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THE COMPLEXITY OF BANKING RISK GOVERNANCE DECISIONS

ABSTRACT

Banking law is increasingly subject to a many regulations, making it complicated for intermediaries to navigate through them. Compliance costs often become a significant problem, especially when the principle of proportionality is disregarded. Therefore, more organized and coherent regulatory interventions would be desirable.

However, these aspects impact the need to avoid cumbersome, conflicting, and overly abundant interventions.

Complexity carries a different meaning: it encompasses plural and dynamic interests that require protection.

The multiform reality in which banks operate represents not a limitation but rather a testament to the relevance of their very activity and a place where fundamental rights find their protection, and their complex solutions are "spectacular evolutions," indispensable for better safeguarding.

KEYWORDS: - complexity – banks – risk governance – governance and control – risk and sustainability

1. Complexity in the field of economics: some reflections as a premise for the investigation

A decision becomes complex when it must address diverse realities in which multiple and dynamic interests are at play. This dimension finds fertile

ground in the field of economics, which appears complex in relation to what it entails. It encompasses various phenomena that require different legal models aimed at defining the relationship between public authorities and economic activities and a multitude of sources of legal norms.

Complexity first manifests through the multi-level dimension of regulatory sources, leading to an overlap between soft law and soft regulation, on one hand, and primary, sub-primary, and secondary sources, on the other hand[1].

Financial globalization creates a global legal space, with an expansion of entities participating in rule-making[2], introducing elements of complexity between member states and the European Union. Soft law and soft regulation become means of managing and coordinating relationships between public authorities, while the use of soft law leads to a shift of regulation at the supranational level[3]. This is because significant decision-making moments often occur beyond the scope of individual states[4]. Directives are frequently supplemented

1 F. Cafaggi, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, in *Pol. dir.*, 2001, p. 547 e ss.; S. Amorosino, *I modelli ricostruttivi dell'ordinamento amministrativo delle banche: dal mercato "chiuso" alla "*regulation*" unica europea*, in *Banca borsa e tit. cred.*, 2016, p. 391; Id., *Trasformazioni dei mercati, nuovi modelli regolatori e "mission" del diritto dell'economia*, in *Il Diritto dell'economia*, 2016, p. 339; Id. *La regolazione pubblica delle banche*, cit.; S. Cassese, *Dalle regole del gioco al gioco con le regole*, in *Mercato, concorrenza, regole*, 2002, p. 265 e ss.; Id., *Oltre lo Stato*, Bari, 2006; G. Napolitano, *Regole e mercato nei servizi pubblici*, Bologna, 2005; G. Napolitano, A. Zoppini, *Le autorità al tempo della crisi. Per una riforma della regolazione e della vigilanza sui mercati*, Bologna, 2009; M. Antonioli, *Mercato e regolazione*, Torino, 2001.

2 G. Romagnoli, , *Concorrenza e "complementarietà" delle vigilanze economiche*, in *P.A. Person and Administration*, 2020, p. 132, states that the uncoordinated evolution, at different times, of the regulations in various sectors of the financial market (insurance, banking, and securities) and the push to align with the European Union's guidelines "have favored the multiplication of regulatory centers and then made it evident that it is necessary to foresee forms of integration and coordination to maximize the result of their work and, at the same time, reduce their negative impact on supervised entities... the coordination processes have developed in two directions: along an internal line within the field, through "structural" normative interventions that have affected entities with competence in safeguarding the same interest, albeit at different levels; along an external line outside the field or "specific public interest," mainly through the provision of agreements between holders of powers when supervisory authorities - by regulatory choice - establish a relationship of complementarity or competition with each other." On the multiplication of market regulations and new public intervention, see S. Amorosino, *Le dinamiche del diritto dell'economia*, Pisa, 2018, p. 34.

3 On this topic, see G. Rossi, *Il mercato dell'azzardo*, Bologna, 2008; Id., *Crisi del capitalismo e nuove regole*, in *Riv. soc.*, 2009, p. 929, who warns about the dangers of heterodirected democracies.

4 S. Cassese, , *Oltre lo Stato*, cit.

by centers producing legal norms, such as guidelines, best practices, protocols, and expectations. This creates a complex relationship with the rule of law, questioning traditional paradigms of transposing regulations into national legal systems.

The combination of constitutional, legislative, regulatory, guidelines, and directive provisions leads to a proliferation of centers of production and a "complexification" of the legal system, inundated by a magma flow of rules, many of which are not determinative. This has intensified the overall burden of regulation, both in terms of costs and potential systematic inconsistencies[5].

Various and heterogeneous measures and actions are adopted, influencing the delicate relationship between public powers and economic activities. These actions encompass both public law interventions and private law actions, creating a complex relationship between new techniques of public intervention and private discipline. As a result, there is a reevaluation of traditional concepts, profound changes in the relationships between authorities and law, and the adoption of new schemes.

On the side of private autonomy, contractual freedom operates within different boundaries due to the emergence of new interests[6]. It appears sur-

5 F. Sartori, *Il diritto dell'economia nell'epoca neoliberale tra scienza e metodo*, in *Riv. dir. banc.*, 2022, 314.

6 L. Di Nella, *Mercato e autonomia contrattuale nell'ordinamento comunitario*, Naples, Esi, 2003, p. 71, emphasizes that emerging private law is "conditioned by the market as it is directed towards the regulation of the market itself and influenced by society, which carries its own legally protected interests". On the concept of private autonomy, see *ex multis*, F. Santoro-Passarelli, *Dottrine generali del diritto civile*, Naples, Jovene, 1986, p. 126 (for whom autonomy is "will productive of effects with respect to the system"); F. Messineo, *Manuale di diritto civile e commerciale,* II, 2, Milan, Giuffrè, 1950, p. 449; D. Barbero, *Sistema istituzionale del diritto privato,* Turin, Utet, 1950, p. 520 (both placing autonomy in the area of contractual freedom, among fundamental rights; R. Scognamiglio, *Contratti in generale*, Milan, 1980; Id, *Negozio giuridico e autonomia privata*, in *La civilistica italiana dagli anni '50 ad oggi*, Atti del congresso dei civilisti italiani tenuto a Venezia, 23-26 giugno 1989, Padua, 1991, p. 289 ff.; G.B. Ferri, *Il negozio giuridico e la disciplina del mercato*, in Id., *Le anamorfosi del diritto civile attuale,* Padua, Cedam, 1994; P. Schlesinger, *L'autonomia privata e i suoi limiti*, in *Giur. it.*, 1999, c. 229 ff.; R. Sacco, *Autonomia nel diritto privato,* in. *Dig. disc. priv., Sec. civ.*, I, Turin, Utet, pp. 517 ff.; Id., *Contratto, autonomia, mercato*, in R. Sacco and G. De Nova, *Il Contratto*, in *Trattato dir. civ.* directed by R. Sacco, Turin, Utet, 2005, pp. 16 ff.; M. Bianca, *Diritto civile. Il contratto*, Milan, Giuffrè, 1993; S. Romano, *Autonomia*, in *Frammenti di un dizionario giuridico*, Milan, Giuffrè, 1983, p. 14; V. Roppo, *Contratti e atti giuridici*, in *http://www.treccani.it/enciclopedia/contratti-e-atti-giuridici_%28Enciclopedia-delle-scienze-*

rounded by rules that come from the outside and serve to protect interests that may be different from the interests of the decision-maker.

The dialectical relationship between private autonomy and public intervention results in an invasion of the parties' freedom and alterations of negotiation and organizational autonomy. Some private law subjects may be subject to public regulation if they engage in activities of public interest and a plurality of subjects, considering the type of public interest, is heavily regulated[7].

Consequently, despite continuing to use the private law model, the connotation of general interests that the model carries influences the contractual organization and its regulation, becoming a point of convergence for different interests that are no longer absorbed solely by social interest[8].

The composition of multiple interests and the need to protect them impose on the legislator and the regulator a response that ends up creating a complex system. This reaction obliges the recipients of the regulations to a difficult task of orientation regarding the rules to follow and the organizational structure to be prepared.

In this context, first of all, we want to reflect on the reasons for the close correlation between multiple interests, complexity, and rigidity. Subsequently, we want to verify whether the complex solutions that the legal system implements in response to this system represent the only possible option.

2. Reasons for complexity

Regulatory law presents itself as a complex legal field. The complexity is certainly linked to the heterogeneity of sources; however, it would be simplistic and misleading to identify the complexity of regulatory law solely with the

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sociali%29/; G. Grisi, *L'autonomia privata. Diritto dei contratti e disciplina costituzionale dell'economia*, Milano, Giuffrè, 1999, pp. 55 e ss.

7 On this point, L.R. Perfetti, *Organizzazione amministrativa e sovranità popolare. L'organizzazione pubblica come problema teorico, dogmatico e politico*, in this *Review*, 2019, p. 28.

8 R. Rordorf, *Le società pubbliche tra inquadramento privatistico e normativa pubblicistica*, in *Magistratura giustizia società*, Cacucci Bari, 2020, p. 310.

overlapping of primary and secondary sources, soft regulation interventions, and the increasing involvement of various entities in rulemaking.

Undoubtedly, the law of the economy, particularly regulatory law, exhibits its peculiar characteristics that explain the diverse interventions. Firstly, the ever-changing market demands require generality, immediacy, dynamism, flexibility, and uniformity in regulations. Secondly, the technical nature of regulatory law involves the incorporation of technical criteria and parameters that must be developed with the assistance of industry experts (for instance, in banking law with rules on capital set by the Financial Stability Board and then the Basel Committee, or technical standards setters) [9].

However, resorting to regulators does not cause the complexity of regulatory legislation; rather, it represents a response to a complex phenomenon.

The use of frequent emergency or derogatory rules also does not constitute the cause of complexity, even though it may introduce distorting effects on the theory of legal sources and introduce objective elements of complexity. These emergency interventions are dictated by the need to address contingent or specific circumstances, often not amenable to further applications, and as such, they deviate from the general rules in place.

In banking law, this phenomenon manifests itself with full force, as the legislation has slowly become layered with emergency interventions. These interventions take the form of derogatory measures concerning the general discipline, justified by the spaces granted by primary legislation (consider, for instance, the regulations on state aid). Additionally, specific provisions are enacted for individual cases (e.g., the d.l. n. 1/2019 concerning urgent measures to support Banca Carige S.p.a.).

9 S. Amorosino, *Le dinamiche del diritto dell'economia*, Pacini, 2018, p. 32, in addition to mutability and technicality, adds the concept of "structural syncretism," which refers to the constitutive coexistence of legal "materials" (concepts, institutions, procedures, prescriptive acts) of different origins, be they from private law, public law, or even general theory.

The use/abuse of emergency law stems from the spread of emergency powers that are often accompanied by derogations from ordinary rules, leading to a progressive deformation of the rule of law[10].

In this context, emergency law primarily originates from secondary sources or soft regulation to address contingent issues. An example is the entire set of capital requirements provided in various Basel Accords, which are revisited whenever there is a need to address emergency situations.

Emergency law also raises concerns about the equal treatment of the protection of subjective positions, not only among the subjects affected by these provisions but also among those who, as compensation for the limitation of their rights, only receive damages (e.g., banking resolution procedures).

Due to these reasons, exceptional interventions end up impacting the legitimacy of power, the hierarchy of sources, and the safeguards connected to issued measures[11].

However, the reasons for complexity are not solely found in the heterogeneity of sources or the number of emergency or derogatory measures.

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10 L.R. Perfetti, *Legge-provvedimento, emergenze, giurisdizione*, in *Dir. proc. amm*., 2019, p. 1021, recalls how a State of emergency, emergencies, and the utilization of the law to address specific issues are both natural and frequent in contemporary legal systems because of the mistaken belief that authority's command cannot violate personal liberties, and the democratic form of the State cannot be overthrown by those responsible for governance from time to time. The author emphasizes that the conceptual core in which the law provision must be observed is one that links emergency, sovereignism, *rule-of-law* crisis, and guarantee of inviolable rights; Id., *Il governo dell'arbitrio*, Rubettino, 2021, *passim*, where references to emergency as rule and the resulting crisis of democracy. On emergency law, see most recently, AA.VV., *Il diritto dell'emergenza: profili societari, concorsuali, bancari e contrattuali*, edited by M. Irrera, 2020, Torino; P. Pantalone, M. Denicolò, *Responsabilità, doveri e coronavirus: l'ossatura dell'ordinamento nelle emergenze "esistenziali"*, in *Il diritto dell'economia*, 2020, p. 125; A. Barone, *Emergenza pandemica, precauzione e sussidiarietà orizzontale*, in *this Review*, 2020, I, p. 185, as well as all contributions hosted on the emergency by *this Review*, 2020, II. During the pandemic, in particular, lawmakers and regulators intervened by implementing various measures. Some were developed by the government to support individuals and businesses, and indirectly involved banks as credit providers. Other measures were prepared at the international level by technical committees and, at the community level, in the form of primary legislation (by the European Parliament) or secondary legislation (by supervisory authorities), and directly affected banks.

11 For an in-depth discussion of these issues, let us refer to R. Calderazzi, *La funzione organizzativa del capitale nell'impresa bancaria*, Giappichelli, Torino, 2020, p. 94 ff.

The complexity of regulatory instruments arises from the need to respond to a complex system. In banking law (but these considerations can be extended to all regulated sectors), the interests to be protected cannot be confined to the classic categories of private law or public law.

The emerging needs have a supra-individual and global scope, capable of influencing broader interests. The emerging needs lead, on one hand, to the development of new forms of public intervention in the market. On the other hand, they require a different role for private law as it no longer solely guarantees private interests[12].

Common law norms become inadequate as they primarily protect private individuals interacting in a context that is not exclusively governed by private law. There is a perceived necessity for regulatory tools to address the asymmetry of subjective positions[13].

The presence of interests that cannot be strictly categorized as either public or private and the need for their protection, therefore, lead to the develop-

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12 F. Sartori, *Il diritto dell'economia nell'epoca neoliberale tra scienza e metodo*, cit., p. 314, t highlights how contracts go beyond merely conveying individual preferences but also contribute to the realization of systemic values such as competition and efficiency.

13 On the relationship between private autonomy and legislative intervention in the economy, see T. Ascarelli, *Certezza del diritto e autonomia delle parti*, in *Diritto dell'economia*, 1956, p. 1238, according to whom, "the problem raised by the contrasts between private autonomy and legislative intervention in the economy is not intelligible unless in relation to the scope of various measures and at a specific historical moment". L. Buttaro, *Corso di diritto commerciale I, Premesse storiche. Disciplina dell'impresa*, Bari, 2005, pp. 68 e 69, highlights that, in commercial law, the increasing intervention of public authorities is no longer a sporadic and exceptional occurrence but a constant feature of the new discipline that extends beyond the realm of private law alone. The novel aspect lies in the convergence and interpenetration of public law and private law. However, it argues against promoting a sort of publicization or administrativeization of the subject, as commercial law remains the law of businesses and entrepreneurs. Therefore, the terms "autonomy" and "specialty" of commercial law should continue to be used as they were understood even under the Commercial Code of 1882. More recently, in relation to the interactions between "common law" and "special rights," concerning the intervention of public authorities in the dynamics of the economic process, refer to G. Di Gaspare, *Diritto dell'economia e dinamiche istituzionali*, cit. For a development on the debate on economic law, see F. Capriglione, *Riflessioni a margine del diritto dell'economia. Carattere identitario ed ambito di ricerca*, in *Riv. trim. dir. ec.,* n. 3, I, 2021, pp. 385 ff.; A. Tucci, *Il diritto dell'economia nella prospettiva storico-istituzionale*, in *Amministrazione in cammino*, 2016, p. 1, as well as Id., *Il diritto dell'economia: "dispute metodologiche e contrasti di valutazione"*, in *Rivista di diritto comm*., 2021, vol. 4. p. 743.

ment of a complex regulatory framework, resulting in the proliferation of regulatory bodies and the use of emergency law as a consequence.

After clarifying the reasons for complexity, it is crucial to examine whether the proposed remedies represent the only viable path forward. In other words, it is necessary to explore whether there are alternative approaches to address the complexities of the regulatory system and achieve the desired objectives of protecting diverse interests effectively.

3. An example of complex decision-making processes: risk governance

An example of a complex decision-making process is found in the governance of risk in banks. Due to the peculiarities of these financial intermediaries, their activities, and the critical role they play, there is a crisis in private autonomy, leading to the need to identify a regulatory response for the protection of public interest.

The regulatory framework established for risk governance in banks is multifaceted in several aspects.

Firstly, it stems from the heterogeneity of sources (which, as mentioned earlier, is not the cause but rather a consequence of complexity). The architecture of the risk governance system is structured through a combination of legislative interventions (primary, secondary, and sub-primary sources) and includes recommendations, expectations, and guidelines that force recipients to the difficult task of compliance.

On the other hand, the regulatory framework also encompasses the entire organizational structure of the bank. This is not only because banks, like all business activities, must manage the element of risk but also because, in their typical function of providing credit, they need to consider a multitude of aspects in which risk becomes particularly relevant.

The management of risk has shown its fragility during the banking and financial crises that have occurred over the years due to the inability of ban-

king institutions to accurately define their risk position and contain it within acceptable limits.

Achieving this outcome requires the bank's awareness, consistency, and management through an integrated approach, which necessarily involves complex and articulated processes.

In this context, there are at least three profiles of interest within the realm of risk that are being referred to here, aiming to confirm the complexity of the interests at stake and the decision-making processes connected to these interests that revolve around them.

3.1 The relationship between risk and control

The bank must be capable of governing the risk management process by establishing an adequate system of controls that sets rules, procedures, and resources to identify, measure, prevent, monitor, and mitigate risks undertaken or assumed in different segments[14].

An appropriate system of controls represents "the crucial hub of the articulation of corporate power and accountability rules"[15]: the provision of rules and procedures derived from primary and secondary regulations, as well as self-regulation by intermediaries (consider the rules drawn from the code of self-discipline), serves to create a complex and organized system within the bank's organization that promotes making informed decisions aimed at safeguarding the social capital, efficiency of business processes, and reliability of information provided to governing bodies and the market.

The strengthening of control occurs on different levels: first and foremost through hyper-regulation, which assigns an increasingly important role to European and national supervisory authorities, with tools that from the outside directly impact the internal organization of the bank (consider, for example,

14 On the relationship between risk and control let us refer to R. CALDERAZZI, *La funzione di controllo nell'impresa bancaria*, Turin 2018, *passim*, where bibliographical references.

15 P. MONTALENTI, *Il sistema dei controlli interni: profili critici e prospettive*, in *Riv. dir. comm.*, 2010, I, p. 936 ff.

the intervention powers attributed by Article 53 bis of the Banking Act) and restricts the scope of contractual autonomy. Therefore, in exercising its power, supervision not only influences the authorization process and structural and organizational aspects of the supervised entities but also impacts the discipline of acts and activities.

Alongside this function of inter-subjective control, special attention is given to the function of intra-subjective control, which encompasses both the classic instruments of corporate law and banking governance and the internal functions within the banking structure[16]. The connection between these two areas is established through a pyramidal structure that places the company's governing bodies at the top, entrusted with managing, administering, controlling the organization, and being responsible for risk management processes. At the base, following a hierarchical order, there are various types of horizontal and vertical controls that involve exchanging information flows among them[17].

16 On the relationship between internal controls and corporate governance, see G. Ferrarini, *Controlli interni, governo societario e responsabilità. Esperienze statunitense ed italiana a confronto*, in *Mercati finanziari e sistema dei controlli*, Milano, 2005, p.113; M. Libertini, *Il sistema dei controlli nelle banche*, in *La* governance *delle società bancarie - Convegno in memoria di Niccolò Salanitro*, a cura di V. Di Cataldo, Milano, 2016, p. 63 ff.; S. Fortunato, *I «controlli» nella riforma del diritto societario*, in *La Riforma del diritto societario. Atti del convegno di studio svoltosi a Courmayeur, 27/28-9-2002*, Milano, 2003, p. 164, who believes that, with the reform, a dangerous mixture of assembly, management and control competences has been created; M. Maugeri, *Note in tema di doveri degli amministratori nel governo del rischio di impresa (non bancaria)*, in *Orizzonti del Diritto Commerciale*, 2014, p. 1; P. Ferro-Luzzi, *Riflessioni in tema di controllo,* in *Diritto, mercato ed etica dopo la crisi: omaggio a Piergaetano Marchetti*, Milano, 2010, p. 325; R. L. Furgiuele, *Funzioni di controllo e procedimento nei sistemi di amministrazione della società per azioni: prime considerazioni*, in *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni*, *Scritti in onore di Giovanni Furgiuele*, edited by G. Conte e S. Landini, 2017, Mantova, t.1, p. 617; P. Schwizer, *Le nuove regole di* Corporate governance *e dei Controlli interni: quale impatto sulla gestione delle banche?*, in *Banca Impresa Società*, 2015, p. 7; S. Bainbridge, *Corporate governance after the financial crisis*, New York, 2012, p. 167. R. Jones-M.Welsh, *Toward a public enforcement model for directors' duty of oversight*, in *Vanderbilt Journal of Transnational Law*, 2012, v. 45, p. 346.

17 There are three levels that involve the participation of different company structures. Firstly, there are the line controls (so-called "first-level controls") aimed at ensuring the correct execution of operations. Responsible for the risk management process are the operational structures that identify, monitor, and report risks arising from ordinary business activities (typically incorporated into information procedures). Line controls are divided into first-instance line controls (procedural, IT, and behavioral checks carried out by those performing a specific activity) and second-instance line controls (carried out by those with supervisory responsibilities); the latter can further be categorized as functional second-instance controls, exercised by independent company structures from those subjected to control, and hierarchical second-in-

The complexity of this articulation, which appears not dissimilar to other entrepreneurial structures, in this case, is regulated by a comprehensive set of regulations that detail the functioning and coordination through a diversity of normative references. Just to mention a few examples, consider the requirements for the appointment of company officers, which are laid out in a detailed set of regulations scattered across the Banking Consolidation Act, the Civil Code, ministerial decrees, supervisory provisions, and codes of self-discipline. Compliance with these regulations entails the observance of complex procedures and controls that the officers themselves must adhere to, following the requests of supervisory authorities.

Furthermore, the allocation of functions within the board of directors plays a crucial role, where the separation between the authority to administer and the actual exercise of that authority becomes significant. Banking regulations structure corporate governance not with reference to corporate bodies but with a functional approach (management function and strategic supervision function) [18].

For these reasons, the President of the Board of Directors is precluded from assuming executive roles to allow for a clear distinction of roles and a balance of powers that enable sound and prudent management. It is also required that all directors have sufficient time available to fulfill their entrusted tasks. Non-executive directors are obligated to act with full awareness and informed decision-making. Consistent jurisprudence asserts that the duty to act

stance controls, carried out by roles that are hierarchically superior. Then, there are risk and compliance controls (so-called "second-level controls") that ensure the correct implementation of the risk management process, adherence to operational limits assigned to functions, and compliance with regulations. Finally, we have internal review controls (so-called "third-level controls") aimed at identifying procedure and regulatory violations, periodically assessing the completeness, adequacy, functionality, and reliability of the control system and information system.

18 . F. CAPRIGLIONE, *Considerazioni a margine del volume* Il tramonto della banca universale?, in *Riv. trim. dir. ec.*, 2018, p. 13; C. FRIGENI, *La* governance *bancaria come* risk governance: *evoluzione della regolazione internazionale e trasposizione nell'ordinamento italiano*, in AA. VV. *Regole e Mercato*, edited by M. Mancini - A. Paciello -V. Santoro - P. Valensise, Torino, 2017, t. I, p. 45 ff.; ID., *Prime considerazioni sulla normativa bancaria in materia di "organo con funzione di supervisione strategica"*, in *Riv. dir. comm.*, 2015, I, p. 485 ff.

in an informed manner, as prescribed by Article 2381 of the Civil Code (which translates into the obligation to take action to prevent, eliminate, or mitigate known critical situations within the company and to inform themselves so that the choice to act or not act is conscious), "is especially significant for directors of companies engaged in banking activities, as they carry not only contractual responsibilities towards the company's shareholders but also regulatory responsibilities towards supervisory authorities" [19].

According to the judges, "the peculiarities of the banking sector have led to the affirmation of the principle that the Board of Directors of banking companies has particularly important duties." Each member of the Board of Statutory Auditors, given the complex structure of the organizational setup of an investment company, can be sanctioned for omissive complicity "quoad functione" since each member has the obligation to exercise supervision, not only to safeguard the interests of shareholders against abusive management by directors but also to verify the adequacy of methodologies aimed at internal control within the investment company, in accordance with procedural parameters dictated by Consob regulatory provisions, guaranteeing investors. Additionally, there is a legal obligation for immediate reporting to the Bank of Italy and Consob[20].

From the perspective of the banking institution, the regulator is concerned with ensuring coordination, collaboration, and continuous exchange of information, requiring intermediaries to establish proceduralization of organizational structures and integration of the entire system. Roles, tasks, responsibilities, coordination and collaboration methods, and information exchange must all be defined in detail. In other words, all decision-making processes must be formalized, defining boundaries and avoiding conflicts.

The provision of an integrated and coordinated system becomes the tool for aggregation and coordination of the entities involved to achieve the objec-

19 Thus Cass. n. 16275/2022; n. 19556/2020.
20 Cass. n. 1602/2021.

tive of system functioning, through actions consistent with the intermediary's entire activity[21].

The establishment of such organizational structures, with rigid formalization of roles and the allocation of a variety of tasks and interventions, makes the entire banking control system extremely complex.

The analysis of the relationship between risk and control proves useful for this investigation as it confirms that the complexity of the control system is not solely due to the presence of a composite, heterogeneous, and at times convoluted and redundant regulatory framework, nor the intervention of numerous measures aimed at addressing emergent cases. Instead, it is driven by the interests that the banking institution, like the entire regulated world, seeks to protect. Here, control and consequently the applicable regulations and established procedures take on profound significance as they enable the establishment of a balance between potentially misaligned interests.

The further consideration is that the presence of a strict and pervasive discipline represents the most effective response for the protection of interests.

3. 2 The relationship between individual claims and collective interests

A second profile from which elements of complexity emerge in the governance of banks' risk management is represented by the relationship between individual claims and collective interests.

In banks, the relationship between the company, shareholders, and third parties takes on particular characteristics: the classical distinction between "social" and "non-social" relationships fades due to a reduction in the peculiarities of social investment, in the sense that capital no longer represents a differenti-

21 The Risk Appetite Framework (RAF) plays a crucial role as it defines the bank's risk appetite, risk tolerance thresholds, risk limits, risk governance policies, and the necessary reference processes required to establish and implement them consistently with the maximum acceptable risk, business model, and strategic plan. Additionally, the "tableau de bord" also holds significant importance, where each control function, according to their respective competencies, indicates verification activities, critical areas, potential corrective actions, process owners, and completion timelines.

ating criterion between shareholders and third parties. The management of the company must find a balance not only between the interests of shareholders but also of creditors subject to bail-in[22], who end up being considered as "internal components of the company and the enterprise, and therefore must be immediately taken into account in management decisions"[23].

The shareholder is not only someone who has made an equity investment and is therefore entitled to the sole claim for reimbursement or return on the investment made, but also becomes the recipient of a set of safeguards that the legislator/regulator prepares to protect all savers.

The multifaceted relationship that the shareholder assumes with the bank affects the number of claims he holds, creating a complex and articulated relationship with the company. For these reasons, the financial and administrative prerogatives can legitimately be understood by the supervisory authority, which ends up weakening the individual positions recognized to shareholders (e.g., the power of removal of corporate executives or the power to convene collective bodies or make certain decisions).

In other words, the management of business activities cannot ignore the presence of interests beyond just social ones and ends up affecting the organizational value of individual claims. For example, consider the entrepreneurial

22 On the relationship between interests, D. Rossano, *Nuove strategie per la gestione delle crisi bancarie: il bail-in e la sua concreta applicazione*, in *Riv. trim. dir. econ.*, 2015, p. 269; Id., *L'esclusione dell'interesse pubblico nell'interpretazione delle autorità europee*, in *Riv. trim. dir. econ.*, supplemento al n. 3, 2017, p. 93; G. Santoni, *Osservatorio la nuova disciplina della gestione delle crisi bancarie: da strumento di contrasto a generatore di sfiducia sistemica?*, in *Banca borsa e tit. cred.*, 2016, p. 619; as well as M. Semeraro, *Principio di condivisione degli oneri e tutela del risparmio. Scritto per il convegno "salvataggio bancario e tutela del risparmio"*, in *Riv. dir. banc.*, 2016, p. 1 e ss.; Ead., *Rischio d'impresa e discipline recenti*, in *Giust. civ.*, 2016, p. 857, the author highlights that the reasonableness of the rule that imposes the burden of distress risk on shareholders and creditors must be evaluated in light of the principles of property protection, savings protection, and protection of reliance. For a recent in-depth analysis of the issues raised by banking crises, please refer to L. Farenga, *Crisi bancarie e disciplina della risoluzione. In particolare il* bail-in, in *Riv. trim. dir. econ.*, 2019, p. 412; AA.VV., *La gestione delle crisi bancarie. Strumenti processi implicazioni nei rapporti con la clientela*, edited by V. Troiano, G. Uda, Milano, 2018, in particular, F. Capriglione, *La nuova gestione delle crisi bancarie tra complessità normativa e logiche di mercato*, p. 3 e S. Amorosino, *Individuazione e tutela dell'interesse pubblico nella regolazione delle crisi bancarie*, p. 165.

23 C. Angelici, *Introduzione*, in *Società bancarie e società di diritto comune. Elasticità e permeabilità dei modelli. Incontro di studio del 23 giugno 2016*, in *Dir. banc.. merc. fin.*, 2016, p. 769.

choices of administrators who may not necessarily take into account the shareholders' expectations for the return on their investment because they prioritize the sound and prudent management that the bank must pursue[24].

However, while the individual prerogatives of shareholders may be limited, they gain collective value as they also manifest towards collective and social dimensions[25].

The complexity of the relationship with the bank is also evident from the investor's perspective, as they navigate in a composite dimension.

Protecting their personal interests faces socio-economic disparities, leading to organizational and informational asymmetries that require particular attention. Traditional responses provided by private law discipline become inadequate and lead to a shift away from the traditional concept of private autonomy. Thus, a discipline emerges that transcends the individual investor's situation while still considering the reasons of the individual investor, moving from the individual sphere to the supra-individual, becoming collective. Consequently, autonomy gives way to public protections[26].

The investor's claims, on the other hand, contain other elements that go beyond the individual's position and, once again, place them in a collective dimension - that of safeguarding savings. The protection of individual investors' savings certainly encompasses individual protection, constitutionally safeguar-

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24 G. Guizzi, *Interesse sociale e* governance *bancaria*, in *Società bancarie e società di diritto comune. Elasticità e permeabilità dei modelli. Incontro di studio del 23 giugno 2016*, in *Dir. banc. merc. fin.*, 2016, p. 795; G. Lemme, *Amministrazione e controllo nella società bancaria*, Milano, 2007, p. 47. In banking companies, the interest in remuneration becomes subordinated and recessive, as it takes a back seat to the interest of sound and prudent management. On this matter, please refer to G. Ferri, *La posizione dell'azionista nelle società esercenti un'attività bancaria*, in *Banca, borsa, tit. cred.*, 1975, I, p. 1 ff; G. Guizzi, *Appunti in tema di interesse sociale e* governance *delle società bancarie*, in *Riv. dir. comm.*, 2017, p. 241.

25 Already L. Mossa, *Diritto commerciale*, Milano, 1937, notes how the law of the economy differs from typical commercial law due to its strong emphasis on the public interest. In this context, there is a tendency for economic relationships to shift towards a collective and social dimension.

26 On this topic see L. R. Perfetti, *La dimensione pubblica dei diritti individuali. Il coordinamento degli enforcement amministrativi e giudiziali nell'unione europea*, in *Aida*, 2012, p. 352, nonché ID., *I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità*, in *Dir. pubbl.*, 2013, p. 114.

ded, which serves the enjoyment of individual rights and all the fundamental prerogatives that derive from them. However, each individual claim also contains a segment of public interest that projects not only towards the protection of the stability and efficiency of the entire banking system but also towards safeguarding in a meta-individual and collective dimension.

The multifaceted nature of individual claims, encompassing collective interests, confirms the complexity of the interests involved in banking activities and provides further explanation for the close correlation between the complexity of interests, heterogeneous regulations, and the rigidity and invasiveness of procedures. The complexity of these claims necessitates a balance between different interests and the enjoyment of a dimension of rights that would not be immediately attainable without the provision of a more impactful and comprehensive regulatory framework. This leads to greater rigidity in the internal organization of bank governance and external intervention by the authority as a means of protecting rights.

3.3 The relationship between risk management and sustainability

An area in which the entrepreneurial choices of a bank are characterized by elements of profound complexity is sustainability.

In all business activities, the pursuit of sustainability impacts the organizational function of the business, the structuring of processes, the definition of strategic lines, and the reporting of activities.

ESG factors (Environmental, Social, and Governance) become the focal point for rebuilding institutions and organizational structures and, at the same time, become ultimate objectives towards which stakeholders must strive. These objectives become constituent elements of a new entrepreneurial paradigm that forms the basis for building a new corporate sociality[27]. The fo-

27 F. Capriglione, *Responsabilità sociale d'impresa e sviluppo sostenibile*, in *Riv. trim. dir. econ.*, 2022, p. 6.

cus shifts from short-term profit margins to a long-term vision in which the aim is to "create socially shared and responsible value"[28].

The banking enterprise is not exempt from pursuing these objectives; it must also align itself towards creating values that encompass respect for the environment, the territory, and human resources.

However, the phenomenon becomes even more complicated when these needs are applied to the discipline of banking activity: the complexity is linked to the very nature of banking activity, which, on the one hand, carries out its own business activities like any other business, and on the other hand, extends credit to its customers.

In this context, banks become a channel for directing financial flows and take on a guiding role in the ecological transition of the economy[29]: it is no longer sufficient to adopt green behaviors in the non-financial reporting, but it is necessary to use ESG factors as a lever for strategic repositioning.

The integration of climate and environmental risks into decision-making processes and operational organizational structures poses a delicate balance with risk management and, more generally, with the pursuit of the principle of sound and prudent management. It is necessary not only to identify[30], measure, prevent, and mitigate climate and environmental risks but also to consider the impacts they have on traditional prudential risks. These impacts include credit risk due to the deterioration of the creditworthiness of counterparties exposed to physical risks in specific geographic areas or economic sectors; market risk due to the volatility of pricing of securities issued by counterparties affected by adverse climate events; operational and reputational risk due to the potential disruption of intermediaries' operations caused by extreme climate risks; and

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28 M.E. Porter, M.R. Kramer, *Creating shared value*, in *Harvard Business Review*, 2011, p. 62 e ss. To this effect M. Stella Richter JR, Long termism, in *Riv. soc.*, 2021, p. 30 ff.

29 For a discussion of the concept of economic transition, see Amorosino, *Il futuribile. Governare le transizioni "economiche"*, in *Diritti e mercati nella transizione ecologica e digitale*, edited by M. Passalacqua, *Studi dedicati a Mauro Giusti*, Milano 2021, p. 497.

30 On the difficulty of data retrieval see S. Cappiello, *Impresa società e mercato finanziario sostenibili: chi decide e sulla base di quali informazioni?*, in *Riv. trim. dir. ec.*, 2022, p. 477 ff.

liquidity risk since customers may be forced to withdraw their deposits due to adverse climate events.

In this context, the regulatory framework is characterized by a plurality of normative references, including the 2016 Paris Agreement, the European Commission's 2018 Action Plan, the UN 2030 Agenda, the 2019 European Green Deal, the 2021 Fit for 55, the 2020 Taxonomy Regulation, the Disclosure Regulation, the Benchmark Regulation, the European Directives, the Guidelines, the ECB's 2020 and Banca d'Italia's 2022 Supervisory Expectations on Climate and Environmental Risks, and the 2023 Universal Standards of the Global Reporting Initiative (GRI), among others. These interventions have been issued in a kind of upward climax[31].

In this area, the regulatory tangle and multilevel government oversight emerge in all their complexity, to which intermediaries must conform.

The normative stratification, which is rapidly evolving, and its marked heterogeneity are the result of the recognition that, in the banking enterprise, the dimension of sustainability becomes more complex due to the plurality of needs and interests that the banking activity must satisfy. This complexity extends not only to the typical business activities, not dissimilar from those of other entrepreneurial activities, but also to the inherent function of providing credit to customers.

Therefore, banks find themselves having to apply ESG (Environmental, Social, and Governance) factors to all relevant regulations, just like any other business activity. Additionally, they must comply with regulatory requirements that designate banks as guiding agents in the transition and demand that sustainability goals and climate change mitigation be integrated into the strategic

31 Thus expresses N. ABRIANI, *La* corporate governance r*esponsabile e sostenibile*, in Corporate governance, 2022, p. 3. For a timely normative reconstruction on the European regulatory pillars of the ecological transition, see BROZZETTI, *profili evolutivi della finanza sostenibile: la sfida europea dell'emergenza climatica e ambientale*, in *Diritti e mercati nella transizione ecologica e digitale*, edited by M.PASSALACQUA, *Studi dedicati a Mauro Giusti*, Milano 2021, p. 197 et seq. as well as ASSONIME, *Doveri degli amministratori e sostenibilità*. Rapporto Assonime (Note e Studi 6/2021), in *Riv. soc.,* 2021, p. 387.

planning process and implemented through an organizational system and operational processes that define responsibilities in relation to climate and environmental risks.

The complexity of sustainability in the banking sector is not only evident in the challenging reconstruction of applicable regulations but also in identifying coherence between pursuing sustainability and its compatibility with the banking business model. As banks are considered public service entities, they must, on the one hand, manage their business activities in line with the principle of sound and prudent management. On the other hand, they must ensure the constitutional protection of savings, avoiding discrimination against those who face difficulties in transitioning and amplification of inequalities.

Regarding the relationship between sustainability and sound and prudent management, the debate has shifted to the compatibility between the entrepreneurial purpose and the pursuit of sustainability, as companies are now "obligated to pursue objectives beyond profit"[32].

The focus on corporate sustainability has revitalized discussions about social interest and the compatibility of profit-driven purposes with sustainability strategies[33]. However, what is important to highlight here is that the pres-

32 S. Cerrato, *Appunti per una via italiana all'ESG. L'impresa costituzionalmente solidale (anche alla luce dei nuovi artt. 9 e 41, comma 3, Cost.)*, cit., p. 67 e 83 excludes that company directors have a legal obligation to pursue social, environmental, sustainability, ethical, social responsibility, or interests of third parties as autonomous objectives of the company's operations, except in organizational forms that permit such pursuits. The author argues that the sole purpose of the company is to generate profit for its shareholders, and, therefore, the pursuit of profit represents the true ethical commitment of the entrepreneur. In other words, the focus on profit is considered the primary ethical responsibility of the business owner.

33 The Italian legal system has, on previous occasions, introduced forms of accountability for businesses towards broader interests beyond those strictly related to shareholders. This is exemplified by the case of "società benefit" (benefit corporations). For more information on this topic, please refer to M. Stella Richter jr., *Società* benefit *e società* non benefit, in *Riv. dir. comm.*, 2017, II, p. 271 e ss.; D. Caterino, *Denominazione e* labeling *della società benefit, tra marketing reputazionale e alterazione delle dinamiche concorrenziali*, in *Giur. comm.*, 2020, I, p. 787; Ead., *Sostenibilità e diritto commerciale: dalla responsabilità sociale d'impresa alle società* benefit, in *Trattato breve di diritto dello sviluppo sostenibile*, a cura di A. Buonfrate e A. Uricchio, Padova, 2023, p. 591 ff; A. Daccò, *Le società* benefit *tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti*, in *Banca borsa e tit. cred.*, 2021, I, p. 40; E. Codazzi, *Società* benefit *(di capitali) e bilanciamento di interessi: alcune considerazioni sull'organizzazione interna*, in *ODC*, 2020, p. 589; S. Corso, *Le società* benefit *nell'ordinamento italiano: una nuova "qualifica" tra* profit *e*

ence of a comprehensive framework concerning ESG factors allows companies to orient their activities within the constitutional perimeter, ensuring that their actions respect social utility, health, the environment, security, freedom, and human dignity.

In banks, the pursuit of sustainability must be reconciled with the principle of sound and prudent management, which represents a rule of conduct and judgment in the entrepreneurial management of the banking institution.

If we agree with the considerations made so far, that banking activity is characterized by a multiplicity of services and activities that define its public service role and that the entities involved in this sector are subject to multiple demands, it becomes evident that management cannot overlook interests beyond purely social ones because individual claims take on collective value and contain a segment of the public interest. Therefore, the choice to prioritize sustainability goals aims to satisfy a public interest, just like the principle of sound and prudent management, which becomes a manifestation of it.

Regarding sustainability and inequalities, the complexity arises from the fact that banks are obligated to direct financial resources towards companies that are more deserving, including from an environmental perspective.

However, it is clear that all business activities and their organization must take place within the constitutional perimeter outlined in Article 41 of the Constitution, and the role of the bank should be to support actions aimed at enjoying fundamental rights. Hence, the economic activity of banking must be regulated with a focus on equality. These considerations lead to the conclusion that prioritizing business activities that adhere to ESG factors represents an opportunity to ensure constitutionally protected rights.

The relationship between risk management and sustainability also confirms the argument put forward so far: the pursuit of sustainability encompasses a wide range of nuances that, from the banking business perspective, must

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non profit, in *Nuove leggi civ.*, 2016, p. 995.

take into account compatibility with the principle of sound and prudent management, and from the perspective of credit provision, safeguarding savings in line with the principle of equality.

Sustainability, therefore, becomes the interpretive key for the purposes that a banking enterprise must pursue in its activities. It represents a complex concept that embodies diverse and dynamic interests. In this context, the complex response of the legal framework meets the need for protection.

4. Concluding remarks

The considerations made so far have highlighted how risk governance contains elements of complexity: the connections between sources are complex, the procedures adopted by intermediaries are complex, and the tasks and functions that the involved parties must undertake are also complex because of the diverse interests that revolve around banking activities.

This reconstruction allows the interpreter to use the polyhedric nature of interests as a prism through which to coherently read the entire discipline of the banking world.

The presence of diverse and sometimes conflicting interests is unquestionable, and it becomes essential to balance them with rules that ensure respect for underlying values and general interests.

It is legitimate to question whether the complex answers provided by the legal system end up becoming a limitation and whether there are other ways to ensure coherence in the system. However, even in this aspect, the profiles examined on risk governance have provided reassuring answers.

There is no doubt that banking law is increasingly subject to a flood of regulations, making it complicated for intermediaries to navigate through them. Compliance costs often become a significant problem, especially when the principle of proportionality is disregarded. Therefore, more organized and coherent regulatory interventions would be desirable.

However, these aspects impact the need to avoid cumbersome, conflicting, and overly abundant interventions.

Complexity, on the other hand, carries a different meaning: it encompasses plural and dynamic interests that require protection.

Giorgio Parisi, Nobel Prize in Physics in 2021, in his book "In a Flight of Starlings. The Wonders of Complex Systems," observes that the collective behavior of a flock of birds cannot be deduced from the sum of the behaviors of individual birds. The physicist notes that the birds adopt group behaviors to defend themselves against aerial predators, particularly the Peregrine falcon: "some of the most spectacular evolutions of starlings are precisely caused by their attempts to evade the repeated attacks of the Peregrine falcon, which must make a large number of attempts before catching a prey." The protection occurs within the group and with continuous movement, as the starlings perform beautiful choreographic figures in the sky, they are actually defending themselves from the Peregrine falcon through the group, as the complex movement allows them to protect the birds.

These reflections can be effectively relevant for a positive jurist.

In the banking sector, rules and regulations become the result of an evolutionary process that is embedded within a constantly changing economic and social context. The rigidity of norms and the multitude of interventions are expressions of a complex organizational process, serving to ensure not only the bank's entrepreneurial interest in risk minimization but also, and primarily, the pursuit of a sound and prudent management of its activities. This is done with the aim of safeguarding all the rights that the exercise of banking activities allows to achieve.

The multiform reality in which banks operate represents not a limitation but rather a testament to the relevance of their very activity and a place where fundamental rights find their protection, and their complex solutions are "spectacular evolutions," indispensable for better safeguarding.