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The Irish Designated Activity Company (DAC) and the evolution of the objects clause

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Corporations are the creatures of the law,
of a highly refined and intangible nature,
whose properties and attributes,
lawyers alone can understand.

Table of Contents

Introduzione

L'oggetto sociale è una sorta di "etichetta" per la società: ne definisce l'ambito di attività e permette sia ai soci che ai terzi di valutare la convenienza economica dell'attività e la sua realizzabilità.

Di conseguenza, l'oggetto sociale è tradizionalmente considerato un'indicazione necessaria nello statuto di una società di capitali, la cui assenza dovrebbe precluderne la registrazione. Nell'Unione Europea, le direttive in ambito societario prevedono che tutte le società di capitali, aperte o meno, indichino nel proprio statuto l'oggetto sociale per cui sono costituite, lasciando alla disciplina nazionale eventuali norme più specifiche. Tuttavia, questa etichetta è risultata una rappresentazione riduttiva delle attività della società e a fronte di questo elemento di "essenzialità" dell'oggetto sociale, l'istituto ha subito un forte depotenziamento sia a livello sovranazionale, che all'interno dei diversi ordinamenti giuridici. Limitando l'indagine al contesto europeo, si possono individuare due filoni.

A livello nazionale, i paesi europei, sia di *civil law*, sia – e soprattutto - quelli di *common law*, hanno progressivamente ammesso formulazioni molto generiche della clausola in esame, fino agli estremi raggiunti dall'ordinamento inglese, in cui le società hanno la facoltà di omettere l'indicazione dell'oggetto sociale. Questo tipo di soluzioni sminuisce l'oggetto sociale poiché lo priva della sua funzione principale, cioè definire l'ambito di attività dell'impresa, e, di conseguenza, i poteri degli amministratori, sia per quanto riguarda la gestione, sia per quanto riguarda la rappresentanza della società.

D'altra parte, a livello comunitario, la Prima Direttiva (Direttiva 68/51/CEE) ha significativamente inciso sulla rilevanza esterna dell'oggetto sociale. Infatti, eventuali limitazioni derivanti dall'oggetto sociale non possono essere efficacemente opposte ai terzi che abbiano contrattato in buona fede con i rappresentanti della società. La scelta del legislatore europeo, improntata a garantire una maggiore certezza negli scambi commerciali transnazionali, ha di fatto eliminato eliminato uno dei principali strumenti per far valere il vincolo dell'oggetto, cioè l'annullabilità delle transazioni *ultra vires*.

È chiaro che, alla luce di questa evoluzione normativa, l'oggetto sociale abbia perso rilevanza poiché la sua previsione ha effetti molto limitati. Più precisamente, anche qualora si riconoscessero delle limitazioni derivanti dalla previsione di un oggetto sociale, i soggetti interessati potrebbero tutelarsi *ex ante*, ma avrebbero pochissime possibilità di ricorrere (efficacemente) ad un rimedio *ex post*.

Nonostante ciò, nel 2014, l'Irlanda ha deciso di operare una scelta controcorrente e creare un modello societario in cui l'oggetto sociale è, invece, l'elemento centrale della disciplina. Le *Designated Activity Companies* (DACs) sono società in cui vige l'obbligo di indicare l'oggetto sociale, contrapposto alla *Limited Company* (LTD), che rappresenta invece una forma societaria "semplificata" per la quale non sono previsti né l'oggetto sociale, né diversi obblighi in materia di governo societario (*e.g.* obbligo di convocare l'assemblea dei soci).

In realtà, il modello DAC era stato originariamente pensato esclusivamente per alcuni modelli di società (*i.e. special purpose veichles*) per poi confluire nella versione definitiva come soluzione a carattere generale. Infatti, ciò che emerge dalla riforma irlandese, soprattutto dai lavori preparatori, è l'esistenza di un interesse della società a mantenere l'oggetto sociale, soprattutto in ragione o del tipo di attività esercitata, o del grado di separazione tra proprietà e controllo. Ed infatti, il legislatore esclude che alle DACs possano applicarsi alcune forme di *governance* semplificata (*i.e.* amministratore unico) ma allo stesso tempo preclude alcuni ambiti di attività che necessitano di un maggiore controllo sulla gestione (banche, assicurazioni, enti benefici) alle LTDs.

È interessante notare che l'Irlanda, in ragione della sua appartenenza al sistema di *common law*, è vincolata da diversi precedenti in materia di *ultra vires*. Di conseguenza, il legislatore avrebbe avuto tutto l'interesse ad eliminare l'obbligo di indicare l'oggetto sociale, così da evitare eventuali incertezze e contrasti interpretativi con le norme europee. Pertanto, un altro aspetto interessante di questa riforma è capire come si coordini con la legislazione comunitaria in materia di capacità delle società e poteri del rappresentante legale (art.9, Direttiva 68/51/CEE), visto che *prima facie* il legislatore irlandese sembra reintrodurre una società a "capacità limitata" alle sole attività indicate nell'oggetto sociale.

L'obiettivo di questa indagine, quindi, è approfondire il punto di vista del legislatore irlandese, sia per valutare l'impatto di questa riforma nel sistema generale, sia per provare ad individuare quale sia (o possa essere), nel quadro normativo corrente, la funzione dell'oggetto sociale. Particolare attenzione è dedicata proprio al modo in cui quest'ultimo può influenzare e regolare il rapporto tra attività previste dall'oggetto e la gestione dell'impresa.

Questo aspetto di indagine, in realtà, non è nuovo alla dottrina ma è stato spesso inglobato in discussione più ampie sulla capacità della società come persona giuridica o sui poteri degli amministratori in generale, restando, per certi versi, trascurato.

Per affrontare al meglio la situazione dell'oggetto sociale alla luce dell'intervento irlandese, la trattazione è stata suddivisa in tre capitoli. Il primo capitolo contiene una ricostruzione sintetica della disciplina dell'oggetto sociale, in modo tale da cogliere gli aspetti peculiari dell'istituto nonché individuare i punti controversi e, qualora ve ne fossero, le soluzioni proposte da dottrina e giurisprudenza. La prima parte del capitolo riguarda le funzioni primarie e le caratteristiche dell'oggetto, con particolare riferimento alla dimensione contrattualistica, tipica degli ordinamenti di *civil law.* La seconda, invece, analizza il rapporto tra l'oggetto sociale e la capacità della società, la sua evoluzione storica con riferimento alla corposa casistica sviluppata dai paesi di *common law*. Questi ultimi, ed in particolare il Regno Unito, infatti, sono stati i fautori la c.d. "*ultra vires doctrine*".

Questo dottrina, che ha influenzato anche altri ordinamenti (Francia, ed in parte Italia), prevedeva la nullità di qualsiasi operazione eccedente l'oggetto sociale, anche quando vantaggiosa per la società o approvata dalla maggioranza dei soci, con un evidente svantaggio sia per i singoli creditori/terzi, sia per la società. La sua trattazione è fondamentale poiché l'eccessiva rigidità di questa disciplina è stata il motore principale del depotenziamento dell'oggetto sociale negli ordinamenti di *common law*, prima con l'introduzione di clausole lunghe e quasi omnicomprensive, poi con il ricorso a clausole generiche che ne annullassero completamente gli effetti (v. *UK Companies Act 1985*). Allo stesso modo, gli effetti penalizzanti per gli scambi, hanno concorso alla formulazione dell'art. 9 della Prima Direttiva, che ha sostanzialmente soppresso la rilevanza esterna dell'oggetto sociale.

Per una maggior chiarezza nell'individuare i termini della discussione sull'oggetto, si è ritenuto opportuno anche fare riferimento al c.d. *ultra vires* degli amministratori, per differenziarlo dalla dottrina precedentemente citata che riguarda esclusivamente la capacità delle società. Sotto il termine *ultra vires*, infatti, sono confluiti diversi temi relativi all'oggetto sociale, che anche a causa dell'ambiguità del concetto di *ultra vires* in sé, hanno finito per creare confusione ed incertezze sulla funzione dell'oggetto sociale - cominciando già dalla distinzione tra attività svolte dalla società e poteri attribuiti agli amministratori – e l'applicazione della relativa disciplina[1]

Il secondo capitolo, invece, si concentra sulla riforma irlandese e sul modello DAC, analizzando l'effettiva portata innovativa della nuova disciplina e le tecniche attraverso le quali il legislatore ha valorizzato l'oggetto sociale. Il capitolo si apre con alcuni cenni all'ordinamento irlandese e al rapporto con il Regno Unito, del quale ha assorbito gran parte delle norme e dei principi in materia societaria. Si passa poi al contesto generale della riforma, con la necessaria individuazione dei principi che hanno ispirato il legislatore e degli obiettivi perseguiti da quest'ultimo nell'attuarla. Segue l'analisi sistematica della *Part 16* del *Companies* Act 2014, cioè quella dedicata alle DACs: oltre alle singole disposizioni, si fa riferimento anche al modo in cui queste interagiscono con le norme precedenti e con le altre disposizioni del *Companies Act 2014* (che risulta interamente riformato). Il cuore dell'analisi è la s. 972 (1) che stabilisce che una DAC ha la capacità di intraprendere solo le operazioni e le attività indicate nello statuto. In primo luogo, occorreva verificare se questa disposizione potesse in qualche modo rispristinare il precedente regime di nullità degli atti *ultra vires*.

Appurato che le nuove disposizioni non richiamano la disciplina precedente, la trattazione si sofferma su quali siano state le altre motivazioni che abbiano spinto il legislatore irlandese a creare due modelli di *private company* contrapposti, in cui una deve obbligatoriamente individuare una *objects clause*, mentre per l'altra l'indicazione è definitivamente omessa. In particolare, l'analisi mira a valutare la convenienza di un regime differenziato anche in relazione agli altri modelli societari previsti (sostanzialmente, le *public companies*, per cui l'oggetto sociale resta obbligatorio). Infine, poiché la riforma irlandese è apertamente ispirata alla riforma

[1] Ad esempio, uno spunto interessante sul concetto di *ultra vires* si ritrova anche in Berle & Means, secondo cui l'oggetto sociale più che precludere determinate attività agli amministratori, rappresenta il criterio per valutare la correttezza della gestione d'impresa (v. Berle & Means, 1933, p.266: "*Yet on closer analysis it develops that the words, "ultra vires" are here used in a sense quite different from that usually applied to the familiar phrase. The courts do not deny the "power" to make the purchase. What they say is that by reason of the object, the power is not well exercised*.").

dello *UK Companies Act* del 2006, il capitolo si conclude con un raffronto tra le due discipline e, in particolare, sulle differenze tra le soluzioni adottate.

Infine, il terzo capitolo guarda al futuro dell'oggetto sociale. Da un lato, sono analizzate le criticità della disciplina e della prassi allo *status quo*. Infatti, la già citata Prima Direttiva ha segnato un punto di svolta nel dibattito poiché ha sostanzialmente respinto il dogma della capacità speciale delle società e introdotto la distinzione tra poteri di rappresentanza e poteri di gestione degli amministratori. Tuttavia, la direttiva non definisce con chiarezza quali siano i limiti opponibili e quali no e, soprattutto, tralascia qualsiasi indicazione sui limiti al potere di gestione degli amministratori. Dall'altro, analizzando la soluzione irlandese, si sviluppano le argomentazioni a sostegno di una nuova valorizzazione dell'oggetto sociale nei diversi ordinamenti e a livello comunitario. Dalla riforma, ma anche dalle norme di altri ordinamenti, emerge chiaramente come l'oggetto sociale sia un "limite" al potere di gestione degli amministratori, nel senso che gli amministratori devono astenersi dal compiere atti estranei a quest'ultimo.

Nonostante questa dimensione "interna" dovrebbe essere il centro della nuova disciplina dell'oggetto sociale, né le riforme europee, né le riforme nazionali hanno approfondito il rapporto tra oggetto e gestione, e soprattutto, i suoi effetti.

Il capitolo prosegue quindi nell'analisi delle consistenti zone grigie che esistono nell'ambito dell'efficacia delle limitazioni derivanti dall'oggetto sociale.

Ad esempio, non è pacifico con quali criteri quando un'attività intrapresa da un amministratore, pur non essendo espressamente prevista dall'oggetto, possa essere comunque necessario per la realizzazione dell'oggetto sociale e quindi rappresentare una competenza implicita. Conseguentemente, sorge spontanea la domanda se anche le attività di una società senza oggetto sociale siano "limitate". Più precisamente, se sia possibile per i soci limitare le attività degli amministratori attraverso delle condizioni o se le scelte degli amministratori siano comunque limitate in concreto, dovendo essere improntate a dei criteri di tutela dell'interesse sociale[2].

Da quest'ultima possibilità si procede verso un'ulteriore problematica connessa alla previsione dell'oggetto sociale, cioè le modificazioni di fatto. Infatti, è pacifico che

[2] Ad esempio, se una società svolge una determinata attività profittevole, potrebbe essere comunque sanzionabile un repentino cambio di settore.

gli amministratori non possono modificare l'oggetto sociale (la competenza appartiene ai soci). Tuttavia, il vero problema è quale rimedio abbiano i soci contro un tale comportamento da parte degli amministratori. Infatti, non è chiaro se questa ipotesi rientri comunque nell'ambito della Prima direttiva o se ne sia esonerata in quanto limite legale al potere degli amministratori.
A conclusione della discussione, sono poi analizzati quei settori in cui l’oggetto sociale ha mantenuto, invece, un ruolo chiave per evidenziare punti di contatto con le soluzioni della disciplina generale e suggerire nuovi sviluppi per la disciplina.

Overview

The objects clause serves as a label for incorporated companies: it defines their main business and activities and allows (potential) members and creditors to evaluate the convenience of the activities and the business risk.

Consequently, the objects clause is traditionally considered a necessary indication in the statutes of a capital company, whose absence should prevent registration. In the European Union, Company Directives provide that all incorporated companies, whether they are public or not, indicate in their constitution the corporate purpose for which they are established, leaving any more specific rules to the national regulations.

However, sometimes those labels, they stick and despite this element of "essentiality" of the objects clause, this latter has suffered from a substantial weakening, both at supranational level and within the various legal systems. By limiting the investigation to the European framework, two different strands can be identified. At the national level, the European countries, both of civil law tradition and - and above all - those of common law, have gradually admitted very generic formulations of the clause, up to the extremes reached by the English system, where companies are allowed to omit the indication of the corporate purpose.

This type of solutions undermines the value the corporate object because it deprives it of its main function, that is to define the scope of the business of the company, and, consequently, the powers of the directors, both as regards management, both with regard of the representation of the company.

Instead, in the EU regulatory framework, the First Directive (Directive 68/51/EEC) has significantly affected the external relevance of the corporate object. In fact, any limitations deriving from the corporate purpose cannot be effectively opposed at least to third parties who have contracted in good faith with the representatives of the company. The choice of the European legislator, aimed at guaranteeing greater certainty in transnational commercial exchanges, has repealed one of the main tools for enforcing the constraints deriving from the objects, that is the possibility of *ultra vires* transactions to be declared void.

It is clear that, in light of this normative evolution, the objects clause has lost its prominent role because it has very limited effects. More precisely, even if the limitations deriving from the provision of an objects clause were recognized, the interested parties might protect themselves *ex-ante* but would have very little chance of resorting (effectively) to an *ex-post* remedy.

Despite this, in 2014 Ireland opted for a substantially different choice and create a company model in which the corporate object is instead the backbone of the discipline. The *Designated Activity Companies* (DACs) are companies which are bound to define their corporate purpose, as opposed to the Limited Company (LTD), which instead represents a simplified corporate type where neither the objects clause is required neither different obligations regarding corporate governance shall be fulfilled (*e.g.* the duty to convene the general meeting). Actually, the DAC model was originally intended exclusively for certain companies, engaged in specific activities (i.e. special purpose vehicles). Instead, not only the model was included in the final version of the reform, but any private company may choose to adopt it.

Moreover, what emerges from the Irish reform, especially in the preliminary papers, is that some companies may have an interest into maintaining the objects clause, mainly in reason of the type of activity or because of the degree of separation between ownership and control.

It is interesting to notice that Ireland, due to its common law tradition, is bound by several precedents regarding the *ultra vires* doctrine. As a consequence, the legislator would have had a relevant interest in repealing the provision of the objects clause in order to avoid any uncertainties and interpretative contrasts with the EU law. Therefore, another interesting aspect of this reform is to understand how it coordinates with the EU legislation on the capacity of the companies and the powers of the legal representative (Article 9, Directive 68/51 / EEC), given that *prima facie* the Irish legislator seems to reintroduce a "special capacity" company, whose capacity is limited only to the activities indicated in the corporate purpose.

Hence, the purpose of this investigation is to look into the work of the Irish legislator, both to assess the impact of this reform in the general system and to try to identify what is (or might be) the function of the objects clause in the current regulatory framework.

Particular attention is dedicated to the way in which this clause can influence and regulate the relationship between activities provided for by the objects and the management of the company. This aspect of the investigation, in fact, is not new to the debate but has often been incorporated into broader discussions on the capacity of a company as a legal entity or on the powers of directors in general.

To deal with and try to answer these arguments, the discussion has been divided into three chapters. The first chapter offers a reconstruction of the discipline of the objects clause. To deal with the situation of the objects clause in the light of the Irish intervention, the discussion has been divided into three chapters.

The first chapter offers a synthetic reconstruction of the discipline of the objects clause, in order to define the most peculiar aspects and to identify the controversial issue and, if there were any, the solutions suggested by the scholars or the case law.

The first part of the chapter concerns the main functions and characteristics of the objects, with reference to the contractual dimension, belonging to the civil law systems. On the other hand, the second one analyzes the relationship between the objects clause and the capacity of a company, its historical evolution with reference to the case law developed in the common law countries. The latter, and in particular the United Kingdom, developed the *ultra vires* doctrine.

This doctrine, which also influenced other legal systems (France, and partly Italy), provided for the invalidity of any operation exceeding the corporate purpose, even when advantageous for the company or approved by the majority of members, to the detriment of both the individual creditors/third parties and the company.

This doctrine represents a key passage of the debate because the excessive strictness of this discipline has been one of the causes of the weakening of the objects clause in the common law systems: beginning with the introduction of articulated and all-inclusive clauses, then with the use of generic clauses that deprived the objects of their effects (*see* UK Companies Act 1985). Similarly, the disadvantageous effects on trade have contributed to the formulation of art. 9 of the First Directive, which substantially repealed the external relevance of the objects clause.

For more clarity, it was also addressed and defined the issue of the *ultra vires* of the directors, to differentiate it from the mentioned doctrine that concerns exclusively the capacity of the companies. Under the umbrella of the term *ultra vires*, in fact, different themes related to the objects clause have converged. Due to the ambiguity of the concept of *ultra vires* in itself, those concepts ended up creating confusion and uncertainties about the function of the objects clause - starting from the distinction between the activities performed by the company and the powers attributed to the directors - and the application of the related regulations[3].

The second chapter, instead, focuses on the Irish reform and on the DAC model, analyzing to what extent the new discipline is innovative and the techniques through which the legislator has empowered the objects clause.

The chapter opens with a short description of the Irish legal system and of the relationship with the UK since Ireland has borrowed most of the English company law rules and principles. Subsequently, the general context of the reform is analyzed, with a focus on the principles that inspired the legislator and the goals pursued. The systematic review of *Part 16*, *i.e.* the one concerning the DACs, of the Companies Act 2014 follows: in addition to the analysis of the most relevant provisions, reference is also made to the way in which they interact with the previous discipline and with the other provisions of the Companies Act 2014 (which was entirely reformed).

The core of the analysis is s. 972 (1) which establishes that a DAC has the capacity to undertake only the operations and activities included in the memorandum.

Firstly, it was necessary to assess whether this provision could somehow reintroduce the previous regime of the *ultra vires*. Assumed that the new provisions do not restore the previous discipline, the focus shifted on the reasons that led the Irish legislator to create two opposing private company models, in which one must choose an objects clause, while in the other, the indication is omitted. In particular, the chapter tries to evaluate the convenience of a differentiated regime also in relation to the other company models (basically, public companies, where the objects clause is still a mandatory requirement). Finally, since the Irish reform is openly inspired by the reform of the UK Companies Act 2006, it was considered appropriate to compare the two statutes and, in particular, the differences between the solutions adopted.

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[3] For instance, Berle & Means offer an interesting insight into the concept of ultra vires. According to the authors, the corporate object, rather than foreclosing certain activities to directors, is the criterion for assessing the fairness of the management (v. Berle & Means, 1933, p.266: "*Yet on closer analysis it develops that the words, "ultra vires" are here used in a sense quite different from that usually applied to the familiar phrase. The courts do not deny the "power" to make the purchase. What they say is that by reason of the object, the power is not well exercised.*").

Finally, the third chapter looks at the future of the objects clause. On the one hand, it deals with the flaws of the discipline and the criticism highlighted by the practice at the *status quo*. Actually, the mentioned First Directive marked a turning point in the debate as it substantially rejected the tenets of the special capacity of the companies and introduced the distinction between powers of representation and powers of management of the directors. However, the directive does not clearly define which limits are opposable and which are not and, above all, omits any indication of the limits on the management power of directors.

On the other hand, by analyzing the Irish solution, arguments are developed with the intent to reshape the role of the objects clause in the different legal systems. From the Irish reform, but also from the regulations in other legal systems, it clearly emerges that the objects clause is a restriction on the management, meaning that the directors must refrain from carrying out acts falling outside from the objects. Despite this "internal" dimension should, thus, be the center of the new discipline of the objects clause, neither the European reforms nor the national reforms have dealt with the relationship between the objects and the management, and above all, its effects.

The chapter then continues in the analysis of the gray areas that still exist around the limitations deriving from the objects clause. For example, it is not clear to assess whether an activity undertaken by a director may still be necessary for the realization of the corporate purpose although not expressly mentioned by the objects, and therefore represent a sort of implied power. Similarly, this also begs the question of whether companies without an objects clause really have no restriction on their activities.

More precisely, if it is possible for members to limit the activities of directors through conditions or if the choices of directors are still limited in practice, as they have to respect other criteria such as the protection of the company interest. On the basis this latter argument, the chapter proceeds towards a further issue related to the provision of the objects clause, namely *de facto* amendments. In fact, it is undisputed that the directors cannot change the corporate objects (the competence belongs to the members).

However, the issue is what remedy members have against such behavior of the directors. In fact, it is not clear whether this hypothesis falls within the scope of the First Directive or has been exempted as a legal limit to the power of the directors.

At the end of the discussion, the analysis moves to those sectors in which the corporate object has retained a key role, in order to highlight any link with the solutions adopted by the general discipline and suggest new developments.

CHAPTER 1 - THE OBJECTS CLAUSE

1.1 The objects clause: a preliminary framework

In order to properly incorporate, a company shall comply with certain formal requirements.

Among these, the statement of corporate objects has been for long one of the essential requirements for the constitution of a company. The notion of the objects of the company *stricto sensu* is relatively recent. Broadly, its introduction follows the development of the notion of a legal object, as opposed to the juridical subject, meaning the one who is the entitled to the juridical relationship. However, machineries to constrain the activity of associations and other forms of legal person have very ancient roots, regardless of the regulatory framework considered.

Despite the widespread use of this tool, no legal system provides for a precise and detailed definition. Conventionally, scholars define it as a clause - the *objects clause*, indeed - contained in the company articles, which designates the particular economic activity for which the company is established. The objects should not be confused with the profit-making, which instead is the ultimate end that shall characterize especially joint-stock companies. After the company is duly registered and incorporated, the objects clause can be amended by a special resolution, passed by the general meeting of the shareholders. Rules, proceedings and effects related to this change vary from country to country[4].

Notwithstanding bold differences in the approach, it is also a common element and to the legal systems of civil law and to those based on common law. However, in the former it is a mandatory requirement for any type of company, while in the latter it concerns solely incorporated companies.

The objects clause impacts the company on different levels. As mentioned above, it represents a mandatory requirement for its establishment and then registration. Once the company is incorporated, the objects clause reveals a deep connection with the company capability and its powers. Ultimately, the objects of the company have a certain relevance in the event of dissolution of the company: the general meeting

[4] For instance, the Italian Civil Code (art.2437) provides that the shareholder who did not approve the change to the objects clause is entitled to withdraw from the company.

might vote for the winding up, in case the objects became impossible to realize or it has been achieved.

The effects of the provision of an objects clause on the businesses have been widely discuss in the past centuries. Traditionally, the issues arising from the analysis of the objects are condensed into two main investigation areas[5]:

- the theory of contracts, which considers the objects clause as the object of the company contract, and has its main contributors in civil law countries;
- the theory of the special capacity of the company, which had its major development in the common law tradition.

The first kind of themes revolve around the "*internal*" dimension of the objects clause, meaning its role as a structural element of the company. As it would be exposed in the next paragraphs, the theory of contracts also contributed to define the adequate formulation of the objects clause.

The second *tranche*, instead, faced the functional aspects of this provision, meaning its relevance upon the powers awarded to the different corporate bodies on behalf of the company, but mostly in the dealings with third parties. In particular, the analysis of those latter ones led to development of the *ultra vires* doctrine, which played a major role in common law countries until very recently.

Each approach reflects a different historical evolution of companies – especially the way each legal system tried to deal with the theory of the separate legal entity – and corresponds to different outcomes towards the corporation in terms of full effectiveness of the acts and liabilities. With regard to the latter, another of the main areas of investigation connected to the function of the corporate objects is the invalidity of the acts of the directors, when they exceed the powers attributed to them by the company articles (*ultra vires* of directors).

Despite several authors argue that the debate on the corporate object is now exhausted, the analysis of the latter, based on the lines of investigation mentioned so far, can offer some ideas on the reforms and the trends that characterize modern corporate law.

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[5] Bertacchini, 1995, p.1

1.2 The corporate object as the object of a contract

Civil law countries introduced the company purpose later than the common law countries. The reasons behind this gap might be found in the different historical evolution of commercial activities or in the absence of an influential financial markets (see par.1.3.3).

Besides this, the the first attempts to regulate commercial activities occurred in France, which was a country who had a certain degree of development of financial markets. Despite the first regulatory reference towards a Commercial Code was the *Ordonnance du Commerce*, in 1673, it did not include any provision regarding the the companies.

Instead, the issues regarding the objects clause would be first addressed in the *Code de commerce,* in 1807. The French Code dealt with issues relating to companies from the perspective of the contract theory. Consequently, since the company was based on a contract, it necessarily had to indicate its own object, i.e. "*l'affaire ou les affaires que la société se propose de entreprendre*", according to an ordinance issued on the 22nd October 1817[6].

Other significant provision concerned the characteristics of the mentioned businesses ("*licite et reél*"), controls on activities involving public interests and the relationship between the company share capital and its activities[7].

Because of the contingent political situation, this codification influenced the majority of the other continental codifications, including the Spanish (*Codigo de Comercio*) and the Italian (*Codice Civile*, and later *Codice di Commercio*) codes. As a result, continental law addressed the issues relating to companies primarily on the basis of the contract theory. Still, contract law tenets have also spread to common law countries. This happened because the companies grew from *partnerships*, which were based on an agreement[8] (while the incorporation developed as a sort of concession).

However, for what it concerns solely the civil law countries, apart from a few exceptions, issues relating to the company's capacity will be lightly dealt or

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[6] La Villa, 1974, p.36

[7] Bertacchini, 1995, p.12

[8] Civil law countries do not distinguish between contracts and agreements

principally in relation to the powers of the directors, in particular the power of representation.

Despite this, the civil law approach has contributed to identify the adequate characteristics of the corporate object, in relation to the characteristics of the object of the contract. As an object of the company contract, the objects clause must be: i) an economic activity which is also ii) lawful; iii) possible and iv) determined.

Before proceeding to analyze the individual requirements in detail, it is interesting to note how the debate around these elements has faced - and attempted to solve - the same issues that were covered by the theory of common capacity and the *ultra vires* doctrine in common law.

For instance, the requirement of the specificity prevented the usage of long and wide clauses that covered any possible activity, in order to protect the primacy of the members upon the management, at least when the main activity of the company was concerned.

1.2.1 (following) Lawfulness of the objects

This requirement is quite adamantine in its meaning: a company cannot choose an activity which is illegal. An activity is considered illegal when it violates mandatory rules or is contrary to public order or morality. Moreover, the objects are considered illegal even when the activity is lawful but pursues a fraudulent purpose. Another case of illicit objects occurs when the activity is lawful, but the law imposes special conditions to carry out that business (*e.g.* an authorization from the Government), and the company does not meet them.

The contract establishing a company with an illicit object is deemed void and cannot pursue the registration. In this regard, La Villa[9] emphasizes that this is an inconsistent solution with the law of contracts. Before declaring the contract void, the judge should also be evaluating the activity carried out in concrete terms, also because it would be quite odd for a company's deed to expressly declare an illicit activity.

[9] La Villa, 1974, p.134

However, the controls undertaken on the company constitution when it is registered do not include substantial analysis but generally consist into controlling the respect of formal requirements *prima facie*.

The reasons behind this provision are quite obvious: economic activities must be carried out in compliance with the law. The fact that certain businesses are profitable does not justify failure to comply with general or special rules.

1.2.2 (following) Possibility of the objects

The possibility of the objects means that the activity chosen by the company must be potentially feasible. The activity is judged on the basis of an objective test, meaning that it does not concern the assets and the skills of the members of the company, but it is a more general judgment. This provision safeguards the rationality of the legal system. The case of a company that pursues an impossible object is in contrast with the principle that the system addresses only those interests that it (or better, the society) deems worthy of protection.

Furthermore, commending to undertake a possible business has two different functions: at the time of the establishment of the company, it affects the validity of the contract. Subsequently, the objects in the articles could become impossible. In this case, the occurred impossibility is a legitimate cause of the dissolution of the company. Significantly, while the preliminary test on the possibility is necessarily an "*objective test*", in this latter case, the test concerns the capacity of the company in its current asset to operate in that business.

This remarks a certain connection between the objects clause and the consistency with company assets. However, this relation – that was one of the core elements also of the *ultra vires* doctrine - shall not be stretched to the extent that the company assets are demanded to be adequate and proportioned to the objects.

Finally, the objects may be impossible because they are prohibited by law. However, this hypothesis falls into the category of the illicit object. In any case, the distinction is rather nuanced, so that in the relative decisions the two concepts tend to overlap.

1.2.3 (following) Specificity of the objects

The specificity of the objects is consistent with the objects clause as a limitation of the company's business. Regardless of the reasons for which the objects clause is introduced in the statute, its function is always that of a "restriction"[10]. It is clear that a limit, to have an effective value, must be defined.

Another of the main aspects linked to the determination of objects clause is the protection of members. More accurately, the identification of a specific activity limits the risks to which the capital contributed by the shareholders is exposed. Also, another consequence is that managers can not choose personally the main activity because it is predetermined by the articles of association[11]. It is not relevant that the object can be modified later, because it is a competence that all legal systems confer exclusively to the members and to the general meeting. On the contrary, such a rule confirms that the specific nature of the company's economic activity is established in the interests of shareholders. This is a principle that has had its partial recognition also in the common law systems. Moreover, in his opinion in *Cotman v Brougham*[12], Lord Parker noted: "*The narrower the objects expressed in the memorandum the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company*".

Similar to what happened in the UK, the practice of using wider and more generic objects clauses would seem to have deprived this requirement of relevance. Besides some new trends (see par. 1.5), the argument is partially invalid. First of all, the specificity of the objects does not exclude the identification of a plurality of objects provided that all are sufficiently determined. Furthermore, in civil law countries the practice of drafting wide and detailed clause never reached the peaks registered in common law (see par. 1.3.4) because the objects clauses did not produced effects as harsh as the effects of *ultra vires* doctrine in common law.

Therefore, in claims pertaining to the corporate purpose, the judiciary has maintained an approach aimed at ensuring a certain degree of specification of the

[10] Zanelli, 1962, p. 31

[11] Gliozzi, 1970, pp. 95 - 100

[12] Cotman v Brougham [1918] AC 514

objects[13], reserving itself the right to assess case-by-case when the legal requirements are respected.

Finally, the specificity of the objects conveys also reasons of public interest. For certain businesses (*e.g.* banks, insurance), the legislator provides special rules and a complex set of authorizations and controls to comply with. If one of those activities is included as the object of the company, the authorities are allowed to apply the special legislation and easily carry out the required validations.

[13] Bertacchini, 1995, pp.32-38

1.3 The external relevance of the objects clause

As mentioned above, the characteristics of the corporate objects as a structural element of the contract (or alternatively the *deed of settlement*) that establishes the company do not show particular issues. Moreover, the various legislations tend to converge on this subject.

With regard to the way in which the corporate objects impact the company's business and its activities, instead, each system offers different solutions. In particular, the main question concerns the fate of those acts undertaken outside the corporate purpose.

On the one hand, the German tradition excludes that the corporate object has an external effect, understood as an impact on the powers exercised by the company. Other legal systems (English, French, Italian), instead, do consider the objects as a limit to the external activity of the company. Depending on the regulatory framework, the corporate purpose can be considered an absolute limit to the company's capacity (UK) or to the powers attributed to directors (Italy)[14].

1.3.1 The objects clause as the boundary of the capacity of corporations

One of the common features of any corporation in the different legal systems is the fact that the incorporation results into the creation of a new body, awarded with a separate legal entity.

The nature of this new legal entity and the effects it produces in the legal system have been widely discussed. Without recalling the complex debate on the subject[15], for the purposes of this dissertation it is important to remember that the creation of a legal person is generally achieved through the introduction of a statutory rule of law.

With reference to the attribution of the status of "*legal person*" to a corporation, the objects clause has had traditionally two main functions:

[14] La Villa, 1974, p.247

[15] Verrucoli, 1964, p. 5

- an instrument modeled on some tenets of public law, used by the central authority to control the concessions made to the new legal entity;
- a tool to balance the interests - with particular regard to the interests of a company's creditors – entangled in a single corporation.

Nevertheless, this area of investigation also remarks a bold difference between common law and civil law countries. However, there are some points of contact due to the common historical origins of the phenomenon. Historically, this attribution emerged generally in the form of a *privilege* (*franchise, octrois*), granted by the established authority.

Ever since the Middle Age[16], the Church or local authorities admitted the creation of a *persona ficta*, anticipating the patrimonial separation typical of modern corporations, when necessary for the pursuit of a public interest or for charity purposes. Subsequently, following the development of the market economy and the expansion of trades, the notion was incorporated into the various systems, moving from public interest activities also to private ones.

In any case, the grant of the privilege was a responsibility of the authority, and was subject to certain restrictions. At this stage, civil law and common law traditions started to grow apart. The first did not question the extent of the capacity attributed the new entity: once the company was lawfully incorporated, the new legal person was awarded with a general capacity.

The second one, instead, developed a very articulated theory of the special capacity, meaning that a company could lawfully perform only the activities expressly stated in its articles.

1.3.2 The theory of the special capacity

The artificial nature of the companies has generated many doubts about the powers legitimately attributed to the legal entity and, hence, to its capacity. Actually, the

[16] Although Roman law did not elaborate a notion of a juridical person, certain kind of association (*municipi*a, *Fiscus*, and within the limits set by Renaud, 1875, *Das Recht der Actiengesellschaften*, 2nd ed., Leipzig, p.2 ss, *societas publicanorum*) possessed several features that could recall the peculiarities of some modern corporations. For further references see also, Arangio-Ruiz V., 1950, *Le società in diritto romano*, Naples, pp.78 ss. and Verrucoli P., 1964, pp. 13-14

attribution of the legal capacity to a legal entity does not imply a complete correspondence between the powers of this latter and those of the natural person[17].

Corporations are no exception. Basically, the capacity of a company consists of its contractual capacity, meaning the acts and powers that it can legitimately exercise. According to the civil law approach, once a company is duly incorporated, it is no longer possible to limit the scope of its capacity. Eventually, the powers of the corporate bodies (*i.e.* the directors) may be restricted[18].

As mentioned above, the common law tradition rejects the possibility that companies benefit of a general capacity. The core of the theory of the special capacity is that the "*company's power to do something*[19]" is not unlimited. Instead, the company can operate only within the limits of its articles, and above all the limits set forth in its objects clause.

Traditionally this theory is a peculiarity of the common law countries and has served two main purposes:

- to realize a public control on the activity of the incorporated companies, on account of the benefits awarded;
- to allocate the company's assets exclusively to the realization of the activity in the objects.

For what it concerns the first purpose, as Verrucoli[20] noted it is unlikely that a privilege is granted unreservedly. Thus, the relevance of defining a corporate purpose: the objects clause allowed the authority to monitor to what extent the privileges of the incorporation – such as the separate legal entity - were exploited by the corporations.

Also, historically this restriction had been used by the Crown to prevent the first companies - which also performed territorial "control" functions in the colonies - to acquire a too strong power to the detriment of the central authority.

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[17] For example, the possibility for a legal person to be held liable for criminal offences is a quite recent development

[18] Martorano, 1961, pp. 6 -13

[19] Dignam & Lowry, 2016, p. 251

[20] Verrucoli, 1964, p.66

Instead, the second point recalls the protection of the interests of social creditors, which represents the pivotal point of the regulation of the incorporated companies. Moreover, this approach has determined one of the main flaws of the English doctrine on the objects clause, namely the attempt to protect all creditors with the same instrument without distinguishing between *insiders* (shareholders) and *outsiders*[21].

Beyond these general principles, the evaluation of an effective convenience and of the endurance of the special capacity doctrine, as well as of its close bond with the objects clause can only be undertaken in the light of the historical evolution of the institution, with particular reference to the UK. Indeed, in the USA, definitely more liberal economic trends nurtured a different development. Actually, even if the *ultra vires* doctrine was applied by the American Courts, too, the scrutiny on the interpretation of the objects and the incorporation tended to be easier and less burdensome for the companies[22]. However, for the purpose of this dissertation the case law originated in North America has little relevance and would not be discussed.

1.3.3 *Historical background*

At the very beginning, the English legal tradition mirrored the principles of Canon Law: the privilege (*franchise*) was granted through an act of the Crown[23], the *charter of incorporation*.

The charter included a *purpose* (similar to the statement of the objects) and the "*corporation*" status was conferred to organizations like the Church or other local administrative organizations that carried out functions of public interest.

In fact, originally, economic activities in England were carried out in the form of the *partnership*. Companies appeared later, around the 13rd century, following the development of overseas trading.

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[21] See the opinion of Lord Parke in *Cotman v Brougham* [1918] AC 514

[22] For a more accurate dissertation on the case law on the objects clause developed in the USA, see Martorano, F., 1995, *op.cit.*

[23] Very rarely, incorporation was granted by an act of the Parliament or it could also be "*presumed*" (*incorporation by prescription*)

The Crown had a significant interest into fostering the flourish of the *merchant adventurers*, the forerunners of modern corporations, because as the latter allowed the central power to have structures dislocated in the territories where the companies carried out their activities. In return, companies obtained the economic benefits settled in the charter.

Thus, in an early stage, the incorporation was basically a tool to pursue a public interest. As Williston[24] noted: "*the corporation was far from being regarded as simply as an organization for the more convenient prosecution business. It was looked on as a public agency, which had been confided the due regulation of foreign trade*".

It is true that often the incorporation was granted to domestic companies along with the grant of a patent or the monopoly on certain activities connected to the general public (*e.g.* railways). However, those organizations steadily evolved: first, members started to provide for a part of the wares (*joint stock*) in exchange of a part of the revenues; then they began to confer a fixed capital, represented by shares; lastly, they were deprived of their direct public functions[25].

Although the widespread rise of new companies, the charter both issued by the Crown or with an act of the Parliament, were quite arduous to obtain for a company. Unincorporated companies tried to achieve benefits of the incorporation, through the purchase of "*second-hand*"[26] charters.

In fact, aside from the benefits arising from the exploitation of monopolies and patents, according to the case law of that time, incorporated companies had potentially no constraints on their powers, even when acting outside of the purpose in the charter.

Speculation arose, leading to relevant financial losses, and required the intervention of the Parliament, which enacted the *Bubble Act* in 1720[27].

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[24] Williston, 1888, p.110

[25] Verrucoli, 1964, pp. 24-28

[26] *Ibidem*, under no. 22

[27] In part, the Bubble Act meant to favor the South Sea Company, sponsored by the Government. For further references see La Villa G., 1974, *op. cit.*, p.28 and Harris, R. (1994), *The Bubble Act: Its Passage and Its Effects on Business Organization*, The Journal of Economic History, 54(3), 610-627. Retrieved from http://www.jstor.org/stable/2123870

The Act aimed to prevent further financial bubbles, by restraining the transfer of share of unincorporated companies. In parallel, the incorporation could be obtained only trough the intercession of the Parliament or the the Crown.
Somehow, the Bubble Act is the precursor of the *ultra vires* doctrine[28]. In one of the claims that followed the enforcement of the Bubble Act, the General Attorney noted: "*those charters, being granted for the particular ends specified and limited therein, not giving sufficient authority to the corporations thereby erected, if they were existing, to carry on a business or employment of so public a nature as that of insurance of ships and merchandise, and which is wholly foreign to the design of those incorporations*".
This opinion has the merit to highlight two of the fundaments of the analysis upon the objects: its close relationship with the capacity awarded to the company and the relevance of the public interest. Still, these principles will not be embodied into English statutory law until the following century.

1.3.4 The Joint-stock Companies Act of 1844 and the rise of the ultra vires doctrine

The strict provisions in the Bubble Act conflicted with the increasing diffusion of companies, as a way for business to operate. Hence, the Bubble Act was repealed in 1825. Few decades later, the Government passed the *Joint-stock Companies Act of 1844*, which reformed the procedure of incorporation. A company was allowed to receive the charter of incorporation, by providing a *deed of settlemen*t.
The contents of this document shall comply with the condition defined by the Act. In particular, sec. 7 required the mandatory statement of "*the business or purpose of the company*", while sec. 25 restricted the capacity of the company so the sole purposes and powers[29] included in the memorandum. In reality, the new provisions did not necessarily exclude the general capacity of the company.

[28] La Villa, 1974, p.29

[29] Companies in common law countries tend to have very articulated objects clauses that include both activities that correspond indeed to the businesses of the company but also a series of activities that cover other potential transaction the directors may enter into while managing the company (i.e. powers of directors) in order to avoid the effects deriving from the special capacity of the company.

This hypothesis is definitively excluded by the *Companies Act 1862* (sec. 12) which states that the memorandum of association is not amendable.

The first case in which courts applied the principles of the new Act was in *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875)[30]. In this landmark case, the House of Lord, overturning the previous decision of the Exchequer, ruled that a company incorporated under the Companies Act 1862, and whose objects were "*to make and sell, or lend on hire, railway-carriages*", could non conclude transactions beyond this objects stated in the memorandum.

In his opinion, Lord Cairns affirmed: "*It was the intention of the legislature, not implied, but actually expressed, that the corporations, should not enter, having regard to this memorandum of association, into a contract of this description. The contract in my judgment could not have been ratified by the unanimous*". Therefore, the contracts concluded by the directors exceeding the powers of the company were deemed to be void, and could not be ratified by the shareholders. In fact, an act falling outside the scope of activities included in the memorandum, exceeded not only the powers of directors, but the company capability.

In brief, the foundation of the *ultra vires* doctrine is that the capacity of companies is "incomplete" (*special capacity*, see above 1.3.2) and faces an insurmountable boundary in its objects clause. *Ultra vires* is a Latin expression meaning beyond (*ultra*) the legal powers (*vires*): any act or power undertaken outside the objects of the company exceeds the capacity of a company and is therefore void. More precisely, the fact that an activity falls outside the capacity of a company implies that the act can not legitimately be carried out by a company. Therefore, the latter can neither authorize it in advance nor ratify it.

The expression can also refer to other areas of the law, rather than the capacity of companies. In particular, in the corporate field, *company ultra vires* and *ultra vires of directors* - which will be discussed later - tended to overlap. In this context, it is worth mentioning only that the first concerns the company as a juridical person, while the second deals with only the powers attributed to the directors and their relationship with the company.

[30] *Ashbury Railway Carriage and Iron Co Ltd v Riche* [1875] LR 7 HL 653

A complimentary rule to the *ultra vires* doctrine is the general principle of "*constructive notice*". According to this theory, which belongs and was developed in relation to the contract law, a third party - an *outsider* - who decides to engage in dealings with the company, must be made aware of any limits and conditions on the company's operations. Concerning the limits to the company's capacity contained in its objects, the instrument through which this notice is given is the memorandum, because it is a publicly registered document.

As a result, outsiders who had concluded an *ultra vires* contract could not have made claims against to any failure to perform on contractual agreements, as they were deemed to know that the act was outside the powers of the company, as defined by its objects.

The harshness of the constructive notice was reduced by the *Turquand* rule (also known as the *indoor management* rule). In *Royal British Bank v Turquand*[31] the court held that an outsider is entitled to assume that all the acts of the internal management are legitimately performed. Hence, when dealing with the company, the outsider is not bound to inquiry if the is covered by the provision in the memorandum. The only exception to this rule occurs when the outsider is already aware that the act fell outside the objects of the company[32].

The contents of all those reforms, including those concerning with the corporate purpose, have mainly anti-speculative purposes. The Government indeed aimed to avoid that a distorted and fraudulent use of the instrument of the incorporation resulted in great economic losses, similarly to what occurred in the South Sea case and other bubbles. At this stage, the choice to limit the company's capacity - as well as those of the directors - is oriented towards investor protection and company's assets integrity. The corporate object limits the ability of the company *tout court*, so as to avoid that potentially harmful acts are ratified by the company and limit the business risk. In fact, the main field of application of the *ultra vires* doctrine, in its most dogmatic form, is precisely financial transactions of dubious legitimacy. For instance, in *Welton v Saffery* (1897)[33] the Court of Appel deemed *ultra vires* the issue of shares at discount.

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[31] *Royal British Bank v Turquand* [1856] 6 E&B 327

[32] *Rolled Steel Ltd v British Steel Corpn* [1986] Ch 246

[33] *Welton v. Saffery* [1897] AC 299 (HL)

Probably, the British government also aimed to exploit the fortunate economic conjuncture – by that time, England had experienced the Industrial Revolution and was approaching the Second one - and to encourage investment in structured economic activities, but in a way that did not allow newly established companies to foster hazardous investments and financial bubbles. It is not without a reason that the reform of the incorporation machinery will be completed by the recognition of limited liability (*Limited Liability Act 1855*)[34], also implemented by the Courts in the landmark case *Salomon v Salomon*[35].

However, a too rigid application of the rule of law backfired. Aside from a way too disadvantageous position for third parties because of the constructive notice rule, also the consequences for the companies happened to be "*bizarre*"[36]. For instance, the rule of law was often applied without regard of the company interest. In the case of *Re German Date Coffee Co*[37], the objects of the company were to make coffee from dates using specifically a German patent. However, the German patent was never granted and coffee was made with a Swedish patent. Despite, the company was solvent, two shareholders[38] petitioned for a winding up on the argument that the company had failed to meet its objects.

The Court had to rule in favor of the claimants, on the grounds that the memorandum had defined a very specific object, affecting the legitimacy of the business. This case also highlights another backlash of the special capacity: indeed, even a minority or a single member was entitled to act against an *ultra vires* transaction even if the consensus of the remaining majority existed, much to the dismay of the other members and third parties.

In short, despite its liberal inspiration, the new rule of law resented of an old-fashioned interpretation, which considered registered companies as public bodies and their powers regulated in the same way of a concession.

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[34] Corapi, 1971, p. 212, sub 157-158

[35] *Salomon v A Salomon and Co Ltd* [1897] AC 22

[36] Hicks, 1995, p.44

[37] *Re German Date Coffee Co* [1882] 20 Ch D 169

[38] As the date of the decision, companies were bound to have at least seven members in order to incorporate, i.e. two shareholders were necessarily a minority

Moreover, the fact that the corporate object was unamendable made it very difficult for a company to move towards different businesses, when they appeared more profitable. Indeed, the *ultra vires* doctrine also represented an obstacle to the flexibility and fluidity of the trades and the economic system.
Hence, a trend spread of drafting extensive objects clauses encompassing broad purposes and powers. This solution proved to be only partially effective. Despite the wide scope of the clauses included in the memorandum, the judiciary interpreted those activities as ancillary to the main object. This rule (*main objects rule*[39]) originated in *Ashbury Railway Carriage and Iron Co Ltd v Riche* and applied in any case it was possible to define a more prominent activity among the various included in the memorandum. Hence, the powers arising this main object shall be "*exercised in furtherance of the main object*"[40] itself.

A shift in the courts position occurred in *Cotman v Brougham* (1918)[41]. In this landmark decision the House of Lord found admissible a very wide and articulated objects clause, which also featured a closing statement, formulated as follows: "*None of such sub-clauses or the object therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property, or acts proposed to be transacted, acquired, dealt with, or performed do not fall within the objects of sub-cl. 1.*"
The court held that the clause was valid, and therefore the acts could not be considered *ultra vires*, because the register had deemed the deed of settlement - and hence the objects clause - valid by granting the certificate of the incorporation. In the aftermath of the decision, similar clauses – consequently named *Cotman v Brougham clauses* - became very popular, weakening the scope of the *ultra vires* doctrine. A even more particular clause was introduced in and and named after the case *Bell Houses v City Wall Properties* (1966)[42]. The plaintiff company had in its

[39] Lowry & Reisberg, 2012, p.115

[40] Dignam & Lowry, 2016, p. 254

[41] *Cotman v Brougham* [1918] AC 514

[42] *Bell Houses v City Wall Properties* [1966] 2 QB 656

memorandum a clause that allowed the directors to undertake any activity – even not included in the memorandum - they considered *bona fide* in the interest of the company[43]. The Court of Appeal, overturning the previous decision, ruled in favor of the validity of both the clause and the transaction claimed to be *ultra vires*, introducing *de facto* a new type of objects clause. Ultimately, the trend became so relevant that it was later endorsed by the reform of the Companies Act in 1985.

1.3.5 The transposition of the EC's First Directive on Company Law

The need for a reform was strong in the English legal system. In their recommendations, both the Cohen Report[44] and the Jenkins Committee[45] suggested to dismiss the theory of the special capacity, at least in the dealings with the outsiders of the company, and the doctrine of the constructive notice. Although the recommendations of both the Cohen and Jenkins Committee reports did not achieve a statutory recognition, the *ultra vires* rule was bound to be reformed, because of the UK's entry into the European Community. In fact, a change in the law was necessary to comply with the EC's First Directive on Company Law[46].

In particular, the First Directive, Article 9(1) affirms:

"Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs."

Also, article 9(2) states:

"*The limits on the powers of the organs of the company arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed*."

The aim of the European legislator with such a provisions was "*to confer a company with an absolute contractual capacity in relation to its dealings with third*

[43] From the memorandum: "(c) To carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by [the plaintiff company] in connexion with or as ancillary to any of the above businesses or the general business of [the plaintiff company]"

[44] *The Report of the Committee on Company Law Amendment* (1945) Cm 6659

[45] *The Report of the Committee on Company Law Amendment* (1962) Cm 1749

[46] First Council Directive 68/151/EEC of 9 March 1968

parties"[47]. Also, the directive was an attempt to harmonize the two different approaches (see above par 1.3) to the function of the objects clause that co-existed in the European framework[48]. The provision remarked the beginning of the decline of the relevance of the objects clauses in all the Member States but it had a stronger impact on common law countries because it implied necessarily that the *ultra vires* doctrine had to be downscaled and the theory of special capacity should be no longer applied.

In the UK, the directive was implemented by sec 9(1) of the *European Communities Act 1972*. This article provided a rule very similar to the principle in *Turquand* (see above par. 1.3.4) as the UK choose to fully implement the European provision by introducing the criterion of the good faith: any transaction enacted by the directors *vis-à-vis* a person dealing in good faith should be considered to be within the capacity of the company, and, still in favor of such a person, the powers of the directors to bind the company are not subject to any restriction contained in the articles of association[49]. Thus, the person is not obliged to investigate the contents of the company's public documents and shall be presumed to have acted in good faith unless the contrary is proved.

Despite addressing the company's contractual capacity, at first, the new section did not affect the requirement of an objects clause. Such a clause must therefore still be included in the memorandum when pursuing the company registration. As a consequence, the limits of the object could not be invoked to the detriment of *third parties dealing with companies*, but could be potentially used against the company itself.

1.3.6 The Companies Act 1985

The following step in the reform of the *ultra vires* doctrine was the Companies Act 1985. The new law embodied the habit of drafting wide objects clauses (*inflated objects clauses*) by the introduction of sec 3A. Section 3A provided that the

[47] Griffin, 1998, p. 19

[48] Farrar & Powles, 1973, p. 275

[49] However, the powers of directors to manage the company are still limited, with the only exception of the general commercial company (see below 1.3.6)

company's object might be formulated as to operate as a "*general commercial company*".

If the memorandum is drafted in this way, it implies that *i*) its object is to carry on any trade or business whatsoever and *ii*) the company has power to do all such things as are incidental or conducive to the carrying on of any trade or business. Also, the *ultra vires* doctrine was affected by the introduction of sec 35[50], which basically mirrored the provision in sec 9 of the *European Communities Act 1972* (*see above*).

The reform was important because it marked a turning point in the approach of English statutory law to the function of the objects clause, which had already been anticipated by the case law.

The formulation turned from long and detailed clauses to a general and concise but with a wide scope provision. Indeed, the provision of a corporate purpose as a structural and essential element of the memorandum is not disputed. Instead, the preclusive effects of the clause are what it is challenged.

Probably, the rationale of the reform was to maintain the corporate object as an element of assessment of the business risk for future investors/shareholders.

At the same time, the legislator intended to prevent the doubts of interpretation - that had already arisen before (see par. 1.3.4) - and the subsequent harsh consequences in terms of nullification of the contracts that could have put in jeopardy the fairness and the stability of the trades.

Up to this point, the objects clause and the *ultra vires* doctrine maintain a certain relevance, even if toughly downsized by the statutory provisions. As mentioned

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[50] Now s 40(1)(2)(3) of the Companies Act 2006: "(1) *In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.*

(2)For this purpose— (a)a person "deals with" a company if he is a party to any transaction or other act to which the company is a party, (b)a person dealing with a company— (i)is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so, (ii)is presumed to have acted in good faith unless the contrary is proved, and (iii)is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving— (a)from a resolution of the company or of any class of shareholders, or (b)from any agreement between the members of the company or of any class of shareholders."

above, the objects clause had insofar an impact on the rights of shareholders. Traces of the *ultra vires* doctrine remained in relation to the company and company insiders, the directors in particular. This ultimate excerpts can be defined as the '*insider dimension*'[51] of the *ultra vires* doctrine and of the objects clause. However, the situation will be again overturned in the most recent reform of the Companies Act in 2006.

1.3.7 The objects clause after the Companies Act 2006

The Companies Act 1985 was repealed in 2006. However, the Companies Act 2006 both re-enacted many provision both introduced major amendments and novelties to the statutory law. One of the main changes concerns the objects clause. By virtue of sec. 31(1)[52] companies incorporated under the Companies Act 2006 no longer have to necessarily include a corporate purpose in their articles. In fact, in the absence of a specific indication, the objects of the company are considered "*unrestricted*".
Because the provision applies from 2009, the reform has also provided that companies incorporated before that date can pass a special resolution to modify their objects and adopt the new regime.
Firstly, the reform continues that process aimed at overcoming the *ultra vires* doctrine, which began with the Companies Act 1985. The most significant difference is that in the previous version of the Companies Act the indication of a generic object was the exception. Instead, following the introduction of the sec. 31(1), it becomes the rule of law. It is important to notice that, even if the company chooses to restrict its objects, the *ultra vires* rule would be still not applicable[53].
Secondly, the term used - *unrestricted* - aims to definitively sanction also the corresponding general and unlimited capacity of joint-stock companies.
Moreover, the new wording of the Companies Act 2006 raised doubts about the compatibility with the EC Company Directive, which contemplates the objects

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[51] Settanni & Ruggi, 2017, p.110

[52] Companies Act 2006, s. 31 (1): "*Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted*"

[53] Davies & Worthington, 2012, p.166-168

clause among the essential requirements of the deed of incorporation or any equivalent act used to establish the company.
According to some authors, to a more accurate analysis, the indication of objects is not properly omitted, but only characterized in a different way. Also, the Directive requires an objects clause but does not exclude an unlimited purpose[54].
In the end, this new set of rules – which was steadily imported in other common law countries - was intended as the end of the relevance of the objects clause (at least for private companies). Indeed, once this kind of "unlimited purpose" is adopted, the objects clause has no significant implications nor for third parties, nor for the management. However, as it would be further explained, the fact that some countries are turning to this kind of companies does not mean straightforwardly that the objects clauses shall be abolished.
Actually, the necessity of an objects clause – even after the intervention of the European legislation – may be related to different elements such as the size of the company or its core businesses. Still, the English reform was a unique (and quite extreme) solution that inspired other countries (it set the basis for the Irish reform, too) to revise the role and the solution adopted about issues revolving around the company objects.

1.3.8 Brief outline of the ultra vires doctrine in the French system (spécialité statutaire)

A principle similar to the theory of the special capacity was developed in France, too. French scholars introduced *la spécialité statutaire*, with reference to the objects clause that is contained in the company's constitution[55].
The idea is that the company was formed to carry out the defined activity, described in the company's articles of association. So a company can only do things that are related to that activity. The act that does not enter the objects clause will not bind a company.
Since in France company law has developed simultaneously with the one of contracts, the reasons for this deviation are of an economic nature. Similar to the

[54] Bianca, 2009, p. 299

[55] Bianca, 2008, p. 56

UK, France had suffered the consequences of major financial bubbles and reacted in order to protect investors. However, the doctrine will not be applied with the same severity as the English experience.

The main reason is that the law - at least for limited liability companies - has not implemented the principle. The French legal system, in line with the other common law countries, has preferred to reckon the acts exceeding the objects binding. In any case, the French experience reaffirms the centrality of investor protection and anti-speculative purposes in the analysis of the function of the objects clause.

1.4 *Ultra vires* of directors

What has been discussed so far excludes that in modern corporate law the theory of special capacity still survives. On one hand, in civil law countries, apart from a few not significant exceptions, the theory did not take root or was voluntarily dismissed by the legislator. On the other hand, even in the common law countries, which were the main proponents of this doctrine, the latter seems to have been permanently deserted[56].

Therefore, what it is left to be examined is the relationship of the corporate object with the powers attributed to the directors.

1.4.1 General outline and consequences of the ultra vires of directors

As mentioned above, an operation is deemed *ultra vires* when it exceeds the powers conferred on the directors. The main difference *vis-à-vis* the *ultra vires* of the company is that the act does not fall outside the general capacity of the company.

As a consequence, those activities, when undertaken by the directors, can be remedied by the approval of the shareholders, because they only fall outside the objects but the company eventually has the legal capacity. Indeed, since the act exceeding the limits of the corporate object or performed outside the conferred powers is not void, but, at most, ineffective, it is the company itself that has the power to reject or to bear the effects of this act.

[56] Stagno d'Alcontres & de Luca, 2017, p.246, *sub* 17

The company engages in the dealings with the outsiders through its board of directors. With reference to the *ultra vires* of the directors, it can alternatively be considered a limit to the management power or a restriction to the powers of representation.

Concerning the powers of representation, traditionally, the directors were considered mere executors of the directives of the shareholders. As representatives, they could act in the name and on behalf of the company within the limits of the proxy received. The proxy corresponded to the content of the by-laws.

The operation would therefore have been valid but ineffective towards the company. This theory has been dismissed, since nowadays, by virtue of the implementation of the First Company Directive, the directors shall benefit from a power of general representation.

The idea of the objects as a restriction of management powers is more common in modern legal systems. In this case, the objects clause binds the directors in the way that they must act pursuing the realization of the object itself. Broadly speaking, they shall undertake only those acts that comply with the purpose of the company, but they are not subjected to particular foreclosures.

However, regardless of the preferred approach, the acts would still be considered binding on the company in the dealings with third parties, due to the influence of European law. The only exception in favor of the company concerns the liability of the directors. From this point of view, the objects have lost its external relevance, while maintaining a strong value upon the internal relations between corporate bodies.

1.4.2 The Italian experience

In Italy, the 2003 Company Law reform has drawn a new structure of the provision in the Civil Code regarding the limitations on the power of representation of the directors. Before the reform, by virtue of art. 2384 (1) of the Italian Civil Code, the directors could not perform all the acts that do not fall within the corporate purpose. The prohibition was mitigated by the unenforceability of the limit to third parties who had engaged in good faith with the company (Italian Civil Code, art. 2384-bis, now repealed).

The act was therefore ineffective, but it was considered as ratified by the company *vis-à-vis* third parties in good faith. The burden of proof was borne by the company. Instead, the new wording of the article established that the directors own a power of general representation and eliminated the requirement of good faith.
Nowadays, the limitations on the powers of the directors to bind the company[57] that result from the articles of association are not enforceable to third parties, even if published, unless it is proved that they intentionally acted to the detriment of the company. Hence, the company must try the willful misconduct and the damage to meet its burden of proof.
Apparently, the new rule makes the limit of the objects clause irrelevant. Indeed, the possibilities for the company to make the limitations contained in the memorandum of association prevail are significantly reduced.
However, the reform has further amended the cases when the corporate object retains an external relevance, namely the willful misconduct of the third party aimed at damaging the company (*exceptio doli*)[58].
Also, as it will be discussed further in this dissertation, the limitation arising from the objects clause may have an influence on the management, in compliance with art. 2380-*bis* (1)[59].
Indeed, this section, which has nevertheless some common points with the duty to act within powers and observe the limitation deriving from the objects, leaves the door open to the analysis of the role of the objects clause in the relationships between the management and the members of the company.

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[57] Italian Civil Code, art. 2384, as last amended: "*Il potere di rappresentanza attribuito agli amministratori dallo statuto o dalla deliberazione di nomina è generale. Le limitazioni ai poteri degli amministratori che risultano dallo statuto o da una decisione degli organi competenti non sono opponibili ai terzi, anche se pubblicate, salvo che si provi che questi abbiano intenzionalmente agito a danno della società*".

[58] This possibility had already been theorized at the time of the implementation of the First EC Directive, with reference to the bad faith of the third. However, this hypothesis had not found much room due to the difficulty of defining to what extent such a general clause could be effectively applied. See above, *sub* 42.

[59] Italian Civil Code, art. 2380-bis (1): "*La gestione dell'impresa spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale*."

1.5 Final Remarks

Going back to the opening of this chapter, it is clear that the various themes related to the objects clause have already been widely dealt with by scholars. On the other hand, the new trends and reforms implemented by different countries have significantly reduced the scope of the objects clause, too.

This does not mean, however, that the objects of a company no longer have any function in incorporated companies. As underlined several times, under the umbrella of the objects clause, there are various, and sometimes opposite, interest (e.g. company creditors, shareholders, public interests) that are still widely debated today. It is no coincidence then, that the statement of a corporate purpose is considered an essential element and in different countries, and above all in the EU regulatory framework, and in those special sectors where some particular interests are safeguarded through the exercise of a certain type of business (e.g. *B-corps*, charity activities).

Surely, the conclusions reached by scholars and case law have often created an excessive disadvantage for one part, rather than another. Moreover, one of the main flaws in the analysis of the objects was not distinguishing their function according to the different types of companies.

Furthermore, even after the First Directive intervention, there are some grey areas left. For instance, the debate on which kind of *ultra vires* transaction and which limitations are covered by the provision in the directive. Similarly, it is unclear to which extent the objects have an influence over the management and in the protection of the people who invest in the company – both members and creditors – given that along with the evolution of companies and markets, new hybrid roles developed (*e.g.* bondholders).

An interesting spark comes from Ireland, where one of the most recent corporate reforms attempted to differentiating the regimes. The reform - which is the topic of the next chapter – addressed mainly private companies and possesses several points of contact with the Companies Act 2006. However, there is a substantial difference since the companies that decide to include an objects clause in their articles (*Designated Activity Companies*), are subject to a different legal regime: they are bound by restrictions and receive benefits different from other models of companies, precisely because of the different interests that could come into play, because of the different size and degree of exposure to the markets and engagement with third parties. Another core point of the reform is the apparent re-introduction of the limited capacity of the company, which may jeopardize the conclusion drawn on the impact of the First Directive on the objects clause.

CHAPTER 2 – THE IRISH DESIGNATED ACTIVITY COMPANY

2.1. An introduction to the Irish Company Law

Ireland used to be part of the United Kingdom. As a result, until the independence - achieved in 1937 - the sources of law correspond to the English ones. Therefore, even the fundamental principles and key-elements[60] tend to coincide, especially in the field of company regulation. In fact, at the very beginning, the statutory provision in force for the companies was the *Companies (Consolidated) Act 1908*, which consolidated all the Acts from 1862 to 1907[61]. However, nowadays, Ireland has retained the common law system, but has developed its own set of statutory rules and case law.

2.1.1 Sources of company law in Ireland

Following independence, Ireland has developed its own body of rules also for what concerns Company Law. Like any other legal system, the sources are several and they can either have a general scope either belong to the special legislation.
Briefly, the most influential sources can be distinguished in:

- The Companies Act
- EU legislation
- Case Law

From the bottom to the top: as mentioned above, Ireland operates a common law legal system. As a result of the long era of domination, the most relevant precedents for the company law are borrowed from the tradition of the English courts. Actually, the judiciary has raised some doubts whether the precedents of the British High Courts are binding, or only persuasive, with regard of the Irish High Court. In *Irish Shell Ltd v Elm Motors Ltd* [1984][62] the opinion of McCarthy J vehemently

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[60] For a comprehensive outline of the UK's Company law see above, chapter 1.3

[61] Company Law Reform Committee, 1958, p. 11

[62] *Irish Shell Ltd v Elm Motors Ltd* [1984] IR 200, 225, 227 (IESC)

denied the influence of English courts. However, the Irish court did not rule on the issue in its final decision.

Ireland is also part of the European Union (EEC at that time) since 1972. As a result, Community legislation is fully part of its legal system. In the same way as in the other Member States, this has also affected the company law. For example, as happened in the UK, Ireland also had to introduce measures to prevent *the ultra vires* doctrine from being invoked to the detriment of outsiders who had engaged in dealings with the companies.

Other main measures to implement European law include the imposition of a minimum capital for PLCs and the regulation of cross-border mergers. The implementation of *non-self-executing* regulations in Ireland occurs through primary sources[63] enacted by the *Oireachtas* (*i.e.* the Irish Parliament).

The main reference for statutory rules is the **Companies Act 2014**, as last amended. The first version came into force in 1963 (*Principal Act*), based on the remarks of the *Company Law Reform Committee* (*Cox Report*, 1958). The Act directly regulates the formation of a company and its registration; the role of the management; accounting and disclosure and the rules applicable in case of winding up of the company or insolvency. Subsequently, there were several interventions by the legislator, one of the main ones being the Companies Act 1990, which introduced the "*examinership*" procedure.

In 2001 the legislator made an attempt to reorganize the system: the Law Enforcement Act was passed and it consolidated the Companies Acts, 1963 to 1999[64]. The law also appointed the Company Law Review Group (**"CLRG"**) as official advisor of the Irish Minister for Business, Enterprise and Innovation on the improvement of company law in Ireland. However, despite the various amendments that have taken place over the years, the core of the Principal Act has remained unchanged until 2014, when the Companies Act 2014 was passed.

In fact, the new act extensively changed all the previous legislation, which are nowadays collectively referred to as the *Companies Acts 1963 to 2013*.

[63] However, implementation through Statutory Instruments is admitted as well

[64] *Law Enforcement Act* [2001], sec. 1

2.1.2 The Company Law Review Group (CLRG)

The Company Law Review Group is an administrative body, established in 2001 by virtue of section 67 of the Enforcement Act[65]. Later, Companies Act 2014, section 958 confirmed its role[66]. Subsequent sections regulate its structure and functioning and define its mission.

The group is subject to the authority of the Minister for Business, Enterprise and Innovation who decides the number of members and appoints them and also its chairperson. At least once every two years the Minister also has the obligation to settle the group's strategy and to verify its implementation. In turn, the Group sends an annual report about its activities to the Minister. The Minister himself is also entitled to submit issues to the Group for a review.

The CLRG is an advisory expert committee, meaning it shall advise advise the Minister on Company Law matters and with the purpose "*to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity*"[67].

In particular, the Review Group shall focus on[68]:

- the implementation and amendment of the Act;
- the consolidation of the enactments to amend the Act or the preparation of a restatement under the Statute Law (Restatement) Act 2002 in respect of them;
- the introduction of new rules relating to the operations of companies and commercial practices in Ireland,
- issues arising from the State's membership of the European Union, to the extent they might affect the Companies Act; and
- international developments in company law.

[65] Company Law Enforcement Act 2001, sec. 67: "*There is hereby established a body to be known as the Company Law Review Group.*"

[66] Companies Act 2014, sec. 958 (1): "*The Company Law Review Group, established by section 67 of the Company Law Enforcement Act 2001, shall continue in being.*"

[67] Companies Act 2014, sec. 959 (2)

[68] Companies Act 2014, sec. 959 (1)

The Company Law Review Group played a key role in the 2014 reform. In fact, both the general scheme of the Companies Bill 2012 and the Companies Act 2014 were modeled mainly on the basis of its "*First Report*"[69] and other following reports.

2.1.3 The framework before the reform

Before the Companies Act 2014, in Ireland business can be carried out with one of the following structures:

- sole trader
- partnership
- unlimited companies
- limited companies:
    - i. public companies;
    - ii. private companies limited by shares or by guarantee

For the purpose of this dissertation, it is not necessary to recall the concepts of sole traders and partnerships that do not fall within the scope of the Companies Act. Instead, it may be useful to provide some preliminary information on the framework in which the reform of 2014 developed.

The Act reformed mainly the structure and the regulation of private limited companies. Basically, a limited company is a company which benefits from the recognition of the limited liability, meaning that members are liable within the limit of the shares subscribed (*limited by shares*) or the to the amount they have guaranteed in the company constitution (*limited by guarantee*).

A limited company is also a separate legal entity. However, under certain circumstances, the courts are allowed to remove the limited liability protection (*piercing the corporate veil*)

A private company is a form of limited company. According to sec. 33(1) of the Companies Acts 1963 -2009, a private company shall have a share capital (although

[69] Company Law Review Group, 2001, *First Report on the Company Law Review Group*, Dublin

there was no minimum capital requirement), a number of members between one[70] and ninety nine, and should apply restrictions to the transfer of its shares.
The private company, in order to incorporate, shall have a constitution made of two documents: the memorandum and the articles of association.
Private companies were also required to have at least two directors and must hold an AGM, the only exception being provide with regard of a single member company. Additionally, they could not issue shares and debentures, neither calling for a public subscription.

According to the Companies Act 1963 a public company is any registered company which is not a private company. Besides this very plain definition, a public company is a company limited by share, which is allowed to offer its share and debentures to the public. Under Irish law, seven members are required to register. Because of this privilege, public companies are also subjected to stricter rules and a significant amount of duties, in particular with reference to the disclosure of financial information.

2.2. The Companies Act 2014

The **Companies Act 2014** (No. 38 of 2014) was signed on December 2014, but entered into force in June 2005. The Act includes over one thousands sections, distributed into 25 parts and 17 schedules, making the Companies Act one of the largest piece of legislation in Ireland. As already mentioned, the reform is mainly based on the work of the CLRG, in particular with regard to the recommendations and the guidelines outlined in the *First Report*.
Formally, the act has repealed all previous legislation, but most of the provisions are nothing more than a re-enactment of the existing law. Still, this reform is considered one of the most significant to the Irish system, because of the range of novelties introduced.

The two principles underpinning the reform were: simplification and "*think small first*". The main purpose of the legislator was a *simplification* of the Irish company

[70] Originally two members were required. The law was changed in 1994 in compliance with Twelfth Council Company Law Directive (89/667/EEC).

law. On a first level, simplification is structural. Despite its length, the companies act 2014 consolidates all previous legislation, reducing the company law sources.
The other aspect on which simplification has been implemented is the contents of the Companies Act themselves. Most of the amendments included in the new text are intended to make statutory rules and proceeding clearer and more accessible. The aim is to "*make it easier for companies to do business*"[71].
From this point of view different provisions can be mentioned. Among the most relevant ones:

- introduction of a universal procedure, namely the *summary approval procedure* by which companies can engage in certain activities (i.e. reduction of company capital, voluntary winding up, mergers of private companies) that otherwise would be restricted. The procedure requires the shareholders' consent and a directors' declaration of solvency but avoids the company to enquire a Court for the approval of the transaction[72];

- re-organization of company offences into a four-tier model, classified by the intensity of the offence, with Category 1 being the most serious;

- codification of the duty of directors[73], meaning those fiduciary duties previously defined by the case law such as the duty to exercise skill and care, the duty to act in the interest of the company and so on;

- recognition and regulation of the mergers between two Irish private companies, thanks to a procedure modelled upon the EU Cross-Border Merger Regulations[74];

However, the Review Group also provided recommendations on the protection of creditors and shareholders. In fact, the need for simplification could have come into

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[71] Conway & Kavanagh, 2015, p.140

[72] Companies Act 2014, Part 4, Ch 7

[73] Companies Act 2014, sec. 228

[74] Companies Act 2014, Part 9, Ch 3

conflict with the protection of the latter. In this regard, the CLRG refused "*unnecessarily complex*" measures and expressed its favorable opinion – at least concerning private companies - towards the preventive validation and *de minimis* exceptions in case of irrelevant transactions[75].

Also, the CLRG "*fully*"[76] endorsed the "*think small first*" approach, which was the guidance of the UK Companies Act 2006 as well. The key implication was the focus on small companies. Finally, the reform puts the private companies "*at the heart of company law*"[77].
Indeed, the Companies Act 2014 completely amends the discipline of registered private companies. The Consolidation Report (2007)[78] distinguished between two pillars: *pillar A* was concerned with the private companies limited by shares (LTD). Despite the name, this a new type of company which will endorse the majority of the changes in the law applicable to private company. Instead, *pillar B* dealt with all the other types of company (including public and unlimited companies).
Besides this, the old models are dismissed and all private companies are obliged to convert into one of the following types:

- private companies limited by shares (LTD);
- designated activity company (DAC).

Also, there is a simplification of the regulatory system: parts 1-15 contain general provisions that apply to all private companies limited by share, including DACs, unless expressly waived by other sections of the Act. Starting from part 16 (DAC), each company has a dedicated part and its own provisions, which eventually prevail over the general ones.

Finally, there is a substantial lessening of administrative burdens concerning either the constitution and registration level, either corporate governance and management

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75 Company Law Review Group, 2001, p. 43

76 Company Law Review Group, 2001, p. 15

77 Conway & Kavanagh, 2015, p.137

78 Company Law Review Group, 2007

(see below 2.3). To facilitate compliance with the new measures, the legislator has disposed a transition period of eighteen months (ending November 30, 2016[79]). At the end of this period, the companies that have not made any choice are automatically converted into an LTD.

Interestingly, however, during the transition period, all the private limited companies already existing were subject to the DAC regime, unless they had already converted into an LTD.

The introduction of these two new models responds to another of the main points of the First Report, namely the company's capacity and the issues concerning the *ultra vires* doctrine. In fact, because of English influence, Ireland also embodied in its legal system the theory of special capacity and the *ultra vires* doctrine, but with far more severe and disadvantageous consequences.

2.3. The Designated Activity Company (DAC)

The Designated Activity Company (DAC), or alternatively *Cuideachta Ghníomhaíochta Ainmnithe* in Irish, is the new model of company introduced by the Companies Act 2014. The legislator has provided two types of DAC, both having a share capital:

i. DAC limited by shares; and
ii. DAC limited by guarantee[80].

Apparently, it is a type of company that has no correspondence in the previous legislation. Actually, the DAC limited by shares will be the one that "*most closely resembles*"[81] to the former private company limited by shares.

Unlike an LTD, the DAC must necessarily include an objects clause in its articles. This difference at the moment of the constitution determines then a large number of

[79] However, an existing private company whishing to convert to a DAC shall have completed or at least commenced the conversion process by September 30th, 2016

[80] A company limited by guarantee, not having a share capital, is a Company Limited by Guarantee (CLG) pursuant Part 18, CA 2014

[81] McCann Fitzgerlad, 2015

differences about the applicable rules. In fact, many of the provisions about DACs should be interpreted by contrast with those concerning LTDs.

In short, the differences between a DAC and a LTD can be summarized as follows:

- both companies can be limited by shares, but only DACs can be limited by guarantee;
- the constitution of a LTD is made up of a single-document, while a DAC shall provide two different documents: a memorandum and the articles;
- a DAC is required to include an objects clause in its memorandum and its capacity is therefore limited;
- only LTDs are allowed to have a single director, but they shall appoint a company secretary as well, meaning that both companies will have at least two company officers[82];
- a multi-member LTD can be dispensed from holding an AGM, while a DAC may avail of this exemption only when it has a single member;
- neither type of company may offer securities to the public, but a DAC can trade and list its debentures;

The provisions concerning this new model are covered by *Part 16* of the Act, but according to the new structure of the Companies Act, the *Parts 1 to 14* also apply, within the limits of *section 964*[83] (see Table 1) or except when they are disciplined by other rules.

[82] This provision notes in order to identify the people authorized to negotiate on behalf of the company

[83] Companies Act 2014, sec 964: "(1) *The provisions of Parts 1 to 14 apply to a DAC except to the extent that they are disapplied or modified by—(a) this section; or (b) any other provision of this Part. (2) For the purposes of that application, section 10 (1) shall have effect as if it read: (1) Unless expressly provided otherwise, a reference in Parts 2 to 14 to a company is a reference to a DAC. (3) Subject to subsection (4), the provisions of this Act specified in the Table to this section shall not apply to a DAC. (4) In relation to a DAC limited by guarantee the non-application of section 32 (1) is provided for by section 976 and, accordingly, the entry of that provision in the Table to this section shall (so far as it relates to that type of DAC) be disregarded. (5) The specification in the foregoing Table of a provision (a "specified provision") of Parts 1 to 14 also operates to disapply to a DAC any other provision of those Parts (notwithstanding that it is not specified in that Table) that*

Table 1 – Provisions disapplied[84] to DACs

Subject matter	Provision disapplied
Way of forming a private company limited by shares	s. 17
Company to carry on activity in the State and prohibition of certain activities	s. 18
Form of the constitution	s. 19
Certificate of incorporation to state that company is a private company limited by shares	s. 25
Provisions as to names of companies	s. 26 (1) to (4)
Trading under a misleading name	s. 27
Amendment of constitution by special resolution	s. 32
Capacity of private company limited by shares	s. 38
Variation of rights attached to special classes of shares	s. 88
Directors	s. 128
Share qualifications of directors	s. 136
Liability as contributories of past and present members	s. 655

makes consequential, incidental or supplemental provision on, or in relation to, the specified provision".

[84] Source: <http://www.irishstatutebook.ie>

2.3.1 Scope of Part 16

The DAC is a company model that can be freely adopted by any private company. In fact, there is no type of foreclosure on companies that can choose this type, as long as (a part of) its activities are carried out in the Republic of Ireland.

Instead, some existing private companies have had to convert into a DAC at the end of the transition period. First, existing private companies limited by guarantee with a share capital were converted to DACs by virtue of ss. 979-980 CA 2014, because LTD can only be limited by shares.

Moreover, insurance undertaking, credit and any other regulated financial institutions[85] are obliged to adopt this model, unless they wish to turn into a public company (PLC)[86]. Likewise, companies wishing to issue debt securities or lists debt instruments are bound to convert to a DAC, since LTDs are not allowed to do this kind of transactions. It is important to notice that already existing companies who had issued notes on regulated markets before the Companies Act 2014 were forced to convert into DACs and were also obliged to give notice to the note-holders. For instance, when Ryanair Limited (formally, a subsidiary of Ryanair Holdings PLC) recently[87] converted into a DAC, both the Irish Stock Exchange and the London Stock Exchange released a company announcement as Ryanair had notes listed in both those markets.

However, it is more likely that most companies prefer to adopt an LTD structure[88], because of the lighter regulation and administrative burdens. Still, some businesses may be interested in converting to a DAC.

Among these, in particular the *special purpose companies* or *vehicles* (**SPV**), i.e. those companies that have been set up solely for performing a single kind of transactions and which generally list debt securities.

Probably, these companies were the main target of the DAC structure. In fact, the First Report makes explicit reference to them and to the urge to adopt this new one, in the interests of investors[89].

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[85] Companies Act 2014, sec 18 (2)

[86] Companies Act 2014, sec 68 (2)

[87] Official notice to noteholders was given on February 2017. The LSE announcement is available at < https://www.londonstockexchange.com/ >.

[88] William Fry, 2016

Another class of subjects that might be appealed by the DAC are minority shareholders. It is plain and simple that in a company of this type, these subjects are more shielded against abusive behaviors.

Actually, the Companies Act 2014 includes some remedies. Broadly speaking, minority shareholders who believed that the directors had used conversion (or non-conversion) to the detriment of their interests or in order to oppress their rights, could have brought the matter before the Court to obtain an injunction[90].

Also, in case of automatic conversion into an LTD, members can object to the constitution modification. Thus, one or more members of the company, which hold at least 15% of the issued share capital, are entitled to apply to the court to seek an order to re-register as a designated activity company[91].

The provision also applies to creditors who hold at least 15% of the company's debts. However, this suggestion loses relevance in light of the limited scope of the company's capacity provisions.

Similarly, companies who had had issues related to the corporate governance (for instance, because of a merger) or companies where a shareholders' agreement is in force may prefer to not jeopardize their current governance with a simplified model that does not guarantee the same balance.

Finally, according to the Group, also companies, whose main activities are of a charitable nature, may have required the retention of designated objects. The CLRG also recommended (par.10.9.9) the *ultra vires* to be still applicable to those companies[92]. In the final version, charitable activities may be exercised in the form of a DAC, and companies for this purpose may be exempted from including DAC

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[89] From the First Report, par. 10.9.2: "*Individuals or corporations often form what are described as "special purpose companies" or "special purpose vehicles." As the name suggests, these are companies incorporated for a special purpose such as a joint venture or a financing company used in a single specific financing transaction. Many of these entities are used in transactions concluded in the International Financial Services Centre and are a recognised mechanism for achieving the legitimate expectations of the parties involved. It is considered by the company's promoters, in many such cases, to be essential that such companies are not empowered to enter into other transactions. Accordingly, the Review Group recommends that the doctrine of ultra vires be retained for special purpose companies.*"

[90] Companies Act 2014, sec. 202

[91] Cox, 2015, p. 20

[92] Company Law Review Group, 2001, p.227

suffixes, or equivalent, in the name and other regulations regarding financial statements and disclosure.

2.3.2 Incorporation of a DAC

The incorporation procedure is regulated by the same procedure of the LTD. In order to incorporate a DAC should submit its constitution to the Irish Companies Registration Office (**CRO**). The CRO checks that the requirements of the Companies Act have been met and, consequently, grants the certificate of incorporation (COI) to the company. The COI also recognizes the separate legal personality.
However, there are significant differences in the documentation to be attached. In compliance with section 967 CA 2014, the constitution of a DAC is divided into *two* documents: a memorandum of association and the articles.

Following, the memorandum must include:

- the name of the company[93], which also contains the expression Designated Activity Company or its Irish equivalent, or alternatively the related suffixes (*dac*, *cga*)[94];
- the status of a private company limited by shares or by guarantee;
- the objects clause (see below, ch. 2.3.6);
- the amount of share capital (DAC limited by shares) and, if necessary, the amount each member will contribute to the assets of the company (DAC limited by guarantee) in case of winding up;

Instead, the articles of a DAC contain company's internal rules. Articles can not exclude or amend any mandatory provision in the Companies Act 2014. However,

[93] A company other than a DAC trading with a misleading name can be charged with a category 3 offence, pursuant sec 970, CA 2014

[94] The only exception occurs in the case of charities or other no profit entities, properly registered to the CRO, which may be dispensed (sec 971, CA 2014)

the articles may also be a simple statement that the company complies with the provision - both mandatory and optional - of the Act[95].

In order to comply with the law, a DAC can have a limited number of members. The current limit is set to 149 members, excluding current or former employees. In case of share owned jointly by two or more people, the different holders are counted as one member[96]. Individuals registered exceeding that limit are not considered members of the company.

Also, "*for the avoidance of doubt*"[97], the members of a DAC limited by guarantee are exclusively a subscribers to its memorandum or a person who is subsequently allotted a share.

In conclusion, the company's constitution has the effect to bind the company and the members to observe its provisions (sec. 31, CA 2014).

2.3.4 Corporate Governance

The Companies Act 2014 also includes some provision aimed at regulating the corporate governance of the DACs. First, a company registered with this model must necessarily have at least two directors[98].

The director must be at least 18 years old and can not hold the same position in more than 25 companies subjected to the Companies Act 2014.

Therefore, the possibility of having a sole director is reserved for LTD. The difference in the regime appears clearer in the light of the Review Group's considerations[99].

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[95] Companies Act 2014, sec. 968

[96] Companies Act 2014, sec. 965

[97] Companies Act 2014, sec. 989

[98] Companies Act 2014, sec. 985

[99] Notably, parr. 11.8.5-6: "*Therefore, whilst allowing for single member companies, Irish law has preserved the requirement for two directors. This has had the perverse consequence (by anecdotal evidence of the members of the Review Group) of this form of corporate entity being used predominantly other than by entrepreneurs, and instead being used by Irish subsidiaries of multinational groups. Incorporation and limited liability are of course privileges conferred by the law and it is proper that in certain circumstances – most notably in the case of quoted companies – that there should be a requirement for more than one director. This aims to ensure that there will*

According to CLRG, the requirement of more than one director is complementary to the limited liability, as the involvement of several people allows to limit the use of limited companies as a mere façade.
The practice, however, had shown how often the appointment of a second director was fictitious, with the sole purpose of comply with the law.
The legislator therefore chose to introduce two different regimes. For structures such as LDTs, smaller and less likely to be used for abusive purposes - also considering the impossibility of obtaining, for example, funding through securitized debts - has acknowledged the possibility of a sole director, also with the purpose of lessening the administrative burdens.
Whilst, for companies like the DACs, on the other hand, the obligation to have more than one director stays.
This type of company, in fact, presents a neater separation between shareholders and management and therefore requires additional control. Besides, it is a more complex model, whose activities may involve a wider range of interest, requiring necessarily a structured management.
Similar arguments may apply also to the provision concerning the AGM. Pursuant sec. 988 CA 2014, a multi-member DSC is required to hold an AGM, while LTD are dispensed.
Indeed, the First Report noted that the closer the relationship between shareholders and directors, the more futile was the AGM, to the point that for some companies was nothing but an "*empty gesture*"[100]. Again, the legislator preferred a double solution. Notably, in the DACs, the AGM may also serve the purpose to voice the rights of the creditors of the company, i.e. those holding secured debts.

Finally, the Companies Act 2014 (sections 989-990) gives DACs the right to use the written resolution system, in the manner prescribed for an LTD[101]. A DAC can use

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always be at least two senior individuals involved in the management of a company so that abuse of limited liability can to some extent be limited." Company Law Review Group, 2001, p.246

[100] CLRG, 2001, p. 6

[101] This is a system regulated by sections 193-194 CA 2014, that allows the company to pass a a special or an ordinary resolution trough some writing signed by the members of the company. Effects of the written resolution vary upon the majority required and in relation to the provision of the company's constitution.

both unanimous written resolution and majority written resolution, unless the constitution prohibits it.

2.3.4 Other applicable provisions

One of most interesting features of the DAC model is that these companies are allowed to list debentures and other debt instruments on a recognized stock exchange[102]. Anyway, a DAC is still excluded from trading shares or other equity instruments. A company wishing to do so shall necessarily transform into a PLC.
The issuing of those instruments is subjected to the same rules provided for a public company. For instance, by virtue of sec 999, rules concerning public offers, market abuse, etc. are applicable to the extent that those latter may be relevant.

Similarly, a DAC with debentures admitted to trading shall comply with requirement in Chapter 3, Part 23 for a corporate governance statement, in respect of the financial year concerned[103]. Additionally, in case of traded debentures the company cannot be exempted from auditing. The same rule applies to DACs - or its holding – being a credit institution or insurance undertaking[104].

2.4. Objects clause and capacity of a DAC

The main feature of a DAC is related to its objects clause. In fact, this sort of company shall state its purpose in the memorandum. As a consequence, the capacity of the company will be limited and the *ultra vires* rule will apply, even if with some differences from its original formulation and from its UK equivalent.

2.4.1 The development of the ultra vires doctrine in Ireland

As mentioned above, the principles of Irish law derive for the most part from the English common law tradition. As a result, it embodied also the *ultra vires* doctrine.

[102] Companies Act 2014, sec. 981

[103] Companies Act 2014, sec 992

[104] Companies Act 2014, sec 994

However, the Irish judiciary developed its own position, which tried to mitigate the most unfavorable and criticized aspects of the doctrine.
Actually, when the process of codification began, the Cox Report (1958) had expressed concerns and conflicting views about whether to include it or not in the statutory law.

On one hand, the Committee observed that the function of the objects clause was traditionally connected to the protection of shareholders (in a passage from the Report: "*The directors would be able to endanger the shareholders' monies by carrying on other types [of business]*") and those who deal with the company. However, this function had been greatly affected by the practice of objects clause being "*drafted with unduly prolixity*"[105]. At the end of the paragraph the Committee concluded that there were reasons enough to dismiss the doctrine.
On the other hand, the following paragraph (par. 50) highlights how a similar recommendation was also supported by the Cohen Committee (1945) but had not made into the English legislation. The Cox Report therefore concluded that there were "*strong reasons*"[106] to maintain this doctrine.
At most, the legislator could have removed the obligation to seek the approval of the Court to amend the objects in the memorandum. As a result, the *ultra vires* doctrine was included in the Companies Act 1963. More precisely, the *ultra vires* rule – as stated in *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875)[107] and related decisions – was applicable by virtue of s.6 (1)(c) a company was bound to have an objects clause in its memorandum.
Significantly, the Companies Act 1963 also included a provision (sec. 8(1), CA 1963) aimed at define the scope of the ultra vires doctrine.
The provision was formulated as follows:

"*Any act or thing done by a company which if the company had been empowered to do the same would have been lawfully and effectively done, shall, notwithstanding that the company had no power to do such act or thing, be effective in favour of any*

[105] Company Law Reform Comittee, 1958, pp.20-21
[106] *Ibidem*
[107] The authority of the decision in Ireland was expressly stated *in Re Cummins, Barton v Bank of Ireland* [1939] IR 60

person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company, but any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof."

Notably, according to the relevant case law the two conditions are not alternative. Therefore, sec. 8 (1) is applicable if the conditions are both met.

The first leading case, revolves around the scope of the section and the interpretation of the expression "*lawfully and effectively*". The point was to exclude from the scope of sec. 8(1) CA 1963 transactions which conflicted with the statutory law or the existing case law. In *Bank of Ireland Finance Ltd v Rockfield Ltd* (1979)[108] the plaintiff had given a loan to the company to purchase its own shares. This sort of transaction was not included in the memorandum but the bank invoked sec. 8 to achieve the repayment of the loan.

However, the Court ruled that sec. 8 did not apply the transaction was forbidden under the Companies Act. Hence, the contract was void, because the transaction itself would have been deemed unlawful, even in the case the company had it included in its objects.

Similarly in *Re Fredericks Inn Ltd.* (1994)[109] the holding company Motel Ltd had made some payments for a tax settlement trough its subsidiaries, including Fredericks Inn Ltd. Later, Fredericks Inn Ltd. and other subsidiaries became insolvent. The liquidator of the companies tried to get the reversal of payments because the objects clause did not include the payment of the debts of affiliated companies while the Revenue Commissioners invoked sec. 8 (1).

The Supreme Court ruled in favor of the companies. In its opinion (394-395), Blayney J. held that sec. 8 was, indeed, applicable. However, the payments were void because this type of transaction, in case of insolvency, was in breach of the directors' fiduciary duties to the creditors and, thus, unlawful.

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108 *Bank of Ireland Finance Ltd v Rockfield Ltd* [1979] IR 21

109 *Re Frederick Inns Ltd* [1994] 1 ILRM 387

Re Fredericks Inn Ltd. also provides the basis for the analysis of the second requirement included in sec. 8(1), namely the expression "*actually aware*". When the case was brought before the High Court[110], Lardner J declared the tax payments void on the grounds that the Revenue Commissioners were aware of the risky financial position of the companies.

However, concerning the common interpretation of the expression "*actually aware*" the milestone case is *Northern Bank Finance Limited v Quinn & Achates Investment Company* (1979)[111][112]. The case concerned a loan borrowed from the plaintiff and secured by a guarantee of the defendant company. Mr Quinn did not repay his debt and the plaintiff bank sued him. In its opinion, Keane J. held that the transaction was *ultra vires* and was not covered by sec. 8 because there was evidence that the company had provided its memorandum to the plaintiff, but the solicitor of the bank had faultily not discerned the transaction to be *ultra vires*. This decision was strongly criticized (Ussher, 1986).

As noted by Mc Grath and Murphy[113], the decision resulted in an unjustified position of advantage for the subject who had not become aware of the memorandum, compared to who had read the constitution but had failed at understanding it. However, Keane J. had the merit to have stressed the necessity of interpreting the term "actually aware" as *subjective knowledge* test, rather than "*simply knowledge*"[114].

In sum, the position of Irish law on the *ultra vires* was slightly stricter of the one achieved in the UK. While the core of the rule is the same, the burden for the outsiders is higher in Ireland. In fact, while sec. 8 aimed mitigated the effects of the rule of the constructive notice, several decisions admitted an investigation on the outsider and his conduct, which had no correspondence in the text of the provision neither in the English rule[115].

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[110] *Re Frederick Inns Ltd* [1991] 1 ILRM 582

[111] *Northern Bank Finance Limited v Quinn & Achates Investment Company* [1979] ILRM 221

[112] Anderson, 2003, p. 276

[113] Mc Grath & Murphy, 2008, p.18

[114] Also Samad, 2013, p. 55, under note 106

[115] Anderson, 2003, p. 277

Indeed, the Companies Act 1963 had achieved *"a useful compromise*"[116] between the rights of the third parties dealing with the company and the rights of the shareholders.
One one hand, shareholders may have not benefit from the protection of the *ultra vires*, but by virtue of sec. 8(2)[117] they could have sought for an injunction to stop misbehavior from directors or other individuals acting on behalf of the company.
On the other hand, the outsiders would have been affected from the consequences of an activity only when they were culpably unaware of the contents of the memorandum or of the nature of the activity undertaken.

Interestingly, this section in some respects anticipates the position of the European legislator, in the First Company Law Directive (1968). In fact, despite the directive had been implemented in Ireland by the *European Communities (Companies) Regulations of 1973*[118], sec. 8 was not amended, as the EU rule was in some ways "*more limited*"[119] than the national one.

Another aspect on which the courts have tried to intrude is the drafting of the objects clauses. In fact, one of the techniques endeavored to limit the effects of the *ultra vires* doctrine was the use of ample clauses to encompass the greatest number of activities and powers[120]. However, despite these expedients, the *ultra vires* doctrine continued to lose relevance, pushing the legislator towards reform.

2.4.2 Company's capacity in the view of the CLRG

As for the rest of the Companies Act 2014, the subject of objects clauses and the ability of the company were both addressed by the CLRG. Actually, the First Report has a whole section (*chapter 10*) dedicated to this subject.

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[116] Mc Grath & Murphy, 2008, p.18

[117] Companies Act 1963, s. 8(2): "*The court may, on the application of any member or holder of debentures of a company, restrain such company from doing any act or thing which the company has no power to do.*"

[118] S.I. No. 163/1973

[119] Hutchinson, 2016, p. 225

[120] *Re P.M.P.A. Garages Ltd* [1992] IRLM 337

The purpose of the Group is to give evidence of the necessity that a private company has the same capacity of a natural person.
After a long historical reconstruction and a comparison with other countries of common law tradition, the CLRG concludes that, current trends and practices in company law "*rendered the rationale of the ultra vires doctrine obsolete in the 21st century*"[121]. The Group, among other reasons[122], underlines how the doctrine has failed in its main purpose, namely the protection of creditors and shareholders. It is interesting to note that the CLRG also makes recommendations on the practical aspects of the abolition of the doctrine, so as to make it effective.
For instance, the statutory reform shall award the entities dealing with the company with "the full benefit", so that consulting the memorandum would not longer be required in any case.
However, based on the approach "*think small first*", those reasoning apply exclusively to the private companies limited by shares. In fact, the Group sustains that the public companies shall be required maintain an objects clause.
The recommendation is manly based on the compliance with the Second Directive[123], which requires public companies to retain an objects clause.
More surprisingly, the CLRG introduced also a general company type which is allowed to retain an objects clause. As a matter of the fact, the CLRG in its First Report had acknowledged that some entrepreneurs and other company law users

[121] Company Law Reform Group, 2001, p. 226

[122]Company Law Reform Group, 2001, p.227, par. 10.9.1: "*The Review Group makes its recommendations for the repeal of the ultra vires doctrine for private companies limited by shares because: (i) ultra vires offers little if any protection to shareholders; ultra vires has operated to the detriment of creditors; (ii) ultra vires entails additional work to be undertaken by persons and their agents in the preparation of a company's constitution prior to its incorporation, as well as additional work by the CRO prior to the company being granted a separate legal status; (iii) ultra vires results in additional delay and costs being incurred by purchasers, borrowers, guarantors (and other parties) in completing their business transactions; (iv) ultra vires has resulted in some persons, who have entered into commercial arrangements in good faith, having their legitimate expectations thwarted; (v) ultra vires has resulted in companies having pages of objects (and powers) so that they can carry out virtually any (non-regulated) activity thereby rendering the rule meaningless*."

[123] Second Company Law Directive 77/91/EEC

may have an interest into incorporating a private company that has an objects clause. However, the focus of the Group for the DAC was "*special purpose companies, i.e. incorporated for a special purpose such as a joint venture or a financing company used in a single specific financing transaction*"[124].

Although the legislator decided not to restrict the availability of DACs solely to persons concerned with those activities, resulting into the current structure of the companies Act.

2.4.3 Objects clause and ultra vires under the Companies Act 2014

Nowadays a DAC can be established "*for any lawful purpose*"[125]. The objects clause in the memorandum can be altered by a special resolution or in compliance with the rules set forth in sec. 974-975[126]. In particular, a resolution amending the objects may be cancelled (or confirmed) by the court. The application can be filed by: i) one or more members representing not less than the 15% of the issued share capital; ii) one or more subjects holding not less of the 15% of the DAC debentures. However, people who have "*consented or voted in favor*" to the resolution are not entitled to apply to the court under this section.

The backbone of the new approach to the *ultra vires* doctrine is sec. 972 (1)[127] which states that a DAC "*shall have the capacity to do any act or thing stated in the objects set out in its memorandum*". This provision might seem like a reshaping of the original form of the *ultra vires* doctrine, which implies a special capacity of the

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[124] Company Law Review Group, 2007, p.75

[125] Companies Act 2014, sec. 965 (1)

[126] This procedure might be applied to other company operations, cfr. sec. 174 (7)

[127] Companies Act 2014, sec. 972: "(1) *A DAC shall have the capacity to do any act or thing stated in the objects set out in its memorandum. (2) For the purposes of subsection (a) the reference in it to an object includes a reference to anything stated in the memorandum to be a power to do any act or thing (whether the word "power" is used or not), (b) if an object is stated in the DAC's memorandum without the following also being stated in relation to it, the capacity of the DAC extends to doing any act or thing that appears to it to be requisite, advantageous or incidental to, or to facilitate, the attainment of that object and that is not inconsistent with any enactment, and a subsequent reference in this Part to an object of a DAC shall be read accordingly.*"

company, in spite of the evolution of the case law. In reality, the new rule must be read in conjunction with the subsequent s. 973(1) which states: "*The validity of an act done by a DAC shall not be called into question on the ground of lack of capacity by reason of anything contained in the DAC's objects*."

Unsurprisingly, the new model does not affect the position of outsiders dealing with the company, since it would have been in contrast both with the previous discipline and with EU rules.

On the contrary, the burden on third parties is further reduced by the sec. 973(5), which clearly states that a party is not required to investigate the DACs objects. This part of the reform reflects the recommendations expressed in the First Report on the effective protection of third parties from the effects of *ultra vires*. The CLRG had found that in business practice it was still common use to enquire the capacity of the company.

Consequently, in the light of a very rigid case law on the interpretation of the expression "*actually aware*" (see above), the protection for third parties was nullified. Hence, from the point of view of the external relevance of the objects clause, the Companies Act does not strengthen it. On the contrary, to some extents, it is further reduced, unless the case law would resolve otherwise.

Somehow, the reform shifts the focus of the *ultra vires* doctrine from the third parties to the directors. It echoes that "*internal dimension*" of the objects clause which had already emerged in the UK Companies Act 1989. Indeed, the most interesting aspect of the new statute is the provision in sec. 973(3)[128]: the re-enactment of the limited capacity is complemented by the codification of general duty for the directors to have regard of the restriction set forth in the objects clause.

The rule gains even more relevance in light of the fact that a similar duty is already included in s.228[129], as a general obligation for all types of companies.

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[128] Companies Act, sec 973 (3): *Notwithstanding the enactment of subsection (1), it remains the duty of the directors to observe any limitations on their powers flowing from the DAC's objects and action by the directors which, but for subsection (1), would be beyond the DAC's capacity may only be ratified by the DAC by special resolution.*

[129] Companies Act, sec. 228 (1)(c): "*A director of a company shall […] act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law*"

This rule serves two purposes. First, it prevents directors from engaging in activities falling outside the objects in the memorandum, on the ground that the validity of the transactions entered by a DAC cannot be affected from the lack of capacity.

Moreover, the codification of such a duty implies that in the event that the director acts in breach of this obligation, he/she may be held liable in any case, notwithstanding any ratification or approval of the transaction by the company. Thus, the company can sue the director in order to recover losses or, eventually claim any profits, besides being awarded with the damages.

Finally, as hinted before, a company is allowed to ratify a transaction[130], that otherwise would be deemed to be *ultra vires*, without affecting any of the directors' liabilities.

This provision remarks the end of the theory of the special capacity in Ireland, too. Indeed, the fact that the company is allowed to ratify the operation in spite of its objects, implies that the limit set in sec.972 is not an absolute limit as the tenets of the special capacity held.

The endorsement requires a special resolution and does not exclude any liability incurred by the directors or any other person. A DAC may agree otherwise by passing a separate special resolution.

2.5 A balance of the Irish reform

In light of the above, the Irish reform has many points and purposes in common with other recent reforms. The Companies Act 2014 meets the same needs for simplification of the system, reduction of burdens administrative and flexibility of the corporate models that occurred, for instance, in England or in Spain.

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[130] Companies Act 2014, sec. 973 (3)(4): "*Notwithstanding the enactment of subsection (1), it remains the duty of the directors to observe any limitations on their powers flowing from the DAC's objects and action by the directors which, but for subsection (1), would be beyond the DAC's capacity may only be ratified by the DAC by special resolution.*

A resolution ratifying such action shall not affect any liability incurred by the directors or any other person; if relief from any such liability is to be conferred by the DAC it must be agreed to separately by a special resolution of it."

It is clear that many provisions are modeled on the basis of the UK Companies Act 2006. Apart from the endorsement of the "*think small first*" approach, the UK Act also included a codification of director duties and several section aimed at lessening the administrative burdens for private companies.

In Ireland, most of these issues are addressed and resolved by the introduction of the LTD. And unsurprisingly, most of the related provisions – such has the exemption from the AGM or the single-director managing body - match those in the UK Companies Act 2006.

Notably, even the English legislature had rejected the *ultra vires* doctrine, with the introduction of private companies with unrestricted objects.

However, while in the English system it is deemed to be a general rule, which does not imply significant differences in the applicable regime, the Irish solution is articulated in the forms mentioned up to this point.

This difference has a certain relevance, since the Irish legislator had a stronger push towards the repeal - or at least the downsizing - of the *ultra vires* doctrine, which in that framework still had sharp edges. Therefore, that begs the question as to what was the purpose of the legislator to maintain an alternative company model, such as the DAC.

The most basic answer would conclude that the legislator simply wished to avoid establishing a single legal regime - leaving up to the companies the choice whether or not to retain an objects clause.

However, the argument is incorrect because:

- the legislator could have foreseen a single company type, with the possibility of choice (similarly to the provision of *unrestricted objects* in the UK);
- the two models involve each their own legal regime, which is pretty dissimilar to the other one.

Another possibility would be to assume that the Irish legislator had an interest in maintaining a certain but narrower extent for the *ultra vires* doctrine.

This solution may be deemed more convincing, but still answers only partially the question. As seen above, the intent to reduce the scope of the *ultra vires* doctrine was present since the dawn of Irish codification.

Moreover, under the reform - limited on the basis of the textual data, since a consistent case law has not developed yet – "*the specification of activities does not raise any issue of legal capacity in terms of the old ultra vires rule*"[131]. Although the rule of law formally attributes to the DAC a limited capacity, in reality the company still responds to all obligations in respect of third parties, just as it can decide to ratify the operation that exceeds the corporate purpose.

Apart from the observations made concerning third parties "*actually aware*" of the contents of the memorandum and the possibility for the members to seek an injunction against a transaction deemed to fall outside the objects, there does not appear therefore to be such great differences in comparison with a LTD company, at least in terms of effectiveness of contractual agreements and operations with outsiders.

Hence, the provision of the part 16 can be interpreted in the sense that the according to the Irish legislator the objects clause is involved in more matters other than the company's capacity, highlighting some of the flaws in the application of the *ultra vires* doctrine. For instance, in motivating why a private company should ditch the requirement of setting out objects and powers, the Review Group held an argument that generally private companies are "*closely held companies*" where property (the shareholders) and the management tend to overlap[132].

Notably, the legislator has also chosen not to extend to the DACs the simplified corporate governance regime introduced for the LTDs. Somehow, the objects clause turns out to be a useful regulatory strategy to overcome agency problems, but only if a serious danger of the company's wealth being misallocated exist[133].

The flaw in the classic formulation of the *ultra vires* doctrine was that it was applied to all kinds of incorporated companies, regardless of: i) the balance of interests at

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131 Fannon & Cuddihy, 2016, p.16

132 Company Law Review Group, 2001, p. 226, par. 10.9.2: "*The majority of these companies are closely held companies. In many instances the directors and shareholders are likely to be the same people or closely connected. Accordingly, (apart from special types of companies such as special purpose companies59 and property management companies60) the Review Group believes that private limited companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person (without the natural person's incapacity status imposed by being a minor, insane, drunk or being subject to undue influence).*"

133 Mc Grath & Murphy, 2008, p.17

stake (for instance the impact of the business chosen on stakeholders; the entity of debentures the company may ever reach, etc.); ii) the relationship between the management and the shareholders or the degree of separation between them.
The Irish solution makes it possible to apply different regimes to different governance situations, if so to limit the illogical outcomes occurred in the previous case law[134].
In line with this view, despite the limited capacity, the law allows the shareholders to ratify the transaction and boldly remarks the duty of directors to act within the limit of the objects.
Another area in which the *ultra vires* doctrine had proved to be fallacious, undermining the usefulness of the objects clauses, was the protection of creditors, meaning a third party dealing with the company.
With regard of those people, the *ultra vires* doctrine has had some effectiveness in the old legal systems, characterized by a meager regulation and no - or very small - disclosure. Nowadays, abusive or hazardous behaviors are covered and sanctioned by other body of rules (e.g. consumer protection codes; rules on mandatory financial statements).
The advantages offered by the application of the *ultra vires* doctrine are very few compared to the disadvantageous effects on the certainty of trade and trade
However, some categories of creditors may be interested in examining the scope of the activities of the company. This is particularly true when the transaction is more like a financial transaction, rather than a regular commercial one. In this case, the objects can be useful to assess the risks associated with investing. In fact, while the Irish legislator imposes an absolute ban on trading shares and debentures for LTD, it allows DAC to list and trade its debentures on the markets.
In conclusion, in the analysis of the corporate object, the DAC is a very interesting company model because it represents a hybrid between the small private company and the public company.
Hence, it allows to identify different interests and (still actual) issues that belong to the company law, but not necessarily to all types of company, and the way the objects clause may interact with them.

[134] See *Re German Date Coffee Co* (1882) 20 Ch D 169

Also the DAC model shifts the focus of the role of the objects clause from the traditional concerns regarding the limitations arising from the clause to the reason why a certain clause is necessary in a company memorandum. Indeed, the Irish legislator correctly assumed that the objects clause serves as an intentional restriction on the management powers. The old *ultra vires* doctrine no longer has external relevance (relating to powers of representation). However, as the capacity of the company is still limited, the precedents and principles of the previous case law can be applied to the internal relationships, between members and directors, when the latter exceeds their powers.
Finally, once the CLRG has defined which kind of company and the protection of which interests may require a specific statement of the activities undertaken, it tried to introduce a discipline tailored on the structure and the functions on those companies, in order to overcome the weaknesses of the previous discipline and enhance their efficiency, to the benefit of the economic environment, too.

CHAPTER 3 - THE FUTURE OF THE OBJECTS CLAUSE AND AN EU PERSPECTIVE

The main objective of this dissertation is to outline the current relevance and possible new usages of a traditional, and somehow controversial part of the company's regulation like the objects clause.

Given that the rules around the objects are still included in many and many legal systems, the topic is still not so outdated. Although it is undeniable that part of the discipline (and its effects) are to be considered at very least "*old-fashioned*", even countries like the UK or the Spain, which have introduced companies with general objects and, by then, have significantly reduced its incidence in company matters, did not dismiss it completely.

Moreover, it is also a matter of compliance with the EU law, as the more recent Company Directives[135] have reiterated the inclusion of such a clause, in the framework of the protection of the members and other subjects engaged with the companies. Despite what was reported at the beginning of this investigation, a thesis addressed to discredit the value of the objects and to affirm their complete irrelevance shall be rejected.

3.1.1 Interests served by the objects clause

Before analyzing the current role and sensible proposals capable of shaking and enhancing the fate of the objects of the company, it is important to first recap all the various interests at stake, in order to have a better understanding of the possible development and consequences.

However, it is equally important to recall that each of these interests has been associated with the objects at different stages of its evolution. Consequently, the choice of the legislator is also linked to specific historical contingencies.

This implies that as these conditions change, the protection accorded by this instrument must necessarily adapt, expanding now towards one verse now towards another.

[135] For public limited companies see Directive 2012/30/EU, while for companies in general see Directive 2017/1132/EU

i) Interest of the State

As mentioned in chapter 1, at the beginning the incorporation - that is the recognition of legal personality - was granted by the authority (Crown, Parliament, etc.), generally in order to benefit the State itself.

As Brandeis J., noted in its dissenting opinion, in *Ligget. v Lee* (1933)[136]:

"*Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable. It may be granted as a means of raising revenue; or in order to procure for the community a public utility, a bank or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm*".

Although the procedure was quite complex, once the companies were registered, a very little regulation applied. Instead, the authority needed to maintain control over these new entities.

Basically, even before the protection of private interests, the need to constrain the influence of the companies "*was underpinned by concern*[137] *for the possible social, economic and political damage which corporations might inflict*"[138].

It is in this context that the various legal systems introduce the obligation to specify the type of activity carried out by the company (*purpose, affaire*).

[136] *Louis K. Ligget Co. v Lee* [1933] 288 US 157

[137] An even stronger position was held by Brandeis J., in the same decision quoted before, where he affirmed: "*It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. […] The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed.*"

[138] Rajak, 1995, p.18

Still, this restriction would have been meaningless if it had not led to legal consequences, too. The legislator's response was a limitation of the company's legal capacity, culminating in the introduction of the *ultra vires* doctrine in common law, and of the *spécialité statutaire* in France[139]. And indeed, in an earlier phase, the landmark decisions concerning *ultra vires* are often linked to activities of public interest such as railways.

However, the influence of public interests reduced as the incorporation was also extended to private companies. The latter, in fact, were rather enlarged partnerships, with dimensions and social relevance much lower than the first chartered companies[140].

In these companies, instead, the protection shall focus on the subjects who have invested money in the company itself, *i.e.* members and creditors, because the most prominent interests belong to them.

ii) Creditors' interest

Another justification common to the maintenance of objects clause, and therefore to the applicability of the restrictions that derive from it, is the protection of creditors. More precisely, with this tool, the law allegedly aims to guarantee the integrity of the company assets, so that, when necessary, creditors can be satisfied.

The principle is outlined in *Guinness v. Land Corporation of Ireland*[141] (192). In this case, Lord Justice Cotton held:

"*In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid*."

However, this does not necessarily imply that the creditors have an interest that the limit set by the object is respected. Many arguments can support this statement.

[139] Actually, both doctrines are borrowed from public law (La villa, 1974, p. 187). The main difference is that in the latter, it is a remedy for the abuse of power of a public body to the detriment of a private interest.

[140] Verrucoli, 1964, p. 26

[141] *Guinness v. Land Corporation of Ireland* [1882] 22 Ch. D, 349

Firstly, it could not be applied in cases where the *ultra vires* act is financed with funds other than capital assets.
Likewise, the rule would conflict with its own *ratio* - if not becoming even harmful for the creditors - in those cases where the *ultra vires* act does not result in a reduction of the company's assets.
Also, such a general provision applies to creditors as a class, but the individual creditor is not completely protected, with all the impractical consequences[142].
Finally, in the abstract, the fact that contracts and other transactions can be declared void when falling outside the purpose of the company entails more burdens and costs for creditors who - in the absence of any *ad hoc* provision - will have to inquire about the company's statute and, eventually, bear the risk of an empty transaction.
As a matter of the fact, this is a typical approach of the common law tradition[143], which may have its roots in the fact that traditionally those countries did not provide for *minimum* capital requirements.
Moreover, in these countries, creditors generally also hold certain rights concerning the modifications of the object, as in the case of Ireland, mentioned in Chapter 2.
Instead, in the countries of civil law, where this obligation exists, creditors can make claims only with respect to changes in registered capital.
For example, in Italy, by virtue of art. 2445 of the Civil Code, creditors may object to changes (i.e. reduction) of registered capital, but there is no equivalent remedy in the case of changes to the corporate purpose. In reality, there is no doubt that there is a correspondence between the protection of company assets and the protection of creditors[144].
Hence, it follows that any rule – including the provision of an objects clause - that may protect the former, by extension is a protection for the latter, too.

iii) Members' interest

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[142] Gower, 1969, p. 90: "*The individual creditor who had lent money to a company on an* <u>ultra vires</u> *borrowing was not likely to be consoled by the thought that he had suffered for the benefit of his fellow creditors*"

[143] La Villa, 1974, p. 195

[144] *Ibidem*, p. 203

Traditionally, the protection of the members is the core of the provisions and the case law related to the objects clause.
The interest of members in protecting objects clause manifests itself in two ways. Similar to the case of creditors, the members of the company have an interest that the corporate assets are not devolved into risky activities, which would result in the loss of the investment. On the other hand, the company contract is based on the common intention of the members to carry out a specific economic, which is precisely that indicated in the articles.
The choice of the sector in which operate is not just a preference, a "whim", of the members but reflects upstream economic evaluations of the profitability and convenience of the investment. Hence, members certainly have an undeniable interest that the activity chosen at the moment of the establishment continues.
However, especially in times of crisis or in the event of strong economic expansions, the strict application of the principles of *ultra vires* doctrine had prevented companies to seize profitable business opportunities, to the disadvantage of their members, too.
This brief excursus shows that the function of the objects clause - that is, limiting the activities of society - is constant, the way in which it has unfolded, its effects and the subjects involved are various.
However, none of the interests involved would necessarily be affected by the recognition of a full legal capacity for companies. On the contrary, the strict application of the principle in the common law countries had disadvantageous outcomes for the parties involved.
This probably was the basis of the demise of the *ultra vires* doctrine, achieved principally by devaluing the function of objects clause.
Instead, interestingly, all the interests generally falling under the umbrella of the objects clause can be traced back to a broader and more general field: the (interest into a) correct management of the company[145]. In fact, an adequate management of the company definitely benefits the members, who have a return on their initial investment. In addition, it ensures that the company's assets are not diverted into scams or other fraudulent activities, so as to guarantee the solvency of the company to creditors.

[145] Bertacchini, 1995, p. 181

This argument highlights another main theme connected to the discussion around the objects clause, namely the powers of the directors, and more precisely the distinction between management power and power of representation, mentioned in Chapter 1. Although the distinction between these powers is very clear in doctrine, the legislator did not always address it carefully. Consequently, the two concepts ended up confusing with each other, generating the uncertainties in the interpretation of the limits set in the objects. The power of representation has a wider scope, and is the way by which the company contract can produce effects also towards third parties. Hence, the need to limit the will of the company.
Management power, on the other hand, concerns almost exclusively the internal dynamics of the company. Its source is the statute or in any case a delegation by the members to the directors. Therefore, it is reasonable that it is subject to the limits imposed by the members.
As evidence of this argument, despite the differences - sometimes even substantial - between the various countries, almost all of them recognize a general right for members to inhibit those transactions and activities who exceed the objects. Indeed, in the analysis of the Irish reform, one of the major concerns about the LTD was precisely the possibility for members to act against the directors.
The fact that such a common prediction exists in different systems that include the objects cannot be a coincidence. Thus, this line of investigation is bound to be the lead in assessing the current role and the prospective evolution of the objects clause.

3.2 The internal dimension of the objects clause

Broadly speaking, the objects have their own relevance in the relations between the members of the company and in the relations between the latter and the company.
Since they represent the activity agreed among the members, it is reasonable - and has a correspondence in the tenets of contract law - that in the event that this activity is significantly modified or becomes impossible to carry on, a member has the right to withdraw from the company. For similar reasons, the impossibility of achieving the objects clause (or the effective achievement) is recognized as a legitimate cause for the dissolution of the company.
There is no doubt that these principles are weakened by the practice of using very broad clauses, which include as many activities as possible. However, these rules

are based on general principles, common to all legal systems and therefore do not give rise to significant issues. Instead, as mentioned, the analysis of the relationship with the directors is more complex.

3.2.1 The objects clause as a limit of the powers of directors

Substantially, the management power is proportionate to the objects, meaning that the directors should undertake only those activities that are functional to the realization of the corporate purpose set in the constitution of the company. The power to manage the company belongs to all the directors – even with some internal distinction between the board members – in contrast with the representation power, that may belong only to the people appointed as representatives.

Now that the theory of special capacity is dismissed, the relationship between objects and management must be interpreted in an extensive way. As noted by Bianca[146], the modern interpretation of the objects clause cannot be narrowed to considering it only a limit, but more correctly it can be defined as a parameter that directs the management of the company and assesses the impact of its performance.

Hence, the powers recognized to the directors do not include act exceeding the objects clause, but they include all those powers and activities that may nurture the success of the company and mitigate the impact of any negative externalities, regardless of the fact that they are included in the objects or not.

However, this does not mean that directors can be authorized to perform any act as it is potentially useful for achieving the corporate purpose. Actually, such an approach would make the notion of the objects meaningless.

Despite any innovative interpretation, the objects clause is still a limit for the capacity of the company, in the sense that it is the constraint that the members have imposed on the company assets conferred. Therefore, to use the words of the Irish reform - that reintroduced the concept of limited capacity – "it remains a duty of the directors to observe any limitations on their powers flowing from the DAC's objects". Thus, the limit to capacity does not imply that the company cannot undertake certain operations in the abstract, but that the directors should refrain from engaging in activities that exceed the constraint imposed by the members.

[146] Bianca, 2008, p.159

Indeed, the duty imposed on directors corresponds to a right for members to inhibit any behavior deemed illegitimate[147].

Therefore, a fundamental junction in the regulation of the objects of the company is represented by the criteria with which it is possible to determine the consistency of the transaction with the type of business in which the company has decided to operate.

3.2.2 Possible criteria for assessing consistency with the objects clause

Apparently, any act could be included or not within the objects clause. However, if the consistency of the transaction with the objects can only be ascertained *ex-post*, the members would lose any protection granted by the clause[148].

Similarly, both civil law[149] and the common law[150] have rejected the possibility of identifying in the abstract the categories of acts or specific transactions that are always excluded from objects. It is necessary to understand which criteria could be identified to evaluate the operations *ex-ante*.

First, analogous to the decision in *Marleasing*[151], such an assessment shall have regard of the objects as stated in the constitution, regardless of the activity carried out by the company.

Second, assumed that it is impossible to ascertain if the act is compatible with the activity of the company before its completion, any earlier assessment must focus on the effects of the act itself. Therefore, an act that does not have a connection with the objects and does not seem suitable to satisfy any economic interest of the company, even mediated or indirect, is considered extraneous to the objects of the company[152]. However, the use of this instrumentality criterion must be based upon

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147 For example, Companies Act 2014, s. 973 (2)

148 Bertacchini, 1995, p.160-162

149 In this sense Calandra Bonaura, 2006, p.663

150 *Attorney-General v The Great Eastern Railway Co Ltd* [1880] 5 AC 473

151 *Marleasing SA v. La Comercial Internacional d. Alimentacion SA* [1990]. ECR. I-04135 where the ECJ, in the interpretation of art. 11, held that the objects of the company refer to the objects as defined by the instrument of incorporation or the articles of association.

152 *Hutton v West Cork Railway* Co (1883) 23 Ch D 654; Cassazione civile, sez. I, 08/09/2016, n. 17761

the common commercial practices of the field and not with reference to any possible connection the activity, due to the fact that potentially any kind of operations may be included into a business strategy[153].

Still, some authors pointed out that such a criterion does not solve properly the issue questions regarding the consistency of an act with respect to the type of activity. Thus, they have suggested a complementary quantitative criterion that allows evaluating the operation also in relation to the dimensions of the company.

It is true that numerical thresholds are often not very useful and are easy to circumvent, but an analysis of the size and turnover of the company is reasonable, as it is a common general principle that there is a correlation between activities performed and assets used. Still, this hypothesis has been followed neither in the statutory law nor in the case law.

3.2.3 Remedies for the company against ultra vires dealings

One of the main problems in the current regulatory framework is that members of the company have few tools to effectively deal with *ultra vires* situations. In fact, beyond a preventive restraining order (injunction or declaration), the only possibility to get rid of such an act, is to provide evidence of the misconduct of the third party. However, this attempt can be very burdensome and expensive (and ultimately vain) for the company. A solution, in this sense, could be the introduction of corrective measures - such as legal or simple presumptions - which, while not invalidating the protection for third parties in good faith, allow the company to dispute at least the most "borderline" operations. In any case, the company can always act against the directors.

However, in civil law countries the liability of the directors - and hence the chance for the company to recover the damages - is bound to the evidence of the losses or at least of the disadvantageous consequences for the company. The underlying *ratio* is that the company who benefits from the transaction has no interest in seeking compensation before the court. Thus, civil law companies can only oppose director acting *ultra vires* by declaring his/her removal.

[153] *Ibidem*, under n.148

Instead, in common law countries, directors can be held liable for the breach of the fiduciary duty, too. In the UK, the breach of the duty to act within powers applies even if the transaction was in the interest of the company and makes the director personally liable with the company, especially if the contract was enforced[154]. However, the most common remedy for the breach of fiduciary duties consists in recovering damages as well. The breach of a fiduciary duty legitimates the director's dismissal; though this solution is quite infrequent[155].
Significantly, the dismissal of the *ultra vires* doctrine in its harshest form has driven the introduction of the instrument of ratification in all the main legal systems. Less linear is the approach to the assembly resolutions authorizing certain acts.
The authorization in fact implies that the general meeting decides on a management act, which should be the exclusive competence of the board of directors. Despite the issue is still controversial, as noted by Miola[156], the solution could be the legitimacy of the authorization only when it is passed because of the proposal and initiative of the directors.

In conclusion of this paragraph, it shall be noted that the objects clause may offer a significant control of the members over the management, especially in those companies with a more influent role of the general meeting and a less powerful management. Still, in the light of the new provisions affecting its external relevance, it offers little protection to the members against the case of the so-called "moral hazard" of the directors.

3.3 The remains of the external relevance

3.3.1 The external relevance after the intervention of the EU regulations

External relevance was the focus of the discussion on the company objects. In fact, one of the most debated functions of this tool concerns the way in which the contrasts with the objects clause affect the dealings with the "*outsiders*".

[154] Companies Act 2006, s.40 (5)

[155] Davies & Worthington, 2012, p. 619

[156] Miola, 2009, p. 286 -288

As discussed above, the limitations deriving from the objects could have been invoked against those who had entered into an *ultra vires* transaction. The sanction was the nullity or annulment of the contract. Depending on the regulatory framework, the act could at most be authorized in advance or ratified by the company.

The objects clause had therefore a strong external relevance, because, on the one hand, it conditioned the type of operations that the company - and therefore the directors - could legitimately conclude (management of the company). On the other hand, it limited the power of representation to the directors, leaving third parties in the uncertainty about the fate of the contract, as the notion of "*ultra vires*" was not always easily identifiable.

The situation changes with the development of the markets, and in particular in the process of creating the single European market. The reference became the First EEC Directive which states that "*acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company*"[157].

As a matter of the fact, the directive, rather than undermining the relevance of the objects of the company, aimed to guarantee the certainty of transactions. In fact, the differences existing between the various Member States (at the time of the directive mainly France, but later the UK and Ireland, too) would have been detrimental for transnational exchanges[158].

Nowadays, the First Directive has been repealed and replaced first by the Directive 2009/101/CE, then again by the Directive 2017/1132/EU. However, the provisions affecting the corporate purpose have been re-enacted without undergoing particular changes, so that the observations about the First Directive are still relevant.

First, the European legislator does not deal with the fate of acts which do not fall within the objects of the company. Instead, the core of his intervention is the protection of third parties. In fact, the transactions concluded with the latter are always enforceable, regardless the assessments expressed on their legitimacy by the legal system of each of the Member States.

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[157] Directive 68/51/ECC, art. 9(1)

[158] From the Directive: "*Whereas the co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance, particularly for the purpose of protecting the interests of third parties*"

Second, the way to enact this protection - which is nothing else than restricting "*to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid*" - translates into eliminating the causes that may invalidate the contract. Since the company has an artificial nature, the transactions and exchanges concerning it are necessarily performed by a natural person.

The EU legislator may have adopted those doctrines where the limitation of the power of representation of the board of directors does not make sense, when the board does not act as a corporate body (whose capacity is limited to the objects clause) but as an agent, and therefore as if it were the company itself (which is deemed to have a general capacity)[159].

Hence, the easiest way to reduce the uncertainties for the subject engaging in dealings with this "a*gent*" is to give him/her a general proxy. Therefore, from the point of view of the European legislator, the corollary of the certainty of commercial exchanges is the introduction of a general "*authority to represent a company*"[160].

Ultimately, the provisions (article 9) of the Directives on this specific subject are more general principles borrowed from the law of contracts and adapted to companies, rather than regulatory strategies tailored to the latter.

And in fact, even the exceptions provided for by the general rule are common tenets. Indeed, the protection granted to third parties lapses when it also exceeds the limits to the powers of the directors imposed by the statutory law or, if provided, when it is the third party itself to have acted in bad faith.

However, this part of the directive has been easily implemented by all member states. As a consequence, the external dimension of the company objects started to lose grip. It is important to notice that the Directive does not directly introduce the distinction between management power and representation power[161]. In fact, in the first attempts to implement it, none of the Member States had introduced significant changes to its statutes, merely transposing the text of the Directive into their

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[159] Cerami, 1959, as quoted in Gliozzi, 1970, p. 103-104, which disputes the validity of such a reasoning

[160] Directive 68/51/ECC, art. 9(3)

[161] But notably, the text of the Directive 2017/1132/EU expressly names art. 9 "*Acts of the organs of a company and its representation*"

national law as happened for England (see Chapter 1) and Ireland (see Chapter 2) when they joined the EEC, often along with controversial redrafting.

Anyway, little by little, the systems have acknowledged the need to distinguish between the powers attributed to the directors in compliance with the objects clause, and the power of representation that instead connects to their role of "spokesperson" of the company.

For example, in Ireland, the general principle is established in s. 40, Companies Act 2014[162]. According to this provision, the board of directors, or in any case all the persons that the company has registered as representatives, are authorized "*to exercise any power*", in spite of any limitation contained in the constitution.

Notably, this very same provision also applies to DACs by virtue of the s. 964. The Irish legislator has therefore clarified that the power of representation does not depend upon the contents of the objects of the company, and the limitation of the capacity of the company (s.972) shall be interpreted according to the meaning mentioned above and does not affect the power of representation, that belongs to directors or any other registered person.

A very similar provision is contained in the Italian Civil Code. In terms of limited liability company (*società a responsabilità limitata, "***srl***"*), which is the company model most similar to the private company in Ireland (DAC or LTD), art. 2745-*bis*, named "*Rappresentanza della società*" (representatives of the company), states that the directors have a general authority to represent the company, regardless of the limitations contained in the articles. The article was introduced in 2003 and is opposed to the previous art. 2745, named "*Amministrazione della società*" (management of the company).

As a matter of the fact, the reform codifies a principle that already existed in the Italian legal system, in art. 2384. Originally, this article - which belongs to the part on public limited companies (*società per azioni*) - was incorporated by reference in the provisions concerning SRLs. Instead, after 2003, the legislator chose to split the provision, so as to avoid uncertainties and confusion due to the overlap of the two regimes.

[162] Significantly, the provision is not included in the Part concerning Corporate governance (Part 4, Chapter 2, Ireland CA 2014) but in the one concerning the Corporate capacity and authority (Part 2, Chapter 3, Ireland CA 2014)

Moreover, the legislator repealed art.2384-*bis*, which stated that acts falling outside the objects do not impact dealings with third parties in good faith. The rule is transplanted in articles 2384 and 2475-*bis*, in its new formulation, which still confirms the protection of third parties, but with a significant difference.
The new rule rejects the criterion of good faith, establishing that the limitations deriving from the objects of the company are enforceable only when there is evidence that the person dealing with the company acted purposely to cause damage to the company.
Anyway, this is a peculiarity of the Italian system that will be described more accurately in the next paragraph. Remaining in the field of harmonization of the national legislation, rules of this sort have also found room in the UK[163], Spain, France[164] and to mention the main countries.
In conclusion, the First Directive introduces a general right for third parties to claim the enforceability of the contract concluded with the directors, on behalf of the company, except when the invalidity is due to a cause independent from the company itself (*i.e.* statutory law, bad faith).
Alternatively, it can be maintained that more than an individual right, the Directive introduces, in favor of third parties, a general remedy against the possible misconduct of the subjects authorized to represent the company[165].

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[163] UK Companies Act 2006, s. 40 (1): "*In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution*."

[164] French Commercial Code, art. L223-18: "*Dans les rapports entre associés, les pouvoirs des gérants sont déterminés par les statuts, et dans le silence de ceux-ci, par l'article L. 221-4. Dans les rapports avec les tiers, le gérant est investi des pouvoirs les plus étendus pour agir en toute circonstance au nom de la société, sous réserve des pouvoirs que la loi attribue expressément aux associés. La société est engagée même par les actes du gérant qui ne relèvent pas de l'objet social, à moins qu'elle ne prouve que le tiers savait que l'acte dépassait cet objet ou qu'il ne pouvait l'ignorer compte tenu des circonstances, étant exclu que la seule publication des statuts suffise à constituer cette preuve. Les clauses statutaires limitant les pouvoirs des gérants qui résultent du présent article sont inopposables aux tiers*." Among other things, the French provision shall be remarked for its clarity in distinguishing between management power and representation, and relative effects.

[165] Notably, according to Bonelli (Bonelli, 2004), in the long run this provision also benefits the company, as it allows it to expand its turnover and exploit the majority of contractual opportunities available

Moreover, art. 9 aimed at creating a level playing field for all the third parties engaging with companies across the EU. Hence, this is a *minimum standard* of protection, and does not exclude that Member States can extend such protection into national legislation[166].

In any case, and also in light of the national provisions, it is undisputed that there is a common principle for which a company cannot oppose the limitations deriving from its statute, and more precisely from its objects clause, to third parties who have acted in good faith. Hence, as a general rule, the objects clause has lost its original external relevance. Still, the principle incurs into some exceptions.

3.3.1 The exceptions to external irrelevance

The First Company Directive, as last amended, contains two exceptions to the rule of irrelevance of the objects of the company. One of them is already identified in the text of the directive and corresponds to the legal limits set forth in statutory provision (whether mandatory or optional[167]). The last, instead, concerns the possibility for Member States to identify cases in which the company can rely upon the limit that derives from the objects.

In this last case, the European legislator provides that the company must prove that *"the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it"*[168]. but, in the same paragraph, it clarifies that "*disclosure of the statutes*" itself is not sufficient to meet the burden of proof.

Substantially, this clarification excludes that the national legislator may allow acts exceeding the objects clause to be ever enforceable against third parties who have acted in good faith, i.e. not being aware of potential limitations arising from the company's constitution.

It is interesting to note that the European legislator, here, affirms the ineffectiveness of the registration and disclosure of the limitations on powers. Apparently, the

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166 Ambrosini, 2003, p.311

167 Directive 68/51/ECC, art. 9(1), indeed, allows the protection "*unless such acts exceed the powers that the law confers or allows to be conferred on those organs*"

168 Directive 68/51/ECC, art. 9(1)

paragraph seems to create a particularly advantageous position for the third party, which would then be exempt from consulting the company's documentation, in contrast to the general rules governing contracts. In reality, the European directive should be interpreted as meaning that the third parties are unaware that the transaction is not covered by the objects clause.

As analyzed in the previous section, a simple consultation of the statute is not always sufficient to estimate whether a particular act exceeds or not the objects.

In fact, with the exception of some operations that may clearly appear illegitimate, most of the transactions and contracts are connected or potentially suitable - for carrying out the activities indicated in the objects.

Eventually, the third parties are still obliged to consult the company's constitution to ensure that the subject has an effective authority to represent the company. In fact, it is true that the limits to the power of representation do not have an external relevance, since in view of the European legislator - confirmed indeed by national solutions - representation is to be considered a general power.

On the contrary, the absolute lack of authority to represent the company should be considered as a statutory limit to the powers of corporate bodies and by this way covered by the exception in art. 9 (1). Thus, the third party would be bound to consult the statute at least to identify the persons authorized to contract in the name of the company, not being protected against the lack of representative power[169].

This interpretation could be confirmed by the noteworthy attention of the various national legislators in identifying the persons who hold the general power of representation in a society.

In particular, in the common law systems, reference is also made to the indication of the officers, other than directors, whose names shall be included in the registered documentation. In any case, the question of the statutory limits applicable in relation to art. 9 (1) is very controversial and partly does not fall within the scope of this dissertation. However, a brief outline is drawn to provide a comprehensive outlook on the implications of the First Company Directive on the company's capacity.

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[169] Also, Directive 2017/1132/EU, whereas (8): "*The basic documents of a company should be disclosed in order for third parties to be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company*"

3.3.2 The statutory restrictions to the power of representation of directors (short background)

As mentioned earlier, only restrictions on the powers of the directors that derive directly from the law can be opposed to third parties. In theory, the scope of the standard may seem very broad. In practice, when compared with the provisions in the various Member States, its applicability is significantly reduced.

In fact, most of the EU countries are limited to assigning management and representation powers to the directors or officers of the company, in an extremely generic formulation, leaving to the articles of the company possible more detailed provisions. However, the latter is covered by Article 9 (2), meaning they have no impact on relations with third parties, unless the Member State has provided for a specific remedy.

Moreover, even when the national codes include rules that expressly prohibit directors from undertaking certain activities, *de facto* limiting their powers, it is the rule itself that provides for the sanction awarded and the admissible effects[170].

Furthermore, the ECJ, when called to decide on the scope of application of art. 9, preferred a more restrictive interpretation of the provisions contained therein.

In *Rabobank*[171] case, the holding company Holland Data Groep BV (HDG), along with its six subsidiaries (including one named Mediasafe), enters into a contract with Rabobank. According to this agreement, HDG and its subsidiaries guarantee the debts of each other *vis-à-vis* the bank, authorizing the latter to compensate balances of the various companies. Subsequently, all other companies in the group go bankrupt, including Mediasafe. At the date of bankruptcy, this latter's balance with Rabobank was in surplus, but the bank compensated the balances of the various companies, considerably reducing the company's surplus.

The receiver brings an action to the Court, seeking for a declaration of the ineffectiveness of the contract mentioned above with regard of Mediasafe, as it was concluded by the director of HGV, who was in a conflict of interest and, hence, in

[170] Calandra Bonaura, 2006, p. 667

[171] Case C-104-96, *Cooperatieve Rabobank "Vecht en Plassengebied" BA v. Erik Aarnoud Minderhoud* [1997] E.C.R. 1-7211

contrast with the art. 2:256 of the Dutch Civil Code. The application was upheld by both the Courts of first and second instance.
The Supreme Court of Netherlands (*Hooge Raad*) referred to the ECJ a question on the compatibility between the Dutch discipline and the art. 9, par. 1, of the first Directive 68/151/EEC, in the part in which it provides that "*acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs*".
The Dutch law, in fact, provides that in the situation in which a conflict of interests arises between a company and the directors, the transaction can only be concluded by the commissioners of that company. Moreover, the provision – which is included in Article 2:146 of the Netherlands Civil Code, which applies to '*naamloze vennootschappen*' (public limited liability companies), and Article 2:256, which applies to '*besloten vennootschappen met beperkte aansprakelijkheid*' (private limited liability companies) - was also incorporated in the statute of the company involved (Mediasafe).
The European Court held that the Directive "*concerns the limits on a company's powers as allocated by law to the various organs of the company and is not intended to coordinate the national laws applicable where a member of an organ finds himself in a conflict of interests with the company represented because of his personal circumstances*" (§ 22). Following, the Court concludes that "*the rules governing the enforceability as against third parties of acts done by members of company organs in such situations fall outside the normative framework of the First Directive and are matters for the national legislature*" (§ 24).
Thus, the Dutch law, despite apparently allocating the authority over a certain situation to a corporate body rather than another, is not a rule that regulates the distribution of powers to corporate bodies but simply a special provision in the field of regulation conflict of interests.
Hence, it follows the inapplicability of the First Directive. At most, the legitimacy of the act can be questioned on the grounds that the deliberation procedure is flawed. However, even this hypothesis is outside the scope of the First Directive.

This reasoning seems to be confirmed by the subsequent clarification of the Court which refers to the proposal for a Fifth Directive, where the procedures on conflict of interests are subject to a separate discipline[172].

As a consequence, the rules of law that award directors and other officers the authority to act on the behalf of the company may occur to be "*only statutory limitation that could be relied upon as against third parties irrespective of their knowledge thereof*"[173].

3.3.3 The solutions implemented by the Member States concerning acts exceeding the objects

In light of what discussed above, external relevance appears to be confined to the narrow space of national legislation. As mentioned, the European legislator has left an ample perimeter to the Member States on the type of solutions to be adopted, as long as the rights of the third party in good faith are not prejudiced and the assessment of the third party's subjective status does not consist in a presumption based solely on the disclosure of the company's documents.

Actually, most of the Member States have introduced a solution of this type, but in its most basic form, meaning that *ultra vires* acts are enforceable by third parties acting in good faith. The criterion of good faith is a fairly balanced solution, but implies various difficulties from an interpretative point of view. In the first place, good faith is a general clause used in very different fields. Hence, its interpretation is not unique.

Even if a common principle of conduct in good faith could be identified, the requirement should in any case be balanced in relation to the status of the parties.

Moreover, as noted by Ussher[174], there is a noteworthy gray area in case the third party only suspects that the act falls outside the objects. In fact, notwithstanding the

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[172] Case C-104-96, *Cooperatieve Rabobank "Vecht en Plassengebied" BA v. Erik Aarnoud Minderhoud* [1997] E.C.R. 1-7211, § 26: "*Article 10(1) of that proposal for a Fifth Directive provided that every agreement to which the company was party and in which a member of the management organ or of the supervisory organ, was to have an interest, even if only indirect, must be authorized by the supervisory organ at least*."

[173] Nashenveng, 2001, p.92

[174] Ussher, 1975, pp.44 - 47

very plain case of the subject who is undoubtedly aware that the act exceeds the objects, it is not clear how the third can have knowledge and be deemed aware of the powers of the directors or any other officer (remembering that any presumption based on public disclosure is excluded).

The situation becomes even more complicated if the provisions of article 9 are considered as a parameter for the interpretation, in the part in which they refer to circumstances in which third parties could *"have been unaware*" of the restrictions.

Anyway, the solution was also adopted by Ireland, too. The requirement of good faith also applies to the DACs, by virtue of ss. 964 and 973, confirming that the limited capacity attributed to this corporate model has nothing to do with the previous theory of the special capacity. However, since the DACs are obliged to include an objects clause in their own statute, the requisite of good faith will be assessed according to the strict criteria of the *ultra vires* doctrine. And indeed, in s. 40, CA 2014, it is confirmed that the provision complement but do not substitute the rule in *Royal British Bank v. Turquand* (constructive notice).

Originally, the *criterion* of good faith had also been adopted in Italy, within the 1969 reform. However, in 2003 the legislator decided to dismiss it. Nowadays in Italy[175], third parties are granted an even stronger protection. In order for the *ultra vires* act not to be enforceable, the third party not only had to be aware that the transaction exceeded the limits to the powers of the directors (*bad faith*) but also aware that the transaction might have damaged the company[176]. The burden of proof is borne by the company, which is obliged to prove both status. Actually, this choice of the Italian legislator does not represent an exclusive remedy of company law.

More correctly, it is a principle typical of the whole legal system, designed to avoid the unfair enrichment of a part. According to some authors[177], such a prediction is the ultimate confirmation of the external irrelevance of the objects clause, whose only limit is a general principle of the legal system and not an *ad hoc* rule. However, if this conclusion can be consistent with Italian legislation, it is more difficult to extend it to the European area, which it has preferred to delegate the choice to the Member States.

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[175] However, a similar protection is granted in France, too (see above, under n.18)

[176] Calandra Bonaura, 2006, p.663-665

[177] Settani&Ruggi, 2017, p. 103

3.4 What perspectives for the objects clause?

3.4.1 Limits of the EU harmonization

Despite the cues in each of the Member States, the relevance of the objects clause was hit hard by the First Directive. Indeed, its implementation determined neat changes in each national legislation, which eroded the original functions of the clause.

Undoubtedly, the intervention of the European legislator on dealings with the companies aimed to establish a general principle that would make the burden of verifying the agent's powers less arduous to third parties. As noted by Enriques[178]:

"it [article 9] *dictates what the default rule is across the EU, thereby reducing the risks associated with the fact that companies can only act through agents, and that it is often difficult, especially in cross-border settings, to find out what the law regulating companies' authority is*".

However, the same author specifies that the scope of this principle is quite controversial[179]. As argued in more detail by La Villa[180], the article is based on two very different principles. The general and mandatory prescription is inspired by the principle of German law, so that the only limit to the powers that may be exercised by the directors are the limits established by law.

Instead, the optional regime allows enhancing the limits deriving from the objects clause, as traditionally perpetrated in the UK, France and Italy.

Actually, this choice overturns the principle expressed in the text of the proposal presented by the E.E.C. Commission to the Council of Ministers of the Community[181].

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[178] Enriques, 2006, p.30, n.112

[179] In the view of the author, the other paragraphs of the same article allow Member States to choose their own regimes on ultra vires transactions. Moreover, as seen in Rabobank, the ECJ refused to bring limits deriving from domestic laws under the scope of the First Directive nor does it harmonize rules on corporate agents' conflicts of interest.

[180] La Villa, 1974, pp. 348 - 354

[181] Notably, in the text of the Proposal for a First Directive (1964), the legislator had affirmed that the act shall have bound the company, "*provided they do not exceed the limits imposed by the law on the powers of the organs, or the limits of the company's objects*".

This solution appears to be unclear because, on the one hand, it essentially deletes the value of the objects in relations with third parties. On the other hand, it also diminishes their internal value, given that the members will be more likely to act *ex-post* against the directors[182] and cannot act against the transaction itself. Still, the objects clause is a "*compulsory information to be provided in the statutes*", as reiterated by art.3, Directive (EU) 2017/1132, which represents a first attempt at uniform codification of the European Company Law.

This discrepancy could have two explanations. First, the observance of the objects could be considered a common principle. Indeed, this hypothesis is supported by the opinion of the Economic and Social Committee of the Community, that noted that the necessity of respecting the objects of a company derived from the general principles of the law[183]. Also, a similar principle existed in common law, as it was recently codified in both UK[184] and Ireland[185].

Accordingly, article 9 would in fact address only exceptional cases, occurring in an incorrect assessment by the directors rather than in a willful misconduct.

And actually, if the first case, the consequences shall not affect neither the director nor third parties, as long as the directors have acted on an informed basis, with the necessary skill and care (*business judgment rule*), while the second case will easily fall into the framework of the conflict of interest and will be subject to the relative rules. This argument takes even more shape if we accept the thesis that transactions that substantially modify the objects clause are not covered by Article 9, and therefore are void.

Also, the argument is consistent with the formulation of ss. 972-973 of the Irish Companies Act 2014 (*Capacity of a DAC*).

The second explanation is based on more practical aspects. One of the main consequences of the *ultra vires* doctrine was the abuse of inflated objects clauses. In fact, prior to the elaboration of the implied powers theory[186], activities potentially connected to objects could also be declared void, with the company not being able

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[182] In fact, it is not always easy to assess the risk associated with a given activity and its consistency with the businesses of the company until it produces its effects.

[183] La Villa, 1974, p.348

[184] Companies Act 2006, s.171

[185] Companies Act 2014, s. 973 (2)

[186] *Attorney-General v The Great Eastern Railway Co Ltd* [1880] 5 AC 473

to ratify or authorize neither profitable or beneficial transactions. Subsequently, the uncertainty of the case law on the point had fostered the practice of including in the objects any activity or power.

As a matter of fact, objects clauses are more effective and has an influence on the company, the more specific they are. Therefore, by excluding one of the root causes of the over-drafting, the legislator could have achieved a more sensible drafting of the clauses, also enhancing their relevance. As suggestive these hypotheses may seem, this attempt by the European legislator to balance the various interests at stake ended up diminishing the value of the objects clauses.

Assumed that the current EU law does not aim to dismiss completely the role of the objects clause, it is appropriate to analyze the limits and the flaws of Article 9, as last amended, and the possible changes.

First, Article 9 establishes a reasonable default rule, which is the enforceability of contracts concluded by a legitimate representative of the company.

Broadly speaking, it is reasonable for a third party to rely on the fact that the director is acting in a way he/she considers *bona fide* to be within powers, beyond what is written in the statute. However, here we have a first flaw: contrary to what usually happens with regard to the protection of the weak part of the contract, there is no distinction regarding the professional status of the contractor.

For example, dealings of a certain value – such as guarantees, credit lines, etc. -are engaged with the help of a lawyer or a professional consultant. In those cases, which are also the most frequent case law upon this topic, the bylaws can provide sufficient information to evaluate the nature of the transaction. Such a distinction could be introduced in the second paragraph of article 9 (1) in order to alleviate the burden of proof on the part of the company.

Second, the definition of legal limits has very blurred lines.

For example, a national provision that attributes to a certain corporate body the power to deliberate on a particular issue can be considered either as a limitation on the competence of the directors, or as an exceptional or procedural rule. In the first case, the exception in art. 9(1) applies, instead the second one is bound to the national law, making for the company and third parties still uncertain whether a transaction would be binding or not, especially in cross-border situation.

Finally, the EU law provides only one regime that applies to all companies. This choice derives from the civil law tradition in which the discipline of the company contract applies to all types of companies. As the objects clause is part of the constitution - i.e. the contract between the members to establish the company - is necessarily included in all types of companies.

Instead, as analyzed in the common law experience, the models of society are different and involve similar interests, but in different measures. Assuming that, within the EU, it is not possible and it is not reasonable to restore the theory of special capacity, an effective choice could be to follow the Irish example and introduce two different regimes. The merit of the Irish reform is to enhance the role of the objects clause, as it associates it with a unique corporate model, awarded with certain prerogatives. Thus, in case the members of the company need more flexibility and potential conflicts between members - management are not relevant, they can exclude the clause.

It is clear that if the members of the company are interested in a certain type of activity, and need more protection against the management, they will choose to include an objects clause. Moreover, this approach confirms that the main function of the objects clause is to promote the correct management of the company. In fact, in the Irish model, in the absence of an objects clause, the higher risk - associated with a more influential management arbitrage - is reduced by precluding the company from issuing debt and engaging in certain activities (e.g. credit institution, insurance undertaking, etc).

Furthermore, the existence of a corporate model with an unlimited object, necessarily implies that the companies that choose to have it, will adopt a more concise and specific drafting, enhancing shareholders' control and their power to restraint directors' misconduct. So far, another area of intervention could be the introduction of some minimum requirements for the drafting of the objects clauses.

As a default rule, the European legislator should require objects that are at least possible and specific. At most, in order to avoid unfavorable decisions by a stricter judiciary, the law may allow the practice of an additional residual clause, which covers any related or instrumental activity (similar to what is already stated by the theory of implied powers). However, despite these considerations and areas of improvement, the relevance of the objects clause can be analyzed from another perspective.

3.4.2 The case of acts that modify the objects clause

The considerations carried out so far concern transactions which by their nature or for their effects are contrary but do not modify *de facto* the economic activity carried out by the company. However, it may happen that the directors engage in activities whose nature is "*is such as to change the substratum of company's activity*"[187]. In this regard, two opposing solutions exist. The first confirms the exclusively internal relevance of the operations modifying the objects, with the consequence that these are assimilated to the regulation of *ultra vires* acts in general. As a result, members could only benefit from a stricter liability regime for directors. For example, in Italy members could file a complaint for major irregularities in the conduct of the management, pursuant to art. 2409[188].

The second one, instead, considers these operations an exception to Article 9 (1) of the First Directive. The hypothesis is supported by two arguments: the first is that the amendment of the corporate purpose is a competence attributed by law to the extraordinary shareholders' meeting. Hence, the latter would be a legal limit in the dealings with third parties.

The second argument holds that the activities would be qualitatively and quantitatively different from the objects clause, which the third could not be aware of the discrepancy, besides the contents of the statute. Actually, this second argument falls into the provision of the second paragraph of article 9 (1). Hence, its validity can only be assessed with reference to the legislation of the individual Member States.

Still, this latter argument appears more convincing. First, for ideological reasons: as noted by Gliozzi[189], the fact that the people who bear the risk of the investment are entitled to choose the activities they want to invest in is the *ratio* underlying the objects clause itself.

Then, for a systematic reason: the single transaction that exceeds the objects does not in itself pertain to a relevant violation of the limit of the objects clause, especially given that is difficult to distinguish which transaction are included and

[187] La Villa, 1974, p.334

[188] Miola, *Ibidem*, n. 22

[189] Gliozzi, 1970, p.96

which are not. Hence, the reason why the objects clause is still a mandatory information is that "*the real ultra vires*" [190] falls outside the scope of the article 9 (1). Nevertheless, the same German doctrine, that inspired the formulation of the First Directive, has developed a consistent jurisprudence on the relationship between the competences of the directors and those competences that belong to the body representing the shareholders.

More accurately, German Supreme Court held in several cases that some decision may affect the interest of the shareholders so deeply, that the relative competence belongs to them, even though those transaction shall belong with the management of the company[191]. Although German Courts did not deal with cases related to the objects clause, a recent Italian decision[192] apparently applied similar principles with reference to the objects clause[193]. Specifically, the sole director of a company sold the core activity of the company. The members of the company sought to invalidate the transaction claiming that the director had exceed his powers. Instead, the purchaser objected that the limitation could not be opposed against him. The Court ruled in favor of the company and deemed the transaction void on the grounds that the transaction was likely to modify the activities of the company. Hence, according to this decision, a transaction that modifies the objects clause is opposable also to third parties, even if they are acting in good faith, because it exceeds a statutory limit. Thus, what becomes relevant are not the contents of the objects clause but the provision of the clause itself. Somehow, this is the same approach that supports the Irish reform and marks the difference between the LTDs and DACs.

In case this approach results correct, the limit of the objects clause on the management should be interpreted in the sense that directors can also perform activities that apparently do not fall within the perimeter of the objects, provided they are meant to implement it or to continue the economic activity chosen by the members. On the contrary, they can not perform acts that, even if they are apparently connected or included in the objects, substantially compromise or modify the objects itself.

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[190] La Villa, 1974, p.335

[191] *Holzmüller*, BGH, 25 February 1982, in *Die Aktiengesellschaft*, 1982, 158

[192] Tribunale civile di Piacenza, 14/03/2016

[193] De Luca, 2017, p. 380

For an even more clear scenario, the analysis can be completed with a brief reference to companies without an objects clause.

3.4.3 Companies without an objects clause

Actually, from the analysis of the current discipline, the idea of a company without an objects clause is more a manifesto than a true innovative norm. The reason behind the inflated objects clauses, which then turned into generic clauses - or unrestricted objects to use the UK terminology - was the chance to make the most of the contractual and business opportunities presented by the market.

The fact that the solution adopted in the UK was later introduced in a similar manner in other countries might have been a response to the economic crisis that occurred in the late 2000s in Europe, rather that the reform of the company's capacity, given that the relevant was still the First Directive, that had already been implemented by the Member States.

Significantly, the two major example are Ireland and Spain (where the *Real Decreto Legislativo 1/2010* introduced the *Sociedad Limitada Nueva Empresa*, which is a smaller private company, with a generic objects clause) which also suffered major losses in their national economies. Theoretically, a company with a generic clause or even without such a clause can perform any kind of operation. In reality, this is a hypothesis that is difficult to put into practice.

First, even in the absence of a specific indication, it is unlikely that a single company will perform more than a small number of activities or alternatively operates in a very large number of businesses.

Second, if the company wanted to change its main sector, a certain number of transactions and investments would still be necessary, so that the members would still have the possibility to evaluate whether to change the corporate purpose or in any case to inhibit further activities by the directors. Instead, without an objects clause would also lose this last form of control.

It is clear that in some company models this need is weaker. For example, in Italy, for the limited liability companies (*srl*) the default rule is that the members manage the company (art. 2475, Italian Civil Code). As a result, eventually, the ratification of the ultra vires operation is only a bureaucratic burden. The CLGR First Report also came to similar conclusions, referring to the "*small and closely held companies*"[194]. Rather than eliminate the objects clause, this a further evidence of the need to differentiate the regimes according to the different company models and the effective fragmentation of the property and the number of stakeholders involved. Indeed, as already mentioned, this is one of the main merits of the Irish reform. Moreover, the hypothesis of a company that does not identify its own sector of competence or makes only a generic indication, makes it much easier to establish façade companies or for elusive purposes. In conclusion, the lack of an objects clause is truly beneficial if it reduces the administrative burden without increasing the so-called agency costs and abusive conducts.

3.4.4 Other possible functions: companies engaged in special activities

At the end of this analysis on the possible new horizons for the objects clause, it is interesting to refer to some aspects that go beyond the functional role of the objects that was the core of this dissertation. In contrast with the general devaluation of the objects of the company, there are some "special" companies, where the activity carried out - and therefore the objects - are the heart of the discipline.

In this type of companies, it is the legislator itself that obliges the company to draft the objects in a certain way, so that it may be subject to the relative special discipline.

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[194] Company Law Review Group, 2001, p.226. 10.9.2 – 10.9.3: "*Almost nine out of ten companies registered are private companies limited by shares.58 The majority of these companies are closely held companies. In many instances the directors and shareholders are likely to be the same people or closely connected. Accordingly (apart from special types of companies such as special purpose companies and property management companies) the Review Group believes that private limited companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person (without the natural person's incapacity status imposed by being a minor, insane, drunk or being subject to undue influence). […] The Review Group makes its recommendations for the repeal of the ultra vires doctrine for private companies limited by shares because: […] (ii) ultra vires entails additional work to be undertaken by persons and their agents in the preparation of a company's constitution prior to its incorporation, as well as additional work by the CRO prior to the company being granted a separate legal status; (iii) ultra vires results in additional delay and costs being incurred by purchasers, borrowers, guarantors (and other parties) in completing their business transactions*"

The most common example is companies that operate in regulated businesses, such as banking or insurance, for which authorization or compliance with certain requirements is required. In this case, the objects of the company must contain the indication of the activity and - even if with differences between the various countries - it cannot include other activities, because they are considered incompatible. Another rather widespread example is charity or non-profit associations, established as limited liability companies. In these companies, the indication of the activity is necessary to exclude some mandatory provisions that may apply to profit-seeking enterprises but also to enjoy some benefits and privileges, granted by the law.
Finally, there are some types of companies that do not operate in a specific field, but they do their business in a particular way. This is the case of innovative start-ups and B-corp. Indeed, in order to achieve the status of innovative start-ups, a company must indicate in its constitution that the activities carried out are innovative with high technological value. Similarly, in order to legitimately perform the charitable activities, B-corp shall include in their objects the indication of the beneficial purposes. In reality, what can be said for these companies does not differ much from the observations on the DACs reported in the previous paragraph. Actually, in these companies the objects clause does not have an external relevance *stricto sensu*.
More precisely in these companies, the company model and the consequent regulatory framework depend upon the activities listed in the objects clause. In all these examples, the objects have a relevance because: i) the type of activity in itself is relevant; ii) a certain formulation determines both internal (e.g. the prohibition of distributing profits) and external effects (e.g. the legal limit to carry out certain activities).
As a matter of the fact, also in this case there is no return of special capacity. However, the objects clause becomes relevant has it exist an interest in the members to carry out a specific activity and, due to the nature of the activity, an interest into a correct conduct of the management that prevails over the other single stakeholder' interests.

Conclusion

The objects clause used to be at the core of the discipline about corporations.

Through its introduction, national lawmakers had addressed various issues that are linked to the incorporated companies, from the protection of public interests to issues relating to the capacity of companies.

Nowadays, at least within the borders of the European Union, the picture has changed. In fact, the creation of the single market does not reconcile with the very different and often conflicting solutions adopted by member states regarding the objects clause.

In this sense, the First Directive has undoubtedly the merit of having established the general capacity of companies (equivalent, as far as possible, to the capacity of a natural person) and the general protection of third parties in good faith.

The tail of the coin was the progressive reduction of the traditional functions of the objects clause. More precisely, these two principles mentioned above have ended up compromising the external relevance of the objects, which was at the heart of the debate and disputes about this matter.

Still, the objects clause is a relevant part of the national and European company law. The question is how to reconcile this seemingly weakened relevance with the mandatory European requirements, without resulting into further administrative or more general burdens for the companies. At the current *status quo* it seems unlikely that external relevance will ever return to play a central role. As Bianca[195] already noted, the way in which objects are formulated has always fluctuated between the protection of the interests of members and that of third parties. It is clear that, from the perspective of the European Union, which is more market-oriented, the protection of third parties shall prevail.

Without doubt, an intervention by the European legislator is desirable in order to clarify some issues related to the First Directive, which still remain in the most recent legislative text (Directive 2017/1132/EU). Firstly, in order to complete the harmonization process, it is necessary to define common principles on the formulation of the objects themselves. In fact, the formulation of the clause has been one of the main ways of circumventing or abusing the harshness of national solutions, but also one of the main causes of the loss of relevance of the clause

[195] Bianca, 2008, p.290

itself. Moreover, some clarifications are needed on which are the criteria for identifying the restrictions which, instead, are opposable to third parties.

For instance, a more correct assessment should exclude at least those operations that happen to modify *de facto* the objects clause, not much in order to give new strength to the *ultra vires* doctrine, but to protect the bond that members have placed on company assets at the time of incorporation.

However, in the silence of the legislator and without homogeneous criteria for evaluating the relationship between the transaction and the corporate purpose, the question can be resolved at most by the national legislator, with all the uncertainties that may derive from it.

Still, in light of both national and EU legislations, it is clear that external relevance is not the only function attributed to objects clause. Even in countries, such as the UK, which have adopted more extreme solutions, rather than a rejection of the role objects clause, they were necessary steps to overcome other regulatory impasse (*i.e. ultra vires* doctrine). On the other hand, a solution with only generic clauses or even repealing the objects clause is not equally ideal. As mentioned several times in this dissertation, there are sectors where the indication of the type of activity is not only necessary and/or mandatory but it is also "convenient" for the members as it allows to attract investors and financing more easily (*e.g.* start-up), making provision about the objects clause still necessary.

Finally, to admit that companies can be created exclusively to carry out activities in the form of companies, without more specific indications, fosters the use of the companies for abusive or fraudulent purposes (*e.g.* to circumvent the responsibility for some offenses, to benefit from limited liability), as it repeals even the slightest form of control.

However, it is also true that for some smaller private companies, the objects clause and the limitations deriving from it are only a burden. Clearly, this area of intervention is the responsibility of the national legislator, given the substantial differences that exist in the various Member States. However, despite the regional differences, any suitable solution should necessarily prospect a different regime - including both benefits and restrictions - for companies which choose to adopt an objects clause and companies that do not. In fact, the real reason why objects clause has relatively lost importance is not so much the fact that it did not cover interests worthy of protection but that there was not an actual difference between companies that had a specific object and those that used broad formulations. In conclusion, the fact that a legal tool was conceived for certain purposes or used mainly to achieve a certain result does not mean that it cannot used to face other necessities and issues, as the law evolves. It is also true that for some smaller private companies, the objects clause and the limitations deriving from it are only a burden. Clearly, this area of intervention is the responsibility of the national legislator, given the substantial differences that exist in the various member states.

In this variegated regulatory framework, the Irish solution is relevant because it affirms the importance of the objects clause despite the *ultra vires* doctrine being dismissed. In fact, the Irish discipline does not dispute the principles on the external relevance, but it focuses solely on the internal dimension, which was affected by the First Directive, despite being a common element to many legal systems. Assumed that it is no longer possible to protect the role of the objects clause by affecting third parties, the Irish reform tries to counterweight the lack of remedies by preventing *ultra vires* transaction from happening thanks to a strengthened duty on the directors and a right for the shareholders to forbid certain transactions, in case they appear to be exceeding the objects of the company[196].

Thus, the Irish example appears a consistent and more efficient implementation of the EU rules in the national company law and opens the door to a renewed significance of the objects clause in company law as the clause is not implemented for its direct effects, but because it defines a different company model, with unique features, that could be more or less suitable for the members, according to their necessities. The ball now is in the field of the remaining twenty seven Member States of the EU.

[196] A solution that also solves the problem of the shareholder making indirectly management decision

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