PUBLIC INTEREST AND BANKRUPTCY BETWEEN ADMINISTRATION AND JURISDICTION

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Abstract: *The purpose of the work is to study the relevance of the public interest in corporate crisis procedures, with reference to banking companies. Traditionally, it is believed that the purpose of crisis resolution procedures is to ensure the satisfaction of creditors, without regard to other interests. This is a view that, although widespread, is not convincing. The enterprise is always a synthesis of a plurality of interests, some of public significance. This does not detract from the fact that, in some cases, these interests take a simplified form, so that the management of the crisis can be handed over to the Courts, which are also responsible for taking care of the public interest already specified into the law. On the other hand, in the case of enterprises whose activity is relevant to the enjoyment of fundamental rights, incorporation, management and dissolution are relevant to the public interest. This explains why the domain of crisis resolution procedures is assigned to the executive power. However, there is a difference between administrative discretion and political choice, so that the crisis resolution instruments that apply to banking enterprises are more effective, both because the administration is represented by an independent authority and because the law more clearly identifies the public interest scope of preserving the enterprise.*

Keywords: *bankruptcy, public interest, discretion, bank's regulation*

I. INTRODUCTION

I.1. The purpose of this paper is to highlight the relevance of the public interest in the face of bankruptcy and company's crises – regardless of whether they are participated in by public bodies or perform public service missions.

More analytically, the aim is to analyze the role of Executive, Judicial and Legislative power in company's crises. In fact, depending on the procedure that the law provides for, one will notice a prevalence of Executive or Judicial power, with a consequent different declination of the public interest; furthermore, at least in Italian law, there are hypotheses in which – although derogating from ordinary procedures - directly the Legislative power takes all the measures necessary to resolve the crisis.

It is not merely a matter of emphasizing the public interest role, but rather of identifying the specific profile of the public interest that the single procedure –- Judicial, Administrative, or direct Legislative power – is intended to guarantee. In this analysis, therefore, recurring and more specific profiles of the public interest will emerge.

More so, it will emerge how the public interest is always present in company crises and bankruptcy, unlike what is normally thought – given that the traditional and even more widespread view is that the only interest that the procedure must pursue is that of the creditors.

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I.2. The hypothesis to be formulated here is that the public interest is structurally one of the aims of any procedures – conducted before the Courts or administrative bodies – in the event of a company crisis. However, the profile of the public interest that the specific procedure protects is not always the same; likewise, the protection of the public interest, in balance with that of creditors, assumes a position of primacy or otherwise, depending on the procedure that is provided for by law. To this must be added the fact that – especially from a neo-liberal perspective – the Legislative power – especially in the case of banking crises - intervenes directly, excluding any room for Jurisdiction or public Administration, to ensure stability, albeit by derogating from the ordinary rules and compressing interests of primary importance.

These hypotheses will be tested by analyzing the different regimes under Italian law, differentiating cases according to both the intensity of the exposure to public power and the industry sector – providing a specific treatment of banking crises due to their peculiarities.

For the sake of economy of reasoning, the analysis will be conducted only considering Italian and EU law. This does not exclude at all – and indeed recommends – a comparative study of different jurisdictions; however, such a comparative analysis is not within the scope of this paper and, from another point of view, it is considered that an in-depth analysis of a national system may be an adequate test-bed for the proposed thesis.

I.3. It is undoubtable that, since its origin, bankruptcy – and business crisis management in general – has been regarded as an instrument for the pursuit of public interests as well.[1] This idea, yet always present, is mostly implicit and it must be made clear which public interests are meant to be referred to.

The relevance of the public interest issue immediately recalls the widespread opinion that the procedures aimed at managing business crises – in this interpretation rightly

[1] D'ALESSANDRO, F. *Interesse pubblico alla conservazione dell'impresa e diritti privati sul patrimonio dell'imprenditore, Fallimento.* Milano: Giuffrè, 1984, p. 79; ROSSI, G. La grande impresa «fra privato» e «pubblico» e le leggi speciali. *Riv. Soc.* 1980, p. 401; TOMASSO, G. Il concordato nella liquidazione coatta amministrativa tra interessi privati ed interesse pubblico. *Nuova giurisprudenza civile commentata.* 2007, N°. I, p. 448; FIMMANÒ, F. *Il concordato straordinario, Giur. Comm.*, 2008, p. 968, in whose opinion «*The arrangement proposed as a structural solution in the context of the restructuring guideline, or as a variant of the divestiture guideline, prior to its implementation, can therefore be defined as "extraordinary", in name and in fact, as it responds to a specific and not generic public interest*». DE SANTIS, F. *Il giudice delegato fallimentare tra "gestione" e "giurisdizione": tracce per una riflessione* de iure condendo, in *Giur. comm.*, 2002, p. 489, begins by noting that «*There is no doubt that since its origin bankruptcy has been considered as an instrument intended to satisfy a public interest (the interest in the satisfaction of creditors and, indirectly, of the state in the tranquility of trade and the market) and that the protection of this interest was among the primary tasks of the judicial authority. The bankruptcy law of 1942 is founded on the idea that the insolvent entrepreneur must be, at least tendentially, eliminated from the market and that creditors must be assured the protection that allows them to recover what can be recovered through the operational instruments of justice. But the evolution of the economy, the recurrence of recessionary periods, and the spread of increasingly complex and sophisticated organisational forms and contractual models in business activity have contributed to a sort of ageing of the traditional insolvency system*». It remains to be noted that the dominant theory is in the direction of the predominantly private purpose of bankruptcy (GALGANO, F. *Diritto civile e commerciale, IV*. Padova: Cedam, 1999, p. 315), to prevent ulterior aims such as market order – at least as far as bankruptcy is concerned – from altering the principle – considered unshakeable – of *par conditio* (JORIO, A. Le procedura concorsuali tra tutela del credito e salvaguardia dei complessi produttivi. In: Giovanni Iudica – Paolo Zatti (eds.). *La crisi d'impresa – Il fallimento. Trattato di diritto private.* Milano: Giuffrè, 2000, p. 5.

modelled on bankruptcy – have as their sole interest that of the concerned company's creditors, thus denying any relevance of interests other than those.

In other words, although the importance of the public interest seems for the most part un–limitable in the face of corporate crises, the interpretation of the discipline regulating them is distinct between those who – and this is the vast majority – believe that the only relevant interest is that of creditors and, and the other hand, those who highlight the regulatory importance of (private) interests other than those of creditors and other (public) interests that concern the economy, the community, the environment and workers.

What, however, cannot be removed from the discussion is that legislation – in most advanced economies[2] – does not leave the field free to the parties involved, but also assigns its management to the judiciary or the public administration or – more often – to a competition between these two authorities.[3]

If the concerned interests were only that of the dissatisfied contracting parties – as is mostly thought – there would be no reason to envisage the necessary involvement of a public authority and, if anything, as is ordinary in equal relationships, jurisdiction would be called upon if and insofar as a party to the relationship, complaining of a violation of one of its rights, proposes to the judge claims in the envisaged procedural forms. Nor can it be denied that, in the discipline of company crises, the judicial function is not exercised in the material forms (and to a large extent also in the form) of the resolution of the conflict between the bearers of subjective positions,[4] assuming, on the contrary, very clear connotations – on the side of the function in the material sense[5] – of administration.

This is not the case in any legal regulation of business crises, since even in cases where there are no competences assigned to the administration, the judiciary necessarily intervenes (there is bankruptcy – today known as judicial dismission – insofar as it is initiated before the competent court) and not to resolve a dispute.

Wherever a business crisis occurs, the intervention of a public authority (administration or court) becomes necessary. In this case, a first problem arises, i.e. to understand whether

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[2] This paper is not the place to discuss systems other than the Italian one, as this would only show erudition and would not contribute to the purpose of these pages. Briefly, see DI MARTINO, P., LATHAM, M., VASTA, M. *Bankruptcy Laws Around Europe (1850–2015): Institutional Change and Institutional Features*. Cambridge: Cambridge University Press, 2020.

[3] COLESANTI, V. *Amministrazione e giurisdizione nella nuova disciplina dell'amministrazione straordinaria. Rivista di diritto processuale*. 2001, Vol. 56, No. 23; also CAVALAGLIO, A. Nuove regole per le crisi dell'impresa tra giurisdizione e amministrazione e soluzioni stragiudiziali. In: Alberto Jorio (ed.). *Nuove regole per le crisi d'impresa*. Milano: Giuffrè, 2001, p. 252.

[4] In a contribution that is not specifically devoted to what is in this paper, but rather addresses a variety of current issues, CAVALLINI, C. L'impresa, la crisi, il giudice. *Rivista delle società*. 2012, Vol. 57, No. 4, p. 758, note that «*The role of the judge in the changed framework of bankruptcy proceedings – and in the changing course of the economic crisis – is therefore twofold and of equal importance and delicacy, precisely in the face of greater and more incisive powers of creditors. And it soon appears to be not only a dual role, but also a "crossed" role: the "judge" (and also the Public Prosecutor, who is urged by the latter) plays not only a role of protection (*jus dicere*) of the conflicting insolvency rights (in this case with somewhat strengthened powers and guarantees), but also and above all a role of safeguarding the need, of economic society above all, that the "market of companies in crisis" should not become arbitrary, legal and not surreptitiously a harbinger of impunity*».

[5] BENVENUTI, F. Eccesso di potere amministrativo per vizio della funzione. *Rassegna di diritto pubblico*. 1950, p. 1 758; Id., *Funzione amministrativa, procedimento, processo, Riv. trim. dir. pubbl.*, 1952, p. 126; Id., *Funzione. I) Teoria generale, Enciclopedia giuridica*, Roma, Treccani,1989, XIV, *ad vocem*. For wider discussions, PERFETTI, L. R. L'azione amministrativa tra libertà e funzione. *Riv. Trim. dir. pubbl.* 2017, p. 99.

there is a logic – and what it is – in the distribution of competences between the administration and the judiciary in relation to a different attitude of public interest;[6] and, if such a logic exists, to verify in practice a second matter, i.e. whether this distribution has brought good results or not. It should be noted from the outset that special attention will be paid to the crises of banking companies, not only to ensure a complete view of the problem, but also because the latter structurally perform functions of public interest, so that the regulation of their crises is also imbued with them.[7]

To address these issues – along an analysis that, here, is conducted only from the perspective of Italian law, as such supplemented by the discipline of the European Union – it will also be necessary to give due consideration to the evolution of these two powers, in the relationship with the public interest, as the traditional distinctions now seem only partially convincing. It is worth moving on from this initial clarification.

II. CHANGES IN THE RELATIONSHIP BETWEEN JURISDICTION AND ADMINISTRATION

The reflection on the distinction between administration and jurisdiction is very broad, so that – for our purposes – it will be taken up only for the essential features useful for understanding the problem at hand.

II.1. From a first point of view, the issue can be framed on the basis of the principle of separation of powers,[8] often referred to by Italian doctrine and jurisprudence as an assumption, without the need to provide too much justification.

However, this approach seems more ideological than legal, as no express constitutional basis for such a principle is to be found. The route of identifying its foundation in European Union law, which codifies Rule–of–Law as a fundamental principle, seems better. However, even this path only leads to partial results, as the *Rechtsstaat* does not necessarily imply a clear separation between administration and jurisdiction.[9]

Regardless of these considerations, what is relevant is that the principle of separation of powers is not useful for our problem. In fact, the separation of jurisdiction from administration is functional to the fact that there is an independent power able to scrutinize the

[6] In a different perspective LOMBARDI, G., BELTRAMI, P. D. I criteri di selezione della procedura più adatta al risanamento di un'impresa in crisi., *Giurisprudenza commerciale*. 2011, p. 713.

[7] So much so that in the United States, as is well known, the discipline of bank failure is quite different; as this is not the place to go into specific details, it will suffice to refer to the detailed study by HYNES , R. M., WALT, S. D. Why Banks are Not Allowed in Bankruptcy. *Virginia Law and Economics Research Paper*. 2010, No. 3, pp. 985 – specifically, from 1006.

[8] For discussion of the topic GILIBERTI, B. *Il merito amministrativo*. Padova: Cedam, 2013.

[9] On the specific issue, one can examine Giorgio Pino - Vittorio Villa (eds.). *Rule of law. L'ideale della legalità*. Bologna: Il Mulino, 2016; COSTA, P., ZOLO, D. *Lo stato di diritto*. Milano: Feltrinelli, 2002; SCHELLY, J. M. Interpretation in Law: The Dworkin–Fish Debate (or, Soccer amongst the Gahuku–Gama). *California Law Review*. 1985, Vol. LXXIII, p. 158; ARTHURS, H. W. *Without the Law*.Toronto: University of Toronto Press, 1985; IP, E. C. Taking a 'Hard Look' at 'Irrationality' Substantive Review of Administrative Discretion in the US and UK Supreme Courts. Oxford Journal of Legal Studies. 2014, Vol. XXXIV, p. 481; BÖCKENFÖRDE, E. *Entstehung und Wandel des Rechtsstaatsbegriffs. Festschrift für Adolf Arndt zum 65 Geburtstag*. Frankfurt am Main: Europäische Verlag, 1969, p. 56; SOBOTA, K. *Das Prinzip Rechtsstaat*. Tübingen, Mohr; for a wider discussions on this topics, PERFETTI, L. R. L'ordinaria violenza della decisione amministrativa nello Stato di diritto. *Persona e Amministrazione*. 2017, No. I, p. 3.

decisions of the executive power. This guarantee is certainly present in the law of corporate crises because any governmental decision on the crisis can be challenged before the appropriate court. Subject to this rule, the principle of the separation of powers does not seem to be of any help in solving the problems posed. In other words, in the light of this principle one will only be able to sanction the justiciability of the acts of the executive power, but not to understand for what reasons the management of the enterprise crisis is (or can or should be) assigned to the jurisdiction or the administration.

II.2. From a second point of view, more adherent to our problem, it may be noted that both administration and jurisdiction are powers that decide according to procedures regulated by law.

There is no need to provide any explanation for the assertion that both are public powers. Instead, it is useful to develop a brief reasoning around this assertion and its consequences. Public powers derive their legitimacy from sovereignty. This is the fundamental point of all theoretical constructions of public law in Europe. As long as sovereignty is thought to belong to the State, it is obvious that jurisdiction and administration will be organizations functional to the satisfaction of the aims of the sovereign, of the State.[10]

For some time, I have been trying to point out the legal reasons why, on the other hand, sovereignty belongs to the people and its consequences for the dynamics of powers.[11] This affirmation entails various consequences, which need not be discussed here, first and foremost that for which public powers are functional to the satisfaction of the interest of the popular sovereign; and since many Constitutions – and above all the Italian one – rec-

[10] PERFETTI, L. R. L'organizzazione amministrativa come funzione della sovranità popolare. *Il diritto dell'economia*. 2019, Vol. LXV, p. 43.

[11] This is not the place for a through argumentation of these theses. For the sake of brevity, let us refer to PERFETTI, L. R. Per una sistematica dell'equità in diritto amministrativo. Principi istituzionali e regole della relazione tra società ed autorità. *Studi in onore di Alberto Romano*. 2011, Vol. I, p. 653; Id., Pretese procedimentali come diritti fondamentali. Oltre la contrapposizione tra diritto soggettivo e interesse legittimo. *Diritto processuale amministrativo*. 2012, pp. 850–875; Id., *La dimensione pubblica dei diritti individuali. Il coordinamento degli enforcement amministrativi e giudiziali nell'Unione Europea e l'emergere del diritto comune europeo. AIDA. Annali italiani del diritto d'autore della cultura e dello spettacolo*. Milano: Giuffré, 2012, p. 338; Id., I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità. *Diritto pubblico*. 2013, p. 61; Id., Discrezionalità amministrativa, clausole generali e ordine giuridico della società. *Diritto amministrativo*. 2013, p. 299; Id., Funzione e còmpito nella teoria delle procedure amministrative. Metateoria su procedimento e processo. *Diritto processuale amministrativo*. 2014, p. 53; Id., Sistematica giuridica e controllo razionale del potere. Osservazioni intorno al problema del metodo nel pensiero di Antonio Romano Tassone e proposta in base all'ordine giuridico della società. *Diritto e processo amministrativo*. 2015, p. 803; Id., *Sull'ordine giuridico della società e la sovranità, Scritti per Luigi Lombardi Vallauri*. Padova: Cedam, 2016, p. 1153; Id., La legalità del migrante. Status della persona e còmpiti dell'amministrazione pubblica nella relazione paradigmatica tra migranti respinti, irregolari, minori trattenuti e potere pubblico. *Diritto e processo amministrativo*. 2016, Vol. X, p. 393; Id., Discrecionalidad administrativa y soberanía popular. *Revista Española de Derecho Administrativo*. 2016, Vol. 117, p.195; Id., L'azione amministrativa tra libertà e funzione. *Rivista trimestrale di diritto pubblico*. 2017, Vol. LXVII), p. 99; Id., *Discrezionalità amministrativa e sovranità popolare, Al di là del nesso autorità/libertà: tra legge e amministrazione*. Torino: Giapicchelli, 2017, p. 119; Id., L'ordinaria violenza della decisione amministrativa nello Stato di diritto. *questa Rivista*. 2017, Vol. I, p. 3; Id., Persona, società e amministrazione pubblica. *Amministrare*. 2019, p. 199; Id., L'organizzazione amministrativa come funzione della sovranità popolare. *Il diritto dell'economia*. 2019, Vol. LXV, No. 98, p. 43; Id., L'attitudine della giraffa. Per una teoria dei diritti sociali come esercizio della sovranità, nella stagione della crisi del welfare pubblico. In: Manolita Francesca – Carlo Mignone (eds.). *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi*. Napoli: Edizioni Scientifiche Italiane, 2020, p. 6.

ognize fundamental rights and do not affirm or constitute them, it must necessarily be assumed that fundamental rights are in the same constituent power. In other words: if the Constitution, the exercise of constituent power and therefore, clearly, of sovereignty, recognizes the existence of rights as fundamental rights, it means that these exist in sovereignty; and in sovereignty they remain permanently. If, therefore, fundamental rights remain in sovereignty, then public powers can only be functional to the full enjoyment of fundamental rights. This discourse is useful with respect to our problem because the regulation of business crises can affect various fundamental rights expressly recognized by the Constitution, from freedom of enterprise to labour, from the protection of competition to that of the environment, and so on.

Jurisdiction and administration, therefore, will have the same purpose in exercising the powers that the law assigns them when faced with an enterprise crisis: not the State's interest in strengthening its economy, defending the nationality of the enterprise or implementing its economic policy, but that of the people to see their fundamental rights compromised as little as possible in the face of an affair that, by dissolving the enterprise, may irreparably compromise fundamental rights (such as the right to work, just to give an example), public goods (such as the environment) or access to services (such as transport and communication) essential for the enjoyment of rights.

Same purpose and same way of deciding, i.e. according to procedures established by law: administrative procedure and trial are both public procedures regulated by law so that the holders of interests involved can participate in an adversarial manner, thus decision is the result of a complete and impartial examination of the facts and the correct interpretation of the applicable law, so that the reasons for the decision are explicit and verifiable.[12] Jurisdiction and administration therefore decide for the same purpose and in the same way. They only show a different degree of independence from the Government.

II.3. It is here, in independence from the government, that the criterion enabling them to be distinguished is to be found. The mere evocation of the separation of powers will not suffice. It presupposes that these two powers are different. But the difference is only presupposed and not explained. In fact, if it is true that courts settle disputes, the administration does and can do the same – the reference to the function of self–defense would suffice; if the administration, on the other hand, is an executive activity of the law in the public interest in such a way as to produce material effects, it cannot be denied that the court also does the same, for example in executive proceedings or in the context of the so–called voluntary jurisdiction, that is, precisely in the hypotheses with which we are concerned here.

It has been argued, following Kelsen, that the distinction lies in the different effectiveness of the acts. The decision of the court is bound to be covered by *res iudicata*, whereas that of the executive power is always revocable. This distinction, always very useful, is no longer tenable with exactitude at the present time. In fact, the jurisprudence of the Court

[12] For the sake of brevity, please refer to PERFETTI, L. R. Funzione e còmpito nella teoria delle procedure amministrative. Metateoria su procedimento e processo. *Diritto processuale amministrativo*. 2014, Vol. 32, No. 1, pp. 53–73.

of Justice has made it clear that the application of European law may require the disapplication of a judgment covered by *res iudicata* (so that, to give just one example, the administration not only may, but must, disapply the *res iudicata* judgment if it conflicts with European law). Similarly, Italian law provides – to protect the rights and legitimate interests formed on the administrative act and in application of good faith – that the administration cannot annul its measures after one year from their adoption. That of the effectiveness of acts remains a tendential criterion, but not a very useful one for our purposes.

II.4. More significant is the profile concerning the interests pursued. It has been said that the administration pursues its own interest (the public interest), while jurisdiction pursues the interest of the parties, as presented by the parties to demonstrate their locus standi. Even this criterion is less precise than one might think. In fact, jurisdiction only predominantly pursues the interest of the parties – since, further, it also pursues the public interest in the application and effectiveness of the law and the avoidance of social conflicts; the public administration, on the other hand, does pursue the public interest (which is its purpose), but the public interest is the interest of citizens in maximising the enjoyment of fundamental rights and equality – thus, on balance, it is the interest of the parties involved in the decision, not the interest of the State, since no one has ever doubted that the public interest does not belong to the public body, which – instead – is only burdened with the task of pursuing it. In other words, the criterion of the interest pursued is also much less precise than traditionally believed.

What is clear, however, at least according to Italian law, is that the judge is granted independence (from the government) while the administration is only granted impartiality[13] and a distinction of tasks between politics and administration.[14]

The difference, therefore, from a strictly positive law point of view, lies only in a greater or lesser degree of independence from political authority.

II.5. Since what has just been clarified, it must be ruled out that – as has always been argued – the care of the public interest (understood as the interest of the State) falls to the administration while the court acts in the interest of the parties and the law. Both the administration and the courts act in the interest of the parties, the recipients of their acts, because they act so that the law may be implemented and so that citizens may enjoy their fundamental rights in the fullest and most equal manner.

If one abandons the purely dogmatic perspective used thus far and looks at the evolving lines of the legal system, the conclusions reached are even more decisively confirmed.

There are, in fact, public interests that are assigned by law only to the jurisdiction, yet clearly remaining public interests. One must only think of the case of private enforcement[15] in the field of competition protection or in the field of trademark and patent protection[16] or consumer rights.[17] In all these cases, the legislator considers judicial protection

[13] PIAZZA, I. *L'imparzialità amministrativa come diritto. Epifanie dell'interesse legittimo.* Santarcangelo di Romagna: Maggioli, 2021.
[14] FORTE, P. *Il principio di distinzione tra politica e amministrazione.* Torino: Giappicchelli, 2005.
[15] SASSANI, B. *Il private enforcement antitrust dopo il d.lgs.* Pisa: Pacini, 2017.
[16] PERFETTI, L. R. *La dimensione pubblica dei diritti individuali. Il coordinamento degli* enforcement *amministrativi e giudiziali nell'Unione Europea e l'emergere del diritto comune europeo.*

by the private party concerned to be an appropriate form of care for the public interest. If one examines the rules, it will easily be noticed that the legislator – both European or national – does not use any ambiguity as to the public interest function of these judicial activities, since the public nature of the interest is clearly and expressly stated. In a specular manner, there are *quasi*–jurisdictional functions that the legislature has assigned to the public administration: it would suffice to refer to the independent authorities (first and foremost, the antitrust authority), or to the area of the creation of public certainty.

In essence, the care of the public interest – and it has been said that bankruptcy proceedings are imbued with the public interest – can be entrusted to the judge at the initiative of the parties, or to public bodies. As has been observed, there is a progressive alignment of administration and jurisdiction in terms of purposes, protected interests and procedures; it is up to the law to assign functions to one or the other, so that if it can be considered that the evolutionary profiles of the two public functions are thus identified, the two remaining problems – i.e., whether there is a rational in this distribution in relation to the public interest and whether it is effective – assume greater importance.

The regulation of business crises, therefore, is consistent with this graduation of the protection of the public interest.

III. GENERAL INTEREST AND PUBLIC INTEREST BETWEEN AGREEMENTS, LEGISLATION, ADMINISTRATION, AND JURISDICTION

The care of the public interest, therefore, may be assigned by law to different subjects or to a various combination of them. In the case of corporate crises, there are several alternatives.

III.1. The primacy of the private law

The law, first, provides for cases in which the business crisis can be resolved directly by the parties involved, mainly through private law agreements and instruments. These are cases of minor importance and of limited impact on assets and relationships relevant to the public interest.

Just to provide an example, this is the case of the negotiated settlement of the enterprise crisis[18] pursuant to Articles 12–25–*quinquies* of the Business Crisis and Insolvency Code; this is a mechanism designed to provide enterprises in difficulty, also due to the pandemic emergency, with an alternative tool to judicial remedies and aimed at preventing the state of insolvency. The negotiated settlement procedure is assisted by elements of publicity, as it is initiated by an application that can be submitted by the legal representatives of the companies to Unioncamere – a public body – through an access test allowing those submitting the proposal to verify the reasonable suspensibility of reorganization. The negotiated

[17] G. ALPA, G., CATRICALÀ, A. *Diritto dei consumatori*. Bologna: Mulino, 2016.

[18] On the topic, see MICHIELI, N. Il ruolo dei soci nelle procedure di composizione della crisi e dell'insolvenza. *Riv. Soc.* 2021, p. 830; DONATO, I. *La gestione non conservativa della società con patrimonio insufficiente, p.* 796; D'AMBROSIO, C. Le esenzioni da revocatoria nella composizione stragiudiziale della crisi d'impresa. *Giur. Comm.* 2007, p. 364.

settlement takes place under the supervision of an independent advisor who assists in the negotiations to restore economic and financial stability. The management of the company must be conducted so as not to jeopardize the economic and financial viability of the company and 'in the best interests of creditors in the event of emerging insolvency risks. Several measures allow for the consolidation of the company's financial position and favor the use of this tool, such as: the suspension of recapitalization obligations and grounds for dissolution in the event of a reduction or loss of share capital and the possibility for the company to apply to the court for protective measures to protect the company's assets. All these measures must be published in the commercial register. Another crucial aspect is the active incentivizing role of financial institutions, which are invited to participate "actively" in the negotiation process. Negotiations may lead to agreements and resolution tools suitable to overcome the difficulties; otherwise, the company may apply for access to the bankruptcy restructuring procedures provided by the Business Crisis and Insolvency Code. In order to facilitate a timely resolution of the crisis, reporting obligations have been introduced for the supervisory bodies of the companies, which are now required to report to the corporate administrative bodies on the existence of the conditions for access to the negotiated settlement. Moreover, again as a preventive measure, the so–called "certified public creditors" are obliged to report to the administrative bodies of the company if certain exposure thresholds are exceeded – cf. Art. 25 of the Business Crisis and Insolvency Code – and to invite the company to enter a negotiated settlement if the relevant conditions are met.

It is not permissible to harbor any doubts as to the fact that the public interest can also be pursued only by means of private law instruments and in general by consensus, as is expressly inferred from Articles 1, 11 and 15 of the general law on administrative procedure (Law No. 241 of 7 August 1990) and widely supported in doctrine; if, therefore, the public administration itself can pursue the public interest by means of private law instruments, negotiated, nothing can call into question the fact that the law can leave the satisfaction of the public interest to the agreement of private parties.[19]

Where the management of the crisis is left to the agreement of the parties involved, it is easier to identify the public interest with that of the continuation of the business activity and, therefore, the protection of creditors, the prevention of usury, the guarantee of the market and competition – an interest that is expressly public by constitutional provision. The public nature of the interest in the continuation of business activity in conditions of financial adequacy is particularly evident, with public subjects intervening both at its inception, through the test of reasonableness regarding reorganization, and at its conclusion (so that if reorganization is not achieved, it flows into another traditional procedure with the primacy of jurisdiction or administration).

III.2. The primacy of judiciary

It is true that judicial liquidation, pursuant to Article 37, Para. 2 of the Crisis Code, may be brought by "the debtor, the bodies and administrative authorities that have control and

[19] The public purpose assigned to the crisis resolution body is different – it is, in fact, a public body; cfr. DE FILIPPIS, D. La natura pubblica dell'organismo di composizione della crisi. *Giurisprudenza Commerciale*. 2022, p. 494.

supervisory functions over the company, one or more creditors or the public prosecutor", so that the role of the public administration is far from being absent. However, it remains clear that the primacy of judicial liquidation lies with the courts and the declaration takes place with a judgement taken in chambers, after the debtor and the petitioners have been heard in court, the proceedings are conducted by the delegated judge, who supervises the operations and checks their regularity, appoints and dismisses the liquidator and the members of the creditors' committee, draws up the statement of liabilities and declares it enforceable by decree, against which oppositions or appeals may be lodged or revocation petitions may be filed. The administration is not involved at all.

The overall management of the crisis by the judicial authority – by removing it from the purely private agreement governed by the pure autonomy of the parties – certainly also responds to reasons of public interest (the exclusion of the insolvent operator from the market, the guarantee of the financial market and equality among creditors, the prosecution of the company, when its sale is possible, and, therefore, of production) and, however, this interest is already fully defined by the rule, so that there is no reason why it should not be released entirely to the care of the courts alone. The public interest functions of bankruptcy and traditional procedures are extremely simplified, dominated by the criterion of maximum satisfaction of creditors, so that since it is only a matter of enforcement of rules, the judicial function is perfectly suited to the purpose.

III.3. The primacy of executive power.

Public administration shows its primacy in the management of enterprise crisis in various procedures. It seems interesting, here, to focus on receivership and bank resolution; the first is the most important hypothesis of government management of enterprise crisis; the second, the most significant one of management by an authority independent of the government (the Bank of Italy).

It is interesting to observe both procedures because, if like all administratively managed mechanisms, these cases are also characterized by the interests of a very wide range of stakeholders, it will be immediately evident how the extraordinary administration of large companies in crisis suffers from the defect of strong political influence – in turn conditioned by the interest of the company's employees, capable of directly committing the Government; on the contrary, the BRRD procedures,[20] insofar as they are managed by an independent and predominantly technical authority (Bank of Italy), despite possible no less strong political interests, suffer this defect to a lesser extent.

III.3.1. Before addressing the subject, it is worth making a few brief remarks on compulsory administrative liquidation.[21] The compulsory administrative liquidation procedure is entirely administrative, and the public interest cannot be easily identified, because both the Bankruptcy Law and the Company Crisis Code dictate basic rules, which are de-

[20] INZITARI, B. Brrd, "bail in", risoluzione della banca in dissesto, condivisione concorsuale delle perdite (d. lgs. n. 180 del 2015). *Giustizia civile*. 2017, p. 197; DE GIOIA CARABELLESE, P. Bail–in, diritti dei creditori e Costituzione italiana. *Giurisprudenza Commerciale*. 2020, p. 944.

[21] BONFANTE, G. La liquidazione coatta amministrativa. Commento a dec. lgs. 12 gennaio 2019, No. 14 (Codice della crisi d'impresa e dell'insolvenza). *Giurisprudenza italiana*. 2019, p. 2032.

veloped in sectoral laws; to specifically identify the public interest one must therefore refer to the individual sectoral laws.

However, relevant general indications are drawn from the function of compulsory administrative liquidation. In fact, reference may be made to the circumstance that the prerequisite for the procedure is not necessarily a state of insolvency; for example, compulsory administrative liquidation may be initiated either because of exceptionally serious asset losses or for reasons unrelated to the economic performance of the enterprise, such as, for example, administrative irregularities or violations of the law or the articles of association. Evidently, therefore, compulsory administrative liquidation may be initiated for reasons of public interest that differ from time to time, including the guarantee of legality – which is by no means specific to the economic sphere.

The competent authority takes the compulsory administrative liquidation measure – in which the specific public interest will be determined – which is published in the National Official Gazette and entered in the commercial register; the same administrative measure appoints the bodies of the procedure, i.e. the liquidators and the supervisory committee, with the administrative authority's directive and supervisory functions, which oversees the specific area and approves the final liquidation balance sheet with the management account and the distribution plan among creditors. The concurrence of the bankruptcy court is only possible in the case of insolvency.

This is an entirely administrative procedure, with only a possible concurrence of the court, in respect of which the identification of the public interest is only possible with respect to the individual sector law.

In any event, the role of the administrative authorities supervising the company concerned (Art. 316, Company Crisis Code) seems relevant to the determination of the public interest, since it will be significant to ascertain, case by case, what these authorities are, what public interests they are responsible for, and what reasons are put forward in the request for ascertaining the state of insolvency with the opening of compulsory administrative liquidation.

A brief observation must be made with regard to the compulsory administrative liquidation of the banking company,[22, 23] whose importance is also emphasized today by the

[22] ACCETTELLA, F. Il concordato nella liquidazione coatta amministrativa di tipo bancario. *Banca borsa e titoli di credito*. 2020, p. 436; BURIGO, F. Osservazioni in merito al procedimento per la dichiarazione di insolvenza dell'impresa bancaria in liquidazione coatta amministrativa. *Rivista di diritto dell'impresa*. 2020, p. 401.

[23] Recent cases are set forth by the Decrees of the Minister of the Economy No. 186 concerning Veneto Banca and No. 185 concerning Banca Popolare di Vicenza of 25 June 2017, by which the two banks were placed under administrative compulsory liquidation pursuant to Article 83(3) of the Consolidated Banking Act. See certainly, MOLLO, G. La nozione di «controversia» nella disciplina della liquidazione coatta amministrativa delle «banche venete». *Rivista di diritto dell'impresa*. 2020, p. 416; PACILEO, F. Cessioni aggregate, aiuti di Stato e responsabilità della cessionaria: note a margine della vicenda delle banche venete. *Il Fallimento e le altre procedure concorsuali*. 2020, p. 684; MECATTI, I. La responsabilità della banca cessionaria nell'ambito della l.c.a. [liquidazione coatta amministrativa] delle banche venete, per le pretese risarcitorie degli azionisti e restitutorie dei creditori della banca cedente. *Banca borsa e titoli di credito*. 2019, p. 784; BONETTI PAOLO, P. Brevi note sui profili costituzionali dell'interpretazione conforme del decreto–legge n. 99/2017 sulla liquidazione coatta amministrativa di due banche venete. *Rivista di diritto bancario*. 2018, p. 641; DOLMETTA, A. A., MALVAGNA, U. Debiti (non) ceduti e insinuazione al passivo. A proposito delle "banche venete". *Rivista di diritto bancario*. 2018, p. 5; MAFFEIS, D. I debiti delle banche venete: interpretare un contratto che ha funzione di legge. *Le Nuove leggi civili commentate*. 2018, p. 994; RISPOLI FARINA, M. La soluzione della crisi del Monte Paschi di Siena e delle banche venete nell'ambito della procedura di risanamento e risoluzione delle banche italiane. Uno sguardo di insieme. *Studi senesi*. 2018, p. 449.

fact that the assessment of the public interest in subjecting the bank to resolution measures is given precisely by the comparison with the effects of the liquidation of the institution with ordinary insolvency proceedings; in fact, on the basis of the provisions of Article 18, para. 5 of the SRM (EU Regulation No 806/2014, establishing uniform rules and a procedure for the resolution of credit institutions and certain investment firms under the Single Resolution Mechanism and the Single Resolution Fund and amending EU Regulation No. 1093/2010) resolution will be possible and "considered to be in the public interest" insofar as it achieves at least one of the resolution objectives (as set out in Article 14 of Regulation 806/2014), is proportionate to them and if "winding up the institution under ordinary insolvency proceedings would not achieve those objectives to the same extent" (the so–called no creditor worse off clause).[24] In the concrete experiences of bank resolution applied in our country, precisely the assessment of the impossibility of pursuing the same interests, to the same extent, through administrative compulsory liquidation, has been central in the many cases that have been brought before the administrative judge (and then the European Courts and the Supreme Court).

Although bank compulsory administrative liquidation is always qualified in the literature as serving the public interest, it is rare to find a specification of it. From the no creditor worse off clause perspective, on the other hand, it is much easier to identify the relevant public interest profiles, also taking into consideration the fact that, in the face of serious irregularities, the Bank of Italy may order the receivership of the intermediary and not its liquidation. Consequently, the public interest that supports liquidation – the result of which is the dissolution of the company with a better effect on creditors than bank resolution – will be that of the orderly development of the banking services market and the consequent guarantee of the constitutional right to savings and investment (Article 47 of the Italian Constitution), also from the perspective of depositors. In fact, no other public interest in the continuation of business will be pursued in this case – since otherwise resolution would have been possible.

III.3.2. On the other hand, the task is easier in relation to the extraordinary administration of large enterprises in crisis, which has 'the purpose of preserving the productive as-

[24] SALERNO, F. La "liquidazione ordinata" delle banche in crisi. *Banca Borsa Titoli di Credito*. 2021, p. 305; GESMUNDO, V. D. L'insolvenza bancaria al tempo dell'Unione. *Giur. Comm.* 2020, p. 1207; RIZZI, A. La disciplina dell'amministrazione straordinaria nella sistematica della riforma della crisi d'impresa e del diritto concorsuale. *Giurisprudenza Commerciale*. 2020, p. 1267; MINERVINI, E. *Il diritto all'indennizzo degli ex azionisti del Banco di Napoli, S.p.A.* Napoli: Banca Borsa Titoli di Credito, 2020, p. 803; SCIPIONE, L. Aiuti di Stato, crisi bancarie e ruolo dei Fondi di garanzia dei depositanti. *Giur. Comm.* 2020, p. 184; DONATI, I. *Crisi d'impresa e diritto di proprietà*. Dalla responsabilità patrimoniale all'assenza di pregiudizio. *Riv. Soc.* 2020, p. 164; CLARICH, M. La disciplina del settore bancario in Italia: dalla legge bancaria del 1936 all'Unione bancaria europea. *Giur. Comm.* 2019, p. 32; GHEZZI, F., BOTTA, M. Standard di valutazione, interessi nazionali ed operazioni di concentrazione in Europa e negli Stati membri, tra spinte centrifughe ed effetti di spill–over. *Riv. Soc.* 2018, p. 1047; AMOROSINO, S. *I modelli ricostruttivi dell'ordinamento amministrativo delle banche: dal mercato "chiuso" alla* regulation *unica europea*, whose opinion is *«Banca d'Italia had recourse to a wide range of administrative acts and procedures' and the 'foundation of all powers was the public interest in the stability and functionality of the banking market, to be pursued by "governing" the entrances and directing their developments, supervising the sound and prudent management of the institutions and managing any crisis situations', with a proposal that unified the public interest profiles – in my view, an operation that was not always easy when one understands the bank's liquidation*; LENER, R. *Bail–in bancario e depositi bancari fra procedure concorsuali e regole di collegamento degli strumenti azionari*. Napoli: Banca Borsa Titoli di Credito, 2016, p. 287.

sets, through the continuation, reactivation, or reconversion of entrepreneurial activities' (Art.1, Legislative Decree No 270 of 8 July 1999).[25]

III.3.2.1. As is well known, this is a mechanism introduced by Decree–Law No 26 of 30 January 1979 ('Prodi Law') to avoid the bankruptcy of companies of major public interest.[26]

Conceived as a temporary and exceptional instrument, it has been the object of various criticisms over time on the side of the violation of EU rules on State aid,[27] so that it was modified by Legislative Decree No 270 of 8 July 1999, with a drastic reduction in duration, provisions aimed at achieving the rapid identification of a new business structure and the strengthening of creditor protection.[28] Specific reforms[29] were approved for procedures

[25] Costa, E. *L'amministrazione straordinaria delle grandi imprese in stato di insolvenza*. Torino: Utet, 2008; RICCI, E. F. Procedure liquidatorie, procedure conservative e tecniche di individuazione del patrimonio (a proposito di 'ristrutturazione' nella nuova amministrazione straordinaria). *Giurisprudenza Commerciale*. 2001, Vol. 1, p. 35 ; CASTAGNOLA, A., SACCHI, R. *La nuova disciplina dell'amministrazione straordinaria delle grandi imprese in crisi in stato di insolvenza*. Torino: Giappichelli, 2000; BIANCA, M. *L'amministrazione straordinaria delle grandi imprese in stato di insolvenza dopo il d.lg. 12 settembre 2007*. Torino: Utet, 2008; ROSSI, A. Il programma nell'amministrazione straordinaria delle grandi imprese insolventi. *Giurisprudenza Commerciale*. 2001, Vol. III, p. 356; STASI, E., ZANICHELLI, V. *"Grandi procedure" non solo per le grandi imprese*. Milano: Ipsoa, 2010; MARTINO, R., MONTANARI, M. La nuova amministrazione straordinaria delle grandi imprese in crisi: il dibattito continua. *Giustizia Civile*. Vol. II, p. 115; NAPOLEONI, V. Amministrazione straordinaria delle grandi imprese in stato di insolvenza: i chiaroscuri della riforma. *Nuove leggi civili commentate*. 1999, Vol. I, p. 112; DANOVI, A., MONTANARO, C. L'amministrazione straordinaria delle grandi imprese in stato di insolvenza: primi spunti di verifica empirica. *Giurisprudenza commerciale*. 2010, p. 245; MELUCCO, A. *L'amministrazione straordinaria. Trattato di diritto delle procedure concorsuali*. Torino: Giappichelli, 2001, p. 776; FRASCAROLI SANTI, E. *Il diritto fallimentare e delle procedure concorsuali*. Padova: Cedam, 2012; RIZZI, A. La disciplina dell'amministrazione straordinaria nella sistematica della riforma della crisi d impresa e del diritto concorsuale. *Giurisprudenza commerciale*. 2020, p. 1267.

[26] COLESANTI, V., MAFFEI ALBERTI, A., SCHLESINGER, P. Provvedimenti urgenti per l'amministrazione straordinaria delle grandi imprese in crisi. *Nuove leggi civili commentate*. 1979, p. 705; ALESSI, G. La crisi dell'amministrazione straordinaria. *Banca, borsa e titoli di credito*. 1982, Vol. I, p. 449; MINERVINI, G. L'amministrazione straordinaria delle grandi imprese in crisi. *Giurisprudenza commerciale*. 1979, p. 617; MILLOZZA, G. La crisi dell'amministrazione straordinaria delle grandi imprese in crisi, in Diritto fallimentare. 1981, 276; Bonsignori, A. *L'amministrazione straordinaria delle grandi imprese in crisi*. Padova: Cedam, 1980; Gambino, A. Profili dell'esercizio dell'impresa nelle procedure concorsuali alla luce della disciplina dell'amministrazione straordinaria delle grandi imprese in crisi. *Giurisprudenza commerciale*. 1980, Vol. I, p. 559; Id., Gli interessi coinvolti nella crisi dell'impresa. *Fallimento*. 1982, 386; Oppo, G. Profilo sistematico dell'amministrazione straordinaria delle grandi imprese in crisi. *Rivista di diritto civile*. 1981, Vol. I, p. 233; Id., Sistematica dell'amministrazione straordinaria e l. 1982, No. 119. *Rivista di diritto civile*. 1982, Vol. II, p. 478; Guerra, P. Sulla tutela dei creditori nella procedura di amministrazione straordinaria. *Rivista delle società*. 1982, p. 107; TARZIA, G. I creditori nell'amministrazione straordinaria. *Giurisprudenza commerciale*. 1982, Vol. I, p. 727.

[27] On *Ecotrade* decision, EC Court of Justice, 1 December 1998, C–200/97, BISCARETTI DI RUFFIA, C. Compatibilità dell'amministrazione straordinaria delle grandi imprese in stato di insolvenza con l'ordinamento comunitario. *Diritto dell'Unione Europea*. 2005, p. 485; DE CESARI, P., MONTELLA, G. *Il nuovo diritto europeo della crisi d'impresa*. Torino: Giappicchelli, 2017. See also, Constitutional Court, 21 April 2006, No 172, *Foro italiano*. 2006, Vol. I, p. 1638.

[28] On the relationship between these special disciplines and ordinary discipline, Jorio, A. Riflettendo sul pensiero di Francesco Vassalli e sull'imperscrutabile futuro per le soluzioni concordate delle crisi d'impresa. *Giurisprudenza Commerciale*. 2021, p. 1025 (previously, Id., Le crisi d'impresa. Il Fallimento. *Trattato di diritto privato*. cit.) RIZZI, A. La disciplina dell'amministrazione straordinaria nella sistematica della riforma della crisi d'impresa e del diritto concorsuale. *Ivi*. 2020, p. 1267; recently, ABRIANI, N. La crisi dei gruppi di imprese tra composizione negoziata e Codice della crisi. *Rivista di diritto commerciale*. 2022, p. 391.

[29] ARATO M. E., DOMENICHINI, G. *Le proposte per una riforma della legge fallimentare. Un dibattito dedicato a Franco Bonelli*. Milano: Giuffrè, 2017.

with greater industrial or social effect – such as the Parmalat, Alitalia and ILVA cases.[30] The influence of the government's political decisions is enormous, given that the procedures take place under the direction and control of the Ministry of Economic Development and are qualified as an 'instrument of industrial policy'.

Recourse to this procedure requires verification of the eligibility conditions – relating to the number of employees and the extent of indebtedness – and of the concreteness of the prospects for economic rebalancing – which will be achieved through the sale of company complexes, on the basis of a one–year business continuation programme; economic and financial restructuring on the basis of a two–year recovery programme; disposal of assets and contracts on the basis of a one–year (extendable to four) business continuation programme for companies operating in the essential public services sector. The bankruptcy court participates in some stages of the procedure, for example declaring insolvency with a judgment and appointing a judicial commissioner[31] who sends the Ministry of Economic Development a report on the causes of the crisis and the prospects for economic rebalancing; on the opinion of the Ministry of Economic Development, the court admits or not the company to extraordinary administration. If the company is admitted, it is up to the Ministry of Economic Development to appoint commissioners to manage the company, updating the Ministry of Economic Development of their activities and requesting the Ministry to approve the programme and authorize the performance of acts aimed at implementing the programme or constituting its prerequisites.

However, the intervention of the judiciary is not always required, given that in the cases governed by Decree–Law No. 347 of 23 December 2003, the procedure may be commenced by the Ministry of Economic Development and the declaration of insolvency by the Court may also intervene subsequently.

In any event, only after the authorization of the Ministry of Economic Development do the extraordinary commissioners transmit the programme to the Court, indicating whether it contains specific news or forecasts whose disclosure could prejudice its implementation. The delegated judge orders the filing of the programme with the registry, with the exclusion of the 'confidential' parts. The periodic reports are also transmitted by the commissioners first to the Ministry of Economic Development and then filed with the clerk's office. The delegated judge's role in the administrative phase of the extraordinary administration (therefore if and until the bankruptcy of the large enterprise is declared) is very limited: to the formation of the state of liabilities (in relation to each claim the ex-

[30] With regard to the Parmalat crisis, Decree–Law No 347 of 27 December 2003, converted into Law No 39 of 18 February 2004, and amended by Decree–Law No 119 of 3 May 2004, in turn converted into Law No 166 of 5 July 2004, and, subsequently, by Decree–Law No 22 of 28 February 2005, converted into Law No 71 of 29 April 2005. 166 of 5 July 2004 and, subsequently, by legislative decree no. 22 of 28 February 2005, converted into law no. 71 of 29 April 2005; as regards Alitalia, legislative decree no. 134 of 28 August 2008, converted into law no. 166 of. 27 In: *mimit.gov.it* [online]. 31. 12. 2021 [2023-06-06]. Available at: <https://www.mise.gov.it/images/stories/documenti/2021_DICEMBRE_270_solo_grafico.pdf>; In: *mimit.gov.it* [online]. 31. 12. 2021 [2023-06-06]. Available at: <https://www.mise.gov.it/images/stories/documenti/2021_DICEMBRE_347_solo_grafico.pdf>.

[31] Appointments that have given rise to much criticism in the past, making it necessary to issue rules. On the current criteria for the appointment of commissioners see Ministry for Economic Development. In: mimit.gov.it [online]. [2023-06-06]. Available at: <https://www.mise.gov.it/images/stories/normativa/Direttiva_organi_amministrazioni_straordinarie_13_05_2021.pdf>.

traordinary commissioners issue their proposal of admission or not); to the issuance of the order to deposit the distribution project in the registry; to the authorization of the distribution of assets; to the identification of the parts of the programme authorized by the Ministry of Economic Development to be kept secret because they are confidential. Extremely limited powers, given that authorization and verification of the correct implementation of the programme are totally removed from the sphere of the delegated judge.

Based on the provisions of the law, therefore, profiles of public interest can – by way of pure interpretation – be identified, but this is not clearly identified. It seems, therefore, useful to look for elements of guidance in practice.

III.3.2.2. From this point of view, the contrast between delegated judges and extraordinary commissioners in the 2008 Alitalia extraordinary administration procedure seems significant. Expressing their opinion on the half–yearly reports, the delegated judges of the Court of Roma, with a measure of 10 October 2012, intervened – on the basis of the "power to make findings and/or request additions" – complaining about discontinuity and inadequacies in the conduct of actions for revocation and – by virtue of the "power of procedural direction" – the approach, different from that of the previous extraordinary commissioner, of the liability actions, with the consequent invitation to the commissioners to report on the revocatory and liability actions, as well as to promptly prepare the distribution plans and, in the exercise of the delegated judge's powers, to subtract from secrecy the items relating to the revocatory actions. The timely response of the commissioners is mainly focused on the "de–jurisdictionalization" of the proceedings, so that the control powers lie with the Ministry of Economic Development – through the Supervisory Committee – and not with the judicial authority; the commissioners, listing the competences of the judicial bodies and those of the Ministry of Economic Development, essentially reject the requests of the delegated judges, considering them undue – even though they report on the issues that the Court had requested. In the face of the affirmation of the essentially purely administrative nature – with occasional and limited jurisdiction of the jurisdictional authority – contained in the commissioners' reply, the Court makes some observations of particular interest.

First, in defending the perimeter of its alleged competences, it is clear – although not explicit – that these are asserted to be the responsibility of a jurisdictional body – the delegated judge – but do not connote the exercise of a jurisdictional function. Explicitly, however, the competences in question are qualified on the basis of the principles proper to administrative activity. The decree of the delegated judges of the Tribunal of Rome of 21 December 2012, in fact, expressly highlights "the need for the delegated judge in the proceedings in question to carry out a sort of formal and substantive legitimacy check on the proper conduct of the extraordinary administration in its progressive procedure, which must always be in accordance with the canons of transparency and the constitutional values of impartiality and good performance of the public administration (Article 97 of the Italian Constitution)". Regardless of the many inaccuracies in the statement (impartiality and good performance are rules and not values, extraordinary commissioners are not public administration in the subjective sense, the control of legitimacy of the administration's acts is the responsibility of the administrative judge and that of the activity, in the very limited cases in which it survives, is provided for by law), the acceptance of the only administrative nature of the procedure is clear, with the Court's attempt to derive

a role of control of legality. In any case, the decree, referring again to the competences of the Court, av–verts the need to affirm that the "power of the ordinary judge assumes the widest possible extension in all the matters reserved to it" even if it admits "the relevance of the public interest that justifies the divergence from the schemes of bankruptcy, the position of private individuals with respect to the management choices represented in the programme is generally of legitimate interest (administrative jurisdiction)". However, by qualifying the nature of the half–yearly report, the role of the judge in the function of controlling legality is emphasized.

If the contrast just referred to appears, clearly, significant between the bodies of the extraordinary administration and indicative of the importance of the public interest, however, it does not allow significant indications to be drawn as to its content. In other words, having taken the importance of the public interest for granted, no clarification is provided as to its content.

III.3.2.3. In view of the scarce results obtained by observing the practice, it seems useful to verify how case law has understood the subject. It is rather easy to record a constant affirmation of the recurrence of the public interest in this procedure and of its primacy over that of the creditors.

The affirmation of the primacy of the public interest, to the detriment of that of the creditor class, is constant and long standing.[32] The public interest profile that is fundamentally highlighted is that of the preservation of companies under extraordinary administration for the purposes of their reorganization.[33] The functionalization of the procedure to the preservation, reorganization and continuation of the company[34] – identified as a task of public interest – is always affirmed in the face of the possibility, even only abstractly, of achieving such a result, so that this "entails the application of a peculiar discipline, in which the elimination of the company from the market or its recovery is managed directly by the administration, in consideration of the particular relevance of its

[32] It is sufficient to recall the decision of the Court of Appeal of Rome, 28 January 1981 for which "the new institution of extraordinary administration was conceived in view of the possibility of restoring, in the public interest, vitality and efficiency to a group of companies", so that the public interest connotes the entire procedure; Later on, the Court of Rome, 3 November 1983, in considering the exceptions of constitutionality of the entire law 95/1979 to be manifestly unfounded, affirmed that "the exclusion of bankruptcy of companies whose fate is linked to collective interests, and the limitation on the exercise of creditors' rights are adequately justified by the public interest and the aspects of relevant social importance concerning employment, production and indebtedness to social security institutions and credit companies" (on the issues of constitutionality, however, see also Cass. Civ. 6 February 2013, no. 2782; Civ. Cass. 18 March 2008, no. 7263; Civ. Cass. 19 September 2006, no. 20259).

[33] *Verbatim*, T.A.R. Lazio, Rome, sec. III, 16 July 2004, no. 6998 that, in relation to the unitary management of the group's crisis and the attraction of the subsidiaries in the parent company's procedure, clarifies "that, given the public interest in the preservation of the companies in extraordinary administration for the purposes of their reorganization, there is an obvious and undeniable need not to disperse the underlying economic value of the group, which cannot be effectively achieved without a single insolvency procedure and a unitary management of all and each of its companies, regardless of the size of the 'daughter' companies".

[34] According to Council of State, section VI, 27 December 2011, No. 6825, the specific management powers of the company and the assets of the insolvent entrepreneur are ensured to the commissioners "for the purpose of public interest pertaining to the preservation of the productive assets, by means of continuation, reactivation or reconversion of the entrepreneurial activities".

activity from the collective point of view",[35] so that the bankruptcy discipline itself is derogated "in the light of the public interest underlying the extraordinary administration, which prevails over the interest of the creditors' class".[36] Once the profile of public interest in the continuation of the business has been identified, as an objective capable of instrumentally guaranteeing a public interest profile, case law finds room to reduce its relevance in vices in which the continuation of the business is excluded, so that the creditors' claim would otherwise be subordinated to the public interest.[37] In essence, case law affirms the prevalence of the public interest, declining it along the lines of the preservation of the business activity, essentially identifying the public interest with the "purposes of preserving the productive assets, by means of the continuation, reactivation or reconversion of the entrepreneurial activities" (Art. 1, Legislative Decree No 270 of 8 July 1999); it is a prevailing interest with respect to that of the company's creditors, destined simply to succumb – in whole or in part – with respect to it, according to much of the case law of the ordinary courts[38] or to have to be balanced with the public interest, according to the canon normally used by the administrative judge.

Jurisprudence, as frequently happens,[39] limits itself to identifying the public interest in a generic manner by referring directly to the text of the law, without describing it in detail. However, once the public interest has been qualified as that of the continuation of the

[35] Civil cassation, sec. I, 27 December 2005, No. 28774.

[36] Ibid., Civil Cassation, Sec. I, 27 December 2005, No. 28774.

[37] Actually, Court of Piacenza, sec. bankruptcy, 22 March 2013, seems to consider that the extraordinary administration can be ordered only to the public interest for the hypothesis of the continuation of the business activity, while – corresponding to a greater breadth of powers of the Tribunal in the opposition to the approval of the arrangement, with an assessment of merit – "in the hypothesis in which the procedure is not aimed at the preservation of the business activity but to the elimination of the same from the market"; in fact, 'in consideration of the particular relevance of the continuation of the business activity from a collective point of view, it is plausible that the public interest underlying the extraordinary administration is pursued by the administrative authority also with the related sacrifice of the competing interests of creditors; if, on the other hand, the pursuit of the public interest leads to the conclusion that the liquidation of the company under extraordinary administration is necessary, it seems reasonable that the consideration of the correspondence of the arrangement solution to the public interest does not exhaust the list of interests that are relevant, taking into account those expressed by the competing creditors by means of the formal oppositions to the judicial approval of the proposal of composition" – so that the statement seems correct only if the public interest is considered, in the procedures aimed at the prosecution of the business activity, as a synthetic place that contains, albeit in the subordinate, the claims of creditors to be balanced with other profiles of immediate public protection.

[38] Court of Palermo, insolvency section, 5 April 2013, in relation to the crisis of AMIA S.p.A. under extraordinary administration and AMIA Essemme S.r.l., so that the public purpose of preserving the business in the interest of the economy and of safeguarding employment levels would entail a balancing of the distinct interests involved in the light of the clear prevalence of the public interest over that of the creditors. The conservative purpose of the business would, in fact, radically differentiate the extraordinary arrangement from the bankruptcy arrangement, thus requiring that the rules on bankruptcy arrangements and those on compulsory administrative liquidation be made applicable only insofar as they are compatible. According to the Court of Palermo, this authorizes the derogation from the principle of par condicio creditorum and respect for legitimate causes of pre–emption, excluding that the debtor's entire assets can be allocated to the satisfaction of all creditors, since in the case of an extraordinary restructuring agreement, only that portion of the debtor's assets that is not necessary for the continuation of the business activity will be allocated to creditors. According to the Court, "the objective of the restructuring would legitimize the subtraction from creditors of part (even a substantial part) of the debtor company's assets".

[39] For discussions on the topic, PERFETTI, L. R. Cerbero e la focaccia al miele. Ovvero dei pericoli del processo amministrativo e delle sue mancate evoluzioni. *Il Processo*. 2020, p. 429.

business – giving prominence to that of creditors insofar as it is not opposed to the prevailing interest of the continuation of the business – it allows the emergence of "aspects of significant social importance" such as "employment, production and the borrowing towards social security institutions and credit companies;"[40] these are profiles that do not exhaust the declination of the public interest, which requires the enhancement of further profiles, such as those relating to the proper functioning of the market, the protection of the environment and the territory.

III.3.2.4. A more complete understanding of the importance of the public interest derives from the mechanics indicated by the law. It is well known that the central element of the law's provisions is the drawing up and approval of the programme, which indicates the activities to be continued and disposed of, the disposal of non–functional assets and the related procedures, the economic and financial forecasts regarding the continuation of the company's operations, the procedures for covering financial requirements, including public financing or facilities, the recapitalization forecasts and changes to the business structure, together with the timing and procedures for satisfying creditors. The programme will have to be authorized, by the Ministry, so that the public interest profiles subject to the government's appreciation must already be included therein, so that they can be appreciated and approved – with the consequences that the rules set forth in Articles 56 to 68 regulate. Except for the hypothesis of a different closure of the proceedings, converting into bankruptcy, the subsequent ministerial approvals relate to the progress of the execution of the programme and its completion with the approval of the budget and the required reports. Also in this case – as for the no creditor worse off clause in the banking resolution – further significant elements for the determination of the public interest derive from the comparison with the alternative hypotheses; in the case of extraordinary administration, the conversion into bankruptcy is determined when it proves impossible to pursue the objectives of the programme which, as such, are structurally further and different from the protection of the creditors – for which recourse to bankruptcy would be sufficient.

III.3.3. It emerges, therefore, structurally, from the mechanism described by the rules, the prominence of interests other than those of creditors and, in particular, of public interests that can be, therefore, linked to two distinct criteria.

Generally speaking, based on the provisions relating to the requirements for recourse to extraordinary administration – *i.e.* the size of the workforce and indebtedness as well as the concreteness of the prospects of economic rebalancing – the link to industrial policy and the protection of employment and the financial market appears evident and correct. These are functions that must be read in connection with the protection of fundamental constitutional rights (to work – Article 4 of the Constitution; to savings – Article 47 of the Constitution; to economic initiative – Article 41 of the Constitution), so that the continuation of the company and the governmental authorizations cannot be justified in a generic way by being an "instrument of industrial policy;" rather, ministerial approvals must (under penalty of illegitimacy) appreciate the elements of the plan that make the rescue of the company

[40] Court of Rome, judgment of 3 November 1983.

consistent with these fundamental rights. There is no legal, let alone constitutional, basis for considering that authorizations and the exercise of supervisory functions can be the expression of purely political assessments or wide discretion;[41] rather, it is a matter of discretionary evaluations (and to a large extent of technical discretion) that are widely open to scrutiny as to the consistency of the plan and, therefore, of the authorization, with the safeguarding of the fundamental rights that the legislation in particular protects through the provision of the instrument to achieve "the conservation of the productive heritage, by means of the continuation, reactivation or reconversion of entrepreneurial activities".

Moreover, from a second and more particular point of view, the public interest to be appreciated in government approval will be linked to the specific field of action of the enterprise. It seems to me that there are serious reasons for considering as a public service the business activity that – freely or because it is subject to public regulation according to the various rules contained in Article 41 of the Constitution. – produces goods or services functional to the enjoyment of fundamental rights.[42] From this perspective, the continuation of the undertaking producing such goods or services is in the public interest – and this interest is characteristic of and specific to certain undertakings and distinct from the general interest mentioned above. Similarly, further specific profiles of public interest dependent on the individual enterprise may emerge from the protection of other fundamental rights of constitutional rank, such as those to health or the environment.

As we can see, from a normative and dogmatic point of view, there are no reasons to assume a broad discretionary – or, essentially, political – power of the government when it exercises functions and powers provided for by law, since the public interest is by no means the result of esoteric evaluations of the individual official who, from time to time, performs the functions of Minister.

III.3.4. On the other hand, the discipline of extraordinary administration in the banking sphere is peculiar, since the fundamental prerequisite is the existence – ascertained by an administrative authority such as the Bank of Italy – of "serious violations of legislative, regulatory or statutory provisions or serious irregularities in administration or when the deterioration of the bank's or banking group's situation is particularly significant", in addition to the provision of "serious losses of assets" and the reasoned request by the administrative bodies or by the extraordinary shareholders' meeting.[43] The regulation, which is no different from the previous one,[44] apart from minor issues with regard

[41] As, on the other hand, is mostly believed; *e.g.*, AMOROSINO, S. *I modelli ricostruttivi dell'ordinamento amministrativo delle banche: dal mercato "chiuso" alla* regulation *unica europea*. p. 391.

[42] I tried to theorise this interpretation in *Contributo ad una teoria dei pubblici servizi*. Padova: Cedam, 2001; futher I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità. *Diritto pubblico*. 2013, p. 61.

[43] CAPRIGLIONE, F. *Commento all'art. 70*, in Id. (a cura di e con M. Pellegrini, M. Sepe e V. Troiano) *Commentario al testo unico delle leggi in materia bancaria e creditizia*. Padova: Cedam, 2012, t. II, p. 858; CANALE, C. L'accertamento dell'insolvenza delle banche alla luce della (nuova) disciplina europea sulla gestione delle crisi bancarie: ritorno alla tradizione tramite l'innovazione? *Banca borsa e titoli di credito*. 2020, p. 275; FALCONE, G. "Stato di dissesto" e "insolvenza" nella liquidazione coatta amministrativa delle banche. *Il Fallimento e le altre procedure concorsuali*. 2019, p. 233; SOLINA, O. I poteri del Mef nella procedura di "amministrazione straordinaria" delle banche. *Giornale di diritto amministrativo*. 2016, p. 263: SEMINARA, L. Amministrazione straordinaria delle banche: condizioni e competenze delle Autorità creditizie. *Banca borsa e titoli di credito*. 2015, p. 289.

to the relevance of public powers,[45] is directed in a peculiar sense – for the profiles that are of interest here.

In fact, it is not difficult to understand how the specific public interest is that of the regularity of the management of the banking company, not only with regard to the regularity of its actions but, more significantly, with regard to the "particularly significant" deterioration of the "'situation of the bank or banking group", with an obvious allusion to the managerial consistency with the "sound and prudent management" of the bank's bodies, which are susceptible to mismanagement due to excessive internal conflict or subservience to other interests – of stakeholders or entirely external to the intermediary.[46] The absence of parameters to distinguish "severe" from "exceptionally severe" losses has been pointed out by many.[47]

This is an element that certainly broadens the technical discretion (it is not seen for what reason it should be, instead, deemed administrative and, in addition, broad) of the Bank of Italy and the Ministry, but it does not alter the profile of recognizability (and, therefore, reviewability) of the public interest. It is, as is frequently the case, only the use of general clauses by legislation,[48] which, moreover, also occurs with reference to the provision concerning the "deterioration of the situation" of the intermediary, qualifying it as "particularly significant". Precisely for this reason, precisely because of the fact that the legislature uses general clauses to identify the relevant public interest profile that legitimizes the exercise of administrative powers, if one wishes to avoid them turning into forecasts with bonne à tout faire tasks, it becomes of central importance to understand which public interest profiles the power is functional to, in order to render its exercise objective[49] and reviewable.

In this perspective, the central element is that of contrast with sound and prudent management, brought about through the conflictual nature of the organs (which is accompanied by or alternatively) functionalization of decisions to interests other than those proper to the intermediary. It is, therefore, a provision that is not limited to guaranteeing the bank's financial stability or compliance with the rules of objective law, but also affects the hypothesis of the institution's lack of good governance. The compression of entrepreneurial and directors' autonomy is therefore evident, as a direct consequence of the direct

[44] NIGRO, A. Amministrazione straordinaria delle banche e giurisprudenza amministrativa: qualcosa si muove? *Banca borsa e titoli di credito*. 2001, p. 390 – and, ID., Amministrazione straordinaria delle banche e giurisprudenza amministrativa: ritorno al passato?, *ivi*, 2003, p. 106.

[45] Such as the boundaries of the applicability of the general law on administrative procedure, on which, CAPRIGLIONE, F. *Commento all'art. 70*. p. 867; more extensively, commenting on Consiglio di Stato, sez. IV, 11 November 2010, No. 801, MOLINTERNI, A. Vigilanza creditizia e diritto amministrativo nella fase di avvio della procedura di amministrazione straordinaria delle banche. *Foro amm. CDS*. 2011, p. 1914.

[46] CAPRIGLIONE, F. *Commento all'art. 70*. p. 868; CERULLI IRELLI, V. Crisi bancarie: i provvedimenti amministrativi e i loro effetti. In: Maria Teresa Cirenei – Gian Candido De Martin (eds.). *Il sistema creditizio nella prospettiva del Mercato Unico Europeo*. Milano: Giuffrè, 1990, p. 165; ROSSI, M. *sub art. 70*, *Commentario breve al Testo Unico Bancario*. a cura di Costi–Vella, Padova: Cedam, 2019, p. 380.

[47] BOCCUZZI, G. *La crisi dell'impresa bancaria*. Milano: Giuffré, 1998, p. 153.

[48] On the relationship between general clauses and administrative power, for the sake of brevity only, let me refer to PERFETTI, L. R. Discrezionalità amministrativa, clausole generali e ordine giuridico della società. *Dir. amm.* 2013, p. 299, ID., Per una teoria delle clausole generali in relazione all'esercizio dei pubblici poteri. Il problema dell'equità. Giur. *It*. 2012, Vol. III, p. 1213.

[49] BELLAVISTA, M. *Oggettività giuridica dell'agire pubblico*. Padova: Cedam, 2001.

and proper legal importance of the interests of savers,[50] investors, and the market, insofar as these – by resorting to banking services – put in place acts and negotiations functional to the enjoyment of rights (fundamental, according to our constitutional system) functional to the exercise of the business or to the satisfaction of rights and claims (to housing, education, rest, etc.) to which the legal system provides for the exercise of the rights and claims (to the home, to education, to rest, etc.).) to which the legal system provides constitutional guarantees and for which the same constitutional protection of savings (Article 47 of the Constitution) is functional. The bank is not just any enterprise,[51] which can be mismanaged because shareholders or directors, as long as they do not violate the law, can fight for its governance even at the cost of worsening production (of services, in the case) or profitability; the bank administers other people's money, performs an essential function in the economic process, finances enterprises or purchases of goods, in other words, it is the place where exercising the rights set forth in Article 47 of the Constitution provides the concrete conditions for the enjoyment of fundamental rights. For this reason, for these reasons of public interest, it can be placed under extraordinary administration, even in the absence of serious losses, if it is shown that its shareholders (in the shareholders' meeting) or directors are not conducting the enterprise in accordance with the function that is consubstantially its own. The aim, therefore, as correctly indicated, that of "reorganizing the credit institution",[52] which explains the breadth of the powers of the extraordinary administration bodies.

III.3.5. The discourse would be incomplete if it did not mention the procedures introduced by the Bank Recovery and Resolution Directive 2014/59/EU (BRRD).[53]

The resulting institutes of resolvability are well known and investigated, and the resolution procedures implemented have allowed problems to emerge and the means to overcome them. It does not serve our discourse to go into detail on these element[54]

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[50] VELLA, C. Proposta di avvio della procedura di liquidazione coatta amministrativa nei confronti delle imprese bancarie e responsabilità degli organi di vigilanza. *Giur. It.* 1990, p. 3, Limits the "specificity of bank bailout intervention instruments to protect savers".

[51] For a shareable approach to the subject, CALDERAZZI, R. La funzione dell'organizzazione nell'impresa bancaria. *Persona e amministrazione.* 2019, Vol. IV, p. 261 – Id., La funzione organizzativa del capitale nell'impresa bancaria. Torino: Giappichelli, 2020.

[52] CAPRIGLIONE, F. *Commento all'art. 72. Commentario al testo unico delle leggi in materia bancaria e creditizia.* p. 889.

[53] WESSELS, B., HAENTJENS, M. *Research Handbook on Cross–Border Bank Resolution.* Cheltenham: Elgar, 2019; DE POLI, M. *Fundamentals of European Banking Law.* Padova: Cedam, 2018; ROSSANO, D. *La nuova regolazione delle crisi bancarie.* Milano: Cedam, 2017; BOCCUZZI, G. *Il regime speciale della risoluzione bancaria. Obiettivi e strumenti.* Bari: Cacucci, 2018; Id., *The European Banking Union, Supervision and Resolution.* London: Palgrave Macmillan, 2016; Rulli, E. *Contributo allo studio della disciplina della risoluzione bancaria. L'armonizzazione europea del diritto delle crisi bancarie.* Torino: Giappicchelli, 2017; CAPRIGLIONE, F. *Crisi bancarie e crisi di sistema. Il caso Italia*, in *Federalismi.it*, 2020, 6, 1; CASSESE, S. La nuova architettura finanziaria europea. Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione dei poteri. *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia.* 2014, p. 19; NIGRO, A. Il nuovo ordinamento bancario e finanziario europeo: aspetti generali. *Giur. Comm.* 2018, p. 181; CECCHINATO, E. L'amministrazione straordinaria delle banche tra vigilanza prudenziale e gestione della crisi. *Riv. diritto bancario.* 2021, Vol. II, p. 303; SALTARI, L. *Che resta delle strutture tecniche nell'amministrazione italiana? Riv. Trim. Dir. Pub.* 2019, p. 249; CAPOLINO, O. The Single Resolution Mechanism: Authorities and Proceedings. In: Mario P. Chiti – Vittorio Santoro (eds.). *The Palgrave Handbook of European Banking Union Law.* Cham: Palgrave Macmillan, 2019, p. 254.

[54] The writer, having dealt directly with such procedures both in and out of court, also has stringent duties of confidentiality, so that the text analyses the topic only and exclusively from the perspective of explaining the general interpretation that is proposed with respect to the various institutions concerning business crises.

As everyone knows, subjecting a bank to resolution means initiating a restructuring process managed by independent authorities aimed at ensuring the continuity of the provision of essential services offered by the bank, restoring conditions of economic viability of the portion of the business resolved through the resolution bodies and liquidating the remainder, in order to safeguard systemic stability, protect customers, and ensure the continuity of essential financial services. The public interest profiles are, therefore, the same as those of extraordinary administration; although the two cases are distinct and the procedures are different, the purposes that the exercise of the power intends to achieve have the same substance.

III.3.6. The observation concerning extraordinary banking administration and resolution procedures under the BRRD rules is useful for the considerations it legitimizes concerning the effectiveness of public intervention. One cannot fail to notice how the role of jurisdiction is substantially absent in the special procedures concerning the banking market (except for the profile of the appealability of public decisions, as for any administrative measure),[55] unlike ordinary procedures, and, however, the degree of efficiency and effectiveness (both on the procedural side and in terms of the consequences of the result), as well as resistance to alterations deriving from political pressures, is extremely higher, almost incomparable. Even in the absence of powers at the head of an authority third to the government, such as the jurisprudence, there is significantly less political influence. The reason for this is to be found in the institutional role and technical expertise of central banks, independent authorities that can resist government influence. If, therefore, one was to envisage a revision of the extraordinary administration in the ordinary sectors, one would have to think precisely of assigning governmental competences to public agencies independent of the government.

III.4. The primacy of legislative

There are, then, on the opposite side, cases in which the intervention of the legislature – normally on an emergency basis and derogating from ordinary procedures – has had the function of managing and resolving the company's crisis. These are hypotheses in which neither the agreement between private parties, nor the courts, nor the administration intervene. The legislator directly, through the law – and any extraordinary bodies that the law provides for – resolves the enterprise crisis.

The hypothesis that we intend to highlight is of particular importance because it constitutes a very serious alteration of the rule–of–law, with the result of removing jurisdictional protection, creating structural inequalities of treatment, altering the functioning of the market, and making the determination of the public interest complex.

These are, eminently, banking crises – or large enterprises of pre–eminent national interest. As regards banking crises, for which ordinary procedures are envisaged (albeit differentiated from normal commercial enterprises), there has been frequent intervention by the Government – with decree–laws – and by Parliament – at the time of conversion

[55] DIMICHINA, F. Brevi considerazioni sul tema del sindacato del giudice amministrativo sugli atti della Banca d'Italia. *P. A. Persona e Amministrazione*. 2021, Vol. VIII, p. 473.

into law – with ad hoc (or tailor–made) laws that introduce rescue measures aimed at taking the banking enterprise out of crisis. Like all tailor–made laws,[56] these are rules of dubious constitutional legitimacy, which limit the jurisdictional defense and are highly suspect in terms of compliance with the rule of equality before the law.[57]

These interventions by the legislature are to be referred to government initiatives. As noted, these are normally decree–laws (later converted into law). In addition, these regulations assign tasks to public (typically the Cassa Depositi e Prestiti)[58] or private entities with which the government itself has reached agreements in principle. It is worth giving some examples to fully understand this legal arrangement.[59]

A first case is that of the Atlante I fund,[60] which saw the intervention of Cassa Depositi e Prestiti and Società di Gestione delle Attività S.p.A., wholly owned by the government (through the Ministry of Finance). The fund took on the role of underwriter of last resort of the new unsubscribed shares issued in the capital increases necessary to rescue Banca Popolare di Vicenza and Veneto Banca – with a subsequent fund, Atlante II, there was the underwriting of junior and mezzanine securities issued as part of the securitization operations, for which it was not possible to grant public guarantees, so that intervention was made – to support the securitization market of impaired loans – with Decree–Law No 18 of 14 February 2016. These interventions were carried out through legislation and concrete actions that were implemented neither by the administration nor by the courts, although the overall direction was undoubtedly by the government. The aims – of public interest – were to ensure the stability and competitiveness of the banking system, to protect depositors, to prevent the impact on small savers of the application of the bail–in and, finally, not to determine harmful effects on the local business system. Only subsequently – and again with ad hoc regulations, such as Decree–Law No. 99 of 25 June 2017 – did the Bank of Italy initiate a procedure for the compulsory administrative liquidation of the two banks, with the continuation of business operations through the sale of the banking business and the purchase of the impaired loans by a company wholly owned by the government.

Also in the case of the Monte dei Paschi di Siena crisis, the legislator intervened directly – with Decree Law 237 of 23 December 2016 – assigning tasks to certain structures of the State or directly traceable to it, so that they would provide a state guarantee on newly issued liabilities and on emergency liquidity disbursement operations carried out by the Bank of Italy as well as the purchase or subscription of newly issued shares for the precautionary recapitalization of the bank.

Even more obvious is the case of Banca Carige S.p.A., for which action was taken by Decree–Law No. 1 of 8 January 2019. Again, this is an ad hoc law. Also in this case, the gov-

[56] PERFETTI, L. R. Massnahmevorschriften and Emergency powers in contemporary Public Law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, p. 23.

[57] PERFETTI, L. R. Legge–provvedimento, emergenza e giurisdizione. *Dir. proc. Amm*. 2019, p. 1021.

[58] For the Court of Auditors (see, *Determination and Report on the result of the audit carried out on the financial management of Cassa Depositi e Prestiti S.p.A. 2017, Determination of 5 February 2019*, No. 9, 56) "The 2017 results reaffirm the central and promotional role played by the CdP Group in supporting the Italian economy, further confirming the company's transformation into a true instrument of industrial policy".

[59] Here again, we will only use indications from public sources, which are entirely independent of the author's professional experience with these procedures.

[60] STANGHELLINI, L. Tutela dell'impresa bancaria e tutela dei risparmiatori. *Banca impresa società*. 2018, p. 436.

ernment, through law, provided for the granting of a state guarantee on newly issued liabilities and loans granted by the Bank of Italy, as well as the subscription of new shares or purchase by the government (Ministry of Finance) to strengthen the bank's capital.

Also, regarding Banca Popolare di Bari,[61] in the face of the banking crisis that began with the commissioner of the bank's bodies by the Bank of Italy for serious irregularities, the government intervened through legislative instruments, with Decree–Law No 142 of 16 December 2019. Also in this case, the law commits companies wholly owned by the State[62] to take on the task of relaunching Banca Popolare di Bari and acquiring its shares.

In all these cases, the involvement of the administration or the jurisdiction is only eventual if not absent. However, the entire operation is under the direction of the government and is carried out through companies wholly owned by the government itself.

The reasons of public interest expressly identified by the government and the publicly controlled companies involved are the protection of savers, the market, the banking system, and the local entrepreneurial system – *i.e.,* the interests of a public stakeholder of the company that is much broader than just creditors.[63]

IV. CONCLUSIONS

In the light of the considerations made so far, some conclusions can be drawn with respect to the problems raised at the beginning.

First of all, as is easy to consider in the light of the provision in Article 41 of the Constitution, the enterprise constitutes an organization that concentrates various profiles of legal importance, some of which are public. The complexity of the organization and the relationships that give rise to the enterprise are not irrelevant to the public interest, so that it may be initiated and conducted in compliance with public limits (Art. 41 Const., para. 1 and para. 2) or be subject to regulation, even dense, aimed at procuring the achievement of social ends (Art. 41 Const., para. 3);[64] it is, therefore, fatal that its extinction is of relevance to those same public interests that affected its birth and ordinary action. In this perspective, it does not seem reasonable to exclude the relevance of the public interest with respect to the events of crisis and extinction of the company.

However, if the ordinary regime for the establishment and operation of a business never excludes the relevance of public interests, for most hypotheses they will be defined entirely by the law (Art. 41 Const., para. 1 and para. 2), so that it is sufficient that the exercise of economic freedom does not conflict with it and is, consequently, authorized. Just as the acts of consent to commence and conduct economic activity are confronted with a public interest clearly identified and detailed by the rules, so that the power is ordinarily expressed through acts of limited discretion (authorizations, clearance, and the like), in the

[61] CECCHINATO, E. L'amministrazione straordinaria delle banche tra vigilanza prudenziale e gestione della crisi. *Riv. dir. banc.* 2021, Vol. II, p. 304.

[62] As Banca del Mezzogiorno MedioCredito Centrale S.p.A., wholly owned by Invitalia S.p.A., owned by the Ministry of the Economy.

[63] MULAZZANI, G. La regolazione dell'attività bancaria tra interesse pubblico e logiche del mercato. *Il diritto dell'economia.* 2020, p. 421.

[64] PERFETTI, L. R. *Contribution to a theory of public services.* Bari: Università degli Studi di Bari, 2020.

same way, with respect to the crisis that leads to bankruptcy or composition with creditors, the public interest is entirely defined by the objective legal system and it appears correct and efficient that its guarantee is entirely the responsibility of the judicial function; it is another matter whether the insolvency procedures as defined by law and applied in practice are actually appropriate and concretely efficient – this is only a problem of regulatory technique, which is not relevant to our problem.

In the exercise of economic freedom, however, the economic operator may give rise to the production of goods and services that constitute essential instruments – directly or indirectly (such as the protection of savings) – for the enjoyment of fundamental rights, or that directly affect them (think of polluting enterprises). In this perspective, the dissolution of such an undertaking is relevant to the public interest in a multiplicity of respects and, above all, there is a concrete interest in avoiding its cessation through reorganization or resolution. Since banks belong by definition to the group of such undertakings, their exclusion from the ordinary procedures established by legislation is easy to understand. The systematic data are quite clearly in this perspective.

However, precisely because of the importance of these enterprises not only for the public interest but, not infrequently, for interests that are politically represented in the organs of government, the observation of practice makes it possible to clearly emphasize how the pursuit of the public interest occurs more effectively and impartially when the administration is (as in the case of the Bank of Italy) an independent authority (from the government).

Finally, it does not seem seriously debatable that for the proper pursuit of public interests it is necessary to distinguish between politics and administrative discretion. In fact, precisely because the legal system provides for procedures that are functional to the public interest and conducted by independent authorities, in recent years there has been a tendency for the government to circumvent them, through a management of banking crises conducted entirely by legislation.

In conclusion, therefore, it is not uncomfortable to observe that the greater importance of the company's activities for the public interest will witness a shift of competence from the jurisdiction to the administration and, at the same time, reveal a tension between the impartiality and objectivity (Art. 97 of the Constitution) of the administration and the aspiration of politics to influence the crisis resolution processes, with respect to which it is easy to denounce intolerable distortions (crisis management by legislation) and indicate preferable solutions (management by independent authorities).

The consequence of the above is that the public interest is always and structurally one of the main purposes of the regime applicable to bankruptcy or corporate crises. It has been shown through the punctual analysis of the various applicable legal provisions that the public interest - albeit with partly constant and partly specific declinations - is always an essential element of the procedure, not infrequently prevailing over that of the creditors. Therefore, the traditional and still widely held idea that the creditors' interest is the only one pursued in crises is unconvincing.