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Viability assessment in corporate debt restructuring: *Optimizing the filtration effect of the European directive on restructuring and insolvency*

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Abstract

Distinguishing viable debtors from non-viable ones is at the epicenter of the law of corporate distress. Designing frameworks that facilitate the restructuring of viable debtors only, while at the same time succeed in filtering out non-viable ones towards liquidation has always been a real challenge for legislators. In this context, viability is a notion of pivotal importance. In Europe, where a harmonized restructuring field is still in its early stages, a close reflection on the notion of viability is therefore essential if we are to build a true pan-European rescue culture upon correct foundations. For this reason, this paper focuses on the intricate notion of viability, its meanings and roles. It presents the different possible models of viability assessment and discusses the optimal choice for the European directive. The paper emphasizes the importance of appropriate filtering mechanisms within any chosen model of viability assessment and for this reason conducts an in-depth analysis of US Chapter 11, where such mechanisms are most characteristically embedded. After highlighting the way in which viability both permeates and infiltrates Chapter 11 through serving as a "litmus test" of its filtering mechanisms, the paper subsequently turns to European directive in order to evaluate the latter's filtering mechanisms under the comparative light of Chapter 11. This way, the paper provides concrete interpretation, transposition and reform suggestions for the directive which will allow it to properly reflect the notion of viability and as a consequence, achieve an effective filtering of viable debtors from non-viable ones.

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1. Introduction

1.1. Importance of the notion of viability generally and for European restructuring specifically

Distinguishing viable debtors from non-viable ones is at the epicenter of the law of corporate distress. In this context, one of the most pressing challenges legislators are constantly faced with is to provide for frameworks that facilitate the restructuring of financially distressed yet viable companies, while at the same time succeed in filtering out non-viable ones towards liquidation.

The said challenge has also been evident at European level. Indeed, the Directive on restructuring and insolvency[1] has made extensive use of the terms "viable" and "viability,"—thirty times in thirty-eight pages -, yet without providing a definition of the notion. Moreover, there is almost no European literature examining viability in a terminological way[2], its role and its impact, and there is certainly no extensive literature examining the prospective filtering success or failure of the directive.

This comes in sharp contrast with US Bankruptcy Law for example, which has significantly casted light on the notion. As will be examined later in the paper, American case law has extensively analyzed viability through interpreting the provisions of Chapter 11, Title 11 of the United States Code.[3] Moreover, the filtering function of Chapter 11, namely whether it finally achieves saving only viable debtors or not, has been placed under the scrutiny of the American Economic Analysis of Law scholars, with one part of the literature praising its "filtering success"[4] and the other highlighting its "filtering failure."[5] This same literature refers to viability in a terminological way, clearly delineating and defining the different possible meanings of the notion.[6]

As a harmonized corporate debt restructuring framework and field constitute a novelty for Europe, a close reflection on the notion of viability is essential if we are to build a true pan-European rescue culture upon correct foundations. It is essential for the interpretation of the new European regime, its national transposition, its future reform, as well as for the increased judicial practice that will arise in this field, especially under the pressing reality of a pandemic-driven economic crisis. This paper aspires to contribute exactly into these directions. In doing so, it will first start by analyzing the different possible meanings of viability.

1.2. The meanings of viability

Viability is an intricate notion; it can first have a double meaning, featuring both as *"financial viability"* (and its opposite, financial distress) and as *"economic viability"* (and its opposite, economic distress). Secondly, it can have a double role, serving both as the ultimate *aim* of a corporate debt restructuring procedure and as its necessary *precondition.* "Understanding that financial and economic distress are conceptually distinct from each other is fundamental,"[7] especially in order to subsequently underline the different role that the two notions play within the structural design of a corporate debt restructuring framework.

Financial viability/distress refers to the solvent or insolvent status of the debtor. More specifically, a debtor can be characterized as financially distressed in two situations: when it is (a) insolvent or imminently insolvent on a cash-flow or balance sheet basis, as well as when it is (b) still technically solvent but facing a reasonable likelihood of insolvency.

On the other hand, economic viability/distress refers to the comparison between the debtor's going concern and liquidation value.[8] Economically viable is a debtor whose going concern value is greater than its hypothetical liquidation value. To illustrate this further we use an *indicator* of economic distress, namely the post-petition "substantial or continuing loss to or diminution of the estate"[9]: economically viable is a debtor that continues operating post-petition under the protection of a moratorium without incurring the said loss to or diminution of its estate, and as such keeps in principle its going concern value higher that its hypothetical liquidation value. Why does this reflect economic viability? It demonstrates that the debtor has managed to fund its post-petition expenses and continued operations principally by generating positive cash flow and/or by attracting debtor-in-possession (DIP) financing; in any case, not by using its estate. This in turn demonstrates that its continuation value entails something beyond and above the mere total value of its assets (liquidation value); it additionally entails the value generated by the continued trust shown by its customers (positive cash flow), as well as the value inherent in the DIP financiers' support, who believe in the prospective rehabilitation of the business and the continuation of their business relations with it.[10] This excess of value, beyond and above the mere total value of its assets, indicates that the debtor is worth more if continued as a going concern than if channeled into liquidation; in other words it indicates that the debtor is economically viable.

The going concern surplus logic described above and based, indicatively, on the customers' continued trust, is the same if we consider an example out of the context of a restructuring procedure. Along these lines, Adler, Baird, and Jackson state the following regarding an economically distressed debtor:

> A firm may be troubled because it cannot succeed in the marketplace. Competitors produce a better product at a lower cost. This first kind of adversity is called "economic distress." *It exists regardless of a firm's capital structure.* The sole owner of a business that attracts no customers will shut it down, even if there are no banks or other creditors in the picture.[11]

Adler, Baird and Jackson distinguish the above from "financial distress," which they define as follows:

> On the other hand, a firm may be distressed because it cannot generate sufficient revenue to pay its debts. This second kind of trouble is "financial distress," meaning the firm's income is *not enough to pay back what is has borrowed. It is a problem that arises because of the firm's capital structure.*[12]

Of course, real life examples will not always be so clear-cut; there can be a feedback loop between the two types of distress and therefore they may often coexist. A firm may be financially distressed and as a consequence of that also become economically distressed or vice versa. For example, imagine a firm that is insufficiently capitalized and faces financial distress. In order to cope with the difficulty of paying its bills, the firm does not "does not fill gaps in its inventory and does not invest in buying the latest fashions." As a consequence, it no more appeals to its clientele and therefore becomes economically distressed as well, which in turn stretches its financial distress even further. On the other way round, a clothing firm may be economically distressed because its fashion does not appeal anymore to its former customers; this in turn creates a financial strain on the firm, which cannot repay its creditors and therefore also becomes financially distressed.[13]

1.3. The role of the law in the viability-related discourse

By correctly using the above meanings of viability, the role of the law is to incorporate *indicators* and provide appropriate *filtering mechanisms*[14] that will enable the parties involved to first distinguish those financially distressed debtors that are irreversibly economically unviable and as such should "die in the market place"[15] from those that are economically viable and demonstrate a prospect of financial rehabilitation, and to subsequently filter the former out of the restructuring procedure.[16]

In this process there are several options regarding which party will be called upon to play the role of the debtor's ultimate viability assessor triggering the framework's filtering mechanisms. The choice of ultimate assessor and as a consequence, the way the filtering mechanisms are triggered constitute the parameters that collectively shape the different possible *models of viability assessment* that can be used in corporate debt restructuring frameworks. It is exactly these models that we will first examine in detail below.

2. Models of viability assessment: IP-centered, Non-IP—centered and the case of the European directive

Two models of viability assessment are discerned by this paper, an "IP-centered" and a "Non-IP-centered" one. The new Part A1 of the Insolvency Act 1986 (United Kingdom), as introduced by the Corporate Insolvency and Governance Act 2020[17], coupled with insights from the established Company Voluntary Arrangement (CVA) procedure[18], offers a characteristic example of the first model. As per the second, this is well depicted in the reorganization process prescribed under Chapter 11 or even the more recent Small Business Reorganization Act (United States).[19]

2.1. IP-centered model: the example of the Part A1 moratorium

Starting from the IP-centered model (hereinafter "Model I"), our focus falls first on the new Part A1 of the Insolvency Act 1986, which deals with a new moratorium and the monitor appointed during it. As a background, the Corporate Insolvency and Governance Act 2020 introduced the said new standalone moratorium and a new restructuring plan. The provisions regarding the first now constitute Part A1 of the Insolvency Act 1986, while the provisions regarding the second make up the new Part 26A process of the Companies Act 2006. For our purposes, namely analyzing the model of viability assessment employed, we look at the moratorium and monitor provisions entailed in Part A1 of the Insolvency Act 1986.

As per its nature first, the Part A1 moratorium is a standalone one, providing the debtor with a "breathing space" from creditors' enforcement actions so as to be in a position to come forward with its restructuring proposal. Such moratorium can serve as a preparatory step for a subsequent CVA, scheme of arrangement, or even a new Part 26A restructuring plan.

As per its scope of application, the moratorium is available to both solvent and insolvent debtors. This constitutes a shift from the original proposal regarding the moratorium's scope, given that the Government response[20] to the consultation conducted for the review of the insolvency framework[21] originally envisaged a moratorium available to solvent debtors only. The shift has been welcomed by the legal field.[22]

Turning now to the core issue for our purposes here, the Part A1 provisions reflect an IP-centered model of viability assessment. Central figure in these provisions is the "monitor," an insolvency practitioner burdened with a positively worded obligation to assess the debtor's prospect of rescue and more broadly its viability, and this in three different stages of the procedure.

More specifically, in order for the moratorium to be granted, a statement by the proposed monitor is required which documents that in his view, it is likely that the moratorium "*would* result in the rescue of the company as a going concern."[23] In order for the monitor to be in a position to effectuate such an assessment at the outset of the moratorium, pre-appointment work is essentially needed. This has been recognized in the Insolvency Service's "Guide for Monitors," which states the following:

Prior to the moratorium the prospective monitor will need to engage with the

> directors and seek information about the company's assets, liabilities and business so that they are able to assess the company's financial position, prospects and eligibility for a moratorium. [. . .] The extent of this pre-appointment work will be for the insolvency practitioner using their professional experience and judgement to decide on and should be proportionate to the size and complexity of the company.[24]

A similar assessment is also necessary for the granting of potential extensions to the moratorium. Sections A10, A11 and A13 of Part A1, which deal with the extension of the moratorium by the directors or by the court, require a "statement from the monitor that [. . .] it is likely that the moratorium *will* result in the rescue of the company as a going concern."[25] As such, the monitor's evaluation of the debtor's prospect of rescue becomes a condition to most extensions of the moratorium.

Finally the monitor is obliged to bring the moratorium to an end if, in his view, "the moratorium is no longer likely to result in the rescue of the company as a going concern"[26] or if he thinks that the debtor is unable to pay any of the two following types of debts that have fallen due: moratorium debts or pre-moratorium debts for which the debtor does not have a payment holiday.[27] These estimations in essence reflect the notions of prospective financial viability and existing economic viability respectively and as such resemble to the assessments effectuated under the Chapter 11's filtering mechanisms, which will be analyzed in detail later in this paper.

On the basis of the above it seems that, *prima facie*, the monitor enjoys a "viability assessment exclusivity." From a first reading of the legislative provisions, the monitor seems to be the sole person responsible for both the initial and the continuous evaluation of the debtor's rescue prospects which is required for the granting and continuation of the moratorium, and secondly is the only one in a position to lift the moratorium, thus effectively "torpedo" the restructuring when the viability of the debtor lapses. While the latter is indeed true[28], the "viability assessment exclusivity" qualification is not an accurate depiction of the reality and further clarifications are needed on the issue.

More specifically, according to Section A35 the monitor's duty is to "monitor the company's affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern." The term "company affairs" is quite broad and necessarily encompasses both the debtor's financial position and its "material relationships and stakeholders."[29] Indeed, in order for the monitor to evaluate the debtor's restructuring prospects, he should take into account not only the debtor's financials but also the creditors' willingness to engage in and support the restructuring negotiations. The latter in their turn continually engage in their own viability assessments of the debtor in order to determine their individual position vis-à-vis the debtor's financial situation and restructuring attempts.[30] As such, the creditors' assessments and attitude will certainly be relevant to the monitor's consideration of the debtor's rescue prospects. In this context we could say that creditors play the role of "continuous assessors" of the debtor's viability and will at least "nudge" the IP both at the outset and during the moratorium in the way he is making his own viability assessment as the "ultimate assessor" ("ultimate arbiter") of the debtor's viability. As such, we could well say that the viability assessment is guided by a "four eyes principle": the eyes of creditors and those of the monitor combined.

This "four eyes principle" is actually inherent not only in the new Part A1 moratorium but also in the more established CVA procedure. In summary, at the beginning of a CVA the debtor's directors have to make restructuring plan proposals and nominate an IP who will supervise the CVA once the proposals get approved. At the procedure's initiation the IP, called the "nominee," receives the plan proposals including a statement of the company's affairs[31] and is obliged to submit a report to the court[32] stating "whether, in his opinion, the proposed voluntary arrangement has a reasonable prospect of being approved and implemented."[33] In order to comprehensively assess the debtor's rescue prospects the nominee should necessarily engage with the creditors, whose own viability assessments in turn determine their stance towards the debtor's restructuring attempt. Indeed, this creditors-nominee engagement is well reflected in the Statement of Insolvency Practice (SIP) 3.2 which deals with CVAs. In its paragraph 11 it is underlined that the nominee should ensure that "an assessment is made of the likely attitude of any key creditors and the general body of creditors, in particular as to the fairness and balance of the proposals," while the nominee should also properly document such engagements "by maintaining record of any discussions with creditors (or their representatives)."[34] In addition, paragraph 13 (b)(ii) sums up clearly the above by requiring that sufficient information are obtained on the likely expectations of any key creditors in order for the nominee to be able to prepare his report.

Finally, referring to the CVA small company moratorium which used to require the same type of assessments to be made by the nominee[35], Payne stated the following:

> For companies to access the small company moratorium, nominees have to be prepared to state from the outset *that the CVA has a reasonable prospect of being approved and implemented*, and that the company is likely to have sufficient funds available during the moratorium to enable it to carry on business. *In order to be in a position to make these statements nominees are likely to engage in significant due diligence and consultations with the company's creditors and suppliers.*[36]

Concluding on all the above, in both the Part A1 moratorium and the CVA procedure, while the IP seems, *prima facie*, to be the frontrunner as regards the debtor's viability assessment, (key) creditors are in fact always "behind the scenes," continually making their own viability assessments, being consulted by the IP or at least "nudging" him and ultimately informing the latter's assessments.[37] In short, the debtor's viability assessment becomes a "four eyes" matter.

The engagement between the IP and the creditors does not stop here though. In fact, it is standard practice in CVAs that IPs also assume the role of advisers, assisting the directors in drafting the CVA proposals. In this context, it is highly likely that a consultative process and significant engagements between the IP and the creditors take place already at this stage.[38] Along the same lines, similar discussions already take place in literature and practice as to how much and in which way the new Part A1 provisions leave scope to the monitor to also act as adviser to the debtor while also complying with his duty of independence.[39] This is an issue that will not be discussed further here as it goes beyond the scope of our analysis. What is nevertheless still relevant for our purposes out of the above discussion is that the creditor-IP engagement is omnipresent at multiple levels and this further upholds the said "four eyes" principle.

Despite the aforementioned role of creditors, it is nevertheless clear that the model of viability assessment used in the Part A1 moratorium is an IP-centered one. Creditors may be consulted or "nudge" the monitor, but it is only the latter who can trigger the filtering mechanism of the stay lift. Moreover, at the end of the day the practitioner has a duty to exercise independent judgement in making his viability assessment, satisfactorily meet the high burden of proof that he bears and play the role of the "ultimate arbiter" ("ultimate assessor") of the debtor's viability.

In the Part A1 moratorium, the said burden of proof is actually gradually increasing: at the outset of the moratorium the monitor should assess whether it is likely that the moratorium "*would* result in the rescue of the company as a going concern."[40] At a later stage though, and in order to grant a moratorium extension, the monitor should assess whether it is likely that the moratorium "*will* result in the rescue of the company as a going concern."[41] "Will" certainly reflects a higher degree of certainty required compared to "would," while at the same time both standards are actually pretty high. Efforts had been made during the legislative process to lower the said burden of proof for the monitor: a relevant amendment was tabled during the bill discussions in the House of Lords with the aim to use "could" in the place of "would." This would have resulted in a lower starting threshold for the monitor. The amendment was not, however, accepted at the end.

Combining the above factors all together ("ultimate arbiter" role, high burden of proof and even pre-appointment work in the case of the Part A1 moratorium), it may well be expected that the IP-centered model becomes a costly one, especially for SMEs. The "Guide for Monitors" states that "the remuneration of a monitor in relation to a moratorium, including that for pre-appointment work is a *contractual* matter between the company and the monitor."[42] It can be of course expected that the monitor's remuneration will be proportionate to the size of the debtor and difficulty of its case. It is nevertheless also legitimate to point out that the "evaluative" aspect entailed in the monitor's work goes above and beyond his typical role as mediator and supervisor of a restructuring. This in turn means that the total expected cost of the IP-centered model will certainly be not a low one.

To conclude, the IP-centered model, as represented primarily by the Part

A1 moratorium provisions, places the monitor at the position of the "ultimate arbiter" of the debtor's viability. This viability assessment is a continuous one, happens at multiple points throughout the duration of the moratorium and is also gradual, in the sense that the burden of proof falling on the monitor's shoulders becomes higher as the case progresses.

2.2. Non-IP—centered model: the US examples of Chapter 11 and the Small Business Reorganization Act

At the other side of the spectrum, restructuring in the US is governed by a "Non-IP-centered" model of viability assessment (hereinafter "Model II"). This is the case for both Chapter 11 and the more recent Small Business Reorganization Act (SBRA). This means that, unlike Part A1, the stay (i.e., its granting and (dis)continuation) does not depend on the evaluations of an insolvency practitioner in the role of the "ultimate assessor" ("ultimate arbiter") of the debtor's viability. In other words, the viability assessment taking place throughout the stay does not follow an IP-centered pattern.

More specifically, in the majority of cases[43], Chapter 11 does not entail appointment of an IP/restructuring practitioner in the case. Under the SBRA now, the appointment of a trustee is mandatory in every case, but the regime is nevertheless a debtor-in-possession one. The trustee's role mostly consists in facilitating the reorganization negotiations and the confirmation of a consensual plan, acting as an adviser to the small business debtor and as a mediator during the process. In the usual course of things[44] the trustee is not taking control over the debtor's operations, and most importantly, is not legislatively burdened, unlike the Part A1 monitor, with the ultimate assessment of the debtor's rescue prospects and viability.

Most of the times creditors[45], acting as "constant assessors" of the debtor's viability, bring in front of the court as the "ultimate assessor" ("ultimate arbiter") the relevant motions for the triggering of the filtering mechanisms. Such mechanisms are the relief from the stay and the conversion/dismissal of the Chapter 11/Sub-V case, which effectively allow the "torpedoing" of the reorganization when the viability of the debtor lapses.

What can be observed is that the "four eyes principle" analyzed in the context of the IP-centered model is also applicable in the Non-IP—centered one. The relevant actors in the latter are the creditors and the court: the creditors constantly assess the debtor's viability and may file motions for the triggering of the filtering mechanisms by the court.[46] The latter acts as the "ultimate assessor" ("ultimate arbiter") of the debtor's viability, as it is in its discretion to decide whether the filtering mechanisms will ultimately be triggered or not.

2.3. The case of the European directive

2.3.1. The viability assessment model employed by the directive

After having identified two fundamental models of viability assessment, the IP-centered and the Non-IP—centered one, the question that follows immediately thereafter is where the directive stands with respect to these two; in other words, what is the model of viability assessment employed by the directive. In fact, the directive stands closer to the Non-IP—centered model.

To start with, the directive provides for a debtor-in-possession regime. In this context, the first debate that took place during its negotiations was whether the appointment of an insolvency practitioner would be mandatory or optional.[47] The different positions held by Member States reflected a kaleidoscope of legal cultures, namely the various different national approaches regarding, *inter alia*, the IP's training and remuneration. Such differences ultimately reflect the different levels of effectiveness and efficiency attached to an insolvency practitioner's appointment across the different Member States. The approach finally adopted is a flexible one. According to article 5, as a general rule a practitioner is not appointed automatically but rather only where necessary, on a case-by-case basis.[48] There is nevertheless a non-exclusive list of cases where such an appointment is mandatory[49] and this is obviously a result of much-needed political compromise during the negotiations. The final outcome thus appears to be a very flexible one, with the general rule being the case-by-case appointment but with extensive leeway left to Member States to prescribe instances of mandatory appointment.

The second debate shaping the content of the directive concerned the role that the practitioner will be called to play if appointed in a case. Here we can discern three possible roles: those of a mediator, a supervisor and an assessor of the debtor's viability.

Looking closely at the directive, the principal roles it has reserved for the practitioner are those of a mediator and supervisor. In fact, the predecessor of the directive, i.e., the 2014 Commission Recommendation, used exclusively the terms "mediator" and "supervisor."[50] And while the directive uses solely the term "practitioner in the field of restructuring," the actual principal role reserved for this practitioner has remained the same as the one envisaged by the Recommendation. More specifically, article 2 (1) [12] prescribes the following:

> "practitioner in the field of restructuring" means any person or body appointed by a judicial or administrative authority to carry out, *in particular*[51], one or more of the following tasks:
>
> (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;
>
> (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;
>
> (c) taking partial control over the assets or affairs of the debtor during negotiations.

The phrase "assisting the debtor or the creditors in drafting or negotiating a restructuring plan" refers to the practitioner's role as a mediator and appears in almost similar wording under article 5 and recital 31 as well. The phrase under (b) above obviously refers to the supervisory role of the practitioner and appears not only under article 2, but also under article 5 and recitals 30 and 31.[52] These two roles combined,—mediator and supervisor —, can well be said to bring the directive closer to the Non-IP—centered model examined above, especially the one employed by the SBRA.

At the same time though, there also exists an evaluative element inherent in the role reserved for the practitioner under the directive. This is reflected on the wording of articles 8 (1)(h) and 6 (9)(b). More specifically, article 8 prescribes the following:

(1) Member States shall require that restructuring plans submitted for adoption [. . .], or for confirmation by a judicial or administrative authority [. . .], contain at least the following information:

[. . .]

> (h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary preconditions for the success of the plan. *Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed*.[53]

It is obvious that the above task entails an evaluation/assessment to be made by the practitioner regarding the debtor's viability.

In addition to the above, article 6 (9)(b) provides that "Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions [. . .] at the request of the practitioner in the field of restructuring." There are various possible occasions that could justify the practitioner's intervention as per the lift of the stay. One such can certainly be when the practitioner *evaluates* the debtor as non-viable and as a consequence requests the lift of the stay, effectively bringing the restructuring to an end. Here again, an evaluative element can be discerned in the role reserved for the restructuring practitioner under the directive.

The above observations call for a holistic consideration of the viability assessment model employed by the directive. As hinted at the beginning of the analysis, the directive's model stands indeed closer to the Non-IP—centered model of viability assessment. This is because the restructuring practitioner, if appointed, is *not* the "ultimate assessor" ("ultimate arbiter") of the debtor's viability. This role is rather reserved for the judicial or administrative authorities, at the discretion of which the triggering of the filtering mechanism of the stay lift seems to have been ultimately left.[54] Finally, unlike Model I, the commencement of the restructuring procedure does not depend on the practitioner's assessment of the debtor's prospect of rescue and viability.

2.3.2. The optimal viability assessment model and the importance of filtering mechanisms

As mentioned earlier, the directive's text is a result of political compromise. This has an obvious impact on its wording, which is unparallel in flexibility so as cover almost all Member States' possible needs and wills. This great flexibility, even in parts of the text that may well pass unnoticed, means that the ultimate result of national transpositions may differ from one Member State to another. This in turn triggers a discussion on which actually is the optimal model of viability assessment, as well as on the importance of appropriate filtering mechanisms.

To start unfolding this discussion, article 2 (1) [12] sets out the definition of the "practitioner in the field of restructuring" and provides a *non-exclusive* list of what may constitute the practitioner's tasks. The addition of the phrase "in particular," denoting such non-exclusivity, is a result of the Member States' negotiations as it was not part of the Proposal's text.[55] The flexibility inherent in the non-exclusive nature of the said list means that one cannot exclude the possibility of an explicitly prescribed evaluative role for the practitioner "kicking in" through the transposition of this particular article into certain Member States. Such a scenario would for example leverage the practitioners' sophistication and expertise found in certain Member States.

Putting the above into a specific context, the said scenario fits for example well with article 5(3)[c], which provides for the mandatory appointment of a restructuring practitioner "where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors." Where such an evaluative role is clearly spelled out for the practitioner, we may well imagine creditors requesting such an appointment in order for the practitioner to provide them with an evaluation of the debtor's viability.

Furthermore, as previously mentioned, another evaluative role example to be added to the above can be found under article 8(1)(h), which allows Member States to require that the restructuring plan's "statement of reasons"[56] be made or validated by the practitioner.

What the scope left to Member States to provide for increased involvement of the practitioner through national transposition reveals is the increased specialization and sophistication of this professional group in certain Member States. This in turn reveals trust in the scenario of the practitioners' playing an enhanced role during the restructuring procedure. While these observations do not alter the directive's Non-IP—centered character given that the court is kept as the "ultimate arbiter" of the debtor's viability, they can nevertheless serve as a springboard for certain conclusions on what could be the optimal model of viability assessment.

Before reaching such conclusions, it is important to underline at this point the similarities between the two models of viability assessment, namely the IP-centered and the Non-IP—centered one. As analyzed above, the "four eyes principle" applies in both, with both models relying at the end on the independent assessment of an "ultimate arbiter," be it the restructuring practitioner or the court. As such, it can be said that both models are actually quite similar from a qualitative and cost-wise perspective[57] and as such, the national choice between the one or the other depends on the sophistication of the practitioners and the judiciary in each country.

Given the above similarities, and for as long as harmonized, EU-wide capacity building regarding the training and expertise of IPs and the judiciary is still in its infancy[58], it could be fairly argued that both models of viability assessment could co-exist at European level, with the nationally optimal choice being based upon the domestic strengths and weaknesses of the IP profession and the judiciary.

What the above suggests, and this paper most fundamentally advocates is that *what ultimately matters most is the appropriateness of the filtering mechanisms employed in any chosen model of viability assessment.* It is therefore these filtering mechanisms that need a close examination. Such mechanisms are currently most characteristically present under the Non-IP—centered model examples of US Chapter 11 and the SBRA. As such, this paper will first examine those mechanisms,—their elements, function, and role -, in the context of US law,[59] before subsequently turning to an equivalent analysis and suggestions in the context of the European directive.

3. Filtering mechanisms in US Bankruptcy Law: spotlight on 11 U.S.C. § 1112 and § 362

The term "filtering mechanism" has been introduced by this paper in order to describe provisions that enable a party in interest to "torpedo" the ongoing restructuring procedure when the debtor's viability lapses. Under Chapter 11, such filtering mechanisms constitute the dismissal of a Chapter 11 case, its conversion to a Chapter 7 case and the relief from the stay of enforcement actions. The latter has an effect equivalent to that of the first two, as most of the times, lifting the stay effectively precipitates the debtor's liquidation. In this context, it is not surprising that motions for conversion/dismissal and motions for relief often appear concurrently in the same case.[60] It is through these filtering mechanisms that the "twin goals" of Chapter 11, namely salvaging only viable business enterprises and maximizing creditors' return[61], are effectively underpinned.

3.1. Conversion/Dismissal of a Chapter 11 case as a filtering mechanism (11 U.S.C. § 1112)

The first filtering mechanism that can be identified within US Bankruptcy Law is the dismissal of a Chapter 11 case or its conversion to a Chapter 7 case under 11 U.S.C. § 1112. According to § 1112 (b)(1), involuntary conversion or dismissal may happen on request of a party in interest, for example creditors, after notice, hearing and "for cause." In other words, when a party in interest requests from the court to dismiss or convert the case and "cause" is established, the court "shall" convert or dismiss, whichever is in the best interests of the creditors and the estate, unless the court decides to appoint a trustee or examiner under § 1104, or the exception under § 1112 (b)(2) applies.

Section 1112 (b)(4) goes a step further by providing a long, non-exclusive list of examples that can constitute "cause" for conversion/dismissal. Needless to mention that more than one of these may appear concurrently in the same case. Among these, the below are the most characteristic:

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;[62]

(C) failure to maintain appropriate insurance that poses a risk to the estate[63] or to the public; unauthorized use of cash collateral substantially harmful to 1 or more creditors;[64]

(D) "The failure of such a debtor to seek cash collateral authorization (or obtain the necessary consents), when applicable reveals a profound ignorance by that debtor of the responsibilities attendant to its status. In appropriate cases, such a failure should be considered in conjunction with the viability of a Chapter 11 case or the continuation of the debtor in possession," see In re Three Partners, Inc. 199 B.R. 230, 237 n.9 (Bankr. D. Mass. 1995).

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

[. . .]

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court

[. . .]

Looking closely at the above, we can first identify a strong temporal element in the non-exclusive list of examples. Such temporal element means that their applicability "is partly dependent on where in the bankruptcy reorganization process we find the debtor. For example, how old is the case? Has exclusivity expired? Has a disclosure statement or, in a small business case, a plan containing adequate information, been approved?"[65] As a consequence, it can be said that the "cause" standard "*continually* measures the value of maintaining the Chapter 11 process"[66] as it applies at various stages throughout the procedure. This way, the ultimate purpose of the provision, namely "to weed out unlikely reorganization prospects even though the debtor's intentions at the time of the filing may be strictly honorable,"[67] is effectively underpinned.

Secondly, it is crucial to underline one more element commonly shared by all the examples listed under § 1112 (b)(4). More specifically, economic and financial distress indicators are embedded into the examples. This results in the notion of *viability* being placed at the very core of § 1112, thus becoming *the "litmus test" of the filtering mechanism.* We examine this in detail below.

3.1.1. 11 U.S.C. § 1112 (b) (4) (B)—(J)

To better understand the above it is necessary to look in depth at the above list, starting from examples (B) to (J). The latter essentially depict two types of behavior by the debtor in question. The first is the debtor's attempt to extract concessions from creditors and divert value to insiders. This is true in cases of gross mismanagement of the estate, failure to maintain appropriate insurance that poses a risk to the estate or to the public, as well as unauthorized use of cash collateral substantially harmful to one or more creditors. The second depicts a debtor ignoring the procedural requirements of the reorganization case. This is true in cases of failure to comply with an order of a court, unexcused failure to satisfy timely any required filing or reporting requirement or failure to file a disclosure statement, file or confirm a plan within the time fixed by the bankruptcy code or by order of the court. The denominator in both types of behavior is common: the debtor is *economi-*

cally distressed, is aware of it and tries to profit out of the situation as long as it lasts (or pushed to last due to debtor-induced delays like the afore-described) before the inevitable collapse.

As a consequence, such examples become "*indicators"* of economic distress, or, as Edward Morrison calls them, "markers" of economic distress. Indeed, Morrison eloquently summarizes the above as follows:

> A business in economic distress cannot rescue its business in Chapter 11. Nonetheless, the business may enter bankruptcy in order to delay liquidation, extract concessions from creditors, or gamble the business's resurrection [. . .]. TO accomplish these goals, a business in economic distress will often ignore procedural requirements, suspend payment for ongoing expenses, and try to divert value to insiders. I call these markers of economic distress.[68]

The crucial point to make here is that the use of indicators (markers) of economic distress clearly highlights viability,—in the form of economic viability -, as the "litmus test" of the 11 U.S.C. § 1112 (b)(4)(B) — (J) filtering mechanism. When the said indicators find applicability in the case in question, viability is absent and therefore parties in interest, e.g., creditors, can "torpedo" the reorganization of a debtor not deserving to go forward with it.

In the above instances, such "torpedoing" may only be avoided when the court finds that unusual circumstances establish that conversion or dismissal is not in the best interests of creditors and the estate, and an objecting party establishes that (1) *there is reasonable likelihood that the plan will be confirmed within a reasonable time,* (2) there is a reasonable justification for the act or omission committed under the relevant indicator and constituting "cause" and finally, (3) that the act or omission will be cured within a reasonable time.[69]

3.1.2. 11 U.S.C. § 1112 (b) (4) (A)

Going a step further in demonstrating how the notion of viability permeates the filtering mechanism of 11 U.S.C. § 1112, we now turn to the first example of "cause" provided in the list. According to § 1112 (b)(4)(A), cause for conversion or dismissal exists when there is substantial or continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation. As noted in Collier,

> [. . .] this standard has two basic requirements. First, it tests whether, after the commencement of the case, the debtor has suffered or continued to experience a negative cash flow, or, alternatively, declining asset values. Second, it tests whether there is any reasonable likelihood that the debtor, or some other party, will be able to stem the debtor's losses and place the debtor's business enterprise back on solid financial footing within a reasonable amount of time. Both tests must be satisfied in order for cause to exist [. . .] to dismiss or convert the case under section 1112 (b)(4)(A).[70]

Extensive case law has casted light onto this "two-prong test,"[71] with *In re AdBrite Corp.*[72] being one of the most prominent cases, being cited by over 44 different decisions. *In re AdBrite Corp.* concerned a debtor who had not made any profits post-petition, had had a negative post-petition cash flow and was paying its post-petition expenses by using property of the estate.

The debtor had no signed agreements for DIP financing nor any agreements with clients that could provide payments to be made to the debtor. We use *In re AdBrite Corp.* as well as similar case law in order to examine how viability, in both its meanings, serves as the "litmus test" of the 11 U.S.C. § 1112 (b)(4)(A) filtering mechanism.

3.1.2.1. "substantial or continuing loss to or diminution of the estate" as an indicator of economic distress

We start the analysis by focusing on the test's first prong, which requires the existence of "substantial or continuing loss to or diminution of the estate." This essentially tests whether, "after the commencement of the case, the debtor has suffered or continued to experience a negative cash flow, or, alternatively, declining asset values."[73] *Through this prong we can evaluate whether the debtor is economically viable or not.*

In the first scenario described in the prong we have a debtor who, despite being availed with an enforcement relief (stay) concerning its historic debt, demonstrates a negative post-petition cash flow and a consequent inability to pay its current expenses.[74] "Negative cash flow means that the estate's current liabilities are increasing more rapidly than cash is available to pay as due. The result is dwindling liquidity, or illiquidity resulting in unpaid post-petition debts which usually constitute administrative expenses that will take priority over prepetition claims."[75] As stated in *In re Schriock Constr.*, such a debtor "has not been capable of servicing basic operating expenses which are critical to the viability of the enterprise even while operating under the protection of the automatic stay, let alone generate sufficient cash flow to rehabilitate and adequately fund a feasible plan of reorganization."[76] Faced with such a situation in *In Schriock Constr.*, unsecured creditors filed a motion for conversion which was finally granted by the court.

Moving on to the second scenario described in the prong, we have a debtor with a positive cash flow but the latter masks in fact use of the property of the estate by the debtor's insiders in order to fund its post-petition expenses.[77] In such a scenario the estate clearly gets diminished and as a consequence the prong's requirement is fulfilled. In the words of Judge Buschman, "[. . .] a positive cash flow will not guard against conversion when it masks a static enterprise whose financial statements do not account for costs necessary to doing business."[78]

What is important here is that the two aforementioned scenarios both depict an economically distressed debtor. Why does "substantial or continuing loss to or diminution of the estate" constitute an *indicator of economic distress*? When a debtor under reorganization is faced with substantial or continuing loss to or diminution to its estate, this means that *the value of its assets is not dependent on its continued operations.*[79] "Those operations are only increasing the debtor's operating losses and its post-petition administrative claims."[80] This in turn indicates economic distress given that the negative impact that the debtor's continuation has upon its *overall going concern value* makes the latter ***less** than its hypothetical liquidation value*, i.e. the value the debtor would have had it "stopped the clock," terminated its operations and sold its assets on a split-up basis. It is exactly this comparison between the debtor's going concern and liquidation values that defines *economic viability/distress.*

Let us now think of the opposite scenario, namely a debtor whose assets' value *is* dependent upon its continued operations. Such debtor's operations are neither creating operating losses nor diminish its estate. On the contrary, the debtor has managed to fund its continued operations and consequent post-petition expenses and did so principally by generating positive cash flow and/or by attracting DIP financing[81]; in any case not by using its estate. This in turn demonstrates that the said debtor's continuation value entails something beyond and above the mere total value of its assets (liquidation value). It entails in addition the value generated by the continued trust shown by the debtor's customers (and reflected in its positive post-petition cash flow), as well as the value inherent in the DIP financiers' support, who believe in the prospective rehabilitation of the debtor and the continuation of their business relations with it. This excess of value, above and beyond the mere total value of the debtor's assets, indicates that the debtor is worth more if continued as a going concern than if channeled into liquidation. As said above, it is this comparison between the going concern and liquidation values of the debtor that lies at the very heart of the economic viability/economic distress definition. A going concern value greater than the hypothetical liquidation value means that the debtor is economically viable.

This comparison between the going concern and liquidation values of the debtor which lies at the heart of the section 1112 filtering mechanism serves the very purpose of Chapter 11, namely the salvation of viable business enterprises only and the maximization of creditors' return.[82] Indeed, lingering of an economically unviable debtor in reorganization minimizes creditors' return because it diminishes the estate's overall value and results in unpaid post-petition debts usually constituting administrative expenses taking priority over prepetition claims.[83]

It is essential to mention at this point though that losses suffered by the debtor may be reversible by cutting off, for example, unprofitable parts of the business[84] *through* restructuring. This depends on whether there exists a realistic possibility of a successful restructuring or not and as such on the specific circumstances of the case. Summarizing eloquently the above in *In re AdBrite Corp.*, Judge Morris states:

> A continuing loss or diminution of the estate may be tolerated where reorganization is feasible and the pattern of unprofitable operations can be reversed as a result of a successful reorganization. The debtor, however, should not continue in control of the business beyond a point at which reorganization no longer remains realistic. The courts must evaluate losses on a case-by-case basis. Small losses over an extended period may be acceptable, whereas large losses in a short period may indicate that rehabilitation is not likely.
>
> and
>
> Conversion is not warranted despite the existence of short-term post-petition operating losses where there exists a realistic possibility of rehabilitation.[85]

3.1.2.2. Reflecting prospective financial viability in the second prong of 11 U.S.C. § 1112 (b) (4) (A)

Let us now turn to the second prong of 11 U.S.C. § 1112 (b)(4)(A), requiring "absence of a reasonable likelihood of rehabilitation" of the debtor in order for the filtering mechanism to be triggered. *Through this prong we can evaluate whether the debtor is prospectively financially viable or not.*

We start "unfolding" the meaning of this prong by underlining the link between rehabilitation and financial viability. More specifically, a rehabilitated debtor is a debtor who has attained financial viability. This becomes evident from the following passage in *In re AdBrite Corp.*:

> [. . .]***rehabilitation*** means to put back in good condition and *reestablish on a sound basis.* It signifies that the debtor will be *reestablished on a secured financial basis,* which implies establishing a cash flow from which its current obligations can be met. Courts have held that the occurrence of short-term postpetition losses is not grounds to convert or dismiss a bankruptcy case where ***financial viability*** is reasonably likely in the near future.[86]

Adler, Baird and Jackson have defined financial distress as the inability of the debtor to generate sufficient revenue to pay back its historic debt.[87] *A contrario* therefore and within our context, **financial viability** refers to **the ability of the debtor to establish such a cash flow from which it can repay its historic debt through a plan of reorganization.**

Such definition of financial viability is also supported by additional case law. Previously we've underlined that rehabilitation means reaching a state of financial viability. In discussing the debtor's absence of reasonable likelihood of rehabilitation, the court in *In re Schriock Constr.* stated the following:

> [. . .] the debtor's postpetition performance from operations reveals that it has been unable to even meet current operating expenses much less ***generate the unprecedented surplus necessary to fund the plan*** [. . .]. [. . .] The court can envision no scenario under which a reasonable likelihood of rehabilitation can exist.[88]

The aforementioned surplus refers to the prospective *net* positive cash flow of the debtor (i.e., exclusive of operating expenses[89])[90] that will be used towards *funding the payment obligations prescribed under the reorganization plan, with the ultimate goal that the debtor is re-established on a sound financial basis.*[91]

Should the *potential* for such a surplus not exist, "however honest in its effort the debtor may be, and however sincere its motives," the court will not "clog its docket with visionary or impracticable schemes for resuscitation."[92] What the specific prong therefore requires is that there exists ***prospective financial viability*** in sight. "Although the success of a plan need not be guaranteed, the court must be satisfied that it is probable that a plan is workable and will cash flow."[93]

In evaluating whether prospective financial viability exists, "pertinent factors to be considered include the business's earning power, [. . .] economic conditions, managerial efficiency, and whether the same management will continue to operate the company."[94] In addition, the restructuring process itself is to be also taken into account. *Through this*, the debtor's operational efficiency and as such revenue-generating power may be improved, while the parameters of its historic debt (e.g., maturity, amount etc.) will be altered through a reorganization plan.

At this point, it is also essential to highlight the interconnection between the second prong of § 1112 (b)(4)(a) and § 1129 (a), which prescribes a plan's confirmational requirements. It is evident that, in order to be able to evaluate whether the debtor has the prospect of attaining financial viability *through* the reorganization plan, it is necessary to assess the *confirmability* of such a plan. On this point, the court in *In re Schriock Constr.*, a case concerning a motion to convert, underlined that the debtor's plan must satisfy the absolute priority rule, which is a confirmational requirement pursuant to § 1129 (b)(2)(B).[95] The counterargument to that, raised by the debtor's counsel, suggested that the issue of the absolute priority rule "is a legal issue to be decided at confirmation and is not a critical issue in determining the Motion to Convert."[96] Despite the opposition, the court clearly emphasized that the debtor's ability to comport to the confirmational requirements of § 1129 determines its ability to effectuate a confirmable plan and thus ultimately its prospects to rehabilitate. It therefore affects the determination of whether prospective financial viability for the debtor exists and as such whether the § 1112 filtering mechanism can be triggered or not.[97]

3.1.3. The overall role of viability in the § 1112 filtering mechanism

To summaries the above, it becomes evident from the analysis of section 1112 that existing *economic viability* is a *precondition* of the continuation of the reorganization procedure. Its absence, as evidenced via appropriate *indicators*, may lead to the debtor's filtering out of the reorganization through the triggering of the § 1112 filtering mechanism. In such cases, among others that will be analyzed later in this paper, economic viability constitutes the "*litmus test"* of the filtering mechanism.

Sometimes economic distress may be tolerated, and the filtering mechanism is not triggered, when, for example, the debtor's losses can be reversed as a result of a successful reorganization.[98] In these cases, the likelihood of rehabilitation, i.e., the debtor's *prospective financial viability*, plays a crucial role and equally becomes a *"litmus test"* of the filtering mechanism.

Attaining financial viability is the ultimate *aim* of a restructuring procedure. To continue pursuing this aim, it is necessary to *ascertain* the debtor's *existing economic and prospective financial viability*. It is exactly this double meaning of viability, — economic and financial -, and its double role, — both as an *aim* and a *precondition* of the restructuring process -, that collectively shape the notion's "intricate" nature.

3.2. Stay relief as an additional filtering mechanism (11 U.S.C. § 362)

"Debtors with irreversibly negative cash flow, no reasonable prospects for ad-

> ditional income or refinancing, and deteriorating property should be forced into liquidation at the earliest opportunity. *Stay litigation provides the courts with a vehicle for doing this.* Alternatively, a creditor might move to convert or dismiss the case."[99]

The above quote by Ferriell and Janger eloquently summarizes the function of the filtering mechanisms provided for under Chapter 11 in general. It also reveals that, apart from the section 1112 dismissal/conversion of a case, the section 362 stay relief also constitutes a filtering mechanism, the specific mechanics of which we will try to approach in detail in this section.

So far, we've already seen motions for conversion/dismissal and motions for stay relief to appear simultaneously in the same Chapter 11 case. Stay litigation also arises independently though, as an "early attack" to the reorganization procedure. In fact, "stay relief motions are one of the most common forms of litigation under the entire Bankruptcy Code."[100]

It is highlighted that "if relief from the stay is granted, a secured creditor might be permitted to foreclose on crucial assets, thus effectively spelling the end of the reorganization effort."[101] Indeed, most of the times, lifting the stay of enforcement actions in regards to (a) certain key asset(s) of the debtor effectively undermines its chances of successful reorganization as it "dismembers" the business from assets that may be deemed necessary in order to "sail through" the reorganization as a going concern and ultimately conclude Chapter 11 successfully.[102] In that sense, stay relief effectively precipitates liquidation and as such, has a *de facto* equivalent function to that of the § 1112 filtering mechanism.

3.2.1. Stay relief under 11 U.S.C. § 362 (d) (2)

In the same way as with section 1112, it is crucial to examine how the notion of viability permeates the filtering mechanism of stay relief, enabling this way the proper filtering of non-viable debtors out of the reorganization procedure. For this purpose, we first look at the provisions of § 362 (d)(2), which reads as follows:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay[103] [. . .]—
>
> (1) [. . .]
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

According to the above, relief from the stay in respect to specific property of the estate shall be granted if two conditions are cumulatively met, namely if the debtor does not have equity in the specific property to which the stay relief relates and secondly if the said property is not necessary to an effective reorganization.

3.2.1.1. Lack of equity in property

As per the first condition, a debtor does not have equity in a specific property if the total value of the property's liens securing claims against the debtor exceeds the property's value.[104] The rationale behind the stay relief provision is that, should the debtor have equity in the property, a bankruptcy purpose is served by denying creditors stay relief. This is explained as follows: in the event of sale of the property by a creditor, the latter is not interested in obtaining a sale price higher than the value of his/her own claim. On the contrary, if the sale is left to the bankruptcy trustee (i.e., to the Chapter 11 debtor in possession), the latter has an interest in obtaining the highest possible sale price, which would ultimately leave the surplus of value (beyond and above the value of the creditor's claim) to the estate, thus maximizing the going concern value of the business under reorganization. As such, a stay relief under § 362 (d)(2) can only go forward if the debtor does not have equity in the property in question. According to § 362 (g)(1), the burden of proof on this issue lies on the party in interest (e.g., creditor) making the stay relief motion.[105]

3.2.1.2. Necessity of the property and prospective financial viability of the debtor

As per the second condition, section 362 (d)(2)(B) requires that in order for the stay relief to be granted, the property to which it relates should not be necessary to an effective reorganization. As such, after the party in interest (e.g., a creditor) has proven that the debtor does not have equity in the property, the burden shifts to the debtor to prove that the said property is in fact necessary to its effective reorganization (§ 362 (g)(2)). Meeting such burden of proof means that the debtor can "counteract" the stay relief motion filed against him.

According to the most prevailing interpretation, the above requires proof of two components by the debtor, namely *necessity* and *feasibility*. Arriving to this conclusion has not been straightforward, as early case law on the issue advocated only in favor of the necessity component. In fact, *Koopmans*[106] first and *Sunstone*[107] second held that only necessity should be proven in the context of a stay relief motion and this for a number of reasons. Such reasons are, for example, that the only time the debtor is called to prove feasibility under the Bankruptcy Code is at the conclusion of the case, i.e., at confirmation (§ 1129 (a) (11)). In addition, the power of a party in interest to dismiss or convert the case is partly dependent upon a feasibility test, which is however clearly expressed linguistically. For these reasons, *inter alia*, the said case law suggested that only necessity should be proven under a stay relief motion.

Despite such case law, the Supreme Court endorsed *obiter dictum* the feasibility approach in the interpretation of section 362 (d)(2) in the *Timbers* decision.[108] In fact, the ground had been prepared even before Timbers. Already in *Terra Mar Assocs*.[109], a case preceding *Timbers*, the court had endorsed the feasibility approach. It can safely be said though that it is since Justice Scalia's interpretation in *Timbers* that the "overwhelming majority of courts support the feasibility test" and that, as a consequence, both necessity and feasibility should be proven under a stay relief motion.[110]

Necessity is rather straightforward, requiring from the debtor to prove that the property is necessary for achieving its reorganization. The necessity of the property is almost always self-evident, as the debtor needs to retain and use (most of) its property in order to remain as a going concern and thus have a chance of reorganizing successfully.[111] As such, "the necessity prong is almost never an issue in reorganization cases."[112]

The main "battleground" centers therefore around the second component, namely the feasibility of the reorganization. It is not sufficient that the property be deemed necessary for *any possible* reorganization. The property must rather be necessary for an *effective* reorganization, i.e., a reorganization that is *in prospect.* As the Supreme Court underlined in *Timbers*:

> What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is *in prospect.* This means, as many lower courts, including the *en banc* court in this case, have properly said, that there must be a *"reasonable possibility of a successful reorganization within a reasonable time."*[113]

What matters therefore is the real prospect of the debtor to fund the reorganization plan and through it, repay its debt and be restored to financial viability; in other words, what is hereby tested is the ***debtor's prospect to attain financial viability***. In discussing this, the United States Court of Appeals for the Second Circuit underlined characteristically the following within the context of a stay relief case:

> [. . .] Pegasus proposed a residential development on the Davenport Property that the bankruptcy judge concluded *could not succeed within a reasonable time.* The court reached this conclusion for three reasons:
>
> (i) Pegasus's proposal relied on unsubstantiated assumptions and "fanciful" calculations, rather than verifiable research and financial analysis;
>
> (ii) by its own calculations, *the plan's projected revenues fell short of paying the full indebtedness owed Grammas*; and
>
> (iii) Hochman's *commitment to fund the reorganization was not credible*, given his testimony that he would invest in the development only if he could reap a million dollars profit or more, while the plan itself showed no promise of any such return.
>
> [. . .] there is no evidence in the record demonstrating that Hochman personally, or others on his behalf, have performed the kind of research, analysis and projections, generally referred to as due diligence, required to make any reliable assessment of the *financial feasibility* of any plan to develop the Property.[114]

What the above first highlight are the steps needed in order to successfully prove the debtor's real prospect of attaining financial viability. For this, "research, analysis and projections, generally referred to as "due diligence" rather than "unfounded assumptions and dubious calculations" are needed.[115] The court might also take into consideration the general outlook of the economy and of the particular market sector in which the debtor is active in order to accurately assess the debtor's prospects for a successful reorganization.[116]

Secondly, all the above underline once more the prominent role of viability as a "litmus test" of the Chapter 11 filtering mechanisms. *When it comes to stay relief under § 362 (d)(2) in particular, it is the debtor's prospective financial viability that is evaluated.* The latter helps determine the fate of the stay, the lifting of which may have a broader "filtering effect" as discussed under section 3.2. above.

It should be also noted here that economic viability is certainly implied within the provision. We cannot possibly think of a reorganization going forward and being prospectively successful if the debtor is not economically viable.[117]Economic viability assessment is therefore an implied element of the provision.

On a final note, it is important to underline that *confirmability* of the plan affects its *feasibility* and as such, satisfaction of the confirmational requirements prescribed under 11 U.S.C. § 1129(a) plays a role in whether the prospective reorganization of the debtor is feasible or not.[118] This means that 11 U.S.C. § 362 (d) (2) is actually linked to § 1129 (a), with the latter impacting upon the former. The result is that "the hearing on the motion to lift the stay under § 362 (d) (2) may become a sort of preliminary confirmation hearing."[119] A similar interconnection has also been noted above between § 1112 and § 1129 (a). Section 1129 (a) in fact prescribes what this paper calls as "filtering safeguards." For the moment it suffices to underline that substantive (viability) and procedural (confirmability) elements interlink the various filtering mechanisms and filtering safeguards provided for under the Bankruptcy Code, helping thus create a "nexus" of provisions with a strong filtering effect.

3.2.2. Stay relief for "lack of adequate protection" (11 U.S.C. § 362 (d) (1))

Before concluding the analysis of stay relief as a filtering mechanism under Chapter 11, it is essential to also examine the first basis for such relief, as this is provided under section 362 (d)(1) of the Code. More specifically, the section reads as follows:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay [. . .]—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest

"Adequate protection" is an important notion in Chapter 11. "The Bankruptcy Code requires that a secured creditor be provided with adequate protection of its interest in property to protect the creditor from diminution in value of its collateral during the pendency of the stay."[120] Despite the importance of the notion, the latter is however not defined by the Code, which is limited to providing only a non-exclusive list of what may constitute adequate protection.[121] As such, according to section 361, such adequate protection can be ensured via the provision to the creditor concerned of either a single or periodic cash payments, an additional or replacement lien or the granting of the "indubitable equivalent" of its interest in the property in order to compensate the creditor for the loss or depreciation of its collateral.

Apart from cash collateral, for the use of which the debtor needs either the relevant creditor's consent or court authorization, the debtor may use the secured creditor's collateral without the latter's consent during the Chapter 11 reorganization. This in turn places the burden on the creditor to protect its interest in the collateral, which can be done either by petition to the bankruptcy court for adequate protection or by motion for relief from the stay so as to be in a position to enforce its claim.[122]

In case the latter happens, the "lack of adequate protection" as a reason for stay relief in essence highlights an uncompensated diminution in value of the collateral. This resonates a potential similarity to the § 1112 (b)(4)(A) filtering mechanism, which can be triggered in case of diminution of the debtor's estate. In this sense, § 362 (d)(1) and § 1112 (b)(4)(A) seem to both flag situations of *declining asset values* of the debtor.[123] In the context of § 362 (d)(1), this in turn constitutes a ***preliminary indicator of economic distress.*** If such a situation continues, its impact upon the debtor's overall going concern value makes the latter *less* than its hypothetical liquidation value, i.e., the value the debtor would have had it "frozen the passage of time," terminated its operations and sold its assets on a split-up, separate basis. It is exactly the result of such comparison between the going concern and the liquidation value of the debtor that classifies the latter as economically viable or not.

Finally, it should be mentioned that in the US, it is standard judicial practice to allow for an evaluation of whether the aforementioned preliminary indication of economic distress is merely a temporal one, which can be reversed as a result of a prospective successful reorganization of the debtor, or not. As Hon. Barbara J. Houser, Chief United States Bankruptcy Judge in the Northern District of Texas, characteristically remarked in a stay relief example concerning adequate protection, judges may be reluctant to grant such relief very early into the case so as to first give any chances of successful reorganization a bit of "room" to play out and as such, "test" the (ir-)reversibility of preliminary signs (indicators) of economic distress.[124] As it becomes therefore evident, the debtor's prospective financial viability plays yet again a "litmus test" role, this time within the context of the § 362 (d)(1) filtering mechanism.

3.3. The overall role of viability in the Bankruptcy Code filtering mechanisms

Connecting now whatever has been analyzed in detail above regarding the different Chapter 11 filtering mechanisms, it becomes clear that the notion of viability strongly permeates all such mechanisms. Economic viability assessment constitutes an integral part of § 362 (d)(1), § 362 (d)(2) and § 1112 (b)(4)(A)—(J), while prospective financial viability is assessed by judicial practice under § 362 (d)(1) and by law under § 362 (d)(2) and § 1112 (b)(4)(A). Moreover, the reasonable likelihood that the plan will be confirmed within a reasonable time is taken into consideration, alongside other parameters, for potentially refraining from the dismissal or conversion of the case in the instances of § 1112 (b)(4)(B)—(J).[125] The result is that viability becomes a "litmus test" of the Chapter 11 filtering mechanisms and continually assesses the value of continuing the debtor's reorganization effort. As such, viability optimizes the "filtration effect" of the US Bankruptcy Code provisions.

3.4. Temporal considerations in 11 U.S.C. § 362 and § 1112 and lessons for the European directive

Apart from the qualitative elements that "build up" both the stay relief and the conversion/dismissal provisions, there is also an inherent temporal element that is actually common in both provisions. More specifically, the stage at which the case is plays an important role under both filtering mechanisms as per the evaluation of the debtor's financial viability prospects. As a consequence, the said temporal element helps determine the outcome of the § 362 and § 1112 motions.

Let us examine § 362 first. Starting from § 362 (d)(2), we have highlighted above that, according to the established interpretation of the provision, there must exist "a reasonable possibility of a successful reorganization within a reasonable time" in order for the stay to be kept in place to the benefit of the debtor. This standard has been later particularized in *In re Holly's, Inc.*[126], which created a four-part test explaining how the debtor's burden to prove its prospects of successful reorganization gradually increases as times passes by. This burden of proof, "a moving target which is more difficult to attain as the Chapter 11 case progresses" has been articulated as follows:

> [. . .] [the] court separated the burden of proof into four distinct stages based on when the creditor seeks relief: "The four broad categories can be stated as follows: (1) is it *plausible* that a successful reorganization will occur within a reasonable time?; (2) is it *probable* that a successful reorganization will occur within a reasonable time?; (3) is it *assured* that a successful reorganization will soon occur?; or (4) is it *impossible* that a successful reorganization will occur within a reasonable time?[127]

In better understanding how the burden of proof gradually increases as the case progresses, it is useful to look at the following detailed passages of *In re Holly's*:

> At the *early stages* of a bankruptcy case, the moving target requires a *less strenuous showing* of "a reasonable possibility of a successful reorganization within a reasonable time." Timbers, 484 U.S. at 376, 108 S. Ct. at 633. This is especially true when a creditor requests relief from the stay fast on the heels of the bankruptcy filing. At such an early stage in the bankruptcy, the burden of proof under § 362(d)(2)(B) is satisfied if the debtor offers sufficient evidence to indicate that a successful reorganization within a reasonable time is *"plausible."* The debtor need only present sufficient *evidence to demonstrate it is superficially worthy of belief that it is capable of producing a plan which by preponderance may be confirmable*. Although, if it is possible, the debtor may present a plan or evidence regarding plan confirmation standards, at this early stage it is only required to produce *some* substantive evidence that a successful reorganization *is on the horizon.* The debtor's plan to reorganize does not have to be crystal clear. At this stage, the debtor's plan can be somewhat obscure or vague as long as it is plausible that a successful reorganization may occur. The

> court must balance the reasonableness of the delay borne by a secured creditor against the debtor's ability to formulate a plan. At this stage in the bankruptcy case, if the debtor presents any evidence that a confirmable plan is plausible, the balance favors the debtor, and the creditor must bear a reasonable delay while debtor attempts to formulate a plan.
>
> Without question, the most nebulous category of cases is when the motion for relief from the stay is requested *near the expiration of the exclusivity period*. At this point in the bankruptcy case, the *moving target* burden of proof *requires a greater showing than "plausibility."* At these intermediate points in a bankruptcy case, this court believes that to satisfy § 362 (d)(2)(B), the debtor must demonstrate that a successful reorganization within a reasonable time is *"probable."* Sufficient evidence must be presented to persuade the court it is *more likely than not that the debtor is capable of producing a plan which by preponderance may be confirmable.* Although the debtor is still not required to produce a plan or satisfy plan confirmation standards, it must produce *sufficient* evidence *that the tools necessary to formulate a plan are available.* As the expiration of the exclusivity period to file a plan nears, and shortly after if a plan has been filed, the balance between the reasonableness of the delay borne by the creditor and the debtor's ability to formulate a plan is approximately equal. If the court concludes that it is improbable that the debtor can formulate a plan, the creditor should not have to bear any additional delay and the stay should be lifted.
>
> A moving target burden of proof requires that the debtor must provide *the most stringent and convincing* showing under § 362 (d)(2)(B) *after the expiration of the exclusivity periods* to file a plan and obtain acceptance thereof. Timbers, 484 U.S. at 376, 108 S. Ct. at 633. The evidence presented by the debtor *must be greater than "plausible" or "probable."* After the expiration of the exclusivity period or periods, to satisfy § 362(d)(2)(B), the debtor must offer *sufficient evidence* to indicate that a successful reorganization within a reasonable time is *"assured."* The debtor must present sufficient evidence to demonstrate it is *certain or unquestionable* that a plan to be considered at confirmation *will soon be produced.* Even at this point in the bankruptcy, the debtor is not required to produce a plan to defend a motion for relief from stay. But the debtor must produce *concrete evidence that a plan is forthcoming. After the expiration of the exclusivity period, the balance between the reasonableness of the delay borne by a secured creditor and the debtor's ability to formulate a plan favors the creditor.* If the debtor cannot show it is *certain* a plan will soon be filed, the creditor should not have to bear any additional delay and the stay should be modified.[128]

All in all, the above passages clearly demonstrate the debtor's *gradually increasing burden of proof* as per its reorganization prospects during the Chapter 11 case.[129]Despite the less stringent burden during the early stages of the case, especially during the debtor's exclusivity period to file a plan, it is clear that lack of any realistic prospect of effective reorganization will certainly lead to the termination of the reorganization by way of stay relief. On this point, a characteristic example is provided by In re BB Island Capital, LL.C, 540 B.R. 16 (Bankr. D. Mass. 2015). According to the case facts, a voluntary Chapter 11 petition was filed on the 4th of August 2015. Just 15 days after, on the 19th of August 2015, a creditor's motion for stay relief was filed and the relief was ultimately granted by the court with its 5th of November 2015 decision. According to the court, "while the bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan [. . .], even within that period lack of any realistic prospect of effective reorganization will require § 362 (d) (2) relief."[130] In the present case, it was specifically found that the debtor "did not even attempt to indicate how it could refinance its assets to satisfy its outstanding obligations and reorganize its financial affairs."

The temporal considerations described above in the context of stay relief motions are equally relevant for conversion/dismissal motions. In discussing such a conversion motion, the court in *In re AdBrite Corp*. stated the following:

> In addition to the amount and the nature of the losses, there is a *temporal quality* to the determination. At the early stages of the case, to prove an absence of a reasonable likelihood of rehabilitation, the movant must show that there is no more than a "hopeless and unrealistic prospect" of rehabilitation.[131]

Similar temporal considerations also appear in other conversion/dismissal cases[132], as well as in the academic literature[133] and as such help clearly establish that the Chapter 11's filtering mechanisms are time-sensitive.

Taking the above into consideration, this paper suggests that the gradual assessment of viability and related burden of proof should similarly be applied under the European directive. This means that clearly hopeless debtors should be filtered out of the framework already at the early stages of the restructuring procedure, while for the rest a case-by-case, time-sensitive viability assessment should govern the procedure. To achieve this, this paper suggests that in transposing the directive Member States should not make use of the latter's Article 6 (9) last subparagraph, which allows them to provide for a protected period of maximum four months during which the stay cannot be lifted.

3.5. Financial reporting enabling the viability assessment

One element of Chapter 11 playing a pivotal role in the viability assessment is the various financial disclosures required in multiple stages of the reorganization procedure. More specifically, according to section 521 (a)(1), the debtor has to file, upon petitioning[134], a list of creditors, and unless the court orders otherwise, a schedule of its assets and liabilities, a schedule of current income and current expenditures, as well as a statement of its financial affairs.[135]

In addition to these initial filings, there is also ongoing financial reporting required under Chapter 11. More specifically, 11 U.S.C. § 1106 (a)(1), § 1107(a) and Fed. R. Bankr. P. 2015(a)(2), (a) (3) oblige the debtor in possession (and the trustee) to file "periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements [. . .]." LexisNexis mentions the following regarding these monthly operating reports (MORs):

> The format and content of MORs may be dictated by the respective regional office of the U.S. Trustee or Bankruptcy Administrator[136], but generally, MORs will include an income statement, balance sheet, and some form of cash receipts

> and disbursements activity. [. . .] MORs may also include select operating and financial data including, among others: accounts receivable detail and/or agings; accounts payable detail and/or agings; taxes paid and payable detail; copies of bank statements and/or bank reconciliations; status of payments to secured creditors, lessors, and other parties to executory contracts; insurance coverage details; and a schedule of amounts owed and paid to the U.S. Trustee or Bankruptcy Administrator.[137]

In addition to the above, it is worth noting that there are even more detailed reporting requirements prescribed for small business cases and Subchapter V cases under sections 1116 and 1187 for initial reporting and sections 308, 1187 for periodic reporting. Finally, "the debtor may also be required to provide additional regular reporting in accordance with a DIP financing agreement (e.g., rolling 13-week cash flow forecasts including variance analyses)[138], or as requested by any of the official committees, such as the official committee of unsecured creditors."[139]

All in all, such detailed financial reporting provides invaluable information on, *inter alia*, whether the debtor's accumulated post-petition liabilities increase, whether its assets are being dissipated during the reorganization and whether the debtor is generating sufficient funds to reorganize. It therefore enables involved parties to carefully monitor the financial situation of the debtor and assess both its economic and prospective financial viability. In other words, such reporting constitutes the "linchpin" of the continuous viability assessment taking place during a Chapter 11 reorganization and as such, the "linchpin" of the framework's filtering mechanisms.[140]

Concluding on the importance of the aforementioned reporting, the latter can be considered of assistance not only to the creditors as "continuous assessors" of viability, but equally also to the debtor itself. More specifically, such data can help the debtor in its own internal analysis in terms of projecting the value of its business as a going concern, the feasibility of its reorganization plan, as well as any other aspect touching upon its future business operations.[141] The value derived by the reporting drives therefore forward the reorganization process in more than one possible dimension.

4. Achieving filtration: The case of the European directive on restructuring and insolvency

4.1. Introduction

After having examined in detail the filtering mechanisms provided under Chapter 11 and the respective filtration effect with which they equip the US reorganization framework, the crucial question is how we can achieve an equivalent filtration effect under the provisions of the European directive on restructuring and insolvency.

In the context of the above question, we will look at what this paper identifies as the existing filtering mechanisms under the directive. *More specifically, drawing comparative lessons from Chapter 11, we will examine how the filtration effect of the directive's existing provisions can be optimized through interpretation, transposition and/or appropriate reform so as to* *ultimately succeed in filtering non-viable debtors out of the framework.* For this purpose, this section will first examine directive's Article 7 (3) coupled with Article 7 (1) and (2), followed by Article 6 (9) coupled with Recital 36.

4.2. The article 7 (3) filtering mechanism

4.2.1. Article 7 overview

To start with, Article 7 prescribes the following:

1. Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.
2. A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.
3. Member States may derogate from paragraphs 1 and 2 in situations where a debtor is *unable to pay its debts as they fall due*.[142] In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

The first step in our analysis is to understand the role of article 7 (3) as a filtering mechanism within the directive. In fact, such characterization is justified by the fact that, while article 7 (1) and (2) prescribe the suspension of the opening of insolvency proceedings, article 7 (3) sets the parameters under which such suspension can be discontinued, with the consequence being spelling an end to the restructuring process. The role of article 7 (3) as a filtering mechanism means that it needs to be closely examined in this paper.

4.2.2. The role of viability in the Article 7 (3) filtering mechanism: an interpretation proposal

To start with, Article 7 (3) deals with financial distress in the form of cash flow insolvency. More specifically, the provision concerns a debtor who becomes unable to pay its historic (pre-petition) debts as they fall due during the stay of enforcement actions and, in such case, it allows Member States to deviate from the suspension of the opening of insolvency proceedings which is prescribed under paragraphs 1 and 2 of the same article.

In the same way though in which Kahl notes that "financial distress is an imperfect indicator of economic viability"[143] and Posner underlines that "a firm can be at once insolvent and economically viable"[144], the European legislator seems to have also recognized here that the debtor's cash flow insolvency does not always point out to a debtor not worth being rescued. This realization is evident by the second part of Article 7 (3), which qualifies the said Member States' power by providing that:

> In such cases *(i.e., of cash flow insolvency arising during the stay)*[145], Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

What this paper suggests is that the above reference to the "general interests of the creditors" allows for an interpretation of the provision that places the debtor's viability in the spotlight and thus shapes the article's filtering mechanism accordingly. It is exactly this proposed interpretation that the paper explores below.

Firstly, in better understanding what the "general interest of the creditors" entails, it is helpful to examine the text's previous versions leading to the current wording of the article. For this task, we look at the different text proposals, as these were originally published by the European Commission and later negotiated by the Council of the European Union and the European Parliament.

Starting with the Commission, Article 7(3) of the Proposal for a Directive underlined what happens upon the debtor's illiquidity and consequent inability to pay its debts as they fall due during the stay period. According to the Proposal, an insolvency procedure may be opened; crucial in such a decision is the examination by the judicial or administrative authority of the debtor's *"prospects for achieving an agreement on a successful restructuring plan within the period of the stay."*

Along the same lines, the Council of the European Union focused on the prospects of arriving to a successful restructuring plan within the duration of the stay both explicitly and implicitly in the various versions of its negotiated text proposals. Indicatively, the December 2017 Council of the European Union version of Article 7(3) was drafted as follows:[146]

> [. . .] Member States shall ensure that (. . .) a judicial or administrative authority may decide to defer the opening of any (. . .) procedure following the insolvency of the debtor and keep in place the benefit of the stay of individual enforcement actions taking into account the circumstances of the case, *in particular where it is apparent that the restructuring plan will be adopted or confirmed within the period of the stay.*

In the same direction, as the negotiations progressed at Council level, the July 2018 text version referred to the particular circumstances of the case that should be taken into account by the judicial or administrative authority in deciding whether to keep the stay of enforcement actions in place. According to the text, examples of such circumstances include *"whether it is likely that the restructuring plan could be adopted or confirmed within the period of the stay and whether opening liquidation proceedings would cause harm to the general body of creditors."*[147]

What can be first observed out of the above is the resemblance of the previous versions' wording to that of 11 U.S.C. § 1112 (b)(2), which refers to the "reasonable likelihood that the plan will be confirmed within a reasonable time." The latter in turn determines the *prospective financial viability* of the debtor, which constitutes a "litmus test" of all the filtering mechanisms identified under sections 362 and 1112 of Chapter 11. As such, it becomes evident that prospective financial viability underpins not only the Chapter 11 filtering mechanisms but equally also the directive's article 7 (3) filtering mechanism.

At the same time though it is fair to highlight that the term adopted in the directive's final version, i.e., "general interest of the creditors," is undoubtedly broader than the previous versions' wording, which reflected solely the prospective financial viability of the debtor. Being broader, it certainly encompasses the latter, but also goes beyond it. Indeed, what is not in the general interest of the creditors is continuing the restructuring of an economically unviable debtor. Existing economic viability is a precondition of the restructuring's continuation and as such, *existing economic viability is also encompassed in the "general interest of the creditors."*

The debtor's economic viability can be, for example, evidenced by the satisfaction of its moratorium debts. Moratorium debts, i.e., debts that arose during the stay *other than* by reason of an obligation entered into prior to the stay, are not covered by the latter. Moratorium debts essentially constitute ongoing operational expenses of a debtor which should be satisfied in order for the latter to retain a going concern premium. In other words, a debtor should satisfy its moratorium debts in order to be considered economically viable. This is also reflected in recital 39, which states that "[T]this Directive should not prevent debtors from paying, in the ordinary course of business [. . .] claims of affected creditors that arise during the stay of individual enforcement actions."

The idea of moratorium debts' satisfaction being an *indicator* of economic viability is also reflected under the Chapter 11 provisions. As previously analyzed, negative post-petition cash flow under § 1112 (b)(4)(A) means illiquidity for the debtor, which in turn results in unpaid moratorium debts. This constitutes an indicator of economic distress. If such pattern is irreversible[148], the case will ultimately be converted or dismissed.

All in all, the debtor's cash flow insolvent status may, *prima facie*, permit the discontinuation of the suspension of the insolvency proceedings' opening. The ultimate determination of this, which essentially constitutes triggering of the filtering mechanism, should however rather be based on viability/distress grounds for the debtor in question. Economic viability and prospective financial viability play the role of "litmus tests" of the restructuring effort's continuation. It is the pivotal role of these two notions as well as the intricacy of their interrelation that should shape the filtration effect of the directive's filtering mechanisms. This paper takes as a starting point the directive's wording and proposes an interpretation that serves exactly this purpose.

4.3. Article 6 (9) as a filtering mechanism

4.3.1. Introduction

Article 6 is a provision of pivotal importance within the directive as it regulates the stay of enforcement actions: its duration, scope exceptions, potential extensions and lift modalities. This section's point of focus are the lift provisions and specifically whether and how these can play the role of a filtering mechanism within the directive's framework. To start with, article 6 (9) prescribes the following:

> Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:
>
> (a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption[149] of the restructuring plan do not support the continuation of the negotiations;[150]
>
> (b) at the request of the debtor or the practitioner in the field of restructuring;
>
> (c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
>
> (d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Once again, the crucial question here is whether viability, in its function as a litmus test, is well reflected upon the directive's provisions, specifically here on the lift of the stay and as such, whether the latter can play an effective role as a filtering mechanism ensuring appropriate filtration of non-viable debtors.

4.3.2. The limited potential of article 6 (9)(a)

To start with, economic viability and prospective financial viability could be considered as already implied in the wording of article 6 (9)(a). Indeed, arriving to a situation where a proportion of creditors who could prevent the adoption of the restructuring plan do not support the continuation of the negotiations anymore, implies that such creditors assess the debtor as being economically unviable and this on an irreversible basis.

Suppose, however, that the required proportion of creditors for such a task has not been reached. This may for example happen due to insufficient information in the hands of the majority of creditors as per the debtor's financial situation ("information asymmetries"). As a consequence, there is uncertainty regarding the provision's potential triggering, which in turn limits considerably its expected effect.

Against this background, it seems crucial to ensure that the directive also provides a *"channel" of individual creditor intervention* when it comes to a debtor that is no longer viable and as such should be filtered out of the restructuring. Such a creditor (or creditors) would flag the existence of indicators of distress as the ones analyzed under the Chapter 11 filtering mechanisms, with the ultimate aim to trigger an evaluation of whether the stay of enforcement actions should be lifted or not, i.e., whether the restructuring effort deserves to be continued or "torpedoed."

4.3.3. The promising wording of article 6 (9)(c)

A suitable starting point for building the above "individual creditor intervention channel" could be the existing provision of article 6 (9)(c), which provides for the lift of the stay "where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions."

This article's core notion is "unfair prejudice," which, despite its paramount importance in understanding the provision, has not been defined by the legislator. Indeed, Recital 36 only lists some parameters that the judicial or administrative authorities should take into account when considering the existence or not of unfair prejudice, without however providing an actual definition of the notion. In similar fashion, "unfair prejudice" also features in other parts of the directive[151], as well as in the text proposals leading to its adoption; nowhere though can we find a definition of the notion itself. Finally, Recital 37 seems to provide some additional guidance, without however clearly outlining the *concrete* scenarios where the stay may be lifted as a result of unfair prejudice being invoked. More specifically, Recital 37 explains that "unfair prejudice" suffered by a single creditor or a class of creditors due to the application of the stay is the situation where, for example, the creditors' claims "would be made *substantially worse-off* as a result of the stay than if the stay did not apply."[152]

Taking the above as a starting point, the aim of this section is to propose a concrete interpretation that will allow the notion of viability to be reflected upon the current wording of article 6 (9)(c) and as such, will transform this stay lift provision into a powerful filtering mechanism with a filtration effect equivalent to the one provided by Chapter 11's filtering mechanisms.

4.3.3.1. The "adequate protection" interpretation as a preliminary indicator of economic distress

In this section, Article 6 (9)(c) will first be analyzed under the comparative light of 11 U.S.C. § 362 (d)(1). To start with, Recital 37, which seeks to interpret Article 6 (9)(c), states the following:

> This directive does not cover provisions on compensation or guarantees for creditors of which the collateral is likely to decrease in value during the stay. A single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than the other creditors in a similar position. Member States should be able to provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. [. . .]

What can be first observed is that the directive does not provide the type of adequate protection prescribed for under 11 U.S.C. § 361.[153] This can be immediately derived by the recital's opening sentence. Despite that, it is interesting to highlight that the same recital continues by introducing the notion of "unfair prejudice," which it describes as the situation where the creditors' claims "would be made substantially worse-off as a result of the stay than if the stay did not apply [. . .]." The consequence prescribed for such unfair prejudice is that the stay can be lifted. *What we can conclude from these is that the directive's "unfair prejudice" seems to be the direct equivalent of the "lack of adequate protection" under U.S.C. § 362 (d)(1).* First, the "unfair prejudice," namely the situation where the creditors' claims are made substantially worse-off by the stay, corresponds to the uncompensated diminution in value of the collateral described under 11 U.S.C. § 362 (d)(1). Secondly, the lift of the stay as a "remedy" for such unfair prejudice under article 6 (9)(c) corresponds to the stay relief provided under § 362 (d)(1), with the first having increased importance as a "remedy" given the absence under the directive of the US alternative of a creditor's petition to be adequately protected.

As a consequence of the above, "unfair prejudice" can be also considered as having the same *role* as the "lack of adequate protection" under § 362 (d)(1), namely that of a *preliminary indicator of economic distress*[154], and the lift of the stay under article 6 (9)(c) the same role as the § 362 (d)(1) stay relief, namely that of a *filtering mechanism*. In exactly this context, this paper makes two proposals regarding the transposition and future reform of the directive which will ensure that the full potential of the aforementioned filtering mechanism is reached.

The first proposal concerns the timing considerations that should be taken into account when contemplating application of the aforementioned filtering mechanism. In the US, as previously analyzed, it is standard judicial practice to allow for an evaluation of whether the aforementioned preliminary indication of economic distress is merely a temporal one, which can be reversed as a result of a prospective successful reorganization of the debtor, or not. As such, judges may be reluctant to grant such stay relief very early into the case so as to first give any chances of successful reorganization a bit of "room" to play out and as such, "test" the (ir)reversibility of preliminary signs (indicators) of economic distress.[155]

Turning to the directive now, its current wording gives Member States the possibility to provide, through transposition, a minimum period during which the stay of enforcement actions could not be lifted at all.[156] This paper suggests that Member States should not make use of this possibility given that, on a case-by-case basis, debtors who prove clearly unviable and without real prospects of successful reorganization should be filtered out of the framework without delay as soon as this becomes evident. Despite that, the paper's suggestion is that, in line with American judicial practice, European judges also take the aforedescribed timing considerations into account, especially when the stay lift is requested at the very early stages of a case.

The paper's second proposal is the future reform of article 6 (9) towards giving greater flexibility to the judicial and administrative authority to adapt the stay lift in the way most appropriate to the debtor in question. Under 11 U.S.C. § 362 (d) for example, the options available to the court are not only stay termination, but also its annulment, modification or conditioning. The court may, for example, condition the continued imposition of the stay on the requirement that the debtor files a plan within a specific timeframe. By way of another example, it may condition the stay on certain disclosures being met, or on taxes and insurance on the collateral in question being paid. The court may alternatively modify the stay by imposing certain parameters on the use of the collateral in question.

From a creditor's standpoint, the aforementioned flexibility can have various advantages. Firstly, there exist cases where the creditor does not find it optimal/beneficial to actually take back the collateral, or realizes that the collateral's nature is such that the only way for the creditor to maximize its recovery from it depends upon the continued existence of the debtor.[157] By requesting a conditioning or modification of the stay, the creditor achieves to "put down a marker," to flag issues that need to be monitored in order to ultimately achieve the most value-maximizing end result, be it a negotiated restructuring or sale of the debtor. This can be of additional value especially if the creditor has petitioned early in the case,—maybe too early for the judge to grant the stay lift -, and as such he may not be granted relief, but nevertheless achieve a conditioning or modification that "sets expectations" from the start and therefore keeps the case moving in an optimal way.[158]

Finally, on a more general note, such "mileposting" ensures a creditor-driven monitoring of the debtor that is similar to its monitoring by its DIP financiers.[159] Such disciplining certainly pushes the debtor towards achieving its restructuring goal more effectively. As such, prescribing a judicial/ administrative flexibility of this kind, i.e., permitting not only the stay lift but also its potential modification or conditioning, may also prove beneficial in the direction of underpinning the directive's filtration effect. A future reform of the directive along these lines is therefore suggested herein by the paper.

4.3.3.2. Interpreting article 6 (9)(c) more generally so as to reflect the notion of economic viability/ economic distress

Moving on with article 6 (9)(c), what remains to be examined is which other circumstances can be considered as covered by its wording apart from the suggested one. This is a crucial issue as it shapes the filtering mechanism's filtration effect. The paper will hereby attempt to provide an interpretation that will make the article applicable to cases similar to those prescribed under 11 U.S.C. § 1112 (b)(4) and provide the reasons that make such a proposed interpretation crucial.

In doing this, we focus once again on the article's core notion, namely "unfair prejudice." Recitals 37 and 36 of the directive, which are relevant to the notion's interpretation, state the following:[160]

> A single creditor or a class of creditors would be *unfairly prejudiced* by the stay if, for example, their claims would be made *substantially worse-off as a result of the stay than if the stay did not apply* [. . .]
>
> and
>
> In establishing whether there is *unfair prejudice* to creditors, judicial or administrative authorities should be able to take into account whether the stay would preserve the *overall value of the estate*, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.

From the above we can well deduce that "unfair prejudice" also reflects the situation where the debtor's going concern value is less that its hypothetical liquidation value. *In other words, it reflects the situation of an economically unviable debtor who should therefore be filtered out of the restructuring procedure and channeled into liquidation.* Such interpretation is firstly based upon the passage "substantially worse-off as a result of the stay that if the stay did not apply"; secondly, upon the passage "whether the stay would preserve the overall value of the estate," which points out to the "going concern vs liquidation value" comparison that makes the very essence of the economically viable/economically distressed distinction. Thirdly, such an interpretation is also underpinned by article 6 (7)(b) which sets the lack of unfair prejudice as a precondition of the extension of the stay.[161]Indeed, it is logical that an extension is granted only when the debtor is economically viable.

Finally, the above interpretation is also underpinned by relevant case law. Such is for example British case law, especially given that "unfair prejudice" is a term mostly used in common law jurisdictions. In this context, the literal meaning of "unfair prejudice" is unequal or differential treatment, unjustifiable discrimination of the *one compared to the other.* Case law has however already extended its meaning well beyond this. *Re Meem SL Limited* for example underlines that "as a matter of language the term "unfair" *is not limited to cases of unequal treatment* but is capable of including conduct which is unfair to *everybody* within the class."[162]In the same way but even more emphatically, the judge in *Hockin v Marsden* noted the following: "[. . .] I do not myself see why the requisite unfairness must necessarily be found in an unjustifiable discrimination. A lack of commercial justification for a decision *causing harm to the creditors as a whole* may be unfair *in the sense that the harm is not one which they should be expected to suffer."*[163] It seems therefore that "unfair prejudice" can well refer to everybody, without the need to confine its limits to a one-to-one comparison.

Taking the above as a springboard, if we are to make an autonomous interpretation of the directive's provisions now, the latter seem to be in the same line as British case law. This means that unfair prejudice encompasses both unfair harm to *everybody* and unjustifiable discrimination of the *one compared to the other.* This is evident by the actual wording of the relevant recital, which states that "a single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position."[164]In other words, this exact wording refers to both possible interpretations of unfair prejudice and as such also clearly demarcates the one from the other. To conclude, unfair prejudice in article 6 (9) also reflects the situation where the going concern value of the debtor is less that its hypothetical liquidation value, i.e., reflects an economically distressed debtor, and this is because the term also means "unfair harm to everybody as a whole."

The afore-suggested interpretation of "unfair prejudice" as reflecting the situation of economic distress is highly important if we take into account that article 6 (9)(c) seems to provide the only "individual creditor intervention channel" under the directive. As a consequence of this, this paper finally suggests that the article is reformed into an *obligatory* provision for Member States. The current wording,—"where so provided for in national law" -, risks undermining the directive's potential filtration effect as it leaves ample room to Member States to shy away from transposing this particular point. And yet, this is the only possible channel through which individual creditors may bring forward for consideration the filtering of a non-viable debtor out of the framework, without such a matter risk being lost underneath non-met majorities.[165]

4.3.3.3. Ultimate result of the proposed interpretation

The above analysis underpins this paper's main conclusion, which ultimately also constitutes one of the paper's main suggestions. Under the directive, "unfair prejudice" reflects the notion of economic distress as a litmus test of the Article 6 (9)(c) filtering mechanism. Indicators of economic distress similar to the ones used under 11 U.S.C. § 1112 and § 362,—e.g., the substantial or continuing loss to or diminution of the estate, its gross mismanagement or the lack of adequate protection to the secured creditors during the stay -, can "flag" economic distress under the directive as well and as such, lead to the triggering of the Article 6 (9)(c) filtering mechanism.

Secondly, prospective financial viability as an additional litmus test is also omnipresent within the filtering mechanisms and "tests" the reversibility or irreversibility of the debtor's situation. Under Chapter 11 for example, the substantial or continuing loss to or diminution of the estate must be accompanied by the absence of a reasonable likelihood of rehabilitation in order for the dismissal or conversion to take place. Gross mismanagement of the estate, demonstrating the debtor's attempt to extract concessions from creditors in order to delay liquidation and gamble the business's resurrection, constitutes a strong economic distress indicator. Nevertheless, existence of a reasonable likelihood that the plan will be confirmed, coupled with other parameters, may lead the court to refrain from the dismissal or conversion in this case as well.[166]

Prospective financial viability is also taken into account by the judiciary in cases concerning application of 11 U.S.C. § 362 (d)(1), even if it is not prescribed at all under the provision's actual wording. More importantly, under § 362 (d)(2) the debtor's prospective financial viability is clearly and heavily relied upon, as provided for under the wording of the provision itself.

The above highlight the strong *interrelation* between the two notions,—economic viability and prospective financial viability—, as litmus tests within a restructuring framework's filtering mechanisms. *This interrelation should be certainly taken into consideration either through judicial practice or future reform within the context of the debtor's overall viability assessment under the European directive.*

Finally, as it has been analyzed earlier, there also exist timing considerations that play a role in the debtor's viability assessment. Such temporal elements are pertinent in the evaluation of the debtor's prospective financial viability and should be considered in the context of a filtering mechanism's triggering.

Having all the above in mind, this paper suggests the use of "unfair prejudice" under Article 6 (9)(c) of the directive as a "channel" for the notion of viability, and therefore as a "vehicle" for transforming, by interpretation, the lift of the stay into a powerful filtering mechanism, capable of achieving a filtration effect for the directive equivalent to that provided by the Chapter 11 filtering mechanisms. This way the directive, as envisaged under this paper, becomes equipped so as to serve its fundamental goal, namely, to restructure only viable debtors and filter out of the framework non-viable ones.

4.4. Financial reporting enabling the viability assessment: reform proposals for the directive

Finally, due regard should also be given to any financial reporting prescribed under the directive. As analyzed earlier in the context of Chapter 11, such reporting significantly underpins the viability assessment effectuated throughout the restructuring procedure and as such, its existence is deemed crucial for achieving the ultimate filtration goal of the framework.

Provision of financial information under the directive is dealt with under Article 8, which prescribes the content of a restructuring plan. More specifically, article 8 (1) requires that such a plan, when submitted for adoption by the affected parties or for confirmation by a judicial or administrative authority, contains information on the "debtor's assets and liabilities *at the time of submission of the restructuring plan*, including a value for the assets, a description of the economic situation of the debtor [. . .] and a description of the causes and the extent of the difficulties of the debtor."[167] In addition, the plan should also provide "the estimated financial flows of the debtor, if provided for by national law" and "a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan."

Some remarks are worth been made on the above, the first concerning the timing of the aforementioned financial disclosures. The earliest moment that the latter come into play is the moment of the plan's submission for adoption by the affected parties. This obviously means that the moment these disclosures will be required by law[168] may be well after the start of the restructuring procedure, depending on how long the debtor-creditors negotiations last.

This is in sharp contrast to the financial reporting prescribed under Chapter 11, which is both initial and periodic. This way, Chapter 11's reporting enables all parties involved in the restructuring to identify not only the debtor's situation at the beginning of the procedure but also its evolution throughout it. It is only by reference to such multiple timepoints that we can deduce whether the debtor incurs, for example, substantial or continuing loss to its estate, or has dissipated its assets in order to pay its post-petition expenses, or mismanages its estate, ultimately thus whether or not the debtor's continuation negatively impacts on its going concern value. It is such a continual and dynamic evaluation that characterizes the viability assessment, not the "snapshot image" that is produced simply and solely at the time of the plan's adoption without any reference to the previous situation of the debtor, especially its situation at the start of the restructuring procedure. It is exactly for these reasons that this paper suggests a future reform of the directive towards provision of reporting not only at the time of the adoption of the plan, but also, at least, at the initiation of the restructuring procedure. Periodic reporting obligations would this way be instrumental in effectively underpinning the envisaged viability assessment and thus the filtration role that the framework is called upon to play.

5. Conclusion

If there is a notion that is, at the same time, highly elusive yet both omnipresent and pivotal in corporate debt restructuring law, this is the notion of viability. The European directive uses the notion extensively, however without definition, while a systematic examination of the notion by European literature is almost inexistent. Against this background Member States are nevertheless called to transpose the directive and corporate debt restructuring law to make its first steps as a harmonized legal field across Europe; and all this against the backdrop of a forthcoming explosion in corporate debt restructurings due to the COVID-19 pandemic. It is exactly this context of uncertainty that makes the systematic examination of the notion of viability a timely necessity, and this paper sought to contribute precisely in this.

In doing so the paper first examined the two meanings of viability, namely financial viability and economic viability, and clarified what the precise role of law is within the viability-related discourse. Such role consists in providing indicators of viability and distress and incorporating appropriate filtering mechanisms that will enable the filtering of non-viable debtors out of the restructuring procedure. The way the filtering mechanisms are triggered depends on who plays the role of the "ultimate viability assessor" within the restructuring framework. The choice of ultimate assessor and as a consequence, the way the filtering mechanisms are triggered constitute the parameters that collectively shape the different possible models of viability assessment that can be used in corporate debt restructuring frameworks. The article distinguished such models into IP-centered and Non-IP—centered ones, with the European directive standing closer to the Non-IP—centered model.

The paper suggested that, from a viability perspective, the most important element in any chosen model of viability assessment is the use of appropriate filtering mechanisms. Such mechanisms can be currently most characteristically found under US Chapter 11. The article thus examined in detail the latter and in particular focused on how the notion of viability is reflected upon the said framework's mechanisms and ultimately permeates and infiltrates Chapter 11 overall.

In light of the above findings and drawing comparative lessons from Chapter 11's filtering mechanisms, the article turned to the European directive so as to examine how the filtration effect of its existing filtering mechanisms can be optimized through interpretation, transposition and/or future reform. Through this, the article sought to underpin viability's double role as both a precondition and ultimate aim of corporate debt restructuring within the context of the European directive. By implementing this, viability will ultimately become the linchpin of European corporate debt restructuring and the directive will succeed in filtering viable debtors from non-viable ones.

NOTES:

[1]Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (hereinafter "Directive on restructuring and insolvency" or "(European) Directive"). References to articles and recitals throughout the paper are to those of the Directive unless stated otherwise.

[2]There are only few such literature examples, see indicatively Eidenmüller referring to "financial distress" and "economic viability" and Mokal distinguishing "financial distress" from "economic distress" (Horst Eidenmüller, "Contracting for a European Insolvency Regime" (2017) European Corporate Governance Institute (ECGI) - Law Working Paper No. 341/2017; Riz Mokal, "The difficulties with "financial difficulties": the threshold conditions for the new Pt 26A process" (2020) 35 JIBFL 662).

[3]Commonly known and referred to in the paper as "(US) Chapter 11."

[4]See e.g. Edward R. Morrison, "Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies" (2007) 50 (2) The Journal of Law & Economics 381; Vojislav Maksimovic and Gordon Phillips, "Asset Efficiency and Reallocation Decisions of Bankrupt Firms" (1998) LIII (5) The Journal of Finance 1495; Matthias Kahl, "Economic Distress, Financial Distress, and Dynamic Liquidation" (2002) LVII (1) The Journal of Finance 135.

[5]See e.g. Lawrence A. Weiss and Karen H. Wruck, "Information problems, conflicts of interest, and asset stripping: Chapter 11's failure in the case of Eastern Airlines" (1998) 48 Journal of Financial Economics 55; Michelle J. White, "Corporate Bankruptcy as a Filtering Device: Chapter 11 Reorganizations and Out-of-Court Debt Restructurings" (1994) 10 (2) Journal of Law, Economics, & Organization 268; Edith Shwalb Hotchkiss, "Postbankruptcy Performance and Management Turnover" (1995) 50 (1) The Journal of Finance 3.

[6]Morrison (n 4) distinguishes "financial distress" from "economic distress" and also uses the pairs "viable vs non-viable" and "going concern value vs liquidation value." Kahl (n 4) also distinguishes between "financial distress" and "economic distress." Nodding to the efficient allocation of resources as the ultimate aim of bankruptcy law under an economic analysis of law approach, White (n 5) refers to firms that are "economically efficient despite their financial distress" and uses the pair "economically efficient vs economically inefficient" firms. Hotchkiss (n 5) does the same.

[7]Barry E. Adler, Douglas G. Baird and Thomas H. Jackson, *Bankruptcy: Cases, Problems, and Materials* (4th edn, Foundation Press 2007) 28.

[8]The paper uses the term **"going concern value"** to refer to the "going concern value of

the *business*." While the term "business" refers to all those assets, human capital, knowledge etc. that collectively constitute a social phenomenon, the term "company" refers solely to the legal vehicle employed for holding the business and conducting it. What is worth preserving as a going concern is a business, not a company in its own right; a company can be incorporated within hours if there is such a need. As such, this paper refers to "going concern value" as the "going concern value of a business."

If a business is not worth saving, it will be closed down and its legal entity (the company) liquidated. This means that the company will be dissolved, i.e. removed from the companies' register. The company's assets will also be liquidated, meaning that they will be split up and sold on a piecemeal basis. As such, when the paper uses the term **"liquidation value,"** this refers to the piecemeal value of the company's assets in the event the business is closed down.

It has been observed that there exists a terminological confusion regarding the notions "liquidation," "going concern," "business" and "company" in parts of the European literature, European practice, as well as in the Directive itself. More specifically, the aforementioned define liquidation value not solely as piecemeal asset value, but also as the going concern value of the business in the event of its sale. Recital 49 of the Directive for example refers to the "*liquidation* of the debtor's *business*" (incorrect combination) by stating that this can be effectuated either "by piecemeal liquidation or by a *sale as a going concern*" (emphasis added).

This paper suggests that what happens in the event of a (partial) sale of a business as a going concern is that, while its corporate entity is dissolved, the business is preserved as a going concern and its overall value is therefore a going concern value, *not* a liquidation value. The fact that the underlying company may be insolvent is indifferent, given that the business may well be economically viable and thus worth being saved.

[9] This is used in 11 U.S.C. § 1112 (b)(4)(A), which will be analysed later in this paper.

[10] David A. Skeel, "Creditors" Ball: The "New" New Corporate Governance in Chapter 11" (2003) University of Pennsylvania Law School - Institute for Law and Economics, Research Paper No. 03-19, 26.

[11] Adler, Baird and Jackson (n 7) 26 (emphasis added).

[12] Ibid.

[13] Ibid 28.

[14] The term is introduced by the author of this paper and will be analysed in a subsequent section.

[15] Adler, Baird and Jackson (n 7) 28.

[16] Epitomising this process from an American perspective, Baird, Adler and Jackson (n 7) 28 state that "Chapter 11 provides an elaborate process that permits the creditors of an insolvent firm to keep the firm intact if it is *economically viable*" (emphasis added).

[17] The Corporate Insolvency and Governance Act 2020 (CIGA) received Royal Assent on 25 June 2020 and came into force on 26 June 2020.

[18] Insolvency Act 1986, Part I.

[19] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181 to 1195 and scattered sections of 11 U.S.C. and 28 U.S.C.) (hereinafter "sBRA" or "subchapter V").

[20] Department for Business, Energy and Industrial Strategy, "Insolvency and Corporate Governance—Government Response" (2018) 47 (sections 5.27, 5.28).

[21] The Insolvency Service, "A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform" (2016).

[22] See Kirkland & Ellis, "Corporate Insolvency and Governance Act: Major UK Restruc-

turing & Insolvency Reforms—Effective June 2020" (2020) 14, footnote 1.

[23]IA 1986 s.A6 (1)(e)(emphasis added).

[24]The Insolvency Service, "Insolvency Act 1986 Part A1: Moratorium — A Guide for Monitors" (2020) 6.

[25]Emphasis added.

[26]IA 1986 s.A38 (1)(a).

[27]Ibid s.A38 (1)(d).

[28]For example, if a creditor being owed a debt not subject to a payment holiday does not get paid during the moratorium, he can only expect from the monitor to lift the stay.

[29]Glen Davis QC, "The Role of the Monitor in a Rescue Moratorium" (2020) 9 <https://southsquare.com/articles/the-role-of-the-monitor-in-a-rescue-moratorium-2/> accessed 5 February 2021.

[30]Indeed, such an assessment of the debtor's viability happens in any case "behind the scenes": rational creditors scrutinize the debtor's financials in order to evaluate whether the proposed restructuring has a prospect of success and therefore is worth their support or whether, in the alternative, the debtor should be channelled into liquidation instead. This is expected to happen in both big and small debtor cases.

In small debtor cases, creditors' low stakes usually lead to low creditor engagement. Nevertheless, at least secured creditors are expected to be actively involved because of the priority status in the satisfaction of their claims. This priority satisfaction could in turn "fuel" a potential "liquidation bias" by secured creditors, which is obviously counterproductive to the debtor's restructuring. Such potential for liquidation bias should not be overstated however. As Skeel underlines for DIP financiers for example, who are "at the top of the priority" ladder," "if the debtor's business is truly viable, and the lender hopes to continue its lending relationship with the firm, the desire for future business will counteract the impulse toward liquidation" (see Skeel (n 10) 26–27).

[31]Insolvency Rules 2016 r.2.3.

[32]The report should be submitted "within 28 days (or such longer period as the court may allow) after he is given notice of the proposal for a voluntary arrangement," IA 1986 s.2.

[33]Ibid 1986 s.2 (2)(a).

[34]Statement of Insolvency Practice (SIP) 3.2, para. 12 (c). An updated SIP 3.2. will apply from 1 April 2021 onwards. This paper is based on the current SIP 3.2. instead. It should be noted however that the substantive content of the SIP 3.2. provisions referred to in this section will remain exactly the same under the updated SIP as well.

[35]IA 1986 Sch.A1 para. 6 (2)(now abolished by virtue of CIGA 2020).

[36]Jennifer Payne, "Debt Restructuring in English Law: Lessons from the US and the Need for Reform" (2014) Legal Research Paper Series—University of Oxford, Paper No 89/2013, 9 (emphasis added). As mentioned earlier, the specific provision to which she refers has been abolished. The moratorium established by CIGA can be used alongside various restructuring mechanisms including CVAs. The above quote remains however still relevant given that the required assessments to be made by the monitor in a CIGA moratorium are roughly the same as the ones described in the quote and as such the need for consultations with the creditors still holds true.

[37]Talking about the general duties of IPs in "whichever type of role they fulfil," Sims and others state the following: "As a fiduciary, an IP must exercise independent judgement. [. . .] However, this does not mean that IPs cannot take into account the wishes of the relevant creditor (s) whose interests are likely to be affected by the decisions he takes. IPs are at liberty to consult with those creditors to ascertain their views, and in many cases it will be entirely sensible that they do so. They are not, however, bound to follow their wishes," see

Hugh Sims QC and others, *Insolvency Practitioners: Appointment, Duties, Powers and Liability* (Elgar Corporate and Insolvency Law and Practice 2020) 98–99.

[38]Ian Fletcher, "UK Corporate Rescue: Recent Developments - Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements - The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002" (2004) 5 European Business Organization Law Review 119, 133.

[39]Davis (n 29) 2; see also the Insolvency Lawyers' Association webinar "Part Three: The New Corporate Moratorium" (dated 20/8/2020), available to ILA members only at <https://www.ilauk.com/member-news-events/webinar-view/part-three-the-new-corporate-moratorium> (accessed 5 February 2021).

[40]IA 1986 s.A6 (1)(e)(emphasis added).

[41]Ibid s.A10 (1)(d) (emphasis added).

[42]The Insolvency Service (n 24) 41 (emphasis added).

[43]A trustee may be appointed in very specific circumstances (e.g. for cause, including fraud, dishonesty or gross mismanagement by the current management of the debtor) as provided for under § 1104.

[44]Removal of the debtor in possession is exceptional. According to § 1185, it may happen for cause, including fraud, dishonesty, incompetence, gross mismanagement of the affairs of the debtor etc.

[45]As it will be analysed in detail later, both the stay relief and the conversion/dismissal of a Chapter 11 case can be triggered on request of a "party in interest." Section 1109 qualifies as a "party in interest" the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder or any indenture trustee.

[46]The *less frequent* instances of *sua sponte* conversion or dismissal do not invalidate the existence of the "four eyes principle" mentioned above.

[47]See for example Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on preventing restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2021/30/EU—General approach, 12536/18" (2018) 3.

[48]Art 5 (2).

[49]Art 5 (3).

[50]Title B of the Recommendation.

[51]Emphasis added.

[52]Article 5 and Recital 31 refer to the "safeguarding of the parties' interest" by the practitioner. This reference certainly connotes the practitioner's supervisory role.

[53]Emphasis added.

[54]Article 6 (9). This may happen, for example, after a request from the creditors or the practitioner. This is also what happens under the SBRA, which constitutes a Non-IP—centred model example. Indeed there, both creditors and the practitioner can request (through motion) the triggering of the filtering mechanism of conversion/dismissal by the court (see reference to "parties in interest," which covers both the creditors and the practitioner (trustee), 11 U.S.C. § 1181 (*a contrario*) coupled with § 1112 and § 1109).

[55]See Article 2 (15) of the Proposal for a Directive.

[56]Such statement explains "why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan," see Article 8 (1)(h).

[57]The significant cost of the Non-IP—centred model is mainly driven by increased court

fees.

[58]Articles 25, 26 and 27 set the stone for such harmonised capacity building, especially as per the training of the judicial and administrative authorities, as well as the training and supervision of practitioners.

[59]These "filtering mechanisms" apply both in standard Chapter 11 and Subchapter V cases (see § 1181 *a contrario*). Any reference made in this chapter to the "(Chapter 11) filtering mechanisms" should be considered as applicable and relevant to both standard Chapter 11 and Sub-V cases.

[60]For example, in In re Premier Gold Props., LP, 564 B.R. 710, the court considered Cottonwood Cajon's motion to grant relief from the stay, or alternatively to dismiss the case. In In re AdBrite Corp., 290 B.R. 209 a creditor moved for conversion of the case to Chapter 7, while the creditor's principal stockholder moved for the termination of the automatic stay. The motion to convert was granted while the motion for relief was held in abeyance.

[61]See 7 Collier on Bankruptcy P 1112.04, at 1112.04 [5] [a] (16th edn. 2020).

[62]Failure to maintain an effective corporate management team has been held to constitute gross mismanagement, see Nester v. Gateway Access Solutions, Inc. (In re Gateway Access Solutions, Inc.) 374 B.R. 556 (Bankr. M.D. Pa. 2007) (citing In re Broadcreek Edgewarwe LP, 371 B.R. 752 (Bankr. D.S.C. 2007); In re Incredible Auto Sales, LLC, 2007 Bnkr. LEXIS 1305 (Bankr. D. Mont. Apr. 10, 2007) (as cited in Collier (n 61) at 1112.04 [6] [b]). Indicia of gross mismanagement are also the lack of reporting and financial transparency, see *In re Gateway Access Solutions, Inc*. 565.

[63]The rationale behind this provision seems to be the protection of the creditors' interests and the maximisation of their return. The insurance should be adequate to protect against losses which would diminish the value of the estate and which could impact not only on the interests of secured lenders, but also on those of unsecured, see Collier (n 61) at 1112.04 [6] [c].

[64]Once again here the rationale is the protection of the creditors' interests. Once the automatic stay commences, creditors are prevented from enforcing on their collateral. When such collateral is cash or cash equivalents, the debtor should either obtain the consent of the creditor or court approval before being able to expend such collateral. Absence of either of the two means that "a serious risk exists of immediate and irreparable harm to the financial value and opportunity of the creditor to recover from such cash collateral," see Collier (n 61) at 1112.04 [6] [d].

[65]*In re Gateway Access Solutions, Inc.* (n 62) 561.

[66]Collier (n 61) P 1112.07, at 1112.07 [1] (emphasis added).

[67]Ibid.

[68]Morrison (n 4) 396.

[69]See § 1112 (b)(2) and Collier (n 61) P 1112.01, at 1112.01 [3].

[70]Collier (n 61) 1112.04 [6] [a].

[71]In re Denrose Diamond, 49 B.R. 754, 756 (Bankr. S.D.N.Y. 1985), as stated in *In re AdBrite Corp.* (n 60).

[72](n 60) 216.

[73]Collier (n 61) 1112.04 [6] [a].

[74]"Courts have held that a negative cash flow post-petition and an inability to pay current expenses satisfy the elements of § 1112 (b)(1)," *In re Adbrite Corp*. (n 60) 215; "Negative cash flow and an inability to pay current expenses as they come due can satisfy the continuing loss or diminution of the estate standard for purposes of § 1112 (b)," *In re Gateway Access Solutions, Inc.* (n 62) 564 (citing *In re AdBrite Corp.*); "The first aspect of § 1112 (b)(1)

requires a showing of a "continuing loss to or diminution of the estate." This element can be satisfied by demonstrating that the debtor incurred continuing losses or maintained a negative cash flow position after the entry of the order for relief," *In re Schriock Constr.*, 167 B.R. 569, 575. On this issue, the following cases cited *In re Schriock*: In re Fall, 405 B.R. 863; Loop Corp v. United States Trustee, 290 B.R. 108; In re Tricycle Enters., 2006 Bankr. LEXIS 4261; SummitBridge NatInvs. VI, LLC v. Orchard Hills Baptist Church, Inc. (*In re Orchard Hills Baptist Church, Inc.*), 608 B.R. 309; In re Pena, 2016 Bankr. LEXIS 824; Official Comm. of Unsecured Creditors v. Moultrie (In re Moultrie), 586 B.R. 498; In re Wide W. Servs., LLC, 2013 Bankr. LEXIS 3822; In re Westgate Props., 432 B.R. 720; In re Seven Falls, LLC, 2010 Bankr. LEXIS 5228; In re Acme Holding Co., 2015 Bankr. LEXIS 2417; In re Walton Street Props., LLC, 2011 Bankr. LEXIS 5330; Taub v. Taub (In re Taub), 427 B.R. 208.

[75]Collier (n 61) 1112.04 [6] [a] [i].

[76]*In re Schriock Constr*. (n 74) 575; Diwan, L.L.C. v. Maha-Vishnu (In re Diwan, L.L.C.), 848 F. 3d 1147, 1150.

[77]In re Nugelt, Inc., 142 B.R. 661, 667 (Bankr. D. Del. 1992) (debtor's shareholders and insiders using property of the estate to fund post-petition expenses constituted a continuing loss to or diminution of the estate), as cited in *In re AdBrite Corp.* (n 60).

[78]In re Denrose Diamond, 49 B.R. 754, 756 (Bankr. S.D.N.Y. 1985).

[79]In re Gateway Access Solutions, Inc. (n 62) 568.

[80]Ibid.

[81]The equivalent term under the directive is "interim financing."

[82]Collier (n 61) 1112.04 [5] [a].

[83]*In re Gateway Access Solutions, Inc.* (n 62) 564.

[84]As noted in Collier, "a debtor may be unprofitable as a whole, but may have several profitable divisions. If the debtor is currently operating at a loss, the debtor may propose a business plan that undertakes to dispose of the unprofitable portion of its business in order to successfully reorganize the profitable portion. If it appears that the debtor is reasonably capable of accomplishing this business plan, the debtor should be afforded a reasonable period of time to reorganize under chapter 11, assuming that there are no other debilitating impediments to the debtor's reorganization effort," see Collier (n 61) 1112.04 [6] [a] [ii].

[85]*In re AdBrite Corp.* (n 60) 215.

[86]Ibid 216 (emphasis added). A similar wording was used in In re Schriock Constr. (n 74), emphasising the link between rehabilitation and financial viability: "The second aspect of § 1112 (b)(1) requires a showing of an "absence of a reasonable likelihood of rehabilitation." This element requires a showing that the state of the debtor's financial affairs are such that it is unable to *re-establish itself on a firm or sound base*" (emphasis added), cited by the following cases: *Fort Knox Mini Warehouse*, 2002 Bankr. LEXIS 909; In re Whitney Lake, LLC, 2009 Bankr. LEXIS 4273. Similar wording also appeared in In re Avis, 2008 Bankr. LEXIS 4005, 2008 WL 5786807 at *3 (Bankr. E.D. Va. Nov. 13.2008): "the test for rehabilitation is the objective likelihood that the debtor's *financial situation can be turned around*" (emphasis added).

[87]"[. . .] a firm may be distressed because it cannot generate sufficient revenue to pay its debts. This [. . .] kind of trouble is "financial distress," meaning the firm's income is not enough to pay back what is has borrowed," Adler, Baird and Jackson (n 7) 26 (emphasis added).

[88]*In re Shriock Constr*. (n 74) 577, 579 (emphasis added). See similar wording in *In re Diwan, L.L.C.* (n 76) 1150: "The figures indicate that Diwan might not be able in some months to meet its operating expenses, *let alone make plan payments to its creditors*" (emphasis added).

[89]See *In re Shriock Constr*. (n 74) 577; When describing "rehabilitation," Tabb explains that in this case the debtor retains its property, which it utilizes profitably, i.e. by producing

positive net income (profits exceeding its expenses): "If the debtor can utilize those assets to produce positive earnings, creditors holding past debts can be paid out of those future earnings. Those creditors will benefit from a future payment plan if the present value of those payments equals or exceeds the amount that creditors would have received in an immediate liquidation," see Charles Jordan Tabb, *Law of Bankruptcy* (4th edn, West Academic Publishing 2016) 1035.

[90]Evident interrelation between prospective financial viability on the one hand and existing economic viability on the other. We cannot talk about a debtor's sufficient prospective cash flow for the purposes of funding the plan unless such cash flow is sufficient if considered as a *net* sum, i.e. after having first covered the debtor's operating expenses.

[91]"Although projections are just that and there will always be a degree of uncertainty as to what actual results will be, feasibility must be predicated upon objective facts using known operational inputs and expenditures," see *In re Schriock* (n 74) 577.

[92]*In re Gateway Access Solutions, Inc.* (n 62) 562 (citing Tennessee Publishing Co. v. American Nat'l Bank, 299 U.S. 18,22, 57 S. Ct. 85, 87, 81 L. Ed. 13 (1936)). Similar wording also appears in *In re Schriock Constr.* (n 74) 577: "A plan for rehabilitation under Chapter 11 must be based on more than speculative data," cited by In re Pena, 2016 Bankr. LEXIS 824; In re De Jesus, 2012 Bankr. LEXIS 307; In re Franco, 2012 Bankr. LEXIS 3524; In re Sbana Del Palmar, Inc., 2013 Bankr. LEXIS 2258; In re MJS Las Croabas Props., 2013 Bankr. LEXIS 2257; In re Costa Bonita Beach Resort, 513 B.R. 184.

[93]In re M & S Assocs., Ltd., 138 Bankr. 848, 849 (Bankr. W.D. Tex. 1992) (cited by *In re Schriock Constr*. (n 74)).

[94]*In re Clarkson*, 767 F.2d 417, 420.

[95]*In re Shriock Constr.* (n 74) 576.

[96]Debtor's Post Hearing Brief, at 19, as cited in *In re Shriock Constr*. (n 74) 579.

[97]"As a threshold matter, the Court recognizes that confirmation of the debtor's plan is not before it at this time. However*, the debtor's ability to effectuate a confirmable plan is relevant to the resolution of the creditors" respective motions to dismiss or convert* and to the approval or disapproval of the debtor's disclosure statement," In re Acme Holding Co., Inc., No. 2:14-BK-71315, 2015 WL 13035103, at *5 (Bankr. W.D. Ark. July 23, 2015) (emphasis added).

[98]See *In re AdBrite Corp*. (n 60) 214; In re Photo Promotion Assocs. 47 B.R. 454, 459 (S.D.N.Y. 1985).

[99]Jeffrey Ferriell and Edward J. Janger, *Understanding Bankruptcy* (4th edn, Carolina Academic Press 2019) 260 (emphasis added).

[100]Tabb (n 89) 285.

[101]Ibid 210.

[102]According to Collier, "[I]n a chapter 11 reorganization case, most of the property of the debtor in possession is likely to be "necessary" for the debtor's business and ultimate reorganization," see 3 Collier on Bankruptcy P 362.07, at 362.07 [4] [b] (16th edn. 2020).

[103]The stay relief can take several forms, for example termination, annulment, modification or conditioning of the stay.

[104]Ferriell and Janger (n 99) 258; Tabb (n 89) 304.

[105]Tabb (n 89) 303.

[106]Empire Enterprises v. Koopmans (In re Koopmans) 22 B.R. 395 (Bankr. D. Utah 1982).

[107]In re Sunstone Ridge Assocs. 51 B.R. 560 (Bankr. D. Utah 1985).

[108]United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,

484 U.S. 365, 375–76 (1988).

[109]Terra Mar Development Corp. v. Terra Mar Assocs. 3 B.R. 462 (Bankr. D. Conn. 1980).

[110]For the history of the "battle" between the "necessity only" and "feasibility" advocates as well as their respective argumentation, see Tabb (n 89) 309 and Daniel A O'Connor, "Application of the Feasibility Test under Section 362 (d)(2): Did Timbers Really Change Anything" (1992) 9 Bankr Dev J 133.

[111]Collier (n 102) 362.07 [4] [b]; As Tabb (n 89) 307 characteristically mentions, "[I]ndeed, the very fact that the debtor in possession is opposing the secured creditor's motion for stay relief suggests rather strongly that the debtor at least believes that the property is necessary. The debtor may be mistaken, of course, and the ultimate determination of need is for the court."

[112]Tabb (n 89) 307.

[113]*United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.* (n 108) 376, quoting In re Timbers of Inwood Forest Assoc. Ltd., 808 F.2d 363, 370–71 (5th Cir. 1987)) (emphasis added); "[. . .] in order for a reorganization to be *effective*, it must be *feasible*," see In re National Real Estate Ltd. Partnership II, 87 B.R. 986, 991 (Bankr. E.D. Wis. 1988) (emphasis added).

[114]In re Pegasus Agency, Inc. 101 F. 3d 882, 886–887 (2nd Cir. 1996) (emphasis added).

[115]Ibid 887; "it goes without saying that an effective reorganization cannot be based solely on speculation," In re Kent Terminal Corp., 166 Bankr. 555, 562 (Bankr. S.D.N.Y. 1994) (citing In re Saypol, 31 Bankr. 796, 803 (Bankr. S.D.N.Y. 1983)); "mere dreams of reorganization cannot sustain the automatic stay," In re New Era Co., 125 B.R. at 725, 730 (Bankr. S.D.N.Y. 1991).

[116]Tabb (n 89) 311.

[117]Or at least if its losses are not reversible *through* the reorganization, see analysis under section 3.1.2.1. above.

[118]See Daniel A O'Connor (n 110) 143–144; Tabb (n 89) 311; In re Mullock, 404 B.R. 800, 810 (Bankr. E.D. Pa. 2009) makes reference to confirmability separately and explicitly ("In short, in a case in which the debtor proposes to fund her reorganization plan through an alleged dramatic increase in income and where confirmability and feasibility are at issue [. . .]").

[119]Tabb (n 89) 311; For an illuminating example where the plan's lack of confirmability led to stay relief, see In re Sun Valley Newspapers, Inc., 171 B.R. 71 (1994).

[120]INSOL International, "Treatment of secured claims in insolvency and pre-insolvency proceedings II" (2020) 359.

[121]Ibid.

[122]Ibid.

[123]Apart from the common rationale identified here, US literature has already pointed out additional linkages between the two sections: "The interrelationship between the statutory grounds for dismissal and the grounds for relief from the stay in § 362 (d) is noteworthy. "Cause" is a basis for relief in both §§ 1112 (b)(1), 362 (d)(1)," Tabb (n 89) 210; "It has been held that there is "no substantive difference between the cause requirement for dismissal of a petition under Section 1112 (b) and the cause for relief from an automatic stay under Section 362 (d)(1)," in Re Laguna Assocs. Ltd. P'ship, 30 F. 3d 734, 737, 31 C.B.C.2d. 545, 549 (6th Cir. 1994) (as cited in Collier (n 102) 362. 07 [7] [a]).

[124]See one of her interventions during the session "How to Successfully Litigate a Relief-from-Stay Motion" at the 2018 American Bankruptcy Institute (ABI) Annual Spring Meeting at <https://cle.abi.org/product/no-cle-how-successfully-litigate-relief-stay-motion> (relevant

part: 35:00 — 38:44 mins), accessed 1 December 2020. On this point, Collier also characteristically states the following: "in most reorganization cases the court will be inclined to allow the debtor a brief period of time in which to attempt rehabilitation, particularly when innocent third parties such as employees, shareholders and unsecured creditors would suffer a complete loss if a foreclosure was permitted to go forward immediately" (2 Collier Bankruptcy Practice Guide 2020, at P 38.05 [1]).

[125] See footnote 69.

[126] In re Holly's, Inc, 140 B.R. 643, 700 (Bankr. W.D. Mich. 1992).

[127] Emphasis added.

[128] Emphasis added.

[129] On this issue, see also Ferriel and Janger (n 99) 259–260 and Tabb (n 89) 310. Alternatively, the term "sliding scale approach" has been also used, see e.g. *In the Matter of Apex Pharmaceuticals, Inc*., United States District Court, N.D. Indiana, South Bend Division (1996) 203 B.R. 432, 441.

[130] In re BB Island Capital, LL.C, 540 B.R. 16, 22 (Bankr. D. Mass. 2015) (citing *United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd*, 484 U.S. at 375–76).

[131] In re AdBrite Corp. (n 60) 215.

[132] See e.g. *In re Gateway Access Solutions, Inc.* (n 62) 561.

[133] "A creditor's motion to convert a case during the early stages of the case, when the debtor has not had sufficient time to resolve its underlying business problems, is unlikely to be successful" and "[. . .] during the exclusive period, courts generally give the debtor *the benefit of the doubt*," see Ferriell and Janger (n 99) 709 (emphasis added).

A quote very similar to the previous one, though in the context of a stay relief case, appeared in *In re BB Island Capital*, *LLC* thus demonstrating the similarity of temporal considerations between the stay relief and conversion/dismissal filtering mechanisms. The quote states that "[D]uring the early stages of a bankruptcy case, the court "must work with less evidence than might be desirable and *should resolve issues in favor of the reorganization* where evidence is conflicting" to ensure that the debtor is given the "breathing room" Congress intended the stay to provide," see *In re BB Island Capital, LLC (n 130) 23* (emphasis added).

[134] Federal Rule of Bankruptcy Procedure 1007 requires that the filing of schedules and statements be completed with the petition or within 14 days thereafter.

[135] See also Tabb (n 89) 133–134, 138.

[136] As of 21 June 2021 and on the basis of the United States Trustee Program's final rule "Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11," all Chapter 11 debtors (except small business and subchapter V debtors) will be using streamlined, uniform forms in order to file *uniform* periodic reports in every case in every judicial district where the U.S. Trustee Programme operates, see 85 FR 82905; Michael J. Bujold, Nan Roberts Eitel and Andrew R. Vara, "Introducing the USTP's New Chapter 11 Periodic Reports" (2021) XL (2) American Bankruptcy Institute Journal 24. For a sample, new format MOR see <https://www.justice.gov/ust/chapter-11-operating-reports> accessed 15 February 2021.

[137] Brian Bonaviri, "Financial Statements and Reporting In and Out of Bankruptcy" (2020) LexisNexis 13.

[138] This falls under the well-known "monitoring role" that the DIP financiers may play.

[139] Bonaviri (n 137) 13.

[140] "MORs serve an essential purpose in helping parties evaluate a case's progress, including compliance with legal requirements and determining whether the case should be converted or dismissed," see Bujold, Roberts Eitel and Vara (n 136) 24.

[141]W. Homer Drake Jr., Christopher S Strickland and Karen Visser, *Chapter 11 Reorganizations* (2nd edn, Thomson Reuters Westlaw 2020) § 11:5.

[142]Emphasis added.

[143]Kahl (n 4) 136.

[144]Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 550–551.

[145]Explanation added by the author.

[146]Council of the European Union, “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU—Revised text proposal, 15708/17” (2017)(emphasis added).

[147]Council of the European Union, “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU—Compromise Text Proposal on Titles I & II and related definitions, 11405/18” (2018), footnote 33.

[148]See indicatively analysis of the “absence of a reasonable likelihood of rehabilitation” (11 U.S.C. § 1112 (b)(4)(A)) earlier in this paper.

[149]According to Article 9 (6), “A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class. Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.”

[150]On this point, see additionally Recital 36.

[151]See for example Article 6 (7)(b).

[152]Emphasis added.

[153]For example (periodic) cash payment(s), additional or replacement liens etc.

[154]See analysis in section 3.2.2. of this paper.

[155]See also footnote 124.

[156]Article 6 (9) last subparagraph. Such period cannot exceed four months.

[157]2 Collier Bankruptcy Practice Guide 2020, at P 38.05.

[158]See ABI (n 124).

[159]See indicatively Sandeep Dahiya and others, “Debtor-in-possession financing and bankruptcy resolution: Empirical evidence” (2003) 69 Journal of Financial Economics 259.

[160]Emphasis added.

[161]“[. . .] Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as: [. . .] (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties [. . .].”

[162][2017] EWHC 2688 (Ch) 34 (emphasis added).

[163][2014] EWHC 763 (Ch) 19 (emphasis added).

[164]Recital 37.

[165]See on this point section 4.3.2. of this paper.

[166]See 11 U.S.C. § 1112 (b)(2).

[167]Emphasis added.

[168]We do not exclude the possibility that creditors request such disclosures at an earlier point during the procedure. What we rather examine here is what is prescribed as a legal obligation by the framework itself.