Regulatory Suspensions in Times of Crisis: The Challenges of Covid - 19 and Thoughts for the Future

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Abstract

The Covid-19 crisis in 2020 severely impacted the corporate and in turn, the financial sectors of the UK, entailing responses from financial regulators to implement unprecedented regulatory suspensions that affect both the financial sector and the real economy. We argue that regulatory suspensions are a unique crisis management tool and give rise to certain concerns and implications. We offer two case studies in regulatory suspension that show how inherently flexible laws and regulations became an anchor for unexpected suspensions or adjustments in other regulatory provisions and laws. These create implications for rebalancing of regulatory objectives and distributive effects and also for incentivizing certain behaviours amongst affected constituents. These institutional implications may be temporary or have a longer-term effect, and we argue that there is a need for a robust and rational regulatory decision-making framework in relation to regulatory suspensions, as part of crisis management. We sketch the contours of such a framework which includes rational balancing of the cost and benefits of regulatory objective trade-offs, distributive effects and institutional implications. We advocate a broad and deep 'humanizing' approach to balancing cost and benefit in regulatory suspensions, drawing upon Sunstein's work. We also advocate a coordinated and inclusive procedural approach to crisis management, including regulatory suspension decisions, that would enhance regulators' preparedness and intuitive skill in this area.

Keywords: Covid-19, financial regulation, micro prudential regulation, pre-emption rights, capital markets regulation, legal elasticity, crisis management

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The Covid-19 crisis in 2020 severely impacted the corporate and in turn, the financial sectors of the UK, entailing responses from financial regulators to implement unprecedented regulatory suspensions that affect both the financial sector and the real economy. We argue that regulatory suspensions are a unique crisis management tool and give rise to certain concerns and implications. We offer two case studies in regulatory suspension that show how inherently flexible laws and regulations became an anchor for unexpected suspensions or adjustments in other regulatory provisions and laws. These create implications for rebalancing of regulatory objectives and distributive effects and also for incentivizing certain behaviours amongst affected constituents. These institutional implications may be temporary or have a longer-term effect, and we argue that there is a need for a robust and rational regulatory decision-making framework in relation to regulatory suspensions, as part of crisis management. We sketch the contours of such a framework which includes rational balancing of the cost and benefits of regulatory objective trade-offs, distributive effects and institutional implications. We advocate a broad and deep 'humanizing' approach to balancing cost and benefit in regulatory suspensions, drawing upon Sunstein's work. We also advocate a coordinated and inclusive procedural approach to crisis management, including regulatory suspension decisions, that would enhance regulators' preparedness and intuitive skill in this area.

I. INTRODUCTION

This paper discusses regulatory suspension, which can be regarded as a subset of the broader literature on crisis management by regulators (e.g. Balleisen et al. 2017). In particular, during the outbreak of the Covid-19 crisis, financial regulators in the UK, i.e. the Prudential Regulation Authority (PRA) (which is the prudential regulator that oversees 2,000 or so banks, insurers and systemically important financial institutions) and Financial Conduct Authority (FCA) (which is the conduct regulator overseeing all financial institutions, including PRA-authorized institutions in respect of business conduct) suspended the application of certain regulatory laws and issued extraordinary measures to regulated entities to suspend the application of certain private contractual laws. These were carried out in order to advance the social desire of meeting emergency business and consumer needs and to enable regulated institutions to contribute towards crisis-fighting social goals. Two case studies of regulatory suspensions in this crisis-management episode will be discussed in Sections III and IV.

Regulatory suspension can be seen as one of the ways the 'elasticity' of law is realized in order to cater for wider political, social and economic needs (Pistor 2013). Reis and Vasconcelos (2016) affirm that such elasticity is institutionally supported as based on the expected macro-economic behaviour of agents in markets, and empirical evidence also offers support for the *ex post* efficiency and welfare effects of certain suspensions, in private law agreements such as debt moratoria (Bolton and Rosenthal 2002; Reinhart and Tresbech 2014 in relation to sovereign debt). Carruthers (2017) characterizes contractual suspensions as ‘financial decommodification’ that is necessary when markets are temporarily dysfunctional. Regulatory suspensions and adjustments were also regarded as necessary during the global financial crisis 2007-09 as ‘normal’ assumptions in market conditions and firm resilience had to be jettisoned (the literature is copious, see for example Awrey 2017; Lastra 2017). However, elasticity of the law should not only be thought of in a utilitarian paradigm, and this paper intends to unpack the nature of, institutional accommodation and the governance implications for such elasticity, adding to the research platform for the legal theory of finance advanced by Pistor (2013), as well as to the burgeoning literature on regulatory crisis management which is inter-disciplinary and yields insights for the governance of regulators (Balleisen et al. 2017; Hutter and Lloyd-Bostock 2017). At a jurisprudential level, we take the view that regulatory suspensions should not be driven only by ends-based considerations and there is room to debate issues of institutional tenets, universal values (Kant 1781; Nozick 1991) and optimal procedures in the mix.

The Covid-19 crisis in the UK hit the financial sector in terms of its market activity and market prices, as a consequence of adversely affecting the real economy, i.e. firms and human capital. Fears of widespread contagion and risk to public health caused the UK government to announce a lockdown of society, and the economy. This lockdown resulted in the freezing of business activity for many sectors, such as bricks and mortar retail (except groceries and pharmacies), travel and leisure, restaurants, public services, and service-based industries that were adversely affected by social distancing such as transport, work-sharing facilities, leisure, hospitality etc. The financial implications of economic lockdown in so many sectors were immediate as the corporate sector is heavily financialised (Ho 2014). The freezing of business activity in these hard-hit sectors has implications for their cash flow, servicing of debt, potential insolvency and hence their market valuation and credit ratings. Further, the decline of market sentiment triggers investors’ behavioural bias towards cash and not illiquidity (using Lo’s adaptive capital markets hypothesis, 2004, also Reis and Vasconcelos 2016), and adversely affects levels of private investment in the corporate sector (Ricketts 2020; Mooney and Smith 2020). Besides public finance packages for emergency help, such as furloughing, financial regulators’ suspension initiatives play a part in the overall mosaic to prevent systemic damage to the economy and to the financial sector’s roles in risk and investment allocation.

The paper provides theoretical framing for regulatory suspension in the time of crisis within the conceptualization of elasticity in law. Section II discusses the literature on elasticity of law in relation to inherent and unprecedented relaxation of existing regulatory structures, the latter usually being revealed in distress scenarios. We suggest that unexpected elasticity is often built upon an aspect of inherent elasticity but can give rise to a broad range of debatable issues as unexpected elasticity extends beyond the underpinning rationales for inherent elasticity. Sections III and IV examine regulatory suspensions in two case studies in the UK where regulatory elasticity, both inherent and unexpected, are deployed. Section V draws together the reflections from the case studies to propose the need for a crisis management framework for financial regulators, in a pre-crisis as well as crisis management mode, in order to provide a more institutionally-disciplined and coherent approach to elasticity in regulatory suspension. Section VI briefly concludes.

II. REGULATORY SUSPENSION AND ELASTICITY IN LAW AND REGULATION

There are two types of regulatory suspension observed, both illustrated in the case studies below. The case studies are constructed not on the basis of single regulatory or legal measures, but as packages of legal and regulatory interventions, comprising a number of different regulatory suspensions, with a mixture of private law and public regulation. This approach better reflects policy measures undertaken by regulators towards the same purposes. This does not mean that the legal or regulatory measures are analyzed only in a collective manner and not as *per se* instruments, as each legal or regulatory measure embeds certain institutional tenets, values and societal bargains (Deakin 2013). The case studies raise issues of institutional, governance, behavioural and outcomes implications that entail from the suspension of each of these measures.

The first type of regulatory suspension is the downwards-adjustment of an *ex ante* elastic law or regulation. Therefore, the law or regulation in question has in-built flexibility as a matter of design. In the first case study, in-built flexibility is discussed in relation to the prudential regulation measure of the counter-cyclical buffer. As Masur and Macey (2017) argue, such regulation is designed to address the need for financial regulators to shape the incentives of financial actors that are inherently biased towards procyclicality, in order to moderate potential market excesses that are not self-correcting. In downturns, as has been caused by the onset of the Covid-19 crisis, the relaxation of prudential regulation that is inherently adjustable is merely counter-cyclical regulation that counteracts sub-optimal market behaviour. In the second case study, in-built flexibility is discussed with regard to the relaxation of pre-emption requirements which has 'enabling' characteristics that allow shareholders and their companies to make adjustments in a 'relational' contractual paradigm.[1] This would permit companies to raise finance with less 'normal' obstacles in company law. In-built flexibility in law and regulation reflects the dynamic needs of policy and institutional tenets, and although regulated subjects, markets and stakeholders would theoretically be conditioned to expect the possibility of adjustment, the extent and duration of adjustment would still raise issues in terms of the governance of regulatory discretion and external reactions. For example, the PRA's guidance to its regulated entities in relation to cancellation of dividends was in particular upsetting for banks and their shareholders (PRA 2020a) despite being part of the overall prudential regulation adjustment package in case study 1.

The second type of regulatory suspension observed is an application of elasticity where none was explicitly built in or expected. In both of our case studies, we observe that these types of suspensions were deployed and inextricably linked to or supported by those regulatory suspensions that have in-built flexibility. In case study 1, the PRA's guidance on regulated entities drawing down their usually 100% mandatory liquidity coverage ratio (PRA 2020b) is a somewhat 'unexpected' complement to in-built flexible regulatory measures such as the counter-cyclical buffer. Further, the PRA's and FCA's guidance to payment holidays for consumers in particular (FCA 2020a; FCA 2020b) suspends clear and inflexible contractual frameworks that govern creditor-borrower relationships, feeding into the prudential treatment of defaults and non-performing loans (PRA 2020c). In this respect the European Banking Authority's similar guidance to national regulators (EBA 2020a)[2] in the EU also show the bundling of regulatory suspensions, extending the aura of inherently flexible regulations to 'justify' or 'cover' the co-option of other adjustments not inherently envisaged. In case study 2, the FCA introduced adjustments to mandatory procedural law for company meetings and mandatory disclosure for corporate fund-raising, accompanying the relaxation of pre-emption rights (FCA 2020c). In both case studies, the aura of 'flexibility' in inherently adjustable instruments has been extended to connect to and cover the suspension of laws or regulations not previously seen to be inherently flexible. It is this phenomenon of bundling of both types of regulatory suspensions that gives rise to the issues critically unpacked in this paper.

We argue that the bundling of regulatory suspensions gives rise to four questions whose unpacking is important for us to develop a framework for making regulatory suspensions more ‘institutionally-disciplined’ without losing their valuable flexibility in dealing with crises (Lastra 2017).

A. THE BALANCE OF INSTITUTIONAL TENETS OR VALUES AFFECTED BY REGULATORY SUSPENSION

The bundling of regulatory suspensions that are inherently flexible with those apparently not gives rise to questions regarding how institutional tenets and values ‘encoded’ in law or regulation are rendered imbalanced. This is relevant to institutional values or tenets underlying mandatory laws or regulations, such as market discipline that needs to ward off moral hazard (Kammel 2015; Hatzis 2015), or financial institution resilience (Acharya and Richardson 2009). The questions at stake are: to what extent does being bundled with inherently flexible regulations or laws affect the institutional tenets underlying the mandatory character of not-inherently flexible laws or regulations; and does the bundling of regulatory suspensions entail competition or trading off between different regulatory goals and objectives (Kammel 2015) that regulators need to balance? Further, questions abound as to whether disrupting the assumed immoveability of certain institutional tenets is likely to be temporary only or gives rise to longer-term rethinking (Iacobucci 2016; Balleisen et al. 2017). In this way, such disruption may re-open social contract negotiations or bargains underlying the institutionalization of those tenets.

B. HOW REGULATORY SUSPENSION AFFECTS INCENTIVES AND BEHAVIOUR

A number of commentators have presented in richly analysed literature how behavioural insights further understanding in regulatory crisis management (Hutter and Lloyd-Bostock 2017; Balleisen et al. 2017), this behaviour relates to regulators, politicians, actors in society with influence over the framing of narratives, e.g. the media and social media opinions (Mayer 2017; Hutter and Lloyd-Bostock 2017), market participants and the general public. There are intricate dynamics in behavioural interactions such as regulatory perceptions that regulators are expected to ‘do something’ (Enriques 2009), politicians’ relationships with regulators, whether as positively co-reinforcing or in negative blame games (Hutter and Lloyd-Bostock 2017), how the general public and markets are affected by or contribute to narrative framing of a crisis (Weber 2017; Birkland and Warnement 2017) that prompts policy or regulatory action. Relevant constituents and stakeholders affect the framing of the ‘focusing event’ (Birkland and Warnement 2017) that anchors policy or regulatory change, and the salience of relevant information that should change assumptions and calculations from normalcy (Stanton 2012; Mayer 2017).

The framing of narratives that underlies suspension of inherently flexible laws may, in conflation with the suspension of apparently inflexible laws or regulations, become more differentiated and uncertain. Further, it cannot be ruled out that regulatory suspensions, especially of apparently mandatory laws or regulations, can give rise to market participants’ incentives to exploit opportunities (Wiggins, Vandevelde, and Wigglesworth 2020).[3] Regulatory suspensions may also affect market-based incentives in unintended ways if rigid or complex market structures have arisen based on assumptions of certain mandatory law or regulations (Noonan 2020).[4] Understanding the landscape of incentives and behaviour entailing from regulatory suspensions is likely to be made more complex by the bundling of the two types of regulatory suspensions.

C. THE REDISTRIBUTIVE EFFECTS OF REGULATORY SUSPENSIONS

Regulatory suspensions often result in reallocations of burden and benefit, and these may be perceived as justified on the basis of who may better be able to bear risk or loss, and who may be in relatively greater need of welfare redistribution. Welfare redistribution can be based on existential threat or 'survival' (Enriques 2020a). These perceptions of individual capacity and need, and *ex post* systemic efficiencies or welfare enhancements (Bolton and Rosenthal 2002; Fleitas, Fishback, and Snowden 2015) interact as dynamic considerations against deeper underlying institutional structures, such as in relation to the nature of the Lockean social contract in politics. The rise of the risk society (Beck 1992) and welfare state in Western developed countries (Rose and Shiratori 1986; Offe 1996), poses the question of the extent to which consumers should be entitled to protection, relief and welfare.

In this debate, the caution issued by Kammel (2015) in relation to over-protection of consumers can be balanced against Pistor's (2013) warning that regulatory suspension can be unfair and differentiated due to different levels of power in financial markets participation. In this respect, consumers who are relatively disempowered when dealing with financial institutions and who find themselves in standardised but rigid contracts (Gerding 2013) are in need of regulatory suspension as intervention. Among more sophisticated or powerful financial market participants, regulatory suspensions also entail redistributive consequences. In case study 2, the adjustments to mandatory disclosure for securities offerings in emergency fund-raising by corporations have redistributive consequences in terms of reducing cost for companies, but potentially increasing opacity cost for investors. In a landscape of potential systemic damage to the corporate sector, the needs of companies and hence their welfare may tip the balance (by analogy, Cassis 2017; Green 2010 on the financial sector bailout in the global financial crisis 2007-09). Nevertheless, such adjustments should be recognised and its governance (Casey and Posner 2015-16) and implications mapped out.

D. THE PROBLEM OF REGULATORY COMMONS

Buzbee (2003) argues that in a crisis, what may be exposed is not the panicked over-regulation typically expected of regulators depicted in public choice theory, but gaps and spaces where regulators do not address. This may be due to existing regulatory boundaries or fragmented financial regulatory architecture such as in the US. Regulatory commons are exacerbated in a crisis as acute needs are likely to be left to already dysfunctional private contracting, which may not have in-built relational elements to deal with crises. In case study 1, we highlight how regulatory suspensions in relief are targeted at consumers and not businesses. This reinforces a broader gap in the regulation of business conduct vis a vis non-consumers. This space is governed by private actors' incentives and behaviour, which have been shown to be sub-optimal in recent history (Chiu and Brener 2019).[5]

We turn now to two case studies in regulatory suspension to show whether and how the issues above have been navigated and considered. We argue that bundling of inherently elastic and unexpected regulatory suspension raises complex issues often left opaque. A more institutionally disciplined framework for the governance of regulatory suspension can more optimally address imbalance in institutional tenets, incentives and behaviour, redistributive consequences and regulatory commons. We propose in Section V a framework that incorporates pre-crisis preparation and crisis management by regulators.

III. REGULATORY SUSPENSIONS AND ELASTICITY IN UK BANKING REGULATION

During the Covid-19 crisis in the UK, a key policy concern is how credit arrangements would affect households and corporations that are both in debt and or need financing by debt in order to meet financial needs during the challenging period. The package of responses from the PRA and FCA regarding banks' role in the crisis was intended to meet the policy goal of keeping credit lines flowing and providing liquidity for businesses and households (FCA 2020d). This package comprises various measures designed to achieve two broad effects. One is to allow banks, as the main creditor of many households and corporations, to be able to treat their borrowers more leniently. This allows borrowers battered by the lockdown to be relieved of the pressures of debt while regrouping themselves and surviving during the crisis. Two, the crisis-fighting regulatory measures would also allow banks to extend credit and finance to business borrowers through the crisis. This would help businesses avoid key social losses such as protecting jobs and inflicting knock-on effects upon their suppliers (Huertas 2020). Further, the PRA has also announced a range of modifications to another set of inherently elastic microprudential rules in order to support banks' market-making activities in financial markets, so as to maintain liquidity conditions.[6] This reflects the PRA's willingness to deploy inherent regulatory elasticity in a significant manner, but is not an area that will be examined in detail in the present case study.

In order to anchor the package of measures introduced in a coordinated manner by the PRA and FCA, the Bank of England's Financial Policy Committee (FPC), which is the macroprudential regulator in the UK with oversight for systemic health of the financial system,[7] exercised its power to adjust an inherently elastic prudential regulatory measure known as the countercyclical buffer (CCyB). The buffer was introduced in the wake of the global financial crisis 2007-09 as a measure to allow the macroprudential regulator to impose capital cost on banks to dampen pro-cyclical creation of debt in bubbly times (Chiu 2019) which could feed into a cycle of Minskian instability (Minsky 1992). Prior to the onset of the Covid-19 crisis, the CCyb was set at 1% for UK banks to be elevated to 2% by December 2020 as economic activity looked strong and banks should be prevented from excessive risk-taking. This was abruptly adjusted to 0% during the Covid-19 crisis,[8] freeing up for banks an estimated capital cost of £190bn (BoE 2020a; PRA 2020d).

The regulatory elasticity in the CCyb reflects the need for microprudential regulation for banks, which uses capital cost tools in adjusting banks' incentives to create credit, to be flexible depending on economic cycles and circumstances. Freeing up the cost of capital originally imposed by the CCyb does not however automatically result in either more lending or forbearance. During the Covid-19 crisis, borrowers' creditworthiness would be difficult to discern due to the uncertainties in relation to wider domestic and international economic conditions, and this may impede banks from lending more. Behavioural tendencies such as risk aversion and impediments to efficient markets such as acute information asymmetry may result in capital hoarding instead. Hence the PRA and FCA introduced a raft of measures in areas where inherent elasticity may not be able to steer more precise actions on the part of banks. This bundling of measures is clearly targeted at the immediate needs of loan forbearance as well as more borrowing, but would give rise to tradeoffs amongst regulatory objectives and distributive effects which this Section examines.

A. REGULATORY PACKAGE AIMED AT RELIEF FOR BORROWERS

First, regulatory suspension is made in relation to loan repayment holidays granted to household borrowers. These measures are applicable to consumer credit and mortgages and not to business loans. In terms of mortgages, FCA guidance requires firms to grant a payment holiday for three months to any customer who indicates that they may potentially experience difficulties in the current circumstances and requests a payment holiday (FCA 2020a). This measure does not affect the accrual of interest on the loan and firms are not required to investigate the individual circumstances of each customer neither to assess affordability, although firms might carry out such investigations on their own initiative. In cases where a customer is in default, the guidance prevents firms from commencing or continuing repossession proceedings and any possession order already made must not be enforced. In parallel, the FCA has required firms to offer a temporary payment holiday for personal loans and credit cards for a period of up to three months to any consumers negatively impacted by the pandemic crisis and, in the case of consumers with an arranged overdraft, to provide an additional interest-free overdraft facility of £500 for a three months period. Finally, the FCA has taken temporary measures to freeze repayments within the context of high-cost short-term credit loans for a period of one month (FCA 2020b; FCA 2020e).

By requesting firms to freeze loan repayments, the FCA has *de facto* suspended normal regulatory obligations as well as the contractual terms between firms and borrowers. Households on payment holidays should not be treated as being in default, or as 'non-performing loans'. This means that banks can refrain from treating such loans as potentially going sour, which would oblige them to provide 'loan loss' capital against such adverse potential. Further, contractual terms regarding default, which operate as efficient market mechanisms to protect lenders, are forcibly suspended for the wider public interest objective of alleviating household suffering. If left to efficient market mechanisms, the operation of private law could lead to the systemically destabilising effect of mass household defaults and even bankruptcies during this period. This suspension coheres with Pistor's (2013) theory that legal flexibility is crucial to financial stability, even though the very quality of legal certainty in efficient and normally-functioning markets seems compromised during crises. Indeed, the FCA does not have statutory power to amend such contracts and the rules on arrears are set out in the Consumer Credit Act 1974. Rather, the relevant guidance of the FCA is based on its general conduct of business principles, especially on Principle 6 that requires firms to pay due regard to the interests of their customers and treat them fairly. It is argued, however, that the guidance on repayment holidays represents a relaxed interpretation of Principle 6 that relies entirely on wide regulatory discretion with few pre-existing principles that could make its exercise predictable.

Although the above meets an intuitive public interest objective of alleviating household suffering, regulators have to delicately balance the objectives between responding to consumer needs and controlling banks' prudential behaviour. Payment holidays exacerbate information asymmetry for banks in relation to borrowers' creditworthiness and banks may make increased loan loss provisions against these, (Rees and Taqi 2020; Morris and Crow 2020; Morris, Vincent, and Crow 2020) paddling back against the capital liberation that has been offered. In terms of loan loss provisioning, the IFRS 9 requires banks to account for debt instruments at fair value unless they satisfy the contractual cash flow test and business model assessment requirement. Changes in fair value have to be reported in the profit and loss account e.g., a reduction in fair value is registered as a loss and thus reduces a bank's common equity tier 1 (CET1) capital. This is an example of a forward-looking approach from supervisory authorities adopted in the aftermath of the 2008-09 global financial crisis (Lastra 2013). The application of IFRS 9 during the pandemic crisis would inevitably lead to a significant increase in expected credit loss provisions and hence a contraction of the ability of banks to grow their balance sheet by lending. To mitigate against excessive loan-loss provisions, the PRA urges banks to consider longer term outlooks for borrowers and the transitional nature of the crisis, nudging banks against excessive loan-loss provisions while not wanting to discourage prudence altogether (BoE 2020b). The ECB, similar to the PRA's approach, now allows banks to take a longer-term view of loan adversity so that the crisis, which is expected to last for the pandemic only, may not result in an excessively pessimistic perspective and loan-loss provisioning (ECB 2020). Although the PRA has not explicitly provided guidance on non-performing loans, the EBA (2020b) has encouraged banks to make use of existing flexibility in its guidelines on the management of non-performing and forborne exposures and to engage in a close collaboration with their supervisors on these matters. There is no universal definition of a non-performing loans (Bholat et al. 2016), although the ECB's approach is to treat loans past due for 90 days as non-performing (ECB 2017). This is suggested to be capable of flexibility. There is also a transitional arrangement under article 473a of the CRR which permits banks to neutralize the effect of IFRS 9 on their CET1 capital until the end of 2022. To address the challenges caused by the economic shock, the Commission has proposed a Regulation amending CRR and CRR II to the effect of extending the transitional arrangements until the end of 2024 (Commission 2020). The proposed Regulation extends the preferential treatment granted to non-performing exposures that are guaranteed by official export credit agencies to exposures guaranteed or counter-guaranteed by the public sector in the context of measures aimed at mitigating the impact of the Covid-19 pandemic.

The above emphasis on relief for consumers and the withholding of prudential 'brakes' on loan assets of uncertain quality creates efficiency disruptions and compliance dissonance for banks. Regulators are unwilling to precisely alter loan-loss provisioning rules and non-performing loan guidances aimed to counteract the excesses of the last financial crisis. Yet asking banks to internalize the balance poses a difficult challenge- should banks take the opportunity to treat borrowers generously, especially favoured clients? How should banks manage the resumption of regulatory expectations in due course? The measures above also create certain distributive effects that need to be considered.

First, banks have warned that payment holidays is not the same as debt relief. Consumers benefiting from this may behaviourally postpone their troubles, but may be storing up an amount of arrears and debt that may become even more unmanageable in the future (Megaw and Vincent 2020a). Indeed, some commentators have warned that unclear advice from regulators risks pushing customers into more debt. Huertas (2020) speaks of both relief during the pandemic and the need for normalization so that predictability and efficiency can work in markets after the pandemic is over. The question at stake is: how will the return of efficiency and contractual discipline affect consumers and are they factoring these into account in their choices under stress during the pandemic? Next, businesses are not excluded from payment holidays by regulatory suspension but are instead enrolled into the loan boosting scheme discussed below. It is uncertain if this policy choice is optimal given that commentators (Eidenmüller, Enriques, and Van Zweiten 2020; Gurrea Martínez 2020) advocate the necessity of corporate debt relief in order to prevent seizure in the real economy. Third, efficiency disruptions introduced by regulatory suspension affects market mechanism chains that may in turn adversely affect consumers. This is experienced in the US mortgage markets where securitization is the norm for supporting mortgage underwriting. Underwriters of mortgages seek to bundle up mortgages into securitised assets usually after 3 months of such mortgages being written. Payment holidays affects the information quality of such mortgages as no reliable stream of income can be reported for securitized assets sales, and this can in turn freeze up mortgage markets, adversely affecting households that need mortgages or refinancing (Noonan 2020).

Further, banks and other lenders may try to discourage retail customers from taking advantage of repayment holidays. The FCA has not provided clear enough guidance to lenders on how to deal with requests for repayment holidays leaving to borrowers the burden of negotiating the exact terms of their debt for the period after the suspension of repayments. Another issue affecting customers is that the repayment holidays can trigger requests by lenders to customers demanding repayment of their debts because they will have gone into arrears, even though the loan holidays will have been agreed in advance (Megaw and Vincent 2020b).

The measure of repayment holidays to ease pressures on consumer borrowers also manifests the characteristics of a regulatory commons as it exposes a pre-existing weakness in UK banking regulation regarding the protection of customers. Despite the regulatory framework that seeks to protect borrowers and consumer mortgages, there is no general legal duty of care owed by banks to their customers and this relationship is not normally a fiduciary one meaning that banks are free to pursue their own interest at the expense of their customers within the limits imposed by conduct of business regulation (Chiu and Wilson 2019). On this point, an exception is the possibility of the Financial Ombudsman Service to grant relief to financial services customers who have been treated unfairly even if the relevant firms have not breached any legal or regulatory obligations.

Finally, regulators need to consider the distributive effects of the measures above. Banks are aware that payment holidays across the board for households, irrespective of borrower quality, would only result in the surfacing of unviable borrowers when the generous tide of relief recedes. The pursuit of unviable borrowers nevertheless needs to be conducted within fair and reasonable standards of conduct (Huertas 2020). There is likely to be a distributive effect from lenders to borrowers entailing from the relief during the crisis. This is privately borne by banks and their shareholders. This type of redistribution via interfering with private contracts may be blunt as bank shareholders may not necessarily be wealthier than borrowers and is generally less efficient than redistribution via taxation (Kaplow and Shavell 1994). How optimal this redistributive effect is also depends on bank fragility and whether there is an increased chance of use of public funds to recapitalise them (Avgouleas and Goodhart 2019). The years of microprudential reform have made banks more resilient (Murphy, Garrido, and Ahmad 2020) and policy-makers may think it is time for such a redistributive effect. It is also interesting that repayment holidays for consumer borrowers are not consistent with the predictions made by Pistor's (2013) legal theory of finance that evidences elasticity at the apex of the financial system, in favour of states and large banks, than at its periphery and hence that consumers are likely to face the full rigour of the law. The reason for this phenomenon is that the current situation is not, at least for the time being, one that threatens the survival of the financial system, and perhaps the UK government and regulators perceive that they can pursue social welfare policies by increasing elasticity at the system's periphery rather than changing the regulatory structures at the apex. The interrelationship between regulatory suspensions and broader policy and political interactions needs to be more thoroughly considered.

B. REGULATORY PACKAGE AIMED AT INCREASING CREDIT AVAILABILITY TO BUSINESSES

The PRA has clearly instructed UK banks that all elements of liquidity and capital buffers "exist to be used as necessary to support the economy" (PRA 2020b, 1). Arguably, this general pronouncement reflects the introduction of objectives in microprudential regulation that are different from the objectives in post-crisis regulatory reforms from 2010. The regulatory adjustment measures are a package of inherently flexible ones and unexpected ones not thought to be flexible. Besides the inherent elasticity of the CCyb, the PRA guidance clarifies that banks can draw down their discretionary capital buffer. Regulatory capital buffers such as the capital conservation, systemic risk, PRA buffer and buffers applying to systemically important banks are required to be maintained as risk-constraining measures since the post-crisis reforms (Chiu 2019). However, banks may build up discretionary buffers on top of regulatory buffers in order to be prudent. They are now encouraged to draw down such discretionary buffer (PRA 2020b) in order to maximise their capacity to lend. The PRA and FPC have nevertheless maintained the levels of regulatory buffers (except CCyb), such as firms' systemic risk buffer rates so as to maintain confidence in banks' resilience (PRA 2020e).

Next, a suite of microprudential regulatory measures in liquidity and leverage thresholds have been relaxed, many of these not thought to be inherently flexible as they relate to the risk moderation objective in shaping banks' asset creation conduct. Banks are encouraged to allow businesses with credit lines and undrawn credit to draw upon such lines, even if this means banks' liquidity ratios may fall below the mandatory 100% they are supposed to maintain. The liquidity coverage ratio has been intended to be maintained at all times at 100% which effectively means that a firm can meet its cash outflows for a period of 30 days as a measure to prevent a liquidity-driven systemic crisis in the future. This relaxation is therefore an example of unexpected elasticity which raises concerns about the balancing of short-term crisis management objectives against prudential regulatory objectives. It is unclear to what extent banks can draw down their liquidity ratio, as this can cause liquidity hazards for them. However, the Bank of England's Coronavirus Corporate Financing Facility (BoE 2020c) which is designed to help businesses tide over liquidity squeezes through their bank could help prevent banks from being dragged into liquidity hazards by corporate customers.

In order to precisely steer banks' behaviour towards increased support for the real economy instead of perverse incentives such as rewarding shareholders, the PRA provided strongly phrased guidance to UK banks to suspend any capital distributions to shareholders including the payment of dividends and share buy backs as well as the payment of any cash bonus to staff that qualify as material risk takers (PRA 2020a). This can be regarded as a different type of 'suspension' as it is a form of intervention that adjusts and disrupts market participants' expectations, such as on the part of institutional shareholders. This is another instance of unexpected elasticity. Regulators' power over dividend restrictions is warranted under the CRD IV[9] in order to promote the resilience of banks and financial stability. This use of discretionary power, outside of the original rationale, may however raise long-term problems relating to banks' cost of capital and ability to attract and retain talented staff.

Further, the relaxation of microprudential requirements to incentivize lending, and hence turn banks' potentially risk-averse preferences to supporting the real economy, is complimented by suspension of externally administered stress testing. Stress tests are a useful exercise for supervisors to understand whether banks have enough capital to continue to intermediate and lend in disrupted scenario (Kohn 2020). Stress tests are run by the FPC which has a macroprudential mandate and the Prudential Regulation Committee (PRC), which has microprudential responsibilities. The BoE normally runs the following stress tests: annual cyclical scenario and a biennial exploratory scenario. Stress tests support the FPC in achieving the legislative mandates to identify risks to financial stability and take steps to contain those risks. The tests are forward looking and facilitate systemic judgments and cross-bank comparisons: they assess bank portfolios against risks that might occur in the future. The BoE has postponed the 2020 stress test, e.g. the annual cyclical scenario (BoE 2020b). This decision is intended to keep credit flowing to households and businesses and reduce pressure on banks which can accommodate more loans on their balance sheets funded by a constant level of equity (Strauss and Morris 2020). Although the suspension is based on an inherently elastic structure as the PRA has full discretion on the timing and frequency of regulatory stress testing, we caution against the drawbacks of such suspension as such suspension does not alleviate information opacity at times of crisis.

As the Covid-19 crisis brings about uncertainties for business in relation to the macro-economic effects of disruption, risk information regarding business creditworthiness is likely to be challenging for banks to price. The relaxation of microprudential requirements provides incentives to lend but banks are likely to be risk averse. Hence, the UK government has announced fiscal support for two loan schemes. UK businesses with turnover of less than £45 million can benefit from the Coronavirus Business Interruption Loan Scheme, which is administered by the government-owned British Business Bank and enables accredited lenders to provide loans and overdraft facilities of up to £5 million, guaranteed at 80% by the government, to be repaid over up to six years (Great Britain. Business, Energy and Industrial Strategy Dept 2020a). UK small and medium sized businesses will also benefit from the Bounce Back Loan Scheme that provides loan facilities of up to £50000, guaranteed at 100% by the government to be repaid over up to six years with no payments in the first twelve months (Great Britain. Business, Energy and Industrial Strategy Dept 2020b). Lenders are expected to assess whether businesses should access such government-guaranteed finance, the principle being that loans should only be available to otherwise healthy businesses that need to trade through the short- to medium-term revenue loss caused by the lockdown. In order to support the lending programme, the PRA has announced that loans made under the Bounce Back Scheme, which is 100% guaranteed, would not be counted in the leverage ratio, a hitherto mandatory microprudential threshold (BoE 2020d). The leverage ratio limits all leverage created by banks to be supported by at least 3% of CET1 capital (Basel Committee on Banking Supervision 2014).[10] This is a measure that backstops bank lending and compliments capital adequacy measures that rely on risk-weighting, which can be discretionary and in the global financial crisis, tested to be inaccurate (Turner 2009).

The suspension of application of the leverage ratio to Bounce Back loans is likely to fuel moral hazard as the urgent demand for such loans makes underwriting a pressed process exacerbated by information asymmetry. Banks are indeed facing the challenge of issuing large volumes of loans to unrated borrowers as fast as possible when the likelihood of default is soaring; and to also follow conventional rules over prudent lending and consumer protection for borrowers (Lee 2020). The government guarantee is likely to incentivize minimal underwriting diligence standards as banks do not have the incentive to price conservatively. Commentators already expect at least a fifth of Bounce Back loans to default in due course (Bounds and Thomas 2020). Although the welfare needs of the real economy are immediately pressing, the suspension of hitherto mandatory microprudential standards creates problems for their future credibility. Further, banks need an exit strategy for when the stringency of microprudential standards may return. The difficult balance that must be struck is to ensure banks have both the flexibility needed to make sound commercial decisions and sufficient capital to remain robust in the face of highly uncertain circumstances (Schammo 2020; Baudino 2020).

It is uncertain if the UK government's policy choice which is to greatly expand commercial channels of financial support for businesses, i.e. through banks, is necessarily optimal, as the public interest needs underlying policy choice greatly interferes with the delicate relationship between microprudential regulation and commercial decision-making. In essence, banks need to suspend much commercial decision-making as supported by the removal of regulatory constraints, but regulators need to ensure that there is no boomerang effect upon banks for weak commercial decision-making during crisis times when the expected microprudential regulatory standards are reinstated. The suspension of the annual regulatory stress testing will also cause a lack of information on bank resilience in the face of microprudential regulatory relaxation, especially as more risk is expected to be taken on. It is argued that regulatory stress testing could be even more indispensable in the current environment. Further, it is uncertain that the temporary boost of lending to businesses would not become a snare for borrowers in the future. The Bounce Back Scheme relieves businesses of interest payments for the first six months, but it is uncertain if six months may be sufficient for a business to recover. The government guarantee can also introduce perverse incentives for banks to accelerate treating recovering Bounce Back borrowers as in default so as to call upon the guarantee and to remove these borrowers from banks' balance sheets. This is not unwarranted as banks would wish to remove the distributive advantage towards borrowers as soon as they are able to. Huertas (2020) rightly argues that current loan support measures must be coupled with regulatory thinking about conduct in treating borrowers in due course, as careful discernment of unviable borrowers and their fair and decent treatment remains a paramount concern even as the crisis recedes.

It may be argued that the hazards of compelling banks to support expanded credit in such emergency times may be overstated as companies have the option of raising equity which is a more stable form of finance to tide over the crisis. Equity-raising also benefits from regulatory suspension which is discussed below. Nevertheless, we observe a regulatory commons in this episode which could be beneficially addressed in order to provide borrowers with more competition and choice in emergency borrowing. It seems that the capital markets aspect has been ignored in the temporary regulatory measures for banks taken by the PRA and FCA. Non-bank specialist lenders play a key role in financing small businesses and providing consumer finance such as point-of-sale credit.[11] The government has not included non-bank lenders in the emergency scheme for businesses which can create problems if they stop originating new loans and customers become unable to switch to new deals at the end of their fixed terms even if they have kept up with repayments (Morris, Megaw, and Thomas 2020). The wholesale and capital markets were for a time effectively closed to non-bank lenders limiting the ability of them to continue lending. To address the problem, the BoE strengthened the "Term Funding Scheme" (BoE 2020e) which provides cheap funding to help maintain credit volumes if wholesale funding markets dry up, but it is only open to banks and building societies. The loan-secured warehouse facilities, which online lenders typically use as a source of cash to fund loans in good times, are unlikely to be available so long as portfolio losses remain a problem. Such facilities are tied to quickly funded loan sales and securitisations into the capital markets although they will not provide funding for new loans in an amount and at a price adequate to support nonguaranteed lending until the economy recovers and credit risks return to normality (Baker and Judge 2020). Therefore, many companies expect capital markets to dry up in the future and funding to become increasingly difficult to secure.

Regulatory suspensions in inherently flexible and unexpected areas are singularly aimed at broader welfare needs for the real economy and society. These welfare needs are however conceived in near-term perspectives, creating uncertainty and dissonance for banks as they manage longer-term expectations of regulatory compliance and the distributive effects of such policies. This could result in unintended and perhaps disadvantageous effects ultimately to the borrowers who benefit in the near-term. Applying elasticity in unprecedented ways can introduce uncertainty and over-reliance on temporary measures. As Dorn (2015, 802) argued, "elasticity in application of finance laws opens up such law to a process of deterioration, undermining legal certainty, loosening market discipline and inviting crisis". The exercise of regulatory powers to modify obligations has been opined to lead to instability and asymmetric policies such as frictions of information and regulatory arbitrage (Hodson and Mabbett 2009). The modification of regulatory obligations that ease standards in bad times but do not tighten them in good times can generate excessive risk-taking in the long run (Borio and Restoy 2020). The pandemic crisis has revealed challenges for supervisory authorities and central banks to achieve the regulatory balance between rescue of real economy and bank resilience (Drehmann et al. 2020). On this view, regulators need to acknowledge the difficult policy balances in creating institutional disturbances and weigh up the likely consequences. However, there is also room to consider if longer-term reform of existing standards may be warranted.

IV. REGULATORY SUSPENSION IN CAPITAL MARKETS REGULATION

As freezes in economic activity during the lockdown have threatened corporate revenues, business operational continuity and even survival (Enriques 2020a), the FCA introduced a slew of emergency measures, suspending and adjusting listing and securities offering regulations that would have applied in normal times, in order to facilitate less cumbersome and burdensome fund-raising by corporations. Such fund-raising could be pre-emptive in nature as businesses try to safeguard against the depletion of their cash reserves during the lockdown. The building up of companies' capital positions would strengthen their ability to retain employees and maintain investment post-crisis. However, companies seeking to raise funds could also be in a precarious state, especially if they have inflexible contractually committed outflows such as debt servicing and rent thus making their securities particularly risky for investors.

The FCA issued a Statement of Policy on 8 April 2020 (FCA 2020f) to facilitate corporate fund-raising exceptionally, intended to last only for the duration of the pandemic. This Policy introduces regulatory suspensions and adjustments to three key aspects of fund-raising: the treatment of pre-emption rights, the general meeting procedures ordinarily needed for shareholder approval of matters specified in the Listing Rules, and the mandatory disclosure document required for the fund-raising.

In relation to the treatment of pre-emption rights, shareholders in the UK have a right of first refusal to the company's new offer of shares in proportion to their existing holdings[12] unless pre-emption is exempt.[13] The right of pre-emption seeks to mitigate managerial agency problems (Jensen and Meckling 1976) as managers may seek to offer new shares cheaply and easily to third parties if left to their own incentives. Shareholders would be adversely impacted in terms of value dilution, particularly when a company has retained earnings, and the dilution of voting power (Ferran and Ho 2014). Although this position was harmonized with the EU's Second Company Law Directive, reflecting the European stance for protecting shareholders against managerial exploitation, it is also regarded in the UK as a 'core' right of shareholders (Burgess 2005). Pre-emption rights may be regarded as a mandatory corporate law rule that is placed along the more 'rigid' end of corporate law (Pistor et al. 2002), reducing the flexibility of managers to raise funds easily in a perhaps changing and dynamic environment. In the US, pre-emption rights are the exception and not the rule, particularly for publicly traded companies, as existing shareholders have a choice to purchase shares in the open market if they wish to maintain the level of their shareholdings. In other words, market mechanisms in the US are seen as sufficient to provide shareholder protection needs so that corporate governance rules such as pre-emption rights need not be legalized. Although there is an increased burden for shareholders to determine if they would use such market mechanisms, the corresponding flexibility for managers reduces cost to the company. The UK, despite similarity with the US in terms of deep and liquid capital markets, has however opted for a different balance of flexibility-control in relation to safeguarding the rights of shareholders to be participatory monitors of corporate decisions (Hill 2019), particularly in publicly-traded companies, and not just leaving them to market mechanisms or ex-post remedies (Xuereb 1998). There is however the possibility that the articles of association can provide for a waiver of pre-emption rights in advance, for a period of up to five years, so that directors can be pre-authorized to an agreed degree of flexibility.[14] The general meeting can also provide ad hoc waivers by special resolution up to certain limits. The limit is usually set at 5% of the issued share capital for any given year and not more than 7.5% of the share capital over a 3-year period. This best practice is recommended by the Pre-emption Group (PEG) (2020) which comprises a number of influential institutional investors.

The PEG made an extraordinary recommendation to investors that pre-emption rights could normally be waived for issuances up to 20% of issued share capital during the pandemic. This recommendation is explicitly endorsed by other trade bodies such as the Association for Financial Markets in Europe (AFME) and by the FCA. The FCA is not the direct authority to adjust company law provisions. However, this is not an adjustment to company law as such but rather an adjustment to the ordinary market practice of institutional investors within the framework of the exercise of their voting power as determined by company law. Although the PEG has shown flexibility during this challenging time for companies, fund-raising still takes time to complete. Commentators have raised the prospect of shortening offer periods as lessons from the emergency fund-raising exercise by banks in the 2007-09 global financial crisis point to disadvantages of a long offer period. Ferran (2008) argued that the 21 day offer period that applied during that time, which has since been reduced to 14 days under the Listing Rules, was too long and allowed short sellers to depress the share price of the issuer, adversely impacting uptake of the shares.

The FCA also endorsed the PEG's stance on 'soft-pre-emption' offers, which allows companies to make private placements, therefore not attracting the compliance burden required in relation to public offers. Companies are urged to work with the investment banks responsible for the placings to engage with existing institutional shareholders, in order to respect the ethos underlying the pre-emption regime despite the newly introduced flexibility.

Next, company law requires directors who wish to allot new shares in the company to seek authorization in the general meeting[15] unless pre-authorization is obtained either in the articles or by a resolution in an earlier general meeting.[16] The PEG has recommended that such pre-authorization could normally be for up to one-third of a company's issued share capital. Pre-authorizations must be revisited every 5 years, hence an in-built mechanism for shareholder monitoring is provided in law to countervail adverse effects of managerial flexibility.[17] In this manner, share issues that are not pre-authorized or exceed pre-authorized levels or requiring renewal of pre-authorization can only proceed upon approval at a general meeting, whose procedures take time and may entail inefficiency while providing for the needs of monitoring. General meeting requirements are procedural rules of law that provide shareholders with a fair playing field for participation but can be regarded as time-consuming and cumbersome. Notice of a general meeting must be given at least 14 days ahead of the meeting,[18] and it may be queried if the need for a general meeting, and the offer period that must be run, exposes a company to adverse media and short-selling pressure during the notice period that would be counter-productive to the capital-raising exercise. Further, the logistics of running a general meeting can be regarded as cumbersome and costly in times of emergency, such as the possibility of having to circulate members' statements,[19] face contesting resolutions,[20] being obliged to answer questions,[21] and to count votes based on a demand for poll.[22]

The FCA Policy (FCA 2020f) allows companies to apply for a dispensation for general meetings in respect of the transactions specified in the Listing Rules.[23] Such dispensation is granted on a case by case basis, and issuers would have to provide evidence that shareholders would have voted in favour of such a resolution if a general meeting had taken place. Such evidence can be provided by issuers securing written undertakings from sufficient shareholders to indicate their support for the resolution either ahead of the issuer publishing a circular for the market generally, or after such a circular has been published. The FCA emphasized the temporary and extraordinary nature of such dispensation. Regulatory discretion may be seen as a form of gatekeeping in a time where investor protection based on normally expected procedures is suspended.

Finally, the FCA has been conscious that mandatory disclosure obligations for issuers at fund-raising, which has been regarded as a fundamental pillar of investor protection (Coffee 1984; Cross and Prentice 2006; Fox 2016), could entail counterproductive obstacles to fund-raising. One such obstacle is the cost of fund-raising in preparing disclosure documents for investors (Howell 2018), and the other relates to the way in which disclosure may affect investors' behavioural biases in times of great uncertainty and challenge for companies. In such times, investors may greatly discount a company's share price as they are susceptible to risk aversion and other cognitive biases. The FCA, with the PEG's support, urged companies to utilise the exemption from the EU Prospectus Regulation 2017 with regard to issuances of securities up to 20% of total traded securities. This means that such issuances would not need to be accompanied by a prospectus, saving companies time and cost in preparing one. Where the exemptions[24] under the Prospectus Regulation 2017 do not apply, issuers are urged to utilize simpler disclosure requirements based on shelf registration of a base prospectus for seasoned offerings.[25]

Further, as mandatory disclosure includes a requirement for issuers to disclose that they have working capital for the next 12 months as a going concern, such disclosure to be audited by the company's auditors, the FCA considers it impracticable for the requirement to apply as such to companies facing the uncertainties wrought by the Covid-19 crisis. The FCA (2020) has exceptionally decided to tweak the application of this requirement by allowing companies to provide an unqualified 'clean' working capital declaration as if the company had not been affected by the crisis, and to append disclosure about effects of the crisis in a separate document that does not require formal audit, but only a comfort letter from an auditor in support. This only applies if a company's adverse financial position has been caused by the pandemic crisis and has not entailed from other weaknesses. The FCA requires the additional 'Coronavirus Working Capital Statement' to contain models and assumptions relating to the impact of the pandemic on the company, including taking into account the uncertainty in length and duration of the crisis and impact on revenue. This tweak is arguably a form of framing that achieves a balance between investors' information rights and issuers' fund-raising interests, which we analyse below.

In parallel, the FCA (2020g) has also provided temporary relief for listed companies in relation to normal compliance obligations to maintain efficient capital markets, to publish their audited annual financial reports. This allows companies to address more pressing concerns, such as fund-raising discussed above. The FCA package of measures includes: (1) delaying the filing of accounts by companies; (2) postponement of auditor tenders and audit partner rotation; (3) reduction of FRC demands on companies and audit firms; and (4) extension of reporting deadlines for public sector bodies. Although these measures disrupt expectations in capital markets for timely and accurate information, companies may not be in a position to offer such reporting in highly uncertain times, and short-termist information may be distortive in itself.

A. ANALYSIS ON TREATMENT OF PRE-EMPTION RIGHTS

The extended suspension of pre-emption rights up to 20% of issued share capital, the threshold inspired by the Prospectus Regulation exemption of mandatory disclosure for rights offers up to 20% of traded capital, is not exactly a regulatory suspension, as it is recommended market practice by the PEG to investors on a case-by-case basis. Its status is more like soft law, with the FCA's endorsement not exactly a form a legalisation, but as a co-reinforcing justification for legitimacy and a nudge directed to investors.

It may be argued that there is no need for a formal or legalized form of 'suspension' as the company law provisions on pre-emption rights contain a built-in element of inherent flexibility. Although pre-emption rights are regarded as mandatory 'shareholder protection' law, their exact implementation is subject to tailoring between companies and their shareholders in relation to pre-authorizations, disapplications and constitutional provisions. This is often referred to as the 'enabling' aspect of company law that is ideologically supported for its efficiency effects regarding the allocation of governance rights between voluntarily bargaining parties (Romano 1989; Butler and Ribstein, 1990; Macey 1993; Anand 2006). It may be argued that in the US, the enabling effects of company law are realised in terms of the doctrine of pre-emption rights itself being up for voluntary adoption. Hence the UK's pre-emption rights regime is mandatory and not enabling law. However, there are different shades of enabling law, in terms of the extent of discretion given for private agreements between companies and their shareholders (Orts 1993; Dammann 2014). As the UK allows negotiated exclusion or disapplication of pre-emption rights between shareholders and their companies,[26] pre-emption rights may be regarded as a strong default rule, and there is still space for private modification.

Inherent flexibility in enabling corporate law is empowering in nature, as it allows for company innovations to be offered and shareholders' preferences to be voiced, without being subsumed under a perhaps one-size-fits-all mandatory prescription. However, even as Easterbrook and Fischel (1991), staunch contractarians in corporate law have acknowledged, freedom in flexible bargaining may be less efficient than constructing hypothetical optimal bargains to be treated as standard default terms between companies and shareholders. Such an ideological position in how corporate law should develop may be regarded as insular as it ignores the public interest elements of corporate behaviour and governance (Gordon 1989; Eisenberg 1989; Thompson 1990; Bratton 2005). However, even if we regard shareholders as the only relevant constituents who should move the lever in this inherent flexibility in order to meet their investee companies' needs, it is uncertain if shareholders are able to agree on coherent crisis management, as negotiation costs can be high in the face of uncertainty and different private preferences amongst investors. In this manner, the role of soft law such as best practices recommended by the PEG is highly valuable and provides a benchmark for convergence and efficiency in private decision-making (discussed by Moore, 2009 regarding the Corporate Governance Code, another soft law institution), as well as a hint of the wider public interest that is collectively internalised by a significant investor community (Orts 1993; Bratton 2005).

It is uncertain to what extent the FCA has engaged with the PEG and AFME ahead of their announcement, and whether the soft law recommendations reflect the multifaceted mix of private and public interest in the exercise of inherent flexibility. The sense of inherent flexibility emanating from the bottom-up persuades investors they have been in control of the enabling scope in corporate law, although some element of public interest nudging could also be at work. The FCA's role in endorsing the PEG's recommendation can potentially achieve the effect of reinforcing legitimacy in the face of perhaps divergent investor preferences, nudging towards convergence in accepting the soft law standard. Nevertheless, any coordination between the FCA and investor trade bodies, although useful in a crisis, can also create opaque networks that may become impenetrable to other interested stakeholders, a point we return to in Section V. Further, we also think the FCA's role in endorsing the PEG's recommendation paves the way for its other regulatory suspensions below. It cannot be underestimated that the other regulatory suspensions, which concern the core of investors' perceptions of adequate protection, are juxtaposed with the inherently flexible measure. The strategic bundling of inherent flexibility with unexpected suspensions mitigates the dissonance effect of the latter. This is also an episode that may illustrate, for the broader purposes of conceptualization in corporate law scholarship, the interconnected relationship between the perceived ‘more enabling’ nature of corporate governance and ‘usually more mandatory’ nature of shareholder protection in relation to their financial interests, i.e. the ideological or jurisdictional separation (Park 2015) of corporate law from securities regulation is likely to be artificial (Ahdieh 2005; Ferrell 2007; Fox 2016).

B. ANALYSIS ON DISPENSATION OF GENERAL MEETINGS

The procedural law of general meetings ensures that all shareholders receive the same information at the same time, and are able to participate collectively in decision-making process. In reality, such procedural fairness under company law has been somewhat undermined as institutional shareholders have begun to be more engaged with their investee companies informally, as part of ‘stewardship’ (since the Stewardship Code of 2010, amended 2020, and the advent of similar provisions in the European Shareholders’ Rights Directive 2017). Policy-makers’ nudge to institutional investors to become more engaged is due to concerns that passive institutional shareholders who vote with management are not effectively performing their monitoring roles (Chiu 2013). Moreover with the rise of American style hedge fund shareholder activism (Armour and Cheffins 2012), the level of voice and vociferousness observed in the institutional shareholder community has risen, both because institutions have worked with hedge funds in joint campaigns (Chiu 2010; Katelouzou 2015) and because the corporate sector has attracted negative attention for the last decade or so, since the global financial crisis of 2007-09 and home-grown scandals (Chiu 2018).

The discretionary dispensation of general meeting procedures may not be regarded as too prejudicial to shareholders. First, its ‘bundling’ with the relatively more enabling regime of pre-emption rights discussed above allows shareholders to see the regulatory suspension in more integrated and less unfavourable light. Second, it may be argued that the condition for discretionary dispensation is that the company must show evidence of sufficient shareholder consent, hence, companies are still compelled to engage with shareholders, much in the ‘stewardship’ ethos of informal engagement ‘outside of general meetings’. Such engagement can also ameliorate the risks taken by investors in allowing the waivers of pre-emption rights discussed above. Finally, regulatory discretion in dispensation may be regarded as a gatekeeping device, although it is uncertain what level of evidence the regulator is looking for in relation to shareholder consent. For instance, it is interested to explore if shareholder consent with conditions or with qualifications can be regarded as sufficient.

Nevertheless, to allow dispensation of general meetings conditioned upon companies securing sufficient written consent of shareholders would mean that companies are likely to engage in selective engagement, with perhaps ‘friendly’ but significant shareholders in order to reach the needed majority. In this manner, the underlying principle of fairness amongst treatment of shareholders in the collective decision-making of general meetings is compromised. Further, retail investors are likely to be marginalized (Somerset Webb 2020). Although it may be argued that stewardship practices already entail differences in the quality of company-investor relationships amongst different investors, allowing companies to selectively ‘court’ shareholders for decision-making seems to go a step further and exacerbate the already uneven playing field.

In this light, regulators should consider the incentives on the part of affected constituents as a result of regulatory suspension, and the trade-offs made amongst different interest groups affected by the suspensions. These should be considered not only on a temporary basis but also in terms of how such trade-offs may exacerbate a longer-running issue, such as the relative marginalisation of the retail investor, in the stewardship landscape that emphasizes the role of institutional ones. This issue borders on both the enabling character of company law, that facilitates shareholders to tailor-make their monitoring arrangements with companies and the need for more mandatory law that standardises common expectations of protection and reflects collective values that the market may not supply (Barzuza 2018). Such trade-offs and their impact on extant balances or values in the corporate economy should not be ignored even if there appears to be pressure for quick policy adjustments (Enriques 2009), and should give rise to longer-term thinking even after a crisis settles.

C. ANALYSIS ON WORKING CAPITAL DISCLOSURE

Where a prospectus or simplified prospectus is required for corporate fund-raising, the FCA (2020d) has not suspended mandatory disclosure obligations. Ferran (2008), drawing on lessons from the last emergency fund-raising by banks in the 2007-09 global financial crisis, recommended that suspension of mandatory disclosure could be warranted if issuers are not new to the market and this would save issuers time and cost. However, mandatory disclosure is a cherished tenet in investor protection (La Porta, Lopez-De-Silanes, and Shleifer 2006; Fox 2016) and suspending this may be counter-productive if companies' cost of capital increases due to investor risk aversion (Bushee and Leuz 2005; Campbell et al. 2014). Hence, the FCA has not chosen to be more radical but rather to adjust mandatory disclosure in a manner that arguably puts issuers in the most favourable light possible.

By allowing issuers without underlying financial problems to issue a separate coronavirus statement which does not affect the otherwise 'clean' working capital declaration, the FCA arguably engages in a form of framing of information while not undercutting the long-held institutional expectations of comprehensive and full disclosure. Investors would still be receiving the Covid-19 impact-related financial information, but in a disaggregated manner. Kahnemann and Tversky's prospect theory (1979) shows how the framing of information affects choice, and in particular, O'Clock and Devine (1995) show how negatively-framed information by companies affects auditors' opinions (in the same way) and that the opposite produces a salutary effect upon auditor perception. The disaggregation of the 'clean' working capital declaration would help to avoid auditors' biases against negatively-framed information (Daugherty et al. 2016), and this would also likely be viewed positively by investors. The confinement of coronavirus-related impact to its own separate statement frames such information as being more contingent, and highlights the exogenous nature of the impact. This may encourage such information to be assessed in more forgiving light and not to preponderantly 'infect' the positive framing within a 'clean' working capital declaration.

A crucial question is whether the framing approach disrupts the balance of institutional values in securities regulation, i.e. the promotion of rational (as far as possible, despite behavioural insights showing lapses from rationality, e.g. Shiller 2000) investor market discipline for issuers. The rational investor brings about efficient pricing in capital markets (Fama 1970), so that ultimately, capital is allocated to the most efficient companies which results in long-term wealth creation for all parties who participate and invest in the corporate economy. However, it may be argued that such framing may just be sufficient as a behavioural antidote to counter sub-optimal behavioural biases on investors' part, such as excessive risk aversion. Nevertheless, in times of crisis, certain behavioural biases for self-preservation may be 'adaptively' efficient (Lo 2012), so the FCA's intervention should be carefully studied in terms of its impact upon incentives and behaviour. When a crisis exposes the fragilities in the corporate economy, it may be argued that it is rationally optimal for a destructive wave to sift out the most robust companies, albeit bringing about a transitionary period of instability. Commentators (Fahlenbrach, Rageth, and Stultz 2020) have found that investors gravitate towards funding companies with less financial fragility, (Saint-Georges 2020) such as lower levels of debt and higher cash buffers, which make them financially flexible. There is a deeper question of whether leaving market discipline to select survivors at this stage is optimal or whether we should indeed be wary of market sub-optimality as affected by current behavioural biases towards conservatism.

The FCA's intervention in framing therefore reflects a hint of public interest in relation to preventing massive destabilisation of the corporate economy and capital markets (Wolf 2020). As the UK Listing Authority, the FCA has an interest in preserving the robustness of London's capital markets (Brummer 2008) to be credible even through the crisis. On balance, however, the regulator has refrained from more pronounced interventionist stances, such as stock market closures proposed by Andhov (2020),[27] in favour of allowing investors' market discipline to do its work - i.e. choose the issuers that investors support and set the price of securities. Nevertheless, this balance in the FCA's policy, to minimise distortions to investors' expected ability to exercise market discipline while hinting towards public interest concerns, is a policy choice of which the objectives and effects upon incentives and behaviour need to be more carefully considered. Schammo (2020) queries if regulatory choices should be more pronounced to be in the overall public interest, such as being more 'precautionary'. In this respect, we observe that there is a lack in precautionary interventions such as moratoria for corporate debt (Eidenmüller, Enriques, and van Zweiten 2020; Gurrea Martínez 2020). At the same time, the relaxation of directors' duties in relation to 'wrongful' trading (Licht 2020) in company and insolvency law, which act in normal times as a controlling lever to prevent directors from wasting corporate assets if a company cannot stave off insolvency, is designed to encourage directors to continue trading.[28] As the Covid-19 crisis entails both solvency and liquidity implications for companies, directors' risk aversion in relation to wrongful trading can lead to premature business closures entailing social losses, e.g. loss of employment and local community deprivation (van Zweiten 2020). However, we are mindful too that such a policy choice involves a distributive effect in favour of stakeholders from creditors, and the UK has, unlike jurisdictions surveyed in Licht (2020) been silent on this.

The FCA's policy choice of continuing to facilitate markets instead of a more pronounced stance relating to the governance of the corporate economy can be critically interrogated, as a robust corporate economy is a matter of public interest (Kay 2012). Nevertheless, this may be a question not only for the FCA, but also for the FPC of the Bank of England in which the FCA and the Treasury are represented (Kaminska 2020).[29]

In sum, our analysis on regulatory suspensions in capital markets regulation shows that suspensions are not easily confined to inherently flexible laws, and unexpected suspensions may be perceived as necessary. The bundling of inherently flexible laws with unexpected suspensions seems to be a consistent pattern that may help in framing the institutional compatibility of such suspensions. The appearance of institutional compatibility is actually a problem as it obscures underlying thought processes giving rise to suspensions, including why suspensions apply to some areas of law and not others. This raises a question about which considerations of objectives, trade-offs, incentives and behaviour, as well as underlying influences for regulators, such as the influence of de-centred actors (Black 2002), have affected suspension choices. Further, it also raises a question on the potential structural implications of such suspensions for future policy thinking. In the next Section we sketch a blueprint for regulatory crisis management in relation to suspensions, a framework which we argue would allow regulators to consider regulatory suspensions in a more holistic and 'institutionally-disciplined' manner, which may yield longer-term lessons from – and for – managing crises.

V. A FRAMEWORK FOR CRISIS MANAGEMENT BY REGULATORS

How regulators manage a crisis is important for immediate outcomes such as stability and welfare but also important for longer-term effects such as institutional change. We have so far highlighted how regulatory suspensions are used in the toolbox of crisis management and shown that suspensions often extend beyond inherently elastic laws and regulations, potentially disrupting society's expectations with respect to not-inherently flexible laws. Such regulatory suspensions are often couched in terms of greater good but embed in opacity trade-offs and balances in regulatory objectives and distributive effects. It is also uncertain how far regulators have thought about potential impact on incentives, behaviour, market mechanisms and the duration of such impact. In this Section we propose a blueprint for managing regulatory suspensions as part of regulatory crisis management. We acknowledge that crisis management involves more regulatory tools than regulatory suspensions, but we focus on the issues raised by this tool and attempt to offer a framework for managing this tool in order to promote a manner of deployment that is more thoroughly considered and explicable. This is coherent with sound administrative practice. The extent of institutional dissonance that may result from regulatory suspensions must not be such that it is perceived as arbitrary. Having a more 'disciplined' approach brings about clearer perceptions of the institutional 'location' of such suspensions, i.e. to what extent they are transient and under what circumstances they are deployed, and of the potential longer-term lessons that may be learnt. Minimizing institutional dissonance safeguards the interpersonal role played by legal principles, as conceptualized by Nozick (1993). In our context, legal principles signal an authority's commitment to certain values and predictability of patterns of behaviour, and is important for maintaining the fabric of social and market confidence.

We propose that regulators should have a pre-crisis framework for thinking about the scope of and possibilities relating to regulatory suspensions, as preparedness is a quality that can be usefully honed and would be beneficial (Crawford 2014-15) even if the actual crisis that materialises and needs to be managed is different from the imagined. Secondly, we propose that regulatory suspensions in crisis management should be subject to a crisis management framework with substantive and procedural elements to ensure that they are holistically considered and deployed with judgment that can be explicable, even if consensus is not always secured for such judgment. This framework may provide wider implications for crisis management methodology more generally.

A. PRE-CRISIS PREPARATION

It is useful for regulators to have a dedicated outfit for pre-crisis preparation, and wisdom may be borrowed from scenario planning literature in business management. Oliver and Parrett (2018) argue that the more dynamic and unpredictable a business environment may be, the more a business needs to engage in scenario planning. Scenario planning allows business leaders to take stock of information and perceptions in a more holistic manner, and to take stock of the existing suite of tools available to the business in imagining responses. This allows business leaders to develop alternative strategic options for possible responses, as they observe how the environment changes around them.

In a similar vein, pre-crisis preparation on the part of regulators can incorporate useful elements from scenario planning practice. In terms of gathering information, regulators' access to information, particularly from the financial sector, has increased dramatically after the global financial crisis 2007-09 (Chiu 2011). This is because of regulators' acknowledgement of their shortfalls in trusting markets and not having comprehensive and even granular information to map out the trends and risks in financial markets domestically and internationally (Claessens and Kodres 2017). Hence micro-prudential, conduct and macro-prudential regulators in the UK and EU have vastly increased reporting and information return requirements. The current information environment for regulators is not anaemic by any means and provides a good starting point for developing greater preparedness for crisis management. However, such information should be regularly shared and mapped in order to provide a holistic picture of dynamic environments (Stanton 2012, ch 3).

Next, regulators should map out the scope of their inherently flexible regulatory tools as these are designed with responsiveness in mind, and they should be mapped out in terms of their objectives as well as the likely effects entailing from their deployment. Maymin (2009) argues that regulators need to be aware that the timing and duration of interventions can promote regularisation of dysfunctional markets but can also distort markets, and much depends on regulators' choice in timing and duration of interventions. Regulators can enhance their preparedness in considering scenarios in which flexible regulatory tools may be used and to what extent. This can contribute to more skilful judgment at the point of deployment. Crawford (2014-15) argues that although regulators cannot prepare for the exact types and extents of crises that occur, training intuitive judgment is beneficial. Indeed he proposes a 'wargaming' approach for regulators to train such intuitive judgment, and this may mean that regulators could perhaps design worst case scenarios in different ranges of probability, in order to test the limits of inherently flexible regulatory tools that can be deployed. This may even be similar to stress-testing that regulators carry out for systemically important banks and financial institutions (Chiu and Wilson 2019, ch 9) and would not be unfamiliar as a methodology to regulators.

Regulators' 'wargaming' or 'stress-testing' of inherently flexible tools may reveal their limits and the need for other flexibilities in other laws or regulations not hitherto explicitly flexible. This provides regulators with the opportunity to consider what other suspensions need to be made and how to articulate these within the institutional framework. Maintaining an initial coherence with existing institutions is important, as crises are already disorienting. Institutional frameworks provide at least an initial sense of control and stability to steer society and markets in adapting to crisis management. This is not to say that institutional change is disavowed, quite the contrary, there is room for lessons to be learnt for potential institutional change, but these should require a process of bedding down in terms of policy choice (Enriques 2009) and social acceptance (Kallinikos et al. 2013). Cultivating preparedness helps regulators in due course to consider the appropriate extent of unexpected regulatory suspensions or adjustments and how to articulate these. As Hutter and Lloyd-Bostock (2017) argue, perceptions of a crisis are subject to framing, and regulators play a part in such framing, including the framing of their responses.

B. CRISIS MANAGEMENT FRAMEWORK

Regulatory suspensions in crisis management easily raise questions as to what regulatory and distributive objectives are being rebalanced. This is borne out in both case studies in relation to the relaxation of the strength of microprudential regulatory objectives and investor protection objectives in capital fund-raising. Further, media critique of how regulatory suspensions affect incentives and behaviour, such as in relation to household and business borrowers in the first case study, gives rise to questions relating to how comprehensively regulatory suspensions and their likely effects have been considered. We are concerned that regulatory suspensions may be based only on ends-focused considerations, in an incomplete and not holistic manner. We are also concerned about potential impact on more fundamental tenets in social contract, institutional bargains and universal principles. Regulators could benefit from a crisis management framework that is substantively robust and also procedurally sound. In the latter respect, we propose that the procedural framework should balance the needs of efficiency, coordination and inclusiveness.

Substantive aspects

Both our case studies illustrate the contest of regulatory objectives in the application of regulatory suspensions. In the first case study, the pre-eminence of consumer welfare objectives disrupts the normal pursuit of efficiency and, to an extent, prudence. The need to preserve both stability and welfare in the corporate economy also poses challenge to regulators in maintaining microprudential objectives. In the second case study, the negotiated balances of power and protection for corporate constituents may be disrupted by the acute need for economic survival. The regulators have in the relevant regulatory suspensions drawn attention to the 'greater need' which also resonates with the markets and the public. However, a more robust framework for considering objective trade-offs, as well as benefits and drawbacks, is necessary in order for regulators to be able to evaluate the sustainability of the suspensions, when exit strategies may need to be implemented and, indeed, whether the suspensions themselves raise longer-term insights for institutional rebalancing in the future.

Objective trade-offs entail rebalancing, even if temporarily, of political, economic and social priorities, which have an impact upon the structures of existing institutions. Regulators should be able to map such trade-offs and render them explicable, as explicability helps regulators in turn to consider the nature and extent of regulatory suspensions, as well as how such decisions can be made accountable. This is important as institutional disturbances often mean disturbances to regulatory objectives that reflect the social contract or distributive positions. It should also be questioned if more fundamental principles (e.g. Nozick, 1991, 1993) are implicated in such trade-offs. These entail cost and benefit (in their broadest sense, see below) in different quarters. The nature of these disturbances and their potential longer-term effects should be transparent and explicable. A key aspect to facilitate explicability lies in rational decision-making as advocated by Sunstein (2014a). Sunstein advocates an approach to regulatory decision-making in general, and not only in crisis management, which is useful even for disorienting circumstances such as crisis management. Indeed, such a rational approach can be even more justified in the midst of crisis management where behavioural biases such as risk aversion, short-termism and fear may dominate perception. In this respect Nozick (1993) argues that principles are important for steering away from behaviourally-induced actions. We support a decision-making framework for crisis management that entails governance for the exercise of discretion in determining regulatory suspensions, in a manner that considers outcomes more holistically, as well as the impact on institutional tenets and values.

Sunstein's approach in regulatory decision-making is grounded in cost-benefit analysis in its broadest terms (also Sunstein and Hahn 2002). This approach goes beyond merely looking to monetary values of benefits and drawbacks in the marketized sense, and seeks to encompass 'hard to value', controversial and subjective valuations in order to incorporate those unique features in order to arrive at a more holistic decision-making compass. The approach encompasses a broad range of what ought to be valued, from the perspective of humanising benefit and cost, and accommodates uncertain values in ranges (Sunstein 2014b). This approach also seeks to account for what may be unknown, changeable and subjective. Sunstein (2014a) sets out in detail and acknowledges the difficulties in such valuations. The aim is not to arrive at a narrowly agreed monetised value, but rather to tease out in the process of valuations, the factors that make variables hard to value, allowing ranges of tentative values to be assigned not to demean the variables but to map them out relative to other priorities and values, so that regulators can see the range of choices available to them more clearly. The broad pursuit of such cost-benefit analysis is challenging, as it requires regulators to have a broad scope of information before them (Wiener 2006) and to make bold judgments but with humility, in relation to every relevant variable that matters in the decision-making compass, avoiding narrow assumptions. We consider this approach to be able to encompass ends-based considerations, and values that may be more 'fundamental' to society or personhood.

Commentators have criticised regulatory implementation of cost-benefit approaches in regular times as being flawed as they have become narrowly defined, in order to avoid hard questions (Froud and Ogus 1996), highly proceduralised in order to show that formalities are completed for advancing a particular law reform (Carrigan and Shapiro 2016), and oftentimes vague and weak when grappling with variables that are difficult to value (Harrison 2009). However, as Wiener (2006) argues, cost-benefit analysis need not be practised in narrow, formalistic and meaningless terms. Regulatory suspensions provide an environment where a rigorous Sunsteinian approach can be taken, so that the noise of political demands that can interrupt technocratic expertise and neutrality would be moderated by decision-making frameworks that are governed by both rationality and principles. Taking this approach also renders such decision-making much more accountable and explicable (Sunstein 1996). In other words, it would benefit us all to know what payoffs and cost there may be for institutional investors and pension savers whose liabilities they meet, if institutions were to inject capital on an emergency basis into companies seeking to raise funds. It would also benefit us all to know how the pros of payment holidays in the short term and medium term as households recover from the crisis, compare to the cons of possibly impaired balance sheets for banks and the future availability or price of credit. In these two examples, there may be even more pros and cons that should be 'put on the map' such as an increased or reduced role for foreign investors in UK equity, the balance of regulatory and privately agreed contractual arrangements that govern household and business credit, the future implications for corporate finance i.e. the debt-equity ratio and more fundamentally, how debt should be treated as a socialized phenomenon, and not merely a legal or economic relationship. The impact of engaging in this mix of considerations would range from minor adjustment to institutional rebalancing. Regulatory suspensions provide a unique opportunity to grapple with robust decision-making in order to facilitate an informed and holistic approach to institutional navigation. Such a decision-making framework is also able to adapt to changing conditions which may render suspensions no longer necessary (providing an exit strategy), or highlight the need for further supporting measures and other suspensions (which increase the need for explicability).

In the longer-term, such robust and rational frameworks allow regulators to weigh up the effects and lessons learnt from crisis management measures. For example, where regulatory suspensions have mobilized a suite of laws and regulations not inherently thought to be flexible, this can provide an opportunity for regulators to consider if more flexibility needs to be built into regulatory systems over the longer-term and what enduring needs for flexibility exist (Marjosola 2014). Regulators may also have to think about any longer-term regulatory adjustment that needs to be made in order to address critique that arises (Balleisen et al. 2017, ch 18). Hence, relevant lessons for institutional adjustment that can be learnt from crisis management can be more clearly perceived and articulated.

Procedural aspects

As the substantive aspects of regulatory suspension need to be grappled with broadly and in a well-informed, holistic manner, regulators in crisis management would benefit from a coordinated inter-agency approach which allows information and resources to be pooled and maximised. After the global financial crisis, it is explicitly provided in legislation that crisis management should be coordinated, such as between the Treasury, Bank of England and PRA in respect of financial stability and public interest needs.[30] As the reform was inspired by the immediate needs of the crisis that related to financial sector instability, the exclusion of the FCA can be attributed to a lack of the perception of business conduct as being contributory to these objectives (Moloney 2012). However, the financial stability crisis of 2007-09 was quickly followed by business conduct scandals in the banking industry,[31] and as such, in this dynamic environment, there should be room to consider a wider and more permanent crisis management group including the FCA.

In the management of the Covid-19 crisis, there is evidence of coordination between the PRA and FCA as observed in the first case study. This likely stems from established coordination between the regulators in relation to joint regulatory functions specified in legislation.[32] A standing group for crisis management, building upon and extending beyond financial stability needs, should be instituted amongst all the financial regulators in order to promote holistic and systemic perspectives and actions (Anand 2006; Claessens and Kodres 2017).

Another procedural aspect that should be considered is the extent to which crisis management can be inclusive in relation to other non-public sector actors and stakeholders. In the second case study, there is evidence of dialogue between the FCA and the PEG which paved the way for the FCA's endorsement of the waiver of pre-emption rights and other regulatory suspensions included in the same communication. The support of relevant non-public sector actors and stakeholders is important, especially if they play a catalysing part in the introduction of regulatory suspensions or if their support may mitigate dissent and resistance. However, there may be an issue regarding how stakeholders are selectively engaged by regulators for the purposes of crisis management. Nevertheless, in most cases there is insufficient time for crisis management measures to undergo the usual processes of public consultation, feedback and response so as to be fully inclusive. Regulators should consider ranges of stakeholders in relation to impact and behaviour, and consider as far as is possible how inclusiveness can be managed. For example, the Business, Energy and Industrial Strategy Committee (BEIS) is providing a channel for feedback (Great Britain. Business, Energy and Industrial Strategy Committee 2020) from the business sector in relation to impact and needs, and such a feedback channel could be usefully opened to all to allow regulators to gain information while strategically adjusting to the needs of crisis management.

VI. CONCLUSION

The Covid-19 crisis in 2020 severely impacted the corporate and in turn, the financial sectors of the UK, entailing responses from financial regulators to implement unprecedented regulatory suspensions that affect both the financial sector and the real economy. We argue that regulatory suspensions are a unique crisis management tool and give rise to certain concerns and implications. We offer two case studies in regulatory suspension that show how inherently flexible laws and regulations became an anchor for unexpected suspensions or adjustments in other regulatory provisions and laws. These create implications for rebalancing of regulatory objectives and distributive effects and also incentivise certain behaviours amongst affected constituents. These institutional implications may be temporary or have a longer-term effect, and we argue that there is a need for a robust and rational regulatory decision-making framework in relation to regulatory suspensions, as part of crisis management. We sketch the contours of such a framework which includes rational balancing of the cost and benefits of regulatory objective trade-offs, distributive effects and institutional implications. We advocate a broad and deep 'humanizing' approach to balancing cost and benefit in regulatory suspensions, drawing upon Sunstein’s work. We also advocate a coordinated and inclusive procedural approach to crisis management, including regulatory suspension decisions, that would enhance regulators’ preparedness and intuitive skill in this area.

NOTES

1. See Section III.
2. See https://eba.europa.eu/coronavirus on similar measures to provide consumer relief, to urge flexibility in the application of prudential regulation within inherent flexibility boundaries, to urge forbearance towards debtors and the refrain from treating as default or non-performing in terms of loan assets.
3. See ‘Coronavirus: Private equity’s bailout moment’, discussing private equity owners’ taking advantage of the government’s private company loan guarantee instead of injecting extra provision into companies.
4. Such as how regulatory suspensions would affect the securitisation market that supports credit in much of the real economy, the expansion of credit in the US and EU has for a large part been made possible by the securitisation market.
5. Small business banking before the global financial crisis showed how banks sold complex hedging products onto small businesses with standardised contracts that absolved banks of any advisory duty or care. Courts held that the losses lay where they fell in the absence of prevailing regulatory standards. See Crestsign Ltd v Natwest and RBS (2014) EWHC 3043 (Ch); Thornbridge Limited v Barclays Bank Plc (2015) EWHC 3430 (QB); Titan Steel Wheels Ltd v Royal Bank of Scotland plc. (2010) EWHC 211; Green and another v Royal Bank of Scotland plc (Financial Conduct Authority intervening) (2013) EWCA Civ 1197; Grant Estates Limited (In Liquidation); Ruari Stephen; and Jamie Stephen v The Royal Bank of Scotland Plc, Thomas Campbell Maclennan, Kenneth Robert Craig, Joint Administrators of Grant Estates Limited (2012) CSOH 133.
6. Regarding the calculation of the total exposure measure for the purpose of the leverage ratio, firms have been permitted to apply article 429g of the Capital Requirements Regulation (CRR II), which would normally only become applicable in June 2021. The effect of this change is to encourage market making activity by banks and thus support the liquidity of capital markets, as such activity will no longer entail a risk that more equity capital needs to be raised.
7. S9A ff, Bank of England Act 1988 amended by Financial Services Act 2012.
8. CCyB aims to absorb losses in response to the spread of systemic risk: prudential authorities determine the rate of CCyB to reflect the phase in the economic cycle, as estimated by reference to a range of macroeconomic indicators. The CCyB was conceived to counter the procyclical tendencies of risk-based capital models to call for less capital when loans are performing and more capital after adverse financial shocks.
9. Art 141 on restrictions of dividends that jeopardises the level of banks’ CET1 capital ratio.
10. Arts 429, 430, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.
11. Investment banks provide “warehouse lines” to collateralised loan obligations managers that help them build portfolios of loans.
12. S561, UK Companies Act 2006.
13. S564-569, ibid.

14. S570-571, UK Companies Act 2006.
15. S549, ibid.
16. S551, ibid.
17. ibid.
18. S307A, ibid.
19. S314-317, ibid.
20. S303, ibid.
21. S319A, ibid.
22. S321-322A, ibid.
23. FCA Handbook Listing Rules 10.5.1.
24. Art 1 (2)-(6), EU Prospectus Regulation 2017.
25. Art 9, ibid.
26. S567-573, Companies Act 2006.
27. See opposite view Enriques, Luca. 2020b. "Stock Exchange Shutdowns in the Time of Coronavirus". https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/stock-exchange-shutdowns-time-coronavirus.
28. S214, UK Insolvency Act 1985.
29. Ss9B-9R, Bank of England Act 1998 as amended by Financial Services Act 2012.
30. S64-5, Financial Services Act 2012.
31. Such as the LIBOR manipulation scandal and mis-selling scandals such as the L&CF unregulated product mis-selling scandal.
32. S3D, 3E, Financial Services and Markets Act 2000 amended by Financial Services Act 2012.

REFERENCES

Acharya, Viral V., and Matthew Richardson, eds. 2009. *Restoring Financial Stability: How to Repair a Failed System*. New Jersey: New York University Stern School of Business, John Wiley & Sons.

Ahdieh, Robert B. 2005. "From 'Federalization' to 'Mixed Governance' in Corporate Law: A Defense of Sarbanes-Oxley." *Buffalo Law Review* 53: 721.

Anand, Anita. 2006. "An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post-Sarbanes-Oxley." *Delaware Journal of Corporate Law* 31: 229.

Andhov, Alexandra. 2020. "COVID-19 Market Protection: Close Down Stock Exchanges." *The FinReg Blog*, March 25, 2020. https://sites.duke.edu/thefinregblog/2020/03/25/covid-19-market-protection-close-down-stock-exchanges/.

Armour, John, and Brian Cheffins. 2012. "The Past, Present and Future of Shareholder Activism by Hedge Funds." *Journal of Corporation Law* 37: 51.

Avgouleas, Emilios, and Charles Goodhart. 2019. "Bank resolution a decade after the global financial crisis: A systematic reappraisal." In *Systemic Risk in the Financial Sector: Ten Years after the Great Crash*, edited by Douglas W. Arner, Emilios Avgouleas, Danny Busch, and Steven L. Schwarcz, 31. Ontario: McGill-Queen's University Press.

Awrey, Dan. 2016. "Law, Financial Instability and the Institutional Structure of Financial Regulation." In *Systemic Risk, Institutional Design, and the Regulation of Financial Markets*, edited by Anita Anand, chapter 3. Oxford: Oxford University Press.

Baker, Todd, and Kathryn Judge. 2020. "How to Help Small Businesses Survive COVID-19." In *Law in the Time of COVID-19*, edited by Katharina Pistor, 120. New York: Columbia Law School Columbia Law School.

Balleisen, Edward J., Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener. 2017. "Introduction." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener. Cambridge: Cambridge University Press.

Bank of England (BoE). 2020a. *Bank of England measures to respond to the economic shock from Covid-19*. 11 March 2020. https://www.bankofengland.co.uk/news/2020/march/boe-measures-to-respond-to-the-economic-shock-from-covid-19.

---. 2020b. *Bank of England announces supervisory and prudential policy measures to address the challenges of Covid-19*. 20 March 2020. https://www.bankofengland.co.uk/news/2020/march/boe-announces-supervisory-and-prudential-policy-measures-to-address-the-challenges-of-covid-19.

---. 2020c. *Covid Corporate Financing Facility (CCFF): information for those seeking to participate in the scheme*. 17 March 2020. https://www.bankofengland.co.uk/news/2020/march/the-covid-corporate-financing-facility.

---. 2020d. *Statement on credit risk mitigation eligibility and leverage ratio treatment of loans under the Bounce Back Loan scheme*. 4 May 2020. https://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-crm-and-leverage-ratio-loans-under-bbls.

---. 2020e. *The Bank of England's Term Funding Scheme with additional incentives for SMEs will open to drawings on 15 April 2020*. 6 April 2020. https://www.bankofengland.co.uk/news/2020/april/the-tfsme-will-open-to-drawings-on-april-15-2020.

Barzuza, Michal. 2018. "Inefficient Tailoring: The Private Ordering Paradox in Corporate Law." *Harvard Business Law Review* 8: 132.

Basel Committee on Banking Supervision. 2014. "Basel III leverage ratio framework and disclosure requirements". January 2014. https://www.bis.org/publ/bcbs270.pdf.

Baudino, Patrizia. 2020. "Public guarantees for bank lending in response to the Covid-19 pandemic," *BIS Financial Stability Institute Briefs*, No 5. https://www.bis.org/fsi/fsibriefs5.pdf.

Beck, Ulrich. 1992. *Risk Society: Towards a New Modernity*. London: Sage Publishing.

Bholat, David, Rosa M. Lastra, Sheri Markose, Andrea Miglionico, and Kallol Sen. 2016. *Non-performing Loans: Regulatory and Accounting Treatments of Assets*. Bank of England Staff Working Paper, No. 594. https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2016/non-performing-loans-regulatory-and-accounting-treatments-of-assets.pdf.

Birkland, Thomas A., and Megan K. Warnement. 2017. "Focusing Events, Risk, and Regulation." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener. Cambridge: Cambridge University Press.

Black, Julia. 2001. "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World'." *Current Legal Problems* 54: 103.

Bolton, Patrick, and Howard Rosenthal. 2002. "Political Intervention in Debt Contracts." *Journal of Political Economy* 110: 1103.

Borio, Claudio, and Fernando Restoy. 2020. "Reflections on regulatory responses to the Covid-19 pandemic," *BIS FSI Briefs*, No 1. https://www.bis.org/fsi/fsibriefs1.htm.

Bounds, Andy, and Daniel Thomas. 2020. "UK's emergency loans for small companies likely to bring rash of defaults, say bankers". *Financial Times*, May 10, 2020. https://www.ft.com/content/678d5750-2383-4aae-9214-4e2536eafa1c.

Bratton, William W. 2005. "Welfare, Dialectic, and Mediation in Corporate Law." *Berkeley Business Law Journal* 2: 59.

Brummer, Chris. 2008. "Corporate Law Preemption in an Age of Global Capital Markets." *Southern California Law Review* 81: 1067.

Burgess, Kate. 2007. "UK investors dig in over pre-emption rights". *Financial Times*, October 22, 2007. https://www.ft.com/content/385b1876-80d4-11dc-9f14-0000779fd2ac.

Bushee, Brian J., and Christian Leuz. 2005. "Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board." *Journal of Accounting and Economics* 39: 233.

Buzbee, William W. 2003. "A Theory of Regulatory Gaps." *Iowa Law Review* 89: 1.

Butler, Henry N., and Larry E. Ribstein. 1990. "Opting out of Fiduciary Duties: A Response to the Anti-Contractarians." *Washington Law Review* 65: 1.

Campbell, John L., Hsinchun Chen, Dan S. Dhaliwal, Hsin-min Lu, and Logan B. Steele. 2014. "The Information Content of Mandatory Risk Factor Disclosures in Corporate Filings." *Review of Accounting Studies* 19: 396.

Carrigan, Christopher, and Stuart Shapiro. 2017. "What's Wrong with the Back of the Envelope? A Call for Simple (And Timely) Benefit–Cost Analysis." *Regulation and Governance* 11: 203.

Carruthers, Bruce G. 2017. "Financial Decommodification: Risk and the Politics of Valuation in US Banks." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, chapter 14. Cambridge: Cambridge University Press.

Casey, Anthony J., and Eric A. Posner. 2015-2016. "A Framework for Bailout Regulation." *Notre Dame Law Review* 91: 479.

Cassis, Youssef. 2017. "Regulatory Responses to the Financial Crises of the Great Depression." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, chapter 13. Cambridge: Cambridge University Press.

Chiu, Iris H-Y. 2010. *The Foundations and Anatomy of Shareholder Activism*. Oxford: Hart Publishing.

---. 2011. "Transparency Regulation in Financial Markets- Moving into the Surveillance Age?" *European Journal of Risk and Regulation* 2: 305.

---. 2013. "Turning Institutional Investors into "Stewards"- Exploring the Meaning and Objectives in "Stewardship". *Current Legal Problems* 66: 443.

---. 2018. "An Institutional Theory of Corporate Regulation." *Current Legal Problems* 71: 279.

---. 2019. "Rethinking the Law and Economics of Post-Crisis Micro-Prudential Regulation- The Need to Invert the Relationship of Law to Economics?" *Review of Banking and Financial Law* 38: 639.

Chiu, Iris H-Y, and Alan H. Brener. 2019. "Articulating the Gaps in Financial Consumer Protection and Policy Choices for the Financial Conduct Authority- Moving Beyond the Question of Imposing a Duty of Care." *Capital Markets Law Journal* 14: 217.

Chiu, Iris H-Y, and Joanna Wilson. 2019. *Banking Law and Regulation*. Oxford: Oxford University Press.

Claessens, Stijn, and Laura Kodres. 2017. "The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions". In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, chapter 16. Cambridge: Cambridge University Press.

Coffee, John C. 1984. "Market Failure and the Economic Case for a Mandatory Disclosure System." *Virginia Law Review* 70: 717.

Cross, Frank B., and Robert A. Prentice. 2006. "The Economic Value of Securities Regulation." *Cardozo Law Review* 28: 333.

Dammann, Jens. 2014. "The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law." *Hastings Law Journal* 65: 441.

Dickins, Denise, Brian Daugherty, Carol Callaway, and Julia Higgs. 2016. "The Terminology of Going Concern Standards: How Subtle Differences in Wording Can Have a Big Impact." *The CPA Journal* 86: 34.

Deakin, Simon. 2013. "The Legal Theory of Finance: Implications for Methodology and Empirical Research." *Journal of Comparative Economics* 41: 338.

Dorn, Nicholas. 2015. "Legal 'Elasticity' and 'Sidestepping' in European Crisis Management of Financial Markets." *European Law Journal* 21: 802.

Drehmann, Mathias, Marc Farag, Nikola Tarashev, and Kostas Tsatsaronis. 2020. "Buffering Covid-19 losses – the role of prudential policy," *BIS Bulletin*, No 9. https://www.bis.org/publ/bisbull09.htm.

European Banking Authority (EBA). 2020a. *Our response to Coronavirus (Covid-19)*. 12 March 2020. https://eba.europa.eu/coronavirus.

---. 2020b. *Draft Technical Standards*. 27 March 2020. https://eba.europa.eu/sites/default/documents/files/document_library/EBA-RTS-2020-03%20Final%20draft%20RTS%20on%20Risk%20factor%20modellability.pdf.

---. 2020c. *Statement on the application of the prudential framework on targeted aspects in the area of market risk in the COVID-19 outbreak*. 22 April 2020. https://eba.europa.eu/coronavirus.

European Central Bank (ECB). 2017. *Guidance to banks on non-performing loans*. March 2017. https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf.

European Central Bank (ECB). 2020. *ECB Banking Supervision provides further flexibility to banks in reaction to coronavirus*. 20 March 2020. https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200320~4cdbbcf466.en.html.

Easterbrook, Frank H., and Daniel R. Fischel. 1991. *The Economic Structure of Corporate Law*. Boston: Harvard University Press.

Eidenmüller, Horst, Luca Enriques, and Kristin van Zweiten. 2020. "COVID-19: A Global Moratorium for Corporate Bonds?". *Oxford Business Law Blog*, March 23, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/covid-19-global-moratorium-corporate-bonds.

Eisenberg, Melvin Aron. 1989. "The Structure of Corporation Law." *Columbia Law Review* 89: 1461.

Enriques, Luca. 2009. "Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View." *University of Pennsylvania Journal of International Law* 30: 1147.

---. 2020a. "Extreme times, Extreme Measures: Pandemic-Resistant Corporate Law". *Oxford Business Law Blog*, April 22, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/extreme-times-extreme-measures-pandemic-resistant-corporate-law.

---. 2020b. "Stock Exchange Shutdowns in the Time of Coronavirus". *Oxford Business Law Blog*, March 12, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/stock-exchange-shutdowns-time-coronavirus.

Fahlenbrach, Rüdiger, Kevin Rageth, and René M. Stultz. 2020. "How Valuable is Financial Flexibility When Revenue Stops? Evidence from the Covid-19 Crisis", *NBER Working Paper*, No. 27106. https://www.nber.org/papers/w27106.

Fama, Eugene. 1970. "Efficient Capital Markets: A Review of Theory and Empirical Work." *Journal of Finance* 25: 383.

Financial Conduct Authority (FCA). 2020a. *Mortgages and coronavirus: information for consumers*. 20 March 2020. https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers.

---. 2020b. *Coronavirus: information for consumers on personal loans, credit cards, overdrafts, motor finance and other forms of credit*. 3 April 2020. https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts.

---. 2020c. *Technical Supplement – Working Capital Statements in Prospectuses and Circulars During the Coronavirus Epidemic*. 8 April 2020. https://www.fca.org.uk/news/statements/listed-companies-recapitalisation-issuances-coronavirus.

---. 2020d. *Joint statement by the FCA, FRC and PRA*. 26 March 2020. https://www.fca.org.uk/news/statements/joint-statement-fca-frc-pra.

---. 2020e. *High-cost short-term credit and coronavirus: temporary guidance for firms*. 24 April 2020. https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-and-coronavirus-temporary-guidance-firms.

---. 2020f. *Statement of Policy: listed companies and recapitalisation issuances during the coronavirus crisis*. 8 April 2020. https://www.fca.org.uk/news/statements/listed-companies-recapitalisation-issuances-coronavirus.

---. 2020g. *Delaying annual company accounts during the coronavirus crisis*. 26 March 2020. https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus.

Ferran, Eilis. 2008. "Limits of Private Sector Solutions for Banks: Recent UK Rights Issues", *ECGI Law Working Paper*, No. 115/2008. http://ssrn.com/abstract=1290717.

Ferran, Eilis, and Look Chan Ho. 2014. *Principles of Corporate Finance Law*. Oxford: Oxford University Press.

Ferrell, Allen. 2007. "The Case for Mandatory Disclosure in Securities Regulation around the World." *Brooklyn Journal of Corporate, Financial & Commercial Law* 2: 81.

Fleitas, Sebastián, Price Fishback, and Kenneth Snowden. 2015. *Forbearance by Contract: How Building and Loans Mitigated the Mortgage Crisis of the 1930s*. NBER Working Paper, No. 21786. https://www.nber.org/papers/w21786.

Ford, Jonathan. 2020. "Coronavirus exposes illusion of UK bank capital strength." *Financial Times*, April 5, 2020. https://www.ft.com/content/31e9e474-1398-430e-92fa-ef4e43c4e0ac.

Fox, Merritt B. 2016. "Regulating Public Offerings of Truly New Securities: First Principles." *Duke Law Journal* 66: 673.

Froud, Julie, and Anthony Ogus. 1996. "Rational Social Regulation and Compliance Cost Assessment." *Public Administration* 74: 221.

Gerding, Erik F. 2013. "Contract as Pattern Language." *Washington Law Review* 88: 1323.

Gordon, Jeffrey N. 1989. "The Mandatory Structure of Corporate Law." *Columbia Law Review* 89: 1549.

Great Britain. Parliament. House of Commons. 2020. *The impact of coronavirus on businesses and workers. Inquiry*. London: Business, Energy and Industrial Strategy Committee. https://committees.parliament.uk/work/178/the-impact-of-coronavirus-on-businesses-and-workers/.

Great Britain. Department for Business, Energy and Industrial Strategy. 2020a. *Coronavirus Business Interruption Loan Scheme*. 23 March 2020. https://www.gov.uk/guidance/apply-for-the-coronavirus-business-interruption-loan-scheme.

---. 2020b. *Apply for a coronavirus Bounce Back Loan*. 27 April 2020. https://www.gov.uk/guidance/apply-for-a-coronavirus-bounce-back-loan.

Great Britain. Department for Business Innovation and Skills. 2012. *The Kay Review of UK Equity Markets and Long-term Decision-making*. London: HMSO. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf.

Green, Edward J. 2010. "Bailouts." *Economic Quarterly* 96: 11.

Gurrea Martínez, Aurelio. 2020. "Insolvency Law in Times of COVID-19." *Oxford Business Law Blog*, April 14, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/insolvency-law-times-covid-19.

Harrison, Mark. 2009. "Assessing the Impact of Regulatory Impact Assessments." *Agenda* 16: 41. http://ssrn.com/abstract=1906482
Hatzis, Aristides N. 2015. "A Law and Economics Framework for Financial Regulation." In *The Changing Landscape of Global Financial Governance and the Role of Soft Law*, edited by Friedl Weiss, and Armin Kammel, chapter 2. Leiden: Brill Nijhoff.
Hill, Jennifer G. 2019. "The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat." *University of Illinois Law Review* 2019: 507.
Ho, Karen. 2014. "Corporate Nostalgia? Managerial Capitalism from a Contemporary Perspective. In *Corporations and Citizenship*, edited by Greg Urban. Philadelphia: University of Pennsylvania Press.
Hodson, Dermot, and Deborah Mabbett. 2009. "UK Economic Policy and the Global Financial Crisis: Paradigm Lost?" *Journal of Common Market Studies* 47: 1051–1052.
Howell, Elizabeth. 2018. "An Analysis of the Prospectus Regime: The EU Reforms and the 'Brexit' Factor." *European Company and Financial Law Review* 15: 69.
Huertas, Thomas. 2020. "Here is How Banks Can Help Save the Economy". *Financial Times*, May 11, 2020. https://www.ft.com/content/f02df444-8f78-11ea-bc44-dbf6756c871a.
Hutter, Bridget M., and Sally Lloyd-Bostock, eds. 2017. *Regulatory Crisis: Negotiating the Consequences of Risk, Disasters and Crises*. Cambridge: Cambridge University Press.
Iacobucci, Edward M. 2016. "Reflections on Financial Crises, Regulation and Sunsetting." In *Systemic Risk, Institutional Design, and the Regulation of Financial Markets*, edited by Anita Anand, chapter 5. Oxford: Oxford University Press.
Kahnemann, Daniel, and Amos Tversky. 1979. "Prospect Theory: An Analysis of Decision under Risk." *Econometrica* 47: 263.
Kallinikos, Jannis, Hans Hasselbladh, and Attila Marton. 2013. "Governing Social Practice: Technology and Institutional Change". *Theory and Society* 42: 395.
Kaminska, Izabella. 2020. "Why the real economy needs a prudential authority too". *Financial Times*, April 1, 2020. https://ftalphaville.ft.com/2020/04/01/1585730516000/Why-the-real-economy-needs-a-prudential-authority-too/.
Kammel, Armin J. 2015. "Government Versus Markets – A Change in Financial Regulation." In *The Changing Landscape of Global Financial Governance and the Role of Soft Law*, edited by Friedl Weiss, and Armin J. Kammel, chapter 1. Leiden: Brill, Nijhoff.
Kant, Immanuel, 1781. *The Critique of Pure Reason*. London, New York: MacMillan & Co.
Katelouzou, Dionysia. 2015. "Worldwide Hedge Fund Activism: Dimensions and Legal Determinants." *University of Pennsylvania Journal of Business Law* 17: 789.
Kaplow, Louis, and Steven Shavell. 1994. "Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income." *The Journal of Legal Studies* 23: 667–670.
Kohn, Donald. 2020. "Stress tests: a policymaker's perspective." 5 February 2020. https://www.bankofengland.co.uk/speech/2020/donald-kohn-speech-at-2020-ecb-conference-on-macroprudential-stress-testing.
Kokkinis, Andreas. 2018. *Corporate Law and Financial Instability*. Abingdon: Routledge.
La Porta, Rafael, Florencio Lopez-De-Silanes, and Andrei Shleifer. 2006. "What Works in Securities Laws." *Journal of Finance* 61: 1.
Lastra, Rosa M. 2013. "Defining forward looking, judgement-based supervision." *Journal of Banking Regulation* 14: 222–223.
---. 2016. "Emergency Liquidity Assistance and Systemic Risk." In *Systemic Risk, Institutional Design, and the Regulation of Financial Markets*, edit by Anita Anand, chapter 7. Oxford: Oxford University Press.
Lee, Peter. 2020. "CBILS faulty: Sunak's flagship UK lending scheme looks unfit for purpose." *Euromoney*, April 24, 2020.

https://www.euromoney.com/article/b1lbgfwrx72nn3/cbils-faulty-sunaks-flagship-uk-lending-scheme-looks-unfit-for-purpose.

Licht, Amir. 2020. "What's so Wrong with Wrongful Trading? On Suspending Director Liability during the Coronavirus Crisis." *Oxford Business Law Blog*, April 9, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/whats-so-wrong-wrongful-trading-suspending-director-liability-during.

Lo, Andrew W. 2004. "The Adaptive Markets Hypothesis: Market Efficiency from an Evolutionary Perspective." *The Journal of Portfolio Management* 30: 15.

Macey, Jonathan R. 1993. "Corporate Law and Corporate Governance a Contractual Perspective." *Journal of Corporation Law* 18: 185.

Masur, Jonathan S., and Eric A. Posner. 2017. "Should Regulation be Counter-cyclical?" *Yale Journal on Regulation* 34: 857.

Mayer, Frederick W. 2017. "The Story of Risk." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, chapter 6. Cambridge: Cambridge University Press.

Marjosola, Heikki. 2014. "Regulating Financial Markets Under Uncertainty: The EU Approach." *European Law Review* 39: 338.

Maymin, Philip. 2009. "Regulation Simulation". *European Journal of Finance and Banking Research* 2: 1–12.

Megaw, Nicholas, and Vincent Matthew. 2020a. "Lenders sound warning on mortgage holidays." *Financial Times*, March 25, 2020. https://www.ft.com/content/3a6b82b0-6e77-11ea-89df-41bea055720b.

Megaw, Nicholas, and Vincent Matthew. 2020b. "UK loan freeze plan leaves customers still open to arrears letters." *Financial Times*, April 5, 2020. https://www.ft.com/content/7a533dc5-8cd8-4ef3-9963-d1f43e76ff47.

Minsky, Hyman P. 1992. *The Financial Instability Hypothesis*. Levy Economics Institute Working Paper, No. 74. http://www.levyinstitute.org/pubs/wp74.pdf.

Moloney, Niamh. 2012. "The legacy Effects of the Financial Crisis on Regulatory Design in the EU." In *The Regulatory Aftermath of the Global Financial Crisis* edited by Eilís Ferran, Jennifer Hill, Niamh Moloney, and John C. Coffee, 111–202. Cambridge: Cambridge University Press.

Mooney, Attracta, and Peter Smith. 2020. "Investors pull record €250bn from European funds." *Financial Times*, April 22, 2020. https://www.ft.com/content/29d69ff6-749b-45dc-b53e-85a236186983.

Moore, Marc T. 2009. "Whispering Sweet Nothings": The Limitations of Informal Conformance in UK Corporate Governance." *Journal of Corporate Law Studies* 9: 95.

Morris, Stephen, and David Crow. 2020. "European bank investors brace for loan-loss provisions." *Financial Times*, April 27, 2020. https://www.ft.com/content/1d9d862a-df05-47c1-8245-cf798127165f.

Morris, Stephen, Matthew Vincent, and David Crow. 2020. "BoE warns bank loan reserves risk choking business funding." *Financial Times*, April 26, 2020. https://www.ft.com/content/75767049-edfb-4074-942c-f9ce4d07f861.

Morris, Stephen, Nicholas Megaw, and Daniel Thomas. 2020. "Non-bank lenders push for access to emergency state funding." *Financial Times*, March 24, 2020. https://www.ft.com/content/51340b70-6d28-11ea-89df-41bea055720b.

Murphy, Peter, Francis Garrido, and Rehan Ahmad. 2020. "CET1 capital ratios at Europe's largest banks, Q4." *S&P Global Market Intelligence*, March 17, 2020. https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/cet1-capital-ratios-at-europe-s-largest-banks-q4-57567429.

Noonan, Laura. 2020. "Payment holidays are messing with America's $2.2tn mortgage machine." *Financial Times*, April 17, 2020. https://www.ft.com/content/f6c218a1-358e-4564-9919-1a96da91fc94.

Nozick, Robert, 1991. "Decisions of Principle, Principles of Decision". Tanner Lectures on Human Values, Princeton University, November 13 and 15, 1991. https://tannerlectures.utah.edu/_documents/a-to-z/n/Nozick93.pdf

O'Clock, Priscilla, and Kevin Devine. 1995. "An Investigation of Framing and Firm Size on the Auditor's Going Concern Decision." *Accounting and Business Research* 25: 197.

Offe, Claus. 1996. *Modernity and the State: East, West*. Cambridge MA: Polity Press.

Orts, Eric W. 1993. "The Complexity and Legitimacy of Corporate Law." Washington & Lee Law Review 50: 1565.

Park, James J. 2017. "Reassessing the Distinction Between Corporate and Securities Law." *UCLA Law Review* 64: 116.

Pistor, Katharina, Yoram Keinan, Jan Kleinheisterkamp, and Marc D. West. 2002. "Evolution of Corporate Law: A Cross-Country Comparison." *University of Pennsylvania Journal of International Law* 23: 791.

Pistor, Katharina. 2013. "A legal theory of finance." *Journal of Comparative Economics* 41: 321.

Prudential Regulation Authority (PRA). 2020a. *PRA statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to Covid-19*. 31 March 2020. https://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses.

---. 2020b. *Q&A on the usability of liquidity and capital buffers*. 20 April 2020. https://www.bankofengland.co.uk/prudential-regulation/publication/2020/buffer-usability-qanda.

---. 2020c. *Letter from Sam Woods 'Covid-19: IFRS 9, capital requirements and loan covenants*. 26 March 2020. https://www.bankofengland.co.uk/prudential-regulation/letter/2020/covid-19-ifrs-9-capital-requirements-and-loan-covenants.

---. 2020d. *Statement by the PRA accompanying measures announced by the Financial Policy Committee*. 11 March 2020. https://www.bankofengland.co.uk/prudential-regulation/publication/2020/statement-by-the-pra-accompanying-measures-announced-by-the-fpc.

---. 2020e. *PRA decision on Systemic Risk Buffer rates*. 9 April 2020. https://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-decision-on-srb-rates.

Rees, Jon, and Taqi Mohammad. 2020. "UK banks' loan loss provisions soar in face of pandemic." *S&P Global Market Intelligence*, May 7, 2020. https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/uk-banks-loan-loss-provisions-soar-in-face-of-pandemic-58478176.

Reinhart, Carmen M., and Christoph Trebesch. 2014. *A Distant Mirror of Debt, Default, and Relief*. NBER Working Paper, No. 20577. https://www.nber.org/papers/w20577.

Reis, Marcos, and Daniel Vasconcelos. 2016. "The Legal Theory of Finance and the Financial Instability Hypothesis: Convergences and Possible Integration." *Journal of Post Keynesian Economics* 39: 206.

Ricketts, David. 2020. "UK investors flee equity funds on coronavirus fears." *Financial News*, February 27, 2020. https://www.fnlondon.com/articles/uk-investors-flee-equity-funds-on-coronavirus-fears-20200227.

Romano, Roberta. 1989. "Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws." *Columbia Law Review* 89: 1599.

Rose, Richard, and Rei Shiratori, eds. 1987. *The Welfare State: East and West*. Oxford: Oxford University Press.
Saint-Georges, Didier. 2020. "Post-coronavirus growth should be more robust but less optimal". *Financial Times*, April 27, 2020. https://www.ft.com/content/e3c4b133-9aaf-4a32-bc59-03fa5438585a.
Schammo, Pierre. 2020. "Who Knows What Tomorrow Brings? Of Uncertainty in Times of a Pandemic." *Oxford Business Law Blog*, April 28, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/who-knows-what-tomorrow-brings-uncertainty-times-pandemic.
Shiller, Robert J. 2000. *Irrational Exuberance*. Princeton: Princeton University Press.
Somerset Webb, Merryn. 2020. "Bypass retail investors at your peril". *Financial Times*, April 24, 2020. https://www.ft.com/content/b9255dab-385d-4182-8c44-200948bfaae2.
Stanton, Thomas H. 2012. *Why Some Firms Thrive While Others Fail: Governance and Management Lessons from the Crisis*. Oxford: Oxford University Press.
Strauss, Delphine, and Stephen Morris. 2020. "BoE cancels stress tests to ease pressure on lenders." *Financial Times*, March 20, 2020. https://www.ft.com/content/7433d55c-6a89-11ea-800d-da70cff6e4d3.
Sunstein, Cass R. 1996. *The Cost-Benefit State*. Coase-Sandor Institute for Law & Economics Working Paper, No. 39. https://chicagounbound.uchicago.edu/law_and_economics/498/.
Sunstein, Cass R., and Robert W. Hahn. 2002. *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*. John M. Olin Program in Law and Economics Working Paper, No. 150. https://chicagounbound.uchicago.edu/law_and_economics/10/.
Sunstein, Cass R. 2014a. "The Limits of Quantification". *California Law Review* 102: 1369.
Sunstein, Cass R. 2014b. *Valuing Life: Humanizing the Regulatory State*. Chicago: University of Chicago Press.
Thompson, Robert B. 1990. "The Law's Limit on Contracts in a Corporation." *Journal of Corporation Law* 15: 377.
van Zweiten, Kristin. 2020. "The Wrong Target? COVID-19 and the Wrongful Trading Rule". *Oxford Business Law Blog*, March 25, 2020. https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/wrong-target-covid-19-and-wrongful-trading-rule.
Vincent, Matthew. 2020. "Regulators tackle concerns over companies' coronavirus reporting." *Financial Times*, March 26, 2020. https://www.ft.com/content/e8e7caa9-a48f-408e-b082-5bc276f4e061.
Weber, Elke U. 2017. "Understanding Public Risk Perception and Responses to Changes in Perceived Risk." In *Policy Shock*, edited by Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, chapter 4. Cambridge: Cambridge University Press.
Wiener, Jonathan. 2006. *Better Regulation in Europe*. Duke Law School Working Paper Series, No. 65. http://www.osservatorioair.it/wp-content/uploads/2009/08/wiener2006.pdf.
Wiggins, Kaye, Mark Vandevelde, and Robin Wigglesworth. 2020. "Coronavirus: private equity's bailout moment." *Financial Times*, April 24, 2020. https://www.ft.com/content/f7cc82d7-70b9-40c3-b4a0-815ebc5d99d5.
Wolf, Martin. 2020. "Coronavirus crisis lays bare the risks of financial leverage, again." *Financial Times*, April 28, 2020. https://www.ft.com/content/098dcd60-8880-11ea-a01c-a28a3e3fbd33.
Xuereb, Peter G. 1988. "Corporate Management and the Statutory Right of Pre-emption: A Critical Review." *International and Comparative Law Quarterly* 37: 397.

CASES CITED

Judgment of the Court (First Chamber) of 18 December 2008 — Commission of the European Communities v Kingdom of Spain (C-338/06).

Crestsign Ltd v Natwest and RBS (2014) EWHC 3043 (Ch).

Grant Estates Limited (In Liquidation); Ruari Stephen; and Jamie Stephen v The Royal Bank of Scotland Plc, Thomas Campbell Maclennan, Kenneth Robert Craig, Joint Administrators of Grant Estates Limited (2012) CSOH 133.

Green and another v Royal Bank of Scotland plc (Financial Conduct Authority intervening) (2013) EWCA Civ 1197.

Thornbridge Limited v Barclays Bank Plc (2015) EWHC 3430 (QB).

Titan Steel Wheels Ltd v Royal Bank of Scotland plc (2010) EWHC 211.

LAWS CITED

Bank of England Act 1988 amended by Financial Services Act 2012.

Commission doc 2020/0066 (COD) Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards adjustments in response to the COVID-19 pandemic, 28 April 2020.

Companies Act 2006 (c. 46).

Consumer Credit Act 1974 (c. 39).

FCA Handbook Listing Rules.

Financial Services and Markets Act 2000 amended by Financial Services Act 2012.

Financial Services Act 2012 (c. 21).

Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

Insolvency Act 1985 (c. 65).

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, Art 1(5)(a), applicable by way of The UK Prospectus (Amendment etc.) (EU Exit) Regulations 2019.

Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012.

The UK Stewardship Code of 2010, amended 2020.

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