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(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Healthcare insolvencies: from pain to recovery?

Daniel F. Fritz, Dentons Europe LLP, Germany  
Christian Wallwiener, WMC Healthcare GmbH,  
Germany

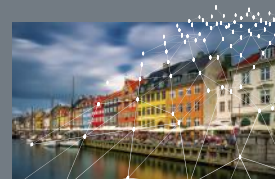
Mr. Dr. Erwin Bos, Simmons & Simmons,  
The Netherlands



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**Daniel F. Fritz**

## **Introduction**

**Recent Developments in Germany  
and  
Case Study:  
Paracelsus-Kliniken Deutschland**



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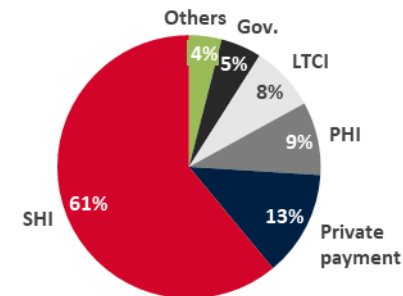
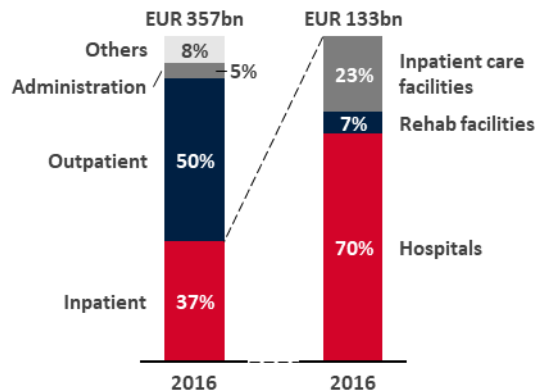


## German acute market *Under Pressure*

### Dual Financing System

Hospital ownership	Public	Non-profit	Private
KHG <sup>1)</sup>	✓	✓	✓
Hospital trusteeship	Fed. government, admin. district, city etc.	Social and charity organisations	Private sponsorship
State hospital plan	✓	✓	✓
Operating costs	Funded fully by statutory or private health insurance on basis of DRG fees		PHI
Investment costs	Funded by public sources in accordance with KHG <sup>2)</sup>		Own funding
Assessment basis for investment costs	Levels of medical care / number of beds / request for individual projects		

Hospitals account for EUR 93bn (~26%) of the total healthcare expenditures



LTCI

PHI

SHI

Long-term care insurance

Private health insurance

Statutory health insurance



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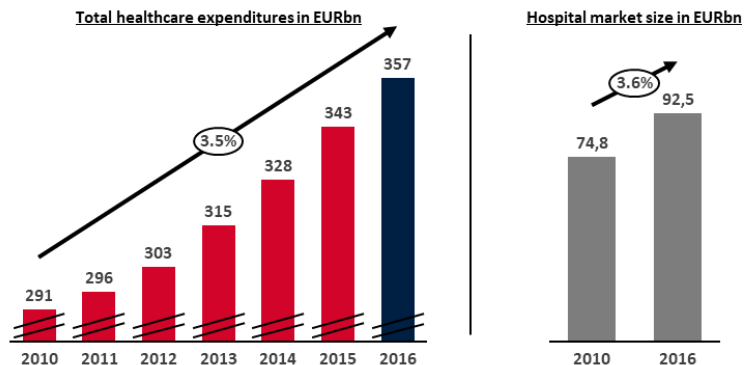
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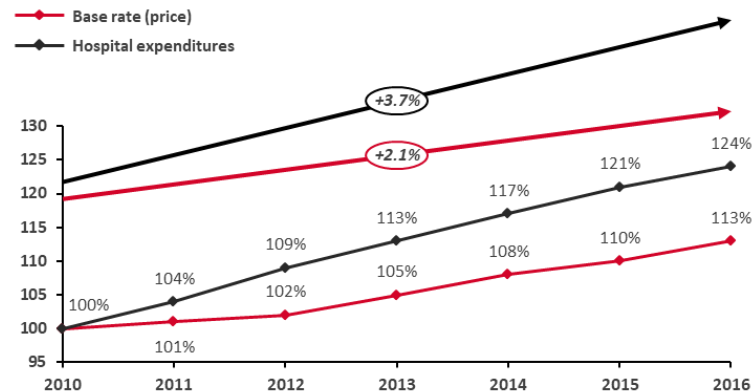


## German acute market *Under Pressure*

### Growth in Expenditures and Market Size



### Hospital Expenditures growing faster than Prices





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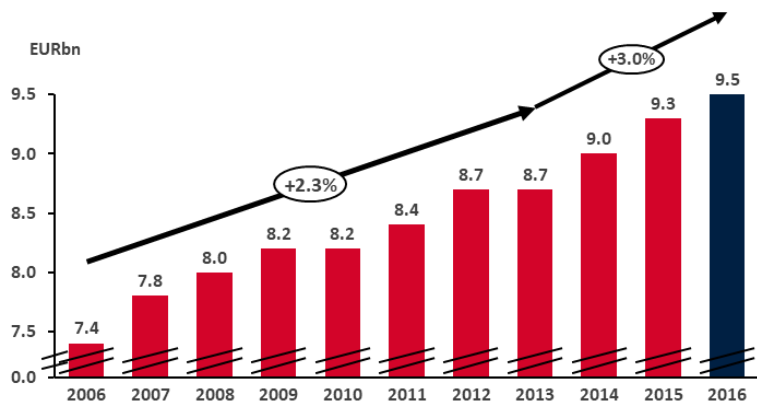
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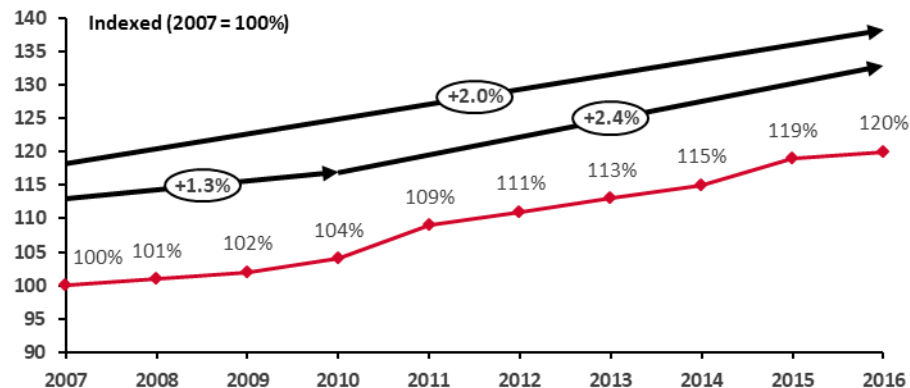


## German rehab market *Steady Growth*

Average Market Growth



Development of price per patient per day

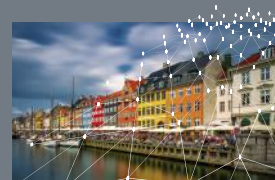




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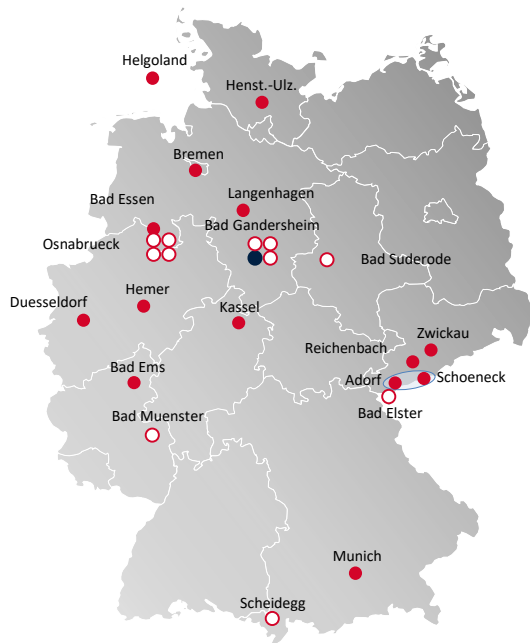
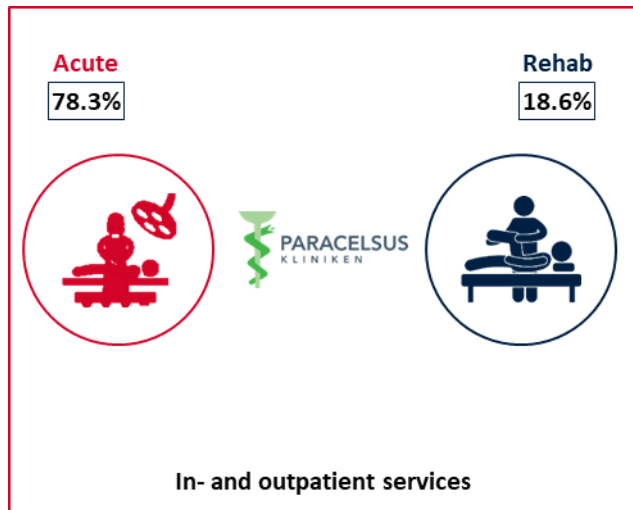
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## Paracelsus-Kliniken

- *Not too big to fail*



**Key Figures**  
Established 1968



40 locations

5,200 employees

100,000 patients p.a.

13 Acute Clinics  
/ aprox. 1,900 beds

11 Rehab Clinics  
/ aprox. 1,700 beds

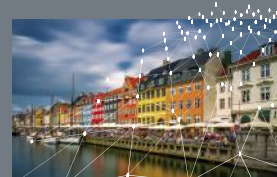
2 Rehab Clinics (CH) / 123 beds



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## Paracelsus-Kliniken

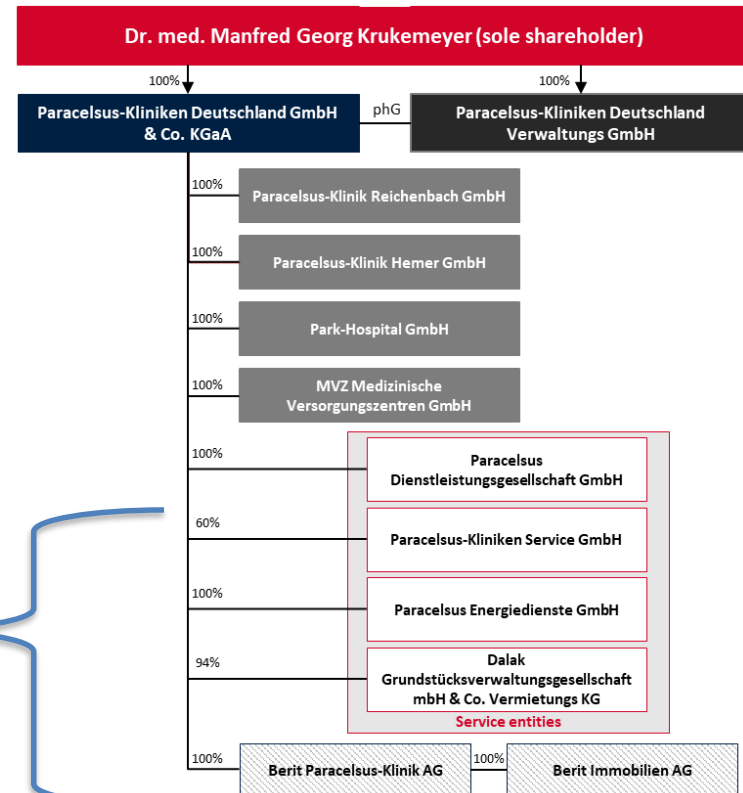
### Restructured via

- *DiP Proceedings*
- *Formally consolidated Group Proceedings*
- *Group COMI in Osnabrück*

Not insolvent

SwissCo (not insolvent)

Source: ACXIT Recovery Management GmbH





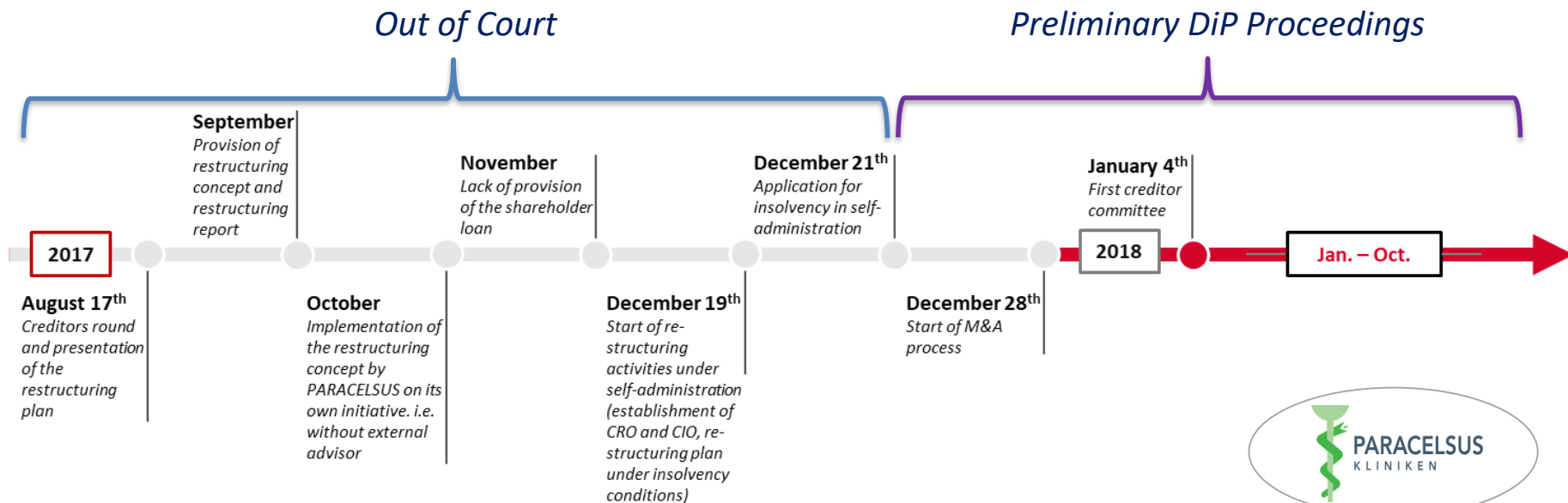
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## Paracelsus-Kliniken - Restructuring Path



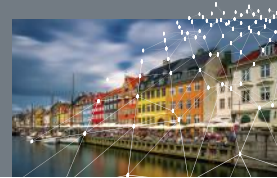




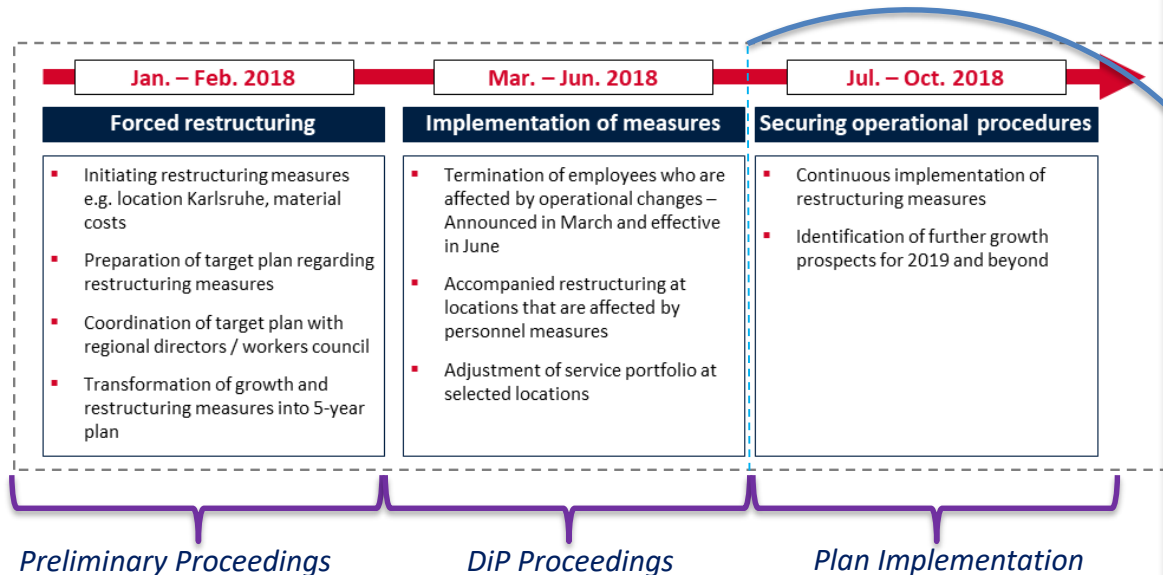
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## Paracelsus-Kliniken - Restructuring Path



### DiP Milestones

大成 DENTONS

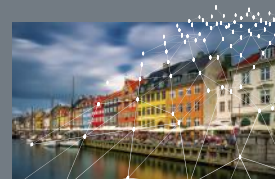
- 1) M+A Process Jan – April 2018
- 2) Commencement of Proceedings 1 March 2018
- 3) Submission of Insolvency Plans 23 May 2018
- 4) Adoption of Insolvency Plans June 2018
- 5) Termination of Insolvency 31 July 2018 (only 4 months!)
- 6) Payment of Guaranteed Quota (October 2018) **41,9 %** for unsecured creditors
- 7) Additional Quota 2019: over **45%** for unsecured creditors



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**Dr. Erwin Bos**

**Recent Developments in The Netherlands  
and  
Case Study:  
MC Group**



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## Healthcare restructuring & Insolvency – The Netherlands

Mr. Dr. Erwin Bos – Simmons & Simmons Amsterdam

### Healthcare system in the Netherlands – a quick guide

- Privatisation of healthcare in 2006
- Major healthcare insurers and healthcare providers compete in a highly regulated market.
- Healthcare further differentiated within cure (hospitals) and care (mental health care, handicapped, old age homes, assisted living)
- After a decade of market mechanics – significant cracks in the system.
- 2016 and 2017 surge in intake distressed debt at healthcare providers

### Key figures:

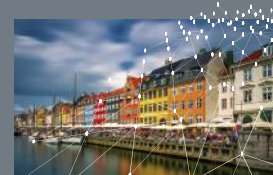
- EUR 100 bln total spend (2018)
- In 2017 turnover (EUR 60 billion) of healthcare providers
- Roughly split 50/50 (2017) in
  - Cure (EUR 28bln) and
  - Care (EUR 32 bln)



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## 2018 - Major insolvency and restructuring issues in Dutch healthcare

- Oct 2018 – Insolvency of privately owned hospital group; MC Group
- Effectively two large hospitals (approx. 1800 employees).
- High dependency on independent contractors
- New stakeholders dynamic comes to bear – healthcare insurers as de factor (informal syndicate of) lenders, municipalities





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## 2018 – Outcome MC Group insolvency

- Slotervaart:
  - Parts of cure and care transferred to other hospitals
  - Major dispute re fate of real estate with municipality
- IJsselmeer
  - 2 branches of hospital acquired by regional strategic parties.
- Both:
  - 3 *separate* investigations into causes of the bankruptcy, *in addition* to the investigation by the insolvency practitioners







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## 2019 – Rescue smallest hospital the Netherlands

- Feb 2019 – threat insolvency hospital
- Freshly learned lessons
  - Proactive healthcare insurers, focus on liquidity
  - Active role regulator and responsible minister
- Q2 - Shift to distressed (mental health, youth) care:
  - Mental health, rehabilitation clinics

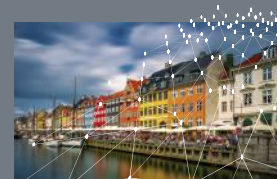




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## Lessons learned

- New role insurers as liquidity providers, potential for new monies.
- Significant risks regarding control, compliance and privacy: key opportunities to innovate through tech
- High number of (expensive) independent contractors creates systemic (insolvency) risks
- Overview new, sector specific, stakeholder playing field is key to successful restructuring and way forward to (return to) investment grade opportunities







## WMC has worked in >10 insolvencies in the German provider market



- **Top management consultancy** focused on Healthcare with >80 staff
- **Highly experienced consultants**, 50% of experts with hospital background
- **Market leader for healthcare providers**, incl. hospitals, rehab centers and senior care
- **In-depth expertise** with all types of providers, payors, pharma and med-tech clients as well as dedicated service lines (Hospital coding, procurement, medical supply management)
- **Successful management and interim management track record**
- **International experience** including US, ME, Asia and strong **senior advisors**

## What distinguishes WMC...



### **Responsible**

...we take on **more responsibility**

*Our team supports management or assumes management roles – especially in turnaround cases, e.g., CRO position for Paracelsus, Delmenhorst and Geno, interim MD Alb Fils Kliniken*



### **Output focused**

...we **measure our success** based on the economic result

*During the last 12 months we generated a runrate result increase of >>20 Mio. EUR for our clients*



### **Driver based**

...we apply **proven WMC-logic** based on precise result drivers

*We frequently (at least weekly) measure and address result driving KPIs and hence realize a strong linkage between activities and EBITDA*



### **Plug & play**

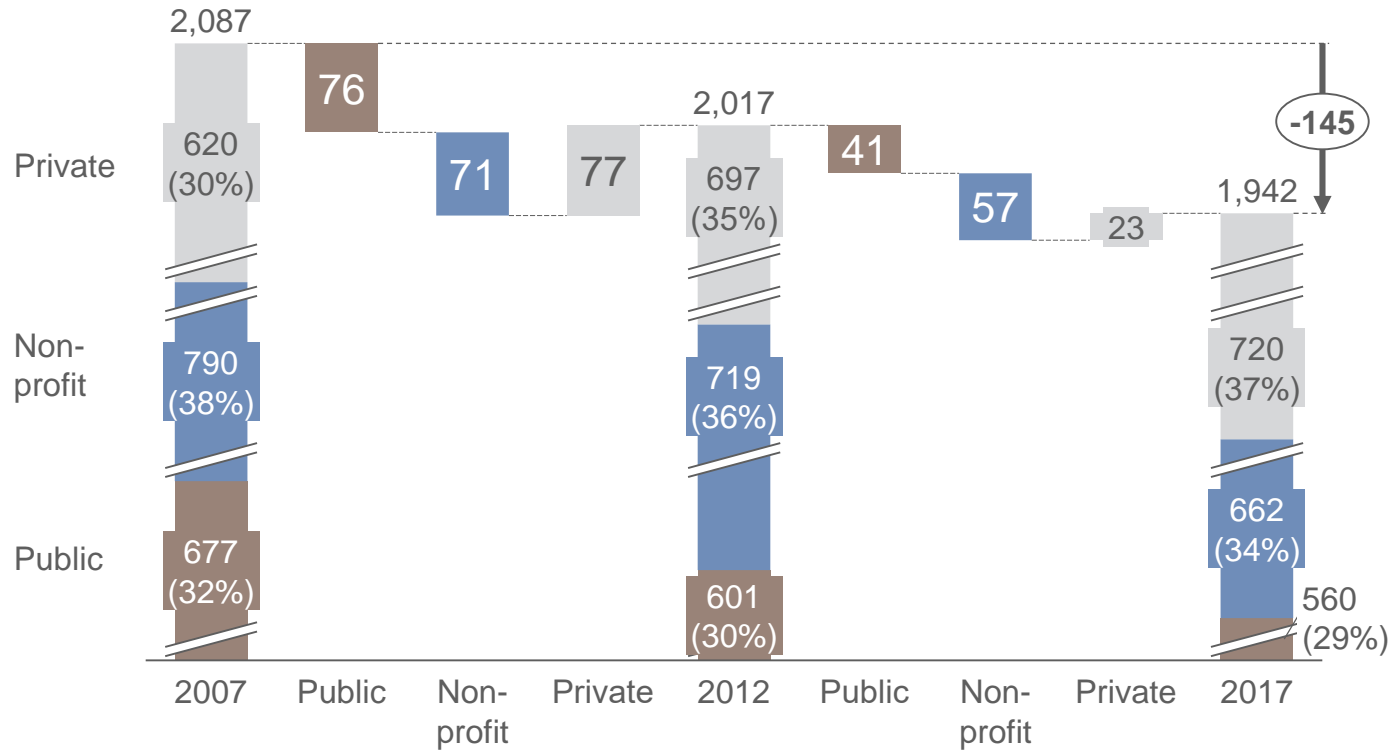
...we speak the **hospital language** and **integrate immediately**

*>2/3 of our team come with a strong hospital background (managing directors, (leading) physicians, (head) nurses, (med.) controller, mgmt.-trainees etc.*



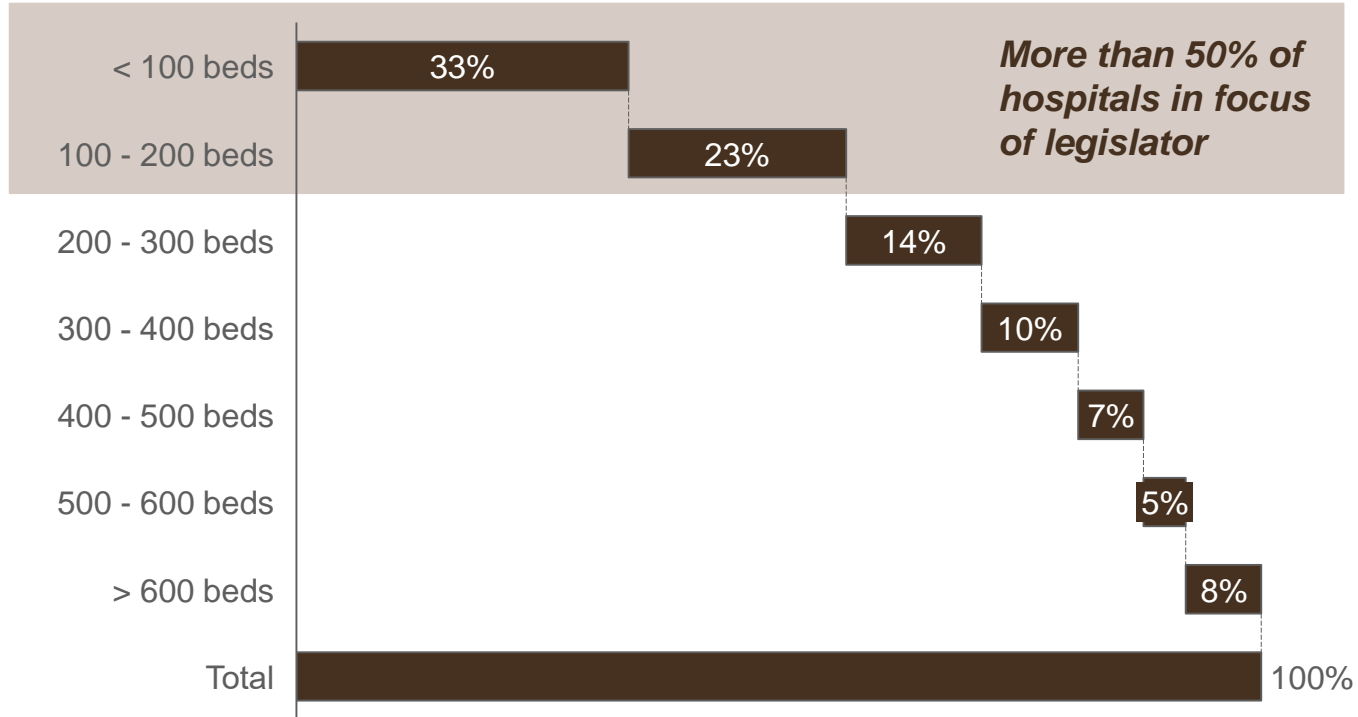
**Combining professional expertise, precise planning, operational integrity and application of efficient tools makes us a strong partner standing by your side**

# The DRG system shows a visible effect ... the number of hospitals is declining



## Especially small and medium sized hospitals are in the spotlight

### Density and distribution of beds



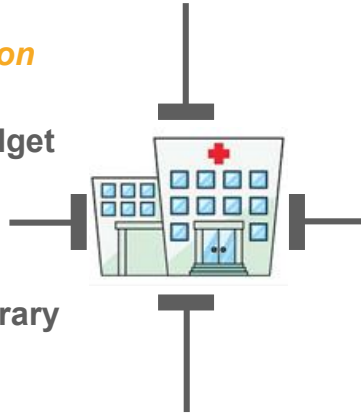
# Over the past years, pressure on hospitals increased substantially

## *Pressure on revenues or stricter caps...*

- Growth limits due to **fix cost degression deduction** (German: "Fixkostendegressionsabschlag")
- **Revenue risks** due to stricter approach on side of payers and MD(K) in accordance with MDK reform

## *Declining "efficiency leeway" on personnel side...*

- **Disembodiment of care budget**
- **Minimum levels** for nursing staff
- **Shortage of qualified personnel** + "threat" temporary employment + destructive competition for personnel



## *Very expensive „requirements“...*

- **GBA-structural requirements** (e.g., emergency care)
- **Minimum quantities**
- **Hygiene requirements** (e.g., multi-resistant germs screening)
- **Quality surcharges and deductions**

## *Increasingly impossible to outgrow costs...*

- **Steering of patient flows is changing:**  
Rise of outpatient care and quality competition
- **Stagnation of performance figures**
- **Declining add-on revenues** from foreign patients

## Typical issues for small and medium sized hospitals

---

**1**

*Fragmented care provision*

**2**

*Departments with subcritical size*

**3**

*Low productivity of clinical personnel*

**4**

*Bottlenecks on critical processes*

**5**

*High fluctuation*

- *Highly unprofitable hospitals show similar causes for negative results*
- *Losses can only be addressed through a disruptive cut*

# Hospital groups have to fight for their existence

Insolvency proceedings started

## **Insolvent Paracelsus Group potentially for sale this summer**

*"The insolvent hospital group Paracelsus could be sold to a new owner as early as this summer. The company announced this on Thursday in Osnabrück. The "final sprint" for a takeover by one or several investors would probably happen until mid of the year."*

Insolvency application

## **Katharina Kasper ViaSalus files for restructuring under self-administration**

*"The "Katharina Kasper Via Salus GmbH" plans to undergo a fundamental restructuring process. This Monday morning the company's managing director filed for a so called insolvency under self-administration procedure with the district court of Montabaur."*



## **Fresenius Medical Care shocks stock markets with profit warning – stock price drops by 15%**

*"Markets are shocked by the reduced forecast regarding the third quarter. Fresenius Medical Care now faces the largest stock price drop in its company history"*

Thuringia-Brandenburg

## **Insolvency proceedings for DRK hospitals initiated**

*"An insolvency under self-administration has been initiated for the "DRK Krankenhausgesellschaft Thüringen-Brandenburg"."*

Reorganization

## **Katholisches Klinikum Oberhausen files for insolvency under self-administration**

*"The "Katholisches Klinikum Oberhausen" (KKO) today filed for insolvency under self-administration. This step became necessary since the economic challenges for KKO had been steadily increasing."*



# Almost 70 insolvencies during the past 12 years





# What to do in case of bankruptcy?

## Focus & Communication!



### ***Seek self-administration***

- Company and owner – although being limited – stay in driver seat and can maintain fairly more steering possibilities and process security
- Ideally, management team is composed of experienced administrator and “hospital-proven” CRO



### ***Liquidity management***

- Filing for bankruptcy guarantees ongoing salary payments and financial liquidity – in case of clever pre-financing
- Cautious handling of financial obligations (old- vs. new demands) – avoid pre-payments and inform financing partners



### ***Structural improvements***

- Use opportunities for structural improvements (Closing of locations & departments with lack of future viability)
- Check contractual arrangements and potentially re-negotiate conditions (laying off isn't always an option)



### ***Safeguard qualified personnel***

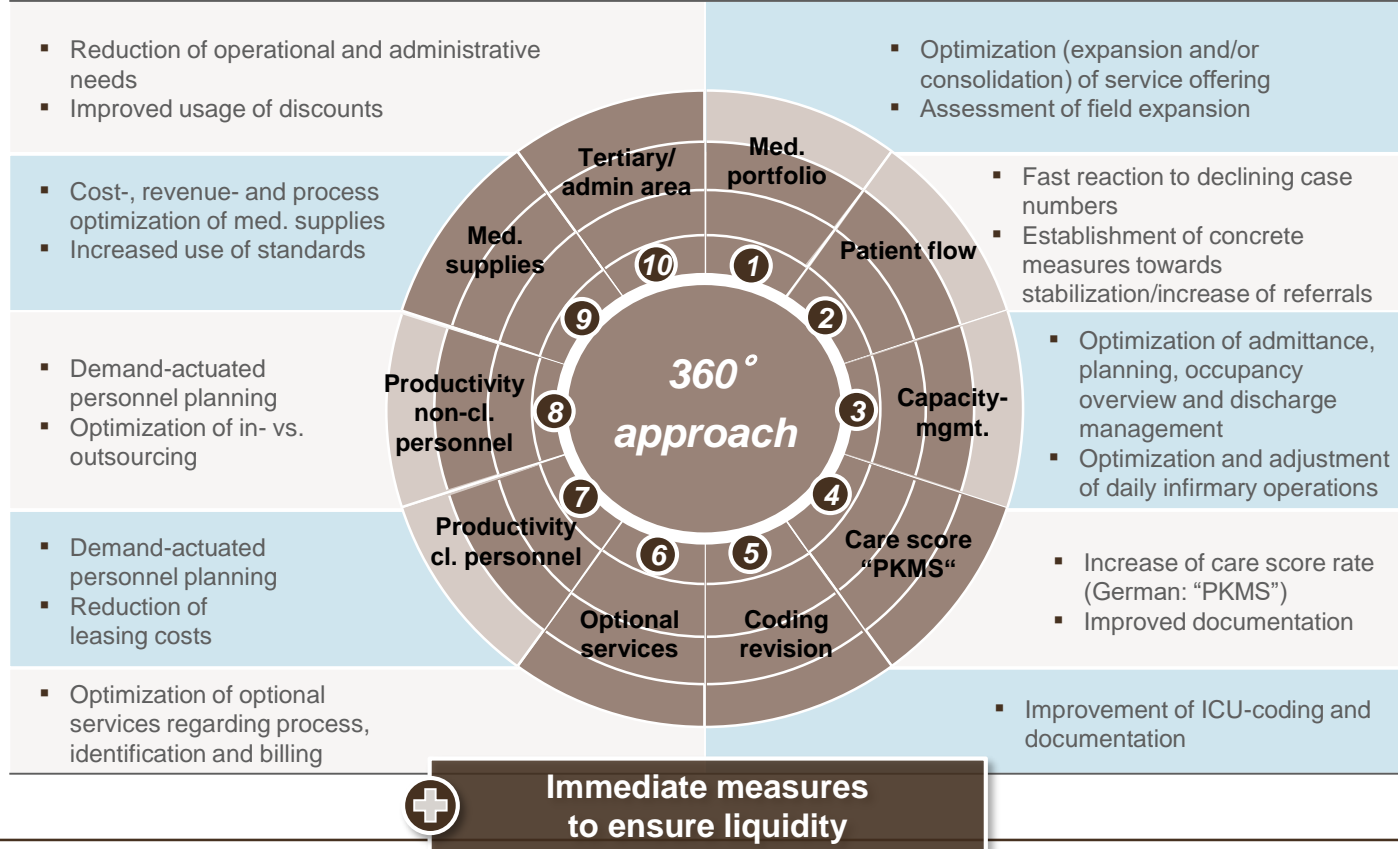
- Safeguard high-performers through open communication, incorporation in bankruptcy process and eventual retention payments
- Closely monitor personnel-recovery after completion of the process

# The entire value creation chain has to be considered for the restructuring roadmap – apply 360° logic

## Topics of potential analysis



Status of the potential quantification during the course of the assessment



# Programs are highly differentiated or even compartmentalized

## Potentials by area, in €M based on 2021

Scenario w/ measures vs. scenario w/o measures

### Explanation

1	Med. Portfolio	1.3	<ul style="list-style-type: none"> <li>Effects from med. portfolio adaptation (in particular consolidation gyn/obstetrics)</li> <li>Adaptation of portfolio as crucial enabler for future viability</li> </ul>
2	Patient flow	0.4	<ul style="list-style-type: none"> <li>Quantification of effect of optimized conversion rate and reduction (ICU-) discharges in progress</li> </ul>
3	Capacity mgmt.	0.6	<ul style="list-style-type: none"> <li>Adaptation of infirmary structure/personnel planning in conjunction with future medical portfolio</li> </ul>
4	Care score "PKMS"	0.1	<ul style="list-style-type: none"> <li>"PKMS"-potential only available for 2020 (here we assess the potential for 2021) hence, not listed</li> </ul>
5	Coding revision	0.2	<ul style="list-style-type: none"> <li>Reduction of revenue loss through additional revenues from retrospective case related revision of coding</li> </ul>
6	Optional services	0.2	<ul style="list-style-type: none"> <li>Increase of elective procedures quota to competitive level (for Eastern Germany)</li> </ul>
7	Productivity cl. personnel	2.2	<ul style="list-style-type: none"> <li>(Further) reduction of temporary personnel in medical service</li> <li>Turnaround of planned increase in current forecast for Q3/Q4 2019</li> </ul>
8	Productivity non-cl. personnel	1.3	<ul style="list-style-type: none"> <li>Downsizing of administrative set up (~10 FTEs)</li> <li>Process optim. (e.g., supported by voice recognition) in writing/clerk service</li> </ul>
9	Med. supplies	0.3	<ul style="list-style-type: none"> <li>Establishment of regular dialogue with chief physician regarding consumption</li> <li>More stringent product/supplier streamlining</li> </ul>
10	Tertiary area	1.1	<ul style="list-style-type: none"> <li>Realization of cost-saving potentials in cleaning, laundry, food products, energy etc.</li> </ul>
Sum gross potential		7.8	
Realization expenses		-1.5	<ul style="list-style-type: none"> <li>Expenses for measures necessary for realization (possibly performance loss, investment cost, layoffs, consulting costs etc.)</li> </ul>
Sum net potential		6.3	

## Important employees need to be retained

***“Now we have to pay for everything...”***



*Doesn't even know that the company is bankrupt*

*Is unsure if overtime hours will be paid*

*Doesn't know what to communicate on the company's bankruptcy; thinks he will be laid off*

*Will join competitor by end of the year*

*Got offers from three competitors*



Friedrichstraße 1a  
80801 Munich  
Germany

**Prof. Dr. med. Christian Wallwiener**  
***Managing Director***

Tel: +49 (0)89 26 20 84 141

Mob.: +49 (0)151 57 16 89 41

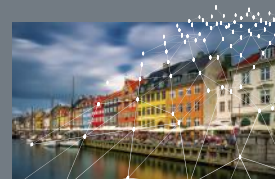
Mail: [christian.wallwiener@wmc-healthcare.de](mailto:christian.wallwiener@wmc-healthcare.de)



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## Panel discussion

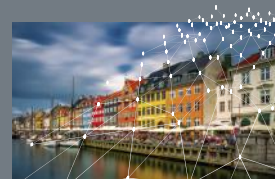
- Lessons learned – from pain to recovery?
- Learn from your neighbour
- R&I future in healthcare



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## Retail Under Pressure: Searching for the New Normal

**Catherine Sahlgren, Stockholm**  
CEO Werksta Group  
Former CEO Teknikmagasinet

**Dan Cohen, London**  
Managing Director AlixPartners

**Heinz Weber, London**  
President, Gordon Brothers Europe

**David Conaway, Charlotte**  
Partner and Head of Restructuring Shumaker  
Moderator



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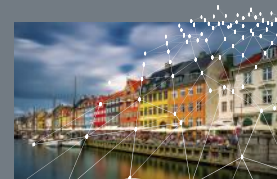




## Case Study: Teknikmagasinet

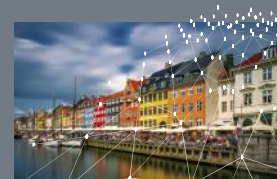
### 1. Teknikmagasinet's Business Profile

- Founded Stockholm – 1989
- 130 stores Sweden, Norway and Finland
- Tech and gadgets: airpods, mobile phone accessories, headphones, accessories



## 2. Debt and Capital Structure

- Capital facility
- Private Equity majority stockholder
- Customary trade credit
- Store lease obligations



## 3. Financial and Operational Challenges

- Highly leveraged
- Inflexible loan covenants
- Bank's Special Assets Division
- Store Closings



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- Warehouse Consolidation
- Insufficient Working Capital
- Private Equity Commitment
- Suppliers support



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## 4. Strategic Plan

- Reduce SG&A costs
- Reduce Secured Debt
- New Private Investment
- Product Management/Categorization



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- Store closings
- Re-envision remaining stores
- Services in stores
- Online sales

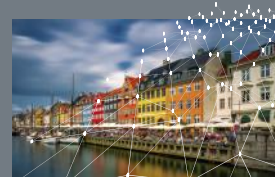


## Lessons Learned

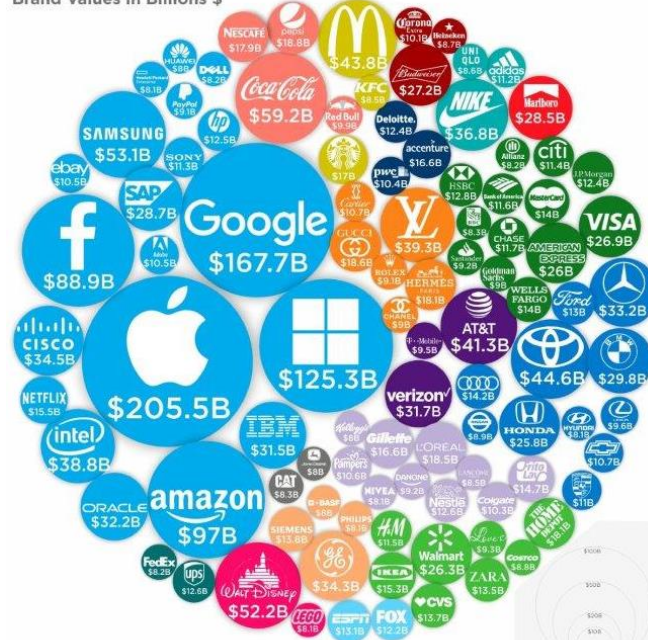
1. Private label impact on brands
2. Brands Emotional Value
3. Support of Key Stakeholders
  - Bank
  - Private Equity
  - Suppliers
  - Landlords
  - Toys “R” Us in US
4. Impact of other Tenants



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**Brand Values in Billions \$**



Note: Forbes considered only companies with a presence in the U.S. market.

Industry

Alcohol	Beverages	Diversified	Leisure	Restaurants	Telecom
Apparel	Business Services	Financial Services	Luxury	Retail	Tobacco
Automotive	Consumer Products	Heavy Equipment	Media	Technology	Transportation

**Article & Sources:**  
<https://howmuch.net/articles/the-worlds-most-valuable-brands-2019>  
 Forbes - <https://www.forbes.com>

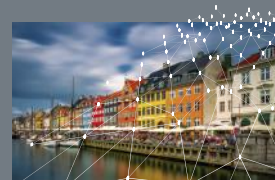
howmuch



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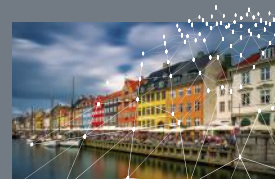


THESE ARE THE 10 MOST VALUABLE  
LUXURY BRANDS IN THE WORLD FOR 2019



1. LVMH (Louis Vuitton Moet Hennessy): \$47.21 billion
2. Chanel: \$37 billion
3. Hermès: \$30.97 billion
4. Gucci: \$25.27 billion
5. Rolex: \$8.39 billion
6. Cartier: \$5.99 billion
7. Burberry: \$4.70 billion
8. Christian Dior: \$4.66 billion
9. Yves Saint Laurent: \$3.57 billion
10. Prada: \$3.51 billion

Source/Chart: CEOWORLD magazine research



## The New Normal

1. Store Profile
2. Product Mix/Services
3. Online Sales
4. Renegotiable or Flexible Leases
  - Flexible rent obligations
  - Lease penalties
  - Pop-up stores



## 5. Shopping Centers

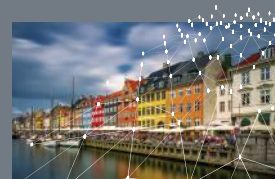
- Retail Rent Down
- Lenders pressure shopping center owners
- Reduce capacity
- Modify tenant mix
  - Residential
  - Office
  - Retail



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## 6. Global Suppliers

- Impact on credit decisions
- Credit insurance



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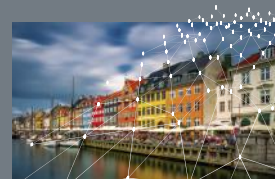
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## Europe vs. U.S. Retail Restructuring Approach

### 1. Europe

- Proactive
- Preserve top-line revenue
- Retain customers during transition



## 2. U.S.

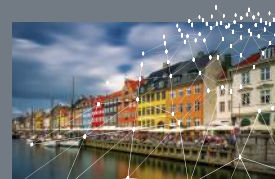
- Reactionary
- Massive store closings ..
  - Sears
  - Toys “R” Us
- Liquidation Sales
- Administrative Insolvency



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Catherine Sahlgren  
Werksta Group



Dr. Rainer Bizenberger  
AlixPartners

**AlixPartners**

Heinz Weber  
Gordon Brothers



David Conaway  
Shumaker, Loop & Kendrick







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## How to manage a successful emergency landing

Airline restructuring

**Henrik Sjørlev**

Partner, DLA Piper

**Andrew Eaton**

Partner, Burges  
Salmon

**Luca Jeantet**

Partner, Gianni

Origoni Cappelli &  
partners



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## Agenda

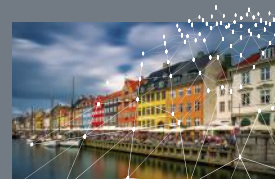
- Introduction – legal frameworks surrounding aviation industry (Henrik Sjørslev, 10 min)
- Alitalia (Luca Jeantet, 10 min)
- UK Approach (Andrew Eaton, 10 min)
- Case study/Q&A (10 min)










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## Legal frameworks governing airline restructuring

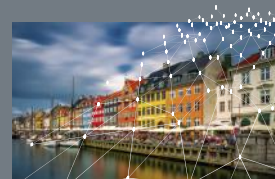
- Aviation is by its very nature a cross border sector
- Trends over the last handfull of decades:
  - No of passengers 
  - No of A/C 
  - Ticket prices 
  - A/C costs 
  - Environmental requirements 
  - No of distressed airlines 
  - Applicable regulations 



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## Legal landscape Insolvency regulations

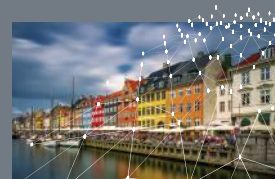
- Local insolvency law, e.g. Danish Bankruptcy Act
- Regional insolvency law, e.g. European Insolvency Regulation (recast)
- A/C Financing agreements
- Geneva Convention on the International Recognition of Rights in Aircraft, 1948
- Cape Town Convention on International Interests in Mobile Equipment & Protocol on Matters Specific to Aircraft Equipment (2001)



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## Geneva vs. Cape Town

### Geneva convention:

- Uniform(ish) cross border recognition of rights
- No substantive insolvency regulation
- Applies to "aircraft"

### Cape Town convention:

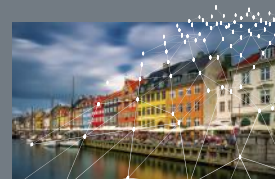
- Substantive cross border perfection of rights and insolvency regulation
- Superseeds Geneva convention
- Applies to airframes, engines and helicopters



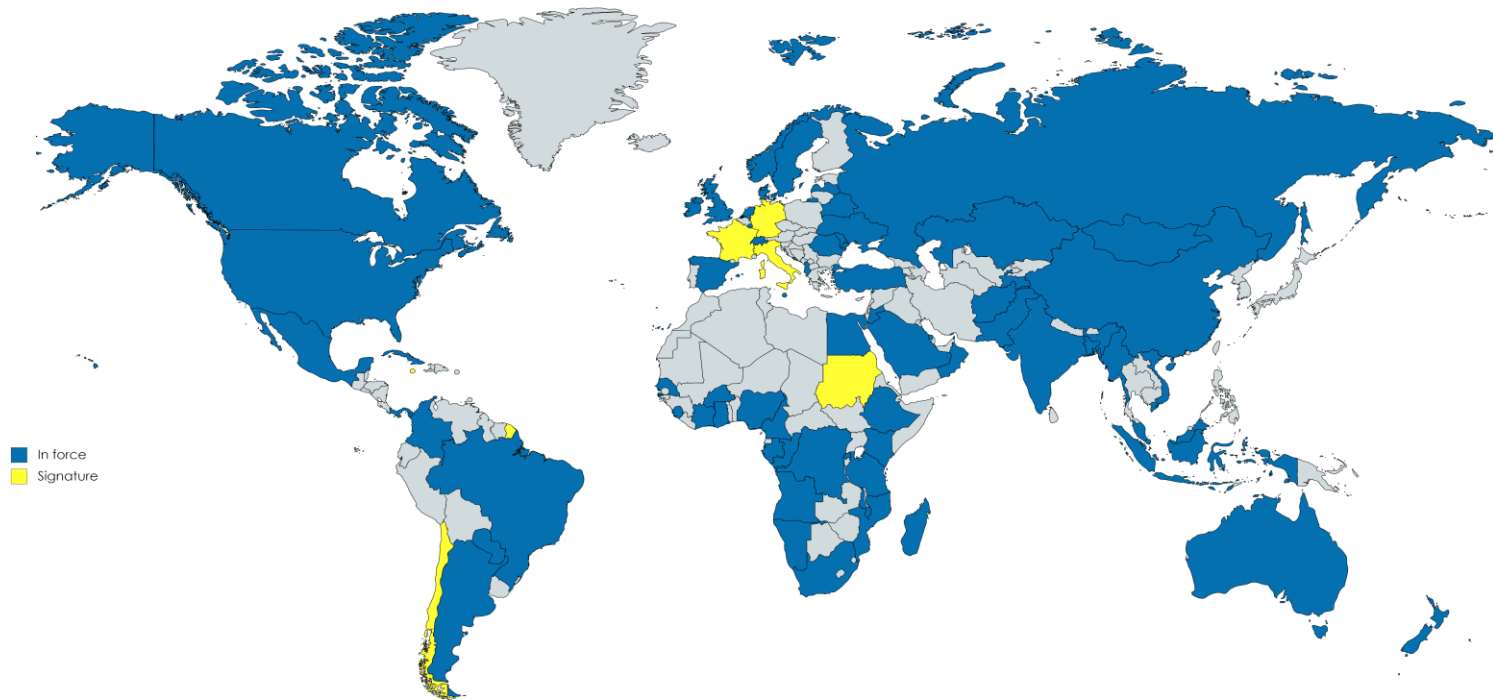
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## Cape Town, A/C protocol

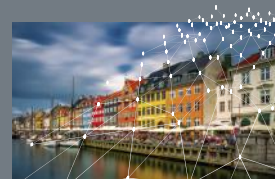




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## Cape Town, status

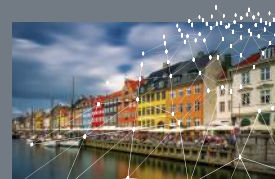
- Most major aviation markets have signed onto the A/C protocol.
  - uniform and predictable insolvency process.
  - facilitates asset financing.
  - provides A/C creditors with familiar legal framework.
  - Number of countrys is growing.



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## Case study

- Cimber Sterling (Danish airline) went bankrupt in 2012.
  - Fleet consisted of owned/mortgaged A/C and leased A/C
  - Spare engines were leased to support staggered engine maintenance programme
- DK had implemented Geneva Convention but not Cape Town.





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## Case study – cont.

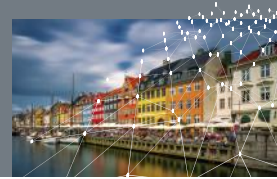
- Under Geneva engines acceded to the aircraft on which they were installed as at the time of the bankruptcy, and the engines no longer constituted separate assets.
  - Litigation on the matter concluded in early 2017.
- DK now uses Cape Town, in part because engines are treated as separate assets (irrespective of installation).
  - Uncertainty limited to waiting period of 60 days -> expedited repossession



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## Restructuring pitfalls

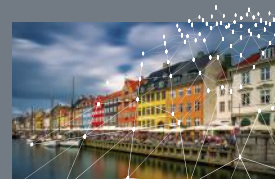
- The limited waiting period requires a pre pack or A/C creditor support.
- Future CO2 quota and airport slots are awarded based on historical operations => a temporary suspension of operations could affect future quotas/slots.
- AOC may be revoked?



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## Restucturing pitfalls – cont.

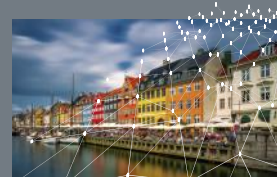
- EU proposal on pre-insolvency procedures are “without prejudice” to Cape Town-obligations.
- Would the commencement of pre-insolvency procedures constitute “*an insolvency-related event*” and thereby start the waiting period prematurely?
  - “Insolvency-related event” = declared or actual suspension of payments with stay of enforcement.



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## Alitalia case

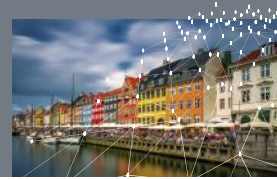
By a decree of the Italian Ministry of Economic Development (MISE) on 2 May 2017 the extraordinary administration procedure set forth by legislative decree No. 347/2003 (“Legge Marzano”) was started for Alitalia Società Aerea Italiana S.p.A., which has also been declared insolvent by the Court of Civitavecchia on 11 May 2017



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## Two extraordinary administration procedures for Alitalia

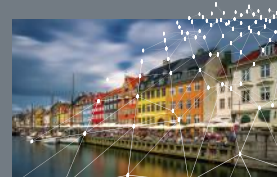
While the extraordinary administration procedure started in 2008 for Alitalia Linee Aeree Italiane S.p.A. and other companies of the group (*inter alia* Alitalia Airport S.p.A., Alitalia Servizi S.p.A. and Alitalia Express S.p.A.) is still pending before the Court of Rome, a new extraordinary administration procedure has now been started before the Court of Civitavecchia for a different company (Alitalia Società Aerea Italiana S.p.A., hereafter “Alitalia SAI”) which purchased the business within the procedure of Alitalia Linee Aeree Italiane S.p.A. and became itself insolvent.



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## **A quick overview on the extraordinary administration procedure**

Extraordinary administration is an insolvency procedure aiming to the preservation of the going concern of large insolvent companies: for these reasons it is different from bankruptcy litigation (it should be noted that, if the extraordinary administration procedure's aims cannot be attained, it can be converted into bankruptcy).

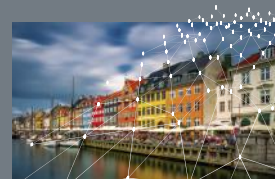
Extraordinary administration consists of two different phases (i) the proof of debt and payment of creditors, which is entrusted to the Court following rules very close to those applicable in bankruptcy and (ii) the continued operation and the restructuring of the business, entrusted to the Commissioners appointed and directed by the MISE.



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During the procedure the Commissioners will prepare the special reorganization business plan set forth by Art. 27, second para., lett. a, b and b-bis of Legge Marzano, providing alternatively for (a) the sale of the assets or (b) a financial and economic reorganization of the Company or (b-bis) the sale of assets and contracts on the basis of a business plan providing for continued operation of the business for no more than one year (this applies only to companies – such as Alitalia SAI – active in the essential public services sector).

The extraordinary administration procedure is governed by legislative decree No. 270/1999 (so-called “Prodi-bis”) and by Legge Marzano which provides for certain special provisions applicable to the “special” extraordinary administration procedure, to which only largest companies are eligible, such as Alitalia SAI.



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## Alitalia extraordinary administration procedure

- The MISE appointed a panel of Commissioners: Luigi Gubitosi (substituted by Daniele Discepolo), Enrico Laghi and Stefano Paleari.  
The Court of Civitavecchia appointed Luigi Bianchi as the Judge in charge of the procedure.  
With a further decree on 12 May 2017, the MISE joined Alitalia Cityliner S.p.A. into the Alitalia SAI's extraordinary administration procedure.  
With law decree No. 55 of 2 May 2017, the Italian Republic granted a six month – 600 million euro bridge loan to Alitalia SAI in order to support the continued operations of the business.
- The loan enjoys a super-priority ranking senior to all other super-priority creditors.
- The same law decree provides that the Commissioners publish a solicitation for non-binding offers for the purposes of the plan to be prepared by the Commissioners.
- In January 2018, the Italian Republic granted a new 300 million euro bridge





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## Effects of the procedure for suppliers

As a consequence of the operation of the business by Alitalia SAI led the Commissioners, contracts with suppliers will continue to be regularly performed and all receivables for supplies made after 2 May 2017 will enjoy super-priority status.

Payment of receivables of key suppliers arising from supplies made before 2 May 2017 can be authorized by the Judge, if he finds that the payment prevents a material prejudice to the company's business or to the value of the company's estate.

Reciprocal claims existing as of 2 May 2017 can be set-off between individual suppliers and Alitalia SAI.

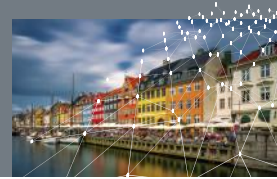
According to Art. 50 of the Prodi-bis, the Commissioners are entitled to terminate contracts, should they consider their performance as not useful for the purposes of the procedure.



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## Alitalia – First Needs

- Safeguard business continuity notwithstanding the opening of an insolvency proceeding
- Keep airplanes flying in all involved jurisdictions all over the world
- Satisfy passengers requests, especially the ones outside of Italy
- Map strategic suppliers and creditors in order to obtain judicial authorization of their immediate payment
- Protect all the foreign legal entities depending on Alitalia



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## Alitalia – Task Force Approach

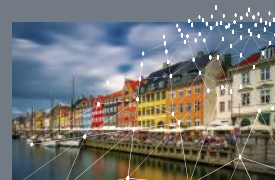
- Select advisors specialize in different matters, legal and financial
- Relationship with ITA Ministry of Economic Development
- Relationship with competent Court
- Relationship with main “anterior” and “strategic” creditors



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## **Alitalia – Restructuring Goal**

(2½ years in)

successfully complete M&A process aimed at selling Alitalia business

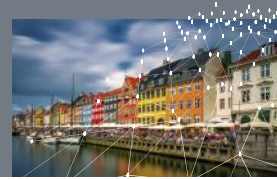
BUT ...



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...

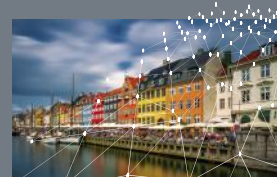
- 33 non binding offers
- only 3 airline companies showed a concrete interest, Lufthansa, EasyJet and Delta Air Lines
- the former government sponsored Ferrovie dello Stato
- the goal was the nationalization of the company under the control of ITA Ministry of Economic Development
- EasyJet abandoned the scene
- Atlantia, the company that controls Rome airports, appeared on the scene
- Atlantia faced great problems because of Morandi bridge falling in Genoa on August 15<sup>th</sup>, 2018



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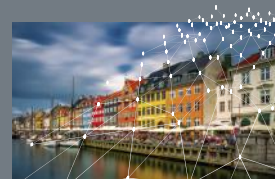
- Gruppo Toto appeared on the scene
- no solution in a short timeframe, also in consideration of ITA instable politic situation
- at the time being, Alitalia is loosing 57,000 Euros / hour notwithstanding 7,4 billions Euros granted by the Italian Republic
- in the last seven years, Alitalia has lost 12,8 % passengers notwithstanding the worldwide airline traffic has grown of 42%
- in 2018, Alitalia has lost 500 millions Euros
- risk of proceeding default is concrete
- Lufthansa is waiting ... interested in the sole trademark to be assigned to his regional controlled ITA entity, Air Dolomiti



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## UK Market

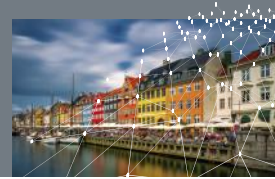
- Fourth largest aviation market in the world
- Top 5 carriers have 60% of the market, top 13 have 80%
- Relatively few insolvencies in recent years (XL Airways, Monarch, FlyBMI)



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## Current Position in UK

- UK does not currently have an insolvency regime to enable an orderly wind down or restructuring
- Default is to file for administration, ground aircraft and wind down
- Challenges with current regime include:
  - Regulatory – current approach of the CAA is to suspend AOC
  - Third Party Action – legislation does not provide sufficient protection
  - Personal Liability – JAs step into the shoes of management





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## Practical Considerations in a Wind Down

- Funding
- Comms with Regulators
- Timing of Appointment
- Location of Assets
- Merchant Acquirers
- Employees
- Recognition Issues
- External Comms



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## UK Airline Insolvency Review

- **Flight Protection Scheme**
  - Repatriation scheme covering all UK originating passengers with return flights to the UK
  - CAA to act as coordinator
  - Funded by the private sector by (1) airlines providing security that can be drawn in the event of failure and (2) a passenger levy
  - Overall cost of the security plus the levy is estimated to be less than 50p per passenger
- **Special Administration Regime**
  - Primary purpose to include a duty to undertake a repatriation exercise (typically over a 14 day period)
  - Appointment of an “airline administrator”
  - Greater involvement of Secretary of State (appointment and indemnity/loan)
  - Preventing termination of contracts/ransom payments
  - Funded through private sector (levy/security)
- **Changes to Regulatory Toolkit**
  - Annual certification re financial fitness
  - Development of repatriation plan
  - Notification requirements re MAC/general financial oversight
  - Ability to grant a temporary operator licence in a SAR to enable repatriation



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## Q&A



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## The appropriate approach to the treatment of MSMEs

**Ignacio Tirado**, Universidad Autonoma de Madrid, Spain /  
UNIDROIT

**Riz Mokal**, South Square and University College London, UK

**Monica Marcucci**, IVASS – Banca d'Italia



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## **Dealing with Financial Creditors. Specific Challenges in the Management of Small Businesses' Distress**

**Monica Marcucci**  
**IVASS – Banca d'Italia**



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## Introduction

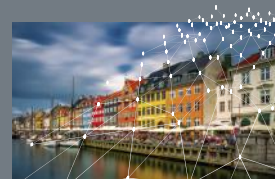
- SMEs' large presence and close links to the banking system make it critical for regulatory authorities to address the issue of SMEs restructuring (financial stability concerns);
- Likewise, a sound financial system is essential to strengthen the corporate sector, including the SME sector (clean-up of banks' balance sheets can free up credit for new lending and promote growth).
- In response to the financial crisis, EU authorities and member states have taken a comprehensive strategy aimed at both resolving the NPL problems and supporting distressed SMEs: improved insolvency frameworks on the one side; strengthened banking supervision on the other.
- Solutions adopted in each of the two fields, however, do not seem fully consistent with one another.
- In the possible trade-off between financial stability and economic growth stability concerns seem to prevail. How does the whole strategy affect SMEs?



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## Peculiarities of SMEs

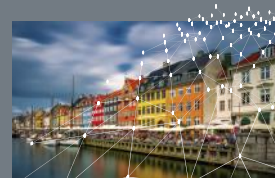
- MSMEs represent the **majority of businesses** (99.8 percent of the 20.4 million non-financial enterprises in the EU (EC 2013)). Very heterogeneous in their characteristics and performance
- **non-performing loans are generally more prevalent among SMEs** than among the overall business population, with the median value of NPLs for SME lending systematically higher than the value for all corporate lending (OECD 2018)
- SMEs heavily rely on **bank funding**; recourse to alternative sources of financing is limited
- SMEs are financially **more vulnerable** to shocks; many remain small and do not extend their reach beyond small local markets



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## Peculiarities of SMEs

- In many cases SMEs are **interconnected** (parts of the same supply chain); despite the small size, a single failure can have domino effects on an entire sector or local market
- SMEs generally have **weaker managerial skills** and less efficient organisational practices than large firms
- Given the large number of SMEs and their small sizes, lower reporting requirements, limited assets and heavy reliance on collateral, **SME loan restructuring is more costly and riskier for banks**
- **banks have less incentives to negotiate** a restructuring plan with an SME; coordination is also complicated by the presence of multiple trade creditors that often support liquidity shortages; in some jurisdictions (e.g. Italy) multiple lending

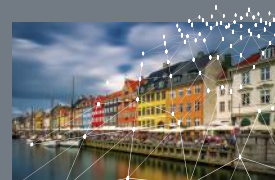




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## The EU policy strategy to address NPLs

### A) Insolvency Reform trends and SMEs specificities

- General restructuring frameworks – both **judicial and out-of court mechanisms** - **are ill suited for SMEs**, limiting the restructuring options and preventing speedy liquidation and exit.
- Reform trends; 3 main models:
  - **special insolvency proceedings** – expedited and simplified judicial restructuring mechanisms or liquidation procedures;
  - **specific out of court regulation frameworks**
  - **pre-insolvency proceedings** (judicial or administrative authority; binding effect; often complemented with early warning systems)

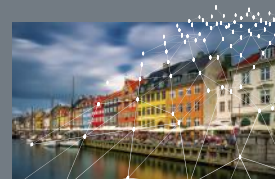
Whatever the model adopted, **promoting SMEs restructuring is the key objective** of these reforms.



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## The EU policy strategy to address NPLs

### B) Reforms in the field of bank supervision

Banks are a special category of creditors: FI are under legal obligations to assess and mitigate their exposure to risks

In response to the financial crisis, **new standards and rules** to pursue timely strategies in managing NPEs and derecognize bad loans from their financial statements

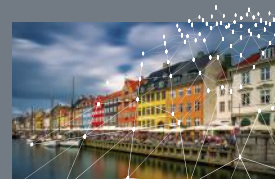
- The most relevant changes concern:
  - (i) supervisory guidelines to urge banks to **effectively monitor** their credit exposures and adopt prompt and appropriate measures when signs of distress emerge.
  - (ii) legislative requirements to ensure common regulatory provisioning levels for NPLs (i.e. amounts of equity capital that loans, depending on the risk category, are to be backed by) = **calendar provisioning**



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## **Possible interaction between prudential rules and crisis management mechanisms for SMEs**

**Additional monitoring requirements under the ECB Guidelines might play an important role in promoting a timely identification and management of crisis situations**

- dedicated work-out units;
- credit monitoring tools and early warning procedures and indicators;
- specific automated alerts at the borrower level to be activated in case of breach of specific early warning indicators

These tools should enable banks to discuss potential solutions with the counterparty and develop customized recovery solutions at a very early stage, **but**

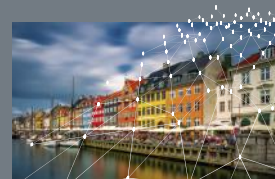
- banks cannot take any initiative in substitution of inactive debtors.
- SMEs' poor internal controls and lack of managerial expertise can be an obstacle to early action and active engagement with financial creditors



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## Possible interaction between prudential rules and crisis management mechanisms for SMEs

### Prudential rules on calendar provisioning by contrast, may discourage banks' participation in restructuring processes

Intensified regulation will likely reduce banks' leeway to give concessions. They are under strong pressure to quickly free up their balance sheet from the burden of risky exposures

According to **calendar provisioning**:

- banks are required to gradually increase coverage levels of NPEs over time (100 % of exposures within 3 years for unsecured and 7/9 for secured NPEs)

banks would participate actively in a restructuring process only if they expect that their exposure would exit from its non-performing status well ahead of full provisioning requirement.

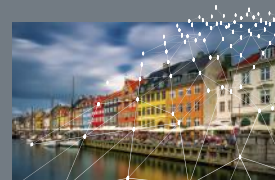
The shift of a forborne exposure to performing status is not automatic (1 year cure period); however, for restructured exposures a freezing period of 1 year is foreseen in which the amount of coverage requested does not increase. This give lenders some breath



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## Risk monitoring, early action are essential for troubled SMEs in the new landscape

Problematic loans should be addressed at a very early stage and trigger prompt action by banks in their own interest. Any negotiation should start in advance of the entry of the loan into the NPL category. After that moment room for concessions by banks would be limited.

### What implications for SMEs?

- Strong need for appropriate **governance tools**, specifically intended to monitor and prevent risks (that would match with banks' monitoring duties under ECB guidelines);
- Need to **improve managerial capacity** (having in place specialized procedures/tool for SMEs would be useless if managers do not possess the capability/expertise to use them in time)



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## Early warning and mediation are key to SMEs

The availability of early warning systems and conciliation bodies is of utmost importance,

**but**

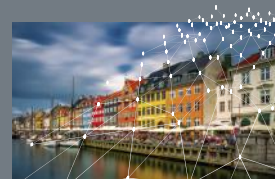
- they have to be **voluntary** and should be marked by an authentic **supportive** approach;
- related **administrative costs** should not be borne (only) by debtors;
- access to managerial **educational programs** and **professional advice** should be granted at reasonable costs on a large scale (importance of the infrastructure framework);
- banks' **coordination mechanisms** would help restructuring where a domino effect risk exists or multiple lending is common



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**Thank you!**



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## Treatment of Distressed MSMEs

### The Modular Approach

Riz Mokal





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## The Bowen Island Group

**Ronald Davis**, University of British Columbia, Canada

**Stephan Madaus**, Martin-Luther-University Halle-Wittenberg, Germany

**Alberto Mazzoni**, then President of UNIDROIT, Italy

**Irit Mevorach**, University of Nottingham, UK

**Riz Mokal**, South Square Chambers & UCL, UK

**Justice Barbara Romaine**, Alberta Court of Queen's Bench, Canada

**Ignacio Tirado**, UNIDROIT, and Universidad Autonoma de Madrid, Spain

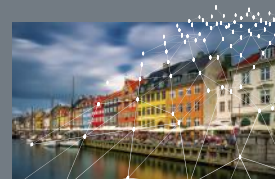
**Janis Sarra**, University of British Columbia, Canada



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## Traditional Approach to MSMEs

### Ad hoc changes to 'standard' insolvency regimes in relation to MSMEs:

- removal of some requirements, such as formal proof of claims or avoidance actions
- shortened statutory timelines
- dispensing with certain types of stakeholder engagement, such as through creditor committee

### Remaining and resulting problems:

- Arbitrary boundaries between MSME/'standard' regimes
- Rigid preconditions for availability
- Clumsy and of limited functionality, since not designed to address peculiar MSME features and needs



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## The Modular Approach

Systematic, bottom-up rethinking of the treatment of MSME insolvency

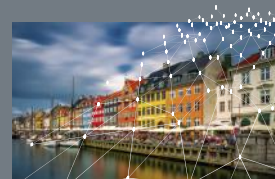
- Familiar **core objectives**
  - preserving and maximizing value
  - fair distribution of that value
  - accountability for wrongdoing
  - enabling discharge of over-indebted natural persons



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## Foundational Assumptions

**Enacting state should define the MSME regime respecting constitutional requirements and in full view of the policy choices involved and their respective costs and benefits.**

Subject to those policy choice:

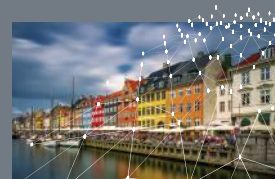
- parties to particular insolvency case are best placed to select the tools appropriate to that case
- the law should
  - ‘unpack’ tools traditionally bundled for workouts, liquidations, and reorganisation
  - provide these tools in a **maximally flexible way**
  - similarly unpack and flexibly distribute **process functions**
  - **create the correct incentives** for their deployment
  - **control moral hazard** for entrepreneur and creditors alike



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## Three categories of function in each insolvency

### 1. Management function

- ordinary commercial decisions
- commercially informed choices about which of the available legal tools to deploy
- negotiations with creditors and other stakeholders to obtain a desirable conclusion to the insolvency process

**Choices: Entrepreneur in possession or insolvency practitioner**

### 2. Administrative function

- Deadline compliance, notification, and disclosures

**Choices: Insolvency practitioner, government agency, court official, or judge**

### 3. Judicial function

- findings of fact reasonable, law correctly applied, and parties treated fairly

**Choices: Insolvency practitioner or government agency acting quasi-judicially, or judge**

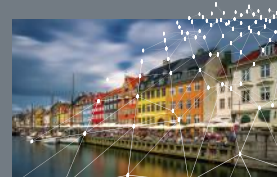
**Who is allowed or required to perform these various functions is a critical policy decision for the state**



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## Core

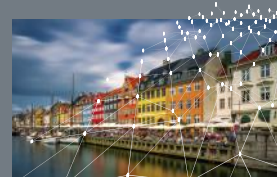
- **Entrepreneur commences** – capitalise on private information; preserve idiosyncratic investments
- **No requirement to declare or demonstrate insolvency** – incentive to use regime; reduce stigma; better ways to control abuse
- **Entrepreneur remains in possession of business** – incentive to use regime; private information and relationships; lowers costs by combining management and residual risk bearing
- **Entrepreneur proposes 'plan'** to restructure or sell piecemeal or as a going concern; 'plan' may be tailored or off-the-peg (i.e. standardised); would cater to the particular needs of the MSME
- **Plan accepted** if sufficient support **or insufficient opposition**
- **Automatic liquidation of business** if no proposed plan is accepted, unless relevant authority considers that another plan may be approved
- **Discharge of entrepreneur** – Most MSs are sole proprietorships or partnerships with entrepreneur(s) bearing personal liability; discharge essential barring fraud or non-cooperation
- **No necessary involvement of court or professionals** so long as administrative authority ensures proper notification to stakeholders and no one objects



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## Modules - 1

- **Creditor commencement** – safeguards against entrepreneur incompetence and/or perverse incentives
- **Creditor action moratorium** – provides entrepreneur with incentive to use insolvency regime in countries where individualistic enforcement mechanisms are effective; costs include adverse signal, impaired relationships, and possible entrepreneur abuse
- **Debtor action moratorium** – on disposal of assets and incurring of liabilities; may incentivise creditor engagement; costs include business disruption and/or costs of external approval
- **Creditor plan proposal** – for example, a proposal to liquidate rather than restructure; if two plans, each put to vote with the one obtaining greater support prevailing
- **Mediation** – Resources permitting, entrepreneur and/or stipulated creditor majority may mediate claim proofs, plan formulation, guarantee treatment, etc; no adverse consequences from failure of mediation



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## Modules - 2

- **Binding of dissentient minorities** - a plan respecting intraclass equality, if approved by requisite majority, may be made effective against dissentients
- **Class cramdown** – subject to standard conditions, such as acceptance by majority of at least one affected class, respect for interclass priorities, and return not less than in liquidation
- **Insolvency practitioner involvement**
  - available if sufficient value in estate, and if entrepreneur or stipulated creditor majority opt for it
  - may overturn entrepreneur in possession default, or only oversee implementation of approved plan, etc.
  - benefits include specialist independent oversight and management
  - direct costs are often very high
- **Court involvement**
  - courts should be treated as the precious and scare resource that they are
  - costs include involvement of legal professionals

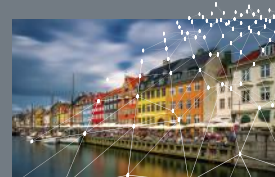




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## Process overview

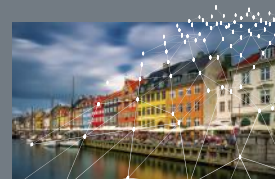
- **Oversight role** – core administrative function; backdrop would likely be a government entity: 1. public interest 2. no-asset cases 3. otherwise insufficient value in estate; set-up and operational costs, but likely outweighed by benefits over the medium to long term
- **Minimisation of commencement and participation costs** – standardised processes and forms; no necessary court or IP involvement; insolvency tools ('modules') deployed only when considered cost-effective; *see further below*.
- **Notices** – effective Individual and public notification is a *sine qua non* of Modular Approach; responsibility of administrative function holder
- **Timelines and non-compliance costs** – Administrative function holder enforces strict, brief timelines. ***Scream or die***: non-exercise of right results in its waiver. ***Deemed approval***: not to vote upon due notification is to be deemed to have voted in favour
- **Regulatory incentives for institutional lenders** – careful consideration to be given to adjusting classification and provisioning rules to incentivise responsible lending and value-maximising participation in insolvency process
- **Supportive framework** – including tax, credit histories, and treatment of guarantees



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**Entrepreneur has central role in Modular Approach.**

**However,**

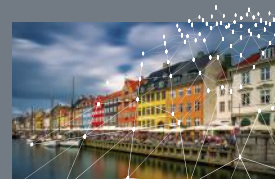
- Non-viable MSMEs may misuse the flexible modular approach and delay an inevitable liquidation; they may also withhold information and exploit the discharge
- Viable MSMEs may avoid taking actions, impeding rescues



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## Incentive problems for entrepreneur:

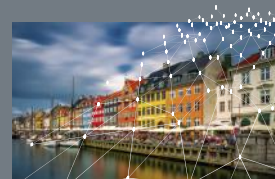
- At times approaching insolvency
  - Need to ensure that entrepreneur takes early action
  - (and) that they act in the interest of the creditors/stakeholders as a whole
- Throughout the insolvency process
  - Need to ensure that entrepreneur does not abuse/misuse the regime
  - That they provide all relevant information



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## Traditional Approach to MSMEs

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### Remaining and resulting problems:

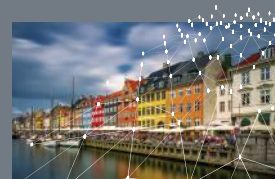
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## Obligations at times approaching insolvency

Wrongful trading

or

Duty to file

- Follows the insolvency standard
- Flexible
- Promotes rescues
- Education tool

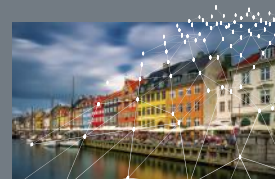
- Clearer
- Easier to implement (less discretion required)



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## Options

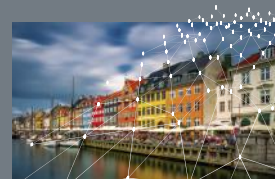
- 'Wrongful trading' tailored for MSMEs- a **simplified** regime
  - Discharging the obligation by giving due consideration to the 'modules'
  - Support from institutions
  - A focus on civil sanctions; including for non-incorporated debtors
- 'Duty to file' lesser discretion for less sophisticated systems



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## Addressing abuse/misuse of the insolvency process

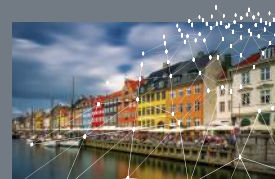
- Monitoring the entrepreneur's choices
  - Creditors (by stipulated value) may require: debtor action moratorium; IP supervision; court intervention [= the **Modular Approach itself addresses the risk of abuse**]
- Obligation to cooperate and provide information, enhanced by:
  - Tailored accounting duties
  - Pre-defined information models
  - Involvement of third parties
- Sanctions for misconduct, including
  - non-discharge of entrepreneur's personal liabilities
  - adverse entries in the credit history register



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Thank you





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## Thank you!