Guidelines & Policy Recommendations

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The present document consists in an excerpt from the Final Report. It collects:

(i) ***Guidelines addressed to key players in the restructuring process*** (in-court and out-of court procedures and measures);

(ii) ***Recommendations addressed to policymakers*** at the European and national level.

Guidelines and policy recommendations have been developed on the basis of the results of the national empirical analysis carried out in four EU jurisdictions (Germany, Italy, Spain, and the U.K.).

Guidelines

Chapter 1 - Timely Identifying and Addressing the Crisis

Guideline #1.1 - ***Voluntary early warning systems***

Even in the absence of legal duties or recognised standards, debtors should install adequate early warning systems monitoring the business for indicators of a crisis / "events of crisis". Most importantly, they should instruct and direct employees to recognise such indicators and promptly alert management.

Guideline #1.2 - ***Access to current and accurate information for advisors***

Professional advisors hired by the debtor should be given access to current and accurate information and tasked to assess it also for signs of a crisis and advise management accordingly.

Guideline #1.3 - ***Banks' assessment of debtor's financial condition***

Financial institutions and other institutional creditors with privileged access to financial information regarding the debtor should assess it for clear indications of a potential crisis. In appropriate cases, loan and financing agreements should contain financial covenants providing for regular as well as – in case of certain events – ad-hoc reporting by the debtor.

Guideline #1.4 - ***Discussion of financial condition of the debtor on the initiative of a creditor or other party***

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In case a creditor (or shareholder) gains knowledge of sufficiently strong indicators for a debtor's crisis, they should contact the debtor with the perspective to openly discuss the situation and options to address it.

Guideline #1.5 - ***Debtor should address crises timely***
Debtors should address a crisis in a timely fashion by properly assessing it and, given the business's viability, taking action to avert it with a view of minimising the risks to creditors as a whole by, for example and as appropriate, making operational changes and/or initiating negotiations with key creditors, customers, suppliers or potential investors.

Chapter 2 - Fairness

There are no Guidelines in this Chapter. See Policy Recommendations below.

Chapter 3 - The Goals, Contents, and Structure of the Plan

Guideline #3.1 – ***Operational and financial restructuring***
The party proposing the plan should consider whether, in order to provide the debtor with the best chance of restoring its viability, both the assets as well as the liabilities side of the debtor's balance sheet requires restructuring.

Guideline #3.2 – ***Assets-side measures***
The party proposing a plan should consider whether operational changes such as sale of assets or of the business or reduction in the workforce are necessary in order to afford the debtor the best chance of restoring its viability.

Guideline #3.3 – ***Valuation methods***
When a valuation of the business is required, use should be made of one or more well-established valuation techniques. Relevant parameters should be chosen in a transparent manner, if possible in consultation with stakeholders.

Guideline #3.4 – ***Content of the plan***
The plan and the explanatory documents should include all necessary information, accompanied by relevant documents, for stakeholders to assess and decide whether or not to support the plan. At a minimum, the plan should address (1) the context of the restructuring, (2) the consequences of the failure to implement the restructuring; (3) an overview of existing indebtedness; (4) the timeline of the plan; (5) financial projections and a feasibility analysis; (6) the valuation and allocation of the value amongst claimants; (7) legal pre-conditions for restructuring; (8) actions to be taken by affected stakeholders; (9) objections to the proposed plan arisen in negotiations; (10) provisions to address contingencies; (11) the treatment of intercompany claims; (12) a discussion on the position of directors and senior management and of the corporate governance of the debtor entity; (13) tax issues; (14) professional costs associated with plan formulation and approval; (15) jurisdiction.

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Chapter 4 - Drafting High-Quality Plans and the Role of Professionals

Guideline #4.1 – ***Professional qualification and experience of the advisors***

It is advisable for the debtor to achieve at the earliest the clearest possible representation of the situation of the distressed business and of the general context in which the restructuring is expected to take place. Such representation should guide the selection of the advisors and be shared with them at the earliest stage, requiring the hired advisors to state in writing that they have the required expertise and resources.

Guideline #4.2 – ***Independence of the advisors***

The quality and effectiveness of a restructuring plan, both from an ex ante and an ex post standpoint, is positively affected by the capability of the advisors to preserve a detached and dispassionate perspective, thereby being able to draft a fair restructuring plan based on accurate assessments and realistic predictions. In general, it is appropriate to hire advisors that have not been counselling the debtor in the ordinary course of business, possibly in addition to previous consultants.

Guideline #4.3 – ***Review of financial and economic data***

Advisors should draft the restructuring plan on the basis of data that have been subject to a thorough review by the same advisors or by other professionals specifically hired with a view to restructuring the distressed business. Internal data or data resulting from reports unrelated to the business restructuring should be used only exceptionally, provided that they are considered accurate and that the advisors expressly state that they have relied on unverified data.

Guideline #4.4 – ***Focus on judicial reviewability***

The restructuring plan should be drafted with a view to facilitating ex-ante and ex-post judicial review. Therefore, the plan should be clear, unambiguous and concise to the extent possible.

Guideline #4.5 – ***Summary and description of main actions***

The restructuring plan should include a summary and synthetic description of the main actions that must be implemented to pursue the strategy chosen in the plan.

Guideline #4.6 – ***Transparency on the causes of the distress***

The restructuring plan should identify the specific causes that have led to the distress of the enterprise, with a view to (i) facilitating the creditors' assessment on whether the plan adequately deals with such causes and prevents them from arising again, and (ii) allowing creditors to make an informed decision on the proposal.

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Guideline #4.7 – ***Assessing and stating the economic viability of the distressed business***

The economic viability of the distressed business needs to be accurately ascertained by the advisors drafting the plan. It is advisable to make explicit in the plan the positive assessment on the economic viability of the business so as to allow an informed assessment on the plan by the creditors and, if applicable, by the court.

Guideline #4.8 – ***Preparing accurate cash flow forecasts***

The success of a restructuring plan may be jeopardised by inaccurate cash flow forecasts that, setting the rescued enterprise in the position of being unable to satisfy claims as they fall due, often leads to insolvent liquidation of the business. Therefore, the plan should include accurate cash flow forecasts, which should be comprehensively illustrated in the restructuring plan so as to allow an informed assessment on the plan by the creditors and, if applicable, by the court.

Guideline #4.9 – ***Time frame of the plan***

The restructuring plan should pursue the goal of rescuing the distressed business through a set of actions and measures due to take place within a period of time not exceeding 3/5 years. Unless justified on the basis of specific circumstances, a longer implementation period is not advisable due to the increasing risk of unforeseeable events.

Guideline #4.10 – ***Reduction of the indebtedness to a sustainable level***

The restructuring plan should illustrate the level of debt that the debtor may serve in the ordinary course of business and how the debtor will achieve such level. Particular attention should be devoted to plans in which a significant part of the debt is merely rescheduled and left payable at a certain future date.

Guideline #4.11 – ***Distinction between conditions for the success of the plan and preconditions for its implementation***

The restructuring plan should clearly distinguish between events that, although subject to uncertainty, are considered more likely than not to occur and therefore do not preclude the plan from being implemented, and events that should occur for the plan to come into effect.

Guideline #4.12 – ***Description of acts to be implemented on the basis of the plan***

The plan should describe in a detailed manner the acts to be carried out on its basis. The level of detail should be proportional to the importance of the act to be carried out.

Guideline #4.13 – ***Assumptions and the effect of their variations***

In order for third parties to be able to check and assess its robustness, the plan should clearly state the assumptions and include tests that describe the effects of their variation.

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Guideline #4.14 – ***Deviation between forecasts and reality***

When a significant deviation between forecasts and reality occurs, the plan cannot be further implemented as originally intended and its protective effects no longer apply with respect to subsequent acts. All the acts implemented prior to the deviation are unprejudiced.

Guideline # 4.15 – ***Provisions for adverse contingencies***

The plan should include provisions for adverse contingencies, including alternate routes to achieve the goal of restructuring.

Chapter 5 - Negotiating on Plans

Guideline #5.1 – ***Requesting a stay on creditors***

The debtor must be clearly aware of the cost of the stay, both in terms of limitation of creditors' rights and in terms of potential losses for all the stakeholders deriving from continuing a loss-making business. Therefore, the debtor must be reasonably convinced that there is going concern value to preserve, a conviction that must be stronger when the stay requested or, when automatically granted upon request by the debtor, effected has a long duration and/or has been extended after a previous request.

Guideline #5.2 – ***Projecting cash-flows during the stay***

Before requesting a stay, the debtor must draw a cash-flow projection showing in detail what the cash-flow inflows and outflows will be during the period creditors are stayed. Such projection must take into account the likelihood of harsher commercial terms by suppliers (possibly, dealing with the firms only if paid upfront) and, if available, interim financing.

Guideline #5.3 – ***Avoiding a harmful stay on creditors***

If the projected short-term cash outflows exceed inflows and no interim financing is reasonably available, the debtor should abstain from requesting a stay and should quickly resort to the best available option to preserve the business value, either as a going concern or as a gone concern.

Guideline #5.4 – ***Existence of the conditions for interim financing***

Interim financing should be sought only when the debtor assesses, on the basis of sound data and, if possible, expert advice, that this is the best interest of creditors, especially to preserve the business value.

Guideline #5.5 – ***Relationships with creditors***

Especially when the restructuring plan requires the creditors' individual consent, the debtor should timely provide the creditors involved with adequate and updated information about the crisis and its possible solutions. Information should be provided concerning the

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causes of the crisis, a description of the plan and its key elements and assumptions, financial information both past and prospective.

Guideline #5.6 – ***Awareness of the regulatory constraints specific to the banks involved in the restructuring***

The introduction of strict standards for the safe and prudent management of credit exposures will most likely cause banks to tighten up their approach in the negotiation process. In this context, it is key that a debtor gains a timely awareness of the regulatory considerations their lenders would make, including in connection with elements of their NPL strategy and operational plan that under given circumstances may materially affect their approach to workout.

To achieve such awareness, a debtor should timely approach its lenders and share with them, under appropriate confidentiality arrangements, any relevant information which might adversely affect the soundness of its business or the value of a given collateral and require, in turn, to be promptly informed, at the outset of any negotiation and to the extent possible, of elements of the lender's NPL strategy and other general constraints that might influence the willingness of the latter to make concessions, or certain types of concessions, in a given crisis scenario.

Guideline #5.7 – ***Internal financial assessments conducted by the bank on the debtor***

Banks should be willing to share with interested debtors (upon reasoned request from the debtor and to the extent possible) any results of internal financial assessments conducted on the debtor's situation or on the status of a specific loan segment, which might favour a better understanding by the debtor of the seriousness of the crisis and a reasoned identification of its possible remedies.

Guideline #5.8 – ***Minimum duration of expected regular performance under the plan***

When negotiating concessions with banks, it is advisable for debtors to consider the feasibility of the proposed distress resolution actions in the light of their predictable effects for lenders in terms of exposure's classification and reporting requirements.

To this aim, any restructuring measure proposed by the debtor should be conceived under credible terms and on the basis of a sound assessment as to the ability of the measure to restore and maintain the financial soundness and ability to perform of the debtor in the long run and, in any case, for a time horizon that should exceed three years.

Guideline #5.9 – ***Early start of restructuring negotiations***

The negotiation of workout strategies should start when first signals of distress emerge and, to the extent possible, before a credit exposure is classified as non-performing. These strategies should be designed so as to ensure that concessions be agreed and brought into effect no later than 1 year before the moment when the bank is expected to ensure full provisioning.

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Guideline #5.10 – ***Adoption of codes of conduct by banks***

Banks should converge towards the adoption of codes of conduct to foster coordination among lenders, independent verification of information and fairness during negotiations.

Guideline #5.11 – ***Dealing with workers during negotiations***

The debtor should devote particular attention to dealing with workers during restructuring negotiations, possibly providing incentive mechanisms and, in any case, dealing with them in a transparent way with a view at preserving or gaining their trust.

Guideline #5.12 – ***Opinion on the restructuring plan by the independent professional appointed as the examiner***

In order to reduce the cost for creditors of actively participating in the restructuring negotiations, the independent professional appointed as the examiner, if any, is required to concisely and clearly express her or his opinion on whether the restructuring plan is in the creditors' best interest. The opinion should be made promptly and easily available to all creditors. Any disclaimer or other expressions having the effect of making the opinion of the examiner on the restructuring plan equivocal should be avoided.

Chapter 6 - Examining and Confirming Plans

There are no Guidelines in this Chapter. See Policy Recommendations below.

Chapter 7 - Implementing and Monitoring Plans

Guideline #7.1 – ***Appointment of a CRO***

The appointment of a chief restructuring officer (CRO) in charge of implementing the restructuring plan is recommended for all large business, whereas the additional costs of the appointment of a CRO may outbalance the benefits in the case of small businesses.

Guideline #7.2 – ***Appointment of a professional to realise assets***

When the restructuring plan envisages the sale on the market of certain assets having a relevant economic value, particularly when such assets are not easily marketable, the plan should consider granting the creditors the right to appoint a professional entrusted with the task of selling the assets in the best interest of creditors.

Guideline #7.3 – ***Monitoring in case of plans affecting only consenting creditors***

Plans should provide for proper creditor monitoring, with a view to triggering the actions and remedies that the plan envisages in case of non-performance.

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Guideline # 7.4 – ***Monitoring in case of plans affecting non consenting creditors***

When the plan has an effect on dissenting creditors' rights and the law does not provide for appropriate monitoring devices [see PR #7.3], the plan should provide for proper independent monitoring.

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Policy Recommendations

Chapter 1 - Timely Identifying and Addressing the Crisis

Policy Recommendation #1.1 – ***Requirements to begin restructuring proceedings***

Restructuring proceedings started by the debtor should be accessible without any threshold, such as crisis or likelihood of insolvency. Such requirements should be introduced only for specific tools or measures directly affecting stakeholders' rights and (if provided for) for proceedings initiated by creditors. On an application by a creditor quorum, an authority should ascertain whether a proceeding has been started abusively and, if so, terminate it.

Policy Recommendation #1.2 – ***Early warning systems***

The law should provide for universal early warning systems and obligations of management to constantly monitor and have monitored the business's affairs for indications of a crisis. This should apply – with possibly additional requirements for big and/or public companies – to all businesses, regardless of legal status or size.

Policy Recommendation #1.3 – ***Duty to define events of crisis***

The law should define general and provide for a duty of the management to define specific "events of crisis" that trigger warnings by employees and, e.g., auditors, accountants and consultants. A particularly important general "event of crisis" shall be any default of the debtor.

Policy Recommendation #1.4 – ***Role of management with regard to early warning***

All warnings are to be addressed to the management that shall generally have to consider how to best safeguard the interests of creditors as a whole and decide, at its discretion, whether to involve third parties (shareholders, creditors, courts, other authorities). Such discretion may be limited by laws to protect, e.g., the market or the employees, by contractual obligations or by the management's general duty towards the shareholders.

Policy Recommendation #1.5 – ***Affordable counselling for MSMEs to prevent and address crisis***

Public or professional bodies, such as the chambers of commerce and trade, should look into offering free or affordable advice to MSMEs in setting up early warning systems and in assessing a crisis and the appropriate reaction.

Policy Recommendation #1.6 – ***Basic training on accounting, business and finance***

Entrepreneurs and directors should have access to training on accounting, finance and business basics and their legal obligations.

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<u>Policy Recommendation #1.7</u> – *Incentives to prevent and address crises*

The law should create both positive and negative incentives for directors to safeguard their creditors' and other stakeholders' interests by monitoring the business, assessing its viability in a crisis, and take appropriate steps (e.g. restructuring or liquidation).

<u>Policy Recommendation #1.8</u> – *Disincentives to creditors' cooperation and overly harsh avoidance regimes)*

Creditors and other stakeholders must not be discouraged by the law and its application from monitoring the debtor's financial situation and engaging in communication and negotiations with the debtor regarding a crisis and its resolution. Avoidance regimes and lenders' liability, in particular, should be appropriately curtailed and – outside of the debtor's material insolvency – restricted to cases of abuse and collusion.[1]

<u>Policy Recommendation #1.9</u> – *Restructuring-friendly legal environment*

Legislators should take steps to create a generally restructuring-friendly legal environment by creating sensible privileges for worthwhile restructuring attempts (whether merely contractually and out-of-court or in the form of a restructuring proceeding), e.g. priorities for fresh money, by facilitating going-concern sales and by abolishing or curtailing existing obstacles.

Chapter 2 - Fairness

<u>Policy Recommendation #2.1</u> – *Approval of plan requires creditors' support*

A plan should only be approved if it receives requisite support from creditors whose rights are to be affected. This should be the case in preventive restructuring and in cases concerning micro and small enterprises.

<u>Policy Recommendation #2.2</u> – *Notice to creditors*

Intended parties to a restructuring should be provided with adequate notice of steps in the plan formulation and approval process. Two to four weeks of notice should be provided unless the Court approves an abbreviated or extended period.

<u>Policy Recommendation #2.3</u> – *Electronic or online notice*

The notification may be provided electronically and/or online where this is the usual mode of communication with the relevant stakeholder group.

[1] Cf. the French example of shielding lenders (in particular banks) – albeit only in the context of institutional restructuring proceedings – from liability found in C. com., art. L 650-1, allowing only for three avenues to liability: (1) fraud, (2) interference with management, (3) excessive securities.

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Policy Recommendation #2.4 – ***Individual notification***

Each affected stakeholder must be provided with individual notification unless the Court is persuaded that such notification is not reasonably practicable and that all reasonably practicable steps have been taken to notify the stakeholders in question.

Policy Recommendation #2.5 – ***Adequate information to be provided to stakeholders***

Stakeholders whose vote is sought should be provided with sufficient information about the effect of the plan, the allocation amongst stakeholder groups of benefits and burdens under it, any collateral benefits offered or provided to some but not all stakeholders, the intended treatment of management. The information should be up to date, and if necessary, should be updated.

Policy Recommendation #2.6 - (*No-plan scenario*)

The plan should provide information about the debtor's prospects and the stakeholders' likely returns in the event that the plan is not approved. This may require information in the event, as appropriate in the circumstances of the particular case, of the debtor's entry into insolvent liquidation or other proceedings or else the debtor's continuation in business with no modification of its obligations. If the correct comparator is insolvent liquidation, the plan should explain whether the debtor's business would be subject to a going concern sale or a piecemeal sale. In each of these scenarios, the plan should explain why it is in the affected stakeholders' interests to approve it.

Policy Recommendation #2.7 – ***Competing plans***

Any creditor or a group of creditors should be permitted to formulate their own plan and to place it before relevant stakeholders for their consideration and vote.

Policy Recommendation #2.8 – ***Classification of stakeholders for voting purposes***

The party proposing the plan should also propose how stakeholders are to be classified for voting purposes.

Policy Recommendation #2.9 – ***Class formation: commonality of interest***

Stakeholders should be placed in the same class if their legal rights both, prior to, and as amended if the proposed plan were to be implemented, are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

Policy Recommendation #2.10 – ***Class formation: relevance of legal rights, not private interests***

What matters for classification purposes are the parties' legal *rights against the debtor*. Their private interests, and any rights they might hold against third parties (such as guarantors) should generally be irrelevant to classification, though it may be taken into account by the court in considering whether their vote should be discounted.

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Policy Recommendation #2.11 – ***Value of claim for voting purposes***
Creditors should be entitled to vote the face value of their claim.

Policy Recommendation #2.12 – ***Voting procedures not requiring a physical meeting***
The law should permit voting by proxy and virtual meetings at which to vote on a plan. The means of communication, preferably digital, used to allow the creditors to vote on the plan should ensure certainty on the capacity as creditors of those taking part to the virtual meeting.

Policy Recommendation #2.13 – ***Presumption of properness of stakeholders' meeting***
There should be a rebuttable presumption that the meeting at which stakeholders voted was conducted properly and that the parties voted in a valid manner. The paucity of a debate at the meeting should not be a basis for rebutting this presumption.

Policy Recommendation #2.14 – ***Conditions for approval of the plan by the court*)**
The Court should approve a plan if satisfied that:
1) adequate information was provided to affected stakeholders, taking into account their level of sophistication;
2) majorities in each approving class were acting bona fide in class interests, there being a rebuttable presumption that they were;
3) there are no circumstances in the circumstances in which the plan was formulated, proposed, voted upon, or proposed to be implemented that impair its appropriateness:
4) the plan is not manifestly non-viable; and,
5) the plan is in the best interests of dissenting creditors, in that it provides them with at least as much as they would receive if the plan were not approved.

Policy Recommendation #2.15 - ***Conditions imposed by the court***
The court should be allowed to impose conditions on its approval of the plan.

Policy Recommendation #2.16 – ***Conditions for cross-class cram down***
The Court should approve a plan that has not received adequate support of the members of one or more affected classes if satisfied that:

1) the plan is in the best interests of dissenting creditors, in that it provides them with at least as much as they would receive if the plan were not approved;

2) at least one class of creditors whose rights are to be impaired under the plan has approved it by the requisite majority; and,

3) the relative priority rule is observed, in that (i) each dissenting class is to receive treatment at least as favourable as other classes with the same rank; (ii) no class of a lower rank is to be given equivalent or better treatment than it; and (iii) higher ranking classes must receive no more than the full present economic value of their claims.

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Chapter 3 - The Goals, Contents, and Structure of the Plan

Policy Recommendation #3.1 – ***Scope of plan***

A plan should be capable of binding the full range of capital providers, including secured and preferential creditors, tax authorities, and equity claimants.

Policy Recommendation #3.2 – ***Applicability to claimant subset***

The law should permit the plan to bind only a subset of any given category of claimants. For example, it may only affect financial lenders, leaving all other claimants out of its scope, not bound by it and therefore with the benefit of their existing rights.

Policy Recommendation #3.3 – ***Sale of business as going concern***

The law should permit the sale of the debtor's business in whole or part as part of the restructuring process.

Policy Recommendation #3.4 – ***Changes in workforce***

The law should provide for specific measures by which the debtor's workforce may be reduced as part of a restructuring process.

Policy Recommendation #3.5 – ***Allocation of new funding***

The law should permit any new funds obtained by or promised to the debtor to be allocated outside the application of ranking of existing claims.

Policy Recommendation #3.6 – ***Debt-for-equity swaps***

The law should permit the restructuring plan to effect an exchange of debt for equity claims.

Policy Recommendation #3.7 – ***Preferred equity and convertible debt***

The law should permit the restructuring plan to provide for (i) different classes of equity claims, and (ii) creditors to exchange debt claims for equity claims at a future date upon the materialisation of a contingency stipulated in the plan.

Policy Recommendation #3.8 – ***Non-subordination of loans of claimants who swap debt claims for equity***

Claimants who give up debt claims in return for equity should not be subject to any rule requiring the subordination of loans provided by equity holders.

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Policy Recommendation #3.9 – ***New financing***

The law should exempt new financing from avoidance and provide for priority over unsecured creditors under court control, when new financing is necessary for the success of the plan. In some circumstances, applicable law may permit priority over existing secured creditors, if such creditors consent or else if the court can be satisfied that the interests of such creditors are adequately protected. The lender should be exempted from the associated risk of liability, provided that the new financing falls within the scope of one of the exemptions and is extended in good faith.

Policy Recommendation #3.10 – ***Director liability and its effect on the plan***

The law or the courts should not bar plans which provide for a waiver of directors' liability on these sole grounds, as long as there is appropriate disclosure and there is no impropriety in seeking the stakeholders' consent.

Policy Recommendation #3.11 – ***Taxation in restructuring***

Write-downs and other debt relief should not be considered a taxable benefit to the debtor. Creditors should be permitted to use such relief as a deductible loss.

Chapter 4 - Drafting High-Quality Plans and the Role of Professionals

Policy Recommendation #4.1 – ***Professional qualification and experience of the advisors***

The legal framework should ensure that advisors possess an expertise adequate to the cases they advise on.

Policy Recommendation #4.2 – ***Costs of advisors***

The law should ensure that advisors' fees are reasonable and designed in a way that, in general, links compensation to the success of the plan. Exceptions to success-based fees should be made for advice relating to preliminary analysis of the case.

Chapter 5 - Negotiating on Plans

Policy Recommendation #5.1 – ***Independent verification of the beneficial effects of the stay***

The law should provide for an independent verification, possibly conditional upon the request of one or more interested creditors, of the beneficial effects of the stay for the creditors as a whole.

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Policy Recommendation #5.2 – ***Protection from avoidance and unenforceability of transactions carried out during negotiations***

The law should provide protection from the risk of avoidance and/or unenforceability of reasonable transactions carried out during negotiations and aimed at making restructuring negotiations possible, by either providing exemptions or designing the requirements for avoidance and/or unenforceability accordingly.

Policy Recommendation #5.3 – ***Protection from avoidance and unenforceability of interim finance***

The law should provide protection from the risk of avoidance and/or unenforceability of interim finance extended during negotiations and aimed at making restructuring negotiations possible, by either providing exemptions or designing the requirements for avoidance and/or unenforceability accordingly.

Policy Recommendation #5.4 – ***Restructuring limited to financial creditors***

The law should provide for restructuring procedures or measures producing effects on, or allowing a limitation of their effects to, financial creditors, without affecting non-consenting non-financial creditors.

Policy Recommendation #5.5 – ***Effective negotiation with tax authorities***

The debtor should be able to negotiate the restructuring with the least possible number of tax authorities, possibly just one, which should be aimed to maximise the interest of tax authorities, as a whole, in the long term. The responsible employees of tax authorities should be able to take an objective decision on whether reducing or waiving certain tax claims would pursue the above-mentioned goal. To this purpose, responsible employees should be made exempt from any risks, possibly upon receiving confirmation of their assessment by an independent professional.

Policy Recommendation #5.6 – ***Appointment of an insolvency mediator. Duty of confidentiality***

Whenever the law mandates or allows the appointment of a mediator, the latter should hold those qualifications and skills specifically required to act as a mediator, in addition to being competent in restructuring and insolvency matters.

In order to facilitate the creation of an adequate set of information at an early stage, thereby avoiding delays, the parties should be able to share with the mediator all the information relying on a strict duty of confidentiality. If the mediator deems that certain information would better be shared among the parties in order to advance negotiations, (s)he should require the party revealing the relevant information to waive the confidentiality. If no waiver is expressly granted, the mediator must not disclose the information under any circumstances.

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Policy Recommendation #5.7 – ***Exclusion of non-participating creditors from the calculation of the required majorities***

The majorities required for the adoption of a restructuring plan should be determined without taking into account those creditors that, although duly informed, have not voted on the restructuring proposal.

Policy Recommendation #5.8 – ***Provisions mitigating the adverse effects of a deemed consent rule***

When abstentions of creditors are deemed consent, the law should provide for a more thorough judicial or administrative scrutiny of restructuring plans that would not have been adopted, but for the application of the deemed consent rule.

Chapter 6 - Examining and Confirming Plans

Policy Recommendation #6.1 – ***Examination and confirmation of the plan***

Examination and confirmation of the plan are essentially complementary and it is good practice to include both in the same out of court regulated procedure. Under particular circumstances, one of the two may be formally excluded. Never both.

Policy Recommendation #6.2 – ***Examination of the plan***

Although a professional examination of the plan is not always necessary, it is advisable in most cases. Only when the debtor is a micro-entity with a basic business model, the examination may be excluded *ab initio*. The examination report may be mandatory for all cases or be only potentially mandatory, when the debtor or creditors request it. Although both systems are acceptable, the latter adds flexibility and may limit the costs of the procedure.

Although more than one examination may be a possibility, it should not be the rule, and, more importantly, a rule should be included to allocate the cost of additional reports on those who request it.

The examiner should be a capable professional, adapted to the specificities of the case and independent from the parties. Pre-existing professional relationships with creditors is not to be deemed an automatic cause for exclusion of the expert, as long as these relationships do not prevent the examiner to exert an independent judgment. A case by case analysis must be conducted.

The examination report should be comprehensive and pay particular regard to the financial assessment concerning the viability of the business and the chances of successful implementation of the proposal.

Examination plans must be subject to control ex post.

Policy Recommendation #6.3 – ***Participation and plan approval***

In formal insolvency proceedings, all creditors must be given the possibility to participate. This is not the case for out of court proceedings, where different options can be considered.

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Where a jurisdiction includes an out-of-court procedure which concerns all creditors, special attention should be paid to creating incentives for its use and avoiding a worse treatment than the parties would get in formal in court proceedings.

Out of court proceedings may be regulated to allow debtors to select which creditors should participate. This adds flexibility. However the efficacy of these plans is limited and rules must be included to safeguard the interest of non-participating creditors in case the agreements are to be protected.

Out of court proceedings involving only some creditors may be an adequate solution, so long as:

(i) the scope of the procedure is adequately defined,

(ii) the creditors involved are sophisticated, professional creditors,

(iii) the exclusion of other creditors is founded on adequate grounds, such as suppliers or non-adjusting creditors. The exclusion of public claims creates a de facto priority in favour of public creditors, undermines the chances of success of the agreement and run against best international practice.

The decision may be taken in a meeting of creditors or by allowing creditors to cast a vote during a period of time. This latter method should be favoured for larger cases.

The majorities required in out of court proceedings should, in general, not be different to those foreseen for in court procedures.

The thresholds should only very exceptionally be higher than 75%.

Policy Recommendation #6.4 – ***Confirmation of the plan***

A confirmation of a plan is to be preferred when the law protects the agreement against avoidance actions, creates an ex post priority for new financing or binds dissenting or non-participating creditors.

An adequately designed judicial or administrative confirmation protects legality, increases legal certainty and gives credibility to the system. It also it facilitates international recognition and fosters the participation of foreign creditors.

Confirmation may be issued by a judge or an administrative agency. Preference over one model or the other depends on the characteristics of the relevant jurisdiction

Confirmation should review (i) compliance with formal legal requirements, (ii) the adequacy in the consent by creditors leading to an approval of the plan, and (iii) the material content of the plan, including its objective viability.

By approving a plan, a majority of creditors voluntarily assume a new risk. While the judge/agency must protect minority creditors, it should refrain from assessing the adequacy of the risk assumed: only in *very clear* cases of non-viability of the plan, its confirmation should be rejected.

There may be different models of confirmation: mandatory confirmation with control ex ante or ex post, and even, in some cases, merely potential confirmation

The confirmation should be subject to appeal. The process to decide the appeal should be quick and simple, and the effects of the plan should not be withheld as a general rule, subject to cautionary measures when justified.

In principle, a successful appeal concerning an individual stakeholder's treatment under the plan should only limit its effects to the appealing stakeholder, not to others in a similar or even identical situation. However, the court should have the possibility to cancel the plan when the new situation makes the plan no longer viable or the sacrifice demanded by creditors excessive.

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Chapter 7 - Implementing and Monitoring Plans

Policy Recommendation #7.1 – ***Provisions on changes in board composition***

The law should permit restructuring plans to include provisions committing the company to carry out, as part of the plan implementation, a change in the composition of the board of directors and/or the senior management team. However, there should not be any legal duty to include this sort of provisions in restructuring plans, due to the discouraging *ex ante* effects that the perspective of a change in the composition of the board of directors and the senior management team, if perceived as unavoidable by the existing directors and officers, would exert on early access to preventive restructuring.

Policy Recommendation #7.2 – ***Appointment of a professional to realise assets***

The law should provide for the appointment of a professional entrusted with the task of implementing the plan concerning the sale of the firms' assets in the best interest of creditors, when the plan is completely or in prevalence based on the realisation of the firm's assets. The creditors should have the right to choose the liquidator.

Policy Recommendation #7.3 – ***Monitoring in case of plans affecting non consenting creditors***

The law should provide for proper monitoring, at least with regard to plans that affect the rights dissenting creditors, to ensure that non-performance does not go undetected due to the lack of incentives for creditors to monitor the implementation of the plan.

Policy Recommendation #7.4 – ***Amending and curing the plan during implementation***

The law should empower the judge, or the independent IP appointed to monitor the implementation of the plan, with the authority to amend the plan, curing minor failures in its implementation in line with what appears to be the best interest of creditors. Such power should be exercised by the judge or the independent IP after having acquired sufficient information from the parties.

Policy Recommendation #7.5 – ***Power to initiate remedies***

The law should consider whether to give the monitor/supervisor the power to initiate remedies (including, as the case may be, the power to file for the insolvency of the debtor). The law should consider whether, after a proper span of time without the complete implementation of the plan, its continuation be conditional upon the determination expressed by the interested parties. [Such provisions should be non-mandatory, thus allowing the parties to opt out of them] [TO BE FURTHER DISCUSSED].

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