Restrictions on Shareholders' Distributions in the Covid-19 Crisis: Insights on Corporate Purpose

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I. General overview

In this period of crisis, there have been a number of different types of interventions as well as pressure towards companies aimed at discouraging, and even prohibiting, dividends distribution and shares buyback[1].

Such a tendency, although with different forms and modalities, has similarly emerged in almost every jurisdiction and has involved any economic sector, including, with some peculiarities, banks, insurance companies and, more in general, financial intermediaries subject to prudential supervision.

By looking at the different measures adopted so far, it is firstly worth highlighting that in the legislative acts which have been passed to support enterprises, it is often requested that if the companies requiring the aid overcome a dimensional threshold they shall not distribute net equity to their shareholders. This is the case for the acts adopted in many EU Member States (e.g. Italy[2], France[3], Germany[4]) as well as in the United States[5]. Despite some differences concerning the forms of the public support which is provided to access credit facilities, such acts are similar in that the possibility to benefit from these facilities is subject to the requiring companies' explicit commitment to avoid any dividends distribution and shares buyback for a certain period.

Secondly, even companies that have not requested public support, nevertheless, have been significantly pressured to suspend shareholders' distributions both in the form of dividend payouts and shares buyback. Particularly, such a pressure has emerged on the markets after that a number of institutional investors pushed listed companies to reconsider the dividends distribution proposals, which they had

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[1] The cut-off date for information included in this article is 7 May 2020.

[2] See art. 2, par. 1, lett. i), *Decreto Legge* 8 April 2020 no. 23 on '*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*' available at https://www.gazzettaufficiale.it/eli/id/2020/04/08/20G00043/sg.

[3] See the official document by the French government '*Engagement de responsabilité pour les grandes entreprises bénéficiant de mesures de soutien en trésorerie*' available at https://www.economie.gouv.fr/files/files/PDF/2020/covid-faq-termes-references-dividendes.pdf regarding the requests for public financial support under *Loi* no. 2020-289 of 23 March 2020 on '*Finances rectificative pour 2020*' available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746298&dateTexte=&categorieLien=id. See also Arrêté of 23 March 2020 'accordant la garantie de l'Etat aux établissements de crédit et sociétés de financement en application de l'article 6 de la loi n° 2020-289 du 23 mars 2020 de finances rectificative pour 2020' available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746813&dateTexte=20200409.

[4] See § 25, par. 3, *Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds (Wirtschaftsstabilisierungsfondsgesetz – WStFG)* – 27 March 2020, available at https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl120s0543.pdf%27%5D__1588781504703.

[5] See Title IV, Subtitle A, sec. (4003), H.R.748 'The Coronavirus Aid, Relief, and Economic Security (CARES) Act' – Public Law no. 116-136 of 27 March 2020, available at https://www.congress.gov/bill/116th-congress/house-bill/748.

prepared before the outbreak of the pandemic, in light of the prevailing interest to preserve capital integrity. Many companies, therefore, have decided to align to these expectations[6], by withdrawing or amending the dividends distribution proposals that had been previously put forward, while the companies that decided to proceed with dividends distribution anyway, had to face criticism and justify their choice to the market[7].

Lastly, with regard to companies operating in the European Union financial sector, particularly banks and insurance companies, the pressure to avoid dividends distribution and shares buyback has been advanced by several authorities, that, without formally introducing a legal ban, have either recommended careful attention in so doing or explicitly encouraged to suspend at least temporarily any decision thereof. This is the case, in the insurance sector, of the EIOPA's Statements of 17 March 2020[8] and of 2 April 2020[9] that have been followed by specific statements by the national competent

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[6] See Financial Times, Investors step up pressure on companies to slash dividends, 25 March 2020, available at https://eur01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ft.com%2Fcontent%2Ffbb0817c-6ebe-11ea-89df-41bea055720b&data=02%7C01%7C%7Cf37be1d658a04d09937908d7f0707cfb%7C569df091b01340e386eebd9cb9e25814%7C0%7C0%7C637242238247072771&sdata=P3sfbmqbpHbW7wrUAhmVhTVJAXzqYANi6N6bnGDQ4TU%3D&reserved=0; see Financial Times, Dividends: pay me later, 27 March 2020, available at https://eur01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ft.com%2Fcontent%2Fe6bec80a-ee9b-4510-bb3a-ce0e46c2d743&data=02%7C01%7C%7Cf37be1d658a04d09937908d7f0707cfb%7C569df091b01340e386eebd9cb9e25814%7C0%7C0%7C637242238247082767&sdata=kXfBRDQJYtufSPh0k7blbxRkRbZcGT3IdroOuxGB0Ps%3D&reserved=0; see Financial Times, Dividends: the new lightning rod for political anger, 3 April 2020, available at https://eur01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ft.com%2Fcontent%2Ff5415884-fc36-4e28-b9e7-87ef4dcc8034&data=02%7C01%7C%7Cf37be1d658a04d09937908d7f0707cfb%7C569df091b01340e386eebd9cb9e25814%7C0%7C0%7C637242238247082767&sdata=CeDST8QGrGRPx8rtmU95a7uznPnPBiCNVTdgSoVJ%2BWE%3D&reserved=0; see Financial Times, French markets regulator backs extension of short-selling ban, 8 April 2020, available at https://eur01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ft.com%2Fcontent%2F08264895-80b0-4951-b79b-c25dff098bbe&data=02%7C01%7C%7Cf37be1d658a04d09937908d7f0707cfb%7C569df091b01340e386eebd9cb9e25814%7C0%7C0%7C637242238247092759&sdata=6E1TJD05S69zv2FDYDiP%2FqXNoFhHHgNjAIRSIyjHnG0%3D&reserved=0.

[7] See Financial Times, Tesco urged to pay dividend despite coronavirus, 7 April 2020, available at https://www.ft.com/content/80fe61c1-3a24-4237-adba-24970ad794f7; see Financial Times, Tesco/UK dividends: welcome to the witch trials, 8 April 2020, available at https://www.ft.com/content/031a7993-3ba5-4af9-a564-6f1b89ef131a, and Financial Times, Tesco defends dividend payout amid warnings over profits hit from coronavirus, 8 April 2020, available at https://www.ft.com/content/4719c92c-ab17-4852-92e6-533c682611f4.

[8] See EIOPA Statement on actions to mitigate the impact of Coronavirus/COVID-19 on the EU insurance sector of 17 March 2020, available at https://www.ivass.it/media/eiopa/documenti/2020/EIOPA_statement_on_actions_to_mitigate_the_impact_of_Coronavirus_COVID-19_on_the_EU_insurance_sector_EN.pdf.

[9] Seee EIOPA statement on dividends distribution and variable remuneration policies in the context of COVID-19 of 2 April 2020, available at https://www.eiopa.europa.eu/sites/default/files/publications/statement-on-dividend-distribution-april2020.pdf o

authorities of the Member States,[10] as well as of an analogous statement by the UK Prudential Regulation Authority. [11]

However, it is in the banking sector that the European supervisory authorities' pressure – unlike what happened on the other side of the Atlantic[12] – has been particularly vigorous. [13] Following EBA's Statement of 12 March 2020 recalling the need to follow prudent dividend and other distribution policies,[14] most prudential supervisory authorities have communicated general expectations and have engaged in bilateral dialogues with a view to either limiting or suspending dividends distribution or share buybacks.[15] These measures have then received further support from EBA's Statement of 31 March 2020.[16] Yet, in this context, it is the ECB's Recommendation issued on 27 March 2020,[17] by

[10] See, for instance: in Italy, IVASS Statement of 30 March 2020, available at https://www.ivass.it/media/avviso/covid-dividendi/?com.dotmarketing.htmlpage.language=1; in France, *L'ACPR appelle les organismes d'assurance sous sa supervision à s'abstenir de distribuer un dividend*, 3 April 2020, available at https://acpr.banque-france.fr/sites/default/files/medias/documents/20200403_communique_presse_dividendes_assurances.pdf; in the Netherlands the similar appeal issued by DNB on 2 April, available at https://www.toezicht.dnb.nl/7/50-238217.jsp.

[11] See PRA Statement on decision by insurance companies to pause dividends of 8 April 2020, available at https://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-decision-by-insurance-companies-to-pause-dividends.

[12] So far the FED has taken note of the voluntary decision made by the main banks to suspend the shares buyback programs, but it has not taken a formal position and more in general has not intervened in order to limit or discourage the dividends distribution. The approach taken so far, however, has raised criticisms and it came out that even within the FED such a choice is not unanimously supported; see The New York Times, Fed Gives Banks a Break to Keep Markets Calm, Asking for Little in Return, 15 April 2020, available at https://www.nytimes.com/2020/04/15/business/economy/fed-banks-dividends-virus.html; see CNN Business, Banks' big, fat dividends are under fire as profits plunge, 14 April 2020, available at https://edition.cnn.com/2020/04/14/investing/bank-dividends-recession/index.html; see CNN Business, Janet Yellen: It's time to stop bank dividends. They need the cash for the crisis, 6 April 2020, available at https://edition.cnn.com/business/live-news/dow-stock-market-today-040620/h_9f02f117961fd854c96bd1277b05fa9e.

[13] For an overall overview of the supervisory initiatives imposing restrictions on banks' capital distributions in response to the Covid-19 pandemic, see Svoronos – Vrbaski, *Banks' dividends in Covid-19 times*, FSI Briefs, May 2020, available at https://www.bis.org/fsi/fsibriefs6.pdf. For a more general survey of the measures taken or yet to be taken by EU financial regulators to combat the coronavirus crisis see Gortsos, *The EU Policy Response to the Current Pandemic Crisis through the Lens of the Eurogroup Report of 9 April 2020: Overview and Assessment* (Cut-Off Date: 14 April 2020) (April 14, 2020), available at SSRN: https://ssrn.com/abstract=3579010; D. Busch, *Is the European Union Going to Help Us Overcome the COVID-19 Crisis?* (May 2, 2020), in *European Banking Institute Working Paper Series – no. 64*.

[14] See EBA Statement on actions to mitigate the impact of COVID-19 on the EU banking sector, of 12 March 2020, available at https://eba.europa.eu/sites/default/documents/files/document_library/General%20Pages/Coronavirus/EBA%20Statement%20on%20Coronavirus.pdf.

[15] On the role of prudential policy in the context of the Covid-19 crisis, see Drehmann, Farag, Tarashev, Tsatsaronis, Buffering Covid-19 losses – the role of prudential policy, BIS Bulletin n. 9, 24 April 2020, available at https://www.bis.org/publ/bisbull09.pdf.

[16] See EBA Statement on dividends distribution, share buybacks and variable remuneration, of 31 March 2020, available at https://eba.europa.eu/sites/default/documents/files/document_library/News%20and%20Press/Press%20Room/Press%20Releases/2020/EBA%20provides%20additional%20clarity%20on%20measures%20to%20mitigate%20the%20impact%20of%20COVID-19%20on%20the%20EU%20banking%20sector/Statement%20on%20dividends%20distribution%2C%20share%20buybacks%20and%20variable%20remuneration.pdf.

[17] See Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1, available at https://www.bankingsupervision.europa.eu/ecb/legal/pdf/oj_c_2020_102i_full_en_txt.pdf.

moving from a request of the banking industry itself, [18] that plays a pivotal role. Indeed, the ECB has recommended that every bank under its direct supervision within the SSM shall suspend any dividends distribution and shares buyback at least until October 2020, simultaneously requesting the NCAs to adopt similar measures concerning less significant banks.[19] An analogous decision has been made by the UK Prudential Regulation Authority, that, after having urged the largest UK banks not to distribute dividends,[20] has subsequently published a statement where it publicly welcomed the choice of the latter to suspend dividends distribution and shares buyback until the end of 2020.[21]

The situation arising from the above described framework, despite being the result of an exceptional emergency, poses a number of questions and requires some further reflections. Dividends distribution and shares buyback are the means through which the shareholders' interest to get their investment remunerated is satisfied. Restrictions on shareholders' distributions that are emerging – in the form of legislative bans, market pressure or supervisory measures – in the context of the Covid-19 crisis, therefore, deserve a specific analysis, particularly in light of the current debate on corporate purpose and the conflicting views as how to balance shareholders' interest and other stakeholders' interest in managing the companies. It has also to be ascertained, in order to fully grasp the way the corporate purpose may be affected, whether and to what extent such restrictions are the outcome of a unique *ratio* or rather they arise from logics which, although similar, are not identical.

II. Public financial support to companies and temporary bans on shareholders' distributions

Restrictions on shareholders' distributions applying to companies that ask for public help are a common feature of all the provisions adopted so far in several countries.

Prima facie, such restrictions appear to have an intuitive rationale linked to the need to ensure that the public support, to be given to companies that find themselves in really serious difficulties, will not be used for abusive or illegitimate purposes.

A more accurate reflection, however, suggests some different considerations.

The legislative acts in question, indeed, do not just limit the ways of using the provided public resources with a view to excluding that they can be employed for purposes which are deemed to be inconsistent with the objectives of the public intervention (such as remunerating shareholders). In fact, they

[18] See EBF Holding Statement – 27 March 2020, EBF letter to ECB/SSM in context of actions to fight Covid-19 pandemic, available at https://www.ebf.eu/ebf-media-centre/ebf-letter-to-ecb-ssm-in-context-of-actions-to-fight-covid-19-pandemic/.

[19] See for instance, in Italy, Banca d'Italia, *Raccomandazione della Banca d'Italia sulla distribuzione di dividendi da parte delle banche italiane meno significative durante la pandemia da COVID-19*, 27 March 2020, available at https://www.bancaditalia.it/media/notizia/raccomandazione-della-banca-d-italia-sulla-distribuzione-di-dividendi-da-parte-delle-banche-italiane-meno-significative-durante-la-pandemia/; in France, *L'ACPR appelle les établissements de crédit sous sa supervision directe et les sociétés de financement à s'abstenir de distribuer un dividende*, 30 March 2020, available at https://acpr.banque-france.fr/sites/default/files/medias/documents/20200330_communique_presse_recommandation_lsi_et_sf.pdf; in the Netherlands DNB issued similar appeal on 27 March, available at https://www.toezicht.dnb.nl/7/50-238213.jsp.

[20] See PRA Letters from Sam Woods to UK deposit takers on dividend payments, share buybacks and cash bonuses, Letters to the seven largest systemically important UK deposit-takers of 31 March 2020 (HSBC, Nationwide, Santander, Standard Chartered Bank, Barclays, RBS, Lloyds Banking Group), available at https://www.bankofengland.co.uk/prudential-regulation/letter/2020/letter-from-sam-woods-to-uk-deposit-takers-on-dividend-payments-share-buybacks-and-cash-bonuses.

[21] See PRA Statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to Covid-19 of 31 March 2020, available at https://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses.

introduce a general rule that significantly amends the legislation on net equity distribution, thereby impacting an aspect of company law which contributes to define and strike a balance between shareholders' interest and other stakeholders' interests.

Yet, before proceeding further in the analysis, a closer look needs to be taken at the provisions barring companies that have received public support from distributing dividends and purchasing their own shares.

These legislative restrictions are connected either with the extension of favourable credit facilities by the state or other public entities or with the possibility to benefit from public guarantees attached to loans given by banks and other private financial intermediaries. Such constraints on the company's net equity are, therefore, not just aimed at preventing the company from using the liquidity received through facilities resulting from the public support to remunerate shareholders. In fact, they also aim at making sure that all present and future earnings are and will be fully retained within the company in order to increase its ability to absorb losses as well as to repay its debts, particularly the ones to the state and the ones guaranteed by the state.

In other words, the company's access to public financing or to credit lines with public guarantees causes the substantial curtailment of shareholders' interests. As a consequence, the latter cannot get any payout from the company even when, according to the general company law rules, this would be allowed.

This is a relevant shift in the overall balance set out by company law rules between the conflicting interests of shareholders and other stakeholders. Additionally, whereas in some jurisdictions the restraints to the net equity distribution are temporally limited [22], in others, they are meant to last until when the state (or the other public entities) will remain exposed to the risk of losses (and, therefore, will cease only after the repayment of the debt) [23].

The rationale behind the choice of setting a timeframe for the application of such restraints on the company's net equity and the ensuing consequences still need to be further analysed.

To this end, it shall be stressed that legislative restraints on capital distributions also impact the corporate purpose, since until when they are in force, it is not permitted to remunerate shareholders. It follows that the corporate purpose is, in this way, modified as, due to a legislative duty to retain earnings with a view to enhancing the net equity, the company's activity ends up aiming at primarily safeguarding the interests of public creditors and creditors benefiting from a public guarantee and, only secondly, the interests of other creditors, employees and customers whose prerogatives against the company's assets remain intact. In essence, those companies which have been hit by the health emergency and have accessed public support are made subject to a special regime that may imply, more or less temporarily, a substantial change in the company's purpose. Accordingly, shareholders' interests, which are no longer considered exclusive or prevailing, end up being subordinated to other interests, if not even temporarily cancelled.

Reversing the perspective, particularly when the ban on shareholders' distribution is meant to last until the expiration of the loan received thanks to the state intervention, it can be argued that the public support finds its main rationale in the safeguard of the interests of creditors, employees and customers who are involved in the business activity.

Still, particularly with regard to small and medium enterprises, it is relevant to focus on whether the company's activity performed without any prospect of remuneration for the shareholders, who in these

[22] See art. 2, co. 1, lett. i) of the Italian *Decreto Legge* 8 April 2020 no. 23 (nt. 2), which requires restriction up to the end of 2020.

[23] See Title IV, Subtitle A, sec. (4003) of the US CARES Act (nt. 5), which states "A loan or guarantee recipient is prohibited from paying dividends or repurchasing stock while the loan or guarantee is outstanding or for 12 months following repayment."

companies often also act as directors, can discourage the continuation of the company and induce them to stop the activity. Against this background, it is not just a coincidence, perhaps, that most jurisdictions have introduced a ban on dividends distribution and shares buyback which only applies to companies that overcome some size thresholds. Nonetheless, even in these cases, an absolute preclusion of any equity remuneration which completely disregards the shareholders' interest, particularly if it is meant to last for years, might end up negatively affecting the company's ability to raise capital, at least from private investors, thereby endangering its survival.

III. Market pressure on companies to refrain from shareholders' distributions

Whether (large) companies that benefit from public aid are subject to strict legal limitations concerning capital distribution, other (large) companies that do not request these forms of support, particularly if they are listed on stock exchanges, face pressure to abstain, in the current period of crisis, from paying out shareholders through dividends distribution and shares buyback.

The reasons for this, in essence, may be based on two different lines of reasoning which, although converging, move from distinct points of view.

According to the first perspective, the choice of not distributing net equity to shareholders is grounded in the need of maintaining the ability to cope with the negative repercussions that likely companies will have to face. This is further exacerbated by the uncertainties affecting both the developments of the health crisis and the seriousness of the resulting economic effects. Thus, the approach in question, which could be defined as the 'traditional approach', underscores the need to favour the company's net equity reinforcement thereby enhancing its ability to bear losses.

By contrast, the frequent observation under which, in a situation of prolonged economic crisis that will negatively affect the social dimension as well, companies shall take into account the increasing difficulties of employees and customers, is based on a different approach. From this perspective, that could be defined as the 'innovative approach', the retained resources should be employed in two directions with a view to reducing the impact of the crisis both on the company's employees (for example, by providing the latter with additional social care services) [24] and on the company's customers (by seeking to minimise the impact of the foreseeable increase in costs and, possibly, to reduce the inherent prices of goods or services).

The 'traditional approach' is linked to the need to prudently use the company's resources, particularly in light of a crisis that will likely be one of the most severe in history. Such a formulation is, therefore, instrumental to ensure the survival of the company and of its capability to make profits[25]. Accordingly, it is consistent with the idea of the corporate purpose giving primacy to the safeguard of the long-term shareholders' interests and in doing so, indirectly, protecting the interests of creditors and other stakeholders as well.

The 'innovative approach', differently, moves from a broadening of the corporate purpose, according to which the protection of the shareholders' interests is not the primary goal in running the business activity. The latter, indeed, is to be performed by taking into account a plurality of diverse interests of equal rank. And within an exceptionally serious scenario as the one caused by the current pandemic, in using the company's resources and running the business activity it can be justifiable to make choices

[24] In this direction, see the explanation given by EssilorLuxottica for the decision to suspend dividend payments and the share buyback program previously launched, EssilorLuxottica to Prepare for Recovery by Preserving Cash and Supporting Employees, available at https://www.essilorluxottica.com/sites/default/files/documents/2020-04/PR%20DIV-Covid%2019-%2020%2004%202020%20UK%20version.pdf.

[25] For such a stance, see Financial Times, Wave of corporate defaults owes much to foolhardy share buybacks, 29 April 2020, available at https://www.ft.com/content/b3817772-ff39-42f5-af0e-4744fa07389b.

that favour the interests of employees and customers over the shareholders' ones. It is worth highlighting, from this point of view, that the positions against dividends distribution taken by some institutional investors have expressly referred to their consistency with the ESG logics that are pivotal in their investment choices. Particularly, it has been underscored that the pandemic has prompted the investors[26] – beside, more generally, the public opinion[27] – to focus on the effective level of attention that listed companies pay to social matters and to give priority to the compliance with the undertaken commitments in this area.

The adoption of one approach over the other is not just a matter of nuances and seems to be capable of affecting the choices concerning dividends distribution and, more in general, the strategic decisions on how to run the business activity.

With regard to companies operating in those economic sectors which are particularly exposed to the pandemic (oil and gas, tourism and transports), on the basis of the general principle of directors' diligence and irrespective of the adopted notion of company's objective, it seems possible to identify a directors' duty to refrain from putting forward dividends distribution and shares buyback proposals. On the contrary, this is not the case for companies operating in economic sectors which have benefited from the current situation (e-commerce, internet and, more in general, online services). Companies operating in those sectors, indeed, have performed better than expected and do not need to get prepared to face losses in the near future.

Against this background, under the 'traditional approach, after ascertaining that there is no need to enhance the net equity position of the company, there would be no reason to restrictively amend the dividends distribution policies and the opportunity to further increase shareholders' remuneration, although carefully, should also be explored. By contrast, under the 'innovative approach, the appropriateness to constrict shareholders' interests in order to meet the other stakeholders' needs could not be ruled out even in case of outperformance, particularly in the face of an extremely serious economic crisis that will severely affect employees and customers.

Yet, it is worth underscoring that even in the context of the 'innovative approach, the subordination of shareholders' interests vis-à-vis the employees' and customers' interests can be only temporarily justified. In the medium term, it will still be necessary to strike a balance between all stakeholders interests, taking into account the need to remunerate the equity capital provided by shareholders in order to run the business. Otherwise, indeed, the capitalistic economic model would be dismissed.

The comparison between these two approaches can be even better understood if it is contextualised within the recent and ongoing debate on the corporate purpose[28]. The latter, after having crossed the borders of academia, has become a subject frequently discussed in entrepreneurial and financial *fora* as

[26] Larry Fink, Chairman of BlackRock, in his Letter to Shareholders, published on March 29, 2020 (available at https://www.blackrock.com/corporate/investor-relations/larry-fink-chairmans-letter), exhorted them to be aware of the profound and lasting implications of the coronavirus outbreak for every nation and for clients and employees.

[27] See, among others, Financial Times, Coronavirus as the ESG acid test, 2 April 2020, available at https://ftalphaville.ft.com/2020/04/02/1585807115000/Coronavirus-as-the-ESG-acid-test/; see Financial Times, Coronavirus forces investor rethink on social issues,30 April 2020, available at https://www.ft.com/content/bc988e0e-687c-4c72-98eb-ae2595e29bee.

[28] Corporate purpose is nowadays the focus of a fundamental and heated debate, with rapidly growing support for the proposition that corporations should move from shareholder value maximization to "stakeholder governance" and "stakeholder capitalism". Prominent financial economists have recently devoted their attention to this topic: among others, see Mayer, *Prosperity: Better Business Makes the Greater Good*, Oxford University Press, Oxford, 2018, stating that the purpose of business should be to "produc[e] profitable solutions to problems of people and planet; Mayer's approach has recently gain support by Edmans, *Grow the pie: creating profit for investors and value for society*, Cambridge University Press, Cambridge, March 2020.

well [29] where it has been progressively recognised the need to take into consideration a plurality of interests which are involved in running the business activity. Accordingly, shareholders' interests rank equally to employees', customers' and creditors' interests.

The economic crisis that will hit companies, therefore, will offer the first and decisive test to verify whether effectively a different notion of corporate purpose will lead to management choices capable to provide more efficient – and possibly more equitable – solutions to the severe difficulties that the world will face[30].

IV. Supervisory measures restricting shareholders distributions for banks and insurance companies

Banks and insurance companies have been specifically urged to avoid distributions to shareholders in light of the situation caused by the spread at the global level of COVID-19. As mentioned, prudential supervisors, mostly in Europe, have adopted a number of measures recommending to suspend both dividends distribution and shares buyback[31].

Such supervisory measures are justified by the peculiar relevance that insurance regulation and, even more so, banking regulation give to the capital adequacy of institutions operating in those sectors. After the global financial crisis this aspect has acquired a paramount importance and, in fact, in the context of the EU, the special provisions of CRR-CRD IV, on one side, request the supervisor's authorisation to purchase own shares and, on the other, limit the possibility to distribute dividends when capital falls below a given threshold (so-called MDA). The importance of capital adequacy is further reiterated by the role of supervisory authorities that are meant not only to verify the compliance of institutions with regulatory requirements, but may set additional capital requirements under the supervisory review process (SREP), as a result of an assessment of the effective adequacy conducted on a case-by-case basis, against the actual exposure to risks not captured by the regulatory capital requirements[32].

It is therefore not surprising that European regulators and supervisors have foremost highlighted the necessity that, in making their own decisions, banks and insurance companies pay careful attention to the need to strengthen their capital position. Accordingly, in view of the current exceptional situation

[29] In this perspective, in the summer of 2019, the Business Roundtable (BRT)—the influential association of corporate chief executive officers (CEOs)—announced a revision of its conception of corporate purpose (Business Roundtable, Statement on the Purpose of a Corporation (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf). Following the publication of the BRT statement, in December 2019 the World Economic Forum unexpectedly published a manifesto that urged companies to move from the traditional model of "shareholder capitalism" to the model of "stakeholder capitalism" (Davos Manifesto 2020: *The Universal Purpose of a Company in the Fourth Industrial Revolution*, Dec. 2, 2019, available at https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/).

[30] Ventoruzzo, *Beware of the Panacea of Stakeholder-friendly Corporate Purposes*, 13 Apr 2020, available at https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/beware-panacea-stakeholder-friendly-corporate-purposes, highlights that now is the time to verify the role of corporate actors with respect to environmental issues and protection of employees, customers and suppliers.

[31] The European Commission has also recently intervened in this regard with the Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending (Supporting businesses and households amid COVID-19), 28 April 2020. The Communication confirms several recent statements in the banking field made by the Basel Committee of Banking Supervision, the European Banking Authority (EBA) and the European Central Bank, also highlighting areas where banks are invited to act responsibly (including by refraining from making dividend distributions to shareholders or adopting a conservative approach to the payment of variable remuneration).

[32] For a recent overview of the CRD IV framework see Mulbert – Wilhelm, *CRD IV Framework for Banks Corporate Governance*, in D. Busch - G. Ferrarini (eds.), *European Banking Union2*, Oxford, 2020.

and the uncertainties concerning the seriousness of its impact on the economy, generally, these institutions are expected to refrain from remunerating shareholders through capital distributions.

Yet, the measures adopted in Europe by the authorities in the banking and insurance sectors to face COVID-19 do not just recall the need to ensure the institutions' stability to justify their recommendations to suspend dividends distribution and shares buyback. They indeed refer such recommendations to a broader understanding of the role that banks and insurance companies should play in the economy and, more generally, inside the society. [33]

Such a novel approach emerges very clearly from the ECB's Recommendation of 27 March 2020, particularly if the latter is compared with the previous ECB's Recommendation issued in January 2020 (which substantially replicated the one adopted in January 2019) [34].

In its previous Recommendation, the ECB urged every bank to assess very prudently the appropriateness to pay out shareholders and, after grouping banks in different categories on the basis of the outcome of the capital adequacy assessment, intensified its recommendations by inviting the most exposed banks to fully retain earnings with a view to increasing their ability to absorb losses. In the last Recommendation, the request to refrain from capital distributions until October 2020, addressed to every bank, does not mention the need to further enhance capital requirements to face the significant losses resulting from the COVID-19 emergency. By contrast, it refers to the ability of banks to lend to the real economy and the need that banks will be in the position to finance both households and businesses in the period of economic crisis that will inevitably follow the pandemic. In other words, the authorities' pressure to suspend any shareholders distribution is not primarily instrumental to enhance banks' resilience, but rather to induce banks to allocate as much resources as possible to its lending activities, in order to ensure they continue performing during the economic crisis their characteristic intermediation function. [35]

From this perspective, the reason why the last ECB's Recommendation does not distinguish among different banks and accordingly requires all of them to suspend, at least for the time being, any distribution of net equity to shareholders is clear. In fact, considering that the less solid banks had already been requested to refrain from distributing dividends, the recommendation to retain resources to be then employed to support the economy and the society in times of crisis is actually addressed to the most solid institutions.

A reference to the peculiar function that, particularly during a crisis, banks are expected to play in order to support the economy and the society is also made both in the measures adopted by the national competent authorities operating within the SSM and in the Statement addressed by the UK PRA to the largest UK banks. Analogous considerations concerning the need that also insurance companies keep on performing their characteristic intermediation function in transferring risks are made both in the last EIOPA's Recommendation and in the Statement addressed by the UK PRA to UK insurance institutions in order to explain the request to refrain from distributing net equity to shareholders.

It is clear that such measures impact extensively the way banks and insurance companies are managed and play a significant role in shaping the corporate purpose of such institutions. If we were to recall the distinction between the 'innovative approach' and the 'traditional approach' previously advanced,

[33] Since they are not directly aimed at preserving the stability, may be open to question whether such measures properly fall within the notion of prudential supervision, as commonly understood.
[34] https://www.ecb.europa.eu/ecb/legal/pdf/en_ecb_2020_1_f_sign.pdf.
[35] This approach was explicitly clarified by Andrea Enria, Chair of the Supervisory Board of the ECB, in his Public hearing at the European Parliament's Economic and Monetary Affairs Committee on 5 May 2020, in which he said that it is vital at this stage to keep as much capital within the banking sector as possible to support the real economy.

it would seem fair to argue that supervisors' recommendations are to be considered more in line with the former approach rather than with the latter.

Actually, the supervisory measures adopted by the European authorities are to be considered in the light of the results of the debate on corporate purpose of financial institutions – particularly with regard to banks – that started after the global financial crisis and which have already led to progressively rethink, in this context, the shareholders' interest primacy [36]. Once the collective interest to the stability of the financial system has emerged as crucial, the need to ensure that banks conduct their business with an adequate level of capital has become the primary objective of the regulation and has fostered a progressive shift in the corporate purpose of banks. On the basis of these assumptions, the shareholders' interest was firstly placed at the same level as the other stakeholders' interests and then expressly subordinated to the depositors' interest, since the latter have been identified as the ones more interested to the bank's solidity. [37]

The recent measures adopted by the supervisory authorities, from this viewpoint, seem to go even further, since they emphasise – more markedly than it used to be in the past – the need that banks and insurance companies must perform their activity by pursuing, as their main objective, the goal that both banking intermediation and insurance intermediation can effectively continue. And this is even more so in light of the exceptional crisis that is coming where the ability of banks to lend to the real economy and the ability of insurance companies to offer risks protection will be crucial for the survival of the economic as well as social system.

V. Conclusions

Restrictions on shareholders' distributions that are emerging – in the form of legislative bans, market pressure or supervisory measures – in the context of the Covid-19 crisis deserve a specific analysis, particularly in light of the current debate on corporate purpose and the conflicting views as how to balance shareholders' interest and other stakeholders' interest in managing the companies.

Companies which have been hit by the health emergency and have accessed public support are made subject to a special regime characterised by legislative restriction on shareholders' distributions that may imply, more or less temporarily, a substantial change in the company's purpose. Accordingly, shareholders' interests, which are no longer considered exclusive or prevailing, end up being subordinated to other interests, if not even temporarily cancelled.

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[36] The literature on this topic is extensive, among the most recent contributions, see Hopt, *Corporate Governance of Banks and Financial Institutions: Economic Theory, Supervisory Practice, Evidence and Policy*, 2020, ECGI Law Working Paper No 507/2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553780; Vos, Morbee, Cools, Wyckaert, *A Cross-Sectorial Analysis of Corporate Governance Provisions: About Forest and Trees*, in V. Colaert, D. Busch, T. Incalza (eds), *European Financial Regulation. Levelling the Cross-Sectoral Playing Field*, Hart Publishing, Oxford, 2020; Busch, Ferrarini, van Solinge, *Governing Financial Institutions: Law and Regulation, Conduct, and Culture*, in D. Busch, G. Ferrarini, G. van Solinge (eds), *Governance of Financial Institutions*, Oxford University Press, Oxford, 2019; Ferrarini, *Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda*, ECGI Law Working Paper No 347/2017, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925721.

[37] Such evolution can be appreciated thoroughly by comparing the objective of corporate governance of banks in the different versions of Basel Commitee corporate governance principles for banks: Enhancing Corporate Governance for Banking Organisations, 16 September 1999, available at https://www.bis.org/publ/bcbs56.pdf; Enhancing Corporate Governance for Banking Organisations, 13 February 2006, available at https://www.bis.org/publ/bcbs122.pdf; Principles for Enhancing Corporate governance, 4 October 2010, available at https://www.bis.org/publ/bcbs176.pdf; Corporate governance principles for banks, 8 July 2015, available at https://www.bis.org/bcbs/publ/d328.pdf.

Whether (large) companies that benefit from public aid are subject to strict legal limitations concerning capital distribution, other (large) companies that do not request these forms of support, particularly if they are listed on stock exchanges, face pressure, from public opinion and institutional investors, to abstain from paying out shareholders through dividends distribution and shares buyback. Such pressures seem to underpin an "innovative" approach aligned to a broader notion of corporate purpose. The crisis will offer the chance to verify if this is case and whether effectively such different notion of corporate purpose will lead to management choices capable to provide more efficient – and possibly more equitable – solutions to the severe difficulties that the world will face.

The recent measures adopted by the supervisory authorities, from this viewpoint, seem to go even further, since they emphasise – more markedly than it used to be in the past – the need that banks and insurance companies must perform their activity by pursuing, as their main objective, the goal that both banking intermediation and insurance intermediation can effectively continue. And this is even more so in light of the exceptional crisis that is coming where the ability of banks to lend to the real economy and the ability of insurance companies to offer risks protection will be crucial for the survival of the economic as well as social system.