INNOVATION AND TRANSITION IN LAW

Experiences and Theoretical Settings

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In the middle of nowhere.
The never-ending transition of Italian private companies
(*società a responsabilità limitata* - SRL)

Alessio Bartolacelli

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1. Introduction

Business Law is one of the fields in legal studies where innovations are usually most frequent and important. Actually, we can assume that Business Law has two basic purposes. On the one hand, it aims at regulating business activities; this means that business regulations are continuously chasing reality, trying to provide legal responses to the innovative situations developed in economic practice, but, at the same time, being aware of the fact that reality is always moving farther away, gaining a lead, like in Zeno's paradox of Achilles and the tortoise. On the other hand, particularly under the most proactive and wise legislatures, Business Law is responsible for promoting new entrepreneurial attitudes and tools, serving as a vehicle of innovation for society as a whole.

This means that Business Law, as regards the specific case, has either a rearguard (response) or a forefront (impulse) approach to the actual business environment. Such a situation is not necessarily dependant on the specific system of rules laid down in a given order: in the same legal environment – which can be either a national or a supranational one – the two attitudes might coexist. In the same legal environment, the rearguard attitude can be present with reference to some situations, while a forefront promotion approach is adopted for others .

In both cases, the need or aim to regulate the innovation gives rise to tran-

sitional phenomena. They nevertheless differ: very often, the rearguard attitude is not fully adequate to provide an answer to the question "where are we going to?", while the forefront one naturally should be forged having a rather clear idea of the final target of the process. This clear idea is not always present, as we are going to see, and this creates somewhat of a short-circuit in legislative interventions, with schizophrenic sudden changes with little or no clear ultimate purpose.

In this chapter, I deal with a specific example from Italian Business Law, i.e. the case of the Italian private company, the *società a responsabilità limitata*. In fact, its course has been meaningfully marked by several conflicting legislative interventions during the last decade. This superabundance of interventions has contributed to changing the very basic profiles of this company form, whose nature and position in the system of Italian Company Law is currently a matter of harsh debate among legal scholars.

2. Streamlines in reforms of Business Law from 1942 to 2004. The birth and growth of SRL

From 1865 until 1942, the realm of Italian Business Law had as its primary legislative source a specific Commercial Code. The first Commercial Code of unified Italy was issued in 1865, and replaced just seventeen years later by the *Codice di commercio* issued in 1882. The remaining part of Private Law had the Italian Civil Code issued in 1865[1] as its main source.

The separation between the Civil and the Commercial Code is naturally relevant in order to understand the attitude of the Italian lawmaker regarding the relationship between Civil and Business Law. Business Law was intended to be a realm separated from general Private Law because of the economic nature of business.[2] It is not by chance that the application of the *Codice di commercio* was intended to occur with reference to all the acts of business (*atti di commercio*), and to contracts where even just one of the parties was a businessman (*commerciante*). In this system, where a single type of contract could have rules in both the Civil and Commercial Code, the provisions laid down in the Commercial Code prevailed over the possibly conflicting rules present in the Civil Code. The system was thus designed in order to expand the application of Commercial rules over the "common" civil ones, and this

1 Galgano (2010) 221 ff.; Spada (2009) 15 ff.

2 Spada (2009) 18-19.

expansion followed the commercial nature of the acts carried out by a subject.[3]

The unification of the Civil and Commercial Codes in 1942 solved the possible conflicts of rules, de facto sanctioning the priority of Commercial rules over general private ones. Even if one might be tempted to think that the repeal of the Commercial Code and the inclusion of the commercial subject in the Fifth Book of the 1942 Civil Code was to be intended as a "defeat" for Commercial Law, which was "losing" its proper Code, the correct reading of the unification is another. From a functional point of view, there has been a substantial transfusion of many of the solutions present in the late Commercial Code into the new Civil Code: many commentators and scholars have spoken of the "commercialisation of Private Law".[4] A corollary to this movement towards commercialisation was the identification of a new cornerstone of the application of commercial law: the passage from the *act* of commerce, to the *person* in charge of commerce, i.e. the entrepreneur (*imprenditore*). It has been clearly pointed out that, from a practical point of view, there were not huge differences between the old *commerciante* (businessman) and the new *imprenditore*.[5] In any case, the fact that from 1942 on, the entire Commercial Law system has as its pivot not an act, but a person (either natural or legal, as in companies) clearly contributed to an increased certainty regarding the area of application of Commercial Law in the entire Italian legal system. A legal system that became much more thoroughly "commercialised" because of the adoption of commercial principles in the new Private Law regulation set down in the Civil Code issued in 1942.[6]

In the area of Company Law, the Civil Code issued in 1942 marked the creation of a "new" company form, the *società a responsabilità limitata* (hereinafter just *s.r.l.*), that was meant to signal the need for a specific legal tool for the development of small enterprises. By means of the s.r.l. the lawmaker was

3 Spada (2009) 25 ff. For a more comprehensive panorama, see also: Buonocore (2006) 15 ss, spec. 22 ff.; Libertini (2006), Delle Monache (2012), and the debate between Libertini (2015), Montalenti (2015), and Maugeri (2015). A new and recent debate on the so-called "*ricommercializzazione*" of Italian Business Law is also interesting: Angelici (2019), Portale (2019), Spada (2019), Libertini (2019), and the German-related remarks by Kindler (2019).

4 Buonocore (2006) 22 ff.

5 Spada (2009) 27-28.

6 For a comprehensive analysis of this transition from the Commercial Codes of the 19th century, to the new Civil Code, see Teti (2018).

granting the members of this company the benefit of limited liability, without imposing on them the stricter legal obligations taken from the rules set down for the (bigger) *Società anonima*, whose name was changed in 1942, becoming *Società per azioni* (s.p.a., Joint stock company).[7]

This general panorama was not affected by major legal amendments until 2003/04. In 2003, a general reform of company law was passed,[8] with the purpose of modernising the Italian company environment. This reform did not modify any of the general Business Law principles, but designed a new allocation of competences for the company forms known by Italian Law. Indeed, the 2003/04 reform on the one hand, contributed to reinforcing the role of the s.p.a. as the reference model of the firm for bigger businesses. On the other hand, conversely, it enhanced the freedom for the members of an s.r.l., so that they were enabled to create a "custom tailored" company, with the specific features the members desired, and no strict legal ties.[9]

This attitude was clearly aligned with the 1942 scheme: s.p.a. for bigger enterprises; s.r.l. for smaller ones. Nevertheless, the reform in 2003/04 was not constrained just to that. It also recognised the momentous social role of the s.r.l. in the Italian economy, taking note that the s.r.l. was – and is – at large the most common company form in Italy, due to the overwhelming predominance of SMEs over bigger businesses in the economic life of the country.[10] In so doing, this normative technique aimed at expanding the possibilities for a broader customisation of the company, leaving limited room for mandatory

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7 A very valuable reconstruction of the legal precursors of the model abroad, and of the projects for the new code can be found in Rivolta (1982) 26 ff. The most complete work on the s.r.l. is certainly Zanarone (2010), where there are also historical and systematic remarks on p. 3 ff.

8 Legislative Decree January 17th, 2003, no. 5, amending the Civil Code with reference to the companies and cooperative societies, entered into force on January 1st, 2004 (hence the reference, in the text to the 2003/4 reform).

9 See the *Relazione* to the Legislative Decree 6/2003, which in the part devoted to the s.r.l. states: "Essa si caratterizza invece come una società personale la quale perciò, pur godendo del beneficio della responsabilità limitata (che del resto, dopo la generale ammissibilità della società unipersonale a responsabilità limitata, non può più ritenersi necessariamente presupporre una rigida struttura organizzativa di tipo corporativo), può essere sottratta alle rigidità di disciplina richieste per la società per azioni". The *Relazione* is available in *Rivista delle società*, 2003, p. 112 ff. (the part cited is on p. 147).

10 According to data retrievable from database AIDA, there are currently more than 1.24 million active s.r.l.s in Italy; just for a quick comparison, the figure for s.p.a.s is 27,048.

legal provisions. The fundamental idea was to remove from the s.r.l. the tag of " s.p.a.'s younger (and smaller) sister", which was very common until 2003, and was due to the massive cross-referencing in the realm of private companies of rules primarily laid down for joint stock companies.[11] The s.r.l. system that the 2003 reform designed was less influenced by the rules established for the *Società per azioni*, and originated a genuinely autonomous company form, with very few formal links with joint stock companies.

Moreover, the new s.r.l. also had a promotional function. Although a company, and due to this needing a starting share capital in order that its members could benefit from limited liability, according to the general doctrine/theory of legal persons in Italian Law, the minimum amount of money needed for the constitution was – and is – much lower than the minimum capital – or legal capital – required for establishing a *Società per azioni*.[12] With a view to this circumstance, the s.r.l. was intended to be the most likely candidate for being the "natural" entry-level company form, for entrepreneurs aiming at developing a business benefiting from limited liability. Of course, they had the opportunity to run their business either as sole entrepreneurs, or by means of a partnership; these solutions, nevertheless, had both pros and cons, the cons being the unlimited liability for the entity's obligations, and the pros being the extreme flexibility that is the hallmark of partnerships and sole enterprises.

Until 2003/04, the members' choice between adopting a partnership or an s.r.l. as a business model had to take into consideration that getting the benefit of limited liability could mean giving up designing the company in full accordance with their entrepreneurial ideas. Conversely, the unlimited liability characteristic of partnerships was the price to pay for full customisation. The reform in 2003/04 removed this obstacle, by expanding the room for members' autonomy also in the s.r.l.[13]

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11 See, for instance, the former (before 2003) Arts. 2486 and 2487 Civil Code, cross referencing for the application in the s.r.l. most of the rules laid down for the s.p.a.

12 Starting from the year 2003/04, EUR 10,000 instead of EUR 120,000 (but only 50,000, since 2014: see *infra*). Furthermore, besides the rules on minimum capital, the norms applicable to contributions allowed members, in most cases, to pay-in only one fourth of the subscribed contribution as of a company's constitution. This means that, when establishing an s.r.l. with two or more members, whose contributions are cash, the amount of contributions to be immediately paid-in did not exceed 2,500 EUR. This entire issue has been revolutionised by the reforms in 2012/13 that we are going to analyse in the forthcoming paragraphs.

13 For instance, in the field of company governance, allowing the use of the models

From a systematic point of view, the new role for the s.r.l. was to be the link between the partnerships, and the s.p.a. There is, however, one more issue to deal with in order to make the panorama as clear as possible. When we mention members' enhanced autonomy in the s.r.l., we must not imply that such autonomy is necessarily intended to create a company that could be seen as "a partnership with members having limited liability".[14] This situation covers just a portion of the entire range. On the opposite side, in fact, we must consider that the members could use their autonomy also in order to recreate an s.r.l. with features very similar to those present in the s.p.a., but with much lower capital requirements. A bird's eye view of the s.r.l., therefore, would not reveal a monolithic organisational form; it would rather show a flexible tool, where the hallmark was, typically, its own intrinsic flexibility.[15] As such flexibility was intended to be used by the company's members, this led to considering the s.r.l. as the company form where the importance of the members as a person – in juxtaposition with the members' contributions as the key organisational feature – was more developed and crucial.[16]

This being said, understanding the key features of the s.r.l. when compared with the s.p.a. is nevertheless not immediate. Their ultimate purposes are intended to be different, and this is mirrored in the lower amount of capital required for establishing an s.r.l.; however, nothing prevents the members of the s.r.l. from deciding to raise the company's share capital not just higher than the minimum capital required for the establishment of an s.p.a., but even much higher. A lower minimum capital requirement for the s.r.l. than for the s.p.a. is thus directly linked with the ultimate purpose of the former, i.e. to serve as the vehicle for the acquisition of limited liability (also) for running small and medium sized enterprises. However, this has almost nothing to do with the key differences between the models, which is itself a paramount issue in a system based on the principle of typicality like that of Italy.[17]

The hallmarks of an s.r.l., when compared with an s.p.a., were traditionally intended to be two, present since 1942, plus one, in some ways reinforced in 2003/04:

established for partnerships (see: Art. 2475 Civil Code), or as far as contributions are concerned, with the possibility of work or service contributions, under certain conditions (Art. 2465 Civil Code).

14 See again the *Relazione* mentioned above, footnote 9.

15 Zanarone (2003) 84-90.

16 *Relazione*, footnote 9, 148.

17 Cf. Art. 2249 Civil Code.

a. In the s.r.l., the membership interests representing the participation of each member in the company (*quote*) cannot be, properly speaking, stocks (*azioni*), which are the hallmark of the s.p.a.;[18]

b. In the s.r.l., the membership interests owned by the members cannot be publicly traded, for instance in a primary or a secondary exchange market;[19]

c. In the s.r.l., one or more members are entitled to be in charge of the management of the company, along and together with the directors, while in the s.p.a. the company's management can only be enacted by the directors, with no competence regarding this for the shareholders.[20]

While features a. and b. have been present in the rules of the s.r.l. since 1942, principle c. has been strongly affirmed in particular by the 2003/04 reform.

Points a. and b. have some common background. When we consider that membership interests cannot be stocks, this means that the company's capital can be divided not into a pre-arranged number of shares, each one with the same par value, and incorporating the same rights and duties – at least where the shares belong to the same class or category – but only in the number of the company's members. In a share-based system, each shareholder can own a certain amount of stocks, or shares; in a non share-based system, like the s.r.l., each member owns just one membership interest, whose actual value normally depends on the member's contribution. This means that, while all the stocks of an s.p.a. (or, more correctly, all the stocks belonging to the same class, in an s.p.a.) are necessarily equal in rights and "weight", the membership interests of an s.r.l. are normally different. The prohibition to create stocks in the s.r.l. is to be read not just in a formal way – it is not possible to call "stock" a membership interest – but not even substantially – it is not possible to create "classes" of membership interests having necessarily the same par value and incorporating the same rights and duties.

This, naturally, has a direct influence on the (legally mandatory) prohibition to trade publicly an s.r.l.'s membership interests. The public trading, in particular when it comes to stock exchanges, requires the exchanged goods to be fungible; if they are not, the market is not in the condition to form the price for the good. Naturally, as membership interests cannot be incorporated in

18 Art. 2468, paragraph 1, Civil Code.

19 Art. 2468, paragraph 1, Civil Code.

20 Art. 2479, paragraph 1, Civil Code (and Art. 2380*bis* Civil Code for s.p.a.). For the deviations from this principle in the s.r.l. see below, paragraph 3.2.4.

shares, they cannot be considered fungible, and therefore cannot be traded on a market. Furthermore, the very nature of the s.r.l., with the central position of the member as a person, makes this company form an organisation where the fiduciary relations among the members are of the utmost importance. The consequence of this is that the number of members is usually rather low. This prevents membership interests from being listed in a public market system, with no guarantee on the personal peculiarities of the buyer, nor on his/her reliability towards the remaining members. Also for these reasons, the s.r.l. – along with its equivalent "sisters" in Europe and elsewhere –[21] is usually classified as a private company.

The private character of this company form is relevant also when it comes to point c. In fact, if we consider a company with few members, we naturally understand that the separation between the ownership (members) and the control (directors) is far less pronounced than in public companies. Empirically speaking, also in those cases where directors are not members themselves,[22] it is fairly usual for members to carry out management activities as well. The rules laid down in the s.r.l. establish a legal framework for such a situation, also by extending directors' liability to the acting members, in the case where their behaviour prejudices the company.[23]

The situation after the Company Law reform in 2003/04 was that in spite of belonging to the same family (the "companies"), s.r.l. and s.p.a. had different purposes and thus different key features. However, everything was about to change, from 2010 on.

3. The long-lasting season of the amendments to the s.r.l. rules (2008-2019)

3.1. The confirmation period (2008-2012)

The regulatory situation of the s.r.l. was not fated to find peace after the 2003/04 reform. In spite of having clear goals and ultimate aims for Italian private companies, from the very early years after the reform the Italian lawmaker found topics whose amendment could somehow reinforce the under-

21 This with meaningful exceptions in the Netherlands (where the local *BV* is at large modelled after the *NV*; references in Wooldridge (2009) 369), and (now for) Belgium, where with the 2019 Reform, the private character of the "old" *SPRL* was de facto denied. References in Bartolacelli (2019) 199 ff.

22 The default rule laid down in Art. 2475, paragraph 1, Civil Code, is that members only are entitled to be directors, if the articles do not state otherwise.

23 Art. 2476 Civil Code.

lying idea of the s.r.l. as an entry-level model, making its establishment and management easier.

The first relevant operation in the field dates back to 2008;[24] it basically deals with the repeal of the obligation for the s.r.l. to keep a specific book where the name of company members had to be recorded (*libro soci*): every transmission of membership interests was effective against the company from the moment of the deposit of the deed in the public Register (*Registro delle imprese*).[25] Naturally, this amendment implies the company directors have fewer duties to fulfil; namely, they were delivered from the keeping of the internal register. Without taking any position regarding the actual effectiveness of the new norm, we can nevertheless assume that the policy behind its introduction is, again, to broaden the differences between the s.r.l. and s.p.a., where the book is still present and mandatorily required.[26]

Actually, with reference to the transfer of s.r.l membership interests, a further innovative legislative measure had been taken a few months before the repeal of the *libro soci*. Again in June 2008, a governmental decree laid down a "deregulating provision" regarding the requirements for the deed of transfer of an s.r.l.'s membership interest. The new rule made the intervention of a public notary in the transfer of the membership interest no longer necessary. It is now sufficient to undersign the deed of transfer by means of an electronic signature, with the eventual deposit to the *Registro delle imprese* to be performed by an enabled intermediary – which basically means a certified professional accountant.[27] This amendment makes the transfer of membership interests easier, and cheaper, considering the averagely high notary fees in Italy.

The role of the public notary in the Law regulating the s.r.l. is one of the key issues also for the second amendment that belongs to the "confirmation" trend, whose systematic impact has been far stronger than the repeal of the members' record book.

Starting from 2012, but still ongoing in 2013, the rules regarding the minimum capital requirement for establishing an s.r.l. were changed radically. The minimum capital currently required for the constitution of a *società a*

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24 Governmental Decree November 29th, 2008, no. 185, converted into Law no. 2, January 28th, 2009.

25 Art. 2470, paragraph 1, Civil Code.

26 Art. 2421.

27 Governmental Decree June 25th, 2008, no. 112, converted into Law, no. 133, Art. 36, paragraph 1*bis*, August 6th, 2008.

responsabilità limitata according to the regulation passed in 2012 (just) for a new company sub-version – the simplified s.r.l. – and in 2013 for every s.r.l., was reduced from EUR 10,000 to EUR 1.[28] Of course, this trend once again facilitates the establishment of a new s.r.l.; the underlying reasons for a further measure are multi-faceted.

On the one hand, if we consider the time of this amendment, it is clear that it came in the long wave of the global economic crisis that started in 2008. As one of the major effects of this crisis was the impossibility of maintaining the previous levels of employability, one of the solutions was to promote self-employment, by turning a former employee into an entrepreneur. In order to make this scheme more realistic, the establishment of a new company needed to be cheaper. This is why the lawmaker decided to modify the minimum capital requirement, taking it to almost zero: as (starting) capital is perceived as a cost, slashing this "cost" was to be seen in a certain sense as a "gift" to promote entrepreneurship.

This attitude alone does not have a direct impact on the above-mentioned issue of the intervention of public notaries in the process of the establishment of a company under Italian Law. As a general rule, in fact, whenever a company is established in Italy, regardless of its form – i.e.: the rule is the same for an s.p.a., s.r.l., and *Società in accomandita per azioni*,[29] – a public notary must draw up the deed of incorporation.[30] Even without taking position on the enhanced reliability of the deeds for third parties triggered by a system where a public servant certifies the deed, this naturally involves an additional cost for the company. Besides the capital and administrative costs to be paid to the public administration for stamps, taxes and filing activities, establishing a new company also requires paying the public notary's fee for the drawing up of the deed. According to data provided by the EU Commission, the cost is not exactly negligible.[31]

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28 The whole, complex history of this legal amendment can be read in Bartolacelli (2016) 665-673.

29 A sort of limited partnership by shares, which is however a company under the Italian company law system.

30 The due legal form (cf. Directive (EU) 2017/1132 of 14 June 2017, relating to certain aspects of company law, Art. 10) for the establishment is, for all these company forms, the *atto pubblico*, i.e. a deed drawn up by the notary : cf. Art. 2328, paragraph 2, Civil Code for s.p.a., cross-referenced in Art. 2454 Civil code for s.a.p.a., and Art.2463, paragraph 2, Civil Code for s.r.l.

31 An interesting comparative overview of the notarial fees throughout Europe is available in the "Commission Staff Working Document - Impact Assessment", Accom-

The meaningful reduction of the capital requirement, therefore means that the cost of establishing a new s.r.l. has been lowered, but not as yet zeroed. Precisely because of that, an additional legislative intervention[32] in early 2012 provided for a low-cost establishment of a new s.r.l., when the founding members were – originally[33] – people under 35 years-old. This special regime of establishment gave rise to a new "sub-version" of the s.r.l., named after the *Società a responsabilità limitata semplificata* – a simplified s.r.l., or s.r.l.s. – where the deed of incorporation is to be drawn up "in accordance" with extremely basic model articles prepared by the Ministries of Justice and Economic Development. In this case, too, the deed must be formally drawn up by a public notary;[34] however, as notaries *must* use the model articles, and they only have to assess the identity of the founding members and the lawfulness of the social object clause, they are not entitled to ask for a fee for this activity. In other words, when an s.r.l.s. is established, no fee is to be paid to the public notary for the deed of incorporation, and the starting capital can even be set at just EUR 1. The "price" for this facilitation in establishing the company is the fact that the s.r.l. will be necessarily governed by means of articles that are too basic to be effective and useful to the actual activity of the company.[35]

The situation created by the establishment of the s.r.l.s. and the reduction of minimum capital requirements for the ordinary s.r.l. is, in my opinion, the highest point achieved by s.r.l. regulation with a view to the simplification of the model, when compared to the s.p.a. The autonomous nature of the s.r.l. is at this point even made extreme: the "price" for the limited liability, i.e.: the capital the members have to invest in the company in order to benefit from

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panying the document "Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies" SUP, SWD(2014) 124 final, of April 4th, 2014, p. 45.

32 Actually, the legislative innovation here discussed came before the reduction of minimum capital for the ordinary s.r.l. As I am trying to explain in the text, and with a procedure that has been used very often in recent years, the simplified s.r.l. served as a sort of laboratory, or a *ballon d'essai*, for innovative solutions to eventually export to ordinary company forms.

33 While the current version of Art. 2463*bis*, amended in 2013, no longer requires a specific age, simply excluding legal persons from the use of an s.r.l.s.

34 But not in the – revolutionary – first version of the Act, where there was the possibility of establishing the company by means of a non-notarial deed. This rule was immediately repealed as of the conversion of the Decree into Act. See again Bartolacelli (2016) 699.

35 For a critical assessment, see Bartolacelli (2016) 669 ff., 689 ff.

a limitation in their liability for the obligations born by the company, tends now to zero. This naturally is a great help in the establishment of new companies, but, intuitively, gives almost no consideration to the protection of third parties, in particular the company's creditors.

On the other hand, the "one-euro company" should be considered in a certain sense as a label fraud: if it is true that one euro is *legally* sufficient for establishing a company, it must nevertheless be remembered that the single euro of capital is manifestly insufficient for the s.r.l. to rent an office, or purchase the furniture, or hire personnel. As it is reasonable that the company will have to perform at least some of these activities, and that at least in its start-up phase there will be no company fund to cover that, the necessary money is to be found elsewhere. This means that the money will be provided either by the members themselves, or by a financing third party, usually a bank, that will do it against a guarantee. However, the new-born company has no asset suitable to serve as a guarantee; such an asset has to be searched for in the members' personal patrimony. At the end of the day, the hyper-autonomy of the "new" s.r.l. is resolved by taking the key issue of financing the company outside Company Law, and within the scope of the application of general Private Law. The new paradox is that we are now facing the privatisation of financing, i.e. a core issue of Company Law.

Besides this, there is another profile where the new s.r.l.s. in particular betray the very nature of the s.r.l., and this concerns the members' autonomy in designing their own company. When we consider a company that, in order to be delivered from the obligation of paying the notarial fees, accepts to be regulated according to model articles arranged in advance by a public administration which the members are not entitled to amend, we are not looking at a company where the members' will is central.[36] For all of these reasons, the

36 Even if the aura of myth surrounding the members' full autonomy in designing the company present in the s.r.l. should perhaps be removed. In fact, if it is true that this is one of the hallmarks of this company model, and that most of the rules laid down with reference to of the s.r.l. are not mandatory but simply establish a default framework where the members' will does not decide otherwise, it must be remembered that such freedom is very costly. The act of designing the company, by means of the drawing up of elaborate articles, is subject to the considerable cost of the fees to be paid to an expert consultant. Should the company decide otherwise, committing the drawing up to a cheaper and less skilled consultant, higher costs could eventually arise, due to the uncertainty in the decisions after the legal proceedings needed to solve the internal conflicts deriving from he poor articles. Freedom to design the articles, therefore, is certainly a wonderful gift, but

panorama here described does not help to define the s.r.l. as a virtuous form of company, as it seems to have lost, in many cases, most of its virtues.[37]

3.2. *The counter-reformation (2012-ongoing?)*
3.2.1. *The Innovative Start-ups*

Later in the same year, 2012 which saw the creation of the s.r.l.s., a new Governmental Decree created a further regime, not limited to, but in particular addressed to the s.r.l.: the Innovative Start-ups.

Again, the purpose of this legislative intervention is to be a means for the promotion of new businesses in the form of a company; in this case, however, the goal is more targeted than in s.r.l.s., or in a low-capital ordinary

a gift that in most cases needs money to work properly – and perhaps too much money for a small company at the dawn of its business. For more comprehensive remarks, see Di Cataldo (2011) 297-316.

37 In the words of an important scholar, "Un tipo senza qualità": Cagnasso (2013).

Even if we argue that, from 2012/13 on, there has been a sort of Counter-Reformation in the field of the s.r.l., with a general trend that has led to the *società a responsabilità limitata* closely resembling a *società per azioni*, also in the following years there have been occasional regulatory amendments intended to further facilitate the establishment of an s.r.l.

Such facilitations usually reduced the legal obligations an s.r.l. should perform. In the wake of this, there is the repeal of the obligation to appoint company auditors when the s.r.l.'s share capital exceeded the minimum required for an s.p.a. (Art. 2477, paragraph 2, Civil Code, eventually repealed in 2014). This amendment was to some extent required by the already mentioned reduction of s.p.a.'s minimum capital from EUR 120,000 to 50,000. If the original rule were maintained, every s.r.l. with a share capital between EUR 50,000 and 120,000 would have suddenly had to appoint at least one auditor, and evidently the lawmaker deemed such a consequence less desirable than reducing in a substantive way the obligation for s.r.l. to have auditors.

A second facilitation, coming from the European Union Law, dates back to August 2015. The Legislative Decree 139/2015, in fact, implementing in Italy the Directive 2013/34/EU, introduced into the Civil Code the new Art. 2435*ter*, on balance sheets facilitations for Micro-Enterprises. Actually, the rule is not addressed explicitly to the s.r.l., as the requirements for benefitting from the facilitation are based on the assets resulting in the Balance Sheet (under EUR 175,000), net turnover (under EUR 350,000), number of employees (5), and not the company form used. This means, on the one hand, that the facilitation is applicable not only to the s.r.l., but also to other company (and partnership, and cooperative society) forms, if they meet the requirements; and, on the other hand, that reasonably it will not be applicable to every s.r.l., as the bigger ones among them will not meet the prescribed requirements.

s.r.l., as the new company must be somehow “innovative”.[38] The primary aim of the operation seemed to be, therefore, the promotion of a new culture of innovation in Italian enterprises. In retrospect, on the contrary, it seems to be looked at as a new *ballon d’essai* to test on a limited scale solution to be eventually extended to a broader range of subjects.

A detailed description of the features of the Italian Innovative Start-ups is not important for the purposes of this chapter. What I must highlight is the specific regulatory regime temporarily (for a duration of up to five years) applicable to the companies that have been recognised as Innovative Start-ups. First, the promotional rules for the Innovative Start-ups are not limited to the s.r.l.; according to the Act, any unlisted company, or even a cooperative society, is entitled to be an Innovative Start-up, and therefore only partnerships are excluded from the scope of application.[39] Naturally, the company must be a start-up, i.e. it needs to have been recently established; specifically, the company must have been constituted up to four years before the application in order to be granted the benefits linked to the status of Innovative Start-up.[40]

As we are looking at cases of newly established companies, the entire background of the amendments to the rules for the s.r.l. discussed so far is useful for understanding that most of the new companies that apply to be registered as Innovative Start-ups will be in the form of the “entry level”, and less expensive, model of company: the s.r.l. Also for this reason, the norm in the Act that provides for the “exceptions to general Company Law rules”[41] focuses primarily on the s.r.l., with very few provisions applicable also to other company forms and cooperative societies.

Almost all the derogations to general s.r.l. rules considered by the norm are, both in empirical and systematic terms, colossal. I am discussing here only those that are more closely related to the trend – or counter-trend – I am trying to describe in this apparently never-ending transition in s.r.l. rules.

According to the already-mentioned Governmental Decree, the s.r.l.s reg-

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38 The notion of “innovation” applicable to this company sub-version is rather broad. It can either be in the way the business is carried out e.g.: an innovative production chain for a “traditional” final product), or in the actual output of the business (an innovative product, regardless of the innovations in its production chain), or, naturally, in both of them. Cf. Benazzo (2014), p. 113 ff.

39 Art. 25, paragraph 2, Governmental Decree October 18th, 2012, no. 179, Converted into Law no. 221, December 17th, 2012,– hereinafter “Start-up Decree”.

40 Art. 25, paragraph 3, Start-up Decree.

41 Art. 26, Start-up Decree.

istered as Innovative Start-ups are entitled to have in their articles provisions regarding their own membership interests, allowing that such *quote* (stakes in the company) can be categorized. The *quote* that belong to each category must have the same rights, even departing from the rule set down by Art. 2468, paragraphs 2 and 3, Italian Civil Code.[42] In the special categories (or classes) of membership interests just mentioned there is also the possibility of affecting the members' voting rights, even having classes of membership interests completely deprived of the right to vote, or with a limited voting right.[43]

Besides that, the membership interests of Innovative Start-ups can be publicly bid for on the market,[44] even using specific online services the Governmental Decree establishes for this purpose, via an equity crowdfunding operation.[45] The Decree explicitly states that this possibility is a derogation to the provision laid down in Art. 2468, paragraph 1, Italian Civil Code.[46]

If we consider that the rules mentioned deal with two of the three topics that can be considered the "inner sanctum" of the s.r.l. as a company form as distinct from the s.p.a., their relevance is naturally extremely meaningful.

The fact that the membership interests can be grouped into homogeneous classes, and that the membership interests belonging to each class have the same rights and duties, makes such membership interests substantially very similar to the stocks of a public company. It is true that the rule does not explicitly require that the membership interests grouped in classes must all have the same par value, as happens for the s.p.a. stocks; their similarity with the stocks is, however, very strong.

In the same vein, when the Act we are describing amends the Financial Markets Code by introducing the rules for a new primary online market for the allocation of the membership interests issued by the Innovative Start-ups, this clearly clashes with the general theory of the s.r.l., and its very nature as a private company.[47]

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42 Art. 26, paragraph 2, Start-up Decree.

43 Art. 26, paragraph 3, Start-up Decree.

44 Art. 26, paragraph 5, Start-up Decree.

45 Art. 30, Start-up Decree.

46 Besides those just mentioned, the Decree on Innovative Start-ups sets down many additional derogations to general rules applicable to the s.r.l., for instance in the area of financial assistance, delayed terms for capital reduction in case of severe losses, issue of hybrid financial instruments, and so on. The exceptions I have described more closely, however, are of the utmost importance from the systematic point of view.

47 As is explicitly recognised by the Decree itself, in Art. 26, when it states the departure from the rules laid down in Art. 2468, paragraph 1, Civil Code.

In different terms, then, we can say that the exceptions to the general rules applicable to the s.r.l. introduced by the Act on Innovative Start-ups substantially take the s.r.l. back to a model similar to that of the s.p.a.. They impact on two areas of the rules of the s.r.l. that had not been brought closer to the s.p.a. even in the period 1942-2003, when the s.r.l. was known as the "s.p.a.'s younger sister". As none of the amendments referred to are obligations for the company members, but just possibilities, they are free either to use, or not, the s.r.l. Innovative Start-Up is much more similar to an s.p.a. than an s.r.l. before the reform of 2003/04.

Indeed, one could object that these amendments are not to be intended as general, as they are applicable only to an extremely limited number of s.r.l.s, i.e. those established fairly recently, that have some kind of an innovative vocation or hallmark. This was true for a little over two years.[48]

3.2.2. *Innovative SMEs*

In fact, in January 2015, the Italian lawmaker, again by means of a Governmental Decree, decided to extend a relevant part of the exceptions the Innovative Start-ups were granted of to every s.r.l. with innovative character classified as an SME, with no need at all for the company to be in its start-up phase.[49] The applicable definition of an SME was the notion laid down by the European Commission in its Recommendation 361/2003.[50]

The extension of the provision to the Innovative SMEs actually made sense. The underlying idea was that they would serve as a sort of "landing field" for the Innovative Start-Ups at the end of the start-up period. During such time, the Innovative Start-Ups benefit from several advantages, under Company, Labour and Tax Law; furthermore, they are allowed to draw up their articles adding provisions that are not consistent with the general s.r.l.

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48 But, also during that time, with the need to recognise that, after the end of the Start-up period, the provisions in the articles would nevertheless stay valid even if the company was not to be considered an Innovative Start-up any longer.

49 Governmental Decree January 24th, 2015, no. 3, converted into Law no. 33, Art. 4, March 24th, 2015.

50 Commission Recommendation of 6th May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC), Annex, art. 2, paragraph 1: "1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million".

rules laid down in the Civil Code. With a view to a continuative promotion of the innovation, not only in the start-up phase, the regulatory intervention extended to the Innovative SMEs the application of many articles of the Decree on Innovative Start-ups.[51] This means, in particular, that the same exceptions to general rules we observed for the Innovative Start-ups are also possible for the Innovative SMEs. Nevertheless, there is a fundamental issue to underline: while the exceptions in the Innovative Start-ups were thought to last for a time-limited period of up to five years, in the case of the Innovative SMEs this advantage is potentially everlasting. If the SME can show that its innovative nature persists – and this is to be declared on a yearly basis by the company directors[52] – then the company continues to benefit from the promotional rules just mentioned. In particular, for the purposes of this chapter, the Innovative SMEs, which naturally can be s.r.l., are also entitled to create categories or classes of their own membership interests, incorporating different rights for each other, and with the possibility of accessing a primary market for the selling of such *quote*, by means of equity crowdfunding.

If even just these observations show the extreme relevance of the new rules for the Innovative SMEs, and the huge fallout for the general system caused by companies taking advantage of time-unlimited derogations from basic general rules and principles, we must nevertheless add that the Decree on Innovative SMEs went far further. In fact, besides the already mentioned extension, it also brought in additional amendments to the rules for Innovative Start-ups.

These amendments are once again hugely relevant also from a theoretical and systematic perspective. They deal with the establishment of an innovative company, and with the trading (and not just the initial placing) of its shares or membership interests. To put it more simply, a new framework applicable to virtually every innovative company was created despite there not being a legal definition of innovation in this case.

As for the company's constitution, as an alternative to the "classic" notarial deed of incorporation, the Decree allows Innovative Start-ups to be established by using an online form with a digital signature and online model articles prepared by the Ministry of Economic Development. The same possibility is also granted for every amendment to the original articles.[53]

51 Art. 4, paragraph 9, Decree 3/2015.

52 Art. 4, paragraph 6, Decree 3/2015.

53 Art. 4, paragraph 10*bis*, Decree 3/2015.

The model articles developed for the case discussed here are fortunately much more detailed, and in general better, than those prepared for the simplified s.r.l.[54]

The second deviation is even more ground-breaking from the systematic point of view. It is now possible not only to place newly-issued membership interests by means of equity crowdfunding on a public market, but also to trade them through enabled intermediaries, which operate in the online market reserved for Innovative Start-ups and SMEs.[55] In this case, not only is the ordinary notarial intervention not required but neither is the written form of the membership interest transfer. We should nevertheless remember that it had been possible to avoid notarial intervention since the Governmental Decree 112/2008, that enabled professional accountants to perform such activities.[56] In this system, which is a voluntary alternative to the usual one, the enabled intermediaries are entitled to hold the membership interests in their own name, but on behalf of the members, and to keep records of all the transactions related to the membership interests. The members are simply given certificates, issued by the intermediary, that entitle them to exercise their rights in the company.[57] Evidently, this new system of membership interest trading dramatically facilitates the transfer of the *quote*, using the online platform as the place where supply and demand come together, in a way very similar to a stock exchange. Again, the point of the compatibility of this rule with the general s.r.l. principle that the company's membership interests cannot be bid for in the open market remains unsolved, as the answer depends on the definition one gives of "bid to the general public" present in Art. 2468, ICC.

The model articles needed for the online incorporation, luckily with a more developed self-awareness than those available for the simplified s.r.l., were laid down by two Ministerial Decrees (Ministry of Economic Development): February 17th, 2016 (on the guidelines for the drawing up of the articles), and October 28th, 2016 (the proper model article).

54 As this way of incorporation does not require the notarial form of the deed, this raises issues for compatibility with the already cited Art. 10, Directive (EU) 2017/1132. Starting from a different case, but basically on the same issue: Licini (2015) 390 ff.

55 Art. 100*ter* Legislative Decree February 24th, 1998, no. 58 (hereinafter also "t.u.f." or "Financial Markets Code"), paragraph 2*bis*.

56 Again, a new deviation from the general rule present in the Financial Markets Code, Art. 23, paragraph 1, laying down the prescription that all the contracts related to investment services must be in written form.

57 Art. 100*ter* t.u.f., paragraph 2*bis*, lett. c).

To sum up, the derogations from the general rules applicable to the s.r.l. were first laid down for the Innovative Start-ups, and later extended to the Innovative SMEs. This naturally has repercussions in the general regulation of the s.r.l.s, but one could think that this is due to the innovative character of these companies, and the lawmakers' clear aim to promote innovation.

3.2.3. *The general extension of specific rules*

This counter-argument becomes hardly defensible when it comes to the second extension of the derogations, decided in April 2017, again by means of a Governmental Decree.[58] The structure of the legal provision is extremely simple; its fallout, epoch-making.

The black letter of the law is, indeed, extremely concise: "In Art. 26, paragraphs 2, 5 and 6 of the Governmental Decree October 18th, 2012, no. 179, converted, with amendments, into Law no. 221,December 17th, 2012, , the words 'Innovative Start-ups' and 'Innovative Start-up', wherever they occur, are replaced by 'SME". Even if there is not a complete extension to the entire realm of the SMEs of all the rules applicable to the Innovative Start-ups (as only some paragraphs are referenced, and not all of them), many important provisions become nevertheless applicable to the latter.

As for the objective extension of the exceptions to the general rule, it deals again with the most relevant issues we have discussed so far.

Regarding the possibility for the s.r.l. to issue categorized membership interests, the *quote* can be aggregated in homogenous classes, each with its proper rights. As the norm does not mention paragraph 3 of Art. 26, d.lgs. 179/2012, it is questionable whether the s.r.l. SMEs are entitled to issue classes of membership interests with partial or even no voting rights. However, the answer should be affirmative, due to the wording of paragraph 3: "the companies paragraph 2 refers to".[59]

As regards market access, the extended scope of the derogation mentioned in paragraph 5, d.lgs. 179/2012, now allows all the SMEs established in the form of an s.r.l. to use the online platform in order to take advantage of the crowdfunding for the initial placement of their membership interests, and for the facilitated transfer of the *quote* by means of enabled intermediaries.

Furthermore, the deviation is also extended for the permission of financial

58 Governmental Decree April 24th, 2017, no. 50, converted into Law no. 96, Art. 5, June 21st, 2017.

59 For a very convincing overall panorama, see Cian (2018) and Speranzin (2018).

assistance to the company's employees, as derogation to Art. 2474 ICC, that forbids in a general way any kind of financial assistance for the s.r.l.

Now, from the objective point of view, there is nothing new in the extensions. The disruptive novelty regards the subjective aspect. In fact, if so far we have faced rather subjectively-limited derogations, justified on the basis of a supposed policy in favour of innovation, the extension we are now dealing with has nothing to do with innovation, as all the exceptions are applicable to every s.r.l. SME, regardless of its innovative feature. The point is that the lawmakers have made the understanding of what an s.r.l. SME is anything but clear.

We had as a reference model the s.r.l. Innovative SMEs, already discussed, where the legislation explicitly made reference to the definition of an SME provided for by the EU Recommendation 2003/361/EC;[60] the d.l. 50/2017, in spite of the huge fallout of its Art. 57 on the general system of the s.r.l., does not even mention the criteria for a company being held as an SME. We can reasonably assume that they are the same as we have some evidence of this, not in the d.l. 50/2017,[61] but in the Financial Markets Code, which regulates SME access to the open market via the online platform. It is easy to remember that the possibility for an s.r.l. to use specific online platforms for placing its membership interests by means of a crowdfunding operation was first granted only to Innovative Start-ups. The Decree that introduced the Innovative Start-ups consistently modified the Financial Markets code, in order to regulate the online platforms;[62] the eventual extensions (first to Innovative SMEs, and later just to SMEs) simply intervened in the field of financial markets by amending those original provisions. This means that in the current version of

60 Art. 4, paragraph 1, Decree 3/2015. The definition of Recommendation 2003/361/EC can be found above, footnote 49.

61 Governmental Decree April 24th, 2017, converted into Law no. 96, June 21st, 2017,. No definition was present either in the Act for State Financial Stability 232/2016, Art. 1, paragraph 70, which was the first but incomplete source for the extension of the regime originally intended just for the Innovative Start-ups to all the SMEs in the form of the s.r.l., at least in the area of financial markets. Such regulatory intervention, then, had to be integrated by the d.l. 50/2017, in order to rectify some applicative mistake brought in by Law 232/2016, and this is why, in the interest of a simplification in the exposition and due to the temporal proximity of the two different amendments, I did not mention Law 232/2016 in the text.

62 Namely, Arts 50*quinquies* and 100*ter* of the Financial Markets Code, introduced by Art. 30, d.l. 179/2012.

Arts 50*quinquies* and 100*ter* t.u.f., where there was originally a reference to the Innovative Start-ups, we can now find only a general mention of SMEs. The need for a clear definition of SME for the purposes of the access to the market was therefore felt also in the field of financial markets law. Art. 1 of the Financial Markets Code provides for a definition of the platform, in paragraph 5*novies*. Again, the paragraph was introduced by d.l. 179/2012, and eventually amended several times; in particular, the Legislative Decree for the implementation of EU Directive 2014/65/EU [63] introduced a definition of an SME. This definition, which should be held applicable also for the purpose of the interpretation of the word SME in the d.l. 179/2012, refers to the notion given by the EU Law, no longer in the Recommendation 2003/361/EC, but in Regulation (EU) 2017/1129, Art. 2, paragraph 1, lett. f. This definition encompasses the one present in the old 2003 Recommendation ("companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000"), adding a further, alternative, criterion ("small and medium-sized enterprises as defined in point (13) of Article 4(1) of Directive 2014/65/EU"). This latter notion is "companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years".[64]

Now, evidently the second part of the definition is not (yet?) applicable to the s.r.l., as it implies a rather high market capitalisation, while we do not have a fully developed market for s.r.l.'s membership interests.[65] The first part, on the other hand, does not add anything new to what we already knew from the Recommendation 2003/361/EC: this will also be the interpretative criterion for the d.l. 179/2012.

What does this mean, in actual fact? It means that, finally, the deviations from the rules given in the Civil Code are applicable to all the s.r.l. that, according to their last accounts, "meet two of the following criteria: an average

63 Legislative Decree August 3rd, 2017, no. 129, art. 1, paragraph 1, let. dd).

64 It should be noted that, consistently with the disjointed system we are describing, the Financial Markets Code, again in Art. 1, paragraph 2, lett. *w-quater.1* already has a (totally different) definition of an SME, that should not be used for the interpretation of the situation referred to here, as it is not compatible with the realm of private companies.

65 We must remember that the definition of SME crosses the different company types, and is thus applicable to the s.r.l. as well as to the s.p.a. that fulfils the requirements.

number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000". This means, as stated by a prominent Italian scholar,[66] that the definition covers 99.8% of the over one million existing Italian s.r.l. This being said, the distinctive feature of the s.r.l. as a company that cannot have recourse to the capital market has almost disappeared,[67] as is confirmed also by the Financial Markets Code itself. In Art. 100*ter*, paragraph 1*bis*, added by the already mentioned d.lgs. 129/2017, there is the following statement: "As a derogation to Art. 2468, paragraph 1, ICC, membership interests of SMEs established as s.r.l. can be subject to public bid of financial products, also by means of the platform for the raising of capital, as far as this Code admits it".

As is evident, the revolution is almost complete.[68]

3.2.4. *The final step: delegated management again*

There is now only one obstacle for seeing an image of the s.r.l. fully comparable with the s.p.a.: the persisting possibility for the member of the s.r.l. to manage the company along with the directors, in spite of not being specifically appointed as a director (and without the use of the category of the so-called "shadow director"). If the description I have made so far of the evolution of the s.r.l. is clear enough, it should be evident that all the other hallmark features of the s.r.l. have already faded away.

The last chapter of this certainly not straightforward and creeping vicissitude is in the new Code of Business Crisis and Insolvency, which replaced the Bankruptcy Code in January 2019.[69] The Code is the product of a reformation

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66 Giuseppe Zanarone, in his keynote speech during the congress *La società a responsabilità limitata. Un modello "transtipico"*, held in Turin, March 21st, 2019.

67 The paradox is that of the 0.2% must be regarded as the "real" s.r.l.: those companies that are by their size more similar to the s.p.a., that are subject to the general rules of the s.r.l.

68 Furthermore, we can add that the State Financial Stability Act for the year 2019 (Law December 30th, 2018, no. 145, in Art. 1, paragraphs 236 seqq.) extended the use of online platforms, intended so far for equity crowdfunding and membership interest transfer, also to debenture financial instruments issued by SMEs, exactly as is possible for the s.p.a. in the (traditional) financial market. A few limitations are nonetheless present in Art. 100*ter*, paragraph 1*ter*, Financial Markets Code, which states that only specific professional investors are entitled to undersign debenture instruments issued by SMEs.

69 Legislative Decree January 12th, 2019, no. 14; many amendments to the rules re-

process in the field of the crisis of the enterprise that began in the early years of 2000, and is not over yet. Since 2005, in particular, there have been many regulatory interventions each year, step-by-step changing many of the tools provided for by the Bankruptcy Law. The new Code, which has been issued by means of a Legislative Decree issued by the Government based on a Parliamentary Act that set down the basic principles to be followed,[70] will enter into force only in September 2021. The Legislative Decree 14/2019, besides encompassing the Insolvency Code, also contains a few (major) amendments to the Civil Code, which – unlike the entire part on insolvency – already entered into force in January 2019. One of them, perhaps the most discussed so far, deals specifically with company management.[71]

Using wording that was already present in the rules applicable to the s.p.a., the d.lgs. 14/2019 extended (not just) to the s.r.l. (but to all companies, and even to partnerships) the principle that an organisation's exclusive management belongs solely to its directors.[72] In this way, the members are excluded, at least apparently, from the s.r.l.'s management.

The scope of this last amendment is naturally huge, even if we consider it alone; if, on the contrary, we put together this and all the recent modifications that have been affecting the s.r.l. over the last eight years, it is clear that the turnabout is actually radical. The point, however, is: did the Legislative Decree on the establishment of the Insolvency Code have the substantive power to change such a core theme of the s.r.l. as an autonomous

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ferred to in the text have been proposed so far, and lastly approved by the Government on October 18th, 2020 and published on the Italian Official Gazette, as Legislative Decree October 26th, 2020, n. 147. According to Art. 40 of such Decree, fortunately, the directors' exclusive management we refer to in the text is now limited to the creation of adequate procedures and guidelines for the administrative, organisational and accounting-related profiles.

70 Which is, by itself, the sign of another major transition in Italian - and not just Italian – Enterprise Law, which no longer sees bankruptcy as a social stigma , but an occasion for a "fresh start", as pointed out also in EU documents, for instance "Report of the expert group: A second chance for entrepreneurs: Prevention of bankruptcy, simplification of Bankruptcy procedures and support for a fresh start", January 2011, available online: https://ec.europa.eu/docsroom/documents/10451/attachments/1/translations/en/renditions/native

71 For different opinions on the issue: Rossi/Di Cataldo (2018), Ibba (2019), 250 ff., De Angelis (2019), 14 ff., Calvosa (2019).

72 Arts. 2357, 2475 Civil Code.

company form? In fact, the Insolvency Code only had the task of dealing with insolvent companies and enterprises, also by preventing insolvencies, while the rule on directors' exclusive management power is always applicable to companies and partnerships, and not only in the proximity of an insolvency situation. Furthermore, even if the Insolvency Code introduced the new rule, it did not amend or repeal any of the still existing regulations, which control, for instance, the liability of those members who intentionally decided or authorised acts (i.e.: acting as directors in their management capability) that caused damage to the company.[73]

These circumstances, among others, led the literature to adopt, in this first year after the issuance of the Insolvency Code, an undecided, or, better, a divided approach. The key division is between those who still think that there should be an autonomous place for the s.r.l., and thus believe that the interpretation of the new legislation must be somehow restrictive[74]; and others who hold that, in spite of there not being a formal repeal of all the remaining regulations linked to the amended ones, the s.r.l. is now similar to the s.p.a. also as far as managerial liability is concerned. To put it shortly, the Italian scholars are discordant on either resisting or surrendering to the new idea of the s.r.l.

This leads us to some final remarks. Or, better, to some remarks, as we have already seen that very few conclusions can be held as final when it comes to the Italian s.r.l.

4. Some possible final remarks

The short journey we have made through the vicissitudes of the Italian s.r.l. over the last few years have shown rather clearly that we have been facing an undoubted transition. It is very hard to say whether this transition has currently come to an end, or not. Actually, I think it depends very much not only on the data relating to legislation, but also on the scholars' opinion, once it has stabilized, and – above all – on the courts' decisions, once a meaningful amount of time has passed to benefit also from jurisprudential interpretation.

If we look just at the legislative data, the panorama is rather clear. The general idea is that the s.r.l. is losing all of its distinctive features, apart from the persisting possibility of a tailor-made design which benefits also from the

73 Art. 2476 Civil Code.

74 According to the new wording laid down in D.Lgs. 147/2020, this seems to be the winning interpretation.

partnership rules, if the founding members so decide. The difference from the s.p.a., therefore, would simply be an enhanced degree of customisation, possible in the s.r.l., and not allowed (or, at least, not so widely) in the s.p.a. Besides this, the s.r.l. would not be substantially different from the s.p.a.

This situation is likely to have several outcomes. On the one hand, the first general idea would be that there is no need for two different company forms in Italian Business Law. If we say that the key legal features of the s.p.a. and the s.r.l. are substantially the same,[75] there is no reason for maintaining two organisational forms: just one company form, perhaps with a modular approach, would probably be sufficient. This conclusion has to do with a specific Company Law policy that, evidently, the Italian lawmaker still has not adopted in a formal and systematic way. Nevertheless, the legislation described here shows that this should be understood as the substantial line of conduct.

The second fallout is probably more interesting, and deals with the interpretation of the regulations and company's articles related to the s.r.l. In spite of being an autonomous company form, the corpus of the regulations specifically applicable to the *società a responsabilità limitata* is far smaller than those laid down for the regulation of the *società per azioni*.[76] This means that many of the legal tools known by the s.r.l. are not fully regulated, as happens in the case of the s.p.a., and to a greater extent for listed s.p.a. The price paid for the freedom of designing the company enjoyed by the founding members of an s.r.l. is that the rules emanating from the members' free will must on the one hand comply with the mandatory regulations, and on the other hand, when they deviate from a legal default solution, should include a reasonably complete set of prescriptions. When this does not happen, which is rather frequent in practice, the need for an interpretation becomes urgent; and the same happens with the interpretation of the legal norms applicable to an s.r.l., when the regulatory framework is not complete.

In these cases, however, the interpretation must take place not considering just the wording of the legislation, which is often insufficient for finding an adequate solution, but the actual and comprehensive situation of the specific company whose rules are being interpreted. This applies even more when it comes to the s.r.l., which by virtue of the members' autonomy is legit-

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75 Naturally, besides the minimum capital required for the establishment of a company, and the higher degree of customisation proper to the s.r.l.

76 Just with rough figures, a little more than 30 articles for the s.r.l. against more than 150 for the s.p.a.

imated – and currently even more than ever – to assume extremely different basic attitudes, from para-partnership, to para-public company. A one-size-fits-all interpretative approach naturally cannot work properly, and finding interpretative benchmarks, and criteria for deciding when to use a certain benchmark instead of another, is indispensable.

One could be tempted to think that, at the end of the day, even the counter-reformation trend we examined above does not substantially change the panorama. If it is true that the newer laws allow an s.r.l. to be more similar to an s.p.a., this does not mean that it *must* necessarily be so. This is just an option, and not an obligation: when the members decide to use this opportunity, and thus to structure the s.r.l. in a form more similar to the s.p.a., then (also from the interpretative point of view) the s.p.a. will become, for that actual company, the paradigm for solving the exegetic problems that could arise. This is naturally true. The fallout could nevertheless be an unwanted and somehow epidemic expansion of the s.p.a. rules as an interpretative benchmark for the s.r.l. also in cases where it is not strictly necessary. This scenario would substantially deprive of any relevance the formally still existing distinction between the s.p.a. and the s.r.l., to the detriment of those s.r.l.s that are, in the range of all the possible configurations, closer to partnerships, or even to those in the "neutral" middle sector.[77]

Again on the issue of the interpretation, however, there is also another side to the story. We have so far considered the interpretation from the s.p.a. (i.e.: using originally s.p.a. principles and rules) to the s.r.l.; a substantial equalisation, however, is likely to have outcomes also the other way around, from s.r.l. to s.p.a. Indeed, there are some rules present in the s.r.l. corpus that do not have an equivalent in the s.p.a., for instance as far as the corporate governance models are concerned,[78] or again for the treatment of the company's financing by members other than contributions.[79]

If we really admit such an extended substantial assimilation between the s.r.l. and the s.p.a., we should also admit some kind of an osmosis as far as the formal rules are involved, irrespective of an explicit reference to the use of the s.p.a. or s.r.l. rules when specific regulation is missing respectively in s.r.l. or in s.p.a.

77 On this issue, see again Cian (2019).

78 Art. 2475 Civil Code allows the s.r.l. the use of the governance systems specific to partnerships (Art. 2357 s. Civil Code), which is not (explicitly?) admitted for the s.p.a.

79 See Art. 2467 Civil Code.

Personally, I am not sure at all that this is a desirable solution, because, again, this would go against the idea of an s.r.l. as the main organisation form for "real" SMEs, and micro-enterprises, where the use of the rules established for the s.p.a. could be extremely resource-consumptive. Naturally, not all of the above mentioned risks can be avoided just by means of interpretative choices; the attitude of the legislator for making the s.r.l.'s legal environment closer to that of the s.p.a. is undeniable, and must be taken into full consideration when dealing with the "new" s.r.l. This is also the case if we can try to weaken – in my opinion, correctly – the last disruptive fallout coming from the Insolvency Code: the previous amendments we discussed are not subject to an equally reductive interpretation, and they do not deal only with national Italian Law. Actually, even if private company law has traditionally been out of the main scope of application of the harmonisation process put in place by the European Union in the field of Company Law, leaving private companies to a substantial regulatory competition among the Member States,[80] we have already seen that the general provision on the access of SMEs – and thus, of private companies – to capital markets comes from an EU legal instrument.[81] This European Union attitude, evidently, on the one hand, cannot take into consideration all of the peculiarities specific to private companies in every Member State – and thus disregards, for instance, the prohibition to access capital markets set down by Art. 2468, paragraph 1, ICC – and in the flexible terms of a Directive tries to establish a not-too-problematic common legal framework regarding the goals, leaving the States relative freedom with reference to the actual means. On the other hand, it indicates that the ultimate distinction that the European lawmaker is drawing is *not* based on the formal type according to which the companies are formed, but on the substantive data relating to their dimension, i.e. a distinction between large enterprises, and SMEs. Such a situation seems to be followed, at least partially, also by the Italian Law: the approximation of the s.r.l. and s.p.a. rules means that the basic rules laid down for the s.p.a. are generally applicable also to the s.r.l., de facto creating just one company macro-type. Furthermore, the specific rules set down for larger companies, generically identifiable as open and listed companies, create a new specific class of companies, which, as we have

80 Bartolacelli (2017).

81 Directive 2014/65/EU of the European Parliament and the Council, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (so-called MiFID 2 Directive).

already seen, do not necessarily belong just to the realm of the s.p.a. In conclusion, we are facing a complete paradigm shift.

The scenario we have just depicted, however, allows for a couple of further more general remarks on another transition we are currently facing – also, but not only – in Italian Company Law.

On the one hand, it is rather clear that we are currently passing through a time of dangerous superficiality in the drafting of regulatory texts. The bigger risk – or certainty? – is that this has to do more with a conceptual indecision than with technically poor skills in legal drafting. Too often, it is not fully clear what the single Acts are actually meant to regulate, in their scope of application, or even in the very rules they are supposed to set down. In an extremely short time, an Act can be subject to several reiterated amendments, which substantially modify the original settings, as is evident, for instance, if we look at the vicissitudes of the simplified s.r.l.[82]

The effect of this on the technical means of legislation should be evident to the shrewder readers: the vast majority of the amendments made in the field of Company Law during the last years have been brought in by means of a Governmental Decree (*decreto legge*). The *decreto legge* is by its very nature an exceptional measure allowed under the Italian Constitution to grant the central Government the opportunity to regulate a specific issue with no need for a prior passage through Parliament. This permits the Government to issue ad hoc rules that are needed in situations of emergency, and Parliament has the right to ratify these emergency rules within 60 days. Now, it is evident that none of the rules described above has an emergency nature. On the contrary, all of them are long-lasting modifications, whose *raison d'être* did not lie in occasional circumstances, but in a – hopefully conscious – change of paradigm.

On the other hand, as a Governmental Decree is usually issued in a very short time, there is not always the opportunity for the government to use its best discernment in drafting the legislation. This supplementary request for wisdom is de facto transferred to the Parliament, while converting, within 60 days, the Decree into a proper Act. The system works properly if there is not an abuse in the use of the Governmental Decree; otherwise, Parliament gets clogged up with Decree conversions and their short deadlines prevents it

82 And not to mention that, during the years 2012/13 only, a further low-cost sub-version of the s.r.l., the *società a reponsabilità limitata a capitale ridotto*, appeared as an alternative to the simplified s.r.l. See, for further details, Bartolacelli (2016), pp. 670-673.

from paying the due attention to the examination of each one of them.[83] This is exactly what commonly happens with Company Law-related Governmental Decrees: the formal conversion into an Act normally simply confirms the original text, or even adds further rules to it, without repealing anything.[84] The final consequence is that an in-depth investigation into the measures contained in a Governmental Decree is rather rare, with the obvious fallout on the general quality of the legislative action.

Again, the above mentioned situation leads us to the final issue I would like to underline: the relevance of the sources, and of their stability. Classically speaking, the system of the main sources in Italian Company Law is not particularly difficult to understand: the main provisions for all the partnerships and companies lie in the Civil Code. The additional rules for listed companies are in a specific Financial Markets Code (*Testo Unico dell'Intermediazione Finanziaria*), and special rules for some peculiar sectors (Insurances, Banks…) have their specific Acts and Codes. In general, we can say that it is a sort of irradiation system: the Civil Code is the sun, and its rays expand to the sectorial specific rules.

Even without considering other very relevant consequences,[85] we must here call to mind that in 2017, the most numerically relevant regulatory modification to the law governing the s.r.l., which affected the 99.8% of Italian private companies, took place by means of a Governmental Decree that did not even change a paragraph in the Civil Code. The d.l. 50/2017, and its Conversion Act, simply extended to virtually every s.r.l. some of the substantial rules applicable (originally, only) to the Innovative Start-ups; and these latter rules, in turn, were laid down by means of another Governmental Decree, derogating, but not amending the Civil Code provisions.

The paradoxical situation we now witness is a company form, the s.r.l., whose regulation – according to the general system – should be almost entirely present in the Civil Code, that has derogations to the general rules provided for by a Governmental Decree, and applicable to the almost entirety of the concerned companies, applicable by virtue of another Governmental

83 See also, in this book, the chapter by Gianni Di Cosimo.

84 Also because the Governmental Decree by its very nature enters into force immediately after being issued. This means that an eventual Conversion Act by Parliament that repeals a part of the content of the Decree, or even does not convert it within the deadline, causes an actual prejudice to the people who validly relied on the rules present in the Decree and in force since its issue.

85 Speranzin (2019).

Decree. The hierarchy of the sources of the s.r.l. is evidently upside down, and this goes to the detriment of the people possibly interested in founding an s.r.l., who are not in the position of being personally aware of the full applicable regulatory framework.

On the other hand, it seems that the trust in the certainty and the stability of the regulations and the legislative systems is not among the priorities of the Italian lawmaker. We will see in the near future if the legislative amendments that really revolutionized the face of the s.r.l., apart from creating a chaotic situation from the interpretative point of view, at least succeeded in providing a further development in the use of this legal tool.

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