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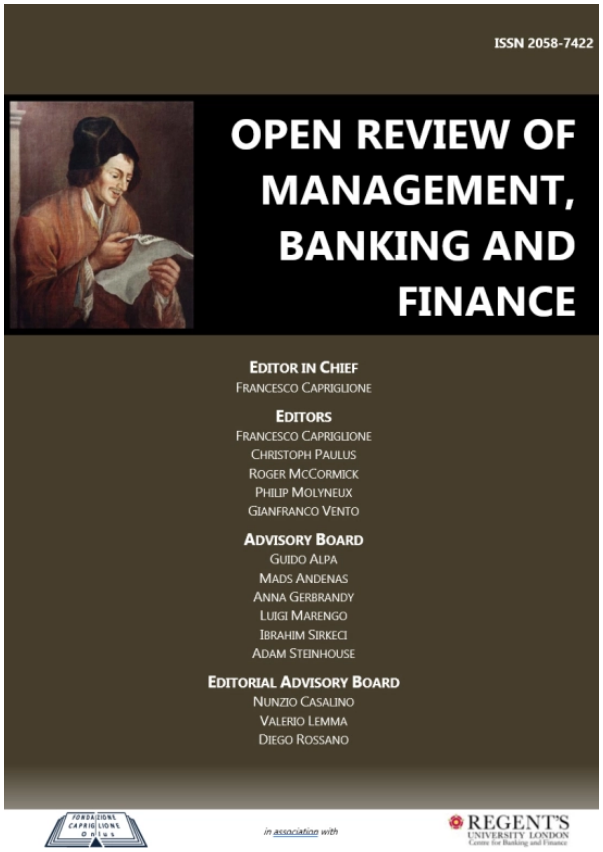

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Measures to support businesses in the wake of the Covid-19 pandemic and their intersection with banking supervisory rules: the paradigmatic case of Italy

by Alberto Urbani

Abstract: *The negative repercussions of the Covid-19 pandemic on the economic fabric have led States to prepare various types of support measures. From this point of view, some measures adopted by the Italian legislator in the first half of 2020 express paradigmatically the challenges national legal systems had to face to reconcile different and contrasting needs. In this regard, the state guarantee measures for loans offered by the banking system appear emblematic, raising dilemmas of "competition between emergencies" in the quest to strike a difficult balance between solidarity and responsibility.*

Summary: 1. Pandemic crisis and public interventions to support economic activities in difficulty. – 2. The paradigmatic case of public guarantees provided for by the Italian emergency legislation of spring 2020. – 3. The challenges of the its first application and the question of the role of banks in the guaranteed credit line investigation. – 4. Possible negative effects on the banking system. – 5. Pandemic, risks of infiltration by crime in companies in crisis and law enforcement measures: the risk of "competition between emergencies", seeking a balance between solidarity and responsibility.

1. Pandemic crisis and public interventions to support economic activities in difficulty.

As is well known, the pandemic crisis from Covid-19 that has afflicted the entire planet for more than a year is having very heavy repercussions also on the economic level, albeit with degrees of intensity and with forms of manifestation evidently different from country to country due to local peculiarities. If we consider the case of Italy, for example, already the first wave of infections in spring 2020, which had led the government to a drastic lockdown that lasted for several weeks with the consequent suspension of many production activities, had led to a drastic reduction in gross domestic product to the point that the National Statistics Institute reported that over 40% of the country's companies had seen their turnover halved in the first quarter of the year[1]; for easily understandable reasons, sectors such as tourism or catering have had much greater losses, moreover exacerbated by the continuous stop and go arranged by the authorities to try to "save the day", that is to contain the spread of the virus through targeted restrictions on the free movement of people as much as possible by removing them or at least mitigating them as soon as circumstances allowed. One year later, companies in important economic sectors must unfortunately still record reductions in turnover that in some cases even exceed 90%[2], so it is easy to predict that many of these will no longer be able to regain viability even after the health emergency is over.

Faced with this situation, the governments of all countries have obviously tried to stem the negative effects of the pandemic on the economic fabric by adopting support measures of various kinds and of different scope. This has also happened in Italy, in relation to which in the following paragraphs I would like to briefly focus the analysis only on some specific measures that have affected the banking system, trying to critically examine them from the specific, purely legal perspective of their intersection with the supervisory legislation underpinning this regulated sector.

2. The paradigmatic case of public guarantees provided for by the Italian emergency legislation of spring 2020.

Let's start, therefore, first of all, with a brief overview of the provisions that more than others seem to be taken into consideration according to the entry point of analysis just proposed.

In support of companies in difficulty, last spring the Italian government decided to act above all with three measures in rapid sequence, then converted into law by the Parliament: the so-called "Cura Italia" Decree in March (law decree March 17, 2020, n. 18, converted, with amendments, into law April 24, 2020, n. 27), the so-called "Liquidity Decree" in April (legislative decree 8 April 2020, no. 23, converted, with amendments, into law 5 June 2020, no. 40) and finally the so-called "Relaunch Decree" in May (law decree 19 May 2020, n. 34, converted, with amendments, into law 17 July 2020, n. 77).

For our purposes, the second is particularly relevant, which – in its original text – first of all envisaged a ceiling of public guarantees of 200 billion euros, of which 30 in favour of small and medium-sized enterprises. The role of guarantor is assumed in this case by SACE, a publicly held company, under certain conditions (headquarters of the beneficiary company in Italy, with the allocation of the loans to establishments located in Italy; being in a difficult situation due to the emergency Covid; having already used the Central Guarantee Fund for small and medium-sized enterprises to its maximum capacity[3]; not being classified as companies in difficulty as of 31 December 2019; not having impaired exposures to the banking system; commitment not to

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(art.13), the access criteria to the Central Guarantee Fund for small and medium-sized enterprises were revised, raising the maximum amount that can be financed up to 5 million euros, admitting companies up to 499 employees, raising the coverage percentage to 90% and with a duration of up to 72 months, extending the possibility of requesting the guarantee – which is granted free of charge – also to cover loans already disbursed, provided it has not been for more than three months and in any case after January 31, 2020 and even, it should be noted, admitting the 100% full guarantee for loans up to 25,000 euros (raised to 30,000 by the conversion law), with the maximum limit of 25% of the turnover of the last financial statement o the last tax return of the beneficiary, with repayment expected not earlier than 24 and not later than 72 months (again, increased to 120 months at the time of conversion); possession of these requirements can also be certified by means of a simple self-certification produced by the beneficiary himself.

It is worth recalling, however, that art. 56 of the "Cura Italia Decree" had provided for a moratorium on debt exposures to banks in various ways in favor not only of small and medium-sized enterprises, but also of micro-enterprises[4], always guaranteed by the Central Guarantee Fund for SMEs, but for an amount equal to 33% of the loan, also in this case upon the occurrence of certain conditions that it is not necessary to investigate here.

3. The challenges of the its first application and the question of the role of banks in the guaranteed credit line investigation.

From a law and economics perspective, what are the considerations raised by the measures summarized above, especially those deriving from the legislative decree n. 23/2020 and its conversion law? The analysis of the question from the particular angle of observation of the banking legislation, both in terms of the relationship between bank and customer (specifically, the enterprise) and of the aspects relating to the sound and prudent management of the bank, gives rise to certain interesting considerations as well as some legitimate fears.

I do not go into the issues regarding the role that the "Liquidity Decree" has designed for SACE and for Cassa Depositi e Prestiti, which is a topic that has already been addressed by some analysis carried out in the legal literature[5]. I rather intend to focus on the State guarantees on loans of a lower amount, by expressing a largely positive assessment in this regard, unlike some contrary opinions that emerged in the public debate: it seems to me that the support system prepared, centred on the instrument of the "state" guarantee against bank financing, is more efficient than the alternative of non-repayable contributions. In fact, on the one hand it makes responsible (at least on the moral level, if not precisely on the legal one) the beneficiaries and, on the other hand, in the event of the return of the funds received, it allows cost savings for public finance[6] and / or, correspondingly, an increase in the number of possible beneficiaries. Likewise, the application extensions made by the law converting the decree and already highlighted above were intended to strengthen, albeit with understandable prudence, the "firepower" of this intervention tool.

Obviously, all this does not exempt from noting the practical-operational difficulties encountered with regard to the timing of the material conclusion of the loan application, as also noted by the Head of the Bank of Italy's Banking and Financial Supervision Department during a hearing before the parliamentary commission of inquiry on the banking and financial system[7], who has promptly pointed out the main reasons. First of all, as of 29 May 2020, that is a couple of weeks before that hearing, the applications presented had touched 800,000 units, of which about 724,000 for amounts up to 25,000 euros guaranteed by the State: if we take into account that the at the beginning of April of the same year the applications had been only a little more than 8,000, it is evident the impressive amount of requests downloaded to the banking system in a very short time. Secondly, it should be noted that the greatest number of applications occurred precisely at the moment of the first peak of the pandemic, that is, when the branches of the banks were largely with reduced operations and with the staff mostly relocated, so that sometimes the intermediaries even had to resort to outsourcing services for the required document checks. Finally, the daily applications submitted to the Central Guarantee Fund also increased from 500 to 20,000, which required Mediocredito Centrale, which manages the Fund, to make an immediate but significant IT adjustment. Over the course of the months, however, these difficulties were greatly attenuated, while the moratoria pursuant to the "Cura Italia Decree" had a fluid process immediately.

On a strictly legal level, however, the thorny question arises of the configurability of a bank's liability, especially for small loans, both in terms of the illegal granting of credit (in the event of bankruptcy of the financed company, to have the bank contributed to aggravate the financial situation of the subsidiary) and also under the criminal one (for possible participation in bankruptcy crimes)[8]. The legislator has in fact realised such issues and it tried to remedy it when converting the Legislative Decree into law. n. 23/2020 by introducing a new art. 1-*bis*, in which a substitutive self-declaration is provided by the applicant regarding the possession of the requisites to be admitted to the support measure, with the specification contained in par. 5, which except for anti-money laundering checks (to which we will return shortly) «*the entity that provides the loan is not required to carry out further investigations with respect to the formal verification of what is declared*»: clear the intention of relieving the bank from liability, at least from the perspective of the subjective element of a possible crime.

But is it really so? Putting aside the purely criminal profiles which we leave to the analysis of the experts in the field, both in a banking civil perspective, in my opinion, the answer must be negative. From the point of view of the supervisory legislation, first of all, it is true that the recently introduced rule has the force of law and therefore is on a equal footing with, and abstractly capable of opposing, other rules of the same legislative rank; at the same time, it cannot be overlooked that the rules relating to the investigation of credit lines and their review are enshrined in supervisory regulations and therefore to subordinate sources of law

is the reflection, as well known, of principles that derive from supranational sources. Hence the repercussions also on the civil law level, since the overall supervisory regulatory framework just mentioned leads us to believe that the bank cannot be considered exempt from any verification, as in fact promptly specified also by the high representative of the Bank of Italy during the above mentioned hearing[9]. Further, the very SACE, despite in a partially different perspective, is bound to «*operate with due professional diligence*» (see art. 1, par. 5, legislative decree n. 23/2020). Of course, another and different discourse – the examination of which is not undertaken here – is that of the degree of probability that one day the public guarantor will take concrete action against the bank to protect its own reasons.

4. Possible negative effects on the banking system.

Three quick considerations before moving to a final critical issue that emerges from the regulations we are dealing with.

The first: transactions not supported by an adequate preliminary investigation are inevitably destined to evolve into impaired loans to an extent that can be presumed to be greater than what would have happened in the face, vice versa, of carrying out the usual investigations. This is even more likely in the presence of a general economic situation which is already particularly problematic[10], even more so if we consider that the conversion law has expanded the possibility of granting the guarantee, for example, also in favor of beneficiaries who present, at the time of the application, exposures towards the lender classified as unlikely to pay or as past due exposures impaired and / or overdue, provided that this classification is not prior to January 31, 2020 (see Article 13, paragraph 1, letter g-*bis*), Legislative Decree n. 23/2020). Although covered in whole or in part by public guarantees, we will therefore see losses on the part of the banks not attributable in this circumstance to bad management by bank representatives: therefore, the remark authoritatively put forward by one of the first commentators on the measures seems well-grounded[11]. The Author calls for a supervisory regulation that does not ignore these specific reflections that the emergency legislation can reverberate in the medium term on the banking business, or at least – I may add – that guidelines taking this into account could be prepared for supervision activities.

Secondly, the fact that the rates of these financing operations are controlled implies a lower profitability for credit institutions. Fortunately, after the first months of the pandemic, the feared contraction of "ordinary" credit was not recorded, which would have implied an excess of liquidity available to banks, forcing intermediaries to pour deposits into the interbank at currently negative interest. Nonetheless, as has been predicted[12], it cannot be ruled out that the measures adopted last spring will have a negative impact on bank balance sheets, and this too must be taken into account by the supervisory action[13].

Lastly, it is known that the instrument of the decree-law makes it possible to respond immediately with regulations having the force of law to urgent needs, but which at the same time is exposed to the possibility of modifications during its conversion. This is precisely what happened also with regard to the measures contained in the so-called "Liquidity Decree" we are dealing with. Well, regardless of any consideration about the appropriateness or inadequacy, effectiveness or ineffectiveness of the changes introduced by law no. 40/2020, it cannot be overlooked that these have imposed to redress the financing practices already concluded in the meantime: on the one hand, a surplus of work for the banks has resulted (which has not been unwelcome given the greater protection that the new measures could ensure to banks), on the other hand supplementary obligations imposed on the customer (in most cases presumably annoyed by what they will have perceived only as yet another useless burden imposed by the bureaucracy machine, but instead favourably oriented when the modification proved to be in their favour, as in the case of an extension of the duration of the guaranteed loan).

In summary, these are therefore measures that deserve an overall positive judgment, but which at the same time also brings up critical issues for the banking system, some actual ones and some potential ones. Hence it arises the opportunity for regulatory and supervisory interventions aimed precisely at tempering such detrimental consequences for intermediaries, even though, as is well known, these are now removed from the competences of the national authorities in the sector as they are endowed to the Single Supervisory Mechanism.

5. Pandemic, risks of infiltration by crime in companies in crisis and law enforcement measures: the risk of "competition between emergencies", seeking a balance between solidarity and responsibility.

It was previously mentioned that even for financing transactions of a smaller amount, the so-called "Liquidity Decree", as supplemented by the conversion law, maintains «*provided… the reporting obligations envisaged by the anti-money laundering legislation*» (art. 1-*bis*, par. 5, legislative decree 23/2020). In the immediately preceding paragraph, this reference to the anti-money laundering regulations is corroborated by the promotion of a memorandum of understanding to be signed between the Ministry of the Interior, that of the economy and SACE for the prevention of criminal infiltration attempts[14].

Those are important steps, which testify not only the concern but also the attention on the part of the legislator for a risk that is unfortunately objectively actual, a risk that is obviously not only Italian. It is well known that among the "collateral emergencies" to the pandemic there is also the risk, feared by many, that criminal organizations will take advantage of the crisis to take over companies in difficulty.

Well, in looking at the Italian legal system, the answer to this legitimate and well-founded fear cannot ignore the preliminary consideration that, fortunately, in general terms Italy has an anti-money laundering discipline which, although with its inevitable limitations, it has always been

As for Italy, competent Authorities are committed to prevent the initiatives of organized economic crime to insinuate themselves into the fabric of companies in difficulty due to the pandemic in progress and this is proved, for instance, by the fact that since 16 April 2020 the Financial Information Unit (UIF), the Italian anti-money laundering agency, issued an ad hoc communication where specific risk areas where highlighted: speculative manoeuvres and scams related to the supplies and services directly involved in the fight against the Coronavirus, collection of funds also online and in the form of crowdfunding, usury, infiltration into companies in crisis, diversion of public resources to support liquidity[15]. In just the first four months after the outbreak of the pandemic in the country, the FIU has received 243 reports of suspicious operations linked to the Covid-19 emergency: this is a worrying figure. At the same time, on 10 April 2020 the Bank of Italy also intervened to recommend compliance with the customer due diligence obligations – improperly not referred to by the "Liquidity Legislative Decree" – calibrating the depth and intensity of controls based on the estimated increase in the level of risk[16]. And at the international level shortly before, i.e. on 1 April, the FATF had also issued a specific "statement"[17] on the matter.

We are faced with extremely critical issues, which, as such, certainly cannot be neglected. On at least one point, I believe we need the utmost clarity: it is not possible to articulate the debate on these so important and at the same time complex issues in terms that we could define as "competition between emergencies", that is, thinking of taking the shortcut of temporarily attenuated legality checks as they are considered as a brake on a timely economy recovery. Instead, the difficult times we are going through require us to make additional efforts in search of a balance point between the need to quickly provide companies with the necessary financial resources, that of protecting the law and that, again, of not dissipating the public funds made available. In this perspective, we embrace the need for a "ethic of virality" advocated in a recent paper equally dedicated to the first emergency interventions of 2020 in the face of the pandemic[18]. The expression can also be correctly applied with reference to the public guarantee instruments we have dealt with, since when there is little risk (because a guarantee of 80%, or even 90%, operates to cover the loan received) or you do not risk anything (if the guarantee is total) it is easy to be tempted by the logic of irresponsibility: it may apply to banks, but it is even more true for financed entities. On a closer look, this is the same underlying temptation (and sometimes not so much underlying) to the multiform and recurring requests for non-repayable loans. If it is true that the State most important role lies in supporting citizens (and businesses) in moments of greatest difficulty, at the same time this should not translate, however, into forms of de-responsibility of the individual to be borne by the community, irrespective as to whether the funding comes from internal national resources or draws on European Union funds.

In this perspective, "ethics of virality" thus means the search for a correct (yet delicate and not easy) point of balance between solidarity and responsibility, between collective efforts and individual commitment.

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[1] ISTAT, *Tra marzo e aprile oltre il 50% di fatturato in meno per 4 imprese su 10*, avaialable at *https://www.istat.it/it/files//2020/06/Imprese-durante-Covid-19.pdf*.

[2] ISTAT, *Tra giugno e ottobre riduzioni di fatturato per oltre due terzi delle imprese*, avaialable at *https://www.istat.it/it/files//2020/12/REPORT-COVID-IMPRESE-DICEMBRE.pdf*.

[3] See art. 2, par. 100, lett. *a)*, law 23 dicembre 1996, n. 662 e art. 17, par. 2, legislative decree 29 marzo 2004, n. 102.

[4] According to the definition provided by the European Commission Recommendation no. 2003/361/ EC of 6 May 2003.

[5] See MOLITERNI F., *Crisi economico-finanziaria, assicurazione dei crediti, garanzia dello Stato e riassicurazione di ultima istanza*, in *Nuova giur. civ. comm*., supplem. al n. 5/2020, p. 54 ff.; ROSSANO D., *La natura privilegiata del credito vantato da SACE S.p.A*., ivi, p. 132 ff; MESSINA P., *Le sorti della garanzia pubblica nell'ipotesi di cessione del credito della banca alla luce della normativa emergenziale*, ivi, p. 127 ss.; per i profili più squisitamente giuslavoristici, v. inoltre ZAMBELLI A. – DI GENNARO V., *Emergenza Coronavirus, la garanzia Sace nel decreto liquidità*, in *Guida al lav*., 2020, n. 27, p. 34 ff.

[6] In the same direction, see e.g. MAGGIOLINO M., *Appunti sul ruolo delle banche ai tempi del COVID-19*, in *Riv. soc*., 2020, p. 547.

[7] ANGELINI P., *Lo stato di attuazione delle misure in materia di finanziamento con garanzie dello Stato previste dai Decreti Legge n. 18 di marzo e n. 23 di aprile 2020*, audizione davanti alla Commissione Parlamentare d'Inchiesta sul sistema bancario e finanziario, 11 giugno 2020, available at *https://www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2020/Angelini_audizione_11062020.pdf*.

[8] The issue was immediately tackled also by the jurisprudence, which in some measures taken as a matter of urgency in the face of appeals presented by the bank's client against the bank's denial of the guaranteed loan (in both cases, 100%) from the state, gave diametrically opposite answers: see Trib. Napoli, 5 agosto 2020 and Trib. Caltanissetta, 8 luglio 2020, in *Riv. trim. dir. econ*., 2020, II, p. 124 ss., commented by ROSSANO D., *La valutazione del merito creditizio nel decreto "liquidità": nota a margine di due ordinanze* ex *art. 700 c.p.c*., ivi, p. 132 ff.

[9] «*Legislative Decree 23, while providing for simplified procedures for granting the guarantee and evaluation by the MCC, did not exempt banks from carrying out checks on these matters*

discussing the emergency legislation has ended up assigning banks almost the role of "public officials" and, even more explicitly and widely see MAGGIOLINO M., *op. cit.*, p. 547 ff.; further, see also CONDEMI M., *Il «Merito creditizio» nel contesto normativo conseguente alla pandemia da Covid-19*, in *Sistema produttivo e finanziario post Covid-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia*, a cura di Malvagna U. e Sciarrone Alibrandi A., Pisa, 2020, p. 238 ff.

[10] On the very likely risk that the current pandemic crisis produces a considerable increase in bank non-performing exposures, see, for all, the considerations of MAGGIOLINO M., *Le esposizioni deteriorate ai tempi della pandemia*, in *Sistema produttivo e finanziario post Covid-19*, cit., p. 199 ff.; MALVAGNA U. – SCIARRONE ALIBRANDI A., *L'onda lunga della pandemia e l'esigenza di una gestione "sociale" delle sofferenze bancarie*, ivi, p. 211 ff.; JING E., *Impact of High Non-Performing Loan Ratios on Bank Lending Trends and Profitability* (August 10, 2020), in *International Journal of Financial Studies*, 2020, 8, 12, available at SSRN: *https://ssrn.com/abstract=3670002*; ARI A., CHEN S., RATNOVISKI L., *COVID-19 and Non-Performing Loans: Lessons from past Crises* (May 27, 2020), available at SSRN: *https://ssrn.com/abstract=3632272* or *http://dx.doi.org/10.2139/ssrn.3632272*.

[11] See CAPRIGLIONE F., *La finanza UE al tempo del* Coronavirus, in *Riv. trim. dir. econ.*, 2020, I, p. 8 ff.

[12] LEMMA V., *I bilanci bancari al tempo del CoViD-19: intervento pubblico e ruolo degli enti creditizi*, in *Nuova giur. civ. comm*., supplem. al n. 5/2020, p. 5 ff.

[13] Also in this perspectivive the various initiatives taken at European level should be interpreted, as well illustrated by BROZZETTI A., CECCHINATO E., MARTINO E., *Supervisione bancaria e Covid-19*, in *Sistema produttivo e finanziario post Covid-19*, cit., p. 165 ff.; PEYDRO J.-L., POLO A., SETTE E., *Risk Mitigating versus Risk Shifting: Evidence from Banks Security Trading in Crises* (November 18, 2020), *European Corporate Governance Institute – Finance Working Paper* 713/2020, available at SSRN: *https://ssrn.com/abstract=3732831* or *http://dx.doi.org/10.2139/ssrn.3732831*; COLAK G., ÖZTEKIN Ö., *The Impact of COVID-19 Pandemic on Bank Lending Around the World* (October 15, 2020), available at SSRN: *https://ssrn.com/abstract=3712668*.

[14] See *Protocollo d'intesa per la legalità e la prevenzione dei tentativi di infiltrazione criminale nelle imprese beneficiarie delle misure temporanee per il sostegno alla liquidità di cui all'art. 1 del decreto legge 8 aprile 2020, n. 23*, allegato alla circolare del Ministero dell'interno n. 11001/119/7, prot. n. 0029842 del 4 maggio 2020, available at *https://www.interno.gov.it/sites/default/files/circolare_4_maggio_2020.pdf*.

[15] UNITÀ DI INFORMAZIONE FINANZIARIA PER L'ITALIA, *Prevenzione di fenomeni di criminalità finanziaria connessi con l'emergenza da Covid-19*, available at *https://uif.bancaditalia.it/normativa/norm-indicatori-anomalia/Comunicazione-UIF-16.04.2020.pdf*.

[16] See *Raccomandazione della Banca d'Italia su tematiche afferenti alle misure di sostegno economico predisposte dal Governo per l'emergenza Covid-19*, available at *https://www.bancaditalia.it/compiti/vigilanza/normativa/orientamenti-vigilanza/Comunicazione-intermediari-aprile.pdf*.

[17] GAFI, *Statement by the FATF President: COVID-19 and measures to combat illicit financing*, available at *https://www.fatf-gafi.org/publications/fatfgeneral/documents/statement-covid-19.html*.

[18] LEMMA V., *op. cit.*, p. 9.