MERGER AND DIVISION OF A COMPANY IN THE EU LIQUIDATION AND BANKRUPTCY

TAIEX

Workshop on European Company Law and Corporate Governance

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MERGERS & DIVISIONS INTRODUCTION

- MERGERS & DIVISIONS: 2 approaches:
- - formal (legal):
  - - substantive law (company types, shareholders' rights, employees' rights, creditors' rights, the new company's / companies memorandum/s & articles of association)
  - - procedural law (draft merger / division terms, publication (in the trade register and / on the company's website and/or the official journal), report explaining the merger / division to shareholders and employees, independent expert report, access of shareholders to documents before the general meeting, approval by the general meeting)
- - functional (economic): competition rules - concentration, control

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DIRECTIVE (EU) 2017/1132
Mergers of public limited liability companies

- Limited liability companies: Annex I (Croatia: dioničko društvo; Slovenia: delniška družba;)
- NOT applicable to:
  - cooperatives
  - company or companies which are being acquired or will cease to exist if they are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings
  - company or companies which are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU (financial institutions & similar)

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- MERGER BY ACQUISITION = the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.
- MERGER BY FORMATION OF A NEW COMPANY = the operation whereby one or more companies are wound up without going into liquidation and transfer to A NEW COMPANY all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

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- A MS may provide that merger by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

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- DRAFT TERMS OF MERGER shall specify at least:
- (a) the type, name and registered office of each of the merging companies;
- (b) the share exchange ratio and the amount of any cash payment;
- (c) the terms relating to the allotment of shares in the acquiring company;
- (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
- (e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;
- (f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
- (g) any special advantage granted to the experts referred to in Article 96(1) and members of the merging companies' administrative, management, supervisory or controlling bodies.

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- PUBLICATION OF THE DRAFT TERMS OF MERGER:
- - according to the laws of the MS, at least one month before the date fixed for the general meeting
- - exemption from the publication requirement if, for a continuous period beginning at least one month before the date fixed for the general meeting it makes the draft terms of such merger available on its website free of charge for the public + adequate security of the website and authenticity of the documents.
- - derogation from the exemption: MS may require that publication be effected via the central electronic platform / any other website designated by them for that purpose (free of charges other than the costs in respect of the central electronic platform) and a reference giving access to that website shall be published on the central electronic platform at least one month before the date fixed for the general meeting
- MS may require companies to maintain the information for a specific period after the general meeting on their website / on the central electronic platform /on the other website designated by the MS concerned.

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- APPROVAL BY THE GENERAL MEETING OF EACH OF THE MERGING COMPANIES
- - at least the approval of the general meeting of each of the merging companies -> a majority of not less than two thirds of the votes attached either to the shares or to the subscribed capital represented.
- - derogation : MS may, however, provide -> simple majority of the votes sufficient when at least half of the subscribed capital is represented + where appropriate, the rules governing alterations to the memorandum and articles of association shall apply.
- - where more than one class of shares, the decision concerning a merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction.
- - decision shall cover both the approval of the draft terms of merger and any alterations to the memorandum and articles of association necessitated by the merger.
- - Art. 94 - derogation from the requirement of approval by the general meeting of the acquiring company

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- DETAILED WRITTEN REPORT AND INFORMATION ON A MERGER
- - the administrative / management bodies of the merging companies -> a detailed written report explaining the draft terms + the legal and economic grounds for them, esp. the share exchange ratio + any special valuation difficulties which have arisen.
- - the administrative / management bodies shall inform the general meeting of their company and the administrative or management bodies of the other companies involved of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger.
- - derogation: the report and/or the information shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed

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- EXAMINATION OF THE DRAFT TERMS OF MERGER BY EXPERTS
- - one or more experts, on behalf of each of the merging companies but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of merger and draw up a written report to the shareholders.
- - exception: if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger agree => NO EXPERT REPORT
- - derogation: one or more independent experts (natural person or legal entity) for all the merging companies, if such appointment is made by a judicial or administrative authority at the joint request of those companies.
- - report: opinion on whether the share exchange ratio is fair and reasonable

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- AVAILABILITY OF DOCUMENTS FOR INSPECTION BY SHAREHOLDERS
- - shareholders entitled to inspect at least the following documents at least one month before the date fixed for the general meeting which is to decide on the draft terms of merger:
- (a) the draft terms of merger;
- (b) the annual accounts and annual reports of the merging companies for the preceding 3 financial years;
- (c) an accounting updating statement
- (d) the reports of the administrative or management bodies of the merging companies, if applicable
- (e) the report of the experts
- - Art. 97 - exemptions

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- PROTECTION:

- Protection of employees' rights: in accordance with Directive 2001/23/EC.
- Protection of the interests of creditors: MS shall provide an adequate system of protection of the interests of creditors with claims are prior to and not due at the publication of the draft terms of merger: adequate safeguards + creditors are authorised to apply to the administrative / judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company. Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.
- Protection of the interests of debenture holders of the merging companies: same as creditors, except where the merger has been approved by a meeting of the debenture holders, / debenture holders individually.
- Protection of holders of securities, other than shares, to which special rights are attached: rights in the acquiring company at least equivalent to those in the company being acquired, unless the alteration of those rights has been approved by a meeting of the respective holders / holders of those securities individually / holders are entitled to have their securities repurchased by the acquiring company.

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- DRAWING UP AND CERTIFICATION OF DOCUMENTS IN DUE LEGAL FORM
- If MS law does not provide for judicial or administrative preventive supervision of the legality of mergers / where the merger need not be approved by the general meetings of all the merging companies =>
- the minutes of the general meetings which decide on the merger + the merger contract subsequent to such general meetings / the draft terms of merger shall be drawn up and certified in due legal form.
- The notary / the authority competent to draw up and certify the document in due legal form shall check and certify the existence and validity of the legal acts and formalities required of the company for which that notary or authority is acting and of the draft terms of merger.
- DATE ON WHICH A MERGER TAKES EFFECT: according to the MS law
- PUBLICATION FORMALITIES: according to the MS law. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

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- CONSEQUENCES OF A MERGER: *ipso jure* and simultaneously:
- (a) the transfer, both as between the company being acquired and the acquiring company and, as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;
- (b) the shareholders of the company being acquired become shareholders of the acquiring company; and
- (c) the company being acquired ceases to exist.
- No shares in the acquiring company shall be exchanged for shares in the acquired company held either:
- (a) by the acquiring company itself or through a person acting in his own name but on its behalf; or
- (b) by the company being acquired itself or through a person acting in his own name but on its behalf.
- MS laws may require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties.

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- CIVIL LIABILITY:
  - OF THE MEMBERS OF THE ADMINISTRATIVE OR MANAGEMENT BODIES OF THE COMPANY BEING ACQUIRED: according to the MS laws
  - OF THE EXPERTS RESPONSIBLE FOR DRAWING UP THE EXPERT REPORT ON BEHALF OF THE COMPANY BEING ACQUIRED: according to the MS laws

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- CONDITIONS FOR NULLITY OF A MERGER
- (a) nullity is to be ordered in a court judgment;
- (b) after taking effect, only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
- (c) nullification proceedings may not be initiated more than 6 months after the date on which the merger becomes effective as against the person alleging nullity or where the situation has been rectified;
- (d) where it is possible to remedy a defect liable to render a merger void, the competent court is to grant the companies involved a period of time within which to rectify the situation;

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- CONDITIONS FOR NULLITY OF A MERGER
- (e) a judgment declaring a merger void is to be published the same as the merger
- (f) if permitted by the MS laws, a third party may challenge such a judgment no later than 6 months after publication of the judgment
- (g) a judgment declaring a merger void does not of itself affect the validity of obligations owed by or in relation to the acquiring company which arose before the judgment was published and after the date on which the merger takes effect; and
- (h)companies which have been parties to a merger are jointly and severally liable in respect of the obligations of the acquiring company referred to in point (g).
- - derogation: the nullity of a merger may be ordered by an administrative authority if an appeal against such a decision lies to a court.

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- MERGER BY FORMATION OF A NEW COMPANY = the operation whereby one or more companies are wound up without going into liquidation and transfer to A NEW COMPANY all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.
- IN PRINCIPLE, THE SAME RULES APPLY
- 'merging companies' and 'company being acquired' = the companies which will cease to exist,
- 'acquiring company' = the new company.
- The draft terms of merger and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of the new company shall be approved at a general meeting of each of the companies that will cease to exist.

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- ACQUISITION OF ONE COMPANY BY ANOTHER WHICH HOLDS 100 % OF ITS SHARES
- TRANSFER OF ALL ASSETS. In principle, the same rules, except:
- DRAFT TERMS do NOT NEED to specify : the share exchange ratio and the amount of any cash payment; the terms relating to the allotment of shares in the acquiring company; the date from which the holding of such shares entitles the holders to participate in profits / any special conditions affecting that entitlement;
- NO NEED for a DETAILED WRITTEN REPORT AND INFORMATION ON A MERGER
- NO NEED for the EXAMINATION OF THE DRAFT TERMS OF MERGER BY EXPERTS
- NO NEED to ensure the shareholders may examine the administrators' / experts' reports
- NO *ipso jure* effect that the shareholders of the company being acquired become shareholders of the acquiring company
- NO civil liability of members of the administrative / management bodies of the company being acquired / experts responsible for drawing up the expert report on behalf of the company being acquired

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Mergers of public limited liability companies

- ACQUISITION OF ONE COMPANY BY ANOTHER WHICH HOLDS 100 % OF ITS SHARES
- NO NEED for the APPROVAL BY THE GENERAL MEETING OF EACH OF THE MERGING COMPANIES, if:
- (a) the publication of the draft terms of the merger is effected, as regards each company involved in the operation, at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of the acquiring company are entitled to inspect: the draft terms of merger; the annual accounts and annual reports of the merging companies for the preceding 3 financial years; an accounting updating statement
- (c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital is entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger
- THE SAME RULES apply if all the shares and other securities of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

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DIRECTIVE (EU) 2017/1132
Mergers of public limited liability companies

- ACQUISITION OF ONE COMPANY BY ANOTHER WHICH HOLDS > 90 % but < 100% OF ITS SHARES
- NO NEED for the APPROVAL BY THE GENERAL MEETING OF EACH OF THE MERGING COMPANIES, if:
- (a) the publication of the draft terms of the merger is effected, as regards each company involved in the operation, at least one month before the operation takes effect;
- (b)at least one month before the operation takes effect, all shareholders of the acquiring company are entitled to inspect: the draft terms of merger; the annual accounts and annual reports of the merging companies for the preceding 3 financial years; an accounting updating statement, where applicable, the reports of the administrative or management bodies of the merging companies and the expert report
- (c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital is entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger
- THE SAME RULES apply if all the shares and other securities of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Mergers of public limited liability companies

- ACQUISITION OF ONE COMPANY BY ANOTHER WHICH HOLDS >90 % but < 100% OF ITS SHARES
- The MS shall not impose the requirements set out above for an acquisition of one company by another which holds > 90% but < 100% of its shares if the following conditions are fulfilled:
- (a) the minority shareholders of the company being acquired are entitled to have their shares acquired by the acquiring company; + (b) if they exercise that right, they are entitled to receive consideration corresponding to the value of their shares; + (c)in the event of disagreement regarding such consideration, it is possible for the value of the consideration to be determined by a court or by an administrative authority designated by the Member State for that purpose.
- A Member State need not apply the first paragraph if the laws of that Member State entitle the acquiring company, without a previous public takeover offer, to require all the holders of the remaining securities of the company or companies to be acquired, to sell those securities to it prior to the merger at a fair price.
- The MS may apply the rules above to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if > 90 % but < 100 % of the shares and other securities of the company or companies being acquired are held by that acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

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DIRECTIVE (EU) 2017/1132
Mergers of public limited liability companies

- OTHER OPERATIONS TREATED AS MERGERS
- Mergers with cash payment exceeding 10 % - in case the laws of a MS permits a cash payment that exceeds 10%, THE SAME RULES APPLY
- Mergers without all of the transferring companies ceasing to exist - in case the laws of a MS permits a merger without all of the transferring companies ceasing to exist, THE SAME RULES APPLY

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Cross-border mergers (CBM) of limited liability companies (LLC)

- These rules apply to mergers of limited liability companies (LLC) formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as 'cross-border mergers' (CBM)).
- ALSO APPLICABLE TO CBMs where the law of at least one of the MSs concerned allows the cash payment exceeding 10 %.
- MSs may decide not to apply these rules to CBMs involving a cooperative society
- THESE RULES DO NOT APPLY TO CBMs involving companies the object of which is collective investment of capital or involving companies which are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU (financial institutions & similar).

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Cross-border mergers (CBM) of limited liability companies (LLC)

- DEFINITIONS:
- A limited liability company (LLC) is:
- (a) a company of a type listed in Annex II (in Slovenia: delniška družba, družba z omejeno odgovornostjo, komaditna delniška družba; in Croatia: dioničko društvo, društvo s ograničenom odgovornošću;); or
- (b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and that is subject, under the national law governing it, to conditions concerning guarantees such as are provided for by Section 2 of Chapter II of Title I and Section 1 of Chapter III of Title I for the protection of the interests of members and others;

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- DEFINITIONS:
- ‘MERGER’ means
- (a) an operation whereby: one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

MERGERS & DIVISIONS
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Cross-border mergers (CBM) of limited liability companies (LLC)

- CONDITIONS (cumulative):
- (a) CBMs shall only be possible between types of companies which may merge under the national law of the relevant MSs;
- (b) a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject (national authorities may oppose on grounds of public interest, but also on grounds such as public security, plurality of the media and according to the MS's prudential rules). The national authorities may take into account also: the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees and minority members who have opposed the cross-border merger.

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Cross-border mergers (CBM) of limited liability companies (LLC)

- The COMMON DRAFT TERMS OF CROSS-BORDER MERGERS are THE SAME as DRAFT TERMS for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES, +
- the likely repercussions of the cross-border merger on employment;
- the statutes of the company resulting from the cross-border merger;
- where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined
- information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
- dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

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DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- The PUBLICATION OF CROSS-BORDER MERGERS is THE SAME as THE PUBLICATION for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES, in the manner prescribed by the laws of each Member State for each of the merging companies at least one month before the date of the general meeting which is to decide thereon +
- the following particulars shall be published in the national gazette of that Member State:
- (a) the type, name and registered office of every merging company;
- (b) the register in which the documents to be disclosed by each LLC are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

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DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- The REPORTS OF THE MANAGEMENT OR ADMINISTRATIVE ORGANS OF the companies involved in the CROSS-BORDER MERGERS are THE SAME as REPORTS for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES
- These report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting
- Where the management or administrative organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be appended to the report.

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Cross-border mergers (CBM) of limited liability companies (LLC)

- The INDEPENDENT EXPERT REPORT for each of the companies involved in the CROSS-BORDER MERGERS is THE SAME as the REPORT for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES. Depending on the law of each Member State, such experts may be natural persons or legal persons.
- Alternatively, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.
- Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- The APPROVAL BY THE GENERAL MEETING of each company involved in the CBM is THE SAME as the APPROVAL for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES.
- The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.
- THE SAME DEROGATIONS as the derogations for the MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- PRE-MERGER CERTIFICATE

- Each MS shall designate the court, notary or other authority competent to scrutinise the legality of the CBM as regards that part of the procedure which concerns each merging company subject to its national law.
- In each MS concerned the authority referred to above shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.
- If the law of a MS provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies explicitly accept, when approving the draft terms of the cross-border merger, the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. In such cases, the authority may issue the certificate even if such procedure has commenced. The certificate shall, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members..

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Cross-border mergers (CBM) of limited liability companies (LLC)

- SCRUTINY OF THE LEGALITY OF THE CROSS-BORDER MERGER
- Each MS shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 133.
- For this purpose, each merging company shall submit to the authority the pre-merger certificate within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting.

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Cross-border mergers (CBM) of limited liability companies (LLC)

- THE DATE ON WHICH THE CROSS-BORDER MERGER TAKES EFFECT

- The law of the MS to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date shall be after the scrutiny of the legality of the cross-border merger.

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Cross-border mergers (CBM) of limited liability companies (LLC)

- REGISTRATION
- The law of each of the MSs to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements for publicising the completion of the cross-border merger in the public register in which each of the companies is required to file documents.
- The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection of registers, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, and not before.

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Cross-border mergers (CBM) of limited liability companies (LLC)

- CONSEQUENCES OF A CROSS-BORDER MERGER: 2 situations
- 1) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, OR a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital =====>
- (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
- (b) the members of the company being acquired shall become members of the acquiring company;
- (c) the company being acquired shall cease to exist.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- CONSEQUENCES OF A CROSS-BORDER MERGER: 2 situations
- 2) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company =====>
- (a) all the assets and liabilities of the merging companies shall be transferred to the new company;
- (b) the members of the merging companies shall become members of the new company;
- (c) the merging companies shall cease to exist.

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DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- CONSEQUENCES OF A CROSS-BORDER MERGER:
- Where, in the case of a CBM of companies, the laws of the MSs require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the CBM.
- The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the CBM takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the CBM on the date on which the CBM takes effect.
- No shares in the acquiring company shall be exchanged for shares in the company being acquired held either: by the acquiring company itself or through a person acting in his or her own name but on its behalf / by the company being acquired itself or through a person acting in his or her own name but on its behalf.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- SIMPLIFIED FORMALITIES:

- 1. Where a CBM by acquisition is carried out by a company which holds 100% shares and other securities conferring the right to vote at general meetings of the company or companies being acquired: NO NEED to mention: the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment; the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger; the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement; NO NEED for the independent expert report; the members of the company being acquired DO NOT become members of the acquiring company; NO NEED for the general meeting of the company being acquired to decide on the approval of the common draft terms of cross-border merger.
- 2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- EMPLOYEE PARTICIPATION:

- PRINCIPLE: the company resulting from the CBM shall be subject to the rules in force concerning employee participation, if any, in the MS where it has its registered office.
- EXCEPTION: the rules in force concerning employee participation, if any, in the MS where the company resulting from the CBM has its registered office shall not apply, where at least one of the merging companies has, in the six months prior to the publication of the draft terms of the CBM, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation / provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights; in these cases, the participation of employees in the company resulting from the CBM is to be regulated by Regulation (EC) No 2157/2001 and Directive 2001/86/EC.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Cross-border mergers (CBM) of limited liability companies (LLC)

- VALIDITY:

- A cross-border merger which has taken effect may not be declared null and void.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies

- DIVISION BY ACQUISITION: the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (= 'recipient companies') and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.
- DIVISION BY THE FORMATION OF NEW COMPANIES: the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies

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- A MS's laws may provide that division by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies

- PRINCIPLE: THE RULES APPLICABLE TO THE MERGERS BY ACQUISITION APPLY, CORRESPONDINGLY =>
- 'MERGING COMPANIES' shall mean 'THE COMPANIES INVOLVED IN A DIVISION'
- 'COMPANY BEING ACQUIRED' shall mean 'THE COMPANY BEING DIVIDED',
- 'ACQUIRING COMPANY' shall mean 'EACH OF THE RECIPIENT COMPANIES'
- 'DRAFT TERMS OF MERGER' shall mean 'DRAFT TERMS OF DIVISION'.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- THE DRAFT TERMS OF DIVISION: the same rules applicable to the draft terms of merger +
- - the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;
- - the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.
- (VERY IMPORTANT) Where an asset is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, the asset or the consideration therefor shall be allocated to all the recipient companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.
- (VERY IMPORTANT) Where a liability is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it. Member States may provide that such joint and several liability be limited to the net assets allocated to each company.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- PUBLICATION OF THE DRAFT TERMS OF DIVISION : the same rules applicable to the publication of the draft terms of merger
- THE APPROVAL BY THE GENERAL MEETING OF EACH COMPANY INVOLVED IN A DIVISION : the same rules applicable to the approval by the general meeting of each company involved in a merger +
- (VERY IMPORTANT) Where shares in the recipient companies are allocated to the shareholders of the company being divided otherwise than in proportion to their rights in the capital of that company, MSs may provide that the minority shareholders of that company may exercise the right to have their shares purchased. In such case, they shall be entitled to receive consideration corresponding to the value of their shares. In the event of a dispute concerning such consideration, it shall be possible for the consideration to be determined by a court.
- DEROGATION FROM THE REQUIREMENT OF APPROVAL BY THE GENERAL MEETING OF A RECIPIENT COMPANY: the same rules applicable to the merger by acquisition

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- THE DETAILED WRITTEN REPORT AND INFORMATION ON A DIVISION
- THE EXAMINATION OF THE DRAFT TERMS OF DIVISION BY EXPERTS
- THE AVAILABILITY OF DOCUMENTS FOR INSPECTION BY SHAREHOLDERS
- THE SIMPLIFIED FORMALITIES
- THE PROTECTION OF EMPLOYEES' RIGHTS

- ====➔ the same rules applicable to the merger by acquisition

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- THE PROTECTION OF THE INTERESTS OF CREDITORS / DEBENTURE HOLDERS OF COMPANIES INVOLVED IN A DIVISION;
- THE JOINT AND SEVERAL LIABILITY OF THE RECIPIENT COMPANIES
- ====➔ the same rules applicable to the merger by acquisition +
- In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation.
- MSs may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred.
- However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Art. 157 and a majority in number representing three-quarters in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to point (c) of Article 157 (l).

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- DIVISIONS UNDER THE SUPERVISION OF A JUDICIAL AUTHORITY
- IF the division operations are subject to the supervision of a judicial authority having the power:
- (a) to call a general meeting of the shareholders of the company being divided to decide upon the division;
- (b) to ensure that the shareholders of each of the companies involved in a division have received or can obtain at least the documents referred to in Art. 143 in time to examine them before the date of the general meeting of their company called to decide upon the division;
- (c) to call any meeting of creditors of each of the companies involved in a division to decide upon the division;
- (d) to ensure that the creditors of each of the companies involved in a division have received or can obtain at least the draft terms of division in time to examine them before the date of the general meeting of their company called to decide upon the division
- (e) to approve the draft terms of division.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- THEN:
- IF judicial authority establishes that the conditions referred to in points (b) and (d) have been fulfilled and that no prejudice would be caused to shareholders or creditors, it may relieve the companies involved in the division from applying / fulfilling:
- (a) the publication of the draft terms of division, on condition that the adequate system of protection of the interest of the creditors covers all claims regardless of their date;
- (b) the first two conditions for the derogation
- (c) the obligation to ensure the availability of documents for inspection by shareholders

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- THE JOINT AND SEVERAL LIABILITY OF THE RECIPIENT COMPANIES
- Member States may provide that the recipient companies shall be jointly and severally liable for the obligations of the company being divided. In such case they need not apply the above-mentioned rules.
- Where a Member State combines the system of creditor protection with the joint and several liability of the recipient companies, it may limit such joint and several liability to the net assets allocated to each of those companies.
- THE PROTECTION OF HOLDERS OF SECURITIES, OTHER THAN SHARES, TO WHICH SPECIAL RIGHTS ARE ATTACHED ====➔ the same rules applicable to the merger by acquisition

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- DRAWING UP AND CERTIFICATION OF DOCUMENTS IN DUE LEGAL FORM ====➔ the same rules applicable to the merger by acquisition

- THE DATE ON WHICH A DIVISION TAKES EFFECT : the laws of Member States shall determine the date on which a division takes effect.

- THE PUBLICATION FORMALITIES ====➔ the same rules applicable to the merger by acquisition

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- CONSEQUENCES OF A DIVISION: *ipso jure* and simultaneously:
- (a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Art. 137(3) (applicable for the situation an asset / a liability is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible);
- (b) the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;
- (c) the company being divided ceases to exist.
- No shares in a recipient company shall be exchanged for shares held in the company being divided either: (a) by that recipient company itself or by a person acting in his own name but on its behalf; or (b) by the company being divided itself or by a person acting in his own name but on its behalf.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by acquisition

- CIVIL LIABILITY OF MEMBERS OF THE ADMINISTRATIVE OR MANAGEMENT BODIES OF A COMPANY BEING DIVIDED
- The laws of MSs shall at least lay down rules governing the civil liability of members of the administrative or management bodies of a company being divided towards the shareholders of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the division and the civil liability of the experts responsible for drawing up for that company the report in respect of misconduct on the part of those experts in the performance of their duties.
- THE CONDITIONS FOR NULLITY OF A DIVISION = THE CONDITIONS FOR NULLITY OF A MERGER

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132
Divisions of public limited liability companies - division by formation of new companies

- DIVISION BY THE FORMATION OF NEW COMPANIES: the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.
- IN PRINCIPLE, THE RULES APPLICABLE TO THE DIVISION BY ACQUISITION ARE APPLICABLE TO THE DIVISION BY FORMATION OF NEW COMPANIES +
- - the draft terms of division shall also indicate the form, name and registered office of each of the new companies.
- - the draft terms of division and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of each of the new companies shall be approved at a general meeting of the company being divided.

MERGERS & DIVISIONS
DIRECTIVE (EU) 2017/1132

Divisions of public limited liability companies – other operations treated as divisions

- DIVISIONS WITH CASH PAYMENT EXCEEDING 10 %
- DIVISIONS WITHOUT THE COMPANY BEING DIVIDED CEASING TO EXIST

- =====➔ the rules applicable to the other operations treated mergers apply

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- TFEU Art. 3 (1) b – The Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market;
- TFEU Art. 4 (1) provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition
- TFEU Art. 101 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (especially cartels)
- TFEU Art. 102 prohibits the abuse of a dominant position: ~~BIG IS BAD~~ BIG MAY BE BAD
- TFEU Art. 107 prohibits State aid.
- What do MERGERS and DIVISIONS have to do with it ?

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- CORPORATE REORGANISATION = > CONCENTRATIONS
- Reg. 139/2004, Art. 3: A concentration shall be deemed to arise where a change of control on a lasting basis results from:
- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- Reg. 139/2004 Art. 3 (2), Art. 4 CONTROL shall be constituted by rights, contracts or any other means which, either separately or in combination confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
- (c) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity
- 3. Control is acquired by persons or undertakings which:
- (a) are holders of the rights or entitled to rights under the contracts concerned; or
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- NO CONCENTRATIONS:
- (a) when credit / financial institutions hold on a temporary basis securities with a view to reselling them, provided that they do not exercise voting rights;
- (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in (b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- THE RELEVANT CONCENTRATIONS = concentrations with a Community dimension:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- THE RELEVANT CONCENTRATIONS = concentrations with a Community dimension:
- A concentration that does not meet the abovementioned thresholds has a Community dimension where:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- APPRAISAL OF CONCENTRATIONS:
- The concentrations with a Community dimension are appraised by the Commission with a view to establishing whether or not they are compatible with the common market.
- ➔ A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
- ➔ A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
- To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised with a view to establishing whether or not the operation is compatible with the common market.

MERGERS & DIVISIONS
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MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- APPRAISAL OF CONCENTRATIONS:
- Concentrations with a Community shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
- A concentration which consists of a merger or in the acquisition of joint control shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be.
- The Commission:
- (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
- (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

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- (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- APPRAISAL OF CONCENTRATIONS:
- The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.
- (c) Where the Commission finds that a concentration fulfils the criterion defined in Art. 2(3) (concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position) or does not fulfil the criteria laid down in Art. 101 (3) TFEU, it shall issue a decision declaring that the concentration is incompatible with the common market.

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- APPRAISAL OF CONCENTRATIONS:
- Where the Commission finds that a concentration: (a) has already been implemented and that concentration has been declared incompatible with the common market, or (b) has been implemented in contravention of a condition attached to a conditional decision, which has found that, in the absence of the condition, the concentration would be incompatible with the common market, the Commission may:
- - require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration;
- -in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
- - order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.
- - take interim measures

MERGERS & DIVISIONS
THE ECONOMIC APPROACH

- PUBLICATION OF DECISIONS
- The Commission shall publish its decisions together with the opinion of the Advisory Committee in the Official Journal of the European Union. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.
- JUDICIAL REVIEW
- Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.
- No MS shall apply its national legislation on competition to any concentration that has a Community dimension.
- MSs may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.
- Public security, plurality of the media and prudential rules shall be regarded as legitimate interests

VOLUNTARY LIQUIDATION

- NO EU uniform substantive law RULES ➔
- VOLUNTARY LIQUIDATION is a matter regulated by the Member States' legislations
- Directive 2017/1132, Art. 14 "Documents and particulars to be disclosed by companies":
- Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:
- (h) the winding-up of the company;
- (j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;
- (k) any termination of a liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.

INSOLVENCY
REGULATION 848/2015 (INSOLVENCY REGULATION RECAST)

- NO EU harmonized substantive law rules, BUT
- REGULATION 848/2015 ➔ PRIVATE INTERNATIONAL LAW RULES ➔ THE APPLICABLE LAW
- Regulation 848/2015 is applicable to PUBLIC COLLECTIVE PROCEEDINGS, including *INTERIM PROCEEDINGS*, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
- (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
- (b) the assets and affairs of a debtor are subject to control or supervision by a court; or
- (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

INSOLVENCY
REGULATION 848/2015 (INSOLVENCY REGULATION RECAST)

- NOT applicable to:
- (a) insurance undertakings;
- (b) credit institutions;
- (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or
- (d) collective investment undertakings.

INSOLVENCY
REGULATION 848/2015

- INTERNATIONAL JURISDICTION

- The courts of the MS within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('MAIN INSOLVENCY PROCEEDINGS'). The centre of main interests (COMI) shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
- In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary. (presumption only applicable if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings).

INSOLVENCY
REGULATION 848/2015

- INTERNATIONAL JURISDICTION
- In the case of an individual exercising an independent business or professional activity, the COMI shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. (the same rule on the presumption)
- In the case of any other individual, the COMI shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. (the same rule on the presumption).
- Where the debtor's COMI is situated within the territory of a MS, the courts of another MS shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State = SECONDARY INSOLVENCY PROCEEDINGS.

INSOLVENCY
REGULATION 848/2015

- EXAMINATION AS TO JURISDICTION. JUDICIAL REVIEW
- A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based.
- Where insolvency proceedings are opened in accordance with national law without a decision by a court, Member States may entrust the insolvency practitioner appointed in such proceedings to examine whether the Member State in which a request for the opening of proceedings is pending has jurisdiction. Where this is the case, the insolvency practitioner shall specify in the decision opening the proceedings the grounds on which jurisdiction is based.Article 5
- The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction. The decision opening main insolvency proceedings may be challenged by parties other than those referred to in paragraph 1 or on grounds other than a lack of international jurisdiction where national law so provides.

INSOLVENCY
REGULATION 848/2015

- JURISDICTION FOR ACTIONS DERIVING DIRECTLY FROM INSOLVENCY PROCEEDINGS AND CLOSELY LINKED WITH THEM

- The courts of the MS within the territory of which insolvency proceedings have been opened shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.
- Where such an action is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the MS within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.
- The abovementioned rule shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate.
- The actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

INSOLVENCY
REGULATION 848/2015

- PRINCIPLE:

- THE LAW APPLICABLE TO INSOLVENCY PROCEEDINGS AND THEIR EFFECTS SHALL BE THAT OF THE MEMBER STATE WITHIN THE TERRITORY OF WHICH SUCH PROCEEDINGS ARE OPENED (THE 'STATE OF THE OPENING OF PROCEEDINGS').

- THIS LAW shall determine :
- the conditions for the opening of those proceedings,
- their conduct and
- their closure.

INSOLVENCY
REGULATION 848/2015

- In particular, THIS LAW shall determine the following:
- (a) the debtors against which insolvency proceedings may be brought on account of their capacity;
- (b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
- (c) the respective powers of the debtor and the insolvency practitioner;
- (d) the conditions under which set-offs may be invoked;
- (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits;
- (g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;

INSOLVENCY
REGULATION 848/2015

- In particular, THIS LAW shall determine the following:
- (h) the rules governing the lodging, verification and admission of claims;
- (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
- (j) the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition;
- (k) creditors' rights after the closure of insolvency proceedings;
- (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
- (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors. This rule shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.

INSOLVENCY
REGULATION 848/2015

- Third parties' rights *in rem*: not affected by the opening of the insolvency proceedings, but the actions for voidness, voidability or unenforceability are not precluded.
- The right of a creditor to demand the set-off: not affected by the opening of the insolvency proceedings, but the actions for voidness, voidability or unenforceability are not precluded.
- The seller's rights based on a reservation of title are not affected by the opening of the insolvency proceedings against the purchaser of that asset where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of the opening of proceedings. The actions for voidness, voidability or unenforceability are not precluded.
- The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.
- The effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the MS applicable to that system or market. The actions for voidness, voidability or unenforceability are not precluded.

INSOLVENCY
REGULATION 848/2015

- The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. The courts / authority competent under national law of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the employment contracts even if no insolvency proceedings have been opened in that Member State.
- The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.
- Where, by an act concluded after the opening of insolvency proceedings, a debtor disposes, for consideration, of: (a) an immoveable asset; (b) a ship or an aircraft subject to registration in a public register; or (c) securities the existence of which requires registration in a register laid down by law; the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.
- The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

INSOLVENCY
REGULATION 848/2015

- RECOGNITION OF INSOLVENCY PROCEEDINGS
- Principle: any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.
- This rule shall also apply where, on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States. (e.g. natural persons)
- The recognition of the main insolvency proceedings shall not preclude the opening of the proceedings by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings.

INSOLVENCY
REGULATION 848/2015

- THE EFFECTS OF THE RECOGNITION:
- The judgment opening insolvency proceedings shall, with no further formalities, produce the same effects in any other MS as under the law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no secondary proceedings are opened in that other MS.
- The effects of the secondary proceedings may not be challenged in other MS. Any restriction of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

INSOLVENCY REGULATION 848/2015

- THE POWERS OF THE INSOLVENCY PRACTITIONER
- The insolvency practitioner appointed by a court which has jurisdiction to open main insolvency proceedings may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another MS, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. The insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in which they are situated.
- The insolvency practitioner appointed by a court which has jurisdiction to open secondary insolvency proceedings may in any other MS claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.
- In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures, unless ordered by a court of that Member State, or the right to rule on legal proceedings or disputes.

INSOLVENCY
REGULATION 848/2015

- PROOF OF THE INSOLVENCY PRACTITIONER'S APPOINTMENT

- The insolvency practitioner's appointment shall be evidenced by a certified copy of the original decision appointing it or by any other certificate issued by the court which has jurisdiction.

- A translation into the official language or one of the official languages of the Member State within the territory of which it intends to act may be required. No legalisation or other similar formality shall be required.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- Where main insolvency proceedings have been opened by a court of a Member State and recognised in another Member State, a court of that other Member State which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings.
- Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened.
- APPLICABLE LAW
- The law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.
- The law applicable to the distribution of proceeds from the realisation of the abovementioned assets, to the ranking of creditors' claims, and to the rights of creditors in relation to the abovementioned assets shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The relevant point in time for determining the abovementioned assets shall be the moment at which the undertaking is given.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- The undertaking shall be approved by the known local creditors. The rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall also apply to the approval of the undertaking. Creditors shall be able to participate in the vote by distance means of communication, where national law so permits. The insolvency practitioner shall inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.
- An undertaking given and approved by the abovementioned creditors shall be binding on the estate. If secondary insolvency proceedings are opened, the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- If the distribution does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge such distribution before the courts of the MS in which main insolvency proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law. In such cases, no distribution shall take place until the court has taken a decision on the challenge.
- Local creditors may apply to the courts of the Member State in which main insolvency proceedings have been opened, in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings.
- Local creditors may also apply to the courts of the Member State in which secondary insolvency proceedings could have been opened in order to require the court to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.
- The insolvency practitioner shall be liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out above.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- The opening of secondary insolvency proceedings may be requested by:
- (a) the insolvency practitioner in the main insolvency proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested.
- Where an undertaking has become binding in accordance with Article 36, the request for opening secondary insolvency proceedings shall be lodged within 30 days of having received notice of the approval of the undertaking.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- A court seised of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give it an opportunity to be heard on the request.
- Where the insolvency practitioner in the main insolvency proceedings has given an undertaking, the court shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors.
- The court may order protective measures to protect the interests of local creditors by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business. The court may also order other measures to protect the interest of local creditors during a stay, unless this is incompatible with the national rules on civil procedure.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- The stay of the opening of secondary insolvency proceedings shall be lifted by the court of its own motion or at the request of any creditor if, during the stay, an agreement in the negotiations referred to in the first subparagraph has been concluded.
- The stay may be lifted by the court of its own motion or at the request of any creditor if the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded, or if the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the establishment is located.

INSOLVENCY
REGULATION 848/2015

- SECONDARY INSOLVENCY PROCEEDINGS
- The insolvency practitioner in the main insolvency proceedings may challenge the decision to open secondary insolvency proceedings before the courts of the Member State in which secondary insolvency proceedings have been opened on the ground that the court did not comply with the conditions and requirements of Article 38.
- Where the law of the Member State in which the opening of secondary insolvency proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- 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 …
- Aims:
- - ensuring that viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating;
- ensuring that honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance;
- ensuring that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- 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 …
- NOT applicable to:
- (a) insurance undertakings;
- (b) credit institutions;
- (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or
- (d) collective investment undertakings.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- 1. Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.
- HOW ?
- Making use of up-to-date IT technologies for notifications and for communication. Early warning tools may include the following:
- (a) alert mechanisms when the debtor has not made certain types of payments;
- (b) advisory services provided by public or private organisations.
- (c) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.
- Such warning tools should be publicly available online (to employees' representatives also).

PRE-INSOLVENCY DIRECTIVE 2019/1023

- 1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.
- Member States may:
- - allow debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.
- - maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.
- - limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.
- MSs shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.
- Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.
- Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.
- Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- Facilitating negotiations on preventive restructuring plans
- MS shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.
- Appointment by a judicial or administrative authority of a practitioner in the field of restructuring only when necessary / decided on a case-by-case basis, except in certain circumstances where MS may require the mandatory appointment of such a practitioner in every case ➔ at least in the following cases
- (a) where a general stay of individual enforcement actions is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;
- (b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; or
- (c) 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.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- Stay of individual enforcement actions
- MSs shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.
- MSs may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary / it would not help the purpose stated above.
- Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims, but it can be limited to individual / a class of creditors. MSs may exclude certain categories of claims from the scope of the stay (not the workers' claims).
- Stay limited to 4 months, possible to extend / possible to renew to max 12 months.
- Consequences of the stay of individual enforcement actions: no individual enforcement, no opening of the insolvency proceedings, *ipso facto* terms inefficient, creditors perform essential executory contracts (MSs may extend the creditors' obligation to perform to non-essential executory contracts too).
- Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions, if necessary.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- Restructuring plans shall indicate, *inter alia:*
- - 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 the position of workers, and a description of the causes and the extent of the difficulties of the debtor;
- - the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
- - the terms of the restructuring plan, including, in particular: any proposed restructuring measures, where applicable, the proposed duration of any proposed restructuring measures, the arrangements with regard to informing and consulting the employees' representatives, overall consequences as regards employment such as dismissals, short-time working arrangements or similar, the estimated financial flows of the debtor, any new financing anticipated as part of the restructuring plan, the reasons why the new financing is necessary to implement that plan, 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. MSs may require that that statement of reasons be made or validated by an external expert / by the practitioner in the field of restructuring.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- The adoption of the restructuring plans:
- - MSs shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.
- - parties that are not affected by a restructuring plan shall not have voting rights: MSs may also exclude from the right to vote: (a) equity holders; (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.
- - MSs shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan. Workers' claims be treated in a separate class of their own.
- - voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted or at an earlier stage

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- THE ADOPTION OF THE RESTRUCTURING PLAN:

- 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. MSs may, in addition, require that a majority in the number of affected parties is obtained in each class.

- MSs shall lay down the majorities required for the adoption of the plan. Majorities be not higher than 75 % of the amount of claims or interests in each class / the number of affected parties in each class.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- THE CONFIRMATION OF THE RESTRUCTURING PLAN:

- MSs shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

- (a) restructuring plans which affect the claims or interests of dissenting affected parties;
- (b) restructuring plans which provide for new financing;
- (c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- THE CONFIRMATION OF THE RESTRUCTURING PLAN:
- MSs shall ensure at least the following conditions are met for a restructuring plan to be confirmed by a judicial or administrative authority:
- (a) the restructuring plan has been adopted in accordance with the abovementioned rules;
- (b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
- (c) notification of the restructuring plan has been given in accordance with national law to all affected parties;
- (d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test; (to be examined by a judicial authority only if challenged on that ground)
- (e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.
- MSs shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of success.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- CROSS-CLASS CRAM-DOWN
- MSs shall ensure that a restructuring plan which is not approved by affected parties in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:
- (a) it complies with the abovementioned conditions;
- (b) it has been approved by:
  - (i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
  - (ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- CROSS-CLASS CRAM-DOWN
- (c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and
- (d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.
- ABSOLUTE PRIORITY RULE + derogation
- (VERY IMPORTANT) MSs may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.
- (VERY IMPORTANT) MSs may maintain or introduce provisions derogating from the rule above where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- VALUATION BY THE JUDICIAL OR ADMINISTRATIVE AUTHORITY
- The judicial or administrative authority shall take a decision on the valuation of the debtor's business only where a restructuring plan is challenged by a dissenting affected party on the grounds of either:
- (a) an alleged failure to satisfy the best-interest-of-creditors test; or
- (b) an alleged breach of the conditions for a cross-class cram-down.
- MSs shall ensure that, for the purpose of taking a decision on a valuation, judicial or administrative authorities may appoint or hear properly qualified experts.
- MSs shall ensure that a dissenting affected party may lodge a challenge with the judicial or administrative authority called upon to confirm the restructuring plan.
- MSs may provide that such a challenge can be lodged in the context of an appeal against a decision on the confirmation of a restructuring plan.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- EFFECTS OF RESTRUCTURING PLANS

- MSs shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in the plans.

- MSs shall ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- APPEALS
- MSs shall ensure that any appeal against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority / taken by an administrative authority is brought before a judicial authority.
- An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan. By way of derogation, MSs may provide that judicial authorities can suspend the execution of the plan / parts thereof where necessary and appropriate to safeguard the interests of a party.
- MSs shall ensure that, where an appeal is upheld, the judicial authority may either:
- (a) set aside the restructuring plan; or
- (b) confirm the restructuring plan, either with amendments, where so provided under national law, or without amendments.
- MSs may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to any party that incurred monetary losses and whose appeal is upheld.

PRE-INSOLVENCY DIRECTIVE 2019/1023

- PROTECTION FOR NEW FINANCING AND INTERIM FINANCING
- MSs shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:
- (a) new financing and interim financing shall not be declared void, voidable or unenforceable; and
- (b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.
- MSs may provide that such protection shall only apply to new financing if the restructuring plan has been confirmed, and to interim financing that has been subject to ex ante control. MSs may exclude from the protection interim financing granted after the debtor has become unable to pay its debts as they fall due.
- MSs may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims. (=SUPERPRIORITY)

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- PROTECTION FOR OTHER RESTRUCTURING RELATED TRANSACTIONS
- THE SAME RULES APPLICABLE TO THE NEW / INTERIM FINANCING
- Such transactions shall include, as a minimum:
- (a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;
- (b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;
- (c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;
- (d) any other payments and disbursements made in the ordinary course of business *(business as usual)*

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- DUTIES OF DIRECTORS WHERE THERE IS A LIKELIHOOD OF INSOLVENCY

- MSs shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:
- (a) the interests of creditors, equity holders and other stakeholders;
- (b) the need to take steps to avoid insolvency; and
- (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- DISCHARGE OF DEBT AND DISQUALIFICATIONS

- MSs shall ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a full discharge of debt / may require that the trade, business, craft or profession to which an insolvent entrepreneur's debts are related has ceased / entrepreneurs who have been discharged from their debts may benefit from existing national frameworks providing for business support for entrepreneurs.
- MSs in which a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur (is proportionate to the entrepreneur's seizable or disposable income and assets during the discharge period, considers the equitable interest of creditors).
- Discharge period: no longer than 3 years ➔ at the latest from the confirmation of the restructuring plan.
- Discharge of debt: automatic on expiry of the discharge period, but under judicial / administrative control.
- MSs shall ensure that, on expiry of the discharge period, the disqualifications cease to have effect without the need to apply to a judicial or administrative authority to open any additional procedure.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- DISCHARGE OF DEBT AND DISQUALIFICATIONS: DEROGATIONS
- MSs shall maintain / introduce provisions denying or restricting access to discharge of debt, revoking the benefit of such discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods, where the insolvent entrepreneur:
  - acted dishonestly or in bad faith towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt
- - the insolvent entrepreneur has substantially violated obligations under a repayment plan
- - the insolvent entrepreneur has failed to comply with information or cooperation obligations
- - there are abusive applications for a discharge of debt;
- - the cost of the procedure leading to the discharge of debt is not covered; or
- - a derogation is necessary to guarantee the balance between the rights of the debtor / creditor(s)
- - longer or indefinite disqualification periods where the insolvent entrepreneur is a member of a profession: (a) the entrepreneur has infringed specific ethical rules or specific rules on reputation or expertise; b) dealing with the management of the property of others.

PRE-INSOLVENCY
DIRECTIVE 2019/1023

- DISCHARGE OF DEBT AND DISQUALIFICATIONS: DEROGATIONS
- MSs may provide for longer discharge periods in cases where:
- (a) protective measures are approved or ordered by a judicial or administrative authority to safeguard the main residence / essential assets of the insolvent entrepreneur / of the entrepreneur's family;
- (b) the main residence of the insolvent entrepreneur / of the entrepreneur's family, is not realised.
- MSs may exclude specific categories of debt from discharge of debt, or restrict access to discharge of debt or lay down a longer discharge period where such exclusions, restrictions or longer periods are justified:
- (a) secured debts;
- (b) debts arising from or in connection with criminal penalties;
- (c) debts arising from tortious liability;
- (d) debts regarding maintenance obligations <= family relationship, parentage, marriage or affinity;
- (e) debts incurred after the application for / opening of the procedure / arising from the obligation to pay the cost of a procedure leading to a discharge of debt.

QUESTIONS ?

THANK YOU FOR
YOUR ATTENTION !