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Restructurings and Debt-to-Equity Conversions in the New EU Statutory Landscape

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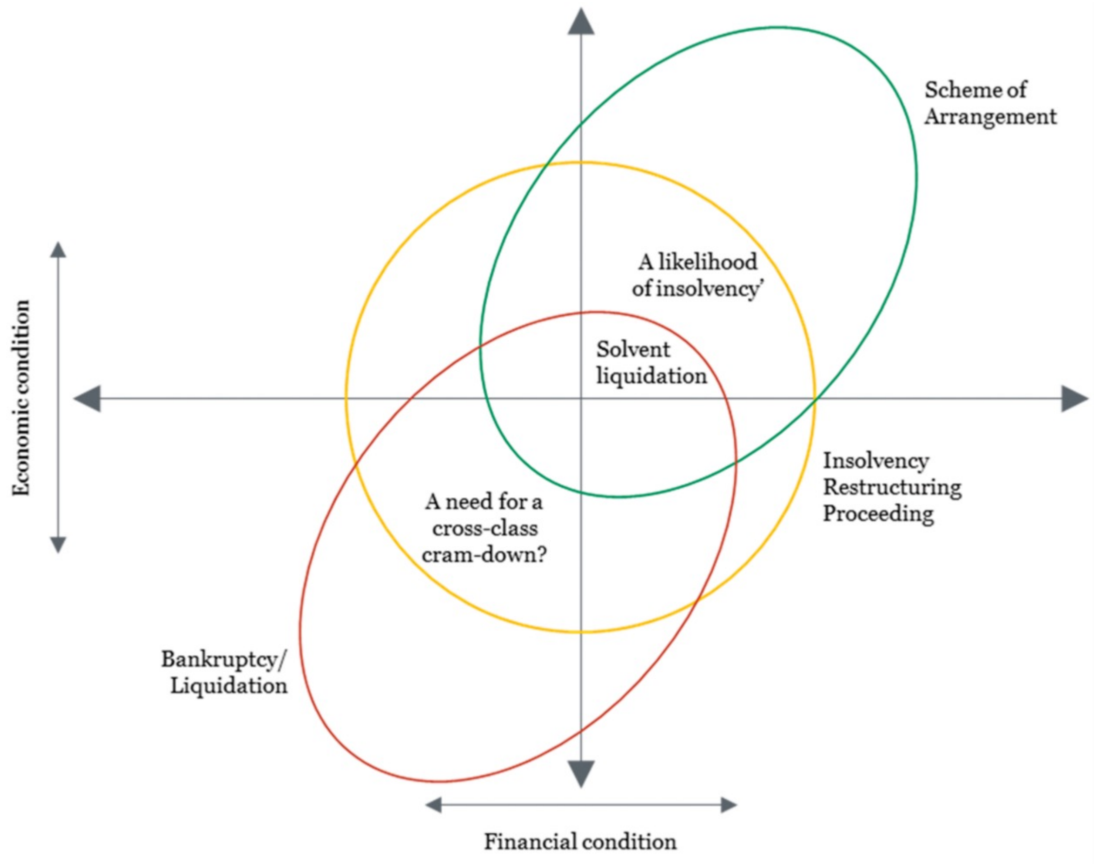
Historical Perspective for the New Restructuring Rules in the EU

- The aftermath of the financial crisis 2008; a significant amount of Continental and Northern European companies rescued under the flexible UK/Irish company law scheme of arrangement (SOA) frameworks
- In a nutshell, the SOA provides a possibility for a court sanctioning a SOA against abuse of hold-out positions in credit facilities; extremely useful also relating to equity restructurings, e.g., relating to public takeovers
- In 2017 the SOA framework also adopted in the European Model Company Act EMCA
- EU Capital Markets Union Action Plan 2015: a need to unify key restructuring rules
- Restructuring Directive (proposal in 2016 and final (EU) 2019/1023); two key targets:
  - (i) developing *preventive* frameworks and
  - *(ii)* *de minimis* harmonisation of restructuring frameworks; particularly providing a cross-class cram-down possibility for dissenting voting-classes in restructuring
- Voting-classes in restructuring to include equity holders, *unless Member States otherwise safeguard that equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan*

Potential Legal Frameworks for a Company and its Stakeholders



Capital Markets Law Journal, 16 March 2019, kmz003, https://doi.org/10.1093/cmlj/kmz003

Why Relativity Matters in Restructuring?

‘Relativity’ may derive from the UK benchmark (no statutory priority), German ‘relaxed’ APR, Danish implementation of APR merely as ‘a principle’ or from the optional RPR in the Restructuring Directive

In the US ‘relativity’ has been understood merely as a deviation of the APR, a part of statutory law; option models, where the strike price set at a level to give 100% return to any senior class

An acid test for the new frameworks; a recent UK Case:

Re Virgin Active Holdings Ltd, Virgin Active Ltd and Virgin Active Health Clubs Ltd [2021] EWHC 1246 (Ch)

- the judgment notes that those creditors who were ‘in the money’ (in this case the secured creditors) should be able to decide how the value of the business is allocated in the restructuring; the ‘in the money’ creditors preferred the structure where shareholders had agreed to further financing
- This was in response to a criticism by the landlords (as non-secured senior creditors) that the shareholders had retained their interest in the future business despite being lower in priority than unsecured creditors in an insolvency waterfall
- It is important to note that the UK legislation (unlike some jurisdictions) does not contain an absolute priority rule which provides that junior creditors (or holders of equity) cannot be paid / receive / retain rights / benefits before all senior classes are paid in full in restructuring

Restructuring surplus is a universally accepted justification for restructuring against bankruptcy - a driver for law and economics to search for an optimal statutory framework for protecting creation of the surplus