Corporate and Financial Markets Law

Long-Lasting Companies and the Withdrawal Right in Italy

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Abstract

In Italian corporations and limited liability companies, the withdrawal right is provided by law when the entity has perpetual duration. Sometimes, case law and scholars hold that this right should exist also when the duration is very long, as happens in partnerships. However, in light of applicable rules and the general principles underlying them, this opinion is not valid. This article analyzes the evolution of the debate and finds a persuasive solution to the issue also in light of a comparative view.

I. Introduction

1. The Withdrawal Right in Italian Company Law

To understand the specific issue with which this article is dealing, it is necessary to provide some introductory notes about the withdrawal right in Italian company law. First, I will briefly analyze the connection between it and the rules about transfer of interest, as the withdrawal right becomes particularly crucial in cases where selling interests is difficult. Secondly, I will describe how the withdrawal right works, its effects, and its importance in company law. This brief analysis will provide context for the specific issue examined in the article.

Under the Italian Civil Code, both the shares of a corporation (the Italian *società per azioni*, or s.p.a.) and the interests of a limited liability company (hereinafter LLC; the Italian *società a responsabilità limitata*, or s.r.l.) are usually freely transferable. Excluding transferability is normally forbidden for corporations, as shares are naturally transferable; there is only a limited exception, which is the possibility of providing a temporary ban of five years in the articles of incorporation (see Art 2355-*bis*, para 1, of the Civil Code). Excluding transferability is permitted for LLCs, but with the counterbalance of a specific withdrawal right (Art 2469, para 2, Civil Code). Conversely, the general rule in the partnership

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regime allows selling of interests only with the unanimous consent of all partners. Changing a partner is considered a case of modification of the partnership agreement, which requires unanimous consent unless otherwise provided in the partnership agreement itself (Art 2252 of the Civil Code).[1] Despite the difference in interest transfer regulations between corporations and LLCs on the one hand, and partnerships on the other, the withdrawal right is important in both cases. For partnerships it is often the only way partners have to leave the venture. It is also important for LLCs and often corporations, given that the ability to sell interests provided by law does not mean it is actually possible to do so, as finding a purchaser for shares or interests in an LLC may in practice be very difficult.[2]

Against this background, we must briefly describe how the withdrawal right works and its main implications. It should be noted that the company law reform enacted in Italy in 2003 did profoundly alter these withdrawal regulations. First, it substantially broadened the number of cases in which this right is provided by law, usually to members that do not approve specific resolutions amending a company's articles. Second, it modified the criteria for liquidation of interests, which now refer to their fair value rather than their book value. Further, the procedure for liquidation is now precisely regulated. It involves various steps including the offering of an interest to other shareholders or third parties; the duty of the company to buy it and – even if at least theoretically a last-resort option – winding up of the company in case it cannot afford the reimbursement of fair value.[3] In short, exercising of the withdrawal right is nowadays more achievable, as its scope of application has been broadened and the rules of liquidation have been changed to now favor the dissenting member.

Although the reduction in legal capital and the possible winding up of the company are the last alternatives provided by law as possible outcomes of the exercising of the withdrawal right,[4] they are actually the most likely to be used.[5]

[1] This is a commonly accepted principle: see, for instance, G.F. Campobasso, *Diritto commerciale. 2. Diritto delle società* (Torino: UTET Giuridica, 10th ed, 2020), 100. The relevant difference between partnerships and corporations from this perspective is underscored – with regard to the peculiar issue of the withdrawal right – by L. Salvatore and E. Simoncelli, 'Termine di durata delle società di capitali eccedente la normale aspettativa di vita dei soci e possibilità di applicazione analogica dell'art. 2285 c.c.' *Rivista del notariato*, III, 1229, 1232 (2007).

[2] With regard to corporations, see C. Angelici, *La riforma delle società di capitali* (Padova: CEDAM, 2003), 9; C. Angelici and M. Libertini, 'Un dialogo su voto plurimo e diritto di recesso' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 1, 2-3 (2015). With regard to limited liability companies (LLCs), see P. Revigliono, *Il recesso nella società a responsabilità limitata* (Milano: Giuffrè, 2008), 11; L. Enriques et al, 'Il recesso del socio di s.r.l.: una mina vagante nella riforma' *Giurisprudenza commerciale*, I, 745, 748 (2004).

[3] M. Ventoruzzo, 'Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law' 4 *European Company and Financial Law Review*, 47, 61 (2007).

[4] ibid.

[5] Winding up will often be difficult to avoid after the withdrawal right has been exercised: L. Enriques et al, n 2 above, 748.

This is because the intermediate option of finding a purchaser for the interest has likely been already unsuccessfully explored by the shareholder before exercising their withdrawal right.[6] The connection between the exercise of this right and a company winding up is therefore clear and relevant, as it could emerge whenever a company has insufficient net worth to acquire an exiting shareholder's or member's interest.

Because of its possible consequences, the withdrawal right has been effectively defined as a 'time bomb',[7] which perfectly describes it in many situations. Its impact may depend on many circumstances that are difficult to foresee: for instance, the company's net worth, the share percentage of the exiting member, and the actual possibility of finding a purchaser. In light of the abovementioned potential consequences, it is not only shareholders and members, but also creditors and third parties related to the company that will have a keen interest in knowing if and when the withdrawal right can be exercised.

2. The Withdrawal Right in Long-Duration Companies

The existence of the withdrawal right when a company has a very long-term duration is a relatively new issue in Italian law concerning corporations and LLCs.

Under Art 2285, para 1, of the Civil Code, which is currently in force, such a right is provided to members where the partnership has perpetual duration and where the partnership ends when one member dies. The equivalence of these two cases, which are actually very different, has led to recognition of the existence of the withdrawal right when a very long-term duration is established – and in particular when members cannot expect to be alive at the end of the partnership, given the length of the term.[8] The focus then becomes defining whether it is the average estimated life expectancy[9] or the specific estimated life of members[10]

[6] A. Paciello, 'Il diritto di recesso nella s.p.a.: primi rilievi' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 417, 436–437 (2004).

[7] L. Enriques et al, n 2 above, 745.

[8] See Corte d'Appello di Bologna 5 April 1997, *Società*, 1032 (1997); Corte d'Appello di Napoli 17 January 1997, *Il nuovo diritto*, 197 (1997); Tribunale di Milano 13 November 1989, *Giurisprudenza commerciale*, II, 524 (1992); Tribunale di Milano 30 October 1986, *Società*, 396 (1987). Among scholars, see P. Piscitello, 'Recesso del socio' *Rivista di diritto societario*, 42, 43 (2008); G. Cottino et al, 'Le società di persone', in G. Cottino ed, *Trattato di diritto commerciale* (Padova: Cedam, 2004), III, 265; O. Cagnasso, 'La società semplice', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 1998), 241; P. Marano, 'Il requisito della durata nelle società di persone' *Giurisprudenza commerciale*, II, 526, 527 (1992).

[9] See Corte d'Appello di Napoli 17 January 1997 n 8 above, 199; P. Piscitello, n 8 above, 43, in particular excluding the existence of the withdrawal right in the case of an older member in a partnership having a duration that does not exceed the average estimated life expectancy.

[10] See Corte d'Appello di Bologna 5 April 1997 n 8 above, 1033; Tribunale di Milano 13 November 1989, n 8 above, 525; G. Cottino et al, n 8 above, 265, holding that the withdrawal right exists where the duration exceeds the estimated life expectancy of one member; P. Revigliono, n 2 above, 215, specifying that only a member whose estimated life expectancy is lower than the duration will be entitled to withdraw; F. Angiolini, 'Il recesso *ad nutum* tra società

that should be considered relevant.

Since the 2003 company law reform, corporations and LLCs are allowed perpetual duration, and withdrawal regulations have changed substantially, as seen above. In particular, when a corporation or company has an indefinite existence, Arts 2437, para 3, and 2473, para 2, of the Civil Code now provide shareholders and members with the right to withdraw, and to obtain a fair value for their shares or interests. However, unlike Art 2285, para 1, Arts 2437, para 3, and 2473, para 2, of the Civil Code do not establish any rules covering situations where the duration coincides with a member's life.

Two questions arise from this difference between the partnership and company rules.

The first is whether shareholders or LLC members are entitled to withdraw if the company will last until the death of one of its shareholders or members. As this seems to occur infrequently, this question is interesting but perhaps not particularly relevant. Indeed, the response to this question is generally negative.[11]

The second question is whether such a right exists when a corporation or LLC does have a finite duration, but a very long one, exceeding shareholders' or members' estimated life expectancy. This is not an uncommon case, according to some statistics.[12] This issue, as will be shown below, is extremely relevant.

This paper aims to analyze this issue, starting with the evolution of the debate in Italy, and offering a persuasive solution, also on the basis of a comparative view.

Aside from the relatively low number of long-lasting companies in use, there are other reasons to deem this issue important. Given the crucial impact of the exercise of the withdrawal right on a company's life,[13] there is a clear need for legal certainty about the scope of the application of such a right – not only for domestic investors and stakeholders, but also for foreign ones. This is indeed

di persone e società di capitali' *Notariato*, 288 (2009).

[11] See Tribunale di Chieti 17 February 2011 no 109, *Vita notarile*, 1622, 1629 (2011); Tribunale di Forlì 16 May 2007, in E. Loffredo and G. Racugno eds, 'Rassegna di giurisprudenza. Società a responsabilità limitata' *Giurisprudenza commerciale*, II, 241, 256 (2008); G. Zanarone, 'Della società a responsabilità limitata', in F.D. Busnelli ed, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2010), 799; L. Salvatore and E. Simoncelli, n 1 above, 1231; L. Delli Priscoli, *L'uscita volontaria del socio dalle società di capitali* (Milano: Giuffrè, 2005), 149.

Conversely, some scholars uphold the existence of the withdrawal right in this case: P. Revigliono, n 2 above, 215; M. Ventoruzzo, 'Sindacati di voto «a tempo indeterminato» e diritto di recesso dei paciscenti nelle società a responsabilità limitata' *Giurisprudenza commerciale*, I, 573, 597 fn 81 (2006).

[12] In a survey of four hundred LLCs, the duration of twenty-two of them was until two thousand one hundred (G. Figà Talamanca, *Studi empirici sulle società di capitali* (Padova: Piccin, 2010), 160); given that Italy has around one million seven hundred thousand LLCs (see M. Stella Richter jr, 'In tema di recesso dalla società a responsabilità limitata' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 273, 276 (2020)), a long duration could be expected in approximately eighty five thousand LLCs.

[13] An effective description of these outcomes is provided in Tribunale di Milano 28 June 2019 no 6360, 7, available at www.giurisprudenzadelleimprese.it, where they are defined as 'always significant, often dangerous, sometimes explosive'.

crucial not only to shareholders and members, but also to creditors and third parties in general, who should be aware in advance when this right can be exercised.

There are further implications regarding the choice of the period of duration for a company that can be explored from the perspectives of both members and their legal experts. Shareholders or members will presumably consider the choice of giving the company a long term a meaningful one; for example, as a way to show creditors (and third parties in general) their willingness to carry on the business through the company for a long time. A short duration might be considered a sign of members' lack of confidence in their company's future development. This will of course depend on the kind of business to be undertaken by the company. In some rapidly evolving fields, nobody could reasonably expect a long-term perspective and particular attention to be paid to a company with long period of duration. Other circumstances will also affect members' decisions in regard to the company's term. In situations where selling shares or interests might be difficult, a very long company duration will presumably be accepted by members only if they do not plan to sell in the future. This will depend on the amount of their investment relative to their net worth.

Legal advice will be helpful if based on prospective investors' answers to questions about their goals,[14] trying to predict the possible consequences of their choices, and managing risks arising from these. The main consequence of a member or shareholder exercising their withdrawal right stems from the duty of the company to pay them the fair value of their shares or interests if other members (or investors) are not interested in purchasing them.[15] The existence of withdrawal options is consequently one of the key points consultants will carefully clarify for members. Doubt regarding such options – for example, if they could arise when the company duration is very long – should be highlighted to members as a possible source of future conflict, in order to enable them to decide whether the risk is worth it. Among the important transactional skills a business lawyer should develop is the ability to minimize risks arising from a contract,[16] and the

[14] Some examples can be found in P. Butturini and S. DeJarnatt, 'Taking on the Role of Lawyer: Transactional Skills, Transnational Issues, and Commercial Law' 44 *Southern Illinois University Law Journal*, 225, 246-247 (2020).

[15] For more details about this, see M. Ventoruzzo, n 3 above, 61, describing various alternatives to the reduction of the capital.

It is true that the rules aim at making it possible for a company to continue its existence after withdrawal, providing for the possibility of selling the interest to other members or third parties, in case other members are not interested in it. However, it is also true that winding up a company is clearly indicated as a possible outcome of this proceeding, in case nobody is interested in purchasing the interest and the company does not have enough assets to buy it: see Arts 2437-*quater*, para 6, and 2473, para 4, of the Civil Code.

[16] D. Snyder, 'Closing the Deal in Contracts – Introducing Transactional Skills in the First Year' 34 *University of Toledo Law Review*, 689, 694 (2003); L. Pantin, 'Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum' 41 *Ohio Northern University Law Review*, 61, 71 (2014); R. Arnow et al, 'Teaching Transactional Skills in Upper-level Doctrinal Courses: Three Exemplars' 10 *Transactions: the Tennessee Journal of Business Law*, 367, 372 (2009).

impact of potential losses.[17]

Although recent developments in the debate about the withdrawal right from a long-lasting company demonstrate a clear trend towards the exclusion of such a right, adequate awareness of this issue is required. I will therefore start my analysis with the opinion upholding the existence of the withdrawal right in relation to a long-lasting company.

II. The Withdrawal Right As a Consequence of Long Duration for Corporations and LLCs

There are clear differences between withdrawal rules for partnerships on the one hand, and corporations and LLCs on the other, as outlined above. Nonetheless, case law and scholarly opinion positing that shareholders and members should be entitled to withdraw in case of a long duration are normally based on the need to avoid a life-long relationship between members and the company.[18] Even if this is not always clearly stated,[19] the premise underlying this conclusion would be that the Art 2285, para 1, of the Civil Code applies by analogy both to corporations and LLCs because of a supposed lacuna in their regulation. As a consequence, Arts 2437, para 3, and 2473, para 2, of the Civil Code should be applied not only when the entity's governing documents provide for a perpetual duration, but also when they provide for very long duration. There is also an alternative argument to reach the same conclusion. Some scholars argue that references to perpetual duration in Arts 2437, para 3, and 2473, para 2, of the Civil Code should be construed as encompassing very long duration as well, even in the absence of an actual lacuna in such rules.[20] It is meaningful to note that

[17] L. Del Duca, 'Keep It Simple, Smarty: Tips for Transactional Training Programs' 48 *Uniform Commercial Code Law Journal*, 1, 5 (2018).

[18] See Tribunale di Varese 26 November 2004, *Giurisprudenza commerciale*, II, 473 (2005); F. Annunziata, 'Art 2473', in L.A. Bianchi ed, *Società a responsabilità limitata*, in P. Marchetti et al eds *Commentario alla riforma delle società* (Milano: Egea, 2008), 495; O. Cagnasso, 'La società a responsabilità limitata', in G. Cottino ed, *Trattato di diritto commerciale* (Padova: CEDAM, 2007), 162; A. Morano, 'Analisi delle clausole statutarie in tema di recesso alla luce della riforma della disciplina delle società di capitali' *Rivista del notariato*, 303, 312 (2003); A. Bartolacelli, 'Profili del recesso *ad nutum* nella società per azioni' *Contratto e impresa*, 1125, 1129-1130 (2004).

[19] However, it seems probable that such an application is the reason for other similar opinions: see E. Ntuk, 'Art 2328', in G. Cottino et al eds, *Il nuovo diritto societario. Commentario* (Bologna: Zanichelli, 2004), 72. The same happens sometimes in case law, where a long duration is treated as a perpetual one without specific justification: see Corte d'Appello di Milano 21 April 2007, *Società*, 1121, 1123 (2008).

[20] Sometimes the need for interpretation of these rules that widens their scope of application is explicitly held (S. Patriarca, 'Disciplina della s.r.l. e società di persone: alla ricerca delle reciproche influenze', in P. Benazzo et al eds, *Il diritto delle società oggi* (Torino: UTET, 2011), 275, with regard to Art 2473 of the Civil Code); other scholars do not expressly refer to this, but reach the same conclusion (M. Ventoruzzo, 'I criteri di valutazione delle azioni in caso di recesso del socio' *Rivista delle società*, 309, 329 (2005)).

these two alternatives were recently proposed as substantially similar by a prominent company law scholar, affirming the priority to apply to corporations and LLCs the same regime established for partnerships, to protect interests related to this issue.[21]

A different basis used to argue the existence of the withdrawal right in the case of a very long duration would be the general private law prohibition of perpetual contracts,[22] meaning that such a duration could consist in a violation of this principle.[23]

Despite the variety of arguments proposed by scholars and case law, the Italian Supreme Court when reaching the same conclusion (ie considering a very long duration equivalent to a perpetual duration) adopted quite a different approach. Shifting the focus to contractual issues in the case of a very long duration for a particular company (whose final year was 2100), the court held it was impossible to understand the members' actual intention in choosing between a perpetual and fixed duration. Accordingly, it argued that the company's long duration was equivalent to either a perpetual one or was a way to evade its consequences (ie the existence of withdrawal right). Accordingly, each member of the company was deemed to be entitled to withdraw.[24]

The same principle was adopted in a subsequent judgment of the Supreme Court, although it expressly excluded the relevance of a duration (the final year was 2050) exceeding members' estimated life expectancy.[25] Other case law applies

[21] See O. Cagnasso, 'Tre "variazioni" in tema di recesso del socio di società di capitali' *Giurisprudenza italiana*, 127, 131 (2019).

[22] Tribunale di Roma 19 May 2009, *Il Foro Italiano*, I, 3567, 3569 (2010); P. Revigliono, n 2 above, 212–213; E. Bergamo, 'Il diritto di recesso nella riforma del diritto societario' *Giurisprudenza italiana*, 1098, 1102 (2006).

[23] N. Ciocca, 'Il recesso del socio dalla società a responsabilità limitata' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 165, 196–197 (2008).

[24] Corte di Cassazione 22 April 2013 no 9662, *Giurisprudenza commerciale*, II, 802, 803 (2014). The solution proposed by this judgment has been generally criticized by scholars: M. Stella Richter jr, 'Ancora in tema di recesso e di «modificazioni dello statuto concernenti i diritti di voto e di partecipazione»' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, II, 149, 149-150 (2017); P. Butturini, 'Società di capitali con termine (particolarmente) lungo e diritto di recesso *ad nutum*' *Contratto e impresa*, 909, 922-926 (2016). A different opinion is held by C. Frigeni, 'Il diritto di recesso', in C. Ibba and G. Marasà eds, *Le società a responsabilità limitata* (Milano: Giuffrè Francis Lefebvre, 2020), 1078 (sharing the need to avoid the possibility to evade perpetual duration's consequences).

[25] Corte di Cassazione 29 March 2019 no 8962, *Società*, 633 (2019). In this case, the LLC duration was established to 2050. While sharing in general terms the principle held by the former judgment of the Supreme Court (Corte di Cassazione 22 April 2013 no 9662, n 24 above) about excessive duration, the court denied the possibility of withdrawing to a member born in 1963, holding that his estimated life expectancy at the end of the company's term was not relevant, as 87 years (the age the member would be in 2050) is longer than the average estimated life expectancy in Italy. In this way, one of the possible outcomes of the rule stated by judgment 9662/2013 is actually excluded. As it is difficult, if not impossible, to define the concept of excessive duration itself, a member's estimated life expectancy might be one criterion to use. However, judgment 8962/2019 rejected this hypotethical criterion.

such a principle to companies lasting until 2100, always without providing further basis.[26]

It is worth now turning to the opposite opinion and examining its grounds.

III. Other Scholarly Analysis

1. The Non-Existence of a Withdrawal Right

Some scholars and case law hold the opposite opinion to the analysis described above – not only criticizing the basis for the adverse theory, but offering additional reasons to consider that a long duration for a company does not provide for the existence of a members' withdrawal right.

The possibility of applying also to corporations and LLCs the rule established with regard to partnerships in Art 2285, para 1, of the Civil Code, is often argued. Such a possibility has to be criticized for two reasons. First, at-will withdrawal cases should be considered exceptional for both corporations[27] and LLCs.[28] Second, the absence of a specific withdrawal right case when the company's duration is very long, in light of the difference between the applicable rules, is clearly a result of legislative choice.[29]

In general terms, if the absence of a specific provision in a rule cannot be considered a legislative lacuna, then the possibility of applying a different rule – in this case Art 2285, para 1, of the Civil Code – should be excluded. Moreover, transplanting a partnership rule to the different context of corporations and LLCs should not be allowed in this case, given the differences between these entities.[30]

[26] Quoting Corte di Cassazione 22 April 2013 no 9662, n 24 above, is deemed sufficient to uphold the existence of the withdrawal right in the case of long duration of a company (in all such cases, until 2100): see Tribunale di Milano 30 June 2018, *Giurisprudenza italiana*, 126 (2019); Tribunale di Torino 30 November 2017 no 5806, 3, available at www.giurisprudenzadelleimprese.it; Tribunale di Torino 5 May 2017 no 2363, 4, available at www.giurisprudenzadelleimprese.it; Tribunale di Bologna 14 November 2013, *Rivista di diritto societario*, 127, 128 (2016).

[27] A. Daccò, 'Il recesso nelle s.p.a.', in O. Cagnasso and L. Panzani eds, *Le nuove s.p.a.* (Bologna: Zanichelli, 2010), 1418; S. Cappiello, 'Recesso *ad nutum* e recesso "per giusta causa" nelle s.p.a. e nella s.r.l.' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 497, 526 (2004).

[28] G. Zanarone, n 11 above, 799.

[29] This is underscored both by case law (Tribunale di Milano 19 June 2019 no 5972, 16-17, available at www.giurisprudenzadelleimprese.it; Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1629, and Tribunale di Cagliari 20 April 2007, *Rivista giuridica sarda*, 375, 377 (2009)) and scholars (L. Salvatore, 'Il «nuovo» diritto di recesso nelle società di capitali' *Contratto e impresa*, 629, 635 (2003)).

[30] This is also emphasized by both case law (Tribunale di Milano 28 June 2019 no 6360, n 13 above, 5; Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16; Tribunale di Napoli 10 December 2008, *Notariato*, 285 (2009)) and scholars (C. Frigeni, n 24 above, 1076; F. Angiolini, n 10 above, 289; V. Di Cataldo, 'Il recesso del socio di società per azioni', in P. Abbadessa and G.B. Portale eds, *Il nuovo diritto delle società. Liber amicorum Gianfranco Campobasso* (Torino: UTET, 2006), 229-230; M. Stella Richter jr, 'La costituzione delle società di capitali', in P. Abbadessa and G.B. Portale eds, *Il nuovo diritto delle società. Liber amicorum Gianfranco Campobasso*

This is another obstacle to establishing an actual similarity between the two different withdrawal regimes. Once again, such a similarity would be required to apply this rule outside of its intended context.

An articulation of the difference between partnerships and corporations (or LLCs) is worthy of more attention. Undeniably, in the case of a very long duration, members or shareholders would be bound to a relationship potentially exceeding their estimated life expectancies. However, shareholders and LLC members, unlike partnership members, have limited liability and other options for exiting a company – in particular, selling their shares or interests.[31] It is also worth noting that case law explicitly applying Art 2285, para 1, of the Civil Code to corporations demonstrates an inherent contradiction, as it literally refers to the different case of partnerships at the same time arguing for the absence of differences concerning the need for protection of the shareholder.[32]

Some criticisms also arise concerning the possibility of construing Arts 2437, para 3, and 2473, para 2, of the Civil Code as applicable to the long duration case, rather than only the perpetual duration case to which they literally refer. As mentioned above, in this way the same conclusion – that is, the possibility of withdrawing because of the length of a company's duration – is reached without claiming the existence of a legislative lacuna in those rules, by asserting the need for a broader construction of the statute.

Widening the scope of application of a rule is permitted in Italian law if it can be argued that, in light of the context and the general principles underlying it, such a rule was not perfectly drafted.[33] The articles of the Civil Code that we have been discussing do not seem imperfectly drafted with regard to this specific point. In other words, the absence of a withdrawal case arising from a very long duration, as stressed above, does not represent an involuntary omission, which theoretically could be corrected through a broad interpretation; on the contrary, it reflects a specific choice made in enacting the reform. This is confirmed through an examination of the reports of the commissions in charge of reform drafting.[34]

(Torino: UTET, 2006), 299; V. Calandra Buonaura, 'Il recesso del socio di società di capitali' *Giurisprudenza commerciale*, I, 291, 300-301 (2005)).

[31] The difference between partnerships and corporations (or LLCs) with regard to rules about selling of interests is duly underscored: Tribunale di Napoli 10 December 2008, n 30 above, 286; M. Stella Richter jr, 'Il diritto di recesso e il controllo della logica della Cassazione' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 603, 606 (2015); M. Stella Richter jr, n 30 above, 299, points out that shareholders' estimated life expectancy cannot count, as shareholders themselves can frequently change as a result of share sales.

[32] Tribunale di Varese 26 November 2004, n 18 above, 473, argues the need for the shareholder not to be permanently bound to the company, even after accounting for the difference between withdrawal regulations for partnerships and corporations.

[33] A. Trabucchi, *Istituzioni di diritto civile* (Padova: CEDAM, 49th ed, 2019), 63.

[34] During the process of the reform drafting, there was a debate about the possibility of providing shareholders with the withdrawal right in the case of a duration longer than fifty years; however, this case was ultimately not mentioned in the rule (see L. Delli Priscoli, 'Recesso ed esclusione dei soci', in C. D'Arrigo et al eds, *Partecipazioni sociali e strumenti di finanziamento*.

Further, with specific regard to company law issues, the Supreme Court held that the withdrawal right concerning corporations should be available only when specifically provided by law. Consequently, the rule establishing particular cases cannot be interpreted in a way that widens its scope of application, in order to protect third parties' and creditors' interests.[35]

As to the general private law prohibition of perpetual contracts, its applicability to corporations and LLCs cannot be taken as given for two reasons. The first takes into consideration the peculiarities of the relationship between shareholders and members and companies, which involves limited liability and free transferability of shares or interests.[36] The second reason takes into account the consequences arising from the exercising of the withdrawal right and the need to protect creditors.[37]

Finally, the judgment of the court that a long duration makes it impossible to understand actual members' intention about it – and consequently that it should be treated as a perpetual one – does not consider that members may actually desire a long, but not perpetual duration. When incorporating a company (or purchasing interests), shareholders or members should indeed be aware of the long duration of any company in which they are investing.[38]

It is also useful to debate the need to protect members' freedom to leave the company[39] – not only because members and shareholders normally have other ways of achieving this goal, but also because investing in a long-duration company is the investor's individual choice. Recognizing that such an interest should include the existence of a withdrawal right because of the long duration means giving members and shareholders a chance to change their initial intention. However, this would affect not only the company itself – by reducing its financial resources through payment of the fair value for shares – but also its creditors and third parties interested in it. In other words, the protection of a supposed interest that

Recesso e patti parasociali (Milano: Giuffrè Francis Lefebvre, 2019), 357; M. Vietti et al eds, *La riforma del diritto societario. Lavori preparatori testi e materiali* (Milano: Giuffrè, 2006), 866); thus, the absence of a similar provision depends on a precise legislative choice.

[35] See judgments Corte di Cassazione 1 June 2017 no 13875, *Banca borsa e titoli di credito*, II, 143 (2018), and Corte di Cassazione 22 May 2019 no 13845, *Giurisprudenza commerciale*, II, 415 and 434 (2021); their importance with regard to our topic is duly considered by Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16.

[36] V. Caridi, 'Recesso "libero" del socio e durata della società' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 603, 704 (2019); V. Calandra Buonaura, n 30 above, 299; S. Cappiello, 'Art 2437', in G. Bonfante et al eds, *Codice commentato delle nuove società* (Milano: Ipsoa, 2004), 846.

[37] Tribunale di Cagliari 20 April 2007, n 29 above, 378; G.F. Campobasso, 'La costituzione della società per azioni' *Società*, 283, 287 (2003).

[38] This is underscored by Tribunale di Milano 28 June 2019 no, n 13 above, 4-5; V. Caridi, n 36 above, 705; F. Ciusa, 'Il recesso *ad nutum* in s.r.l. con durata determinata al 2100' *Giurisprudenza commerciale*, II, 804, 812 (2014); S. Patriarca, n 20 above, 276 fn 91.

[39] Some scholars uphold the existence of such an interest, variously referring to 'substantive' issues: O. Cagnasso, n 21 above, 131; M. Ventoruzzo, n 20 above, 329; P. Revigliono, n 2 above, 212-213. However, the protection of various other interests should always be taken into due consideration, as will be soon shown in this subsection.

could much more efficiently be protected by members themselves through closer attention when initially investing in a company, harms other, more relevant interests, described below.

The opinion that there is no withdrawal right in the case of a long company term has bases other than criticism of the opposite theory that we have discussed. As mentioned, some of these involve interests relevant to company regulations in general and others involve specific company law rules.

Company regulations tend to protect fundamental interests, such as the need for certainty in company law and the protection of creditors. Allowing a case of at-will withdrawal right not expressly provided by law would harm both of these interests. It would make unclear the regime applicable to corporations and LLCs,[40] and be dangerous for creditors, since a member's withdrawal outcome would probably result in diminution of the company's net worth, the only protection for creditors in the absence of member liability.[41] This issue is not considered crucial by a judgment holding that finding a purchaser for an interest in a company with perpetual duration should be easy, given that the withdrawal right is always present. Accordingly creditor protection should not be an obstacle to the existence of such a right even when a company's duration is long but not perpetual.[42] However, even assuming that the indefinite existence of a company makes it easier to sell shares or interests, this is not the case when the duration is finite, albeit very long. In this case, a third party could not be sure about the possibility of exercising the withdrawal right, as this depends on a peculiar construction of the regulation.

Taking then into consideration the specific relevant company law rules, it should be stressed that for corporations, the withdrawal right can be excluded by a company's articles for shareholders who do not approve an extension of duration, under Art 2437, para 2, of the Civil Code.[43] The mere existence of such a right is

[40] L. Della Tommasina, 'La nozione di società contratta a tempo indeterminato: il regime del disinvestimento tra società di capitali e società di persone' *Rivista delle società*, 102, 115 (2020), with particular regard to creditors' need for clear and unambiguous information about companies; F. Ciusa, n 38 above, 811; L. Delli Priscoli, n 11 above, 150; S. Cappiello, n 27 above, 527.

[41] Corte di Cassazione 21 February 2020 no 4716, *Il Foro Italiano*, I, 1617, 1619 (2020); Tribunale di Milano 28 June 2019 no 6360, n 13 above, 7; Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16; Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1628; Tribunale di Terni 28 June 2010, *Giurisprudenza italiana*, 2551 (2010); Tribunale di Cagliari 20 April 2007, n 29 above, 378; Tribunale di Forlì 16 May 2007, n 11 above, 256; M. Rubino De Ritis, 'Lunga vita alle società di capitali, senza recessi!' 3 *giustiziacivile.com*, 12 (2020); M. Morgese, 'Sulla legittimità del recesso *ad nutum ex* art. 2473, 2° comma, c.c., in caso di società con durata superiore alla normale vita umana' *Rivista di diritto societario*, 127, 143 (2016); F. Ciusa, n 38 above, 812; G. Zanarone, n 11 above, 799; A. Daccò, n 27 above, 1418; P. Piscitello, n 8 above, 45.

[42] Tribunale di Roma 19 May 2009, n 22 above, 3569.

[43] V. Caridi, n 36 above, 705; D. Galletti, 'Art 2437', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2005), 1511; V. Calandra Buonaura, n 30 above, 300; A. Paciello, 'Art 2437', in G. Niccolini and A. Stagno d'Alcontres eds, *Società di capitali. Commentario* (Napoli: Jovene, 2004),1115, consequently considering as possible a very long duration for a company (literally, an 'abnormal' length).

debatable with regard to LLCs, since Art 2473 of the Civil Code does not mention it at all.[44] This means that a minority member could be forced to accept a longer duration for the company. This situation can be deemed even worse than that of a very long duration initially established in a company's articles, which is negotiated by all members or shareholders.

Moreover, as already mentioned, both corporation shares and LLC interests are usually freely transferable. While excluding transferability is normally forbidden for corporations – with the only exception being a temporary ban (see Art 2355-*bis*, para 1, of the Civil Code) – it is permitted in LLCs, albeit with the counterbalance of a specific withdrawal right (Art 2469, para 2, Civil Code). Consequently, shareholders or members of a long-lasting company do not have to wait for its end to sever their relationship with the entity, but are allowed to sell their shares or interests. Of course this option can be problematic, as the actual ability to sell depends on many factors. Nonetheless, this should lead members and shareholders to carefully consider the implications of a very long duration when investing in a company. The mere concrete difficulty of selling shall not be considered a reason to uphold the existence of a withdrawal right in such cases. Sometimes case law has explicitly held that what matters in excluding the right to withdraw in the case of a long duration is the simple possibility of selling an LLC interest without depending on other members' consent (as happens in partnerships).[45]

2. A Unified Solution for Corporations and LLCs

Some further arguments which exclude the possible relevance of the differences between corporations and LLCs need to be considered. These entities have so far been jointly considered in this paper, and this choice requires a brief explanation.

The 2003 company law reform profoundly altered the LLC regulations; in particular by allowing peculiar choices in a company's articles, like clauses apt to govern some aspects of company life in a way more similar to partnerships than to corporations. As an example, an operating agreement could establish that LLC governance follows partnership rules (see Art 2475, para 3, of the Civil Code). In light of this peculiarity of LLCs, some scholars identify a possible connection between long duration and the withdrawal right, which belongs to partnership regulations, as mentioned above. Such a connection may exist in the case where an LLC company's articles provide for those choices, and consequently make the

[44] However, some scholars argue that the corporation rule should apply to LLCs too, by analogy (G. Zanarone, n 11 above, 806; P. Revigliono, n 2 above, 225-226; E. Bergamo, n 22 above, 1112), while others reach the opposite conclusion (V. Caridi, n 36 above, 705; M. Ventoruzzo, 'Recesso da società a responsabilità limitata e valutazione della partecipazione del socio recedente' *Nuova giurisprudenza civile commentata*, II, 434, 447 fn 42 (2005); D. Galletti, 'Art 2473', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2005), 1904; G. Gabrielli, 'La disciplina del recesso nel nuovo diritto societario' *Studium Iuris*, 729, 732 (2004)).

[45] Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1628.

LLC an entity resembling a partnership more than a corporation.[46] However, this opinion is not correct, both in light of some factors specifically concerning LLC regulation, and of the fundamental need for certainty in company law.

Considering LLC regulation, it has to be underscored that the features distinguishing an LLC from a partnership are the free transferability of interest and liability regime. As I have noted above these features are indeed directly or indirectly connected to a company's duration.[47] Neither is actually relevant to justifying the existence of the withdrawal right in the case of long duration. From the exclusion of free transferability of interests, a specific withdrawal right case arises. There is neither the need nor the possibility to apply a rule similar to Art 2285, para 1, of the Civil Code in this case. The liability regime cannot be modified by an LLC operating agreement – converting members' limited liability to unlimited liability would not be allowed.

Turning now to the importance of certainty in company law, even hypothetically allowing for the possibility of distinguishing one LLC from another in light of the specific contents of their operating agreements would be difficult, and is not consistent with such a general and fundamental interest. The outcome of the analysis of each LLC operating agreement would indeed be almost impossible to predict,[48] and this is the second reason to object the analyzed opinion.

Finally, it is interesting to note that a recent judgment (4716/2020) of the Supreme Court discussed below, which excludes the withdrawal right for a corporation with a long duration, expressly mentions in general terms both corporations and LLCs as entities that should be treated in the same way to this specific end.[49]

3. Judgment 4716/2020 of the Supreme Court and Its Importance to the Debate

This recent judgment of the Supreme Court is an important milestone in this debate. It refers to a long-lasting corporation with a final year of 2100, which is the final term most commonly taken into account by relevant case law. The judgment addresses all the crucial issues related to the link between duration and the withdrawal right and undertakes an in-depth analysis of both the applicable rules and underlying interests. From this perspective, its approach is quite different – and definitely preferable – to that adopted in previous Supreme Court judgments. Hopefully, in particular from the perspective of the abovementioned relevant interests related to the issue, such an approach and the consequent

[46] L. Salvatore and E. Simoncelli, n 1 above, 1236; V. Calandra Buonaura, n 30 above, 301.

[47] See para III, 1; conversely, there is no connection between the issue and other LLC features that could be regulated in a way more similar to that for partnerships, such as their governance system.

[48] Tribunale di Milano 28 June 2019 no 6360, n 13 above, 6; M. Gatti, 'Sul recesso del socio da s.r.l. avente durata "eccessiva" ' *Giurisprudenza commerciale*, I, 607, 619-620 (2017).

[49] Corte di Cassazione 21 February 2020 no 4716, n 41 above, 1620.

solution will be confirmed in future case law. In particular, the court upheld the absence of a withdrawal right for shareholders of a corporation, whose articles established a long duration (until 2100), at the same time excluding the withdrawal right in the case of an extension in the duration.[50]

Some comments are important in relation to the reasoning behind the conclusion reached by the court and the possible relevance of some specific features of the case. The court took into adequate consideration both the specific rule about the withdrawal right for a corporation and the general principles and interests related to the need for certainty and creditor protection. In particular, the court stated that existence of the withdrawal right must be considered limited to the specific case mentioned in Art 2437, para 3, of the Civil Code, that is, the perpetual duration of the company, for two reasons. The first reason involving to respect the exact wording of the norm and the second, the protection of the fundamental needs of creditors and third parties through the exclusion of the possibility of applying the different rule provided by the Civil Code for partnerships.[51] With specific regard to this point, the vagueness of criteria that would be necessary to apply this rule is also highlighted as an obstacle to such an application, because of the ongoing need to protect companies' creditors.[52] Unlike judgment 9662/2013 of the same court, which basically shifted the focus to contractual issues, this most recent judgment is in line with case law and scholars, and adopts a specific company law approach to reach a well-explained conclusion, which hopefully will be upheld in the future.

One final remark is worth making about this judgment. As noted above, in this case the corporation had a long duration and its articles excluded the withdrawal right in case of extension of the term. It is necessary to consider whether this clause is relevant when reaching the conclusion of the absence of the withdrawal right because of long duration. In case it is, shareholders or members willing to give their company a long duration without uncertainty about the withdrawal right might also expressly exclude such a right in the case of an extension. This makes it reasonably certain that any future, hypothetical litigation arising from long duration would be decided following the principle held by judgment 4716/2020 of the Supreme Court. However, the presence of such a clause in a company's articles should not be considered necessary to apply the abovementioned principle – not only because it is mentioned in the judgment when describing the features of the case and is no longer recalled when providing the solution, but also because postponement is actually unlikely in the presence of a very long company term.

After exploration of the state of the art about the topic in Italy, the next step is a brief comparative view of the issue.

[50] ibid 1619.
[51] ibid 1619.
[52] ibid 1619–1620.

IV. Comparative Perspectives: Company Duration and Withdrawal Rights in Other Legal Systems

In this section I briefly analyze, using a comparative approach, the link between long duration and withdrawal rights. This can be useful in order to get some possible further arguments to propose an appropriate solution to the problem, and is important in order to provide a basic understanding of what a foreign entrepreneur interested in investing in an Italian company might expect.

With regard to the first point, comparative law can make an important contribution to the correct interpretation of domestic regulations, both as a means to fill legislative lacunas[53] and as a possible source of legal reasoning.[54] This is particularly true with regard to company law,[55] and there are examples of the application of foreign company law to Italian disputes. As an instance, United States (US) business judgment rule is frequently invoked in cases of director liability;[56] similar phenomena are evident with regard to the French regulation of share allotment and US prospectus liability case law.[57] These references are extremely meaningful for two reasons. First, they confirm the application of principles inspired by foreign law in Italian case law, which is also well known in other countries,[58] and probably even underestimated, as the comparative influence is not always explicit in such a case law.[59] Second, they reflect another general

[53] See, in general terms, P.G. Monateri and A. Somma, '«Alien in Rome». L'uso del diritto comparato come interpretazione analogica ex art. 12 preleggi' *Il Foro Italiano*, V, 47, 50 (1999), which underscore that the rule mentioned in the title of the article can be applied also to foreign law; with regard to company law, see G.B. Portale, 'Il diritto societario tra diritto comparato e diritto straniero' *Rivista delle società*, 325, 326 (2013).

[54] A. Gambaro, 'Il diritto comparato nelle aule di giustizia ed immediati dintorni' *L'uso giurisprudenziale della comparazione giuridica* (Milano: Giuffrè, 2004), 10.

[55] G.B. Portale, n 53 above, 326.

[56] A. La Mattina, 'Il giudice italiano e il diritto societario straniero' *Diritto del commercio internazionale*, 933, 935 (2009). The concept itself of business judgment rule, despite being clearly a foreign one, is commonly used by company lawyers and scholars in Italy: see, for instance, L. Benedetti, 'L'applicabilità della *business judgment rule* alle decisioni organizzative degli amministratori' *Rivista delle società*, 413 (2019); C. Angelici, 'Interesse sociale e *business judgment rule*' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 573, 585 (2012); P. Piscitello, 'La responsabilità degli amministratori di società di capitali tra discrezionalità del giudice e *business judgement rule*' *Rivista delle società*, 1167 (2012); C. Angelici, '*Diligentia quam in suis* e business judgement rule' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 675 (2006).

[57] A. La Mattina, n 56 above, 934-935; see also G. Alpa, 'L'uso del diritto straniero da parte del giudice italiano', in A. Somma, *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario* (Milano: Giuffrè, 2001), XVII.

[58] See B. Markesinis and J. Fedtke, 'The Judge as Comparatist' 80 *Tulane Law Review*, 11, 26-27 (2005).

[59] G. Alpa, 'Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica – La giurisprudenza civile', in G. Alpa ed, *Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica* (Milano: Giuffrè, 2006), 41; V. Vigoriti, 'L'uso giurisprudenziale della comparazione giuridica' *L'uso giurisprudenziale della comparazione giuridica* (Milano: Giuffrè, 2004), 8; A. Somma, n 57 above, 17.

and important trend, which is the possible role of common law regulations (eg, the US and United Kingdom ones) in the construction of Italian rules.[60]

Turning now to the second point, analyzing foreign jurisdictions is also important in order to understand the point of view of foreign entrepreneurs interested in investing in Italian companies. Analyzing how the issue is dealt with in their countries may reveal whether the uncertainty arising from the Italian debate might be a 'surprise', apt to diminish a long-run foreign investor's interest in Italian companies. As I discuss later, this is highly relevant to our goal to achieve an appropriate solution to the problem, given that the unpredictability of rules applicable to Italian companies might result in a substantial lessening of their competitiveness against foreign companies, which would conflict with one of the fundamental goals of the 2003 company law reform.

1. US Uniform and State Regulations

Analyzing the link between long duration and withdrawal rights in US rules requires the making of a distinction between corporations and LLCs. From this perspective, the US system differs from other jurisdictions examined here. It is also interesting to briefly consider the evolution of regulations in these two types of companies with regard to duration and its potential link to withdrawal rights, as this is meaningful for a comparative view of the issue.

Focusing on corporations, it is worth highlighting that, despite the traditional affirmation of their natural perpetual duration,[61] limits to companies' terms were not uncommon among US jurisdictions. In the 1950s, some states established strict rules about this issue, with a twenty- or thirty-year maximum – even if the common trend was towards corporations having a perpetual existence.[62] It is also meaningful to note that, some decades later, this general trend has come to pass in the form of a reduction in the number of state laws providing limited duration; most used to have a 99-year term.[63] At the same time, the perpetual or longest duration for a corporation has been shown to be the best choice from the perspective of a person interested in a business acquisition, with the consequent suggestion by scholars to amend the company's articles to provide a similar duration if a limited one is established.[64] This provides for a very interesting

[60] V. Vigoriti, n 59 above, 20; P.G. Monateri and A. Somma, n 53 above, 53; G.B. Portale, n 53 above, 327.

[61] See the description of an 1819 case in which immortality is defined as a characteristic of corporations, in L.W. Hein, 'The British Business Company: Its Origins and Its Control' 15 *University of Toronto Law Journal*, 134 (1963).

[62] F.A. Wright and V.D. Baughman, 'Past and Present Trends in Corporation Law: Is Florida in Step' 2 *Miami Law Quarterly*, 69, 83 (1947) highlight this general trend and mention various limitations of company's duration in United States (US) jurisdictions, with a range of 20–100 years (fn 23).

[63] R.W. Doty and P.M. Renfro, 'Procedures for Corporate Record Searches' 8 *Creighton Law Review*, 803, 810–811 (1974).

[64] R.W. Doty and P.M. Renfro, n 63 above, 811; it is interesting to note that no attention is

comparison, as the perspective of an Italian lawyer would likely be the opposite in light of the abovementioned consequences of a perpetual duration, and of the risks potentially arising from a long one.

Nowadays, the perpetual duration of a US corporation is common both in the uniform model legislation,[65] and at the state level,[66] always without a link between this duration and the specific case of a member's withdrawal right.[67]

With regard to the regulation of LLCs, it is necessary to begin by emphasizing that the state statutes in the US vary much more than do the states' corporation statutes.[68] Consequently, the aim of the following notes is to offer not an all-encompassing analysis of the issue, but some examples that seem meaningful for a comparative approach.

LLC statutes tend to show a similar evolution towards the general achievement of perpetual duration (considered an important feature for doing business).[69] Different rules on the topic were in force around the 1990s,[70] or sometimes even later.[71] However, the context of this trend and its possible explanation differ from that for corporations, and the same is true for the link between perpetual duration and the chance for a member to leave the company (through withdrawal

paid to withdrawal rights or similar member rights depending on a company's duration.

[65] See Model Business Corporation Act (MBCA) §3.02.

[66] See the example of Delaware, as the leading US state in corporate law: Delaware Corporation Act § 102(b)(5). See also New York Business Corporation Law § 202(a)(1); Pennsylvania Business Corporation Law § 1306(a)(6) and § 1914(c)(2), which allows the board of directors to amend the articles providing for perpetual existence, without requiring the approval of shareholders.

[67] See MBCA § 13.02; Delaware Corporation Act § 262; New York Business Corporation Law §§ 623 and 806; Pennsylvania Business Corporation Law § 1571.

[68] See, for example, Alan Palmiter et al, *Corporation: A Contemporary Approach* (St. Paul: West Academic Publishing, 1st ed, 2010), 136.

[69] An LLC's limited life is deemed an outdated and antibusiness feature: R.K. Smith, 'Utah Should Adopt a Modified Version of the Revised Uniform Limited Liability Company Act' 2 *Utah Law Review OnLaw*, 12, 14 (2013). Perpetual duration is nowadays the LLC statutory norm: see J. MacLeod Heminway, 'The Death of an LLC: What's Trending in LLC Dissolution Law' *Business Law Today*, available at https://tinyurl.com/yckjtztc (last visited 31 December 2021).

[70] See examples of national regulations amended to permit an indefinite duration for a company in place of the original limits, in A.G. Donn, 'Unincorporated Business Entity Statutory Developments' 2(6) *Journal of Passthrough Entities*, 15, 16 (1999), referring to the cases of Delaware, Florida, New York, Minnesota, and North Carolina; similar remarks also apply to South Dakota, as, prior to 1 March 1998, its legislation provided for a 30 year duration: see P.G. Goetzinger et al, 'The South Dakota Limited Liability Company Act: The Next Generation Begins' 44 *South Dakota Law Review*, 207, 225 (1999); perpetual duration, unless otherwise stated, is the current rule: see SD Codified L § 47-34A-203(5) (through 2011); and with regard to Wyoming, comparing the 1989 regulation, which established a 30 year duration (see Wyo stat. § 17-15-107(a)(ii) (1989), quoted by J.A. Rodriguez, 'Wyoming Limited Liability Companies: Limited Liability and Taxation Concerns in Other Jurisdictions' 27 *Land & Water Law Review*, 539, 546 (1992)) and the current one (Wyo Stat § 17-29-104(c) (2015)), allowing for perpetual duration.

[71] See the example of Utah Revised Limited Liability Company Act (2001), establishing a maximum duration of 99 years (Utah Code ann § 48-2c-403(4)(c)): see R.K. Smith, n 69 above, 14, underscoring that LLCs' perpetual existence is in general a common feature, provided by almost all LLC statutes.

or dissociation rights).

The root of rules that previously provided LLCs with limited duration is tax regulation: the rules were originally established to qualify LLCs as partnerships for tax purposes.[72] This approach changed after the enactment of the so-called 'check the box' regulation.[73] From a comparative perspective, this is important, as the original reason to limit a company's duration was totally different from the contemporary need to avoid perpetual duties, sometimes deemed relevant in Europe (as happens in France, and is supposed to happen in Italy).

LLC regulations should also be considered with regard to the evolution of rules about a member's withdrawal or dissociation. A warning about the relevance of these rights is at this point necessary. The ability to withdraw becomes important in essentially two cases: where the LLC operating agreement prohibits the transfer of the interest; and where selling the LLC interest might be difficult because of the absence of a market.[74] In as far as an at-will exit from the company is permitted, a long term or indefinite duration would be naturally counterbalanced by such a right. The link between perpetual duration and dissociation right has been highlighted in the past,[75] as has the function of a limited duration as a 'safety valve' to avoid a member being 'locked into' the company.[76]

However, when examining the evolution of withdrawal and dissociation regimes, it is possible to exclude the need for counterbalancing the length of the relationship between members and the company with specific cases of exit. Reviewing the rules in force in the 1990s, state statutes typically provided members withdrawal rights only unless otherwise specified in the operating agreement and the possibility of giving the company a long duration did not affect this issue.[77]

[72] R.K. Smith, n 69 above, 13–14, in general terms and with specific regard to Utah regulations.

[73] Prior to this, a limited duration was commonly established in almost all LLC statutes (D.S. Kleinberger, 'The LLC as Recombinant Entity: Revisiting Fundamental Questions through the LLC Lens' 14 *Fordham Journal of Corporate & Financial Law*, 473, 487 fn 190 (2009)); after this time, uniform and state regulations were modified in this regard (J. MacLeod Heminway, n 69 above; R.K. Smith, n 69 above, 13-15).

[74] When analyzing current regulations, attention is thus paid also to the interest transfer regime, if relevant.

[75] See the example of Florida, mentioned by A.G. Donn, 'Withdrawal and Cash-out from Partnerships and LLCs' 1(4) *Journal of Passthrough Entities*, 13, 15 (1998). It is worth noting that nowadays a different regulation applies, as an LLC has an indefinite duration (Florida Revised Limited Liability Company Act, § 605.0108 (3)), and there are no specific cases of dissociation right depending on this (under §§ 605.0601/0602 of the mentioned Act).

[76] D.S. Kleinberger, n 73 above, 489-490, referring to both perpetual duration and the absence of the transferee's right to seek dissolution.

[77] See various state statutes mentioned by R.R. Keatinge et al, 'The Limited Liability Company: A Study of the Emerging Entity' 47(2) *Business Lawyer*, 375, 418 (1991), with regard to withdrawal rights, which exist unless otherwise specified in the operating agreement, and 421, with regard to duration; a cross-check of these data makes it clear that there is no connection between long duration and withdrawal rights, as the statutes in which a mandatory period of duration is not provided do not impose withdrawal rights. The same is true in the specific case of South Dakota: see P.G. Goetzinger et al, n 70 above, 225, which mention perpetual duration as the default rule, and 236, with regard to member dissociation from the LLC, which is always possible unless

Since then, the general trend has been in the direction of removing the default right to withdraw and obtain the value of the interest.[78] In the current regulations, both uniform and state ones,[79] perpetual duration is the default rule for LLCs. Under these statutes, the establishment of any member dissociation regime often depends on specific provisions contained in the operating agreement.[80] Under the uniform statute, dissociation is not imposed by a mandatory rule,[81] and – even more interestingly – does not imply the right of dissociated members to have their interests to be purchased by the company.[82] Once dissociated, they lose their rights as members and become transferees. The main danger arising for a company from a member's exit, which is the duty to pay their interest, is, in this way, avoided. Of course, this approach raises a 'lock in' issue,[83] which has to be taken into careful consideration by members and their advisors. There are also different remedies provided by the uniform statute: for example, applying for dissolution of an LLC may resolve the issue, but only in the case of oppressive misconduct.[84] This is completely different from a withdrawal right that depends on the company duration, considering both the scope of application and the effects.

otherwise provided by the operating agreement.

[78] A.G. Donn, n 75 above, 15, underscores that withdrawal rights became a default rule in Uniform Limited Liability Company Act (ULLCA) and proposes examples of state statutes in which there is no default right to withdraw; the trend is thus confirmed: see further examples in A.G. Donn, n 70 above, 16, referring to Florida, Indiana, New York and North Carolina.

[79] See Revised Prototype Limited Liability Company Act (RPLLCA) § 104(b) and before Revised Uniform Limited Liability Company Act (RULLCA) § 104(c); regarding state statutes, some examples are New York Limited Liability Company Law § 701(a)(1); Virginia Limited Liability Company Act § 13.1-1009; North Carolina Limited Liability Company Act § 57D-2-01. Perpetual duration is deemed 'the LLC statutory norm': J. MacLeod Heminway, n 69 above, provides further examples, such as Delaware Limited Liability Company Act § 18-801(a)(1) and the abovementioned case of Florida.

[80] In some states, withdrawal rights can be accorded by the operating agreement (see New York Limited Liability Company Law, § 606(a); Texas Business Organizations Code, Title 3, Section 101.107, which can be amended by the operating agreement in light of Section 101.054; with regard to appraisal right, that is not the same, but does have a similar function: Delaware Limited Liability Company Act, § 18-210) or can be excluded by it (Maryland Limited Liability Company Act § 605(1)).

As mentioned above, it seems relevant to also review the interest transfer regime in these cases. All of these statutes provide for the possibility of excluding transfers in the operating agreement: New York Limited Liability Company Law, § 603(a); Texas Business Organizations Code, Title 3, Section 101.108, which can be amended by the operating agreement in light of Section 101.054; Delaware Limited Liability Company Act, § 18-702(a); Maryland Limited Liability Company Act § 603(a).

[81] See the Revised Prototype Act Comment referring to RPLLCA §§ 601-602, in 'Revised Prototype Limited Liability Company Act' 67(1) *Business Lawyer*, 117, 171 (2011).

[82] The same solution is proposed also in some state statutes: see, for instance, Virginia Limited Liability Company Act § 13.1-1040.2. It is worth highlighting that under this statute it is also possible to exclude the transfer of interest in the operating agreement (see § 13.1-1039).

[83] D.S. Kleinberger, n 73 above, 488-490 underscores the differences between LLCs and close corporations from this perspective, and clarifies that 'the transferee is "locked in" to its status in perpetuity'.

[84] See J. MacLeod Heminway, n 69 above.

In terms of a comparison, the habit of predicting the abovementioned 'lock in' issue understandably leads US entrepreneurs interested in investing in Italian companies to pay attention to operating agreement clauses, but not to expect an at-will withdrawal right from a company simply because of the very long length of its duration.

Accordingly, in the US nowadays, both corporations and LLCs can have perpetual duration, or the longest duration, in the absence of a specific withdrawal or dissociation case for the member. As highlighted below, a US investor participating in an Italian company with indefinite duration will presumably not be expecting the possibility of withdrawing from it because of the absence of a final term. This will likely happen in the case of a long-lasting company as well, even if the existence of a withdrawal right is in this case debatable, as presented above.

2. France

Focusing now on other civil law systems, French company law provides for a maximum duration of companies, which is ninety-nine years, following Art L210-2 *Code de commerce*. This rule is deemed by scholars to have been established in light of a general principle that forbids perpetual duration duties, and consequently perpetual duration companies.[85] However, the rule has been criticized as harmful to companies and enterprises, as well as being unnecessary for allowing a member to leave the company in case they want to.[86]

Before the introduction of this rule, a member was entitled to ask for the dissolution of the company in the case of perpetual duration.[87] Case law normally provided the member with the same right in the case of a company duration longer than the member's estimated life expectancy.[88] However, this principle was rarely applicable to corporations and SARLs (*société à responsabilité limitée*, the French equivalent of an LLC), and, in particular, applied in the presence in the operating agreement of restrictions to the freedom of selling interests.[89] This is understandable in light of the relevant difference between long-lasting contracts and long-lasting companies. Indeed, members can in general sell their interest and consequently end their relationship with the company without waiting for the end of its duration period. When this opportunity is limited by the operating

[85] M. Cozian et al, *Droit des sociétés* (Paris: LexisNexis, 32nd ed, 2019), 301.

With regard to Italian regulations, the actual applicability of this general principle to corporations and LLCs has been debated above, para III, 1.

[86] R. Libchaber, 'Réflexions sur les engagements perpétuels et la durée des sociétés' *Revue des sociétés*, 437, 454–456 (1995).

[87] ibid 438, referring to the previous Art 1869 *code civil*, repealed by law reforms in 1966 and 1978.

[88] ibid 448-449.

[89] ibid 452, about corporations, and 452 fn 39, about LLCs. This specific feature of the LLC operating agreement is not deemed relevant by R.M. Kohler, 'The New Limited Liability Company Law of France' 24(2) *Business Lawyer*, 435, 437 (1969), who simply refers to the possible dissolution of a SARL (French LLC) having an existence in excess of a human life.

agreement, the need to protect members from a perpetual or longest duration of the company therefore arises. However, the right to ask for the company's dissolution is totally different from a withdrawal right, which is usually provided to members in other jurisdictions under similar circumstances. Therefore, the tool that was once common in the French legislature to protect this interest is peculiar.

A final comment about French regulation is important for our comparison. As mentioned above, following some recent Italian cases, a member is not entitled to withdraw if the company's duration is established until 2100.[90] In light of the similarities between Italian and French systems, it is worth examining whether this case law is somehow connected to the French rule, being this rule hypothetically taken into account when considering such a duration as not implying member withdrawal rights. Although it is sometimes difficult to discover comparative influences in domestic disputes,[91] this does not seem to be the case. This is not only because terms were in those cases fixed to end in 2100, but they were actually longer than 99 years, given the date of incorporation of those companies. Furthermore, the most probable analytical basis for those cases will probably be found in the opinion (expressed by the same court) that upheld the possibility of giving a company a duration until 2100 when the possible length of the company term was a debatable issue.[92]

V. Conclusion

As we have discussed, the decision of the Italian Supreme Court 4716/2020 plays a crucial role in the debate about the absence of a member's withdrawal right when a long duration is established in the company's articles. However, the issue cannot be considered definitively resolved, at least until the same Supreme Court confirms this opinion through a peculiar kind of decision, adopted by the so-called *Sezioni unite*, which can provide substantial certainty regarding the solution. Before this happens, the issue must be considered controversial, and entrepreneurs and consultants must be aware of the risks arising from a long duration.

This is true not only with regard to the Italian scenario, but also for foreign investors potentially interested in an Italian company. The point of view of these investors must be taken into account not only in light of the obvious economic development needs of the Italian system, but also because of one of the specific goals that the company law reform of 2003 aimed to achieve. Improving the ability of Italian companies to compete with foreign companies was one of the

[90] See, in particular, Tribunale di Milano 28 June 2019 no 6360, n 13 above, 3; Tribunale di Milano 19 June 2019 no 5972 n 29 above, 13.

[91] As the comparative influence is not always clearly expressed: see G. Alpa, n 59 above, 18; A. Somma, n 57 above, 17.

[92] See 'L'omologazione degli atti societari negli orientamenti del Tribunale di Milano' *Notariato*, 386, 389 (2000).

main principles established by legge no 366/2001, which was the starting point for the aforementioned reform.[93]

This raises two questions. Is there a connection between Italian companies' competitiveness and the theory that enables a member to withdraw when a long-term duration is established? If the answer is yes, can such a theory be deemed to be in contrast (also) with this general goal of the company law reform?

We can provide an answer to the first question on the basis of the comparative view carried out here. Foreign jurisdictions tend to permit companies' perpetual duration without counterbalancing it with specific withdrawal rights. Moreover, perpetual duration is often taken as a given,[94] and even in jurisdictions where a limited duration was common some decades ago, the trend towards this indefinite existence of companies is clear.[95] The same is true where perpetual duration is forbidden but the maximum duration limit is close to a century.[96]

It is possible to claim that an investor coming from a country in which company duration is not linked to withdrawal rights will find it somewhat surprising that in Italy not only is such a right explicitly provided when the company has indefinite

[93] See Art 2, para 2, a), legge 3 October 2001 no 366. The relevance of this law (so-called *legge delega*) in providing insights for the interpretation of the company law reform is commonly highlighted (G.M.C. Rivolta, 'Autonomia privata e strumenti per l'esercizio delle imprese minori' *Rivista delle società*, 1274, 1281-1282 (2010); G. Zanarone, n 11 above, 8-9) and is consistent with the general principle regarding this issue (R. Guastini, 'L'interpretazione dei documenti normativi', in A. Cicu et al eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2004), LI, 173-176).

[94] See the cases of the United Kingdom (UK) and Spain.

In UK company law, perpetual life of companies is deemed an obvious feature (see, for instance, A. Dignam, *Hicks & Goo's Cases & Materials on Company Law* (Oxford: Oxford University Press, 7th ed, 2011), 598), and even if it is for sure possible to fix a limited duration, this is unlikely (P.L. Davies et al, *Gower's Principles of Modern Company Law* (London: Thomson Reuters, 10th ed, 2016), 1157; A.J. Boyle et al, *Boyle & Birds' Company Law* (Bristol: Jordan & Sons, 2nd ed, 1987), 781). There are no member withdrawal cases related to company duration. Companies' perpetual existence has a long history: see L.W. Hein, n 61 above, 139, noting that the concept of perpetual existence is older than the concept of separate existence, and 140, dating at 1844 the opportunity for companies to be given perpetual duration through the process of registration.

Spanish regulations on this issue are substantially similar to those in the UK, and totally different from those in force in the other civil law systems analyzed. Spanish companies normally have perpetual duration (this happens in the vast majority of companies: E. Valpuesta Gastaminza, *Comentarios a la ley de sociedades de capital* (Madrid: Wolters Kluwer, 2018), 125), unless otherwise provided by company articles; there are no withdrawal cases related to company duration (see *Texto refundido ley sociedades de capital*, Art 25 – about perpetual duration, and Art 346 – about the absence of withdrawal rights connected to duration). The same approach was adopted in the former regulations (see *Ley de sociedades de capital* (1995), Art 14 – perpetual duration, and Art 95 – absence of withdrawal rights connected to duration). It is actually difficult in these cases to find any reference to perpetual duration, as it is probably considered an obvious feature of a company. This can make even more difficult for investors from these countries to understand the peculiar Italian law developments.

[95] See the case of the US, in particular for LLCs, but with the abovementioned peculiarities (above, para IV, 1).

[96] See the case of France (above, para IV, 2).

duration,[97] but sometimes also when the term is very long, even if this is debatable. Further, it is possible to consider this 'surprise' not only disappointing, but also apt, from a long-term perspective, for lowering foreign investors' trust in Italian regulation, and thus Italian companies' competitiveness.

There may of course be many other obstacles to such competitiveness arising from other Italian rules. However, focusing only on this issue, allowing the withdrawal right, except in cases explicitly established by law, may be dangerous to the company itself and to its members and, in general terms, could discourage potential members from investing in the company.

Accordingly, if providing a member with withdrawal rights when the company's duration is long can harm the reputation of Italian companies abroad and affect their ability to compete with foreign companies, it is also possible to answer the second question in the affirmative. Of course there are many more reasons to reject the opinion permitting a member's withdrawal right when the company has a long duration. However, once the existence of a possible contrast between such an opinion and the general principle discussed here is established, there is even more of a justification; it consists precisely in the need for clarity and certainty, which is crucial in business and company law, and the lack of which can play an important role in diminishing foreign investors' interest in Italian companies.

The wisdom of the idea of linking perpetual duration and withdrawal rights could probably be debated. The absence of such a link in other jurisdictions seems to be meaningful. However, the explicit choice of Italian legislature in this direction does not harm certainty. On the contrary, this crucial interest is threatened when the existence of a different rule is upheld despite the clarity of such a choice.

In conclusion, the comparative perspective provides further reasons to reject the existence of member withdrawal rights from long-lasting companies – both corporations and LLCs. A further development of case law on the issue – hopefully confirming this rejection – could be extremely useful for Italian companies and their advisors, as well as to foreign ones.

[97] Although the link between perpetual duration and withdrawal rights is sometimes emphasized abroad also, this was in the past and cannot be considered common knowledge among entrepreneurs and consultants: see the abovementioned case of Florida regulations (above, para IV, 1) and associated discussions in A.G. Donn, n 75 above, 15.

It is important to emphasize that such a link seems highlighted only in this case, despite the number of regulations potentially including it. Further, the US model and national regulations both tend to permit perpetual duration nowadays, without providing members with specific withdrawal or dissociation rights.