Local government financial distress: international comparison and latest developments in the light of the Italian spending review approach

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Abstract

Although it is not difficult to note the increasing number of financial crises in the public sector field (municipalities, counties, states, etc.), it is quite easy to see that most of the literature has focused mainly on pathological situations occurred in private companies (Cahill and James, 1992; Honadle, 2003; Migliaccio, 2012).

The key question, therefore, lies in the consequences for stakeholders involved arising from different remedies. USA and Italy legal system provides for a mechanism to be used trying to heal the crisis but they are forms of intervention after the crisis. The real question is to clarify why, today, is relatively simple and common for local governments to have over-spending crisis. The answer to this question lies, probably, in the correct vision and understanding of public administration and, in particular, of local government.

Keywords: *Bankruptcy, Public Administration, Local government, Italy.*

JEL classification: H83, H12, H70.

1. Introduction

Even crises are related to every type of organization, the analysis of them is very interesting with specific reference to non-profit public companies (Guatri, 1986; Cahill and James, 1992; Honadle, 2003) and, more specifically, to local governments, mainly because they are the primary providers of public services to the residents of a country (Kimhi, 2008; Ricci, 2012b).

In these cases, there is one important aspect on which it is necessary to focus our attention: because of institutional and public purposes that led to their birth, they cannot dissolve, but they need to live and provide essential services and goods to city residents. This means that financial crises impact hardly on the development of cities and – mainly – on living conditions of citizens (Manes Rossi, 2000; Kimhi, 2008; Migliaccio, 2012; Ricci, 2012a, 2012b).

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This situation creates a profound difference in the treatment of local governments crises, as well as the need for a specific legal framework regarding local governments bankruptcy which is distinct from the other insolvency and bankruptcy procedures provided for private companies.

So, if a local government can never be dissolved, but we should always find its way to a desirable and sustainable recovery, it becomes imperative to understand what are the causes of the crisis, what are the warning signs and, therefore, to identify tools that can monitor the permanently existence of the institution equilibrium. Nevertheless, when crises situations arise, it is important to look for tools to monitor developments of the next phase of rehabilitation and to ensure the restoration of equilibrium.

In crises situations, the most dangerous threat is represented by possible delay in the intervention. Historically, crises are often marked by belated recognition of the symptoms of crisis, the illusion of excluding crises or minimize the scope, the fear of adopting measures that are inevitably painful. The net effect of these behaviors is that the process of decomposition and depletion becomes more severe, up to the limit of irreversibility.

Fundamental problem is, therefore, to identify the early onset of the crisis, before the imbalances and inefficiencies will irreversibly affect the life of a company: apart from rare exceptions, crisis is a phenomenon not unexpected, although sometimes it can manifest suddenly. It is a phenomenon that may be present in a latent form, and gradually undermining the financial balance until someone (inside or outside the company) is able to detect it.

The present work aims to investigate, first, the fundamental and structural features of local governments financial difficulties to provide a relevant supervision of the phenomenon, partly because of changing legislation.

Secondly, it is important to make a critical analysis of technical and legal conformation of the topic, to highlight possible elements of distortion and, therefore, of change. In this way, the Italian spending review reform represents an opportunity for local governments to acquire appropriate measures to ensure the achievement of a new equilibrium about their financial situation. On the other hand, the Italian central government, with this type of reform, may be the cause of local governments bankruptcy, due to the continuous reduction of financial transfers, representing a serious threat to them.

2. Local government financial distress: the Italian case

The introduction of local governments Bankruptcy Law in Italian legal system has its reasons in an attempt to put a stop to the legal phenomenon of chronic budget deficit of municipalities, provinces and other types of public organizations. With time, this has become absolutely not to be delayed.

The reasons that led to these circumstances are various and of different relevance. Among these, we can mention: a steady rise in spending, an increasing deficit pace and continuous increase of local taxes.

We can identify other causes (not only for Italian case) in:

- political class chronic irresponsibility, regarding financial management of public bodies (Osborne, 1998, 2011; Lapsley, 2010; Ricci, 2012a, 2012b);
- case law too precautionary against creditors (Romano et al., 1998).

The notion of Italian local governments Bankruptcy can be deduced analytically from the reading of numerous provisions of Italian laws, covering a wide historical period.

The end result of this sequence is represented by the D. Lgs. No. 267 of 18th August 2000: Text of the laws on the local governments (TUEL).

Therefore, the current definition of the phenomenon of local government bankruptcy is provided by Article 244 TUEL, which specifies that:

'State of local governments Bankruptcy occurs if a local government cannot guarantee the performance of functions and essential services, or there are against it demandable claims which cannot cope with the arrangements laid down in Articles 193 and 194 of TUEL' (TUEL is the Italian local governments code).

From this definition, it is possible to deduce two fundamental conditions (De Dominicis, 2000):

1. the entity's inability to provide essential services (and related compulsory expenditure);
2. inability to honor its debts, especially debts below the line, including those "black debts" contracted in previous years without complying the normal procedure of commitment accounting.

In other words, these are conditions or situations that show a certain deficit and serious total financial imbalance, but that may not co-exist and compete simultaneously, so the financial default does not arise with a casual deficit, but is related instead to a real and concrete structural imbalance in the local government financial situation (Mulazzani, 2001).

In a situation of bankruptcy, a recent law (D.Lgs. No. 149/2011) provides that administrators responsible (because judged by the Judicial Organs in charge) of damage in the five years preceding the occurrence of bankruptcy, may not hold significant positions in public and private institutions for a period of ten years, if the Court finds that the circumstances and causes of bankruptcy are derived from acts or omissions of administrator found guilty.

Similarly, mayors and presidents of the provinces that are responsible for the bankruptcy are not candidates for a period of ten years for position of mayor, president of the province, president of the Regional Council and other high offices in the communal, provincial, regional and European level.

Regarding the procedure, after the declaration of bankruptcy we will have a "dual management", which two actors involved: the Extraordinary Settlement Body and the Council of the local government.

The Extraordinary Settlement Body mainly deals with local government's management after the bankruptcy. In particular, it has three main functions:

- detection of local government's debts;
- acquisition and management of assets;
- payment of local government's debts.

The Council, instead, should declare the state of bankruptcy but, in addition, it must also evaluate the generating causes, on the basis of a report prepared by the auditors.

This is because the Italian National Audit Office declaration is not a simple aseptic acknowledge, but the first measure of determination and designation of responsibility.

This declaration produces mainly two kinds of consequences.

The first of these concerns local government's creditors: in this case, the declaration determines the freezing of some of their rights and guarantees.

The second consequence of the declaration affects management of the organization and introduces several constraints on expenditure and the income management and lasts until compilation of hypothetical balanced and healthy budget.

In other words, management is not based on the budget of next year (as is usual) but takes as reference the last budget adopted before the bankruptcy.

After the declaration of bankruptcy, local government is not obliged only to contain costs (as discussed above) but it must take any kind of action aimed at achieving incremental variations of incoming resources. These measures are identified in Article 251 TUEL, and consist, in general, in raising fees and taxes to the maximum extent permitted by Law. This resolution, therefore, is not revocable, and retains its effectiveness for five years starting from the hypothetical balanced and healthy budget.

After approval of hypothetical budget (within 30 days) the next step is to approve the budget for which the hypothesis applies.

This because it is necessary that the hypothetical budget becomes a real budget to legitimate action of the Council.

The duration of the procedure is five years after approval of the hypothesis.

To further facilitate the healing process, the law clarifies that local governments can get a bank loan only in particular cases (for the duration of the process).

It is very difficult to identify bankruptcy causes but it is possible to highlight some internal and external dangerous factors (Corte dei Conti - Italian National Audit Office, 2005-2012):

- mismanagement (e.g. deficit, "black-debts", etc.);
- management goals are too ambitious;
- short-term management policies;
- mismanagement of cash flows;
- excessive debt exposure;

- inefficient management control system;
- inability to promptly identify potential causes of damage and/or inability to act promptly to remove them;
- uncontrolled increase of expenditure;
- growing deficit (without making investments);
- continuous increase of certain local taxes;
- discontinuity in management;
- lack of business management tools to support management;
- negative events that involve the market.

By analyzing statistical data one of the most significant considerations – it is our opinion - is the analysis of bankruptcy phenomenon as a function of time. Indeed, as shown in Figure 1, the number of bankruptcies (frighteningly large in the first few years following its introduction) has quickly and steadily reduced over the years, remaining (from 1997 to present) always below dozen cases reported each year.

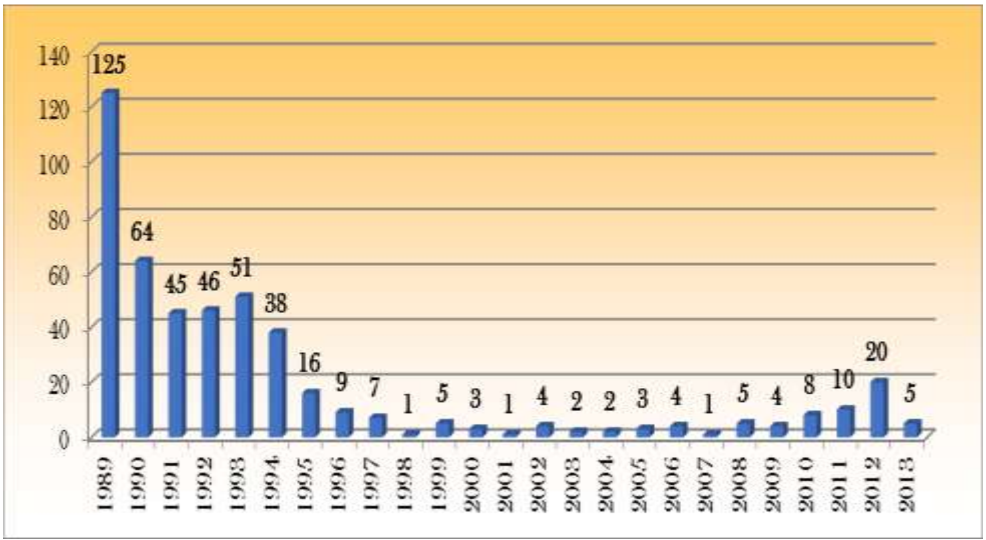

Figure 1. Italian local government bankruptcies over the years (till 13th May 2013)

The falling graph demonstrates that the aim of transforming this procedure in an exceptional tool (to be applied only when it was impossible to manage the financial collapse) had actually been achieved (despite a discipline, at that time, not fully mature).

However, it is important to point out that the drastic reduction of local government defaults has another explanation, simple but very persuasive. Until 2001, bankruptcy had its own “convenience” because the deficit was covered by a loan financed directly by the State.

Today, instead, declaration of bankruptcy causes damage to all:

- employees: those who are redundant (compared to the national average ratio employee/population) may lose their jobs;
- suppliers: due to the constraints arising from the declaration;
- citizens (especially): as mentioned earlier, after the collapse there is an obligation to increase local taxes to the legal maximum.

The circumstances outlined above allow us to easily admit that the probability for a local government in bankruptcy to reach a situation of real and tangible rehabilitation is very difficult without a consistent activity of “support” at State or Regional level.

The problem is that we need to reflect jointly on these two aspects:

- ✓ it is vital to assist local governments in difficulty by a Regional or State support;
- ✓ it is important to avoid systematic safeguards action, to encourage a real and long-lasting recovery will.

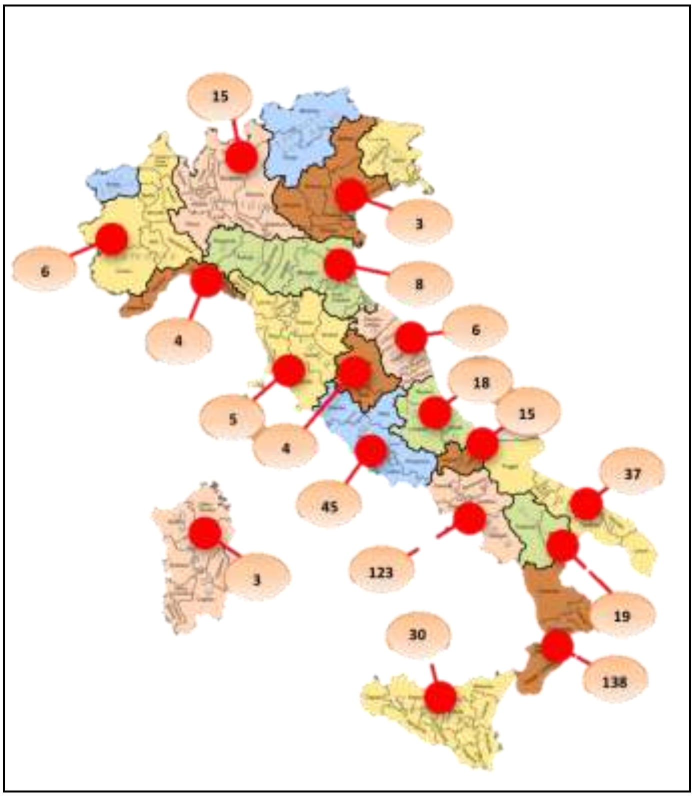

Figure 2. Italian local governments bankruptcies by Regions (till 13th May 2013)

3. The United States approach to local governments financial distress topic

After a general description of Italian local governments bankruptcy law, it is essential a reflection in the international context, to have a comparison between different type of approach to treat local financial crises (Kimhi, 2008; Spiotto, 2011, 2012).

About this topic, first of all, it is necessary to highlight that it is possible, even in other countries (such as Unites States), to find similar approach in dealing with municipal financial bankruptcies.

In this regard, United States legislative system contains a specific remedy to the local crises. This is the Chapter 9, under the Title 11 (Bankruptcy) of US Code. Chapter 9 deals with municipal financial crises, although it is titled as "Adjustment of debts of a municipality".

Specifically, Chapter 9 provides a specific mechanism whose main purpose is to allow the municipality to continue its life, while it adjusts or refinances creditor claims with the aid of a specific court. Indeed, one of the stated purposes of the U.S. Bankruptcy Code was to provide a "*workable procedure so that a municipality of any size that has encountered financial difficulties may work with its creditors to adjust its debts*".

In a few words, it is the same aim of Italian legislation.

With regard to the procedure, according to U.S. Bankruptcy Code, to initiate an action and be a debtor under Chapter 9 a local government must meet five requirements, which are provided by section 109(c) of Bankruptcy Code:

1) it must be a municipality;
2) it must be specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
3) it must be insolvent;
4) it has to show that it desires to effect a plan to adjust its financial obligations;
5) it must show that it tried to negotiate a debt readjustment agreement with its creditors, or that such negotiations are impracticable.

Moreover, the determination of insolvency condition of a municipality is not as easy. It is necessary that one of the following points is met:

A. has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
B. has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

C. is unable to negotiate with creditors because such negotiation is impracticable; or
D. reasonably believes that a creditor may attempt to obtain a transfer that is avoid able under section 547 of this title.

The states have adopted different approaches to this requirement (see Figure 3 and Figure 4):

- ✓ 13 states have statutory provisions specifically authorizing the filing by an in-state municipality of a Chapter 9 petition;
- ✓ 11 states authorize a filing conditioned on a further act of the state, an elected official or a state entity;
- ✓ 3 states grant limited authorization and two states prohibit filing, but one of them has an exception to the prohibition.
- ✓ 21 states are either unclear or do not have specific authorization with respect to filing;
- ✓ the District of Columbia and Puerto Rico are not permitted to file.

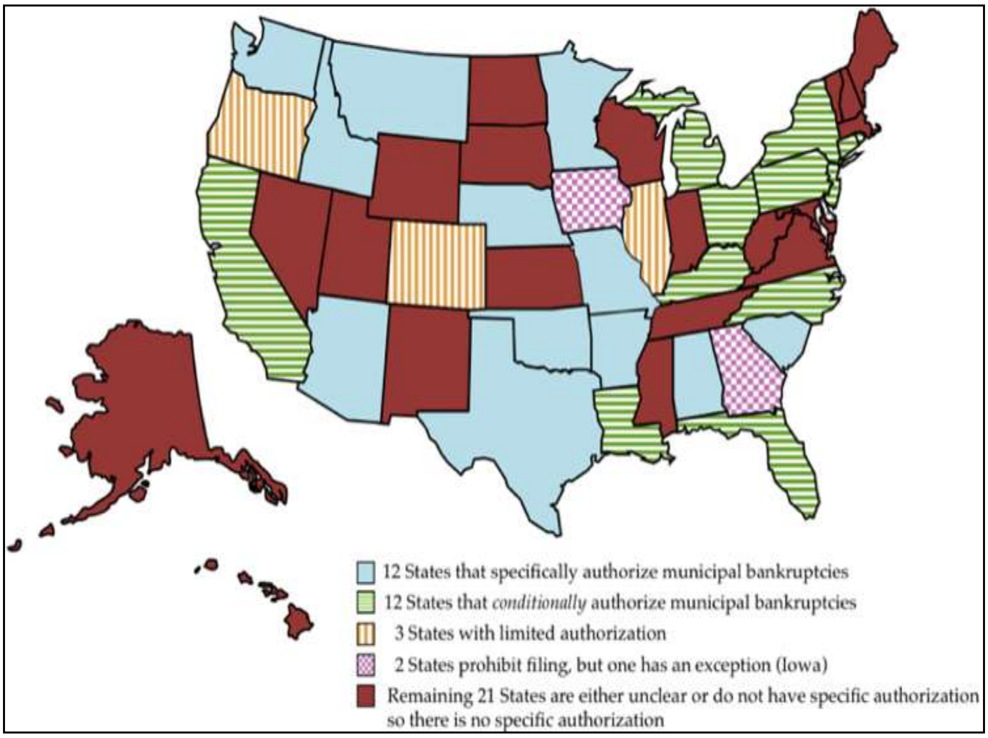

Figure 3
Source: Spiotto, J. E. (Remarks of) (2011), 'U.S. Securities and Exchange Commission – Field hearing on the state of municipal securities market distressed communities', Chapman & Cutler LLP

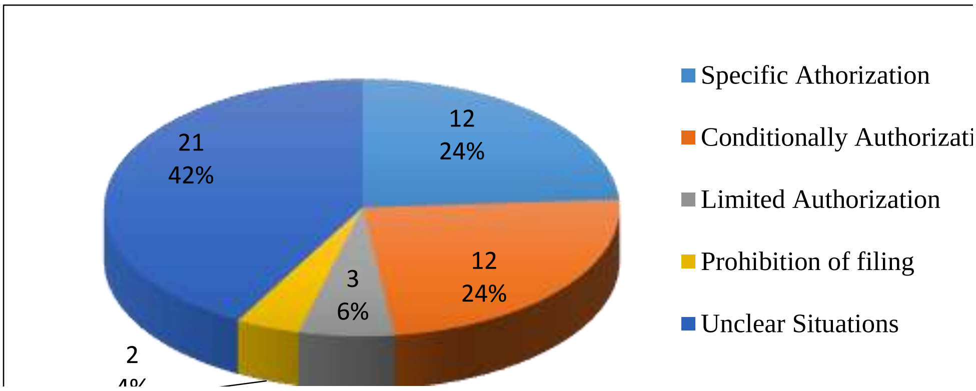

Figure 4

Source: Spiotto, J. E. (Remarks of) (2011), 'U.S. Securities and Exchange Commission – Field hearing on the state of municipal securities market distressed communities', Chapman & Cutler LLP. Elaboration of the Authors

If the requirements listed above are met, to initiate the procedure provided by Chapter 9, a municipality has to implement an automatic stay, which operates as a procedural halt to all judicial proceedings against the municipality.

Under the automatic stay status, the municipality shall file a plan for the adjustment of its debts. If such a plan is not filed with the petition, the debtor shall file such a plan at such later time as the court fixes.

During this phase, the municipality enjoys the exclusive right to submit such plans to the court, and the creditors can only approve or disapprove the plans the locality submits (Kimhi, 2008; Spiotto et al., 2012).

Once the locality constructs a debt readjustment plan, it submits the plan for the court's confirmation.

If the court finds that the submitted plan meets the conditions set forth in chapter 9, then the plan is confirmed and considered binding upon all creditors. The municipality's prepetition obligations thereafter consist only of those it has assumed under the plan, and the rest of the local debts are discharged. If the court does not confirm the plan (or if the municipality fails to submit a plan), then the court may dismiss the case, and the locality loses bankruptcy protection.

Note, however, that the court's powers are limited to confirming or rejecting the plan the locality submits. According to chapter 9, the court cannot change the submitted plan, or interfere in any other way in the governmental or political affairs of the locality. This is particularly important with regard to tax collections. Whereas outside of bankruptcy, creditors can use the mandamus remedy and force municipalities to raise their tax rates, in bankruptcy both the creditors and the court are subject to the tax rates set by the municipality itself. So, as long as the municipality is under bankruptcy protection, the court cannot order a tax increase, whether or not the local revenues are sufficient to pay the creditors in full. This limitation clearly raises a concern that the locality will not exhaust its tax-raising capacity, and that its revenues will be insufficient to repay its debts.

According to the Chapter 9 bankruptcies, it is important to highlight that the United States contains the most extensive and sophisticated public works system in the world including 3.866.000 miles of roadways, 565.000 bridges, 1.000 public mass transit systems, 16.000 airports, 25.000 miles of inland and intercoastal waterways, 70.000 dams, 900.000 miles of pipe in water supply systems and 15.000 waste water treatment plants provided mostly by municipalities and political subdivisions of a state (Spiotto, 2012). For these reasons, it is not hard to imagine that local governments financial crises are not prevalent, they may occur. For example, large and important U.S. municipalities have found themselves in a position in which they had difficulties providing even basic services to their residents. New York City (1975), Cleveland (1979), Philadelphia (1990), Bridgeport (1991), Orange County (1994), Washington D.C. (1995), Miami (1996), Camden (1999), Pittsburgh (2004), Vallejo (2008), Jefferson County (2011), Stockton (2012) and San Bernardino (2012) (Kimhi, 2008) are just some examples (Kimhi, 2008; Spiotto, 2011, 2012).

Chapter 9, however, is not the only remedy tool to be available in the U.S. legislation, in such kind of situation. According to a part of the literature (Kimhi, 2008; Spiotto, 2012), for example, we could identify some other approaches to municipal insolvency situations:

- creditors' remedies (writ of mandamus);
- state financial boards.

Creditors' remedies to local financial crises essentially consist of writ of mandamus to collect taxes which is a sort of court order that instructs a locality to levy and collect taxes in an amount sufficient to pay a judgment rendered against the locality (Kimhi, 2008). This specific tool is built on the consideration that in case of failure to pay debts in full, legal remedies available to the creditor are very different, depending on the nature of the debtor.

In particular, when this type of dispute involving a municipality, the practice and the literature (Kimhi, 2008; Spiotto, 2012) show that the creditor does not have effective remedies. With specific reference to U.S. law, for example, some states law distinguishes between "public assets," which are non subject to any execution because essential for performance of the localities' duties, and "private assets," which are not essential for public purposes, and therefore are subject to execution (Kimhi, 2008).

Because of such type of considerations, with the mandamus, the municipality must levy a special tax or increase the rates of existing taxes, while it transfers the extra tax revenues to the creditors as payment for their claims. However, the court itself does not directly impose the taxes and it may not force a locality to increase its taxes above any limits prescribed in the state's statutes. The creditors can use only the surplus of the revenues the municipality receives above the amount it needs for the local operating expenses (Kimhi, 2008).

A further and alternative approach, in addition to Chapter 9 and creditor's specific remedies, is based on state financial boards.

A state financial board is a state agency created to help a distressed locality overcome its economic troubles. The board usually oversees the financial affairs of the city during its time of crisis, and initiates a rehabilitation process designed to help the locality recover and its financial stability (Kimhi, 2008).

In most states the decision to form a state financial board is an ad hoc one. Most states do not have clear criteria as to when a board should be established, and the decision often depends on the political situation in the state and the gravity of the city's economic need. Usually, states decide about a state financial board only in particular situation (for example, when a city's credit rating falls below investment grade, or when the city is unable to finance its operating expenses). In a few states, however, the decision to establish a state financial board depends of list of economic criteria, and state boards are established when a certain municipality meets one of these criteria (for example, the locality's deficit reaches a certain level) (Kloha et al., 2005; Kimhi, 2008). State financial boards usually have different types of functions, including gathering information, debt management, and fiscal management. The board can prepare a plan to help the city to decrease its expenditures, increase taxation, or change the political environment (Honadle, 2003; Kimhi, 2008).

As shown above, the analysis of both Italian and United States legislative approach to the bankruptcy theme, allows us to highlight many interesting things. Both Italian and US legislative systems provide a debt readjustment tool:

- the "Financial collapse" regulated by art. 244 of D.Lgs. 267/2000 – TUEL, in Italy;
- the "Adjustment of debts of a municipality", provided by Chapter 9 of US Code, for United States.

We could try to synthesize them in the following table.

Table 1. A comparison between Italian and United States legislative approach to the bankruptcy theme

	ITALY	**USA**
Main acts of Law	• Artt. 244-275 of D.Lgs. No. 267/2000 – TUEL (Financial Collapse); • D.Lgs. No. 149/2011; • D.L. No. 174/2012.	U.S. Code, Title 11 (Bankruptcy), Chapter 9 (Adjustment of debts of a municipality).
Recipients of the laws	Local Governments.	Municipalities.
Main conditions for the declaration	1. Inability to provide essential services (and related compulsory expenditure); 2. Inability to honor its debts, especially debts below the line ("black debts").	1. To be a municipality; 2. Specific authorization by State law; 3. Insolvency; 4. Willing to effect a plan to adjust debts;

	ITALY	USA
		5. Attemoting to negotiate a debt readjustment agreement with its creditors, or that such negotiations are impracticable.
Duration of the procedure	5 years.	There is no expected duration.
Burdens of the procedure	Usually, on residents.	Usually, on creditors.
Implications for the involved actors	• Inability to hold public and private positions for ten years (for guilty administrator); • Ineligibility for ten years (for guilty mayors and presidents of the provinces).	There are no unique implications for actors involved in the procedure.

Source: elaboration of the Authors.

4. Conclusions

After having analyzed the regulatory framework and the relevant literature on the subject of municipalities in financial difficulties, we can try to outline some general conclusions and reflections on the theme of the municipalities in situations of financial distress.

Given the current conditions of local governments finances, we may argue that the probability for them to incur in financial distress situations is significantly higher. In this regard, and for these reasons, some countries have introduced a number of legislative measures trying to stabilize local governments financial situation. The purpose is to prevent the occurrence of the difficulties before they become irreversible.

For example, recently, in Italy, there was at least two acts of law in this direction.

The recent D.Lgs. No. 149/2011 (so-called Decree "Awards and Penalties") has intensified its supervisory functions of the regional sections of the Italian National Audit Office. When the judges identify a real risk of "default", the Italian National Audit Office indicates the stability measures to bring "safe" the local government, with a resolution that also includes the deadline should be adopted.

Upon expiry of these deadlines, there is a second resolution, aimed at verifying the effective adoption of stability measures and if these have not been taken to restore condition of stability, there is the appointment of a special commissioner for the compulsory declaration of the state of collapse.

More recently, the D.L. No. 174 of 10 October 2012 (turned into law No. 213 of 7 December 2012) has intensified the system of preventive controls of local governments financial situation. In particular, the law is aimed primarily at improving the effectiveness of internal controls on their administrative and accounting system.

According to the United States context, we can highlight some other stimulating considerations. A very interesting aspect is to note that notwithstanding the subject's importance, from a legal perspective, municipal insolvency is still very much an uncharted area. There is hardly any legal writing about municipal financial crises, and researchers have not sufficiently explored how the legal system deals, or should deal, with this problem. Even in the United States, like the Italian context, we can see how legislative innovations introduced over the years, are oriented towards the convergence of local governments bankruptcy law in the direction of corporate insolvency situations. In this way the majority of the literature (Kimhi, 2008) has ruled out the possibility of identifying other tools to solve such problems.

For example, in relation to the United States case, historically, Chapter 9 has been used generally by small tax districts and small municipalities while major issuers of municipal debt have refrained from proceeding with a Chapter 9 filing. As set forth in Figure 6, since 1937, when Chapter 9 was instituted, there have been 624 Chapter 9 filings as of June 30, 2011. Since 1980 there have been 253 filings as of June 30, 2011. Of those who have filed since 1980, only three municipal debt issuers of any significance, namely: (1)-Orange County in 1994, in which the public debt was refinanced and paid, (2)-the City of Bridgeport, Connecticut, in 1991, which ultimately was dismissed, and (3)-the City of Vallejo in 2008, which is exiting bankruptcy in July 2011.

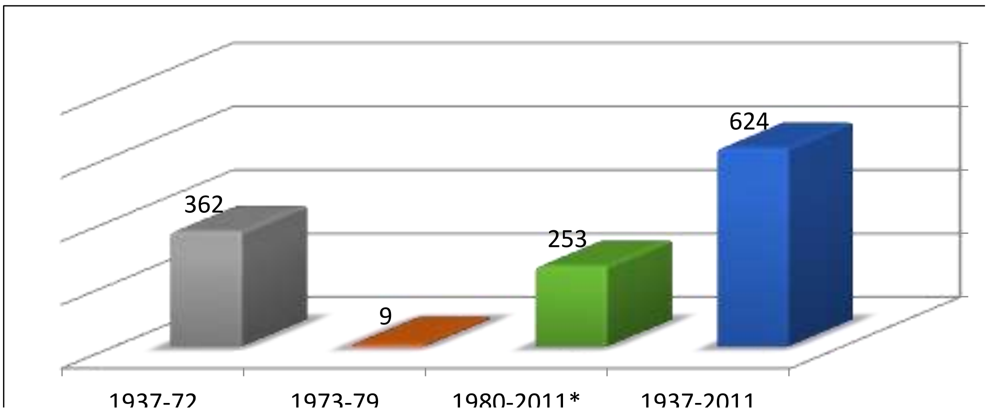

Figure 5

Source: Spiotto, J. E. (Remarks of) (2011), 'U.S. Securities and Exchange Commission – Field hearing on the state of municipal securities market distressed communities', Chapman & Cutler LLP.

About a third of 253 Chapter 9 filings since 1980 have been dismissed, rather than being completed, by confirming a Plan of Debt Adjustment. While corporate issuers utilizing Chapter 11 have filed in recent years over 1,000 Chapter 11 filings per year, the Chapter 9 filings, even during the current economic downturn, have been small: 5 in 2007, 4 in 2008, 10 in 2009, 6 in 2010 and 4 as of June, 2011. Chapter 9 has been viewed by major municipal issuers as clearly the last resort and an alternative to be avoided at virtually all costs. It is no accident that New York City in 1975, Cleveland in 1978, Philadelphia in 1991 and other significant issuers of municipal debt, when faced with a financial crisis, chose other viable alternatives rather than filing Chapter 9. Chapter 9 provides no additional revenues or tax sources to solve the problem, and it affects all creditor relationships and not just the few that are the problem. Chapter 9 tips over those desired creditor relationships that are not the problem and are working just fine. Further, the stigma and complexity and travail of Chapter 9 is more than what many local governments can tolerate.

However, one of the central points of the topic is related to the balance of burdens generated when a municipality is in a state of bankruptcy between the main actors involved:

- the residents;
- the creditors;
- the state.

Each of remedies previously described can be viewed as placing the burden of a local financial crisis – or at least a substantial part of it – on a different entity. Creditors' remedies place the burden of a crisis on the residents of the locality; the Bankruptcy Code, on the other hand, places the burden of the crisis on the locality's creditors; and finally, state financial boards place the burden on the state.

The goal is to shift from formal verifications and investigations into activities of concrete support for managerial decisions, especially in those with greater economic and financial impact.

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