Verband Insolvenzverwalter Deutschlands

Statement of the Verband Insolvenzverwalter Deutschlands (VID) [Registered Association of Insolvency Administrators] regarding the general approach of the Council of the European Union on the

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

(12536/18, Comm. doc. 14875/16)

A. Introduction

The Council has attached to the general approach (hereinafter GA) adopted on 11/12 October 2018 on the 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, a range of proposals for amendment that are intended to create more leeway for national implementation through the adoption of flexibility clauses.

At a different point, the GA attempts to refute national reservations by concretisation and specification and to more specifically define the scope of the adopted regulations.

In some cases, the GA also goes beyond the Commission's draft in recognisably making the attempt to maintain the central effective elements of this draft despite the aforementioned measures.

The VID has already commented on the draft Directive of the Commission in extensive statements.[1]

[1] https://www.vid.de/wp-content/uploads/2017/03/vid-stn-zum-rl-vorschlag-com-2016-723-final.pdf.
https://www.vid.de/wp-content/uploads/2017/06/stellungnahme-axel-w-bierbach-sachverstaendigenanhoerung-20-06-2017-bruessel.pdf (also available in English)
https://www.vid.de/wp-content/uploads/2017/08/vid-aenderungsvorschlaege-zu-com-2016-723-final.pdf (also available in English and French)

Given their different methodology, the following comments are limited to such changes that cause the GA to stand in contrast to the resolutions of the European Parliament. The deviating wording regarding the protection of workers and the wording regarding the professional rights of the administrators are not illustrated.
As regards the protection of workers, the wording of the Parliament and the GA differ considerably and on many occasions. This indicates underlying differences in valuation that cannot be discussed within the confines of this statement.
As regards the professional rights of the administrators, various degrees of codification apply across Europe. In Germany, the professional public is currently discussing for the first time and based on an according statement of intent by the legislator the introduction of a professional law that would also have to comply with the framework conditions set by the Directive.

On 10 October 2018, the German federal government approved the report on the experience with the application of the law on further facilitation of restructuring of companies (ESUG). This report is based on a decision of the Deutscher Bundestag from 27 October 2011 in which the German federal government was obliged to evaluate the experience with implementation of that law five years after its adoption and to report to the Deutscher Bundestag immediately on this basis.
The 353-page evaluation presented by the commissioned scientists covers the period from 1 March 2012 until 28 February 2017. Their recommendations were included and cited in this statement because the ESUG anticipated elements of the scheduled restructuring proceedings and because the experience with it may therefore be helpful in the further discussion.

B. In Detail

1) Recital 2 GA
(concept of operational adaptations) ... 4
2) Recital 4 sentence 2 GA
(occupational bans) ... 5
3) Recital 7 sentence 2 und 8 sentence 3 GA
(occupational bans) ... 5
4) Recital 10a GA
(cross-border recognition of proceedings) ... 6
5) Recital 14 sentence 5 / Art. 1 section 2(g) GA
(public sector entities under national law) ... 6
6) Recital 17 sentence 4 / Art. 7 section 5 GA
(protection of own contractual clauses) ... 7
7) Recital 17(a) / Art. 4 section 1(a) GA
(viability review as underlying condition) ... 8
8) Recital 17(b) / Art. 1 section 1(a) GA
(debtor in difficulties not of financial nature) ... 9
9) Recital 19 sentence 2 GA
(suspension also towards third parties) ... 10
10) Recital 19 sentence 4 and 5 as well as Recital 21 / Art. 7 section 1 and 2 GA
(effects of insolvency on restructuring proceedings) ... 11
11) Recital 19(a) sentence 2 / Art. 6 section 2(b) GA
(excluding claims or claims categories from scope of suspension) ... 13
12) Recital 19(b) sentence 2 / Art. 6 section 5 GA
(extension of suspension of enforcement measures) ... 13
13) Recital 19(b) sentence 5 und 6 / Art. 6 section 7(a) GA
(unlimited extension of time until confirmation of a plan) ... 14
14) Recital 20 sentence 1 / Art. 6 section 8 GA
(lifting suspension of enforcement measures) ... 15
15) Recital 21 sentence 1 / Art. 7 section 1 GA
(effect of suspension on application obligations and application rights) ... 16
16) Recital 22(a) / Art. 7 section 5(a) GA
(inclusion of liabilities incurred already at an earlier point) ... 16
17) Recital 28 und 28(a) / Art. 9-12 GA
(protection of minority creditors) ... 17
18) Recital 29 sentence 1 / Art. 12 GA
(reservation of approval of a majority of creditor groups) ... 19
19) Recital 30(c) sentence 2 GA
(unknown claims) ... 19
20) Recital 31 sentence 2 GA
(definition of financial support) ... 21

1) Recital 2 GA (concept of operational adaptations)

Recital 2 GA now contains a number of clarifying additions that have the recognisable aim of limiting the intrusive character of restructurings and to thus make them more bearable for creditors.

Sentence 2 refers to the concept of operational adaptations newly introduced in sentence 1:

"Unless provided for otherwise in national legislation, operational adaptations such as the cancellation or amendment of contracts or the sale or other disposal of assets shall be in accordance with the general requirements that are provided for under national law – especially under civil law and regulations of employment law – for such measures. Also in a conversion of liabilities into equity, the guarantees provided for in national legal regulations shall be complied with."

Their inclusion in the canon of measures that can be planned and implemented in the course of restructuring proceedings expands restructuring beyond financial facilitation into operative measures.

In very many cases, the ability to survive of companies during a crisis cannot solely be secured by financial concessions to the creditors. These have to be accompanied by operational measures that improve the cost structure and income structure as quickly as possible and therefore prevent the repeated incurrence of unsustainable levels of debt. According to the examples set out in sentence 2, the concept of operational adaptation addresses such operational measures.

Their inclusion in a potential catalogue of measures of restructuring proceedings, however, seems problematic. With the operative measures agreed in the restructuring plan, the debtor would commit to the implementation of these measures towards the creditors who are immediately affected with own claims under Art. 2 section 3 GA. Since the intended effect of operational adjustments can also affect unaffected creditors or uninvolved third parties, it seems questionable what effect a court confirmation of the restructuring plan is to have in this case. In this regard, the recital refers to national law by assigning to it the decision on reliability and effect of such agreements. Art. 10 section 1 GA sees in a confirmation issued by a court or a public authority a security for the parties involved, which has to be effective at least in the cases set out in that section.

The protection of unaffected creditors or uninvolved third parties is not addressed here. Such protection, however, has to result in approval being withheld in case of an obvious

violation of national law, if such violation (e.g. of dismissal protection regulations) were already apparent at the time the decision was made and if such would result in legal unimplementability of the planned operational adjustments.

With the addition of the limitation "at least" in Art. 10 section 1 GA it is indicated that the member states can also place further cases under the reservation of approval. The Recital 30 sentence 2 GA also speaks of the possibility given to member states to specify the requirement of an approval in further cases. The protection purpose of this condition as set out in Recital 30 sentence 1 GA, however, only covers affected creditors and shareholders.

To protect the persons affected by operational adjustments in terms of Art. 2 section 2 GA that are not participating in the restructuring measures it should be explicitly recorded in Recital 30 that the members states can guarantee the protection of this group of persons as well by reserving approval.

2) Recital 4 sentence 2 GA (occupational bans)

Connected to the occupational bans addressed now in Recital 4 sentence 2 GA is a general classification of such occupational bans as inefficient framework for a new start within an appropriate period. This cannot be convincing in cases where such occupational bans are based on legally binding criminal convictions.

The Recital 4 should not mention occupational bans or should at least limit mention thereof to such occupational bans that are not based on criminal convictions.

3) Recital 7 sentence 2 und 8 sentence 3 GA (occupational bans)

The criticism already stated in regard to Recital 4 sentence 2 GA can also be transferred to the newly added mention of occupational bans in Recital 7 sentence 2 GA. The connection formed here between the functioning of the internal market and the harmonisation of occupational bans required for it on the one hand and on the other hand disregards the national rights to reservation in criminal law and, moreover, implies that occupational bans under criminal law would constitute an impediment to smooth functioning of the internal market. In Recital 8 sentence 3 GA, the criticism of the occupational bans is repeated: "Furthermore, the obstacles that are caused by long occupational bans in connection with excessive debt

of a company supress entrepreneurship." This criticism stems from the original draft of the Commission and – insofar as could be determined – was not yet addressed in parliamentary debates. In connection with the concerns set out above in regard to Recitals 4 and 7 GA, mentioning of occupational bans should be refrained from at this point as well, or such occupational bans should be limited to such that are not based on criminal convictions.

No mention of occupational bans should be made in Recital 7 and 8, or any such should be limited to occupational bans not based on criminal convictions.

4) Recital 10a GA (cross-border recognition of proceedings)

Firstly, the newly added Recital 10a GA makes it clear that an application of the European Insolvency Regulation (Regulation EU 2015/848) to future restructuring proceedings according to this Directive is only the case if they also meet the information requirements according to Art. 24(2) Regulation EU 2015/848. However, the Recital then states as goal of the Directive the facilitation of cross-border recognition of proceedings across its area of application even if they do not meet this requirement.
The appeal formulated here does not pose any problems at first glance. It does, however, carry a considerable danger for the constitutional legitimisation of future restructuring proceedings. If they are to be able to trigger cross-border effects and thus interfere with the rights of creditors across borders or even provide for cross-border operational adjustments (see above), then a waiver of publicity seems like a considerable limitation of co-determination rights such as demanded by the European Parliament in their proposed Recital 8(a), for example.

Recital 10a sentence 4 GA should not be adopted.

5) Recital 14 sentence 5 / Art. 1 section 2(g) GA (public sector entities under national law)

Recital 14 sentence 5 and following it Art. 1 section 2(g) GA now exclude public authorities in general from application of the Directive. This means that these public authorities cannot be restructured as debtor in restructuring proceedings. This newly introduced exception has an example in section 12 InsO [Insolvency Code] that exempts legal persons under public law in general from the application of the Insolvency Code.

According to the first cases from the municipal level (e.g. in 2014 - Stadtwerke Gera AG), the insolvency of municipal enterprises seems to be a conceivable and enforceable solution for handling crises caused by high levels of debt and the demographic development, not only in Germany. This would have to apply all the more to restructuring proceedings that would be particularly suitable in this area given their preventative nature.

Recital 14 sentence 5 and following it Art. 1 section 2(g) GA should be made more specific in regard to not having legal persons under private law and under public ownership fall under the definition of public authority.

6) Recital 17 sentence 4 / Art. 7 section 5 GA (protection of own contractual clauses)

In Recital 17 sentence 4, the GA now adds:
"The member states can decide whether claims that are due or arise after the proceedings were requested or opened are to be included in the preventative restructuring measures or the suspension of individual enforcement measures. The member states are free to decide whether the interest on claims are subject to the effects of suspension of individual enforcement measures."

This extension is extremely problematic. It contradicts Art. 7 section 5 GA, the points c and e of which have now also been newly added, and as compulsory regulation now strips affected creditors of the protection of own contractual clauses that would allow for refusal of performance or cancellation of contract based on application for or opening of preventative restructuring proceedings.

If the creditor is, based on a national regulation following Recital 17 sentence 4 GA, also bound by liabilities arising after opening of the proceedings or already after filing of an application, he can simply not be expected to waive the protection of such contractual clauses. A corresponding national constellation would be an unbearable risk for any creditor who is affected by a restructuring risk in their position as suppliers. He would have to continue to provide deliveries in the certain knowledge that any of his claims against the debtor arising from such deliveries could be partially or fully devalued as part of restructuring proceedings. The continuation of a financing of the supplier (e.g. through factoring) or a credit insurance would also be excluded in this case because the corresponding bank or credit insurer could no longer insure the foreseeable (partial) default.

Contrary to the Parliament, the GA does not provide for a hardship clause either, which would enable the affected creditors to assert special circumstances on a case-by-case basis

in order to effect an individual exception for themselves. Neither does the Parliament propose a mandatory regulation at this point, but with good reason would like to leave it to member states whether they want to utilise an exclusion of such contractual clauses.

Recital 17 section 4 and Art. 7 section 5 c, e, and f GA should not be adopted.

7) Recital 17(a) / Art. 4 section 1(a) GA (viability review as underlying condition)

Recital 17(a) and following it Art. 4 section 1(a) GA now concede the option of a viability review as underlying condition for restructuring proceedings. This viability review is to be placed under the reservation that it must not cause any negative effects on the assets of the debtor and that their purpose is, according to the wording of the newly added Art. 4 section 1(a) GA, excluding debtors with no prospect of viability from restructuring proceedings. Within this limitation, it is to remain possible to have the debtor himself pay for the costs of the review.

At this point, the GA falls considerably short of the proposal of the Parliament that had pleaded in a much more specific and practice-oriented manner for demanding from the debtor proof for proper accounting and balancing as underlying conditions for restructuring proceedings.

The German experience with the so-called shield process [Schutzschirmverfahren] the evaluation of which (prescribed by law) was only presented a few days ago[2], confirms the findings that the certification to be submitted pursuant to section 270b section 1 InsO is not considered to be a suitable basis for proceedings[3]. Here, the debtor has to submit together with the reasoned application of a certification of a tax consultant, auditor or lawyer with experience in insolvency matters or another person with comparable qualification that states that insolvency or excessive debt but not insolvency is impending, and that the intended restructuring is not past hope.
Since the viability review proposed by the GA is not defined in more detail, it most likely would contain the form of the certification pursuant to section 270b section 1 InsO in order to comply with the further requirements of the GA, especially in regard to avoiding negative effects. This would lead to a similar result as was set out in the recent evaluation of section 270b. Instead, one should turn the proof for proper accounting and balancing as now also

2 https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/101018_Gesamtbericht_Evaluierung_ESUG.pdf?__blob=publicationFile&v=2
3 L.c., page 31

proposed in the evaluation of the German regulations[4] into an underlying condition for restructuring proceedings that can be regulated on the national level.

Instead of a not further defined viability review, the stipulation of proper accounting and balancing (Parliament proposal to Recital 17(b) as underlying condition for restructuring proceedings that can be regulated on a national level seems to be clearly preferable.

8) Recital 17(b) / Art. 1 section 1(a) GA (debtor in difficulties not of financial nature)

In the newly added Recital 17(b) and Art. 1 section 1(a), the GA now returns to Recital 17 Regulation EU 2015/848 by opening restructuring proceedings also for debtors who are in difficulties that are not financial in nature. According to the proposed wording of Recital 17(b), this opening shall, however, be subject to "*these difficulties coming with the actual and considerable risk of the debtor not being able to satisfy liabilities on their due dates or of not being able to do so in the future. The decisive period for determination of such a risk can span several months or longer, in order to account for cases in which the debtor is in difficulties that are not financial in nature that threaten the continuation of his company and, in the medium term, his liquidity.*"

Listed as example is (as was the case in Regulation EU 2015/848) the loss of a major contract.

The opening of restructuring proceedings as outlined by the Directive for these cases seems to be extremely problematic. First, it remains unclear if a danger to the continuation of the company has to be already determinable or if the proceedings are also to include cases in which it was not yet determined if such a danger actually exists. In addition to the lack of semantic clarity, the question also arises if restructuring proceedings could, if in doubt, also be opened if it is not yet clear if there is a risk to the company.
Such an option would open up a considerable potential for abuse given the options to influence creditor's rights (suspension of enforcement measures and cram-down)[5]. In case of default of major customers, debtors would no longer have to make relief efforts by increasing operational activities (acquisition of new customers) but would have their creditors participate directly in the risk of such default by initiating restructuring proceedings immediately. Especially on markets with intense competition and small margins the temptation to seek relief with these measures would be particularly strong. If in doubt, competitors could

[4] l.c., page 80.
[5] See Full Report, l.c., page.139.

only react by also utilising this option. The unclear definition of "difficulties not financial in nature" and the use of an only medium-term risk to liquidity as basis would, on such markets, cause almost all market participants to become potential restructuring candidates.

Art. 1 section 1(a) GA might well still provide for the necessity of impending liability, but simultaneously, Recital 37 sentence 5 and Art. 2 b GA refer to national law when defining this concept. This means that they do not follow the proposal of the Parliament that would have been preferable, which had proposed in Art. 2 section 2(a) a separate and stand-alone regulatory concept of impending insolvency as actual and real threat to solvency of the debtor. This proposal would prevent individual national regulations deviating from this concept and applying a very wide interpretation and therefore creating considerable leeway for the abuse strategies described above.

Opening of restructuring proceedings for debtors in "difficulties that are not financial in nature", and a national option for definition of the concept of impending insolvency open up considerable potential for abuse. The proposal of the Parliament for a stand-alone regulatory definition of the concept of impending insolvency without inclusion of debtors in "difficulties that are not financial in nature" is clearly preferable from a practical point of view.

9) Recital 19 sentence 2 GA (suspension also towards third parties)

In Recital 19 sentence 2, the GA now talks of suspension now also being available towards third parties that provide securities, including guarantors and issuers of securities, if this has a basis in national law.

This new approach that has no equivalent in a change proposal to the regulatory wording of the Directive, seems to be highly problematic. It implies that uninvolved third parties (e.g. credit insurance companies) can be included in the intervention scope of restructuring proceedings. If members states were to use this option and, for example, prohibit credit insurance companies to withdraw from the insurance of their customers, who in turn are obliged to supply the debtor, this would have considerable and serious effects on this insurance market, which is vital in the supplier industry in particular.
Here, it would make little difference whether all or only some member states would utilise this option. Given the cross-border supply chains and the already stated expectation that restructuring proceedings are recognised across Europe under the proposed Directive, even the individual use by member states would be highly problematic already. Furthermore, this version would at least in Germany also pose constitutional concerns because it would inter-

fere with the private autonomy of third parties that are not obliged towards the debtor under the law of obligations.

The Recital 19 sentence 2 GA should be rejected without replacement.

10) Recital 19 sentence 4 and 5 as well as Recital 21 / Art. 7 section 1 and 2 GA (effects of insolvency on restructuring proceedings)

Addressed with Recital 19 sentence 4 and 5 as well as Recital 21 GA that refer to Art. 7 section 1 and 2 GA are the effects of occurrence of insolvency on restructuring proceedings.

Apparent here are considerable and again problematic deviations from the line that the Parliament determined in its discussions.

Firstly, Art. 4 section 1 GA talks further of access upon impending insolvency, analogous to the draft of the Commission, but leaves open whether access under national law is to remain possible also after insolvency has occurred already.

Companies that are already insolvent entering into restructuring proceedings has to be rejected absolutely, with reference to the considerable potential for abuse of such regulation[6]. Such proceedings would be used as evasion strategy by solvent companies. The affected creditors, whose losses already became obvious upon insolvency, would then have to jointly bear the further restructuring attempts of the debtor. They would be prevented from limiting their losses by total enforcement (insolvency) and would therefore be pushed into a blackmail situation in which a debtor could drive them towards more and more concession with the threat of long restructuring proceedings. The regulatory competence of the EU for such hidden insolvency proceedings would seem highly doubtful, apart from everything else.

This is precisely why the Parliament had opened the option for an application for suspension of enforcement measures only for such debtors that would not yet have to file an application for insolvency under national law by making an addition to Art. 6 section 1 sentence 1. This was to prevent them from refusing creditors access to the insolvency estate by requesting restructuring proceedings.

The GA would like to pass over this aspect and therefore adopts the original wording of the Commission's draft that does not provide for such insolvency reservation. Instead, it only

[6] See Full Report, l.c., page 139.

concedes in Recital 19 sentence 5 the option of a national regulation that prohibits the suspension enforcement measures until insolvency of the debtor. For this purpose, it envisages the option of refutable legal assumptions in national law that, here analogously to the case law of the Supreme Federal Court, can intervene if taxes or social security contributions are no longer paid. According to the assumptions of the GA, also the suspension of the application obligation of the debtor pursuant to Art. 7 section 1 is to be maintained in the very debtor-friendly version of the Commission's draft. The Parliament did not formulate a change proposal for this point but deviated from the proposal of the Commission in regard to the application rights of the creditors in Art. 7 section 2. It had not adopted the suspension of application rights in case of a general suspension of enforcement measures as proposed by the Commission in order to prevent the withdrawal of the insolvency estate as already described above.

The newly worded Recital 21 GA now even goes beyond the proposal of the Commission by making clear that the suspension of the application rights of creditors are to be not only limited to the case of general suspension of enforcement measures. Rather, it is to only apply to a limited number of creditors even in case of suspension of individual enforcement measures. This last correction completes the contradiction of the proposed regulation and the protection rights of the affected creditors, which are also secured by the constitution. In the future, they would be impeded in the enforcement of their rights even if the suspension was not even targeted at them, for example because they have already made an unsuccessful enforcement attempt and can only enforce their rights by way of insolvency proceedings.

In case of insolvency occurring after enforcement measures were suspended, the GA would now certainly like to accept the national regulation of a resurgence of the application obligation, but at the same time still does not permit opening of insolvency proceedings without the additional condition of consideration of the general interest of the creditors.
It remains open, however, how such interest can be determined in this situation. Usually, this could only be achieved by way of coordination, which is, however, only envisaged for the acceptance of a restructuring plan.

In regard to effects of the occurrence of insolvency on restructuring proceedings, the rejection or termination of suspension of enforcement measures and the maintaining of the total insolvency application rights of the affected creditors proposed by the Parliament are preferable to the contrary proposals of the GA.

11) Recital 19(a) sentence 2 / Art. 6 section 2(b) GA (excluding claims or claims categories from scope of suspension)

For the first time, Recital 19(a) sentence 2 and following it Art. 6 section 2(b) GA now provide for member states being able to exclude certain claims or categories of claims from a suspension.

The examples listed hereto include, amongst others, claims secured with assets the seizure of which would not jeopardise the restructuring of the company.
It remains unclear how jeopardising the restructuring can be excluded if individual creditors can effect an exception from the restructuring measures with this method. The assertion that the seizure of a security would not jeopardise restructuring would without a doubt be made in several cases and in just as many cases would be challenged by other creditors or the debtor themselves. Court action in these disputes could not be excluded and with their duration can themselves become a risk to restructuring.

Recital 19(a) sentence 2 list as another example claims of creditors for whom a suspension would constitute an inappropriate limitation, such as a result of a non-compensated loss or a write-off of securities. Again, it remains unclear here which further cases of inappropriate limitation could result in an exception. Court cases would be unavoidable in this case as well and again could, due to the fundamental effects of an exception on the restructuring plan and therefore the results thereof, jeopardise the approval of the other creditors and thus restructuring as a whole. Furthermore, a solution cannot be sought here, as was already discussed, by accessing the liabilities that the creditors conclude with third parties (e.g. credit insurances) in order to secure losses. The cancellation of a credit insurance in case of impending loss of value or even the loss of securities is likely to generally inappropriately affect the creditor in question. Apart from everything else, it remains questionable if not even already the opening of restructuring proceedings would habitually trigger a need for write-offs among creditors who would then be kept from utilising their securities.

Recital 19(a) sentence 2 as well as Art. 6 section 2(b) GA should not be adopted.

12) Recital 19(b) sentence 2 / Art. 6 section 5 GA (extension of suspension of enforcement measures)

Recital 19(b) sentence 2 and following it in part Art. 6 section 5 as in the GA now provide for an extension of the suspension of enforcement measures beyond a period of four months if the member states meet set conditions.

Recital 19(b) sentence 2 GA includes in these conditions, amongst others, also the size of the debtor. Using sheer size as a basis poses a problem because it creates a distorting effect on competition in favour of large companies. They can rely on an extension of the suspension period simply because of their size, while small and medium-sized companies do not enjoy this advantage.

The size of the debtor should be removed as justifying condition for an extension of the time period of suspension of enforcement measures in Recital 19(b) sentence 2 without replacement.

13) Recital 19(b) sentence 5 und 6 / Art. 6 section 7(a) GA (unlimited extension of time until confirmation of a plan)

Recital 19(b) sentence 5 and following it Art. 6 section 7(a) GA extend the option for extension as set out in Art. 6 section 7 in a highly problematic manner by allowing for an unlimited extension of time until confirmation of a plan, if the restructuring plan has to be submitted within eight months after start of the original suspension of enforcement measures under national law.

Already using this long submission period as a basis poses the question how such regulations are to be compatible with the provisions of Art. 6 section 4 that limit the original duration of a suspension to no more than four months. According to the provisions of Art. 6 section 5, required in all cases would be an application of the debtor including a presentation of the clearly specified circumstances that would sufficiently justify the extension. The examples for such circumstances listed in Recital 19(b) sentence 2 (see above) do not include the simple deviation of national law. A generalised extension under national law would otherwise provide the debtor with a considerable blackmail potential versus their creditors in regard to achieving a quick agreement on a restructuring plan.

Also unclear in this context is the meaning of Recital 19(b) sentence 6 GA. Here, the member states are given the option to provide for an unlimited suspension as soon as the debtor becomes insolvent under national law.
A general suspension stop is usually a feature of insolvency proceedings. If this general feature is addressed here, Recital 19(b) sentence 6 GA, however, would make very little sense because a national outline for insolvency proceedings is expressly not intended by the Directive and this is also why a granting of options for defining outlines would be of no reason here. It therefore has to be assumed that Recital 19(b) sentence 6 GA is to extend the general effect of insolvency proceedings to the individual enforcement measures of creditors

into the restructuring proceedings as soon as grounds for insolvency applies under national law.
Such extension would, however, be highly problematic because it would transform the estate-protecting effect of the general and unlimited suspension stop that is to ensure equal treatment of creditors into a debtor-protecting effect in the restructuring proceedings. A central protective element of insolvency proceedings, the intensity with which it takes effect can only be justified by the effect of insolvency proceedings that affect all creditors, thus becomes a protective element for the debtor that does not have to apply to all creditors in the restructuring proceedings and is aiming at maintaining the assets of the debtor. This means that occurrence of insolvency would even increase the protection for the debtor further instead of replacing it with a protection of the estate in favour of the creditors.

Recital 19(b) sentence 5 and 6 as well as Art. 6 section 7(a) GA should not be adopted.

14) Recital 20 sentence 1 / Art. 6 section 8 GA (lifting suspension of enforcement measures)

With Recital 20 sentence 1 and Art. 6 section 8, the GA again departs considerably and very one-sidedly in favour of the debtor from the line of the Parliament.
While the Parliament provides for lifting the suspension of enforcement measures upon occurrence of insolvency, the GA at this point only intends to hold a review if the suspension can still fulfil the purpose of supporting the negotiations. Only in this case does the GA see an unnecessary disadvantage for creditors, while coming to the opposite conclusion that the suspension of enforcement measures to support negotiations is to be declared a "necessary" disadvantage for creditors.

The decision of the Parliament in favour of termination of suspension in the case of insolvency is definitely preferable here because it ensures the protective effect of insolvency proceedings for all creditors. It can therefore dispense with questionable conditions such as protection applications of individual creditors or a minimum duration of suspensions, such as are to be introduced now by Recital 20 sentence 3 and 4 GA. Driving back or limiting individual creditors is rendered superfluous by the insolvency proceedings since all creditors are involved in the proceedings in this case.

The solution of lifting the suspensions in case of insolvency is preferable to the proposal of the GA regarding the wording of Recital 20 sentence 1 and Art. 6 section 8. The proposals of the GA should not be adopted here.

15) Recital 21 sentence 1 / Art. 7 section 1 GA (effect of suspension on application obligations and application rights)

The newly worded Recital 21 sentence 1 and following it Art. 7 section 1 GA would like to considerably extend the effect of suspension on application obligations and application rights under national insolvency law.
Against the decision of the Parliament for maintaining at least the application rights of creditors, first of all, a further limitation of these rights is proposed (see above). Additionally, this effect is to occur already if the national regulations provide for the option of a limited suspension of individual enforcement measures for a limited number of creditors only (see above).
All this is also to apply if national insolvency law, despite extensive restructuring instruments, does not exclude the liquidation of the debtor. With this last limitation, the GA assigns insolvency law, independent from its national variation, the general role of liquidation law and thus blocks the options that are given with extensive restructuring instruments under insolvency proceedings in particular.

The expanding proposals of the GA for Recital 21 sentence 1 and 2 as well as Art. 7 section 1 should not be adopted.

16) Recital 22(a) / Art. 7 section 5(a) GA (inclusion of liabilities incurred already at an earlier point)

The newly added Recital 22(a) of the GA adopts the content of Recital 21 of the Commission's draft but softens it with the option for national deviation and additionally establishes a necessary package deal consisting of making owed payments under current deliveries and of the inclusion of liabilities incurred at an earlier point in a suspension.

Art. 7 section 5(a) GA, however, does not adopt this package deal for the wording of the directive, but only provides for an inclusion of liabilities incurred already at an earlier point into the limiting effect of suspension. The obligation of the debtor to pay outstanding deliveries as contained in Recital 21 sentence 4 of the Commission's proposal is not repeated here. This follows the draft of the Commission that also did not provide for such a package deal in Art. 7 section 4.

The Parliament had therefore included in Art. 7 section 4 the proviso that the obligation of the affected creditors as stated in that section must not bring the affected creditors themselves into financial difficulties. The GA now deviates from this creditor-protecting line, which is urgently required at this point as corrective action.

The regulation with identical wording offered as compensation by the Commission and the GA in Art. 7 section 6, which the Parliament did not adopt, cannot provide a compensation at this point. It only makes clear that the Directive did not want to keep the debtor from the payment for ongoing deliveries.

In Art. 7, section 5(a) GA should not be adopted, and section 4 in the wording of the Parliament should be adopted instead.

17) Recital 28 und 28(a) / Art. 9-12 GA (protection of minority creditors)

The Recitals 28 and 28(a) as well as the corresponding regulations in Art. 9-12 GA make the attempt of replacing the changes to protect minority creditors introduced by the Parliament with other regulations that are allegedly less obstructive to a decision being adopted.
For this purpose and first of all, these ignore the principle introduced by the Parliament in Recital 28 sentence 1 and Art. 9 section 4 sentence 1 that in addition to a majority of creditors within each group of affected creditors also a majority of all affected creditors would be required to adopt a plan.
In deviation from the draft of the Commission, the GA only proposes to provide for a facultative (instead of mandatory) option for plan approval if a majority in each class of affected creditors is not achieved.

This means that it is left to the member states to implement this highly problematic regulation despite its negative effects on classes that do not agree. In order to at least mitigate the disadvantages, which are especially obvious in case of a cross-class cram-down, the GA proposes in Recital 28 sentence 3 and 4 a fall-back solution. Yet at the same time it stresses in sentence 5 that all member states must not provide for an acceptance by the majority within all classes. According to the wording of Recital 28 sentence 6, the GA is intending to prevent the situation where a rejection by one class if only two classes are formed can derail a plan.
Here, however, the Parliament offers a much more convincing solution. The majority support by all affected creditors demanded by the Parliament ensures that it is not possible for an actual rejection by the majority of creditors to be ignored by a clever establishment of the classes.

Finally, with Recital 28(a) the GA makes the attempt of further moderating the disadvantages of its proposal for creditors in cross-class cram-downs. To achieve this, it allows the member states several compensation varieties that are to ensure that rejecting creditors

must be largely or completely satisfied before lower-tier creditors obtain satisfaction under the restructuring plan.

Even more flexibility is ultimately accorded under Recital 28(a) sentence 4 GA that permits the member states a preferential treatment of shareholders and certain suppliers of essential utilities and therefore a deviation from the initially postulated principle of complete satisfaction of rejecting higher-priority creditors. In regard to shareholders, reasons of fairness[7] that are not described in detail are cited. This version would permit proceedings with extensive debtor-friendly premises and would simultaneously strip affected creditors even of the minimum protection of their rank under insolvency law, which they would retain under insolvency proceedings.

In Art. 9 section 3, the GA does not want to permit the review of voting rights of creditors as demanded by the Parliament. The GA may well adopt the possibility of an earlier review as introduced by the Parliament, which would prevent a delay in the proceedings by the review process, but at the disadvantage of the creditors actually entitled to vote, the creditors without voting rights are not to be kept from voting. This opens up considerable potential for abuse, for example via creditors "invented" by the debtor. The solution of the Parliament is therefore much more preferable at this point.

In Art. 9 section 4 sentence 1, the GA maintains the widely criticised wording of the Commission's draft that had provided only for a so-called summary majority and no per-head majority in each class of creditors for acceptance of the restructuring plan. This reduction of creditor protection aims at a definition of classes in which a few creditors act at the disadvantage of a majority of creditors and in doing so put their own interests before the interests of this majority. This possibility also illustrates how important the review of voting rights as set out above is.

The proposals set out in the Recitals 28 and 28(a) as well as Art. 9-12 regarding creditor protection in the voting on restructuring plans fall in part short of the ideas of the Parliament and even the draft of the Commission at the disadvantage of some affected creditors and should therefore not be adopted.

[7] The fairness test proposed in Art 11 section 2(a) GP affects, according to its wording, only rejecting creditors and can therefore not be applied to shareholders.

18) Recital 29 sentence 1 / Art. 12 GA (reservation of approval of a majority of creditor groups)

In Recital 29 sentence 1 and Art. 12 as well the GA does not adopt the reservation of approval of a majority of creditor groups as provided for in the wording of the Parliament.
Instead, Recital 29 sentence 2 and 5 et seqq. propose an alternative version that offers member states the option of several different versions.
The reservation of acceptance as introduced by the Parliament, however, is more suited to ensure that indeed only such restructuring plans intervene in the rights of shareholders that are also supported by the majority of creditor classes and which therefore are likely to be accepted.
In contrast, the solution proposed by the GA opens up considerable legal uncertainty if it uses factors such as size, limiting effect on shareholder rights or the type of shareholders as a basis for the assessment of justification of interventions from the group of shareholders.
It seems highly likely that such criteria will give rise to severe legal disputes, the resolution of which would have to be awaited even just in order to protect the assets of the shareholders before any intervention can take place.

Art. 12 section 1 should not be adopted in the form as proposed by the GA. Instead, the wording of the Commission should be supplemented by reserving approval by the majority of creditor classes as proposed by the Parliament.

19) Recital 30(c) sentence 2 GA (unknown claims)

For the first time, Recital 30(c) sentence 2 GA also includes unknown claims in the potential scope of restructuring plans.
The affected party is defined in Art. 2 section 3 as a creditor whose claims are directly affected by a restructuring plan. These creditors, according to Art. 8 section 1(c), do not have to be listed by name in a restructuring plan, but it is necessary to list their claims that fall under the restructuring plan in the restructuring plan.
This listing ensures that all affected creditors have an overview over their share in the restructuring and can therefore gauge whether they will be inappropriately disadvantaged or limited in comparison to other creditors. A determination of majority relationships such as envisaged in Art. 9 section4 for the acceptance of the plan is also possible only if all claims of the affected creditors are known.
Recital 30(c) sentence 1 and Art. 10 section 2 (ab) of the GA therefore now also supplement the acceptance requirements with the ruling that the restructuring plan was sent to all affected parties in accordance with national law.

Recital 30(c) sentence 2 does now, however, seem to be of the opinion that also unknown claims can be included in the effects of the plan because the Recital allows members states to provide for a special form of sending also for such claims and to thus bring about the acceptance effects of Art. 14 section 1 for such claims as well.

First of all, this contradicts the regulation Art. 8 section 1(c) as cited above.
Unknown claims can per definitionem not be listed in a restructuring plan. If this were to be permitted, an abstract description of the reason for indebtedness (e.g. a contract) would be sufficient for bringing about the plan effects and the described protective regulations in favour of the affected creditors would be futile. Since the affected creditors do not have an overview over the total liabilities of the debtor, they may not be able to oppose any attempted abuse. The debtor could simply not name problematic creditors and could include their claims in the scope of the restructuring plan by way of a general description of the reason of indebtedness. Affected creditors would also become aware of the acceptance after the plan was approved and would not be able to exercise their voting rights pursuant to Art. 9 section 1. During the approval process, they may not even be protected by Art. 10 section 2(b) GA that only provides for a review of the plan based on the criterion of creditor interest if there were creditors who rejected the plan.
Art. 14 section 2 GA may now provide for the member states to ensure that creditors who were not involved in the approval of a restructuring plan under national law are not affected by the plan. The reference to national law added by the GA, however, leaves open the option for a national regulation possibly refraining from involvement under certain circumstances. This option corresponds to the discussed expansion of the restructuring proceedings to unknown claims.

Ultimately, such extension of restructuring measures to unknown claims has to be strictly rejected, not just because it opens up extensive potential for abuse, but also because it moves the restructuring proceedings in its effects alongside insolvency proceedings. In these, effectiveness for all creditors is one of the underlying principles that simultaneously necessitates the compliance with legal protective regulations. Bypassing these protective regulations by initiating restructuring proceedings with simultaneous equivalence of the effect of such proceedings would at this point raise the question of the sense of insolvency proceedings.

Recital 30(c) sentence 2 GA should not be adopted..

20) Recital 31 sentence 2 GA (definition of financial support)

With Recital 31 sentence 2, the GA extends the definition of financial support in order to exempt it from the effects of contested insolvency proceedings the goal of which is to declare such financing in later insolvency proceedings as void, contestable or unenforceable as actions that place the creditors in their entirety at a disadvantage.

Already the introduction of such an exception meets with fundamental and justified criticism because it results in the undifferentiated replacement of national law at this point, despite the criteria of the so-called serious restructuring attempt that were developed, for example under German insolvency law, that prevent the aimless and general contestation of insolvency in regard to such financial aid.
Its extension to the provision of financial aid or third-party guarantees as well as goods, inventory, raw materials, and utilities services, for example by granting the debtor a longer repayment period, may initially seem justified in order to the put the trade creditors on equal footing. They would otherwise be at a considerable disadvantage compared to financial creditors in a potential subsequent insolvency.

At the same time, however, it cannot be correct to postulate an exception to contestation of insolvency based simply on a change of payment periods. This would open up considerable potential for abuse. Together with the debtor, creditors would be able to significantly improve their own situation in a subsequent insolvency at the costs of all other creditors by making even the smallest of concessions. Under the threat of a significant worsening of delivery conditions in the future or even the termination of deliveries, major suppliers could force their inclusion in a plan under conditions that see them get off very lightly (e.g. smallest concessions regarding payment targets) in order to take precautions regarding any subsequent insolvency of the debtor.

Apart from the above, placing extended payment targets within the definition of interim financing or new financing seems at least doubtful, since no new resources in order to overcome the crisis are made available to the debtor at this point.

In Recital 31 sentence 2 GA, the mention of granting longer repayment terms should not be adopted.