The EU Restructuring Directive 2019/1023: Implications for Member States

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This thesis is submitted to fulfil the requirements of the degree of Doctor of Philosophy.

Declaration

I declare that this thesis is my own work and has not been submitted in substantiallythe same form for the award of a higher degree elsewhere.

Luca Simonetti

To my father Antonio,

with immense love.

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Finally, I thank myself, because despite everything this goal has also been achieved!

I dedicate this thesis to my dad, by my side every day as if we had never left each other!

Abstract

Title: **The EU Restructuring Directive 2019/1023: Implications for Member States**

By Luca Simonetti

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The EU Directive 1023/2019, inspired by the Chapter 11 of the US Bankruptcy Code, introduced a set of principles rules and practices concerning a modern corporate rescue and restructuring approach that all EU Member States have transposed into their national insolvency laws. Since the EU insolvency panorama presents significant cultural differences among jurisdictions, the introduction of preventive restructuring frameworks has contributed to the pursuit of the Directive's goal of improving the functioning of the internal market and facilitating the exercise of fundamental freedoms.

This study analyses the discipline of the Directive and its impact on the national insolvency laws of Germany, France, Spain, Italy and the UK. Despite the peculiarities that distinguish each of the jurisdictions investigated, the study highlighted how the reforms on corporate restructuring have succeeded in achieving a good level of harmonisation of European insolvency law. The rescue of the company as a going concern that remains in the entrepreneur's managerial control (debtor-in-possession principle), the introduction of a moratorium offering the debtor a 'breathing space' from the claims of creditors, early warning mechanisms to detect financial difficulties at an early stage and

the Restructuring Plan as a legal instrument encompassing the will of all actors involved in the restructuring, are today the pillars characterising the European insolvency law.

In addition, the transposition of the Directive has also balanced the protection of the creditors' interest in satisfying their claim and the debtor's interest in saving the company and having a second chance.

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Chapter 1 – Introduction

1.1 The European framework of insolvency law

In recent years, the European institutions have devoted considerable attention to the issue of harmonisation of insolvency law within the EU, attributing high priority to the interventions to be taken to this purpose. The impulse on the EU insolvency legal system has been justified by taking note of the heterogeneous conditions that have characterised national jurisdictions of the EU Member States and that have represented, and to some extent still represents, an obstacle for the economy both from the point of view of the domestic market and from the point of view of foreign investors.

In general terms, the subject of harmonisation seems to be complicated by factors often unrelated to the specific area in which the harmonisation is required, such as the protection of national sovereignty and legal cultural differences. This approach has led to a shift away from common solutions by favouring more nationalistic choices. Long before the recent measures issued by the European institutions on insolvency law, the perception of the harmonisation process was already negative.[1]

Considering this context and considering that, because of fear of social stigma and the inability to pay off debts which leads to failure, one out of two Europeans (49 %) stated that they would not start a business.[2] In order to boost entrepreneurial activity by reinforcing a uniform framework of rules within the EU, the EU Commission issued the 2014 Recommendation on a new approach to business failure and insolvency and the EU

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[1] Stephen Weatherill, 'Why Harmonise?', in Takis Tridimas and Paolisa Nebbia, *EU Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing 2004), 31.
[2] Flash Eurobarometer 354 – Report 'Entrepreneurship in the EU and beyond' (June-August 2012).

legislator enacted the Directive (EU) 1023/2019[3] (hereinafter "Directive") with the aim of 'to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications'.[4]

It should be mentioned how the aforementioned harmonisation process received a considerable boost from the Covid 19 pandemic:[5] even though the Directive had already entered into force, it should be pointed out that the economic and financial crisis due to the pandemic increased global restructuring activities by legislatures to avoid insolvency and bankruptcy of companies.[6] It should be noted how similar emergency measures to contain the virus and avoid recession have been taken by countries[7] around the world as well as in Europe. The similar actions taken by single jurisdictions to mitigate the effects of the crisis, despite not having been coordinated and agreed upon by the various countries, further have highlighted the need to have a unified legal framework of homogeneous rules shared throughout the European Union to counter future crises.

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[3] DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[4] Recital 1, Directive.

[5] Since the advent of the covid-19 pandemic, it became clear that the laws of insolvency had to be, if only temporarily, adapted to the new circumstances – Christoph G. Paulus, 'Past, present and future: The impact of the COVID-19 pandemic on restructuring and insolvency laws in Europe' [2021] Eurofenix Insol Europe 15. For the specific case of the UK jurisdiction, see John Wood 'Corporate Rescue Reanimated' [2025] Journal of Business Law 1.

[6] Andreas Rauch, 'An Innovative Framework: Evaluating the New German Business Stabilization and Restructuring Law (StaRUG)' [2022] Northwestern Journal of International Law & Business 93 – 121.

[7] The circumstance that most countries have adopted similar emergency measures has been defined as "copycat coronavirus policies" – Ivan Krastev, 'Copycat Coronavirus Policies Will Soon Come To An End' (2020) Financial Times <https://www.ft.com/content/bd12b3ca-77e9-11ea-bd25-7fd923850377 accessed 10 August 2024.

1.2 Research questions and research methods of the project

The main **research question** of this thesis concerns the suitability of the Directive to provide sufficient tools for the effective promotion of corporate restructuring at an early stage of companies in financial distress.

Through the analysis of the insolvency law reforms in those EU Member States observed in this study, it is possible to highlight how, despite the peculiarities and cultural, social and legal differences that characterise each individual jurisdiction, the management and early intervention in business crises now appears much more homogeneous and uniform within the European Union.

The implementation of the Directive has allowed a rethinking of the previous paradigms that in some cases, as in the UK and Italy, rewarded the interests of creditors over those of debtors or, on the contrary, in other cases such as France, debtors received stronger protection than creditors: the introduction of the remedies contemplated by the Directive has resulted in a balancing of the opposing interests of the parties involved in the hypothesis of companies in distress.

With regard to the **methods of the research**, this research made use of the comparative method and the doctrinal method.

The **comparative method** adopted for this piece of work on the insolvency law in the five chosen jurisdictions (UK, Italy, Germany, France and Spain) has made it possible to grasp the similarities and differences that characterise each of them. Although there are some jurisdictions, such as Ireland and the Netherlands, which, especially after the UK's exit from the European Union (Brexit) are today a point of reference in the field of cross-border corporate restructuring, this thesis, in addition to Italy and the UK, has selected the following EU Member States: Germany, France, and Spain. The reason for this choice is based not only on their geographical proximity to Italy, but mainly on the fact that all their legal systems have been strongly influenced by the Roman law. This has led to the presence of common principles that make these jurisdictions particularly interesting for a comparative analysis.

Since the law is influenced and closely linked to the culture of the place (country) where it is formulated and since most rules adopted by one jurisdiction influence the legal systems of other countries[8] (which is the reason why they are also found, albeit in alternative forms, in different legal regimes) this research considers not only the laws and disciplines from a strictly legal point of view, but also the historical and cultural context of the various countries observed. Thus, by means of the comparative method, the present work attempted to achieve a 'high level of abstraction' in order to more effectively address the interpretative difficulties caused by the divergences and affinities between the compared legal systems.[9] Through this approach, in certain cases it has been possible to trace and understand the origins and reasons why, especially before the reforms brought about by the Directive, some jurisdictions had adopted certain rules: this is the case of Italy, which historically and culturally considered the debtor as a delinquent, with the consequence of having adopted a legal system penalising the debtor and favourable to creditors.

After the transposition of the Directive, each EU Member States introduced, in a different manner, those common principles and tools that have narrowed the distances between one discipline and another, thus determining a uniform European Framework.

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[8] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, The University of Georgia Press 1993) 107.

[9] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices ' in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 3.

The use of the **doctrinal method** made it possible, firstly, to correctly identify the international (EU directives, regulations and recommendations) and national (primary and secondary) sources of law relating to insolvency area and, secondly, to analyse and interpret them. In detail, the international legal sources mainly concerned the European ones and, among them, the analysis focused on the discipline contained in the Directive and the acts that preceded it, such as the 2014 EU Recommendation and the Proposal for a Directive. Among the national primary sources, the statutes, codes, laws and jurisprudence of the five chosen EU Member States were logically observed both before and after the transposition of the Directive. Secondary sources may be identified in books and legal articles published in scientific journals.

After the first stage of selecting the legislative sources, during the analysis and interpretation of the principles and rules, the utmost attention was paid to make the interpretative result achieved as clear as possible to the outside world.[10]

The comparative method facilitated this approach by allowing, through the comparison of different national disciplines, the most accurate interpretation possible. The principles of the Directive were modulated and contextualised by each EU Member State, taking into account its own specific regulatory context in which the new rules were inserted, and the cross-comparison of national disciplines made it possible to grasp the underlying functioning and logic.

Bearing these considerations in mind, the fact that all of the analysed and compared jurisdictions, with the exception of the UK, were civil law facilitated the doctrinal

[10] It has been correctly argued that the outward comprehensibility of the interpretation is the most complex phase for the researcher – Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin Law Review, Vol 17, 111 – 112.

research in respecting certain significant considerations elaborated by the doctrine,[11] such as the choice of sources from authors selected on the basis of experience and authority, by considering their established prestige and reliability in the field of the insolvency law, or the awareness that the law is a coherent network of principles, rules and exceptions and that the different levels must always be considered as a whole.[12]

1.3 Objective and contribution of the research

The aim of this study is to provide an up-to-date overview of restructuring and insolvency law as it stands today following the full transposition of the Directive, taking specific European jurisdictions as reference.

Thus, this research offers an accurate description of the modern insolvency law as supplemented by European principles and remedies: it emerges that nowadays corporate crisis management, regardless of the country where the event occurs, follows the same rules and guarantees the same results.

With the entry into force of the Directive, this study addressed, in comparative terms, the issue of the uniformity of insolvency law in the four selected EU countries, by also considering the 'state of the art' of UK insolvency law as a non-EU country. The advantages that derive from the aforementioned insights may be identified, on the one hand, in the knowledge that, albeit with due differences, all the national legal systems analysed guarantee effective restructuring of companies in crisis and, on the other hand, through the knowledge of the specific legal tools provided in each jurisdiction that may be chosen as the most appropriate remedy for that concrete case.

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[11] Rob van Gestel and Hans W. Micklitz, 'Revitalizing doctrinal legal research in Europe: What about methodology?' [2011] European university Institute, Law 2011/05, 26.
[12] Aleksander Peczenik, 'A Theory of Legal Doctrine' [2002] Ratio Juris 82.

With regard to the first aspect, what emerged from this research is the overcoming, thanks to the transposition of the Directive's discipline, of the previous insolvency regimes oriented to favour either the debtor (pro-debtor or debtor-friendly) or the creditors (pro-creditor or creditor-friendly). With the Directive has been overcome one of the aspects that most determined the heterogeneous contest between EU countries: in a debtor-oriented regime the prospects and opportunities for rescuing the debtor company were greater than in a creditor-oriented regime in which, on the contrary, the prospects for rescuing the company were lower.[13]

As far as the choice of the remedy is concerned, it has been repeatedly emphasised how is crucial, for the success of the rescue and restructuring attempt, both to intervene at the right time and to identify the most pertinent legal tool to manage that specific condition of distress affecting the company.

Therefore, this study may represent a valuable support for a wide audience dealing with corporate restructuring operations: for instance, consider the academic community, the world of professionals (lawyers, accountants), the banking sector (and thus the banks) and the legislators of the analysed countries.

1.4 The thesis structure

The thesis contains seven chapters. After the present introduction, in the second chapter the characteristics of the concepts underlying insolvency matters such as rescue, restructuring, crisis and insolvency will be faced. The terminological analysis allows the

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[13] Ron W. Harmer, 'Comparison of Trends In National Law: The Pacific Rim' [1997] Brooklyn Journal of International Law 147.

correct delineation of the scope of the Directive's intervention, which deal with the first signs of company difficulties.

Chapter 3 will describe the European legislative process and the main measures that led to the Directive, including mainly the discipline of the 2014 EU Recommendation and the Proposal for a Directive.

Chapter 4 will analyse the discipline of the Directive, highlighting its structure and the main legal remedies such as the Early Warning Tools, the various tools that make up the Preventive Restructuring Frameworks and the rules of New Financing and the Discharge of Debt and Disqualification.

Chapter 5 will contain a focus on the Italian jurisdiction which implemented the new Code of the Business Crisis and Insolvency (hereinafter "CCII") by reforming the previous insolvency law.

Chapter 6 will illustrate the most relevant peculiarities of the legal systems of Germany, France, Spain and the UK, introduced after the implementation of the Directive. These five countries were chosen because each of them has, *mutatis mutandis*, a rich and ancient legal tradition in insolvency law. As far as the UK is concerned, despite the fact that Brexit has removed the country from the obligation to transpose the Directive, the substantial similarity between Anglo-Saxon and European law of the Directive will be highlighted, considering that the latter was considerably influenced by the UK law during the drafting phase.

Chapter 7 concludes the thesis by providing a synopsis of the arguments addressed as well as some thoughts on whether European insolvency law may be further harmonised. In this regard a brief mention of the new 2022 Proposal for a Directive on the harmonisation of certain aspects of insolvency law will also be offered.

Chapter 2 – Why restructuring?

2.1 Introduction

This chapter seeks to trace the transition - first cultural and then legal - from a corporate crisis management through judicial liquidation aimed at eliminating the company from the market to a modern model of rescue and restructuring at an early stage that aims to preserve business continuity and the connected values.

The terminology used by the European legislator (and in general in the context of insolvency law) is even examined in depth, which is useful for correctly framing the perimeter in which the concepts of 'rescue', 'restructuring', 'crisis', 'likelihood of insolvency' and 'insolvency' operate. Effectively, the Directive's intervention affects only the debtor's difficulties related to the "crisis" and to the "likelihood of insolvency" and thus before the latter become insolvent.

Finally, the question of the choice between restructuring and liquidation is addressed.

2.2 From the liquidation approach to the rescue and restructuring culture: general considerations through the time

Over the past half century, the legislative approach to the companies in distress has undergone a progressive cultural evolution which has characterised numerous EU Member States.[14] **Rescue and restructuring strategies** are relatively modern concepts, whether compared to the ancient bankruptcy phenomenon,[15] although a logical

[14] Actually, this process also affected other countries around the world, such as Japan, Australia and Russia, but as the present study concerns the EU restructuring it is preferable to confine within the European borders.

[15] In the Roman Empire law, the *cessio bonorum* (literally 'surrender of the goods'), introduced by Giulio Cesare, was the way adopted by the debtor to avoid personal arrest by transferring his goods to his creditors. For an *escursus* on the development of the insolvency law in the Roman empire, see Alfredo Rocco, *Il*

relationship connects the former with the latter. Indeed, looking at the etymology of 'bankruptcy' emerges how its origins may be traced back to the Italian medieval word '*banca-rotta*',[16] which literally means 'broken-benches'. The sense of the expression is not only figurative since, in the past, it indicated the action – made by the merchant's creditors in the medieval age – of breaking the debtor's counter of the marketplace when he defaulted on payments.[17] Thus, for a long time, the attitude not to honour the debts (and therefore the figure of bankrupt), was seen very negatively: insolvency was considered as a repressive regime[18] in which the role of the law and institutions was to punish debtors.[19]

Several representative examples of legislative experiences in the area of insolvency deserve to be illustrated.

The French legal and social context of the Middle Ages was not propitious for debtors: into the legal relationship between these latter and their creditors were evidently unbalanced. Evidence of creditors' advantage over debtor may be observed reading the formulation of the expression contained into the ordonnance promulgated by Louis VI in the year 1134, since creditor could seize the goods of his debtors wherever he could find

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fallimento (Fratelli Bocca Editori 1917); George Joseph Bell, *Commentaries on the laws of Scotland, and on the principles of Mercantile jurisprudence* (7th edn, Alex. Lawrie & Company 1870).

16 **bancarótta** s. f. [da *banca rotta*, per l'uso medievale di rompere il banco al banchiere insolvente] <https://www.treccani.it/vocabolario/bancarotta/> accessed 1 August 2024.

17 Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997) 249; Roy Goode, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 10.

18 Paul J. Omar, 'The future of corporate rescue legislation in France: Part 1: History and reforms' [1997] ICCLR 2.

19 Benvenuto Stracca, considered as one of the first author of commercial law in the western world, confirming how bankrupts were frowned upon by the society, wrote this emblematic affirmation in his book: '*falliti sunt infames*' (bankrupts are infamous) – Benvenuto Stracca, *De mercatura seu mercatore tractatus* (Venetiis, Paolo Manuzio 1553).

For an interesting *escursus* of the debtor treatment through the centuries, see Fabrizio Di Marzio, *Fallimento - Storia di un'idea* (Giuffrè Editore, 2018).

them.[20] In addition, the creditor could take possession of the debtor's good without the intervention of the authority.[21]

In Italy, the first official legal source (statute) which mentions the rules regarding the bankruptcy, states how the debtor was arrested and his goods were confiscated and sold.[22] There was a relevant distinction between the civil debtors and the commercial ones. A great testimony may be found into the story of Giorgio Giulini who described the phenomenon of the merchants' escape: some of them took goods and stuff by forming fraudulent mortgages and going into debts, they were obliged to escape. For this reason, legislators exacerbated the consequences by provided that, every time there was suspicion of escape, the debtor could be caught.[23] However, the treatment of the civil debtors was more indulgent, being able to count on important benefits which were, by contrast, preluded for the latter.[24] Notwithstanding the softer approach to civil debtors by the law, the solemn form by which they had to confer their goods to their creditors, was barbaric: in public, they were obliged to be semi-nude, sitting on the stone properly called *lapis vituperii*.[25]

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[20] The original latin sentence is '*ubicumque et quocumque modo poterunt, tantum capiant, unde pecuniam sibi debitam integre et plenarie habeant*' – André Isambert et all, *Recueil général des anciennes lois françaises* (tome I, Janvier 1672) 152.
[21] Israel Treiman, 'Escaping the creditor in the Middle Ages' [1927] Law Quarterly Review 233.
[22] *Statuti dei giudici del Petizon*, Repubblica Veneta (1244).
[23] Giorgio Giulini, *Ragionamento sulle leggi che riguardano i falliti* (Archivio storico lombardo, Vol. III, Fasc. I, 1876) 16, <http://emeroteca.braidense.it/eva/sfoglia_articolo.php?IDTestata=26&CodScheda=113&CodVolume=766&CodFascicolo=3909&CodArticolo=60077> accessed 25 July 2024.
[24] The remedies for civil debtors granted by the law were a 3-5 year moratorium and the voluntary cession of goods. On the contrary, the merchant, as commercial debtors, were to be arrested in the hardest form – Alessandro Lattes, *Il diritto commerciale nella legislazione statutaria delle città italiane* (Hoepli 1884) 310.
[25] Giovanni Francesco Pagnini, *Della decima e delle altre gravezze della moneta, e della mercatura de' fiorentini fino al secolo XVI* (II, Giuseppe Bouchard Librajo in Firenze Editore 1765) 13, <https://books.google.it/books?redir_esc=y&hl=it&id=gIg8bpvnC8IC&q=lapis+vituperii#v=onepage&q=lapis%20vituperii&f=false> accessed 22 July 2024. Another interesting example of the aversion to the bankrupts by common people, is testified in the book of Placido Bucolo, who described that in Biancavilla (Sicily, Italy) the debtors who could not or would not pay, were forced to drop their trousers in public and beat the buttocks on a stone for three times. The surprising thing is that the described fact dates back to the first decades of the last century – Placido Bucolo, *Storia di Biancavilla* (Arti grafiche 1953) 151.

In 1800s, France and Italy shared a notable slice of their insolvency regulation since the influence of the 1807 *Code Napoleon* on the first Italian 1865 *Codice di commercio* (commercial code) characterised the latter discipline. To be specific, the Italian legislation was clearly influenced by the French Napoleonic Code: the mentioned Italian Commercial Code of 1865 and the following reformed Code of 1885,[26] contemplated part of the original principles of the Code Napoleon since the clear intention of Napoleon, after being crowned king of the Kingdom of Italy in 1805, was to unify Italy with France both politically and legislatively.

In Spain, the famous 'Siete Partidas', a codification published by authority of Don Alfonso X the Wise, king of Castile and Leon, during the second half of the 13th century, contained detailed provisions relating to insolvent debtors.[27] Around the concept of 'Bancarrota' (bankruptcy), remarkable appears the evidence of the magistrate Joaquin Escriche in the 1863 dictionary,[28] in which is confirmed both how the remedy was punitive and how the people's cultural perception of debtors was hostile in that period. Indeed, on the one hand it qualifies the word as hateful, describing how its origin is to be traced back to the Italian Genoese merchants who traded in the main European markets, such as the famous 'Medina del Campo' situated in the centre of Castilla and, on the other hand, it offers a clear distinction between the '*quiebra*', which was used to express the

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[26] At the end of the France domination, the first codification, which gathered all the laws, was the 'Codice del Commercio 1865'. With reference to the next 1885 Commercial Code, it was the result of a revisitation of the previous one: notably, the Italian legislator introduced the discipline of bankruptcy in the 1885 version – Ercole Vidari, *Corso di diritto commerciale* (4th edn, Hoepli 1897) 98 – 100.

[27] To be specific, the Siete Partidas contained provisions for voluntary liquidation proceedings applicable to all classes of debtors and on that basis the Spanish jurist Salgado de Somoza elaborated in his tract, entitled Labyrinthus Creditorum, detailed rules for initiation and conduct of voluntary liquidation proceedings which were styles concourse of creditors - *Encyclopaedia Britannica*, (Macropaedia, 1984) vol 2, 695.

[28] Joaquin Escriche, *Diccionario razonado de legislacion y jurisprudencia* (Libreria de Rosa y Bouret 1863) 343.

failure of honest but unlucky merchants, and the '*bancarrota*' which was the culpable failure provoked by *mala fides* (bad faith).[29]

In England, some evidence of changes of the bankruptcy perception may be found after the Statute of Henry VIII of 1543[30] which introduces for the first time the basic principle of collective property execution.[31] With the Debtors Act of 1869 the powers of courts to arrest debtors were strongly mitigated, and only the "guilty" debtors only debtors could be imprisoned.[32] Only at the beginning of the nineteenth century the evolutionary process reaches the features of the contemporary debate.

What emerges from the delineated context is the continental dimension of the bankruptcy phenomenon and its perception by the societies of the 'Old World'.[33] For this reason, by referring to the historical period, from the Roman Empire through the Middle Ages until the 1900s, the traditions and customs (before) and the more recent laws (after) related to the discipline of debtors, shared similar and homogeneous bases: the influence of the Italian merchants around Europe, gave birth to a discipline which was characterised by the common element of severity regards the treatment of debtors. The bankruptcy was full-fledged equated to a crime. Furthermore, it should be noted that the outlined scenario persisted through most of the 19th century: although social, cultural and the economic

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[29] Besides confirming the origin of the word 'bankruptcy', as it has been analysed above, this source describes how the insolvent merchants who had not paid their debts were obliged – among several punishments – to break the counter and, in front of the crowd, consuls and judges declared that they were unworthy to remain among good people.

[30] Statute of Bankrupts, 34 & 35 Henry VIII, c.4. For an analysis of the bankruptcy after the 1543 statute of Henry VIII, see W. J. Jones 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' [1979] American Philosophical Society 1– 63.

[31] Charles Jordan Tabb 'The Historical Evolution of the Bankruptcy Discharge' [1991] American Bankruptcy Law Journal Vol. 65 325 – 71.

[32] Even during the eighteenth century, innovative interrogatives enriched the debate around the opinion of bankrupts, and although no satisfactory solutions were affirmed, they considerably attributed new lifeblood to the argument: '*were bankrupts honest or dishonest? Was bankruptcy accidental or avoidable? Should bankrupts be punished or consoled, deterred or encouraged?*', reassumed Julian Hoppit in his book *Risk and Failure in English business 1700-1800* (Cambridge University Press 1987) 19.

[33] The term "Old World" refers to those countries (Africa, Asia and Europe) known before the discovery of the Americas (new world).

framework of Europe had sharply changed, debtors were still seen with prejudice.[34] A reliable response may be found looking at the description of the bankruptcy phenomenon: in earlier times the designation 'bankrupt' was frequently coupled with the imposition of penalties and loss of civil rights upon fraudulent debtors, becoming therefore associated with dishonesty.[35]

This thesis is confirmed by the fact that the insolvency panorama was mainly characterised by the predominant use of the liquidation solutions:[36] notwithstanding the (exiguous) presence of alternative legal measures, which contemplated several typical aspects of modern rescue and restructuring tools,[37] the winding up was considered the most appropriate (and still punitive) remedy to expunge the insolvent company from the market through its dissolution and the sale of its assets to satisfy creditor claims.[38]

The second half of the 20th century might be considered the period of the turnaround and this result largely reflects the innovations due to the innovative reforms implemented by several countries, such as England, Germany, France and Italy. The reformist season, in turn, may be attributed to the general and diffused transformation of the economies of the

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[34] Emblematic is the witness provided by an article written in 1938 where the author states how the popular image of bankrupt was unchanging – Israel Treiman, 'A Medieval Concept in Modern Bankruptcy Law' [1938] The Harvard Law Review Association 190.

[35] Cf *Encyclopaedia Britannica* (n. 27) 694.

[36] Bob Wessels, 'Themes of the future: rescue business and cross-border cooperation' [2014] Insolvency Intelligence 2.

[37] For instance, the Italian 'legge 21 maggio 1903' introduced for the first time three alternative legal arrangements: the *Concordato Preventivo*, the *Liquidazione Giudiziaria* and a particular type of *Moratorium*. In the UK, the 1870 Joint Stock Companies Act introduced the Scheme of Arrangement, which nowadays still represents an important rescue instrument. In German, the first insolvency regulation, the 1877 *Konkursondnung* contemplated both the *Konkursverfahren* (liquidation) and the *Zwangsvergleich* (a procedure that through a plan between debtor and creditors could avoid the sale of assets and the consequent dissolution of the company).

[38] In Italy, the abrogated 1882 *Codice di Commercio* (1882 Commercial Code), contemplated both the personal and the company liquidation. Gustavo Bonelli, one of the most influent Italian scholars and lawyers of the last century stated, in his famous comments of the Commercial Code, how bankruptcy was a serious and severe event, since the entrepreneur – although honest but unlucky – suffered a *capitis deminutio*, losing his assets, receiving a damage in the reputation and being subjected to a criminal proceeding – Gustavo Bonelli, *Del Fallimento: Commentario al Codice di Commercio* (Dottor Francesco Vallardi, Vol. III, 1923) 188.

most developed countries, reserving a central and dominant position to companies. Thus, through the centuries, the attention of the society – and hence of the law – has shifted even more from the bankrupt (debtor as person) to the enterprise failure (debtor as company).

The prolific scientific literature and acts during the 1980s and 90s, first of all the UK Cork Report,[39] demonstrates how imposing was the debate on overcoming the traditional winding-up procedures in favour of alternative legal remedies. In addition, the effect produced by the dissolution of companies liquidated, did not produce satisfactory outcomes.[40] For this reason, the soul of the reforms that affected various jurisdictions such as the UK, German, French and Spain, was oriented to offer to companies in distress other chances to preserve and valorise the remaining business value instead of the dissolution as inevitable consequence of liquidation.[41]

Relevant considerations concerning a modern and efficient insolvency system were formulated, in the UK, by the Cork Committee. The Report produced by the Cork Committee influenced, with its recommendations and principles, numerous and subsequent implementations into the insolvency law,[42] mostly towards the rescue dimension. Effectively, since the publication of the Cork Report, the process of rethinking

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[39] Report of the Review Committee on Insolvency Law and Practice, [1982] Cmnd 8558.

[40] The EU Commission states that '*when companies go into liquidation, the value of the company drops sharply and investors can expect to lose money*' – see the fact sheet of the EU Commission entitled 'Early restructuring and a second chance for entrepreneurs - A modern and streamlined approach to business insolvency' (June 2019) <https://commission.europa.eu/system/files/2019-06/factsheet_-_a_modern_and_streamlined_approach_to_business_insolvency.pdf> accessed 8 August 2024.

[41] Preserving the company business value involves notable advantages not only for the company itself but also towards other subjects which are active parts of the commercial life of enterprises. During the present analysis, this aspect will be faced again in other occasions, since it represents one of the main boosts which has led to think back the precedent insolvency system based on the liquidation, in favour of the modern scheme.

[42] To be specific, the contribution of the Cork Report on the UK insolvency law was indirectly reflected on the other international jurisdiction that took inspiration from the UK insolvency model.

the approach to be taken to companies in crisis, based on restructuring and not on liquidation of the company, has begun at the cultural level.[43]

Briefly, the Report suggested less formal procedures as alternatives to bankruptcy and liquidation proceedings, stating how a good modern insolvency law should, *inter alia*: to diagnose and treat an imminent insolvency at an early rather than a late stage; to relieve and protect where necessary the insolvent…from any harassment and undue demands by his creditors and, at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency. In addition, insolvency law should prevent conflicts between individual creditors; to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations amongst the creditors in a fair and equitable manner, returning any surplus to the debtor; to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the Country.[44]

In the same period, the French jurisdiction was invested by significant legislative reforms which introduced the rescue and restructuring paradigm. In particular, the 1984 and 1985 laws[45] pursued the objective of 'ensure the rescue of companies in difficulty by preventing them going into liquidation'.[46]

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[43] In the UK, the terminology 'rescue culture' identifies the approach, alternative to the liquidation, to contrast financial company crisis. It exploits those informal (also called no-statutory) arrangements which try to overcome the difficulties saving and preserving the company as a going concern.

[44] cf Report (n. 39) Ch 4, 54.

[45] For instance, the '*loi n. 84-148 du 1 mars 1984'* was the first law on prevention of financial distress for companies, introducing both a compromise arrangement procedure and the alert procedures. Even the '*loi n. 85-98 du 25 janvier 1985'* deserves to be mentioned: it favoured company reorganisation over the liquidation, attributing priority to the former with the option, in case of problems, of the conversion into liquidation after a period of observation.

[46] The original sentence is: '*d'assurer le sauvetage des entreprises en difficulté en leur évitant une mise en liquidation*'.

With reference to the German jurisdiction, the 1994 *Insolvenzordnung (InsO)*[47] reformed the old 1877 *Konkursordnung*, introducing an important amendment: the possibility of access to an *insolvenzplan* (insolvency plan) to preserve the business value of companies. In addition, honest debtors may entirely extinguish their passivity.

Finally, as far as the Italian insolvency innovation is concerned, in 2001 a Government Commission called 'Trevisanato' had submitted to Parliament the insolvency reform Bill (DDL 1243) attempting to introduce the early warning tools. Unfortunately, this reform never became law.

The European scenario was therefore characterised by the common exigence of several EU Member States, even though devoid of formal European project, to update their jurisdictions by equipping them with tools and procedures oriented to the rescue and restructuring approach: the new culture the acquired relevance also at the European level. The European debate around the rescue and restructuring approach and the legislative process which led to the formulation of the EU Directive 2019/1023 will be analysed in Chapter 3.

As it will be better clarified below, the existence of a uniform restructuring and insolvency framework across Europe implicates innumerable advantages. The focus on the economy undoubtedly characterises the objective of the EU legislator: [48] under the macro-economic[49] point of view, the creation of common principles and rules among the Members States means to offer, regardless the jurisdiction of provenance, similar

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[47] The reform project started at the end of the 1980s.

[48] The words used in the Recital 8 of the Directive EU 2019/1023 leave no room for other interpretations: '*a higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs*'.

[49] The Recital 1 of the Directive EU 2019/1023 states that '*the objective of this Directive is to contribute to the proper functioning of the internal market*': the internal market is composed by all Member States and thus the use of the expression 'macro-economic' is to be understood in this sense.

remedies to the companies in distress; This approach provides similar opportunities to overcome the crisis and avoid insolvency. Moreover, the European business market may become stronger, as the uncertainty of a legal context often produces mistrust among investors and entrepreneurs.[50] From a micro-economic perspective, a cutting-edge restructuring framework might guarantee the survival of companies in every EU jurisdiction, giving a second chance to the insolvent but honest entrepreneur and also offering his/her debts discharge. In addition, other relevant interests would be protected, such as the preservation of jobs as well as the losses of value for creditors.[51]

2.3 A holistic approach on the terminology

2.3.1 "Rescue" and "Restructuring"

In the previous paragraph (2.1) the origin of the bankruptcy from ancient times has been described, focusing the attention on how the figure of debtors was seen negatively and therefore how they were considered criminals, deserving to be severely punished. It has also been observed how, during many centuries in Europe, the phenomenon of the inability to pay debts underwent a positive legislative evolution, mainly with regard to a legislative point of view. In addition, from a cultural and social perspective, the same fact of not honouring debts was still seen disagreeable and insolvent debtors were still

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[50] Nowadays, the destiny of a company which is involved in an insolvency procedure may be opposite depending on the Country it is opened, significantly influencing the investors' choice concerning the Country/jurisdiction in which to do the business. Indeed, the EU legislator clarified this point very roundly into the same Directive 2019/1023: '*Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based. That uncertainty acts as a disincentive which obstructs the freedom of establishment of undertakings and the promotion of entrepreneurship and harms the proper functioning of the internal market*' (Recital 7).

[51] The Recital 16 of the EU Directive 2019/1023 asserts: 'Removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy'.

considered as delinquents. Only in the last decades the approach to the crisis has changed and the new terminology of rescue and restructuring has reached the culmination. The popularity that those terms have gained, imposes a clear identification to familiarise with their notions: lending weight to the importance of the terminology allows a clearer perception of the phenomenon, which may indeed assume multitudes of facets.

Before the illustration of the peculiarities of the two terms, it deserves to be clarified that for the purpose of the present analysis, the restructuring approach will be privileged, although either concept may well be adopted. In fact, as it will be argued below, rescue and restructuring may be considered two aspects of the same strategy: to save companies (rescue) through operations, measures and procedures (restructuring) to overcome the distress, achieve the turnaround and avoid the liquidation.

Starting from the investigation of '**restructuring**', it might be argued that the range of the concept results particularly wide. The calibrate recognition of the perimeter allows the understanding of its nature and purposes, as well as the avoidance of confusion with the other similar terms.

The 'restructuring' term suggests interesting synonyms such as 'reconstruction' and 'reorganisation',[52] highlighting the temporal and consequential liaison between 'Bankruptcy' and 'Restructuring': the broken benches of the insolvent debtor,[53] which have been broken by his creditors, may be adjusted and repaired through a restructuring operation. The evoked image of the past, if translated into a modern optics, still represents

[52] The definition of 'Reorganisation' provided by the UNCITRAL in the *Legislative Guide on insolvency law* could be perfectly applied to the restructuring concept. It is defined by letter kk) of art. 2 as '*the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern*' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> > accessed 30 March 2021.

[53] The origin of 'bankruptcy' and the laws and customs of medieval merchants have been described in paragraph 2.1 of chapter 2.

– *mutatis mutandis* – the complex interaction between creditors and debtors that becomes conflictual when the latter becomes insolvent.

The broad spectrum of the concept depends on the fact that it is not necessarily limited to the cases of companies in crisis, but also in those cases in which companies need to be reorganised.

To be specific, the reference to restructuring may be interpreted in two different dimensions: both in a broad and in a strict sense. Regarding the first hypothesis, **restructuring in *lato sensu*** may refer, as anticipated, to the corporate business reorganisation, regardless of whether the company is in financial difficulty: in this case 're-structuring' and 're-organisation' coincide.

Restructuring in *stricto sensu*, which largely represents the most common meaning,[54] is used to indicate the situation of companies in distress, and in these terms the Directive EU 2019/1023 (Restructuring Directive) qualifies the notion: **restructuring** '*means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements*'.[55] Since all the measures contemplated into the Restructuring Directive are only activated in case

[54] In fact, 'restructuring' is usually paired with 'debt', identifying itself as a measure to correct the company financial imbalances represented by debts. The two definitions provided by the Cambridge dictionary confirm the correctness of such interpretation: '*the act of organising a company, business, or system in a way to make it operate more effectively*' may be considered as restructuring in *lato senso*, whilst with the specific reference to the category-area of finance, the qualification as '*the act of arranging to make debt payments in a different way or at a later time than was originally agreed*' may be identified as restructuring in *stricto sensu* <https://dictionary.cambridge.org/dictionary/english/restructuring> > accessed 02 February 2021.

[55] Article 2 (1) of the Directive EU 2019/1023.

of financial difficulties, the exclusive reference to the interventions on the debtor's capital structure, in the cited definition, appears logic and sensible.[56]

Both the general and the specific declination in which the concept of restructuring may be identified, share the same underlying logic: through specific interventions and operations, disposed by several subjects,[57] the company is re-structured (in the sense of 'to equip with a new structure or to provide a quality structure again').[58]

With reference to the interventions and operation, the kind of approach, and thus the function of the restructuring operations, depends on the purpose that a company wants to achieve. Whether the interventions are invoked to address the crisis, the specific strategy would be drawn according to the types of troubles which affect the company, and more precisely having regard to the nature of the crisis. In case of 'financial crisis', the difficulties may be both economic and financial: in the former type, the imbalance between the assets and liabilities characterise the crisis, whilst the latter hypothesis concerns the inability to pay debts. In case of 'non-financial crisis', the problems usually derive from the organisation of the company.[59]

Indeed, it deserves to be mentioned that in numerous circumstances, the distinction between financial and economic distress may be very labile, as the characteristics of the

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[56] Effectively, no insolvency provisions are to be observed when companies '*in bonis*' decide for a restructuring or for a reorganisation.

[57] In the hypothesis of restructuring for healthy companies without financial distress, the operations are arranged by the company itself and thus by the shareholders. On the other hand, when the restructuring approach is undertaken to deal with the crisis and save the company, the options may be multiple: depending on the gravity of the circumstances, the initiative might fall on the company's directors or on the company's creditors. In the latter case, creditors might trigger collective procedures to enforce their rights. In critical situations, also the court may play an active role, both as supervisor of the fairness of the procedure and as guarantor of parties' claims.

[58] In other words, the purpose is the renovation of that precedent structure that, at least in theory, was supposed to be efficient.

[59] Alessandro Nigro and Daniele Vattermoli, *Diritto della crisi delle imprese – le procedure concorsuali* (IlMulino 2017) 21.

former often overlap with the latter.[60] In addition, it deserves to be argued how the decision to reorganise the company corporate structure may be independent of the crisis. Therefore, restructuring strategy might address financial imbalances or the company reorganisation due to other factors unrelated to the crisis, such as modification of the capital structure, or amalgamation and demerger's operations.[61]

Always in the circumstances in which a company is in trouble, the term '**rescue**', which includes several procedures and measures to avert the insolvency, is more common than restructuring. Rescue and restructuring (in *stricto sensu*), may be considered coincident and interchangeable, although the first term seems to be more connected to the procedures whereby the second is carried out.[62] In addition, rescue strategies may operate both through **informal interventions** and **formal arrangements**.[63] The international praxis usually sees the recourse to the former mechanisms when the intensity of the state of distress is not advanced: in fact, being based on private and contractual negotiations between debtor and creditors to conclude one or more agreements,[64] an informal approach offers the highest degree of freedom, flexibility and discretion to the parties involved, during the configuration of the rescue strategy.[65] Alternatively, the recourse to the formal procedures is desirable when the circumstances entail complex situations which deserve

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[60] Gerard McCormack, *Corporate rescue - an Anglo-American perspective* (Edward Elgar 2008) 9.
[61] cf Goode (n. 17) 41.
[62] In other words, it could be argued that restructuring may be seen as the modality through which the rescue strategy is realised.
[63] The conceptual definition of the rescue and restructuring mechanisms in 'informal' and 'formal' is not a universal prerogative, although this doctrinal distinction is commonly adopted in many jurisdictions. For instance, Germany (*informellen Verfahren und formelle Verfahren*), France (*procédures informelles et procédures formelles de faillite*), Spain (*insolvencia formal e informal*) and the UK share, in their own languages, the same terminology, whilst in Italy the classification has never been adopted. The mentioned categories might also be called as no-statutory arrangements and statutory arrangements.
[64] According to the composition of credit (number and types of creditors), the company might stipulate both bilateral and multi-lateral contracts.
[65] In practical terms, companies might obtain the postponement or the redesigning of its debts, or the modification *in peius* of the rights of secured creditors – Vanessa Finch and David Milman, *Corporate insolvency law - Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 244.

to be managed with specific instruments, created *ad hoc* for this purpose. Generally, these measures may be further divided into two different categories, depending on whether the presence of public bodies (the court and the IP) is or is not provided and in what extent the public intervention results incisive: in the hypothesis in which the public component is not contemplated (or only administrative functions are demanded to it) and the debtor still retains the management of the company, the procedure may be defined as 'debtor-in-possession'.[66] As it will be addressed in para. 3.3 of Chapter 3, both the Proposal and the Directive (art. 5) describe the debtor-in-possession approach as the opportunity for debtors to remain totally or at least partially in control of their assets and the day-to-day operation of the business and only where necessary the appointment of a practitioner by the court should be considered.

On the contrary, there are judicial procedures in which the court is deeply involved, having an active role and enjoying wide powers and discretion.[67] In the latter case, the opportunity of the court to interfere and conduct the operations, confers more stability, reliability and guarantees to this latter instance.[68]

It deserves to be specified how the purpose of the rescue and restructuring measures contemplated in the Directive is to intervene as soon as possible (i.e. before the debtor

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[66] It should be specified that even though the court is involved into the procedure, it usually deals with administrative functions without going into the merits of the parties' decisions. For instance, with reference to the UK jurisdiction, a 'Company Voluntary Arrangement' approved, based on an agreement stipulated between debtor and creditors, cannot be amended by the court. Another example is offered by the Italian jurisdiction, where the role of the court into the Arrangement with creditors ('Concordato preventivo') mainly consists in the homologation of the private arrangement concluded by the parties involved.

[67] It is the case of the UK Restructuring Plan provided in the Part 26° of the Company Act 2006 which recognises to the court broad general discretion on whether to sanction a plan. This aspect has been addressed in para. 6.4 of chapter 6 concerning the UK restructuring tools.

[68] In addition, the intervention of the judicial authority also prevents abuses to the detriment of unsecured creditors. It has been observed how, on the other hand, in the in-court procedures the duration and complexity of the judicial phase of the pre-insolvency procedures. However, the court's assessment must be technical, based only on the existence of the conditions required by law and not on the convenience of financing for creditors.

becomes insolvent) in order to safeguard the company as a going concern: therefore, rescue and restructuring address the debtor's business playing a crucial role in the recovery of the companies in distress.[69]

2.3.2 "Crisis", "likelihood of insolvency" and "insolvency"

Having clarified the meaning and the extent of rescue, restructuring and liquidation terms, other connected concepts are also to be outlined. The expressions under the magnifying glass are '**crisis**', '**likelihood of insolvency**' and '**insolvency**': whilst the former never appears in the terminologies of the EU legislator,[70] the latter two are used to identify the grade of the company distress. However, it should be borne in mind that the three concepts constitute different and subsequent stages of the same degenerative phenomenon.[71]

The common use of the word '**crisis**' is usually to indicate the difficulties that affect the company,[72] and the extension of this concept may be so wide that it might also include other expressions such as 'likelihood of insolvency' or even the 'insolvency': thus, these terms sometimes may be used as synonyms. From a financial perspective, the company crisis is the condition in which the liquidity and the credit to comply with its obligations fail.[73] However, depending on the point of view, the definitions may change. Prioritising the organisational aspect, crisis has been described as the instability of profitability which leads to economic losses and capital value losses, with consequent disruptions in financial flows such as the inability in obtaining new credit due to a collapse of confidence by the

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[69] John M. Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing Ltd 2022) 1.

[70] The reference is both to the Commission Recommendation 2014/135/EU and to the Directive 2019/1023.

[71] Gualtiero Brugger, 'Art. 160 l.f. Profili aziendali', in *Il nuovo diritto fallimentare, novità ed esperienze applicative a cinque anni dalla riforma* (Zanichelli editore 2006) 2302.

[72] On the crisis of companies, see Aberto Falini, *La crisi d'impresa e le sue cause: un modello interpretative* (Università degli studi di Brescia 2011).

[73] Mirella Zito, *Fisiologia e patologia delle crisi d'impresa* (Giuffré 1999) 70.

financial community, customers and suppliers. When the intervention is not timely and effective, the company might join into a dangerous vicious circle.[74]

It should be premised that the phenomenon of company distress may be influenced by several factors: the historical period and the place (intended as the country), the economic context and its conditions, the managerial culture, the legal arrangements and tools provided by the law to contrast the crisis.[75]

Having specified that, the reference to the crisis may describe any circumstances characterised by a need for action to protect or restore the viability of companies through rescue and restructuring operations.[76] It has been correctly argued that the crisis affects more properly the companies' activity (the business) and not the company as entity (subject):[77] the presence of mechanisms which may led the company to the insolvency direction affect the structure, the organisation and thus the business of companies. Whether no interventions are promptly carried out, the crisis may turn into insolvency, in which the company (like entity and thus the entrepreneurs) cannot pay its debts.[78]

The spectrum of the concept appears particularly broad, depending on the type and the intensity of troubles: among the countless factors that may lead the company to be insolvent, not all are able to affect immediately and directly the solvency of the company. For example, the imbalance of the productive organisation is not related to financial

[74] Luigi Guatri, *Turnaround. Declino, crisi e ritorno al valore* (EGEA 1995) 76.

[75] Because of the high number of variables, corporate crisis may be considered as a physiologic and pathologic event of the company life – Maria Cleofe Giorgino, *Crisi aziendale e prevenzione. Metodologie e modelli per prevedere il prevedibile* (Franco Angeli 2015) 25.

[76] Lorenzo Stanghellini et al, *Best Practices in European Restructuring. Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) 4.

[77] To be more exhaustive, crisis concept belongs to the business science and for this reason it should be correctly traced back to the activity of the company. Differently, insolvency is a legal aspect which characterised the subject (the entrepreneur) who cannot pay its debts. Crisis denotes the malfunctioning of the company's production centre whilst insolvency the capital imbalance between assets and liabilities - Fabrizio Di Marzio, *Il diritto negoziale della crisi d'impresa* (Giuffrè Editore 2011) 19. See also Fabrizio Di Marzio, *La riforma delle discipline della crisi d'impresa e dell'insolvenza* (Giuffrè Editore 2018) 15.

[78] Luigi Farenga, *L'amministrazione delle grandi imprese in stato di insolvenza* (Giuffré editore 2005) 34.

elements although it might also convert, with the passing of time, to financial troubles. In the described hypothesis, and always considering the complexity of the problem, the connection in terms of *consecutio* between 'crisis' and 'insolvency' appears merely eventual.

Another example may be helpful: image a good company with a thriving business that, during the Covid-19 pandemic, is obliged to close its plants by the Government measure, with obvious negative repercussions. In this peculiar (but very topical) case, the difficulties depend on other and external factors which are untied to the company organisation or the business strategy. With the interruption of the measure, the company may resume the business again in the same way as before. Even here there is the possibility that an extended closure period may determine the risk of insolvency, but it is not the ordinary rule.

Therefore, what should be clear is that a company in crisis is not always a dead company, being possible the turnaround: having an efficient legal support offered by a modern restructuring framework, it may still be able to overcome the distress, returning financially solvent.

By abstractly outlining a sort of (theoretical) hierarchy among the concepts of 'crisis', 'likelihood of insolvency' and 'insolvency',[79] and ordering them according to the intensity of the difficulties that company might suffer, it may be argued that the 'crisis', considered as the initial manifestation of the troubles, might be viewed as the broadest phenomenon: the first alarm bell which alerts the company when something goes or might go wrong.

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[79] It must be clear that the border line among these concepts, and in particular between the notion of 'crisis' and 'likelihood of insolvency', may be imperceptible or, in several cases, completely inexistent.

The terms '**likelihood of insolvency**' and '**insolvency**' are the lexical choice adopted by the EU legislator, although no definitions are provided into the text of the Directive 2019/2023, as they '*are to be understood as defined by national law*'.[80] Even though this legislative approach was dictated by the consideration that the EU Member States present profound cultural and judicial differences, significant implications may arise. Indeed, hypothetic diversities concerning the notions,[81] which may be considered as assumptions of the applicable discipline, might determine an asymmetry among the various national insolvency frameworks, contrasting with the conviction of the EU legislator which believes that '*a higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general*'.[82]

As far as the '**likelihood of insolvency**' expression is concerned, it may be generally described as the antecedent condition of the debtors before to become insolvent.[83]

Taking up the same example offered above on a theoretical graduation of the three concepts, 'likelihood of insolvency' might be placed between the 'crisis' and the

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[80] Art. 2(2), Directive UE 2019/1023. It deserves to be mentioned that in the new Italian CCI (art. 2, lett. a)) the notion of 'crisis' is described like the state of economic-financial imbalance which makes the insolvency of the debtor probable, and which, for companies, appears as the inadequacy of prospective cash flows to regularly meet planned obligations: the EU likelihood of insolvency and the Italian crisis concepts coincide.

[81] It should be observed that the majority of countries share the same notions of insolvency. Therefore, the lexical differences do not seem to alter the general meaning and thus the concrete application. An example may clarify the sense of reasoning: in Italy, the insolvency is considered the inability of the debtor to regularly meet his/her obligations (art. 5, *Legge fallimentare*); the Spanish insolvency regulation also contemplated whether the insolvency is current or imminent (art. 2, *Ley concursal*); differently, the French law take into account the debtor's assets in relationship with the liabilities (Art. L631-1, *Code de commerce*).

[82] *Ibid* Recital (8). As better described in Chapter 4, the EU legislator explicitly states into Recital (1) that the objective of the Directive 1023/2019 is the elimination of the obstacles '*which result from differences between national laws and procedures concerning preventive restructuring, insolvency…*'. More clearly appears the formulation of Recital (7) in which is affirmed that '*investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing*'.

[83] As anticipated, the Directive reserves national jurisdictions the definition of the notions of likelihood of insolvency and insolvency: therefore, the specific meaning of these concepts will be addressed in Chapter 6 during the analysis of the national insolvency law.

‘insolvency’, and precisely after the former and before the latter: on the one hand, the negative dynamics that affect the company take on a more delineated conformation, being here characterised not by generic, but by probabilistic terms; on the other hand, despite having the concrete possibility of becoming insolvent, the company still has a certain ‘room for manoeuvre’ to avoid collapse. Alternatively, the order of the concepts might be also inverted: by considering the crisis as a full-blown manifestation of company distress, it should be collocated after the ‘likelihood of insolvency’ and before the insolvency. In this view, the first signals of difficulties might be traced down into the ‘likelihood of insolvency’ concept, qualifying as crisis the next stage only after the worsening of the conditions.[84]

Everything illustrated above arises a useful interrogative: *how to detect the situation inherent in the ‘likelihood of insolvency’ concept, in which the company navigates in a bad waters but it may still turn the tide?*

The Directive expressly provides that ‘*Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay*’.[85] It should be observed how this mechanism of alert should allow the emersion of those negative circumstances that might evolve in ‘likelihood of insolvency’. Therefore, this provision delineates a remedy to reveal the situation of distress (that it has been qualify ‘crisis’), avoiding that the aggravation of the conditions leads to the much more serious and specific state: the likelihood of insolvency!

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[84] It should be clarified that these theorisations should be considered with the right weight, since beyond the theory what it should be really taken into account is the correct identification and comprehension of the underlying phenomena that provoke the crisis.

[85] Art. 3(1), Directive.

It may also happen that, when the difficulties are detected on an advanced stage, the company may be directly considered in the condition of likelihood of insolvency. In this hypothesis, the EU legislator has contemplated for debtors the '**preventive restructuring framework**', which enables them to restructure preventing insolvency. All these aspects will be widely and deeply addressed below, during the present analysis.[86]

In conclusion, the last concept (the '**insolvency**') does not need presentation: summarising the experiences of several European jurisdictions,[87] a company (more properly the entrepreneurs) is insolvent when it is unable to pay its debts.[88] As anticipated upon, whether on one side the crisis should be referred to the business, on the other side insolvency should be traced back to the subject (entrepreneur).[89] The payment that company has failed to make should be significant and therefore suitable to lead the company at a point of no return.

Therefore, by concluding with the given example, the phenomenon of corporate distress which always starts from general difficulties (crisis) that might assume the conformation of likelihood of insolvency, in case no restructuring and rescue interventions are done, terminates the route in the insolvency nightmare: the condition in which exacerbated troubles cannot be resolved and where restructuring operation are now useless.

It is worth bearing in mind that once companies become insolvent, all the measures provided by the Directive lose their function, since - as repeatedly argued - the *raison d'être* of the Early Warning Tools, the Preventive Restructuring Framework and the other

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[86] The EWT and the PRF will be described in Chapter 4.

[87] For the Italian legislation, see art. 2 of the Regio Decreto n. 67/1942; for the insolvency Spanish law, see art. 2 of the Real Decreto Legislativo 1/2020; for the UK, see art. 122(1) f) of the Insolvency Act.

[88] Karen Hopper Wruck 'Financial distress, reorganization, and organizational efficiency' [1990] Journal of Financial Economics 419.

[89] cf (n. 77).

restructuring tools, lays in the timely action to prevent the insolvency, that may be seen as the point of no return.

2.4 Insolvency law: restructuring or liquidation? A thoughtful choice

The answer to the question 'which between restructuring and liquidation approaches should be preferred', implies the response of another central and prior interrogative: what is the **objective of the insolvency law**? As easily expectable, the answer may be considered like a 'can of worms', since during many decades an impressive number of definitions, from divergent points of view, have been provided around the globe by the doctrine. Hence, only a symbolic slice of the vast scientific production may synthetically be reported: in the UK, the mentioned innovative work of the Cork Committee deserves to be recalled, since in the Report, it argued that '*insolvency law is not an exact science and it is not possible to design a set of rules which will be valid for all times, but we believe that there are certain general principles to which the law should strive to give effect'.*[90] In Italy, after the 1942 Italian Bankruptcy law (Legge Fallimentare) commentators, for more than half a century, argued that the purpose of the procedure was the execution of the *par condicio creditorum* (the same treatment of creditors)[91] or the expunction of the companies in distress to avoid prejudices to other companies.[92]

In the USA, the primary objective of any bankruptcy process was identified in the regulation of '*the inherent conflicts among different groups having separate claims against a debtor's assets and income stream*'.[93] It has also been stated how the '*insolvency*

[90] cf Report Ch 4 54.
[91] Angelo De Martini, 'Posizione degli organi fallimentari rispetto al fallito ed ai creditori' cited in Francesco Ferrara jr., Il fallimento (4th edn, Giuffré editore 1989) 71.
[92] Carlo D'Avack, *La natura giuridica del fallimento* (Cedam 1940).
[93] Thomas H. Jackson and Robert E. Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' [1985] Virginia Law Review 158.

regimes…try to balance several objectives, including protecting the rights of creditors…and preventing the premature liquidation of viable firms. A good insolvency regime should include ex ante screening mechanisms that prevent managers and shareholders from taking imprudent loans and lenders from giving loans with a high probability of default…and…provide for a degree of entrepreneurship in the economy, that is, not stifle risk-taking. An insolvency regime should also deliver an ex post efficient outcome, in that the highest total value is obtained for the distressed firm with the least direct costs and loss in going concern value'.[94]

More recently, it has also been argued how the role of the bankruptcy law should facilitate, as much as possible, the allocation of resources in the economy to the greatest use.[95]

According to the EU legislator, *'an effective insolvency law should be able to liquidate speedily and efficiently unviable firms and restructure viable ones in order to enable such firms to continue operating and to maximise the value received by creditors, shareholders, employees, tax authorities, and other parties concerned.*'[96] The premise is confirmed by the formulation: the role of the insolvency law is certainly to recognise when a company is or not viable and, depending on the subjective circumstances of the company and the context in which it operates, to decide whether it may be restructured or liquidated.

Differently from the past, nowadays the insolvency regulation offers, besides the liquidation procedure, also rescue and restructuring mechanisms, with the result of

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[94] Stijn Claessens and Leora F. Klapper, 'Bankruptcy around the World: Explanations of Its Relative Use' [2005] American Law and Economics Review 254.
[95] Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' [2016] Oxford Journal of Legal Studies 699.
[96] See the Commission staff working document 'Impact assessment - Commission Recommendation on a New Approach to Business Failure and Insolvency' SWD(2014) 61 Final, 2.

excluding an approach aimed to saving companies at all costs: the risk is part of the business game,[97] so as corporate financial troubles.[98] However, as it will be illustrated below, the definition of the insolvency law purpose provided by the EU legislator appears too reductive, since numerous other variables should be annexed to the phenomenon of company crisis.

Facing the dilemma concerning the correct decision between restructuring and liquidation, it seems necessary to stress how this point may become a matter of life or death: it may mainly depend on the accurate recognition of the **moment** in which an intervention is needed. Corporate insolvency is a complex and often gradual phenomenon which usually arises during a considerable timeframe, and the uncertainty about when it is the time to legislatively support the company, represents a considerable component of the failure of several insolvency law systems. Academic evidence suggests that where a stable legal system based on a debtor-friendly insolvency law (and thus with a relevant presence of rescue and restructuring tools) is ensured, entrepreneurs are more willing to take risks, which translates into more innovation.[99]

Thus, a timely action might offer that opportunity to rescue and restructure the company that, otherwise, could be impossible to achieve at a later stage: in other words, since

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[97] The risk of business failure has been defined '*an essential concomitant of entrepreneurial activity*' - Goode (n. 17) 57. On the argument see also Roy Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 45; cf Milman and Finch (n. 65) 123.

[98] Michelle J. White, 'The corporate Bankruptcy decision' [1989] The Journal of Economic Perspectives 129. The business life makes no concessions: companies which are competitive survive, the others should not be in the market.

[99] The study included numerous jurisdiction: Austria, Croatia, Estonia, Finland, Greece, Lithuania, Latvia, Sweden, Germany, Bulgaria, the Czech Republic, France, Spain, Poland, Portugal, Romania, Slovakia, Slovenia, Hungary, Denmark, the Netherlands, Ireland, Italy, the United Kingdom, the United States, Canada, and Australia - Błażej Prusak et al, 'The impact of bankruptcy regimes on entrepreneurship and innovation. Is there any relationship?' [2022] International Entrepreneurship and Management Journal 473 - 498.

depending on the moment of the intervention, the same firm might be saved or might be dissolved through the liquidation.

These considerations strengthen the conviction that an efficient and modern insolvency law has to contemplate measures which are able to detect the first malfunctions of the proper crisis,[100] and it is precisely to this direction that the EU legislator aims introducing the Early Warning Tools in the Directive 2019/1023.[101]

The same reflections lead to another key point: the **role of the insolvency law**. In fact, once the dynamics of the company in distress have been identified and a conscious decision may be taken, the law should be able to offer, as much as possible, all the legal measures to concretely face the crisis, both in case of restructuring and of winding up. Although what has been argued may appear trivial, this is a central point: it is not enough to understand an event without offering efficient ways to manage it.[102]

Until now, the discussion around the insolvency law's goals has exclusively interested the company itself, as though all the dynamics related to the business may be considered as the consequent of the internal structure and organisation. However, the performance of company does not always depend on its business decisions or whether or not it is well structured and organised. Actually, during the commercial activity, numerous business relationships – which become essential parts of the company commercial life – are established with several subjects: for instance, the banks (or other financial institutions), customers, suppliers and employees. What it should be emphasised is that, in the event of

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[100] On the importance of the moment in which the measures provided by the law should be triggered, with a different incisiveness in accord with the severity of the difficulties of the companies, see Francesco Pacileo, *Continuità e solvenza nella crisi d'impresa* (Giuffrè editore 2017) 3.

[101] Para. 4.2 of Chapter 4 is devoted to the specific analysis of the Early Warning Tools contained in art. 3 of the EU Directive 2019/1023.

[102] It has been observed how the insolvency law should not contribute '*to undesirable failures or prove deficient in processing failed companies*' – cf Milman and Finch (n. 65) 117.

the insolvency, each of the mentioned actors of the company life, might become hypothetical creditors with relevant consequences in case of insolvency: in fact, once aware of the financial difficulties, they would undertake a race to enforce their claims as soon as possible and before the others, transforming the contest into an arena, where a war of 'all against all' would be fought and where who arrives earlier would obtain more. Although hypothetical, this scenario represents what could happen if the principles and rules provided by insolvency law did not exist and therefore, another crucial objective of insolvency law may be deduced: it should replace the pursuit of individual creditor's claims with a set of rules and mechanisms capable of ensuring the ordered collection and realisation of company assets for fair distribution.[103] The role of creditors cannot be ignored since they are the subjects who usually decide whether or not approve the restructuring plan. In case of divergent position, categories and interests, restructuring approach may result impracticable. Generally, the banks are the main secured creditors of companies, holding the majority of credits. The consequence is that the choice between rescue and restructure or liquidate the company mainly depends on their decision: the option of restructuring should guarantee a greater recovery of their credits (or part of them, also through a new negotiation) than they would obtain from the liquidation.

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[103] These principles are contemplated in almost all countries, although they may present diversities. For instance, in the UK insolvency law, the *pari passu* (this Latin phrase literally means 'with an equal step') and the anti-deprivations principles were clearly explained by the jurisprudence: the first '*avoids that an asset is subtracted from the insolvency procedure so as to reduce the value of the insolvent estate to the detriment of creditors*' whilst the second contemplate the rule according to which '*statutory provisions for pro rata distribution may not be excluded by a contract which gives one creditor more than its proper share' – Belmont Park Investment Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] U.K.S.C. 38, [2012] 1 A.C. 383.
In Italy, the *par condicio creditorum*, which literally means "equal treatment of creditors", expresses a legal principle found in both civil and insolvency law, according to which creditors have an equal right to be satisfied on the debtor's assets subject to legitimate causes of pre-emption.

Having summarily highlighted the common factors which characterise the corporate crisis, the answer to the *vexata quaestio* on 'what is the preferable choice between restructuring and liquidation', may be provided.

From a purely economic point of view,[104] the choice should be taken considering the best allocation of resources and minimising the costs of managing the crisis. Thus, liquidation should be preferred to restructuring when the value of the company is higher when it is dead than when it is alive. In other words, the recoverable value in the event of liquidation is higher than the economic value of the company after the restructuring, even taking into account the costs related to restructuring operations. Conversely, corporate restructuring, which aims to contain and avoid further failure,[105] should be preferable when the value of the restored company, which may consist not only of its own business (assets) but also of brand values or goodwill, net of restructuring costs, is higher than its liquidation value. It is clear that whether the point of observation focuses on the stakeholders (workers, suppliers, clients, business partners and so on), then the conclusion changes radically: in that case, restructuring, which allows the economic and financial recovery of the company in distress, appears always preferable to liquidation, which only benefits the debtor's creditors.

In conclusion, there is no absolute and universal rule that may determine when restructuring is preferable to liquidation and *vice-versa*: many relevant subjective components, which differ according to the specific case, are to be considered.

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[104] It should be the starting point, since other factors, interests and stakeholders, that cannot be immediately quantified or translated into economic terms, are even to be considered: for instance, the employees, mainly in the large companies, represents a relevant component that is to be contemplated during the whole assessment to determinate the convenience of restructuring or the winding up.

[105] cf Wood (n. 69) 3.

Thus, it might be inopportune (and sometimes impossible) to rescue a company at all costs: there are cases where the same environment and the commercial context in which the company operates have changed, making the restructuring operation uneconomic.[106] In addition, the mere survival of a company does not mean that the rescue operation has successfully occurred, whether the probability of failing again is concrete.[107]

It must be emphasised that the recent philosophy that favours rescue over bankruptcy risks disrupting the natural market process that sees companies arise and others dissolve: without destruction, creative wealth is suppressed.[108] Therefore, in certain cases, the best option remains the sale of company's assets to recover as much value as possible to pay the debts. It is interesting to note how even the Commission was aware of the possible negative impact of the rescue and restructuring approach. In one of its Communications,[109] the Commission clearly stated that '*rescue and restructuring aid are among the most distortive types of State aid*' and that *'successful sectors of the economy witness productivity growth not because all the undertakings present in the market gain in productivity, but rather because the more efficient and technologically advanced undertakings grow at the expense of those that are less efficient or have obsolete products. Exit of less efficient undertakings allows their more efficient competitors to grow and returns assets to the market, where they can be applied to more productive uses. By interfering with this process, rescue and restructuring aid may significantly slow economic growth in the sectors concerned*'.[110]

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[106] For instance, changes in technology or in consumer preferences – Lorenzo Stanghellini, *Le crisi d'impresa tra diritto ed economia. Le procedure di insolvenza* (IlMulino 2007) 49.
[107] The companies which are saved that remain unable to repay their main debts are defined 'zombie companies'. On the argument, see Christine Elliott 'The zombie Budget Deficit' [2013] Corporate Rescue and Insolvency 78–79; cf Milman and Finch (n. 65) 198.
[108] Richard Brealey et all, *Fundamentals of Corporate Finance* (McGraw-Hill Education, 2012) 459.
[109] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01).
[110] ibid 3.

On the other hand, when through a rescue approach the majority of creditors could be satisfied and the other parallel interests be protected,[111] restructuring result the right choice.[112] As anticipated above, the moment in which the intervention is carried out represents a factor that may influence the choice of the strategy to be adopted: at an early stage, where the company's business[113] has not been compromised by the crisis, rescue and restructuring mechanisms appear more suitable than liquidation.[114]

Another fundamental aspect is to be analysed: the conflicting and divergent interests among the parties. In fact, according to the perspective from which the situation is observed, the result might well be opposite: for instance, from the directors' point of view, the timely access to rescue and restructuring remedies to avoid the insolvency often appears like a utopian circumstance; they usually are reluctant to admit to the distress both because they desire to keep their salary position as long as possible and because they sometimes underestimate the seriousness of the situation.[115]

Therefore, although in theory any decisions should be made in order to overcome the crisis by converging all the efforts of stakeholders for the exclusive benefit of the company, in reality this does not always happen. Giving several examples, the interests

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[111] It has been argued that the rescue of companies as a going concern may produce benefits to other categories of subjects which are related to the enterprise, such as the employees, the suppliers, the revenue authorities (and thus the State) and in general the economic system – Carlo Angelici, *La società per azioni e gli altri*, in *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders* (Giuffrè 2010) 45.

[112] The condition should be always the same: the company should be 'viable' and the restructuring costs should be lesser than the value produced in case of liquidation. Even the future perspectives of the company into the market should be taken into account.

[113] In generic terms, the reference is to those elements such as the indebtedness, the productivity, the reputation and so on.

[114] It has been underlined that the late in the reaction to a crisis contributes, more than other factors, to making businesses unsustainable – cf Stanghellini et al (n. 76) 5.

[115] On the argument, see Emilie Ghio and Donald Thomson 'Corporate insolvency: why are directors afraid of help? Preliminary study on the stigma associated with corporate insolvency' [2023] Chicago-Kent Law Review Vol. 98, n. 1, 410.

In Italy and in Spain, the centuries-old consideration that the insolvency proceedings were punitive measures still induces numerous companies to pursue alternative solutions which are usually less feasible than the rescue and restructuring approach.

of the directors may not be in tune with the shareholders one, who are interested in limiting losses and maximising profits; diametrically opposite should be the interest of creditors who are indifferent to the survival of the company: they want immediate satisfaction of their credit and only whether their objective may be achieved through the rescue and restructuring procedures they might opt for this option rather than the liquidation. [116]

In conclusion, the option between restructuring or liquidation is often influenced by subjective dynamics and factors that influence the choice towards one direction, and it is precisely in this context that the exigence, felt from the EU Legislator to offer several legal instruments in the whole European area able to support companies in financial crisis, took the shape of the Directive 2019/2021.[117]

[116] Another example of divergent interest might be represented from the workers: compared to creditors, they would prefer to maintain their jobs.

[117] It should be bear in mind that the attention on the rescue and restructuring approach by the EU legislator arises from the importance of preserving the value of the business as a going concern, since 'a collection of assets is sometimes more valuable than the same assets would be if spread to the winds': it is the surplus of a going concern value over liquidation value – Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge MA, Harvard University Press 1986) 14.

Chapter 3 – Background to the EU Directive 2019/1023

3.1 Introduction

This chapter explores the main legislative steps that led to the enactment of the Directive: in particular, all the relevant acts and documents of the European institutions involved in the legislative process that preceded the 2014 Recommendation, those that preceded the Proposal for a Directive and the Directive itself, are illustrated.

Through a dedicated paragraph, the structure of the Directive is analysed with a general examination of the principles contained therein.

3.2 Towards a common European discipline: principal legislative steps of the restructuring debate

Before illustrating the reasons and the stages that have characterised the debate during the legislative process which led first to the Recommendation and then to the Directive, it seems essential here to get familiar with several legal instruments which may consist of principles, provisions, procedures and generic legal remedies capable of contributing to the restructuring of companies in distress. These legal measures derive from decades of experience of national jurisdictions,[118] and today constitute both the spirit of the modern insolvency law's approach to the corporate distress and, in substantial terms, the fulcrum of the main European legal discipline, such as the Recommendation and especially the Directive.

[118] It should be noted how the evolution of the rescue and restructuring approach may be considered as a global phenomenon, and therefore not confined into the European borders. In particular, the Chapter 11 of the US Bankruptcy Code have importantly influenced the EU legislator during the formation of the 2019 Restructuring Directive.

Therefore, the brief following overview aims to increase the degree of awareness on how modern insolvency culture has taken form. The classification of the legal tools will be ordered according to the function which diversifies them:

i) **the early warning tools** are aimed at identifying, as soon as possible, those dangerous circumstances of the company that might give rise to a likelihood of insolvency. Their function is therefore to detect the crisis signs before they assume the peculiarity of the 'likelihood of insolvency' or/and the 'insolvency';[119]

ii) the **preventive restructuring frameworks** may be described as a set of measures provided to prevent the likelihood of insolvency in which companies are, from becoming actually insolvent. The legal discipline is to be outlined to intervene by helping the company that is in serious difficulties (since they may lead it to be insolvent) by adopting one or more legal arrangements.[120] Among these latter, the debtor-in-possession, the moratorium and the restructuring plan represent valid examples;[121]

iii) the **debts discharge** [122] mechanism contemplates all the measures which are invoked when the previous attempts to avoid insolvency fail. In this case, there is no alternative to the winding up procedure which involves the dissolution of the company. By preventing that the continued existence of debts after the liquidation may limit further and future commercial initiatives of the honest entrepreneur, a second chance is thereby

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[119] The discussion on these concepts may be consulted in paragraph 2.2.2.

[120] The PRF was already provided into the 2014 Recommendation (art. 6) and into the 2016 Directive Proposal (Chapter 1, art. 4). The position of the PRF is not change into the Directive, which contemplates the tool in art. 4.

[121] The analysis of the PRF tools is addressed into Chapter 4.

[122] It deserves to be clarified that the debts discharge is reserved to personal insolvency being turned to those debtors who carry out business activities as individual. Therefore, since the present work focus the investigation on corporate crisis and insolvency, this argument will not be touched except in summary form, in order to provide a more complete picture of the elements which characterised the Directive. A peculiar position is represented by the Italian jurisdiction, which with the new Insolvency Code allows even companies the possibility to benefit the remedy of debts discharge – see para. 5.4 of chapter 5.

allowed.[123] For this reason, this remedy is usually included into the wider concept of 'fresh start', which should offer to the honest but unfortunate debtor a '*new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt*'.[124]

This cursory description of the afore-mentioned insolvency mechanisms will be elaborated below.

From an outdoor perspective, the route delineates several connected moments which are all oriented in the same direction: growth and jobs.[125] In fact, the 2009-2010 economic and financial crisis significantly impacted on the EU legislative agenda and the EU legislator was totally conscious that an efficient insolvency regulation and a solid economy are strongly connected. Therefore, reform of national insolvency law to obtain a certain uniformity of the European insolvency framework aims to produce beneficial effects on the EU internal market.[126]

To better describe the documentation which led, during almost a decade, to the adoption of the Directive, it might be useful to divide, at least theoretically, **the process in two moments**: on the one hand, there are the acts which contributed to the enactment of the

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[123] The logic of the measure is well described in the Recital 1 of the 2019 Restructuring Directive: '*honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length*'.

[124] This phrase - which has passed into bankruptcy lore - comes from the US case law Local Loan Co. v. Hunt, 292 U.S. 234, 244 (I934).

[125] Gerard McCormack, *The European Restructuring Directive* (Edward Elgar 2021) 14.

[126] The statistical numbers did not leave space to different interpretations: the Commission stated that between the 2009 and 2011, an average of 20.0000 firms went bankrupt per year in the EU and therefore '*modernising the EU's insolvency rules to facilitate the survival of businesses and present a second chance for entrepreneurs has been identified as a key action to improve the functioning of the internal market*' – European Commission Communication to the European Parliament, the Council and the European Economic and Social Committee: A new European approach to business failure and insolvency [COM(2012) 742 final, 12.12.2012] 2.

2014 Recommendation[127] and, on the other hand, those documents that preceded the Directive.[128] In order to properly appreciate the evolutionary process of the phenomenon, the analysis will be presented chronologically.

Starting from the description of the documents antecedent to the 2014 Recommendation, the first formal initiative was carried out in **2010** by the Commission to a wide number of EU institutional subjects, through two **Communications**:[129] on March 3rd, the '**Europe 2020** - A strategy for smart, sustainable and inclusive growth'[130] and, on May 12nd, the **Communication for the reinforcement of economic policy coordination**.[131] It should be underlined that these acts were released in the midst of the 2009 financial storm, and thus when the catastrophic effects of the crisis were beginning to manifest. Therefore, the felt exigence of reforming the EU financial system begins now. The former Communication (Europe 2020) marks a decisive impulse to the whole evolutionary process, setting the **Europe 2020 strategy**: the words included into the preface, whereby the ex-president of the Commission José Manuel Barroso alerted the interlocutors, appear emblematic: '*2010 must mark a new beginning. I want Europe to emerge stronger from*

[127] On the argument, see Gerard McCormack 'Business restructuring law in Europe: making a fresh start' [2017] Journal of Corporate Law Studies 167-202; Horst Eidenmuller and Kristin van Zwieten 'Restructuring the European Business Enterprise: the European Commission's Recommendation on a New Approach to Business Failure and Insolvency' [2015] European Business Organization aw Review 625-667; Stephan Madaus 'The EU recommendation on business rescue – only another statement or a cause for legislative action across Europe?' [2014] Insolvency Intelligence 81-85.

[128] To be specific, the project for the creation of a European insolvency legal system able to share and influence principle and rules belonging to different jurisdiction, took form with the introduction of the first version of European Insolvency Regulation (Council Regulation (EC) No. 1346/2000). This latter Regulation aims the reduction of the risk by enabling, into national jurisdictions of EU Member States, cross-border cooperation, mainly by increasing certainty in the law applicable on insolvency. In 2015, even to adequate the scope of the Regulation to the modern approach to insolvency based on rescue and restructuring solutions, the European Commission made proposals for an update which led to the recast Insolvency Regulation (Regulation (EU) No. 2015/848) which entered into force on 26 June 2015.

[129] In particular, the second Communication was addressed to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions. The fact that the recipients were not only the EU institutional bodies in strict sense, should make us reflect on the value, the relevance and mainly on the large spectrum of the initiative.

[130] COM (2010) 2020 final.

[131] COM (2010) 250 final.

the economic and financial crisis…If we act together, then we can fight back and come out of the crisis stronger.'

It should be noted that even though the **EU 2020 strategy** was particularly aimed at economic aspects,[132] there is no lack of reference to the difficulties due to the financial crisis of the companies.[133]

The latter **Communication**[134] also focused on the relevance of a stronger European economy, by underlining how the critical issues concerning the interdependence among the economies of the EU Member States,[135] the surveillance procedures and the importance of public debt,[136] deserved to be urgently tackled.

Another fundamental paper, which has probably contributed more than the others to the consolidation of the exigence of having common insolvency rules and principles at the EU level, is the **2010 Report produced by INSOL Europe**.[137] This latter analysis was based on reports redacted by several countries[138] and it touched numerous aspects of the substantive insolvency law. In particular, the assessment aimed the necessity of an

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[132] The document listed three main priorities: 1) smart growth: developing an economy based on knowledge and innovation; 2) Sustainable growth: promoting a more resource efficient, greener and more competitive economy; and 3) Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion. The purpose is to '*turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion*'.

[133] cf Europe 2020 (n. 130) 21.

[134] cf 2012 EU Communication (n. 126).

[135] It represents a central point, since the Commission recognises how the recent experiences '*showed gaps and weaknesses in the current system, underlining the need for stronger and earlier policy co-ordination, additional prevention and correction mechanisms and a crisis resolution facility for euro-area Member States*' – *Ibid* 2.

[136] It is quite comprehensible how the Commission's Communication mainly focuses on the measures pertaining the national fiscal governance and the reinforcement of the preventive dimension of budgetary surveillance, since the case of the Greece's crisis in 2009 had warried both the EU Member States and the EU institutions.

[137] INSOL Europe (2010) 'Harmonisation of insolvency law at EU level', European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, PE 419.633

[138] Several information which was necessary to redact the study were asked to Poland, France, United Kingdom, Germany, Spain, Italy and Sweden. Among many, a brief outline of the balance sheet test and liquidity test, the rules on the effect of the commencement and management of the procedures, the rules on the ranking of creditors, the liability of directors, shadow directors, shareholders and the other parties involved, were reported.

insolvency harmonisation at EU level and the investigation started from an unequivocal fact: there were substantial disparities among national insolvency regimes which created obstacles and disadvantages.

The INSOL Report concluded by listing several issues where the frictions among jurisdictions were glaring and on which the harmonisation was possible and recommended: for instance, *inter alia*, the criteria for the opening of an insolvency proceeding, the general stay on creditors' powers to assert their rights after the commencement of insolvency proceeding, the different ranking of creditors and different rules regarding the responsibility for the proposal, verification, adoption of the restructuring plan.[139]

2011 was a particularly productive year for the European insolvency debate: first of all, another **INSOL paper** on the harmonisation of insolvency law at EU level, requested by the European Parliament (EP), was published;[140] subsequently, two acts were sent from the EP to the Commission and Council: the **Report** and the **Resolution**.[141]

The former is a brief note based on the antecedent Report (2010 INSOL Report)[142] which focuses the attention on the harmonisation of laws of EU Member States in **three specific areas**: opening of insolvency proceedings; claims filing and verification; reorganisation plans.

The first area concerns the criteria adopted by national jurisdictions to open an insolvency proceeding, and it is interesting to note how, even then, the importance of offering pre-

[139] All the cited points and the others are widely addressed in detail in the Report.

[140] Anna Maria Pukszto, '*Harmonisation of insolvency law at EU level with respect to opening of proceedings, claims filing and verification and reorganisation plans*' [2011] <https://www.europarl.europa.eu/RegData/etudes/note/join/2011/432766/IPOL-JURI_NT%282011%29432766_EN.pdf> > accessed 22 July 2022.

[141] European Parliament Report (A7-03355/2011, 2011/206 INI, 17.10.2011); European Parliament Resolution (P7_TA(2011)0484, 2011/2006 INI, 15.11.2011) with recommendations to the Commission on insolvency proceedings in the context of EU company law.

[142] In particular, it is developed on the Reports which were redacted by the selected EU Member States.

insolvency procedures to the solvent companies (but probably insolvent in the imminent future) was felt.[143] Another points where an EU harmonisation was considered worthwhile pertains the entities that are eligible as debtors since several EU Countries exclude the possibility of opening insolvency procedures to specific category.[144]

With regard to the **claims filing and verification** the Report identifies **four** themes on which an urgent need to harmonise the rule was emphasised: the procedures, the limits, the penalties and consequences for failure to comply and the information to be provided to creditors.[145]

The latter area, concerning the **reorganisation plans,** refers to those rules which may facilitate the conditions of the restructuring operations with particular reference to the way in which shareholders may be affected by the plan, the composition of classes, the voting rules, the content and the test applied by the court for the approval of the plan.[146]

Focusing the analysis on the other two cited documents (**Report** and **Resolution**),[147] what sharply emerged was the further consolidation of the idea that even though the creation of a body of substantive insolvency law was not achievable, the disparities between national insolvency laws created competitive disadvantages and difficulties in certain insolvency law areas which were to be contrasted through the harmonisation of specific

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[143] Specifically, the paper underlines how creditors of those EU Member States which contemplate measures for solvent but in difficulty companies receive more protection compared to creditors of those jurisdictions that are unprovided for. This awareness gives rise to a relevant reflection: more than 10 years ago the debate was oriented to the preventive restructuring framework which are today consolidated into the article 4(5) of the EU Directive 2019/1023 which states that '*the preventive restructuring framework…may consist of one or more procedures, measures or provisions*'. For the analysis of the preventive restructuring framework see Chapter 4, para. 4.3.

[144] An example is represented by Italy where an insolvency proceeding may not be opened by small debtors – art. 1 of the Italian bankruptcy law (R.D. 1942 n. 267).

[145] The Report stresses how creditors' ability to obtain satisfaction in bankruptcy procedures is affected by the efficiency and transparency of the claims filing and verification process – cf Report (n. 141) 9.

[146] The document underlines significant differences regarding the identification of the parties that may submit the plan. For instance, whilst under the Polish law, debtors, administrator and the creditor that filed for bankruptcy may propose the plan, the French law restricts that possibility only to debtors.

[147] cf Report and Resolution (n. 141).

rules. Thus, several priority considerations were identified and several recommendations were formulated such as, *inter alia*: once again, insolvency has an adverse impact not only on the business concerned but also on the EU economy[148] and it should be a tool for the rescue of companies and for the benefit of debtor, creditors and the employees;[149]
the rules for the winding up should be less harmful and the most beneficial for all participants;[150] in each specific case the reasons for the insolvency of a business and whether the difficulties are merely transient or definitive must be investigated;[151] the current lack of harmonisation regarding the ranking of creditors reduces predictability of outcomes of judicial proceedings.[152]

In 2012, the interlocution among the European actors, and in particular between the EU Parliament and the Commission, continued with the answer of the latter to the EU Commission[153] through further documents: chronologically, a **Communication on the Single Market Act II**[154] (October 2012), a new **Report** (2012 Report)[155] and another **Communication** (2012 Communication),[156] both promulgated in December 2012.

More attention is to be dedicated to the latter Communication, since the 2012 Report regards the application of the Council Regulation (EC) No 1346/2000 on insolvency proceedings, which established a European framework for cross-border insolvency

[148] *Ibid* Recital H.
[149] *Ibid* Recital J.
[150] *Ibid* Recital N.
[151] *Ibid* Recital O.
[152] *Ibid* Recital AB.
[153] The EU Commission' answer is referred to the 2011 Report and Resolution sent by the EU Parliament – cf Report and Resolution (n. 141).
[154] European Commission Communication, 'Single Market Act II - Together for new growth' [COM(2012) 573 final, 3.10.2012].
[155] European Commission Report on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [COM(2012) 743 final, 12.12.2012].
[156] European Commission Communication, 'A new European approach to business failure and insolvency' [COM(2012) 742 final, 12.12.2012].

proceedings,[157] whilst the former Communication constitutes the continuation of the Single Market integration started with the first Single Market Act in 2011.[158]

The **2012 Communication** might be considered a sort of precursor of the 2014 Recommendation and the 2019 Restructuring Directive, as the elements which are covered assume a central position in both of the mentioned acts. In particular, the EU Commission highlights several areas in which differences among domestic insolvency laws have that may hamper the establishment of an efficient insolvency legal framework in the internal market. For instance, the '**second chance** for entrepreneurs in honest bankruptcies' is today a consolidated component of the modern insolvency law,[159] and indeed the 2014 Recommendation dedicates to the argument the whole paragraph IV.[160] Anyway, what should be underlined here pertains the reaffirmation of the principle of the second chance that, although expressed in a different way, preserves its native *animus* as well as its function. It may be convenient to offer a short example of the formulation of the concept in the three mentioned acts: '*Giving entrepreneurs a second chance to restart viable businesses and safeguarding employment are key elements of the new European approach to business failure and insolvency'* (2012 Communication); '*The negative effects of bankruptcy on entrepreneurs should be limited in order to give them a second*

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[157] The Regulation applies whenever the debtor has assets or creditors in more than one EU Member States.
[158] Single Market Act, 'Twelve levers to boost growth and strengthen confidence - Working together to create new growth' [COM(2011) 206 final, 13.4.2011].
While the Single Market Act set out twelve levers to boost growth and strengthen confidence in the EU economy, the Single Market Act II contemplates fours main drivers and under them, twelve levers and key actions: one of this action (the key action 7) concerns the modernisation of the EU insolvency rules to facilitate the survival of businesses and present a second chance for entrepreneurs.
[159] The EU legislator states that: '*Modern insolvency law in the Member States should help sound companies to survive and encourage entrepreneurs to get a second chance'* – cf 2012 EU Communication (n. 156) 3.
[160] Recommendation 2014/135/EU. It should be noted that in opposition to such approach, the 2019 Directive deals with the subject only at recitals level.

chance. Entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy' (art. 30, 2014 Recommendation);

'*Honest insolvent entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance*' (Recital 1, 2019 Restructuring Directive).

Note should be made of the significant implications that derive by the implementation of the principle in terms of legal rules, measures, provisions and procedures.[161] This point deserves to be stressed: **the second chance**, like many others, is a basic principle which composes modern insolvency discipline, but principles are not the exclusive figures which characterised the insolvency regulation: even the other mentioned legal instruments (provisions, procedures and other legal remedies) constitute the insolvency matters. However, a fundamental difference marks them, since whilst principles abstractly and generically indicate the objective that is to be achieved, the other legal remedies concretely and specifically provide means to achieve that objective. In other words, the latter legally apply what the principle requires. For instance, one of the aspects that is to be considered concerns the honesty of the bankrupt: should a second chance be allowed to the delinquent entrepreneur? The answer appears quite obvious, although to draw up legal rules to concretely distinguish the honest from the dishonest subject might result complicated.[162] In this respect, the principle offered by the Commission into the 2012 Communication states that '*the 'honest' failure is a case where the business failure was through no obvious fault of the owner or the manager, i.e. honest and above-board,*

[161] As anticipated upon, the second chance principle identifies an objective which may be pursued through legal arrangement that concretely put it into practice allowing the achieving of the goal.

[162] Several examples concerning the rules adopted by national jurisdictions to differentiate the honest from fraudulent entrepreneurs, will be provided in Chapter 6 during the description of the other national insolvency law systems.

contrary to cases where the bankruptcy was fraudulent or irresponsible' and that fraudulent failures are to be discouraged.[163] The assessment of the entrepreneur's conduct is therefore always carried out *ex post*: for instance, whether the entrepreneur has distracted, concealed, dissimulated, destroyed or dissipated the assets, or whether it has misappropriated, destroyed or falsified, with the aim of procuring an unjust profit for itself or others or prejudicing creditors, the books or other accounting records or has kept them in such a way as to make it impossible to reconstruct the assets or the movement of business.[164]

The relevance of determining whether an entrepreneur has acted honestly or not, becomes indispensable for the purposes of applying another insolvency legal remedy: the **discharge of debts**. This latter contributes to the implementation of the second chance principle by offering the full discharge of all debts for the insolvent but honest entrepreneur: without the burden of the past debts a business fresh start appears a feasible perspective. Therefore, the access to this legal benefit is to be reserved only to those entrepreneurs that have complied to the law,[165] and that is exactly the approach affirmed by the EU legislator. The 2014 Recommendation has suggested to the EU Member States the introduction of '*more stringent provisions which are necessary to discourage entrepreneurs who have acted dishonestly or in bad faith, either before or after the bankruptcy proceedings were opened*'.[166] Similarly, the concept is expressed into the

[163] cf (n. 119) 5.
[164] This is what the Italian CCII (art. 322) requires in order to sentence the entrepreneur to imprisonment and which categorically excludes it from being qualified as an 'honest entrepreneur'. Article 260 of the Spanish Criminal Code covers the conduct of the bankrupt (or those acting on his/her behalf) who maliciously causes or aggravates a crisis or insolvency situation, whilst the subsequent Article 261 regulates the specific conduct of the debtor who, in order to obtain a different declaration of his state of insolvency, presents false data relating to accounting documents.
[165] The fairness of the debtor should be verified both with reference to the moment before the crisis taking into account whether during the business, he/she enacted with the due correctness (in order to exclude that the causes of failure are not the consequences of his/her conduct), and during the restructuring proceeding.
[166] Art. 32, 2014 Recommendation.

2019 Restructuring Directive: '*Member States shall maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of such discharge…where the insolvent entrepreneur acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt*'.[167]

Other reflections concerning the second chance principle and the legal instruments through which it is implemented into national jurisdiction will be addressed during the investigation of all those measures contemplated by the Directive to face company crisis.[168]

Another tool covered by the 2012 Communication confirms how this paper has anticipated the key element of modern insolvency: the restructuring plan.[169]

The importance of the 2012 Communication is also confirmed looking at another argument covered by recalling another central figure, the **restructuring plan,** through which the restructuring of companies in distress is achieved. It should be noted how this insolvency instrument has already spread into numerous EU jurisdictions, although relevant diversities in how it is configured, have contributed to the EU legislator's decision of contemplating this tool among those principles and rules in order to standardise the insolvency law across Europe. Again, the principles concerning the restructuring plan indicate how EU Member States shall implement it into their insolvency law. What the Commission suggested into the 2012 Communication regards the common rules which the EU jurisdictions are to be provided to limit differences and create conditions for successful restructuring: for instance, the framework appears uneven

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[167] Art. 23 (1), Restructuring Directive.
[168] See Chapter 4.
[169] For the specific analysis of the restructuring plan as drawn into the 2019 Restructuring Directive, see Chapter 4, para. 4.3.3.

with reference to the subjects that may act as promoters of the plan, as well as the adoption, modification and verification of this latter.[170]

Another aspect which is stressed in the document, pertains the procedure for the adoption of the plan and the importance of dividing creditors into categories.

All the mentioned issues assume relevance also into the 2019 Restructuring Directive and therefore they will be analysed in Chapter 4.

3.3 The 2014 EU Recommendation

In the light of the described evidence emerged during the comparison among the main EU institutional subjects, the uncertainty which characterised the European economic context seemed to impose the adoption of concrete and urgent legislative actions. Surprisingly, despite the pursuit of the harmonisation appeared to be inevitable, the EU Commission still vacillated: indeed, whether the benefit of business rescue was clearly recognised, by listing several advantages such as the maximisation of asset value (since the rescue of a company allows preserving the value of its technical know-how and business goodwill whereas liquidation is limited to the value of the company's physical assets), the better recovery rates for creditors, the saving of jobs (since saving companies saves jobs), and lower costs of pre-insolvency and hybrid insolvency proceedings than that of traditional insolvency proceedings,[171] the effective concerns regarded the hypothesis in which the harmonisation of certain procedural aspects might have had significant consequences on national laws, requiring additional "*in-depth comparative-*

[170] In particular, it is stated that '*while the laws of Member States generally accept that it is up to the debtor to propose a restructuring plan, the rules on whether creditors may propose the plan or influence its preparation vary*' – cf (n. 119) 7.

[171] Commission Staff Working Document, Impact Assessment, Accompanying the document, Revision of Regulation (EC) No 1346/2000 on insolvency proceedings COM(2012) 744 final SWD(2012) 417 final.

law analysis of national insolvency laws and procedures which would enable the Commission to identify the precise areas in which procedural harmonisation would be necessary and feasible, and not too intrusive to the national legislations and insolvency systems".[172]

In 2014, notwithstanding the above scepticism, the EU Commission enacted the **Recommendation 2014/135/EU**.[173] Even the reaction of several Member State was not enthusiastic, mainly for those jurisdictions in which the measures and procedures like the preventive frameworks had never been contemplated.[174]

Looking at the substantial content of the Recommendation, two major objectives may be identified:

i) '*to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to* ***national insolvency frameworks*** *which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole';*

ii) *'at giving honest bankrupt entrepreneurs* ***a second chance*** *across the Union*'.[175]

To achieve these aims, the Commission considered necessary '*to encourage greater coherence between the national insolvency frameworks in order to reduce divergences*

[172] ibid 44.

[173] With the Recommendation, another document was published where the Commission, reversing one more time its orientation, reiterated the importance of the EU insolvency harmonisation stating that: '*At a time when the European Union (EU) is facing the biggest economic crisis in its history leading to record numbers of bankruptcies in most Member States, improving the efficiency of insolvency laws in the EU has become an important factor in supporting the economic recovery.'* – Commission Staff Working Document Executive Summary and Impact Assessment SWD(2014) 621 final, Accompanying the document Commission Recommendation on a new approach to business failure and insolvency C(2014) 1500 final, 2.

[174] Germany reaction constitutes an emblematic example: one month after (April 2014) the publication of the Recommendation, the minister of justice stated that 'there were no need in Germany for such new procedure – Speech of *Justizminister* Heiko Mass from 3 April 2014, ZInsO 2014, 819 cited in Christoph G. Paulus and Reinhard Dammann, *European Preventive Restructuring – Article-by-article commentary* (Beck-Hart-Nomos 2021) 4.

[175] Recital (1), Recommendation 2014/135/EU.

and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. In addition, in the opinion of the Commission, greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment, as well as to facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.[176]

The observations and reasons of the EU legislator are shareable: a European Union without common rules (and not only legislative but also economic, social and cultural) would never be truly united. This is a slow and gradual process that is indispensable to achieve a strong and stable position in the current international contest.

The attention should be focused on **the preventive restructuring frameworks** (PRF), which is, with the discharge of debts,[177] an essential point of the Recommendation (as well as in the Directive),[178] which dedicates numerous provisions to the argument.[179] Hence, in addition to what it has shortly been hinted upon,[180] the Commission specifies that the framework which allows debtors to restructure their business should be able to prevent insolvency 'as soon as it is apparent that there is a likelihood of insolvency':[181] the requirement for the access to the framework is the condition of difficulties that might lead the debtor to be insolvent.[182]

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[176] Ibid Recital (11).
[177] cf (n. 114).
[178] With regard to the discipline of the preventive restructuring framework contemplated by the Directive, see Chapter 4, para 4.3.
[179] The Recommendation provides, under the part III entitled 'Preventive Restructuring Framework', the rules regarding the availability of the preventive restructuring framework, the restructuring plans and the related negotiations and the protection for new financing.
[180] See para. 3.1.
[181] 2014 EU Recommendation, Section 6(a).
[182] Although the *ratio* of all the measures related to the preventive restructuring framework undoubtedly is the intervention of companies as soon as possible, not all the circumstances are suitable to justify the

Under the Recommendation, according to the article 6, the PRF regime is based on **four main elements**,[183] where: i) the debtor should keep **control over the day-to-day operation**; ii) the debtor should be able to request a **temporary stay** of individual enforcement actions; iii) a **restructuring plan** adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court; iv) **new financing** which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.[184]

The first provision (i) represents a consolidated international principle[185] which privileges the **debtor-in-possession approach**, where during the restructuring operations the (debtor) company management remains in control of the business,[186] with the result of facilitating operations by offering an incentive to use the procedure early and by ensuring minimum disruption to the debtor operations.[187] The principle is reaffirmed into the Restructuring Directive in which it is stated that '*to avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for*

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recourse to these instruments: common and general situations which are part of the ordinary business life, are usually face through the use of remedies which are directly contemplated into national jurisdictions. One of the most effective tool is the contract through which the parties may, for instance, modify the original conditions, postpone or reduce the debts and so on.

[183] See Section 6, lett. *b*), *c*) and *d*) of the 2014 Recommendation.

[184] The discipline drawn into the Directive appear wider since the attention of the EU Legislator turned on further protected interests, such as the protection of jobs and the maintaining of business activity.

[185] To be specific, the majority of principles and rules contemplated before into the Recommendation and after into the Restructuring Directive, are the result of international best practices, such as, *inter alia*, the UNCITRAL Legislative Guide on Insolvency Law, World Bank Principles for Effective Insolvency and Creditor Rights Systems, International Monetary Fund (IMF) Orderly and Effective Insolvency Procedures and the European Bank for Reconstruction and Development Core Principles for an Insolvency Law Regime.

[186] According to the choices made by each jurisdiction, debtors are often under the supervision of a judicial or administrative authority. For instance, under the USA Chapter 11, the management of the distressed company work together with the business rescue practitioner to produce a plan for the bankruptcy court to ratify – Anea Burke-le Roux and Marius Pretorius, 'Exploring entrepreneurial learning during formal business rescue processes: Insights from the South African experience' [2017] SA Journal of Human Resource Management 1–15.

[187] cf Stanghellini et all (n. 76) 10.

preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business'.[188]

The second element, the **stay (or moratorium) of individual enforcement actions** (ii), represents another key point of the PRF and more in general of the modern insolvency system, and it is no coincidence that it is disciplined both into the Recommendation and the Directive.[189] In the former Act, the legislator affirms that debtors should have the right to request a court to grant a temporary stay of individual enforcement actions lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan: therefore, the moratorium is a temporary remedy[190] which favours the delicate process of restructuring by protecting the company from a host of recovery (and individual) procedures initiated by individual stakeholders.[191] It should be noted that the provision delineates a moratorium which also affects the rights of **secured and preferential creditors**:[192] the clarification is owed, since it is principally towards those type of creditors that the measure should be addressed. Effectively, those creditors benefit more compared to the other creditors, as by virtue of their guarantee on debtor assets they may promptly taking actions compromising rescue and restructuring

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[188] Recital 30. Apropos this argument into the Restructuring Directive, see Chapter 4, para. 4.3.1.
[189] The analysis of the moratorium as it has been drawn into the Restructuring Directive is contained in Chapter 4, para. 4.3.2.
[190] The Recommendation states that the moratorium should strike a fair balance between the interests of the debtor and of creditors, and in particular secured creditors. Therefore, the duration should be determined on the basis of the complexity of the anticipated restructuring. It should not exceed 4 months and in case of renewal, it should not exceed 12 months – Section 13, Recommendation.
[191] It should be also pointed out that the moratorium is not necessarily connected to legal arrangements: depending on the intensity of the financial distress, a breathing space might also be achieved during the negotiations between the debtor and his creditors. This aspect will be further investigated in Chapter 4, para 4.3.2.
[192] The hierarchy of creditors may assume different configurations according to the national insolvency law. By way of example, on the following internet page may be consulted the creditors' rankings against debtor insolvency established in some jurisdictions <https://uk.practicallaw.thomsonreuters.com/9-518-5211?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 15 June 2022.

operations. A moratorium that would not protect the debtor from secured creditors would not bring any benefit to the rehabilitation regime.[193]

In addition, the law specifies that the remedy should be subjected to certain conditions and that the access should be granted where (a) *creditors representing a significant amount of the claims likely to be affected by the restructuring plan support the negotiations on the adoption of a restructuring plan*; and b) *a restructuring plan has a reasonable prospect of being implemented and preventing the insolvency of the debtor*.[194]

The expression 'significant amount of the claims' is referred to indicate the hypothesis where the majority of creditors support the negotiation. It must be borne in mind that when signals reveal that a company might suffer of financial troubles and/or it might become insolvent, this new condition inevitably affects the individual positions of all the parties involved: the consensus paradigm which characterises the contractual relationship between creditor and debtor becomes, within the formal insolvency procedures, the majoritarian paradigm, where the voted agreement by the majority of creditors may bind minority dissenters.

The latter two issues confirm the strong relationship between the moratorium and one of the other legal instruments which composes the PRF: the **restructuring plan (RP)** (iii).[195]

It should be anticipated that the discipline regarding the RP, as delineated into the Recommendation, appears thinner and less exhaustive (probably even defective) compared to what it has been postulated in the Restructuring Directive.[196] Therefore, even

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[193] On the argument, see David Milman, 'Moratoria on enforcement rights: revisiting corporate rescue' [2004] CPL 89 – 108.
[194] Section 11.
[195] Section 14 of the Recommendation provides that when the moratorium is no longer necessary with a view to facilitating the adoption of a restructuring plan, it should be lifted.
[196] The common elements of the restructuring plan discipline will be highlighted during its analysis in the context of the Directive – see Chapter 4, para. 4.3.3.

though the primary objective of this study is the Directive, the critical reflections on the discipline of the RP in the Recommendation, which will be formulated below, will be also useful to appreciate, in general term, several characteristics of this important legal tool.

First of all, the Commission alerted Member States that the restructuring plan that '*do not have any prospect of preventing the insolvency of the debtor and ensuring the viability of the business*' should be rejected by the court, confirming that the primary function of the plan is to prevent insolvency and to preserve the business and its value as a going concern.[197] As far as the content of the RP is concerned, several indications concerning the elements that it should provide were listed, such as: (a) clear and complete identification of the creditors who would be affected by the plan; (b) the effects of the proposed restructuring on individual debts or categories of debts; (c) the position taken by affected creditors on the restructuring plan; (d) where applicable, the conditions for new financing; and (e) the potential of the plan to prevent the insolvency of the debtor and ensure the viability of the business.[198]

The RP should be adopted by creditors grouped in separate classes according to their interests,[199] and the voting process[200] should be delineated with the adoption of the plan when the majority of claims in each class is achieved. In case of more than two classes of creditors, national law should contemplate provisions which empower courts to confirm restructuring plans which are supported by a majority of those classes of creditors.[201]

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[197] Section 23, Recommendation.
[198] Coherently, the ability of the plan to prevent insolvency is to be indicated.
[199] As a minimum, secure and unsecured creditors should be divided in different classes.
[200] Section 19 specifies that where a formal voting process is provided, creditors should in principle be allowed to vote by distance means of communication such as registered letter or secure electronic technologies.
[201] Section 18, Recommendation.

It should be noted how the filing of the plan to the court is here an eventual stage: indeed, the RP which is adopted by the unanimity of affected creditors should be binding on all those affected creditors,[202] with the result that the confirmation of the plan by the court should be provided in those cases where such unanimity is not achieved.[203] In this latter hypothesis the attention of the Commission was focused both on the dissenting creditors[204] and on a new financing, since the conditions under which the plan should be confirmed by the court should be clearly specified into national laws and should at least include: a) the protection of the legitimate interests of creditors; b) the notification to all creditors likely to be affected by it; c) the avoidance of the reduction of dissenting creditors below what they would reasonably be expected to receive in the absence of the restructuring, if the debtor's business was liquidated or sold as a going concern, as the case may be; d) any new financing necessary to implement the plan without unfairly prejudicing the interests of dissenting creditors.[205]

Notwithstanding the described discipline may appear incomplete and not exhaustive, it has been formulated by concentrating the most popular international concepts and principles in the field of the insolvency which have been adopted, by the way, for a long time by the majority of national jurisdictions. Looking at the unanimity and majority principles adopted for the voting process, the right of dissenting creditors or the binding effects of the RP confirmed by the court: they constitute the basis of modern insolvency

[202] Section 25, Recommendation.
[203] Section 21 specifies that the restructuring plan which affects '*the interests of dissenting creditors or make provision for new financing should be confirmed by a court in order to become binding*'.
[204] This is the fulcrum of all those insolvency procedures in which the effects are bind to all creditors, even those that do not take part at the voting process (absent) or the dissenting creditors. These fundamental aspects of the discipline of the RP are addressed both in the present Chapter in para 3.3 (RP as formulated into the Proposal for a Restructuring Directive), and in Chapter 4, para 4.3.3 (RP characteristics into the Restructuring Directive).
[205] Section 22, Recommendation.

procedures and for this reason they have been collected into the European law. During the analysis of the Directive each of them will be widely addressed.

As it has been mentioned, several criticisms due to the shortcomings should be revealed. Foremost, no indications on the negotiation phase between debtor and creditors have been provided: however, this stage represent an indispensable moment for the conclusion of the agreement (RP).[206]

Another peculiar lack concerns the adoption of the plan that seems to be only attributed on creditors: no provisions mentioning the power of initiative of the debtor to submit the RP is contemplated.[207]

To better understand the logic of the procedure, and in particular the first stage, the attention should be turned on the **nature of the restructuring plan**: it may be traced back to the contractual figures, since the parties stipulate a full-fledged agreement, and more precisely a multi-party contract. Indeed, the negotiations between company and its stakeholders (*in primis* creditors) which characterised the first moment, are put in place outside of any institutional procedures:[208] only once that the terms contemplated into the (contract) restructuring plan are defined, the second phase starts under the court.

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[206] The only reference to the negotiation is contained into the section 8 and 9 under the title 'Facilitating negotiations on restructuring plan'. Here, with reference to the practitioner, there are two alternative options: the insolvency practitioner ('IP') may act as 'mediator', in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan; or, in the shoes of 'supervisors', in order to oversee the activity of the debtor and creditors and take the necessary measures to safeguard the legitimate interests of one or more creditors or another interested party. The law is silent with regard to the two described alternative functions of the IP.

[207] It is comprehensible that the attention has been paid on the adoption of the plan, but it should be remembered that into the debtor-in-possession logic, debtors should be the privileged actors which might activate the rescue and restructuring instruments. Hence, they realise before all the others that the writing is on the wall and, even if the consolidated practice show how they ignore such warning signals, they should be fostered by the law.

[208] To be specific, the negotiations are based on the general contract law contemplated into each national jurisdiction and the reason lies in the wide degree of freedom and flexibility that the parties have, as well as a significant reduction of costs compared to the traditional insolvency procedures - Jennifer Payne, 'Debt Restructuring in the UK' [2018] ECLFR 451; Andrew Keay and Peter Walton, *Insolvency law: corporate and personal* (4th edn, Jordan Pub 2017) 191.

Turning to the last of the four described pillars of the PRF discipline, the **new financing** (iv) may be considered as a significant component for rescue and restructuring, to the point that the same Commission affirmed that it is '*necessary to ensure the success of the restructuring plan*'.[209]

In general terms, it may be argued that restructuring operations often require fresh financing, which may be divided in two types: the 'new financing' and the 'interim finance'. Whether the Recommendation only considers the first one, which supports debtors during the implementation of the RP, the Directive also contemplates the interim finance, which represents new financial assistance during the moratorium to allow debtors to continue operating or to preserve or enhance the value of the business.[210] Into Recommendation, new financing, and thus new loans, the sale of certain assets by the debtor and debt-equity swaps, which are provided into a confirmed RP, should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.[211] In addition, the providers of new financing as part of a confirmed RP should be exempted from civil and criminal liability relating to the restructuring process.[212]

Indeed, exemptions from civil and criminal liability could be a useful incentive not only for suppliers but even for the debtor itself, and in particular for directors, who are often reluctant to acknowledge the distress. Therefore, rules providing for exemptions should be extended to all those who participate in a restructuring attempt and act in good faith.

In concluding it should be highlighted how it is precisely the presence of the described legal remedies that contribute to the creation of the context in which rescue and

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[209] With these words the Commission attributes relevance to the new financing in the context of rescue and restructuring operations – see 'European Commission evaluation of the implementation of the Recommendation' 4.

[210] For financing in the discipline of the Directive see Chapter 4, para 4.4.

[211] Section 27, Recommendation.

[212] Section 28, Recommendation.

restructuring interventions may be successful. The phenomenon might be explained through a simple example: to get a perfect cake all the ingredients are to be used in a properly way because the absence or imbalance of one of them would compromise the end result. The same reasoning might be transposed to the PRF: here the ingredients are the moratorium, which allows debtor to keep control over the day-to-day operation by protecting him from creditors' claims and by avoiding the opening of insolvency proceedings; the restructuring plan, during the stay and thanks the debtor-in-possession option, may offer the opportunity to achieve an agreement between debtor and his creditors; and the new financing, through which the company receive new resources to preserve or improve the business value.

Thus, all the remedies analysed should build a flexible restructuring procedure, which should be less lengthy and costly. In addition, to configure an out-of-court procedure, the involvement of the court should be limited to where it is necessary and proportionate with a view to safeguarding the rights of creditors and other interested parties affected by the restructuring plan.[213]

3.4. The proposal for a Directive

Whether the prescriptions provided by the Recommendation had been implemented by the Member States, probably the Directive would have never been enacted. Anyway, history is not written through 'if', and even in this case the events have taken a precise direction: thus, in September 2015 the EU Commission,[214] redacting a document

[213] Section 7, Recommendation.
[214] It should be noted that according to art. 86 of the Regulation 2015/848, Member States have to describe their insolvency national legislation and procedures, keeping the information updated.

providing an evaluation,[215] took note of the unjustified inactivity of the majority of Member States.[216] Moreover, given that the Recommendation is non-binding,[217] the EU vision of a uniformed European insolvency framework was to be achieved through alternative and more incisive legislative instruments: therefore, in 2016, after two years from the Recommendation, a new Restructuring Proposal for a Directive (Proposal) was enacted by the Commission.[218]

Although the Recommendation inspired the Proposal[219] – which shares several key points with the former – it contemplates a more detailed discipline. In general terms it may be observed that the Proposal constitutes a substantial evolution of the Recommendation discipline, being able to be placed, both chronologically and substantially (having regard to the leap forward in term of content), between the latter and the Directive.[220] Hence, besides the provisions concerning the preventive restructuring frameworks, the

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[215] *Directorate-General Justice and Consumers of the European Commission, Evaluation of the implementation of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency*, 30 September 2015. It has been rightly argued that the timespan of 18th months, given to the Members States to comply with the Recommendation, has resulted too short considering the different national legislative processes to implement the law. The impression is that – from the first moment – the real intention of the EU legislator was also to adopt an additional legislative act: the Directive – cf McCormack (n. 125) 172.

[216] The Commission did not miss the opportunity to reiterate, into the same Proposal, how '*the 2014 Commission Recommendation did not succeed in ensuring that Member States have a coherent and robust response to the problems it identified'* - Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 16.

[217] Article 288, Treaty on the Functioning of the European Union (TFEU).

[218] 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' COM(2016) 723 final.

[219] For an investigation on the similarities between the Restructuring Proposal and the 2014 Recommendation, see Gerard McCormack, 'Corporate restructuring law – a second chance for Europe' [2017] E.L.R. 7.

[220] It has been argued that on the one hand the transition from the Recommendation to the Proposal represents the synthesis of the solutions promoted in Europe to deal with the issue of company crisis and, on the other hand, it highlights that the protection of creditors 'right does not represents the only purpose of the regulation, being the attention also paid on the preservation of the company and on every connected values – Fabrizio Di Marzio, *Obbligazione, insolvenza, impresa* (Giuffrè Francis Lefebvre 2019) 36.

restructuring plans and a second chance for debtors, the Proposal introduced the early warning tools,[221] which also characterised the Directive regulation.[222]

The investigation will be primarily dedicated to those further introductions which enrich the Proposal discipline from the Recommendation one, shortly mentioning the similarities between the two Acts. Therefore, considering the relevance of the introduction of the **early warning tools (EWT)**, it seems consistent to touch this argument first.

The underlying logic of the general and modern approach, based on the contrast crisis as soon as possible, appears reaffirmed with more emphasis on the Proposal: '*the earlier the debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency*'.[223] In fact, with the introduction of the EWT, next to the other tools already contemplated into Recommendation, the European legal framework looks stronger and more complete. Thus, the function of the EWT, as it has been delineated into the Proposal, should be to ensure to debtors and entrepreneurs the access to several mechanisms able to detect a deteriorating business development and signal to the debtor or the entrepreneur the need to act as a matter of urgency.[224] Useful information of the purpose of these tools may be found, in a scattered order, into other recitals, where the EU Commission clarifies how possible early warning mechanisms should include accounting and monitoring duties for the debtor or the debtor's management as well as reporting duties under loan agreements and that third parties, such as accountants, tax and social security authorities, having relevant information could be

[221] Article 3, Proposal. It should be noted how the debate around the early warning tools mechanisms and their relevance in the rescue and restructuring viewpoint, was already felt at EU dimension: into the 2003 Report of the Commission, the discussions focused on the availability of early warning mechanisms and on the prevention of failure – European Commission, Best Project on Restructuring, Bankruptcy and a Fresh Start - Final Report of the expert group (September 2003) 9.
[222] Article 3, Proposal.
[223] Recital 16, Proposal.
[224] Art. 3, Proposal.

incentivised or obliged under national law to flag a negative development.[225] The activation of such flanking measures, depending on the circumstances which characterise the crisis of companies, might also promote initiatives of renegotiation of the agreements concluded between the entrepreneur and its creditors in order to avoid in-court procedure.[226]

As it will be better illustrated, the EWT discipline provided by the Directive is based on the same principles, only differing in the degree of detail offered.[227]

Following the same, the **moratorium** still occupies a central position in the Proposal: as in the Recommendation, also here the discipline contemplates a no automatic stay of individual enforcement actions. It affects all types of creditors,[228] including secured and preferential creditors, with a relevant exception concerning the claims of workers, unless and to the extent in which Member States ensure by other measures the protection of such claims.[229] In order to facilitate restructuring operations, in the circumstances where the debtor is obliged to file for insolvency under national law during the period of the stay, the obligation shall be suspended for the duration of the stay, unless the company becomes illiquid (and thus unable to pay its debts).[230]

Several differences between the Recommendation and the Proposal might be identified with respect to the **debtor-in-possession** norm, since in the Recommendation, this aspect was not explicitly regulated through a dedicated article. On the contrary, the discipline of

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[225] Recitals 16 and 36.

[226] The same presence of formal alarm mechanism may represent an incentive for creditors and a powerful arm for the debtor, which may induce the former to find the solution when it is still possible to do.

[227] For the features concerning the EWT into Directive, see Chapter 4, para. 4.2.

[228] Even in the Proposal the moratorium is drawn to offer to debtors that possibility for negotiation and formulation of the plan, without the threat of hostile actions by creditors who, in the absence of this remedy, would seize the debtor's assets which are indispensable to keep the business as a going concern: the result would be the compromise of the restructuring attempt.

[229] Art. 6, Proposal.

[230] Art. 7, Proposal.

the Proposal is contained into article 5[231] which states how Member States shall ensure that debtors accessing preventive restructuring procedures remain totally or at least partially in control of their assets and the day-to-day operation of the business. As in the Recommendation, also here the figure of the practitioner in the field of restructuring, who may be nominated by a judicial or administrative authority, is contemplated, although the appointment shall not be mandatory in every case but only in two cases: i) where the debtor is granted a general stay of individual enforcement actions; ii) or where the restructuring plan involves cross-class cram-down. It should be noted that the role of the practitioner in the two different roles of mediator or supervisor provided by the Recommendation,[232] disappears in the language of the Proposal, which prefer adopting the more generic formulation of 'practitioner in the field of restructuring'.[233]

Among the strong points of the debtor-in-possession approach,[234] which are valued into Directive discipline, it might be highlighted how the management of the business remains in the hands of who better knows what the real situation of the company is. Hence, depending on the difficulties, a prompt response, able to face the crisis without wasting precious time, may be carried out. For this reason, the appointment of the practitioner is not mandatory in the Proposal: this person would miss those internal dynamics which characterise the corporate life of the company and on this basis the law privileges the appointment of the practitioner only in case restructuring operations have taken place

[231] The same article 5 also disciplines the debtor-in-possession norm in the Directive.
[232] For the configuration of the practitioner adopted by the Recommendation, see note n. 92.
[233] As correctly observed, in the field of the insolvency law, and more considering the EU dimension, the terminology appears very wide, since into Member States the practitioner may be qualified with numerous and different expressions such as 'liquidators', trustee', 'receiver', 'mediator', 'curator', 'supervisor', 'administrator', 'commissioner' or 'official' – Gerard McCormack et all, *European Insolvency Law: Reform and Harmonisation* (Edward Elgar, 2017) 65.
[234] Further aspects will be addressed during the description of the Directive regulation in Chapter 4, para 4.3.1.

through the grant of the moratorium or when the restructuring plan involves cross-class cram-down.

In the area of **restructuring plans**, it might be immediately noted how, compared to the precedent, the Proposal discipline appears more full-bodied, constituting a very faithful representation of what will become the final discipline contemplated by the Directive: therefore, focusing the observation beyond the mere examination of the discrepancies between the Recommendation regulation and the Proposal one, it gets a useful preview on the peculiarities of the Directive legislation.[235]

Limiting the investigation on the relevant introductions, the detailed rules concerning the **majorities of creditors** into the classes, which in the Recommendation had been neglected, deserves to be mentioned. In fact, it is provided that, besides the fact that the affected parties are treated in separate classes such as workers or secured and unsecured creditors,[236] the RP shall be adopted when the majority in the amount of their claims or interests is obtained in each and every class. In addition, the majority required by Member States shall be in any case not higher than 75% in the amount of claims or interests in each class.[237]

The attention is to be paid on the provision which establishes that in case the necessary majority is not reached in one or more dissenting voting classes, the plan may still be confirmed whether it complies with the **cross-class cram-down** requirements, which are met when: i) the RP fulfils the conditions in Article 10(2);[238] ii) the RP has been approved

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[235] Just notice that the heading of the articles regarding the restructuring plan, such as art. 8 (Content of restructuring plan), art. 9 (Adoption of restructuring plan) and art. 10 (Confirmation of restructuring plan), remained unchanged as well as the majority of the substantial content.

[236] Article 9(2) specifies that classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest.

[237] Article 9(4).

[238] The article 10(2) attracts the provisions contained into article 9, which synthetically provides that Member States shall ensure that the conditions under which a restructuring plan may be confirmed by a

by at least one class of affected creditors other than an equity-holder class and any other class which would not receive any payment; iii) the RP complies with the absolute priority rule.[239] The described mechanism, denominated cross-class cram-down, deserves to be further deepened: on the one hand, whether the scenario in which all creditors vote unanimously does not cause for concern, on the other hand, the presence of dissenting creditors has to be disciplined to avoid the failure of the RP adoption. Indeed, when there are members that do not give the individual consent in several classes, which determine the formation of dissenter classes, whether the conditions provided by the aforementioned rules are respected, the plan becomes binding to all creditors and to all classes, and thus both to those who voted for the adoption and to those who voted against.[240] There may also be the case where the RP is adopted although in each classes creditors have not given their consent to the plan.

3.5 The EU Directive 2019/2023: general observations

The Restructuring Directive, as all the other Directive enacted by the EU legislator, is composed by two main blocks (or parts): the 'preamble' which may be individuated after the title of the act, and that includes citations and recitals, and the 'enacting terms' formed by the articles,[241] which constitute the legislative part. Since the following Chapters will be dedicated to the description of the disciplines contemplated into the legislative part, in

judicial or administrative authority are clearly specified, including at least the notification to all known creditors likely to be affected by it, the compliance of the plan with the best interest of creditors test and any new financing which is necessary to implement the restructuring plan without unfairly prejudicing the interests of creditors.

[239] Article 11, Proposal.

[240] It should be mentioned how the figure of the RP, as delineated by the EU Legislator, appears as a very powerful legal tools: in the majorities of Member States a plan which these peculiarities has often been missing and its implementations can remarkably benefit to those jurisdictions. The argument will be treated during the analysis of the individual national insolvency law.

[241] The articles are divided into Titles and Chapters.

this paragraph the recitals which encompass principles and the purpose of the Restructuring Directive will be faced. More precisely, the recitals contain the statement of reasons for the adoption of the Act, recalling the historical context and the facts which characterise the matter.[242] In addition, from the analysis of the recitals,[243] significant information regarding each tool provided into the Directive may be acquired. Such premise should help to bear in mind that, although the preamble is a fundamental part of the act, its content (the recitals) is technically not binding,[244] considering the enacting terms (the articles) the real discipline which Member States should be adopted.[245]

Therefore, the objective of the Restructuring Directive is not only, as someone could deduce reading the title,[246] to offer a modern and efficient insolvency non-liquidating approach for the benefit of companies to Member States, but it is *in primis*, to '*contribute to the proper functioning of the internal market and remove obstacles to the exercise of*

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[242] The 2015 Practical Guide, which provides the general principles to better understand the Acts adopted by the Community legislation, states, with reference to the Recitals (page 33) that they "*should constitute a genuine statement of reasons… However, the reasons stated for acts of general application do not need to recount, much less to assess, the facts on the basis of which the act is adopted… it is enough simply to refer to the criteria and methods used…to indicate the general situation which led to adoption of the act and the general objectives which it is intended to achieve"* – Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in drafting of European Union legislation' 2015 <https://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf> accessed 05 January 2022.

[243] It should be noted how the main principles which govern the whole Directive, are almost all consolidated into Recital (1).

[244] The EU Court of Justice clarified that: "*the preamble to a Community Act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the Act in question*" - CGUE, C-162/97, *Nilsson*, [1998] ECR I-7477, para. 54.

[245] In general terms, recitals introduce the main provisions of the Directive and represent the reasons for their adoption. Therefore, besides they are not legally binding they are not implemented by national jurisdiction. However, they are useful for understanding directives, especially as they clarify the meaning of certain provisions and the intentions of the EU legislator that led him to adopt this type of legislative measures – Case C-244/95, *Moskof*, [1997] ECR I-6441, paras. 44-45. For these reasons the relationship between recitals and the normative terms is very close, since the former have, during the implementation of the act, the function of guiding national legislators to resolve ambiguities and to adopt the right interpretation which should coincide with the EU legislator intention. On the Recitals' role to help establish the purpose and the scope of provisions, see Case C-173/99 *BECTU* [2001] ECR I-4881, paras 37-39; Case C-435/06, *C* [2007] ECR I-10141, paras. 51-52.

[246] In the title are mentioned the preventive restructuring frameworks, the discharge of debt and disqualifications, the measures to increase the efficiency of procedures concerning restructuring, which are the means (*rectius* the ground of intervention) through which the purpose of the Directive may be achieved.

fundamental freedoms'.[247] Hence, the efficiency of the internal market, according to the language of the EU legislator, depends on the obstacles due to the differences between national laws and procedures concerning the preventive restructuring and the other remedies: taking action on these latter, the objective of the Directive may be achieved by ensuring that '*viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating*'.

The pillar of the discipline, which is clearly underlined by the EU legislator, may be traced back to **the timeliness of the reaction to the crisis to avoid the insolvency**[248] and the priority of leaving the business in the debtor's hands (**debtor-in-possession**): '*Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises.*'[249]

A particular protective position is reserved to the **workers** and, consequently, to the contrast to the job losses, since these two aspects are often invoked in the preamble as well as into the articles of the Directive. The purpose of the EU legislator is to offer protection to workers and employees of corporate entities whenever they are involved in a preventive restructuring process. To the workers, the discipline, besides to cite the category in several recitals, dedicates the whole article 13,[250] advising Member States to ensure that '*individual and collective workers' rights, under Union and national labour*

[247] Recital (1), Directive. It is noteworthy how the main objective often emerges in other parts of the preamble such as when it is states that '*the frameworks should help to…the economy as a whole*' – recital (2).
[248] It is well-known fact that rapidity is the core of the insolvency procedures, and this factor assume more relevance in the wide majority of restructuring cases.
[249] cf Proposal (n. 218).
[250] It should be noted that the provisions dedicated to the workers into the Directive were not contemplated in the Proposal, although numerous references were present in the explanatory memorandum.

law are not affected by the preventive restructuring framework': the reference is to the right to collective bargaining and industrial action; the right to information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation; the right to information to employees' representatives about any preventive restructuring procedure which could have an impact on employment; and the right to information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption or for confirmation by a judicial or administrative authority.

As anticipated, the consideration reserved to workers may be also found into the recitals: for instance, with regard to the aforementioned aims of the Directive to remove those obstacles that result from the differences between the jurisdictions of Member States, the legislator specifies that it should be achieved '*without affecting workers' fundamental right and freedoms*'.[251] The same regime of protection may be noticed in the context of the RP: the workers' rights arising from a contract of employment or from an employment relationship, should be safeguarded without prejudice to the specific rules applying in the event of insolvency proceedings. Moreover, they (the workers) should have the right to vote (in a separated class from the other classes of creditors)[252] on the plan in case their claims are affected by the RP;[253] they also should benefit of the exception from the stay of individual enforcement actions, in order to ensure an appropriate level of protection of workers;[254] yet, they appear with reference to the additional going-concern value compared to the liquidation solution, since the former '*is based on the assumption that*

[251] Recital (1), Directive.
[252] Article 9 (4), Directive.
[253] Recital (62), Directive. In addition, according to article 8 (1) let. b), before the rules on the vote, the same content of the RP shall contain '*a description of the economic situation of the debtor and the position of workers*' (art. 8 (1) let. b)).
[254] *Ibid*.

the business continues its activity with the minimum of disruption, and limits the impact on workers'.[255]

Another aspect faced by the Directive and related to the workers concerns the role and rules of the **representation**: in general Member States should ensure that employees' representatives are given access to relevant and up-to-date information regarding the availability of early warning tools, the assessment of the economic situation of the debtor and the information regarding the proposed restructuring plan to '*allow them to undertake an in-depth assessment of the various scenarios'*.[256]

[255] Recital (49).
[256] Recital (23) and (61).

Chapter 4 – Detailed analysis of the EU Directive 2019/1023

4.1 Introduction

In this chapter, the discipline contemplated by the Directive is analysed in detail.

Thus, after describing the Early Warning Tools, the remedies provided in the Preventive Restructuring Frameworks are addressed. These latter are: the debtor-in-possession principle, the Moratorium, the Restructuring Plan (adoption, confirmation and cross-class cram-down mechanism), the New Financing and a brief mention of the Discharge of Debt and Disqualification.

4.2 Structure and peculiarities

Looking at the structure of the Directive, which is composed of numerous recitals and 6 titles which constitute the body containing the legislative part,[257] it may be affirmed that the EU Legislator has confirmed the well-established custom of reserving a wide space for recitals within the Act. This descriptive area plays a central role for the interpretation of the Act, since it offers that information which are not contained into the legislative text. The recitals, although technically not binding, are able to provide the reasons and the purpose of the legislator's intervention and thus the principles underlying the tools. The consequence should be an accurate comprehension of the function assigned to the text by the EU legislator: in the specific case, the faithful identification of how to apply

[257] Precisely, the Directive consists of 101 recitals, 6 titles and 36 articles.

the legislative rules taking into account the economic context and the subjective circumstances in which companies operate.[258]

With regard to the peculiarities, in addition to the content aspect characterised by the new restructuring instruments contemplated in the Directive and which will be described in this chapter, it might be useful, in more general terms, to focus on the Directive, both as a harmonization tool and as an objective. As a legislative tool it is different from the Recommendation and precisely for this reason with a more decisive impact on the regulatory autonomy of the Member States, which, whether on the one hand are to transpose its discipline in their jurisdictions, on the other hand may preserve all the previous remedies and eventually enrich their insolvency law, that culturally and traditionally form part of the variegated legal system of the European countries; as an objective, the set of principles and instruments contained therein that must make the European landscape uniform, at least at a minimum level, for several reasons: (i) to allow all companies operating in European jurisdictions to avail themselves of the same rescue and restructuring tools, and thus have the same chances of avoiding liquidation; (ii) to make the European economy more robust and competitive through an appropriate level of all insolvency laws in the EU Member Countries.

With regard to the specific restructuring legal tools, the core of the Directive may be individuated by focusing the attention on the needed to promptly reveal the non-performing situation of the company (EWT), the option for debtors to have access to several remedies (RP) to overcome the crisis through restructuring, maintaining business

[258] It has been argued how it would be possible to attribute to the Recitals might enjoy a status of a sort of 'hybrid character', therefore more relevant with respect the simple function of a description of the historical legislative intent – cf Paulus and Dammann (n. 174) 79.

activity (PRF) and avoiding insolvency, all to reach the reintegration of debtor, in the shortest possible time, into the market as a company *in bonis*.

4.3 Early Warning Tools

It has been shortly anticipated how the EWT consist **in a set of measures** which should be able to predict, as soon as possible, the financial crisis signals to allow debtors to take action in order to avoid insolvency.[259]

Theoretically, the tools capable of predicting the probability of a company to suffer financial difficulties in a given period of time and of soliciting the debtor to act to avoid insolvency, may be established both merely on an internal level through report systems imposed on the internal control bodies of the company and on an external level, providing the report on third parties (qualified creditors) which should be potentially informed of the economic and financial performance of the company.

Before describing the discipline as drawn in the Directive by the EU Legislator, several general reflections should be raised in order to provide a useful picture on the specific role attributed to these tools in the context of the whole discipline of the Directive. In addition, further information on the position of debtors that receive the alert, may be offered.

Addressing the **first aspect**, it must be underlined that the EWT have nothing in common with the PRF except the context in which debtor is involved: the alert tools should be activated at a very early stage of the crisis, hence before and independently from the

[259] It should be noticed how the installation of any type of measures able to ensure an adequate level of monitoring of the company situation both for the interest of the company itself (directors) and for the interest of the other parties (customers and creditors) should be considered a general duty. The same fact in the reality of business life that the majority of companies have not adopted such early warning system led the EU Legislator to provide it.

measures and procedures (PRF) adopted to overcome the onset of difficulties, and their role is not a direct intervention on the company but only to turn on the spotlight on the problems of the company. Synthetically, whilst the EWT have to report problems, the PRF have to try to solve them.

A further clarification regarding the scope of action of the EWT concerns the nature of the causes of the crisis: for the alert system is irrelevant which factors trigger the crisis indicators since the report is automatically activated upon the occurrence of that specific event (such as the hypothesis in which debtor fails certain types of payments. It is only after the emersion of the crisis that the criticalities which have generated the distress may be addressed into the merit (through the tools offered by the PRF) with the aim to overcoming them.

With regard to the **position of debtor,** once the alert has reported the crisis, two are the available options: either to enter into individual negotiations with creditors in a purely private manner based on principle and rules of the general contract law (also called "informal" or "out-of-court" procedures),[260] or to enter into a statutory procedure (also defined "formal procedure").

It should be considered how, on the one hand, the informal procedures, which are characterised by a high elasticity and flexibility,[261] may offer relevant advantages such as the immediate and timely management of the crisis[262] through the reduction of the time

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[260] Usually, debtors try to obtain from its creditors the financial review of the terms and conditions of the contract, by the postponement or the conversion of the debts into shares, or even by the modification of the rights of secured creditors.

[261] cf Finch and Milman (n. 65) 244; cf Goode (n. 17) 44, cf Wood (n. 69) 17.

[262] By contracting with creditors – both individually, adopting bi-lateral contracts, and collectively, concluding multi-lateral contracts – does not require any type of approval, and no specific majority for the conclusion of the agreement is to be achieved. Only the acceptance through the counterparty's consent to conclude the contract is needed. This latter is the old principle consolidated into the ancient latin *lex mercatoria* and that has survived in time to date.

required in formal procedures and costs[263] due to the involvement of institutional parties (court and IP), as well as prevent or at least contain the reputational damage.

These procedures are based on agreements concluded among the involved parties which require the individual consent of creditors, with the result of binding only who, among these latter, decide to agree the procedure.

On the other hand, the formal procedures usually offer an intensive protection to the debtor in conjunction with creditor: the former may benefit of the automatic stay of the individual enforcement actions whilst the latter have, thanks to the presence of the insolvency practitioner (IP)[264] appointed by the court, greater guarantees on the conduct of the procedure in term of correctness and debtor asset management.

With reference to the EWT discipline contained into the Directive, article 3, entitled 'Early warning and access to information', provides that '*Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay*'.

It should be underlined that the EWT discipline found inspiration in the French model which introduced, the *procédures d'alerte* (alert procedures and thus the EWT) into the *Code de Commerce*.[265] The objectives of those alert measures were finalised, on the one hand, to the improvement of information concerning debtor situation and, on the other hand, to the creation of a more effective internal alarm system aimed at facilitating out-of-court solutions between the parties involved.[266]

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[263] Jennifer Payne, 'Debt Restructuring in the UK' [2018] ECLFR 451; cf Keay and Walton (n. 208) 191.
[264] Even called Insolvency Office Holder (IOH).
[265] The update of the French Commercial Code was due to the introduction of the law n. 84-148 of March 1984.
[266] A more detailed description of the French alert procedures will be addressed in Chapter 6, para. 6.2.1.

Looking at the terminology of article 3, it deserves to be mentioned an interpretative uncertainty concerning the scope of the EWT rules. To be specific, although on the one hand the same article 3 uses the general term of 'debtor', and therefore including companies, business persons (entrepreneur) and consumers, on the other hand there are several indications contained in the Directive that would limit accessibility of the EWT only to companies and entrepreneurs. In support of the first hypothesis, in addition to article 3, even article 1, para. 2, lett. (*h*) seems to confirm the broad spectrum of application, by affirming that several procedures of the Directive do not apply to debtors that are natural persons and who are not entrepreneurs: without contemplating the EWT, the procedures listed are preventive restructuring framework, debt discharge and other measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt. On the other side, further references contained in several Recitals seem to favour a more limited scope of the norms: for instance, Recitals 2 states, describing the PRF, that they should enable debtors to restructure effectively at an early stage and to avoid insolvency, thus '*limiting the unnecessary liquidation of viable enterprises*'.[267] Even Recital 22 seems to be in the same direction, providing that Member States should be able to adapt the early warning tools '*depending on the size of the enterprise*' and to lay down specific provisions on early warning tools for large-sized enterprises and groups that take into account their peculiarities. The issue concerning the scope of the EWT is also of substantive relevance, since the crisis of natural persons often originates from different causes compared to entrepreneurs: job loss, illness, and other personal reasons such as a divorce may determine the ghost of the likelihood of

[267] This explicit reference to the companies would be superfluous if it were not aimed to limit the scope of the application to a specific type of debtor!

insolvency. Hence, on the basis argued, the application of the EWT to natural persons should be avoided and, preferably, triggering the alert only for companies and entrepreneurs.[268]

As easily expectable, the alert mechanisms, even differently called 'early warning system' or 'alert measures', should forecast at an early stage the emersion of those initials and critical dynamics that characterise the business life of companies before the evidence of the real crisis.[269]

The phenomenon of the early emersion of company crisis derives from the exigence, felt in several jurisdictions, to have to counter recurring problems. For instance, especially with regard to the small and medium-sized enterprises (SMEs),[270] the company accounting may be usually lack adequate, determining an inefficient reporting system that does not allow early revelation of the difficulties.[271] In addition, not always the directors are correctly update and informed on the real status of company's daily affairs or, on the contrary, even being fully aware of the circumstances, they prefer to carry on the business ignoring (sometimes not in good faith) the reality of the fact.[272]

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[268] It does not mean that Member States cannot provide a set of rules for natural persons. They should pay attention to the different factors which may arise personal troubles even by separating the type of debts.

[269] The argument on the EWT has already been touched in Chapter 2, para. 2.2.2 and it will be addressed in more detail in Chapter 4 para 4.2.

[270] It should be stressed how the role of the SMEs in the EU economy is particularly felt by the EU Commission, which considers them, literally, '*the backbone of Europe's economy*'. Effectively, they represent 99% of all businesses in the EU and they employ around 100 million people, account for more than half of Europe's GDP, playing a key role in adding value in every sector of the economy <https://single-market-economy.ec.europa.eu/smes_en> accessed 10 March 2023.

[271] Michael Kuttner et al, 'Impact of accounting on reorganization success: empirical evidence from bankrupt SMEs' [2021] JAOC 25.

The Directive expresses the attention on the delicate position of SMEs, dedicating a specific sentence in Recital 17: '*the EWT should be put in place to warn debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts*'. Effectively, it is comprehensible how small businesses do not have huge resources to sustain the restructuring costs such as the appointment of specific professional figures (as lawyers or accountants which are expert in the financial crisis field), especially considering the situation of financial difficulties which further aggravate the economic availabilities.

[272] cf Stanghellini et al (n. 76) 7.

In the Directive the text of the law, affirming '*circumstances that could give rise to a likelihood insolvency'*, clearly refers to the situation of distress that precedes the 'likelihood of insolvency': the *ratio* of the art. 3 lies in the possibility, for the Member States, to immediately detect the distinctive signals and alert debtors in order to contain, as much as possible, the progress of the crisis and avoid insolvency, e.g. by exploiting those legal remedies offered by national jurisdictions with the implementation of the preventive restructuring framework.[273]

It should be noted that offering means to debtors for the mere purpose of alerting them that something is going wrong, it is not sufficient: para. 2 clarifies that Member States must set up a warning system which may specifically include:

(a) **alert mechanisms** when the debtor has not made certain types of payments;

(b) **advisory services** provided by public or private organisations;

(c) **incentives** under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

As far as the **alerts mechanisms** are concerned, it is not so simple to offer an efficient system of warning which is able to detect in due time the emersion of the difficulties and it may be noticed, looking at the international panorama concerning the insolvency regulation, that this aspect has had neglected in favour of the advice. Probably the reason of the lack of the use of the alert mechanisms may be found in the difficulty of preparing

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[273] The stage of the company difficulties is to be revealed immediately, since the aggravation of the conditions leads to the much more serious and specific state, which might be the likelihood of insolvency or insolvency.

a balanced system measures and the necessary involvement of other subjects, usually third parties and public authorities.[274]

Placed this premise, EU Member States should set up a mechanism that may be triggered when debtor did not make certain payments due, such as the tax or social security contributions. Among the authorities which could carry out the report, besides those which are strictly connected to the missed payments, even courts might be part of the alert process so that, when a judicial claim has been submitted, debtor might be informed on the possibility to receive the advice.[275]

With regard to para. 2(b) of article 3, *id est* the **advisory services** provided by public or private organisations, it deserves to be underlined that the same fact that a possibility to receive the advice is offered for debtors, might represent a real change of pace with respect to the past. In fact, historically, debtor approach to the crisis, and in particular the way to manage the overcoming difficulties, always represented one of the *punctum dolens* of the matter: a trivial sentence like 'the problem of the crisis is the debtor' is not so trivial as it seems, considering the psychological attitude of directors to persisting in hiding difficulties as far as possible. Thus, the reception of the advice concerning financial condition of the company might be a real advantage for debtors, mainly whether the access to this mechanism is organised in a simple and fast manner, such as through an easy and simple submission on a dedicated web-site, via email or even by a phone call, avoiding cumbersome and complex procedures with too extensive models.[276] Therefore, a central role in the process is undoubtedly assigned to the directors, since now, having

[274] In addition, the attribution of duties to public authorities requires significant changes into national legislation – cf Paulus and Dammann (n. 174) 80.

[275] In the most common case studies, a request for fulfilment, a claim to seize property and in general any cases that raise a suspicion of issues related to the financial and patrimonial situation of debtors.

[276] It has been argued how a concrete advice should be able to delineate an adequate and faithful representation of the situation of the business debtor – cf Paulus and Dammann (n. 174) 82.

received the advice in case of potential distress, they may promptly take action to avoid crisis.[277] The *favour* of the Legislator in this sense may be noticed reading Recital 70 and articles 17 and 18 of the Directive: whilst the former suggests that directors, when the writing is on the wall, should seek professional advice, for instance by making use of early warning tools, articles 17 and 18, that concern the "Protection for new financing, interim financing and other restructuring related transactions", encourage them to take all the steps which are necessary to avoid insolvency. In addition, letter (b) of art. 18, expressly mention '*the payment of fees for and costs of seeking professional advice closely connected with the restructuring*' among those transactions which for the benefit of the negotiation of a restructuring plan are not to be declared void, voidable or unenforceable.

The same relevance attributed to the advisor services may be easily noticed looking at the recommendations promoted by the Early Warning Europe [278] (EWE), since it has been stated that '*volunteer advisers are a cornerstone in an Early Warning organization*'.[279] Here, the role of advisers is considered decisive for the implementation of an efficient system of EWT, also taking into account that volunteers carry out their activities for free.[280]

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[277] It should be specified that the promotion of the EWT as mechanism aimed to contrast financial crisis as soon as possible, is confirmed by the choice of the EU legislator of recommends to the Member States in Recital 22 not to impose any liability for potential damage incurred through restructuring procedures which are triggered by such early warning tools.

[278] The Early Warning Europe is a European network to create strong framework conditions for entrepreneurs and businesses across sectors that can help them face key challenges, including managing a crisis, dealing with bankruptcy and getting a second chance. Its objective is therefore to promote entrepreneurship and growth of SMEs across Europe, providing advice and support to companies in distress.

[279]https://www.earlywarningeurope.eu/manual/5-building-maintaining-and-use-of-a-well-tuned-corps-of-volunteer-advisors, accessed 2 May 2022.

[280] It may be helpful to observe the psychological (subjective) element which emerges next to the objective skills and that should be considered when selecting volunteer advisors, such as his/her reasons for working as a volunteer, asking whether it is sure that he/she is driven of the wish to, and meaningfulness of, helping entrepreneurs in crisis. This aspect highlights the importance regarding the role of the person who holds

Indeed, the candidate for the role of volunteer advisors should possess skills capable of understanding the company situation as well as having experience with general management and company reorganisation.[281]

The second part of article 3[282] concerns the information system that Member States should set up to ensure to debtors and employees' representatives the access to relevant and up-to-date information about the availability of early warning tools, the procedures and measures regarding restructuring and discharge of debt. As already anticipated,[283] once again the relevance of the employees' representatives is here recalled: in fact, the purpose of the norm is to improve the circulation of those information concerning the tools offered by the law to facilitate the restructuring the company through the public online consultation. To ensure a real up-to-date information, national jurisdictions might introduce a duty on employers to inform, each significant event related to the restructuring operations, the employees' representatives. In addition, the consultation should be easily accessible and presented in a user-friendly manner, especially for SMEs which need to promptly react to avoid the worst, when they are likely to become insolvent.[284]

The last section of the article in question deals with the opportunity for the employees' representatives to give their support for the assessment of the economic situation of the

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that position: he/she should not only be professionally competent, but also humanly interested in the destiny of the company in distress.

[281] The importance of qualified and professional experts for the benefit of the whole insolvency system has been often emphasised: figures like lawyers, accountants, judges and other insolvency practitioners are to be able to perform and face all the critical issues belonging to the financial distress or insolvent business – see, for instance, Bob Wessels and Gert-Jan Boon, *Cross-Border Insolvency Law, International Instruments and Commentary* (Alphen aan den Rijn: Kluwer Law International 2015); World Bank Principles (2016); UNCITRAL Legislative Guide (2004); UNCITRAL Legislative Guide, Part Four: Directors' Obligations in the Period Approaching Insolvency (2013).

[282] To be specific, sections (3) and (4) of article 3.

[283] See Chapter 3, para. 3.4.

[284] It has been suggested that an easy consultation might be favoured by creating an early warning Europe's website, so as all the legitimated subjected may found without difficulty such information – cf Paulus and Dammann (n. 174) 83.

debtor.[285] This rule might be implemented mainly into those jurisdictions where the employees receive an effective legislative protection and where the power of action of the workers' representatives is concrete.

4.4 Preventive Restructuring Frameworks

The most relevant provisions regard two innovative legal arrangements which are contained in the Title 2 and 3: the "Preventive restructuring framework" and the "Discharge of debt and disqualification".

As briefly mentioned upon, preventive restructuring framework represents the innovative approach adopted by the European legislator to manage company crisis. In the past, the traditional management crisis was only represented by the liquidation of the business activity, completely ignoring the phase before (pre-crisis): the inevitable result was that companies left the market, closing down their business.

In the Directive, the purpose of the PRF is very wide and it is clearly reaffirmed both in several Recitals and in the dedicated provisions: thus, these frameworks, according to recital 2, should enable debtors to restructure effectively at an early stage and to avoid insolvency, by limiting the unnecessary liquidation of viable enterprises. Even the job losses, the loss of know-how and skills, and the maximisation of the total value to creditors should be countered through these mechanisms, which should achieve a better result '*in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan*. The legislator expectations of the PRF do not run out here, since Recital 3 explains how the frameworks should also prevent the build-up of non-performing loans, and that

[285] Article 3, section (5).

their availability *'would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector'*. In addition, the homogenous adoption of these measures by all Member States would favour the restructuring of groups of companies.[286] Considering, at least theoretically, the relevant impact which the EU legislator attributes to the PRF, it could be inferred that they should not considered as a debtor's privilege, since the advantages of their presence might benefit all parties involved in the restructuring process, and therefore debtors, creditors, investors, workers and in general the economy as a whole.[287]

It could nevertheless be argued that the PRF aim to preserve general and collective interest because restructuring operation, when are not based on an effective integration among the subjects that are part of the process, have lack chances of success.

Having regard to the prescriptive discipline, the provision on the PRF is contained in the article 4, entitled '*Availability of preventive restructuring frameworks*', which offers, in its sections, several and specific indications on how the structure of the frameworks should be drawn in national jurisdictions: (i) section 2 addresses the position of those debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations; (ii) section 3 offer the possibility to maintain or introduce a viability test under national law; (iii) section 4 faces the opportunity to limit the number of times within a certain period a debtor may access PRF; (iv) section 5 and 6 describe the main characteristics of the frameworks; (v) section 7 and 8 the subjects who may request the opening of the PRF.

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[286] See Recital 7.

[287] The importance of the PRF for the whole economy is expressed in Recital 2.

Starting from Section 1, it confirms the obligation for Member States to implement the frameworks, by specifying that the access to these measures is to be granted only in case of likelihood of insolvency (and thus with a view to preventing insolvency) ensuring debtor's viability.[288] These are crucial points since without the risk of the insolvency (hence, the likelihood of insolvency concept) and the guarantee of the viability of the company, the PRF cannot be invoked. The premise arises natural questions: how to verify that the risk is concrete? And also: are the RPF always available in presence of the risk of insolvency, even if the percentage of likelihood of insolvency is very low? How the viability may be determined? In general, to answer the first two interrogatives it might be argued that companies might be considered insolvent whether, taking the cash flows as a parameter, within the following year has a probability of becoming insolvent greater than 50%. Usually, next to the cash flow test, even the balance sheet test is recommended: whether the former reveals when debtor is unable to pay its debts as they fall due, the latter test establishes whether the liabilities exceed the value of the assets of debtor.[289]

Member States should therefore set up a sort of "entry test" which may guarantee the access and the use of the PRF from the preliminary stage and only in those cases in which companies are almost certainly "likely insolvent".[290] Furthermore, the business tradition has long identified in the profitability, liquidity or solvency parameters the possible

[288] The words use in article 4 (1) are '*Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity'*. It should be noted how the fact that in the provision is mentioned that other solutions for avoiding insolvency should not be received prejudice from the frameworks implicitly still highlights the favour to the out-of-court negotiations accorded by the legislator. In addition, the effectiveness of other hypothetical and eventual civil and commercial tools provided by national jurisdictions which are not contemplated by the Directive are recognised and protected.

[289] A well-done description concerning the cash flow and the balance sheet tests may be found in Finch and Milman (n. 65) 119 and in Goode (n. 17) 121.

[290] Horst Eidenmuller, 'Contracting for a European Insolvency Regime' [2017] Eur Bus Org Law Rev 279.

reasons for the crisis of the company, although it is useful to specify that there are significant limits regarding these predictive accounting instruments, especially when debtor is an SME.[291]

It has been correctly affirmed that such models, reports or diagnostic tools for predicting long-term solvency or business failure may be especially beneficial to larger companies.[292] Conversely, small firms, which represent the majority of businesses in the European Union, are managed by entrepreneurs who lead the business in a familiar way, without providing adequate internal controls, often even complicating the situation, because the measures to face the crisis are being taken too late.

In addition, as anticipated above,[293] the definitions of the concepts of "likelihood of insolvency" and "insolvency" are demanded to each national legislation of Member States. This aspect further complicates the picture, since any differences in the perimeter of the notion of "likelihood of insolvency" provided by EU national jurisdictions may create divergences into the EU area regarding the condition for access to the PRF. The EU legislator considered this risk offering several general indications on how this facet is to be addressed by Member States: recital 24, after reiterating the definition of the PRF, and thus that they should enable debtors to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured, it specifies that the PRF "*should be available…before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator*". Although these clarifications might appear trivial, they introduced

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[291] Jonathan McCarthy 'A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises' [2020] European Business Organization Law Review 905.
[292] David Milman, *Governance of distressed firms* (Edward Elgar 2013) 6.
[293] See para. 2.2.2 in Chapter 2.

elements which may, to some extent, contribute to make more uniform the direction which national legal systems may define their internal insolvency discipline: last sentence, by clarifying that the moment within preventive measures available for debtors should be set before the occurrence of the conditions for the access to collective insolvency procedures, allows legislators of Member States to identify and fix, each according to their own national insolvency framework, that particular status of companies which are already affected by distress but still in time to take actions to overcome the crisis and avoid insolvency.

It should be emphasised how this flexible legislative approach (characteristic of the EU legislative system) allows on the one hand not to interfere (and therefore even avoiding contrasts) with the specific national rules, concerning, for example, the prerequisites for access to insolvency proceedings or the definitions of certain phenomena and, on the other hand, to achieve a level of homogeneity such that a company in distress based in a EU Member State may have access, on equal terms, to the same preventive anti-crisis tools that it would have exploited in any other EU jurisdiction.

Moreover, the Recital 28 extends the scope of the PRF by suggesting that the latter should be available for debtors even in case of non-financial difficulties, on the condition that such difficulties give rise to a "*real and serious threat to a debtor's actual or future ability to pay its debts as they fall due*".[294] For instance, this may be the case where the debtor has lost a strategic contract.

[294] Recital 28 continues by specifying that the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity.

Section 2 introduces significant exception[295] for debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations, since the opportunity to access to the PRF is allowed only after that they '*have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations*.

The comprehension of the provision may be facilitated by reading the recital 27, which tightens the rule by extending its scope: it warns that the limit of access to PRF by Member States should also concern those debtors who have '*their books and records incomplete or deficient to a degree that makes it impossible to ascertain the business and financial situation of the debtors*'.

Thus, national jurisdictions may, on the one side, limit access to the frameworks to those convicted debtors for breaches of accounting or bookkeeping obligations, but only to the extent in which they do not have adopted adequate measures to remedy the issue that have given judgment and, on the other side, even extend this exception for those debtors who, due to their accounting shortcomings, do not make possible to ascertain the financial situation of their company. The reason why the latter category of debtors is equated with the former may be individuated taking into account the protected interests of creditors, since in case of deficient accounting books also the real financial situation may result altered. Therefore, this measure may be read as a further guarantee for creditors instead of a punishment for debtors.

[295] This exception is optional for Member States. It should be noted how the original version of the text was more flexible in its scope that, in fact, did not consider the limitation for debtor which are not in order with their accounting books – see the original text in the amendment 34, Draft European Parliament Legislative Resolution of 21 August 2018.

Facing the issue of the **viability of debtor** contained in **section 3**, it is worth remembering that the Restructuring Directive is aimed only at companies that, although in financial difficulties, are economically sustainable: the purpose is precisely to allow these companies to continue their business activities.[296] From an economic point of view, the European Commission has defined the concept of viability, stating that it is achieved when companies are able to provide an appropriate projected return on capital after having covered all its costs.[297] On the contrary, when the future prospects of survival do not seem to be considered, companies should be liquidated "*as quickly as possible*".[298] Therefore, the **viability test** should offer a powerful tool able to distinguish between those companies in financial distress which, through a successful restructuring may remain in the market and those non-viable companies that should be liquidated and be removed from the market. Having placed the premise on the concept of the viability of debtor, it should be specified that the prescription of the (viability) test in the Directive is not mandatory for Member States:[299] the art. 4 (3) states that "*Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.*" The formulation appears very clear: national jurisdictions may decide to adopt the viability test under the conditions that its purpose is

[296] Coherently, the goal of the PRF is to prevent debtor insolvency and ensure its viability (articles 1(1) lett. a) and 4(1).
[297] European Commission Communication, 'Information from European Union Institutions, bodies, offices and agencies - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty' [2014/C 249/01] 31.07.2014.
[298] Recital 3, Restructuring Directive.
[299] It has been stated that the reason for the choice to make the viability test optional should be found as the result of a compromise between two different positions within the European Union: in fact, whether some Member States have considered the presence of the test as essential, in order to avoiding the indiscriminate access to the PRF, e.g. allowing to the non-viable debtors to make use of these instruments to the detriment of their creditors, other countries have instead expressed that the introduction of such instrument could delay the opening of the procedure and even jeopardise its effectiveness – cf Paulus and Dammann (n. 174) 93.

to be to exclude those debtors that do not have a prospect of viability and that it can be carried out without detriment to the debtor's assets. Recital 26 offers additional information regarding the protection of debtor assets which could take the form of, *inter alia*, the granting of an interim stay or the carrying out.

It has been underlined how the choice of the introduction of the viability test is left to the Member States which decide whether to contemplate or not this tool: once implemented, as it has been clarified, the test should allow the access to the restructuring proceedings only to the viable companies. The verification of the correct functioning and the achievement of the purpose of the test is contained in art. 10(3) which states that judicial or administrative authorities may refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of '*ensuring the viability of the business*'. Since the Restructuring Directive does not specifies whether the verification of the viability of the plan is to be triggered by the parties or by the judge, the task of regulating this aspect is given to the individual national jurisdictions. A useful clue to assess the viability of company business may regard the qualified majority of affected parties: whether these latter have decided to support the plan, it means that, at least in theory, the viability of debtor business is probably verified.

Everything has been argued so far may be useful for determining when (the moment) to consider the company at risk of insolvency and consequently be able to activate the restructuring tools: refer to business risk and refer to insolvency risk is not the same thing. The existence of the generic business risk, as a constant element for the entrepreneur during the exercise of the business activity,[300] does not legitimise access to the PRF,

[300] The legal and business literature is rich of numerous contributes concerning the business and management risk, such as, inter alias: Keith Baxter, *Risk Management* (Harlow, England: Financial Times/Prentice Hall 2010); John Hampton, *Fundamentals of Enterprise Risk Management: How Top Companies Assess Risk, Manage Exposure, and Seize Opportunity* (American Management Association

which instead presuppose a more specific conformation of the difficult situation of the business, identifiable through the indications already described above contemplated by the Restructuring Directive.[301]

The approach taken by the EU Legislator to the form that the PRF may assume, appears wide and elastic: section 5 (art. 4) warns that they may consist of one or more procedures, measures or provisions, some of which may take place out-of-court.

There are other further marginal (but relevant) aspects which deserve to be addressed on the PRF, such as the eventual **maximum number of access points to the restructuring tools** by debtors, mainly considering on the one hand the exigence to avoid abuse by those company which are clearly not able to avert the liquidation and, on the other hand, the consideration that more restructuring operations (deferred over time) may be needed to definitely ferry the company out of the crisis condition. In this regard, the Restructuring Directive leaves, on an optional basis, the task of setting a limit on the number of times within a given period of time to national jurisdictions: Art. 4 (4) in fact provides that Member States "*may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive*".

With reference to the issue of the number of restructurings, it is not so rare that there are companies that undergo consecutive interventions before returning fully efficient (and thus before reaching the turnaround). By considering that restructuring operations may last even a few months, as it has to be clearly expressed into the plan, it may be easily

2009); Pierluca Di Cagno, *Il sistema aziendale tra rischio di impresa e rischio economico generale* (Cacucci 2002).

[301] It has been suggested that, in order to identify the circumstances of distress which characterised the crisis of debtor and which entitle this latter to access to the PRF even limiting forms of abuse of such tools, the likelihood of insolvency should be identified through a sort of "but for" rule: the PRF should be exploit when, whether the restructuring plan were not adopted (but for it), the insolvency will be unavoidable or at least may reasonably be expected to occur – cf Paulus and Dammann (n. 174) 90.

understood how the market conditions in which the company operates may change, with the result of requiring further restructuring steps.

With reference to the hypotheses of abuse, the risk that the restructuring procedures are used to refinance companies that are irretrievably deceased, should also be pointed out: as it has already been highlighted, this issue is closely related to the restructuring plan and its ability to ensure the viability of the business. An indicative sign of the company's impossibility to recover the viability may be found in the hypothesis in which the first two restructuring attempts have not been successful and therefore the company has not yet reached the economic and financial balance: in this case, it does not seem possible to ignore the evidence that a different and more invasive intervention is recommended, identifiable in collective solutions (formal procedures) through which the management and protection of the debtor’s assets may be insured. It should be emphasised how often, in practice, restructuring plans are concluded despite the awareness of the parties concerning the uncertainty of future trends. For this reason, a second chance might be sometimes necessary even after an unsuccessful first attempt at restructuring. Think of the creditors who freely decide, even assuming greater risks and losses regarding the satisfaction of their credit, to try other routes through the negotiation of a new plan: why such opportunity should not be granted, whether rules and positions of the subjects involved are fully comply?

In establishing the national rules, Member States should take into account these aspects, trying to offer balanced the opportunity of restructuring without excessive limits to those companies which are in conditions to achieve this result, but always considering, on the opposite side, those interests which do not exclusively concern debtors, but also creditors, employees and in general the whole national economic system.

It seems also to be the time to describe the procedural aspects relating to PRF. In the text of the Directive there is no specific part dedicated to the procedure, since it is the competence of the Member States to have to outline, in their respective national insolvency laws, even the way in which the restructuring tools are carried out and managed. In general terms, the Directive offers, in this regard, general principles and some particular rules concerning judicial or administrative intervention on the suspension or confirmation of the restructuring plan: thus, an interconnected reading to reconstruct a unitary framework seems indispensable.

Reading paragraph 5 of art. 4, emerges that the PRF "*may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law*": therefore, the Directive seems very flexible towards each national jurisdictions, to which is left a wide range of provisions and not, *vice versa*, the imposition of a single unitary procedure with the mandatory participation of the Court. The fact that, according to the last sentence of the first period of para. 5, the PRF contemplated in the Restructuring Directive should not prejudge any other restructuring frameworks under nation law, confirms, on one side that Member States must have a PRF which meet the requirements provided by the Directive discipline and, on the other side, that they may have other PRF which may not comply with the Directive.[302]

In addition, the specification that the PRF may take place "out-of-court" confirms the relevance (and thus the advantages) of the informal remedies recognised by the EU

[302] There are several cases of EU jurisdictions which contemplate PRF that not perfectly comply with the PRFv discipline provided by the Directive: for instance, in France, there are the "*conciliation*", the "*procedure de sauvegarde*", the "*sauvegarde financière accélérée*" and the "*sauvegarde accélerée*".

legislator.[303] However, since Member States may decide to modulate the PRF as they prefer, especially by considering the specific peculiarities which characterised the national insolvency law, debtors should be able to benefit of a balanced restructuring system based both on provisions, measures and procedures accessible without the intervention of the court and on PRF which contemplate the involvement of the judicial authority, in order to better protect the rights and guarantees of the parties involved.[304]

Always connected to the role of courts and administrative authorities is the issue of the limit of their intervention in a PRF, which may be provided by national insolvency laws. The point is more delicate than it may appear *prima facie*, since the active involvement of the court may have a strong impact on the individual rights already claimed by the parties before their participation in the restructuring operations. In several cases, the presence of the judicial authority seems essential in order to ensure adequate protection for these subjects, even if such guarantee should not compromise the fluency of the process.[305]

The text of the provision contained in paragraph 6 of art. 4 clarifies that member states may limit the involvement of a judicial or administrative authority in a PRF to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded'': indeed, the general principle affirmed by the EU legislator

303 In particular cases it might be preferred the obtainment, without the judicial intervention (the approval of the plan) of the court, of a voluntary moratorium (suspension of individual enforcement actions) by specific creditors (or classes of creditors) that, by virtue of their strategic position may determine the successful of the restructuring process (the conclusion of the plan) without the judicial approval of the court.

304 Obviously, the Directive allows that typical elements of the out-of-court tools may be combined with elements which are usually provided in formal (judicial) procedures: for instance, a judicial confirmation of the plan without the say. This is the case of the Spanish jurisdiction which offers to the interested party, alternately, the option of the moratorium, the judicial confirmation of the plan or both tools.

305 In the first version of the text (Commission proposal), the principle of minimum intervention was mandatory for Member States but this choice clashed with the different approach by several EU jurisdictions, by affirming that the presence of the judicial authorities would not automatically signify a minor performance of the procedures: hence, after the negotiations in the Council, the final version of the text today appears more elastic – cf Paulus and Dammann (n. 174) 95.

allows such limitation only i) where it is necessary and ii) proportionate and, at the same time, ensuring the protection of the rights of all affected parties and relevant stakeholders.[306]

The reference to the latter subjects must be traced back to all those who, even incidentally, may be affected by the restructuring plan, such as the company's employees or other creditors who do not participate in the plan but who may suffer the effects during its implementation.

Therefore, in conclusion, since Member States may decide, even according to the characteristics of their national institutional framework, the intensity of the participation of the judicial or administrative authorities in the PRF, it would be appropriate that the choice would respect on the one hand the indispensability of such an intervention in certain cases and, on the other, the exigence of celerity required by the restructuring operations themselves.

Article 4 concludes with the last two paragraphs 7 and 8 relating to the initiative for the application to the PRF by debtors and creditors, by giving to the former priority over the latter: in fact, the rule contained in paragraph 7 states that the PRF ‘shall be’ available on application by debtors; paragraph 8 grants the availability of PRF to creditors and workers' representatives by subordinating the initiative to an agreement (and thus to the consent) with the debtor.

Therefore, the literal tenor of the two provisions is unequivocal: the Directive requires from Member States that the FRP are available to debtors, after which, optionally, it also allows creditors and workers’ representatives to request the initiative, by limiting this

[306] As it will be better addressed in the next paragraph, there are cases in which the intervention of the court is automatic and it cannot be excluded, such as when, in order to extend the restructuring plan to dissenting interested parties, it must be necessarily confirmed by a judicial or administrative authority (Article 15(1)).

faculty to the conclusion of an agreement with the debtor,[307] confirming, once again, the centrality of the latter as a beneficiary of the restructuring tools.

Regarding the "**Discharge of debt and disqualification**" (title 3), the current European situation is particularly fragmented: in many member states, the entrepreneurs who are insolvent but honest spend more than 3 years to be discharged from their debts and make a fresh start. Inefficient discharge of debt and disqualification frameworks result in entrepreneurs having to relocate to other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves. According to the art. 20, the entrepreneurs of every Member States shall have the access to at least one procedure that can lead to a full discharge of debt in accordance with this Directive. Next article (21) specifies that the period after which insolvent entrepreneurs are able to be fully discharged from their debts is no longer than three years.

4.4.1 Debtor-in-possession

It has already been mentioned how the Directive, in line with the previous regulation of the 2014 Recommendation,[308] favours and promotes the approach in which the debtor in crisis that participates in a preventive restructuring procedure is not dispossessed and thus, as stated in art. 5(1), remains '*totally, or at least partially, in control of their assets*

[307] The last period of para. 8 specifies that the requirement of the agreement of the debtor may be limited by Member States where debtor is a SME. Recital 29 on this point clarifies that '*where the debtor is an SME, Member States should require the agreement of the debtor as a precondition for the initiation of the procedure*'.

[308] See Chapter 3, para 3.2.

and the day-to-day operation of their business': this is the **debtor-in-possession principle** (DIP).[309]

It should be preliminarily noted that the policy of the principle is based on several considerations: *in primis*, on the probability that the debtor (and thus in this case the directors) knows the business activity carries out by the company better than anyone else;[310] *in secundis*, the continuation of the management by the same subjects avoids a series of relevant costs that would burden on the company, which is already in difficulty;[311] *in tertiis*, the psychological element consisting in the awareness that the control of the company, in case of crisis, is to be maintained, should timely encourage the intervention in the restructuring tools, avoiding that an excessive delay could compromise or even preclude the access to such tools.[312]

In addition, it seems worth noting that, in comparative terms, there are similarities between the Directive discipline and the Chapter 11 of the US Bankruptcy Code: the latter emphasises the need for the debtor to retain control to a certain extent, in order to

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[309] The principle is even affirmed into Recital 30, which states that '*to avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business*'.

[310] It might be argued that the appointment of an external professional, in addition to representing an increase of costs of the company, which is already in difficulty, involves a necessary cognitive phase to understand what the business activity consists of and how it is carried out (e.g. the nature of commercial operations, the network of contacts with suppliers and final clients, the distribution channels and so on). All these activities affect the time factor which represents the keystone, in terms of effectiveness, of the efficiency of corporate restructuring.

[311]The evidence that the access to formal procedures is very expensive and that these costs have a negative impact on the economic and financial situation of the company is consolidated knowledge from numerous studies carried out in recent decades. In this regard se, inter alia, S.C. Gilson et all 'Troubled Debt Restructurings: An Empirical Study of Private, Reorganisation of Firms in Default' [1990] Journal of Financial Economics 315-353; Horst Eidenmuller 'Trading in times of crisis: formal insolvency proceedings, workouts and the incentives for shareholders/managers' [2006] European Business Organization Law Review 239.

[312] It should be specified that there are other additional elements concerning the DIP which may affect the efficiency of the restructuring regime, such as the ownership structure of debtor or the professional qualification of the directors and shareholders – David Hahn 'Concentrated Ownership and Control of Corporate Reorganisations' [2004] The journal of corporate law studies 117-127.

encourage debtors to voluntarily adhere to restructuring measures and avoid reaching that point of no return which make the opportunity of restructuring impractical. [313]

It important to also mention that there is a the close link between the PRF and the DIP: Article 5 clearly states that debtors accessing PRF procedures remain, totally or at least partially, in control of the company. Hence, on the one hand there is a priority that may be found in the restructuring operation made by the debtor which remain in control of the company. On the other hand, a supervision or assistance on the debtor during the negotiation and the drafting of the restructuring plan may be required. In this regard, the presence of a professional figure, the **restructuring practitioner** – who depending on the circumstances, or as the law says '*on a case-by-case basis*', may be optional or in specific cases mandatory – has been provided.[314]

It should be observed that the choice to name the practitioner "Restructuring Practitioner" and not "Insolvency Practitioner" appears consistent with the divergent nature of restructuring proceedings compared to liquidation ones: in these latter, the practitioner is appointed by the court and acts in place of the debtor, which does not retain control of the company and therefore of its assets. In fact, the restructuring approach based on the DIP is precisely aimed at avoiding liquidation proceedings and the consequent replacement of the company management.

As far as the role of this figure in the Restructuring Directive is concerned, it emerges how he/she may be filled by any person or body appointed by a judicial or administrative

[313] The ABI report on Chapter 11 confirms the position in favour of the DIP approach, stating that '*The ability of the debtor-in-possession to continue to operate through its prepetition management team facilitates the company's seamless transition into chapter 11 and allows the debtor to avoid the additional time, cost, and resulting inefficiencies of bringing in an outsider who is not familiar with the debtor's business specifically or the debtor's industry generally. The prepetition management team may also have industry relationships or 'know-how that would benefit the debtor's restructuring efforts*.'
[314] Art. 5(2), Restructuring Directive.

authority, and that the specific tasks individuated by the Restructuring Directive in art. 2(1) are:

a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;

b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;

c) taking partial control over the assets or affairs of the debtor during negotiations.

Whether, on the one hand, national jurisdiction may freely determine specific and additional tasks, on the other hand they have to contemplate at least one of the hypotheses listed in the Directive. A relevant aspect that the EU legislator has not neglected, concerns the preparation and competence that practitioners have to possess in the performance of their activities.[315] For this reason, Member States shall ensure that: the subjects that carry out this role receive suitable training and have the necessary expertise for their responsibilities[316] and that the conditions for their eligibility, as well as the process for the appointment, removal and resignation, are to be clear, transparent and fair.[317] It is also considered the hypothesis in which the appointing of a practitioner may regard specific cases, including cases with cross-border elements, suggesting that in this circumstances, the practitioner's experience and expertise is to be considered with particular attention.[318]

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[315] The EU legislator has also made sure that Member States provide for appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way and, in relation to the parties involved, are provided impartially and independently. Those mechanisms shall also include measures for the accountability of practitioners who have failed in their duties (art. 27(1)).
[316] Art. 26(1) lett. a), Restructuring Directive.
[317] Ibid lett. b).
[318] Ibid lett. c).

In addition, debtors and creditors may oppose to the selection or appointment of a practitioner or request the replacement of the practitioner.[319]

The role of the practitioner, who has to assist the debtor and creditors in negotiating and draw up the plan, becomes mandatory:

a) where a **general stay of individual enforcement actions** is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

b) where the **restructuring plan needs to be confirmed** by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11;

c) where it is **requested by the debtor or by a majority of the creditors**, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

It has been correctly observed how in the case of compulsory appointment, the practitioner has a limited role compared to the functions contemplated by the Directive in the general definitions.[320] Indeed, the fact of narrowing the perimeter of action to the assisting the debtor and the creditors in the negotiation and drafting of the restructuring plan, excludes a series of typical and relevant activities, such as the role of supervision of the debtor during the negotiations on a restructuring plan, or the reporting activity to a judicial or administrative authority.[321] Therefore, ultimately, the scope of action of the practitioner, when the appointment is provided *ex legem*, seems restricted to the role of adviser, supervisor and in some circumstances also of manager, although in the latter case

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[319] Ibid lett. d).
[320] cf McCormack (n. 125) 90.
[321] All the activities carry out by the restructuring practitioner are listen in art. 2(1)(12), as well as the general indications contained into Recital 30.

he/she never replaces the debtor which, on the contrary, retains full control and the consequent responsibilities, in line with the provisions of art. 5(1).[322]

The circumstance that the debtor remains in possession of the company and its assets implies that he must have a responsible behaviour that on the one hand aims to overcome the crisis (or at least that it does not worsen the condition of the company) and, on the other hand, that does not harm the interests of the involved. For this purpose, art. 19 requires Member States to provide that, in the event of likelihood of insolvency, directors have due regard of (a) the interests of creditors, equity holders and other stakeholders; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business. The prescriptions contained into the mentioned provision originate from several EU sources concerning the directors' obligations and encourage the access to the restructuring solutions as well as to prevent directors misconduct and creditors losses.[323]

With regard to the first point (lett. a), it should be observed that in case of financial crisis the company's objective should still not be the maximisation of profits, but it should be the protection of creditors interests. Therefore, in such circumstances, directors have a

[322] It may be useful to point out that the Restructuring Directive discipline slightly differs from the 2014 Recommendation one which has been described in the paragraph 3.2. Effectively, in the Recommendation the insolvency practitioner could be appointed both as mediator and as supervisor, where the former had to assist the debtor and the creditors during the negotiations on a restructuring plan, while the latter had to supervise the activities of the debtor and the creditors and to safeguard the legitimate interests of the creditors and other interested parties. As will be better seen in the chapter 6 para. 6.2.1. the Recommendation has some similarities with the French discipline of "Sauvergarde".

[323] For instance, the Uncitral Legislative Guide on Insolvency Law in part four states that the aim of imposing the directors 'obligations "*is to protect the legitimate interests of creditors and other stakeholders and to provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise*"; and yet, the principle B2.1 of the World Bank Principles for Effective Insolvency and Creditor Rights System that addresses accountabilities of directors and officers in the period when a company is facing an imminent risk of insolvency, states that "*At a minimum, standards should hold management accountable for harm to creditors resulting from willful, reckless, or grossly negligent conduct*".

duty to give priority to protecting creditors, equity holders and stakeholders by avoiding mismanagement.

Indeed, the provision mentions the interests without specifying whether they are legal, economic, financial or social. [324] However, the interests of creditors that could be harmed by the debtor's *mala gestio* may be traced back to the interest in receiving full satisfaction of their claims: with inappropriate conduct, the debtor could jeopardise the company's assets, which constitute the guarantee of creditors for their maximum satisfaction, which might even increase with a successful restructuring operation. In lett. b), the indication of the need to take steps to minimise losses and avoid insolvency may appear superfluous, since these elements characterised the restructuring approach and may be considered the basis of the PRF. However, this provision was introduced precisely because of the lack of specific obligations for directors in most national jurisdictions.[325] In addition, as suggested by recital 70, in case of financial difficulties, directors should take steps to minimise losses and to avoid insolvency by seeking professional advice, including on restructuring and insolvency;[326] protecting the assets of the company so as to maximise value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value; holding negotiations with creditors and entering preventive restructuring procedures.

Finally, with regard to the need to avoid deliberate or grossly negligent conduct of directors which threatens the viability of the business (lett. c), it should be taken into

[324] Although Member States may define the type of interests that need to be protected, the practical impact will not be so evident, since the protection of them may be achieved through the use of the tools provided by the Directive to facilitate negotiations to conclude a restructuring plan.
[325] Cf Paulus and Dammann (n. 174) 246.
[326] For instance by making use of early warning tools where applicable.

account that each national jurisdictions usually contemplate a general duty of care. It is only worth pointing out that such conducts should be avoided at all times, and therefore even (and especially) outside cases of restructuring of the company, in order to prevent that performing companies may run into distress precisely because of management conduct.

4.4.2 Moratorium

As far as the "moratorium" (or alternately "stay") is concern, it has already been anticipated how the relevance of this legal instrument might be perceived considering that it has been contemplated both in the 2014 EU Recommendation and in the Restructuring Directive,[327] although in the latter Act it appears much more articulated.

As defined by the Directive, the stay of individual enforcement actions is a temporary suspension, granted by a judicial or administrative authority or applied by operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out-of-court the assets or business of the debtor.[328] This general definition is to be red with the detailed discipline contained in art. 6 and 7 of the Directive and in several Recitals with enrich the latter: the first aspects which deserves to be analysed concerns the nature and the objective of this measure.

Before addressing the substantive aspects of the EU moratorium, it should be recalled that this remedy in fact realises an individual interest (the protection of the debtor's assets

[327] See para 3.3, Chapter 3.
[328] Art. 2 (4), Directive.

from the aggression of individual creditors) and that it only indirectly realises benefits for the restructuring (and thus for all stakeholders). In addition, in recent decades, rescue and restructuring mechanisms based on the modern insolvency philosophy have strengthened the justification for the stay that would increase the likelihood of a successful rescue.[329]

Looking at the Directive discipline, it may be undoubtedly affirmed that the stay is aimed at supporting the negotiations of a restructuring plan in a preventive restructuring framework.[330] Therefore the logic of this remedy may be individuated in the function of offering debtors a period of time during the negotiations of the restructuring plan without the pressure of creditors,[331] which might seize the assets that are necessary to preserve the business as a going concern,[332] with the result of compromise the success of the restructuring operations. In this context, to clarify the concept, it has been efficiently used the metaphor of the 'common pool': whether creditors overfish in the common pool then it harms the overall ecological structure and prevents the possibility of fish stocks being replenished. [333]

Furthermore, the Directive states that Member States may provide that judicial or administrative authorities may refuse to grant a stay of individual enforcement actions in two hypotheses: where the stay is not necessary; where it would not achieve the objective (supporting the negotiations of a restructuring plan).[334]

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[329] On this aspect, see David Milman 'Moratoria in UK insolvency law: policy and practical implications' [2012] Sweet and Maxwell's Company Law Newsletter 317, 1 – 4.

[330] Apart from art. 6(1), it is even affirmed in Recital 32 which states that '*the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations*'.

[331] Debtor might mainly need protection during the delicate moment between the filing and the confirmation of the plan.

[332] On the notion of the surplus of a going concern value cf (n. 93).

[333] cf McCormack (n. 125) 110.

[334] Looking at the two elements and considering the purpose of the moratorium, it is difficult to discern any substantial differences: whether the suspension is not necessary, it also means that it could not facilitate negotiations; conversely, whether it was necessary, it would be so in order to facilitate negotiations.

Therefore, the various national laws will have to provide that their competent authorities enjoy discretionary powers to grant or not the stay to the debtor, and the very general lexical tenor of the provision may allow Member States to regulate this aspect with the greatest freedom. A further and significant element may be found in recital 35 which suggests that '*Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive*': it might be inferred that a kind of automatic and limited preventive stay could be envisaged before the authority's decision, hence offering to the national jurisdiction another option for their internal discipline.

Arguably, the identification of the criterion on the basis of which such authorities may decide whether a moratorium is necessary does not appear easy, since a crucial point should be to ensure that such decisions are not arbitrary or untimely.[335] This interpretative issue may receive a valuable suggestion from the examples contained in recital 33, which explains that the stay should be denied where '*the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due*[336] *or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations*'.

It deserves to be argued that the cases in which the stay may be deemed unnecessary are, in practice, remote and this assertion seems to be supported by the examples offered by the mentioned recitals, which refer to borderline hypothesis in which the debtor distress and its financial imbalance appear so evident to exclude the restructuring attempt.[337]

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[335] cf Paulus and Dammann (n. 174) 106.
[336] Such as a substantial default vis-à-vis workers or tax or social security agencies.
[337] Effectively, the condition in which a debtor is unable to pay its debts exactly corresponds to the state of insolvency, which excludes the restructuring approach in favour of the liquidation one.

Another central indication concerns the recipients of the moratorium: according to art. 6 (2) the stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims. The explicit reference to this latter kind of claims may be easily justified by the exigence to protect the debtor's assets which represents the creditor' s guarantee and that may be threatened through individual executive enforcement based on secured and preferential claims: therefore, an efficient PRF must provide the stay for such type of claims.

In addition, it should not be underestimated how the EU Member States, when transposing European legislation, have to take into account other regulatory sources: in this case, the transposition of the Directive has to be coordinated with the regulation of financial collateral arrangements provided by the Directive 2002/47/EC. The latter Directive states that this category of contracts is not affected by the provisions of the insolvency law, with the result that even the rule of the stay should suffer a derogation.[338]

It should be noted that the European legislator has always considered the phenomenon of possible interference between the rules of PRFs and those derived from other legislative sources, and the proof may be found reading recitals 94 and 95 of the Restructuring Directive. [339] The latter, recalling the Convention on international interests in mobile equipment provides another exemption to PRF: '*Member States that are parties to this Convention …and its Protocols should be able to continue to comply with their existing international obligations. The provisions of this Directive regarding preventive restructuring frameworks should apply with the derogations necessary to ensure an*

[338] Art. 4(5) clearly states that Member States shall ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

[339] Recital 94 of the Restructuring Directive mentions, among others, the Directive 2002/47/EC, stating that '*the provisions of Directives 98/26/EC (19) and 2002/47/EC (20) of the European Parliament and of the Council and Regulation (EU) No 648/2012 should apply notwithstanding the provisions of this Directive'*.

application of those provisions without prejudice to the application of that Convention and its Protocols'. An interesting examples is represented by the Cape Town Convention and its Protocols which establish an international regime of security interests in high-value movable property, such as aircraft (and various parts of aircraft), railway rolling stock, and space objects. [340]

The moratorium conceived in the Directive may be **general or limited**, in the first case covering all creditors and in the second one covering one or more individual creditors or categories of creditors. The provision specifies that in the latter hypothesis, the stay '*shall only apply to creditors that have been informed, in accordance with national law, of negotiations…on the restructuring plan or of the stay*'.[341]

Significant aspects concern the **duration and the extension** of the moratorium. On the first point the Directive provides that the initial duration of the stay shall be limited to a maximum period of no more than 4 months,[342] and that the total duration, including extensions and renewals, shall not exceed 12 months.[343] In addition, a specific reference to the COMI (Centre of main interests) and the practice of the forum shopping is considered, as the total duration of the stay does not exceed 4 months whether the COMI of the debtor "*has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring*

[340] Since the subject is too specific to be addressed on the merit here, for further discussion see Van Zwieten, the insolvency provisions of the Cape Town Convention and. Protocols: historical and economic perspectives, Cape Town Convention journal 53-77 2012.

[341] Art. 6(3).

[342] Art. 6(6).

[343] Art. 6(8). It should be noted how in Recital 35 it has been affirmed that Member States should be able to decide whether "a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive." Although this information is contained into a recital and not into an article, whether the UE legislator had not wanted to consider this hypothesis, it would not have included it: therefore, the possibility of exceeding the 12-months limit in certain specific cases seems feasible.

proceedings".[344] An initial period of four months with the possibility of extension seems to strike a balance between the need for protection of the debtor and the duration of the restructuring, which should not be too long.

Apropos of the possibility to increase the duration of the stay, Recital 35 informs that complex restructurings may require more time and therefore in such cases Member States should be able to provide an extension of the initial period by the judicial or administrative authority. Thus, these latter should be the competent authorities to extend the duration of a stay or to grant a new stay although only after evaluating whether "*well-defined circumstances show that such extension or new stay is duly justified*". Art. 6(7) offers three examples:[345]

(a) relevant progress has been made in the negotiations on the restructuring plan;[346]

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

A relevant aspect of the rules under investigation concerns the possibility for Member States to contemplate **exemptions from the moratorium** for "*certain claims or*

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[344] The forum shopping practice is an international phenomenon in which a litigant prefers invoking a court in a specific jurisdiction to obtain a favourable treatment that would not have otherwise received in another country. This provision of the Restructuring Directive clearly aims to discourage this practice.

[345] The list should not be considered exhaustive and therefore there is nothing to prevent Member States from providing for additional circumstances under which an extension and renewal of the stay may be granted. It might certainly be useful to observe the behaviour of the debtor (such as whether it is paying its debts and keeping its commitments) and the progress of negotiations: even if only in a purely prospective perspective, to observe how the situation was wanted after the first moratorium could provide a general overview of the likely outcome of the restructuring.

[346] Again, here the choice of how to attribute significance to the progress in the negotiation of the restructuring plan is left to each Member State. Usually, a relevant element that could provide an indication of the progress of the negotiations concerns the adherence of strategic creditors without whom there would not be the majorities to adopt the restructuring plan.

categories of claims": the two listed hypothesis which may allow an exclusion of the stay regards cases where **i)** the enforcement is not likely to jeopardise the restructuring of the business; **ii)** when the stay would unfairly prejudice the creditors of those claims.[347] According to the wording of the norm, such exemptions should relate to "*well-defined circumstances, where such an exclusion is duly justified*".[348] Dwelling on the latter aspect, it has been argued that the inclusion of the element of "*duly justified*" may be considered the result of a choice to balance the usual contrast between individual rights and the overriding purpose of collective proceedings, which characterises the entire insolvency law.[349] As repeatedly stated, a good law should contain rules able to prevent individual position that could affect the value of the debtor's assets as a whole, but without unduly compressing the value of individual rights. Therefore, an efficient legislation should be able to suspend individual actions by offering the subjects gathered in a collective form an alternative condition that should be convenient (or at least equal) to the individual one.[350] This approach may also be seen in recital 2, which states that such frameworks "*should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan*".

As far as the **two specific exceptions** are concerned, it should be anticipated that the formulation of the norm adopted by the EU legislator appears perhaps too general and approximate to the point of being difficult for national laws to implement. Staring from

[347] Art. 6(4) Directive.
[348] It should be specified that no other references or clues on this aspect are provided in the discipline. Therefore, the well-defined circumstances are to be considered as a reminder of good legislative practice that each national jurisdiction should contemplate.
[349] Cf Paulus and Dammann (n. 174) 110.
[350] Douglas Baird, *The Elements of Bankruptcy*, (3rd edn, Foundation Press 2001) 169.

the derogation which allows the exclusion of certain claims or categories of claims from the stay where the enforcement "*is not likely to jeopardise the restructuring of the business*", the first step should involve recognising which individual enforcement action may adversely affect the progress of the procedure to the extent that it may jeopardise the entire company restructuring operation. In this regard, it should be observed that all creditors with a legitimate title may attack the debtor's assets, and thus all "claims or categories of claims" might potentially be dangerous for the restructuring. Clearly, creditors that have a charge over a particular asset or a set of assets which are strategic for business continuity, namely secured creditors, undoubtedly are the most fearsome and should not be able to benefit from the exception that disables the moratorium. However, as already clarified, all creditors could jeopardise the restructuring by aggregating the debtor's assets. Probably, a more accurate choice would have been to identify in the same assets (or categories of strategic assets) and not in the claims, the parameter on which determine the granting or denial of the exception of the stay. If the enforcement action had been connected to certain strategic assets considered necessary for the restructuring operations, the exception would not have been granted.

Similar reflections should be made on the second exception concerning the exclusion of the stay when it would unfairly prejudice the creditors.

The discussion around the possibility to exclude the stay should be completed with an additional and general reflection: a legislative intervention on such sensitive issue should not be underestimated for the following reasons. Firstly, all those rules that are not part of insolvency law and that belong to other regulatory sources, such as company law or private law, should be considered to avoid conflicts and interferences, since they often affect the insolvency discipline.[351] The same considerations apply to specific insolvency rules: it should be avoided that the introduction of certain exceptions could generate contrast. An emblematic example might be represented of the rules regarding the order of satisfaction of different types of creditors, such as secured, quasi-secured, preferred and unsecured creditors. [352]

In addition, further information on the same art. 6(4) may be found in the recitals 34, 36 and 37. Recital 34, in reiterating the concept expressed in the provision, clarifies that the exclusion of the stay could regard both claims which are secured by assets the removal of which would not jeopardise the restructuring of the business and/or claims of creditors in respect of which a stay would cause unfair prejudice, such as through uncompensated loss or depreciation of collateral. Recital 36 adds procedural information, stating that judicial or administrative authorities, during the necessary period to decide on the possible presence of the unfair prejudice to creditors, should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors. Finally, recital 37 affirms that a single creditor or a class of creditors would be unfairly prejudiced by the stay whether, for example, their claims would be made substantially worse-off as a result of the stay than

[351] For instance, in Italy there are multiple cross-references between the rules of the Civil Code and the Insolvency Code (CCII): Art. 2086 c.c. regulates company management by providing that the directors must equip the company with adequate 'organisational, administrative and accounting' arrangements with respect to the timely detection of the company's crisis and the loss of business continuity, as well as the activation of one of the tools provided for overcoming the crisis and the recovery of business continuity; Art. 120 bis of the CCII provides that during the access of one of the tools, the directors must inform the shareholders periodically.

[352] By establishing, as provided for in the Restructuring Directive, that certain categories of creditors may be excluded from the moratorium could generate favourable treatment for some creditors to the detriment of others, with the result of an antinomy with other rules of private law.

if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position.

The further clarifications offered by the recitals relating substantive (recital 34) and procedural aspects (recitals 36 and 37) serve to achieve a general reading of the regulation so that each EU Member State may be able to transpose the moratorium regime in the most appropriate way and form, especially given the differences among the EU legal systems.

Coherently, the Directive even allows Member States to provide for the hypothesis in which there is no longer a need for a moratorium. To this purpose, Art. 6(9) lists four hypotheses, two mandatory and two facultative:

- **(a)** the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan;
- **(b)** at the request of the debtor or the practitioner in the field of restructuring;
- **(c)** where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
- **(d)** where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

The first example offered by lett. (a) appears quite consistent (and on a certain extent obvious): if it seems evident that the majority of the creditors will not vote in favour of the restructuring plan – with the logical consequence of not wishing to continue the restructuring negotiations – the function of the moratorium which is to facilitate those negotiations no longer makes sense.

With reference to lett. (b), the issue is directly connected to the powers and duties attributed to the practitioner by the Member States. As already highlighted above, the

latter figure assumes a central role during the restructuring procedure.[353] The opportunity granted to the debtor to request a moratorium appears coherent with the logic of favouring negotiations by protecting it from those actions that could jeopardise the restructuring.
With regard to the first of the two optional hypotheses indicated by lett. (c) and (d), once again the recitals perform the function of providing a correct interpretation of the provision. In this specific case, recital 36 states that judicial or administrative authorities, in establishing whether there is unfair prejudice to creditors should be able to take into account whether the stay would preserve the overall value of the estate. Recital 37 affirms that a single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position. The intention of the EU legislator is to guide Member States by setting such principles, but it should be recognised that in practice setting up a balanced system of rules in this area is not easy. Consider recital 37: is it really avoidable that the creditor's claim would not be substantially worsened as a result of the suspension? If one considers an inevitable compression of creditors' rights in favour of successful restructuring, the answer would probably be negative.
The last example contained in lett. (d) seems a remote hypothesis, and perhaps this is the reason that led the EU legislator to make this provision optional for Member States. It may happen that creditors losses due to the failure in payment of the debtor, especially if the debtor is a large enterprise, may contribute to lead them to the insolvency. However, in that case the real cause for the insolvency would be the non-performance of the debtor itself and not the moratorium.

[353] See para 4.3.1.

As anticipated above, the articulated discipline concerning the moratorium does not end with art. 6, since with the following art. 7 the EU legislator even considers those aspects which regard the **consequences of the stay of individual enforcement actions**.

The provision starts by affirming in para. (1) that in case EU national laws provide, during a moratorium, an obligation on a debtor to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, that obligation shall be suspended for the duration of that stay. A premise deserves to be made here: the obligation to file for the opening of formal insolvency proceedings against companies that become insolvent seems to be the dominant regulatory approach in the EU,[354] although it seems to be in contrast with the underlying rationale of informal restructuring measures, which aim precisely to avoid those effects that result from the opening of liquidation proceedings. For this reason, the Directive allows the suspension of the debtor's obligation in order to avert the opening of liquidation proceedings in cases where the debtor, through the remedy of moratorium, is attempting restructuring.

Criticism has arisen by doctrine regarding the extension of the rule of suspension of the filing obligation only for insolvency proceedings that may end in liquidation. Such rule should even include non-liquidation proceedings since the negative effects resulting from the filing of such proceedings would in any case be evident. For instance, think of the increase in costs, the alarm of creditors and in general of the stakeholders who become aware of the proceedings and the related crisis of the company and so on.[355]

Another reflection relates to possible abuses: granting the suspension of the obligation to file for the opening of winding-up proceedings, with the sole requirement of being

[354] Gerner-Beurle et al, *Study on Directors' Duties and Liability* (Department of Law, London School of Economics 2013) 208.
[355] cf Paulus and Dammann (n. 174) 126.

pending a moratorium, could induce debtors to request the activation of such a remedy even when there is no real necessity for it.

Consistent with the rule provided for the debtor in para. (1), the next para. (2) extends the option of suspension, always during the stay, to the creditors' request for the opening of insolvency proceedings which could end in the liquidation of the debtor. Effectively, it is properly this function that represents the real protective tool for the debtor, which could therefore neutralise the actions of third parties.[356] Clearly, the protections contained in the first two paragraphs of Article 7 favour restructuring more than liquidation and for this reason it would not make sense to grant them where the restructuring attempt cannot be carried out because the crisis is at an advanced stage. Therefore, para. 3 offers to EU Member States the possibility to deviate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due and thus in the hypothesis of insolvency. More precisely, one of the traditional cornerstones of the insolvency law is here invoked by the norm: the **general interest of creditors**. Indeed, EU Member States shall ensure that a judicial or administrative authority may decide to keep in place the benefit of the moratorium whether the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors. The fact of attributing to judicial or administrative authorities the power to decide whether to grant the moratorium necessarily implies that they have to enter into the merits of the circumstances characterising the crisis. However, it should be considered that there are no open proceedings at that stage, with the result that the information may only be summary. Therefore, it is essential that national legislations are able to balance the need

[356] The same observations made in the previous note also apply here: protecting the debtor only against the creditor claims for the commencement of liquidation proceedings and allowing them to access other proceedings which might in any case compromise the restructuring attempt, does not seem a sensible choice.

to understand the debtor's situation as accurately as possible with the need for speed, in order to prevent a pause from jeopardising the already precarious restructuring attempts. The measure issued by these authorities must of course be provisional and not definitive. In general, the Directive emphasises the importance of safeguarding creditors' rights during the moratorium period. When the duration of restructuring procedures is extensive, there may be a transfer of wealth in favour of managers and shareholders to the detriment of creditors. Whilst shareholders retain the value of their shares through successful restructuring and managers keep their jobs, creditors suffer a loss of wealth.

The last para. (7) imposes to EU Member States to ensure that, when there has been no adoption of a restructuring plan at the end of the moratorium, the opening of an insolvency procedure which could end in the liquidation of the debtor cannot be automatic, unless the other conditions for such opening laid down by national law are fulfilled.

Thus, the hypothesis contemplated here relates to the case where the restructuring process has not been followed through the adoption of a restructuring plan. Whilst, on the one hand, the consequence of this outcome does not entail the automatic opening of liquidation, on the other hand this provision implicitly highlights the importance of acting and continuing the restructuring operations during and before the end of the moratorium. In addition, it should be noted how the Directive attributes (rightly) primary relevance to the EU Member States nation law since according to the latter, where other conditions are fulfilled, the liquidation may be opened. Therefore, whilst in the context of restructuring approach the failure to adopt a restructuring plan does not automatically lead to the opening of winding-up proceedings, the final word still lies with national insolvency law.

4.4.2.1 Executory contracts

It was chosen to dedicate a specific subparagraph to the discipline concerning the sort of the essential executory contracts because the impression is that this part of the provision (art. 7 para. (4) and (5)), by regarding the specific argument of the ongoing contracts, seems to be connected to the rest of the norm only because the contractual rules are to be considered in the space of time in which the stay is operative.[357]

Looking at the concept which the Directive attributes to the executory contracts, they are defined by para. (4) as those contracts that are "*necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill*".

The Directive requires EU Member States to provide rules that, during the stay, prevent creditors from withholding performance or terminating, accelerating or, in any other way, modifying this type of contracts to the detriment of the debtor.[358] Debts are to be existent before the moratorium.[359] In addition, para. 5 specifies that creditors cannot withhold performance or terminate, accelerate or modify executory contracts to the detriment of the debtor solely by reason of:

a) a request for the opening of preventive restructuring proceedings;

b) a request for a stay of individual enforcement actions;

c) the opening of preventive restructuring proceedings; or

d) the granting of a stay of individual enforcement actions.

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[357] Effectively, whilst art. 7 appears as a substantial norm, para. 4 and 5 contain merely procedural aspects.
[358] It should be understood that this provision is limited to the ipso facto clauses and that therefore nothing prohibits creditors from exploiting other legal instruments to obtain the modification of the contract "to the detriment of the debtor".
[359] The prohibition applies only whether the debtor is in arrears with the counterparty for obligations that arose before the commencement of the moratorium. Therefore, it is not relevant whether the non-performance of the debtor is prior or subsequent to the commencement of the stay: the parameter is the date of the obligatory legal relationship between the parties which is to be antecedent.

The rules contained in para. 4 and 5 of Art. 7 refer to the *ipso facto clauses* which, however, are only expressly mentioned in Recital 40. The latter highlights how these contractual rights allow some suppliers to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. If such clauses are invoked when the debtor is negotiating a restructuring plan or requesting a stay of individual enforcement actions, early termination may have a negative impact on the debtor's business and the successful rescue of the business.[360] The *ratio* for the prohibition of such clauses lies in their effect of allowing the automatic termination of the contractual bond upon the mere opening of a mandatory collective procedure.[361] It deserves to be reported as the majority of EU Member States have prohibited these clauses: emblematic is the example of the UK which with the Corporate Insolvency and Governance Act 2020 introduced the new Section 233B into the Insolvency Act of 1986, which provided important limits for such clauses. To be specific, the norm states that a provision of a contract for the supply of goods or services to the company ceases to have effect when the company becomes subject to the relevant insolvency procedure.[362]

It deserves to be noted that the norm ends with a balancing provision between the position of debtors and the position of creditors. The possibility of preventing creditors from prejudicing the debtor on pending contracts must not, on the contrary, create prejudice to the former's claims. For these reasons, the second period of art. 7(6) prescribes that EU

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[360] Recital 41 even adds that the early termination of contracts related essential supplies such as gas, electricity, water, telecommunication and card payment services, may endanger the ability of a business to continue operating during restructuring negotiations.
[361] On the implication between the contracts and the insolvency proceeding, see D. Faber et all, *Treatment of contracts in insolvency* (OUP Oxford 2013).
[362] In the UK, prior to the reform, *ipso facto* clauses were scarcely limited since the principle of freedom of contract applies in that jurisdiction. To deepen the subject, see Janis Sarra et al 'The promise and perils of regulating *ipso facto* clauses' [2022] International Insolvency Review, 31(1), 45–80; Dennis Faber et al, *Treatment of contracts in insolvency* (OUP Oxford 2013).

Member States shall afford appropriate safeguards to such creditors with a view to preventing unfair prejudice.

It should be noted how the Directive allows EU Member States to provide that these rules relating the executory contracts might be even applied to non-essential executory contracts. On this point, criticism has been raised[363] since it is not clear what could be the reasons for extending this discipline on contracts that are not essential for restructuring. In addition, it might represent a further and undue compression of the private contractual autonomy granted and protected by private law.

Finally, it should be pointed out that the Directive does not contemplate the fate of the debtor's contracts once the protective period of the moratorium has expired, probably because outside of this specific and delicate moment, the regulation of contracts is entrusted to the relevant civil law and labour law regulations.[364] Moreover, it will be the private autonomy between the debtor and its creditors that, through the instruments offered by the restructuring procedure (such as the restructuring plan *et similia*) will shape the contractual relations and will determine the fate of the rescue attempt.

4.4.3 Restructuring plan

The restructuring plan (RP) is one of the pillars of the Restructuring Directive and numerous parallelisms may be found with the discipline contained into US Chapter 11.

Undoubtedly, the principle that the value of companies in financial difficulties is higher than companies that following liquidation are sold piecemeal, is shared by both the Directive and US Chapter 11.[365] Moreover, both regulations base the restructuring

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[363] Cf Paulus and Dammann (n. 174) 135.
[364] As mentioned in the second period of Recital 2.
[365] Francesco Carelli 'L'influenza del Chapter 11 sulle legislazioni della crisi d'impresa e le differenze con gli strumenti previsti dal CCI' [2020] Crisi d'Impresa e Insolvenza 1 – 47.

attempt on the approval of a restructuring plan, requested by the debtor (in line with the debtor-in-possession principle that belongs to both legislative sources), which is to be approved by a majority of creditors. It should be highlighted how, in recent years, Chapter 11 practice has been influenced by the use of contractual arrangements between debtor and creditor called 'pre-packs'. This latter figure, by operating in a context outside the proceedings which are presided by the judicial authority (the court), is slimmer, faster and less expensive: once an agreement is reached, it is adopted for the Chapter 11 proceedings. Clearly, as for all procedures that escape supervision of authorities, such private negotiations are not adequate to resolve complex cases of corporate crises, as well as presenting the risk that certain rights, usually belonging to minorities, are not protected.[366]

Having underlined that, the Directive discipline concerning this tool appears imposing: Chapter 3 is completely dedicated to its regulation, which consists of nine articles.[367] In order to facilitate the analysis, it seems convenient to follow the same order of the Directive provisions, by listing in the title of paragraphs the key words of the heading of the Directive articles.

Before going into the merits on the matter it seems useful to spend a few words on the legal nature of the RP, as it seems to have both elements of the contractual tools and characteristics of the collective procedures. Hence, a proper analysis cannot fail to consider the principles governing the rules on which the discipline of RP is based. On the one hand, it must be undoubtedly recognised that the Plan is negotiated among the parties, who regulate their relationship in the same way as for the contract[368] whilst, on the other

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[366] On the argument, cf McCormak (n. 125) 165.
[367] From article 8 to article 16.
[368] According to the general law of contract, the latter is based on the 'consensualism' with the result that only the contractual parties are bind.

hand, the same fact that the adoption of the RP is achieved by obtaining the majority of the claims of the affected parties in each class, the validity of the principle of the equal treatment and that, as it will be faced above, the plan is to be confirmed by a judicial or administrative authority, seems to attract typical elements of the collective procedures, in which the individual rights are compressed by the 'majorityism'.[369]

Therefore, since it would not be prudent to attribute to this remedy neither purely contractual nature nor purely collective nature, a more cautious and less categorical approach could describe the RP as a hybrid tool composed of both a strong private component based on the rules of the contract and public-collective rules that compress the rights of individuals in favour of the majority.[370]

4.4.3.1 Content and adoption of restructuring plan

Articles 8 and 9 provide, respectively, indications on the content and on the adoption of the restructuring plan. Regarding the former, it deserves to be observed how, although the information required appears very detailed, it is the minimum content that EU Member States are to be contemplated in their nation law. The logic of requiring a high minimum level of information lies in the exigence for all the partied involved (especially for creditors and the judicial or administrative authorities) to assess whether the restructuring proposal is feasible. Since the field of restructuring is, by its very nature, particularly complex, the more information about the company and its condition are provided, the greater the chances of success of the restructuring operations. Generally, a complete

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[369] Very powerful are the words used by the author: '*Enforcement rights can thus be sacrificed on the altar of "majorityism*" – cf Milman (n. 179) 91.

[370] It should be noted that the regulation contained in the Directive has been transposed differently by the national jurisdictions, with the result that, in the various EU legal systems, the RP has been characterised on more private or more public connotations, depending on the exigences of each EU Member States.

information framework produces several advantages: for advisors, having up-to-date and accurate information and access to data on the state of the company allows them to implement the most appropriate strategies for the specific case; for creditors, receiving adequate information from the debtor allows them to make informed and timely decisions. This is even truer in the context of the RP where information about the company must be reliable, up-to-date, complete and understandable, and be shared among all interested parties.[371]

Therefore, the RP shall contain, at least, indications regard **the debtor** with reference to its identity of and its assets and liabilities (at the time of submission of the plan), including a value for the assets, a description of its economic situation and the position of workers, as well as a description of the causes and the extent of the difficulties.

Another required piece of information concerns **the affected parties**:[372] the plan must mention the classes into which they have been grouped,[373] by specifying the respective values of claims and interests in each class. Even the parties which are not affected by the RP, both named individually and described by categories of debt, are to be indicated with a description of the reasons why they are not affected. [374]

Another relevant block of information required as content of the RP concern the terms of the plan: lett. g) of art. 8 lists any proposed restructuring measures capable of pursuing restructuring effectively and their duration; the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;

[371] cf Stanghellini et all (n. 76) 123.
[372] According to the Directive (art. 2(2)), affected parties' means "creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan".
[373] An exception is represented by the SMEs: EU Member States may opt not to treat them in separate classes (art. 9 (4)).
[374] Para. 2 of art. 9 explicit a fundamental rule: only the affected parties have a right to vote on the adoption of the plan whilst the not affected parties shall not have voting rights.

where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar; the estimated financial flows of the debtor, if provided for by national law; and any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan. The discipline on the new financing has been addressed in para. 4.4.

The last point of para. 1 (lett. h) prescribes a very useful information: a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. In addition, EU Member States may decide whether this document is made or validated by an external expert or by the appointed IP.

Art. 8 concludes the list by providing a check list for RP which Member States shall make available online. This checklist should help the debtor on the redaction of the plan, since offers practical guidelines on how the restructuring plan has to be drafted under national law.

As far as the **adoption of the RP** is concerned, the Directive dedicates Art. 9 on the argument. The provision opens with a general rule: debtors have the right to submit restructuring plans for adoption by the affected parties, regardless of who applies for a preventive restructuring procedure.

Therefore, since the adoption of a plan is always subject to approval by creditors,[375] the possibility of requesting a restructuring procedure and the submission of a plan cannot be limited to the debtor, but on the contrary extended even to other parties. [376]

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[375] Para. 2 is clear in stating that affected parties have a right to vote on the adoption of a RP whilst parties that are not affected shall not have voting rights.

[376] In the implementation of such indications, EU Member States could be inspired by the provisions of Chapter 11, which contemplates that '*only the debtor may file a plan until after 120 days after the date of*

It seems useful to clarify the meaning of the concept of '**affected parties**' defined in Art. 2(2) as '*creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected*[377] *by a restructuring plan*'.

Returning to para. 1 of Art. 9, the debtor does not have to file the plan to the court but share it with the interested parties. Thus, the debtor proposes a restructuring plan, even if some other party has requested the initiation of restructuring proceedings. According to the second part of the provision, in addition to debtors, even creditors and IPs may submit the RP.[378]

The decision to allow competing proposals of creditors is to be read with favour. Besides the fact that this mechanism already exists in several national jurisdictions,[379] it is precisely during negotiations that this exigence comes to light. On the one hand, creditors may suggest additions and amendments, whilst on the other hand, they may decide to submit new proposals.[380]

Paragraph 2 imposes to Member States of ensuring that affected parties have a right to vote on the adoption of a restructuring plan, whilst parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan. However, this principle is subject to an exception (para 3), which regards several subjects: equity holders, creditors whose claims rank below the claims of ordinary unsecured creditors in

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the order for relief under this chapter'; at the end of that period, this possibility is extended to creditors and other interested parties - US Code, Chapter 11, Subchapter II, 1121.

[377] The expression '*directly affected*' refers to those subjects that are affected by a change by the plan in the terms and conditions of the repayment of their claims.

[378] It seems logical that, where national law provides for the mandatory presence of an IP, the latter should be responsible both for assisting the parties during negotiations and for presenting the RP.

[379] In Italy, with respect to the 'Arrangement with creditors' (the original Italian name is 'Concordato preventivo'), this possibility was introduced by Decree-Law No. 83/2015, converted into Law No. 132/2015, which amended the previous insolvency law by introducing paragraphs 4 and 5 to Article 163.

[380] It has been observed how the creditor' s faculty to submit an alternative RP might represent a disincentive to the recourse of the restructuring tools by debtors – cf Paulus and Dammann (n. 174) 155.

the normal ranking of liquidation priorities and/or any related party of the debtor or the debtor's business, with a conflict of interest under national law, may be excluded from the right to vote. The basis for the mentioned derogation does not appear to be justified since no further indications are given in the Recitals. In practice, although such parties are not directly involved in the restructuring, they may have an interest in the success of the transaction, being therefore united in separate classes and vote on the plan.

The real core of art. 9 is contained into para. 4, 5 and 6, which address the rule on the **classes formation of the affected parties**: hence, they provide that Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria,[381] in accordance with national law.[382] In addition, the norm specifies that as a minimum, secured and unsecured creditors' claims are to be treated in separate classes for the purposes of adopting a restructuring plan. Lastly, para. 4 specified that **workers' claims** are to be treated in a separate class[383] and when debtor is a SME[384] national law may opt not to treat affected parties in separate classes.[385]

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[381] Such criterion seems to replace the provision of the US Bankruptcy Code (1222 (a)) which, with regards to the content of the plan, states that '*a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.*'

[382] On this point, Recital 44 offers a valuable contribution by defining the meaning of the 'Class formation', omitted by art. 9: class formation means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests.

[383] Special attention is dedicated to the positions of workers during company crises by the Directive and by many national legal systems. In fact, several jurisdictions often attribute special forms of privilege to such claims in order to guarantee a more certain satisfaction. In such cases, such as France which contemplates for workers' claims a super-privilege, the formation of creditors classes is to be taking into account these peculiar regimes.

[384] Recital 45 gives further indications on classes' formation in SMEs: in such cases, since debtor capital structure is relatively simple, EU Member States should be able to provide exception from the obligation to treat affected parties in separate classes. Where SMEs have opted to create only one voting class and that class votes against the plan, it should be possible for debtors to submit another plan.

[385] Para. 4 introduces an addition element that EU Member States are to be considered during the creditors' class formation: appropriate measures are to be provided to protect vulnerable creditors such as small suppliers.

Therefore, the mechanism whereby creditors are to be divided into separate classes and that those creditors which are in the same class have to possess sufficient commonality of interest appears as a general rule, already present in some national jurisdictions.[386] Furthermore, Recital 44 emphasises that the need to create separate classes of creditors becomes an even more concrete requirement in cases where there is a lack of sufficient commonality of interest.

By virtue of these rules, the transposition might undoubtedly be easier for those EU Member States whose national laws provide for a simple regulation of privileges; on the contrary, it might be complex for those jurisdictions which contemplate a wide variety of privileges.[387]

Particular attention should be paid on the formation of creditors classes even considering the **principle of the equal treatment** affirmed in art. 10(2)(b): whether, on the one hand art. 9(4) specifies that '*as a minimum, creditors of secured and unsecured claims shall be treated in separate classes*' coherently, on the other and, the principle of the equal treatment provides that '*creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim*'.[388] A combined reading of the two aforementioned provisions makes it possible to outline a mechanism in which creditors within each class must receive equal treatment. Hence, Member States, have to ensure that: (i) the classes of secured creditors are to be composed of creditors with the

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[386] On the argument in the Italian jurisdiction, among many, see Stefano Ambrosini 'Classifications of creditors, moratorium of secured creditors and reorganization plan contents in the new arrangement with creditors' [2023] Il diritto fallimentare e delle società commerciali 233-259.

[387] In France this problem was particularly felt during the transposition of the Directive. On the argument see Reinhard Dammann and Anais Alle 'Directive «restructuration et insolvabilité»: l'introduction des classes de créanciers en droit français' [2019] Recueil Dalloz 2047-2053.

[388] In practice, whether one creditor will be paid 30% of what it is owed, others in the same class even should receive 30%. The principle is adopted in numerous jurisdictions such as in the UK (under the latin name of '*Pari Passu*' distribution) or into the Italian insolvency law, even from latin '*Par Condicio Creditorum*'.

same type of security;[389] (ii) creditors with both secured and unsecured claims have to vote in more classes: in the secured class to the extent of their security and in the unsecured class for the remainder of their unsecured claim;[390] (iii) creditors which are in the same class are treated equally, and in a manner proportionate to their claim.

As far as the **formation of creditor classes and voting rights** are concerned, the norm (art. 9(5)) provides that both stages are to be examined by a judicial or administrative authority which may perform these functions both when a request for confirmation of the RP is submitted and at an antecedent moment, when the request has not yet submitted.[391] The RP may be considered adopted by the affected parties if a majority the amount of their claims or interests is obtained in each class.[392] However, the provision leaves Member States the possibility to require a majority in the number of affected parties in each class. The percentage to obtain the majority is not contemplated by the Directive, although it shall not exceed 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

The threshold set at 75%, which offers to EU Member States a great deal of flexibility in establishing the details of the voting rules, takes into account the differences that characterise the individual European national systems. It deserves to be specified that a percentage as high as 75% may be justified by the fact that these are restructuring tools

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[389] This aspect is very relevant: even if it appears evident how each national legal system has its own rules which derive from a specific tradition and culture, EU Member States have a duty to ensure that within the same class there must be homogeneous creditors who must receive the same treatment. The parameter to be taken into account is precisely the extent of the security which represent the reference on which to determine the extent to which creditors should vote in each class.

[390] It is implied that, in the event that each creditor has only unsecured or only secured claims, it will vote in the only class to which it belongs.

[391] The discipline is supplemented by Recital 46 which enriches the information providing how the authority may even to select the creditors affected by the plan.

[392] It is not clear whether for the achievement of the majority should be considered all creditors of the class or only those creditors that effectively express the vote. EU Member States have to address this issue during the transposition of the Directive discipline.

and not liquidation proceedings. The difference is evident because whilst the former are based on the consent of the creditors (and therefore higher is the consent, more successful may be the restructuring), the latter are characterised by being supervised by the judicial authority, which guarantees the respect of minority rights.

Clearly, since no minimum percentage of the amount of claims or interests is provided by the norm, it would not be appropriate (as well as recommendable) to set a minimum threshold below 60%.[393]

4.4.3.2 Confirmation of the restructuring plan

One adopted, the RP may bind the parties only whether it is confirmed by a judicial or administrative authority. Art. 10 (1) indicates three hypotheses[394] where the plan shall always bind the parties:

(a) when the RP affects the claims or interests of dissenting affected parties;

(b) when the RP provides for new financing;

(c) when the RP involves the loss of more than 25 % of the workforce, whether such loss is permitted under national law.

Hence, in the listed cases, the Plan binds the affected parties notwithstanding EU Member States may provide other and additional circumstances.[395] In addition, Recital 48 helps the interpretation of such provision when it states that a confirmation of a RP by a judicial

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[393] For instance, a majority of 50+1% would objectively be too narrow considering the possibility, through the cram down, of binding the dissenting minority to the effects of the plan.

[394] It should be observed how in the Proposal of the Commission were contemplated only two hypothesis which concerned the cases where the RP affected the interests of dissenting affected parties and where it provided for new financing – see art. 10(1) COM/2016/0723 final.

[395] Recital 48 replaces the provision specifying that a confirmation of a plan involves the loss of more than 25 % of the work force should only be necessary where '*national law allows preventive restructuring frameworks to provide for measures that have a direct effect on employment contracts*'.

or administrative authority '*is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy*'. In fact, it should be borne in mind that if the negotiation of the conditions of the plan is based on the civil and contractual law, the adoption and confirmation regime provided by the Directive and based on the majority system involves the compression of the individual rights of the minority dissenting parties. Therefore, the confirmation by the authority is necessary and placed as a guarantee of the minority.

The second hypothesis (lett. b) is justified considering the protection attributed to new financing by Art. 17. [396] New financing must be included in the plan and confirmed by the authority to activate that special protection for financiers in derogation of the rules of civil, criminal and administrative liability. [397]

Whilst the first paragraph addresses the binding nature of the plan, the second is concerned with listing the conditions that national jurisdictions must provide for the plan to be confirmed by administrative or judicial authority. Specifically, the five hypotheses are as follows:

(a) the restructuring plan has been adopted in accordance with Article 9;

(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;

[396] The regime of new financing has been addressed in para. 4.4.

[397] Recital 67 is very clear on this point: "*National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for the successful negotiation and implementation of a restructuring plan*".

(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;

(d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;

(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors. Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

According to lett. (a), the confirmation of the RP is possible whether it has been adopted in accordance with Article 9. Therefore, the rules concerning the adoption of the Plan, as observed above, are to be complied.

Even the requirement states in lett. (b) has already been partially treated in the issue of the formation of creditors classes. It enunciates the **principle of the equal treatment**[398] which may be verified by means of the **unfair discrimination test**, i.e. the test ensuring that creditors belonging to the same class receive equal treatment. Thus, lett. (a) and (b) are strongly interrelated: the competent authority confirms the Plan whether the classes of creditors have been correctly formed and whether those creditors are treated equally within the same class.

The third requirement contained in lett. (c) concerns the notification of the RP to all interested parties: although this is a procedural aspect, it is essential in order to give creditors the opportunity to exercise their voting rights in an informed manner. In fact,

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[398] The principle of the equal treatment may be considered one of the most important principles of the insolvency law – on the argument and even for criticisms, see David A. Skeel Jr. 'The Empty Idea of "Equality of Creditors"' [2018] University of Pennsylvania Carey Law School 700.

through the notification they are aware of the conditions and features contained in the plan.[399]

The fourth condition deserves attention as it includes a further test for compliance with another fundamental principle: the **best-interest-of-creditors**. Indeed, in case there are dissenting creditors the RP must satisfy the best-interest-of-creditors test which is defined by art. 2(6). The test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied. This applies, in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed. It should be noted how the interest of creditors must be guaranteed even with regard to dissenting creditors that belong to a class that has obtained a majority of votes from the other creditors.

The logic of the principle[400] may be identified in ensuring that the solution reached by the parties involved in the restructuring and contained in one of the multiple tools provided by each national insolvency law such as the RP, will determine a better creditors treatment than the liquidation procedure or, as the provision states, in the event of the '*next-best-alternative scenario if the restructuring plan were not confirmed*'. In the Proposal of EU Commission, the parameter indicated for compliance with the test in question was only the liquidation, in both types considered today. The next-best-alternative scenario was inserted by the EU Council to include possible solutions that EU Member States may

[399] In addition, recital 51 clarifies both that the definition of the form of the notification should be define by EU Member States and that they should also be able to provide that non-affected parties have to be informed about the restructuring plan.

[400] The best interest of creditors test has been adopted internationally: for instance, the US Chapter 11 provides that a creditor '*will receive or retain under the plan…not less than the amount that such holder would so receive or retain if the debtor were liquidated*' – Section 1129(a)(7)(ii) Chapter 11, US Bankruptcy Code.

have regulated with respect to the liquidation. Thus, the confirmation of the RP will always be the better path for creditors, including dissenting ones, than any other alternative offered by law in the event of non-confirmation of the Plan.

Recital 52 suggests that EU Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. Criticisms have been expressed regarding the latter indication, since the analysis based on the circumstances that characterise the subjective condition of the company in crisis should be up to the court on the basis of the available evidence.[401]

In addition, the same Recital 52 even suggests how, as a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, EU Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.

The last requirement contemplated in lett. (e) concerns the new financing: the RP may be confirmed whether the new financing is necessary to implement it without unfairly prejudicing the interests of creditors. Article 8 (g) (vi) specifies that the reasons why new financing is necessary for the confirmation of the plan are to be indicated. It should be noted how the two conditions are both to be fulfilled. Whilst at first sight the new financing may easily offer a way out for the debtor in crisis and thus at the same time represents an opportunity for creditors, it may also happen that the restructuring attempt fails. In that case, the position of creditors in a subsequent liquidation procedure may be worse than that of the financing creditors whether the latter have obtained super

[401] Cf Paulus and Dammann (n. 174) 173.

priority.[402] Cases of prejudice may arise from various circumstances: for instance, the new financing may be granted on unjustified favourable terms.

It may seem obvious, but the discipline concerning the confirmation of the RP must even provide that judicial or administrative authorities may refuse to confirm the Plan where it would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.[403] The reference is to viability and insolvency tests, already addressed in Chapter 4.3 on PRF. Whilst EU Member States may freely decide on the terms of the tests, they are obliged to provide provisions for the rejection of the RP when the results emerging from the tests show that the plan is not capable of preventing the insolvency of the debtor or ensuring the viability of the business.

Art. 10 concludes by stating that where the authority is required to confirm a RP in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.[404] These are procedural aspects that are based on two opposing exigences: on the one hand, to have clear procedural rules and, on the other hand, to ensure that the authority acts in a timely manner since, as already affirmed, restructuring attempt is more effective the sooner the relevant rescue and intervention operations are initiated.

4.4.3.3 Cross-class cram-down

[402] Super-priority is a special priority status granted by insolvency law in several jurisdiction to a claim arising after the submission of a restructuring tool or procedure. This status is attributed to those subjects that support the restructuring by providing new financial resources to the company: since the company is in distress, the risk of the operation is undoubtedly high and for this reason, in case the restructuring attempt fails, they will be paid before all other creditors.

[403] Art. 10(3).

[404] Compared to the version contained in the Directive Proposal, the final discipline appears less rigorous. In fact, in the Proposal the Commission had set an express limit, providing that the authorities decision '*is taken without undue delay after the request for confirmation has been filed and in any case no later than 30 days after the request is filed*' – art. 10(4).

The cramdown was first introduced by Chapter 11 of the United States Bankruptcy Code in 1978. Today, it has been implemented by several jurisdictions globally and, through the Directive, by EU Member States.[405]

In the context of the Directive, the **cross-class cram-down** provided in art. 11 assumes considerable attention. Going to into the merit, the discipline provides that, despite the fact majority have not been reached in all creditor voting classes, the Plan may still be confirmed by the administrative or judicial authority and thus become binding even for the dissenting minority. Clearly, this will only be possible if the precise conditions described below are met.

First of all, in the event where the majority is obtained in all creditor classes the cross-class cram-down mechanism does not apply, configuring in this case the common hypothesis of the adoption of the RP provided by art. 9(6). Instead, in the circumstance where such majority has not been obtained, the confirmation may be still achieved if certain conditions are met:

a) the RP must comply with Article 10(2) and (3).[406]

b) the Plan must have been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any

[405] On the history of the US cramdown see Richard F. Broude 'Cramdown and Chapter 11 of Bankruptcy Code: The Settlement Imperative' [1984] The Business Lawyer 441 – 454.

[406] Art. 11(1) lett. (a). On this point, see para. 4.3.3.2 on the confirmation of the restructuring plan.

payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law.[407]

c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

Whilst the **first condition (a)** does not deserve further investigation, doubts concerning the satisfaction in practice of the **second one (b)** has been arisen: indeed, it has been excluded from the vote the equity-holders class which represent those subject that have the advantage of voting in favour, since any alternative scenario to the restructuring would almost certainly be worse.[408]

Condition (c) expresses the **absolute and relative priority rule** which the RP must satisfy.

It should be underlined how the adoption of the relative priority principle contained in art. 11 (1)(c) seems to be the main hypothesis suggested by the Directive;[409] effectively, the second paragraph of the same provision gives this impression when it states: '*By way*

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[407] Art. 11(1) lett. (b).

[408] Cf McCormack (n. 125) 186.

[409] The rule of the relative priority was not provided in the Directive Proposal, having been directly introduced in the final version of the Directive after appearing for the first time in the interinstitutional file of the EU Council which provided in art. 11(2a): '*Member States shall define the fairness test by requiring that either:*
(a) a dissenting voting class of affected creditors is satisfied in full by the same or equivalent means if a more junior class is to receive any payment or keep any interest under the restructuring plan; or
(b) dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class - EU Council, Interinstitutional File: 2016/0359(COD), Brussels, 1 October 2018, 12536/18.

of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan'.

Hence, summarising, the condition allowing the RP to bind dissenting voting classes (minority) through cross-class cram-down is fulfilled whether the treatment offered to the latter is at least as favourable as the other classes of the same rank and more favourable than any junior classes (**relative priority rule**). However, EU Member States may derogate from this approach in favour of the **absolute priority rule**, by providing for the full satisfaction of classes of creditors before providing for the payment of creditors belonging to junior classes.[410]

The mechanism of the relative and absolute priority rule is even recalled by Recitals 55 which suggests how dissenting class of affected creditors should be protected '*by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class*'. Alternatively, dissenting class of affected creditors could be protected by ensuring that '*such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule')*'.

By analysing the whole context in which these rules may operate, it might be affirmed that the relative priority rule should be preferred to the absolute priority rule. The latter condition seems to be more difficult to achieve because ensuring the full payment of the dissenting creditor's claims before to pay junior class creditors might increase, in

[410] It should be mentioned that the absolute priority rule comes from the US insolvency law. In particular it is contemplated in Section 1129(b)(2)(B)(ii), Chapter 11 of the US Bankruptcy Code.

probabilistic terms, the dissent. Indeed, the latter category of creditors could be more inclined to vote against the Plan (knowing that they risk not being satisfied). Conversely, the relative priority rule ensures the fairness of dissenters by protecting their relative position with respect to all other affected stakeholders that will be incentivised to adhere the RP.[411] In addition, even form a more generic perspective, a partial satisfaction of a broader range of subjects, as indeed envisaged by the relative priority rule which provides the possibility to pay even the junior classes of creditors, seems more consistent with the condition which all parties involved share equally by participating in the restructuring project.[412]

Conversely, a negative opinion about the relative priority rule as alternative to the traditional absolute priority was expressed in the study of INSOL Europe.[413] The criticisms are, *inter alia*: the relative priority rule (RPR) distorts the rankings agreed among creditors, and affects ex-ante credit concession; the RPR creates legal uncertainty for both investors and judges over the exact amount of incremental value that constitutes "better treatment" of the senior class over the junior class; the RPR casts a perverse shadow under which to negotiate, because it gives an incentive to more junior shareholders not to reach consensual plans, but to run the risk to see how the judge will interpret "better treatment"; the RPR affects corporate governance by further complicating the determination of which will be the fulcrum class that would entitled to

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411 For a discussion on the priority matters see, inter alia, Douglas G. Baird, Priority matters: absolute priority, relative priority, and the costs of bankruptcy (University of Pennsylvania Law Review, Vol. 165, No. 4 (March 2017) 785-829; David G. Tyndall 'Absolute v. Relative Priority in Reorganization A Reconsideration' [Cornell Law Review, Volume 33, Issue 4, 1948] 507 – 523; Walter J. Blum 'The "New Directions" for Priority Rights in Bankruptcy Reorganizations' [Harvard Law Review 1953] 1367 - 1378; cf Stanghellini et all (n. 76) 46.

412 For this specific opinion see Stephan Madaus 'Is the Relative Priority right for your jurisdiction? A Simple Guide to RPR' 1-8, https://ssrn.com/abstract=3827696 > accessed 13 March 2023.

413 Tomáš Richter and Adrian Thery 'INSOL Europe Guidance Note on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023 - Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down' [INSOL EUROPE 2020] 35.

the post-restructuring equity in the absence of consensus among the classes of affected parties; the RPR associated uncertainty has an adverse effect on securing the highest price for the sale of non-performing loans.

The **last condition (d)** may appear superfluous because it could not be otherwise that each creditor participates with its own claim (asserted at the time of the opening of the restructuring) and that the total of each class, given by the sum of the creditor individual claims, will have to respect that amount. However, here it has reiterated the principle that in the case further value are available from the going-concern surplus, it cannot be distributed among creditors that are entitled to have their claims or interests.[414]

4.4.3.4 Equity holders and workers

The position of equity holders and workers assumes considerable relevance within the discipline of the Directive. If, on the one hand, equity holders play a central role on the side of the debtor, since they are intimately connected with the debtor being the 'owners' of the company,[415] on the other hand the workers receive particular protection both as possible creditors and as a 'weak party' to be protected in the event of a crisis. Moreover, either fall within the definition of 'affected parties' contained in Art. 2(1)(2).

Equity holders are defined by the Directive as '*a person who has an ownership interest in a debtor or a debtor's business, including a shareholder, to the extent that such person*

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[414] Cf Jackson (n. 117) 213.

[415] In the process of negotiating the terms of the plan, equity holders are necessary to the extent that without their support, approval is unlikely to be obtained, especially in the out-of-court phase of the confrontation between the parties. Moreover, in some jurisdictions such as France, general insolvency rules recognise to equity holders 'veto' rights over any RP that seeks to harm them – Vasile Rotaru 'The Restructuring Directive: a functional law and economics analysis from French law perspective' [2020] Droit et Croissance.

is not a creditor'. [416] Article 12 which is intending to regulate this category of subjects, does not in fact contain a real positive regulation, leaving this duty to national laws. Indeed, EU Member States, must decide whether or not to include the equity holders in the discipline contemplated by art. 9 – 11 concerning respectively the adoption, the confirmation and the class-cross cram–down mechanism of the RP. In particular, even Art. 9(3) lett. A) clearly provides that "*Member States may exclude from the right to vote ... holders of shares*" with the consequence that, in this case, the adoption and confirmation of the RP will only take place by creditors.

Conversely, in the opposite hypothesis in which EU Member States decide to provide for the participation of equity holders in the adoption and the confirmation of the RP, they may vote like any other class of creditors,[417] and as for these latter, the RP will be approved by obtaining a majority in all classes (Art. 10) or, in the case of dissenting minorities, by applying the cross-class cram-down discipline (Art. 11).

The Directive, through the art. 12, takes into consideration the case in which equity holders are excluded, requiring EU Member States to ensure, by other means, that they are not allowed to '*unreasonably prevent or create obstacles to the adoption and confirmation and implementation of a restructuring plan*'. The reason for the existence of this norm may be found in the EU legislator concern that equity holders, holding a central and strategic position, may obtain undue advantages by threatening the fall of the restructuring attempt.[418]

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[416] Art. 2(1)(3). It should be observed how the same person may own both debentures and shares, being simultaneously in the position of creditor, for the part relating to the bonds, and in position of shareholder, for the part relating to the shares held.

[417] Recital (58) suggests that several classes of equity holders may be needed where different classes of shareholdings with different rights exist.

[418] An example of how crucial equity holders are in the restructuring process may be found in the recapitalisation of the company in financial distress. Usually, the most common scenario is a new capital injection by the equity holders. Whether the latter are not willing to recapitalise the company, an alternative solution may be recapitalisation by the creditors, through the conversion of the debt the company owes

Although this risk may be concrete, it should not be forgotten that equity holders are also, as the provision states, parties that '*have an ownership interest in a debtor or a debtor's business*' and therefore they may have an interest in the RP being approved and the restructuring being successful. In conclusion, the choice to exclude the equity holders should always be supported by solid reasons, especially in cases where, in addition to not being involved in the restructuring, no payment is envisaged for them.

As far as the **workers** are concerned, sporadic references have already been made above during the analysis of the early warning tools and the preventive restructuring frameworks.[419] The Directive – besides Article 13 which represents the main normative reference – contains numerous references both directly to the position of workers as a category and indirectly to the prevention of job losses.[420] It may be mentioned, by way of example, recital (1) which states that '*without affecting workers' fundamental rights and freedoms, this Directive aims to remove…obstacles to the exercise of fundamental freedoms*'; or that the RPF '*should help to prevent job losses*' (recital (2)) and that '*removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses*' (recital (16)). Even in the context of the RP workers are invoked. For instance, recital 61 suggests that employees and their representatives should be provided with information regarding the proposed restructuring plan in so far as provided for in Union law, enabling them to undertake an in-depth assessment of the various scenarios.

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them into equity (debt-for-equity swap). Whilst equity holders would seem to have been bypassed, this perception could turn out to be misleading since in the majority jurisdictions the rules of company law and articles of association provide that such transactions must be approved with the consent of the equity holders.

[419] See para. 4.2 and 4.3.

[420]The reason for such a widespread presence of references to workers might depend on the circumstance that an article *ad hoc* like the current art. 13 was not initially envisaged. In fact, the latter was not present in the original drafts.

Many more examples on the relevance of the workers in the contest of the restructuring could be cited. In definitive, the purpose of such a dense presence of references to workers-employees confirms the importance for the EU legislator that these categories are to receive full and adequate protection within all company restructuring processes.

Looking at art. 13, the provision opens with a warning to EU Member States: the PRF cannot affect individual and collective workers' rights, under Union and national labour law. Several examples of these rights are mentioned, such as the right to collective bargaining and industrial action and the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC.[421] The former Directive aims to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community,[422] whilst the latter concerns the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. Besides to the general reference to the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, art. 13 specifies that these rights refer, in particular, to:

(i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling

[421] Art. 13(1) lett. a) and b).

[422] Art. 4(2) of the Directive 2002/14/EC states that information and consultation shall cover information on the recent and probable development of the undertaking's or the establishment's activities and economic situation; information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment, information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations.

them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;

(ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;

(iii) information to and consultation of employees’ representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10; (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC. 2.Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.[423]

The Directive dedicates the specific art. 17 to financing, through which requires EU Member States to ensure that **new financing** and **interim financing** are adequately protected and that in the case of any subsequent insolvency of the debtor these latter:

- **a)** shall not be declared void, voidable or unenforceable; and
- **b)** the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

[423] Art. 13(1)(b)(i,ii,ii).

In general, it may be argued that this discipline is aimed at encouraging those new resources which are, in certain cases, considered necessary to increase the debtor's chances of restructuring.[424]

Starting from the definition of the two concepts, the Directive considers the **new financing** as any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan, whilst the **interim financing** means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business.[425]

As it has already been underlined, such mechanisms were also contemplated into the previous 2014 Recommendation.[426] However, it appears from the UNCITRAL Report results that several EU national jurisdictions are not yet equipped of rules in favour of new and interim financing.[427]

And yet, it has been rightly observed how both for new financing and interim finance the advantages between debtor and creditors are reciprocal. On the one hand, the debtor receives new resources which help restructuring and, on the other hand, this latter will offer more guarantees to the creditors for the repayment of the advance.[428] Article 17

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[424] On the argument, see Jennifer Payne and Janis Sarra, 'Tripping the Light Fantastic: A Comparative Analysis of the European Commission's Proposal for New and Interim Financing of Insolvent Business' [2018] International Insolvency Review 178 - 222.
[425] Art. 2 (7) and (8).
[426] See para. 3.2 in Chapter 3.
[427] In the UNCITRAL Legislative Guide on Insolvency Law it has been clearly specified that, notwithstanding obtaining new money might be beneficial for the debtor, a number of jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency, which creates uncertainty - UNCITRAL Legislative Guide on Insolvency Law 114(96).
[428] Cf McCormack (n. 125) 138.

concludes by stating that EU Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims. This provision deserves to be deepened, as it is the result of a compromise taken by the EU Commission in the matter of new financing not to impose and not to overly affect national jurisdictions. On the contrary, a more assertive approach would have led to new financing being configured as **super-priority new financing**, meaning these latter as financing that attributes to the lenders a 'super priority status', thereby giving them preference over all the other precedent creditors and ensuring a prior access to the values generated by the company as a going concern during its restructuring.[429]

Moreover, it should be mentioned that such super-priority new financing appears to be decisive in overcoming both the phenomenon of 'debt overhang', and thus in the circumstance in which all the assets of the debtor's assets are secured and in case of 'underinvestment, which is the lack of incentives to finance value-generating projects.[430]

In some jurisdictions, such as the UK jurisdiction, the lack of super-priority regulation may lead to opportunism when new financing occurs during the moratorium. In the case of the opening of administration or liquidation proceedings within 12 weeks after the end of the moratorium period, such financing receives priority status over other creditors.[431]

There are contrasting opinions on this regime that justify a softer approach of the Directive discipline. On the one hand, it would be necessary to reflect on whether a mechanism which attributes a super-priority to certain subjects may be conceived, with

[429] The regime of super-priority new financing is contained into Section 365 of the US Bankruptcy Code.
[430] Gerard McCormack 'Super-priority New Financing and Corporate Rescue' [2007] Journal of Business Law 701.
[431] On the argument, see Sofia Ellina, '(Re)considering the Position of Corporate Rescue Finance for Distressed Companies under English Insolvency Law' [2024] Journal of Business Law 1 – 22. It should be noted that the article has been accepted but not yet published.

the result of altering the original order (and thus prejudicing the previous creditors), as well as the risk of creating instability and uncertainty in the credit market; on the other hand, by forcing an injection of liquidity could prove counterproductive: in some cases, keeping a company alive without it being in a position to sustain itself independently would not benefit the market in which it operates. [432]

In the light of the above, the position of the EU, which while not requiring EU Member States to implement the described new financing regime, allows them to choose whether or not to provide it, seems to be shareable.

4.5 Discharge of debt and disqualification

The consideration of bankruptcy as a cultural phenomenon that began in the Middle Ages, in which the debtor was regarded as a criminal, has already been addressed.[433] Over the time, the cultural evolution of trade has upgraded the figure of the merchant-entrepreneur, replacing harsh penalties with sanctions that prevented the continuation of trade. Modern insolvency law represents the overcoming of this last paradigm based on the sanctions, instead favouring an approach that in part justifies the entrepreneur's bankruptcy by offering a new chance to recover the failing business (through the rescue and restructuring measures). Alternatively, if the recovery is not feasible, to start again with a new business (fresh start and second chance principles). The debts discharge represents an important point of arrival for the most recent consideration of the entrepreneur-debtor and the 'antagonistic' positions with creditors. Whether, on the one hand, the creditors' right to be paid constitutes the basis on which the rules of insolvency proceedings are traditionally

[432] Think of the risk to which all parties (customers, suppliers, workers and so on) who have commercial relationship with such company would be exposed.
[433] See para. 2.1 of Chapter 2.

based, on the other hand, debtor's rights have recently been increasingly taken into account, and the debts discharge remedy appears as a strong signal in that direction.[434]

It is worth premising that the discipline of debts discharge was already contained in several EU national jurisdictions. However, the EU legislator had long felt the exigence to harmonise this aspect,[435] on the basis that legal measures which are not too much hostile to the debtor are certainly capable of leading to a greater acceptance of risk by entrepreneurs themselves, therefore giving a beneficial boost to the whole market.[436]

Reading the Directive discipline, what is immediately perceived is the autonomy granted to national jurisdictions in defining certain key elements of the discipline, and this choice seems appropriate since the formulation of specific regulatory rules on certain aspects could have contrasted with several legal systems of the EU Member States.

The debts discharge mechanism is regulated in Art. 20-24 although further significant information is contemplated by the recitals. Without analytically following the literal tenor of the norms, the discipline might be summarised in the introduction in the national jurisdictions of a procedure that leads the honest but unfortunate[437] entrepreneur[438] to

[434] On the crucial debate on favouring creditors or debtors in insolvency law, which still divides scholars, see *inter alia* Philip Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2010); Philippe Frouté, 'Theoretical Foundation for a Debtor Friendly Bankruptcy Law in Favour of Creditors' [EJLE 2007] 201 – 214; Linda Coco 'Beyond Failure and Forgiveness: The Debtor's Place in American Fiscal Identity, Bankruptcy, and Capitalism' [UC Berkeley 2011) 1 - 151.

[435] European Centre for the Development of Vocational Training, Overcoming the stigma of business failure – for a second chance policy; implementing the Lisbon Partnership for Growth and Jobs [2007] COM(2007) 584 final; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Small Business Act for Europe (SBA) [2008] (COM(2008) 394 final).

[436] Błażej Prusak et all, 'The impact of bankruptcy regimes on entrepreneurship and innovation. Is there any relationship?' [International Entrepreneurship and Management Journal 2022] 473 – 498.

[437] The insolvent entrepreneur must deserve the discharge remedy. Limitations and revocation of the benefit of debts discharge are permitted when the insolvent entrepreneur '*acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt'* (art. 23(1)).

[438] Although the Directive refers to the entrepreneur, as the beneficiary of the debts discharge, there is no express prohibition preventing the extension of this remedy even to legal entities (like companies), considered as a business activity exercised collectively by more than one person-entrepreneur. This is the case of the recent Italian Insolvency Code (CCII), addressed in Chapter 5.

obtain the discharge of he/she debts in a maximum period of three years: practically, the principles of fresh start and second chance are here consolidated.[439]

EU Member States must establish obligations that entrepreneurs have to fulfil in order to benefit of the discharge: for instance, partial repayment of the debt.[440] Besides the discharge of the debtors' debts, another effect produced by the remedy is the termination of any disqualification from taking up or pursuing a trade, business, craft or profession.[441]

The rationale of these measures lies in the desire to ensure that entrepreneurs may actually are able to carry on a business activity again, and the mentioned prohibitions would conflict to this objective.

[439] Recital 72 in facts warns that '*the effects of insolvency, in particular the social stigma, the legal consequences, such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity, and the continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have become insolvent have more chances of being successful the next time*'.

[440] Art. 20(2).

[441] Art. 22(1).

Chapter 5 – How the EU Directive 2019/1023 was applied in Italy

5.1 Introduction

This Chapter focuses on the current Italian insolvency law today contained in the CCII. More precisely, a detailed overview of how the Directive has updated the Italian discipline is offered, by considering that this jurisdiction had already adapted its insolvency regulations to the 2014 EU Recommendation.

Therefore, firstly the transition from the previous 1942 insolvency law to the new CCII is described, tracing the main updates during this time.

Secondly, the centre of attention concerns the new CCII: the structure is illustrated and the principles are analysed. As regards the structure, protective measures and alert mechanisms (EWT) have been introduced for the first time into Italian insolvency law, allowing certain public entities to report signals of crisis and empowering debtors to participate in negotiations with creditors without being subjected to individual enforcement claims. The protective measures may be invoked directly by debtors at a prior stage to accessing one of the restructuring tools.

The sequence of restructuring tools contained into the CCII and offered to the debtor has also been deliberately ordered progressively by the legislator according to the intensity and severity of the difficulties faced by the company: firstly, the PRF are provided, namely the new Negotiated Settlement of a Business Crisis Procedure, the Recovery Plan, the Restructuring Plan, to which a specific section is dedicated, and the Arrangement with Creditors Procedure. Particular attention is paid to the introduction of the cross-class cram-down rule which was not implemented in the RP as required by the Directive, but was instead included in the Arrangement with creditors procedure. As a result, the RP may only be approved if creditors, representing two-thirds of the claims and holding at least half of the total claims in the class, vote in favour.

The structure of the CCII is clearly inspired by the principles contained in the Directive, such as the general principle of preference for restructuring of the company as a going concern over winding-up procedures – which determines the cessation of business activity – and the debtor-in-possession principle, which allows company directors to promptly invoke the corporate restructuring solutions.

During the analysis of the Italian insolvency reform, the CCII is compared with the European discipline of the Directive. In general terms, it may be observed the significant contribution of the Directive to Italian insolvency law, both in terms of the preference for preventive restructuring based on business continuity and the introduction of the RP and the cross-class cram-down mechanism, which broaden the range of restructuring tools available to the debtor, favouring the success of the rescue attempt.

5.2 The Italian insolvency law through time: by the old 1942 insolvency law to the new 2019 Insolvency Code

The "Code of the Business Crisis and Insolvency"[442] (CCII) came into force on 15th July 2022, but it is better to take a step back, precisely to 1942 when the insolvency discipline first emerges as a unitary and autonomous form in the Italian legal system.[443] In the course of almost a century, there have been many legislative interventions in insolvency law. In Italy, the reforms adopted in the 70s and 80s arose when the contingent economic situation made aware the exigence to introduce other legal instruments in addition to the traditional liquidation. With the 1979 Law n. 95, a new procedure was enacted to manage the crisis of large enterprises. In '90s, the 1998 Law n. 274 and the 1999 Legislative

[442] The original Italian name is "Codice della Crisi d'Impresa e dell'Insolvenza".
[443] The insolvency discipline was already contained in the third book of the previous 1865 Italian Commercial Code and therefore, being included in a codification, it lacked its own autonomy.

Decree n. 270 modernised the insolvency law by the reduction of the public costs of the procedures.[444]

As far as the present research is concerned, it seems worth focusing the attention only on the most recent changes that, in particular, have represented the watershed between the previous and the new paradigm of the insolvency discipline. Specifically, this refers to the legislative interventions of 2005-2007, defined by the doctrine as the privatisation of insolvency law.[445] Synthetically, liquidation prior to this reform process was characterised by the coexistence of two elements, the public element, which can be identified in the protection of the economic system with the elimination of companies that improperly organized their factors of production, and the private element, identified in the credit protection. The coincidence of two interests (public and private) justified the jurisdictional nature of the collective procedure for the satisfaction of creditors' rights. This 'harmonious' convergence of public and private would soon be destined to fail, at least starting from the 1970s, in the presence of a serious economic crisis and the occurrence of numerous corporate failures.

Therefore, with the reforms of 2005-2007, an attempt to strengthen, even in the pathological phase of the company, the private autonomy has been made: to the creditors of the insolvent entrepreneur have been recognised similar powers that belong to the venture capital holders.[446]

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[444] On the Italian reforms see Alessandro Nigro and Daniele Vattermoli, *Diritto della crisi delle imprese – le procedure concorsuali* (ilMulino 2014) 26.

[445] Fabrizio Di Marzio, 'Contratto e deliberazione nella gestione della crisi d'impresa', in *Autonomia negoziale e crisi d'impresa* (Giuffrè Editore 2010) 73.

[446] The cultural context in which this reform process took place is part of a long-term bipartisan trend which has recorded the profound transformation in the management of the economy, and which may be identified in the favour for the creation of a market economy - Luigi Rovelli 'I nuovi assetti privatistici nel diritto societario e concorsuale e la tutela creditoria' [2009] Il Fallimento 1029.

The described reformist direction undertaken by the legislator in 2005, which in the meantime received new impetus thanks to the enactment of the 2014 EU Recommendation,[447] underwent a further acceleration in 2017 with the publication of the delegated law by the Italian Government (l. n. 155) 'for the discipline reform of the business crisis and insolvency'.[448]

The goal of the Italian legislator was expressed into **the delegated law**: to complete the legislative *iter* within the following 12 months (October 2018). As anticipated, it should be underlined how the insolvency law reform had taken into account the 2014 Recommendation provisions.[449] This aspect may be noticed looking at the general principles listed into the delegated law such as, *inter alia*: the replacement of the term 'bankrupt' with the new expression 'liquidation';[450] the introduction of 'crisis'

[447] The contribution of the 2014 EU Recommendation in the modernisation process of the Italian insolvency law is confirmed by the Report redacted by the Rordorf Commission, where it was explicitly argued how the need to an overall resettling of the insolvency matter was more impellent because of the EU solicitations put in place with the Recommendation 2014/135/EU - Report on 29th December 2015 'Commissione per elaborare proposte di interventi di riforma, ricognizione e riordino della disciplina delle procedure concorsuali - Relazione allo schema di legge delega per la riforma delle procedure concorsuali'.

[448] The delegated law is the result of the work of a ministerial commission. In fact, right after the promulgation of the 2014 EU Recommendation, a Commission called 'Rordorf Commission' (toking the name by its president Renato Rordorf) was instituted by the Italian Minister of Justice on January 28th 2015. The Commission, composed by scholars and judges, drew up the Report on 29th December 2015, selecting the scopes of intervention to renovate the insolvency law. This document may be considered the first act of the long process of the Italian insolvency reform: actually, the text of the 'Legge Delega 2017, n. 155' follows the content of the Report, which in the introduction, paid the attention for the first time on the need to implement the Italian jurisdiction with both the early warning tools and the automatic debt discharge for minor insolvencies.

[449] Article 1, 2017 Delegated Law n. 155.

[450] This is an important aspect that it may even found into the new 2019 CCII: the Italian Commission had pointed out in its Report how it is decisive to dismiss this word for the negativity and the discredit (also personal) that it implies. Indeed, the term represent a strong offense in the Italian common language and its cancellation was necessary to overcome the social mentality which nowadays is still widespread among judges, business consultants, lawyers, notaries and all those who deal with corporate crises and insolvency. For this reason, by replacing it with the other formulation of 'insolvency liquidation', a new positive approach should be perceived by the people, with the result of favouring the recourse of the alternative rescue procedures.

definition;[451] the implementation of the European notion of 'COMI';[452] attributing the priority to the proposal which considers the overcome of company crisis on going concern; the reduction of costs; and the improvement of the specialisation of the judges in insolvency.[453]

Returning to the CCII, it might arise to wonder why the effective entry into force of the code, which took place in 2022, appears to be much later than the enactment of the 2017 delegated law. The answer may be found by analysing the provisions which in sequence led to the release of the new insolvency code: (i) the legislative decree 14/2019 by which the first version of the code was introduced; (ii) the "corrective" legislative decree 147/2020; [454] and (iii) the legislative decree 83/2022 which implemented the Restructuring Directive 2019/1023.[455] The reason why a single and definitive regulatory document was not immediately packaged lies, on the one hand, in the asynchrony between the Italian and European legislators, since the first draft of the CCII was inspired by the 2014 Recommendation and not by Restructuring Directive 2019/1023.[456] On the other hand, the explosion of the health crisis from Covid-19 which has led, throughout the

[451] Until now, the Italian insolvency law has only had the notion of insolvency, being the lack filled by the doctrine and the jurisprudence. Now, the reform defines the crisis as the likelihood of future insolvency and therefore as a prodromic condition of financial difficulties that may lead to insolvency.
[452] Introduced in the EU legislation by the Regulation n. 1346/2000 and replaced by the subsequent Regulation EU 2015/848, the notion of 'centre of main interests' (COMI) has never been integrated into the national insolvency law. Although, according to the art. 288 of the TFEU the regulation '*shall be binding in its entirety and directly applicable in all Member States*', the introduction by the organic reform surely represents an additional element toward a modern and harmonised insolvency legislation.
[453] The 'Rordorf Commission' illustrated an incompatible scenario between an updated insolvency regulation and the organisation of the Italian justice. In the Report it was argued that the management of the insolvency procedures required technical and specialist juridical evaluation by the judges: in Italy, only around twenty courts were equipped with specialised sections on the insolvency matter, whilst in the majority of cases an overage of one/two judges was assigned to those procedures – cf Report (n. 448) 7.
[454] With this measure, two new important legal instruments were introduced: the negotiated settlement of the crisis (composizione negoziata della crisi) and the simplified arrangement with creditors for liquidation (concordato preventivo di liquidazione semplificato), both described in the course of this chapter.
[455] D.lgs. n. 83 del 2022.
[456] Although the Recommendation inspired the 2016 Directive Proposal – which shares several key points with the former – it contemplates a more detailed discipline. For instance, besides the provisions concerning the preventive restructuring frameworks, the restructuring plans and a second chance for debtors, the Proposal introduced the early warning tools.

world and mainly in Italy, the need for a dense emergency legislation, with the result that all the consolidated regulation has been accompanied by a powerful exceptional legislation,[457] which has induced the Italian legislator, even to preserve the legal certainty, to defer the entry into force of the CCII, first to 2021 and then to 2022.

5.3 Concepts and principles in the Italian CCII

During the description of the CCII peculiarities and the restructuring tools by the latter contemplated, it will be also identified the principles originated by the Directive, having particular regards on how they have been implemented in the Italian jurisdiction.

As already anticipated, the fundamental rules of business crisis, for a long time entrusted to the precedent 1942 insolvency law, are today contained in the CCII. Only a few categories of remedies are governed by complementary legislation, such as the extraordinary administration procedure of large companies in crisis[458] and bank liquidations, in which the governance of the procedure, by virtue the significant involvement of public interests, is entrusted to the administrative authority instead of to the judge. Therefore, whilst the CCII provides the so-called ‘common insolvency law’, the complementary legislation governs the so-called ‘administrative insolvency law’.

It is worth to briefly reiterate that the Directive expressly ignores the definition of the concepts of “insolvency” and “likelihood of insolvency”,[459] which must be understood in accordance with national law, and that this approach follows the will of the European legislator not to affect the substantive aspects of insolvency proceedings so as not to interfere with other branches of national law, such as civil, commercial, corporate and

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457 Cf Stanghellini 2020, 353 ss.; Marchetti 2020, 1694 ss.; Pacchi 2020, 137 ss.; Ambrosini - Giannelli 2020, 187 ss.

458 In Italian the ‘*Amministrazione straordinaria delle grandi imprese in crisi’*.

459 Article 2(2), letters a) and b), Directive.

labour law.[460] The harmonisation to which the Directive aspires is not general but limited to the restructuring solutions which are the EWT, the PRF tools and all the other remedies aimed at increasing the efficiency of all insolvency framework.

The CCII has adopted the term 'crisis',[461] already introduced in the Italian legal system, becoming a sufficient (objective) requirement for the debtor to be admitted to some of the procedures envisaged in the Code.[462]

Despite the linguistic difference between the Restructuring Directive and the Italian CCII, the concepts of 'crisis' and of 'likelihood of insolvency' should be considered analogous in the Italian insolvency law, since both express the description of a condition of financial difficulty of the company that precedes the insolvency. In effect, even the lexical position in the title of the CCII (business crisis and insolvency) seems to confirm this. The first concept (crisis) suggests the distress situation before insolvency, which in EU terminology is represented by the 'likelihood of insolvency'.[463]

The crisis condition assumes a fundamental relevance even under another aspect, which is the close connection with the activation of the EWT, literally translated into the CCII

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[460] It should be noted that the European Central Bank (ECB) had expressed reservations on the decision to leave the definition of these concepts to the EU Member States, and in particular on the concept of 'likelihood of insolvency' which appeared for the first time in the proposal of the Directive. The ECB in its opinion had therefore suggested that '*this concept needs to be further elaborated in the proposed directive as it is crucial to the restructuring framework and should not be left to the complete discretion of Member States. In particular, further guidance should be provided to national legislators regarding the scope and content of the 'likelihood of insolvency' concept. As an alternative to including such guidance in the proposed directive, it could be provided via regulatory technical standards to be adopted by the Commission by means of delegated legislative powers*' - European Central Bank, 'Opinion of the European Central Bank of 7 June 2017 on a proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', (CON/2017/22) (2017/C 236/02), para 2.2.

[461] Art. 2 lett. a), CCII.

[462] Specifically, the crisis is required as requirement of the procedure of 'Concordato preventivo' and of the 'Accordo di ristrutturazione dei debiti', which will be described below.

[463] The definition offered by the CCII (Art. 2(a)) provides that 'crisis' is to be understood as a state of economic and financial imbalance that makes 'probable' the debtor insolvency; it is specified that, for companies, this condition is manifested as the inadequacy of prospective cash flows to meet obligations over the next twelve months.

as 'alert measures', aimed at allowing the timely emergence of the crisis. The Italian legal tradition has long matured the awareness that debtors (and thus directors) often appear reluctant in recognising the distress to the point of refraining from intervening promptly, generating a worsening, sometimes irreversible, of the same condition of the company.

There is a different situation for the PRF, since the definition offered by the CCII is almost entirely coincident with the European one provided for in art. 4(5)) of the Restructuring Directive: in fact, the art. 2, paragraph 1, lett. m-*bis*) of the CCII describes them as: 1) measures; 2) agreements; 3) procedures.[464]

Finally, still remaining on lexical aspects, another relevant signal aimed at highlighting the overcoming of the previous view of the bankrupt contained in the old bankruptcy law, concerns the replacement of the term 'bankruptcy' with the term 'liquidation'. The illustrative report which accompanied the delegated law n. 155/2017, clearly affirms that even a different lexical approach may better express a new culture of overcoming insolvency, seen as a physiological event in the life cycle of a business.[465]

A crucial aspect of the Italian reform may be identified in the concept of the '**going concern'**: this is a fundamental aspect transposed by the Directive in the new CCII which may be considered both from an economic perspective and cultural one: it refers to the value of the business considered as a going concern in the new approach to tackling business crises.

The distribution of the surplus value resulting from the continuity of the business company may be considered as the core of the new business restructuring procedures and

[464] The only difference, merely formal, concerns the choice of the Italian legislator to adopt the term 'agreements' instead of the European term 'provisions'.
[465] Illustrative report that accompanied the delegated law n. 155/2017. cf (n. 449).

it is the element through which the best satisfaction of creditors may be achieved with respect to the liquidation alternative.

Over the last two centuries, the gradual emergence of the reality of the market and the value of the companies have progressively raised the need for greater protection of these latter. This need has been felt by the evident development of commercial trade and, with it, the increase of liquidation procedures. On the one hand, it may no longer be overlooked that commercial crises are an inevitable cost of economic progress; on the other hand, it cannot be ignored that liquidations ruin the fortunes of entrepreneurs whilst affecting many other interests. It must be clearly expressed that, despite the attempt to change the paradigm of the vision of corporate crisis law, still today the entire Italian insolvency law is based on the primary objective of creditor protection. However, the Directive, the CCII and the reformulation of Article 2086 of the Civil Code have introduced the idea that the protection of creditors may coexist with the preservation of the business as a going concern and that from the realisation of the latter objective, even creditors may have benefit.[466] Hence, the centre of the insolvency system is no longer the debtor's assets to be liquidated, but the business of the company that prospectively and dynamically must be enhanced.[467]

5.4 The structure of the Italian CCII

As far as the CCII structure is concerned, it deserves to be specified how this latter provides protective measures and manifold legal tools aimed at tackling both the crisis, which is the scope of application of the Restructuring Directive, and insolvency.

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[466] Fabrizio Di Marzio, *Diritto dell'insolvenza* (Giuffrè 2023) 44, 45.

[467] Stefania Pacchi 'Par condicio e relative priority rule. Molto da tempo è mutato nella disciplina della crisi d'impresa' 2022 Diritto della crisi < https://dirittodellacrisi.it/articolo/par-condicio-e-relative-priority-rule-molto-da-tempo-e-mutato-nella-disciplina-della-crisi-dimpresa > accessed 10 February 2024.

The **protective measures** were introduced for the first time in the Italian insolvency system by the reform that gave birth to the CCII: they are protection in favour of debtors from the aggression of creditors that do not agree to participate in negotiations (both contractual and deliberative). These measures are directly aimed at favouring restructuring by protecting the assets and the company and their application is left to the debtor's request, which will assess on a case-by-case basis the need to curb the aggression of certain creditors. Such protection should not be confused with the protection offered to the debtor at the commencement of insolvency proceedings such as compulsory winding-up. In such cases, the inhibition of the debtor's powers is functional to the proper conduct and realisation of the credit distribution in the procedure. It should be stressed that such protective measures may be invoked by debtors at a time prior to the access to one of the restructuring instruments in order to allow them to plan a rational organisation for overcoming the crisis by disinhibiting, from the first moment, the powers of creditors.[468]

As for the legal tools, the progression according to which the CCII is structured responds to today's sensitivity which is directed to maximise the value of the business as a going concern.[469] This underscore the relevance of the general principle which favour restructuring over liquidation: the recovery of the company is preferred over the cessation of the business activity. [470] Therefore, coherently to this approach, the tools contained into the CCII are ordered according to a progressive logic which consider the intensity and the

[468] It has been argued that the use of protective measures may exacerbate the confrontation between the debtor and the inhibited creditors. Therefore, it should preferably be avoided unless it appears necessary for the successful outcome of negotiations which, in the absence of such measures, would risk being completely undermined.
[469] Vincenzo Pinto, 'La fattispecie di continuità aziendale nel concordato del Codice della crisi' [2020] Giurisprudenza Commerciale 372.
[470] cf Di Marzio (n. 467) 31.

seriousness of the company distress: the tools assigned to the resolution of less serious cases of difficulties (the PRF category), where a corporate restructuring attempt may be made, will be here addressed, whilst the liquidation solutions will not treated as they falls outside the scope of application of the Restructuring Directive.[471]

Having clarified the logic with which the CCII has been redacted, the groups of tools may be described: the **first type of tools** contemplated by the CCII are contractual and not judicial. By observing the Italian practice, it may be noticed that a way to deal with the insolvency issues is based on contractual solutions concluded between debtor and creditors, often characterised by the concession, by the latter, of payment extensions and acceptance of partial payments.[472] These restructuring agreements are drawn up by mutual consent, and therefore are based on the consent given by the parties involved. It should be highlighted how in this type of contractual remedies the general rules on contracts, provided in the Civil Code, are repealed in favour of the conclusion of the agreement between the debtor, the creditor and other involved parties (such as purchasers of business branches and lenders) that have interests in overcoming the debtor's distress.[473]

[471] In the CCII, the liquidation procedures, which intervene in cases of full insolvency of the enterprise, are judicial liquidation and compulsory liquidation, both managed by the judicial authority. The other liquidation procedure is the compulsory administrative liquidation, managed by the administrative authority.

[472] On the incentive to intervene to overcome the risk of insolvency, cf Galletti 2008.

[473] For instance, the general clause of good faith (Art. 1175 of the Civil Code) is strengthened, and the relativity of the contractual effects (cf. Art. 1372 of the Civil Code) are derogated.

Going into detail, the CCII contemplates the figures of the 'Negotiated Settlement of a business crisis procedure' (**Negotiated Settlement**)[474] and of the '**Recovery Plan'**.[475]

The former probably represents the most relevant novelty of the entire reform: it is a discipline on contractual negotiations between the debtor and creditors aimed at overcoming the company's unbalanced situation before it reaches insolvency.[476] It is therefore an out-of-court procedure that envisages the involvement of an expert (mainly accountants, lawyers and labour consultants with previous experience in resolving business crises) who works alongside – without replacing – the entrepreneur, as a guarantee for creditors and other interested parties. A national telematic platform is created *ad hoc*, linked to other public databases with which information may be exchanged. The appointed expert may accept or refuse the assignment: in case of acceptance, he/she convene the entrepreneur, to evaluate the reorganisation hypothesis and identify an adequate solution within 180 days. At the end of the assignment, the expert must draw up a final report that will be entered into the platform and communicated to the entrepreneur.

The result of the procedure may take several forms: it may be defined in a contract with one or more creditors, in a moratorium agreement, in an agreement that has the same effects as a Recovery Plan, in a real Recovery Plan, in a debt restructuring agreement and

[474] The 'Composizione negoziata per la soluzione della crisi d'impresa' is provided by Art. 12 CCII. On the argument see Stefano Ambrosini 'La composizione negoziata compie un anno: breve itinerario fra le prime applicazioni' [2023] Giurisprudenza Italiana 1699- 1707; Paola Vella 'Le finalità della composizione negoziata e la struttura del percorso. Confronto col ccii' [2021] Il fallimento e le altre procedure concorsuali Vol. 43, 1489 – 500; Michele Bana 'Composizione negoziata della crisi: responsabilità solidale tributaria e fiscalità d'impresa agevolata' [2021] Crisi d'impresa 4041 – 4049.

[475] The 'Accordi in esecuzione di piani attestati' is provided by Art. 56 CCII. Literally translated "agreements on attested plans" although it might be better called Recovery Plan.

[476] It has been correctly specified that this procedure is not properly a restructuring tool: it may be defined as a regulated space of negotiations which may precede the adoption of one of the restructuring tools contained into the CCII – cf Di Marzio (n. 467).

even in the application for a ‘Concordato semplificato per la liquidazione del patrimonio’.[477]

In order to encourage recourse to the procedure, the Code regulates (Article 25-*bis*) certain measures and tax benefits. These include a reduction of the statutory interest accruing on the company’s tax debts during the procedure; a reduction of tax penalties for which a reduced amount is applied, in the event of payment within the time limit a reduction to half, within the framework of any subsequent bankruptcy proceedings, of all penalties and interest on tax debts subject to the negotiated settlement procedure; a deferment of the tax debts of the entrepreneur who adheres to the negotiated settlement.

Regarding the **Recovery Plan**, it may be described as the agreement stipulated between the company and its creditors to save the business before reaching the point of no return. This tool does not provide for any judicial intervention and is based on the agreement reached directly from the negotiation of the parties. In turn, the agreement is concluded based on a plan shared and certified by an independent professional[478] as to the veracity of the company data and the feasibility of the planned restructuring. It should be noticed that the agreement and the plan are different in nature. The former is the legal act that therefore through its juridical effects bind the parties whilst the latter is the economic act through which the strategy is prepared.[479] In fact, the law specifies that the plan must

[477] This is a procedure governed by arts. 25-*sexies* and 25-*octies* of the CCII in the event that the negotiations of the expert have ended negatively. The purpose of this procedure is to liquidate the debtor's assets only after receiving the approval and appointment of a liquidator by the competent court.

[478] The CCII defines the independent professional that has to certify the correctness of the business data and the economic and legal feasibility of the plan, as the professional appointed by the debtor in one of the procedures for the regulation of a company's crisis. In addition, he/she must meet specific requirements, such as, among many, he/she must be registered in the register of corporate crisis and insolvency managers and in the register of the auditors, must be in possession of the requirements provided by the Civil Code, and does not be linked to the company or other parties involved in the crisis resolution operation by personal or professional relationships.

[479] On the argument, see Fabrizio Di Marzio, ‘Piano attestato e accordo di ristrutturazione. Il paradigma contrattuale’ in Il diritto negoziale della crisi d'impresa (2011) 121; Luca Simonetti, ‘Autonomia contrattuale e crisi d'impresa: concordato stragiudiziale e piano attestato’ [2019] GFL 4.

indicate, *inter alia*, the economic and financial situation of the company, the main causes of the crisis, the intervention strategies and timeframe necessary to ensure the rebalancing of the financial situation, the creditors and the amount of the claims proposed to be renegotiated and the status of any negotiations, the new finance and so on. In addition, once the agreement is concluded, the parties may benefit of a relevant protection: every act, payment and new guarantee granted on the company's assets, in execution of the agreement, is not subjected to the revocatory action by creditors.[480] It must be specified that this benefit only concerns the acts, payments and guarantees which are functionally connected with the plan. The provision's objective is to favour private negotiations, eliminating the risk of the revocatory action.

A second set of remedies consists of procedural tools (contractual or collective) necessary to manage the crisis in cases of intermediate difficulty.

The contractual tool may be denominated '**Restructuring Agreements**' (the Italian name is 'Accordi di ristrutturazione dei debiti'), whilst the collective restructuring procedure is identified in the '**Arrangement with creditors**' ('Concordato Preventivo'). Finally, the **Restructuring Plan** introduced by the Directive closes the circle. However, this latter represents a *unicum* in the panorama of the Italian restructuring legal tools and therefore deserves to be treated separately.[481]

The contractual and collective solutions are characterised by not depriving the debtor of the management of the economic activity, and hence adhering to the principle of debtor-in-possession, subjecting it to different forms of public control. In addition, they are based

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[480] Art. 166 (3), lett. d) CCII. The 'revocatory action', in the Italian civil law, refers to an action that is brought by creditors to obtain the ineffectiveness of those acts operated by the debtor which, by reducing the assets, cause prejudice to their claims. The *ratio* of this remedy is the protection of creditors from the wilful misconduct of the debtor.

[481] See para. 5.5.

on a motion normally submitted to the approval of the majority of creditors and in any case always to the approval of the court. Furthermore, both the contracts and collective procedures share the possibility, when the agreement is reached, of benefiting the discharge of debt: the release of the debtor as a natural person or collective organisation from the debts that remain.[482]

Addressing the Restructuring agreements,[483] it may be argued how even this remedy is, as the Recovery Plan, based on the agreement and on the certificated plan. However, here the restructuring operations are improved by the presence of the court to which is entrusted of the homologation of the plan.[484] Moreover, the agreement must be concluded between the company and its creditors representing at least 60% of all the credits. Even the role of the IP is here improved, since he/she must ensure that the agreement is able to pay in full the creditors who are not part of it,[485] with the result that this tool cannot bind the creditors outside the contract.[486] Once the certification is received, the agreement must be submitted to the competent office of the court to obtain homologation. After that, the agreement is published in the register of companies and, from that moment, the same

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[482] As already mentioned, although the debt discharge has not been assessed in the present investigation, it is worth noting that this remedy, already present in the previous Italian bankruptcy law, today appears to be updated by the Directive and operates, with varying intensity, in most of the anti-crisis solutions contemplated in the CCII.

[483] Now contained in art. 57 of the CCII, the introduction of this figure into the Italian jurisdiction dates back to an important process of 'privatisation' of the insolvency law by the legislator of 2005. The purpose was to favour the recourse of legal measure – based on the private solutions – to face and manage the company financial crisis.

[484] It should be underlined that the activity of the court concerns the legality review of the procedure, and therefore never interferes with the merit and the substance of the private parties' choices.

[485] According to art. 57 (3) CCII, the full payment of the expired credits must be done within 120 days from the homologation of the agreement by the court or, whether the credits are not yet due, from their expiry date.

[486] The existence of the rule that only the creditors, who participate in the arrangement, must comply with its conditions – whilst who does not accept must be paid in full – confirms the private nature of this measure. The discipline of the contract in the Italian jurisdiction provides that the effects of the contract may be imposed only with the party's consent (art. 2741 c.c.) – Luca Simonetti, 'Autonomia contrattuale e crisi d'impresa: gli accordi di ristrutturazione dei debiti' [2019] GFL 4.

protective effects provided for the Recovery Plan are activated.[487] In addition, from the date the agreement is published, and for the next 60 days, the previous individual creditor claims on the company assets are paralysed.

It is worth noting that the protective measures described above may even be requested from the court by the debtor during the negotiation of the Restructuring Agreements. In such a case, the debtor receives even broader protection, since creditors who do not participate in the negotiations or do not consent to the agreement are obliged to refrain from exercising their powers. Moreover, the debtor's choice of whether or not to benefit of the protective measures determines the possibility of access to two other forms of restructuring agreements: the '**Facilitated Restructuring Agreements**' ('Accordi di ristrutturazione agevolati') and the '**Extended-effectiveness Restructuring Agreements**' ('Accordi di ristrutturazione ad efficacia estesa'). The former contemplates that the percentage of 60% of creditor's claims is reduced to 30% when the debtor has not benefit of the protective measures or of any deferral of payments. Thus, the debtor may limit the agreement to a minority fraction of the claims if a large part of the creditors do not want to share the sacrifices envisaged in the agreement.[488] The latter has a more incisive impact: the effects of the Restructuring Agreement may even be extended to creditors outside the agreement who belong to the same category. Such extension may take place only if: (a) the non-member creditors have been informed of the commencement of negotiations and have received complete information; (b) the agreement must not have a liquidation nature, providing for the continuation of the

[487] The same protective measures are reproposed: the recovery action against those acts, payments and guarantees which are implemented for the execution of the agreement and the criminal responsibility, are inhibited.
[488] In such an eventuality, the reduction of the percentage of adhesion prevents the hypothesis that the agreement will not be homologated by the court despite the fact that the creditors that are extraneous will be fully satisfied.

business activity either directly or indirectly; (c) the claims of the adhering creditors belonging to the category represent 75% of all the creditors belonging to the category (d) the creditors in the same non-member class to which the effects of the Restructuring Agreement are extended may be satisfied under the agreement to an extent not less than in a court-supervised liquidation; and (e) the debtor has notified the agreement, the application for approval and the documents attached thereto to the creditors in respect of whom it seeks to have the effects of the agreement extended.

The other restructuring remedy, the '**Arrangement with creditors**' ('Concordato Preventivo') may be defined as deliberative procedure having necessarily a competitive nature.[489] The collective decision of the majority of creditors binds all creditors: therefore, in order to avoid prejudice to the individual rights of the dissenting minority, the proposal subject to approval by the creditors must comply with the **equal treatment rule**.[490]

Hence, the difference between such deliberative procedure and the contractual solutions previously described, appears evident: these latter solutions produce effects only in respect of creditors who freely choose to adhere to the agreement by expressing their consent.

Contractual consent and the collective decision taken by majority are completely equidistant, since where there is consent (contracts) there is no need for the collective decision and where there is the collective decision there is no need for consent because the majority decision binds even the minority creditors.

Finally, **the last category of tools** includes the liquidation proceeding. In the most serious cases where the disagreement of creditors or the insufficiency of the debtor's assets

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[489] Deliberative procedures may even have a non-competition nature, such as the Restructuring Plan that will be outlined below.
[490] cf (n. 388).

combined with a high debt exposure does not make possible the recourse to the restructuring solutions: inevitably, all that remains is to proceed with the liquidation of the assets, carried out by IP under the control of the court. These procedures may be followed by the cessation of economic activity and the dissolution of the company.

As far as the procedural aspect is concerned, it deserves to be briefly described how the Italian legislator introduced a unitary procedure for access to the PRF and to judicial liquidation.[491] In this respect, the Directive did not impose any constraints, by providing generically that '*procedures concerning restructuring, insolvency and discharge of debt are dealt with in an efficient manner, with a view to the expeditious treatment of procedures*'.[492]

In the Government Report to the Draft legislative decree[493] which was submitted to the Chambers of Parliament in order to receive the prescribed parliamentary opinion, there is an eloquent declaration of intent, according to which a 'unitary procedure' for the judicial assessment of crisis and insolvency has been provided for, which constitutes a sort of uniform procedural container of the judicial initiatives based on the prospect of crisis or insolvency. Effectively, the CCII provides a unitary procedural 'container', intended for the confluence of all the applications, even opposing ones, filed by the legitimated parties. To be specific, the procedure is not really unitary since after the introduction of the application there are two procedural paths, depending on whether who files the application intends to access to the restructuring tools or the liquidation procedure.

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[491] For an extensive analysis of the procedural aspect of PRF, see Rinaldo d'Alonzo and Francesco De Santis 'Il cd. procedimento unitario per l'accesso agli strumenti di regolazione della crisi e dell'insolvenza' 2022 Diritto della crisi <https://dirittodellacrisi.it/articolo/il-cd-procedimento-unitario-per-laccesso-agli-strumenti-di-regolazione-della-crisi-e-dellinsolvenza> accessed 13 March 2024.

[492] Art. 25(b), Directive.

[493] The Draft legislative decree on the business crisis and insolvency code (Act n.53, 14 novembre 2018) was the first act which contemplated the first version of the CCII.

In any case, the unitary procedure is governed by Article 40 CCII which states that the access to the instruments for the regulation of crisis and insolvency and to judicial liquidation takes place at the court in collegiate composition. The application is submitted by appeal and must indicate the judicial office, the object, the reasons for the application and the conclusions. For companies, the application is to be approved by the directors and must be stated in the minutes.

5.5 The Italian early warning tools and preventive restructuring frameworks

It has already been noted the relevance attributed to the EWT by the EU legislator and how the mechanisms of alert are one of the cornerstones of the whole approach of corporate restructuring.[494]

It is noteworthy that a previous attempt of introducing the early warning tools had already been made in 2001 when, a Government Commission called 'Trevisanato Commission' – inspired by the French insolvency model[495] – had presented to the Italian Parliament the reform Bill (DDL 1243) which never became law. In addition, even regarding the CCII the regulation of EWT underwent some changes during the reform process. More precisely, between the publication of the new CCII and its final version, the Italian legislator intervened several times with some corrective measures. Among these regulatory interventions, the Legislative Decree N. 83/2022 modified the precedent discipline of the EWT as well as reformulating the protective measures discipline.

Very briefly, it is worth describing the 'transitional' regulation of EWT contained in the previous version of Article 12 of the CCII. The first point to note concerns the formulation

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[494] See para. 4.2 in Chapter 4.

495 On the argument, see Eva Desana, 'Procedure di allerta e composizione' [2020] Bocconi Legal Papers 29.

of the norm, which explicitly mentioned as EWT the reporting obligations imposed on corporate control bodies, the auditor, the auditing firm and certain qualified public creditors. These reporting obligations were aimed at the early detection of indications of a company's crisis and the prompt adoption of appropriate measures to contrast it. In addition, a number of indices were then envisaged to help intercept the distress at an early stage. The list of these indices was to be drawn up by the National Association of chartered Accountants every three years. They were to measure the non-sustainability of debt burdens with cash flows, the inadequacy of the company's own means with respect to those of third parties, and repeated and significant payment delays.[496]

For a correct framing of the current discipline, it must be premised that the key norms are not limited to the CCII, but they are even contained in the civil code. In fact, in the latter legislative source, Article 2086 concerning the entrepreneur's duties to put in place adequate organisational arrangements to prevent insolvency may be considered of primary relevance. Alongside the latter, there are the provisions on the reporting duties of corporate control bodies contemplated by the CCII and already provided even in the precedent version of the Code. More precisely, on the one hand, the indices have been eliminated whilst, on the other hand, the reporting obligations of the supervisory bodies and those of the qualified public creditors have been retained. With regard to the former, although the explicit reference to the EWT has disappeared, the regulation has maintained the basic logic of the previous one, so that the supervisory body still has the duty to report, in written form, to the administrative body the existence of the requirements for access to the contractual negotiation already described above.

[496] It deserves to be emphasised that it was already clear before their elimination that such indices, although could have contributed to the emersion of the crisis, they would not have been sufficient for the pursuit of early crisis detection.

With regard to the qualified public creditors, the Italian legislator has provided duties on certain public entities (INPS, INAIL and the Revenue Agency),[497] the reporting of signals of a crisis directly to the debtor (specifically to the directors and to the supervisory body) so that the latter may be still in time to activate one of the restructuring remedies. In addition, these public entities must report any delays in the debtor' payments: for the INPS, the report is triggered when there is a delay of more than 90 days in the payment of social security contributions of an amount proportionate to the number of workers, but in any case modest; for the INAIL, when there is a debt for insurance premiums overdue for more than 90 days and not paid in excess of EUR 5. 000; finally, for the Revenue Agency, when there is a debt for VAT overdue and unpaid, also of a modest amount, and credits entrusted for collection, self-declared or definitively ascertained and overdue for more than 90 days, exceeding, for sole proprietorships, the amount of EUR 100,000, for partnerships, the amount of EUR 200,000 and, for other companies, the amount of EUR 500,000.

As anticipated above, it is not possible to discuss of the EWT without mentioning the amendment made by the Italian legislator to Art. 2086 of the Civil Code. Effectively, the transposition of the principles contained in the Directive has been positively realised even through this normative intervention. Therefore, the new version of Article 2086 (2) of the Italian Civil Code imposes on the entrepreneur the duty to put in place **organisational, administrative and accounting system** which may be defined as an articulated and rational composition of rules, provisions, procedures and operational practices that are to

[497] The qualified public creditors are listed in art. 25-novies CCII: The National Institute for Social Security (INPS), the National Institute for Insurance against Accidents at Work (INAIL) and the Revenue Agency.

be appropriate to the nature and size of the business as well as to be able to timely detect the business crisis and the loss of the company going concern.[498]

The organisational rules concern the governance structure of the company (administration and control), the administrative set-up includes control systems on the conditions of economic-financial balance, considering the objectives set and the results achieved by the company, and finally the accounting system detects the relevant company events, allowing the true and correct representation of the economic and financial situation of the enterprise. Hence, this system of rules is to be appropriate to the real characteristics of the company's business, having as a reference the size and the complexity of the business activity.

The supervisory bodies of the companies must verify the adequacy of the system and monitor the maintenance of the adequacy requirement over time. It appears evident how the described organisational, administrative and accounting system, required to the company by the Civil Code, is closely linked to the EWT discipline contemplated in the CCII: art. 3 of the latter expressly refers to the former recalling Article 2086 and clarifying that these set of rules are to be capable of detecting any imbalances of an economic and financial nature, the prospective unsustainability of debts (in the next twelve months) and the loss of the business going concern.

From what has been observed so far, it clearly emerges the picture of the entire discipline: on the one hand, the company is to be equipped with an organisational, administrative and accounting system, which may allow directors to independently adopt one of the restructuring tool; and on the other hand, there must be full cooperation between the

[498] Art. 3(2), CCII.

corporate bodies in order to be able to fulfil their obligations in a timely manner in the event of a report from qualified creditors. [499]

The close connection between the organisational arrangements laid down in the Civil Code and the CCII, and therefore in the commercial and insolvency law, is even reaffirmed in Article 377 CCII, which states that the management of the company shall be carried out in accordance with the provision of Article 2086(2) and shall be the sole responsibility of the directors, that shall carry out the operations necessary for the implementation of the corporate purpose.[500]

Serious irregularity in the company management with regard to the directors' failure to comply with their duties is a prerequisite for a complaint to the court at the initiative of the board of auditors. This may lead to the revocation of the administrative body and the appointment of an administrator of a judicial nature. [501] A jurisprudential example of the breach of the obligations under Article 2086 of the Italian Civil Code may be found in the judgment of the Court of Milan of 21 October 2019 (Sentence n. 9557/2019), which condemns the inertia of the directors on the organisational arrangements, as they did not comply with their duty to act promptly to address the crisis.

Going into the merits of PRF in the Italian discipline, in addition to the main legal tools already described in the previous paragraph, there are two other remedies introduced in the Italian jurisdiction by the CCII: the new **Negotiated Settlement** of a business crisis

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[499] The described duties have a twofold purpose, which varies depending on the subject on whom they are imposed: the obligations on the supervisory bodies are intended to make the administrative body responsible, whilst those on the qualified creditors are intended to make more responsible both the directors and the supervisory body remained inactive - Paolo Valensise, *Il ruolo dell'organo di controllo nelle procedure di c.d. "allerta" tra legge delega e "Codice della crisi": nuove soluzioni o nuovi problemi?* (Giappichelli 2019) 676.

[500] This was one of the objectives expressed by the Rordorf Commission: to create a single and coordinated management model – Renato Rordorf, 'Prime osservazioni sul codice della crisi e dell'insolvenza' [2019] Contratti 134.

[501] Articolo 2409 c.c..

procedure ('Composizione negoziata della crisi')[502] and the RP which will be dealt with individually in the following paragraph.

Before describing the new negotiated settlement, it is worth pointing out that all PRF tools are not necessarily aimed at restructuring and the preservation of the company as a going concern, as they even contemplate the possibility of liquidation solutions. Moreover, a common feature of these legal instruments is the presence of the judicial authority,[503] which intervenes with varying intensity depending on the type of instrument used. In this respect, the national discipline does not seem to have transposed the requirements of the Directive, which instead suggested a limited public intervention in the context of preventive restructuring.[504]

As far as the new **Negotiated Settlement** is concerned, it is probably the most impactful novelty present in Italian insolvency law today, possessing some unique features with respect to the other PRF tools. In fact, the first peculiarity may be identified in the fact that this procedure[505] deals with regulating the delicate phase of restructuring negotiations that precedes the adoption of a crisis regulation instrument. Thus, it not just about an arrangement aimed at restructuring, rather it is a regulated space for negotiations that may precede the adoption of a restructuring tool in the event that the debtor decides to resort to it.[506]

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[502] This procedure is provided by the CCII in art. 12 and following.

[503] The only legal tool that does not provide for any court intervention is the Recovery Plan in which only the IP participates to certify the plan.

[504] According to Recital 29 '*Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures*'.

[505] It should be specified how the qualification of this tool as 'procedure' in the same terms of 'insolvency procedure' is not correct, both because it does not have the typical elements of these latters and because it is concretely efficient invoked at an early stage of the crisis. Hence, the term procedure indicates here the steps and the modes of the tool.

[506] cf Di Marzio (n. 467) 457.

The procedure provides for the figure of a mediator (IP) who assists the parties during negotiations to facilitate the reaching of an agreement. With this remedy, in which the debtor and the creditors are the protagonists with the eventual intervention of the court, an optimal balance is sought between a resolution of the crisis left to the autonomy of the parties and the need to provide of support/supervision by a professional (IP).[507] With this remedy, involving the debtor and creditors with the possible intervention of the court, an optimal balance is sought between a resolution of the crisis left to the autonomy of the parties and support/supervision by a professional.

As anticipated, the court's role is eventual, becoming necessary for measures affecting subjective rights, such as the adoption of protective measures or the authorisation of preferential financing, and is consequently limited to these hypotheses.

Thanks to access to the negotiated settlement, it is therefore possible to address difficulties from the initial stages, in which it would be premature and unjustified to assume recourse to the judge, but in which it would nevertheless be very opportune to activate solution mechanisms to prevent the crisis from degenerating into insolvency. The balance between the two positions is achieved by offering the parties to confront each other within a path governed by precise rules that everyone is called upon to respect.

Unlike the other restructuring remedies, which may be requested through access to the already described unitary procedure,[508] access to the negotiated settlement may be requested by commercial, agricultural, large, medium and small entrepreneurs, but not by professionals and consumers. With reference to the objective condition, the debtor is to be in a condition of asset or economic-financial imbalance that makes crisis or insolvency

[507] Massimo Fabiani, *Sistema principi e regole del diritto della crisi d'impresa* (Il Foro Italiano – La Tribuna 2023) 73.
[508] The unitary procedure for access to the PRF has been described in para. 5.3.

likely; this condition must not reasonably preclude the possibility of the company's rescue and restructuring.

Being, as anticipated, a procedure that may precede a restructuring approach, the state of the debtor that makes the crisis likely should be such that insolvency is merely possible. In other words, the asset or financial-economic imbalance is sufficient to integrate this condition. In addition, it is not required that such imbalances may lead to the loss of business continuity in the following months as a probable event; it is sufficient that they may lead to the loss of business continuity as a simply possible event.

This is the most advanced threshold provided by Italian law to allow the entrepreneur to intervene immediately, limited only by the circumstance of the unreasonableness of the restructuring attempt.[509]

From a procedural point of view, the negotiated settlement is designed to be streamlined and effective. Very briefly, the procedure is initiated when the entrepreneur submits an application to an online platform and attaches certain documents.[510] An expert (IP), in the meantime appointed by a commission including, among other members, two magistrates, within two working days of receiving the appointment, informs the entrepreneur of its acceptance, confirming that it meets the requirements for this role. Once the appointment is accepted, the IP convenes the entrepreneur without delay in order to assess the existence

[509] The objective condition of the debtor in the negotiated settlement appears to be inspired by the need for alertness. The situation of initial difficulty already relevant to the start of the restructuring path operates, on this level, as a manifesto disposition, addressed to entrepreneurs so that they promptly take action to face incipient problems of business continuity, in a preventive rather than restorative perspective - cf Di Marzio (n. 467) 466.

[510] Among these, the most important are: the balance sheets of the last three financial years; a draft reorganisation plan; a clear and concise report on the activity actually carried out containing a financial plan for the next six months and the steps it intends to take; a list of creditors with an indication of their respective claims that have fallen due and are falling due and the existence of rights *in rem* and personal guarantees; a statement as to whether any proceedings for the opening of compulsory winding-up proceedings or for a declaration of insolvency have been brought against it; the single certificate of tax debts.

of a concrete prospect of restructuring-reorganisation, even in light of the information obtained from the supervisory body and the statutory auditor.

It is worth noting that the debtor participates personally and may be assisted by advisors. Whether the IP considers that the prospects for reorganisation are concrete, he/she meets with the other parties involved in the reorganisation process, outlining possible intervention strategies and scheduling subsequent meetings at regular intervals. When there are no concrete prospects for reorganisation, the IP informs the debtor and the secretary-general of the chamber of commerce at the outcome of the meeting, who orders the archiving of the negotiated settlement request within the following five working days.

The IP's role is very decisive: in the course of negotiations, and always with impartiality and independence,[511] he/she may invite the parties to redetermine, in good faith, the content of contracts if performance has become excessively onerous or if the balance of the relationship is altered due to circumstances that have arisen. The parties are bound to cooperate with each other to redetermine the content of the contract or to adapt the performance to the changed conditions.

The IP's appointment shall be deemed terminated if, one hundred and eighty days after acceptance of the appointment, the parties have not identified, even following his proposal, an adequate solution to overcome the crisis conditions.

At the end of the assignment, the expert draws up a final report. Whether the process ends without a solution, it may even prelude the opening of insolvency proceedings.[512]

A fundamental aspect concerns the management of the company by the entrepreneur during the proceedings and pending negotiations.

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[511] The reference to the principles of impartiality and independence of IPs is in line with the requirements of the Directive in Art. 27(1), which states that "*the work of practitioners…are provided impartially and independently*".

[512] Art. 23(2)(c) and (d)), CCII.

Whether, on the one hand, debtor is allowed to continue to manage the business, on the other hand it must observe precise criteria that depend on the conditions and circumstances which characterise the distress. In general, in addition to the duty to represent company situation to the expert, creditors and other involved parties in a complete and transparent manner, it has the duty to manage the assets without unfairly prejudicing the interests of creditors.[513] In particular, the approach and the method of management varies depending on the degree of difficulty of the business:

in the event of a state of crisis, the debtor must manage the business in such a way as to avoid jeopardising the viability of the business; when, in the course of the negotiated settlement, it becomes evident that the company is not merely in crisis, but it is insolvent, and despite the insolvency there are concrete prospects of restructuring (reversibility of the insolvency), the debtor must manage the business in the best interests of the creditors. Therefore, what must be emphasised is the different purpose of protection required by law, which changes according to the debtor's conditions of financial difficulty. The general management criterion of prudence shifts from the mere protection of the economic-financial sustainability of the business, in cases of crisis, to management in the best interest of creditors in cases of reversible insolvency, and it is precisely on these aspects that the expert is required to supervise.

With regard the management criterion of prudence, such management must avoid taking excessive risks and must be carried out with a view to preserving the business. Whether the debtor condition is the reversible insolvency, the criterion of prudence is accompanied by a further criterion: management decisions must be made in the overriding interest of

[513] Art. 21, CCII.

the creditors, who are particularly exposed to the negative consequences of such management.

It should be mentioned how, with reference to acts of extraordinary administration[514] and the execution of payments which are inconsistent with negotiations or reorganisation prospects, compared to other instruments provided for in the PRFs, such as a Recovery Plan or a debt restructuring agreement, the opening of the negotiated settlement determines certain particular effects governed by *ad hoc* rules.

Prior to the completion of the act, the debtor must give notice to the expert so that the latter may take a position by expressing his/her opinion: when the expert considers that the performance may be detrimental to creditors, negotiations or restructuring, he/she shall notify the debtor and the internal control body in writing. The deed is therefore not barred; since the debtor remain in the company control, it may still be performed. The debtor may continue to manage by communicating its decision to the expert, but in that case, it may be liable for the performance of detrimental acts. The expert may register his/her dissent in the commercial register.[515] If protective measures had been granted in the meantime, the expert shall notify the court of his/her dissent. The measure granted may consequently be revoked or modified to protect creditor' rights (Art. 21(2)).

In conclusion, it should be recalled that when it becomes apparent in the course of negotiations that the debtor has become insolvent, it may continue to manage the business whilst preserving the interests of creditors. The only condition is that there are concrete

[514] According to the Supreme Court of Cassation, the acts of ordinary management of the company not subject to prior notification are those strictly adhering to the purpose and size of the company assets that improve or even merely preserve them, as well as those relating to the continuation of pending business relations when they are inherent to the characteristic management of the company and do not affect its assets in an innovative manner – Cass. n. 2194/2011.

[515] It should be noted how, when the dissent is entered in the commercial register, it has the effect of making the procedure public, which is normally characterised by being deliberately confidential – Stefano Morri 'La composizione negoziata della crisi di cui al D.L. 118/2021: un rapido quadro e alcune riflessioni critiche' [2021] IlFallimentarista 132 – 166.

prospects for recovery, i.e. that the insolvency may be deemed reversible. The power of management even in such circumstances of concrete danger for the creditors (on whom a particularly serious business risk is shared) makes the active control of the expert and the power to revoke protective measures fully justified.

To conclude the examination of the tools of the PRF, it only remains to address the procedure of **Arrangement with Creditors** (‘Arrangement’). As mentioned in the previous paragraph, this an insolvency procedure and today, compared to the past, thanks to the changes introduced for the transposition of the Directive, it plays a central role within the new CCII.

The remodelling of the system has already taken place at the classification level: this procedure is now included in the set of restructuring instruments (Art. 2(m-*bis*)).

The discipline of the Arrangement is contained in Art. 84 CCII, which provides that a (commercial) entrepreneur who is in a state of crisis or insolvency may propose an arrangement that achieves, on the basis of a plan, the satisfaction of creditors to an extent not less than that achievable in the event of the liquidation by means the going concern, the liquidation of assets, the assignment of assets to an assumption[516] or in any other form: the focus should be placed on the type of Arrangement that ensures the business continuity or the liquidation of the company’s assets.

Analysing the provision, the subjective prerequisite is the same as that of judicial liquidation whilst, with regard to the objective prerequisite, access to the procedure is allowed to entrepreneurs who are in crisis or insolvency. Clearly, insolvency in such restructuring context is to be reversible and therefore surmountable.

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[516] The Assumptor is a person who is obliged, by substituting himself for the debtor, to fulfil the obligations arising from the proposed arrangement: following the approval, he/she is subrogated to the ownership of the assets constituting the company’s assets and the liabilities under the arrangement.

Between the Arrangement on a going-concern basis and the liquidation Arrangement the legislator expresses a clear preference for the former: effectively, in the Arrangement on a going-concern there are no minimum percentages to be ensured for unsecured creditors, which, on the contrary, they are set at 20% in the liquidation Arrangement; always in the former there are no thresholds for the contribution of external resources, which, in liquidation Arrangement must, at the time of the application, increase the available assets by 10%.

In addition, always in favour of the going concern solution, other incentives were provided, such as the introduction of the **relative priority rule**, in addition to the already existing **absolute priority rule**[517], and the moratorium. Regarding the introduction of the relative priority rule, it should be underlined how before the reform, the procedure only contemplated that the liquidation value was to be distributed by fully satisfying the creditors of a higher class before the lower classes (absolute priority rule). Today, the new Article 112 CCII, [518] while, on the one hand, confirms that dissenting class of affected creditors is to be paid in full if a more junior class receives any distribution, on the other hand it introduces that the value in excess of the liquidation value, i.e., the additional value that may be obtained from the going concern over the judicial liquidation value, may be distributed among creditors of the junior dissenting classes as long as they receive the same treatment as the senior or equal classes (relative priority rule).

[517] Before the reform, the Supreme Court of Cassation had definitively ruled on the absolute or relative priority rules in Arrangement with creditors, clearly expressing itself in favour of the distributive rule of absolute priority - Cassazione 8th June 2020, n. 10884.

[518] It is the duty of the court to see that the absolute priority rule and the relative priority rule are properly observed in terms of the treatment of dissenting creditors during distribution.

As for the moratorium, the reform introduced the possibility of modulating the duration of the moratorium for the payment of secured creditors (Art. 86 CCII), a possibility precluded for liquidation arrangements.

Finally, the Arrangement based on the going concern may be '**direct**' or '**indirect**': Article 84(2) specifies that the former consists of the continuation of the business activity by the entrepreneur who filed the petition for the arrangement, whereas the indirect arrangement involves the management of the company as a going concern by a different subject other than the debtor.[519]

However, although the legislation favours the Arrangement with the going concern, the choice of the latter over the liquidation one may present certain critical issues. Precisely, an initial non-virtuous management of the company in the period between the filing of the application and the opening of the procedure could, as often happens in the Italian experience, lead to an increase of credits for the pre-deductible debts[520] in addition to the risk that earlier creditors receive a lower satisfaction than the alternative of judicial liquidation.[521] This risk, besides to already being provided for in the Directive, which states in recital 3 that '*restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders*', it has also been considered by Italian jurisprudence, which has affirmed that it is not a foregone conclusion that the maintenance of business continuity is always in the interest

[519] It has been observed that the going concern, in the context of the Arrangement with creditors, must be understood in an objective sense, since the rule only assumes that the business activity continues after the conclusion of the procedure, regardless of the identity of the entrepreneur – Marco Greggio, 'Finalità e tipologie di piano concordatario: prime osservazioni al "nuovo" art. 84 del Codice della crisi' 11 (2022) Diritto della crisi <https://dirittodellacrisi.it/articolo/finalita-e-tipologie-di-piano-concordatario-prime-osservazioni-al-nuovo-art-84-del-codice-della-crisi> accessed 01 March 2024.

[520] These are the debts that arise from the financing necessary to support the restructuring and which, in the Italian hierarchy of creditors, must be paid before all others.

[521] On the risk of inferior satisfaction of creditors see Vincenzo Pinto, 'Le fattispecie di continuità aziendale nel concordato nel codice della crisi' [2020] 375; Stefano Ambrosini 'La gestione dell'impresa "in perdita" tra vecchia e nuova sistematica concorsuale' [2023] Ristrutturazioniaziendali 1 – 16.

of creditors. To be sure that the going concern factor pursues this latter interest, the Supreme Court stated that at least one of the two following conditions are to be present: a) the company is capable of generating profits immediately (immediate benefit); b) the company is capable of prospectively returning to generating profits in a relatively short time, following restructuring (future benefit).[522]

In conclusion, the going concern Arrangement undoubtedly represents a value for the stakeholders (creditors, shareholders, and workers), but it may present a potential risk factor first and foremost for creditors. Thus, jurisdictions accept the possibility that by favouring business continuity may occur that creditors are adversely affected in the perspective that the going concern is functional to a future turnaround of the company with all the advantages for stakeholders compared to the liquidation alternative.[523]

With regard to the voting stage, Art. 109 CCIII states that the Arrangement shall be approved by creditors representing a majority of the claims admitted voting and that in the event of several classes of creditors, approval shall be obtained if a majority of the claims admitted voting in the largest number of classes is reached. In the event that the majority is not obtained in all classes, the approval is still obtained if in each class two-thirds of the creditors vote in favour, provided that the voting creditors represent at least half of the total claims in the class.

Aware of the difficulty of achieving a majority in all classes, the Italian legislator, demonstrating once again its favours to the Arrangement on a going-concern basis, introduced the **cross-class cram-down mechanism**. It should be noticed how the Italian legislator introduced this mechanism in the Arrangement with Creditors procedure and

[522] Cassazione Civile 19th November 2018, n. 29742.

[523] Giacomo D'Attorre, 'La continuità aziendale tra "scommessa" e "tradimento"' [2024] Il Fallimento 1049 – 1059.

not, as required by the Directive, in the Restructuring Plan. Thus, court may approve the Arrangement (even at the debtor's request) even if a majority is reached only in one class of creditors, provided that such creditors are satisfied in compliance with the absolute priority rule, even with reference to the excess value obtained with respect to the liquidation. In addition, the court must verify the regularity of the procedure, the outcome of the voting, the admissibility of the proposal, the proper formation of creditor's classes, the equal treatment of creditors within each class and, in the case of a going-concern arrangement, that all classes have voted in favour, that the plan is not without reasonable prospects of preventing or overcoming insolvency and that any new financing is necessary to implement the plan and does not unfairly prejudice the interests of creditors.[524]

5.5.1 The Italian Restructuring Plan

As far as the Italian Restructuring Plan[525] is concerned, this tool is contained in Article 64-*bis* of the CCII and it is placed in a median position between the Extended-effectiveness Restructuring Agreements and the Arrangement with creditors already described upon. Although not surprising, it should be noted that the RP represents one of the most significant innovations in the reform of Italian insolvency law today contained in the CCII.

The function of the Italian RP is to allow the entrepreneur to prepare the restructuring operation by implementing the distribution of resources to creditors resulting from the going concern, but only when the plan is approved unanimously.

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[524] In general, the court even verifies the feasibility of the plan, understood as not being manifestly unsuitable to achieve the stated objectives.

[525] The Italian name of the tool is 'Piano di ristrutturazione soggetto a omologazione'.

To be eligible for RP, the Italian legislator has provided for the following subjective and objective prerequisites: if the latter required that the entrepreneur must be in a state of crisis or insolvency, with regard to the former Article 64-*bis* of the CCI allows access to this tool only to the debtor that is a commercial entrepreneur[526] and that is not minor-entrepreneur.[527]Moreover, the commercial entrepreneur must be 'non-minor', i.e. a person potentially subject to the judicial liquidation procedure. Therefore, it is sufficient for the debtor to exceed even one of the following three parameters: (a) annual assets exceeding €300,000 in the three preceding financial years; (b) annual revenues exceeding €200,000 in the three preceding financial years; (c) debts, including those not past due, exceeding €500,000.

Like the other PRF, even the RP follows the unitary procedure provided by Article 40 of the CCII and already outlined in para 5.3.

There is a relevant aspect of Italian insolvency law that deserves to be described and that concerns the novelties introduced by the reform regarding the distribution rules of assets. Before the transposition of the Directive, the application of the absolute priority rule was undisputed, i.e., as already described, the prohibition in the distribution of assets to alter the order of the legitimate causes of pre-emption which, in Italian law, are contained in Articles 2740 and 2741 of the Civil Code.[528]

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[526] According to Article 2195 of the Italian Civil Code, commercial entrepreneurs are those who do not carry out agricultural activities.

[527] The entrepreneur must be a person potentially eligible for compulsory winding-up proceedings, i.e. it must not exceed any of the following three parameters: (a) annual assets exceeding €300,000 in the previous three financial years; (b) annual revenues exceeding €200,000 in the previous three financial years; (c) debts, including those not past due, exceeding €500,000.

[528] Whether art. 2740 states that the debtor shall be liable for the performance of its obligations with all its present and future assets and that limitations of liability are not allowed except in cases established by law, the following article 2741 provides that creditors have an equal right to be satisfied on the debtor's assets, subject to legitimate causes of pre-emption which are liens, pledges and mortgages.

With the new CCII, this approach has been superseded by introducing, only in certain cases, the **relative priority rule**.[529] More precisely, the Italian legislator has provided, within the broad meshes left by the Directive, for the possibility of providing the distribution of creditor's claims of the value generated by the RP in derogation of both Articles 2740 and 2741 of the Civil Code and the civil and insolvency provisions governing the graduation of legitimate causes of pre-emption, on the sole condition that the proposal is unanimously approved by all classes of creditors. The only exception to this rule, again of European origin for the special attention paid to the position of workers, contemplates that in any event, the preferential claims of employers must be satisfied in full, in cash and within 30 days of approval (art. 2751-*bis* n. 1 of the Civil Code).

The distributive freedom offered by the Italian RP, which is one of the distinctive features of the procedure, has given rise to some interpretative doubts: the main question concerned whether or not privileged creditors must be satisfied to an extent at least equal to what they would obtain in the winding up.[530]

As required by the Directive, the RP must mandatorily provide for the division of creditors into classes, according to the criterion of **homogeneous legal position** and **economic interests**. On this point, it is worth noting that Italian case law (jurisprudence

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[529] As addressed in the following paragraphs on the jurisdictions of Germany (para. 6.1), France (para. 6.2) and Spain (para. 6.3), these latter have opted for the absolute priority rule, whereas the Italian legislator, going along with the Directive, has adopted the relative priority rule.

[530] According to the prevailing doctrine, creditors in favour of the debtors proposal, may be satisfied freely even with regard to the alteration of the legitimate causes of pre-emption, as they are protected by the necessary approval by all classes and the additional element of guarantee that creditors - if dissenting - must always obtain at least what they would obtain in a liquidation procedure – Stefano Ambrosini, 'Piano di ristrutturazione omologato (parte prima): presupposti, requisiti, ambito di applicazione, gestione dell'impresa. E una (non lieve) criticità' (2022) <https://ristrutturazioniaziendali.ilcaso.it/uploads/admin_files/ambrosini-19-08-2022_RA-64f40.pdf> accessed 26 Febbruary 2024; Luciano Panzani, 'Il Piano di ristrutturazione soggetto a omologazione' (2022) Quaderni di Ristrutturazioni Aziendali fascicolo 2/2022 <https://ristrutturazioniaziendali.ilcaso.it/uploads/admin_files/panzani-26-08-2022_RA-54e3c.pdf> accessed 12 October 2023.

of the Supreme Court of Cassation) has recently addressed the meaning of homogeneity of legal positions and economic interests, by affirming, with regard to the former concept, that it is a criterion aimed at guaranteeing on a formal level the positions and expectations of satisfaction of creditors and that it concerns the objective nature of the credit. With reference to the economic interest criterion, it concerns the source and type of credit (i.e. banks as secured creditors, employees as preferential creditors, suppliers as unsecured creditors etc.) in order to ensure, in accordance with the principle of *par condicio creditorum*, greater homogeneity for the purpose of easier distribution. [531]

An independent professional asserts the authenticity of the company data and the feasibility of the plan. The court, in accordance with the preference expressed by the Directive for instruments with limited public intervention, assesses the correctness of the formation of the classes and the formal requirements of the proposal, proceeding to the appointment of an IP. It deserves to be specified how the court's assessment is limited to verifying the correctness of the criteria for the formation of the classes (Article 64-*bis* (4)). Therefore, compared to the review that takes place in the Arrangement with creditors, it is expressly limited to the formal legality of the petition, with the exclusion of any further consideration concerning the content of the plan. The assessment on the debtor's motion is left entirely to the resolution of the creditors.

The content of the certified plan is set out in Article 56 that lists: the economic and financial situation of the company, the causes of the crisis, the intervention strategies and the necessary timeframe, the creditors and their claims, any contributions of new finance and the proposed business plan.

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[531] Cass. Civ. 16 aprile 2018, n. 9378.

During the course of the procedure, and thus from the date of filing the application until its approval, the entrepreneur retains the ordinary and extraordinary management of the company (debtor-in-possession), under the supervision of the IP appointed by the court. The debtor has the duty to manage the business in the overriding interest of creditors and to inform the IP in advance for: a) the performance of extraordinary administration acts; b) the execution of payments that are inconsistent with the RP (Art. 64-*bis*, paragraphs 5 f.).

The management criterion, focused on the protection of creditors' interests, may be understood by observing that the debtor is entitled to apply for the RP both when it is in financial crisis and when it is insolvent. When the IP considers that the act may be detrimental to the creditors or is inconsistent with the plan, he/she notifies the entrepreneur and the supervisory body.

When, notwithstanding the report, the act is carried out, the IP immediately informs the court for the purpose of taking the measures provided for to counter acts carried out to defraud creditors. Pursuant to art. 107 CCII, at least fifteen days prior to the initial date set for voting, the IP shall illustrate his/her report and the debtor's final proposal and any proposals submitted by creditors by means of a communication sent to creditors, the debtor and all other interested parties and filed in the clerk's office of the delegated judge.[532] A list of the creditors entitled to vote with an indication of the amount for which they are admitted shall be attached to the report. At least ten days before the vote, the debtor, creditors and those that have formulated alternative proposals may submit observations and objections addressed to the IP.[533]

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[532] The delegated judge is the judge appointed by the court in insolvency proceedings and therefore, with the introduction of the RP, even for the latter tool.

[533] This is a real confrontation between the involved parties: each creditor may state the reasons why it does not consider the submitted plan proposal admissible or convenient and raise objections to competing claims.

Once the IP informs the delegated judge of the observations and objections received, he/she files the final report by notifying creditors, the debtor and other interested parties at least seven days before the date set for the commencement of voting.

With regard to the **approval of the proposal**, the law expressly refers to the rules on the Arrangement with creditors.

As anticipated, the cross-class cram-down mechanism, which allows the court to sanction the plan without the majority obtained in all creditor classes, was not introduced in the RP, with the result that the plan cannot be approved if at least two-thirds of the claims of the voting creditors have not voted in favour. In addition, voting creditors must hold at least half of the total claims of their class (Article 64-*bis*, paragraph 7 CCII).[534]

It deserves to be reiterated that the decision resulting from majority approval, being based not on consent but on deliberation, presupposes the application of the principle of equal treatment of creditors and, in the case of several classes of creditors, the equal treatment of creditors within the class.[535]

After the vote, there is the final stage concerning the approval of the RP: depending on how the plan was approved, i.e. by all classes or by two-thirds of the voting creditors' claims, the procedure takes two different directions.

In the first hypothesis, when no objections have been filed, the court approves the plan, which thus becomes binding on all creditors prior to the publication of the request for access in the Commercial Register; in the event that objections to the approval have been

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The debtor is entitled to respond and contest the competing claims and proposals in turn, stating the reasons why it considers them inadmissible or unfeasible.

[534] Part of the doctrine has criticised the presence of such low percentages, considering that the RP may be approved whether exactly half of the eligible creditors vote and 2/3 of them vote in favour of the Plan: the result is that the RP may only be approved with 33.33% of the eligible creditors voting – Giuseppe Bozza, 'Il piano di ristrutturazione soggetto ad omologazione' (2022) Diritto della crisi 14 <https://dirittodellacrisi.it/articolo/il-piano-di-ristrutturazione-soggetto-a-omologazione> accessed 02 January 2024.

[535] cf Di marzio (n. 467) 33.

filed by dissenting creditors, where they relate to a 'lack of convenience' of the plan, the Court nevertheless approves the plan when the proposal shows that the claim is satisfied to an extent not less than the judicial liquidation. The consequence is that whether the preferential creditors receive less satisfaction than they would be entitled to in the liquidation, they will be able to prevent the approval of the RP even if voted unanimously by all classes. [536] It should be noted how preferential creditors do not vote in case the proposal provides for their satisfaction in full cash within 180 days of approval. When the latter condition is not met, the preferential creditors vote and, for the part that is not satisfied, are placed in a separate class.

As for the second hypothesis, in which the RP has not been approved by all classes, the debtor, within fifteen days from the date of the filing of the IP report, whether it considers that the majority on the proposal was reached in each class (e.g., by contesting the vote count or the expression of the vote by some creditors), it may request that the court ascertain the result of the vote and approve the RP. Otherwise, the debtor may amend the application, formulate a proposal for Arrangement with creditors and request that the court directly pronounce the opening of the latter procedure.

Whether the RP has not been approved by all the classes and the debtor does not initiate the actions described, after 15 days the delegated judge reports the non-approval of the RP to the court which, if an appeal has been filed by one of the eligible parties and the requirements have been ascertained, declares by judgment the opening of the liquidation procedure.

[536] Opposition to homologation, likewise, is the only instrument provided by the law that allows creditors to challenge the validity of extraordinary transactions such as mergers, demergers or transformations contemplated in the restructuring plan subject to homologation in view of the express reference in Article 116 CCII.

To make the restructuring legal system as flexible as possible, the Italian legislator even provided for the possibility for the debtor to amend the proposed application for the RP at any time by formulating a proposal for an Arrangement with Creditors[537] by publishing the amendment of the application in the Commercial Register.

From the day of publication, the debtor may perform urgent acts of extraordinary administration only upon authorisation by the court. In the absence of authorisation, the acts are ineffective, and the court orders the revocation of the decree opening the Arrangement with Creditors procedure.

It has been observed how the rules on the conversion of the RP into an Arrangement with Creditors may be interpreted as the legislator's awareness of a possible lack of use, in practical application, of the former tool: for this reason, the debtor may, through conversion, avoid judicial liquidation once the plan has failed, by resorting to an effective procedure as the Arrangement with Creditors.[538]

It should be noted how the CCII even allows the reverse route: the debtor that has filed an application for Arrangement with Creditors may, as long as voting has not commenced, amend the latter in order to apply for approval of the RP.[539] This may be particularly convenient in all those hypotheses in which the debtor is aware of a widespread consensus among creditors in the various classes with respect to its proposal so as to be able to further modulate the proposal without the constraint of the distribution rules provided for the procedure of Arrangement with Creditors.[540]

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[537] Art. 64-*quater* CCI.

[538] cf Di Marzio (n. 467) 641.

[539] Art. 64-*bis* CCI.

[540] Pierdanilo Beltrami and Francesco Carelli, 'Il Piano di ristrutturazione soggetto a omologazione' (2022) Quaderni di Ristrutturazioni Aziendali fascicolo 2/2022 <https://ristrutturazioniaziendali.ilcaso.it/Focus/294__Il-piano-di-ristrutturazione-soggetto-a-omologazione> accessed 11 October 2023.

5.6 Debt discharge

Under the old bankruptcy law, to avail the benefit an objective condition was necessary: debtor had to, at least partially, pay his creditors. Always in the old law, even several personal limitations were provided for the debtor when a bankruptcy petition was filed and until the procedure was concluded. For instance, he/she was unable to hold the office of director or auditor of a company and legal common representative of the shareholders, besides to being excluded from the stock exchange and by right from partnerships.[541]

The exigency to limit the described 'sanctioning measures' against debtors-entrepreneurs was already evident in the 2014 Recommendation whereby, introducing the second chance for entrepreneurs declared bankrupt, the European legislator stated that the same fact of having gone bankrupt may represent an advantage for future attempts.[542]

The definition of debt discharge in the Italian law is contained in art. 278 CCII which defines it as the discharge from debts and the consequent unenforceability, by creditors, of the part of debtor's debt that have remained unsatisfied in judicial liquidation proceedings.

As provided by the Directive, the CCII grants *ex lege* the debt discharge to debtors within three years after the opening of the liquidation or at the time of the closure of the proceedings, in the case it closes before.[543] From the Italian perspective, in order to prevent this instrument from favouring dishonest behaviour of debtors (as the moral

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[541] Until 2006, Article 50 of the previous bankruptcy law even provided for a system of publicity for bankrupts (the so-called 'register of bankrupts'). Even today, Article 2382 of the Civil Code includes the status of bankrupt among the causes for the disqualification of directors and auditors of companies, whilst Article 2288 provides for the exclusion *ex lege* from participating in certain type of companies for the shareholder who is bankrupt.

[542] It was the same Recommendation that affirmed this principle in recital 20 stating literally that '*evidence shows that entrepreneurs who have gone bankrupt have more chance to be successful the second time*'.

[543] Art. 21(1), Directive.

hazard concept)[544] that, on the contrary, are to be considered 'honest but unfortunate', it has become essential to introduce requirements of merit: art. 280 CCII subordinates the debtors admission to the remedy of debt discharge in the absence of convictions for fraudulent bankruptcy or offences against the public economy, industry and commerce; or absence of misappropriation of assets or liabilities (disobeying the obligation of faithful and transparent representation); absence of misuse of credit; not having obstructed or slowed down the procedure; not having benefited from the debt relief in the previous five years or twice in their lifetime.

[544] The concept of moral hazard offers a useful tool for analysing the law's safeguards against abuse of debt relief. On the argument, see Joseph Spooner, *Bankruptcy - The Case for Relief in an Economy of Debt* (Cambridge University Press 2019) 216 – 270.

Chapter 6 – The application of the EU Directive 2019/1023 in several EU Member States and the position of the UK after Brexit

6.1 Introduction

This Chapter provides an analysis of insolvency law in the following three EU Member States: Germany, France and Spain. The UK insolvency law is even illustrated.

The aim of this Chapter is to represent both how insolvency law within the European Union has appeared with significant differences in substance in each jurisdiction and how insolvency law appears in these EU countries after the transposition of the Directive. The result obtained from the analysis of the insolvency law – *ex ante* and *ex post* Directive – makes it possibile to assess, in addition to the peculiarities which characterised each legal system, the level of harmonisation achieved in the EU, as a context known to have always been particularly heterogeneous.

A peculiar position concerns the UK since, although this jurisdiction is no longer part of the European Union, it has greatly influenced the regulation contained in the Directive. Therefore, through the description of its insolvency law emerges that the discipline appears modern and updated although the Directive has never been transposed.

6.2 The German experience

Traditionally, and thus prior to the implementation of the Directive, the German insolvency law system has been characterised by balancing the interests of the debtor with those of the creditors, placing in an intermediate position between a debtor-friendly system, such as the French insolvency regulation, and the creditors-friendly system that characterises the Italian and Anglo-Saxon systems.[545]

Moreover, the Germans jurisdiction have always had a strict approach to entrepreneurial business and insolvency matter.

Even though many years have passed since the amendment in the Insolvenzordnung (InsO)[546] of the procedure inspired by US Chapter 11, the feeling of aversion to insolvency seems still widespread and strong. In addition, as in the Italian experience, the terminological component did not facilitate the process, as the German words 'Schuld, schulden, überschuldet, etc..' have entirely different connotations than their foreign counterparts and invoking the concept of guilt: the inevitable consequence has been that, in mass culture, this area has been qualified with negative connotations.[547]

It is worth emphasising that the prevailing view in Germany held that creditors' rights could only be compressed in the context of insolvency proceedings on constitutional grounds. The praxis, however, contradicted that approach as some German companies began to move their centre of main interests (COMI) from Germany to the United Kingdom (Forum Shopping phenomenon) in order to take advantage of more flexible legal tools such as the UK company voluntary arrangement.[548]

Having noted the described scenario, on the one hand the Ministry of Justice had invited experts from the UK and France to better understand the functioning of these pre-

[545] Sergei Davydenko and Julian Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK' [2008] 63 Journal of Finance 565.

[546] In force since 1999, the German InsO has granted broad powers to creditors, that by virtue of the principle of autonomy (*Gläubigerautonomie*) have always played a central role in insolvency proceedings, being able to influence both the choice of which procedure to adopt and the manner of liquidation of the debtor's assets for the satisfaction of their claims.

[547] Christoph G. Paulus, 'The new German preventive restructuring Framework' [2021] Orizzonti del diritto commerciale 10.

[548] Christoph Paulus et al., 'Sanierung im Vorfeld von Insolvenzverfahren' [2010] WM 1337.

insolvency procedures and, on the other hand, the Ministry of Economy had organised a conference to highlight the advantages and disadvantages of PRF.[549]

In 2013, a procedure similar to the moratorium, called '*Schutzschirm*' (protective umbrella), was introduced in the Insolvency Code, which, after a maximum of three months, converted into normal insolvency proceedings. This update made Germany mistakenly believe that it did not have to implement what was required by the 2014 Recommendation that had meanwhile been enacted: as already described, the inertia of the other UE Member States even led the European legislator to issue the Directive.[550]

The impact of the Covid-19 pandemic on the German companies, as in many other countries, was a push to offer an alternative to traditional insolvency proceedings.[551] Therefore, in mid-September 2020, the Ministry presented its bill, which was subsequently approved on 1 January 2021.

With the law transposing the Directive, the '*Unternehmensstabilisierungs - und – restrukturierungsgesetzes*' (StaRUG or German Insolvency Code),[552] the German insolvency legal system has been equipped of an *ad hoc* legislation to regulate PRF, offering debtors new tools suited to the specific case.

Anticipating what will be addressed on the merits in the following section, it is possible to observe how the reform outlined a system characterised by access to the restructuring instruments through a single procedure, both if the debtor wished to propose a plan voted in court and in the context of private negotiations.

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[549] cf Paulus (n. 547) 11.
[550] cf (n. 215).
[551] Stephan Madaus, 'Giant Leap for German Restructuring Law? The New Draft Law for Preventive Restructuring Procedures in Germany' 2020 University of Oxford - Law Blogs https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/10/giant-leap-german-restructuring-law-new-draft-law-preventive accessed 12 April 2022.
[552] Gesetz über den Stabilisierungs – und Restrukturierungsrahmen für Unternehmen, Artikel 1 G. v. 22.12.2020 BGBl. I, p. 3256 (Nr. 66).

6.2.1 The implementation of the EU Directive 1023/2019 into the German legal system: main features

It seems worth illustrating, before going into the merits of the legal instruments of the PRF in the German regulation, how the concepts of imminent insolvency, insolvency and over-indebtedness are defined. In fact, as in the Spanish system,[553] it is possible to find a terminological (but not substantial) difference, with respect to the lexicon used by the EU Legislator of the concepts of 'likelihood of insolvency' and 'insolvency'.[554]

To be precise, the three conditions of debtor for access to one of the rescue and restructuring instruments were already present in the German Insolvency Code. Regarding to the 'insolvency', the debtor is deemed insolvent when it is unable to meet its due payment obligations and this condition is generally presumed when the debtor has stopped making payments.[555] 'Imminent insolvency' is realised when the debtor is likely to be unable to meet existing payment obligations when they fall due:[556] the existence of this condition presumes a prognostic assessment, referring to the following 24 months, of the possible future inability to meet the obligations undertaken. Finally, the 'over-indebtedness' exists if the debtor's assets no longer cover its existing liabilities, unless the continued operation of the company is substantially likely in the circumstances.[557] Whilst insolvency and over-indebtedness may be reported by both the debtor and the creditors, the condition of imminent insolvency may be invoked only by the debtor,

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[553] See *infra* (n. 560).
[554] It has already been clarified that the Directive leaves the definition of the concepts of likelihood of insolvency, insolvency and SMEs to national law (art. 2(12), letters a), b) and c) Directive – see para 2.2.2 of Chapter 2.
[555] Section 17 of the German Insolvency Code.
[556] Section 18 of the German Insolvency Code.
[557] Section 19 of the German Insolvency Code.

having this latter the choice of filing a petition for one of the remedies offered within the new PRF or for normal insolvency proceedings.

As far as the out-of-court negotiations are concerned, the German Insolvency Code, section 94–100, allows the debtor to be supported by a court-appointed *Sanierungsbeauftragter* (IP)[558] who facilitates negotiations to reach an agreement.[559] In particular, the IP acts with marginal functions and powers to the support of the debtor and the role of the court is limited to the control of the formal aspects.

It should be underlined that, once the court has confirmed the agreement signed by the parties, in the event of non-compliance with the conditions and terms contemplated by the agreement, the opening of subsequent insolvency proceedings will be more likely (sec. 97(3)). In addition, from a procedural aspect the debtor must submit, in order to request the appointment of an IP, a petition to the court addressing the debtor's financial or economic difficulties, which are a prerequisite for the commencement of rescue moderation proceedings. This has the effect of allowing the IP, during the course of the negotiations, to have access to and inspect the company's books and records, obliging him/her to report to the court the existence of the conditions for the insolvency of the debtor. As to the protective effects, during the negotiations, the court orders the prohibition of individual actions on the debtor's assets.[560]

The **EWT** have also undergone updates: in addition to the already provided warning signals arising from civil and company law, the reform, conforming to the Directive (Art. 19), has introduced additional duties for the persons (directors) who are legally

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[558] The German legislator introduced the role of the insolvency practitioner inspired by the role of the French '*conciliateur*' – cf Paulus (n. 547) 15.

[559] It should be remembered that the debtor may enter into informal negotiations with its creditors according to civil law (and thus, as a micro area, from contract law) and this possibility is contemplated in all the European jurisdictions.

[560] Section 49, German Insolvency Code.

responsible for the management of the company. These duties concern the monitoring of the company's performance and development prospects in the exercise of economic activity.[561] Therefore, directors, after notification to the court initiating the restructuring process, (Art. 31 (1) StaRUG), must manage the company considering the interests of the creditors, which are prevalent those of the shareholders. With regard to alert mechanisms, this information comes from both public and private entities and concerns cases where the debtor has failed to make certain types of payments or advisory services: in such circumstances, tax advisors, tax agents, auditors, sworn accountants and lawyers are obliged to inform the client (debtor) when they find grounds for opening insolvency proceedings. Hence, the reform focuses on the education of the management and control body in the interception of crisis risk.[562]

With regard to the **Restructuring Plan**, as a pivotal measure of the Directive in the context of the PRF tools, the measure is regulated in Sections 2 to 28 of the StaRUG.[563] Access to this remedy is permitted, consistently, to the debtor in a state of imminent insolvency, excluding the other two conditions of actual insolvency and over-indebtedness, which are more serious situations than the first, in terms of the intensity of the distress.

Moreover, compared to the previous InsO, the reform excluded the category of consumers from the possibility of using the plan, allowing the access to this instrument only to entrepreneurs, both natural and legal.[564]

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[561] Section 1, German Insolvency Code.
[562] Section 1, 101 und 102, German Insolvency Code.
[563] Although with many new features, the regulation of the RP has been modelled on the previous regulation contained in Sections 220 et seq. of the InsO.
[564] Section 30, par. 1, German Insolvency Code.

German law requires that the RP is to be composed of a declaratory and a constructive part, and the Ministry of Justice offers a check list published on its website to which reference should be made for proper drafting of the plan.

The declaratory part deals with describing the basis and effects of the plan, whilst the constructive part determines how the rights of the addressees are affected.

With regard to claims against the debtor, it should be noted that the law divides them into restructuring claims and those that do not belong to the latter category: restructuring claims are security claims, affiliation claims and certain claims arising from intra-group securities, whereas workers' claims and claims arising from torts are not considered as such. The RP may also contemplate debt-for-equity swap transactions, which is even effective for the management of non-performing loans as well as encouraging loan-to-own strategies where such loans are purchased from investors at a discount.[565]

With regard to the rules concerning the classes of creditors, in line with the Directive, the discipline provides the division into classes according to classification criteria that must be appropriate and described in the declaratory part of the RP. In addition, there are certain types of creditors which are to be necessarily compose special classes: these are secured creditors and shareholders.[566] Within each class of creditors, the principle of *par condicio creditorum*, i.e. equal treatment, is to be respected.[567]

The RP plan may contemplate new financing as well as any changes in property rights.

Once the negotiations are complete, the offer in the RP must be accepted by the creditors involved: the plan must include an explicit notice that dissenting creditors will be bound if the majority of creditors accept the offer and the court confirms the plan.[568] Prior to

[565] Cf Paulus (n. 547) 17.
[566] Section 9 German Insolvency Code.
[567] cf (n. 389).
[568] Sections 17-23, German Insolvency Code.

acceptance, all parties involved discuss the terms of the plan at a special meeting. What is crucial for the court's confirmation of the plan is the observance of all deadlines and procedural steps.

Sections 24-28 regulate the voting rules of the RP: on the one hand, for the right to vote, reference parameter is the nominal value and the value of the guarantee; on the other hand, to achieve the majority required for the confirmation of the plan, the three-quarters of the eligible creditors (and not the creditors that concretely participate in the vote) must vote in favour in each class.

According to the scheme of the Directive, if a majority of votes is obtained in each class, the plan offer is accepted and the Court, after the verifications, may proceed with the confirmation. On the contrary, whether the majorities are not obtained, then the cross-class cram-down mechanism may be applied, but only in case the following three requirements are met:

(1) the creditors' position under the restructuring plan is not expected to be worse than without a restructuring plan, (2) the creditors will receive an adequate return from the assets (plan value) and (3) a simple majority of the classes have approved the plan (where there are only two classes of creditors, it is sufficient that one of them has given its consent). Furthermore, it should be noted how the RP becomes binding on all creditors, and thus even on the dissenting minority, only when it is confirmed by the court: otherwise, the plan will only bind those creditors that, by voting in favour, have adhered to it.

With reference to the second requirement, it should be pointed out that the German Legislator has chosen to adhere, like other EU jurisdictions, to the **absolute priority rule**

(Section 27), already described in the paragraph on RP in the Directive discipline.[569] Therefore, no creditor may receive more than is due and no creditor may receive anything before the higher-ranking creditors have been fully satisfied. However, there is even the possibility of applying the relative priority rule, although it remains the exception to the absolute priority rule, when the value of the available resources allows even the satisfaction of lower ranking creditors.[570]

Besides the RP, the German regulation even contemplates other measures which may help the debtor to address the crisis as adequately and efficiently as possible, in an attempt of the 'lasting' removal of imminent insolvency.[571] These remedies, listed in section 29, are the court-supervised voting (judicial voting), preliminary plan examination by the court for viability (pre-check), stabilisation through stays on outside claims (moratorium) and court confirmation of the plan.[572]

In the first remedy, the **judicial voting**, considering that the plan voting process appears quite complex, the debtor might prefer court supervision. The court will make certain evaluations, such as the compliance of the plan with the law, the debtor's eligibility for restructuring, the creditors' voting rights and the correct classification.[573]

With the **pre-check** tool, the debtor can preliminarily verify one or more issues that are considered decisive for the confirmation of a RP: the parties may submit comments and observations on the plan.[574]

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[569] See para. 4.3.3.3 on the Cross-class cram-down mechanism.

[570] Section 28, German Insolvency Code.

[571] It has been observed how, since the law does not define the concept of 'lasting' removal of the imminent insolvency, it should be assumed that the restructuring must ensure the viability of the company for a period of at least 24 months - Tjark Pogoda and Christoph Thole, 'The new German "Stabilisation and Restructuring Framework for Businesses" [2021] EIRJ 14.

[572] These included a fifth instrument called 'discontinuation of contracts', which, however, was removed before the legislative process was completed.

[573] Section 46, German Insolvency Code.

[574] Section 47, German Insolvency Code.

The request for a **moratorium** is to be accompanied by all the significant information which justify the restructuring. It protects debtors for a maximum period of three months, with the possibility of an extension for a maximum of eight months.[575] The court has to assess the condition of imminent insolvency, granting the protection only when all the information is complete and not false, the restructuring is feasible or that the requested measure is necessary for the purposes of restructuring. [576]

Once the remedy is granted, the moratorium produces its effects: creditors' enforcement actions, including secured ones, are suspended, and debtor may even choose to suspend singular individual actions, as well as to suspend any pending insolvency proceedings.

As far as the **confirmation of the plan** is concerned, the debtor may decide whether and at what time to request the court to confirm the plan, being able to avoid this step in the event that creditors have voted unanimously to accept the plan.

On the contrary, it is sufficient that only one creditor has voted against the plan to require confirmation by the court. The court, after assessing the documents and information provided by the debtor and hearing the parties, may confirm the plan when: (i) the debtor is not in imminent insolvency (ii) the rules on the content of the RP and the procedure are not violated in an essential element; (iii) the financial or economic situation of the company does not allow for the payment of creditors.[577] Whether the debtor's request overcomes all of these obstacles, and the plan is confirmed, then the constructive part of the RP may be implemented.

It is interesting to note how regardless of the instrument or instruments invoked by debtor, the procedure is always the same. In all cases there is the participation of the court, and it

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[575] Section 49 – 59, German Insolvency Code.

[576] These requirements are in line with Art. 178(1)(b) Capital Requirements Regulation EU 575/2013.

[577] Section 63, German Insolvency Code.

starts precisely with the notification to the latter of a restructuring proposal, in which debtor must attach all the documentation relating to the measure that intends to adopt and that may be useful for the commence of the procedure.

When the competent court,[578] which is called 'Restructuring Court',[579] finds that the debtor conditions does not allow a restructuring approach (the debtor is insolvent or over-indebtedness) will have to close the procedure. In this review, the court, besides to verifying its competence and analysing the documents produced by the parties, has *ex officio* powers to investigate the circumstances it deems relevant.[580] Moreover, it assesses whether to appoint a restructuring commissioner.

A relevant effect of the commencement of restructuring proceedings is the ineffectiveness of the ipso facto clauses. In addition, from the notification to the court, the suspension of the administrators' obligation to file for the opening of insolvency proceedings is triggered, unless the debtor subsequently becomes insolvent or over-indebted.

Focusing the analysis from the debtor's perspective, the commencement of restructuring proceedings represents for directors the triggering of certain duties, such as the obligation to engage in the restructuring process with the care of an 'orderly and conscientious restructuring manager'[581] and to avoid any action that may conflict with the restructuring. An obligation even arises on the debtor: the notification to the court of the existence of a ground for insolvency and general information obligations.582

[578] Section. 34 (1) German Insolvency Code, which contains the rules on the competent jurisdiction, provides that the local court (*Amtsgericht*), which is also competent for ordinary insolvency proceedings, has exclusive jurisdiction for restructuring decisions. The competence of the local court is given by the COMI of the debtor (section 35 (2) German Insolvency Code).

[579] This is a division within each court which is competent to deal with restructuring cases.

[580] Section 39 (1) German Insolvency Code.

[581] Cf Paulus (n. 547) 21.

[582] Breach of the insolvency obligation during restructuring proceedings entails civil and criminal liability.

In conclusion, it may be argued that the new German insolvency law, as it appears today after the updating of compliance with the Directive principles, focuses on the *Restrukturierungskonzept* (restructuring concepts) and on the *Restrukturierungsziel* (restructuring objective) aimed at satisfying creditors by allowing the debtor to restructure as a going concern, closely resembling the US Chapter 11 in this respect.583

Hence, the outlined restructuring model appears modulable and flexible in relation to the exigences expressed by the parties and by giving to them the possibility of adopting the more appropriate restructuring tool for the concrete case.

Despite the traditional German pro-creditor regime,[584] the reform placed the focus on the preservation of the debtor's business in crisis by mitigating the orientation towards liquidation and satisfaction of creditors at any cost. In order to consolidate the described new paradigm, which for several authors has not yet been accomplished,[585] it was necessary to give more confidence to the debtor through a system of responsibilities that enhanced the latter's role as opposed to the previous supremacy reserved for creditors.[586]

6.3 The French experience

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[583] For several points of contact between the German Insolvency Code and the US Chapter 11, see William L. Norton Jr. and William L. Norton III, *Norton Bankruptcy Law & Practice* (3d ed. 2023) 91:1.

[584] Aurelio Gurrea Martinez 'The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index' [2023] Singapore Management University Yong Pung How School of Law, Research Paper 4/2023 15; Marianna Santalova et all 'Evaluation of Types of Insolvency Systems in Russia, Germany, and France' [2017] Journal of Advanced Research in Law and Economics 204.

[585] Although innovative measures have been introduced in order to prevent the crisis, the traditional culture, even influenced by economic aspects, remains anchored to an arrangement directed at the primary satisfaction of creditors, rather than absorbing the European rescue culture, conceiving business continuity as merely instrumental to the satisfaction of creditors' claims – Carlotta Rinaldo '*Il salvataggio delle imprese in crisi: l'attuazione della direttiva sulla ristrutturazione e sull'insolvenza in Germania e in Olanda e prospettive per l'ordinamento italiano' [Le nuove leggi civili commentate* 2020] 31.

[586] It has been argued that following the reform, the German model now prioritises the survival of the company and its value, so that on the one hand the debtor is made responsible and on the other the maximum satisfaction of creditors is guaranteed – cf Rauch (n. 3) 121.

France was the first European country to contemplate mechanisms that acted in a pre-insolvency regime, anticipating protection for the debtor and the parties involved before insolvency was reached.[587] More precisely, the overcoming of the stigma of bankruptcy occurred with the 1967 reform (loi 13 July 1967, n. 67-563) that introduced a regime for companies in difficulty as an alternative to bankruptcy. [588] For this reason, it has indeed had a jurisdiction known for its 'restructuring-biased' insolvency law regime,[589] considering its inclination for the promotion of the rescue of businesses at an early stage, with the aim of preserving above all employment.[590]

In addition, compared to most European jurisdictions, French insolvency law has traditionally been favourable to debtors and, as argued, unreasonably adverse to creditors.[591] Whilst all the reforms that preceded the transposition of the Directive had contributed to strengthening the position of creditors in insolvency proceedings, they had not pursued the objective of bringing insolvency law into line with international standards.[592] The *punctum dolens* mainly concerned restructuring procedures that reserved insufficient involvement for creditors compared to the other parties involved.[593] Thus, although it was quite clear that the implementation of the Directive would not radically change the French system of preventive restructuring, the innovations made

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[587] cf Di Marzio (n. 460) 303.

[588] The 1967 reform even had an impact on terminology, as it went from '*droit des faillites*' to '*droit des enterprises en difficulté*' – Yves Chaput, *Droit des entreprises en difficulté et faillite personnelle* (Presses universitaires de France, 1996) 66.

[589] Muge Adalet McGowan and Dan Andrews, 'Insolvency Regimes And Productivity Growth: A Framework For Analysis' [2016] OECD Economic Department Working Papers No. 1309 18.

[590] Rebecca Parry and Katarzyna Gromek Broc, *Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer, 2004) 1.

[591] Francois Pérochon, *Entreprises en difficulté* (LGDJ, 2014) 205.

[592] According to the data published by the World Bank, the total score attributed to the 'resolving insolvency score is the 74,6%, against the total percentage awarded to German of 89.8% <https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency> accessed 01 November 2023.

[593] Anne Epaulard Chloé Zapha 'Distressed firms: how effective are preventive procedures?' France Stratégie – La Note D'Analyse no. 84 (February 2020) 2.

nevertheless provided an opportunity to rebalance the protection offered to the debtor against the position of creditors.[594]

Given that premise, it may be succinctly useful to go back in time to trace the most relevant stages in the evolution of insolvency law, it may be noted how the described medieval culture of a coercive and punitive insolvency law based on the arrest and imprisonment of the debtor continued to characterise French jurisdiction until the Commercial Code was introduced in 1807.

The corporate insolvency scenario changed with the adoption of Laws of 20 July 1955 and 13 July 1967, which introduced the first rescue procedure known as *redressement judiciaire* (rehabilitation proceedings), establishing a legal system through which companies had two options: to be liquidated or to be rescued. Next stage was the introduction of the first pre-insolvency process in 1984 and the new Commercial Code consolidating insolvency laws which was promulgated in the year 2000: from that time the French legislator and government regularly reformed and modernised the insolvency regime.[595] The main idea of these reforms is based on the fact that corporate distress should be solved upstream to preserve the value of the assets as well as to facilitate companies restructuring. Another crucial step was represented by the introduction of the *procédure de sauvegarde* (safeguard procedure) in 2005, which implemented the French insolvency law with the debtor-in-possession principle. Due to the global economic and financial crisis, alternative forms of the safeguard procedure were provided: the *sauvegarde financière accélérée* (expedited financial safeguard) in 2010 and the

[594] Emilie Ghio, 'The French transposition of the EU Directive on Preventive Restructuring 2019: revamping the law while preserving the status quo' [2022] HERO/W-003 10.

[595] This intense reform process was even determined by the onset of economic crises and the high number of insolvency cases.

sauvegarde accélérée (accelerated safeguard) in 2014.[596] Furthermore, two additional events contributed to the modernisation of the insolvency legal system: in 2014, the insolvency law was reformed to increase the efficiency of pre-insolvency proceedings and the rights of creditors in insolvency proceedings, whilst in 2016, the Law on the Modernisation of 21st Century Justice[597] promoted the rescue culture, the enhancement of confidentiality during proceedings and the improvement of transparency and impartiality. The last act which precedes the current insolvency law may be identified in the *Plan d'Action pour la Croissance et la Transformation des Entreprises*[598] (Pacte Law), with had as its the objective the growth of business, the job creation and the redefinition of the place of the company in society to better involve employees in the life of the company. Finally, the provisions of the EU Restructuring Directive were transposed by the Ordinance No. 2021-1193 of 15 September 2021. Nowadays, the procedures of the current corporate insolvency law system are all governed by Title VI of the Commercial Code (Code de Commerce), and they may be listed as follow: the *mandat ad hoc* (*Ad hoc* mandate), the *conciliation* (Conciliation), the *sauvegarde* (Safeguard), the *sauvegarde accélérée* (Accelerated safeguard), the *redressement judiciaire* (Judicial rehabilitation) and the Liquidation.[599]

The ***Ad hoc* mandate** and the **Conciliation** are out-of-court procedures.

The former starts when the competent court receives the debtor request in which are offered the elements which represent the economic and/or financial distress. To access this tool, the debtor cannot be insolvent. On the one hand debtor maintains control of the

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[596] The former was introduced by the Law No. 2010-1249 of 22 October 2010 and the latter by the Ordinance No. 2014-326 of 12 March 2014.
[597] Law No. 2016 – 1547 of 18 November 2016.
[598] Law No. 2019 – 486 of 22 May 2019.
[599] The judicial procedure will not be described since it does not fall within the scope of restructuring and thus in the Directive discipline.

company (according to the debtor-in-possession principle) and, on the other hand, an IP who assist the negotiations between the debtor and their main creditors is appointed.[600] The range of possibilities offered to the latter and included into the agreement may usually consist in new financing injection and a debt rescheduling (reduction or cancellation).[601] As already described,[602] since the *Ad hoc* mandate is based on a contract and thus on consent, it does not bind those creditors that decide to not to take part in the negotiations and that do not sign the agreement.

Even the **Conciliation** is opened at the request of the debtor which is in legal, economic or financial distress and, as the *ad hoc* mandate, has not been insolvent for more than 45 days.[603]

The solution reached into an agreement among the parties involved with the participation of a 'conciliator' appointed for four months by the court may be the restructuring or the sale of the business.[604] During the procedure, the debtor may request the court to grant a debt deferral for up to two years against certain creditors as well as the suspension of payments. In addition, the recorded or approved agreement suspends or prohibits all legal action and suspends or prohibits all individual proceedings against both the movable and immovable property of the debtor.[605]

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[600] Articles L611 – 7, Commercial Code.
[601] According to Article L611 – 8 of the French Commercial Code, the court may sanction the agreement through homologation only whether certain conditions are satisfied, such as the preservation of the company going concern.
[602] It should be clear how the contractual tools are based on consent of the parties which decide to participate.
[603] Article L611 – 4, French Commercial Code.
[604] Article L611-7, French Commercial Code.
[605] Article L611-10-1, French Commercial Code.

Whether the agreement cannot be reached, the conciliator shall submit a report to the President of the Court. The latter terminates the conciliator's mission and the conciliation procedure.[606]

It may even occur that the conciliation is converted into restructuring proceedings.

What differs from the ad hoc mandate is that in the conciliation, the agreement is ratified by the court at the request of the debtor, and it may be both approved (constatation), where the confidentiality of the procedure is preserved, or sanctioned (homologation), making the judgement public.[607]

The **Safeguard** and the **Accelerated Safeguard** belong to the category of the restructuring procedures in which the court has an active role.

As far as the former procedure, it deserves to be mentioned how the matrix that has inspired this tool is the US Bankruptcy Code Chapter 11.[608]

As anticipated, the presence of the court characterises the entire procedure: in fact, it appoints i) an *administrateur judiciaire* (administrator) whose task is to supervise and assist the debtor, as the latter remains in control of the company and its assets; ii) the *mandataires judiciaires* (representatives of the creditors) to protect their interests and to assess the proofs of claim; and iii) a *juge commissaire* (supervising judge) who oversees the entire procedure.[609]

The procedure begins with an observation phase (*période d'observation*) lasting 6 months, renewable for a further 6 months, starting from the act by which the court opens the

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606 It may even occur that the conciliation is converted into restructuring proceedings.
607 According to Article L611-9, French Commercial Code, the parties of the agreement (debtor, creditors and the conciliator) are to be heard by the court before the sanction.
608 The safeguard procedure was firstly introduced as an insolvency procedure where the debtor had to show that it was facing 'difficulties that it was not able to overcome' and which would lead to a payment failure situation (*cessation des paiements*). In 2008, the safeguard became available to those debtors unable to overcome difficulties but not yet in a payment failure situation, making the safeguard procedure a hybrid mechanism that can be also a preventive restructuring process – cf Ghio (n. 594).
609 Article L621-4, French Commercial Code.

procedure. During this period, the debtor and the appointed administrator prepare a safeguard plan that may include debt rescheduling, debt for equity swaps and so on. The plan is to be approved by the creditors, that may be grouped into classes. Whether the debtor does not comply with the terms of the plan or becomes insolvent, the court, in case the circumstances still permit the restructuring of the company, may convert the safeguard procedure into a rehabilitation procedure (*redressement judiciaire*); on the contrary, whether the latter option is not feasible, a liquidation proceeding is to be opened.

When the Safeguard starts, several protective measures automatically are activated: on the one hand, enforcement actions brought against the debtor are suspended and, on the other hand, the debtor himself cannot make any payment.

With reference to the **Accelerated Safeguard**, it is worth to briefly describe the reformatory path that led to its current conformation. It has already been mentioned that in 2010 the Accelerated Financial Safeguard, inspired by the UK pre-pack,[610] was introduced, whilst in 2014, the effects of the crisis on the French economy prompted the legislator to create a second variant of this latter tool, the first version of the Accelerated Safeguard: compared to the Accelerated Financial Safeguard it was not limited to financial creditors but extended the scope of negotiation to all creditors. The implementation of the Directive into French law resulted in the merger of the two version of legal remedies into the single and current Accelerated Safeguard procedure.

Going into the substantial discipline, this procedure shares with the Safeguard, the active role of the court. Moreover, the Accelerated Safeguard may be invoked only with request of a debtor that is in financial difficulty and not insolvent. Even the debtor-in-possession

[610] On the argument, see Paul Omar, 'Preservation and Pre-Packs à la Française: The Evolution of French Insolvency Law after 2005' [2011] International Company and Commercial Law Review 258.

principle is here applied, whereby the debtor retains control over the management and assets of the company. In addition, there is even the protection of the suspension of the creditors' enforcement actions for four months.

The feature that makes this procedure peculiar is the method of access: in order to be eligible for the Accelerated Safeguard, debtor must have complied with the following conditions: a conciliation procedure must have been initiated; a restructuring plan must have been negotiated with the creditors who will then be involved in the negotiations; the prove that the plan will receive the support of the creditors involved must be provided to the court. [611]

The adjective 'accelerated' which qualifies the name of the procedure, reveals the essence of this tool: the debtor must reach an agreement with his creditors as soon as possible. Among the strengths that make this instrument very attractive, in addition to confidentiality vis-à-vis third parties and contractual flexibility during the conciliation phase, there is the possibility for the court to bind dissenting creditors through the cross-class cram-down mechanism.[612]

6.3.1 The implementation of the EU Directive 1023/2019 into the French legal system: main features

The reform process for the transposition of the Directive had an initial legislative impulse through the approval of the so-called 'pacte law', which had, in addition to the objective of implementing the Directive, the purpose of increasing both the number of companies and jobs, and the involvement of workers in company life.

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[611] Article L628-1, French Commercial Code.
[612] Articles L628-8 and L626-31, French Commercial Code.

It should be mentioned how, although the French insolvency reform did not introduce any new (preventive) restructuring procedures in Book VI of the French Commercial Code, the existing discipline underwent significant changes that concerned: i) the approval of the preventive framework, i.e. conciliation followed by an accelerated safeguard procedure; ii) the shift from committees to classes of creditors; and iii) the introduction of a cross-class cram-down mechanism.

The reform process for the transposition of the Directive had an initial legislative impulse through the approval of the so-called 'pacte law',[613] which had even the objective of increasing both the number of companies and jobs and the involvement of workers in company life.

Therefore, as anticipated, the French PRF are composed of the **conciliation procedure** and **accelerated safeguard.** The follow description will only concern the most relevant changed which interested the discipline. Starting with the former, the amendment of the procedure concerned the possibility of allowing debtors to obtain a moratorium of enforcement actions and protection periods. Prior to the reform, the debtor could request a stay only against creditors that attempted to enforce their claims due and payable, whilst the conciliation procedure was pending:[614] in other words, the protection was only granted *ex post*.

Under the new rules, the debtor may ask the judge who opened the conciliation procedure to suspend enforcement actions and renegotiate claims due and payable for up to two years against both creditors that have not granted a consensual stay requested by the conciliator during the negotiations and creditors that attempt to enforce their claims. In

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[613] Law No. 2019-486 of 22 May 2019.

[614] The suspension period lasted two years and although the granting of this measure was never widely used in practice, such a long period was considered excessive and therefore criticised as being too favourable for the debtor - cf (n. 399) 98.

addition, debtor may even renegotiate claims that are not yet due and payable for the duration of the ongoing conciliation procedure.[615] Suspension may also be automatic, and this occurs during the performance of the conciliation agreement, under the condition that this latter is approved by the court.

Hence, with reference to the conciliation procedure, it may be considered that the reform has improved the effectiveness of the conciliation agreement by enlarging the number of participating creditors.[616] The conciliator's task is to promote the conclusion of a restructuring agreement between the debtor and its main creditors (and, whether applicable, its main co-contractors). Accordingly, the debtor and the conciliator have the duty to determine which creditors should be included in the negotiations and it may represent a crucial step of the PRF phase: if the conciliation procedure is followed by an accelerated safeguard procedure, the decision as to which creditors to include during the conciliation must consider that these latter are to be able to achieve the necessary majority to approve the plan.

After the reform, the access to the procedure has been opened to all types of companies that have met the previously mentioned requirements, and the decision is taken by the court on the basis of the report prepared by the conciliator, who expresses his/her opinion on whether the RP is likely to be adopted by the creditors concerned.

As required by the Directive,[617] the French legislator even introduced the formation of classes of creditors,[618] since with regards the majorities required for the adoption of an

[615] According to French jurisprudence, renegotiation would be used as an incentive to reach an agreement with the most restive creditors – French Commercial Court, Nanterre, Order of 17 May 2021.
[616] cf Ghio (n. 594) 13.
[617] Art. 9(4) Restructuring Directive.
[618] Before the reform, the Commercial Code grouped creditors without regard to the nature of their claims and homogeneity of interests. There were three categories: (i) credit institutions; (ii) main suppliers; (iii) bondholders. It is easy to understand how complex it was to include creditors with different interests such as privileged, unsecured, etc. in these categories.

RP,[619] the French law, by providing for majorities of 2/3 in each of the creditors, was already adapted to the dictates of the Directive.[620]

After the reform, the connection between conciliation and the accelerated safeguard procedure may be regarded as the core of French PRF: this consecution allows the debtor to conduct, in conciliation, a flexible and confidential negotiation that may, in the event of the subsequent safeguard, involve the court to bind dissenting creditors even through the mechanism of cross-class cram-dawn.[621] It deserves to be observed how French jurisdiction, as the German one, adopted the **absolute priority rule**: creditors of the junior classes are to be satisfied only after creditors belonging to the higher classes have been satisfied in full.

The integrations to the French legislative framework due the implementation of the Directive are not exhausted by the PRF, since there have also been substantial updates with regard to EWT. In particular, two further alert mechanisms in addition to the already existing *procédure d'alerte* have been contemplated.

The first may spontaneously be activated by the president of the competent court who may summon the directors of the debtor company when there is evidence of difficulties emerging from documents, acts or procedures, which might jeopardise the sustainability and the going concern of the company. The second may be invoked by '*groupements de prévention agréés*' (authorised risk management agencies) whenever these latter identify signs of distress from the accounting and financial documents which debtor has to send: where necessary, the agency shall inform the debtor's administrative body and may suggest the intervention of an expert.[622]

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[619] Art. 9(6) Restructuring Directive.
[620] Art. L626-30-2, French Commercial Code.
[621] Articles L628-8 and L626-31.
[622] Article L611-1, French Commercial Code

The purpose of these instruments is to alert the debtor to the emergence of signs of those symptoms of financial instability in order to prevent insolvency.

In conclusion, the implementation of the Directive by the Ordinance No. 2021-1193 of 15 September 2021 has certainly enhanced the French law on rescue and restructuring areas, making the French legal system more robust: in the conciliation procedure, a moratorium of enforcement actions and protection periods has been provided, whilst the accelerated safeguard procedure has been updated by giving the possibility of constituting classes of creditors in an automatic manner, as well as the introduction of the cross-class cram-down mechanism. These legislative interventions have strengthened the PRF with the result that now debtors have an incentive to rely on the instruments offered by the law, an objective shared with the spirit of the Directive. As in all other EU Member States, an essential contribution to enhancing the new preventive restructuring instruments may derive from the preparation of Ips (e.g. administrators, conciliator), judges and all professionals involved in the field of insolvency law.

6.4 The Spanish experience

The Spanish insolvency legal system received a first radical reform impulse in 2003 with the new insolvency law.[623] Despite such renovation, the procedures introduced had not been widely used, and this even though economic crises have led to an exponential increase in the number of companies in distress.

Experience has shown that debtors and creditors prefer ‘alternative mechanisms’ and try to overcome - then as now – the difficulties with instruments that sometimes do not turn

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[623] With the Spanish ‘Ley Orgánica N. 8/2003 de 9 de julio de 2003’, the antecedent insolvency legal system based on the ‘Ley Orgánica N. 6/1985 de 1 de julio de 1985’, was reformed.

out to be suitable for the desired result. The reference is to the out-of-court agreements, the new financing which are sometimes obtained on dubious terms, the liability actions against company directors and, in the best of cases, through voluntary liquidations, structural changes or recapitalisations.[624]

In addition, the objectives missed have been different: the duration and cost of the procedures have not decreased, nor has the number of procedures that end with the cessation of business and the consequent extinction of the company; neither the increase in the degree of satisfaction of ordinary creditors has been achieved. A second significant step, in the insolvency reform path, took place in 2009 with the updating of the *Ley concorsual* (insolvency law), which, with reference to several insolvency tools, brought the Spanish insolvency system closer to Anglo-Saxon models such as the UK schemes of arrangement.[625]

Finally, it was with the Law 16/2022[626] that the transposition of the Directive into the Spanish insolvency legal system was accomplished, resulting in a significant transformation of the previous pre-insolvency framework. Effectively, the exigence to overcome the old paradigm imprinted in the previous law, where the liquidation solution was preferred to rescue and restructuring remedies, was widely felt.

It is worth mentioning how the strong impact produced by the COVID-19 pandemic on the Spanish economy contributed to the acceleration in the adoption of measures in different economic and legal areas, including those related to restructuring and insolvency

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[624] Emilio Beltrán 'Reflexiones sobre la reforma de la ley concursal española' [2012] Diritto della banca e del mercato finanziario 199.

[625] Bernardo Russo, 'Due modelli a confronto. Differenti soluzioni adottate da Italia e Spagna in esecuzione alla Direttiva UE 2019/1023' 2023 Diritto della crisi <https://dirittodellacrisi.it/articolo/due-modelli-a-confronto-differenti-soluzioni-adottate-da-italia-e-spagna-in-esecuzione-alla-direttiva-ue-2019-1023> accessed 17 April 2024.

[626] Ley 16/2022 de 5 de septiembre 2022.

law.[627] Focusing on the latter, the most significant extraordinary interventions may be summarised, by grouping them into three different categories:

(i) those aimed at enabling a company in financial difficulty but not yet insolvent to avoid the opening of formal liquidation proceedings: this was achieved by introducing an 'insolvency moratorium', which took effect as of the declaration of a state of emergency (14 March 2020) and that prevented creditors from obtaining a declaration of formal insolvency proceedings (*concurso de acreedores*);

(ii) those aimed at facilitating access to new financing for debtors that would have difficulty obtaining them due to their state of distress: the rule by which financing received from shareholders or group companies were considered ordinary and thus lower than the subordinated class, was suspended;[628]

(iii) those rules introduced that strengthened the informal procedures to prevent early termination in cases of non-fulfilment of the terms of the plans due to the emergency situation.

The importance of the adjustment of the insolvency discipline to the principles of the Directive was clearly felt by the Spanish legislator, in the awareness that the time of intervention in corporate crises is a central aspect. For this reason, the rules underlying the pre-insolvency discipline must reduce the delays and costs of the procedure, limiting judicial intervention to what is strictly necessary to protect the rights of creditors, of

[627] Besides insolvency law, the legislative interventions concerned the areas of contracts, civil procedure, corporate law, tax law and labour law – Ignacio Tirado 'Corporate Restructuring Laws Under Stress: The Case of Spain' [2023] European Business Organization Law Review 318.
[628] This exception would concern financing granted to the debtor within a period of two years from the time of the declaration of the state of emergency. It appears evident how a such condition strongly disincentivises the possibility of shareholders deciding to finance the overcoming of the company's crisis.

workers, of the debtor and its shareholders. In this sense, the Spanish law on PRF has opted for a 'hybrid procedure', according to the terminology used in supranational acts:[629] the entire negotiation, the convening of the classes and the voting on the plan take place out-of-court, through a sort of spontaneous or informal cooperation between the parties concerned. The judge only comes into play in the final stages and only when the intervention is necessary to extend the effects of a restructuring plan to a minority or dissenting classes, and to guarantee certain protections and privileges in the event of the failure of the execution of the restructuring plan, which in other words means the inevitable passage to formal insolvency proceedings.

Having described the principles that guided the Spanish reform, from a structural point of view it should be noted that the entire Spanish system is regulated in a very long legal text, divided into four distinct sections, one for each type of procedure:

section 1 regulates the traditional formal judicial insolvency proceedings (*concurso de acreedores*);[630] section 2 contains the restructuring agreements (*acuerdos de restructuración*), hybrid proceedings with very limited judicial intervention; Section 3 introduces a new procedure for micro-enterprises; and Section 4 which contemplated the rules of private international law applicable to proceedings with one or more international elements.

With regard to the possible outcomes of restructuring, the solutions may be piecemeal or continuous liquidation, out-of-court restructuring agreement and simplified procedure for the discharge of individual debtors.

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[629] See, World Bank Group, *Workout in the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2022, at 2-3.

[630] It is the most detailed part of the law and, with almost 600 articles, it includes rules generally applicable to all procedures.

Before focusing the analysis on PRF, it is worth mentioning how the reform changed some aspects of the traditional liquidation procedure.[631] On the one hand, duration times have been shortened and, on the other hand, more efficient rules have been introduced on IP positions, plan approval[632] and streamlining of the liquidation procedure. Still with reference to in-court procedures, another relevant innovation is represented by the introduction, again by the reform, of a pre-pack liquidation, according to the Anglo-Saxon model of the UK: an insolvency administrator tries to find potential buyers of the company as a going concern and only when this condition is realised the insolvency procedure may be considered initiated. The sale will be concluded within the formal insolvency proceedings, although the procedural *iter* will be faster.

6.4.1 The implementation of the EU Directive 1023/2019 into the Spanish legal system: main features

As far as the substance of the reform is concern, the Law 16/2022 intervened on the legal mechanisms of the previous insolvency law and adapted them to the requirements of the 2019 EU Directive. In the preamble, the same law states that the purpose of insolvency systems is to '*procurar una reasignación eficiente de los recursos productivos*'[633] and that the PRF tools are to be '*ágiles y con participación reducida de la administración concursal*'. [634]

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[631] Although the reform significantly improved the Spanish 'concurso de acreedores', it is still considered over-regulated and excessively procedural, and still too similar to rigid models such as the German one which, however, has a superior institutional framework compared to Spain – see cf Tirado (n. 627) 327.
[632] Noteworthy is the introduction of a test certifying that the solution adopted respects the principle of the best interests of creditors.
[633] The meaning is "obtain an efficient reallocation of productive resources".
[634] The PRF are to be "streamlined and with reduced involvement of the insolvency administration".

The substantive changes concerned the following main aspects: i) the restructuring plan has a greater impact and assumes a central position; the plan must list all the elements of interest to creditors in order to allow them to recover their claims; ii) the possibility of selling the company in a state of pre-insolvency as an alternative to liquidation, with the advantage of preserving the company's value; iii) new options of refinancing the company and debt and the guarantee of the '*Instituto de Crédito Oficial*' (Official Credit Institute).[635]

The animus of the Spanish reform may be identified in the new procedure of the '**acuerdos de reestructuración**'[636] ('Acuerdos') which replaced the name of the previous 'acuerdos de refinanciación' without actually substantially modifying its content, which already appeared to comply with the Directive.[637] This remedy may to be considered a hybrid, flexible and efficient procedure in which most of the agreement is negotiated and channelled out-of-court. In this sense, it has been compared to the British Schemes of Arrangement, due to the limited intervention of the court at the stage of approving the formation of the classes and at the time of approving the plan when the latter has been approved by the creditors.[638] Common characteristic which this tools shares with other agreements adopting by several EU jurisdiction[639] and that makes it from the position of debtor preferable to purely out-of-court solutions may be found in the protective effects offered, such as the reduction of the ex post liability risk, the facilitation of new financing by creditors, and the possibility of binding creditors once the plan has been approved. The

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[635] Carlos Bellido Gonzalez Del Campo, 'La nueva regulacion del derecho pre-concursal' in *Un mundo en aceleraciónlas ciencias jurídicas, económicas y sociales ante los retos del siglo XXI* (Dykinson 2023) 292.
[636] Provided by Section 2 of the Spanish Ley 16/2022 de 5 de septiembre 2022.
[637] Several rules of international matrix, so called best practice, were introduced and the procedure was extended to all creditors and not, as previously, only to financial creditors.
[638] cf Tirado (n. 627) 328.
[639] For example, the Italian 'Accordi di ristrutturazione del debito'.

parties (debtor and creditors) enjoy broad flexibility in determining the content of the restructuring agreement both when it concerns the business and when it concerns the restructuring of the mere debt.

As regards the rules concerning creditors, in line with the Directive prescriptions (art. 9(6)) they are affected by the plan when the majorities are obtained in each class. Always with regard to the classes of creditors, the general criterion is that of commonality of interests, determined on the basis of 'objective parameters' such as: the type of claim, whereby claims with different degrees are to be separated into different classes (Art. 623. 2); the types of creditors, such as public creditors, which by their nature must be grouped in the same class (Art. 623.3) and secured creditors, insofar as the different nature of their rights and the value of the security justify the formation of separate classes (Art. 624).[640] It deserves to be underlined how, although control over the proper formation of classes occurs only at a later stage (when the court approves the plan), the parties involved may request judicial confirmation of the classes prior to such final approval (Arts. 625-626).[641] With regard to the majorities required to approve the Acuerdos, creditors divided into classes are entitled to vote according to the (nominal) amount of their claim (Art. 628.1). For unsecured creditors, the majority required in each class is 2/3 (Art. 629.1), whilst for classes of secured creditors the majority required is 3/4 (Art. 629.2). The general rule for plan approval requires a majority in all classes. Whether this condition is not achieved,

[640] Creditors that are SMEs must even be grouped in separate classes when the plan requires a devaluation of more than 50 per cent of the value of the claim.

[641] It has been correctly observed that such opportunity could be useful during the plan negotiation phase to clarify any doubts concerning the formation of classes ex ante, without having to wait until the end of the entire process. In addition, another advantage may be found on the fact that in that case the formation of classes may no longer be a ground for challenging or opposing the plan (Art. 626.4) - Francisco Garci Martin, 'The Spanish Approach to Corporate Restructuring: A "Pre-packaged Chapter 11"' [2022] European Insolvency and Restructuring Journal 8.

the plan may still be approved by the cross-class cram-down remedy.[642] The result obtained will be to extend the effects of the plan even to the dissenting/absenting/abstained creditors of the classes in which the required majority of votes was not obtained. Thus, in order to impose to creditors the plan which did not achieve the majority, the law requires that: it has to contain the required minimum elements; the classes have been properly formed; it has to offer a reasonable prospect of avoiding insolvency and ensuring the viability of the company; it has to ensure that all affected creditors are informed; claims within the same class must be treated equally; and the plan must satisfy the best interests of creditors test. Since the plan did not approve without the consent of one or more classes, le law requires that at least one class in which a majority of votes in favour of the plan have been reached is to be composed of general or special secure or, alternatively, at least one class of creditors that would not have received any payment or retained any right or interest, applying the rules of liquidation (Art. 639). In the latter hypothesis, the law requires that the value of going concern is to be determined in order to understand whether or not those creditors would receive any payment in the event of liquidation.

In order to ensure that the RP becomes effective and that it extends its effects to all dissenting creditors through the cross-class cram-down mechanism, judicial approval is required whereby the court verifies that all have been complied. Dissenting creditors are allowed to file an objection to the approval to the court of appeal.

Still with regard to the formation of classes and voting on the RP, the *ad hoc* discipline relating to shareholders position in the hypothesis that the plan affects their rights,

[642] With reference to the cross-class cram-down mechanism, it should be noted that Spain has adopted the absolute priority regime which, as already clarified in para. 4.3.3, in the Directive represents the exceptional hypothesis compared to the main one of the relative priority rule.

deserves to be described. In fact, the ordinary rules deriving from company law are subjected to certain exceptions: precisely, when the law or the articles of association require that the shareholders express themselves by voting at the shareholders' meeting, as in the case of capital increases, structural changes or the transfer of essential assets, a procedure is provided for to facilitate a favourable decision on the plan (Art. 631.2). The rules which are derogated concern the notice of the shareholders' meeting, deadlines or the agenda; even the majorities are changed, as only ordinary statutory quorums and majorities may be apply, excluding qualified majorities.[643]

Another key element of the Spanish reform may be identified in the moratorium. Following the reform, the debtor's attempt to reach an agreement with creditors is protected by a moratorium of three months, which may be extended for a further three months.[644] This negotiation period may be invoked by the debtor and has two main effects: (i) the suspension of enforcement actions by individual creditors and (ii) the suspension of the opening of formal insolvency proceedings, including the debtor's legal obligation to file for such proceedings.

During the moratorium, the debtor remains fully in control of its assets (in deference to the debtor-in-possession principle) retaining management powers (Art. 594). The appointment of an IP is usually not required, except in particular cases.

The requirements under Spanish law for the debtor's access to this remedy are the state of probable, imminent or actual insolvency.[645] Once the debtor notifies to the court of

[643] The aim is to prevent that enhanced majorities or other statutory clauses may hinder the company measures provided by the restructuring plan.

[644] Extension is subject to the consent of the majority of the creditors and must be justified by the need to ensure the successful outcome of negotiations (Art. 607).

[645] Under Spanish law, probable insolvency is considered to be that situation of the company whereby, in the absence of restructuring, the debtor would become insolvent within the next two years; imminent insolvency has a much shorter time horizon, whereby the debtor has only three months to act (Art. 2.3).

the existence of negotiations with the creditors, the stay automatically produces the protective effects[646] and among them, as required by the Directive,[647] the ineffectiveness of the *ipso facto* clauses (Art. 597).[648]

The Spanish reform even dealt with SMEs with some special rules collected in an autonomous and exclusive procedure that even further enriched the discipline compared to the Directive prescriptions. Since these types of enterprises are characterised by not having a great business value, the high costs of formal procedures represented a critical element and for this reason a specific procedure was designed. Therefore, the microenterprises with fewer than 10 employees, may have access to this simplified procedure which is faster, digitised and at a very low cost, and that may increases the possibility of continuity for viable companies and facilitates the reallocation of resources.[649] After a period of negotiation with creditors of a maximum of three months, there are two possible routes: either a rapid and flexible plan, when there is a possibility of concluding an agreement or, failing that, an orderly but rapid liquidation through an online platform. Hence, this procedure appears much more flexible than the traditional liquidation because, although it offers the same tools as the latter, it allows the parties to choose how to modulate the procedure according to what is concretely necessary in that specific case. For instance, the receiver will only be appointed, at the request of the

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[646] The automatic activation of protective measures could encourage abuse by debtors. Therefore, it is provided that, in cases where the moratorium is misused, such as to delay the opening of insolvency proceedings with the result of worsening the company's state of distress, the directors of the company are subject to a special insolvency liability regime.

[647] The issue regarding the discipline of the EU *ipso facto* clauses has been addressed in para 4.3.2.1. of Chapter 4 entitled "Executory contracts".

[648] According to art. 597 of the Spanish insolvency law, from the moment the court receives notice from the debtor of the commencement of negotiations with creditors, executory contracts cannot be terminated, suspended or modified, except for financial contracts (art. 599).

[649] The main peculiarities of the new procedure for SMEs are described by the government at <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/asuntos-economicos/Paginas/2022/300622-ley-concursal-congreso.aspx> accessed 24 October 2023.

parties, when there are the resources to pay his/her professional fee; the creditors' meeting is not contemplated in this procedure because it is considered costly and, in these circumstances, inefficient.

In conclusion, in the light of the above, the Spanish reform may be considered a positive and valid legislative product which, thanks to the transposition of the principles of the Directive, has introduced the PRF that were hitherto absent in the previous insolvency law.

As argued by the legislator in the introductory report of the reform, the new elements must be identified, in addition to the reduction of costs and greater flexibility of the procedures, especially in the centrality of creditors that express their consent through a majority vote on the restructuring plan, since their determination is to be considered the most appropriate and necessary indication for overcoming the crisis.

6.5 The UK position in the light of the Brexit

The position of the UK is undoubtedly the most peculiar: on the one hand, the rescue and restructuring culture matured earlier than in other countries[650] and the effective tools of its jurisdiction inspired the European legislator in the drafting of the Directive; on the other hand, there was the Brexit, and the UK left the European Union. In addition, the Covid-19 pandemic, as in other jurisdictions, accelerated the reform process to face the criticalities, especially in the economic field, by introducing the 'Corporate Insolvency

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[650] It should be mentioned how only few years after the Cork report, some courts had already applied the principles on the rescue culture. See, *inter alia*, Powdrill v. Watson [1995] 2 AC 394; Thomas v. Ken Thomas Ltd [2006] EWCA Civ 1505; Re Farnborough-Aircraft.com Ltd [2002] 2 BCLC 641; Re Demaglass Holdings Ltd [2001] 2 BCLC 633.

and Governance Act 2020' (CIGA 2020),[651] which may be considered the most relevant insolvency reform since the introduction of administration under the 2002 EA and which made the UK jurisdiction more debtor-friendly.[652]

Before addressing the substance of the novelties contained in CIGA 2020, it is worth to briefly describe the tools already contemplated in the UK jurisdiction which, as anticipated, inspired the Directive.

The tools which belong to the UK PRF jurisdiction are the Scheme of Arrangement (Scheme), the Company Voluntary Arrangement (CVA), the Administration and the new Restructuring Plan. All of them, except the Administration, are debtor-in-possession tools, since the latter is led by an insolvency practitioner, with the result that the company is excluded by the management.

The "**Scheme of Arrangement**" (Scheme) is consolidated into section 895, Part 26 of the Companies Act 2006, although this figure boasts ancient origin.[653] It deserves to be mentioned how the use of this tool is not limited to face company financial distress, being largely used by solvent companies for corporate takeover or merger operations and for the reorganisation of the company's share capital by the consolidation or the division of shares into shares of different classes.[654]

Through a 'compromise' or an 'arrangement', the company[655] and its creditors (or class of them) attempt to overcome difficulties agreeing new and different conditions. The

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[651] Actually, the reform has been hovering in the wings since 2018 and presented as the 'Corporate Insolvency and Governance Act Bill' before receiving the Royal Assent by the Parliament and come into force on 26 June 2020.

[652] Cf Wood (n. 16) 43.

[653] It appeared in its embryonal form during Victorian legislation, namely into the Joint Stock Companies Act 1870.

[654] Jennifer Payne, *Scheme of arrangement – Theory, Structure and Operation* (2nd edn Cambridge University Press 2021).

[655] It has been stated that, being this measure debtor-in-possession, the proposal for a Scheme formulated by the directors must be approved by the company board or by a member's resolution, otherwise the court could not sanction the scheme due to a lack of jurisdiction – *Re Savoy Hotel Ltd* [1981] Ch. 351.

former term may be described as an agreement in settlement of a claim which may result arduous to enforce or particularly uncertain.[656] The latter term, has a very broad meaning, being able to be used in a wide range of cases, such as for the conversion of debt into equity or secured into unsecured claims. Both the compromise and the arrangement are agreements, with the result that an essential contractual component is to be considered, although the process is even characterised by the massive presence of the court.

With reference to the procedure, an application to the court is submitted by the company, by any creditor or member of the company, or by the administrator or liquidator.[657] The court may order the summoning of the meeting of creditors or members of the company (or classed of creditors or members): according to section 899(1) of CA 2006, whether in the meeting '*a majority in number representing 75% in value of the creditors or class of creditors or members or class of members…present and voting either in person or by proxy…agree a compromise or arrangement, the court may…sanction the compromise or arrangement*'.

The central role of the court deserves to be underlined, since its penetrant involvement results evident during the two mandatory hearings: the court – before sanctioning the Scheme – has to accurately collect the information about the procedure and the arrangement,[658] ensuring that the latter is 'fair and reasonable';[659] in addition, the correct

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[656] cf Goode (n. 17) 39.
[657] S.896 CA 2006. Usually, the arrangement is concluded by company and a plurality of its creditors, although the stipulation with an individual creditor cannot be excluded – *Taurusbuild Ltd v Svenska Handelsbanken*, unreported [1994] CA, cited in Payne (n. 424) 179.
[658] *Re Indah Kiat International Finance* [2016] E.W.H.C. 246 (Ch).
[659] *Re RAC Motoring Services Ltd* [2000] 1 B.C.L.C. 307.

composition of the classes is to be determined,[660] as well as the protection of the minority[661] and the hearing of the dissenter parties.

Once the Scheme is sanctioned, the compromise or the agreement, bind all creditors or the class of creditors and the company or, in case of liquidation, the liquidator and contributories.[662] It should be specified that the Scheme may enable a limited cramdown because, whether the agreement is bound on the classes which have achieved the majority voting in favour (and thus also on all creditors within these classes), it will not be imposed on the dissenting classes.

Intuitively, even the creditors that are not part of the agreement are not bound.[663]

Another relevant consideration concerns the long duration and the onerous cost that the steps before the sanction might require. To be specific, when the situation of the company presents a fragmented capital structure, characterised by a huge number of different creditors, the division in class meetings may result particularly complex. Therefore, the access to the Scheme might be impervious for small companies in financial distress.

As far as the "**Company Voluntary Arrangement**" (CVA)[664] is concerned, it may be useful to recall that it is the result of the recommendations of the Cork Committee, which recognised the exigence to institute a new '*simple procedure where the will of the majority of creditors in agreeing to a debt arrangement could be made binding on a*

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[660] S.896 CA 2006. It should be noted that the correct composition of class meetings represents the guaranty that the vote will concretely respect creditors rights, avoiding the prejudice of the minority – cf Goode (n. 17) 489.

[661] The protection of minority interests may be a crucial point for the success of the scheme: it has been argued that, whether minority are prejudicated by the agreement approved by the majority, the court might refuse its sanction – cf Payne (n. 263) 454. On the other hand, it has been affirmed that the minority protection is not so relevant as it appears – Louise Gullifer and Jennifer Payne, *Corporate Finance Law – Principles and Policy* (2011) 652.

[662] S.899(3) CA 2006.

[663] *Re Marconi Corp Plc* [2003] E.W.H.C. 1083 (Ch).

[664] The CVA discipline is mainly contained into Part 1 of the IA 1986 and into the Insolvency Rules 2016 (IR 2016).

minority'.[665] This tool may be described as an agreement concluded between the company and its creditor which binds all those who are entitled to vote at the creditor's meeting, even the minority dissenters.[666]

A fundamental role is played by an IP, since the court only has – in this procedure – administrative and not judicial functions.[667] The IP acts in the dual role of 'nominee',[668] before the vote for the approval, and as 'supervisor', when the agreement is approved.[669] A significant aspect that deserves to be highlighted concerns the relationship of the CVA and the other insolvency procedures. In fact, when it is proposed during the administration or the winding up, it receives the moratorium protection, benefiting from the traditional advantages that this remedy implies.[670]

The process which leads to the completion of the CVA, may be theoretically divided into three stages which are: the establishment, the management and the conclusion. Starting from the former, section 1 of the IA 1986 states that the directors may make a proposal to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. Although the legislator used an identical

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[665] *Ibid* Ch. 7.

[666] According to the dominant doctrine and jurisprudence, the CVA may be qualified as a form of statutory contract – cf Goode, (n. 17) 495; cf Payne, (n. 263) 452; cf Keay and Walton (n. 208) 162; Chris Umfreville, 'Prepackaged administrations and company voluntary arrangements: the case for a holistic approach to reform' [2019] ICCL 3; Wild Charles and Stuart Weinstein, *Smith & Keenan's Company Law* (2016) 464; *Re TBL Plc, Oakley-Smith v Greenberg* [2004] B.C.C. 81; *Whitehead v Household Mortgage Corp* [2003] 1 All E.R. 319.

[667] Indeed, it has been stated that when the CVA approval is legitimately concluded, the Court has no power to modify it – *Re Beloit Walmsley Ltd* [2009] B.C.L.C. 584.

[668] Relevant principles concerning the nominee powers and duties are contained into the Statement of Insolvency Practice No. 3 (SIP No. 3 2014).

[669] In *Prosser v Castle Sanderson* [2003] B.C.C. 440, it has been stated that when the IP acts as nominee – during the consultation with the directors – his professional position of advisor is subjected to the duties of care in contract and tort. Conversely, in the wear of supervisor, he/she acts as officer of the court under its control – *Appleyard Ltd v Ritecrown Ltd* [2009] B.P.I.R. 235. For a concrete example of the IP activities, see *Paymex Ltd v HMRC* [2012] B.P.I.R. 178, where the court condensed the functions in negotiation and payment handling.

[670] Without the pressing of creditor claims, better solutions may be made among the parties involved. Even psychological factors should be considered, since the presence of the moratorium – which disable individual claims – may offer a greater predisposition by creditors to reach a favourable solution.

terminology – referring to the scheme of arrangement as specific configuration of the CVA – it should not be confused with the Scheme provided into Part 26 of the Companies Act 2006. Here, the scheme of arrangement is an agreement which states the postponement of the original deadline to pay the creditors, providing their full payment.[671] With reference to the other possible configuration, the composition, the agreement usually provides a reduced payment of creditors.[672]

It should be noted that the directors' proposal is to be evaluated – within 28 days – by the appointed nominee, who provides the submission to the court, indicating whether in his opinion it is serious and viable[673] and whether it has a reasonable prospect of being approved and implemented.[674] Other indications concerning the director's proposal and the nominee's report are provided by the IR 2016.[675]

The core of the process is, undoubtedly, the voting modalities for the approval of the proposal, since these rules offer the coordinate for the complete comprehension of the CVA effects on the parties involved. The shareholder and creditor meetings are summoned *ad hoc* to consider and to approve the proposal: whether the law requires – for the shareholders – the majority in value (50 per cent) of those who have voted in favour,[676] the creditors' meeting must approve the proposal by the 75 per cent (voting in person or

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[671] In the practice, several payments indicating the dates and the amounts are scheduled in the scheme.

[672] The two described configurations represent the praxis and they are not imperative. For instance, in *Inland Revenue Commissioners v Adam & Partners Ltd* [2000] B.P.I.R. 986 the agreement contemplated a moratorium, without the discharge of the creditor's debts.

[673] *Davidson v Stanley* [2005] B.P.I.R. 279; *Singh v Singh* [2014] B.P.I.R. 1555.

[674] The law also requires that in the report, the IP states whether the proposal should be considered by a meeting of the company and by the company's creditors, and whether on the date, time and place a meeting of the company should be held – S.2(2) IA 1986.

[675] For instance, R.2.2 states that the CVA proposal must contain information about company assets and liabilities, explain why the proposer thinks a CVA is desirable, why the creditors are expected to agree and how the business of the company will be conducted during the procedure. The nominee report, where the person is not the liquidator or administrator, must be filed to the court along with the considerations on whether the proposal does or does not have a reasonable prospect of being approved and implemented; also the indications on why the members and the creditors might or might not be invited to consider it are to be included – R.2.9. IR 2016.

[676] R.2.36 IR 2016.

by proxy) by reference to the value of their claims. Either meetings may approve the proposed voluntary arrangement with or without modifications, although the rights of secured creditors of the company to enforce their securities and the order of the payment for preferential debts, are not to be affected without the consent of the persons concerned.[677] It should be emphasised that, in case of contrast between shareholders and creditors decision, the prevalence is recognised to the latter by the law. [678]

Having addressed the attention on the procedure of voting, several considerations concerning the position of creditors deserve to be faced. First of all, both secured and unsecured creditor may be entitled to vote, although the law establishes specific rules: where a debt is wholly secured, its value for voting purposes is nil, and where a debt is partly secured, its value for voting purposes is the value of the unsecured part.[679]

The second stage regards the management of the company, by the same directors, after the approval of the CVA. Here, the role of the IP should be stressed, since – once the agreement becomes effective – his/her functions as nominee give the place to the functions as supervisor. To confirm the importance of the IP role, it must be mentioned how the law disciplines other duties on the supervisor[680] such as, *inter alia*, the supervision of the terms and the progress of the agreement; that any variation to the terms of the CVA is appropriately approved before it is implemented, and that the enquiries by creditors and shareholders are dealt with promptly.[681]

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[677] S.4(3) and (4) IA 1986.

[678] In the circumstances of different decisions between the meetings, only the shareholders may apply to the court: implicitly, the creditors' choice if favoured – S.4A(3) IA 1986. In the same direction, S.5(2) states that the CVA takes effect at the time the creditors decided to approve the arrangement.

[679] R.15.31(4)(5) IR 2016.

[680] In *Appleyard Ltd v Ritecrown Ltd* [2009] B.P.I.R. 235 it has been clarified that the role of the supervisor is *super-partes*: he/she does not protect specific parties, neither the unsecured creditors.

[681] For the full list, see S.17 of the Statement of Insolvency Practice No. 3 2014.

The last stage concerns the conclusion of the procedure, and several hypotheses may occur. Whether, on the one hand, the turnaround is achieved, a consistent part – or, desirably, all – of debts is paid and the restructuring has been profitable concluded, the purpose of the CVA is realised. On the other hand, the failure of the agreement probably leads to other more stringer procedure such as the administration or the liquidation.[682] There is also a third hypothesis which regards the coexistence of the CVA and the administration: the former continues into the latter that – meanwhile – has been started.[683] The CVA approved binds both the company and all creditors who are entitled to vote, and therefore also who was absent or dissenting.[684] Furthermore, the law contemplates the opportunity – for certain specific persons[685] – to challenge the CVA whether it '*unfairly prejudices the interest of a creditor, member or contributory of the company*' or whether 'there has been some material irregularity at or in relation to the meeting of the company'.[686]

It should be mentioned that before the CIGA 2020 a particular type of CVA was contemplated by the law.[687] It provided the moratorium protection for small companies, but it has been now abolished by 2020 Act.

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[682] It is likely that the failure of the CVA depends on the breach of the terms of the agreement by creditors. Even individual actions – taken by secured creditors who are not bound by the voluntary arrangement – may wind up the company. However, the range of the reasons that impede the success of the operation, may be wide.

[683] For an example, see *Wright v Prudential (RE SHB Realisations)* [2018] E.W.H.C. 402 (Ch).

[684] S.5 IA 1986.

[685] The persons who may apply are: who is entitled to vote at the company meeting, who would have been entitled to vote if he had had notice, the nominee and the liquidator or the administrator – S.6(2) IA 1986.

[686] S.6(1) IA 1986. Whether the prejudice may easily be proved, the demonstration that it is also unfair might be difficult. For these reasons, different tests exist to consider all the specific circumstances, such as other solutions instead of the CVA – *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] B.P.I.R. 839.

[687] The CVA for small companies was introduced by the Insolvency Act 2000, amending the previous discipline of the IA 1986.

With regard to the **Administration**, the considerations made by the Cork Committee concerning the CVA, may be also recalled here.[688] This legal instrument may be defined as a collective insolvency procedure which promotes the interests of the company's creditors, through the appointing of an administrator. He/she performs his functions by rescuing the company as a going concern or, whether it is not pursuable, by achieving a result for its creditors better than the one achieved on an instant liquidation.[689] The most relevant difference with the previous measures described, the Scheme and the CVA, lies behind the fact that the administrator replaces the director: therefore, this procedure is clearly no debtor-in-possession.[690] The protection of the moratorium is here *ope legis*: when the company enters into the procedure, its creditors automatically cannot enforce their claims, allowing the administrator to concentrate all the efforts and resources on the rescue and restructuring strategy.

With reference to the affinity between Administration and the restructuring concept, there is no doubt on the fact that the procedure favours the restoring of companies as a going concern: even thanks to those contractual measures like the CVA and the Scheme, the management of the parties involved – with different and often conflicting interests – is facilitated.

As far as the purpose of the procedure is concerned, the law clearly provides a priority list of objectives that the administrator must follow, performing his functions. He/she must primarily rescue the company as a going concern; whether the administrator thinks

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[688] With reference to the administration, the Cork Committee believed that corporate restructuring and rescue could be promoted through the management of the business as going concern of companies in crisis by an independent expert able to preserve the profitable parts of the enterprise – see (n. 33) para. 495.

[689] Para 3(1), Schedule B1, IA 1986.

[690] The administration was designed to introduce a procedure capable of both putting aside the directors for the benefit of the parties involved and protecting the assets of the company from creditors' claims – cf Goode (n. 17) 380.

that the first objective is not practicable, the second priority concerns the achievement of a better result for the company's creditors as a whole than would be likely if the company were wound up; the last objective in the priority list – always whether the previous two are not practicable – is realising property in order to make a distribution to one or more secured or preferential creditors.[691] The described graduation of priority confirms that the legislator conferred to the Administration, by attributing the precedence to the company as a going concern, an unequivocal rescue and restructuring role.[692]

The role of the IP, specifically in the context of administration but even in the other legal tools in which this figure is contemplated, must not be underestimated as his/her wide discretion in strategic and commercial choices during restructuring has influenced the UK insolvency practice.[693] More specifically, in the administration procedure, the IPs discretionally decide on the objective to be pursued and the manner in which it is to be pursued: firstly, the IP assesses whether rescuing the company as a going concern is possible; secondly, when the latter objective is not feasible, the IP must assess alternative hypotheses, again taking into account the position of the creditors.[694] The described discretional powers of IPs[695] while appearing necessary to the success of bailouts, may

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[691] Para 3, Schedule B1, IA 1986.

[692] With the recommendations of the Cork Committee, the rescue idea to favour the preservation of the company business, was consolidated. It clearly argued: '*in the case of an insolvent company, society has no interest in the preservation or rehabilitation of the company as such, though it may have a legitimate concern in the preservation of the commercial enterprise'* – Report (n.10) para 193. Nevertheless, in the original version of the Enterprise Bill 2002, the provisions were referred to the rescue of the company, and not to the business. Therefore, the Government – clarifying the policy – brought the House of Lords to insert the formulation 'as a going concern' – House of Lords, Deb. Cols 1100-1105 (2002).

[693] The UK jurisprudence has often chosen not to interfere in IP decisions - Re C E King Ltd [2000] 2 BCLC 297, 202-3; Re T&D Industries Plc [2000] 1 WLR 646, 657; Re MF Global UK Limited [2014] Bus LR 1156 [41].

[694] The statutory objectives of the administration may be found in paragraph 3 of Annex B1 of the Insolvency Act 1986.

[695] Vast powers to the point of determining the outcome of a restructuring attempt which may depend, besides all the circumstances which characterised the concrete case, on the IP intentions and decisions. On the argument, see John M. Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour' [2019] Journal of Corporate Law Studies 333 – 366.

also encourage some opportunistic behaviour, especially in terms of remuneration.[696] It has been observed that such opportunistic behaviour in the form of excessive pricing is the result of insolvency industry self-regulation, notwithstanding the introduction of revocation measures and supervisory powers in the 2015 Small Business, Enterprise and Employment Act.[697]

Therefore, whilst the discretion of IPs must always be within the limits set by the law[698] and that Recognised Professional Bodies may impose sanctions in case of conduct that does not meet the 'fit and proper' standard, in practice courts have always avoided contest IP decisions when creditors have challenged them. Future reforms will probably have to address this aspect by balancing IP discretion with regulations that are more attentive to possible abuses.

As anticipated, in addition to the instruments already present in the UK PRF, the reform (CIGA 2020)[699] introduced the new '**Restructuring Plan**',[700] which allows the cross-class cram-down mechanism to the minority of dissenting creditors, even across classes. The structure of the RP is inspired and therefore designed on the figure of the Scheme of arrangement provided by the CA 2006, and thus a wide similarity between the disciplines may be observed. The Plan, like the Scheme, contemplates a compromise or arrangement between the company and its creditors or any class of them, or between the company and its members or any class of them. In addition, another condition is to be met here: the

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[696] On the argument, see Meng Seng Wee and Yan Yu Kiu 'Principles and rules on insolvency practitioners' remuneration' [2021] International Insolvency Review 383 – 409.
[697] cf Wood (n. 695) 339.
[698] Precisely the Insolvency Act, the Statements of Insolvency Practice and the Insolvency Code of Ethics.
[699] This reform has been considered a complex piece of legislation for several reasons. For instance, *inter alias*, the peculiarity of the temporary measures contemplated and the broad scope of application covering not only insolvency law but also corporate law. On the argument see David Milman and Peter Bailey, *Sealy & Milman: Annotaded Guide to the Insolvency Legislation 2021* (Sweet & Maxwell 24th edn, Vol. 1, 2021) 1405.
[700] The CIGA 2020 inserts – in the CA 2006 – the new Part 26A entitled 'Arrangements and reconstructions: companies in financial difficulty'.

company has encountered or is likely to encounter financial difficulties that are affecting its ability to carry on business as a going concern.[701]

Even the role of the Court is central: once received the application, it orders a meeting of the creditor or class of creditors, or of the member or class of members, and when, like for the Scheme, the majority of 75% in value of the present voting parties is achieved, it may sanction the agreement.[702] Among the court's powers, the discretion over the sanction of the plan deserves to be mentioned: it is a general power that, in the absence of an express rule specifying them and circumscribing their limits,[703] have been developed by case law practice. For instance, the court is called upon to consider what, if any, is a viable alternative to the liquidation of the company, in the event that the plan is not confirmed, and whether all of the parties economically interested in the restructuring have been involved.[704]

Another significant power of the court, which represent the real innovation, is connected to the effects of the sanctioned Plan: besides binding all creditors or the class of creditors, the members or class of members, the company and the liquidator or administrator, it may also bind the dissenter classes. To be specific, also the dissenter class is bound by the plan, when two conditions are met: whether the court is satisfied that, in case the plan were to be sanctioned, '*none of the members of the dissenting class would be any worse*

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[701] S.901A CIGA 2020. It should be observed that the presence of this additional condition might lead – with regard to the field of application – to a more restrictive interpretation: only companies in financial distress must have the access to this measure.
[702] S.901F(1) CIGA 2020. The voting system is the same as for the Scheme.
[703] According to section 901G(4) Part 26A of the Companies Act 2006, , the only information provided is that the 'relevant alternative' is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F'.
[704] On the concept of 'relevant alternative' the Explanatory Notes of the House of Lords specifies that 'the court should consider what would be most likely to occur in relation to the company if the restructuring plan were not sanctioned'- House of Lords Explanatory Notes (2020 paragraph 205) https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113en.pdf accessed 02 September 2024.

off than they would be in the event of the relevant alternative';[705] and whether the plan has been agreed by a number representing 75% in value of a class of creditors or of members, who, in the event of the relevant alternative, would receive a payment or have a genuine economic interest in the company. The scope of these provisions is impressive, since for the first time, into the UK insolvency law, a legal arrangement may enable a cross-class cramdown, preventing that the majority may be limited by the dissenting minority.[706]

Together with the RP, the reform even introduced the **self-standing moratorium**.[707] Hence, after a long time, a statutory breathing space from creditors, for eligible companies,[708] has been provided: in fact, the real innovation lies in the protection for companies from their creditors' claims, which is completely unbound from any legal arrangements, and this is the reason why it may be defined 'self-standing'. It should be pointed out that the moratorium covers an initial period of 20 business days, and that may be extended in several circumstances:[709] the enforcement or payment of the pre-moratorium debts – fallen due before the commence of the moratorium or during it – are

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[705] *Ibid* S.901G(3). The relevant alternative is whatever the court considers would be most likely to occur to the company in case of non-sanction of the plan.

[706] It should be emphasised that the legislator, whether on the one hand provided that the plan may bind the minority, on the other hand it contemplated a certain balance of interests: in fact, with the condition B, it has been ensured that the majority interest in the company is not a pretext. It must be 'genuine' and 'economic' even if the agreement was not sanctioned – S.901G(5) CIGA 2020.

[707] Before the CIGA 2020 the moratorium was only provided for the companies which entered into administration, liquidation or company voluntary arrangement (CVA) for small companies. The Part A1 of the CIGA 2020 containing the provisions concerning the new moratorium, will be inserted into the Insolvency Act 1986 before the Part 1 (CVA). For a discussion on several implications connected to the moratorium, see David Milman, 'Moratoria on enforcement rights: revisiting corporate rescue' [2004] CPL 89 - 108.

[708] Schedule ZA1 of the CIGA 2020 contains the provisions to determine when a company is excluded from being eligible: for instance, *inter alia*, the insurance companies, the banks, the investment banks or the companies which are subjected to an insolvency procedure or to a moratorium, are not eligible.

[709] The extension may be filled to the court by directors, both with and without the consent of creditors – see ss. A10 and A11, CIGA 2020.

prevented.[710] In addition, an officer of the court called 'monitor', must control the company's affairs, being sure that, during the moratorium, it remains likely that the moratorium will result in the rescue of the company as a going concern: once again, it emerges how relevant is to preserve the company business activity.[711]

[710] Subsection (3) of s.A18, CIGA 2020, contemplates several exceptions in which the debts are to be paid, such as, among other things, the monitor's remuneration or expenses and the goods or services supplied during the moratorium.
[711] S.A35(1), CIGA 2020.

Chapter 7 – Conclusion

7.1 Synopsis

With the EU Directive 2019/1023, it may be stated without too much risk that a good level of harmonisation[712] in the area of insolvency and restructuring law has been achieved among the EU countries, although according to the 2022 impact assessment of the European commission, significant efficiency differences between the EU national jurisdictions still persist and constitute a serious obstacle to the capital markets union.[713] The study found that proceedings in some EU Member States are characterised by much longer delays and significantly lower recovery rates than in other EU countries.

It is important to note that the effects of the reforms resulting from the transposition of the Directive had not yet taken effect in 2022. Furthermore, the European insolvency legal landscape prior to these implementations was highly heterogeneous. As outlined in this research, while some 'creditor-friendly' jurisdictions such as Italy, Spain, and the UK prioritised creditor satisfaction at the expense of business continuity for companies in crisis, other EU countries achieved a better balance between these competing interests. In contrast, the French 'debtor-friendly' system placed greater emphasis on protecting the debtor over the creditors.

Today, in the current post-transposition scenario, professionals and academics are witnessing an important paradigm shift in which the possibility that a company faces financial distress during the course of its life is considered not only a probable but an

[712] cf Paulus and Dammann (n. 174) 37.

[713] The words used in the document are unequivocal: "It is a well-established view among stakeholders, researchers, international institutions and policy makers1 that the significant differences in insolvency rules across Member States constitute an important barrier to cross-border investments and a key obstacle to further economic integration" – Commission Staff Working document impact assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - COM(2022) 702 final, 5.

almost ordinary event which therefore deserves of being addressed in a restructuring perspective and no longer punitive. The interlocution between the protagonists of the legal and patrimonial relationship, debtors and creditors, may now take place at an early stage of the crisis by being able to access the new PRF legal tools provided well before a condition of irreversible insolvency arises, and this occurs regardless of the EU jurisdiction in which the company exists. The great achievement of the Directive concerns the opportunity offered to debtors to adhere to new and efficient legal remedies implemented by the European national jurisdictions prior to court intervention.

In a certain sense, it may be argued how after the transposition of the Directive, specifically into those jurisdictions characterised by creditor-friendly regimes, the traditional and historical negative consideration of companies that have run into financial difficulties has been overcome: the collaboration between the various actors is now aimed at contrasting the crisis by preserving, through restructuring operations, the business company and its value as a going concern. Therefore, the previous liquidation approach, aimed at the cessation of the company's activity and its consequent expulsion from the market because it was considered detrimental to other companies *in bonis*, is reversed. The debtor, for centuries prosecuted and treated as a criminal, and then more recently rehabilitated but still considered a subject not worthy of further trust, today appears the real winner. The entrepreneur who runs a business and bears the risk inherent in the activity, when acts honestly deserves a second chance, a chance to continue to run the business and attempt restructuring preserving the going concern. Both for debtors and for creditors, the going-concern value may be higher than the break-up value and this is the purpose of the restructuring approach.[714] After all, the Cork Committee had suggested this view 40 years ago and this shows how that Report was ahead of its time long ago.[715] By adhering to the new RP, with the introduction of the cross-class cram-down rule, the chances of reaching a restructuring agreement increase significantly. The possibility of averting irreversible insolvency is also increased by the introduction of early warning systems that detect the emergence of difficulties at an early stage, averting the spectre of liquidation proceedings. The task of balancing the conflicting interests and rights of debtors and creditors, with a view to safeguarding business values ensuring the going-concern, is a complex issue: taking the example of the moratorium, as a typical debtor protection remedy, it may be noted that the regulation of the Directive certainly intended to favour the restructuring of the debtor, but making access to this tool conditional only if it would facilitate the negotiation of the restructuring plan and giving the possibility to exclude its application for those enforcements which are unlikely to jeopardise the restructuring of the business or in the event that it would unfairly prejudice the creditors of particular claims (art. 6(4)).

In conclusion, certainly the process of European harmonisation of insolvency law has consolidated the regulations of the jurisdictions of Member States by establishing solid common principles that have oriented the national legislator by leaving ample margins of freedom necessary to modulate the disciplines in respect of the individual and heterogeneous legal traditions.

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[714] cf McCormack (n. 125) 135.

[715] The Report literally affirms that '*bankruptcy may occur in circumstances beyond the debtor's control or by unavoidable misfortune or without any misconduct on his part*' – cf Cork Report (n. 39) 9.

7.2 Thinking and final thoughts

A legitimate question arises at this point: is it possible to achieve an even deeper level of harmonisation in insolvency matters between the legal systems of the EU?

Some clues to this question may be found by reading the recent 2022 Proposal for a Directive on the harmonisation of certain aspects of insolvency law:[716] the Report shows that the harmonisation in the field of insolvency is closely linked to the freedom of capital movement in the EU and to greater integration of the EU's capital markets.

Therefore, whilst there is no doubt that relevant aspects of the insolvency law, such as the efficiency and duration of restructuring and liquidation proceedings, equal protection of cross-border creditors, ensuring a second chance for the honest but unfortunate entrepreneur through access to PRF and debt discharge, are the key elements on which to intervene, probably the real impetus will come from the need to achieve further financial and economic integration in the European Union,[717] to improve access to capital market financing (particularly by SME) and to facilitate the participation of cross-border investors.[718]

Whether these latter are the key objectives, and considering the significant historical, cultural and legal differences of the individual EU Member States, it may be assumed that profound legislative interventions in the EU national legal systems will not be required by the European legislator which instead could limit interventions to mere technical aspects: indeed, this is the direction in which the above-mentioned proposal for a directive

[716] Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law Brussels, 7.12.2022 COM (2022) 702 final 2022/0408 (COD).

[717] Concept already expressed in the Directive, which states in recital 1 that the objective is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms.

[718] In the document entitled 'Harmonising certain aspects of insolvency law in the EU', redacted by European Parliamentary Research Service which analyses the progress of all substantial legislative proposals at each stage of the legislative procedure, it is argued that according to the Commission the efficiency of insolvency laws is considered as a 'key criterion' for cross-border investors.

currently aims for '*minimum harmonisation in targeted areas of core non-bank insolvency proceedings*'.[719]

Moreover, it must be considered that the path towards a standardisation of the entire European insolvency law system may present several criticalities: excessive uniformity may lead to a reduction of opportunities for competition, opportunities that arise precisely from those aspects that still make European national jurisdictions different.[720] Hence, European insolvency law solutions that require EU Member States to formulate rules on the basis of general principles and not specific prescriptions seem to better adhere to the principle of subsidiarity contained in the European Treaty, which provides that, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.[721]

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[719] Art. 1 of the Proposal for directive entitled 'Subject matter and scope' provides that the Directive lays down common rules on: (a) avoidance actions; (b)the tracing of assets belonging to the insolvency estate; (c)pre-pack proceedings; (d) the duty of directors to submit a request for the opening of insolvency proceedings; (e) simplified winding-up proceedings for microenterprises (f) creditors' committees (g) the drawing-up of a key information factsheet by Member States on certain elements of their national law on insolvency proceedings.

[720] cf McCormack (n. 125) 196.

[721] Art 5(3) of the Treaty on European Union.

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