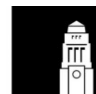

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Corporate Restructuring Law – A second chance for Europe?*

McCormack, Gerard

1. Introduction

The Brexit vote in the UK on 23rd June 2016 means that the European Union (EU) is in something of an existential crisis compounding earlier difficulties. Growth rates are anaemic and unemployment rates are high.[1] The Capital Markets Union[2] project aims to kick-start the growth process and promote greater employment opportunities.[3] On 22nd November 2016 the European Commission launched a proposal for a restructuring directive[4] and this proposal is firmly anchored in the Capital Markets Union project. The proposed directive has three main elements; firstly, a "preventive" restructuring framework; secondly, provisions on second chance/fresh start for "entrepreneurs" and thirdly, more general provisions designed to enhance the efficiency of restructuring, insolvency and second chance procedures

The overall objective is to reduce barriers to freedom of establishment and the free flow of capital stemming from differences in the laws and procedures of EU Member States on restructuring and insolvency. The specific intention is that jobs and growth will flow. The proposal suggests:

"Boosting jobs and growth in Europe requires a stronger rescue culture which helps viable businesses to restructure and continue operating while channelling enterprises with no chance of survival towards swift liquidation, and gives honest entrepreneurs in distress a second chance. This proposal is an important step towards such a change of culture."[5]

The proposed directive represents the Commission's plan for legislative action in this area and it complements the recast Regulation on Insolvency Proceedings[6] which comes into in June

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*The author was part of a team that carried out research work for the European Commission in the period leading up to the formulation of the Restructuring directive proposal – JUST/2014/JCOO/PR/CIVI/0075 but the views expressed in this article are entirely personal.

[1] See generally J. Stiglitz, The Euro and its threat to the future of Europe (London, Penguin Random House, 2016).

[2] COM (2015) 468. For discussion of the Capital Markets Union see the symposium in (2015) 9 Law and Financial Markets Review 187 and see also Wolf Georg Ringe, "Capital Markets Union for Europe: A Commitment to the Single Market of 28" (2015) 9 Law and Financial Markets Review 5.

[3] The Action Plan proposed taking forward a legislative initiative on business insolvency that addressed the most important barriers to the free flow of capital and built on national regimes that work well - see in particular pp 24–5 of the Action Plan and pp. 73–8 of the staff working document accompanying the Action Plan – SWD (2015)183 final.

[4] COM (2016) 723 final 2016/0359 (COD) and see also European Commission Staff working document accompanying the proposal – SWD (2016) 357 final.

[5] COM (2015) 468 at p. 6.

[6] Regulation 2015/848. It should be noted that under Article 86 Member States are required to provide the Commission with a short description of their national legislation and procedures relating to insolvency and to keep this information regularly updated.

2017. The proposal builds on earlier Commission initiatives most notably the 2014 Recommendation on a new approach to business failure and insolvency.[7] According to the Commission, this Recommendation, lacking formal legal status, had only been partially implemented by Member States.[8] The proposal differs in some important respects from the Recommendation most notably in the treatment of executory contracts. Moreover, it is not clear what the final form of the proposed directive will be. The European Union will have its say under the EU's legislative co-decision procedure and any differences then have to be resolved.

This paper analyses the Proposal in detail[9] setting it in the context of broader international indicators and most notably Chapter 11 of the US Bankruptcy Code.[10] Apart from this first introductory section, the paper consists of 5 substantive sections. The second section addresses the background to the proposal more expansively. The third section considers the areas where the similarities between the Proposal and the 2014 Recommendation are strongest; namely stays/moratoria on enforcement proceedings by creditors, debtor in possession and new finance. The fourth section considers restructuring plans where the Proposal contains a level of detail that is largely absent from the earlier recommendation. The fifth section considers the performance of ongoing/executory contracts where the policy stance adopted in the Proposal does not necessarily mirror that reflected in the earlier Recommendation. The sixth section concludes.

The overall message in the paper is that while more time might have been given to Member States to implement the 2014 Recommendation, the Restructuring directive proposal adds

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[7] C (2014) 1500 final and see also the Commission Communication A New European Approach to Business Failure and Insolvency COM (2012) 742. For discussion of the recommendation see, inter alia, G. McCormack, "Business restructuring law in Europe: making a fresh start" (2017) 17 Journal of Corporate Law Studies 1; S. Madaus, "The EU Recommendation on Business Rescue: Only Another Statement or a Cause for Legislative Action across Europe?" [2014] Insolvency Intelligence 81; H. Eidenmuller and K. van Zweiten, "Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency" (2015) 16 E.B.O.R. 625.

[8] See the Commission evaluation published on 30th September 2015 – the same date as the Capital Markets Action Plan. http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf at p 5. See also SWD (2016) 357 final.

[9] The Proposal also contains other provisions particularly on debt discharge for individual debtors and more generally on qualifications for insolvency and restructuring practitioners but these provisions will not be addressed in this paper – Articles 19-23 and 24-27 of the proposed directive.

[10] On international norms in this area, see the UNCITRAL Legislative Guide on Insolvency available at www.uncitral.org and see generally T. Halliday and B. Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis (Stanford, Stanford University Press, 2009); S. Block-Lieb and T. Halliday, "Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law" (2007) 42 Texas International Law Journal 481 and also T. Halliday, "Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead" (2006) 32 Brooklyn Journal of International Law 1081.

value and is likely to be particularly beneficial in those States that currently lack a developed restructuring framework for ailing businesses. A minimum measure of reform and harmonisation is practicable and achievable though the detailed measures contained in the proposed directive require fine-tuning in a number of respects. These points are elaborated upon at greater length throughout the paper.

2. Background

The explanatory memorandum accompanying the proposal for a Restructuring Directive firmly locates the proposal in the context of the jobs and growth agenda animating EU policy makers. The objectives of insolvency law are often spoken as being to restructure and rescue viable businesses and to liquidate non-viable ones as efficiently as possible.[11] The explanatory memorandum references these propositions though not in so many words and not surprisingly puts more of an emphasis on the rescue objective.[12] It also asserts that a higher degree of harmonisation in insolvency law is essential for a well-functioning single market and for a true Capital Markets Union. It would ensure greater legal certainty for cross-border investors, reduce credit risk; deepen financial integration; lower costs of obtaining credit and increase EU competitiveness. This is certainly a tall order and it remains to be seen whether these generally laudable objectives will necessarily be accomplished in practice.

The memorandum goes further however, and attempts to put some figures on the benefits that might be obtained from the Restructuring proposal. It refers to an estimate that[13]

"[I]n the EU, 200 000 firms go bankrupt each year (or 600 a day), resulting in 1.7 million direct job losses every year. One in four of these are cross-border insolvencies, i.e. they involve creditors and debtors in more than one EU Member State. A significant percentage of firms and related jobs could be saved if preventive procedures existed in all Member States where they have establishments, assets or creditors."

Part of the ostensible justification for European Commission action is the ranking of EU countries on the World Bank Doing Business Resolving Insolvency framework.[14] It mentions

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[11] See the Impact Assessment accompanying the Recommendation on a New Approach to Business Failure and Insolvency SWD (2014) 61 at p. 2.

[12] COM (2016) 723 final at p. 1.

[13] COM (2016) 723 final at pp. 2-3

[14] The Doing Business reports and rankings are based on a more sophisticated version of the "legal origins" or "law matters" thesis developed by an elite group of financial economists – see R. La Porta, F. Lopez de Silanes, A. Shleifer and R. Vishny, "Legal Determinants of External Finance" (1997) 52 Journal of Finance 1131, and by the same authors, "Law and Finance" (1998) 106 Journal of Political Economy 113. For a brief discussion of the background to the project see the statements by the new World Bank Chief Economist, Paul Romer, in the Foreword to the 2017 report at p iv and for some more

that the Doing Business (DB) project ranks countries according, inter alia, to the efficiency of their insolvency frameworks on a scale of 0-16. "The EU average is 11.6, which is 5% below the OECD average for high income countries."[15]

It is submitted that reliance on these World Bank figures is somewhat questionable. While the World Bank DB project has focused attention on law and development issues and produced data sets of benefit to policy makers and researchers, the way in which the rankings are compiled encourages countries to "game" the system.[16] Moreover, the particular indicators, including the "resolving insolvency" indicator, embody, explicitly or implicitly, a particular set of ideological or technical preferences, whose relationship with matters of economic development is at best uncertain. The DB project largely, if not entirely, mirrors the law on the books which may not necessarily reflect what happens in practice in a particular country.[17]

These criticisms have even been made in a 2013 report by an Independent Review Panel commissioned by the World Bank itself.[18] This report suggested that the DB project relied on a narrow information source; it only measured regulations applicable to categories of business that could be captured through its methodology; its data-collection methodology could be improved; it was not designed to help countries respond appropriately; and the use of aggregate rankings was problematic.[19] The Review Panel was particularly concerned about rankings because these involved a process of aggregation across topics including a value judgment about what was "better" for doing business and how much better it was. In its words, "aggregation relies on strong built-in assumptions, making it an inherently value laden practice.

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details see S. Djankov, "The Doing Business Project: How It Started: Correspondence" (2016) 30 Journal of Economic Perspectives 247.

[15] See the European Commission Press Release of 22nd November 2016 accompanying the proposal which is available at http://europa.eu/rapid/press-release_MEMO-16-3803_en.htm. See also COM (2016) 723 final at p. 3 for use of the World Bank reports.

The 2017 Doing Business report and other Doing Business annual reports are freely downloadable from the World Bank website – for the 2017 report see http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf/. The report was published on 25th October 2016 and the rankings for all economies are benchmarked to June 2016.

[16] The 20l16 Doing Business report at p. v. acknowledges the possibility of gaming: "Ranking universities often leads them to try to game the system and move resources and effort away from some important but unmeasurable dimensions to the narrower tasks that are tracked and measured."

[17] See generally on differences in outcomes when one measures "law on the books" as distinct from its application in practice see M. Hallward-Driemeier and L. Pritchett, "How Business Is Done in the Developing World: Deals versus Rules" (2015) 29 No 3 Journal of Economic Perspectives 121.

[18] Doing Business Review Panel, Independent Panel Review of the Doing Business report at p. 11.

[19] The Panel was chaired by Trevor Manuel, the former South African Minister of Finance. The Doing Business Reports appear to have made some adjustments in response to the Independent Panel report but the fundamentals of the project remain unaltered; see Foreword to the 2015 Doing Business Report, p. vii: "Our attention has been drawn to many critiques by the Independent Panel on Doing Business, chaired by Trevor Manuel, which submitted its report in 2013. Following this report a decision was made to set a 2-year target to improve the methodology of Doing Business without damaging the overall integrity of this valuable publication."

The act of ranking countries may appear devoid of value judgement, but it is, in reality, an arbitrary method of summarising vast amounts of complex information as a single number."[20]

The DB "resolving insolvency" scores are premised on a cluster of normative assumptions that some elements of insolvency law are better or more desirable than others.[21] The assessment is relatively crude and depends largely on blunt "all or nothing" measures. It assumes that particular legislative solutions are superior to others and misses out subtlety and nuances in the laws of a particular country. The approach simply asks whether one specific rule does or does not exist in different countries and effectively disregards other legal solutions that achieve the same goal.[22]

In it justification for a Europe wide legislative instrument, the European Commission also referred to statistics in the Doing Business report on recovery rates in insolvency proceedings across EU Member States which it said varied widely.[23] "World Bank indicators suggest that recovery rates vary between 30 % and 90% in the EU. Recovery rates are higher in economies where restructuring is the most common insolvency proceeding: in such economies creditors can expect to recover 83% of their claims, against an average of 57% in liquidation procedures. The length of insolvency proceedings ranges from a few months to four years, with 14 Member States having procedures which last for two or more years." Again reliance

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[20] Ibid at p. 20. For a strong defence of aggregate rankings see a 2006 paper by the team behind the DB rankings – S. Djankov et al "Doing Business indicators: Why aggregate and how we do it". The paper is highlighted prominently in the methodology section of the DB website – see http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Methodology/Other/why-aggregate-doing-business-2006.pdf

[21] For general criticism of the World Bank rankings se R. Michaels, "Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports and the Silence of Traditional Comparative Law" (2009) 57 American Journal of Comparative Law 765 and the literature referred to therein, and for insolvency specific criticisms see G. McCormack, "World Bank Doing Business Project: Should Insolvency Lawyers Take it Seriously" [2015] Insolvency Intelligence 119. See also K. Davis and M. Kruse, "Taking the Measure of Law: The Case of the Doing Business Project" (2007) 32 Law & Social Inquiry 1095.

[22] Doing Business Review Panel, Independent Panel Review of the Doing Business report at p. 23. This comment is made by the Review Panel generally about the Doing Business approach.

[23] COM (2016) 723 final 2016/0359 (COD) at p. 3.

on these statistics is questionable since the methodology used to determine the recovery rate seem highly contestable for at least three reasons.[24]

Firstly, the rate is seen as a function of the outcome, time and cost of insolvency proceedings in respect of a particular kind of local company.[25]There is no attempt however, to measure whether this type of company is typical of the particular economy or whether different outcomes and returns could be expected in relation to different types of company. Secondly, calculation of the rate also depends essentially on the subjective views of questionnaire respondents on the returns to creditors in their particular countries. In most countries, there will not be any publicly available and accurate data on these matters.[26] Thirdly, the recovery rate is based on the percentage recovery by secured creditors through restructuring, liquidation or debt enforcement proceedings. The focus in the rankings is solely on returns to secured creditors and if the insolvency law in a particular country had redistributionist elements this would necessarily reduce the returns to secured creditors and therefore, a country's position in the rankings would fall. [27] For example, recital 22 of the preamble to the recast EU Insolvency Regulation — Regulation (EU) 2015/848 - refers to improving the preferential rights of employees in the next review of the Regulation. Depending on which, if any, policy option is adopted this may have the effect of worsening the position of EU countries in the rankings.

Be that as it may, there is undoubtedly persistently high unemployment across Europe. The global financial crisis produced asymmetric shocks and since then the economic recovery has been sluggish. The need for a European Commission response becomes apparent and the

[24] The Commission also acknowledged however (COM (2016) 723 final at p. 3) that recovery rates depend partly on "economic factors such as the overall health of the economy… anchored in a strong institutional and cultural setting …."

[25] For the intellectual basis of the underlying methodology see S. Djankov, O. Hart, C. McLiesh, and A. Shleifer, "Debt Enforcement around the World" (2008) 116 Journal of Political Economy 1105.

[26] The European Commission Staff working document accompanying the restructuring directive proposal – SWD (2016) 357 final – at various times acknowledges limitations in the statistics e.g. p. 103 fn 202: "comparability is hampered by the fact that there can be discrepancies in the definition of insolvency and the criteria used for the construction of the statistics."

[27] See comment by Manfred Balz, one of the drafters of the original Insolvency Regulation, "European laws take quite different approaches to the treatment of secured creditors in insolvency proceedings" in 'The European Union Convention on Insolvency Proceedings" (1996) 70 American Bankruptcy Law Journal 485 at p. 509. For arguments for and against redistributionist elements in insolvency proceedings in both the US and UK context see E. Warren, "Making Policy with Imperfect Information: The Article 9 Full Priority Debates'(1997) 82 Cornell Law Review 1373; S.L. Harris and C.W. Mooney, 'Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy'(1997) 82 Cornell Law Review 1349; J. Armour, "The Law and Economics Debate about Secured Lending: Lessons for European Lawmaking?" (2008) 5 European Company and Financial Law Review 3, and J. Armour, 'Should We Redistribute in Insolvency?' in J. Getzler and J. Payne (eds), Company Charges: Spectrum and Beyond (Oxford, Oxford University Press, 2006).

Restructuring directive proposal is part of that response. The proposal has been spoken of as Europe's response to Chapter 11 of the US Bankruptcy Code.[28] The objective of Chapter 11 is said to be "to provide a debtor with the legal protection necessary to give it the opportunity to reorganize, and thereby to provide creditors with going-concern value rather than the possibility of a more meagre satisfaction of outstanding debts through liquidation"[29]. Professors Warren and Westbrook suggest that Chapter 11 deserves a prominent place in "the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world".[30] Chapter 11 has been cited as a great success by its proponents and certainly as a model for European restructuring laws.[31]

There are undoubtedly strong similarities between the European restructuring proposals and Chapter 11 most notably in relation to the debtor in possession norm; the provision for a stay on claims against the debtor to facilitate the restructuring process, the treatment of executory contracts, the conditions for getting a restructuring plan approved and the protection for new money finance. Nevertheless, there are also strong differences in detail between the proposal and Chapter 11 in each of these areas. For instance, while the Chapter 11 stay is automatic in its effects and global in its reach, [32] the stay proposed under the Directive is discretionary.[33] Chapter 11 also contains a much more extensive new finance regime than is proposed under the Directive.

Five general comments are appropriate about the use of Chapter 11 as a model and the form and likely success of the proposed Directive. Firstly, Chapter 11 in something like its present form became part of the US Bankruptcy Code in 1978 though there were earlier precedents.[34] Since then Chapter 11 has undergone a mini-metamorphosis with now much more of a market orientation to the process. There is a greater emphasis on whole or partial sale of the business assets on a going concern basis rather than creditors and shareholders coming together under

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[28]See the Clifford Chance briefing paper on the proposal (at p.4) - https://onlineservices.cliffordchance.com/online/freeDownload.action?key...
See also http://www.euractiv.com/section/euro-finance/opinion/a-chapter-11-law-for-europes-entrepreneurs/

[29] Canadian Pacific Forest Products Ltd v JD Irving Ltd (1995) 66 F. 3d 1436 at 1442.

[30] See E. Warren and J.L. Westbrook, "The Success of Chapter 11: A Challenge to the Critics" (2009) 107 Michigan Law Review 603 at p. 604.

[31] See M. Brouwer, "Reorganization in US and European Bankruptcy Law" (2006) 22 European Journal of Law and Economics 5; A, Tilley, "European Restructuring: Clarifying Trans-Atlantic Misconceptions" (2005) Journal of Private Equity 99; C. Pochet, "Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules" (2002) 6 Journal of Management and Governance 343.

[32] On the worldwide effect of the US automatic stay see In re Nortel Networks Inc (2011) 669 F. 3d 128.

[33] COM (2016) 723 final Articles 6 and 7.

[34] See generally D.A. Skeel Jr, *Debt's Dominion: a History of Bankruptcy Law in America* (Princeton, Princeton University Press 2001).

the umbrella of Chapter 11 and working out a restructuring plan. While the figures are disputed, it has been estimated that "roughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan."[35] Part of the difficulties in working out statistics is that a company may undergo dramatic changes during the Chapter 11 process. Outcomes are often imprecise, difficult to measure and may be assigned potentially to more than one category. Companies "may shrink in size, be split into multiple businesses, sell their businesses to new owners, discharge their managers, change their names, and fundamentally change the nature of their businesses. One or more businesses may survive after a bankruptcy, but it may nevertheless be difficult to say whether that survivor is the bankrupt company, a company that acquired the bankrupt company, or a company that acquired elements of the bankrupt company."[36]

The business and financing landscape has also changed fundamentally since Chapter 11 was enacted and this has prompted calls for its revision. In short, there has been more expanded use of secured credit, growth in distressed-debt markets as well as other factors that have impacted on the effectiveness of the current law.[37] Leading commentators have observed: "We have a new form of chapter 11 emerging in the courts. Having invented the DIP (debtor-in-possession), American lawyers are now creating the SPIP (secured-party-in-possession). More and more chapter 11 cases seem to be no more than vehicles through which secured parties may enjoy their Article 9 rights under the umbrella, and the protective shield, of the bankruptcy law."[38] One of the influential actors in the reform process - the American Bankruptcy Institute (ABI) – produced a comprehensive report in 2014[39] detailing a proposed list of changes to Chapter 11 though the nature of the political process in the US is such that that these changes are unlikely to be enacted in the immediate future.[40]

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[35] See K. Ayotte and D. Skeel, "Bankruptcy or Bailouts" (2010) 35 Journal of Corporate Law 469, 477: "[R]oughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan." But for another perspective on the available data see Lynn M Lopucki and Joseph W Doherty, "Bankruptcy Survival" (2015) 62 U.C.L.A. Law Review 970.

[36] See Lynn M Lopucki and Joseph Doherty, "Bankruptcy Survival" (2015) 62 U.C.L.A. Law Review 970 at 979.

[37] See E. Altman, "The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations" (2014) 22 American Bankruptcy Institute Law Review 75.

[38] See E. Warren and J.L. Westbrook, "Secured Party in Possession" (2003) 22 American Bankruptcy Institute Journal 12. Article 9 (of the Uniform Commercial Code) permits the creation of security interests over personal property on a very liberal basis.

[39] American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter Full Report available at www.commission.abi.org/full-report.

[40] For detailed criticism of the report by the Loan Syndications and Trading Association (LSTA) see "The Trouble with Unneeded Bankruptcy Reform: The LSTA's Response to the ABI Commission Report" (October 2015) at p. 9: "If adopted, these reforms risk disrupting the operation of a bankruptcy system that has served the nation very well—aiding in the economic recovery from the Great

Secondly, the proposed directive has been a while in gestation. While there are some differences, most notably in the treatment of ongoing contracts not yet performed by the debtor (executory contracts), the proposal builds on the earlier 2014 Recommendation on a New Approach to Business Failure and Insolvency.[41] The Commission appear to think however, that the Recommendation is not enough. Because of incomplete and inconsistent implementation of the Recommendation, something stronger is needed in the form of a legislative instrument. According to a Commission evaluation, while "the Recommendation has provided useful focus for those Member States undertaking reforms in the area of insolvency, it has not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty."[42] Nevertheless, Member States were given very little time to implement some of the suggestions made in the 2014 Recommendation which, after all, was not legally binding.[43] There is a suspicion that the political imperatives of the Capital Markets Union project pushed the Commission into legislative mode and such action is perhaps premature.

Thirdly, the proposed directive still leaves a considerable degree of flexibility for Member States and can be characterised as more minimum rather than maximum harmonisation. The Commission staff working document accompanying the proposal refers to the directive establishing "a minimum harmonised framework covering a number of key aspects ... conducive to effectively achieving the policy objectives in the areas of restructuring and insolvency, which are highly regulated at the national level."[44] Member States are not necessarily obliged to put in place any new legislative measures. They can claim any existing statutory regime they may have is in conformity with the directive. Article 4 of the proposal states that where there is likelihood of insolvency, Member States should ensure that debtors have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency. It is also stated that such frameworks may consist of one or more procedures or measures.[45]

Recession—and that has become the envy of the world. They also threaten to increase the cost of credit to both performing and distressed businesses, which will in turn hurt the very businesses that the proposals are designed to help."

[41] C (2014) 1500 final.

[42] Commission evaluation (30th September 2015) http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf at p. 5.

[43] For more justification of the need for legislative action see SWD (2016) final at p. 105.

[44] See SWD (2016) 357 final at p. 51.

[45] Article 34 states that Member States shall adopt and publish, within 2 years from the date of entry into force of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They then have to communicate to the Commission the text of those provisions.

There is clearly sense in Member States adding to existing procedures that work well; perhaps taking additional dimensions from the Directive rather than starting off with a completely new blueprint and disregarding what has gone on before. Law is a cognitive institution which means that to be effective and actually change behaviour, it must be understood and embraced by "customers" and legal intermediaries – essentially those using the law. Empirical evidence suggests that to be effective, laws are required to have local constituencies with a strong interest in the understanding and application of these laws and the inter-relationship of legal rules means that only a few rules that can be understood and applied without reference to other legal rules or concepts.[46] There is a rich literature that highlights the role of existing legal norms in shaping subsequent legal developments.[47] One leading commentator has remarked that "[t]he institutions important to development are more likely to bear fruit if they evolve out of roots already growing in the soil of particular countries."[48]Change may best be brought about by adapting existing legal concepts instead of introducing new ones since existing concepts are most developed and safest to use. It tends to be the case that legal concepts behave differently in different countries and concept transplantation may have unintended consequences for the rest of the body of law in the receiving country.[49]

Fourthly, if politics is the ultimate dynamic that pushed the Restructuring proposal up the European legislative agenda, it also appears to have manifested itself in the minutiae of policy formation.[50] Political compromise is at the heart of the Restructuring proposals. These are no strangers either in US Chapter 11 bankruptcy and restructuring. The restructurings of the giant auto manufacturers, General Motors (GM) and Chrysler, with the financing assistance and goodwill of both the US and Canadian governments is an example in point. [51] New finance

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[46] See K. Pistor, "The Standardisation of Law and its Effect on Developing Economies" (2002) 50 A.J.C.L. 97.

[47] H. Spamann, "Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law" [2009] Brigham Young University Law Review 1813 and see also W. Twining, "Social Science and Diffusion of Law" (2005) 32 Journal of Law and Society 203; "Diffusion of Law: A Global Perspective" (2005) 49 Journal of Legal Pluralism 1 and D. Cabrelli and M. Siems, "Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis" (2015) 63 American Journal of Comparative Law 109.

[48] See generally J. Armour, S. Deakin, P. Lele, and M. Siems, "How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection" (2009) 57 A.J.C.L. 79.

[49] See G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61 M.L.R. 11.

[50] On the broader dimensions of insolvency law see generally F. Mucciarelli, "Not Just Efficiency: Insolvency Law in the EU and its Political Dimension" (2013) 14 E.B.O.R. 175.

[51] On these restructurings see the US Congressional Oversight Panel report (September 2009) "The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry" available

was provided in abundance to facilitate the restructurings. In another period of time however, it appears that Chapter 11 filings were used by companies to rewrite collective bargaining agreements with employee unions.[52] This was a tactic in heavily unionised sectors of the economy such as the airline industry. Perhaps conscious of this history, employee rights have now been specifically factored into the European restructuring proposal. "'Trade Unions' representatives warned against the moral hazard risk that business may use restructuring frameworks strategically to reduce their liabilities towards workers."[53] A number of directives currently guarantee information and consultation rights before restructuring and/or collective redundancies and the Restructuring proposal is stated to be without prejudice to these. Under the proposal there may be a stay of enforcement actions following the commencement of restructuring proceedings.[54] There is however, in principle relief from the stay with respect to workers' outstanding claims as defined in Directive 2008/94/EC. A stay in relation to such claims is only permissible for the amounts and during the period that Member States guarantee the payment of such claims by other means.[55]

In a proposal designed ultimately to promote jobs and economic growth, it clearly makes sense for the European Commission to allay concerns by employee representatives about some aspects of the proposal. Nevertheless, despite this concern for employee interests, employees may be adversely affected by the application of the cross class creditor cram-down rules in Article 11 of the proposal. While employees may constitute a separate class under the class formation rules,[56] there is no requirement of class unanimity before a restructuring plan can be approved by a court or administrative authority.[57] A whole class or classes of creditors, including an employee class, may be crammed down if certain conditions are satisfied.

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at: http://cop.senate.gov/documents/cop-090909-report.pdf. For different perspectives on these cases see D. Baird, "Lessons From The Automobile Reorganizations" (2012) 4 Journal of Legal Analysis 271; S. Lubben, "No Big Deal: The GM and Chrysler Cases in Context" (2009) 82 American Bankruptcy Law Journal 531; M. Roe and D. Skeel, "Assessing the Chrysler Bankruptcy" (2010) 108 Michigan Law Review 727. For an account by those involved in the process see A. Goolsbee and A. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler" (2015) 29 Journal of Economic Perspectives 3.

[52] See the comment by B. Carruthers and T. Halliday, Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States (Oxford, Clarendon Press, 1998) at p. 266: "[S]olvent firms have filed for Chapter 11 bankruptcy to take advantage of the considerable powers incumbent managers have to remake the corporation, undo its commitments, and reduce its obligations . . . In many cases, the reorganizing firm was not insolvent, and may in fact have been performing rather well."

[53] SWD (2016) 357 final at p. 16.

[54] Articles 6 and 7.

[55] Article 6(3).

[56] Article 9(2).

[57] Article 9(4).

Fifthly and finally, there is no guarantee that implementation of the Commission proposals will necessarily lead to an economic upturn[58] though it may have the effect of boosting the position of the EU countries in the World Bank "resolving insolvency" rankings. It is the case however, - despite suggestions from the Commission to the contrary - that EU countries already score pretty well on these rankings; certainly on the 2017 ranking with Finland no. 1 and Germany no. 3. In the latter rankings, 13 out of the top 20 spots are occupied by EU countries. In the closely related "Getting credit" indicator however, there is more of a mismatch between position in the rankings and perceived economic development and success. Although developed "First World" economies fill many of the places in the top 10th and top 20th, there are some surprise inclusions. For example, despite the recent history of violence and political instability in these countries, Colombia and Rwanda are equal 2nd whereas France and the Netherlands are among a number of countries including Japan that are ranked equal 82nd. Speaking of an earlier DB report, a lead economic analyst with the charity CAFOD, said: "Decision makers will rightly wonder how much weight to give to a publication that has ranked Zambia 12th in the world on access to credit for businesses, when over 90% of small businesses there cite this as a major constraint for their success."[59] Zambia has since dropped down the rankings to joint 20th alongside the UK in the latest (2017) iteration. The underlying proposition remains however. How can some less rich 'developing' countries where credit availability is seen to be a problem in practice score so highly in the 'Getting Credit' rankings?

Perhaps the strongest example of the lack of correlation between economic success and World Bank ranking position is China. China has scored relatively poorly on the World Bank rankings including for 'resolving insolvency' and 'getting credit'[60] but has done enormously well economically lifting hundreds of millions of people out of poverty though it faces new challenges as its economy enters a more mature phase. The Chinese experience tends to show that to show that legal changes must be sensitive to local conditions and take account of different implementing environments. There are choices, or a set of choices, to be made between means and ends and that the relationship between means and ends is contingent and uncertain. To date, the development of the financial system in China has had uniquely

[58] For a somewhat sceptical perspective on the merits of restructuring versus liquidation see D. Baird and R. Rasmussen, '"The End of Bankruptcy" (2002) 55 Stanford Law Review 751 at p 758: "We have a going-concern surplus (the thing the law of corporate reorganizations exists to preserve) only to the extent that there are assets that are worth more if located within an existing firm. If all the assets can be used as well elsewhere, the firm has no value as a going concern."

[59] See International Trade Union Confederation , 'Why the World Bank must do better at Doing Business' http://www.ituc-csi.org/why-the-world-bank-must-do-better?lang=en/

[60] In the 2017 rankings it is 53rd for "resolving insolvency" and 62nd for "getting credit".

Chinese characteristics.[61] China's singular journey suggests the need to avoid simplistic conclusions that certain consequences will inevitably follow form certain formal changes. It also suggests the need for a continuous process of adaptation and development; learning sensitively from experience and responding appropriately to local conditions. [62]

3. Similarities between the Restructuring Directive proposals and the 2014 Recommendation

a) The stay

The stay or moratorium on actions against the debtor is a fundamental part of the Restructuring directive proposals as it was in the earlier recommendation on A new approach to Business Failure and Insolvency.[63] Article 6 refers to a stay of individual enforcement actions to the extent necessary to support negotiations on a restructuring plan and Member States are required to put in place measures to allow for such a stay. The stay is not automatic nor necessarily comprehensive however, though it may include secured and preferential creditors. The only exception is the outstanding claims of workers unless, and to the extent, Member States put in place alternative measure for the protection of such claims.[64] The initial maximum duration of the stay is 4 months[65] though the stay may be extended for a period or periods reaching a maximum duration of 12 months.[66] In general the stay precludes the filing of insolvency proceedings for its duration[67] unless the debtor becomes illiquid although such a state of affairs does not bring the stay automatically to an end.[68] There is also provision for relief from the stay if affected parties can establish unfair prejudice to their rights or interests.[69] Member States are also required to allow the lifting of the stay when it appears that negotiations on a restructuring are not likely to yield a plan that will pass the approval hurdles.[70]

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[61] See generally D. Kennedy and J. Stiglitz eds Law and Economics with Chinese Characteristics (NY, Oxford University Press, 2013) and also J. Ohnesorge, “Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience” (2007) 28 University of Pennsylvania Journal of International Economic Law 219.

[62]On the role of law generally and institutions in promoting economic development see generally D. North, Institutions, Institutional Change, and Economic Performance: The Political Economy of Institutions and Decisions (Cambridge, CUP, 1990); C. Goodhart, “Economics and the Law: Too Much One-Way Traffic?” (1997) 60 M.L.R. 1; R. Posner, “Creating a Legal Framework for Economic Development” (1998) 13 World Bank Research Observer 1; K. Dam, The Law-Growth Nexus: The Rule of Law in Economic Development (Washington DC, Brookings Institution Press, 2013).

[63] C (2014) 1500 final. Articles 10-14 of this Recommendation dealt with the stay.

[64] Article 6(3).

[65] Article 6(4).

[66] Article 6(7).

[67] Articles 7(1) and 7(2).

[68] Article 7(3).

[69] Article 6(5).

[70] Article 6(8).

The stay is designed to provide the debtor with the necessary free space to negotiate a restructuring plan free from the threat of hostile creditor action. If there is no stay, then creditors may seize or otherwise immobilise assets that are useful or indeed essential for the carrying on of the debtor's business and thereby jeopardise the prospects of a successful restructuring. The "common pool" metaphor has been used in this connection. If creditors "overfish" in the common pool then this harms the overall eco structure and prevent the possibility of fish stocks being replenished.[71] A business essentially consists of a network of assets and relationships and these should be worth more collectively than if they are scattered in different directions. According to Professor Jackson:[72] "To the extent that a non-piecemeal collective process (whether in the form of liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group. This is derived from the commonplace notion: that a collection of assets is sometimes more valuable than the same assets would be if spread to the winds. It is often referred to as the surplus of a going concern value over a liquidation value."

The stay is intended to augment the common pool of assets and on the flip side of the coin, it addresses the "anti-commons" problem of blocking actions by individual creditors who are seeking to frustrate the wishes of the majority.[73]

In the US, the stay has been described as one of the fundamental debtor protections provided by the bankruptcy laws:[74] "It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganisation plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." The US law goes into much more detail however, on the safeguards available for creditors who are adversely affected by the stay; in particular for the holders of security interests in the debtor's property – "collateral"' in US terminology.[75] These

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[71] On the use of the "overfishing" analogy in another context see J. Diamond, Collapse: How Societies Choose to Fail or Survive (New York, Viking Penguin, 2005) at pp. 427-428.
[72] See T.H. Jackson, The Logic and Limits of Bankruptcy Law (Cambridge, MA: Harvard University Press, 1986) p. 14.
[73] For a discussion of "anti-commons" problems, see D. Baird and R. Rasmussen, "Anti-bankruptcy" (2010) 119 Yale L J 648; R. de Weijs, "Harmonisation of European insolvency law and the need to tackle two common problems: common pool and anticommons" (2012) 21 International Insolvency Review 67; and, more generally, M.A. Heller, "The tragedy of the anticommons: property in the transition from Marx to markets" (1998) 111 Harv L Rev 622.
[74] HR Rep No 595, 95th Cong, 1st Session 340 (1977).

[75] Under the UNCITRAL Legislative Guide on Insolvency Recommendation 50 a secured creditor is entitled to relief from the stay if the encumbered asset is not necessary to a prospective restructuring

holders of property rights are entitled to "adequate protection"[76] and three examples of "adequate protection" are given - cash payments, additional or replacement security interests on other property and, unusually expressed, something that will give the creditor the "indubitable equivalent" of its security interest. Case law has however, served up some parameters on the concept of adequate protection. It establishes that it is only the value of the collateral that is entitled to adequate protection and that maintaining a certain debt/collateral ratio is not part of the creditor's property interest that warrants protection.[77]

The proposed directive does not have this level of detail on protection of creditors who may be adversely affected by a bankruptcy stay. Certainly, secured creditors may be adversely affected; for instance, by seeing the value of their collateral fall during the period of the stay but with no viable business emerging from the restructuring process. Effectively the debtor is gambling unsuccessfully on resurrection and the debtor is footing the bill for the rescue/restructuring attempt. In the directive, everything is subsumed within the notion of "unfair prejudice". It may be that the concept is being asked to do too much and that some of its workload can reduced by more particularised guidance. A possible precedent in this regard comes from the stay associated with the administration procedure in the UK. This procedure was purposely designed to promote the rescue of the business of a company as a going concern though in practice it seems to be used to achieve a more advantageous realisation of company assets than could be accomplished in a liquidation. Be that as it may, the procedure comes with a stay on creditor enforcement actions and the courts in Re Atlantic Computer Systems plc (No 1)[78] have enunciated a comprehensive list of guidelines on when the stay should be lifted.[79]

b) Debtor in possession

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or sale of the debtor's business. Moreover, while the stay lasts, a secured creditor is entitled to the protection of the value of the asset in which it has a security interest. Appropriate measures of protection are stated to include cash payments by the debtor's estate, provision of additional security interests, or such other means as the court determines.

[76] Section 361 US Bankruptcy Code.
[77] See Re Alyucan (1981) 12 B.R. 803 where the court rejected the view that the preservation of a certain collateral-to-debt ratio was part of the creditor's property interest that warranted protection. See also United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd (1988) 484 U.S. 365 where the Supreme Court held that the adequate protection provision did not entitle an under-secured creditor to compensation for the delay caused by the stay in enforcing the security.

[78] [1992] Ch. 505
[79] [1992] Ch. 505 at pp. 541-542.

Like the earlier Recommendation, the proposed directive is based on a debtor in possession norm.[80] Article 5 is headed "Debtor in possession" and it lays down that Member States should ensure that debtors remain totally or partially in control of their assets and the day-today operation of the business. The appointment of "a practitioner in the field of restructuring shall not be mandatory in every case" but Member States may require such requirement where there is either a general stay or where the restructuring plan involves cross-class cram-down. It is not altogether clear from the text whether Member States may require such an appointment in other circumstances.

The provisions in the earlier Recommendation were subtly different.[81] While also reflecting a debtor in possession presumption, it envisaged the appointment, in certain circumstances, of either a mediator or supervisor. The mediator's role was seen as being to assist the debtor and creditors during the course of negotiations on a restructuring plan[82] while that of the supervisor was to oversee activities of the debtor and creditors and to safeguard the legitimate interests of creditors and other interested parties.[83] In this demarcation between mediator and supervisor, the Recommendation had some resemblances with French law though it should it be noted that the latter makes provision for mandatory appointment. Under the mandate ad hoc procedure, the court appoints a person who does not displace management but assists the company in trying to resolve its differences and come to an agreement with creditors. The French sauvegarde procedures, on the other hand, involve the appointment of one or more IPs to supervise the debtor, safeguard the interests of creditors and assist with negotiations on a restructuring plan.[84]

The language of mediator or supervisor does not appear in the proposed directive and, its place, we have "practitioner in the field of restructuring". The latter language may seem somewhat euphemistic as in many, if not most, Member States, this person is likely to be an Insolvency Practitioner or IP. In opting for this expression, the proposed directive departs from the recast Insolvency Regulation[85] which uses the expression "insolvency practitioner".[86] In

[80] C (2014) 1500 final Article 6(b).
[81] C (2014) 1500 final Articles 8 and 9.
[82] Ibid Article 9(a).
[83] Ibid Article 9(b).
[84] For a general discussion of French rescue procedures and French/US parallels see A. Kastrinou, "Comparative Analysis of the Informal Pre-Insolvency Procedures of the UK and France" (2016) 25 International Insolvency Review 99; P. Omar, "A Reform in Search of a Purpose: French Insolvency Law Changes (Again!)" (2014) 23 International Insolvency Review 201; R.F. Weber, "Can the Sauvegarde reform save French bankruptcy law? A comparative look at chapter 11 and French bankruptcy law from an agency cost perspective" (2005) 27 Michigan Journal of International Law 257.

[85] Regulation 2015/848
[86] Article 2(5) of the recast Regulation – Regulation 2015/848.

this area, there is some diversity of expression and words such as “administrators”, “trustees”, ‘”liquidators”, “supervisors”, “receivers”, “mediators”, “curators”, “officials”, “office holders” or “judicial managers” or “commissioners” are used across the European Union to denote persons involved in insolvency or restructuring work. [87]

The original Regulation on Insolvency Proceedings used the expression “liquidator”[88] and defined this to meaning any person or body whose function was to administer or liquidate assets of which the debtor had been divested or to supervise the administration of its affairs. That person was referred to as “liquidator” even though they might have the responsibility of preparing a restructuring plan. The recast Insolvency Regulation went for the more neutral terminology of insolvency practitioner rather than liquidator and the proposed directive adds to the mix by introducing the expression “practitioner in the field of restructuring”. This is done presumably to remove or reduce the link between restructuring and insolvency but since the possibility of using the restructuring procedure is predicated on there being some element of financial distress the link is pretty much inextricable.[89] Moreover, Articles 25-27 of the proposed directive more or less lumps insolvency practitioners and practitioners in the field of restructuring together in terms of appointment, remuneration and professional training.

In its debtor in possession norm, the proposed restructuring directive resembles the US Chapter 11. [90] The debtor in possession presumption is based on a number of factors; most notably, on the fact that existing management is most likely to be familiar with the debtor’s business thereby saving on expense and time compared with the situation where an outside insolvency practitioner is appointed and has to get acquainted with the nature of the debtor’s business operations in a necessarily short period of time. The “carrot” of remaining in control of the business is also a factor that may induce existing management to address the causes of the debtor’s difficulties at a sufficiently early time when restructuring is still a realistic

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[87] See G. McCormack, A. Keay and S. Brown European Insolvency Law: Reform and Harmonisation (Cheltenham, Edward Elgar, 2017) at p. 65.

[88] Regulation 1346/2000 Article 2(b).

[89] Article 1(a) refers to preventive restructuring procedures available for debtors in financial difficulty when there is a likelihood of insolvency. See also Article 3 which requires Member States to ensure that debtors and entrepreneurs have access to early warning tools and relevant up-to-date, clear, concise and user-friendly information about the availability of early warning tools. These early warning tools are supposed to detect a deteriorating business development and signal to the debtor/ entrepreneur the need to act as a matter of urgency.

[90] See generally on debtor-in-possession versus creditor-in-possession see D. Hahn, “Concentrated Ownership and Control of Corporate Reorganizations” (2004) 4 Journal of Corporate Law Studies 117; S. Franken, “Creditor - and Debtor-Oriented Corporate Bankruptcy Regimes Revisited” (2004) 5 E.B.O.R. 645; See also V. Finch, “Control and co-ordination in corporate rescue” (2005) 25 Legal Studies 37; G. McCormack, “Control and corporate rescue – an Anglo-American Evaluation” (2007) 56 I.C.L.Q. 515.

possibility rather than waiting too long until the prospect of rescue is remote. Risk averse management may become less motivated to work hard under a strictly enforcing regime which removes them from office. In other words, the presumption in favour of debtor in possession advances restructuring objectives in that management are not penalised by automatic displacement in favour of outsiders through a Chapter 11 filing.[91]

To mitigate the risk of damage to creditor interests, there are certain safeguards built in to the Chapter 11 process including the possibility of management displacement in certain circumstances. More generally, the debtor in possession is said to be a fiduciary of the creditors and is under an obligation to refrain from acting in a way that could damage the estate or hinder a successful restructuring.[92]There is also support in the US case law for the proposition that managerial allegiance must shift from the shareholders to the creditors when a company approaches insolvency. In the vicinity of insolvency, the board of directors is said to have an "obligation to the community of interests that sustained the corporation to exercise judgment in an informed good faith effort so as to maximize the corporation's long term wealth creating capacity".[93]

The proposed directive takes a broadly similar approach in Art 18. While the provision is headed "Duties of directors in connection with negotiations on a preventive restructuring plan" it sets down a series of European norms that apply more generally. Member States are required to ensure that, "where there is a likelihood of insolvency, directors have the following obligations: (a) to take immediate steps to minimise the loss for creditors, workers, shareholders and other stakeholders; (b) to have due regard to the interests of creditors and other stakeholders; (c) to take reasonable steps to avoid insolvency; (d) to avoid deliberate or grossly negligent conduct that threatens the viability of the business." It might be argued however, that the proposed European norm is internally contradictory. At one stage it seems

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[91] For a discussion of incentives to initiate proceedings see H. Eidenmüller, "Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts, and the Incentives for Shareholders/Managers" (2006) 7 E.B.O.R. 239.

[92] Re Marvel Entertainment Group (1998) 140 F 3d 463 at p. 471.

[93] Credit Lyonnais Bank Nederland NV v Pathe Communications 1991 Del Ch LEXIS 215, 108-9. It seems however, that this decision creates a shield for the directors from the claims of shareholders rather than putting a sword into the hands of creditors. The decision does not create new fiduciary duties in favour of creditors in the case of financially troubled companies. Rather the directors continue to have the task of attempting to maximise the economic value of the firm. See generally R.T. Nimmer and R.B. Feinberg, '"Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity" (1989) 6 Bankruptcy Developments Journal 1; S. Paterson,"The Paradox of Alignment: Agency Problems and Debt Restructuring" (2016) 17 EBOR 497; A. Keay, "Directors' Duties and Creditors' Interests" (2014) 130 Law Quarterly Review 443; A. Keay, "The Shifting of Directors' Duties in the Vicinity of Insolvency" (2015) 24 International Insolvency Review 140.

to postulate a duty to take reasonable care – "reasonable steps to avoid insolvency" but at another point it suggests the somewhat laxer duty of only having to avoid "grossly negligent" conduct which implies a greater margin of appreciation and tolerance of error.

Traditionally, a distinction has been drawn between what was perceived to be the 'pro-debtor' bias of Chapter 11 with its debtor in possession norm and the harsher manager-displaying philosophy practised in Europe including in the UK.[94] This century however, Chapter 11 has much more of a market focus and become a vehicle for going concern sales of a company's business operations rather than for restructurings in the traditional sense. One commentator remarks:[95] "At the end of the day, the world got more complex, new markets opened, new uses of Chapter 11 were invented, new parties came to the table." There now appears to be a greater emphasis placed on the maximization of creditor recoveries and asset sales than on traditional reorganizations. "Whereas the debtor and its manager seemed to dominate bankruptcy only a few years ago, Chapter 11 now has a distinctively creditor-oriented cast. Chapter 11 no longer functions like an anti-takeover device for managers; it has become, instead, the most important new frontier in the market for corporate control, complete with asset sales and faster cases."[96]

Creditors have been able to exert a greater measure of control through provisions in finance agreements.[97] Companies in financial difficulties are in need of finance and lenders and other providers may be willing to make such facilities available but only on condition that the debtor implements certain changes, whether in the form of management personnel or otherwise. Financing agreements typically have features that enable the credit provider to exercise influence or control over the company during the restructuring process and this may include the appointment of a chief restructuring officer (CRO) with the task of exploring ways to bring about a restructuring. The debtor may be forced to bow to the wishes of the credit provider through the control by the latter of the financing lifeline.[98] Covenants in the financing

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[94] For a description of the traditional view of Chapter 11 see e.g. D.A. Skeel, "Rethinking the line between Corporate Law and Corporate Bankruptcy" (1994) 72 Texas Law Review 471 at p. 535: "Like an antitakeover device, bankruptcy can impair the market's ability to discipline managers because it may substitute reorganization procedures for market mechanisms that would otherwise lead to the ouster of managers outside of bankruptcy."

[95] K. Gross, "Finding Some Trees but Missing the Forest" (2004) 12 American Bankruptcy Institute Law Review 203 at pp. 217-18.

[96] D.A. Skeel, "Creditors' Ball: The 'New' New Corporate Governance in Chapter 11" (2003) 152 University of Pennsylvania Law Review 917 at p. 918.

[97] See generally D. Baird and R. Rasmussen, "The End of Bankruptcy" (2002) 55 Stanford Law Review 751; "Private Debt and the Missing Lever of Corporate Governance" (2006) 154 University of Pennsylvania Law Review 120

[98] See K. Ayotte and E. Morrison, "Creditor Control and Conflict in Chapter 11" (2009) 1 Journal of Legal Analysis 511 who find "pervasive creditor control".

agreement may incorporate a time schedule that sets out a date for the confirmation of a restructuring plan and failing which the debtor's assets will be auctioned off to the highest bidder.[99] Lenders may require the sale of company assets pursuant to s 363 of the Bankruptcy Code which authorises such sales outside the normal course of business if there is a business justification for the sale. A major advantage of section 363 sales is that buyers take free of security interests and other encumbrances and claims against the insolvency estate. There have been some concerns however, that quick sales lack the safeguards of the Chapter 11 plan confirmation process and may benefit some stakeholders to the disadvantage of others.

According to Professors Baird and Rasmussen, to the extent that the US Chapter 11 is thought of as creating a collective forum in which creditors and their common debtor fashion a future for a firm that would otherwise be torn apart by financial distress, that era has come to end.[100] It has been argued that:[101]

"Creditors have converted two existing contractual tools into important governance levers. The first is debtor-in-possession (DIP) financing. Before they even file for bankruptcy, corporate debtors must arrange an infusion of cash to finance their operations in Chapter 11. To an increasing extent, lenders are using these loan contracts to influence corporate governance in bankruptcy. . . The second is that key executives are increasingly given performance-based compensation packages in Chapter 11. The most common strategy is to promise the executives a large bonus if they complete the reorganization quickly; likewise, executives face ever-smaller bonuses if the case takes longer."

A greater role for creditors in the Chapter 11 process may promote speedier resolution of distressed businesses ensuring that assets are deployed more effectively and that incompetent management is ended. On the other hand, it may have undesirable side effects such as cross-collateralisation – the securing of previously unsecured debts thereby giving certain existing lenders an advantage over others. More generally it might be viewed as a mechanism whereby favoured groups such as powerful creditors and corporate insiders extract value from a distressed business and benefit themselves at the expense of more vulnerable groups such as employees.[102]

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[99] D. Skeel Jr, "The Past, Present and Future of Debtor-in- Possession Financing" (2004) Cardozo Law Review 101; D. Baird, "The New Face of Chapter 11" (2004) 12 American Bankruptcy Institute Law Review 69.

[100] D. Baird and R. Rasmussen, "The End of Bankruptcy" (2002) 55 Stanford Law Review 751.

[101] D.A. Skeel Jr, "Creditors' Ball: The 'New' New Corporate Governance in Chapter 112" (2003) 152 University of Pennsylvania Law Review 917 at pp. 918-919.

[102] B. Adler, V. Capkun and L. Weiss, "Value Destruction in the New Era of Chapter 11" (2013) 29 Journal of Law, Economics, and Organization 461.

Superficially at least, the proposed directive is more protective of employees though they can be forced to accept a restructuring plan against their wishes through the cross class creditor cram-down procedure.[103] The proposal does not however, have very much to say about possible creditor control or influence on the restructuring process through new finance agreements.

c) New finance

Article 17 provides a measure of protection for restructuring related transactions whereas Article 16 is a more general provision safeguarding interim and new financing. "Interim financing" is defined as financing that is "reasonably and immediately necessary" to ensure continuation of the debtor's business or to preserve/enhance the value of that business pending confirmation of a restructuring plan[104] while "new financing" is defined as financing necessary for the implementation of a restructuring plan.[105] Member States are required to ensure that both new and interim financing are adequately encouraged and protected; in particular, against the risk of being declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures. The protection does not apply however, if the transactions have been carried out fraudulently or in bad faith.[106]

Articles 16 and 17 have very similar counterparts in the earlier Recommendation[107] and it is unlikely that they will bring out major changes in the domestic laws of Member States. Many domestic insolvency laws have anti-avoidance mechanisms that invalidate or set aside advantage gaining by creditors in the period prior to the commencement of formal insolvency proceedings. Such laws will vary in terms of precise details on matters such as the length of the vulnerability period, the types of transaction that are vulnerable to challenge and the defences that may be available to a counterparty. Nevertheless, it is unlikely that "new finance" transactions would in practice, be impeachable under a transactional avoidance regime except perhaps to the extent that the new financing agreement has features such as cross-collateralisation clauses. The latter clauses typically provide that any security given in return for the new advance will also typically secure existing unsecured loans or "rollover" such

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[103] Employees may be placed in a separate creditor class and "crammed down" i.e. forced to accept a restructuring plan against their wishes. In this respect they are treated in the same way as other creditor classes who likewise have no veto on a restructuring plan. Giving any such group a power of veto may be counter-productive in terms of business rescue and stop new jobs from being created.
[104] Article 2(11).
[105] Article 2(12).
[106] Articles 16(1) and 17(1).
[107] C (2014) 1500 final Articles 27-29.

loans into the new advance. Normally, in a new or interim finance situation, there is a reciprocal flow of benefits and obligations from creditor to debtor since the creditor is providing new finance and, in return, gets the benefit of the debtor's promise plus possibly security and/or the benefit of a guarantee from a third party that reinforces the debtor's commitment to repay the advance. Transactional avoidance provisions generally strike only at "incongruent" transactions where the creditor is receiving disproportionate benefits, such as the benefit of cross-collateralisation.[108]

Articles 16 and 17 do not go further and create anything in the nature of a legislative regime for super-priority new financing along the lines of s 364 of the US Bankruptcy Code.[109] Member States it seems are free to give these credit providers priority over the claims of ordinary, unsecured creditors but they are not required to provide such priority. On the other hand, the US regime in s 364 lays down a series of detailed prescriptions.[110] Credit given in the restructuring period has priority over existing unsecured creditors though if the extension of credit is outside the ordinary course of business, then the priority must be authorised by the court before the granting of credit.[111] Moreover, unless the lender agrees otherwise, a restructuring plan may not confirmed unless the new lender is paid in full, at or before the confirmation stage, and, even in the event of plan failure, "new" debts have priority over existing unsecured debts in any liquidation. Section 364 does entertain the possibility of new finance gaining priority over existing secured creditors but only in narrowly defined circumstances – the debtor must establish that it cannot obtain the loan without granting such a security interest and that existing secured creditors are adequately protected against loss.[112] Therefore, in the US it appears that the "priming" of existing secured lending is permitted only infrequently and in exceptional instances. Nevertheless, a specialised market has evolved in the US for new financing in restructuring contexts. Bank lenders, it seems, are drawn to this

[108] See generally R. Bork, "Transactions at an Undervalue—A Comparison of English and German Law" (2014) 14 Journal of Corporate Law Studies 453 and for a UK/US comparison see G. McCormack, "Swelling Corporate Assets: Changing What Is on the Menu" (2006) 6 Journal of Corporate Law Studies 39.

[109] See also Recommendation 67 of the UNCITRAL Legislative Guide on Insolvency which suggests that new finance may trump existing security interests if certain conditions are met including: (a) existing security interest holders were given the opportunity of being heard; (b) the debtor can show that it cannot obtain the finance in any other way and (c) the interests of existing secured creditors will be protected.

[110] See generally G. McCormack, "Super-priority New Financing and Corporate Rescue" [2007] JBL 701. On the theoretical justifications for debtor-in-possession financing see G. Triantis, "A Theory of the Regulation of Debtor-in-Possession Financing" (1993) 46 Vanderbilt Law Review 901; S. Dahiya, K. John, M. Puri and G. Ramirez, "Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence" (2003) 69 Journal of Financial Economics 259.

[111] Section 364(b).

[112] Section 364(d)(1)(B) refers specifically to "adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted."

form of finance by the lure of substantial upfront fees, higher margins and a strong package of covenants. There is also "increased activity from bespoke lenders such as hedge funds, private equity funds, institutional lenders and CLO funds drawn by the higher yields available or possible loan to own strategies".[113]

The transplant of a US style new financing regime to the UK has sometimes been advocated with a view to curing "underinvestment" problems, i.e. lack of incentives to finance value-generating projects and to address "debt overhang", i.e. existing assets being fully secured.[114] The call for such a regime was made in a study by Association of Financial Markets in Europe (AFME)/Frontier Economics that advocated EU legislative action.[115] The call has so far been resisted by the European Commission and the call also appears to have fallen on deaf ears in the UK where reforms are being considered as part of a "Review of the Corporate Insolvency Framework" by the Insolvency Service.[116]

It may be that there is a lack of an extensive and bespoke new finance market but there are obvious dangers in assuming that if certain US style legal reforms are enacted, then certain consequences will more or less automatically flow. There is a role for history, culture and business traditions in the reform process and formal reforms that do not have a solid grounding in the norms and experiences of a particular country or countries may not necessarily flourish. It is worth pointing out that among the reasons for not taking reform proposals forward in the UK has been the differences in business culture and economic environment between the US and UK. There has been some hesitation about sanctioning a situation that essentially guaranteed a return to credit providers advancing funds on the basis of super-priority and irrespective of the commercial viability of the restructuring proposals. The decision whether or not to lend to a distressed business, and on what terms, is a business judgment that may be best left to the market.

Moreover, under the World Bank Doing Business "Resolving Insolvency" indicators, the highest marks are given to countries that have a new financing framework but only where

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[113] Potential economic gains from reforming insolvency law in Europe (February, 2016) at p. 18. The report was prepared by AFME, Frontier Economics and Weil, Gotshal and Manges LLP.

[114] SWD (2016) 357 final at p 158 refers to "debt overhang" as a situation where a firm's high debt levels act as a disincentive to new investment.

[115] Potential economic gains from reforming insolvency law in Europe (February, 2016) at p. 18.

[116] See UK Insolvency Service A Review of the Corporate Insolvency Framework: summary of responses (September, 2016) at para 5.52 "[Some] respondents were concerned that any changes made to the order of priority would have a negative impact on the lending environment by increasing the cost of borrowing."

there is no provision for super-priority over existing secured debt.[117] In general, the "Resolving Insolvency" indicators follow US Chapter 11 precepts but in this area there is a notable departure. There was a strong view made known to the Commission that statutory "super priority is best left to each Member State to decide as any such proposals will need to be consistent with existing national laws regarding priority rights and security interests."[118]

4. Restructuring plans

In the area of restructuring plans, the description of the Restructuring directive proposal as a Chapter 11 for Europe rings most true. The proposal contains old Chapter 11 favourites such as cram-down of dissenting creditors, cross-class creditor cram-down and the "best interests of creditors" test. These features were hardly found at all in the earlier Recommendation on a New Approach to Business Failure and Insolvency.[119] In its Article 17, the precursor instrument did say however, that creditors with different interests should be dealt with in separate classes which reflect those interests and, as a minimum, required separate classes for secured and unsecured creditors. On the other hand, it did not lay down detailed rules on the necessary majorities before a majority of creditors in a particular class were deemed to have accepted a plan and whether the consent of all classes of affected creditors was necessary. The proposal goes into far greater detail on these matters though there some issues left up for grabs and where Member States may take divergent views.

In principle, each class of affected creditors must accept a restructuring plan before it may be approved by a judicial or administrative authority.[120] If there is no unanimity within the class then the dissenting members of the class are said to be "crammed down". The plan becomes binding on them even though they have not given their individual consent. In some cases however, judicial or administrative approval for the plan may be given even if all the affected classes of creditors have not given their consent to the plan. This is referred to as cross class creditor cram-down.[121] There are at least four issues to be considered – class composition; how consent is to be determined; conditions for judicial or administrative approval and finally, further conditions to be satisfied in the event of a possible cross-class creditor cram-down.

[117] See the 2017 DB Report at p 159: "Whether post-commencement finance receives priority over ordinary unsecured creditors during distribution of assets. A score of 1 is assigned if yes; 0.5 if post-commencement finance is granted superpriority over all creditors, secured and unsecured; 0 if no priority is granted to post-commencement finance or if the law contains no provisions on this subject."
[118] SWD (2016) 357 final at p. 140.
[119] C (2014) 1500 final.
[120] Articles 9(4) and 10.
[121] Article 11.

(a) class composition

The ability to put creditors into separate classes may be crucial in the context of a contentious restructuring. It facilitate ongoing negotiations over the division of the "going concern surplus" – the amount of "value" greater than liquidation value which a corporate restructuring is intended to preserve and enhance.[122] Moreover, like the gerrymandering (manipulation) of constituency boundaries in the context of electoral politics, it can give rise to considerable controversy. The assignment of creditors to particular classes or the creation of artificial classes may produce an outcome in favour a particular restructuring that would not necessarily be obtained if the division of creditors into classes followed a more obvious or natural pattern. It may be however, that there are legitimate legal, business or personal reasons for putting creditors into separate classes or groups. Persons with some business or familial relationship with the debtor might be regarded as constituting a separate class.[123] Also trade creditors[124] or others with a stake in the survival of the debtor's business operations could potentially have a diametrically opposed view on a proposed restructuring compared with those creditors who have a purely financial interest in the outcome of the case. The US Bankruptcy Court once said that if the expectations of trade creditors are frustrated, they have "little recourse but to refrain from doing business with the enterprise. The resulting negative reputation quickly spreads in the trade community, making it difficult to obtain services in the future on any but the most onerous terms." [125] On the other hand, a number of creditor classes may make it difficult to achieve creditor consensus especially if the relevant legislation required unanimity or near unanimity among creditor groups before a restructuring plan can be approved.

Like the earlier Recommendation,[126] the proposed directive requires as a minimum that secured and unsecured creditors should be put in separate classes but it goes somewhat further in laying down certain parameters for class composition. For instance, employees may be put in a separate class of their own. Classes are also required to be internally homogenous comprising the holders of "claims or interests with rights that are sufficiently similar to justify

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[122] See the Congressional record - HR Rep No 595, 95th Cong., 2nd Sess 224 (1978) "The bill does not impose a rigid financial rule for the plan. The parties are left to their own to negotiate a fair settlement. The question of whether creditors are entitled to the going-concern or liquidation value of the business is impossible to answer. It is unrealistic to assume that the bill could or even should attempt to answer that question. Instead, negotiation among the parties after full disclosure will govern how the value of the reorganizing company will be distributed among creditors and stockholders."

[123] See recital 25 of the preamble to the proposed directive.

[124] Recital 25 of the preamble states that "[n]ational law may also stipulate specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation."

[125] Re Greystone 111 Joint Venture (1989) 102 B.R. 560 at p. 570.

[126] C (2014) 1500 final Article 17.

considering the members of the class a homogenous group with commonality of interest."[127]The classes must be constituted in accordance with class formation rules which are defined in Art 2(6) as rules requiring the "grouping of affected creditors and equity holders in a restructuring plan in such a way as to reflect the rights and seniority of the affected claims and interests, taking into account possible pre-existing entitlements, liens or inter-creditor agreements, and their treatment under the restructuring plan." It should be noted however, that there is no specific requirement that creditors connected to the debtor should be placed in a separate class. At least, this is the case as far as Article 9(2) is concerned but recital 25 of the (non-binding) preamble states that national laws should "ensure that adequate treatment is given to matters of particular importance for class formation purposes, such as claims from connected parties".

It is also the case that Article 9 uses the expressions "claims' or 'interests" in a somewhat loose way not reflecting its usage under either US or UK restructuring law. The US Bankruptcy Code, for instance, distinguishes between claims[128] i.e. debt claims or indebtedness, and "interests"[129] – equity or shares. In the UK, the case law has resolved some of the difficult issues over class composition by distinguishing between rights and interests. In one of the classic cases, the judge cautioned against giving small groups veto powers over the decision-making procedures in a restructuring process stating that "we must give such a meaning to the term 'class' as will prevent the … [provisions] being so worked so to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."[130] The relevant test in the UK is based on the similarity or dissimilarity of legal rights against the company and not on the similarity or dissimilarity of the interests that may be derived from such legal rights. If creditors hold divergent views based on private interests that are not derived from their legal rights against the debtor, this is not a ground for saying that the creditors formed separate classes.[131]

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[127] Article 9(2).
[128] See the definition in s 101(5) of the US Bankruptcy Code.
[129] There is no definition of "interest" as such in the US Bankruptcy Code but the right of an equity security holder is an interest, as can be seen from s 101(16), 101 (17) and 501(a) of the US Bankruptcy Code.
[130] Sovereign Life Assurance Company v. Dodd [1892] 2 Q.B. 573 at pp. 582-583.
[131] See Chadwick LJ in Re Hawk Insurance Co Ltd. [2001] 2 B.C.L.C. 480 at para 33. He also said that the relevant tests should not be applied in such a way that they become an instrument of oppression by a minority and referred to the observations of Lush J in the Australian case Nordic Bank plc v. International Harvester Australia Ltd [1982] 2 V.R. 298 at p. 303: "To break creditors up into classes, however, will give each class an opportunity to veto the scheme, a process which undermines the basic approach of decision by a large majority, and one which should only be permitted if there are dissimilar interests related to the company and its scheme to be protected. The fact that two views may be

(b) How consent within a class is to be determined

The directive is somewhat unclear on this. Article 2(7) appears to impose a pure "value" requirement requiring a majority in value within a class. Article 9(4) is a little less clear requiring that a majority in the amount of their claims or interests is obtained in each and every class. Perhaps the most straightforward reading is to say that this provision imports a pure value requirement rather than an alternative or additional numerosity requirement. The latter requires a majority in number of affected creditors but its utility is questionable. Numerosity requirements can generally be overcome by debt splitting and assignment though this process adds to delay and expense.[132]

What is altogether less clear is whether the relevant majority is of all the creditors in the affected class or merely those voting or otherwise expressing a view on the proposed restructuring. It is possible to envisage in fact three possible scenarios and all of them seem equally plausible in terms of the proposed directive. One approach would be to say that creditors not voting are deemed to have voted in favour of the plan. Another approach is to say that those not voting are deemed to have voted against the plan while the third approach is effectively a compromise approach which disregards the votes of those not voting. The third approach seems the most sensible since it only take into account the voices of those who are motivated enough to vote in determining whether or not the plan has gained the necessary level of acceptance.[133]

On the other hand, the proposed directive deliberately and consciously leaves it up to Member States to stipulate the required majorities for the adoption of a restructuring plan. It does state however, that this majority should not be higher than 75% in the amount of claims or interests in each class. Therefore Member States have considerable flexibility to shape the relevant rules depending perhaps on the particular characteristics of the national economy and the existing characteristics of restructuring law in that country. Some countries have majority requirements that vary depending on either the percentage of creditors voting, or the extent of the debt reduction ("'haircut") that creditors will suffer as a result of the proceedings. In Portugal, for example, the requirement is for either two-thirds in value of creditors provided

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expressed at a meeting because one group may for extraneous reasons prefer one course, while another group prefers another is not a reason for calling two separate meetings."

[132] For criticisms of numerosity or "headcount" requirements see J. Payne, Schemes of Arrangement; Theory, Structure and Operation (Cambridge: CUP, 2014) at pp. 61-68.

[133] See generally on this issue G. McCormack, A. Keay and S. Brown European Insolvency Law: Reform and Harmonisation (Cheltenham, Edward Elgar, 2017) at p. 254.

that at least one-third in value of creditors vote or more than 50 per cent in value of total debt. Sweden distinguishes pure debt reduction (composition) proceedings and more general restructuring proceedings. In respect of composition proceedings, the threshold is at least 60% of the total value of claims if the payment is 50% or more but for steeper discounts on the debt, the threshold for acceptance increases to 75%.[134]

(c) Conditions for judicial or administrative approval

Article 10 requires that a restructuring plan should have been adopted in accordance with Article 9 i.e. consent of the necessary majority of creditors within the class, and that the plan has been notified to all known creditors likely to be affected by it. The plan is also required to comply with the' best interest of creditors test' and to pass a feasibility review. Both the "best interests of creditors" test and feasibility tests are a touch controversial in their own right.

Article 2(9) defines the "best interest of creditors test" as meaning that no dissenting creditor should be worse off under the restructuring plan than they would be in the event of liquidation of the business whether in piecemeal form or by means of a going concern sale. This test was also found, though in a somewhat less developed form, in Art 22(c) of the earlier Recommendation on a New Approach to Business Failure and Insolvency[135] which implied that a restructuring plan could only be confirmed if it did not reduce the rights of dissenting creditors below what they would reasonably be expected to receive if the debtor's business was liquidated or sold as a going concern, without being restructured. There are also precedents for the test internationally. For example, the "best interests" test is also a strongly entrenched feature of the US Chapter 11 which requires that a creditor should receive at least as much under a restructuring plan as it would in a liquidation.[136] Moreover, the UNCITRAL Legislative Guide on Insolvency refers, in particular, to protecting the position of the secured creditor during restructuring proceedings by ensuring that payments of future interest will be made and that the value of encumbered assets are not affected.[137]

Some other countries however, take more of a "creditor democracy" approach.[138] In other words, the principle that creditors should not be left worst off is not a formal requirement of the relevant restructuring law. If the necessary majorities within the classes are obtained, the court

[134] Ibid.
[135] C (2014) 1500 final.
[136] Section 129(a)(7)(ii) US Bankruptcy Code.
[137] Recommendation 50 of the Legislative guide.
[138] See G. McCormack, A. Keay and S. Brown European Insolvency Law: Reform and Harmonisation (Cheltenham, Edward Elgar, 2017) at pp. 250-251.

in deciding whether or not to approve the restructuring plan, is not obliged to consider alternative values of the debtor's assets, such as liquidation value. The procedures that apply in respect of court approval of UK scheme of arrangement[139] are symptomatic of this kind of approach. Before giving approval, the court must be satisfied that the scheme proposed is fair such that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."[140]The proposed scheme however, need not be the only fair scheme or even the best scheme. The courts have recognised that there was room for reasonable differences of view on these issues and, in commercial matters, creditors were reckoned to be much better arbiters of their own interests than the courts. It has been pointed out that the test is not whether the opposing creditors have reasonable objections to the scheme since a creditor might be acting equally reasonably in voting either for or against the scheme. In these circumstances, the English courts consider that creditor democracy should prevail.[141]

Like in the earlier Recommendation,[142]a "feasibility" review is also a feature of the Restructuring directive proposal, albeit in slightly altered form. Article 10(3) of the latter provides that Member States should ensure that a plan does not meet with judicial or administrative approval where it does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business. The feasibility review is also found in the US Bankruptcy Code with section 1129(a)(11) stipulating that for a restructuring plan to be confirmed by the court, it must find that the process is not likely to be followed by liquidation or the need for further financial restructuring of the company or any successor to the company under the plan. On the other hand, the UNCITRAL Legislative Guide somewhat sets its face against a fully blown feasibility review. In its view, any review should be "light touch" stating that it was:[143]

"highly desirable that the law not require or permit the court to review the economic and commercial basis of the decision of creditors . . . nor that it be asked to review particular aspects of the plan in terms of their economic feasibility, unless the circumstances in which

[139] Schemes are dealt with in Part 26 of the Companies Act 2014 and see generally G. O'Dea, J. Long and A. Smyth, Schemes of Arrangement Law and Practice (Oxford: OUP, 2012); J. Payne, Schemes of Arrangement; Theory, Structure and Operation (Cambridge: CUP, 2014). See also L.C. Ho, "Making and enforcing international schemes of arrangement" (2011) 26 J.I.B.L.R. 434; J Payne, "Cross-Border Schemes of Arrangement and Forum Shopping" (2013) 14 E.B.O.R. 563.

[140] See Anglo-Continental Supply Co Ltd [1922] 2 Ch. 723 at p. 736.

[141] See Re British Aviation Insurance Co Ltd [2005] E.W.H.C. 1621 at para 75.

[142] C (2014) 1500 final Article 23.

[143] See the discussion in the Legislative Guide at pp. 228-229.

this power can be exercised are narrowly defined or the court has the competence and experience to exercise the necessary level of commercial and economic judgement."

It may be that the kind of feasibility review envisaged under the proposed directive is sufficiently light touch to pass muster under these strictures.[144] The difficulties really come however, in terms of valuing a restructured entity and foreseeing future economic conditions that might affect the profitability and value of the business. This becomes important in deciding whether particular creditors are "in the money" or not i.e. whether the value of a restructured entity is such that they would have an economic stake in the restructured business. These judgments are necessary under the conditions for cross-class creditor cram-down in the proposed directive.

D. Conditions for cross-class creditor cram-down

Essentially this means confirming a restructuring plan against the objections of one or more classes of affected creditors. Not only does the proposed directive envisage the cram-down of creditors within a class, it also envisage the cram-down of whole classes of creditors. Again, this feature is found in the US Chapter 11 but is not a traditional aspect of the European restructuring scene.[145] Apart from the "best interests of creditors" test",[146] creditors in Chapter 11 are protected by an extensive list of conditions set out in s 1129. The restructuring plan must not discriminate unfairly and has to be fair and equitable. Some gloss is then added to the "fair and equitable" requirement in respect of both secured and unsecured creditors.[147] For the secured creditors, this means effectively the payment of the amount secured in full over time. Section 1129(b)(2)(A) requires that a secured creditor should get either
(a) retention of its secured interest plus sufficient deferred payments to equal the present value of the collateral; or

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[144] It should be noted that the recent UK Insolvency Service consultation, A Review of the Corporate Insolvency Framework, does not propose any "feasibility" test for restructuring plans but it states [9.31]: "The purpose of the court at the restructuring stage is not to be a 'rubber-stamping' exercise. The court should have discretion to not confirm a plan, as has happened with schemes of arrangements."

[145] ' For a general discussion of the issues see J. Payne, "Debt Restructuring in English Law: Lessons From the United States and the Need for Reform" (2014) 130 L.Q.R. 282. It should be noted that, in the UK, A Review of the Corporate Insolvency Framework states [9.9]: "The cram-down of a rescue plan onto 'out of the money' creditors is currently possible in the UK only through a costly mix of using a 'scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to 'cram-down' may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern."

[146] Section 1129)(7)(A)(ii).

[147] See s 1129(b)(i) "the court, on request of the proponent of the plan, shall confirm the plan … if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

(b) sale of the collateral with the creditor's security interest attaching to the proceeds of sale; or

(c) receipt of the "indubitable equivalent" of its security interest.

Unsecured creditors, on the other hand, are protected by the absolute priority principle.[148] This means that shareholders cannot, in principle, be paid before the creditors unless the creditors consent or the shareholders are providing some new or additional value. Section 1129(b)(2)(C)(ii) provides that the "holder of any claim or interest that is junior to the claims of such class [of unsecured creditors] will not receive or retain under the plan on account of such junior claim or interest any property".

In Europe, the conditions for cross class creditor cram-down are laid down in Article 11 of the proposed directive supplemented by Article 2. Superficially, they are much simpler than the somewhat convoluted wording and contorted numbering of Chapter 11. Nevertheless, they may be problematic to apply in practice, and the words in Article 11 are also somewhat difficult to interpret. Article 11 requires adherence to the absolute priority principle which is defined in Article 2(10) as meaning that a dissenting class of creditors should be paid in full before a more junior class may receive any distribution or keep any interest under the plan. It also requires that the plan should have "been approved by at least one class of affected creditors other than an equity-holder class 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."

It is not altogether clear whether this imports the US Chapter 11 requirement that at least one "impaired" class of creditors must approve the plan before it can be approved by the courts.[149] The notion of being "impaired" signifies receiving less than full entitlements. Some assistance in the interpretation of Article 11 may be provided by recital 28 in the preamble which refers to a plan being "supported by at least one affected class of creditors and that dissenting classes are not unfairly prejudiced". What does emerge from Art 11 and recitals 28- 30 is a concern

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[148] It has been argued that deviations from the priority rules that apply outside insolvency will result in increases in the cost of borrowing since lenders adjust their rates to reflect the fact that shareholders retain some value that would otherwise have gone to the lenders but for a suggestion that the "absolute priority" principle in the US is less absolute than it might superficially appear see Mark Roe and Frederick Tung, "Breaking bankruptcy priority: How rent-seeking upends the creditors' bargain" (2013) 99 Virginia Law Review 1235 and also S. Lubben, "The Overstated Absolute Priority Rule" (2016) 21 Fordham Journal of Financial and Corporate Law 581.

[149] Section 1124 provides that a claim or interest is impaired unless the plan leaves unaltered the rights outside bankruptcy that are associated with that claim or interest. Under s 1126(f), the holders of claims or interests that are not impaired are deemed to have voted to accept the plan since their rights against the debtor outside bankruptcy are preserved and protected in full.

for the value of the enterprise on a restructured basis rather than on a liquidation value.[150] The absolute priority principle has to be applied by reference to this enterprise value which rather means that there is less on the table for junior classes of creditors and shareholders.[151] Senior classes have to be paid in full valuing the enterprise on a restructured basis, rather than on the basis of liquidation value, before junior classes are entitled to anything. Senior creditors may not receive however, more than 100% of the value of their claims. [152]

There is specific provision in Art 12 to deal with equity holders. Member States are urged to take measures that prevent equity holders from blocking the adoption or implementation of a restructuring plan which designed to restore the viability of the business. Equity holders may form a separate class or classes to vote on the restructuring plan but they have no veto on the adoption of the plan and are subject to the standard cross-class cram-down mechanism provided in Article 11.[153]

Application of the rules for cross-class cram-down is dependent on a determination of value by the relevant courts or administrative authorities. Working out value, whether on a liquidation or restructured enterprise basis, is no easy task though some assistance is provided in this regard by Article 13 which obliges Member States to 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." This will not necessarily solve all the matters. The restructuring may take place at a time of depressed asset values, whether for the economy generally or in respect of particular sectors. It is easier to put a value of greater or lesser precision on an enterprise when there is some auction or bidding process. The general state of the economy, or sectors thereof, or a lack of available financing may all chill bids however. The valuation experts do not have crystal balls that enable them to anticipate future economic conditions and to foresee when the economic storm clouds will lift.

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[150] Recital 30 states that "enterprise valuation is, as a rule, higher than the going-concern liquidation value because it captures the fact that the business continues its activity and contracts with the minimum disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues and limits the impact on workers."

[151] See generally on valuation uncertainties in the US D. Baird and D. Bernstein, "Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain" (2006) 115 Yale Law Journal 1930; L Weiss, "Bankruptcy Resolution" (1990) 27 Journal of Financial Economics 285.

[152] Recital 28 of the preamble.

[153] But see recital 29: "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."

Nevertheless, the possibility of a valuation hearing may prevent senior creditors from grabbing a significant proportion of the equity or "upside" value of an enterprise when the market is depressed. Junior creditors, and possibly equity holders as well depending on how far the enterprise is '"underwater" financially, have the benefit of "holdup" value – the potential of holding up or delaying the implementation of a restructuring plan by forcing a contested court hearing. The possibility of a valuation hearing incentivises all the relevant parties to try to reach a negotiated settlement. The point has been well made that all parties have good reason to fear the litigation risk and expense inherent in a courtroom valuation fight.[154]

It seems that valuation disputes are a significant part of the US Chapter 11 landscape. Each of the relevant creditor classes will come to the valuation hearing armed with their own expert to put a plausible value on the enterprise and making use of standard valuation methodology in the form of comparable transaction, discounted cash flow (DCF) and leveraged buyout pricing. The US approach has serious potential disadvantages. "First, out-of-the money creditors may fear the valuation fight less than senior creditors (having less to lose) and thus capture returns which they ought properly not to be entitled to. Secondly, negotiations can become very protracted, costing significant amounts and delaying rehabilitation of the company. Finally, the approach is very subjective so that the result is somewhat unpredictable, and the judge hearing the valuation dispute may … 'feel gamed'".'[155]It is the case however, that unless the judge at the valuation hearing takes a particularly optimistic view of the company's prospects, those lower down the priority hierarchy may be left with meagre pickings.

A 2014 report from the American Bankruptcy Institute on Chapter 11 reform suggested some changes to the "absolute priority" principle by giving the "out of the money" stakeholders "redemption option value".[156] The report pointed out that "valuation may occur during a trough in the debtor's business cycle or the economy as a whole, and relying on a valuation at such a time my result in a reallocation of the reorganized firm's future value in favour of senior stakeholders and away from junior stakeholders in a manner that is subjectively unfair and

[154] See generally S. Paterson, "Rethinking Corporate Bankruptcy Theory in the Twenty-First Century" (2016) 37 Oxford Journal of Legal Studies 697; "Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards" (2014) 14 Journal of Corporate Law Studies 333 as well as UK Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016) at p. 539 – response by S. Paterson.

[155] See UK Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016) at p 539 – response by S. Paterson.

[156] See American Bankruptcy Institute, Commission to Study the Reform of Chapter 11 2012–2014, Final Report and Recommendations (2014), pp. 207–11, available at www.commission.abi.org/full-report.

inconsistent with the Bankruptcy Code's principle of providing a breathing spell from business adversity."

Under the Chapter 11 reform proposals, a class receiving no distribution under a restructuring plan but was next in line to receive such a distribution is given a "redemption option value" that equals the value of an option to purchase the entire company and pay in full or "redeem" all the outstanding senior debt. The option is valued using a market based model and options pricing methodology. It is designed to reflect the possibility that within 3 years the value of a restructured company might be such that the senior creditors can be paid in full and there is incremental value for the immediately junior class of stakeholders. The detailed rules proposed however, increase rather than decrease the complexity of Chapter 11 and there appears to be little prospect of the proposals being implemented in the near future.[157]

Given the diversity in national economies across it seems sensible for the Restructuring proposals to steer clear of complexities associated with options pricing methodology – a world of strike price and defined exercise periods. The approach in the proposed directive may be broad brush and have its own imperfections but it in its relative simplicity it appears preferable to the Chapter 11 reform suggestions.[158]

5. Ongoing/executory contracts

Article 7 of the Proposal obliges Member States to ensure that creditors may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor during the stay period. This policy extends to creditors relying on contractual clause that provide for such measures, solely by reason of the debtor's entry into restructuring negotiations or requesting a stay of individual enforcement actions and to "any similar event connected to the stay". Executory contracts are defined in Article 2(5) as contracts between debtors and counterparties under which both sides still have obligations to perform at the time the stay of individual enforcement actions is ordered.[159]According to recital 21 of the preamble, early termination endangers the ability of the business to continue to operate during restructuring negotiations and it references in this connection contracts for the

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[157] For a discussion see generally D. Bernstein and J. Millstein, "ABI Commission Report: Redemption Option Value Explained" (June 2015) 34 American Bankruptcy Institute Journal 10.
[158] See generally S. Paterson, "Rethinking Corporate Bankruptcy Theory in the Twenty-First Century" (2016) 37 Oxford Journal of Legal Studies 697 in particular at pp. 718-720; "Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards" (2014) 14 Journal of Corporate Law Studies 333.
[159] For the classic definition in the U.S. see V. Countryman, "Executory Contracts in Bankruptcy" (1972) 57 Minnesota Law Review 439; (1973) 58 Minnesota Law Review 479.

supply of utilities, telecoms and card payment services. Recital 22 speaks of similar dangers in respect of "ipso facto" clauses that make reference to negotiations on a restructuring plan. Ipso facto clauses are clauses that entitle the supplier to terminate the contractual relationship in certain circumstances such as the debtor's insolvency.

In terms of the broad thrust of Article 7, there is certainly some general international precedents to rely upon.[160] For instance, the US Bankruptcy Code in s 365(e) has an invalidating provision in respect of "ipso facto" clauses in executory contracts. The provision covers clauses that provide for the termination of the contract conditional on the insolvency or financial condition of the debtor and is part of a more general set of provisions allowing a debtor in US insolvency proceedings to "cherrypick" executory contracts. The debtor may assume or reject such contracts; effectively deciding to continue contracts that are advantageous to the debtor's business but rejecting contracts that are actually or potentially unprofitable and leaving counterparties with an unsecured damages claim against the debtor.

Both the UK[161] and Australia[162] has also been discussing similar legislative reforms. A recent UK Insolvency Service consultation contains proposals under which the debtor would be allowed to designate certain contracts as "essential" and prevent the counterparties to those contracts from terminating for a period of up to 12 months.[163] While counterparties are allowed to go to court after the event and challenge the designation of a contract as "essential", the UK proposals have been criticised for tipping the balance too far in favour of the debtor since counterparties might find themselves having to support distressed debtors when they may not desire to do so.[164] In principle, the Commission proposal goes much further though Member States are allowed to limit the application of the proposal to "essential contracts which are necessary for the continuation of the day-to-day operation of the business."[165]

The Commission proposal may be criticised on four grounds. Firstly, the proposal has not been heralded to any greater extent in the earlier Commission Recommendation.[166]

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[160] For a detailed cross-country comparison of this issue see D. Faber, N. Vermunt, J. Kilborn and K. van der Linde, Treatment of Contracts in Insolvency (Oxford, Oxford University Press, 2013).
[161] The UK proposals are referenced at p. 62 of SWD (2016) 357 final.
[162] Recent Australian government proposals "Improving Bankruptcy and Insolvency Laws" (29 April 2016) contains provisions for the invalidation of "ipso facto" clauses during a restructuring attempt.

[163] Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (UK Insolvency Service, 2016) at paras 8.7 -8.9.
[164] Adrian Cohen, "Clifford Chance briefing note 'Restructuring in the UK: Proposals for Reform" - https://www.cliffordchance.com/briefings/2016/06/restructuring_intheukproposalsfor reform.html/
[165] Article 7(4).
[166] SWD (2016) 357 final refers at p. 55 to the assistance of a specially created representative group of restructuring and insolvency experts from across the EU and it says "a new rule on the effects of the stay on early termination clauses in contracts was suggested by this group".

Recommendation 10 provided that the stay or moratorium envisaged should not "interfere with the performance of on-going contracts" but there were no other provisions on the matter. Secondly, while designed to enhance the viability of the debtor's business, it represents a much greater encroachment on freedom of contract. Thirdly, it is also not hedged about with some of the detail that is found in the US Bankruptcy Code on this issue.[167] Fourthly, the possible limitation to "essential contracts" produces uncertainty.

On the (second) freedom of contract point generally, it is expected that the debtor would continue to meet its post-stay obligations i.e. it would make payments for further supplies according to standard contractual terms.[168] But what if the counterparty wishes to terminate the contract because of pre-stay arrears by the debtor? This would appear to be prohibited by Article 7.4 which specifically precludes the modification of executory contracts to the detriment of the debtor for debts that came into existence before the stay. The language also seems sufficiently broad to encompass moving the debtor on to a higher cost tariff during the stay period by reason of existing arrears in payment since this action is clearly to the detriment of the debtor. The language may not sufficiently watertight however, to counteract all possible strategies by the counterparty. The ban only covers actions "solely by reason of" and if there is another justification for the counterparty action, then this would not seem to be covered.

On the third issue, the executory contracts regime in the US Bankruptcy Code – s 365 – contains carve outs for particular types of transaction such as financial markets contracts and intellectual property licenses. Section 365(n) for instance contains specific provisions on intellectual property rights. If the debtor chooses to reject a contract under which it is the licensor of intellectual property rights, the licensee may elect to retain its rights under the license agreement, including the benefit of any exclusivity provision, by continuing to make royalty payments due under the agreement. The public policy basis of this carve out was considered by the US Bankruptcy Court[169] and at appellate level[170] in Re Qimonda. It was acknowledged that terminating the licenses would enhance the value to the debtor's estate, but this legitimate interest had to be weighed in the balance against the risk to licensees who had relied on the design freedom provided by the licensing agreements and invested substantially in research and manufacturing facilities as a result. The court spoke of a concern

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[167] Section 365.
[168] See Article 7(6).

[169] (2011) 462 B.R. 165.
[170] (2013) 737 F3d 14.

that terminating intellectual property licenses in a bankruptcy or restructuring context could create uncertainty and lead to a slower pace of innovation with detriment for the US economy.[171]

It may be that that the less detailed EU executory contracts regime in Article 7 was not intended to apply to such specialised contracts. Nevertheless, the definition of "executory contracts" in Article 2(5) seems sufficiently comprehensive to include these contracts. Article 1(2) provides that the proposed directive should not apply where the debtor is a financial institution of various types such as credit institution, insurance undertaking, investment firm, collective investment undertaking, central securities depositary etc. The disapplication does not operate however, where the financial institution is merely a counterparty in the transaction.[172]

On the fourth point – possible limitation of the executory contracts regime to essential contracts necessary to the day to day operation of the debtor's business, there is no definitional amplification and this lack of detail may be disconcerting for some. One might argue that most well run businesses will not want to purchase non-essential supplies – a wasted expense. Therefore, unless it was decided, as part of the restructuring, that certain aspects of the business should not survive, then all or most suppliers could be considered to be essential. On the other hand, a narrow definition would confine the definition of "essential contracts" to contracts for the supply of water, gas and electricity. In the UK the provision designed to secure continuity of supplies – s 233 of the Insolvency Act – was originally so limited. Changes in the business world however, revealed the limitations of this approach and s. 233 was widened in 2015 by the Insolvency (Protection of Essential Supplies) Order 2015[173] to ensure continuity in the supply of a wider range of utilities, including IT goods or services, to insolvent businesses.

The recent UK Insolvency Service consultation, takes the process a stage further. It argues that there are other supplies of goods and services that may also be essential to the survival of a particular business.[174] It gives the example of a printing company that needs special paper in order to continue its operations. "If this paper was only available from one supplier, that

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[171] (2011) 462 B.R. 165 at p. 185. It should be noted that at appellate level the case was decided in the same way but the grounds for decision were different.
[172] SWD (2016) 357 final at p. 110 refers to the need for "certain clarifications in order to remove uncertainty and ensure compatibility with the Financial Collateral Directive."
[173] SI No 2015/989 made under sections 92-95 of the Enterprise and Regulatory Reform Act 2013.
[174] Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (UK Insolvency Service, 2016) at para 8.8.

supplier would be an essential supplier to the printing company. Alternatively, a garage or dealership that only services one make of car would consider the supply of parts from this manufacturer essential."[175] A response to the consultation by the Chancery Judges refers to the malleability of the concept of "essential contracts".[176] It suggests a legislative fleshing out of the concept and this approach also seems appropriate in the context of "essential contracts" in the restructuring directive. The factors mentioned include the following but the list is not exhaustive[177] - whether the product or service can be regarded as necessary (as distinct from being merely advantageous or convenient) for the survival of the business; availability of substitute sources of supply; the time that is likely to be needed to access the product or service elsewhere; whether, and to what extent, the source of supply is integrated into the operations of the business through e.g. through shared tooling or "just in time" scheduling; regulatory consideration and shared intellectual property rights.

6. Conclusion

Reforming and enhancing corporate restructuring and insolvency law in Europe is a work in progress. The recast Insolvency Regulation[178] was one step and the European Commission proposal for a restructuring directive is an even bigger step. The proposal suggests a minimum harmonisation directive with a substantial measure of uniformity in respect of the laws in Member States on corporate restructuring and "second chance" for individual entrepreneurs. The proposal does not suggest however, the introduction of a fully harmonised procedure. This option was discarded as "politically unfeasible and clearly disproportionate".[179]

On the other hand, there appears to be a political imperative behind some element of action at the central European level in the business restructuring field. Growth rates remain relatively low across Europe and this is coupled with relatively high levels of unemployment which is a particular issue in some countries. The President of the European Commission, Jean-Claude Juncker, has put jobs and growth at the heart of his own personal manifesto[180] and this prioritisation has been reinforced by other policy pronouncements at the European level.[181]

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[175] Ibid at 8.9.

[176] See UK Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016) at p 650 – para 19 of the response by the Chancery Judges.

[177] Ibid at para 20.

[178] Regulation 2015/848.

[179] See SWD (2016) 357 final at p. 51.

[180] http://juncker.epp.eu/my-priorities

[181] See COM (2016) 723 final at p 8 referring to the Five Presidents' report of 22 June 2015 on "Completing Europe's Economic and Monetary Union" which at p. 10 listed insolvency law among the most important bottlenecks preventing the integration of capital markets in Europe. The report was by

The intimate association between business restructuring and the jobs and growth agenda has been highlighted in the Commission proposal which attempts to put more or less precise figures on the number of jobs saved by having efficient restructuring procedures in place across Europe.[182] Commission and other evaluations have suggested deficiencies in the legal frameworks governing business restructuring in many EU Member States.[183]In some countries, restructuring procedures may be very outdated at best or completely lacking at worst. Where relevant procedures exist, they may be cumbersome and inefficient and have the effect of transferring wealth to out-of-the money creditors and shareholders. Other possible inefficiencies include prolonging the life of financially unviable enterprises which may have detrimental consequences for healthy competitors and the overall soundness of the economy since it runs counter to the objective of putting assets to their most effective use.[184]
Unfavourable comparisons have been drawn in this regard between the US and Europe and US commentators have not hesitated to sing the praises of the best known US restructuring vehicle – Chapter 11 of the US Bankruptcy Code. For instance, one financial industry lobby group has recently spoken of the system as served the "[US} nation very well—aiding in the economic recovery from the Great Recession—and that has become the envy of the world."[185] Certainly, the US Chapter 11 appears to have been used to good effect in the high profile General Motors (GM) and Chrysler restructurings where huge auto manufacturers and distributors were effectively reorganized through a sale of the potentially profitable part of the company's businesses to newly created shell companies under the protective umbrella provided by Chapter 11. The shell companies paid a certain amount for the assets of the "old" car companies and also agreed to assume certain workforce-related liabilities including pensions and healthcare. The detailed structure and funding arrangements had been worked out in advance of the bankruptcy filings with the US government contributing a large part of the funding. The US government exited its investments in the restructured GM and Chrysler entities at a net financial loss but jobs were saved and an overall cost benefit assessment has

Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz ("the Five Presidents").

[182] See COM (2016) 723 final at pp. 2-3 and in more detail SWD (2016) 357 final at pp. 29-40.

[183] See SWD (2016) 357 final at p. 105 referring, inter alia, to the independent study carried out by a team from the University of Leeds (January 2016).

[184] See G. McCormack, A. Keay and S. Brown European Insolvency Law: Reform and Harmonisation (Cheltenham, Edward Elgar, 2017) at p. 230.

[185] See Loan Syndications and Trading Association (LSTA) see "The Trouble with Unneeded Bankruptcy Reform: The LSTA's Response to the ABI Commission Report" (October 2015) at p. 9.

to take into account the enormous social cost and dislocation occasioned by any closure of these companies.[186]

The restructuring directive proposal in a sense is Europe's answer to Chapter 11 but it a work in progress rather than a fully finished product. This is so for a number of reasons. Firstly, while the proposal builds on the earlier Commission Recommendation on a new approach to new approach to business failure, some new aspects are new. Worth singling out in this respect are the provisions on executory contracts. It may be that these aspects were not fully "road tested" in advance and need further discussion and refinement Secondly, in some areas there is a level of detail in the proposal such as on cross class cram-down that was absent from the earlier Recommendation and again it may be that these matters could do with adjustment and refinement. Thirdly, it is important to acknowledge the limitations of corporate restructuring law. A restructuring law, by itself, cannot right a bad business model. Macro-economic and political stability may be far more important drivers in creating the conditions for jobs and economic growth.[187] Fourthly, assuming the proposal passes through the legislative process and becomes a directive, it is subject to review by the Commission 5 years after coming into force.[188] The wording of the relevant provision suggests further moves in the direction of greater integration referring to "whether additional measures to consolidate and strengthen the legal framework on restructuring, insolvency and second chance should be considered."[189] In short, there is no "end of history"[190] for business restructuring law at the European level.[191] But fifthly and finally, political events in the course of 2016 including the 'Brexit' referendum vote in the UK suggest that it is unwise to assume that the direction of travel with the EU project is necessarily linear and one way.

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[186] See A. Goolsbee and A. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler" (2015) 29 Journal of Economic Perspectives 3.
[187] See generally R. Posner, "Creating a Legal Framework for Economic Development" (1998) 13 World Bank Research Observer 1; C. Goodhart, "Economics and the Law: Too Much One-Way Traffic?" (1997) 60 M.L.R. 1; K. Dam, The Law-Growth Nexus: The Rule of Law in Economic Development (Washington DC, Brookings Institution Press, 2013).
[188] Article 33.
[189] The Commission in its analysis of what further, if any, measures are appropriate will be aided by the statistical data that Member are obliged to provide on an annual basis under Article 29 of the proposal. This data covers – (see SWD (2016) 357 final at p. 103).
"(i) the number of preventive restructuring procedures opened by enterprises in difficulty,
(ii) the number of liquidations and sales as a going concern,
(iii) the average length of proceedings, including particular procedural phases (e.g. before courts, out-of-court),
(iv) the size of the debtors involved in such proceedings (medium, large or micro-enterprises), and
(v) the outcome of the procedures opened, including the recovery rates in different types of procedures."
[190] See Francis Fukuyama's The End of History and the Last Man (New York, Free Press, 1992) for a different perspective that is somewhat belied by events over the past 25 or more years.

[191] See more generally S. Paterson, "Rethinking Corporate Bankruptcy Theory in the Twenty-First Century" (2016) 37 Oxford Journal of Legal Studies 697.