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REGULATORY COMPETITION: TERMS AND CONDITIONS FOR USE[1]

IL MERCATO DELLE REGOLE: CONDIZIONI D'USO

Roberto Sacchi

Abstract: It is normal to raise some doubts regarding the fact that competition between legal orders —not only corporate law rules but also equity market rules — has a strong impact on the economy, in view of the fact that listing and investment choices are made in the prospect of globalisation.The creation of a standardised legal framework, at least in relation to baseline issues, can perhaps permit competition to be concentrated on that which should, definitively, greatly concern investors, or rather economic and financial fundamentals for companies. Alternatively, if one prefers a market for rules, in the hope that this will trigger a *race to the top*, there must be full awareness of the fact— based on experience accrued to date — that this results in the interests of equity investors and debt capital investors with high risk propensity being preferred over those of investors adverse to risk. This awareness should induce any legislator that intends to encourage competitiveness between legal regulations and domestic equity markets, to achieve reasonable balance between the sacrifice of interests penalised and to avoid this sacrifice when (as in the

1 The Italian text of this article is published in *Diritto, etica e mercato*, Milano, 2010, anthology of essays in honour of professor Piergaetano Marchetti.

case of d. lgs. 38/2005 regarding international accounting standards) it is not actually justified by the aims pursued.The legislative choice to clearly establish that composition is a private law matter, providing that votes by creditors represent the very centre of the institution with the aim of encouraging those formulating the proposal to select efficient plans that are capable of producing value, must be accompanied by provisions suitable for guaranteeing minimum necessary conditions so that the creditors can exercise their independent choice, which is represented by the expression of their vote.

Keywords: Regulatory competition vs. standardised legal framework. A market for corporate law, financial markets regulations, accounting standards, rules contained in a composition proposal. Investors with high risk propensity vs. risk-adverse investors.

Sintesi: E' lecito formulare seri dubbi sul fatto che la competizione fra ordinamenti — con riguardo non solo a regole di diritto societario, ma anche a regole di diritto dei mercati finanziari — abbia un forte impatto sull'economia, data la prospettiva di globalizzazione nella quale sono ormai effettuate le scelte di quotazione e anche quelle di investimento.La creazione di una cornice normativa omogenea nelle linee di fondo può forse consentire che la concorrenza si concentri su ciò che, in definitiva, dovrebbe maggiormente interessare agli investitori, ossia sui fondamentali economici e finanziari delle imprese. Ove, in alternativa, si preferisca il mercato delle regole, nella speranza che esso inneschi un circolo virtuoso di *race to the top*, si deve essere pienamente consapevoli che — sulla base dell'esperienza fin qui maturata — questo conduce a privilegiare gli interessi dei fornitori di *equity* e di capitale di debito propensi al rischio rispetto agli interessi di quelli avversi al rischio. Questa consapevolezza deve indurre il legislatore, che intende favorire la competitività della regolamentazione giuridica e dei mercati finanziari nazionali, a collocare su livelli di ragionevole equilibrio il sacrificio degli interessi penalizzati e ad evitare questo sacrificio quando (come nel caso del d. lgs. 38/2005 in tema di principi contabili internazionali) non effettivamen-

te giustificato dagli obiettivi perseguiti. A sua volta la scelta legislativa di connotare il concordato in senso marcatamente giusprivatistico, collocando al centro dell'istituto la votazione dei creditori con l'obiettivo di incentivare chi formula la proposta a selezionare piani efficienti e capaci di produrre valore, deve essere accompagnata da previsioni idonee ad assicurare le condizioni minime necessarie perché possa operare l'autonomia privata dei creditori, di cui la loro votazione costituisce una manifestazione.

Parole-chiave: Mercato delle regole vs. cornice normativa omogenea; mercato delle regole di diritto societario, delle regole di diritto dei mercati finanziari, dei principi contabili, delle regole contenute nella proposta di concordato. Investitori/finanziatori propensi al rischio vs. investitori/finanziatori avversi al rischio.

1. Introduction

There is a widespread belief (or at least there was until the recent financial market crisis) that it would be worthwhile creating competition between legal rules, allowing the market to select the best ones. This not only applies to legislative rules (one only has to think of competition between corporate law for the various US States), but also with reference to rules dictated by individuals, such as clauses of by-laws regulating joint stock companies and those contained in proposals for arrangements with creditors or bankruptcy composition.

It was no coincidence that during the recent reform in Italy of joint stock companies and of bankruptcy procedures there was a significant increase respectively in independence in the drafting of by-laws[2] (above all in *s.r.l.* (limited liability companies) but also in *s.p.a.* (joint stock companies) in particular for those that do not make recourse to capital market risk) and in freedom of choice with regard to the content of composition proposals.

Now is not the time to review an analysis of the well known benefits and risks of competition between legal orders, which can trigger the virtuous circle of a race to the top but can also lead to the vicious circle of a race to the bottom. For example, in Italy at least, independence in the creation of by-laws following the effective date of the t.u.f. (consolidated financial act) does not authorise particular illusions[3], although the laws can however be of value on a pedagogic level[4].

Further, the creation of a standard framework of baseline regulations for companies and the financial markets, as an alternative to a market for rules, could perhaps result in competition concentrating on that which should, definitively, concern investors the most, or rather the economic and financial fundamentals of companies issuing securities traded on regulated markets.

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2 In this regard see for all P. Marchetti, *L'autonomia statutaria nella società per azioni*, in *Riv. soc.*, 2000, pp. 562 ss., whose findings directly refer to the so-called Mirone Project (and to d. lgs. 24 February 1998, no. 58), but which can be extended to the reform implemented by d. lgs. 17 January 2003, no. 6.

3 One only has to think of the choice, which became wide-spread following the effective date of the t.u.f., to reduce the statutory auditors to three, which under the original regulations meant that one statutory auditor alone would represent the minority (article 148 (2) of the original version), and as such would be devoid of powers to call a shareholders' meeting, board of directors meeting or a meeting of the executive committee, and of the power to seek the collaboration of company employees (these powers are reserved by article 151 (2) of the original version to the board of statutory auditors or at least two auditors).

4 In other words, and in the absence of excessive illusions, any change which leads us closer to the market and cultural characteristics of a capitalist system that is more mature and more advanced than our own, can in some way be favoured by legislative choices inspired by these systems. These choices alone are in all probability insufficient to change the characteristics of Italian capitalism, but may benefit the evolutionary process.

In fact, community choices appear to go against the trend of the creation of a market for rules: they aim not to create competition between Member States' legal orders but rather to create a common legal framework, at least with regard to baseline matters. This trend in fact seems to go beyond the confines of the European Union, with an attempt to create generally accepted standards at a global level in (at least) all of the most advanced capitalistic Countries. One only has to think of attempts to create global legal standards[5] following the recent crisis that disrupted the financial markets.

In this article — and without in any way questioning in general terms theories that consider a market for rules a value to be pursued — I intend to highlight certain errors that are easily made on pursuing the aim of competition between rules; for this purpose it is useful to examine recent Italian reforms and an important US document, the *Interim Report* by the *Committee on Capital Markets Regulation* (a committee desired by the US Secretary Paulson) dated 30 November 2006[6], proposing a loosening of rules under the *Sarbanes-Oxley Act.*

2. A market for corporate law

Primarily I will consider the reform to joint stock companies implemented by way of d. lgs. 12 January 2003, no. 6, which declare-

5 Moreover, prior to the crisis and in relation to international accounting standards, the second preamble of EC regulation no. 1606/2002 issued by the European Parliament and Council on 19 July 2002 stressed the need for "an increasing convergence of accounting standards currently used internationally with the ultimate objective of achieving a single set of global accounting standards". See also the sixth preamble of European Commission Regulation no. 1787/2006 4 December 2006, which acknowledges that the Committee of European securities regulators considered that the GAAP of Canada, Japan and the United States are equivalent to the IFRS adopted pursuant to article 3 of EC Regulation no. 1606/2002 (subject to remedies such as additional disclosures and in some instances supplementary financial statements).

6 Available on the web-site www.capmktsreg.org at http://www.capmkts-reg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

dly proposed to ensure that Italian corporate law was competitive with that of the other principal capitalistic countries[7].

In fact it is no coincidence that article 2 of the *legge di delega* (l. 3 October 2001, no. 366) on listing the general principles underlying the reform, primarily lists the pursuit of a priority objective, or rather encouragement of the establishment, growth and competitiveness of incorporations, also through their access to domestic and international capital markets.

Costs linked to a loosening of regulations and a reduction in the mandatory nature of such regulations are therefore justified by the need to equip Italy with legal standards that are competitive with those of the most advanced capitalistic countries and are capable of ensuring that Italian investors remain in Italy, whilst also attracting foreign investors.

It is then necessary to consider the matter of the creation, within the European Union, of a market for corporate law rules analogous to that existing in the U.S.A. In truth, this possibility clashes primarily (but not only) with language and culture barriers which, at present, characterise Europe and deeply differentiate the situation from that in the USA, despite the fact that this situation is developing (for example I would not underestimate the effects that could be achieved in the medium term following, to cite extremely different phenomena, inter-university student exchanges and the diffusion of international legal networks).

In truth it has been found that in Europe there is a *Market for Incorporation* and not a *Market for Reincorporation* and that this mar-

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7 In truth, prior to d. lgs. 6/2003 developments in rules governing savings shares are emblematic of the radical change in fundamental legislative options under Italian corporate law, from Law no. 216, 7 June 1974 — establishing the minimum content of privileges based on analytical and mandatory rules — to d. lgs. 58/1998, whereby the only limit on the format in the by-laws of quantitative and qualitative characteristics of privileges appears to be the need for savings shares to be qualifiable as corporate stakeholdings and compatible with characteristics of a s.p.a. (“società per azioni”, i.e. the Italian share capital).

ket is *Rules-based* and not *Cost-based*; in other words it has been highlighted that in the USA the choice of establishing a registered office outside the territory of a State is normally made by large-scale enterprises, which often transfer their registered office in view of important corporate events (such as listing), and this choice is based on considerations relating to the commercial attraction of rules, including not only primary and secondary regulations, but also all that which contributes to defining the characteristics of the law applied. Therefore, for example, including case law choices, the level of efficiency of the judicial system and the rate of effectiveness of standards and enforcement; in Europe on the contrary, the decision to establish a registered office outside the State territory is still really only taken by small enterprises upon incorporation and based principally on considerations regarding incorporation costs[8].

Aside from this, when it is claimed that competitive corporate law results in the stimulation of domestic and foreign investments in "Italian" companies, it is worth reflecting on the notion of an Italian company.

In fact this would only make sense if Italian corporate law was applicable to all companies that actually have an office responsible for administration and operations in Italy. If however the criterion for resolving conflict between domestic corporate laws is that of the place of incorporation of the company, it is clear that in order to attract investments it would be sufficient to locate the registered office of the company in a Country whose corporate law is considered "attractive", leaving only administrative activities and operations in Italy. In this second event, the effect that competitive corporate law can have on the development of an economy is extremely limited. Therefore the identification of the criterion used to resolve the conflict between legal orders is decisive.

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8 In this regard see M. Ventoruzzo, *"Cost-based" and "Rules-based" Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U.*, 3 *NYU Journal of Law & Business*, pp. 91 ss. (2006).

If this is the case, the need to "keep up" in the competition between legal orders appears to have been completely rationalised by decisions issued by the European Court of Justice (in particular decisions on the following cases: Centros, Ûberseering and Inspire Art[9]), whereby on protecting freedom of establishment in case of a company incorporated in a Community State and operating in the territory of another Community State, the Court preferred the application of laws for the State in which the company was incorporated[10]. The ECJ maintained the exception whereby mandatory requirements relating to the general interest justify a restriction on freedom of establishment[11] in order to avoid abusive conduct. The exceptions to application of the criterion of the location of the registered office are also interpreted restrictively and abuse requires extremely rigorous proof: the decision to incorporate a company in one State, when it is destined to operate principally or exclusively in other States, is not sufficient proof of such abuse[12].

The above highlights the fact that when there is conflict between the corporate laws of various different States, this is resolved on the basis of the criterion of the location of the registered office, and the fact that one State has competitive corporate law will allow it to attract investments in companies that do not necessarily operate in

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9 See respectively decision 9 March 1999 (C-212/97), decision 5 November 2002 (C-208/00) and decision 30 September 2003 (C-167/01). The principles confirmed in these decisions do not appear to have been influenced, to the extent relevant, by decision 16 December 2008, in C-210/06 (the Cartesio case).

10 With regard to the finding that community case law involves a significant rationalisation of the rule regarding conflict as enacted by article 25 (1) of Law 31 May 1995, no. 218 — which after having established that companies are governed by the law of the State in whose territory they were incorporated, adds that Italian law is applicable if the administrative office is situated in Italy or if the principal business of the company is conducted in Italy — see G. B. Portale, *Riforma delle società di capitali e limiti di effettività del diritto nazionale*, in *Corriere giuridico*, 2003, p. 148 and S.M. Carbone, *La riforma societaria tra conflitti di leggi e principi di diritto comunitario*, in *Dir. comm. int.*, 2003, p. 94, who extends this matter to article 2509 — *bis* c.c.

11 See point 92 of the Ûberseering case decision.

12 See point 139 of the Inspire Art case decision.

that State and that may merely have their registered office there. This does not have a positive effect on growth in the overall economy of the State in question, but rather simply on certain limited and specific segments of advanced service industries, starting with that of legal advice.

In other words if, as has occurred, multiple small German enterprises establish themselves in the United Kingdom as private companies, rather than in Germany as *G.m.b.H.*, this does not appear to have particular effects on the British economy or on the German economy, other than with regard to the recourse those enterprises make to professionals able to offer then legal assistance on English law.

A similar argument would in all probability apply in Italy, should small-scale enterprises rush to apply the English private company model. The effects of a market for corporate law on the economy should therefore be downsized.

3. A market for financial market regulations

Moving on to competition between rules of law regulating the financial markets, primarily it is necessary to admit that it is extremely difficult to attempt to identify certain selective criteria that permit a watertight division between corporate law and equity markets law[13]. For the purposes of the arguments in this report however — or rather for the purposes of evaluating the effects of competition between legal orders — it appears to be possible to distinguish between rules applicable when the connection criterion with the State is that of the location of the registered office of the corporate enterprise and rules applicable when the connection criterion with the State is the fact that the corporate enterprise has issued securities traded on financial markets in that State.

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13 See for example, M. Notari, in *La disciplina delle società quotate nel testo unico della finanza d. lgs. 24 febbraio 1998, no. 58 — Commentario*, by P. Marchetti e L. A. Bianchi, Milano, 1999, t. I., *sub* art. 119, pp. 754 ss.

In this article the former rules are indicated as corporate law rules, whilst the second are indicated as equity market rules, although I have not sought to establish any general and definitive distinctive criterion.

An interesting example of the effects of application of a market for equity market rules is offered by the previously cited *interim Report* by the *Committee on Capital Markets Regulation*[14]. The *Report* illustrates a loss of competitiveness between USA regulated markets and foreign markets — in particular the *London Stock Exchange*, which is studied attentively in the Report — not only as a result of listing choices by Chinese, Indian and Russian enterprises, but also due to those of companies in advanced capitalistic Countries (Western Europe, Australia, Canada, Japan and New Zealand) and in fact, as a result of the decision by US companies to list in London[15].

The Report therefore deals with a problem of competitiveness between rules of law governing financial markets, or rather the rules applicable to all companies operating on US regulated markets, irrespective of the whether they are "US" or "foreign companies", or rather of whether they have their registered office within or outside the confines of the United States.

In this case, competitiveness would appear to have more influence than when it refers to corporate law rules. In fact, the Report stresses the connection between the size of financial markets and economic development. It is confirmed that "if one examines recent

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14 The Report was discussed at a convention held in Naples on 18 May 2007, organised by the Faculty of Political Science at the University of Naples Federico II, the records of which are published in *Competitività dei mercati finanziari e interessi protetti — Il pendolo del diritto americano e le prospettive del diritto italiano*, by C. Amatucci e V. Buonocore, Milano, 2008. See in particular the report by Roberta Romano, *The Sarbanes — Oxley Act at a crossroads*. The considerations raised in this report cover matters raised in my report submitted at the convention (*Competizione tra ordinamenti, mercati finanziari e interessi protetti*).

15 See the *Report*, for example, *Executive Summary*, I. II. A. and *section* I (*Competitiveness*), II.A.

data on growth in the most advanced economies, one sees that countries with a bigger stock market (like the United States and the United Kingdom) enjoyed a much better record of economic growth than other similarly developed European economies (such as Germany, France, and Italy) with less developed stock markets (Carlin and Mayer, 2000). Hence, the impact of a decline in the efficiency of the U.S. equity markets could severely impact growth" (*section* I, *competitiveness*, I. B, where it is stressed that efficient equity markets are particularly important for the success of the venture capital industry).

Steering clear of any irony — which would be easy following the recent crisis on global equity markets, starting with the USA — I will limit myself to pointing out that it does not appear to me that it is possible to doubt that in the current scenario of economic globalisation it is certainly possible and in fact increasingly frequent that securities traded on a regulated market are issued by companies operating principally abroad and are acquired by foreign investors. This is because — and the concerns on which the Report is based are the best confirmation of this — companies are now in the habit of listing on foreign regulated markets (or at least of considering listing on foreign regulated markets as an alternative option) and investors are in the habit of investing in these markets.

In fact, in truth, recent experience demonstrates that even the nationality of members of management bodies of regulated markets can be foreign. Based on the above, further analysis of the effects on a Country's economy of the competitiveness of the equity markets is required.

It certainly has a significant impact on the development of the securities industry — which constitutes an extremely important sector (in fact it is no coincidence that this is stressed insistently in the Report; see the introduction p. IX), with extremely strong lobbying capacity — but obviously it does not represent the entire economy of a Country.

When faced with legal amendments proposed in the Report — and above all in light of amendments that the Report could suggest to its Italian admirers — a cost/benefit analysis between competition between equity market rules appears to provide divided and ambiguous results. A loosening of the mandatory nature of regulations, to some extent hypothesised in the Report in view of concerns regarding the competitiveness of financial markets results in:

- benefits for issuer companies (not necessarily domestic ones), which can reduce the cost of funding, and for companies (not necessarily domestic ones) operating in the financial services sector;

- disadvantages in terms of a reduction in precautions protecting equity stability for issuer companies; these disadvantages are diluted by the fact that in a scenario where companies can choose the corporate law applicable to them, simply by moving their registered office, the only effective mandatory instruments protecting their equity stability can be provided by equity market regulations.

At first impression one could be led to believe that a reduction in the mandatory nature of rules, induced by the market for equity market rules, is positive for shareholders interested in the profitability of their investment — which is favoured by dynamic business management — and is negative for company creditors, concerned by the equity stability of the debtor companies.

In reality the different levels of risk propensity transversally involve all categories of shareholders and company creditors. Alongside shareholders with high risk propensity and merely interested in the profitability of a company (which is solvent in the short term), there are those shareholders who are adverse to risk and who regard equity stability as an important value.

On the other hand, creditors may also include persons with high risk propensity. Think, for example, of venture capital lenders. The fact that capital has been provided in the form of equity or debt capital is not therefore decisive and neither is the fact that the investment (in risk capital or debt capital) is direct or mediated by institutional investors. One only has to think, in this regard, of the extremely different logics behind a pension fund and a hedge fund.

It cannot be disputed that over the last few years — up until the recent equity markets crisis — in advanced capitalist Countries there has been a tendency to prefer suppliers of capital (risk or debt) with a high risk propensity and a view to short term investment[16]. The following are an illustration of this:

- widespread enthusiasm for the value of contendibility of corporate control, which in a market that is not fully efficient can lead directors to adopt short term profitability policies, even if they put growth prospects for the company and medium-long term investment returns at risk[17];

- pressure for the abolition of legal capital, also in Europe, which is manifested not only in doctrine[18], but also (up until a short

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16 The Corporate Governance Code in its 2006 version issued by the Borsa Italiana S.p.a Corporate Governance Committee goes against this trend however. In the Comment to Principle 1 it allocates directors the task, inter alia, of taking decisions which may reasonably lead to the creation of value for shareholders over the medium-long term — as a priority objective (see also Principle 7.P.2).

17 In this regard it is of significance that with reference to the Enron Case J.R. Macey, *Efficient Capital Markets, Corporate Disclosure & Enron*, in *Giur. comm.*, 2002, I, pp. 754 ss., reveals (p. 755) that "this sudden deterioration in performance created pressure on management to engage in transactions that increased revenue and moved debt off of the firm's balance sheet" and more in general stresses "the acute pressure felt by U.S. management to produce superior performance results". In this regard I also refer to my observations in *La responsabilità dell'impresa e il controllo dei rischi*, in *La responsabilità dell'impresa* (atti del Convegno per i trent'anni di *Giurisprudenza commerciale*, Bologna, 8-9 ottobre 2004), Milano, 2006, pp. 164 s.

18 See the theory by K. Kübler, *Aktie, Unternehmensfinanzierung und Kapitalmarkt*, Köln, 1989 (re-proposed in an essay with the same title, published in *Il diritto delle società per azioni: problemi, esperienze, progetti*, by P. Abbadessa e A. Rojo, Milano, 1993, pp. 101 ss), which Italy is particularly sensitive to, M. S. Spolidoro, *Il capitale sociale*, in *Il diritto delle società per azioni,* cit., pp. 59 ss., in particular pp. 99 s and the entry *Capitale sociale*, in *Enc. dir.*, agg., vol. IV, Milano, 2000, pp. 195 ss., in particular pp. 235 ss. See also the debate between Enriques and Macey (L. Enriques-J. R. Macey, *Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules*, 86 *Cornell Law Review,* pp. 1165 ss. (2001), the Italian version of which, with certain adaptations, was published in *Riv. soc.*, 2002, pp. 78 ss., entitled *Raccolta di capitale di rischio e tutela dei creditori: una critica radicale alle regole europee sul capitale sociale*) and Denozza (F. Denozza, *A che serve il capitale sociale? (Piccole glosse a L. Enriques — J.R. Macey,* Creditors Versus Capital Formation: The Case Against the European Legal Capital

time ago[19]) at a community level and was expressed: (i) in the *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* dated 4 November 2002, which proposes granting Members States the possibility to opt for a regime for the protection of company creditors centred on a solvency test and alternative to the legal capital; (ii) in the communication from the Commission to the European Council and Parliament, dated 21 May 2003[20], whereby (point 3.2.) it expresses the intention of launching, in the short term, a feasibility study relating to an alternative to a capital maintenance regime; (iii) in Directive 2006/68/EC (implemented in Italy by way of d. lgs. 4 August 2008, no. 142), the second preamble of which make express reference to the need "to proceed without delay to a general examination of the feasibility of alternatives to the capital maintenance regime which would adequa-

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Rules), in *Giur. comm.*, 2002, I, pp. 585 ss.; the debate continued with additional interventions by p L. Enriques, *Capitale sociale, informazione contabile e sistema del netto: una risposta a Francesco Denozza,* in *Giur. comm.*, 2005, I, pp. 607 ss. and by F. Denozza, *Le funzioni distributive del capitale*, in *Giur. comm.*, 2006, II, pp. 489 ss. For a broader outlook in this regard, in addition to the Authors cited above, cf. for all G.B. Portale, *Capitale sociale e società per azioni sottocapitalizzata*, in *Trattato delle società per azioni*, directed by G.E. Colombo and by G.B. Portale, vol. I, t. 2, Torino, 2004, pp. 28 ss, where specifically in notes 44 and 51, various citations are upheld by doctrine cited by L. Enriques (cit. in this note), pp. 608 s. and studies published in *Legal Capital in Europe*, by M. Lutter, Berlin, 2006. The following authors distance themselves from a conception of legal capital as an instrument for the protection of company creditors (in reality, shareholders and company creditors that are adverse to risk) E. Ginevra, *Conferimenti e formazione del capitale sociale nella costituzione della s.r.l.*, in *Riv. soc.*, 2007, pp. 102 ss, in particular pp. 122 ss. and G. Ferri jr., *Struttura finanziaria dell'impresa e funzioni del capitale sociale*, in *Riv. not.*, 2008, pp. 741 ss.

19 Recently, moreover, the push towards the abolition of legal capital has slowed-down at a community level. In this regard, for an illustration of the results of a study by KPMG DTG AG promoted by the European Commission and the position of the Directorate General for the Internal Market and Services see G. Strampelli, *«Fattibilità» di sistemi alternativi al capitale sociale: uno studio promosso dalla Commissione Europea*, in *Riv. soc.*, 2008, pp. 607 ss. and N. Baccetti, *Creditori extracontrattuali, patrimoni destinati e gruppi di società*, Milano, 2009, pp. 393 s., note 24.

20 *Modernizzare il diritto delle società e rafforzare il governo societario nell'Unione europea. Un piano per progredire*, in *Riv. soc.*, 2004, pp. 568 ss., with a comment by G. Ferrarini, *Armonizzare il governo societario in Europa?, ivi*, pp. 551 ss.

tely protect the interests of creditors and shareholders of a public limited liability company".

Without adequately describing the terms of this debate, it should be stressed that the fundamental argument used by those who hope for the suppression of legal capital, relates to the need to avoid a reduction in expected investment returns and in equity market efficiency, caused by rigid restrictions created by this institution, which limit freedom of choice on establishing the size (and type, in view of restrictions regarding assets that can be granted) of the means that a company must equip itself with.

In this manner, those who supply equity and debt capital and have a high risk propensity, who are sophisticated and in a contractually strong position, have the upper hand as compared to those who are adverse to risk and have little capacity to monitor and/or are weak. The latter are sacrificed when, in the absence of legal capital, the former procure guarantees which are to their exclusive advantage and/or increase the cost of borrowing in order to offset risks arising out of the absence of legal capital, rather than imposing contractual restrictions regarding compliance with specific ratios, for example regarding the ratio between own resources and third party resources.

The tendency to prefer investors (in equity or in debt capital) with high risk propensity may be something one agrees with or disagrees with, but it certainly has a logic. It is however important to be clearly aware that in this way a choice is made that does not increase the efficiency of the system, nor does it favour domestic economies, in view of the now diffused globalisation of listing and investment choices; in fact it is a political choice of interests, preferring some to the detriment of others.

Knowledge of this constitutes an incentive to achieve a reasonable level of balance in relation to the sacrifice of interests penalised and above all leads to avoidance of injury to the interests of investors adverse to risk, which is not justified by the aim of privileging those with high risk propensity.

4. A market for accounting standards

A typical example of some of the drawbacks that arise in the absence of awareness of the real political nature of choices that aim to privilege competitiveness on the financial markets is provided by the Italian legislator's choices on applying international accounting standards.

The adoption of international accounting standards was also justified by the need to render community global payers competitive on the global capital markets and to attract investors to the equity markets, providing standards that require a company to provide information suitable for permitting rational investment choices[21]. For this purpose an assessment system based on fair value accounting, such as that under the IAS/IFRS, is of far greater significance than one based on historical cost.

In fact fair value accounting provides information relating to the future and not to the past, and as such is far more useful to the investor for the purpose of making investment choices than information provided by historical cost accounting, which is based on values arising out of events already recorded in accounts.

In this regard, when a market assessment incorporates future income expectations and future cash flows — as it normally does —

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21 In this regard the second, fourth and fifth preamble to EC regulation no. 1606/2002 are of significance. In the second preamble it is stressed that it is necessary that "financial reporting standards applied by Community companies participating in financial markets are accepted internationally and are truly global standards. This implies an increasing convergence of accounting standards currently used internationally with the ultimate objective of achieving a single set of global accounting standards". The fourth preamble then specifies that "This Regulation reinforces the freedom of movement of capital in the internal market and helps to enable Community companies to compete on an equal footing for financial resources available in the Community capital markets, as well as in world capital markets." Further the fifth preamble confirms that "It is important for the competitiveness of Community capital markets to achieve convergence of the standards used in Europe for preparing financial statements, with international accounting standards that can be used globally, for cross-border transactions or listing anywhere in the world".

fair value accounting includes unrealised profits, in strict contrast with the principle of prudence, as understood in the Italian tradition of accounting standards and under the Italian civil code, which in article 2423-*bis*, paragraph 1, no. 2) includes amongst principles for the preparation of financial statements the precept whereby only profits realised at year end can be indicated in accounts.

Therefore (and although the principle of prudence is not absent under the IAS/IFRS systems) a system centred on fair value accounting as a rule involves a lower level of reliability than one based on historical cost accounting, leads to evaluations that tend to be higher[22] and — again as a rule — increasingly volatile, since they are (also) based upon unrealised values linked to market oscillations.

In this regard, the adoption of international accounting standards constitutes further evidence of the trend of providing solutions that aim to maximise competitiveness between stock markets, favouring the requirements of those who provide equity or debt capital to the enterprise over the short term and who have a high risk propensity, for whom the relevance of information is fundamental, even at the cost of reduced reliability in assessments and greater volatility in values.

In this event however, it would be possible to conciliate the disclosure purposes of the IAS/IFRS with the effectiveness of protection instruments (such as legal capital) for those interested in equity stability in a company. Community regulation no. 1606/2002 left it to

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22 See for all, S. Fortunato, *Fallimento del mercato e revisione contabile*, in *Il nuovo diritto delle società*—Liber amicorum *Gian Franco Campobasso*, directed by P. Abbadessa e G.B. Portale, vol. 3, Torino, 2007, p. 85. The above argument does not exclude events in which the application of international accounting standards may lead to an assessment with a lower value than that arising out of the civil code rules. One only has to think that the capitalisation of costs with long-term benefits under assets in the balance sheet — which can provide the possibility for unlawful manoeuvres for the purpose of over-assessing assets — is permitted to a much lesser extent than under the Italian Civil Code. In fact the IAS/IFRS only allow for capitalisation of development costs, and not plant and expansion, research and advertising costs, which is permitted (where certain conditions are fulfilled) by article 2426, no 5) Italian Civil Code.

the domestic legislator to conciliate the disclosure requirements of investors (in equity and debt capital) with high risk propensity with the equity stability requirements of investors adverse to risk.

In fact, article 4 of regulation no. 1606/2002 only requires the adoption of international accounting standards for the consolidated financial statements of listed companies. Consolidated financial statements are in themselves informative, unlike year-end financial statements, which are also organisational and form the basis on which distributable profits are established. The extension of international accounting standards to annual financial statements for listed companies and consolidated and/or annual financial statements for unlisted companies is merely an option for Member States (art. 5 of regulation no. 1606/2002).

The Italian legislator however made broad recourse to this option, and in fact was extremely advanced in the acceptance of international accounting standards. In fact, d. lgs. 28 February 2005, no. 38, requires the adoption of international accounting standards not only for the preparation of consolidated financial statements for listed companies, or for those with securities distributed to the public, for banks and financial intermediaries and for insurance companies (article 3) but also for the preparation of annual accounts for listed companies, companies with securities distributed to the public, banks and financial intermediaries and listed insurance companies that do not draw up consolidated financial statements; the possibility of applying international accounting standards is admitted in general terms, aside from companies who can draw up their accounts in abbreviated form (art. 4).

Moreover the *Organismo Italiano di Contabilità* (Italian Accounting Body or OIC) prepared a project for the reform (amongst other things) of Civil Code rules applicable to annual accounts, in implementation of community directives 65/2001 and 51/2003, which includes in these rules the possibility to adopt the fair value criterion.

If international accounting standards are applied to consolidated accounts alone, aside from discussions regarding the procyclicality of these standards, which are a cause of debate following the equity markets crisis, this will permit the achievement of quality objectives in relation to financial information provided by community companies and its comparability with information provided by non-EU competitors on the global capital markets (considering that consolidated accounts are clearly of greater importance than annual accounts in relation to investment choices), without compromising the possibility of conducting rigorous controls of legal capital coverage, based on the year-end accounts,.

The introduction of the IAS/IFRS for the preparation of annual accounts however seriously compromises the possibility of adequately verifying legal capital coverage, since the use of fair value accounting leads to an illustration of evaluations that (also) incorporate unrealised values linked to market oscillations.

In d. lgs. no. 38, 2005 and in the OIC project the legislator believes that it has resolved the problem by way of a provision for reserves made up of gains arising out of application of fair value accounting (articles 6 and 7 of d. lgs. no. 38, artt. 2433, 2478-*bis* and 2481-*ter* Italian Civil code as amended by the OIC project). These reserves are (as a rule) unavailable[23]; gains from fair value accounting can only be distributed after a reduction in the reserve following their realisation; reserves cannot be used to increase legal capital, to pay

23 Moreover year end profits corresponding to fair value gains relating to traded financial instruments and exchange and hedging transactions can be distributed (article 6 (1), sub-paragraph a) d. lgs. no. 38). Above all, in the opening balance sheet in the first year-end accounts prepared in accordance with international accounting standards, the increase in equity due to registration of tangible assets at fair value, can be booked to capital; alternatively it is booked to a specific reserve that may be reduced, in compliance with article 2445 (2 and 3) of the Italian Civil Code; moreover in case of use of the reserve to cover losses it is possible to avoid the restriction on distribution of profits reducing the reserve; in this event there is no provision (in fact there is an express exclusion) for application of the precautions specified under article 2445 (2 and 3) Italian Civil Code (article 7 (6) d. lgs. no. 38). For a criticism of the choices made in the provision under discussion due to the risk that it creates in relation to equity stability, see G. Strampelli, *Le riserve da* fair value: *profili di disciplina e riflessi sulla configurazione e la natura del patrimonio netto*, in *Riv. soc.*, 2006, p. 313.

dividends to holders of correlated shares, for the acquisition of treasury shares or those in parent companies, or for transactions that may lead to the distribution of gains from fair value accounting.

Despite the adoption of these precautions, the application of international accounting standards to annual accounts could lead to a distortion in the workings of articles 2446 and 2447 Italian Civil Code. It may lead both to the bringing forward of and to a delay in the operation of mechanisms provided by these rules, in particular the so-called "recapitalise or liquidate" rule.

Mechanisms may be brought forward since, in view of the volatility of values established on the basis of fair value accounting, it is possible that the basis for application of the regulations in question will be established in case of transitory and contingent losses.

If this occurs, there are two possible alternatives: either it must be held that the provisions in question still operate, which can lead to unnecessary recapitalisation, penalising the profitability of the investment and sacrificing the interests protected by international accounting standards, or the directors must be allocated the right to delay the call of the shareholders' meeting, with a risk that this right is exercised even when losses are not actually transitory, and where the remedy of liability actions against directors would not alone be sufficient.

The possibility of application of international accounting standards leading to a delay in the implementation of measures provided by articles 2446 and 2447 Italian Civil Code — which constitutes the greatest risk in the context of probabilities, since evaluations based on fair value accounting lead to values that tend to be higher than those based on historical cost accounting —involves a dual profile.

Primarily, unrealised gains can influence the year-end result lowering losses to below the limits provided by the provisions mentioned above.

Moreover fair value reserves can — or rather should, given the hierarchy between various net entries — be used prior to legal capital to cover losses, when they are not absorbed by other net equity items (article 6 (5), d. lgs. no. 38 and articles 2446 (2), and 2482-*bis*, (1) Italian Civil Code as amended in the OIC project)[24].

In this way — and despite the obligation to restore these reserves setting aside profits in subsequent years — evaluations which are based on fair value accounting and incorporate unrealised profits, allow companies to avoid the application of the "recapitalise or liquidate" rule where net equity, if evaluated (as a rule) at historical cost, is under the legal minimum level.

Therefore fair value reserves as provided by d. lgs. no. 38, despite protecting suppliers of capital adverse to risk from distributions — in the broadest sense, including any form of distribution of value to shareholders — do not provide them with adequate protection when this is increasingly necessary, or rather when the company is in crisis.

The choice of applying international accounting standards to annual accounts (unlike that which occurred in Germany, for example) has, as shown, significant repercussions on legal capital[25], which prior to d.lgs. no. 38 represented an important institution under Italian corporate law, and appears not to be motivated by a precise and informed intention to take a stance in the debate on legal capital. If this were the case it would, *inter alia*, be senseless to make provision for fair value reserves.

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24 With regard to technical problems in this area see G. Strampelli, *Le riserve*, cit., pp. 302 s., according to whom fair value reserves can only be used to cover losses after having used not only available profits and the legal reserve, but all other reserves and article 6 (5) of d.lgs no. 38 applies by analogy to reserves provided by article 6 (1) sub-paragraph b).

25 The opinion of L. Enriques, *op. cit.*, pp. 611 s., according to whom the adoption of IAS/IFRS will have repercussions on the efficiency and workings of legal capital as an instrument for the protection of creditors (I would add: and shareholders adverse to risk) can therefore be upheld exclusively if it refers to d. lgs. no. 38, and not in relation to Community regulation no. 1606/2002.

It is not a necessary choice for the purpose of achieving the aims of regulation no. 1606/2002. In fact, as stated, the introduction of the IAS/IFRS for the preparation of consolidated financial statements only — in view of their greater relevance for the purposes of investment choices, as compared to annual accounts — is sufficient for the purposes of placing community companies in a position whereby they can compete, in relation to quality and comparability of financial information provided, with companies that apply American accounting standards[26].

The choice made under d. lgs. no. 38 cannot be justified by the need to avoid the costs of two sets of accounting: one based on fair value, for disclosure purposes; the other based on historical cost, for the purposes of establishing distributable profits.

An argument of this kind cannot alone justify an option which, if that which has been stated so far is correct, completely disrupts the Italian corporate law system. Further the solution adopted does not in reality lead to avoidance of the dual costs mentioned above. In order to establish fair value gains for the purpose of forming reserves provided by articles 6 and 7 of d. lgs. no. 38, it is in fact necessary to carry out evaluations based both on fair value and on historical cost accounting.

The choice made under d. lgs. 38/2005, to pursue at any cost the aim of competitiveness between regulations, does not therefore appear to have been accompanied by adequate awareness of the interests that are injured in this way.

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26 Also, following d. lgs. no. 38 there is a coexistence in Italy of companies that apply international accounting standards to annual accounts and companies that prepare their annual accounts based on traditional rules, and consequently it is difficult to compare results for one set of companies with those of others. This inconvenience will not be removed in case of possible approval of the OIC project, whereby the adoption of fair value accounting is merely optional and not mandatory.

5. A market for rules contained in a composition proposal

Recent legislative interventions that reformed bankruptcy procedures (d. l. 14 March 2005, no. 35, converted into Law 14 May 2005, no. 80, d. lgs. 9 January 2006, no. 5, d. lgs. 12 September 2007, no. 169) in the framework of an overall reduction in the possibility for judicial authorities to intervene in relation to bankruptcy composition and pre-bankruptcy composition with creditors, has on the one hand significantly increased freedom of choice on establishing the content of the proposal, permitting the formation, *inter alia*, of classes (articles 124 and 160 of the bankruptcy law)[27], and on the other hand has reduced the judicial review of the arrangement (articles 129 and 180 bankruptcy law), enhancing the role of creditors upon voting on the proposal[28].

In the intentions of the legislator this should trigger virtuous competition between possible rules for the satisfaction of creditors and should encourage those making the proposal to select arrangements that are more efficient and capable of producing greater value and which, as such, should be those with the greatest possibility of being appreciated by creditors and of obtaining their approval.

In fact in case of bankruptcy composition there can be competition not only between the potential content of the proposal, but also between a plurality of proposals (see articles 135 and 128 bankruptcy law, as amended by article 61, of Law 18 June 2009, no. 69).

In this case also therefore, the aim is that of creating a market for rules. There is a risk that the space given to individual choice —

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27 See article 4-*bis* of d. l. 23 December 2003, no. 347, converted into law 18 February 2004, no. 39, as subsequently amended, which was notably applied in the arrangement for the Parmalat Group.

28 A similar argument also applies in case of composition in the specific case of extraordinary administration as governed by d. l. 347/2003 (converted into law 39/2004), but not for composition in case of compulsory administrative liquidation and for composition in case of "common" extraordinary administration as provided by d. lgs. 8 July 1999, no. 270.

on the part of the party proposing the arrangement and of the creditors called to approve the proposal, even if through the technique of silent-consent in case of bankruptcy composition as provided by article 128 (2) bankruptcy law[29] — will allow abuse by strong creditors to the detriment of the weaker ones[30].

The risk of abuse to the detriment of the latter during composition is increased by the fact that: (i) articles 128 and 177 bankruptcy law allocate relevance in voting by creditors to the overall majority, whilst there is no provision for a numerical majority which, in the past, meant that it was necessary to take account of the requirements of the smallest creditors (even if it did encourage opportunistic manoeuvres by them); (ii) provision is made for a possibility to divide creditors into classes, reserving different treatment to creditors belonging to different classes (articles 124 (2) sub-paragraphs a) and b) and 160 (1) sub-paragraphs c) and d) bankruptcy law).

This means that the fate of strong creditors can be separated from that of weak creditors. The risk of this legislative choice is even greater if one takes account of the fact that it forms part of a more general legislative trend that seeks to introduce instruments that facilitate the division of risk for certain creditors as compared to that for other creditors. One only has to think of the admissibility of ear-marked equity (articles 2447-*bis* and ff. Italian Civil Code) and aid in the establishment of financial guarantees (d. lgs. 21 May 2004, no. 170, which implements community directive 2002/47/EC regarding financial guarantee agreements) which also permit strong creditors to differentiate their risk from that of weak creditors.

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29 See also article 4-*bis*, paragraph 8, of d. l. 347/2003, converted into law 39/2004, with regard to composition in the context of the specific extraordinary administration procedure, governed by it.

30 This risk is reported by A. Nigro, *"Privatizzazione" delle procedure concorsuali e ruolo delle banche*, in *Banca, borsa, tit. cred.*, 2006, I, pp. 368 s., who points out the opposite risk, or rather that inertia by creditors leads to a lack of success in procedure models which presume they will take action; one only has to think of the possibility, which has been proposed by many, of flight by the committee of creditors in case of small-scale bankruptcies.

This possibility can be avoided if the legislator who — as in the event of reform of bankruptcy procedures — chooses to place voting by creditors at the centre of the institution of composition, as an expression of their independent autonomy, is aware of the need to guarantee minimum necessary conditions for the purpose of allowing independent autonomy to operate.

For this purpose it is necessary to guarantee (in addition to adequate disclosure to creditors) the standardisation of interests held by creditors belonging to the group that is bound by majority decisions.

In this regard it should be reiterated, as I have sought to demonstrate in the past[31] with reference to previously applicable rules, (reaching negative conclusions in light of the tenor of such regulations) that the majority principle on which creditors' voting on a composition proposal is based, refers to contract law principles — and therefore it is today justifiable, in the context of the private law system that characterises new composition rules — since it operates in the presence of a standardisation of interests held by those voting.

Only in this event, in fact, can a majority decision produce the same effects for all those voting, and therefore there is an instrumental relationship between the decision and the interests of voters and therefore a common interest, which justifies rendering the dissenting minority subject to the majority wishes[32].

The two technical principles that can be used to guarantee standardisation of voters' interests, to deal with risks due to conflicts of interest and consequently to justify, in relation to private law con-

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31 Cf. R. Sacchi, *Il principio di maggioranza nel concordato e nell'amministrazione controllata*, Milano, 1984, in particolare pp. 300 ss.

32 Cf., for example, F. d'Alessandro, *La crisi delle procedure concorsuali e le linee della riforma: profili generali*, in *Giust. civ.*, 2006, II, in particular p. 336 e p. 341 and F. Galgano, most recently in *La forza del numero e la legge della ragione — Storia del principio di maggioranza*, Bologna, 2007, p. 204.

cepts, the application of the majority voting principle, are: (i) in the presence of significant interference on the part of atypical interests of voters, the sterilisation of votes; (ii) in case of significant differences between typical interests of creditors, the creation of sub-classes of creditors, each characterised by the standard nature of typical interests of all those who belong to such sub-class, and provision for distinct majorities for each sub-class.

Both techniques are applied in regulations governing votes in shareholders' meetings for joint stock companies. The first technique is used in article 2373 Italian Civil Code, which provides that resolutions approved by way of a vote of shareholders in conflict of interest can be annulled, if they can cause damage to the company (see also article 107 (1) sub-paragraph b), d. lgs. 24 February 1998, no. 58, which for the purposes of approval of an o.p.a. (take-over bid) excludes from the calculation securities held by the offeror, the majority shareholder, including any relative majority, if the holding exceeds 10%, and by persons linked to them).

Application of the second technique is article 2376 Italian Civil Code which, in case of a plurality of categories of shares, requires approval of meeting resolutions that are detrimental to the rights of a category by a special meeting of persons belonging to such category.

It is therefore necessary to understand what margins there are in rules for composition for the purpose of recourse to the techniques described above.

With regard to the first profile (sterilisation of votes in case of significant interference by atypical interests held by voters) in rules governing voting on a composition proposal there is no rule comparable to article 2373 Italian Civil Code.

With regard to the creation of sub-classes of voters, each characterised by internal standardisation of their typical interests, it is necessary to acknowledge that the legislator did not expressly require the formation of various classes in the presence of obvious differences between creditors' interests.

This is undoubtedly open to criticism[33]. The legislator reformed composition but did not appear to have a sufficient amount of awareness of the implications of the choice of private law concepts made and, in particular, of the need to provide legal instruments suitable for neutralising the possibility of pollution of voting due to conflicts of interest, caused by atypical interests held by voters and/or by differences between their typical interests.

In truth I believe that it is possible to interpret regulations so as to avoid legislative insufficiencies on this point. In particular I believe that:

(i) with reference to the problem caused by the presence of atypical interests held by voters, it is possible: (*a*) to apply by analogy exclusions from voting to the composition proposal; (*b*) to extend to the pre-bankruptcy arrangement with creditors an exclusion from voting on the part of claims held by parent companies, subsidiaries or those subject to common control, expressly provided solely in case of bankruptcy composition (article 127 (6) bankruptcy law); (*c*) more in general, to require that voters comply with principles of correctness and good faith which, pursuant to articles 1175 and 1375 (and 1337) Italian Civil Code, regulate any expression of a private individuals autonomy and consequently also voting by creditors on a composition proposal[34]; (*d*) to apply by analogy article 37-*bis*, paragraph 2, bankruptcy law to voting on the pre-bankruptcy arrangement with creditors, which provides — with reference to new appointments of mem-

33 In the sense that it would be advisable for the legislator to use categories of corporate law in full — since the protection of the minority is a known problem that has been broadly evaluated — in case of voting on composition, unlike that which occurs in bankruptcy law, cf. L. Stanghellini, *Creditori «forti» e governo della crisi d'impresa nelle nuove procedure concorsuali*, in *Fallimento*, 2006, p. 387.

34 Cfr. F. Guerrera, *Il «nuovo» concordato fallimentare*, in F. Guerrera e altri, *Le soluzioni concordate delle crisi d'impresa*, Torino, 2007, pp. 145 s., with direct reference to voting on bankruptcy composition. In this regard it appears to me that it can legitimately be asked whether abusive voting not only results in liability on the part of the voter, but also results in the neutralisation of the vote.

bers of the creditors' committee and requests to replace the trustee in bankruptcy — that upon application by one or more creditors, any creditors in conflict of interest are excluded from the calculation of claims and therefore from voting[35];

(ii) with reference to the possibility of standardised typical interests held by creditors, the court can (and should) intervene, not only when various classes are established despite the interests held by creditors that form them, but also when provision is made for a sole class of unsecured creditors, despite significant and clear differences in their interests[36].

These however are interpretative solutions which, despite having received a few case law controls[37], and having certainly led to discussion[38], are far from indisputable. This means that an attempt by the legislator to trigger virtuous competition between possible regulations for the satisfaction of creditors by way of composition has led to a situation of objective uncertainty, since it has not been accompa-

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35 Conflict of interest is dealt with in article 37-*bis*, paragraph 2, bankruptcy law, using a technique different from that used for voting in joint stock company shareholders' meetings. Bankruptcy regulations result in a true sterilisation of the vote (upon application by one or more creditors) whilst article 2373 (1) Italian Civil Code, merely sets a limit on the exercise of votes (unlike paragraph 2 of the Code regulation), since the resolution approved by way of a determining vote by a party in conflict of interest can only be invalidated if it can cause damage to the company.

36 In consideration of the viewpoints in this work, the theory is expressed in this report in an assertive manner — and I am aware of this. For an illustration of the reasons that lead me to reach the conclusions expressed in summary above please refer to R. Sacchi, *Dai soci di minoranza ai creditori di minoranza*, in *Fallimento*, 2009, pp. 1063 ss. For a fuller formulation of the theory see the detailed monography by M. Fabiani, *Contratto e processo nel concordato fallimentare*, Torino, 2009.

37 For an indication of certain judicial measures that illustrate an awareness of the matter of standardisation of classes see R. Sacchi, *Dai soci di minoranza*, cit., p. 1070.

38 In fact, with regard to the fact that the division into classes of creditors is a mere right, see for all: M. Sciuto, *La classificazione dei creditori nel concordato preventivo (un'analisi comparatistica)*, in *Giur. comm.*, 2007, I, p. 581 e G. Bozza, ad es. *La facoltatività della formazione delle classi nel concordato preventivo*, in *Fallimento*, 2009, pp. 424 ss.

nied by an adequate level of awareness of the implications of the private law choice made.

It also explains, to a certain extent (and perhaps justifies) attempts to restore strong judicial control over composition, by way of fictional constructions which refer to the use by case law of a conceptual category of non-existent meeting resolutions based on laws prior to the reform of joint stock companies.

I refer to the opinion whereby a composition proposal that provides for merely symbolic satisfaction is inadmissible[39] and according to which the court, following d. lgs. no. 169, 2007, can criticise the feasibility of the plan[40] that accompanies the arrangement proposal[41].

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39 Cf. B. Inzitari, intervento alla tavola rotonda su *Il concordato preventivo,* in *Il nuovo diritto delle crisi d'impresa*, by A. Jorio (Atti del Convegno svoltosi a Torino il 23 e il 24 maggio 2008), Milano, 2009, pp. 66 ss., who reports on and upholds a measure issued by the Court of Rome, which excluded the admissibility of a proposal that provided for satisfaction in the amount of 0.03% of unsecured creditors placed in a single class (whilst provision was made for preferred creditors to obtain full satisfaction).

40 See for example, I. Pagni, *Il controllo del Tribunale e la tutela dei creditori nel concordato preventivo*, in *Fallimento*, 2008, pp. 1091 ss. For arguments stating that d. lgs. 169/2007 weakened controls by the judiciary over bankruptcy composition see S. Pacchi, *Il concordato fallimentare*, in *Fallimento e altre procedure concorsuali*, directed by G. Fauceglia e L. Panzani, vol. 2, Torino, 2009, p. 1428, nota 138.

41 Analogies between theories stated in this report and case law constructions of the category of non-existent shareholder meeting resolutions appear to be clear: (i) with regard to composition it is held that the proposal is not a proposal if the level of satisfaction of creditors is scarce and the plan is not a plan if it is not feasible; in both events it is held that the composition proposal must fail to pass judicial evaluation for admissibility; (ii) for joint stock company shareholder meeting resolutions it was stated, prior to the reform (obviously I cannot deal with the issue of whether there are still margins for using the conceptual category of non-existent resolutions following the reform of joint stock companies), that a shareholders' meeting resolution is non-existent if it is devoid of one of the requisites deemed essential by the interpreter for its existence, and therefore regulations under articles 2377, 2378 and 2379 Italian Civil Code (old version) should be disapplied and an action for the purpose of verifying the non-existence of the resolution could be commenced even after expiry of the three month term provided for the purpose of challenging resolutions that can be invalidated.

6. Conclusions

Considerations set out above provide certain clarifications regarding that which can be defined as the “terms and conditions for use” — to use an expressing used in debates on legal entities[42] — of a market for legal or standard rules regulating companies and equity markets.

It is normal to raise some doubts regarding the fact that competition between legal orders —not only corporate law rules but also equity market rules — has a strong impact on the economy, in view of the fact that listing and investment choices are made in the prospect of globalisation.

The creation of a standardised legal framework, at least in relation to baseline issues, can perhaps permit competition to be concentrated on that which should, definitively, greatly concern investors, or rather economic and financial fundamentals for companies.

Alternatively, if one prefers a market for rules, in the hope that this will trigger a *race to the top*, there must be full awareness of the fact— based on experience accrued to date — that this results in the interests of equity investors and debt capital investors with high risk propensity being preferred over those of investors adverse to risk.

This awareness should induce any legislator that intends to encourage competitiveness between legal regulations and domestic equity markets, to achieve reasonable balance between the sacrifice of interests penalised and to avoid this sacrifice when (as in the case of d. lgs. 38/2005 regarding international accounting standards) it is not actually justified by the aims pursued.

The legislative choice to clearly establish that composition is a private law matter, providing that votes by creditors represent the very centre of the institution with the aim of encouraging those for-

42 See F. Galgano, for example, in *Trattato di diritto civile*, vol. I, Padova, 2009, p. 194.

mulating the proposal to select efficient plans that are capable of producing value, must be accompanied by provisions suitable for guaranteeing minimum necessary conditions so that the creditors can exercise their independent choice, which is represented by the expression of their vote.