back to the contents

Article

Valuation Ambiguities under the European Directive on Preventive Restructuring Frameworks

– Insights from the Netherlands –

Increasing attention is currently being paid to the topic of business valuation related to the implementation of the European Directive on Preventive Restructuring Frameworks. This directive essentially aims at preserving value for those companies which are, in principle, economically viable, yet which are experiencing financial (cash) difficulties. However, opposing views by creditors on the value of these companies and on the extent to which a creditor should waive a claim makes the valuation process susceptible to unwanted external pressures. Using a recent landmark case in the Netherlands as example, this article discusses valuation-related ambiguities and bottlenecks that may negatively affect the outcome of the restructuring process. Possible remedies to mitigate these effects are proposed.

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I. Introduction

1. Background

In 2019, in the aftermath of the 2008 global financial crisis, the European Union (EU) adopted the European Directive on Preventive Restructuring Frameworks ('the Directive')[1] as part of a broader program to create a Capital Markets Union (CMU) in Europe. Originally, the Directive was to be transposed into national legislation by the 27 EU Member States no later than 17 July 2021. Although several Member States – including the Netherlands – had already translated the Directive into national legislation before this date, some Member States have requested a postponement until 17 July 2022.[2] Historically, most Member States have neither offered a court-supervised possibility to implement a debt restructuring plan based on the approval of the majority of creditors (outside of a formal insolvency procedure) nor have they felt any urgency to implement such a sophisticated hybrid restructuring process. Nonetheless, in the aftershock of Covid-19, many companies in Europe need to restructure yet want to avoid formal bankruptcy. Policy makers and practitioners are now being pressured to develop and implement efficient restructuring procedures and best practice principles.

2. The Directive at a Glance

The many publications related to the Directive indicate that its objective is twofold. First, it aims to minimize discrepancies between Member States concerning the range of restructuring tools available to debtors in financial distress, partly to avoid so-called "bankruptcy tourism". Second and more important, the Directive aims to prevent the insolvency of economically viable businesses and seeks to preserve as much economic value as possible by facilitating early and relatively easy access to preventive restructuring frameworks characterized by both informal and formal – hence hybrid – elements. To achieve these overarching goals, the Directive introduced several workout instruments such as moratorium proceedings to facilitate the negotiation process, and the so-called cross-class cram-down that allows a restructuring plan to be confirmed – subject to several conditions – by a judicial or administrative authority even if the plan was not approved by all classes of creditors. Furthermore, the debtor-in-possession proceeding was introduced, meaning that company directors should be able to remain in control of the company during the restructuring process instead of being replaced by an administrator or trustee. These newly introduced tools should facilitate debtors in (i) restructuring their business, (ii) minimizing the risk of dissenting creditors obstructing a fair and realistic restructuring plan, and (iii) aligning the restructuring process across all EU member states.[3] From the creditor's perspective the Directive also offers certain advantages. First, the restructuring plan can only be confirmed if the going-concern value of the company exceeds its liquidation value, proving that the underlying business is viable. Second, the best-interests-of-creditor-test ensures that creditors should never be worse off under a restructuring plan when compared to liquidation proceedings.

Considering the new Directive, two important valuation concepts come into play. The first is the liquidation value and the second the reorganization value; concepts already known under the US Chapter 11 procedure. In general, the reorganization value can be defined as the enterprise value of the reorganized debtor[4] whereby the enterprise value can then be interpreted as the net present value of future free cash flows or, from a going-concern perspective, the value in which the debtor's future earning capacity should be considered.[5] More specific, in the context of WHOA, reorganization value can be equated with the company's total enterprise value and defined as the value distributable for the company's existing capital providers (i.e., shareholders and non-operational creditors) at the time of the confirmation of the restructuring plan and in accordance with their (legal) rank.

Both liquidation value and reorganization value appear straightforward, but in reality, their application turns out to be less so. As the concept refers to the reorganized debtor, the going-concern value should be determined after the restructuring plan's implementation, a process susceptible to many assumptions. In practice, the complexities in both valuation concepts can lead to serious disputes due to conflicts of interest between the different stakeholders of the subject company, be it (not limited) shareholders, management, senior and junior lenders, trade creditors, as well as tax authorities.

Disputes in bankruptcy cases regarding the debtor's enterprise value are relatively underexplored in the academic literature. Nonetheless, in practice, valuation and restructuring experts frequently disagree strongly about the key inputs in both a Discounted Cash Flow (DCF) and multiples-based valuation, although disagreement about the key inputs occur more frequently in DCF compared to the latter.[6] In this context, determining a hypothetical going-concern value

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1 European Union, Directive (EU) 2019/1023, 26.06.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023, last access 07.05.2022.

2 This article was finished and submitted before July 2022.

3 IVSC, Mitigating valuation risks arising from the new EU restructuring directive, 28.05.2021, www.ivsc.org/mitigating-valuation-risks-arising-from-the-new-eu-restructuring-directive/, last access 28.05.2022; preliminary memo and speaker notes by Broekema (18.05.2021).

4 Pantaleo/Ridings, Reorganization Value, The Business Lawyer, Vol. 51 (1996): 419-442.

5 Eu, Valuation Issues in the UK Restructuring Plan, NUS Law Working Paper 2021/001 / EW Barker Centre for Law & Business Working Paper 21/01 (2021): 1-27.

6 Ayotte/Morrison, Valuation Disputes in Corporate Bankruptcy, 166 U. PA. L. REV. 1819 (2018): 1819-1851.

for a company subject to some degree of distress and in urgent need of a workout solution with creditors is a potential tinderbox. It often leads to fierce debates between stakeholders, given that economic claims and interests on the value of a reorganized debtor may have to be waived. Moreover, defining the future of a company without distress is often less complex and sensitive than that of one which must undergo a tough restructuring and operational turnaround process, and whose nature of operations and assets may change as a result. Consequently, there is inherent uncertainty in estimating a hypothetical going-concern value compared to the observable cash distribution sum in a liquidation value[7] due to time constraints, ambiguity of information, and the unavailability of and inaccessibility to relevant and objective inputs required for the valuation.

II. Valuation Challenges and Implications for Practice: insights from the Netherlands

The Directive was implemented in the Netherlands on 1 January 2021 and is known as the Act on the Confirmation of Private Plans (in Dutch: "WHOA"[8]). To illustrate the relevance of business valuation and subsequent challenges under the Directive, a recent landmark case in the Netherlands[9] has shown that stakeholders have strongly divergent views on the debtor's financial outlook and performance, as reflected in a substantial range of values. For the context it is important to emphasize that, as is generally the case with other schemes under the Directive, the WHOA provides a framework on the basis of which the court can ratify a private debt restructuring agreement informally negotiated between a company and its creditors and shareholders, i.e., without active intervention of a judge along the way. Approval means that the agreement is binding to all creditors and shareholders involved in the agreement. Interestingly, the WHOA acknowledges two types of procedures, namely the public and closed agreement procedure, which is of importance for reasons, amongst others, of confidentiality.

This article uses the aforementioned landmark case example in which an undisclosed company faced financial difficulties following the Covid-19 pandemic. The company was financed by equity contributions of its (indirect) shareholders and by debt through a senior facilities agreement facilitated by a group of financiers, de facto controlled by one main creditor with a senior ranking.[10] Based on the recently implemented WHOA and through a closed agreement procedure, the company offered, after informing its creditors about a proposed so-called stay, a restructuring plan to its creditors mainly involving a postponement of interest payments, temporary non-testing of covenants, and some technical adjustments of the facilities agreement. Based on the proposed restructuring plan, the shareholders were also willing to provide an equity contribution of €4 million. The main creditor on the other hand, demanded an early loan repayment and wanted to exercise their (security) rights. Furthermore, the main creditor requested the court to appoint an independent restructuring expert (a legally defined role within WHOA[11]) as they had little confidence that the debtor's management would take sufficient account of their interests when preparing and offering a definite restructuring plan. The WHOA stipulates that each creditor may request the appointment of a restructuring expert who can take the lead to offer a plan to (some of) the debtor's creditors and shareholders. If this request is granted by the court and the expert is appointed, the debtor may no longer offer a plan independently while remaining a debtor-in-possession. As the majority of the creditors (the main creditor represented over € 107 million of the debtor's total outstanding debt of € 118.0 million[12]) supported a court-appointed restructuring expert, the court decided in favor of this request.

Additionally, the WHOA stipulates that a restructuring plan (in this case proposed by the restructuring expert) must inform the creditors and shareholders of the debtor's liquidation and reorganization value. Hence, both the company, the shareholders, and the main creditor hired professional, independent valuation experts to determine these two values. Yet where the debtor's valuation experts determined the liquidation value at € 49.4 million, the main creditor's two valuation experts determined a liquidation value of € 58.6 million and € 69 million, respectively. Based on the calculated liquidation values it appeared that in the event of liquidation of the debtor's assets in a bankruptcy, it was to be expected that the distribution of proceeds would be insufficient to cover the main creditor's entire claim. In other words, the liquidation value 'breaks' into the creditor's debt. However, in this case the liquidation value was not a topic of debate between parties and any existing difference of opinion following from the calculated liquidation values would not result in different outcomes.

When it came to the reorganization value the views were not the same given the different valuation assumptions used. First, valuation experts hired by two minority shareholders and some creditors determined the reorganization value at € 186.3 million. The valuation experts on behalf of the company determined the debtor's reorganization value

7 Determining the liquidation value may not be as straight forward as it seems and may also involve a fragmented asset sale where assets (e.g. business units) are continued on a going-concern basis.

8 The Dutch name for Act on the Confirmation of Private Plans is Wet Homologatie Onderhands Akkoord, hence abbreviated as WHOA.

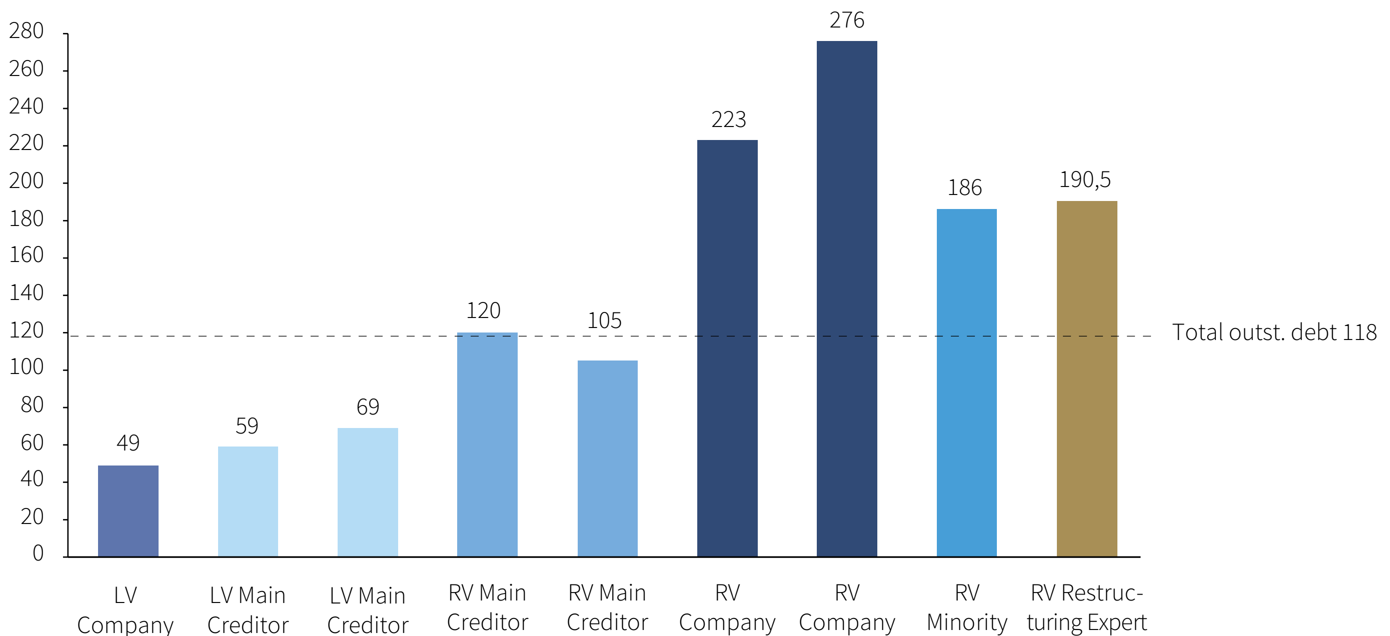
9 ECLI:NL:RBAMS:2021:6521, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2021:6521, last access 30.05.2022.

10 In the case at hand, there was also a creditor with a super senior ranking however for the purpose of this article her position will remain undiscussed.

11 In Dutch named "Herstructureringsdeskundige".

12 ECLI:NL:RBAMS:2021:1876, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2021:1876, last access 30.05.2022.

Figure 1: Liquidation Value (LV) and Reorganization Value (RV)



at € 222.6 million and € 275.7 million, respectively. Finally, the main two creditor's valuation experts determined the debtor's reorganization value at € 105 and € 120.4 million, respectively. For the record, at that time, the debtor's total outstanding debt was € 118.0 million (book value). The figure above presents an overview of the different values that illustrate the opposing views of all parties involved. Interestingly, the company considered a much higher reorganization value compared to those determined on behalf of the main creditor, indicating the main creditor was in the money while the main creditor considered themselves to be out of the money.

The independent restructuring expert decided – although not legally obliged under WHOA – to engage an independent valuation company[13] unrelated to the interests of the parties involved, to determine the reorganization value from an objective and neutral view; this resulted in a reorganization value of € 190.5 million. Thereafter, the court considered that the independent valuation expert made it sufficiently plausible that the debtor's reorganization value exceeded its debts, so that the value 'breaks into the shares', i.e., that the company was in principle viable thus suitable for a workout plan and vote under WHOA. Finally, the court confirmed the restructuring expert's plan that had been accepted by a majority of the (classes of) creditors, which resulted in the need for a cram-down.

Needless to say, the presence of multiple, diverging valuations on behalf of different classes not only results in the process taking more time than planned. It also increases the risk of a further decline in value and even a possible bankruptcy scenario as the company will remain in a state of distress during this period.

III. Causes of Diverging Value Perceptions

While in general, practice shows that valuation outcomes often diverge in cases of opposing interests, estimating an enterprise value is even more sensitive in restructuring issues, as in this case. As the legal framework may force parties to waive part of their claims, in certain situations it can also give parties legal rights to pull the business strategically or opportunistically towards them by means of a debt-for-equity swap.

Causes of diverging value perceptions in restructuring processes are, in theory, many, so for the context of this article the authors discuss a selection. For example, Richter & Thery argue that uncertainty plays a prominent role as there is no real market verification. They state: "Another disadvantage of restructuring is that, although it may be chosen democratically and even legitimately by a majority of creditors, it involves a certain amount of uncertainty as to the enterprise value because there is no real market verification. The creditors do not divide the cash proceeds among themselves but instead have to resort to estimates of enterprise value which are unlikely to be as convincing. Based on those estimates, they will have to reinvest their liquidation distribution in exchange for which they will receive a paper under the Plan representing their pro-rata share of the restructuring value. And not all creditors will always be equally convinced by such reinvestment."[14]

13 For full disclosure, the authors of this article were hired by the independent (court-appointed) restructuring expert to act as independent valuation experts.

14 Richter/Thery, Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down. INSOL Europe (2020): 1-45.

Earlier, Baird & Bernstein recognized that uncertainty and ambiguity accompany any valuation procedure, however the valuation problem in a reorganization case is fundamentally different compared to more 'regular' cases, as uncertainty plays a more prominent role.[15]

Another cause of diverging value perceptions relates to the opposing interests of the different classes in which parties with a claim or interest in the debtor are categorized. Such opposing interests are possibly caused by creditors' risk appetite, their policies and other principles (e.g., tolerance, attitude, preference) that they adopt in order to pursue their interests. The allocation of 'creditor class' is of importance to the creditor because the reorganization value defines which class the creditor concerned is in, and therefore which classes are in the money or out of the money, i.e., who is for example eligible for a debt discharge or not (often referred to as a "haircut"). Consequently, categorizing those with a claim or interest into classes can result in diverging valuation perceptions depending on their position within the value distribution. Interestingly, according to Baird & Bernstein, small differences in valuation assumptions can easily lead to changes in the valuation by 10% or 20%; these assumptions can therefore easily be driven by forms of self-interest.

A third cause of diverging value perceptions may be attributed to cognitive biases. These can be defined as systematic patterns of irrationality human beings are exposed to. Their powerful effects on human judgments, particularly in situations characterized by high degrees of complexity and uncertainty, were revealed in the early seventies of the last century by the renowned social scientists Tversky & Kahneman.[16] Recent empirical research by Leiden University among valuation experts[17] has shown that perceptions are also susceptible to other biases, including the recently described "engagement bias".[18] The researchers defined engagement bias as when business valuators (or any professionals for that matter) are hired, they (consciously or unconsciously) are affected in their judgments to favor their clients' interests. In an experimental empirical survey study the researchers determined that when valuation experts represent their client's interest, this relationship affects the valuation experts' judgments so that these are more in tune with their client's wishes. If their client is looking to sell and would therefore benefit from a high valuation, the valuator gives the object a higher value than when the valuator represents a buyer who would benefit from a lower valuation.

Interestingly, when participants were asked to motivate their answers regarding the adjustment of the valuation, none of them hinted at the potential influence of engagement bias, and the researchers therefore assumed that engagement bias operates largely unconsciously, as well as that the participants had the tendency to rationalize their intuitions regarding the company's value post-hoc.

Furthermore, the researchers argued: "more worrisome in light of the impending aftermath of the COVID-19 pandemic, engagement bias ultimately risks unduly liquidating economically viable companies when the liquidation value of a company is erroneously deemed higher than the going-concern value after restructuring, or contrastingly the allocation of significant resources to save companies that in reality have little chance of surviving." In analogy to previous research, valuation experts representing the interests of creditors in potential in the money or out of the money classes in restructurings may thus be affected by the same engagement bias, with potentially the same consequences as in the case of buying or selling a company. In line with the literature challenging the independence of auditors, the researchers demonstrated that due to engagement bias, valuators' professional judgments can be overshadowed by the urge to satisfy clients, ultimately leading to suboptimal valuations and loss of value. Moreover, it may potentially broaden and extend disputes that might arise or have already risen between the different classes. Meanwhile, the distressed company may drift further into failure.

In practice, it is worthwhile exploring which remedies could mitigate strongly diverging valuation outcomes or, at least, contribute to a higher level of acceptance of valuation outcomes both by courts and individual stakeholders of the subject company. The case example may provide clues: these are discussed in the next section.

IV. Remedies to Minimize Valuation Disputes in Restructuring Contexts

In the case in this article, both the restructuring expert, the independent valuation team, and the engaged legal advisors quickly realized that some sort of engagement bias may have played a role, thus explaining the diverging valuation outcomes. They also understood that the independent valuation outcome could become subject of lengthy debates with and among the stakeholders. Given the company's problematic situation, this obviously was unwanted as it could jeopardize the chances of a fast and successful restructuring and with that, the prospects of survival. It was also thought that the broader the support base for the independent valuation outcome, the better the chance of successful negotiations with stakeholders, i.e., consensual agreement, or at least only a small part of the creditors that would need to be "cram-downed" under the WHOA.

15 Baird/Bernstein, Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain, 115 Yale Law Journal (2006): 1930-1970.

16 Tversky/Kahneman, Judgment under Uncertainty: Heuristics and Biases: Biases in judgments reveal some heuristics of thinking under uncertainty. Science, Vol. 185 (1974): 1124-1131.

17 The authors were members of the research team.

18 Broekema/Strohmaier/Adriaanse/Van der Rest, Are Business Valuators Biased? A Psychological Perspective on the Causes of Valuation Disputes, Journal of Behavioral Finance, 23:1 (2022): 23-42.

back to the contents

To achieve this, it was decided by the independent restructuring expert to ask the court permission to hire an independent strategy consulting firm as part of the valuation process with the prime task of reviewing the company's business plan, as well as scrutinizing and validating the underlying assumptions regarding market outlook. With that, the inputs for the valuation calculation by the independent valuation team was largely objectified. By then giving all relevant stakeholders the chance to review the results and to give feedback, a further remedial step was taken to minimize diverging opinions and to create common ground for the eventual valuation outcome.

Based on the literature and the approach chosen by the hired consulting firm, a set of questions has been developed that may, in practice, help to objectify the valuation inputs in a restructuring situation. In essence, these should, help answer the one main question, i.e., despite its current debt-structure and given the market outlook, is the company able to survive?

Viability

The literature shows that many factors determine the viability of firms.[19] Taken together, these factors indicate that four key questions must always be addressed when assessing viability in a restructuring process:

1. Is the centrally defined customer need that can be solved with a product or service within the range of the unique resources, core skills, and competencies available to the enterprise, and can that be converted into positive cash flows?
2. Does the synthesis between the company's (idiosyncratic) resources match customer needs (i.e., strategic fit), or has a suitable market been found for this (i.e., resource-based approach)?
3. What strengths and weaknesses does the company have in relation to its (direct) competitors: what comparative (i.e., in resources) and what competitive (i.e., in market position) advantage and disadvantage does the company have, respectively?
4. Which external factors (e.g., political-legal, economic, socio-cultural, and technological) constitute opportunities, threats, and risks to the company's future revenue model?

Furthermore, the four questions can be divided into nine value-related clusters including specific (sub)questions. These clusters align with the following theoretical and conceptual perspectives: *Resource-Based View of the Firm*[20], *dynamic capabilities of firms*[21], *business models*[22] *and governance and accounting.*[23]

(1) Value proposition

1. How does the firm create value with the delivered products/services?
2. Who are the customers/target groups?
3. In what customer need do the products/services provide?
4. How distinctive are the products/services compared to competitors – for example in quality/price?
5. Does the company have an established customer base, good reputation?
6. Are there alternatives/substitutes with respect to the products/services, and how threatening are these in terms of quality and price?
7. Which marketing channels and promotion does the company use, and are they appropriate?
8. Which problems do the products solve for the customer; where exactly do the products derive their value and are customers willing to pay cost-effective prices?

(2) Value developments

1. How big is the market and what are the market's main (expected) developments in the next 3-5 years?
2. Is it a growth market or a declining market, and is it an innovative, dynamic and competitive market?
3. Can the company continue to distinguish itself from (potential) competitors?

(3) External value net [network of external stakeholders]

1. Who are the company's main (external) stakeholders and to what extent does the company depend on them?
2. Is the company under pressure from powerful stakeholders?
3. Who are the main competitors, is new entry taking place, and how does the company compare to its main competitors in terms of cost, quality, and image?

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19 This section is partly based on [in Dutch] Adriaanse/Verdoes/Van der Rest in: Kerstens/Rikkert/Broeders/Feenstra (editor), Wet Homologatie Onderhands Akkoord, Insolad Jaarboek 2021: 1-20; See also Thomson, Dimensions of Business viability, Appendix H. Dimensions of Business viability (2005), http://bestentrepreneur.murdoch.edu.au/; D'Souza/Wortmann/Huitema/Velthuijsen, A business model design framework for viability; a business ecosystem approach, Journal of Business Models, no. 3, ed. 2 (2015): 1-29.

20 See e.g., Barney, Firm Resources and Sustained Competitive Advantage, Journal of Management, volume 17, issue 1 (1991): 99-120; Amit/Shoemaker, Strategic Assets and Organizational Rent, Strategic Management Journal, no. 14, ed. 1 (1993): 33-46; Kraaijenbrink/Spender, Theories of the Firm and Their Value Creation Assumptions (presentatie), SMS 31st Annual International Conference, Miami, US, 2011.

21 See e.g., Teece/Pisano/Shuen, Dynamic Capabilities and Strategic Management, Strategic Management Journal, no. 18, ed. 7 (1997): 509-533; Bowman/Ambrosini, Value Creation Versus Value Capture: Towards a Coherent Definition of Value in Strategy, British Journal of Management, no. 11, ed. 1 (2000): 1-15; Bowman/Ambrosini, Identifying Valuable Resources, European Management Journal, no. 25, ed. 4 (2007): 320-329.

22 See e.g., Teece, Business Models, Business Strategy and Innovation, AJIBM, no. 2 (2010): 172-194; Morris e.al.,The entrepreneur's business model: toward a unified perspective, Journal of Business Research (2005); D'Souza/Wortmann/Huitema/Velthuijsen, A business model design framework for viability; a business ecosystem approach; Journal of Business Models, no. 2 (2015): 1-29.

23 See e.g., Bushman/Smith, Transparency, Financial Accounting Information, and Corporate Governance, Economic Policy Review, no. 9 (2015): 65-87; Monks, Creating Value Through Corporate Governance, SSRN Paper 314284 (2003); Moxey/Berendt, Creating value through governance – towards a new accountability: a consultation, London: ACCA (2014).

back to the contents

(4) Internal value chain and valuable resources

1. Which unique (comparative) resources (including intellectual property) does the company have at its disposal and can these be shielded (sustainably) from competitors?
2. What is the distinctive core of the enterprise from which it derives its uniqueness? And to what extent do products and services fit these core competencies?
3. To what extent is there an internal and external fit between the sources and products brought together?
4. How firm are the contracts that the company has concluded with its internal and external stakeholders?
5. What processes/activities does the company perform, and is it necessary for the company to perform them itself? Are there possibilities to outsource or (other) flexibilization of costs?
6. Is the production process efficiently organized?
5. Does the company focus on its core competencies?

(5) Adaptive value

1. Is the company flexible and adaptable in terms of material, personnel, and financial?
2. Can the enterprise react to changing circumstances and developments in the value chain?
3. To what extent is the company bound by contracts?

(6) Risk value [risk factors that can destroy value]

1. How sensitive is the value creation (and derived cash flows) to changes in turnover and cost structure?
2. What are the short and long-term risks represented by means of a PESTLE analysis (i.e., Political, Economic, Social, Technological, Legal, Environmental factors) and a SWOT analysis (i.e., Strengths, Weaknesses, Opportunities, Threats)?
3. Is the company dependent on a (major) customer(s), or supplier(s) or other stakeholders (e.g., landlords)?

(7) Governance value [management and oversight]

1. Is there a clear, streamlined information system and rules and procedures?
2. Is the management capable of giving direction, making choices, and motivating staff?

(8) Financial value

1. What do the key ratios liquidity, solvency and profitability look like, and what are the expectations?
2. What do the forecast cash flows look like and how do they relate to the repayments?

(9) Miscellaneous and ancillary value [additional value-creating or value-destroying elements]

1. Are there company-specific factors that could impede viability?
2. Is there conflict within the company, an impending departure of a crucial stakeholder, or disputes among stakeholders?

These clusters make the underlying narrative logical and visible, and show implicit assumptions, hypotheses, and/or paradigms in a coherent, transparent, and holistic way. This makes the viability issue more testable and, when used as inputs for the cashflow assumptions, more objective.

In sum, it can be stated that in the case study, it helped parties overcome some of their diverging opinions and even when differing beliefs persisted on some issues, the strategy process as a whole helped to create common ground and "language" for negotiations. To conclude, it largely contributed to the eventual successful confirmation of the plan.

V. Conclusion

To minimize valuation disputes in restructurings under the Directive, business practice benefits from a jointly supported business valuation, something that often appears to be a utopia rather than a reality. Nevertheless, one of the Directive's aims is to prevent insolvency of viable businesses and preserve their inherent value by facilitating early access to preventive restructuring frameworks. Instruments that contribute to minimizing loss of value and legal costs following extensive debates on the distressed debtor are thus worthwhile exploring, with the aim of enhancing a distressed transaction (e.g., a debt discharge under WHOA) that is fair to all parties. In this context, the concept of fairness can best be understood in terms of fair dealing and fair price, as exemplified by the Delaware Court of Chancery[24]: "fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, and negotiated, and how the transactional approvals were obtained" and, "fair price focuses on the economic and financial considerations of the challenged transaction."[25] In this article we have described complexities related to valuation in restructuring, as well as providing practical insights and ideas for remedies against valuation ambiguities, such as the appointment of both fully independent valuators and strategy consultants in the course of the early (informal) restructuring process, in order to create common ground and (a higher degree of) fairness. ◆

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24 A non-trial jury court recognized as US' most prominent forum for handling corporate disputes and involving the affairs of thousands of companies including the majority of Fortune 500 companies and those listed on the New York Stock Exchange and NASDAQ (see Broekema/Strohmaier, From Leiden to Delaware: How empirical legal research on valuation biases was used in a US courtroom, Leiden Law Blog (2022), www.leidenlawblog.nl/articles/from-leiden-tot-delaware-how-empirical-legal-research-on-valuation-biases-was-used-in-a-us-courtroom, last access 30.05.2022.

25 See Laster, Memorandum Opinion Addressing Claims for Breach of Fiduciary Duty in Connection with Freeze-Out of Minority Partners in Salem Cellular Telephone Company (2022), https://law.justia.com/cases/delaware/court-of-chancery/2022/c-a-no-6885-vcl.html, last access 30.05.2022.