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Restructuring Companies During and After the Covid-19 Pandemic: A Law & Economics Approach

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Abstract

As a result of the Covid-19-pandemic, enterprises worldwide have suffered tremendously so that one of the common challenges is how to rescue companies. This paper argues that the approach of subsidising companies and, in particular, the approach of suspending legal obligations to file for insolvency which many European Member States have pursued does not rescue the companies sustainably and these mechanisms merely relieved the companies for a short period. This paper points out why it is important to put mechanisms of market shakeout back in place that have helped protect other market participants and keep the economy as a whole running for decades.

Small, medium and large enterprises that have built up a crushing burden of debt can no longer survive on their own. The paper proposes that in these cases a restructuring must go hand-in-hand with cutting debts. The thesis will explain why, however, only the restructuring of viable companies is justifiable. The main part of this paper is the argumentation that necessary restructuring measures, such as debt reliefs, can be justified by two principles: the no-party-worse-off-principle on the one hand and the market-conformity test on the other. But

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only the interplay of these two principles leads to a coherent solution that is applicable to all sizes of companies. Even if both principles are only mentioned vaguely in the EU Directive 2019/1023 of June 20, 2019, they can nevertheless be derived from the Directive and may serve as principles throughout Europe.

I. NON-SUSTAINABLE REACTIONS OF THE MEMBER STATES

1. Drop of the gross domestic product (GDP) in many Member States

The European Union is a federation of states.[1] Its members are sovereign states with their own economies. Discussing the reactions of European Member States, therefore, means focusing on individual states, individual parliaments, individual governments, and their subordinate agencies. France, Italy, the Netherlands, Belgium, Poland, and Germany were all Member States with a more or less solid or even strong economy. Therefore, I have picked out the strongest economies as a benchmark to look at how they have developed during the pandemic and how they reacted to these developments. As is customary, the gross domestic product is taken as a basis to measure the strength of an economy.

Starting with Germany, its economy experienced a huge drop in GDP in 2020. Compared to 2019, when the economy grew by under one percent, it dropped by nearly 5% in 2020.[2] Of course, there are differences within the markets. The logistics market, for instance, has actually increased, but many areas in the production and service sectors have hardly made any more sales. Particularly, business areas such as travel, hotels, restaurants, amusement parks, and town centre retail caused a huge drop in GDP. Similar figures have been reported for

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[1] Article 1 of the Treaty on European Union speaks about the establishment and foundation of a Union. The understanding as a federation of states has been mentioned, inter alia, by the German Constitutional Court, judgment 12.10.1993 – 2 BvR 2134/92, BVerfGE 89, 155, 188. See also Christian Calliess in Christian Calliess and Matthias Ruffert (eds) *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, C. H. Beck 2016) Article 1 Treaty on European Union paras 41 et seq.; Martin Nettesheim in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds) *Das Recht der Europäischen Union* (71. edn C. H. Beck 2020) Article 1 Treaty on European Union paras 53 et seq.

[2] German Federal Statistical Office (Destatis), [2021] <https://service.destatis.de/DE/vgr_dashboard/bip_vj.html> accessed 3 May 2021. In Q2 of 2020, the pandemic caused a historic drop of 10.1% in GDP (Andreas Fillman, Marcin Wnukowski and Fabrizio Vismara, 'Reflections on the impact of the COVID-19 crisis in Germany, Poland and Italy' Winter 2020/21 eurofenix, 32, 32).

2020 from France (8,1% drop), Italy (8,9%), the Netherlands (3,7%), Belgium (6,3%) and Poland (2,7%).[3]

2. Decreased insolvency cases

If an economy is declining because many companies are making no revenue or very little revenue, then these companies earn no money or hardly any more money. Hence, no profit or hardly any profit is added to the profit and loss accounts. JP Morgan reported in June 2020 that typical small companies in personal services in the US had seen their revenue fall by over 80 per cent. Revenue does not equal profit, but the percentage for the profit in many cases is rather small. In these cases, the profitability was close to or even zero. Here, the US and Europe were in the same boat.[4]

However, all these companies still needed to meet their running expenses, e.g. wages, rent for the business premises, or lease for a property. Loans still had to be paid back. So, these overheads have caused many companies to accumulate large debts. As a result, many companies are over-indebted (debt overhang[5]). Furthermore, many companies are in danger of becoming illiquid.

As a typical reaction to a shrinking economy, one would expect insolvency proceedings to increase. But in fact, insolvency proceedings have also declined massively in various Member States of the EU. Normally, however, insolvency proceedings only decline when the economy is booming. But that has not been the case.

It is therefore quite remarkable that insolvency proceedings are at an all-time low. After the obligation to file for insolvency was suspended until September 30, 2020, the insolvency proceedings in Germany

[3] European Commission (Eurostat), [2021] < https://ec.europa.eu/eurostat/web/euro-indicators/national-accounts> accessed 3 May 2021; German Federal Statistical Office (Destatis), [2021] <https://www.destatis.de/Europa/EN/Topic/COVID-19/COVID-19-article.html> accessed 3 May 2021.
[4] Anthony J. Casey, 'Bankruptcy & Bailouts; Subsidies & Stimulus: The Government Toolset for Responding to Market Distress' [2021] Law Working Paper No 578/2021, 9.
[5] Casey (n 4) 11.

dropped from 18.749 in 2019 to 15.841 in 2020.[6] This is not a German phenomenon. Insolvency proceedings in the Netherlands, for example, are also at an all-time low. Corporate insolvency cases there started to increase at the beginning of 2020 and then dropped from over 300 to currently just over 100 per month.[7] As a third example, the insolvency cases in Belgium dropped to under 8.000 in 2020 compared to 2019 where they had over 10.000 cases a year.[8] In the US, it was also initially predicted that a big wave of insolvencies was coming. This wave, however, never materialized in the US. Quite the opposite is true. Bankruptcy filings in 2020 experienced one of the largest drops in history.[9] One could think there was not great distress, neither in Europe nor the US.

3. State Subsidies

In many European countries, the massive drop in insolvency proceedings, even though the economy has suffered such a severe slump, is attributable – amongst other factors – to two approaches. I will start with the widely used approach of backing companies with state subsidies. Wherever Member States of the European Union had the financial strength, key industries were backed with state aid. A case in point is the state aid for Lufthansa, the only major German airline. Lufthansa had hardly any passenger flights from March 2020 onwards. Nevertheless, it incurred roughly 20 million euros/17 million GBP in fixed costs per day.[10] The German government decided that an exporting

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[6] German Federal Statistical Office (Destatis), [2021] < https://www.destatis.de/EN/Press/2021/03/PE21_161_52411.html;jsessionid=3E6132BE32D82F8F97AB955C95DB5331. live742> accessed 3 May 2021.

[7] Statistics Netherlands (cbs) <https://www.cbs.nl/en-gb/news/2021/10/bankruptcies-in-february-at-lowest-level-in-30-years> accessed 3 May 2021.

[8] Statbel (Directorate-general Statistics - Statistics Belgium) <https://statbel.fgov.be/en/themes/enterprises/bankruptcy-statistic/bankruptcies-monthly-basis#panel-12 > accessed 3 May 2021.

[9] Am. Bankr. Inst. <https://www.abi.org/newsroom/press-releases/total-bankruptcy-filings-drop-30-percent-in-calendar-year-2020-commercial> accessed 3 May 2021.

[10] Lufthansa Group, 'Pressemitteilung – Folgen der Corona-Pandemie belasten Lufthansa Ergebnis erheblich' [2021] 2 <https://www.lufthansagroup.com/en/newsroom/releases/finance/consequences-of-corona-pandemic-have-a-considerable-impact-on-lufthansa-result.html> accessed 3 May 2021.

nation must have at least one significant airline. Therefore, the collapse of Lufthansa was avoided by state aid.[11] Here, as well, the approaches to solutions in Europe and the USA are similar. The US CARES Act that came into force on March 27th 2020 made 50 billion US dollars available for relief to large airlines, and 17 billion US dollars to Boeing.

The financially strong Member States of the European Union have developed and tested various forms of state subsidies. In addition to participation in key industries, countries such as Italy,[12] France,[13] and Germany[14] have paid so-called short-time allowances. States took over part of the wage costs for the weeks or months in which the companies could not fully employ their employees. Many states also provided the companies with loans, which have a very low interest rate and do not have to be repaid for several years. Additionally or alternatively, the banks' repayment claim was often – as in Germany and France – secured with a state guarantee.[15] Of course, state aid also included tax relief such as a reduction in sales tax for a few months,[16] instalment payments or deferrals of tax claims, as in Italy and France, or the suspended enforcement of due taxes.

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[11] The Federal Republic of Germany has created a fund for this purpose (Economic Stabilisation Fund). This has enabled direct investments by the Federal Republic in companies. This was also possible in the form of silent partnerships. In the case of Lufthansa, the fund holds a direct 20.05% stake in the share capital, which amounts to around 1.5 billion euros.

[12] See Alessandro Honert and Sara Puglia Mueller, 'Italien' *Insolvenzrecht und Unternehmenssanierung* (Schultze & Braun Jahrbuch 2021) 32 with an overview of the Italian Decreto Legge Cura Italia No 18 of 17.03.2020.

[13] See Patrick Ehret, 'Frankreich' *Insolvenzrecht und Unternehmenssanierung* (Schultze & Braun Jahrbuch 2021) 27 with an overview of the French short-time allowances (activité partielle).

[14] See Alexander von Saenger, 'Deutschland' *Insolvenzrecht und Unternehmenssanierung* (Schultze & Braun Jahrbuch 2021) 21 with an overview of the German short-time allowances (Kurzarbeitergeld).

[15] The state-owned development bank KfW offered companies bridging loans at 3% and a repayment term of 10 years. The loans were disbursed by the house banks. The Federal Republic of Germany provided a guarantee to repay the loan instead of the company if necessary.

[16] The sales tax rate in Germany was reduced from 19% to 16% for 6 months to boost sales. In the Netherlands, such a reduction was also discussed. Only for certain medical products, such as mouth-nose protection, the sales tax was suspended. For this discussion, see also Michael Rozijn, 'The Netherlands' *Insolvenzrecht und Unternehmenssanierung* (Schultze & Braun Jahrbuch 2021) 39.

4. The suspension of the obligation to file for insolvency

Much more important is that many European countries have decided in their parliaments to suspend the obligation to file for insolvency. This has been the case in France, Poland, and Germany, for example.[17] Many Member States of the European Union adhere to the principle that the management of a corporation must file for insolvency if a reason for insolvency occurs. In several Member States this principle applies in case of illiquidity, while in some Member States over-indebtedness also leads to this obligation for a corporation's management. Member States that do not have an insolvency filing requirement, such as Italy, have suspended the obligation for companies to notify the company register of the liquidation of the company when over-indebtedness occurs.[18] However, suspending the obligation to file for insolvency only buys the parliaments time and postpones the evil day for the companies[19] but it did and does not solve the problem as will be shown in the next part.

II. RATIONALE OF RESTRUCTURING AND INSOLVENCY PROCEEDINGS

Modern states protect the market by a regulation that guarantees a market shakeout of those enterprises that are no longer viable. Whether this market regulation is understood as an area of insolvency law, restructuring law, civil procedure, or commercial law, is secondary. The

[17] In France, Decree No 2020-341 of March 27, 2020, and No 2020-596 of May 20, 2020 suspended the obligation to file for insolvency within 45 days upon the occurrence of illiquidity. For France, see Ehret (n 13) 26. In Poland, the obligation to file for insolvency within 30 days of becoming insolvent or over-indebted has been suspended. Regarding the Polish law from March 02, 2020, see Alexandra Josko de Marx, 'Polen' *Insolvenzrecht und Unternehmenssanierung* (Schultze & Braun Jahrbuch 2021) 41.

[18] See Honert and Mueller (n 12) 31 for an overview of the Italian Decreto Legge Liquidità that suspended corporate law capital maintenance provisions.

[19] The German legislator explicitly stated this as a reason for suspending the obligation to file for insolvency in the explanatory memorandum of the Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors' Liability in the Case of Insolvency Caused by the COVID-19 Pandemic (COVID-19-Insolvenzaussetzungsgesetz – COVInsAG). See Bundestags-Drucksache 19/18110, 17.

point is that the legal system ensures a mechanism for a market shakeout.[20]

Both the UK and the EU differentiate two systems, namely the restructuring proceedings in which the debtor attempts to avoid insolvency, and insolvency proceedings if the debtor become insolvent.[21] Enterprises that are no longer viable due to the pandemic or by other means must leave the market.[22] These enterprises can no longer sell their goods or services at a price that justifies the cost of producing them. This problem is called economic distress.[23] In these cases, goods and resources need to be re-allocated. It is then the primary goal to realise the remaining assets, to distribute the proceeds to the creditors, and write off remaining claims in the creditors' balance sheets. If this does not happen, an economically distressed company constitutes unfair competition. Hence, there is hardly any justification for rescuing enterprises that are not viable.[24]

The European legislator has meanwhile adopted this view. Recital 3 of the Directive on restructuring and insolvency sets forth that

> [i]n restructuring frameworks the rights of all parties involved, including workers, should be protected in a balanced manner. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly

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[20] In German law, insolvency proceedings traditionally belong to civil procedure and less to commercial law. Restructuring law in Germany is also clearly researched more by scholars from civil procedural law than from corporate law. For example, in the German-language literature on Directive (EU) 2019/1023 at the end of 2019, there were 28 publications from academics in civil procedure and 2 from academics in corporate law.

[21] At the European level, the Directive of 20.06.2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18 differentiates both subsystems in its short title. From a historical point of view, insolvency law has been developed at the European level first (even if this mainly included procedural aspects such as international jurisdiction, recognition and enforcement), whereas restructuring law has been partly harmonised at the European level for the first time by the aforementioned Directive. For a clear differentiation between insolvency law and restructuring law under German law, see Dominik Skauradszun, 'Grundfragen zum StaRUG – Ziele, Rechtsnatur, Rechtfertigung, Schutzinstrumente' (2021) KTS Zeitschrift für Insolvenzrecht 1, 36 et seq. For UK law see, inter alia, Part 26 'Arrangements and reconstructions' and Part 26a 'Arrangements and reconstructions: companies in financial difficulty' of the Companies Act 2006 for restructuring law and the Insolvency Act 1986 and the Insolvency Rules 2016 for insolvency law. For an overview of the law of England and Wales, see Ursula Schlegel in Rolf Stürner, Horst Eidenmüller and Heinrich Schoppmeyer (eds), *Münchener Kommentar zur Insolvenzordnung* (4th edn, C. H. Beck 2021) England and Wales paras 1 et seq.

[22] Skauradszun (n 21) 37.

[23] Casey (n 4) 11.

[24] Casey (n 4) 18 rightly remembered that a legal system is not designed for solving the problem of economic distress, as a legal system cannot transform a bad running business into a good one.

> as possible. Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole.

Consequently, the European legislator decided to open the scope of the Directive on restructuring and insolvency only for those

> debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor.[25]

Though Article 1(1)(a) of the Directive is clear and unambiguous, the European legislator reproduced the wording of Article 1(1)(a) in Article 4(1) nearly word for word. The legal framework is only available for viable enterprises and for ensuring their viability. According to Article 4(3) of the Directive on restructuring and insolvency Member States may (even) 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. The pandemic does not lead to a different assessment.

Of course, restructuring law and insolvency law are not designed to stimulate the economy. Insolvency proceedings will not create customers and revenue.[26] But still, restructuring and insolvency proceedings protect the market. Imagine company A, which operates in the manufacturing sector. Company A is facing serious financial distress. When placing an order for new raw materials, company A does not tell the seller, company B, that it cannot pay the purchase price. Company B will then enter into a purchase agreement and maybe into another purchase agreement with its supplier. Now, if company A cannot pay the purchase price, company B will likely not be able to pay its debts either. This is a classic fraud[27] by company A's managers or representatives. Company A deceives the other market participants about being able to fulfil its contractual obligations. It needs to do so because company B would not enter into a contract if company A ordered goods

[25] Article 1(1)(a) Directive on restructuring and insolvency.
[26] Casey (n 4) 22.
[27] Under German law, this type of fraud is called "Eingehungsbetrug" according to section 263 Criminal Code.

and made it transparent that it is unable to pay. In many cases, the story will end with a typical domino effect.

This is why the market mechanism needs to be back in place. The market shakeout through restructuring and insolvency law is a mechanism that has helped protect companies and keep the economy as a whole running for decades.

III. RESTRUCTURING OF VIABLE ENTERPRISES

After reasoning why restructuring and insolvency proceedings are important even and especially in a pandemic, I now propose my thesis on how we can rescue financially distressed small, medium and large companies that are viable in principle:

Viable companies can only be saved through restructuring measures. First and foremost, this includes cutting debt. To this end, creditors must waive claims and collateral. However, these measures and their extent are limited to ensuring that no creditor or shareholder is worse off than in the next-best-alternative (no-party-worse-off-principle). Compliance with this prohibition of worse off is monitored by the market by means of a majority decision of the creditors and shareholders affected (market-conformity test). This test is designed to ensure that the outcome of the corporate rescue is in line with the market.[28]

1. Debt cut as core element of restructuring measures

I start by explaining that restructuring measures require first and foremost a debt cut. As an example, one should imagine a small company that has 50,000 euros in cash and is waiting for payments of 100,000 euros from its own customers. Its own plot of land is on the balance sheet at 700,000 euros. However, the company has much more debt. It cannot pay its own suppliers due to the pandemic, who agreed to a deferment. The employees have to be paid at the end of the month.

[28] Skauradszun (n 21) 56.

The insurance company and the tax office are also still waiting for payments. If the company no longer has a chance to pay off the debts itself, then there will no longer be any perspective for this company to continue business as usual. The company is burdened by its past debts and cannot finance new contracts, even when new options are profitable.[29]

From the creditors' point of view, it is very unlikely to still receive 100% of their claims. The reason is simply that the company does not earn enough money itself and the debts are now too high. Therefore, the first part of my thesis simply expresses the economic reality. Above a certain debt level (financial distress)[30], a company that is viable in principle (no economic distress)[31] can only be saved if the creditors, for example, waive part of their claims, agree to a longer deferment, or swap their claims for a share.

Now, it could be argued that restructuring measures – in particular debt cuts – are not necessary. One could list the various subsidies the respective Member States have decided on. Among the many measures there were also those that stabilised the companies. Once again, these measures do not sustainably restructure companies:

- A deferral of tax claims, as in France, only helps in the short term. However, the tax claims still remain as debts on the balance sheets of the companies.

- Payment in instalments on tax claims, as in France, does not change the fact that these debts remain on companies' balance sheets.

- State loans or loans from private banks secured by government guarantees are still debts on the balance sheet of the companies. Above a certain debt level, these loans can no longer be repaid. Then it does not matter whether the loan is to be repaid in one, two or five years.

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[29] Casey (n 4) 11.
[30] ibid.
[31] ibid.

- If, as in Italy, existing loan agreements to small and medium-sized enterprises cannot be terminated for a few months, this does not change the fact that these debts are on the balance sheets of small and medium-sized enterprises and make it harder for them to finance new contracts, even when new options are profitable.

Regarding a possible objection: it could be argued that some states have also paid subsidies to companies that do not have to be repaid. For example, Italy, Poland and Germany have had these grants. However, this is not the solution either. For one thing, the states are not strong enough to endlessly pay more subsidies.[32] For another, states like Germany have not even managed to transfer the subsidies to the companies' accounts even after many months of promises.

Notwithstanding state subsidies, the first part of my thesis still seems to have merit: there is hardly any way around the debt cut.

2. Corporate rescue by majority vote

If a company asks its creditors for a (partial) waiver and all creditors agree, the company is quickly and fairly rescued. In most cases, however, the creditors will have to enforce their claims, otherwise they will get into financial problems themselves. If a supplier runs out of reserves after a year of pandemic, that supplier will not simply agree to a waiver. It is therefore more likely that the debtor will only be able to convince some of its creditors.

Some of the creditors will argue that the debtor should be helped to survive, as it will then be possible to do further business in the future.

[32] It could be countered that a state does not have to pay subsidies endlessly either, but at some point companies will return to the revenue they earned before the pandemic. Firstly, states have often become so heavily indebted after only 14 months of the pandemic that it will take many years to stabilise the state budget again. Secondly, in many cases 14 months of pandemic have already been enough to build up such high debts that the companies can no longer pay on their own. Finally, every additional month of subsidies is problematic because they distort competition between companies.

Perhaps most creditors, calculated by the sum of their claims, are in favour of a rescue and only the minority is not.

In the recent legislative process of the Directive on restructuring and insolvency, the European legislator has developed a tool that is similar to English Solvent Schemes of Arrangement.[33] Preventive restructuring frameworks harmonise restructuring law at the European level for the first time. Companies can be rescued with a majority vote and judicial review of the voting and the restructuring measures.[34]

Even in insolvency proceedings, there may be tools to restructure the company based on a majority vote of the creditors and shareholders. The German insolvency plan is similar to the restructuring plan regulated in Article 8 of the Directive on restructuring and insolvency. It also enables the maintenance of the debtor's company if a head and sum majority is reached in each group for the creditors and shareholders.[35]

Even if the majority supports the restructuring, there is also a minority that does not. There can be many reasons why this minority does not want to save the company. Perhaps the minority wants to wait and see whether other creditors will waive more in order to waive less themselves. Alternatively, the minority insists on the payments because otherwise the dissenting parties will become illiquid themselves. Perhaps the minority simply insists on the principle that concluded contracts must be honoured (*pacta sunt servanda*).

[33] *Vice versa*, Part 26A CA 2006 now contains a cross-class cram-down the Directive on restructuring and insolvency contains in Article 11.
[34] English Schemes of Arrangement are regulated by Part 26 of the Companies Act 2006 (CA 2006). Similar to a European restructuring framework, basically it is about an agreement between the debtor and its creditors (section 895(1) CA 2006). A head majority and a 75% sum majority must be achieved (section 899(1) CA 2006) within a meeting ordered by the court (section 896(1) CA 2006), which is then followed by the sanctioning by the court of the Scheme (section 899(1) CA 2006).
[35] See section 244 German Insolvency Code.

3. *No-party-worse-off-principle*

Corporate rescue not based on consensus but a mere majority vote needs a justification, for which there are two pillars: the no-party-worse-off-principle and the market-conformity test.

The no-party-worse-off-principle basically says that if the minority is not worse off as a result of the restructuring than in the next-best-alternative scenario, then there is no reason why the minority should be allowed to obstruct the debtor's rescue.[36] If, upon reversion, a creditor or shareholder is likely to be worse off as a result of the restructuring than they would have been without the restructuring, the restructuring must be refused. Therefore, the debtor will most likely only envisage such restructuring measures that comply with the no-party-worse-off-principle. Otherwise, the debtor risks failing.[37]

At the European level, the no-party-worse-off-principle originates in the best-interest-of-creditors test based on Article 2(1)(6) and Article 10(2)(d) of the Directive on restructuring and insolvency. According to its wording, the best-interest-of-creditors test according to Article 2(1)(6) Directive only covers creditors. It does not protect shareholders, even though the underlying Recital 49, first sentence, also mentions shareholders in addition to creditors.[38] However, for instance, the Dutch and German legislators extended the criterion of best-interest-of-creditors to the shareholders to protect them.[39]

The mechanism of the no-party-worse-off-principle works by comparing two scenarios.[40] The legal position of an affected party is compared

[36] Skauradszun (n 21) 9.
[37] ibid 54.
[38] Recital 49 first sentence Directive literally states that "Member States should ensure that a judicial or administrative authority is able to reject a plan where it has been established that it reduces the rights of dissenting creditors or equity holders".
[39] The Dutch WHOA (Wet homologatie onderhands akkoord) includes shareholders in Article 384(3) ("[…] creditors or shareholders will be worse off under the plan than they would have been in a liquidation of the debtor's assets in bankruptcy"). The German Implementation Act of the Directive (Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG) includes shareholders in addition to creditors by the wordings "parties affected by the plan" (section 64(1) first sentence StaRUG) and "members of this group" (section 26(1)(1) StaRUG).
[40] Article 2(1)(6) Directive calls this the "'best-interest-of-creditors test' [which] means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of

with and without the restructuring measure.[41] Both scenarios are based on the economic assumption that the fulfilment of all liabilities is at risk. There is a likelihood that the market value of the creditor's claim[42] or the market value of a shareholder's right, such as an LLC share, dropped below its nominal value during the pandemic. This results in the fact that as a restructuring measure the nominal value of a creditor's claim can be reduced to the value the creditor would obtain within the next-best-alternative scenario, without breaching the no-party-worse-off-principle. Besides, the debtor can decide on whether it exploits this scope or not.[43]

An example may illustrate the idea of the no-party-worse-off-principle. Supplier No 4 demands 50,000 euros from the debtor but the debtor says they can only pay 40,000 euros and the creditor has to waive the remaining 10,000 euros. If the creditor does not want to do so and blocks the debtor's rescue, then such a position cannot be justified in a restructuring proceeding if, in the next-best-alternative scenario, the creditor also only receives 40,000 euros or even only 30,000 euros or 20,000 euros without this restructuring. If, within the next-best-alternative scenario, the creditor only receives 20,000 euros, the debtor can cut off the debt except for an amount of 20,000 euros.

For the purpose of a differentiated application of the no-party-worse-off-principle, the next-best-alternative scenario requires a most realistic determination of the loss of value of a claim or a shareholders' right. Therefore, it is necessary to find out whether and to what extent a creditor or shareholder is already partially out-of-the-money in the next-best-alternative scenario. In positive terms, it must be determined how much a creditor or shareholder is still in-the-money. This is basically because any cutting of debt beyond the value to be achieved in the next-best-alternative scenario violates the prohibition of worse off.

liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed".

41 Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 EBOR 615, 638.

42 Madaus (n 41) 638 also compares 'nominal value' and 'market value'.

43 Skauradszun (n 21) 54.

However, if a creditor is, for example, 20% out-of-the-money,[44] then it can be argued that this creditor may not take a holdout position and thus may not prevent the restructuring of a viable company if the restructuring concept only provides for a deferral or a cut of debts in the range of 1-20% for its claim.[45] The creditor is then no worse off with the restructuring than it would be without.[46]

The intensity of the measures taken by the debtor may depend, for example, on whether the debtor has calculated various economic scenarios (e.g. a very optimistic scenario 1, a moderately optimistic scenario 2, and a cautiously optimistic scenario 3) and whether it is confident the cut of debts in scenario 2 is less than in scenario 3. The debtor must also consider how it can convince the creditors to vote in favour of the restructuring with at least the required majority, e.g. 75% % of the voting rights in a group based on the value of the creditors' claims under German law according to section 25(1) StaRUG. In this respect, the debtor could consider choosing scenario 1 or 2. Therefore, the debtor does not exhaust the given scope and thus promotes its plan, which could also have provided for an even greater cutting of debts.[47]

Whether the no-party-worse-off-principle is observed can only be verified if the two scenarios are compared. This task is performed by a comparative calculation.[48] The debtor must typically present this comparison calculation to the affected parties so that they can review whether the no-party-worse-off-principle has been complied with.

Under European law, a Member State may allow the debtor to adopt piecemeal liquidation of the business as the next-best-alternative scenario (Article 2(1)(6) Directive on restructuring and insolvency). This

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[44] The phrase 'out-of-the-money' is used not only for shareholders but also for creditors (although the Commission used the term only for shareholders), see Daoning Zhang, 'Preventive Restructuring Frameworks: A Possible Solution for Financially Distressed Multinational Corporate Groups in the EU' (2019) 20 EBOR 285, 300.

[45] The same conclusion is reached by the European Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' COM (2016) 723 final, Recital 29 and Madaus (n 41) 638: "While no compensation is necessary as long as the plan only reduces a claim or share from its nominal to its current market value, any further impairment must be compensated".

[46] Skauradszun (n 21) 56.

[47] ibid 54.

[48] Under German law, section 6(2) StaRUG and section 220(2) Insolvency Code require comparison calculations.

is problematic. If the debtor compares the outcome of the restructuring with the piecemeal liquidation, two different things are being compared, namely a going concern scenario and a piecemeal sale scenario. If the restructuring provides for the continuation of the enterprise, the determination of the prospects of satisfaction without this restructuring should be based on the assumption that the business will be continued.[49] This does not apply if a continuation without the envisaged restructuring is not sufficiently likely. The comparison calculation, therefore, considers, on the one hand, the effects of the restructuring on the prospects of satisfaction of the parties affected by the restructuring (reference point) and, on the other hand, the prospects of satisfaction of the parties affected by the restructuring without this envisaged restructuring in a different going concern scenario (comparison point).[50]

At the European level, a comparison calculation is not explicitly named in the Directive on restructuring and insolvency. However, it derives from the wording of the best-interest-of-creditors test in Article 2(1)(6) of the Directive that the debtor on the one hand has to assess the prospects of satisfaction of the parties affected by the restructuring and on the other hand on the prospect of satisfaction of the parties affected within the scenario that will achieve the highest satisfaction if the restructuring plan is not accepted or not confirmed.[51] This comparison point may be called the next-best-alternative scenario. The next-best-alternative scenario can (and must) take into account what the debtor will earn in the future.[52] The question now is how exactly the protective mechanism of the comparison calculation works, i.e. which alternative scenarios are to be determined.[53] What the next-best-alter-

[49] In this respect, the German implementation goes beyond Article 2(1)(6) Directive on restructuring and insolvency and requires in section 6(2) StaRUG that the comparison scenario must also be a going concern scenario.
[50] Skauradszun (n 21) 63; Similarly, Riz Mokal in Lorenzo Stanghellini and others (eds), *Best Practices in European Restructuring* (Wolters Kluwer 2018) 37, 38: "the scenario most likely to materialise in the absence of the implementation of the proposed plan".
[51] Cf. Marcus Backes and Daniel Blankenburg, in Christoph Morgen (ed), *Präventive Restrukturierung: Kommentar zur europäischen Richtlinie über präventive Restrukturierungsrahmen* (RWS 2019) Art 10 para 37.
[52] Skauradszun (n 21) 65.
[53] As comparison points, Article 2(1)(6) Directive mentions "either [...] the event of liquidation, [...] piecemeal or by sale as a going concern, or [...] the event of the next-best-alternative scenario if the restructuring plan were not confirmed".

native scenario is depends furthermore on what tools the particular legal system provides. I argue that the next-best-alternative scenario should really be the next-*best* scenario. Therefore, the outcome of restructuring should not be compared in principle with a piecemeal liquidation. A more differentiated view is needed:

a) Without-anything-scenario

A possible next-best-alternative scenario could be that the debtor continues without using restructuring proceedings or insolvency proceedings, furthermore, without selling the business at going concern value, but continues without all these (without-anything-scenario). As the debtor company is at risk of insolvency, changes will also be required but only those that the debtor can implement on its own. This could include raising prices for services or goods, reducing services, outsourcing production steps, discontinuing production divisions,[54] no longer filling vacant positions, or only filling them with less qualified employees.

A without-anything-scenario, if permitted under national law, will not necessarily be the next-best-alternative scenario, but at least it should be shown why the without-anything-scenario is not the next-best-alternative scenario. For instance, this could be the case because the market would not accept higher prices and therefore revenues would further decline, lower quality is not contractually negotiable or there are no providers available that could be used for outsourcing. Furthermore, perhaps any measures taken by the company itself would not be sufficient to prevent insolvency and ensure the debtor company's ability to continue as a going concern. If, for these or similar reasons, a without-anything-scenario is not sufficiently likely[55], it is not the next-best-alternative scenario.[56]

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[54] Wolfram Desch, 'Der neue Stabilisierungs- und Restrukturierungsrahmen nach dem Regierungsentwurf StaRUG in der Praxis' [2020] Betriebs-Berater 2498, 2504.

[55] Although the characteristic 'sufficiently likely' is inspired by the German explanatory memorandum of the StaRUG (Bundestags-Drucksache 12/2443, 163), it can also be applied in other legal systems. This is because it is a principle of logic that a scenario that is not sufficiently likely cannot be the next-best-alternative scenario.

[56] Skauradszun (n 21) 65.

b) Continuation within an insolvency plan proceeding

Depending on whether the national insolvency law of the respective Member State also permits insolvency plan proceedings, the continuation within an insolvency plan proceeding could potentially also be the next-best-alternative scenario. Insolvency plan proceedings can preserve the legal entity of the debtor, which is also promoted by the Directive on restructuring and insolvency. Depending on the effectiveness and scope of the measures provided by the respective national law for insolvency plan proceedings, for example, whether employee rights can be affected, an insolvency plan proceeding may be even more effective than a restructuring proceeding. However, if a continuation within an insolvency plan proceeding is not sufficiently likely, this scenario won't come into question as the next-best-alternative scenario.

c) Sale as a going concern outside insolvency proceedings

As a general continuation scenario, the sale of the business shall be assessed. At the European level, Article 2(1)(6) of the Directive on restructuring and insolvency explicitly mentions the sale as a going concern as a variant of a liquidation.[57] The main assets of the business are sold as a unit, the business is thus continued and the remaining legal entity, once all assets have been converted into money and distributed, is terminated. The proceeds obtained can finally be distributed to the creditors. Normally, the sale as a going concern is conceptually worse than the aforementioned scenarios, since the sale as a going concern is regularly limited to a fixed distribution amount and earn-out clauses[58] can only lead to additional purchase price payments.

[57] Cf. Desch (n 54) 2504; Friedrich Cranshaw and Wolfgang Portisch, 'Präventiver Restrukturierungsrahmen in Konkurrenz zu bisherigen "Verfahrensweisen" der Sanierung' [2020] Zeitschrift für das gesamte Insolvenzrecht 2617, 2629 ("übertragende Sanierung mit Verkauf des Unternehmens als Ganzes oder in Teilen").

[58] For earn-out-clauses see Rüdiger Werner, 'Earn-Out-Klauseln – Kaufpreisanpassung beim Unternehmenskauf' [2012] Deutsches Steuerrecht 1662; Christian Schröder, 'Kaufpreismechanismen, insbesondere Earn-Out-Klauseln in Unternehmenskaufverträgen – Kritische Analyse rechtlicher Ausgestaltungsmöglichkeiten' in Jutta Stumpf-Wollersheim and Andreas Horsch (eds), *Forum Mergers & Acquisitions 2019* (Springer Gabler 2019) 29 et seq. and Ruben Becker, 'Earn Out Klauseln – Aufgaben, Funktionsmechanismen, Risiken Anwendungsbereiche' in Ingo Saenger and Gerhard Schewe (eds), *Forum Mergers & Acquisitions 2012* (Springer Gabler 2012) 221 et seq.

The prospects of satisfaction of the parties affected by the restructuring in the event of a sale as a going concern can be reliably assessed as an alternative scenario especially if the market has been asked to submit an offer (market test). Therefore, in principle, the market is to be consulted, whereby a selection of suitable purchasers may be approached confidentially and an offer requested. However, there may be exceptions to this principle.[59] If a potential purchaser understands that it is to submit an offer only to quantify the alternative scenario, it will not be willing to spend time and effort on such an offer. Besides, neither the management nor the shareholders actually want to sell the business. Another disadvantage of a market test is that through an offered sale the restructuring project becomes public, which is usually not desired in non-public restructuring proceedings.[60] Eventually, before a purchase offer can be made, the prospective purchasers must at least conclude non-disclosure agreements and must still be allowed to conduct due diligence.[61]

Therefore, a company valuation may be worth considering instead of a market test. Here, however, the decisive factor is not what can be calculated, but what is sufficiently likely to be realisable on the market. This is because no creditor can be satisfied with a mere calculation. Moreover, especially in cases of conflict, a real market test can coincide with a company valuation; in cases of doubt, the result of the market test is then more likely than the calculated company valuation. If the market is asked for such an offer and no offers are made or only

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[59] With regard to German insolvency plans, it is disputed whether there is an obligation to address the market in this way. Authors in favour of a real market test are, inter alia, Gülsah Tan and Martin Lambrecht, 'Die Quotenvergleichsrechnung im Insolvenzplan als Instrument der Interessenverfolgung' [2019] Neue Zeitschrift für Insolvenz- und Sanierungsrecht 249, 252; Ingeborg Karin Leib and Dietmar Rendels, 'Zurückweisung der Beschwerde gegen die Bestätigung des Suhrkamp-Insolvenzplans' [2015] Entscheidungen zum Wirtschaftsrecht 23, 24; Hans Jochen Lüer and Georg Streit, in Wilhelm Uhlenbruck (ed), *InsO* (15th edn, C. H. Beck 2019) section 220 para 16 (then it becomes apparent what a potential buyer is willing to pay depending on the individual case); Jochen Drukarczyk and Andreas Schüler, in Rolf Stürner, Horst Eidenmüller and Heinrich Schoppmeyer (eds), *Münchener Kommentar zur Insolvenzordnung* (4th edn, C. H. Beck 2020) section 245 para 80 (without real market tests it cannot be said what a third party is willing to pay). In contrast, however, Jürgen D Spliedt, in Karsten Schmidt (ed), *Insolvenzordnung* (19th edn, C.H. Beck 2016) section 245 para 41 (but with restrictions if a company valuation is otherwise difficult); in contrast, furthermore, in the case of a comparison calculation under the Directive on restructuring and insolvency Nicole Langer and Rüdiger Wolf, in Christoph Morgen (ed), *Präventive Restrukturierung: Kommentar zur europäischen Richtlinie über präventive Restrukturierungsrahmen* (RWS 2019) Art 14 para 39.

[60] Thus already on the Directive Langer and Wolf (n 59) Art 14 para 39.

[61] On these disadvantages regarding time and effort in the insolvency plan, see Spliedt (n 59) section 245 para 41.

inadequate offers are made, this incidentally meets the market-conformity test. If the majority in the groups[62] votes in favour of the restructuring plan, then this result must also be assessed as being in line with the market, since there would not have been the possibility of a better sale of the company as a going concern.[63]

Thus, the sale as a going concern is not sufficiently likely and does not represent the next-best-alternative scenario if no offer was made after the market was approached. For instance, this may be since there are no prospective purchasers (for example, the market segment is too specific). However, the sale as a going concern is also not the next-best-alternative scenario if the company, instead of a market test, was valued and the potential purchase price determined by a company valuation does not lead to a higher prospect of satisfaction for the parties affected by the plan.[64]

d) Sale as a going concern within insolvency proceedings

However, if the sale as a going concern outside insolvency proceedings is not sufficiently likely, the sale as a going concern within opened insolvency proceedings may be the next-best-alternative scenario.[65] Depending on the respective national law, liability risks for the successor may be reduced if the insolvency practitioner sells the business by way of an asset deal.[66] Therefore, finding a purchaser might be more likely than outside opened insolvency proceedings.

If there is no purchaser or no purchaser makes an adequate offer for an asset deal, the sale as a going concern is not sufficiently likely and, therefore, does not represent the next-best-alternative scenario. Furthermore, the sale as a going concern in insolvency proceedings is not the next-best-alternative scenario if the potential purchase price determined by a business valuation would not lead to a higher prospect of

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[62] As a minimum, creditors of secured and unsecured claims and shareholders shall be treated in separate groups/classes for the purpose of adopting the restructuring concept. See, e.g., Article 9(4) Directive on restructuring and insolvency.
[63] Skauradszun (n 21) 68.
[64] ibid.
[65] Langer and Wolf (n 59) Art 14 paras 20, 23 understand insolvency proceedings as liquidation within the meaning of Article 2(1)(6) of the Directive on restructuring and insolvency.
[66] Desch (n 54) 2504.

satisfaction of the parties affected by the plan. Finally, the sale as a going concern in insolvency proceedings is not sufficiently likely if the calculated company value is not realisable because a real market test does not reach the calculated value and thus the calculated prospect of satisfaction of the parties affected by the plan.[67]

e) Piecemeal liquidation

The piecemeal sale of the enterprise is the next and last logical step. The Directive on restructuring and insolvency also understands this realisation as a potential alternative scenario (Article 2(1)(6) Directive). This type of liquidation means an alternative scenario in which the distribution amount is limited.

A deviation from the assumed continuation in the alternative scenario in favour of a piecemeal liquidation will only be fair, if a without-anything scenario, a continuation within an insolvency plan proceeding, a sale as a going concern outside or within insolvency proceedings is not sufficiently likely.[68] Thus, the effort to justify the piecemeal liquidation as the next-best-alternative scenario will be great. However, this is a further argument for the effectiveness of the no-party-worse-off-principle as a protective mechanism.

Finally, the important finding is this: if an affected party is no worse off as a result of the restructuring than it would be under the next-best-alternative scenario, then it can be justified to overrule that party and still bind them to the outcome.[69]

[67] Skauradszun (n 21) 69.
[68] If the debtor compares the outcome of the restructuring with the piecemeal liquidation, two different things are being compared, namely a going concern scenario and a piecemeal sale scenario. This does not seem fair to the affected parties if an alternative continuation is sufficiently likely.
[69] Recital 52 of the Directive rightly states that "[s]atisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be [...] if the restructuring plan were not to be confirmed. [...] That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors".

4. Market-Conformity Test

Above I explained that the market needs to be protected and market shake-outs need to be reactivated as a market mechanism. But the market also has a task. It has to decide whether a restructuring is in line with the market or not (market-conformity test). Although the debtor makes a proposal as to how much the debt must be reduced or converted to rescue the company, it is not the debtor who makes the final decision, but the market.[70]

Allowing the market[71] to decide on the restructuring of a market participant instead of putting this into the hands of judges has a significant advantage. The economic assessment of whether and to what extent a creditor or shareholder is out-of-the-money and whether the potential outcome in the next-best-alternative scenario for the affected parties is plausible or not can best be assessed by the market.

The principle of market conformity originates in economics and is an economic policy rule for interventions in the market.[72] According to this rule, policy-makers and legislators shall only take those measures (such as legal frameworks for restructuring and insolvency) that are in line with the market, i.e. in correspondence with the economic constitution and not undermining the price mechanics and therefore, the self-regulation of the market.[73]

Although the debtor is in charge of an initial estimate of whether and to what extent creditors and shareholders are out-of-the-money, the market conformity of the restructuring measures is not safeguarded by the debtor's decision, but by the vote of the parties affected by the restructuring. This is because restructuring and insolvency proceedings must not be tools for perpetuating the debtor against market forces.[74] The debtor itself is not suitable for finally deciding on the

[70] Skauradszun (n 21) 58.
[71] For a definition of the relevant market, see under III.4.a.
[72] From the economic literature, see Christian Watrin, 'Zur Diskussion um das Problem der Marktkonformität' [1957] Zeitschrift für Wirtschaftspolitik 47.
[73] Watrin (n 72) 48.
[74] In German insolvency law, the terms 'perpetuation' and 'market forces' were first used by the German parliament in the explanatory memorandum of the "Proposal of an Insolvency Code". See Bundestags-Drucksache 12/2443, 77.

market conformity since no one can be a judge in their own case. Nevertheless, when the debtor calculates how much help the company needs and then explains to the affected parties that they are asking for at most the same as creditors and shareholders would receive in the next-best-alternative scenario, then the debtor is merely allowed an *initial estimate*. However, it is the market that decides. Back to the example given above. If the debtor estimates that their creditors are 20% out-of-the-money and explains their estimate, and if the market now decides that the debt will be reduced by 20%, then an outcome is produced that is consistent with the market. The market then produces an outcome that is economically plausible.

a) Market failure and representation of the market by the majority of affected parties

From an economic perspective, a unanimous decision by all market participants affected would be ideal. In many cases, however, this consensus can no longer be achieved. Market failure occurs again and again. Although the rescue of a *viable* company makes sense, individual creditors obstruct the rescue of the company and take a holdout position.[75] Therefore, the market must exceptionally be represented by the *majority* of the affected market participants. However, the market must be *sufficiently* represented. By selecting the parties affected by the plan the debtor defines the representative market itself.[76] Thus, it has the right to delimit the market and to determine how it will be affected by the restructuring.

If, for example, the debtor selects the unsecured suppliers and the financial creditors as participants in the restructuring, then these form the relevant market and thus represent it. However, this discretion to select is also subject to a market-conformity test. If, for example, the debtor's restructuring plan provides for restructuring with four of its

[75] The overcoming of the holdout problem has been discussed, inter alia, by Horst Eidenmüller, 'Contracting for a European Insolvency Regime', (2017) 18 EBOR 273, 290; Christoph Paulus and Matthias Zenker in Lorenzo Stanghellini and others (eds), *Best Practices in European Restructuring* (Wolters Kluwer 2018) 2; Florian Eckelt, *Der präventive Restrukturierungsrahmen* (Nomos 2020) 801 et seq.

[76] In preventive restructuring frameworks according to the EU Directive on restructuring and insolvency, the debtor has the right to choose the affected parties and divide them into classes (cf. Articles 8(1)(c), 9(4) Directive).

ten suppliers[77] and the four suppliers signal that they will therefore vote against the plan because they do not consider the market to be sufficiently represented, the debtor will have to expand the market to include more or even all ten suppliers. Conversely, if the four selected suppliers agree to the restructuring and thus six suppliers are not included, again this speaks for a representative market. An effective market-conformity test does not necessarily require that the market is represented by the sums of the claims, values of the collateral, or shares in the subscribed capital and the heads of the market participants. The market share can also be determined by business variables, such as the revenue of the market participants and the economic significance.[78] Notwithstanding, at least as a rule of thumb the focus on the claims' sums seems to be suitable as the relevant criterion.

If a very large majority, e.g., three quarters of the affected market participants vote in favour of the restructuring, then a prima facie presumption is that the outcome is in line with the market.[79] Although a majority vote partially creates a market distortion, restructuring measures can also be justified by a market-conformity test in the absence of a unanimous vote of market participants. This is because allowing the majority vote can overcome the holdout problem, which is from a regulatory liberal perspective[80] a market failure.[81] Thus, the majority requirement is part of the justification since a majority voting in favour of the restructuring (as an assessment by the market participants) indicates that the outcome is in line with the market. Further-

[77] This differentiation might be appropriate. Under German law, for example, an appropriate reason would be that claims of small creditors, especially SMEs, remain unaffected (section 8(2) StaRUG). Therefore, if the six suppliers not affected are SMEs, this selection would be justified.

[78] See specifically the definition of 'market share' in Dirk Piekenbrock, *Gabler Kompakt-Lexikon Volkswirtschaftslehre* (3rd edn., Springer Gabler 2019): "Marktanteil, prozentualer Anteil eines Unternehmens am Gesamtumsatz oder -absatz aller Anbieter (der Nachfrager) auf einem relevanten Markt".

[79] Skauradszun (n 21) 58.

[80] According to ordoliberalism or the so-called Freiburg School, the task of economic policy is to shape the framework conditions for functioning competition in line with the market, see Walter Otto Ötsch, Stephan Pühringer and Katrin Hirte, 'Das Konzept des Marktes', *Netzwerke des Marktes* (Springer 2018) 89, 93; Werner Lachmann, 'Dogmengeschichtlicher Überblick', *Volkswirtschaftslehre I* (5th edn, Springer 2006) 56.

[81] The optimal allocation of goods and resources is therefore no longer guaranteed, see Piekenbrock (n 78) on 'market failure'. In the case of such a market failure, for the state, it may be economically reasonable to counteract with regulations, see Michael Fritsch, 'Ökonomische Theorie des Staates und der Politik', *Marktversagen und Wirtschaftspolitik* (10th edn,Vahlen 2018) 327.

more, a large majority vote constitutes an *almost consensual restructuring*. Consensual solutions lead to legal peace[82], which is also a possible argument to justify the measures. Conversely, a very large majority vote indicates that the dissenting minority is pursuing other goals, for example, possibly taking a holdout position.[83]

b) Mathematical correctness not intended

The sufficiently represented market decides whether the interference with the rights of the affected parties will only happen to the maximum extent that the affected parties are out-of-the-money anyway. However, the debtor's initial estimate on whether and to what extent creditors and shareholders are out-of-the-money is also subject to a market-conformity test. It is, however, not a matter of the outcome being *mathematically* correct.

For example, the debtor assumes that its creditors are 20% out-of-the-money and thus offers a cut of 10%. If the creditors now agree to this measure, the prima facie evidence suggests that the relevant market considers this measure to be in line with the market and that the creditors are indeed out-of-the-money at least to this extent. If the 20% assumed by the debtor were calculated on a reference date, then it might actually be only 18% or even 24%. But this is not relevant, since mathematical correctness is not the intention. The relevant point is that the market-conformity test is intended to prevent such restructurings that are not in line with the market. The important finding is that the market should regulate itself as much as possible. If the sufficiently represented market assumes that the affected creditors are 20% out-of-the-money, the market-conformity test is satisfied anyway.

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[82] Manfred Balz, 'Aufgaben und Struktur des künftigen einheitlichen Insolvenzverfahrens' [1988] ZIP 1438, 1443 already points out the advantage of consensual solutions in insolvency proceedings in order to create legal peace.

[83] Even more severe Stephan Madaus and Bob Wessels, 'Business Rescue in Insolvency Law – A Challenge for Private Law?' [2020] ZEuP 800, 814: "Where a high percentage (75-80 %) of equally affected creditors accept a workout solution, we suggest that it should be assumed that a veto from a minority of dissenting creditors is made in bad faith unless good faith is proven to the court". Similar but more reluctant is Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (OUP 2019) 61, according to which the minority creditor may therefore be in favour of liquidation because it is in urgent need of the distribution of the proceeds.

c) State-controlled market participants

This solution does not need an adjustment if some market participants are companies that are controlled by states or states hold shares in the market participants. Indirectly, states may thus influence the majority decision on restructuring the debtor. However, in semi-collective proceedings, the debtor has a discretionary power and can choose the creditor it demands a special sacrifice from. Therefore, if the debtor wants to avoid state influence, it can spare a business partner which is state-controlled. Furthermore, it must be seen that it was the debtor who chose their contractual partners who, at a later time, may decide on its restructuring.

d) The reverse case: negative market decision

After all, it must be clear that the approach presented also applies to the reverse case: if the debtor thinks their company is viable and therefore prepares restructuring measures, but the majority of the affected parties reject the rescue, then the market judges that this company cannot be rescued or should not be rescued. The mechanism mentioned at the beginning then takes effect. The market then organises a market shakeout and purges itself of companies that the market can no longer or no longer wants to support. Even if the debtor could prove that no affected party would be worse off than in the next-best-alternative scenario, there is no way of bypassing the market decision. The market-conformity test thus applies in both cases: in the decision to rescue companies and in the decision in favour of a market shakeout.

IV. CONCLUSION AND THESES

1. Government measures such as subsidies, the deferral of tax claims or their payment in instalments, bridging loans and guarantees for bank loans, statutorily suspended termination rights for loans and leases, and in particular the suspension of the obligation to file for insolvency do not solve the problem that many companies have accumulated such high debts that they can no longer repay them on their

own. Therefore, protective market mechanisms such as market shakeouts through restructuring and insolvency proceedings in the case of financial distress should be put back into place to prevent domino effects.

2. Only the rescue of viable companies can be justified. Above a certain debt level (financial distress), a company that is viable in principle can only be rescued by restructuring measures. First and foremost, this must include a debt cut.

3. The no-party-worse-off-principle, whereupon no affected party of the restructuring shall be worse off as a result of the restructuring than they would have been without the restructuring, is both a safeguard for the affected parties and a justification for the interferences. For this purpose, the prospects of satisfaction of the affected party with the restructuring are compared to the prospects of satisfaction of the affected party in the next-best-alternative scenario besides the envisaged restructuring. This requires a comparison calculation and a determination if and to what extent an affected party is out-of-the-money.

4. If the restructuring concept foresees continuation, the next-best-alternative scenario should be also based on the assumption that the business will be continued. Different scenarios are to be examined, in particular the without-anything scenario, the continuation within an insolvency plan proceeding, the sale as a going concern outside or within insolvency proceedings as well as the piecemeal liquidation. If a scenario is not sufficiently likely, it cannot be the next-best-alternative to the restructuring.

5. The debtor is allowed to make an initial estimate of whether and to what extent the creditors and shareholders are out-of-the-money. The market conformity of the restructuring measures is neither safeguarded by the ruling of a judge who is never the better entrepreneur nor the debtor themselves since no one can be a judge in their own case. This is why the market conformity is safeguarded by the vote of the affected market participants (market-conformity test). This market-conformity test does not require mathematical correctness. Rather, the majority voting in favour of the restructuring measures indicates *prima facie* that the measures taken are in line with the market. The

market is – in deviation from economic principles on market conformity – defined by the debtor through the selection of the parties affected by the plan and is already sufficiently represented by a large majority vote. This is a reaction to market failure that can arise from individual holdouts.