

LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL
MARKET
REGULATION,
BUSINESS
DEVELOPMENT AND
GOVERNMENT'S
POLICIES ON
GLOBALIZATION

Editors

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The “Law and Economics Yearly Review” is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government’s policies, business development constraints and the “sovereign debt crisis” are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism’s turbulences and to promote a sustainable retrieval.

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CONTENTS

The EU seeking a new balance between regulatory harmonization, economic convergence and sovereignty	149
--	------------

Francesco Capriglione

Eurozone creation and possible exits: political, institutional, monetary and economic issues. An analysis of the key stress points of the single currency and their interactions190
---	-------------

Rainer Masera

Testing the EU framework for the recovery and resolution of banks: the Italian experience.....	242
---	------------

Stefano Micossi

“We know what we are, but know not what we may be”: considerations on the (need for) harmonization of regulations for financial leasing in the EU.....	255
---	------------

Antonio Blandini – Gianfranco Alfano

Smart contracts and (non-)law. The case of the financial markets.....	291
--	------------

Francesco Di Ciommo

Microcredit in the Italian and Brazilian legal systems: a bird’s eye view	326
--	------------

Roberto Miccù – Jose Luis Bolzan de Morais – Diego Rossano

FOCUS ON GLOBAL PERSPECTIVES

Revisiting the issue of unitary enterprises` "inefficiency" (on the example of the stavropol territory)..	351
--	------------

Aleksey P. Anisimov – Vyacheslav S. Eliseev – Ekaterina V. Stepanova

Strategic and organizational effects of environmental regulation on operational processes of sustainable MSEs.....	365
---	------------

Nunzio Casalino – Henrietta Nagy – Barbara Borin

MICROCREDIT IN THE ITALIAN AND BRAZILIAN LEGAL SYSTEMS: A BIRD'S EYE VIEW *

Roberto Miccù ** - Jose Luis Bolzan de Morais *** - Diego Rossano****

ABSTRACT: *The aim of this paper was to analyze the regulation of microcredit in Brazil and in Italy, contextualizing the activity of microcredit within the Italian legal system constitutional order, and identifying the reasons for its poor diffusion.*

We believe that Italy, similarly to what has taken place in Brazil where governments, over the years, have strongly promoted policies to favor the development of microcredit in the country, should invest more in this field. It appears, moreover, appropriate to identify, in law, less strict criteria for access to this sector, as well as more flexible conditions in the areas of auxiliary services, interest rates and capitalization of the microcredit entities.

SUMMARY: 1. Introduction. – 2. Microcredit in Brazil - in perspective. – 2.1. History and Legislative Discipline. – 2.2. The typology of microcredit in Brazil. – 2.3. The results of microcredit in Brazil. – 3. The regulation of microcredit in Italy. – 4. The various types of microcredit in Italy. – 5. The constitutional framework of microcredit in Italian regulation. – 6. The reasons for the poor diffusion of microcredit in Italy. – 7. Conclusions.

1. In Italy between 2016 and 2018, the Italian “Ente Nazionale per il Microcredito” registered a three-figure increase in the request for microcredit from financial institutes under contract to it. The figures indicate an increasing trend in re-

*This paper is the result of a unitary approach and a common reflection by the three authors. However, paragraphs 1 and 5 can be attributed, in particular, to Roberto Miccù, while paragraphs 2, 2.1., 2.2., 2.3. can be attributed to Jose Luis Bolzan de Morais. Paragraphs 3, 4 and 6 can be attributed to Diego Rossano. Paragraph 7 can be attributed to the three authors.

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quests of more than three thousand only in 2018, with a net increase with respect to the 463 requests in 2016. This positive tendency also concerns financing actually provided: the credit check was positive in 88% of the cases, and the total sum was € 31.4 million, with a growth rate that from 2016 to date, has increased by 100% annually.

Even if these figures are only a fraction of the total annual Italian finance and banking market, microcredit is an important hub for national economic development, orientated at closing the gap between unexpressed potential, often due to the absence of an adequate guarantees and material economic situations. In synthesis, it appears to be an instrument for direct financial facilitation favoring the integration and increase of production, increasing company competitiveness and accelerating the processes of inclusion and financial literacy of small economic initiatives.

Albeit originating – at least in its modern sense - in contexts of low and problematic levels of economic development, microcredit is, in this way, a very interesting instrument also in contexts that are highly advanced and equipped with an advanced financial industry. It is an effective alternative to traditional channels of credit that are often in the grip of regulations and high competitive pressure, both internal and external.

What are, briefly, the identifying characteristics of microcredit? In doctrine, microcredit is defined as the loan of a small sum, generally not supported by a traditional guarantee, with auxiliary services, offered to individuals or groups who are extremely poor or who are victims of financial exclusion¹.

On the practical level and in the context of the various juridical regulations, the institute is then variously applied, assuming different characters² according to how the variables of the size of the loan, the absence of a traditional guarantee, the presence of auxiliary services, the nature of the beneficiary and thus the aim of the financing are stated. There therefore exist a variety of microcredit models that de-

¹See LA TORRE, VENTO, *Microfinance*, Palgrave Macmillan, 2006.

²See BOTTI, CORSI, ZACCHIA, *La microfinanza in Europa: modelli a confronto*, *Moneta e Credito*, vol. 70, 2017, 101-129.

pand on geographic context and procedures of reference, especially in industrialized countries³.

The characteristics of the legal system in which the phenomenon of microcredit (think of India)⁴ was originally created and diffused encouraged us to associate to the experience of laws such as those in Brazil, a country between those that are strictly “under development” and those of the most developed countries, to the Italian legal-financial system, with the aim of obtaining a “lesson” on the possibility of improvement and growth of an instrument such as microcredit⁵.

With this aim, in this paper we will focus on the analyses of the regulation of microcredit in Brazil and in Italy, contextualizing the activity of microcredit within the Italian legal system⁶, and identifying the reasons for its poor diffusion.

2. The interest in microcredit in some way dialogues with the transformations in the forms and formulas of state intervention, under the model of the Social State, in a context of change of perspective, especially due to economic changes when the relationship between the gross domestic product, and financial assets drifts towards the latter in the proportion of dollars from four to one, which is not necessarily confused with a preponderance of the private sector in the supply of credit to these sectors.

On the other hand, it is necessary to consider the transformations in the productive models and in the labor market, which contributes to the expansion of the number of small entrepreneurs circulating in the credit markets, many if not the majority, with difficulties of access to traditional financial services mechanisms.

³See GARRIDO-PRIOR, *Bancarización y microfinanzas. Sistemas financieros para las Mypymes como un dilemma central para el Desarrollo economico en Mexico*, in *Financiamiento del crecimiento economico*, ed. Calva, Mexico, 2007, 57 ff.; MARTINEZ, *Microcrédito y pobreza en Venezuela: un caso de estudio*, *Revista mexicana de ciencias políticas y sociales*, 2006, p. 95-112

⁴See YUNUS, *Il banchiere dei poveri*, Milano, 2007

⁵See CONDE BONFIL, *Contribucion de las microfinanzas al desarrollo economico y social. Desafíos actuales.*, in *Financiamiento del crecimiento economico*, ed. Calva, Mexico, 2007.

⁶See LA TORRE, *Il microcredito in Italia tra regolamentazione e mercato*, in *Bancaria*, 5, 2015, 2 pp. 2 ff.

All this, as it happens in Brazil, must be well understood so that one can understand such novelties and give adequate and qualified answers to them.

Thus, we will here make a small historical development of the microcredit situation in Brazil, especially in the legislative perspective, in order to try to recognize the conditions of possibility for its success or not, responding adequately or not to the economic circumstances peculiar to small activities small-scale trades and manufactures, usually located in the peripheries of the metropolitan regions and in the small cities of the interior of the country, in particular.

2.1. In Brazil, the first experience in microcredit was developed by the Northeastern Union for Assistance to Small Organizations in the cities of Recife (PE) and Salvador (BA). Known as Program One, it ran from 1973 to 1991.

In the 1980s, in the forefront, the first experiences of what could be classified as microcredit emerged, exemplarily the Ceape Network and the Women's Bank, affiliated with international networks - Acción Internacional, Banco Interamericano de Desenvolvimento (BID), Inter-American Foundation e Women's World Banking.

On the other hand, in the 1990s, the first public programs focused on microcredit emerged. In 1996, the National Bank for Economic and Social Development (BNDES) created the Popular Productive Credit Program (PCPP), which provided financial resources to civil society organizations specializing in microcredit. In 1997, the Banco do Nordeste (BNB) launched the CrediAmigo Program and in 1999, Law nº. 9790/99 - called the Third Sector Law - entered into force, which established the so-called Civil Society Organizations of Public Interest (OSCIPs) as non-profit private legal entities, including microcredit as one of the purposes of these entities, through access to public resources for the provision of these funds.

In 2001, under Law nº. 10194/01, the creation and operation of micro-entrepreneurial credit societies (SCMs), legal entities under private law, with a profit-making purpose, were created to encourage the participation of private sector actors in this market.

Then, in 2003, the Federal Government stipulated that banks could use up to 2% (two percent) of the compulsory deposit to which they are liable as capital to shore up their productive and targeted microcredit operations, allowing those who did not have structured operations to negotiate this capital with other organizations that were interested in using microcredit resources.

And, on April 25, 2005, the National Program of Productive Oriented Microcredit (PNMPO) was established, through Law nº. 11110/05, and, on August 24, 2011, under the Brazil Without Misery Plan and PNMPO, the Federal Government launched the Growing Program.

In the same way, over the last twenty years, several state and municipal governments have implemented their own microcredit programs, such as: “Microcredit Program” of Santa Catarina’s State Development Agency SA (BADESC), “CredPop” of Minas Gerais’s Bank of Development SA (BDMG), “Our Credit” from Espírito Santo’s Development Bank (BANDES), among others.

Now, on March 20th, 2018, the Federal Government enacted Law nº 13636/18, amending Laws nº 11110/05 and nº 10735/03, with the conversion of Provisional Measure nº. 802/17.

In this legislation, despite the vetoes imposed by the Federal Chief Executive, reviewing the National Program of Productive Oriented Microcredit (PNMPO), the objective of supporting and financing productive activities of entrepreneurs is reiterated, mainly through the provision of resources for productive microcredit (art. 1º), benefiting natural and legal entrepreneurs of urban and rural productive activities, presented individually or collectively (§ 1º), provided that they have income or gross annual revenue of up to R \$ 200,000.00 (two hundred thousand reais), defining (article 1º) what it considers productive oriented microcredit:

§ 3º . For the purposes of the provisions of this Law, it is considered productive microcredit oriented the credit granted to finance the productive activities, whose methodology will be established in regulation, observing the preference for the direct relationship with the entrepreneurs, admitting the use of digital and elec-

tronic technologies that can replace the face-to-face contact. (translated by the author)

Also, it established (art. 3º) which institutions are authorized to participate or operate the PNMPO, bringing together public, private, cooperative, OSCIPS and FINTECHS entities⁷.

On the other hand, because of the very characteristics of this type of credit and of its borrowers, credit operations were allowed to be guaranteed using several guarantee instruments (jointly or individually) (art. 5º)

In order to manage the Program (PNMPO), it provided in its operational structure an Advisory Council and a National Microcredit Forum (art. 7º). The first is consultative and propositive, composed of representatives of the Union's organs and entities, with the purpose of proposing policies and actions to strengthen and expand the Program; and the second, with the participation of competent federal agencies and representative entities of the sector, with the objective of promoting the continuous debate among the entities related to the segment⁸.

Thus, the legislative formulation is set, and it can be seen that the PNMPO, instituted by Law nº. 11110/05, amended by Law nº 13636/18, maintains, as general

⁷As stated in art. 3º: I - Caixa Econômica Federal; II - National Bank for Economic and Social Development; III - commercial banks; IV - multiple banks with commercial portfolio; V - development banks; VI - central credit cooperatives; VII - individual credit cooperatives; VIII - development agencies; IX - microentrepreneur and small business credit societies; X - civil society organizations of public interest; XI - credit agents established as legal entities, under the terms of the National Classification of Economic Activities (CNAE); XII - fintechs, thus understood the companies that provide financial services, including credit operations, through electronic platforms. (translated by the author)

⁸In art. 7º: I - Ministry of Labor, who will preside; II - Ministry of Finance; III - Ministry of Social Development; IV - Ministry of Industry, Foreign Trade and Services; V - Ministry of Planning, Development and Management; VI - Ministry of National Integration; VII - Secretary of Government of the Presidency of the Republic; VIII - Central Bank of Brazil; IX - National Bank for Economic and Social Development; X - Caixa Econômica Federal; XI - Banco do Brasil S.A. ; XII - Banco do Nordeste do Brasil S.A. ; XIII - Banco da Amazônia S.A. ; XIV - Civil House of the Presidency of the Republic; XV - National Institute of Colonization and Agrarian Reform. In addition to these, the following may be invited: I - National Forum of State Secretaries of Labor (Fonset); II - Brazilian Service of Support to Micro and Small Companies (Sebrae); III - Brazilian Association of Microcredit and Microfinance Operators (ABCRED); IV - Organization of Cooperatives of Brazil (OCB); V - Brazilian Association of Microcredit Societies (ABSCM); VI - Brazilian Development Association (ABDE); VII - Brazilian Federation of Banks (Febraban); VIII - National Union of Cooperative Solidarity Organizations (Unicopas); IX - Brazilian Forum of Solidarity Economy (FBES).

objectives:

- Encourage the generation of work and income among the popular microentrepreneurs.
- Provide resources for targeted productive microcredit.
- Provide technical support to targeted productive microcredit institutions, aimed at strengthening them to provide services to popular entrepreneurs.

Under the PNMPO, targeted microcredit is the credit granted to meet the financial needs of this public, using a methodology based on direct relationship with the entrepreneurs in the place where the economic activity is performed.

According to MTb data, in the Balance Sheet for 2016, that can be find on the website <http://trabalho.gov.br/noticias/4444-programa-atende-3-6-milhoes-de-microempendedoras-com-mais-de-r-11-bilhoes>, sustains that:

More than R \$ 11 billion were released to 3.6 million microentrepreneurs in the country, through the National Program for Productive Microcredit (PNMPO), coordinated by the Ministry of Labor and operationalized through public and private banks, development agencies, credit unions, Civil Society Organizations of Public Interest (OSCIPs), Microentrepreneur Credit Societies and Small Business Enterprises (SCMEPP). (translated by the author)⁹

In the same way, on August 24, 2011, under the Brazil Without Misery Plan and PNMPO, the Federal Government launched the "Grow Program", through the edition of Provisional Measure (MP) 543, as amended by MP 554, of December 23, 2011, and finally converted into Law 12666 of June 14, 2012. This, Grow Program authorized the Union to grant economic subsidy, limited to R\$ 500 million per year, to

⁹It is interesting to note, according to the same electronic address: "According to the IBGE National Household Sample Survey (Pnad), the number of entrepreneurs in Brazil corresponds to a quarter of the employed workforce (24.4%) and exceeds 23 , 1 million people. Of these, 84.6% are self-employed and 15.4% are employers.

In this context, estimates indicate that 21.8 million people can reach the number of entrepreneurs who can become PNMPO clients - 85.7% self-employed and 14.5% employers. Of this total, 80.9% are in urban areas and 19.1% in rural areas." (translated by the author)

financial institutions that carry out operations of productive microcredit oriented to first floor, as long as that they carry out productive microcredit operations with the final borrower, microentrepreneur with annual gross revenues of up to R\$ 120 thousand, under the following conditions:

- maximum amount of financing per operation: R\$ 15,000.00;
- interest rate: 5% p.a. .;
- credit opening rate: 1% on the amount financed.

Also in the normative plan, there is a set of infra-legal regulations, which make up the regulatory framework of microcredit, which may be mentioned: resolutions of the Central Bank of Brazil and, in particular, after the entry into force of Law 13636/18, nº 804 of April 24, 2018, of the, then, Ministry of Labor, through the Deliberative Council of the Workers' Assistance Fund (FAT), providing for the use of its resources for the PNMPO.

As can be seen, the history of microcredit demonstrates how this financing model has contributed and impacted the Brazilian economy. This history can be thought of, as suggested by Lauro Gonzalez, Lya Porto and Eduardo Henrique Diniz, in *cinco momentos*.

For them, it began in the decade of 1970, *by the articulation of the national microfinance institutions to the international networks*. Then, in a second moment, *civil society organizations were introduced as important actors*, followed in a third moment, by the end of the 1990s and beginning of the 2000s, government institutions began to act more strongly, especially at the state and municipal levels. The fourth moment starts with the edition of Law n. 10194/01, *which authorizes the institution of Microentrepreneur Credit Societies (SCM)*. Finally, the National Program of Productive Oriented Microcredit (PNMPO) gives rise to the fifth moment.

All this, for the authors, would make it possible to perceive the participation of different actors and strategies of action in this economic space, and the State acted in two ways: through the performance of public banks and / or the formulation of public microcredit policies.

Há, todavia, quem entenda que a experiência de microcrédito no Brasil deva retroagir apenas aos anos 1990, tendo o terceiro setor papel fundamental, seguido, a partir de 1998, pela criação do *CrediAmigo* do Banco do Nordeste, pela participação dos bancos públicos

There is, however, some who thinks that the experience of microcredit in Brazil should only be retroactive to the 1990s, with the third sector having a fundamental role, followed, since 1998, by the *CrediAmigo* Program of Banco do Nordeste, by the participation of public banks¹⁰.

2.2. In general terms, microcredit assumed a normative meaning in Brazil, being present in Law nº 10735/03, initially, when this legislation determines that a portion of demand deposits of multiple banks, with commercial portfolio, commercial banks and Caixa Econômica Federal bank, should be applied for the supply of this type of credit. This conception was amplified by Law nº 11110/05 - National Program of Productive Oriented Microcredit (PNMPO) - having as sources of funds the Fund for Workers' Assistance (FAT) and funds from demand deposits in banks that have a mandatory destination.

With Law 13636/18, microcredit was linked to that one granted to finance productive activities, preferably through direct relationship with entrepreneurs, but accepting the participation in this field of technological means, as stated in its art. 3º.

Taking this into account, it can be said that, in Brazil, there are two types of microcredit. On the one hand, one, which the objective is the fight against poverty, destined to the generation of employment and income for the needy populations, as, was originally thought. On the other hand, there is the *business* model, which is widely distributed, aimed at financial support and also, often, technical, for small enterprises and entrepreneurs.

On the one hand, we have a model that is more focused on social inclusion

¹⁰See: COSTA, Fernando Nogueira da. Microcrédito no Brasil. Text for debate. IE/UNICAMP. N. 75. April, 2010

and, on the other hand, one aimed at those who already "venture" in entrepreneurship, in small businesses.

There is also what could be named as public microcredit, offered by entities linked to the State - and corresponding to the largest share of supply - and private microcredit, from economic market agents.

2.3. Revisiting the history of microcredit in Brazil, one notices that although it began in the 1970s, it gained momentum with the governments linked to the Workers' Party, as a rule through policies of social inclusion¹¹.

However, it has always been verified that one of the greatest needs of the segment is the creation of new funding modalities, concentrated in banking institutions and credit cooperatives - in these only for their associates, despite the role played by the resources public funds managed by the banking and credit institutions managed by the government, especially through funds derived from funds raised from the labor market and from economic agents, such as the Fund for Workers' Assistance (FAT).

In any case, one must always bear in mind that Brazil still lives with a definition constructed decades ago, that of being a "Belindia" - a Country that has a small part of the population living with Belgian economic standards and, on the other hand, of a broad stratum of citizens living in India.

In other words, Brazil presents itself as a country composed of a significant number of poor people and excluded from the financial system, alongside a small number of people with broad access. In fact, this means that the country's socio-economic division is replicated in terms of access to credit, prioritizing economic ac-

¹¹As Fernando Nogueira da Costa points out: The biggest financial innovation of the Lula government was popular credit. This program did not follow the pure microcredit model of the Grameen Bank in Bangladesh. But it was a Brazilian model, with modern banking technology, used to deal with specific problems of urbanized society (84% of the population live in cities), mass (the fifth largest population in the world), spread over gigantic territory (almost half the continent) and with great disparity of income. Promoted popular consumer market in the country. View, by the author: Text for Discussion. IE/UNICAMP, Campinas, n. 175, apr. 2010.

tors with greater capacity both in terms of individuals and companies. In addition, since Brazilian inequality is also expressed in geographic terms, there is a concentration of access in the most privileged regions, thus promoting a double advantage for those who already have greater and better economic and financial capacity.

This leads us to consider the importance of microcredit when it comes to financing those who most need it and who are in the most impoverished regions of Brazil.

Thus, with the expansion of the actors involved - see the list present in Law nº 16636/18, art. 3º - there is, at least in terms of legislative recognition, the possibility of participation of several economic actors in the microcredit supply process, in addition to public entities, still predominant, especially in terms of the contribution of resources for this purpose .

This seems to be an important way, even as a mechanism to combat the high unemployment rates observed in the Brazilian economy in the last years - as shown by the surveys of the Brazilian Institute of Geography and Statistics (IBGE)¹² - and indebtedness and default rates - as indicated by the National Consumer Indebtedness and Indebtedness Surveys (PEIC)¹³ carried out by the National Confederation of Goods, Services and Tourism (CNC) -, which has led many families to entrepreneurship as the only alternative - as can be seen from the data growth of Individual Microentrepreneurs (MEIs)¹⁴ in the period.

¹²The unemployment rate in Brazil fell to 11.6% in the quarter ended in November, according to data released by the Brazilian Institute of Geography and Statistics (IBGE) in November 2018, influenced once again by the growth of informal work and Brazilians who work on its own. In the October survey, unemployment in the country was 11.7%. A year ago, unemployment was 12%.

¹³"The percentage of families who reported having debts between pre-dated check, credit card, overdraft, store card, personal loan, car and insurance provision reached 59.8% in December 2018, which represents a decrease in compared to 60.3% in November 2018. It was the second consecutive monthly decrease. There was also a reduction compared to December 2017, when the indicator reached 62.2% of the total families." (PEIC, dez/2018. See in: http://cnc.org.br/sites/default/files/arquivos/release_peic_dezembro_2018.pdf, translated by the author)

¹⁴The MEI - Individual Microentrepreneur - is one that works on its own, has a small business register and exercises one of the more than 400 types of services, commerce or industry. The MEI figure emerged in 2008, with Complementary Law No. 128, seeking to formalize Brazilian workers who, until then, performed various activities without any legal protection or legal security. With legislation

On the other hand, data indicate that the balance of the microcredit portfolio declines in the last years, in the order of 13.2% in April 2018, compared to the same month of 2015, from R \$ 5.3 billion to R \$ 4, 6 billion and, on the other hand, interest rates rose from 22.5% to 29.2, even as the default rate dropped from 5.7% to 3.1%, in the same comparison.

Such circumstances, according to financial analysts, stem from the concentration of operators, in particular, which can be reversed or minimized, with the extension allowed by the new legislation, especially with the entry in this field of *fintechs*.

3. In Italian law it is known that the activity of public financing is reserved for banks and financial intermediaries authorized by the Banca d'Italia and registered in a specific list for those having specific requisites¹⁵.

Exemptions are particularly limited, given the need to prevent the risk deriving from uncontrolled expansion of credit and of entrusting financing only to those who possess an adequate technical-economic ability. However, those professionals who work in the field of microcredit can access these exceptional regimes of exemptions in a framework of operators and regulatory forms of activity. These latter forms enjoy the advantages of a special regulation that allow them access to the market with less strict conditions with respect to other financial competitors, albeit with the stringent limits of a sector that looks at the financial support towards a chosen group of beneficiaries¹⁶. The Italian legislator, in fact, felt the need to delimit the field of application of the exceptions to the discipline of financial intermediaries with the objective of avoiding possible opportunistic behavior of operators to profit from legal facilities; of which the imposition of specific subjective requirements for providing

in place since 2009, more than 7 million people have already been formalized as individual microentrepreneurs. (Ver: <http://blog.sebrae-sc.com.br/voce-sabe-o-que-e-um-microempreendedor-individual-mei/>)

¹⁵See, CAPRIGLIONE – LEMMA, *Comment on art. 106*, in *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, by Capriglione, Milan, 2018, p. 1566 ff.

¹⁶See, ANTONUCCI, *L'intermediazione finanziaria non bancaria nel d.lgs. 141/2010. Profili di sistema*, in *Riv. trim. dir. econ.*, 1, 2011, p. 29 ff.

microcredit and, as will be seen, the definition of a maximum ceiling for financing¹⁷.

It appears evident how the legislator set out to create, in this field, a difficult reconciliation between the interests of some subjects not being able to access traditional sources of financing alternative to banking and financial channels and the need to prevent unscrupulous operators using less rigid rules to access the market. On the other hand, the necessity of introducing a specific law for microcredit appeared to be urgent for some time in as much as it had already been seen how the organizational and financial constraints of the ordinary regulations were a deterrent for those interested in working in this sector¹⁸.

The regulation of microcredit was thus designed to safeguard the interests of the subjects belonging to the weaker levels of society and, in particular, in favor of those who want to undertake small-sized business activities and people excluded from normal credit circuits, and often labelled as “not bankable”. In this regard, in Europe microcredit has been included among the instruments of social inclusion, even with the limits connected with the high management costs of financing carried by those who provide modest, short-term loans¹⁹. Nevertheless, attention towards this phenomenon has been, in a certain way, untimely: it was seen, in fact, that faced with a global financial crisis and the long double recession from 2007, microcredit

¹⁷See, BANI, *Comment on art. 111*, in *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, by Capriglione, Milan, 2018, p. 1635 ff.

¹⁸See, HARDY, HOLDEN, PROKOPENKO, *Microfinance Institutions and Public Policy*, IMF Working Paper No. 02/159, 2002; KARNAMI, *Regulate Microcredit to Protect Borrowers*, Ross School of Business Paper No. 1133, 2009, available at SSRN: <https://ssrn.com/abstract=1476957>, according to which the regulation is needed to protect the microcredit clients in three areas: transparency, interest rate ceiling, and loan recovery practices.

¹⁹See, European Parliament, *Report with Recommendations to the Commission on a European Initiative for the Development of Micro-credit in Support of Growth and Employment*, 29 January 2009; European Parliament, *A European Initiative for the Development of Micro-credit in Support of Growth and Employment – European Parliament Resolution of 24 March 2009 with Recommendations to the Commission on a European Initiative for the Development of Micro-credits in Support of Growth and Employment*, 29 March 2009. See, also, 283/2010/EU of the European Parliament and of the Council of 25 March 2010 establishing a *European Progress Microfinance Facility for employment and social inclusion* and 1296/2013/EU of the European Parliament and of the Council of 11 December 2013 on a European Union programme for employment and social innovation (EaSI) and amending Decision No 283/2010/EU establishing a *European Progress Microfinance Facility for employment and social inclusion*.

could have efficaciously countered the restrictions that have affected the normal areas of support to productive activity²⁰. On the other hand, the strong credit contraction and the imposition of severe measures of vigilance adopted at the global level and thus also at the European level, have certainly not favored the diffusion of microcredit ²¹.

In this context, in Italy, legislative decree no 141 (the transposition of directive 2008/48/EU) was adopted in 2010, that, modifying the Italian Banking Act, introduced art. 111 and 113. The regulatory framework of reference was completed with a certain delay by the legislative decree of 19th September 2012, n. 169, and the implementing of the ministerial decree of 17th October 2014, no 176, on which the general regulation was faced with addressing some significant shortcomings, especially as concerns the integration of aspects not of secondary importance with respect to the function of the area of microcredit.

It should be stated that in the Italian legal system, already before the introduction of the laws of 2010, microcredit was provided by non-profit ethical banks, consortiums of associations and legal entities (often religious)²². These organizations, however, operating without a defined disciplinary framework, have not benefited from an adequate support by public authorities in carrying out their respective activities, although the constitution of the Italian National Committee for microcredit (this non profit public entity was established in 2011) with the decree-law of 10th January 2006, no 2, converted into law 11th March 2006 no 81, has been adopted to encourage the promotion and the development of microcredit.

4. Article 111 of the Italian Banking Act distinguishes two types of microcredit.

The first is the concession of financing: *i)* individuals, *ii)* societies, *iii)* societies with limited responsibility, *iv)* associations, or *v)* cooperative societies, to start or car-

²⁰See, RUSSELL, *An introduction to mutual funds worldwide*, West Sussex, 2007, *passim*; VALDEZ, MOLYNEUX, *An introduction to global financial markets*, Palgrave Macmillan, 2015, *passim*.

²¹See, BANI, *Commento all'art. 111*, cit., p. 1639.

²²See <https://www.bancheitalia.it/finanziamenti/the-microcredit.htm>

ry out autonomous work or micro-enterprises. This financing has to have, however, three characteristics: a first element, of a quantitative assessment, consisting of the limit of the concession of financing for a sum not greater than € 25,000 and not helped by collateral guarantees; a second element is the finalization of this credit at the start or development of business initiatives or insertion in the work market; finally, financing has to be accompanied by auxiliary services, whose peculiarities are defined by the secondary regulation.

A different type of microcredit is, instead, more markedly social. This type of operation of microcredit is aimed at individuals in conditions of particular economic or social vulnerability. Also in this case there are a series of limits and elements that make up the *proprium* of the regulation being discussed: on the one hand, the financing can have a limit of €10,000, a particularly reduced sum considering the type of potential beneficiary and out of line with maximum limits of credit for consumers regulated in a harmonized form at the supra-national level; on the other hand, financing has to be accompanied by auxiliary services of family budget, have to be finalized to prevent the social and financial exclusion of the beneficiary and have to be made at the most favorable prevailing conditions of the market. This last type of financing can be made both by operators of microcredit, in a strict sense, and by non-profit entities who have the characteristics identified by the ministerial secondary regulation of 2014. In this regard, the legislator has thus conceded to operators possibly engaged in other sectors of activity the possibility to provide microcredit in the presence of specific conditions. In this case, the interested legal entity does not have to be a joint stock company or exclusively carry out microcredit activities.

Therefore, it can be stated that Italian regulations concerning microcredit introduce a model characterized by two parts: on the one hand, microcredit for companies, functioning to increase productive capacity; and on the other hand, microcredit, conforming to what has been established at the European level, favoring the process of social inclusion of needy subjects who, as has been said, are often at the edge of the economic-financial circuit, having a reduced capacity to access traditional

forms of credit.

Two additional notations regard the type of operator who can access this type of activity.

First, the law allows the activity in microcredit only after the inclusion in a specific list, subordinate to a series of conditions, much less strict than those – as has been stated – necessary to access to the market in the ordinary way. The legislator requires, in particular: *i)* the constitution of a cooperative, limited company; *ii)* the deposit of capital, not less than five times the minimum capital required by the constitution of a public limited company; *iii)* the possession of the requirements of honorability and professionalism of certain shareholders and the members of management; *iv)* a legal entity's objective limited to the activity of microcredit as well as any accessory and instrumental activity, and *v)* the presentation of an activity program, in line with what is traditionally provided by other banking and finance operators.

Second, a significant role in the area of microcredit is also given to cooperative credit banks (BCC), which have supported, above all during the recent period of crisis, the economy of the area where they operate by financing the activity of small and medium companies. Therefore, it is not surprising that the BCC has been particularly active in the area of microcredit in as much as it, more than other operators, has established the relationship with the borrower based on trust and respect of the rules of correctness between debtor and creditor²³. Moreover, the mutual nature of their activity linked to the in-depth knowledge of the territory, means that the BCC is inspired by the values of solidarity rather than profit²⁴.

²³See CIRAVEGNA – LIMONE, *Otto modi di dire microcredit*, Bologna, 2007.

²⁴See PROVENZANO – ARNONE, *Microcredit and probability of default for small business in Italy*, available on www.euricse.eu/ according to which the default rates of microcredit programs highlighted the fact that distinctive features of the CCBs and the local banks, such as relationship lending, local interaction, the increased availability of soft information, the mutual approach, an efficient organizational structure with few hierarchical levels, may represent the strategic leverage in order to ensure a greater presence of these banks in the field of microcredit and microfinance. The relational approach, as opposed to “transaction lending” of large banks, can facilitate the management of microcredit initiatives that are so different as to be difficult to standardize. The methodologies of credit scoring used by commercial banks that privilege hard information should be updated frequently to represent the real situation of the client's solvency in a changing business environment.

It should be stated, however, that the Italian cooperative sector has been recently the object of reform²⁵ that could reflect negatively on the specificity of the cooperation of credit and, thus, on the value-driven nature itself that has always characterized the activity of the BCC²⁶. In particular, the constitution of three banking groups (two national and one regional) to which the BCCs are obliged to adhere, can produce the effect of keeping governance far from the centers of destination of its strategic input²⁷. It is evident that if the actuation of the reforms should implicate, in fact, a radical change of the traditional appearance of such banking institutions; this could negatively affect their action in the area of microcredit²⁸. In fact, the eventual abandonment of an operation aimed at favoring economic development in Italy could have a restriction for the granting of microcredit.

5. The innovative character of the phenomenon analyzed here in the framework of sectorial regulation of credit does not allow us to arrive at an easy classification of all the reference provisions within the Italian constitutional order²⁹. To some extent, microcredit combines forms of tradition and innovation; analogous archetypes were present in all Europe, as well as the Italian credit system, already in the late medieval period. In this regard, an example is the establishment of the pawn brokers; beyond the Alps numerous references are found also in the activation of many forms of financial support for the poorer classes facing the first wave of mass industrialization³⁰.

From a theoretical point of view, the reflection around "microcredit" is linked to the origins of the so-called "financial exclusion" of groups of "weak" subjects. The

²⁵We refer to the Legislative Decree of 14th February 2016, n. 18, converted into law n. 49 of 2016, in turn, modified with the Legislative Decree "milleproroghe" of 25th July 2018, n. 91, converted into law n. 108 of 21st September 2018.

²⁶In these terms CAPRIGLIONE, *La riforma del BCC al vaglio del nuovo Governo*, in *www.diritto bancario.it*, giugno 2018.

²⁷See CAPRIGLIONE, *La riforma del BCC al vaglio del nuovo Governo*, cit.

²⁸According to the data published in May 2014, in a study by the Federcasse, 69% of the BCC was active in microcredit both to companies and individuals.

²⁹See FALCONE, *Microcredito*, in *Leggi d'Italia PA*, 2012, p. 1 ff.

³⁰See BECCHETTI, *Il microcredito*, Bologna, 2009, pp. 18 ff.

theme of microfinance and microcredit, as possible references to the phenomenon of financial exclusion, the cultural substratum, on the one hand, in progress, derives from instances, in a certain sense, of "ethical finance", in a mature and updated attention to the concept of "human rights"³¹.

An important aspect is the fact that regulation of microcredit was slowly introduced into Italian regulations during a complex re-ordering of the credit area for consumers given the need for the implementation of the first European directives on this subject. The delayed actuation of the regulation in this area, which had to wait six years until it was possible to fully implement it, betrayed the tepid institutional behavior towards urgent problems of social inclusion in an era in which there was a stimulating push towards uncontrolled phenomena of consumption and borrowing, in a spiral sometimes potentially deleterious for the economic-financial system.

The decree law 141/2010 is downstream of the in-depth consideration of the Finance Commission of the Senate of the Italian Republic that made an investigation into consumer credit. The analysis examined the principal issues that this form of finance generally presents, also in relation to the impact of community legislation on internal regulation and to the statistical data concerning the diffusion of the phenomenon, with the aim of elaborating guidelines for revision. This showed the positive role of consumer credit, but also shone light on a series of issues relative to the substantial profiles of safeguards for the consumer as well as the vigilance of the active operators. For this reason, the Commission showed the necessity of corrective interventions, in occasion of which the Government is committed to take into due account also the need to define a specific regulation aimed at correctly establishing the characteristics of microcredit, combining the necessity to favor the creation of a further channel of credit access with that of assuring the transparency of the sector and an adequate system for its supervision.

Going back to the distinction previously recalled between company micro-

³¹See CAPRIGLIONE, *Etica della finanza e finanza etica*, Roma-Bari, 1997.

credit and social microcredit, it is possible to proceed to a constitutional framework of the phenomenon.

Micro-credit for small enterprises finds its first reference in article 41, comma 3, and article 47, comma 1, of the Italian Fundamental Charter³². Further connections are found in the promotion of the conditions that make the right to work effective, a pragmatic element indicated in article 4 of the Constitution, as well as in the principle of subsidiarity found at the last comma of article 118 Cost.³³.

As for the first disposition, it seems correct to detect how microcredit is being configured as a particular form of private economic activity of free initiative in which its social aims and the definition of a specific regime of controls emerge in two forms: on the one hand, through the prevision of objective and specific limits of credit from within the sphere of business microcredit, all aimed to increase national productive capacity by means of the diffusion of vocational business activity “micro”; on the other hand, in the light of the assimilation of the public enforcement regime of controls that inform other dimensions of the banking-finance business. From this point of view, the importance of microcredit appears indirectly reflected in the equal dignity of the system of controls that apply to this sector, given the attribution of sector authority - and, in particular, to the “Banca d’Italia” - of relevant powers directed at the repression of irregularities and expulsion of operators who do not have the correct legal attributes.

Exercising credit - and here with reach the second constitutional reference - thus becomes a means by which regulation serves to reassure the continuation of

³²GIAMPIERETTI, *Art. 47 Cost.*, in BARTOLE, BIN (Eds.), *Commentario breve alla Costituzione*, Padova, 2008; GIAMPIERETTI, *Art. 41 Cost.*, in BARTOLE, BIN (Eds.), *cit.*, ; MANFRELOTTO, *Articolo 47*, in CLEMENTI, CUOCOLO, ROSA, VIGEVANI, *La Costituzione italiana. Commento articolo per articolo*, Bologna, 2018, p.299 ff.; CASSETTI, *Articolo 41*, in CLEMENTI, CUOCOLO, ROSA, VIGEVANI, *La Costituzione italiana. Commento articolo per articolo*, Bologna, 2018, p. 267 ff.

³³See RIVOSECCHI, *Art. 118 Cost., Ad vocem*, in CLEMENTI, CUOCOLO, ROSA, VIGEVANI, *La Costituzione italiana. Commento articolo per articolo*, Bologna, 2018, p. 370-371; LONGOBUCCO, *La “questione ermeneutica” della sussidiarietà orizzontale: assiologia costituzionale e attività amministrativa*, in *Temi e problemi di diritto regionale*, Ed. P. Perlingieri, Napoli, 2008, 229 and PELLEGRINI, *“Impresa e finanza” alla luce della dottrina sociale della Chiesa*, in *MB* 2006 (4) , 17-22.

public interest believed to be worthy of particular safeguards. The statute of micro-credit reaffirms the social function of that particular business activity that is substantially the financing of the economy, that is its critical relevance to assure the harmonious development of the society and of the economic and productive fabric.

To this last profile we can connect, inescapably, the theme of work and the work principle anchored in the first article of the Italian Constitution: in an era of constant efforts towards the definition of policies able to assure a reduction in the tendency of unemployment and social marginalization due to globalization and of the transformation of production processes, microcredit is designed to guarantee minimum conditions for basic access to those sources of supply that allow the effective creation of employment.

Incapacitated by cost constraints and by competitiveness that often prevent the realization of long-term policies aimed at supporting employment and a wage, the State “leans”, on the other hand, on private business initiatives, defining their conditions and orientating the choices to carry out an activity of clear general interest because of its correlations with economic development in general and thus the reference to a correctly intended principle of horizontal subsidiarity appears inescapable.

If from this side we give our attention to social microcredit, other than the references mentioned earlier, a further point can be seen art. 47 and, above all, in articles 2 and 3 of the Italian Charter³⁴. The definition of a regime of facilitated access to the credit market is, in fact, instrumental in supporting the part of the population that are negatively effected by the form of economic-financing exclusion. In this, was the prevision of ancillary initiatives aimed at favoring a subjective inclusion to overcome deteriorated material conditions that stop part of the population from accessing consumption and even essential services. Credit thus becomes an instrument to

³⁴See CHECCHINI, *Eguaglianza, non discriminazione e limiti dell'autonomia privata: spunti per una riflessione*, in *NGCC*, 2012,II, pp. 186-198; SICLARI, *Tutela del risparmio, educazione finanziaria e principio costituzionale di sussidiarietà orizzontale*, in *Scritti in onore di Francesco Capriglione*, Padova, 2012.

assure dignity to subjects who are not only excluded from the banking system, but are marginalized in the social structure³⁵.

The constitutional statute of microcredit can soon then join that almost forgotten tradition of economic credit activity as a social function. A tradition that even if it has its own statute recognizing the social function of cooperation that has for so long assured a regime of special discipline in cooperation in the field of credit, that, however, is colored in part by the particular typology of activity discussed here (see art. 45 of the Italian Constitution)³⁶.

6. Notwithstanding the legislative framework so far set out, microcredit in Italy has had a poor diffusion as can be seen from the studies that have shown its fragmentation and diversification in the market, as well as the insecurity of the programs of intervention adopted³⁷. On the other hand, as emerges from the data of the Italian “Ente Nazionale per il Microcredito”, highlighted at the beginning of this paper, over the last two years, there has been a trend of clear recovery³⁸ in as much as the statistics show that Italy is behind most of the other European countries. Therefore, while in the south of Italy it has been used to counter the diffusion of episodes of usury, in the regions of north Italy, its use has been principally to support needy families.

In the past, the reasons for the failure of microcredit were the delay with which Italy, with respect to other European and international countries, had regulated this area with the consequence that the operators in the sector had to comply with the stringent constraints imposed by general regulations³⁹.

It would be well to consider, however, the regulation introduced in 2010 and

³⁵See TORCHIA, *Il consumo del microcredito e la tutela della persona*, Napoli, 2006.

³⁶See PIZZOLATO, MATTASSOGLIO, *Articolo 45*, in CLEMENTI, CUOCOLO, ROSA, VIGEVANI, *La Costituzione italiana. Commento articolo per articolo*, Bologna, 2018, p.291 ff.

³⁷See, for all, ARNONE, *Divari macroregionali nella diffusione del microcredito*, in *EyesReg*, Vol.6, N.2, Marzo 2016.

³⁸See the document entitled *Il microcredito imprenditoriale in Italia assistito dalla garanzia MCC. Dati e statistiche al giugno 2018*, available on www.microcredit.gov.it/

³⁹See CONZETT, GONZALEZ, JAYO, *Overview of the microcredit sector in the European Union 2008-2009*, EMN, working paper n.6, 2010.

modified in the following years, does not seem to have increased the demand and offer of microcredit; circumstances that justified the adoption of measures aimed at facilitating access to the “Central Guarantee Fund” for who wanted it (we refer, in particular, to the Ministerial Decrees of 24th December 2014 and 18th March 2015).

Under another profile, the doctrine shows how the low request for microcredit in Italy could depend on the poor financial education of its citizens⁴⁰. It is clear that the question is of a general character and concerns the difficulty of the individual to fully understand the complexity of the market, as well as how to use financial services. On this point, it is certainly appreciable the intervention of the Italian legislator that, during the conversion of the well-known decree "save savings" (decree law no 237 of 2016 converted into law no 15 of 17th February 2017), introduced specific dispositions concerning financial education, giving this its correct relevance in the framework of instruments for consumer safety.

In particular, the Ministry of Economy and Finance, in conjunction with the Ministry of Education, Universities and Research, adopted a program of “national strategy for Financial, Insurance and Social Security education”; for its actuation a special Committee was set up. On the other hand, the modest resources assigned to this initiative have to be mentioned (€ 1 million) with the aim of supporting the activity of the above-mentioned Committee.

Moreover, it has been observed that the organizations operating in this area of microcredit would not have had the necessary experience to adequately carry out such an important function. Therefore, part of the doctrine hoped for the creation of a strategic network that would allow the above-mentioned legal entities to collaborate with the banking institutes who, thanks to their greater skill and professionalism acquired in the field of granting of credit, could support their activity⁴¹.

⁴⁰See, for all, MCKILLOP, WILSON, *Financial exclusion, public money and management*, 27, 9-12, 2007.

⁴¹See MALLICK SUSHANTA, HO SHIRLEY, *Making Commercial Microfinance Work for the Poor. The Case of MFIs-Bank Linkage*, in *SSRN Electronic Journal*, 2007, available on <https://www.researchgate.net/>.

Indeed, a further aspect of criticality that negatively affects the diffusion of the phenomenon of microcredit in Italy is the existence of numerous operational constraints imposed by financial entities (and on their beneficiaries) by regulations on this subject. As an example, we can look at the dispositions concerning the minimum capital required for active organization in the sector that, when an operator is placed on the special list, has to be up-paid and cannot be less than five times that indicated for the constitution of a public limited company. We refer to the regulation that necessitates the possession of specific subjective qualities to be an administrator or a member of the board of directors, as well as those concerning interest rates and auxiliary services. Moreover, it is significant what was established in art. 14 of the ministerial decree no 176/2014 according to which the operators active in the area of microcredit can acquire financial resources of not more than sixteen times the net assets reported in the last approved financial statement.

Therefore, as the doctrine has shown, the Italian legal framework does not provide, in this sector, appropriate mechanisms for access to funding in the markets of capital and credit⁴². From this, there are the limits of a regulation that has stringent requisites of access to the sector to counter the activity of operators unworthy of being safeguarded, thus hindering the diffusion of microcredit.

7. In the light of what has been said, it should be noted that in Brazil, over the years, numerous initiatives have been adopted to favor the development of microcredit. With this aim in mind, the intervention of the state has to be mentioned, that, in this sector, financed programs of specific interventions, above all to safeguard the poorest part of the population. On this point, it has to be stated that for some time the Brazilian legislature has set up regulations in this sector with the aim, on the one hand, of supporting the fight against poverty, and on the other hand, of assuring an adequate financial support for small businesses and entrepreneurs.

⁴²See, THE TORRE, *Il microcredito in Italia tra regolamentazione e mercato*, in *Bancaria*, 2015, p. 16.

In this context, however, we should remember the circumstances for which Brazil, faced with a significant number of poor people who are excluded from the financial system, has a restricted circle of individuals who, instead, have easy access to the financial system and credit. The Brazilian legislator has thus strongly felt the need to identify the sources of alternative finance to the traditional bank channels. From this they enlarged the number of subjects who can legitimately provide microcredit and the establishment of regulation that provide significant advantages for those who intend to operate in this sector.

It is thus evident that the success of microcredit in Brazil also depends on the high number of subjects needing financial support; it is relevant that microcredit in Brazil is aimed at 8 million people who, maybe due to the difficult context in which they live, or due to economic transformations in a modern society caused by the effects of the recent crises, find it difficult to find work and start eventual entrepreneurial projects.

Therefore, it is certainly appreciable the efforts made by the Brazilian legislator who favored, by adopting specific measures, the growth of microcredit in Brazil making sure to assure a good participation, in this area, of public institutions and to allow a significant increase in operators able to provide microcredit.

On the other hand, as has been shown above, Italy has regulated this area with some delay with respect to the other European and international countries, with the consequence that subjects active in this sector had to comply with the stringent constraints of a regulation with a general character. To this we must add that the legislature of 2010 wanted to realize a hard reconciliation between the interests of certain subjects in difficult conditions to use sources of financing and the need to stop unscrupulous operators using less rigid rules with respect to those provided by the ordinary rules for market access.

In particular, the existence of numerous operational constraints imposed on financial entities (and their beneficiaries) by the regulations, are an element of criticism able to negatively affect the diffusion of microcredit in Italy. In fact, as was previ-

ously stated, the Italian regulatory framework does not allow, in this sector, easy access to funding from capital and credit markets. In particular, this area necessitates stringent requisites for access for those legal entities interested in operating in this sector; circumstances that limit the diffusion of the phenomenon of microcredit. However, as can be seen from the data reported by the Italian “Ente Nazionale per il microcredito”, over the last two years there has been a positive trend with respect to the past.

In the above context, similarly to what has happened in Brazil where governments, over the years, have promised policies to favor the development of microcredit in the country, it is auspicious that, in the future, Italy will invest further in this sector. We refer to the opportunity to increase the resources of the Central Guarantee Fund dedicated to microcredit favoring the stipulation of conventions with private and public entities and the possibility of providing tax benefits for providers. Finally, there is the need to identify, in legislation, less stringent criteria for access to the sector, as well as more flexible conditions in the areas of auxiliary services, interest rates and the capitalization of the microcredit entities.