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WEBINAR
EXTRAORDINARY MEASURES TO COPE
WITH THE COVID-19 CRISIS

The impact on corporate and financial market law: a comparative analysis

(Research Centre for the study of EU banking and financial law
'Paolo Ferro-Luzzi', Grandangolo, University Roma Tre, 19 June 2020)

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1. The Objectives of the Webinar

On 19 June 2020 the Research Centre for the study of EU Banking and Financial Law ‘Paolo Ferro-Luzzi’, Grandangolo, University of Roma Tre, held a webinar on “EXTRAORDINARY MEASURES TO COPE WITH THE COVID-19 CRISIS. The impact on corporate and financial market law: A comparative analysis.”

The webinar was organized, chaired and moderated by Professor Concetta Brescia Morra, Director of Research Center Grandangolo and Professor of Economic Law - University of Roma Tre, together with Giulio Napolitano, Professor of Administrative Law - University of Roma Tre, and Andrea Zoppini, Professor of Private Law - University of Roma Tre, both deputy directors of the Center.

Opening the webinar, Professor Concetta Brescia Morra, as chair of the event, recalled that the webinar aims to investigate the impact of Covid-19 on corporate and financial markets in Europe and in the main Member States.

The economic slowdown caused by the outbreak of Covid-19 has and will greatly affect the corporate and financial market.

The Covid-19 pandemic, besides causing a social isolation within countries, borders’ closure, loss of business and employment, industry-wide shutdowns, also involved many adverse economic effects on the corporate and financial market.

The Covid crisis has forced all Member States to impose wide-ranging restrictions that have curtailed the production and sale of goods and services, which led to a downfall in spending and investment by households and companies, income and job prospects concerns, worsening of financial conditions and to a pervasive uncertainty about the future and possible new crises.

Although, from a health point of view, the peak seems to be behind us, probably the worse in terms of economic consequences is yet to come.

To overcome this, Governments across the globe introduced fiscal and monetary stimulus programs to combat the damaging economic effects caused by the virus.

Volatility in the financial markets spiked in the aftermath of the crisis, most likely due to difficulty in estimating the extent of the economic damage caused by this global event, which is still unfolding. Consequently, some legislative interventions by the EU institutions and the major EU countries were necessary in order to strengthen the stability of the financial system and the good functioning of capital markets. In this

context, Professor Concetta Brescia Morra still recalls the webinar was an opportunity to discuss the regulatory responses of the European institutions and the Member States to the Covid-19 crisis.

In conclusion, Professor Brescia Morra recalled that all the academics and experts who were invited thus have the task to explain the new rules adopted in their countries, with a punctual focus on the measures about Corporate and Financial Law approved in Italy, France, Germany, Austria, Spain and UK, specifying also how important it is to know the position of the European Union to understand the recovery strategy and the actions adopted in the area of financial services and financial markets. Once Professor Brescia Morra clarified the objectives of the webinar, she thanked the speakers and opened the webinar's works.

2. The European Perspective

The first guest to take the floor was Ugo Bassi, DG FISMA, European Commission.

He firstly acknowledged the effects of the Covid-19 crisis and underlined that, in order to make it out of it, we need a common and coordinated effort in the European Union.

Doctor Ugo Bassi briefly illustrated the new European Commission recovery tool named "Next Generation EU" focusing on its ability to address the damages caused by the crisis and relaunch the economy unlocking beneficial effects.

The core of Doctor Ugo Bassi's intervention regarded the measures taken in the financial services area. Starting with banking measures, he gave practical evidence of how the cooperative effort was put in place: EC, EBA, ECB, ESMA, and partners at the Basel Committee collaborated in order to spot regulatory flexibility for banks to exploit. The examples don't stop there: some bank prudential framework aspects were changed in order to make sure that liquidity provided by central banks could effectively be channeled to the real economy; or deferrals were provided. The Council and the European Parliament's proactivity widely eased the task.

As Doctor Ugo Bassi recalled, not only banks were lent a hand: round tables were organized with representatives of all the segments of the financial market. In this case the EC was there to listen: a platform was provided to participants to flag the

identified problems. The result was an act of soft law: the compiling of a list of best practices to be communicated which will help to spot the remaining issues and enhance coordination in their solution.

The presentation followed illustrating the ongoing discussion concerning an intervention on the securities markets based on three pillars: prospects, Mifid and securitization.

As far as the first pillar is concerned, the intervention would be addressed to secondary markets issuers and the key word would be *simplification*.

Mifid intervention would focus on the coverage research increasing, in order to provide SMEs with good investment research an adequate visibility. Both these goals' pursuance will take in consideration investor protection.

The last field of intervention again took into account the useful recommendations of EBA and aimed at alleviating the crisis' impact on banks while financing economic recovery.

Concluding, Doctor Ugo Bassi gave an example of the importance of the rainchecks put in place: several Level 2 legislation measures regarding securitization and market infrastructures in order not to burden on financial entities.

Cooperation permitted also DG FISMA and CONSOB to generate a European debate on short-selling measures, a topic which is not yet subject to a common European approach.

Doctor Ugo Bassi reminded that the path in front of all of us is still long and it includes completing Banking Union, Capital Markets Union, digitalization, and cannot avoid the greening of the financial agenda.

This crisis, like every crisis, should entail *per se* an opportunity. The presenter underlined that institutions should do everything in their power in order to top the benefits of digitalization by performing the usually difficult exercise of striking a balance between what is good and what is advantageous for the market, the market participants and for the investors but at the same time protecting the investors as much as they can. Therefore, it is all about finding the right balance and *putting the cursor where it is necessary*.

3. The Italian Case

As previously mentioned, the recent Covid-19 crisis has impacted all corporate and financial markets worldwide. In particular, in the first months of 2020, during the early stage of the pandemic crisis, the Italian, French, German, Austrian, UK and Spanish markets were among the corporate and financial markets that more experienced this situation.

The powerful impact of the Covid-19 on these financial markets has led these countries to take different – not always easy – choices to protect the different trading directions in order to reduce the impact on the world economy.

For this reason, during the webinar, after having analyzed the European perspective, the most relevant legislative news adopted in these countries were submitted.

The first country, whose legislative measures were examined, was Italy. The academics provided a regulatory framework in the perspective of public and private law. Giulio Napolitano, Professor of Administrative Law - University of Roma Tre, took the floor and made some remarks from a Public Law perspective. In particular, he explained the Italian extraordinary measures to cope with the Covid crisis from the Public Law point of view and the possible new extraordinary role of the State. He questioned whether this is a completely new role of the State or if it is simply managing conventional tools under temporary framework.

According to his experience it is very difficult to provide now, in the beginning of the post crisis management, a reply without enough experience and without enough implementation of the new measures.

However, his personal opinion is that the tools are conventional but what is unknown is the magnitude of all of them together, operating at the same time, and this could change the trend of State intervention in the economy for the next years.

With particular reference to the extraordinary measures adopted in Italy in this moment, the fundamental tools we are experimenting and implementing are four: the first one is the State guarantee provided by Italian State-owned companies which traditionally provided insurance and credit for export. In this system the company is required to provide a guarantee supported by the State as lender of last resort in order to cover the lending activity provided in the first place by banking and other financial institutions to enterprises.

The second fundamental tool is the new economic recovery asset that was established within *Cassa Depositi e Prestiti* with the purpose of strengthening the capital of enterprises.

The third tool is public ownership which, however, is supposed to be activated only in very exceptional circumstances. This is the case of the public ownership within the context of strengthening capital intervention by *Cassa Depositi e Prestiti* and the regulation provides for this kind of direct intervention in equity only as a last resource solution, and public ownership is also possible in the context of very specific cases.

This is a very exceptional measure in this direction, for example the case of Alitalia, but probably this is not a new trend to a State intrapreneur as it existed in the past.

In this respect, although some commentators and even some consultants of the Government argued that a new time has come for the return of the State as a direct economic operator, this is not the solution currently envisaged by the Government.

The fourth tool is the tightening of the foreign direct investment screening which is taking place with the extension of the screening to new sectors including banking and insurance operators. This was made in the light of the European Union Regulation on foreign direct investment screening and following a specific communication from the European Commission that pushed all Members States to apply the screening mechanism in a very strict and rigorous way.

Professor Napolitano, after having listed the Italian extraordinary measures, specified that all these four instruments – State guarantee, economics recovery asset, public ownership and foreign direct investment screening - are not completely new.

For example, Public ownership and State guarantee are of course very old tools, while the foreign direct investment screening has already been in place since 2012 and the expanded role of *Cassa Depositi e Prestiti* is an already tested instrument.

For this reason, he asked himself what is the main regulatory difference compared to the past.

His answer was that all these instruments have been implemented at the same time. They are acting in the same context. There is, to some extent, a potential overlapping between some of these instruments and, as a consequence, the overall dimension of this new potential role of the State.

This leads to some fundamental questions.

First of all, there is a relevant issue of governmental or administrative capacity, which is even different from financial capacity. Of course, the issue of financial capacity in a country as Italy, with such a huge level of public debt, is a relevant one, but we also have problems of administrative and bureaucratic capacity in managing effectively all these very powerful tools of intervention.

The problem of capacity is strictly related to the problem of promoting a sound cooperation with private actors. First, for banks: we experience in the first weeks of implementation how difficult it is, for instance, for banks to perform preliminary assessments and take decisions in the loan activity.

Secondly, there is a problem of discretion. So, what is the relationship between automatic measures that to some extent are provided in the law with the relevant area of administrative discretion in deciding where, when and how to auto-intervene and support the economic private sector.

The issue of discretion becomes extremely relevant when we think about regulatory conditions that can be introduced in relation to some of these measures.

Lastly, there is a problem about the real strength of procedural and judicial safeguards that in principle should be applied to every area of public authority, every area of State intervention and that however can to some extent be threatened when there is high discretion as it is in the field of some of this State support measures or even in the case of foreign direct investment screen.

In conclusion, Professor Napolitano affirmed that, in his view, the tools are to some extent conventional. About these tools there is the complete unknowledge of the overall magnitude of these interventions and Professor Napolitano thus believes that a new equilibrium between the role of the government, of the State, and the role of private operators must still be found.

Regarding the measures adopted in Italy, the second speech focused on the Private Law perspective. This subject has been addressed by Andrea Zoppini, Professor of Private Law - University of Roma Tre.

In particular, Professor Zoppini opened his speech with a metaphor, reporting that “*We are, basically, in the position of the pilot who tries to restart the engine,*” then he recalled that there is a remarkable need for equity in all Europe and in particular in

Italian enterprises.

Firstly, Professor Zoppini clarified that there are important problems from the private law perspective about State intervention.

First of all, the State Aid regulation, and, then, Competition Law.

With regard to the State Aid regulation, he suggested to read a brilliant expression on “The Economist:” the “zombie companies.” Basically, there are corporations living after death because of State Aid and State support. A good example in our experience could be Alitalia.

From a Private Law point of view another relevant point regarding guaranteed loans is whether the Covid is a material adverse change. Professor Zoppini considers it not to be a material adverse change: the Covid is thought to be as something transitory in Italian forecast.

Clarified that aspect, he introduced the economic scenario and in particular the COVID-19 impact on the Italian economy. The contraction in GDP in Italy is estimated between 8% and 10%. Regarding the market capitalization, the FTSE-MIB index reduced by 25% since January 2020 vs -7% of the European index whereas the Italian “Top line” company revenues face an estimated reduction between 7% and 18%, worth 220 to 470 billion euros. In this economic scenario, the Italian Government acted promptly by introducing measures aimed at strengthening corporate equity. In particular, as far as enterprises with revenues above 50 million euros are concerned, the Italian Government created the «Equity Recovery» initiative (*Patrimonio Rilancio*), 44 billion euros of Special-Purpose Assets dedicated to equity and quasi-equity interventions.

About the principal aspects of *Patrimonio Rilancio*, Professor Zoppini briefly summarized its characteristics.

It is a side company within *Cassa Depositi e Prestiti* (CDP), but it is separated and autonomous from CDP’s own assets.

The main point to take into consideration is *Patrimonio Rilancio*, an organizational and operational system designed to ensure maximum efficiency and speed, also on the basis of self-declarations made by the beneficiaries (i.e., investee enterprises).

Patrimonio Rilancio is funded with contributions by MEF and the issuance of bonds or other financial instruments.

It has been estimated that something like 5,000 enterprises are potentially interested subjects. *Patrimonio Rilancio* will basically operate with two (or three) operating models: Temporary Framework and Market Operator Framework.

About the Temporary Framework, the entry condition for the enterprises are that the beneficiary was not already in difficulty as of 31 December 2019 and lacking the State intervention the beneficiary would go out of business; there is in the common interest to intervene (e.g., to avoid social hardship); the beneficiary is unable to find financing on the markets.

With regard to the Market Operator Framework, the second operating mode, it provides the regulation for two tools: capital increase and subordinated convertible bond, with different conditions for listed companies and not listed companies.

The third possible operating way of intervention of *Patrimonio Rilancio* is corporate restructuring, which is an intervention in enterprises that are or could go in a bankruptcy proceeding. It is not clear by now how it will be set up.

After outlining the new regulatory framework, Professor Zoppini looked at the open problems.

One is the relationship with failure discipline and insolvency procedure, an open point because of the lack of a special norm that clarifies this possible relationship.

Another is the potential litigation.

In the end, Professor Zoppini concluded that the program *Patrimonio Rilancio* is thought to be a temporary measure, but, he warned, there is nothing as steady in Italy as something which is thought to be temporary. So, it is well possible that we'll keep on with those measures for a long time.

3.1. The French case

Continuing in the exam of the different rules adopted in EU countries, the measures applied in France were examined.

The following guest to take the floor was Antonino Cusimano, Group General Counsel and Secretary General at Nexans. He told himself impressed with the French State reaction to the sudden crisis and agreed with the measures taken by the French government. In particular, with the Decree of 26 March, the French government eased the access to Partial Unemployment measures and has reduced the amount of charges

on employers.

The conditions to obtain it are (i) qualifying as impacted by exceptional circumstances as per Labour Code definition; (ii) partial or total business interruption due to Covid.

Also, he enjoyed the readiness of Parliament in passing the Emergency Law. An official declaration by the French government recognized Covid as a *force majeure* event when contracting with public authorities: a useful tool to claim Covid-19 is material adverse change, also in private litigation.

The intervention followed illustrating the Corporate Law measures closely affecting corporate life. The two Orders n° 2020-318 and 2020-321, both retroactive, extended by three months the deadlines imposed by law or articles of association for the approval of the accounts, attached documents, and the convening of the general meeting in charge of this approval.

Furthermore, corporations were allowed to broadcast meetings as a replacement of physical meetings – hard to set up in these difficult circumstances – preempting corporations’ bylaws prohibitions, a measure widely used by French corporations. The remote attendance by members of governance bodies was guaranteed and the general meeting were allowed to be held ‘behind closed doors’.

Doctor Cusimano noted that, while it is usually permitted to cancel general meetings if it is impossible to convene shareholders by mail, this possibility was temporary waived. On the contrary, remote shareholders attendance, such as by postal vote or proxies, was favored. These provisions implied the prevention of casting votes in real time, shareholders’ questions and interventions. This caused a hostile climate toward this kind of meetings which eventually evolved in a higher rate of opposing votes, especially on corporate governance resolutions. Critics, according to Doctor Cusimano, do not take into account the difficulty of properly identifying people intervening in an online meeting, open to questions and interventions. Nonetheless, the measure’s success is confirmed by data: 75 of the SBF 120 issuers held shareholders meetings ‘behind closed doors’.

The second tool enthusiastically quoted and described by the speaker was the *Prêt Garanti par l’État* (PGE): the measure allows corporations to borrow money from commercial banks guaranteed by the State, typically for up to 90% of the loan. The

guarantee can be provided between mid-March and the end of 2020 while the reimbursement is not required for the first year, plus the borrower has the chance to amortise the loan over a further one to five years; it shall not exceed 25% of the borrower's 2019 turnover and it does not require any other security or guaranty; only property companies, credit institutions, financing companies and businesses in the midst of collective proceedings were excluded. The loan comes with two requirements: no dividends shall be payed and, following the signing of a *déclaration sur l'honneur*, suppliers shall be payed according to terms.

Doctor Cusimano concluded by recalling the corporate crisis management skills applied during this difficult time: board meetings drastically increased, liquidity issues arose and forced issuers to come up with ideas to increase it. Also, governance' remuneration took a hit and decreased, whereas, conversely, the circumstances implied increasing risk management skills and reporting on the crisis management.

Lastly, he highlighted the help of the *Autorité des marchés financiers* (AMF) recommending advices and handling the simplification of corporations' life. The Covid crisis appeared after the publication of the 2020 guidance, the annual report and the first quarterly results. As the emergency constantly increased, some issuers faced liquidity problems which led them to suspend their 2020 guidance and impacted quarterly results. The French regulator encouraged those with available reliable data to regularly disclose their information on periodic reassessments of their activities, financial situation and prospect, which led to a reassessment of the announced risk factors and outlooks.

After Doctor Cusimano, Pierre-Henri Conac, Professor of Commercial and Company Law at the University of Luxembourg, took the floor. First of all, he reflected on the previously discussed ability of the French State to provide loans quickly and readily. According to Professor Conac, the mechanism lacked fluency and smoothness when SMEs needed it, whereas it proved itself useful when large companies did. Professor Conac followed addressing the Foreign Direct Investment screening' regulation change. He underlined how previously, as a foreign investor crossed the threshold of the 25% in the participation in a company capital, the operation required an authorization; nowadays, once it crosses the 10% threshold, the investor has to inform the Ministry of Finance.

Subsequently, Professor Conac illustrated the electronic turn the company meetings and compliance have taken. He mentioned the disclosure required to the

companies by the AMF and then he pointed out how many French companies largely referred to the bond market rather than to the loan one, as the former is less regulated than the latter.

Once he settled these matters, Professor Conac intervention focused on the AMF action and the development of its relationship with companies during the crisis. Companies asked AMF for advices regarding a matter of social interest. The issue arose for some companies with real estate assets: whether they should forgive rent in order to help the borrowers. The AMF reply was of the non- official kind, as its powers are limited in the Company Law field. Professor Conac argued the opportunity to help customers to survive and not go into insolvency but he warned that shareholders might have a different point of view as this behavior implies losses.

Professor Conac objected the difficulty to comply with AMF requests to companies to involve shareholders during meetings and discussions, on the basis of practical reasons: identification and the right to first intervene.

Following, he told himself surprised that companies were required from many quarters to reduce the amount of dividends as a sign of solidarity with workers; even in the case the company had not received any funds by the State.

Lastly, the speaker addressed the nationalization topic. Professor Conac highlighted how a State purchase of a company whose shares price dropped because of the stop of the activities is something that sounds weird to him.

In conclusion, Professor Conac believes that the last two points revealed that the French approach is “*not liberal at all.*”

3.2. Pandemic-Resistant Corporate Law: The example of the UK

Luca Enriques, Professor of Corporate Law at the University of Oxford, then took the floor. Professor Enriques specified that his report was based on a forthcoming essay which will be published in the *European Company and Financial Law Review*.

The speech took the UK as an example of what measures can be taken in the area of Corporate Law. The purpose is to identify what tweaks should be introduced in these exceptional times in order to make sure that European businesses can get through the crisis more easily.

The way to do it is by using new special rules as little as possible but, rather,

provide for the suspension of existing rules wherever possible.

The reason for that is that these are times in which a public debate and consultation procedures are unlikely to take place with the same degree of reflection and ponderation, as in normal times: it is not the best time to test new solutions. Furthermore, these measures, if they are suspensions, by definition, will have a sunset built-in: a date on which they will elapse, and old rules will be back in place. Of course, at a later point, we may ask whether the suspensions of the rules may have proven that the old rules were not the right ones. We may do so, also, in the light of how the world has changed due to the crisis, if any permanent change will be observed.

The rationales for suspending corporate law rules are two-fold. First, since March 2020 many companies are in “survival mode”: *primum vivere* may mean sacrificing some protections that have been built into corporate law but increased the time and costs of engaging in some transactions that may now be crucial for survival. Second, in usual times the degree of uncertainty is lower than today and therefore some choices can be made with less risk of getting it wrong, and markets can be trusted in providing rational signals about the value of companies.

In terms of what to do, then, “survival first” may mean to suspend rules on capital increases and on related-party transactions for capital increases and shareholders loans whenever the normal-time rules are burdensome and/or especially time-consuming. The Italian government has moved in this direction by amending the rules on capital increases.

Traditionally, there is in the UK a sort of agreement among institutional shareholders to vote against proposals to waive pre-emption rights. Exceptionally, earlier this year, this group of institutional investors declared that they would be open to the idea of waiving pre-emption rights on a case by case basis. This would be pure self-regulation, but at the same time an important signal because everyone knows that in the UK you don’t just issue new shares without pre-emption rights since the general meeting would never allow you to do it.

With regard to the area of related-party transactions, the Financial Conduct Authority also adopted measures about large related-party transactions aimed at recapitalizing companies: they have provided for a suspension of the rule that requires the shareholders meeting to approve the transaction with the favourable vote of a

majority of the minority. They have done this very cautiously, because still an informal vote is needed. The company has to call, basically, all the shareholders or a majority of the shareholders and make sure that they agree with the transaction. One way to get an equity capital infusion may also be by having someone to contribute to the company in exchange of shares; that may lead an existing shareholder or a third party to cross the threshold for the mandatory bid rule. In exceptional times one could think of tweaking the mandatory bid rule provisions in order to allow these transactions to go through without the need for a mandatory bid. It would be a sort of recognition that all companies are currently *in crisis mode*. In the UK, however, there is no need for such an intervention because the Panel has broad discretion: it has a general exemption power which may be used in this situation.

Next, Professor Enriques addressed the issue of director liability. In the UK, the Parliament is passing the suspension of wrongful trading rules for just three months. Wrongful trading rules are those that apply to companies in the vicinity of insolvency when directors are aware, or should have known that the company could not survive. However, this kind of intervention is partial: not only because it does not cover situations in which companies are not close to insolvency but also because, even for companies in the vicinity of insolvency there is a doctrine named after the case “West Mercia”, which may lead to liability for directors. The idea is that when the residual claimants of the company are now the creditors because the equity is worth zero, then the fiduciary duties are ought to creditors and not to directors, and the new legislation is not doing anything in this regard. Broader exemptions for duty of care violations could be rolled out to avoid risk aversion on the part of decision-makers at companies managed in crisis mode.

Lastly, Professor Enriques focused on hostile take-overs and shareholders activism.

In his own opinion, the envisaged solutions are quite extreme. In fact, he suggested that the best solution in these circumstances would be to provide for a (temporary) default rule allowing directors to veto the purchases of share above 20%, of course in the interests of the company.

Nothing of this kind is going on in the UK where they are very proud of their takeover-friendly regime.

At the end of his speech, Professor Enriques made a final general comment

stating that if the times are exceptional, extraordinary measures are maybe needed, but they should not be permanent. In his opinion there is no reason to permanently change the rules now. Perhaps, the only permanent change that could be introduced are rules that allow for a quicker switch from normal times to exceptional times in the event of another crisis in the future. That would also reduce the pressure of making the possibly temporary changes permanent.

3.3. The German and Austrian cases

The webinar following guest was Chris Thomale, Professor at the University of Vienna and Roma Tre. He presented both the German and Austrian Commercial Law solutions.

The crisis was a chance to re-assess some parts of Corporate Law: the topical issue which arose from the circumstances was the *rebus sic stantibus* general clause problem. Professor Thomale explained: the German legislator action's overarching goal was to provide time to corporations, in order to allow them to deal with the new circumstances. Since many tried to apply for a special restructuring procedure the German Code provides – which requires the applicant has reasons to demand the restructuring but has not fallen in over-indebtedness – the legislator suspended the obligations to file for insolvency. Professor Thomale underlined that the suspension was not generalized but rather surgical: only the insolvencies linked to the Covid-19 crisis shall not be filed. Professor Thomale reasoned the issues arising from this approach in terms of burden of proof. Altogether with this provision the civil liability for unduly delaying filing for insolvency was suspended.

A second step taken by the German legislator and illustrated by the speaker was the suspension of a peculiar German rule suspending the validity of corporations' payments when close to insolvency. Professor Thomale drew the participants' attention to a German Corporate Law specificity: the recharacterization of shareholder's loans to be equity rather than debt. The rule will be suspended for three and a half years and aims to incentivize shareholders to take care of their own company: shareholders will be now more likely to give debts to their company rather than further equity.

Professor Thomale found that suspension played a key role in the German legislator approach, but he also found this crisis highlighted the unworkability of certain rules.

As far as general meetings rules were concerned, Professor Thomale believes the German legislator confirmed its unique approach: since normally virtual meetings are not allowed, management and directors still have to meet in person whereas shareholders' presence can be virtual. The issue arose because corporate management decides discretionary whether to allow or not questions, turning general meetings in "*corporate management's private parties*." The provisions regarding general meetings specifically affected smaller shareholders and exacerbated their relevance issue: big institution investors and asset managers will be allowed to the meetings whereas smaller investors are somehow expropriated of their control rights.

Moving to the Austrian solutions instead, the speaker observed that they trace the German ones. Professor Thomale underlined how the Austrian legislator has reacted not earlier than two months after the German one did. One of the differences he emphasized regards the recharacterization of shareholders loans: the Austrian provision was suspended for only three months, with poor efficacy.

Concluding, Professor Thomale deemed that when it comes to capital structure and recapitalization of companies, we could learn a lot from the crisis. Especially in the grey area between corporate law and insolvency law, the promises made by our laws are to be "*crisis solid*." Professor Thomale underlined also the need to reevaluate those rules because they are not designed for times when everything's fine.

3.4. *The Spanish Case*

With regard to the Covid measures applied in Spain, Ignacio Tirado, Professor of Commercial, Corporate and Insolvency Law at the Universidad Autónoma of Madrid and Secretary-General UNIDROIT, showed that Spain, as Italy, did not change the law at once. It did it in different times and not in a very coordinated manner.

In particular, Professor Tirado recalled three far-reaching relevant Royal Decrees that took care of many aspects in addition to those in the webinar at hand (Labour Law issues, Tax Law issues, insolvency and restructuring).

Concerning the amendments to the Spanish Corporate Law, they are very similar to those applied in Italy, France and the UK.

In particular, with regard to financial accounts, the duty to file financial accounts has been postponed, the terms to do it have been deferred, the shareholders meetings

and the board directors' meetings have been made more flexible: they can be done remotely, in videoconference or teleconference. Some amendments of corporate law are of particular importance: specifically, the possibility to suspend a decision previously adopted to deliver dividends and to suspend also the possibility of shareholders, when they have it, to separate from the company because dividends have not been distributed.

Also, the Spanish government, fearing the lowering of the value of the shares especially in open markets and their possible purchase during fire sales by foreign investors, suspended for a while the possibility to acquire a certain percentage of the shares of capital of companies and then it moved further, simply requiring a pre-authorization to be able to invest in the shares capital of certain companies.

Professor Tirado specified also that in Spain, like in many other countries, following ESMA's approach, the short selling is not allowed.

But the most interesting part of the extraordinary measures lays with two items: one is the banking side and the other is the contractual side. About the banking side, the core is obviously the European Union and the European Central Bank, especially with this Pandemic Emergency Long Term Restructuring Operation which was and still is key to ensure that money continues to flow into the banking systems of the different European states.

Also, Professor Tirado represented the real situation of the Spanish banking sector, specifying that Spanish banks are getting out of liquidity, in part to lend to the real economy, in part, more importantly, to buy sovereign bonds. In February, Spain had for the first time a higher percentage of foreign investors as holders of national bonds than national ones.

At this point, he asked himself several questions: how is it possible that countries issue bonds and are able to place the bonds in the markets at a better price than before the crisis? How can it be possible that Brazil, one of the most battered countries in the world and with no prospect of good recover at least for a few years, has just placed 3.5 billion at the lowest interest rate in its history?

His explanation is that there is so much liquidity already available that investors just invest somewhere.

Professor Tirado underlined that the huge amount of liquidity is making the market unable to work properly. And if the market is not pricing instruments properly,

that means the monetary policy is at risk of not working in the future, and that is going to be a very big problem.

The other issue which he believes is very important in the banking area is that all this money being channeled on to the real economy by the banking system is very difficult to place in a reasonable manner.

In Spain, like in Italy, it is very difficult to really make sure that money goes only to those companies that are in trouble because of the Covid situation and not to every company. This is a very difficult task for the Spanish institutions.

The other issue that Professor Tirado represented in his speech as very important for the banking sector is that in Spain every contract is pretty much in a situation of breach with particular reference to the material adverse change (MAC) clauses that are present in the vast majority of banking contracts. In this respect Professor Tirado called for a clear-cut rule that is reasonable and that allows for a streamlined application of the rules of *force majeure* and hardship. This is something that many governments will have to implement to try to make sure that their judicial systems are not completely clogged in the coming months.

In conclusion, Professor Tirado hopes that many governments comply with the UNIDROIT principles in international commercial contracts providing the most flexible option for the clause of *hardship* and *force majeure*.

Professor Tirado brought to the attention of the participants that UNIDROIT is about to issue a note on: “*Covid and the principles of hardship and force majeure.*”