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Adequacy, Information and Capitalisation as a Function of Proper Corporate Governance

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Abstract

Adequacy implies a certain conceptual relativism: it must be anchored to both the size and the specific activity of a corporate enterprise, which are the primary parameters for the evaluation and classification of companies. An adequate corporate structure is the result of business choices; adequacy should be regarded as a general clause in corporate organisation, and therefore as a mandatory criterion of the management activities for which directors are responsible. Adequacy and information are the key elements to be taken into account in the corporate governance of a company, both in the performance of business activities and when the company's corporate purpose and interests are being pursued. Here, the economic method applied to the law, so that the legal form must correspond to the economic substance of the regulated phenomena, translates into the information method in business law according to which the legal form must match the informative content of the regulated phenomena.

1. - The phenomenology of company practice leads to an emphasis on the fact that the changes in corporate circumstances and situations in terms of size or sector that might take place in the course of a long-term company agreement are different: they may depend on events the occurrence of which is unsure, or even unpredictable, or they may be theoretically predictable, although the extent, the moment when the effects will be seen, the means of producing the same effects and their duration may remain uncertain[2].

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[2] See HOLTZMANN, Arbitration in Long-Term Business Transactions , in Schmitthoff (ed.), International Commercial Arbitration. Documents and Collected Papers, London, 1975. On this topic, see BRATOUS, Arbitration and International Economic Cooperation Towards Industrial, Scientific and Technical Development (report to the IVth International Congress on Arbitration, Moscow, 1972), in The Arbitration Journal, 1972, 239. We suggest a reading of GALGANO, Le forme di regolazione dei mercati internazionali, in Contr. impr., 2010, 353; L'interprete del diritto nell'economia globalizzata, in Contr. impr., 2010, 366.

To this must be added other circumstances that may disrupt the economy of the company agreement and the organisational structure of an entity, which are fully accomplished through the acts and decisions of the administrative body or the resolutions passed at shareholders' meetings[3]. There being the need to adopt a cyclical system for giving adequacy to company structures in the broadest sense so as to take account of the occurrence of circumstances that were not foreseen at the time a company agreement was entered into, which can substantially unbalance the position of the regulation of interests of subjects participating in the genesis of a company as contracting parties, it is necessary to lean in the direction of attributing significance to any contingent fact that may affect the cost-effectiveness of performance of the company agreement [4].

As we intend to demonstrate later in our discussion, the provision of a contractual clause on corporate adequacy requires close collaboration among the various corporate bodies, and is inextricably linked to compliance with the principle of loyal cooperation and good faith. As a result, shareholders will tend to accept any provision that might render the principle of contractual efficacy among the parties adequate to the changing needs of the company, given the potential benefits that can be identified in the body of the agreement by virtue of adding a clause that may generate the certainty that the corporate structure will be given adequacy. An adequacy clause may, therefore, be applicable where there is an imbalance in the dimensions of the various business sectors of corporate activity.

But then, one might reflect that from the perspective of the intention to make a hermeneutically correct distinction between clauses and principles of corporate governance that have a similar contractual genesis and effectiveness, note should be taken of the fact that the adequacy clause reflects a generally recognized principle in the various legal systems, postulating - and here there is considerable scope for innovation - a further attenuation of the principle of contractual effectiveness among the parties by waiving what is a generally widespread rule across various national legal systems[5], as well as in the business practice of corporate matters. More specifically, if one wished to undertake a detailed study of a *trait d'union* between adequacy clauses and corporate contractualism, given the fact that they are present in long-term contractual relationships, the requirements for contractual typologies that give adequacy to the structures within a corporate organisation would seem to coincide: corporate adequacy clauses undoubtedly have a wider radius of application. The reasoning behind this is not that situations of unexpected inequality in corporate structures must be compensated for, but rather that the manner in which the contract is performed should be adequately regulated, thereby ensuring that the company's organisational structure enjoys the necessary flexibility[6].

As a result, the correction of effects developed by events that produce adequacy is possible, while at the same time, even in the absence of events or effects so sudden as to trigger the protections provided for cases of deadlock during the organisational life of the corporate entity, shareholders and corporate bodies are provided with a legal tool to permit the evolution of corporate relations through an agreed management of the new situation, with the ultimate goal of refining and completing the contractual outcome of pursuing the corporate purpose. One might infer that corporate discipline considers that a cause of providing for adequacy consists of any form of organisational imbalance brought about by the occurrence of ordinary and extraordinary events the nature of which must not be assessed in the abstract but in the light of the decision that a legal and economic operator would have decided to formulate *ex ante* in order to protect itself when managing and controlling a corporate structure.

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[3] See FRIGNANI, Factoring, Leasing, Franchising, Venture Capital, Leveraged Buyout, Hardship Clause, Countertrade, Cash and Carry, Merchandising, Know-how, Securitization, Turin, 1996, 393. On this topic, see, FRANZONI, Il contratto nel mercato globale, in Contr. impr., 2013, 69; MARRELLA, Lex mercatoria e principi Unidroit. Per una ricostruzione sistematica del diritto del commercio internazionale, in Contr. impr. Europa, 2000, 29.

[4] BERMAN, Excuse for Non-performance in the Light of Contract Practices in International Trade, in Columbia Law Rev., 1963, 1420 et seq., which defines the "decline of faith in contract", is in agreement.

[5] With a few isolated exceptions, including Italian law, which in Articles 1467 - 1469 of the Civil Code provides for termination due to the occurrence of excessive burden, which gives the part affected by an economic imbalance the opportunity to seek rescission of the contract if performance by one of the parties has become prohibitively burdensome as a result of the occurrence of extraordinary and unforeseeable events. See GALGANO, Libertà contrattuale e giustizia del contratto, in Contr. impr. Europa, 2005, 509; ID., Dai principi Unidroit al regolamento europeo sulla vendita, in Contr. impr. / Europa, 2012, 17.

[6] On this subject, in most studies, the sphere of application of renegotiation clauses is unjustly limited to the situations envisaged in the adequacy clauses, while in reality, especially in the discipline of contracts that support international investment, the field of agreed renegotiation is much wider.

If one wished to attempt a systematic reconstruction of the means whereby a corporate organisation is given adequacy, one might argue (correctly) that corporate contingencies, in the broadest and most inclusive sense of the term, determine whether it is possible to subsume any alteration in the initial governance of the interests of corporate contracting parties within the category of the circumstances for contributing adequacy. Any reflection on the range of the adequacy phenomenon must begin by highlighting the legal significance of so-called contingencies and structural changes: that is, circumstances that given the absence of agreed rules, suddenly appear in the life and growth of business and result in an organisational imbalance between the company's original regulatory conditions and subsequent economic and business-related developments in the field when the developing obligations are actually performed[7].

2. - In the heterogenesis of corporate adjustment modalities, the real scope of application of the provision of adequacy clauses must be stressed: making a corporate structure adequate is the hypothesis of a prognostic consideration of the interests pursued by the parties with the prospect of a possible future assessment of the governance agreed at the outset. In the phenomenology of adequacy, one must recall the application methodology of corporate structures: in the case of a proposal to make it compulsory to adjust structures if circumstances occur that bring about a clear change in a company's requirements, the shareholders are under no obligation to set it in motion: only the administrative and control bodies will give notice of the need to make changes to the entity (and will put these changes into effect). Because it is our intention to discuss the issue of adequacy clauses included in the contract by the parties that contain precise parameters with which the parties must comply when making changes to the company, or that establish that a decision on the changes to be made must be referred to an outside evaluation, we must show, in a systematic way, that in the dynamic of adjusting the synallagma, a heteronomous intervention aimed at restoring the proportionality between a corporate structure and its corporate-productive dimensions is the natural remedy to be adopted in the event that the structure of the entity must be altered[8].

As a result, in the light of the conceptual notion of adequacy as the correct step to remedy an alteration that has occurred in the physiology of the management of a company, and given the nascent obligation to carry out a systemic study of the positive genesis of the phenomenon, it should be noted that the conduct of corporate bodies must not violate the general obligation of contractual cooperation; this leads to a breach of the duty to perform the obligation fairly and in good faith, based on the fairness, clarity and consistency of the parties' conduct in accordance with the general principle that ratifies the subsequent conduct of the party. Good faith as a supplementary source of contractual governance represents the moment when the dynamics of identified changes are stabilized so as to operate as a limitation to misconduct, or rather, conduct that does not pursue the corporate purpose, in compliance with the correlated principle of another person's benefit in relation to personal interest. The behavioural model described above represents the first hermeneutical acquisition of concretization of the concept of adequacy: the principle of adequacy may, in a first approximation, derive from respect for contractual fairness, loyalty and good faith.

If we now attempt to make a comparison in corporate practice, we see that corporate contracting parties and members of the management and control bodies must comply with so-called fair dealing as a behavioural manifestation of good faith (good faith and fair dealing). In common law, the phenomenology of heterointegration separates remedies into judicial and non-judicial remedies: a remedy involves a balance of interests on the part of the court.

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[7] See DEWEZ, RAMBERG, URIBE, CABRILLAC, PRADERA, The Duty to Renegotiate an International Sales Contract under CIGS in Case of Hardship and the Use of the UNIDROIT Principles, in European Rewiew of Private Law, 2011, 101-154; PUELINCKX, Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, in Journal of International Arbitration, 1986, 47 et seq.; RODOTÀ, Le fonti di integrazione del contratto, Milan, 2004, 111 et seq..; SCHMITTHOFF , Hardship and Intervener Clauses Hardship and Intervener Clauses , in The Journal of Business Law, March 1980, 87; SCHMITTHOFF , The Law of International Trade, in Sources of the Law of International Trade, London, 1964, 3-38; STORME, Applications possibles et caractères généraux des principes de droit uniforme des contrats, in Revue de Droit International et Droit Comparé, 1995, 309-325.

[8] See M.A. EISENBERG, Corporate Governance: The Board of Directors and Internal Control, in 19 Cardozo L. Rev., 1997, 237, with further reference to L. CUNNINGHAM, Compilation, The Essays of Warren Buffett: Lessons for Corporate America, in 19 Cardozo L. Rev., 1997, 40.

Here, we believe that it is possible to reach a conclusion on whether damage can be compensated and the so-called balance of power, which leads to the possibility of granting an injunction being subordinated to an assessment of its severity.

As a result, to follow this line of argument, we see that the remedial model represents a solution that can be adopted by agreement at the time of reconstruction of the system[9]. This means, however, that from the perspective of a comparative study, adequacy will come to the rescue of an assessment by a third party of the need to integrate the conduct of the person who has the task of proceeding with the request to adjust the corporate structure[10]. To summarize the potential normative tensions relating to adequacy clauses, one might rightly take the position that the contractual provision will lead to a certain predictability of the immediate consequences of any changes to the corporate structures brought about by unforeseen or unpredictable events, and as a result encourage a considerable level of prevention of impasses in the organisational management of the company. Ultimately, adequacy clauses are designed to address events that have already occurred - so-called contractual and/or company contingencies - with regard to the conclusion of the binding obligation, where the parties have excluded the risk that they might occur during the stage when the obligation was being created.

One phase where a corporate adequacy clause might find practical application whether or not it is expressed in the corporate contract may be the time prior to dissolution of the company. If one reads the body of laws relating to dissolution, one can - by means of extensive interpretative investigation - understand those situations in which a corporate structure, and in particular corporate governance, malfunctions. When this happens, the duty of the corporate bodies - or rather the directors - to attempt to adapt the corporate structure to the functional change that has taken place arises automatically. If the function of company law is to ensure the timely performance of the company's programme, or rather, the pursuit of the corporate purpose desired by the shareholders, this function must be performed with account being taken of the interests and *de facto* premises on which the designated regulation is based, so that any modification of these interests and premises cannot but assume legal significance and lead to an adjustment of the designated models.

Here there is a need for systemic reflection: adequacy relates to the existence of special circumstances relating to the progress of ongoing corporate equilibriums that affect the benefits of a transaction for individual shareholders: from a conceptual point of view, we see that when making adjustments, the interests of one shareholder or another are based on certain specific circumstances that have been indicated in the agreement. Correspondingly, we see that adequacy implies the positive representation of a specific circumstance, and a change in the undifferentiated state of affairs within which a transaction is concluded; this represents the normal context within which economic transactions are carried out, as they consist of an indeterminate series of inter-related factors, against the background of practical representations made by the managers of the company[11].

If we think systematically about the value of company adequacy as a legal phenomenon affected by a provision on contingencies, even making the natural ontological distinction regarding the moment of occurrence of the events, we can identify the essence of the institution under review in a practical analysis of the imbalances in the original scheduled structure of interests, in full compliance with the law. In principle, the specific objectives sought by shareholders when agreeing on duration, with the provision of an adequacy clause, are treated as being capable of affecting the corporate structure for the emphatic reason that the security and fluidity of legal transactions can be improved. One must therefore admit the relevancy of the adequacy clause, which we believe may affect corporate contractual relations, and constitute the objective condition precedent.

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[9] On this subject, we recall that: It is true that more and more international long term agreements contain provisions according to which is considered as an event of force majeure any event beyond the control of the parties which renders the performance of the agreement very difficult and/or more expensive than anticipated or any event which cannot be overcome by the use of reasonable means at reasonable costs. Such provisions, when agreed upon, leave no doubt as to the intent of the parties. They clearly reflect that the parties intended to avoid that the impossibility to perform be considered as the sine qua non requirement for force majeure. However, in order to be accepted, such exceptions to the common law of force majeure must be expressly provided for; they should not be presumed or implied.

[10] See BRODSKY, ADAMSKI, Law of Corporate Officers and Directors, New York, 1984-2006, § 2.02, 3.

[11] See on this subject HOPT K.J., LEYENS P.C., Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy**,** Max Planck Institute for Private Law and Max Planck Institute for Private Law, ECGI, January 2004.

Treating adequacy in an operational context permits the emergence of interests other than those that are typically found in company contracts, thereby highlighting the fact that adequacy in the sense of a structural function may justify the significance of aims that are not supported by the corresponding contractual precepts [12]. The natural interrelation between the operativeness of adequacy and its ontological belonging at the causal moment does not require the conventional identification of the underlying corporate interests, which assume their legal significance implicitly, because they can be protected even in the absence of express statutory requirements. This conceptualization offers legal evidence to specific interests of the contracting parties through the determination of the actual cause of the adequacy, and provides the governance that is most likely to guarantee the level of protection that the management and control body deems necessary.

3. - Now that the affirmation of the principle by which the rules requiring fairness and adequacy have the value of real legal commands has been unconditionally accepted, with methodological rigour, it is now necessary to give effect to the meaning of the corporate solidarity which immediately intervenes by means of these rules to give conformity to the legal relations among private parties, and since it refers to the parties to the contract, to classify it as corporate solidarity. The principle of adequacy becomes specific in the principle of protection, in the sense of the obligation on the part of every operator to protect the utility of the corporate structure over and above the obligations that are specifically imposed by the contract, to the extent that the managerial conduct of adequacy does not involve an appreciable sacrifice for this person, or, as one might say - drawing inspiration from the common law experience - within the limits of reasonableness, understood as a parameter for the practical determination of a standard of correctness that is compatible with human nature and its unavoidable impulses.

The criterion to which one should aspire in order to give actual content to the requirement of adequacy, and to be able to assess the legitimacy of the *exception doli* - or the lack thereof - at the time a relationship begins, is the congruity of corporate action with the economic balance attained by the interested parties. The manner in which services must be performed, to the extent they have not been formally agreed - subject to compliance with the laws, such as those regarding the exercise of discretionary powers, and taking account of the ancillary services that are not provided for in contract itself but that must also be performed - depends on their consistency with the contractual schedule and the economic equilibrium that the contract entails: the rules of negotiation therefore become a sort of independent organism that has the capacity to evolve in order to pursue its ends effectively.

Following changes in organisational and market conditions, the corporate contract that was entered into with the expectation that it would be able to meet certain needs rather than others is now revealed to be inadequate to fully satisfy the interests of the shareholders. But it is precisely these instances of solidarity that permeate corporate action under the adequacy clause and justify its application. Given the function of cognitive action to gain awareness of the economic significance of a company transaction, which is the prodromal moment for application of the heteronomous management rule adjusted for contractual risk, the criterion for the allocation of risks can be determined by extensive interpretation, when the practical circumstances of the case so permit[13].

It is our intention to functionalize the corporate contract to a particular structure of interests, thereby connoting its economic expansion through the adequacy clause, and to explain all the factors that go to make up its economic basis: the interpretative solution lies in an equitable balance of conflicting interests, even where these interests are assessed according to objective parameters. We must consider that the axiological framework of a discipline represents an ontologically different moment from that when the methods by which the recurrence of the values that underlie them must be ascertained in cases of external realities. Adequacy lends itself to being applied both in the case of a misrepresentation of an assumed fact that the directors had in mind at the time they took a decision and where the factual elements are modified at a later date. The institute in question is a valid tool for protecting cases that it is difficult to subsume into the law, or situations in which the event is such that if it does not occur, the entire structure of contractual regulation desired by the shareholders of the company might be overturned.

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[12] HIRSCHLEIFER , Where Are We in the Theory of Information? in 63 (2) Amer. Ec. Rev., 31 (1973); HIRSCHLEIFER and RILEY, The Analytics of Uncertainty and Information. An Expository Survey, in 17 Journ. Ec. Liter., 1375 (1979).

[13] GORMLEY, Disclosure of future-oriented information under the Securities laws, in Yale Law Journal, no. 88, 1978, 336.

Company practice must provide appropriate and specific clauses aimed at creating an effective system of contractual protection of the efficiency of the company's structural organisation[14].

4. - Based on what we have affirmed to this point, we now wish to attempt an operation of hermeneutic subsumption of adequacy clauses into the concept of presupposition, in the sense of a legal phenomenon of a condition that lacks contractual expression at the time the interests are regulated. From the phenomenology of the causal element of the contract, understood as a tension towards manifestation of the true substance of the designated interests, it must be inferred that the division of corporate clauses into primary and secondary elements leads to the conclusion that changes to the initial circumstances of the company formation phase should be treated as a fundamental element of the regulations in the Memorandum of Association, so that emphasizing a factual change in circumstances will give rise to the legal requirement to adjust the means by which companies are structured and organized.

The reasoning behind this is as follows: from the perspective of a desire to frame the legal situation of adequacy within the economic dimension of a fact-pattern, especially taking into account the reason why the contractual provision of adequacy of services is included in the services that are agreed at the outset, systematic rigour must be applied in order to arrive at an attempt at a hermeneutic transaction that will succeed in framing adequacy from the perspective of a presupposition. In our attempt to subsume adequacy within the concept of presupposition, we must look at how changes in corporate structures should be framed from the viewpoint of an institution's equity and financial well-being, in relation to both circumstances that prove to be unpredictable at the time the company agreement is concluded and circumstances that emerge as deficient because after the Memorandum of Understanding has been concluded - and contrary to expectations - they do not occur, or cease to exist[15].

If one makes a systematic argument in terms of presupposition and occurrence as closely-linked phenomena, it is possible to continue to ask questions regarding the relevance of presuppositions in contractual situations affecting companies: the moment of adequacy of a company structure must lead the process of objectification of management positions to its new dimensional conditions, in such a way that the sought-after objectification can adjust the outcomes of corporate action.

Given the concept of an economic transaction evoking the differing physiognomies offered by a negotiating tool that, considering the finite size of the fact-pattern, is characterised in terms of flexibility and openness with respect to issues that were not originally contemplated by the shareholders, a long-term contract qualifies as a situation with its own genetic code, in accordance with the information that was originally mutually conveyed by the company bodies in homage to the values that must permeate the company contract through continuous adaptation to the changing nature of the realities involved in its principal intervention. The external circumstance assumes legal significance when according to objective indices it turns out to have been the factor that gave rise to the change in the corporate organisation[16].

The result of this is that it becomes the basis for the corporate contract as objectively evaluated in the determinations that contextualize it, so that, being directly associated with the agreed negotiating schedule, it may be considered to be common to both partners and shareholders, in the most congruous meaning of the term, in the sense of the highest level of contractual adequacy in terms of data that are exogenous to the corporate structure.

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[14] See M.J. NOVAK, MC CABE, Information Costs and the Role of the Independent Corporate Director, in Corp. Gov. Eur. Rev., 2003, 301.

[15] H. EIDENMÜLLER, Wettbewerb der Insolvenzrechte?, in ZGR, 2006, 467 et seq.; ID., Free Choice in International Company Insolvency Law in Europe, in EBOR, 2006, 423 et seq.; ID., Abuse of Law in the Context of European Insolvency Law, in ECFR, 2009, 1 et seq.; W. G. RINGE, Strategic Insolvency Migration and Community Law, in W.G. RINGE-L. GULLIFER-P. THERRY (Eds), Current Issues in European and Financial Law, Oxford and Portland, 2009, 71 et seq.; ENGERT, Solvenzanforderung als gesetzliche Ausschüttungssperre bei Kapitalgesellschaften, in ZHR, 2006, 318 et seq.; B. PELLENS-T. KEMPER-A. SCHMIDT, Geplante Reformen im Recht der GmbH: Konsequenzen für den Gläubigerschutz, in ZGR, 2008, 423.

[16] W. SCHÖN, The Future of Legal Capital, in EBOR, 2004, 447 et seq.; ID. Balance Sheet Test or Solvency Tests - or Both?, in EBOR, 2006, 182 et seq..; C. ALONSO LEDESMA, Algunas reflexiones sobre la function (la utilidad) del capital social como técnica de protección de los acreedores, in Estudios de Derecho de Societades y Derecho Concursal, en homenaje al Prof. García Villaverde, Madrid, 2007, 127 et seq.; SANTELLA-R. TURINI, Capital Maintenance in the EU: Is the Second Company Law Directive Really that Restrictive?, in EBOR, 2008, 427 et seq.

The legal corollary to be arrived at from the application of adequacy, as the outcome of a study of the institution of presupposition in corporate governance, is that if the supervening circumstance does not exist at the time of conclusion of the corporate contract, or where it is lacking at a later date even though it was present at the genesis of the contract, the corporate contract must be considered to have been modified, in that legally speaking it has been provided with adequacy, and as a result includes a causal basis that has the capacity to attain the purpose for which it was objectively concluded, in compliance with the typical so-called *expressio causa*.

We should recall that the corporate contract, or the Memorandum of Association of a joint stock company, has the typical physiognomy of an open contract, in that is provides, both empirically and legally, for the natural possibility to make subjective changes to the entity's management structure. Nevertheless, since creating an entity leads to a subjective change between companies and shareholders with regard to the so-called *piercing the corporate veil* or *lifting the corporate veil*, in taking corporate action in pursuit of the corporate purpose, the natural persons in the corporate structure acquire significance, with a corresponding, though subordinate, decline in corporate adequacy in the subjectivist sense.

The negotiated basis and recognition of the legal significance of the phenomenon of adequacy must be interpreted as moments in the evolution of the corporate contract and the related corporate governance structure, from a vision of this fact pattern that is rigidly confined within its structural conformation to the vision of an economic transaction that expands towards the horizon of the other interests that might be objectively associated with the corporate contract.

The significance of the economic transaction means expressing the need for a more reasonable (i.e. adequate) evaluation in each contract, and not limiting it to the merely instrumental aspect, given the need to extend its hermeneutic scope to its teleological connotation: the aim that must be achieved is to rationalize the organisational structure - that is, to tend towards towards guarantees in relation to both the expectations of the shareholders and the no less important requirement that the institution must function properly as the ideal system for the allocation of resources - since it should be noted that contractual regulation takes the form of requirements related to the will of the parties and above all, based on criteria of reasonableness, of the precepts can be derived from the economic substance, in the sense of as a synthesis of will and the need for corporate agreement. In the pursuit of contractual transparency as an implicit requirement of contractual practice, adequacy was developed to implement the demands of good faith, regardless of the technical and legal instrument employed, and it therefore exists in perfect harmony with the principles of fairness and reasonableness. The sustainability of an affirmation of adequacy when the economic basis of a relationship fails requires the proposition of a particular interpretation of legal rules in order to encourage patterns of conduct that are believed to be more efficient for the corporate system, or in order to ensure the maximization of investments: in other words, what is required is respect for the economic principle that substance must prevail over form.

Now, however, we need to respond to a possible objection of the system: what relationship is created between corporate adequacy and the binding nature of a contract, if, that is to say, adequacy can go beyond the limitations of the binding effect, or rather, the regulatory considerations of the shareholders. Here, the need to test the principle of the absolutely binding nature of a contract is supported by the legal-economic theory of the incomplete contract[17]. This contractual theory places major emphasis on the need for the flexibility of corporate regulations in contexts such as that of companies in which the speed of progress of economic traffic, the speed of economic events and the intensification of interconnections among economic players make the risks of future disturbances in the original structural equilibrium subject to constant implementation, both qualitatively and quantitatively.

[17] On this subject, see A. SHWARTZ, Le teorie giuridiche dei contratti e i contratti incompleti, in D. FABBRI - G. FIORENTINI - L.A. FRANZONI, L'analisi economica del diritto, Rome, 1997, 37 et seq., and in Italian literature, R. PARDOLESI, Regole di default e razionalità limitata: per un (diverso) approccio di analisi economica al diritto dei contratti, in Riv. crit. dir. priv, 1996, 451 et seq.

If we want to offer a full response to this objection, we must therefore hypothesize that given the particular nature of the corporate contract as an agreement that organizes a corporate structure that governs an economic activity, the rule of the majority principle in the adoption of corporate will and the legislative tendency to treat the interests of the company as prevailing over those of individual shareholders, adequacy should prevail over the binding nature of contracts in the actual performance of corporate business; this illustrates, *inter alia*, the statutory and legal freedom in favour of an individual shareholder to withdraw from the company when he or she is faced with decisions that bring about a substantial contingent and legal metamorphosis in the corporate organisation in the sense of a synod of corporate substance and legal form.

5. - The methodological approach to the regulation of corporate organisation as a system of economic and legal rules must be treated as supplementary and complementary to the economic analysis of corporate regulations. The methodological contribution of interdisciplinary research, between pure corporate law, business law and contract law, consists in a functional study of a corporate organisation's data that with regard to the form of administration and control a joint stock company results in a functional interpretation of normative data and intra-company fact patterns. As we have seen, this is a principle of general application, which covers all areas of the economic analysis of law.

In fact, the method of applying economics to the law, where the legal form must correspond to the economic substance of the phenomena being governed, results in the information system in business law whereby the legal form must correspond to the informational substance of the phenomena being governed. All economic decisions are characterised *de facto* by the presence of information; they therefore develop in conditions of uncertainty, and occur over time. Economic science is classified by elements of time, information and uncertainty[18]. In an economic system, the simultaneous presence of information and technological advancement creates externalities that place the emphasis on certain effects that had initially been calculated as being secondary.

The study and research of the economic analysis of law, together with the development of economic theory, lead to the creation of a natural relationship between the efficiency of regulated markets and the positive governance of information flows of the corporate structure, since the question of the efficiency of the allocation of financial instruments stands alongside informational efficiency, or rather the objective of providing sufficient information to make the investment decisions taken by investors rational[19].

If we reflect on the relationship between the cost of disclosure requirements faced by intermediaries and issuers and the liquidity status of the securities market, then as an economic corollary, we come to determine that the breadth and depth of disclosure requirements, which characterize the financial market physiologically, must be appropriate not to the size of the issuer, but conversely to the various degrees of liquidity of the securities and their reference market. Clearly, the proceduralisation of tools of information involves an analysis of the true risk level of financial instruments for third parties. Given the mandatory nature of corporate disclosure and its functions, we believe that the costs of corporate disclosure should be evaluated in relation to the issuers' ability to respond to the need for disclosure expressed by investors so that they can be in possession of the information elements necessary to base their decision-making processes regarding their investment choices on the principle of the optimal allocation of their savings[20]. Corporate information must have a pricing function: that is, corporate information must be available to investors at a low cost in order to reduce the expenses they incur to gain possession of them, and so that the price of securities can be calculated accurately. The governance function (namely, the corporate information) contributes to the good governance of the company in three respects: enforcement, education and compliance or explanation.

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[18] For comparative purposes, see STIGLER, The Economics of Information, in 69]ourn. Pol. Ec., 213 (1961); HIRSCHLEIFER , Where are we in the Theory of Information? in 63 (2) Amer. Ec. Rev., 31 (1973); HIRSCHLEIFER and RILEY, The Analytics of Uncertainty and Information. An Expository Survey, in 17 Journ. Ec. Liter., 1375 (1979); HIRSCHLEIFER, The Private and Social Value of Information and the Reward to Inventive Activity , in 61 Am. Econ. Rev., 1971, 561; AKERLOF, The Market for "Lemons" : Quality Uncertainty and the Market Mechanism, in Quarterly Journal of Econ., 1970, 488.

[19] See P. ABBADESSA, Diffusione dell'informazione e doveri di informazione dell'intermediario, in Banca, borsa tit. cred., 1982, 34; M BELCREDI, Economia dell'informazione societaria, Utet, 1993, 4 et seq.; P. DEMARTINI, Informazione, imprese e mercati finanziari efficienti. Spunti di riflessione in una prospettiva multidisciplinare, Franco Angeli, 2004, 32 et seq.; G. FERRARINI, Informazione societaria: quale riforma dopo gli scandali?, in Banca Impresa Società, 2004, 22.

[20] See G. AKERLOF (1970), The market for "lemons": quality, uncertainty " and the market mechanism, in Quarterly Journal of Economics, Vol. n. 84(3); S. BOZZOLAN, Trasparenza informative e mercato finanziario, McGraw-Hill, Milan, 2005, 2.

The adoption of a principle of proportionality when establishing the extent of the disclosure obligation due from issuer companies requires an imposition of information regulations that differentiates the scope of disclosure requirements in relation to both the number of shareholders of the issuer company and the varying degrees of liquidity of the securities: this allows the obligatory cost of the information to be regulated on the basis of the effective need for investor protection and a reduction in the regulatory burden for smaller listed companies that have less liquidity in the market in which their securities are placed.

6. A study of the organisational methods of markets other than stock exchanges for the purpose of crowdfunding and the so-called private markets in financial instruments requires an *ad hoc* discipline that can clarify application of the financial markets law in this sector, on the one hand, and overcome the trade-off between the benefits of widespread distribution financial instruments, web permits and the costs of protecting the solicited investors on the other. Crowdfunding is not regulated as a phenomenon applicable to issuers in general: on the contrary, there is specific, organic legislation for innovative start-ups, through rules and funding arrangements that can exploit the potential of computer networks.

Information economics deals with contractual relationships that occur in conflict situations characterized by asymmetric information; it does not directly address the causes that underlie individual decisions, but rather the effects, and deals with the form taken by individual decisions when placed in an interactive context. Information relating to a company's performance and its future prospects is not distributed uniformly between insiders and outsiders, which results in information asymmetry in favour of the former. The presence of asymmetric information does not absolutely require that the law intervene to correct it by proposing various remedies that can be traced in the dynamics of the market. The regulation of information is evident both in the imposition of specific obligations to inform the public and in the provision of sanctions in the event of false or omitted information [21].

The term "asymmetric information" refers to the fact that information is distributed among the various actors involved in a given context in different ways and in different quantities[22]. The presence of asymmetric information hinders the achievement of a social optimum through free contracting among parties. In the absence of an optimal model that permits the problem of asymmetric information to be resolved, it would be appropriate to identify a solution that is geared towards a plurality of responses based on a model in which individual remedies carry out a complementary function. In an economic environment in which constraints of reputation and market mechanisms play a dominant role, the legal requirement for information is a tool for correcting organisational dysfunctions, while sanctions play the role of guarantors that the system will function[23].

Confirming the results of research on the improved circulation of information within listed companies, it is possible, as we have said, to configure three different sets of informational rules: one on the organisational structure of the company, one on decision-making processes and the legal allocation of activities common to corporate organisations and the relevant internal controls, and one the legal actions of the company in the market. The principle of the responsibility of directors in joint stock companies finds its logical collocation in information systems. The internal information process is, in fact, aimed at the proper management of enterprises, while informational tension towards the exterior meets the minority shareholders' and third parties' need for information and control for an exact reconstruction of the company's assets and the individual relationships created in the exercise of the company's activities.

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[21] See HANSMANN, KRAAKMAN, The Essential Role of Organisational Law, NYU Law and Economics Working Paper and ID. Il ruolo essenziale dell'organisational law, in Riv. soc., 2001, 21. On this topic, see ROSSI-STABILINI, Virtù del mercato e scetticismo delle regole: appunti a margine della riforma del diritto societario, cit., 4 et seq.

[22] It is a well-known fact that information asymmetry leads to two problems: moral hazard and adverse selection).

[23] It is interesting to read GROSSMAN, STIGLITZ, Information and Competitive Price Systems , in Am. Econ. Rev., 1980, 393; ID., On the Impossibility of Informationally Efficient Markets, in Am. Econ. Rev., 1980, 421, and STIGLITZ, Informazione, economia pubblica e macroeconomia, Bologna, 2002. And again, KRONMAN, Mistake, Duty of Disclosure, Information and Law of Contracts, in Journal of Leg. Stud., 1978, 4; BEALES, CRASWELL, SALOP, The Efficient Regulation of Consumer Information, in Journal of Law & Econ., 1981, 491.

In a joint stock company, a business belongs to the shareholders: that is, to those who risk their investments. These people expect effective management, and are willing to risk losses, according to the characteristics of the commercial activities selected in the Articles of Association. Management of the company depends on the shareholders in shareholders' meetings; they hold the managed interest that makes fiduciary appointments by resolutions to appoint directors. Given that according to the theory of agency, a director is an agent and a shareholder is the principal, if an agent wishes to reduce his or her liability, he or she must make the shareholders aware of decisions regarding company business before putting them into effect. There may be inverse proportionality between directors' liability for their management actions and the information they receive and convey.

In the management of joint stock companies, the availability of information not only plays a fundamental role in decision-making processes, but also supplements one of the directors' duties, which is to act in an informed manner; a breach of this duty is relevant to the area of responsibility. The conceptual notion of corporate organisation as an information system can be seen at the bases of the legal system. The economic theory of organisations must be linked to the economic theory of information. In this regard, one must be aware of the information asymmetries that exist in corporate organisations among the various actors who combine to create a corporate organisation that in the pursuit of a common goal, through diverse patterns of conduct, may create uncertainty in decision-making processes, since not all the agents who take part in decision-making processes have the same information available to them. Information therefore becomes the basis for the notion of corporate organisation, and assumes the role of the interpretive key for the governance of corporate organisations[24].

7. - The topic of systems of administration and control has aroused particular interest in Italy since the approval of the company law reforms enacted by Legislative Decree no. 6 of 17 January 2003. These reforms profoundly reshaped the internal organisation of Italian joint stock companies by introducing the possibility of choosing from among three models. Besides the Italian model, the reform now allows a choice to be made between two additional models: the dual system or the one-tier system. An explanation of the role of an administrator within a company cannot be provided without examining and understanding the system of administration and control adopted by the company in question. The traditional system was the only possible model in the Italian legal system until the entry into force of Legislative Decree no. 6 of 17 January 2003, even though authoritative voices had been expressing the hope that new corporate governance rules would be introduced by Italian companies through careful use of their statutory independence for some time.

The above-mentioned model is based on a distinction between boards of directors and boards of auditors, where the former deal with management and the latter control the managers (without, however, being entitled to go into the merits of the choices made)[25]. Both bodies are appointed by shareholders' meetings, and therefore end up being the expression of the will of the majority of the shareholders or of a sole shareholder with absolute control. This system of management and control has often been the subject of criticism regarding the monitoring role that must be played by the board of auditors. In fact, although directors still have the duty to oversee general management performance, the body that primarily had the function of internal controls and supervision of management was the board of auditors. With regard to to the latter's actions, systems of governance used in other countries were often considered to be more appropriate for ensuring more effective and better-developed controls. The two-tier system (one of the two alternative models to the traditional form permitted by the company law reforms) is taken from the experience of various continental European legal systems. It is most of all a feature of Germany (and so is often also called the "German Model"), where it was one of the tools used to attempt to create the famous *Sozialmarktwirtschaft* (the social market economy).

The German Model was devised to permit comparison and agreement among the interests of the major stakeholders through the system known as *Mitbestimmung* (co-management or co-determination), which ensures broad representation in the governance of an enterprise.

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[24] See KRONMAN, Mistake, Duty of Disclosure, Information and Law of Contracts, in Journal of Leg. Stud., 1978, 4; BEALES, CRASWELL, SALOP, The Efficient Regulation of Consumer Information, in Journal of Law & Econ., 1981, 491; SCHULZE, EBERS, GRIGOLEIT, Informationspflichten und Vertragsschluss im Acquis communautaire, Tùbingen 2003, with a review by TROIANO in Riv. dir. civ., 2005, 94; HERTEUX, Les informations des actionaires et des épargnants. Etude comparative , Paris 1961; BALATE, STUYCK, Pratiques du commerce. Informations et protection du consommateur , Brussels, 1988.

[25] On this topic, DENOZZA, La nozione di informazione privilegiata tra "Shareholder Value" e "Socially Responsible Investing", in Giur. comm., 2005, 585.

This model is based on the distinction between a management board and a supervisory board. The former has skills and functions that are roughly similar to those of a board of directors in the traditional Italian model. The latter combines the skills that belong to the supervisory board and ordinary shareholders' meetings in the traditional model: namely, the control of corporate management, the approval of balance sheets, the appointment and removal of directors and the promotion of corporate liability actions against them[26]. The main difference compared with the traditional Italian model, based on the distinction between a board of directors and a supervisory board, is that in the latter case, both bodies are appointed by shareholders' meetings, while in the two-tier system, shareholders' meetings only appoint the supervisory board, which in turn appoints the board of management.

It is thanks to this appointment procedure, as provided in the German and Dutch legal systems, that the presence of representatives of minority shareholders in the control body is ensured; this leads to *de facto* continuous supervision and the negotiation of management options. The single-tier model (the second of the alternatives to the traditional model prescribed by the company law reforms) is derived from the common law, and is a characteristic of the British and American systems (in fact, it is it also called the "Anglo-Saxon Model"). The main feature of this model is that it does not provide for the existence of two bodies, one for management and one for management control, as is the case with the two-tier model, but only for a single body, the board of directors, within which committees dedicated to specific areas are created[27].

There may be a remuneration committee, which decides on directors' and managers' salaries, except for those of the independent directors who make up the committee, which are decided by the board of directors. There may be a nomination committee, which proposes candidates for election as members of the board to shareholders' meetings, and communicates the personal and professional characteristics of the candidates so as to ensure that all the shareholders can exercise an informed, reasoned vote. Finally, the committee that merits the most attention, which replaces the traditional model of the board of auditors in the Italian system (or the supervisory board in the two-tier system) in carrying out the true internal control function is the audit committee, a term that is translated into Italian as the committee for management control, or the internal control committee. This committee is the fulcrum around which the operation of the model under review revolves, and is also the element that permits the financial and legal literature to define the one-tier model with the term "monitoring model".

8. - The hermeneutic tension surrounding the imposition of legal research on share capital intends to, and must, adopt a vision of the requirements of share capital and company funding in positive and productivistic terms: if one reads it in both systemic and corporate terms, one is led to consider how the rules on so-called real capital, or better, the system of making contributions to joint stock companies, currently represents the typical moment of application of the principle of corporate adequacy.

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[26] The law on joint management (Mittbestimmungsgesetz) of 4 May 1976, which strengthened the principles that were already a part of the Betriebverfassungsgesetz 1952, establishes that in enterprises with a legal personality with more than 2,000 employees, the supervisory board must be structured in such a way as to ensure the presence of representatives of the shareholders and employees - in equal numbers - so as to ensure representation of the interests of the two categories and joint decisions in the administrative decisions that are within the powers of the Aufsichtsrat . Favourable terms are, however, reserved for representatives of the shareholders, who are generally responsible for appointing the President of the Aufsichtsrat by a vote in favour of two-thirds of the members of the Council, except in the case of a special resolution. See K.J. HOPT, Direzione dell' impresa, controllo e modernizzazione del diritto azionario: la relazione della Commissione governativa tedesca sulla corporate governance, in Riv. soc., 2003, 182 et seq.

[27] J.M. NELISSEN GRADE-M. WAUTERS, Reforming Legal Capital: Harmonisation or Fragmentation of Creditor Protection?, in K. GEENS- K. HOPT, The European Company Law Action Plan Revisited, Leuven, 2010, 26 et seq.; H. EIDENMÜLLER, Wettbewerb der Insolvenzrechte?, in ZGR, 2006, 467 et seq.; ID., Free Choice in International Company Insolvency Law in Europe, in EBOR, 2006, 423 et seq.; ID., Abuse of Law in the Context of European Insolvency Law, in ECFR, 2009, 1 et seq.; W. G. RINGE, Strategic Insolvency Migration and Community Law, in W.G. RINGE-L. GULLIFER-P. THERRY (Eds.), Current Issues in European and Financial Law, Oxford and Portland, 2009, 71 et seq.; ENGERT, Solvenzanforderung als gesetzliche Ausschüttungssperre bei Kapitalgesellschaften, in ZHR, 2006, 318 et seq.; B. PELLENS-T. KEMPER-A. SCHMIDT, Geplante Reformen im Recht der GmbH: Konsequenzen für den Gläubigerschutz, in ZGR, 2008, 423.

In the desired methodology, which is to investigate and interpret corporate regulations from the point of view of compliance with the principle of adequacy of corporate structures, it is necessary to proceed with an extension of the concept of adequacy beyond the narrow confines of management and control to arrive, *de plano*, at an understanding of how adequacy must even affect the dogmatic acquisition of joint stock company governance: share capital must be properly framed within the productivist perspective[28].

As a result, abandonment of the almost axiomatic criterion of share capital as a natural form of guarantee for creditors follows in the form of a conceptual denial. If one reflects on legislative modelling in this area from an economic viewpoint, it seems that one might take the position that the legal requirements relating to constraints on share capital do not initially have the purpose of ensuring that the creditor class is guaranteed; rather, it seems correct to think that it is also the desire of the regulatory tension to bring about the improved functioning of enterprises by securing the structural soundness of the corporate organisation as a prodromal benefit to ensure adequate corporate continuity based on the size of the company.

If we take the core of this argument, and abandon the exegetical uncertainties, we might justifiably make the case that it is a requirement of the necessary business functionality to make advance plans for investments in the enterprise at regular, long-lasting times, so that the enterprise is adequately organized; in hermeneutics that take account of comparative reflections, [29] solvency and balance sheets tests can represent moments in time in which it is possible to approach the concept of adequacy of the share capital of a joint stock company, as a criterion that underlies both the protection of creditors who develop legal relationships with the entity, and above all, the correct form of organisation of the corporate structure in the sense of a continuous, periodic need to adjust the financial resources of the company to the real activities and size that pursuit of the corporate purpose requires.[30]

Control of the quantity and quality of the risk financial resources for the genesis and life of a corporate structure to be allocated to a company is the necessary antecedent to identification of the adequacy and effectiveness of capitalisation, thereby provoking an easing of the system governing the formation and control of share capital, the so-called *Kapitaleinbringung*, through the link to continuity of the structural support of risk offered by the rules on the preservation of capital[31]. If we reflect on this, we see that the system of funding by shareholders is an indicator of the legislative tension towards obtaining an adequate system of share capital: management of a company means entrusting the company's solvency not to an investment decision resolved by the use of legislative requirements, but to an occasional decision: that is, one that is generated by a current financial assessment.

If one reads the laws carefully, one can correctly note indications of the tension towards acceptance of adequacy as the defining principle behind corporate governance and practice. It must be remembered that with regard to transactions carried out in the name of the company prior to registration, those who took the actions have unlimited joint and several liability towards third parties, as do a sole shareholder founder and those shareholders who have taken the decision in the Memorandum of Association or a separate document to authorize or permit the conclusion of the transaction. Where, following registration, a company approves a transaction carried out during that period of time, the company is also liable, and is required to identify those who took the action.

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[28] MIOLA, Legal Capital and Limited Liability Companies: the European Perspective, in ECFR, 2005, 413 et seq.; DENOZZA, A che serve il capitale? (Piccole glosse a L. Enriques-J.R.Macey, Creditors Versus Capital Formation: The Case against the European Legal Capital Rules), in Giur. comm., 2002, I, 585 et seq.

[29] On this subject, for a widely-used analysis, see L. ENRIQUES- J. MACEY, Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules, in Cornell L. Rev., 2001, 1164 et seq.; and on the related discussion, P.O. MÜLBERT-M. BIRKE, Legal Capital: Is There a Case Against the European Legal Capital Rules?, in EBOR, 2002, 698.

[30] See SANTELLA-R. TURINI, Capital Maintenance in the EU: Is the Second Company Law Directive Really that Restrictive?, in EBOR, 2008, 427 et seq.; J.M. NELISSEN GRADE-M. WAUTERS, Reforming Legal Capital: Harmonisation or Fragmentation of Creditor Protection?, in K. GEENS- K. HOPT, The European Company Law Action Plan Revisited, Leuven, 2010, 26 et seq.;.

[31] See on this subject H. EIDENMÜLLER, Wettbewerb der Insolvenzrechte?, in ZGR, 2006, 467 et seq.; ID., Free Choice in International Company Insolvency Law in Europe, in EBOR, 2006, 423 et seq.; ID., Abuse of Law in the Context of European Insolvency Law, in ECFR, 2009, 1 et seq.; W. G. RINGE, Strategic Insolvency Migration and Community Law, in W.G. RINGE-L. GULLIFER-P. THERY (Eds), Current Issues in European and Financial Law, Oxford and Portland, 2009, 71 et seq.

Therefore, if we apply contrary reasoning, we cannot but realize that the law provides for the need to adapt a company's capitalisation to the requirement to protect persons who have established legal relationships with the managers of the legal entity that is being formed; nor should we forget the negative prescription that provides that issuance of the shares is prohibited prior to registration, since they cannot be the subject of a public offering as financial products.

From the viewpoint of wishing to demonstrate that the principle of adequacy is implicitly present in the underlying legislation, including as a function of the capitalisation and funding of a company, it is worth considering that with regard to contributions, a person who contributes assets in kind or in the form of receivables must submit a sworn declaration prepared by an expert appointed by the courts of the judicial district where the company has its registered office that must include a description of the goods or receivables granted, a declaration that their value is at least equal to that attributed to them for the purposes of calculating the share capital and any premium and the evaluation criteria applied: by way of a corollary interpretation, the tension of the regulations that ensure that share capital must be created correctly in order to obtain an adequate capitalisation of the company cannot but be a consequence of this. Among other things, if we wish to continue our reading of the provision, the fact of adequacy appears to be even more stressed, since directors are required to check the evaluations within a specific time period, and, if there are reasonable grounds, must proceed with a revision of the estimate.