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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

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Welcome address

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Chair of the INSOL Europe Academic Forum

First Session: Designing and implementing Preventive Restructuring Frameworks in light of the Directive

Chair: Anthon Verweij

Sdu publishers, The Netherlands

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

Viability test in a European corporate debt restructuring framework

Lydia Tsioli

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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)

➢ 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]

How one should define viability in order to serve the said function ? : The theory (1)

- **Financial viability / financial distress**
- **Economic viability / economic distress**

2 separate notions :

- **Financial viability / Financial distress -> Insolvency**
  - A business is in financial distress if it is insolvent on a balance sheet or cash flow basis
  - "A firm can be at once insolvent and economically viable"
    [R. Posner, *Economic Analysis of Law (9th edn,* Wolters Kluwer Law & Business 2014) 550-551]
- **Economic viability / Economic distress -> Going concern value vs liquidation value**
  - If going concern value of the company > its liquidation value → the company is economically viable
    - "Viable firms should be continued because their continuation value is higher than their liquidation value"
      [Matthias Kahl, 'Economic Distress, Financial Distress, and Dynamic Liquidation' (2002) LVII (1) The Journal of Finance 135, 141]
  - What is the best use of the company's assets ?

➢ How one should define viability in order to serve the said function ? : The theory (2)

- B. Adler, D. Baird & T. Jackson on the notions of financial and economic distress:

"Understanding that financial and economic distress are conceptually distinct from each other is fundamental [...]"

*"A firm may be troubled because it cannot succeed in the marketplace. Competitors produce a better product at a lower cost. This first kind of adversity is called **"economic distress"**. It exists **regardless** of a firm's capital structure. The sole owner of a business that attracts no customers will shut it down, even if there are no banks or other creditors in the picture."*

*"On the other hand, a firm may be distressed because it cannot generate sufficient revenue to pay its debts. This second kind of trouble is **"financial distress"**, meaning the firm's income is not enough to pay back what is has borrowed. It is a problem that arises **because** of the firm's capital structure."*

[B. Adler, D. Baird and T. Jackson, Bankruptcy: Cases, Problems, and Materials (4th edn, Foundation Press 2007) 26-29]

- **How one should define viability in order to serve the said function ? : The theory (3)**

- **Corporate viability for restructuring purposes should be defined as "economic viability"** (≠ solvent/insolvent status of the debtor company)

- **Why?**

- This serves the aim of bankruptcy law, which is the efficient allocation of resources (under an **economic analysis of law approach**)

  "Modern bankruptcy law primarily exists to help reduce the frictions that otherwise would impede assets from moving to their highest-and-best use." [T. Jackson and D. Skeel, 'Bankruptcy and Economic Recovery' (2013) Penn Law Legal Scholarship Repository, 2]

- Under such an approach, non-viable companies are those with a more efficient alternate use of their assets [see going concern - liquidation value comparison]

➢ How one should define viability in order to serve the said function ? : The directive

- The theory: Corporate viability should be defined as "economic viability"

- **The directive: Corporate viability has been defined as "financial viability" (= non-insolvency)**
  - Preventive (pre-insolvency) framework
    - Available to debtors that have not yet become insolvent under national law (Recital 24)
    - **"Pre-insolvency" defined very broadly:**

      *Article 4 (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."*

      - ❑ ***likelihood of insolvency vs imminent insolvency***
      - ❑ *Broad definition/scope but the framework includes insolvency law tools*

➢ Contradictory choices/wordings by the European legislators

- "Where a debtor in financial difficulties is not **economically viable** or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole." **(Recital 3)**
- "Preventive solutions are a growing trend in insolvency law. The trend favours approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still **economically viable**." **(Recital 4)**
- "Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example **where a financial restructuring is needed but the business is otherwise viable**." **(Recital 47)**

A step further : *stricto sensu* viability test

- **Article 4 (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."

- **Is this "non-insolvency plus" ?**

➢ 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**

➢ 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

➢ 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.)

➢ Strengthening the Capital Markets Union

- **<u>The problem</u>**

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

➢ 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.

➢ 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.

➢ 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**

➢ Conclusions (2)

- From an economic perspective
- From a political perspective

- **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*

Thank you !

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

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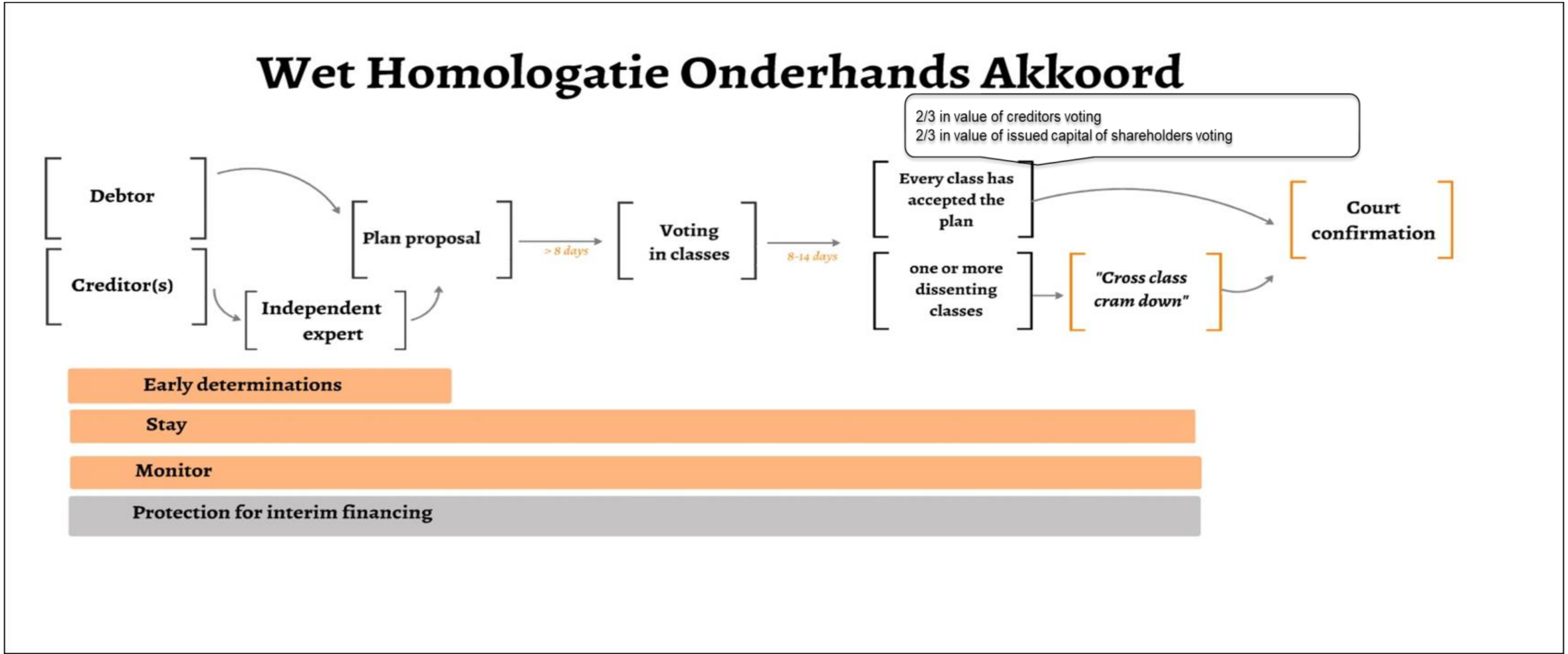
Professor Michael Veder
Radboud University / RESOR, The Netherlands

The Dutch plan procedure in a nutshell



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

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*)

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

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

Recognition in the United States

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

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

Potential U.S. Recognition Issues

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

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

Dr. Aurelio Gurrea-Martínez
Singapore Management University, Singapore

Table of contents

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'

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)

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?

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

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.)

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:
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

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.”

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.”

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

(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

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

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)

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

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?

The United Kingdom

- Brexit
- Directors' duties in the vicinity of insolvency
- Liability

Conclusion

- Article 19 Directive
- Reflecting the purpose of the Directive in directors' liability judgments

Thank you for your kind attention

Liability of Company Directors in Case of Pre-Insolvency Preferential Payments: Should directors be worried?

Dr. Arpi Karapetian
Rijksuniversiteit Groningen, The Netherlands

Content

Introduction

Part I: conflict of interests → article 18 of the Directive

Part II: separating good preferences from bad preferences

Conclusions

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

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

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)

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.

Part I: conflict of interests

- In conclusion:

Where there is a likelihood of insolvency paying a creditor can harm other creditors' interests and at the same time serve the (public) interest of company rescue

Part II: good and bad preferences

- Good and bad are relative qualifications:
  - Good for the continuance of the business but bad for creditors since they face the risk of reduced payment

- Drawing the line: often using reference dates

Part II: good and bad preferences

- English case law :
  - ‘parlous financial state’, ‘doubtful solvency’ ‘a real and not a remote risk of insolvency’
  - re HLC Enviromental Projects Ltd [2013] EWHC 2876 (Ch): ‘directors are not free to take action that puts at real (as opposed to remote) risk the creditors’ prospects of being paid without first having considered their interests rather than those of the company and its shareholders’

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

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

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

Part II: good and bad preferences

- An unacceptable risk with regard to creditors' interests
  - Nature of the paid debt (the preference), nature of its consequences and other circumstances
    - Was the payment necessary (supplier, gas, electra?) and/or common in the business, type of creditor paid?

Conclusions

- Preferences entail a conflict of interests
- Reference dates are not an appropriate tool to separate good from bad preferences
- Alternative approach: taking an unacceptable risk

A legal comparison of the debtor in possession

Gert-Jan Boon
Leiden University, The Netherlands

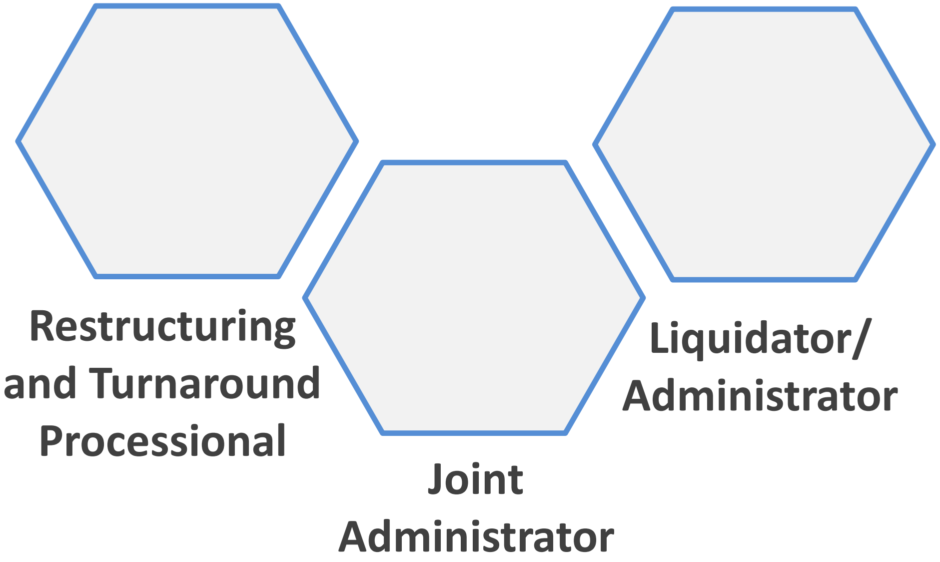
Agenda

1. A study of the DIP
2. The EU DIP
3. DIP in the EIR 2015
4. DIP in the EU Preventive Restructuring Directive 2019
5. Conclusions

A study of the DIP

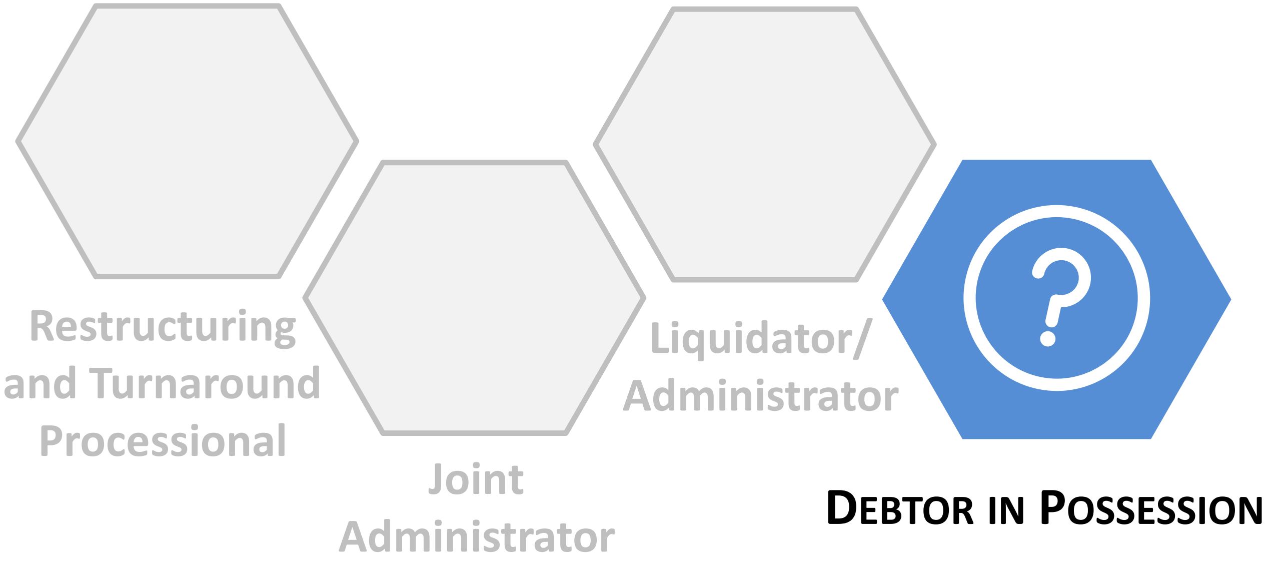
1. A study of the DIP (I)

Governance in restructuring and insolvency:



1. A study of the DIP (II)

Governance in restructuring and insolvency:



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

The EU DIP

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

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?

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)

EIR 2015

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.'

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.'

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

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

3. EIR 2015

DIP versus IP

Cooperation & Communication

1. **Art. 41 CoCo between IPs**
   Applies mutatis mutandis to DIP
2. **Art. 43 CoCo between IPs and courts**
   No reference to DIP
3. **Art. 76 DIP**
   Provisions on IP in Chapter V apply where appropriate to DIP

Secondary proceedings/Undertaking

1. **Art. 36 Giving undertaking**
   No reference to DIP
2. **Art. 38(2) Amending type of secondary proceeding to be opened**
   No reference to DIP

3. EIR 2015: Observations

- DIP introduced in EIR 2015
- Initial aim EC to align IP with DIP was not succeeded
- Currently
  - EIR confers some obligations, rights and powers of IP explicitly **on the DIP**
  - EIR confers some obligations, rights and powers of IP explicitly **on the debtor**
  - Some obligations, rights and powers are available to IP, but **not the DIP (or debtor)**

Reflection: EIR 2000

- No mentioning of DIP, but
- Scope of insolvency proceedings:
  - Debtor is not fully divested (in favour of a liquidator)
  - Insolvency proceedings aimed at liquidation or restructuring insolvent debtor
  - No mandatory court involvement

EU Preventive Restructuring Directive 2019

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

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

4. EU Preventive Restructuring Directive 2019

Objectives

- DIP: overall aim of 'preventive the insolvency' and 'ensuring viability' (Art. 1)
- PIFOR: 'rescuers not liquidators'; 'main objective of restoring the viability of the company'

Role

- DIP: Art. 19
  - consider interests of creditors, equity holders and other stakeholders
  - avoid insolvency
  - avoid deliberate or grossly negligent conduct threatening viability
- PIFOR: 'suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity'(Recital 87; see also Art. 26-27)

Conclusions

5. Conclusions

- Broad definition of DIP
  - Allowing different ‘types’ of DIP
- Scope EIR 2000 comprises DIP concept
- EIR 2015 embeds DIP, but seems inconsistent
- EU Preventive Restructuring Directive 2019

Questions

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Coffee break

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