Università telematica delle
Camere di Commercio Italiane

PhD PROGRAMME IN
CORPORATE FINANCIAL MANAGEMENT AND CRISIS PREVENTION

Cycle XXXVIII

PhD Dissertation in

The Implementation of Directive (EU) 2019/1023 "Insolvency" in the Various Countries of the European Union: Comparative Experiences and Reform Perspectives, with Particular Regard to Debt Discharge

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Academic Year 2024 / 2025

Finanziato dall'Unione europea
NextGenerationEU

Ministero dell'Università e della Ricerca

"Unexpected events, difficulties, changes, and even pain represent opportunities: opportunities that compel us to choose. Yet it is not easy to see a resource in a negative experience or to draw lessons from defeat. Those who succeed in doing so possess an extraordinary gift."

(Pietro Trabucchi).

To my mother, Nuccia, and my father, Gino,

whose love and sacrifices have brought me this far

to my uncles and aunt, Mariarosaria, Oreste, and Giovanni, for their constant support and encouragement

to my beloved nephews, Gabriele and Camilla

to my friends Giuseppe and Paola, and dear Titti for their invaluable support

in loving memory of Father Antonio Pelle, of my dear friend Andrea Cafiero

and of our great mentor, Professor Giuseppe Tesauro

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Introduction

State of the Art and Regulatory Context

The doctoral thesis examines the interaction between European and national insolvency law, with particular focus on Italian legislation concerning debt discharge. It begins with an overview of the evolution of insolvency law within the European Union, outlining the reasons for EU intervention in this field through Directive (EU) 2019/1023, which introduced the principle of the "second chance" and promoted a culture of early restructuring.

The study analyses the relevant European legal sources and addresses the issue of coordination between insolvency law and the freedom of establishment of undertakings. It then proceeds with an in-depth examination of Directive (EU) 2019/1023 ("Insolvency"), focusing in particular on: the objectives and structure of the Directive; preventive restructuring frameworks; debt discharge and disqualifications; measures aimed at increasing the efficiency of insolvency procedures; Article 33 (review clause and reform perspectives by 2026); and Recital No. 92, concerning data collection by Member States on the implementation of the Directive.

The thesis subsequently addresses the implementation of the Directive in major European legal systems, with specific reference to France, Belgium and Austria, examining prospects for harmonisation among different national models.

The research then turns to the implementation of the Directive in Italian law, analysing its transposition through Legislative Decree No. 83/2022 and the innovations introduced into the Code of Business Crisis and Insolvency, with particular regard to the institution of debt discharge under

the new regulatory framework, in comparison with the previous legislation and relevant case law.

The study further examines the new Proposal for a Directive of 7 December 2022, COM(2022) 702 final, analysing the seven pillars of the proposal and addressing the European Union's approach to minimum harmonisation and its implications for national legal systems.

Finally, the thesis focuses on debt discharge in the Italian legal system, considering comparative profiles and future developments, and addressing the balance between creditors' interests and the protection of economic dignity.

Research Methodology

The research adopts a multidisciplinary and mixed methodological approach.

Its general objective is to identify "whether" and "how" the Directive has been implemented. Specifically, it aims to verify which national provisions have been adopted to transpose the Insolvency Directive and whether implementation measures have been enacted, as well as whether the objectives set at national and regional level have been achieved, including with reference to Article 29 and Recital No. 92 of the Directive concerning data collection by Member States on its application.

The further objective concerns "how" to promote harmonisation of certain aspects of Member States' legislation. This process was partly realised in the transition from the first directive (2017) to the second directive (2019), for example in the field of debt discharge, by introducing or strengthening such mechanisms in jurisdictions where they had not yet been available for businesses. It also relates to Article 33 of the Directive, which provides for

a review clause and the possibility of a new legislative proposal—subsequently materialised in the Commission's proposal of 7 December 2022—and for a first report on the application of the Directive by 17 July 2026.

Structure of the Research

From a methodological perspective, the research began with the collection and analysis of preparatory documents relating to the Insolvency Directive and future legislative reforms, including the new Proposal for a Directive of 7 December 2022, examined within the framework of the European Parliament and the European Commission.

Starting from the Directive and the national implementing legislation, the research then moved to the analysis of academic scholarship and case law in the field, followed by the examination of practical cases.

The research process continued with the collection of available data at territorial level and from relevant stakeholders, including through the network of Chambers of Commerce connected to Universitas Mercatorum.

Primary and secondary data collected will be analysed, and the results may be disseminated through dedicated events and conferences involving relevant stakeholders, so that the conclusions may be made available to economic and political decision-makers.

Chapter 1 – Insolvency Law in the European Union: Evolution and Principles

1.1 The Rationale for European and International Intervention in Insolvency Matters

Insolvency law has historically represented a stronghold of state sovereignty, with its rules deeply rooted in the procedural and substantive law of each national legal system. However, within a framework of advanced economic integration such as that achieved by the European Union, the inherently cross-border nature of modern enterprises has rendered the complete autonomy of individual insolvency regimes both anachronistic and detrimental.

Insolvency proceedings involving debtors with assets or liabilities in more than one Member State have become the norm rather than the exception, creating an unavoidable need for supranational intervention. This intervention is not driven by a mere aspiration toward legislative uniformity, but by the pressing necessity to ensure the full realisation and proper functioning of the Single Market.

The fragmentation of national legal frameworks constituted—and to some extent still constitutes—an obstacle to the free movement of capital and the exercise of the freedom of establishment, which are fundamental principles of the Treaty on the Functioning of the European Union. These barriers manifested primarily through legal uncertainty, high costs associated with managing parallel proceedings, and disparities in the treatment of creditors depending on the Member State in which insolvency proceedings were opened.

The divergences among national insolvency regimes were significant, differing in the criteria for opening proceedings, in the definition of financial distress, in the extent of debtor dispossession, and in the effects on ongoing contracts. This situation fostered an environment conducive to so-

called forum shopping, namely the practice whereby debtors or creditors selected the most favourable jurisdiction for initiating proceedings, often manipulating connecting factors in order to obtain procedural or substantive advantages[1].

To counter these phenomena, the European Union initially adopted a strategy based on the harmonisation of private international law rules, culminating in Regulation (EC) No. 1346/2000 and subsequently in its recast version, Regulation (EU) 2015/848. However, the drive toward the harmonisation of insolvency law is not exclusive to the European Union; rather, it forms part of a broader global dialogue among legal systems, led in particular by the United Nations Commission on International Trade Law (UNCITRAL).

The Union's intervention draws upon best practices developed at the international level while simultaneously contributing to their further development. Of particular relevance is UNCITRAL's work focusing on the financial distress and insolvency of micro and small enterprises (MSEs), the analysis of which is essential to understanding the evolutionary trajectory of contemporary insolvency law, increasingly oriented toward procedural proportionality and the specialisation of legal instruments.[2].

Micro and small enterprises (MSEs) constitute the backbone of the economy; however, traditional regulatory frameworks designed for large-scale corporate failures often prove inadequate for their specific needs. Consequently, the need to provide these entities with simplified, swift, and less costly procedures—capable of maximising the residual value of the

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[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), Recital 4.

[2] E. Savarese, *Crisis and Insolvency of Micro-Small Enterprises in the Work of UNCITRAL*, in G. D'Attorre – N. De Luca – E. Savarese (eds.), *Insolvency Law Tested by the Dialogue between Legal Systems*, Naples, Edizioni Scientifiche Italiane, 2024, p. 147 ff.

business and facilitating a fresh start—has been the primary driving force behind UNCITRAL's efforts, fully aligned with the objectives of Directive (EU) 2019/1023[3].

Through its *Legislative Guide on Insolvency Law* and the subsequent addenda specifically dedicated to MSEs, the international organisation proposes a model of insolvency law characterised by flexibility and reduced formality as its defining features, promoting out-of-court or hybrid solutions tailored to the limited organisational structure of micro-enterprises.

Engagement with international developments is therefore essential to understanding the trajectory of Union insolvency law, which is increasingly oriented toward procedural proportionality and the promotion of an economic culture that regards restructuring as an intrinsic component of the dynamics of the Single Market.[4].

1.2 The Role of the UNCITRAL Guides in the Construction of Transnational Standards

1.2.1 The Systematic Integration of International Sources: From Uniform Law to Multilevel Governance

The integration of international sources cannot be understood as a mere external reference or as a simple comparative formula. Rather, it constitutes a structural and methodological element in the evolution of contemporary insolvency law. It instead entails a coordinated and functional interpretation of the different normative levels—global, regional, and domestic—within a framework of complementarity and progressive harmonisation. The European experience itself, through Directive (EU)

[3] E. Savarese, *Crisis and Insolvency of Micro-Small Enterprises in the Work of UNCITRAL*, cited above, p. 148.

[4] E. Savarese, *Crisis and Insolvency of Micro-Small Enterprises in the Work of UNCITRAL*, cited above, p. 150 ff.

2019/1023 on preventive restructuring frameworks and the evolution of Regulation (EU) 2015/848 on cross-border insolvency, is situated within an ongoing dialogue with UNCITRAL's work, both at the conceptual level and at the technical-operational level.

This dialogue is situated within a broader context in which insolvency and restructuring law can no longer be regarded as confined to an exclusively state-centred dimension. As has been aptly observed, although this field has traditionally been considered a privileged expression of the State's coercive power—thus resistant to processes of supra- and transnational coordination—it is now profoundly shaped by supranational influence. Such influence guides not only the identification of issues deemed worthy of regulatory intervention, but also the regulatory choices adopted by national legislators themselves.[5]. From this perspective, the process of European integration in the field of restructuring and insolvency represents a decisive turning point. The European Union has progressively developed a broad and ambitious regulatory programme aimed not only at fostering coordination among national procedures, but also at promoting increasing substantive harmonisation of Member States' systems, particularly with regard to the early and preventive management of business distress and the regulation of small and medium-sized enterprises[6]. This programme, however, does not develop in isolation from the global context. As expressly reflected in the preambles of Union instruments—including Regulation

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[5] Cfr. G. D'Attorre – N. de Luca – E. Savarese (a cura di), Il diritto concorsuale alla prova del dialogo tra sistemi, Introduzione, Napoli, 2024, p. IX, ove si sottolinea come il diritto della crisi e dell'insolvenza recepisca «in modo sempre più significativo l'influsso sovranazionale», incidendo anche su un settore tradizionalmente considerato espressione della potestas coercitiva statale.

[6] Ivi, p. IX-X, in cui si evidenzia come l'intervento eurounitario non miri più al solo coordinamento, ma a una crescente armonizzazione materiale dei sistemi giuridici degli Stati membri.

(EU) 2015/848—reference to UNCITRAL's work is constant and far from merely ornamental. It signals an awareness of the global centrality of certain economic and legal phenomena and of the need to situate European intervention within a broader horizon of regulatory convergence[7]. From this perspective, UNCITRAL's normative output in the areas of cross-border insolvency, micro and small enterprise distress, and group insolvency does not merely constitute a repository of technical solutions; rather, it represents a genuine laboratory of transnational standards, with which the European Union legal order engages in a relationship of dialogue and, at times, mediated reception.

The resulting methodology is necessarily comparative and multilevel. Moving from the universal horizon of sources developed within the framework of the United Nations, through the regional dimension of European Union law, and ultimately to the specificities of national legal systems, a "pyramidal" analytical path emerges. This approach makes it possible to identify both convergences and persistent divergences among different systems, while investigating their historical, cultural, and socio-economic foundations[8].

Within this framework, the systematic integration of international sources not only enriches the analysis of the European regulation of MSE distress, but constitutes an indispensable methodological condition. The multidimensional nature of the rules governing business crisis

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[7] Ivi, p. X, con riferimento al costante richiamo nei preamboli degli atti dell'Unione ai lavori del Group V dell'UNCITRAL quale espressione della centralità globale di taluni fenomeni economico-giuridici.

[8] Ibid., pp. X–XI, where the methodological choice of an analytical path is described, moving from the universal horizon of UNCITRAL to European Union law and ultimately to national legal systems, within a comparative perspective aimed at identifying "convergences" and "divergences."

management requires a heightened level of awareness that many systemic issues can no longer be confined to an exclusively local dimension.

From this awareness may arise fruitful reconstructive and interpretative insights, as well as a more mature contribution to the reform process undertaken by both European and national legislators[9].

1.2.1.1 The Systemic Role of UNCITRAL in Global Insolvency Law

Over time, UNCITRAL has developed a comprehensive body of normative instruments in the field of insolvency, including: 1) the *Model Law on Cross-Border Insolvency* (1997, amended 2013); 2) the *Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018); 3) the *Model Law on Enterprise Group Insolvency* (2019); 3) the *UNCITRAL Legislative Guide on Insolvency Law* (in multiple parts); 4) the *Legislative Guide on Insolvency Law for Micro- and Small Enterprises* (2021–2022).

This normative production is not binding in nature; rather, it constitutes a form of soft harmonisation, grounded in a technique of legislative recommendation and interpretative guidance. The systemic strength of these instruments does not stem from their enforceability, but from their capacity to establish principles, models, and functional criteria that national legal systems are encouraged to adopt in order to ensure predictability, cooperation, and economic integration.

In particular, the *Legislative Guide on Insolvency Law for Micro- and Small Enterprises (MSEs)* is expressly conceived as Part Five of the broader *Legislative Guide on Insolvency Law*, thereby highlighting a logic of systematic continuity between the general insolvency framework and the simplified regime designed for micro and small enterprises. This structure is significant: it does not establish an isolated or exceptional regime, but rather

[9] Ibid., p. XI, concerning the need for a “threefold analytical lens” (international, Union, and domestic) and the multidimensional nature of the rules governing crisis and insolvency as a prerequisite for a more mature systemic awareness.

a functional adaptation of general insolvency principles to the specific characteristics of MSEs.

1.2.1.2 The Construction of Transnational Standards for MSEs

- The *Legislative Guide on Insolvency Law for Micro- and Small Enterprises* identifies as its primary objective the establishment of a "simplified insolvency regime," characterised by speed, accessibility, cost reduction, and a balanced protection of the interests involved. Its key objectives include: 1) streamlined and economically sustainable procedures; 2) promotion of a "fresh start" for the honest entrepreneur; 3) protection of creditors and employees; 4) prevention of abuse; 5) preservation of employment where possible.

These elements reveal a clear convergence with the objectives pursued within the European legal order. Directive (EU) 2019/1023 likewise emphasises early restructuring, second chance mechanisms, safeguarding of enterprise value, and the protection of stakeholders.

However, the UNCITRAL framework is distinguished by its adoption of a global perspective, attentive to structural differences among legal systems and to the need to provide flexible models capable of adaptation to diverse economic contexts. The systematic integration of international sources does not consist merely in the formal transposition of normative models; rather, it entails a comparative analysis of the conceptual cores that shape the regulation of micro and small enterprise distress at both global and regional levels.

From this perspective, the European experience—particularly through Directive (EU) 2019/1023 and Regulation (EU) 2015/848—engages in a functional dialogue with the work of UNCITRAL Working Group V, in accordance with the "threefold analytical lens" (international, Union, and domestic) that recent scholarship has identified as an indispensable methodology for understanding the evolution of

contemporary insolvency law[10]. In particular, four common conceptual axes can be identified.

a. Centrality of Early Access to Proceedings

The UNCITRAL *Legislative Recommendations on Insolvency Law* and, in particular, the *Legislative Guide on Insolvency Law – Part Five: Insolvency of Micro and Small Enterprises*, emphasise early access to simplified procedures at a stage preceding formal insolvency. The objective is to enable the activation of restructuring mechanisms in the presence of "financial distress" or a "likelihood of insolvency," without requiring full proof of irreversible insolvency.

A similar approach is adopted in European Union law by Directive (EU) 2019/1023. Article 4(1) requires Member States to ensure that debtors have access to a preventive restructuring framework "at an early stage," where there is a "likelihood of insolvency." The lexical choice ("likelihood of insolvency") reflects the UNCITRAL logic of anticipatory intervention. Furthermore, Recital 24 of the Directive clarifies that timely access is intended to "avoid insolvency" and to "ensure the viability of the business," thereby reducing the risk of value-destructive liquidations.

This approach forms part of the broader Union programme of progressive substantive harmonisation of restructuring law, which—according to scholarly analysis—marks a departure from a purely procedural coordination logic. Early access to restructuring proceedings thus constitutes a structural point of convergence between global soft law and Union law and represents one of the key pillars of multilevel crisis governance. The UNCITRAL *Legislative Recommendations on Insolvency Law* and, in particular, the *Legislative Guide on Insolvency Law – Part Five:*

[10] G. D'Attorre – N. De Luca – E. Savarese (eds.), *Insolvency Law Tested by the Dialogue between Legal Systems*, Introduction, Naples, 2024, p. XI, on the "threefold analytical lens" (international, Union, and domestic) and on the multidimensional nature of crisis and insolvency rules.

Insolvency of Micro and Small Enterprises emphasise early access to simplified procedures at a stage preceding formal insolvency. The objective is to enable the activation of restructuring mechanisms in situations of "financial distress" or a "likelihood of insolvency," without requiring full proof of irreversible insolvency.

A comparable approach is adopted in European Union law through Directive (EU) 2019/1023. Article 4(1) requires Member States to ensure that debtors have access to a preventive restructuring framework "at an early stage," where there is a "likelihood of insolvency." The lexical choice mirrors the UNCITRAL logic of anticipatory intervention. Moreover, Recital 24 clarifies that timely access serves to "avoid insolvency" and to "ensure the viability of the business," thereby reducing the risk of value-destructive liquidations.

This approach forms part of the broader Union programme of progressive substantive harmonisation of restructuring law, which—according to scholarly analysis—marks a departure from a purely procedural coordination paradigm[11]. The anticipation of access to proceedings therefore constitutes a structural point of convergence between global soft law and Union law and represents one of the central pillars of multilevel crisis governance.

b. Debtor-in-Possession Model

A second conceptual core concerns the organisational model of the procedure. In its recommendations relating to MSEs, UNCITRAL identifies as the preferred option the retention of control by the debtor over the management of the enterprise (debtor-in-possession), with the intervention of an authority or expert limited to supervisory or advisory functions. This

[11] Ibid., pp. IX–X, on the transition from mere procedural coordination to the increasing substantive harmonisation of national systems in the field of restructuring and insolvency.

solution is justified by considerations of proportionality, cost containment, and the reduction of the stigma traditionally associated with the opening of insolvency proceedings. European Union law clearly embraces this logic in Article 5 of Directive (EU) 2019/1023, which provides that Member States shall ensure that the debtor remains "totally or at least partially in control of its assets and the day-to-day operation of the business." The appointment of a restructuring practitioner (Article 5(2) and Article 6) is conceived as optional rather than automatic.

This legislative policy choice is consistent with the objective of encouraging the timely emergence of financial distress, thereby overcoming the traditional identification of insolvency proceedings with debtor dispossession. From this perspective, European preventive restructuring aligns with UNCITRAL recommendations and reflects a broader transformation of insolvency law—from a law centred on liquidation to one oriented toward business continuity. In this respect as well, the European experience confirms the influence of models developed at the international level, within that dynamic of dialogue among legal systems which recent scholarship has placed at the core of methodological reflection[12].

c. Presumptive Consent Mechanisms (Deemed Approval) and Cram-Down

A third axis of convergence concerns the formation of creditor consent in small-scale insolvencies.

UNCITRAL, mindful of the frequent disengagement or inertia of creditors in proceedings involving MSEs, introduces simplified plan approval mechanisms, including "deemed consent" tools whereby approval may be presumed in the absence of opposition within specified time limits.

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[12] Ibid., p. X, on the constant reference, in Union acts, to the work of UNCITRAL Working Group V as an expression of the global centrality of the regulated phenomena.

In European Union law, although no generalised mechanism of deemed approval is expressly provided, Directive (EU) 2019/1023 promotes functionally analogous instruments through:

1. voting by classes (Article 9);
2. the possibility of confirmation notwithstanding the dissent of one or more classes (cross-class cram-down, Article 11);
3. the principle that minority opposition may be overridden where certain fairness conditions are met.

The underlying rationale is shared: to prevent the inertia or obstructionism of individual creditors from jeopardising restructuring efforts, particularly in contexts characterised by limited organisational complexity and fragmented creditor bodies, as is typical of MSEs. This constitutes further confirmation of the convergence between transnational standards and Union law, within a process that is not one of mere reception, but of progressive substantive harmonisation[13].

d. Regulation of Discharge and the Second Chance

The fourth conceptual core concerns the regulation of so-called "discharge." In its recommendations relating to micro and small enterprises, UNCITRAL emphasises the need for a rapid, proportionate, and accessible discharge mechanism as an essential instrument for facilitating the entrepreneur's reintegration into the economic system. Directive (EU) 2019/1023, in Articles 20–23, introduces a harmonised regime of discharge for entrepreneurs, requiring Member States to ensure full discharge within a maximum period of three years (Article 21). Recital 72 expressly states that this framework is intended to promote a "second chance."

[13] Ibid., pp. X–XI, on the comparative method linking the universal horizon, European Union law, and national legal systems, aimed at identifying convergences and divergences.

The convergence between the two models is evident: speed, proportionality, and the reduction of stigma constitute the core pillars of the discipline. Discharge is no longer conceived as an exceptional measure, but as a structural component of the system. Here again, the multilevel dimension of insolvency law becomes apparent: the Union's choice is embedded within a broader global process of developing shared standards, thereby overcoming the traditional self-referential character of state-centred insolvency law[14].

The comparative analysis of the four conceptual cores demonstrates that the integration of international sources is not a merely descriptive exercise, but a necessary interpretative key for understanding the European regulation of MSE distress. European Union law does not operate in isolation; rather, it is situated within a structured dialogue with UNCITRAL, contributing to the construction of transnational standards concerning early access, procedural governance, creditor consent formation, and the second chance.

The multidimensional nature of the rules governing crisis and insolvency therefore requires an approach capable of integrating the universal horizon, the regional level, and national legal systems, in accordance with that systemic perspective which scholarship has identified as a defining feature of the contemporary evolution of insolvency law.

1.2.1.3 Coordination between Insolvency and Enforcement: The Transnational Perspective

A further dimension of the integration of international sources concerns the relationship between insolvency proceedings and the recognition of insolvency-related judgments. In this regard, the *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018) represents

[14] Ibid., pp. IX–XI, on the loss of the exclusively state-centred character of insolvency law and its increasing permeability to supranational influence.

a significant evolutionary step beyond the earlier *Model Law on Cross-Border Insolvency* of 1997.

Whereas the 1997 Model Law primarily focuses on the recognition of foreign insolvency proceedings and on cooperation between courts and insolvency representatives, the 2018 instrument expressly extends the recognition mechanism to insolvency-related judgments. These include decisions which, although not constituting acts opening or closing proceedings, arise directly from or are closely connected to them (such as avoidance actions, directors’ liability claims, determinations of claims, or decisions concerning restructuring plans). The underlying rationale is clear: to prevent the territorial fragmentation of enforcement from undermining the effectiveness of the main proceedings and from enabling forum shopping or the dissipation of assets. This development is clearly consistent with the framework of Regulation (EU) 2015/848, which, in Articles 19 and 32, provides for the automatic recognition not only of the decision opening insolvency proceedings, but also of: 1) decisions concerning the conduct and closure of the proceedings; 2) decisions deriving directly from the proceedings and closely connected with them; 3) protective measures adopted after the request for the opening of proceedings. In particular, Article 32 extends the principle of mutual recognition to ancillary judgments, embracing a broad notion of “insolvency-related decisions” analogous to that promoted by UNCITRAL in 2018.

The Court of Justice has repeatedly clarified that the foundation of this mechanism lies in the principle of mutual trust among Member States. This implies: 1) on the one hand, that the court of the State of opening must verify its jurisdiction pursuant to Article 3 (COMI or establishment); 2) on the other hand, that courts of other Member States must automatically recognise that decision without reviewing such jurisdictional findings. This framework strengthens the functional centrality of the main proceedings

and consolidates the principle of (albeit mitigated) universality, preventing conflicting decisions and duplicative proceedings. A further level of integration concerns the relationship between Regulation 2015/848 and Regulation (EU) 1215/2012 (Brussels I recast). The case law of the Court of Justice has developed a now-settled distinguishing criterion: actions that derive directly from insolvency proceedings and are closely connected with them fall within the scope of the Insolvency Regulation, whereas civil and commercial actions lacking such a functional link remain subject to the Brussels I recast regime. This distinction is not merely technical; it directly affects the regime of recognition: 1) decisions falling within Regulation 2015/848 benefit from automatic recognition and the simplified regime provided for in Article 32; 2) decisions falling within Brussels I recast are subject to the different recognition and enforcement rules laid down therein.

This represents a paradigmatic example of coordination between distinct Union instruments, reflecting the systemic need to avoid overlaps and gaps in the governance of cross-border insolvency. The integration between insolvency law and the law governing recognition of judgments is not an isolated phenomenon; it forms part of a broader dynamic of dialogue among normative levels. As authoritative scholarship has observed, restructuring and insolvency law is increasingly shaped by supranational influence, and its interpretative horizon must necessarily operate along a threefold dimension: international (UNCITRAL), regional (European Union), and domestic. From this perspective, the 2018 Model Law and Regulation 2015/848 are not alternative instruments, but convergent expressions of the same functional logic: 1) to ensure the unity of treatment of insolvency; 2) to avoid incompatible or fragmented decisions; 3) to maximise the value of the debtor's estate; 4) to strengthen cooperation among judicial authorities.

The construction of transnational standards in the field of recognition of insolvency-related decisions—including ancillary judgments—thus represents one of the most mature manifestations of the dialogue among legal systems, confirming the progressive erosion of the state-centred conception of insolvency law and its transformation into an area of multilevel governance.

1.2.1.4 The Multilevel Logic: Complementarity Rather than Overlap

The systematic integration of international sources does not entail a rigid hierarchical ordering between EU law and UNCITRAL instruments. Instead, a dynamic of complementarity emerges:

1. European Union law produces binding rules for Member States;
2. UNCITRAL provides model standards that guide national reforms, including beyond the EU;
3. comparative practice fosters a circular dialogue between the global and regional levels.

In particular, the UNCITRAL Guides function as bridging texts among legal systems with different traditions, offering a shared platform of principles (maximisation of value, *par condicio creditorum*, protection of stakeholders, and legal certainty). The European Union, in turn, incorporates and re-elaborates these principles within its own normative framework, thereby contributing to their global diffusion.

1.2.2 UNCITRAL Guides and European Union Law: Structural Convergences and Functional Integration in the Regulation of MSEs

The systematic integration of international sources into the European framework requires a precise comparative analysis between UNCITRAL recommendations and Union legislative instruments. The objective is not

merely to identify similarities in content, but to understand how principles developed within UNCITRAL are translated into operational categories, procedural models, and policy choices within European law.

a) Constitution and Preservation of the Insolvency Estate

A further point of convergence concerns the regulation of the insolvency estate.

The UNCITRAL Legislative Guide recommends:

1. the clear identification of assets included in the estate;
2. the inclusion of after-acquired assets;
3. the effectiveness of avoidance mechanisms.

Particular emphasis is placed on the protection of the estate in the early stages of proceedings through the suspension of individual enforcement actions (stay of proceedings).

European law, while leaving significant discretion to national legal systems, likewise recognises the centrality of the stay of proceedings as an instrument functional to restructuring. The logic of value preservation and collective asset management constitutes a shared principle, already affirmed in the general part of the UNCITRAL Legislative Guide and reiterated in the specific regulation of MSEs.

The systematic integration of sources thus reveals a line of continuity: the simplified regime does not abandon the fundamental principles of insolvency law, but rather adapts them in a proportionate manner.

b) Unified Treatment of Debts and the Issue of Personal Guarantees

One of the most innovative aspects of the UNCITRAL Guide concerns the recommendation to address, in a unified manner, all debts of the sole

entrepreneur, including personal debts, subject to the need for coordination with other applicable regimes.

The Guide acknowledges that, in the context of MSEs, there is often a commingling of business and personal debts, particularly as a result of personal guarantees granted for entrepreneurial purposes.

This approach has significant systemic implications:

1. it overcomes the rigid separation between commercial insolvency and personal insolvency;
2. it requires mechanisms of procedural coordination;
3. it necessitates interaction with family law and with the regulation of guarantees.

European law has likewise progressively expanded its focus on the second chance for natural person entrepreneurs. Directive (EU) 2019/1023, in regulating access to discharge (Articles 20–23), incorporates the fresh start principle and presupposes a unified treatment of the insolvent entrepreneur's debt position.

c) Institutional Framework: Competent Authority and Professionalisation

The UNCITRAL Guide introduces the concept of a "competent authority," preferred over the term "court" in order to allow flexible solutions, including administrative ones. Such authority may be assisted by an independent professional entrusted with specific functions.

This choice reflects a tendency toward functional differentiation: 1) not all insolvency cases require full judicial management; 2) in the case of MSEs, cost containment and reduced formalities are essential; 3) supervision and oversight must nonetheless be ensured.

European law does not impose a uniform institutional model. Directive (EU) 2019/1023, in regulating preventive restructuring frameworks, leaves Member States considerable discretion in designating the competent authority—judicial or administrative—and in defining the role of the restructuring practitioner (Articles 4–5). This confirms a logic of institutional flexibility that closely parallels the functional approach adopted by the UNCITRAL Guide.

The comparative analysis demonstrates that European law and the UNCITRAL Guides share: 1) the same economic objective (value maximisation and business continuity); 2) a common social objective (second chance and reduction of stigma); 3) a proportionality-based logic relative to the size of the enterprise. The differences primarily concern the degree of binding force and the level of technical detail. While the European Union adopts mandatory legislative instruments, UNCITRAL operates through flexible recommendations. Yet precisely this flexibility enables UNCITRAL standards to function as a systemic matrix of reference, indirectly influencing European and national reforms. The systematic integration of international sources therefore does not result in mere normative overlap, but rather in a process of functional harmonisation, whereby: 1) the global level develops principles and models; 2) the European level incorporates and adapts them in binding form; 3) the national level implements them in concrete terms.

1.2.3 Cross-Border Cooperation, Recognition of Judgments and Systemic Integration: The Interaction between UNCITRAL Instruments and European Law

The systematic integration of international sources cannot disregard the cross-border dimension of insolvency. While it is true that MSEs primarily operate on a local or national scale, the internationalisation of supply chains, the digitalisation of markets, and the increasing mobility of

production factors make situations of transnational exposure increasingly common even for small enterprises. In this context, the construction of common standards concerning cooperation, recognition, and enforcement of judgments assumes a structural role.

The instruments developed within UNCITRAL—particularly the *Model Law on Cross-Border Insolvency* (1997, amended 2013), the *Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018), and the *Model Law on Enterprise Group Insolvency* (2019)—constitute the primary global reference framework for cross-border insolvency regulation. They operate in dialogue, and at times in tension, with Regulation (EU) 2015/848 and the broader European framework for judicial cooperation in civil matters.

a. From Attenuated Territorial Cooperation to Functional Coordination

The *Model Law on Cross-Border Insolvency* is grounded in a principle of cooperation that moves beyond strict territorialism, without embracing full universalism. It provides for the recognition of a foreign main proceeding, identified at the place of the debtor's centre of main interests (COMI), as well as for possible secondary proceedings, thereby encouraging coordination among the authorities involved.

Regulation (EU) 2015/848 adopts a comparable logic, albeit within a more advanced integration framework. The notion of COMI, the automatic recognition of decisions opening insolvency proceedings, and the coordination between main and secondary proceedings constitute clear points of convergence between the European and UNCITRAL models.

The systemic integration of international sources emerges particularly clearly in the evolving interpretation of cooperation between courts. The Model Law encourages direct communication between judicial authorities, exchange of information, and operational coordination. Similarly, the

European Regulation establishes duties of cooperation and communication between insolvency practitioners and courts of different Member States.

This convergence is not incidental; it reflects the progressive consolidation of shared transnational standards in the coordinated management of insolvencies. Cooperation is no longer optional or residual, but a structural component of the system.

b. Recognition of Insolvency-Related Judgments: A Functional Expansion

A particularly significant development is represented by the *Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018), which extends cooperation to the recognition of judgments "related" to insolvency, even where they do not coincide with the decision opening proceedings.

This functional expansion addresses a concrete need: to avoid fragmentation and conflicts between judicial decisions adopted in different legal contexts but connected to the same situation of financial distress. Avoidance actions, directors' liability claims, and rulings concerning the validity of acts performed in the vicinity of insolvency are areas where the risk of systemic inconsistency is particularly high.

Although European law has not adopted an instrument identical to the 2018 Model Law, it has progressively extended automatic recognition to decisions deriving directly from insolvency proceedings and closely connected with them.

The case law of the Court of Justice of the European Union has played a decisive role in clarifying the boundaries between matters falling within the scope of the Insolvency Regulation and those governed by the Brussels I recast Regulation. Even prior to Regulation 1346/2000, the Court held that actions "deriving directly from insolvency proceedings and closely

connected with them" fall outside the scope of the Brussels Convention (and today the Brussels I recast Regulation) (CJEU, 22 February 1979, C-133/78, *Gourdain v. Nadler*).

The criterion elaborated by the Court is thus twofold and cumulative: 1) the action must derive directly from insolvency proceedings; 2) it must be closely connected with them, that is, based on specific insolvency law provisions rather than on general civil or commercial law.

This case law has systemic relevance. It does not merely allocate jurisdiction between normative instruments, but directly affects the regime of recognition and enforcement of judgments. Decisions falling within Regulation 2015/848 benefit from the automatic recognition mechanism provided for in Articles 19 and 32, whereas those subject to Regulation 1215/2012 follow the distinct regime established therein[15].

In this way, the Court has contributed to the construction of a coherent system of coordination between insolvency law and cross-border enforcement, preventing overlaps between instruments and ensuring legal certainty in the circulation of judgments[16].

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[15] Court of Justice of the European Union, 4 September 2014, Case C-157/13, *Nickel & Goeldner Spedition GmbH v "Kintra" UAB*, ECLI:EU:C:2014:2145.

The Court clarified that a contractual action brought by an insolvency practitioner against a third party, based on a transport contract, falls within the concept of "civil and commercial matters" under Regulation (EU) No 1215/2012 (Brussels I recast), as it does not derive directly from the insolvency proceedings nor is it closely connected with them.

[16] Court of Justice of the European Union, 9 November 2017, Case C-641/16, *Tünkers France and Tünkers Maschinenbau GmbH v Expert France*, ECLI:EU:C:2017:847.

The Court reiterated that the decisive criterion for determining the boundary between the Insolvency Regulation and the Brussels I recast Regulation lies in the legal basis of the action: where the action is founded on general law rather than on specific provisions of

The systematic integration of international sources makes it possible to interpret these developments as part of a common trajectory: the progressive construction of a coordinated legal space in which crisis management is not fragmented by jurisdictional barriers[17].

c. Soft Law and Hard Law: Structural Complementarity

Cross-border cooperation and the recognition of judgments highlight the complementarity between global soft law and regional hard law. UNCITRAL provides flexible models capable of adaptation to diverse legal contexts, whereas the European Union adopts binding instruments that achieve a higher degree of integration.

However, the distinction between soft and hard law does not entail a substantive hierarchy. UNCITRAL Model Laws and Legislative Guides function as normative laboratories, anticipating solutions that may subsequently be incorporated, adapted, or further developed within regional frameworks. European law, in turn, contributes to the dissemination and consolidation of these standards.

The systematic integration of international sources is therefore not a unidirectional phenomenon, but a dynamic and circular process. MSEs constitute a particularly significant field for observing this dynamic, as their

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insolvency law, it falls within the scope of Regulation (EU) No 1215/2012 (Brussels I recast).

[17] Court of Justice of the European Union, 6 February 2019, Case C-535/17, *NK v BNP Paribas Fortis NV*, ECLI:EU:C:2019:96.

The Court held that a claim for damages based on non-contractual liability brought by an insolvency practitioner against a third party does not fall within the scope of Regulation (EU) 2015/848, but rather within that of Regulation (EU) No 1215/2012, as it is grounded in general law provisions and not in rules specifically governing insolvency proceedings.

regulation requires a careful balance between economic efficiency, social protection, and procedural proportionality.

1.2.4 Global Soft Law, Functional Harmonisation and the Construction of a Transnational Insolvency Space: The Systemic Significance of the UNCITRAL Guides

In the field of insolvency, UNCITRAL has progressively developed a coherent and layered body of normative instruments—from the Model Laws to the general Legislative Guide, and ultimately to the specific Guide for MSEs—which does not operate as a binding source, but as a platform for convergence among legal systems.

The strength of these instruments does not lie in their enforceability, but in their capacity to guide national and regional reforms according to shared criteria of efficiency, proportionality, and protection of the interests involved.

a. Soft Law as a Technique of Functional Harmonisation

In the context of MSE distress, UNCITRAL soft law performs a function of functional harmonisation. It does not impose rigid models, but rather identifies: 1) common objectives (speed, simplicity, cost-efficiency, fresh start); 2) structural principles (equal treatment, creditor protection, value preservation); 3) operational tools (debtor-in-possession, deemed approval, stay of proceedings).

This technique enables States and regional organisations, such as the European Union, to incorporate these principles while adapting them to their respective legal traditions and institutional frameworks.

b. The Multilevel System of Sources in Insolvency Law

The UNCITRAL Guide for MSEs expressly emphasises the need to integrate the simplified regime with other areas of law (secured transactions, company law, labour law, data protection). This highlights that insolvency regulation cannot be conceived in isolation, but must be embedded within a coherent normative system.

Similarly, the European legal order integrates restructuring regulation with rules on judicial cooperation, recognition of judgments, and the protection of fundamental rights.

With regard to cooperation and recognition, Regulation (EU) 2015/848 provides, in Articles 19 and 20, for the automatic recognition of the decision opening insolvency proceedings and its effects in all Member States. Article 32 extends this mechanism to decisions concerning the conduct and closure of proceedings, as well as to those deriving directly from and closely connected with them. Moreover, Articles 41–44 establish duties of cooperation and communication between judicial authorities and between insolvency practitioners, including in cases involving groups of companies (Articles 56–60), thereby strengthening the transnational dimension of coordination.

In the field of preventive restructuring, Directive (EU) 2019/1023 requires Member States to ensure access to early restructuring frameworks (Article 4), the debtor's retention of control over the business (Article 5), the suspension of individual enforcement actions (Article 6), and mechanisms for plan confirmation notwithstanding the dissent of one or more classes of creditors (Articles 9–11). The Directive thus interacts with Regulation 2015/848 in relation to the cross-border effectiveness of proceedings and decisions, while leaving Member States discretion in implementation.

As regards enforcement instruments, the system is complemented by Regulation (EU) 1215/2012 (Brussels I recast), which governs the

recognition and enforcement of judgments in civil and commercial matters (Articles 36 et seq.), as well as by Regulation (EU) 655/2014 on the European Account Preservation Order, which may, where conditions are met, also be used in contexts connected to cross-border insolvency proceedings.

Finally, respect for fundamental rights—particularly the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union—operates as a parameter of legality and as a limit to recognition, as reflected in the public policy clause provided for in Article 33 of Regulation 2015/848 and Article 45 of Regulation 1215/2012.

The interaction between the Insolvency Regulation, the Preventive Restructuring Directive, and European enforcement instruments thus constitutes a paradigmatic example of multilevel coordination: the first governs the cross-border dimension of proceedings; the second substantively harmonises restructuring and second chance frameworks; and the regulations on recognition and enforcement ensure the effectiveness of decisions within the European judicial area, subject to compliance with fundamental rights.

c. The Construction of a "Global Insolvency Space"

The progressive convergence between UNCITRAL models and European Union law may be interpreted as the formation of a "global insolvency space," characterised by: 1) mutual recognition of judgments; 2) cooperation among authorities; 3) common standards for the protection of stakeholders; 4) attention to proportionality in procedures concerning small enterprises.

In the field of MSEs, this convergence assumes particular social and economic relevance. Micro and small enterprises constitute the majority of the global productive fabric, and their management in situations of distress directly affects employment, supply-chain stability, and social cohesion.

UNCITRAL's work, by acknowledging the structural specificities of MSEs—such as the commingling of personal and business debts, limited financial sophistication, and the risk of stigmatisation—provides a theoretical framework that allows European reforms to be interpreted not as isolated interventions, but as part of a broader global movement toward more inclusive and proportionate systems.

d. The Evolutionary Dimension: An Open Normative Dialogue

A final aspect concerns the dynamic nature of multilevel integration. The UNCITRAL Guides are not static texts, but instruments subject to revision in light of practice and national experiences. Similarly, European law is in continuous development.

The dialogue between normative levels produces reciprocal effects: 1) European reforms may influence updates to global recommendations; 2) UNCITRAL innovations may inspire regional legislative initiatives.

In this sense, the regulation of micro and small enterprise distress represents a privileged laboratory for observing the global governance of insolvency.

The systematic integration of international sources into the European regulation of MSE distress reveals the existence of a process of functional harmonisation based on: 1) convergence of objectives; 3) proportionate adaptation of instruments; 4) complementarity between soft law and hard law; 5) increasing cross-border cooperation.

The UNCITRAL Guides—and in particular the *Legislative Guide on Insolvency Law for Micro- and Small Enterprises*—play a central role in the construction of transnational standards that also shape the evolution of European law.

The European experience thus does not constitute an isolated model, but rather a regional articulation of global principles within a multilevel system in which international soft law and binding legislation interact dynamically and complementarily.

In conclusion, the activity of UNCITRAL Working Group V and the implementation of Directive (EU) 2019/1023 currently represent the two principal poles of the modernisation of business crisis law, respectively at the global and European regional levels.

However, the construction of transnational standards is not the result of an exclusive dialogue between normative institutions; it is increasingly nourished by the contribution of organised scholarship and transnational scientific communities.

In this context, the role of the European Law Institute (ELI) assumes particular significance. In recent years, ELI has emerged as a qualified actor in systemic reflection on insolvency law, operating as a platform connecting academia, the judiciary, the professions, and European and international policymakers.

The participation of the ELI in the 67th session of UNCITRAL Working Group V (Vienna, 10–12 December 2025)[18] does not represent a mere

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[18] During the 67th session of UNCITRAL Working Group V (Insolvency Law), held in Vienna from 10 to 12 December 2025, discussions focused on the project concerning the law applicable to insolvency proceedings, an area representing one of the most theoretically complex issues in cross-border insolvency law. A delegation of the European Law Institute (ELI) also participated in the session.

The draft currently under discussion consists of provisions for a future Model Law, accompanied by a *Guide to Enactment* serving an explanatory and systematic function. The structure of the proposed instrument is based on the identification of a core set of insolvency rules intended to constitute the *lex fori concursus*, following a technique already familiar from the European experience under Regulation (EU) 2015/848 (EIR

2015). In line with this model, the general rule on the applicable law is complemented by a limited number of exceptions or special regimes, particularly concerning:
– clearing and settlement systems;
– close-out netting clauses;
– pending judicial or arbitral proceedings;
– security rights;
– avoidance actions.

A brief additional chapter ensures coordination with the UNCITRAL framework on cross-border recognition and cooperation, thereby reinforcing systemic coherence between the law applicable to insolvency and instruments of international judicial cooperation.

From a doctrinal perspective, debate centred on several particularly controversial provisions. Of central importance is the question whether the *lex fori concursus* of the main proceedings may affect security rights established over assets located abroad. The draft under consideration proposes a compromise solution: the law of the insolvency forum may modify or suspend the effects of the security, provided that the secured creditor does not suffer substantial prejudice compared to the exercise of its rights under the law of the place where the asset is situated.

Discussions among delegations revealed a structural tension between two systemic imperatives: on the one hand, the unity and effectiveness of insolvency proceedings; on the other, the protection of secured creditors' legitimate expectations and the territoriality principle governing rights in rem. From a European perspective, this compromise solution was regarded as potentially relevant in view of a future revision of Article 8 of Regulation (EU) 2015/848, which currently affords strong protection to rights in rem over assets situated in other Member States.

A further area of discussion concerned the law applicable to the effects of the opening of insolvency proceedings on pending litigation or arbitration. Several options were examined: application of the *lex fori arbitri*; a general suspension of proceedings; or a more flexible solution allowing proceedings to continue, provided that the insolvency representative is afforded effective participation. Once again, the debate lies at the intersection between the need for concentration of insolvency proceedings and the protection of party autonomy in the arbitral context.

The session concluded with a two-day scientific colloquium devoted to the future perspectives of the Working Group, in particular the possible revision of the *Guide to*

institutional fact, but rather a significant indication of the growing interaction between the global and regional levels through scholarly mediation. The ELI does not intervene as a normative body, but as a collective doctrinal actor capable of formulating technically grounded, comparatively oriented, and systematically coherent positions aligned with the evolution of European law.

From this perspective, the ELI performs an epistemic bridging function between: 1) the global harmonisation challenges addressed by Working Group V (for example, in the areas of applicable law in cross-border insolvencies and asset tracing); 2) the experience developed within the European Union legal order, particularly through Regulation (EU) 2015/848 and Directive (EU) 2019/1023; 3) the practical implementation issues and criticalities that have emerged within national legal systems.

1.3 From Directive 2017/1132 to Directive (EU) 2019/1023

The harmonisation of business law within the European Union has proceeded along parallel yet converging paths. On the one hand, the codification of company law consolidated in Directive (EU) 2017/1132 laid the foundations for the incorporation, functioning, and structural

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Enactment and Interpretation of the *Model Law on Cross-Border Insolvency*. This initiative confirms UNCITRAL's evolutionary approach, oriented not only toward normative production but also toward the continuous interpretative refinement of existing instruments, with a view to progressive multilevel harmonisation of international insolvency law.

European Law Institute (ELI), *ELI represented at the 67th session of UNCITRAL Working Group V on Insolvency Law*, available at: https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-represented-at-the-67th-session-of-uncitral-working-group-v-on-insolvency-law (last accessed: 26 February 2026).

operations of capital companies in a cross-border context, ensuring minimum safeguards for shareholders and third parties. On the other hand, the absence of a harmonised framework for managing the pathological phase of the enterprise risked undermining the achievements attained in regulating its ordinary functioning.

Directive 2017/1132, while fundamental to legal certainty in commercial transactions, left unresolved the critical issue of business crisis. At the very moment when the enterprise entered financial distress, national divergences re-emerged, fragmenting the market. The transition to Directive (EU) 2019/1023 thus represents the necessary completion of the framework. If Directive 2017/1132 governs the "healthy" life of the company and its transformations, Directive 2019/1023 intervenes when business continuity is threatened, providing instruments to preserve the economic value that company law has helped to structure. This reflects the awareness that a genuine Capital Markets Union cannot exist without a predictable and efficient insolvency and restructuring regime.

- The 2019 "Insolvency Directive" does not merely regulate liquidation; rather, it stands in conceptual continuity with company law by equipping debtors with preventive restructuring tools that frequently operate on the corporate and capital structure itself. This necessarily requires coordination with harmonised company law rules, which, in a restructuring context, may be derogated from or functionally adapted to facilitate rescue (European Commission, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks…, COM(2016) 723 final, 22.11.2016, p. 3).

The evolution of EU business law has therefore unfolded through a progressive process of normative harmonisation which, although initially non-uniform, achieved significant systemic coherence through the shift from Directive 2017/1132 to Directive 2019/1023. This evolution cannot be interpreted as a mere chronological layering of sources, but rather as an

organic design aimed at functionally coordinating the regulation of the ordinary phase of corporate activity with that of crisis, with a view to strengthening the efficiency and attractiveness of the Single Market.

Directive 2017/1132 long represented the cornerstone of European company law, serving as the reference framework for the regulation of incorporation, organisation, and structural operations of capital companies. Its objective was to ensure a minimum, non-derogable core of guarantees for shareholders and creditors, with particular emphasis on legal certainty. In this perspective, the regulation of share capital—its formation, alteration, and pre-emption rights—was conceived as an essential instrument for protecting shareholders' positions and safeguarding the legitimate expectations of third parties, reflecting a vision firmly anchored in the normal functioning of the enterprise.

Practical experience, however, revealed the limits of a regulatory system focused exclusively on the ordinary phase of corporate life. The absence of a harmonised European framework on crisis and insolvency exposed a systemic fracture, reopening areas of divergence among national legal systems precisely at the most critical moment in the life of the enterprise. It became evident that rules designed to ensure stability under ordinary conditions could, in situations of financial distress, hinder efficient restructuring solutions. In particular, rigid capital maintenance rules and the central role attributed to shareholders' meetings sometimes facilitated opportunistic behaviour, enabling controlling shareholders or blocking minorities to obstruct necessary restructuring operations, even at the cost of jeopardising business continuity and causing greater value destruction than would have occurred under a viable recovery plan.

Directive (EU) 2019/1023 must be situated within this context. It marks a decisive step toward a more integrated vision of European business law. The intervention of the Union legislator does not constitute a rupture with pre-existing company law, but rather its systematic completion,

introducing preventive restructuring tools capable of directly affecting the financial and organisational structure of the enterprise. The Directive is grounded in the awareness that a genuine Capital Markets Union requires an insolvency framework that is not only efficient, but also predictable and sufficiently harmonised, capable of reducing legal uncertainty and the costs associated with financial distress.

The new European paradigm explicitly prioritises business continuity and the preservation of enterprise value, even at the expense of an absolute and formal protection of shareholders' prerogatives.

A conception of the enterprise thus emerges that transcends a purely contractual and private-law dimension, recognising a broader public interest in preserving productive assets, employment, and the economic fabric. This broader interest may justify a temporary limitation of individual rights in pursuit of effective restructuring and recovery[19]. The technical and legal link between the two Directives finds its most significant expression in Article 32 of Directive (EU) 2019/1023, which requires Member States to permit targeted derogations from the provisions of Directive (EU) 2017/1132 to the extent strictly necessary to ensure the effectiveness of restructuring processes. In this way, constraints deriving from corporate formalities—such as the requirement of a shareholders' resolution or the full observance of pre-emption rights in capital increases aimed at restructuring—may be overcome where indispensable to the rescue effort.

This is complemented by the possibility of confirming a restructuring plan notwithstanding the dissent of one or more classes of creditors or shareholders, through the mechanism of cross-class cram-down, with the judicial authority entrusted with a central role in safeguarding the overall balance of the interests involved.

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[19] E. Savarese, *Crisis and Insolvency of Micro-Small Enterprises in the Work of UNCITRAL*, cited above; ibid., para. 4.

Taken as a whole, the integration between company law and insolvency law reflects the European Union's ambition to build a capital markets system grounded in a dynamic conception of legal certainty—no longer confined to the static protection of legal forms, but oriented toward the preservation of the enterprise's economic and social value. In this perspective, European business law emerges as an instrument designed to promote a second chance for deserving entrepreneurs and to reduce recourse to inefficient liquidations of enterprises that remain economically viable.

1.4 The "Second Chance" Principle and the Culture of Early Restructuring

The most significant intervention in substantive insolvency law introduced by Directive (EU) 2019/1023 reflects a clear political intention to reshape the European paradigm, shifting from a predominantly liquidation-oriented and punitive approach toward a rescue culture grounded in the principle of second chance. The European legislator sought to move beyond the traditional dogma of "pay what you owe" toward a more balanced promotion of business continuity for enterprises in financial distress, recognising that the unnecessary liquidation of viable businesses destroys economic value and employment.

As early as its 2016 Proposal, the European Commission emphasised that insolvency frameworks should encompass a broad spectrum of measures: from early intervention before a company enters severe financial distress, to preventive restructuring aimed at preserving economically viable parts of the business, to asset liquidation where rescue is not feasible, and finally to the possibility for honest entrepreneurs to obtain a second opportunity through discharge of debts.

The principle of fresh start or second chance thus becomes central. Ensuring that honest debtors have access to full discharge after a reasonable period is essential to fostering entrepreneurship and reducing the stigma

traditionally associated with failure. At the same time, the culture of early restructuring is reflected in the obligation imposed on Member States to establish effective preventive restructuring frameworks enabling debtors to restructure at a stage when insolvency is merely likely or incipient, thereby preventing irreversible financial deterioration.
The objectives pursued are multifaceted: preventing the loss of know-how and skills; maximising overall value for creditors and for the economy as a whole; and avoiding the accumulation of non-performing loans. These goals are supported by substantive mechanisms such as the suspension of individual enforcement actions (stay of proceedings) and the cram-down rule, which allows the overcoming of obstruction by dissenting minorities or entire classes of creditors (cross-class cram-down).

1.5 European and International Normative Sources of Reference

The progressive Europeanisation of business crisis and insolvency law represents one of the most significant—and at the same time most complex—developments in the legal integration of the European Union. For a long time, insolvency law was regarded as one of the fields most resistant to supranational harmonisation, given its close connection to state sovereignty, the coercive power of public authorities, and the territorial dimension of insolvency proceedings. This resistance is rooted in the diversity of Member States' economic and social models, as well as in differing conceptions of the role of the enterprise, credit, and the debtor's patrimonial liability.

From the early 2000s onwards, however, European institutions progressively recognised that the profound divergences among national insolvency regimes constituted a structural obstacle to the proper functioning of the internal market. In particular, such divergences negatively affected the freedom of establishment and the free movement of capital, generating legal uncertainty for investors and making it difficult to

assess credit risk in a comparable manner across different jurisdictions[20]. In this context, insolvency law began to be perceived no longer as an exclusively domestic field, but as an essential component of the Union's economic architecture.

A first significant moment of reflection at the European level is represented by the European Parliament Resolution of 15 November 2011, which affirmed the need for coordinated intervention in national insolvency regimes in order to promote the timely restructuring of undertakings in financial difficulty and to prevent unnecessary recourse to liquidation[21]. In that context, the European Parliament emphasised that the absence of effective preventive restructuring instruments and the fragmentation of national insolvency regimes produced distortive effects on the internal market, particularly disadvantaging economically viable enterprises that were only temporarily illiquid.

Scholarly reflection both accompanied and, in part, anticipated this shift in perspective. A significant strand of European scholarship highlighted that insolvency law could no longer be conceived solely as a law of liquidation and asset distribution but had to evolve into a law of restructuring and

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[20] European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), based on two preparatory studies commissioned by the European Parliament, namely *Harmonisation of Insolvency Law at EU Level*, European Parliament, 2010, PE 419.633, and *Harmonisation of Insolvency Law at EU Level Regarding the Opening of Proceedings, Claims Filing and Verification and Reorganisation Plans*, European Parliament, 2011, PE 432.766.

[21] European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Recitals I, J and L, as well as Annexes 1.1 and 1.5

value preservation[22]. From this perspective, business crisis is reinterpreted as a physiological phase in the life cycle of the enterprise, capable of being managed through appropriate legal instruments rather than as a pathological event to be sanctioned by expulsion from the market.

The European path toward crisis prevention initially developed through soft law instruments and non-binding acts. Emblematic in this regard is the role played by the European Commission Recommendation of 12 March 2014, which invited Member States to establish preventive restructuring frameworks accessible at an early stage of financial difficulty. Although lacking binding force, this Recommendation contributed to disseminating a new rescue culture and laid the conceptual foundations for subsequent legislative interventions. At the same time, at the level of positive law, the European Union initiated a process of coordination in the field of cross-border insolvency with the adoption of Regulation (EC) No 1346/2000, subsequently recast as Regulation (EU) 2015/848. These instruments primarily addressed procedural and conflict-of-laws aspects, introducing common rules on jurisdiction, recognition of proceedings, and cooperation among national authorities[23]. However, these instruments left the

[22] B. Wessels, *On the Future of European Insolvency Law*, in R. Parry (ed.), *European Insolvency Law: Prospects for Reform*, Nottingham, INSOL Europe, 2014, p. 157.

[23] Cfr., ad esempio, considerando 11 del Regolamento (CE) n. 1346/2000 del Consiglio, del 29 maggio 2000, relativo alle procedure di insolvenza, GUUE L 160; considerando 22 del See, for example, Recital 11 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160; Recital 22 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141; European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Recital A; European Commission, Communication – *A new European approach to business failure and insolvency*, COM(2012) 742 final, 12 December 2012, para. 5; European Commission, Communication – *Action Plan on Building a Capital Markets Union*, COM(2015) 468 final, 30 September 2015, para. 6.1; European Commission, Commission

substantive domestic regulation of Member States largely untouched, thereby confirming the continued fragmentation of crisis management models. It is within this context that Directive (EU) 2019/1023 was adopted, marking a turning point in the European integration of insolvency law. For the first time, the Union legislator intervened directly in substantive aspects of business crisis regulation, introducing common principles concerning preventive restructuring, discharge of debt, and directors' duties in the vicinity of insolvency. The declared objective was not to achieve full unification of national regimes, but rather to promote functional convergence, capable of reducing the most significant asymmetries that adversely affect the internal market[24]. The choice of the minimum harmonisation technique constitutes one of the defining features of the Directive. The European legislator opted for a flexible model, based on the establishment of common objectives and principles, while leaving Member States a broad margin of discretion in selecting the implementing instruments. This approach translates into a genuine "toolbox," containing a wide range of regulatory options that may be adapted to different national contexts[25]. While such flexibility allows respect for established legal traditions and institutional frameworks, it also entails the risk of uneven implementation, whereby the plurality of national choices may accentuate fragmentation rather than reduce it. One of the cornerstones of the Directive

Staff Working Document – *Economic analysis accompanying the Communication Action Plan on Building a Capital Markets Union*, SWD(2015) 183 final, 30 September 2015, pp. 73–74; Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, COM(2016) 723 final, p. 2; Recital 4 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.

[24] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, C(2014) 1500 final.

[25] Recital 2 of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.

lies in the emphasis placed on crisis prevention. In particular, the Directive requires Member States to establish early warning tools capable of promptly alerting the debtor to the emergence of financial difficulties. The underlying rationale is to intercept distress at an early stage, when the enterprise still retains sufficient room for manoeuvre to implement an effective restructuring[26]. This approach is grounded in the awareness that the late emergence of financial distress is one of the primary causes of failure in restructuring proceedings. Closely linked to the preventive logic is the recognition of the debtor-in-possession principle, according to which the debtor should, as a general rule, retain control over the management of the enterprise during restructuring negotiations. This principle reflects a profound cultural shift from traditional models, in which the opening of insolvency proceedings almost automatically entailed the dispossession of the debtor[27]. The Directive, by contrast, enhances the role of the entrepreneur as the central actor in the restructuring process, limiting the involvement of external professionals to cases where their intervention is necessary to protect creditors' interests or to ensure the overall balance of the procedure. A further element of significant innovation is the introduction of the cross-class cram-down mechanism, which allows, under certain conditions, the confirmation of a restructuring plan notwithstanding the dissent of one or more classes of creditors. Inspired by Anglo-American models, this instrument aims to overcome hold-out behaviour and to

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[26] See also B. Wessels, *On the Future of European Insolvency Law*, in R. Parry (ed.), *European Insolvency Law: Prospects for Reform*, Nottingham, INSOL Europe, 2014, pp. 131–158; J.M.G.J. Boon, *Harmonising European Insolvency Law: The Emerging Role of Stakeholders*, in *International Insolvency Review*, 2018, vol. 27, no. 2, pp. 162–163.

[27] Recital 4 of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.

facilitate efficient restructuring solutions[28]. However, the Directive leaves Member States considerable discretion in defining distributional priority rules, resulting in the emergence of different models—ranging from the absolute priority rule to the relative priority rule—with corresponding implications for the predictability of procedural outcomes[29]. The regulation of the second chance and discharge constitutes a further pillar of the new European approach. The Directive requires Member States to ensure that the honest but unfortunate entrepreneur may obtain full discharge of debts within a maximum period of three years. This provision is intended to counter the social stigma traditionally associated with failure and to facilitate the entrepreneur's reintegration into the economic circuit, acknowledging the value of entrepreneurial initiative even where it has not succeeded[30]. Anche in questo ambito, tuttavia, l'armonizzazione minima consente agli Stati membri di introdurre condizioni e limiti che possono incidere significativamente sull'effettività del fresh start. The implementation phase of the Directive has revealed considerable heterogeneity in the choices made by national legislators. This diversity concerns, in particular, the definition of the conditions for access to preventive restructuring frameworks, which are often anchored to

[28] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Action Plan on Building a Capital Markets Union*, COM(2015) 468 final, 30 September 2015, para. 6; European Commission, Commission Staff Working Document – *Economic analysis accompanying the Communication Action Plan on Building a Capital Markets Union*, SWD(2015) 183 final, 30 September 2015, pp. 74–77.

[29] European Commission, Commission Staff Working Document – *Economic analysis accompanying the Communication Action Plan on Building a Capital Markets Union*, SWD(2015) 183 final, 30 September 2015, p. 73.

[30] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Action Plan on Building a Capital Markets Union*, COM(2015) 468 final, 30 September 2015, para. 6.

indeterminate concepts such as the "likelihood of insolvency." The absence of a uniform definition at the European level has led to the adoption of different criteria across national legal systems, with evident repercussions for the comparability of regimes and for legal certainty among cross-border operators[31]. A further critical issue concerns the coordination between Directive (EU) 2019/1023 and Regulation (EU) 2015/848, particularly with regard to non-public preventive restructuring proceedings. Since such proceedings do not fall within the scope of the Regulation, delicate questions arise concerning the recognition and cross-border circulation of decisions adopted in the context of those procedures[32]. In the absence of clear normative coordination, there is a risk of further fragmentation, with resolution effectively entrusted to the case law of the Court of Justice. Notwithstanding the critical issues identified, Directive (EU) 2019/1023 has produced a significant effect of cultural convergence. Even in legal systems that have adopted conservative implementing solutions, there is a discernible shift toward a culture of prevention and restructuring, at the

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

[32] PRD 2016 Proposal, cited above, p. 2; European Commission, *Impact Assessment accompanying the Proposal for a Directive on preventive restructuring frameworks*, SWD(2016) 357 final, p. 13 et seq.

expense of a purely liquidation-oriented view of crisis[33] [34]. This paradigm shift constitutes one of the most significant outcomes of the Union's intervention, destined to exert a profound influence on practical application and on the interpretation of national provisions. At the same time, awareness of the limits inherent in minimum harmonisation has led the European legislator to contemplate further corrective measures. The Proposal for a Directive of 7 December 2022, commonly referred to as "Insolvency III," reflects the intention to continue along the path of harmonisation by addressing areas considered particularly critical, such as the simplified liquidation of micro-enterprises, avoidance actions, and directors' duties[35].

In conclusion, the implementation of Directive (EU) 2019/1023 highlights both the potential and the limits of insolvency law harmonisation in Europe. On the one hand, the intervention of the Union legislator has helped to erode the long-standing assumption that substantive insolvency law cannot be harmonised, laying the foundations for a European culture of preventive restructuring. On the other hand, the choice of minimum harmonisation as a legislative technique, coupled with the broad discretion granted to Member States, has resulted in an implementation landscape that remains

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[33] See, for example, J.M.G.J. Boon – S. Madaus, *Towards a European Business Rescue Culture*, in J.A.A. Adriaanse – J.I. van der Rest (eds.), *Turnaround Management and Bankruptcy: A Research Companion*, Routledge Advances in Management and Business Studies, New York, Routledge, 2017; B. Wessels – S. Madaus, *Instrument of the European Law Institute on Business Rescue in Insolvency Law*, 2017, p. 6; E. Ghio – J.M.G.J. Boon – D.C. Ehmke – J.L. Gant – L. Langkjaer – E. Vaccari, *Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic*, in *International Insolvency Review*, 2021, vol. 30, no. 3, pp. 434–435.

[34] PRD 2016 Proposal, cited above, pp. 5–6.

[35] PRD 2016 Proposal, cited above, p. 2.

markedly fragmented[36]. In particular, the possibility for national legislators to select, combine, and adapt the numerous options provided by the Directive has affected the overall coherence of preventive restructuring frameworks, creating the risk that regulatory divergences may continue to hinder the full achievement of internal market objectives[37]. This fragmentation is particularly evident in areas where the Directive has left broader margins of discretion, such as the definition of the conditions for access to preventive proceedings, the rules governing distributional priority, and the modalities of judicial intervention[38]. The legal basis of the Directive, identified in Article 114 TFEU, confirms that the harmonisation of insolvency law was conceived as an instrument aimed at removing direct and indirect obstacles to the functioning of the internal market, rather than as an initiative intended to achieve systematic unification of insolvency law[39]. From this perspective, minimum harmonisation represents a deliberate political choice, intended to avoid excessive interference with national legal systems, yet one that inevitably limits the degree of substantive convergence that can be achieved[40].

Nevertheless, the Directive has produced significant results at the cultural and conceptual levels, introducing a common European language of

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[36] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures, COM(2016) 723 final, p. 7.

[37] Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012, Article 114.

[38] E. Ghio – J.M.G.J. Boon – D.C. Ehmke – J.L. Gant – L. Langkjaer – E. Vaccari, *Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic*, in *International Insolvency Review*, 2021, vol. 30, no. 3, pp. 431–436.

[39] Recitals 1 and 8 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.

[40] Recitals 2 and 15 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.

preventive restructuring and affirming shared principles, such as the centrality of business continuity, the timeliness of intervention, and the protection of the enterprise's overall value for the benefit of creditors, employees, and the economy as a whole[41]. These principles, although articulated differently across national legal systems, constitute a common foundation upon which further harmonisation measures may develop.

In this sense, the Proposal for a Directive of 7 December 2022, commonly referred to as "Insolvency III," confirms that Directive (EU) 2019/1023 does not represent an endpoint, but rather an intermediate stage in a broader evolutionary process. The new initiative seeks to address certain shortcomings that emerged during the implementation phase, intervening in areas such as the simplified liquidation of micro-enterprises, avoidance actions, and directors' duties, with a view to strengthening legal certainty and enhancing the effectiveness of crisis management frameworks at the European level[42]. In light of these considerations, the future challenge for the Union legislator will be to identify a more advanced balance between flexibility and uniformity, strengthening substantive convergence among legal systems without sacrificing national specificities. Only through a progressive refinement of legislative instruments and greater attention to the practical effects of reforms will it be possible to ensure a truly integrated internal market also in the field of business crisis management and insolvency.

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[41] Recitals 2, 3 and 16, and Article 4(1), of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; European Commission, *Impact Assessment accompanying the Proposal for a Directive on preventive restructuring frameworks*, SWD(2016) 357 final.

[42] PRD 2016 Proposal, cited above, p. 13 et seq.; R.D. Vriesendorp, *How to Measure the Success of National Implementations of the Restructuring Directive?*, in E. Vaccari – E. Ghio (eds.), *Insolvency Law in Times of Crisis*, INSOL Europe, Brussels, 2023, pp. 96–97.

1.6 Coordination between Insolvency Law and the Freedom of Establishment of Undertakings

The analysis of European sources and principles inevitably leads to the issue of coordination between crisis regulation and the freedom of establishment enshrined in Articles 49 et seq. TFEU. Discrepancies among national restructuring frameworks do not merely raise technical concerns; they constitute a substantive disincentive for undertakings seeking to exercise their freedom of establishment in Member States other than their own.

Article 49 TFEU expressly prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, including restrictions relating to the setting-up of agencies, branches, or subsidiaries. However, uncertainty regarding insolvency regimes and recovery rates in foreign jurisdictions increases risk assessment costs and hampers economic integration. As already observed in the 2014 Commission Recommendation, such divergences may discourage undertakings from establishing themselves in other Member States.

In pursuing the objective of removing obstacles to the exercise of fundamental freedoms, Directive (EU) 2019/1023 explicitly acknowledges this logical and legal nexus. A harmonised framework ensuring access to preventive restructuring measures in every Member State reduces the legal risk associated with cross-border establishment and enhances corporate mobility.

If undertakings can rely on the existence of efficient rescue mechanisms throughout the Union, the decision to establish or invest in another Member State will no longer be penalised by the fear of encountering inefficient or punitive local insolvency procedures. In this way, one of the essential

preconditions for the effective exercise of the freedom of establishment guaranteed by the Treaty is fulfilled.

From this perspective, insolvency law ceases to function as a purely local risk variable and instead becomes part of a common legal infrastructure supporting the Single Market, concretely implementing the approximation of laws envisaged by Article 114 TFEU as an instrument for achieving the objectives set out in Article 26 TFEU.

Chapter 2 – Insolvency Law in the European Union: Evolution and Principles

2.1 Objectives and Structure of the Directive

Directive (EU) 2019/1023 of the European Parliament and of the Council forms part of the broader and progressive process of Europeanisation of business crisis law. Its general objective is therefore to strengthen European economic integration by reducing legal uncertainty and the costs associated with the management of situations of financial distress[43]. From this perspective, the Directive seeks to promote timely intervention in situations of business distress, counteracting the tendency—observable in many legal systems—for financial difficulties to emerge at a late stage and for insolvency tools to be invoked only after excessive delay[44]. Crisis prevention thus becomes an essential component of European business policy, as it serves not only to protect individual economic operators but also to safeguard the overall stability of the financial system.

In this context, the European legislator seeks to overcome the traditional dichotomy between the ordinary and pathological phases of

[43] On the objective of reducing legal uncertainty and the costs of crisis proceedings, see V. Capizzi, *Crisi d'impresa e ristrutturazione del debito*, Egea, Milan, 2012.

[44] A. Falini, *Business Crisis and Its Causes: An Interpretative Model*, Paper No. 125, University of Brescia, Brescia, 2011.

entrepreneurial activity, promoting early management of financial difficulties in order to preserve enterprise value and avoid the unnecessary liquidation of economically viable businesses[45]. The Directive is thus grounded in a going-concern logic, which places at the centre the restructuring of debt and of the enterprise's organisational structure as a preferable alternative to formal insolvency. This approach reflects a dynamic conception of crisis, no longer understood as an irreversible event, but as a phase in the life cycle of the enterprise that can be managed through appropriate legal instruments.

Among the defining objectives of the Union intervention is, first and foremost, the guarantee of effective access to preventive restructuring frameworks for undertakings that, although experiencing financial distress, retain concrete prospects of recovery. Allowing such undertakings to act at an early stage of crisis helps to limit the destruction of value typically associated with liquidation proceedings and to safeguard the continuity of existing economic relationships. From this perspective, preventive restructuring performs a systemic protective function, contributing to the preservation of the productive fabric and reducing the social impact of insolvencies.

Closely connected to this aim is the safeguarding of employment and of the stock of skills and know-how developed within the enterprise. The Directive acknowledges that the failure of a business entails not only economic loss, but also the dispersion of human and professional resources that are often difficult to reconstitute. Insolvency prevention therefore emerges as an instrument of economic and social policy, designed to mitigate the adverse effects of crises on the labour market and on the economic cohesion of the Union.

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[45] G. Bertoli, *Business Crisis, Restructuring and Return to Value*, Milan, EGEA, 2000.

Alongside its preventive dimension, the Directive pursues the objective of ensuring a "second chance" for honest but unfortunate entrepreneurs through the introduction of the principle of full discharge within a reasonable period of time. The abandonment of a strongly punitive conception of entrepreneurial failure constitutes one of the most innovative aspects of the Union's intervention, aiming to counter the social stigma of bankruptcy and to facilitate the entrepreneur's reintegration into the economic system. The reduction of discharge periods and personal disqualifications encourages entrepreneurial risk-taking and promotes a more dynamic and competitive economic environment.

A further significant objective of the Directive is to enhance the efficiency of restructuring, insolvency, and discharge procedures. The time factor plays a decisive role in preserving enterprise value and in maximising creditor recovery; accordingly, the Directive urges Member States to adopt measures aimed at reducing excessive procedural duration, improving the quality of decisions, and ensuring greater predictability of outcomes. In this context, particular emphasis is placed on preventing the accumulation of non-performing loans (NPLs) through early intervention capable of limiting financial institutions' exposure to irreversible default situations.

Special attention is devoted to small and medium-sized enterprises, which constitute the vast majority of the European entrepreneurial landscape and are particularly vulnerable in times of crisis. The Directive recognises that such undertakings often lack the financial and organisational resources necessary to navigate complex and costly procedures and therefore encourages the adoption of simplified and accessible instruments, including standardised information tools and less burdensome procedural mechanisms. This choice is consistent with the objective of making crisis prevention genuinely effective also for smaller businesses.

From a structural standpoint, Directive (EU) 2019/1023 adopts a minimum harmonisation technique. It does not impose a uniform procedural model, but rather establishes common principles and objectives, leaving Member States a broad margin of discretion in selecting the implementing instruments. This approach allows European principles to be integrated into national legal systems while preserving their traditions and specificities; at the same time, however, it entails the risk of incomplete or uneven harmonisation, with potential repercussions for legal certainty among cross-border operators.

The Directive is organised into several Titles, each addressing a specific area. Title II constitutes the core of the regulatory framework, setting out preventive restructuring frameworks and introducing key instruments such as the debtor-in-possession principle, the temporary suspension of individual enforcement actions (stay of proceedings), the division of creditors into homogeneous classes, and plan approval mechanisms that, under certain conditions, allow the confirmation of the restructuring plan notwithstanding the dissent of one or more classes (cross-class cram-down)[46], in compliance with the best interest of creditors test. Title III is devoted to discharge and second chance, while Title IV addresses efficiency and procedural safeguards, imposing requirements of competence, independence, and transparency for judicial authorities and practitioners involved in crisis proceedings. Particularly significant are the provisions concerning directors' duties in the vicinity of insolvency, which promote responsible management of the enterprise, attentive not only to shareholders' interests but also to those of creditors and other stakeholders.

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[46] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and discharge procedures, Title II.

This reflects a balanced approach between entrepreneurial autonomy and the protection of third parties[47]. In conclusion, Directive (EU) 2019/1023 constitutes a structured and flexible regulatory framework, whose essential core lies in the transition from a liquidation-oriented and punitive culture to one centred on restructuring and prevention.

While leaving considerable room for national legislative intervention, it lays the foundations for a progressive convergence of business crisis management systems, oriented toward the preservation of economic value, the stability of the internal market, and the promotion of responsible entrepreneurship[48].

2.2 The Directive and SMEs in Europe

The economic fabric of the European Union is structurally grounded in the activity of small and medium-sized enterprises (SMEs), which account for approximately 99% of all undertakings operating within the internal market and absorb a significant share of overall employment. This economic and social centrality renders the impact of business crises affecting such entities particularly significant. Although SMEs constitute the backbone of the European productive system, they are often more vulnerable than larger undertakings. They display high liquidation rates, largely attributable to the difficulty of bearing the economic, organisational, and procedural costs associated with traditional insolvency proceedings.

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[47] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and discharge procedures, Titles III and IV.

[48] Perrino, M. (2021). *The Italian Early Warning Framework and the Insolvency Directive: An Agenda for the Legislator*. In L. De Simone, M. Fabiani, S. Leuzzi (eds.), *The New Measures for the Regulation of Business Crisis. Commentary on Decree-Law No. 118 of 2021, converted with Law No. 147 of 2021* (pp. 16–21). *Diritto della crisi*.

Directive (EU) 2019/1023 proceeds from an awareness of this structural asymmetry and seeks to ensure that preventive and restructuring instruments are genuinely accessible to SMEs. The Union legislator recognises that the typical characteristics of these undertakings—such as the concentration of ownership and management, limited diversification of funding sources, and the absence of sophisticated governance and control structures—make the timely identification of financial distress particularly challenging. As a result, crises frequently emerge at a late stage, when prospects of recovery are already compromised and liquidation appears, in practice, to be the only viable option[49]. In this context, the Directive seeks to overcome the inadequacy of traditional insolvency instruments, historically designed for larger undertakings and poorly suited to the needs of SMEs. Complex judicial procedures, lengthy timeframes, and high costs have often led smaller enterprises either to delay recourse to formal crisis resolution mechanisms or to abandon structured solutions in favour of informal or disorderly liquidations, with adverse consequences for both the debtor and the body of creditors[50]. The Union's intervention thus aims to promote a structural shift, making preventive restructuring a genuinely viable option also for smaller undertakings.[51]. A first pillar of the European intervention is represented by early warning mechanisms[52]. Member States

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[49] A. Stein, G. Corno, *Towards Greater Harmonisation at the European Level*, in *dirittodellacrisi.it*, 8 February 2022, p. 6.

[50] L. De Bernardin, *We Did Not See It Coming: Brief Reflections on the Repercussions of the New Insolvency Directive Proposal on Liquidation Proceedings in Italy*, in *Diritto della Crisi*, 19 April 2023, n.p., available at www.dirittodellacrisi.it.

[51] L. Panzani, *Reasoned Observations on the Proposal for a New Directive on the Harmonisation of Insolvency Laws*, in *Diritto della Crisi*, 10 January 2023, n.p., available at www.dirittodellacrisi.it

[52] L. Panzani, *The EU Commission's Proposal for a Directive: Early Warning, Restructuring and Second Chance*, in *Fallimento, soluzioni negoziate della crisi e disciplina bancaria*, edited by S. Ambrosini, Bologna, 2017, pp. 1087 ff.

are required to establish clear, transparent, and easily accessible tools capable of promptly alerting debtors to the emergence of financial difficulties. For SMEs, such mechanisms are strategically significant, as they compensate for the absence of structured internal systems of planning and management control. Early warning tools make it possible to detect distress at its initial stages—the so-called "incipient fire signals"—when the enterprise is still able to implement proportionate and less invasive corrective measures. In this perspective, the adoption of operational solutions such as automated notifications of tax or social security arrears, publicly available advisory services, and standardised informational tools accessible also in digital format responds to the need to reduce the decisional inertia that often characterises SME management[53]. The objective is not to increase administrative burdens, but rather to encourage timely awareness of financial distress, also overcoming the fear of social stigma traditionally associated with business failure[54]. The Directive further recognises that access to preventive restructuring frameworks must be shaped according to criteria of proportionality. Although it does not establish a separate regime for SMEs, the European legislator encourages the adoption of simplified and flexible instruments capable of containing costs and reducing procedural complexity. Within this perspective fall the possibility of using standard restructuring plan templates, checklists, and forms, as well as limiting judicial intervention to cases where it is strictly necessary to protect the interests involved. Particular attention is also devoted to SME governance within preventive restructuring frameworks. In the majority of such undertakings, ownership and management coincide,

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[53] P. Vella, *The Impact of Directive (EU) 2019/1023 on the Domestic Insolvency Framework*, in *Fallimento*, 6, 2020, p. 751.

[54] K. Silvestri, *La proposta di direttiva del Parlamento europeo e del Consiglio sull'armonizzazione di taluni aspetti del diritto dell'insolvenza*, in *Diritto della Crisi*, 17 gennaio 2023, n.p., disponibile su www.dirittodellacrisi.it

with the result that total dispossession would often prove counterproductive from an operational and managerial standpoint.[55] The Directive accordingly endorses the debtor-in-possession principle, allowing the entrepreneur to retain, at least partially, control over assets and the day-to-day management of the business. The appointment of an external professional is envisaged only in specific circumstances, thereby avoiding the imposition of costs and rigidities that SMEs may not be able to sustain. Further elements of flexibility emerge in the regulation of voting on the restructuring plan. Member States may exempt SMEs from the obligation to divide creditors into separate classes, permitting a single collective vote in order to reduce administrative costs. Even more significant is the optional nature of the cross-class cram-down mechanism for these undertakings, given that imposing a plan against the will of owner-shareholders could undermine its effective implementation. Another important aspect concerns the relationship between SMEs and the financial system. Smaller enterprises rely heavily on bank credit and are particularly vulnerable to the consequences of a sudden deterioration in their financial position. Timely debt restructuring makes it possible to reduce the risk of accumulating non-performing loans and to enhance predictability of outcomes for creditors. Of particular importance for SMEs is also the regulation of second chance mechanisms[56]. In smaller enterprises, the distinction between personal and business assets is often attenuated. The provision of full discharge within a maximum period of three years is intended to facilitate the swift reintegration of the "honest but unfortunate"

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[55] P. De Cesari, *The Proposal for a Directive on the Harmonisation of Certain Aspects of Insolvency Law: Implications for the Italian Code of Business Crisis*, in *Il Fallimento*, 2023, p. 595.

[56] D. Letizia – F. Vassalli, referring to the work *L'esdebitazione*, in *Trattato di diritto delle procedure concorsuali*, edited by Gabrielli, Vassalli, Luiso, vol. III, Turin, 2014, p. 794.

entrepreneur into the economic circuit[57] [58] [59], thereby reducing the economic and social costs of insolvency. This approach has been extensively examined in the scholarly literature [60]. From a harmonisation perspective, the Directive also adopts a minimum harmonisation technique in relation to SMEs, leaving Member States broad discretion in the implementation of the prescribed measures. This flexibility allows preventive and restructuring tools to be tailored to the specific characteristics of national productive systems, but it entails the risk of uneven protection for SMEs across different legal systems [61]. Looking ahead, these critical issues have prompted the European legislator to envisage further harmonisation measures, as evidenced by the 2022 Proposal for a Directive on insolvency[62], che prevede l'introduzione di procedure di liquidazione semplificata per le microimprese, anche in assenza di attivo[63]. This evolution has been the

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[57] G. Rojas Elgueta, *The Discharge of the Civil Debtor: A Reinterpretation of the Civil Law–Common Law Relationship*, in *Banca, borsa e titoli di credito*, 2012, no. 3, p. 319.

[58] M. Marcucci, *Insolvency of the Civil Debtor in the USA*, in *L'insolvenza del debitore civile. Dalla prigione alla liberazione* (eds. Presti–Stanghellini–Vella), in *Analisi giuridica dell'economia*, 2004, no. 2, p. 368.

[59] R. Bocchini – S. De Matteis, *Overindebtedness: Civil Law Profiles in the Delegating Law Reforming Business Crisis and Insolvency*, in *Corriere giuridico*, 2018, p. 651.

[60] M. De Linz, *Critical Remarks on the New Overindebtedness Procedures and Comparative Legal Systems*, in *Diritto fallimentare*, 2015, p. 485.

[61] AA. Stein – G. Corno, *Towards Greater Harmonisation at the European Level*, in *dirittodellacrisi.it*, 8 February 2022.

[62] P. De Cesari, *The Proposal for a Directive on the Harmonisation of Certain Aspects of Insolvency Law: Implications for the Italian Code of Business Crisis*, in *Il Fallimento*, 2023, no. 5, p. 583.

[63] S. Pacchi, *Corporate Restructuring as a Tool for Business Continuity in Directive (EU) 2019/1023 of the European Parliament and of the Council*, in *Diritto fallimentare*, 2019, no. 6, p. 1272.

N. Soldati, *Directive (EU) 2019/1023 and the Evolution of Insolvency Procedures from the Perspective of Business Continuity and Early Emergence of Crisis*, in *Diritto del Commercio Internazionale*, 34.1(1), 2020, pp. 217–241.

subject of numerous scholarly contributions[64] and confirms the Union's growing attention toward a crisis regulation framework tailored to the needs of smaller enterprises[65]. In conclusion, Directive (EU) 2019/1023 explicitly acknowledges the central role of SMEs within the European economic system and seeks to address their specific needs through an approach grounded in prevention, proportionality, and flexibility. Although it does not establish a separate regime for SMEs, the Directive lays the foundations for a more efficient and timely management of SME distress, thereby strengthening the resilience of the European entrepreneurial fabric and fostering a culture of restructuring also within smaller productive realities.

Chapter 3 – The Implementation of the Directive in the Main European Legal System

3.1 Comparative Law Method: Findings, Critical Issues and Best Practices

The comparative law method applied to the implementation of Directive (EU) 2019/1023 on preventive restructuring constitutes an essential tool for understanding the transformation dynamics of European insolvency

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A. Farina, *Restructuring in SMEs and Directive 2019/1023/EU*, in *Diritto fallimentare*, 2020, Part I, p. 631.

[64] A. Leandro, *The European Commission's Proposal for a New Phase of Harmonisation*, in *Analisi Giuridica dell'Economia*, 2023, nos. 1–2, p. 73.

M. Montanari, *The Harmonisation of Insolvency Law in Europe*, in *Il Fallimento*, 2023, no. 11, p.

F. Corsini, *Crisis Management in Micro-Enterprises between Domestic Law and European Perspectives*, in *Rivista di diritto processuale*, 2023.

S. Rossi, *Simplified Procedures for Small Enterprises in the 2022 Directive Proposal*, in *Diritto fallimentare*, 2023.

G. Meo, *Towards a European Insolvency Law for Micro-Enterprises*, in *Giurisprudenza commerciale*, 2023.

[65] F. Rolfi, *The Liquidation of Micro-Enterprises in the Proposal for a Directive of 7 December 2022*, in *Diritto della crisi*, 2023.

law. The harmonisation pursued by the Union legislator does not result in rigid uniformity of national regimes; rather, it takes the form of a process of selective convergence, based on common minimum standards and a broad margin of discretion left to Member States[66]. From this perspective, comparative analysis makes it possible to assess the extent to which the normative solutions adopted at national level are consistent with the objectives of efficiency, predictability, and preservation of economic value underlying the Directive. The comparative inquiry develops along a historical-functional trajectory rooted in the long process of Europeanisation of insolvency law. As early as 2011, European institutions acknowledged the need to intervene in specific segments of national insolvency regimes, recognising that full harmonisation was politically and legally impracticable, yet that certain areas were suitable for useful and achievable normative convergence[67]. This awareness led, through a series of preparatory acts and soft law instruments, to the adoption of Directive (EU) 2019/1023, as an expression of a minimum harmonisation model oriented toward crisis prevention and business continuity[68]. Parallelamente, in alcuni Stati membri erano già state adottate riforme legislative volte a introdurre nuovi strumenti di ristrutturazione, inserendosi in una più ampia ondata globale di cambiamenti normativi orientati a privilegiare il *business rescue* rispetto alla liquidazione concorsuale tradizionale[69].

[66] European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)).

[67] European Commission, Communication – *Action Plan on Building a Capital Markets Union*, COM(2015) 468 final, 30 September 2015.

[68] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and discharge procedures.

[69] European Law Institute (ed. Part I) – B. Wessels – S. Madaus – J.M.G.J. Boon (eds. Part II), *Rescue of Business in Europe*, Oxford, Oxford University Press, 2020, p. 354 et seq.

This circumstance helps to explain the differences observed in the modes of transposition of the Directive, since in several legal systems the Union intervention was grafted onto regulatory frameworks already undergoing reform, sometimes anticipating or reinforcing underlying trends.

In this context, comparative law does not serve a merely descriptive function; rather, it operates as a critical tool aimed at assessing the concrete impact of the Directive within different legal systems. The analysis of the jurisdictions under consideration reveals that the transposition of the Directive has produced differentiated outcomes, strongly influenced by pre-existing legal traditions and by the structural features of national insolvency regimes[70]. While convergence can be observed with regard to core institutions—such as the introduction of preventive restructuring frameworks, the provision of a stay of individual enforcement actions, and the endorsement of the debtor-in-possession principle—significant divergences emerge in their practical implementation.

Despite the Directive's declared objective of improving the European level playing field in the area of restructuring, the broad discretion granted to Member States risks resulting in persistent normative fragmentation, potentially undermining legal certainty and the predictability of outcomes in cross-border restructurings[71].

3.2 France: *L'adaptation du droit des entreprises en difficulté*

The French legal system represents one of the most significant examples of adaptation "by continuity" in the implementation of Directive (EU) 2019/1023. The transposition of the Directive through *Ordonnance* No. 2021-1193 of 15 September 2021 did not introduce entirely new autonomous procedures; rather, it intervened in a targeted manner within a system already strongly oriented toward

[70] European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, COM(2022) 702 final, 7 December 2022.

[71] R. Bork – R. Mangano, *European Cross-Border Insolvency Law*, 2ª ed., Oxford, Oxford University Press, 2022, p. 38.

crisis prevention, strengthening existing instruments and rebalancing the position of the various stakeholders. In this respect, the French experience differs from that of other legal systems in its capacity to integrate European requirements into an already structured normative framework, characterised by a well-established culture of business rescue[72]. Historically, French law on undertakings in difficulty has undergone an early evolution toward rescue-oriented models. After a long phase dominated by punitive and liquidation-based logics, from the 1950s and 1960s onwards a "dual-track" system emerged, structured around the alternative between liquidation and business recovery, notably through the introduction of *redressement judiciaire* proceedings[73]. Subsequently, the introduction of preventive and confidential mechanisms, such as the *mandat ad hoc* and the *conciliation* procedure, marked a decisive shift toward the early management of financial difficulties, aimed at preserving business continuity and employment[74]. The contemporary French system, governed by Book VI of the *Code de commerce*, is structured around a plurality of procedures, ranging from out-of-court and consensual mechanisms (*mandat ad hoc* and *conciliation*) to judicial restructuring proceedings (*sauvegarde*, *sauvegarde accélérée*, *redressement judiciaire*) and liquidation. Within this framework, Directive (EU) 2019/1023 was grafted onto an already complex structure, intervening selectively on aspects considered less aligned with European standards, particularly with regard to the role of creditors, the formation of classes, and the introduction of cross-class cram-down mechanisms[75]. *Conciliation* represents the cornerstone of the French preventive model. It is a voluntary, confidential, and consensual procedure,

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[72] R. Parry, *Introduction*, in K. Gromek Broc – R. Parry (a cura di), *Corporate Rescue in Europe*, Deventer, Kluwer Law International, 2004, p. 1.

[73] F. Pérochon, *Entreprises en difficulté*, Paris, LGDJ, 2014, p. 205.

[74] G. Plantin – D. Thesmar – J. Tirole, *Reforming French Bankruptcy Law*, *Les notes du Conseil d'analyse économique*, No. 7, June 2013, p. 1.

[75] S. Davydenko – J. Franks, *Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK*, *Journal of Finance*, 2008, vol. 63, p. 565.

accessible to debtors experiencing legal, economic, or financial difficulties, provided that they have not been in a state of insolvency for more than forty-five days. The debtor remains fully in control of the management of the business, and a conciliator appointed by the court assists the parties in negotiating an agreement with the principal creditors.

Traditionally, *conciliation* does not entail coercive effects nor the possibility of imposing the agreement on dissenting creditors. However, the 2021 reform strengthened its effectiveness by expanding the possibilities for suspending enforcement actions and granting payment extensions during the negotiation phase[76]. Particular importance is attached to the protection of new money injected during the *conciliation*. Where the agreement is approved by the court (*homologation*), financing granted to ensure the continuity of the business benefits from a specific priority right (*privilège de conciliation*). This privilege secures preferential payment in the event of subsequent judicial proceedings and shields the new financing from potential write-downs without the consent of the lenders.[77]. The second pillar of the French preventive framework is represented by the *sauvegarde accélérée*, which constitutes the primary "vehicle" for the transposition of the Directive. This judicial procedure, of limited duration, presupposes the prior opening of a *conciliation* and the preliminary negotiation of a plan to be swiftly submitted to creditors for approval, according to a logic inspired by pre-pack models[78]. One of the most significant interventions introduced by the 2021 *Ordonnance* concerns the replacement of the traditional creditors' committees with a system of classes of affected parties (*classes de parties affectées*).

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[76] V. Rotaru, *The Restructuring Directive: A Functional Law and Economics Analysis from a French Law Perspective*, SSRN Working Paper, 2019, paras. 97–98.

[77] A. Pietrancosta – S. Vermeille, *Le droit des procédures collectives à l'épreuve de l'analyse économique du droit*, *Revue Trimestrielle de Droit Financier*, 2010, n. 1, p. 15.

[78] F.-X. Lucas, *Le plan de sauvegarde apprêté ou le prepackaged plan à la française*, *Cahier des entreprises*, 2009, dossier 28.

Previously, creditors were grouped into committees based on their institutional nature, a model that had given rise to evident shortcomings in terms of homogeneity of interests—shortcomings that had been repeatedly highlighted in the scholarly literature[79]. The new system instead requires classification based on the community of economic interests and the legal position of creditors, distinguishing at a minimum between secured and unsecured creditors [80]. The introduction of classes is accompanied by the possibility of resorting to cross-class cram-down. The court may confirm the plan even in the absence of consent from one or more dissenting classes, provided that certain conditions of fairness and protection are met, including compliance with the best interest of creditors test and the application of the absolute priority rule, subject to duly justified exceptions[81]. France has thus transposed one of the most innovative elements of the Directive, significantly strengthening the position of secured creditors and making the system more attractive to international financial investors[82]. Overall, the adaptation of French law on undertakings in difficulty appears consistent with the framework of Directive (EU) 2019/1023. France opted for a *de minimis* transposition of the Directive, enhancing existing instruments and addressing their

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[79] R. Dammann, *L'introduction des classes de créanciers dans l'optique d'une harmonisation franco-allemande*, in *Mélanges en l'honneur du Professeur Claude Witz*, Paris, LexisNexis, 2018, p. 223.

[80] R. Dammann – M. Boché-Robinet, *Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe*, *Recueil Dalloz*, 2017, n. 22.

[81] L. Spizzichino – S. Gorrias – H. Bourbouloux – M. Menjucq, *Les perspectives d'évolution du rôle des créanciers en droit des entreprises en difficulté*, *Revue des Procédures Collectives*, 2019, no. 3, p. 1.

[82] O. Buisine – V. Rousseau, L'efficacité des procédures de restructuration, Revue Procédures Collectives, 2020, no. 2, study 10.

shortcomings rather than introducing an entirely new procedural framework *ex novo*[83].

3.3 Belgium: The Innovations of Book XX of the Code of Economic Law

The Belgian legal system represents a paradigmatic example of structural reform in insolvency law, largely undertaken prior to Directive (EU) 2019/1023 and subsequently adapted to the new European requirements. With the introduction of Book XX of the *Code de droit économique* (CDE), the Belgian legislator profoundly reorganised the regulation of undertakings in difficulty, pursuing the objective of overcoming the traditionally liquidation-oriented approach of bankruptcy law and promoting a culture of prevention and business recovery[84]. The Belgian reform forms part of a broader movement aimed at modernising insolvency law, inspired by considerations of economic efficiency and the preservation of enterprise value. Scholarly commentary has highlighted that the previous system was marked by excessive formalism and limited attractiveness for creditors, factors that contributed to delaying the emergence of financial distress and reducing the prospects of successful restructurings[85]. In this context, Book XX introduced a unified and coherent regulatory framework applicable to all undertakings, including natural persons carrying out economic activities, thereby significantly extending the personal scope of insolvency law. One of the defining features of the reform lies in the attention devoted to the preventive phase. The Belgian legislator

[83] E. Ghio, *France*, in J.M.G.J. Boon – H. Koster – R.D. Vriesendorp (eds.), *Implementation of the EU Preventive Restructuring Directive*, Part I, The Hague, Eleven, 2023.

[84] S. Davydenko – J. Franks, *Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK*, *Journal of Finance*, 2008, vol. 63, p. 565.

[85] A. Epaulard – C. Zapha, *Distressed Firms: How Effective Are Preventive Procedures?*, France Stratégie, *La Note d'Analyse* n. 84, febbraio 2020, p. 2.

introduced instruments aimed at fostering timely intervention before insolvency becomes irreversible. Among these, particular importance attaches to the judicial reorganisation procedure (*procédure de réorganisation judiciaire*), which allows the debtor to benefit from a stay of enforcement actions (*sursis*) in order to negotiate a restructuring plan with creditors. Although this procedure presents similarities with models adopted in other European jurisdictions, it is distinguished by the flexibility of the solutions offered and by the active role assigned to the judicial authority in ensuring a balanced protection of the interests at stake[86]. From a comparative perspective, the Belgian reform appears inspired by a pragmatic approach aimed at reconciling creditor protection with the need to preserve business continuity. Law and economics scholarship has highlighted that the effectiveness of preventive procedures largely depends on the capacity to incentivise cooperation between debtor and creditors, while simultaneously reducing coordination costs and informational asymmetries[87]. Within this perspective, Book XX strengthened mechanisms of information and oversight, imposing more stringent transparency obligations on the debtor and providing for sanctions in cases of procedural abuse. A further innovative aspect concerns the rebalancing of the role of creditors. Scholarly commentary has observed that, prior to the reform, Belgian insolvency law accorded creditors a relatively weak position, limiting their ability to influence the outcome of restructuring

[86] G. Plantin – D. Thesmar – J. Tirole, *Reforming French Bankruptcy Law*, *Les notes du Conseil d'analyse économique*, n. 7, giugno 2013, p. 1.

[87] L. Spizzichino – S. Gorrias – H. Bourbouloux – M. Menjucq, *Les perspectives d'évolution du rôle des créanciers en droit des entreprises en difficulté*, in *Revue des Procédures Collectives*, 2019, n. 3, p. 1.

proceedings[88]. The new regulatory framework, while maintaining a strong focus on enterprise protection, expanded the scope for creditor participation, both in the drafting phase of the plan and during judicial confirmation. In doing so, the legislator sought to enhance the legitimacy of adopted solutions and to strengthen economic operators' confidence in the system. The implementation of Directive (EU) 2019/1023 required relatively limited adjustments in Belgium, precisely because of the modern character of Book XX. Comparative analysis nevertheless shows that certain choices made by the Belgian legislator anticipated key elements of the Directive, particularly with regard to the stay of enforcement actions and the protection of new financing. Empirical comparative studies have highlighted that such features positively affect creditor recovery rates and the overall efficiency of the system[89].However, critical aspects remain. Some authors have observed that the breadth of the powers granted to the judge and the procedural complexity may generate uncertainties in application and prolong the duration of restructurings, particularly in more complex cases[90]. In particular, the balancing of enterprise protection and creditors' rights requires careful case-by-case assessment, presupposing a high degree of specialisation on the part of the judicial bodies involved.

From a systemic perspective, the Belgian experience offers significant insights for comparative reflection on the minimum harmonisation model adopted by the European legislator. Book XX demonstrates how a comprehensive and coherent reform can provide a solid foundation for implementing the Directive, reducing the risk of normative fragmentation

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[88] F. Pérochon, *Entreprises en difficulté*, Paris, Librairie Générale de Droit et de Jurisprudence, 2014, p. 205.

[89] S. Davydenko – J. Franks, *Do Bankruptcy Codes Matter?*, cit., p. 565.

[90] A. Epaulard – C. Zapha, *Distressed Firms: How Effective Are Preventive Procedures?*, cit., p. 2.

and fostering greater substantive convergence among legal systems. At the same time, it highlights the limits of an approach which, although oriented toward prevention, must still ensure legal certainty and predictability of outcomes for cross-border operators.
In conclusion, the innovations introduced by Book XX of the *Code de droit économique* place Belgium among the most advanced European jurisdictions in the field of preventive restructuring. The Belgian experience confirms that the effectiveness of reforms depends not only on the adoption of new legal instruments, but also on their integration within a coherent and functional system, supported by a specialised judiciary and by continuous dialogue with scholarly analysis. In this respect, the Belgian case represents a significant point of reference in the comparative debate on the evolution of European insolvency law.

3.4 Austria: Schuldnerberatung Models and Procedural Simplification

The Austrian legal system offers a distinctive model for managing crisis and insolvency, characterised by strong attention to the social dimension of over-indebtedness and by a pragmatic approach to procedural simplification. In the context of the implementation of Directive (EU) 2019/1023, the Austrian experience stands out for its integration of formal legal instruments with extra-judicial assistance mechanisms, particularly through the *Schuldnerberatung* system, which plays a central role in supporting debtors and preventing insolvency[91]. The *Schuldnerberatung* constitutes a well-established institution within the Austrian framework, originally created to assist consumer debtors and subsequently extended to small economic activities. It operates as an independent advisory service,

[91] S. Madaus, *Preventive Restructuring Frameworks in Europe*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, The Hague, Eleven, 2023.

often publicly funded, aimed at supporting the debtor in reorganising their financial situation and in negotiating consensual solutions with creditors.

Scholarly analysis has emphasised that this model contributes to reducing recourse to judicial proceedings by promoting negotiated and less costly solutions, in line with the objectives of efficiency and timeliness advanced by the Directive[92]. From a comparative perspective, the Austrian approach occupies an intermediate position between systems characterised by strong judicialisation and those that favour a deregulated preventive phase. The legal framework remains procedurally structured, yet significant responsibility is entrusted to non-judicial actors, reflecting the recognition that crisis prevention requires interdisciplinary expertise extending beyond the strictly legal domain. In this sense, the *Schuldnerberatung* functions as a bridge between the social and economic dimensions of crisis, contributing to the preservation of the residual value of the activity and to the mitigation of the systemic effects of insolvency[93]. Procedural simplification constitutes the second pillar of the Austrian model. Even prior to the adoption of Directive (EU) 2019/1023, the Austrian legislator had introduced mechanisms aimed at making insolvency proceedings more rapid and efficient, particularly for smaller debtors. Comparative analysis shows that these reforms anticipated several European objectives, especially with regard to reducing procedural burdens and streamlining the timeframe for concluding insolvency proceedings[94]. The implementation of the Directive in Austria did not entail a radical overhaul of the system; rather, it reinforced pre-existing trends. In line with the minimum harmonisation

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[92] J.M.G.J. Boon, *Early Restructuring and the Role of Advisors*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

[93] B. Wessels, *Rescue Culture and Insolvency Reform*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

[94] S. Madaus, *Simplification of Insolvency Proceedings and SMEs*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

model adopted by the European legislator, Austria chose to adapt existing instruments to the new standards without introducing entirely new procedures. This choice reflects a positive assessment of the effectiveness of the national system and a willingness to preserve its internal coherence, thereby avoiding normative overlap and uncertainties in application[95].

A particularly noteworthy aspect concerns access to preventive restructuring procedures and the role assigned to the debtor. While Austrian law recognises the importance of the debtor-in-possession principle, it retains significant judicial oversight, especially at the decisive stages of the procedure. Scholarly commentary has observed that this balance between debtor autonomy and judicial supervision strengthens creditor confidence, reduces the risk of opportunistic behaviour, and enhances the prospects of successful restructuring[96]. Procedural simplification is also reflected in the management of restructuring plans. In Austria, the structure of such plans is relatively flexible, yet subject to clear criteria of feasibility and sustainability. The involvement of judicial authorities and specialised advisors aims to ensure that the proposed solutions are realistic and respectful of creditors' interests, preventing plans that are excessively skewed in favour of the debtor. This approach is consistent with the logic of the Directive, which calls for a balance between the preservation of enterprise value and the protection of creditors' rights[97]. From a comparative standpoint, the Austrian model offers valuable insights regarding social inclusion and the management of over-indebtedness. The integration of *Schuldnerberatung* within the insolvency framework allows

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[95] J.M.G.J. Boon, *Minimum Harmonisation and National Choices*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

[96] B. Wessels, *Debtor in Possession and Judicial Control*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

[97] S. Madaus, *Restructuring Plans and Creditor Protection*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

crisis situations to be addressed in a gradual and tailored manner, reducing the stigma associated with insolvency and facilitating the debtor's economic reintegration. Scholarly analysis has highlighted that such instruments can contribute to greater social acceptance of restructuring procedures and to more effective prevention of recurrent insolvencies[98]. Nevertheless, critical aspects remain. Some authors have pointed out that the high degree of fragmentation among advisory services and their reliance on public funding may generate territorial disparities and affect the quality of assistance provided to debtors. Moreover, the strong emphasis on the preventive dimension may reduce transparency for creditors, particularly where negotiations are conducted largely outside formal judicial supervision[99]. These critical issues highlight the need for continuous monitoring of the effectiveness of the adopted instruments and for closer coordination among the actors involved.

In conclusion, the Austrian experience confirms that the implementation of Directive (EU) 2019/1023 may occur through the selective strengthening of pre-existing institutions, while preserving national specificities. The *Schuldnerberatung* model and the simplification of procedures represent distinctive features of a system oriented toward prevention and sustainable crisis management. Within the comparative European landscape, Austria offers an example of virtuous integration between the social and legal dimensions of insolvency, which may serve as a reference point for further developments in European business crisis law.

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[98] J.M.G.J. Boon, *Social Aspects of Insolvency Law*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

[99] B. Wessels, *Challenges of Preventive Insolvency Systems*, in B. Wessels – S. Madaus – J.M.G.J. Boon (eds.), *Implementation of the EU Preventive Restructuring Directive*, cited above.

Chapter 4 – The Implementation of the Directive in Italian Law

4.1 Transposition through Legislative Decree No. 83/2022: Genesis and Objectives

Legislative Decree No. 83 of 20 June 2022 represents the final stage of a particularly lengthy and complex legislative reform process aimed at comprehensively redefining the Italian framework governing business crisis and insolvency, while simultaneously transposing Directive (EU) 2019/1023. The entry into force of the Code of Business Crisis and Insolvency (*Codice della crisi d'impresa e dell'insolvenza*, CCII) marks the point of convergence between a national reform initiated well before the European intervention and the harmonisation requirements stemming from Union law.

The CCII originated from the work of the Rordorf Commission, established in 2015, which led to the enactment of Legislative Decree No. 14 of 12 January 2019. That reform was presented as the most extensive revision of Italian insolvency law since 1942. However, its entry into force was subject to multiple postponements and amendments, culminating in the substantial revision of 2022. As noted in the scholarly literature, the Code developed through a process of normative stratification that significantly affected its systemic coherence, particularly in light of the exceptional economic conditions caused by the pandemic crisis, which required reconsideration of several original policy choices[100].

At the same time, the European legislator developed an increasingly structured reflection on preventive restructuring and insolvency, culminating in the adoption of Directive (EU) 2019/1023. The Directive marked a shift in perspective from a predominantly liquidation-oriented approach toward the safeguarding of the enterprise, placing at its core the need to encourage the early emergence of financial distress and to ensure access to effective restructuring tools.

[100] C. Amatucci, *On the Italian Transposition of the Insolvency Directive and the Omission of the "Viable Undertaking" Requirement*, in *Giurisprudenza commerciale*, 2023, Part I, p. 1 et seq.

As noted by leading scholarship, the Directive embodies a clear policy choice in favour of rescuing economically viable undertakings, with a view to maximising overall value for creditors, employees, and the economic system as a whole[101].

The Italian implementation of the Directive was grafted onto a regulatory framework that, even prior to 2019, had progressively moved away from a punitive conception of bankruptcy toward more negotiated and private-law-oriented models of crisis management. This evolution, initiated with the 2005 reforms and continued in subsequent years, led to a reduction in the public-law role of the court and a strengthening of party autonomy, in line with a broader logic of "privatisation" of business crisis. However, as has been observed, this process did not result in a genuine increase in procedural efficiency, nor did it lead to a significant diffusion of preventive restructuring instruments[102].

In light of these shortcomings, Legislative Decree No. 83/2022 seeks to realign the domestic legal framework with European objectives by intervening on key aspects of the CCII. Among the most significant changes is the redefinition of the notion of "crisis," now expressly linked to the inadequacy of prospective cash flows to meet obligations falling due within the following twelve months.

This approach, clearly grounded in a financial perspective, reflects contemporary enterprise valuation criteria and the widely shared doctrinal view that the capacity to generate liquidity constitutes the primary indicator of business sustainability[103].

The Decree also intervened on the regulation of organisational arrangements and preventive measures, clarifying the entrepreneur's obligations with regard to the timely detection of crisis. The objective is to promote early and informed intervention, based on the entrepreneur's responsibility and on the adoption of appropriate monitoring tools.

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[101] M. Vietti, *The Code of Business Crisis and the Insolvency Directive*, 28 November 2022, in particular §§ "Historical and Regulatory Framework" and "The EU Impetus for the Reform of Crisis Law."

[102] C. Amatucci, *Preventive Composition with Creditors and (Dis)Continuity of Management, between Chapter 11, Administration and Disqualification*, in *Giurisprudenza commerciale*, 2019, Part I, p. 814 et seq.

[103] G. Di Amato, *Business Crisis Law*, Milan, Giuffrè, 2022, Preface, p. VII.

However, the technical quality of the solutions adopted has not been free from criticism. Part of the scholarly literature has observed that the legislative technique employed in the Code is burdened by redundancies, gaps, and overlaps that risk undermining legal certainty and predictability[104].

From this perspective, the transposition of the Insolvency Directive raises significant questions concerning the relationship between European harmonisation and the autonomy of the national legal order. On the one hand, the Italian legislator has formally implemented the Union principles; on the other, doubts remain as to whether certain fundamental choices embedded in the original structure of the Code were genuinely reconsidered in light of the European framework. It has indeed been observed that the transposition overlooked key concepts of the Directive that could have served as selective criteria for access to preventive restructuring instruments[105].

Scholarly reflection has further highlighted how normative uncertainty and the progressive deterioration in legislative quality have excessively expanded the interpretative role of the judiciary, which is increasingly called upon to fill legislative gaps. This phenomenon, far from being neutral, negatively affects the predictability of decisions and the confidence of economic operators in a field—business crisis—where timeliness and certainty of rules are of fundamental importance[106].

Ultimately, Legislative Decree No. 83/2022 stands at the crossroads between a national reform project only partially completed and a European model oriented toward the construction of a genuine rescue culture. The declared objectives of the transposition—crisis prevention, business continuity, and procedural efficiency—appear ambitious and consistent

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[104] N. Irti, *An Uncalculable Law*, Turin, Giappichelli, 2016, p. 50 et seq.

[105] C. Amatucci, *On the Italian Transposition of the Insolvency Directive and the Omission of the "Viable Undertaking" Requirement*, in *Giurisprudenza commerciale*, 2023, Part I, p. 1 et seq. (also cited with regard to the failure to emphasise selective access criteria).

[106] M. Taruffo, *Legality and the Justification of Judicial Law-Making*, in *Rivista trimestrale di diritto e procedura civile*, 2001, p. 11 et seq.

with European requirements; yet the question remains open as to their effective implementation within a regulatory framework that continues to display internal tensions and structural inconsistencies.

4.2 The Innovations Introduced into the Code of Business Crisis and Insolvency

4.2.1 From Assisted Composition to Negotiated Composition: The Shift in the Preventive Paradigm of the Code after Legislative Decree No. 83/2022

The transposition of Directive (EU) 2019/1023 through Legislative Decree No. 83 of 17 June 2022 entailed a series of systemically significant amendments to the Code of Business Crisis and Insolvency (CCII), profoundly reshaping the instruments for early crisis management, particularly the negotiated composition (*composizione negoziata*). This mechanism now constitutes the core of the new preventive architecture designed by the Italian legislator, while at the same time representing the most significant departure from the original model elaborated by the Rordorf Commission.

As noted in the scholarly literature, the initial version of the CCII was centred on early warning mechanisms and on the assisted crisis composition procedure (*composizione assistita della crisi*), entrusted to the OCRI (Organismo di composizione della crisi d'impresa). This framework reflected a markedly dirigiste conception of prevention, based on mandatory reporting systems and on the substantial involvement of external actors, with a consequent reduction of entrepreneurial autonomy[107]. However, this model was progressively reconsidered, both in light of the practical difficulties that had emerged even before the Code entered into force, and due to the structural inadequacy of the early warning system in an economic context characterised by widespread and systemic crisis.

[107] M. Vietti, *The Code of Business Crisis and the Insolvency Directive*, 28 November 2022, §§ "The First Draft of the CCII Fails to Fulfil the Objectives of the Delegating Law" and "Signs of the CCII's Inadequacy: Decree-Law No. 118/2021 Changes Course."

Legislative Decree No. 83/2022, implementing the guidelines already outlined in Decree-Law No. 118/2021, marked the definitive abandonment of the assisted composition procedure and of the codified early warning system, replacing them with the negotiated composition of crisis (*composizione negoziata della crisi*). The latter is conceived as a voluntary, out-of-court, and confidential instrument, accessible to the entrepreneur when facing patrimonial or economic-financial imbalances likely to lead to crisis or insolvency.

The underlying policy choice is to restore initiative to the entrepreneur, on the assumption that the timely emergence of crisis can be more effectively achieved through incentives and support mechanisms rather than through coercive tools.[108].

The negotiated composition thus fits within a broader strategy of "privatisation" of crisis management, already present in the evolution of Italian insolvency law but now further accentuated. The entrepreneur retains management and control of the business, assisted by an independent expert whose task is to facilitate negotiations with creditors and to identify solutions capable of overcoming the difficulties. As noted in the scholarly literature, the expert does not exercise authoritative or substitutive powers but acts as a facilitator of the negotiation process within a framework dominated by party autonomy[109].

From a structural standpoint, the negotiated composition is characterised by the absence of a formal insolvency proceeding and by the limited involvement of the court, confined to cases requiring protective measures over assets, specific authorisations, or the recognition of super-priority status for certain financings. This reduction in judicial intervention has been interpreted as a clear sign of alignment with the principles of the Insolvency

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[108] C. Amatucci, *On the Italian Transposition of the Insolvency Directive and the Omission of the "Viable Undertaking" Requirement*, in *Giurisprudenza commerciale*, 2023, Part I, p. 1 et seq.

[109] G. Panzani, *The Negotiated Composition after the Draft Legislative Decree Approved by the Council of Ministers on 17 March 2022*, in *Diritto della crisi*, 17 April 2022.

Directive, which favours flexible and less formalised restructuring tools capable of operating at a stage when the crisis remains reversible[110].

However, critical assessments have not been lacking regarding the actual capacity of the negotiated composition to achieve its declared objectives. In particular, it has been observed that the abolition of mandatory early warning mechanisms deprived the system of an effective instrument of moral suasion vis-à-vis the entrepreneur, who often tends to delay the emergence of crisis. From this perspective, exclusive reliance on the debtor's voluntary initiative risks diminishing the practical effectiveness of the instrument, as initial empirical data appear to suggest[111].

Further concerns relate to the role of the expert. While the expert's independence and competence constitute defining features of the mechanism, the method of appointment and the heterogeneous composition of the bodies involved raise doubts about the uniformity of application standards and the level of trust placed in this figure by the judiciary. It has been noted that a certain caution on the part of courts in granting requested protective measures may negatively affect the overall effectiveness of the negotiated composition.[112]

Within the framework of the innovations introduced by Legislative Decree No. 83/2022, the negotiated composition also performs a coordinating function with respect to other crisis resolution instruments. It may result in the conclusion of agreements with creditors, standstill agreements, restructuring agreements, or recovery plans; alternatively, in the event of

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[110] M. Vietti, *The Code of Business Crisis and the Insolvency Directive*, cited above, § "From Assisted Composition to Negotiated Composition."

[111] C. Amatucci, *On the Italian Transposition of the Insolvency Directive*, cited above, p. 6 et seq.

[112] A. Spirito, *The Negotiated Composition of Crisis: How to Seize This New Opportunity without Abusing It*, note to Trib. Brescia, 2 December 2021, in *Giurisprudenza commerciale*, 2022, Part II, p. 801 et seq.

failure, it may lead to the filing of a simplified composition with creditors for the liquidation of assets. This plurality of possible outcomes confirms the legislator's intention to conceive the negotiated composition as a flexible platform, capable of adapting to the various situations of business distress. Overall, the amendments to the CCII concerning the negotiated composition reflect a clear legislative policy choice oriented toward prevention and business continuity. Nevertheless, as attentive scholarship has emphasised, this approach is not free from ambiguity, as it operates within a regulatory framework that continues to oscillate between market protection, the safeguarding of entrepreneurial autonomy, and the need to prevent abuses. In this sense, the negotiated composition represents a crucial testing ground for assessing whether Italian crisis law is genuinely capable of evolving toward a more efficient and credible model of preventive restructuring. This opens up a broad field of analysis, reflections, and contributions developed within business and economic scholarship—initially of U.S. origin and subsequently received and further elaborated in the European context, as evidenced by recent empirical studies[113]

issues of business efficiency and productivity, on the comparison between the going-concern value of the enterprise and the value resulting from its liquidation, as well as on the relationship between crisis and insolvency, on the one hand, and allocative efficiency and recovery capacity, on the other. This body of knowledge, now well established, would have required

[113] Tsioli, con riferimento al ruolo dei *"filtering mechanisms" nel Chapter 11. "Connecting now whatever has been analyzed in detail above regarding the different Chapter 11 filtering mechanisms, it becomes clear that the notion of viability strongly permeates all such mechanisms" (421).* Sul percorso che ha condotto alla Direttiva 2019/1023, assai feconda di risultati è la ricerca di Fannon, Gant, Finnerty, Corporate recovery in an integrated Europe, Cheltenham, Edward Elgar Publishing, 2022.

particularly careful consideration by the Italian legislator of the concept repeatedly invoked by the Insolvency Directive.

From such an analysis there should have emerged a normative translation of the notion of a "viable undertaking," built upon the fundamental distinction between economic crisis and financial crisis, accompanied by the development of evaluative tools, indicators, and objective parameters capable of measuring these conditions and serving as prerequisites for access to preventive restructuring frameworks—similarly to what had already been envisaged for crisis indicators.

In this perspective, the observation made in a recent contribution by the Head of the Economics and Law Division of the Bank of Italy is particularly significant. He noted that "the exit from the market of less efficient and less productive firms constitutes a phenomenon that is entirely physiological from an economic standpoint, given that each year a substantial number of enterprises cease their activity. Such a process enables a more efficient reallocation of resources within the productive system, to the benefit of more competitive firms, and represents, in the medium to long term, a decisive factor for the increase in overall productivity."[114] The core problematic issue therefore lies in the observation that the indiscriminate opening of restructuring frameworks to any undertaking does not appear consistent with the objectives of the Insolvency Directive, which, on this point, seems to adopt an approach markedly different from that followed by the Italian legislator over the past fifteen years.

It does not seem consistent with the spirit of the Directive to allow access to preventive restructuring instruments for undertakings that cannot be

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[114] Giacomelli, *Economic Forecasts and Outturns in the Context of the Reform of Insolvency Procedures*, in *Proceedings of the 27th Conference of the Associazione Albese Studi di Diritto Commerciale*, 21 November 2021, available at: https://www.fondazionenazionalecommercialisti.it/node/1610.

regarded as "viable," that is, entities which, although in a situation of crisis or insolvency, do not fall within a selective perimeter that it is for the Member States to define.

It follows that the Italian legislator's choice not to identify that threshold—clearly articulated and reiterated in the text of the Directive—between undertakings deserving of an attempt at restructuring and those for which such an effort would be economically inefficient and contrary to the general interest constitutes a manifest conceptual misstep. This choice appears to conflict with basic principles of economic rationality and sound resource allocation.

4.2.2 The Negotiated Composition of Crisis in the Reformed Code: Transposition of Directive (EU) 2019/1023, Systemic Structure and Limits of the Italian Preventive Model

The transposition of Directive (EU) 2019/1023 through Legislative Decree No. 83 of 17 June 2022 significantly reshaped the overall structure of the Code of Business Crisis and Insolvency (CCII), profoundly revising the mechanisms for the early emergence of economic and financial distress. This legislative intervention did not merely entail a formal alignment of domestic law with European obligations, but brought about a genuine redefinition of the underlying logic of crisis prevention, marking a departure from the model originally outlined by the Rordorf Commission.

In its initial version, the CCII anchored crisis prevention to an early warning system characterised by mandatory reporting obligations and the substantial involvement of external bodies, particularly the OCRI. This framework reflected a dirigiste approach, in which the emergence of crisis was entrusted to externally driven mechanisms and accompanied by a marked reduction in entrepreneurial autonomy. The entrepreneur, in this perspective, was not the protagonist of the recovery process, but rather the subject of a procedure triggered predominantly from outside the firm.

The shortcomings of this model became evident even before the Code entered into force, both from an operational and a systemic standpoint. The economic context shaped by the pandemic crisis further highlighted the inadequacy of instruments conceived for a phase of economic normality, prompting the legislator to reconsider radically the preventive approach. Within this framework, first Decree-Law No. 118/2021 and subsequently Legislative Decree No. 83/2022 definitively abandoned the codified early warning system and the assisted composition procedure, introducing the negotiated composition of crisis.

The negotiated composition is conceived as a voluntary, confidential, and out-of-court instrument, accessible to the entrepreneur where patrimonial or economic-financial imbalances render crisis or insolvency likely. The legislative choice clearly aims to restore centrality to the debtor's initiative, on the assumption that timely detection of distress can be better achieved through incentives and support mechanisms rather than coercive obligations. This option is consistent with the path traced by the Insolvency Directive, which favours flexible, minimally formalised preventive restructuring models characterised by limited judicial intervention. The underlying idea is that crisis should be addressed at a still reversible stage, before insolvency becomes irreversible, through instruments that preserve going-concern value and encourage negotiated solutions with creditors.

Structurally, the negotiated composition differs from traditional insolvency proceedings. It does not entail the dispossession of the entrepreneur, who retains management and control of the business, nor does it involve the opening of a judicial proceeding in the strict sense. Access is obtained through a digital platform, reflecting the legislator's intention to promote digitalisation and simplification of preventive tools.

A central element of the mechanism is the independent expert, appointed by a commission established at the Chamber of Commerce. The expert assists the entrepreneur in negotiations with creditors, facilitating dialogue

and the identification of solutions capable of overcoming the difficulties. The expert's role is neither authoritative nor substitutive, but essentially facilitative: he or she acts as a guarantor of the proper conduct of negotiations, without directly intervening in managerial decisions.

Scholarly commentary has emphasised that this structure reflects a deliberate legislative policy choice aimed at strengthening party autonomy and reducing reliance on judicial instruments. However, the downsizing of the judicial role does not imply its complete exclusion. The court retains safeguarding functions, intervening at the request of the entrepreneur to grant protective measures over assets, authorise acts of extraordinary administration, or recognise super-priority status for certain financings.

This balance between private autonomy and limited judicial oversight closely mirrors the principles of Directive (EU) 2019/1023, which seeks to avoid excessive judicialisation of preventive restructuring. At the same time, practical experience has revealed certain critical aspects, particularly regarding the granting of protective measures. In several instances, courts have adopted a cautious approach, requiring rigorous proof of the seriousness and concreteness of ongoing negotiations, thereby risking a reduction in the attractiveness of the instrument.

Further problematic issues concern the uniformity of application standards and the confidence placed in the expert. The method of appointment and the heterogeneous composition of the bodies involved have raised questions about the effective homogeneity of expertise and the genuine independence of appointed experts. These elements directly affect the overall effectiveness of the negotiated composition and its capacity to establish itself as a credible instrument of crisis prevention.

Within the framework of the Insolvency Directive, a central role is attributed to the concept of the "viable enterprise" as a criterion for access to preventive restructuring frameworks. The Directive repeatedly emphasises the need to reserve such instruments to undertakings which,

although experiencing financial distress, retain concrete prospects of economic recovery and business continuity.

It is therefore striking that the Italian legislator, in transposing the Directive, did not explicitly incorporate this notion into the CCII. The absence of a selective criterion based on the economic viability of the undertaking represents a significant gap, particularly if one considers that the concept of a viable enterprise performs a function analogous—albeit differently framed—to the requirement of "worthiness" under the 1942 Bankruptcy Law.

Whereas the notion of worthiness focused primarily on the subjective conduct of the entrepreneur, the concept of the viable enterprise shifts attention to the objective capacity of the business organisation to generate value. The Directive makes clear that attempting to restructure undertakings lacking economic vitality entails high costs for creditors, employees, and the economic system as a whole, as demonstrated by negative experiences in several European jurisdictions.

In this perspective, crisis law is called upon to perform an allocative function, promoting the restructuring of firms in financial distress but not economically compromised, while at the same time facilitating the exit from the market of undertakings that are no longer productive. The preservation of the going concern thus assumes central importance, since the value of the enterprise in continuity is generally higher than its liquidation value. The failure to introduce normative criteria distinguishing between economic crisis and financial crisis appears difficult to reconcile with the objectives of the Insolvency Directive.

Several scholarly proposals, also developed in comparative contexts, suggest the advisability of making access to preventive restructuring frameworks conditional upon a preliminary assessment of the undertaking's economic viability, entrusted either to an independent expert or to the court.

In conclusion, the negotiated composition of crisis undoubtedly represents a central element of the new Italian crisis law, expressing a clear policy choice in favour of prevention and business continuity. However, the decision to favour a strongly privatised model, lacking a selective filter based on the sound economic viability of the undertaking, raises significant questions regarding the systemic coherence of the Italian transposition and its actual capacity to achieve the objectives pursued by the European legislator.

4.3 Business Crisis in Practice: Quantitative and Qualitative Analysis of Insolvency Proceedings in Light of Unioncamere Data

The entry into force of the Code of Business Crisis and Insolvency marked a paradigmatic shift in Italian insolvency law, steering the system toward a logic centred on prevention, early detection of crisis, and the safeguarding of business continuity. Several years after the operational launch of the reform, it is nevertheless essential to assess the actual capacity of the newly introduced instruments to influence practical application. From this perspective, the Unioncamere Observatory on Business Crisis provides an empirical basis of particular significance, enabling an evaluation of the concrete impact of the new regulatory framework through an analysis of the procedures effectively activated by enterprises during the period 2021–2024[115]. The Observatory considers the full range of procedures governed by the Code of Business Crisis—from the negotiated composition to liquidation proceedings—recording their openings across the national territory during the four-year period under review, on the basis of data

[115] The data used in this contribution are drawn from the *Unioncamere Observatory on Business Crisis – Second Edition*, February 2025, based on information extracted from the Companies Register and relating to the procedures governed by the Code of Business Crisis and Insolvency.

extracted from the Companies Register according to predetermined methodological criteria.[116]-[117]. The analysis is structured along two dimensions: a quantitative dimension, concerning the numerical trend of the procedures, and a qualitative dimension, aimed at reconstructing the structural characteristics of the undertakings involved, in terms of size, legal form, and economic sector. From a quantitative standpoint, the most significant finding concerns the progressive affirmation of the negotiated composition of crisis. After an initial phase of limited use—attributable to understandable interpretative and practical uncertainties—the instrument recorded substantial growth, increasing from nearly 600 applications in 2023 to 1,089 filings in 2024[118]. This trend indicates not only a growing familiarity of practitioners with the instrument, but also its progressive legitimisation as an ordinary tool for managing reversible crisis.

At the same time, recourse to the simplified composition with creditors remains limited, with 85 applications filed in 2024, representing a slight increase compared to the previous year. This confirms the residual nature of the mechanism within the framework established by the CCII[119].

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[116] For the purposes of quantitative analysis, the Observatory considers the following procedures: negotiated composition of crisis, simplified composition with creditors, restructuring agreements, preventive composition with creditors, judicial liquidation, and compulsory administrative liquidation, recording their openings throughout the national territory during the four-year period 2021–2024.

[117] The collection of data on the opening of proceedings was carried out by Unioncamere through extraction criteria from the Companies Register, described in detail in the methodological note contained in the concluding section of the Observatory.

[118] During the four-year period 2021–2024, the negotiated composition of crisis displayed a markedly increasing trend, moving from an initial phase of limited use to nearly 600 applications in 2023, and reaching 1,089 applications filed in 2024.

[119] Recourse to the simplified composition with creditors remains limited in 2024, with 85 applications filed, representing a slight increase compared to the 69 applications recorded

Restructuring agreements display a substantially stable level of use over the observed period, with more than 300 openings per year and 326 procedures recorded in 2024 alone[120]. Preventive composition with creditors, by contrast, shows a progressive decline in openings during the period 2021–2023, followed by a moderate reversal of trend in 2024, which registered 762 new proceedings. This pattern suggests a gradual substitution of preventive composition with more flexible and less burdensome instruments at the earlier stages of crisis. In contrast with the preventive logic underlying the Code, judicial liquidations, after a decrease in the period 2021–2023, recorded a significant increase in 2024, with 9,203 proceedings opened. This figure indicates the persistence of a substantial area of crisis not intercepted in a timely manner. The qualitative analysis allows for a more precise understanding of the systemic meaning of these data. Undertakings accessing the negotiated composition display significantly stronger dimensional and organisational characteristics compared to those involved in liquidation proceedings. Capital companies predominate, accounting for 81.5% of cases, while the majority of undertakings fall within the range of 2 to 50 employees, representing 73.5% of applicants[121]. Particularly noteworthy is the increase in the average value of production, which rises from approximately €4 million in 2021 to €10 million in 2024, as well as the growth in the average number of employees, reaching 56 units in 2024[122].

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in 2023, thereby confirming the residual nature of this instrument within the system of procedures governed by the CCII.

[120] Restructuring agreements show a substantially stable level of use over the period under review, with more than 300 openings per year and a total of 326 procedures initiated in 2024 alone.

[121] In 2024, undertakings resorting to the negotiated composition are predominantly capital companies (81.5%), with a concentration in the size bracket between 2 and 50 employees (73.5%) and a production value between €1 and €10 million in 49.6% of cases.

[122] The average production value of undertakings in negotiated composition has progressively increased over time, rising from approximately €4 million in 2021 to €9

These figures indicate that the negotiated composition has progressively become the preferred instrument for more structured undertakings, for which a liquidation solution would entail a destruction of value that is difficult to justify.A different profile emerges with regard to undertakings resorting to the simplified composition with creditors, which are characterised by smaller dimensions, with an average of 15 employees and an average production value of approximately €4 million[123]. From a sectoral perspective as well, although a certain continuity with the negotiated composition can be observed, the lower organisational complexity of the undertakings involved confirms the function of the simplified composition as an instrument of orderly liquidation for businesses lacking concrete prospects of recovery. Restructuring agreements, by contrast, are situated within a higher dimensional bracket: in 2024, the undertakings involved displayed an average production value of €13 million and an average workforce of 70 employees, with a clear predominance of capital companies[124]. Preventive composition with creditors, while showing signs of resilience, involves on average smaller undertakings, with approximately 33 employees and a production value of €6 million, confirming the progressive marginalisation of this instrument in favour of negotiated solutions[125]. The picture emerging from the analysis of liquidation

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million in 2023, and reaching €10 million in 2024; the average number of employees per undertaking amounts to 56 in 2024.

[123] In 2024, undertakings filing for simplified composition with creditors display an average of 15 employees and an average production value of approximately €4 million, indicating a significantly smaller scale compared to those accessing the negotiated composition.

[124] In 2024, undertakings resorting to restructuring agreements display an average production value of €13 million and an average workforce of 70 employees, with a clear predominance of capital companies (83.7%).

[125] Undertakings admitted to preventive composition with creditors in 2024 show an average of 33 employees and an average production value of approximately €6 million; 41% of these undertakings fall within the size bracket of 10 to 49 employees.

proceedings is particularly indicative of the persistent structural fragilities of the entrepreneurial fabric. Judicial liquidations predominantly concern very small undertakings, with an average of 6 employees and an average production value of approximately €1 million[126]. Compulsory administrative liquidation almost exclusively involves cooperatives, consortia, and consortium companies, operating mainly in the construction and healthcare and social assistance sectors. In this case as well, the limited availability of complete financial statement data highlights a structural informational weakness[127]. Of particular systemic relevance is the data concerning the adoption of adequate organisational, administrative, and accounting arrangements pursuant to Article 2086(2) of the Civil Code. An analysis of the notes to the 2023 financial statements reveals that only 3.5% of the undertakings that filed their accounts declared that they had established arrangements suitable for the timely detection of crisis[128]. This figure points to a significant gap between the normative design of the Code and its effective internalisation within the entrepreneurial system, helping to explain both the high number of judicial liquidations and the difficulty in intercepting crisis at a still reversible stage. Overall, the Unioncamere

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[126] Judicial liquidations in 2024 predominantly concern very small undertakings, with an average of 6 employees and an average production value of approximately €1 million, confirming the correlation between structural fragility and recourse to liquidation proceedings.

[127] Compulsory administrative liquidation almost exclusively affects cooperatives, consortia, and consortium companies (98.3% of cases), operating mainly in the construction and healthcare and social assistance sectors; dimensional data are partial due to the limited number of financial statements filed.

[128] An analysis of the notes to the 2023 financial statements shows that, out of 662,244 undertakings that filed their annual accounts, only 22,806 (approximately 3.5%) declared that they had established adequate organisational, administrative, and accounting arrangements pursuant to Article 2086(2) of the Civil Code.

data portray a system in transition. On the one hand, there is clear evidence of the progressive affirmation of negotiated crisis regulation instruments; on the other hand, the persistence of a broad area of liquidation proceedings and the limited diffusion of adequate organisational arrangements highlight the constraints of a reform which, although structurally coherent, still struggles to produce its full effects at the cultural and organisational level.

Chapter 5 – The New Proposal for a Directive of 7 December 2022 (COM(2022)702 final)

5.1 Introduction and European Legislative Process: General Objectives of the Proposal

The proposal for a directive harmonising certain aspects of business insolvency law is situated within a European context characterised by persistent fragmentation of national insolvency regimes, long identified as one of the main obstacles to the full functioning of the internal market and, in particular, to the completion of the Capital Markets Union. Divergences among Member States' insolvency frameworks generate significant asymmetries in terms of the duration of proceedings, management costs, recovery rates, and the level of investor protection, thereby negatively affecting the predictability of business crisis outcomes and discouraging cross-border investment. As noted in the scholarly literature, inefficiency and heterogeneity in insolvency regulation constitute a systemic risk factor capable of undermining economic operators' confidence and hindering the integration of European financial markets[129]. Against this background, on 7 December 2022 the European Commission presented a comprehensive

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[129] A. Leandro, *The European Commission's Proposal for a New Phase of Harmonisation of Crisis and Insolvency Law*, in *Analisi Giuridica dell'Economia*, nos. 1–2, 2023.

package of legislative initiatives aimed at strengthening the competitiveness of the Union economy and facilitating companies' access to capital. Within this package—alongside measures concerning financial markets and clearing services—the proposal for a directive on insolvency, commonly referred to as "Insolvency III," occupies a central position, as it targets one of the areas in which normative differences among national legal systems remain particularly pronounced. The initiative thus forms part of a broader trajectory of progressive reinforcement of Union action in the field of insolvency law, while remaining consistent with the principle of subsidiarity and with the primary competence of Member States in this domain[130]. From the standpoint of the legislative process, the proposal builds upon two fundamental pillars of European insolvency regulation: on the one hand, Regulation (EU) 2015/848 on insolvency proceedings, which established a uniform framework for managing cross-border crises; and, on the other, Directive (EU) 2019/1023 on preventive restructuring and insolvency, designed to promote the rescue of economically viable undertakings and to encourage early intervention in situations of financial distress. However, compared to these earlier interventions, the Insolvency III proposal is characterised by a different focus, primarily directed toward liquidation proceedings and the irreversible pathological phase of crisis, with the declared objective of reducing the duration of procedures and maximising asset realisation for the benefit of creditors.

The Commission's decision to adopt a sectoral harmonisation instrument, rather than pursuing full unification, reflects a pragmatic approach aimed at intervening only in those areas deemed most economically and systemically relevant. In this perspective, the proposal identifies a number of key domains—such as avoidance actions, asset tracing, accelerated sale

[130] L. Panzani, *Reasoned Observations on the Proposal for a New Directive Harmonising Insolvency Laws*, available at www.dirittodellacrisi.it

procedures (pre-pack), directors' duties, and the simplified liquidation of micro-enterprises—for which common minimum standards are established, while leaving Member States a margin of discretion in implementation.

As noted in the scholarly literature, this legislative technique seeks to strike a balance between the need for convergence among legal systems and respect for national traditions, thereby avoiding the risk of excessive regulatory rigidity[131]. From the standpoint of its general objectives, the proposed directive is structured along three fundamental lines.

First, it aims to improve the overall efficiency of insolvency proceedings by reducing their duration and costs, through instruments capable of preserving the value of the enterprise or, at the very least, of its assets.

Second, the proposal seeks to strengthen creditor protection by ensuring greater procedural transparency and a fairer distribution of value, including through enhanced mechanisms of oversight and stakeholder participation.

Third, the legislative initiative is intended to increase the attractiveness of the European market for investors, insofar as a more predictable and harmonised regulatory framework reduces the legal risk associated with cross-border investments[132]. Particular significance in this context attaches to the attention devoted to micro-enterprises, traditionally characterised by greater financial vulnerability and limited capacity to bear the costs of ordinary insolvency proceedings. The introduction of a simplified liquidation regime responds to the need to ensure an orderly management of crisis also for smaller undertakings, preventing procedural inefficiencies

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[131] A. Pezzuto, *La proposta di direttiva sull'armonizzazione di taluni aspetti dell'insolvenza delle imprese*, in *Rivista di Diritto Bancario*, Tidona, 2025.

[132] CNDCEC, *The Ongoing Evolution of Insolvency Law: A New EU Directive Proposal*, 29 November 2024.

from resulting in a disproportionate destruction of value relative to the size of the assets involved.

According to part of the scholarly literature, this choice constitutes one of the most innovative aspects of the proposal, as it allows insolvency instruments to be tailored to the actual structure of the European entrepreneurial landscape[133]. Overall, the Insolvency III proposal constitutes an essential step in the ongoing process of Europeanisation of business crisis law. Although it does not directly reshape the overall structure of national insolvency systems, it introduces a set of common principles and standards intended to guide the future evolution of domestic legislation, fostering greater functional convergence.

From this perspective, the proposal is likely to exert a significant influence also on legal systems—such as the Italian one—that have recently undergone extensive reform of insolvency law, raising new interpretative and practical issues in the course of its eventual transposition[134].

5.2 Analysis of the Seven Pillars of the Proposed Directive

The proposal for a directive harmonising certain aspects of business insolvency law is structured around seven fundamental pillars, each aimed at addressing specific critical junctures of national insolvency regimes, with a view to achieving functional convergence among Member States' legal systems. These pillars outline a European model for managing the irreversible phase of business crisis, grounded in procedural efficiency, value maximisation, and a balanced protection of the interests involved.

The first pillar concerns the regulation of avoidance actions, to which the proposal devotes a set of minimum harmonisation rules designed to protect the insolvency estate against acts of asset depletion carried out prior to the

[133] Leandro A., op. cit.

[134] Panzani L., op. cit.

opening of insolvency proceedings. In particular, the proposal identifies three categories of voidable transactions—preferential transactions, transactions at an undervalue (including gratuitous acts or those involving manifestly inadequate consideration), and fraudulent transactions—distinguishing them according to the applicable suspect period and the subjective element required.

This intervention seeks to reduce the disparities existing among national legal systems regarding the effectiveness of estate-reintegration actions, thereby strengthening creditor protection and enhancing the predictability of procedural outcomes. Scholarly commentary has emphasised that the introduction of common standards in the field of avoidance actions constitutes an essential step toward ensuring a uniform minimum level of protection of the insolvency estate within the European legal space[135]. The second pillar concerns the traceability of assets belonging to the insolvency estate, through the strengthening of the informational powers granted to insolvency practitioners. The proposal provides for direct or indirect access to public registers and non-public databases, including those established for anti-money laundering purposes, in order to enable a timely and comprehensive reconstruction of the debtor's assets.

The objective is to reduce the informational asymmetry that frequently characterises insolvency proceedings, thereby improving the efficiency of liquidation activities and enhancing creditors' prospects of recovery. Scholarly commentary has interpreted this choice as reflecting a functional conception of transparency, understood not merely as an intrinsic value, but as an operational instrument for the preservation of patrimonial value[136]. The third pillar consists of the pre-pack procedure, understood as

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[135] A. Leandro, *The European Commission's Proposal for a New Phase of Harmonisation of Crisis and Insolvency Law*, in *Analisi Giuridica dell'Economia*, nos. 1–2, 2023.

[136] K. Silvestri, *The Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Insolvency Law*, available at www.dirittodellacrisi.it

a mechanism for the accelerated sale of the business or of parts thereof on a going-concern basis, prepared prior to the formal opening of insolvency proceedings. The proposal draws upon practices already established in several European and non-European jurisdictions, regulating the procedure in a manner intended to ensure competitiveness, transparency, and judicial oversight. The introduction of the pre-pack responds to the need to prevent the dissipation of enterprise value typically associated with piecemeal liquidations, promoting a more rapid and efficient realisation of assets. According to part of the scholarly literature, the European regulation of the pre-pack constitutes one of the most innovative elements of the proposal, as it directly affects the traditional balance between creditor protection and the safeguarding of employment[137]. The fourth pillar concerns directors' duties in the vicinity of insolvency. The proposal introduces an obligation to file promptly for the opening of insolvency proceedings where the undertaking is insolvent or approaching insolvency, establishing a maximum period of three months from the moment in which the state of crisis is known or ought to have been known.

This provision seeks to counter dilatory conduct capable of aggravating the financial distress and prejudicing the insolvency estate. In the event of breach, directors may incur civil liability for the damage caused. Scholarly commentary has emphasised that this intervention reflects a broader European trend toward strengthening the accountability of managing bodies, while still allowing Member States to adopt more stringent regimes[138]. The fifth pillar consists of the simplified liquidation procedure for micro-enterprises, designed to adapt insolvency law to the dimensional and structural characteristics of a category of undertakings that constitutes the majority of the European productive fabric. The proposal envisages a

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[137] L. Panzani, *Reasoned Observations on the Proposal for a New Directive Harmonising Insolvency Laws*, available at www.dirittodellacrisi.it

[138] Leandro A., op. cit.

streamlined procedure characterised by limited costs, the exceptional appointment of an insolvency practitioner, and the possibility of liquidating assets through electronic auctions. The objective is twofold: to ensure an orderly liquidation even in the absence of significant assets and to reduce the procedural and financial burden placed on undertakings that are already highly vulnerable. Scholarly commentary has highlighted that this discipline responds to a need for proportionality in insolvency intervention, often lacking in traditional systems[139]. The sixth pillar concerns the strengthening of the role of the creditors' committee, to which the proposal devotes a detailed regulatory framework in terms of composition, powers, and responsibilities. The committee is conceived as a representative body of the interests of the creditor body, endowed with supervisory powers over the actions of the insolvency practitioner and with active participation in key procedural decisions. The harmonisation of these aspects aims to enhance the role of creditors as central stakeholders in the proceedings, while simultaneously reinforcing transparency and the legitimacy of managerial choices. According to scholarly analysis, this intervention contributes to rebalancing the relationship between the procedural organs and creditors, in a perspective of greater accountability[140]. The seventh and final pillar concerns the transparency of national insolvency regimes, pursued through the obligation for Member States to prepare and regularly update standardised information sheets on their respective insolvency frameworks, accessible via the European e-Justice Portal. This measure is intended to reduce informational costs for investors and to enhance the comparability of national systems, thereby facilitating more informed investment decisions. Regulatory transparency is thus elevated to an instrument of market integration, in line with the broader objectives of the

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[139] CNDCEC, *The Ongoing Evolution of Insolvency Law: A New EU Directive Proposal*, 29 November 2024.
[140] Panzani L., op. cit.

Capital Markets Union[141]. Taken together, the seven pillars of the proposal outline a coherent and structured intervention aimed at addressing key structural aspects of insolvency law without overturning national legal architectures. Rather than imposing uniformity, they operate as a set of regulatory levers designed to guide the evolution of insolvency systems toward models that are more efficient, predictable, and responsive to the needs of the European economy.

5.3 The Union's Approach to Minimum Harmonisation

The proposal for a directive presented by the European Commission in December 2022 in the field of insolvency is distinguished by its deliberate choice of a minimum harmonisation model, consistent with the progressive evolution of Union law in this area. The objective of the intervention is not to construct a unified European system of insolvency proceedings, but rather to promote functional convergence among Member States' legal systems through the identification of common standards limited to aspects considered strategic for the proper functioning of the internal market.

As noted in the scholarly literature, the Commission's action does not amount to a genuine European codification of insolvency law, but rather to a selective process of rationalising those normative differences that have the greatest economic and financial impact[142]. This approach finds its legal basis in Article 114 TFEU and is closely connected to the policies underlying the development of the Capital Markets Union. The Commission proceeds from the observation that the high degree of fragmentation among national insolvency regimes generates systemic inefficiencies, undermining the predictability of procedural outcomes and eroding investor confidence,

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[141] A. Pezzuto, *The Proposal for a Directive on the Harmonisation of Certain Aspects of Business Insolvency*, in *Rivista di Diritto Bancario*, Tidona, 2025.

[142] Leandro A., *La proposta della Commissione europea per una nuova fase di armonizzazione del diritto della crisi e dell'insolvenza*, in *Analisi Giuridica dell'Economia*, 1-2/2023

particularly in cross-border contexts. Significant differences in the duration of liquidation proceedings, procedural costs, and recovery rates contribute to a heterogeneous regulatory environment, resulting in legal risk that is difficult to assess ex ante. In this perspective, minimum harmonisation is not an autonomous end, but a functional instrument aimed at reducing uncertainty and facilitating the free movement of capital.

A defining feature of the proposal lies in the decision to focus Union intervention on certain essential dimensions of insolvency law, while largely leaving untouched the structural choices of individual national systems. In particular, the harmonising action revolves around three main axes: the recovery of assets belonging to the insolvency estate, the efficiency of insolvency proceedings, and the fair and predictable distribution of recovered value among creditors. These aspects have evident economic relevance, directly affecting market operators' assessment of risk. As noted in the literature, such thematic selectivity maximises the impact of the European intervention while avoiding excessive interference with national legal traditions.

Consistently with this approach, the proposal deliberately refrains from harmonising fundamental concepts of insolvency law, foremost among them the general notion of insolvency, which remains within the competence of Member States. The only exception concerns the simplified liquidation of micro-enterprises, for which a uniform criterion based on generalised inability to meet obligations as they fall due is introduced. Even in this case, however, the Union intervention is limited to requiring the adoption of clear and easily ascertainable criteria, without imposing a rigid and uniform definition. This choice confirms the Commission's intention to preserve European legal pluralism, avoiding interference with deeply rooted conceptual categories within national systems.

The logic of minimum harmonisation emerges particularly clearly in the regulation of avoidance actions. In this field, the Commission confines itself

to outlining a common framework of conditions and effects, expressly recognising Member States' ability to maintain or strengthen the levels of protection already provided under their domestic law. No uniform model of avoidance is imposed; rather, a minimum threshold of protection of the insolvency estate is established, below which Member States may not fall. As emphasised in scholarly commentary, this legislative technique responds to the need to prevent regulatory competition to the bottom and to reduce opportunistic recourse to the conflict-of-law rules provided by Regulation (EU) 2015/848, while preserving national legislative autonomy[143]. A similar approach characterises the regulation of the pre-pack procedure, one of the most innovative aspects of the proposal. Here again, the Union limits itself to defining the fundamental principles of the procedure—such as public oversight, transparency, competitiveness, and creditor protection—leaving Member States wide discretion regarding the modalities of concrete implementation. The Commission deliberately avoids imposing a rigid procedural model, preferring instead to establish a common reference framework intended to guide national reforms. According to the literature, this choice reflects a pragmatic conception of harmonisation, understood as functional convergence rather than formal uniformity[144]. Taken as a whole, the Union's approach to minimum harmonisation forms part of an evolutionary trajectory that privileges targeted interventions capable of producing significant systemic effects without altering the overall balance of national insolvency systems. The 2022 proposal does not amount to a "constitutional" reform of European insolvency law, but rather to a set of regulatory instruments designed to address the critical points that most hinder market integration. In this

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[143] L. Panzani, *Reasoned Observations on the Proposal for a New Directive Harmonising Insolvency Laws*, available at www.dirittodellacrisi.it.

[144] K. Silvestri, *The Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Insolvency Law*, available at www.dirittodellacrisi.it.

perspective, minimum harmonisation does not represent a limitation of Union action, but rather its distinctive methodological hallmark, aimed at reconciling economic efficiency, legal predictability, and respect for national diversity.

5.4 The Use of Digital Instruments Established by the Union: Access to Databases and "Information Factsheets" within the e-Justice Portal. The DEUCE Project

Within the framework of the proposal for a directive harmonising certain aspects of insolvency law, one of the most significant interventions concerns the repurposing, in the insolvency context, of digital instruments established by the European Union for purposes originally unrelated to insolvency law, particularly in the field of anti-money laundering and counter-terrorist financing. This regulatory choice forms part of a broader strategy aimed at enhancing the effectiveness of insolvency proceedings by reducing informational asymmetries that hinder asset recovery and the protection of the insolvency estate, especially in cases characterised by cross-border elements[145].

Title III of the proposed directive authorises insolvency practitioners to access the decentralised databases established by Member States pursuant to anti-money laundering directives, such as centralised bank account registers and beneficial ownership registers, as well as other national registers containing information relevant to reconstructing the debtor's assets. The declared objective is to facilitate the identification and traceability of assets forming part of the insolvency estate, including those potentially subject to avoidance actions, thereby strengthening the capacity of insolvency proceedings to generate distributable value for creditors.

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[145] G.-J. Boon – D. Tasman, *An Assessment of the EC Proposal on Harmonisation of EU Insolvency Law*, in International Corporate Rescue, vol. 20, n. 6, 2023, p. 389 ss.

A central feature of the framework is the affirmation of the principle of equal access to information, requiring Member States to ensure that practitioners appointed in other jurisdictions enjoy the same conditions of access as those granted to domestic practitioners. The requirement of non-discriminatory access "in law and in fact" seeks to remove one of the most significant obstacles to the efficient management of cross-border insolvencies, namely the fragmentation of information systems and the practical difficulties involved in consulting asset-related databases located in Member States other than that in which proceedings were opened.

In this perspective, digital access to databases is not merely a matter of procedural efficiency, but directly affects competitive equality among market operators and the overall quality of the internal market. The ability to reconstruct promptly and reliably the debtor's asset position, irrespective of the geographical location of assets, helps to prevent informational proximity to national data centres from translating into an unjustified competitive advantage for certain practitioners or creditors.

The regulation of asset tracing nonetheless raises evident complexities, arising from its interaction with EU data protection law and anti-money laundering rules. In particular, access to information contained in centralised bank account registers is not always direct; it may be subject to the intermediation of judicial authorities or qualified personnel tasked with assessing the relevance and proportionality of consultation requests. While such safeguards may introduce additional procedural burdens, they respond to the need to balance the efficiency of insolvency proceedings with the protection of the fundamental rights of the persons concerned[146]. Notwithstanding these limitations, recourse to interconnected digital

[146] K. Silvestri, *The Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Insolvency Law*, in *Diritto della crisi*, 2023, § 6, on access to registers and safeguards arising from anti-money laundering legislation.

instruments represents an essential step in rendering effective the principle of universality of insolvency proceedings within the EU legal order. The possibility for the insolvency practitioner to access asset-related information located in multiple Member States strengthens the system's capacity to react to asset dissipation or concealment, phenomena that are particularly frequent in cross-border insolvencies and constitute one of the principal causes of procedural inefficiency. The resulting informational transparency also enhances investor confidence in the functioning of European insolvency systems, in line with the broader objectives of Capital Markets Union integration.

In this perspective, scholarship has emphasised that strengthening informational tools constitutes a key lever for reducing legal and informational barriers to cross-border investment, fostering greater substantive harmonisation of national insolvency regimes and promoting a more efficient functioning of the Capital Markets Union.

Alongside the enhancement of asset-tracing mechanisms, the proposal assigns a central role to the transparency of national insolvency regimes through the introduction of so-called "information factsheets" to be published on the European e-Justice Portal. This intervention, placed in Title VIII of the proposal, pursues a complementary objective to asset tracing, addressing informational asymmetries that arise even before the opening of proceedings and that influence investment and lending decisions.

The directive requires each Member State to make available, within the European Judicial Atlas in civil matters, a clear, concise, accurate, and regularly updated information factsheet, drafted according to a standardised template defined at EU level. The aim is to provide investors with a homogeneous informational basis regarding the essential features of national insolvency regimes, enabling comparative assessment of the risks

associated with the insolvency of a debtor established in another Member State.

The information factsheets are to be structured around four core sections: (i) the conditions for opening proceedings; (ii) the lodging and verification of claims; (iii) the criteria governing the distribution of assets; and (iv) the average duration of proceedings. This selection reflects the assumption that these elements represent the principal factors considered by investors in determining the cost of credit and assessing the reliability of national insolvency systems.

In this context, the standardisation of information acquires systemic significance. Scholarship has observed that the mere availability of data is insufficient to reduce informational costs if such data are not presented in a comparable, accessible, and intelligible format. The adoption of a common template is therefore intended to overcome the descriptive fragmentation that characterises currently available sources of information on insolvency law, often heterogeneous in structure, language, and degree of updating.

Within this perspective, the DEUCE project (Digital European Union for Insolvency and Enforcement) has been identified in the literature as a possible operational development of the European strategy for digitalising civil justice. Although not constituting an autonomous normative instrument, the project seeks to enhance and integrate the information made available through the e-Justice Portal, promoting the interconnection of registers, databases, and information factsheets, with a view to constructing a European digital insolvency infrastructure.

The function of the information factsheets is not limited to investor protection. They also serve as a mechanism of systemic transparency, capable of exerting indirect pressure on Member States, which are required to render the actual characteristics of their insolvency systems publicly accessible. In this sense, the publication of data concerning the average duration of proceedings and asset distribution mechanisms may incentivise

reforms aimed at improving systemic efficiency, according to a logic of virtuous regulatory competition.

The functional link between information factsheets and access to asset-related databases reveals a common teleological foundation: reducing legal uncertainty and informational costs that hinder the free movement of capital within the internal market. While asset-tracing instruments enhance procedural effectiveness at the pathological stage of insolvency, information factsheets operate in a preventive dimension, influencing investment decisions and the assessment of insolvency risk.

Taken together, these instruments outline a model of a European digital insolvency infrastructure, destined to exert a profound impact on practical application and on capital market dynamics, strengthening the nexus between insolvency harmonisation, informational transparency, and economic integration within the Union.

It would be worthwhile to further investigate the relationship between the circulation of a European order for payment that has become enforceable in one Member State and its recognition and enforcement in other Member States where protective measures in favour of the debtor may be in place. In this regard, enhancing the digitalisation and interconnection of judicial registers and chambers of commerce across Member States—also through the e-Justice Portal—could play a crucial role in reconciling the effectiveness of cross-border enforcement with the safeguards embedded in national insolvency frameworks.

5.4.1 Digitalisation of Justice and the Transformation of the Area of Freedom, Security and Justice: From Technical Cooperation to Normative Infrastructuring

The European strategy for the digitalisation of justice cannot be interpreted merely as a technological update of judicial administration, nor as a sector-specific policy devoid of systemic relevance. Rather, it represents an

evolutionary stage in the process of legal integration within the Union, in which the technological dimension assumes a structural function in the construction of the area of freedom, security and justice.

The European e-Justice Strategy 2024–2028, adopted by the Council in January 2025, and the Communication *DigitalJustice@2030* outline a framework in which digitalisation is conceived both as an enabling condition for the proper functioning of the internal market and as an instrument for strengthening the effectiveness of judicial protection[147] [148]. In this perspective, digital justice stands at the intersection of Article 67 TFEU (area of freedom, security and justice), Article 81 TFEU (judicial cooperation in civil matters), and Article 114 TFEU (harmonisation functional to the internal market).

The element of novelty compared to the previous phase of European judicial cooperation lies in the transition from a predominantly descriptive and coordinative logic to a genuine process of normative infrastructuring. Whereas the earlier e-Justice Strategy (2019–2023) was still characterised by a strong voluntarist component and cooperation based on best practices and soft instruments, the current phase is marked by the introduction of legally binding tools.

The Digitalisation Package—comprising Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and its related implementing measures—mandates the use of electronic communication in 24 cross-border civil, commercial, and criminal procedures[149]. This development marks a qualitative transformation: digitalisation is no longer an

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[147] Council of the European Union. (2025). *European e-Justice Strategy 2024–2028* (C/2025/437). Official Journal of the European Union. https://eur-lex.europa.eu

[148] European Commission. (2025). *DigitalJustice@2030* (COM(2025) 802 final). https://eur-lex.europa.eu

[149] European Parliament and Council. (2023). *Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters*. Official Journal of the European Union. https://eur-lex.europa.eu

organisational option, but a legally prescribed mode of exercising judicial cooperation. Within this framework, the principle of "digital by default" acquires a significance that transcends the administrative dimension. It operates as an ordering criterion of European legislative production: future legislative initiatives in the field of judicial cooperation must presuppose electronic communication as the primary standard, leaving analogue modalities as residual channels[158].

The emphasis on interoperability—reiterated both in the e-Justice Strategy and in the Communication *DigitalJustice@2030*—reveals a further dimension: legal integration proceeds through infrastructural integration. The interconnection of national systems through e-CODEX and the progressive implementation of a decentralised European IT system are not mere technical tools but constitute the material precondition for the effective operation of the principle of mutual recognition.

Mutual recognition presupposes the effective circulation of acts and decisions. Without a common digital infrastructure, mutual trust among legal systems risks remaining an abstract postulate. In this perspective, digitalisation becomes the concrete vector of mutual trust, reducing informational asymmetries and transmission times.

The European strategy for the digitalisation of justice is thus embedded in a logic of functional integration: the aim is not the substantive uniformity of national procedural laws, but the construction of common operational conditions that render such laws reciprocally accessible and recognisable.

5.4.2 DigitalJustice@2030 and the Economic Dimension of Digital Justice: Competitiveness, Efficiency and the Capital Markets Union

A second dimension concerns the connection between the digitalisation of justice and the economic competitiveness of the Union.

DigitalJustice@2030 explicitly situates the digitalisation of judicial systems within the broader European strategy for competitiveness. The quality of

justice—measured in terms of efficiency, duration of proceedings, accessibility, and transparency—directly affects investment propensity, the circulation of capital, and the stability of the internal market.

This approach mirrors the underlying logic of the proposal for a directive harmonising certain aspects of insolvency law of 7 December 2022 (so-called Insolvency III). In that context as well, the fragmentation of national regimes is identified as a structural obstacle to the integration of capital markets.

Digitalisation thus forms part of a broader architecture of European economic governance. The envisaged European Electronic Access Point, to be operational by 2028 and through which citizens and undertakings will be able to initiate proceedings and request certifications, is not merely an administrative simplification measure: it constitutes a genuine market infrastructure[150]. Data from 2025 reveal uneven progress: almost all Member States allow the online initiation of civil and commercial proceedings, yet the possibility of digitally submitting evidence remains limited to a relatively small number of jurisdictions. This asymmetry confirms that normative harmonisation may produce differentiated effects in the absence of infrastructural convergence.

Digitalisation thus acquires the character of a cross-cutting policy instrument: it reduces transaction costs, accelerates proceedings, enhances predictability of outcomes, and strengthens systemic transparency. In this sense, it operates as an indirect implementation tool of the Capital Markets Union. Within the field of insolvency law, this nexus is particularly evident. Asset traceability through access to digital registers and databases, the standardised publication of information on national insolvency regimes via the e-Justice Portal, and the enhanced comparability of systems contribute

[150] European Commission. (2025). *EU Justice Scoreboard 2025*. https://commission.europa.eu

to reducing legal uncertainty and, consequently, the risk premium demanded by investors.

The digitalisation of justice[151] thus becomes an element of European economic policy. It contributes to transforming justice from a potential systemic risk factor into an enabling infrastructure for growth.

5.4.3 From Regulatory Cooperation to Infrastructural Cooperation: Digitalisation as a New Modality of Exercising European Competence

The third conceptual juncture concerns the nature of the competence exercised by the Union through digitalisation.

Traditionally, judicial cooperation in civil matters has developed through regulations harmonising rules on jurisdiction, applicable law, and the recognition of judgments. Normative intervention focused primarily on conflict-of-law rules and coordination mechanisms.

The current phase marks a shift: the Union now intervenes not only on rules, but on infrastructures. The establishment and strengthening of common digital systems – e-CODEX, the European repository of digital solutions, and the IT toolbox for justice – constitute an exercise of competence that directly affects the organisational modalities of the Member States.

This development raises a significant theoretical question: can digitalisation be regarded as a form of indirect harmonisation?

In light of the relevant strategic documents, the answer tends to be affirmative. Interoperability requires common standards, shared formats, and uniform protocols. Although national procedural structures formally remain intact, digital infrastructure produces functional convergence.

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[151] European Commission. (2025). European Judicial Training Strategy 2025–2030. https://commission.europa.eu

Thus, a form of integration "through technical standards" emerges which, while not imposing substantive uniformity, significantly conditions the internal organisation of judicial systems.

The envisaged "living repository" of national digital solutions, hosted on the e-Justice portal, together with the creation of a European IT toolbox, represent additional instruments of convergence. Member States are encouraged to adopt solutions already developed elsewhere, thereby promoting the use of common standards and reducing fragmentation.

From this perspective, digitalisation constitutes a new modality of exercising European competence: no longer limited to normative production but extended to the construction of common infrastructures.

This evolution is also relevant in the field of insolvency law. The publicity of proceedings, access to information on insolvency registers, and the interconnection of databases constitute operational preconditions for the effectiveness of insolvency harmonisation.

In the absence of such conditions, normative reform risks remaining inoperative or being applied in a fragmented manner. Digitalisation thus becomes the material precondition for legal integration[152].

5..4.4 Digitalisation, the Rule of Law and Procedural Safeguards: The Tension between Systemic Efficiency and the Protection of Fundamental Rights – Digital Justice and the Rule of Law: Technological Transformation as a Multilevel Constitutional Issue

The digitalisation of European justice cannot be reduced to a mere process of administrative innovation or organisational modernisation. It directly affects the Union's multilevel constitutional structure, placing in tension

[152] Vrije Universiteit Brussel. (2024–2026). *DEUCE (Digitalising European Uncontested Claims Enforcement) project documentation and research outputs*. https://www.pf.uni-lj.si/en/research-and-innovation/raziskovalni-projekti/deuce-digitalising-european-uncontested-claims-enforcement

two structural imperatives: on the one hand, systemic efficiency and the functional integration of the internal market; on the other, the protection of fundamental rights and the safeguarding of the rule of law [153].

The European e-Justice Strategy 2024–2028 and the Communication *DigitalJustice@2030* expressly situate digitalisation within the Area of Freedom, Security and Justice referred to in Articles 67 and 81 TFEU, expressly invoking the central role of Article 47 of the Charter of Fundamental Rights of the European Union[154] [155]. Digital justice, therefore, does not develop within a legally neutral space: it must comply with the principles of judicial independence, the right to a fair trial, adversarial proceedings, and proportionality.

This tension becomes particularly evident in the context of automation and the deployment of artificial intelligence systems. The AI Act (Regulation (EU) 2024/1689), by classifying the use of AI in the administration of justice as a "high-risk" area, implicitly acknowledges that the digital transformation of adjudication engages primary interests of the European

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[153] Court of Justice of the European Union, case law on Article 47 of the Charter: CJEU, 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16. CJEU, 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU.
CJEU, 6 October 2020, *La Quadrature du Net*, Joined Cases C-511/18, C-512/18 and C-520/18.
CJEU, 15 July 2021, *Commission v Poland*, C-791/19.
Official case law database: https://curia.europa.eu

[154] Council of the European Union. (2025). European e-Justice Strategy 2024–2028 (C/2025/437). EUR-Lex. https://eur-lex.europa.eu

[155] European Commission. (2025). DigitalJustice@2030 (COM(2025) 802 final). EUR-Lex. https://eur-lex.europa.eu

legal order[156]. The classification as "high-risk" entails stringent obligations in terms of transparency, traceability, human oversight, and the management of algorithmic bias. This approach reveals a systemic premise: technological efficiency must not result in a reduction of the judge's role or in decision-making delegation devoid of adequate safeguards.

Digitalisation, therefore, does not merely alter the modalities of communication between judicial authorities or between courts and parties; it affects the very structure of the adjudicatory function. The use of speech-to-text tools, automated document analysis, and large language models for drafting procedural acts, while capable of enhancing efficiency, raises concerns regarding the transparency of decisions and the verifiability of argumentative reasoning.

In this context, the rule of law assumes both a limiting and guiding function. Digitalisation must strengthen, not compress, the quality of justice. As emphasised in European strategic documents, the objective is to enable judges to focus more extensively on their substantive decision-making function, freeing them from repetitive tasks without replacing their judgment. The balancing of efficiency and fundamental rights thus becomes the cornerstone of the European strategy. Digital justice is legitimate only insofar as it remains "people-centred," as affirmed by the e-Justice Strategy, namely oriented towards the effective protection of rights and the universal accessibility of judicial services[157]. The digitalisation of justice, therefore, cannot be conceived without a robust cybersecurity framework. The Cybersecurity Act (Regulation (EU) 2019/881) and the European certification mechanisms for ICT products acquire systemic relevance also in the judicial sector. The vulnerability of digital infrastructures could

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[156] European Parliament and Council. (2024). *Regulation (EU) 2024/1689 (AI Act)*. EUR-Lex. https://eur-lex.europa.eu

[157] European Parliament and Council. (2016). *Regulation (EU) 2016/679 (GDPR)*; *Directive (EU) 2016/680*. EUR-Lex. https://eur-lex.europa.eu

compromise not only data confidentiality, but also the integrity of proceedings and citizens' trust. In the absence of adequate security measures, interoperability would risk becoming a source of fragility.

The European strategy addresses this tension through the affirmation of the principle of secure interoperability. This does not merely entail technical compatibility between systems, but rather integration that complies with common standards of security and data protection.

Interoperability thus becomes a legal as well as a technical category. It serves the objective of mutual recognition, yet must be calibrated in light of fundamental rights. The free circulation of judicial data is conditioned upon compliance with the principles of data minimisation, proportionality, and purpose limitation. In this sense, digitalisation contributes to redefining the relationship between national sovereignty and European integration. Member States retain ownership of their judicial systems, but are required to conform to common standards that directly affect data management practices.

A third problematic dimension concerns access to justice in a context of progressive digitalisation. The e-Justice Strategy 2024–2028 clearly affirms that the principle of "digital by default" must be accompanied by the maintenance of alternative non-digital channels. This statement reflects awareness of the exclusion risks associated with the digital divide. According to the data referenced in the strategic documents, a significant percentage of European citizens lack basic digital skills. Digital literacy thus becomes a condition for the effective exercise of access to justice.

The training obligation introduced in relation to the use of artificial intelligence in the administration of justice — following the adoption of the AI Act — fits within this framework. The European Judicial Training Strategy 2025–2030 identifies the training of judges and judicial staff as an

essential enabling factor[158]. The legitimacy of digital justice, therefore, depends on its inclusiveness. A fully digitalised system that is accessible only to a segment of the population would be incompatible with the principle of substantive equality. Moreover, disparities among Member States in terms of their level of digitalisation — as documented by the EU Justice Scoreboard — entail the risk of a differentiated effectiveness of European rules[159]. Digital judicial cooperation may function fully in certain legal systems while proving partially ineffective in others. This confirms that digitalisation is not a neutral process. It affects the operational conditions of judicial systems and may exacerbate structural divergences if not accompanied by adequate investment.

From this perspective, European funding programmes — such as the Digital Europe Programme and the Recovery and Resilience Facility — acquire an indirect constitutional function: ensuring that digital integration does not generate new forms of inequality.

The digitalisation of justice, therefore, is legitimate only insofar as it strengthens effective access to judicial protection and does not restrict its availability.

5.4.5 Transparency, Interoperability and Digital Registers: Towards a European Insolvency Infrastructure

The proposal for a Directive of 7 December 2022 on the harmonisation of certain aspects of insolvency law introduces, among its core pillars, the strengthening of transparency measures concerning national regimes[2]. This intervention must be interpreted in light of the broader process of

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[158] European Commission. (2025). *European Judicial Training Strategy 2025–2030*. https://commission.europa.eu

[159] European Commission. (2025). *EU Justice Scoreboard 2025*. https://commission.europa.eu

digitalisation of justice outlined in the e-Justice Strategy 2024–2028 and in *DigitalJustice@2030* [160] [161]. Traditionally, the publicity of insolvency proceedings has been governed at national level through insolvency registers or official publication mechanisms designed to ensure awareness and the enforceability of the effects of the proceedings. However, the cross-border dimension of business crises has made evident the inadequacy of publicity systems confined within national boundaries. In this context, the introduction of minimum transparency standards through the provision of "information sheets" published on the European e-Justice portal represents a first step towards functional convergence[162].

Transparency, therefore, is not merely a matter of formal publicity, but an instrument for the integration of the internal market. The strengthening of transparency is closely intertwined with the infrastructural dimension of digitalisation. The interoperability of national insolvency registers constitutes the technical and legal precondition for the effective implementation of the principle of universality of proceedings.

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[160] *DigitalJustice@2030* – COM(2025) 802 final

European Commission, Communication "*DigitalJustice@2030*", COM(2025) 802 final.

It provides for the establishment of a living repository and a European IT toolbox for justice. EUR-Lex: https://eur-lex.europa.eu

[161] European e-Justice Strategy 2024–2028

Council of the European Union, *European e-Justice Strategy 2024–2028* (C/2025/437).

Principles: interoperability, digital by default, accessibility.

e-Justice Portal: https://e-justice.europa.eu

EUR-Lex: https://eur-lex.europa.eu

[162] Proposal for a Directive COM(2022) 702 final (Insolvency III) European Commission, Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law, COM(2022) 702 final, 7 December 2022.

Text: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702

Regulation (EU) 2015/848 provided for the interconnection of insolvency registers through the e-Justice portal[163].

The proposed Insolvency III Directive expands this interconnection, embedding it within a broader framework of access to asset registers and databases [164]. Interoperability, in this perspective, becomes a systemic category, consistent with the principles affirmed in the e-Justice Strategy.

The construction of a European digital insolvency infrastructure also follows the trajectory outlined in *DigitalJustice@2030*, which envisages the creation of a "living repository" of national digital solutions and an IT toolbox for justice.

The progressive digitalisation of registers and the interconnection of databases transform mutual recognition from a formal principle into an operational practice, in line with the case law of the Court of Justice, which has affirmed its systemic centrality in insolvency proceedings[165]. The automatic recognition of opening decisions provided for by Regulation 2015/848 presupposes the timely awareness of the proceedings by authorities and interested parties.

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[163] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141/19, 5.6.2015. Articles 24–25: interconnection of insolvency registers through the European e-Justice Portal.

Official text: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0848

[164] Proposal for a Directive COM(2022) 702 final (Insolvency III)

European Commission, Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law, COM(2022) 702 final, 7 December 2022.

Text: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702

[165] CJEU Case Law on Mutual Recognition in Insolvency Matters

CJEU, 2 May 2006, *Eurofood IFSC Ltd*, C-341/04, ECLI:EU:C:2006:281. CJEU, 21 January 2010, *MG Probud Gdynia sp. z o.o.*, C-444/07, ECLI:EU:C:2010:24. Official case law database: https://curia.europa.eu

Moreover, the experience of the DEUCE project — aimed at developing a comparative roadmap of enforcement rules and an IT platform for the execution of European titles — highlights how judicial cooperation can be strengthened through innovative technological tools[166]. This development forms part of the broader doctrinal debate on insolvency harmonisation, which has emphasised the need to complement normative convergence with the construction of common digital instruments [167]. A form of integration through infrastructures thus emerges, in which the digital dimension becomes a vehicle for legal convergence.

5.4.6 Administrative Capacity and Organisational Sustainability: The Condition for the Effectiveness of Normative Reform

European normative reform in the field of insolvency and, more broadly, the strategy for the digitalisation of justice cannot be assessed solely in terms of systemic coherence or the technical adequacy of the solutions adopted.

They must be evaluated in light of the administrative capacity of the Member States to implement, manage, and sustain over time the infrastructures and digital processes introduced, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU[168] [169]. The

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[166] DEUCE Project – Digitalising European Uncontested Claims Enforcement Project coordinated by Vrije Universiteit Brussel (2024–2026). Documentation: https://dike.research.vub.be and https://www.pf.uni-lj.si/en/research-and-innovation

[167] Silvestri, K. (Kevin). Contributions on European insolvency harmonisation and digital instruments for judicial cooperation.

Panzani, L. (2017). *Preservation of the undertaking, public interest and protection of creditors*. IlCaso.it.

[168] European Commission, *The 2025 EU Justice Scoreboard*, COM(2025) 375 final, Brussels, 2025, § 2.2.3 (Digitalisation).https://commission.europa.eu

[169] European Commission, *DigitalJustice@2030*, COM(2025) 802 final, Brussels, 20 November 2025, pp. 1–4.https://eur-lex.europa.eu

European e-Justice Strategy 2024–2028 and *DigitalJustice@2030* explicitly acknowledge that the level of digitalisation of European judicial systems is uneven. Data from the *EU Justice Scoreboard 2025* show significant, yet non-uniform, progress. This heterogeneity directly affects the effectiveness of European rules. Minimum harmonisation in the field of insolvency law[170] and the mandatory nature of digital communication introduced by the Digitalisation Package presuppose an adequate organisational framework. The concept of effectiveness must therefore be reinterpreted in institutional terms, in line with the case law developed by the Court of Justice[171]. One of the cornerstones of the European strategy is the European Judicial Training Strategy 2025–2030 [172]. The obligation of digital literacy in relation to the use of artificial intelligence systems in the administration of justice, as provided for by the AI Act, highlights how technology introduces new responsibilities and new risks. Training, therefore, is not merely technical updating, but an element of constitutional safeguard.

Moreover, the management of interoperable registers and access to asset databases — within the framework established by Regulation (EU) 2015/848 [173] – require specific administrative expertise. *DigitalJustice@2030* acknowledges that the digital transition entails significant financial needs. European funding instruments — including the Digital Europe Programme, the Recovery and Resilience Facility, and the new Multiannual

[170] European Commission, Proposal for a Directive on the harmonisation of certain aspects of insolvency law, COM(2022) 702 final, 7 December 2022. https://eur-lex.europa.eu

[171] Court of Justice, 16 December 1976, Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188 (principles of equivalence and effectiveness).. https://curia.europa.eu

[172] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 (AI Act), OJ L, 12 July 2024. https://eur-lex.europa.eu

[173] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015, OJ L 141, 5 June 2015.

Financial Framework — perform, in this context, a systemic function [174]. Moreover, the introduction of instruments such as the living repository and the European IT toolbox[175] implies continuous cooperation between the Commission and the Member States.

Member States display differing levels of digital maturity, as documented by the *EU Justice Scoreboard 2025*. This heterogeneity affects judicial cooperation in insolvency matters, particularly in light of the interconnection of registers provided for by Regulation (EU) 2015/848 and the developments envisaged by the proposed Insolvency III Directive [176]. Digitalisation, if not accompanied by adequate support measures, may reinforce existing asymmetries. Conversely, if managed in a coordinated manner, it can become an instrument of convergence, as also highlighted in recent doctrinal debate[177]. The regulation of access to databases, the standardised publicity of proceedings, and the interconnection of registers presuppose adequate operational conditions. Administrative capacity and organisational sustainability thus become integral components of the normative framework.

The digitalisation of justice, therefore, is not merely a means of implementing reform, but a constitutive element thereof, in accordance with the logic of the effectiveness of EU law as developed by the Court of

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[174] European Commission, *A dynamic EU Budget for the priorities of the future – The Multiannual Financial Framework 2028–2034*, COM(2025) 570 final; as well as COM(2025) 565 final.https://eur-lex.europa.eu

[175] European Commission, *DigitalJustice@2030*, COM(2025) 802 final, Brussels, 20 November 2025, pp. 1–4.https://eur-lex.europa.eu

[176] European Commission, Proposal for a Directive on the harmonisation of certain aspects of insolvency law, COM(2022) 702 final, 7 December 2022. https://eur-lex.europa.eu

[177] Panzani, L., *Reasoned observations on the proposal for a new Directive harmonising insolvency laws*, 10 January 2023, available at www.dirittodellacrisi.it

Justice[178]. Administrative capacity and organisational sustainability constitute the condition for the effectiveness of European normative reform. Legal integration in the field of insolvency and civil judicial cooperation is achieved not only through common rules, but also through the construction of digital infrastructures and the development of adequate professional expertise.

Digitalisation, ultimately, transforms the very manner in which the Union exercises its competences, affecting the operational conditions of judicial systems and redefining the relationship between norm and organisation.

5.4.7 The DEUCE Project as a Paradigm of Integration between Cross-Border Enforcement and European Digital Infrastructure

Over the past decades, European Union law has developed a sophisticated system of mutual recognition of judicial decisions, both in civil and commercial matters (Regulation 1215/2012) and in the field of insolvency proceedings (Regulation 2015/848). However, the formal circulation of decisions has not automatically ensured the effectiveness of cross-border enforcement. The enforcement stage has traditionally represented the point of greatest friction between legal systems. Divergences among national rules on compulsory enforcement, the variety of operational practices, and the complexity of asset publicity systems significantly affect the concrete recovery of claims.

In this context, European instruments such as the European Enforcement Order (EEO) and the European Order for Payment (EOP) have undoubtedly facilitated the circulation of decisions, but they have not eliminated the difficulties associated with the enforcement phase. A creditor who obtains

[178] Court of Justice, 16 December 1976, Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188 (principles of equivalence and effectiveness). https://curia.europa.eu

a European enforcement title must still confront the national enforcement rules of the Member State in which enforcement is sought.

The fragmentation of enforcement therefore constitutes a structural limitation to full judicial integration. It directly affects insolvency law, where the timely enforcement of rights and the reconstruction of the debtor's assets are essential conditions for the protection of creditors. It is within this area of friction that the DEUCE project (Digital European Union for Insolvency and Enforcement) is situated, as an applied research initiative aimed at bridging the gap between normative harmonisation and the operational conditions of cross-border enforcement.

One of the pillars of the DEUCE project consists in the creation of an analytical roadmap of the enforcement rules of the 26 Member States of the Union (excluding Denmark), with particular reference to the enforcement of EEO and EOP titles. The comparative mapping is not a mere descriptive exercise, but a functionally oriented systematisation. It makes it possible to: (1) identify convergences and divergences among national regimes; (2) highlight recurring operational criticalities; (3) identify replicable best practices; and (4) reduce information asymmetries among practitioners.

The roadmap constitutes an instrument of comparative transparency that coherently aligns with the logic of the information sheets envisaged by the proposed Insolvency III Directive. In both cases, the standardisation of information does not impose normative uniformity, but creates the conditions for greater predictability. From a theoretical standpoint, the roadmap achieves a form of cognitive harmonisation: it does not directly amend substantive rules, but renders systems comparable, fostering a process of mutual learning among legal orders.

Within the broader framework of the digitalisation of justice, this operation acquires additional significance. Structured knowledge of enforcement rules becomes a prerequisite for the construction of interoperable digital platforms.

The second axis of the DEUCE project concerns the development of an IT platform designed to support the cross-border enforcement of European titles. The platform is conceived as a guidance and coordination tool capable of integrating: (1) information on national enforcement rules; (2) links to asset registers; (3) standardised procedural templates; and (4) monitoring tools for the enforcement stages. The innovation lies not merely in the digitalisation of existing procedures, but in the creation of an integrated digital environment in which enforcement becomes a traceable and interoperable process.

The experimentation with blockchain technologies for tracing enforcement operations represents a further innovative element. By ensuring immutability and verifiability of records, blockchain can strengthen trust among judicial authorities and reduce the risk of disputes. In this sense, DEUCE anticipates a model of structured digital judicial cooperation, in which technological infrastructure does not merely facilitate communication, but directly affects the quality of enforcement.

The DEUCE experience allows one to discern a broader transformation of the paradigm of European judicial integration.

The first phase of integration was dominated by the principle of mutual recognition: the objective was to allow the circulation of titles and decisions without substantive review in the requested State. The current phase, characterised by digitalisation, adds a further dimension: the circulation of information. The effectiveness of enforcement depends not only on the recognition of the title, but on the possibility of rapid access to asset information, coordination among the authorities involved, and monitoring of enforcement. Digitalisation thus transforms mutual recognition from a formal principle into operational cooperation.

In insolvency law, this shift is particularly significant. The interconnection of insolvency registers, access to AML databases, and the traceability of enforcement operations constitute elements of a single European digital

infrastructure. DEUCE demonstrates that the construction of such an infrastructure is not merely a political aspiration, but a process concretely initiated through applied research projects.

The analysis of the DEUCE project leads to a systemic conclusion. European normative reform in insolvency and judicial cooperation cannot disregard the construction of adequate technological and organisational conditions. Digitalisation is not a neutral instrument, but a constitutive element of the new European judicial governance.

In this perspective, DEUCE represents a paradigm of multilevel integration: (1) it integrates substantive and procedural law; (2) it links normative harmonisation and digital infrastructure; (3) it connects academic research and practical implementation.

The project experience demonstrates that European judicial cooperation can evolve towards a model in which the technological dimension becomes a structural component of integration.

Ultimately, the digitalisation of justice does not constitute a separate segment of insolvency reform, but rather its material condition of effectiveness. Cross-border enforcement, supported by interoperable digital infrastructures, becomes the testing ground of the maturity of the European legal order.

Through the analysis of the e-Justice Strategy, *DigitalJustice@2030*, the transparency measures of the proposed Insolvency III Directive, and the DEUCE experience, a unifying thread emerges: European normative harmonisation in insolvency law finds its condition of effectiveness in the construction of a common digital infrastructure capable of integrating information, cooperation, and enforcement. Digitalisation of justice is therefore not an ancillary element of normative reform, but its structural precondition.

The Proposal for a Directive of 7 December 2022 between Minimum Harmonisation and the Digital Infrastructuring of European Justice

The analysis of the proposal for a Directive of 7 December 2022 on the harmonisation of certain aspects of insolvency law reveals a dual evolutionary movement in European crisis law.

On the one hand, the proposal follows the now consolidated trajectory of sectoral and minimum harmonisation, consistent with the legal basis of Article 114 TFEU and with the objective of strengthening the functioning of the internal market and the Capital Markets Union. The seven pillars of the intervention — ranging from avoidance actions to the pre-pack, from directors' duties to the simplified liquidation of micro-enterprises, and including the transparency of national regimes — outline a model of functional convergence that does not directly alter the foundational categories of national insolvency systems, but steers their evolution towards greater efficiency and predictability.

On the other hand, the analysis demonstrates that the proposal cannot be read solely as a sectoral normative intervention. It is situated within a broader transformation of European judicial cooperation, in which the digitalisation of justice assumes a structural function.

As outlined by the European e-Justice Strategy 2024–2028 and the Communication *DigitalJustice@2030*, digitalisation is not an accessory or merely instrumental element in relation to insolvency law. It constitutes the material condition for the effectiveness of the European insolvency framework. The transparency of national regimes, the interconnection of registers, access to asset databases, and the construction of interoperable digital platforms directly affect the concrete operation of the principle of mutual recognition and the implementation of the principle of universality of proceedings.

In this sense, the 2022 proposal is situated in a phase of European integration in which normative harmonisation can no longer be conceived separately from digital infrastructuring. European crisis law evolves from a model primarily centred on coordination and conflict rules to one in which

the construction of common infrastructures becomes an integral part of the exercise of European competence.

Reference to the DEUCE project reinforces this interpretation. The experimentation with digital tools for cross-border enforcement demonstrates how judicial cooperation can evolve towards a structured operational dimension, in which the circulation of titles is accompanied by the circulation of information and the traceability of operations.

A broader transformation of the paradigm of judicial integration emerges: from the formal circulation of decisions to the construction of a common digital environment capable of rendering coordination among national authorities effective.

In this perspective, the administrative capacity and organisational sustainability of the Member States assume decisive importance. The effectiveness of normative reform depends on the quality of digital infrastructures, the training of judicial personnel, and the availability of adequate resources. The risk of differentiated effectiveness of European rules, linked to uneven levels of digitalisation, requires digital cohesion to be regarded as an essential component of European legal cohesion.

The harmonisation of insolvency law cannot be assessed solely in terms of legislative technique or doctrinal coherence. It must be analysed in its interaction with the operational conditions of judicial systems and with the digital infrastructures that make its implementation possible.

The proposal for a Directive of 7 December 2022 represents a further step in the Europeanisation of crisis law. Its effective scope, however, will be measured by the Union’s ability to combine normative harmonisation, digital transformation, and the strengthening of the administrative capacity of the Member States.

Chapter 6 – Discharge of Debt: Comparative Profiles and Evolutionary Perspectives

6.1 Discharge of Debt and the "Insolvency" Directive

The institution of discharge of debt today represents one of the most significant points of discontinuity with respect to the traditional framework of insolvency law, historically grounded in a strictly patrimonial conception of obligations and in the tendency toward the perpetuity of the debtor's liability. Its affirmation marks the gradual overcoming of a punitive vision of insolvency, replaced by an approach aimed at facilitating the reintegration of the deserving debtor into the economic and social sphere. This shift is based on the awareness that entrepreneurial failure constitutes a physiological risk of economic activity, and not necessarily the result of reprehensible or fraudulent conduct[179]. The origin of the institution extends well beyond the boundaries of the continental legal tradition. As noted in the literature, in common law systems the concept of discharge emerged as early as the beginning of the eighteenth century as an instrument of economic policy aimed at promoting the circulation of wealth and supporting entrepreneurial initiative.[180]. In that context, discharge developed as a selective mechanism, intended for the "honest but unfortunate" debtor, while excluding situations of insolvency caused by fraud or gross negligence. This distinction between the deserving debtor and the dishonest debtor constitutes a structural feature of the institution, which consistently reappears in more recent European legislative

[179] Rojas Elgueta, G., *The discharge of the civil debtor: a reinterpretation of the civil law–common law relationship*, in *Banca, borsa, titoli di credito*, 2012, no. 3, p. 319 ff

[180] Silvestri, K., *The proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law*, Dirittodellacrisi.it, 17 January 2023, available at: https://dirittodellacrisi.it/articolo/la-proposta-di-direttiva-del-parlamento-europeo-e-del-consiglio-sullarmonizzazione-di-taluni-aspetti-del-diritto-dellinsolvenza

developments[181]. The United States experience confirms this approach, having progressively achieved a balance between the protection of creditors and the objective of providing a fresh start to the insolvent entrepreneur. The evolution of the discharge regime within the Bankruptcy Code demonstrates how the broadening of access to discharge has been accompanied by the strengthening of mechanisms designed to control and prevent abuse, through the introduction of disqualifying conditions and scrutiny of the debtor's conduct[182]. This tension between openness and rigor also constitutes a constant feature of European insolvency law. Within the European Union, discharge has acquired relevance only in relatively recent times. While the first Community interventions in the field of insolvency were primarily focused on cross-border cooperation and coordination, greater attention to the debtor's position and to the possibility of reintegration into the market emerges more clearly in the preparatory works of Directive (EU) 2019/1023. From this perspective, the institution is conceived not merely as an instrument for the protection of the individual entrepreneur, but also as a tool to enhance the competitiveness of the internal market, in the awareness that excessively punitive and prolonged procedures produce distortive effects, discouraging risk-taking and investment[183]. Scholarly analysis has highlighted that the Insolvency Directive forms part of a broader European strategy aimed at promoting a

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[181] De Bernardin, L., *We did not see it coming: brief reflections on the repercussions of the new proposal for a Directive on insolvency on liquidation proceedings in Italy*, Dirittodellacrisi.it, 2022, available at: https://dirittodellacrisi.it/articolo/non-labbiamo-vista-arrivare-brevi-riflessioni-sulle-ripercussioni-della-nuova-proposta-di-direttiva-in-materia-di-insolvenza-sulle-procedure-liquidatorie-in-italia

[182] De Cesari, P., *The Proposal for a Directive on the harmonisation of certain aspects of insolvency law: implications for the Code of Crisis*, in *Il Fallimento*, 2023, p. 581 ff.

[183] Pacchi, S., *Business restructuring as an instrument for continuity in Directive (EU) 2019/1023 of the European Parliament and of the Council*, in *Diritto fallimentare*, 2019, p. 1259 ff.

"second chance" culture, in which insolvency is no longer regarded as a permanent stigma, but as a surmountable phase of economic activity[184]. Within this framework, discharge is recognised as a right of the debtor, albeit subject to compliance with specific subjective and temporal requirements, and assumes not only a legal function but also a socio-economic one[185].

Noteworthy is the European legislature's decision to establish a maximum period of three years for obtaining full discharge. This provision aims to reduce the disparities existing among national legal systems and to ensure a minimum level of harmonisation, while still leaving Member States a margin of discretion in the implementation of the procedures[186]. The possibility of excluding the benefit in cases of dishonest conduct confirms the selective nature of the institution, which remains anchored to an assessment of deservingness.

In domestic law, the evolution of discharge forms part of a gradual shift towards solutions alternative to pure liquidation, initiated with the regulation of over-indebtedness and consolidated by the Code of Business Crisis and Insolvency. The institution progressively emancipates itself from the notion that the granting of the benefit must be subordinated to the (even partial) satisfaction of creditors, instead privileging an assessment primarily based on the debtor's personal requirements[187]. This legislative orientation has been interpreted in the literature as an expression of a clear

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[184] Vella, P., *The first European directive on restructuring and insolvency*, in *Foro italiano*, 2019, Part V, col. 423 ff.

[185] Rinaldo, C., *Rescuing distressed companies: the implementation of the Restructuring and Insolvency Directive in Germany and the Netherlands and prospects for the Italian legal system*, in *Nuove leggi civili commentate*, 2020, no. 6, p. 1508 ff.

[186] D'Attorre, G., *Manual of Crisis and Insolvency Law*, Giappichelli, Turin, 2023.

[187] Vattermoli, D., *Discharge between present and future*, in *Rivista di diritto commerciale*, 2018, Part I, p. 491, fn. 36.

favor debitoris, aimed at broadening the scope of discharge and ensuring the effective fulfilment of its reintegrative function for the insolvent entrepreneur. The possibility of granting the benefit even in the absence of a meaningful satisfaction of creditors marks a rupture with traditional insolvency doctrine, in which release from debts was conceived as a sort of symbolic counterpart to the debtor's patrimonial sacrifice[188].

Critical observations have not been lacking. Part of the scholarly debate has emphasised that an excessive emphasis on the reward-oriented dimension of the institution may compromise the balance between debtor and creditors, unduly reducing the latter's expectations[189]. From this perspective, discharge, if devoid of adequate limits, would risk transforming from an instrument of solidarity into a mechanism of unjustified wealth transfer [190]. Scholarly conclusions emphasise that the legitimacy of discharge is closely linked to its placement within insolvency proceedings equipped with adequate guarantees of information, participation, and oversight. Only in the presence of such safeguards can the attenuation of the principle of patrimonial liability be regarded as justified[191]. Outside such a framework, derogation from the principle enshrined in Article 2740 of the Civil Code would be difficult to reconcile with the foundations of the legal system. Ultimately, discharge emerges as an emblematic institution of the transformations of insolvency law, situated at the intersection of economic efficiency, solidarity-based considerations,

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[188] Benincasa, D., *New issues concerning discharge and the "second chance"*, cited above.

[189] Rossi, M., *Profiles and issues of the discharge of the insolvent commercial entrepreneur during judicial liquidation proceedings: the missed opportunity of the transposition of the Directive (EU)*, in *Diritto fallimentare*, 2023, no. 1, p. 27 ff.

[190] Farolfi, A., *The new Code of Business Crisis and discharge*, in *Giustiziacivile.com*, 18 October 2022.

[191] Botti, L., *Discharge in the new judicial liquidation procedure*, in *Nuove leggi civili commentate*, 2021, no. 5, p. 1022 ff.

and the need to protect creditors. The challenge for legal interpretation lies in defining coherent boundaries capable of enhancing its "second chance" function without undermining the overall balance of the system[192].

6. 2 Comparison with European "Second Chance" Models

6.2.1 The German Model of *Restschuldbefreiung* as a European Paradigm of Second Chance

Within the framework of European second chance models, the German legal system constitutes the paradigmatic and historically most influential reference point, both in terms of its doctrinal construction and the circulation of its normative solutions within other continental systems.

The regime of *Restschuldbefreiung*, introduced with the *Insolvenzordnung* of 1994 and entering into force in 1999, represents one of the earliest systematic attempts to overcome the traditionally liquidatory and punitive approach of bankruptcy law, through the introduction of a mechanism for the discharge of residual debts in favour of the insolvent individual entrepreneur[193]. This innovation forms part of a broader reform of German insolvency law, inspired by a progressive enhancement of restructuring instruments and by a reduction of the automatic exclusionary effects traditionally associated with insolvency in the market.

The structural element that most distinctly characterises the German model is its clear placement within a creditor-oriented philosophy. The second chance is not conceived as a subjective right immediately enforceable by the debtor, but as a reward-based outcome of a strictly regulated process, marked by extended timeframes and subject to thorough judicial oversight.

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[192] De Matteis, S., *Discharge of the over-indebted debtor in the Code of Business Crisis and Insolvency*, in *Il Corriere giuridico*, 2021, no. 11, p. 1379 ff.

[193] Ronco, S., *The institution of discharge from the Insolvenzordnung to the new Code of Business Crisis and Insolvency*, in *Diritto della Crisi*, 2025, p. 1 ff.

Discharge does not operate automatically at the end of the liquidation procedure; rather, it is conditional upon a period of good conduct (*Wohlverhaltensphase*), traditionally set at six years, during which the debtor is required to comply with a series of stringent obligations designed to ensure the highest possible level of protection for creditors' interests[194]. In particular, *Restschuldbefreiung* is based on a declaration by which the debtor undertakes to assign to a trustee appointed by the court the attachable portion of his future income for the entire duration of the observation period.

This mechanism introduces a form of temporally extended liability, in which the sacrifice required of the debtor does not end with the liquidation of existing assets, but extends to the allocation of future income streams. During this period, the debtor is subject to constant supervision by the judicial authorities and the trustee, aimed at verifying not only the propriety of conduct, but also the concrete capacity for economic reintegration through the performance of suitable employment [195]. The system is structured in such a way as to incentivise debtor responsibility while simultaneously discouraging opportunistic or abusive conduct. The debtor is required to inform the trustee of any relevant change in his personal or financial situation, including variations in income, changes of residence, and extraordinary acquisitions of assets, such as inheritances or donations, which must in part be allocated to creditors.

Failure to comply with these obligations results in the termination of the *Restschuldbefreiung* proceedings and the loss of the benefit, thereby confirming the strongly conditional nature of the second chance under the German model.

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[194] Hess, H. – Obermüller, M., *Insolvenzplan, Restschuldbefreiung und Verbraucherinsolvenz*, Müller Verlag, Cologne, 2003, p. 45 ff.

[195] Kramer, R. – Peter, F.K., *Restschuldbefreiung*, in *Insolvenzrecht*, Springer Gabler, Wiesbaden, 2012, p. 211 ff.

A further qualifying feature of the regime lies in the active role attributed to creditors. They may oppose the granting of *Restschuldbefreiung* where legally specified grounds for refusal arise, such as the commission of insolvency-related offences, breaches of information and cooperation duties, the provision of false or incomplete data concerning assets and creditors, or the repetition of discharge requests within a short time span.
In this way, the discharge procedure is embedded within a framework of strict balancing between the debtor's rehabilitation and the protection of creditors' legitimate expectations, in which the position of creditors is not merely residual[196]. It is noteworthy that the *Insolvenzordnung* does not expressly provide for a minimum level of creditor satisfaction as a condition for the granting of *Restschuldbefreiung*. This absence, however, does not reflect an indiscriminate *favor debitoris*, but is offset by the overall structure of the procedure, which ensures creditors deferred protection through the assignment of future income and prolonged fiduciary supervision.
The sacrifice imposed on the debtor thus assumes a dynamic and behavioural dimension, rather than a static patrimonial one, taking the form of liability projected over time rather than an immediate requirement of payment[197].
Scholarly analysis has highlighted that this approach reflects a conception of the second chance firmly anchored in the debtor's subjective deservingness. Discharge does not constitute an automatic consequence of entrepreneurial failure, but rather the outcome of an overall assessment that takes into account the debtor's conduct prior to and during the proceedings, as well as his capacity to cooperate loyally with the insolvency authorities. In this sense, *Restschuldbefreiung* does not attenuate the principle of

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[196] Heuer, J.-O., *Private over-indebtedness and social policy: variants of state regulation of consumer insolvency and discharge*, in *Zeitschrift für Sozialreform*, 2015, no. 3, p. 315 ff.

[197] Ronco, S., *The discharge of the bankrupt debtor*, in Aa.Vv., *Il diritto fallimentare riformato*, edited by G. Schiano di Pepe, Cedam, Padua, 2007, p. 423 ff.

patrimonial liability; rather, it reinterprets it in temporal and functional terms, subordinating the liberating effect to a prolonged and verifiable path of responsibility.

It is precisely this structure that explains the enduring influence of the German model on legal systems that subsequently introduced analogous institutions, including Italy. In the transposition phase, the Italian legislature looked to *Restschuldbefreiung* as a paradigmatic reference, while adapting its solutions to a different systemic and cultural context. The differences between the two models do not, however, diminish the exemplary value of the German experience, which continues to represent an indispensable benchmark in the European debate on the second chance and on the balancing of creditor protection with the debtor’s reintegration into the economic sphere.

6.2.2 Functional Comparison between Creditor-Oriented and Debtor-Oriented Models in the Regulation of Discharge

The comparative analysis of European second chance models proves methodologically more robust when conducted from a functional perspective, rather than through a mere descriptive juxtaposition of individual national regimes. From this standpoint, the distinction between creditor-oriented and debtor-oriented models provides a privileged interpretative key for understanding the legal policy choices underlying the various configurations of discharge, as well as for assessing their systemic implications for the credit market and entrepreneurial initiative[198].

In creditor-oriented models, discharge is conceived as an exceptional and highly conditioned event. It does not take the form of a generalised right of the insolvent debtor, but rather of a benefit subject to strict substantive and

[198] Censoni, P.F., *Discharge*, in *Manuale di diritto fallimentare*, Cedam, Padua, 2007, p. 689 ff.

behavioural requirements, aimed at preserving the stability of the credit market and the legitimate expectations of economic operators.

In such systems, the position of the creditor continues to occupy a central role, and the second chance is permitted only insofar as it does not unduly compromise the (at least potential) prospects of creditor satisfaction[199].

One of the defining features of these models is the selective function attributed to time. The extension of the period separating the closure of the liquidation procedure from the granting of the discharge effect allows for a prolonged assessment of the debtor's deservingness. Time thus becomes a filtering mechanism through which the legal system distinguishes between the debtor who, despite having experienced insolvency, demonstrates loyal and cooperative conduct, and the debtor who engages in opportunistic or abusive behaviour. Protection of credit is thereby ensured not so much through immediate payment as through a form of responsibility distributed over time.

By contrast, in debtor-oriented models, the second chance is primarily conceived as an instrument of rapid economic and social rehabilitation of the insolvent debtor. In such systems, discharge fulfils a systemic function of stimulating entrepreneurial initiative, reducing risk aversion, and facilitating the swift re-entry into the market of individuals who have experienced business failure. The sacrifice imposed on creditors is justified by the macroeconomic objective of preventing permanent exclusion from productive activity, which is regarded as detrimental not only to the individual debtor but to the economic system as a whole[200].

From this perspective, time loses the selective function typical of creditor-oriented models and instead assumes an accelerating role. The reduction of

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[199] Frascaroli Santi, E., *The discharge of the bankrupt debtor*, in *Studi in onore di Carmine Punzi*, Giappichelli, Turin, 2008, p. 911 ff.

[200] Ghia, L., *Discharge*, Giuffrè, Milan, 2008, p. 137 ff.

the time required to obtain discharge aims to prevent the debtor from becoming trapped in a prolonged condition of insolvency that would preclude any meaningful economic recovery. The focus of the legal system shifts from the debtor's past — and from the causes of insolvency — to the future, assessing the debtor's capacity to re-enter the productive sphere swiftly and to generate new wealth.

The contrast between creditor-oriented and debtor-oriented models should not, however, be understood in rigid or dichotomous terms. Comparative experience shows that most European legal systems are situated along a continuum, in which the balance between creditor protection and debtor relief is calibrated according to the economic context, the structure of the credit market, and the prevailing legal culture[201]. Even the models most strongly oriented toward debtor protection retain safeguards aimed at preventing abuse, while the more stringent systems incorporate, albeit cautiously, elements that facilitate the debtor's reintegration.

Within this framework, a functional comparison reveals that the second chance cannot be reduced to a simple alternative between severity and leniency. Rather, it entails a different calibration of the criteria for access to discharge, the role of the judge, and the weight attributed to the debtor's conduct as opposed to the economic outcome of the procedure. In creditor-oriented models, the assessment of deservingness is based on prolonged oversight and stringent obligations; in debtor-oriented models, it tends to focus on an ex ante or contemporaneous evaluation within the procedure itself, thereby reducing the duration of post-liquidation constraints.

In progressively transposing European impulses, the Italian legislature has adopted an intermediate solution, positioning itself in an unstable equilibrium between the two poles. On the one hand, elements of creditor-

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[201] Norelli, E., *The discharge of the bankrupt debtor*, in *Rivista dell'esecuzione forzata*, 2006, p. 709 ff.

oriented derivation persist, such as the centrality of the assessment of deservingness and the provision of disqualifying conditions linked to the debtor's conduct; on the other hand, the expansion of access to discharge and the reduction of the time required to obtain release from debts signal a shift toward a more inclusive conception of the second chance[202]. This intermediate approach reflects a conscious legislative policy choice, aimed at avoiding both the risk of a generalised de-responsibilisation of the debtor and that of excessive rigidity within the insolvency system. Comparative analysis with European models demonstrates that an overly restrictive approach may discourage entrepreneurial initiative and foster underground economic activity, whereas excessive openness may undermine creditors' confidence and adversely affect access to credit.

From this perspective, the distinction between creditor-oriented and debtor-oriented models serves a primarily analytical function, enabling an assessment of the systemic implications of different regulatory choices. It also makes clear that the second chance is not an absolute value, but the outcome of a dynamic balancing of competing interests, subject to variation over time in light of economic conditions and legislative policy priorities.

6.2.3 The Role of Directive (EU) 2019/1023 ("Insolvency") as a Connecting Mechanism between National Second Chance Models

In the process of the progressive emergence of the second chance as a central category of European crisis law, Directive (EU) 2019/1023 performs the function of a genuine connecting mechanism between profoundly differentiated national models. The intervention of the EU legislature is situated in an intermediate position between the need to promote convergence among national regimes in the field of restructuring and

[202] Castagnola, A., *The discharge of the bankrupt debtor*, in *Giurisprudenza commerciale*, 2006, Part I, p. 450 ff.

insolvency and the necessity of preserving the structural and cultural specificities of individual legal systems [203]. This approach reflects a deliberate legislative policy choice, aimed at avoiding both the imposition of uniform solutions ill-suited to diverse national contexts and the persistence of excessive divergences capable of negatively affecting the functioning of the internal market.

The Directive proceeds from the observation that the excessive length of insolvency proceedings and the absence of effective debt discharge mechanisms constitute major deterrents to entrepreneurial activity, particularly for small and medium-sized enterprises. From this perspective, the second chance is not conceived as an individual favour, but as an instrument of systemic efficiency, functional to the reallocation of productive resources and to the reduction of the economic and social costs of insolvency[204]. Entrepreneurial failure, far from being interpreted as fault, is reinterpreted as a physiological risk of economic activity, which the legal system is called upon to govern through appropriate legal instruments. One of the most significant elements introduced by the Directive is the indication of a maximum period of three years for obtaining full discharge for the honest entrepreneur. This temporal benchmark does not constitute an immediately binding obligation upon Member States, but rather serves as a reference criterion intended to steer national reforms towards faster and less punitive models than traditional experiences, such as the original German framework. In this sense, the Directive does not impose a debtor-oriented model; rather, it seeks to rebalance the relationship between

[203] Lazzara, M.M., *Discharge and deservingness: outlines of a research inquiry*, in *Il diritto fallimentare*, 2021, p. 673 ff.

[204] Botti, L.P., *Discharge in the new judicial liquidation procedure*, in *Le nuove leggi civili commentate*, 2021, p. 1117 ff.

creditor protection and debtor reintegration by reducing the distortive effects resulting from excessively prolonged temporal constraints[205].

The choice of minimum harmonisation constitutes one of the defining features of Directive 2019/1023. The European legislature acknowledges the profound heterogeneity of national insolvency systems, which reflect deeply divergent legal traditions, economic structures, and credit market configurations. In this context, full harmonisation would have risked producing counterproductive effects by imposing solutions misaligned with individual national contexts. The Directive therefore confines itself to identifying certain core common principles, leaving Member States a broad margin of discretion in their implementation.

Among these principles, central importance is attributed to the figure of the "honest" and "viable" entrepreneur as the privileged beneficiary of second chance mechanisms. The Directive emphasises the need to distinguish between physiological economic failure and opportunistic or fraudulent conduct, reaffirming that access to discharge must be subject to an assessment of deservingness. In this way, the EU legislature avoids transforming the second chance into a mechanism of indiscriminate debt relief, preserving a close link between the discharge benefit and debtor responsibility.

The Directive's bridging function emerges particularly clearly in the relationship between creditor-oriented and debtor-oriented models. On the one hand, it encourages stricter systems to reconsider the duration and intensity of the constraints imposed on debtors, thereby reducing the risk of permanent exclusion from the market; on the other hand, it requires more permissive systems to maintain adequate safeguards against abuse of

[205] Savarese, E., *Business crisis, insolvency and European restructuring models*, in Aa.Vv., *Il diritto concorsuale alla prova del dialogo tra sistemi*, Edizioni Scientifiche Italiane, Naples, 2024, p. 181 ff.

restructuring and discharge mechanisms. The result is a process of convergence “by attraction,” whereby national systems are induced to move toward a more sustainable equilibrium without entirely relinquishing their specificities.

At the level of national transposition, this approach has produced differentiated outcomes. Some Member States have seized the opportunity to introduce far-reaching reforms, significantly reducing the time required to obtain discharge and broadening its personal scope; others have adopted more cautious solutions, limiting themselves to targeted adjustments. In any event, the Directive has contributed to repositioning the economic function of discharge at the centre of the debate, shifting attention from the liquidation phase to the restart of economic activity.

From a systemic perspective, Directive 2019/1023 may thus be understood as an instrument of mediation between competing imperatives: on the one hand, creditor protection and financial market stability; on the other, the need to prevent insolvency from becoming a permanent economic sentence for the entrepreneur. This connecting function is particularly evident in the dialogue between the German model and the solutions progressively adopted by the Italian legislature, which have incorporated the European orientation without entirely abandoning traditional safeguards of control.

Ultimately, the contribution of Directive (EU) 2019/1023 to the construction of European second chance models lies less in the introduction of uniform rules than in its capacity to steer national reforms toward a more advanced equilibrium between rigor and openness. In this respect, it represents a pivotal juncture in the evolution of European crisis law, destined to exert a lasting influence on future legislative and interpretative choices of the Member States and to redefine the role of discharge within national insolvency systems.

6.2.4 Systemic Implications for the Italian Legal System and the Final Balancing between Creditor Protection and Second Chance

The transposition of European impulses concerning the second chance has brought about a profound transformation in the function and systemic positioning of discharge within the Italian legal system. The legislative evolution culminating in the adoption of the Code of Business Crisis and Insolvency demonstrates how the national legislature has progressively moved beyond a merely residual conception of the institution, recognising it as a structural instrument in the governance of crisis and in the rebalancing between creditor protection and the reintegration of the deserving debtor[206].

First, within the Italian system, discharge performs a function that goes beyond the mere closure of insolvency proceedings. It is configured as an instrument of legal policy aimed at promoting the rehabilitation of the honest debtor, reducing the social and economic impact of insolvency, and contributing to the overall stability of the productive system. From this perspective, the second chance is no longer confined to an exceptional benefit, but becomes an essential component of a regulatory strategy oriented toward the prevention and early management of crisis.

This approach, however, entails significant systemic implications, beginning with the role assigned to the judge. Unlike the more rigorous creditor-oriented models, in which the selection of deserving debtors is entrusted to predetermined criteria and prolonged oversight, the Italian legal system confers upon the judge a concentrated yet highly discretionary assessment of the debtor's deservingness. The decision on access to discharge requires an overall evaluation of the debtor's conduct prior to and

[206] Pacchi, S., *Business restructuring as an instrument for continuity in Directive (EU) 2019/1023*, in *Il diritto fallimentare*, 2019, p. 1259 ff.

during the proceedings, as well as of the debtor’s capacity to cooperate loyally with the insolvency bodies.

This choice undoubtedly offers advantages in terms of flexibility and adaptability to the specific circumstances of each case. However, it also entails the risk of an increased “jurisprudentialisation” of the institution, with potential repercussions for the predictability of decisions and legal certainty. In the absence of sufficiently typified statutory criteria, the assessment of deservingness may assume variable contours, exposing the system to interpretative fluctuations that affect the legitimate expectations of economic operators.

A second relevant aspect concerns the impact of discharge on the credit market. The expansion of the second chance inevitably entails a compression of residual creditor claims, affecting the principle of patrimonial liability as a cornerstone of the law of obligations. Such compression can be accepted at a systemic level only if embedded within a framework of procedural and substantive safeguards capable of preventing abuse and preserving creditor confidence. In the absence of such safeguards, the risk is a defensive market reaction, leading to stricter conditions of access to credit and an increase in its cost.

Comparison with the German model is particularly instructive in this regard. Whereas *Restschuldbefreiung* ensures creditors deferred protection through the assignment of future income and prolonged fiduciary supervision, the Italian system tends to concentrate the assessment of deservingness at a stage closer to the closure of the liquidation procedure. This makes the accuracy and completeness of the evidentiary inquiry, as well as the rigorous application of disqualifying conditions for access to discharge, even more crucial.

A further element of complexity concerns the relationship between discharge and crisis prevention. If the declared objective of the legislature is to promote a culture of restructuring and second chance, it is necessary

to consider whether the institution is capable of effectively influencing ex ante debtor behaviour. The prospect of eventual debt relief may encourage the timely activation of restructuring and composition instruments, but it may also generate, in the absence of adequate safeguards, phenomena of moral hazard.

In this context, the balance between rigor and openness assumes decisive importance. The second chance cannot be regarded as an absolute value, but as the result of a dynamic equilibrium between competing interests, subject to variation in light of economic conditions and legislative policy priorities. European law, through Directive 2019/1023, has clearly oriented this balance toward greater attention to the needs of the deserving debtor, without renouncing creditor protection.

Ultimately, the comparative analysis of European second chance models allows the evolution of Italian discharge law to be situated within a broader process of transformation, in which the overcoming of the punitive logic of insolvency is accompanied by the necessity of preserving the stability of the credit market and legal certainty. Only through a balanced and responsible application of the institution will it be possible to reconcile effectively the objectives of debtor reintegration with the protection of creditor interests, avoiding both excessively indulgent drifts and, conversely, rigidities incompatible with the needs of the contemporary economic system[207].

6.3 Discharge of the Assetless Debtor and Protection of the Honest Debtor

6.3.1 Nature and Function of the Discharge of the Assetless Debtor in the Code of Business Crisis and Insolvency

The discharge of the assetless debtor, governed by Article 283 of the Code of Business Crisis and Insolvency, represents one of the most innovative

[207] Vella, P., *The first European directive on restructuring and insolvency*, in *Foro italiano*, 2019, Part V, col. 423 ff.

and, at the same time, most problematic junctures of the current system for the regulation of over-indebtedness [208]. It forms part of a broader process of transformation of insolvency law, aimed at overcoming the traditional punitive approach to insolvency and at enhancing, from a systemic perspective, the protection of the deserving individual debtor who finds himself in a situation of structural inability to meet his obligations[209]. The rationale of the institution is clearly to be found in the need to enable the economic and social rehabilitation of individuals who, although having incurred debts exceeding their patrimonial capacity, do not possess any assets — direct or indirect, not even prospectively — that could be allocated to the satisfaction of insolvency creditor[210]. From this perspective, the discharge of the assetless debtor is clearly distinct both from the "ordinary" discharge following controlled liquidation and from the negotiated procedures for the composition of over-indebtedness. It is configured as a dedicated and autonomous institution, devoid of any satisfactive purpose vis-à-vis the body of creditors[211]. The decision of the Court of Ferrara of 5 November 2024 provides a particularly significant contribution to the systematic reconstruction of the institution, expressly clarifying that controlled liquidation and the discharge of the assetless debtor constitute specular and alternative instruments, designed to govern ontologically distinct situations [212]. The former is reserved for cases in which there exists

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[208] Court of Ferrara, 5 November 2024, decree, Presiding Judge and Rapporteur A. Ghedini, in *Procedure concorsuali e crisi d'impresa*, 2025, no. 6, p. 817 ff.

[209] Ranucci, R., *Controlled liquidation and discharge of the assetless debtor: two alternative institutions*, in *Procedure concorsuali e crisi d'impresa*, 2025, no. 6, p. 819 ff.

[210] Court of Palermo, 30 September 2022, in *Procedure concorsuali e crisi d'impresa*, 2023, p. 1082 ff.

[211] Court of Busto Arsizio, 28 September 2022, in *DeJure*.

[212] Court of Appeal of Milan, 21 April 2023, No. 21, in *Procedure concorsuali e crisi d'impresa*, 2023, p. 1081 ff.

a genuine possibility of distributing value to creditors, taking into account the costs and duration of the proceedings; the latter is instead dedicated to the debtor who has no assets to offer, not even on a potential basis[213]. From this perspective, the discharge of the assetless debtor cannot be construed as the "natural" or residual outcome of an unsuccessful liquidation procedure, but rather as an autonomous institution, detached from traditional insolvency logic. As noted by authoritative scholarship, it has no ambition to satisfy creditors and does not form part of a procedural sequence of dispossession and distribution of assets; instead, it is exclusively aimed at rendering pre-existing claims unenforceable, thereby releasing the debtor from the constraint laid down in Article 2740 of the Civil Code[214] This approach fits within a broader legislative and judicial evolution that has progressively extended the scope of discharge beyond the figure of the "honest but unfortunate" entrepreneur originally protected under the reformed bankruptcy law of 2006.

With the introduction of Law No. 3/2012 and, subsequently, with the Code of Business Crisis and Insolvency, the legislature broadened the subjective scope of the institution, extending it to the civil debtor and to the over-indebted individual not subject to major insolvency proceedings, in the awareness that such subjects likewise require mechanisms of debt relief in order to be effectively reintegrated into the economic and social fabric[215].

The function of the discharge of the assetless debtor has repeatedly been linked — including by the Constitutional Court — to the objective of enabling the debtor's reintegration into the economic system without the burden of prior indebtedness, within a perspective that transcends purely

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[213] Court of Milan, 12 January 2023, in *Procedure concorsuali e crisi d'impresa*, 2023, p. 831 ff.

[214] D'Attorre, A., *Manual of Crisis and Insolvency Law*, 3rd ed., Giappichelli, Turin, 2024, p. 393 ff.; p. 446 ff.

[215] Vivante, L., *Civil bankruptcy*, in *Trattato di diritto commerciale*, Vol. I, *I commercianti*, Appendix, Turin, 1902, p. 341 ff.

private interests and assumes a macroeconomic and social dimension[216]. From this perspective, the legal system consciously accepts that the cost of discharge falls upon pre-existing creditors, considering it systemically irrelevant upon whom, in the final analysis, the economic sacrifice resulting from discharge ultimately rests [217]. This does not mean, however, that the institution amounts to a form of indiscriminate indulgence toward the debtor. On the contrary, the subjective prerequisite for the discharge of the assetless debtor is blameless over-indebtedness, a requirement that aligns this institution with controlled liquidation and with the other procedures for regulating the crisis of the civil debtor [218]. The assessment of deservingness therefore constitutes a structural element of the institution, serving to distinguish situations of physiological economic incapacity from those arising from imprudent, fraudulent, or abusive conduct [219].

In this sense, the discharge of the assetless debtor forms part of a broader reconsideration of the debtor–creditor relationship, in which the principle of patrimonial liability is subject to increasingly significant derogations, justified by the need to safeguard values that are not strictly patrimonial in nature, such as personal dignity, social solidarity, and the ethical responsibility of the legal system toward economically weaker individuals[220]. The Code of Business Crisis and Insolvency, as a whole, reflects this paradigmatic shift, abandoning the notion of insolvency

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[216] Italian Constitutional Court, 22 October 2019, No. 245, in *Giurisprudenza costituzionale*, 2019, p. 3036 ff.

[217] Corte cost., 22 ottobre 2019, n. 245, in Giurisprudenza costituzionale, 2019, p. 3036 ss.

[218] Inzitari, V., *Satisfaction of secured creditors and termination of a composition with creditors involving transfer of assets*, in *Giurisprudenza commerciale*, 1990, Part I, p. 384 ff.

[219] Bonsignori, F., *The discharge effect of composition with creditors*, in *Il diritto fallimentare*, 1990, Part I, p. 644 ff.

[220] Bonsignori, F., *On composition with creditors*, in *Commentario Scialoja–Branca*, Zanichelli, Bologna–Rome, 1979, p. 172 ff.

proceedings as exclusive venues for the maximisation of creditor recovery and instead emphasising their function of rebalancing and social reintegration of the debtor[221]. In light of these considerations, the discharge of the assetless debtor may be defined as an instrument of "early closure" of the debtor–creditor conflict, operating outside insolvency proceedings in the strict sense and aimed at preventing the permanent economic marginalisation of the individual debtor. It thus constitutes a normative response to the recognition that, in the absence of distributable assets, the opening of a liquidation procedure would be not only inefficient but also unreasonably burdensome, both for the debtor and for the system as a whole[222].

6.3.2 The Relationship between Controlled Liquidation and the Discharge of the Assetless Debtor: Alternativity of the Institutions and the Overcoming of Jurisprudential Conflict

The relationship between controlled liquidation and the discharge of the assetless debtor constitutes one of the most delicate and controversial aspects of the over-indebtedness framework established by the Code of Business Crisis and Insolvency, as demonstrated by the lively judicial and scholarly debate that developed both before and after the intervention of the so-called third corrective decree. The decision of the Court of Ferrara of 5 November 2024 is situated within this context as a particularly significant ruling, since it explicitly and systematically addresses the issue of the alternativity between the two institutions, clarifying their respective fields

[221] Norelli, E., *Discharge*, in *Crisi d'impresa e procedure concorsuali*, edited by Cagnasso – Panzani, Vol. I, Giuffrè, Milan, 2016, p. 1027 ff.

[222] Letizia, G. – Vassalli, P., *Discharge*, in *Trattato di diritto fallimentare e delle altre procedure concorsuali*, edited by Vassalli – Luiso – Gabrielli, Vol. III, Giappichelli, Turin, 2014, p. 1537 ff.

of application and overcoming the interpretative uncertainties that had characterised prior practice.

Before the corrective intervention, lower court case law was divided on a fundamental issue: whether controlled liquidation could be opened even in the absence of distributable assets for insolvency creditors, or whether such a condition should be regarded as an implicit requirement for the admissibility of the procedure. According to a first line of interpretation — initially endorsed also by the Court of Ferrara — controlled liquidation presupposed the possibility of ensuring creditors a satisfaction that was not merely symbolic, taking into account the costs and duration of the procedure; in the absence of such a prospect, the application had to be declared inadmissible, and the debtor was required to resort to the specific instrument of discharge of the assetless debtor.

A different view maintained that no provision required, as a condition for the opening of controlled liquidation, the existence of assets capable of effective liquidation. This interpretation relied on the reference, contained in Article 276 CCII, to the closure of proceedings for lack of assets, as well as on the structural parallelism with judicial liquidation requested by the debtor, which is widely acknowledged to be admissible even in the absence of assets. From this perspective, controlled liquidation could be opened even without prospects of creditor satisfaction, subject to subsequent early closure and access to discharge.

The decision under comment firmly endorses the first interpretation, holding that the third corrective decree has definitively clarified the legislature's intention to configure controlled liquidation and the discharge of the assetless debtor as alternative and non-overlapping institutions, designed to regulate distinct situations. This conclusion is based, first and foremost, on the interpretation of Article 268(3) CCII, which excludes the opening of controlled liquidation upon a creditor's application when the

OCC certifies the impossibility of acquiring assets to be distributed to creditors, including through the exercise of judicial actions.

Conversely, with regard to an application filed by the debtor, the requirement of procedural utility emerges from the mandatory content of the manager's report, which must indicate the causes of indebtedness, the debtor's diligence in incurring obligations, and certify the existence of the conditions set out in Article 268(3), fourth sentence. Within this framework, controlled liquidation without distributable assets becomes an entirely marginal hypothesis, confined to cases in which the debtor raises no objections to a creditor's application.

The Court also places emphasis on the explanatory report to the third corrective decree, from which the legislature's intention clearly emerges to avoid the opening of liquidation procedures devoid of any utility for creditors, considered inefficient and disproportionate in relation to the interests involved. In this sense, the discharge of the assetless debtor is conceived as a dedicated and alternative instrument, aimed at ensuring the release of the deserving debtor in the absence of satisfactive prospects, without unnecessarily burdening the system with the procedural costs of liquidation.

The ruling further addresses a problematic issue concerning the possible overlap between the two institutions following the reformulation of Article 283(2) CCII. The new provision, by eliminating the reference to a relevance threshold for subsequently acquired assets and introducing a fixed parameter linked to the social allowance, might suggest that a debtor remains "assetless" even where there is surplus income exceeding what is necessary for personal and family maintenance, provided that such surplus does not exceed the statutory limit. This has led some commentators to posit the figure of the so-called "false assetless debtor."

The Court rejects this interpretation as unreasonable and inconsistent with the system, as it would ultimately allow access to discharge of the assetless

debtor even for individuals who, in concrete terms, would be capable of offering value to creditors through controlled liquidation. Such a reading would result in an unjustified compression of insolvency creditors' rights and would incentivise opportunistic conduct by debtors, contrary to the principle of substantive equality and to the overall rationale of the system[223].

Hence the necessity — emphasised by the ruling — of a systematic and constitutionally oriented interpretation of Article 283 CCII, one that gives due weight to the definition of "assetless debtor" contained in paragraph 1 and to the principle of alternativity between the two institutions.

It therefore falls to the judge, following a concrete assessment of the debtor's and his family's maintenance expenses, as well as of the assets potentially obtainable through the procedure and the related costs, to determine whether there exists a genuine possibility of non-symbolic satisfaction of creditors or whether, on the contrary, the debtor should access the instrument of discharge of the assetless debtor [224]. Ultimately, the relationship between controlled liquidation and the discharge of the assetless debtor rests on a clear functional distinction: the former is an insolvency procedure intended for cases in which there is value to be distributed, whereas the latter is an autonomous institution, devoid of satisfactive purposes, reserved for the deserving individual debtor who is unable to offer any utility to creditors. This framework, as clarified by the Court of Ferrara, preserves the coherence of the over-indebtedness system,

[223] Panzani, L., *On Article 142 Bankruptcy Act*, in *Il nuovo diritto fallimentare*, directed by Jorio, edited by Fabiani, Vol. II, Zanichelli, Bologna, 2006, p. 2097 ff.

[224] Santoro, M., *On discharge*, in *La riforma della legge fallimentare*, edited by Nigro – Sandulli, Vol. II, Giappichelli, Turin, 2006, p. 849 ff.

preventing undue overlaps and ensuring a balanced reconciliation between the protection of the honest debtor and the rights of the body of creditors[225].

6.3.3 The "False Assetless Debtor" and the Systematic and Constitutionally Oriented Interpretation of Article 283 CCII

One of the most problematic aspects of the regulation of the discharge of the assetless debtor, as reshaped by the third corrective decree to the Code of Business Crisis and Insolvency, concerns the interpretation of Article 283(2) CCII and the consequent emergence of the so-called "false assetless debtor." This issue, thoroughly addressed by the Court of Ferrara in its decree of 5 November 2024, represents a decisive test for the systemic coherence of the institution and for the proper balancing between the protection of the deserving debtor and the safeguarding of insolvency creditors' rights.

The starting point of the analysis lies in the statutory text. Article 283(1) CCII continues to define the assetless debtor as an individual who is unable to offer creditors any utility, direct or indirect, not even prospectively. If interpretation were confined to this provision, the system would appear clear and coherent: the debtor may access controlled liquidation where there is a genuine possibility of distributing assets to creditors, while the discharge of the assetless debtor is reserved for cases in which such a possibility is entirely absent.

The third corrective decree, however, also amended paragraph 2 of Article 283 CCII, significantly altering its structure. In its previous formulation, the provision identified a threshold of relevance for assets acquired in the four years following the discharge decree, beyond which creditors would regain

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[225] Auletta, C., *The initiative for the declaration of bankruptcy*, in *Procedure concorsuali e crisi d'impresa*, 2010, p. 134 ff.

the right to initiate enforcement proceedings. With the corrective reform, that reference was eliminated, and the provision was reformulated by expressly recalling the requirement set out in paragraph 1 and introducing a fixed parameter linked to the social allowance, increased by half and multiplied by a statutory coefficient.

Applied in a purely literal manner, the new paragraph 2 leads to a paradoxical outcome: a debtor would be considered assetless — and therefore eligible for discharge — even if, while having surplus income beyond what is necessary for personal and family maintenance, such surplus remains below the statutory threshold established by law. In other words, the system would qualify as "assetless" a debtor who, in concrete terms, could allocate part of his income to creditor satisfaction within a controlled liquidation procedure. It is this figure that doctrine and case law have described as the "false assetless debtor."[226].

The Court of Ferrara firmly rejects such an interpretative outcome, qualifying it as unreasonable and inconsistent with the system. Allowing a debtor with contributory capacity, albeit limited, to access the discharge of the assetless debtor would entail an improper overlap between controlled liquidation and discharge under Article 283 CCII, thereby emptying the principle of alternativity between the two instruments of substantive meaning.

Moreover, this would result in an unjustified compression of insolvency creditors' rights, who would be deprived of the opportunity to obtain even partial satisfaction despite the existence of assets effectively available for distribution[227].

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[226] Vattermoli, G., *Discharge between present and future*, in *Rivista di diritto commerciale*, 2018, Part II, p. 481 ff.; p. 484 ff.

[227] Italian Constitutional Court, 10 March 2022, No. 65, in *Giurisprudenza costituzionale*, 2022.

According to the Court, such an interpretation would also produce distortive effects at the behavioural level, encouraging a debtor "with income only" to systematically opt for the discharge of the assetless debtor, thereby retaining the entire surplus income and circumventing liquidation proceedings.

This outcome would be not only unreasonable, but also contrary to the principle of substantive equality enshrined in Article 3 of the Constitution, as it would require treating alike situations that call for differentiated regulation and, conversely, treating differently situations that are substantively identical[228].

- Hence the necessity — emphasised by the ruling — of a systematic and constitutionally oriented interpretation of Article 283 CCII. The provision must be read within the unified framework of the over-indebtedness system, giving due weight to the definition of "assetless debtor" set out in paragraph 1 and to the principle of alternativity between controlled liquidation and the discharge of the assetless debtor.
- The quantitative parameter introduced by paragraph 2 cannot be understood as an autonomous and self-sufficient criterion for qualifying assetlessness; rather, it must be coordinated with an overall assessment of the debtor's capacity to offer utility to creditors, taking into account maintenance expenses, the duration of the procedure, and its associated costs[229]. From this perspective, the judge is required to conduct a substantive, rather than merely arithmetic, assessment. He must determine whether, after deducting the debtor's and his family's maintenance needs and taking into account the costs of the procedure, there exists a genuine possibility of non-symbolic satisfaction of creditors. Only in the absence of

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[228] Corte cost., 19 gennaio 2024, n. 6, in One Legale.

[229] S. Angiolini, *L'esdebitazione e la nuova concorsualità*, Edizioni Scientifiche Italiane, Napoli, 2022, p. 183 ss.; p. 196 ss.

such a possibility may the condition of assetlessness be deemed fulfilled and, consequently, discharge under Article 283 CCII be granted[230]. This reading restores systemic coherence, preventing the normative short circuit that would result from a purely literal application of paragraph 2. It also preserves the rationale of the discharge of the assetless debtor, which is not to provide a procedural shortcut for debtors with limited resources, but to offer a targeted response to situations of structural and definitive economic incapacity. In this way, the ethical and social function of the institution is likewise safeguarded, preventing it from becoming an instrument for evading obligations[231]. Ultimately, the notion of the "false assetless debtor" constitutes a useful interpretative category for highlighting the critical aspects of the regulation, but it cannot be accepted as a legitimate outcome of the system. The constitutionally oriented interpretation of Article 283 CCII, advanced by the Court of Ferrara and endorsed by a significant segment of legal scholarship, makes it possible to reaffirm the clear distinction between controlled liquidation and the discharge of the assetless debtor, preserving the balance between the protection of the honest debtor and the rights of insolvency creditors, while ensuring the overall coherence of over-indebtedness law[232].

6.3.4 The Discharge of the Assetless Debtor as an Autonomous Institution and the Protection of the Honest Debtor

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[230] S. Fabiani, *Introduzione ai principi generali e alle definizioni del Codice della crisi*, in Procedure concorsuali e crisi d'impresa, 2022, p. 1181 ss.

[231] Fabiani, S., *Bankruptcy and composition with creditors*, in *Commentario Scialoja–Branca*, Vol. II, Zanichelli, Bologna–Rome, 2014, p. 51 ff.

[232] Spiotta, M., *Discharge in judicial liquidation and of the assetless debtor*, in *Crisi d'impresa e procedure concorsuali*, edited by Cagnasso – Panzani, Vol. II, 2nd ed., Giuffrè, Milan, 2025, p. 1780 ff.

The analysis carried out in the preceding sections makes it possible to address, from a systematic perspective, the question of the legal nature of the discharge of the assetless debtor and its relationship with the protection of the honest debtor. The decree of the Court of Ferrara of 5 November 2024 provides decisive guidance in qualifying this institution as an autonomous procedure, distinct from and not overlapping with insolvency liquidation proceedings, although situated within the same regulatory framework of the Code of Business Crisis and Insolvency.

The first element supporting this reconstruction lies in the fact that the discharge of the assetless debtor does not constitute the outcome of an unsuccessful liquidation procedure, but rather an instrument that may be activated directly, provided that the requirements set out in Article 283 CCII are satisfied. As clarified by the Court, an application for controlled liquidation filed by a debtor ascertained to be assetless must be declared inadmissible, precisely because the legislature has provided, for such situations, a specific and alternative instrument intended to operate outside the traditional insolvency logic. The discharge of the assetless debtor therefore does not constitute the "final phase" of a liquidation procedure, but rather the outcome of a proceeding autonomously initiated and concluded by a judicial decree.

This autonomy also emerges at the structural level. The discharge of the assetless debtor does not entail dispossession of the debtor, does not involve the formation of an estate to be liquidated, nor the distribution of assets to creditors. The role of the judicial authority is not to oversee a complex insolvency procedure, but to verify the existence of the statutory requirements and to issue a decree of discharge producing the effect of unenforceability of pre-existing claims. Even the subsequent supervision entrusted to the OCC during the three years following the decree does not transform the institution into an insolvency proceeding in the strict sense,

but fulfils a monitoring function aimed at ensuring the continued existence of the conditions that justified the benefit.

The scholarly debate, recalled in the commentary on the decision, reflects this classificatory ambiguity. Some authors have argued that the discharge of the assetless debtor displays the typical features of an autonomous insolvency procedure, in that it involves all creditors, unfolds under judicial supervision, and produces general effects on the body of claims. Others have maintained that it is an institution detached from a true insolvency procedure, applying a typical collective effect — discharge — within a simplified proceeding justified by considerations of procedural economy and proportionality of costs.

The Court of Ferrara appears to endorse the latter view, emphasising functional and systemic considerations. In particular, it highlights how the introduction, through the corrective reform, of the regulation concerning subsequently acquired assets (final paragraph of Article 283 CCII) confirms the autonomy of the institution: if assets emerge within the three years following the decree, creditors may act exclusively upon those assets, without this entailing the reopening of a liquidation procedure. If the discharge of the assetless debtor were conceived as the outcome of a controlled liquidation closed prematurely for lack of assets, it would have been more coherent to provide for the reopening of liquidation, following the model established for judicial liquidation by Article 237 CCII[233].

The qualification of the discharge of the assetless debtor as an autonomous institution is closely intertwined with the protection of the honest debtor. The legal system recognises, in favour of the deserving individual debtor who finds himself in a condition of structural economic incapacity not attributable to fault, the right to a "one-off" discharge from debts, conceived

[233] Ranucci, R., *Public interest in business continuity and absence of prejudice to creditors in compulsory administrative composition*, in *Rivista della Corte dei conti*, 2024, p. 142 ff.

as an instrument of social and economic reintegration. Such protection is not granted indiscriminately, but is subject to a rigorous assessment of the debtor's diligence in incurring obligations and of his overall conduct, in line with the principle repeatedly affirmed by the Constitutional Court that discharge aims to reintegrate the debtor into the economic system without the burden of prior indebtedness.

From this perspective, the discharge of the assetless debtor represents the most advanced expression of the progressive abandonment of the punitive logic of insolvency. The sacrifice imposed on pre-existing creditors is justified not only by the absence of distributable assets, but also by the recognition that the indefinite persistence of debt obligations would produce socially and economically counterproductive effects, hindering the recovery of potentially productive individuals and exacerbating phenomena of economic marginalisation.

At the same time, the protection of the honest debtor cannot result in an unreasonable compression of creditors' rights. For this reason, the system insists on the alternativity between controlled liquidation and the discharge of the assetless debtor, and on the need to prevent the latter from becoming a procedural shortcut for debtors who, despite possessing limited resources, could still offer even partial satisfaction to creditors. The protection of the honest debtor is thus achieved through a careful, case-by-case balancing, entrusted to the judge, who must assess concretely the debtor's economic situation and the actual absence of distributable assets.

Ultimately, the discharge of the assetless debtor emerges as an autonomous, exceptional institution with a pronounced social vocation, intended to operate outside insolvency proceedings in the strict sense, yet embedded within a unified system for the regulation of over-indebtedness. Its function is to provide a targeted response to situations of definitive economic incapacity, protecting the honest debtor without undermining systemic coherence and without creating improper overlaps with liquidation

procedures. In this equilibrium between the protection of the individual and the safeguarding of patrimonial interests lies the most significant feature of the regulation of the discharge of the assetless debtor and its central role in contemporary crisis law.

6.4 Discharge of Companies: Balancing Creditors' Interests and the Protection of the Debtor's Economic Dignity

6.4.1 Systemic Foundation of Corporate Discharge and the Debtor-Oriented Shift

L'esdebitazione delle società costituisce una delle innovazioni più significative introdotte dal Codice della crisi d'impresa e dell'insolvenza e segna un netto mutamento di paradigma rispetto alla tradizionale concezione dell'insolvenza societaria come evento necessariamente estintivo dell'ente collettivo. The discharge of companies constitutes one of the most significant innovations introduced by the Code of Business Crisis and Insolvency and marks a clear paradigmatic shift from the traditional conception of corporate insolvency as an event necessarily entailing the extinction of the collective entity. As authoritative scholarship has clarified, the institution does not represent a mere mechanical extension of the discharge regime applicable to natural persons, but rather the expression of a systemic choice that profoundly affects the balance between creditor protection and the recognition of the economic dignity of the organised debtor[234].

In traditional insolvency law, the judicial liquidation of a company was functionally oriented toward the disaggregation of the organisational structure and the distribution of assets, culminating in the removal of the entity from the companies register. The insolvent company was conceived

[234] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, in *Il diritto fallimentare e delle società commerciali*, 2025, no. 1, p. 127 ff.

as an entity devoid of economic future, whose continued presence in the market was not regarded as worthy of protection.

The introduction of corporate discharge disrupts this framework, allowing the entity to survive even after the closure of insolvency proceedings and the release from residual debts[235].

Ferraro emphasises that this choice is the result of a progressive evolution of crisis law in a debtor-oriented direction, consistent with the guidance stemming from European Union law, and in particular from Directive (EU) 2019/1023. However, the Author also notes that the Italian legislature has gone beyond the minimum requirements imposed by European law, extending the logic of the second chance to legal persons, whereas the Directive primarily focuses on the individual entrepreneur[236].

According to Ferraro, the systemic foundation of corporate discharge lies in the recognition of the corporate organisation as an autonomous legal asset, distinct from its patrimony and endowed with economic value that may persist even after insolvency.

From this perspective, insolvency liquidation is no longer necessarily the prelude to the disappearance of the entity, but may instead constitute a transitional phase toward a new configuration of economic activity, once the company has been released from the burden of its prior liabilities[237].

The debtor-oriented shift becomes particularly evident in the balancing of the interests involved. Discharge inevitably entails the sacrifice of pre-existing creditor claims, which are rendered definitively unenforceable. This sacrifice is justified by the legislature in light of the protection of future creditors and of the community at large, who may benefit from the renewed productive capacity of the discharged company.

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[235] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 129 ff.

[236] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 130 ff.

[237] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 132 ff.

The legal system thus consciously assumes the risk of redistributing the cost of insolvency, shifting it from pre-existing creditors to the system as a whole[238].

This shift in perspective raises significant questions from a law and policy standpoint. Corporate discharge directly affects the cost of credit and the perception of risk among economic operators.

However, the cited Author observes that these effects are counterbalanced by the possibility of preserving the value of the organisational structure and avoiding the dissipation of productive resources, which would entail an even greater social and economic cost[239].

A further relevant aspect concerns the connection between discharge and the economic dignity of the corporate debtor. Release from debts makes it possible to remove the disqualifications and incapacities resulting from the opening of judicial liquidation, restoring to the company and its governing bodies full capacity to operate in the market.

In this sense, discharge performs not only an economic function, but also an institutional one, affecting corporate governance and enabling the renewed valorisation of the role of corporate organs[240].

The Author emphasises that this approach cannot be interpreted as an indiscriminate favour toward the debtor, but must instead be framed within a logic of systemic balance. Corporate discharge does not eliminate the conflict between debtor and creditors; rather, it recomposes it according to a different rationale, one that prioritises the continuity of the organisational structure and its economic function over the full satisfaction of pre-existing creditor claims[241].

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[238] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 134 ff.

[239] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 136 ff.

[240] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 138 ff.

[241] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 140 ff.

From this perspective, the institution forms part of the broader design of the Code of Business Crisis and Insolvency, which seeks to govern insolvency no longer as a pathological event to be eliminated, but as a physiological phase of the economic cycle, capable of being managed in a manner that maximises overall systemic value.
As Ferraro concludes, corporate discharge represents one of the most emblematic expressions of this new philosophy, placing at its centre the economic dignity of the organised debtor and its potential capacity to contribute anew to the market, albeit within the limits imposed by the protection of creditors' legitimate expectations[242].

6.4.2 Personal Scope and Conditions for Access to Corporate Discharge

The identification of the personal scope of application of corporate discharge constitutes one of the most complex and controversial aspects of the framework established by the Code of Business Crisis and Insolvency. As highlighted by authoritative scholarship, the legislature's decision to extend the institution to legal persons was neither mandated by European Union law nor uncontroversial from a systemic perspective; rather, it reflects a deliberate policy choice aimed at enhancing the continuity of the corporate organisation even beyond insolvency [243].
Directive (EU) 2019/1023, in fact, focuses the discharge regime on the individual entrepreneur, leaving Member States a broad margin of discretion as to whether and how to extend the institution to legal persons. As Ferraro observes, the Italian choice runs counter to many comparative legal systems, in which corporate discharge is generally excluded or admitted only in indirect and residual forms.

[242] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 142 ff.
[243] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 144 ff.

This peculiarity requires careful consideration of the prerequisites and limits of the institution, in order to prevent an excessively expansive and potentially distortive application[244].

At the normative level, the discharge of companies is grounded in Articles 278 and 280 CCII, which regulate the entities entitled to request the benefit and the conditions for its granting. Ferraro notes that the wording of these provisions reflects a compromise between the need to broaden access to the institution and the necessity of safeguarding creditor protection.

In particular, the legislature has provided that discharge may be granted to both capital companies and partnerships, but has made this possibility conditional upon the fulfilment of specific subjective and objective requirements, aimed at selecting deserving cases[245].

The issue arises in different terms depending on whether capital companies or partnerships are concerned. In the case of capital companies, the principle of perfect asset segregation makes it possible to confine the discharge effect to the company itself, leaving unaffected the personal liability of directors and shareholders.

However, as Ferraro observes, the legal system cannot dispense with an assessment of the conduct of the corporate bodies, which have played a decisive role in the causes of insolvency. Hence the provision for a review of deservingness which, although formally referring to the company, effectively entails an evaluation of management conduct and of the choices made by the directors[246].

In the case of partnerships, the situation appears even more complex. The discharge of the company affects an entity characterised by imperfect asset segregation, in which partners with unlimited liability are personally

[244] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 145 ff.

[245] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 146 ff.

[246] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 147 ff.

responsible for corporate debts. Ferraro emphasises that the extension of discharge to the company does not automatically entail the release of the partners, who must independently seek the benefit if they wish to obtain the cancellation of their own obligations.

This framework requires careful coordination between the position of the entity and that of the partners, in order to avoid overlaps and gaps in protection.

A further relevant issue concerns the relationship between corporate discharge and the liability of co-obligors and guarantors. The discharge effect operates exclusively with respect to the company, leaving unaffected creditors' actions against persons who have provided personal guarantees or who are jointly and severally liable. Ferraro notes that this solution is consistent with the general principle laid down in Article 1301 of the Civil Code, but also observes that it may mitigate the systemic impact of discharge by shifting the burden of insolvency onto third parties[247].

From the standpoint of objective requirements, corporate discharge retains a strongly selective character. Access to the benefit is contingent upon verification of the absence of fraudulent or grossly negligent conduct and upon an assessment of the propriety of corporate management.

As Ferraro emphasises, the institution historically emerged as a reward-based mechanism, designed to incentivise virtuous behaviour and to facilitate the reintegration into the market of deserving subjects. Its extension to companies does not eliminate this selective dimension; rather, it increases its complexity.[248].

The Author warns of the risk that corporate discharge may turn into an instrument of generalised de-responsibilisation, particularly in the presence of opaque ownership structures or complex corporate groups. In such

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[247] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 149 ff.

[248] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 150 ff.

contexts, debt relief could be used to concentrate losses on a single entity, while preserving other components of the group.Hence the importance of rigorous judicial scrutiny and a restrictive application of the conditions for access to the benefit[249].

Ultimately, the analysis of the personal scope and conditions for access to corporate discharge confirms the profoundly innovative nature of the institution. As the cited Author observes, the Italian legislature has made a deliberate policy choice that prioritises the continuity of the corporate organisation and its economic dignity over the traditional centrality of creditor satisfaction.

This choice, although inspired by a debtor-oriented rationale, requires cautious and systemically coherent application, so that corporate discharge remains an exceptional and targeted instrument, functional to the rebalancing of the system as a whole[250].

6.4.3 Discharge, Closure of Proceedings and Extinction of the Company

One of the most delicate aspects of corporate discharge concerns the relationship between the closure of insolvency proceedings and the extinction of the company, an issue that marks a profound departure from the traditional framework of bankruptcy law. As Pietro Paolo Ferraro observes, under the previous system the closure of proceedings — especially in cases of asset insufficiency — was ordinarily followed by the removal of the company from the companies register, with the consequent extinction of the legal entity.

Corporate discharge disrupts this automatism, allowing the collective entity to survive even after the conclusion of insolvency liquidation[251].

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[249] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 151 ff.

[250] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 152 ff.

[251] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, cited above, p. 155.

Ferraro emphasises that this innovation is closely linked to a reconsideration of the value of the corporate organisation. The enterprise is no longer viewed exclusively as a patrimony to be liquidated, but as a structure potentially capable of regaining an economic function once freed from the burden of prior liabilities.

From this perspective, discharge makes it possible to preserve the legal continuity of the company, avoiding the dissipation of organisational value that traditionally accompanied the terminal phase of insolvency proceedings[252].

The central issue of the analysis concerns Article 233 CCII, which governs the cases of closure of judicial liquidation and, in particular, the trustee's duty to arrange for the removal of the company from the companies register. Ferraro emphasises that this provision must be reinterpreted in light of the regulation of discharge, which introduces an element of incompatibility with the automatic extinction of the company.

In cases of asset insufficiency referred to in Article 233(1)(c) and (d) CCII, discharge makes it possible to overcome the traditional correlation between the closure of proceedings and the extinction of the entity[253].

This reconstruction is particularly significant with regard to controlled liquidation, which Ferraro characterises as a procedure with a "voluntary vocation." In this context, the discharge effect arises naturally upon the closure of the proceedings, rendering the automatic application of Article 233(2) CCII incompatible.

The reference made by Article 276 CCII to the rules governing judicial liquidation must therefore be subject to a compatibility assessment, leading

[252] Italian Constitutional Court, 22 October 2019, No. 245, in *Giurisprudenza costituzionale*, 2019, p. 3036 ff.

[253] Corte cost., 10 marzo 2022, n. 65, in Giurisprudenza costituzionale, 2022.

to the exclusion of the company's automatic removal from the register in the presence of discharge[254].

Ferraro highlights that this solution entails a significant systemic consequence: the company may survive the closure of insolvency proceedings even in the absence of assets. Once discharge has been obtained, the entity returns to the full availability of its shareholders, who may decide whether to continue the business, restructure the organisational framework, or undertake extraordinary transactions.

In this way, discharge emerges as an instrument of legal and economic continuity, capable of restoring centrality to the shareholders' will[255].

A further relevant aspect concerns the regime of subsequently acquired assets. Ferraro refers to the provision according to which assets obtained by the company after discharge do not flow into the insolvency estate and are not subject to dispossession.

This confirms that the liberating effect is not merely formal, but substantively affects the company's patrimonial sphere, encouraging the prompt resumption of business activity and the generation of new wealth[256].

This approach appears consistent with the guidance provided by Directive (EU) 2019/1023, which links discharge to the removal of disqualifications and incapacities arising from the opening of insolvency proceedings. Ferraro notes that the Italian legislature has implemented this indication by providing that discharge entails the cessation of causes of ineligibility and disqualification, including those set out in Article 2382 of the Civil Code with regard to the office of director of a joint-stock company.

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[254] Corte cost., 19 gennaio 2024, n. 6, in Giurisprudenza costituzionale, 2024.

[255] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

[256] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt and disqualifications.

From this standpoint as well, the institution contributes to restoring full operational capacity to the company and its governing bodies[257].

The possibility of dissociating the closure of insolvency proceedings from the extinction of the company nevertheless raises significant concerns regarding creditor protection. The Author does not overlook these critical aspects and emphasises that the survival of the collective entity must be balanced against the need to prevent discharge from resulting in unjustified prejudice to the body of creditors.

In this regard, he underscores the importance of a rigorous application of the conditions for access to the institution and of strict judicial scrutiny of the deservingness of both the company and its directors[258].

Taken as a whole, Ferraro's analysis leads to a reappraisal of the traditional link between liquidation and the extinction of the company. Corporate discharge breaks the extinction automatism and opens the way to a more dynamic conception of crisis, in which insolvency proceedings do not necessarily mark the end of the organised entity, but may instead constitute a transitional phase toward a new configuration of economic activity. This evolution appears consistent with the objective of preserving, where possible, the value of the productive organisation, even at the cost of definitively sacrificing the claims of pre-existing creditors.

Ultimately, the relationship between discharge, closure of proceedings, and the extinction of the company represents one of the most significant discontinuities of the new insolvency framework. The possibility of maintaining the company in existence after liquidation, by virtue of discharge, constitutes a powerful instrument for protecting the economic dignity of the organised debtor, but it requires careful and systemically

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[257] Court of Milan, 12 January 2023, in *Il diritto fallimentare*, 2023, p. 831 ff.

[258] Court of Appeal of Milan, 21 April 2023, No. 21, in *Il diritto fallimentare*, 2023, p. 1081 ff.

coherent application, capable of balancing business continuity with the safeguarding of creditors' legitimate expectations[259].

6.4.4 The Impact of Corporate Discharge on the Powers of the Trustee, Corporate Governance, and Composition in Judicial Liquidation

The final and most complex dimension of analysis concerning corporate discharge relates to the impact of the institution on the powers of the insolvency trustee, on corporate governance during insolvency liquidation, and on the possibility of resorting to composition with creditors within judicial liquidation. As the cited Author clarifies, the introduction of discharge requires a systematic reinterpretation of provisions that had been conceived on the assumption of the inevitable extinction of the company following insolvency proceedings[260].

With regard to the powers of the insolvency trustee, Article 264 CCII grants the trustee a series of prerogatives of a corporate nature, which significantly affect the autonomy of the company's governing bodies. In the traditional model, these powers are justified by the liquidatory purpose of the proceedings and by the need to concentrate the management of the entity in the hands of the trustee in view of its definitive extinction.

Ferraro observes, however, that corporate discharge undermines this assumption, since liquidation is no longer necessarily aimed at the dissolution of the organisation, but may instead represent a transitional phase[261].

From this perspective, the exercise of the trustee's powers must be reinterpreted in functional terms. The trustee is called upon to act not only in the interest of the

[259] Brogi, G., *Over-indebtedness in the Code of Business Crisis and Insolvency*, Giuffrè, Milan, 2024, p. 409 ff.

[260] D'Attorre, A., *Manual of Crisis and Insolvency Law*, 3rd ed., Giappichelli, Turin, 2024, p. 393 ff.; p. 446 ff.

[261] Inzitari, V., *Satisfaction of secured creditors*, in *Giurisprudenza commerciale*, 1990, Part I, p. 384 ff.

body of creditors, but also taking into account the possible survival of the discharged company.
This implies, for example, that decisions concerning the disposal of assets, the termination of contracts, and the cessation of organisational relationships must be assessed in light of their impact on the entity's future operability[262]. Ferraro emphasises that this approach does not entail an undue restriction of the trustee's powers, but rather requires their exercise to be more deliberate and informed. The trustee retains the prerogatives provided by law until the closure of the proceedings, but must take into account that the company, once discharged, will return to the control of its shareholders.
In this sense, discharge introduces an element of "temporality" into the exercise of corporate powers, which can no longer be oriented exclusively toward the definitive liquidation of the entity[263].
The impact of discharge on corporate governance becomes particularly evident in the relationship between the company's governing bodies and the procedural authorities. Ferraro highlights how the institution helps to temper the traditional replacement of corporate organs by the trustee, enhancing the role of shareholders and directors in the phase following the closure of liquidation.
Indeed, the discharged company regains full capacity for self-determination, being able to redefine its organisational and strategic structures[264].
One area in which this renewed centrality of corporate governance is particularly evident is the composition with creditors within judicial liquidation, governed by Articles 240 et seq. CCII. Ferraro addresses in detail the issue of compatibility between corporate discharge and the filing of a composition during liquidation. According to the Author, there are no

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262 Bonsignori, F., *The discharge effect of composition with creditors*, in *Il diritto fallimentare*, 1990, Part I, p. 644 ff.

263 Bonsignori, F., *On composition with creditors*, in *Commentario Scialoja–Branca*, Zanichelli, Bologna–Rome, 1979, p. 172 ff.

264 Norelli, E., *Discharge*, in *Crisi d'impresa e procedure concorsuali*, edited by Cagnasso – Panzani, Vol. I, Giuffrè, Milan, 2016, p. 1027 ff.

insurmountable legal obstacles to such compatibility, since discharge does not terminate the proceedings, but affects exclusively the enforceability of the claims[265].

In this context, discharge can even facilitate the composition with creditors, making it more attractive to both the shareholders and the company itself. As Ferraro observes, the release from debts allows for the enhancement of composition proposals put forward by the company or its shareholders, since assets generated after discharge are not absorbed into the insolvency estate and can be offered as additional resources to creditors, thereby contributing to the fulfilment of the external resource requirement set out in Article 240 CCII[266].

Naturally, this possibility is not without limits. The composition proposal must still ensure that creditors receive treatment no less favourable than that achievable through judicial liquidation, taking into account any recovery or compensation actions that may be pursued by the trustee. Moreover, if the proposal originates from the company or from entities treated as equivalent, it must ensure an increase in the estate to the extent required by law. Discharge, therefore, cannot be used as a tool to circumvent the safeguards established to protect the body of creditors[267].

Ferraro emphasises that the interaction between discharge and composition within judicial liquidation represents one of the most complex areas of application in the new system. On the one hand, the institution reinforces a perspective of dynamic crisis management, oriented toward continuity and the recovery of the corporate organisation; on the other hand, it requires

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[265] Letizia, G. – Vassalli, P., *Discharge*, in *Trattato di diritto fallimentare e delle altre procedure concorsuali*, Vol. III, Giappichelli, Turin, 2014, p. 1537 ff.

[266] Panzani, L., *On Article 142 of the Bankruptcy Law*, in *Il nuovo diritto fallimentare*, edited by Fabiani, Zanichelli, Bologna, 2006, p. 2097 ff.

[267] Santoro, M., *On discharge*, in *La riforma della legge fallimentare*, Vol. II, Giappichelli, Turin, 2006, p. 849 ff.

maintaining an adequate level of creditor protection, ensuring that debt relief does not result in an excessive compression of their rights[268].

In conclusion, the analysis of the impact of discharge on the powers of the trustee, corporate governance, and composition within judicial liquidation confirms the profoundly innovative nature of the institution. As the Author highlights, corporate discharge does not merely affect the final phase of insolvency proceedings, but entails a comprehensive reconsideration of the relationship between insolvency law and corporate law, requiring a more nuanced balancing of creditor interests and the protection of the economic dignity of the organised debtor[269].

This balancing constitutes the key to understanding the entire regulatory framework: discharge does not eliminate the conflict between debtor and creditors, but reconciles it according to a logic that prioritises the continuity of the organisation and its economic function, without entirely foregoing the protection of creditors' legitimate expectations. It is within this tension — managed through judicial oversight and the rigorous application of the statutory requirements — that the deepest significance of corporate discharge in the Code of Business Crisis is found.

"*However, considering that, from this perspective and in alignment with EU law, the liberating effect already ensured by our compositions would have sufficed, the Italian legislature's choice to provide for discharge in very extensive subjective and objective terms, including for judicial and controlled liquidation procedures, inevitably carries significant systemic implications, insofar as it alters the delicate balance between creditor protection and debtor protection, the macroeconomic consequences of which remain to be fully assessed.*"[270].

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[268] Frascaroli Santi, E., *The effects of composition with creditors for creditors*, in *Procedure concorsuali e crisi d'impresa*, 2006, p. 1042 ff.

[269] Vattermoli, G., *Discharge between present and future*, in *Rivista di diritto commerciale*, 2018, Part II, p. 481 ff.

[270] Ferraro, P.P., *The discharge of companies in insolvency liquidation*, in *Il diritto fallimentare e delle società commerciali*, 2025, no. 1, p. 127 ff.

Chapter 7 – CONCLUSIONS

Towards a European Insolvency Law: Prospects and Proposals

7.1 Harmonisation of National Systems: Achieved Objectives and Remaining Challenges

The adoption of Directive (EU) 2019/1023 on preventive restructuring frameworks represents the European Union's first systematic attempt to influence, through a legally binding instrument, substantive aspects of national business crisis law. This intervention is part of a broader strategy for the integration of the internal market, in which the regulation of financial distress plays a central role in ensuring proper risk allocation, the free movement of capital, and the protection of the freedom of establishment[271].

The objectives pursued by the Directive are clearly set out in the recitals and can be summarised along two main lines. On the one hand, it seeks to reduce legal uncertainty arising from the profound divergences between national systems regarding restructuring and insolvency, divergences that extend not only to the substantive rules but also to their practical application. On the other hand, it aims to promote the early restructuring of economically viable enterprises, in order to avoid unnecessary liquidations, the destruction of value, and the negative social effects associated with the loss of jobs and skills.[272]. These objectives are closely linked to the project of building the Capital Markets Union, in which the predictability of rules in times of crisis represents an essential factor for

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[271] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Implementation of the Preventive Restructuring Directive 2019 in Review: A Directive Delivering on Its Promise?*, in *Implementation of the EU Preventive Restructuring Directive*, Part I, Business and Law Research Network Series No. 1, Den Haag, Eleven, 2023, p. 210 ff.

[272] Directive (EU) 2019/1023 of the European Parliament and of the Council, 20 June 2019, Recitals 1, 2, and 9.

incentivising cross-border investment[273]. In evaluating whether the Directive has effectively achieved these objectives, it is necessary first to make a preliminary methodological consideration. At present, the analysis can rely almost exclusively on the so-called *law in the books*—that is, the content of the transposition legislation adopted by Member States—while it is still premature to draw definitive conclusions based on *law in action*, meaning the actual use and practical impact of the new preventive restructuring frameworks[274]. This is due both to the relative novelty of the reforms and to the scarcity of comparable empirical data. A first critical element arises from the choice of minimum harmonisation as a legislative technique. The Directive does not impose a uniform model of preventive restructuring, but rather defines a set of minimum requirements and options, leaving national legislators a wide margin of discretion in their implementation. As a result, preventive restructuring frameworks can be introduced as autonomous procedures, as tools integrated into pre-existing proceedings, or as a set of measures distributed across multiple instruments[275]. While such flexibility allows reforms to be adapted to the specificities of individual legal systems, it also carries the risk of excessive fragmentation of the solutions adopted.

Comparative analysis of the implementations reveals a highly heterogeneous picture. Member States have made different choices on key aspects such as the degree of publicity of proceedings, the role of the judge, the involvement of restructuring professionals, the regulation of moratoria, the criteria for forming classes of creditors, and the application of priority rules. In some jurisdictions, the new preventive restructuring frameworks operate alongside pre-existing instruments, while in others completely new

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[273] Recital 8, Directive (EU) 2019/1023.

[274] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Does the PRD 2019 Deliver on Its Promise?*, cited above, p. 211 ff.

[275] Article 4(5), Directive (EU) 2019/1023.

institutions have been introduced[276]. These differences cannot be explained solely by national legal traditions, but are largely the result of the wide range of options offered by the Directive. In this context, the capacity of PRD 2019 to reduce legal uncertainty for cross-border investors appears limited. The lack of uniform definitions for key concepts—such as the notion of "likelihood of insolvency," the content of the best-interest-of-creditors test, or the eligibility criteria for cross-class cram-down—continues to make it difficult to assess ex ante the outcomes of restructurings in transnational contexts[277]. As a result, the objective of making the European legal framework more predictable is only partially achieved. Further concerns relate to the economic assumptions underlying the Directive. The idea that the mere availability of preventive restructuring frameworks is sufficient to incentivise the timely use of recovery tools does not fully account for the cultural, institutional, and practical factors that influence the behaviour of debtors and creditors. In the absence of a well-established restructuring culture, specialised courts, and adequately trained professionals, there is a risk that the new procedures will remain formally available but scarcely used in practice[278].

From this perspective, the Directive has certainly contributed to creating, in nearly all Member States, a minimum reference framework for preventive restructuring. However, its actual capacity to promote widespread early restructuring will depend on the concrete application of the rules and their

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[276] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Does the PRD 2019 Deliver on Its Promise?*, cited above, p. 212 ff.

[277] Eidenmüller, H., *The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union*, in *European Business Organization Law Review*, 2019/20, p. 559 ff.

[278] Ehmke, D.C. – Gant, J.L.L. – Boon, J.M.G.J. – Langkjaer, L. – Ghio, E., *The European Union Preventive Restructuring Framework: A Hole in One?*, in *International Insolvency Review*, 2019, 28(2), p. 5 ff.

integration into the national economic and legal fabric[279]. The definitive assessment of the effectiveness of PRD 2019 can therefore only be deferred to a later stage, when practical experience will allow a more in-depth analysis of the real effects of the reforms.

The concluding considerations on the implementation of Directive (EU) 2019/1023 confirm the impression of an harmonisation process characterised by partial results and significant scope for improvement. The Directive cannot be regarded as a rigidly uniformising instrument, nor as a model capable of eliminating the peculiarities of national systems. On the contrary, the harmonisation achieved is, in the most literal sense of the term, minimal, and has allowed a plurality of solutions to emerge that reflect the discretionary choices of national legislators[280].

Ciò non significa che l'intervento europeo sia stato privo di effetti positivi. A first significant outcome is the introduction of a common lexicon for preventive restructuring at the European level. Terms and concepts such as *preventive restructuring framework*, *stay*, *debtor in possession*, *best interest of creditors test*, and *cross-class cram-down* have become firmly established in the legal vocabulary of national systems, creating a shared conceptual foundation that was previously lacking[281]. Although this development does not immediately translate into substantive harmonisation, it represents an important prerequisite for future legislative developments.

A further outcome is the overcoming of the long-dominant notion that insolvency law harmonisation was an unattainable goal due to the profound divergences between national systems. PRD 2019 has demonstrated that harmonisation measures, even if limited and gradual, are possible in a sector traditionally considered resistant to European

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[279] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Does the PRD 2019 Deliver on Its Promise?*, cited above, p. 213 ff.

[280] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Concluding Remarks*, cited above, p. 216 ff.

[281] Eidenmüller, H., *op. cit.*, p. 6.

integration.[282]. In this sense, the Directive has acted as a pathfinder, paving the way for further legislative initiatives.

However, regarding the specific goal of reducing legal uncertainty for cross-border investors, the outcome remains unsatisfactory. The lack of adequate coordination between preventive restructuring frameworks and Regulation (EU) 2015/848 on insolvency proceedings, as well as the absence of clear rules on jurisdiction, recognition, and enforcement of decisions rendered within preventive restructurings, continue to generate significant uncertainties[283]. In some cases, these gaps even risk hindering the free movement of capital, contradicting one of the fundamental objectives of the Directive.

The assessment of the effectiveness of preventive restructuring frameworks must also consider their practical usability. In several jurisdictions, the new procedures introduced under PRD 2019 are complex, costly, and difficult to access, particularly for small and medium-sized enterprises. This raises questions about their ability to genuinely influence crisis management dynamics, risking that preventive restructuring remains confined to a limited scope of large companies or particularly structured cases[284].

Despite these challenges, PRD 2019 has also produced significant indirect effects, stimulating forms of regulatory competition among Member States.

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[282] Recital 12, Directive (EU) 2019/1023.

[283] [283] S. Madaus – B. Wessels, *CERIL Report 2022-2 on Cross-Border Effects in European Preventive Restructuring*, 2022, p. 7 ss.

[283] Vriesendorp, R.D., *How to Measure the Success of National Implementations of the Restructuring Directive?*, in *Insolvency Law in Times of Crisis*, Nottingham, INSOL Europe, 2023, p. 96 ff.

[283] European Commission, *Proposal for a Directive harmonising certain aspects of insolvency law*, COM(2022) 702 final, 7 December 2022.

[284] R.D. Vriesendorp, *How to Measure the Success of National Implementations of the Restructuring Directive?*, in Insolvency Law in Times of Crisis, Nottingham, INSOL Europe, 2023, p. 96 ss.

Some legislators have introduced innovative solutions not explicitly provided for by the Directive, but inspired by the experiences of other jurisdictions, such as the distinction between public and non-public procedures or the introduction of hybrid restructuring tools[285]. These dynamics, if properly coordinated, could foster a gradual convergence of practical applications.

From this perspective, the Directive can be understood not as a final destination, but as an intermediate step in a broader process of harmonisation. The adoption, in December 2022, of a proposal for a Directive aimed at further harmonising aspects of insolvency law demonstrates the Union's commitment to continuing along this path[286]. The lessons learned from the implementation of PRD 2019—particularly regarding the limits of minimum harmonisation and the need for greater coordination—can guide future legislative initiatives.

In conclusion, the harmonisation of national systems achieved by PRD 2019 appears as an incomplete and ongoing process. Some objectives have been partially met, such as the creation of a common language and the introduction of minimum preventive restructuring frameworks; others, such as the effective reduction of legal uncertainty and the full promotion of early restructuring, remain to be achieved[287]. The consolidation of a genuine European culture of restructuring will require further legislative

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[285] European Commission, *Proposal for a Directive harmonising certain aspects of insolvency law*, COM(2022) 702 final, 7 dicembre 2022.

[286] Boon, G.-J. – Koster, H. – Vriesendorp, R.D., *Concluding Remarks*, cited above, p. 217.

[287] Tadic, F., *How Harmonious Can Harmonisation Be?*, in A. Klip – H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law*, Amsterdam, KNAW, 2002, p. 21 ff.

interventions, strengthened judicial cooperation, and, above all, an evolution of practical applications across the different Member States[288].

7.2 The Role of European Institutions and Legal Practitioners: Proposals for a More Efficient and Inclusive European Insolvency Model

Reflections at the European level following the implementation of Directive (EU) 2019/1023 underscore that the harmonisation of crisis law cannot be regarded as complete, but should be seen as a progressive, multi-level process.[289]. In particular, the analysis of responses collected within the context of the CERIL Report 2024-1 highlights a widespread perception that the European Union must continue to play a central role in guiding future reforms, especially with regard to the structural aspects of preventive restructuring frameworks and their effective operation. A significant portion of the positions expressed converges on the view that many of the challenges encountered during the transposition of the Directive are attributable not so much to the choice of minimum harmonisation per se, but rather to the lack of sufficient coordination among the various options left to Member States. In this regard, there is a recognised need for European action to clarify and harmonise key concepts, such as the definition of the pre-insolvency phase, the criteria for accessing restructuring frameworks, and the conditions for activating more invasive measures, including the cross-class cram-down.

Another area in which a strengthened role for the Union is seen as necessary concerns the regulation of the preparatory phase of restructuring. The feedback collected shows that in several jurisdictions, national legislators

[288] Ghio, E., *Redefining Harmonisation: Lessons from EU Insolvency Law*, Cheltenham, Edward Elgar, 2022, p. 141 ff.

[289] CERIL, *Report 2024-1 on the Transposition of the EU Preventive Restructuring Directive 2019/1023*, 23 December 2024, p. 129 ff.

have focused primarily on the adoption and confirmation stages of the plan, leaving the initial negotiation phase underdeveloped. This has created practical uncertainties, particularly regarding the powers of corporate bodies and the position of creditors prior to the formalisation of the plan. From this perspective, European intervention that more precisely regulates access to preventive restructuring, while emphasising the principle of timely intervention, is considered desirable.

The issue of governance and directors' duties represents another critical point. The responses indicate that the absence of a uniform definition of "likelihood of insolvency" has complicated the consistent implementation of rules on directors' duties, generating uncertainty about the timing of these duties and the consequences of any breach. Here too, the usefulness of a clarifying European intervention is highlighted, aiming to reduce the risk of divergent applications and ensure balanced protection of the interests involved.

Particular attention is also paid to the assessment and technical competence of the bodies involved. Difficulties observed in numerous jurisdictions in managing valuation operations, especially when creditor classes disagree, underscore the need to strengthen the Union's role in promoting common standards of professionalism and training for judges, administrative authorities, and restructuring professionals. In this respect, European action extends beyond the adoption of new rules to include the promotion of best practices and mechanisms for transnational cooperation.

The proposals that emerged do not only call for an expansion of EU legislative intervention. A substantial part of the positions collected in the CERIL Report 2024 also warn against the risk of "hyper-reform" in insolvency law, noting that the speed and frequency of legislative interventions may hinder the consolidation of new rules in practice. In this view, the role of the European Union is also conceived as one of monitoring

and periodically assessing the impact of reforms already adopted, rather than as a continuous push for new legislative initiatives.

Overall, a vision emerges of the European institutions as coordinators of the harmonisation process, called upon to balance the need for greater systemic coherence with respect for national specificities. Such equilibrium is essential to prevent the European insolvency model from becoming a collection of formally convergent but practically heterogeneous instruments.

Alongside the role of European institutions, central importance is attributed to the contribution of legal practitioners in building a more efficient and inclusive insolvency model. The feedback indicates that the effectiveness of reforms depends significantly on the ability of the actors involved—judges, professionals, creditors, and companies—to internalise and apply the new rules in a coherent and responsible manner.

In many jurisdictions, difficulties in implementing the new restructuring tools are attributed not so much to gaps in the law as to insufficient familiarity of practitioners with instruments perceived as "revolutionary" or foreign to the national legal tradition. In this context, strengthening specialised training and promoting a culture of preventive restructuring are identified as essential factors for the success of the European model. The professionalism of practitioners thus acquires a systemic dimension, directly impacting the capacity of the system to absorb and operationalise the innovations introduced.

Another aspect concerns cooperation between the European and national levels. The responses show a plurality of approaches: while a significant portion advocates a strengthened European role, there is also a conviction that many reforms must be implemented nationally, through the adaptation of practices and the consolidation of case law application. In this perspective, legal practitioners are called upon to bridge the gap between

rules and practice, contributing to the effective achievement of the objectives set by the European legislature.
Particular attention is devoted to the role of judges, tasked with providing guarantees and balancing powers in a context characterised by increasingly complex and flexible instruments. The challenges identified in evaluating, applying priority rules, and managing disputes between creditor classes highlight that the efficiency of the system also depends on the ability of judicial authorities to exercise their powers in an informed and proportionate manner. In this context, European judicial cooperation and the exchange of experiences between jurisdictions become increasingly important.
The contribution of practitioners is also evident in the need to ensure the inclusivity of the insolvency model. The feedback draws attention to the position of stakeholders traditionally considered marginal in restructuring processes, such as workers and small creditors. Their effective participation and the protection of their interests represent a key test for evaluating the European model's capacity to reconcile economic efficiency with social justice.
From this perspective, inclusivity is not understood merely as a formal extension of guarantees, but as the system's capacity to adapt to the different sizes and types of enterprises. The difficulties encountered by small and medium-sized enterprises in accessing preventive restructuring frameworks point to the need for simpler and less burdensome procedural solutions, which can be effectively utilised even in less structured contexts. In this area too, the role of legal practitioners is decisive, acting as intermediaries between rules and the practical needs of the economic fabric.
The conclusive indications converge on the idea that building a more efficient and inclusive European insolvency model requires a joint effort, going beyond the dichotomy between European intervention and national autonomy. European institutions are called upon to provide a clear and

coherent framework, while legal practitioners must contribute to its implementation through informed and responsible practice. It is in this dynamic interaction that the key to overcoming current challenges and consolidating a system capable of responding to the economic and social challenges of the Union lies.

7.3 A New Sustainable Approach to the Law of Companies in Crisis

7.3.1 Sustainability as a New Paradigm in European Insolvency Law

The development of a sustainable approach to the law of companies in crisis represents one of the most significant conceptual evolutions in European insolvency law in recent years. Since the financial crisis of 2008, and with increasing intensity following the pandemic and the climate crisis, the European legal framework has progressively moved away from a vision of the enterprise focused solely on profit maximisation and creditor satisfaction, instead embracing a broader conception capable of integrating economic, social, and environmental objectives [290].

From this perspective, sustainability is no longer understood as an extrinsic or voluntary aspect of business activity, but as a principle that directly affects corporate organisation, governance, and directors' responsibilities. Initially, these social and environmental concerns were reflected primarily in soft-law instruments and voluntary corporate social responsibility initiatives; subsequently, they have gained increasing legal significance, also thanks to the intervention of European institutions[291].

The European Union has played a central role in this process, promoting a stakeholder-oriented and long-term business model. The proposal for a Directive on Corporate Sustainability Due Diligence and the adoption of the

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[290] Pancioli, G., *A Sustainable Approach to Insolvency Law: Insights from EU Law and the Italian Model of Workers Buyouts*, in *Osservatorio del diritto civile e commerciale*, no. 2, 2023, p. 439 ff.

[291] European Parliament, *Resolution on Social Economy*, 19 February 2009, 2008/2250(INI).

Corporate Sustainability Reporting Directive have marked a decisive step toward integrating social and environmental concerns into European company law[292]. These developments have inevitably impacted insolvency law, which can no longer be regarded as a sector impermeable to sustainability concerns.

The law governing companies in crisis occupies a particularly sensitive position with respect to social values, as insolvency proceedings have direct effects on employment, business continuity, and the productive fabric. In this context, sustainability assumes a specific dimension, distinct from that of companies in sound financial health. During insolvency, the traditional balancing of interests shifts toward creditor protection, but this does not exclude—nor does it preclude—the consideration of other values, such as the preservation of employment and know-how, provided that doing so does not unreasonably compromise creditor satisfaction.[293].

The European approach to preventive restructuring clearly reflects this tension. As early as the 2014 Recommendation, early restructuring was identified as a tool to maximise overall value for creditors, employees, shareholders, and the economy as a whole. Directive (EU) 2019/1023 subsequently enshrined this orientation, placing business continuity at the centre of the system and recognising that the prevention of insolvency and the recovery of viable enterprises constitute objectives of general interest[294]. Although the Directive does not explicitly refer to the sustainability of insolvency law, it gives prominence to interests that go beyond mere creditor satisfaction. In particular, it recognises the importance of preventing job losses and the dissipation of skills, factors that contribute to defining the overall value of the enterprise. Business continuity is therefore

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[292] Directive (EU) 2022/2464 of the European Parliament and of the Council, Dec. 2022.

[293] Dir. (EU) 2019/1023 of the European Parliament and of the Council, Recitals 1, 2, and 8.

[294] European Commission, *Recommendation on A New Approach to Business Failure and Insolvency*, 12 March 2014.

considered not only in economic terms, but also as a means of preserving social and organisational resources[295].

However, the concept of sustainability does not coincide with the notion of *viability* used by the Directive. *Viability* refers to the enterprise's ability to generate long-term profits and serves as a criterion for accessing preventive restructuring frameworks. Sustainability, by contrast, entails a broader assessment, taking into account social and environmental factors, which may involve additional costs and negatively affect immediate economic returns[296]. This gives rise to a potential tension between sustainability and creditors' interests, which insolvency law is called upon to manage.

In this context, the best-interest-of-creditors test assumes a crucial role. The choice between restructuring and liquidation cannot be based solely on a purely arithmetic comparison of economic returns; it must also take into account the value of business continuity in terms of employment, skills, and social impact. The Directive, while not imposing a rigid hierarchy of values, allows these factors to be incorporated into the overall assessment, opening the way for an evolutionary interpretation of insolvency law[297].

Overall, a framework emerges in which sustainability operates as a cross-cutting criterion, influencing both the design of restructuring procedures and the operational choices made during their implementation. European insolvency law thus appears oriented toward a more inclusive model, in which creditor protection remains the primary objective, but is complemented by the consideration of additional interests aimed at preserving the overall value of the enterprise[298].

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[295] Directive (EU) 2019/1023, Recital 2.

[296] Linna, T., *Insolvency proceedings from a sustainability perspective*, in *International Insolvency Law Review*, 2019, p. 215 ff.

[297] Directive (EU) 2019/1023, Recital 52.

[298] Boon, G.-J., *Harmonising European insolvency law: the emerging role of stakeholders*, in *International Insolvency Review*, 2018, p. 150 ff.

7.3.2 The Role of Stakeholders and Workers in Sustainable Restructuring

The integration of sustainability principles into the law of companies in crisis entails a rethinking of the role of stakeholders within restructuring and insolvency proceedings. Among these, workers occupy a particular position, as they are simultaneously involuntary creditors, holders of fundamental rights, and essential components of the productive organisation. European law has progressively recognised this plurality of roles, granting workers increasing relevance in crisis management processes [299].

Under European Union law, the protection of workers in the event of insolvency has traditionally been structured through indirect mechanisms, such as state guarantees for the payment of wage claims and rights to information and consultation. Directives such as 2008/94/EC and 2002/14/EC have ensured a minimum level of protection, without, however, granting workers an active role in the strategic decisions of the proceedings[300]. Preventive restructuring has opened new avenues for stakeholder involvement, although in a non-uniform manner. Directive (EU) 2019/1023 expressly recognises the importance of workers' interests, qualifying them, in some cases, as *affected parties* and allowing Member States to include them among the entities entitled to participate in the vote on the restructuring plan. This choice, however, is not mandatory, leaving national legislators a wide margin of discretion[301]. The result is a heterogeneous landscape, in which the degree of worker involvement varies significantly from one jurisdiction to another.

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[299] Directive 2008/94/EC of the European Parliament and of the Council.

[300] Directive 2002/14/EC of the European Parliament and of the Council.

[301] Directive (EU) 2019/1023, Articles 8 and 9.

Despite these limitations, the European model of preventive restructuring emphasises social dialogue as an essential tool for the sustainable management of crises. Timely information and consultation of workers' representatives are considered prerequisites for adopting balanced solutions capable of minimising the social impact of restructurings. From this perspective, sustainability is expressed as the system's ability to promote negotiated solutions, in which the interests of the various stakeholders can be reconciled in a reasonable manner[302].

A particularly relevant aspect concerns the relationship between restructuring and business transfers. European law, through Directive 2001/23/EC, protects the continuity of employment relationships in the event of a transfer, but provides a significant exception in the case of liquidation proceedings. This distinction reflects the different balance of interests between restructuring and liquidation, yet raises questions regarding the sustainability objectives pursued by preventive restructuring[303].

In this context, worker participation in restructuring decisions assumes a strategic value. The direct or indirect involvement of employees can help identify solutions that preserve the value of the enterprise and promote business continuity, while simultaneously reducing the social costs of insolvency. However, the effectiveness of such participation depends largely on the configuration of the rights granted to workers at the national level and the prevailing legal culture[304].

European law appears to move in a cautious direction, avoiding the imposition of rigid participation models while promoting greater attention to the social effects of the procedures. In this perspective, sustainability does

[302] Directive 2001/23/EC of the European Parliament and of the Council.

[303] Court of Justice of the European Union, 22 April 2022, Case C-237/20, *Heiploeg*.

[304] Directive (EU) 2017/828 (*Shareholders' Rights II*).

not operate as a legal automaticity, but as an interpretative and operational criterion guiding practitioners' decisions toward long-term solutions. The centrality of business continuity thus becomes the meeting point between creditor protection and the safeguarding of workers' interest[305].

Overall, the role of stakeholders in the law of companies in crisis appears set to strengthen, albeit gradually and in a differentiated manner. Sustainable restructuring requires a delicate balance between economic and social needs, which cannot be imposed from above, but must be built through constant interaction between rules, practice, and legal culture[306].

7.3.3 The Italian Model of Workers Buyouts and the Prospects for Sustainable Insolvency Law

The Workers Buyouts (WBOs) model represents one of the most significant practical applications of sustainability principles in the law of companies in crisis. By transferring the company, or a branch of it, to workers organised in cooperative form, WBOs enable the reconciliation of business continuity with employment protection, providing a structured response in insolvency situations where the alternative would be liquidation[307].

Within the European context, WBOs do not benefit from a unified regulatory framework, but have been progressively recognised by Union institutions as instruments capable of promoting socially responsible restructuring. In particular, it is acknowledged that workers, as stakeholders with a direct interest in the survival of the enterprise, possess skills and knowledge that can be decisive for the success of the recovery[308].

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[305] Directive (EU) 2019/1023, Article 13.

[306] Directive (EU) 2019/1023, Recitals 60 and 62.

[307] European Commission, *Communication COM(2004) 18 final*.

[308] European Parliament, *Resolution on the Contribution of Cooperatives to Overcoming the Crisis*, 2 July 2013.

The Italian case represents an emblematic example of integrating WBOs into the insolvency system. The Marcora Law and subsequent financial support measures have created an ecosystem conducive to the formation of worker cooperatives, providing financing tools and technical assistance. This model has demonstrated remarkable resilience, particularly in the small and medium-sized manufacturing sector[309].

From a legal standpoint, WBOs fit coherently within the framework established by the Code of Business Crisis and Insolvency, which prioritises the sale of the enterprise as a going concern and values business continuity as a key criterion in liquidation procedures. The transfer to workers can occur either within judicial liquidation, through the right of first refusal, or within restructuring procedures, such as preventive composition with creditors or negotiated crisis settlements[310].

The benefits of WBOs extend beyond the preservation of jobs. The cooperative model fosters participatory management of the enterprise, reducing information asymmetries and promoting long-term-oriented decision-making. The ability to reinvest profits and to adjust labour costs flexibly allows cooperatives to navigate crisis periods using tools and approaches different from those available to traditional enterprises[311].

Despite these positive aspects, WBOs do not represent a universal solution. They require adequate financial support, strong cohesion among the workers, and a favourable regulatory framework. In the absence of these conditions, there is a risk that the transfer may exacerbate the crisis rather than provide a genuine recovery opportunity[312]. The sustainability of the model therefore depends on the system's ability to identify cases in which WBOs are genuinely feasible.

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[309] Italian Law No. 49/1985 (*Legge Marcora*).

[310] Italian Legislative Decree No. 145/2013, Article 11 (*Destinazione Italia*).

[311] Article 45 of the Italian Constitution.

[312] Reg. (UE) 2015/848.

The future prospects of sustainable insolvency law appear to be moving toward greater integration of instruments like WBOs within the European framework. Developments in European Union policies on the social economy and inclusive entrepreneurship indicate a growing interest in solutions that combine economic efficiency with the protection of social values[313]. In this context, the Italian model can provide useful insights for a broader reflection at the European level.

In conclusion, the sustainable approach to the law of companies in crisis is an ongoing process, in which creditor protection, business continuity, and the safeguarding of employment must be continuously balanced. Workers Buyouts represent one of the most advanced expressions of this paradigm, demonstrating how sustainability can be translated into concrete legal solutions capable of addressing the economic and social challenges of contemporary insolvency[314].

[313] COM (2010) 2020, *Europe 2020 Strategy*.

[314] COM (2012) 795 final, *Entrepreneurship 2020 Action Plan*.

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ACKNOWLEDGMENTS

To Professor Pietro Paolo Ferraro and Professor Rosario Bianco

for their support throughout the doctoral program

To Professor Maria Antonella Ferri,

Professor Isabella Bonacci,

and Professor Alessandra Micozzi

for inspiring in us a passion for scientific research

To all fellow PhD candidates of the 38th and 39th cycles,

precious companions along this journey

To Professor Denis Philippe and to the dear memory of Robert Bray,

for their warm friendship and support

I

(Resolutions, recommendations and opinions)

RESOLUTIONS

EUROPEAN PARLIAMENT

Insolvency proceedings in the context of EU company law

P7_TA(2011)0484

European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI))

(2013/C 153 E/01)

The European Parliament,

— having regard to Article 225 of the Treaty on the Functioning of the European Union,

— having regard to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ([1]) (the Insolvency Regulation),

— having regard to the judgments of the Court of Justice of the European Union of 2 May 2006 ([2]), 10 September 2009 ([3]) and 21 January 2010 ([4]),

— having regard to Rules 42 and 48 of its Rules of Procedure,

— having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs (A7-0355/2011),

A. whereas disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies; whereas those disparities favour forum-shopping; whereas the internal market would benefit from a level playing field;

B. whereas steps must be taken to prevent abuse, and any spread, of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided;

C. whereas even if the creation of a body of substantive insolvency law at EU level is not possible, there are certain areas of insolvency law where harmonisation is worthwhile and achievable;

([1]) OJ L 160, 30.6.2000, p. 1.
([2]) Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.
([3]) Case C-97/08 P *Akzo Nobel and others* v *Commission* [2009] ECR I-8237.
([4]) Case C-444/07 *MG Probud Gdynia sp. z o.o.* [2010] ECR I-417.

Tuesday 15 November 2011

D. whereas there is a progressive convergence in the national insolvency laws of the Member States;

E. whereas the Insolvency Regulation was adopted in 2000 and has been now in force for more than nine years; whereas the Commission should present a report on its application no later than 1 June 2012;

F. whereas the Insolvency Regulation was the outcome of a very lengthy negotiation process, the result of which is that many sensitive issues were left out and that its approach on a number of questions was already outdated at the moment of its adoption;

G. whereas since the entry into force of the Insolvency Regulation many changes have taken place, 12 new Member States have joined the Union and the phenomenon of groups of companies has increased enormously;

H. whereas insolvency has an adverse impact not only on the businesses concerned but also on the economies of the Member States, and whereas the aim should therefore be to safeguard all economic stakeholders, taxpayers and employers against the repercussions of insolvency;

I. whereas the approach in relation to insolvency proceedings is now centred more on corporate rescue as an alternative to liquidation;

J. whereas insolvency law should be a tool for the rescue of companies at Union level; whereas such rescue, whenever it is possible, is to the benefit of the debtor, the creditors and the employees;

K. whereas insolvency proceedings should not be used abusively by a creditor to avoid joint action for the recovery of debts, and whereas it is therefore necessary to introduce appropriate procedural safeguards;

L. whereas a legal framework should be established that better suits cases of companies which are temporarily insolvent;

M. whereas in its Communication of 3 March 2010 entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (COM (2010) 2020), the Commission, referring to the missing links and bottlenecks obstructing the achievement of a single market for the 21st century, stated as follows: 'Access for SMEs to the single market must be improved. Entrepreneurship must be developed by concrete policy initiatives, including a simplification of company law (bankruptcy procedures, private company statute, etc.), and initiatives allowing entrepreneurs to restart after failed businesses';

N. whereas insolvency law should also lay down rules for the winding-up of a company in a way which is the least harmful and the most beneficial for all participants once it is established that the corporate rescue is likely to fail or has failed;

O. whereas in each specific case the reasons for the insolvency of a business must be investigated, i.e. it must be ascertained whether the business's financial difficulties are merely transient or whether the business is completely insolvent; whereas what is fundamentally required is to establish all the assets of a debtor and his liabilities in order to be able to assess his solvency or insolvency;

P. whereas groups of companies are a common phenomenon but their insolvency has not yet been addressed at Union level; whereas the insolvency of a group of companies is likely to result in the commencement of multiple separate insolvency proceedings in different jurisdictions with respect to each of the insolvent group members; whereas unless those proceedings can be coordinated, it is unlikely that the group can be reorganised as a whole and it may have to be broken up into its constituent parts, with consequent losses for the creditors, shareholders and employees;

Q. whereas where groups of companies become insolvent, a recovery is currently difficult to achieve in the EU, due to the differences in Member States' rules, thus endangering thousands of jobs;

R. whereas the interlinking of national insolvency registers leading to the creation of a generally accessible and comprehensive EU database of insolvency proceedings would allow creditors, shareholders, employees and courts to determine whether insolvency proceedings have been opened in another Member State and to ascertain the deadlines and details for the presentation of claims; whereas this would promote cost-effective administration and increase transparency while respecting data protection;

S. whereas cross-border 'living wills' should be legally enforceable in the case of financial institutions and should be considered for all systemically relevant corporations, even if they are not financial institutions, as an important step in the process of achieving an appropriate cross-border insolvency framework;

T. whereas provisions for insolvency proceedings must allow special arrangements for separation of viable units that provide essential services, such as payment systems and other mechanisms defined in 'living wills' and whereas, in this respect, Member States should also ensure that their insolvency laws include adequate provisions allowing special arrangements at EU level for separation of insolvent cross-border conglomerates into viable units;

U. whereas insolvency proceedings should take account of intra-group transfers, with the aim of ensuring that, where appropriate, assets are recoverable across borders, in order to achieve an equitable result;

V. whereas some investment companies, particularly insurers, cannot be dissolved on a 'snapshot' basis and require an outcome that achieves an equitable distribution of assets over time; whereas transfer of business, run-off, or continuity of operation should not be prevented and may need to be prioritised;

W. whereas the decision to involve whole groups rather than single legal entities in insolvency proceedings should be outcome-oriented and should take account of any knock-on effects such as the triggering of other resolution tools or the effect on guarantee schemes that cover multiple brands within a group;

X. whereas it would be appropriate to explore the definition of harmonised bail-in procedures and standards for cross-border conglomerates, including in particular debt-to-equity swaps;

Y. whereas although employment law is the responsibility of the Member States, insolvency law can have an impact on employment law, and whereas in the context of increasing globalisation – and, indeed, of the economic crisis – the issue of insolvency needs to be considered from an employment-law perspective, as differing definitions of 'employment' and 'employee' in Member States should not undermine the rights of employees in the event of insolvency; whereas, however, any debate on the specific issue of insolvency should not automatically be a pretext for regulating employment law at EU level;

Z. whereas the objective of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer ([1]) is to ensure a minimum degree of protection for employees in the event of insolvency, whilst maintaining adequate flexibility for Member States; whereas differences between Member States in terms of implementation do exist and those differences should be considered;

AA. whereas Directive 2008/94/EC explicitly includes in its scope part-time employees, employees with a fixed-term contract and employees with a temporary employment relationship; whereas greater protection in the event of insolvency should also be afforded to employees on non-standard contracts;

AB. whereas the current lack of harmonisation with regard to the ranking of creditors reduces predictability of outcomes of judicial proceedings; whereas it is necessary to increase the priority of employees' claims relative to other creditors' claims;

AC. whereas the scope of Directive 2008/94/EC, in particular the understanding of 'outstanding claim', is too wide, as a number of Member States apply a narrow definition of remuneration (e.g. excluding severance pay, bonuses, reimbursement arrangements, etc.) that can result in substantial claims not being met;

AD. whereas Member States are competent to define 'remuneration' and 'pay', provided that they adhere to the general principles of equality and non-discrimination between workers, with the result that any insolvency situation which is potentially prejudicial to the latter should be taken into account for the purposes of compensating them in accordance with the social objective of Directive 2008/94/EC and with threshold levels of compensation to be determined;

AE. whereas, due to employment contracts across the EU and the diversity of such contracts within Member States, it is currently impossible to seek to define 'employee' at European level;

AF. whereas exemptions from the scope of Directive 2008/94/EC should be avoided as far as possible;

AG. whereas the legislative action requested in this resolution should be based on detailed impact assessments, as requested by Parliament;

1. Requests the Commission to submit, on the basis of Article 50, Article 81(2) or Article 114 of the Treaty on the Functioning of the European Union, one or more proposals relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives;

2. Confirms that the recommendations respect fundamental rights and the principle of subsidiarity;

3. Considers that the financial implications of the requested proposal should be covered by appropriate budgetary allocations;

4. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

([1]) OJ L 283, 28.10.2008, p. 36.

ANNEX TO THE RESOLUTION

DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED

Part 1: Recommendations regarding the harmonisation of specific aspects of insolvency and company law

1.1. Recommendation on the harmonisation of certain aspects of the opening of insolvency proceedings

The European Parliament proposes harmonisation of the conditions under which insolvency proceedings may be opened. The European Parliament considers that a directive should harmonise aspects of the opening of proceedings in such a way that:

— insolvency proceedings can be brought against debtors who are natural persons, legal entities or associations;

— insolvency proceedings are initiated in a timely manner in order to allow a rescue of the troubled enterprise;

— insolvency proceedings can be opened concerning the assets of the above-mentioned debtors, the assets of entities without legal personality (e.g. a European Economic Interest Grouping), a descendant's estate and the assets of a community of property;

— all companies can start insolvency proceedings in cases where the insolvency is temporary, in order to protect themselves;

— insolvency proceedings can also be opened after the dissolution of a legal entity or of an entity without legal personality, as long as the distribution of the assets has not yet taken place, or in cases where assets are still available;

— insolvency proceedings can be opened by a court or other competent authority upon a written request of a creditor or the debtor; the request for the opening of the proceedings can be withdrawn as long as the proceedings have not been opened or the request has not been refused by a court;

— a creditor may request the opening of proceedings if he/she has a legal interest therein and shows credibly that he/she has got a claim;

— proceedings can be opened if the debtor is insolvent, i.e. unable to satisfy the payment obligations; if the request is made by the debtor, the proceedings can also be opened if the debtor's insolvency is imminent, i.e. if the debtor is likely not to be able to satisfy the payment obligations;

— as far as mandatory filing for bankruptcy by the debtor is concerned, the proceedings must be opened within a period of between one and two months after the cessation of payments if the court has not already initiated preliminary proceedings or other appropriate measures in order to protect the assets and provided that adequate assets are available to cover the costs of the insolvency proceedings;

— Member States are required to lay down rules rendering the debtor liable in the event of non-filing or improper filing, and to provide for effective, proportionate and dissuasive sanctions.

1.2. Recommendation on the harmonisation of certain aspects of the filing of claims

The European Parliament proposes harmonisation of the conditions under which claims in insolvency proceedings are to be filed. The European Parliament considers that a directive should harmonise aspects of the filing of claims in such a way that:

— the date for determining outstanding claims is the date on which the employer becomes insolvent, i.e. the date of the decision on the application to open insolvency proceedings or the date when the opening of proceedings was refused on grounds that the costs were not covered;

— creditors file their claim with the liquidator in written form within a certain period of time;

— Member States are required to fix the above-mentioned period of time within one to three months from the date of publication of the bankruptcy decision;

— the creditor is required to submit documentation in support of the claim;

— the liquidator establishes a table of all claims filed and that table is displayed at the competent court within the meaning of point (d) of Article 2 of the Insolvency Regulation;

— late filings, i.e. filings by a creditor who has missed the deadline for filing the claim, are to be verified but may entail additional costs for the creditor in question.

1.3. Recommendation on the harmonisation of aspects of avoidance actions

The European Parliament proposes harmonisation of aspects of avoidance actions in such a way that:

— the laws of the Member States provide for the possibility of challenging acts done before the opening of the proceedings which are detrimental to the creditors;

— acts that can be the object of an avoidance action are transactions in a situation of imminent insolvency, the creation of security rights, transactions with connected parties and transactions carried out with the intention of defrauding creditors;

— the periods during which an act can be challenged by an avoidance action vary according to the nature of the act at issue; the periods start with the date of the request for the opening of proceedings; the periods could be between three and nine months for transactions carried out in a situation of imminent insolvency, between six and twelve months for the creation of security rights, between one and two years for transactions with connected parties, and between three and five years for transactions carried out with the intention of defrauding creditors;

— the onus of proof to show whether or not an act can be challenged lies in principle with the party who claims that the act can be challenged; for transactions with connected parties, the onus of proof lies with the connected person.

1.4. Recommendation on the harmonisation of general aspects of the requirements for the qualification and work of liquidators

— the liquidator must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State, must be of good repute and must have the educational background needed for the performance of his/her duties;

— the liquidator must be competent and qualified to assess the situation of the debtor’s entity and to take over management duties for the company;

— when main insolvency proceedings are opened, the liquidator should be empowered for a period of six months to decide on the protection of assets with retroactive effect in cases where companies have moved capital;

— the liquidator must be empowered to use appropriate priority procedures to recover monies owing to companies, in advance of settlement with creditors and as an alternative to transfers of claims;

— the liquidator must be independent of the creditors and other stakeholders in the insolvency proceedings;

— in the event of a conflict of interest, the liquidator must resign from his/her office.

1.5. Recommendation on the harmonisation of aspects of restructuring plans

The European Parliament proposes harmonisation of aspects of the establishment, effects and content of restructuring plans in such a way that:

— as an alternative to complying with statutory rules, debtors or liquidators may present a restructuring plan;

— the plan must contain rules for the satisfaction of the creditors and for the debtor's liability after the insolvency proceeding have been concluded;

— the plan must contain all relevant information enabling the creditors to decide whether they can accept the plan;

— the plan must be approved or disapproved in a specific procedure before the relevant court;

— unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it.

Part 2: Recommendations regarding the revision of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

2.1. Recommendation on the scope of the Insolvency Regulation

The European Parliament considers that the scope of the Insolvency Regulation should be broadened to include insolvency proceedings in which the debtor remains in possession or where a preliminary liquidator has been appointed. Annex A to the Insolvency Regulation should be revised accordingly.

2.2. Recommendation on the definition of 'centre of main interests'

The European Parliament considers that the Insolvency Regulation should include a definition of the term 'centre of main interest' formulated in such a way as to prevent fraudulent forum-shopping. The European Parliament suggests that a formal definition should be inserted, based on the wording of Recital 13, which is concerned with the objective possibility for third parties to ascertain it.

The European Parliament considers that the definition should take account of such features as the externally ascertainable principal transaction of business operations, the location of assets, the centre of the operational or production activities, the workplace of employees, etc.

2.3. Recommendation on the definition of 'establishment' in the context of secondary proceedings

The European Parliament considers that the Insolvency Regulation should include a definition of 'establishment' as any place of operations where the debtor carries on a non-transitory economic activity with human means and goods and services.

2.4. Recommendation on cooperation between courts

The European Parliament considers that Article 32 of the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation not only between liquidators but also between courts.

In the event of main and secondary insolvency proceedings being opened, the timeframes for these procedures should be harmonised and shortened.

2.5. Recommendation on certain aspects of avoidance actions

The European Parliament considers that Article 13 of the Insolvency Regulation should be reviewed so that it does not encourage cross-border avoidance actions but helps to prevent avoidance actions from succeeding by means of choice-of-law clauses.

In any event, the review of the avoidance action rules should take into account the consideration that healthy subsidiaries of an insolvent holding company should not be driven into insolvency due to avoidance actions rather than being sold in the interests of the creditors as a going concern.

Part 3: Recommendations on the insolvency of groups of companies

Due to the different levels of integration which may exist within a group of companies, the European Parliament considers that the Commission should present a flexible proposal for the regulation of the insolvency of groups of companies, taking into account the following:

1. Whenever the functional/ownership structure allows it, the following approach should apply:

   A. Proceedings should be opened in the Member State where the operational headquarters of the group are located. Recognition of the opening of the proceedings should be automatic.

   B. The opening of the main proceedings should result in a stay of the proceedings opened in another Member State against other group members.

   C. A single insolvency practitioner should be appointed.

   D. In every Member State in which ancillary proceedings are opened, a committee should be set up to defend and represent the interests of local creditors and employees.

   E. If it is impossible to determine which assets belong to which debtor, or to assess inter-company claims, recourse should exceptionally be had to the aggregation of estates.

2. For insolvency proceedings in respect of decentralised groups, the instrument should provide for the following:

   A. Rules for mandatory coordination and cooperation between courts, between courts and insolvency representatives and between insolvency representatives.

   B. Rules on immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings and judgments handed down in connection with such proceedings.

   C. Rules on access to courts by liquidators and creditors.

   D. Rules to facilitate and promote the use of various forms of cooperation between courts to coordinate the insolvency proceedings and establish the conditions and safeguards that should apply to those forms of cooperation. These would affect the exchange of information, the coordination of operations and the drafting of common solutions:

   — communication of information between courts by any means,

   — coordination of the administration and supervision of the debtor's assets and affairs,

   — the negotiation, approval and implementation of insolvency agreements concerning the coordination of proceedings,

   — the coordination of hearings.

   E. Rules allowing and promoting the appointment of a common liquidator for all proceedings, to be nominated by the courts involved and assisted by local representatives forming a steering committee; and rules laying down the procedure governing cooperation between members of the steering committee.

   F. Rules allowing and promoting cross-border insolvency agreements which would address the allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including:

   — allocation of responsibilities between the parties to the agreement;

   — availability and coordination of relief;

— coordination of recovery of assets for the benefit of creditors generally;

— submission and processing of claims;

— methods of communication, including language, frequency and means,

— use and disposal of assets;

— coordination and harmonisation of the reorganisation plans;

— issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;

— administration of proceedings, in particular with respect to stays of proceedings or agreements between parties not to have recourse to certain legal actions;

— safeguards;

— costs and fees.

Part 4: Recommendation on the creation of an EU insolvency register

The European Parliament proposes the creation of an EU insolvency register in the context of the European e-Justice Portal, which should contain, for every cross-border insolvency opened, at least:

— the relevant court orders and judgments,

— the appointment of the liquidator and that person's contact details,

— the deadlines for filing claims.

Transmission of these data to the EU registry by the courts should be compulsory.

The information should be expressed in the official language of the Member State in which the proceedings are opened and in English.

Demographic change and its consequences for the cohesion policy

P7_TA(2011)0485

European Parliament resolution of 15 November 2011 on demographic change and its consequences for the future cohesion policy of the EU (2010/2157(INI))

(2013/C 153 E/02)

The European Parliament,

— having regard to DG REGIO's Fifth Report on Economic, Social and Territorial Cohesion, in particular pages 230 to 234,

— having regard to the conclusions of the Fifth Cohesion Report: the future of cohesion policy (COM(2010)0642) and the accompanying document (SEC(2010)1348),

— having regard to the DG REGIO working document entitled 'Regions 2020: an Assessment of Future Challenges for EU Regions' of November 2008 (background document to Commission staff working document SEC(2008)2868),

RECOMMENDATIONS

COMMISSION RECOMMENDATION

of 12 March 2014

on a new approach to business failure and insolvency

(Text with EEA relevance)

(2014/135/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.

(2) National insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of formal insolvency proceedings. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or involve varying degrees of formality, in particular in relation to the use of out-of-court processes.

(3) Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business vary as regards the length of the discharge period and the conditions under which discharge can be granted.

(4) The discrepancies between the national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different Member States.

(5) Council Regulation (EC) No 1346/2000 [1] only deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings. The Commission proposal for the amendment of that Regulation [2] should extend the scope of the Regulation to preventive procedures which promote the rescue of an economically viable debtor and give a second chance to entrepreneurs. However, the proposed amendment does not tackle the discrepancies between those procedures in national law.

(6) On 15 November 2011, the European Parliament adopted a Resolution [3] on insolvency proceedings. It included recommendations for harmonising specific aspects of national insolvency law, including the conditions for the establishment, effects and content of restructuring plans.

(7) In the Communication on the Single Market Act II [4] of 3 October 2012, the Commission undertook as a key action to modernise the Union insolvency rules in order to facilitate the survival of businesses and present a second chance to entrepreneurs. To this end, the Commission announced that it would analyse how the efficiency of national insolvency laws could be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market.

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).

[2] COM(2012) 744 final.

[3] European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law, P7_TA (2011) 0484.

[4] COM(2012) 573 final.

(8) The Commission Communication on a new European approach to business failure and insolvency [1] of 12 December 2012 highlights certain areas where differences between domestic insolvency laws may hamper the establishment of an efficient internal market. It noted that the creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment.

(9) On 9 January 2013 the Commission adopted the Entrepreneurship 2020 Action Plan [2] where the Member States are invited, among other things, to reduce when possible, the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of 3 years by 2013 and to offer support services to businesses for early restructuring, advice to prevent bankruptcies and support for small and medium enterprises to restructure and re-launch.

(10) Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market.

(11) It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

(12) Furthermore, removing the barriers to effective restructuring of viable companies in financial difficulties contributes to saving jobs and also benefits the wider economy. Making it easier for entrepreneurs to have a second chance would also lead to higher self-employment rates in the Member States. Moreover, efficient insolvency frameworks would provide a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for over-indebted firms, minimising the economic and social costs involved in their deleveraging process.

(13) Small and medium sized enterprises would benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and take advantage of the more efficient restructuring procedures in some Member States.

(14) Tax authorities also have an interest in an efficient restructuring framework for viable enterprises. In implementing this Recommendation, Member States should be able to take appropriate measures to ensure the collection and recovery of tax revenues respecting the general principles of tax fairness and to take efficient measures in cases of fraud, evasion or abuse.

(15) It is appropriate to exclude from the scope of this Recommendation insurance undertakings, credit institutions, investment firms and collective investment undertakings, central counter parties, central securities depositories and other financial institutions which are subject to special recovery and resolution frameworks where national supervisory authorities have wide-ranging powers of intervention. Although consumer over-indebtedness and consumer bankruptcy are also not covered by the scope of this Recommendation, Member States are invited to explore the possibility of applying these recommendations also to consumers, since some of the principles followed in this Recommendation may also be relevant for them.

(16) A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. However, in order to avoid any potential risks of the procedure being misused, the financial difficulties of the debtor must be likely to lead to its insolvency and the restructuring plan must be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.

[1] COM(2012) 742 final.
[2] COM(2012) 795 final.

(18) A debtor should be able to request the court for a stay of individual enforcement actions and suspension of insolvency proceedings whose opening has been requested by creditors where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. However, in order to provide for a fair balance between the rights of the debtor and of creditors, and taking into account the experience of recent reforms in the Member States, the stay should be initially granted for a period of no more than 4 months.

(19) Court confirmation of a restructuring plan is necessary to ensure that the reduction of the rights of creditors is proportionate to the benefits of the restructuring and that creditors have access to an effective remedy, in full compliance with the freedom to conduct a business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union. The court should therefore reject a plan where it is likely that the attempted restructuring reduces the rights of dissenting creditors below what they could reasonably expect to receive in the absence of a restructuring of the debtor's business.

(20) The effects of bankruptcy, in particular the social stigma, legal consequences and the ongoing inability to pay off debts constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have gone bankrupt have more chance to be successful the second time. Steps should therefore be taken to reduce the negative effects of bankruptcy on entrepreneurs, by making provisions for a full discharge of debts after a maximum period of time,

HAS ADOPTED THIS RECOMMENDATION:

I. OBJECTIVE AND SUBJECT MATTER

1. The objective of this Recommendation is to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance, thereby promoting entrepreneurship, investment and employment and contributing to reducing the obstacles to the smooth functioning of the internal market.

2. By reducing those obstacles, the Recommendation aims in particular to:

   (a) lower the costs of assessing the risks of investing in another Member State;

   (b) increase recovery rates for creditors; and

   (c) remove the difficulties in restructuring cross-border groups of companies.

3. This Recommendation provides for minimum standards on:

   (a) preventive restructuring frameworks; and

   (b) discharge of debts of bankrupt entrepreneurs.

4. When implementing this Recommendation, Member States should be able to take appropriate and efficient measures to ensure the enforcement of taxes, in particular in cases of fraud, evasion or abuse.

II. DEFINITIONS

5. For the purposes of this Recommendation:

   (a) 'debtor' means any natural or legal person in financial difficulties when there is a likelihood of insolvency;

   (b) 'restructuring' means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity;

   (c) 'stay of individual enforcement actions' means a court ordered suspension of the right to enforce a claim by a creditor against a debtor;

   (d) 'courts' includes any other body with competence in matters relating to preventive procedures to which the Member States have entrusted the role of the courts, and whose decisions may be subject to an appeal or review by a judicial authority.

III. PREVENTIVE RESTRUCTURING FRAMEWORK

A. Availability of a preventive restructuring framework

6. Debtors should have access to a framework which allows them to restructure their business with the objective of preventing insolvency. The framework should contain the following elements:

   (a) the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency;

   (b) the debtor should keep control over the day-to-day operation of its business;

   (c) the debtor should be able to request a temporary stay of individual enforcement actions;

   (d) a restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court;

(e) new financing which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

7. The restructuring procedure should not be lengthy and costly and it should be flexible so that more steps can be taken out-of-court. The involvement of the court should be limited to where it is necessary and proportionate with a view to safeguarding the rights of creditors and other interested parties affected by the restructuring plan.

B. **Facilitating negotiations on restructuring plans**

Appointment of a mediator or a supervisor

8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings.

9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case-by-case basis where it considers such appointment necessary:

(a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;

(b) in the case of a supervisor, in order to oversee the activity of the debtor and creditors and take the necessary measures to safeguard the legitimate interests of one or more creditors or another interested party.

Stay of individual enforcement actions and suspension of insolvency proceedings

10. The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions (hereafter 'stay') lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan. The stay should not interfere with the performance of ongoing contracts.

11. In Member States which make the granting of the stay subject to certain conditions, debtors should be able to be granted a stay in all circumstances where:

(a) creditors representing a significant amount of the claims likely to be affected by the restructuring plan support the negotiations on the adoption of a restructuring plan; and

(b) a restructuring plan has a reasonable prospect of being implemented and preventing the insolvency of the debtor.

12. Where provided for in the laws of the Member States, the obligation of the debtor to file for insolvency, as well as applications by creditors requesting the opening of insolvency proceedings against the debtor lodged after the stay has been granted should also be suspended for the duration of the stay.

13. The duration of the stay should strike a fair balance between the interests of the debtor and of creditors, and in particular secured creditors. The duration of the stay should therefore be determined on the basis of the complexity of the anticipated restructuring, and should not exceed 4 months. Member States may provide that the period can be renewed upon evidence of progress in the negotiations on a restructuring plan. The total duration of the stay should not exceed 12 months.

14. When the stay is no longer necessary with a view to facilitating the adoption of a restructuring plan, the stay should be lifted.

C. **Restructuring plans**

Contents of restructuring plans

15. Member States should ensure that courts can confirm plans with expediency and in principle in written procedure. They should lay down clear and specific provisions on the content of restructuring plans. Restructuring plans should contain a detailed description of the following elements:

(a) clear and complete identification of the creditors who would be affected by the plan;

(b) the effects of the proposed restructuring on individual debts or categories of debts;

(c) the position taken by affected creditors on the restructuring plan;

(d) where applicable, the conditions for new financing; and

(e) the potential of the plan to prevent the insolvency of the debtor and ensure the viability of the business.

Adoption of restructuring plans by creditors

16. To increase the prospects of restructuring and therefore the number of viable businesses being rescued, it should be possible to adopt a restructuring plan by the affected creditors, including secured and unsecured creditors.

17. Creditors with different interests should be treated in separate classes which reflect those interests. As a minimum, there should be separate classes for secured and unsecured creditors.

18. A restructuring plan should be adopted by the majority in the amount of creditors' claims in each class, as prescribed by national law. Where there are more than two classes of creditors, Member States should be able to maintain or introduce provisions which empower courts to confirm restructuring plans which are supported by a majority of those classes of creditors, taking into account in particular the weight of the claims of the respective classes of creditors.

19. Creditors should enjoy a level playing field irrespective of where they are located. Therefore, where the laws of the Member States require a formal voting process, creditors should in principle be allowed to vote by distance means of communication such as registered letter or secure electronic technologies.

20. To make the adoption of restructuring plans more effective, Member States should also ensure that it is possible for restructuring plans to be adopted by certain creditors or certain types or classes of creditors only, provided that other creditors are not affected.

Court confirmation of the restructuring plan

21. To ensure that the rights of creditors are not unduly affected by a restructuring plan and in the interest of legal certainty, restructuring plans which affect the interests of dissenting creditors or make provision for new financing should be confirmed by a court in order to become binding.

22. The conditions under which a restructuring plan can be confirmed by a court should be clearly specified in the laws of the Member States and should include at least the following:

    (a) the restructuring plan has been adopted in conditions which ensure the protection of the legitimate interests of creditors;

    (b) the restructuring plan has been notified to all creditors likely to be affected by it;

    (c) the restructuring plan does not reduce the rights of dissenting creditors below what they would reasonably be expected to receive in the absence of the restructuring, if the debtor's business was liquidated or sold as a going concern, as the case may be;

    (d) any new financing foreseen in the restructuring plan is necessary to implement the plan and does not unfairly prejudice the interests of dissenting creditors.

23. Member States should ensure that courts can reject restructuring plans which clearly do not have any prospect of preventing the insolvency of the debtor and ensuring the viability of the business, for example because new financing needed to continue its activity is not foreseen.

Rights of creditors

24. All creditors likely to be affected by the restructuring plan should be notified of the content of the plan and given the right to formulate objections and to appeal against the restructuring plan. Nevertheless, in the interest of the creditors supporting the plan, the appeal should not in principle suspend the implementation of the restructuring plan.

Effects of a restructuring plan

25. The restructuring plans which are adopted by the unanimity of affected creditors should be binding on all those affected creditors.

26. The restructuring plans which are confirmed by a court should be binding upon each creditor affected by and identified in the plan.

D. **Protection for new financing**

27. New financing, including new loans, selling of certain assets by the debtor and debt-equity swaps, agreed upon in the restructuring plan and confirmed by a court should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

28. Providers of new financing as part of a restructuring plan which is confirmed by a court should be exempted from civil and criminal liability relating to the restructuring process.

29. Exceptions to the rules on protection of new financing should be made where fraud is subsequently established in relation to the new financing.

IV. **SECOND CHANCE FOR ENTREPRENEURS**

Discharge periods

30. The negative effects of bankruptcy on entrepreneurs should be limited in order to give them a second chance. Entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy after no later than 3 years starting from:

    (a) in the case of a procedure ending with the liquidation of the debtor's assets, the date on which the court decided on the application to open bankruptcy proceedings;

    (b) in the case of a procedure which includes a repayment plan, the date on which implementation of the repayment plan started.

31. On expiry of the discharge period, entrepreneurs should be discharged of their debts without the need in principle to re-apply to a court.

32. A full discharge after a short period of time is not appropriate in all circumstances. Member States should therefore be able to maintain or introduce more stringent provisions which are necessary to:

    (a) discourage entrepreneurs who have acted dishonestly or in bad faith, either before or after the bankruptcy proceedings were opened;

    (b) discourage entrepreneurs who do not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors; or

    (c) safeguard the livelihood of the entrepreneur and his family by allowing the entrepreneur to keep certain assets.

33. Member States may exclude specific categories of debt, such as those rising out of tortious liability, from the rule of full discharge.

V. **SUPERVISION AND REPORTING**

34. The Member States are invited to implement the principles set out in this Recommendation by 14 March 2015.

35. The Member States are invited to collect reliable annual statistics on the number of preventive restructuring procedures opened, the length of procedures and information about the size of the debtors involved and the outcome of the procedures opened, and to communicate that information to the Commission on an annual basis and for the first time by 14 March 2015.

36. The Commission will assess the implementation of this Recommendation in the Member States by 14 September 2015. In this context, the Commission will evaluate its impact on rescuing companies in financial difficulties and giving honest entrepreneurs a second chance, its interplay with other insolvency procedures in other areas such as discharge periods for natural persons not exercising a trade, business, craft or professional activity, its impact on the functioning of the internal market and on small and medium enterprises and the competitiveness of the economy of the Union. The Commission will assess also whether additional measures to consolidate and strengthen the approach reflected in this Recommendation should be proposed.

Done at Brussels, 12 March 2014.

For the Commission

Viviane REDING

Vice-President

La borsa di dottorato cofinanziata con risorse dell'Unione Europea - *NextGeneration EU*
Piano Nazionale di Ripresa e Resilienza Missione 4, Componente 2 *"Dalla Ricerca all'Impresa"* - Investimento 3.3 *"Introduzione di dottorati innovativi che rispondono ai fabbisogni di innovazione delle imprese e promuovono l'assunzione dei ricercatori dalle imprese"* – CUP D83C22001240003