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ACADEMIC FORUM
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Academic Forum Annual Conference

COPENHAGEN

25-26 September 2019

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Dear Colleagues and Friends

Michael Veder
Chair,
INSOL Europe
Academic Forum

Welcome to Copenhagen! It is a great pleasure to welcome you to the 15th Annual Conference of the INSOL Europe Academic Forum.

With the formal adoption of the EU Restructuring Directive by the European Council on 6 June 2019, the theme of this year's Academic Forum conference is very topical: "**Harmonisation of insolvency and restructuring laws in the EU**".

The conference focusses on the preventive restructuring frameworks that the EU Directive seeks to implement throughout the EU Member States. In six sessions, key elements of the restructuring framework as contemplated in the EU Directive will be discussed, as well as their (current and future) implementation and application in the Member States.

The conference features sessions on the design and implementation of preventive restructuring frameworks, the role of directors and the position of the 'debtor-in-possession', the manner in which, and extent to which, creditors can be affected and protected by preventive restructuring frameworks (e.g. through a stay and cross-class cram-down mechanisms) and the administration of the restructuring process, with ample attention for the role of practitioners (in the field of restructuring) and judges.

The board of the Academic Forum is very grateful to all speakers and participants for joining us to debate and celebrate here in Copenhagen!

CONTENTS

RICHARD TURTON AWARD 2019

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, The Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in his memory. The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the annual INSOL Europe Congress and have a technical paper published.

In recognition of those aspects, in which Richard had a special interest, the award for 2019 was open to applicants who fulfilled all of the following:

- Are a national of a developing or emerging nation;
- Work in or are actively studying insolvency & restructuring law and practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the congress technical programme.

Applicants for the award were invited to write a statement detailing why they should be chosen, and a brief synopsis of their proposed paper.

A panel representing the four associations adjudicated the applications. The panel members are as follows: Robert van Galen – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA.

The committee received outstanding number of applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession, and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner of this year's award is **Odwa Ngxingo** from South Africa. Odwa is currently working at ASOC Management Company (Pty) Ltd. as a portfolio manager dealing with business rescue and distressed private equity funds, and is active in promotion of insolvency and business rescue awareness in South Africa.

He will be writing a paper on *"Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom"*, which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Odwa is invited to attend the INSOL Europe Congress on 26-29 September 2019 in Copenhagen, Denmark.

We would like to congratulate Odwa on his excellent application, and also thank all the candidates who applied for the award this year and wish them successful career in their chosen field.

The details of the Turton Award and papers of the previous winners can be found at **https://www.insol.org/turton-award**.

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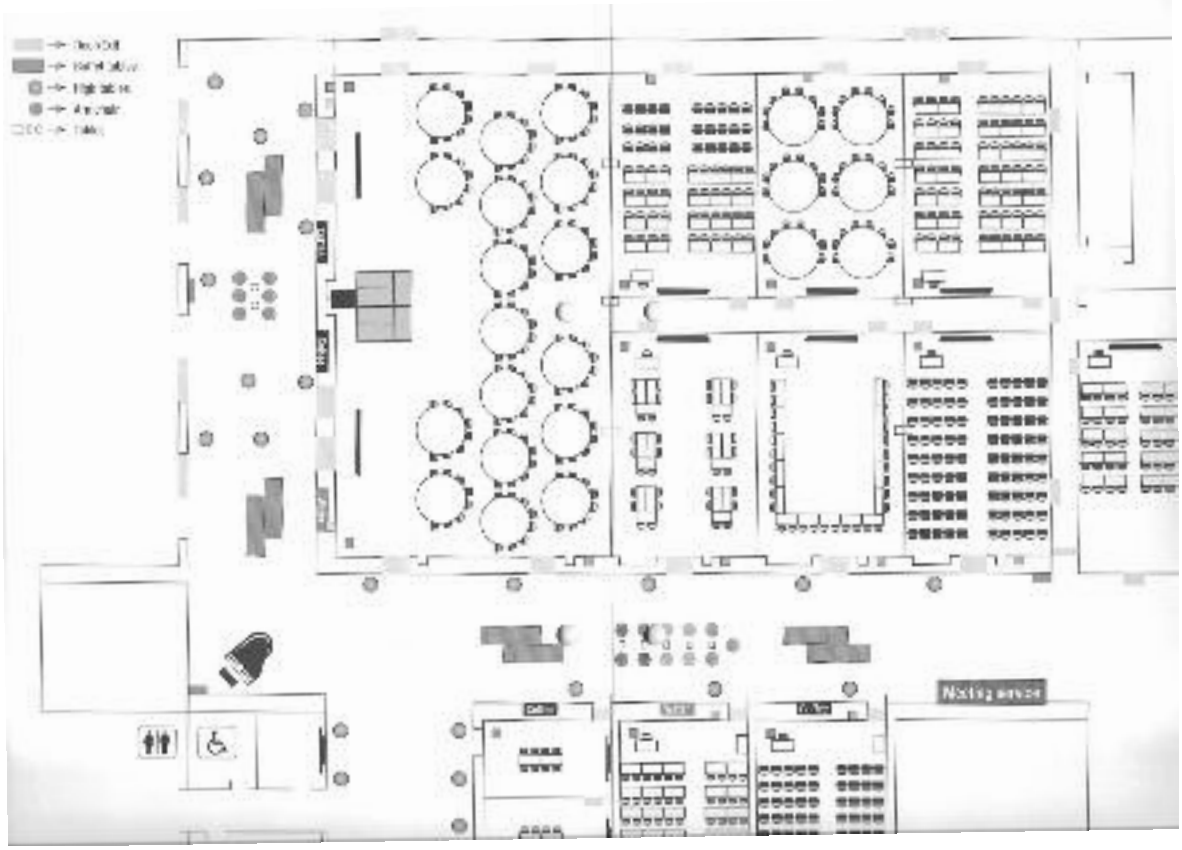

INSOL Europe Technical Series Publications

INSOL Europe are pleased to announce further additions to the current Technical Series, arising from events organised by INSOL Europe. The publications contain papers delivered by speakers and panellists at those conferences. Ancillary texts (draft laws and rules) debated at the conferences are also included. The texts form a comprehensive report of the conferences and contain accounts of recent research in the insolvency field that will be useful for academics and practitioners alike.









Only €20 each

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Conference Programme

HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

WEDNESDAY 25 SEPTEMBER

12.00–13.00	Management Board Meeting (including lunch)	*Hotel Grill Restaurant*
13.00–13.20	**Registration & Welcome Coffee**	*Conference Foyer*
13.20–13.30	Welcome address by the Chair of the Academic Forum *Professor Michael Veder, Radboud University / RESOR, The Netherlands*	*Salon 14 - Rosenborg*
13.30–15.00	**First Session: Designing and implementing Preventive Restructuring Frameworks in light of the Directive** **Chair: Anthon Verweij, Sdu publishers, The Netherlands** **Viability test in a European corporate debt restructuring framework** *Lydia Tsioli, King's College London, United Kingdom* **Implementation of the Restructuring Directive: Enforcing Reorganization Plans in the US** *Professor Ray Warner, St. John's University School of Law New York, United States; Professor Michael Veder, Radboud University / RESOR, The Netherlands* **The future of reorganization procedures in the era of pre-insolvency law** *Dr. Aurelio Gurrea-Martínez, Singapore Management University, Singapore*	*Salon 14 - Rosenborg*
15.00–16.30	**Second Session: Directors / debtor-in-possession** **Chair: Professor Jessica Schmidt, University of Bayreuth, Germany** **The Restructuring Directive and its impact on directors' duties and liabilities: A comparative analysis of the Netherlands, Germany and the United Kingdom** *Michelle van Haren, Radboud University, The Netherlands* **Liability of Company Directors in Case of Pre-Insolvency Preferential Payments: Should directors be worried?** *Dr. Arpi Karapetian, Rijksuniversiteit Groningen, The Netherlands* **The Debtor in Possession in an EU perspective** *Gert-Jan Boon, Leiden University, The Netherlands*	*Salon 14 - Rosenborg*
16.30–17.00	Coffee break	*Conference Foyer*
17.00–18.00	**The Edwin Coe Lecture** *Professor Ignacio Tirado, Secretary General UNIDROIT and Professor of Commercial, Corporate and Insolvency Law, Universidad Autónoma of Madrid, Spain*	*Salon 14 - Rosenborg*
18.00–19.30	Welcome Reception	*Conference Foyer: Northern Lounge*
19.30–late	Academic Dinner	*Salon 15 - Marselisborg*

THURSDAY 26 SEPTEMBER

08.30–09.00	Retrieval Registration / Morning Coffee	*Conference Foyer*
09.00–10.30	**Third Session:** **Younger Academics take on the Restructuring Directive** **Chair: Dr. Jennifer L. L. Gant, Chair of the Young Academics' Network in Insolvency Law and University College Cork, Ireland** **Intra-group financial support in insolvency:** **Finding the balance between group interest and protection of creditors' rights** *Ilya Kokorin, Leiden University, The Netherlands* **The insolvency practitioner and personal data** *Minke Reijneveld, Radboud University, The Netherlands* **Creditors' right to property and restructuring proceedings** *Caro Van den Broeck, KU Leuven, Belgium*	*Salon 14 - Rosenborg*
10.30–11.00	Coffee break	*Conference Foyer*
11.00–12.30	**Fourth Session: Affecting and protecting creditors** **Chair: Professor Rolef de Weijs, University of Amsterdam and Houthoff Buruma, The Netherlands** **Fairness standards of the cross-class cram-down mechanism in the "Restructuring Directive"** *Giulia Ballerini, Bocconi University, Italy* **Trade Credit vs. New / Interim Financing in the Context of the Preventive Restructuring** *Judge Flavius-Iancu Motu, Specialized Court of Cluj, Romania;* *Dr. Andreea Deli-Diaconescu, National Institute for Training Insolvency Practitioners, Romania*	*Salon 14 - Rosenborg*
12.30–13.30	Lunch	*Hotel Restaurant*
13.30–15.00	**Fifth Session: Administering the restructuring process** **Chair: Luigi Lai, National Information Processing Institute, Poland** **JCOERE - Judicial Co-Operation in the European Union: Insolvency and Rescue** *Professor Irene Lynch Fannon and Dr. Jennifer L. L. Gant, University College Cork, Ireland* **Financial Distress Resolution and the Role of Insolvency Practitioners:** **Unearthing Best Practices and Crystallizing Regulation** *Animesh Khandelwal and Surbhi Kapur, Insolvency and Bankruptcy Board of India, India* **Mediation in restructuring and insolvency** *Erik Selander, Stockholm University and DLA Piper, Sweden;* *Professor Reinout Vriesendorp, Leiden University and De Brauw Blackstone Westbroek, The Netherlands*	*Salon 14 - Rosenborg*
15.00–16.30	**The Edwin Coe Practitioners Forum:** **Scope and limits of the stay** **Chair: Florian Bruder, DLA Piper, Germany** **Taming the secured creditors:** **Restraints and protection during the pre-insolvency stay** *Dr. Vincent van Hoof, Radboud University, The Netherlands* *Further speakers to be announced*	*Salon 14 - Rosenborg*
16.30–16.45	Closing Address and hand over by the Chair of the Academic Forum *Professor Michael Veder, Radboud University / RESOR, The Netherlands*	
16.45–17.15	Coffee	*Conference Foyer*

ABOUT INSOL EUROPE

INSOL Europe is an organisation of professionals specialising in insolvency and business reconstruction and recovery.

With over **1,220 members across 46 countries** made up of lawyers, accountants, judges, regulators, academics and bankers, INSOL Europe makes a significant contribution to the work of European and international official bodies on insolvency, bankruptcy and business recovery. Many members also belong to kindred associations and are members of INSOL International.

Holding international and regional events throughout Europe, INSOL Europe makes networking easy and helps the exchange of professional experience across borders. At their events, delegates can learn about industry developments, participate in academic conferences and network with colleagues in inspiring locations.

The goals and strategies of INSOL Europe are to:

- lead the study and evaluation of insolvency, business recovery law and practice in Europe;
- disseminate technical and topical information on insolvency, bankruptcy and business recovery matters through the website, newsletters and quarterly journal;
- hold international and regional congresses throughout Europe;
- facilitate networking between members and exchange of professional experience;
- discuss and negotiate with relevant officials of European national and international bodies in regard to any matter which may concern members;
- make submissions and contribute to the work of European and other international official bodies who are affected by the insolvency process, or who have a role to play in the saving of businesses and jobs;
- co-operate with INSOL International (*www.insol.org*) and its member organisations and other international associations in connection with any insolvency study or project; and
- assist in the education and training of members, their staff and others.

The benefits of joining INSOL Europe include:

- Complimentary copies of the INSOL Europe Technical Series publications.
- Free copy of our quarterly journal, Eurofenix, and excellent advertising rates.
- Discounted rate for all INSOL Europe conferences and seminars.
- Discounted rates available for INSOL International conferences.
- As a member Association of INSOL International, our members receive copies of their quarterly newsletter, INSOL World, together with their annual Membership Directory and technical releases.
- Opportunities to join INSOL Europe working groups and to write articles featured in our e-newsletter and on our website.
- Weekly emails with top insolvency news items featuring stories from over fifty news sources across Europe.
- Monthly e-newsletters with all the latest INSOL Europe membership news and special offers.
- Privileged access to ‘member only’ pages on our website.
- Our Council has direct contact with the EU. We regularly appear before the European Parliament and are in constant dialogue with the European Commission.

ABOUT INSOL EUROPE

INSOL Europe Events

Every year we hold many international and regional events where members can learn about industry developments, participate in academic conferences and network with others.

Our flagship Annual Congresses are held throughout Europe in Autumn – Copenhagen (Denmark) in 2019, Sorrento (Italy) in 2020, Dublin (Ireland) in 2021 and Dubrovnik (Croatia) in 2022.

Bi-Annual Academic Forums take place every six months to tackle relevant themes of interest to the practice and academic communities.

The Eastern European Countries' Committee Conference, which is usually organised once a year in Spring, tackles insolvency issues particularly pertinent to Eastern European countries, and also, themes of general interest for all Europe and the world.

Our other working groups meet regularly to discuss specific topics, including the Anti-Fraud Forum, the Financial Institutions Group, the Turnaround Wing, the Insolvency Office Holders Forum, the Judicial Wing and the Young Members Group. Members can apply to join any of these groups and contribute to their work.

Research and training projects

INSOL Europe undertakes a wide range of projects relating to insolvency law and practice within Europe and beyond European borders. The first 'High-Level Course on Insolvency Law in Eastern European Jurisdictions' was launched in Bucharest (Romania) in 2017 and the 2018 course was held in Nicosia (Cyprus).

INSOL Europe is available to identify speakers on insolvency related topics for meetings and conferences. The Technical Committee will, from time to time, identify and initiate studies into insolvency or turnaround matters of interest, legislation or on comparative subjects.

UNCITRAL

INSOL Europe regularly participates in the United Nations Commission for International Trade Law (UNCITRAL) Working Groups on Cross Border Insolvency Law.

Eurofenix

INSOL Europe publishes its journal, Eurofenix, four times a year, in English and French. It features current events concerning the profession in Europe; news and book reviews; high quality technical articles written by leading practitioners and academics; news concerning law reform throughout Europe; the efforts that jurisdictions are making to update their insolvency legislation and practice; and issues related to the European Insolvency Regulation and jurisprudence.

Case Register

The European Insolvency Regulation Case Register website (visit *www.insolvency cases.eu* which now redirects you to the service hosted by LexisNexis) is a valuable tool designed by INSOL Europe members currently containing over 500 abstracts and judgments, from throughout the EU, that refer to the EC Regulation on Insolvency Proceedings (No 1346/2000).

Governance

INSOL Europe is governed by the Executive Board who are responsible for the day-to-day management of the Association. Its affairs are administered by a Council which elects the President, Deputy President, Vice President and Treasurer. Council consists of the officers, a Council member from each country with a number of members as Council may decide and several other members elected from the membership.

Contact INSOL Europe

Find out more about how to become a member, our events, sponsorship and more at ***www.insol-europe.org*** or contact Caroline Taylor, Director of Administration at ***CarolineTaylor@insol-europe.org*** or telephone: ***+44 (0)115 878 0584***.

THE ACADEMIC FORUM

The INSOL Europe Academic Forum, founded in 2004, is a constituent body of INSOL Europe, a Europe-wide association of practitioners in insolvency. The Academic Forum's primary mission is to engage in the representation of members interested in insolvency law and research, to encourage and assist in the development of research initiatives in the insolvency field and to participate in the activities organised by INSOL Europe. The membership of the Academic Forum includes insolvency academics, insolvency practitioners with recognised academic credentials as well as those engaged in the research and study of insolvency.

The Academic Forum meets annually in conjunction with the main conference of INSOL Europe and also arranges half-yearly conferences around suitable themes of interest to the practice and academic communities. Previous meetings have taken place in Prague (2004), Amsterdam (2005), Monaco (2007), Leiden and Barcelona (2008), Brighton and Stockholm (2009), Leiden and Vienna (2010), Milan, Venice and Jersey (2011), Nottingham and Brussels (2012), Trier and Paris (2013), Leiden and Istanbul (2014), Trier, Nottingham and Berlin (2015), Berlin and Lisbon (2016), Trier and Warsaw (2017) as well as Athens (2018). A number of smaller events, including University seminars and colloquia, are also co-hosted by the Academic Forum with institutions across Europe.

At Lisbon, Professor Michael Veder (Radboud University, the Netherlands) was elected Chair of the Academic Forum for a three-year term. Anthon Verweij (Sdu Publishers, the Netherlands) serves as Secretary to the Board, while Florian Bruder (DLA Piper Munich, Germany), Jessica Schmidt (University of Bayreuth, Germany), Jennifer Gant (Chair of the Young Academics' Network in Insolvency Law), Emmanuelle Inacio and Myriam Mailly (INSOL Europe Technical Officers), Rolef de Weijs (Amsterdam University, the Netherlands) and Luigi Lai (National Information Processing Institute, Poland) are ordinary members of the Board. Jennifer Gant (University College Cork, Ireland) is the Editor of the Conference Proceedings series. A Supervisory Committee has also been established as a consultative board for Academic Forum projects whose membership includes senior insolvency academics and practitioners.

With the sponsorship renewed by Edwin Coe LLP from 2018 as well as that previously provided by Edwin Coe LLP and Shakespeare Martineau, the Academic Forum has been able to offer young scholars travel grants to attend its conferences. The sponsorship has also permitted for an annual lecture to be given by a scholar of international repute. These have included Professor Jay Westbrook (University of Texas, the United States), Gabriel Moss QC (3/4 South Square, Gray's Inn, the United Kingdom), The Hon Mr Justice Ian Kawaley (Supreme Court of Bermuda), Professor Karsten Schmidt (President of the Bucerius Law School, Germany), Professor Bob Wessels (Leiden Law School, the Netherlands), Professor Ian Fletcher QC (University College London, United Kingdom), Professor Rosalind Mason (Queensland University of Technology, Australia), Professor Axel Flessner (Humboldt University Berlin, Germany), His Honour Judge Ignacio Sancho (Spanish Supreme Court), Professor Bruce A. Markell (Northwestern University Chicago) and Professor Frank Verstijlen (Groningen Law School, the Netherlands).

These lectures and many of the presentations at the Academic Forum conferences have been collected in the conference proceedings booklets that have been regularly published since the publications series arising from conferences was inaugurated in 2009 by reports from the 2008 Leiden and Barcelona events. The intention is that conference proceedings booklets will be published from all of the conferences listed above and will accompany other publications in the Technical Series produced by INSOL Europe and the Judicial Wing. Overall, the publications are intended to form a comprehensive report of the conferences and contain accounts of recent research in the insolvency field useful for academics, judges, policy-makers and practitioners alike.

The Academic Forum's next meeting is taking place in conjunction with the INSOL Europe conference in Athens, Greece on 3-4 October 2018, with future conferences likely to see Academic Forum members visit Copenhagen (2019) and Sorrento (2020).

Details of academic conferences will be posted at the Academic Forum website at: **www.insol-europe.org/academic/** as and when available. An on-line registration facility for academic conferences as well as further information about the work of the Academic Forum can also be obtained via the website as well as a dedicated Facebook page.

Report on Activities

Past Projects/Events

Athens Annual Conference 2018

The Academic Forum conference in Athens on Wednesday 3-Thursday 4 October 2018 was a considerable success, attracting around 55 delegates from more than 18 different jurisdictions. Central theme of this conference was "Party Autonomy and Third Party Protection in Insolvency Law" with a particular focus on the following topics: "Ipso Facto Clauses", "Insolvency and Secured Creditors", "Corporate Restructuring" and "Transactions Avoidance Laws".

The first conference day started with an excellent presentation by Natalie Mrockova (University of Oxford, United Kingdom) regarding the permissibility of contractual opt-out from court-driven insolvency. Furthermore David Brown (University of Adelaide, Australia) gave a presentation on the antipodean lessons from ipso facto law reform. In addition Eugenio Vaccari (University of Essex, United Kingdom) discussed essential supply contracts and ipso facto clauses. During the second session of the first conference day Melissa Vanmeenen and Inge Van de Plas (University of Antwerp) delved into third-party effectiveness of retention of title agreements and discussed maintaining the balance between owners and other creditors in bankruptcy proceedings. Furthermore Ben Schuijling, Vincent van Hoof and Tom Hutten (Radboud University, The Netherlands) gave an excellent comparative analysis of options in light of the accelerated extrajudicial collateral enforcement for non-performing loans. Then Flavius-Iancu Motu (Specialized Court of Cluj, Romania) presented a paper regarding the impact of the 2nd chance approach on the secured creditor rights in cross border insolvencies. The first conference day ended with the Edwin Coe Lecture which this year was given by Frank Verstijlen (Rijksuniversiteit Groningen, The Netherlands) who discussed secured credit on and over the brink of insolvency.

The second conference day kicked off with the Young Academics' Network in Insolvency Law session during which Frederik De Leo (University of Leuven, Belgium) discussed good bankruptcy governance. Following this presentation Sofia Ellina and Kayode Akintola (Lancaster University, United Kingdom) delved into the potential abuse of the corporate rescue procedures by comparing Cyprus and the United Kingdom. The YANIL session ended with a presentation by Olha Stakheyeva-Bogovyk (Kyiv National Taras Shevchenko University, Ukraine) regarding the possible future of financial restructuring by moving from COMI to change in governing law based upon the DTEK-case.

During the following session Wai Yee Wan (Singapore Management University, Singapore), Gerard McCormack (Leeds University, United Kingdom) and Casey Watters (Nottingham University Business School China, China) discussed schemes of arrangement in Singapore through an empirical and comparative analyses. Furthermore Tereza Vodičková (Czech Republic) presented a paper into the limits to the absolute priority rule.

The Academic Forum conference traditionally ended with the Edwin Coe Practitioners Forum and focused on transaction avoidance laws. During this forum Reinhard Bork (University of Hamburg, Germany) gave a presentation regarding his approach to harmonization of avoidance laws including practical aspects. Following this presentation Simeon Gilchrist (Edwin Coe, United Kingdom) and Hans Renman (Hamilton, Sweden) made several comments from a practitioners perspective which in turn lead to an interactive discussion with the audience.

On-going Matters

Annual Conference (Copenhagen, Wednesday 25 September-Thursday 26 September 2019)

The Academic Forum will be staging its 15th Annual Conference in Copenhagen. The overall theme for this conference has been determined as: "Harmonisation of insolvency and restructuring laws in the EU". The theme is intended to allow for papers that address issues relevant to the three pillars of the new EU insolvency and restructuring directive: (i) preventive restructuring frameworks, (ii) second chance, and (iii) efficiency of restructuring, insolvency and discharge procedures.

The call for papers has attracted over thirty proposals for papers and presentations from multiple jurisdictions. The Board of the Academic Forum has reviewed each of these proposals on their merits and substance and confirmed 14 proposals with just one slot vacant for a representative of the European Commission. This conference will consist of five topical sessions. Furthermore five Travel Grants have been awarded to Eleni Lydia Tsioli, Gert-Jan Boon, Caro Van den Broeck, Animesh Khandelwal and Surbhi Kapur.

During the first session on Designing and implementing preventive restructuring frameworks in light of the Directive Eleni Lydia Tsioli (King's College London, UK) will discuss the viability test in a European corporate debt restructuring framework. Then Ray Warner (St. John's University School of Law New York, USA) and Michael Veder (Radboud University, The Netherlands)

will present their joint paper on the implementation of the restructuring directive in light of enforcing reorganization plans in the USA. The first session ends with Aurelio Gurrea-Martínez (Singapore Management University – School of Law, Singapore) delving into the future of reorganization procedures in the era of pre-insolvency law.

The second session regarding Directors and Debtors-in-possession will start with an impact assessment of the European directive on several member states' regimes regarding directors' duties and liabilities through a comparative analysis by Michelle van Haren (Radboud University, The Netherlands). Then Arpi Karapetian (Rijksuniversiteit Groningen, The Netherlands) will present a paper on the liability of company directors in case of pre-insolvency preferential payments and delves into the question if directors should be worried. Finally Gert-Jan Boon (Leiden Law School, The Netherlands) will give a legal comparison of the debtor-in-possession.

The first conference day will end with the traditional Edwin Coe Lecture which this year will be given by Ignacio Tirado (Secretary General UNIDROIT and Professor of Commercial, Corporate and Insolvency Law, Universidad Autónoma of Madrid, Spain). After the Edwin Coe Lecture the conference reception and dinner will take place.

The second conference day will kick off the YANIIL-session where younger academics will give their perspective on the Restructuring Directive. During this session Ilya Kokorin (Leiden Law School, The Netherlands) will discuss intra-group financial support in insolvency and finding the balance between group interest and protection of creditors' rights. Furthermore Minke Reijneveld (Radboud University, The Netherlands) will present her paper on the insolvency practitioner and personal data. Finally Caro Van den Broeck (KU Leuven, Belgium) give discuss the impact of the European directive on preventive structuring frameworks on creditor protection.

The following session on Affecting and protecting creditors will start with a presentation by Giulia Ballerini (Bocconi University Milan, Italy) on the fairness standards of the cross-class cram-down mechanism in the restructuring directive. Then Flavius-Iancu Motu and Andreea Deli-Diaconescu will discuss their joint paper on trade credit versus new or interim financing in the context of preventive restructuring.

During the fifth conference session on Administering the restructuring process an interactive discussion will take place regarding the JCOERE Project by Irene Lynch Fannon and Jennifer Gant (University College Cork, Ireland). Then Animesh Khandelwal and Surbhi Kapur () will present their joint paper on financial distress resolution and the role of insolvency practitioners by unearthing best practices and crystallizing regulation. This session ends with a discussion by Erik Selander (Stockholm University and DLA Piper, Sweden) and Reinout Vriesendorp (Leiden University and De Brauw Blackstone Westbroek, The Netherlands) on mediation in pre-insolvency proceedings.

The second conference day ends with the Edwin Coe Practitioners Forum on the topic of Scope and limits of the stay. This session will start with a presentation by Vincent van Hoof (Radboud University, The Netherlands) on taming the secured creditors by looking into the restraints and protection during the pre-insolvency stay. Further speakers will be announced at a later stage.

ERA conference: Restructuring and Insolvency within the EU (Trier, Thursday 7 November and Friday 8 November 2019)

This upcoming event is organised in cooperation with the Academic Forum of INSOL Europe. Several active members of the Academic Forum will present during this conference amongst others Stefania Bariatti (University of Milan and Chiomenti Studio Legale, Italy), Stephan Madaus (University of Halle-Wittenberg, Germany), Paul Omar (Gray's Inn and De Montfort University, UK) and Tomáš Richter (Clifford Chance, Czech Republic).

Future Conferences and Events 2020

Events in 2019 will include the Annual Conference in Sorrento (30 September and 1 October 2020) and possibly a further Joint Conference or Symposium (co-hosts and dates to be advised). Information about the conferences will be made available on the Academic Forum website in due course.

Book Projects/Conference Reports

The Technical Papers series will in due course be joined by one volume representing the contributions at Athens conference. Jenny Gant (Nottingham Law School) as main editor of the Technical Series is handling the collation and editing of all the texts. This will be launched at the Annual Congress in October.

Speaker CVs

Giulia BALLERINI

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Experience

Giulia received her J.D. summa cum laude from the University of Milan School of Law in 2016. In 2017, Giulia entered the Bocconi University Ph.D. program in Legal Studies with a merit-based fellowship (three-years program). Her research topic addresses the distribution of value among the debtor's claimants in corporate restructuring.

In 2019, Giulia was first a visiting researcher at the Max Planck Institute for Comparative and International Private Law in Hamburg (January-July 2019) and then at the Institute of European and Comparative Law of the University of Oxford (August-September 2019). Also, Giulia was invited as a speaker and took part in academic conferences and workshops mainly focused on European Insolvency Law and Business Law.

Since December 2016, Giulia works as a Teaching Assistant in Business Law at the University of Milan (co-advisor for JD dissertations; tutor for the Moot Court in Business Law; member of the examination committee).

Publications of Interest

Ballerini G., The Absolute Priority Rule and the Distribution of Value in Corporate Reorganisation: the Italian Perspective, International Company and Commercial Law Review [ICCLR] (2019) (forthcoming)

Ballerini G. and Macchi R., Conflict of interest and creditors' vote in the preventive restructuring frameworks in Legal Science: Functions, Significance and Future in Legal Systems.

Gert-Jan BOON

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Experience

Gert-Jan Boon LL.M MSc is a researcher and lecturer at the departments of Corporate Law and Business Studies at the Leiden Law School. Before, he has finished masters in Marketing (Free University Amsterdam) and in Corporate Law (University of Leiden). He conducts research in the field of turnaround, rescue and insolvency of financially distressed businesses. Gert-Jan has been involved in several international research projects, including the project of the European Law Institute on rescue of business in insolvency law. His PhD research comprises a study of the Debtor in Possession.

Publications of Interest

- David C. Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer & Emilie Ghio, 'The EU Preventive Restructuring Framework: a hole in one?', International Insolvency Review, 2019, 28(2), p. 1-26.
- Bob Wessels & Gert-Jan Boon, 'Soft law instruments in restructuring and insolvency law: exploring its rise and impact, TvOB 2019/2, p. 53-64
- Gert-Jan Boon & Stephan Madaus, 'Toward a European Business Rescue Culture', in: Jan Adriaanse & Jean-Piere van der Rest (eds.), Turnaround Management and Bankruptcy: A Research Companion (Routledge Advances in Management and Business Studies), Routledge, 2017, p. 238-258.

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Experience

- Attorney at law at DLA Piper UK LLP (previously Weil, Gotshal & Manges LLP and Kirkland & Ellis International LLP)
- Council, German Bar Association, Section on Insolvency
- Law and Restructuring, European affairs
- Research Assistant, Max Planck Institute for comparative and international private law, Hamburg
- Magister Juris, Oxford
- University Regensburg, Munich and Geneva

Publications of Interest

- Cross-border insolvency proceedings within the EU, Riga, 27-28 August 2018, Court Administration of Latvia
- Recognition and enforcement of insolvency-related judgements - Draft model law completed by UNCITRAL Working Group V (Insolvency Law) in its 53rd session, eurofenix, summer 2018, p. 32
- Insolvency laws within the EU in comparative perspective, Summer course on insolvency proceedings within the EU, Academy of European Law, Trier, 13 June 2018
- The new Directive on insolvency, restructuring and second chance, Summer course on insolvency proceedings within the EU, Academy of European Law, Trier, 13 June 2018
- The EE preventative restructuring framework: a cross-jurisdictional comparison, 9 May 2018

Andreea DELI-DIACONESCU

Organisation:	National Institute for Training Insolvency Practitioners
Position:	Member of the Scientific Council
Address:	23 Vulturilor Street, 4 Floor, 3 District, Bucharest
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Experience

- University of Bucharest, Faculty of Law, Graduate Diploma, June, 2000;
- LLM Business Commercial Law within European Regulations, June, 2008;
- PhD, West University from Timisoara, Faculty of Law, December 2018, qualification "Magna Cum Laude";
- Member of the Bucharest Bar since 2000;
- Member of the Romanian National Association of Insolvency Practitioners since 2005, Scientific Consultant for Phoenix, National Insolvency Publication;
- Member on INSOL Europe.

Publications of Interest

- Author of the book "Problems of Compatibility between Insolvency Law and Civil Procedure Code", under coordination of Mrs. Nicoleta Tandareanu and Mr. Florin Motiu, Universul Juridic, Bucharest, 2019;
- Co-Coordinator of Insolvency Code, updated with the provisions enforced by Government Ordinance no 88/2018, together with Mrs. Simona Maria Milos, president of the Romanian National Association of Insolvency Practitioners, Bucharest, 2018;
- Co-Author of the book "New Insolvency Law – comparative analyse", together with Mrs. Simona Maria Milos, 2015;

Jennifer L. L. GANT

Organisation: School of Law,
University College Cork, Ireland

Position: postdoctoral researcher

Email: jenniferl.l.gant@gmail.com

Experience

Jennifer is currently the postdoctoral researcher on a project exploring Judicial Co-Operation supporting Economic Recovery in Europe (JCOERE) to identify obstacles to judicial co-operation presented by the implementation of the new preventive restructuring directive. This project is funded by the European Union's Justice Programme (2014-2020) and is based at the School of Law, University College Cork, Ireland.

Jennifer is Chair of the Younger Academics Network of Insolvency Law, member of the INSOL Europe Academic Forum Board, and editor of the INSOL Europe Academic Forum's conference paper series. Some of her most significant publications include a monograph published by Eleven International Publishing in 2017 entitled Balancing the Protection of Business and Employment in Insolvency - An Anglo-French Perspective; an article entitled "Studies in Convergence? Post-Crisis Effects on Corporate Rescue and the Influence of Social Policy: The EU and the USA" published in the International Insolvency Review in 2016; and a collaborative article with the YANIL Board published in the International Insolvency Review in 2019 entitled "Restructuring Europe - The EU Preventive Restructuring Framework: a hole in one?" as well as an article with Jenny Buchan of University of New South Wales entitled "Moral Hazard, Path Dependency, and Failing Franchisors: Mitigating Franchisee Risk through Participation" published in the Federal Law Review (Australia) in 2019.

Aurelio GURREA-MARTÍNEZ

Organisation: Singapore Management University

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Experience

Aurelio Gurrea-Martínez is an Assistant Professor of Law at Singapore Management University (SMU), where he teaches corporate governance, financial regulation, and comparative and international insolvency law. He is also the Academic Director of the Ibero-American Institute for Law and Finance and co-chair of the SMU-Cambridge Roundtable on Corporate Insolvency Law. Before joining SMU, he was a Fellow at Harvard Law School. He has taught or conducted research at several institutions in the United States, the United Kingdom, Continental Europe, Asia, and Latin America, including Harvard Law School, Yale Law School, Columbia Law School, Stanford University and the University of Oxford.

He has been invited to present his academic work before various regulators, international organizations and policy-makers such as IOSCO, the OECD, the IMF and the U.S. Securities and Exchange Commission (SEC). Aurelio has received several scholarships and awards, including the Talentia Fellowship to pursue his studies in law and finance at the University of Oxford, the Class Prize for Best Paper in Law and Economics at Stanford Law School, and the Silver Medal in International Insolvency Studies given by the International Insolvency Institute. In 2016, he was named Rising Star of Corporate Governance by the Millstein Center for Global Markets and Corporate Ownership at Columbia Law School.

Michelle van HAREN

Organisation:	Radboud Business Law Institute
Position:	PhD Candidate (company law & insolvency law)
Address:	Faculty of Law, Radboud University Nijmegen, Montessorilaan 10, Postal address: P.O. Box 9049, 6500 KK Nijmegen
Email:	M.vanHaren@jur.ru.nl

Experience

- Legal intern at the Supreme Court of the Netherlands (The Hague) at the office of the Procurator General of the Supreme Court
- Court clerk at the Court of Appeal ('s-Hertogenbosch)
- Legal intern at the Public Prosecution Service of the Netherlands

Publications of Interest

- M.E.N. van Haren, De persoonlijke aansprakelijkheid van de bestuurder. Bestuurdersaansprakelijkheid in het strafrecht en in het ondernemingsrecht, Amersfoort: Celsus 2018 (based on master's thesis on directors' criminal and civil liability)
- Case notes on Rb. Midden-Nederland 19 December 2018, JOR 2019/56 and Rb. Amsterdam 4 October 2018, JOR 2019/4 (on directors' disqualification in civil and criminal law)

Other Information

- Awarded with Radboud 'university study award 2019'

Vincent van HOOF

Organisation:	Radboud University
Position:	Assistant professor of legal history
Address:	PO Box 9049, 6500 KK Nijmegen, The Netherlands
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Experience

2015-now: Assistant professor of legal history, Radboud University (Nijmegen)

2009-2015: Lecturer legal history / PhD candidate, Radboud University

Publications of Interest

- V.J.M. van Hoof, General security by means of special notarial bonds, Journal of Contemporary Roman-Dutch Law, (2019).
- B.A. Schuijling, V.J.M. van Hoof & T. Hutten, Collateral Recovery and Non-Performing Loans. Impact, Appropriateness and Necessity of Harmonisation, J.L.L. Gant (ed.), Party Autonomy and Third Party Protection in Insolvency Law (INSOL Europe 2019).
- V.J.M. van Hoof, The 'generalis hypotheca' and the sale of pledged assets in Roman law, The Legal History Review, 85 (3-4), 474-491.

Surbhi KAPUR

Organisation:	Insolvency and Bankruptcy Board of India
Position:	Research Associate (Law)- Level II
Address:	House No. 53, Ground Floor, Pocket-6 Sector-24, Rohini, New Delhi-110085
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Experience

- Presently, working as a Senior Research Associate (Law) with the Insolvency and Bankruptcy Board of India (IBBI)- legal research experience in a wide range of cases pertaining to the implementation of the insolvency laws in India, the importance of learning and teaching international insolvency and trade law.
- Pursuing Ph. D. in Law from University School of Law and Legal Studies (USLLS), Guru Gobind Singh Indraprastha University (GGSIPU), Delhi.
- Completed Master of Laws (LL. M.) from NALSAR University of Law, Hyderabad in the area of international trade and business laws in the year 2013;
- Completed B.A., LL. B. (Hons.) (Integrated Law) from Guru Gobind Singh Indraprastha University, Delhi in the year 2011.

Publications of Interest

- "Intersection of Economic Legislations in Corporate Insolvency Resolution: A Juridical Analysis" at the Conference on "Financial Distress, Bankruptcy, and Corporate Finance" held at Indian Institute of Management, Ahmedabad (IIM-A) Campus on August 9-10, 2019. (Forthcoming- IIM-A Journal- Vikalpa)
- Co-authored a paper with Mr. Animesh Khandelwal titled, "Walking the Walk: Analysing the Impact of the Insolvency & Bankruptcy Code, 2016 on Corporate Governance", forthcoming- Visakha Corporate Law Journal (Damodaram Sanjivayya National Law University,

Arpi KARAPETIAN

Organisation:	Rijksuniversiteit Groningen (University of Groningen, The Netherlands)
Position:	Assistant Professor Private Law
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Experience

Holds an LLM from the University of Groningen. From 2014-2018 worked as a PhD-researcher and lecturer at the Law Faculty of the University of Groningen. Defended her dissertation (cum laude) in March 2019 titled 'Bestuurdersaansprakelijkheid uit onrechtmatige daad. Civielrechtelijke en strafrechtelijke normen voor bestuurders van noodlijdende ondernemingen'[Directors'duties to creditors in the vicinity of insolvency']. Currently working as an Assistant Professor in Private Law with a focus on property law and insolvency law. Ancillary activities: secretary to the editorial board of Tijdschrift van Insolventierecht (Dutch

Publications of Interest

- A. Karapetian, Bestuurdersaansprakelijkheid uit onrechtmatige daad. Civielrechtelijke en strafrechtelijke normen voor bestuurders van noodlijdende ondernemingen (diss. Groningen), Deventer: Wolters Kluwer 2019.
- Karapetian & F.M.J. Verstijlen, 'Strategic asset partitioning under Dutch law', in reports 2019 from the Netherlands Association for Comparative and International Insolvency Law: The 800-pound gorilla. Limits to Group Structures and Asset Partitioning in Insolvency, Eleven international publishing 2019, p. 57-75.
- A. Karapetian, 'De rol van de faillissementspauliana bij de strafbare bevoordeling van schuldeisers ex artikel 343 aanhef en onder 3 Wetboek van Strafrecht'[The relationship between transaction avoidance rules and directors' criminal liability for preferences],

Animesh KHANDELWAL

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Experience

Presently, working with the Insolvency and Bankruptcy Board of India (the insolvency law regulator of India) in the capacity of Senior Research Associate (Law) handling all litigation filed by or against the Board along with extensive research on various facets of the new insolvency law. Since July 2017, worked on insolvency matters post enactment of the Insolvency and Bankruptcy Code, 2016 and handled independent insolvency applications and Corporate Insolvency Resolution Processes before the various adjudicating authorities.

Completed B.A., LL.B. (Business Law Hons.) integrated degree in 2013 and subsequently worked with Mahindra & Mahindra Limited at their Corporate Legal Department at the post of Deputy Manager Legal till 2015. Worked with a Non-Governmental Organisation (in 2016) which was involved in de-addiction of intravenous drug users.

Publications of Interest

Presented a paper titled, "Dawn of a new era: Insolvency Professionals under the personal insolvency regime of India" at the Conference on "Financial Distress, Bankruptcy, and Corporate Finance" held at Indian Institute of Management, Ahmedabad Campus on August 9-10, 2019. (To be published in the IIMA Journal- Vikalp).

Ilya KOKORIN

Organisation:	Leiden Law School, Leiden University (The Netherlands)
Position:	PhD researcher
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Experience

PhD researcher and lecturer, March 2017 – till now, Leiden University, The Netherlands

Partner, of Counsel, Dispute resolution & insolvency, October 2015 – March 2017, Buzko & Partners, Saint Petersburg, Russia

Associate, January 2013 – August 2014, Attorneys at Law Borenius Russia Ltd, St Petersburg, Russia

Publications of Interest

Kokorin I. Contracting around insolvency jurisdiction: private ordering in European insolvency jurisdiction rules and practices, Asser Short Studies, 2019 (forthcoming).

Wessels B. & Kokorin I., Cross-Border Cooperation and Communication: How to Comply with Data Protection Rules in Matters of Insolvency and Restructuring, International Corporate Rescue, Volume 16, Issue 2, 2019, pp. 98-103.

Wessels B. & Kokorin I., Divergent trends in COMI determination: Singapore's position further drifts from European approach, GRR, 11 March 2019.

Other Information

In 2019, together with Prof. Bob Wessels, prepared the module on the European Insolvency Regulation, a compulsory module within the newly created Foundation Certificate in International Insolvency Law, operated by INSOL International. Author (together with Prof. Bob Wessels) of the lecture "European Insolvency Law" recorded in April 2019 for Boom Juridish.

Luigi LAI

Organisation:	National Information Processing Institute, Warsaw, Poland
Position:	Research fellow
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Experience

- Research project Coordinator: "Legal aspects of AI application in specific R&D projects".
- Italian Desk Responsible at Wardynski and Partners (www.wardynski.com.pl).
- Research fellow at the Faculty of Law, University of Cagliari (2009-2011).
- Spanish LL.M. University of Cadiz 2009.
- School of Polish Law, University of Warsaw 2007.
- Italian LL.M. University of Cagliari 2005.
- State - funded research award
- Ph.D. Fellowship award

Other Information

- Admitted to the Bar in Italy and Poland.
- President of the International Lawyers Group at the Warsaw Law Bar (www.ora.waw.pl).

Irene LYNCH FANNON

Organisation:	School of Law, University College Cork, Ireland
Position:	Professor of Company Law and Corporate Insolvency
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Experience

Professor Irene Lynch Fannon is a Professor of Company Law and Corporate Insolvency at the School of Law at University College Cork, IRELAND. She is the Principal Investigator of the JCOERE project https://www.ucc.ie/en/jcoere/. She researches and teaches Corporate Insolvency and Rescue Law, Company Law and Corporate Law Theory.

She has published articles, books and book chapters in all of these areas and has written a seminal work on Irish corporate insolvency and rescue law which is published by Bloomsbury Professional. Corporate Insolvency and Rescue (1996, 2012). The third edition of this work is currently under contract. She takes a comparative approach in her work and is particularly interested in EU integration.

Her work on corporate law theory began with a focus on EU- US comparisons and was published as Working Within Two Kinds of Capitalism (Hart 2003). In this theoretical space her current interest focusses on sustainability as described by the UNSDGs (United Nations Sustainable Development Goals). She has recently co-edited a comparative collection of essays called Creating Corporate Sustainability (CUP, 2018).

She qualified as a Solicitor in 1985 and is a graduate of University College Dublin, Oxford University (Somerville College), and the University of Virginia, Charlottesville, USA where she completed a doctorate in comparative corporate law theory.

Flavius Iancu Motu

Organisation:	The Specialized Court of Cluj, Romania
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Experience

- Junior judge: 01/08/2003 – 10/04/2004
- Appointment as a judge: 10/04/2004
- Court or First Instance of Gherla: 2003 – 2006
- Court of First Instance of Cluj: 2006 – 2007
- Specialized Court of Cluj: 2007 –

Publications of Interest

- Articles on various insolvency legal topics published in: Pandectele romane, Revista romana de dreptul afacerilor, PHOENIX – Revista de insolventa
- (Co-author to) "Practical Treatise on Insolvency", Hamangiu Publishing House, 2014
- "The actions to set aside fraudulent conveyances", Universul Juridic Publishing House, 2015

Other Information

- President of Specialized Court: 2012 - 2017
- Trainer for the Romanian National Institute of Magistracy: 2009 –
- Member of the Insolvency Code Project's Group of External Experts (Ministry of Justice in cooperation with the World Bank)
- Legal expert for the European Judicial Training Network (civil, commercial)
- Enrolled for PhD in 2017

Minke REIJNEVELD

Organisation:	Radboud University
Position:	PhD Candidate
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Experience

Minke Reijneveld is a PhD candidate at the Business & Law Research Centre at Radboud University. She obtained her LLM (Research Master) at Utrecht University.

Her research focuses on data protection during insolvency proceedings, and in particular on the responsibilities and obligations that the General Data Protection Regulation imposes upon the insolvency practitioner.

Publications of Interest

- M.D. Reijneveld, 'Quantified Self, Freedom, and the GDPR', Scripted 2017/14, p. 285-325.
- M.D. Reijneveld, 'De faillissementscurator en persoonsgegevens', [The bankruptcy trustee and personal data] Ars Aequi 2019, p. 614-623.

Jessica SCHMIDT

Organisation:	University of Bayreuth
Position:	Professor
Address:	University of Bayreuth, 95440 Bayreuth, Germany
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Experience

Since 2014, professor at the University of Bayreuth (chair for civil law, German, European and international company and capital markets law)

Publications of Interest

More than 200 publications, especially on German & EU company and insolvency law (full list at: https://eref.uni-bayreuth.de/view/divisions/132031.html); e.g.:

- Lutter/Bayer/J. Schmidt, Europäisches Unternehmens- und Kapitalmarktrecht [European company and capital markets law], 6th ed. 2018;
- Mankowski/Müller/J. Schmidt (eds.), EuInsVO 2015, 2016;
- Die Konzerninsolvenz im Rahmen der EuInsVO 2015 – kritische Würdigung und Vergleich mit dem neuen deutschen Konzerninsolvenzrecht – , KTS 2018, 1;
- Das Prinzip „eine Person, ein Vermögen, eine Insolvenz“ und seine Durchbrechun-gen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht, KTS 2015, 19;

Other Information

2014 habilitation award of the Friedrich-Schiller-University Jena for the habilitation thesis “Der Vertragsschluss“ [“The Conclusion of a Contract”]

Erik SELANDER

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Position:	Partner
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Experience

2011 - ongoing	DLA Piper Sweden, Attorney at law/Partner
1999 - 2011	Swedbank, Corporate law adviser, acting general counsel, deputy manager Group Financial Restructuring and Recovery
1994 - 1999	Advokatfirman Lindahl, Partner

Erik furnishes the firm's Restructuring and Insolvency group with his extensive international and national experience with regard to company reorganisations, liquidations and bankruptcies. He is currently the Swedish representative for insolvency matters at the World Bank and participates in the ELI Rescue of Business in Insolvency committee.

Erik was the Chairman of the Nordic/Baltic Insolvency Network and he is Chairman of the Council at the Stockholm Centre for Commercial Law (SCCL), and leads the Research Panel for Insolvency Law, Stockholm Centre for Commercial Law/Stockholm University.

Erik has been involved in several of the largest insolvency/restructuring cases in Sweden, both as practitioner and as banker. Erik has also been involved in cases regarding acquisition finance, real estate finance and structured finance etc.

Ignacio TIRADO

Organisation: UNIDROIT

Position: Secretary-General

Experience

Ignacio Tirado, Titular Professor of Corporate and Insolvency Law at the Universidad Autonomá de madrid, was appointed the new Secretary-General of UNIDROIT at a meeting of the body in May 2018.

Ignacio Tirado was Senior Legal Consultant at the World Bank's Financial Sector Practice and Consultant on insolvency-related matters to the IMF´s Legal Department. A qualified lawyer, Ignacio was Of Counsel of the Business Restructuring and Insolvency Practice of Hogan Lovells, LLP (Madrid Office, then Lovells LLP), until he joined the World Bank. Ignacio's research interests (present and former) as well as legal practice focuses on Insolvency Law (corporate and sovereign), Corporate Law (business and company restructuring,) banking, financial and securities regulation. Ignacio is a member and a Director of the International Insolvency Institute, where he is Co-Chair of the Academic Committee.

He has represented the World Bank in UNCITRAL´s Working Group V (insolvency) and Spain and the III in Working Group VI (secured transactions). Ignacio is the Lead Researcher at the UAM in a European Commission´s DG Justice Project on out of court workouts within the context of the programme to Support Judicial Cooperation in Civil Matters, a founding member of the Academic Board of the European Banking Institute, and an International Fellow of the American College of Bankruptcy.

Lydia TSIOLI

Organisation: King's College London

Position: PhD in Law Candidate

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Education

- University of California, Berkeley - School of Law Visiting Researcher (January – May 2020)
- King's College London, UK
  PhD in Law Candidate (since October 2018)
- University of Cambridge, UK
  Master of Law (LL.M.), 2016
- National and Kapodistrian University of Athens, Greece, Bachelor of Laws (LL.B.), 2015

Experience

- White & Case LLP, Brussels, Legal Consultant, Restructuring & Insolvency, (September 2017-April 2018)
- European Commission, Brussels, Blue Book Trainee, DG Justice - Unit A.1. Civil Justice, Restructuring & Insolvency (March - July 2017)
- European Banking Federation, Brussels, Legal Trainee, Restructuring & Insolvency (September 2016 - February 2017)
- Other positions: European Banking Federation (Digital & Retail Banking)

Publications of Interest

- Chapter co-author in P. Monokroussos and Ch. Gortsos (eds), Non-Performing
- Loans and Resolving Private Sector Insolvency: Experiences from the EU
- Periphery and the Case of Greece (Palgrave MacMillan 2017)

Caro VAN DEN BROECK

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Experience

After obtaining my master's degree in Law at the Catholic University of Leuven (KUL) I started as a PhD assistant under the supervision of Prof. Dr. M.E. STORME. The PhD project focusses on the reduction of creditors' rights in the context of restructuring proceedings for enterprises. My teaching assignments focus on the master course in Insolvency Law.

During my studies I had the privilege of studying a semester at Paris 1 – Sorbonne University.

Publications of Interest

- C. Van den Broeck, The EU Directive on restructuring and insolvency : towards a new level of harmonisation ?, #TILT Conference paper, University of Verona, May 2019, 24p. [to be published]
- C. Van den Broeck, De voorrang van reorganisatieschulden in een navolgend faillissement, TRV/RPS 2018, vol. 7, 691-706. [ENG: The priority of reorganisation debts in a subsequent bankruptcy proceeding]

Other Information

Nullum Crimen Master thesis award (2015) – 1st prize

"Searches and seizures of minors: possible with their consent? - Case study of the search and body search from a de lege lata and de lege ferenda perspective."

Supervisor: Prof. Dr. R. VERSTRAETEN

Michael VEDER

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Position:	Professor of insolvency law
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Experience

Michael Veder is professor of insolvency law at the Business & Law Research Centre, vice-dean of research of the Faculty of Law of Radboud University and adviser at the Amsterdam based law firm RESOR.

Michael is admitted to the bar in the Netherlands. He specialises in (international) insolvency law and secured transactions. He holds a doctorate in law from Radboud University. He is a member of the European Commission Group of Experts on Restructuring and Insolvency Law and was a member of the European Commission Expert Group on cross-border insolvency.

He is fellow of the Dutch Insolvency Practitioners Association (Vereniging Insolventierecht Advocaten (INSOLAD)), member and former chair of the Netherlands Association of Comparative and International Insolvency Law, member of INSOL Europe, for which he is a member of its Council and chair of its Academic Forum, and member of INSOL International, for which he is a member of its Academics' Steering Committee.

He regularly publishes and lectures on matters of property law, secured transactions, insolvency law and private international law. He is course leader of the Global Insolvency Practice Course for the Fellowship of INSOL International. Michael advises the International Monetary Fund and the World Bank on insolvency and restructuring issues.

Reinout VRIESENDORP

Organisation: Leiden University

Position: Professor of Insolvency Law

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Experience

Reinout Vriesendorp is part-time Professor of Insolvency Law at the Institute of Private Law (Department of Company Law) and the Institute of Tax Law and Economics (Department of Business Studies) as of 1 January 2016. At the Department of Company Law he gives various courses at the bachelor's, master's and advanced master's levels. His research is at the crossroads of private law, company law and business studies, mainly focused on legal norms (ex ante) and judgements (ex post) of the behaviour of directors, supervisors and other stakeholders in enterprises in financial distress.

Apart from his part-time tenure as professor of Insolvency Law at Leiden University, Reinout Vriesendorp is partner at the Netherlands-based law firm De Brauw Blackstone Westbroek. His expertise is in the areas of (cross-border) restructuring, corporate litigation and insolvency law. He was involved in Imtech, Oi, Syncreon and currently Jet Airways

Prior to his appointment as Professor of Insolvency Law in Leiden, Reinout Vriesendorp was professor of Civil and Commercial Law at Tilburg University from 1992 to 2016. He lectured on a variety of subjects in the field of private law and commercial law to students in all phases of their law curriculum. Before that time he was also a lawyer at (the predecessors of) De Brauw Blackstone Westbroek in The Hague and New York from 1985 to 1992.

Anthon VERWEIJ

Organisation: Sdu Publishers

Position: Publisher Financial Law and Insolvency Law

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Experience

Anthon Verweij (LL.M.) is a publisher at SDU Publishers and working on his PhD concerning Insolvency Investigations performed by Insolvency Office Holders. Anthon has participated in the Kosovo Insolvency Capacity Building Project which was funded by the European Commission as part of the Instrument for Pre-accession Assistance (IPA) program for Kosovo.

Currently Anthon acts as secretary of the board of INSOL Europe Academic Forum (IEAF). In addition Anthon was involved with the establishment of the Netherlands Association for Comparative and International Insolvency Law (NACIIL).

Furthermore Anthon is an editor for the European and International Insolvency Law Studies (EIILS) book series. Anthon served also as intern at the United States Bankruptcy Court Eastern District of New York under supervision of the Honorable Judge Elizabeth Stong.

Publications of Interest

- Verdoes T.L.M. & Verweij A.M. (2018), The (Implicit) Dogmas of Business Rescue Culture, International Insolvency Review, INSOL International and John Wiley & Sons Ltd.
- Kuijl, J.G., Verdoes T.L.M. & Verweij A.M. (2014), The life cycle of Meccanno: business perspectives on corporate insolvency law. In: Santen, B.P.A., & van Offeren, D.H. (eds.) Perspectives on international insolvency law A tribute to Bob Wessels. Deventer: Kluwer. 197-214

Ray WARNER

Organisation: School of Law, St. John's Universit

Position: Professor

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Experience

Professor Warner has extensive academic and practical experience in U.S. and cross-border insolvency and commercial law. As Associate Dean of Bankruptcy Studies at St. John's, he built the nation's most extensive bankruptcy program and its first bankruptcy-specific LL.M. degree program. His legal experience includes many years of practice with one of the largest international law firms.

Professor Warner is a frequent seminar speaker and has received multiple teaching and service awards, including and the prestigious Leadership in Education Award from the National Conference of Bankruptcy Judges. He served as Course Leader for the INSOL Global Insolvency Practice Course (INSOL Fellows program).

In addition, he is a Fellow in the American College of Bankruptcy, a founding member of the International Insolvency Institute and headed the national Conrad B. Duberstein Bankruptcy Moot Court Competition.

Rolef de WEIJS

Organisation: University of Amsterdam

Position: Professor, National and International Insolvency Law

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Experience

- Professor National and International Insolvency Law, University of Amsterdam
- Law firm Houthoff Buruma, Amsterdam office, counsel
- Riga Graduate School of Law, Latvia, visiting professor
- Chief series' editor of European and International Insolvency Law Studies, Eleven Publishing.
- Visiting professor Riga Graduate School of Law, Latvia, 2013 - present
- Co-director master Law, Markets and Behavior, 2015 - present.
- Teaching courses Insolvency Law, European Property Law, Critical Analyses of Corporate Finance and Insolvency Laws, European Insolvency Law.
- Attorney and trustee in bankruptcy, Houthoff Buruma, 2001 - present
- PhD 2010 on Transaction Avoidance in Insolvencies
- LL.M. Harvard 2001

Publications of Interest

- 'Loan-to-Own meets Credit Bid: Credit Bidding naar Amerikaans en Nederlands recht', TvI 2016/15 (together with Geza Orban)
- International Contribution to the reform of Chapter 11 U.S. Bankruptcy Code, 2015, (book editor, together with Bob Wessels)

Speaker Presentations: Wednesday

First Session – 13.30-15.00

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Viability test in a European corporate debt restructuring framework

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- **Designing a European restructuring framework**
  - **The role of the notion of "viability" in designing such a framework**
- **What is "viability" ?**
  - **Importance of the term: a) frequency of use & b) function**

a) Use of the terms "viable" & "viability" in the Directive : 30 times in 38 pages !

b) Use as an eligibility criterion for entry into the restructuring framework:

- "…this Directive aims to remove such obstacles by ensuring that: **viable enterprises** and entrepreneurs that are in financial difficulties **have access to** effective national preventive restructuring frameworks…" (Recital 1)
- "…At the same time, **non-viable businesses** with no prospect of survival **should be liquidated** as quickly as possible." (Recital 13)

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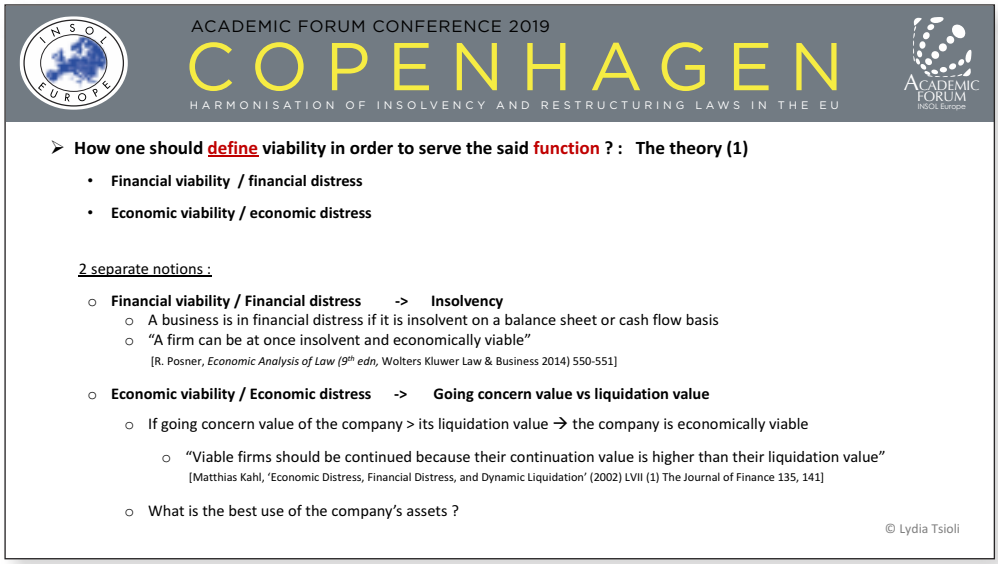
- **B) Function *(cont.)* : Viability as an eligibility criterion / "filtering mechanism"**
  - **This is in line with classic insolvency law theory:**

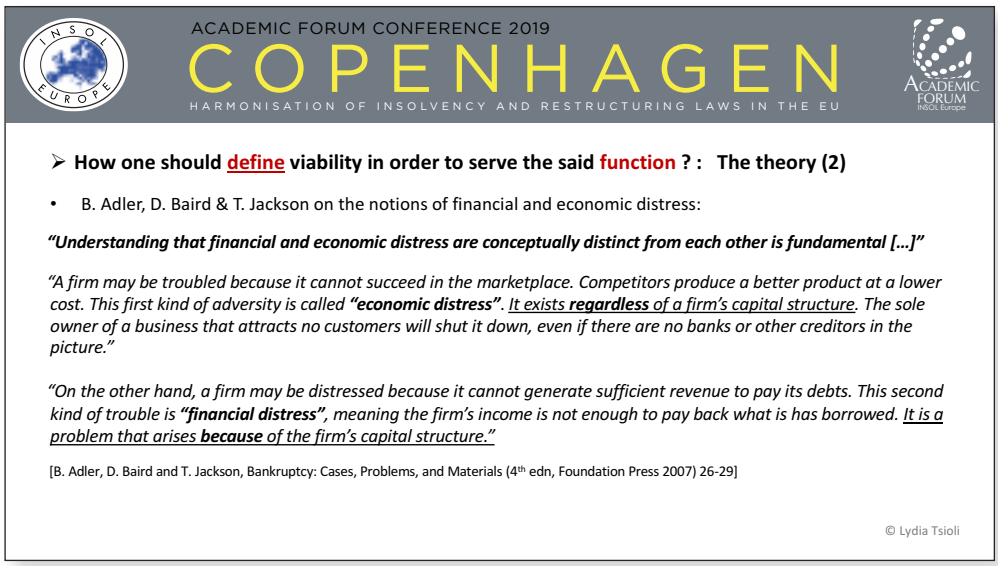
*"Insolvency procedures have an important 'filtering function' to fulfil: **non-viable** firms should be identified, and they should be **liquidated** as efficiently as possible."*

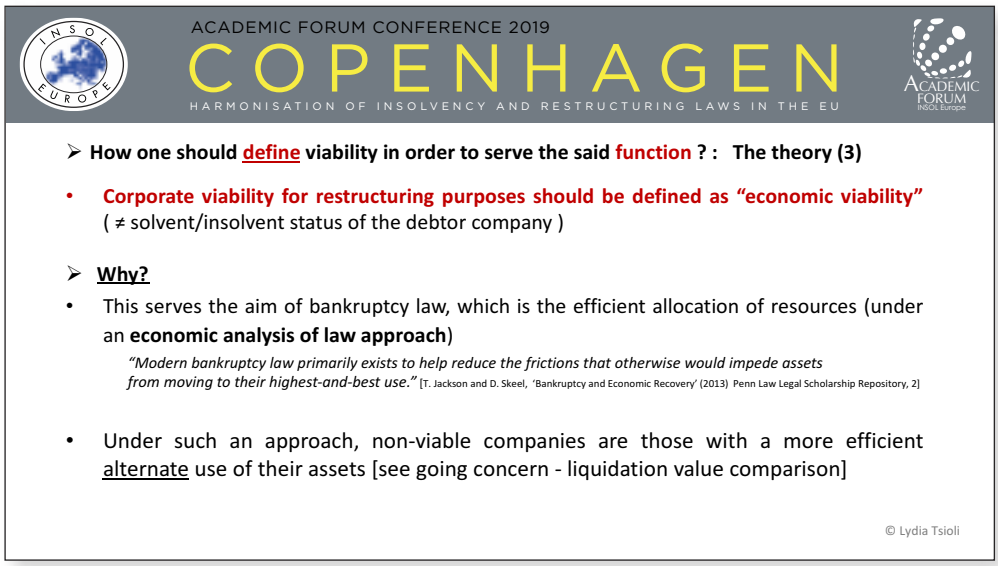
*"[…] the important filtering function that insolvency laws must fulfil: to **restructure** only **viable** firms and liquidate the non-viable ones."*

[Horst Eidenmüller, 'Contracting for a European Insolvency Regime' (2017) European Corporate Governance Institute (ECGI) – Law Working Paper No. 341/2017]

First Session – 13.30-15.00 (continued)







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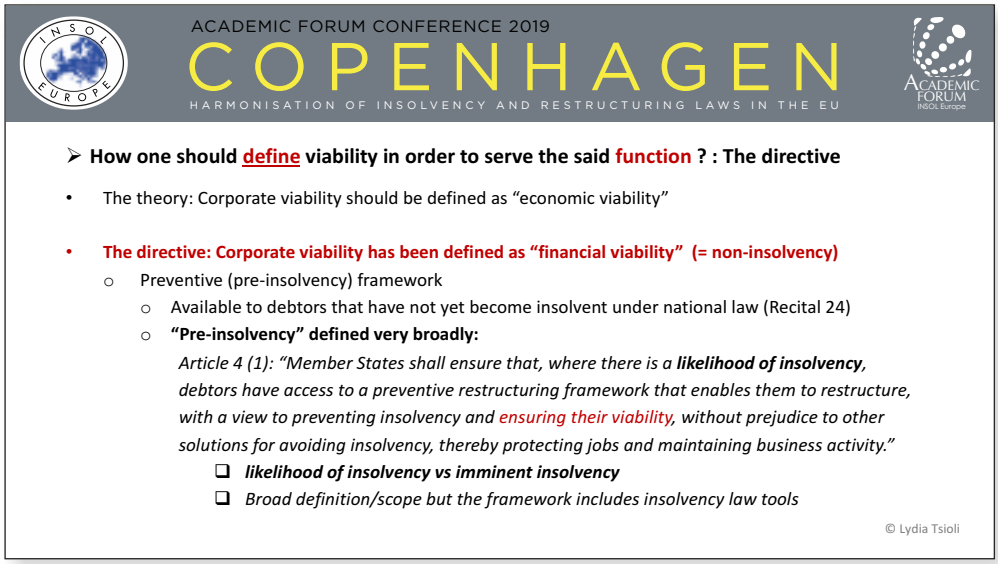

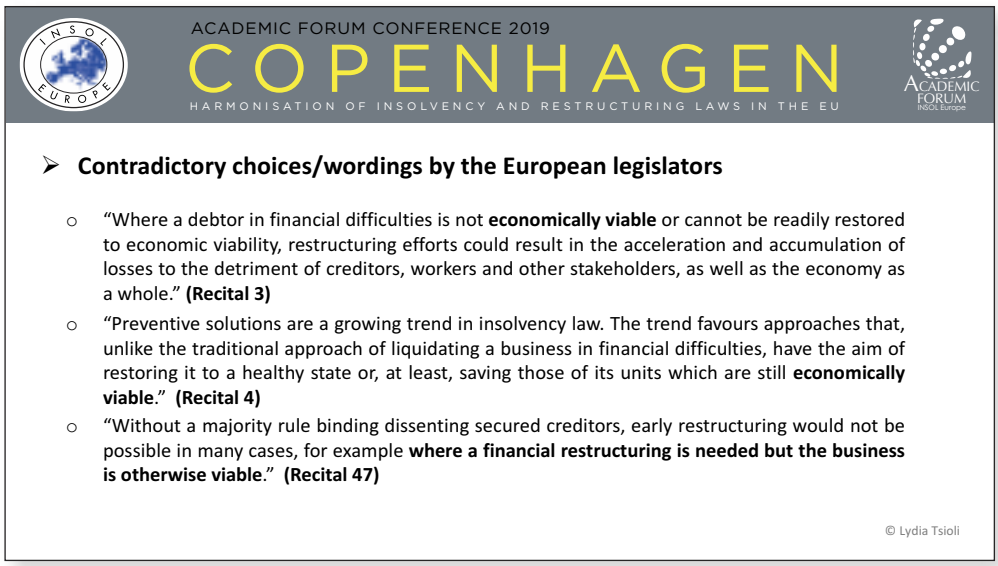

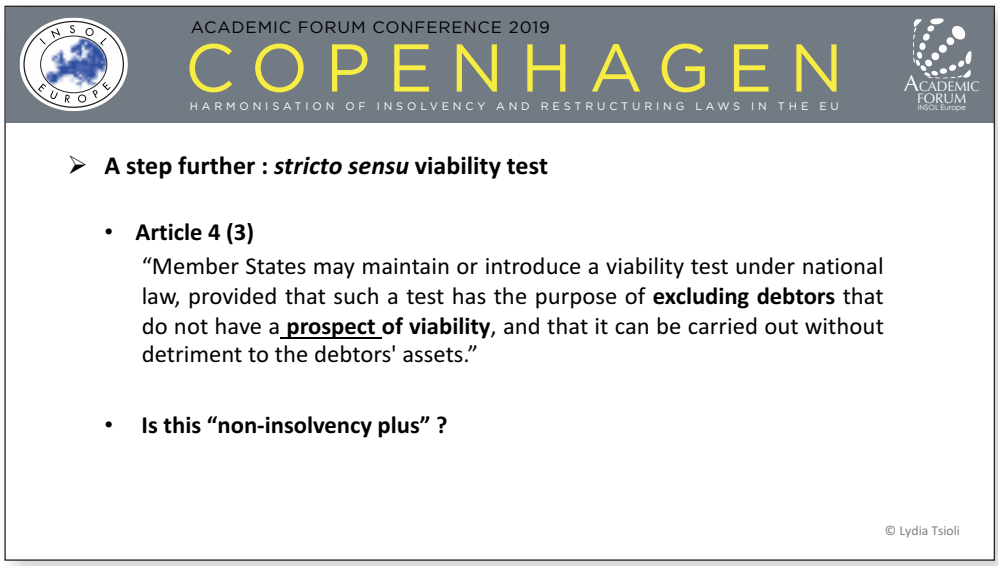

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➢ **Evaluation of the choices made in the Directive**

- **Politically**
  - Original aim: to achieve harmonization but avoid any interference with the notion of insolvency, due to the political sensitiveness and opposition that this would face
    - See e.g. Impact Assessment, p. 61 : "[…] almost all Member States were opposed to harmonizing the definition of insolvency or that of likelihood of insolvency."
  - **Could there have been any other way forward?**
- **Economically**
- **Policy-wise**

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➢ **Policy-wise: Evaluation of the choices made in the Directive**

- **The 3 Policy Goals of the Directive**

1. Combat forum shopping/relocation
2. Strengthen the Capital Markets Union
3. Complete the Banking Union

Article 114 TFEU – internal market (legal basis)

a) removal of appreciable distortions of competition

b) elimination of obstacles to the exercise of fundamental freedoms

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➢ **Combat forum shopping/relocation**

- **The problem** *(see e.g. Schefenacker, Deutsche Nickel, Hellas Telecommunications etc.)*
  - Company relocations to restructuring-friendlier jurisdictions, coupled with the high costs that such moves entail, highlight the **competitive disadvantages** existing among companies located within different MSs and as such, the **distortions of competition within the internal market** ⟹ **114 TFEU**
- **Has a solution been achieved ?** **LIMITED IMPACT**
  - The directive can only cover **forum shopping** cases that relate to **pre-insolvency restructuring.**
  - This obviously limits significantly its intended impact, especially considering that the most important forum shopping cases within the EU concerned use of restructuring mechanisms provided for under **insolvency** legislation (e.g. Schefenacker, Deutsche Nickel, Hellas Telecommunications etc.)

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First Session – 13.30-15.00 (continued)

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➢ **Strengthening the Capital Markets Union**

- **The problem**

Divergence → Information costs/ **ex ante costs of credit risk assessment** → Cross-border investment (free flow of capital)

114 TFEU

Divergence → **Recovery rates** – borrowing costs → Cross-border investment + competitive disadvantages

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➢ **Has a solution been achieved ? LIMITED IMPACT**

- What primarily lies in the heart of investors' **credit risk assessments** and **consideration of their expected recovery rates** is what will happen to their investment in the event of **default** of a company, which, in many cases, will involve the characterisation of the company as ***insolvent*, at least under a cash-flow test.**

- However, by its very nature as a ***pre-insolvency* regime**, the directive restricts itself to a very limited scope, which evidently has doubtful power to bring about the desired impact on the intra-EU free flow of capital.

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➢ **Completing the Banking Union**

- **The problem**
  1. Accumulation of future NPLs
  2. Existing NPLs

- **Has a solution been achieved ?**
  1. **Future NPLs:** By restructuring non-insolvent companies, the risk that their loans become non-performing in cyclical downturns is reduced, and therefore accumulation of non-performing loans is essentially prevented.

  2. **Reduction of Existing NPLs:** **LIMITED IMPACT, varying across Member States**
     - The extent to which restructuring of current NPLs may be possible under the directive's framework will vary across Member States. This is because it **depends on the national threshold triggering inability to pay and therefore insolvency** under Member States' laws, **which in turn restricts eligibility to the directive's framework.**
     - Such a reduction would have been significantly higher if the new framework had not restricted eligibility to non-insolvent companies only, but rather allowed also entry to the regime to insolvent, yet economically viable companies.

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First Session – 13.30-15.00 (continued)

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➢ **Conclusions (1)**

1. Combating forum shopping/relocation
2. Strengthening the Capital Markets Union
3. Completing the Banking Union

CRUCIAL PARAMETER:

DEFINITION OF VIABILITY AS AN ELIGIBILITY CRITERION

- **From a policy-making perspective**
  - ➢ The crucial parameter for achievement of the said policy goals is the eligibility criterion for entry into a restructuring framework, **i.e. whether the viability of the company,** which is deemed a prerequisite for restructuring, **is defined as a function of the solvency/insolvency of the company or rather by use of another benchmark**
  - ➢ **De – linking viability from solvency/insolvency would be more effective policy-wise**

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➢ **Conclusions (2)**

- From an economic perspective
- From a political perspective

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➢ **Key considerations of my research project :**

- ➢ **Are we entering the era of "Unnecessary *preventive* restructuring frameworks" ?**
  - Premise of a viability test for a European restructuring framework
  - Interlinked with the question of whether such a framework should be structured as a pre-insolvency ('preventive') one or not - impact on the achievement of policy goals
- ➢ **Ideally? (reform suggestions) – Optimal modalities of a viability test & role of relevant players**
  - Insights from the US?
  - Different filtering model - Filtering success or filtering failure ? Lessons ?
  - Relevant players involved in the filtering function (e.g. judiciary, creditors etc.) – EU context ?
- ➢ **What can be done under the existing new framework?**
  - *stricto sensu* viability test (Article 4 § 3 of the directive)

➢ ***Ultimate aim:*** *Proposing the most optimal (economically, politically and policy-wise) criteria for entry of viable companies into a European corporate debt restructuring framework*

First Session – 13.30-15.00 (continued)

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Implementation of the Restructuring Directive:
Enforcing Reorganization Plans in the US

Prof. Michael Veder
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Prof. G. Ray Warner
St. John's University, New York, U.S.

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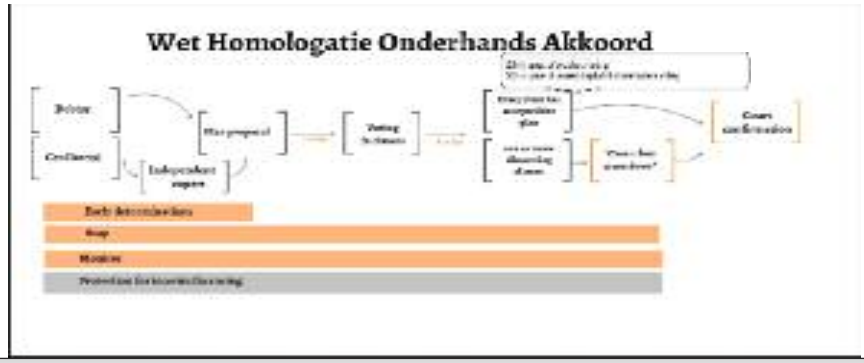
The Dutch plan procedure in a nutshell



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Implementation of the EU Restructuring Directive

The 'Dutch' Scheme legislation follows the Directive:

- Facilitates and promotes early restructuring
- Flexibility as to content and scope of the plan
- Flexibility as to procedure
- Flexibility as to court involvement
- Speed and deal certainty
  - In straightforward cases, the formal stages of the process may be dealt with in 4-5 weeks
  - Appeals are (largely) excluded

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Cross-class cram down and APR

A plan that has not obtained the consent of all classes of capital providers cannot be sanctioned by the court, if:

- the distribution of the reorganization value that is realized on the basis of the plan – to the detriment of the dissenting class(es) – deviates from the order of priorities that applies in case of a concursus, unless there is a reasonable ground for such deviation and such deviation does not harm the interests of the dissenting capital providers (*fair share of reorganization value*), or
- the dissenting capital providers that have requested the court to reject the sanctioning of the plan do not have the right to opt for a dividend in cash for the amount that they would receive in case of a liquidation of the debtor's assets in bankruptcy (*exit right/cashout right*)

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Groups and third party releases

- A sanctioned plan, in principle, does not affect rights of creditors against third parties (guarantors, third party security providers, etc)
- A plan may, however, provide for the release or amendment of rights against third parties that are in the same group as the debtor, if:
  - such rights serve to secure the performance of the obligations of the debtor or the group member is jointly liable for such obligations,
  - the group members concerned are in a state of pre-insolvency,
  - the group members concerned have agreed to the proposed release or amendment, or the plan has been proposed by an independent restructuring professional, and
  - the court would have jurisdiction in respect of these group members, had they proposed the plan themselves

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Dual track

- Public plan procedure → Insolvency Regulation (Annex A)
  - » COMI
  - » Publication in Insolvency Register
  - » Automatic recognition
- Confidential plan procedure → Insolvency Regulation does not apply
  - » Jurisdiction based on general rules of civil procedure
    - Debtor has its seat (or COMI) in the Netherlands
    - One or more affected creditors have their seat in the Netherlands
    - An otherwise sufficient connection to the Netherlands exists
  - » No general publicity
  - » Recognition abroad to be determined by local p.i.l. rules

First Session – 13.30-15.00 (continued)

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Recognition in the United States

- Liberal U.S. recognition of foreign proceedings
- The pragmatic U.S. approach to COMI
- Recognition of non-COMI proceedings

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Scope of Relief in the U.S.

- Enforcement of the restructuring plan
  - No need to parallel U.S. law
  - But many novel Dutch provisions mirror chapter 11

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Potential U.S. Recognition Issues

- Due process – speed, secrecy and finality
- Minimum treatment of claimants
- Group company issues
  - Release of joint debtors

First Session – 13.30-15.00 (continued)

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The Future of Reorganization Procedures in the Era of Pre-Insolvency Law

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1. Introduction to pre-insolvency law and pre-insolvency proceedings

- **What is a 'pre-insolvency proceeding'?**
  - Debt restructuring mechanism that lacks some **features existing in insolvency proceedings** (e.g., insolvency, possibility/imposition of trustee, avoidance actions, majority rule/cramdown for approval of reorganization plans, DIP financing, etc.)
- **Types of pre-insolvency proceedings**
  - Workouts
  - Mediation/conciliation procedures
  - Scheme of Arrangements
  - **De Facto Chapter 11 (DFC11),** sometimes under the form of an 'Enhanced Scheme of Arrangement'

First Session – 13.30-15.00 (continued)

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2. The rise of pre-insolvency law around the world

- **Singapore:** New **enhanced Scheme of Arrangement** characterized by moratorium, court supervision, enhanced cross-class cramdown, DIP financing, restriction of *ipso facto* clauses, moratorium [no IP required]
- **European Union:** New **preventing framework** characterized by moratorium, court supervision, cross-class cramdown, DIP financing, restriction of *ipso facto* clauses, moratorium [no IP required]
- **United Kingdom:** New **restructuring tool** characterized by moratorium, appointment of IP, court supervision, cross-class cramdown, *ipso facto* clauses [no DIP financing]

De facto Chapter 11 (DFCH11)

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3. Chapter 11 vs DFCH11

- **Differences between DFC11 and Chapter 11**
  - **DFCH11 coexists with formal reorganization procedures.**
    - Therefore, debtors failing to reorganize under a DFCH11 can still use formal reorganization procedures. In the US, unsuccessful Chapter 11 reorganizations lead to Chapter 7 liquidations.
  - **DFCH11 does not provide some features exclusively existing in formal reorganization procedures** (e.g., avoidance actions)
  - **DFCH11 deals with situation of pre-insolvency** while Chapter 11 may serve as both pre-insolvency and pre-insolvency proceeding
- **Why DFC11 instead of a formal Chapter 11?**
  - **Failure of existing reorganization procedures (why?).** It is more efficient just abandoning them!
  - **Behavioural aspects and costs of political reforms:** Reforming 'pre-insolvency' or 'restructuring' framework sounds more appealing than 'insolvency' framework
  - **Efficiency**: superiority of pre-insolvency + insolvency law over Chapter 11?

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4. Need for harmonization between insolvency and pre-insolvency law (I)

- **In countries with a DFCH11, higher risk of opportunism:** non-viable firms and viable business manged by the wrong people will have incentives to try workouts + DFCH11 + reorganization procedure. Therefore, **delays for liquidation/going concern sale and destruction of value.**
- **Higher risk of opportunism in countries where (i) debtors are not replaced by insolvency practitioners; and (ii) IP has the duty to promote the efficient allocation of the debtor´s assets** (ie, to maximize the returns to creditors).
- Higher risk of opportunism may mean several **costs for society:**
  - **Ex ante**: creditors can respond with an **increase in the cost of debt**
  - **Ex post**: **loss of jobs/value/returns to creditors** if viable firms run by wrong people are not quickly sold as going concern and non-viable firms are not quickly liquidated piecemeal

First Session – 13.30-15.00 (continued)

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4. Need for harmonization between insolvency and pre-insolvency law (II)

- How to harmonize pre-insolvency and insolvency law? **Avoiding duplications and minimizing opportunistic use of reorganization procedures. How?**
  - Ex ante vs ex post strategies
  - Why ex post solutions may make more sense in countries without a DFCH11? (e.g., USA)
  - Why an ex ante solution makes more sense in countries with a DFCH11 (e.g., EU, Singapore, UK)
- Proposed ex ante solution for countries with a DFCH11: **insolvency procedures should be opened as liquidation procedures *unless* debtor justifies:**
  - **Viability** (GCv>LV) – otherwise, why reorganization instead of liquidation?
  - **Minimum support of creditors** – otherwise, why reorganization instead of liquidation and selling the assets as a going concern to any third party?
  - **Valid reasons to have a 'second shot'** (e.g., why the DFCH 11 failed or it was not used at all, why reorganization procedures may help, etc.)

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5. Conclusion

- There is a **rise of pre-insolvency law** around the world.
- While the rise of pre-insolvency proceedings is not necessarily undesirable provided that several protections are put in place, **countries implementing a DFCH11 should make sure that their pre-insolvency framework is coordinated with their insolvency laws**.
- Namely, countries implementing a DFCH11 should make sure that non-viable companies and viable business run by the wrong people **do not use reorganization procedures opportunistically**. How? **More stringent requirements to use formal reorganization procedures.**
- If the (higher) risk of using reorganization procedures opportunistically in the era of pre-insolvency law is not addressed: (i) ex ante, creditors might respond with an increase in the cost of debt; (ii) ex post, jobs and value can be destroyed.

Second Session – 15.00-16.30

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"The Restructuring Directive and its impact on directors' duties and liabilities: a comparative analysis of the Netherlands, Germany and the United Kingdom"

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Article 19 Restructuring Directive

"Duties of directors where there is likelihood of insolvency

Member States shall ensure that, where there is a likelihood of insolvency, directors,

have due regard, as a minimum, to the following:

(a) the interests of creditors, equity holders and other stakeholders;

(b) the need to take steps to avoid insolvency; and

(c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business."

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No. 71 (Preamble)

"Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, **when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account**. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States' national rules on the decision-making processes in a company."

Second Session – 15.00-16.30 (continued)

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Impact – directors' duties

Kindly refer to:

- Impact Assessment (European Commission Staff Working Document, Impact Assessment, SWD 2016 357 final (2016) (esp. part B5)
- L. Lennarts, S. Brijs, A. van Hoe et al., '*Directors' Liability in the Twilight Zone. Reports 2017*' Eleven International Publishing 2017 (NVRII / NACIIL National reports on Dutch, German, Belgian and English law)
- INSOL International, '*Directors in the Twilight Zone V*'
- *NZI-Beilage* 2019

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(Lack of) impact on the existing framework regarding directors' duties

- Article 19 Directive contains vague provisions on directors' duties:
  - The duty to have 'due regard to the interests of creditors, equity holders and other stakeholders'
  - The duty to have 'due regard to the need to avoid deliberate negligent conduct'
- To a large extent, these duties are already reflected in the framework regarding directors' duties

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Taking directors' duties from the Directive into account when assessing directors' liability

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The Netherlands

- Directors' liability
  - Article 6:162 DCC (*Beklamel*)
- The director should not be held liable if there are realistic chances of survival at the time of entering into an obligation
- The goal of the Directive can be reached only if Dutch courts do not establish directors' liability under such circumstances (a viable restructuring plan)

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Germany

- Directors' duties
  - Sect. 43 GmbHG
- Duty to file + liability risks
  - Sect. 15a InsO
- Directors' liability for payments after the company has become illiquid or after it is deemed to be over-indebted
  - Sect. 64, Abs. 1 GmbHG

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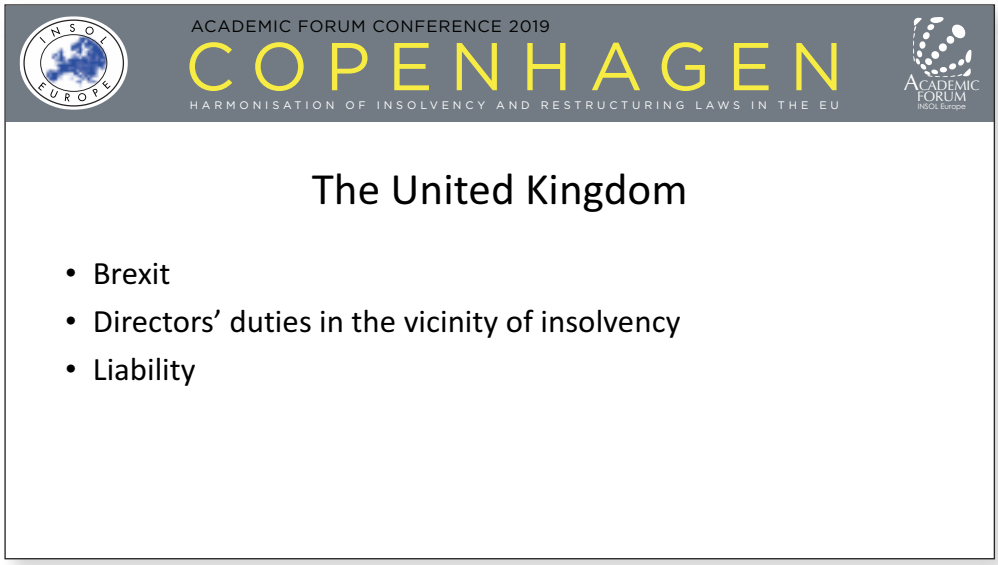
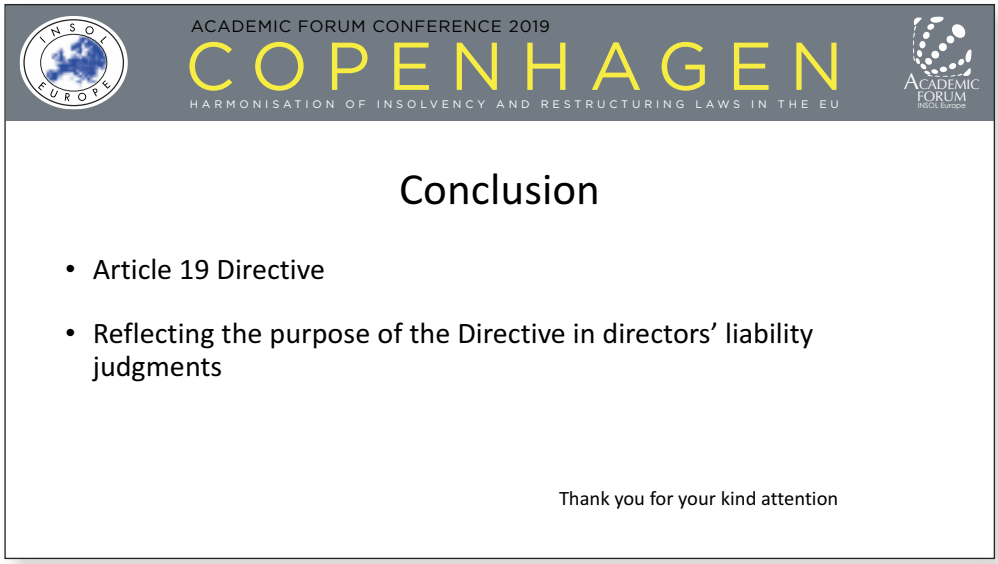
Germany

- Conflicting duties
  - Preventive restructuring

  vs.
  - Director's duty to file for the commencement of insolvency proceedings (and corresponding liability risks)
- Compatibility with the promotion of early restructuring?

Second Session – 15.00-16.30 (continued)





Second Session – 15.00-16.30 (continued)

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Liability of Company Directors in Case of Pre-Insolvency Preferential Payments: Should Directors Be Worried?

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University of Groningen, the Netherlands (a. karapetian@rug.nl)

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Content

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Introduction

- Facilitating preventive restructuring = *inter alia* rules for a stay, protection of interim and new finance, and:
- Directors' duties and responsibilities
  - Preferences: an important and a challenging case
    - Putting a creditor in a better position than he would be in if the debtor immediately ended up in insolvent liquidation

Second Session – 15.00-16.30 (continued)

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Part I: conflict of interests

- Article 18 Directive: four obligations for the director when there is a likelihood of insolvency
- Positive vs negative obligations, i.e.:
  - Advancing interests

    vs
  - Not violating interests

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Part I: conflict of interests

- Positive obligations potentially collide with negative obligations in case of preferences:
  - Negative obligation: avoiding a preference because it harms creditors' interests
  - Positive obligation: providing a preference because it will help avoid insolvency (article 18 section 3 Directive)

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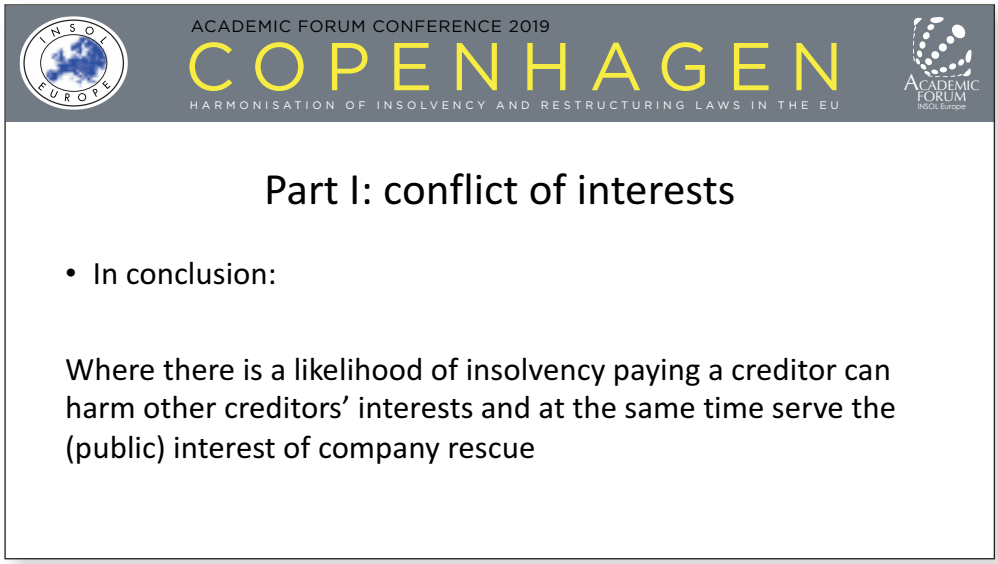
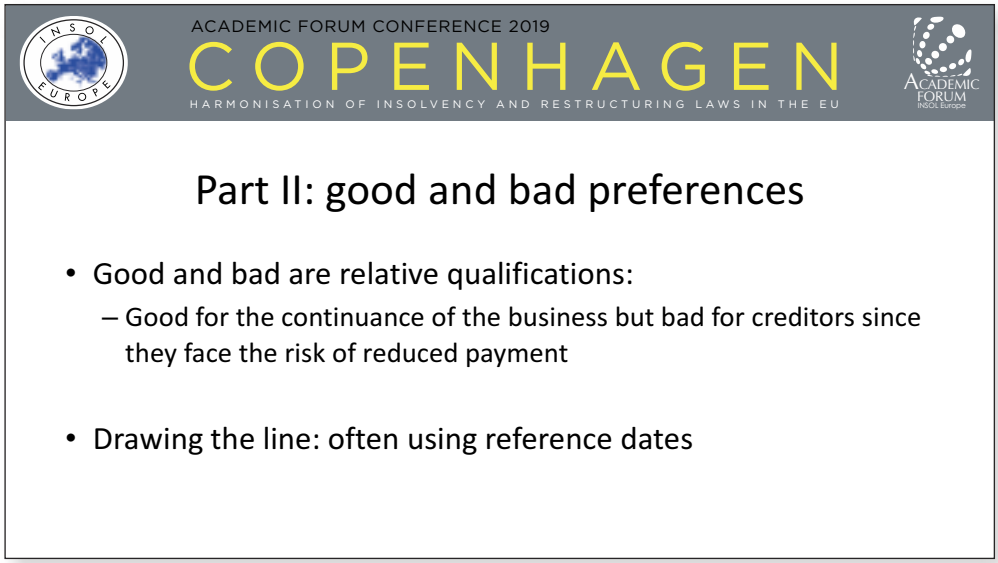
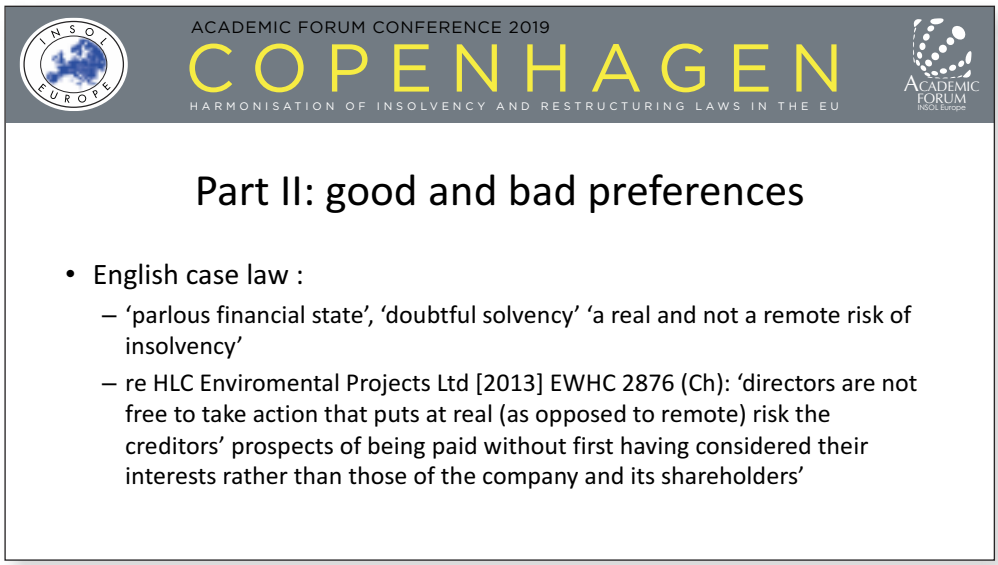
Part I: conflict of interests

- Creditors' interests
  - Shadow of *pari passu* principle, paid creditor avoids risk of non performance in insolvent liquidation
- Private and public interest of company rescue
  - Preserving employment, wealth, resources, know how etc.

Second Session – 15.00-16.30 (continued)







Second Session – 15.00-16.30 (continued)

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Part II: good and bad preferences

- Dutch (lower) case law:
  - general creditors: when insolvent liquidation cannot be avoided
  - connected parties: when insolvent liquidation is a serious risk

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Part II: good and bad preferences

Dual nature of preferences: good or bad depending on which interest is pursued → reference date not an appropriate tool to separate good from bad

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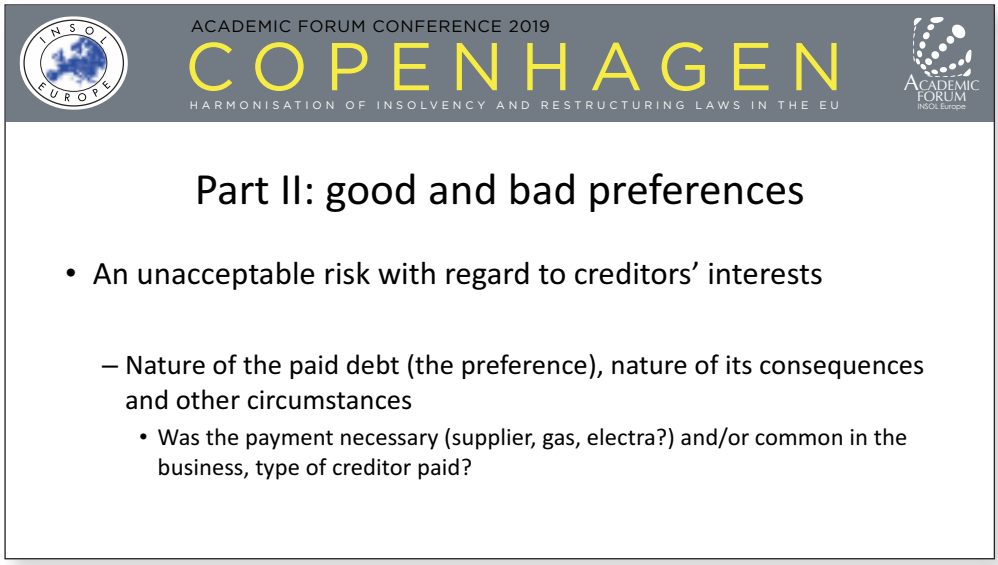
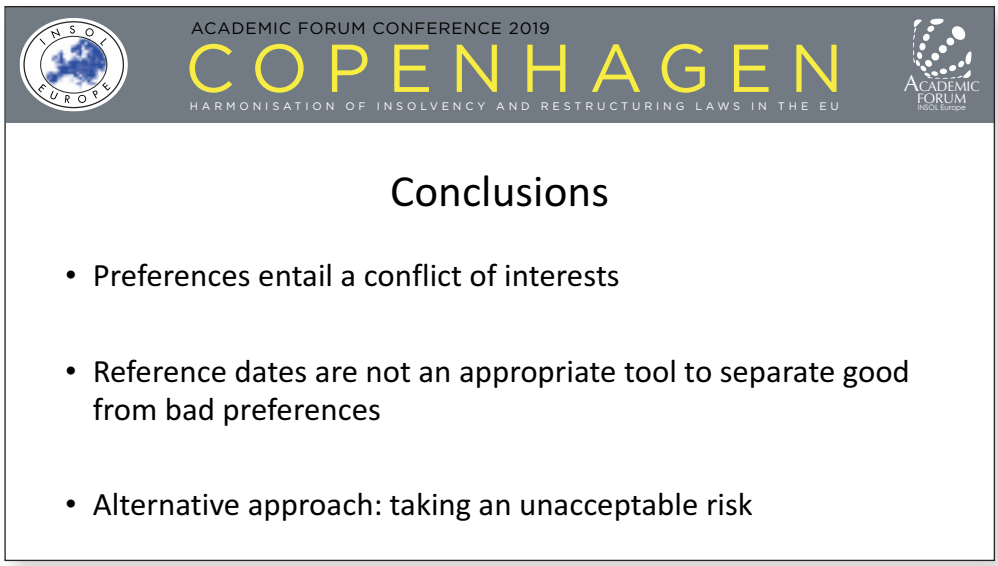
Part II: good and bad preferences

- Alternative approach: taking an unacceptable risk with regard to creditors' interests

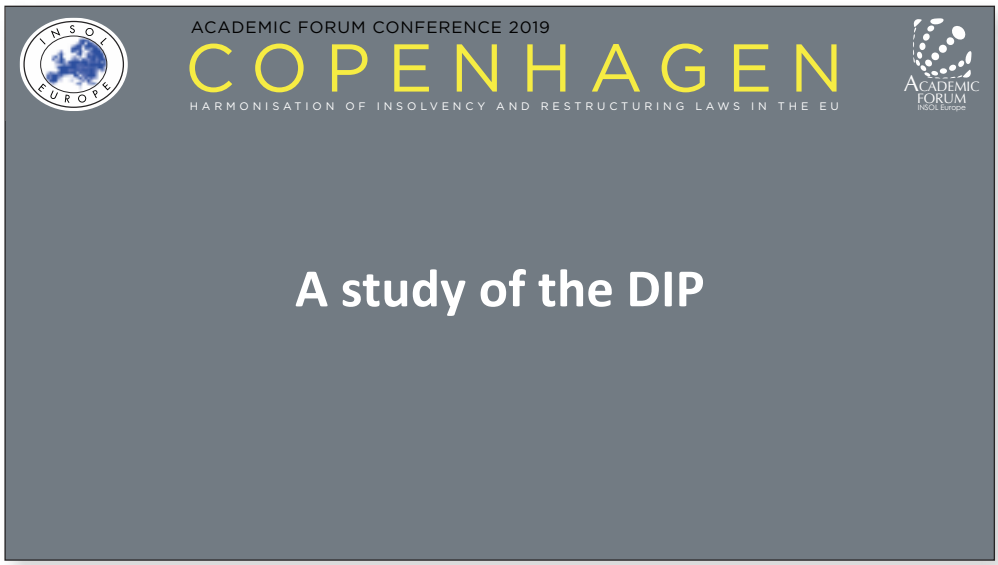
→ Financial state of the company interacts with other factors in assessing the (un)fairness of the preference

Second Session – 15.00-16.30 (continued)





Second Session – 15.00-16.30 (continued)



Second Session – 15.00-16.30 (continued)

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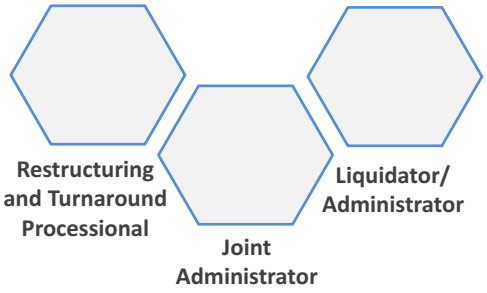
1. A study of the DIP (I)

Governance in restructuring and insolvency:



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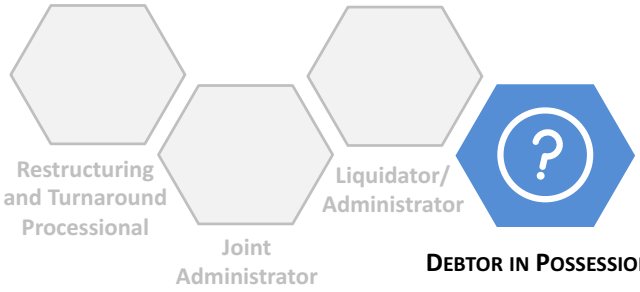
1. A study of the DIP (II)

Governance in restructuring and insolvency:



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1. A study of the DIP (III)

1. DIP concept developed in the US
2. Available in some, not all EU Member States
3. DIP embedded in EU legislation
4. However:
    1. What is a DIP?
    2. What is the role of a DIP?
    3. How is a DIP governed
    4. How should the DIP operate

Second Session – 15.00-16.30 (continued)

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The EU DIP

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2. The EU DIP (I)

1. This study examines development of DIP concept at EU level
   1. Where does the DIP come from
   2. What does it mean
   3. How does role of DIP relate to IP/PIFOR
2. EIR 2015 introduces DIP in EU legislation
   1. Definition in Article 2(3)
3. EC Proposal 2016 / EU Preventive Restructuring Directive 2019
   1. Expands concept of DIP
   2. 'DIP Principle'
   3. No definition

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2. The EU DIP (II): Some questions

- What is aim and role of the DIP
- Does the DIP concept relate to the director or the debtor?
- Is the role of the DIP equal to that of the IP?
- Does the DIP have a duty to communicate with foreign courts?
- Can a DIP give an undertaking?

Second Session – 15.00-16.30 (continued)

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2. The EU DIP (III): Methodology

- **Qualitative document analysis of published preparatory documents for the:**
  - EIR 2015
  - EU Preventive Restructuring Directive 2019
- **Included documents**
  - European Commission (EC)
  - European Parliament (EP)
  - Council
  - Studies/Reports commissioned by the EU bodies
- **Available documents:** 387 (± 20 documents not yet published)

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EIR 2015

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3. EIR 2015

17 references to the DIP in EIR 2015, including a definition:

Article 2(3)

'"debtor in possession" means a **debtor** in respect of which **insolvency proceedings** have been opened which do not necessarily involve the appointment of an **insolvency practitioner** or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, **the debtor remains totally or at least partially in control of its assets and affairs**;'

EC noted: '(…) certain rights and obligations of the liquidator should fall on the debtor in possession in situations where no liquidator was appointed.'

Second Session – 15.00-16.30 (continued)

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3. EIR 2015

EC Proposal 2012 includes *one* reference to DIP:

Article 2(b)

'"liquidator" means

(i) any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;
(ii) in a case which does not involve the appointment of, or the transfer of the debtor's powers to, a liquidator, the debtor in possession.'

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3. EIR 2015

Amendments by EP and Council
EP at first reading:

- Deletion of Art. 2(b)(ii): 'referring to debtor as a liquidator would be strange'
- 'Liquidator' replaced by 'insolvency representative'
- Introduction definition of DIP
- Art. 18 (Powers of the liquidator) amended to include also DIP

EC supports proposed changes by EP

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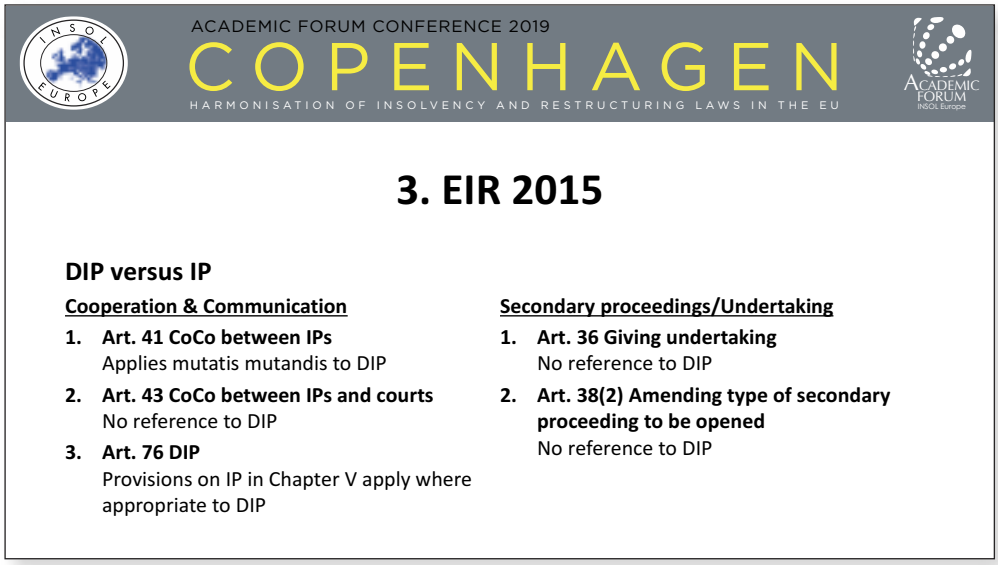
3. EIR 2015

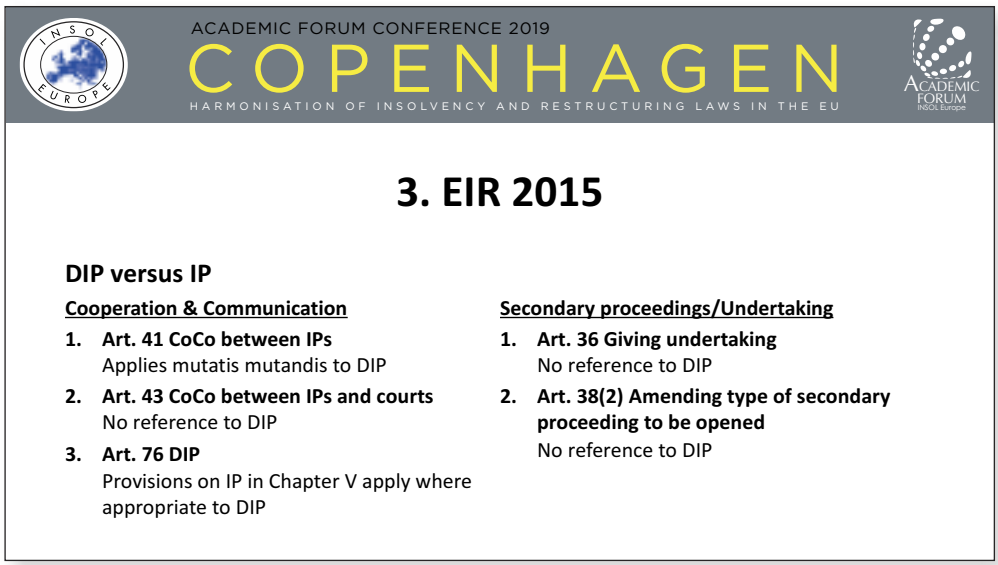
Amendments by EP and Council
Council at first reading:

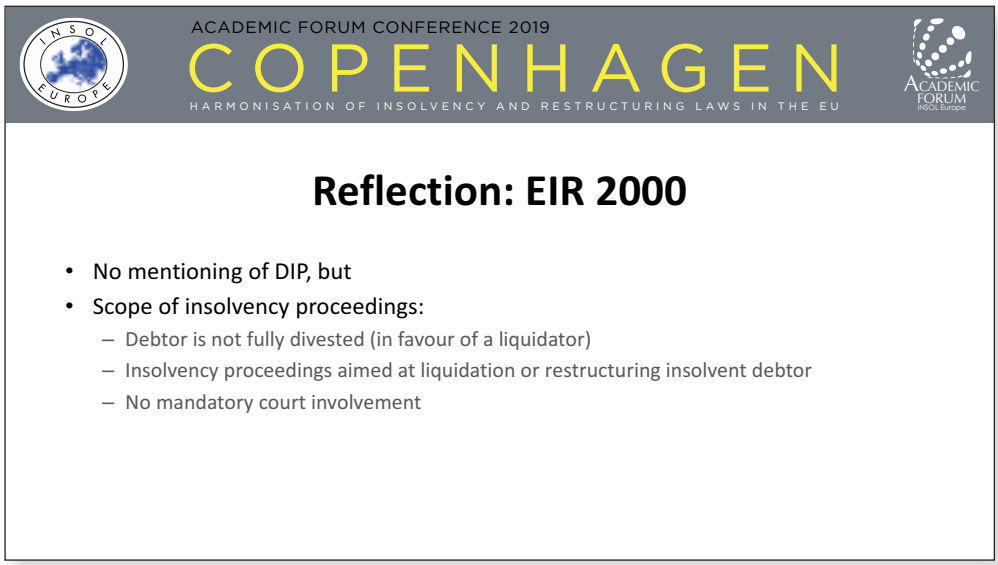
- Deletion of Art. 2(b)(ii): 'referring to debtor as a liquidator would be strange'
- 'Liquidator' replaced by 'insolvency practitioner'
- Introduction definition of DIP
  - Question rises: 'what rights an obligations the DIP should have'
  - DIP included in various provisions throughout the text
  - DIP excluded from Art. 18, 31, but new Article 76

EP adopts this text at its second reading

Second Session – 15.00-16.30 (continued)







Second Session – 15.00-16.30 (continued)

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EU Preventive Restructuring Directive 2019

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4. EU Preventive Restructuring Directive 2019

Article 5 Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures **remain totally, or at least partially, in control** of their assets and the day-to-day operation of their business.
2. Appointment of **practitioner in the field of restructuring** to be decided on a case-by-case basis
3. An practitioner in the field of restructuring will be provided when:
   1. Where a **general stay** of enforcement is provided;
   2. Where restructuring **plan must be confirmed by the court** , upon a cross-class cram-down;
   3. Where **required by the debtor** or majority of creditors

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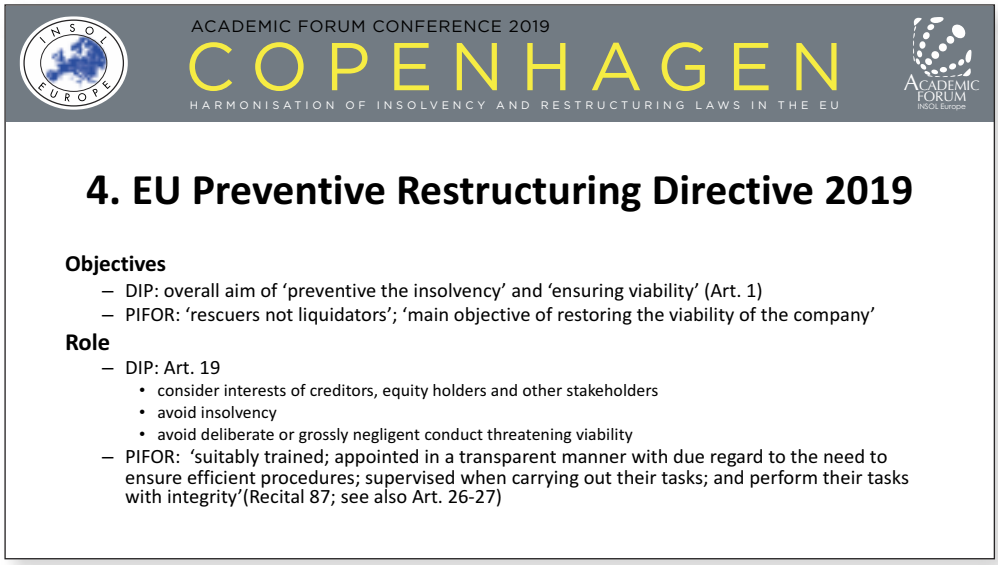
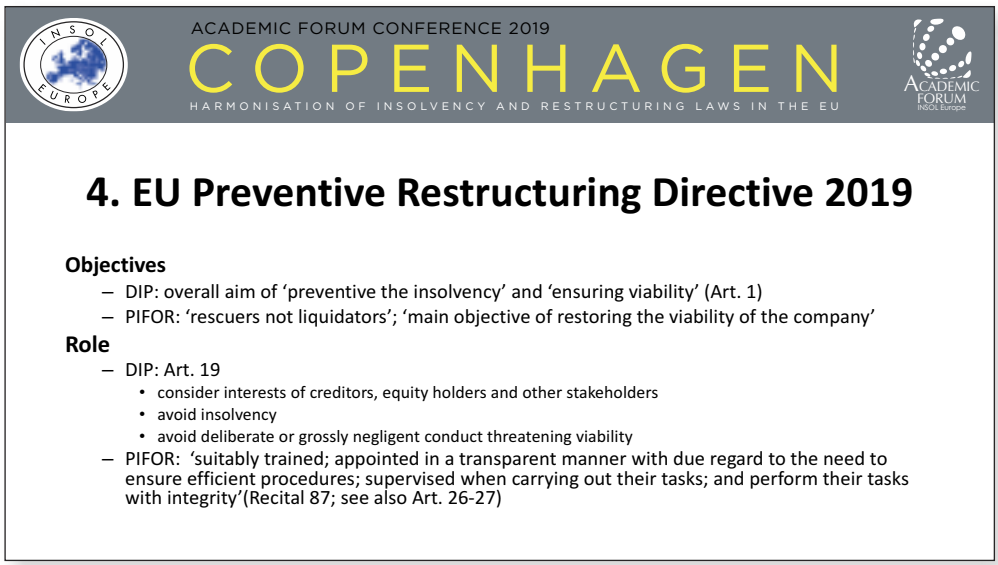
4. EU Preventive Restructuring Directive 2019

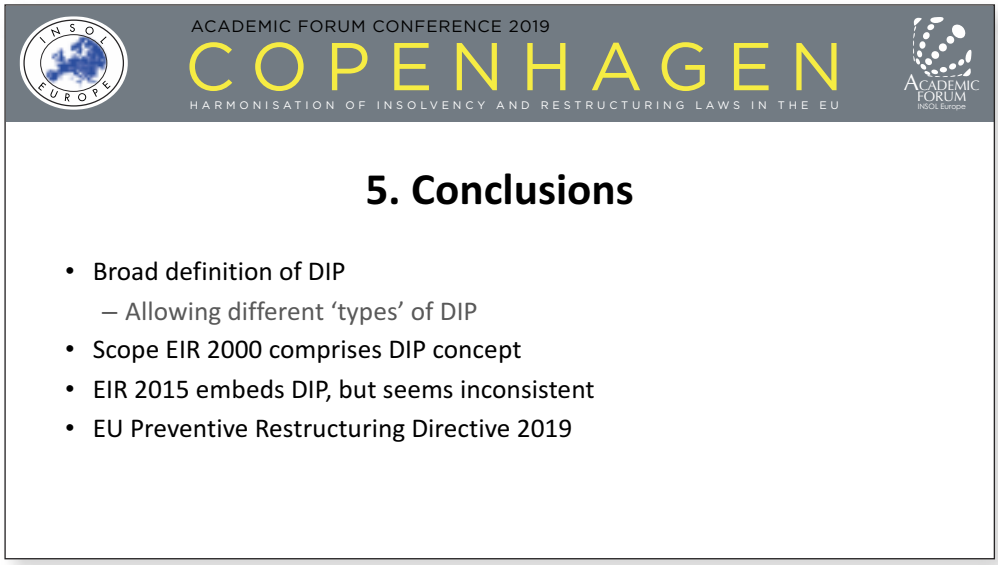
- No definition, but description of DIP (Art. 5)
  - (No full) divestment
  - Position of DIP directly relates PIFOR and court involvement
  - Commencement DIP not harmonised
- 'DIP principle'
- Who qualifies as DIP

Second Session – 15.00-16.30 (continued)





Second Session – 15.00-16.30 (continued)



Speaker Presentations: Thursday

Third Session – 09.00-10.30

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Intra-group financial support in insolvency: Finding the balance between group interest and protection of creditors' rights

Ilya Kokorin
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Leiden University

Copenhagen, 26 September 2019

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AGENDA

- **Problem** – Transaction avoidance rules in the EU and rescue support in times of financial distress
- **Solution?** – Directive on preventive restructuring frameworks and its regime for rescue financing
- **Group context** – Application of the Directive's rescue financing regime in the context of corporate groups
- **BRRD** – Intra-group financial support and group support arrangements in banking groups
- **Conclusion**

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PROBLEMS

1) Lack of harmonised transaction avoidance and claim subordination rules in the EU → legal uncertainty, increased transaction costs
2) Interim and new financing (rescue financing) is discouraged → despite vast empirical evidence of positive effects of rescue financing*
3) Successful rescue attempts may be prevented due to the above problems

* S. Dahiya, K. John, M. Puri, G. Ramírez, Debtor-in-possession financing and bankruptcy resolution: Empirical evidence, Journal of Financial Economics, Vol. 69, Issue 1, 2003, pp. 259-280; U. Dhillon, T. Noe, G. Ramírez, Debtor-in-possession financing and the resolution of uncertainty in Chapter 11 reorganizations, Journal of Financial Stability, Volume 3, Issue 3, October 2007, pp. 238-260. The World Bank Doing Business Report, 2016, p. 102. See also L. Stanghellini, R. Mokal, C. Paulus, I. Tirado (eds.), Best Practices in European Restructuring. Contractualised Distress Resolution in the Shadow of the Law, Wolters Kluwer, 2018, p. 60.

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Third Session – 09.00-10.30 (continued)

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SOLUTION?

Proposal for Directive, 2016 → General approach, 2018 → Final Directive, 2019

1) Partial harmonisation of transaction avoidance rules in the EU: "Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable" (Recital 66)

2) Harmonisation of rules on rescue financing, which shall encourage extension of financial support in crisis and saving of viable but distressed companies (Article 17: Protection for new financing and interim financing)

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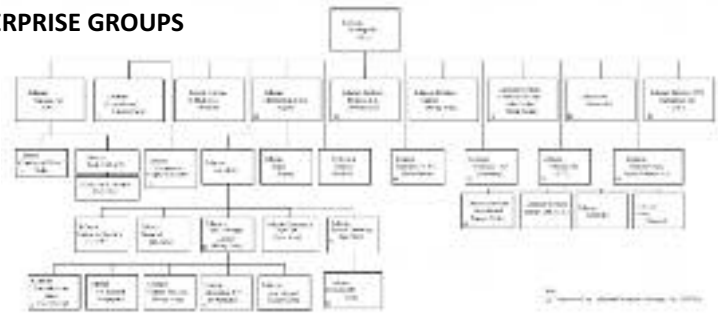
GLOBAL ENTERPRISE GROUPS



Lehman Brothers Corporate Structure, 2007

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QUESTIONS

1) Does the Directive's rescue financing support framework extend to financial support provided within corporate groups (intra-group financial support)?

2) What should be the most appropriate regulatory framework for intra-group financial support, to facilitate rescue of viable businesses and prevent abusive behaviour?

METHODOLOGY

Principles-based approach*

- Equal treatment of creditors
- Optimal realisation of debtor's assets (maximization of the estate value)
- Protection of trust and certainty of transactions

* R. Bork, Principles of Cross-Border Insolvency Law, Intersentia, 2017

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DIRECTIVE'S RESCUE FINANCING FRAMEWORK
Articles 2 (definitions), 17

- Protection against avoidance actions
- Protection against civil/administrative/criminal liability for grantors of rescue financing
- Broad category, that includes provision of new money, third-party guarantees, supply of stock, materials, etc.

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Proposal for Directive, 2016 → General approach, 2018 → Final Directive, 2019

LIMITATION OF INTRA-GROUP RESCUE SUPPORT

Recital 67 Directive: the Directive does not affect "other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing"

! "Such other grounds could include, among other things, fraud, bad faith, a certain type of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company"

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LIMITATION UNWARRANTED AND OVERREACHING

1) Rules on avoidance of related party transactions significantly vary among EU MS (but in general related-party transactions are prone to challenge)
2) Shareholder claim subordination rules (Germany, Austria, Sweden, Portugal, Spain, Slovenia, Italy and Poland)
3) Efficient intra-group rescue financing will be discouraged, while discrepancies between applicable rules will remain – **TWO PROBLEMS UNSOLVED**

The insolvency system should "permit an enterprise group member subject to insolvency proceedings to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings"

"The insolvency law should specify that […] post-commencement finance may be obtained from an enterprise group member subject to insolvency proceedings by another group member subject to insolvency proceedings"

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BANK RECOVERY AND RESOLUTION

1) Recovery and resolution planning
2) Early intervention powers
3) Resolution tools
4) Resolution financial arrangements
5) Communication and cooperation in the group resolution context

Bank Recovery and Resolution Directive (BRRD)

Chapter III (Intra group financial support)

Article 19 (Group financial support agreement): "Member states shall ensure that a parent institution […] and its subsidiaries […] may enter into an agreement to provide financial support"

"Member states shall remove any legal impediment […] to intra-group financial support transactions that are undertaken in accordance with this Chapter"

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GROUP FINANCIAL SUPPORT AGREEMENTS UNDER BRRD

1) Different forms (loan, guarantee, collateral)
2) Financial support can be provided downstream, upstream or cross-stream
3) "Pre-emptive transaction" - may only be concluded if none of the parties meets the conditions for an early intervention
4) The procedure for concluding and executing intra-group financial support agreements is rather complicated

* World Bank, Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD, April 2017.

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PROS AND CONS OF BRRD's GROUP FINANCIAL SUPPORT FRAMEWORK

Pros	Cons
Acknowledgement of the group context	The procedure for concluding and executing group support agreements is complex, time-consuming, multi-level/multi-actor
Extension of financial support regime to cover intra-group transactions	Ex ante character of support agreements can make them ill fit for a particular crisis situation
Ex-ante preparation (including entering into group support agreements) plays an educational and a disciplining role, encouraging early action	Limitations related to the solvency of the entity providing support (as a general rule, solvency of the providing entity should not be at risk)

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"GROUP INTEREST" IN INTRA-GROUP RESCUE FINANCING

1) Elevated approach to an "individual" interest to include group considerations
2) The best interest of the providing entity, including direct and indirect benefits resulting from the stabilisation of the group as a whole and a restoration of the financial soundness of the receiving entity
3) Calculation of risks related to destabilisation of the group as whole resulting from the failure of the (receiving) entity
4) "The analysis should include potential damage to franchise, refinancing and reputation and benefits from efficient use and fungibility of the group's capital resources and its refinancing conditions"

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CONCLUSION

1) Extend the Directive's rescue finance protective framework to cover intra-group financial support
2) Recognise at the European level the value and importance of the category of a group interest in the context of intra-group rescue financing
3) Establish an ex ante approval mechanism for certain pre-insolvency group support transactions
4) Adopt a guidance with relevant factors that restructuring experts, creditors and finally courts may take into account when considering and approving intra-group financial support

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TAK SKAL DU HAVE!

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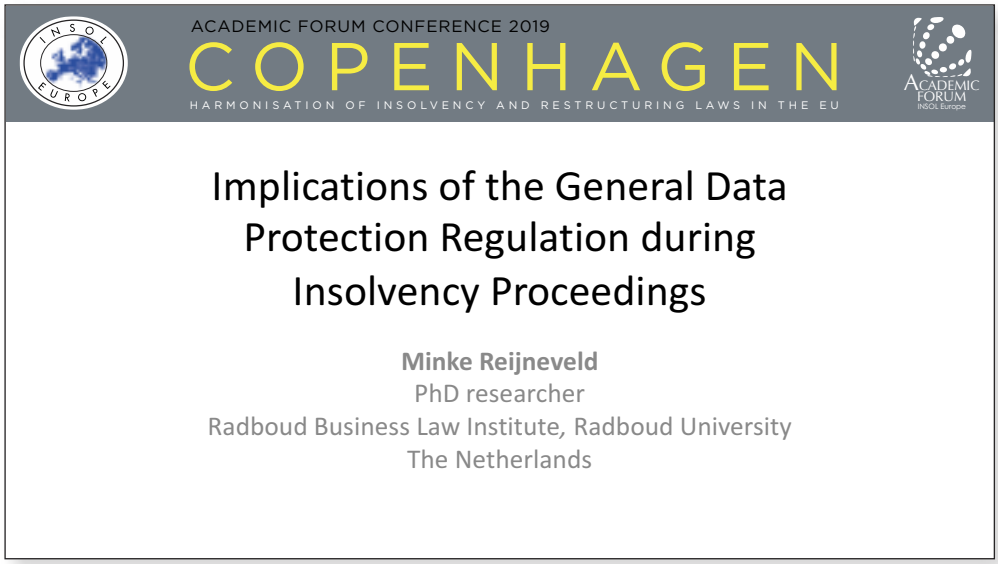

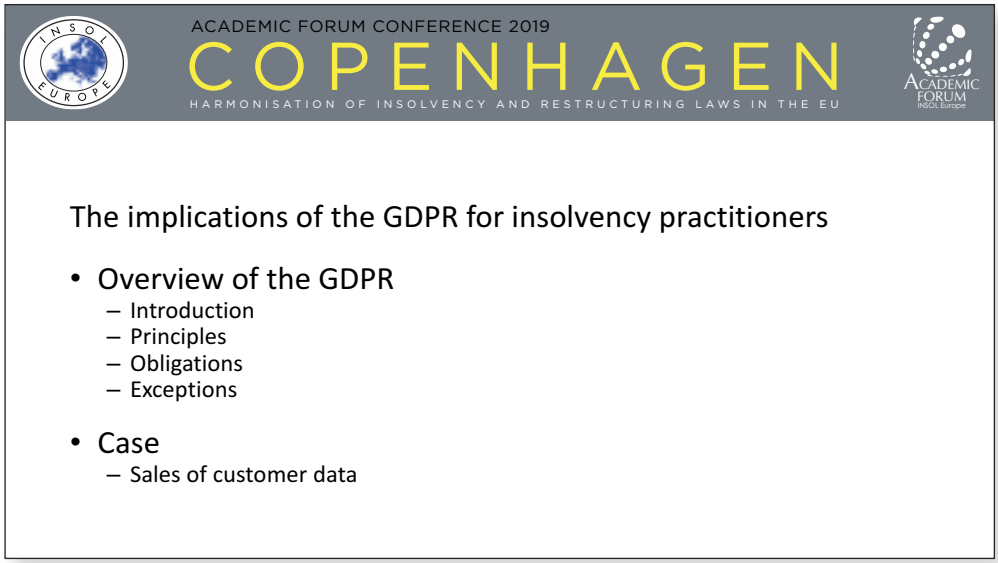

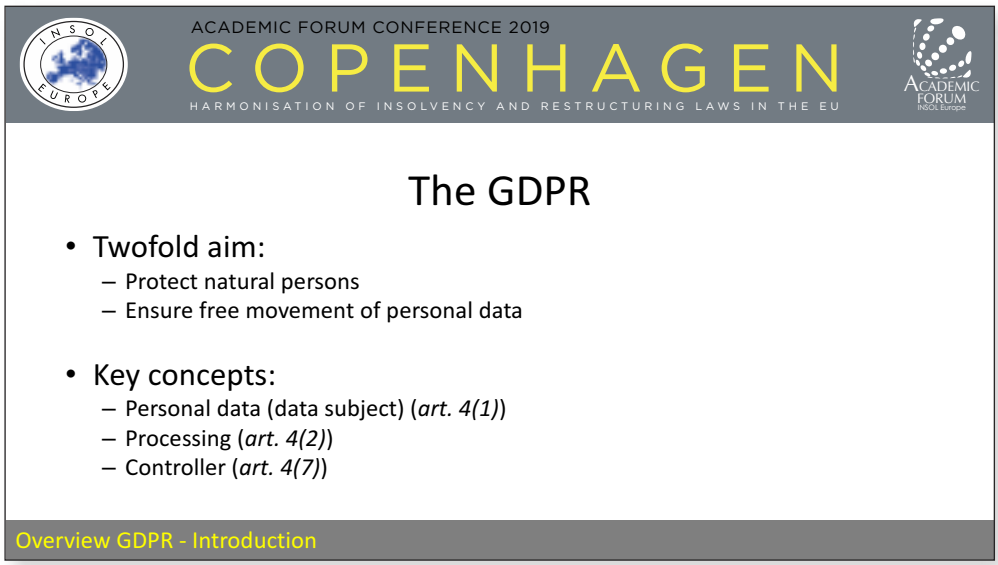

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- Any information
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Overview GDPR - Introduction

Source: https://bit.ly/2kIR3Q7

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Processing

- Any operation
- Performed on personal data

Such as collection, recording, organization, structuring, storage, adaptation, alteration, retrieval, consultation, use, disclosure, dissemination, alignment, combination, restriction, erasure, destruction

Overview GDPR - Introduction

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Controller

- The natural or legal person
- Which alone or jointly with others
- Determines
- The purposes and means of the processing of personal data

Overview GDPR - Introduction

Third Session – 09.00-10.30 (continued)

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The insolvency practitioner and personal data

Overview GDPR - Introduction

Sources: https://fitsmallbusiness.com/personnel-file/; https://bit.ly/2kEaXvr; https://bit.ly/2lExvfP.

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The GDPR - principles

- Data protection principles: (*art. 5(1)*)
  - **Lawfulness**, fairness and transparency
  - **Data minimisation**
  - **Purpose limitation**
  - Accuracy
  - Storage limitation
  - Integrity and confidentiality

Overview GDPR - Principles

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Lawfulness of processing (*art. 6*)

- **Consent** (*art. 7*)
- Contract
- Vital interests of a person
- Public task
- **Legal obligation**
- **Legitimate interests**

Overview GDPR - Principles

Third Session – 09.00-10.30 (continued)

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Data minimisation

- Adequate
- Relevant
- Limited to what is necessary

Overview GDPR - Principles

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Purpose limitation

- Specified, explicit and legitimate purposes
- Not processed further in incompatible manner

Overview GDPR – Principles

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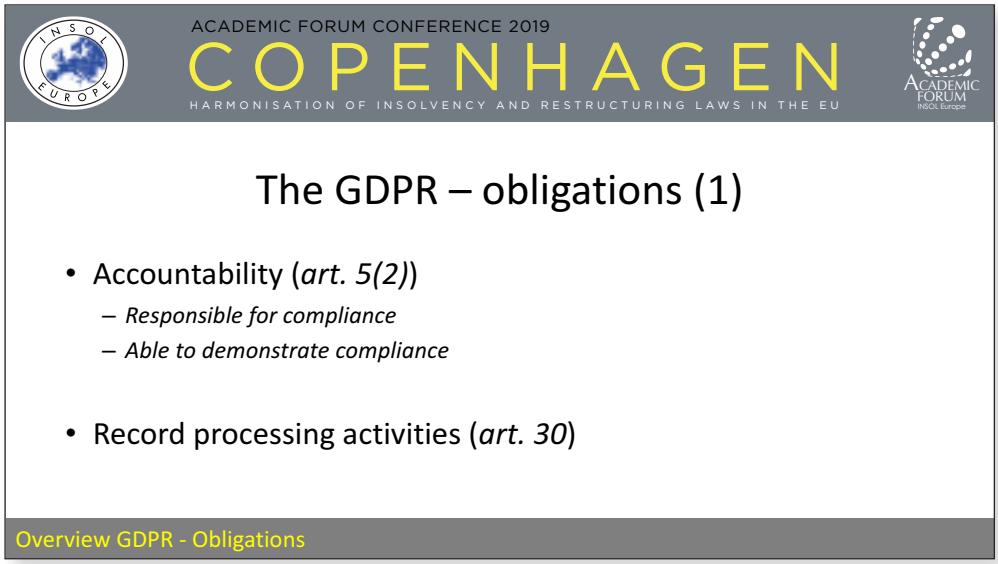
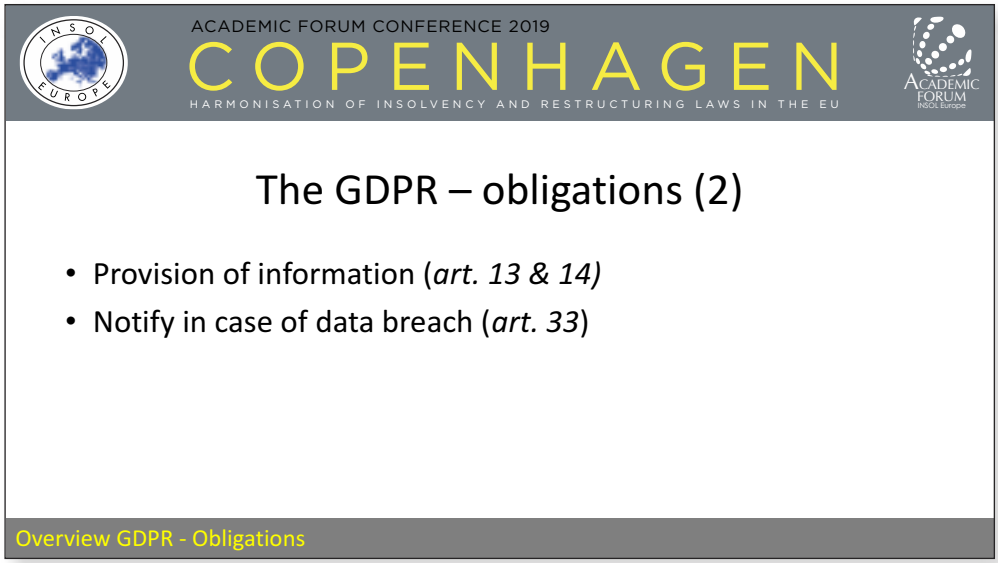
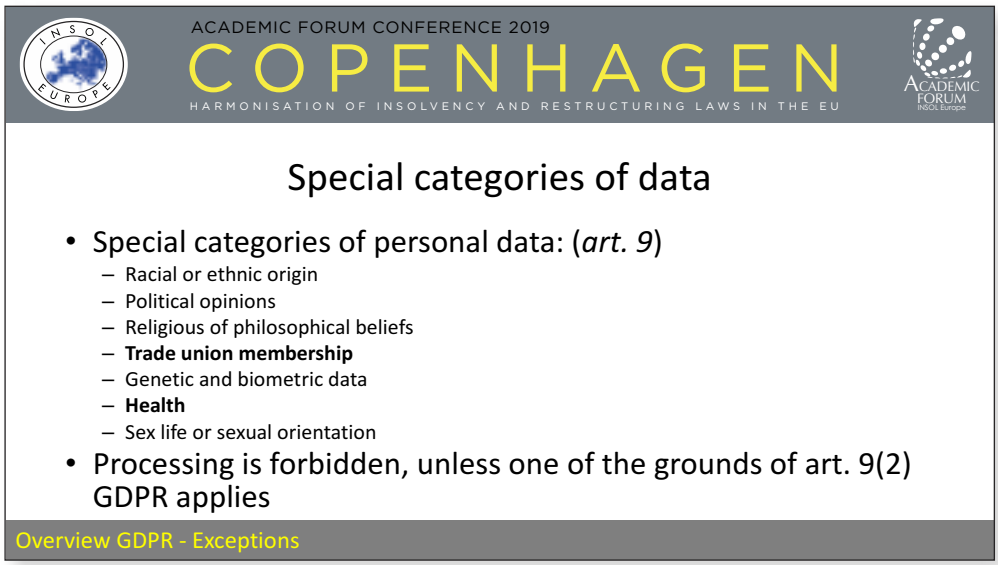
Insolvency practitioner and data protection principles

Third Session – 09.00-10.30 (continued)







Third Session – 09.00-10.30 (continued)

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Criminal convictions data

- Personal data relating to criminal convictions (*art. 10*)
  - Criminal convictions and offences
  - Related security measures
- Processing is forbidden, unless it is authorised by EU or MS law providing for appropriate safeguards

Overview GDPR - Exceptions

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Case

Source: http://bestellen.sho.nl/

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Applicability GDPR?

- Personal data?
- Processing?

Case

Third Session – 09.00-10.30 (continued)

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Lawful basis

- Legal obligation?
  - Prescribed by law?
  - Legal task or legal obligation?
- Consent
  - Free, specific, unambiguous
  - Active

Case

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Lawful basis (2)

- Legitimate interests
  - Balancing of interests
    - Purpose limitation
    - Lawful basis debtor?
    - Data minimization
    - Information obligations
    - Special categories of data?

Case

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"Before I write my name on the board, I'll need to know how you're planning to use that data."

Fourth Session – 11.00-12.30

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Fairness Standards of the Cross-class Cram-down Mechanism in the Restructuring Directive

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Summary

- Justification for a cross-class cram-down mechanism
- The fairness of the plan: APR vs. EU RPR
- A proposal for a different model introduced
- Elements of the Directive that are consistent with the suggested model
- Elements of the Directive which create an obstacle to the suggested model

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The cross-class cram-down: justification and functioning

- The need for a cram-down in restructuring: veto rights and hold-out problems
- One solution: the majority rule
  - The majority rule works well if: information and homogeneity of interests → classes of claimants
- The majority rule does not work across different classes → the need for a cross-class cram-down = the class is bound not because the majority has so decided but because of **the court's action**
- Under which conditions? The court must verify that the plan is fair. When is a plan fair?

Fourth Session – 11.00-12.30 (continued)

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The Fairness Issue: APR vs. EU RPR

- The Draft Directive 2016 and the APR = the plan is binding because it respects the negotiated pre-existing entitlements
- The Council of the EU and the EU RPR = it is sufficient for the plan to respect only partially the applicable priority rules
- The final compromise: MSs can choose APR or EU RPR
  - preference for the EU RPR;
  - the no more than 100% rule;
  - the non-discrimination rule and the APR;
  - no reference to a separate treatment of secured creditors (≠ US)

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EU RPR [Art. 11, par. 1, lett. (c)]	APR (Art. 11, par. 2)
"dissenting voting classes of affected creditors are treated at least as favorably as any other class of the same rank [non-discrimination rule] and more favorably than any junior class [EU RPR]"	"the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan"

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The APR

- Strong legal tradition in the US
- After 1978: a normative negotiation framework

PROS	CONS
Complies with the CBT: honours negotiated entitlements and avoids opportunistic use of bankruptcy	Costly and time consuming because of the valuation problem
Protects the market of credit by respecting priorities	It wipes out essential shareholders
Improves decision-making efficiency because it helps to align risk-bearing with benefits-sharing	It is a day of reckoning → the US RPR (≠ *EU RPR*)

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The EU RPR

ARGUMENTS IN FAVOUR	But...
Less costly because no valuation of the firm RV	It requires to compare the treatment assigned to different types of claimants (e.g. SH and creditors)
SHs may retain their interests and be involved in the restructuring	Wealth-transfer and opportunistic behaviour, moral hazard, financial leverage. Inconsistent with corporate law rules (limited liability)
Plan confirmation more likely (especially when strong presence of preferential creditors)	True, but the problem is only in those systems where you can cram down only the minority of the classes (≠ all minus one like in the U.S.)
Correct because the debtor not yet insolvent	True, but debt's haircut and discharge need safeguards
Correct because it is flexible and restructuring needs to balance different interests	It lacks a solid legal basis and is contradictory
	Unpredictable, brings uncertainty, forum shopping

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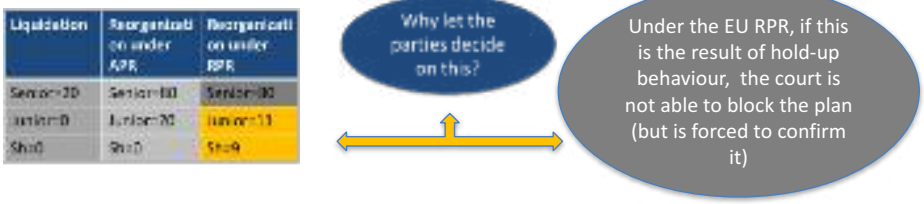
The solution to the contrast

- RPR: probably right reasons, wrong mechanism
- The problem: the decision of whether to alter the pre-existing entitlements falls to the parties (**self-regulation**)
- Ex: Debtor owes 80 to senior, 50 to junior. LV= 20, RV=100



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- Proposed model: APR applied in principle (*default protection rule*), subject to *alterations* under the control of the court
- The decision on the alteration should be scrutinized by the court (**public regulation**).
- Alteration subject to *evidentiary burdens* (Casey) → strict *duty to explain*
- No hold-up threats + efficient
- If the burden of proof is met, the court is able to cram down the dissenting class
- Importance of procedural rules and judicial oversight in debt restructuring
- Case-by-case valuation. Large corps vs SMEs. Entrepreneur-SH vs investor-SH. Competing plans issued?

Fourth Session – 11.00-12.30 (continued)

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Examples

1) the SHs are needed for the maximization of the RV

- Tollenaar: SH's 'soft variables' no part of the RV. True.
- Same result: the decision falls to **the court**

2) overall normative framework: requirement that the majority of the classes approve the plan [impossibility to cram down all the classes (minus one)] (wrong from a theoretical point of view): hold-out powers are added to the game → compliance with APR is problematic → Court's intervention

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The Directive's consistency with the model

- **Recital 56**: MSs "should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors".
- **Recital 58**: "equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways [by providing "soft variables"], such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs". **Why making optional the entire cross-class-cram-down and not only the APR?**
- **Recital 59**: " the restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts".

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- **Article 11, par. 2**: MSs may introduce provisions derogating from the APR "where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties".

- These provisions show that the Directive already provides for a model that is fair and flexible at the same time → there is no need for the EU RPR

Fourth Session – 11.00-12.30 (continued)

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The Directive's obstacles to the model: some misconceptions (part 1)

- **Recital 57**: "Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders".
- Confusion of two different levels = to give the right to vote as a tool to make the plan binding vs the vertical order of priorities. They cannot be interdependent.
- Absurd consequences in terms of coherency and fairness
- **Recital 57**: "restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements…"
- Inclusive vs exclusive models to impair SHs' rights
- Lowering the threshold not enough; SHs have hold-out powers

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(Part 2)

- **Article 9**: debtors *shall* have the right to submit a plan vs creditors *may* have the right to submit a plan
- **Article 11**: cross-class cram-down available *upon the proposal of the debtor* or *with the debtor's agreement* (this *may* be limited to cases where debtors are SMEs)
- **Recital 53**: if debtor is a legal person: debtor = management board or a certain majority of SHs.
- Misconception: cross-class cram-down should benefit the in-the-money claimants, not the debtor (see US)

→ Hold-out problems

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TRADE CREDIT VS NEW/INTERIM FINANCING IN THE CONTEXT OF THE PREVENTIVE RESTRUCTURING

Andreea Deli, PhD
Judge Flavius Motu

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- **Directive 2019/1023: "FINANCIAL ASSISTANCE":**
- Although not defined in Art. 2, the concept of 'financial assistance' "*should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period*" (Recital 66) => includes trade credit;
- Art. 2, para 8: 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business;
- Art. 2, para. 7: 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan.

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- **INTERIM FINANCING:**
- Recital (68) *"When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses,* ***only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected****. Furthermore, this Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing. [...] An ex ante control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures."*

Fourth Session – 11.00-12.30 (continued)

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- **INTERIM FINANCING**:
- Suppliers bound by contracts containing *IPSO FACTO* clauses:
- Art. 7 para. 5: *"Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:*
- *(a) a request for the opening of preventive restructuring proceedings;*
- *(b) a request for a stay of individual enforcement actions;*
- *(c) the opening of preventive restructuring proceedings; or*
- *(d) the granting of a stay of individual enforcement actions as such."*

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- **INTERIM FINANCING**:
- Suppliers bound by **'essential' executory contracts** (Art. 7 para. 4): *"Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill. The first subparagraph shall not preclude Member States from affording such creditors **appropriate safeguards** with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph. Member States may provide that this paragraph also applies to non-essential executory contracts."*
- Suppliers bound **by 'essential' executory contracts containing *ipso facto* clauses**: (Art. 7 para. 5): *"Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of: (a) a request for the opening of preventive restructuring proceedings; (b) a request for a stay of individual enforcement actions; (c) the opening of preventive restructuring proceedings; or (d) the granting of a stay of individual enforcement actions as such."*

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- **INTERIM FINANCING**:
- Recital (40) *"When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses […]. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay".*
- Recital (41) *"Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements."*

Fourth Session – 11.00-12.30 (continued)

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- **INTERIM FINANCING**
- => UNLESS the executory contracts contain 'pay on delivery' / 'cash on delivery' clauses:
- => (at least) the 'essential' executory contracts are "locked" and suppliers are bound to perform, thus offering the debtor compulsory (?) 'financial assistance'
- => *ipso facto* clauses are rendered inefficient. As a consequence, the 'non essential' suppliers are bound to perform, thus offering the debtor compulsory (?) 'financial assistance'
- What are the *'**appropriate safeguards** with a view to preventing unfair prejudice being caused to such creditors'* ?

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- **UNCITRAL LEGISLATIVE GUIDE** (Part Two, para. 101): Suppliers of goods and services would only continue to supply those goods and services to the insolvency representative on credit if they had a reasonable expectation of payment ahead of pre-commencement unsecured creditors. In some cases, such a priority is afforded on the basis that the new credit or lending is extended to the insolvency representative, rather than to the debtor, and thus becomes an expense of the insolvency estate.
- **Directive 2019/1023** did not embrace the approach 'the new credit or lending is extended to the insolvency representative'; at most, an *ex ante* control is set in place.
- => the 'appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors' = the *ex ante* control ? What other safeguards ?
- the appropriate safeguards ≠ super-priority ?

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- **INTERIM FINANCING**:
- Art. 17 para. 4: "*Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims*" = super-priority
- Providers of interim cash financing vs. suppliers bound by executory contracts: which one has priority ?
- Our answer: it's complicated
- a) The Directive seems to qualify only 'voluntary' granting of financing / as 'financial assistance', *per a contrario* placing the performance of a supplier bound by an executory contract outside the scope of 'financial assistance'
- b) If the supplier bound by an executory contract performs under *the same conditions* as before, where is the 'assistance' ?
- => interim financing cash suppliers (seem to) have priority over suppliers bound by executory contracts

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- **INTERIM & NEW FINANCING**: EQUAL PROTECTION

Recital (66) *"The success of a restructuring plan often depends on whether financial assistance is extended to the debtor […]. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures."*

Recital (67) *"National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardize the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds […] Such other grounds could include, among other things, fraud, bad faith, […] conflict of interest […], and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed."*

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NEW FINANCING

❑ **Directive 2019/1023**

- Recital (68): *"However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing* ***priority*** *at least over unsecured claims in subsequent insolvency procedures"*
- Article 17 para. 4: *"Member States may provide that grantors of new or interim financing are entitled to receive payment with* ***priority*** *in the context of subsequent insolvency procedures in relation to other creditors* ***that would otherwise have superior*** *or equal claims."*

❑ **UNCITRAL, Part Two, para 101 – 104**

- administrative expense;
- super-priority;
- priming lien.

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NEW FINANCING

❑ **The World Bank Principles for Effective Insolvency and Creditor/Debtor Rights System (Revised, 2015)**

- B3.2: *"Encourage lending to, investment in, or recapitalization of viable financially distressed enterprises"*;
- C9.2: *"Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs."*

Fourth Session – 11.00-12.30 (continued)

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IS THERE ANY DIFFERENCE IN THE LEGAL TREATMENT OF *INTERIM FINANCING* AS OPPOSED TO *NEW FINANCING*?

- The moment of granting;
- The restructuring framework / stage of the proceedings and the bodies authorized to approve the granting;
- The foreseeable effects in the overall operations of the debtor;
- The extent to which the key-objective "*recognition of existing creditor rights and establishment of clear rules for ranking priority claims*" is affected.

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FINANCING CREDITOR'S POSITION AS OPPOSED TO TRADE CREDIT SUPPLIERS

- *Interim financing* is granted during the : on-going negotiations / preventive restructuring frameworks when the debtor enjoys the stay of the individual enforcement actions => the debtor's recovery chances are *uncertain*
- The confirmation of a restructuring plan => *higher certainty* of the debtor's recovery chances than during the previous stage(s)
- *Post confirmation:* the mechanisms allowing the survival of the debtor's business are defined and become operational;
- The difference between the *voluntary* granting of financing and the "*mandatory*" providing the financing in performing an executory ongoing contract;
- **new financing, if granted => the new financer's secured position over the prior secured creditors.**

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PRIORITY OVER THE PRIOR SECURED CREDITORS

- The funding granted in the past by a creditor with a security interest in a specific asset or in a functional set of assets is already spent. Its recovery requires the granting of new financing, secured with "dynamic" assets ("core assets" => going-concern value);
- "The valuation" of the security *before* and *after* the granting of the financing;
- Purpose: to enhance the "entropy" of the collateral(s) as a business operational ensemble of assets;
- Analysis: in the absence of new financing, the prior secured creditor will only obtain the **liquidation value of the collateral**, whereas if new financing is granted, the preior secured creditor has a higher chance of recovering the **market value of the collateral**;
- **The baseline**: the value of the collateral if already affected by the absence of an adequate **going-concern value**.
- **Two conditions** set out by Directive 2019/1023 by reference to the applicable definition of "interim financing", and "new financing", *mutatis mutandis*: *"is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business".*

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CONCLUSIONS

- There are certain situations in which the difference between financial assistance and trade credit is difficult to grasp. This is why Directive 2019/20123 allows a *lato sensu* definition; the appropriate instrument intended to make the difference is the **visualization of effects**;
- The *super-priority* of financial assistance and trade credit or *pari passu*?

  pros and *cons*
- In all cases, fresh financing must be reasonable and immediately necessary for the business to continue to operate. The coordinates encompassing the super-priority of fresh financing are: **fairness** and **rationality**;
- "Plan B" solution (*next-best-alternative scenario in the absence of a plan*) = granting an interim financing for a viable business transfer (preventing a piecemeal dismemberment) simultaneously with the commencement of liquidation?
- Other applications? Still, the exclusion principle of Pauli ...

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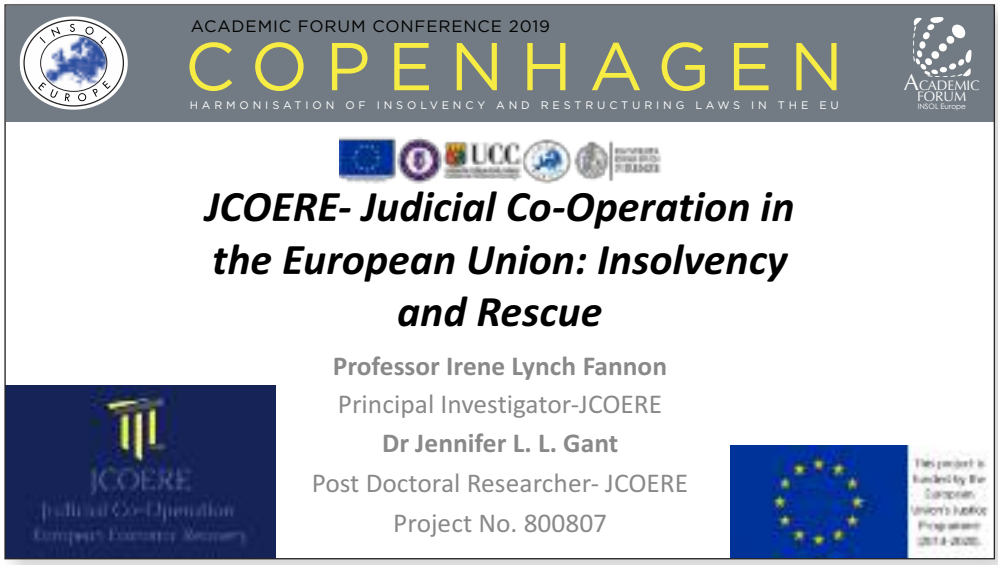
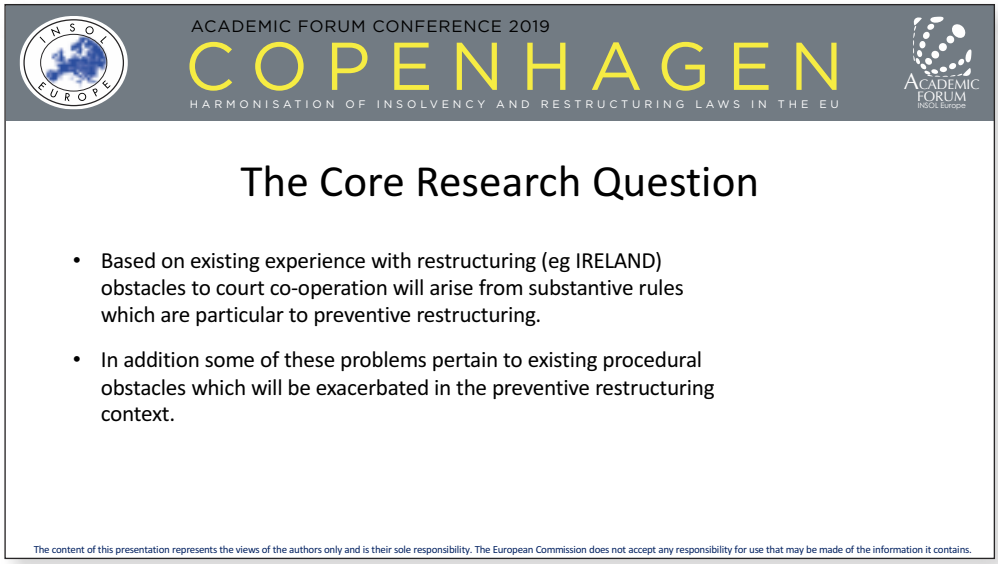
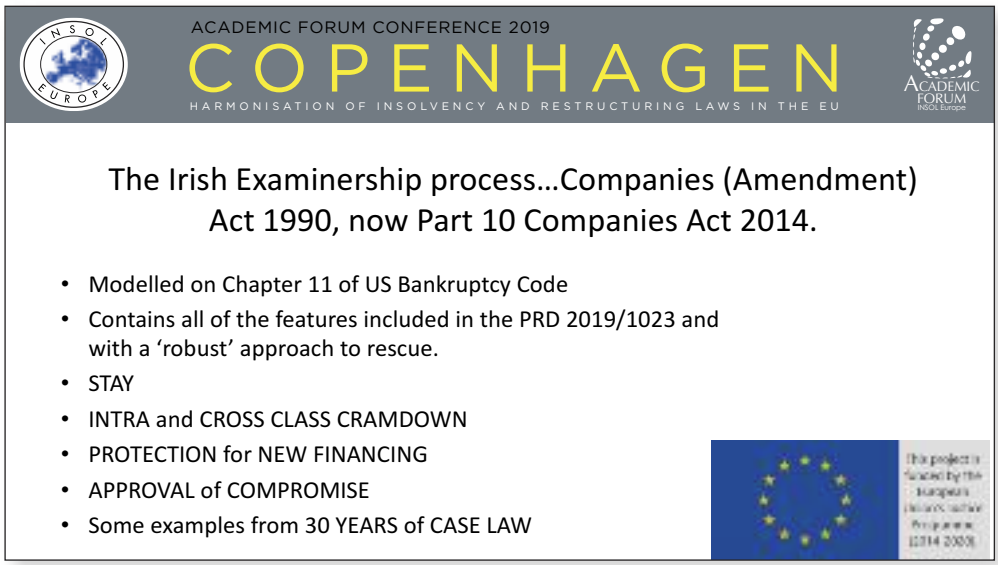
EQUILIBRIUM IN RESTRUCTURING FRAMEWORKS

Fifth Session – 13.30-15.00







Fifth Session – 13.30-15.00 (continued)

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

Appointing and examiner and imposing the stay…the threshold question

Re Vantive Holdings Ltd. [2009] IEHC 384 and [2009] IESC 68
Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

- Conditions are that the company is 'unable to pay its debts' or 'likely to be unable to pay its debts.'
- No order for winding up.
- No receiver appointed for more than 3 days.
- There is a 'reasonable prospect of the survival of the company' or companies (group).

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Cram down: Secured Creditors (including with rights in rem).

Re Holidair [1994] 1 I.R. 416

- Secured creditor with right to appoint a receiver (usually considered a right in rem).
- Receiver appointed by AIB and was removed on appointment by court of an Examiner.
- During examinership interim financing given priority.
- Rescue successful.

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Approval of compromise or settlement- formality of court approval.

Re McInerney Homes Ltd. [2011] IESC 31 O'Donnell J.
Re SIAC Construction Ltd. [2014] IESC 25

- Under Irish law the court will approve a scheme where it satisfies the consent requirements and where the court is satisfied that the scheme is not 'unfairly prejudicial to any creditor or class of them'.
- McInerney the final scheme not approved on the basis of 'unfair prejudice'.
- SIAC – Scheme approved. What does the 'unfair prejudice' test entail?
- APR or RPR- What does this mean considered against the reality of court approval?

Fifth Session – 13.30-15.00 (continued)

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Cross Class Cram down

Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

Court to Court co-operation, practitioner to court co-operation – what difference
Do these obligations make?

www.ucc.ie/en/jcoere/research and click on the Judicial Wing Case Study

Lynch, Marshall and O'Ferrall: Corporate Insolvency and Rescue (Butterworths, 1996)
Lynch Fannon and Murphy: Corporate Insolvency and Rescue (Bloomsbury 2012)
O'Donnell and Nicholas Examinerships (2017)

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The Preventive Restructuring Directive 2019/1023 and other member states.

- Questionnaire addressing what we consider to be substantively important rules in the context of court to court co-operation.
- And addressing what we consider to be procedurally important rules in relation to the same question.
- www.ucc.ie/en/jcoere/research and click on link JCOERE Questionnaire (Jurisdictions)

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JCOERE Invitation

- Any ideas or suggestions? Join our network!
- Thank you.

Lynch, Marshall and O'Ferrall: Corporate Insolvency and Rescue (Butterworths, 1996)

Fifth Session – 13.30-15.00 (continued)

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Financial Distress Resolution and the Role of Insolvency Practitioners: Unearthing Best Practices and Crystallizing Regulation

Authors: Animesh Khandelwal & Surbhi Kapur
Research Associates (Law)
Insolvency and Bankruptcy Board of India (IBBI)

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

Background

- Lord Acton's reflection, *"power tends to corrupt, and absolute power corrupts absolutely"*
- **Creative destruction** is an important feature of well-functioning economies
- **Evolving role** of IPs in the EU as well as other jurisdictions vis-à-vis the new norms of preventive restructuring.

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Overview

The new EU Directive on preventive restructuring frameworks[1]		
published in the *Official Journal of the European Union*	26 June 2019; and	entered into force on 16 July 2019.

Fifth Session – 13.30-15.00 (continued)

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Objective

- Harmonize the laws and procedures of EU member states concerning preventive restructurings, insolvency and the discharge of debt.
- first major step in the process of harmonizing Europe's diverse insolvency laws.

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Stakeholders: An Invasive Perspective

- Two (not mutually exclusive) types of stakeholders:
  - (i) Individuals and groups- affect the drafting process of a legislative measure on insolvency law,
    - The Council, the Parliament and the Member States; and
  - (ii) Individuals and groups- affected by a legislative measure on insolvency.
    - Companies, employees, insolvency practitioners and judges

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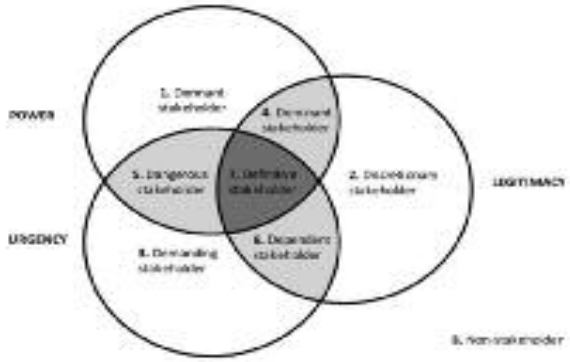
Qualitative Classes of Stakeholders (Matchell, Agle and Wood)



Fifth Session – 13.30-15.00 (continued)

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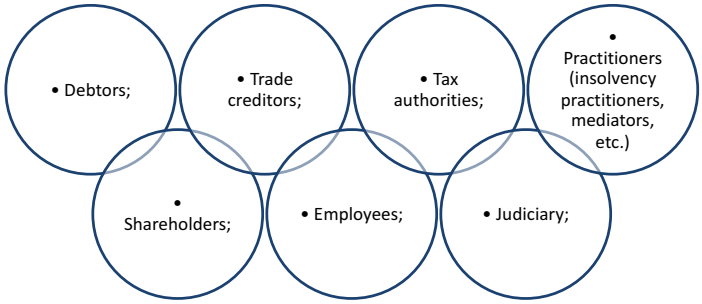
Discretionary stakeholder (attribute: legitimacy)

- Legitimacy for various stakeholders is based on their direct involvement in insolvency and restructuring proceedings, as is the case for



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Definition of IP as per the Directive

"Any person or body	*Appointed by a judicial or administrative authority*	*To assist the debtor and its creditors*
To draft or negotiate a restructuring plan,	*Supervise the activity of the debtor during negotiations on a restructuring and/or*	*Take partial control over the affairs and assets of the debtor"*

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Need for Regulation of the Insolvency Practitioners

- Lack of trust- erosion of trust of the insolvency process
- Ensure- competence and impartiality
- Protect consumers- information asymmetry
- Entry barriers- ensure Standards and quality
- Great responsibility- balanced by proper regulation
- Positive externality of better utilisation of judicial time
- Mitigation of risks- collusion between the CD and the IP or by FCs

Fifth Session – 13.30-15.00 (continued)

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Role of the State (Government) and the regulatory or supervisory bodies

:Consumer protection

- Competition-efficiency gains
- Performance requirements
- Compliance with legal apparatus

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Addressing the entry requirements

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Competence, ethics and integrity

Straightforward and honest

- professional and business dealings

Objectivity –should not allow overriding his business or professional judgment

- Bias;
- Conflict of interests;
- Undue influence of others;

Fifth Session – 13.30-15.00 (continued)

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The Regulation of Insolvency Practitioners

A Conspectus of Emerging Issues in Different Jurisdictions

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United Kingdom

Insolvency is a regulated profession under:

- the Insolvency Act 1986 (as amended),
- the Insolvency Rules 1986 (as amended), and
- the Enterprise Act 2002 (as amended).

Only a licensed insolvency practitioner (IP) may be appointed in relation to formal insolvency procedures for individuals and businesses.

Only a licenced IP can act as:

- a liquidator,
- an administrative receiver or administrator (in respect of company insolvencies), or
- a trustee in bankruptcy (in respect of personal insolvencies)

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Availability of preventive restructuring procedures

The procedures available in the UK include:	1)Schemesof Arrangement
	2)Administration (including pre packaged administration)
	3)Company Voluntary Arrangements
	4)Consensual agreements

Fifth Session – 13.30-15.00 (continued)

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United Kingdom: Regulatory authorities

- Secretary of State for Business Innovation and Skills Department (BIS)
- Recognised Professional Bodies (RPBs)
- The Institute of Chartered Accountants in England and Wales- Accountants
- Lawyers: Law Society of England and Wales

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India

- The Insolvency and Bankruptcy Code, 2016- two-tier regulatory regime- Sections 17 (2) (e), 18, 23(1), (2), 206
- Pre- registration and Post-registration conduct
- Code of Conduct
- Regulation 7(2) – IBBI (Insolvency Professionals) Regulations, 2016- First Schedule
- IBBI (Model Bye laws and Governing Board of IPA) Regulations, 2016

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Enforcement and Adjudicatory Mechanisms

- Orders by the Disciplinary Committee- IBBI
- Orders by the Adjudicating Authority
  - *Advance Power infra Tech Limited ;*
  - *Tirupati Jute industries Limited;*
  - *Madhucon Projects Limited;*
  - *Hahnemann Housing and Development Private Limited;*
  - *Apna Scientific Supplies Pvt. Ltd.*
  - *Shivam Water Treaters Pvt. Ltd.*

Fifth Session – 13.30-15.00 (continued)

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Remuneration of IP

- *Section 208(2)(a)* of the Code stipulate that an IP has to take reasonable care and diligence while performing his duties, including incurring expenses.
- Regulations 25, 25A, 26 and 27- Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016

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Japan

- Ranked as no. 1 by the World Bank Rankings in "Resolving Insolvency".
- Debtor is allowed to continue operations during the restructuring proceedings. (Minji Saisei). In preventive restructuring, the role of the Insolvency Practitioner is therefore to work in close coordination with the debtor.
- Japanese Courts are involved to a large extent in appointing, reviewing and setting the Insolvency Practitioner's remuneration.
- This is key during pre-packaged and informal insolvency resolutions.

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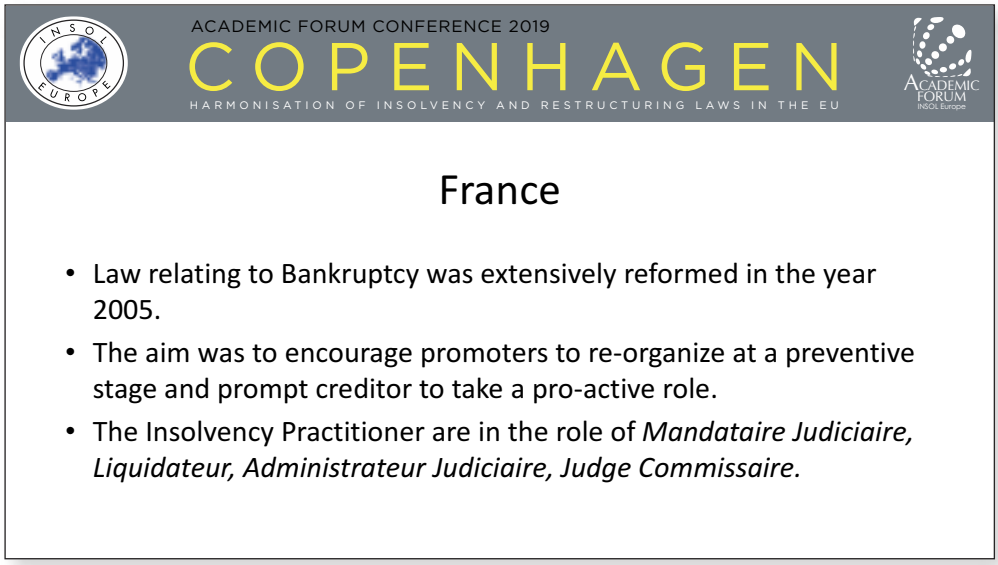
Germany

- The insolvency regime is regulated by the German Insolvency Act- *Insolvenzordnung,* InsO.
- Each Insolvency Practitioner is in the role of an administrator with powers ranging from claw back of transactions option, arranging a pre-pack sale, privileged insolvency claims etc.

Fifth Session – 13.30-15.00 (continued)



Fifth Session – 13.30-15.00 (continued)

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Mediation in restructuring and Insolvency

Prof. Reinout Vriesendorp
Leiden University (The Netherlands)
Erik Selander
DLA Piper (Stockholm)

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Agenda

1. Mediation: what's the role in restructuring and insolvency
2. Mediation at the EU stage
3. Research Project Design
4. Framework for study of mediation
5. Next steps

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1 Mediation: what's the role in restructuring and insolvency

Mediation seems on the rise:

1. In US it has become 'common' practice
2. In EU context relevance of mediation is in development
   1. EU legislator
   2. National legislators
   3. Recommendations by ELI Business Rescue Project
3. INSOL International's College of Mediation (cross-border cases)

Fifth Session – 13.30-15.00 (continued)

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2 Mediation at the EU stage (I)

Commission Recommendation on a new approach to business failure and insolvency (2014)

- Recital 17

  '(…) to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.'

- Recommendation 9(a)

  'The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary: (a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan; (…)'

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2 Mediation at the EU stage (II)

Proposal for the EU directive on restructuring an insolvency (2016) (Proposal 2016)

- Reiterating the position of the Commission in the Recommendation:
  Recital 18

  '(…) The appointment of a restructuring practitioner, whether a mediator supporting the negotiations of a restructuring plan or an insolvency practitioner supervising the actions of the debtor, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. (…).'

- Article 25(1)

  'Member States shall ensure that mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters receive the necessary initial and further training in order to ensure that their services are provided in an effective, impartial, independent and competent way in relation to the parties.'

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2 Mediation at the EU stage (II)

What is a mediator?

- Proposal 2016: No definition of mediator.
- Impact assessment 2016, Glossary:

  Mediator = "A person who **assists the debtor and creditors in negotiations on a restructuring plan**".

- Article 2(15) of Proposal 2016

  Definition of the practition in the field of restructuring (PIFOR):
  '(…) means any person or body appointed by a judicial or administrative authority to carry out one or more of the following tasks:

  (a) to **assist the debtor or the creditors in drafting or negotiating a restructuring plan;**
  (b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;
  (c) to take partial control over the assets or affairs of the debtor during negotiations.'

Fifth Session – 13.30-15.00 (continued)

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2 Mediation at the EU stage (II)

And the 'mediator' disappears …

- Supporters
  From the Commission public consultation it follows that support for involving a mediator on a case-by-case basis was supported, in particular, by:
  - Businesses and business support organisations
  - Credit and financial institutions
  - Most EU Member States (AT, BE, EE, DE, EL, HU, IE, FR, FI, IT, LV, LT, PL, SK, SI)

- But, here came the critiques
  - **Council**
    - During Council Working Group Discussions, EU Member States discuss deletion of 'mediator'
    - As of 15 May 2018, the 'mediator' is deleted from draft texts
  - **EP** supports inclusion of mediation for a long time, but is deleted as of 24 September 2018 in its draft report

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Why was it removed?

- **Council discussions:**
  - Swedish delegation:
    "We suggest that the word "mediator" is deleted, in accordance with the working group discussions"
  - UK delegation:
    "Mediators are not subject to mandatory professional regulation in the UK and we would prefer the reference to mediators to be removed."
- **PIFOR** is considered an umbrella including the mediator
  - Note of explanation finds requirements for PIFOR 'too descriptive', and prefers a principle-based approach.
  - Leaving room to the interpretation of Member States
- **Compromise**:
  - introduce general principles with a margin of interpretation for Member States

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What could the consequences be?

- Clear definition of a 'mediator' is missing
- Mediation is mostly left to the interpretation of Member States
- Article 2(12) states on the PIFOR:
  - 'practitioner in the field of restructuring' means **any person or body appointed by a judicial or administrative authority** to carry out, in particular, one or more of the following tasks:
    (a) **assisting** the debtor or the creditors in drafting or **negotiating a restructuring plan**; (…)'

Fifth Session – 13.30-15.00 (continued)

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Appointed mediator; an oxymoron?

Voluntary nature is essential element of mediation

Possible approaches:

1. Judge suggests mediation, leaves choice of mediator to the parties
2. Mediators are chosen by a debtor, creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority
   - (Recital 88 of the Directive)
3. Parties suggest a mediator of their choice, judge appoints if eligible

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Project design

Aim

To make an inventory of available legislation and to design (elements of) a legal framework regarding the use of mediation as a tool to encourage parties to reach alternative solutions for businesses in financial distress. Such a framework would focus primarily on:

- voluntary, out-of-court, restructurings as well as pre-insolvency proceedings within court led restructurings; and
- proceedings with elements of cross-border issues.

Structure

- Stage 1: Development of a **questionnaire**
- Stage 2+3: 10-15 **national** inventory reports + **international** inventory report
- Stage 4: **Report on mediation** in restructuring and insolvency

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Project governance

Project Team:

1. Prof. Reinout Vriesendorp
2. Erik Selander
3. Gert-Jan Boon
4. Defne Tasman

Advisory Committee

1. Jan Adriaanse
2. Jasnica Garasic
3. Alan Gropper
4. Stephan Madaus
5. Mincke Melissen
6. Nicoleta Mirela Nastasie
7. Ignacio Tirado
8. Jean-Luc Vallens
9. Bob Wessels

National Correspondents

A group of national correspondents will be involved in preparing inventory reports

Fifth Session – 13.30-15.00 (continued)

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Framework for study of mediation

Study of international instruments dealing with mediation, mediators and/or actors in insolvency:

1. UNCITRAL Conciliation Rules, 1980
2. UNCITRAL Legislative Guide on Insolvency Law, Part II, 2004
3. Directive 2008/52/EC of the EP and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
4. INSOL Europe Insolvency Office Holder Project, 2014
5. INS0L Europe Restructuring and Turnaround Professional Project, 2015
6. European Law Institute, Instrument on Rescue of Business in Insolvency Law, 2017
7. EU Directive on Restructuring and Insolvency 2019/1023

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Framework for study of mediation

- **Introductory questions**
  - Existing legal framework for mediation
- **When and how to:**
  - Commence mediation
  - Involve a mediator
- **Selection, appointment or involvement, and removal of mediator**
  - Licensing of mediators
  - Liability/insurance
  - Assignment with a mediator
  - Informing third parties of mediation
  - Duty/right to be heard (in legal proceedings)
  - Remuneration
  - Costs and expenses
  - Accountability of a mediator
  - Replacement/removal of a mediator

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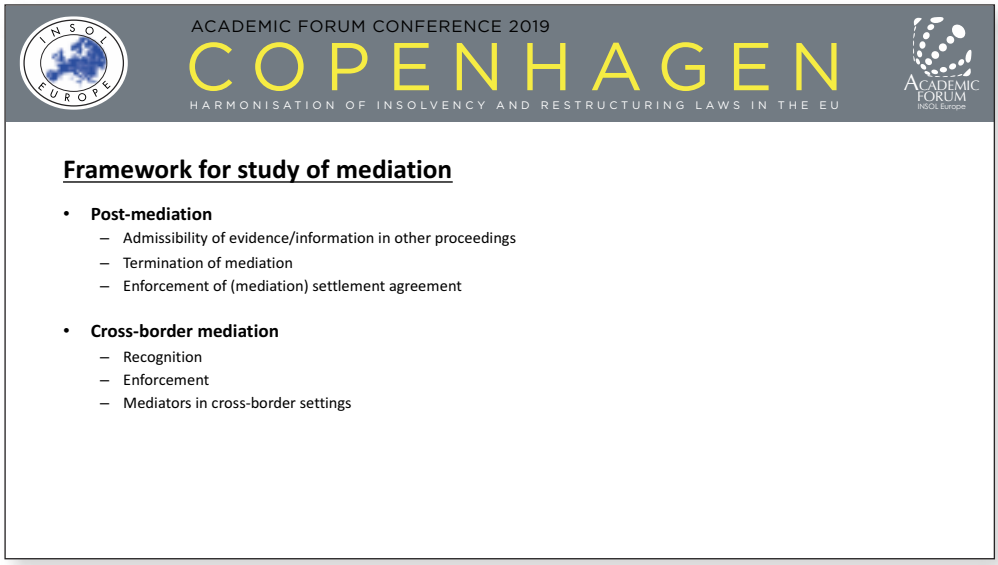
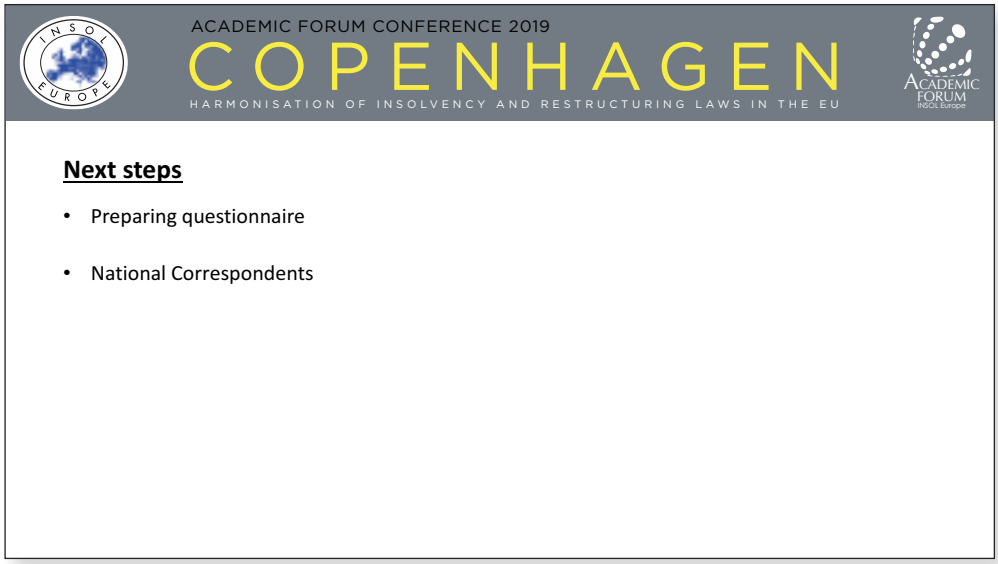
Framework for study of mediation

- **Process of mediation**
  - Effects of commencing mediation on involved/third parties
  - Access to information by mediator
  - Settlement agreement
  - Supervision/oversight of mediator
- **Roles & responsibilities**
  - Powers of a mediator
  - Duties of a mediator
  - Relation of mediator and third parties (and vice versa)
  - Communication by/with mediator (internal and external)
- **Professional standards;**
  - Education
  - Professional skills/qualifications
  - Professional ethics
  - Disciplinary action against a mediator

Fifth Session – 13.30-15.00 (continued)





Edwin Coe Practitioners Forum – 15.00-16.30

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Taming the secured creditors: restraints and protection during the pre-insolvency stay

Vincent van Hoof

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Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

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Article 6

Stay of individual enforcement actions

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

Edwin Coe Practitioners Forum – 15.00-16.30 (continued)

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

Article 7

Consequences of the stay of individual enforcement actions

4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

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Article 7

Consequences of the stay of individual enforcement actions

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such.

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A comparative analysis of the stay in formal insolvency procedures

- Austria
- Belgium
- France
- The Netherlands

Speaker Papers: Wednesday

Viability test in a European corporate debt restructuring framework

First Session – Lydia Tsioli

In the field of corporate distress, the real challenge for legislators has long been the provision of a framework that facilitates the restructuring of financially distressed yet viable companies and, at the same time, filters out non-viable ones towards liquidation. In this context, the correct *definition* of the notion of viability becomes highly crucial in order for it to serve its *filtering function*.

This presentation focuses on the Directive on preventive restructuring frameworks and specifically on its eligibility criterion for entry into the framework. The directive supposedly aims at enabling the restructuring of 'viable' companies. However, while the European legislators seem to recognise and theory to suggest that insolvent companies may well be *economically viable* and thus worth being restructured, the directive restricts eligibility to the framework to non-insolvent companies only. As such, it apparently defines viability as a function of the company's solvency/insolvency. While this approach may be explainable on political grounds, it is questionable from an economic perspective and risks undermining achievement of the directive's policy goals.

As such, this presentation evaluates the directive's choices as per the viability issue firstly from an economic standpoint and secondly against the three prescribed policy goals of the new framework. In light of this evaluation, it suggests that the optimal treatment of the viability issue calls for a reconsideration of the structure of a European restructuring framework as a preventive one. Finally, it highlights some key considerations towards the direction of ultimately finding the most optimal criteria for entry of viable companies into a European corporate debt restructuring framework.

Implementation of the Restructuring Directive: Enforcing Reorganization Plans in the US

First Session – Prof. Michael Veder & Prof. G. Ray Warner

The Netherland's response to the European Union's Preventive Restructuring Framework Directive is the proposed Act on the Confirmation of Private Plans that provides two options for pre-insolvency restructuring. One is a public proceeding that will be listed in Annex A to the EU Insolvency Regulation while the other is a confidential proceeding that will not be listed in Annex A.

The proposal draws heavily from both the English scheme and the U.S. chapter 11 and incorporates aspects of each procedure. In addition, the proposal includes provisions designed to permit a group restructuring even if members of the group have no COMI or establishment in The Netherlands.

If the new Dutch scheme is to become a world-leading restricting tool, the resulting restructuring plans will need to be enforceable in the EU and the United States. This paper analyzes how the U.S. courts will treat the major innovations of the Dutch proposal and concludes that Dutch schemes likely will be enforceable in the United States.

The future of reorganization procedures in the era of pre-insolvency law

First Session – Aurelio Gurrea-Martínez

Several countries and regions around the world, including Singapore, the United Kingdom, and the European Union are amending their restructuring framework to implement a pre-insolvency mechanism that includes most of the features existing in the US Chapter 11. However, unlike what happens in the United States, where unsuccessful reorganizations lead to Chapter 7 liquidations, companies using this 'de facto Chapter 11' (DFCH11) will be still allowed to use formal reorganization procedures. This paper argues that, while the rise of the DFCH11 is not necessarily undesirable provided that various protections are put in place, jurisdictions implementing this restructuring tool need to adapt their formal insolvency framework to this new era of 'pre-insolvency law'. Otherwise, some inefficiencies can be created from the lack of coordination between insolvency and pre-insolvency law, since non-viable firms as well as viable businesses managed by the wrong people can opportunistically delay the commencement of a liquidation procedure even when it is the most desirable outcome.

The Restructuring Directive and its impact on directors' duties and liabilities: a comparative analysis of the Netherlands, Germany and the United Kingdom

Second Session – Michelle van Haren

The Restructuring Directive aims to give viable enterprises in financial difficulties access to preventive restructuring frameworks to enable them to restructure at an early stage. In this presentation, I will study the Restructuring Directive from the perspective of an important affected stakeholder: the company director. Article 19 of the Directive contains duties for directors when there is a likelihood of insolvency of the company. Under the Directive, Member States are obligated to ensure that judicial or administrative authorities take the rules on duties of directors laid down in this Directive into account when assessing whether a director is to be held liable for breaches of duty of care.

My paper contains an impact assessment of the final Article 19 on the current framework of directors' duties and liabilities for the Netherlands, Germany and the United Kingdom. In this presentation, I will summarize my preliminary conclusions. Firstly, I will argue that the obligations outlined in Article 19 of the Directive constitute rather vague norms. Furthermore, these norms are to a large extent already reflected in the directors' duties regimes of the studied member states. Therefore, the wording of Article 19 is relatively ineffective in these states. Secondly, I will draw your attention to the way in which judicial authorities in the studied member states can take the directors' duties stemming from the Directive into account when assessing directors' liability. For Dutch law specifically, I will argue that it would be incompatible with the purpose of the Directive if directors would face liability for entering into obligations which are meant to continue the business as part of a reasonable and realistic restructuring plan as provided for by the Directive. For German law, directors' incentives to negotiate and implement a preventive restructuring plan may be hindered by the threat of liability for not pursuing their duty to file for the commencement of insolvency proceedings. The duty to file should therefore be suspended. As far as the United Kingdom is concerned, the Brexit decision makes it unclear what effect, if any, the Directive will have in the United Kingdom. In conclusion, by reflecting on the rationale of the Directive in director's liability judgments, courts may contribute to the overall goal of promoting preventive restructuring.

Liability of Company Directors in Case of Pre-Insolvency Preferential Payments: Should Directors Be Worried?

Second Session – Arpi Karapetian

Preventive restructuring frameworks entail an essential pillar within the EU insolvency and restructuring directive (hereafter: the Directive). Facilitating preventive restructuring includes, inter alia, the protection of new and interim financing and a stay. However, directors' duties and responsibilities to creditors in the vicinity of insolvency make an important part of the overall legal structure aiming to enhance preventive restructuring. One share of the duties pertains to the situation in which directors make preferential payments to certain creditors. There is no rule in law which deems preferential payments to creditors unlawful. De debtor is allowed to pay its creditors in the order he wishes as long as he is able to pay its debts as they fall due. However, selective payments become problematic when the company is having financial difficulties. In that case, there is always a risk that other creditors will go unpaid if an insolvency procedure is opened subsequently. The preferential payment, which took place on the eve of insolvency, would in such case violate the pari passu principle. The purpose of the presentation is twofold. Firstly, it seeks to provide insight into the conflict of interests that emerges within the concept of preferences: the interest of the creditors arguably collides with the (public) interest of company rescue. This is particularly interesting with regard to article 18 of the Directive which sums up directors' duties where there is a likelihood of insolvency. Secondly, it will elaborate on the difficulty of separating good preferences from bad preferences. In that regard, certain suggestions will be made.

The Debtor in Possession in an EU perspective

Second Session – Gert-Jan Boon

Preventive restructuring frameworks entail an essential pillar within the EU insolvency and restructuring directive (hereafter: the Directive). Facilitating preventive restructuring includes, inter alia, the protection of new and interim financing and a stay. However, directors' duties and responsibilities to creditors in the vicinity of insolvency make an important part of the overall legal structure aiming to enhance preventive restructuring. One share of the duties pertains to the situation in which directors make preferential payments to certain creditors. There is no rule in law which deems preferential payments to creditors unlawful. The debtor is allowed to pay its creditors in the order he wishes as long as he is able to pay its debts as they fall due. However, selective payments become problematic when the company is having financial difficulties. In that case, there is always a risk that other creditors will go unpaid if an insolvency procedure is opened subsequently. The preferential payment, which took place on the eve of insolvency, would in such case violate the pari passu principle. The purpose of the presentation is twofold. Firstly, it seeks to provide insight into the conflict of interests that emerges within the concept of preferences: the interest of the creditors arguably collides with the (public) interest of company rescue. This is particularly interesting with regard to article 18 of the Directive which sums up directors' duties where there is a likelihood of insolvency. Secondly, it will elaborate on the difficulty of separating good preferences from bad preferences. In that regard, certain suggestions will be made.

Speaker Papers: Thursday

Intra-group financial support in insolvency: finding the balance between group interest and protection of creditors' rights

Third Session – Ilya Kokorin

Traditionally, insolvency law and company law have been treating companies atomistically. This approach is underpinned by the doctrines of separate legal personality or entity shielding, which recognise and respect separateness of a company from its shareholders. However, modern economic reality leads to the creation of global interconnected and interdependent economic enterprises – groups, comprising of dozens or even hundreds of legal entities, spanning across national borders and operating in different parts of the world. In light of this development, the strict entity-by-entity approach could be outdated and lead to suboptimal outcomes. In case of a group financial crisis and insolvency, this approach may result in piecemeal liquidation and disintegration of otherwise viable (but distressed) business. In my article I attempt to overcome this limited "singular" vision by analysing the context of intra-group financial (rescue) support. I show that current rules applicable to intra-group transactions (i.e. intra-group loans, guarantees and collateral) greatly vary among European jurisdictions and may generally disincentivise value creating financial support in times when it is most needed. The recently adopted EU Directive on preventive restructuring frameworks (2019), while bringing some harmonisation to otherwise diverging transaction avoidance rules, and supporting rescue financing, does not alleviate this complexity, but actually worsens it.

By relying on the principle-based approach and studying the EU bank recovery and resolution framework as a reference point, I propose supplementing the existing European regulatory regime with special rules to facilitate intra-group financial support, while establishing necessary safeguards against group opportunism. To do so, I suggest 1) to extend the Directive's protective framework to cover intra-group financial support, 2) to recognise at the European level the value and importance of the category of a group interest in the context of intra-group rescue financing, 3) to establish an ex ante approval mechanism for certain pre-insolvency group support transactions, and 4) to adopt a guidance with relevant factors that restructuring experts, creditors and finally courts may take into account when approving intra-group financial support. While the article primarily concentrates on the EU area, its findings may be equally relevant for the treatment of global enterprise groups, with EU and non-EU group members facing financial distress and requiring group-wise crisis prevention and resolution.

The insolvency practitioner and personal data

Third Session – Minke Reijneveld

In May 2018, the General Data Protection Regulation (GDPR) has become enforceable within the EU. The GDPR has a twofold aim. On the one hand, it aims to protect natural persons (the 'data subjects') against the unlawful processing of their personal data. On the other hand, the GDPR ensures the free movement of personal data. The GDPR aims to protect the fundamental right to data protection.

The GDPR lays down the framework for the protection of natural persons with regard to the processing of personal data. It has a broad material and territorial scope. Every processing of personal data has to take place under the responsibility of a controller. This controller is the natural or legal person that determines the purpose and means of the processing of personal data. Every processing of personal data must also be in line with the principles related to the processing of personal data. Article 5 GDPR enlists these principles, which are lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality. This implies, amongst others, that a processing shall only be lawful if one of the legal grounds for processing as enlisted in the GDPR exists. Furthermore, the GDPR contains a number of concrete obligations for processors and controllers and certain rights for data subjects.

Due to the declaration of insolvency, the debtor is divested of his assets and an insolvency practitioner is appointed. The insolvency practitioner has as main obligation to administer and supervise the debtor's affairs. After its appointment, the insolvency practitioner becomes responsible for the management of the insolvent estate. This insolvency practitioner can face personal data in the insolvent estate. Examples of such personal data are customer or personnel files and emails. The GDPR is in principle applicable to the processing of personal data during insolvency proceedings within the EU. This means that the GDPR is applicable to the insolvency practitioner when he deals with an insolvent company as well.

This presentation discusses the implications of the GDPR for insolvency practitioners. During the insolvency proceeding, the insolvency practitioner will use certain personal data. For example, the insolvency practitioner consults the email addresses, names, and banking accounts of customers in a company's record in order to categorise and sell this information; he stores phone numbers and home addresses he finds in the personnel administration in order to give the information to an interested third party; he structures a list with all names, banking accounts, and payment information of debtors of the company with the purpose to collect their debts. In all of these examples, the insolvency practitioner determines the purposes and means of the processing of personal data.

The insolvency practitioner is the one who has factually retained control over the debtor's assets. He has the ability to decide what to do with the personal data he finds in the insolvent estate. Therefore, the insolvency practitioner becomes the new controller for any processing of personal data that used to belong to the debtor for which he decides the means and purposes. This imposes upon the insolvency practitioner the obligation to meet all legal duties and obligations imposed upon controllers.

Since there exist neither exemptions in favour of the insolvency administrator nor special provisions for data protection during insolvency proceedings, the rules of the GDPR apply fully to the insolvency practitioner during the settlement of the insolvency proceedings. Therefore, the insolvency practitioner must comply with the rules and principles of the GDPR, and he must be able to demonstrate compliance due to the accountability principle.

Creditors' right to property and restructuring proceedings

Third Session – Caro Van den Broeck

Current restructuring proceedings, including the EU framework, are typically plan proceedings where a majority consent may impose restructuring measures to non-dissenting-creditors. A common feature of those plan proceedings is the requirement that the agreement reached must be "fair" (or 'adequate' or 'equitable') for all parties involved. But the definition of what fair means with regard to the possible reduction of creditors' rights as a result of the restructuring (plan)procedure differs. Where some national legislation implements checks and balances as a best-interest-test, the classification of claims or an absolute priority rule, others leave the interpretation to the discretion of the judge. Consequently, the actual level of creditor protection differs among the Member States.

In order to reach a more concrete minimum definition of the notion of fairness, we will take a closer look at the protection the European Convention on Human Rights offers to creditors. Since their claims are recognised as a "possession", creditors may rely on the peaceful enjoyment of their possession. Therefore, each interference with their right to property, in this case the restructuring plan (proceeding), must be proportionate in order to be a justified interference. More specifically, the relevant case law of the ECHR with regard to that proportionate character will be examined and applied to restructuring proceedings.

Next, we will review whether or not the EU's preventive framework meets those requirements and whether or not, in addition to this, the Directive offers creditors a more far-reaching protection by introducing minimum standards the Member States must implement.

Fairness Standards of the Cross-Class Cram-Down Mechanism in the Restructuring Directive

Fourth Session – Giulia Ballerini

In corporate restructuring, the ability of the plan to be imposed on dissenting parties is of paramount importance, since it helps to overcome the parties' veto rights and the hold-out problem. To this end, while the majority rule can work properly only within a group of claimants with homogenous interests, a cross-class cram-down mechanism, introduced by the Directive on restructuring frameworks (the 'Directive') on the model in Chapter 11 under US Bankruptcy Code, enables the court (or the administrative authority) to force the plan on whole dissenting classes. This power is, however, subject to certain conditions, the central one being that the plan is 'fair'. A core issue in debt restructuring is, therefore, to determine what are the criteria for a plan to be fair.

While drafting the text of the Directive, the EU Institutions have long debated this issue. On the one hand, the EU Commission, in its 2016 Proposal for a Directive, suggested adopting the US-like 'absolute priority rule' (the 'APR'), requiring that a dissenting class of creditors is paid in full before any value can be distributed to a lower ranking class, thus respecting the applicable priority rules in the distribution of the value created through the plan. On the other hand, the Council of the EU demanded a more lenient and flexible standard and introduced the EU version of the 'relative priority rule' (the 'EU RPR'). According to this rule, a plan that treats a dissenting class as favourably as any other class of the same rank and more favourably than any junior class is to be considered a fair one.

After having outlined the benefits and downsides of both rules, it is shown why the arguments advanced by the supporters of the EU RPR (which is very different from the US RPR) are not convincing. Even though the EU RPR might have been introduced for the right reasons, the chosen mechanism is detrimental because the parties are left 'free' to decide whether to deviate from the pre-existing rights (albeit within a certain limit) (self-regulation). This incentivises opportunistic behavior and wealth transfer.

Instead of the EU RPR, a different model, which appears to be more effective at balancing the need for flexibility and that for fairness, is put forward. This approach complies in principle with the APR but at the same time allows alterations therefrom, when justified in specific circumstances, provided that certain conditions are met. These conditions include that a specific procedural mechanism takes place and that the court is enabled to scrutinize the reasons behind the alteration (public regulation). The power to alter the APR is subject to evidentiary burdens aimed at showing that the alteration is not part of a hold-up attempt (good faith) and that it is efficient. Procedural rules and judicial oversight are key aspects of this model.

After having introduced this model, two examples are given on its reasoning and functioning.

Subsequently, the elements of the Directive which are consistent with the suggested model are displayed.

Finally, some elements of the Directive which create potential obstacles and are inconsistent with the suggested model are indicated, and the Directive is criticized on this basis.

Trade Credit vs. New / Interim Financing in the context of the Preventive Restructuring

Fourth Session – Andreea Deli-Diaconescu & Flavius-Iancu Motu

Undoubtedly, the interim and the new financial assistance during preventive restructuring frameworks are of the essence of the restructuring landscape itself. Whether they are necessary in order to preserve or to enhance the value of debtor's estate, such financing mechanisms may make the difference between *success* and *failure*. To the same extent, the debtor's capacity to preserve the trade credit flow - most of the time against the co-contractors' opposition - is a second checkpoint in the assessment of the debtor's economic viability. The stay granted by Directive 2019/1032, as well as the protection afforded against the *ipso facto* clauses, are equally necessary and useful tools that allow the debtor to maintain its current *status-quo*. These legal mechanisms circumstantiate the "support" lent by the EU lawmaker to the debtor in (the already installed) financial difficulty.

However, the financial assistance alone is not likely to rescue itself the debtor; it must be accompanied by specific measures that allow the continuation of the debtor's business (as a going concern). Strongly encouraged by the provisions of Directive 2019/1032, the interests of the providers of such „fresh money" - whether interim financing or new financing - may collide with the interests of the trade suppliers parties to contracts in progress at the time the non-payment risk is calculated and / or the priority of recovery is to be determined. Traditionally, the priority of the new finance creditors varied between administrative *expense, super-priority* or even *priming lien*. Directive 2019/1032 seems to be rather generous to the grantors of new / interim financing, while forcing the suppliers into a de facto servitude, making them subject to a strict stay and to the inefficiency of the *ipso facto* clauses in their contracts concluded with the debtor. Apparently, the beneficiaries of these trade credit contracts appear to be the "Cinderella" of the Directive's protection mechanisms. Subsequently, the issues at stake are the appropriate safeguards that should be granted to the providers of "trade credit", and the criteria under which such safeguards must be examined; they appear to be way more complicated than a mere time factor (both interim / new financing and, respectively, trade credit being granted after the commencement of the preventing restructuring proceedings).

The economic rationale behind the financial assistance relies on the conditions to be met for the granting of such financing: *"immediately necessary for the debtor's business to continue operating*" and "*to preserve or enhance the value of that business*". In the case of ongoing contracts, the Directive makes a difference between *"essential executory contracts*" and "*non essential executory contracts*", yet, the consequences may be the same.

The present analysis aims at striking a balance between the vulnerabilities of the trade credit suppliers' position in contrast to the leverage of the providers of financial assistance during the preventive restructuring frameworks, on the one hand, and the upper position the trade credit suppliers might achieve by merely agreeing to grant the debtor better contract terms compared to the risks the fresh money lenders may be reluctant to assume. It also intends to look into the differences, if any, between the priority of the fresh money suppliers (depending on the moment the credit is granted, interim or new financing) and the trade credit suppliers.

The answer to these questions must be, firstly, fair and equitable. Then, it must also be reasonable, therefore not to substantially affect any of the parties involved. However, relativity is a significant factor in insolvency, thus the participants' positions in the insolvency proceedings may vary widely. At the end of the day, what really counts is to have a *stable structure* underlying the Directive's workout mechanisms, that takes into account the subtle differences stemming from the actual specific terms and conditions agreed by the debtor and, respectively, the providers of financial assistance, be they fresh money lenders or trade credit suppliers.

JCOERE Project

Fifth Session – Irene Lynch Fannon and Jennifer LL Gant

The JCOERE Project has as its core research question whether the obligations imposed on courts and practitioners to co-operate in the EIR Recast 848/2015 will be particularly difficult in the context of the introduction of robust preventive restructuring mechanisms envisaged by the Preventive Restructuring Directive (PRD 1023/2019).[1] The Project research questions were driven by experience of the Irish Examinership legislation which is based squarely on Chapter 11 of the US Bankruptcy Code.

To that end the JCOERE Project identified particular substantive rules and procedural features of preventive restructuring frameworks as being potentially problematic for co-operation obligations. The first Report of the JCOERE Project includes a comparative survey of restructuring processes in selected member states as measured against the Directive. The second Report will consider the nature of, understanding and awareness of the co-operation obligations amongst judiciary and practitioners in this context.

As part of the overall JCOERE project, this presentation will consider some of the substantive rules and procedural aspects of the Irish experience. These rules have been considered and applied in cases tried in Ireland. This discussion will add to the theoretical debate currently being conducted in member states regarding implementation of the PRD. The presentation is also designed to be interactive. The JCOERE Project has primarily focussed on the following rules:-

The STAY (and the related threshold question)[2]. Current European debate focuses on a high entry threshold or an alternative easier access to restructuring. The Directive provides an option and does not specifically refer to an insolvency requirement as a condition for restructuring.

INTRA and CROSS CLASS CRAMDOWN

PROTECTION for NEW FINANCING

APPROVAL of COMPROMISE (in particular this aspect raises procedural issues)

The three issues which are addressed in these provisions of the Directive and which appear in the Irish restructuring framework have translated into a debate in Europe regarding what are termed absolute priority rules or relative priority rules.[3] The Irish experience indicates that this debate requires clarification as to what is meant by either of these approaches and raises serious questions about the value of this debate and its outcomes in terms of 'real life' rescue. The assertion made in this presentation that a compromise on pre-existing priorities is part and parcel of any robust preventive restructuring framework will be illustrated by reference to significant Irish case law which includes decisions of the Irish Supreme Court.

Please find the JCOERE Project questionnaire at the end of this workpack.

Footnotes:

1 Enacted in Ireland in 1990 and which is now contained in Chapter 10 of the Companies Act 2014. Modelled on the US Bankruptcy Code Chapter 11 this was probably enacted as part of Ireland's Foreign Direct Investment Strategy sending a clear message to US multinational companies that Ireland's legal system presented with similar features to that of the United States.

2 Ehmke, Gant et al The European Union preventive restructuring framework: A hole in one? IIR August 2019

3 de Weijs, Roelf Jakob and Jonkers, Aart Lambertus and Malakotipour, Maryam, The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR) (March 11, 2019). Centre for the Study of European Contract Law Working Paper No. 2019-05. Available at SSRN: https://ssrn.com/abstract=3350375 or http://dx.doi.org/10.2139/ssrn.3350375
Mokal R et al in Best Practices in European Restructuring.

Financial Distress Resolution and the Role of Insolvency Practitioners: Unearthing Best Practices and Crystallizing Regulation

Fifth Session – Animesh Khandelwal & Surbhi Kapur

While delving deep into the cross-country comparative study of role of practitioners, it is important to take into account the jurisdictions of the United Kingdom, a fairly old regime with years of rich experiences and that of India, a nascent regime and the fastest growing G20 economy. The aim of the paper is to understand and appreciate the concept of preventive restructuring, and more so, the changed role of practitioners. By making a comparison among highly efficient jurisdictions like Japan on the one hand to rapidly growing jurisdictions like India on the other and between EU and non-EU states, it is our endeavour to formulate key suggestions that will enhance the narrative of the EU directive on preventive restructuring, aid in harmonization of laws among the EU states and benefit the regime of a growing and much-evolving regime of India. Redefining the role of a practitioner in light of preventive restructuring is a mammoth task but one which is of utmost importance in the evolving world business as well as economic arena.

Mediation in restructuring and insolvency

Fifth Session – Erik Selander & Reinout Vriesendorp

The enactment of the EU Directive on restructuring and insolvency (EU/2019/1023) presented the restructuring community with various opportunities and instruments for preventive restructuring. In a restructuring phase, however, the competing interests of debtor vs creditor but also of creditors among themselves, shareholders and other stakeholders form a recipe for conflicts, disputes and litigation. During its genesis, mediation and mediators had been introduced in the draft version, but they disappeared in the final version. Nonetheless, with the introduction of the PIFOR, mediation has become a serious restructuring tool. Under the aegis of CERIL (Conference of European Restructuring and Insolvency Law), Erik Selander and Reinout Vriesendorp, assisted by Gert-Jan Boon and Defne Tasman, lead a research project on this topic in Europe. The presentation will focus on the history of the (non)appearance of mediation in the various stages of the Directive and the aim and scope of the proposed research project. We invite IEAF participants and other interested academics and practitioners to respond and comment on the issues we expect to submit in the questionnaire of this project.

Taming the secured creditors: restraints and protection during the pre-insolvency stay

The Edwin Coe Practitioners Forum – Vincent van Hoof

TextArticle 6 of the Restructuring Directive requires that Member States grant debtors a stay on individual enforcement actions. The stay may cover all types of claims, including secured claims and preferential claims. Member States may provide that the stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

How the Member States will treat secured creditors during the stay will affect the feasibility of a pre-insolvency arrangement. If the stay does not affect secured creditors, a debtor would have to look on as (some of) his secured creditors take away collateral to have it sold in execution, even if the collateral is essential to the debtor's course of business and the prevention of insolvency. This would make the notion of article 5 (the debtor remaining in control of its assets and day-to-day operation of business) illusory. The prevention of insolvency could become very unlikely. If the stay prevents secured creditors from enforcing their security rights, there could be some very undesirable side effects. For example, if the value of the collateral is likely to decrease during the stay, a secured creditor could enforce his security as soon as possible before a stay is granted. The slightest doubt about the debtor's solvency could trigger enforcement. It could also lead to the creditor getting rid of the non-performing claim by selling it to a professional credit purchaser.

The Directive does not harmonise the effects of the stay for security collateral. It is up to the Member States to decide if the debtor can use or sell the collateral and if the secured creditors have protection against the debtor's dealings with the collateral. The Member States need to balance the conflicting interests of the creditors and debtor.

In the paper, I will discuss if and how secured creditors should be tamed on a national level in implementing the stay of article 6 of the Directive to make the prevention of insolvency feasible. Lessons can be drawn from how some Member States already deal with secured creditors during a stay in their (formal) insolvency proceedings aimed at restructuring. Special attention will be paid to the discrepancy between secured creditors with and secured creditors without executory contracts.

Date for your Diary

EASTERN EUROPEAN COUNTRIES' COMMITTEE CONFERENCE

22 MAY 2020

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Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project:

Jurisdiction Questionnaire

Introduction

Thank you for agreeing to contribute to our report mapping the Preventive Restructuring Processes and the new EU Directive[1] as part of the JCOERE Project.

The JCOERE Project (Judicial Co-Operation supporting Economic Recovery in Europe), (Project Number 800807) funded by the EU Justice Programme (2014-2020), will identify obstacles to judicial co-operation presented by both existing domestic restructuring frameworks and the implementation of the Directive. JCOERE is focused on the strengthened co-operation and communication obligations imposed on the courts in the Recast Insolvency Regulation,[2] specifically in the context of preventive restructuring processes.

The Project will explore substantive and procedural rules arising in the context of preventive restructuring, which we consider may present obstacles to co-operation. It will focus on specific substantive rules arising in a typical restructuring process, such as the commencement of secondary proceedings to protect a creditor's interests in the face of the 'cram-down' provisions. The question of whether it is reasonable for a court in the second state to decline jurisdiction becomes more immediate in such circumstances. In addition, the project will explore the challenges that procedural rules might present to co-operation. In short, our hypothesis is that the obligations imposed on courts to cooperate may be challenged in the context of radical restructuring processes.

A key element of the first JCOERE Project Report is to map existing restructuring processes and the Directive, focussing on specific provisions in several EU Member States. Firstly, it will include those partnered on the JCOERE Project: Ireland (University College Cork), Italy (Università degli Studi di Firenze), and Romania (Universitatea Titu Maiorescu).[3] Secondly, contributors from several other Member States have agreed to take part: Germany, The Netherlands, Spain, France, and the United Kingdom (for comparative purposes). Other jurisdictions may be added if contributors are identified and available to participate.

The purpose of this mapping exercise is to firstly determine what preventive restructuring frameworks are already present in the contributing jurisdictions and how they relate to the terms of the Directive. Secondly, the mapping exercise will determine existing rules in member states, in addition to those in the Directive regarding key areas of interest for the project. These include the stay/moratorium; cram-down provisions; the protection of rescue financing; and rights *in rem*. Additional issues which seem to have emerged as being important during the discussions on the Directive are rights accorded particularly

[1] We refer to the current iteration published on 28 March 2019 of P8-T-Prov(2019)0321 Increasing the Efficiency of Restructuring, insolvency and discharge procedures: European Parliament legislative resolution 28 March 2019 on the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency, and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016.0359(COD)) (Ordinary Legislative Procedure – First Reading) (the 'Directive').

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the 'Recast Regulation'), Article 42-44 and Articles 57-59 (see Appendix B).

[3] INSOL Europe is also partnered on the JCOERE Project but represents a network of the jurisdictions that will be contributing.

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to employees and court or judicial approval processes. In addition, the Questionnaire will focus on a number of emerging procedural issues which also may present obstacles to co-operation.

The following questions are intended to assist you in focusing on the particular areas of interest that are key to the JCOERE Project. Please provide references in footnotes to your jurisdiction's legislation or professional rules, where relevant, as well as any other texts or information referred to when providing your report. This will assist us in further research during the project.

If there are questions that are irrelevant to your jurisdiction, please answer with "not applicable".

Appendix A contains the full text of each of the relevant Articles drawn from the iteration of the Directive published on 28 March 2019. Appendix B includes the relevant Articles from the Recast Regulation 848/2015.

Please complete your report directly in the table of questions below but limit your responses to **500 words** for each question and/or sub-question (excluding footnotes). Please submit your answers to Jennifer Gant at jennifer.gant@ucc.ie by **15st June 2019**.

The Questionnaire

Part 1: General Context of Preventive Restructuring

The Preventive Restructuring Directive in its current iteration as of 28th March 2019 gives EU Member States a suggested framework and options for approaching the development and improvement of preventive restructuring procedures aimed at creating a more effective European rescue culture and improving the prospects of economic recovery at an earlier stage in the life cycle of companies. The Directive states in Article 4(1) that:

> *"Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity."*

The first part of this questionnaire aims to investigate your jurisdiction's current preventive restructuring frameworks, practices, and underpinning principles in light of the Directive. Please consider Article 4(1) set out above as you discuss the current provisions in place in your jurisdiction and whether they comply fully with this Article. The complete Article 4 is set out in Appendix A.

1	Please specify existing legislative frameworks (if any) in your jurisdiction that provide for the preventive restructuring of companies, specifying the relevant legislation, legislative provisions, and/or rules that regulate the framework along with the date of implementation. (Please note that there will be specific questions in Part II and Part III in relation to specific substantive and procedural rules so there is no need for a high level of detail on these specific aspects here in Part I).
➡	
2	What are the stated functions and aims of your jurisdictions' preventive restructuring frameworks? Please refer to legislative policy documents or from your jurisdiction where relevant, statements in the legislation or statements by courts in applying the legislation (e.g. the Cork Report in the UK).[4]
➡	

[4] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

Part II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The JCOERE project focuses on a selection of provisions found in restructuring processes by type. The following questions are directed at these provisions (Articles 6, 9, 10, 11, 13, and 17).

Introduction to Part II

The provisions typically found in most effective restructuring processes and which are also present in the Directive include first that the debtor remains in possession; second, that individual enforcement actions are stayed in order to provide the debtor with "breathing space; third the adoption of restructuring plans (cram-down) and cross-class cram-down; and the protection of new and interim financing.

The full text of each Directive Article is set out in the Appendix A for your ease of reference.

The following questions are based on the assumption that your jurisdiction has preventive restructuring frameworks. If this is not the case, please write "not applicable" as your answer.

3	**Article 6: Stay of Individual Enforcement Actions**
3.1	Article 6 of the Directive states that: "*Member States shall ensure that debtors may benefit from a stay of individual enforcement to support the negotiations of a restructuring plan in a preventive restructuring framework*."
	a) Does your jurisdiction provide for a stay of individual enforcement actions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of your jurisdiction's stay or moratorium and how it compares with the terms of Article 6(1-8) of the Directive.
	
	b) Will your jurisdiction have to make changes to comply with Article 6 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(1-8) of the Directive.
	
3.2	Article 6(9) sets out a mandatory provision allowing for the removal of the stay by a judicial or administrative authority under certain conditions.

	a. If your jurisdiction provides for a stay, does it also provide for its removal by judicial or administrative authorities and under what conditions are authorities empowered to remove it?
	
	b. Will your jurisdiction have to make changes to comply with Article 6(9) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(9).
	
4	**Article 9: Adoption of Restructuring Plans** Article 9(1) provides for the adoption of restructuring plans: *"Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties."* The full Article sets out conditions under which such plans should be adopted, including the creditors' right to vote on the adoption of restructuring plans, the creation of creditor classes for voting purposes, and an intra-class cram-down.
4.1	Article 9(2) requires that Member States to *"ensure that affected parties have a right to vote on the adoption of a restructuring plan",* allowing for certain exclusions from this rule in 9(3).
	a. Does your jurisdiction provide voting rights to affected parties of a restructuring plan and what, if any, exclusions are permitted? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with Article 9(2-3) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(2-3).
	
4.2	Article 9(4) requires that Member States treat affected parties in separate classes, *"which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law."*
	a. Does your jurisdiction provide for the separation into classes of those parties affected by a restructuring plan? b. What classes does your jurisdiction recognise? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.

	c. Will your jurisdiction have to make changes to comply with Article 9(4) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(4).
4.3	Article 9(5) allows for judicial or administrative examination of voting rights and the creation of classes when a request for confirmation of a plan is submitted and, further, allows Member States to *"require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage…"*
	a. Does your jurisdiction provide for the examination, confirmation, approval or otherwise of the voting rights and separation into classes of affected parties for the purpose of approving a restructuring plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	b. Will your jurisdiction have to make changes to comply with Article 9(5) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(5).
4.4	Article 9(6) includes a compulsory intra-class cram-down element: *"A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class."* The optional provisions are that member states may provide that a majority in number in each class must also agree. In addition, the majority can be set down by member states but cannot be higher than 75%. Article 9(7) provides that formal votes can be replaced by an agreement with the requisite majority.
	a. Does your jurisdiction have intra class cram down provisions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive.
	b. Will your jurisdiction have to make changes to comply with Article 9 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 9(4).

5	**Article 10: Confirmation of Restructuring Plans**
5.1	Article 10(1) provides that: "*Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:* *(a) restructuring plans which affect the claims or interests of dissenting affected parties; (b) restructuring plans which provide for new financing; (c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law."*
	a. Does your jurisdiction provide conditions under which restructuring plans must be approved by administrative or judicial authorities? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	b. Will your jurisdiction have to make changes to comply with Article 10(1) of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 10(1).
5.2	Article 10(2)(a-e) provides for a number of conditions under which a restructuring plan can be confirmed by judicial or administrative authorities (see Appendix A), while 10(3) requires Member States to ensure that administrative authorities can refuse to confirm a plan where the plan "*would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business."*
	a. Are there conditions specified for judicial or administrative confirmation and are such authorities also empowered to refuse to confirm a plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	b. Will your jurisdiction have to make changes to comply with the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment Article 10 of the Directive provisions in this context.

6	**Article 11: Cross-class Cram-down**
6.1	Article 11(1)(a-b) provides for the application of a cross-class cram-down in the adoption of restructuring plans: "*Member States shall ensure that a restructuring plan which is not approved by affected parties as provided for in Article 9(4) in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils*" certain conditions Articles 10(2) and (3).
	a. What is the current position regarding a cross-class cram-down for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, specifically Art 11(1)(a-b).
	
	b. Will your jurisdiction have to make changes to comply with the Directive? If so please describe any currently suggested changes to your provisions in light of the enactment of Article 11(1)(a-b) of the Directive.
	
6.2	Article 11 offers options for dealing with affected and dissenting classes of creditors in a cross-class cram-down. Under Art 11(1)(c), one of the conditions for approval by a judicial or administrative authority of a cross-class cram-down is if the plan: "*…ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.*" A derogation from this condition is also offered in 11(2): *"By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan."*
	a. If your jurisdiction provides for a cross-clam down, how does it treat dissenting classes of creditors? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular 11(1)(c) and 11(2).
	
	b. Will your jurisdiction have to make changes to comply with the treatment of classes of creditors in the cross-class cram-down? If so, please describe any

	currently suggested changes to your provisions considering the enactment of Article 11(1)(c) and 11(2) of the Directive.
	
6.3	Article 11 goes on to provide the following regarding an 'unfair prejudice' test. *"Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."*
	a. If your jurisdiction provides for a cross-clam down, does it apply a similar test in the current state of your jurisdiction's legal framework? If not, is there a different approach adopted by your jurisdiction in the context of the cross-class cram-down? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular this derogation at the and of Article 11.
	
	b. Is your jurisdiction likely to avail of this 'unfair prejudice' test derogation? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11 of the Directive.
	
7	**Article 13: Workers** Article 13 provides for the protection of workers in the context of preventive restructuring, stating that *"Members States shall ensure that individual and collective workers' rights, under Union and national labour law…are not affected by the preventive restructuring framework."*
	a. What is the current position regarding workers in the context of preventive restructuring in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 13 of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with the treatment of workers in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions in light of the enactment of Article 13 of the Directive.
	

8	**Article 17: Protection for New Financing and Interim Financing** Article 17 provides that "*Member States shall ensure that new financing and interim financing are adequately protected*." This includes protecting it from claims that it is detrimental to the general body of creditors, but also includes an option to provide a "super-priority" in 17(4).
	a. What is the current position regarding new and interim financing for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 17 of the Directive
	
	b. Will your jurisdiction have to make changes to comply with Article 17 in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 17 of the Directive.
	
	Part III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive
9	**Article 5: Debtor in Possession**
	Article 5 includes an option for the involvement of an insolvency practitioner in relation to preventive restructuring processes.
	a. What is the current position regarding insolvency practitioners in restructuring processes in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 5 of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with the requirements regarding the involvement of insolvency practitioners in relation to preventive restructuring processes?
	
10	**Rights *in Rem***
10.1	How are rights *in rem* defined in your jurisdiction? Please describe a type of right in rem which arises in insolvency proceedings.
	

10.2	Given the interaction of Article 8 of the Recast Insolvency Regulation (see Annex B) on the protection of rights *in rem* and Article 11 of the Preventive Restructuring Directive allowing for a cross-class cram-down, there is a potential conflict between the protection of rights *in rem* and the application of a cross-border cross-class cram-down. Consider Article 8 in Annex B and Article 11 in Annex A and indicate whether or not this conflict is present in your jurisdiction. Please provide examples, reference to policy, principles, and legislative texts where relevant.
	
11	**The Role of Judicial or Administrative Authorities.**
	Many of the Articles in the Directive refer to judicial or administrative authorities exercising power or authority in various ways. However, there can be a significant difference in the characteristics of *judicial* and *administrative* authorities, whether within a single jurisdiction or in a cross-border situation. What authority is empowered to confirm, approve, or examine plans and other aspects of preventive restructuring frameworks, such as those referred to in the questions in Part II above? From whence is their authoritative competence derived? If an administrative authority is involved are these subject to procedural rules which are similar to procedural rules to which courts are subject?
12	In your jurisdiction, are there specific constitutional parameters present that delimit the freedom of judicial communication generally? For example, a constitutional provision that requires that justice is administered in public?
	
13	In your jurisdiction, are there examples of judicial cooperation in case law, focusing on the issues set out in Part II of this questionnaire.
	
14	In your jurisdiction, what are the training and competency requirements for insolvency judges?
	

15	If you have any further comments to provide in relation to the research being conducted on this project, including any other potential contributors from jurisdictions not listed in the introduction above, please do so below.
	

Please accept the JCOERE Team's sincere thanks for the time and effort you have put into this questionnaire. We will keep you updated as to our progress. If you encounter any issues of clarity or require more time to complete your report, please contact Dr Jennifer L. L. Gant at jennifer.gant@ucc.ie.

JCOERE Team

Appendix A: Preventive Restructuring Framework Directive

Articles Relevant to the Questionnaire

Article 4:

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

(a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or

(c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State

within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or

(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, that does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or

(c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. Member States shall ensure that affected parties are treated in separate classes, which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

(a) restructuring plans which affect the claims or interests of dissenting affected parties;

(b) restructuring plans which provide for new financing;

(c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

(a) the restructuring plan has been adopted in accordance with Article 9;

(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;

(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;

(d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;

(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a) it complies with Article 10(2) and (3);

(b) it has been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going-concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

Article 13

Workers

1. Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

(a) the right to collective bargaining and industrial action; and

(b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:

(i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;

(ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;

(iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;

(c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Appendix B

Excerpt from the European Insolvency Regulation (Recast)

Article 8

Third parties' rights in rem

1.The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2.The rights referred to in paragraph 1 shall, in particular, mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right *in rem* to the beneficial use of assets.

3.The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.

Article 42

Cooperation and communication between courts

1.In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

2.In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3.The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of the insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols, where necessary.

Article 43

Cooperation and communication between insolvency practitioners and courts

1.In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

(a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;

(b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and

(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings; to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.

2.The cooperation referred to in paragraph 1 may be implemented by any appropriate means, such as those set out in Article 42(3).

Article 44

Costs of cooperation and communication

The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.

Article 57

Cooperation and communication between courts

1.Where insolvency proceedings relate to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interest. For that purpose, the courts may, where appropriate, appoint an independent person or body to act on its instructions, provided that this is not incompatible with the rules applicable to them.

2.In implementing the cooperation set out in paragraph 1, courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with each other, or request information or assistance directly from each other, provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3.The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the assets and affairs of the members of the group;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols where necessary.

Article 58

Cooperation and communication between insolvency practitioners and courts

An insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies:

(a) shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings; and

(b) may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed; to the extent that such cooperation and communication are appropriate to facilitate the effective administration of the proceedings, do not entail any conflict of interest and are not incompatible with the rules applicable to them.

Article 59

Costs of cooperation and communication in proceedings concerning members of a group of companies

The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.