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RIFLESSIONI SU SOCIETÀ, DIRITTO, ECONOMIA

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pubblicato il 30/07/2019

Failing or likely to fail: time for a normative reconsideration?

Summary: Introduction – 1. The technical assessment and the grey zone – 2. The impossibility to square the grey zone between solvency and insolvency and the problems along with it – 3. Framing "Failing or likely to fail" in the BRRD, SRM and National Law context-meaning, purpose and interpretation- the Principle of Proportionality – 4. Conclusion

Introduction

Among the three resolution conditions the ascertainment of the first, namely "failing or likely to fail", covers critical importance under the new bank resolution framework. Indeed, even if all these three conditions are to be considered peremptory in order to begin a resolution action, logic requires the list to be deemed ordinal to the extent that experiencing financial trouble constitute the logical assumption for the other conditions to be fulfilled. Therefore, the verification that the institution is "failing or likely to fail" should be considered the cardinal parameter to be met in order to begin *any* (resolution) action.

The importance of the determination that an institution is "failing or likely to fail" results even strengthened by the fact that the decision has an impact in economic terms on the life of a financial institution. Needless to say, even more on its future viability. Indeed, the inescapable consequences stemming from the ascertainment of this condition by the resolution authorities are either resolution under the new European resolution rules or insolvency proceedings under national law.

This trigger should perform the functions to set the point of non-viability of the banking business to determine when regulators should shut down the concerned institution and act as a protection for creditors and debtors while preserving of legal certainty and ensuring the achievement of the resolution objectives. In spite of the theory, the protection the directive seems to grant to both, creditors and banks when setting up this condition is somewhat annulled by the considerable degree of discretion and the vagueness left with regard to the assessment condition under subparagraphs (a) (b) (c) of article 32 (4) and by the EBA guidelines. Far from being sufficiently determined "failing or likely to fail" is not linked to objective, quantitative thresholds but largely subject to a discretionary judgment.

This article is aimed at proving that the lack of determinedness affecting "failing or likely to fail" creates a state of destructive ambiguity which annuls the protection of creditors and debtors' established by the directive and nullify its purposes, causes confusion and clash with the framework set out for emergency liquidity assistance and precautionary recapitalization, produces legal uncertainty, raises regulatory arbitrage and entails further unnecessary financing costs for the entities supervised. Most importantly it brings about the risk of unjustified impairment of creditors' and debtors' rights and reputational damage for supervisors. The recent case of ABLV bank is the living proof of that. Section one explains the

meaning of the trigger and the elements which acts as a foundation of the technical assessment, clarifying also some basic assumption of principle. Section two illustrates the current problems affecting the trigger and the daunting consequences of the current state of affair by analysing the cases of ABLV and Veneto Banca. Section three frames the purpose and function of the trigger by locating it under the current bank insolvency framework. Section four provides some concluding remarks.

1. The technical assessment and the grey zone

Under the BRRD framework and SRM framework, taking formal action against an institution requires the triggering of the three resolution conditions provided by article 32(4) (a-d) of the Directive. Namely*: 1) the institution is failing or is likely to fail; 2) there is no reasonable prospect that any alternative private sector measures taken in respect of the institution would prevent the failure of the institution within a reasonable timeframe; and, 3) a resolution action is necessary in the public interest*[1]. All these three conditions are to be considered peremptory in order to initiate resolution action[2].

The technical assessment on whether an institution is to be considered failing or likely to fail is set out by article 32(4) of the BRRD and article 18(4) of the SRM regulation and further "specified" by the EBA's guidelines[3]. The first detail to note is that the assessment is embedded into two different legal acts. The first disciplines the resolution triggers for National Resolution Authorities all over Europe (the BRRD) and has to be transposed in national law. The second regulates the assessment only for significant entities supervised by the ECB (SRMR) and it is immediately applicable. The difference between the two acts lies in the fact that the regulation does not assign to the EBA the task to clarify the concept of "failing or likely to fail" nor it make any reference to the assessment framework as developed in the EBA's guidelines.

Therefore, the ECB and the entities it supervises as a single supervisor under the SSM are to be deemed implicitly excluded from both, the concept of "failing or likely to fail" under the BRRD and the scope

[1] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms' article 32(4).

[2] Freudenthaler, D. Lintner, P. (2017) "Condition for taking resolution action and the adoption of resolution schemes" in Understanding the Bank Recovery and Resolution Directive: A Guidebook to the BRRD, The World Bank Group, available at http://pubdocs.worldbank.org/. The two Authors assert: "Article 32 of the BRRD sets out a cascade of cumulative conditions that determine whether resolution authorities should take resolution actions (rather than applying regular insolvency law to a failing bank).
There are three main requirements. First, it must be determined that the institution is failing or likely to fail (FOLTF). Second, there must be no reasonable prospect that alternative private sector measures would prevent the failure. Third, resolution action must be in the public interest.

[3] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms', Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 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 Resolution Fund and amending Regulation (EU) No 1093/2010 Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU.

of the guidelines[4]. This exclusion would have granted to the ECB a wider level of discretion and autonomy in shaping the assessment of "failing or likely to fail" not even comparable in theory with the discretion enjoyed by the NCA when performing the assessment and the creation of *two* categories of "failing or likely to fail". One for national authorities in the EU's 28 Member States and one for the ECB and the significant banks supervised under the SSM[5]. Still, since the ECB has publicly adopted the EBA's guidelines, the central bank is now bound by the principle of legitimate expectation[6] to follow the EBA's assessment criteria otherwise, the assessment would be void and susceptible of an action for annulment in front of the Court of Justice[7].

Turning to the assessment parameters, it must be noted that when defining failing or likely to fail, the directive and the regulation make reference to four resolution conditions, which are set out in article 32(4) and 18(4). If one or more conditions are fulfilled, Supervisors are entitled to declare an institution "failing or likely to fail" and trigger the resolution. They are respectively:

(a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

(b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;

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[4] This interpretation is somewhat corroborated by both, the case of Veneto Banca and by paragraph 11 of the EBA's guidelines. In fact, the last indent of paragraph 11 expressly states that the guidelines are addressed to competent authorities and resolution authorities within the meaning of article 4(2) (i) (iv) of the EBA's regulation *when they assess whether an institution is failing or likely to fail, according to Article 32(1)(a) of Directive 2014/59/EU, or to Article 32(2) respectively[4]*. Therefore, the ECB and the entities it supervises are out of the scope of "failing or likely to fail" as defined by the BRRD and the EBA guidelines.

[5] The practical consequence of this policy choice would have been an asymmetry between the assessments at the European Level as compared to the assessment under national level, generating further confusion and potentially triggering regulatory arbitrage with attempts from banks to maintain the classification as less-significant in order to "escape" the SSM.

[6] See Galetta, D. Hofmann, H. Puigpelat, O. M. Ziller, J. (2015) "The General Principles of EU Administrative Procedural Law: In depth analysis for the jury committee" European Parliament, Policy department C available at http://www.europarl.europa.eu. According to the authors "Last, there are also principles and/or rules of EU administrative procedures which are established by soft law instruments, especially in codes of conduct, guidelines, communications etc. While those soft law instruments are not formally binding – contrary to secondary legislation and decisions of EU institutions, bodies, offices and agencies – they can nevertheless generate legal effects in application of the EU courts' jurisprudence on legitimate expectations". "The principle of protection of legitimate expectations has been recognised since the very early case law of the CJEU as sub-principle of the rule of law.26 Actions of public bodies shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest. Legitimate expectations shall be duly taken into account where an administrative decision is cancelled or revoked". See also Case T-357/02 Freistaat Sachsen vs Commission (2007) ECR II-1261, para. 98, where the Court stated that "provisions of Community law have no retroactive effect unless, exceptionally, it clearly follows from their terms or general scheme that such was the intention of the legislature, that the purpose to be achieved so demands and that the legitimate expectations of those concerned are duly respected".

[7] See Case 111/63 Lemmerz-Werke v High Authority of the ECSC [1965] ECR 677, where the concept of protection of legitimate expectations was first explicitly enunciated. See also Joined Cases 7/56 and 3/57 to 7/57 Algera and Others v Common Assembly of the ECSC [1957] ECR 39, 55; Cases 42 and 49/59 S.N.U.P.A.T. v High Authority [1961] ECR 53; Case 14/61 Koninklijke Nederlandsche Hoogovens en Staalfabrieken v ECSC High Authority [1962] ECR 253.

(c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;

(d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability,

A caveat which must be made before beginning the analysis is that although failing or likely to fail has often been read all together as indicating a common difficult state a bank can experience, the specifications made in the guidelines, as well as the first applications of the directive and the regulation contradict this simplistic interpretation of the concept. In this respect, it must be noted that the EBA's guidelines when specifying the assessment for each subparagraph, provide for a clear distinction between current breaches and perspective breaches of the requirements set out by the directive, setting out separately the "objective elements" which must be considered for the assessment in the "near future"[8]. Moreover, the wording of article 32(4) the directive seems to make a distinction between the state of failing and the state of likely to fail, which is evident in the use of the alternative conjunction "or" instead of "and" in all the subparagraph 32(4) (a-c). Adding up to that, the European Legislator set out two states of banks' financial health instead of one when framing the assessment[9].

The practical application of the directive and of the regulation further enforces this interpretation. When the Bank of Italy declared the liquidation of Banca Etruria[10], Cassa di Risparmio di Chieti[11], Banca Marche[12] and Cassa di Risparmio di Ferrara[13] it made explicit reference to the failing state (dissesto) and not to the state of "likely to fail" (rischio di dissesto)[14]. The same has to be said for the ECB with respect of its assessment Banca Popolare di Vicenza[15], and ABLV[16]. In this respect, although the press releases mention the two states altogether, the court documents and the specific assessment circumstances clearly draw a line between the two states. According to the Court of Vicenza, the ECB declared Banca Popolare

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[8] See paragraphs 20, 24, of the EBA Guidelines n. 4.
[9] BRRD art 32.
[10] See Banca D'Italia (2015)" Provvedimenti rilevanti relativi ai soggetti sottoposti a risoluzione" (Avvio della risoluzione Banca Marche) available at www.bancaditalia.it In its resolution decree bank of Italy expressly states: "The provision was adopted in the presence of the conditions set forth in art. 17 of Legislative Decree 16 November 2015, No. 180, as for the Banca delle Marche SpA, in Extraordinary Administration: 1) the failing state has been verified;(in Italian e' verificata la situzione di dissesto) 2) there are no alternative supervisory or market measures, which can be implemented at an appropriate time, to overcome this situation3) the public interest occurs, given that the resolution is necessary and proportionate to the pursuit of the related objectives and that the administrative compulsory liquidation procedure is unsuitable to achieve them to the same extent". See also See Banca D'Italia (2015)" Provvedimenti rilevanti relativi ai soggetti sottoposti a risoluzione" (Avvio della risoluzione Banca Etruria)) available at www.bancaditalia.it See also Banca D'Italia (2015)" Provvedimenti rilevanti relativi ai soggetti sottoposti a risoluzione"(Avvio della risoluzione, Cassa di Risparmio di Ferrara) available at www.bancaditalia.it See also Banca D'Italia (2015)" Provvedimenti rilevanti relativi ai soggetti sottoposti a risoluzione" (Avvio della risoluzione, Cassa di Risparmio di Chieti) at www.bancaditalia.it.
[11] Cit., n. 11.
[12] Cit., n. 11.
[13] Cit., n. 11.
[14] Cit., n. 11.
[15] See Tribunale Vicenza Sez. fall., Sent., 09/01/2019, n. 83.
[16] See European Central Bank (2018) "Failing or Likely to Fail" Assessment of ABLV Bank Luxembourg, SA available at www.bankingsupervision.europa.eu see also European Central Bank press release (2018) "ECB determined ABLV Bank was failing or likely to fail" available at www.bankingsupervision.europa.eu.

di Vicenza "deemed to be failing in the near future"[17] (prossima al dissesto) because it has been found in a current breach of the capital requirements in a way that would justify the withdrawal of authorization ex article18(4)(a).Turning to ABLV, in the non-confidential version of the assessment, it is written in clear letters that "*there are objective elements to support a determination that the Institution will in the near future be unable to pay its debts or other liabilities as they fall due, in accordance with Article 18(4)(c) of Regulation (EU) No 806/2014"*[18]

Therefore, one must conclude that the state of failing refers to a current assessment which translates in i) *a current infringement of the requirements for continuing authorisation in a way that would justify the withdrawal ii) the inability to pay obligation as they fall due iii) the value of liabilities exceeding the value of assets iv) the need for public financial support*. By contrast, the state of likely to fail substantiates in a forecast of the likelihood of i) a future breach of the requirement for continuing authorization ii) a future inability *to pay obligation as they fall due and iii) a future disbalance in asset and liabilities.* This "likelihood" of breaches must be based according to the EBA's guidelines on "objective elements" taking "the near future" as time horizon. Both the mentioned term, as it will be specified later, are left undetermined and to the discretional interpretation of each relevant supervisory authority.

Turning to the analysis of the provisions, as it is testified by the express reference to the two insolvency thresholds under subparagraphs (b) (c) the similarity in function with the insolvency state speaks for itself. Failing and likely to fail are aimed at acting as dividing line among healthy and unhealthy banks, to justify the resolution procedure. Still, as recognized by the doctrine[19] the point on non-viability changes in time. The concepts of failing and likely to fail, are wider than the concept of insolvency. They

[17] Ibid n. 16 The court states: "All this is reflected in the documents and especially by the correspondence of the B.I. and the ECB: - in its opinion of 13.6.2018 the ECB reports that, since March 2017, "the prospects for a successful outcome of the initiatives undertaken for the settlement of the bank's crisis following the acquisition of control by the Fund had ceased to exist" (page 3/8); - the ECB declared in the spring of 2017 that the bank. was " deemed to be failing in the near future" ("is deemed to be failing in the near future") (page 3/8);- the Single Resolution Board, "considered that there was no need (...) for a resolution action in the public interest", where "resolution" means "rescue"" (page 4/8)). Italian version: "Tutto ciò traspare dagli atti ed in particolar modo, dal carteggio della B.I., e della BCE: - nel parere del 13.6.2018 B. riferisce che erano venute meno, dal mese di marzo 2017, "le prospettive di buon esito delle iniziative intraprese per la soluzione in bonis della crisi della banca a seguito dell'acquisizione del controllo da parte del Fondo A." (p. 3/8); - la BCE ha dichiarato nella primavera del 2017 che la B. era "prossima al dissesto" ("is deemed to be failing in the near future") (p. 3/8); - il Single Resolution Board, autorità di risoluzione competente, "ha ritenuto non sussistere (...) la necessità di un'azione di risoluzione nell'interesse pubblico", ove "risoluzione" sta per "salvataggio"" (p. 4/8).

[18] See SRB (2018) "Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS" non-confidential version in www.srb.europa.eu.

[19] See Brescia Morra, C (2016). "Il diritto delle Banche", Il mulino. See also Grünewald S. (2017) Legal challenges of bail-in "ECB Legal Conference 2017 Shaping a new legal order for Europe: a tale of crises and opportunities" 4-5 September 2017 available at www.ecb.europa.eu the author asserts "as a consequence, it is no longer insolvency banks are afraid of under the BRRD/SRMR regime. The new reference point for failure is failing an ECB (or other relevant) stress test. If a bank is fine under the baseline scenario, but fails the adverse scenario, it qualifies for "precautionary recapitalisation". If the bank fails the baseline scenario, this is a strong indicator for the supervisor to declare a bank as FOLTF. At this point, however, insolvency has not necessarily occurred. It is a point determined by authorities according to their best judgement, on which the design of the underlying stress test has a large influence".

are "situations that precede the state of insolvency as considered in the common meaning"[20]. The cases of Veneto Banca and Carichieti bring about an explicit judicial recognition of the point[21].

In Carichieti, the court explicitly pointed out that "*failing or likely to fail*" is a completely different concept from that of the state of insolvency as enshrined in article 5 of the Italian Insolvency Law and as interpreted by the Italian Supreme Court (Cass. 9408/'06)[22].The court remarks that the condition of *failing or likely to fail* represents the core requirement of both resolution under BRRD and liquidation under normal insolvency proceeding. Still, the court highlight that under the new legal framework: "[*ultimately a less serious condition than the state of insolvency is necessary and sufficient to trigger crisis management procedures*"[23]. The court concluded the reasoning by declaring that the bank was *not insolvent* when the resolution was opened but was insolvent in the meaning of Article 5 as interpreted by the Supreme court in 9408/2006 during the liquidation. According to the court "there are no elements that make it possible to affirm the existence of a state of insolvency at the time the resolution is initiated"[24] because the resolution was based on the subsistence of condition b of Article 17 of the Italian implementation decree of the Directive as there were "extremely serious capital losses, such as to deprive the bank of the entire assets or a significant amount of assets"[25].

The same has to be said for the case of Veneto Banca where the ceased directors of the entity intervened in the proceeding for the declaration of insolvency of the bank arguing among other things that the bank was given green light by the ECB to benefit from a precautionary recapitalization procedure and enjoyed full support by the ministry of finance and the Bank of Italy, the precautionary recapitalization has fallen solely on the compatibility of state aid that. Therefore, since one of the main assumptions of the precautionary recapitalization is that the beneficiary bank is not in an insolvent bank, the bank was not insolvent. Indeed, it is on the compatibility with state aid that the precautionary recapitalization has fallen. The court recognized that the situation of the bank had undoubted margins of uncertainty as to the requirement of insolvency before the declaration of failing or likely to fail but argued that the situation of the bank had to be valued exclusively having as a reference the time period after the bank was put into resolution. Therefore, declared the bank insolvent having as exclusive reference the

[20] Brescia Morra, C. supra cit.

[21] Tribunale di Chieti, 19 Luglio 2016, n.25 Est. Valletta. in www.il caso.it; Tribunale di Ancona, 15 marzo 2016, n. 22, in www. Il fallimentarista.it; Tribunale di Ferrara, 19 Febbraio 2016, n. 7, in www. Il fallimentarista.it; Tribunale di Arezzo, 11 febbraio 2016, n. 12, in www. Il fallimentarista.it; Tribunale di Treviso, 27 Giugno 2018, n. 83, in www. Il fallimentarista.it; Tribunale Vicenza, Sez. fall., Sent., 09/01/2019. n.1 in www.Ilfallimentarista.it.

[22] Cassazione civile, sez. I, 21 Aprile 2006, n. 9408. Est. Maria Rosaria Cultrera.

[23] Tribunale di Chieti, 19 Luglio 2016, n. 25. In the judgement, the court of Chieti pointed out that "failing or likely to fail" as imbedded in the implementation Decree is a completely different concept from that of the state of insolvency as enshrined in article 5 of the Italian Insolvency Law and as interpreted by the Italian Supreme Court (Cass. 9408/'06). The court remarks that the condition of failing or likely to fail represents the core requirement of both resolution under BRRD and liquidation under normal insolvency proceeding. Still, the court highlight that under the new legal framework: "[u]ltimately a less serious condition than the state of insolvency is necessary and sufficient to trigger crisis management procedures". The court concludes by declaring that the bank was not insolvent when the resolution was opened but was insolvent in the meaning of Article 5 as interpreted by the Supreme court in 9408/2006 during the liquidation. According to the court "there are no elements that make it possible to affirm the existence of a state of insolvency at the time the resolution is initiated".

[24] Tribunale di Treviso, 27 Giugno 2018, n. 83.

[25] Tribunale di Treviso, 27 Giugno 2018 n. 83.

financial state of affairs of the entity in the liquidation proceeding when the financial situation of the bank had to be valued on a gone concern basis and a relevant amount of core assets was transferred to a bridge entity later on bought by Intesa San Paolo. Lastly, this interpretation is corroborated by the fact that two solvency tests are recalled separately and not altogether by article 32(4) and by the supervisory authorities in their decisions[26].

At the same time, as it has been noted[27] failing and likely to fail do not coincide with the state of solvency because the circumstance under article32(4) paragraph sub (d) which refer to precautionary recapitalization tool prohibit its use on institutions which are failing or likely to fail. Thus, limiting the use of injection of own funds or purchase of capital instruments to solvent recipients and introducing a differentiation between "solvent institutions" and "other"[28]. This reconstruction is fostered by the EBA's definition of solvency which has clarified that "solvent institution means an institution which does not fall within article 32(4)(a), (b), and (c): this means the institution does not and is not likely to, in the near future: infringe the conditions for authorisation; hold less assets than liabilities; fail to pay its debts as they fall due"[29].

Therefore, one must conclude that failing and likely to fail lie in a grey zone between solvency and insolvency. Still, no one has stated clearly where the solvency- non solvency- insolvency points lie in practice and no one has defined with reasonable precision the parameters for the assessment of failing and likely to fail. This state "destructive ambiguity" which affect the trigger raises, as a minimum, huge problems which could potentially destroy the credibility and the effectiveness of the new framework.

2. The impossibility to square the grey zone between solvency and insolvency and the problems along with it.

In this respect, the first problem of the trigger appears when it is read in conjunction with the precautionary recapitalization instrument, which "exempts "solvent" recipients of public assistance from the application of resolution tools". In doing so the provision adds a differentiation (between solvent institutions and others) which makes difficult to distinguish to which category a particular case actually belongs. Moreover, the differentiation between "solvent" and "other" institutions further complicates the understanding of the solvency point in time assessment under article 32(4)(a)-(c), "as it is difficult to

[26] Ibid., notes 73-74- 68.
[27] Binder J.H. (2016) "Resolution: Concepts, requirements and Tools" Ch. 1, in id. and Dalvinder Singh (eds.), "Bank Resolution: The European Regime", Oxford University Press. See Olivares-Caminal R. Russo C. (2017) "Precautionary recapitalisations: time for a review" Available at www.europarl.europa.eu., Bodellini, M. (2017) "Greek and Italian 'Lessons' on Bank Restructuring: Is Precautionary Recapitalisation the Way Forward?", in Cambridge Yearbook of European Legal Studies, 2017, 19, pp. 144 – 164.
[28] Binder., supra cit.
[29] See European Parliament 'Precautionary recapitalization under the Bank Recovery and Resolution Directive: conditionality and case practice', 16 June 2017, 2, available at www.europarl.europa.eu.

imagine a case where neither of these requirements is met but nonetheless extraordinary public financial support is required"[30].

The second problem which emerges is how to square the understanding of non-solvency ('point-in-time' assessment) relevant for the triggering of resolution with the solvency point in time set out by the ECB relevant for the granting of emergency liquidity assistance[31] as well as the notion of solvency relevant for precautionary recapitalization purposes [32]. Especially when it comes to the "likely to fail assessment" under article 32(4) sub (a-c) and the inability to pay obligation as they fall due assessment. Indeed, as it is commonly acknowledged to be compatible with the state aid discipline and the prohibition of monetary financing, ELA must be granted to solvent banks[33]. In fact, as has been underlined by the relevant doctrine the provision of ELA to a non-solvent bank, could compromise the capacity of the European System of Central Banks to carry out monetary policy operations effectively[34]. Moreover, since an inherent subsidy exists when a central bank lends to an institution which is non-solvent and must be put into resolution, to be in compliance with article 123 TFEU Central Banks must withstand government pressure to finance government deficits via central bank credit[35] and limit lending to viable institutions. "Any recourse to taxpayers' money is a decision for the fiscal authority (State's task, not a central bank task)". ELA can be granted to solvent institutions temporarily illiquid on the basis of adequate collateral to which appropriate haircuts are applied, in function of its quality and market value; the central bank has to charges a penal interest rate to the beneficiary; the measure is taken at the central bank's own initiative, and in particular is not backed any counter-guarantee of the State[36].

Under its 2017 agreement on ELA, the ECB considers undercapitalised banks with a "credible prospect of recapitalisation" to be solvent as well[37]. The stance taken in the ELA agreement raises some perplexities given that two of the four circumstances set out in article 32 (4)(a) and (c) in which a bank could be declared likely to fail are: I) when there are objective elements that in the near future the bank will infringe the requirements for continuing authorisation in a way that would justify the withdrawal of authorization and II) when there are objective elements that the assets of the institution will be in the near future less than its liabilities.

[30] Binder., supra cit.
[31] Deslandes J. and Magnus M. Banking Union (2018):" Towards new arrangements to finance banks under resolution?" European Parliament Directorate-General for Internal Policies EN PE 624.402 available at www.europarl.europa.eu "The exemption of ELA from State aid rules is based in particular on the assumption that a bank is only temporarily illiquid but otherwise solvent at the moment of the liquidity provision. It seems up for debate how to square that understanding of solvency ('point-in-time' assessment) with that of the ECB ('forward looking' assessment), as the 2017 Agreement considers undercapitalised banks with a 'credible prospect of recapitalisation' to be solvent as well".
[32] Cit., n 76.
[33] On Emergency Liquidity assistance see Lastra R.M. (2015) "International financial and monetary Law", Oxford university Press, chapter 4. See also Lastra R.M., Russo C. (2018)" The financing of bank resolution - who should provide the required liquidity?", available at www.europarl.europa.eu. See also Halleberg M, Lastra R.M.(2017) "The Single Monetary Policy and Decentralisation: An Assessment".
[34] Lastra, R. M. supra cit.
[35] Lastra, R.M. supra cit.
[36] Lastra. R.M. Supra cit.
[37] See European Central Bank (2017) "Agreement on emergency liquidity assistance" available at www.ecb.europa.eu.

As specified by the EBA in its guidelines under the above circumstances the infringement of own funds and other requirements for continuing authorization has to be perspective and not current. The same has to be said for the valuation of assets with respect to liabilities. Under this prospective scenario, the likelihood of the breach must be based on "objective elements" taking "the near future" as a time horizon. As regard as "near future" it should be noted that EBA's guidelines leave explicitly[1] the determination of the time horizon to the discretion of the competent authorities. Thus, the near future could be three months, a year or even ten depending on the consideration of the relevant supervisor. By contrast, the objective elements are not linked to any quantitative threshold or any reference parameters at all[38].

Therefore, from a technical point of view the "forward-looking assessment" under article32 (4)(a) and (c) to determine whether a bank must be put into resolution is somewhat awkwardly in contrast with the definition of solvency provided by the 2017 agreement on ELA which states that banks which are in the present undercapitalized but have "credible prospects" of recapitalization must be considered solvent for the purpose of ELA. Thus, either one must conclude that in spite of the general theory ELA could be granted to institutions which are non-solvent and must be put into resolution or b) there is a clash of the emergency liquidity assistance provisions with two of the four circumstances set out under article 32(4)(a) (c) which state that a perspective infringement of the requirements for continuing authorization in the near future and a perspective lack of asset with respect to liabilities in the near future are two sufficient reasons to put the bank under resolution as well as a clash with the state aid rules and the prohibition of monetary financing along with it[39].

Moreover, the situation raises also questions about the failing hypothesis under article 32(4) sub (a) "the *institution infringes the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority" its relationship with the perspective hypothesis under* article 32(4) sub (a) and (c) and the notion of solvency for precautionary recapitalization purposes.

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[38] See EBA Guidelines supra cit., "When assessing the assets and liabilities of the institution in the near future and when assessing whether the institution will comply in the near future with the own funds' requirements, the determination should be based on objective elements including among other things: i) the level and composition of own funds held by an institution and whether it meets the minimum and additional own funds requirements imposed on the institution ii) the results of an asset quality review, including a national/Union/Single Supervisory Mechanism ('SSM') review, indicating a significant decrease in asset value leading to infringement of own funds requirements, where available; iii) results of any valuation conducted in order to inform whether the conditions for resolution are met IV) the results of any other institution-specific assessment of the value of its assets and liabilities supporting a determination that the assets of the institution are less than its liabilities or that this is likely to occur in the near future. Elements of the valuation results may be used in the determination whether the institution infringes or is likely to infringe in the near future the own funds' requirements".

[39] As Lastra supra cit., underlines, since an inherent subsidy exists when a central bank lends to an institution which is non solvent and must be put into resolution, which in turn could lead to financing government deficits via central bank credit. The same as to be said now for institution under resolution. See Mersch, Y. (2018) "The limits of central bank financing in resolution" Speech by Yves Mersch, Member of the Executive Board of the ECB, IMFS Distinguished Lecture Series Goethe Universität Frankfurt, 30 January 2018". Available at www.ecb.europa.eu "in particular the support of insolvent credit and/or other financial institutions, is incompatible with the monetary financing prohibition. Financing insolvent institutions is a government task – indeed the ECB has identified criteria to distinguish between government tasks and central banking tasks. The ECB has also repeatedly clarified that while central banks may be involved in administering resolution measures, they should not finance them. National central banks could also administer resolution measures on a genuine agency basis on behalf and for the account of a third party, that is, the government or one of its entities. In this case, however, the central bank would not itself provide liquidity, but simply carry out these tasks like an agent".

Cases like Veneto Banca are illustrative of the point. Indeed, before being declared "failing or likely to fail by the ECB for breach of the requirement for continuing authorization in a way that justify its withdrawal, the bank has demonstrated a structural inability to comply with the capital requirement[40] for three consecutive years and a deteriorating financial position deepening in time[41]. Since 2014 the bank has been granted firstly the possibility to raise capital in the open market, secondly by using the wide system intervention of Atlante due to the failure of its initial public offering, thirdly has been allowed to benefit from the precautionary recapitalization[42] and after the hypothesis has fallen under the compatibility with state aid and only when the Tiepolo plans I and II have fallen, the supervisory authority ordered the resolution. Therefore, if a bank with serious breaches of capital requirement deepening in time notwithstanding multiple "public interventions" like Veneto Banca has been considered solvent until all the possible private and public means has been exhausted, one cannot avoid to wonder how it is possible to reconcile this definition of solvency with the two circumstances set out under article 32(4)(a) (c) which, again, set out that an actual and perspective infringement of the requirements for continuing authorization in way that justify its withdrawal in the near future (which include capital and liquidity requirements) and a perspective lack of asset with respect to liabilities in the

[40] See European Central Bank (2017) "Failing or Likely to Fail' Assessment of Veneto Banca" available at www.bankingsupervision.europa.eu

[41] The core equity tier of Veneto Banca in 2015 was 7,12% against a minimum required by the ECB of 10,25%, see Introzzi, M. (2015) "SREP BCE: tutti i numeri delle banche Italiane" in Soldi online www.soldionline.it. See the score received for the SREP assessment which was reported by the press to be 4 and therefore the worst possible indicating elevate risk of failure since 2015. See Venetoeconomi (2015)" Bce: BpVi e Veneto Banca, "rischio elevato" in www.venetoeconomia.it /. For year 2016 see: Banca IMI (2016) "Veneto Banca: Equity Company Note" in www.borsaitaliana.it According to the valuation: "The company has a number of weak points, in our view, that management is seeking to address in the business plan, including: 1) the capital base below supervisory requirements: as of December 2015, Veneto Banca's CET1 FL was 6.8%, below the 10.25% SREP requirement to be maintained after June 2016. The company plans to raise EUR 1Bn new funds through a capital increase which, together with the implementation of the BP actions, should drive the CET1 to 14.5% in 2020, according to management's targets; 2) the net deposit outflows of EUR 4.5Bn (or 22.7% of direct funding from the commercial network) experienced in 4Q15 and 1Q16 and a high weighting of corporate deposits are factors of concern, in our view; and 3) asset quality worse than peers: Veneto Banca has a higher-than- peers' NPE ratio, forborne ratio and weighting of NPE on TBV; cash coverage ratios are also below the peers' average, although we highlight that considering collateral, coverage looks more in line with peers; and 4) regulatory and legal issues: the company has a number of outstanding regulatory and legal issues, including inspections by the Consob and ECB and litigations with shareholders over the value of shares only partially provisioned for in 2015. The potential outcome of these issues is difficult to quantify". See also Bank of Italy (2016) "Technical note transmitted by the Bank of Italy to the Committee of Enquiry of the Regional Council of Veneto" in www.bancaditalia.it. For the Capital situation in 2017 and the Breaches of Liquidity see: Reuters (2016) "Veneto Banca warns on liquidity in prospectus for share sale" in www. de.reuters.com. According to which "MILAN, June 7 (Reuters) Veneto Banca IPO-VENE.MI said on Tuesday its liquidity level had fallen below a regulatory minimum at the end of May due to significant outflows as it prepared to tap the market for 1 billion euros ($1.14 billion)". See also Sanderson, R. (2017) "Italy's Veneto banks given state guarantee over liquidity" in www.ft.com. According to the author: "Veneto Banca, the smaller of the two banks, tapped Europe's emergency liquidity assistance last summer, say people with direct knowledge of the decision". See also Senato della Repubblica e Camera dei Deputati (2017) "Disposizioni Urgenti per la tutela del risparmio nel settore creditizio" Dossier XVII Legislatura, Parte I – Schede di lettura, Parte II – Profili di carattere finanziario in www.senato.it, Niccoletti, F. (2018) "Bancarotta Veneto Banca senza liquidità già a Marzo 2017 ma l'insolvenza non è scontata" in Corriere di Verona 18/03/2018 in www.pressreader.com. Sanderson, R. (2017) "Italian finance minister reassures over liquidity of troubled banks". In www.ft.com. See SRB (2018) "Decision of the single resolution board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A. (the "Institution"), addressed to Banca d'Italia in its capacity as National Resolution Authority" non-confidential version in www.srb.europa.eu. See also ECB (2017) "Failing or Likely to Fail' Assessment of Veneto Banca Società per Azioni" in www.ecb.europa.eu. See also Tribunale di Treviso, 27 Giugno 2018 n. 83.

[42] See Banca d'Italia (2017) "La crisi di Veneto Banca S.p.A. e Banca Popolare di Vicenza S.p.A.: Domande e risposte" in www.bancaditalia.it

near future are two sufficient reasons to put the bank under resolution. Especially when considering that these requirements were violated by the bank multiple times as it will be seen in detail below.

The third problem is that the current set up of the trigger is in contrast with the ratio and the conditions to granting ELA. As underlined above, by default, emergency liquidity assistance should theoretically avoid the resolution of a solvent bank for illiquidity or even worse perspective illiquidity. In general terms, the provision of ELA amounts to a crisis prevention tool that falls within the competence of national central banks as part of their mandate to ensure financial stability. This 'crisis prevention' role is fully recognised in the SRM Regulation which explains that the "*need for emergency liquidity assistance is not a condition that sufficiently demonstrates that a [bank] is, or is likely in the near future to be, unable to pay its liabilities as they fall due*"; and therefore, does not need to be placed under resolution[43].

Still, under article 32(4)(b) one of the circumstances in which a bank can be declared likely to fail is a perspective lack of liquidity. This case of "likely to fail" establishes the point of non-viability even before the materialization of a liquidity crisis. The assessment is a forecast of the likelihood of the occurrence of a lack of liquidity. As previously highlighted, even in this case the determination of the near future is remitted to the discretion of the competent authority, whereas the objective elements are established by paragraph 24 of the EBA guidelines are not linked to quantitative thresholds or reference parameters rendering impossible to understand when a bank should be provided ELA or should be put into resolution[44].

The Case of ABLV Bank Luxembourg S.A. well testify the chaos and the risks generated by the excessive discretion granted to supervisory authorities with respect to the definition of the trigger. Indeed, the broad drafting of the norm lured the ECB's supervisors to misjudge a perspective temporary liquidity crisis recoverable by using ELA for a circumstance in which the bank must have been put under resolution. Thus, materializing an evident clash of the assessment provision with those sets out for the agreement on emergency liquidity assistance.

Following the issue by the FinCen of a notice seeking to prohibit the opening or maintaining accounts in U.S dollars based on money laundering concerns ABLV Bank Luxembourg S.A along with the parent company experienced a wave of deposit withdrawal. The institution faced a limit to effectively use a significant amount of its counterbalancing capacity. As a consequence, the institution was unable to process payments in USD. On 18th of February 2018, the ECB invited the CSSF in its capacity as NCA to take the necessary measure to suspend payments. On the same day the institution received ELA and was reported has had more than sufficient high-quality collateral till the failing or likely to fail declaration. On the 23rd February, the ECB forced ABLV out of business by determining that the bank was "likely to fail" in accordance with article 18(4)(c) of the SRMR, as the bank would in the near future be unable

[43] Deslandes, J Magnus, M (2018) "Banking Union: Towards new arrangements to finance banks under resolution?" European Parliament Briefing, Economic Governance Support Unit available at www.ecb.europa.eu.
[44] EBA Guidelines on failing or likely to fail supra cit., n. 4.

to pay its debt as they fall due. The ECB basically reported that should the currently applicable suspension of payment being lifted it would be highly likely that the outflows would continue given the reputational damage suffered by the institution and its parent company. The ECB concluded that the existing counterbalancing capacity was insufficient considering the current liquidity stress and the linkage of the subsidiary with the parent company[45]. Therefore, after the SRB concluded that the other conditions were met and there were no public interest concerns, the Central Bank instructed the CSSF to file an application for the judicial liquidation with the Luxembourg District court[46].

As it was foreseeable the Luxembourg Commercial Court rejected the request made by the CSSF on the ground that the CSSF has failed to prove its claim that ABLV Bank was substantially unable to meet its obligation towards its creditors. The court considered the specific situation of the Luxembourg entity and overruled the assessment of the ECB basing its determination, amongst other, on the strong financial standing of ABLV Bank Luxembourg, S.A which had a strong excess capital (the capital adequacy ratio of more than 29% versus the legal requirement of 10.5%), was compliant with the liquidity buffers (the LCR of 383% versus the legal minimum requirement of 100%), had no bad loans, and a very limited reliance on the group[47].

The case of ABLV Luxembourg S.A. brings about several lessons. On the one hand, the lack of any real specification on the failing and likely to fail assessments, the poorly drafted determination of the point of non-viability for lack of liquidity in the near future brings about the danger of luring supervisors into putting into resolution perfectly sound banks which experience merely liquidity problems and which should have been granted ELA rather than resolved. Thus, potentially destroying value and jobs, damaging the rights of creditors and shareholders as well as the reputation of the bank involved. On the other hand, the lack of a specific determination of the specific non-viability point for banks brings about clashes with the traditional condition required for granting emergency liquidity assistance and contrasts with national insolvency law frameworks which require at least current illiquidity to liquidate a bank. It goes without mentioning that the excessive discretion related to the current assessment make both the supervisors and the entities supervised prone to reputational damages.

[45] "The ECB concluded that the existing CBC is considered insufficient given the current liquidity stress and the failure of the Parent Company" "Finally, as observed by the ECB, [...] also contributed to the inability of the Institution to continue its operations in circumstances in which the Parent Company would be failing, like in the situation at stake". See SRB (2018) "Decision of the single resolution board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS" non-confidential version in www.srb.europa.eu. See ABLV (2018) "The Court Recognises the Soundness of ABLV Bank Luxembourg, S.A" in www.ablv.com in which the bank states that the court recognize ABLV to have limited reliance on the group.

[46] See CCSF newsletter (2018) "ABLV Bank A.S. et ABLV Bank Luxembourg S.A" N° 206 – Mars 2018. See also See European Central Bank (2017) "'Failing or Likely to Fail' Assessment of ABLV" available at www.bankingsupervision.europa.eu See SRB (2018) "Decision of the single resolution board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS" non-confidential version in www.srb.europa.eu. See ABLV (2018) "The Court Recognises the Soundness of ABLV Bank Luxembourg, S.A. Which Can Now Be Sold to New Investors" in www.ablv.com. See also Action brought on 3 May ABLV Bank v ECB (Case T-281/18)(2018/C 259/53) ABLV Bank AS VS European Central Bank (ECB), Delano (2018) court reject call to liquidate Luxembourg branch" in www.delano.lu Mironescu. R (2018) "Luxembourg court extends suspension status for ABLV" Luxembourg Times in www. luxtimes.lu. See ABLV (2018) "ABLV Bank asks the Court of Justice of the European Union to review the decisions of the European Central Bank and the Single Resolution Board" in www.ablv.com

[47] Ibid., n 47.

The fourth problem is that the formulation of the failing or likely to fail trigger raises the risk of differential treatment in analogue cases. This is evident from the comparison of the liquidity and capital situation of Veneto Banca with the position attributable to ABLV Luxembourg S.A. Since 2015 Veneto Banca faced important outflows from customers linked to reputational reasons[48]. The liquidity coverage ratio (LCR) fell below the minimum liquidity requirements set out by article 38 of the commission Delegated Regulation (EU) 201/61[49] two times. This situation occurred in 2016[50] and led the bank to request emergency liquidity assistance (ELA) which was granted [51]. The liquidity situation of Veneto Banca was so endangered that the bank requested a government guarantee on liability to be newly issued for an amount of EUR 3.5 billion which was approved by the Italian Ministry of Finance[52]. A new breach of LCR was also reported in 2017[53].

Turning to ABLV Luxembourg S.A from what has been reported by the bank, from the public version of the ECB's assessment and from the decision of the court emerges that the bank had a very strong capital position the capital adequacy ratio of more than 29% versus the legal requirement of 10.5% and was in actual compliance with the liquidity buffers the LCR of 383% versus the legal minimum requirement of 100%) and had eligible collateral for ELA. The declaration of likely to fail was thus mainly based on the allegation put forward by the central bank that applicable suspension of payment being lifted it would be highly likely that the outflows would continue given the reputational damage suffered by the institution and its parent company and thus, the insufficiency of the counterbalancing of the institution was measured against a merely hypothetical counterfactual.

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[48] Banca IMI (2016) "Veneto Banca: Equity Company Note" in www.borsaitaliana.it. According to the valuation: "We calculate that the company experienced deposit outflows from the commercial network of EUR 4.5Bn between September 2015 and March 2016 (or 22.7% of direct funding from the commercial network). While the LCR (liquidity coverage ratio) has been restored above the minimum requirement in March 2015 (78% from 52% as of December 2015)" Reuters (2016) "Veneto Banca warns on liquidity in prospectus for share sale" in www. de.reuters.com. According to which "MILAN, June 7 (Reuters) Veneto Banca IPO-VENE.MI said on Tuesday its liquidity level had fallen below a regulatory minimum at the end of May due to significant outflows as it prepared to tap the market for 1 billion euros ($1.14 billion)". See also Sanderson, R. (2017) "Italy's Veneto banks given state guarantee over liquidity" in www.ft.com. According to the author: "Veneto Banca, the smaller of the two banks, tapped Europe's emergency liquidity assistance last summer, say people with direct knowledge of the decision". See also Senato della Repubblica e Camera dei Deputati (2017)" Disposizioni Urgenti per la tutela del risparmio nel settore creditizio" Dossier XVII Legislatura, Parte I – Schede di lettura, Parte II – Profili di carattere finanziario in www.senato.it, Niccoletti, F. (2018) "Bancarotta Veneto Banca senza liquidità già a Marzo 2017 ma l'insolvenza non è scontata" in Corriere di Verona 18/03/2018 in www.pressreader.com. Sanderson, R. (2017) "Italian finance minister reassures over liquidity of troubled banks". In www.ft.com. See SRB (2018) "Decision of the single resolution board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A. (the "Institution"), addressed to Banca d'Italia in its capacity as National Resolution Authority non-confidential version in www.srb.europa.eu. Tribunale Treviso sez. II, 27/06/2018, n. 83.

[49] Reuters (2016) "Veneto Banca warns on liquidity in prospectus for share sale" in www. de.reuters.com. According to which "MILAN, June 7 (Reuters) Veneto Banca IPO-VENE.MI said on Tuesday its liquidity level had fallen below a regulatory minimum at the end of May due to significant outflows as it prepared to tap the market for 1 billion euros ($1.14 billion)". See also Sanderson, R. (2017) "Italy's Veneto banks given state guarantee over liquidity" in www.ft.com. According to the author: "Veneto Banca, the smaller of the two banks, tapped Europe's emergency liquidity assistance last summer, say people with direct knowledge of the decision". Niccoletti, F. (2018) "Bancarotta Veneto Banca senza liquidità già a Marzo 2017 ma l'insolvenza non è scontata" in Corriere di Verona 18/03/2018 in www.pressreader.com. Sanderson, R. (2017) "Italian finance minister reassures over liquidity of troubled banks". In www.ft.com.

[50] See financial times ibid., n. 42 "Veneto Banca, the smaller of the two banks, tapped Europe's emergency liquidity assistance last summer say people with direct knowledge of the decision".

[51] See also Sanderson, R. (2017) "Italy's Veneto banks given state guarantee over liquidity" in www.ft.com. According to the author: "Veneto Banca, the smaller of the two banks, tapped Europe's emergency liquidity assistance last summer, say people with direct knowledge of the decision".

[52] Ibid., n. 42.

[53] Ibid., n. 42.

Therefore, notwithstanding the breach of liquidity and capital requirements over the three consecutive years Veneto Banca was declared solvent for the purpose of precautionary recapitalization and granted ELA[54] whereas ABLV notwithstanding the strong capital and liquidity requirements was declared likely to fail for a mere perspective breach of liquidity requirements in the near future[55].

To sum up, a comparison of the two cases reveal that the discretion granted for the judgement and its vagueness is well far above what is needed. Which lead, in turn, to wonder if the power granted to the authorities gives a blank paper on the assessment of banks health and therefore should be considered disproportionate in relation to the outcomes being pursued by the directive

More broadly the analysis of the two cases leads to wonder if the considerable amount of discretion present in the European System with respect to crisis management and bank resolution is a wise policy choice or has created potential for undermining the European treaties framework which is the grounding and foundation of Europe. The current definition of "failing or likely to fail" and the considerable discretion intrinsic to the judgement, overlaps with the notion of solvency for ELA purposes[56] as well as with the definition adopted for precautionary recapitalization purposes[57], making impossible to square the circle and understand when a bank is solvent for the purpose of ELA, when a bank is solvent for public financial support and when a bank must be put into resolution. This means that supervisory authority plays now the role of the judge, jury and prosecutor of banks' financial health, but also expose them to an increased risk of legal suit and eventually to reputational damage, as the Suing of ABLV shareholders testify. It must be also taken into consideration that, if the authority in charge of supervision is also a Central Bank, the lack of trust stemming from eventual mistakes could extend the reputational damage to the monetary policy side and damage the capacity of the Central Bank to influence the market.

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54 Tribunale Treviso sez. II, 27/06/2018 n. 83. The tribunal of Treviso attest in its judgement that: "The same ECB had certified, on 3-4-2017, the conciliation of precautionary recapitalization for a maximum of € 3.104 billion (document.2 and see page 10-11 of the memorandum of 16/3/2018)". "The precautionary recapitalization procedure was started with the full sharing and support of the MEF and the Bank of Italy". Original words of the judgement: "la procedura di ricapitalizzazione precauzionale fu avviata con la piena condivisione e supporto del MEF e della Banca d'Italia. La stessa BCE aveva certificato, in data 3-4-2017, la concedibilità della ricapitalizzazione precauzionale per un massimo di 3,104 miliardi di euro (doc. 2 e v. p. 10-11 della memoria del 16/3/2018)". See also Gruppo Veneto Banca press release 04/04/2017 available at www.gruppovenetobanca.it according to the bank "it received from the Ministry of the Economy and Finance two letters drawn up by the ECB, addressed to the same Ministry which, in addition to confirming the existence of the requisites necessary to access the measure of "precautionary recapitalization"".

55 Ibid., n. 42.

56 With regard to ELA The European Central Bank has defined a bank as solvent if "a) its Common Equity Tier 1, Tier 1 and Total Capital Ratio as reported under CRR on an individual (if applicable) and consolidated (if applicable) basis comply with the harmonised minimum regulatory capital levels (namely 4.5%, 6% or 8%, respectively); or (b) there is a credible prospect of recapitalisation - in case (a) is not met". See ECB (2017) "ELA Agreement" 17 March 2017 available at www.bankingsupervision.europa.eu.

57 With regard to precautionary recapitalisation, the European Central Bank has defined a bank as solvent "if it fulfils the minimum capital requirements (i.e Pillar 1 requirements). In addition, the bank should not have a shortfall under the baseline scenario or the relevant stress test"; see European Central Bank, 'What is a precautionary recapitalisation and how does it work?', 27 December 2016, available at www.bankingsupervision.europa.eu.

The outcome of the current set up is likely to be inefficient for all the parties involved. The current level of discretion makes key provisions overlapping with each other. Thus, raising the risk of either putting into resolution perfectly sound and solvent bank, or giving rise to an inherent violation of the prohibition of monetary financing and state aid rules every time a supervisory authority delays the declaration and put into resolution banks which according to the letter of the law should have been resolved earlier.

The final problem caused by the vagueness of the failing or likely to fail trigger is given by the fact that failing or likely to fail's guidelines far for specifying the assessment, broaden the amount of discretion left in the hand of supervisory authorities. Thus, affecting negatively the all assessment framework. An in-depth analysis of the guidelines is outside the scope of this paper, still it worthy to note that the assessment framework in the guidelines is developed using mainly a qualitative rather than a quantitative approach.[58]. Whilst this approach provides some common metrics and factors to be considered in the assessment, it leaves a considerable degree of discretion to competent authorities in determining the non-viability triggers.

In the failing or likely to fail's Guidelines the influential parameters for the ascertainment of a forthcoming situation of financial distress (namely: "near future" and "objective elements") are left to the discretion relevant NCAs and of the ECB. As a result, the near future could be three months, a year or even three. It will depend on the case, on the authority involved and on the member state in which the bank it is located. The specification of the objective elements suffers the same limitations. Indeed, the objective elements are detailed by the guidelines by merely enlisting a set of indicators and leaving to the discretion of national authorities to determine the threshold which is required to trigger the non-viability indicators listed[59].

This is in part recognized by the EBA itself and in part evident by the redundant use in the guidelines of terms such as "serious", "significant", "non-temporary" or "material". These terms are broad and remit to the discretion of national authorities also the determination of the severity of the non-observance of regulatory requirements (capital and liquidity as well as governance arrangements). In addition, the EBA states in paragraphs 15, 21, 22 and 23 of the Guidelines, that the list of indicators is not exhaustive and allow authorities to consider other indicators unilaterally[60].

The lack of any further specification provided as regards as the elements of the determination and the time horizon leaves to each National Authority the power to determine the materialization and the

[58] EBA, "Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU" 26/05/2015 pag 24.
[59] EBA, "Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail".
[60] EBA Guidelines supra cit. Particularly important in this light are the locutions "should be based on objective elements including among other things" or "additional elements that should be considered, when carrying out the determination … where they are relevant to the characteristics of the institution, include …." which explicitly leaves the metrics of assessment opened to the discretion of the relevant national competent authorities. The consequence is that the vagueness affects both the qualitative and the quantitative side of the assessment as well as its time horizon.

severity of the violation of the elements which lead to the determination of "failing or likely to fail" and article 32 (4) (a-c). Therefore, the assessment of the trigger will differ not only from a case by case basis but on a state by state basis. Thus, putting at stake the coherence in the application of the directive, increasing the risk of jeopardizing its implementation and fostering regulatory arbitrage in the single market. The present lack of a common standardized framework could lure financial institutions into forum shopping in the Member States where regulatory practices are deemed looser. The most likely outcome could be the jeopardizing of the application of the directive in the Union's territory and the undermining of regulatory agencies' ability to deliver a coherent judgement. Moreover, the broad and undetermined range of elements which could be used as a basis of the assessment of "failing or likely to fail" creates also a form of opacity that makes it hard to discover why in practice under the specific cases the decision of "failing or likely to fail" has been taken, on which particular grounds, what are the gains and what are the costs for creditors and shareholders, therefore indirectly nullifying the duties of transparency and accountability of the authorities holds toward the parliaments and the European citizens and the affected parties.

Finally, the last problem, which affects the trigger is that the use of the traditional insolvency tests to define the current circumstances in which an institution has to be considered failing are inefficient and ineffective to achieve the directive and regulation purposes. As it has by underlined by the doctrine, there has to be "Some value left to achieve the general objectives of the directive"[61].

As it is commonly acknowledged the resolution objectives have to inform the activity of supervisory authorities all throughout the resolution process[62]. These objectives reconnect altogether a series of important provision embedded in the Directive shaping and harmonizing their implementation and practical application. Thus, creating a net of synergies to ensure the consistency in supervisory authorities' action and the coherence of the system[63]. The resolution objectives constitute the cardinal parameter of the system because they enclose altogether the *ratio* and the aims for which the new normative framework has been created. They bound the supervisory action and orient the normative provisions to ensure the continuity of critical functions, to avoid a significant adverse effect on the

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[61] Douglas J. Guynn, R. Kornberg, A. Olivares-Caminal, R. Paterson S. Singh, D (2016)" Debt Restructuring", Oxford University Press, Chapter IX.

[62] On resolution objectives and financial stability please see Kleftouri N. "European Union Bank Resolution Framework: can the objective of financial stability ensure consistency in resolution authorities' decisions?" (2017) ERA Forum.

[63]. In particular, resolution authorities must regard these objectives when: shaping their resources and operational capacity ex-art. 3(8), deciding on whether to legislate for additional resolution tools and powers ex-art 37(9); managing the institution under resolution ex art 34(1) (c) and 35(3); deciding whether to exercise control over the institution under resolution when taking resolution actions ex art 72(3); considering whether to take resolution actions that have not been contemplated in the resolution plan ex art 87(j), 91(6)(a) and 92(2)(a); applying the resolution tools and powers ex art. 31(1) and 91(6)(b), marketing the assets, rights, liabilities, shares or other instruments of ownership of the institution under resolution ex-art. 39(3), authorising the bridge institution ex-art art. 41(1), exempting mortgage credit institutions from the application of the minimum requirement for own funds and eligible liabilities (MREL) ex-art. 45(3)(b); setting the MREL ex-art. 45(6) (a); writing down or converting Additional Tier 1 and Tier 2 instruments ex-art. 60(1)(b) and 60(1) (c); considering whether to extend the deadline for the preparation of the business reorganisation plan ex-art. 52(3) of the; exercising ancillary powers ex-art. 64(2) ; using the financing arrangements ex art. 100 of the BRRD; refusing to recognise and enforce third-country resolution proceedings ex art. 95(b); taking independent action in relation to a Union branch ex Art. 96(3) of the BRRD; and when triggering resolution ex-article 32(5).

financial system, in particular by preventing contagion, maintaining market discipline, protecting public funds by minimising reliance on extraordinary public financial support, to protect depositors and investors, to protect client funds and client assets.

In this respect providing for the alternative use of the two traditional insolvency tests to determine a point of non-viability which has to lie before insolvency is neither the most intelligent nor the most considerate move on the simple ground that ***banks are a special kind of corporates***. Starting from the circumstance set out by article 32(4) (b) "*the institution is unable to pay its obligation as they fall due",* the first objection to raise is that, as underlined by the doctrine, problems in liquidity not always imply that the bank should be considered failing or likely to fail. As Lastra and Hupkes [64]underline: "The test of insolvency as the inability to meet payments as they fall due is not applicable to banking since the inability to honour the convertibility guarantee of deposits is not a proof of insolvency, but rather an evidence of illiquidity". Indeed, because of their business structure, banks are structurally exposed to maturity mismatch.

Banks hold highly liquid liabilities in the form of deposits payable on demand, whereas on the asset side they hold long-term loans that may be difficult to sell against the short notice. Banks can have problems of market liquidity (difficulties in transforming illiquid assets into cash) or funding liquidity problems (difficulties to obtain funding from the market) due to several factors i.e. adverse market condition, rumours about the financial situation of the bank etc. Still, like the aforementioned case of ABLV testify a current or prospective state of illiquidity alone does not equate to assert that the bank is non-viable especially if it has high-quality long-term assets. Therefore, in the absence of other elements, the liquidity situation alone should be regarded as a condition for granting ELA as history and the doctrine[65] teaches us, rather than a condition to put the bank into resolution. Concluding on this point, the provision set out by article 32(4) (b) carry out the risk to clash with the traditional territory of ELA and to put into resolution a perfectly sound and solvent bank.

Turning to balance sheet insolvency under article 32(4) (c), it must be underlined that, on the one hand, as the insolvency practice demonstrates[66], it carries out its own uncertainty and forecasting elements and has a relative importance in determining the point of non-viability of a company because it must be read in conjunction with the cash flow test and by taking into consideration the particular circumstances of the case. On the other hand, it must be pointed out that this kind of test is hardly fit to determine the point on non-viability of a bank if the resolution objectives have to be achieved.

[64] Lastra, R. M. "Cross-border Bank Insolvency" Law in transition online, October 2007 ebrd.com/country/sector/law Hüpkes, E. "Insolvency – Why a Special Regime for Banks", in Current Developments in Monetary and Financial Law, Vol. 3, International Monetary Fund, Washington DC, 2003.
[65]Lastra, R.M. supra cit.
[66]Lewin, Sophy "Net liabilities + post enforcement call option = balance sheet insolvency? Lessons from Eurosail" (2010) 6 Corporate Rescue and Insolvency 239, Allison, David "The continuing search for the meaning of s 123(2) of the Insolvency Act 1986: The Supreme Court decision in Eurosail" (2013) 8 Journal of International Banking and Financial Law, 492. See also n. 61.

In this respect, the conclusion reached by the British jurisprudence in the Eurosail[67]the case is emblematic. Indeed, as affirmed by the court although the statutory balance sheet is likely to be the start of the inquiry, a misbalance in assets with respect to liabilities does not suffice to provide a truthful and fair view of the financial position of a company. Equally important in this respect are contingent and prospective liabilities which are not reflected in the statutory balance sheet. Evaluating the viability of an institution represents all but a mechanical exercise which entails due attention to considering prospective elements and keeping a firm eye both on commercial reality and commercial fairness when the particular circumstances of the cases so require and in any case, it cannot be taken alone to evaluate the financial condition of a company as the cash-flow test should also influence the determination of the financial health of a corporate[68].

Turning to its applicability in a situation of banking distress, it should be taken into consideration that if there has to be value left to achieve the objectives of the directive, the balance sheet test is hardly fit as an index to determine the point on non-viability test for a bank. This is expressly recognized by recital 57 of the SRM regulation which contradict the express letter of the law by asserting" *The decision to place an entity under resolution should be taken before a financial entity is balance sheet insolvent and before all equity has been fully wiped out*"[69].

Thus, the norm implicitly recognize that waiting until the materializing of a misbalance in assets to liability to resolve a bank would already compromise the critical functions of the entity via mass withdrawals, fire sales and, if the bank is large enough, would already endanger financial stability via the interbank inter-institution channel, the payment systems and the widespread of information spreading contagion. Thus, precisely creating the effects that the resolution objectives want to prevent, posing the supervisory authorities' action in stark contrast with article 31(2) and 32(5), creating disharmony in the system and nullifying the purposes for which the new framework has been created.

3. Framing "Failing or likely to fail" in the BRRD, SRM and National Law context- meaning, purpose and interpretation- the Principle of Proportionality.

The explanation of the technical assessment and the reference to the practical cases make it easier to classify the resolution condition in a systemic perspective in order to understand more deeply its meaning and to better identify the problems related to the judgement.

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[67] Ayres, N. "The Eurosail Ship Has Sailed…and Left Muddied Waters in its Wake" (2014) 2 Corporate Rescue and Insolvency 66.
[68] Lewin, Sophy "Net liabilities + post enforcement call option = balance sheet insolvency? Lessons from Eurosail" (2010) 6 CRI 239, Allison, David "The continuing search for the meaning of s 123(2) of the Insolvency Act 1986: The Supreme Court decision in Eurosail" (2013) 8 JIBFL 492.
[69] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 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 Resolution Fund and amending Regulation (EU) No 1093/2010 Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU.

The BRRD and the SRM regulation set out the three peremptory conditions to allow an objective determination on whether resolution authorities should take resolution actions. Therefore, these three conditions substitute the traditional insolvency law triggers under the new regime[70]. Among them, "failing or likely to fail" possess the function to determine the point of non-viability of the banking business and substitute the traditional insolvency tests which, given the peculiar nature of the banking activity, have already in the past been recognized as not applicable to banks[71] and at the same time act with the other two as legal safeguards to ensure that only overarching concerns regarding financial stability motivate the impairment of creditors' and shareholders' rights[72].

In this respect, it has been universally recognized that waiting until the materializing of a functional non-temporary liquidity shortage and a disbalance in assets to liability to resolve a bank, would already compromise the critical functions of the entity via mass withdrawals, fire sales and, if the bank is large enough, would already endanger financial stability via the interbank inter-institution channel, the payment systems channel and the information channel spreading contagion[73]. Still, from the fact that reasons of financial stability and public interest demand to set a point of non-viability different as compared to the test applicable to other companies does not automatically follow that the purpose of the first resolution condition ("failing or likely to fail") is to grant authority time and the required discretion to intervene early enough[74].

As regard as the timing, it is worth reminding that given the extensive set of powers granted by the current bank resolution regime the authorities do not need time to determine what to do in case of resolution. Authorities already have a resolution strategy in place stemming from ongoing supervision,

[70] Cit., ibid., n. 2 on the same note see also European Central Bank (2017) "What does it mean when a bank is failing or likely to fail?" available at www.bankingsupervision.ecb.europa.eu.

[71] For a complete reconstruction of the point see Dombret. A. (2017): "Failing or likely to fail? Putting the European banking union to the test" Speech by Dr Andreas Dombret, Member of the Executive Board of the Deutsche Bundesbank, at the Deutsche Bundesbank's University of Applied Sciences, Hachenburg, 21 August 2017 "All in all, one thing is clear: when it comes to the timing of "failing or likely to fail" verdicts, banking supervisors cannot simply arrange these around the premier league schedule. A lack of confidence and liquidity can force the supervisors' hand at extremely short notice. In each individual case, every single detail needs to be scrutinised so that a well-thought-out decision can be made. In this regard, cooperation within the SSM and with the SRM has worked well in the cases I have mentioned". On the effects of banks' failures upon society and contagion channels see also Lastra. R.M. (2015) "International Financial and Monetary Law" Chapter 4, crisis managements paragraph F, "Systemic risk and systemic crises". Oxford University Press.

[72] Binder J.H. (2016) "Resolution: Concepts, requirements and Tools" Ch. 1, in id. and Dalvinder Singh (eds.), Bank Resolution: The European Regime, Oxford University Press. The author asserts: "these triggers – which are complemented by EBA guidelines pursuant to article 32(6) of the Directive are designed to further restrict the relevant authorities' powers and, in this regard, add to the objectives prescribed by article 31. Conceptually, the triggers should ensure that creditor rights – which, given the discretionary nature of resolution, are likely to be less effectively protected in alternative resolution regimes supervised by resolution authorities than they would be in a normal insolvency liquidation – are infringed only in cases where concerns for the protection of financial stability outweighs the interests of individual stakeholders".

[73] Ibid., n 4.

[74] See Freudenthaler, D. Lintner, P. (2017) cit., supra n.7 "The FOLTF definition used under the BRRD is rather vague (and it will be difficult in practice to define the point of non-viability) but gives the required discretion to intervene early enough".

monitoring and most importantly the setting up of resolution plans[75]. The idea embedded in the whole directive is that both, banks and regulators have to be prepared in advance to face failure in order to minimize negative externalities[76]. This is the reason why resolution plans have been defined as "one of the preventive innovations of the BRRD"[77]. Moreover, according to the doctrine at the point this trigger needs to be pulled it is time to act to avoid adverse effects on the market and on financial Stability[78].

Having ruled out that the authority at the stage of resolution needs time to tailor the resolution strategy[79] let's talk about administrative discretion. According to uniform constitutional and administrative doctrine and jurisprudence the amount of technical discretion allowed in the administrative proceeding to the relevant authorities is always a means to a public outcome that the legislator consider worthy of protection and not a goal *per se*[80]. Therefore, it has nothing to do with the purpose of "failing or likely to fail" as a resolution trigger. The thesis here backed is that: although a good amount of technical discretion is to be granted to assess the situation of a falling bank, the current level of technical discretion

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75 On the function, purpose and framing of the resolution plans there is a vast literature. See *ex multis* Merc. G. "Resolution Plans" in Understanding the Bank Recovery and Resolution Directive: A Guidebook to the BRRD, The World Bank Group, available at http://pubdocs.worldbank.org/. According to the author: "Resolution planning by resolution authorities is one of the preventives innovations of the BRRD. It better prepares for future crisis situations by assessing the significance of a bank with a focus on its critical functions and possible implications of a failure". Kleftouri N. (2017) "European Union Bank Resolution Framework: can the objective of financial stability ensure consistency in resolution authorities' decisions?" ERA Forum June 2017, Volume 18, Issue 2, pp 263–279. According to the author: "Resolution authorities must undertake appropriate planning (resolution planning) in accordance with a number of rules and processes under the Directive. In conducting resolution planning, resolution authorities may require institutions to assist them by for example drawing up a draft resolution plan or preparing a draft update of the existing resolution plan". See also: Schillig, M. (2013) "Bank Resolution Regimes in Europe – Part I: Recovery and Resolution Planning, Early Intervention" European Business Law Review, Issue 6, pp. 751–779. The author asserts: "In addition, resolution authorities, in consultation with competent supervisory authorities, have to prepare resolution plans for each institution, providing for the resolution actions that may be taken where the institution meets the conditions for resolution, in particular the options for applying the resolution tools and resolution powers. The contents of a resolution plan are specified in Art 9(4) of the Proposal. Of particular significance seems to be the demonstration of how critical functions and core business lines can be legally and economically separated in order to ensure their continuity under a range of stress scenarios". See also Bank Recovery and resolution Directive art. 10(6)"Resolution plans shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure of the institution or to its business or its financial position that could have a material effect on the effectiveness of the plan or otherwise necessitates a revision of the resolution plan".

76 Ibid., n.75.

77 Ibid., n.75.

78 See Dombret, A. (2017) cit., supra: "A lack of confidence and liquidity can force the supervisors' hand at extremely short notice".

79 See Janssen L. (2018) "Bail-in from an insolvency law perspective" Journal of International Banking regulation, 2018 issue I "Moreover, the bail-in rules create a kind of pre-packaged procedure in the sense that the debt restructuring is based on the resolution strategy agreed by the relevant resolution authorities beforehand in so-called resolution plan". Hüpkes, E. (2015)"Revolution in resolution: loss absorption, recapitalisation and restructuring of distressed banks" Butterworths Journal of International Banking. and Financial Law 35.

80 Cons. Stato, Ad Plen., 24 maggio 2007, n. 7; Cons. Stato, sez. IV, 7 maggio 2007, n. 1971; Cass. civ., sez. Un., ord. 19 aprile 2017, n. 9862; Cons. Stato, sez. IV, sent. n. 1274/2010. On the point see Caringella, F. (2011) "Corso di Diritto Amministrativo: profili sostanziali e processuali" Giuffre Editore VI Edizione, Galanti, E. (2009)" Discrezionalità delle autorità indipendenti e controllo giudiziale" Bank of Italy, Legal Research Paper Series available at www.bancaditalia.it, Giannini, M.S. (1989) "Il potere discrezionale della pubblica amministrazione. Concetto e problemi" Giuffrè, 1989, Virga, P. (1957) "Appunti sulla cosiddetta discrezionalità tecnica", in Jus, 1957, 95; De Valles, A.(1966) "Norme giuridiche e norme tecniche", in Scritti in onore di A. C. Jemolo, Arcargne Editore , 1966, III, 177; Daniele, N. "Discrezionalità tecnica della pubblica amministrazione e giudice amministrativo", in Scritti in memoria di Antonino Giuffré, III, Milano, 1967, 295 ss.; Ledda, F.(1989) "Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica", in Diritto Processuale amministrativo, 1989, 72; Cerulli Irelli, (1984) "Note in tema di discrezionalità amministrativa e sindacato di legittimità", in Diritto processuale amministrativo, 1984, 46 ss.; Marzuoli, C. (1985) "Potere amministrativo e valutazioni tecniche", Giuffrè, 1985, 8 ss., Salvia, F. (1992) "Attività amministrativa e discrezionalità tecnica" in Diritto processuale amministrativo,1992, 685 ss.; Pelagatti, G. (1992) "Valutazioni tecniche dell'amministrazione pubblica e sindacato giudiziario, un'analisi critica dei recenti sviluppi della dottrina giuspubblicistica", in Rivista trimestrale di diritto pubblico 1992, 158; De Pretis D. (1995) "Valutazione amministrativa e discrezionalità tecnica", Cedam, 1995; Mastrangelo D. (2001) "La tecnica nell'amministrazione fra discrezionalità pareri e merito", Cacucci, 2001.

stemming from the vagueness of the current assessment is clearly excessive. In other words: the assessment criteria set out under article 32 (4) as specified by the EBA's guidelines are drafted so broadly to touches the arbitrium. Thus, as it will be demonstrated below, the new provisions foster the risk of regulatory arbitrage and arbitrary differentiations in analogue cases making supervisory authority prone to reputational damage. They also cause clashes with other normative provision present in the system. Therefore, the interpretation of the provisions of article 34(2) must be further restricted and limited to what it is essential to achieve the outcomes of the directive. A level of normative reconsideration would be desirable.

In order to understand the point made above, one must clarify that the new regime is essentially an administrative procedure which aims on the one hand to achieve the same economic ends as the traditional insolvency proceedings while, at the same time, preserving the stability of the financial system as a whole and minimize public financial support by shifting the losses associated with the failure of financial institutions to shareholders, creditors and to the senior management of the insolvent firms[81].

This administrative procedure entails as a paradigm the sacrifice of the rights of both creditors and debtors[82]. These limitations are clear and evident when comparing the position of the interested parties under the new regime to the position they hold under normal insolvency proceeding. Starting with creditors', the highly discretionary nature of the implementation of resolution tools is well susceptible to affect negatively the rights of creditors on both a procedural and a substantial point of view. From a procedural perspective, the administrative nature of the new resolution regime which entails no participation of the creditors whatsoever in the decision-making process force creditors to be passive subjects in the hand of resolution authorities. By contrast, under national insolvency law creditors' interests are safeguarded by allowing them an active monitoring and participation in the insolvency proceeding, usually by resorting to collective bodies like the creditor committee which represent

[81] For a complete view of the point see Binder. J. H. (2017) The Position of Creditors Under the BRRD Commemorative Volume in memory of Professor Dr. Leonidas Georgakopoulos, Bank of Greece's Center for Culture, Research and Documentation, 2016, pp. 37-61 according to author "the legal nature of the new resolution tools is based on administrative law and designed and managed by resolution authorities with no participation of creditors in decision-making whatsoever". See also Binder. J.H (2015) "Cross- Border Coordination of Bank Resolution in the EU: All Problems Resolved?", Working Paper (2015), available at www.ssrn.com. See also Janssen L. (2018) "Bail-in from an insolvency law perspective" Journal of International Banking regulation, 2018 issue I. The author asserts "The EU bank resolution rules aim to replicate the economic effects of a traditional insolvency procedure for a failing bank's shareholders and creditors and recognise several principles of insolvency law, while the effects of a bank failure on the financial system and the wider economy are taken into account. They establish an administrative, non-judicial bank resolution procedure in which a resolution authority is allowed to intervene in and restructure a bank which is considered failing or likely to fail, with a view to safeguard its essential services and functions, including its deposit portfolio, and make other parts subject to a controlled wind-down". Schillig, M. (2016) "Resolution and Insolvency of Banks and Financial Institutions" pp. 54–55; S. Gleeson and R. Guynn, Bank Resolution and Crisis Management, Oxford University Press, pp. 3 5; Binder J.-H., (2015) "Komplexitätsbewältigung durch Verwaltungsverfahren? Krisenbewältigung und Krisenprävention nach der EU Bankensanierungs- und -abwicklungsrichtlinie" (2015) 179 ZHR Zeitschrift füwr das gesamte Handels- und Wirtschaftsrecht 93–95, 105; J.-H. Binder, (2014), "Resolution: concepts, requirements and tools" (2014), p.9 www.ssrn.com.
[82] Ibid n. 14 and 13.

creditors' interests, positions in a balanced way and possess functions of authorization of extraordinary administration acts, control, supervision as well as consultative functions[83].

Turning to a substantive point of view, in spite of the grandiose concepts of "no creditor worse off" and "*pari-passu* principle" a reality check reveals that the position of creditors under the new bank resolution regimes will be systematically worse as compared to national insolvency law regimes. Starting from the application of resolution tools, it has been noted how each of the instrument provided by the directive entails in a way or another a different discretional treatment of "systemically relevant" and "non-systemically relevant" commercial relationships. Under the sale of business, bridge institution and asset separation tools, the former has to be transferred to a new acquirer which is expected to fully perform the ongoing obligation *vis-a-vis* third parties whereas the latter remain with the insolvent entities which have to be wound up under national insolvency law and receive the ordinary insolvency dividend. Consequently, unequal treatment between specific groups of creditors is the rule rather than the exception. Against this background, it is worth nothing to object by invoking the safeguards prescribed by articles 73 and 75 of the directive. Indeed, although these articles want to ensure that the shareholders and those creditors whose claims have not been transferred or have been bailed in, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings, there will be a "*reformatio in peius*" of creditors' treatment both in term of time and terms of amount[84].

As regard as the time, the transferred claims will be repaid earlier, the remaining claims later. As regard as the amount, creditors whose claims have not been transferred will receive the repayment against the insolvency counterfactual whereas creditors whose claim have been transferred can reasonably expect full repayment. Moreover, the repayment of claims which rest with the insolvent entity will be likely to be further impaired by the complexity of the valuation assessment. In fact, "evaluating a complex, interconnected business, whose value is highly contingent on the market environment, on a hypothetical basis will inevitably prove to be a daunting task, especially in the context of cross-border banks and banking groups"[85]. Adding up to that, it must be underlined that the implementation of resolution action will affect the market environment and the factual basis of valuation. Against this background determining exactly the hypothetical outcome of an ordinary winding-up will be no more than wishful thinking. To sum up the exercise of valuation will be likely to require the deployment of significant financial resources and increase ex-post litigation dramatically which for creditors will entail the wasting

[83]For an in-depth discussion on the point See Binder, J.H. cit., supra. See also Gardella, A (2015) "Bail-in and the Financing of Resolution within the SRM Framework", in Danny Busch and Guido Ferrarini (eds.), European Banking Union, Oxford University Press; World Bank, (2011) "Revised Insolvency and Creditor Rights Systems Principles" (2011), available at www.worldbank.org p.20 ss; UNCITRAL, (2011) "Legislative Guide on Insolvency Law" part two, chap. III, paras. 75-88 (2011), available www.uncitral.org.

[84] Ibid n.16.

[85] Ibid n.16 Binder cit., for the Valuation under the BRRD see also Mitchell, D. (2014) "the no-creditor-worse-off principle from a Valuation perspective: standing in the shoes of a hypothetical liquidator", Butterworth's Journal of International Banking and Financial Law (2014), 233, at p. 234. See also, Athanassiou P. (2014) "Valuation in Resolution and the no-creditor worse off Principle" Butterworth Journal of International Banking and Financial Law 2014, volume 29, issue 1. See also Lastra R.M., Olivares- Caminal R. (2018) "Valuation Reports in the Context of Banking Resolution: What are the Challenges?" available at www.europarl.europa.eu.

of further financial resources dragging on for years, thus reducing the prospect of recover the difference between the real outcome of resolution action and the hypothetical proceeds of the ordinary winding-up based on nothing more than a set of assumption[86].

On a final note, the information asymmetry between resolution authorities and creditors will restrict the efficacy of legal redress. The above considerations are worth also for the valuation with respect to the bail-in tool[87]. With the aggravating circumstance that the write-down power could entail an integral debt write-off. Since the directive leaves to the discretion of the resolution authority to decide whether some liabilities should be excluded from bail-in, it is clearly impossible to assess *ex-ante* whether the single resolution proceeding is compliant with the "no creditor worse off" principle or not[88].

Turning to the debtors' rights, the impairment the new regime brings about pertains to "non-monetary" rights which possess a higher ranking on the constitutional ladder. Although under national insolvency law the proceeding for the declaration of insolvency has often summary nature, the regime effectively protects the debtor's right to a due process of law, his right of defence, and his right to a fair hearing in compliance to the principle according to which no one could be declared insolvent without being heard and having had the possibility to defend himself[89]. For example, the Italian Constitutional Court in its judgement 141/1970, declared the old art 15 unconstitutional in the part in which it did not provide for the court to order the appearance of the debtor for the exercise of the right of defence[90]. This minimum standard of protection for the debtor is also embedded in international standards, such as the World Bank principles for effective insolvency and creditor/debtor regimes and the Uncitral legislative guide on insolvency law[91]. The protection of the debtor is also granted by the fact that the insolvency

[86] See Binder Supra cit., Carriero V. (2017) "Bank Rescues and Legal Challenges: The Case of Bail In" 28 *European Business Law Review*, Issue 5, pp. 635–647 See also: De Serière, V. Van der Houwen D. (2016) ""No creditor worse off" in case of bank resolution: food for litigation?" Journal of International Banking Law and Regulation, Issue 7, 2016, p. 376.

[87] Janssen, L, Carriero, V. Lener P. De Serière, V. Van der Houwen, Binder J.H. supra cit. See also Tobias H. Tro ̈ger.T.H.(2015) "Regulatory Influence on Market Conditions in the Banking Union: the Cases of Macro-Prudential Instruments and the Bail-in Tool" Eur Bus Org Law Rev (2015) 16:575–593 Tro ̈ger., T.H (2018) "Too Complex to Work: A Critical Assessment of the Bail-in Tool under the European Bank Recovery and Resolution Regime" Journal of Financial Regulation, 2018, 4, 35–72.

[88] Carriero cit., supra, The author asserts: "In this case, differently from what happens in a normal insolvency proceeding, the creditor shall not be involved in the bankruptcy assets' distribution. And since the BBRD leaves it up to the resolution authority in some cases to decide whether some liabilities should be excluded from bail-in if their exclusion appears necessary or appropriate to ensure the continuity of critical functions or to avoid significant adverse effects on financial stability (Art. 44, 49 BRRD), it is impossible to assess ex ante whether the single resolution proceeding is compliant with the "no creditor worse off" principle or not".

[89] See UNCITRAL, (2011) "Legislative Guide on Insolvency Law, Party in Interest's Right to Be Heard and To Appeal" (part two, chap. III, paras. 116-120) (2011), available at www.uncitral.org. The guide states: "The insolvency law should specify that a party in interest have a right to be heard on any issue in the insolvency proceedings that affects its rights, obligations or interests. For example, a party in interest should be entitled to:(a) Object to any act that requires court approval; (b) Request review by the court of any act for which court approval was not required or not requested; and (c) Request any relief available to it in insolvency proceedings right of appeal. The insolvency law should specify that a party in interest may appeal from any order of the court in the insolvency proceedings that affects its rights, obligations or interests".

[90] See Italian Constitutional Court (Corte Costituzionale) sentenza n.141 anno 1970, in www.giurcost.org.

[91] World Bank, (2011) "Revised Insolvency and Creditor Rights Systems Principles" (2011), available at www.worldbank.org p 20 ss the key objectives and policies enlist, among others, "Provide for timely, efficient, and impartial resolution of insolvencies; Prevent the improper use of the insolvency system; Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments". As regard as due Process: Notification and Information the guide states "Effectively protecting the rights of parties with an interest in a proceeding requires that such parties have a right to be heard on and to receive proper notice of matters that affect their rights, and that such parties be afforded access to information relevant to protecting their rights or interests and to efficiently resolving disputes".

assessment is carried out by independent and impartial judges and the presumptions about insolvency are clearly defined in the law. Lastly, the debtor has the right to appeal the decision of the court on its own insolvency[92].

By contrast the BRRD regime subject the right of defence and due process of Law to considerable limitations. Indeed, article 85 of the Directive limits the possibility of any legal challenge to the decision taken by the authority to ex-post resolution action, provides that the effectiveness of a possible appeal against the measure will not alter in any case the immediate effectiveness and enforceability of the resolution decision and finally imposes on the measure a rebuttable presumption that a suspension of its enforcement would be against the public interest[93]. Lastly, in order to protect the interests of third parties acting in good faith, the only remedy provided for the loss suffered by the applicant caused by a wrongful decision or action by the resolution authorities is ex-post compensation[94].

In light of the above it emerges that the new regimes could potentially entail a significant impairment to the right to property as defined in article 17 of the European charter of human rights, article 1 of Protocol 1 of the European Convention of Human Rights, as well as to the right to an effective remedy and fair trial ex article 47 European charter of human rights as well as to the right of defence as embedded in article 48 European Charter of Human rights and finally violation of the principle of equality and non-discrimination ex articles 20 and 21 European Charter of Human rights[95]. These limitations are the costs the new regime requires to pay in order to preserve financial stability and avoid

[92] See n. 24 as regard to appeal the guide states: "Afford timely and proper notice to interested parties in a proceeding concerning matters that affect their rights. In insolvency proceedings, there should be procedures for appellate review that support timely, efficient, and impartial resolution of disputed matters". See also UNCITRAL supra cit., "Party in Interest's Right to Be Heard and To Appeal (part two, chap. III, paras. 116-120) Right to Be Heard and To Request Review "The insolvency law should specify that a party in interest have a right to be heard on any issue in the insolvency proceedings that affects its rights, obligations or interests. For example, a party in interest should be entitled to: (a) Object to any act that requires court approval; (b) Request review by the court of any act for which court approval was not required or not requested; and (c) Request any relief available to it in insolvency proceedings". Right of Appeal: "The insolvency law should specify that a party in interest may appeal from any order of the court in the insolvency proceedings that affects its rights, obligations or interests".

[93] See on the issue: by Haentjens, M. "judicial review of resolution action" in Understanding the Bank Recovery and Resolution Directive: A Guidebook to the BRRD, The World Bank Group, available at http://pubdocs.worldbank.org/. See also Savigni, S. and Nabilou, H. (2018) "Undermining Judicial Review in Bank Resolution: Is the Bang Worth the Buck?" (June 4, 2018). Available at SSRN: www.ssrn.com, Schillig, M. (2016) "Resolution and Insolvency of Banks and Financial Institutions", (OUP 2016), p.117.

[94] Ibid n.27.

[95] Non-discrimination was, for example, invoked by Dutch and U.K. claimants in the Icelandic banking crisis. See Judgment of the EFTA Court, Case E-16/11, EFTA Surveillance Authority and Commission v Iceland, 28 January 2013. In its HETA ruling (VfGH 3.7.2015, G 239/2015 ua), the Austrian Constitutional Court found that the differentiated treatment of creditors within the class of subordinated creditors based on the cut-off date of their claims constituted a violation of the right to property (see Raschauer (2016) pp. 15-17). On the case of Banco Espirito Santo/Novo Banco (re-transfer of liabilities related to non-subordinated bonds intended for institutional investors in the amount of approximately EUR 2 billion) see Goldman Sachs v Novo Banco [2015] EWHC 2371 (Comm); Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA [2016] EWCA Civ 1092; Garcia (2016), pp. 56-57.

economic disruption. Therefore, within certain limits, they can be considered perfectly legal[96]. The jurisprudence of the European Court of Human Rights and the European Court of justice and National Courts is clear in this sense[97].

Still, as the jurisprudence of the Courts of Justice[98] also asserts the limitation of the rights of individuals must " correspond to objectives of public interest pursued by the Union"[99] and must "not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed"[100], Therefore the sacrifices imposed by the directive on constitutionally protected rights must be justified and limited to the cases in which concerns of financial stability and public interest subsist objectively. If it can be given for granted that reason of public interest legitimizes the impairment of individual rights, it cannot be given for granted that public interest reasons exist when the administrative authorities say so. This is why in the first place when it comes to all the resolution triggers a restrictive interpretation is due. This is the reason why, as Binder asserts, the purpose of the three resolution triggers is "to further restrict the relevant authorities' powers"[101].

As it has been stated "[Conceptually, the triggers should ensure that creditors' rights …] and debtors' [which, given the discretionary nature of resolution, are likely to be less effectively protected in alternative resolution regimes administered by resolution authorities than they would be in a normal insolvency liquidation – are infringed only in cases where concerns for the protection of financial stability outweigh the interests of individual stakeholders]"[102]. This is also why the first resolution condition "Failing or likely to fail" should suffer a restrictive interpretation, the first condition wants to

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[96] On the issue see: Grünewald, S. (2017) "Legal challenges of bail-in" ECB Legal Conference 2017 Shaping a new legal order for Europe: a tale of crises and opportunities 4-5 September 2017 available at www.ecb.europa.eu. The author asserts: "While left open by the CJEU and the European Court of Human Rights (ECtHR), any kind of bail-in measure – be it the writing-down or conversion of debt, be it the cancellation or severe dilution of shares – will qualify as a deprivation of possessions under the relevant provisions. Bail-in measures must thus observe the highest standards regarding justification and compensation. Three conditions must be met for a deprivation of possessions to be justified: 1) The underlying legal basis must be sufficiently accessible, precise and foreseeable in its application. 2)The interference must be in the public interest (in the terminology of the CFR: meet an objective of general interest). The ECtHR grants states a large margin of appreciation in determining what is in the public interest. Only a deprivation of possessions that is "manifestly without reasonable foundation" does not satisfy the public interest requirement.3) The principle of proportionality between the means employed and the aim pursued must be satisfied. The principle contains three elements: (i) suitability to achieve the aim pursued; (ii) necessity to achieve the aim pursued; and (iii) proportionality in a narrow sense, i.e. a fair balance between the demands of the public interest and the individual's fundamental rights. The CJEU applies different levels of scrutiny in its proportionality assessments. Its more stringent version, the "least restrictive effective means test", requires that "when there is a choice between several appropriate measures, the least onerous measure must be used (...)". See also Maguze T.C. (2016)" EU bank recapitalisation and the bail-in option: an analysis of the effects of mandatory bail-in on creditors' property rights" UCL Journal of Law and Jurisprudence.

[97] See Dowling and others vs Minister of finance Case C-41/15 Paragraph 50-52 "Although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by those amendments (see, to that effect, judgment of 19 July 2016, Kotnik and Others, C-526/14, EU:C:2016:570, paragraph 91)".

[98] Kotnik and others Case C-526/14 paragraph 87 "Article 17 of the Charter states that the right to property is not absolute but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions, in fact, correspond to objectives of public interest pursued by the Union and do not constitute, in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed"

[99]Cit., Kotnik.

[100]Cit., Kotnik.

[101] Binder, supra cit., see also n.30.

[102] This argument has been put forward by Binder, J.H. supra cit.

ensure that the resolution action is triggered under objective needs and only in exceptional circumstances related to financial stability and under the actual non-viability of the institution itself. Indeed, if it is not sufficiently proved that the institution is non-viable then the reason of public interest and financial stability does not occur automatically. Therefore, the list is to be deemed ordinal to the extent that failing or likely to fail is a necessary condition for financial stability reasons and public interest to subsist and as the other two conditions must be interpreted restrictively.

Wanting to enlarge the argument, there is a strong reason which demands a restrictive, less discretionary interpretation of failing or likely to fail, namely the compliance of the administrative procedure the principle of proportionality[103]. Proportionality is an important principle of EU Administrative Law, although not explicitly mentioned in the treaties, it has been part of the constitutional tradition of member states for more than a century[104]. The principle of proportionality has been shaped by the court European Court of Justice and the European Court of Human rights as a defence from EU action and Member state action[105]. As has been affirmed earlier, the public interest justifies the limitations of the new bank resolution procedure imposes on the constitutionally protected rights. Still, this justification does not equate to state that authorities are free to declare resolution as they please as long as the public interest is fulfilled.

Administrative provisions and actions are subject to the principle of proportionality which limits the discretion and powers of administrative authorities when they are excessive or unnecessary in relation to the outcome being pursued. This limitation is based on three aspects: I) suitability (Geeignetheit) a mean is suitable if the purpose set out by the Law can be reached or at least promoted. It is sufficient a mere contribution to reach the aim to consider the first aspect of the test of proportionality materialized. Indeed, as Alexy underlines cases in which laws are declared unconstitutional for reasons of unsuitability are rare[106]. II) necessity (Erforderlichkeit) This subtest is violated every time the purpose set out by the law could be reached by using another means equally efficient but able to entail the less sacrifice to the counterparties' rights. The necessity test requires the least intensively interfering means for the rights of

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103 Craig, P. (2018)" EU Administrative Law" Third Edition, Oxford University Press.

104 Heintzen, M. (2015) "Il principio di proporzionalità. Un cosmopolita tedesco del diritto costituzionale", Mucchi Editore. According to the Author its origins date back to 1912 in the context of the German «*Polizeirecht*» in order to challenge policing measure when they were excessive or unnecessary in relation to the outcome pursued. Gradually along with the principle of reasonableness, it became the main counter limit and weapon to challenge public power in both forms policy measure and administrative action.

105 Craig, P. cit. supra. See also on the principle of proportionality Alexy, R. (2014), Constitutional Rights and Proportionality, 22 J. Const. Theory & Phil. Law, Alexy, R (2002) A Theory of Constitutional Rights, Oxford University Press; Barak, A (2012), Proportionality: Constitutional Rights and their Limitations, Cambridge University Press; Beatty, D.M. (2012) The Ultimate Rule of Law, Oxford University Press; Sweet, A. Matthews, J, (2009) "Proportionality Balancing and Global Constitutionalism" Columbia Journal of Transnational Law 73 Klatt, M and Meister, M, (2012) "The Constitutional Structure of Proportionality" (Oxford, Oxford University Press, 2012), Pino. G (2010) "Diritti e interpretazione: il ragionamento giuridico nello stato costituzionale" Il Mulino Editore. Chapter 8 pag 240, Mezzetti L, Costanzo, P. Ruggeri A. (2014) "Lineamenti di diritto costituzionale dell'Unione Europea" Giappichelli, Cartabia, M (2013) "I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana" trilateral conference of the Spanish, Italian and Portuguise Constitutional Court, Rome, Palazzo della Consulta 24-26 ottobre 2013 available at www.cortecostituzionale.it Alexy, R. (2018) "Proportionality, Constitutional Law, and Sub Constitutional Law: A Reply to Aharon Barak" International Journal of Constitutional Law, Vol. 16, Issue 3 (July 2018), pp. 871-879 Borowski, M. (2013) "Absolute Rights and Proportionality" German Yearbook of International Law, Vol. 56, pp. 385-424 G. Zagrebelsky (1992) "Il diritto mite", Torino, 1992, p. 216.

106 Alexy, R. cit., supra.

individuals to be applied because it constitutes a quantitative limit to the public power. As it has been affirmed "one cannot use a baseball wood to crush a nut"[107] III) proportionality in the narrow sense or adequateness (Verhältnismäßigkeit im engeren Sinne) a measure cannot bring about a sacrifice which is not balanced to the aim pursued. This principle expresses the law of balancing, what optimization relative to the legal possibilities means. This rule has been stated as:" the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"[108].

In areas characterized by wide legislative discretion, the scrutiny of proportionality requires the verification that the balancing of constitutionally relevant interests has not been achieved in such a way as to determine the total sacrifice or the compression of one of them in an excessive and therefore incompatible way and by using the less intrusive means for individuals' rights. This principle act as a boundary against the misuse of public power and by tying the administrative discretion in the *an, quantum et quomodo* to the legal objective which constitutes its grounding and foundation in order to resolve the tension between public and private interest and safeguard the protection of rights constitutionally granted[109].

Therefore, considering that "failing or likely to fail" represents nowadays "the most powerful weapon in the banking supervisors' arsenal" because is able to trigger a serious impairment of creditors' property rights and debtors' rights to defence and due process of Law, one should ask itself if the broad drafting and the lack of any real specification of the "failing or likely to fail" to the point in which discretion could give supervisory authorities a blank paper on the life and dead of banks does not equate to giving the authorities a baseball wood to crush a nut. The second question one should ask is if this is in line with the principle of proportionality (general principle of EU law) as considered in the sub-test of necessity which among two means equally effective in relation to the outcome being pursued requires the adoption of the least intrusive means for the rights of individuals. The third question is if an interpretation based on discretion would lead indirectly to the total impairment of the protection of constitutionally guaranteed rights of counterparties involved.

A broad interpretation of the trigger brings about the risk to increase cases of misuse of discretion, thus potentially rising claims under the second and third criterion of the proportionality test in singular matters where the rights of creditors and debtors could be unlawfully sacrificed in cases where the bank is still in distress but has not reached point of no return and its economic recovery is possible as it happened in the case of ABLV[110].

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[107] Heintzen, M. cit., supra.
[108] Alexy, R. cit., supra.
[109] See n. 105.
[110] Case T-280/18, ABLV Bank v SRB, "pending: request for annulment of the SRB Decisions of 23 February 2018. The applicant relies on 13 pleas in law, including lack of competence of the SRB, error of assessment, violation of the principle of proportionality, the equal treatment, the right to property". Available at www.ebi-europa.eu.

A thing is to say that the point of non-viability must be set earlier because reasons of financial stability demand it, given that the traditional insolvency tests are not applicable to banks. Another thing is to allow a certain amount of discretion pertaining to the judgement to better achieve the objectives of the Directive. A completely different thing is to grant to leave the facto de assessment criteria undetermined. Thus, turning de facto the assessment into arbitrium. Continue to allow a broad interpretation of failing or likely to fail would trespass the thin line which divides a discretionary judgement from a whim, power from abuse, and it would grant authorities disproportionate powers in relation to the outcome. Putting at stake supervisory authorities' reputation and debtors' and creditors' rights.

The awareness of the European legislator of the limit of administrative action and of the importance of the principle of proportionality when framing the resolution conditions is evident if we consider recitals 49 and 50 of the preamble of the directive which respectively states:" *The limitations on the rights of shareholders and creditors should be in accordance with Article 52 of the Charter. The resolution tools should, therefore, be applied only to those institutions that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest"* [111]and *"Interference with property rights should not be disproportionate. Affected shareholders and creditors should not incur greater losses than those which they would have incurred if the institution had been wound up at the time that the resolution decision is taken"*[112].

The express reference to article 52 of the charter of human rights (which set out that any limitation on the exercise of the rights and freedoms may be made only if it is necessary to genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others)and to the principle of proportionality, wants to ensure that the limitations that the new regime impose to creditors must be proportionate in relation to the outcome and be related to objective and sufficiently determined cases in order to protect the rights of creditors and debtors. Concluding, in light of the above, a restrictive, more determined, interpretation of failing or likely to fail (and of the other resolution triggers) to avoid blank assessments and limit Authorities' powers is not just theoretically possible but due, demanded, and required.

It follows that the purpose of failing or likely to fail as resolution trigger cannot be simply to grant discretion to act, but rather to act as an almost objective condition to determine with reasonable precision the point of non-viability of the banking business in order to justify resolution and the impairment of creditors' and debtors' rights that come with it. In this respect, failing or likely to fail should perform a similar function as the concept of insolvency for traditional corporates with some caveats stemming from the peculiarity of the banking business. The discretion intrinsic in the judgement is a mean to an end and must be anchored to specific and known parameters to achieve these aims and must not be considered as a goal in relation to the outcome *per se*.

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[111] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. Recital 49.
[112] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. Recital 50.

This point could be better understood if we compare the function and purpose of the failing or likely to fail trigger with the function and purpose of insolvency triggers in ordinary bankruptcy law proceeding.

Economically speaking insolvency is nothing more a financial state of affairs[113]. The insolvency analysis tests "the company's ability to pay its obligations in the long-term including interest and principal debt"[114]. In other words, the valuation of solvency generally includes an in-depth analysis of the components of the company' financial structure to determine its ability to continue operation and stay in business into the foreseeable future[115]. Legally speaking the concept of insolvency and the solvency tests along with it protect creditors from illicit actions of the debtors that might relieve them of their debt burden. When the financial condition of a company is seriously deteriorated, borrowers may try to strip the firm of its assets through gifts, dividends, or exorbitant salaries and benefits purchase of assets for an overvalued price to the borrower's insiders, loans to shell corporations and so on. The determination of the objective condition or the factual state of insolvency plays the trigger role, preventing illicit transfer of wealth that may damage the firm's ability to pay debts and creditor position, dividing permissible from impermissible transfers, limiting the power of debtors over the firm and enabling creditors to receive satisfaction of their claims via the insolvency procedures. Put it simply, the concept of insolvency is legally a dividing line that justifies the limitations of the debtor's powers[116].

The objectivity of the condition and its determination play also the function to foster legal certainty for creditors and debtors because avoids the commencement of a proceeding by requiring creditors to prove reliance on any particular representation of the debtor, on anything the debtor says or does. On the debtor side, it avoids fraudulent commencement of the proceeding and the potential disastrous losses stemming from being declared insolvent for temporary inability to meet obligations due to seasonable fluctuations. Therefore, limiting the uncertainty and litigations that a determination without reference parameters would bring and allowing "a borrower to increase its debt capacity ex-ante by protecting creditors ex-post from actions that make it less likely that the firm will pay its debts. Economically speaking, creditors who know that such limits are in place are willing to lend more money to the firm in the first place. Firms would have little or no debt capacity if there were no controls on their power to intentionally reduce their ability to pay debts after they have borrowed money"[117].

Failing or likely to fail in the line of principle maintain, the same functions of the concept of insolvency with some inevitable functional adaptation which are necessary given the special nature of the banking

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[113] Heaton, J.B. (2007) "Solvency Tests" The Business Lawyer Vol. 62, No. 3 (May 2007), pp. 983-1006 (24 pages) Published by American Bar Association.
[114] Robinson, T. R. Henry, E. Pirie, W. Broihahn, M. Cope, T. (2015) "International Financial Statement Analysis" (CFA Investment Series) (English Edition) 3rd Edition.
[115] Anderson, H. (2016) "An Introduction to Corporate Insolvency Law", Plymouth Law and Criminal Justice Review, 8, pp. 16-47. Heaton, J.B. (2002) "Legal Solvency Tests and Financial Economics", The Journal of Risk Finance, Vol. 4 Issue: 1, pp.57-62.
[116] Ibid see n. 113, 114,115.
[117] Ibid., Heaton., supra cit.

business and the considerable effects that banking failures can have upon society. Failing or likely to fail should be considered as a financial state of affairs. This trigger acts as a point of non-viability of the banking business to determine when regulators should shut down the concerned institution, function as a measure or reference parameter for banks' financial health for the market and finally perform a legal certainty role to avoid unlawful commencements of the proceeding in order to protect banks' creditors, shareholders, bondholders.

Having clarified the role and purpose of failing or likely to fail among the three resolution conditions, framing the function of "failing or likely to fail" becomes easier. Firstly, since "Failing or likely to fail" belongs to the family of resolution triggers, this requirement should act as a legal safeguard to ensure the only overarching concerns regarding financial stability motivates the impairment of creditors' and debtors' rights. Secondly, this trigger should also act as an objective condition to determine when regulators should shut down the concerned institution which has to be liquidated under national insolvency law, and resolved under European bank insolvency law. In both cases, this condition should be objective and sufficiently determined to perform the two aforementioned functions. As it has been clarified, this is not the case.

4. Conclusion

To conclude the analysis on a more theoretical note, the general theory wants "failing or likely to fail" to be sufficiently determined to perform the functions of legal safeguard for creditors' and shareholders' rights and of determination of the point of non-viability of the banking business to achieve the objectives of the resolution procedure. In spite of the theory, the practice demonstrates that "failing or likely to fail" as a trigger lies in an undetermined grey zone between solvency and insolvency and, under the current state of affair, is impossible to square the boundaries of the grey zone in which the trigger lies and determine with sufficient precision when a bank should be put into resolution. .

The extensive degree of discretion granted when in shaping the trigger cause confusion and clashes also with the current framework set up for ELA and for precautionary recapitalization , making impossible to square the circle and understand when a bank is solvent for the purpose of ELA, when a bank is solvent for public financial support and when a bank must be put into resolution.

The voluntarily generic specification of the triggers made by the failing or likely to fail's guidelines and the lack of determination of the relevant solvency point in time as regards to ELA cause legal uncertainty, put at risk the rights of bank creditors' and shareholders' which can see their bank wound up for a mere liquidity crisis and can cause reputational damage for the supervisors, the supervisees as well as unmotivated destruction of value as the case of ABLV Luxembourg S.A. demonstrates. Moreover, the uncertainty affecting the assessment has also a relevant impact in term of financing cost for banks, given

that in case of troubles the market will not be able to assess with reasonable certainty if the bank will be granted temporary assistance or it will be put into resolution and therefore market actors could require higher returns to invest.

Moreover, the current uncertainty affecting the trigger and the policy choice to willingly leave the crucial elements of the assessment in the hand of each national authority foster regulatory arbitrage in the single market putting at stake the coherence in the application of the directive, increasing the risk of jeopardizing its implementation. Adding up to that the broad and undetermined range of elements which could be used as a basis of the assessment makes hard to discover in practice why in specific cases the decision has been taken. Therefore, nullifying the duties of transparency and accountability supervisory authorities have towards European Citizens as well as towards affected parties. The present lack of a common standardized framework could lure financial institutions into forum shopping in the Member States where regulatory practices are deemed looser and undermine the ability of regulatory agencies to deliver a coherent judgement.

Lastly the alternative use of the traditional insolvency test to determine the point of non-viability of a bank is neither the most intelligent nor the most considerate move on the simple ground that banks are a special kind of corporates and the test of cash flow insolvency does not grant an accurate picture of the financial situation of these entities. Moreover, moving the point of non-viability too near to the state of insolvency would already compromise the critical functions of the entity via mass withdrawals, fire sales and, if the bank is large enough, would already endanger financial stability

In light of the above, the set-up of the current framework and the state of destructive ambiguity in which the "failing or likely to fail" trigger lies raises serious concerns about its effectiveness and in terms of the compatibility of the discretion granted to the authority with the general principle of proportionality embedded in EU law. Therefore, a normative reconsideration or further specification od the non-solvency point in time defined by this trigger would be highly desirable.