Corporate and Financial Markets Law

The Legal Transplant into Italian Law of the *Procédure d'Alerte*. Duties and Responsibilities of the Companies' Bodies.

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Abstract

The Italian Law on Bankruptcy of 1942 has been amended and integrated several times on specific subjects, but until now, the total reform proposal has failed. Finally, in October 2017, a statute has been approved that establishes new principles on the entrepreneurial crisis and insolvency and delegates powers to the Government to enable it to elaborate an organic reform of rules and procedures. Among the most important amendments, the law regulates an alert procedure, based on the French model, in order to allow for prompt measures in case of distress. The essay offers a comparative analysis of the French *procédure d'alerte* and of the new Italian principles of regulation, from the perspective of the theory of legal transplants. Numerous institutional, systemic and technical factors may jeopardise the desired goals of reproducing in Italy the successful foreign experiences in this field. Nevertheless, the new law is of a paramount importance for its effects on the corporate governance and, in particular, on the new duties and liabilities of management and control bodies in financial distress. On this aspect, there is a need of a more detailed regulation to be implemented by the Government and possible solutions are envisaged in the paper. The success of the alert procedure largely depends on the new legal incentives for a prompt and efficient reaction of the companies' bodies and on a wise implementation of the new principles of regulation on insolvency.

I. The Alert Procedure in the Enabling Law Reforming the Legal Framework for Enterprises in Distress: the French Model, the Peculiarities of the New Italian Regulation and the Problems Entailed by 'Legal Transplants'

At the end of a lengthy process culminating in the report drawn up by the Rordorf Commission, lodged in December 2015,[1] and in the draft law presented by the Government to the Chamber of Deputies on March 2016,[2] the enabling

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[1] Report on the draft enabling law for reforming insolvency proceedings presented on 29 December 2015 by the Commission, for preparing reform proposals, surveying and reorganising the legal framework of insolvency procedures, chaired by Renato Rordorf: 'Relazione allo schema di legge delega per la riforma delle procedure concorsuali' *fallimentiesocietà.it*, 7 January 2016, 1-39.

[2] Draft law no 3671 presented on 11 March 2016 by the Ministry of Justice, in agreement with the Ministry for Economic Development, to the Chamber of Deputies available at https://

law reforming the legal framework for enterprises in distress and insolvency proceedings was approved by the Parliament in October 2017.[3]

This reform was necessary and, in some respects, represents a seismic shift, marking a sharp discontinuity from previous regulations.[4] That discontinuity clearly emerges in the enabling law. The room left to the Government for implementation does not, however, permit a detailed forecast of the new provisions, in terms of both the corporate governance of distressed enterprises and the pertinent procedures.

One of the elements that characterise the reform consists of the so-called '*alert and crisis composition procedure*', a set of procedures aimed at preventing the insolvency of distressed companies and promptly implementing suitable reorganisation measures.[5] In order to ensure the success of the restructuring

tinyurl.com/yd8khjag (last visited 25 November 2017) and approved with amendments on 1 February 2017 with the no 3671-*bis* available at https://tinyurl.com/y9tmwvby (last visited 25 November 2017). Regarding the draft law see: the proceedings of the Conference 'Verso un nuovo diritto della crisi d'impresa' (Sapienza – Università di Roma, 13 May 2016) *Giurisprudenza Commerciale*, 915 (2016) and the reports by Alberto Jorio, Giuliana Scognamiglio, Vincenzo Calandra Bonaura, Roberto Sacchi, Giorgio Meo, Paolo Montalenti, Giuseppe Terranova; M. Arato, 'La riforma organica delle procedure concorsuali nel disegno di legge delega elaborato dalla Commissione Rordorf', in O. Cagnasso and L. Panzani eds, *Crisi d'impresa e procedure concorsuali* (Torino: UTET, 2016), III, 4527; L. Abete, 'La "bozza Rordorf": l'impatto delle innovazioni prefigurate in ambito societario' *Fallimento*, 1132 (2016); P. De Cesari, 'Riforma Rordorf e sollecitazioni europee: le parallele cominciano a convergere' *Fallimento*, 1143 (2016); M. Fabiani, 'Di un ordinato ma timido disegno di legge delega sulla crisi d'impresa' *Fallimento*, 261 (2016); P. Vella, 'La riforma organica delle procedure concorsuali: un nuovo approccio in linea con le indicazioni dell'UE' *Società*, 734 (2016).

[3] Legge 19 October 2017 no 155, *Gazzetta Ufficiale* 30 October 2017.

[4] The stratification of a large amount of legislation enacted at different times, and under profoundly different political circumstances, has entailed a discrepancy between the updated and the original provisions laid down in Regio decreto 16 March 1942 no 267. Therefore, there is a unanimous opinion that reform is necessary: cf Report by the Commission chaired by Renato Rordorf, n 1 above, 3 and the Draft law no 3671, n 2 above, 2. The recent evolution of the Italian legal system within the international framework is presented by *ex multis* D. Corapi et al, 'Le procedure concorsuali in un'ottica comparatistica', in F. Vassalli et al, *Trattato di diritto fallimentare e delle altre procedure concorsuali* (Torino: Giappichelli, 2014), V, 384; A. Jorio, 'Introduzione generale alla disciplina delle crisi d'impresa', in Id and B. Sassani eds, *Trattato delle procedure concorsuali* (Milano: Giuffrè, 2015), I, 14; E. Frascaroli Santi, *Il diritto fallimentare e delle procedure concorsuali* (Padova: CEDAM, 2016); M. Fabiani, *Diritto fallimentare. Un profilo organico* (Bologna: Zanichelli, 2011).

[5] An alert procedure had already been included in the two draft reforms of the Trevisanato Commission in 2001 available at https://tinyurl.com/y9obhkk2 (last visited 25 November 2017). The subsequently implemented reforms revealed a renewed focus on financial corporate difficulties prior to insolvency. In particular, the decreto legge 14 March 2005 no 35, converted into legge 14 May 2005 no 80, radically overhauled the rules governing the process of composition with creditors ('*concordato preventivo*') in order to favour the debt restructuring and the business continuity. Failing an alert procedure, the debt restructuring agreements regulated by Art 182-*bis* et seq of the Bankruptcy Law constituted another important tool to overcoming financial difficulties. Subsequently, the decreto legge 22 June 2012 no 83, converted into legge 7 August 2012 no 134, has remodelled the text of the Art 161 of the Bankruptcy Law (further amended by the decreto legge 21 June 2013 no 69, converted into legge 9 August 2013 no 98), introducing

processes for debt-ridden enterprises, it is unanimously believed that they must be launched before the enterprise actually becomes insolvent, (unable to meet its debts as they fall due). Once insolvency strikes, it has been seen that any possible solution becomes extremely costly, in terms of job loss, credit decimation and the overall devaluation of the enterprise's know how.[6]

Accordingly, indications are emerging from various international and European sources, and from the most advanced national legislations, that point towards the introduction of dedicated procedures and bodies for fostering the early adoption of debt restructuring plans by enterprises in financial difficulties and facilitating the individual or collective reorganisation of relations with creditors.[7]

The introduction of the new alert procedure is founded in the hope that successful results observed in other legal systems may be replicated in Italy as well. Hence, an analysis of the new system could and should also be made from a comparative standpoint, so as to test its validity or, rather, the hurdles that might hinder the achievement of the aforesaid goals.

The following comparative references are based on the French *procédure d'alerte* model, that the reform clearly attempts to 'transplant' into the Italian legal system, in a fashion that even resorts to using the same name.[8]

The transplantation of legal provisions and procedures, however, is a

the so called '*concordato in bianco*' (a request to the court concerning a future arrangement with creditors), which grants enterprises more time to prepare a recovery plan without undergoing pressure from the creditors. See M. Fabiani, *Fallimento e concordato preventivo. Art. 2221*, II, *Il concordato preventivo* (Bologna: Zanichelli, 2014); G. Lo Cascio, *Il concordato preventivo e le altre procedure concorsuali* (Milano: Giuffrè, 2015).

[6] See the explanatory memorandum to the proposal for a directive of the Parliament and of the Council 22 November 2016 COM (2016) 723 final and the World Bank – Index Doing Business 2016. Among the Italian contributions see *ex multis* F. D'Alessandro, 'La crisi tra diagnosi precoci e "accanimenti terapeutici" ' *Giurisprudenza Commerciale*, 411 (2001); M. Cataldo, 'La soggezione dell'impresa in crisi al regime di allerta e composizione assistita' *Fallimento*, 1023 (2016).

[7] The Uncitral Legislative Guide on Insolvency Law (part one, para 3) include among the key issues '*the balance between liquidation and reorganisation*' in order to encourage '*the development of an entrepreneurial class and protecting employment*' and to preserve the '*greater value (that) may be obtained from keeping the essential components of a business together, rather than breaking them up and disposing of them in fragments*'. In Europe elements in the same direction may be found in the recommendation 2014/135/UE and, recently, more explicitly, in the proposition of the directive 22 November 2016 COM (2016) 723 final. The propagation of the *rescue culture* from USA to Europe has been analysed recently by P.E. Mears and E.O. Mears, 'The Advance of "Rescue Culture" Business Insolvency Laws: The Long and Winding Road from Chapter 11 to the 2016 Proposed EU Directive' 13 *Pratt's Journal of Bankruptcy Law*, 117 (April/May 2017); L. Panzani, 'La Proposta di direttiva della Commissione UE: *early warning*, ristrutturazione e seconda *chance*' *Fallimento*, 129 (2017); L. Stanghellini, 'La Proposta di direttiva UE in materia di insolvenza' *Fallimento*, 873 (2017). On the transposition in the national system of the European directives in this field see P. De Cesari and G. Montella, *Il nuovo diritto europeo della crisi d'impresa* (Torino: Giappichelli, 2017), 196 .

[8] See A. Jorio, 'Legislazione francese, raccomandazione della Commissione europea e alcune riflessioni sul diritto interno' *Fallimento*, 1070 (2015) and Id, 'Su allerta e dintorni' *Giurisprudenza Commerciale*, 261 (2016).

notoriously complex operation, even when attempted between systems with solid common roots and countries with a similar socio-economic fabric.[9] A correct prognosis regarding the replication, in the 'recipient' countries, of the effects of the set of rules in force in the 'donor' legal system, so to speak, must take into account and compare a number of aspects. Particular significance has to be attributed to the sphere of application and the characteristics of the physical and legal persons involved, the objective conditions underlying the new rules, the parties entitled to commence judicial or other proceedings, the incentives provided for in this respect and, of equal importance, the features and powers of the Courts or other bodies involved in the application of the new law. Above all these aspects, the success of a legal transplant depends on the characteristics of the recipient legal system as a whole and the traditional attitudes of the relevant public institutions and private parties.

Finally, it is necessary to consider that, even some apparently modest distinguishing features, compared to the set of significant provisions may sometimes provide important incentives or deterrents, and produce discrepant effects in the different contexts.[10]

The case of the *procédure d'alerte* that the new Italian law attempts to

[9] The theory of the 'legal transplants' is one of the more controversial within the comparative law studies. The problem of reception of the foreign law is crucial and has been studied for a long time (ie in the 1970 a section of the International Academy of Comparative law was dedicated to 'The global reception of foreign law'; R. Sacco, 'Le but et les méthodes de la comparaison du droit', in *Rapports nationaux au IX Congrès de droit comparé, Téhéran 1974*, 127 (1974)), but the systemic use of the expression 'legal transplant' was proposed in A. Watson, *Legal Transplant: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974), where the legal transplant is analysed as an authonomous phenomenon and disconnected to the background of the 'donor' and of the 'receiving' countries. Watson's approach has been strongly criticized by the comparative scholars who exploit the link between law and society, culture, socio-economic and political context: *ex multis* O. Kahn-Freund, 'On uses and Misuses of Comparative Law' 37 *Modern Law Review*, 27 (1974); P. Le Grand, 'What "Legal Transplant"?', in D. Nelken and J. Feest eds, *Adapting Legal Cultures* (London: Bloomsbury, 2001), 55-69 and R. Cotterrell, 'Is There a Logic of Legal Transplants?', ibid, 71. Among the Italian scholars the subject has been analysed in particular by R. Sacco, *Introduzione al Diritto Comparato* (Torino: UTET, 1980); U. Mattei and G.P. Montaneri, *Introduzione breve al diritto comparato* (Padova: CEDAM, 1997), 37-44 make specific references to the numerous cross transplants emerging from the Italian legal system and underline the risks of drift in the interpretation of concepts and rules imported from foreign systems. Recent theoretical presentations on the subject are offered by M. Graziadei, 'Comparative Law as the Study of Transplants and Receptions', in M. Reimann and R. Zimmermann eds, *The Oxford Handobook of Comparative Law* (Oxford: Oxford University Press, 2006), 441; E. Örücü and D. Nelken, *Comparative Law – A Handbook* (Portland: Hart publishing, 2007), 406-408; M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), 195-200.

[10] The historical, sociological, and cultural, before than legal, factors that jeopardise the result of a '*legal transplant*' and even the possibility to use this expression are examined in P. Legrand, 'Impossibility of Legal Transplant' 4 *Maastricht Journal of European & Comparative Law*, 111 (1997). The A. Watson reply to these radical critics may be read in A. Watson, 'Legal Transplants and European Private Law' 4.4 *Electronic Journal of Comparative Law* (December 2000), available at https://tinyurl.com/y9dh3bg2 (last visited 25 November 2017).

'import' from France is emblematic of the problems inherent to 'legal transplants' and, as I demonstrate further on, in spite of its consistency with international trends, a series of factors can jeopardise the success of this process.

The first fundamental factor in this case is of an institutional nature. The *procédure d'alerte*, in fact, originates from the practices of a judicial body unique to the French system, the *Tribunale de Commerce* (Commercial Court), and was regulated in light of this experience by a series of defining and strengthening legislative measures, which did not impinge on the consolidated role of this body.[11]

In Italy, the alert procedure originates from and is regulated by a wholly different process, compared to the French model. Accordingly, the entire Italian experience cannot be replicated, not only for the different characteristics of the body, which, in Italy, is vested with the authority to implement the alert procedure, but also because this new competence is attributed by law and not through consolidated practice by virtue of a positive experience built up over time.

A second characteristic element that distinguishes the Italian alert procedure from the French experience is the assignment to a 'body' that will be set up at each Chamber of Commerce and supported by a board of three experts. They will be selected from a list – kept by the Ministry of Justice – of individuals, associations, and companies authorised by the Courts to perform management and supervisory functions in insolvency proceedings.[12]

This system is intended to remove these proceedings from the judicial sphere, enhance their confidential nature and weaken resistance to their use by enterprises, that, if the court was involved, could view them as the first step towards a judicial liquidation. On the other hand, the solution appears to be influenced by the unexpressed intention of striking a balance between the competences and ambitions of various institutions, such as the Ministry of Justice, judicial authorities, Chambers of Commerce and employers' organisations.

[11] In France the proposal to establish early signals of distress and to regulate procedures in order to favour a prompt reaction was originally submitted by the report Sudreau (*Rapport du Comité d'étude pour la réforme de l'entreprise*, 1975, *La documentation française*). Considering the need of an external intervention and the traditional role of the president of the *Tribunal de Commerce,* the act no 84-148 of 1 March 1984 gave to this authority the power to summon the managers in the case of loss of more than one third of the capital. Upon this basis, a large practice developed and was extended to other signs of crisis. The procedure was very soon considered useful to prevent the insolvency: see J.-J. Daigre, 'Le rôle de prévention du tribunal de commerce. Bilan d'une enquête', in Id, 'La prévention des difficultés des entreprises après deux années d'application' *Juris-Classeur périodique, édition entreprise*, 15066 (1987). Thanks to this experience, the law reform of 1994 has strongly implemented the *procédure d'alerte* and increased the powers of the president of *Tribunal de Commerce* (J.-Ph. Hael, 'La consécration du droit d'alerte du président du tribunal' *Les Petites Affiches*, no 17, 30 September 1994).

[12] Regarding this point, there has been a change compared to the proposal by the Rordorf Commission and the draft approved by the Government, following which the alert procedures were assigned to a special division of the crisis composition bodies provided by Law 27 January 2012 no 3, on the procedures for consumers' over-indebtedness.

In view of the facts described above, the alert procedure in Italy has to overcome some initial obstacles. It is not rooted in legal practice or in a successful experience and no standardised mediation mechanisms for the collective debt restructuring of distressed (but not yet insolvent) companies have yet been tested, either judicially or otherwise. The recent experience of crisis composition bodies dealing with situations of consumer over-indebtedness is rather marginal and hardly successful.

Accordingly, the new alert procedure in Italy will suffer from the difficulty of having to establish institutions and professional skills from scratch, and will be required to overcome the mistrust for any new institution, especially if this institution vested with such significant duties and powers.

From another point of view, compared to the concentration of *procédure d'alerte* competences in the president of the *Tribunal de Commerce*, the Italian reform distributes competences between several institutions, thus implementing a set of rules hardly consistent with the declared intentions of designing an extra-judicial, streamlined and confidential procedure. In fact, if no simplifying solutions are found, the body to be established at each Chamber of Commerce will be required to appoint three experts for each alert procedure, one designated by the president of the business division of the competent court having jurisdiction over the district in which the company's registered office is located, one by the Chamber of Commerce itself and one by the trade associations. Clearly, such a procedure is marked by a startling degree of complexity, and carries the risk of disseminating confidential information.

Moreover, the method for appointing experts provided in the legislation also undermines the intention to exclude judicial intervention from the procedure, and the risk of introducing a liquidation procedure outside the control of the enterprise is heightened by other provisions related to the procedure that we will examine later on.

The institutional framework and the organisation of these procedures highlight significant differences from the French model. Nevertheless, an overall assessment of the possibility of a successful use the alert procedure in Italy requires a careful examination of a number of factors, including, first and foremost, the subjective sphere of application, the objective conditions of the procedure, the parties entitled to commence the procedure, the role of the internal supervisory bodies and that of the bodies responsible for the alert procedure.

II. The Subjective Sphere of Application

Art 4 of the new Italian law contains no forecast in positive terms regarding the subjective sphere of application of alert procedure, but only includes a provision (in para 1, letter *a*)) envisaging an additional exclusion to that of public entities pursuant to the general principles of the same law (Art 2, letter

e)). The interpreter of the statute is therefore required to identify the enterprises and undertakings to which the alert procedure does not apply, which could include companies whose shares are traded on the stock exchange or on other regulated markets, and large-scale enterprises, as defined by the European regulations.[13] This important limitation in the sphere of application differs from the French *procédure d'alerte*, which does not provide for thresholds.[14] First of all, this provision appears to be inconsistent with the overall scheme of the reform because it excludes a large group of companies (which, moreover, are also the most important for the country's economy) from the benefits of promptly reacting to the impending signs of financial difficulty. This exclusion is probably due to the fact that these enterprises can put into place various type of procedures for tackling a situation of difficulty, especially the so-called extraordinary administration procedure.[15] It should be noted, however, that the extraordinary administration procedure requires a previous declaration of bankruptcy. In such a situation, large companies are deprived of making use of a preventive instrument, on the grounds of a situation of mere financial difficulty. More likely, this exclusion betrays a degree of scepticism on the use, by large, distressed enterprises, of an innovative tool assigned to bodies and experts that have yet to be identified and trained. We can assume, however, that after an initial trial period, the alert procedure could be extended to include larger companies if is found to be effective.

The alert procedure is applied, subject to the exclusions discussed above – pursuant to Art 2, letter *e*) of the new law – to all types of debtors: individuals or enterprises, collective entities, consumers, professionals or retail, agricultural or craft businesses.

This broad scope of application underscores a discrepancy with the body designated to handle the procedure and the method for appointing the experts. The establishment of a dedicated body at the Chambers of Commerce is justified by the fact that the procedures apply to individuals/enterprises enrolled in the company registers kept by said Chambers, which traditionally represent and

[13] See recommendation 2003/361/EC: on the basis of Art 2, para 1, an enterprise may be considered large if it employs more than two-hundred and fifty persons, has an annual turnover in excess of EUR fifty million or an annual balance sheet total exceeding EUR forty-three million.

[14] It is no coincidence that the AMF has also published a guide on the relations between the *commissaires aux comptes* of listed companies and the Authority itself, which also affects the different hypotheses of *procédure d'alerte*: see *Les relations entre les commissaires aux comptes et l'AMF: Guide de lecture de l'article L.621-22 du code monétaire et financier*, July 2010, available at https://tinyurl.com/y7r5d6hs (last visited 25 November 2017).

[15] The extraordinary administration procedure was originally provided by decreto legislativo 29 January 1979, no 26 ('Prodi Law') and successively amended by decreto legislativo 8 July 1979, no 270 and by decreto legislativo 23 December 2003, no 347. The reform of the extraordinary administration procedure consistently with the overall framework of insolvency procedures was included in the draft law prepared by the Rordorf Commission and in the draft law presented by the Government to the Chamber of Deputies (Art 15 of the draft law no 3671 presented on 11 March 2017), but was then cancelled.

protect them. This extension of the procedure to include professionals and consumers appears unsuitable, in terms of both the nature of the body designated to handle the procedure and the specific subjective references in the rules governing the alert procedure to companies and parties subject to judicial liquidation.

From a comparative point of view, it is interesting to note how questions have been raised in France concerning the subjective field of the *procédure d'alerte*, which, in 2005, led to the introduction of significant changes to the initial rules introduced in 1984. As a result, Art 34 of the Act of 1 March 1984, as amended by the Act of 10 June 1994 and now enshrined in Art L611-2 of the *Code de Commerce* (Commercial Code), extended the powers of the President of the *Tribunal de Commerce* to all companies, economic interest groups and individual (retail/craft) enterprises. Furthermore, Art L611-5 provided for the extension of the procedure to all private legal persons. In the latter case, jurisdiction was reserved to the *Tribunal de Grande Instance*. Following the reform of 2005, which introduced the *procédure de sauvegarde*, Art 611-5 was repealed, leaving most parties that are not subject to the *Code de Commerce* (associations, professionals partnerships), ineligible for the *procédure d'alerte* and its ensuing benefits.[16] This procedure continues to apply to economic interest groups, however, as explicitly provided by Art 611-2 of the *Code de Commerce*.[17] An *Ordonnance* of 2014 has filled this gap, providing again that the *Tribunal de Grand Instance* is competent for legal entities regulated by the *Code Civil* and natural persons pursuing a professional, agricultural or other independent activity, including the professions regulated by law.[18]

[16] An alert procedure has also been envisaged for economic interest groups – EIG (Art L 251-15 of the *Code de Commerce*) and legal persons under private law carrying out economic activities, as well as subsidised organisations (Art L 612-3 *Code de Commerce*). Numerous other codes organise alert procedures either directly or by reference to other legal persons: see CNCC (*Compagnie nationale des Commissaires aux comptes* – National Company of Auditors), *Le Commissaire aux comptes et l'Alerte*, June 2012.

[17] These delimitations have been criticised pointing out the inconsistency of the exclusion of the professionals, to whom other crisis prevention and management measures apply. See M.-H. Monsérie-Bon, 'Entreprises en difficulté (détection des difficultés)' *Répertoire de droit commercial* (Paris: Dalloz, 2017), no 67, according to whom '*This exclusion is unfortunate because, moreover, the law has extended the benefit of the procedure for the prevention and management of financial difficulties to professionals. Therefore, there is clearly an inconsistency in this approach. At present, most of the organisations not subject to commercial law are excluded; this applies to "sociétés civiles" (non-commercial companies) or partnerships. Only EIGs exercising non-commercial activities are subject to this preocedure, because it is envisaged by article L. 611-2 of the Commercial Code*'. Regarding the act on the safeguard of enterprises no 2005-845 of 26 July 2005, which has narrowed the scope of application of the procedure, see F. Macorig-Venier, 'Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises' *Revue trimestrielle de droit commercial*, 829, 830 (2005) and F. Pérochon and R. Bonhomme, *Entreprises en difficulté. Instruments de crédit et de paiement* (Paris: LGDJ, 7th ed, 2006), 39.

[18] The Ordonnance no 2014-326 of 12 March 2014 has introduced Art L611-2-1 in the *Code de Commerce*. The legal entities with an economic activity regulated by the private law are obliged by Art 612-1 of the *Code de Commerce* to appoint a *commissaire aux comptes*,

This discrepancy could be remedied in Italy if the law implementing the delegated powers, by exercising the power of delimitation provided in Art 4, para 1, letter *a*), would limit the power to commence the alert procedure to those enrolled at the Chambers of Commerce. Alternatively, in order not to deprive persons and legal entities not enrolled therein of the benefits associated with the alert procedure, it would be necessary, as in France, to provide a different body responsible for designating the experts and handling the procedure. Furthermore, since – unlike in France – companies other than commercial enterprises are enrolled in the registers of the Chambers of Commerce in Italy, the problem exists primarily for professionals who do not practice as companies, and civil debtors. Pursuant to the general principles of the new law (Art 1, para 1, letter *e*)), the procedures for determining a situation of financial difficulty (before insolvency) should apply to all types of debtors, including collective entities and legal persons not operating as commercial enterprises, as well as professionals and consumers. The provision provides for the assimilation of entrepreneurs, however, who do not meet the size requirements set out in Art 1 of the Bankruptcy Law (regio decreto 16 March 1942 no 267), concerning civil debtors, professionals and consumers, to whom the over-indebtedness rules apply. From this point of view, the application of the alert procedure in the implementing provisions, should be restricted to parties eligible for judicial liquidation. In fact, judicial liquidation is precisely the procedure that is applied when the board of experts is unable to identify any appropriate measures to overcome a situation of financial difficulty, hereby certifying the onset of insolvency, and notifying the public prosecutor to this effect, so that it can also be judicially certified. The same conclusions can be reached if we consider that the mechanisms for commencing the alert procedure, and the relevant reaction, have been designed with specific reference to companies and collective entities with a 'structured' corporate governance, ie internal and external bodies capable of determining the existence of solid evidence of impending difficulty.[19] It would be expedient, therefore to limit eligibility for the alert procedure to enterprises, undertakings and other parties enrolled in company registers.

The parties who are ineligible for insolvency procedures could become eligible for the over-indebtedness procedures provided in legge 27 January 2012 no 3; pursuant to Art 9 of the new law, the rules governing over-indebtedness should be reorganised to offer a range of crisis composition instruments to parties who are ineligible for the alert procedure.

who, in case of facts that jeopardise the continuity of the activity, has the duty to take specific actions provided by law: see CNCC, *Le Commissaire aux comptes et l'Alerte* n 16 above.

[19] Among the distinctive elements of the alert procedure there is, for example, the involvement of the supervisory bodies and auditors: an aspect that obviously could not be applied to professionals, individual entrepreneurs and partnerships.

III. Objective Conditions: Situations of Distress

The identification of the objective conditions for the alert procedure, is of significant importance, since the preventive intent of the procedure requires its early application during a stage in which the financial difficulties of the enterprise have not yet reached the point that will inevitably lead to insolvency. Moreover, we should not run the opposite risk of requiring the judicial system, Chambers of Commerce and enterprises to unnecessarily incur the costs of the formalities and proceedings, without there being sufficient evidence that the company is veering towards a situation of paralysis and discontinuation of its operations.[20] Furthermore, since the alert procedure is a prerequisite for requesting protective measures, such as the suspension of individual enforcement procedures, it should be necessary to prevent the illegal commencement of the procedure by debtors solely for the purpose of easing the pressure applied by creditors.

The new law identifies the prerequisites enabling debtors to commence the alert procedure in a '*stato di crisi aziendale*' (situation of company crisis). The term '*stato di crisi aziendale*' is, however, defined by Art 2 in very general terms. Within the meaning of the law, a situation of '*crisi aziendale*' is a situation that is 'likely to lead to future insolvency', also taking into account the results of business management surveys.[21] Therefore, it is the duty of the delegated legislators to more accurately define this term, presumably based on the guidelines or technical rules developed by the bodies representing the corporate professions.

At the same time, several economic parameters that could be taken into account have emerged from a provision related to the alert procedure (Art 4, para 1, letter *h*)). This provision introduces a bonus mechanism, representing a fundamental incentive to the 'spontaneous' commencement of an alert procedure by an enterprise: namely, immunity from prosecution or the granting of attenuating circumstances with special effects in connection with the offences stated in bankruptcy law and the curtailment of the interest and sanctions

[20] Concerns regarding procedures that might hinder the management of a company in temporary financial difficulty, but without any serious risk of the difficulty becoming insolvency, are raised when, as in the case of the alert procedure, the procedure cannot be commenced exclusively by the company's management, but by external bodies or parties with this responsibility. Moreover, the appearance of a situation of difficulty, and its possible disclosure, may also be counterproductive for a positive solution. These concerns are also highlighted by G. Scognamiglio, 'Osservazioni sul disegno di legge delega per la riforma della disciplina della crisi d'impresa e d'insolvenza' *Giurisprudenza Commerciale*, 918-925 (2016).

[21] The '*stato di crisi*' is also a condition for commencing composition with creditors proceedings; therefore, there is a risk that abandoning the concept of '*crisi*' as 'probable future insolvency', which has already been widely addressed in case law, in favour of purely corporate-based parameters, could pave the way for abuse: see M. Ferro, 'Ddl crisi di impresa: la nozione di crisi nel testo approvato dalla Camera' *Il quotidiano giuridico*, 14 marzo 2017. On the different interpretation of the concept '*stato di crisi*' see G. Presti, 'Stato di crisi e stato di insolvenza', in O. Cagnasso and L. Panzani eds, *Crisi d'impresa e procedure concorsuali* n 2 above, I, 422.

levied on tax debts. The application of this bonus mechanism, however, should be subject to the prompt commencement of the alert procedure or other distress solution instruments.[22] Promptness, in the case of the procedure, would be defined as occurring within six months from the moment in which the factors of financial imbalance emerge, '*to be identified based, in particular, on the debt: assets ratio, the receivables turnover ratio, the inventory turnover and the liquidity ratio*'. Thus, the expediency of commencing the alert procedure should be based on these ratios.

Two considerations emerge from the approach adopted in the reform. First of all, the integration of an explicit reference to economic and business management parameters into the concept of '*stato di crisi aziendale*' – which is a cornerstone of the new insolvency system – requires the cultural and organisational evolution of the recipient enterprises. Therefore, the sphere of application, at least of the alert procedure, should be designed by making reference to enterprises which, due to their size and corporate governance system, employ (or are expected to employ) professionals capable of assessing the ratios established by law.

We should not forget, however, that the concepts and technical rules referred to herein have not been developed for regulatory functions and, therefore, their transposition into national legislation requires legal review or integration. If they were instead simply transposed as they are, there would be a serious risk of unforeseeable discrepancies of the rules, *vis-à-vis* the purpose for which they had been introduced.

This risk is clearly exemplified by the above-mentioned reference to Art 4, para 1, letter *h*) (*the debt to assets ratio, the receivables turnover ratio, the inventory turnover and the liquidity ratio*). These parameters are 'financial ratios', which are unquestionably important. It can reasonably be argued, however, that a difficult situation for an enterprise, featuring the '*likelihood of future insolvency*', may also occur in connection with other factors, before they translate into financial imbalance ratios. Suffice it to mention that the introduction of rules that suddenly make a production process, hitherto perfectly legal and profitable, legally impossible or extremely costly.

Here too it is useful to compare the procedure with the French legal system.

According to the current French formulation, which has been integrated in Art L234-1 of the *Code de Commerce*, the objective conditions for commencing a *procédure d'alerte* are the existence of '*faits de nature à compromettre la*

[22] The bonus mechanism is also provided for in the case of a prompt request for the approval of a restructuring agreement, the proposed composition with creditors or the commencement of a judicial liquidation procedure. The breadth of the range of application of the provision highlights how, in the reform draft law, the decisive moment is precisely the onset of a '*stato di crisi aziendale*', rather than insolvency, and therefore emphasizes the importance of its definition and the determination of the econometric parameters that are referred to for this purpose.

continuité de l'exploitation' (facts such as to jeopardize the business continuity). However, the Code does not specify a method for identifying the relevant events, involved therein, nor are there any references to technical provisions or corporate criteria. However, since a fundamental role in commencing the procedure is performed by the *commissaires aux comptes*, the guidelines for exercising this profession do specify the facts that should be considered 'relevant'.

In particular, according to the *norme d'exercice professionnel* (NEP), no 570, the factors that are likely to jeopardise the continuation of the business are broken down into factors of either a 'financial' nature (capital, capacity to find new resources, debts, state of payments, litigation that could affect the company's liquidity) or an 'operational' nature (continued employment of the company employees with decisive roles, presence in the reference market, conflicts with the employees, significant changes in the applicable technology or regulations).[23]

The timeline during which the assessment is made depends on whether or not the directors have already prepared a plan. If they have not, the evaluation of the company's capacity to continue its business is based on a twelve-month horizon, from the date of the latest financial statements.

Comparing the French provision with the proposed Italian reform highlights two significant differences. First, the economic and financial ratios are not referred to in the *Code de Commerce* provisions governing the *procédure d'alerte*, so that legal interpretation can also take other ratios into account. Moreover, the guidelines for the *commissaires aux comptes* mention that the circumstances to be reported in the periodic reports, and which require the commencement of the *procédure d'alerte*, go significantly beyond the financial ratios to include other technical, legal or corporate events.

In Italy, to the contrary, in the definition of '*stato di crisi*' – ie the likelihood of future insolvency – the reference to economic and financial ratios is not exclusive,[24] but Art 4 of the law, sets values for several specific parameters, hereby requiring a period of six months to pass, from the moment the values are exceeded, before the alert procedure can be commenced. Furthermore, the law generally refers to various ratios, which entails the specification of the significant value for each ratio and its respective 'weight'.

The possible risk scenario here involves the excessive tightening of the rules, which could lead to mechanistic effects that are inconsistent with its law's ends. At the same time, these effects may foster the circumvention of the law's ends through management and accounting strategies aimed at preventing the

[23] The *norme d'exercice professionnel* (NEP) 570 represents the implementation, in France, of the ISA 570 provision and has been approved in its current form with an *arrêté* on 26 May 2017 and published in the Official Journal no 134 of 9 June 2017.

[24] As already mentioned in Art 2, para 1, letter *c*), the definition of financial difficulty – as the probability of future insolvency – should be addressed 'also' and not exclusively taking into account the principles of business management.

ratios from being exceeded, rather than fostering the introduction of measures to ensure the positive performance of the company.

IV. The Parties Entitled to Commence the Alert and Crisis Composition Procedure

The parties entitled to commence the alert and crisis composition procedure have been grouped into three categories: a) the debtor; b) the debtor's supervisory bodies; c) qualified public creditors.

The law provides for different formalities and procedures for each category depending on the type of procedure commenced, there are three different ways of involving the other categories, which may affect the outcome of the procedure.

1. Commencement of the Procedure by the Debtor or by the Management Bodies

In a distress situation, the debtor is not obliged to commence the alert and crisis composition procedure. The debtor, in fact, may alternatively enter into negotiations for a restructuring agreement, lodge an application for composition with creditors or wind-up the enterprise the debtor, however, cannot continue to operate the enterprise without any consolidation measures. The prompt adoption of one of the instruments for overcoming the effects of the financial difficulties in order to ensure that the enterprise continues its business is a specific obligation, which is expected to be included in the Civil Code as a result of Art 14 of the new law. The same article provides that, to ensure the prompt detection of a crisis and failure to continue its business, the enterprise should suitably adjust its organisation.[25]

This new approach concerning the management in a situation of distress must be coordinated with the obligatory conduct of the management bodies of an enterprise, currently provided in case the company assets drop below the capital. As is known, should losses reduce a company's capital to below the legal minimum, the directors are required to restrict all management operations to ensure the preservation of its assets. If not, they are jointly and severally responsible for the damage caused to the company, the shareholders and third parties, pursuant to Art 2486, para 2, of the Italian Civil Code. However, in the

[25] The nature and characteristics of the organisational structures that may be required obviously depend on the criteria that will be selected for identifying the crisis. In any case, the appointment of a supervisory body and/or an auditor seems to represent an adequate measure. In the case of partnerships and limited liability companies that do not require such bodies, it shall be necessary to set up internal control and account management systems related to the size of operations. This provision, however, does not specifically refer to the alert procedure and therefore introduces a general obligation, although it can be fulfilled in accordance with the characteristics of the enterprise.

event of a loss that reduces the capital by over one third, the directors must convene a shareholders' meeting, inform the shareholders and allow them to recapitalise the company.

Instead, according to the new law, it would be possible to suspend the effectiveness of these provisions, by commencing the alert procedure, or in the case of a debt restructuring and composition, with creditor agreements. Furthermore, according to Art 14, para 1, letter *d*), it may be inferred that, once the alert procedure has been commenced, the company could request the suspension of the effectiveness of the these provisions as a protective measure.[26]

In a situation of financial difficulty, the debtor and the management bodies of either the enterprise or the entity performing the economic activities are not just legally bound, but also encouraged to promptly lodge an application for the composition of any financial difficulties. They must primarily consider two factors: a) the possibility of requesting that the court adopt protective measures to complete the negotiations in progress; or b) the possibility of benefitting from the bonus mechanism referred to in Art 4, para 1, letter *h*), with regard to both assets (curtailing the interest and sanctions applicable in the case of tax debts) and personal responsibility (non-applicability of the sanctions for the crime of '*bancarotta semplice*' ('bankruptcy without fraud'), and of the other offences referred to in the bankruptcy law, (if they have caused limited damage to the assets).

In considering a) above, the law does not specify whether the implementation of the so-called 'protective measures' follow the law, should the debtor have commenced an alert procedure, or if they are referred to the Court for a judgement of expediency, In any case, the legislative decree implementing the law shall fix the duration, effects and rules of disclosure. The profile of point b), combined with the fact that the law requires that any protective measures must be implemented subject to examination in *inter partes* proceedings, implies that, when the debtor has an interest in benefiting from protective measures, the confidential nature of the alert procedure (representing its overall situation in the proceedings), must necessarily be waived.

Moreover, it should be noted that, regarding further incentives for the debtor, or the management body, to access the procedure, the bonus effect does not automatically spring from the lodging of the application, but is dependent on compliance with a prompt timeframe, (within six months from the emergence of the financial imbalance ratios). This must be more clearly specified in the legislative decree implementing the law, but is identified in Art 4, para 1, letter *h*), with reference to certain financial ratios (*the debt to assets ratio, the receivables*

[26] The possibility for the company to obtain the suspension of the obligations by the court, provided in the rules of the civil code that regulate the cases of capital losses, should not exclude the obligation for the managers to inform the shareholders of, and their right to, intervene with recapitalisation.

turnover ratio, the inventory turnover and the liquidity ratio).

Undoubtedly, if the company or management bodies fear that they may incur criminal liability, in relation to judicial liquidation proceedings, the non-applicability of the offence is the best incentive for promptly lodging the application. However, in order for the incentive to be effective, there must be certainty as to the date on which the six-month period that precedes the prompt lodging of the application begins. Therefore, the key task of the legislative decree will be to specify the ratios and related significant deadlines, a difficult task because the ratios indicated are different and must be coordinated.

The same problem applies to the substantial benefit of the '*significant curtailing of the interest and sanctions levied on the company's tax debts, until the conclusion of the alert procedure*'. This provision does not seem decisive in itself, however, it could lead to a new type of damage, should the alert procedure not be promptly commenced and the company go into judicial liquidation.[27] Therefore, when faced with a situation of financial difficulty, it would be expedient for the directors who do not wish to commence an alert procedure or apply the other legal instruments for this situation, to make known to the supervisory bodies and the shareholders their cost/benefit assessments for the company. They should include a debt restructuring plan that disregards the protective measures associated with the alert procedure and is nevertheless susceptible to producing results in the timeframe established for the alert procedure.

Faced with these incentives, there would be many reasons for keeping the debtor and the management bodies from commencing an alert procedure. First and foremost, regardless of the application for protective measures (which would entail a disclosure of the procedure and possible measures handed down by the Court), the commencement of the procedure must be reported to the qualified public creditors (Internal Revenue Service, pension institutions, tax collection authorities) who will thus become aware of the situation of financial difficulty and overall indebtedness of the enterprise. Secondly, unlike composition with creditors and restructuring agreements already provided by the bankruptcy law, the new law does not envisage the possibility of approving by a majority of creditors debt restructuring solutions proposed during the alert procedure.

Moreover, the commencement of the procedure entails the definition of a deadline within which an agreement may be entered into by the debtor and all the creditors. Such a deadline can be specified in the implementation decree or referred to the Body[28] for a decision, but may not exceed six months. Again, should the board of experts fail to identify suitable measures for overcoming the

[27] In the case of winding up, the directors could be held responsible for the fact that the failed prompt commencement of an alert procedure might have prevented the enterprise not only from requesting the benefit of protective measures, but also from reducing the interest and sanctions on the tax debts, thus increasing the liabilities.

[28] The word 'Body' is used in the paper to designate the entity that will be set up by the Chambers of Commerce and that will be charged to manage the alert procedures.

difficulties during this procedure, or at the expiration of the deadline, (triggering an obligation to declare a state of insolvency) the Body shall notify the Public Prosecutor, who must then commence the procedure for the immediate determination of the state of insolvency, which would open judicial liquidation proceedings. Once the alert procedure has been commenced, the decision regarding the determination of the state of insolvency is removed from the debtor. This is undoubtedly the greatest disincentive for the lodging of an application by the latter or the management bodies.

2. Determination of the Distress Situation by the Supervisory Bodies and Auditors

A prompt reaction to a situation of financial difficulty, for the purpose of attempting a reorganisation process, is of interest to the company and its shareholders, as well as to its creditors and all the stakeholders involved. Therefore, the alert procedure may also be commenced, in the case of inaction by the management body, by the company's supervisory bodies or by the company's statutory or independent auditors, if they have been appointed.

Given the broad range of parties to which the alert procedure applies, not all of them have supervisory or accounting bodies. Lacking any supervisory bodies, the 'spontaneous' commencement of the procedure by the management body is certainly much less likely.

With relation to the parties entitled to commence the procedure, the rules of the alert procedure should be coordinated in accordance with Art 14 of the new law, which significantly amends the Civil Code, in terms of the supervisory bodies of enterprises and auditing procedures. In particular, the law provides for a drastic reduction of the thresholds, which, when exceeded for two consecutive years, require the appointment of a single- or multi-member supervisory body or an auditor even by *società a responsabilità limitata* (srl) (private limited company). With respect to the current thresholds set out in Art 2435-*bis* of the Civil Code, (referred to in Art 2477 of the Civil Code for the *società a responsabilità limitata*,) the law provides for the reduction of the assets to two million euros (instead of four million four hundred thousand), two million euros in revenues from sales and services (instead of eight million eight hundred thousand) and ten (instead of fifty) employees. It also provides for the above-mentioned effects being triggered if even one of the ratios – and not more than two – is exceeded.

These new provisions appear questionable, not so much for their merits, but for the procedures through which the introduction of such far-reaching amendments is envisioned. In fact, the role of statutory auditors, independent auditors and supervisory bodies in general goes beyond bankruptcy law provisions, and therefore the fact that, after years of discussions on company law reform, these amendments could be introduced through a law on corporate distress and, therefore, apparently on the basis of specific needs in this field, does not

represent a rational approach to law-making.[29]

A comparison with the French system on this score as well reveals a broader range of categories of Italian companies obliged to set up a supervisory body. In fact, the appointment in France of *commissaires aux comptes* by SARL-type companies is mandatory when two of the following thresholds are exceeded for two years running: for SARL companies, one million five hundred and fifty thousand euros of net assets; turnover of three million one hundred thousand euros before tax; fifty employees; for SAS companies, one million Euro net assets; turnover of two million Euro before tax; twenty employees.[30]

Notwithstanding these different thresholds, the difference between the two countries lies primarily in the fact that, in Italy, it is sufficient to exceed one threshold alone, and not at least two, as in France.[31] In particular, the turnover and number of employees' figures appear to be rather low and susceptible to significantly extending the base of enterprises required to set up a supervisory body.[32]

The supervisory body and the auditors, based on the above-mentioned parameters, are obliged to take initiatives when they detect 'specific clues of financial difficulties' for the purpose of identifying the bonus measures for debtors in connection with the prompt commencement of the alert procedure. If a supervisory body is in place, however, it is not allowed to benefit from the six-month deadline for judging the promptness of the debtor's response. Supervisory bodies, in fact, are required to act 'immediately' and to inform the management body of any signs of difficulty.

As in the case of directors, prompt commencement is encouraged by the application of sanctions or rewards. On the one hand, the obligation to promptly commence the procedure entails that, if the failure to act damages the company, the auditors and directors are considered jointly liable, pursuant to Art 2407 of the Civil Code. On the other hand, Art 4, para 1, letter *f)* provides that the legislative decree implementing the law must specify the criteria for exempting

[29] Moreover, the intent of the reform to extend the scope of the alert procedure even more than in France also emerges from the envisaged reintroduction of the capacity to bring an action under Art 2409 of Code Civil for limited liability companies without a supervisory body. This would entitle, even for minority members holding the minimum stake in the capital envisaged by the provision, to lodge an application with the Court based on claims of serious mismanagement and the failure to commence the alert procedure despite persistent financial difficulties.

[30] The obligation is provided for the *Sociétés à responsabilité limitée* (SARL) in Art L223-35 of *Code de Commerce* and for the *Sociétés par actions simplifiées* in Art L227-9-1 of *Code de Commerce*. The thresholds are determined by decree of *Conseil d'État*.

[31] From another point of view, the supervisory body's obligation no longer applies in France in the event of the failure to fulfil the ceilings for two consecutive years while, in Italy three years are required (Art 14, para 1, letter *i*)).

[32] A study based on the Infocamere data has calculated that one hundred seventy-five thousand srl, previously exempted, will be obliged to appoint an auditor: see G. Negri, 'Revisore d'obbligo per 175mila Srl' *Il Sole 24 Ore*, 13 October 2017.

the statutory auditors from any responsibility in this respect if they report the situation of difficulty to the management body and the body responsible for implementing the alert procedure. The same principle should also apply, *mutatis mutandis*, to the other supervisory bodies and auditors.

3. The Reporting Powers of Qualified Public Creditors

The new law provides for a further form of commencement of the procedure that has no equivalent in the French model, which includes, among the entitled parties, the so-called 'qualified public creditors'. The latter, in turn, include, by way of example only, the Internal Revenue Service, social security bodies and tax collection agents.[33] For these parties, the grounds for commencement do not consist of evidence of financial difficulties or significant indicators for the debtor or the supervisory bodies, but, more simply, in a situation described in the new law as a 'persistent significant indebtedness'. The same provision also indicates that these amounts should be determined not in absolute terms, but in relation to the size of the company and the specific importance of tax or debts for social security contributions, as self-declared or finally assessed, such as to '*determine the early and timely appearance of difficulties, in relation to all the companies subject to the procedures herein*'.

Notwithstanding the fact that any further assessment of these grounds is subject to determinations by the legislative decree that will implement the law, it soon becomes clear that they intersect – but do not coincide with – those provided in relation to the other entitled parties. Therefore, the problem arises of coordinating the various procedures. In fact, when the qualified public creditors determine the existence of debts in excess of the threshold, they are required to immediately notify the debtor to this effect and, if the debt is not paid within three months, if no agreement is reached (without, however, specifying which kind of agreement would rule out an alert procedure) or if no application is made for admission to insolvency proceedings, an alert proceeding may be commenced. At the expiry of the three-month deadline, the creditors must immediately notify the circumstance to the company's supervisory bodies and, in any case, to the Body that will be established at the Chamber of Commerce.

Given that failure to comply with this obligation will be sanctioned with the loss of privileges which may seriously damage the creditors, the administration bodies involved will probably set up suitable computer systems to automatically report the exceeding of the thresholds or indicators established by law at the expiry of the ensuing three-month deadline.

Accordingly, each time the reports by the qualified public creditors occur before or at the same time as those by the internal supervisory bodies (which

[33] Based on the provision that relates the failure to promptly commence the procedure the loss of credit privileges, the category of entitled parties must be deemed to extend to all public entities holding privileged credits, pursuant to Arts 2752, 2753 and 2754 of the Civil Code.

will likely frequently be the case), the interval of time during which the company may propose a plan of measures will be limited to three months, after which the qualified creditors will commence the alert procedure before the Body.

Moreover, the risk of being reported to the Body by the qualified public creditors might encourage debtors to keep their more significant debts (ie self-certified or finally assessed debts) below the thresholds for mandatory reporting, thus reducing the availability of other necessary corporate reorganisation measures.

V. The Internal Phase of the Alert Procedure and the Role of Governance Bodies

The commencement of the alert procedure by the supervisory bodies and auditors entails a new approach to corporate governance. In fact, the alert procedure may foster arrangements with the creditors or debt restructuring plans, but it can also increase the risk that, in the event of a negative outcome, the company will undergo judicial liquidation in accordance with or against the will of the management body and the shareholders. In order not to deprive the management body of its prerogatives and allow it to shirk its responsibilities, the initiatives by the supervisory bodies and auditors must be preceded by discussions with it. Therefore, the supervisory body or the auditors that detect evidence of difficulties must, first of all, immediately inform the management body of this evidence. Moreover, since the decisions to be taken in these circumstances are often fundamental for the company's fate and may affect its purpose or capital, the manner of involvement of the shareholders should also be considered.

The solution to this problem proposed in Italy differs significantly from the French model. In France, the procedure is strictly regulated and differs between *sociétés anonymes* and other types of companies.[34] In both cases, however, a central role is played by the *commissaires aux comptes* (CAC) in detecting the crisis and alerting the management, but thereafter the procedure involves primarily the internal bodies of the company, including the shareholders. The external authority (the President of *Tribunal de Commerce*) is informed from the outset, but only intervenes in case of failure of an internal prompt and effective reaction to the alert.[35]

[34] The *procédure d'alerte* for the *sociétés anonymes* is regulated by Art L234-1 of the *Code de Commerce*, whereas the following Art 234-2 is applicable to all the other types of companies. In the part of the *Code de Commerce* dedicated to the regulations see Arts from R234-1 to R234-4 for the *sociétés anonymes* and the following Art R234-5 et seq for the other types of companies.

[35] On the role of the CAC see J.F. Barbièri, 'L'amélioration de la prévention et la procédure d'alerte: le rôle des commissaires aux comptes' *Les Petites Affiches*, 14 september 1994, 40-44; E. Du Pontavice, 'Le rôle nouveau du commissaire aux comptes (généralisation, alerte et statut) et l'alerte par le président du tribunal de commerce' *Revue de jurisprudence commerciale, no spécial*, 53 (1986); Y. Guyon, 'Le rôle de prévention des commissaires aux comptes' *Juris-Classeur*

More specifically, as regards *sociétés anonymes*, when one of the above-mentioned objective conditions occurs, the *commissaires aux comptes* (CAC) must immediately inform the management body (the Chair of the *Conseil d'administration* or the *Directoire*) of the conditions detected. Within fifteen days from receiving the first report, the management body must prepare a plan to ensure the continuation of the business. Otherwise, the CAC shall invite the management body to express an opinion, through a resolution, on the status of the company. This letter of invitation should also be addressed to the President of the *Tribunal de Commerce*.[36] Within eight days of said invitation by the CAC, the management body is to be called to pass a resolution concerning the status of the enterprise. The resolution, which must be passed within fifteen days of the invitation by the CAC, is then notified to the *Comité d'entreprise* or the employees' representative. The CAC is to be present at the meeting of the management body. If this phase does not take place, or if the enterprise's difficulties worsen, the CAC invites the directors to call a general meeting of shareholders. The general meeting, which must be called within eight days from the invitation by the CAC to the directors, must be held within one month of that date, failing which the CAC may itself call the meeting and put the status of the enterprise on the agenda. If the general meeting fails to express a suitable position as to the criticalities highlighted by the CAC, the latter shall notify the *Tribunal du Commerce* to this effect.

The CAC may also suspend the alert procedure at any time, if it deems the decisions taken by the enterprise to be sufficient. Subsequently, the procedure may be reactivated from the stage at which it has been suspended by the CAC, provided that no more than six months have passed from the date of sending the first notice to the management body.[37]

For enterprises other than *sociétés anonymes*,[38] the President of the *Tribunal de Commerce* is immediately involved in the proceedings, although initially only for information purposes. At the occurrence of the above-mentioned objective conditions, the CAC is to inform the management body of any criticalities detected,

périodique, édition entreprise, 15066 (1987); A. Liénard, 'La responsabilité du commissaire aux comptes dans le cadre de la procédure d'alerte' *Revue des procédures collectives*, 7 (1996); B. Soinne, 'La procédure d'alerte instituée par la loi du 1er mars 1984 et la mission du commissaire aux comptes' *Juris-Classeur périodique, édition entreprise*, II, 14563(1985). On the involvement of the shareholders see A. Brunet and M. Germain, 'L'information des actionnaires et du comité d'entreprise dans les sociétés anonymes depuis les lois du 28 octobre 1982, du 1er mars 1984 et du 25 janvier 1985' *Revue des sociétés*, 1 (1985).

[36] Art R234-2 of *Code de Commerce* offers a very clear and detailed description of the procedure that the *commissaires aux comptes* must follow.

[37] T. Monteran, 'La procédure d'alerte filante des commissaires aux comptes issue de la loi de simplification du droit' *Gazette du Palais*, 8 July 2011, 7; B. Saintourens and P. Emy, 'Simplification et amélioration de la qualité du droit des sociétés après la loi 2011-525 du 17 mai 2011' *Revue des sociétés*, 467, (2011).

[38] J. Paillusseau, 'L'alerte du commissaire aux comptes dans la SAS' *Juris-Classeur périodique*, I, 262 (2000).

hereby requesting, within fifteen days, the preparation of a plan for ensuring the continuation of the business. The *Comité d'entreprise* or the employees' representative and the *Conseil de surveillance*, as well as the President of the *Tribunal de Commerce,* are informed about this request and its ensuing response. Failing a response by the management body, or if the difficulties worsen, the CAC may request that a general meeting of shareholders be called. Such a request is also notified to the President of the *Tribunal de Commerce*, as well as any negative outcome of the general meeting.

In Italy, the procedure is outlined in its essential terms in the new law, without any distinctions based on the type of company being made. However, while the exclusion from any involvement in the procedure of the shareholders is understandable in the case of *società per azioni*, (since the management bodies are exclusively responsible for the company's management, pursuant to Art 2364 of the Civil Code) this approach cannot be justified in the case of *società a responsabilità limitata,* in which the members play a role, often extended by the articles of association, in the company's management. Moreover, since the alert procedure can also lead to the Body concluding that a solution cannot be found, which could result in a determination of insolvency and the winding-up of the enterprise, the involvement of the general meeting prior to the commencement of the procedure before the Body would be expedient, to say the least.[39] Accordingly, when implementing the delegation, it would be necessary to assess the expediency of requiring the management body to call a general meeting of shareholders as soon as possible, for the purpose of deciding on the measures to be undertaken, after receiving a report from the supervisory body or auditors.

Three types of response to the notice by the supervisory body or auditors may be theorised: the prompt adoption of measures for tackling the difficulties, the prospective adoption of such measures or inactivity. In the third case, the supervisory body's conduct is clearly forced and entails immediate reporting to the Body. In the first case it will be necessary to examine the proposed measures, to determine their adequacy, and then assess their possible outcome. Similarly, in the second case, it is necessary to assess the adequacy of the measures and then monitor their implementation.[40] These assessments are particularly delicate and the assessment of the effects of the measures undertaken by the management body requires a certain amount of time. Moreover, the supervisory bodies and auditors might be persuaded to adopt an excessively harsh attitude with regard

[39] On the contrary, the commencement of an alert procedure enables a request to be made to the Court to suspend the enterprise from the obligation to call a general meeting of shareholders for reconstituting the capital, with the potential effect of excluding the meeting itself from the procedure.

[40] In this sense, the adequacy of the response or of the measures adopted does not exempt the supervisory body from monitoring the evolution within the enterprise and from notifying the enterprise itself, once again, if the measures are deemed insufficient to overcome the difficulties.

to the timelines. This risk is heightened in the case of statutory auditors, given their exemption from joint liability with the directors, as provided in Art 4, para 1, letter *f*) of the new law.[41]

Considering this legal framework, the assessment of the adequacy of the measures undertaken by the management body should be expressed in a reasoned report and – in the case of a positive assessment – monitoring by the supervisory body should be contemplated, as well as a deadline within which to report to the Body. This way, if it proves impossible to overcome the situation of distress within the deadline, the Body can take further necessary steps.

VI. The Role of the President of the *Tribunal de Commerce* in France and the Crisis Composition Body in Italy

In France, the prevention of financial difficulties in the corporate sector by the *Tribunaux de Commerce* is grounded on Act no 84-148 of 1 March 1984, under which the President of the Court having jurisdiction over the place where the company is based has the power to summon the legal representatives of an enterprise whose financial statements show a loss of over one third of its assets.[42] This condition, however, soon appeared insufficient to prevent situations of financial difficulty. Thus, several courts established different ways of identifying enterprises at risk of insolvency, and allowed the legal representatives to obtain informal meetings and to collect information regarding the measures to be introduced for the purpose of countering the difficulties.[43]

The positive outcome of this experience led to the reform of 1994, which introduced the power of the President of the *Tribunal de Commerce* to summon the management of any enterprises about which there is information of difficulties capable of jeopardising the continuation of their business.[44] This instrument for preventing financial difficulties is supplementary to the other forms of alert in situations of corporate distress and is granted to the President

[41] The delegation principle referred to in Art 4, para 1, letter *f*), is particularly hard to implement. Subjectively, the exemption from joint liability is envisaged only for the *sindaci* (statutory auditors), but it should be extended to include the independent auditors, who are jointly liable with the directors, pursuant to Art 15 of decreto legislativo 27 January 2010 no 39. Regarding the conditions for exemption, there is a problem of promptness of reporting to the body, if the management body, following the notice, implements measures that reveal themselves to be inadequate.

[42] Art 34 of the Act no 84-148 of 1 March 1984, actually Art L611-2 of the *Code de Commerce*.

[43] See J.-J. Daigre, 'Le rôle du tribunal de commerce, bilan d'une enquête' *Juris-Classeur périodique, édition entreprise*, II, 15066, 625 (1987).

[44] J.-Ph. Hael, 'La consécration du droit d'alerte du président du tribunal' *Les Petites Affiches*, no 117, 30 September 1994, 13. For a recent presentation of the legislative and practical developments, see M.-H. Monsèrié-Bon, 'Entreprises en difficulté (Détection des difficultés)' *Répertoire de droit commercial Dalloz*, 65 (2017).

of the *Tribunal de Commerce*, not in a judicial capacity,[45] but as a person with economic experience and capable of assessing the situation from the outside. This can be particularly useful in situations of difficulty. We cannot ignore the fact, however, that this function is particularly significant in France because the President of the *Tribunal de Commerce* is a so-called *juge consulaire*, (ie a non-professional magistrate elected from among entrepreneurs and top managers) as well as being a leading member of the Court that is competent to consider commercial matters. This magistrate is, therefore, knowledgeable on and familiar with insolvency procedures.[46] Therefore, the contribution of the President and his delegates is particularly authoritative based on the experience accrued in the field and in the exercise of judicial functions concerning financial difficulties.

The quantitative and other importance of this alert instrument has increased over the years, through the consolidation of a practice of reports and collection of information from a large number of sources.[47] First and foremost, information to the President may be provided by all the parties entitled to commence an alert procedure, including, apart from the *commissaires aux comptes*, the employees' representatives and the *groupements de prévention agrée*.[48] Furthermore, the President receives and may obtain information from the company register, as well as receive reports from the tax, social security, banking supervision and judicial authorities (Public Prosecutor, civil and criminal courts), in addition to creditors or other parties.[49] The President's power to convene is

[45] J.-L Vallens and J.-F. Martin, 'Entreprise en difficulté' *Lamy Droit Commercial*, no 2638, 1155 (2005), speak of the summoning as a *sui generis* power that is unrelated to the judicial activities proper of the magistrates, but rather to the so-called *giurisdiction gracieuse*, the relevance of which effectively descends from the power of the Court to officially commence collective procedures following the determination of the *cessation de paiement* (declaration of bankruptcy).

[46] To guarantee the principles of independence and impartiality of judges, the president of the *Tribunal de Commerce* and the *juges consulaires* who, having been delegated by the president to do so, have participated in the meeting with the management of enterprise, within the framework of an alert procedure, cannot then preside over or play any sort of role in connection with the disputes or insolvency proceedings in which they were involved: Cour de Cassation 6 November 1998 no 95-11.006, *Bulletin civil de la Cour de cassation, assemblée plénière,* no 4, 6.

[47] Since the reform of 1994, the prevention activities of the commercial court have gradually broadened their scope. The Court of Paris has made available data highlighting an average number of meetings between the president, or his/her delegates, and the management of enterprises in the order of three thousand per year.

[48] The recognition of alert powers to the *comité d'entreprise* dates back to the company law reform of 1966 (Act 66-537 of 24 July 1966). The *groupements de prévention agrée* were introduced by Art 33 of Act 84-148 of 1 March 1984 and are now regulated by Art L611-1 of the *Code de Commerce*: these are aggregative forms of various kinds between commercial companies and other legal persons, the purpose of which is to provide the members with a periodical analysis of the economic and financial data and provide advice in the event of financial difficulties. This instrument, however, has not spread significantly: see D. Legeais, 'Les groupements de prévention', in 'La prévention des difficultées des entreprises après deux années d'application' *Juris-Classeur périodique, édition entreprise*, II, no 15066, 629 (1987).

[49] The most frequent case consists of the difficulties emerging from the data collected by

not necessarily based on the possession of specific documents or information regarding the existence of difficulties likely to jeopardise the company's ability to continue its business.

Meetings with the managers of distressed companies are strictly confidential and the minutes thereof do not contain specifics as to the information required or supplied, but are simply proof of the meeting having taken place. In addition to communications to companies, the President also officially collects information through the company registers, which have therefore become an essential tool in the prevention process and are periodically adjusted, for the purpose of providing useful support, to the indications of the President of the *Tribunal de Commerce*.[50]

During the meetings, the President does not offer advice and cannot provide management instructions, but must simply remind the managers of their obligations, under the law and the articles of association and take note of any measures put into place to promptly react to any signs of difficulty. If he requires further information about the situation, he may fix a new meeting and, at the same time, request additional facts and information from the *commissaires aux comptes*, employees' representatives, public and social security authorities and the risks office of the banks concerned. At the conclusion of this investigation, if the debtor has proved unable to implement any measures capable of effectively tackling the financial difficulties and the enterprise has not stopped its payments, the appointment of an *ad hoc* agent, or conciliator, may be requested to support the company in finding a solution mutually agreed to with the creditors. Instead, if the company is in a state of *cessation des paiements*, but the legal representatives fail to take the necessary decisions, the President of the *Tribunal de Commerce* is to inform the *Ministère Public* (Public Prosecutor), who must then lodge an application for *redressement judiciaire* (Art L631-3-1 of the *Code de Commerce*) or *liquidation judiciaire* (Art L640-3 of the *Code de Commerce*).

In conclusion, in the French system, the President of the *Tribunal de Commerce* is the sole reference for all those situations about which, regarding debtors or third parties, there is information that appears to indicate the likelihood of the enterprise not being able to continue its business. The President therefore becomes the recipient of petitions and reports and directs company registers to monitor their registered companies and find any signs pointing to a situation of difficulty. On the other hand, since the President receives the petitions

the company register, such as the loss of assets and the failed or late filing of the financial statements; significant data can also be drawn from the register of protestations or the registration of privileges by the State or social security institutions. See E. Martineau (with the collaboration of Y. Chaput), *Lettre de l'Observatoire consulaire des entreprises en difficulté*, special edition, May 1998.

[50] J.-J. Hyest, *Prévention et traitement des difficultés des entreprises: une évaluation des procédures et leur mise en oeuvre*, Report of the Office for evaluating the legislation, 5 December 2001, availabe at https://tinyurl.com/ydf990yw (last visited 25 November 2017).

or reports, his role primarily consists of collecting all the necessary facts for making a punctual and accurate assessment of the situation and encouraging the management to acknowledge the situation of their company and adopt the necessary measures. The President is not required to offer advice or impose specific solutions.

Therefore, the success of the alert procedure in France is not the result of any measures taken directly by the President,[51] but rather of his capacity to promptly direct the management towards adopting the most appropriate solutions to tackle the crisis, in accordance with the law. This effect is the result of a set of factors that are, primarily, instruments for promptly reporting signs of financial difficulties, the authoritativeness of the President of the *Tribunal de Commerce* and his delegates, (given their role in commercial proceedings) the confidentiality of the procedure and, the possibility of the governance bodies implementing measures without necessarily impairing its business reputation, in the wake of the circulation of information relating to the situation of distress.

In Italy, the role of the so-called 'Crisis Composition Body' to be set up at the Chambers of Commerce according to Art 4 of the new law is certainly not comparable to that of the President of the *Tribunal de Commerce* in France for several reasons. First, the establishment of an entirely new Body requires the creation – from scratch – of an efficient organisation and the formation of related operational practices, which have played a fundamental role in the French experience, but which nevertheless require a certain amount of time. Furthermore, the Body will not have any judicial functions and, therefore, its indications and decisions will not be as authoritative as those of the President of the *Tribunal de Commerce*. Indeed, they might even differ from decisions taken by the judicial authorities.

Furthermore the Body cannot be compared with the President of the *Tribunal de Commerce* in terms of its powers. In fact, the Body does not liaise with the company register, does not receive information from the registry office and, above all, does not have the power to commence the crisis composition procedure, except upon the initiative of the competent authorities.

Once the procedure is launched, the law does not provide for specific information collection powers. Thus the Body must rely solely on the information forthcoming from the directors and the supervisory bodies.[52]

[51] The appointment of *ad hoc* agents, which is the principal formal measure that a president can adopt with regard to an enterprise, at the outcome of the meeting held pursuant to Art L611-1 of the *Code de Commerce*, is the outcome of a very low percentage of summons, while the majority of cases are taken on directly by the management. The appointment of an *ad hoc* agent or conciliator (pursuant to Art L611-4 *Code de Commerce*) may only be made after a specific request by the debtor.

[52] Art 4, para 1, letter *b*) provides that the decreto legislativo implementing the law must regulate the judicial use of the preliminary documents relating to the procedure before the body: the provision should be interpreted as referring to the minutes of the meetings held

Moreover, the new law does not provide the power to summon the auditors, who are entitled to report any financial difficulties and are required to monitor their development. In connection with its implementation, it would be preferable to extend the power to convene to include the auditors, or at least to provide that the Body may request the auditors to provide full information on the enterprise's financial position.

At the same time, the Body is required to inform the qualified public creditors, as well as the other entities required to report to the Body about any long-lasting significant events of non-compliance, about the notice. Moreover, the notification of information to the qualified creditors entails the risk that they may move to protect their claims by obtaining provisions that could hinder the adoption of suitable measures for overcoming the difficulties.

Procedurally, problems could arise out of the relations between the Body and the board of three experts appointed by three different institutions from among the persons enrolled in a relevant list kept by the Ministry of Justice. The membership of the Body is not at all clear, nor is it clear whether it must or may delegate the entire procedure – including the meetings with the debtors to the board of experts; or whether the latter has a purely advisory role and the function of certifying the outcome of the procedure.[53] In any case, it would be preferable to provide for simplification of these mechanisms (for example, by predetermining the three-person board of experts or the individual experts designated by the respective authorities), to ensure that the formation of the board does not slow down the procedure.

The debtor is summoned for the purpose of determining,

> 'in the shortest possible time, subject to the verification of the current financial and operating conditions of the undertaking, the necessary measures for remedying the financial difficulties',

a task that seems to be referred to the board of experts (Art 4, para 1, letter *b*)). Clearly, though, the 'determination' of the necessary remedies is not sufficient; what is needed is the guarantee of their 'adoption' by the debtor. Furthermore, the board is required to make sure that a solution has been agreed to with the creditors. Moreover, regardless of the possibility of obtaining the necessary protective measures for completing the negotiations under way and the assistance of the board of experts, the alert procedure, and the ensuing attempt at the composition of the difficulties, are not governed by any special rules. Therefore, the negotiations are carried out on the basis of the ordinary civil law provisions.

before the Body and to the documents acquired by the Body, as well as in connection with the outcome of the activities of the Board of experts appointed by the Body itself.

[53] The first solution appears to be the most efficient, but this doesn't seem to emerge clearly from the wording of the law. Therefore, it would be desirable to better specify the distribution of roles between the Body and the Board of experts referred to in Art 4.

Thus, the composition of relations between debtors and creditors is inevitably hampered by all the problems of multilateral negotiations, which do not benefit from the deliberative advantages of insolvency proceedings, and are thwarted by the limited timeline within which the procedure must be completed. In fact, pursuant to Art 4, para 1, letter *b*) an agreeable solution for the difficulties must be found within six months, a period that can only be extended (presumably by the Body) on the basis of 'positive results achieved during the negotiation'.

If, however, at the expiry of the six-month deadline, or before, the board of experts reports that there is no hope of a mutually agreeable solution to the crisis or that there is no significant progress in the implementation of the suitable measures for overcoming the difficulties, the protective measures may be withdrawn, even *ex officio*. In order to make this provision operational, the legislative decree must logically provide that the Judge who decided on the protective measures must require updates from the board of experts, or, more probably, the obligation of the latter to transmit their report.

The report by the board of experts may confirm, as provided in the opening stage of the procedure, the failed determination (or ineffectiveness) of the any suitable measures for overcoming the difficulties and, possibly, the intervening state of insolvency. In this case, according to Art 4, para 1, letter *b*), the Body is required to notify the circumstance to the Public Prosecutor, who will act promptly to obtain a declaration of insolvency from the Court. In other words, once the procedure has been commenced before the Body, it is beyond the control of the debtor, who can no longer withdraw from or terminate the procedure, in agreement with the creditors; the Body and the Board of Experts are the only parties entitled to ensure that the adopted measures are suitable for overcoming the situation of financial difficulty and that there are significant developments in the negotiations, the only inexorable alternative being a declaration of insolvency. This characteristic of the procedure will presumably be the most important disincentive for debtors to directly apply for its commencement.

VII. Conclusions

The introduction of an alert procedure in the Italian legal system fills a serious gap consisting of the lack of procedures for preventing financial difficulties, due to the approach specified in the 1942 Bankruptcy Law, the aims of which were simply to wind up insolvent companies and pay off the creditors.

It is still too early to assess the recent legislation, because the new act leaves open a large number of options. However, based on the comparison with the French system, which has been adopted as a model, a number of observations need to be made.

First of all, the creation of a French-style alert procedure requires certain underlying 'institutional' conditions, pertaining to both the debtor's organisation

and the Bodies responsible for implementing the procedure. The setting up of *ad hoc* Bodies at the Chambers of Commerce, as mentioned above, the training of professionals capable of effectively performing the role of members of the Board of Experts and, above all, the capacity of these bodies to become authoritative, reliable and efficient, is no easy task. These are the key values of the French model however, in which the *jurisdiction consulaire* of the *Tribunal de Commerce*, and, in particular, the role of the President, as the person in charge of the alert procedure, have accrued their expertise in the prevention of corporate difficulties in the field. Moreover, the role of the French *Tribunal de Commerce*, for its history, membership and practice, is unique and, therefore, replicating the procedure typical of this institution in other countries would probably lead to different results, regardless of the similarity of the legal systems from other points of view.

It should also be noted that the choice of promoting instruments for preventing financial difficulties and providing for the commencement of the procedure regardless of the management bodies of the enterprises concerned would have a direct impact on corporate governance. Apart from the new responsibilities of the directors, the role of the internal supervisory bodies and auditors would be strengthened, with the consequent need to change the organisation, competences, procedures and responsibilities of the enterprises, according to their type and size.

The new act has also drastically reduced the size thresholds, above which the *società a responsabilità limitata* (private limited companies) are required to appoint statutory or independent auditors, reintroducing for these companies, in the case no auditors have been appointed, the possibility of a qualified minority of members applying to the Courts in the event of serious mismanagement, pursuant to Art 2409 of the Civil Code. It is very likely that the applications lodged pursuant to this provision would also include cases of (real or alleged) financial difficulties, with respect to which the directors have not commenced an alert procedure. This would entail reorganising relations within the *società a responsabilità limitata* and, in particular, those with statutory or independent auditors.

One huge difference, compared to the French *procédure d'alerte,* is the entitlement, in the first instance, of qualified public creditors to report the existence of a significant debt and, hence, commence the alert procedure before the Body. This provision significantly affects the regulatory framework, because it provides that the alert procedure, as is the case in France, may also be commenced externally. Moreover, given the different underlying conditions, compared to other cases (ie the ongoing failure to pay back a significant debt, with regard to self-declared or finally assessed positions) and the obligation to activate the procedure, under penalty of losing the privileges of the credits related thereto, it features as an expedient incentive for entities that often rely solely on

their position as privileged creditors and therefore do not presently contribute to a prompt emergence from the financial difficulties. However, it is clear that, if the debt thresholds are not adequately calibrated, the number of reports might be very high, thus overburdening the conciliation Bodies, with negative effects on the economic system as a whole.

One final observation: the effectiveness of the *procédure d'alerte* is also related to its possible outcome. In France, the 2005 reform introduced the *procédure de sauvegarde*, a procedure that – under certain circumstances – requires creditors to choose between either a significant reduction of the amount owed or the repayment of the debt in instalments over a ten-year (or potentially longer) period. The prospect of such an outcome for the distress situation could decisively influence the behaviour of the parties during the negotiations, including during the *procédure d'alerte*.

Therefore, the success of the alert and crisis composition procedure in Italy is strictly tied to the regulations concerning insolvency procedures, which will affect the parties' prospects and decisions, as well as the related negotiations.