Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis

Law Working Paper N° 530/2020
July 2020

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ECGI Working Paper Series in Law

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Abstract

This essay argues that, to address the Covid-19 crisis, in addition to creating a special temporary insolvency regime, relaxing provisions for companies in the vicinity of insolvency, and enabling companies to hold virtual meetings, policymakers should tweak company law to facilitate equity and debt injections and address the consequences of the extreme uncertainty faced by European firms. After some general reflections upon the type of rules that are needed in these exceptional times, examples of temporary corporate law interventions for the emergency are provided. Specifically, rules to facilitate injections of equity capital and shareholder loans are suggested, together with relaxations of directors' liability rules and measures to protect firms against hostile takeovers. All of these measures should apply merely by default and only for so long as the emergency lasts. The essay concludes with some thoughts about how to make normal-times corporate law ready for similar emergencies in the future. The goal is both to reduce the risk that the temporary extreme measures enacted for this crisis are made permanent under the pretence that another crisis may hit again and to have quick adaptation mechanisms already in place to respond to such a crisis.

Keywords: Corporate Law, Covid-19 Crisis, Uncertainty, Equity issuance, Directors Liability, Hostile takeovers, Shareholder activism, Loyalty shares

JEL Classifications: G38, K22

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Forthcoming in European Company and Financial Law Review

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Table of Contents

Pandemic-Resistant Corporate Law

It's a pandemic. There are no rules.
Seth Meyers

1. Introduction

These are exceptional times. Accordingly, almost everywhere, policymakers are taking exceptional measures to tackle the Covid-19 pandemic, especially in the domains of public health, public finance, monetary policy, and public law. Among public law measures, of great relevance to corporate governance are the rules broadening governments' powers to authorize large share block purchases (e.g. in Germany[1] and Italy[2]). Even stronger proposals are being aired, and in some cases adopted, in the direction of injecting public funds into companies in exchange for equity (Germany[3]), or even nationalising businesses altogether (France[4]).

In addition, some incursions into private law have also been made. This is especially true with regard to insolvency (or bankruptcy) law.[5] Some of the bankruptcy law-related measures intervene to change rules that ordinarily apply in the vicinity of insolvency and are, therefore, at the boundary between insolvency and corporate law. For instance, a number of countries are in the process of tweaking the rules on directors' duties in the proximity of

(*) Luca Enriques is Professor of Corporate Law at the University of Oxford and ECGI Fellow. *I wish to thank Ignacio Farrando Miguel, Andrés Recalde, Kristin Van Zwieten and participants to an Oxford Business Law Workshop for excellent comments and suggestions and Georgios Pantelias for his valuable research assistance. The usual disclaimers apply.*

[1] *Patrick Donahue*, "Merkel's Government Approves Tighter Rules on Takeovers", Bloomberg, 8 April 2020 (<https://www.bloomberg.com/news/articles/2020-04-08/merkel-s-government-approves-tighter-rules-on-foreign-takeovers> last accessed: 4 May 2020).

[2] Articles 15-16, Decreto-Legge 8 aprile 2020, No. 23, "Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali" (Law-Decree 8 April 2020, No. 23, "Urgent measures in the matter of access to credit and tax compliance for enterprises, special powers in strategic sectors and interventions in the area of health and labour, prorogation of administrative and trial deadlines").

[3] *Guy Chazan*, "Germany to Spend Extra €122.5bn to Counter Coronavirus Slump", Financial Times, 22 March 2020 (<https://www.ft.com/content/e85f35e0-6c30-11ea-89df-41bea055720b> last accessed: 4 May 2020).

[4] *Guy Chazan/Jim Brunsden*, "Coronavirus Crisis Pushes Europe into Nationalist Economic Turn" Financial Times, 26 March 2020 (<https://www.ft.com/content/79c0ae80-6df1-11ea-89df-41bea055720b> last accessed: 4 May 2020).

[5] *Stephan Madaus/F. Javier Arias*, "Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law", in this issue.

insolvency (e.g. the UK[6]) or have already done so (e.g. Australia,[7] Germany,[8] Switzerland[9] and New Zealand[10]).[11]

Similarly, some of the jurisdictions still providing for the "recapitalize or liquidate" rule (which requires directors to promote the recapitalization of the company, convert it into an unlimited liability partnership or liquidate it, if net assets fall below a given threshold), such as Spain,[12] Italy[13] and Ecuador,[14] have chosen to suspend its application during the crisis.[15] Moreover, in Italy, the rules on the subordination of shareholders loans have also been suspended.[16]

This essay asks the question of whether company law rules not specifically dealing with companies in the "twilight zone" should also be tweaked to counter the emergency. One obvious focus is rules on how (and when annual) general meetings must be held[17] (e.g. in the

[6] See *Madaus/Arias* (fn. 5).

[7] *Michael Murray/Jason Harris*, "Managing the Insolvency Curve in Australia" Oxford Business Law Blog, 20 April 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/managing-insolvency-curve-australia> last accessed: 4 May 2020).

[8] *Marco Wilhelm/Ulrike Binder/Tina Hoffmann*, "Law to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedure Law Passed by the German Parliament", Mayer Brown, 26 March 2020 (<https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/ger-law-to-mitigate-the-consequences-of-the-covid-19-pandemic> last accessed: 4 May 2020).

[9] *Luca Kenel*, "Switzerland Temporarily Modifies the Duty to Trigger Insolvency Proceedings During the Covid-19 Pandemic" Oxford Business Law Blog, 28 May 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/switzerland-temporarily-modifies-duty-trigger-insolvency-proceedings> last accessed: 28 May 2020).

[10] *Akshaya Kamalnath*, "Insolvency Measures for Covid-19 in New Zealand - A Temporary DIP Model" Oxford Business Law Blog, 26 May 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/insolvency-measures-covid-19-new-zealand-temporary-dip-model> last accessed: 27 May 2020).

[11] For an analysis of these emergency measures see *Angelo Borselli/Ignacio Farrando Miguel*, "Corporate Law Rules in Emergency Times Across Europe", in this issue.

[12] *Aurelio Gurrea Martinez,* "Insolvency Law in Times of COVID-19", Ibero-American Institute for Law and Finance, Working Paper 2/2020 (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562685> last accessed: 4 May 2020).

[13] *Daniele Vattermoli*, "Pandemic and Insolvency Law: the Italian Answer", Oxford Business Law Blog, 14 May 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/pandemic-and-insolvency-law-italian-answer> last accessed: 22 May 2020).

[14] *Esteban Ortiz Mena/Paúl Noboa Velasco*, "Corporate Liquidation Proceedings in Ecuador: The Recapitalize or Liquidate Rule in Times of COVID-19", Oxford Business Law Blog, 16 April 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/corporate-liquidation-proceedings-ecuador-recapitalize-or-liquidate> last accessed: 4 May 2020).

[15] See *Borselli/Farrando Miguel* (fn. 11) for further details.

[16] See Article 8, Law-Decree 8 April 2020, No. 23, supra note 2.

[17] See *Borselli/Farrando Miguel* (fn. 11). See also *Dirk A. Zetzsche/Linn Anker-Sørensen/Roberta Consiglio/Miko Yeboah-Smith*, "The COVID-19-Crisis and Company Law - Towards Virtual Shareholder Meetings", University of Luxembourg, Faculty of Law, Economics & Finance WPS 2020-007 (<https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3576707> last accessed: 4 May 2020).

UK[18] and Italy[19]). These rules may be at odds with social distancing provisions wherever they do not allow for virtual meetings or forms of collective representation of the shareholders.

Yet, the challenges for businesses in current months are such that one ought to think more broadly about how corporate law should be amended with a view to avoiding economic, rather than viral, contagion and keeping companies afloat in these exceptional times. Below are some general considerations to guide policymakers' choices in this area,[20] followed by some examples of temporary corporate law interventions to counter the emergency. This essay concludes with some thoughts about how to prepare for a similar emergency in the future.

2. Tackling the Covid-19 Crisis: A Framework for Tweaking Corporate Law

What kind of interventions should be made in the area of corporate law? First of all, a case can be made in favour of adopting, wherever feasible, the simplest form of intervention, consisting of either the suspension of existing rules or the temporary application of a set of already-existing relatively lax rules to matters that would usually fall under stricter ones.

An alternative to these very basic forms of intervention would be the crafting of new special temporary rules. While in some cases that may be necessary (as some of the examples below will illustrate), caution is warranted when contemplating the design of new rules: experimenting with new (corporate law) rules in exceptional times carries the risk that the new rules will not have been properly pondered, let alone been the subject of a consultation process or a cost-benefit analysis.[21] In addition, in exceptional times such as these, it is likelier that extreme solutions leaning on the side of excessive state interventionism and "stealth

[18] *Gibson Dunn*, "COVID-19 UK Bulletin-April 8, 2020", Gibson Dunn, 8 April 2020 (<https://www.gibsondunn.com/covid-19-uk-bulletin-april-8-2020> last accessed: 4 May 2020); *Dominic McCahill/Peter Newman/James D. Falconer*, "UK Government Introduces COVID-19 Bill to Aid Businesses and Reform Restructuring Law", Skadden Arps, 22 May 2020 (<https://www.skadden.com/insights/publications/2020/05/uk-government-introduces-covid19-bill> last accessed: 28 May 2020).

[19] *Pietro Fioruzzi/Carlo De Vito Piscicelli/Francesca Gesualdi/Federico Cenzi Venezze/Giuseppe Scassellati-Sforzolini*, "Italy's Economic Measures to Mitigate the Effects of COVID-19", Cleary Gottlieb, 18 March 2020 (<https://www.clearygottlieb.com/news-and-insights/publication-listing/italys-economic-measures-to-mitigate-the-effects-of-covid-19> last accessed: 4 May 2020).

[20] The focus here, however, will be neither on financial markets law nor on accounting law. On the measures taken by governments in these areas see *OECD*, National Corporate Governance Related Initiatives During the Covid-19 Crisis (2020) (<http://www.oecd.org/corporate/National-corporate-governance-related-initiatives-during-the-covid-19-crisis.htm> last accessed: 29 May 2020), 36 et seqq. On ESMA's measures in these areas see *Niamh Moloney*, "EU Financial Market Governance and the Covid-19 Crisis", in this issue.

[21] See *Iris H-Y Chiu/Andreas Kokkinis/Andrea Miglionico*, "Regulatory Suspensions in Times of Crisis: The Challenges of Covid-19 and Thoughts for the Future", European Corporate Governance Institute - Law Working Paper 517/2020 (https://ssrn.com/abstract=3605423 last accessed 28 May 2020), 22-24.

protectionism"[22] will be approved. Finally, novel off-the-cuff measures could be taken as a response to the political pressure to "do something" for the sake of it rather than because something genuinely needs to be done.[23] While lawmakers and governments may have plenty of ways to demonstrate they are tackling the crisis, securities regulators may find themselves in the awkward position of being seen on the side lines and may therefore be strongly tempted to come up with something (anything!) within their power.[24] For this reason, the granting of *new* emergency powers to regulators, other than in the form of the authority to relax or suspend existing rules, should be resisted as much as possible.

All emergency measures should have a clear and reasonably short sunset (or end date), so that the need to extend their validity can be duly pondered and the risk of them staying in force for longer than needed is reduced.

Needless to say, the rule tweaks should also be proportionate, which means that deviations from the corporate law that applies in normal conditions should be as slight as possible. One way for an intervention to be proportionate is by suspending normal-times rules in the way that is most deferential to individual companies' autonomy. In a time of extreme uncertainty,[25] it is safer to let individual companies decide on whether to move away from normal-times corporate law rules, unless a clear case can be made that individual companies would make choices contrary to the interests of society as a whole.

Deference to individual companies' choices can take on many forms, which policymakers should consider when assessing rules for proportionality. First of all, rather than suspending rules themselves, policymakers may just enable companies to deviate from them. They may do so by leaving the decision to opt-out of normal-times corporate law rules to the shareholder meeting or, should they favour a leaner decision-making process, the board. Second, and more effectively but also more intrusively, lawmakers may introduce new "majoritarian defaults,"[26] based on the argument that, at the time of starting up the company or

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[22] *Mariana Pargendler*, "The Grip of Nationalism on Corporate Law", Indiana Law Journal 95 (2020), 533 et seqq.
[23] *Luca Enriques*, "Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View", University of Pennsylvania Journal of International Law 4 (2009), 1147, 1148.
[24] See *Enriques* (fn 23), 1148 et seq. with specific regard to short-selling bans. On such bans in general and their effects see eg *Luca Enriques/Marco Pagano*, "Emergency measures for equity trading: the case against short-selling bans and stock exchange shutdowns", in: Christos W. Gortsos/Wolf-Georg Ringe (eds.), Pandemic Crisis and Financial Stability, 2020, p. 413, 414 et seqq.
[25] *Robin Wigglesworth*, "Coronavirus Creates Biggest Economic Uncertainty in Decades", Financial Times, 20 April 2020 (<https://www.ft.com/content/4d77ab77-0ff0-46ff-b30e-ae712c582457?shareType=nongift> last accessed: 4 May 2020).
[26] *Frank H. Easterbrook/Daniel R. Fischel*, The Economic Structure of Corporate Law, 1996, p. 15.

going public, shareholders had not focused their attention on a pandemic scenario (such as the current one)[27] and that, had they done so, most companies would have chosen, for example, a leaner decision-making process or wider discretion for decision-makers. Hence, instead of suspending a given mandatory rule, policymakers may provide for a new, more lenient rule that companies would remain free to opt-out of, thereby moving back into the normal-times corporate law rule. Again, the "opt-back" decision could be left with the shareholders, with the board, or both.

Finally, what rules should policymakers tamper with, content-wise? Normal-times corporate law rules exist to make sure that, throughout their lives, companies are managed in the interests of their shareholders and other stakeholders, so long as contractual arrangements are insufficient to ensure that outcome. Lawmakers enact those rules because they believe the benefits they carry for investors, other stakeholders and society more generally are greater than their costs. Things can change dramatically in extreme times though. With economies worldwide so heavily disrupted, most companies are in survival mode[28] and corporate law constraints, justified as they are in normal times, may simply prove fatal in these extraordinary circumstances. Hence, the main focus should be on the rules that may affect a company's very *survival*.

In addition, lawmakers calibrate rules to work well with levels of *uncertainty* lower than we are presently observing. This raises the question of whether any corporate law rules may become ineffective, if not counterproductive, once the level of uncertainty reaches and/or surpasses the current levels.

Extreme uncertainty also affects share prices. Indeed, share prices have moved wildly in both directions since the Covid-19 outbreak became a pandemic. With levels of uncertainty so high about the disease and its public health and economic consequences, rules implicitly relying on prices providing a good-enough estimate of future cash flows may no longer be securely grounded.

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[27] Arguably, the pandemic was a known unknown, in the sense that it was highly likely to strike at some point but no one could know exactly when. Yet, given that very few people have memory of previous pandemics and governments reactions to pandemics themselves change over time, it is almost impossible to anticipate how best to deal with an exceptional event such as one of this kind. In addition, human beings, both individually and collectively, may be biased against planning for such an event: see *Tim Harford*, "Why We Fail to Prepare for Disasters" Financial Times, 16 April 2020 (<https://www.ft.com/content/74e5f04a-7df1-11ea-82f6-150830b3b99a> last accessed 4 May 2020).

[28] *Financial Times Editors*, "Up 'Schitt's Creek': Shell-Shocked Companies Turn to Survival Playbook", Financial Times, 14 April 2020 (<https://www.ft.com/content/d3b1155c-8552-4166-a750-48943f5444cb?shareType=nongift> last accessed: 4 May 2020).

3. Tackling the Covid-19 Crisis: What Tweaks?

So, which rules should be suspended or relaxed? Every jurisdiction is, of course, different and may require different interventions, but here are some areas that policymakers at the EU or member-state level, may consider. The suggestions that follow have publicly traded companies in mind, although most of them would still be appropriate for closely held companies as well.

In quite a few cases, these suggestions touch upon corporate law rules that are arguably of dubious justification even in normal times. Yet, consistent with the considerations above about the risks of making hasty and lightly motivated decisions in exceptional times, I have formulated all the suggestions for pandemic-resistant rules as temporary deviations from the normal-times rules even when I share doubts about the merits of the latter. Any assessment about the costs and benefits of such rules in normal times cannot be made here other than by referring to the relevant literature in the footnotes.

3.1 Survival First: Streamlining Equity and Debt Capital Injections

When it comes to following a "survival first" imperative, attention should be given to rules that hamper quick decisions for matters on which the life of the company may depend.

While most of the attention of policymakers is currently focused on whether companies can borrow to ensure their survival, it is already clear that quickly raising equity could represent a lifeline for many companies. Governments in many countries are not helping matters by tightening public law rules on foreign investments. But they could also do something supportive by making it easier to raise capital quickly.

Wherever the law grants shareholders a pre-emption right on newly issued shares, lawmakers could relax (if not outright suspend) that requirement, and hence considerably shorten the time it takes to execute a capital increase resolution (within the EU, by at least 14 days: article 72(3), Directive (EU) 2017/1132). Doing so should make it easier to find one or more investors willing to prop up the company via an equity capital injection.[29]

Because timing can be existentially important when it comes to securing new funding, another requirement that may be suspended, or narrowed down in its scope, is the need for

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[29] In the UK, self-regulatory constraints on share issues, which practically limited issuances of shares without granting existing shareholders a pre-emption rights to five percent of the company's capital have been relaxed: the limit is now 20 percent. See *The Pre-Emption Group*, "Pre-Emption Group Expectations for Issuances in the Current Circumstances", Statement, 1 April 2020 (<https://www.frc.org.uk/news/april-2020/pre-emption-group-expectations-for-issuances-in-th> last accessed: 4 May 2020).

shareholders to approve new issues of shares or delegate share-issuing approval powers to the directors within the boundaries set, for EU countries, by article 68, Directive (EU) 2017/1132.[30]

Granted, lightening measures such as these, which will obviously have to be enacted at the EU level, will increase the risk that existing shareholders lose out to buyers of newly issued shares who may obtain these at a bargain price. But if there is self-dealing or any other abuse, this can be dealt with by *ex post* review, including liability suits for the breach of directors' duty of loyalty; in the present circumstances this seems preferable to making all transactions more burdensome and time-consuming *ex ante*.[31]

One way for a company to find new equity may be by having the incumbent controlling shareholder cede their control to a third party. A mandatory bid, under normal circumstances, would then follow, which may, at the margin, rule out not only inefficient control transfers but also efficient ones.[32] Many European jurisdictions allow for exemptions in special situations such as financial distress.[33] Others provide for a general exemption power, placed in the hands of the regulator (like in the UK).[34] Especially where the latter does not exist, the current situation may justify a general (temporary and default) exemption from the mandatory bid rule in case of control block transfers: in "survival first" mode, an imperfect tool for the protection of minority shareholders may well have to be sacrificed. For countries that grant the regulator a general exemption power, a policy could be announced that spells out the conditions, if any, under which the regulator will still require mandatory bids to be launched in the event of control

[30] In the US, where it is stock exchange rules that vest shareholders with voting rights on new issues of shares, the New York Stock Exchange has relaxed, through June 30, 2020, certain requirements of its shareholder approval rules. See *Victor Goldfeld*, "Wachtell, Lipton, Rosen & Katz: NYSE Temporarily Relaxes Shareholder Approval Rules", Oxford Business Law Blog, 15 April 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/nyse-temporarily-relaxes-shareholder-approval-rules> last accessed: 4 May 2020).

[31] To be sure, the rules allocating issuance powers to shareholders and granting existing shareholders pre-emption rights can already be avoided, albeit with a certain amount of legal risk, which a rule suspension would avoid. That can be done by issuing mandatory convertible bonds with a clause that provides for restitution of capital and interest if the shareholder meeting, to be convened after the issuance is executed, rejects the proposal to raise capital for conversion purposes. For an example of such a transaction see *Telecom Italia*, "Telecom Italia: Board approves mandatory convertible bond up to 1.3 billion euros" Press Release, 7 November 2013 (<https://www.telecomitalia.com/tit/en/archivio/media/comunicati-stampa/telecom-italia/corporate/economico-finanziario/2013/11-07a.html> last accessed: 4 May 2020). Another tool, free of legal risk, but costly, if accessible at all in exceptional circumstances, is provided for in Article 72(7), Directive (EU) 2017/1132, according to which "[t]he right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company." See *Marco S. Spolidoro*, "Nuove e diverse soluzioni di aumento del capitale e diritto di opzione in situazioni di emergenza", Rivista delle società (forthcoming), § 7.

[32] See eg *Lucian A. Bebchuk*, "Efficient and Inefficient Sales of Corporate Control", The Quarterly Journal of Economics 109 (1994), 957. On the dubious merits of the mandatory bid rule see *Luca Enriques*, "The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?", ECFR 1 (2004), 440, 447 et seqq.

[33] *Christophe Clerc/Fabrice Demarigny/ Mirzha de Manuel/Diego Valiante*, A Legal and Economic Assessment of European Takeover Regulation, 2013, 122.

[34] *Clerc/ Demarigny/de Manuel/ Valiante* (fn. 33), p. 64.

transfers taking place during the emergency. In all cases, though, such a general exemption clause may considered to run counter to the principle, expressed in Article 3(1)(a) of the Takeover Bids Directive,[35] that "if a person acquires control of a company, the other holders of securities must be protected;" hence, an EU intervention may be justified to allow member states to introduce such a default exemption.

Finally, EU rules on capital increases that aim to ensure that a company's legal capital provides a reliable measure of funds that cannot be easily distributed to shareholders should be suspended. Doubtful as it is that such rules serve any purpose in normal times,[36] they certainly reduce companies' range of actions when their very survival may depend on raising new equity.

With regard to debt financing, it is well-known that there can be situations in which the dominant shareholder, even of a listed company, may be in the position to provide cheap debt finance to an ailing company. In times when the need for cash may be urgent and the avoidance of bankruptcies is in the public interest (given the risk of clogged courts), restrictions on such cash infusions may have to be eased even at the cost of, again, increasing the risk of abuse. The suspension or relaxation of rules on related party transactions, especially when they considerably lengthen the decision-making process (for example, by requiring majority of the minority approval), should be considered. That, incidentally, should also be the case for new share issues reserved for related parties.[37]

All of these should be merely default measures: well capitalized companies may want to signal their financial health by opting-back to normal-times rules; in doing so, they can reassure their institutional shareholder base that the risk of abuse will not increase. If the risk of abuse is considered high, lawmakers could facilitate companies' opting-back to normal-times protections by requiring a simple majority to do so, or even allowing a qualified minority (say, one-third of the shares represented at the meeting) to force the opt-back. And because it

[35] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30 April 2004, p. 12).

[36] *Luca Enriques/Jonathan R. Macey*, "Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules", Cornell Law Review 86 (2001), 1165, 1201.

[37] The UK Financial Conduct Authority has done that for recapitalization transactions with related parties requiring majority of minority approval (until further notice). See *Travers Smith*, "Listed companies: FCA equity fundraising measures", Travers Smith Legal Briefing, Corporate and M&A, Corporate Advisory, 14 April 2020 (<https://www.traverssmith.com/knowledge/knowledge-container/listed-companies-fca-equity-fundraising-measures/> last accessed: 4 May 2020). The Italian securities regulator, Consob, has amended its regulation on related party transactions to broaden the scope of provision relaxing procedural requirements in the presence of urgency reasons by providing that the special regime for urgent transaction shall apply by default rather than by opt-in via a corporate charter clause, until 30 June 2021. See Delibera n. 21396 of 10 June 2020 (<http://www.consob.it/web/area-pubblica/bollettino/documenti/bollettino2020/d21396.htm> last accessed 14 June 2020).

could be a company's board that may want to signal the company's financial health, the board itself may be given the opt-back power.

3.2 Dealing with Extreme Uncertainty

Two areas where rules can be tweaked to deal with extreme uncertainty are directors' liability and control transactions.[38]

3.2.1 Directors' Liability

Companies do not have to be close to insolvency for their managers to get things terribly wrong, *a fortiori* in the given circumstances. Legal systems giving rise to significant liability risks for directors' violations of the duty of care may reveal themselves as excessively harsh in a business environment characterized by extreme uncertainty. For instance, Germany's version of the business judgement rule requires the defendant director to prove that they complied with their duty to make informed decisions.[39] Although the risk of liability in European jurisdictions is only serious in the event of insolvency, claims of duty of care violations occurring before a company entered the twilight zone can usually be brought by the insolvency administrator as well.[40]

At present, we are all aware of the extreme uncertainty under which businesspeople are making decisions. However, uncertainty will eventually recede in the not too distant future and we (as well as judges and regulators in at least some jurisdictions) may be too quick to conclude that harmful choices made during the crisis could and should have been avoided if directors had given due weight to information signalling the likelihood of a bad outcome. Of course, judges are not supposed to use their *ex post* knowledge to judge directors' behaviour. And it is readily conceded that nowhere do directors respond for bad decisions, so long as the decision-making process is not faulty, the decisions are based on adequate information and they seemed reasonable at the time they were taken. In other words, judges are indeed expected to put themselves in the directors' shoes at the point in time when a decision that had harmful consequences was made.

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[38] On the role of uncertainty in corporate governance and corporate law policy, see generally *Claire Hill/Alessio M. Pacces*, "The Neglected Role of Justification under Uncertainty in Corporate Governance and Finance", Annals of Corporate Governance 3 (2018), 275, 299 et seqq.

[39] See §§ 93(1)2 and 93(2)2 Aktiengesetz.

[40] See e.g. *Carsten Gerner-Beuerle/Philipp Paech/Edmund P Schuster*, "Study on Directors' Duties and Liability" (2013), p. 218–24, 238.

And yet, courts' hindsight bias can easily creep in even when decisions taken in an extremely uncertain economic environment are under review. Boards may have to make hasty decisions with an inherently incomplete information set, which may ex post be easily judged as inadequate. Events may unfold in ways that will inevitably influence anyone's *ex post* judgement of what piece of available information should have been explicitly gathered and given due weight in making a given decision.

Anticipation of the ensuing liability risks can make managers excessively risk-averse *ex ante* or, more precisely, averse to taking "actions that change the status quo."[41] This may be appear to be good from the creditors' perspective, as it may prevent companies from precipitating a crisis by pivoting in the wrong direction. Yet, when a shift in strategy is in fact needed, a mix of risk-aversion and extreme uncertainty creates a status quo bias that may well make insolvency a likelier outcome than swift action.

A parallel with governments' responses to the pandemic itself may be evocative. The countries that have successfully suppressed the pandemic so far are those that have reacted rapidly, strongly and systematically.[42] That is neither the response that a committee of scientists with an understandable preference for evidence-based advice will recommend[43] nor the recipe a politician fearful of displeasing distrustful voters will prefer.[44] Inaction or delayed action has been be the outcome in many Western democracies, with disastrous consequences.[45]

Of course, individual companies are in a very different position than governments in shaping their responses to the current health and economic crisis. Yet, few would dispute that many of them will find, or already have found, themselves in the condition of making fundamental business decisions (whether to keep open or shut down factories, whether to

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41 *Holger Spamann,* "Monetary Liability for Breach of the Duty of Care?", Journal of Legal Analysis 8 (2016), 337, 353.

42 *Gary P. Pisano/Raffaella Sadun/Michele Zanini*, "Lessons from Italy's Response to Coronavirus", Harvard Business Review, 27 March 2020 (https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus last accessed: 2 June 2020).

43 See *Isabella Kaminska*, "Making Sense of Nonsensical Covid-19 Strategy", The Financial Times, 2 June 2020 (<https://ftalphaville.ft.com/2020/06/01/1591001732000/Making-sense-of-nonsensical-Covid-19-strategy/ > last accessed: 2 June 2020) ("Nor do we understand why the committee was so slow to make judgments on many seemingly obvious decisions. Being evidence-based, in many cases, seems to have been the delaying factor.").

44 *Pisano/Raffaella Sadun/Michele Zanini* (fn. 42) ("The most effective time to take strong action is extremely early, when the threat appears to be small — or even before there are any cases. But if the intervention actually works, it will appear in retrospect as if the strong actions were an overreaction. This is a game many politicians don't want to play"). On the importance of trust in government for the effectiveness of coronavirus responses see *Francis Fukuyama*, "The Thing That Determines a Country's Resistance to the Coronavirus", The Atlantic, 30 March 2020 (<https://www.theatlantic.com/ideas/archive/2020/03/thing-determines-how-well-countries-respond-coronavirus/609025/> last accessed: 2 June 2020); *Mark L. Schrad*, "The Secret to Coronavirus Success Is Trust", Foreign Policy, 15 April 2020 (<https://foreignpolicy.com/2020/04/15/secret-success-coronavirus-trust-public-policy/> last accessed: 2 June 2020).

45 *Pisano/Raffaella Sadun/Michele Zanini* (fn. 42).

reduce orders or bet on a quick, V-shaped recovery, whether to convert production to manufacture masks or ventilators, whether to take on more debt or restructure the existing one, and so on) with potentially disastrous consequences, based on limited information and with extreme uncertainty about the future. What is argued here is that managers' and boards' decisions will on average be better, not worse, if they are taken without the ancillary goal of minimizing the risk of incurring liability for harm suffered by their companies as a consequence of those decisions. Reputation concerns and the risk of losing their highly rewarded jobs (with uncertain prospects of finding an equivalent position/salary thereafter), which already in normal times act as no less powerful incentives to engage in diligent decision-making than liability standards, will be even more effective in times of crisis. Moreover, in an extremely uncertain business environment, concerns about the increased likelihood of bad decisions being taken by directors appear to be less pressing than those about inhibiting risk-taking.

Reasonable minds may of course differ on whether, within individual jurisdictions, courts' self-restraint in deciding negligence-based liability cases has proved so far sufficient to provide directors, *ex ante*, with the right attitude towards risk-taking in the current circumstances.[46] What can be made here is a general argument for more lenient standards or, preferably, a blanket exemption from liability for negligent conduct, similarly to what some countries have done with regard to directors' duties in the vicinity of insolvency,[47] with respect of jurisdictions where it is doubtful that this has been the case.

Any change in this area should take the form of a default rule, granting companies the power to opt-back into the ordinary regime whenever they wish.[48] This opting-back resolution should be made available to boards themselves: while it is most unlikely that turkeys would vote for an early Christmas, there is no reason to prevent them from having the opportunity to do so.

[46] The analysis in *Gerner-Beuerle/Paech/ Schuster* (fn. 40), pp. 75-118, shows that there is significant variation across European jurisdictions in this respect.
[47] See fns. 6-12 and corresponding text.
[48] In jurisdictions, such as the UK, where directors liability vis-à-vis creditors is (also) based on the doctrine according to which, in the vicinity of insolvency, directors' duties shift from being owed to the company to being owed to its creditors (the West Mercia rule: see *BTI 2014 LLC v Sequana SA & Ors* [2019] EWCA Civ 112 (06 February 2019)), a suspension of director duties would imply that creditors would lose the protection that comes from that doctrine. Hence, leaving the decision of whether to opt back to normal times director liability standards to shareholders would allow them also to decide on whether that doctrine should apply. Lawmakers in those jurisdictions could therefore reflect upon whether to leave the West Mercia rule in place, carving out an exception from the general suspension rule, or whether to say nothing, which would have the effect of freezing the same rule as regards duty of care violations. The former solution would be in line with the recent trend towards suspending the application of wrongful trading liability rules. For a discussion, see *Kristin van Zwieten,* "The Wrong Target? COVID-19 and the Wrongful Trading Rule" Oxford Business Law Blog, 25 March 2020 (<https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/wrong-target-covid-19-and-wrongful-trading-rule> last accessed: 4 May 2020).

3.2.2 Hostile Acquisitions

Extreme uncertainty, coupled with the strong accountability mechanisms that characterize today's (or perhaps yesterday's) capital markets, is likely to engender easy-to-justify but suboptimal managerial choices.[49] More prosaically, extreme uncertainty *may* also imply share price discounts,[50] which may in turn attract hostile bids and hedge fund activism.

Consistent with that emerging picture, poison pills have been experiencing a revival of sorts in the US in the spring of 2020.[51] In jurisdictions where poison pill-style defences are unavailable such as those in Europe (with the exception of the Netherlands), companies may have to heavily rely on governments to fend off hostile bids (and activism).

Government protection, though, can only be relied upon in a subset of cases; and it's far from free. First of all, the target may not hold "strategic assets" that trigger a government's vetting powers. In addition, the bidder may be better connected with a government than the target company: geopolitics may even get in the way and lead a government to acquiesce to a hostile bid from a company from a given country to maintain good relations with its government. Further, political capital may have to be spent in order to secure a government veto, which may then come with formal or informal strings attached. Finally, governments can rarely intervene against activists, if the latter stay below the thresholds that trigger the former's veto rights.

In the present circumstances, shareholders themselves may prefer managers to focus on their business rather than having to handle the distraction of mounting a defence in the face of a low-ball hostile bid or an activist campaign.[52] Hence, leaving aside the question of whether mandatory rules preventing takeover defences or curbs on activism are justified in normal

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[49] *Hill/Alessio M. Pacces* (fn. 38), 308 et seqq.

[50] To be sure, that has been the case for just a couple of months into the Covid-19 crisis. As of this writing, share prices have fully recovered, with more than a little help from loose monetary policies. See e.g. John Authers, "We're Back at the Top of the Stocks Helter-Skelter", Bloomberg, 8 June 2020 (<https://www.bloomberg.com/opinion/articles/2020-06-08/stocks-are-back-at-the-top-of-the-helter-skelter?srnd=economics-vp&sref=7iliGpFt> last accessed: 8 June 2020).

[51] *Ofer Eldar/Michael D. Wittry*, "The Return of Poison Pills: A First Look at 'Crisis Pills'", Duke Law School Public Law & Legal Theory Series 2020-18 (<https://ssrn.com/abstract=3583428> last accessed: 4 May 2020).

[52] Consistent with this intuition, ISS and Glass Lewis have recently revised their guidance on poison pills, adopting a more open stance with regard to those laid out specifically to address threat situations such as the current Covid-19 crisis. See *Paul J. Shim/James E. Langston/Charles W. Allen, Cleary Gottlieb Steen & Hamilton LLP,* "ISS and Glass Lewis Guidances on Poison Pills during COVID-19 Pandemic", Harvard Law School Forum on Corporate Governance, 26 April 2020 (<https://corpgov.law.harvard.edu/2020/04/26/iss-and-glass-lewis-guidances-on-poison-pills-during-covid-19-pandemic/> last accessed: 4 May 2020).

times,[53] until the crisis is over governments may want to consider granting incumbents discretion in responding to takeovers and shareholder campaigns.

One way to broaden the scope of private autonomy in this area would be to introduce a temporary default rule granting boards the right to approve purchases of share blocks above a given threshold.[54] In addition, one could contemplate a temporary default rule requiring a supermajority for the removal of directors if a bid is on the table. Finally, for companies with no majority shareholder, tenured voting shares could become the norm by way of a default rule doubling the voting rights of shares held for a certain time. Such a default, of course, should be in force only until a pre-set date, and the additional vote pertaining to qualifying shareholders should not be tallied in shareholder meeting resolutions aimed at making tenured voting permanent. Again, the stickiness of the temporary default could vary and opting-back could be made more or less difficult. But there would seem to be no reason to require anything more than a simple majority of shareholders (or a board resolution) to opt-back to the one-share-one-vote rule before tenured voting becomes effective.

4. Being Prepared for Future Crises

The current crisis will teach us many lessons. A minor and hopefully inconsequential one may be that, if another crisis such as this strikes again, we will have a framework in place to allow us to adapt corporate law quickly to such an emergency.

One way of achieving this would be to have regulatory governance mechanisms in place to facilitate adaptation of normal-times corporate law to emergency times. That would have two main advantages: first, if a new crisis as serious as the present one does strike again, adaptation would be faster and, hopefully, better thought-through; and, second, such regulatory governance mechanisms could reduce the risk that emergency solutions that are disproportionate for normal times are adopted (or made permanent after the current crisis is

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[53] See, respectively, *Luca Enriques/Ronald J. Gilson/Alessio M. Pacces*, “The Case for an Unbiased Takeover Law (with an Application to the European Union)”, Harvard Business Law Review 4 (2014), 85, 91 et seqq., and *John C. Coffee Jr/Darius Palia*, “The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance” Annals of Corporate Governance 1 (2016), 1, 40 et seqq.

[54] A milder and much less effective alternative, for countries mandating the board neutrality rule or adopting it as a default (Articles 9 and 12, Directive 2004/25/EC), would be to temporarily make it an opt-in rule and therefore providing for no limitation on the board’s discretion in using its powers to defend against a hostile takeover. This is what Italy did during the financial crisis. Although the change in the law had no sunset, the law switched back to having the board neutrality rule as a default when the financial crisis was over. See *Klaus J. Hopt*, “Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis”, Columbia Journal of European Law 20 (2014), 249, 277.

over) with the justification (or excuse[55]) that another crisis may hit in the future and we had better be suitably prepared.

Corporate law legislation should thus include delegations of powers to the government (executive branch) so that a pre-determined set of rules can be suspended (or replaced by a leaner set) in an emergency. To identify which rules should be tweaked, the experience of emergency-based deviations from normal-times law in the current crisis will help. Of course, parliament could always re-appropriate those powers or restrict them and corporate law may also provide that suspension of the relevant rules will follow *ipso jure* a declaration of emergency, without giving the government any discretion as to whether deviations from normal-times law should take place. Yet, each crisis is different and poses different problems, as we are starting to learn by experience: thus, it is far from clear that the same extreme measures would play out well in different extreme circumstances.

5. Conclusion

In the extreme times we are living through, lawmakers should enact corporate law rules deviating from normal-times corporate law in recognition of the exceptional risks that companies are running of going under, and the extreme uncertainty under which companies are operating. These tweaks should take the form of temporary default rules. The areas where it would make most sense to enact such rules include equity issuances, shareholder loans, control transfers, directors' liability and hostile takeovers.

While some of the temporary default rules suggested here may be justified even in normal times, this essay has only suggested their adoption for the purpose of allowing companies to better weather the crisis. Once the crisis is over, the discussion about their merits can resume, possibly in a changed economic environment that will require us to think about old corporate law rules through new lenses. But, in the meantime, we can content ourselves with the conclusion that what we could make permanent of crisis responses in the area of corporate law (and possibly others) should be regulatory governance mechanisms allowing for a quick switch to the crisis-resistant corporate law mode that policymakers have just started experimenting with.

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[55] Many of the measures suggested in part 3 happen to be pro-managers and pro-dominant shareholders. These are the interest groups most likely to have the upper hand in corporate law-making, especially in normal times (see generally *Pepper D. Culpepper*, "Quiet Politics and Business Power" (2011), p. 1 et seqq.). Hence, it is fair to predict that insiders will pressure policymakers to convert those temporary measures into permanent ones. It would be hyperopic, though, in exceptional times such as these, not to use special corporate law rules to help businesses for fear that such rules will become permanent.

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