent with incentives to fiscal discipline.

[329] A common issuance implying a joint liability of Member States and of these with the Union could contravene Article 125 TFEU. The issue had been analysed already in more detail in other policy documents. See in particular: European Commission, ‘Green Paper - on the feasibility of introducing Stability Bonds’, COM (2011) 818 final, Brussels, 23 November 2011, and Giovannini Group, ‘Co-ordinated public debt issuance in the euro area’, 8 November, 2000.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The close link between the set-up of a single resolution authority and an appropriate backstop is restated in the final version of the Four Presidents Report of December 2012[330], whereby both objectives are scheduled for the s.c. 'stage 2' (i.e. 2013-2014), following the set-up of the operational framework for direct bank recapitalisation through the ESM, upon completion of the establishment of the SSM in the s.c. 'stage 1' (2012-2013). The Report proposes in particular that the single resolution mechanism ('SRM') 'should include' an appropriate and effective backstop, which could possibly be organised by means of an ESM credit line to the SRM: it is to be noted that the fiscal backstop is envisaged as 'fiscally-neutral' over the medium-term, since public assistance would be recouped by means of ex post levies on the financial industry[331]. On the other hand, the Report clarified that the fiscal capacity should not be an instrument for crisis management[332], this being the role of the ESM, while the report should rather contribute to crisis prevention and thus make ESM intervention less likely[333]. To the nature and the role of a fiscal capacity is dedicated a large of the Four Presidents Report, which however spans over a wider range of arguments[334]. As

---

[330] H. Van Rompuy, in close cooperation with J. Barroso, J. Juncker and M. Draghi, 'Towards a genuine Economic and Monetary Union', 5 December 2012.

[331] H. Van Rompuy et al., 'Towards a genuine EMU', cit., 7.

[332] The function of the fiscal capacity is connected in the Report to the concept of 'contractual arrangement' which would lead to an insurance-type mechanism to absorb shocks in Member States: see H. Van Rompuy et al., 'Towards a genuine EMU', cit., 9.

[333] H. Van Rompuy et al., 'Towards a genuine EMU', cit., 12.

[334] The final report incorporates the views of the Commission expressed in the Communication 'A Blueprint for a deep and genuine EMU – Launching a European Debate' of 28 November 2012 in which the Commission

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

for the proper crisis management and resolution mechanism inside the banking union, according to the Four President's Report this should be composed by two pillars: a legislative framework encompassing harmonised tools for bank resolution available in all Member States, including – besides resolution tools *tout court* such as bail-in or bridge banks – also early intervention, and a single resolution mechanism limited in scope to the Member States included in the SSM, following the establishment of the latter: this in particular was considered as a key element to ensure timeliness and impartiality in the decision-making process in case of a crisis, to make resolution costs as low as possible and to break the link sovereign-banks, to ensure market discipline by imposing that costs are firstly borne by shareholders and creditors. With reference to DGSs, it is noteworthy that the Report does not call for the establishment of a single scheme, but simply for the swift adoption of the reform proposal already presented. Finally, the principle of separation within the ECB between the supervisory and central bank money functions was stressed once more, which has some implications in

---

suggested its own schedule for completion of the genuine EMU, outlining measures that need to be taken in short, medium and long term. Establishment of the SSM and a Single Resolution Mechanism were considered priorities to be completed within the next 6-18 months. On the one hand, the Commission acknowledged that the integration of the euro area should accelerate. Nonetheless, the euro area measures should be, to the extent possible, open for participation of other Member States. The final Report of the four Presidents, building largely on Commission's blueprint, considers most of the steps leading towards the integrated financial framework to be highly urgent. First of all, the Union should endeavour to 'break the link between banks and sovereigns', in particular by establishing the effective SSM, harmonizing national resolution and deposit guarantee frameworks, bringing into force Capital Requirements Regulation and Directive and setting up of the operational framework for direct bank recapitalisation through the ESM, by the end of 2013. Setting up of a common resolution authority should follow in the next stage (2013 – 2014).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the context of crisis management, at least with reference to the early intervention phase.

The European Council of December 2012[335] finally agreed on a roadmap for the 'completion of the EMU': in particular, according to the indications of the European Council, the first phase of the process should have included the establishment of the SSM and the adoption of the new rules on recovery and resolution and on deposit guarantee schemes (before June 2013), to be completed by the establishment (with the intention of adopting the relevant legal act during the current parliamentary cycle, i.e. before mid-2014) of a single resolution mechanism[336].

With reference to the latter, the Council also affirmed the principle that it should be based on contributions by the financial sector and include appropriate and effective backstop arrangements which should be fiscally neutral over the medium term, by ensuring that public assistance is recouped by means of ex post levies on the financial industry: the nature of this backstop – and in particular whether this should be limited to the ESM, or whether the future 'fiscal capacity' could play a role in this context – is not further clarified in this document.

---

[335] European Council, 'European Council 13/14 December 2012 – Conclusions', Brussels, 14 December 2012, EUCO 205/12.

[336] To date (December 2013) only the SSM Regulation has been adopted: see Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63 of 29 October 2013 (the 'SSM Regulation').

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A reference is however made to the role of the ESM for the purposes of the 'direct recapitalisation' of banks: in this respect the European Council introduced, as a precondition for the possibility to activate this tool, that in addition to the establishment of the SSM, an operational framework including the concept of 'legacy asset' should be agreed: the concept of 'legacy asset', which had not been developed in the preliminary reports, but originated by the requests of some Member States[337], might in particular be an important constraint to the first applications of ESM recapitalisation arrangements, as these assets may be excluded from the scope of such intervention[338].

Besides recalling that the process of building a deeper EMU should be open and transparent towards Member States not using the single currency and respect the integrity of the Single Market, the European Council also addressed in its conclusion a number of other issues to be dealt at a later stage which, albeit being relevant for the

---

[337] The Ministers of Finance of Germany, Netherlands and Finland publicly expressed for a design of the direct recapitalisation based on four principles: 1) decisions on this matter should be taken be taken by a regular decision of the ESM to be accompanied with a MoU; 2) legacy assets should remain under the responsibility of national authorities; 3) the recapitalisation should always respect real economic values; 4) first private capital should be used, then national public capital, and then ESM capital only as a last resort. See Ministry of Finance of Finland, 'Joint Statement of the Ministers of Finance of Germany, the Netherlands and Finland', Press release 175/2012, Helsinki, 25 September 2012.

[338] The detection of 'legacy assets' is one of the objectives of the balance sheet assessment to be conducted by the ECB prior to starting carrying out its tasks in the field of supervision, pursuant to Article 33(4) of the SSM Regulation. See P. Hakkarainen, 'Banking Union in the Nordic context', Keynote address by Mr Pentti Hakkarainen, Deputy Governor of the Bank of Finland, at the Nordic Opportunities/SEB Seminar, London, 3 September 2013, 5.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

EMU from a broader viewpoint, are not of direct relevance for the establishment of a crisis management and resolution framework in the banking union.

3.5. The Joint German-French Proposal

In preparation of the June meeting of the European Council, which the latter scheduled as a decisive appointment in the run-up to the establishment of the banking union, the German and French Governments decided to contribute to the debate by publicly delivering a joint contribution on this matter[339]. Such contribution, while offering a broad and comprehensive understanding of what should have been the optimal design of the banking union in the view of the two Governments, which with reference to crisis management and resolution focused in particular on the features of the ESM direct recapitalisation instrument and on the establishment of the SRM.

With regard to the ESM direct recapitalisation instrument, the two Governments recommended that the work should be finalised in parallel with that on the DGSs and BRR Directives. With regard to the SRM, the two Governments agreed on five basic principles which, in their opinion, should be enshrined in the final design of the SRM. First, the SRM should be established 'on the basis of the current treaties': this is a very important requirement because it not only shows a lack of willingness of the two

[339] Presse- und Informationsamt der Bundesregierung, 'France and Germany – Together for a stronger Europe of Stability and Growth', Pressemitteilung No. 187/13, Berlin, 30 May 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Governments to proceed with a Treaty change, where necessary to achieve certain objectives, but rather and in turn that such objectives should be shaped in such a way to be constrained within the legal boundaries provided by the Treaty currently in force. Second, the single resolution board should in charge for decision-making body within the resolution mechanism, should involve national authorities, which – again – may be interpreted as a certain opposition to entrust new tasks and powers to an Institution at the European level.

Third, the SRM should be based on contributions by the financial sector, pre-financing an appropriate and effective *private* backstop arrangement building on *national* private backstop arrangements.

Fourth, the role of the ESM, both through the direct recapitalisation and lending to concerned Member States, should be limited to that of additional public backstop.

Finally, the possibility to bring together the ESM and the SRM should be explored.

3.6. Final steps to the establishment of a Banking Union?

The European Council meetings of March[340] and June[341] 2013 reaffirmed in broad terms the conclusions of the December 2012 meeting, while taking into account the

---

[340] European Council, 'European Council 14/15 March 2013 – Conclusions', Brussels, 14 March 2013, EUCO 23/13, see in particular p. 13.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

indications coming from certain influential Member States. In the June 2013 Conclusions is in particular noteworthy a certain shift regarding the qualification of the backstop to be developed in support of the single resolution mechanism: whereas in the past the need for a common backstop was mentioned, in the June Conclusions reference is made, in the context of the balance sheet assessment to be carried out prior to the start of the SSM supervision, to the need for Member States taking part in the SSM to make ahead of the completion of the exercise all appropriate arrangements, including the establishment of 'national backstop'[342].

In its October meeting, besides reaffirming the need to swiftly reach a general approach on the Commission Proposal on the establishment of a SRM[343] and to adopt the draft Directives on BRR[344] and on DGSs[345], the Council also reaffirmed the need to have such national backstop arrangements in place, and stressed that those backstops should comply with state aid rules[346], while at the same time calling again on the Eurogroup to finalise guidelines for ESM direct recapitalisation.

---

[341] European Council, 'European Council 27/28 June 2013 – Conclusions', Brussels, 28 June 2013, EUCO 104/2/13, see in particular pp. 12-13.

[342] See European Council, 'European Council 27/28 June 2013 – Conclusions', cit., 9, p. 13 (b).

[343] COM/2013/520, cit.

[344] COM/2012/280, cit.

[345] COM/2010/369, cit.

[346] European Council, 'European Council 24/25 October 2013 – Conclusions', Brussels, 25 October 2013, EUCO 169/13. See in particular p. 43.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In respect of the latter issue, i.e. the establishment of an ESM direct bank recapitalisation instrument, it should be highlighted that some developments had been already achieved by the Eurogroup at a meeting held on 20 June 2013[347].

In that occasion, the Eurogroup announced that such instrument would be added to the list of instruments available to the ESM under the ESM Treaty, according to the procedure provided in Article 19 thereof, thus by mutual agreement of the Board of Governors[348], only subsequent to the finalisation by the European Parliament of the DGSs and BRR Directives.

As for the features of such instrument, also decisions relating to its activation will be taken by mutual agreement, while funds available for it would be limited to 60 billion euro, subject to the possibility for the ESM Board of Governors to review such limit.

The Eurogroup also agreed on a quite detailed burden-sharing mechanism, under which the Member State requesting the direct recapitalisation to take place, should contribute to such recapitalisation: (i) firstly to the extent necessary to allow the relevant credit institution to meet the legal minimum 4,5% Common Equity Tier 1 ratio, as established under the Basel III framework/CRD IV/CRR in order to address the issue of potential 'legacy assets', and (ii) secondly by a share amounting to 20% of

---

[347] See Eurogroup, 'ESM direct bank recapitalisation instrument – Main features of the operational framework and way forward', Luxembourg, 20 June 2013. This document will be analysed more in detail in Chapter 3.

[348] See also Article 5(5)(i) of the ESM Treaty.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the total public contribution, with the aim to grant that incentives of the recipient Member State and of the ESM are appropriately aligned.

In addition to institution-specific conditionality under State-aid rules, the Eurogroup also agreed that additional conditions relating to the concerned institutions and also to the general economic policies of the recipient Member State should be attached to the ESM support, where appropriate[349].

In light of the above, the scope of the analysis will thus be limited to the framework emerging from the December 2013 compromise. Reference to acts which are external to such compromise, will be only made insofar as this will be required to better understand the new framework as emerging from this agreement[350].

2. Status of the legislative procedures

2.1. The DGS Directive

The ECOFIN updated its position on the reform of DGSs in connection with the parallel dossier of bank recovery and resolution and in light of on-going negotiations with the European Parliament on 10 December 2013[351]. A very important feature of

[349] The Eurogroup also agreed on other features of the instruments, including in particular the possibility to review it to take into account the progresses of the Banking Union, and in any case every two years.

[350] In this respect it is worth mentioning that refere

[351] Council of the European Union, Press Release 17556/13, Brussels, 10 December 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

this position regards the ranking of credits in case of bank resolution: eligible deposits from natural persons and micro, small and medium-sized enterprises would have preference over the claims of ordinary unsecured, non-preferred creditors and depositors from large corporations, while DGSs, which would always step in for covered deposits (i.e. deposits below EUR 100 000), would have a higher ranking than eligible deposits[352].

The two main innovations in the European framework for DGSs, once approved, will be the introduction of financing requirements for DGSs, i.e. ex ante financing as a fixed percentage of deposits, and of borrowing between DGSs on a voluntary basis. In addition, the new DGSs Directive would also enhance the simplification and harmonisation, in particular relating to coverage and pay-out arrangements, as well as further reduce the time limit for paying out depositors[353].

2.2. The Resolution Regime

[352] Ibidem.

[353] Following the near-collapse of Northern Rock in 2007, and to prevent future bank runs, Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 had already raised guarantee levels and reduced pay-out delays in the event that deposits of a bank would become unavailable. Specifically, the minimum coverage level was increased from EUR 20 000 to EUR 100 000 and the pay-out deadline reduced to 20 working days.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In July 2013, the Commission made a proposal for a regulation[354] regarding both the establishment of a Single Resolution Mechanism (SRM) and of a Single Resolution Fund (SRF). Negotiates have been conducted since then within the European Parliament and the Council, to find a political agreement on such a proposal, but a definitive agreement on a binding legal text has not been reached yet.

The scope of the SRM is the same of the SSM, and thus limited to a subset of the whole Single Market. With reference to the latter, a harmonised discipline is provided in the Banking Recovery and Resolution Directive (BRRD), on which the SRM Regulation widely builds the more specific regime for the SSM/SRM area. An agreement between the Council and the European Parliament on the adoption of the BRRD has been reached on the 20 December[355], thus this component of the framework will be available prior to the specific component regarding more closely the Banking Union.

On 18 December 2013 the Council set out its position[356] and mandated the Presidency to negotiate with the European Parliament, with the aim to agree on a regulation on a

---

[354] Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM/2013/520 final, 10 July 2013.

[355] See Council of the European Union, Press Release 18093/13, Brussels, 20 December 2013.

[356] See Council of the European Union, Press Release 17983/13, Brussels, 18 December 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

single resolution mechanism in first reading[357] before the end of the current legislature (i.e. before May 2014): in this respect, a fundamental change needs to be highlighted between the Council compromise and the original Commission proposal. While the Council still pursues the adoption of a Regulation on the SRM, Euro Area Member States decided to commit to negotiate by 1 March 2014 an intergovernmental agreement (IGA) on the functioning of the SRF. Such IGA would enter into force once ratified by member states participating in the SSM/SRM that represent 80% of contributions to the single resolution fund[358].

2.3. Perspective legislative developments

The choice to enter into an IGA has been fiercely criticised by the European Parliament. The latter, which has also in the meanwhile produced an ECON Committee Report on the original Commission proposal[359], warned on the possibility for to go ahead on the basis of this report due to the gap with the Council position, and

---

[357] See Article 294 TFEU, in particular paragraphs 3 to 6.

[358] See Press Release 17983/13, cit., 8.

[359] See European Parliament, Committee on Economic and Monetary Affairs, Report on Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM(2013)0520 – C7-0223/2013 – 2013/0253(COD), PE519.706, 20 December 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

stressed thus the unlikelihood that a deal is found before the next elections[360]. In this context, the Chairwoman of the ECON Committee and the Rapporteurs on the proposal submitted a joint letter to the Greek Presidency to illustrate the objections which the European Parliament raises to the compromise reached by the Council[361].

In particular, in the letter of the European Parliament it is observed that the IGA is not indispensable to address any specific legal issue[362], and that once the Commission has made its proposal, transferring part of its content to an international law agreement would circumvent the legislative procedure and infringe the principle of sincere cooperation, besides being allegedly done *ultra vires* by Member States[363]; moreover, in the letter it is also noted that regulating the SRF in an international agreement would contravene the provisions of Article 291 TFEU for laying down uniform conditions for implementing legally binding Union acts.

---

[360] See European Parliament, Press Release 'Conference of Presidents discussion on Single Resolution Mechanism', 16 January 2014.

[361] European Parliament, Committee on Economic and Monetary Affairs, Letter to the Greek Presidency of the EU, 15 January 2014.

[362] In this respect it is maintained that Article 114 TFEU being a sufficient legal basis, an international law agreement is not needed.

[363] Reference is made to the pre-emptive doctrine in EU law: accordingly, the external competence of the Union mirrors internal competences, thus once an EU legal act is adopted, Member States would be pre-empted from entering into obligations of international law which would clearly impact on a matter which is not any more in their availability, having been regulated at EU level (see ECJ, Case 22/70, Commission v. Council *ERTA* [1971] ECR 263, Opinion 1/94 *WTO* [1994] ECR I-5267, Opinion 2/94 *ECHR* [1996] ECR 1759, and Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427. See also C. Hillion, *"ERTA", "ECHR" and "Open Skies" : Laying the Grounds of the EU System of External Relations*, in M. Poiares Maduro, L. Azoulai (eds.), *The past and future of EU law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 2010, 224.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Finally, in the letter objections are raised also on the substance, in particular with regard to the gradualist approach chosen for building up the SRF, which would infringe the principle of equal treatment of banks irrespective of their place of establishment.

Whereas it is likely that the objection raised on the substance may eventually be overcome by means of a compromise between the European Parliament and the Council, it seems that the objections regarding the modalities for the establishment of a SRF, and in particular the need for an IGA, are more radical, and a solution could be found only when one of the two Institutions accepts the other position.

In view of the above, it is unlikely that any of the texts on which the European Parliament and the Council agree could result as the final text of the Regulation which will be finally adopted. Nonetheless, an analysis of the Council compromise – which is the one of the two texts in a more advanced stage of negotiations – could offer a good understanding of what the overall terms of the final resolution regime will eventually be: for the same reason, however, the analysis will be limited to the wide picture rather than to the single details of the proposal.

The compromise reached by the Council consists of: (i) a draft regulation on the SRM[364] (hereinafter the 'draft SRM regulation'), (ii) a decision by euro-area member

[364] See Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

states committing them to negotiate, by 1 March 2014, an IGA on the functioning of the SRF[365], (iii) the 'Terms of Reference' (ToR) along whose lines the IGA should be drafted[366], (iv) a Statement of Eurogroup and ECOFIN Ministers on the fiscal backstop[367], and (v) a declaration of the representatives of the 28 Ministers in the Council on the voting in the cases provided under the draft regulation[368].

3. Basic principles of the Resolution Framework

3.1. Resolution in the Single Market and in the Banking Union

In the field of crisis management and resolution, the EU legislator decided to follow an approach similar to the one applied in the field of supervision. On the one hand, a set of substantive provisions is contained in a legal act applying to the whole Union, to grant a level playing field in the single market: the CRD IV / CRR package in the field

---

investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council - *General Approach*', Brussels, 19 December 2013, 18070/13.

[365] See Council of the European Union, 'Decision of the representatives of the euro area Member States meeting within the Council of the European Union', Brussels, 18 December 2013, 17743/13 ADD 1, 1.

[366] See Council of the European Union, 'Terms of Reference concerning the Intergovernmental Agreement on the Single Resolution Fund', Brussels, 18 December 2013, 17743/13 ADD 1, 4.

[367] See Council of the European Union, 'Statement of Eurogroup and ECOFIN Ministers on the SRM backstop', Brussels, 20 December 2013, 18137/13, 1.

[368] See Council of the European Union, 'Declaration of the Representatives of the 28 Member States meeting within the Council', Brussels, 20 December 2013, 18137/13, 2.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of supervision, and the BRRD in the field of crisis management and resolution[369]. Substantive provisions in the field of supervision refer for their application to a 'national competent authority': in the euro area, and in the other Member States which will decide to join the SSM, the ECB is to be considered the national competent authority with regard to a series of tasks which are defined in the SSM Regulation. Along the same lines, the BRRD refers to 'national resolution authorities' (NRAs) and the draft SRM Regulation (SRMR) designates the Single Resolution Board as the NRA of Member States participating in the SRM when it exercises tasks or powers which are exercised by NRAs under the BRRD[370]. The close connection between the structure of the SSM and of the SRM is also stressed by the geographical scope of the latter, which is construed by reference to the SSM regulation, and therefore includes all Member States which participate in the SSM[371]. In view of the above, the draft SRMR is the gateway of a more complex legal framework, including also the application of the EU State aid regime to the banking sector in the case of resolution[372], which regulates the management and resolution of banking crises in the

---

[369] Article 6(1) of the draft SRM Regulation specifically provides that no action, proposal or policy of the Board, the Council, the Commission or a national resolution authority shall discriminate against entities established in non-participating Member States, deposit holders, investors or other creditors established in the Union on grounds of their nationality or place of business

[370] See Article 5(1) of the draft SRM Regulation.

[371] See Article 4(1) of the draft SRM Regulation. Paragraphs 2 and 3 of Article 4 regulate the cases of suspension and termination of a SSM close cooperation for the purposes of the SRM.

[372] On the interaction between the resolution and the State aid regime, see Article 16a SRMR.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Banking Union, and needs to be supplemented by specific provisions in other relevant legal acts, and in particular in the BRRD[373].

3.2. Principles and Objectives

In the relationship between BRRD and the SRMR, the latter's role should be regarded as *lex specialis* within the geographical scope of the SRM: in particular, when making decisions or taking action which may have an impact in more than one participating Member State, the SRM requests to give due account, in addition to BRRD resolution objectives, also to a series of factors which need to be balanced with such objectives 'as appropriate to the nature and circumstances of each case and shall comply with the decisions made by Commission under Article 107 TFEU'[374]. These factors include: the interests of the Member States where a group operates and in particular the impact of any decision or action or inaction on the financial stability, the economy, the deposit guarantee scheme or the investor compensation scheme of any of those Member States; (b) the objective of balancing the interests of the various Member States involved and avoiding unfairly prejudicing or unfairly protecting the interests of a participating Member State; (c) the need to minimize a negative impact for any part of

[373] According to Article 6(2) SRM of the draft Rregulation, due consideration is to be given to the BRRD resolution objectives, as set out in Article 12 of the draft SRM Regulation.

[374] See Article 6(3) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

a group, an entity of which is subject to a resolution; and, when the entities concerned are established in both participating and non-participating Member States, (d) possible negative effects on non-participating Member States, including on entities established in these Member States[375].

The resolution objectives which will have to be balanced with these factors when choosing tools and powers to use in the management of a crisis include: (i) ensuring the continuity of critical functions; (ii) avoiding significant adverse effects on financial stability in the EU and Member State concerned, including preventing contagion, and maintaining market discipline; (iii) protecting insured depositors and investors; (iv) protecting public funds by minimising reliance on extraordinary public financial support[376].

With reference to extraordinary public financial support, it should be noted that an overarching principle of the SRM regards the 'fiscal neutrality' of the mechanism: to guarantee the budgetary sovereignty of the participating Member States, decisions requiring a Member State to provide extraordinary public financial support will be prohibited, unless a Member State has approved the provision of this support according to its national budgetary procedures[377].

---

[375] See Article 6(2) and (2a) of the draft SRM Regulation.

[376] See Article 12(2) of the draft SRM Regulation.

[377] See Article 6(4) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Consistently with this approach, no extraordinary public financial support – besides the support from the SRF – can be assumed in the resolution plans, which will be drawn up and reviewed at least annually for each entity considered as 'relevant' for SSM purposes[378], or any other cross-border group within the SRM, and will provide for the resolution actions that the Board may take if one of these entities meets the conditions for resolution[379].

In the context of the annual drawing up of resolution plans, an assessment will be conducted of the extent to which institutions and group are resolvable, i.e. the extent to which it would be feasible and credible for the relevant authorities to either liquidate or resolve such entities without the assumption of external public support (besides the SRF), and without giving rise to significant adverse consequences for the financial systems[380]. In the case where the conditions for resolvability are not fulfilled, the entity concerned will be requested to propose measure to address the issue and, in case these are not considered as sufficient to remove the impediments to resolvability, appropriate measures will be taken by the relevant NRAs upon instruction of the SRB, ranging from the imposition of information requirement to the requirement to divest certain assets, limit and cease specific proposed or existing activities, or to restrict or

---

[378] Resolution plans for any other entity within the SRM will be drawn up by NRAs, see Article 7a of the draft SRM Regulation.

[379] See Article 7(4), (5) and (9) of the draft SRM Regulation.

[380] See Article 8(1), (2) and (3) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

prevent the development of new or existing business lines, up to the requirement to change legal and operating structures of the concerned entities, to set a parent financial holding company in the Union, or to issue certain amounts of liabilities eligible for resolution[381].

3.2. Eligible liabilities

Under the new framework, it will be for the SRB, together with the competent authorities – including the ECB – to determine a minimum requirement for own funds and eligible liabilities[382]. Upon request of the relevant NRAs, such minimum requirement could be fulfilled with contractual bail-in instruments, whereby their contractual terms provide that such instruments will be written down or converted into equity before any other eligible liability when it is decided to apply the bail-in tool and that they rank below such eligible liabilities[383]. Other than these contractual instruments, other liabilities will be considered eligible, which satisfy a series of requirements which are set out to grant that each institution can rely on a stable and funded basis in case of bail-in[384]. For both categories of liabilities, in case they are not

---

[381] See Article 8(8) of the draft SRM Regulation.

[382] See Article 10(1) of the draft SRM Regulation. See also Article 39 of the draft BRRD.

[383] See Article 10 (4) and (5) of the draft SRM Regulation.

[384] According to Article 10(9) of the draft SRM Regulation, in order to be considered eligible such liabilities have a remaining maturity of at least one year, are not owed to, secured by or guaranteed by the institution itself,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

regulated by the law of a EU Member State, NRAs can request the concerned entity to show that any decision to write down or convert such liability would apply under the relevant applicable law[385].

Satisfying the eligible liabilities requirement is a key element in the design of the new resolution framework, under which, whereas no creditor should bear more losses than would have been incurred if the relevant entity had been wound up under normal insolvency proceedings, losses should be borne by shareholders first, and by (eligible) and after the shareholders by creditors, to be treated in an equitable manner according to their class[386]. In this latter respect, while the national legislation is to be applied by the NRAs exercising write down and conversion powers of liabilities on the basis of an instruction of the SRB[387], a certain degree of harmonisation is going to be achieved in this respect at EU level: in this context a 'depositor preference rule' is going to be introduced, whereby eligible deposits from natural persons and micro, small and medium-sized enterprises will have a higher priority ranking than the claims of ordinary unsecured, non-preferred creditors, and covered deposits will have a higher

---

do not arise from a derivative, nor from a deposit which benefits from preference in the national insolvency hierarchy in accordance with Article 98a of the BRRD, the purchase of the relevant instruments need not to be funded either directly or indirectly by the concerned institution, and the instrument is to be issued and fully paid up.

[385] See Article 10(9a) of the draft SRM Regulation.

[386] See Article 13(1) of the draft SRM Regulation. Accordingly, other principles also include the replacement of the management of the institution under resolution,

[387] See Article 15(1) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

priority ranking than that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceed the coverage level[388]. When the bail-in tool will be applied, DGSs will be liable for the amount covered depositors would have been written down if the covered depositors had been included in the scope of the bail-in, and the DGS will subrogate to the rights and obligations of such covered depositors[389].

4. The Single Resolution Board

4.1. Nature of the SRB

The cornerstone of the Single Resolution Mechanism is a Single Resolution Board (SRB), to be established as an EU Agency[390], and to be considered as the national (group) resolution authority for the purposes of the BRRD[391]. The SRB will be composed by an Executive Director and four full-time members[392], appointed by the Council by qualified majority on a proposal of the Commission and after having heard

---

[388] See Article 98a of the draft BRRD.

[389] See Article 15 of the draft SRM Regulation. The ranking of the deposit guarantee scheme subrogating to the rights and obligations of covered depositors in insolvency will correspond to the ranking of covered deposits: see Article 98a of the draft BRRD.

[390] See Article 38 of the draft SRM Regulation.

[391] See Article 5 of the draft SRM Regulation.

[392] See Article 39 of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the European Parliament[393], as well as by a member appointed by each Member State representing the relevant National Resolution Authority (NRA)[394]. The SRM will consist of both NRAs and the SRB; the latter will issue guidelines and general instructions to NRAs, while these will send to the SRB draft decisions on which it make express its view: NRAs will in particular be responsible for the resolution of all entities which are neither significant for the purposes of the SSM, nor cross-border groups[395]. It should be noted however that, besides the possibility for the SRB to assume the NRA's tasks in certain cases[396], the SRB will exercise all powers directly when Member States decide to make use of this option[397].

4.2. Legal Constraints to the Establishment of a Single Resolution Board

The Council agreed to go ahead with the adoption of a Regulation based on Article 114 TFEU establishing a SRM. The choice of Article 114 TFEU as a legal basis could be still influenced by developments regarding the ESMA Case[398]. It should be

---

[393] See Article 52(5) of the draft SRM Regulation.

[394] See Article 39 of the draft SRM Regulation.

[395] See Article 29 of the draft SRM Regulation.

[396] When necessary to ensure consistent application of high resolution standards the SRB, on its own initiative after consulting with NRAs or upon request by a NRA, the SRB may at any time decide to exercise directly all the relevant powers. See Article 29(2) of the draft SRM Regulation.

[397] See Article 29(3) of the draft SRM Regulation.

[398] See CJEU, Case C-270/12. The United Kingdom instituted these proceedings against the European Parliament and the Council to seek the annulment of Article 28 of Regulation (EU) No. 236/2012. The UK

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

highlighted in this regard that in its Opinion on this Case Advocate General Jääskinen argued that "reliance on Article 114 TFEU as the sole legal basis […] is not supported by the Court's case law because the conferral of decision making powers […] in substitution for the assessments of the competent national authorities, cannot be considered to be a measure 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' within the meaning of Article 114 TFEU"[399]. In ENISA the Court held that the EU legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation 'in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'[400]. Advocate General Jääskinen pointed out that it is difficult to envisage

---

frames its case on four grounds of annulment. Firstly, the UK alleges that the authority vested in ESMA under Article 28 would breach the limits set by the ECJ in the Meroni judgement for delegation of powers by the institutions. Secondly, the UK argues that that Article 28 seeks to empower ESMA to pass measures of general application which have the force of law, contrary to the Court's ruling in Romano. Thirdly, the UK contends that Article 28 purports to confer power on ESMA to adopt non-legislative acts of general application in breach of Articles 290 and 291 TFEU. Fourthly, the United Kingdom claims that, in as much as Article 28 of Regulation No 236/2012 empowers ESMA to adopt individual decisions that are binding on third parties in the event of insufficient or inadequate action by relevant competent authorities of the Member States, Article 114 TFEU is an incorrect legal basis for the adoption of such measures. See Case C-270/12, *United Kindom v Parliament and Council*, Opinion of AG Jääskinen, p. 4.

[399] See Opinion AG Jääskinen, cit., p. 37.

[400] See Case C-217/04, United Kingdom v Parliament and Council (ENISA), [2006] ECR I-3771.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

how the exercise of the decision making power attributed to ESMA under Article 28 of Regulation No 236/2012 could contribute to harmonisation of the kind described by the Court in *ENISA*: “rather its function is to lift implementation powers […] from the national level to the EU level”[401], similarly to what should be the case for the institutional design of the Single Resolution Board, and that “a centralised emergency decision making process that replaces the decision of the competent Member State authority, without its consent, or which provides a substitution for the absence of one, cannot be considered to be encompassed by the concept of ‘approximation of the provisions laid down by law, regulation or administrative action in Member States’ under Article 114 TFEU”[402].

Advocate General Jääskinen argues that Article 352 TFEU would be the appropriate legal basis for similar cases, as “there is clearly a need for action at the EU level since, in an integrated market of financial instruments, inaction or inadequate action by a competent national authority […] may have significant cross-border effects. These might include distortions in the banking systems of other Member States […]. Hence, in situations posing a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system in the European Union, a centralised decision making procedure enabling uniform application of EU

[401] See Opinion AG Jääskinen, cit., p. 50.

[402] See Opinion AG Jääskinen, cit., p. 54.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

rules […] would seem to be both necessary and proportionate"[403]. Moreover, recourse to Article 352 TFEU has been already approved by the Court as for measures 'which are specifically aimed at individuals', when the measures concerned fall within the scope of the objectives of the Union for the purposes of Article 352 TFEU[404]. However, the choice of Article 352 TFEU as a legal basis instead than Article 114 TFEU is not without consequences, as a legal act based on Article 352 TFEU needs to be adopted by the Council by unanimity: this is a particularly heavy constraint, especially for a mechanism which is conceived and designed for a subset of the EU Member States (i.e. those Member States which will be participating to the SSM, and thus the Euro Area Member States and those which will enter a close cooperation agreement with the ECB under the SSM Regulation).

The Opinion of Advocate General Jääskinen is also important in so that, subject to the choice of the appropriate legal basis, it proposes in light of the changes introduced by the Treaty of Lisbon a *revirement* with regard to legal constraints deriving from the CJEU case-law and consisting in the prohibition on the delegation to agencies and other bodies of inordinately broad and/or insufficiently well-defined discretionary powers that was laid down in *Meroni*[405], and the prohibition on adoption by agencies

---

[403] See Opinion AG Jääskinen, cit., p. 54.

[404] See Case C-402/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, [2008] ECR I-6351, pp. 220 and 235.

[405] The Court stated in *Meroni* (Case 9/56 Meroni v High Authority [1957 and 1958] ECR 133, p. 149-154) that the delegation of powers was subject to restrictions imposed by the ECSC Treaty, and that the High Authority

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of measures having the 'force of law' that was established in *Romano*[406]. Advocate General Jääskinen notes that the authority of the Court to review the acts of 'bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties' is now confirmed by the first paragraph of Article 263 TFEU, while the second paragraph of Article 263 TFEU provides that the Court has as at its disposal, in reviewing acts of agencies, the grounds traditionally available in EU law[407]. Thus, Advocate General Jääskinen argues that agencies can be vested with powers to take

---

could not confer on the authority receiving the delegation powers that differed from those which the High Authority possessed under the ECSC Treaty. In particular, the decisions of the Brussels agencies were not subject to review of the Court of Justice. Moreover, the Court pointed out that delegations of power were only legitimate if they were necessary for the performance of the tasks of the High Authority. Any delegation of power could only relate to clearly defined executive powers, the use of which had to be subject, in their entirety, to the supervision of the High Authority. It was in this context that the Court came to its well-known conclusion that 'the delegation of powers granted to the Brussels agencies by Decision No 14/55 gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty'. In the Opinion of AG Jääskinen, cit., it is argued that first, the Court was concerned about the absence of any judicial review of acts of the Brussels agencies; secondly, the Court sought to prevent the High Authority from delegating powers that were wider than its own, and which were so broadly defined as to be arbitrary. In my opinion, the Court was therefore upholding the constitutional imperatives of effective judicial control and institutional balance.

[406] In Case 98/80, *Romano*, [1981] ECR 1241, p. 20, the Court held that '[…] a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law'.

[407] See Opinion AG Jääskinen, cit., p. 73, whereby it is also noted that Under the first paragraph of Article 265 TFEU, the action for failure to act is also available to challenge the work of agencies, and point (b) of the first paragraph of Article 267 TFEU ensures that validity review via national courts is also available with respect to agencies. Agencies are brought into the last plank of the EU judicial architecture through their mention in the Article 277 plea of illegality, which is applicable to acts of general application. In contrast, no reference is made to agencies in the provision concerning the non-contractual liability of EU institutions and damages, namely Articles 268 and 340 TFEU, but according to the case law damages are available with respect to measures taken by agencies.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

legally binding decisions intended to produce legal effects in relation to third parties, otherwise these Treaty amendments would be meaningless[408]. In particular, whereas Article 290 TFEU would allow for the delegation of powers for adoption of rules which supplement or amend certain non-essential elements of a legislative act to the Commission only, in the Opinion of Advocate General Jääskinen such restriction does not apply to Article 291 TFEU implementing measures[409], which can take the form of individual administrative decisions (wholly precluded under Article 290 TFEU): given that implementing powers do not extend to amending or supplementing legislative acts with new elements, fundamental constitutional principles do not prevent the legislator from conferring such powers on agencies as a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other[410].

Advocate General Jääskinen maintains in his Opinion also that conferral of power by the legislature cannot, in and of itself, be subject to the restrictions set out in Meroni: indeed, the EU legislature is not acting as a 'delegating authority' in the sense of the

---

[408] See Opinion AG Jääskinen, cit., p. 74.

[409] In Opinion AG Jääskinen, cit., p. 77, it is maintained that Article 291 TFEU on implementing powers has a different aim. First, it sets out the fundamental rule that implementation of EU law falls within the remit of Member States. Secondly, when securing implementation of legally binding EU measures in a more uniform manner than would otherwise be possible, implementing powers can be conferred on the Commission, or under certain restrictive conditions, the Council. As a consequence implementing powers can be exercised at the EU level instead of the national level.

[410] See Opinion AG Jääskinen, cit., pp. 81-86.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Meroni judgment when it confers implementing powers on institutions, agents, or other bodies of the Union, but a constitutional actor exercising its own legislative competence, as conferred on it by the higher constitutional charter, i.e. the Lisbon Treaty[411]. This is however without prejudice to the need for the legislature to comply with the principle first expressed in the Meroni judgment appertaining to the prohibition on inordinately broad and/or arbitrary implementing powers[412].

Thus, if the arguments proposed by Advocate General Jääskinen were to be agreed by the Court in what could become a landmark decision, the establishment of the Single Resolution Mechanism and its Board would be subject to compliance with two basic requirements: (i) the appropriate legal basis would be Article 352 TFEU, rather than Article 114 TFEU; (ii) the power conferred to the Board would allow the latter to adopt legal acts binding on third parties, but such power would be subject to certain narrowly defined limits ex-ante, and should not include policy determinations.

---

[411] See Opinion AG Jääskinen, cit., p. 91. According to the AG Jääskinen, the executive and judicial powers that the EU legislature can confer on institutions or bodies are qualitatively different from its own powers.

[412] See Opinion AG Jääskinen, cit., pp. 92-93: the European Union legislature may not vest [a body] with an authority to pass implementing measures that would breach this principle because an implementing power will be validly conferred only if it is sufficiently specific, that is to say it must clearly specify the bounds of the power conferred. Otherwise the institutional balance and the possibility of effective judicial control of the use of implementing powers would not be safeguarded. In addition, [a body] cannot be empowered to take policy decisions. [This] would represent an unconstitutional conferral of excessive implementing powers, irrespective of whether they were conferred on the Commission or an agency. This reflects the general principle of the primary role of the democratic legislature, recognised in the constitutions of several Member States, and in Article 290 TFEU, to the effect that legislation may not be so vague or open-ended that essential policy choices or value judgements remain to be decided at the implementation phase.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4.3. Decision-making in the SRB

Within the Board, tasks and competence are assigned by the draft SRM Regulation to two different decision-making bodies: the plenary session, and the executive session. All members of the Board participate in the SRB plenary session[413], while only the Executive Director and the other four full members would compose the executive session of the SRB[414]. In addition, the ECB and the Commission will designate a representative each, entitled to participate to the executive session of the Board as permanent observers[415].

In specific occasions, and in particular when the Board in executive session will deliberate on an individual credit institution or a cross-border group, also the Board members appointed by Member States where the relevant credit institutions are established[416], as well as subsidiaries, entities covered by consolidated supervision are established and group level resolution authorities situated in the case of cross-border groups[417]. In these cases, the Executive Director will set a deadline for finding by consensus a joint agreement among all members admitted to participate to the

---

[413] See Article 45 of the draft SRM Regulation.

[414] See Article 49 of the draft SRM Regulation.

[415] See Article 49(-1) of the draft SRM Regulation.

[416] See Article 49(2) of the draft SRM Regulation.

[417] See Article 49(3) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

executive session of the Board: in the absence of such joint agreement, decisions will be taken by simple majority by the Executive Director and the other four full members of the executive session only[418].

4.4. Tasks

The Board in executive session has a general competence to take all the decisions of the Board, unless otherwise specifically provided by the SRM regulation, and to prepare the decisions to be adopted by the plenary session[419].

The tasks reserved to the plenary session by the draft SRM regulation are however numerous and substantial. Some of these competences need to be highlighted for their importance, which is also stressed by the aggravated procedure, whereby decisions are taken by a two-third majority, representing at least 50% of the SRF contributions[420] (whereas decisions are taken by simple majority in other cases). The plenary session is competent to adopt resolution schemes, in case one of the following conditions is fulfilled, i.e. the support of the SRF is above (a) 20% of the fully paid-in financial means of the SRF for decisions granting liquidity support, or (b) above 10% for any other resolution decision; in addition, the plenary session is competent also (c) once 5

---

[418] See Article 51 of the draft SRM Regulation.

[419] See Article 50 of the draft SRM Regulation.

[420] See Article 48(1a) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

billion euro of the SRF funds have been used in a certain calendar year, for all resolution actions in that calendar year, irrespective of their amount[421]. When SRF funding is involved above these thresholds, the plenary session is also competent to decide on voluntary borrowing between financing arrangements, alternative financing means, as well as the mutualisation of national financial arrangements[422].

A fundamental task of the SRB regards the draw up of resolution plans, in cooperation with the relevant NCAs and NRAs, for entities which are considered significant for the purposes of the SSM, and for other cross-border groups[423]. While the NRAs will be required to prepare such plans, the SRB will issue guidance and adopt instructions to such NRAs to ensure that this task is effectively and consistently performed in the whole SRM[424].

5. The Resolution Procedure

5.1. Early Intervention

In the new framework, the preparation of resolution has thus become an on-going activity which is carried out by the SRB and the NRAs parallel to the supervisory

---

[421] See Article 46(1)(bb) of the draft SRM Regulation.

[422] See Article 46(1)(c) of the draft SRM Regulation.

[423] See Article 7(1) of the draft SSM Regulation.

[424] See Article 7(1b) of the draft SSM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

activity conducted by the ECB and NCAs, to a great extent on the same sample of concerned entities.

When a credit institution is in breach of prudential requirements, or likely to breach them within 12 months[425], the ECB or the NCA as relevant is empowered to take a wide range of measures aimed at restoring compliance with such requirements. These measures include requiring institutions to hold own funds in excess of the capital requirements, to apply a specific provisioning policy, to present a plan to restore compliance with supervisory requirements, to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution, to require the reduction of the risk inherent in the activities, products and systems of institutions, to restrict or prohibit distributions[426]. Moreover, the ECB or the relevant NCA can also impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions, specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities, and additional disclosures[427].

When certain triggers will be met, competent authorities will also be empowered to require the management body to implement one or more of the arrangements and measures set out in the recovery plan and to convene a meeting of shareholders on

---

[425] See Article 16(1) of the SSM Regulation and Article 102(1) CRD IV.

[426] See Article 16(2) of the SSM Regulation. See also Article 104 CRD IV.

[427] Ibidem.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

certain decisions to be considered for adoption by the shareholders, one or more members of the management to be removed or replaced, to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, changes to the institution's business strategy and to the legal or operational structures of the institution, and to acquire all information necessary to update the resolution plan and prepare for the possible resolution of the institution[428].

When these measures are not sufficient to reverse the deterioration of the situation and such deterioration in the financial situation is significant or there are serious violations of law, regulations or bylaws or serious administrative irregularities, competent authorities may require the removal of the management body of the institution or, when such replacement is deemed insufficient, directly appoint one or more temporary administrators to the institution[429]. The ECB or the competent authority, as relevant, will inform the SRB and the relevant NRAs of any of these measures when taking or requiring the concerned entities to take any of these early intervention measures, and will in particular consult the SRB and the relevant NRAs before imposing any additional measure[430].

Upon receipt of such information, the SRB will inform the Commission and may prepare for the resolution of the concerned institution: such preparation would in

---

[428] See Article 23(1) of the draft BRRD.

[429] See Article 23a and 24 of the draft BRRD.

[430] See Article 11(1) and (4) of the draft SRM Regulation and Article 24(1a) of the draft BRRD.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

particular include requiring all necessary information and varying out a valuation of assets and liabilities, as well as contacting potential purchasers and requiring the relevant NRAs to draft a resolution scheme[431].

5.2. The resolution scheme

The resolution procedure will be initiated upon fulfilment of certain conditions: the relative assessment will be conducted by the ECB or the relevant NRA (after consultation with the ECB) and communicated to the Commission and the SRB, or by the SRB on its own initiative (subject to communicating such assessment to the ECB)[432]. Such conditions include the fact that the entity is failing or likely to fail[433], that there is no reasonable prospect for any alternative private sector or supervisory

[431] See Article 11(2) and (3) of the draft SRM Regulation. The SRB will inform the ECB and the relevant NCA and NRA of any such action.

[432] See Article 12 of the draft SRM Regulation.

[433] See Article 16(2)(b) of the draft SRM Regulation. Under Article 16(3) of the draft SRM Regulation the entity is deemed to be failing or likely to fail when there are objective elements to support a determination that: there is a breach or that the institution will be in breach of prudential requirements in a way that would justify the withdrawal of the authorisation by the ECB, the assets are or will be in the less future less than the liabilities, the entity will be unable to pay its debt, or extraordinary financial public support is required, except when this is expressly excluded (see below).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

action which would prevent its failure within a reasonable time frame[434], and that a resolution is necessary in the public interest[435].

When these conditions are met, the SRB will and adopt a resolution scheme prepared in cooperation with NRAs, i.e. a decision under which the concerned entity is placed under resolution, the application of resolution tools is determined, as well as the use of the SRF to fund resolution actions[436].

The crucial importance of the resolution scheme in the new framework is highlighted by the role that the Council has reserved for itself in the complex process for its adoption, which may requires several procedural steps in a trialogue between the involved institutions, i.e. the SRB, the Commission and the Council: the resolution scheme may enter into force only if the Council does not express any objection within 24 hours from its adoption by the SRB[437]. The Council, on a proposal by the Commission, may address directives to the SRB in order to reformulate the resolution scheme within a deadline. Within such deadline the SRB can express its disagreement and request the Council and the Commission to amend the directives: if the SRB

---

[434] including early intervention measures or the write down or conversion of capital instruments

[435] See Article 16(2)(c) of the draft SRM Regulation. See also Article 16(4) of the draft SRM Regulation: accordingly, a resolution action is deemed in the public interest if it achieves and is proportionate to one or more of the resolution objectives, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

[436] See Article 16(5) and (5a) as well as Article 20 of the draft SRM Regulation.

[437] See Article 16(6) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

requests are not agreed by the Council within 24 hours from their receipt by the latter, the SRB will need to incorporate the Council's directives in the resolution scheme[438].

Albeit the power to object of the Council is limited to specific grounds[439], such limits are so broad that the Council's influence on the process is essential, and raises some questions on the appropriateness of the process to disentangle the management of banking crises from national interests at European level.

5.3. Compliance with State Aid

The role of the Commission in the context of the resolution process deserves in particular being stressed. On the one hand, any decision of the Council objecting to the draft resolution scheme prepared by the SRB needs to be preceded by a Commission proposal[440]. On the other hand, where resolution action involves State aid[441] under Article 107(1) TFEU or funding from the SRF, the Commission will carry out a

---

[438] See Article 16(6) of the draft SRM Regulation.

[439] The matters to which the power of objection of the Council include the assessment on the fulfilment of criteria for resolution, the guarantee to the integrity of the internal market, the adequacy of resolution tools, the extent to which the use of the SRF respects its purposes. See Article 16(8) of the draft SRM Regulation.

[440] See Article 16(6) of the draft SRM Regulation.

[441] Under Article 16(3)(d) of the draft SRM Regulation, the requirement of extraordinary public financial support, except when such support takes the form of a State guarantee to back liquidity facilities provided by a central bank, a State guarantee of newly issued liabilities, an injection of own funds or the purchase of capital instruments on terms that do not confer advantages to the concerned entity.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

parallel and independent assessment of such action[442], concerning its compatibility with the integrity of the single market. The resolution action will not take place until a positive decision is not taken from the Commission[443], which could also take a decision contingent to conditions, commitments or undertakings in respect of the beneficiary entity or a negative decision[444]. The essential role of the Council in this context is highlighted by the possibility for the latter to overrule the decision of the Decision and decide by unanimity that the use of the SRF is compatible with the single market[445]. In order to preserve the independency of such assessment on the compatibility of the action with the State aid regime from the assessment regarding the resolution, two different organisational branches of the Commission are requested to carry out these tasks separately[446].

5.4. Implementation of the Resolution Scheme

---

[442] The SRB will request Member States to notify the Commission when it considers that resolution measures could constitute State aid, or notify the Commission itself if the resolution scheme provides for the use of SRF funds, which will be subject to the application of State aid rules. See Article 16a(2) and (3) of the draft SRM regulation.

[443] See Article 16a(1) of the draft SRM regulation.

[444] See Article 16a(3) of the draft SRM regulation. In the case of a negative decision, the use of SRF funds cannot be implemented. If the decision is not complied with, the Commission will issue a decision addressed to the relevant NRA to recover the funds, to be paid into the SRF. See also Article 16a(4) and (5) of the draft SRM Regulation.

[445] See Article 16a(10) of the draft SRM regulation.

[446] See Article 16a(1) of the draft SRM regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The Resolution scheme is an act addressed to the NRAs[447], which will be thereby instructed to take all necessary implementation measures[448] under national law implementing the EU framework[449] and on the basis of a fair and independent evaluation[450]. The tools which can be applied in the context of the resolution scheme will regulate the application of the relevant resolution tools to the specific case. The tools available to resolution authorities will be the sale of business tool[451], the bridge institution tool[452], the asset separation tool[453] and the bail-in tool[454].

With regard to the latter tool, it should be highlighted that some liabilities are excluded from its scope of application[455], or can be excluded in exceptional circumstances[456]. In

---

[447] The SRB will closely monitor on the execution of the resolution scheme, while NRAs will implement the resolution scheme. In case a NRA is in breach of the relevant resolution scheme, the SRB have the power to impose certain orders to the institution under resolution. See Article 26 of the draft SRM Regulation.

[448] See Article 16(8a) of the draft SRM Regulation.

[449] See Article 20 of the draft SRM Regulation.

[450] Whereas this evaluation should be conducted before the taking the resolution action, Article 17 of the draft SRM regulation foresees cases where the evaluation can take place *ex post*.

[451] See Article 21 of the draft SRM Regulation. This tool will consist of the transfer to a purchaser, other than a bridge institution, of shares or other instruments of ownership, or of all or specific assets, rights and liabilities.

[452] See Article 22 of the draft SRM Regulation. Under this tool, shares or other instruments of ownership, assets, rights and liabilities are transferred to a bridge institution.

[453] See Article 23 of the draft SRM Regulation. In this case assets, rights and liabilities of an institution under resolution are transferred to an asset management vehicle which is wholly, partially owned or controlled by one or more public authorities (including NRAs).

[454] See Article 24 of the draft SRM Regulation. The bail-in tool may be applied to recapitalise an institution or reduce the claims to be transferred under the bridge institution, the sale of business or the asset separation tool.

[455] In particular: covered deposits, secured liabilities, liabilities with an original maturity of less than 7 days, liabilities arising from participation in a system designated under the Settlement Finality Directive, liabilities to employees for accrued salaries, to tax and social security authorities, as well as commercial and trade creditors,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

those cases where eligible classes of liabilities are – also partially – excluded, a contribution may be made by the SRF to the institution under resolution, to either cover the losses, or purchase capital instruments in such institution[457].

6. The Single Resolution Fund

6.1. Sources of Funding

In the agreement reached in December 2013, it was decided that the funding of resolution would have been gradually pooled at European level, and pooled in two main sources of funding: a pan-European fund, to be developed from national compartments thereof (i.e. the SRF), and a common backstop based on the ESM.

As for the gradual development of a SRF, according to the draft SRM regulation and IGA Terms of Reference, this process should take place during over a ten-year transitional phase, at the end of which the amount available to the SRF will cover at least a 'target level' amounting to 0,8% of the total deposits covered by the DGS Directive[458]. The sources of funding of the SRF will include contributions raised at

---

whose credits arise from the provision of goods and services which are essential to the functioning of the institution's operations. See in particular paragraph 3 of Article 24 of the draft SRM Regulation.

[456] See Article 24(5) of the draft SRM Regulation.

[457] See Article 24(6) of the draft SRM Regulation.

[458] See Article 65 of the draft SRM Regulation. It should be highlighted that, if financial means available go below such target level, contributions from entities will be raised until the target level is reached again.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

national level and transferred through the IGA, loans from other resolution arrangements, financial institutions or third parties, as well as the returns on the investment[459] of the funds and the expenses for resolution actions once recouped[460].

While the owner of the SRF will be the SRB, its development will be based on the transfer of funds to be raised at national level[461]. To cater for this, the intergovernmental agreement to be concluded by March 2014 by Member States participating in the SSM (and thus in the SRM)[462] should include arrangements for the transfer of national contributions to the fund and their progressive mutualisation[463].

The SRF will be funded in the first place via *ex ante* contributions, to be raised annually by NRAs, and to be calculated pro-rata to the amount of liabilities, excluding own funds and deposits on the total of such liabilities[464]: such contributions would be

---

[459] The funds raised by the SRF will be invested in obligations of Member States, intergovernmental organisations, or in highly liquid assets of high creditworthiness. See Article 70(3) of the draft SRM Regulation.

[460] See Article 57(1) of the draft SRM Regulation.

[461] See Article 64(1) of the draft SRM Regulation. Such funds would be raised in compliance with the requirements for financing arrangements pursuant to Article 91 of the draft BRRD.

[462] The intergovernmental agreement would allow the single resolution fund to be financed by bank levies raised at national level. It should however be noted that the establishment of the fund, decided by the Council, is to date strongly opposed by the European Parliament. See MEPs' statement on the work on the single resolution mechanism for banks, of 9 January 2014.

[463] Therefore, while in the first year the costs of a bank resolution (after bail-in) would still be borne by funds at national level, the share of the cost shifting at the European level would progressively increase to reach 100% over this ten-years period.

[464] The rational of this exclusion being that own funds are aimed at absorbing losses, and in the case of covered deposits the primary source of funding is the DGS. See Article 66(1) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

based on a flat component, and on another one, to be adjusted for the risk of each specific institution[465].

In addition, extraordinary *ex post* contribution will be levied when the available financial means do not cover for the losses, costs or other expenses incurred by the SRF[466]. In the case where the amounts raised by the SRF do not cover losses and such ex post contributions are not immediately available, the SRB could recur to alternative funding means or borrow from other financing arrangements of non-participating Member States[467].

6.2. Use of the SRF Funds

SRF funds can be used by the SRB only for those purposes which are expressly defined in the draft SRM regulation, which include purchasing assets of the institution under resolution, contributing capital to a bridge institution or an asset management vehicle, making loans to and guaranteeing the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle, as well as paying compensation to shareholders or creditors if these have received less than what they would have received in a winding up under normal insolvency

---

[465] See Article 66(1a) of the draft SRM Regulation.

[466] See Article 67(1) of the draft SRM Regulation.

[467] See Articles 68 and 69 of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

proceedings[468]. In addition to SRF funds, the SRB, after having consulted the relevant DGS, will also be able to use DGS funds, provided that these actions ensure that depositors continue having access to their deposits[469].

Moreover, the SRF funds can be used when a decision will be made to exclude certain creditors from the scope of bail-in in the context of a bail-in resolution action[470]. In this case, SRF funds may only be used when the SRF contribution would not exceed and 5% of the total liabilities including own funds of the institution under resolution, and at the same time shareholders and other holders of capital instruments contributed to loss absorption and recapitalisation with an amount of 8% at least of the total liabilities including own funds of the institution under resolution[471].

6.3. The Role of the IGA

In spite of the principles contained in the SRM Regulation, the latter expressly refers to the IGA, and to the agreement between Member States in this context, for the use of SRF funds, specifying also that during the transitional 10-year period, the use of the

---

[468] The SRF may not hold in any case the capital contributed for more than 5 years, and See Article 71(1) of the draft SRM Regulation.

[469] See Article 73 of the draft SRM Regulation.

[470] See Article 24(6) of the draft SRM Regulation.

[471] See Article 24(7) of the draft SRM Regulation.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

SRF funds would be regulated in the IGA in accordance with the principle of its division into national compartments[472].

The main features of the IGA have been only sketched to date, and before analysing them briefly it should be stressed once more that a final agreement has not been reached yet on the fact that an IGA should contain the discipline of the SRF, and that this should be based on the principle of national compartments: in spite of that, it is noted that Member States took a decision in December 2018, whereby they agreed that an IGA, which should supplement the SRM Regulation, should be negotiated and agreed by 1 March 2014[473].

The main features of the IGA, subject to further negotiations, were set out in a separate document, the IGA Terms of Reference (ToR)[474]. A fundamental point of such ToR is that the obligation to transfer the funds raised at national level to the SRF would not stem from EU law, but directly (and exclusively) from the IGA itself[475]. The funds would be transferred to separate national compartments, which would be merged over time[476]. As a first step, the cost of any SRF intervention would be borne by the

---

[472] See Article 17a of the draft SRM Regulation.

[473] Council of the European Union, Decision of the representatives of the euro area Member States meeting within the Council of the European Union, Brussels, 18 December 2013, 17743/13, Annex 1, in particular p.4.

[474] Council of the European Union, Terms of Reference of the Intergovernmental Agreement on the Single Resolution Fund, Brussels, 18 December 2013, 17743/13, Annex 2.

[475] See point A) 3 of the ToR.

[476] See point B) of the ToR.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

national compartment of the relevant home and host parties, but the use of each national compartment would decrease annually by 10%[477]. As a second step, during the transitional period would be used, for the part exceeding the amounts available in the national compartment of the home and host Member States, the amounts available in all national compartments, for an amount increasing every year by 10%[478]. In the case where the funds available in the first two steps were not sufficient, the concerned NRAs would then be required to raise extraordinary ex post contributions[479].

7. The Development of a Fiscal Backstop

7.1. The Commitment to Develop a Common Backstop

As part of the compromise package of December 2013, Member States also committed to develop, during the ten-year transitional period, a common backstop aimed at facilitating borrowings by the SRF, and to be reimbursed by the banking sector through ex-post levies[480].

In situations where the SRF is not sufficiently funded by the banking sector, the Eurogroup and Ecofin Ministers agreed that Member States participating in the

---

[477] See point B) 8 of the ToR.

[478] See point B) 9 of the ToR.

[479] See point B) 10 of the ToR.

[480] See the 'Statement of Eurogroup and ECOFIN Ministers on the SRM backstop', Brussels, 18 December 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

SSM/SRM should put in place a system by which bridge financing would be available as a last resort and in full compliance with State aid rules. Such a backstop will be aimed at facilitating borrowings by the SRF, while the banking sector will ultimately be liable for repayment by means of levies in all participating Member States.

In the transition period the bridge financing will be provided either from national sources, backed by bank levies, or from the ESM in line with agreed procedures.

It is worth highlighting that, once more, at the moment the development of such backstop is at the stage of a political commitment, and further steps will need to be made to clarify the nature and the scope of this mechanism.

7.2. The ESM Direct Recapitalisation Instrument

In this context, it should be reminded that in June 2013 Member States had agreed already on the adoption by the ESM of a new instrument pursuant to Article 19 of the ESM Treaty, whereby, on request of a Member State, the ESM could conduct the direct recapitalisation of a credit institution in specific cases, i.e. when (i) the requesting ESM Member is unable to provide financial assistance to the institutions in full without very adverse effects on its own fiscal sustainability, (ii) providing financial assistance to the requesting ESM Member would be indispensable to safeguard the financial stability of the euro area as a whole or of its Member States, (iii) the relevant institution is (or is likely to be in the near future) in breach of the

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

capital requirements established by the ECB in its capacity as supervisor and is unable to attract sufficient capital from private sources or other means in order to resolve its capital problems and (iv) the institution has a systemic relevance or poses a serious threat to the financial stability of the euro area as a whole or the requesting ESM Member. Also in this case the approval of the recapitalisation by the Commission in accordance to the State aid regime would be a necessary precondition[481].

As in the case of the SRF, also this funding device would be limited in size to the amount of 60 billion euro. Also in this case, similarly to the SRF where a burden sharing mechanism has been designed along the lines of national compartments, the provision of support from the European level would be subject to a certain degree of participation from the relevant Member State[482]: the latter would be requested, in the first place, to carry out the recapitalisation of the relevant institution, until compliance with the legal Common Equity Tier 1 minimum requirement under the CRD IV and CRR is ensured, and secondly to contribute to the recapitalisation with an amount equivalent to 20% of the total ESM contribution.

7.3. The ESM framework

---

[481] See European Council, 'ESM direct bank recapitalisation instrument – Main features of the operational framework and way forward', Luxembourg, 20 June 2013.

[482] Ibidem.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The interaction between the common backstop and the ESM direct recapitalisation instrument as last resort funding mechanisms for the management of banking crises in the Banking Union will need to be better analysed in the future: to date, due to the lack of any further detail, it is only possible to imagine that both tools will be available at least for a certain period, but the existence of a fund within the ESM 'earmarked' for conducting the recapitalisation of credit institutions will probably lose much of its meaningfulness, once a completely integrated SRF will have been put in place, and this will have the support of a fully-fledged fiscal backstop (to date only vaguely envisaged), enabled to borrow to the SRF potentially unlimited funding to cope with any crisis within the area. Until then, however, the different instruments available in the crisis management toolbox could be variously used to cope with different situations.

In this respect, it should be stressed that the agreement on the common backstop refers, for the interim period, to the recourse to national sources or the ESM 'in line with agreed procedures'.

Thus, it seems that in the interim period there may be a certain gradualism in the support available, based on incentives clearly aimed at discouraging any attempt to the mutualisation of the burden.

The financing of the 'fiscal backstop' by the concerned Member States could be the favoured option in terms of costs, provided that the relevant Member States rely on

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

sufficient funding. Recourse to the direct recapitalisation instrument would indeed require a high degree of involvement, to which would however be attached the conditionality required by Article 12 of the ESM Treaty.

At the end of the continuum of the instruments available would be the instrument originally provided under Article 15 of the ESM Treaty, i.e. financial assistance for the recapitalisation of financial institutions, which would consist of a loan for potentially the total amount required by the operation, without however any burden sharing with other Member States (differently from the direct recapitalisation)[483].

Regarding the use of these different tools, it is also worth mentioning that not only the interest of the beneficiary Member State will be considered, but also, perhaps mainly, the preferences of the other Member States participating in the ESM. In this respect, the voting mechanism of the ESM is of key importance, as any decision on the provision of financial support is to be taken by mutual agreement by the Board of Governors, where all Member States sit, under Article 5(5)(f) of the ESM Treaty. A partial exception to this rule is provided by Article 4(4) of the ESM Treaty, whereby such a decision can be taken by a 85% majority whenever the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance would threaten the economic and financial sustainability of the

---

[483] See the Guideline on Financial Assistance for the Recapitalisation of Financial Institutions, available on the website of the ESM.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

euro area, which is likely to think it would often (if not always) be the case, when the provision of SRF funding will be needed but not sufficient.

As an additional element of complication, it should also be mentioned that ESM membership is however limited to Member States whose currency is the euro[484], and albeit participation to ESM operations is not precluded to non-ESM Member States, this would however happen on an ad-hoc basis, with no obligation for non-euroarea Member States to participate, and a symmetrical obstacle for the ESM to provide financial support to SSM/SRM Member States which, not being euroarea members, are not its own Members. In view of these considerations, it needs to be highlighted that, whereas some sort of fiscal backstop, albeit limited in scope, could be arranged in a relatively short timeframe, the development of a fully-fledged backstop for all Member States participating in the SSM/SRM seems to require a more comprehensive effort, and most probably also some Treaty change, concerning either the EU treaties, or at least the ESM Treaty.

8. Conclusive remarks

8.1. An incomplete Framework

---

[484] See Article 2 of the ESM Treaty.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The analysis of the framework emerging from the December 2013 compromise, albeit giving an idea of where the whole system is heading to, is still too fragmentary and unstable to enable an observer to draw any final conclusion on the future functioning of the new regime for the management and resolution of crises in the banking union.

An effort has however been made to highlight the main features of such overall political agreement and the limits which it could show. On this basis, it is possible to at least make an attempt to sketch some conclusive remarks on the main features of the framework as it stands now, bearing in mind that until the final adoption of the framework is achieved, its key feature will have probably changed in a substantial way.

8.2. Impact of Newly Developed International Principles on the European Scenario

In Chapter 1, reference was made to the developments at international level in the field of financial crisis management and resolution. In that context, the importance of the TBTF problem, and thus the need to combine the protection of financial stability with the minimisation of the taxpayer's money involvement, as well as the agreement matured across the board to address it, have been highlighted. The intense international policy debate on this issue has produced several results, mainly enshrined in the *FSB Key Attributes*, and in a series of other policy documents which are thereto connected.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The policy orientations resulting from such debate have provided some guidance and coordination arrangements to both national lawmakers and national authorities in charge for supervision of the banking and financial sector, and for restructuring and resolution of crises affecting such sector. In particular, two main innovations have been introduced, which have a somewhat revolutionary impact on the framework applicable to crisis management and resolution, and most remarkably, to some key legal principles of general application which underlie such framework.

First, the 'legal entity' principle, under which each legal entity should be considered as completely separate and independent from any other, notwithstanding the material and economic connections which may tie such entities, has been severely undermined by the choice to pursue a 'group-based' crisis management and resolution approach, which should be conceived to address the 'economic reality' subject to the crisis, rather than its legal representation. This approach is particularly well-suited to capture the reality of economic entities which span across borders through a ramification of closely interconnected legal entities which remain though subjects to the legal frameworks of the jurisdictions where they operate. However, for this very reason, an approach which ignores such legal separation hampers the system of rights, safeguards and guarantees which are provided by any legal framework to the stakeholders of any legal entity. The advantage of this approach, at a macro-level, would however be in the possibility to better manage cross-border negative-spillover effects, prevent thy-your-neighbour policies, and thereby preserve international financial stability.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Second, mainly in order to reduce the involvement of public funding in crisis management and resolution interventions, the concept of '*bail-in*' has been developed as a 'preferential tool' to be used in such circumstances, and – in most cases – as a precondition to the use of public funding. The need to introduce such tool, rather than recurring to 'normal' insolvency rules, is to be understood in light of the different aims which insolvency procedures are requested to pursue.

Insolvency is aimed at maximising the 'residual value' available to shareholders and creditors, and for this reason prevents uncoordinated actions of creditors which would be detrimental to the common interest of creditors collectively considered. The use of resolution tools and of the bail-in in particular, instead, is primarily aimed at protecting the interests of stakeholders other than the creditors and shareholders – taxpayers in the first place, but also any subject concerned with financial stability – which could be damaged by the inaction of creditors and shareholders. The need for specific rules to be in place derives from the assumption that, in case of significant deterioration of the firm's condition, a rescue would follow thanks to the implicit public guarantee due to the systemic importance of the concerned bank: or, as it also been put, insolvency law would address a 'common pool problem', while resolution would rather target '*anticommons*' or '*hold-out*' problems[485].

[485] See R. De Weijs, Too big to fail as a game of chicken with the state: what insolvency law theory has to say about TBTF and vice versa, in European Business Organization Law Review, 2013, 14(2), 201-224.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Albeit resolution tools are optimally designed, also in this case their introduction could be potentially in conflict with basic principles of the legal framework such as the *pari passu*, especially in the case of bail-in, or more in general property rights, as in the cases of bridge banks, asset separation, and sale of business: moreover, the interaction of the application of such tools together with the aforementioned group approach has not been fully analysed, with respects to the way shareholders and creditors of parent companies and subsidiaries would be differently affected. This is even more the case in those contexts where parent companies and subsidiaries, as within the EU and the Banking Union, may be located in different jurisdictions, thus with important redistribution consequences, also relevant from a burden-sharing perspective.

8.3. The Development of an European Approach

The strategy to address the current Great Financial Crisis by policy makers in the EU has been developed along the same lines. Arguing however that such response at EU level was simply designed to be in line with determinations undertaken at the international level would be misleading at least. The issue of how to manage and resolve financial crises within the Single Market – including also financial services – was known since its outset, as shown by the White Paper on the internal market of 1985.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In 1989 the second banking directive laid down a set of rules for a minimum harmonisation of supervision, based on the s.c. *single passport* and on the *home country control*. This first step on the supervisory side was followed, with some delay, by an effort to achieve some minimum harmonisation also on the front of crisis management with a directive on Deposit Guarantee Schemes in 1994. This pair of directives enshrined one of the basic principles of the EU legal framework: the principle of liability, i.e. liability for crisis management is at the same level where responsibility for supervision is located.

In view of a quick integration of financial markets and of the advent of the EMU which was deemed as a factor which would have further accelerated such integration process, both the doctrine and policy makers started wondering on the resistance of the crisis management arrangements of the time. Whereas the doctrine focused in particular on the role of 'lender of last resort' in the EMU, and on the possible performance of such role by the ECB, policy makers dealt with the issue of crisis management and resolution in broader terms, having particularly in mind the possibility of conflicting interests between different competent authorities in the amidst of a financial crisis within a deeply integrated financial market, so that priority became coordination. Also following the suggestions advanced in the s.c. Browuer reports, the concerted authorities developed a network of MoUs which, in the intentions of the draftsmen, should have prevented the insurgence of conflict of

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

interests and, where these arose, would have provided ex-ante arranged rules to address any such conflict and work out a coordinate response to crises.

The period following the inception of the EMU was characterised by a further advancement and deepening of the financial integration within and without the Euro Area. The crisis of 2008 was in fact the first occasion when the approach to crisis management and supervision, which had been based on national responsibility and liability, was (severely) tested. The test did not prove very successful for such MoU-based model of crisis management.

The first tool to be tested was DGSs: to stop a wave of panic among depositors which may have triggered a sudden liquidity crisis, Member States started offering increasingly higher levels of depositor protection, with distortionary competitive effects. A directive was swiftly adopted to achieve a maximum harmonisation of DGSs with regard to the amount of deposits covered by DGSs in each Member State[486]. Whereas this clearly showed the limits of a discipline based on minimum harmonisation, the following events would have in particular highlighted the limits of coordination in these contexts.

---

[486] The coverage level was harmonised at 100000 euro for all Member States. See Article 7(1a) of Directive 94/19/EC, as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Two cases in particular are considered as illustrative of how such arrangements fail to meet some at least of the objectives they were supposed to pursue, i.e. the rescues of Fortis[487] and Dexia[488]. In the former case, an agreement could not be found among national authorities on a solution which could preserve the unity of the group, which was therefore split along national lines. In the latter case, despite the relevant bank was similar in many respects, including the jurisdictions involved and the crisis arose at the same time, a different result was achieved, so that the unity of the group was preserved. The two examples, besides showing the risk of possible inconsistencies in the treatment of similar cases, also highlight the concrete risk that in the case of crisis, a retrenchment of the entities concerned within national borders and thus a dismantlement of the financial integration achieved through the single market and the of beneficial effects produced thereby is a concrete option for national authorities.

Whereas the rescue of Fortis was the case where such a process of retrenchment and ring-fencing was probably most evident, a similar approach was also followed in other cases.

---

[487] See European Commission, 'State aid NN 42/2008 - Belgium, NN 46/2008 – Luxembourg, NN 53/A/2008 – Netherlands – Restructuring aid to Fortis Bank and Fortis Bank Luxembourg', Brussels, 3 December 2008, C(2008) 8085.

[488] See European Commission, 'State aid NN 49/2008 – Belgium, NN 50/2008 – France, NN 45/2008 – Luxembourg – Emergency aid to Dexia in the form of a guarantee for bonds and liquidity assistance', Brussels, 19 November 2008, C(2008)7388 final.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Another element which both cases considered and those which have not been analysed also had in common is the substantial level of public funding which was used in the rescue operations. Also in this case, the policy responses were determined by the problems which had shown up in the context of the EU, thus the Commission started working on legislative proposals which were aimed at further enhancing the DGSs discipline, allowing a cross-border management of the crisis of a banking entity, and at minimising the contribution of taxpayer's money through the introduction of resolution tools in the EU legal framework: at this very point in time the need of the EU happened to meet those which were trends developing at international level, and this alignment was mutually reinforcing for both levels of policy actions.

8.4. The impact of the Fiscal Crisis in the Design of the New Framework

Having this in mind, it should be noted that the scenario in Europe developed further quite rapidly, and already in 2010 the EU had to cope with the start of its fiscal crisis, i.e. the crisis of the sovereign debt of some of its Member States.

The systemic relevance of such new crisis, which was quite specific for the EU Member States at international level, diverted some of the attention of policy makers from the previous priority, consisting in creating new crisis management arrangements for financial entities, and in particular banks.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A considerable effort was thus put in finding ways to overcome several obstacles, including of a legal nature[489], to the envisaged solutions to the new problems. In this context, the link between the sovereign and banks became the central topic in the policy debate at EU level.

Despite in only some of the Member States in need of financial assistance the crisis originated from a situation of distress in the banking or financial sector, the empirical evidence of the fiscal crisis showed that a link between States and Sovereigns exists at least in so far as the worsening of fiscal conditions of a Member State – which may or may not be determined by a prior financial crisis triggering the need for public intervention to rescue the financial sector – affect the financial institutions of such Member States for at least two connected reasons.

First, the assets held by these institutions, being mainly located in the jurisdiction of the Member States – and often sovereign bonds issued by the latter – (this is a form of the s.c. *home bias*) are exposed to the risk specific to such country, hence a reduction in the value of such assets, producing a capital shortfall, to be typically addressed with the injection of public money by the fiscally troubled Member State, whose fiscal condition is thereby further impaired.

Second, deteriorating fiscal conditions of the Member State where an institution is established imply a lessening of the implicit guarantee provided by the State, which in

[489] Such as the s.c. no-bailout clause enshrined in Article 125 TFEU.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

turn casts some doubts on the solvency of all institutions located in the fiscally troubled Member State: also in this case the loss of confidence may trigger a liquidity crisis, in turn forcing the institution to fire sales, hence losses and eventually need for recapitalisation by the State. Such link thus creates a loop which is difficult to interrupt.

In order to address the first of the two problems illustrated above, the asset structure of banks should be changed in order to enhance (also geographical) diversification in the bank’s assets.

With reference to the second problem, i.e. how to ensure that the need for bank recapitalisation of a certain institution does not lead to an impairment of the fiscal conditions of the home Member State, at least two solutions would have been possible: prohibiting any form of recapitalisation at the national level, and/or conversely, organising at European level a common fiscal backstop which could cope with banks’ recapitalisations where needed.

The mere existence of this tool would prevent the insurgence of many potential crises, because the ‘implicit guarantee’ would hold valid also when the Member State where the relevant institution is established is fiscally troubled. Furthermore, the activation of a common recapitalisation would not impair the fiscal position of the concerned Member State, as the burden would be shared by the Member States involved.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

While this common recapitalisation instrument is particularly well-suited to prevent the risks of insurgence of crises, and to manage such crises after their insurgence, its introduction inevitably entails some degree of mutualisation of liabilities, which has been traditionally connected to the fiscal competences of a Sovereign, and to the concept of sovereignty in itself.

It has been argued, in this respect, that this is a development which would 'genetically' change the nature of the European Union, from being a 'Benefit Union' to becoming a 'Transfer Union'. Moreover, the mutualisation of losses *per se* implies a redistribution of resources which, in a democratic form of Government, is by necessity a matter reserved to the People, as the ultimate holder of sovereignty: thus, the any attribution of redistributive powers to the European level by necessity also requires the establishment of proper institutional and accountability arrangements which allow the democratic character of the process to be preserved.

8.5. Interaction with the current EU Legal Framework

The above general considerations were also complemented by a more specific issue regarding the compatibility of the envisaged changes of the institutional framework with the *principle of conferral*, i.e. with the limits imposed by the Treaties to the competences of the Union, and to their widening.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A historical compromise between the s.c. ‘creditor’ and ‘debtor’ Member States was struck at the Council meeting of 29 June 2012, when it was agreed that an instrument for the direct recapitalisation of credit institutions should have been established, and that the ESM should have been competent to carry out such direct recapitalisations.

In compliance with the principle of liability – whereby liability should be placed at the same level where responsibility is located – creditor countries obtained as a precondition that also responsibility for supervision should be brought to the European level, and only upon fulfilment of such precondition common recapitalisation arrangements could have been established.

The establishment of European-level DGSs and resolution arrangements were ultimately instrumental to allowing common recapitalisation interventions. Pan-European DGSs would have prevented the spread of panic among depositors connected to the deterioration of the fiscal position of a certain Member State, thereby shielding credit institutions located in that Member State from incurring in a liquidity crisis.

Common resolution arrangements would have minimised the burden transferred to the taxpayer in case of losses, by first using private resources of shareholders and creditors, to minimise the effective recourse to the fiscal backstop: also in this case, to comply with the principle of liability and achieve an alignment of incentives, the authority competent for taking decisions on the resolution of credit institutions should

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

be at the European level, to avoid incentives to be misplaced on national authorities to shift the burden of a crisis from 'national' private stakeholders to the 'European taxpayer'.

The above is very important to understand a key development in the role of crisis management and resolution for the EU legal framework and the EU integration process more in general. Whereas crisis management had been seen in the past as an issue ancillary to the establishment of a single market for financial services, and later as a possible issue in the context of the EMU, crisis management (admittedly both with regard to financial and fiscal crises) becomes now the cornerstone of a new phase of the European integration process.

This analysis is not however shared in the official narrative, which rather prospects the issue of crisis management as a flaw of the EMU original design, rather than an issue in itself.

8.6. Crisis Management: a Flaw of the EMU or a Need of the Single Market?

Underlying this approach is a view of the EMU and of the whole integration process which is in contrast with the original spirit of the Treaties, and which is important as it will ultimately affect the design of not only the crisis management framework, but of the whole European integration process from now on. According to this view, the EMU is an arena where national interests are confronted and settled. Consistent with

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

this approach is for example the interpretation of Target2 balances as balance-of-payment indicators among Member States (from which stems the distinction among 'creditor' and 'debtor' Member States), rather than as accounting items of a single payment systems where credits and debits of individual entities are settled cross-border through national entry points: against this background, the reduction of these and similar macroeconomic imbalances has become a policy priority[490].

In the same vein, a crisis affecting an individual institution in a Member State (notwithstanding the fact that such institution could have branches or subsidiaries in other EU jurisdictions) is primarily a problem for the national fiscal authority standing behind, and rather than threatening financial stability at the European level *per se*, such crisis may become an European problem and be treated as such only insofar as it significantly affects the fiscal position of a Member States, whose sovereign debt may then in turn become a systemic risk for the financial stability of the EMU, rather than of the Union: limiting the geographical scope of the banking union to the Member States whose currency is the euro is consistent with this design, under the implicit assumption that, in case of extreme need, the risk in excess deriving from a financial crisis could be monetised in a Member State outside the euro area, which is simply not an option, neither from a policy nor from a legal perspective, within the EMU.

---

[490] As set out in the s.c. Six-Pack.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Against this background, incentives undoubtedly exist for Member States, or at least for some sectors of their public opinions, to exit the currency union in order to get back some margins of flexibilities: this is of course without prejudice to further considerations on the other negative consequences that such an event would trigger, let alone the legal feasibility of an ‘euro exit’, which is disputed at least under the current legal framework[491].

The analyses of intra-EMU spreads at the peak of the sovereign debt crisis confirmed such an interpretation, so much that open reference was made to the existence of a ‘redenomination risk’ (which may be seen as a ‘conversion rate’ between an euro in a Member State and an euro in another Member State) which was priced in the spreads by the markets.

Albeit it does not emerge from official documents, such a view of the EMU emerges from an analysis of some factual developments which appear consistent with such a design. Although not being the only possible view of the EMU, currently it seems to have influential supporters: another view and design of the EMU is however possible and more in line with the original spirit of the Treaties. Rather than being only an intellectual distinction, such an approach has a direct impact on the policy choices

[491] See P. Athanassiou, ‘Withdrawal and Expulsion form the EMU and the EU – Some Reflections’, in ECB Legal Working Papers, No. 10, December 2009.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

which follow, especially with regard to the Banking Union, and to the arrangements established therein to manage and resolve financial crises.

If any aspect of the EMU had to be considered as relevant with regard to the establishment of the Banking Union, then this should be the ‘conversion ratio’ among euros held by individual credit institutions, independent of the place of establishment of such institutions: this has to do with the classical function performed by central banks and banking supervisors, to oversee the ‘conversion rate’ between commercial bank and central bank money, as discussed above, in paragraph 1.

The single currency had been seen and conceived as a completion, a ‘crowning’ of the Single Market: considering that it had been originally conceived as a way to eliminate price oscillations depending on exchange rate which could hamper competition (initially with particular regard to the agricultural sector)[492], it is striking to see that, in the opinion of some (at least considering that the banking union is deemed as necessary for the euro area member states, whereas it is not for the others), the single currency could amplify risks for credit institutions within the euro area, more than national currencies would do for credit institutions in jurisdictions outside the euro area.

---

[492] See T. Mayer, Europe’s Unfinished Currency – The Political Economics of the Euro, London, New York, 2012, 19. See also H. James, Making the European Monetary Union, London 2012, 63-64.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In this respect it would be interesting to notice that the first crisis episode with a certain cross-border relevance at the outset of the Great Financial Crisis started in 2007-2008 did not originate in the EMU, but in a State which participates to the single market, in the EEA context, i.e. outside the borders of the EU: reference is made to the case of Icelandic banks, following whose collapse the Icelandic DGS did not reimburse foreign depositors: this case is particularly illustrative as it also shows that the use of a national currency instead than the euro does not shield a State from fiscal consequences which may derive from a financial crisis, the Icelandic lost quickly 50 per cent of its value, the reserves were depleted and the sovereign debt suddenly raised from 10 to 150 per cent of GDP[493].

Against this background, the adoption of the euro was seen by the Icelandic Government as a factor which would have protected the local economy from instability and thus first enquired on the possibility to immediately use the euro and then, upon refusal to do so prior to satisfying all the Treaty requirements, applied for membership of the Union[494].

The EMU is not a factor which increases *per se* the risk that a financial crisis may incur, neither that this crisis would involve the fiscal position of the concerned Member State, nor that the negative effects of the crisis would spill over across the

---

[493] See M. Waibel, Bank Insolvency and Sovereign Insolvency, in R. Lastra (ed.), Cross-Border Bank Insolvency, cit., 354-355.

[494] See Charlemagne, *Iceland hunts the euro*, in The Economist, 24 January 2009.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

borders. As seen in the Icelandic case, the preconditions for this to happen are in the Single Market already. The likelihood of a banking crisis to produce cross-border effects inside the EMU is higher not because of the use of the single currency, but rather because the adoption of the latter drove a process of deepening of integration in the market for financial services of the euro area Member States: as long as a credit institution enjoying of the freedom granted by the single market manages to be deeply integrated with the EMU financial markets, it well may be the case that its crisis may negatively affect the financial sector of the Euro Area as a whole.

The concept of a Banking Union is inevitably interconnected with the concept of Single Market, even more than it is with the EMU, insofar as it predicates that a certain economic activity (banking) should be regulated and supervised in a uniform manner, including with respect to crisis management and resolution. Whereas the establishment of a banking union may have mainly been driven by the objective to pursue financial (and fiscal) stability, a peculiar feature of the banking union is that – like the Single Market – it should primarily be meant to directly address credit institutions rather than Member States.

Although each of the policy documents considering the design and the institutional engineering of the banking union made reference to the need for the Banking Union not to hamper the Single Market, it has not been duly addressed in the policy debate so far: also depending on the way it will be finally established, the banking union may ultimately have an impact on the Single Market not only with regard to its ‘extension’

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

(insofar as there would be two sets of potentially overlapping rules and authorities), but also with regard to its ‘depth’.

Since the times of the historical judgement Van Gend & Loos[495], a basic principle of EU law is indeed that the Union

> […] *constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community* […].

The possibility for the EU to lay down rules which are directly addressed and applicable to individuals within the Member States was the greatest innovation of the EU in the field of international law, and at the same time both the cornerstone around which the whole idea of Single Market has been developed, and possibly the single most important principle of EU law to date. In view of this, developing a crisis

[495] ECJ, Case 26/62 Van Gend & Loos (1963) ECR 1

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

management framework based on the 'intermediation' of Member States, whereas would be beneficial in any case for the purpose of enriching the toolkit available to protect financial stability, would however represent a step back with regard to the principles of EU law, and to the spirit of the European integration process.

Moreover, such an approach would also not be in line with the principles of a level playing field among competitors in the Single Market: as long as credit institutions benefit of an implicit guarantee from the Member State where they are established, this is detrimental to a fair competition, in a similar fashion to the concept of State Aid in broader terms, which is subject to a strict discipline that, not accidentally, is fully enshrined in Treaty provisions[496] which are directly applicable by the Commission, subject to the possibility for the latter to specify further the interpretation of such provisions in its guidelines (which do not have, strictly speaking, the value of legal acts).

It is no wonder, therefore, that the EU framework which seems closest to a (financial) crisis management and resolution framework has been, up until now, the State aid regime as applied by the Commission, especially in view of the Communications relating to the banking sector, which the Commission adopted from 2008 onwards.

---

[496] See Articles 107-109 TFUE.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The development of a highly competitive [social] market economy is one of the basic principles and objectives of the European Union[497], and for competition to be enhanced and granted, a necessary precondition is a level playing field among competitors, end even more so in a cross-border context. Thus ideally, in order to grant a level playing field, in the banking sector as in other economic sectors the intervention of Member States in support of market players (banks) should be excluded to avoid distortive effects on competition.

Such an ‘extreme’ approach reveals the irreversible and unavoidable tension which exists between the basic principles underlying the Single Market and the Banking Union respectively: competition and financial stability. Such tension has been evident in several cases, and in some of them, such as the crises of the Icelandic and of the Cypriot banking systems, the practical application of fundamental principles of EU law – besides legal considerations on the legitimacy of the derogations granted in those occasions due to the existence of a ‘state of exception’, and thus pursuant to the overarching principle of *ordre public* – on which the whole construction of the Single Market is based, such as the principle of non-discrimination[498] and the free movement

---

[497] See Article 3(3) TEU.

[498] Article 18(1) TFEU.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of capital[499] respectively, have been seriously undermined in the name of the protection of financial stability (from a national perspective, mainly).

8.7. Implications for an Optimal Design for Crisis Management in the Banking Union

The tension between financial stability and competition has much to do with the nature of the banking sector, which is traditionally structured in such a way to be, by its very nature, 'collusive' and anti-competitive, to a large extent: whereas the exit from the market of a player is not seen as a risk, but rather often as an opportunity or a success from competitors which strive for market shares, in the banking sector there are strong incentives for banks to support one another and strive to maintain competitors afloat, as their exit from the market is seen as the biggest threat to financial stability as it could undermine trust in the whole sector, which, not accidentally, is often referred to as banking 'system'[500].

Against this background the presence of an implicit support to banking activity from fiscal authorities in case of need, as an '*extrema ratio*', seems to be an element of the banking industry which cannot be completely eliminated to date: the problem is thus how to deal with it in the context of the Single Market, and even more so within the Banking Union. The tools provided under the Treaty are designed in fact to cope with

[499] Articles 63-66 TFEU.

[500] See T. Padoa Schioppa, *Regulating Finance*, cit., 36.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the 'over-provision' of State aid, in line with 'normal' competitive markets where the under-provision of State aid is not an issue.

The Commission Communications issued in the amidst of the Crisis with specific reference to the banking sectot have effectively dealt with the upside of the problem, thereby limiting the risk that the deeper pocket of certain fiscal authorities could grant an unfair competitive advantage to some market players only by virtue of their nationality. In view of the nature of the banking industry the problem of an under-provision of (implicit) State aid however exist and needs to be addressed in its cross-border dimension, in order to avoid a *de facto* segmentation of the market on the basis of the level of such (implicit) State aid support.

Thus, the role played by the Commission is important and welcome, but only sufficient to ensure that State aid (once it becomes explicit, as granted) does not exceed the minimum necessary level. Such role should however be complemented by a central authority or mechanism (a 'fiscal backstop') providing the needed assistance on the basis of criteria which are homogeneous in the whole Single Market (and even more so inside the Banking Union).

To grant the homogeneity of such criteria, there are two possibilities. A first possibility is that a central authority is assigned an exclusive competence, which due to the exclusivity of such competence, may be coupled by a higher degree of discretion, thereby granting more flexibility to the system, as the presence of a single authority is

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

by itself a guarantee of the application of equal criteria to the relevant cases. A second possibility is that a mechanism is established, whereby assistance to the troubled institutions is provided by national authorities, subject to the possibility for these to revert to a central authority acting as a 'reinsurer', i.e. providing the necessary funds in the case where the limited funds available to the concerned Member State would entail a certain degree of 'under-provision' of State aid.

This second model can only work if its functioning is based on automatic triggers and conditions, and no discretion is left, both to the national authorities in charge for supplying the public support to the troubled institution and to the central authority acting as a 'reinsurer': any margin for discretion, left at both or either of the two levels would greatly diminish the effectiveness of such arrangement, as the market would take into account the possibility that due to these margins of discretions there is a possibility that two institutions in an equal (crisis) situation receive a different treatment, solely due to the use of discretion which is done by the relevant national authorities (or by the central authority vis-à-vis the concerned national authorities), also – if not mainly – in connection to the funds available to the concerned authorities, which again would imply an unfair competitive advantage for certain entities, exclusively based on their 'nationality'. The greatest shortcoming of this type of arrangement, though, is that exactly in its lack of flexibility: a system whose reaction to a crisis is exactly foreseeable by the market risks in fact to incentive some form of

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

moral hazard, and thus increase the likelihood that a crisis may occur and that the crisis framework needs to be activated.

In view of the above, it seems clear that the only optimal solution is the first one, i.e. a completely centralised system for the provision of support in case of crisis, endowed with the necessary degree of flexibility. Also, it seems clear that any choice in between of the two models described above would be particularly ineffective, and the more so, as the features of the implemented model get further from one of the two theoretical options referred to above.

The choice made by European policy-makers with the establishment of the ESM was, especially in the first phase, tilted towards a decentralised model, but with a huge degree of discretion, at least with reference to the triggers for the support intervention, both at national and European level. The high-level agreement[501] reached on the direct recapitalisation instrument, while being far from being complete or binding, gives however an indication of the fact that awareness has risen on the need to move towards a centralised approach, even though the final compromise is far from achieving a complete application of a centralised model. Several feature of this instrument affect its potential effectiveness as a form of 'centralised mechanism' for support, and in particular the fact that its activation is still subject to the inability of the concerned

---

[501] See Eurogroup, 'ESM direct bank recapitalisation instrument – Main features of the operational framework and way forward', Luxembourg, 20 June 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Member State to address the situation without external support, and to the contribution – in any case – by the concerned Member State with its own funds first for the amount required to ensure that the beneficiary institution complies with the 4,5% CET1 equity ratio, and then for an amount equal to 20% (10% after two years from the entry into force of the instrument) of the total amount of public funding to be provided[502].

The compromise reached on the direct recapitalisation, while being a clear improvement in respect of the current situation – when it will be adopted and enter into force – is however inadequate insofar as it still connects the treatment of individual institutions in case of a crisis to the fiscal position of its national authorities (and their capacities to contribute 100% to the first phase of the recapitalisation and with a 20/10% to the second phase).

The negative impact on competition of such an arrangement would indeed be limited only in the hypothetical case where the fiscal positions (including in particular the debt-GDP ratio) and the banking markets (including size of the industry relative to the GDP, composition of the market, number and size of most significant institutions) of all Member States were characterised by equal conditions (which would make the mechanism only a form of 'reinsurance' among Member States for cases going beyond the possibilities of any of them to cope with them alone).

---

[502] The features of the direct recapitalisation instrument are analysed more in detail in Chapter 3.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The last observation leads directly to the consideration on whether and how could be possible to minimise the – even only potential – need for (implicit) State aid, i.e. the existence of a fiscal backstop, which would in turn reduce the importance of the centralised support mechanism, whose less than perfect features would have a smaller impact on cross-border competition among banks.

Two options are available if the policy objective is to minimise the need for a centralised fiscal backstop. One option, as suggested above, would be to achieve a complete harmonisation of Member States with regard to their fiscal positions and their banking sectors, preferably by also reducing the range of the business of such national banking industries to the domestic activities only: not only the first part of this ‘solution’ is difficult to achieve, as also shown during the recent fiscal crisis, but the second part, which is relatively easier to pursue, would tantamount to dissolve in substance the Single Market for financial services (and its benefits) while letting it untouched from a purely legal viewpoint. If the system is arranged in such a way that the resolution of bigger entities, with substantial cross-border activities is subject to stricter rules and controls for the concerned Member State, and the latter is designated to support the burden of crisis management in a substantial part. In this scenario Member States could be subject to powerful incentives to promote the downsizing of their banking industries and the reduction of the perimeter of their activities within national borders, thereby determining the end of the benefits of the Single Market exactly to escape the conditions of a new banking union, which should instead be

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

conceived in such a way to allow a further deepening and enhancement of the Single Market.

A second option, and also a more radical one, would be to change the structure of market incentives in such a way to bring close to zero the amount of public support that the market could reasonably expect in extreme cases, thus by making more acceptable an orderly exit of the market of stressed institutions. Such results can be achieved by introducing – in addiction to stricter State aid rules – a resolution regime which is completely harmonised and does not leave scope for any national discretion which, again, would leave margins for unfair competitive advantages merely based on the 'nationality' of the credit institutions.

The development of such a regime would also be in line with developments at international level. On the other hand the development of a resolution regime which leaves margins for discretion both in the rules and in their implementation at national level would fall short from achieving a similar policy objective.

8.8. Outcomes of the Policy Debate on the European Framework

The current legislative debate on the proposals for a crisis management and resolution regime provides currently for a series of derogations and carve out which would allow Member States in better financial conditions to better protect the interests of the stockholders of domestic institutions.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The distance between what would seem the most rationale outcome of a new framework for crisis management and resolution within the Banking Union, and its current design in the legislative proposals (or in other institutional arrangements) is driven by different sets of incentives underlying the positions of Member States in the short and in the long term.

The development of a crisis management framework as a policy objective for the EU was mainly originated by the need to provide policy responses in the short term, while also developing those institutional arrangements to avoid that similar crises could occur in the same terms in the future, and that in case of their occurrence, appropriate tools are in place to cope with such a crisis more effectively and less costly.

Whereas in the long term, at least according to policy documents and other policy declarations, there seems to be an overall agreement on the need to pursue a rapid centralisation of those functions which relate to a banking union, in the short term other interests play a role, and can also be quite different among different payers in the negotiations.

The s.c. ‘creditor countries’, in particular, aim at reducing to the minimum their share of the burden for the re-adjustment of the banking system at European level, especially with reference to the cost deriving from the s.c. periphery (or debtor countries).

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

At the same time, a lengthening of the whole procedure allows the banks in 'creditor countries' to benefit as long as possible of their competitive advantages mentioned above several times.

The willingness to minimise costs explains in particular the development of the doctrine of 'legacy assets' – connected to the s.c. 'principle of liability' – according to which first the need was affirmed to conduct a balance sheet assessment for banks to be supervised by the ECB prior to the establishment of the SSM, and then the need for the concerned Member State to substantially participate in the burden-sharing of the costs for resolution, both directly, with regard to direct recapitalisation, and through the involvement of national stakeholders in the context of resolution.

A definitive framework is however far from having been set. The choice to analyse mainly policy documents in this Chapter, rather than concrete legal acts or legislative proposals, is determined by the fact that negotiates are on-going while this work is written, and the provisions contained in these proposals have proven being quite unstable, thus an overview of the overall picture of the design of the new framework which should be enshrined in such new legal acts may be at the moment more important than the analysis of the current legislative proposals. In this respect it is noteworthy to consider that, as reminded above, the whole idea of a banking union was originated by the need to develop at the European level arrangements for the management and resolution of financial crises: in particular a fiscal backstop should be established, which required as a prerequisite the existence of a single resolution

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

framework and deposit guarantee scheme, both in turn requiring as a precondition a single supervision mechanism. Out of these components of the banking union, only the single supervisory mechanism has been enshrined in a fully-fledged legal act[503]. The initial idea of a single DGS – initially described as one of the 'three pillars' of the Banking Union – has been put off the table in the meanwhile, while several aspects of the resolution regime are far from being agreed and only a high-level common understanding exist for the role of the common fiscal backstop[504].

In this context, also relevant is the whole debate on the legal constraints and legal bases for the banking union. The request for Treaty changes prior to adopting a new framework, besides being driven from a legitimate legal concern, could also be used as a means to stretch negotiations, to try to limit the range of options available without a Treaty change, or to use negotiations for a Treaty change to modify certain issues which cannot be solved otherwise, such as, for example, the conferral of supervisory powers to the ECB, whose competence should be limited to monetary policy only in the opinion of some Member States, in order to avoid potential conflicts between the different mandates. Analysing what can be achieved under the current legal framework can therefore be relevant to better understand the issues on the table.

---

[503] Council Regulation No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29.10 2013.

[504] Including the concept of 'direct recapitalisation', from which the whole idea of a banking union originated, which is less direct that what it may have been expected in the beginning.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Against this background, some preliminary conclusions can be drawn. The EU and the EMU entered the Great Crisis without proper arrangements for the management and resolution of financial crises. The Crisis was therefore dealt on the basis of ex post arrangements, which showed a certain degree of ineffectiveness. The rapid establishment of a Banking Union was primarily led by the need to have in place a framework to address these crises more effectively, but, while pursuant to the principle of liability supervision was quite swiftly moved to the European level with the establishment of the SSM, the full development of a thorough framework for crisis management and resolution has not followed yet. Its development is more affected by the need and the urgency than by a well pondered design. The risk is that, as during the crisis up until now, the ECB will continue being the anchor of the system also in the future, and even more so with its new competences in the field of the Banking Union.

Many general principles of a framework for crisis management and resolution have been thoroughly discussed and are enshrined in a number of Council Conclusions and other high-level policy documents. These documents, however, do not have legally binding effects. Some draft legal acts have been proposed, but their design could be substantially far from what be the final outcome enshrined in the legal acts, once approved.

Considering the timing for the approval of EU legislative acts, it seems highly likely to date that there will be a period, following the establishment of the SSM, during which no proper framework for crisis management and resolution will have been established,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

and ad hoc ex post arrangements will continue being the only viable solution, safe as for what provided ex ante in the Commission Communications on State aid and in the ESM Treaty and the implementing acts.

The latter observation is not a minor detail: as repeated several times, bringing supervision at the EU level was by no means a policy priority when this was agreed: it was rather the ancillary consequence of the decision to have in place common arrangement to manage and resolve financial crises, in full compliance with the liability principle, according to which liabilities should be at the same level of responsibilities. The paradox of the final outcome of the process, at least for a period of time which it is reasonable to wish being as short as possible, the principle of liability will have been broken, is that the principle of liability will have been broken, but no centralised arrangements will be in place to manage and resolve financial crises, should the need be. The seriousness of the potential consequences of this outcome should be assessed against the background of how the reputation of the newly born SSM and of the ECB could be affected in the case where a crisis arose in the absence of a proper framework to manage and resolve the crisis: this may potentially undermine the trust in the appropriateness of a transfer of competences at European level in this field with specific regard to the establishment of proper crisis management and resolution arrangements, but also with regard to supervisory competences, and ultimately even question the whole institutional framework under which the ECB acts.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The risk presented above will have not been completely excluded when the relevant legal acts will have been adopted. The details of these legal acts will be crucial to understand what will be the overall balance in the design of the new framework. Although the main components of this legal framework have not been enacted yet, a first analysis of the most relevant features of the proposals under discussion, or of other relevant element of the framework, may be useful to better understand the possible legal obstacles to the achievement of certain results, and how the interaction between certain legal solutions may deeply influence the final design of the crisis management and resolution framework. In light of the above considerations, the following chapter first analyses more in detail the structure of the State aid regime in the banking sector, as well as the legal framework concerning the ESM, to complete the forms of public funding in a crisis. In the second place, the legislative proposals regarding resolution and DGSs will be discussed. Finally, an overview of some institutional issues, including the role of the ECB in the SSM for the purposes of early intervention and its capacity as a central bank in the provision of liquidity assistance will be also discussed.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Conclusions

As illustrated in the introduction, the present work was conceived as a modest attempt to give a contribution on the analysis of the impact that financial crises, particularly the most recent Great Financial Crisis, have had on legal frameworks for crisis management and resolution, with specific regard to the European Union.

In Chapter 1 the recent trend for the development of new harmonised principles at international level was examined. In this context, the main finding was an attempt to coordinate the policy responses of States to allow the overall amount of implicitly needed public support in this field. This entails by necessity an increased involvement of private funding, to be also carefully coordinated to avoid distortive effects on competition among States, which may ultimately also affect financial stability.

In Chapter 2 the European situation was analysed, with the insight of the aforementioned principles. In particular, it was acknowledged that, while the international principles have influenced the policy discussion at European level, the latter was however dominated by drivers which are peculiar to Europe, by virtue of its institutional and legal features. The development of a Single Market first and of a Monetary Union later, have made the EU more similar to a domestic area than to a space for international cooperation. The overlapping of two levels of integration,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

however, leaves scope for doubts on what the appropriate level of the policy response would be, and how it should be designed. One of the two components of the crisis in Europe was a fiscal crisis, which particularly affected some Member States within the EMU. Such development led the debate to particularly stress the need between the sovereign and banks inside the EMU, whereas after a careful analysis, it is hereby maintained that equal considerations should also apply to Member States which are part of the Single Market, but not of the Euro Area. Against this background, it has been however concluded that, in the presence of such level of integration, crisis management and resolution arrangements should be optimally located at a centralised, European level. Any arrangements giving scope for national differentiation would reveal not being effective neither from a viewpoint of the costs to be borne by the system, nor for the purpose of protecting financial stability. Moreover, such a development would certainly maintain currently existing obstacles to the existence of a level playing field in the Single Market for Banking Services, and could also ultimately entail a step backward in the type of integration reached in the European Union, which is uniquely placed in the international scenario, in so that its citizens enjoy directly a space of freedom and a heritage of rights connected to such entity, rather than to the intermediation of the participating Member States.

In order to analyse the possibility that the risks presented in Chapter 2 could materialise, a brief overview of the most relevant details of the legal framework under development was carried out in Chapter 3. It has been noted that important

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

developments have taken place, in line with and against the background of the trends at international level: however, the lack of absolute uniformity which seems to be envisaged in several essential rules of the new framework risk to make it less effective in the European context, and surely not adequate to grant an absolute level playing field among market participants which should be the main aim of the whole integration process at European level. Finally, some considerations of a primarily legal nature are exposed with regard to the emerging legal framework. In the first place the appropriateness of the legal basis is analysed, also in view of the criticism raised by some for the choice to advance through secondary EU law, rather than by approving a Treaty changes which they consider necessary. The tension between the EMU, the EBU and the Single Market is also analysed with respect to the interaction among institutions which have competences in this field at either a Single Market, or EBU level.

The findings of this extensive analysis, which have been presented in the course of the work, can be summarised as follows.

The impact of the Great Crisis on the legal and institutional framework for crisis management and resolution has been huge. At international level this is witnessed by the number of competences designed to cope with future crises, and by the bodies established or developed to serve these competences. At international level, though, the effectiveness of these changes largely depends on the effective degree of

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

coordination in the response of States, when the next crisis will arise: competence in this domain remains in fact exclusively national, and the pressure on States to act in conformity with international standards or non-binding agreements could be easily overweighed by the compelling need to address requests to acts coming from internal stakeholders. The need of a binding legal framework to avoid an uncoordinated approach has been already highlighted within the European Union, when the Great Crisis arose. Given the possibility to adopt legally binding instruments in such institutional context, an effort has been made to explore to which extent such a binding legal framework could be developed. It cannot be denied that on this front important progresses have been made, and the establishment of a single supervisor is particularly important in this respect, as it increases the likelihood that the prevention of crises is carried out equally across Member States, also by recurring to early intervention powers, which can be activated in the very early stages of a crisis. Also with regard to 'proper crises', i.e. those crises which have already produced their effects, it should be highlighted that the degree of harmonisation has sensibly increased across the whole EU. This is in particular the case with references to the rules applicable to DGSs and resolution of credit institutions: also the legal instruments used for this purpose (Directives) gives an indication of the fact that these developments fall short from ensuring a level playing fields across the borders of Member States, which retain wide margin of discretion for competences which are still considered as national. Also where new institutions are put in place for the EBU or the EMU, as in the case of the

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

SRM and of the ESM respectively, the institutional framework, and in particular the limitations to the possibility of intervention and the modalities of the decision-making process, are such that neither uniformity, nor rapidness and effectiveness in the intervention, where needed, can be granted ex ante. The risk entailed by this new framework, as currently envisaged, is, as a minimum, that the response to the next crisis could be less than adequate. The gap between the declared intention of a design of the new framework which should be intended to centralise the competences for the management and the resolution of crises, and the reality of a framework of legal acts of various nature which leave substantial scope for national discretion, may lead in this case the public and the decision-makers to consider at that point in time that part of the problem will have been the transfer of the competences, rather than the fact that it will have not been optimally completed. This in turn act as an incentive to repatriate those competences which have been transferred in the context of this crisis, and eventually even competences (or spheres of legal rights and faculties) which had been developed at European level already prior to the outset of the crisis, and thus ultimately put at risk the whole process of European integration. Another alternative, though, is that the further steps in the integration process which have been undertaken may allow the development of a common culture in fields which had previously been of exclusive national competence. This could, as a consequence, lead in time to an increase of mutual trust and understanding of the mutual benefit for the general interest of further

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

advancement in the integration process, and in the transfer of further competences and powers at the European level. This could in particular be completed and also driven by the involvement of the European 'demos', whose interest in the exercise of the powers attributed to the European level could rapidly increase as a consequence of the transfer, and whose opinion in the future developments of the framework, in light of the common interest of the EU as a whole, should be duly taken into account.

A consideration which is often abused is that crises imply at the same time risks and opportunities. This is particularly true in the case of the Great Financial Crisis, and of the impact it had on the legal framework of the EU. The risks are important and should not be undervalued: the same appropriateness of an integrated framework at European level could be questioned, and the important benefits which European people enjoyed from this process could go lost. The opportunities for the enhancement of these benefits and of the whole framework are however as important. The developments which will follow are difficult to predict. It is sensible to foresee however that the emerging framework is not going to be permanent, and that important changes to its design may at latest be enacted as a consequence of the next crisis.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Bibliography

Books

Bagehot W., Lombard Street A Description of the Money Market, London, 1873.

Bacon K., *European Community Law of State Aid*, Oxford University Press, 2009.

Baring F., Observations on the Establishment of the Bank of England, 1797.

Brummer C., Soft Law and the Global Financial System: Rule-Making in the Twenty-First Century, Cambridge University Press, 2011.

Campbell A., LaBrosse J., Mayes D., Singh D.(eds), *Deposit Insurance*, Palgrawe Macmillan, New York, 2007.

Cassis Y., Crises and Opportunites – The Shaping of Modern Finances, Oxford University Press, 2011.

Craig P., De Burca G., *EU Law – Texts, Cases and Materials*, 5th ed., Oxford University Press, 2011.

Dombret A., Kenadjian P.(eds), *The Bank Recovery and Resolution Directive – Europe's Solution for 'Too Big to Fail'?*, Walter de Gruyter, Berlin/Boston, 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Dragomir L., *European Prudential Banking Regulation and Supervision*, Routledge, Oxon, New York, 2010.

Eijffinger S., Masciandaro D. (eds), *Handbook of Central Banking, Financial Regulation and Supervision – After the Financial Crisis*, Edward Elgar Publishing, Cheltenham, Northampton, 2011.

Giovanoli, M. (eds) International Monetary Law – Issues for the New Millennium, Oxford University Press, 2000.

Giovanoli M., Devos D. (eds), *International Monetary and Financial Law – The Global Crisis*, Oxford University Press, 2010.

Guarracino F., *Supervisione Bancaria Europea, Sistema delle Fonti e Modelli Teorici*, CEDAM, Milano, 2012.

James H., *Making the European Monetary Union*, The Belknap Press of Harward University Press, Cambridge, London, 2012.

Kindleberger C., Aliber R., *Manias, Panics and Crashes – A History of Financial Crises*, 5th ed., John Wiley & Sons, Inc., Hoboken, 2005.

LaBrosse J., Olivares-Caminal R., Singh D.(eds), *Financial Crisis Management and Bank Resolution*, Informa, London, 2009.

Lastra R., Legal Foundations of International Monetary Stability, Oxford University Press, 2006.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Lista A., *EU Competition Law and the Financial Services Sector*, Oxon-New York, 2013

Masciandaro D., Quintyn M. (eds), *Designing Financial Supervision Institutions – Independence, Accountability and Governance*, Edward Elgar Publishing, Cheltenham, Northampton, 2007.

Mayer T., Europe's Unfinished Currency – The Political Economics of the Euro, Anthem Press, London, New York, 2012.

Mayes D., Wood G. (eds), *The Structure of Financial Regulation*, Routledge, Oxon, New York, 2007.

Pantaloni M., *Scritti Varii di Economia*, Rome, 1925.

Padoa Schioppa T., Regulating Finance – Balancing Freedom and Risk, Oxford University Press, 2004.

Proctor C., *Mann of the Legal Aspect of Money*, Oxford University Press, 2012.

Rubini L., *The Definition of Subsidy and State Aid – WTO and EC Law in Comparative Perspective*, Oxford University Press, 2009.

Reinhardt C., Rogoff K., *This Time Is Different - Eight Centuries of Financial Folly*, Princeton University Press, Princeton, Woodstock, 2009.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Schoenmaker D., *Governance of International Banking – The Financial Trilemma*, Oxford University Press, 2013.

Thornton H., An Enquiry into the Nature and Effects of the Paper Credit of Great Britain, London, 1802.

Viterbo A., International Economic Law and Monetary Measures – Limitations to States' Sovereignitiy and Dispute Settlement, Elgar International Economic Law, Cheltenham, Northampton, 2012.

Articles appearing in edited volumes

Gaspar V., 'Bagehot and Coase Meet the Single European Market', in *International Financial Stability – Global Banking and National Regulation,* D. Evanoff, G. Kaufman, J. LaBrosse (eds.), World Scientific Publishing Co. Pte. Ltd., Singapore, 2007, 243.

Goodhart C., The Regulatory Response to the Financial Crisis, in The Failure of Northern Rock: a Multi-Dimensional Case Study, F. Bruni, D. Llewellyn (eds.), SUERF, Vienna 2009, pp. 169-170..

Grande M., 'Decentralisation of State Aid Control in the Banking Sector', in *European Competition Law Annual 1999 – Selected Issues in the Field of State Aids*, C. Ehlermann, M. Everson (eds.), Hart Publishing, Oxford, Portland, 2001, 542.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Hancher L., ‘Bailouts in the Financial Sector: The Compatibility with the EU State Aid Rules’, in P. Delimatsis, N. Herger (eds.), *Financial Regulation at the Crossroads*, 2011, 123.

Kahn C., Santos J., *Institutional Allocation of Bank Regulation*, in *The Structure of Financial Regulation*, D. Mayes, G. Wood (eds.), Routledge, New York, 2007, pp. 195-200.

Lastra R., ‘The Role of the European Central Bank with regard to Financial Stability and Lender of Last Resort Operations’, in *Which Lender of Last Resort for Europe?*, C. Goodhart (ed), Central Banking Publications, London, 2000, pp. 203-204.

Masciandaro D., Comment: Allocating Financial Regulatory Powers: the Twin Views in The Structure of Financial Regulation, D. Mayes, G. Wood (eds.), Routledge, New York, 2007, pp. 213-214.

Nieto M., Comment: the Debate on the EMU Institutional Framework for Dealing with Banking Crises, in The Structure of Financial Regulation, D. Mayes, G. Wood (eds.), Routledge, New York, 2007, pp. 209-210.

Padoa Schioppa T., ‘EMU and Banking Supervision’, in *Which Lender of Last Resort for Europe?*, C. Goodhart (ed), Central Banking Publications, London, 2000.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Padoa-Schioppa T., 'The IMF in Perspective', in *Reforming the IMF for the 21st century,* Truman, Edwin (eds), Peterson Institute for International Economics, Washington DC, , 2006, p. 513.

Sacerdoti G., 'Nascita, affermazione e scomparsa del Nuovo Ordine Economico Internazionale', in *Problemi e Tendenze del Diritto Internazionale dell'Economia – Liber amicorum in onore di Paolo Picone*, A. Ligustro, G. Sacerdoti (eds), Editoriale Scientifica, Napoli, 2011, pp. 127-152.

Vellano M., 'Verso il superamento del principio della parità formale degli Stati nel Governo dell'economia mondiale', in *Problemi e Tendenze del Diritto Internazionale dell'Economia – Liber amicorum in onore di Paolo Picone*, A. Ligustro, G. Sacerdoti (eds), Editoriale Scientifica, Napoli, 2011, pp. 127-152.

Waibel M., Bank Insolvency and Sovereign Insolvency, in Cross-Border Bank Insolvency, R. Lastra (ed.), Oxford University Press, 2011.

Journal Articles

Athanassiou P., 'Withdrawal and Expulsion from the EMU and the EU – Some Reflections', in *ECB Legal Working Papers, No. 10*, December 2009.

Begg D. et al., 'The ECB: Safe at Any Speed? – Monitoring the European Central Bank 1', *CEPR*, Information Press, Oxford 1998.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Campbell A., Lastra R., ‘Revisiting the Lender of Last Resort’, in *Banking and Finance Law Review*, vol. 24, 2009, 453-497.

Caprio G. et al., ‘The Lender of Last Resort Function Under a Currency Board – The Case of Argentina’, *World Bank Policy Research Working Paper No. 1648*, 1996.

Charlemagne, ‘Iceland hunts the euro’, in *The Economist*, 24 January 2009.

Cooper A., ‘The G20 as an improvised crisis committee and/or a contested “steering committee’ for the world”, in *International Affairs*, vol. 86, issue 3, May 2010, 741–757.

De Weijs R., ‘Too big to fail as a game of chicken with the state: what insolvency law theory has to say about TBTF and vice versa’, in *European Business Organization Law Review*, June 2013, vol. 14, issue 02, 201-224.

Ferran E., Alexander K., ‘Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board’, in *European Law Review*, December 2010, pp. 751 – 776.

Fonteyne W.et al., ‘Crisis Management and Resolution for a European Banking System’, *IMF Working Paper WP/10/70*, March 2010.

C. Goodhart, ‘Myths about the Lender of Last Resort’, in *International Finance*, vol. 2, issue 3, November 1999, pp. 339-360.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Goodhart C., Schoenmaker D., ‘Institutional Seperation Between Supervisory and Monetary Agencies’, *LSE Financial Markets Group Special Paper No. 52*, 1993.

Humphrey T., Keleher R., ‘The Lender of Last Resort: A Historical Perspective’, in *Cato Journal*, Vol. 4, No. 1, Spring/Summer 1984.

Lastra R., ‘Lender of Last Resort, an International Perspective’, in *International and Comparative Law Quarterly*, vol 48, issue 02, April1999, 340-361.

Merler S., Pisani-Ferry J., ‘Hazardous tango: sovereign-bank interdependence and financial stability in the euro area’, in *Banque de France, Financial Stability Review, No. 16*, April 2012.

Norton J., ‘NIFA-II or “Bretton Woods-II”? The G-20 (Leaders) summit process on managing global financial markets and the world economy – quo vadis?’, in J*ournal of Banking Regulation*, 2010, vol. 11, 261-301.

Reinhardt C., Rogoff K., ‘Growth in a Time of Debt’, in *American Economic Review: Papers & Proceedings 100*, May 2010, 573–578.

Schwartz A., ‘The Misuse of the Fed's Discount Window’, in *Federal Reserve Bank of St Louis Review*, vol. 74, No. 5, September/October1992, pp. 58 - 69.

Smits R., ‘The Role of the ESCB in Banking Supervision’, in *Legal Aspects of the European System of Central Banks – Liber Amicorum Paolo Zamboni Garavelli*, Frankfurt am Main, 2005, 199-2012.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Other sources

Attinger B., *Crisis Management and Bank Resolution, Quo Vadis Europe?*, European Central Bank, Legal Working Paper 13/2011

BCBS, 'A framework for dealing with domestic systemically important banks', October 2012.

BCBS, 'Global systemically important banks: Assessment methodology and the additional loss absorbency requirement - final document', November 2011.

BCBS, 'Global systemically important banks: updated assessment methodology and the higher loss absorbency requirement', October 2011.

BIS, 'Report and Recommendations of the Cross-border Bank Resolution Group', March 2010.

FSB, Charter of the Financial Stability Board.

Commission of the European Communities, Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 244/02 of 1.10.2004.

Commission of the European Communities, 'Completing the internal market – White Paper from the Commission to the European Council', COM(85) 310 final, June 1985.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Commission of the European Communities, ‘Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee, the European court of Justice and the European Central Bank – an EU Framework for Cross-Border Crisis Management in the Banking Sector’, COM(2009) 561 final, Brussels, 20 October 2009,.

Commission of the European Communities, 95/547/EC: Commission Decision of 26 July 1995 giving conditional approval to the aid granted by France to the bank Crédit Lyonnais, OJ L 308/92, 21.12.1995

Council of the European Union, ‘Press Release of the 2628th Council Meeting – Economic and Financial Affairs’, 15150/04 (Presse 339), Brussels, 7 December 2004,.

Council of the European Union, ‘Press Release of the 2822nd Council meeting – Economic and Financial Affairs’, 13571/07 (Presse 217), Luxembourg, 9 October 2007.

Council of the European Union, ‘Press Release of the 2981st Council meeting Economic and Financial Affairs’, 16838/09 (Presse 352), Brussels 2 December 2009.

Council of the European Union, ‘Press Release 17556/13’, Brussels, 10 December 2013.

Council of the European Union, ‘Press Release 17983/13’, Brussels, 18 December 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ECB, 'Bank Structural Reform – Position of the Eurosystem on the Commission's Consultation Document'.

ECB, 'Commission Communication on "an EU Framework for Cross-border Crisis Management in the Banking Sector": Eurosystem's Reply to the Public Consultation'.

ECB, 'ELA Procedures (the procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank with regard to the provision of ELA to individual credit institutions)', 17 October 2013.

ECB, 'Press Release',10 March 2003.

ECB, Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, 20.11.2008

EFC, 'Report on Financial Stability', Economic Papers, No. 143, (EFC/ECFIN/240/00-EN FINAL), 8.4.2000, May 2000.

EFC, 'Report on Financial Crisis Management', Economic Papers, No. 156, (EFC/ECFIN/251/01-EN-Final), July 2001.

EFC 'Report' (ECFIN/CEFCPE(2007)REP/53990), 5 September 2007.

ESFS, 'ESFS Articles of Incorporation'.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Eurogroup, ‘ESM direct bank recapitalisation instrument – Main features of the operational framework and way forward’, Luxembourg, 20 June 2013.

Eurogroup, ‘Statement’, 28 November 2010.

Eurogroup, ‘Statement’, 16 March 2012.

Eurogroup President, ‘Statement’, 18 March 2012.

Eurogroup President, ‘Statement’, 25 March 2013.

European Commission, ‘A blueprint for a deep and genuine economic and monetary union – Launching a European Debate’, COM(2012) 777, Brussels, 28 November 2012.

European Commission, Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216/1, 30.7.2013.

European Commission, Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector Official Journal C 72/1, 26.03.2009

European Commission, Commission Communication Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. Adopted on 5 December 2008 OJ C 10/2, 15.1.2009

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

European Commission, Communication from the Commission - The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270/8, 25.10.2008.

European Commission, Communication from the Commission, The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rule, OJ C195/9, 19.8.2009.

European Commission, 'Communication from the Commission to the European Parliament and the Council – A Roadmap towards a Banking Union', COM(2012) 510 final, Brussels, 12 September 2012.

European Commission, 'Deposit Guarantee Schemes – Frequently Asked Questions', MEMO/10/318, 12 July 2010.

European Commission, 'Green Paper - on the feasibility of introducing Stability Bonds', COM (2011) 818 final, Brussels, 23 November 2011.

European Commission, 'State aid NN 42/2008 - Belgium, NN 46/2008 – Luxembourg, NN 53/A/2008 – Netherlands – Restructuring aid to Fortis Bank and Fortis Bank Luxembourg', C(2008) 8085, Brussels, 3 December 2008.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

European Commission, ‘State aid NN 49/2008 – Belgium, NN 50/2008 – France, NN 45/2008 – Luxembourg – Emergency aid to Dexia in the form of a guarantee for bonds and liquidity assistance’, C(2008)7388 final, Brussels, 19 November 2008.

European Council, ‘Conclusions’, 16 – 17 December 2010.

European Council, ‘Conclusions’, 24 – 25 March 2011.

European Council, ‘Conclusions’, Brussels, 29 June 2012.

European Council, ‘Conclusions’, Brussels, 19 October 2012.

European Council, ‘Conclusions’, EUCO 205/12, Brussels, 14 December 2012.

European Council, ‘Conclusions’, EUCO 23/13, Brussels, 14 March 2013.

European Council, ‘Conclusions’, EUCO 104/2/13, Brussels, 28 June 2013.

European Council, ‘Conclusions’, EUCO 169/13, Brussels, 25 October 2013.

Eurostat, ‘Table on the general government gross debt in the EU Member States (1995 – 2012)’.

Eurostat, ‘Table on the general government deficit/surplus in the EU Member States (2001 – 2012)’.

Euro Summit, ‘Statement’, 26 October 2011.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

FSB, 'Assessment Methodology for the Key Attributes of Effective Resolution Regimes for Financial Institutions - Consultative Document', 28 August 2013.

FSB, 'Implementing the FSB Key Attributes of Effective Resolution Regimens – how far have we come? – Report to the G20 Finance Ministers and Central Bank Governors on progress in reforming resolution regumes and resolution planning for globally systemically important financial institutions (G-SIFIs)', 15 April 2013.

FSB, 'Intensity and Effectiveness of SIFI Supervision – Recommendations for enhanced supervision', 2 November 2010.

FSB, 'Key Attributes for Effective Resolution Regimes for Financial Institutions', October 2011.

FSB, 'Policy Measures to Address Systemically Important Financial Institutions', 4 November 2011.

FSB, 'Principles for Cross-Border Cooperation on Crisis Management', 2 April 2009.

FSB, 'Progress and Next Steps Towards Ending "Too-Big-To-Fail" (TBTF) - Report of the Financial Stability Board to the G-20', September 2013.

FSB, 'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies', 16 July 2013.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services', 16 July 2013.

FSB, 'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Recovery Triggers and Stress Scenarios', 16 July 2013.

FSB, 'Reducing the moral hazard posed by systemically important financial institutions - FSB Recommendations and Time Lines', 20 October 2010.

FSB, 'Thematic Review on Resolution Regimes – Peer Review Report', 11 April 2013.

FSF, 'Principles for Cross-border Cooperation on Crisis Management', 2 April 2009.

Giovannini Group, 'Co-ordinated public debt issuance in the euro area', 8 November 2000.

G 20, 'Cannes Summit Final Declaration – Building Our Common Future: Renewed Collective Action for the Benefit of All', 4 November 2011.

G 20, 'Communiqué: G20 Leaders Summit'.

G20, 'Communiqué – G20 Meeting of Finance Ministers and Central Bank Governors' Washington DC, April 19, 2013

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

G 20, 'Declaration on further Steps to Strengthen the Financial System', 4-5 September 2009.

G 20, 'Declaration on Strengthening the Financial System', 2 April 2009.

G20, 'Declaration – Summit on Financial Markets and the World Economy', 15 November 2008.

G20, 'G20 Leaders' Declaration – Saint Petersburg Summit', 5-6 September 2013.

G20, 'Leaders Declaration', Los Cabos, Mexico, June 19, 2012.

G 20, 'London Summit, Leaders' Statement', 2 April 2009.

G 20, 'Pittsburgh Summit – Leaders' Statement', 24-25 September 2009.

G 20, 'The Seoul Summit Document', 12 November 2010.

G 20, 'Toronto Summit – Leaders' Statement', 27 June 2010.

Hakkarainen P., 'Banking Union in the Nordic context', Keynote address by Mr Pentti Hakkarainen, Deputy Governor of the Bank of Finland, at the Nordic Opportunities/SEB Seminar, London, 3 September 2013.

Heads of State and Government of the euro area, 'Statement', 25 March 2010.

Heads of State or Government of the euro area and EU institutions, 'Statement', 21 July 2011.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Heads of State or Government of the European Union, ‘Statement’,11 February 2010.

High-Level Group on Financial Supervision in the EU – Chaired by Jacques Delarosiére, Bruxelles, 25 February 2009.

High-level Expert Group on reforming the structure of the EU banking sector chaired by Erkki Liikanen, ‘Final Report’. http://www.bis.org/bcbs/history.htm

IMF, ‘Articles of Agreement’.

‘IMF Expanding Surveillance to Require Mandatory Financial Stability Assessments of Countries with Systemically Important Financial Sectors’, Press Release No. 10/357, 27 September, 2010.

IMF, ‘Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination’, 11 June 2010.

IMF, ‘International Capital Markets – Developments, Prospects, and Key Policy Issues’, September 1998.

Joint letter to the G-20 Ministers and Governors of 13 November 2008 by the IMF Managing Director S. Strauss-Kahn and the FSF Chairman M. Draghi.

Memorandum of Understanding on cooperation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis situations, 14 May 2005.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on Cross-Border Financial Stability, 1 June 2008.

Memorandum of Economic and Financial policies.

MEPs, 'Statement on the work on the single resolution mechanism for banks', 9 January 2014.

Ministry of Finance of Finland, 'Joint Statement of the Ministers of Finance of Germany, the Netherlands and Finland', Press release 175/2012, Helsinki, 25 September 2012.

Presse- und Informationsamt der Bundesregierung, 'France and Germany – Together for a stronger Europe of Stability and Growth', Pressemitteilung No. 187/13, Berlin, 30 May 2013.

President of the European Council, 'Towards a stronger Economic Union – Interim Report', 6 December 2011.

President of the European Council, 'Towards a genuine Economic and Monetary Union', Brussels, 26 June 2012.

President of the European Council, 'Towards a genuine Economic and Monetary Union - Interim Report', Brussels, 12 October 2012.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tietmeyer H., ‘Report on international cooperation and coordination in the area of financial market supervision and surveillance’, 11 February 1999, pp. 1, 5.

Van Rompuy H., in close cooperation with J. Barroso, J. Juncker and M. Draghi, ‘Towards a genuine Economic and Monetary Union’, 5 December 2012.

Legal acts

Commission Recommendation of 22 December 1986 concerning the introduction of deposit guarantee schemes in the Community (87/63/EEC), OJ L 33/16 of 4.2.1987.

Council implementing decision on granting Union financial assistance to Ireland of 7 December 2010.

Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287/63 of 29 October 2013) [SSM Regulation].

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ L 135/5, 31.5.1994).

Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast).

Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay (OJ L 68, 13.3.2009, p. 3).

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [CRD IV].

European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/511 final, 12 September 2013.

Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC,

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM(2012) 280 final.

Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes (recast), COM (2010) 368 final.

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/0512 final, 12 September 2012.

Proposal for a Regulation of the European parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (Interinstitutional File: 2013/0253 (COD) in the compromise version 14754/13 of 15 October 2013).

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1, of 27.6.2013 [CRR].

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ L 386/1, of 30.12.1989.

Statute of the European System of Central Banks and of the European Central Bank, Protocol

Treaty on the European Union, consolidated version, OJ C 326/13, of 26.10.2012

Treaty on the Functioning of the European Union, consolidated version, OJ C 326/47, of 26.10.2012.

Case-law

Case 9/56, *Meroni v High Authority* [1957 and 1958] ECR 133.

Case 26/62, *Van Gend & Loos* (1963) ECR 1.

Case 98/80, *Romano*, [1981] ECR 1241.

C-441/93, Panagis Pafitis and Others v. Trapeza Kentrikis Ellados A.E. and Others [1996] ECR I-1347).

C-217/04, United Kingdom v Parliament and Council (ENISA), [2006] ECR I-3771.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

C402/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, [2008] ECR I6351.

C-270/12, United Kindom v Parliament and Council, Opinion of AG Jääskinen.

C-370/12, Thomas Pringle vs Government of Ireland, of 27 November 2012.

Tesi di dottorato "Crisis Management and Resolution in the Banking Union"
di RISO ANTONIO LUCA
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.