THE ADMINISTRATION OF BIG COMPANIES IN STATE OF INSOLVENCY: THE ITALIAN FRAMEWORK[1]

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ABSTRACT

Law and economics – as everybody knows - are social sciences, as they are intimately connected to the life of people's organizations and communities through perceptions, guidelines, management and government activities. This article seeks to describe and analyse the legal framework within which insolvency proceedings are conducted in Italy. Starting from the main legal and business theories in the field of bankruptcy, the authors try to explain a set of principles on which the guidelines of insolvency proceedings should be based so as to achieve all its targets. The article concludes that in the light of the identified principles, the existing guidelines of Administration meet the community's requirements, in terms of efficiency and effectiveness of the procedure, rather successfully.

I. INTRODUCTION

[1] Even thought the paper is a result of all Authors, the introduction, Section II and conclusion are the result of Raffaele Trequattrini's efforts, the Section IV is the result of Simone Manfredi's efforts and the Section III is a result of Fabio Nappo's efforts.

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Introducing the pages whose subject is the administration of companies during insolvency proceedings, it is right to mention the aims and objectives that insolvency proceedings must achieve. Without an initial reference we can only describe the regulations in an "unsystematic" framework, focusing on the individual provisions without a general shared arrangement. In the case of the Administration, it doesn't seem possible to identify a single objective or a single aim. On the contrary, many purposes can be identified which are not always reconcilable. It follows that the identification of these purposes can be a useful tool to interpret the most important aspects of a procedure that is characterized by a high st5555andard of complexity.

In this paper, we opt for an approach through which the above-mentioned contrasts will be enunciated, starting from the main legal and business theories in the field of bankruptcy. We will try to explain a set of principles on which the guidelines of the insolvency proceedings should be based so as to be able to achieve all its targets. Finally, we will investigate whether, in the light of these principles, the existing guidelines of Administration will be able to meet the community's requirements in terms of efficiency and effectiveness of the procedure.

II. THE ROLE OF INSOLVENCY PROCEEDINGS IN MODERN ECONOMIC SYSTEMS: TOWARDS THE IDENTIFICATION OF A NEW INTERPRETIVE PARADIGM

In light of the role of insolvency proceedings within modern economic systems, the guidelines seem to be lacking, considering that different theoretical paradigms often lead to points of view that are unlikely to be coincident and only in rare cases are they in harmony.

According to the utilitarian thought,[5] insolvency proceedings ought to be aimed at maximizing the interest of creditors through the rapid realization of the company, while respecting other people's legitimate interests, such as managers, suppliers and communities. According to the Rawlsian[6] theory of justice, insolvency proceedings should create a system designed to reflect the agreements that creditors would have reached if they had been able to negotiate such arrangements before the financial difficulty, that is, under the veil of ignorance. However, the present approach, in general, seems to be unable to assign to insolvency proceedings non-economic meanings, such as moral, political, social and individual.

The idea that a company in bankruptcy is a mere collection of activities, and not a complex system with remaining unexpressed potential, has been severely criticized. Often, it happens that companies in crisis return to being of some worth through a change of strategies and men, revealing that creditors' interests may be better protected through the use of future incomes rather than through the sale of the activities existing during the financial difficulty.

From a theoretical point of view it has been observed[7] that the model in question assumes the equality of creditors while it is well known that, for some of them, the veil of ignorance is transparent since the contractual terms specify with precision the terms of the agreement in case of debtor's financial problems. Moreover, it can't be denied that there are creditors who do not have exclusive economic interests: for example, employees make petitions going beyond the mere restitution of wages that can't be cashed because they are forced to bear the costs of finding a new job.

[5] T.H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986).
[6] J. RAWLS, A THEORY OF JUSTICE (1971).
[7] D.G. CARLSON, *Philosophy in bankruptcy (book overview)*, 85 MICHIGAN LAW REVIEW 1341 (1987).

Another weak point of the theory of maximization of the utility of debtors is its poor consideration of business relationships that are not formalized in a contractual instrument.[8] The same can hardly be ignored as it leads to the losses that fiscal authorities are supposed to bear through the exit of a taxpayer, as well as the deterioration of an economic ecosystem resulting from the failure of one of its components.

Following a contract-oriented approach in a broad sense, a part of the Guidelines have proposed to go beyond the limits of the above-mentioned theory, affirming that the rules on insolvency proceedings should not only protect the interests of the creditors but also those of all the people whose behaviours can be influenced by the decline of the company.

In the ideal sense, the lawmaker – acting under the veil of ignorance - should opt for two fundamental regulating principles in order to manage the insolvency proceedings: the principle of inclusion, according to which the rule should consider all the people involved into financial difficulties; and the principle of rational planning in order to identify the people whose rights should be strengthened by the law and at the same time fixing the conditions through which they can lever on these rights. The overall result should lead to the maximization of all the *stakeholders'* targets involved, allowing all the people that are in a weaker contractual position not to be forced to see their legitimate hopes frustrated.

This ideal has been criticised through the following argumentation. It has been pointed out[9] that the target of each person essentially depends on the function of individual utility related to them so that it is possible, for example, to suppose that people with different approaches to the risk can opt for different legal principles. Moreover, an insolvency proceeding that aims at considering the interests of many people may generate a huge uncertainty with

[8] E. WARREN, *Bankruptcy Policymaking in an Imperfect World*, 92 MICHIGAN LAW REVIEW 353 (1993).
[9] J. M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 93-4 (1982).

catastrophic effects on the cost of credit. Hence, in practice, there is a possible trade off between the principle of effectiveness, according to which each person has the right to reach his own targets through the procedure, and the principle of efficiency, according to which the rule has a limited enforceability if the users don't have the resources to benefit from them.

In contrast to these theories that solicit the centrality of individual interests, the formulation of the so called "community"[10] criticizes the basis of the traditional economic model, according to which the decisions are taken by the *homo oecomunicus*[11] who is - by definition - omniscient and perfectly rational. This theory focuses on redistributive processes, with the result that a high priority in the allocation of the value of an insolvent company can be imputable to the petitions of the community as a whole. In addition, the need to protect the interest of the whole community may lead the lawmaker to force the company and the creditors to bear the costs of the failure rather than forcing taxpayers or third parties so that, in some circumstances, the survival of the whole company can be preferred to its liquidation. The main limitations[12] of approach concern, on the one hand, the probable indeterminacy of interests to protect; and on the other hand the inadequacy of a court to function as a guide in the procedures with a clear political value. In the first case, it should be noted that the problem is not the eventuality that the interests of the community are not identifiable *a priori* but rather that in each insolvency proceeding many interests are likely to be involved, which are not necessarily a predictable selection, and may cause unmanageable contentions. Other criticisms include the possibility that courts may not be in the best position to judge

[10] K. GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1997).

[11] In regard to the assumptions of traditional economic models, see among others the works of R. AXELROD, GIOCHI DI RECIPROCITÀ, MILANO FELTRINELLI, (1985); A.M. COLMAN, GAME THEORY AND ITS APPLICATIONS (1999); J. VON NEUMANN, O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1947); R. SCHLAIFER, H. RAIFFER, APPLIED STATISTICAL DECISION THEORY (1967); L. Savage, *The Theory of Statistical Decision*, 46 JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION (1951).

[12] B.S. SCHERMER, *Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy*, 72 WASHINGTON UNIVERSITY LAW REVIEW (1994).

the means through which the interest of the community can be protected and to ask judges to express such an opinion means to involve them in political evaluations that are unconnected with their function within the legal system.

An entirely alternative approach which expresses a trend developed in the professional sphere,[13] is to view the analysis of insolvency proceedings not in relation to their purposes but as an open space for discussion, where all the interests involved in the financial problems of a company should be able to express their own voice. From this point of view, an insolvent company is understood as a crossroad of interests where all the people involved in the crisis are holders and the law creates the conditions for an uninterrupted discussion where each sharer cooperates in order to determine the target of the company. This debate should involve not only the stakeholders but also anyone who is able to contribute with his own experience and competence during the execution of the procedure, with particular reference to the role of the bookkeepers and lawyers.

This approach has the merit of highlighting the role of the professional men and women involved in insolvency proceedings but offers few considerations for solving the problems related to the correct balance between the need to assure on the one hand the fair representation of the *stakeholders* involved in financial problems and on the other hand the efficiency of the decision making process.

About the philosophical basis of insolvency proceedings, Shuchman[14] affirms that the lawmaker should consider the ethical implications of the company's failure among which the reasons of the debtor and of the creditor deserve attention. He thinks that insolvency proceedings should pivot the basic principle of comparison between the benefits of people

[13] A. FLESSNER, *Philosophies of Business Bankruptcy Law: An International Overview*, J.S. ZIEGEL (a cura di), CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPETITIVE CORPORATE INSOLVENCY LAW (1994).
[14] P. SHUCHMAN, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA LAW REVIEW 403 (1973).

involved so that the solutions will be determined adding the profits which result from individual preferences.

If it is fair to suppose that the rules on insolvency proceedings must be based on moral principles that can be shared, the situation wherein a group of people can reach an agreement on these principles is unlikely to be achieved. What will follow is a state of uncertainty wherein the negative effects on availability and on the cost of credit will be quickly evident.

According to a divergent approach insolvency proceedings are in service of a set of values that can't be organized according to clear priorities. This understanding is in contrast with the approaches that prefer a single objective such as the logic of the maximization of value for the creditors. The multi-value approach - promulgated by some scholars[15] - seeks to achieve many targets, in particular, the distribution of consequences of the company's failure among several people, the identification of priorities among creditors, the protection of the interests of future claimants, the grant to continue the activity through a company shake-up and the consideration of those people who are not creditors but have an interest in continuing the activity (e.g. employees, customers, suppliers, fiscal authorities, etc), the protection of investors' interests and of the community as a whole.

This approach has the merit of merging some instances both of the community approach and of the approach that considers insolvency proceedings as an open space for discussing: on the one hand it clears the way for the protection of non-creditors' interests; and on the other hand it assigns to the guidelines the function of creating premises to enable different people to express their own idea on how to carry out the different phases of the procedure.

[15] D.R. KOROBKIN, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUMBIA LAW REVIEW 717 (1991).

This approach has represented the theoretical paradigm of reference on which the Cork Committee,[16] established in England in 1982 to reform the bankruptcy law, has developed the targets that the rules on insolvency proceedings should achieve, among which we point out:

(i) the support to the credit system, including its uncertainties;

(ii) the analysis and the treatment of an imminent crisis of a company in its early stage rather than in an advanced one that can become irreversible;

(iii) the prevention of conflicts among creditors even belonging to different categories;

(iv) the achievement of the goods of the total assets of insolvent institutions in order to satisfy the creditors on time and at a fair price;

(v) the distribution of what has been achieved through the sale among the creditors in a fair and rightful way, giving back any *surplus* to the insolvent debtor;

(vi) the assurance that the processes of realization and of profit sharing are managed in a fair and rightful way;

(vii) the determination of the causes of the insolvency and assuming that managers' behaviour deserves to be ratified, the identification of the measures to be taken;

(viii) the recognition and the protection of the interests of insolvent organizations, those of their creditors and of the community, in particular the interests of the people who suffer the consequences of insolvency, including directors, shareholders, employees, suppliers and all those people whose lives depends on the destiny of the company.

(ix) the retention of companies that are able to contribute usefully to the national economic life;

[16] CORK COMMITTEE, REPORT OF THE REVIEW COMMITTEE ON INSOLVENCY LAW AND PRACTICE (1982).

(x) the identification of a simple normative, understandable, consistent and flexible enough model, on the one hand, to face the changes; on the other hand to be applied efficiently and effectively;

(xi) the assurance of the recognition and of the enforcement of the regulation even from other countries.

The broad lines of the Cork Committee highlights that insolvency proceedings concern both the protection of interests of creditors as well as several other people interested in the destiny of the company. In this context, causal connections and balancing between the creditors' protection and liquidation and between other stakeholders' protection can't be taken for granted: it seems to be possible to prefigure a higher economic interest that aims at preserving the organizations that are able to contribute usefully to the national economic life.

Apart from the contentious and varied approached highlighted above, the one conceptual paradigm that can be considered as a theoretical assumption even by the Administration is that a procedure must use a model that is simple, normative, understandable, consistent and flexible. The model should, additionally, consider the preservation of the value of companies as being able to contribute usefully to the national economic life and as the main instrument for protecting a wide variety of *stakeholders* in an ethical, economic and political sense. It is within this basic understanding that we seek to understand and analyse the insolvency proceedings.

III. The Discipline of the Industrial Reorganization of Insolvent Large Companies: Historical Itinerary and Productive Profiles

The historical itinerary of the Administration begins at the end of the 1970s and coincides with the first big financial problems relating to company activity of national importance.

The idea that State intervention may represent a useful decisive tool for dealing with financial crisis led the Italian Government to issue the "decree Donat Cattin" n. 602/1978 which was never converted into a law and thereafter the "Legge Prodi" (Prodi Law) by decree on January 30th, 1979 n. 26 which was converted into a law on April 3rd, 1979 n. 95.

This law, which identified "urgent measures for the administration of the companies in crisis", declared an organic insolvency proceeding for the insolvent group supporting the principle that an organization with financial problems and in need of reorganization had priority in comparison with the *par condicio* of creditors.

The procedure allowed companies with at least three hundred employees, and indebtedness, to access, in absolute terms of 20 thousand millions, including an easy-terms loan and, in relative terms, five times higher than the existing and paid-up capital according to the last approved budget. It was an alternative to bankruptcy and included an administrative process where the management was given to one or more commissioners appointed by the Ministry of Industry.

Since its introduction, this procedure was subject to much criticism. On the one hand, attention was drawn to the excessive arbitrariness of access to the procedure which did not properly consider the perspectives of reorganization of an industry. On the other hand offence was taken to the profiles of *governance* of the procedure wherein the role of public authority seemed to prevail. Further, it cannot be ignored that during the period of validity of the rule when more than two hundred companies were admitted to the procedure, including even a group with serious financial problems, serious prejudice was caused to the

creditors, both because the distribution of assets took a long time and because there was several deductible debts connected to the expense of the procedure.

Despite the criticism of the guidelines and their limitations, the law remained in force until the community Authority recognized serious encroachment of Article 92 of the European Community Treaty relating to the prohibition to apply for state aid which damage rival firms rules.

The infringement procedure that was adopted afterwards, with the risk of incurring sanctions, lead the Italian Government to bring a bill before Chambers aimed at repealing law n. 95/79 which was followed by the legislative decree on July 8th, 1999 n.270 concerning the administration of big companies in state of insolvency (the so-called "Legge Prodi *bis*").

Among the most significant innovations included in the law[17] the division of the procedure in two stages deserves special attention: in the first stage, culminating in the decision declaring the state of insolvency, the court assesses the existence of objective and subjective need for admission; in the second stage, the court itself, on the basis of the statements of a commissioner appointed by the Minister of Industry, creditors, entrepreneurs and any other

[17] Among others, we highlight the importance of the document Aristeia n. 53 by Consiglio Nazionale dei Dottori Commercialisti dal titolo *La legge Marzano: disciplina della ristrutturazione industriale delle imprese insolventi di rilevanti dimensioni*, pp. 5-6, includes:

- the extension of the effects of the sentence of insolvency and of administration to the shareholders with unlimited liability;
- the selectivity for the access to the procedure, restricted to the company that can be reorganized;
- the strict definition of the criteria and of the content of balancing programmes and the considerable reduction of its time scale;
- the extension of liability for abuse of unitary direction and of aggravated recovery action to the big company became insolvent;
- the inadmissibility of the recovery action during the company shake-up, the regulation of existing contracts;
- a greater protection for previous creditors achieved both by reducing the period of implementation of the balancing programme and by granting the court the power for having the procedure at its disposal and for converting it into bankruptcy and the power to decide of the impugnation of the acts of liquidation.

interested party, checks the requirements for the reorganization of the industry, to decree the access to the procedure or the failure of the company with finances in serious difficulty.

Important elements have affected the subjective requirements for access to the procedure. These are jointly represented by a number of about two hundred employees and debts for a total amount not lower than two thirds of statement of assets both of sale proceeds and of efficiency of the last budgetary year. Both conditions have caused many disagreements and doubts. With regard to the dimensional parameter it has been shown that the lowering of the employment level is in conflict with the limit of five hundred employees provided for by the law enacted under delegate power but it affirms the Community Regulation that qualifies the company on an average of two hundred employees. In this way the real prospect of recovering the economic balance is to be seen as the only presupposition on which the access criteria to the procedure is based. This method is invalidated by the intention to allow access to the procedure to medium companies improperly defined as big companies.

Further, criticism has been levied against the new patrimonial parameter which is considered to be the cause of interpretative doubts connected with whom can be accused of weakening the company and also the evidentiary tools to be used in order to demonstrate the level of the debts.

However, despite the above-mentioned problems, the crisis management of the industrial structure characterized by precise dimensional and patrimonial relevance continued to serve as an appropriate means of resolution in the procedure of Administration regulated by legislative decree n°270/1999, until the financial difficulty suffered by the Parmalat group represented the necessary condition for issuing the so called "*Marzano decree*" intended to introduce a procedure that can more effectively manage the new situation of economic imbalance that had taken place.

The intense financial crisis suffered by the agro-industrial Parmalat group, one of the most important Italian companies at an international level, in late 2003, represents the basis for the issuance of law by decree n°347 on December 23rd, 2003 then converted and modified with law n°39 on February 18th, 2004 (Legge Marzano).[18] The legislative decree introduced "urgent measures for a company shake-up with financial problems" despite the fact that Parmalat group itself had all the necessary elements provided for by the Prodi Law *bis* for admission to the administration procedure. The reasons for the introduction of the new proceedings can be identified as: the need to assure the effective reorganization of a huge insolvent company and of the group it belongs to; the preservation of the start-up; and maintaining the market positioning of the company in light of creditors interests in order to assure the reorganization of liabilities and the possible divestment of the activities that are not strategic or consistent with the purpose of the main activity of the company. These targets were unlikely to be achieved through the administration procedure provided for by legislative decree n° 270/99 because of the different lacunae that are typical of it,[19] except in terms of medium companies that continue to subject to this regulation.

Despite their laudable purposes, the new regulations have had their share of criticism. The prevailing guidelines consider that the procedure has no reason to exist and they point out how the destiny of a company depends on the discretion of political authorities rather than

[18] The law in hand, only 45 days from its issue, has been corrected and amended by law by decree n°119 on May 3rd, 2004, then converted into a law on July 5th, 2004, n° 166. The final changes to the regulation for a company shake-up with financial problems, have been introduced by law by decree n°281 on November 29th, 2004, then converted into law in force n°6 on January 5th, 2005. (Documento Aristeia n. 53 a cura del Consiglio Nazionale dei Dottori Commercialisti dal titolo *La legge Marzano: disciplina della ristrutturazione industriale delle imprese insolventi di rilevanti dimensioni*, cit., p. 7).

[19] On this matter the connection to legislative decree n° 347 on December 23rd, 2003, "Urgent measures for big companies shake-up in state of insolvency", includes among the criticism attributable to the Prodi Law *bis*:

- the excessive complexity of the opening stages of the procedure;
- the typical liquidator aspect of the procedure;
- the unreliability on the start of the administration procedure due to the preliminary observation from a judicial authority.

the impartiality of a judge, pointing out that the guidelines require – on the one hand - a reduction of judicial power and - on the other hand - the extension of the power of the Ministry of Industry, which is given the option to have the procedure without checking in advance the real possibilities to put a company on its feet again.

Another concern is that the issuing of the Legge Marzano could be a harbinger of incompatibility with the so-called "No State Aid" provision instituted at a Community level. Law n° 39/2004 states that the new administration procedure can access the companies liable to bankruptcy except those that may be subjugated to an administrative compulsory winding up. With the intent to level the administration procedure to the procedures regulated by bankruptcy law such as arrangements with creditors, adjustment of creditors' claims and receivership, an important innovation was to give, unlike Prodi and Prodi bis,[20] an option to make a petition that allows the entrepreneur to be admitted to the procedure.

As provided in the previous regulations, the existing version of the Marzano Law requires, to be able to access to the procedure, the existence of two parameters: the first is dimensional while the second is patrimonial, even if important innovative changes are likely to happen. The dimensional requirement, represented by a number of about 500 employees, which includes subordinate employees and those who receive redundancy payments, has caused obvious scepticism in the guidelines. The risk associated with that order is based on many applications being admitted to the procedure, also promoted by entrepreneurial contexts that are not very important from a socio-economic point of view. In the matter of the dimensional parameter the debt exposure has been reduced to three hundred million Euros. This event has been contested. It is supposed that such a quantitative threshold can provide opportunistic increases to the liabilities, highlighting a non-existent economic substance of

[20] The laws in hands conferred the legitimation to make a petition to declare the state of insolvency to the entrepreneur, to one or more creditors, to the Public Prosecutor, to the court itself or the declaration of the state of insolvency.

obligations arising from guarantees given, to which the law confers importance for the nominal achievement of the acquisition of the debt limit required.

Among the conditions for being admitted to the procedure there is no mention of the economic reorganization of the company, an element required by former article n°27 of the Prodi law *bis.* Reading section 2 of the Marzano Law we understand that the entrepreneur in crisis can ask the Ministry of Productive Activities, with a reasoned request and an appropriate documentation, to be admitted to administration procedure, as long as there are requirements of which we spoke in the previous paragraph and it's necessary to appeal for declaring the state of insolvency. Moreover the entrepreneur must submit a recovery plan aimed at restoring the financial-economic situation of the company in crisis.

After determining whether the conditions required have been fulfilled, the Ministry of Productive Activities provides for – through his own decree - the immediate admission of the company to the administration procedure and to the election of a temporary commissioner. This decree, that causes many consequences,[21] must be reported immediately to the competent court that declares the state of insolvency.

In compliance with the Prodi law *bis*, the Marzano law provides for the opening of the procedure and the declaration of the state of insolvency, though reversing the chronological order of the implementation.

[21] The measures taken by the administrative authority involve:

- the debtor is deprived of the company and goods management (*rectious*, of the group) that are assigned to the special commissioner;
- the prohibition to commence or continue enforceable actions even if they are special;
- the ineffectiveness of the acts and of the payments made after the beginning of the procedure;
- the execution of the formality that are necessary to make the acts exceptionable to third parties;
- the exclusion of some debtor's goods from the procedure;
- to provide alimony for the debtor and his family;
- the presence, in the court, of a temporary commissioner in disputes, even existing, concerning the relationship of the patrimonial right of the company.

The innovation brought by the law in force, in relation to the power given to the Ministry of Productive Activities and not to the court to take a decision about the resolution of the financial problems of a company, has led to the abolition of the Judicial Commissioner[22] and the exclusive election of the ministerial commissioner who has, for the duration of the procedure, the same powers that the judicial commissioner had according to law 270/99.

It is evident that these changes are aimed at favouring the activity of the public administration, reducing, at the same time, the powers of judicial authority and putting the legal-administrative balance in the right perspective. This balance characterizes the administration procedure regulated by the Prodi law *bis,* even if it caused many doubts.

With regard to the role of the judicial authority, the issuance of the Marzano law has limited the same since the judicial authority is only required to declare insolvency[23] within 15 days after the notification of the decree by the Ministry of Productive Activities. After the declaration of the state of insolvency the court has the power to order the conversion[24] of the administration into bankruptcy, at the temporary commissioner's request, if the Minister doesn't approve the reorganization plan and it's not possible to use a conveyancing plan of the company unit, according to Section 27, second paragraph, letter *a* of the legislative decree n°270/99. Finally, the court has the power to pronounce a decision with regard to the

[22] The designation of this figure, in the Prodi law *bis*, was attributed to the court with the declaration of the state of insolvency and its replacement, as provided for the possible opening of the procedure, it was up to the temporary commissioner.

[23] With a sentence that declares the state of insolvency, the court appoints the judge supervising the procedure, assigns to creditors and third parties that claims estate rights on the entrepreneur's goods, a term that is not lower to 90 days and not superior to 120 days from the date of billposting of the sentence, for submitting the applications to the Court, it determines the place, the day and the time of when, within 30 days from the date shown, liabilities will be under consideration by the official receiver. (Documento Aristeia n. 53 a cura del Consiglio Nazionale dei Dottori Commercialisti dal titolo *La legge Marzano: disciplina della ristrutturazione industriale delle imprese insolventi di rilevanti dimensioni*, cit., p. 11).

[24] Considering that the deadline for the drafting of the reorganization programme is 6 months, liable to extension for three months, this circumstance may occur even after the opening of the procedure.

complaint against the official receiver supervising the approval of the composition through the controversial phases for assessing liabilities and for the identification of revocatory actions.

Within 180 days, that can be extended for another 120 days from the judgment of the decree, the temporary commissioner must submit the economic and financial reorganization plan of the company in crisis to Ministry of Productive Activities. The recovery in the economy is to be seen as the only assumption[25] on which the preparation of the plan can be focused with the result that any solution involving the sale of companies could be implemented only with the opening of the administration provided for small and medium companies according to Legislative Decree n° 270/99, with the exception of the possibility that the shake-out will not be approved, in case the special commissioner could submit the conveyancing plan within sixty days from the date of disapproval. From this provision it is evident that the lawmaker's intentions were to put at the forefront the protection and the integrity of the company that doesn't have an economic balance because of its conveyance.

After checking the correspondence of the programme with the reorganization of the industry and its real implementation, the Ministry of Productive Activities authorizes, by order, its execution. Because of its administrative nature, that decree, like the opening one, may be impugned before the Regional Administrative Court.

The existing law provides for the cases where the court, at the temporary commissioner's request, orders the turning of the administration into bankruptcy, by impugned decree, before the Court of Appeal. This event happens when the Ministry of Productive Activities doesn't authorize the implementation of the plan and when it is impossible to transfer the

[25] On the contrary, according to legislative decree n° 270/1999, paragraph 27 the possibility to recover the company unit are identified referring to two different paths, represented respectively by the transfer programme of the company unit and by the economic and financial reorganization of the company.

company unit, or when there is no execution, on the agreed expiry date, of the obligations assumed under the programs, even if it is approved.

Reading paragraph 6, according to law 39/2004, it is clear that revocatory actions under paragraphs 49 and 91 of legislative decree 270/99 may be proposed by the temporary commissioner, even after the authorization to implement the company shake-up plan,[26] as long as they are useful, in creditors interest, to achieve the goals of the plan itself.

The existing law also provides for the transfer of the actions exercised by the commissioner until the sentence of the deed of arrangement isn't approved. The terms of these measures run from the judgment of the decree according to which the company can be admitted to the procedure and this provision includes the conversion of the administration into bankruptcy.
The decision to allow revocatory actions to be tried even if the recovery plan is approved has raised significant objections to the guidelines. These objections have stressed on the benefits that the entrepreneur could obtain because of the ineffectiveness of his actions to creditors' cost. It is therefore considered that the existing law involves an infringement of the principle according to which the effects of revocatory action can't generate any benefits for the entrepreneur.

It has been noted that the disposition in question involves the principle of equity infringement confirmed by the paragraph of the Constitution, which considers a difference in treatment of creditors and third parties. The same is penalized by the Marzano law because of the negative effects caused after the experiment of revocatory actions and is facilitated by Prodi law *bis*.

[26] The execution of revocatory actions, in case the reorganization plan is approved, and vice versa, was explicitly prohibited by legislative decree n° 270/99, except for the possibility where the execution of the transfer programme of the company unit was authorized. The law that regulates revocatory actions was applied as provided for the bankruptcy law to the conversion of the procedure into bankruptcy.

It must be noted that, by virtue of the privileged treatment reserved to big companies in crisis, some incompatibility of the Marzano law with Community control may occur as far as is provisions relating to competition are concerned, in particular the above-mentioned "No State Aid" provision.

Law n° 39/2004, converting legislative decree n° 347/2003, has introduced paragraph 4-*ter* where it has been provided that liabilities assessment must be based on rapid criteria and it must occur in accordance with the provisions of paragraph 53 of legislative decree n° 270/99.[27] This procedure assumes, within the Marzano law, a jurisdictional[28] function developing before the official receiver who is helped by the temporary curator.

If the presentation of a proposal of a deed of arrangement has been authorized, the provisions of paragraph 4 *bis* are enforced. Even the agreement is not approved (section 4-*ter*, paragraph 2, Marzano law), where it is provided that with the proposal of a deed of arrangement it is necessary to issue the decree by which the official receiver specifies the period within which the creditors and any other interested party can submit any comment concerning the credit list and pre-emption clause prepared by the temporary commissioner. Any further application from creditors may be submitted if they are not appearing in that list.

When the list of all the claims[29] has been accepted even conditionally, and those excluded, are registered at the office of the court's clerk, the official receiver declares its enforceability.

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[27] The latter rule demands to the procedure assessment provided for paragraph 93 that concern the bankruptcy law.

[28] The first version of legislative decree n° 347/2003 provided for an assessment procedure partly judicial and partly administrative. The range of issues of legitimacy, resulting in the unusual feature characterizing the formation of liabilities, has required a redefinition of the procedural model.

[29] The creditors that have been accepted conditionally and those excluded can oppose according to paragraphs 98 that follow the bankruptcy law and those accepted can impugn the admission of other creditors according to paragraph 100.

Because of the different adjournments to the provisions contained in paragraphs 93 that follow the bankruptcy law provided for paragraph 53 of legislative decree n° 270/99, it is possible to submit applications for tardy measures (insinuazione tardiva di credito).

With regard to the liquidation of assets, Section 5, paragraph 1 of law n. 39/04 provides that after the declaration of the state of insolvency, the Minister of Productive Activities may authorize the transfer of the company unit required by the temporary commissioner if it is aimed at reorganizing the company or the group.

However, as it is stated in paragraph 8, the liquidation of the assets during the procedure may take place only if the Minister of Productive Activities doesn't authorize the reorganization plan and if it's still possible to implement the plan for supplying goods.

Within the administration procedure, as well as in the insolvency proceedings,[30] the deed of arrangement is intended as an extrajudicial solution for the company in crisis. It consists of an agreement between the debtor and the creditors in order to protect the company unit, It is, according to the Prodi law *bis*, a way to terminate the procedure but it is also provided by the Marzano law, within which the existing realization is enriched by innovative contents upon receiving orders proposed by the reform project of the bankruptcy law and of guidelines. The first innovation concerns the person who is entitled to bring the deed of arrangement proposal. Within the administration of big companies in crisis, this authority is vested in the temporary commissioner, unlike in the legislative decree n° 270/99 that gives the authorization to the insolvent entrepreneur or to third parties. The reason for this order

[30] Insolvency proceedings provide that, even if with different functions, contractual means of the deed of arrangement. In particular, the institution in question has to prevent or stop the bankruptcy of the entrepreneur in state of insolvency, while in the subsidiary liquidation procedure and in the compulsory winding up procedure it has the function to stop or convert the procedures.

is to anticipate, as far as possible, a proposal agreement for the settlement of insolvency, paying off a creditor as soon as possible.

However, one criticism is that the authority to propose a deed of arrangement could cause discrepancies as soon as the temporary commissioner will have to represent conflicting positions of the entrepreneur, creditors and third parties. An important aspect herein is the possibility that the deed of arrangement proposal, which may appear in the reorganization plan, may contain the subdivision of creditors in classes.[31] This division must be approved by the Minister of Productive Activities. This provision has led to several criticisms on the lack of a realistic and exhaustive explanation about how the different classes of creditors should be formed, though this is implied by law.

Another innovative aspect is the possibility of transferring to a contractor both the activities of the companies that are interested and the revocatory actions promoted by the temporary commissioner. The contractor can hold a position by the creditors or by the companies that they own or by the companies formed by the temporary commissioner, "whose actions are intended to be allocated to creditors because of the agreement".

The scheme of arrangement must be registered at the office of the Court's clerk and must be duly publicized. Any documents and memoirs containing comments on the list of creditors

[31] The subdivision must be made in accordance with the legal position and homogenous economic interests, with the possibility of establishing independent classes for small creditors and bonds holders issued or guaranteed by the company under an administration. In addition to the division into classes, the deed of arrangement may provide for:

- a different treatment for creditors belonging to each class;
- the rescheduling of debts and credits through the use of any technical or legal procedure and also by contract, merging or any other corporate transaction;
- assignment to creditors or to some categories they belong to and to their companies where they have shares or
  bonds that can be converted or other financial instruments including state securities of the company subjected to the procedure. This provision increases the value of the conversion of the *debt capital into risk capital* that is recurring in a company shake-up.

may be made by an insolvent debtor or by any interested party and, if some creditors are not in the list, it is possible to make a petition for the admission of their credits. The period within which it is possible to make a petition is determined by the official receiver.

Within 60 days, beginning from the deadline, the official receiver, who is helped by the temporary commissioner, makes the necessary changes and supplements, indicating the possible pre-emption right given to creditors. The redefined lists are re-registered at the office of the court's clerk and the official receiver declares its enforceability. The temporary commissioner will publicize and inform the interested people, through a registered letter with return receipt, about the registering of the creditors list and the measure by which the official receiver will decide the procedures and the period within which the creditors, and those admitted conditionally, must vote regarding the scheme of arrangement.

Within 15 days, beginning from the notification of the registration, creditors or third parties can propose an opposition or an impugnation. The deed of arrangement is approved if it has had a favourable vote of creditors representing the majority allowed to vote in every single class (paragraph 4-*bis*, Section 8). If within the period fixed by the official receiver, the creditors don't send their votes, they will be considered to be in favour of the passage of the deed of arrangement. This includes creditors and those people who have financial instruments which have not enabled the identification of the registration of people's names that are entitled to vote and that are in the creditors list with the mere indication of the total amount of the category pertinent to the financial instrument.

In the event that the deed of arrangement has been approved by a majority of the classes of the creditors but there has been a disagreement from one or more classes, it can be approved by the court, provided that the dissentient creditors will be satisfied in a measure that is not inferior to the measure resulting from other solutions that can be put into practice.

An approval or denial of the deed of arrangement delivered by judgement, which is provisionally enforceable, may be issued by the Court in chambers. However, the final decision must be publicized reproducing an extract in national newspaper and, where necessary, in an international one, or through another form deemed appropriate in accordance with the procedures and the deadline passed by the sentence.

The effects of the decision of approval are produced towards all creditors whose shares are prior to the opening of the procedure and, in the deed of arrangement, involve the transfer of all the assets of the contractor's company.

This verdict may be contested by the insolvent debtor, creditors and the temporary commissioner through the Court of Appeal within 15 days beginning from its adoption, and this appeal won't suspend its temporary enforceability.

A verdict in favour of the passage of the law includes the end of the administration procedure. In case of disapproval of the deed of arrangement, the temporary commissioner may submit a programme to the Minister of Productive Activities for transferring the company unit within 60 days after the verdict. If this programme is authorized, the deadline, which was one year, will be prolonged for another one year in order to continue the activities of the company.
If a timely presentation doesn't occur or the programme isn't approved, the court, with the help of the temporary commissioner, orders the conversion of the administration procedure into bankruptcy.

The complex process for completing the guidelines marks another turning point with the introduction of legislative decree n°134 on August 28th, (the so-called "Alitalia decree") that

was converted through the amendment of law n°166, issued on October 27th, 2008. The guidelines, introduced again when a company is in crisis, are aimed at big companies operating in public service and are aimed at keeping intact the value of the company through the transfer of the line of industrial activity, without necessarily including a recovery plan. In such cases the transfer of people that change their working conditions and start working for the transferee can also be made by previous placement in a redundancy fund and extraordinary earnings or termination of the employment and the transferee starts engaging employees.

The concept of group companies is also expanded, including the firms that maintain, in an exclusive way, contractual relationships with the company subjected to the procedure for supplying the necessary services to perform the task.

With reference to the early stages of the procedure, the new rule provides that for the admission, the appointment of the temporary commissioner and the wage determination are set out by the Prime Minister of the Cabinet and by the Minister of Economic Development.

Once the procedure has begun, the commissioner, respecting the principles of transparency and non-discrimination, could identify the potential buyers, by a private contract, from among the parties that ensure continuity of the service in the medium period, in compliance with requirements provided for by the national legislation and by the treaties signed in Italy. The sale price won't be inferior to the market one resulting from an examination made by a leading financial institution with the help of an independent expert appointed by decree of the Minister of Economic Development.

Finally, one of the most important aspects of the new legislation concerns the accountability system. Considering the public interest in the need of ensuring the continuity of public

service, managers and auditor's liability is excluded and in this way the creditors' protection is reduced. A similar provision is provided for the acts of the temporary commissioners against which the possibility of using a revocatory action is excluded.

IV. THE ADMINISTRATION GUIDELINES: CRITICAL REFLECTIONS

Analyzing the theoretical profiles of insolvency proceedings and checking the methods through which the general principles have been changed into the procedure that has led to the existing structure of the administration, it is considered appropriate to carry out an overall assessment of the guidelines, considering the institutional goals from which they arose. This assessment, which requires the identification of some benchmarks, becomes very important on the one hand to compare the Administration and other insolvency proceedings, and on the other hand to see if the Administration is a procedure necessary within the system.

According to the criteria through which it is possible to carry out the assessment, a thorough[32] list of Anglo-Saxon origin identifies at least four criteria comparable to other values that can be summarized as follows:

(i) efficiency, for which the procedure must achieve the purposes for which it has been created using the available resources in the best possible way;

(ii) competence, according to this criterion the process must be managed using tools that allow people, who have skills and power, to conclude it in a satisfactory way for all the *stakeholders* involved;

(iii) responsibility, which concerns the level control that the *stakeholders* involved in the procedure can have through the court, the bodies democratically elected or

[32] G.E. FRUG, *The ideology of bureaucracy in American Law*, 97 HARVARD LAW REVIEW (1984).

participating to the decision-making process or even through the representation institute;

(iv) honesty, which includes issues relating to justice and the attitude of the procedures to protect the interests of the parties involved, allowing them to enter or, in some way, to influence the decision-making process.

Clearly, these criteria/values don't result from a single theoretical view but they draw their strength from the characteristic of being widely shared and accepted in the legal and economic field.

(i) Efficiency

The criterion of efficiency is based on the assumption that the achievement of social purposes involves incurring in costs that generally fall on some of the people involved in the procedure.

In this context, we can note that the Administration was introduced in the Italian insolvency proceedings for identifying means for resolving the crises of companies of significant importance, that consider the creditors interests and more general interests, including the preservation of production and employment levels.

In a recent study[33] it has been found out that from 2000 to 2008, 57 groups, with a total of 183 companies, were admitted to the procedure, mostly joint-stock companies. The historical trend of the submission follows economic cyclical phases although there is an increase in the

[33] A. DANOVI, C. MONTANARO, *L'amministrazione straordinaria delle grandi imprese in stato d'insolvenza; primi spunti di verifica empirica*, 2 GIURISPRUDENZA COMMERCIALE 245 e ss (2010). For other empirical studies carried out on the administration**,** see among others the contributions of A. FLOREANI, *L'amministrazione straordinaria delle grandi imprese in crisi: un'analisi delle procedure dal 1979 al 1996*, L. Caprio, *Gli strumenti per la gestione delle crisi finanziarie in Italia*, 17 MILANO, QUADERNI DEL MEDIOCREDITO LOMBARDO 329 (1997); G. LEOGRANDE, *L'amministrazione straordinaria delle grandi imprese in stato d'insolvenza: primo bilancio a tre anni dall'entrata in vigore del d. lgs. 8 luglio 1999 n. 270*, III IL FALLIMENTO 331 (2003).

transition from the "Prodi Law" to the "Prodi Law *bis*" due to the lowering of the dimensional limit required for entering the procedure. The analysis of the dimensional characteristic of the companies administered through an external commissioner shows, in fact, an average dimension of the groups involved as considerably inferior to that found during the period of the previous law in force, showing a considerable extension of the operative area of the renewed institute.

Further, efficiency parameters can be identified in the ability of the procedure of satisfying the interests of key *stakeholders* involved, with particular reference to the protection of the employment levels and the duration of the procedure. Regarding the first aspect, it is noted that the transfer of the company unit is corresponding to the protection of jobs, if it is true that after the change of the economic entity, the employees transferred are approximately 52.01% of the total work force, while 24.5% of the remainder is still in charge and the 23.49% seem to have found an independent place during its execution.

The ability of the guidelines to pay off creditors can be roughly measured by analyzing the duration of the continuation and liquidation phases, where the temporary commissioner opts for the sale of the company unit and not for its reorganization (98% of cases). Looking over the sample of firms for which the programme is completed, it is clear that the average duration of the continuation phase is equal to 583 days, while, with regard to liquidation the analysis carried out exclusively on the 11 firms for which this phase is completed, shows an average duration of 3.36 years. That is a good result although it is influenced by the fact that in 8 out of 11 cases the procedure was closed by the arrangement.

The performances achieved in terms of spread and duration suggest that the administration has certainly satisfied the criterion of efficiency especially when compared to the results achieved by the other insolvency proceedings. The analysis of the reason behind these results

is particularly controversial. This is due to the well-known phenomenon of so-called "dejurisdictionalisation"[34] of the procedure, according to which the role of the Ministry of Economic Development is gradually replacing the place of the court with the aim of resolving the crisis of the company.

(ii) Competence

In order to assess the administration through the guide-criterion of competence, we should wonder about the attitude of this procedure to enable the formulation of conscious opinions on the future of the company, for its survival.

Generally speaking we can say that the passage of the directive function from the management of the company in bankruptcy to external professionals often involves costs related to the physiological slackening in economic activity that is partly due to the lack of information of the incoming people. About this aspect, we need to analyze the possibility that the government acquires the information necessary to make correct decisions as soon as possible. It should not be omitted that for the temporary commissioner is very important to get information and he has a limited period of time for submitting the recovery plan and to undertake the activities for the transfer of the company unit or of a part of it. Since the supervisors and the employees of the company in crisis are the richest reserve of information, it may be useful to analyze the factors that can influence the coordination between the commissioner and the people that are the keepers of such knowledge, including the different types of incentives that could create a cooperative atmosphere.

[34] M. FERRO, M. FABIANI, *Dai tribunali ai Ministeri: prove generali di degiurisdizionalizzazione della gestione della crisi d'impresa*, IL FALLIMENTO 132 (2004).

It may be noted that, if the commissioner doesn't pay attention to the old managers' and employees' requests as it is likely that they reduce or interrupt the flow of information necessary for a proper continuation of the procedure. For this reason, it is very important for the commissioner to have means that can harmonize the interests of the people involved in the procedure. It should be noted that it might be beyond the commissioner's skill to involve the people who are keepers of the information relating to certain aspects of the company management. His skill and means seem to be, at the moment, limited to and consist of the possibility of opting for the reorganization of the company.

It is important to consider the means of communication[35] too, whose value is as important as the needs of the people who know how to implement the decision-making process. Since the Administration is a very complex procedure involving many people in a process that aims at gathering information, in the absence of a coherent system of communication tools, it is likely that an error may occur during the identification and implementation of strategies. Practically, we can say that communication difficulties can affect not only the predisposition but also the ability of each person to cooperate.

While information plays a key role in the administration procedure, the legislation doesn't provide for an obligation to implement a business information system capable of powering the basic process of planning and control applied to the procedure.

It was observed that planning is "a creative intellectual process projected into the future that aims at fixing the business goals and the managerial ways through the identification and the

[35] *See* among others, A. FALINI, *Controllo e comunicazione nelle imprese in amministrazione straordinaria ex d. lgs. 270/99*, Relazione al Convegno Aidea sul tema *Corporate governance: governo, controllo e struttura finanziaria*, Napoli (2008).

research of alternatives and making choices".[36] In order to achieve this process, the temporary commissioner must fix the targets, policies, procedures and *budgets*.

The purposes can be defined as the goals towards which the procedure is inclined. They can be divided into general and special goals: the former concern the basic purposes that the procedure wants to pursue with regard to the most important *stakeholders,* that are creditors, employees and the reference economic ecosystem; the latter are the objectives of some bodies or business sectors that compete in a complementary way for the achievement of the overall purposes of the procedure.

Policies represent a principle or the system of principles that guide and bind the logical paths that the temporary commissioner must undertake in order to achieve the overall purposes of the procedure. They assume the awareness of the targets to be achieved, the research and development of alternatives and the choice of the alternative considered the most significant. In this sense, we note that the policies are more likely to be successful if, in the intellectual process that cause them, we consider the opinions and the interests of the people to which they are referred to.

Procedures consist of a system of regulations that fix the conditions according to which an action must be implemented. They reduce the burden and the cost of the management function performed by the temporary commissioner by eliminating regular and too frequent decisions and they allow to "routinize" some activities in the manner provided for by law.

After fixing the purposes, the policies and procedures, the temporary commissioner is able to draw up a budget or a document where, in terms of numbers, the results that are expected to be achieved from the work to be done are set. This is an essential tool, whose use on the one

[36] G. ZANDA, LA FUNZIONE DIREZIONALE DI CONTROLLO 100 (1968).

hand might improve the assessment of the temporary commissioner's action; on the other hand it could favour the relationships within *stakeholders,* making more transparent the decision-making process implemented by the academic bodies of the procedure.

It is clear that the executive branch of the State of the Administration must be able to use an information system that can help it in the decision-making process but it must have the knowledge and experiences necessary to be able to orientate itself in the law and business fields. In this sense, the possibility given by the lawmaker to opt for a body made up of several people with experience in different fields is consistent with the idea according to which the mere knowledge of the institutions of bankruptcy law is not sufficient to ensure the achievement of the main target consisting of the preservation of the values of the company.

(iii) Responsibility

The guide-criterion of responsibility is based on the assumption that it is very important to control the progresses of the procedure because, in this way, it may be possible to avoid opportunistic behaviour and achieve widespread success for the work performed by the academic bodies. This work is necessary for them to be able to work serenely and in order to achieve the purposes previously stated. This analysis of the law of the administration focuses on one of the central issues raised by many commentators of the law, represented by the ratio between the prerogatives of the Court and those of the Ministry.

We have already had the opportunity to observe that the evolutionary process of the guidelines seems to be characterized by a progressive drift from the prerogatives of the Court in favour of the prerogatives of the Ministry. However, it should not be ignored that the general legislation still gives the Court, during the preliminary phase of the procedure, the

task of declaring the state of insolvency by decree, which is a precondition to access the benefits of the administration.

In this context it seems worth noting that the problem doesn't concern the body that should be privileged by the law but rather it concerns the ability of each body to protect the interests of the different categories of *stakeholders*.

According to the authors, another dangerous process that should be avoided is the one that considers the Court capable of protecting the creditor's petitions and the Ministry capable of protecting the interests of those people that are involved in the management of the company in bankruptcy. The result of this is that the drift of powers could be seen as a kind of preference by the lawmaker for the petitions of a particular category of people at someone else's cost.

The best guarantee to protect the interests of different categories of stakeholders is represented by, on the one hand, an effective performance of the address function within the procedure; and on the other hand the implementation of concentrated supervision on the temporary commissioner's actions for which, it should be stressed, it is essential to use the programming and control tools above-mentioned.

The procedure for presenting a financial statement regarding the temporary commissioner's activity, currently consisting of preparing a final budget report and a management account with a report of the vigilance committee, are not sufficient to carry out an in-depth analysis on how to implement the decision-making process which should allow the monitoring activities to be carried out by the Ministry. Actually, the latter should be in a position to judge the work of the commissioner both in terms of compliance with the law and in terms of correctness of the choices made, evaluating each case, when he, considering different

possible alternatives, didn't take the relevant factors into account or he didn't avoid ignoring irrelevant factors, making irrational choices that no one, in his conditions, would have made.

This is an audit focused on the responsibilities carried out by the commissioner who has to be, at all times, capable of demonstrating that he acted diligently and in compliance with his duties and that the decision-making process has been completed, considering the *stakeholders'* interests and using the information available properly.

In connection with the commissioner's responsibility there is the principle of fairness which involves the issues concerning the capacity of the procedure of protecting the interests of the parties involved, allowing them to influence the decision-making process and, at the same time, not allowing some people or groups to manipulate it in order to achieve the exclusive purposes and not the general ones.

(iv) Honesty

It is worth stressing that the mechanisms for participating in the decision-making process in insolvency proceedings differ depending on whether we use a government system with a single or multiple authority or participatory character. The government system of the procedure with a single or multiple authority differs in terms of the number of people who take the decision but has a common feature according to which the stakeholders involved participate only indirectly in the decision-making process through the representation mechanism. In the system where the government is inclusive, the decision maker is generally unique but his discretion is strongly influenced by the law which requires solutions based on consultation among the different parties involved in the procedure management. This produces potential benefits in terms of transparency and fairness but it increase the likelihood of errors due to the need to come to an arrangement among the different

categories of people involved.[37] We should note that these subjects are not only keepers of the interests, whose harmonization is not always possible, but they are often influenced by mental structures that give different meanings to the survival of the company in bankruptcy with the result that the communication among them may be affected by delays and distortions. Another factor that can increase the probability of error in a procedure with a management that uses a system of participatory governance is the possible pressure exerted by the most influent creditors, which are generally the banks.

In this sense, the choice of the Italian legislator to opt for a system of multiple government authorities, where the executive branch of the State is appointed by a public authority, has certain benefits. On the one hand it allows an increase the effectiveness of the decision-making process, not concentrating all the power in a single body; on the other hand it protects the commissioner from undue pressure from the more powerful groups of *stakeholders*.

In conclusion we can say that the Administration, even with the above-mentioned limitations, is essentially a successful attempt to introduce in the Italian system an education that aims at preserving the values of the company that is one of the most developed pillars of the law in terms of shake-up.

V. CONCLUSION

In these pages we have tried to outline, in a systematic way, the elements that distinguish the Administration from the other insolvency proceedings, offering an interdisciplinary interpretation that favours the comparison between institutional purposes and means used

[37] *See* O. BRUPBACHER, *Functional Analysis of Corporate Rescue Procedures: A Proposal from an Anglo-Swiss Perspective*, 5 JOURNAL OF CORPORATE LAW STUDIES 105 (2005).

for achieving them. However, there are new challenges on the horizon because of certain phenomena that, starting from the finance and credit field, can easily concern the real economy and the businesses.

Among them we include the massive use of derivative products that can transfer the credit risk from one person to another, the growth of the use of *hedge funds private equity* as means for investing in companies and the change of the role of the banks that are no more mere intermediaries in the credit market but are operators that are able to generate and distribute financial products.

Not surprisingly, during the period preceding the crisis that has damaged the worldwide economy since 2007, we have seen the success of big banks, hedge funds and insurance companies that have always run bigger risks and have used the financial world improperly in order to become financial global *leaders* and achieve higher profits.[38]

Many submissions[39] have been expressed about the possibility to support the systemic risk related to the excessive use of derivatives, whose capacity can prevent the possibility of realizing, in due time, the level of financial difficulty of a company not allowing the procedures that aim at keeping the company unit alive to achieve the fundamental purposes of preserving the values of the company.
The transformation from managerial capitalism will have a significant impact on bankruptcy law too and, in particular, on insolvency proceedings, that is, on Administration which although is relatively young has already undergone, over the years, significant changes and adjustments.

[38] G. ZANDA, IL GOVERNO DELLA GRANDE IMPRESA NELLA SOCIETÀ DELLA CONOSCENZA 175 (2009).
[39] V. FINCH, CORPORATE INSOLVENCY LAW 133 e ss (2009).

The judicial phase of the admission procedure should allow a momentary analysis of the business keeping in mind the purposes for which the rule was enacted and hence preserve any of the intangible elements that represent a source of competitive advantage for the organization in a broad sense, and are therefore worthy of protection possible and appropriate. In particular, as key element of the intangible, intellectual capital,[40] human capital, structural and relational social impact that a business generates in a large territory, considered by some scholars as part of an "ecosystem" business,[41] should be evaluated in terms of quality and quantity. Therefore, it is desirable that the legislator, during the possible revision of the procedure for treatment and, in particular, for the reformulation of the requirements needed to access the institute, provides admission to the protection of the rule under consideration to those firms whose business immateriality prove to be configured as a "Great Company", dependent upon the possession of debtors and dimensional requirements already provided for by the legislation.

In this perspective, one could hypothesize that the applicant who does not fulfill a particular requirement (as currently identified) may still forward the appropriate application procedure by providing access to a wealth of information to the Ministry that goes beyond the mandatory information thus allowing the authority to investigate in a more analytical way the role played by the business complex on the territory of reference and the value of intangible assets not accounted for. To this end, the application may be accompanied by, for example, the fundamental business contribution, the *reporting* of intellectual capital, in essence, a tool that provides relevant information for such purposes of the business reality (relations clients / suppliers, public etc.).[42] So, in the broader case of any intangible asset

[40] R. TREQUATTRINI, *Conoscenza ed Economia Aziendale, elementi di teoria*, Edizioni Scientifiche Italiane, Napoli, 2008

[41] L. PILOTTI, A. GANZAROLI, SHARED OWNERSHIP AND OPEN SOURCE, THE ROLE OF KNOWLEDGE IN EMERGING ECOLOGIES OF VALUE (2009).

[42] In particular, the Danish Ministry for Industry and Technology has issued guidelines for the preparation of *reporting* on intellectual capital. Some of the authors who contributed to the drafting of guidelines Danes are:

which is not recorded, an accompanying the request with a specific report of a sworn expert is also relevant.

In order to identify a useful parameter for the purpose of appreciating a company that requires Administration, which may be subjected to evaluation by the Ministry, it may be sufficient to estimate the business materiality in absolute terms and in relative terms compared to the other fundamental variables already considered by the legislature.

Jan Mouritsen, Professor, Business School Copeanghen; Nikolaj Bukh, BDO Professor, Aarhus School of Business, Kirsten Flagstad, Research Assistant, Copenhagen Business School; Stefan Thorbornsen, Research Co-Ordinator, Copenhagen Business School; Thorsgaard Heine Larsen, Chief Consultant, Ementor; Christian Nielsen, Research Assistant, Aarhus School of Business; Haisler Jensen, Head of Section, Ministry of Science, Technology and Innovation. *See* in particular: DMSTI, *Intellectual Capital Statements-The New Guideline,* Danish Ministry of Science Technology and Innovation, www.vtu.dk/ icaccounts (2003).
Furthermore, European *guidelines* have been issued to guide the companies in the financial statements of intellectual capital. The main ones are the International Federation of Accountants (IFAC) in 1998, those of the Danish Agency for Trade and Industry (DATA) of 2000 and 2003, those of Nordika Project of 2001 and that of the Meritum Project 2002. For further information on the subject, *see* among others: C. Eustace, *The Intangible Economy - Impact and Policy* Issues, Report of the "High Level Expert Group on the Intangible Economy" set up by the European Commission, Directorate-General Enterprise, Luxembourg, Office for Official Publications of the European Communities (2001).