Council of the
European Union

Brussels, 11 October 2017
(OR. en)

13121/17

LIMITE

JUSTCIV 237
EJUSTICE 121
ECOFIN 815
COMPET 667
EMPL 481
SOC 633
CODEC 1570

Interinstitutional File:
2016/0359 (COD)

PUBLIC

NOTE

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (Insolvency)
Subject:	Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU - Compilation of Member States' written comments on Article 2(6)-(12), Article 8-18 - Comments from DK, ES, HR, IT, CY, LT, LU, NL, FI, UK & SE

1. At the meeting of the Working Party on Civil Law Matters (Insolvency) on 3 & 4 July 2017, the Presidency invited delegations to communicate in writing their positions on the following issues:

Title II - Preventive restructuring frameworks

Chapter 3 - Restructuring plans

- Article 8 (Content of restructuring plans)
- Article 9 (Adoption of restructuring plans) & relating definition in Article 2(6) - ("Class formation") & Article 2(7) - ("Cram-down of dissenting creditors")
- Article 10 (Confirmation of restructuring plans) & relating definition in Article 2(9) ("Best interest of creditors test")
- Article 11 (Cross-class cram-down) & relating definitions in Article 2(8) ("Closs-class cram-down") & Article 2(10 ("Absolute priority rule")
- Article 12 (Equity holders)
- Article 13 (Valuation by the judicial or administrative authority)
- Article 14 (Effects of restructuring plans)
- Article 15 (Appeals)

Chapter 4 - Protection for new financing, interim financing and other restructuring related transactions

- Article 16 (Protection for new financing and interim financing) & related definitions in Article 2(11) ("New financing) & Article 2(12) ("Interim financing")
- Article 17 (Protection for other restructuring related transactions)

Chapter 5 - Duties of directors in connection with negotiations on a preventive restructuring plan

- Article 18 (Duties of directors)

2. The compilation attached sets out the responses of delegations received so far. Several delegations indicated that the positions expressed in response to the above request are of a preliminary nature.

GENERAL REMARKS

DK

The Danish Ministry of Justice welcomes the opportunity to express its preliminary views on the European Commission proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.

The Danish Ministry of Justice would once again like to state that the Ministry remains supportive of the objectives to which the proposal refers, e.g. helping viable businesses avoid an unnecessary bankruptcy.

The importance of these objectives – and the complex and technical nature of the proposal – underlines, however, the need to review the proposal thoroughly. A rushed process, we fear, would result in loose ends and be detrimental to the objectives pursued.

In this context, the Ministry would like to echo the view expressed in our previous written contribution – i.e. that many questions still remain unanswered regarding the scope of the individual articles, many of which seem to aim for a quite detailed and exhaustive regulation. The Ministry wishes to highlight the following questions and concerns:

Overall – a more simple and flexible approach. As mentioned, a number of articles seem quite complex and seem to aim for an exhaustive regulation in certain areas, e.g. the proposed provisions on stay of enforcement, cf. Article 6-7, and on adoption and confirmation of restructuring plans, cf. Article 9-11.

With a view to establishing minimum standards while still allowing Member States to maintain well-functioning national insolvency regimes, the Danish Ministry of Justice in general strongly supports making the provisions of the proposal more simple and flexible for Member States.

The position afforded by the proposal to secured creditors during restructuring – in relation to e.g. adoption and confirmation of restructuring plans, cf. Article 9-11, and demanding payments and enforcing claims during a restructuring, cf. Article. 6-7. Overall, the rights of secured creditors seem unclear. The Danish Ministry of Justice has concerns whether the proposal takes into account, to the necessary extent, the position of secured creditors and the consequences for the value and status of collateral, including – if the purpose or consequence of the proposal indeed is to impair the position of secured creditors – possible future implications for the terms on which businesses can obtain loans against collateral from banks or mortgage providers.

It seems as if the use and status of collateral varies considerably between Member States. At the same time, a clear legal basis is imperative to allow Member States the flexibility of maintaining well-functioning national systems and accommodating the rights of secured creditors.

A solution would be to add to the proposal a new article with a general scope – covering the entirety of the restructuring process – stating that Member States may, regardless of the provisions of the proposal, regulate in every respect the rights of secured creditors.

The status of outstanding financial matters during restructuring, cf. Article 7(4)-(5), e.g. the effects of restructuring in regards to undrawn lines of credit and offers of financing. The consequences of the proposal in regards to such instruments seem unclear. The Danish Ministry of Justice has concerns as to the consequences for the status of these instruments, including – if the purpose or consequence indeed is to impair such rights of financial creditors – possible future implications for the terms on which businesses can obtain lines of credit etc.

A clear legal basis is imperative to allow Member States the flexibility of accommodating such rights of financial creditors.

A solution would be to add to the proposal a provision stating that Member States may, regardless of the provisions of the proposal, regulate in every respect the status of such outstanding financial matters and instruments.

<u>ES</u>

The concept of '*likelihood of insolvency*': "Likelihood of insolvency" appears in different parts of the Proposal of Directive and represents a key role in this instrument. For example, in Article 1.a) related to the subject matter and scope, in Article 4, availability of preventive restructuring frameworks or in Article 12, related to the role of equity holders in restructuring plans.

On the other hand, the differences between the several insolvency regimes in the UE make difficult to harmonize this concept so that it properly fits in all systems.
Therefore, Spain proposes that Member States should define "likelihood of insolvency" according with their national laws, and the Proposal must indicate it consequently.

<u>LT</u>

It is to be noted that in explanatory memorandum it is indicated that provisions of Title II establishing preventive restructuring frameworks should be applied to the debtors, be they legal or natural persons. On the other hand, Article 2, point 13, provides for a separate definition of over-indebted entrepreneur (natural person). Moreover, according to the Article 3, it is supposed that debtors and entrepreneurs are separate subjects. Therefore, it can be supposed that the provisions related to insolvency frameworks of natural persons are established only in provisions of Title III, whereas Title II establishes provisions of preventive restructuring frameworks for the debtors – legal persons.

In this respect, it is suggested to clarify the text of the Directive in order to make it clear which provisions apply to legal persons or natural persons. Moreover, it is supposed that it would be reasonable to provide for the definition of the debtor in Article 2.

This comment was already sent by Lithuanian delegation to the working group. Since the legal certainty in this scope is very important for the implementation of the directive, we would like to draw the attention repeatedly that this uncertainty should be eliminated.

Moreover, under national legislation debtors – natural persons performing individual activity have a possibility to restore the viability of their business in the scope of bankruptcy proceedings, i. e. they can perform a profitable individual activity under the Law of Personal Bankruptcy, which actually establishes second chance proceedings for both entrepreneurs and other natural persons – consumers.

In this respect, it is suggested to establish more flexibility for Member States in this scope and to foresee that member states are not obliged to apply the rules of Title II to the debtors – natural persons.

FI

Finland repeats the general comments presented in our written comments on Articles 1–7. More flexibility is needed to the provisions to avoid the situation where the directive would harm the functioning of well working national systems or would lead to incompatibility problems with them.

We repeat our request to have a written opinion of the Council Legal Service on the legal basis of the proposal. Taking into account that this is the first time when the Commission proposes harmonization of national legislation in the area of general insolvency law, a thorough analysis of the legal basis is an absolute prerequisite for adopting a directive.

We also repeat our request to have a written analysis of the Commission on the relationship between the proposed preventive restructuring procedure and the Insolvency Regulation EU 2015/848. Furthermore, the relationship between the proposed restructuring framework and national formal restructuring procedures will need clarification.

UK

The UK is subject to a general scrutiny reservation in respect of the proposed directive. These comments are therefore preliminary in nature and are intended to help inform the working group's discussion of the Commission's proposals and to assist the Presidency with drafting suggestions for a revised text.

ARTICLE 8 (Content of restructuring plans)

DK

Article 8(1)(b) and (g) should state who is responsible for the statement and valuation etc. Is it the debtor, the judicial or administrative authority or others? Are there any requirements to the person responsible, e.g. impartiality?

Article 8(1)(f): The article should reflect that a restructuring can include a transfer in ownership of the debtor's going concern or part thereof (and not just a compulsory debt arrangement with creditors).

Article 8(2): The legal ramifications of the "model" restructuring plan are unclear. Is the purpose, for example, simply to provide an optional, instructive template – in which case Article 8(2) does not seem to have substantive legal effects? Or is the implicit purpose, as alluded to in recital (13) – which would be far more substantive and far-reaching – to ensure that the debtor is allowed to complete the process without counsel etc.? One solution could be to make use of the model explicitly optional for the Member States.

In Article 8(3) it should, in any case, be specified who "the parties" are that may choose to make use of the model.

HR

Article 8(2), which stipulates that member states shall make a model for restructuring plans available online, coures uncertainty. Croatia emphasizes that it is unclear whether the model for restructuring plan shall be a form containing information stipulated in Article 8(1) of the Proposal, or fully drafted restructuring plan template. Having regard the provision of Insolvency Act of the Republic of Croatia which stipulates lodging of documents in the predefined forms in the insolvency and restructuring proceedings, Croatia does not opposes the forms, but considers their application impossible in all cases. Creating a unified model for restructuring plans is almost impossible because restructuring plans differs according to form and size of companies. Croatia suggests that the model of the restructuring plan looks like a list of steps that need to be met and a special addendum with explanations for easier and quicker completion of the form by the applicant. Furthermore, article 8(1), which stipulates that member states shall endeavour to make the model available in other languages, in particular in languages used in international business, is problematic because the model may be submitted in another language other than the official language of the Member State. Clarification is required as to way and the amount of reimbursement of costs for the member states' restructuring plan models. In light of the above, regulation of model for the restructuring plan should be left to the choice of EU member states.

CY

The minimum contents of a proposed restructuring plan referred in the first paragraph of this article refer to ***"the debtor or the debtor's business"*****,** which is reasonable since the application of this Directive may be extended to natural persons who are not entrepreneurs (as provided in Article 1(3)). However, this broad application imposes a burden on the drafters to be very careful with the language and wording throughout the Directive so that it applies to all natural persons, with or without business activity, and legal entities.

In this respect we suggest redrafting paragraph 1(b) as follows:

- **Replace** “present value” with “present financial situation” so that it applies to natural persons too.
- **Remove** “as well as a reasoned statement on the causes and the extent of the financial difficulties of the debtor”, as these can be identified in any financial statement and may anyway be covered in (g) if they are relevant to the plan. Also the more statements and reports are required in the procedure, the more expensive it’s going to be, so it is best to avoid as much as possible.
- Also, the translation requirement in paragraph 3 is vague, and for this we suggest to specify these/this language(s); preferably English or keep it as a ‘may’ provision.

LU

Paragraph 1:

Point (b): This compulsory valuation of the present value of the debtor constitutes a substantial administrative burden and should be optional.

Point (c): We would like clarification on the concept of '*affected parties*'. Does it refer to those affected by the restructuring plan?

Point (d): We would like this provision to be optional for the Member States, or the conditions for voting and approving the restructuring plan should be determined by national law.

Point (e): Scrutiny reservation.

NL

We've had discussions with our stakeholders (including many insolvency practitioners) who were generally more-or-less satisfied with the content of Article 8. They indicated that in most cases the information is more in less in line with what is needed, but they requested more flexibility for practice and a more 'principle based approach' to this article, as the detailed requirements may not be useful or even be burdensome in certain specific situations. We will have some suggestions for that with our comments on paragraph 1.

We have a couple of questions as regards to the principles behind this article.

- Would a plan which aims to dissolve the business, while distributing value to creditors also be covered under this procedure? If so, then the requirements may need to be adjusted. This is perhaps also related to the definition of 'restructuring'. If not, would member states have the discretion to regulate this?
- As a second point. Would this plan also cover affected third parties, such as guarantors and debtors who are jointly liable with the debtor requesting the restructuring? We assume, based on previous answers of the Commission, that this would be left to Member States. But this could perhaps be further clarified in a recital.

Paragraph 1(General)

From what we understood from stakeholders, it would be better to take a more principle based approach, at European level by formulating the objectives the article aims to achieve. As the paragraph stand, it is quite detailed.

If we understand paragraph 1 correctly, its objectives are (1) to inform the creditors, to enable them to make an informed decision on agreeing or not agreeing to the proposed restructuring (i.e. they need to be able to assess whether the plan is reasonable, viable and realistic) and (2) to allow the court to properly assess the situation and enable them to decide upon a possible cram-down (by assessing, like creditors, whether the plan is realistic, viable and reasonable).

Paragraph 1(a) - (b)

For letter (b), we wonder who will determine the value of the debtor. Is this the debtor itself or an independent expert?

We acknowledge that this information is useful. Depending on the circumstances, a rather strict valuation procedure should apply (perhaps even provided by an independent expert) or a light procedure could apply, where creditors agree with the valuation. Stakeholders suggested to add that this requirement could be an 'indication' of the value of the debtor at the time of proposing the plan, thereby leaving it up to the creditors to challenge the value in court. If the latter happens, then more (expert) evidence is needed to assess whether the value has been done properly.

Moreover, if it's apparent from the context that creditors do not need the detailed valuation, this should not be necessary. As this requirement is most likely to generate costs for a debtor (as he will likely have to ask an expert to give an opinion), this could be a useful way to reduce costs.

Paragraph 2

It's an interesting idea to develop a model plan, which could in particular be useful to SME's. As a starting point, we would like to invite the Commission to develop an optional restructuring plan, which could be discussed first with experts and later with the Member States? This plan should serve as a tool for in particular SME's who want to restructure. It should not prohibit Member States from setting procedural requirements. This should be clarified (see also next article).

Paragraph 3

Does 'the parties' refer to the parties who can propose the restructuring plan, under Article 3? (i.e. the creditor + the debtor)? This is not yet clear from the text.

We assume this is without prejudice to member states setting formal requirements for debtors/creditors when submitting the plan to the courts with the objective of confirming this plan with the court. In other words: if we set as a formal requirement that a certain model plan / model form is required, can we still do that? Could this flexibility be further clarified?

FI

We support *paragraph 1*, and do not wish to include any further details into it. Regarding subparagraph d, we do not deem it necessary to require a "rationale" for class formation, which very often happens directly by virtue of law and is not based on a case-by-case discretion. Also, "*when applicable*" should be added in the beginnings of subparagraph e since this information is not applicable when the proceedings apply to all creditors.

In subparagraph g, it should not be specified that the required information must be presented in the form of "an opinion or reasoned statement by the person responsible for proposing the restructuring plan". It should be sufficient to spell out the required information itself ("why the business is viable", etc.). Suggested kind of formulation would eliminate unnecessary questions on whether formalities have been complied with, and on who is "responsible" for proposing the plan and whether he or she might even be at risk of legal liability due to a provision merely describing contents of restructuring plans (which should not be the case). Finally, we remind in relation to subparagraph g that viability should be tested way before the adoption phase. However, this doesn't mean that we would object to explaining the viability in the plan, too.

We support *paragraph 2* with some minor reservations. It should be clarified in the recitals that only a model, and not an electronic application form, is meant by the provision. We also support the idea of some delegations that the provision could be implemented by providing a check-list of requirements on Internet. Finally, words "of every case" in the last sentence of the paragraph are too optimistic and could be replaced by "*different cases*".

Paragraph 3 should be redrafted as follows: *"The use of the model restructuring plan is voluntary."* The current reference to "parties" would raise unnecessary questions on practitioners´ (who in several Member States draft the plan) possibilities to choose whether to use the model or not.

SE

We support that the list of information items required in Article 8(1) is non-exhaustive. At the working group meeting on 24 April, the Presidency asked the Member States to consider whether certain items should be added to the list. We see no reason for additional items, especially since it is possible for Member States to extend the number of information items in national legislation.

Further, the scope of Article 8(1) is limited to restructuring plans that are to be submitted for confirmation. We do not mind this limitation *per se,* but would like to point out that in the case of a restructuring process where no new financing is foreseen, it is not clear before the voting procedure whether confirmation by an authority will be needed. We assume national rules can require the same information as is required according to Article 8(1) even if no confirmation can be foreseen. Otherwise the proceeding of voting may result in a need for confirmation which in turn would activate the requirements in Article 8(1), which at this stage could delay the proceedings.

We believe the concept "the present value" in Article 8(1)(b) has to be clarified. We assume "present value" is the same as the enterprise value. If so, that should be clarified, preferably by replacing "the present value".

It might be of relevance to require information regarding the identity of non-affected parties according to Article 8(1)(e). However, as follows from our comments regarding Article 14 we question that the confirmed restructuring plan is binding on each identified party and we propose that Article 14 be altered.

The connection between Article 2(2) and Article 8(1)(f) also has to be clarified.

Drafting suggestion

Article 8(1)(f)(ii)

any ~~proposal by which debts are rescheduled or waived or converted into other forms of obligation~~ **proposed measure of restructuring as defined in Article 2(2);**

As we see it, measures "by which debts are rescheduled or waived or converted into other forms of obligations" fall within the definition in Article 2(2). But the definition in Article 2(2) has a broader scope, and since Member States are expected to provide for all the restructuring measures in Article 2(2) and, in the end, arrange a system where those measures are binding on each party, there should be a requirement to include relevant information about all such measures in the plan.

We understand the rationale for Articles 8(2) and 8(3). However, the more details the model contains, the fewer debtors will find it helpful, and a model with the purpose of being useful to many obviously runs the risk of lacking in detail. We suggest Articles 8(2) and 8(3) are deleted. If there is broad support for an obligation for the Member States to make information available online, we would prefer Articles 8(2) and (3) to be redrafted into one new rule, a new 8(2) setting out requirements for Member States to make available a check-list or general guidelines. If the proposal for a model would be retained, we question why the "the parties" may choose, according to Article 8(3). Is it not more appropriate that the person responsible for the plan *alone* be entitled to choose (see Article 8(1)(g))?

UK

Generally we consider that the content of Article 8 is overly prescriptive for a directive and that the content of plans would be best left to Member States to determine. If this is not the approach to be taken, we would make a number of comments on the current drafting.

Paragraph 1

In respect of sub-paragraph (b) and the requirement to provide a valuation, the Commission has explained that this does not have to be a professional valuation and we understand the Commission's concern to limit costs for SMEs. We note a suggestion made in the working group by the Netherlands that different valuation procedures should apply depending on circumstances, for example where creditors agree with the valuation it could be a light touch, but where there is a challenge the valuation should be provided by an appropriate person. This seems sensible to us in that we think that the type or level of valuation required ought to be context specific to avoid disproportionate cost, and support the general principle of fair and independent valuation.

In sub-paragraphs (c) and (e) the ability to determine if affected/non-affected parties should be named individually or be described by reference to one or more categories of debt should rest with Member States when creating their own procedural rules. The current drafting does not make it clear if the choice rests with Member States or the person preparing the plan.

We note that the term 'non-affected party' is not defined and therefore the obvious interpretation of the meaning would be by virtue of non-inclusion within the definition of 'affected party'. Consideration could be given to whether or not this provides sufficient certainty.

Paragraph 2

The concept of a model restructuring plan set out in paragraph 2 seems flawed to us. Restructuring plans should be extremely flexible to suit the needs of every debtor in financial distress for whom a plan is suitable. A plan should allow a wide range of both financial and economic issues to be addressed for all types and sizes of businesses. The requirement that a model plan can be '*adapted to the needs and circumstances of every case'* seems unrealistic.

Online model plans may generally lead unsophisticated debtors to think there is no need to seek the advice of insolvency specialists which we think would run counter to the effective handling of cases of financial distress. For example, it might encourage some debtors to attempt to negotiate a plan without professional advice despite the fact it may not be in their or their creditors' interests to do so and where liquidation would be a more appropriate course of action.

It might also encourage unscrupulous practitioners at the lower end of the market to offer bargain basement plans in circumstances where a business is no longer viable, but there might be more profit for the practitioner in advising on a restructuring plan than bankruptcy or liquidation.

We would therefore support deleting paragraph 2 or, at the very least, amending the requirement on Member States, limiting it to one of providing general online information and guidance on the process of concluding a restructuring plan, so that business can understand what steps are required.

Drafting suggestion

*Article 8**(h)***

(h) an opinion by the person responsible for proposing the restructuring plan which explains:

(i) what the next best available rescue or insolvency procedure would be, and

(ii) the likely alternative outcomes for creditors if the next best available rescue or insolvency procedure were implemented.

ARTICLE 9 (Adoption of restructuring plans) & relating definition in:

Article 2(6) - ("Class formation")

Article 2(7) - ("Cram-down of dissenting creditors")

DK

On the regime in Article 9 - 11: In general – complex and detailed. The regime which Article 9-11 seems to aim for appears very complex and detailed, leaving room for a number of interpretations and misinterpretations. The Danish Ministry of Justice suggests – with a view to establishing minimum standards while still allowing Member States to maintain well-functioning national insolvency regimes – making these provisions more simple and flexible for Member States.

- **The Danish Ministry of Justice in general suggests making Article 9-11 more simple and flexible for Member States.**

Formation of classes. The Danish Ministry of Justice assumes that the class system should have/can have explicit basis in the statutory system – as opposed to the appropriate authority deciding upon classes on a case-by-case basis. This should be clarified.

Voting rights. It should be left to Member States to lay down rules on voting rights in relation to requirements on active participation/representation. It should also be more explicitly stated that Member States can determine that only those classes vote that are affected by the restructuring plan, i.e. creditors who are not fully satisfied.

- **The Danish Ministry of Justice suggests to clarify that the system for formation of classes should have/can have explicit basis in the statutory system.**
- **The Danish Ministry of Justice suggests that Member States are able to lay down rules on voting rights in relation to requirements on active participation/representation.**
- **The Danish Ministry of Justice suggests that it is explicitly stated that Member States can determine that only those classes vote that are affected by the restructuring plan.**

HR

Croatia supports the majority criteria set out in paragraph 4 and the flexibility for determining the required majority for the adoption of a restructuring plan in individual Member States. It considers that in each category, required majorities for the adoption of a restructuring plan should not be less than 75%, so this should be the lower limit. Croatia would like to point out that the number of creditors should be included in Article 9(4) of the Proposal, primarily for the protection of small creditors. According to the national legislation of the Republic of Croatia the number of creditors and value of the creditor's claims are set as conditions under which a restructuring plan can be adopted. Therefore, Croatia is in favour of introducing a double criterion of value of the claims and the number of creditors in the Proposal, having regarded the principle of equal treatment of all creditors in the restructuring proceedings.

CY

We agree with the provisions of paragraphs 1, 2 and 3 that refer to class formation.

On the voting rights (paragraph 4) we would like some types of “affected parties” to be excluded from voting, including of course the cross class cram-down procedure, because they have conflict of interest (ie spouses, parents, children).

Further to the above, we have noticed that there are no provisions on amending a proposed plan during a meeting, which could be crucial in adopting a plan without any unnecessary delays. If the aim is to leave this to national law, then we should clarify it in a recital.

LU

Paragraphs 2 to 6: These measures should remain optional for the Member States, or the conditions for voting and approving the restructuring plan should be determined by national law.

NL

We have similar principles in our draft restructuring law, therefore, we are supportive of this article. We think it's inappropriate that workers can be directly affected through a cramdown (or through other mechanisms introduced by this directive, such as the stay). Therefore, we request to exclude them from the scope of the directive.

We have some questions on certain paragraphs, as they are not immediately clear to us.

Paragraph 1

Does this paragraph mean that if Member States grant voting rights to equity holders they have to follow Article 12 (2)? Moreover, equity holders are not defined. What would fall under the definition of equity holder? We may need a definition on 'equity holder', if only to separate them from creditors.

Do we have the freedom to set the amount of votes for equity holders & creditors? Could this be linked to the financial interest at stake? E.g. we are considering to grant one vote for every € 100 claim. In theory, that would mean that creditors with a claim regarding very low amount would be excluded. Is that possible? We understood from the Commission when discussing this provision that this would be possible. This should perhaps be clarified in a recital.

Paragraph 2

We had similar criteria on class formation in our draft restructuring law, but received some criticism from stakeholders. Therefore, we changed the criterion to 'rights which are not dissimilar' as to slightly widen the group of creditors. Moreover, this gives the court a bit more flexibility when assessing the class of creditors. We would also be open to refer the notion of class formation or formation of categories to member states.

Does the last sentence [of Article 9(2)] imply that claims from workers may be part of a cram down? We read the recital 34 which stated that existing safeguards granted by Union law are left in place. So how could workers be affected under the restructuring plan? We think it's inappropriate that workers can be directly affected through a cram-down. Therefore, we request to exclude them from the scope of the directive.

Paragraph 3

When first reading this rule, we thought that class formation can only be assessed when the restructuring plan is submitted. We got feedback from our stakeholders that class formation should be able to be assessed at an earlier stage, as to increase 'deal certainty'. When we read recital 25 we were quite happy that the debtor may seek court review of separate issues, such as class formation, before the plan is officially submitted for confirmation. Save new circumstances (e.g. the information provided by the debtor or the court clearly erred as regards the law), could such a court ruling be final, in the sense that the class formation may not be revisited when the plan is submitted? Or would the court always need to be able to revisit the class formation?

This would save time and needless procedures in our view. Could adding the words **'at the latest'** in the text be useful in to clarify this point? So the text would read as follows: Class formation shall at the latest be examined by the judicial or administrative authority when a request is filed for confirmation of the restructuring plan.

Moreover, the wording of the provision appears to imply an ex officio test by the court. Why would this be necessary if no creditor complains about the class formation? We would prefer clarifying that no ex officio test is intended or at least that this is up to member states.

Paragraph 4

This rule seems fine. It offers sufficient flexibility for us.

For clarity purposes: the second sentence implies that setting a limit which relates to the number of creditors or equity owners voting in favor of the plan, rather than the amount, would be prohibited. Is this intended?

Minor drafting point: *'deemed to be adopted'* is a legal fiction. This should be changed into *'shall be adopted'*.

Paragraph 5

What does this rule mean, in particular in relation to paragraph 4 which already states that a majority is necessary in each class? Or does it mean that Member States have some flexibility in determining the way creditors vote? Would a written or digital procedure be allowed? Some clarification would be useful in this regard.

Would this rule allow a system where, if the creditor has been properly notified to vote would be deemed to vote for the plan if he does not vote at all?

We would prefer a flexible system, where a voting procedure can expeditious, where possible, and thorough, when necessary.

Paragraph 6

We agree with the principle. We assume that a cram-down and a cross-class cram-down can be done at the same time, i.e. in the same hearing by the court. This would in particular be useful if it is already apparent, before the voting, that a cross-class cram-down is needed. If that's true, we do not have further comments at the moment.

Article 2(6) ("Class formation")

On 'on inter-creditor' agreements: how can the debtor know whether there is an inter-creditor agreements between creditors?

Would guarantees or claims versus third parties be part of the consideration to put a creditor in a certain class or not?

FI

We support the principle in *paragraph 1*.

However, we would suggest adding an exception for the creditors, who are of the lowest priority in national priority ranking order. In Finland, such creditors cannot vote if the proposed restructuring is to cut down any rights of creditors superior to them. If we imagine that such an exception is lacking, it means that the lowest priority creditors are able to cause an unnecessary cross-class cram-down situation, in which they cannot anyway prevent the adoption of the plan. Therefore we propose to add the following second sentence to paragraph 1: *"Member States are not obliged to grant voting rights to creditors of the lowest priority in accordance with national law."*

We do not have a problem with the principle of *paragraph 2*. However, Article 2(6) is likely to narrow national margin of discretion (or at least cause confusion) insofar as it stipulates criteria, which must be complied with when forming classes. This is why the whole definition should be deleted. The Commission has explained that class formation criteria are meant to be left for the Member States, and this is also correctly confirmed in Recital 25 (first sentence: "under national law") as well as in Article 9(2) (third sentence: "as a minimum…", which stipulates the only obligatory criterion). In order not to dilute this, we suggest to redraft Article 9(2) as follows: *"Member States shall ensure that affected parties are treated in separate classes, which reflect sufficient commonality of interest, in accordance with national law. As a minimum, secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan. Member States may also provide that workers are treated in a separate class of their own."* In addition, Article 2(6) should be deleted and all necessary instructions regarding class formation criteria should be collected into Recital 25 as non-binding guidelines.

If the above drafting suggestions were not accepted, at least the text "taking into account possible pre-existing entitlements, liens or inter-creditor agreements, and their treatment under the restructuring plan" should be deleted from Article 2(6). We find it particularly worrisome that the treatment under the restructuring plan should be taken into account in class formation. The treatment under restructuring plan follows from national law (in Finland, for instance, the capital part of secured creditors' claims may not be subject to a cut; and all creditors within the same class must be treated equally), and the class formation is definitely not a corollary of creditors' treatment, but rather the treatment is a corollary of class formation (which, in turn, follows from national legislation and especially priority ranking order). In addition, if Article 2(6) will not be deleted in whole, the reference to equity holders should be preceded by "where applicable under national law", as is stipulated in Article 2(3).

Regarding the last sentence of paragraph 2 and other worker-related provisions, it is our understanding that the directive does not and should not require any specific approach in terms of employees' position in restructuring. However, if we understood correctly, the Commission explained in a working party meeting that if employment contracts are affected in the context of restructuring, then the workers should also be given voting rights. This kind of interpretation must be rejected. It should remain entirely as a question of national (and EU) employment law whether employment contracts may be modified or terminated in restructuring; in other words, workers should be left outside the scope of the directive, i.e. into national discretion. However, these observations do not mean that we would object to the last sentence of paragraph 2, provided that it will remain as a may–clause.

We support *paragraph 3*, and do not have any observations regarding *paragraphs 5 and 6*.

In terms of *paragraph 4*, Member States should be allowed to require a "double majority", i.e. majority in both number of the creditors and their claims. This could be achieved by simply adding a third sentence to the paragraph: *"In addition, Member States may require that a majority in the number of the creditors is obtained in each and every class."* Further, a following clarification should be added to the recitals: "*Member States may choose whether the majority pursuant to Article 9(4) is calculated on the basis of all affected parties in a given class or merely those parties who have voted."* This is very important to avoid excessive disadvantage in such (typical) cases where creditors are not active e.g. due to the fact that they fully trust the practitioner or voting would cause them more effort than simply passively accepting the restructuring plan.

SE

In principle we have no objections to a system where affected creditors are given the right to vote. However, there are some questions on our side relating to the connections between Articles 2(3), 8(1)(b), 8(1)(e) and 14.

What creditors and claims are intended to be affected by the preventive restructuring? The definition in Article 2(3) explains that an affected creditor is someone who has an interest or a claim that is affected, but then again, what claims and interests are affected? This is an important question because one could easily imagine a system where only such claims would be included in the restructuring procedure that are given no priority ranking (and hence no secured claims) in a bankruptcy or liquidation. The Swedish system is arranged that way. But alternatively, the restructuring framework could actually include claims with priority rights. It is not clear from the text of the directive what is meant by affected claims and interests. It follows by Article 9 that both secured and unsecured claims should be subject to the restructuring plan. Also Article 2 (2) takes a broad approach. The impression is that claims given a priority ranking in case of bankruptcy/liquidation as well as non-priority claims are to be covered. We do not object to including secured claims and other claims with priority, but the scope must be clarified, perhaps in a new definition of "affected claims" in Article 2, inserted immediately after Article 2 (3).

Further, the directive seems to be silent regarding when in time a claim must have arisen to fall under the scope of the directive (eg. it could be prescribed that the directive is applicable only to claims that have arisen before the decision for a stay or before the submitting of a restructuring plan to the authority). This question has bearing on several issues in the directive, eg. in Articles 2, 6, 7 and 9. We believe the line should be drawn at the time when the restructuring plan is submitted to the authority. Claims that came into existence later should not be included in the restructuring procedure. We suggest this should be explained in the directive, or if that is not considered appropriate, it should be explained in the directive that Member States may lay down national rules deciding at what time the claim must have arisen to be included in the restructuring plan. This could be added in the proposed new definition mentioned above regarding affected claims.

It could be argued that the protection for employees' salaries can be strengthened in the proposal. While there is protection for this kind of claims in the stay procedure of the framework (Article 6 (3)), there does not seem to be sufficient protection regarding the restructuring itself. There is a possibility in Article 9 (2), for Member States to decide that workers are treated in a separate class. However, this rule does not provide full protection. If a majority of workers in the class supports the plan there is no protection for the minority. And if the majority in the class votes against the plan, the class can still be crammed down. One way to give better protection would be to allow Member States to make exemptions for certain kinds of claims, eg. employees' claims. We suggest this could be considered (with amendments in Article 2).

Rules on voting are laid down in Article 9(4). The majority can be based on claims or interests only. We suggest an additional and optional requirement, the possibility to base the majority also on the number of creditors. Hence, we propose a rule that makes it mandatory for the Member States to base a majority on claims/interests and a rule that makes it optional for member states to amend the rule with a requirement of basing majority on creditors.

Drafting suggestion

Article 9(4)

A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. **In addition, Member States may also require that a majority of creditors is obtained in each and every class.** Member States shall lay down the required majorities for the adoption of a restructuring plan, which shall be in any case not higher than 75 % in the amount of claims or interests in each class **and [if relevant] not higher than 75 % in the number of creditors.**

We have earlier raised the question how to understand the possibility of deciding, in the restructuring plan, to emit new shares in relation to the protection for shareholders to be treated equally (Directive 2012/30/EC). This matter still has to be addressed.

UK

Paragraph 3

For the sake of clarity, we would suggest the position contained in recital 25, that judicial or administrative authorities may also examine class formation at an earlier stage than plan confirmation, be inserted into the operative provisions in paragraph 3. The current drafting suggests that examination can only be done at the point of confirmation of the plan.

UK experience with schemes of arrangement suggests that permitting earlier examination of class formation has significant advantages, such as resolving disputes and avoiding challenges later in the process, so we consider it important to make this abundantly clear that this is permitted. We would therefore suggest the following amendment:

Drafting suggestion

Article 9(3)

Class formation shall be examined by the judicial or administrative authority **no later than** when a request is filed for confirmation of the restructuring plan.

We would also note that UK courts, when examining class formation, examine jurisdiction at the same time to ensure jurisdictional tests are met, which helps increase efficiency.

Paragraph 4

In order to avoid abuse by connected parties in a restructuring, we think it is important that measures be taken to avoid connected parties being able to force through approval within a class. We note the contents of recital 25 in this respect but consider it an important enough point to be addressed in the operative parts.

We would also comment that we think the threshold requirement should only take into account creditors who vote in any given class. Creditor apathy is a persistent feature of many insolvency proceedings so requiring the stipulated threshold to relate to all creditors, including those who do not vote, may mean reaching the necessary approval level is unrealistic in many cases. This could cause plans to fail due to creditor apathy rather than genuine creditor opposition. We think this point should be addressed, at the very least, in the recitals.

Paragraph 5

We are not sure of the intention of this paragraph and wonder if it is necessary. If it is intended to mean that a vote can be carried out by written communication rather than at a physical meeting, it would be better to explain that more explicitly.

ARTICLE 10 (Confirmation of restructuring plans) & relating definition in:

Article 2(9) ("Best interest of creditors test")

DK

The principle on "best interest of the creditors test", cf. Article 10(2)(b) and Article 2(9), is basic and crucial – it should be considered clarified as being relevant not only within creditor classes, but more generally between all creditors, including individual creditors.

"New financing", cf. Article 10(1)(b) and Article 2(11). It should be clear in Article 10(1)(b) that "new financing" is aimed at protecting an influx of fresh funds – as opposed to remission of old debt, cf. Article 2(11), Article 16 and recital (31). The distinction is relevant where a judicial or administrative authority has to confirm a restructuring plan, cf. Article 10(1)(b).

Member States should be able to lay down additional grounds for refusal of a restructuring plan, cf. Article 10(3) – for example, the Danish Insolvency Act has provisions that makes it possible to refuse confirmation of a restructuring plan because of, inter alia, errors during the preparation of the restructuring plan, undue advantages given to creditors outside the scope of the restructuring or other irregularities etc.

Transfer of going concern etc. It could be clarified in Article 10(3) that a restructuring can include a transfer in ownership of the debtor's going concern or part thereof (cf. also above on Article 8(1)(f).)

- **The Danish Ministry of Justice suggests that it is clarified in Article 10(1)(b) and/or Article 2(11) that "new financing" is aimed at protecting an influx of fresh funds and not remission of debt.**
- **The Danish Ministry of Justice suggests that Article 10(3) provides Member States with the flexibility to lay down additional grounds for refusal of a restructuring plan.**

ES

Even when we are talking about a "may provision", in our opinion, if the restructuring plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, there is no sense at all in confirming the plan: In those cases the decision about confirming the plan should not be disposable for the judicial or administrative authority.

Drafting suggestion

Article 10

Member States shall ensure that judicial or administrative authorities ~~**may**~~ **shall** refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.

HR

In general, Croatia agrees that the court needs to examine all the conditions and to make sure that the restructuring plan is adequate to prevent bankruptcy of the debtor and the sustainability of the enterprise. In this regard, Croatia points out that the effectiveness of restructuring plan depends on whether the borrower can implement the restructuring plan. There must be an evaluation of the plan as well as the possibility to reject it. Croatia in Article 10(3) which stipulates that member states shall ensure that judicial or administrative authorities may refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business. Paragraph 3 should be formulated as a „shall''. The phrase "may" in paragraph 3 allows the situation in which the court confirms the plan regardless of viability plan showing that the debtor will not be able to implement the restructuring plan. It does not want member states to impose a mandatory endorsement of the viability test. Croatia thinks the definition should be changed to make it clear that the restructuring plan must be rejected if there are no conditions for the debtor's viability. Also, considers that paragraph 3 should be formulated as shall so that it is clear that the restructuring plan should be rejected if there are no conditions for viability. Furthermore, Croatia objects to setting time limits of length for the decision confirming the restructuring plan for a number of reasons. Croatia considers problematic the 30-day deadline for the decision confirming the restructuring plan since the deadline for ruling on the confirmation of the restructuring plan is not laid down in its national legislation and general legal provision already stipulates the urgency of the restructuring proceedings. In addition, the 30-day deadline is problematic because of judicial independence, having regard the impossibility to impose a deadline for court decision-making. It is very difficult for the Court to make a decision in such a short period of time in cases involving large legal entities or multinational companies. In such cases, it is necessary for the court to have a longer period of time in order to evaluate all the evidence, hear all the parties and make a decision to confirm a restructuring plan.

CY

As concerns paragraph 1, the Commission suggested that (a) and (b) is an exhaustive list and that only those two types of plans would have to require court approval. However, they agreed later on that the way this paragraph is currently drafted suggests that when it comes to those 2 specific situations Court intervention is imperative, and not that Court approval should be required only on those 2 specific types of plan. We suggest that Member States should have the option of extending this list in national law (so make it non-exhaustive list).

On the "best interest of creditors test" we would like to clarify that even though there is no such definition in national law, in essence this is the test used by Courts.

As concerns the tests set out in the 3rd paragraph of this article, CY national law on the restructuring of companies provides for the requirement of a viability test right at the beginning of the procedure. On the other hand, it holds true that an individual may be seeking to restructure his debts and maintain his professional capacity, irrespective of the survival of his current business (the viability). This differentiation on debts of natural or legal persons should either be explicitly reflected in the text, or delete the remaining text after "reasonable prospect of preventing the insolvency of the debtor".

LT

It is suggested to clarify Article 10(3), since it is not clear whether Member States will be obliged to establish in the national law the right or an obligation for judicial or administrative authorities to refuse to confirm the restructuring plan in determined case.

Moreover, it is suggested to reconsider whether these provisions should not be included in Article 10(2), determining the conditions under which a restructuring plan can be confirmed.

It is suggested to establish more flexible provisions for Member States determining conditions to refuse to confirm the restructuring plan in Article 10(3), in a case the restructuring proceedings would be applied to insolvent debtors, for instance, to set out the paragraph as follows:

Drafting suggestion:

"3. Member States shall ensure that judicial or administrative authorities may refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of ~~preventing the insolvency of the debtor and~~ ensuring the viability of the business."

It could be also assumed that the provisions in Article 10(4) determining the deadline of 30 days for confirmation of restructuring plan are too restrictive. It is suggested to provide for that Member States are encouraged to determine such a deadline.

LU

Paragraph 2: In conjunction with Article 2(9), we can accept the principles laid down in this paragraph. However, point (e) is not immediately comprehensible and requires clarification.

Paragraph 3: Scrutiny reservation.

NL

Along broad lines, we agree with the approach chosen by the Commission. In particular, we appreciate that Member States can set additional requirements for confirmation of the plan. We have some comments as to effects to running/executory contract and the role of the court however.

What is the role of the court when confirming the plan? We are unsure whether the directive provides for an active role of the court (even with sometimes implying that certain criteria need to be tested ex-officio) or whether the directive offers flexibility in this regard. According to our stakeholders, a system where the court is passive and leaves it up to the creditors to signal possible obstacles to confirmation of the plan is preferable, as to avoid unnecessary costs. With one exception: the court always has to test whether the creditors have been properly notified to all creditors likely to be affected by it. We would request clarifying (in either the article or recital) that Member States retain the autonomy to decide the role of the court.

Moreover, we miss any reflection on running (executory) contracts. What do we do with contracts for lease, rent and supply? Can they be affected? In what sense? In our own draft law, this part was hotly debated in the consultation. We now consider being able to affect existing contracts through a restructuring procedure, but, as a counterweight we want to give a creditor who has voted against the plan a right to cancel the contract within a fixed period after the plan is confirmed, with a possibility to claim damages as well. We would appreciate it if the article or a corresponding recital would clarify that executory contracts can be dealt with by the law of member states.

In discussions with our stakeholders, some more practical questions were raised and suggestions were made to improve the criteria under paragraph 2.

Paragraph 1

Even if all creditors agree but the plan provides for new financing, the plan would still have to be confirmed by a court?

What do we do with 'unknown' creditors? For example future claimants on basis of (non-performance of) contract, tort, etc? Should they be left out in any case? Or can they be bound somehow, through, for instance, a public notice? Can Member States regulate this situation themselves? This could be clarified further.

Paragraph 2(a)

We wonder whether this criterion offers sufficient protection to the creditors. Shouldn't they be involved in the plan, in the sense that they would need to have been given a proper opportunity to consider their position? If that is the case, the mere notification is insufficient. They also should have had proper time to seriously consider the proposal and give a proper reaction to the debtor.

Why has the wording 'likely to be affected by it' been chosen? Does this imply that 'indirect' effects should be included as well? For example, would suppliers need to be notified when they are not formally involved in the restructuring, but are indirectly affected by outcome of the restructuring of the business, as they are likely to get less or more future orders? This is unclear in the current draft.

Paragraph 2(b)

This is also in conjunction with the definition of 'best interests of creditors test'.

Some of our stakeholders suggested that this test is not complete, as it should include the seniority of the creditor and other criteria which are relevant for determining the expected value/claim of the creditor in insolvency. The result of this should be compared with the value which is distributed under the restructuring plan.

Attention is to had with regard to the way the creditor would be paid in insolvency (i.e. if the creditor would be paid 'in cash' in insolvency compared to being paid in 'equity' after a restructuring, this is something which should be considered, as being paid in 'cash' generally offers more value.

Paragraph 2(c)

While we subscribe to these criteria. We wonder whether it should be supplemented by other criteria, namely to prevent (1) there may not be any unfair discrimination of creditors who vote against (i.e. they may not be treated worse than creditors which have the same ranking but who are receiving more under the plan or are left outside the restructuring (ii) creditors may not be granted more than 100% of their claim (see also recital 28).

Paragraph 3

We support this test. Referring to earlier remarks, we wish to stress that this feasibility test may be useful also early on when assessing the entry to the procedure, as well as access to a stay.

Moreover, we think that we need to set the criterion that there is sufficient prospect that the restructuring plan will be performed. This should be part of the test.

Paragraph 4

This timing is of 30 days rather ambitious. We understand that a certain degree of 'haste' is needed, but this timing is rather ambitious, in particular if the court needs to consider expert evidence on the value of the businesses. Would the court comply if they give an interlocutory decision within 30 days? Or does it need to be 'confirm' or 'not confirm'? What would be the sanction if the court does not adhere to this limit?

What is the exact justification for 30 days? How would the Commission assess this deadline in complex cases with multinational businesses, where international private law aspects may also be relevant?

As a first assessment, more flexibility is needed for complex cases. Therefore, we would suggest to change the text that the decision is taken 'within reasonable time'.

Article 2(9) ("best interest of creditors test")

See our comments under 10 (2 (b).

FI

We support *paragraph 1* provided that the following clarification is added to the recitals: *"Member States may also in other circumstances require confirmation by a judicial or administrative authority."* It is necessary that Member States may require confirmation of all restructuring plans because such confirmation ensures that plans are enforceable and may be enforced without instituting separate legal actions in case the debtor does not comply with the plan. Were this not the case, considerable burden were put on both creditors and national courts. For instance, failure by the debtor to comply with a restructuring plan that affects 500 creditors would mean that 500 separate actions should be instigated in district courts.

We support *paragraph 2*. However, it should be clearly spelt out in the recitals that *ex officio* examination is not required, especially not in relation to subparagraphs b and c, and that Member States may also require that a creditor, who invokes subparagraph b or c, has voted against the plan. In the context of civil law cases it would be really weird and burdensome for the courts if they were expected to play an inquisitorial role in terms of provisions, which are aimed at protecting private parties. Finally, regarding subparagraph a, we would prefer replacing "all known creditors likely to be affected by it" with either *"all known creditors that will be affected by it"* or *"all known creditors affected by it"*, in order to avoid unnecessary expansion of the notifying obligation. This formulation would still leave room for the Member States to extend the scope of notifying obligation, should this be deemed appropriate for some reason.

We support *paragraph 3*. In our opinion, the words 'may' and 'shall' are correctly used. Those Member States, who wish to investigate this aspect ex officio in every case, are free to do so in spite of the word 'may'.

We strongly oppose *paragraph 4,* which should be limited to the following*: "…a decision is taken without undue delay* [or: as soon as practicable]." The current formulation would not only jeopardize independence of judiciary, but also insidiously nullify the flexible approach taken in Article 4(2), hindering the possibilities to implement the directive in the context of existing restructuring procedures. For instance in Finland, after a draft plan is delivered to the court, the court reserves all affected parties an opportunity to express their views, resolves any disputed claims, checks the class formation etc, only after which it shall commence the voting procedure.

SE

According to Article 10(2)(b), notification must be done to all creditors "likely to be affected", which is a very broad group. While we understand the motives for Article 10(2)(b) as explained by the Commission in the working group meeting, we believe this broad group only brings confusion, and it seems unnecessary to require that others than those actually affected be notified.

Drafting suggestion

Article 10(2)(a)

"[…] Article 9 and ~~has been notified to all known creditors likely to be affected by it~~ **that any affected creditor was notified prior to the adoption**;

Article 10(4)

"[…] a decision is taken without undue delay after the request for confirmation has been filed ~~and in any case no later than 30 days after the request is filed~~."

We deem it unrealistic to have a prescribed short time frame, and believe that an obligation to ensure swift procedures is sufficient.

UK

Paragraph 1

We would suggest a minor drafting change in (a) for greater certainty and consistency with the definition of 'affected parties':

Drafting suggestion

Article 10(1)(a)

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

Paragraph 2

The UK is not convinced that the definition of the best interests of creditors test as provided for in Article 2(9) sets the right threshold. The requirement for creditors to be no worse off than in the event of liquidation appears inequitable to creditors who are being (involuntarily) crammed-down in the restructuring plan, shifting the current balance between the debtor's and creditors' interests too far in favour of the debtor.

This is certainly the case in the UK context where creditors would otherwise have better options open to them than simply seeking the liquidation of the debtor. Alternative insolvency procedures, particularly those aimed at rescue, such as the UK's administration procedure, can be initiated by certain categories of creditors, with the reasonable expectation that such procedures will produce higher returns for creditors than liquidation.

If creditors are to be deprived of the opportunity to initiate alternative recovery proceedings of either an individual or collective nature, this should be reflected in the standard of the protection offered by the best interests of creditors test. Giving creditors less in a restructuring plan than they could obtain in an alternative rescue procedure is not in their best interests.

In addition to issues of fairness and equity, there is also a risk that imposing a lower standard would have an effect contrary to the overall objectives of Title II. Creditors with the ability to instigate alternative insolvency procedures may look to do so at the first available opportunity if they fear the debtor is contemplating applying for a stay for the purposes of commencing negotiations for a restructuring plan under which they may receive less than they otherwise would in an alternative procedure. This could destroy or damage any efforts to rescue the business of the debtor. It seems quite plausible that covenants in lending agreements will become stricter, making it easier for lenders to evidence default and that lenders may use the most trivial of breaches of covenants as grounds for pursuing insolvency options, matters in respect of which they currently are content to exercise restraint over.

When we consulted on similar proposals in 2016, respondents had very mixed views on this particular issue. Many favoured the simplicity of a liquidation standard but many thought this inequitable for the reasons stated above. Whilst simplicity is an attractive feature of legislative frameworks, the UK thinks that in this instance it is outweighed by the potential harm to creditors and possible consequences arising from that harm, such as higher costs of lending.

As such, the UK thinks the appropriate standard should be the next best alternative i.e. the most likely course of action to be taken if the plan did not proceed – in effect a counterfactual approach. This avoids fixing the standard on any one alternative but rather leaves it to the court, upon the available evidence, to assess what would be most likely to happen if it does not confirm the plan and fix the level of creditor protection on that basis.

Drafting suggestion

Article 2(9)

'best interest of creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they would be if the restructuring plan were not agreed and the next best ~~liquidation, whether piecemeal or sale as a going concern~~ **available rescue or insolvency procedure were implemented;**

So that creditors understand what the debtor assesses the next best alternative to be, the debtor should set out in the plan what it considers this to be with an estimate of the likely returns to creditors in such a scenario. This is common practice in UK Company Voluntary Arrangements and provides creditors with a relatively straightforward comparison which they can use to decide whether or not to support the proposal. Exactly how such information should be set out is best left to Member States as there are various options as to how to illustrate the comparison. While we would generally favour a less prescriptive approach to Article 8, we would therefore suggest the insertion of the following :

<u>Drafting suggestion</u>

<u>*Article 8**(h)***</u>

(h) an opinion by the person responsible for proposing the restructuring plan which explains:

(i) what the next best available rescue or insolvency procedure would be, and

(ii) the likely alternative outcomes for creditors if the next best available rescue or insolvency procedure were implemented.New 8(1)(h) :

<u>*Paragraph 3*</u>

Whilst the objective of paragraph 3 is sensible in that we do not want to encourage restructuring plans that are likely to fail, the UK envisages problems with this provision in its current form.

Firstly, we are asking judges to make what is an inherently commercial determination in assessing the restructuring plan's ability to prevent the debtor's insolvency and ensure its future viability. In the context of large corporate restructurings this may not be so problematic in that the debtor should be able to afford to pay suitably qualified experts to provide judges with the evidence they need to make such a determination. There is however some concern as to whether or not affected creditors who dispute the debtor's assessment would be able to afford to put alternative evidence before the judge to allow the judge to make a well reasoned determination.

In the context of SMEs and individuals, we are less convinced that debtors will have the resources to pay for the professional advice on which the judge can make their determination. Without high quality professional evidence we think it likely that UK judges will feel somewhat uncomfortable in making such a commercial determination. This may lead to judges being unwilling to apply cross-class cram down if they cannot be sure the best interests of creditors test has been met (whatever the standard that applies).

Secondly, we think paragraph 3 goes too far in imposing a two part test in that not only must the restructuring plan avoid insolvency but must also ensure the viability of the business. This could create considerable uncertainty in that the proposed directive is silent on what viable means, over what time period it should be assessed and what level of consideration should judges give to wider macroeconomic factors that the debtor has no control over.

Requiring the plan to "ensure" the viability of the business is a high threshold: effectively it requires a guarantee of viability. In practice, if courts have to apply this test, we think they may be reluctant to confirm plans in many cases on the basis that they are not satisfied that this difficult requirement has been met. We think the viability test goes too far and would suggest it be removed so that judges are only required to consider the restructuring plan's ability to avoid insolvency. This would have the added benefit of removing the need for costly viability assessments, and so reducing burdens on SMEs seeking to restructure.

Paragraph 4

These provisions appear overly prescriptive for a directive. The 30 day period stipulated is unlikely to be sufficient in all cases and would impose burdens on the judicial system.

In reaching a decision on whether to confirm a restructuring plan, the court will need to consider the valuation of the present value of the debtor and/or the debtor's business, which is required content of the plan under Article 8. Valuation is often a highly contentious issue in restructurings. Two valuers using the same valuation method may differ in their valuations. As well as being contentious, it is complex and therefore time-consuming. In UK schemes of arrangement, valuation hearings are dealt with by highly experienced senior judges in the commercial division of our High Court, and are, in effect, mini-trials which typically last for at least 2 weeks.

Valuation is not the only matter that may require close examination. Class formation may often be challenged given the importance of this issue to whether or not a plan is approved. (As stated above in respect of Article 9, we suggest allowing earlier examination of class formation, which may help here.) The court may require further information on how classes have been formed and various other aspects of the proposed plan and it may take time to gather and present evidence to the court.

We certainly agree with the principle of swift resolution as this is an important factor in achieving business rescue, but we think a more workable solution would be to follow the drafting suggestion below. This retains the principle of swift resolution but allows Member States flexibility and allows judges to make informed decisions with the ability to consider disputed evidence and seek the information they require.

Drafting suggestion

Article 10(4)

Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, a decision is taken ~~without undue delay after the request for confirmation has been filed and in any case no later than 30 days~~ as soon as practicable after the request is filed.

ARTICLE 11 (Cross-class cram-down) & relating definitions in:

Article 2(8) ("Closs-class cram-down")
Article 2(10 ("Absolute priority rule")

DK

Although Article 11(1)(b) is somewhat unclear in this regard, it is apparent based on the discussions in the Working Group that the provision allows for *one* creditor class to fulfill *both* conditions mentioned. This should be specified.

Class with decisive vote. More generally, Member States should be able to determine which class of creditors has the decisive influence (cf. also remarks above on Article 9 and voting rights).

Article 11(2) is quite unclear. Does this provision make it possible to require more or fewer creditor classes to approve a plan before cross-class cram-down is possible?

- **The Danish Ministry of Justice suggests that it is clearly stated in art. 11(1)(b) that one creditor class can fulfill both conditions mentioned.**

ES

The 'Absolute Priority Rule' means that "a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan".

The concept of the absolute priority rule has a key role in the application of the cross class cram down system and should not present any doubt.

Accordingly, the meaning of been satisfied in full (does it mean that debts are satisfied in cash?), and of a more junior class (does it mean a less privileged class according to national law?) should be clarified.

CY

We agree that there should be some kind of cross-class cram-down so as to effect a restructuring plan that has been unjustifiably rejected by some creditors or some class of creditors, however, there should be greater flexibility on the Member States on how to apply a cross-class cram-down (as the reasons for approving or rejecting a plan may differ accordingly) and perhaps give more discretion to the Courts to consider enforcing such a restructuring plan. It is, although, very important to ensure that such a cross-class cram-down complies at least with the provisions of Article 10(2) of the Directive.

Definition of "cross-class cram-down": We are fine with this definition

"absolute priority rule": We are not quite positive on this test because such a priority order is usually applied in liquidation procedures, and for this alone, it is disproportionate and contrary to the aim and policy of any restructuring plan, the aim of which is to rescue the business as opposed to dissolving it. The "best interest of creditors test" should suffice.

Paragraph 2: This is a "may" provision, therefore, it is flexible enough.

LT

It is supposed that the wording "and become binding upon one or more dissenting classes" in Article 11(1), are excessive provisions, since the provisions of Article 14 establishes that Member States shall ensure that restructuring plans which are confirmed by a judicial or administrative authority are binding upon each party identified in the plan.

It is suggested to consider whether the wordings in Article 2(10), "any distribution or keep any interest" and in Article 11(1), point b, "any payment or other consideration" should not be consistent.

It is also considered that the wording in Article 11(1), point b, "if the normal ranking of liquidation priorities were applied" could be simplified with respect to the text of Article 2(9) ("in the event of liquidation").

According to provisions of the Article 11, cross-class cram down could be applied both to creditors' classes and equity-holder class. However the provisions of Article 2(8), establishes that 'a cross-class cram-down' means the confirmation by a judicial or administrative authority of a restructuring plan over the dissent of one or several affected classes of creditors. Therefore it is suggested to eliminate this inconsistency. It is also supposed that the wording "affected parties" or "affected classes" should be in line with each other.

LU

Paragraphs 1 and 2: These measures should remain optional for the Member States, or the conditions for voting and approving the restructuring plan should be determined by national law.

NL

In general, we are quite satisfied with this article. We think it provides some protection for creditors, while it allows some flexibility for Member States to set additional criteria to approve a cross-class cram-down.

We understood from the Commission – earlier on – that this article allows Member States to set additional criteria which have to be met in order to confirm a cross-class-cramdown. It would be good if this could be clarified in the text. This could be done in paragraph 2.

We have a few comments on the definition of the absolute priority rule. We think this may not be comprehensive in its current form, as it may be supplemented by rules on unfair discrimination of creditors.

Paragraph 1

It should be clarified that a class of creditors may not be unfairly discriminated against (as regards the value they receive, compared to the value which will be distributed to other classes of creditors). We acknowledge that certain recitals mention these criteria, but we think it's important enough to include these principles in the text. As an alternative, the absolute priority rule could be a principle which can be further clarified under national law.

Paragraph 2

Does the word 'vary' imply that Member States can adjust the amount of affected classes both upward and downward? If this is not intended, the word 'increase' should be used.

Article 2(10)("Absolute priority rule")

Our stakeholders commented that this should only apply insofar the creditor's claim's rank warrants this. It's possible that a security (such as a pledge or mortgage) only covers part of the outstanding claim. This may depend on the value of the pledged/mortgaged asset. In other words: if the creditor has a claim for 2 million, but the security is only worth 1 million, the claim should be split in two parts: a secured claim of 1 million and an unsecured claim of 1 million.

We've read recital (26) – in the context of the rules on class formation - which allows national law to provide that secured claims may be divided into secured and unsecured claims based on collateral valuation. Would this reasoning apply to the absolute priority rule as well?

FI

Regarding *paragraph 1*, we support cross-class cram-down (CCCD) as a matter of principle. It should be clarified in the beginning of the paragraph that subparagraphs a–c are merely minimum conditions, and Member States remain free to set additional conditions. After having heard the explanations of the Commission on Article 12 we are of the opinion that the commencement of CCCD mechanism should always be subject to the debtors' consent or the Member States should remain free to require that.

In our view, subparagraph c protects secured creditors excessively (and at the same time, fails to protect equity holders at all, because they come after everyone else in the priority ranking order) and creates a tempting incentive for secured creditors to vote against the plan. We would prefer to completely remove it from the text, or at least, following clarifications should be added into the provisions:

1) It should be clearly specified that national law defines when the creditor is deemed to be "satisfied in full" (as prescribed by Article 2(10)). In Finland, the capital (principal) of secured creditors' claim is protected, but certain adjustments may be made in relation to other terms and conditions, such as interests and payment schedule. If the "satisfied in full" clause would, contrary to our opinion, mean that *no* kind of restructuring method could be imposed on secured creditors who invoke absolute priority rule, the following question arises: why are secured creditors in the scope of the directive at all?
2) It should be clearly specified in recitals that "before a more junior class" clause does not affect the temporal arrangements regarding implementation of restructuring plans. Restructuring plans are usually drafted so that for the next, for example, five years the debtor must in every month pay, for instance, 300 euros to secured creditors' class, 200 euros to ordinary creditors, etc. The amounts are imaginary but the point is that all classes will receive some payments simultaneously from the very beginning of the implementation. It would be very harmful and excessive protection for secured creditors if the debtor, for instance, during the first four years were only allowed to make payments to secured creditors, and only after these years – after reaching the point of "satisfied in full" – other creditors could get their first payments. Such an interpretation would significantly hamper ordinary creditors' incentives for restructuring, and must be eliminated.

SE

Drafting suggestion

Article 11(1)

1. Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement ~~and become binding upon one or more dissenting classes~~ where the restructuring plan:

(aa) has been notified to every affected creditor prior to the adoption procedure;

(a) fulfils**, at least,** the conditions in **Articles 10(2b) and 10(2c)** ~~Article 10(2)~~;"

Article 11(3)

3. Article 10(3) and 10(4) apply at the cross-class cram-down.

The reasons for the aforementioned proposals are the following. Firstly, the condition in Article 10(2)(a) that the restructuring plan has been adopted accordance with Article 9 cannot be fulfilled in the Article 11-situation, and this means Article 11(1)(a) has to be redrafted. Secondly, it seems sensible that the conditions laid down in Article 10(3) and 10(4) also should apply in the cross-class cram-down procedure according to Article 11 (this seems to be the Commission's idea even though Article 11 has not been designed that way). Thirdly, it has to be clarified that the non-exhaustive character of the Article 10(2)-list applies also according to Article 11(1)(a). And fourthly, the binding effect of the plan is dealt with in Article 14 and does not have to be in Article 11(1).

The Absolute Priority Rule was questioned in the working group meeting. We support the APR-rule and urge that it is retained. The APR-rule is important for the purpose of maintaining the priority ranking in all insolvency procedures. Besides, if the priority ranking would only be upheld in bankruptcy/liquidation procedures, and not in the preventive restructuring, creditors with high ranking might not be interested in restructuring, but actually prefer liquidation.

UK

Paragraph 1

We think the current drafting causes confusion and, based on our understanding of the Commission's intention from its explanation during working group, we would suggest the following drafting amendment:

<u>Drafting suggestion</u>

<u>Article 11(1)(b)</u>

(b) has been approved by at least one class ~~of affected creditors~~ affected parties, other than an equity-holder class, **whose interests are detrimentally affected**, ~~and~~ or by any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;

With regards to 11(1)(c) and the use of the absolute priority rule (defined in Article 2(10)), we are concerned that this does not permit sufficient flexibility. As a starting point, we support the underlying principle behind the absolute priority rule in that the order of priority provided for insolvency procedures should also apply in a restructuring plan. A plan is an alternative course of action intended to avoid insolvency. If creditors' rights are to be subject to interference, the relative treatment of different classes should not differ from that which would apply in an insolvency procedure. However, we have heard criticism of the absolute priority rule in Chapter 11 from US bankruptcy judges and academics focusing on the 'absoluteness' of the rule and the lack of judicial discretion it affords.

Indeed the UNCITRAL Legislative Guide states, '*the limitation of this approach, however, is that it may reduce the chances for a successful reorganization where the encumbered assets or modification of the rights of such creditors are key to the success of the plan*.' The recent European Law Institute's Rescue of Business in Insolvency Law paper also notes considerable criticism of the inflexible nature of the rule, referencing the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 (2014) in which the absolute priority rule is described as, '*inflexible and often a barrier to a debtor's successful reorganization*'. We view flexibility and the ability to act pragmatically not only as a desirable feature in restructuring law, but also invaluable to achieve successful restructurings.

As the text is currently drafted, we think the absolute priority rule prohibits sufficient flexibility where some departure from the rule may be justified for the greater good. For example, Article 7 notes the importance of essential suppliers in respect of the stay but, where essential suppliers are dissenting creditors, the absolute priority rule would prohibit a restructuring plan that kept them on-board to achieve future viability by paying off their historic debt ahead of say junior financial creditors. There is a therefore a disconnect in that the stay acknowledges the requirement to maintain essential supplies but the absolute priority rule does not. Once the stay ends, such suppliers are free to terminate supplies which, quite possibly, could cause the business to fail, leaving the restructuring plan in ruins. The UK has a provision in its administration procedure which permits the administrator to make a payment outside the ordinary order of priority if it is likely to assist in achieving the purposes of the administration. This recognition of the need for pragmatism has been used precisely to avoid termination of essential supplies given the UK's current lack of general ban on ipso facto clauses in insolvency proceedings.

In addition to the issue of flexibility, we would note that the absolute priority rule can permit abuse whereby sophisticated parties benefit at the expense of other parties. The trend of predatory market actors cheaply acquiring junior secured debt as bondholders sell out and using restructuring negotiations to extract maximum value for themselves, regardless of the interests of other creditors or the rescue of the debtor, is well documented. This trend would not assist the aims of the draft Directive.

The UK would therefore favour an approach that allowed a court to confirm a plan even though it did not comply with the absolute priority rule where such non-compliance was both necessary to achieve the aims of the restructuring and was just and equitable in the circumstances, including preventing abuse. We think this two stage test for permitting non-compliance creates a high threshold so the absolute priority rule will, in most cases, be followed, but there is just enough flexibility to allow departure where such departure is vital to agreeing a plan and making it work. We would again point to the example of an essential supplier demanding some additional payment as a condition for future supply to the debtor. This flexibility may only be used where judicial scrutiny has resulted in a decision that a departure is needed and is fair, providing adequate protection for creditors whilst also achieving the best outcome for parties as a whole. We therefore suggest the following amendments:

Drafting suggestion

Article 11

1. Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement and become binding upon one or more dissenting classes where the restructuring plan:

(a) fulfils the conditions in Article 10(2);

(b) has been approved by at least one class of affected ~~creditors~~ **parties** other than an equity-holder class**, whose interests are detrimentally affected, or by** ~~and~~ any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;

(c) **either :**

(i) complies with the absolute priority rule **; or**

(ii)the judicial or administrative authority considers departure from the absolute priority rule to be both necessary to achieve the aims of the restructuring plan and just and equitable in the circumstances.

2. Member States may vary the minimum number of ~~affected~~ classes **of detrimentally affected parties** required to approve the plan laid down in point (b) of paragraph (1).

ARTICLE 12 (Equity holders)

DK

Transfer of going concern etc. It could be clarified in Article 12 that a restructuring can include a transfer in ownership of the debtor's going concern or part thereof (cf. also above on, inter alia, Article 8(1)(f).)

More generally, our concern is that the rights of the shareholders and other equity holders *before* actual insolvency will be diluted, cf. also the first written contribution of the Danish Ministry of Justice on the crucial Article 4(1) and the interpretation of the point in time of "likelihood of insolvency". In this context, the interpretation of Article 12 in connection with other provisions of the proposal is not quite clear.

CY

In principle we agree with this limitation on equity holders, however, paragraph 1 should be re-drafted to achieve clarity on the objective of this provision.

LT

According to provisions of the Article 12(1), Lithuanian translation, it is supposed that the Directive in this paragraph respectively limits the rights of creditors who are shareholders and other equity holders. However this perception is not quite clear in the English version, which determines "shareholders and other equity holders with interests in a debtor". Therefore it is suggested to establish more clear provisions whether the rights of creditors who are shareholders and other equity holders or the rights of all shareholders and other equity holders are limited in this paragraph.

Having regard to the Article 11(1), point b, it is doubtful whether provisions of Article 12(1), are not excessive.

Moreover, since the restructuring means inter alia changing any other part of the debtor's capital structure, including share capital, it is considered that cross-class cram down in relation to the shareholders and other equity holders, when a company is solvent, could be contrary to the constitutional property rights.

LU

Paragraph 2: If this is optional for the Member States, we have no objection.

NL

While we understand the purpose of the rule, we find article 12 in its current form very unclear. As the article currently stands, we have too many questions. We would suggest to make this optional for member states.

As a first point/question: what does an 'unreasonably prevent the adoption or implementation' mean? What does this article require Member States to do? What is the role of the court in this?

How do paragraphs 1 and 2 interact? If a member states opts to give voting rights to shareholders, as described in paragraph 2, would this automatically mean the conditions of paragraph 1 are fulfilled? Even if this would mean that the shareholders, who are normally 'out of the money', will be outvoted and can be subject to a cross-class-cramdown?

Would this article also apply to the scenario where the shareholders prevent the **proposal** of a restructuring plan? For instance, they threaten to dismiss the board of the directors if a plan is proposed?

We would prefer giving voting rights to shareholders. In addition, shareholders rights to invoke statutory rights or call a meeting should be excluded, as to prevent them from invoking these rights to de facto block the agreement. We would prefer this approach instead of the approach chosen by the Commission.

Question for clarification: will the decision of the court to invoke a cross-class cram-down bypass any statutory or legal requirement to request permission from the shareholders?

FI

We accept the general principle of not letting equity holders unreasonably prevent the adoption of a restructuring plan. However, discussions in the working party have shown that the proposal is not very clear, and does not openly discuss on what it actually seeks in this respect and to what extent. We think that a mere reference to "changing debtor's capital structure" in Article 2(2):

- must not mean that any kind of changes to capital structure should obligatorily be implemented into and provided for in national restructuring procedures (for instance, debt-to-equity swap should be left into national discretion); and
- especially must not mean that whenever such changes to capital structure are nevertheless made in the context of restructuring, they should automatically be subject to far-reaching conditions of Articles 9–13.

Thus, there must be sufficient flexibility in terms of the intersection between company and insolvency law. However, if the proposal is indeed meant to cover changes in capital structure, and to subordinate such changes to Article 12, it is clear that more thorough and open discussions will be needed, and the following aspects must be taken into account.

Equity holders, even those who are considered "out of the money", should not be completely excluded from having a say in the adoption. In our view, Member States should be able to require a reasonable majority in the general meeting of shareholders – that is, a majority of 50 to 75 percent, as stated in Article 9(4) – to let a plan, which affects their rights, be adopted, without breaching the principle in Article 12. We acknowledge that the case would be different if, for instance, national law would grant one minority shareholder the right to block the adoption. This kind of clarifications might be useful in the recitals.

Also, we remind that the conditions for cross-class cram-down (CCCD) in Article 11(1) do not as such protect equity holders at all. Absolute priority rule only requires that more senior classes must be satisfied in full before a more junior class may keep any interest under the plan, and equity holders in many countries hold the weakest position in priority ranking order. This is why it is of utmost importance that 1) Member States may grant "the debtor", meaning for instance the general meeting of a company, a veto right to block the commencement of CCCD mechanism, irrespective of the size and nature of the company (although the end of recital 29 misleadingly refers to SMEs only); and that 2) Member States may set higher conditions for CCCD than those mentioned in Article 11(1) also in respect of equity holders, provided that "unreasonableness test" in Article 12(1) is complied with.

For the former point 1) we propose that the last sentence of Article 12(2) should be deleted or the word "shall" replaced by "*may in accordance with national law*". Furthermore, Article 18 should not dilute this; it would be unacceptable to deprive shareholders of their right to vote (in favour of the board or the managing director) while adopting a restructuring plan, which affects their rights.

The concept of "equity holders", should be expressly left into national discretion. Especially, partnerships and other comparable company forms with *unlimited* owner responsibility should in any case be left outside the scope. It would be unacceptable to let creditors gain holdings in a partnership, while leaving the original owners with full liabilities.

Finally, we think that it is unnecessary to include "implementation" in the wording of Article 12(1). It is sufficient that confirmed plans will bind the parties according to Article 14(1).

SE

Recital 29 states that "equity holders of small and medium enterprises who are not mere investors but are the owners of the firm and contribute to the firm in other ways such as managerial expertise may not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down mechanism should remain optional for the plan proposer". Despite the Commission's attempts to explain, we still do not understand this recital. We suggest this part of the recital is removed.

In order to achieve the purpose of preventing equity holders from blocking the adoption of a restructuring plan, Member States may have equity holders form one or several classes of their own, according to Article 12(2). We do not object to this but we have a question. If a member state chooses to apply the Article 12(2)-option, our understanding of the directive is that Articles 9, 10 and 11 apply in the regular way. This would mean that if the minority in a class of equity holders votes against the plan, the procedure in Article 10 could be used to adopt and confirm the plan. If, on the other hand, the majority in the class votes against the plan, the procedure according to Article 11 would have to be used to confirm the plan. If these assumptions are correct, what does the last sentence of Article 12(2) mean? It could be argued that Article 12(2), the last sentence, only provides (redundant) information, but then it should read as the following:

> ***Drafting suggestion***
>
> *Article 12(2)*
>
> […] shall be subject to the ~~cross-class cram-down mechanism~~ **mechanisms** provided for in ~~Article 11~~ **Articles 9, 10 and 11 where applicable**.

If the sentence in question has any other meaning, this has to be clarified.

UK

We agree with the principle that equity-holders should not be allowed to unreasonably prevent a restructuring from proceeding.

The Explanatory Memorandum to the proposal says of Article 12, that it: "*lays down the principle the shareholders and other equity holders should not be allowed to obstruct the adoption of restructuring plans of a viable business, provided that their legitimate interests are protected*". We are not quite certain how equity interests are protected and wonder if this needs to be addressed in the operative parts. We think further discussion may be helpful.

We have also considered whether or not 'equity holder' ought to be a defined term. The Commission has suggested it is open to this idea or would consider leaving this to national law. The UK favours the second approach.

Paragraph 1

We have a small drafting suggestion as we think the current text imposes too high a threshold in respect of the restructuring plan's ability to restore the business:

> ***Drafting suggestion***
>
> *Article 12(1)*
>
> Member States shall ensure that, where there is a likelihood of insolvency, shareholders and other equity holders with interests in a debtor may not unreasonably prevent the adoption or implementation of a restructuring plan which would **be likely to** restore the viability of the business.

Alternatively, we are not particularly convinced paragraph 1 is necessary. The content of recital 29 is probably sufficient for paragraph 1 to be deleted.

ARTICLE 13 (Valuation by the judicial or administrative authority)

DK

It should be explicitly stated that the "properly qualified experts" mentioned in Article 13(3) can participate in determining the liquidation value mentioned in Article 13(1).

HR

Croatia emphasizes the analytical reserve of Article 13 of the Proposal because its national legislation does not know the liquidation and enterprise value and this is in contradiction of its restructuring proceedings. Furthermore, the calculation of the liquidation value and the enterprise value with assistance of properly qualified experts contradicts the objective of the Proposal to carry out a fast restructuring proceeding in a cost-effective way. The objective of the Proposal is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. This Directive aims at removing such obstacles by ensuring that viable enterprises in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; that honest over indebted entrepreneurs have a second chance after a full discharge of debt after a reasonable period of time; and that the effectiveness of restructuring, insolvency and discharge procedures is improved, in particular with a view to shortening their length. However, in order to implement Article 13 in the present wording, Croatia would have to modify a significant portion of the company law, hence the Republic of Croatia emphasizes the analytical reserve on Article 13 of the Proposal. Furthermore, given that the determination of the liquidation value and the enterprise value differs by the method of determination and by the competent judicial or administrative authority in every Member State, it very difficult to unify valuation in all EU Member States.

CY

This article introduces two types of valuation that the Courts shall apply in assessing a restructuring plan: the liquidation value and the enterprise value. Having two tests and experts to assist the judicial or administrative authorities increases the costs and time-spam of the procedure to be followed to confirm a plan, which will be detrimental especially on personal restructuring plans. For these reasons we have reservations on this article and would like more flexibility on these matters, (which may involve judiciary) as legal systems differ immensely in Member States.

LT

Taking into account the Article 10(2), and Article 2(9), it seems that judicial or administrative authority by confirming a restructuring plan should know the liquidation value in order to evaluate 'best interest of creditors test'. On the other hand, the paragraph 1 of this Article states that liquidation value should be determined when restructuring plan is challenged. It is suggested to eliminate this uncertainty in the text of the Directive.

It is supposed that the text in paragraph 4 should be clarified, since it is not clear whether Member States will have a right to choose one of two alternatives, or Member States will be obliged to establish in the national law both possibilities to challenge the restructuring plan.

It is assumed that paragraph 4 of this Article should be included into Article 15, since the content of this paragraph is related to appeals and does not comply with the title of the Article 13.

LU

We suggest that Article 13(3) be reworded.

Article 13(3) provides that, for the purposes of the liquidation valuation, the judicial or administrative authority may be assisted by experts when necessary and appropriate.

If this Article (and the principle itself) is to remain, we suggest that experts should be appointed as a matter of course and that the concept of assisting the authorities should be removed.

NL

While we can subscribe to the idea that a valuation should be given upon certain challenges by the creditors, we think the current article is a bit too detailed, in particular paragraphs 1 and 2, and parts of paragraph 3.

We would prefer having the principle set that appropriate valuation should be given in the appropriate circumstances, which may (1) be left up to the discretion of the court to determine, or upon (2) certain challenges of the creditors.

Paragraph 1

As indicated before, we would prefer a less detailed text.

However, if there is a clear wish to keep this rule, it would need to be supplemented, as it currently does not include the valuation of the claims of creditors .

You would also need to value the claims of creditors in a restructuring scenario, and compare this to the expected value of the claims in a liquidation scenario.

Paragraph 2

We would prefer less detailed text here.

Again, if there is a clear wish to keep this rule, it would need to be adjusted.

First, we would propose that as a starting point valuation by the court on basis of an enterprise value is only needed where creditors challenge the restructuring plan in a cross-class-cram-down scenario. This means that letter (a) and (b) could be merged.

Like under paragraph 1, the value of the claims of creditors would need to be included in the valuation process as well, to compare their position before and after the restructuring.

We don't really understand why the enterprise value looks, according to recital 30, more at the 'long-term' value? What does this mean? This does not seem to take into account the scenario where at least parts of the business are being sold or closed down. Furthermore, it does not provide a lot of guidance for experts or the courts. Shouldn't the value at the time of expected execution of the restructuring plan be taken as a main point of reference for valuation of the business?

Paragraph 3

Which creditor(s) may challenge the value of the collateral? We assume this would only be the creditor which has been given the collateral to cover his claim? Or could it be other creditors as well? As a first reaction, this seems quite detailed. Could this be left to national law?

What does 'properly qualified' mean? Would this imply the need to introduce a register with experts? That seems inappropriate.

We would suggest making the text simpler, by simply stating that the judicial or administrative 'may appoint experts to assist them in their task'.

Paragraph 4

Is it possible to allow the challenge to be lodged at an earlier stage, e.g. during negotiations?

We would prefer to have the ability to determine when these challenges can be lodged and under which conditions, to avoid very difficult and technical discussions during the confirmation hearings.

We would therefore suggest to make the paragraph more open, so member states have more flexibility in determining when and how the appeals can be lodged.

FI

We support *paragraph 1*. We interpret the provision so that the expression "whether piecemeal or sale as a going concern" in Article 2(9) is meant to leave some useful case-by-case flexibility as to what kind of liquidation is the most probable in each case.

Regarding *paragraph 2*, we have reservations in terms of including obligatory provisions on enterprise valuation into the directive and in terms of separating in-the-money and out-of-the-money classes of affected parties (creditors or equity holders) with the purpose of determining whether they can have any say in the adoption. Also, such division, and thus the ultimate purpose of calculating the enterprise value, is completely lacking from the legally binding part of the proposal.

In *paragraph 3*, major changes are needed to let the Member States keep a system where it is up to the parties to present necessary documentation and evidence as well as to challenge valuations (which may already be calculated by the practitioner). This could be achieved, for instance, by the following formulation: "*Member States shall ensure that properly qualified experts may be appointed or heard by the judicial or administrative authority, for the purposes of the valuation, including where a creditor challenges the value of the collateral*." Another possibility is to redraft the provision to require that if experts are used by the court, they must be properly qualified.

In addition to what is stated above, we don't have any further observations on *paragraph 4*.

SE

A general observation regarding the terms used for different values is that there appears to be inconsistencies in the proposal. In Article 8(1)(b) the phrase "the present value" is used, in Article 11(1)(b) the phrase "valuation of the enterprise" is used and in Article 13(2), the phrase "enterprise value" is used. Only the "enterprise value" concept is explained in the directive. This has to be clarified.

According to Article 13(1) and (2)(b), the liquation value and the enterprise value respectively are to be determined, "where the restructuring plan is challenged". It is not clear to us what this phrase means, especially since, in the Swedish version, the word "challenged" in both Article 13(1) and 13(2) has been translated into "överklagas" which means "is appealed". We assume – in line with explanations from the Commission – that Article 13(1) and (2)(b) are intended to require that the court shall determine the value in the confirmation process according to Article 10 or 11, see also Article 13(4). This could be clarified in the text of Article 13(1) and 13(2)(b) by reference to Articles 10 and 11 where appropriate.

Further, Article 13 might have to be amended due to the following. The process of confirming a restructuring plan includes a test as prescribed in Article 11(1)(b), which means that the value of the enterprise has to be determined by the class approving the restructuring plan. It could therefore be argued that Article 13(2) should be amended so that it includes a rule imposing an obligation to determine a value of the enterprise where a restructuring plan is challenged on the grounds of an alleged breach of the rule in Article 11(1)(b).

We also have another question: What is the purpose of Article 13(2)(a)? Especially if the proposed amendment (see above) to protect the principle in Article 11(1)(b) would be accepted, it seems that Article 13(2)(a) is redundant. (But if the rule in Article 13(2)(a) were to be retained it would have a very broad scope and also make Article 13(2)(b) redundant. However, that is not a solution we favour.)

We assume that Article 13(4) has the objective of giving Member States the option to choose whether challenges referred to in Article 13(1) and (2) should be considered in the first instance proceedings or on appeal. We support that Member States will have this option. In any case, it must be possible to prescribe in national law that these challenges can be considered in the authority or court of first instance.

We are hesitant to the detailed rule in Article 13(3). According to Swedish procedural law, the burden to bring facts, evidence and expert witnesses to the proceedings normally lies on the parties, not the court. We suggest that Article 13(3) is removed. At least it could be changed to a less prescribing rule stating that, with respect to the independence of the procedural systems of the Member States, Member States shall ensure that properly qualified experts are involved in the process of valuation. Further, the last part of Article 13(3) has to be explained ("including…"). In which context is the challenging of the value of collateral relevant? The simple solution could be that the Article is motivated by some procedure in other Member States, and if so, it will simply not be relevant for Sweden.

It has been suggested in the working group meetings that Article 13(4) is intended to give the parties concerned a right to appeal against a decision that determines a valuation. We are not convinced that this is clear from the present wording and believe this should not at all be a right derived from this Article. We do not object, however, to the idea that there should be a right to appeal against a judgement or court decision regarding confirmation of a restructuring plan, but that is already guaranteed in Article 15(1).

UK

It seems reasonable to predict that judicial determinations on questions of valuation will lead to significant cost. We reiterate our contention (set out in our written comments on articles 1 to 7) that restructuring plans as envisaged by Title II are not appropriate nor proportionate for natural persons.

Paragraph 1

As we have already noted, we support the alternative approach of the next best alternative as the standard for valuation purposes.

Paragraph 2

Article 13(2) provides for the judicial or administrative authority to determine an enterprise value on the basis of its value as a going concern, but we question who would decide the value to dissenting creditors? It would appear that there are two steps to the valuation process in the case of creditor dissent: firstly, the value of the entity as a whole must be determined and secondly, the value of the dissenting creditor's debt must be determined. Recital 30 goes some way towards making this point.

Paragraph 3

We are of the view that paragraph 13(3) looks more like a recital than an operative provision. In adversarial systems like the UK's, the parties appoint experts to assist the court, subject to permission and directions from the court.

If paragraph 3 is to remain in the operative parts, we would favour a drafting amendment to clarify that Member States have discretion in this regard. We also suggest that the reference to 'creditor' be removed as this would suggest an equity holder could not challenge a valuation.

Drafting suggestion

Article 13(3)

Member States ~~shall~~ **may** ensure that properly qualified experts are appointed to assist the judicial or administrative authority, when necessary and appropriate, for the purposes of the valuation, including where ~~a creditor challenges~~ the value of the collateral **is challenged**.

ARTICLE 14 (Effects of restructuring plans)

DK

The scope and purpose of this provision is quite unclear. For example, in Article 14(1) what is meant by *"identified in the plan"*? Is it, for example, possible to deliberately not mention some parties in a restructuring plan? Furthermore, in Article 14(2) it is unclear what is meant by *"involved"* creditors – a restructuring should, as a rule, comprise all creditors, so as to not give an incentive to creditors to "keep hidden".

CY

In principle we agree with this provision, yet we suggest some further clarification of the phrase "not involved" in the Directive, to ensure that anyone who was given a notice and chose not to participate in any meeting is considered to be involved in the plan.

NL

We have no problems with the principle of this article.

One request for clarification. What can be regulated by member states as regards 'unknown' creditors? For example future claimants on basis of (non-performance of) contract, tort, etc? Should they be left out in any case? Or can they be bound somehow, through, for instance, a public notice? Can Member States regulate this situation themselves? We would want some leeway for Member States to regulate this, this, given our law on collective settlements which provides for an option to bind unknown creditors, which may be used during a restructuring procedure (or, in fact, can be used as a restructuring procedure). Clarification on this point would be useful.

Is the second paragraph strictly necessary? While it states the obvious, we would like to be sure to have the option to bind creditors who are not involved in the adoption of the plan, but have been duly notified during the adoption of the plan.

FI

We support *paragraph 1*.

Paragraph 2 should be clarified in order not to outlaw such efficient procedures, where creditors are deemed to have been notified (and thus "involved") either by publicly registering (in accordance with Regulation 848/2015) or publicly announcing the commencement of the restructuring procedure, the announcement including a general request for the creditors to lodge their claims under the threat that the claims will otherwise not be taken into consideration (cf. Article 24(2)h of Regulation 848/2015). Without such a clarification, the directive would create harmful incentives for creditors to remain unknown.

Also, under Insolvency Regulation creditors must be notified individually (Article 54) and through registers (Article 24), *inter alia*, of the opening of the proceedings and of the date for lodging claims. The directive should not institute a new obligation to inform unknown creditors about the restructuring *plan*.

We propose to redraft paragraph 2 as follows: *"Creditors who have not been notified individually or through public registers during the restructuring proceedings shall not be affected by the plan.*"

SE

The object of Article 14 is to enable that the restructuring plan can be given binding effect. To attain this goal it is necessary to prescribe that the restructuring plan is binding upon each affected party. We do not see reasons for binding all parties identified in the plan. Further, we understand the idea behind Article 14(2) and agree in principle, but are concerned that it could be confusing to try to explain "the mirror" (the e contrario-rule) of Article 14(1) in Article 14(2), and we propose Article 14(2) is deleted. We suggest the following wording.

Drafting suggestion

Article 14

Member States shall ensure that restructuring plans which are confirmed by a judicial or administrative authority are binding upon each **affected** party identified in the plan.

In order to make the system efficient, the restructuring plan should be binding on parties who are affected by and notified of the plan, even if they choose not to participate in the proceedings after the notification. It follows from Article 8 that the restructuring plan should include information about all affected parties, and it follows from Article 10 that the plan has to be notified to all affected parties. Possibly it could be clarified in the text that these parties are bound even if they do not participate, but that might not be necessary. This could preferably by explained in the recitals. In the recitals it could possibly also be explained that it is for the Member States to decide the conditions for the notification.

<u>UK</u>

<u>Paragraph 2</u>

We suggest the following drafting amendments to achieve greater clarity and consistency with paragraph 1:

> ***<u>Drafting suggestion</u>***
>
> *<u>Article 14(2)</u>*
>
> Creditors who ~~are not involved in~~ **did not have the right to vote on** the adoption of a restructuring plan shall not be ~~affected~~ **bound** by the plan.

<u>ARTICLE 15 (Appeals)</u>

<u>DK</u>

Article 15(4) can be read as giving dissenting creditors an advantage (monetary compensation) over other creditors in relation to an appeal process. More generally, the provision seems redundant – it could be left to Member States to determine the specific legal effects of an upheld appeal.

HR

Croatia is in favour of the stipulation in paragraphs 1., 2. and 3. but in relation to paragraph 4, has doubts regarding point b which stipulates the confirmation of the restructuring plan and granting monetary compensation to the dissenting creditors. It is unclear what goal is to be achieved by prescribing that a debtor in financial problems should pay monetary compensation to the dissenting creditors and that according to the unknown criteria. Also, it is not clear why the second-instance institution can not only confirm the restructuring plan without granting monetary compensation to creditors, provided that all the mechanisms of protection of the best interest of the creditors from the Proposal have been utilized. The restructuring proceeding are being carried out precisely in order to provide second chance and preventive restructuring to the debtor who can not meet his due financial obligations. Article 15(4)(b), which stipulates monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan is contrary to the goals and the meaning of restructuring and the institute of Croatian pre-bankruptcy proceeding. It further points out that in its national legislation there is a possibility for the debtor to amend the restructuring plan if at a voting hearing creditor declares he disagrees with the proposed restructuring plan, or if he is considered to have been a creditor against the restructuring plan. Croatia considers it is necessary to determine who can file an appeal; also can it be submitted by the creditors who are not affected by the restructuring plan if it affects the later exercise of their rights.

CY

We agree with this provision, however, it fails to clarify in which cases the debtor shall be responsible to pay damages, as opposed to the instances where the creditors that agreed to the plan will be responsible. If the intention is to leave this to national law to be regulated, then we would like to clarify this in a recital.

LT

It is suggested to refuse the possibility indicated in the Article 15(4)(b), to grant monetary compensation to the dissenting creditors, since a creditor has a possibility to claim the damage according civil law rules. Besides, it would be not clear considering the compensation size, on the other hand, the debtor's, who suffers financial difficulties, situation can be worsened.

LU

Paragraph 4: The possibility of setting aside the restructuring plan as provided for by point (a) seems reasonable to us; however point (b) lacks clarity and we therefore request its deletion.

NL

While we understand the safeguards an appeal may offer to creditors and debtors, we have serious doubts whether the directive should oblige member state to introduce an appeal.

We envision a thorough procedure by the court of first instance (which can appoint experts or a delegated judge) which may organize hearings or order an expert opinion, but without possibilities for appeal, as the latter may (1) endanger the deal certainty which is needed in restructuring cases and (2) unnecessarily slow down the process.

Furthermore, although no suspensive effect is granted, it is still a major risk for the debtors and the creditors to execute the restructuring plan while an appeal against confirmation of the plan has been lodged. Therefore, our practitioners predicted that everyone would wait with executing the plan until the appeal has been decided upon. We don't think this would help restructuring businesses in financial need.

Paragraph 4 also seems inappropriate as it dictates the powers of the appellate court. It can either set aside the restructuring plan or confirm the plan and grant monetary compensation, which is payable by either the debtor or the creditors who voted in favour of the plan. The latter is actually an incentive to vote against the plan.

We think it should be left to member states to decide if and under what conditions there should be an appeal, and which consequences are attached to a successful appeal.

FI

We support *paragraphs 1 and 2* as well as the current title of the article.

We support the principle in *paragraph 3*, but an exception *"…unless the court, in which the appeal is pending, decides otherwise."* should be added. This is necessary with regard to circumstances where a court of appeal must be able to immediately prevent harmful consequences stemming from manifestly unfounded decisions.

We strongly oppose subparagraph b of *paragraph 4*. The risk of liability would significantly diminish creditors' motivation and courage to vote in favour of the plan, and might cause tactical votes against the plan. Also, it is not acceptable to think that the debtor could assume such liability, given the fact that the debtor is already in financial trouble. It also appears questionable to oblige Member States to give legal protection to unfounded court decisions, only relieving groundlessness through compensations between private parties. Finally, reference is made to several practical problems that were raised during working party discussions, such as determining the amount of the compensation; how the compensation could be collected from possibly hundreds of creditors; and whether the decisions imposing such liability should themselves be subject to appeal, causing chains of appeals.

As for a possible solution, subparagraph b should be deleted, or at the very least it should be drafted as a completely optional provision for the Member States, so that they could choose one or both of the options in subparagraphs a and b. The Commission has during a working party meeting raised concerns that deleting subparagraph b would mean that only subparagraph a (setting aside the plan) would remain at the disposal of national appeal courts. Such an interpretation must be rejected, even in the context of the current wording. The directive is claimed to be of minimum harmonization, and it is impossible to think that subparagraphs a and b would form an exhaustive list, forbidding national legislators or courts to grant any other type of decision. Thus, deleting subparagraph b would not cause any harm.

SE

Article 15(3) contains a very detailed rule on a specific procedural issue. As a consequence, one detailed issue which is part of a wide complex national procedural context will be the focus for EU law. In Swedish law, an appeal does not in general have suspensive effects on the execution. It would be complicated to change this. We urge that Article 15(3) is removed.

Article 15(4)(a) should give room for alternative options for the Member State courts, since the Member States have different procedural systems. We suggest "set aside the restructuring plan or **make changes in the plan**; or […]"

We are concerned with Article 15(4)(b). During the working group discussions it was indicated that the rule in Article 15(4)(b) is flexible and to a sufficient degree leaves for Member States to decide on the details. The Article however, is gravely deviating from general Swedish procedural principles and structure, not least as regards the effect of the proposal that the second instance will be given the power to decide on matters of fact without there being a first instance decision to review. Further, it seems to require a highly complicated system. Thirdly, a system where the parties who vote in favour of a restructuring plan run the risk of being liable can be counter-productive and impede efficiency. We suggest that Article 15 (4b) be removed.

UK

Paragraph 1

In UK law, decisions can be appealed to a higher judicial authority on a point of law, which is on the application or interpretation of legal principles, or on the factual findings reached. Appeals on the facts are fairly restricted. This helps to avoid higher courts being swamped with frivolous appeals. We favour the same approach in respect of Article 15; limiting appeals to matters of law only. This would avoid the impact on court systems of having to deal with large volumes of appeals. We would therefore suggest the following drafting amendments :

Drafting suggestion

Article 15(1)

Member States shall ensure that **the legal basis for** a decision on the confirmation of a restructuring plan taken by a judicial authority may be appealed before a higher judicial authority and that **the legal basis for** a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority.

Paragraph 2

Whilst we support the principle of swift resolution, the use of the term ‘expedited’, at least in the UK, suggests a special accelerated procedure should be adopted to hear such appeals, which may have a resource impact on national courts. We therefore suggest the following drafting amendment which achieves consistency with Article 10(4):

Drafting suggestion

Article 15(2)

~~Appeals shall be resolved in an expedited manner.~~ **Member States shall ensure that where a judicial or administrative authority is required to consider an appeal, a decision is taken as soon as reasonably practicable.**

Paragraph 3

We think the principle in paragraph 3 is sensible as a starting point, but there may be circumstances where executing the plan might result in something irreversible for which it would be difficult to compensate satisfactorily, if an an appeal is upheld. Therefore we think it would be prudent to give courts the discretion to suspend execution of the plan if the circumstances warrant it and it is just and equitable to do so. We would therefore suggest the following drafting amendment :

Drafting suggestion

Article 15(3)

The lodging of an ~~An~~ appeal against a decision confirming a restructuring plan **shall not affect or delay** ~~have no suspensive effects on~~ the execution of that plan~~.~~**, unless the judicial authority considers it just and equitable to do so, or unless and until the appeal is fully or partially upheld pursuant to paragraph 4.**

Paragraph 4

We would express concern at the provision in paragraph 4(b) that permits a court to grant monetary compensation to dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan. It seems reasonable to predict that such a provision will make it less attractive to pursue a restructuring plan since there will be a risk of a financial penalty in the event of a successful appeal. Creditors receiving no significant economic benefit from the plan may conclude it is safer not to participate in voting in order to protect themselves from the risk of penalty. From a practical perspective, voting may not be conducted in an open forum (depending on whatever procedural rules Member States adopt) so this may result in difficulty achieving the requisite majorities for class approval.

A further practical consideration to note is that the debtor, to be eligible for such a plan, must be in financial difficulties, so requiring the debtor to pay monetary compensation may not be a feasible remedy where an appeal is upheld. As such, we would favour removing the words ‘and grant monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan.’ If parties wished to seek any compensation for damages, it would be at their discretion to do so, but it should not be a specific requirement of the Directive to provide for this.

In addition, we would suggest the judicial authority be given the ability to confirm the plan subject to any amendments it considers necessary before doing so. A plan may contain a minor defect but we do not think the optimal result in such cases would be for the plan to be set aside, meaning the procedurals steps would have to begin again, potentially jeapordising rescue.

Drafting suggestion

Article 15(4)

Member States shall ensure that, where **all or part of** an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:

(a) set aside the restructuring plan; or

(b) confirm **or amend** the plan **in whole or in part** ~~and grant monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan~~.

ARTICLE 16 (Protection for new financing and interim financing) & related definitions in: Article 2(11) ("New financing) Article 2(12) ("Interim financing")

DK

Article 16(2) optional. The Danish Ministry of Justice understands Article 16(2) – regulating a subsequent liquidation procedure – as being optional for Member States, cf. also recital 31.

ES

It should be clarified the application of the absolute priority rule to the equity holders who provide new financing (the new value exception in USA). According to Article 16 all new financing, unless it have been carried out fraudulently or in bad faith, must be protected and shall not be declared void, voidable or unenforceable.

However, if equity holders who provide new financing keep any interest in the company, this may be incompatible with the application of the absolute priority rule.

LT

With reference to the Article 16(1), where it is established that Member States shall ensure that new financing and interim financing are adequately encouraged and protected, it is assumed that paragraph 3 is not necessary or it is suggested to determine more clear rules in order to avoid any misunderstandings during the implementation of the Directive, since the current formulation "the grantors of new financing and interim financing in a restructuring process shall be exempted from civil, administrative and criminal liability in the context of the subsequent insolvency of the debtor" raises a lot of questions and the meaning of it is not clear.

NL

We initially have major concerns and hesitations on the provisions on new financing and interim financing. In general, we think they are too debtor friendly and lack sufficient safeguards to protect creditor's rights and legitimate interests. In this regard, the terms 'bad faith' and 'fraud' seem to be very strict. Moreover, these terms are vague and do not give sufficient guidance for courts. This gives a risk of legal uncertainty, as there likely need to be many referrals to the European Court of Justice to get a proper interpretation of these terms.

The system we envisage foresees some protection for new finance, but offers more possibilities to avoid suspicious transactions. We would prefer a less detailed text with more flexibility, e.g. a provision which stipulates that Member States should give adequate protection to new and interim financing. This gives some discretion for Member States to provide for adequate measures to ensure sufficient protection for new finance, while taking into account legitimate interests of creditors. We have some draft ideas which take into account these principles.

Paragraph 1

As mentioned before, we think the text of paragraph 1 is too strict and does not sufficient leeway for Member States to prevent abuse of the rule or provide protection to creditors.

We would prefer to use the same standard as used in article 10 "(c) any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors". Although this language is not ideal (as it is quite vague), it seems to offer a bit more possibilities for insolvency practitioners in a subsequent insolvency to avoid this new or interim financing. It could be clarified further by changing 'the interests of creditors' into: 'the interests of the general body of creditors'.

Moreover, it is not clear what is protected: is it merely the act of making available the funds to the debtor? Or would it also cover any granted securities by the debtor to the creditor?

We have two drafting suggestions, one to allow for more flexibility, and one to make the standard to avoid the transactions lower.

Drafting suggestion

1. Member States shall ensure that new financing and interim financing are adequately encouraged and protected. **As a minimum**, new and interim financing shall not be declared void, voidable or unenforceable ~~as an act detrimental to the general body of creditors~~ in the context of subsequent insolvency procedures, unless such transactions **unfairly prejudice the interests of the general body of creditors**.

This draft allows Member States to go beyond the provision, by providing additional protection for new finance. As a minimum, the Member States should grant protection with application of the standard that these transactions do not unfairly prejudice the interests of the general body of creditors (in general). It follows from the wording that it has to be proven that the transaction is against the interests of the general body of creditors – which basically shifts the burden of proof to the insolvency practitioner. This offers legal certainty for providers of new finance.

In cases where a security has been granted which benefits only one certain creditor, the security can still be avoided as being unfairly prejudicial to the interests of the general body of creditors. This could be reflected in a recital for clarity purposes.

Paragraph 2

While we are not against this paragraph, we do not think it is necessary to stipulate that Member States have this possibility.

Paragraph 3

We have similar comments as with paragraph 1. We think the standard of ‘fraud’ and acting in ‘bad faith’ is too narrow and does not provide sufficient protection. We would prefer the standard “does not unfairly prejudice the interests of the general body creditors”. In any case, it would be preferable to integrate this paragraph in paragraph 1 or refer to it.

Drafting suggestion

3. **If the new financing and interim financing cannot be avoided under paragraph 1, t**he grantors of new financing and interim financing in a restructuring process shall be exempted from civil, administrative and criminal liability in the context of the subsequent insolvency of the debtor.~~**, unless such financing has been granted fraudulently or in bad faith.**~~

Article 2(11)

Question on the term 'funds': what is intended to be covered by this? Only money? Or also resources, such as real estate, inventory, stock?

What is intended by using the terms 'that are necessary to implement a restructuring plan' ? Would this imply that, for instance, money provided by an investor can always be tested on its necessity to implement a restructuring plan? Or could this new money only be avoided on grounds of fraud or acting in bad faith?

We would suggest to clarify the term, by removing the subjective elements 'that are necessary to implement a restructuring plan'.

Article 2(12)

We basically have the same questions as with the definition of 'new financing':

What is intended to be covered by the term 'funds'? Only money? Or also resources, such as real estate, inventory, stock?

What is intended by using the terms 'that is reasonably and immediately necessary for the debtor's business to continue operating or to survive, or to preserve or enhance the value of that business pending the confirmation of a restructuring plan' Would this imply that interim financing can always be contested on the ground that it is not necessary to preserve the value of the business? We would suggest to clarify the definition of 'interim finance' by removing these rather subjective elements.

FI

On Article 16-17 in general: Regarding Articles 16 and 17, we emphasize that avoidance actions have traditionally been regulated by national legislation. In our view, harmonizing this legislation in some very limited areas may cause unexpected consequences and legal uncertainty. If these provisions are to be included in the directive, they should be optional. Provisions on jurisdiction and applicable law in the Insolvency Regulation EU 2015/848 suffice.

With this general reservation, we present our more detailed comments on Articles 16 and 17.

Article 16

We consider it essential that transactions between the debtor and any closely connected person are not protected as extensively as other transactions. On the contrary, it must be guaranteed that the Member States may set these transactions under close scrutiny. For instance, in the Finnish law of avoidance actions there are specific provisions on reversed burden of proof in a few well-defined situations. In our opinion, the transactions involving closely connected parties should be left outside the scope of Article 16 entirely and into national discretion. Regarding these transactions, it seems that the concept "fraudulently or in bad faith" does not provide enough flexibility for the Member States.

It is likely to cause legal uncertainty that the proposal does not provide a precise starting point from which onward transactions are protected in Articles 16 and 17. Regarding Article 16, interim financing is especially subjected to this uncertainty as in Article 2(12) it is connected merely with a vague expression "pending the confirmation". To make it possible for the Member States to implement the provisions in Article 16, it should be clearly stated that the aforementioned starting point is left into national discretion. Alternatively, the starting point of the protection should be linked to some exact and clear point in time in the directive, e.g. a court decision on the stay of individual enforcement actions.

We were pleased to hear the Commission confirming that the content of the concept "fraudulently or in bad faith" in *paragraph 1* is meant to be left into national discretion. However, this should be clearly stated in Article 16 or at least in the recitals.

We also have two comments on the expression ”in the context of subsequent insolvency procedures” in paragraph 1. Firstly, it is necessary to specify that the expression refers to the subsequent insolvency of the debtor undergoing the restructuring and not the insolvency of the lenders. New financing or interim financing should not be exempt from avoidance actions in the possible later insolvency of the lender. Therefore, the clarification “of the debtor” ought to be added to the end of the said expression in the same way as it is used in paragraph 16(3). Secondly, as we have suggested in previous articles, the term “insolvency procedure” should be replaced with the term “liquidation procedure”. Thus paragraph 1 would be consistent with paragraph 2, in which “liquidation procedure” is also used.

We do not have any observations regarding *paragraph 2* provided that it will remain as a may clause.

Finally, *paragraph 3* should be clarified or deleted. The current wording is extremely wide and would produce all too extensive immunity for the purposes of the directive.

SE

Regarding Article 16, we would like to point out the following problem to be considered, but we do not advocate any particular solution. We understand that the definition of interim financing in Article 2(12) is limiting interim financing to financing pending the confirmation of the restructuring plan. This can be understood as meaning that in the situation where there is eventually no confirmation according to Article 10 (because all creditors agree and there is no new financing proposed in the plan), the financing is not "interim financing" as defined Article 2(12), and will not be protected according to Article 16. Since the interim financer cannot be certain that there will be a confirmation of the plan later, he or she will not know whether the interim financing will eventually be protected. This can discourage investors and impede interim financing. A solution to this problem could be to remove the words "pending the confirmation of a restructuring plan" from the text, widening the scope of the protection. This seems to be the point of view in recital 31 (in contradiction to Articles 2(12) and 16. On the other hand, it could be argued that it is reasonable to only protect interim financing in cases where a court is involved in confirmation of the plan (even though Article 10 does not specifically prescribe that the authority has to assess the interim financing).

UK

We recognise the importance of rescue finance to successful restructurings and therefore support the principles underpinning Article 16.

In 2016 we consulted on measures designed to encourage rescue finance and were told by stakeholders that the UK's current system works well; the framework provides adequate protection for those who lend to distressed businesses and the market meets demand for rescue funds. The overwhelming view was that changes were not needed, at least not in the current economic climate. Interestingly, we had proposed measures similar to the priming available in Chapter 11 under US law, but responses elicited strong concerns about the impact on the wider lending market.

Regarding the definitions of 'new financing' and 'interim financing' in Article 2(11) and (12), we consider that the current drafting unnecessarily limits the scope of what may be captured under these headings. For instance, 'funds', in our view, may not cover a guarantee that may be necessary to ensure continued trading. We would therefore suggest the following amendments :

Drafting suggestion

Article 2(11)

(11) 'new financing' means any new ~~funds~~ **financial assistance**, whether provided by an existing or a new creditor, that ~~are~~ **is** necessary to implement a restructuring plan that ~~are~~ is agreed upon in that restructuring plan and confirmed subsequently by a judicial or administrative authority;

Article 2(12)

(12) 'interim financing' means any ~~funds~~ **financial assistance**, whether provided by an existing or new creditor, that is reasonably and immediately necessary for the debtor's business to continue operating or to survive, or to preserve or enhance the value of that business pending the confirmation of a restructuring plan;

Paragraph 1

The provisions seem to limit the protection for new and interim financing to insolvency situations only. Securing new finance and agreeing a plan should lead to the expectation that the debtor will be rescued, but the current drafting seems to omit to extend the protection to cover the possibility of challenge where the debtor does not enter insolvency.

We also question if the reference to ‘fraudulently’ may narrow the effect of this provision more than is intended. ‘Fraud’ in the criminal codes of different Member States’ legal systems will have a very precise meaning. We suggest the drafting be amended to ensure it captures a broader range of activity.

With regard to civil misconduct as a ground for invalidating the protection from challenge for new finance, ‘bad faith’ has quite a particular meaning in English law. It relates to the English law concept of good faith which can affect the formation, performance and interpretation of the parties’ duties under a commercial contract. Again, we think a drafting revision could improve the text here.

An alternative approach to the two above points would be to leave it to Member States to define such terms. We understand the Commission is open to this possibility.

We also suggest one final amendment to ensure the protection created by paragraph 1 is only afforded to the right type of transactions and not unintentionally extended to any transactions that do not promote the successful completion of negotiations.

In light of the above comments, we therefore suggest the following drafting amendments:

Drafting suggestion

Article 17(1)

Member States shall ensure that transactions carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority ~~or closely connected with~~ **and necessary for the success of** such negotiations are not declared void, voidable or unenforceable ~~as acts detrimental to the general body of creditors in the context of subsequent insolvency procedures~~, unless such transactions have been carried out ~~**fraudulently**~~ **in breach of criminal law** or **have unfairly prejudiced the interests of others** ~~in bad faith~~.

Paragraph 2

We would make the same comment as in paragraph 1 with regards to limiting protection for new finance to insolvency procedures.

We also question why priority to new lenders is limited to liquidation procedures only. We suggest that Member States be left to decide themselves whether or not to extend priority to non-liquidation insolvency procedures.

Paragraph 3

We reiterate our earlier comments in respect of paragraphs 1 and 2.

ARTICLE 17 (Protection for other restructuring related transactions)

DK

In general, the article should be more flexible for Member States with regards to ensuring that unwanted transactions are not protected.

- For example, Article 17(3) – on approval of transactions – should refer to Article 17(2) in its entirety and not only Article 17(2)(e).
- In addition, Article 17(2)(b) should be clarified in relation to what is deemed a "reasonable" cost or fee when seeking professional advice – does this criterion only refer to the *size* of an expense or also to the *type* of the expense? It should, in any case, be possible for Member States to exclude certain types of expenses that cannot generally be deemed as relevant for the restructuring plan.

Aricle. 17(2)(c) should only comprise work carried out after the start of the restructuring process.

- **The Danish Ministry of Justice suggests adding at the end of art. 17(1): "unless such transactions have been carried out fraudulently or in bad faith or are otherwise unreasonable".**
- **The Danish Ministry of Justice suggests that "reasonable", cf. art. 17(2)(b), refers to both the size and types of fees etc.**
- **The Danish Ministry of Justice suggests that art. 17(3) refers to art. 17(2) in its entirety and not only art. 17(2)(e).**
- **The Danish Ministry of Justice suggests that art. 17(2)(c) be clarified – the provision should only comprise work carried out after the start of the restructuring process.**

ES

The relationship, if any, should also be clarified between transactions consisting in “new credit” and “financial contributions” referred in Article 17(2)(e) with “new financing” mentioned in Article 16.

Protection of at least above-mentioned transactions, should be the same as provided by Article 16. Therefore, those transactions must be protected and shall not be declared void, voidable or unenforceable, unless have been carried out fraudulently or in bad faith, and in addition grantors of this new financing may afford the right to receive payment with priority in the context of subsequent liquidation procedures.

Transactions mentioned in Article 17(2)(a) to (d) should be protected it they are reasonable but also necessary, in order to avoid unnecessary costs of restructuring plans unduly justified.

For this last reason, transactions on Article 17(2)(a) to (d) should also require the approval mentioned in Article 17(3).

CY

The phrase “transactions carried out to further the negotiation” in conjunction with the broad application of this article could give rise to resentment from creditors on approving a plan. We wish to re-draft this article in order to be clear on what is the scope and at what point in time it kicks in. Also for the purpose of achieving clarity we agree with the suggestion to merge this with Article 16.

LT

If the purpose of both Article 16 and Article 17 is the same, i.e. to protect financing and other restructuring related transactions in the course of subsequent insolvency procedures, it is assumed that these provisions could be established in one article, particularly when there is no clear difference between them (for instance other restructuring related transactions inter alia shall include any payments of implementing restructuring plan, meanwhile new financing means any funds that are necessary to implement a restructuring plan).

Referring to the fact that the requirement to approve the transactions indicated in paragraph 2, point a-d, by practitioner or judicial or administrative authority would not be established, it is suggested to reconsider whether the Directive provisions properly protects the interests and rights of creditors.

NL

General comments

We have concerns and hesitations on the provisions on protecting transactions which have been carried out to further the negotiation of a restructuring plan (paragraphs 1-3). These are similar to the concerns we voiced when discussing Article 16.

In general, we think the rules are too debtor friendly and lack sufficient safeguards to protect legitimate creditor's rights. In this regard, the terms 'bad faith' and 'fraud' seem to be very strict. Moreover, these terms are vague and do not give sufficient guidance for courts. This gives a risk of legal uncertainty, as there likely need to be many referrals to the European Court of Justice to get a proper interpretation of these terms.

We would prefer a less detailed text with more flexibility, e.g. a provision which stipulates that Member States should give adequate protection to related transactions, without prejudice to any civil or criminal liabilities. This gives some discretion for Member States to provide for adequate measures to ensure sufficient protection furthering negotiations on the restructuring plan, while taking into account legitimate interests of creditors.

We have less concerns for paragraph 4, as this provision has a different purpose/scope.

Paragraph 1-3

We are not convinced that the protection for other 'restructuring related transactions' as laid down in paragraphs 1 – 3 are justified or necessary. Why can't we rely on the more general test that any acts committed during the restructuring phase may not unfairly prejudice the general body of creditors?

Furthermore, we are unsure how we would distinguish the acts carried out to 'further the negotiation of a restructuring plan' from acts in the normal (or abnormal) course of business. If special treatment/protection is justified or necessary, which we doubt, it should at the very least be clear to (1)which transactions this protection is granted and from (2) which time on.

There is a requirement that the transactions have to be connected to a plan which actually has been confirmed, which could be seen as a safeguard for creditors. However, there seems no specific condition to test whether these transactions have been necessary. This means that the protection granted after confirming the plan basically extends to all transactions which have been carried out before the plan has been adopted. This seems quite risky. Furthermore, we do not see sufficient justification to grant this protection.

In particular the transactions selected for protection are too broadly formulated, in particular those mentioned under (b), (d) and (e). Potentially, parts of the business could be sold to an owner which has close ties (e.g. family ties) to the owner of the original business. This could result in asset-stripping of the business without any likelihood of recovering these assets from the debtor or the other businesses. We have doubts whether the mere option to require court approval or approval from an appointed insolvency practitioner would provide sufficient protection for stakeholders. It would be better to delete paragraph 2.

Drafting Suggestion

1. Member States shall **as a minimum** ensure that transactions carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations are not declared void, voidable or unenforceable ~~**as acts detrimental to the general body of creditors**~~ in the context of subsequent insolvency procedures, **provided these transactions are necessary and reasonable and do not unfairly prejudice the interests of the general body of creditors.**

Like under the previous article, the article clarifies that member states may go beyond this article to provide additional protection to related transactions.

Paragraph 4

In general, we are not against the idea behind this paragraph. Its purpose/scope is different from the previous paragraph one: in our view it makes sense that the execution of the implementation of a restructuring plan cannot be undone too easily in a subsequent insolvency procedure. Moreover, the restructuring plan will have sufficient information for creditors to determine which transactions/payments/debt-equity swaps will have to take place.

However, we wonder whether there is a real risk that in practice such transactions would be considered void or avoidable. We think a court which will assess such cases will in practice not easily avoid such transaction on basis of the action pauliana, as there has been court involvement before in the confirmation process of the restructuring plan. For clarity and legal certainty reasons, it would be preferable to make sure that the restructuring plan which has been approved explicitly mentions the actions needed to carry out the restructuring plan.

Drafting Suggestion

4. Member States shall ensure that any transaction, payment, debt-equity swap, guarantee or security **foreseen in a restructuring plan confirmed by a judicial or administrative authority and** carried out to further the implementation **of the plan** ~~of a restructuring plan confirmed by a judicial or administrative authority~~ or closely connected with such implementation is not declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith, irrespective of whether such transactions were deemed to be in the ordinary course of business.

If all creditors have agreed on the restructuring plan, there is no court approval necessary. This means the plan will go into force without any prior court approval. Would this situation be covered by paragraph 4? The words ‘any transaction, payment, debt-equity swap, guarantee or security carried out to further the implementation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such implementation’ imply that prior court involvement is required in order to benefit from the protection of this paragraph. Is this intended?

FI

We have presented general comments on both Article 16 and 17 above. Additionally, some of our comments on Article 16 can be repeated in relation to Article 17:

- As it is with Article 16, transactions between the debtor and any closely connected person should equally be left outside the scope of Article 17 to ensure sufficient and effective supervision of these transactions in the Member States.
- It should be stated expressly and clearly in Article 17 or in the recitals that the concept “fraudulently or in bad faith” in paragraphs 1 and 4 is meant to be left into national discretion to avoid legal uncertainty.
- The starting point of the protection for transactions should be left into national discretion or linked to some exact and clear point in time in the directive, like the moment of ordering a stay. At the very least, it must be up to the Member States to decide which negotiations are to be connected with a restructuring plan. The concepts like ”further the negotiations” and ”closely connected with negotiations” in paragraph 17(1) leave completely open if even the most initial transactions were under protection provided by Article 17. This should not be the case as it would once again cause legal uncertainty and unnecessary litigation.

For successful implementation of Article 17, it is of the essence to define the material scope of protection unambiguously and strictly. Abstract and broad concepts and expressions form a grey area, in which it is difficult to know if transactions are protected from avoidance actions or not. In Finland, this ambiguity is emphasized by the fact that our national law has taken an opposite perspective on the issue, that is, every transaction is protected unless there is a legitimate reason to lift that protection.

Paragraph 1 must not be a general clause but subparagraphs a–e in paragraph 2 should define the content of paragraph 1 exhaustively. As the Commission has pointed out, Member States will still have an opportunity to provide wider protection without that being expressly stated in the directive. Moreover, the expression "in the context of subsequent insolvency procedures" should be redrafted as we have suggested in our comments on Article 16. The clarification "of the debtor" should be added to the end of the said expression in the same way as it is used in paragraph 16(3) and the term "insolvency procedure" should be replaced with the term "liquidation procedure". As the expressions like "further the negotiation" and "closely connected with such negotiations" indicate, wording in paragraph 1 is also otherwise too vague leaving it open which transactions are protected and which are not.

In *subparagraphs a and b of paragraph 2*, it should be required that fees and costs are not only reasonable but also necessary as in subparagraph d. Without the said additional precondition these provisions may protect also unnecessary transactions.

Regarding *subparagraph c*, protecting unreasonable worker wages cannot be seen as justified in connection with the continued operation of the debtor's business and the successful restructuring. Therefore it should be required that the wages are reasonable as it is required of transactions in subparagraphs a, b and d.

We do not have any observations regarding *subparagraph d*.

We strongly oppose vague *subparagraph e*, which should be deleted in whole from the directive. Considering that financing is sufficiently protected in Article 16, costs of restructuring in Article 17(2)(a) and transactions included in a restructuring plan in Article 17(4), it is unclear what independent significance subparagraph e would have. If subparagraph e is not deleted, it should be required as a minimum that protected transactions are reasonable and necessary for the continued operation of the debtor's business. In subparagraph d, necessity and reasonableness are required of transactions made in the ordinary course of business, which is why it is difficult to understand lack of the same conditions in subparagraph e in relation to transactions outside the ordinary course of business.

Regarding *paragraph 4*, we suggest that an inexplicit expression ”carried out to further the implementation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such implementation” should be replaced by a more concrete and accurate expression, e.g. *“carried out in accordance with a restructuring plan confirmed by a judicial or administrative authority”*. It is of the utmost importance to treat creditors equally under the directive. In practice, broad wording used in paragraph 4 may prevent avoidance actions based on any of the transactions made by the debtor as it is always possible to claim that the transaction is connected with the restructuring.

SE

According to Article 17(4) transactions must be protected that are undertaken as a consequence of a restructuring plan that has been confirmed by an authority or a court. These transactions can be examined by the authority or court in the proceeding according to Article 10 or 11, at least if the transaction was challenged by any creditor.

Whereas we understand the objectives for Article 17(4) and generally support the solution laid out there, we are sceptical to Article 17(1), (2) and (3). These Articles are intended to protect transactions that are undertaken without approval by any authority in the restructuring proceedings (limited exemption in 17(2)(e)). This Article will instead in practice be applied by the authority or court for the first time in the bankruptcy proceeding, after the restructuring was closed, most probably if the liquidator considers initiating an avoidance action. Article 17(1) has far-reaching effects and includes several rather vague criteria. We think it could be made optional, especially Article 17(2)(e).

It should also be pointed out that there seems to be an overlap between Article 16 regarding interim financing and Article 17(1) and 17(2). Also Article 16 regarding new financing and Article 17(4) seem to overlap. This could be problematic; at least since transactions falling within the scope of Article 17(2)(e) can be made subject to approval, which would not be the case if Article 16 were applied instead.

UK

Paragraph 1

We repeat the comments made in respect of Article 16(1).

Paragraph 2

The Commission confirmed that, as drafted, the list is intended to be non-exhaustive, and we would support that approachin order to provide adequate flexibility.

Paragraph 4

We repeat the comments made in respect of Article 16(1).

ARTICLE 18 (Duties of directors)

DK

In Article 18 it is stated that "Member States shall lay down rules (…)" as opposed, e.g., to "Member States shall ensure (…)". Is the intention that a specific form of regulation is required? This would be quite inflexible for Member States.

What group of persons (physical or legal) is intended to be covered by the term "other stakeholders"? Is it left to Member States to define this group?

ES

The title "duties of directors" should be replaced by "obligations of directors" in order to coordinate the Title with the text of the Article. Furthermore, the concept of "directors" should be determined by the national law, due to the important consequences that the failure to comply with these obligations entail for them (i.e. sanctions).

CY

We are positive with the principles laid down in this article. However, some of these duties of sub-sections (a) to (d), which underline a director's duty towards various, different stakeholders, may contradict each other. For example, in order "to minimize the loss for creditors, (the majority of) workers, shareholders, a director may have to dismiss some workers. In this respect it would be preferable to replace the phrase "creditors, workers, shareholders and other stakeholders" in sub-section (a), with the phrase "the business".

LU

We request that the first sentence be changed from: *'Member States shall lay down rules to ensure that...'* to the following wording: *'Member States shall ensure that, where there is a likelihood of insolvency, directors are bound by the following obligations:'*

NL

After having discussed this provision with stakeholders (including practitioners, lawyers, judges, labor unions and employers), we have major concerns regarding this article. While we can understand the underlying aim to offer an incentive to directors to act in the good of the business, we think this provision is likely to interfere with the company law of member states, in particular with the rules on director's liability, thereby causing massive legal uncertainty.

The current provision is framed as an obligation. We presume that the only really effective sanction for breaching this obligation may be liability of the directors which violate this article. Liability is strongly dependent of the circumstances and is decided on a case-by-case basis. There are many judicial cases on director's liability (in case of insolvency) so this could have a real impact on legal practice.

Given the broad terms in which the article is drafted, we fear a lot of questions will be referred to the Court of Justice of the European Union to determine what the duties, as laid down here, mean in practice.

Moreover, given the lack of clear scope, any entity which goes bankrupt may be exposed to this special liability. This could include businesses, non-profit organizations, associations. We don't think this is intended. In any case, we don't think this is justified. In the Netherlands recent plans to enhance liability for directors of non-profit organizations in case of insolvency have led to a lot of criticism.

We would have a strong preference to delete this article. If there is clear support to keep this rule, we would prefer a non-binding approach, such as suggested during the working party (i.e. introduce 'Member States shall endeavor'). However, we took note that the Commission strongly prefers to keep 'ensure'. We would suggest the following as an alternative, without prejudice to the previous comments & observations.

Drafting Suggestion

Article 18

Member States shall ~~lay down rules to~~ ensure that, where there is a likelihood of insolvency, directors have due regard to ~~the following obligations~~:

(a) ~~to take immediate steps to minimize the loss for~~ **the position of** creditors, workers, shareholders and other stakeholders;

(b) to have due regard to the interests of creditors and other stakeholders;

(c) **the need** to take reasonable steps to avoid insolvency;

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

Recital 36

(36) To further promote preventive restructurings, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks, particularly where to do so would improve the chances for the restructuring of potentially viable businesses. Where the enterprise experiences financial difficulties, directors should take such steps as seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors and entering preventive restructuring procedures. Where the debtor is in the vicinity of insolvency, it is also important **to have due regard to** ~~to protect~~ the legitimate interests of creditors **when taking** ~~from~~ management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions may have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary that in such circumstances **member states, either through statute, case law or practice, ensure that** directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, agreeing to transactions at under value, or taking actions leading to unfair preference of one or more stakeholders over others. Directors for the purposes of this Directive should be persons responsible for taking decisions concerning the management of the company.

FI

We strongly oppose Article 18. In our opinion, Article 18 should be deleted in whole from the directive, or at the very least it should be clarified considerably.

We emphasize that according to fundamental principles in our national company law, directors shall promote the interests of the company, which ultimately means duty of loyalty to shareholders. The said principles are not present in Article 18. In our opinion, the directors should not be obliged to take crucial and far-reaching business decisions without taking into account of the shareholders as a priority. Although the directors must also consider other interests mentioned in this provision, first and foremost such interests are taken into account in national law by different means, which include avoidance actions and rules on dishonesty of a debtor.

In fact, in the Finnish system it would be practically impossible to put aside shareholders' interests in a few situations. For instance, the application for the commencement of restructuring proceedings may be filed by a decision of the general meeting of the shareholders, whereas the management does not have independent authority on that matter. The directive should not have hidden implications which would oblige Member States to change rules on the decision making in a company.

During discussion in the working party the Commission regarded it inevitable that interests of the parties mentioned in Article 18 will collide with each other. It seems that directors are therefore in fact unable to fulfil all the obligations imposed by Article 18 and are obliged to take different parties into account in a priority order. However, wording in the article is ambiguous in terms of this priority order. It is also unclear which parties are referred to with the concept "other stakeholders" in subparagraphs a and b.

In our opinion, Article 18 is not sufficiently precise on its scope of application. It remains unclear whether directors are obliged solely within the context of restructuring proceeding or in some broader sense. The concept "likelihood of insolvency" is far too inexplicit an expression and should be replaced with something more concrete or left expressly into national discretion.

Finally, Article 18 may underline the avoidance of insolvency in excess and thus unnecessarily diminish the extent to which directors are willing to take reasonable commercial risks in other areas of business. In addition, the Commission regarded it necessary that the Member States bind some kind of sanctions to breaching of the obligations. Given that the article is drafted vaguely, directors may therefore be subjected to claims of damages irrespective of their actual efforts.

SE

If Article 18 will be retained, it must at least be understood in the light of Article 4 which requires Member States to establish preventive frameworks available for the debtor when there is a likelihood of insolvency. While in Article 4 there is an obligation for Member States to establish systems of early warning and preventive restructuring, Article 18 is imposing on the Member States the obligation to prescribe that the directors must take steps to make use of those systems.

Further, Article 18 would preferably have to be understood as a number of more general guidelines. Especially since the working group meeting showed that Member States have a variety of systems in this area, the most realistic way to attain the objectives in Article 18 is to accept that Member States can implement Article 18 not by setting up national rules similar to the rules in Article 18, but rather by ensuring that national systems give the effect that Article 18 is seeking to achieve. We suggest the Article is re-drafted as follows:

Drafting suggestion

Article 18

Member States shall lay down rules to ensure that, where there is a likelihood of insolvency, directors ~~have the following obligations~~:

1. (a) ~~to~~ take immediate steps […]; (b) ~~to~~ have due regard […]; (c) ~~to~~ take reasonable steps […]; (d) ~~to~~ avoid deliberate […].

2. Member States may require directors to take other steps.

We believe this will make clear that the rules in the Article do not have to be implemented as written in the Article but rather through any set of rules achieving the objectives of the Article.

Finally, there is need for an explanation of the relation between Article 18 and 32, the latter prescribing that Member States shall derogate from Article 19(1) in the Directive 2012/30/EU. Article 19(1) in Directive 2012/30/EU reads: "In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken." According to Swedish company law, the board of directors in the case of serious loss of subscribed capital has to order an auditor's report, similar to a balance sheet and depending of the outcome, has to take further steps. It is confusing that Article 18 calls for duties in the likelihood of insolvency when at the same time Article 32 seems to impede suitable tools. We need a deeper explanation of Article 18 and its relation to Article 32.

UK

We have considerable reservations and concerns about the inclusion of Article 18 in Title II of the proposal, which seems to encroach on company law. We would therefore be open to deleting these provisions if there is wider support for this suggestion. However, if other Member States do not share our concerns and consider it important that Article 18 remains , we would make the following comments about the text as currently drafted.

We have noted previously we do not support the idea of Title II applying to debtors who are individuals. We would nevertheless question why, if the Commission intends for it to do so, Article 18 only applies to directors. 'Director' is not a defined term but recital 36 states, "Directors for the purposes of this directive should be persons responsible for taking decisions concerning the management of the company." In the UK we would usually associate duties of directors with those responsible for an incorporated body. If Article 18 is intended to extend duties to unincorporated businesses and entrepreneurs then this should be made clearer, although, as stated, we oppose the application of Title II to natural persons.

When we discussed Article 7(1) and the suspension of obligations to file for insolvency, we noted the potential for creating confusion for directors of financially distressed companies. It is important, in order to avoid such confusion, that there is no contradiction between directors' duties.

On the current drafting, we are not convinced the requirements in (a) would work effectively. The interests of the various categories of parties will often conflict so conceptually there seems to be a problem here. Minimising losses to creditors could be achieved by, for example, using remaining funds to pay them rather than employees. As insolvency approaches and funds run out, choices have to be made as to whom to pay in order to keep trading to explore rescue options. Some acknowledgment of the competing interests seems justified, requiring directors to find a balance so that all parties are treated fairly. The current provisions do not seem to provide the certainty which directors require.

Turning to the question of sanctions and penalties, the Commission has indicated this would be for Member States to determine. As such, we suggest this position be made clear in either the recitals or in the text of Article 18.

Lastly, in (d), we think 'grossly' is too high a threshold. While in Working Group discussions the Commission indicated that it felt this is the right level, we remain of the view that 'grossly' should be deleted so that 'negligent conduct' is the standard set. There is a risk that otherwise (d) could be interpreted as implying that it is acceptable for a director to be negligent, but just not grossly negligent.

Drafting suggestion

Article 18(d)

(d) to avoid deliberate or ~~grossly~~ negligent conduct that threatens the viability of the business.