TOWARDS A TRANSNATIONAL MODEL OF BANKRUPTCY LAW?

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ABSTRACT

For a long time, the European insolvency laws have been considered as country-specific regulations, entirely focused on national needs and expectations. This perception depends on several factors. First, the debtor's financial distress tends to be systematic by naturally expanding its effects on other debtors operating in the same country. Second, the financial distress is often imbued with criminal liabilities that are unilaterally ruled by national legislators without interferences of supranational legal sources. But the European Union (E.U.) law has gradually modified the approach to insolvency proceedings. The E.U. approach to the harmonization of national laws on insolvency proceedings has been twofold. Initially, the E.U. legislature has directly imposed to Member States some general rules in order to favor the coordination and cooperation between two or more cross-border insolvency proceedings opened in different Member States. Recently, the approach is significantly changed. The E.U. Directive No. 1023 of 2019 establishes a new legal model of restructuring plan for debtors in financial distress ("preventive restructuring framework") and requires Member States to adequate their national laws to the model within next years.

Accordingly, several European legislations are changing their rules on restructuring proceedings in accordance with the E.U. model. The change is extremely relevant for several reasons. First, it shows that the new approach to insolvency law is aimed at equalizing and standardizing European legislations on insolvency proceedings. Second, it promotes a crucial role for creditors in restructuring bankruptcy by providing that they are not only entitled to submit a plan on behalf of their debtor but also empowered to formulate a plan under which the debts can be paid in relation to the creditors' financial conditions. When the E.U. law emphasizes the role played by creditors, it seems to reflect an innovative opinion in the recent American legal debate on bankruptcy. The New Creditors' Bargain Theory suggests a broad understanding of the creditors' power in determining and approving a restructuring plan under Chapter 11. The E.U. law similarly accords significant powers to creditors – especially to those who are financially weak or vulnerable – in restructuring proceedings. The article examines the relationship between the New Creditors Bargain Theory and the new E.U. law on preventive restructuring frameworks. By comparing the U.S. legal theory with the E.U. legal rules, the analysis brings a transnational model of bankruptcy law to the forefront.

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INTRODUCTION

Insolvency law is considered a country-specific regulation of the debtor's financial distress.[1] There are two reasons why insolvency law is generally viewed in this way. The first reason is that the financial distress tends to be systematic.[2] Insolvency law provides legal ways of preventing or regulating the financial distress of entrepreneurs. When the entrepreneur's financial situation becomes progressively worse, its financial distress tends to spread and infect other related entrepreneurs such as the debtor's financers and suppliers. They are not only the debtor's creditors but also the debtors of their own creditors. The financial distress of their debtor can cause their own financial distress because they become unable to pay their debts, especially in situations

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[1] *See generally* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); *see also* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).
[2] *See generally* BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES 421 (1998); *see also* SKEEL, note 1, at 36.

where there is a national or global economic crisis. This propagation of the debtor's financial distress can produce many problems for the product market where the debtor's goods or services should be sold. In this way, a single event of financial distress can potentially infect the national economy of an entire country. These implications tend to empower national legislators to provide country-specific regulations for bankruptcy and insolvency proceedings. Finally, insolvency law allows citizens and entrepreneurs to minimize the risk that the debtor's financial distress can proliferate and severely damage their commercial activities and social lives.

The second reason why insolvency law is viewed as a country-specific regulation is that the insolvent debtor's conducts often are considered criminally relevant because they engender or produce harmful results on important public interests such as the integrity of the bankruptcy estate or the creditors' claims. According to an ancient European legal tradition, States always imposed a legal monopoly on the regulatory regime of crimes. They opposed the idea of delegating this power to a supranational political entity such as the European Union. The regional nature of European bankruptcy law is also based on this tendency, which is still deeply rooted today.

However, bankruptcy law ceased to be qualified as country-specific in as much as it is asked to regulate the cross-border events of financial distress. The more entrepreneurial activity crosses the borders between two or more States, the more the insolvency – that is the state of financial distress in which a business is unable to regularly pay their debts – become a cross-border event. This leads to consider a country-specific bankruptcy law as inadequate to regulate the financial distress of multinational firms. In modern times, the implications of insolvency are not circumscribed to a given country. Rather, the insolvency can now be applied to debtors who are in two or more countries, so that the systemic impact of insolvency can involve simultaneously two or more national markets and potentially the global market itself.

The European Union (E.U.) law answered the question of how to regulate the cross-border insolvency by conceiving the theory of limited universality: in case of cross-border insolvency, the E.U. Regulation of 2015 on insolvency proceedings[3] (hereinafter Regulation) allows European authorities to open the main insolvency proceedings (M.I.P.) in the Member State where the debtor has its center of main interests, while secondary insolvency proceedings (S.I.P.) can be opened in those

[3] *See* Regulation No. 2015/848/EU of 20 May 2015 on insolvency proceedings, Pub. L. No. 141/19 (hereinafter Regulation).

Member States where the debtor has its establishment(s).[4] The point is that the rules governing the M.I.P. must be applied not only to the debtor's estate and creditors located in the State of the debtor's main center of interests but also to the debtor's estate and creditors located in the State(s) of the debtor's establishment(s).[5] This extensive application of the law governing the M.I.P. promotes coherence, certainty, and predictability of law; it also saves the costs required for opening one or more S.I.P. related to the same debtor. Nevertheless, the rules governing the M.I.P. cannot be applied to the debtor's establishment(s) when the S.I.P. is opened in a Member State where the debtor has its establishment(s).[6] The costs imposed by the opening of the S.I.P. are balanced against the advantages that accrue in this case because of the application of the national law – that is, the law of the Member State in which the debtor's establishment is located.

The theory of limited universality suggested the first way of harmonizing the European insolvency laws. The E.U. institutions allowed those European legal systems maintained their differences regarding the regulation of insolvency proceedings. The E.U. law only dictated procedural rules governing the coordination between two or more insolvency proceedings opened in accordance with their national laws. As a practical matter, the E.U. law advocates the coordination of insolvency proceedings through the cooperation and the exchange of information between courts and bankruptcy trustees. The reason is that the European institutions traditionally allow Member States to adopt specific – meaning, country-specific – mechanisms for implementing their insolvency laws. This conservative approach to insolvency law leads European institutions to respect the choices of Member States to provide certain mechanisms for preventing or regulating financial distress on the theory that such mechanisms reveal their national policies.

The second way of harmonizing the European insolvency laws is more pervasive. For the first time the European institutions directly imposed new insolvency rules on the Member States. The E.U. Directive of 2019 on restructuring and insolvency[7] (hereinafter Directive) dictated Member States to adopt "early warning tools"[8] and "preventive restructuring frameworks"[9] in accordance with the legal principles and technical

[4] *See id.*, art. 3(1).
[5] *Id.*
[6] *See id.*, art. 3(2).
[7] *See* Directive No. 2019/1023/EU of 20 June 2019 on restructuring and insolvency, Pub. L. No. 172/18 (hereinafter Directive).
[8] *See id.*, art. 3.
[9] *See id.*, arts. 2-18.

rules articulated by the Directive itself. Italy is called upon to adopt laws and regulations to comply with the Directive by 17 July 2022.[10] The point is that, unlike the Regulation, the Directive does not impose a set of rules that merely coordinate two or more insolvency proceedings opened in accordance with their own insolvency laws. Rather, it provides a set of rules that require Member States to adapt their insolvency laws to the new legal framework.[11] Member States are asked to introduce in their legal systems new mechanisms that encourage debtors to promptly acknowledge and prevent their financial distress. The function of the Directive is to shape the extent to which the European legal systems allow debtors to prevent their financial distress and to avoid the opening of insolvency proceedings.[12]

Although Member States are traditionally asked to implement the E.U. Directives, it is a great innovation that this practice occurred with respect to insolvency law. After all, this innovation was inevitable. As the Directive stated, "[a]n increasingly interconnected internal market, in which goods, services, capital and workers circulate freely … means that very few enterprises are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base."[13] In this context, the Member States can pursue the result of preventing the entrepreneur's financial distress by shaping their laws in a uniform and coherent fashion. In providing for legal mechanisms consistent with the E.U. models of "early warning tools" and "preventive restructuring frameworks", Member States harmonize the E.U. insolvency law at the local level. In other words, they achieve the harmonization across common, though adaptable, models to be implemented by each Member State.

A central feature of the Directive is the role assigned to creditors in proposing and implementing a preventive restructuring framework (P.R.F.). The P.R.F. is one of the legal mechanisms the Directive

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[10] *See id.*, art. 34(2). *See also* L. 22 aprile 2021, n. 53 art. 1(1) (It.) (Italian Law of 2021, Pub. L. No. 53, art. 1(1)) (concerning the transposition of European directives and the implementation of other European Union acts for 2019-20).

[11] *See* Directive, *supra* note 7, art. 34(1) ("Member States shall adopt and publish … the laws, regulations and administrative provisions necessary to comply with this Directive").

[12] *See id.*, recital 1 (stating that the Directive aims to remove obstacles to the exercise of fundamental freedoms "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").

[13] *Id.*, recital 11.

provides for preventing the debtor's financial distress.[14] It is the model of a reorganization plan containing a restructuring agreement between the debtor and its creditors (or, at least, a significant number of them).[15] The P.R.F. is binding on the debtor and its creditors when it is approved by the court.[16] According to the laws of several European countries, creditors generally have a limited role to play in the reorganization plan.[17] For instance, they are not entitled to propose a restructuring plan on their own.[18] Similarly, they cannot affect the debtor's choice to categorize claims in various classes.[19] To the contrary, the P.R.F. allows creditors to propose competing plans in agreement with the debtor.[20] Moreover, it requires that the plan considers a variety of claims against the debtor, not at least of which are the claims of vulnerable creditors such as workers and small suppliers who are, in turn, other creditors' debtors.[21] The possibility to take into account creditors other than banks or financers depends on the fact that the Directive introduces and employs the category of the "affected parties"[22] – who are all parties affected by the debtor's financial distress[23] – in lieu of the traditional and smaller category of "creditors". Finally, this feature of the P.R.F. allows to state that, even if the P.R.F. tends to restructure the debtor's financial distress, it can also satisfy the expectations of those creditors such as the vulnerable creditors who are generally neglected in the reorganization plan.

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[14] *See id.*, art. 4(1) (stating that European debtors must 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"); *see also infra* Part V.

[15] *See* Directive, *supra* note 7, art. 9(1) (stating that "Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure …, debtors have the right to submit restructuring plans for adoption by the affected parties.").

[16] *See id.*, art. 10.

[17] *See infra* Part V.

[18] *Id.*

[19] *Id.*

[20] *See* Directive, *supra* note 7, art. 9(2) (stating that "Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.").

[21] *See id.*, art. 9(4) (stating that "Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers."); *see also id.*, art. 33.

[22] *See id.*, art. 2(1)(2) (describing affected parties 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 by a restructuring plan").

[23] *Id.*

The new approach to the reorganization plan under Chapter 11 recently theorized by Prof. Anthony J. Casey known as the "New Creditors' Bargain Theory"[24] allows us to qualify the P.R.F. as an agreement between the debtor and its creditors that tends to produce more economic value than it destroys. According to Prof. Casey, the reorganization plan under Chapter 11 must be designed not only to restructure the debtor's financial distress but also to enhance the creditors' confidence in satisfying their expectations.[25]

The new creditors' bargain theory emphasizes the role of creditors in proposing and implementing the P.R.F. According to the Directive, the P.R.F. must also consider the expectations of those creditors who are vulnerable,[26] so that the restructuring plan can produce two kinds of results. On the one side, it is asked to restructure the debtor's financial situation. On the other side, it is also asked to provide a specific treatment of vulnerable creditors. This specific treatment can allow the P.R.F. to create new value in terms of preventing the financial distress of vulnerable creditors involved in the P.R.F. itself. By paying vulnerable creditors or favoring them over other non-vulnerable creditors the P.R.F. allows the debtor to obtain an efficient result.

I. Insolvency Law as Country-Specific Regulation

It is well-known that regulation of corporate financial distress and insolvency has for a long time been a strictly regulated area of national legislation.[27] Historically, this has depended on two factors: on the one hand, the propensity of a corporate insolvency to spread among other players in the same market, and, on the other hand, the necessity of providing for a system of penal sanctions to safeguard public economic interests affected by those behaviours that have generated the crisis or insolvency. Relevant to the first factor is that the emergence of crisis or insolvency has always had implications that go beyond the assets, economic and financial spheres of a single debtor, but involve a series –

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[24] Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020).

[25] *See id.*, at 1723 (noting that "[a]mong sophisticated rational actors, initial investment decisions and prices take into account expectations about ultimate returns") (footnote omitted). *See also infra* Part VI.

[26] *See* Directive, *supra* note 7, art. 9(4).

[27] *See generally* Louis Edward Levinthal, *Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1918).

more or less extensive – of relationships related to the business activity in a state of crisis or insolvency.[28]

If it is indeed true that the instability directly involves creditors, holders of legal rights, and the bearers of real or restitution claims against the debtors, it is no less true that, at the same time, there arise indirect implications for *systems*, potentially able to impact, for example, the performance of an entire commercial sector or even an entire market. These implications may even involve subjects who, while enjoying substantial capital and solvency, slowly end up – but, sometimes, even suddenly – with worsened profitability or significantly increased indebtedness as they operate in the same commercial sector in which single but crucial incidents of insolvency have emerged. Here, for example, where the main players of a specific business sector are declared insolvent, the equity and financial repercussions that may derive from it, above all in the context of a generalized economic crisis,[29] can hit even those

[28] *See generally* Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L. J. 587 (1998) ("It is self evident that as the global marketplace continues to develop, business failures with global implications will become more common. Such failures will increasingly engender insolvency proceedings and/or collection litigation in multiple countries involving the same debtor."); *see also* Andrew B. Dawson, *Modularity in Cross-Border Insolvency*, 93 CHI.-KENT L. REV. 677, 700 (2018); P. John Kozyris, *Cross-Border Insolvency*, 38 AM. J. COMP. L. SUPP. 271 (1990). For the Italian debate, see LUIGI GUATRI, CRISI E RISANAMENTO DELLE IMPRESE (1986) [The Crisis and Restructuring of Companies]; LORENZO STANGHELLINI, LA CRISI D'IMPRESA FRA DIRITTO ED ECONOMIA 117 (2007) (The Business Crisis Between Law and Economics). It is worth noting that the expansion of business risk is a phenomenon inherent in the entrepreneurial and productive system as it is, in turn, naturally correlated to the activity of multiple subjects and to the fiduciary logic inherent, above all, in the fulfillment of contractual relationships. The spread of the crisis and insolvency can therefore be considered as a pathological reflection of the natural development of business relationships. Such a reflex discounts the entrepreneur's inability to implement the contractual relationships in compliance with an ordinary method both in terms of timeliness of contractual implementation and in terms of ordinary means of implementation. It is true, however, that the degree of expansion of the crisis is clearly less intense than that of insolvency. In fact, a reversible and temporary worsening of capital and financial conditions does not disperse the entirety of the corporate value nor does it entirely prejudice the trust of the banks and, in general, of the creditor class in the recovery of the debtor.

[29] *See* Flaschen & Silverman, *supra* note 28, at 590. The conditions in which a national (or supranational) economic system finds itself play a decisive role in favoring or, conversely, in controlling the systemic expansion of individual episodes of crisis or insolvency. In particular, the probability that a single business event contaminates other debtor enterprises tends to proportionally increase when the general economic conditions – affecting the market in which the single debtor operates – reflect a financial or asset crisis widespread at national level. Other factors, of course, can also affect this probability and, above all, the speed of spread of the insolvency, as well as its

companies that did not have direct relations with those that became insolvent, and which even originally enjoyed an adequately solid equity and financial position. The individual weaknesses of a productive sector risk *expanding* their effects over time onto relations with other (only apparently autonomous) operators in the same sector,[30] exacerbating, for example, the conditions for accessing credit or acquiring primary materials or workforce.[31] This is specifically because individual firms in the same production sector, are generally less inclined to change and productive diversification,[32] but rather, they are tied to the same

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capillarity. Nevertheless, such factors – such as, for example, the number of firms operating in a given market, their average capitalization, and the intensity of public intervention in terms of aid to firms – usually remain unrelated to the group of causes generating the crisis of an economic system, and can only contribute to accelerating or slowing down the worsening of the capital and financial conditions of individual operators.

[30] *See* Directive, *supra* note 7, recital 11 ("Even purely national insolvencies can have an impact on the functioning of the internal market through the so-called domino effect of insolvencies, whereby a debtor's insolvency may trigger further insolvencies in the supply chain"); Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 455 (2011) (describing the domino effect as the "[c]ounterparty contagion [that] occurs when the failure of one firm leads directly to the failure of other firms that are its counterparties because the counterparties relied on payment or future business from the initial failed firm."). For the analysis of the domino effect in group companies, see Irit Mevorach, *Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge*, 9 BROOK. J. CORP. FIN. & COM. L. 107, 115-16 (2014).

[31] It is worth adding that the domino effect of insolvencies is, in fact, a frequent risk of production systems also at a national level, which spreads through the company's relationships with customers, suppliers and lenders. The systemic implications of insolvency therefore guide national legislative intervention on the subject of competition towards a sectoral protection of the creditor class. The law imposes a regulation of insolvency that is suitable for protecting an entire production sector and, lastly, an entire market avoiding that the negative consequences of insolvency generate unsustainable capital losses for the debtor's creditors. On the other hand, rules such as those which, for example, require the provision of a minimum percentage of satisfaction of the creditors or the issue of a prior public authorization for the performance of contracts can be read as attempts to stem the spread of a single case of insolvency in a given production sector or, as mentioned, in a given market. *See infra* Part V.

[32] *See* Robert E. Litan, *Evaluating and Controlling the Risks of Financial Product Deregulation*, 3 YALE J. ON REG. 1 (1985); *see also* Lawrence E. Mitchell, *The Morals of the Marketplace: A Cautionary Essay for Our Time*, 20 STAN. L. & POL'Y REV. 171, 173 (2009). It is worth noting that the tendency to change and production diversification – the latter subject of overwhelming social and political relevance – must be evaluated in relation to the times with which the crisis affects an economic or financial system. The abilities of economic operators to adapt to the unexpected production needs are usually not reconcilable with the evolutionary times of an economic crisis. The crisis generated, for example, by the recent pandemic or, according to a different perspective, the one that will be determined by planetary climate change,

systems for private finance, supply of production components and workforce recruitment.[33]

In this context, national legislatures in Europe have always reserved the power to regulate the conflict of interest between the insolvent debtor and their creditors according to the specific criteria of their respective national legal systems. The potential systemic repercussions of single incidents of assets or financial distress have always required adequate measures in respect, above all, to (i) the specific regulatory frameworks for credit protection and the various pending lawsuits, (ii) the distribution of the debtor's assets that are to be liquidated to satisfy creditors and the relative exceptions, and (iii) the fate of fraudulent transactions conducted after the debtor was insolvent or of legitimate transactions which are still pending at the commencement of insolvency proceedings. It is significant to note how the supremacy of national legislation on the regulation of these aspects of crisis and insolvency constitute a peculiar characteristic not just of continental European legal systems (historically shaped by the supremacy of the national legislature), but also of common law federal legal systems that, while giving supranational relevance to bankruptcy legislation (and jurisdiction) grant state legislations the monopoly to regulate many aspects of credit protection, starting from – very significantly – the discipline of secured credits.[34]

On the other hand, the involvement of general interests and supraindividual reasons for the potential – and in reality, frequent – systemic repercussions of a single incident of distress, is not the only aspect that ends up explaining historically the fact that national legislatures have been vested with protecting the various relations implicated in a crisis or insolvency. As mentioned, in that respect one can certainly combine it with a second aspect, which can be inferred from the common repression of criminal conduct relevant to the cause of the failure, or, in any case, connected to the emergence of insolvency. The relevance of this conduct to the criminal law indeed accentuates the role which the national legislature has been called to carry out in the regulation of crisis and its implications. From this particular point of view, there is no doubt

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follow a strongly accelerated trend, with respect to which the traditional logics of change and production diversification often prove too much slow, thus ending up further aggravating the individual failures of the single operators.

[33] *See* Litan, *supra* note 32, at 9.

[34] *See* Butner v. United States, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"); DANIEL J. BUSSEL & DAVID A. SKEEL, JR., BANKRUPTCY 1 (10th ed. 2015) ("Although bankruptcy cases are administered by federal courts and the Bankruptcy Code is federal law, the substantive rights of debtors and creditors in bankruptcy are governed in large part by applicable state law.").

that the implications of criminal prosecutions that follow crisis are limited to the sphere of relations that run directly between debtors and their creditors; the ambit of application of bankruptcy legislation cannot concern those entities impacted by the 'domino effect' of insolvency,[35] which has been mentioned above regarding the systemic implications that can derive from a single incident of insolvency. Nonetheless, in the ambit of individual direct relationships between the insolvent debtor and the creditors, the criminal legislation implicitly (and inevitably) reinforces the central role of the national legislature and the safeguarding of the public interest from the moment in which it becomes urgent to preserve the assets and finances of a specific entity. The idea that the insolvency law has a significant national characterisation due to the numerous criminal implications for the legislative intervention on the subject could also appear a foregone idea. However, it reveals an additional element of nationalisation in the insolvency rules; this factor has historically played a role in containing the supranational trends emerging, other than from international legislative models,[36] from E.U. legislation in this area not only on business and corporate matters, but also (and above all), procedural matters.[37]

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[35] *See supra* note 30.

[36] *See* UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997) [hereinafter Uncitral Model Law]; K. Anderson, *Testing the Model Soft Law Approach to International Harmonization: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency*, 23 AUST. YBIL 1 (2004) (arguing that the model law "facilitate[es] a common market [and] simplif[ies] cross-border litigation and dispute resolution"). *See also* Flaschen & Silverman, *supra* note 28, at 587-89; Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709 (1999); Jay Lawrence Westbrook, *Modeling International Bankruptcy*, 1998-1999 ANN. SURV. BANKR. L. 465 (1999). Implicit in the very idea of elaboration of a model law is, in fact, the tendency to harmonize individual state regulations with common principles and standards which are not limited to providing rules of coordination between different insolvency proceedings, but induce individual legal systems to a gradual adaptation of internal regulations to the parameters accepted in the model law.

[37] *See generally* Kristin van Zwieten, *An Introduction to the European Insolvency Regulation, as Made and as Recast*, in COMMENTARY ON THE EUROPEAN INSOLVENCY REGULATION 3 (Reinhard Bork & Kristin van Zwieten eds., 2016); Gerard McCormack & Andrew Keay, *Procedural Issues Relating to Formal Insolvency Proceedings*, in EUROPEAN INSOLVENCY LAW. REFORM AND HARMONIZATION 202 (Gerard McCormack et al. eds., 2017). For the Italian debate, see Ilaria Queirolo, *Profili di diritto dell'Unione europea*, in TRATTATO DI DIRITTO FALLIMENTARE E DELLE ALTRE PROCEDURE CONCORSUALI 95 (Francesco Vassalli et al. eds., 2014) (European Union Law Profiles) (noting that the European legislation on cross-border insolvency proceedings was born as a procedural discipline, aimed at ensuring the automatic recognition of judicial decisions in the European area and at regulating the needs of

II. A Cross-Border Regulation for a Cross-Border Insolvency: The Experience of the E.U. Law

It is true, however, that the first of the factors noted above – namely, the potential systemic nature of the financial implications of each single incident of business crisis or insolvency – has ended up, in more recent times, crumbling the theoretical and practical sustainability of a purely (or predominately) national dimension in the discipline of corporate insolvency. Indeed, there is no doubt that financial crisis and insolvency, precisely as these phenomena herald potential systemic implications, manifest themselves, in modern economic and business relationships, as cross-border events, detached from an exclusively national ambit. Therefore, not just because commercial sectors are expanding, more and more frequently, beyond national borders, and business operators establish productive activities in more states, but also because the potential cross-border spread of financial crisis or insolvency generates new specific regulatory needs which national legislatures can only partially satisfy.[38] They are (i) coordination needs between plural national procedures, (ii) needs for the recognition of insolvency declarations pronounced in other states according to national rules and (iii) collaboration needs between the organs of the individual procedure that have progressively imposed a supranational gaze on entrepreneurial failure. The European dimension of this legal development was expressed – as is well-known – in the fold of the theory of *limited universality*. A solution that represents a wise (but, ultimately, also inevitable) compromise between purely *territorial* instances,[39] animated by a normative national imprint and an open conflict between legal systems, and the

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coordination between proceedings and cooperation between the respective bodies such as courts and practititoners).

[38] *See generally* Jay Lawrence Westbrook, *Theory and Pragmatism in Global lnsolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991); Lucian A. Bebchuk & Aandrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775 (1999). For the European debate, see Peter Gottwald, *Le insolvenze trans-frontaliere: tendenze e soluzioni europee e mondiali*, 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE, 149 (1999) (Cross-Border Insolvencies: European and Global Tendencies and Solutions).

[39] *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 733 (1999) ("In a secondary bankruptcy case, the court reorganizes or liquidates the debtor's local assets and makes distributions necessary to protect creditors entitled to priority under local law.") (footnote omitted).

purely *universal* instances,[40] inclined to radical expansion of bankruptcy effects beyond national borders.[41] The principle of limited universality requires, therefore, the identification of "the centre of the debtor's main interests"[42] and attributes a potential cross-border efficiency to the insolvency proceedings that have been opened in the Member State where the debtor has the centre of its main interests.[43] The insolvency proceedings opened where the debtor has its centre of main interests takes clearly the name of "main insolvency proceedings"[44] (hereinafter M.I.P.) and produces its effects on the debtor's assets and contracts spread throughout each Member State.[45] The limitation of the potential expansive effects of the M.I.P. depends instead on the opening of "secondary insolvency proceedings"[46] (hereinafter S.I.P.), connected to the existence of the debtor's "establishment"[47] in a Member State other than that in which the M.I.P. has been opened. The debtor's establishment is any secondary operating place, distinguished, simultaneously, as both non-habitual and non-transitive.[48] The balancing of competing interests is, therefore, evident: the flexibility of the M.I.P., associated with the centrifugal forces of the S.I.P., assures

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[40] *See* Jay Lawrence Westbrook, *supra* note 38, at 461-64; Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 27 (1997).
[41] *See* Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 507 (1991).
[42] *See* Regulation, *supra* note 3, art. 3(1) (establishing that "[t]he centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.").
[43] *Id.*; *see also* Wolf-Georg Ringe, *Comment on Article 3*, in COMMENTARY ON THE EUROPEAN INSOLVENCY REGULATION, *supra* note 37, at 125-27. For an analysis of the limited universality model within the European legal context, see Horst Eidenmüller, *Free Choice in International Company Insolvency Law in Europe*, 6 EBOR 430 (2005); Marcello Gaboardi, *The Role of Consent in European Cross-Border Insolvency Proceedings: The Unilateral Undertaking under Article 36 EIRR*, 21 GLOBAL JURIST 417 (2021).
[44] Regulation, *supra* note 3, art. 3(1).
[45] *See id.*, art. 3(2).
[46] *Id.*
[47] *Id.*; *see also id.*, art. 2(10) (defining the debtor's establishment as "any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets").
[48] *See* Case C-396/09, Interedil Sri v. Fallimento Interedil SrI, 2011 E.C.R. 1 09915, para. 64 (describing the debtor's establishment as "requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity" so that [t]he presence alone of goods in isolation or bank accounts does not, in principle, meet that definition."); *see also* Gerard McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, 68 CAMBRIDGE L.J. 196 (2009); Ringe, *supra* note 43, at 160.

the efficient protection of local – meaning, national – interests and, at the same time, reduces the operating costs of the M.I.P., from which are subtracted management activities and liquidation of the assets located in the debtor's establishment.[49]

The "variable geometry" of limited universality enables, therefore, the increase in expenditure following the opening of one or more S.I.P. to be justified by the strength of the local interests. The greater the number of local creditors, amount of goods located at the debtor's establishment[50] or the number of pending contractual relationships at the date of the opening of the S.I.P., the greater the saving of expenditure obtained from the local management of the insolvency through the insolvency practitioner[51] of the S.I.P. The opening of the S.I.P. allows, in fact, the application of local legislation and significantly reduces the cost for the creditors – and, in general, for the stakeholders – in accessing judicial credit protection, avoiding moreover the formal and language obstacles posed by the need to access a foreign legal system.[52] Likewise, the potential universal expansion of the M.I.P., while imposing on local stakeholders the rights and duties provided by the law of the "centre of the debtor's main interests",[53] ensures coherence and homogeneity in the

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[49] *See* Westbrook, *supra* note 41, at 515.

[50] *See* Regulation, *supra* note 3, art. 2(10).

[51] Under the Regulation, the insolvency practitioner corresponds to the trustee in bankruptcy; *see id.*, art. 2 (5).

[52] *See* Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXFORD J. LEGAL STUD. 97 (2014). It is worth noting that the problem of the higher costs of accessing foreign insolvency proceedings, deriving above all from regulatory and linguistic differences, is part of the broader question of the costs of accessing foreign legal systems and, in particular, judicial protection systems. In the context of insolvency law, therefore, the right to obtain effective remedies against the insolvent debtor can be ensured through the access to justice, as the choice of making the opening of insolvency proceedings subject to a judicial decision on the debtor's economic and financial conditions is a common feature of several European legislations. *See* van Zwieten, *supra* note 37, at 15; Ringe, *supra* note 43, at 126.

[53] *See* Bob Wessels, *Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation*, 9 Brook. J. Corp. Fin. & Com. L. 236, 243-44 (2014) (("Although secondary proceedings are opened in another Member State (in which the debtor has an 'establishment') the secondary proceedings are concerned with the same (insolvent) debtor as the main insolvency proceedings")) (footnotes omitted); *see also* Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings*, 33 TEX. INT'L L. J. 53, 69 (1998) ("Secondary proceedings do not, generally speaking, claim a universal scope, but are limited to the territory of the state in which they have been opened. Secondary proceedings cover only collateral located in that state.") (footnote omitted). The universal nature of MIP finds its most meaningful expression when SIP have not been opened. The fact that stakeholders such as local creditors do

management of the debtor's assets, significantly reducing the costs due to the savings incurred from not commencing a S.I.P.
It is true, however, that, as mentioned, the coexistence of more insolvency proceedings requires assets that, although geographically fragmented, can be traced back to a single owner requires procedural coordination, cooperation between the procedural organs, and, ultimately, the circulation of judicial decisions that are the basis of what could be defined as the first stage of the process of European regulatory harmonization for financial crisis and insolvency management procedures. This European harmonization of bankruptcy law is, in fact, undoubtedly a process that evolves in time and that tends to be gradually defined through consequential stages, one more articulated and penetrative than the one which proceeded but, above all, more invasive in its plan for shaping national insolvency laws. It is convenient, therefore, to examine the first stage of this evolution that, as will be seen, does not yet affect the content of national laws, but favours them in the functional coordination in cases of cross-border insolvency.

III. The Harmonization of European Insolvency Law. The First Path: A Dialogue Among Different Languages

The evolution of Italian insolvency law offers an interesting perspective for investigation, through which it is possible to examine the first, fundamental step of the harmonization process of European legislation concerning insolvency.
In Italy, the legal regime of insolvency found its first complete expression in the Italian Bankruptcy Law of 1942.[54] The Italian Bankruptcy

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not claim their rights in order to obtain the opening of SIP is evidence of how less severe is the intensity of economic local interests connected to the debtor's establishments. In fact, it is highly likely that the existence of strong economic local interests tends to stem the application of the law of the State where MIP have been opened beyond national borders with the opening of one or more SIP.

[54] R.D. 16 marzo 1942, n. 267 (It.) (Italian Law of 1942, Pub. L. No. 267) (concerning bankruptcy, agreement with creditors, temporary receivership and compulsory winding) [hereinafter Italian Bankruptcy Law], *translated and reprinted* in THE ITALIAN CHANCE FOR RESTRUCTURING 639-738 (Fabrizio Di Marzio et al. eds., 2014). Note the Italian Insolvency Law has been amended several times. The source contains several rules on insolvency proceedings (arts. 1-156; 160-186-bis) aimed at liquidating the assets of insolvent debtors. The most important insolvency proceedings are bankruptcy ("fallimento") and agreement with creditors ("concordato preventive"). While bankruptcy is a liquidation proceedings entirely governed by the court and the trustee in bankruptcy, the agreement with creditors allows the debtor to submit a liquidation or restructuring plan to its creditors. Under the Italian Bankruptcy Law, the agreement

Law is still in force. Generally speaking, it comprises a set of rules that aimed to favour the liquidation of the debtor's assets in case of insolvency.[55] These rules have the primary purpose of protecting creditors from the negative consequences of the debtor's insolvency such as missed or late payments.[56] The Italian Bankruptcy Law makes explicit that creditors are entitled to obtain substantial payments mainly by forcing the debtor into involuntary bankruptcy liquidation.[57] Unlike the debtor and its creditors, trustees in bankruptcy, who are public officials under Italian law,[58] play a crucial role in liquidation bankruptcy. In fact, while all of the property of the debtor owned at the date of bankruptcy becomes part of the bankruptcy estate,[59] trustees are asked to collect the property of the bankruptcy estate that it is not exempt, liquidate it, and use the proceeds to pay creditors claims.[60] Only in cases involving minor financial difficulties, the Italian Bankruptcy Law establishes a second type of bankruptcy that is usually referred to as agreement with creditors.[61] It expressly authorizes the debtor to restructure at an early stage and to avoid bankruptcy liquidation.[62] The debtor, who continues in possession as a "debtor in possession" that exercises the powers of a trustee in bankruptcy,[63] is required to formulate a plan under which the debtor proposes to pay, in whole or in part, some or all prebankruptcy debts.[64] Creditors are paid in accordance with the plan normally from the liquidation of the debtor's assets although the plan can also provide for the reorganization or rehabilitation of the debtor without liquidation.[65] The plan needs to be approved by creditors who in turn have to determine whether the proffered agreement satisfies their

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with creditors is mainly used by a debtor to liquidate its assets and use the proceeds to pay its creditors. *See generally* Marcello Gaboardi, *Commento all'articolo 167*, in COMMENTARIO ALLA LEGGE FALLIMENTARE 574 (Cesare Cavallini ed., 2010) (Comment on article 167 of the Italian Bankruptcy Law).

[55] *See* Italian Bankruptcy Law, *supra* note 54, art. 5.

[56] *See* SALVATORE SATTA, ISTITUZIONI DI DIRITTO FALLIMENTARE 15 (5th ed. 1957) (Institutions of Bankruptcy Law).

[57] *See* Italian Bankruptcy Law, *supra* note 54, arts. 104-ter-109.

[58] *See id.*, art. 30. *See also* SATTA, *supra* note 56, at 39.

[59] *See* Italian Bankruptcy Law, *supra* note 54, art. 42.

[60] *See id.*, arts. 25, 31.

[61] *See* Italian Bankruptcy Law, *supra* note 54, art. 160.

[62] *See id.*, art. 160(1)(a), (b), (c).

[63] *See id.*, art. 167; *see also* Gaboardi, *supra* note 54, at 575.

[64] *See* Italian Bankruptcy Law, *supra* note 54, art. 160(1)(a), (b), (c).

[65] *See id.*

expectations.[66] If the plan is confirmed by the bankruptcy court, creditors are bound by its terms.[67]

The Italian Bankruptcy Law, like other continental insolvency laws, has only been influenced by European legislation in the past few years. Many of the legal provisions that, starting from 2005, have progressively reformed the Italian Bankruptcy Law were born instead under the impulse of the national legislature.[68] In fact, the Italian legislature gradually promoted the "privatization" and "simplification" of bankruptcy by reducing the powers of the trustee in bankruptcy and increasing the role of the creditors committee,[69] that is made up of three or five creditors representatives,[70] in authorizing the exercise of several trustee's duties.[71]

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[66] *See id.*, art. 177.

[67] *See id.*, art. 180.

[68] *See* D.Lgs. 9 gennaio 2006, n. 5 (It.) (Italian Law of 2006, Pub. L. No. 5) (concerning the oarganic reform of the Italian Bankruptcy Law); D.Lgs. 12 settembre 2007, n. 169 (It.) (Italian Law of 2007, Pub. L. No. 169) (concerning the integration and correction of several legal rules on insolvency proceedings); L. 18 giugno 2009, n. 69 art. 61 (It.) (Italian Law of 2009, Pub. L. No. 69, art. 61) (concerning the agreement with creditors); D.L. 31 maggio 2010, n. 78 art. 48 (It.) (Italian Law of 2010, Pub. L. No. 78, art. 48) (concerning the debtor's restructuring agreements); D.L. 22 giugno 2012, n. 83 art. 31 (It.) (Italian Law of 2012, Pub. L. No. 134, art. 31) (concerning the agreement with creditors); D.L. 21 giugno 2013, n. 69 art. 82 (It.) (Italian Law of 2013, Pub. L. No. 69, art. 82) (concerning the agreement with creditors); D.L. 27 giugno 2015, n. 83 arts. 1-11 (It.) (Italian Law of 2015, Pub. L. No. 83, arts. 1-11) (concerning the agreement with creditors); D.L. 3 maggio 2016, n. 59 art. 6 (It.) (Italian Law of 2016, Pub. L. No. 59, art. 6) (concerning the insolvency proceedings).

[69] *See* Italian Bankruptcy Law, *supra* note 54, art. 40.

[70] *Id.*

[71] *Id.*, arts. 40-41, 72. As we have seen, local needs mainly inspired the amendments to the Italian Bankruptcy Law. *See supra* note 68. Nevertheless, even the European legislation partly influenced the reforms of the Italian Bankruptcy Law. In particular, it is worth noting the role played by the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 1-19 (9th ed. 1974). The Convention establishes an individual right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". *Id.*, art. 6. Such a rule carried meaningful consequences for the way in which the Italian legislation reformed the legal provisions governing those facts that may bear on matters that may subsequently be presented to the bankruptcy court. For example, collecting the property of the bankruptcy estate sometimes requires the trustee to bring a civil lawsuit to recover property that was transferred by the debtor prior to bankruptcy in transactions that are avoidable in bankruptcy. *See* Italian Bankruptcy Law, *supra* note 54, arts. 66-67. With respect to such cases, the Italian legislation reformed the Italian Bankruptcy Law ensuring that fundamental procedural values such as the right to a fair trial within a reasonable time are borne out in practice. Again, still, the reach of this argument is limited. Even if the European legislation actually exerted influence on the Italian

The "Europeanization" of Italian Bankruptcy Law has manifested itself to a significant extent only in the recently enacted Italian Code of Corporate Crisis and Insolvency[72] (hereinafter Italian Insolvency Code). It will enter into force in May 2022 and, partly, in December 2023 when it will definitively repeal the Italian Bankruptcy Law.[73] Nevertheless, the Italian Insolvency Code is only the last step toward the adaptation – or, better yet, harmonization – of the Italian law to the EU insolvency legislation.

The path of harmonization within the European legal systems has gradually developed around the need for an *uniform* legal framework, implying that insolvency proceedings are subject to common rules. The impact of this development was twofold. First, the harmonization of European insolvency legal systems originally materialized with the introduction of *supranational procedural rules*, through which the European legislator has ensured a homogenous and coordinated management of cross-border insolvency proceedings in an economic and commercial context that, by definition, goes beyond national borders. Second, the European legislation subsequently imposed the Member States to adapt their legal systems on insolvency proceedings and, especially, restructuring bankruptcy to a set of common legal rules that aim to facilitate the harmonization of national laws *by the inside*.[74]

The presence of rules that uniform the development of cross-border insolvency procedures and assure their efficient coordination has constituted, therefore, the first stage of harmonizing European laws on the topic of cross-border insolvency proceedings. At this first evolutionary level, the harmonization of laws is limited to a dimension *external* to national legal systems, as it relates to the coordination of procedures that are distinguished by a cross-border nature, without intruding on the formation of national laws and to shape the structure and the content of national legal rules and, with them, the limits of protecting the subjective interests of stakeholders.

Bankruptcy Law, the amended rules remained consistent with a vision domestic of the insolvency proceedings and their rules. For example, liquidation bankruptcy is still the predominant type of bankruptcy in Italy compared to reorganization or rehabilitation bankruptcy. *See id.*, arts. 104-ter-109.

[72] D.Lgs. 12 gennaio 2019, n. 14 (It.) (Italian Law of 2019, Pub. L. No. 14) [hereinafter Italian Insolvency Code]; *see also* L. 19 ottobre 2017, n. 155 (It.) (Italian Law of 2017, Pub. L. No. 155) (concerning the delegation to the Italian Government for reforming the Italian Bankruptcy Law).

[73] *See* D.L. 24 agosto 2021, n. 118 art. 1(a) (b) (It.) ((Italian Law of 2021, Pub. L. No. 118, art. 1(a) (b)) (concerning urgent measures in matter of companies insolvency and restructuring).

[74] For the analysis of the second step of harmonization, see *infra* Part IV.

This point is undoubtedly very complex and goes beyond the limits imposed on this paper. Nonetheless, with reference to this first factor of "Europeanization" of insolvency law, it seems legitimate to dwell on the reasons for which uniformization – or, more precisely, harmonization – of national insolvency disciplines has manifested itself initially only on the procedural level. The reason seems to consist of the fact that, for a long time, the E.U. institutions such as the E.U. Commission and the E.U. Council reject to import a common vision – wherever this is possible – of the ways of promoting the pragmatic goals of bankruptcy proceedings.[75] It was not considered, for example, to impose a common definition of what constitutes insolvency, or, even more so, a firm in financial crisis.[76] If it is in fact true that almost all European legal systems share – it would be worth saying: naturally – the same average notion of insolvency, locating in a condition of serious and irredeemable financial difficulty,[77] there is no doubt that the concept of

[75] Generally speaking, European legal systems tend to regulate homogenously several aspects of insolvency proceedings and their relationships in case of cross-border insolvency. In fact, they normally aim at the greatest possible satisfaction of the creditor class and, through this purpose, they favor, in cases of reversible financial distress, the debtor's restructuring and business rehabilitation in lieu of the debtor's assets liquidation. *See* Kristin, *supra* note 37, at 8; Horst Eidenmüller & Kristin van Zweiten, *Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency*, 16 EBOR 625, 626 (2015). Instead, the differences between legal systems revolve around both the tools envisaged by national legislations for pursuing these purposes and the regulation of the debtor's economic conditions such as its estate and earnings necessary for their activation as well as the effects they produce. *See* Italian Bankruptcy Law, *supra* note 54, art. 1(2).

[76] *See* Directive, *supra* note 7, art. 2(2) ((establishing that "the following concepts are to be understood as defined by national law: (a) insolvency; (b) likelihood of insolvency; (c) micro, small and medium-sized enterprises ('SMEs')."')).

[77] A common feature of several European legislations is the tendency of legal system to infer the debtor's insolvency from the inability to fulfill regularly its obligations. When the debtor is unable to pay its creditors on due dates or decides to pay them by unconventional means such as assets exchange in lieu of money, it could make it reasonable to treat the debtor as insolvent. *See* Italian Bankruptcy Law, *supra* note 54, art. 5; *see also* Horst Eidenmuller, *What Is an Insolvency Proceeding*, 92 AM. BANKR. L.J. 53 (2018). Thus, it is perfectly appropriate to consider the debtor's insolvency as a presumptive condition that gradually emerges from several evidences of financial distress. The debtor's accounting or business data often carries important implications for resolving the question of whether the debtor can be considered as insolvent. Nevertheless, it is necessary to distinguish between situations where accounting data suggests important information from those in which they do not engender appreciable reliance. For example, the surplus of the liabilities over the assets emerging from financial statements in itself cannot suggest that the debtor is surely insolvent as the increase of liabilities can depend on a bank loan that ensures the debtor the money to

crisis has given even less attention to an effort of legal standardization. It appears to be a concept decisively more vague and uncertain than insolvency, and simultaneously – particularly for this reason – even more articulated and, so to speak, rich in nuances and evolutionary stages (as taught, moreover, by business science).[78] Such a wealth of possibilities contains, even significantly different from one another (an account is, for example, the temporary financial distress, another account is instead the temporary but robust difficulty that implies a high probability of future insolvency),[79] resists any rigid and peremptory possibility to classify (all) the phenomena that can be traced back to the concept of financial crisis.

Consequently, the E.U. legal system entrusts to the discretionary assessment of each national legislature the work of defining the objective conditions for accessing individual insolvency procedures.[80] requiring

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pay regularly its creditors. Similarly, the surplus of the assets over the liabilities is often unsuitable to exclude the debtor's insolvency since such a surplus can derive, for example, from the existence of an asset that is not susceptible to immediate liquidation (i.e., an intangible asset such as a trademark).

[78] *See generally* Bebchuk & Guzman, *supra* note 38, at 777; Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155 (1989). For the Italian debate, see LUIGI GUATRI, TURNAROUND. DECLINO, CRISI E RITORNO AL VALORE (1995) (Turnaround. Decline, Crisis, and Return to the Value); Lorenzo Stanghellini, *Proprietà e controllo dell'impresa in crisi*, 4 RIVISTA DELLE SOCIETÀ 1041 (2004) (Ownership and Control of the Company in Crisis).

[79] *See generally* Richard A. Epstein & M. Todd Henderson, *Do Accounting Rules Matter – The Dangerous Allure of Mark to Market*, 36 J. CORP. L. 513, 522-23 (2011) ("Private parties are not worried only about insolvency. Market valuations are also required to decide whether a party that has purchased stocks, bonds, or other financial instruments on credit has to make good on a margin call. That judgment requires some assessment as who best bears risk in the face of uncertainty about the future.") (footnote omitted); *see also* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 518 (1976).

[80] *See* Regulation, *supra* note 3, art. 7(2); *see also id.*, recital 22 (acknowledging "the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union."). *See* Regulation No. 2000/1346/EC of 29 May 2000 on insolvency proceedings, Pub. L. No. 160/1, art. 4(2) (repealed in 2017) [hereinafter Regulation of 2000]. It is worth noting that another clear evidence of the difficulties that are inherent in the legal adaptation of European insolvency laws emerged – a few years before the Regulation of 2000 was enacted – in the UNCITRAL Model Law on Cross-Border Insolvency of 1997 which, while constituting a set of non-mandatory rules, promotes coordination between insolvency proceedings rather than harmonization between legal systems. *See* Uncitral Model Law, *supra* note 36, at 19 ("The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between

rather that the laws of Member States will conform with one another in terms of the procedural dimension that leads to the opening, and then, the carrying out, of individual phases of the solution to financial crisis or insolvency. Similarly, E.U. legislation seems to reserve little interest to the conditions such as the debtor's financial situation for accessing insolvency proceedings. Notwithstanding, a trend is now widespread in European legal systems – and recently incorporated also into the discipline of the Italian Insolvency Code[81] – to the expansion of number of subjects – entrepreneurs (even non-commercial) and civil debtors – which are dealt with by the existing legal rules, providing for specific mechanisms for overcoming financial distress and over indebtedness.[82] But national laws prevailed over the E.U. law also with regard, ultimately, to the effects of the opening of bankruptcy or insolvency proceedings: for example, the effects of insolvency proceedings on the destination of the various components of the debtor's assets or on the demands claimed by classes of creditors are removed from any kind of attempt of regulatory standardization since those repercussions are inevitably intertwined with the peculiarities of each national legislation, with the interpretive events that are offered, in particular, by the case

jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency").

[81] One of the most important reforms the Italian Insolvency Code will introduce is undoubtedly the enlargement of the debtors' category to which the new legal rules can apply. It is worth noting that the Italian Bankruptcy Law applies only to those debtors that are entrepreneurs or companies while debtors who do not carry out a business activity or carry out a business activity that cannot be subject to liquidation bankruptcy can formulate a plan for restructuring its financial over-indebtedness. *See* L. 27 gennaio 2012 n. 3 (It.) (Italian Law of 2012, Pub. L. No. 3) (concerning the restructuring bankruptcy for over-indebted debtors). The fact that debtors other than entrepreneurs and companies are subject to special legal rules created several interpretative difficulties as the Italian Bankruptcy Law plays the role of a landmark insolvency regulation. It contains legal rules that are designed to establish fundamental principles and shape the debtor's and creditors' behaviors in case of insolvency. The choice to exclude the over-indebted debtors from the Italian Bankruptcy Law engaged questions regarding, above all, the application of its rules to over-indebted debtors. To the contrary, the Italian Insolvency Code regulates over-indebted debtors in the same context of the entrepreneurs and companies bankruptcy. *See* Italian Insolvency Code, *supra* note 72, arts. 268-277. This choice offers the opportunity for a homogeneous application of legal provisions that are very similar both in terms of applicable proceedings and in terms of purposes pursued. *See also* Regulation, *supra* note 3, recital 10 ("It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor.").

[82] *See* Italian Insolvency Code, *supra* note 72, art. 268.

law in each legal system, and, ultimately, with the evolution of legislation of each Member State.

The E.U. legislation has turned out to be, therefore, primarily, a regulatory system intended to regulate the relationships that are established between single procedures for regulating financial crisis or insolvency when they relate to the same debtor's asset or financial failure is spread between two or more Member States. The affirmation of the eminently procedural character of this first E.U. legislation is demonstrated, in particular, in several factors such as (i) the rules on jurisdiction for the opening of insolvency proceedings, in contrast – arising from the principle of limited universality[83] – between the M.I.P. and S.I.P. or between two or more S.I.P.,[84] (ii) the provision of recognition and automatic circulation of declarations regarding the opening of insolvency proceedings, (iii) the imposition and regulation of cooperation obligations between the bodies – including judicial ones – of the insolvency proceedings relating to the same debtor and, ultimately, (iv) the coordination of insolvency proceedings regarding companies belonging to the same corporate group. The accentuation of the procedural moment to the detriment of the substantial one – reserved, as mentioned, mainly to the competence of national legislations – therefore finds its main reason for being in the safeguarding of national interests inherent in regulatory equilibrium achieved by single legislatures. As mentioned, these balances certainly depend on the peculiarities of the individual substantive laws (for example, in the specific discipline of pre-emption rights or assets included in the bankruptcy estate), but they are also the consequences of specific legislative politics (sometimes in favour of the debtor, other times in favour of the creditor) that are certainly not exportable to other legal systems.

Therefore, it is possible to conclude that the first stage of European harmonization entirely realized on a procedural level due to a sort of unavailability of the national legal systems to cede "shares" of legislative

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[83] *See* John A.E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT'L L. J. 579, 580 (2011) («The purpose of a secondary proceeding is to allow local creditors of a foreign debtor the opportunity to open a bankruptcy case in their native country, chiefly to enjoy the benefit of local bankruptcy law. They exist only in contrast to a main proceeding, which is a plenary bankruptcy case opened in the country housing the debtor's center of main interests.»); *see also* Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN. & COM. L. 85, 93-94 (2014).

[84] For an analysis of the juxtaposition between MIP and SIP, see generally Ringe, *supra* note 43, at 125; *see also* Gerard McCormack, *Reconstructing European insolvency law – putting in place a new paradigm*, 30 LEGAL STUDIES 126 (2010).

sovereignty to E.U. institutions in this matter.[85] The systemic and supraindividual implications of financial distress and insolvency – which have been mentioned above – have induced, and still widely induce, the national legislature to hold the monopoly on substantive laws on insolvency. The harmonization was posed, therefore, initially as an *external* factor with respect to national legal systems, promoting coordination and cooperation between bodies of the individual proceedings in only cases of cross-border insolvency, without affecting their substantial content. The national laws that regulate, in particular, the opening and the effects of the single insolvency proceedings express, in fact, the degree with which each legal system intends to protect the interests involved in the debtor's insolvency, as well as the specific purposes it intends to pursue through the management of the debtor's financial crisis. They express, therefore, the specific policy of the national legislature as, for example, the maximization of credit protection via the accentuation of the liquidation moment or, on the other hand, the preservation of residual value of the company anticipating interventions of debt restructuring and business recovery. Although the evolution of European insolvency laws follows a partially homogenous course,[86] the

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[85] *See* European Convention on Certain International Aspects of Bankruptcy, June 5, 1990, Europ. T.S. No. 136, *available at* https://www.coe.int/en/ web/conventions/full-list/-/conventions/rms/090000168007b3d0. This convention was drafted by the European Council and signed in Istanbul in 1990. Owing to insufficient ratification, the convention remained without force. *See also* European Union Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223, *available at* https://eur-lex.europa.eu/ legal-content/EN/TXT/?uri=CELEX%3A51999IP0234%2801%29. This convention was signed in Brussels, but it did not enter into force because the United Kingdom failed to adhere within the period of time open for signature. For an analysis of these Conventions, see Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind*, 23 BROOK. J. INT'L L. 25 (1997); Gaboardi, *supra* note 43, at 428.

[86] *See generally* Donald T. Tratuman, Jay Lawrence Westbrook & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573 (1993). For the European debate, see ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 706 (4th ed. 2011). Generally speaking, European insolvency laws alternatively recognize that bankruptcy liquidation serves as remedy against serious or irremediable financial distress such as insolvency, while reorganization bankruptcy is an appropriate mechanism for resolving minor or remediable financial difficulties. *See* Directive, *supra* note 7, recital 2 ("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*.") (emphasis added). The underlying theory is that bankruptcy liquidation is more suitable for serious situations because it ensures that the bankruptcy estate is *unilaterally* liquidated by the trustee and the proceeds are *entirely* used to pay creditors claims. To the contrary, reorganization bankruptcy often allows the debtor to formulate a plan under which it proposes to

predisposition of the tools for pursuing the same policy tends, on the other hand, to generate heterogenous structures (as well as, inevitably, to assert themselves at different times) in existing legal systems: they are an example of the differences in the opening and management of proceedings, the differences in the recognized powers – and, even above all, in the role assigned – to the judicial and administrative authority, or, finally, the differences in the effects that insolvency proceedings have on pending contracts.[87]

IV. THE SECOND PATH: A COMMON LANGUAGE FOR DIALOGUING LEGAL SYSTEMS

However, it is precisely at the level of policy choices that, in an only apparently contradictory way, the second factor of "Europeanization" of insolvency law is also measured. There is no doubt, as mentioned, that the national rules on the subject, for example, of objective and subjective conditions of access to insolvency proceedings or the effects of the proceedings on subjects involved in the financial collapse reflect the specific legislative policy of the national legislature. Nonetheless, the most recent E.U. legislation on insolvency has promoted, from this point of view, a significant evolution in the E.U.'s approach to insolvency. In particular, it has given import to a set of rules that regulate the relationships between the national proceedings (inspired, in fact, by the specific legislative and political choices of national legislatures). But it has also intended to express – and, to a certain extent, impose – *supranational legislative policy* choices, thus favouring national regulatory developments that are coherent and homogenous not only on a purely procedural level, but also and above all on the level of substantial content of the individual disciplines. This development has been effectively implemented by the abovementioned E.U. Directive No. 1023 of 2019[88] (hereinafter Directive) in the parts regarding, above all the

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partially pay its debts, while creditors are asked to approve the proffered plan despite acknowledging the substantive *reduction* of their claims. *See* Christoph G. Paulus, *Introduction*, in EUROPEAN PREVENTIVE RESTRUCTURING 2 (Christoph G. Paulus & Reinhard Dammann, 2021).

[87] *See generally* Douglass G. Boshkoff, *Some Observations on Fairness, Public Policy, and Reciprocity in Cross-Border Insolvencies*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 677 (Jacob S. Ziegel ed., 1995); *see also* Gaboardi, *supra* note 43, at 420.

[88] *See supra* note 7. For an analysis of the origins of the Directive, see the legislative preparatory works *available at* https://eur-lex.europa.eu/legal-content/IT/HIS/?uri=CELEX:32019L1023. *See also* Eidenmüller & van Zweiten, *supra*

"early warning tools" and the "preventive restructuring frameworks". This legal text, in fact, albeit referring to national legislation for its own organic transposition, shows a clear awareness of the conditions in which the E.U. business market finds itself and the urgency that national legislations provide for uniform regulatory instruments for internal financial distresses (not transnational) that can find application well before the conditions of the debtor's asset or financial distress becomes a full-blown and irreversible state of insolvency.[89]
Undeniably, a specific European policy choice in favour of preventing financial distress underlies the rules on the early warning instruments and its preventive restructuring frameworks, through the harmonization of *existing national tools* for restructuring debt (via the introduction of *new restructuring tools* coherent with E.U. policy choices),[90] based on agreement between the debtor and its creditors and on an essential, albeit limited, intervention of administrative or judicial authority when approving the agreement. It is, undoubtedly, a new stage of the harmonization process for E.U. law on business financial distress: in this case, in fact, the harmonization of legal systems is realized through means that might qualify as *endogenous* insofar as they arise from within state legal systems. The E.U. legislative policy – as has occurred in other sectors of the E.U. legal system – penetrates for the first time into state insolvency legislation and moulds them to uniform principles and rules of operation.
Indeed, the idea of an *ex ante* solution of insolvency, based precisely on the timely application of preventive tools for financial distress (or its progressive worsening over time), could be said to be spread throughout some European legal systems – such as, for example, the French[91] and the German[92] – far before the long and complex approval

note 75, at 625; GERARD MCCORMACK, THE EUROPEAN RESTRUCTURING DIRECTIVE 14-15 (2021).
[89] *See* Directive, *supra* note 7, recital 12 (establishing that the "Regulation [of 2015] does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs."). *See also* Paulus, *supra* note 86, at 2; MCCORMACK, *supra* note 88, at 14.
[90] *See* Paulus, *supra* note 86, at 6.
[91] *See*, *e.g.*, JÉRÔME BONNARD, DROIT DES ENTERPRISES EN DIFFICULTÉ 123 (2009) (The Insolvency Law of Companies).
[92] *See*, *e.g.*, REINHARD BORK, EINFÜHRUNG IN DAS INSOLVENTZRECHT 34 (2009) (Introduction to Bankruptcy Law).

process of the Directive.[93] The preventive perspective will also be accepted into the complex regulatory framework contained in the Italian Insolvency Code.[94] And it is legitimate to see in this legislation a sort of *anticipated adaptation* of national legislation to indications emerging from E.U. legislation not yet in force, but recognizable in advance with the reading of the Proposal of the Directive of 2016.[95] This legislation, having entered into force only in July 2019,[96] and having to be implemented by July 2021,[97] did not exactly constitute a formally binding precedent, for the Italian legislature when it enacted the Italian Insolvency Code. Nevertheless, there is no doubt that it constituted for the Italian legislature one of the main inspiring parameters on the laws of financial distress prevention through not only, as mentioned, the introduction of financial distress warning requirements, but also through the overall reform of the restructuring bankruptcy.[98] It is now essentially aimed at ensuring business continuity, even indirectly, in a place of consensual liquidation, that now becomes recessive and subordinate to the bankruptcy liquidation in terms of profitability for the creditor class.[99] Similarly, there is no doubt that national legal frameworks progressively approaching the themes of financial distress and insolvency *prevention* was mainly depended on the urgency of imposing a *common legislative policy* on the national legal systems. Such an urgency, in turn, depends on the common need to respond with adequate (and that is, substantially, *homogeneous*) tools to cases of systemic economic and financial distress that have had – and, in the case of financial distress due to the recent pandemic, continue to have – inevitably supranational repercussions.

[93] The formation and approval of the Directive was started in November 2016. The process was characterized by an intense debate within the European institutions focused on several suggestions for modification and expansion of the original set of rules contained in the 2016 Proposal for a Directive on preventive restructuring frameworks. *See* Proposal for a Directive on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures, 2016/0359 (COD), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN. *See also supra* note 88.

[94] *See* Italian Insolvency Code, *supra* note 72.

[95] *See supra* note 93.

[96] *See* Directive, *supra* note 7, arts. 34-35; *see also supra* note 10.

[97] *See* Italian Law of 2021, *supra* note 10, art. 1(1).

[98] *See* Italian Insolvency Code, *supra* note 72, arts. 57-61, 84-120.

[99] *See id.*, art. 84(2).

V. THE NEW ROLE OF CREDITORS IN PROMOTING THE EUROPEAN PREVENTIVE RESTRUCTURING FRAMEWORKS

The policy underlying the Directive can be identified in the pursuit of legal uniformity on those instruments that are aimed at preventing financial distress by restructuring the debtor's assets. The benefits of a timely emergence of situations involving financial and asset distress are universally known.[100] Notwithstanding, the pursuit of such benefits with heterogenous instruments in a strongly interconnected economic and legal context (like that of the E.U.) ends up significantly reducing the entire positive impact of a timely intervention. In other words, the advantages that can be attained by the provision, in various European legal systems, of preventive restructuring frameworks end up frustrated by the co-existence of the heterogeneous disciplines with which the emergence is pursued and the timely regulation of financial distress. The harmonization of European rules is accomplished, therefore, on the basis of *minimum common precepts* that, for tolerating the possibility of some derogations on the part of national law,[101] prescribe legal

[100] *See* Directive, *supra* note 7, recital 22 ("The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be."). It is worth noting how the EU legislator correctly emphasizes an aspect which, when analyzing the timeliness of the interventions to identify and regulate the crisis, is often underestimated. This aspect is the usefulness that the timely emergence of the (irreversible) financial distress ensures for the economic efficiency of liquidation bankruptcy in terms of greater profit from the business sale and greater satisfaction of the creditor class. *See generally* NICOLAES TOLLENAAR, PRE-INSOLVENCY PROCEEDINGS: A NORMATIVE FOUNDATION AND FRAMEWORK 15 (2019).

[101] The Directive actually ensures a certain margin of adaptation of its general principles to the specificities of national legislations. This aspect, which generally characterizes the functioning of the EU directives as opposed to the EU regulations, is extremely important because it reveals a new tendency against the national monopoly of insolvency law. For example, the Directive requires a judicial or administrative confirmation of restructuring plan only in three specific cases while in any other case Member States are empowered to decide whether or not to require it and under what conditions. *See* Directive, *supra* note 7, art. 10(1), (2). Similarly, the Directive establishes that "Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary". *Id.*, art. 6(1). Finally, the Directive also allows Member States to ensure that "a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors". *Id.*, art. 6(3). These choices assign national legislators a significantly stronger role than in the past in identifying the balance between the powers and duties of the subjects involved in the preventive restructuring proceedings.

requirements and effects that have to be valid for every type of instrument and/or proceeding aimed at the preventive restructure of financial distress. The harmonization of European rules is accomplished, therefore, on the basis of *minimum common precepts* that, for tolerating the possibility of some derogations on the part of national law, prescribe legal requirements and effects that have to be valid for every type of instrument and/or proceeding aimed at the preventive restructure of financial distress.

On the level of "Europeanization" of insolvency law, we are witnessing therefore, by a radical change in approach on the part of the E.U. legislature; an approach, very common in many areas of law, but certainly new in that of insolvency law. As mentioned previously, the harmonization today becomes the result of a work of internal adjustment to individual legal systems, entrusted (and set) by the E.U. legislation to decentralised regulatory interventions, without the need to impose – beyond the mechanisms for the functioning of the E.U. legal space – a normative (and, at times, somewhat bureaucratic) "superstructure" composed of rules for coordination rules between proceedings and obligations of cooperation between bodies. E.U. insolvency law is no longer, therefore, only an instrument for dialogue between different legal systems that are not harmonized, but becomes also, and above all, a *new normative language*, created and reformed according to common rules in individual national legal systems.

The most interesting aspect of this new normative language is composed of its innovative approach to regulation of insolvency and financial distress; and that is not only in the sense that the legislature favours the prevention of financial collapse (in place of a declaration of insolvency) and the restructuring of debt with reorganization of the company (in place of its liquidation), but above all in the sense that the legislature seems to favour a balance in the relationships between the debtor and the creditor class that notably differentiates with respect to the traditional approach prevailing in European legal systems. From this perspective, the E.U. discipline surprisingly reveals itself to be in synchrony with the interpretive guidelines accepted in common law systems and as observed in the next part of the present article,[102] above all in the U.S. legal debate.

Now, this is certainly not the place for indulging in a detailed analysis of the individual partitions and rules that form the Directive; nonetheless, it could be interesting to reveal, in a general perspective, that there are some elements that introduce, effectively, a *new framework of*

[102] *See infra* Part VI.

interests at the base of the model of negotiated restructuring of debtors in financial crisis. The new framework values above all the interests of the creditor class; but this value is not accomplished through a generic disfavour towards the debtor (who, on the contrary, remains the debtor in possession and benefits, upon request to the legal authority, from an automatic stay of individual executive actions), but through recognition of the creditors in a more incisive and efficient role in shaping the restructuring framework. Until the regulation of financial distress and insolvency shifts in perspective – long dominant in national legal systems – of maximising the proceeds during the (public or negotiated) sale of debt, the role of the creditor class will inevitably remain marginal and passive. The Italian law offers a very eloquent example of this. In fact, even without considering the marginal contribution of creditors to the conduct of insolvency procedures, which is mostly limited to the authorization function through the representative body, the creditor class also plays a secondary role even in the restructuring proceedings.[103] The absence of an autonomous legitimacy (but only concurrent and incidental) with respect to that of the instant debtor, the essential judgment endorsement of the composition agreement and, finally, the absence of rigorous conditions for the *cram down* judgment put the creditor in an inevitably weaker position compared to the concordant debtor, who competes notoriously for the management and the disposition of nearly all the debtor's assets, and above all, the protection deriving from an automatic stay. All this leads to considering the composition plan as an instrument in which the best satisfaction of the creditor class is

[103] *See* Italian Bankruptcy Law, *supra* note 54, art. 160, 177. A marginal role of the creditor class can be tolerated in bankruptcy liquidation in which the court has the authority to control the insolvency proceedings and the trustee is empowered to collect and liquidate the property of the bankruptcy estate and use the proceeds to pay creditors claims. Instead, a marginal role of the creditor class can be deemed as extremely negative in a reorganization or rehabilitation bankruptcy. In fact, in cases where the debtor is asked to formulate a plan to pay its creditors, the prevailing purpose is to achieve a new and more efficient balance between the interests of the debtor and those of the creditor class. The more creditors engage in the insolvency proceedings, the more they are interested in approving the restructuring or rehabilitation plan. The role played by creditors serves the economic efficiency of insolvency proceedings by ensuring that the plan reflects their interests and increases the likelihood it will be approved. The Directive is noteworthy on this point. It allows Member States to provide that preventive restructuring frameworks are available not only on application by debtors but also "at the request of creditors and employees' representatives, subject to the agreement of the debtor". *See* Directive, *supra* note 7, arts. 4(8), 9(1); *see also id.*, recital 65 ("It should be possible for any amendments to the plan to be proposed or voted on by the parties, on their own initiative or at the request of the judicial authority.").

functional to the achievement of purposes that are pursued by the debtor in terms of liquidation of their assets for the release from outstanding debts or debt restructuring for corporate restructuring or, in any case, for the resumption of business activity.

The Directive, on the other hand, ensures a different structure for the interests involved in the management of financial crisis through preventive restructuring frameworks. First, it should be noted that the category of preventive restructuring frameworks does not naturally aim at introducing a debt restructuring instrument into national legal systems that works, so to speak, in combination with those existing therein, but rather to provide a regulatory model – binding for the most part – for the creation of new instruments or, more often, for the adaptation of pre-existing instruments in the various state legal systems. The preventive restructuring framework is, therefore, a regulatory framework, largely variable, imposed on Member States to harmonize the timely management of reversible business crises. It has been developed to adapt to many of the characteristics that distinguish single national legal systems. In other words, the objectives set by the E.U. legislature can be pursued – at the national level – in rather different ways, without disregarding some essential and non-derogable principles that characterize the reform intervention.

Among these principles, the timely and preventive nature of the debt restructuring intervention must certainly be included; an aspect closely related to the obligation to introduce the so-called early warning tools into state legal systems that must guarantee the identification, in a clear and transparent way, of situations that could lead to the probability of insolvency and the reporting to the debtor the need to act "without delay"[104] to remedy them. Nonetheless, alongside this main aspect, another one can be selected, largely connected to it. It is, as mentioned, the framework of interests upon which the agreement between debtor and creditors is based to obtain a debt restructuring that prevents the onset of the financial crisis and insolvency. And this is an interest structure in which the purpose of restructuring is pursued taking into account above all the variety of credit positions and the repercussions that the preventive restructuring framework can have beyond the area of the debtor's assets.

The choice to identify the category of creditors through the broader concept of "interested parties"[105] constitutes a first essential indication of the new approach to the relationship between debtor and creditors

[104] *See* Directive, *supra* note 7, art. 3(1).
[105] *See id.*, art. 2(1)(2).

offered by the E.U. legislature. This approach was intended to enhance, above all, the *versatility* of a concept – that of a creditor in fact – in relation to the business financial crisis or insolvency.
On the other hand, the use of the notion of "creditor" in the context of insolvency law usually assumes the value of a real synecdoche, with which the law indicates a complex subject that is very wide and heterogeneous referring to only one part of it and, especially, to that which has the most representative capacity. The holders of real and personal rights of enjoyment on assets that are in possession and therefore at the disposition of the debtor constitute, for example, a homogenous group of subjects (fewer than the real creditors, but) equally interested in the bankruptcy liquidation or the endorsement on the proposed composition plan. But there is more. The same category of creditors, if they are considered in a purely generalized dimension and free from the details that distinguish the single obligatory relations or, at least, the single paradigmatic types, loses much of its usefulness. It is true that the legislature, with reference above all to the composition proceedings, assigns to the debtor the obligation to introduce these distinctions for homogenous economic categories, but there is no doubt that the debtor's initiative in the matter of classes does not often satisfy the need for adequate representation of the creditor class, neglecting the importance of enunciating special homogenous categories beyond the tradition contrast between secured and unsecured creditors.
And indeed, categories like workers, in their multiple and complex variations, or that of suppliers, a category that is equally internally heterogeneous, make it possible to organize debt restructuring plans in a way that is more in keeping with the complex interests at play. The U.S. experience of Chapter 11 – which will be widely referred to in the next part of this article[106] – offers a clear demonstration of this when, in relation to debtors with a complicated capital structure, there are often several classes for multiple debtor entities, for multiple unsecured bond issuances, for the unsecured creditors and for various equity interests.[107]
The E.U. legislation now seems to give space to this variety of interests and substantial claims, bringing the category of creditors back into the area of the so-called "affected parties".[108] This new segmentation of the

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[106] *See infra* Part VI.
[107] *See generally* BUSSEL & SKEEL, *supra* note 34, at 588-89. See also *In re U.S. Truck Co.*, 800 F.2d 581 (1986); *Matter of Greystone III Joint Venture*, 995 F.2d 1274 (1991).
[108] *See* Directive, *supra* note 7, art. 2(1)(2) (defining the affected parties as "creditors, including, where applicable under national law, workers, or classes of creditors and,

subjects who make claims against the debtor that is insolvent or in financial difficulties is identified, in particular, by a double regulatory limit: a positive one and a negative one. First of all, the Directive has attempted a definition of affected parties, revealing how the legislature's intention was to widen as much as possible the participation in the preventive restructuring framework. Not only the creditors, identified also through classes and, in particular, the workers but also the holders of equity instruments (the so-called equity holders) whose interests – even not purely creditors[109] – are involved in preventive restructuring plan. They also have a role in the formulation of the plan that must prevent the onset of the debtor's financial and asset distress. These regulatory indications shape the positive limit of the category. The concept of "affected parties" drawn by article 2 of the Directive[110] remains on a substantially *wide* definition; this is due, first of all, to the variety of creditors that can be involved in the preventive restructuring framework. According to E.U. legislation, in fact, alongside the traditional distinction between secured and unsecured creditors, a specific, distinct class can be reserved for workers and vulnerable creditors, like smaller suppliers.[111] But, even more, the variety of interests that can be involved in the preventive restructuring framework lends itself to be modulated according to the needs of the specific case, given that the Directive allows the exclusion from the right to vote those parties who, to varying degrees, have lower credit claims or lower chances of obtaining satisfaction through the restructuring plan like, for example, respectively, the holders of equity instruments or creditors ranking lower than unsecured creditors.[112]

According to the Directive, the non-affected parties to the preventive restructuring framework cannot constitute, however, a generic and

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where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan").

[109] *See id.*, art. 2(1)(3) (defining the equity holder as "a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, *in so far as that person is not a creditor*") (emphasis added).

[110] *See id.*, art. 2(1)(2).

[111] *See id.*, art. 9(4). It is worth noting that this provision (does not prescribe but) merely establishes the possibility that the Member States allow the debtor to apply for preventive restructuring frameworks in which the subdivision of creditors into two or more classes takes into account, in particular, the specific nature of credits in relation, above all, to the vulnerability of the underlying contractual relationship. *See id.* Therefore, the provision shows that one of the primary purposes of the EU legislator is to promote a classification of creditors that is consistent with the specificities of each situation of insolvency or financial distress. *See also infra* Part VII.

[112] *See* Directive, *supra* note 7, art. 9(3).

uncertain category. They are, rather, the "non-affected parties"[113] opposed to the "affected parties"[114] and, equally to the latter, must be identified in the preventive restructuring framework. In particular, the non-affected parties must be "named individually or described by categories of debt in accordance with national law … together with a description of the reasons why [the restructuring plan] is proposed not to affect them".[115] The number of parties that can be excluded from the restructuring plan therefore constitutes the negative limit of the subjective scope of the preventive restructuring framework. It enables above all to affirm that the restructuring plan is not strictly an insolvency instrument, since it may well adapt itself to a restructure that involves only some of the stakeholders involved in the debtor's financial distress; but above all makes it possible to enhance in new terms the content of the restructure and of the consequent prevention of financial crisis.

The preventive restructuring could, in other words, be achieved also through solutions that focus only on some of the credit positions that are at the origin of the debtor's *current and future* financial difficulties: if there is no doubt that not all the creditors must be involved in the preventive restructuring framework,[116] it seems however conceivable, in light of the potentials of the directive, that the position of subjects who, for example, have not yet accrued due receivables (but which will accrue within a certain period of time) may be involved in the restructure plan. Likewise, it seems conceivable, according to the indications

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[113] *See id.*, art. 8(1)(e).

[114] *See id.*, art. 2(1)(2).

[115] *See id.*, art. 8(1)(e).

[116] *See* Directive, *supra* note 7, art. 9(6) ("A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class."). *See also id.* ("Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class."). It is worth noting that the Directive seems to subordinate the approval of the preventive restructuring framework to requirements that are more severe than those provided for by several national legislations such as the Italian Bankruptcy Law and the Italian Insolvency Code. Under the Italian law, in fact, the majority of creditors who are admitted to vote the reorganization plan are asked to approve it. When creditors are divided into several classes, the Italian law dictates that the reorganization plan is approved only when the majority of creditor classes also approve the plan. *See* Italian Bankruptcy Law, *supra* note 54, art. 177; Italian Insolvency Code, *supra* note 72, art. 109. For the German legal systems, see PRÄVENTIVE RESTRUKTURIERUNG. KOMMENTAR UND HANDBUCH ZUR EUROPÄISCHEN RICHTLINIE ÜBER PRÄVENTIVE RESTRUKTURIERUNGSRAHMEN 3 (Christoph Morgen ed., 2019) (Preventive Restructuring. Commentary and Handbook on the Directive on Preventive Restructuring Framework).

that can be obtained from the directive, that the position of the subjects whose credits are already due may instead be considered in the same way as the non-interested parties in view of their (full) satisfaction post-restructure.

The role assigned to non-interested parties in relation to preventive restructuring frameworks is, therefore, just as decisive as that assigned to interested parties. And this constitutes a notable change in perspective which, albeit with difficulty, will also have to be accepted by the national legislature, called to revolve their own attention far beyond the category of creditors interested in solving the financial crisis as bearers of due claims. It may be hoped, for example, that the application of the directive induces the Italian legislature to allow greater adaptability of the restructuring tools to the needs of subjects such as holders of credits not yet due or debtors of the debtor in crisis. If the preventive restructuring frameworks must operate in a condition of financial *crisis* or, even, of pre-*crisis* of the debtor at the end of avoiding the irreversible decline of their financial position, the management of the debtor's financial distress must be carried out in a *prospective* dimension; one that takes into account the interests of existing relationships on the part of the debtor, of their possible development in time and, lastly, of their possible failure on the financial position of the debtor. This logic already partially responds to the attention that the discipline of debt restructuring agreements reserves, for example, for the moratorium on foreign credit and not yet expired loans, providing that they can be fully satisfied by the debtor within 120 days of their expiration. But the Directive invites the state legislature to further broaden its perspective,[117] potentially involving in restructuring frameworks also subjects who are interested in the development of the entity's capital situation – and, therefore, in restructuring and business continuity – without being able to claim immediately expendable claims against the debtor.[118] It seems recognizable, in other words, a breakdown of relationships of dependence – usually, instead, very strict in insolvency regulation – between the expiry of debt and its restructure, insomuch as the debt restructure often becomes synonymous with a complex activity of redefining the conditions for satisfying the sole credit claims that slowly become due.[119]

[117] *See* Paulus, *supra* note 86, at 4.
[118] *See id.*
[119] *See generally* MCCORMARK, *supra* note 88, at 16; TOLLENAAR, *supra* note 100, at 134; GOODE, *supra* note 86, at 14; *see also* IRENE LYNCH-FANNON & GERARD MURPHY, CORPORATE INSOLVENCY AND RESCUE 115 (2nd ed. 2012).

The restructure, as mentioned, could also be achieved even through the inclusion of subjects who are not holders of receivables (or receivables due), but who nevertheless qualify as “affected parties” according to the Directive.[120] Thus, while the receivables the persistence of which does not hinder the restructuring of debt may remain extraneous to a preventive restructuring framework in relation, for example, to the beneficiary of the exclusion of the automatic stay on individual executive actions,[121] *vulnerable* creditors – like, for example, small suppliers and workers – can be involved in the restructuring framework whenever their position, without being necessarily due or, however, needing an urgent payment, facilitates the debtor’s asset reorganization. These subjects,[122] to which the E.U. legislature devotes particular attention, would thus receive an evident double advantage, which is to be identified, on the one hand, in the satisfaction of their own substantial claim, and on the other hand, in the prevention – through the restructuring of others’ debt – of their own financial and equity distress, potentially induced by the crisis condition of its debtor and facilitated by the vulnerability of their own financial situation.

VI. THE U.S. NEW CREDITORS’ BARGAIN THEORY. A NEW VISION OF THE REORGANIZATION PLAN UNDER CHAPTER 11 VIEWED FROM A CONTINENTAL PERSPECTIVE.

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[120] *See* Directive, *supra* note 7, art. 2(1)(2).

[121] *See id.*, art. 6(4) ((“Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where: (a) enforcement is not likely to jeopardise the restructuring of the business; or (b) the stay would unfairly prejudice the creditors of those claims.”)). *See also* MCCORMACK, *supra* note 88, at 69. The variability of the regulatory regime concerning the automatic stay of individual enforcement actions represents an innovation in several European legal systems. For example, it is worth noting that the Italian law establishes that the automatic stay is a general effect that cannot be limited to some categories of creditors in all of the types of restructuring and rehabilitation bankruptcy. Only in cases where the automatic stay reveals itself as necessary to preserve the integrity of the debtor's estate until creditors have approved the plan, the Italian law empowers the court to decide whether to grant the stay or not. *See* Italian Bankruptcy Law, *supra* note 54, arts. 168(1), 182-bis(3), (6); *see also* Italian Insolvency Law, *supra* note 72, art. 54(2).

[122] *See* Directive, *supra* note 7, art. 33 (“No later than 17 July 2026 and every five years thereafter, the Commission shall present … a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers”).

Given the investigation carried out so far, we may now shift our attention towards the U.S. discipline and, in particular, the *New Creditors' Bargain Theory* recently developed in the literature. In the last two decades, the U.S. front, so to speak, has played a decisive role in the continental discipline, both at the supranational E.U. level, as well as the insolvency discipline in individual member States. The U.S. model can therefore be viewed in comparison to the Italian insolvency discipline, which has undergone an important reform and is about to undergo another, currently postponed due to the pandemic era.
The reforms are professedly inspired by the Chapter 11 model. In general terms, they are based on a system of restructuring a company in financial crisis (as a priority over its liquidation) considered to be *efficient,* based on a marked margin of (uncertain) *ex ante* valuation. The so-called professional attestator is emblematic of the *ex-ante* valuation, which inspires the commencement of the reorganization procedure in its various forms. Equipped with specific professional qualifications, the professional attester is an external figure who must precisely attest to a situation that is, by definition, prospective and often unknown (such as the plan to be presented by the debtor),[123] according to a scheme that, like the entire system, is *debtor oriented*. However, development in the law of a possible agreement between creditors and debtor, who are placed symmetrically on the same level, collides with the asymmetrical information between them, information only filtered (*ex-ante*) by the attestation of the professional chosen by the debtor themselves.
The reference to Chapter 11, as providing the reference model for the renewed bankruptcy law and, most recently, for the Italian Insolvency Code is, or was, like Rossini's eponymous opera, *l'inganno felice* ["a fortunate deception"]. Fortunate, as it has undoubtedly endorsed a seismic shift in policy in terms of the approach to insolvency legislation. A deception, since, right at that time (about fifteen years ago) the "fundamentals"[124] of the Chapter 11 reference were partially disregarded, both from a structural perspective, and from the, albeit typically American, theoretical framework of law and economics that permeated the theoretical debate. It is at this point from which it seems interesting to conduct an evaluation from a partially different perspective, at least at a

[123] *See* Carlo Amatucci, *Concordato preventivo e (dis)continuità del management tra Chapter 11, Administration e Disqualification*, 7 GIURISPRUDENZA COMMERCIALE, 819 (2019) ((Agreement with Creditors and Management (Dis)Continuity Between Chapter 11, Administration, and Disqualification)).
[124] *Primus inter pares,* the physiological change of the management of a firm in financial crisis as presupposed by an objective valuation between the choice to continue or to (even partially liquidate). *See* Amatucci, *supra* note 123, at 828.

methodologic: the opportunity is in fact provided by a change that appears epochal, even in the American level debate on the point.
A recent article from Anthony J. Casey appearing in the *Columbia Law Review*[125] has acutely questioned the policies traditionally believed to guide U.S. corporate bankruptcy law. The reading of an article this important not only elicits a look of admiration towards the *quomodo* [means by which] the doctrine can enhance the theoretical debate, but above all causes us to ponder if, and how, it might provide *food for thought* for the debate on insolvency regulation, both at the E.U. level above all, the national level in individual member states. Doing so requires us to first conduct a brief examination of the "before" and the "after" in Casey's recent article – which is focused exclusively on U.S. law – through the eyes of a European scholar. The objective of Casey's article is evident from the first lines, wherein, in Socratic fashion, he establishes the premise for "his" vision (and the underlying reason for which there must be a vision) by asking the reader: *Why does the legislature provide a special regulatory framework for financial distress?*
The answer, according to Casey, contrary to the until-now prevalent approach, in short, is that: "the corporate bankruptcy law's proper purpose is to solve the incomplete contracting problem that accompanies financial distress".[126] In other words, the first (and we will see, largely well-founded) impression is that, not only is the change in policy proposed by Casey remarkable from the perspective of the U.S. debate, but above all, retrospectively, it casts a very different light on the (at least majority) vision of Italian insolvency reforms of the last decades, at least insofar as how they have mostly been "explained" and "justified" by the drafters and the extensive commentary that followed. In my opinion, therefore, it is worth exploring Casey's new theory, also in light of the planned and incipient changes to Italian law.
This could be considered a legacy acquired from U.S. insolvency law and not just of the so-called *Creditors' Bargain Theory*, which was certainly a product of its time and of the mainstream culture during the golden age of law and economics, substantially focused on maximizing the debtor's economic value.[127] The prevailing ideological environment

[125] Casey, *supra* note 24, at 1709; *see also*, Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NORTHWEST. UNIV. L. REV. 775 (2019).
[126] Casey, *supra* note 24, at 1711.
[127] *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlement, and the Creditors' Bargain*, 91 YALE L. J. 857 (1982); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 UNIV. OF

of *what the law should be* prompted some important US scholars not so much to provide a justification for the Chapter 11 rules, but more so to propose a vision of what the legislation should have pursued. The perspective was therefore to justify the existence of bankruptcy law as an instrument for the realization of a "hypothetical bargain" for creditors.[128] Even if this is not the place to retrace one of the most relevant theories of law and economics, it is opportune to specify, for the purposes of this article, the meaning of the "hypothetical bargain", when applied to corporate financial distress. The objective of the legislation on corporate financial distress is (or would be) to claim or even "imitate" the agreement that the creditors would have reached with the debtor if they had contracted between each other, individually, regardless of the crisis itself. Essentially, a negotiation of insolvency according to a purely abstract contractual scheme, which would imitate a "perfect" bargain, *ex ante* (to the financial distress), at no cost and with maximum reciprocal information between contracting parties. The *Creditors' Bargain Theory* has (had) a further theoretical justification, typically on the basis of policy. It is pursuant to this justification, which I will highlight shortly, that is worth making some further reflections in terms of the model and impact that it has had, and continue to have, for European, and above all, Italian legislation, in light of Casey's criticisms and the new model for Chapter 11 that he suggests in his article. The perspective of this prevailing theory on reorganization – based on the *hypothetical bargain theory* – is an *ex-ante* perspective. This means that the very existence of a bankruptcy reorganization (Chapter 11) is not only justified by economic utility of a better valuation of the debtor's assets, like the effect on the rights of the creditor of a negotiation procedure conducted with debtor not *uti singuli* [individually], but collectively. However, it gains its rationale above all from the aforementioned *ex-ante* perspective, which affects how such a collective negotiation should be planned and how it impacts the economic results of the credit claims. In fact, it should ensure, through those claims, exactly the utility that, *ex ante* (to the crisis or insolvency of the debtor) each creditor could have acquired if the financial distress had not occurred. The expectation of credit is focused (and affects the success of the reorganization), in good part, on the potential bargain of creditors, rather than on the current possibility of satisfaction due to

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CHICAGO L. REV. 97 (1984); Lucian A. Bebchuk, *A New Approach to Corporate Reorganization*, 101 HARV. L. REV. 775 (1988); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEXAS. L. REV. 51 (1992).

[128] David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

the prevailing financial distress. This dominant approach, at the basis of Chapter 11 to date, is (was) based on the so-called *Butner* principle (from the leading case *Butner vs. United States*).[129] Namely, the primacy of protecting so-called *non-bankruptcy entitlements*; that is, the parties' rights as stipulated *before* the onset of a financial distress, and therefore considered not to be included within the remit of a legal discipline that aims to regulate insolvency or a presently-unfolding financial distress. To such an extent that the US literature goes so far as to affirm that "bankruptcy law should exist, essentially, in order to serve the interests of the holders of nonbankrupt legal entitlements". [130]
If we consider that the 2006 Italian legislature declared itself to be inspired by the model of Chapter 11, we realize that this reference was in large part illusory, considering the-then dominant *Creditors' Bargain Theory*, centered exclusively on a policy of *economic value*, as opposed to other policies that are, in short, *socially-oriented* (especially like those relevant to the level of employment of a firm in financial distress and the repercussions it has on the welfare system). The Chapter 11 revealed a basic ideological choice, product of its time, and valued on a vaguely *law and economics* level; an *ex-ante* perspective and assumption of deemed equivalence that that which represents the purpose of a *solvent* firm (profit), must be pursued by the regulation of *insolvency*, first of all on the creditors' side.[131] In essence, the *ex-ante* perspective constituted a fictious model, so to speak, aimed at designing an approach by the *parties* (creditors and debtors) completely regardless of the intervening financial distress, and above all, the variables that could have otherwise rendered unenforceable the various contracts of the reorganization plan.
The reference to Chapter 11 by the Italian legislator undoubtedly can and could refer to the reduction of strategic costs deriving from the blocking of individual executive actions, combined with the maximization of the debtor's overall economic value, through a block sale of the debtor's assets, not removed from the fact that the buyer may not be only a third party, *but one of the debtor's very creditors*.[132]

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[129] *Butner*, 440 U.S., at 54.
[130] *See* Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure,* 61 WASH. & LEE L. REV. 934 (2004).
[131] *See* Richard V. Butler & Scott M. Gilpatric, *A Re-examination of the Purposes and Goals of Bankruptcy*, 2 AM. BANKR. INST. L. REV. 269 (1994). *See also* Jackson, supra note 127, at 860 ("[T]he Creditors' Bargain approach involves view[ing] bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were, they able to negotiate such an agreement from an *ex-ante* position.").
[132] *See* Jackson, *supra* note 127, at 864-68.

Nonetheless, the reference to Chapter 11 appears to be remedied in the renewed structure of insolvency legislation – whether still in the original framework of bankruptcy law, or today in the new draft *Codice della crisi*. In fact, in the aftermath of the first reform movement of 2005-2006, the *Creditors' Bargain Theory* was unchallenged and drew upon Chapter 11 as an operative instrument aimed at achieving its purpose. Consciously or not, the inspiration of an ideologically very particular and policy-oriented reference model, namely that dominated by the *Creditors' Bargain Theory* (perhaps even beyond its intention) shaped the very marked initial and almost unanimous approach towards a mainstream "privatization" of bankruptcy. Where, of course, this approach came into conflict not only with the significantly different approach of much meritorious jurisprudence, but above all with the general approach of the then current (albeit now outdated) bankruptcy law, which had nothing to contribute with its non-interference with so-called *non-bankruptcy legal entitlements*.
Times they are a-changin': a brilliant law and economics scholar from the Chicago school dares, so to speak, to defy the monolith of the *Creditors' Bargain Theory,* interrogating it from a more basic premise. Does this theory respond to the question of *what is the utility of "bankruptcy" law*? And, most importantly, does the Chapter 11 legislation reflect that theory or, conversely, has it been bent to reflect that theory?
The answer arises from a pre-assessment of the applicability of the seminal economic theory of so-called *incomplete contracts*.[133] In simplified terms, Casey's intuition, albeit to be evaluated within a way of thinking that is exclusively (or almost exclusively) "foreign" to continental European legal systems, arises from the observation of the inconsistency (if not the error) of the *Creditors' Bargain Theory* – if it applies to bankruptcy law – of the (crucial) part in which the hypothetically *ex-ante* bargain of creditors is based on the deemed efficacy, in the face of financial distress, of a renewed *complete contract* between creditor and debtor, in the fiction that could be concluded at zero cost and with maximum information. Which is not, I add by way of definition, correct, in the case of financial distress and/or insolvency (and the application of the laws that govern its effects). High costs and, at best, limited information, are the parameters within which the law of insolvency

[133] *See* Sanford J. Grossman et al., *The costs and benefits of ownership: A theory of vertical and lateral integration*, 94 J. POLIT. ECON. 4 (1986); *see also* Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 THE REV. ECON. STUD., 115 (1999). For an application to the field of contract law, see also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 92-93 (1989).

necessarily moves, in the face of the empirical uncertainty that characterizes (or characterized) the conclusion of a contract before insolvency, and qualifies *ex-post* its possible continuing effectiveness and methods of execution *after* insolvency.[134] Further, I would add, there is an uncertainty that inevitably conditions the parent contract itself, so to speak, of the reorganization, which we know as the reorganization-conservation plan contained in the proposal-acceptance scheme between debtor and creditors.

To the contrary, the *New Bargain Theory* aims to assign a predefined role to Chapter 11 as a regulatory response to the physiological event of the company's financial distress, hence it is not foreseeable and negotiable *ex ante* on the part of the debtors and individual creditors. In this sense, it represents a radical abandonment of the *Butner principle,* surprisingly heading towards a direction that, like it or not, appears much less American and decisively more European: one in which bankruptcy law cannot help but affect the rights of creditors as they were formed prior to the onset of the crisis. This regulation must be able to balance relationships between the debtor and the creditors according to a negotiation scheme dominated, on the one hand, by a sense of uncertainty regarding the solution to the financial distress and, on the other hand, by the attempt to commence such a negotiation in order to derive value from this uncertainty: an efficient regulatory framework for corporate financial distress, to be such, *must be able to create more value than it has destroyed.*

The first consideration is based on the unpredictable and multifaceted variety of causes that give rise to the crisis.[135] The multiple and genetically different causes of the financial distress are, by definition, the first element that inevitably (I dare say) renders the renegotiation of contractual relationships between debtors and creditors *incomplete*, which must or should find completion in the reorganization. This

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[134] *See* Casey, *supra* note 24, at 1172 ("The real problem for any bankruptcy contract – or legislation – is not in convening the bargainers. It is in dealing ex post with the incomplete terms those parties actually drafted. This is a classic problem in law."). *See also* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187 (2005); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law,* 113 YALE L.J. 545 (2003); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 730 (1992).

[135] *See* Casey, *supra* note 24, at 1738-39 ("[E]very firm is distressed in its own way. Overhang and illiquidity might be caused by failed expansion, a cyclical downturn, technological change, a systemic liquidity shock, a supply shock, a demand shock, new competition, bad management, asymmetric information, a global pandemic, or any combination of these or the many other possible candidates.").

approach becomes even more interesting if we analyze the objective that insolvency regulation aims to achieve. That is not just the obvious and generic objective of company preservation, but that more ambitious, and if you like, *profit related* objective: to create more value than financial distress ultimately destroys. Employing a parameter of *efficiency*, therefore, provides the necessary answer as to why the legal system – any legal system – must provide an *ad hoc* law to regulate insolvency (in this sense, "special").

The immediate consequence of the various possible causes of the financial distress is manifested precisely with regard to the policy of the bankruptcy legislator, at the same time constituting the basis of overcoming the until-now dominant *ex ante Creditors' Bargain Theory* and legitimizing, almost naturally, a different *ex post Bargain Theory.* This not only translates, I would say, almost naturally into the fact that the legislator cannot provide a general model of re-organization that is equally valid regardless of the cause of the distress, but also that, in terms of efficiency, an economic model of *hypothetical* renegotiation between debtor and creditors that fails to take into account the so-called *bargaining costs* resulting from financial distress proves to be inconsistent with a law that aspires to regulate financial distress in an active (creating net value) rather than passive (liquidation) way. To the contrary, Casey's theory of *incomplete contracts* provides an efficient framing for bankruptcy law and therefore a basis from which a regulation suitable to favor an optimal outcome should derive. [136] In fact, the reference to the general scheme of so-called *incomplete contracts* is suited perfectly to negotiations that are established following the onset of the crisis, with reference to the negotiation that took place between creditors and debtor prior to the crisis. The contracts stipulated *ex ante,* in fact, can be qualified as *incomplete* – at the onset of the crisis – because they could not foresee the two non-negotiable factors of high costs[137] and the correlated asymmetry of information. For example, the debtor is undoubtedly in possession of information concerning their business from a financial and industrial point of view that – if not

[136] *See id.*, at 1741; *see also* Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 687 (2010) ("[H]olders of the same type of claim can have different incentives and abilities, and thus hinder optimal outcomes").

[137] The high costs are not just those ascribable to the costs of the reorganization procedure, but also, for example, to those that would be tolerated by an erroneous provision of reorganization, wherein the rule, for example, of *automatic stay* – useful and indispensable for the situation of an *ex post* correct perspective of reorganization – reveals itself to be detrimental and inefficient, resulting in a delay of satisfaction of creditors faced with an ailing and irreparable firm.

adequately shared – has altered the terms of the *ex-ante* negotiation, opening the way to hold each other up. Thus determining – in the abstract – also a possible inefficiency of *ex post* negotiation.
Concretely, it is precisely the special "insolvency" law that prevents, for example, creditors from executing individual attacks on the debtor's assets. The impossibility of regulating the incomplete contract *ex-ante* due to the unpredictability of the causes and the duration of financial distress finds in the *ex-post* perspective (that is, to crises that occurred as a pre-condition for the application of the special "bankruptcy" law) the basis for a *controlled* renegotiation, so to speak, in the fold of an insolvency *process.*[138] A *process,* in the example given, which provides for and justifies the provision of the automatic stay rule as a counterweight to the *hold up* by creditors.
This approach reveals a decisive change in course. It means, in fact, and first of all, to take for granted a "little risk of market distortion",[139] that the transaction traditionally delegated to the judge, of *filling the gaps* in information for each single renegotiated contract between creditor and debtor. The filling of these gaps must be timely, competent, unitary (i.e.: within the framework of a single specialized judged) and therefore instrumental in avoiding single *hold-up* instances, which could undermine the efforts for a coordinated renegotiation at the basis of the reorganization plan. The *procedure* becomes precisely *ex post* the ideal controlled legal space for the reorganization of a contract, by definition, incomplete. The presence and the powers of the judge therefore constitute a guarantee that the renegotiation of contracts takes place with a balance between opposing interests: facilitation and control, essentially a good outcome of an *ex-post* negotiation suitable to cover the gaps that would exist in the context of a negotiation purely *conducted* on a substantial level. The renewed theoretical-economic framework of Chapter 11 stimulates a far-reaching reflection on the approach by the Italian legislator to insolvency law, and as a participant in the European plan on the subject.
From the perspective of the U.S. regulation, the turning point marked by the theoretical framework of incomplete contracts as a reorganization model leads, I would say to the surprise of many, towards a rereading of Chapter 11 that is less liberalist and more *liberal,* if we can use these terms. Simply, it occurs to me how placing Chapter 11 in the context of economic analysis – already employed as the prevalent framing due to the *Creditors' Bargain Theory* – allows us to rebalance a

[138] *See* Casey, *supra* note 24, at 1730-31.
[139] *See id.*, at 1745.

system structurally qualified *not* to be debtor-oriented, but rather mainly centered on the initiatives of the creditors themselves to the reorganization plan, at least starting on the same equal footing as the debtor. Nonetheless, from this basic consideration, a renewed suggestion emerges for a *retrospective* assessment of the regulatory evolution of the crisis and insolvency in Italy, also in light of the Directive. This retrospective assessment starts with the approach that marked the beginning of the "change", between the contingent needs and vague comparative aspirations, mostly descriptive and decontextualized.

Given Chapter 11 is the declared reference model for the Italian reforms, what does the change of direction, so to speak, provided by the *New Creditors' Bargain Theory*, in light of the new Italian Insolvency Code, suggest?

The first observation that emerges from the historical perspective is the following. The introduction of the (subsequently) declared reference to Chapter 11 into the Italian insolvency system is due to the so-called *Parmalat agreement*, which was established by the *ad hoc* emergency decree issued pursuant to the law of extraordinary administration of large companies in crisis.[140] If anything gave Italy confidence in the Chapter 11 model, it was the insolvency of Parmalat, a peculiar situation occasioned by a specific series of factors referable to that insolvency: firstly, the insolvency emanated from purely financial, not industrial, causes; secondly, the "rescue operation", so to speak, was made possible not just by the promulgation of the *ad hoc* law, but above all by the introduction of underwriters, as the main "guarantee" for an *ex-post* creditors' negotiation. If, therefore, on the one hand, the matter and the regulation of Parmalat's insolvency was "extended", so to speak, to a general model for an arrangement with creditors in the renewed legislation (and then trickled down to other negotiable instruments for the management of insolvency) – in this indirectly echoing the model of Chapter 11 – then the *sui generis* nature of that case has been underestimated, in my opinion. Indeed, the Parmalat case should have pointed to some issues that cast doubt on the deemed equivalence between the Italian law on the one hand, and Chapter 11 and the "privatization" of bankruptcy on the other.[141] Namely, the involvement in

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[140] *See* L. 18 febbraio 2004, n. 39 (It.) (Italian Law of 2004, Pub. L. No. 39) (concerning the industrial restructuring of large companies in a state of insolvency).

[141] So much so that it was acutely observed how Italian law n.39/2004, if evaluated comprehensively, presented contradictory elements, between the marked "administrationization" of the same and some specific provisions, which may be found also in Chapter 11, like the subdivision of secured creditors into differently treated classes and a determinant vote on the agreed upon plan, that exalted more than a clear

the Parmalat situation by the "public" (being the declaration of insolvency by the court, the appointment of a commissioner by the government, and the absence of any restructuring plan attested to by the debtor) (rather than "invisible") hand of the Italian law on extraordinary administration and, above all, by the liquidity recovered from the public purse and guaranteed by an underwriter, aided by the continued effectiveness of the core business underpinning the industrial plan, as well as the extraordinary strength of the corporate brand. Moreover, this process was facilitated by the-then strongly expressed Italian rules on bankruptcy law, which hardly could be said to have been inspired by the US model.
The success of the Parmalat operation, especially in terms of safeguarding jobs and company continuity, rightly justified making it natural model to replicate in general terms, when the reform was promulgated in 2006. The absence of the "public hand" in *launching* the bankruptcy procedure, more so than the reference to "foreign" legislation, extolled what was already emerging in the regulation of the Parmalat case, so that the motor of "*de-jurisdictionalization*" that started with *ad hoc* legislation in the Parmalat case (nonetheless in favor of an *"administratization"* of the procedure)[142] veered towards the so-called "privatization" of bankruptcy, which in the first years of application was markedly accentuated especially by commentators.
It is thus possible to note the differences between the system taken as reference (in some dispositive evidence of similarities, like the *automatic stay* and the *cram down*) – Chapter 11 – and the approach followed by the Italian legislator in 2005-2006. From a retrospective view of its subsequent mini-reforms, the differences emerge more clearly, thus suggesting a different prospective assessment. In fact, if we consider the structural differences of the US legislation – above all, the competition *ab initio* between a reorganization proposal by the creditors with the more "traditional" one by the debtor[143] – but precisely the

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reference policy, an adjustment to the peculiarity of the concrete case. *See* CONCETTO COSTA, L'AMMINISTRAZIONE STRAORDINARIA DELLE GRANDI IMPRESE IN STATO DI INSOLVENZA 634-35 (2008) (The Extraordinary Administration of Large Companies in a State of Insolvency).

[142] *See* Massimo Fabiani & Massimo Ferro, *Dai Tribunali ai ministeri: prove generali di degiurisdizionalizzazione della gestione della crisi d'impresa*, in 2 IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI 132, 134 (2004) (From Courts to Ministries: Attempts to Dejurisdictionalize the Management of the Corporate Crisis).

[143] *See*, *e.g.*, Michael G. Williamson, *The reorganization procedure in U.S. Bankruptcy law: Chapter 11*, in LE PROCEDURE CONCORSUALI VERSO LA RIFORMA TRA DIRITTO ITALIANO E DIRITTO EUROPEO 135 (Paolo Montalenti ed., 2018); Paolo Manganelli, *Gestione delle crisi di impresa in Italia e negli Stati Uniti: due sistemi*

policy framework to which this legislation was subject *illo temporare* [at that critical time] (being the aforementioned Creditors' Bargain Theory, which as we have seen now appears disregarded), it emerges that in Italy, the "privatization of bankruptcy" is a simple change in perspective in considering the arrangement with creditors as an *inter partes* arrangement – which is today preferable – in respect to the declaration of insolvency and the subsequent bankruptcy "procedure".

In other words, the insolvency pact, in the aftermath of the 2005-2006 reforms, was emblematic of a turning point that was decidedly "anti-jurisdictional". That is, the inefficiency of the bankruptcy system, mostly liquidation, due to the slowness which the *vis actractiva* [right of a court to take over a legal matter] moved disputes into the bankruptcy procedure. All of which was to the detriment of creditors, those who, following an application for the payment of their claims, saw themselves as passive spectators in a judicial castle, designed at a time when duration and the quantity of the dispute was not a problem, as it is now.

A diachronic evaluation of the subsequent changes (amendments) seems to confirm this assumption. It is opportune to premise this by saying that the legislative process succeeding the 2005-2006 reform's "correction" of the original system pursued, not to mention chased, the virus of progressive company financial distress which contaminated the productive system with (at least initially) exponential effects, starting with the sudden but global financial crisis of 2007. That is, it followed the already existing bankruptcy law reforms on the Chapter 11 model, which in any case made it possible to not be completely overwhelmed by the inexorable new approach that such a crisis postulated.

Nonetheless, two institutions have appeared, among others, more significant than a marked "privatization of bankruptcy", which, as has been said, first of all meant the progressive abandonment of the "bankruptcy procedure" derived from the declaratory judgment of bankruptcy. This is the so-called *blank agreement*, governed by article 161-*bis* of the Italian law and reiterated by the Italian Insolvency Code; and the so-called arrangement between creditors, originally and mainly conceived of in the process of absolute emergency due to a financial crisis in the construction sector, but which has since become mainstream in

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fallimentari a confronto, in 2 IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI 129 (2011) (Business Crisis in Italy and the United States: Two Bankruptcy Systems Compared); *see also* Corrado Ferri, *L'esperienza del Chapter 11. Procedura di riorganizzazione dell'impresa in prospettiva di novità legislative*, in GIURISPRUDENZA COMMERCIALE, 2002, 65 (The Experience of Chapter 11. Company Reorganization and Legislative Changes).

the regulation of the arrangement with creditors in the Italian Insolvency Code. The admissibility gradually recognized the majority doctrine[144] of the *blank agreement;* continued operation of a business as a going concern not only marks (undoubtedly) the *trait d'union* [common trait] between the two institutions, but above all reveals the legislative approach that inevitably pursues, so to speak, an (economic) situation characterized by two temporal connotations: being almost always *sudden* but requiring *timely and urgent* responses.
The aforementioned considerations bring us back to the *New Creditors' Bargain Theory,* posing a question: *if and to what extent is correct to argue in terms of "privatization" as such of the management of a corporate financial distress?* The question is by no means trifling – as we shall see – and Casey's renewed approach underlying Chapter 11 suggests a broader, and to some extent, surprising, answer. Given the declared reference to Chapter 11 as a model of the Italian bankruptcy law reform (even with its limits and substantial differences to the Italian law, first of all with regards to the role of the creditors themselves in accessing reorganization), "privatization" cannot mean access to a negotiation of insolvency that risks translating into *unrealizable* reorganization plans and programs. Reorganization plans and programs cannot be envisaged and certified according to an *ex-ante* perspective that does not take into due account not only the "costs" of the procedure, but above all the inevitable information asymmetries between debtor (in financial distress) and creditors, both at the time of contracting *in bonis* [while solvent], and even more at the time of the renegotiation following financial distress that has occurred.
In truth, the initial pronouncements around the "privatization turning point" denoted at most a partial reading of the American model, of the (essential) part of the role of the judiciary in the U.S system as a whole, and its wide discretionary power recognized by the application of the *rule of law*. That, in fact, the private "management" of insolvency could not be pushed beyond the proposal of the debtor in crisis as a way of accessing the arrangement with creditors was already revealed by the provision of the so-called *cram down* reserved for the judge empowered

[144] *See*, *e.g.*, Lorenzo Stanghellini, *Il concordato con continuità aziendale*, in 12 IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI 1322 (2013) (The Agreement with Creditors and Rehabilitation); Adriano Patti, *Il contratto di affitto di azienda nel concordato preventivo in continuità*, in 2 IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI 191 (2014) (The Company Lease Agreement and the Agreement with Creditors).

to approve the arrangement.[145] In fact, specifically that provision takes (took) for granted the opposite concern (so to speak), that the mechanism for completing the "negotiating" phase of the arrangement could present some gaps to be exploited by a negotiation conducted primarily with some creditors, to the potential detriment of other creditors, whose economic stake that did not appear attractive (with respect to the eventual liquidation of assets) to the former group. In other words, the intervention of the judge in the approval phase on the suitability of the proposed agreement for one or more classes of dissenting creditors (even if activated by the opposition of just one dissenting creditor in the class)[146] answer(ed) – I would dare say on the final and concrete plan of *pecunia decoctionis* [pecuniary bankruptcy] – the asymmetrical information of the outgoing negotiation and the potential distortions of the "private autonomy" in charge of managing insolvency.

All this appears even more evident if one considers how this bargaining represents an alternative and preventive measure to the declaration of bankruptcy and, at the same time, reveals how the rationale that must guide this measure is not a simple balance between the best satisfaction of creditors (reaffirmed by the Italian Insolvency Code, again in comparison with the eventual liquidation) and the net value that the restructuring plan contained in the proposed agreement can ensure[147] – in the

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[145] *See* Italian Bankruptcy Law, *supra* note 54, art. 180(4)(1)(f). *See also* Giovanni Lo Cascio, *Commento all'articolo 180*, in CODICE COMMENTATO DEL FALLIMENTO 2354-55 (Giovanni Lo Cascio ed., 2015) (Comment on article 180) ((describing the rule as an exception to the de-jurisdictionalization of the arrangement, since it introduces court control over the suitability of the agreement).

[146] It seems even excessive to argue, in our opinion, that the indispensable initiative of the dissenting creditor (of the dissenting class) wanted to represent a return to private autonomy with respect to judicial review at the time of approval on the convenience of the agreement for dissenting creditors. We must not confuse the two plans, in fact: the clarification of the necessary credit application represents a corrective, precisely, which re-establishes an equally necessary respect for the principle of demand; on the contrary, it has nothing to do with the (more hypothesized than actual) mainstream of the so-called "privatization" of bankruptcy, which emerges from these pages more as a declamation than an all-round legislative policy. The judicial review on the convenience of the arrangement, aimed at impeding approval, with all the possible flow-on effects, constitutes from the origin of the reform, not only a reference to the Chapter 11 model, but also a sign that the aspiration to a higher percentage of satisfaction on the part of the dissenting creditor acknowledges and attempts to resolve the initial possible gap that can derive – in the broader framework of the reorganization plan – from each incomplete contract stipulated by individual creditors with the debtor in crisis and that, as such, can find (only) in judicial review – also due to the evaluation of convenience – an equally indispensable moment to fill the gap.

[147] Even through *different utilities other than the payment of debts,* such as for example the possibility for some corporate creditors to maintain or resume commercial

logic of business continuity – without unjustified detriment, precisely, to some creditors with respect to others. Or, better still, without a still possible (and lawful) differentiation between the creditors themselves, not resulting from a sort of (even hypothetically) mendacity endorsed by private autonomy.

A very first retrospective evaluation of the state of art of Italian legislation on corporate financial distress – in light of the progressive change of the mainstream U.S. reference model – allows us to draw other conclusions that are, so to speak, surprising. The tension between the "privatization" of the regulation of crisis, hastily understood as a type of preventive and almost apodictic "*de-jurisdictionalization*", of the now clearly outdated, blunt approach of liquidation, not only revealed itself, in the aftermath of the 2005-2006 reforms, to be denied in the facts and the corrective measures of progressively intervening laws, but in a certain sense naturally (and inevitably, we would add) anticipates the correct balance between the role of the judiciary and the negotiated management of the financial distress that today appears to be the dominant turning point in the theoretical approach of the U.S. reference model itself.

In particular, precisely in light of this renewed basic theoretical framework of Chapter 11 from the particular perspective of economic analysis, today many debates on the limits of judicial power to "control" of the so-called feasibility of an application for an arrangement of creditors seem sterile; as it appears quite natural, and the epilogue of a natural path. One can also imagine the reluctance of all who think that the judicial power of control is equivalent to a sort of interference by the judicial authority with the sphere of private autonomy. Therein the term *interference* comes to be employed with a negative connotation, as a synonym for almost undue intrusion in the face of the legislator's choice to commence a path of negotiating financial distress management as the primary instrument to resolve the financial distress ahead of judicial liquidation as a sort of *second-best* option. However, it should not be overlooked that the Italian Insolvency Code, if already valued for its own general system, does not only confirm but even increases the role of the judiciary,[148] attributing to it a judicial review of

relations (even under different conditions) with a company once it has been restructured, considering the non-dispersion of wealth in the manner of a new attribution of wealth.

[148] *See* Cesare Cavallini, *Regolamentazione dell'insolvenza e iurisdictio*, in 5 RIVISTA DI DIRITTO PROCESSUALE 1001 (2019) (Insolvency Regulation and *Iurisdictio*).

the arrangement's functional feasibility, especially (as in the provisions of the Italian Insolvency Code itself) as a going concern.[149]
However, what is of interest here, in light of our extensive investigation into the new theoretical reference model of Chapter 11, is precisely the consonance between this model and the provisions of Italian legislation with regard to the role, in the course of checks by the judge, of "emerging" information defects that the judicial authority (organ and auxiliary of the Court) can detect following the application for an arrangement, even after it has been deemed admissible. If the information defect is intentionally perpetrated, it can even result in the revocation of the arrangement. Nevertheless, the role of the information frameworks as a reflection of the information defect "upstream" of the bargaining between creditors and debtor inevitably leads to scrupulous judicial review – also by the judicial commissioner's report – of the negotiation throughout the regime of going concern proposed in the plan (even if certified by the professional attestor). The judge must evaluate the balance between the negotiation in the agreement regime with the continuity and functional realization of the plan itself, intervening to ask about this already at the admissibility phase, but with the same role in the eventual withdrawal and approval stage, to obtain supplementary information and make a possible adjustment to the plan itself but above all to end up with an informed vote by creditors. Those creditors *ex ante,* so to speak, that in relation to *incomplete contracts* find themselves today in continuing relationships (or authoritatively interrupting them pursuant to art. 169-*bis* of the Italian law) achieving a measure of satisfaction (or compensation) that they would not have been able to negotiate *ex-ante,* due to the impossibility of negotiating a non-remote insolvency of their counterpart (and the effect this would have on the net value proposed by the relative contract).
From a broader perspective, in our opinion we should appreciate the basic theoretical remodeling of Chapter 11 according to the *incomplete contract* scheme, where, by valuing the intervention of the judge in filling the gaps (of the reorganization plan, from whoever proposed it), stresses the somewhat non-remote possibility (especially if the request comes from the debtor) that the plan itself places the burden of financial repositioning of the firm primarily on the creditors. This is an eventuality that we would define as almost physiological in the pandemic or post-pandemic era. And that *a fortiori* finds new life in the framework

[149] *See* Corte di Cassazione Sezioni Unite Civili [Supreme Court United Civil Sections] Jan. 13, 2013, [2013] FORO ITALIANO pt. I, col. 1573 (Italy); Corte di Cassazione Sezione I Civile [Supreme Court Civil Sectio] Apr. 7, 2017, [2017] IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI 923 (Italy).

of a regulatory system of corporate financial distress, like the Italian one, decidedly centered on the debtor and strengthened by the near "normality" of a blank arrangement with creditors as a going concern.
Therefore, if on the one hand the more marked role of the judiciary in the Italian Insolvency Code can mitigate the risk of a debtor-centered bankruptcy law (which would set off a chain reaction of corporate financial crises of non-satisfied creditors), on the other hand it should make us reflect on what remains still hidden in our system and to the contrary constitutes a cornerstone of Chapter 11: in short, the creditor's initiative, that we know due to the recent but feeble institution of so-called *competing proposals*.[150] The purpose of avoiding an indirect hold-up by, at best, opportunistic behavior by the debtor is (was) at the heart of the institution, but its regulatory conformation has not been able to remedy the circumstance – already needed after the 2005-2006 reforms – by which any instrument of indirect control over the effectiveness of the plan proposed by the debtor (*cram down* included) collides (collided) with the zero parameter, so to speak, with the hypothetical credit satisfaction of a laborious bankruptcy liquidation. Ensuring that, considering the minimal satisfaction rate reserved by the liquidation process for unsecured creditors, the rationale underlying the institution of competing proposals has been and remains substantially disregarded in practice, once again rewarding the debtor with the inevitable expectation of the creditors to *receive*, more than to *propose,* a "better" reorganization plan.
The reasons for the lack of success are undoubtedly and primarily normative, although an evident Italian custom of *indirect rewarding* of the debtor in financial distress should also not be ignored, which unfortunately makes the general system of our insolvency outdated. In concrete terms, the institute of competing agreements reveals itself less appetizing for creditors where it discounts, from the outset, the asymmetry of information between the debtor (proponent) and creditors (potential competitors), topped off by the pre-condition that the governance of the firm must remain unchanged at least until approval of the arrangement, with the simultaneous unknown of an uncontrollable business risk for creditors given the confidentiality of company information.
Nonetheless, the "information" factor appears crucial, and brings us back in some way to the focal point of Casey's study. It is the "information" factor that induces Casey to propose another theoretical framing for Chapter 11 – albeit in the context of economic analysis – but it

[150] *See* Italian Bankruptcy Law, *supra* note 54, art. 163(4), (7); *see also* Italian Insolvency Code, *supra* note 72, art. 90.

is above all this factor that justifies – and indeed makes indispensable – the role of the judge, so to speak, supplementary to the preparation of an *efficient* reorganization plan. On the other hand, the "information" factor has marked (and marks) the Italian model of arrangements with creditors, decisively rendering it orientated towards the debtor; obligations of "public disclosure" are in fact provided only up to the time envisaged by art. 161 (8) of the Italian law in the case of an application for a blank agreement, and solely for the purposes of the admissibility of the arrangement. This clearly does not induce the qualified creditor (and those who would like to qualify for acquiring the credit) to propose anything, knowing nothing relevant about the company but assuming the risk of the company, with the result of buying the credit without any possible and logical due diligence on its fair price, and without at all being able to affect the governance of the company at the crucial moment of the vote and approval of the proposal.
The issue becomes therefore the policy pursued by the legislator; and the policy of the legislator must today confront the incipient and circular financial crisis deriving from the pandemic, and, on the other, the directive for banks to divest of irrecoverable loans.
It seems paradoxical, but in this case the judiciary itself – in its various articulations, including the role of the judicial commissioner – would bring about a truly efficient "privatization" of insolvency management. A change in perspective would therefore be desirable, in the direction of strengthening the role of the judicial commissioner in demanding the acquisition of company data and information. This would allow creditors to have a complete picture of the going concern and the financial situation during the course of the bankruptcy procedure, thus achieving the dual objective of facilitating both judicial review of the economic feasibility of the plan and the potential interest of creditors to propose improved plans and with a higher rate of not only recovery, but of feasibility. Further, a competitive regime of proposals aims at ensuring the best satisfaction of creditors, which could also be achieved through a phenomenon of business management involving the proposing creditors, for which the intervention of the judge is really to fill the information gap and endorse the most efficient solution to the financial crisis.
The analysis carried out leads to a first retrospective assessment, so to speak, which opens the door to a prospective assessment of the rationale of the European directive and its impact for a uniform insolvency model regulation from an international perspective. An evaluation that, for some aspects, concerns the legislative process, and for others, it concerns the role of doctrine in the potential definition of this path.

In retrospect, it is curious to highlight how the Italian legislation – also in light of the jurisprudential interpretive guidelines that followed after the first reform of 2005-2006 – never concretely disregarded the essential role of the judiciary in its various manifestations (also through some procedural bodies). A crucial role that the Italian Insolvency Code has itself reaffirmed and, in some aspects, expanded. From this point of view, it is legitimate to deduce that thanks (precisely) to the original blunt approach of liquidation, it was not difficult to "preserve" a juridical approach in the (inevitable, for many reasons) turning point of "negotiation" in the management of corporate financial crisis. Indeed, as the very structure of the Italian Insolvency Code demonstrates, which leads to the completion of this turning point, some signs of "control" on the part of the judiciary are clearly preordained towards a rebalance of otherwise excessive legislation oriented towards an unjustified favoring of the debtor, such as, the non-automatic production of the effects of the automatic stay at the time of filing the application for an arrangement with creditors. It should therefore be acknowledged (meritoriously, in our opinion) that the renewed theoretical and policy framing of Chapter 11 as advanced significantly by Casey would appear to confirm the validity of certain choices on behalf of our legislator, which, in light of the *New Creditors' Bargain Theory,* happily appears anticipatory and consonant. Nonetheless, as the analysis of the institution's potential of competing proposals – as currently and prospectively outlined – demonstrates, the reference to Chapter 11 actually appears incomplete, and probably unknowingly so. Hence, Casey induces us to reflect upon how a blatantly private institution, suitable for overturning the conditions for access to the negotiation procedure of the crisis *par excellence* – which is the arrangement with creditors – is not in conflict with the role of the judiciary, but, conversely, it benefits from this concretely in terms of realizing the efficiency of the legislation itself and therefore the effective protection of the creditor class.
From a different, perhaps more academic, perspective, the merit of Casey's renewed approach to Chapter 11 has reaffirmed the following concept very effectively. More than individual provisions, what animates and must qualify the legislation on financial crisis and insolvency is the underlying policy (chosen by the legislator) which allows them to interpret, case by case, crisis by crisis, each single regulatory provision. Last but not least, it must courageously lead towards another turning point – if we want more negotiation, in the terms mentioned above – which places private interest and public interest on a level of symmetrical parity, where the role of the judiciary appears at the same time control and facilitator of an *efficient* bankruptcy procedure.

The time is ripe for a universal model of bankruptcy law.

VII. TOWARD A TRANSNATIONAL APPLICATION OF THE NEW CREDITORS' BARGAIN THEORY

The analysis of the Directive[151] has revealed that the perspective imposed by the juxtaposition between interested parties and non-interested parties to a preventive restructuring framework offers a somewhat interesting starting point for understanding the potential expansion of the E.U. law.[152]
With reference, in particular, to the position of *vulnerable creditors,* the preparation of a preventive restructuring framework reveals itself suitable for creating an economic result which, by preventing the debtor's failure, can ensure also the protection of weak creditors from the negative financial consequences that the persistence (and the natural worsening) of the debtor's financial distress tends to engender. From this point of view, therefore, the restructuring can lead to a result that, in terms of economic efficiency, produces more value than that which the redefinition of the conditions of satisfaction of the creditor class and, in general, of interested parties inevitably destroys. There is no doubt, of course that a substantial part of the value produced by the restructure consists of the corporate restructuring and the consequent continuation of business activity; a value, the latter, which is reflected, therefore, both in the greater profit for the debtor and in the conservation of legal and commercial relationships for the creditor. Nonetheless, the value generated by the preventive restructuring should be understood more deeply, above all if one considers the system character of financial crisis and insolvency inside a market or an economic system as mentioned above.
The reflection of the debtor's financial failure on the economic conditions of vulnerable subjects, more exposed to the implications of the financial situation of their debtors, seems to offer the opportunity to interpret the preventive restructuring frameworks according to the New Creditors' Bargain Theory which was previously examined[153] and which identifies in the reorganization plan with creditors a tool with which to strength, rightly, the value of the company in crisis and, at the same time, the economic interests of the creditors.

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[151] *See supra* Part V.
[152] *Id.*
[153] *See supra* Part VI.

And it is given, that of the vulnerability of the creditor, that, notwithstanding a certain degree of vagueness of the legislative need, evidence the objective of the E.U. legislature to promote a classification of creditors that is no longer adapted to the specifications of the single situations of failure, but is also – and above all – suitable to accomplish that which could be defined as indirect prevention of the crisis (and, therefore, of the insolvency).
In fact, it can be observed that, by reserving a specific economic treatment to those creditors that, due to their small or medium size, are more exposed to the risks of crisis (and insolvency) reflected, the preventive restructuring framework ends up assuring – although this is not the primary and direct purpose[154] – an improvement also in the capital and financial conditions of the weakest creditors.
The set of prerogatives that E.U. legislation assigns to the creditor and, in general, to the interested parties in preventive restructuring frameworks, certainly contributes to this result. On the subjective level, for example, it is significant to note that the Directive admits, next to the traditional outcome in which the formation of the restructuring framework is promoted by the debtor, the possibility that the initiative is autonomously assumed by the creditors or by representatives of the workers, even if it remains "subject to the agreement of the debtor".[155] Equally significant is also the provision of homogenous obligations of restructuring frameworks has been approved, in particular, with the dissent of interested parties whose credits or interests have been affected by the restructuring plan.[156] It strengthens the role of the creditors, whose consent therefore serves the debtor to obtain the advantage of the immediate binding nature of the restructuring framework.
These are the main elements of a possible *global model of business financial crisis management,* in which the new framework of interests between debtors and creditors is defined on the basis of the enhanced dynamics between interested parties to the preventive restructuring and based on the capacity of the restructuring plan to generate value beyond the financial context of the debtor in crisis. The global character of the

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[154] *See* Directive, *supra* note 7, art. 4(8); *id.*, recital 1 (stating that the Directive ensures that "viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating"). *See also id.*, recital 2 ("Preventive restructuring frameworks should … enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises.").
[155] *See id.*, art. 4(8) (adding that Member States may also limit that requirement to obtain the debtor's agreement to cases where debtors are small or medium-sized enterprises).
[156] *See* Directive, *supra* note 7, art. 10(1)(a).

model derives, in particular, from the common approach adopted by the legislature of the directive and of the modern interpretation of the reorganization plan of the U.S. law. A model, the latter, in which it becomes essential, first of all, an extension to creditors (*recticus* to the "interested parties") of the legitimacy to commence the preventive restructuring proceedings. This will very much require the Italian legislator to evaluate an adaptation to the legislation on concordant agreements and on the debt restructuring agreements foreseeing an autonomous legitimation of creditors, subject to at least the previous agreement with the debtor but no longer subordinate or incidental with respect to the application of the latter.

The model must inspire the Italian legislation also to encourage a relaxation of the rules on the homologation of preventive restructuring frameworks, admitting in particular their derogability in cases where the approval of the plan does not prejudice the rights of dissenting creditors, does not foresee new loans and does not result in the loss of more than 25 percent of the work force, where this is permitted by national law.[157] The exclusion of an intervention by the judicial or administrative authority in these cases comes to be justified both by the need to obtain the swift approval and implementation of the preventive restructuring plan, the effectiveness of which in large part depends precisely on the timely execution of the restructuring measures, both with the need to favour the use of preventive restructuring measures in conditions of confidentiality, which exempt the debtor from forms of early disclosure of their financial position when it is still reversible.

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[157] *See id.*, art. 10(1).