Pandemic Emergency Measures and Insolvency Laws

Federico Pernazza and Domenico Benincasa[*]

Abstract

The international spread of the Covid-19 has generated in the past years financial and social consequences affecting the global economy. Despite the different legal frameworks, the response by national governments and financial and international regulators has showed an unexpected convergence in several economic and legal aspects.

In particular, bankruptcy law emergency measures have provided fertile ground for comparative and interdisciplinary analysis of States' approaches. In this field, the underlying common intention of governments to facilitate the continuation of business activities was transposed in emergency measures with different impact on the framework of the insolvency law and in connected subjects, depending on the national jurisdictions.

This paper inquires comparatively the most relevant emergency measures concerning insolvency from an Italian perspective, with particular reference to (i) the suspension of involuntary proceedings, (ii) the duty (and exemptions) to filing for bankruptcy and directors' liabilities, (iii) freezing of capital maintenance rules and (iv) the full or partial postponement or anticipation of the entry into force of the bankruptcy law.

The research highlights the close connection between the regulation of corporate crisis and that of corporate governance and the liability of corporate bodies and the need, therefore, for a coordination of emergency measures in the field of insolvency with the legal framework of company and corporate law. On the other hand, in the context of the European Union, it has emerged how the harmonization effected through supranational sources, most recently with the Insolvency Directive, can be usefully supplemented by fostering the circulation of models through a more intense comparative study of national experiences, as occurred during the Covid emergency period.

I. Methodological Premise

The pandemic has been a dramatic event of a global dimension that has few precedents in recent history and whose effects in many socio-economic spheres are still difficult to assess.

However, in the context of comparative studies, it constitutes an extraordinary and precious opportunity.[1]

[*] Federico Pernazza is Associate Professor of Comparative Law at the University of Molise and the author of paragraphs I, II and IV.3. Domenico Benincasa is Adjunct Professor of Comparative Law at Luiss University and the author of paragraphs III, IV, IV.1, IV.2 and IV.4. The fundamentals and the final remarks are the result of common analysis.

[1] The extraordinary opportunity to carry out comparative research that has been provided by the Covid pandemic has been supported jointly by three Italian Associations of Comparative Studies (Associazione Italiana di Diritto Comparato, Associazione Diritto Pubblico Comparato

In fact, for those who adopt an approach that combines the scientific study of legal systems with an assessment of the operational effectiveness of the respective institutional, normative and jurisprudential approaches, the diversity of phenomena that legal systems are called to deal with represents a fundamental, often underestimated, problem.[2] Therefore, the Covid 19 pandemic, having affected in a short time and with similar characteristics all human communities, offers a paradigmatic hypothesis for comparing, measuring and evaluating in every affected sector the response of legal, social and economic systems, with the risk that the different results achieved depends on the diversity of the phenomenon to which they intend to respond, rather than the specific response of the legal system.

On the other hand, the comparative analysis of the normative interventions, facing the pandemic, should distinguish the pandemic phenomenon in its dimension connected to public health from the many 'derived emergencies', including those connected to the provision of essential services, to the needs of individuals and to institutional and economic activities. Among the latter, the business crisis induced by the restrictions on the movement of people and goods imposed by Covid-19 is the focus of this contribution.

It is therefore necessary to propose a first methodological consideration, which becomes relevant in any study of the so-called emergency laws related to the pandemic.[3] Although the primary origin of the emergency law is constituted in all areas by the epidemic, the analysis, evaluation and comparison in different legal and socio-economic sectors must proceed from a precise identification of the 'derived emergency', which becomes relevant in a given context. Thus, while it is evident, for example, that the measures limiting movement and individual behaviour are closely linked to the epidemiological trend in the context of reference (with an immediate impact from the onset of the pandemic, but also with the possibility of a rapid relaxation of the measures, when the epidemiological trend improves), the derived emergencies, among which the business crisis,

ed Europeo e Società Italiana per la ricerca nel diritto Comparato) setting up a common repository of normative documents of over 120 jurisdictions concerning Covid, available at https://tinyurl.com/mr37mfuk (last visited 31 December 2022).

[2] See F.P. Ramos, 'Parameters for Problem-Solving in Legal Translation: Implications for Legal Lexicography and Institutional Terminology Management', in L. Cheng et al eds,*The Ashgate Handbook of Legal Translation* (London: Routledge, 2014); D. Corapi, 'Diritto commerciale comparato'*Rivista del diritto commerciale e del diritto generale delle obbligazioni,* II, 167, 174 (2016); F. Pernazza, 'L'insegnamento del Diritto Comparato dell'Economia: a problem oriented approach' *Revista Eletrônica do Curso de Direito da USFM*, 255, 263 (2017); I. Candelario Macias, 'Commento sul "I convegno europeo di diritto concorsuale (First European Conference on Insolvency Law and Practice)" '*Il diritto fallimentare e delle società commerciali,* IV, 797, 797 (1999); with even more specific reference to the comparison of this legal matter in a pandemic context, see G. Ivone, 'Il diritto dell'insolvenza al tempo della pandemia' *Giustiziacivile,* available at https://tinyurl.com/dk55k598 (last visited 31 December 2022); L. Panzani, 'L'insolvenza in Europa: sguardo d'insieme' *Il Fallimento e le altre procedure concorsuali,* XX, 1013, 1013 (2015).

[3] This approach will be developed below in paras 3-4.

induced directly or indirectly by the pandemic, constitute a distinct phenomenon, which can have different incidences according to the product sectors, and a development that varies in time according to the contexts. In fact, it is evident that even within the same State, in some business sectors the crisis has been very serious and sometimes fatal, while in others it has been much less serious or even non-existent.

Within the framework of the regulation of business crisis, therefore, the first thought is that the adoption of potentially applicable indiscriminate measures uniformly to all businesses, on the assumption of a pandemic, is logically improper, since the emergency to be faced in this case is not the pandemic itself, but the emergency deriving from the economic-financial crisis induced mainly by the restrictions on the movement of goods and persons. A preliminary assessment to any comparative consideration should therefore verify whether the measures have been adopted assuming, presumably, that the epidemic has determined effects on the performance of the business, or whether law makers noted the emergencies that have occurred in some economic sectors and have intended to respond punctually to them.[4]

Moreover, in terms of the methodological approach, as will be illustrated below (para 3), it should be pointed out that a geo-localization of countries at the time these investigations are undertaken is necessary and useful, since geo-political differences may make it appropriate to create families of 'emergency bankruptcy law' systems that share, beyond the technical profiles of the specific legal regime, aspects of commonality in economic and political terms.

Thus, whereas in some realities, which can be found within most EU States, there is a general feeling that the basic needs of the vast majority of companies are a lack of cash flow and the impossibility of making acceptable forecasts about the future (whence the introduction of forbearance and other legal measures to temporary suspend the exercise of creditors' rights)[5], in others tapering government support and providing greater judicial training and specialization may be a more pressing need.[6]

[4] As will be discussed in more detail below (paras 4, 4.1), some emergency rules concerning business crisis in Italy and England make reference purely to a period of time (assumed to be affected by the pandemic), and not to the pandemic itself, while in France and Germany, the importance of the pandemic on the crisis is also recalled.

[5] See G. Corno and L. Panzani, 'I prevedibili effetti del coronavirus sulla disciplina delle procedure concorsuali' *IlCaso,* 26 March 2022.

[6] As an example, some countries such as Colombia felt the need to implement a previously less developed system of using digital platforms. See also, for a more extensive overview of Latin American countries, C. Cervantes 'Necessary reforms: Adaptation of insolvency regimes in Latin America?' *Eurofenix*, 27, 27 (2021).Other interesting differences and specificities between Africa and Middle East, Americas, Asia and Europe, emerge in the webinars organised within 2021 World Bank & Insol International's Legislative & Regulatory Group: Covid-19 response and the challenges ahead (collected on July 27, 2021, available at https://tinyurl.com/yckkrvty (last visited 31 December 2022)).

II. Lines of Comparative Investigation of Emergency National Laws on Business Crisis

Some lines of comparative research and system considerations are outlined in the following paragraphs, in order to deeply explore the specific analysis of legislation on business crises adopted by some of the main European legal systems (Italy, France, Germany, Spain and England).

In the first phase of the pandemic, the regulatory interventions adopted in various countries in favor of companies were traced and justified by the crisis of liquidity resulting from the sudden drop in income due to the impossibility of providing services or delivering goods; these were mostly financial interventions, similar in the various countries, aimed at ensuring the liquidity of the company and the payment of workers' salaries and supplies.[7]

The worsening and expansion of the epidemic, as well as the increase of companies involved, led to the emergence of a new type of interventions specifically aimed at regulating the phenomenon of business crises, *ie,* of companies that find themselves in the conditions foreseen by the regulations in force, where the legal system mandates to activate restructuring procedures or to initiate a liquidation procedure.

In this context, as will be seen, not only specific types of partially different interventions have emerged, but also differences in approach. We identify below some perspectives of analysis, which will then be traced through the specific comparison of the measures adopted at national level in relation to business crises resulting from the epidemic.

1. National Laws and European Harmonisation

The first point is that, although the subject of business crisis assumes pivotal importance in the construction of the European single market and has been therefore the object of numerous legislative interventions, it is still characterised by significant differences in approaches to corporate governance of companies in crisis, affecting the logic, characteristics and aims of national procedures to deal with it.[8]

[7] See G. Corno and L. Panzani, n 5 above; S. Madaus and F.J. Arias, 'Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law' 17(3/4) *European Company and Financial Law Review*, 318, 318 (2020).

[8] See E. Frascaroli Santi, *Gli accordi di ristrutturazione dei debiti. Un nuovo procedimento concorsuale* (Padova: CEDAM, 2009); F. Guernielli, 'La riforma delle procedure concorsuali in Francia e in Italia' *Il diritto fallimentare e delle società commerciali,* I, 256, 258 (2008); A. Flessner, 'L'idea dell'impresa nel diritto fallimentare europeo' *Il diritto fallimentare e delle società commerciali,* IV, 489, 489 (2005); S. Bonfatti and G. Falcone, *La legislazione concorsuale in Europa* (Milano: Giuffré, 2004); A. Nigro, 'Procedure concorsuali e società in Italia e in Europa' *Diritto della banca e del mercato fi*nanziario, I, 3, 3 (2003); VVAA, *Insolvency & Restructuring* 31 *Jurisdictions Worldwide* (London: Law Business Research, 2000). The process of harmonisation in the field of insolvency law has been elaborated also on a substantive level for about twenty

This meant that, even in the presence of a similar, if not identical, phenomenon in various countries, there have been different responses in terms of regulation, as referred to in a broad sense (thus including the role played by jurisprudence).

This phenomenon highlights the importance of context in comparative analysis even between Western countries and within the EU:[9] in our case, as we will see, a valid example is the existence of rules concerning the minimum legal capital of companies and obligations in the event of a loss of capital and, correlatively, the liability of directors of companies in crisis (*infra*, para IV.2 and IV.3).

2. Mandatory Rules or Ex Post Control

A second aspect is the approach to regulation from the perspective of the dialectic between mandatory supranational or national norms (top-down approach) and the adoption of principles or broad criteria, within which it is left to the States (in the relationship with the EU) or to private individuals to adopt the best response strategies, trusting in the adequacy and effectiveness of an ex-post control of jurisprudence. With respect to this fundamental regulatory alternative as the key to the comparison, it is worth noting that the hypothesis of emergency regulation is perhaps not the most straightforward case, since the need for prompt intervention and strict conformity of conduct to collective needs stresses out the appropriateness of mandatory rules. However, as will be seen particularly in the final paragraph, even in this difficult situation there have

years, as will be seen in the following paragraphs and in the conclusions, mainly through a mechanism of circulation of models. However, the distances remain particularly critical on some specific issues which deeply affect the practical experience both in the relationships between interested and involved parties and, in a broader perspective, in the matter of competition of systems. The above has emerged, especially in the European Union, with regard to the applicationof the EU Regulation on Insolvency Proceedings (EIR 2015/848), which has not always succeeded in hindering forum shopping and creditor law shopping, despite the fact that these objectives were present in the original text: see preamble 3) of the former version of the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, according to which 'It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)'. On this topic, see *ex multis* M.V. Benedettelli, ' "Centro degli interessi principali" del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera' *Rivista di diritto internazionale privato e processuale,* II, 499, 499 (2004).

[9] The interference between a set of rules and the country's legal culture and institutions is a well-known field in comparative studies and research, in particular in the cases of transplant of Western law in countries characterized by different history, culture, religion, resources, economics conditions: see J.S. Gillespie and P. Nicholson, *Law and Development and the Global Discourses of Legal Transfers*, Cambridge: Cambridge University Press: 2012); M. Siems, *Comparative Law*, (Cambridge: Cambridge University Press, 2014), 281. In this paper the word 'context' is used in a much narrow way, making reference to the fundamentals of a national legal system concerning corporate governance, company and bankruptcy law.

been many cases in which State systems have offered differentiated responses, in some cases adopting exclusively the instrument of mandatory regulation, in others preserving a greater space for private autonomy and therefore, in the event of conflicts, for its judicial evaluation.[10]

3. Temporal Perspectives

A third profile of comparative analysis which will emerge in the course of this survey – to be found in general terms in several disciplinary fields (from general procedural law, eg suspension and enforcement of claims, to contract law, eg in case of impossibility and *force majeure*) – concerns the temporal perspective.[11] The emergency in *re ipsa* follows a sudden and unexpected phenomenon, which requires a timely and effective response, in order to bring the situation as soon as possible into the realm of 'normality', even if it is also complex and problematic, and therefore to the adoption of 'ordinary' regulatory tools.

The effects of the epidemic on commercial activities have differed, in terms of intensity and duration, varying from transitory situations to more stable (but still unpredictable) changes, turning into a theory of a permanent evolution (for example, for the activities that can also be carried out through internet connections).

[10] See, for further references, by G. Corno and L. Panzani, 'La disciplina dell'insolvenza durante la pandemia da Covid-19. Spunti di diritto comparato, con qualche riflessione sulla possibile evoluzione della normativa italiana' *Il Caso*, available at https://tinyurl.com/5ebdhrxz (last visited 31 December 2022); A.R. Mingolla, 'L'illusorio allineamento allo spazio concorsuale europeo del nuovo diritto della crisi di impresa'*Il diritto fallimentare e delle società commerciali,* II, 286, 286 (2021).

[11] Particularly significant in Italy was the legislation relating to the suspension of the execution of property release orders, which, initially provided by Art 103, para 6 of decreto legge 17 March 2020 no 18, converted into legge 24 April 2020 no 27, until June 30, 2020, was extended until the end of December 2021 as a result of repeated law decrees. The Constitutional Court intervened in this matter with judgment Corte costituzionale 11 November 2021 no 213, which declared the question of constitutional legitimacy relating to these regulations to be unfounded, noting that the measure was ordered in the presence of an exceptional situation deriving from the pandemic, referring precisely to the temporally limited nature of the measures and not extendable beyond December 31, 2021.

However, with regard to the Italian legal system, it should be noted that some provisions originally intended to have a limited duration – and as such derogating from the ordinary rules – were then extended, losing that exceptional character. This has in some sense happened with regard to the capital maintenance rules, which in the past could only be derogated from in the event of bankruptcy reorganisation proceedings, which are in any case likely to produce effects of publicity and credit impairment (thus making such need no longer applicable in case of confirmation or limiting its scope), as in the case of Art 182-*sexies* of Italian Insolvency Law (IL). Thus, the derogation from the rule set forth in Art 2446 et seq. Civil Code, first implementedwith the emergency legislation (as will be seen below, under 4.3) has now been partially stabilised when considering that, with the new 'assisted negotiation' procedure (decreto legge 24 August 2021 no 118 it is now possible to extend, also in the future and in the medium term, the derogation from the 'capitalise or liquidation rule' even in the (semi-confidential) phases of the negotiations. In this case, the suspension of recapitalisation obligations and the causes of dissolution in the interim phase are a further incentive to initiate the negotiated settlement procedure (which is in several respects a 'non-universally collecting proceedings' and does not involve all creditors).

Against this varied backdrop, national legal systems have reacted differently, including the business crises sector: in some cases, adopting measures that are very limited in time, substantially limited to lock down periods; in others, they have referred to longer periods (with reference or not to the duration of the 'state of emergency'); in others (eg in Italy), measures have been adopted taking into consideration the businesses directly affected by the epidemic phenomenon with the aim to cushion its effects by 'spreading' them over a longer period of time, thus actually slowing down the process of 'normalisation', and bringing the economic-legal system back to the ordinary system.[12]

4. Consistency or Contradiction with the 'Ordinary' Legal System

The dialectic between emergency intervention and the systemic approach of the legal systems in the field of insolvency also concerns another aspect of the investigation, relating to the consistency or contradiction of the emergency regulatory intervention with the legal systems order.

With respect to this issue, two preliminary considerations are necessary.

First of all, emergency law is characterized by the need for a rapid and extraordinarily effective approach in countering the phenomenon that imposes it, and therefore logically can take 'exceptional' characteristics compared to ordinary competences, procedures and rules.

Secondly, with respect to the evolution of the regulation of business crisis in European countries, in the presence of Euro-unitary sources, consisting of recommendations and directives limited to certain specific profiles (in addition to regulations on cross-border insolvency), the national legal systems are characterized by different approaches, especially in the basic dialectic between protection of creditors and protection of the company and between judicial and extrajudicial approaches. Moreover, the recent reforms introduced by Directive 2019/1023 on restructuring, insolvency and discharge are at a different stage of development.[13]

However, while in some legal systems the emergency law, albeit with its peculiarities, appears consistent with the framework of competences, procedures and aims of the current system or the one envisaged by the legislation implementing the Directive, it is noteworthy that in others, the interventions have been inconsistent with, or departed from, the existing rules in the legal system and its doctrines, policies and principles. For example, in Italy, the decreto legge 24 August 2021 no 118 broadened the scope for out-of-court

[12] On these profiles, on which we will return in para 4 and following, see the analysis of A. Gurrea-Martinez, 'Insolvency Law in Times of COVID-19' *Ibero-American Institute for Law and Finance Working Paper*, II, 1, 1 (2020).

[13] Many Member States have notified the Commission of their wish to extend the deadline for transposing EU Directive 2019/1023 by one year. See P. De Cesari, 'Osservatorio internazionale sull'insolvenza' *Il Fallimento e le altre procedure concorsuali,* 427, 427 (2021).

restructuring processes (the so-called negotiated composition of the crisis) in contrast with the approach of the Codice della crisi d'impresa e dell'insolvenza (decreto legislativo 12 January 2019 no 14 – 'CCI') on the alert procedure and on a binding path directly or indirectly controlled by the Judiciary.[14]

In this context, then, rather than appearing as an exceptional or temporary law, the emergency law can be cast as as a provisional, or rather, the first concrete step towards a radical change of systemic approach.[15] This interpretation requires to be verified when the epidemic phenomenon comes to an end, but it is clear that for the systems that have introduced measures of this kind, the emergency period constitutes at least a phase of experimentation from which indications of permanent systemic change can emerge.

III. The Collection and Selection of Emergency Measures on a Comparative Approach

The examination of concrete measures adopted by single countries is aimed at giving a substantial content to the general and introductory premise set out above.

In this context, it should be pointed out that it was barely necessary in the past to adopt new ideas, processes or substantive solutions so immediately and extensively. And that was the case notwithstanding prior experience of rapid spread of crises from one sector of the economy to another, such as in the subprime mortgages saga.[16]

This is already a significant element in terms of the experience and impact of the Covid 19 pandemic in the field of corporate insolvency law, at the same time facilitating the identification of the most convergent (or eventually

[14] The reasons for the different approach, not only due to the effects of the coronavirus, are explored comprehensively in M. Fabiani, 'La proposta della Commissione Pagni all'esame del Governo: valori, obiettivi, strumenti' *Il Caso,* 2 August 2021; M. Arato, 'La scelta dell'istituto più adeguato per superare la crisi d'impresa' *Rivista delle Ristrutturazioni*, 8 October 2021, 1-6; both authors highlight the distance of the decreto legge 24 August 2021 no 118 from the dirigist approach of the Codice della Crisi e dell'Insolvenza di Impresa (CCI).

[15] It is necessary, however, to underline the repeated changes of direction in Italian legislation (unlike, for example, that of the United States system, which has been based on Chapter 11 since 1978). See M. Arato, ibid 1, highlighting the tendency to introduce more flexible rules of bankruptcy law in moments of crisis and more rigid rules in phases of economic recovery. However, it is to be hoped that also in Italy, on the basis of European indications and more advanced models, the prospect of a timely identification of crisis indicators and the consequent voluntary recourse to forms of negotiated settlement will be firmly established.

[16] Regarding the so called 'insolvenza diffusa', that is a condition of pervasive illiquidity caused by an exogenous shock, affecting several markets simultaneously, see V. Minervini, 'La "composizione negoziata" nella prospettiva del recepimento della direttiva "insolvency". Prime riflessioni' *Il Caso,* 4 May 2020, 1-14; G. Brancadoro, *Società di capitali e crisi sistemiche* (Torino: Giappichelli, 2019), 85, and, with particular reference to the Covid 19 Pandemic experience, S. Pacchi and S. Ambrosini, *Crisi d'impresa ed emergenza sanitaria* (Bologna: Zanichelli, 2020).

divergent) aspects of the various national regulatory interventions for the purposes of this survey.

The examination of internet sites that collect and summarise the most significant interventions adopted by the various legal systems in the field of bankruptcy and company law, makes it possible to appreciate how some of these have appeared, at the beginning, more reluctant to tackle the problem in a drastic and interventionist manner - having adopted a fragmentary approach - and have then changed their approach by adopting systematic and more far-reaching solutions.[17]

Thus, for example, some countries, such as Spain[18] and England,[19] initially hesitated and appeared unprepared to adopt comprehensive reforms of bankruptcy law: that is understandable given that in the immediate impact of the pandemic and the economic fallout of social containment measures each legislator is apparently 'inseguro y urgido'.[20] However, these same countries have succeeded in a short time - sometimes borrowing from foreign experiences - in changing their approach and filling any gaps, as well as projecting the

[17] Regarding the so called "copycat coronavirus policies" phenomenon, as the result of regulatory emulation occurring spontaneously, see E. Ghio et al, 'Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of COVID-19 Pandemic' 30(3) *International Insolvency Review,* 427, 427 (2021); I. Krastev, 'Copycat Coronavirus Policies Will Soon Come To An End' *Financial Times*, available at https://tinyurl.com/ycx9utt7 (last visited 31 December 2022)

[18] As pointed out by A. Rojo, 'Reflexiones sobre el Derecho concursual de emergencia' *Blog Facultad de Derecho*, available at https://tinyurl.com/mtzmkd2d (last visited 31 December 2022), among the various option, the one adopted in Spain was the most prudent: to introduce a very fragmentary law, destined to govern for a time, and then, more or less soon, to disappear. Nevertheless, no long after the adoption of Royal Decree 14 March 2020 no 463 (the first to introduce the health emergency), the Spanish legislature, in view of the need to have more modern instruments to deal with the crisis, adopted renewed legislative intervention (as the *Texto Refundido* of the *Ley Concursual* on 5th May 2020). See S. Pacchi, 'Le misure urgenti in materia di crisi d'impresa e di risanamento aziendale (ovvero: i cambi di cultura sono sempre difficili)'*Ristrutturazioni Aziendali*, 30 June 2020, 1-19.

[19] Regarding the initial wait-and-see attitude of the English legislator (on 28th March 2020 the UK Government announced changes to insolvency laws, but until May 2020, the timing appeared uncertain since in the meantime the Parliament was in recess) and the subsequent change of trend by the English legislator, whose measures were mainly concentrated to suspension of wrongful trading and fast-tracking new restructuring plan and moratorium, announced since August 2018, see 'CIG Act - Summary Update' *Lexology*,available at https://tinyurl.com/2p93tkp7 (last visited 31 December 2022); S. Madaus and F.J. Arias, n 7 above, 318; E. Ghio et al, n 17 above, 14, noting that 'although not bound to implement the Directive due to leaving the EU, the UK's CIGA 2020 entails several elements largely reflecting the provisions of the Directive, possibly to defend its position with the ongoing institutional competition with other European countries'.

[20] See A. Rojo, n 18 above, 14, pointing that 'being insecure' is because it is not in a position to know exactly what the impact of the crisis will be; while 'urgent' is because the known, or barely suspected, reality demands that it does not delay its response. Referring to the Spanish Government, the Author adds that 'inseguro, urgido y ensolitario, ha actuado como cirujano de campaña'. From an Italian perspective, see M. Cossu, 'Il diritto e l'incertezza. La legislazione d'impresa al tempo della pandemia' *Il Diritto Fallimentare,* I, 1221, 1221 (2020).

duration of the solutions adopted in the medium term or at least in a perspective of stability.

Among these experiences, particularly useful on an institutional supranational basis are the initiatives of the World Bank and Insol International Global Guide (Measures adopted to support distressed businesses through the Covid-19 crisis),[21] and, to quote the most up-to-date and comprehensive initiatives, on a doctrinal level, the CERIL - *Conference on European Restructuring and Insolvency Law* statement and works. In the national scene, in a wider perspective, the website developed on the initiative and under the auspices of the Italian Association of Comparative Law is noteworthy, aiming

> 'at offering a map of these changes on a global scale, providing a repository of some of the innumerous normative documents which have been prompted by the health emergency and of the first available comments'.[22]

What firstly emerges looking at the relevant insolvency reforms taking place around the world as a response to the global pandemic, as well as other insolvency-related reforms in order to minimize the harmful economic effects of COVID-19, is the opportunity of a geo-localisation of countries in this field of investigations, as pointed out above (para 1).

The European Union is one of those geographical areas where these data collection initiatives have been carried out with greater drive and strenght (including through projects financed by the Union itself)[23] and are also more functional and coherent than elsewhere, if one considers that not only in the field of company law, but also in that of bankruptcy law, the road to harmonisation and unification has now been crossed.

Indeed, while only ten years ago an intervention of the EU legislator in substantive and positive insolvency law would have appeared invasive and unjustified, first with Commission Recommendation 2014/135/EU of 12 March 2014 (on a new approach to business failure and insolvency)[24] and then with

[21] Downloadable athttps://tinyurl.com/3pdhbuw7 (last visited 31 December 2022). See G. Corno and L. Panzani, n 10 above, where further references can be found. See also 'Insolvency and debt overhang following the COVID -19 outbreak: assessment of risks and policy responses' *OECD,* available at https://tinyurl.com/2p9zfv8y (last visited 31 December 2022) and Insol Europe tracker of insolvency reforms, available at https://tinyurl.com/34pcezff.

[22] Respectively downloadable at www.ceril.eu and www.comparativecovidlaw.it. See also, both for further doctrinal references and for the insights provided therein, A. Gurrea-Martinez, n 12 above, 3.

[23] A comprehensive comparative table is downloadable 'Impact of COVID-19 on the justice field' *European Justice*, available at https://tinyurl.com/26x5syxd (last visited 31 December 2022).

[24] Main purpose of the Recommendation was to implement within Member States a framework in order to allow debtors to: (i) Restructure as soon as likely insolvency becomes apparent, (ii) Keep control over the day-to-day operation of their business, (iii) Request a temporary stay of enforcement actions lodged by creditors if such actions would hamper the prospects of a restructuring plan. The length of the stay should depend on the complexity of the

Directive (EU) 2019/1023 the legislator has identified general common rules necessary to preventive restructuring frameworks, discharge and fresh start, and on measures to increase the efficiency of restructuring, insolvency and debtors rehabilitation proceedings.[25]

IV. Assessment of Main Tools and Measures in the Area of Enterprises Insolvency Law from an Italian Perspective

The peculiar interventionism and consequent progressive harmonisation process that marks the European systems also in bankruptcy law, briefly mentioned above, make it easier to discern and recognise, even in emergency law, a spontaneous evolution at the overall level.

A useful yardstick for assessing the various similarities or differences in the courses of action in bankruptcy law in European legal systems that are similar in economic and political terms is represented by the mechanisms introduced and the intervention adopted by the Italian legislator with the decreto legge 8 April 2020 no 23 ('Decreto liquidità', converted into legge of 5 June 2020 no 5),[26] undoubtedly the one that has most significantly affected this matter, at

anticipated restructuring and be granted for no more than 4 months initially and for no more than 12 months in total, (iv) Seek court confirmation of a restructuring plan which affects the interests of dissenting creditors. Creditors would be bound by any court-confirmed plan. The recommendation lists the contents of restructuring plans and the requirements for court confirmation, (v) More easily in new financing for a restructuring plan, as court-confirmed-new financing would be exempt from avoidance actions.

This was an ambitious (and not particularly successful) project which, moreover, was significantly inspired by the major reforms already undertaken independently by the main European insolvency systems.

[25] See N. Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings', 30(5) *Insolvency Intelligence,* 65, 65 (2017)*;* T. Richter and A. Thery, 'Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down', 1*,* available athttps://tinyurl.com/36uyujat (last visited 31 December 2022); C.G. Paulus, 'La recente legge tedesca sui quadri di ristrutturazione preventiva (The new German preventive restructuring framework), Commento alla legge 22 dicembre 2020 (Legge sul quadro di stabilizzazione e ristrutturazione delle imprese - GesetzüberdenStabilisierungs - und Restrukturierungsrahmen für Unternehmen (StaRUG)) (Germania)' *Orizzonti del diritto commerciale*,1, 9, 9 (2021); A.R. Mingolla, n 10 above, 286.

[26] On the law-decrees adopted from the beginning of the declaration of the state of emergency, after 8 March 2020, until the summer of the same year in Italy (eg, Cura Italia, Liquidity, Relaunch, Semplification decree), see *ex multis* M. Basili, 'L'epidemia di "Covid-19": il principio di precauzione e i fallimenti istituzionali (The "CoVid-19" pandemic outbreak: The precautionary principle and institutional failures)' *Mercato concorrenza regole,* III, 475, 475 (2019); M. Fabiani, 'Prove di riflessioni sistematiche per le crisi da emergenza covid-19'*Il Fallimento e le altre procedure concorsuali,* 2020, 589; F. Macario, 'Per un diritto dei contratti piu' solidale in epoca di "coronavirus" '*Giustiziacivile.com*, 17 March 2020. The primary purposes of these very urgent law decrees were aimed mainly at containing the first negative effects of the blocking of activities, providing for (i) special measures in terms of social safety nets, (ii) prohibitions of revocation of bank credit lines, (iii) facilitations for access to credit for SMEs, (iv) exemptions from liability for contractual failure or delay in debtors directly affected

least in the full emergency of Covid 19. Subsequent interventions, perhaps more far-reaching and lasting (such as the 'Restoration Decree' - decreto legge 28 October 2020 no 137, converted with amendments by legge 18 December 2020 no 176),[27] belong in fact to a less immediate and urgent reality.

As in many other legal systems, interventions have settled on main topics which can be categorised into (i) insolvency and (ii) "insolvency related" reforms, which may also include insolvency tools outside of bankruptcy (*ie*, moratorium against legal actions and out-of-Court negotiation facilitation) as well as tax incentives to promote debt restructuring, and (iii) other legal, economic, and financial reforms.[28]

Although aware of the relativity of some classifications (also due to the systematic internal legislation of each State),[29] the interventions on the aforementioned insolvency and insolvency related matters provided by the 'Decreto liquidità'– based on (i) postponement of entry into force of the insolvency law reform, (ii) temporary deferment of bankruptcy filings or requests, (iii) extension of terms for restructuring proceedings and agreements with creditors, and (iv) rules impacting on the Italian Civil Code, as reduction of

by containment measures, (v) exceptions to the rules of company meetings. Similarly, from a broader and comparative perspective, S. Madaus and F.J. Arias, n 7 above, 321, note that the rules quickly introduced by European lawmakers 'include a variety of solutions which can be grouped as rules relating to the (need to) use insolvency and restructuring proceedings, rules aiming at financial support for businesses and their entrepreneurs and employees, and rules introducing virtual meetings and hearings in courts and companies'.

[27] On the Restoration Decree (which, in the bankruptcy context, has, inter alia, resulted in a sort of anticipation of the entry into force in November 2020 of the crisis code with respect to the 'first rescheduling' of the so-called liquidity decree, so as to coin the expression 'shrimp legislation'), see M. Irrera, 'Le tormentate procedure concorsuali e la nuova legislazione "a gambero" (E' giunto il tempo di un recovery plan per le crisi d'impresa?)' *Il Caso*, 4 January 2021, 1-8; R. Masoni, 'Diritto processuale civile dell'emergenza epidemiologica (a seguito della conversione in legge del decreto ristori)', available at *Giustiziacivile.com,* 11 January 2021*;* B. Bertarini, 'Misure di sostegno a favore delle micro, piccole e medie imprese nel contest della pandemia Covid-19', available at *Ambientediritto.it,* 4, 519, 519 (2020); S. Pacchi, n 18 above.

[28] See for a general overview A. Gurrea-Martinez, n 12 above, 15; G. Corno and L. Panzani, n 10 above*,* 2; A. Borselli and I.F. Miguel*,* 'Corporate Law Rules in Emergency Times Across Europe' 17(3-4) *European Company and Financial Law Review,* 274, 274, (2020). On the necessary combination of types of intervention (including State intervention), and the fair balance between them, see *ex multis* L. Stanghellini, 'La legislazione d'emergenza in materia di crisid'impresa' *Rivista delle società*, II-III, 354, 354 (2020).

[29] With these regards, see L. Enriques, 'Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis' *European Corporate Governance Institute - Law Working Paper No. 530/23020*, July 2020, 1-16, including among the bankruptcy law-related measures, tweaking the rules on directors' duties in the proximity of insolvency and freezing the 'recapitalize or liquidate' rule, while, within a framework for tweaking Corporate Law, the introduction of new 'majoritarian defaults', relaxing pre-emption rights in case of capital raising, modification on limits of funds distribution to shareholders, relaxation of rules on related party transaction and several intervention of lenience on Directors' liabilities, aimed at favouring (without excessive deterrent bias) a right attitude towards risk-taking in the current circumstances.

capital pursuant to losses, going concern principle preservation, new financing regime - allow for an interesting and functional comparative survey that leads to the appreciation of common lines of tendency within Member States from which retrieving tested mechanisms to be re-used in case of similar emergencies, albeit with unavoidable specificities.

1. Suspension of Involuntary Insolvency Proceedings

Temporary deferral or suspension of bankruptcy filings or requests have been one of the predominant means of adjusting corporate insolvency laws in the Covid-19 period.

Moreover, compared to most countries that adopted this measure, there has been a consistent and parallel trend with respect to the physical and concrete measures to contain the pandemic.

It is no coincidence, indeed, that Italy was one of the first countries to introduce an *ex lege* inadmissibility ('improcedibilità') of filings for bankruptcy or other insolvency procedures, filed between 9 March and 30 June 2020; since Italy was the first European country to introduce a general lockdown.[30]

For its part, Spain is the country that has longest advocated such a suspension (in particular, until the end of the state of emergency,[31] thus contrasting with other approaches like Germany that decided to suspend the duty to file for bankruptcy for a much shorter or defined period of time). By way of example, to other national legislation, the Greek Government has suspended all court filings and other procedural actions including insolvency petitions until 15 May 2020; in Belgium it has been generally provided that creditor petitions filed between 24 April 2020 and 17 June 2020 would not be processed.[32]

Expressed as a suspension of creditors' rights to file for involuntary bankruptcy petitions,[33] the English legislature introduced it later compared with other European countries,[34] but then had to take action and extend the measure

[30] See D. Vattermoli, 'Pandemic and Insolvency Law: the Italian Answer' *Oxford Business Law Blog*,14 May 2020.

[31] In Spain the reform was implemented in the first package of insolvency responses, and lasted until the end of the state of emergency (Art 43.1 of the Royal Decree 8/2020); in the second package of insolvency reforms, the said suspension has been extended until 31st December 2020 (Art 11.2 of the Royal Decree 16/2020).

[32] Some exceptions are provided whereas a Public Prosecutor's Office or a provisional administrator sue a company in bankruptcy during this period. For further indications and references, see S. Madaus and F.J. Arias, n 7 above,325.

[33] This reform has been introduced, among the others, in Belgium, Russia, Czech Republic; See A.G. Martinez, n 12 above, 10, noting also that 'in the absence of an actual or de facto suspension of the right to file involuntary bankruptcy petitions, creditors will have the ability to force debtors to bear the direct and indirect costs associated with a procedure that, in the absence of Covid-19, would not even be needed', and quoting J.B. Warner, 'Bankruptcy Costs: Some Evidence' 32(2) *The Journal of Finance*, 337, 337 (1997), showing that the direct cost of bankruptcy were 3% to 4% of the pre-bankruptcy market value of total assets in large firms.

[34] The Covid-19 legislation on bankruptcy law has been extended several times since the

several times, with a strong analogy with what happened at the level of the general reaction to the pandemic (where initially there was a strong reluctance to introduce any of the lockdowns, which then turned into a change in trend in the short term).[35] This aspect, even if general and relatively easy to adapt regardless of the specific shapes of each bankruptcy system, was also the subject of discussions aimed at identifying what could be a more efficient approach such as the identification of a desiderable standard period with fixed deadlines and other flanking measures. Thus, an uncertain and generalised period of suspension of involuntary insolvency proceedings could turn into a generalised subsidy by the legislator, who would then no longer adequately distinguish between potentially recoverable companies and others that were not,[36] including zombie companies, which are financially and economically precarious, as parasites, of viable companies.[37] After all, it is already possible to agree with the reasoning, which is also valid for other areas of intervention, that even in an emergency situation it is essential to have a 'systemic vision and, above all, a peripheral and prospective vision'. Indeed, it is advisable to reactivate those

> 'aid measures that on the one hand offer oxygen to businesses, but on the other hand reconvert unsalvageable businesses to a crisis market that

Corporate Insolvency and Governance Act 2020 (Extension of the Relevant Period) Regulations 2020. However, this type of measure is not new in this country, considering that the Courts (Emergency Powers) Act 1914 already gave English judges the power to suspend bankruptcy proceedings in the event of a debtor's inability to pay his debts as a result of war-related circumstances. See S. Baister and J. Tribe, 'The Suspension of Debt Obligations and Bankruptcy Laws during World War I and World War II: Lessons for Private Law during the Corona Pandemic from previous national crises'33(3) *Insolvency Intelligence,* 67, 67 (2020).

[35] Other countries that did not enforced immediately such provisions, at least in the initial period, were Denmark and Poland, while Sweden has totally declined to adopt this measure.

[36] On this subject, see A. Gurrea Martinez, n 12 above, 9, who point out, albeit with reference to a neighbouring aspect and collimating with the one just examined, namely the suspension of the management's duty to file for bankruptcy, that 'the German response seems more desirable than those implemented in jurisdictions just suspending this duty during the state of emergency'. Within these terms and context we can fully endorse and share the reflection that 'a parallel with governments' responses to the pandemic itself may be evocative. The countries that have successfully suppressed the pandemic so far are those that have reacted rapidly, strongly and systematically', used by L. Enriques, n 29 above, 15, arguing that 'in addition to creating a special temporary insolvency regime, relaxing provisions for companies in the vicinity of insolvency, and enabling companies to hold virtual meetings, policymakers should tweak company law to facilitate equity and debt injections and address the consequences of the extreme uncertainty faced by European firms'.

[37] With respect to zombie companies, see R. Banerjee and B. Hofmann, 'The rise of zombie firms: causes and consequences'*BIS Quarterly Rev*iew, September 2018, 67-78; H. Anger and K. Ludowig, 'Insolvenzverwalterwarnenvor Zombie-Unternehmen' *Handelsblatt,* available at https://tinyurl.com/52ccjdyc (last visited 31 December 2022)*;* R. Ippoliti and R. Masera, 'Per un rafforzamento patrimoniale delle imprese italiane: analisi e proposte' *Rivista Trimimestrale Diritto ed Economia,* 1, 23, 23 (2021)

does not tie up wealth'.[38]

As a result, solutions in some jurisdictions appeared less plausible or appreciable, as in the case of Australia and Singapore, who opted for restrictions, rather than a prohibition, on the initiation of insolvency proceedings by creditors. In the latter country, for example, the solution was not a real suspension of creditors' claims, but only an increase of the threshold from S$10,000 (ie Euro 6.550,00 approx) to S$100.000,00 and a doubling of the period to respond to demands from creditors from three to six months.[39] Our legal system has moved in symbiosis with the other main legal systems on this point. Indeed, apart from a technical mistake in the wording of the rule (where reference is made to the concept of 'improcedibilità', ie an effect capable of affecting even pre-investigation proceedings in place in the period of reference even though started before the pandemic and lockdown), the pivotal aspect that appeared to be clearly at odds with the trend in other jurisdictions[40] was the indiscriminately broad scope of the provision, which also included voluntary petitions, thus imposing without empirical or entrepreneurial justification a dispersion of value, even where applications for admission came directly from insolvent entrepreneurs.[41]

Appropriately, the legislator has remedied some of these discrepancies, so that, following the amendment made at the time of conversion, the inadmissibility regime has not been applicable:

(a) to the petition filed voluntarily by the entrepreneur, when the insolvency was not a consequence of the COVID-19 outbreak;

b) to the petition for bankruptcy filed by any person in case of inadmissibility (Art 162, para 2, Italian Insolvency law 'IL') or revocation (Art 173, paras 2 and 3) of the proposal of a restructuring plan proceeding ('concordato preventivo') or failure to approve the same (Art 180, para 7);

c) whereas the request is submitted by the public prosecutor when the same request is made for the issue of precautionary or conservative measures.[42]

[38] See M. Fabiani, n 26 above, 589; Id, *Introduzione,* in P. Trombini et al eds, *Dalla crisi all'emergenza: strumenti e proposte anti-Covid al servizio della continuità d'impresa* (Mantova: Fallco, 2020), 7; D. Galletti, 'Il diritto della crisi sospeso e la legislazione concorsuale in tempo di guerra' *Il Fallimentarista,* 14 April 2020.

[39] See COVID-19 (Temporary Measures) Act 2020, 22(1) and (24 (1).

[40] In this sense, see G. Corno and L. Panzani, n 10 above, 5.

[41] For the main criticism of the original wording of this provision, see S. Ambrosini, 'L'improcedibilità delle istanze di fallimento: ratio legis, tassatività della deroga e corollari applicativi' *Il Caso*, 29 May 2020; Id, 'La "falsa partenza" del codice della crisi, le novità del decreto liquidità e il tema dell'insolvenza incolpevole'*Il Caso*, 21 April 2020, 1-23, for further critical insights into the first emergency regulatory interventions.

[42] Equally appropriately, the third paragraph of Article 10 has been amended to clarify that the period in which bankruptcy petitions and claims are unfeasible is not taken into account not only for the purposes of Arts 10 and 69-*bis* of the Italian insolvency law ("IL"), but also for the purposes of Arts 64, 65, 67, paragraphs 1 and 2, and 14 IL. In particular, in case of a future winding up, the period of suspension will not be counted for the purpose of calculating the terms set forth by:

2. Timely Emergence of Insolvency and Directors' Liability

Another aspect of particular interest, which has been the subject of intervention by various national legislators, appears to be contiguous to the one just discussed in the above paragraph, although this one had a more marked function of containing the pandemic while the one we are about to examine intervenes on a more dogmatic aspect of company law.

This concerns, in particular, the duty of the directors to comply with the obligations and requirements for the detection of insolvency and the commencement of proceedings.

In fact, the suspension of the duty to file for bankruptcy where corporate directors are required to initiate insolvency proceedings once a company becomes insolvent,[43] has been adopted in various jurisdiction, including (among the first to implement it) Germany, France, Spain, Luxembourg, Poland, Portugal and Czech Republic.

In this context, the rules of the German legal system, where insolvency must be filed by the entrepreneur without delay and, in any case, within three weeks from the moment the situation arises, have been particularly careful and detailed.[44]

The German Government has in fact suspended this obligation several times, first until 30 September 2020 and then until 31 December 2020, albeit with some slight exceptions,[45] although the *COVInsAG* authorized the Federal Ministry of Justice to extend the regulations according to these provisions until 31March, 2021 (as was in fact the case, albeit with the introduction of additional and

- Art 10 of the IL, (*ie* winding up within one year from the cancellation from the Register of Companies), and
- Art 69-*bis* IL (forfeiture of claw-back petitions – so called *azioni revocatorie* – after three years from the declaration of winding-up and after a certain period from the completion of the operation). In this latter case, the variability (six months to five years) depends on the specific issues and types of claw back (according to Arts 64, 65, 67, and 69 IL).

[43] On the *ratio* of this rule, whose suspension is highly recommended in these circumstances see B. Wessels and S. Madaus, 'Ceril Executive Statement on Covid-19 and insolvency legislation' *Ceril*, available at https://tinyurl.com/4heyzzxm (last visited 31 December 2022); see P. Davies, 'Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency' 7(1) *European Business Organization Law Review*, 301, 301 (2006).

[44] However, in other countries the provisions are even stricter and time-limited, such as in France where the debtor is obliged to apply for the initiation of collective proceedings within 45 days of the *cessation des paiements*.

[45] On the main aspects of the Covid-19 Suspension Act (GesetzzurvorübergehendenAussetzung der Insolvenzantragspflicht und zur Begrenzung der Organhaftungbeieinerdurch die COVID-19-Pandemie bedingten Insolvenz (COVID-19-Insolvenzaussetzungsgesetz- COVInsAG), see A. Wolf, 'Legal Reactions in Germany: the Covid19 Insolvency Suspension Act'29(5) *Norton Journal Bankruptcy Law and Practice*, 538, 538 (2020). It should be noted that the suspension prolonged (by September 2) until 31December 2020 applied under the condition that the origins for the financial distress are rooted in the pandemic and there is a prospect that the insolvency can be eliminated once the economic situations has recovered.

significant limits).[46] The relevant rules properly specified that his derogation shall not apply if the insolvency situation is not due to the consequences of the spread of the SARS-CoV-2 virus or if there are no prospects of eliminating an existing insolvency. Moreover, the law provides that if the debtor was not insolvent on 31 December 2019, it is presumed that the insolvency maturity is due to the effects of the COVID-19 pandemic and there are prospects of eliminating an existing insolvency. Furthermore, the burden of proof is reversed, so that the creditors (or the insolvency administrator) have to provide evidence of the obligation to submit an application despite the suspension.

In this way, the continuation of the obligation and the ordinary discipline are correctly identified and specified, when, for example, the crisis can be traced back to periods or situations prior to or in any case not connected to the pandemic and the related containment measures; at the same time, an appropriate distinction is made according to whether there is the prospect of recovery or re-establishment of the ordinary cash flow trend.

If this is an aspect that may appear 'static' and 'defensive', as regards the discipline included in the framework of the directors' liabilities and duties, an equally important role is played by the adoption of other rules more related to the dynamic-managerial moment of the company, often implemented through rules, other times configured as standards, in relation to the ordinary and extraordinary management of the company.

From the point of view of regulation by standard mechanisms (ie intended to operate *ex post*) such as agent constraints,[47] a very interesting example of debate was the suspension, implemented by the United Kingdom, of the wrongful trading (under section 213 et seq of the IA 1986).

Such provisions have finally been suspended retrospectively since 1 March 2020 until 30 September 2020 due to the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, and then re-instated to 30 April 2021. Such suspension is addressed to company directors so they can keep their business going without the threat of personal liability,[48]

[46] For instance, first part of third para, Art 1 provides that 'from 1 January 2021 to 30 April 2021, the obligation to file an insolvency petition pursuant to paragraph 1 shall be suspended for the managers of such debtors who filed an application for the granting of financial assistance under state aid programs to mitigate the consequences of the COVID 19 pandemic in the period from 1 November 2020 to 28 February 2021'.

[47] Regarding the typical classification between *ex ante* and *ex post* mechanisms, both regulatory and governance strategies, see R.R. Kraakman et al, *The Anatomy of Corporate Law* (Oxford: Oxford University Press, 2004), 26.

[48] Moreover, even here from the very first phase, as noted by S. Madaus and F.J. Arias, n 7 above, 326, 'the government consider(ed) legislation mandating the court not to take into account losses incurred during the period in which businesses were suffering from the impact of the pandemic when deciding if a director should be declared liable to contribute to a company's assets under wrongful trading provisions'.

which would otherwise be triggered for having continued the business activity to the detriment of the creditors by not adopting the necessary measures to maximise the value of the business in the interest of the creditors.[49]

Such provision could indeed lead to a prudential and excessively risk-averse approach by the directors in the twilight of a crisis, as it could operate as a sort of reverse business judgment rule (ie, using an *ex post* knowledge).

This profile of inefficiency, which this rule has sometimes proved to be the source of, even in regular situations in the economy, could have an exponential impact in a situation of generalised crisis, in which there is after all a situation of 'extreme uncertainty under which business people are making decisions'.[50]

Furthermore, the UK has not resulted alone with its initiative, since New Zealand and Australia respectively (i) announced, and subsequently implemented, planned changes to Companies Act 1993 aimed to allow directors of companies facing significant liquidity problems because of Covid-19 to take advantage of a period-limited safe harbor from liability for reckless trading and incurring obligations during insolvency (sections 135-136), and passed legislation inserting a new section 588GAAA to the Corporations Act 2001, providing for a temporary safe harbor relief suspending director liability for insolvent trading.[51]

Clearly, there were not entirely unanimous reactions within the UK's debate to this intervention, and different prospective assessments.

In fact, in some respects, there have been doubts about the effective scope of the innovation, on the basis that the wrongful trading rule is but a part of a

[49] See A. Licht, 'What's so Wrong with Wrongful Trading? – on Suspending Director Liability during the Coronavirus Crisis' *Oxford Business Law Blog*, 9 April 2020.

[50] See the insightful reflections of L. Enriques, n 29 above, 12, who notes that 'anticipation of the ensuing liability risks can make managers excessively risk-averse ex ante or, more precisely, averse taking 'actions that change the status quo'. This maybe good from the creditors' perspective, as it may prevent companies from precipitating a crisis by pivoting in the wrong direction. Yet, when a shift in strategy is in fact needed, a mix of risk-aversion and extreme uncertainty creates a status quo bias that may well make insolvency a like lier outcome than swift action'.

[51] These interventions, so widespread in common law with regard to the freezing of wrongful trading could however lead to some rethinking about its 'latent' reference in Article 19 of the Insolvency Directive 1023/2019. See G. Strampelli, 'The European regime of directors' duties in the twilight zone: problems and perspectives' *Orizzonti del Diritto Commerciale,* III, 723, 723 (2020), asserting that Art 19 of Directive 2019/1023/EU cannot lead to an effective harmonisation at the European level of the duties of directors in the twilight zone, on the basis of the analysis of the differences existing between the national rules concerning directors' duties in the vicinity of insolvency (further accentuated by the emergency rules adopted to cope with the effects of the Covid-19 pandemic). The Author also argues that'Art 19 of the Directive, notwithstanding the general nature of the general nature of the provisions contained therein, clearly indicates that (consistently with the overall with the overall approach of the Directive) the European legislator favours a solution geared to the early detection and forecasting of insolvency and based on insolvency and based on standards of conduct (on the model of wrongful model) rather than on the specific duty to file for bankruptcy within a predetermined period, a predetermined deadline'.

> 'broader regime that also includes the common law rule in West Mercia Safetywear v Dodd on directors' duties in the zone of insolvency as well as liability provisions under the Company Directors Disqualification Act 1986. Suspending sections 214 and 246 ZB will thus have only a limited effect'.[52]

On the other hand, there is nevertheless a widespread belief that the existing laws for fraudulent trading and the threat for director disqualification will continue to act as a valid deterrent toward directors' misconduct.[53]

3. Freezing of Capital Maintenance Rules

Among the aspects that can be classified as bankruptcy related matters (some of which cannot be dealt with here for the sake of dimension of this essay),[54] it is appropriate to deal with the amendments connected to the Covid emergency to the requirement to promote the recapitalization, liquidation or bankruptcy of the company whenever, due to the existence of losses, the firm's net assets fall below a certain percentage of the company's legal capital.

Such kind of rule are provided by several jurisdiction and traditionally monitored and regulated in Continental Europe[55] and Latin America,[56] as alternative of the solvency test adopted in USA and other jurisdictions.[57]

[52] A. Licht, n 49 above, quoting the thoughts of K. van Zwieten, 'Director Liability in Insolvency and Its Vicinity' 38 (2) *Oxford Journal of Legal Studies,* 382, 382 (2018).

[53] See C. Serra, 'Directors'duties under COVID-19 legislation: A comparative perspectives' *Eurofenix Summer 2020*, 20, 20. For a broader perspective, see 'Directors' duties and liabilities in financial distress during Covid-19' *Allen Overy*, available at https://tinyurl.com/4a42muyh (last visited 31 December 2022); L. Enriques, n 29 above, 11.

[54] Among the measures provided by the Liquidity Decree, have to be recalled those relating to the suspension of the subordination rule for loans from shareholders, and the facilitation of business continuity with regard to the preparation of financial statements; similar measures have been implemented in various forms in different countries: see O. Blanchard, et al, 'A new policy toolkit is needed as countries exit COVID-19 lockdowns' *12 Bruegel Policy Contribution*, 1, 7 (2020).

[55] B. Wessels and S. Madaus, *ELI Report on rescue of business in insolvency law*, available at https://tinyurl.com/2p8f5rrj (last visited 31 december 2022), highlighting that this duty is grounded in Art 19 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second para of Art 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital. On this topic see L. Stanghellini, 'Directors' duties and the optimal timing of insolvency. A reassessment of the 'recapitalize or liquidate' rule', in P. Benazzo et al eds, *Il diritto delle società oggi. Innovazioni e persistenze* (Torino: UTET, 2011), 731.

[56] See A. Gurrea Martinez, n 12 above,9.

[57] A comparative analysis of those different approaches in terms of efficiency and protection of the stakeholders, the role of the share capital in company law and the mechanisms for preventing agency problems (especially between creditors/stakeholders) have been the subject of lively doctrinal debate also in occasion of a conference organised by the AIDC: *Global law* v *Local law* (Brescia, 12-14 May 2005); the conference proceedings are published in AIDC,

Indeed, the duty to recapitalize or liquidate companies in situation of qualified losses tends to have different implications in various jurisdictions depending on whether their mechanism of insolvency detection is entrusted to the mechanism of balance sheet test or cash flow test.[58]

In connection with Covid-19 emergency, such duty has been temporarily suspended, or at least relaxed, in several countries, including Spain and Italy, and, unlike other reforms discussed above, emergency provisions have been applied or had legal effects for a period of time much longer than the lock down period, due to the evident reason that

> 'most of the losses borne by companies during the toughest part of the Covid-19 crisis will only be reflected in the balance-sheet prepared in 2021'.[59]

In Spain, where the directors are personally liable if they do not promote the recapitalisation of the company or alternatively its liquidation within two months from the moment when the net assets have fallen below half of the company's capital, the first package of insolvency responses to Covid included the provision according to which, during the period of emergency (*estado de alarma*) the debtor was not obliged to file a bankruptcy proceeding, the shareholders' meeting called to ascertain a cause of liquidation were suspended and the directors were not liable for the debts incurred in that period.[60] Later on, during the year 2020 the duty to recapitalize or liquidate in case of losses exceeding half of the capital has been suspended and in the same case for the year 2021 only the duty of the directors to call a general meeting within two

Global law v. Local law.Problemi della globalizzazione giuridica. 17° Colloquio biennale Associazione italiana di diritto comparato (Torino: Giappichelli, 2016). On that occasion, prof Francesco Denozza took up the arguments and references from his essay 'A che serve il capitale? (Piccole glosse a L. Enriques-J. R. Macey, creditors versus capital formation: the case against the European legal capital rules)' *Giurisprudenza Commentata*, 2002, V, 585, 585, to recall the various profiles of relevance of the regulation of share capital and the fundamental role it plays not only as a measure to protect creditors but also in the internal structural organisation of capital companies. The dialectic exchange of thoughts between the two authors may be read in the following articles: L. Enriques and J. R. Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' 86 (6) *Cornell Law Review,* 1165, 1165 (2001); L. Enriques, 'Capitale sociale, informazione contabile e sistema del netto: una risposta a Francesco Denozza' *Giurisprudenza commentata,* I, 607, 607 (2005); F. Denozza 'Le funzioni distributive del capitale' *Giurisprudenza commentata*, IV, 489, 489 (2006).

[58] For comparative studies, see G. McCormack et al, *European Insolvency Law – Reform and Harmonisation,* (London: Elgar, 2017), 185.

[59] A. Gurrea Martinez, n 12 above, 10, who appreciates the choice of providing for a duration of at least one or two years for this measure, and points out that for this reason the reform recently adopted in Colombia, suspending the recapitalize rule or liquidate rule for 24 months, seems more desirable.

[60] Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19, artt. 43.1, 40.11 and 40.12.

months since the end of the financial year has been provided.[61]

In Italy, the first emergency rule stated that the duties provided for in the cases of capital losses exceeding the quotas indicated in the civil code (articles 2446, 2447, 2482-*bis*, 2482-*ter*) and the connected duty to liquidate the company were not applicable to the losses emerged since the 9 April to the 31 December 2020.[62]

Later on, the final date has been replaced with the date of 31 December 2021, extending the original provision to one more year.[63] For both financial years 2020 and 2021 the companies are imposed to reduce those losses within the limit of one third of the capital within the fifth following year and the shareholders' meeting approving the balance sheet of that year shall reduce the capital in proportion of the losses.

Those provisions proposed a set of problems in their interpretation and coordination with the 'ordinary' regulation on company law and bankruptcy.

As an example, various questions were raised about the connection between Covid and the companies' losses.

In order to clarify some equivocal provisions, the original wording that provided for an exemption in the period between 9 April 2020 and 31 December 2020, 'for events occurred in the course of the financial years closed by the aforementioned date', due to the conversion into law, has been replaced with reference to 'losses arising in the current financial year as at 31 December 2020' (later on, as above mentioned, the final date has been postponed to the 31 December 2021). The new wording has overcome the risk to exclude companies that close their financial statements after 31 December 2020, and, on the other hand, to encompass companies whose capital losses had occurred during the year 2020 without the need to prove their connection with pandemic.[64]

The amendments of the original text of Art 6 of decreto legge 8 April 2020

[61] Real Decreto-ley 16/2020, de 18 de abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia, art. 18. A comparative analysis of the Spanish provisions on this topic is proposed by A. Gurrea Martinez, n 12 above, 10.

[62] Decreto legge 8 April 2020 no 23 converted by legge 5 June 2020 no 40, Art 6. On this topic A. Busani*, 'Quinquennio di grazia per le perdite* 2020' *Le Società*, V, 538, 538 (2020); G. D'Attorre, 'Disposizioni temporanee in materia di riduzione del capitale ed obblighi degli amministratori di società in crisi' *Il Fallimento e le altre procedure concorsuali,* 597, 601 (2020); F. Dimundo, 'La "messa in quarantena" delle norme sulle perdite del capitale e sullo scioglimento delle società. Note sull'art. 6 del "Decreto Liquidità" ' *Il Caso,* 21 April 2020.

[63] Decreto legge 30 December 2021 no 228, converted by legge 25 February 2022 no 15, Art 3, para 3. On the extension of the suspension of the above mentioned duty see 'Conversione Decreto Milleproroghe: estensione del regime speciale in tema di riduzione del capitale e scioglimento alle perdite d'esercizio 2021' *Assomime,* available at https://tinyurl.com/yx2yj69c (last visited 31 December 2022) and 'Decreto "Milleproroghe" e disposizioni temporanee in materia di riduzione di capitale' *Fondazione Nazionale Commercialisti*, available at https://tinyurl.com/4h6hb82s (last visited 31 December 2022).

[64] On the different readings of this provision, A. Busani, n 62 above*,* 201; M. Tola, 'Le società di capitali nell'emergenza' *Banca Borsa Titoli di Credito*, IV, 531, 531 (2020).

no 23 allowed to overcome the ambiguities concerning the period of application of the rule, due to the replacement of the wording ‘events occurred’ with ‘losses arising in the current financial year as by 31 December 2020’. Moreover, it has been provided adequate breathing space to the companies, being the capitalize or liquidate mechanism, originally suspended from April 2020 to 31 December of the same year, then postponed until the shareholders' meeting that approves the financial statements for the fifth subsequent financial year.[65] Finally, the same five years period to recover has been extended to the losses incurred in the year 2021 and therefore up to the approval of the financial statements concerning the financial year 2026.

Nevertheless, the emergency regulation still has a number of weaknesses.

First, the criteria to define the losses included in the special regime (in particular for losses dating from before the start of the pandemic) are not clear, depending on the interpretation of the term ‘emergence’ of losses.[66]

Moreover, the effects of the losses ‘suspended’ have to be examined in detail: ie if in the financial year 2022 or during the following years, there is a new loss of more than one third of the capital, and therefore the directors will have to comply with the obligations set forth in Arts 2446, 2482-*bis*, 2447 and 2482-*ter* of the Italian Civil Code,[67] the reference to the long-term continuity of the company shall take in consideration the losses ‘suspended’ until the final term of the moratorium.

In a different perspective, the emergency regulation provokes some suggestions concerning the function of rules about the capital in case of losses, even though in the context of this pandemic crisis the debate on the value of the rules on share capital and the advisability of replacing them with solvency tests has not surfaced as on other previous cases.[68]

[65] The awareness of such inadequacy led the legislator, in the context of the so-called ‘Legge di bilancio’ to replace the original wording of article 6.

[66] A broad interpretation that gives the term ‘incurred losses’ in the new wording both the meaning of ‘accrued losses’ and the meaning of ‘losses recognised in a financial statement approved in 2020’ is envisaged in A. Busani, ‘*Il 2020 come anno “di grazia” per le perdite da COVID-19*’ *Le Società*, II, 208, 208 (2021); *contra* M. De Poli and M. Greggio, ‘La suspensione degli obblighi in materia di capitale nel nuovo art 6 del Decreto liquidità’ *Diritto Bancario,* 1-20.

[67] The question remains unresolved as to whether the inability of the company to operate as a functioning economic unit intended to produce income, ie the loss of business continuity, can be treated as a cause for dissolution due to the impossibility of achieving the company's object. See R. Guidotti, ‘*Continuità aziendale e scioglimento della società*’ *Diritto Bancario*, 31 January 2021. On the problems deriving from the suspension of losses both for 2020 and 2021 see ‘Decreto “Milleproroghe” e disposizioni temporanee in materia di riduzione di capitale’ *Fondazione Nazionale Commercialisti,* available at https://tinyurl.com/4h6hb82s (last visited 31 December 2022).

[68] However, see the interesting insights of C. Ebeke et al, ‘Corporate Liquidity and Solvency in Europe during COVID-19: The Role of Policies’ *International Monetary Fund Working Papers*, March 2021. A detailed survey with some prospective solutions is carried out by D. Latella, ‘L’eclissi del capitale sociale ai tempi del Covid-19’ *Diritto ed Economia dell’Impresa*,

Assuming that no definitive conclusions have yet been reached on the function of the rules governing the reduction of capital for losses,[69] among the various thesis formulated in this regard,[70] it could be argued that, considering the approaches and amendments recently adopted in various legal systems, the prevailing frame is the recognition of this rule as a mean of adequate internal disclosure and re-emergence of the shareholders meeting as a decision-making forum in the vicinity of insolvency.

Indeed, the Italian scenario shows that the regulatory changes due to the Covid emergency are aimed at pursuing two major scopes.

First, the emergency rules intend to prevent directors from being immediately confronted with the alternative that arises in the event of relevant losses of share capital and the consequent liability, in order to let the companies profit of a convenient period of time to recover the losses without being forced to liquidate.

Moreover, the emergency regulation protects the decision-making role of shareholders, given the continued applicability of disclosure duty.[71]

In this framework, it has to be underlined the major innovation of an exception to the capitalisation or liquidation rule extended to non-court situations and therefore without the protection deriving from an external circulation of information and judicial control.[72]

However, the suspension of the rule has been already provided for in

4, 1, 1 (2020).

[69] R. Nobili, 'La riduzione di capitale', in P. Abbadessa et al eds, *Il nuovo diritto delle società*, *Liber amicorumGian Franco Campobasso* (Torino, UTET: 2007), III, 321.

[70] Following a comparative study on the functions of the share capital in the legal regime of losses, the main scopes envisaged are the following: a) it represents a form of guarantee for creditors; b) the protected interests should be shifted to the shareholders, in particular the minority shareholders, so that the majority do not pursue their own extra-social interests; c) it is a safeguard of the veracity of the nominal value of the shares in order to guarantee the possible purchasers and the interest of the shareholders in disinvesting their shares; see N. De Luca, 'Riduzione del capitale ed interessi protetti. Un'analisi comparatistica' *Rivista di Diritto Civile,* VI, 559, 559 (2010).

[71] The temporary suspension of directors' duties does not affect those set forth in Art 2446, para 1, and Art 2482-*bis*, paras 1, 2 and 3, of the Italian Civil Code and, therefore, irrespective of the Covid-19, the directors' duty to call the shareholders' meeting without delay upon the occurrence of a loss of more than one third of the share capital, even if it does not affect the legal minimum, remains in place. See A. Busani, n 66 above, 538; A. Paolini and M. Garcea, '*Riduzione del capitale sociale per perdite nella legislazione emergenziale "Covid19" e problematiche connesse alla parità di trattamento tra imprese*' 2 *Dirittifondamentali.it*, 1294-1308 (2020); G. D'Attorre, n 62 above, 599, who, however, points out that there are also clear indications of creditors protection, such as the prohibition of distributing profits to shareholders until the losses have been eliminated (although the possibility of 'spreading' losses over a long period of time may in part trigger mechanism of functional diversion).

[72] A similar exemption has in fact operated in the context of bankruptcy proceedings, according to art 182 *sexies* of the Insolvency Law: on this topic see C. Montagnani, 'Disciplina della riduzione del capitale: impresa o legislatore in crisi?' *Giurisprudenza Commerciale*, IV, 754, 754 (2013); F. Lamanna, 'L'art. 182-*sexies* l. fall. e la sospensione delle norme di salvaguardia del capitale sociale al tempo della crisi dell'impresa: effetti positivi, controindicazioni ed effetti collaterali da overshooting' *Il Fallimentarista.it*, 25 September 2015.

favour of start-up and innovative PMI, within the limit of one financial year.[73]

Nevertheless, in comparison with those other cases the extension of suspension due to Covid emergency regulation has a much great importance, both because of the general application of the rule including large corporations and of the long period of time allowed to recover the losses. Moreover, beyond the formal character of emergency rule, it appears to trace a fundamental step in the evolution of the role of the capital regulation.

4. General Interventions with Reference to National Bankruptcy Laws

With regards to the option of modifying the entire underlying insolvency law due to Covid emergency, it should be noted – as already mentioned in the previous paragraphs – that many insolvency laws were already in the process of being codified or reformed in order to be compliant with the Insolvency Directive.

Although almost all Member States have appropriately chosen at first glance to postpone the entry into force of the Directive, the reform processes have slowed down but have not been abandoned. On the contrary, some countries (including Spain, as noted above)[74] have even accelerated the process of general reform of bankruptcy law, on the basis that in a situation of crisis a regulatory stalemate would not have been the most appropriate response.

Looking at the single insolvency regimes and the approach adopted, a key role was played by the background and the situation occurring in the pre-covid systems.

A number of countries have therefore adopted a special law and a new procedure, in particular the Netherlands, which has introduced, as of 1 January 2021, the Wet Homologatie Onderhands Akkoord ('WHOA'), that offers

> 'an efficient process to effect a compulsory restructuring plan/composition between the company and all or certain of its (secured and/or unsecured) creditors and/or shareholders'.[75]

[73] For the start-up see decreto legge 18 October 2012 no 179 (converted by legge 17 December 2012 no 221), Art 26, para 1; for the Innovative PMI, see decreto legge 24 January 2015 no 3 (converted by legge 24 March 2015 no 33), Art 4, para 9. On this topic O. Cagnasso, 'Note in tema di start up innovative, riduzione del capitale e stato di crisi (Dalla "nuova" alla "nuovissima" s.r.l.)' *Il Nuovo diritto delle società*, V, 7, 7 (2014).

[74] See M. Gurrea Martinez, n 12 above, 5; B. Arruñada, 'Interpretación positiva del derechoconcursal español y propuestas para una reforma equilibrada' *FEDEA Policy Papers no. 2021-08*, 1-31 (2021). Among other countries that have profoundly innovated their regulations, also drawing inspiration from the pandemic experience of Covid 19, it is worth mentioning Portugal, characterised by the proliferation of initiatives that led to the 'Pevec' bill, whose new rules on insolvency and restructuring of companies will come into force in mid-April of this year.

[75] See 'An international guide to changes in insolvency law in response to COVID-19' *Dla Piper*, available at https://tinyurl.com/b64fmyzk (last visited 31 December 2022).

Unanimously voted by the Dutch House of Representatives on 26 May 2020 and by the Senate on 6 October 2020, with this new procedural mechanism,[76] of which there are two variants (one private, more reserved, and one public, eventually in accordance with the requirements of Art 24 Reg. EU 2015/848),[77] the lawmaker clearly strengthens the competitiveness policy among EU Member States, in particular considering the deliberate points of contact between this discipline and that of the Scheme of Arrangement, eg a procedural instrument adopted in the United Kingdom and which has shown great success in practical experience also for procedures relating multinational enterprises.[78]

On the other side, countries as France, probably also because already traditionally focused on alert procedures under bankruptcy law, have instead limited the intervention to some amendments, in this case to the *code de commerce,* by introducing changes to the regulation of some of the already existing procedures.[79]

At present, the foremost pivotal aspect of the legislative intervention and reforms for companies in financial distress can be listed as follows: (i) reinforcement of warning procedure, (ii) extension of accelerated safeguard conditions, (iii) creation of a safeguard of reorganization privilege, (iv) extension of safeguard or reorganization plans, (v) simplification of creditors consultation.[80]

[76] It should be recalled, however, that the Dutch legislator has also amended some of the provisions of the Insolvency Act and in particular has passed a proposal that offers business in distress due to the Covid-19 pandemic some breathing spell if they are confronting with creditors filing for their bankruptcy of for conservatory or executory measures (moratorium of payments – *Tijdelijke wet Covid-19 SZW enJenV*).

[77] P. De Cesari, 'Osservatorio internazionale sull'insolvenza'*Il Fallimento e le altre procedure concorsuali,* III, 427, 427, points out in this regard that for this 'public' version of the procedure, the Netherlands may request that it be included in Annex A EIR. In any case, the WHOA also present flexible and complex procedural mechanisms, in compliance with the Insolvency Directive, considering inter alia that cram-down and cross class cram-down are possible. In particular, it is provided, as regards cross class cram down, that the Court may approve the plan even when not all classes have voted in favour (Art 384), provided that the conditions for cram down are met, the plan has been approved by at least one class of creditors other than a class of equity holders and that it respects the absolute priority rule. See K. Durlinger, '*The Netherlands – Wet HomologatieOnderhandsAkkoord*' *Norton Rose Fullbright*, available at https://tinyurl.com/2tv4a7v5 (last visited 31 December 2022).

[78] This is indeed a restructuring instrument that can also be used by non-Dutch debtors, who can apply for approval of the plan by the Dutch courts (irrespective of the COMI) provided that there is a sufficiently close connection.

[79] See L. Panzani, 'La composizione negoziata alla luce della Direttiva Insolvency' *Ristruturazioni Aziendali*, 31 January 2022, 1-20, quoting *Ordonnance no 2021-1193 du 15 Septembre 2021 portant modification du libre VI du code de commerce.* For further references to the more limited French intervention compared to other systems such as Germany, who created by the *StaRUG* a '*brand new standalone and very detailed restructuring procedure, containing no less than 102 paragraphs*' see R. Dammann, 'The transposition of the EU Directive: A great Franco-German convergence' *Eurofenix,* Winter 2021/2022, 20, noting also the importance of the respective different starting points.

[80] On these measures, some of which are of more limited duration, as in the case of the

Within this framework, Italy has distinguished by a counter-trend approach, repeatedly postponing the entry into force of the already promulgated CCI. Less than a month before its lastly provided entry into force – which should have fallen on 1 September 2021 – the Council of Ministers approved a 'draft Decree Law containing urgent measures on business crisis and corporate rehabilitation, as well as further urgent measures on justice'. Arts 1 and 1-*bis* of the new decreto legge 118/2021, have thus provided for the extension of the entry into force of the Code of Crisis and Insolvency ('CCI') to 16 May 2022 – finally postponed to 15July 2022[81] while, as regards Title II (whose rules on the 'procedura di allerta' represented the most relevant and expected novelty), the enforcement had been originally postponed until 31 December 2023 and then finally revoked.

This extension, at the time of the so-called Liquidity Decree, found reasons – in combination with each other – both of a practical nature (for the containment of the pandemic, since it was a procedure that implied organizational meetings and the involvement of various personalities, even third parties with respect to creditors and debtors, within the relevant Chambers of Commerce) and of a regulatory and managerial one, in that the number of companies in such a financial situation as to require the initiation of such procedures would have been (by virtue of the applicable economic indicators)[82] too high, when on the contrary the alert procedure had been designed to operate in a economic and financial stable situation.[83]

At a later stage, following the new and diversified assisted negotiation ('composizione negoziata' – introduced by the same decreto legge 118/2021 also to comply with the Insolvency Directive terms), it was pointed out that the further posticipation also depended on a more acquired distrust at a theoretical and general level regarding the structure of the alert procedure contemplated by Arts 12 et seq of the ICC.

possibility of applying for the opening of an accelerated safeguard or accelerated financial safeguard procedure (specific insolvency proceedings) for any business which so requests, notwithstanding the required thresholds for recourse to such a procedure, considering that this measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive, and no later than 17 July 2021, see C. Texier and M. Abdelouahab, 'French Report, An International Guide to Chances in Insolvency Law in response to Covid 19' *www.dlapiper.com*, 11.

[81] It was so provided by the latest decree for the approval of the PNRR on 13 April by the Council of Ministers. The final version of the CCI has been published in the Gazzetta Ufficiale 1 July 2022 no 152.

[82] Some criticism of the economic criteria are expressed by A. Quagli, 'Sulla necessaria rimodulazione nel codice della crisi degli indicatori e indici della crisi' *Ristrutturazioni Aziendali,* 28 August 2021, 1-13.

[83] It should be noted, thus, that in 2020 the number of insolvent business was (quite unexptectedly) lesser than 2019, and this trend has been confirmed also in 2021 (while the 'emergency legislation' measured had substantially expired). A deep survey conducted by T. Orlando and G. Rodano, 'L'impatto del Covid-19 sui fallimenti e le uscite dal mercato delle imprese' *Banca d'Italia*, 24 January 2022, 1-8.

Actually, the new procedure has a clear change of tendency comparing with the previously provided regulatory framework set out in Arts 12 et seq of the CCI regarding the 'alert procedure', which can be succinctly translated into a higher level of 'extrajudicialism, confidentiality and voluntariness',[84] that has been welcomed by most experts in the practical field and academics[85], although there has been no lack of criticism or remarks also about the latest legislative innovation.[86]

A general point to be highlighted within this framework is that:

i. the aspects of time-scheduling, on the one hand, and primarily, the deadline for implementation of the Insolvency Directive (17 July 2022) together with the deferral of the alert proceeding ('composizione assistita' under arts 12 ey seq CCI) to 31 December 2023,[87] suggested the legislator' will to base the main insolvency reform at a general level on the 'composizione negoziata' of decreto legge no 118/2021, which marks an important 'change of pace' in the identification of the new model of early warning tools, more in line with the

[84] See S. Ambrosini, 'La nuova composizione negoziata della crisi: caratteri e presupposti' *IlCaso*, 23 August 2021.

[85] Positive assessments are expressed, among others, see L. Panzani, 'Il D.L. "Pagni" ovvero la lezione (positiva) del covid' *Ildirittodellacrisi.it*, 25 August 2021, 1-62; M. Fabiani, 'La proposta della Commissione Pagni all'esame del Governo: valori, obiettivi, strumenti' *Ildirittodellacrisi.it,* 2 August 2021, 1-6*;* M. Arato, n 14 above, who adds that 'certainly the negotiated settlement of the crisis will be a very effective tool for the restructuring of housing', that 'it is peculiar that in times of crisis the bankruptcy rules become more 'flexible (just think of the reforms of 2010 and 2012 post-Lehman crisis [...] while in times of economic recovery they return to rigidity (think of the 2015 d.l. that marked the beginning of the pendulum swing towards a tightening of the rules as it introduced a minimum percentage of payment in the liquidation arrangement and the return of the silent-refusal of creditors [...])' and that this 'is an irrational and not shareable attitude'. Among the pivotal points of assisted negotiation it should be noted that (i) it is an out-of-court procedure offered to debtors in crisis or insolvency provided that the latter is irreversible, (ii) it leaves ordinary and extraordinary management in the hands of the entrepreneur, (iii) it provides for the figure of an expert mediator appointed by a commission composed of third parties (iv) can be concluded with an agreement with creditors ensuring rewarding measures, or with one of the instruments already offered by the regulation, or even lead to a 'simplified arrangement', (v) allows a protective umbrella of up to eight months in order to facilitate the reaching of agreements.

[86] See, with several critical points of reflection, D. Galletti, 'È arrivato il venticello della controriforma? Così è se vi pare' *Ilfallimentarista.it*, 27 July 2021; F. Lamanna, 'Nuove misure sulla crisi d'impresa del D.L. 118/2021: Penelope disfa il Codice della crisi recitando il "de profundis" per il sistema dell'allerta'*Ilfallimentarista.it*, 25 August 2021; to some extent also S. Leuzzi, 'Una rapida lettura dello schema di DL recante misure urgenti in materia di crisi d'impresa e di risanamento aziendale'*Dirittodellacrisi,* 5 August 2021,1, 3.

[87] Originally, some Authors assumed (without regret) that this further deferral of the alert procedure may lead to a new formulation of the relative sets of rules or even a withdrawal of such mechanism. See S. Ambrosini, 'Il (doppio) rinvio del CCI: quando si scrive "differimento" e si legge "ripensamento"'*Ristrutturazioni aziendali,* 22 September 2021, 1-10. This approach has been thus definitively confirmed as a result of the so-called Insolvency Decree (decreto legislativo 17 June 2022 no 83), which effectively has recently suppressed the intertemporal discipline relating to the alert procedure, which therefore, as will also be seen below, has been definitively removed from the structure of the Crisis Code.

spirit and the theoretical approaches adopted with these regards by the Insolvency Directive;[88]

ii. on the other hand, there may be marginal aspects of incomplete compliance with the European regulatory framework, as pointed out by the same supporters of the new form of 'composizione negoziata',[89] which will lead to some further intervention in the general regulatory framework.

These arguments reflect the lack of nerve by the legislator, who missed to preserve a text on which there had been a great work and a deep discussion (ie the 'alert procedure' referred in the CCI). From a more practical point of view, they highlight some probable inefficiencies of the new legal regime,[90] because a

[88] See M. Pirollo, 'La nuova riforma del Codice della Crisi d'impresa all'insegna della Direttiva Insolvency' *Dirittobancario.it,* 22 March 2022; V. Minervini, n 16 above, 2, noting that decreto legge 118/2021 does indeed mark an important 'change of pace' and that despite the technical form of the emergency intervention... the negotiated settlement seems to be solidly based on the doctrinal approaches established before the pandemic and which, at European Union level, had culminated in the Insolvency Directive. Accordingly, P. Vella, 'La spinta innovativa dei quadri di ristrutturazione preventiva europei sull'istituto del concordato preventivo in continuità aziendale' *Ristrutturazioni Aziendali*, 1 January 2022, 1-31, points out that the three pillars on which the Directive bases the preventive restructuring frameworks are (i) the preservation of the entrepreneurial activity, (ii) the efficiency of the procedure, aimed at reducing issues and costs and requiring a specialization of the judicial authority and professionals, (iii) the dialogue between all interested parties during the negotiations.

[89] See L. Panzani, n 79 above, noting, *inter alia*, that (i) the Directive provides for wide-ranging rules, the system of which is largely contained and implemented by decreto legge no. 118/2021 (slightly amended by legge di conversion 21 October 2021 no 147), but (ii) in any event, in the case of the 'negotiated settlement' (composizione negoziata), there is no restructuring plan at the time when the debtor/enterprise applies for access to the procedure, which is slightly at variance with the Directive, nor is there any real intervention by the judge in questioning and verifying that the plan meets certain conditions, nor any vote by the creditors. However, the Author suggests a reading according to which not necessarily all the measures and instruments of the directive must be present in a single procedure, but that these, where indicated as mandatory, may be simply inside in the national legislation of a Member State and not necessarily in one single procedure, provided that they can be found as a 'general framework' within that State insolvency legal system. This approach is followed also by P. Vella, 'I quadri di ristrutturazione preventiva nella Direttiva UE 1023/2019' *Il Fallimento e le altre procedure concorsuali,* 1489, 1489 (2021). See also F. Minervini, n 16 above, 3, who exalts the change of culture of d.l. 118/2021, which is therefore placed in a long-term perspective, and outlines its attitude to 'inform' the law to come ('il diritto che verrà'). Moreover, the Author underlines that the Report to the said decreto encompasses the need to fully implement the Insolvency Directive and (i) sees in its path the 'composizione negoziata' (effective also in a period of emergency crisis), but (ii) will also require further 'additions' to the provisions of the CCI.

See also P. Liccardo, 'Neoliberismo concorsuale e le svalutazioni competitive: il mercato delle regole'*Giustiziainsieme.com*, 07 September 2021, who critically points out that 'the simplification introduced constitutes a fragile mirage of the legislator of the urgency and that any legitimising reference to the Community provisions of EU Directive 2019/1023 is substantially betrayed by a rewriting in terms of value of the institutional spaces hitherto reserved also by the CCII to the articulations of competition law, both in the negotiated phase and in the more strictly procedural phase'.

[90] It is often highlighted, for example, that decreto legge 118/2021 has strengthened and made a form of liquidation 'concordato preventivo' more flexible and simplified, whereas in the CCI, in continuity with the past, there is still a tendency to marginalize such kind of proceedings.

shorter *vacatio legis* compared to that originally predicted will not allow for *ex-ante* solution settlement, but only in the course of practical-operational experience.

Regardless of the albeit numerous elements of perfectibility,[91] the confidence in this new procedure is progressively gaining ground, thus also favouring comparative reflections in relation to this new legislation, both (i) with systems (such as the French one) in respect of which traditional continuity has been maintained with respect to the recent past[92], and (ii) with systems in which respect the profiles of assonance are certainly more random and unexpected.[93]

In this regard, it is sufficient to consider that, compared to an initial period of impasse, just a few months after its debut, there has been an exponential increase in the number of companies embarking on this new voluntary and out-of-court reorganisation process,[94] whose full assessment will only be possible after the initial running-in period, when standards and best practices will consolidate.

V. Final Remarks and New Perspectives of Harmonisation

The result of this comparative examination, in line with the evidence shown in other recent articles, is that the pandemic crisis and the emergency legislation has created in bankruptcy law a further opportunity for confrontation and a push towards harmonisation, moreover, re-evaluating a different line of path from the current one. As correctly pointed out, the COVID-19 pandemic revealed that top-down harmonization process of insolvency law, that has been

For further references, see *ex multis* P. Vella, n 88 above, 11.

[91] Some Authors have pointed out that some innovation of the decreto legge 118/2021, as the 'concordato sempificato' may be used as a strategic and opportunistic alternative to other liquidation proceedings and may be also unfittable with other articles of the CCI. See P. F. Censoni, 'Il concordato "semplificato": un istituto enigmatico' *Ristrutturazioni Aziendali*, 22 February 2022, 1-23.

[92] See M. Arato, n 14 above, noting that the procedure introduced by Decree-Law 118/2021 was inspired by the French experience of the *conciliateur judiciaire* under Article 611-4 Code de Commerce (introduced about 10 years ago and amended on 15 September 2021 by *Ordonnance* 2021/1193), which is producing good results but which is not allowed in France for companies being in *cessation de paiements* for more than 45 days.

[93] See S. Pacchi, n 18 above, 6, which refers in particular to the recent interventions of the Colombian legislator since Decree 560/2020 (Decreto Ley 560/2020 'Por el cual se adopta nmedidas transitorias especiales en materia de procesos de insolvencia, en el marco del Estado de Emergencia, Social y Ecológica', available at https://tinyurl.com/yx32azaj (last visited 31 December 2022)) and notes that 'the objectives of the new decree coincide in several respects with those of the Colombian legislator: flexibility, negotiability, cost reduction, use of mediation/facilitation, assistance of the Chambers of Commerce, limited intervention of the judge, abolition of the authorization regime'.

[94] Some positive data are collected: see V. Magione and B.L. Mazzei, 'Composizione negoziata, I bilanci spingeranno le istanze' *Il Sole 24 Ore,* 14 February 2022; Id, 'Crisi d'impresa, la via e i primi percorsi volontari per il salvataggio' *Il Sole 24 Ore*, 14 February 2022, according to whom, at the date of 10 February 2022, there were about 800 'experts' (a key role for the practical ongong of the proceeding) already registered and an increasing number of filing (about 80).

a top priority on the European institutions' agenda in the last decade – reaching its peak with the 2019 Insolvency Directive – has been temporarily halted.[95]

Conversely, the measures that have been urgently implemented to mitigate the financial effects of the pandemic, although largely uncoordinated, showed a phenomenon of bottom-up harmonisation, based on the common normative substratum, at the level of general approach and of concrete solutions in the European jurisdictions.

On the other hand, it has become clear that the regulation of business crises is inseparable from the regulatory framework involving other fundamental subject of corporate governance, including, in particular, the regulation of companies' capital and that of the liability of directors and other corporate bodies.

Moreover, even in an emergency phase harmonisation appears useful and functional, in order to assess both in the immediate present and in an *ex post* perspective, the efficiency of individual regulations and solutions in order (i) to update and perfect them and (ii) to have an arsenal ready to be used when it will be necessary, so that it can be compliant with fundamental criteria and parameters even in a physiological economic period, such as the guarantee of competitiveness for companies that can actually be restored and are therefore economically deserving.

With these regards, the statement according to which 'although lack of systematic structure', in this pandemic period, a 'convergence of goals and means' was achieved, is effective and real.[96]

Thus, assuming that this process has been on a bottom-up basis, it can be shared the perspective of those Authors who, from the national legislative experience (at first immediate and confused and then reasoned and 'archived'), that has characterized bankruptcy law in the pandemic emergency, identify or hope for a further/similar change of approach at European level.[97]

After all, a harmonization that proceeds through a different mode of intervention (top-down) inevitably risks imposing a timid or minimalist approach, unable to intervene on many sensitive and substantial aspects of insolvency law.[98]

Indeed, and not only at the EU level, from several decades this process of approximation and harmonisation of regulations has seen at first a spontaneous– and meditated, long and thoughtful – circulation of models and rules between

[95] See E. Ghio et al, n 17 above, 1.

[96] S. Madaus and F. J. Arias,n 7 above, 320.

[97] See E. Ghio et al, n 17 above, 6. On necessary partiality and other criticality of harmonisation initiatives, more generally, see R. Bork, 'Preventive Restructuriong Frameworks: A 'Comedy of Errors' or 'All's Well That Ends Well?' ' 14 (6) *International Corporate Rescue,* 417, 417 (2017); H. Eidenmueller, 'Contraxcting for a European Insolvency Regime' 18 *European Business Organization Law Review,* 273, 273 (2017).

[98] In these terms, referring to the approach and boundaries of the Insolvency Directive, see L. Panzani, n 85 above.

countries, some of which have been more receptive and others more exporters.[99]

In a more recent stage, the promotion of European integration has been covered mainly via EU-driven initiatives (that is 'top-down harmonisation').

This choice, based on solid research plans and studies,[100] has occurred however (i) at first according to a soft law approach (see the 2014/135/EU Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency),[101] in the wake of other international experiences,where initiatives of harmonization are mainly carried out through model laws,[102] and (ii) only recently with a more invasive and binding approach, although the Directive instrument has established 'minimum standards', both

[99] A traditional example of template circulation is represented by US Bankruptcy Code 1978, and, in particular, Chapter 11 proceedings, that spread through various insolvency proceedings with some different characters, as for the best interest of creditors test and cram down rule (for examples within the Italian 'concordato preventivo', evidently inspired to the US experience, or the similar German institute of Obstruktionverbot adopted by § 245 of Insolvenzordnung, see L. Stanghellini, *Le crisi di impresa fra diritto ed economia* (Bologna: il Mulino, 2007), 228, also recalling art 48 of *Ley de concursos y quiebras* n. 24.522 of 20 July 195, providing for a similar mechanism. See also, with these regards, C. Ferri, 'L'esperienza del Chapter 11. Procedura di riorganizzazione dell'impresa in prospettiva di novità legislative' *Giurisprudenza Commerciale,* I, 65, 65 (2002); V. Confortini, 'Between strategic use and abuse of insolvency law: shareholders' rights and corporate reorganisations under German "insolvenzordnung" and Italian insolvency law' *Jus civile,* VII, 14, 14 (2015); F. Di Marzio, *Autonomia negoziale e crisi d'impresa* (Milano: Giuffré, 2010), 75. More recently, the debt restructuring agreements (art 182-*bis* IL) introduced in 2005 into the Italian bankruptcy system have also inspired foreign legislators, as in the case of the acuerdos de refinanciacion in Spain. See B. Quatraro and B. Burchi, 'Gli istituti di composizione della crisi d'impresa in alcune legislazioni straniere' *Il Nuovo Diritto delle Società,* XIX, 7, 7 (2016); J. Pulgar Ezquerra, ' "Holdout" degli azionisti, ristrutturazione di impresa e dovere di fedeltà del socio' *Il Diritto Fallimentare e delle società,* I, 13, 13 (2018).

[100] Regarding these initiatives, as COM(2007)584 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Overcoming the stigma of business failure — For a second chance policy — Implementing the Lisbon Partnership for Growth and Jobs; and Report of 17 October 2011 on recommendations to the Commission on insolvency proceedings in the context of EU company law, '011/2006(INI)', seeG. Nuzzo, 'Il debito e la storia: dalla colpa alla fisiologia dell'insolvenza' *Rivista del Diritto Commerciale e del diritto generale delle obbligazioni,* I, 89, 89 (2017); P. De Cesari and G. Montella, 'La proposta della Commissione UE in tema di ristrutturazione preventiva delle imprese in crisi' *Il Fallimento e le altre procedure concorsuali,* XI, 1151, 1151 (2017).

[101] See *ex multis* S. Pacchi, 'La Raccomandazione della Commissione UE su un nuovo approccio all'insolvenza anche alla luce di una prima lettura del Regolamento UE n. 848/2015 sulle procedure d'insolvenza' *Fallimentiesocieta.it,* 27 July 2015, 1-34; G. Corno, 'La disciplina delle ristrutturazioni preventive delle (piccole e medie) imprese in crisi. Il contributo della raccomandazione della Commissione Europea in data 12 marzo 2014' *Il Nuovo Diritto delle Società,* VII, 156, 156 (2015); and, more generally, B. Wessels, 'Europe deserves a new approach to insolvency proceedings' 4 (6) *European Company Law*, 253, 253 (2007).

[102] With regard to various international and supra-State initiatives and, in particular, Uncitral initiatives, as the Model law on Cross-border Insolvency 2007 and further developments, see A. Mazzoni, 'Osservazioni in tema di gruppo transnazionale insolvente' *Rivista di diritto societario,* IV, 2, 2 (2007); G. Mazzei, 'Il nuovo Codice della crisi d'impresa e dell'insolvenza: la continuità aziendale tra legislazione europea e nazionale' 2 *Amministrativ@mente,* 99-110 (2019).

for preventive restructuring procedures for debtors in financial difficulty and for procedures leading to discharge of debts.[103]

The recent experience marked with the pandemic emergency trace a further change of approach and represents a thoughtful synthesis of the previous ones, in any case reassessing the importance of bottom-up harmonisation, via Member States-driven initiatives. This new approach may in fact avoid or limit the negative aspects that are often associated with a hetero-imposed approach, that inevitably narrows the scope and sphere of application, sometimes resulting in programmatic guidelines whose implementation on a national basis still leaves clear differences in the law of each Member State.

Therefore, the lesson that can be drawn within the European framework is that these processes of investigation and self-induced harmonisation have direct effects and shall be adopted as a model also in a phase of economic and financial stability, leading to a reduction of risks and inefficiencies related to the distance still discernible today within the national bankruptcy regimes on fundamental aspects, such as grading of secured creditors, treatment of new-financing, directors duties in the twilight of insolvency, claw back regimes and avoidance actions, etc.

Undoubtedly, uniform provisions at European level represent an incentive for the investments to cross-border level and further step in the operation of the Capital Markets Union, promoting an entrepreneurial spirit and locally affecting certainty and functioning of insolvency frameworks.[104]

This trend already seems to have finally played influence role on the European agenda, recently embarked in a greater synergy and integration between processes of harmonisation at different level, such as in the initiative '*enhancing the convergence of insolvency laws*',[105] launched by the European Commission at the end of 2020 and whose consultation level recently concluded, where even before the type of regulatory text to be adopted (in the awareness of the constant tension between hard and soft law) reflection and investigation dwells on the relevant issues of substantial bankruptcy law, already mentioned above, that

[103] In particular, the minimum standard established by Insolvency Directive, as summarized above, formally relates to: (i) preventive restructuring procedures available for debtors in financial difficulty, when there is a likelihood of insolvency; (ii) procedures leading to a discharge of debts incurred by over-indebted entrepreneurs and allowing them to take up a new activity, (iii) targeted rules on increasing the efficiency of all types of insolvency procedures, including liquidation procedures.

[104] See D. Valiante, 'Harmonising insolvency laws in the Euro Area: rationale, stock-taking and challenges. What role for the Eurogroup?'*Study of the European Parliament*, July 2016, pointing out the four distinct areas where harmonising national insolvency frameworks can improve the functioning of the single market and stability of the Euro area: early restructuring businesses, bank resolution, cross-border insolvency and NPL management. Each of these aspects rely on common features of local insolvency frameworks.

[105] 'Inception Impact Assesment Enhancing the convergence of insolvency laws' *European Commission*, 11 November 2020, expressly encompassing among the target audience 'everyone who might be affected by insolvency proceedings, whatever role they may play in them'.

need effective and readily convergence at EU level.[106]

These goals, indeed, may be achieved only with a common reference and large basis of investigation, overcoming preconceptions and resistance that can arise while adopting a rigid top-down approach, meanwhile allowing local experience, practice and standards to represent important tool in the harmonisation process.

[106] Comments, opinion and papers have been provided indeed at every level, form Ministerial to law firms, sources of legal and law formation and practice, on the assumption that EU Directive did not harmonise core aspects of substantive insolvency law, such as the following endorsed areas: common definition of insolvency, the conditions for opening insolvency proceedings, the ranking of claims, avoidance actions, the identification and tracing of assets belonging to the insolvency estate. On the European Commission, Inception Impact Assessment, '*Enhancing the convergence of insolvency laws*', ibid, see R. Ghio, n 17 above, 13.