Classes, majorities and minorities in the adoption of a restructuring plan and its impact on the contractual synallagma – Bilò Giovanna

1. Introduction

The EU Restructuring directive states clearly at its firs recital that its objective is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, without affecting workers' fundamental rights and freedoms. It goes on to say that it aims to remove such obstacles by 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 and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

This non-exhaustive list of fundamental rights must be read in the light of the EU Charter (article 52(5)) and, by means of articles 6(3) TUE and 53(3), of the ECHR. Indeed, under article 53(3), "in so far as that Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

Therefore, for our purposes, when interpreting and applying the Directive we must bear in mind not only article 63 TFEU, which forbid all restrictions on the movement of capital, and article 49 TFEU, which, in turn, prohibits restrictions on the freedom of establishment of nationals. Special consideration must also be given to the freedom to conduct a business, under article 16, and the right to property, under article 17 of the Charter.

The reference to fundamental workers' rights is also explicit and this lead us to consider article 15 of the EU Charter, which enshrines the right to engage in work, and articles 27 to 32 of the Charter, which further protect the right to work, taking into account specific aspects such as workers' rights to information (article 27) and to collective bargaining (article 28), but also the right to protection in the event of unjustified dismissal (article 30) and, of course, the right to fair and just working conditions (article 31).

Moreover, the first recital expressly takes into account also the need to ensure effectiveness of procedures concerning restructuring, insolvency and discharge of debt, in particular with a view to shortening their length: hence the right to an effective remedy and a fair trial under article 47 of the Charter.

All these rights are also protected under the ECHR. As we have seen, the rights to work and to conduct a business are normally dealt with by the Strasbourg Court under article 8 (Right to respect for private and family life), while the right to property (but also credits) receives specific consideration under article 1 of Protocol n. 1 (Protection of property). Lastly, we cannot forget articles 6 and 13 ECHR, respectively, concerning the rights to a fair trial and to an effective remedy.

In the Directive, the tool aimed to deal with all these rights and interests in the event of business distress is the preventive restructuring framework, which, in a quite broad sense, is defined by article 2(1) as the set of "measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements".

According to article 1(a) preventive restructuring frameworks should be available for 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.

Thus, viable businesses are not only protected with a view to the entrepreneurs' rights to maintain their business and property, but also as a means of preserving jobs for employees and trade for suppliers. In addition, of course, the purpose of reorganisation is also to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated.

However, "with different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved".[1]
To this regard, in principle, the Directive lies on the assumptions that the stakeholders involved in the enterprise's crisis are those better placed to assess the viability of a restructuring plan and its convenience in the light of the foreseeable impact on their rights.
This is why, according to article 9 of the Directive, the adoption of a restructuring plan is conditional on their approval. In principle, this should mean that each affected creditor should accept the plan. However, unanimity is not required under the Directive. The said approval, at least based on the letter of article 9, paragraph 6, is achieved by virtue of the majority principle.

2. Application of the majority principle within classes

The majority principle and, with it, the cram-down of dissenting creditors belongs to the European legal tradition of restructuring and, more in general, company law. This is a feature that the Directive has in common with the US Chapter 11, which is known to be the model used for the construction of this part of the Directive (Chapter 3, articles 8 to 16). Traditionally, a successful Chapter 11 outcome is that it results in a reorganisation plan agreed by a majority of creditors[2].
The reason behind this choice is clear and responds to the need to shield the restructuring plan from the leverage(if not even blackmail) of minorities who would be otherwise incentivised to use the threat of dissent to obtain greater concessions to their own advantage (and to the detriment of other parties). In a context of limited resources as the one of distressed companies, this would make it impossible to reach the consent of all those involved and, thus, the adoption of the plan. Common-law doctrine usually refers to this issue as the 'hold-out problem'.
The majority rule lies on the presumption that the decision taken by the majority reflects the interests of the whole group, provided that this group is homogeneous and has full information about the plan[3].
Following this rationale, article 9, paragraph 6, of the Directive 2019/1023 establishes that "a restructuring plan (which shall be notified to all affected parties pursuant to article 10(2)(c)) shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class".
We can derive three insights from this statement.
First, the provision refers to 'affected parties' since only affected parties shall have a right to vote on the adoption of a restructuring plan, according to article 9(2). The rather tautological definition of affected party is provided for by article 2(1)(2), which refers to "creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan".
Thus, affected parties are those whose claims are directly affected by the plan. They include impaired parties, for which recital 54 offers a more specific definition, stating that 'The impairment of creditors should be understood to mean that there is a reduction in the value of their claims'. Since these two terms ('affected' and 'impaired') are distinctly used in the Directive (article 11), it has been proposed, in order to draw a meaningful distinction, that the term 'impaired' should be construed as referring to creditors whose claims are reduced in their amount (whether as to principal or interest) by the plan. By contrast, affected creditors would not be impaired if, without suffering any reduction on their claim, they undergo a deferral of the original payment terms[4].

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[1] UNCITRAL Legislative Guide on Insolvency, Part. I, 2005, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf, p. 209
[2] G. Mc Cormack, Restructuring plans and their confirmation, in G. Mc Cormack, The European restructuring Directive, Cheltenham, 2021, 164
[3] G. Ballarini, The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?, International Insolvency Review 30, 1, Spring 2021, 9
[4] T. Richter, A. Thery, INSOL Europe Guidance Note on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023. Claims, classes, Voting, Confirmation and the Cross-Class Cram-Down, 2020, 11

However, this is an interpretative proposal, since the Directive does not state anywhere that the claim reduction of the impaired parties must, for instance, include both principal and interest, and not, for instance, only the capital.
Moreover, it seems that these definitions should not be construed as an autonomous concept of EU law, since recital 55, albeit in relation to the specific context of absolute and relative priority rule, entrusts Member States with the definition of what 'full payment' should mean.
Similarly, there is no clarity in the notions of 'claims' as opposed to 'interests', as used in the Directive. If this were a notion imported from the Bankruptcy Code, it would be inferred that claims refer to indebtedness, whereas interests refer to shares and equity[5]. This conclusion seems to be backed by article 2(1)(3), which defines 'equity holder' as a person that has an ownership interest in a debtor. And it can be maintained in all cases the two words are mentioned together, as, for instance, in article 8(1)(c) and (d), concerning the information to provide with a plan, and in article 9(6), on the majority rule. By contrast, the term 'interest' is clearly used in a very different sense in article 9(3), where we find references to 'related parties with a conflict of interest', as well as in article 9(4), where 'different classes with different commonality of interests' are mentioned. The question of whether the definition of these terms should be elaborated as an autonomous EU concept or left to Member States remains open[6].
Unaffected parties, i.e. parties who do not suffer the direct effects of the plan, shall not have voting rights according to article 9(2). In addition, pursuant to article 14, they do not need to be granted the possibility to challenge a plan. Here, the distinction between non-affected parties and indirectly affected parties can be relevant, although both of them are outside the scope of the plan's regulation. Indirect affected parties can be, for instance, those that suffer the creation of a senior class of creditors with respect to them or a change in the composition of assets or corporate structures such as to reduce the company's assets or increase its overall obligations. The fact that the value of their claims and the overall terms of their contract are not affected by the plan justifies, as it is the rule under non-insolvency conditions, that they have no say in the aforementioned decisions.
In any case, pursuant to recital 46, the selection of creditors affected by the plan should be examined by the judicial or administrative authority, when a restructuring plan is submitted for confirmation.
If non-affected parties are not involved in the adoption of a plan, this means that the restructuring plan is not (or not necessarily) universal. Indeed, as the Directive aims to promote early intervention to resolve the crisis, it is understandable that it takes into account situations in which the need to renegotiate the terms of performance of claims arises only with respect to certain creditors and not with regard to all of them.
However, this aspect must be borne in mind when considering the majority principle, since the votes required for the adoption of a plan do not represent all the stakeholders involved in a company's distress, but only those directly impacted by the plan itself. Hence, the majority principle can be actually applied, from the very beginning, to a minority of stakeholders: those whose claims need to be reshaped.
The second piece of information that can be drawn from article 9(6) is that majorities are calculated within each class. Indeed, according to article 9(4) 'Member States 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'. And pursuant to article 8(1)(d), the classes into which the affected parties have been grouped and the respective values of claims and interests in each class are part of the essential information of the plan.
However, pursuant to article 9(4), Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes. This rule, which aims, like other provisions of the directive, to provide SMEs with more flexibility in their restructuring, must be taken into account when assessing the impact of the EU legislation under consideration, given that, as pointed out in recital 17, SMEs represent 99 % of all businesses in the Union.

[5] See G. Mc Cormack, Restructuring plans and their confirmation, cited, 172-173
[6] T. Richter, A. Thery, INSOL Europe Guidance Note on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023. Claims, classes, Voting, Confirmation and the Cross-Class Cram-Down, above note 4, 13, are in favour of the second solution.

When classes apply, however, the Directive requires a homogeneity within them, although the determination of the criteria for the formation of classes is left, by article 9(4), to national law. Nonetheless, it offers some hints to this regards.
As a minimum, according to article 9(4), creditors of secured and unsecured claims shall be treated in separate classes. But it is also possible for Member States to provide that secured claims are divided into secured and unsecured parts based on collateral valuation (recital 44).
In addition, workers' claims may be treated in a separate class of their own (article 9(4)) unless Member States have decided to exempt them from restructuring (in which case, they will not vote).
In any case, Member States should require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States could also treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes. Finally, specific rules are required with a view to protecting especially vulnerable creditors, such as small suppliers (article 9(4)), eventually supporting class formation in respect of them (recital 44).
Equity holders, related parties of the debtor and creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities may be excluded from the right to vote, according to article 9(3), which means that they can also be grouped in separated classes.
Recital 46 adds, indeed, that Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, contingent claims and contested claims. Member States should regulate how contested claims are to be handled for the purposes of allocating voting rights. Similarly to what provided for labour related claims, maintenance claims and tortious claims by article 1(5)(c), if not included in a specific class, they could be excluded from the plan[7].
According to recital 44, the formation of separated classes of affected parties aims to ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties. And, indeed, classes should reflect the priority of claims according to article 11(1)(c). This equitable and fair treatment shared among claimants belonging to the same class should be, therefore, one way to ensure that claims are treated in accordance with the priority established under national insolvency law[8].
Nevertheless, the formation of classes may also facilitate, and it is normally used to facilitate, negotiations over the plan. Claimants may have different views on the risks connected to its implementation and the estimated value of the 'going concern surplus'. These different views will normally be influenced by the different interests they have at stake. For instance, the interest of small suppliers and traders in general in the prosecution of a business is not the same than that of a tort victim or a financial creditor, eventually secured by a debtor's asset. These latter interests, in turn, are highly different from those of a hedge found having acquired non-performing loans on the secondary market below par and willing to maximise its investment. The need to separate these groups of creditors and to deal with them in a partially different manner responds to a common sense of commerce and it may produce an outcome in favour of the proposed plan that would not be obtained if the division of claimant followed different criteria.
For this very reason, however, the creation of classes may also be artificial, aimed only at isolating dissenting creditors in order to obtain classes' approval. In UK, to deal with this problem, the Insolvency Act 1986 draws a clear distinction between legal rights and interests or motives, only the firsts being relevant for class formation. However, the entitlement to different legal rights does not prevent creditors from being grouped in the same class. To require separate classes, the rights of the holders have to be so dissimilar as to make it impossible for them to consult together with a view to their common interest. It has been observed that this criterion has introduced a certain subjectivity into the assessment for class

[7] T. Richter, A. Thery, INSOL Europe Guidance Note on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023. Claims, classes, Voting, Confirmation and the Cross-Class Cram-Down, above note 4, 16
[8] UNCITRAL Legislative Guide on Insolvency, cit., 219

formation, which has generated a particular flexibility in the courts, making them not too demanding in this respect[9].

The appropriateness of referring to the commonality of legal rights rather than motives has also been argued in connection with European restructuring[10].

The need to avoid the artificial use of classes, however, is dealt with by the Directive, providing that voting rights and the formation of classes shall be examined by a judicial or administrative authority before the plan is put to a vote and, in any case, when a request for confirmation of the restructuring plan is submitted (article 9(5) and recital 46).

Lastly, the third data deriving from the provision at stake is that majority is calculated with reference to the parties' claims or interests, not on their number. The rationale behind this option is stated clearly by recital 47. 'To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests'. In addition, article 9(6) draws an upper limit by stipulating that, although the definition of the required majorities are left to Member States, they may not exceed 75% of the claims or interests involved. This cap shall also apply in cases where States, exercising the option provided for in the same rule, add a majority in number to the majority in value.

The reason behind the introduction of this upper limit is the same that is behind the application of the majority rule, i.e. the hold-out problem. A requirement of near unanimity may help some creditors to hinder the plan success by withholding consent in order to obtain better treatment.

Within this limit, Member States have a considerable margin of discretion. In fact, from an analysis of the various implementing legislations, the required percentages not only vary from State to State but may also vary depending on the type of procedure or be conditioned by the percentage of voting creditors or by the extent of the proposed credit reductions.

For instance, in composition proceedings (i.e. pure debt reduction proceedings as opposed to general restructuring proceedings), Sweden distinguishes between plans providing for 50% or more of payments, where the required percentage of votes is 60% of the total value of claims, and plans providing for deeper discounts on the debt, where the required majority raises up to 75%[11].

In Portugal the requirement is either of two-thirds in value of credits, provided that at least one-thirds vote, or more than 50% in value of total debt[12].

In Spain, two-thirds of the value of eligible claims are required, a majority that raises to three-quarters in the case of secured claims[13].

France[14] and The Netherlands[15] demands two thirds in value of each class of creditors.

In Germany, a plan needs to be approved by 75% of the represented claims in each group[16].

In Denmark, a majority in value among the creditors taking part at the meeting is required[17].

In Austria the plan is adopted when a simple majority in number and a majority of 75% in value of those attending the hearing is reached[18].

[9] Re Lehman Brothers International (Europe) [2018] EWHC 1980 Ch, paragraph 69

[10] R. Mokal, Fairness, L. Stanghellini, R. Mokal, C. Paulus, I. Tirado, Best Practices in European Restructuring Contextualised Distress Resolution in the Shadow of the Law, above note 9, 40

[11] UNCITRAL Legislative Guide on Insolvency, cit., 224

[12] G. Mc Cormack, Restructuring plans and their confirmation, cited, 176

[13] P. De Cesari, Al via in Spagna la nuova 'reforma concorsual', Il Fallimento, 2023, 176 ss.

[14] E. Ghio, France, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 58

[15] J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, The Netherlands, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 131

[16] B. McKenzie, European Restructuring Scheme. Snapshot on the status of implementation of the EU Restructuring Directive in selected Member States and the new English scheme, https://www.bakermckenzie.com/-/media/files/insight/publications/2022/05/european-restructuring-schemes.pdf, 4-5; S. Madaus, D. Ehmke, Germany, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 80

[17] L. Langkjaer, Denmark, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 39

In Greece[19] the consent of more than 50% in value of secured claims and more than 50% in value of remaining claims is required.
In Italy, different restructuring proceedings require different majorities. Nonetheless, if we consider the concordato preventivo in continuità, the law requires 50% + 1 in value. Failing this, two-thirds of the votes cast are required, provided that the latter represent at least half of the total debt value of a class.
This last example leads us to another point. The Directive does not deal with affected parties who have not cast their vote. It is therefore up to Member States to determine whether the votes of those abstaining should be taken into account and, if so, whether they should be considered as having been cast in favour of the plan or against it. It has been pointed out that a rule that states that only votes that are actually cast are counted seems the most effective one. 'It does not excessively favour one outcome over the other and responds to a common idea of democracy, which requires that the opinion of those that decide to express it prevails"[20]. Nonetheless, if only the votes cast count and if, as in the Italian case, only 50% of the class value vote, the majority of votes in favour will not represent the majority but rather a minority in the class[21].
More generally, where only votes cast are taken into account and where non-voting creditors are deemed to have agreed, it is possible that the adoption of the plan will be determined by a minority of claims. This is not a criticism, of course. It is simply an illustration of how the majority principle works when some of the voters abstain from exercising their right. On the other hand, with clear rules on the value of abstention, the latter can also be seen as an expression of will.

3. Empowering minorities: the cross-class cram-down

In the scenario previously delineated, the plan is adopted and potentially confirmed if voted by a majority of claims in each and all classes. It can be posited that if a majority is required within each class, unanimity is required among all classes. It has been said that unanimity is required among classes, in principle, because, by definition, classes are bearers of different interests and, therefore, the presumption that the majority decision reflects the interest of all cannot operate[22].
But, it is notorious, this is a rule that can be waived provided that article 11 introduces a new European cross-class cram-down.
This is another feature of the US Chapter 11 under which a class of creditors can be crammed down, i.e. forced to accept the plan against its wishes, provided that at least another class of impaired creditors has accepted the plan and provided that the priority ranking that would be applied in liquidation, i.e. the absolute priority rule, is not violated[23]. Like the majority principle, this instrument aims at overcoming hold-out scenarios and freeriding positions[24].
Other than on the debtor's consent (which Member States can, however, limit to SMEs), in the EU Restructuring Directive the cross-class cram-down is conditional on two alternative circumstances.
Judicial or administrative authorities may disregard the will of one or more dissenting classes, firstly, when the plan has been approved by a majority of the voting classes of affected classes, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class (article 11(1)(b)(i)).

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[18] G. Wabl, M. Trenker, Austria, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 24
[19] Y. Bazinas, A. Paizis, Spain, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 103
[20] L. Stanghellini, Negotiating Restructuring plans, L. Stanghellini, R. Mokal, C. Paulus, I. Tirado, Best Practices in European Restructuring Contextualised Distress Resolution in the Shadow of the Law, Milan, 2018, 175
[21] G. D'Attorre, Dal principio di maggioranza al principio di minoranza, Il fallimento, 2023, 3, 302
[22] G. Ballarini, The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?, above note 3, 9
[23] G. McCormack, Restructuring plans and their confirmation, cited, 182-184
[24] A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new 'best interest of creditors test' in European Union, above note 16, 77

With reference to this condition, it has been pointed out that, since the value of credits included in each class will normally be different, it may happen that the favourable vote of the majority of classes will not reflect the favourable vote of the majority of the value of credits entitled to vote or voting, as the case may be. If the classes in favour are made up of smaller credits than the classes against, it may indeed be the case that although the proposal is approved by a majority of the classes, the votes in favour represent only a minority of the voting credits. The same could occur when in the classes in favour the majority is reached by a narrow margin, while in the classes against it the margin is wider[25].
Not only that, according to article 11(1)(b)(ii), a plan may be confirmed when 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 if the normal ranking of liquidation priorities were applied under national law.
States may, on the one hand, limit the application of this second hypothesis to cases where the consent comes from a class of impaired creditors as defined in recital 54 (reduction of the claim value), and not only affected. On the other hand, they can increase the minimum number of classes required to approve the plan. Nonetheless, it is clear that, following this provision, the cross-class cram-down does not require the support of a majority of classes. In theory, the plan could be confirmed even if only one class votes in favour, provided that this class is in the money and it is not an equity holder class. The reason for the exclusion of these two categories of stakeholders evidently stems from the fact that they would be unlikely to be paid in a liquidation alternative, which leads to the fact that they will always find it convenient to vote in favour of the plan, as they have nothing to lose. Anyway, this test is closer to US Chapter 11 than the previous one[26].
It has been noted, however, that even in the event that the affirmative vote was obtained in a minority of classes, this would not necessarily exclude the obtaining of an affirmative vote by a majority of the value of the voting credits. Once again, everything will depend on the amount of the claims constituting the consenting and dissenting classes[27].
Member States have followed different routes when implementing cross-class cram-down. In Spain, France[28] and the Netherlands, for instance, even a single class vote is sufficient[29] and, although it has been discussed, the same conclusion should be reached in relation to the Italian concordato preventivo con continuità. In Germany[30], Austria[31] and Denmark[32], by contrast, the legislator has required the approval of a majority of classes. Greece[33] having only two classes, demands the agreement of creditors representing more than 60% of total claims and more than 50% of secured credits.
Nonetheless, in general, the choice to apply the principle of majority within the classes, rather than with respect to the totality of the value of credits, inevitably brings with it the risk that only an actual minority of creditors will support the approval of the plan.
Besides, regardless of the value of the claims which are reflected in the favourable votes obtained, it is the cross-class cram-down mechanism itself which is designed to override the expressed will of the creditors by replacing it with the decisions of the judicial or administrative authorities.
For this reason, it has been proposed to reverse the perspective and to consider that, in the structure of the Directive, the vote of creditors is not decisive for the approval of the plan but for its non-approval, in

[25] G. D'Attorre, Dal principio di maggioranza al principio di minoranza, cited, 303, with reference to the Italian regulation of the concordato preventivo in continuità but whose conclusions can be extended to the Directive as well.
[26] G. Mc Cormack, Restructuring plans and their confirmation, above note 16, 185
[27] G. D'Attorre, Dal principio di maggioranza al principio di minoranza, above note 18, ibidem
[28] E. Ghio, France, above note 14, 62
[29] H. Volberda, Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023, above note 10, 71; J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, The Netherlands, above note 15, 131
[30] G. D'Attorre, Dal principio di maggioranza al principio di minoranza, above note 18, 306
[31] G. Wabl, M. Trenker, Austria, above note 18, 25
[32] L. Langkjaer, Denmark, above note 16, ibidem
[33] Y. Bazinas, A. Paizis, Spain, above note 19, 104

the sense that in case of a negative vote unanimously obtained in all classes, the plan cannot be confirmed. In other words, classes of affected parties are recognized a veto power rather than a power of approval of the plan[34].
These findings obviously put into question the traditional conception of the restructuring plan as a contract between the debtor and several collective parties, each consisting of a class.
It is, in fact, the very starting point of our discussion that is called into question. If it is not really the majorities that decide on the approval of the plan and, in any case, if their will is not an obstacle to its confirmation, it is clear that the assumption that those involved are in the best position to assess the feasibility and cost-effectiveness of the plan and that, as a consequence, it is to them to decide, does not hold.
Beyond the declarations of principle, the Directive clearly move from an approach based on self-regulation to a public regulation of the restructuring process, in which the will of the stakeholders certainly has an informative value, but where the final decision is left to the judicial or administrative authorities.
To apply the cross-class cram-down these authorities are, indeed, required to submit the plan to a fairness test, which, among others, imposes adherence to the relative or absolute priority rule.

4. The impact on creditors' rights

And here we come to the second part of my intervention, which concerns the impact of the rules on the approval and validation of a restructuring plan on the contractual synalagma or, in other words, on the creditors' rights.
RPR was not contemplated by the original Commission proposal submitted to the EU legislative process in 2016[35]. It was, in fact, introduced in a 2018 draft agreed by the Council of Ministers, which explained such an amendment on the basis that the cross-class cram-down and the APR would make the procedures more burdensome and costly and would render the preventive restructuring more restrictive if not impossible[36].
As known, under the absolute priority rule, no junior class can receive any distribution or keep any interest if senior classes have not been satisfied in full by the same or equivalent means (article 11(2)). This means that shareholders, which are the residual claimants, cannot retain nothing if they have not paid creditors in full. This is what is meant when it is said that shareholders are wiped out first.
For the relative priority rule as interpreted by article 11(1)(c), by contrast, dissenting voting classes of affected creditors must be treated at least as favourably as any other class of the same rank and more favourably than any junior class. Hence, it is not necessary for senior classes to be paid in full. Shareholders may retain a stake in their firm as long as they provide creditors with better treatment. Moreover, the Directive does not explain what a more favourable treatment is, which means that it could be even a minimal improvement. Although, in both cases no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests, RPR essentially provides for a partial redistribution of the reorganisation surplus in favour of lower ranking claimants and especially shareholders.
In the Directive's approach, Member States may retain the APR by way of derogation from point (c) of paragraph 1. In addition, they can introduce variations on the traditional APR when this is necessary to achieve the aims of the plan, provided that the rights and interest of affected parties are not unfairly prejudiced. Failing that, RPR shall be the rule when drawing up a restructuring plan.

[34] G. D'Attorre, Dal principio di maggioranza al principio di minoranza, above note 18, 308
[35] 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/2016/0723 final - 2016/0359 (COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0723:FIN, especially recitals 28 and 30 and articles 2(10), 11(1)(c), and 12(2)(b).
[36] Note from Presidency to Council, 12536/18, 1 October 2018, https://data.consilium.europa.eu/doc/document/ST-12536-2018-INIT/en/pdf, 4-5

However, given that a plan may be challenged under the BIT, the value that can eventually be distributed according to RPR is conditional on this test[37].

The BIT is another feature derived from the US Chapter 11, which requires that an affected party should receive or retain under the plan at least as much as it would in a liquidation under Chapter 7 (whether piecemeal or as a going concern).

However, in defining the test, article 2(1)(6) adds something more. 'Best-interest-of-creditors test' means that 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 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.

Similarly, according to recital 52, 'Satisfying 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 either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors'.

The next-best-alternative scenario is the scenario that is most likely to materialise if the plan were not confirmed[38]. Intuitively, one would expect to recover more by a going concern sale than by a piecemeal liquidation. However, the Directive also takes into account a third scenario.

Thus, if, for instance, a different plan that was put to a vote, has received adequate support and is likely to be approved if this plan were not, the treatment envisaged by such a plan should be the benchmark for the BIT test.

This means that, in the rare cases where an alternative restructuring plan is available, the benchmark to be applied should not be determined only on the basis of the highest proceeds from piecemeal or as a going concern sale. Where available, the BIT should also take into account the surplus value made available by an alternative plan.

Therefore, not only the freedom granted to the debtor or, in any event, the proponent of the plan in the distribution is limited to the surplus value. In addition, this surplus may potentially be further limited in the presence of a feasible alternative plan.

Now, considered the amount of work and costs normally required for a restructuring plan to be construed, the possibility for this third alternative scenario to be really available in practice is scarce. Yet, it cannot be excluded. Indeed, practice has already familiarised the Italian judges, for instance, with the possibility of competing proposals.

The difficulties related to this EU BIT construction are apparent. In particular, it requires to estimate two distinct and highly hypothetical values: the surplus value offered by the proposer and that available according to the alternative plan. In addition, this evaluation should be made with reference to each dissenting class. It is not clear, however, how to proceed. Should the different creditors' payments be compared as allocated in the two plans? Or should one instead calculate the total surplus under the alternative scenario, assume its redistribution according to the APR, and make the comparison with that redistribution? To this regard, it should be noted that articles 2(1)(6) and 11(1)(b)(ii) refers to 'the normal ranking of liquidation priorities under national law'.

These criticisms come in addition to those expressed against the RPR.

An example could explain the differences between APR and RPR. Consider a firm with a debt with senior creditors of 30 and a debt with junior creditors of 30. The restructuring value is 50 while the next best alternative scenario is a piecemeal liquidation, which would provide a value of 30. The surplus value is, therefore, 30.

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[37] A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new 'best interest of creditors test' in European Union, International Insolvency Review 30, 1, Spring 2021, 85 ff.

[38] R. Mokal, Fairness, L. Stanghellini, R. Mokal, C. Paulus, I. Tirado, Best Practices in European Restructuring Contextualised Distress Resolution in the Shadow of the Law, above note 9, 44-45

Applying the APR, senior creditors should have 30 and junior creditors 20. Under the RPR, instead, the debtor could propose to give 30 to senior creditors, 15 to junior creditors and 5 to shareholders. The senior creditor class and shareholders class vote in favour of the plan. The junior class votes against.

Since in the best alternative scenario the junior creditors would receive nothing, the junior class can be crammed-down and the plan confirmed.

This EU RPR outdistances the Directive from its US model. Obviously, RPR is not unknown to the latter system. Nevertheless, the proposals to introduce it in Chapter 11[39] have never gone as far as Article 11 of the Directive and, in any case, have not been implemented except with respect to small companies[40].

This does not mean that the APR is applied without exceptions. According to the case law, in principle, each class of claims shall be paid in full before any junior class receives any value[41]. Nonetheless, a settlement providing interim distributions in violation of the APR will yet be approved, if the debtor proves that there is a "significant code-related objective" to deviate from the Code's priority scheme[42].

Not only that, the Small Business Reorganisation Act 2019 has introduced a Subchapter V, which is said to remove APR but only in the relationship between unsecured creditors and equity holders, without affecting the position of secured creditors under Chapter 11[43]. Indeed, in a manner similar to that provided for the over-indebted consumer, with reference to small businesses the court may confirm a plan over the objection of unsecured creditors as long as all projected disposable income of the debtor, to be received in maximum five years, will be applied to the plan. The disposable income is all the income received by the debtor which is not necessary for the continuation of the business. However, it is distributed among the junior creditors according to the APR (but the debtor's pre-petition equity remains untouched).

The fact is that, albeit the US and EU RPR share the aim of the rule, which is to create a new capital structure that maintain equity holders in the picture, the paths chosen to achieve this goal differ radically. US RPR grants pre-petition equity the option of regaining their stake in exchange for payment in full of creditors[44].

By contrast, it has been noted that EU RPR 'compromises rather than respects priority', by reducing pre-existing rights[45].

Not that APR has been exempted from criticism.

In fact, while APR provides definite rules for the distribution of the value of the company, it has been observed that it does not offer any means for the determination of that value (the so called 'valuation problem'). And this determination results in the enterprise incurring additional costs, to the detriment of creditors, as well as the emergence of possible litigation. On the one hand, in fact, the senior creditors have an interest in keeping the valuation as low as possible in order to reduce the amounts to be shared with the lower classes (underestimation). On the other hand, unsecured creditors and shareholders have an interest in keeping the estimate high in order to be able to participate in the relevant distribution (overestimation).

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39 ABI Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations, https://commission.abi.org/full-report, 207-224

40 Debtors with non-contingent, liquidated debts totalling not more than USD 2,725,652 (§ 101 (51D) Chapter 11). During the Covid pandemic, this limit was temporarily raised up to USD 7,5 million by the Coronavirus Aid, Relief, and EconomicSecurity (CARES) Act 2020.

41 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1998); Czyzewski v. JevicHolding Corp. 1137 S. Ct. 973 (2017)

42 In re Short Bark Industries, Inc., Case No. 17-11502 (Bankr. D. Del. Sept. 11, 2017) (No. 200).

43 See W. L. Norton III & J. B. Bailey, The Pros and Cons of the Small Business Reorganization Act of 2019, 36 EMORY BANKR. DEV. J. 383 (2020), https://scholarlycommons.law.emory.edu/ebdj/vol36/iss2/2, 385.

44 ABI Commission to Study the Reform of Chapter 11, above note 28, 218 ff.: proposing that class receiving no distribution under a restructuring plan but next in line to receive such a distribution is given a 'redemption option value' that equals the value of an option to purchase the entire company and pay in full all the outstanding senior debt. If, within 3 years, the value of a restructured company becomes such that the senior creditors can be paid in full and there is incremental value for the immediately junior class of stakeholders, the latter exercise the option and retain the value that remains after the senior investors are paid in full. If the value of the stake remains below the strike price at the exercise date of the option, the junior investors will walk away with nothing.

45 G. McCormack, Restructuring plans and their confirmation, cited, 189-190

Moreover, the fact that the APR ends up substantially rewarding preferential creditors to the detriment of unsecured creditors and shareholders raises doubts of unfairness. The surplus value is considered, according to the RPR advocates, as 'cooperation premium', something that is obtained thanks to the cooperation (and sacrifices) of all the stakeholders involved and that, therefore, should be shared among all those who contribute to its creation[46].
APR is also seen as a deterrent for early access to restructuring plans. If the prospect of the shareholders is to lose all rights in the company, it is obvious that they will delay as long as possible the moment when they have to face such a risk.
Finally, the exit of shareholders may also be an obstacle to the restructuring itself, in cases where the viability of the company is strongly linked to the know-how of the owners, as is normally the case in SMEs (the problem of the relevant shareholders)[47]. This is clearly pointed out by recital 59, which states that 'the restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts' (the so-called 'soft variables').
However, it must be taken into account that the Directive intervenes in a very diverse context, particularly with regard to the order of priorities. Member States have different ways of ranking claims and their choices are linked to deep-rooted assessments of the prevalence of public over private interests, on which the directive clearly could not impact[48]. The greater flexibility given with the RPR may, however, allows these differences to be remedied to some extent.
The Directive lies on the assumption that a restructuring plan is only possible if the company is not yet insolvent and, therefore, the conditions for liquidation are not met. If conditions for liquidation are not met, creditors have no claim on the debtor's assets and the applications of the insolvency distributional norms, including APR, are not justified. Again, if conditions for liquidation are not met, not only creditors' rights should be protected, but also shareholders' property rights and their rights to conduct a business. We shall also consider the employees' rights to work and the interest of the enterprises involved to continue to trade with the debtor. That is, we return to the starting point whereby the Directive aims to achieve a sophisticated balancing of the various interests at stake, looking to the interests of economy as a whole.
Objectively, RPR provides greater flexibility to the debtor when negotiating the terms of the plan. It allows the potential value of the company to be enhanced without the need to completely pander to the parties that are normally favoured by the application of APR, namely banks and large investors. This flexibility could be of great help in constructing a plan especially in the context of SMEs where the separation of ownership and control may not be feasible since the enterprise viability rests on the knowledge and skills of the management, which, in turn, is identified in the shareholders. In the end, the idea of rewarding certain stakeholders, willing to contribute to the common good in a restructuring against opportunistic behaviour of others stakeholders does not seem unreasonable[49].
Nonetheless, it has been pointed out that while the APR rests on solid academic studies and on more than a hundred-year experience in the US, the RPR has not such solid dogmatic foundation. In addition, RPR disregards the parties' legal entitlements since, while it is true that the rule only concerns the restructuring surplus, this does not alter the fact that it reduces the rights of creditors in order to preserve the shareholders' share in the company[50].

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[46] S. Madaus, Leaving the Shadow of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law, European Business Organisation Law Review, 2018, 19, 615
[47] A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new 'best interest of creditors test' in European Union, above note 16, 79.
[48] A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new 'best interest of creditors test' in European Union, above note 16, 81
[49] A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new 'best interest of creditors test' in European Union, above note 16, 80
[50] G. Ballarini, The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?, above note 3, 8

Even assuming that the surplus value should be shared among all those who cooperate to the restructuring, it is not clear why such cooperation should be imposed even against the claimants' will.
Moreover, although it is argued that with the RPR there is no need to determine the exact value of the restructured business as it is sufficient to ascertain that the senior creditors are best paid, the need to apply the BIT in respect of the best next alternative scenario in fact nullifies the claimed simplification.
The idea that the greater leeway given to the debtor in the distribution of surplus value may facilitate negotiations is also criticised. In fact, the RPR creates uncertainty as to the rules of distribution, which, at the moment, are not those under which the debt was negotiated, and this complicates rather than facilitates negotiations, stimulating opportunistic behaviour.
Moreover, if creditors know that they could not be repaid in full in an insolvency state, because part of the value can also go to the shareholders, they will rise the interest rates to compensate for the risk of not being fully repaid. On the other side, knowing the possibility to save something, shareholders could be incentivized to choose sub-optimal but highly risky projects or to file for a restructuring plan just to reduce their obligations and continue their activity with a lower burden. In other words, the concern is that RPR can enhance moral hazard and, with it, the costs of debt finance for firms.
Above all, what is criticised about the RPR is the assumption on which it is based, namely that the company would be outside the insolvency zone. As noted[51], if a company needs to haircut its debts because it cannot pay them in full, and if such cuts can be imposed on creditors irrespective of their consent, no matter how we call it. We are, however, in the area of insolvency. Some authors deduce from this that corporate restructuring should not take into account any interest other than maximising the satisfaction of creditors.
More in general, it has been underlined that bankruptcy/restructuring law has in impact on all contracts between the debtor and its creditors. Therefore, changing the way legal entitlements are treated in insolvency/restructuring proceedings change the contract law itself[52].
It should be noted, however, that even those who criticise the Directive's adherence to the RPR believe that some derogation from the APR in order to allow the confirmation of a plan that truly maximises the available resources for creditors should be permitted.
These authors[53], in particular, propose to estimate the contribution of entrepreneurial shareholders in the implementation of restructuring in order to determine how much interest they should retain in the restructured company, according to the US model of the new value exception 'in kind'. This proposal is based on the assumption that the soft variables made available by certain shareholders after the filing of the plan do not form part of the restructuring value and, therefore, should not be distributed in accordance with the APR. The derogation, however, should be subject to strict judicial scrutiny and permitted only to the extent that it is fair and necessary for the implementation of the plan, i.e. for the maximisation of the value available to the satisfaction of creditors.
The traditional APR has been maintained in Denmark[54], while the Netherlands have introduced some sort of mitigation to it, if there is a reasonable ground to deviate from the regular priority ranking and if the interest of the dissenting class of creditors, to whom this deviation is disadvantageous, is not impaired by it[55]. Similarly, France allows for exceptions to the APR where necessary to achieve the plan's objectives and provided that the plan does not excessively affects the right or interests of impaired parties[56]. Germany maintains the APR, allowing, however, different treatment among classes of equal rank if there

[51] G. Ballarini, The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?, above note 3, 27, note 50
[52] R. de Weijs, A. Jonkers, M. Malakotipour, How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR), Tijdschrift voor Belgisch Handelsrecht, 125, 4, 14-15
[53] N. Tollenarr, Pre-Insolvency Proceedings : A Normative Foundation and Framework, Oxford, 2019, 238; G. Ballarini, The Priorities Dilemma in the EU Preventive Restructuring Directive: Absolute or Relative Priority Rule?, above note 3, 18-21
[54] L. Langkjaer, Denmark, above note 16, 40
[55] H. Volberda, Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023, above note 10, 71-72; J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, The Netherlands, above note 15, 133
[56] E. Ghio, above note 14, 62

is a justifying economic reason[57]. Austria[58] and Italy, from their part, have fully adhered to the new RPR. Greece[59] seems to have adhered to the RPR too.

5. Conclusions from a comparative perspective

In UK, albeit proposal for introducing the RPR were considered in order to prevent opportunistic conducts to the detriment of a plan, they were in the end abandoned, so that the only applicable distribution rule in restructuring, according to the Corporate Insolvency and Governance Act 2020, remains the APR. Nonetheless, as in the US, the case-law has sanctioned certain deviations from the APR, for instance, in cases where a differential treatment of out-of-the-money creditors was justified[60] or where shareholders had provided new money under the plan[61]. In addition, the cross-class cram-down has been introduced after the enactment of the Directive[62].

In Singapore, were reforms were enacted with a view to promoting the country as an international and restructuring friendly jurisdiction, the Insolvency, Restructuring and Dissolution Act (IRDA) 2018 opts for a cross-class cram-down, construed on the US Chapter 11, but requiring a majority in number and of 75% in value of total claims to proceed. Moreover, the cross-class cram-down cannot be applied to shareholders. To cope with this limit, which could hinder the validation of restructuring plans, the IRDA provides that the APR cannot be applied to the shares in the company owned by shareholders. This special feature is considered close to the EU RPR[63].

In Australia, the Corporations Act 2001 provides for a voluntary administration, which may eventually lead to a Deed of Company Arrangement (DOCA), a small business restructuring procedure for companies with less than AUD 1 million and creditors' schemes of arrangements. The last tool is especially available for non-insolvent companies. In it, APR applies, although the priority ranking can be changed by allowing for certain debts (such as those provided to assist with the restructuring) to be give priority over existing debt classes (provided each of the affected classes approve the scheme). The cross-class cram-down, by contrast, is not provided for[64].

The main rescue procedure in China is the reorganisation procedure under Chapter 8 of the 2006Enterprise Bankruptcy Law Act. Under this procedure the priority ranking must be respected. Nonetheless, the cross-class cram-down is available[65].

In South Africa, under the Companies Act 2008, a Business Rescue can be implemented if approved by more than 75% of the creditors' voting interests, provided that at least 50% of the creditors are independent creditors. The priority ranking provided for under the Company Act must be respected. However, this ranking does not include secured pre-business rescue creditors because their claims are settled from the proceeds of the sale of the assets that are subject to their security. If the business rescue plan alters the rights of the holders of any class of the company's securities, they are entitled to vote at a meeting of shareholders to approve or reject the adoption of the business rescue plan. These shareholders can therefore block the plan. Another tool is the Creditor Compromise, which must be approved by a

[57] S. Madaus, D. Ehmke, Germany, above note 16, 81

[58] G. Wable, M. Trenker, Austria, above note 18, 25

[59] Y. Bazinas, A. Paizis, Spain, above note 19, 104, who notes that Greece has implemented an ambiguous provision, requiring that dissenting affected creditors must be treated more favourably than each creditor whose claims has a lesser repayment priority

[60] Re DeepOcean 1 UK Ltd [2021] EWHC 138 (Ch) (Sanction)

[61] Re Virgin Active Holding Ltd [2021] EWHC 1246 (Ch) (Sanction)

[62] E. Vaccari, J. Gant, United Kingdom, J.M.G.I. Boon, H. Koster, R.D. Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, The Hague, 2023, 154

[63] Ken Teo Chuanzhong, "A Critical Evaluation of the New Cram-down Tool in Singapore's Restructuring Regime," International Insolvency Review 30, 2, Summer 2021, 271

[64] J. Harris, "Class Warfare in Debt Restructuring: Does Australia Need Cross-Class Cram down for Creditors' Schemes of Arrangement," University of Queensland Law Journal 36, 1, 2017, 73 ff., especially 76 and 78; S. Taylor, G. Hamilton, Restructuring and Insolvency in Australia: Overview, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/2-502-1459?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a712136

[65] X. Yin, S. Zhang, Restructuring and Insolvency in China: Overview, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com

majority in number representing at least 75% in value of the creditors or class of creditors present and voting. If approved, it binds all affected creditors[66].
In Brazil, the Judicial Reorganisation (recuperação judicial) is based on certain requirements of the debtor's worthiness there is no priority ranking among creditors. The only requirement under Law No. 14,112/2020 is that all labour-related claims must be paid within one year of the court's confirmation of the reorganisation plan. Creditors who have been granted a chattel mortgage (fiduciary property) (up to the value of the encumbered asset) are not considered part of the debtor's estate and are therefore not affected by a reorganisation proceeding. This also applies to tax claims, regardless of their nature. If no creditor challenges the reorganisation plan, and it does not offend Brazilian law or public order, the plan is considered approved and binding. However, if the reorganisation plan is challenged by any creditor, it must be submitted to the creditors' vote. The plan will be binding if approved by both more than 50% of the total credit held by secured and unsecured creditors present at the meeting and by a simple majority I number of those present at the meeting; or a simple majority of employee/labour and small enterprise creditors present at the meeting, regardless of the amount of their claim. If the reorganisation plan is not approved, the court can impose the plan on opposing creditors provided all the following applies: the plan has been approved by at least two-thirds of the classes of creditors (or at least half of them, if there are only two voting classes); the plan has been approved by creditors representing at least 50% in value of the total claims present at the creditors' meeting; within the class that rejected the plan, at least one-third of the creditors of that class must have approved it [67].
The choice in the Directive to grant an option within APR, eventually with amendments, and an unedited RPR, is very progressive but it is not the only one on the international scene. Clearly it increases the differences between Member States by creating two additional options in a context where the application of the APR was rather shared. If, in general, the particular flexibility and alternatives recognised by the Directive represent the minimum level of harmonisation that was possible to achieve when the Directive was drafted, this does not seem to be the case for the RPR.
Law and economics scholars have argued that different rules in different legal systems endorses forum shopping behaviour[68]. In the end, then, the choice of the Directive runs counter to the need for harmonisation that is invoked in recital 1 as a means to promote fundamental freedoms.
In addition, if we consider that in some Member States, preventive restructuring frameworks are also applied to insolvent companies where it is possible to restore their viability, the Directive also has a disruptive effect on insolvency law. How the market is going to cope with this is something that needs to be assessed in the near future.

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[66] J. de Hutton, Aanisah, Restructuring and Insolvency in South Africa: Overview, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com
[67] D. F. Refinetti, J. Brotto de Barros Milaré, V. Salgado, Restructuring and Insolvency in Brazil: Overview, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com
[68] G. McCormack, Restructuring plans and their confirmation, cited, 184, 199