INSOLVENCY PROCEDURES AND ASSETS LIQUIDATION IN ITALY AND THE UK

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Abstract

The study explores the different approaches of Italian and the United Kingdom (UK) law on the topic of assets liquidation in insolvency procedures. In particular, it aims at investigating the reasons of this different approach, which could be found, in author's opinion, in the peculiar legislative philosophy that have inspired, on the one hand, Italian law reform process, essentially devoted to the preservation of the business of the firm even where subject to the insolvency procedure, as far as possible, and, on the other hand, the UK insolvency law, rather pointed towards the expulsion from the market of the firm undergoing the insolvency procedure, because of its inefficiency, for the benefit of the economic system as a whole. The current divergence of legislative philosophy above outlined can also be ascribed, in particular, to the influence of European Union (EU) law, which is evidently no longer applicable to UK law, unlike Italian law. Nonetheless, the evolution of EU legal systems continues to play an important role, also for non-EU countries, due to the natural "economic competition" between legal systems that insolvency law typically produces at the international level, as clearly evidenced by the well-known phenomenon of forum shopping. Therefore, the author hopes that this study could contribute to the development of comparative academic debate, not only limited to the legal systems herein considered but potentially involving also other non-EU legal systems, so as to assess the impact of EU law and its implementation — including possibly voluntary implementation — at the national level on the international stage.

Keywords: Insolvency Procedures, Assets Liquidation, Preservation of the Business, Continuation of the Business, Expulsion of the Firm from the Market

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1. INTRODUCTION

The interest in comparing Italian law and United Kingdom (UK) law on the specific issue of assets liquidation in insolvency procedures arises from the observation of a certain gap and, therefore, a structural difference between the Italian judicial liquidation procedure (the so-called "*liquidazione*

giudiziale"), on the one hand, and the so-called compulsory liquidation procedure in the UK legal system, on the other hand.

The gap between the two procedures may be basically identified in the related different approaches with regard to the choice of preserving or not the business of the firm and, consequently, to the management of assets liquidation under the insolvency procedure.

Indeed, while the Italian legal system, in light of the recent reform process — which already affected the old bankruptcy law, i.e., Royal Decree No. 267 of March 16, 1942, many of whose provisions have been substantially reproduced in the new legislation, up to the recent entry into force of the Legislative Decree No. 14 of January 12, 2019, the Italian Crisis and Insolvency Code (hereinafter also the "Code") — reveals a supportive approach, during the judicial liquidation procedure, towards the continuation of the business, as far as possible, on the contrary compulsory liquidation in UK seems to be strictly oriented to the prompt removal of the firm from the market as a fundamental goal to be reached.

The study, therefore, aims at outlining the above issues, investigating the reasons and the legislative philosophy that inspired these different approaches to the matter in the compared legal systems.

In any case, it deserves to be promptly noted that the current divergence of legislative philosophy above outlined can be basically ascribed to the influence of European Union (EU) law, which is evidently no longer applicable to UK law, unlike Italian law. Nonetheless, the evolution of EU legal systems continues to play an important role, also for non-EU countries, due to the natural "economic competition" between legal systems that insolvency law, in particular, typically produces at the international level, as clearly evidenced by the well-known phenomenon of forum shopping. On this topic, see, recently, Paulus (2021).

Therefore, an investigation about the different provisions ruling assets liquidation in insolvency proceedings, depending on whether or not they are EU law-derived, could be useful to contribute to the development of comparative academic debate, not only limited to the legal systems herein considered but potentially involving also other non-EU legal systems, so as to assess the impact of EU law and its implementation — including possibly voluntary implementation — at the national level on the international stage.

The paper is organized as follows. Section 2 shortly reviews the theoretical background. Section 3 analyzes and discusses research findings. Section 4 presents the conclusion of the current study.

2. LITERATURE REVIEW

The legislative tendency toward preserving the business, rather than dissolving it, even in insolvency proceedings, was fostered by Italian law as early as the 2005–2007 bankruptcy reforms, as highlighted by many scholars (Bozza, 2014; Nigro & Vattermoli, 2021). Broadly on this argument, see also studies by d'Alessandro (2006), Jorio (2010), Portale (2010), and Irrera (2023). Furthermore, with a view to extending to all bankruptcy procedures the perspective of reorganization of the enterprise in crisis, typical of Italian extraordinary administration procedure, with priority given to the objective assessment of the enterprise as an "organization", see Ferri (2006) and Minervini (2018).

This perspective, however, has been significantly developed in the new Italian Crisis and Insolvency Code also due to the influence exerted by EU law, at least starting from the Commission Recommendation 2014/135/EU on a New Approach to Business Failure and Insolvency up to the most recent Directive (EU) 2019/1023 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt (the so-called Insolvency Directive), as has also occurred in other EU jurisdictions and consequently emphasized in a large number of international studies. In particular, for the Italian legal system, see Fabiani (2022d); for the German legal system, see Paulus (2021); for the French legal system, see Ghio (2022), who, however, observes that the already deep-rooted rescue culture in the French legal system has made only marginal regulatory adjustments necessary. Furthermore, a huge comparative analysis on the transposition of Directive (EU) 2019/1023 in the Italian legal system, as well as in those of other EU Member States (with a special focus on the Spanish legal system), specifically devoted to delving deeper into director duties in the proximity of insolvency, has been recently carried out by Benedetti (2023).

The UK law, however, still maintains a clear separation between liquidation and restructuring proceedings in terms of object, methods, and objectives pursued (Vaccari & Ghio, 2022).

But the topic under study is not limited to the consideration of the different rules governing insolvency proceedings and their related purposes, but also involves further key issues already under the attention of international doctrine.

Indeed, the alternative between preserving and continuing the business, on the one hand, and expelling the firm from the market, on the other hand, clearly impacts also the balance of interests that typically gravitate around the business, starting from the relationship between the owners and creditors of the same (for the doctrine assumption of the acquisition of company's control, in case of insolvency, by the creditors in place of the shareholders, see, in the Italian doctrine, Stanghellini (2007, 2004) and Easterbrook and Fischel (1983) in the international doctrine) up to its environmental and social sustainability. On this last topic in the context of insolvency law, see, in particular, D'Attorre (2021), Stanzione (2023, 2024). In the international debate, specific attention to the topic of sustainability in insolvency law has been dedicated by Linna (2019), while in the Italian doctrine, for the opinion which admits the potential consideration of stakeholders' interests, in addition to that of the creditors, in the context of business crisis, see, in particular, D'Attorre (2021), Fabiani (2022b), Inzitari (2023), Pacchi (2022), Santosuosso (2023), Stanghellini (2007), and Stanzione (2023). On the contrary, for a critical view on the effective relevance of stakeholders' interests in the management of business crisis, see, with a variety of arguments, Ballerini (2023), Fauceglia (2023), and Galletti (2021, 2023). Furthermore, on the fundamental issue of the possible representation of stakeholders' interests

within the administrative body of the company in crisis, see, specifically, Abriani (2025), as well as, for the hypothesis of the establishment of a specialized committee for crisis management — Della Tommasina (2022), or for committees also addressing stakeholders' issues — Bartalena (2022).

More in general, with regard to the different dimensions of the concept of "sustainability" — the economic one, on the one hand, and the social and environmental one, on the other hand — see Stella Richter (2021).

In light of the above, this study aims to outline the main differences between Italian and UK law in the management of insolvency proceedings, with specific regard to assets liquidation, by placing them in the broader context of the interests consequently involved.

Therefore, the paper will address, firstly, the analysis of the different rules governing assets liquidation in the context of insolvency procedures under Italian and UK law, and then will focus on the impact of the above rules on creditors' and stakeholders' interests. Finally, specific attention will be devoted to the future developments of the EU legal framework in the field of insolvency law — especially in light of the European Commission's (2022) proposal — in order to consider its potential impact on the international market.

3. FINDINGS AND DISCUSSION

3.1. Structural difference between Italian judicial liquidation and UK compulsory liquidation

The abovementioned structural difference between Italian judicial liquidation and UK compulsory liquidation may be clearly perceived by looking at the fundamentals of the two procedures, which emerge from the relevant legal framework.

Indeed, we can note in short that, on the one hand, Italian judicial liquidation increasingly reflects the perspective of the so-called "reallocative liquidation" ("*liquidazione riallocativa*", as stated by Fimmanò, 2024, p. 576) or dynamic conservation of the business complexes (Fimmanò, 2016, 2024), thus seeking a balance between the best profit of creditors — to which the continuation of the business during the procedure and the leasing of the same business, ruled, respectively, by Articles 211 and 212 of the Code, ultimately tend — and of the related benefits that the economic system as a whole (and, therefore, the market) could earn as a result of the enhancement of those assets and business relationships that are "no longer *functioning* in the insolvent firm but [may be] *functional*" to other firms operating on the market (Fimmanò, 2016, p. 47). In this perspective, see also Nigro and Vattermoli (2021).

On the other hand, the UK compulsory liquidation, like the other "voluntary" liquidation procedures provided for by the same legal system, seems to be clearly oriented towards the expulsion of the firm from the market, due to the application of the liquidation procedure, in order to pursue macroeconomic and microeconomic efficiency: efficiency which, as Vaccari and Ghio (2022) observed, represents "an additional and autonomous goal of liquidation procedures" (p. 59).

The gap at issue appears as the outcome of a legislative policy choice that, in the UK legal system, has resulted in a clear separation between reorganization procedures (certainly encouraged, also for competitive reasons, in compliance with the so-called rescue culture that has spread throughout Europe) and procedures, such as compulsory liquidation, of a purely "dissolution" type, not only aimed at pursing the interest of creditors and their fastest and highest satisfaction but also the interest of the economic system considered as a whole, clearly deemed as best satisfied through the rapid removal of the inefficient from the market rather than by virtue of its survival, with the costs and risks of failure that this entails.

The inefficiency of the firm to be subject to compulsory liquidation, moreover, not only derives from its insolvency, as the insolvency is only one, probably the main[1], but not the unique, of the causes that allow the opening of the procedure at issue.

In this perspective, Vaccari and Ghio (2022) have recently observed that: "Liquidation (or winding-up) is a collective insolvency procedure. It is available to companies experiencing financial or economic difficulties that prevent them from operating as a going concern. The assets of the company are collected and sold, and the proceeds arising from the sale are distributed to creditors. Following distribution, the company is dissolved. The objectives of the liquidation process are to: allow for an equitable and fair distribution of the debtor's assets among the creditors; remove unviable companies from the market; and investigate any situation of misconduct" (Vaccari & Ghio, 2022, pp. 43–44; Keay & Walton, 2017).

In light of the above analysis, it could be argued that while the opening of a liquidation procedure in UK implies the "economic" failure of the firm and the consequent inability of the same to continue to carry out its business (therefore, to be liquidated), judicial liquidation in Italy, although is not intended to grant the recovery of the firm (D'Attorre, 2021; Nigro & Vattermoli, 2021), does not exclude the continuation of the business (on the contrary, it presumes it, as better explained below) during the procedure or at the outcome of the same (Cardinale, 2020; Brogi, 2022; Stanzione, 2023).

In the first case (the UK) the interest of the market is protected by guaranteeing the dissolution (as quickly as possible) of the inefficient firm (not necessarily insolvent) while in the second case (Italy) an attempt is made to reallocate business complexes which, although not "functioning" under the management of the debtor, could instead be "functional" in the context of other business managements (Fimmanò, 2016, 2024).

3.2. The conditions required to be admitted to liquidation procedures in Italy and the UK

The structural difference between Italian judicial liquidation and the UK compulsory liquidation, as outlined above, also results in the conditions required to be admitted to the same procedures according, respectively, to Italian and UK law.

Such conditions, indeed, are clearly different and, specifically, broader in the UK law compared to Italian law. In fact, while Article 121 of the Italian Code provides that judicial liquidation can be applied to non-minor insolvent commercial firms

[1] Vaccari and Ghio (2022) have observed that "the most common ground for a petition is that the company is unable to pay its debts" (p. 66).

in state of insolvency[2], compulsory liquidation, according to Section 122 of the UK Insolvency Act 1986[3] (hereinafter also the "Insolvency Act"), first of all, applies in further hypotheses than that regarding the inability to fulfil obligations[4], including, inter alia, the case in which "the court is of the opinion that it is just and equitable that the company should be wound up" (Parliament of the United Kingdom, 1986, Section 122(1), letter (g)) or "the company does not commence its business within a year from its incorporation or suspends its business for a whole year" (Parliament of the United Kingdom, 1986, Section 122(1), letter (d)).

Again, the same inability to fulfil obligations also includes the case in which "[…] it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities" (Parliament of the United Kingdom, 1986, Section 123(2)), therefore, in a condition of financial imbalance which however implies a complex and dynamic business assessment very far from the static approach emerging by Article 2, para. 1, letter (d), of the Italian Code — rather aimed at qualifying the size of the business on the basis of past or current data but not on the forecasting ones — and the perspective grounded on the consideration of the repeated failures of the debtor to pay its debts as a symptom of insolvency. More precisely, according to letter (b) of para. 1 of Article 2 of the Legislative Decree No. 14 of January 12, 2019, insolvency means "the state of the debtor which reveals itself through non-fulfilment or other external facts, which demonstrate that the debtor is no longer able to regularly satisfy his obligations".

It could then be argued that, according to the UK insolvency law, the conditions required for the application of the compulsory liquidation procedure imply an assessment of the (in)efficiency of the business complex, which is broader and more complex than that aimed at ascertaining the state of insolvency, which allows the submission to judicial liquidation, under Italian law.

As proof of the above, indeed, Vaccari and Ghio (2022) recently observed that, for example: "The just and equitable winding-up of a company is an appropriate method of severing the business relationship only where there had been a catastrophic loss of trust and confidence among the directors, such that the company's business could no longer be conducted. These grounds do not refer to the company's solvency. It is quite possible for CLs to be commenced against solvent entities, provided that a case is made under one of the grounds outlined in the Act" (p. 65).

Finally, it is worth noting that compulsory liquidation can also be launched on grounds of public interest (Parliament of the United Kingdom, 1986, Section 124A), the existence of which the Court is called upon to verify based on the results of the investigations. In this perspective, Vaccari and Ghio (2022) clarify that: "The conclusion may be reached on the grounds of an inspector's report or after an autonomous investigation of the Department. A court will order the winding-up if it appears just and equitable to do so" (p. 66). This may be the case in which, for example, the company is unable to clarify the origin of certain cash flows, which could lead to the presumption that the same is operating illegally (Vaccari & Ghio, 2022).

3.3. The continuation of the business in case of insolvency under Italian judicial liquidation and UK compulsory liquidation

The abovementioned characteristics of the (in)efficiency assessment of the business complex subject to compulsory liquidation also influence the different value assigned to the continuation of the business itself in the same compulsory liquidation procedure compared to judicial liquidation, under Italian law.

Indeed, it is worth to be reminded that among the purposes of liquidation procedures in UK, as recently highlighted by Vaccari and Ghio (2022), there is that of "remov[ing] companies that are hopelessly insolvent from the market" (p. 58) and to "allow for an investigation of the company's affairs, particularly to scrutinise the director's behaviour" (p. 59). On the topic, see also Keay and Walton (2017). On the contrary, Italian legal doctrine observes that, in the post-reform Italian insolvency law, no procedure can still be intended as exclusively devoted to the dissolution of the business, given that also judicial liquidation can allow the conservation of those entities still having productive capacities (D'Attorre, 2022; Nigro & Vattermoli, 2021).

This different approach of the two compared legal systems impinges on the related provisions ruling the continuation of the business in compulsory liquidation, on the one hand, and in judicial liquidation, on the other hand.

In fact, while the opening of compulsory liquidation in the UK automatically produces the dismissal of the company's employees, "except if the business continuation is beneficial for the winding-up" (Vaccari & Ghio, 2022, p. 73; Fletcher, 2017), in the Italian legal system, the substantially inverse rule applies.

According to Article 211 of the Italian Code, indeed, the opening of judicial liquidation does not prevent the continuation of the business unless the continuation is detrimental to the creditors — as assessed by the Tribunal before the appointment of the creditors' committee — or the continuation of the business has been authorized by the deputy judge, on the proposal of the liquidator and after a favourable opinion of the creditors' committee, once appointed (Legislative Decree No. 14 of January 12, 2019, Article 211, paras. 1–3).

Therefore, and summarizing, while in the UK insolvency law the business continuation of the firm undergoing compulsory liquidation must produce an advantage to be authorized, under Italian insolvency law the business of the firm subject to judicial liquidation automatically continues, unless it causes harm to creditors, according to the assessments carried out time to time by the procedural bodies, so it is not required that it

[2] More precisely, Article 121 ("Presupposti della liquidazione giudiziale") of Italian Legislative Decree No. 14 of January 12, 2019 provides as follows: "The provisions on judicial liquidation apply to commercial entrepreneurs who do not demonstrate joint possession of the requirements set out in Article 2, paragraph 1, letter d), and who are in a state of insolvency".
[3] The updated text of Section 122 ("Circumstances in which Company May be Wound up by the Court") of the Insolvency Act 1986 is available at https://www.legislation.gov.uk/
[4] Namely the case provided by letter (f) of Section 122(1) of the Insolvency Act 1986, according to which, "a company may be wound up by the Court if […] (f) the company is unable to pay its debts".

is advantageous for the procedure. Prior to the adoption of the Italian Code, based on the old bankruptcy law (Royal Decree No. 267 of March 16, 1942), Bozza (2014) and Fimmanò (2016) have emphasized that business continuation should not benefit the creditors but rather be indifferent, therefore, not prejudice them.

Finally, as a further confirmation of the different approach of the two compared legal systems on the topic at issue, while the conclusion of the compulsory liquidation procedure determines the automatic dissolution of the company[5], in the Italian legal system such automatic effect does not occur[6].

3.4. The absence of assets liquidation instrumental measures in compulsory liquidation

A logical consequence of the different approach described above is the absence, in the UK legal system, of a formal regulation of the instrumental measures for the liquidation of assets (such as the continuation of the business during the procedure and the leasing of the business itself), as well as of the favour for the preservation of the business, in the context of the sale, which instead emerges from the Italian legislation.

The purpose of compulsory liquidation (i.e., dissolution of the business and prompt removal of the inefficient firm from the market) is secured, indeed, since from the appointment of the "provisional liquidator" — hence, even before the issuance of the "winding-up order" — in "preventing the destruction of documents or the dissipation of assets before the winding-up order could be made" (Vaccari & Ghio, 2022, p. 70) and, once the liquidator has been appointed, by ensuring "[…] that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it" (Parliament of the United Kingdom, 1986, Section 143(1)).

Furthermore, and consistently with the above, Section 202(2) of the Insolvency Act 1986 also provides for an early dissolution of the company to be wounded up, specifically applicable when "the official receiver […] is the liquidator of the company and […] it appears to him — (i) that the realisable assets of the company are insufficient to cover the expenses of the winding up, and (ii) that the affairs of the company do not require any further investigation" (Parliament of the United Kingdom, 1986, Section 202(2))[7].

3.5. Instrumental measures for assets liquidation in the Italian legal system and the problem of sustainability of the insolvent firm

In the Italian legal system, on the contrary, assets liquidation instrumental measures, such as business continuation and business leasing, respectively ruled by Articles 211 and 212 of the Code, deserve a valuable role, at least in the perspective, mentioned above, of the so-called "reallocative liquidation" ("*liquidazione riallocativa*", as stated by Fimmanò, 2024, p. 576), or dynamic conservation of the business complexes (Fimmanò, 2016, 2024), "no longer *functioning* in the insolvent firm but [potentially] *functional* to other firms" (Fimmanò, 2016, p. 47). In this perspective, see also Nigro and Vattermoli (2021). A perspective that reveals its potential usefulness in order to increase the value of the assets to be liquidated, first of all for the purpose of a more profitable sale, to the benefit of the creditors, and at the same time of the market and the interests it involves (Fimmanò, 2016).

We have already noted that, pursuant to Article 211 of the Code, business continuation represents a physiological condition, despite the opening of the judicial liquidation, unless it is capable of causing prejudice to the creditors.

Nevertheless, business leasing is the most widespread solution in practice, considering the multiple advantages it offers, above all, the transfer of the risks and burdens arising from the management of the business to the lessee (D'Attorre, 2022), also due to the derogatory regime to Articles 2112 and 2560 of the Italian Civil Code provided for by Article 212, para. 6, of the Code for the benefit of the procedure, whose liability is excluded for all debts accrued during the leasing, until the business or its branches return to it, at the end of the same leasing (Legislative Decree No. 14 of January 12, 2019, Article 212, para. 6).

The attention to the preservation of the business complexes belonging to the firm undergoing insolvency procedures is further enriched should stakeholders' interests (including those of the workers, suppliers, environment, community, etc.) point of view be considered, weighing up the possibility that the procedure would take care of them: interests that proper business continuation could allow to safeguard (Stanzione, 2023).

In other words, it should be assessed the applicability of sustainability principles with respect to the insolvent firm, a question to be primarily reconciled with the main goal of all insolvency procedures — judicial liquidation first and foremost — represented by the satisfaction of creditors.

However, the consistent development of sustainability principles and their frequent transfer, nowadays, in increasingly specific rules, especially at the EU level, does not allow for exclusion of the applicability of the same rules (and to duly consider the same principles, albeit with the necessary adjustments) within the context of insolvency procedures (D'Attorre, 2021). Several European Directives have now been adopted on the topic, starting at least from Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, to Directive (EU) 2022/2464 on Corporate Sustainability Reporting (the so-called CSRD), until the recent Directive (EU) 2024/1760 on Corporate Sustainability due Diligence (the so-called CSDDD).

[5] Indeed, as observed by Vaccari and Ghio, (2022), "the company loses its legal personality and ceases to exist" (p. 81), taking into account the presumption of dissolution operating after three months from the completion of the procedure. The authors, in fact, add that: "For CLs, except in case of early dissolution, the company is deemed to be dissolved 3 months after the Registrar of Companies has received and registered (i) the final account and statement under s.146(4) IA 1986 and (ii) a notice from an OR that the winding-up of a company by a court is complete" (Vaccari & Ghio, 2022, p. 81), as provided by Section 205, para. 1, letters a) and b) of the Insolvency Act 1986.

[6] Indeed, according to Article 233, para. 2, of Legislative Decree No. 14 of January 12, 2019, the liquidator requests the cancellation of the company from the company register, once the judicial liquidation procedure is closed, only in the cases referred to in para. 1, letters (c) and (d) of the same Article 233.

[7] Section 202(2) (Early dissolution) of the Insolvency Act 1986, specifically provides that: "The official receiver, if — (a) he is the liquidator of the company, and (b) it appears to him — (i) that the realisable assets of the company are insufficient to cover the expenses of the winding up, and (ii) that the affairs of the company do not require any further investigation, may at any time apply to the registrar of companies for the early dissolution of the company".

The existence of an instrumental relationship between the care of creditors' interest and stakeholders' interests could then be supposed, not dissimilar to that theorized, in a solvent firm, between the interest of shareholders and those of the stakeholders (D'Attorre, 2021) (the so-called "instrumental stakeholderism"). Some accurate clarifications about the concept of stakeholderism have been provided by Bebchuk and Tallarita (2020), who have appropriately distinguished what they call the "instrumental version of stakeholderism", whose management policies take into account the interests of stakeholders only as a "means" with respect to the ultimate goal of increasing profit (and, therefore, "shareholder value"), from that version they call, instead, "pluralistic", in which the interests of stakeholders become a goal of the company, on a par with profit (p. 97).

In other words, the care of stakeholders' interests may be functional to the protection of corporate values and, therefore, also useful for the purposes of satisfying the creditors' interest, at least from the perspective of a more profitable sale of the debtor's business.

Obviously, the potential consideration of stakeholders' interests, in the context of the insolvency procedure, physiologically implies the onset of a conflict of interests to be resolved, avoiding, nevertheless, an unjust sacrifice of any of the two categories of interests and searching, thus, for a fair balance between them (D'Attorre, 2021).

A more careful analysis of assets liquidation instrumental measures, under Italian law, seems to offer a solid confirmation of the above.

Indeed, not only the business continuation is substantially an automatic effect of the opening of the judicial liquidation, as abovesaid, unless the creditors should be damaged from it — leading to presume a positive evaluation, by the legislator, of the same continuation, also for the benefits of the stakeholders having a relationship with the debtor's firm, such as workers, suppliers and so on (Stanzione, 2023) — but again, and perhaps even more clearly, the provision ruling business leasing (i.e., Article 212 of the Italian Code), in identifying the criteria for selecting the lessee, seems to place the immediate (and strictly economic) interest of the creditors, coinciding with the amount of the lease offered, on a level at least of equal importance with the other parameters that must be "taken into account" in the evaluation, i.e., the guarantees provided and the reliability of the plan for the continuation of business activities, taking into account the maintenance of employment levels, if not even of possible subordination with respect to the latter, for the purposes of a more efficient and profitable liquidation of the assets, in view of the subsequent sale of the firm or branches of it (D'Attorre, 2021). In the opinion of Nigro and Vattermoli (2021), instead, the amount of the lease is the criterion to be considered above all others.

It has indeed been rightly observed that the procedure could well accept a lower lease in view of a more profitable sale of the company later, potentially facilitated and better remunerated in the face of a better prospect of continuation of business activities (with the associated profitability) and maintenance of employment levels: a perspective that could be functional not only for the firm, as a collector of the interests that gravitate around it and for its more profitable placement on the market, but also, and above all, for the creditors, whose satisfaction could be ensured to a greater extent through a more fruitful liquidation — to which the lease is ultimately instrumental — rather than through the immediate collection of a higher lease, which however, in addition to being, by its nature, temporary, does not represents the intrinsic purpose of the lease but only the means to achieve the liquidation with hopefully better results (Fimmanò, 2016).

3.6. The sale of the business or of its branches: The "greater satisfaction of creditors" as the guiding principle of judicial liquidation

If business continuation and business leasing, under Italian insolvency law, seem to allow a potential alignment or, at least, a potential balancing between stakeholders' interests and creditors' interest, even in the face of "dynamic" and qualitative evaluations, the provision regarding assets liquidation — the "final stage" of judicial liquidation — seems to express, on the contrary, an absolute and "static" prevalence of creditors' interest based on a merely quantitative level, admitting the potential "sacrifice" of the preservation of the business, and, therefore, of its reallocation, if useful for the better satisfaction of creditors (D'Attorre, 2021; Stanzione, 2023).

Indeed, according to Article 214 of the Italian Code, the sale of the entire business complex is allowed only in the name of the "greater satisfaction of creditors" (namely, "*maggiore soddisfazione dei creditori*", according to Article 214 of the Code), otherwise the liquidator must try to sell, in the order, branches of the business, assets or legal relationships identifiable as a whole and, finally, individual assets of the debtor.

This more "rigid" prevalence of creditors' interest does not, however, appear dystonic with the system, which grants to creditors' interest its maximum value gradation precisely in judicial liquidation (D'Attorre, 2021; Stanzione, 2023), which is not a procedure formally devoted to the recovery of the business, unless its preservation is safeguarded (Nigro & Vattermoli, 2021).

Moreover, should business continuation and/or leasing be beneficial for its future sale and for the increasement of the value of the business itself, potentially allowing the achievement of a better profit for the creditors themselves later (Fimmanò, 2016; Stanzione, 2023), the circumstance whereby the sale of debtor's assets coincides, actually, with the end of judicial liquidation — as its fundamental goal has been pursued — prevent the possibility to adopt long-term solutions and, essentially, to take seriously care of interests other than those pertaining to creditors (Pacchi, 2023; Stanzione, 2023).

Nevertheless, the objective of preserving the productive capacity of the business, as reconstructed so far, is not so easily "sacrificed" by the legislator for the benefit of creditors' profit.

In this sense, as previously highlighted, Article 214 of the Italian Code allows the liquidation of the individual assets of the debtor and, therefore, in essence, the dissolution of the business values, only if it is suitable to allow a "greater satisfaction of creditors" with respect, in order, to the sale of the entire business complex, of its branches, or of assets or legal relationships identifiable as a whole

(Legislative Decree No. 14 of January 12, 2019, Article 214), thus expressing a preference for the preservation, as far as possible, of the entire business complex, with a view to the continuation, at least indirect, of the business activity by other firms on the market.

3.7. The influence of EU law on business continuation and its relationship with creditors' interest

Before drawing the conclusions of the above analysis, a further issue deserves to be considered, i.e., the influence exerted by EU law on the relevance of business continuation and its relationship with creditors' interest.

The starting point of the above investigation may be identified in the so-called "shift of the fiduciary duties" theory, according to which, even before the opening of an insolvency procedure and, properly, in the proximity of the zone of insolvency, the directors must manage the firm in the best interest of creditors, rather than in that of shareholders, who may be satisfied with the assets of the firm only residually, subordinate to the creditors (Keay, 2015; Campobasso, 2023; Vattermoli, 2018).

The above thought setting has found, moreover, a specific recognition in Italian insolvency law at Article 4, para. 2, letter (c), of the Code, according to which the debtor, during the proceedings, has the duty to manage the assets of the firm "in the primary interest of the creditors" (namely, "*nell'interesse prioritario dei creditori*", as provided by Legislative Decree No. 14 of January 12, 2019, Article 4). Abriani (2025), Campobasso (2023), and Stanzione (2024) further argue and make references, including international doctrine. On this topic and with particular regard to the position of shareholders, see also Benedetti (2020).

Furthermore, as argued by Stanghellini (2004, 2007), the opening of an insolvency procedure causes the transfer of the company's control from shareholders to creditors, who, properly due to the insolvency procedure and the organizational structure that it implies, superseding that which characterizes the solvent company, can exercise those powers of control previously belonging to shareholders. In the international doctrine, see, in particular, Easterbrook and Fischel (1983, 1996), who observed: "When the firm is insolvent, the bondholders and other creditors eventually acquire control, through provisions in bond indentures and other credit agreements or through operation of bankruptcy law" (Easterbrook & Fischel, 1983, p. 404).

The creditor's interest, in other words, receives increasingly intense consideration depending on the economic-financial condition of the company and the stage of its management, before or after the opening of an insolvency procedure (Palmieri, 2025).

Such consideration, however, takes on different gradations in the main European legal systems, due to the position they assign to the interest of creditors.

The above topic has received significant development in light of the adoption of Directive (EU) 2019/1023 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt and its transpositions in the various EU countries.

According to recital 1 of the aforementioned Directive, it aims, inter alia, at "[…] ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating […]" and, according to recital 2, it assumes that "[…] Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises […]".

The above perspective — in addition to appearing very distant and substantially opposed to that which inspires compulsory liquidation in the UK — is clearly addressed to place the continuation of the business at the center of the objects to be pursued by modern insolvency law, apparently even at the cost of the possible sacrifice of creditors' interest (Fabiani, 2022a, 2022c).

Nevertheless, from the transposition of Directive (EU) 2019/1023, as realised in some of the main European legal systems[8], it seems possible to find several confirmations of the (still) primary relevance (and prevalence) of the creditors' interest, even in the context of the "social dimension" outlined by the Directive itself, in the name of business continuation (Pacchi, 2019, 2022; Vella, 2020).

An exemplary case may be found in Ordonnance No. 2021-11936, the measure through which France implemented Directive (EU) 2019/1023. For a comment on this new legislation, see, particularly, Ghio (2021, 2022).

Indeed, the international doctrine has observed that the transposition of Directive (EU) 2019/1023, despite the favour for business continuity and the risks of compression of creditors' interest that such value brings with it, has represented the fundamental opportunity to proceed with a strengthening of creditors' rights in the French insolvency system, thus achieving a better involvement of the same in the execution of the procedures and a more balanced protection of their interests[9]: this also on the assumption that — as too observed by the scholars — in this system the so-called rescue culture was already deeply rooted, which determined the need to proceed, with the implementation of Directive (EU) 2019/1023, only with minimal adjustments in this direction. In this perspective, Ghio (2022) states that: "The French government has transposed the Directive *de minimis*, by retaining existing preventive restructuring procedures. In particular, the combination of the conciliation and accelerated safeguard proceedings was preserved and endorsed as the reference preventive framework within the meaning of the Directive, through the reinforcement of the effects of conciliation proceedings and the facilitation of

[8] Has emphasized the wide margin of discretion reserved to the Member States in the transposition of the Directive, Paulus (2021), where he observes: "[…] the Directive EU 2019/1023 offered almost 90 options for variations so that in the end it is to be assumed that there will be 27 different insolvency avoidance instruments" (p. 13).

[9] Ghio (2021) had deemed as appropriate to seize the opportunity of the transposition of the Directive (UE) 2019/1023 to provide for a review of the role of the judge and a strengthening of the rights of creditors, in procedures with restructuring purposes.

the adoption of restructuring plans in case of opposition by dissenting creditors" (subsection 3.1). While, on the contrary, Ghio (2021) observes that the efforts of the legislator were concentrated above all on the review of the intrinsic critical issues of the system, starting precisely from the perceived need to outline a better balance between the interests of stakeholders and those of creditors, in procedures with recovery purposes.

But the EU regulatory framework is still evolving.

Indeed, while creditors' interest continues to play a crucial role also within the current international insolvency law framework, the continuation of the business — preliminary condition for at least potentially protecting the interests of stakeholders — has equally become a fundamental target to be reached at the EU level. Palmieri's (2025) study on this subject has extensive argumentative and bibliographical references. The author specifically observes that Italian insolvency law (and not only Italian insolvency law) is no longer inspired by the so-called absolute primacy of creditors, but rather by the safeguarding of business continuity, a true cornerstone of the Italian Crisis and Insolvency Code.

As a confirmation of the above, the recent Proposal for a Directive of the European Parliament and of the Council Harmonising Certain Aspects of Insolvency Law, adopted by the European Commission (2022), has regulated in a structured way the so-called pre-pack proceedings, already widespread and practiced in some legal systems[10] as well as "generally considered effective for value recovery for creditors", in which "[…] the sale of the debtor's business (or part of it) is prepared and negotiated before the formal opening of the insolvency proceedings. This makes it possible to execute the sale and obtain the proceeds shortly after opening the formal insolvency proceedings intended to liquidate a company" (European Commission, 2022, Section 5, para. 24).

More specifically, the abovementioned Proposal provides, at Article 19, that pre-pack proceedings shall be composed of two consecutive phases, i.e., the so-called preparation phase, "which aims at finding an appropriate buyer for the debtor's business or part thereof" and the so-called liquidation phase, "which aims at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors" (European Commission, 2022, Article 19, para. 1, letters (a)–(b)).

Such proceedings seem to offer an adequate balance between the pursuit of creditors' interest and the interest in the continuation of the business (also for the benefit of stakeholders and the market), as are suitable to avoid or at least reduce the dispersion of value that typically produce the opening of an insolvency procedure, anticipating it, and, at the same time, are intended to ensure the indirect continuation of the business by a different entrepreneur, in compliance with the perspective suggested, within the Italian doctrine, by Fimmanò (2016, 2024).

4. CONCLUSION

The starting assumptions seem confirmed by the outcome of the above analysis.

Indeed, on the one hand, Italian judicial liquidation enhances the objective of preserving the business complexes, at least in view of the relative reallocation on the market, for the benefit of the creditors and the market itself (and of sustainability objectives, in a broad sense) (Fimmanò, 2016, 2024; Stanzione, 2023).

Instead, compulsory liquidation, on the other hand, aims at removing the inefficiencies of the firm undergoing the procedure (for reasons not necessarily confined to insolvency, unlike the Italian legal system) by providing for the relative, prompt expulsion from the market (Vaccari & Ghio, 2022).

Obviously, in the UK law scenario, the possibility to protect stakeholders' interests seems to be reduced (although not prevented), already considering that the opening of compulsory liquidation automatically determines the dismissal of the company's employees "except if the business continuation is beneficial for the winding-up" (Vaccari & Ghio, 2022, p. 73). On the topic, see also research by Fletcher (2017).

However, the issue must be placed and examined not only in the context of legislative policy choices, aimed or not at the rescue of the business, but also taking into account the reference market in which the inefficient firm is intended to operate.

In fact, in the UK economic system, relocation on the market (of the same debtor, of the workers, etc.) is probably easier "outside the procedure", on the assumption that starting a new business can represent a more easily achievable and more profitable goal than keeping alive a business that has already proven, in various ways, not to be efficient. And then, the expulsion from the market instead of preserving the insolvent firm and its business may also comply with sustainability principles, at least in terms of the limitation of negative externalities that could result from the preservation of a no longer efficient business.

Nevertheless, the competitive effect which could be produced by the developments of insolvency law and its harmonization at the European level cannot be underestimated, even if it is not formally involving the UK. Indeed, the significant role attributed to pre-pack proceedings in the European Commission's (2022) Proposal suggests that business continuation will be further enhanced by the modern EU insolvency law and preferred to the expulsion of the insolvent firm from the market, where possible.

[10] For example, in the Netherlands. In this regard, Gant et al. (2021) stated as follows: "Practitioners in the Netherlands, however, have been quite creative in working around the lack of a comprehensive restructuring procedure and have created various opportunities for restructuring companies in financial distress, such as the use of a Dutch-style pre-pack, though associated uncertainties due to legal challenges limited the effectiveness of the procedure" (p. 8).

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