Prevenzione e risoluzione della crisi delle banche

Versione 15 aprile

Bank Recovery and Resolution Directive establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD)

Accanto vi è il Reg. che fissa le procedure uniformi per la risoluzione delle crisi
Scopo

1) to prevent insolvency or, when insolvency occurs, to minimize negative repercussions by preserving the systemically important functions of the institution concerned.

2) to prevent **moral hazard: bail out** (During the crisis, those challenges were a major factor that forced Member States to save credit institutions using taxpayers’ money).
Ambito di applicazione soggettivo

Si applica a:
1) credit institutions and investment firms
2) financial holding companies
3) parent financial holding companies
4) branches of institutions
Resolution authority

One or more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers (ma nella zona Euro il Comitato agirà come autorità nazionale, probabilmente con la collaborazione della Banca d’Italia, in tal caso con una Direzione indipendente)
Crisis prevention measure

- removal of deficiencies or impediments to recoverability under Article 6(4),c (una sorta di moral suasion)
- the exercise of powers to address or remove impediments to resolvability under Article 14 or 15, (operazioni concordate ad es. dismettere asset)
- the application of an early intervention measure under Article 23, the appointment of a temporary administrator under Article 24 (in sostanza come l’amministrazione straordinaria)
- or the exercise of the write down or conversion powers under Article 51;
Write down or Conversion
Si tratta sia di misura preventive sia contestuale alla Resolution (art. 51)

Member States shall ensure that the resolution authorities have the power to write down or convert relevant capital instruments into shares or other instruments of ownership of institutions....
Article 52

(a) Common Equity Tier 1 items are reduced first in proportion to the losses and up to its capacity. The resolution authority takes in respect of holders of Common Equity Tier 1 instruments one or both of the actions specified in Article 42(1);

(b) the principal amount of relevant capital instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 26 or up to the capacity of the relevant capital instruments, whichever is lower;
Valuation (art. 30)
(Costi eccessivi?)

**Before** taking resolution action or exercising the power to write down or convert capital instruments, resolution authorities shall ensure that a fair, **prudent and realistic valuation of the assets and liabilities** of the institution or entity referred to in points (b), (c) or (d) of Article 1 is carried out by a **person independent** from any public authority, including the resolution authority, and the institution or entity referred to in points (b), (c) or (d) of Article 1. Subject to paragraph 6 and Article 78, where all the requirements laid down in this Article 30 are respected, the valuation shall be considered as definitive.
29. Article 1 of Protocol No. 1 provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
La sentenza 10 luglio 2012
(Grainger)

The Court observes that it is well established in its case-law that any interference with the right to the peaceful enjoyment of possessions must, indeed, strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights....
	here must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure applied by the State
Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”...

certain margin of appreciation

Legitimate objectives in the “public interest”, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.
Northern Rock had survived only because of the provision of LOLR support and that the Government now sought to bring an end to that support.

the Court accepts that the Government’s objective throughout its dealings with Northern Rock during this period was to protect the United Kingdom’s financial sector
» Art. 47 Cost.
» La Repubblica incoraggia e tutela il risparmio in tutte le sue forme; disciplina, coordina e controlla l’esercizio del credito

» Art. 81 Cost.
» Lo Stato assicura l’equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico

Inversione priorità?
Resolution objectives

(a) to ensure the **continuity** of critical functions;
b) to avoid significant adverse effects on financial stability, in particular by **preventing contagion**, including to market infrastructures, and by maintaining market discipline;
(c) to **protect public funds** by minimising reliance on extraordinary public financial support; and
(e) to **protect depositors** covered by Directive 94/19/EC and **investors** covered by Directive 97/9/EC;
(f) to **protect client funds and client assets**.
Principi generali art. 29

(a) the shareholders of the institution under resolution bear first losses;
(b) creditors of the institution under resolution, bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings…;
(c) management body and senior management of the institution under resolution are replaced, except ….;
d) individuals and entities are made liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the institution;
(e) …., creditors of the same class are treated in an equitable manner;
(f) no creditor shall incur greater losses than would have been incurred if the institution ….had been wound up under normal insolvency proceedings ….; and
(fa) covered deposits are fully protected.
Risoluzione:

- sale of assets,
- bridge bank,
- bail-in,
- asset separation tool.

I quattro strumenti di Risoluzione
Sale of Assets

Should enable authorities to effect a sale of the institution or parts of its business to one or more purchasers without the consent of shareholders
Section 2
Article 32

Member States shall ensure that resolution authorities have the power to transfer to a purchaser that is not a bridge institution:

(a) shares or other instruments of ownership issued by an institution under resolution; (espropriazione)

(b) all or any assets, rights or liabilities of an institution under resolution. (cessione di attività e passività?)
Bridge Bank

Si tratta di una istituzione temporanea per amministrare le azioni e gli assets di una banca in crisi può assumere le caratteristiche della bad bank, quando siano separati gli assets negativi
Bridge Bank requirements:

1) it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority.

2) purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to continuing some or all of their functions, services and activities.
Modello e casi verificatisi

- UK Banking Act 2009
- Spagna l. 9/2012 (art. 27 Banco Puente)
Asset Separation

The asset separation should enable authorities to transfer assets, rights or liabilities of an institution under resolution to a separate vehicle. (Art. 36, § 2)
A legal entity that meets all of the following requirements:

(i) it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority;

(ii) it has been created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution.
Bail in

to ensure that shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of those costs arising from the failure of the institution.

Sperimentato a Cipro, sarà operativo dal 2018
OBJECTIVE AND SCOPE OF THE BAIL-IN

1) to **recapitalise** an institution
2) to **convert to equity** or reduce the principal amount of **claims** or **debt** instruments that are transferred

(art. 37, § 2)
ANCILLARY POWERS

Member States shall ensure that the resolution authority shall have the power ....
(a) the **amendment** of all relevant registers;
(b) the **delisting** or removal from trading of shares or other instruments of ownership or debt instruments;
(c) the **listing** or admission to trading of **new shares** or other instruments of ownership;
(d) the **relisting or readmission** of any debt instruments which have been written down, without the requirement for the issuing of a prospectus pursuant to Directive 2003/71/EC.
Problemi

Non è chiaro quale sia il ruolo da fare giocare al mercato nell’immediato (delisting provvisorio?)

rammentare caso Banco Ambrosiano

la corsa alla vendita non è un gioco a somma zero: occorre prevedere per tempo il divieto di vendere le azioni

coinvolgimento di altre autorità (Consob)