1. **What were in your opinion the causes of financial distress at Flow Management (see e.g. Mellahi & Wilkinson, 2004)? Could the financial distress have been prevented? If yes, explain how. If not, why not?**

From the outset of this case study, it is made clear that there is steady market demand in truck and private car hires, that Flow Management operates in. Then as the case unfolds there appears to be no further reference to any external factors affecting Flow Management, such as technological or regulatory changes in the car leasing industry or truck repairs, or other changes in the economy or the resources available impacting this market sector at the time.

In this respect, the financial distress at Flow Management is posing a challenge to the deterministic view of classical industrial organization (IO) and organization ecology (OE), that both support the notion that *“when it comes to failure, the industry matters more than the firm*”[[1]](#footnote-1). More specifically, industrial organization attributes corporate failure to dynamic changes in the environment that the organization operates in, such as shortage in resources and complexities with other stakeholders and competitors; while the organization ecology approach focuses on the effect of demographic and regulatory changes to organizations, with focus on smaller or newly founded organizations.[[2]](#footnote-2)

In the case of Flow Management, the financial distress emerges rather from faults in the annual accounts and poor management of its main subsidiary, Flow Management Work BV (“Subsidiary 1”). In particular, it is well established that these related initially to highly miscalculated profit forecasts that in the end turned out to be a loss; wrongfully issued management bonuses; mistakes in contingency gain entries in the annual accounts and ‘formula errors’ affecting the cost price calculations, which resulted in a loss as the prices charged were too low. Most significantly, the overestimated profit forecasts extent throughout 2014 and even 2015 to Flow Management, as the management seems to be numb to the financial distress of the group at first.

This is an indication that perhaps the numbers that form the basis of these forecasts, as well as annual accounts, which should be monitored by the management of an organization, were not accurate or were incomplete. In fact, this is verified in this case study as it mentions explicitly that the management *“failed to periodically check the real costs against the results of the cost price calculation”* and, as a result of this, they were charging too low prices that produced financial loss in the end. Yet still Lease Group Holding United Kingdom Ltd (the “Shareholder”) only proceeded to change Flow Management’s CFO in January 2014 and its CEO in April 2014, that is two and six months respectively from the time that these financial issues were first identified.

Therefore, the cause of this financial distress of Flow Management at its core lies on the fault perception, actions and decision making of its management. One plausible reason for this could be that they tended to overly rationalise the extremely low prices that they charged their clients with, by way of being required to increase the volume of sales or other, to the extent though that they gave trust to the cost price calculation produced by their accountants and failed to ever check the actual costs against results, that could have indicated the flawed calculation. Similarly, such rationalization of accounting mistakes could explain also the management’s failure to question the 2012 annual accounts, as well as the forecasts and other results presented to them by their accountants.[[3]](#footnote-3)

Instead, Flow Management’s managers, blinded by apparent good results, they relied on the flawed annual accounts, most likely even interpreted these as their personal success, and proceeded to get their large bonuses in 2013. Such failure attributed to over-ambiguity of the managers supports the notion that ‘success brings failure’ and that ‘failure breeds further failure’.[[4]](#footnote-4)

As to whether this financial distress in Flow Management could have been prevented, based on the reasoning provided above, the answer is definitely in the affirmative, should the management applied more rigorous and regular close monitoring on the company’s results and the calculations that let to these results, independently from their accountants’ formula-based analyses. This issue should have been identified also and addressed by the group’s CFO or an external auditor, if any, since there is no explicit reference in the text to audited accounts.

1. **What are in general advantages and disadvantages of an out-of-court restructuring (workout) as compared to a formal bankruptcy procedure? More specific, what are the advantages versus disadvantages in your country?**

The importance of identifying our major stakeholders and assessing their influence in averting corporate failure has been discussed thoroughly by academic research in the past, such as K. Pajunen’s model for stakeholder influence identification and propositions for their management throughout the restructuring process.[[5]](#footnote-5) In my opinion, identifying these stakeholders and considering their position and intentions right before deciding upon the preferred restructuring tool, is crucial to the latter’s success, as it can turn out to be both an advantage or a disadvantage in out-of-court restructurings, where their collaboration is required.

Therefore, in order to determine which type of restructuring best suits an organization in financial distress, there are two critical questions that should be set up front: (1) Which stakeholders are pursuing the restructuring? (2) Which stakeholder interests are likely to be impacted by the restructuring? The answer to this will determine whether an out-of-court restructuring is a feasible option, or whether it is likely that the scheme would have to be imposed on certain stakeholders, in which case a court order affirming the restructuring will be required.

Usually, the first to identify the financial distress situation would be the organization’s own management, that’s engaged with its day-to-day management and financials. If the issue at hand is some temporary cash flow constraint, deriving from some unexpected expenses, loss of major contract or resources, or rather of minor financial extent compared to the overall organization’s turnover and budget, then it is most definitely more advantageous to pursue out-of-court restructuring.

The reason is that such financial restraints of minor extent can be averted by involving less stakeholders in number, that could be just the company’s management and a couple of the main financial institutions it collaborates with in providing short-term financing. The reason is that such measures are informal, simple and swift and they allow the debtor to remain in control throughout their negotiation, adoption and implementation.

In Cyprus though, such a debt restructuring can be initiated conversely by the financial institution against the organization, had it identified that the business’ overdraft or a loan is in arrears. This can be pursuit through a formal debt restructuring procedure under the Arrears Management Directive[[6]](#footnote-6). Since the enforcement of the Arrears Management Directive by the Central Bank of Cyprus in 2015, the major financial institutions in Cyprus have utilized immensely this toll. Judging though by the re-default rate following such debt restructurings[[7]](#footnote-7), it has become apparent that this solution was not best suited in most cases.

The reason is simple; it relates only to the debt owed to that financial institution, while all other debts of the business -taxes, contractors, service providers and so on- are not necessarily being restructured respectively. This is the main disadvantage of such informal debt restructuring procedures, as it’s on the organization management’s appetite alone how to use or distribute the funds from such a re-financing.

Other immediate relief solutions that are popular in out-of-court restructurings are cost cuts, collection of receivables and collaborating with long-time business partners to create economies of scale (ie on a shared distribution line). All of these measures can be implemented without delay by the organization’s management alone and they are beneficial in that they increase the cash flow and can facilitate valuable ‘breathing space’ in a financial distress situation.[[8]](#footnote-8)

However, such informal arrangements may not be adequate for businesses with long term financial constraints, such that could be deriving from market instability; credit constraints imposed by financial institutions or currency fluctuations. Informal restructurings may not be the solution either for businesses that may be facing additionally certain operational issues, such as shareholder disagreements; succession constraints; or creditors with conflicting interests, such as franchisors whose goodwill is at stake or contractors with competitive advantages. Which brings us to the second question to be addressed: which stakeholder interests are likely to be impacted? If these vary, as described above, then a more integrated formal restructuring may have better chances of success.

There are two schemes by which Cypriot companies may be put under restructuring by Court order: Reorganization, provided in section 198 of the Companies Law, and Examinership, provided in Part IVA of the same legislation. Both of them may be initiated by the company, or any of its creditors or shareholders and, once approved by the majority at the creditors’ meeting or shareholders meeting or meetings of the different classes of creditors, the restructuring plan shall then be affirmed by Court order and be binding against all stakeholders.

The main difference between the two is that with Examinership the company will also benefit from a 4-month-long moratorium on all claims against the company by its creditors, which may be extended for a further 2 months. This is so provided to facilitate a period of negotiations between the company and its stakeholders, without undue pressure from creditors. For the duration of this protection period, an insolvency practitioner will be appointed as Examiner of the company and will work, in collaboration with its board of directors, to examine the company’s affairs for the purpose of forming a restructuring plan and getting it approved by its shareholders and creditors. Once approved this restructuring plan can be affirmed by the Court and be binding to all of the stakeholders involved.

The advantages of such formal restructuring procedures as opposed to out-of-court restructuring are as follows: a standstill can be imposed on all creditors, to facilitate negotiations; and a insolvency practitioner, who will add value to the restructuring process with his/ her expert advise and independent monitoring, must always be appointed.

In conclusion, it can be argued that while out-of-court restructurings can offer immediate relief and more confidentiality, formal restructurings can be more efficient in the long run.

1. **Were the turnaround/ reorganization approaches as presented in the reading material (see e.g. Adriaanse & Kuijl, 2006, Sudarsanam, s, Lai, J., 2001, Schmitt, A., Raisch, S., 2013) applied in this case? If yes, explain in what way. If no, detail what in your opinion should have been done differently.**

The first reaction by the management of Flow Management after having identified the critical problems that caused the financial distress was to adopt immediate relief solutions to ‘stop the bleeding’. In particular, the plan adopted was to negotiate with their main clients on price increases and to implement spending cuts to stabilize the situation. This was then implemented within just one month, including also some job cuts, higher excess premiums, saving on car repairs. This is consistent with the sequential perspective analysed by Schmitt, A., Raisch, S., 2013 [[9]](#footnote-9) suggesting that turnarounds start with retrenchment activities, while recovery measures follow right after. At the same time, it is evident that the Dutch model to informal reorganisation set forth by Adriaanse & Kuijl, 2006 [[10]](#footnote-10) was also followed as these initial measures were aimed to stabilize the situation.

Simultaneously with adopting these immediate relief solutions, Flow Management hired an independent turnaround consultancy agency that proceeded to analyse and assess the situation and concluded that the company is viable. This is in fact the second step to be pursuit in an informal reorganisation according to Adriaanse & Kuijil, 2006[[11]](#footnote-11). At the same time, recruiting an independent expert to consult on the recovery indicates using a recovery technique to drive retrenchment activities, which is consistent with Schmitt, A., Raisch, S., 2013[[12]](#footnote-12) theory on the duality of retrenchment and recovery.

This pattern is then repeated by the Shareholder that responds with concurrent changes in the management of the company, namely replacing the CFO followed by the CEO, and injections of risk-bearing capital, which illustrates an intent to reposition the company.[[13]](#footnote-13)

By June 2014 that the Flow Management presents to the banks its proposal on the turnaround of the Subsidiary, the CRO announces further expected losses, yet it is established that the banks are nevertheless *“content about Flow Management Holding BV’s new management (including the CRO) and they notice a slight result improvement due to the reorganisation*”. Now this evidences that the managerial and financial restructuring pursuit has succeeded in regaining the trust of creditors and banks, as suggested in fact by the 6th proposition of Pajunen K., 2006 establishing that *“In an existence-threatening crisis, governing stakeholders association of management with good firm performance is positively related to the continuing support of those stakeholders and increase the probability of organizational survival”[[14]](#footnote-14).*

Nevertheless, it should be pointed out at this stage that, although Flow Management called in the banks to talks and has since improved its reporting to them on the financial position of the companies within the group, there is no reference throughout this case study on any measures taken to improve management information systems and the overall communication among stakeholders.

In the final stage of Flow Management’s restructuring all operating subsidiaries are transferred to a new healthy subsidiary to reinforce the restructuring, that is the final stage in informal reorganization as suggested by Adriaanse & Kuijil, 2006[[15]](#footnote-15).

Overall this case study seem to be more in line with the exact analysis and results presented by Adriaanse & Kuijil, 2006[[16]](#footnote-16). Namely Flow Management’s corporate decline was an immediate cause of poor management, most evidently in the Subsidiary, that seemed non-responsive to threats; then for the restructuring they’ve used turnaround consultants and taken measures to improve efficiency; while the banks were also inclined to provide new financing to improve the chances of success. All of these are included in the analysis by Adriaanse & Kuijil, 2006[[17]](#footnote-17) of the evidence from the Dutch practise and the success factors identified therein.

1. **Banks C and D seem to frustrate the process at a certain point. What could have been the (rational and/or opportunistic) reason(s) for them to behave like that? What would you have done in that situation in your role as advisor of the other two banks?**

In late 2013, that the financial distress in Flow Management surfaced, banks C and D were positively inclined towards the suggested discussions for the restructuring of the Subsidiary at the time. The common view of all banks at the time was ‘not to panic’. This notion that the financial institutions should be supportive of restructurings of viable companies, as this is crucial to the success of the restructuring is not new. As stated by the Bank of Finland in the Kymi case back in 1908, a situation where the banks retreat from the restructuring negotiations and the credit agreements *“might endanger the existence of the organisation… and lead to severe social and economic conflicts”.[[18]](#footnote-18)*

This decision by the banks at that time was taken despite the fact that there seemed to be some problem with the securities on the company’s assets established by the banks. In particular, this related to the respective security contracts and there are implication that in the event of liquidation of the company the companies may be exposed to lower to zero proceeds.

Then just a couple of months in the discussions, Banks C and D are all of a sudden not cooperating. At the time there were ongoing negotiations between the consortium of banks on the one hand, and the company on the other hand, for the banks to agree on a standstill. Therefore, Banks C and D were called to commit on not taking any action against the company for quite some time, yet at that stage the company had not committed yet neither on the strategy to be followed for Flow Management’s restructuring, nor on the required risk-nearing capital injections. In fact the Shareholder has not even proceeded yet with the discussed changes in the company’s management, which is crucial to gain the creditors’ trust.

*“Often, banks and creditors, will continue financial support only if they are confident that the management team can manage the crisis in hand”[[19]](#footnote-19)* and it has become quite obvious by now that this is not the case with the management of the company at the time. With this in mind, I believe it is rational at this stage that Banks C and D took a more passive approach. They were after all primary stakeholders, since their securities over assets of the company indicates high direct resource dependency of the company with these banks[[20]](#footnote-20). As such, they were also aware of their power to influence, or rather exert pressure, on the company’s management and the Shareholder by showing their dissatisfaction on the progress of the negotiations at that point in time.

Then in June 2014, that the company comes up with a proposal for the financial restructuring of the Subsidiary, the newly appointed CRO announced increased expected losses and imminent liquidity shortage, all attributed to the delay in the sought reorganisation. It is at this point that, to the discouragement of banks A and B, banks C and D threaten to even cancel credit.

By now, banks A and B have already considered the possibility of buying out banks C and D with 15% - 20% discount. However, considering their relatively easy-going approach to the restructuring negotiations, this would not necessarily strengthen their negotiating power. Personally, I would advise them instead to embark on becoming the ‘mediator’ between Flow Management and banks C and D. Achieving this would have improved their network position, as a direct effect of the betweenness centrality power they’d gain, just like the role that Bank of Finland asserted in the restructuring of Kymi Corporation[[21]](#footnote-21).

In the end, the retreating tactic of banks C and D seems to have paid on, since the Shareholder proceeded with the sought after changes in the management of the company and agreed to proceed with he required cash injections, so by August 2014 a standstill agreement is achieved. Nevertheless, judging from the result of the July 2015 restructuring agreement which favoured the consortium of banks in general, it’s implied that banks A and B did not succeed in using this situation with the passive attitude of banks C and D to their advantage. This is another indication that they should have perhaps pursuit a more active role in the negotiations at that stage.

1. **Which of the eight principles of the ‘Statement of Principles for a Global Approach to Multi-Creditor Workouts II’ can be found in the workout process of the Flow Management (explicit or implicit)?**

From the outset of the financial distress identified at the Subsidiary, Flow Management has indeed called in all the banks it’s been working with to inform them about the situation and request their cooperation in facilitating a standstill period. At about the same time they’ve appointed an independent accountancy firm and an independent turnaround consultancy firm to investigate on the procedures followed by the company and come up with the current and prospect financial position of the company. It should be noted at this stage that this sharing of information was effected at this early stage, that is before any standstill agreement was achieved.

All these actions of Flow Management indicate their willingness to gather and facilitate relevant information to the creditors. This is in fact mastered throughout the restructuring process in relation to the consortium of banks that were regularly informed on the financial position and forecasted results of Flow Management, which confirms adherence to the 5th principle of INSOL’s International Statement of Principles.[[22]](#footnote-22)

At the same time, the consortium of banks cooperates in the end in facilitating a standstill period to formulate proposals and refrain from taking any enforcement measures during this standstill period, as provided by the 1st and 2nd principles of INSOL’s International Statement of Principles. [[23]](#footnote-23)

Conversely, Flow Management is in breach of the 3rd principle of INSOL’s International Statement of Principles stating that *“the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commence Date”* [[24]](#footnote-24). The reason is that in October 2014, that is just 2 months after signing the standstill agreement, Flow Management provides €10 million if tax refunds as additional security to the banks.

Further, compliance to the 5th principle mentioned above is limited to just certain classes of creditors, that is the consortium of banks, the company’s management and the Shareholder. There isn’t any reference to providing this information or getting involved in the restructuring process in any other way, any other creditors such as governmental or local authorities in respect of any taxes due or suppliers of car components or other. This confirms also that neither the 4th principle of INSOL’s International Statement of Principles on a co-ordinated response by the creditors, through committees and professional advisors, was followed.[[25]](#footnote-25)

Similarly, compliance to the 7th principle of INSOL’s International Statement of Principles, which explicitly provides that information on *“any proposals for resolving (the company’s) difficulties should be made available to all creditors and should, unless already publicly available, be treated as confidential”[[26]](#footnote-26)*  is hindered by the fact that the Restructuring agreement of July 2015 provides that Flow Management shall be liquidated in an undisclosed manner. Furthermore, there is no reference to any confidentiality agreement being adopted throughout this case study.

The fact that Flow Management shall be liquidated in an undisclosed manner further implies non-compliance with the 6th principle of INSOL’s International Statement of Principles, stating that *“Proposals for resolving the financial difficulties of the debtor (…) should reflect applicable law”* and that creditors should be in a position to compare the likely outcome of such proposals to that of an imminent formal liquidation process or other formal restructuring arrangement perhaps *[[27]](#footnote-27).*

Also, the fact that, as provided in the Restructuring agreement, Flow Management will cancel all claims against Flow Management II BV that will acquire all of the assets of the former, may constitute alienation of assets in the imminent undisclosed liquidation process of Flow Management, which again hinders compliance with applicable law. Although transferring of its assets to Flow Management II BV, which will be owned by the banks, that is its creditors, can be reasoned as part of a debt for asset swap implemented through the Restructuring agreement, it’s doubtful whether rights to a claim against this new company, that may not be directly related to the debt owed to the banks, can be adequately reasoned as part of the debt for asset swap agreement under applicable law.

Another proposition of the Restructuring agreement, that’s not being adequately explained and could be in breach of the 2nd principle of INSOL’s International Statement of Principles relating to conflicts of interest arising in the restructuring process,[[28]](#footnote-28) is the reason that a number of board members of Flow Management during the restructuring period, including the CRO that developed the Restructuring agreement, shall receive shares in the newly founded Flow Management II BV.

1. **Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there any other possibilities for “soft law” to use (perhaps specifically in your country/ region)? If yes, explain in what way. If not, do you see any alternative (informal possibilities)?**

Unfortunately, in Cyprus there isn’t any ‘soft law’ to provide guidance on out-of-court restructuring proceedings.

Therefore, the only route there it may be to establish a memorandum of understanding as to the process and the principles to be followed and encompass therein perhaps certain principles to be found in legislation applicable to formal restructuring procedures in Cyprus or abroad or in any ‘soft law’ applicable abroad.

Such formal reorganization proceedings provided by legislation in Cyprus that include proceedings and principles related to restructurings is the companies’ reorganization[[29]](#footnote-29) and the examinership[[30]](#footnote-30). Companies’ reorganization is a summary procedure with minimum Court involvement, simply to ensure the notification of all stakeholders whose rights may be impaired by the restructuring plan and ensure also enforcement by all stakeholders of the plan to be approved by them in the end. As such it doesn’t provide any detailed set of rules and may not be of much assistance to this end.

The examinership, on the other hand, provides for a much more detailed and integrated restructuring procedure and includes provisions on moratorium of payments, stay of proceedings against the company, debtor in control, creditors’ voting rights, protection of new financing and so on. In this respect, this legislation can provide the required guidance in drafting a memorandum of understanding on the process and principles to be followed in an out of court restructuring.

Similarly, certain principles laid out in UNCITRAL Model Law on Cross-Border Insolvency (1997)[[31]](#footnote-31) could be adopted to provide guidance on an informal reorganisation procedure. It’s important to mention here though that Cyprus has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997)[[32]](#footnote-32) in national legislation.

1. **Explain in detail the essence and result of the restructuring agreement as signed on the 4th of July 2015.**

In situations of severe financial distress of the organization, such as that experienced by Flow Management, secured creditors will always consider liquidation of the company as an option, since it involves realisation of collaterals that will at least mitigate their losses, or even cover them in total in some cases. However, in the case of Flow Management the consortium of banks is not positively inclined towards liquidation for two reasons: (i) the liquidation as such will affect the value of the assets of the company that form their collateral in this case and, therefore, diminish their proceeds (ii) a liquidation scenario will trigger certain provisions in the security agreements (pledges) rendering the proceeds substantially lower (or even zero). In line with this, the consortium of banks wouldn’t entertain the liquidation option.

With this in mind and the going concern option vanishing as both the reorganization and the much-needed working capital injections promised at times by the shareholder delayed, which resulted in the increasing losses of Flow Management, it does not come as a surprise that the Restructuring agreement adopted is based on Debt equity swap. Therefore, in essence, with the July 2015 Restructuring agreement all the assets of Flow Management, that is all of its subsidiaries, are transferred to the consortium of banks, through Flow Management II BV, that serves as a special purpose vehicle to that extent.

The possible reasons that this special purpose vehicle is required in implementing the debt equity swap can be summarised as follows:

* Legislative or regulatory restrictions applicable to the consortium of banks, that are regulated financial institutions, in acquiring shares of companies registered abroad, since each one of the six subsidiaries of Flow Management to be transferred through this Debt equity swap is based in a different jurisdiction.
* Legislative restrictions in any of the jurisdictions that the subsidiaries of Flow Management are based in transferring their shares to financial institutions in the Netherlands.
* To avoid transferring also any taxes and other governmental and municipal charges payable by Flow Management, that would diminish the proceeds of the consortium of banks in the event of direct transfer of Flow Management to them; or in the event of liquidation of Flow Management as such taxes and charges usually enjoy priority to other creditors in liquidation proceedings.
* To enable the liquidation of Flow Management at the minimum expense to the consortium of banks
* To enable cancellation of all claims of Flow Management and its Shareholder against the subsidiaries (Flow Management II BV that is) and thus facilitate maximum return to the consortium of banks
* To secure ‘clean’ title to the shares, that is free of any charges or liens, by the consortium of banks and those board members that have become the new shareholders of Flow Management II BV; as opposed to the scenario of transferring to them directly the existing shares of Flow Management.

Further, the Debt equity swap, together with the liquidation of Flow Management that will follow, facilitates all the claims’ cancellations and debts write off, that the consortium of banks will need to implement within this restructuring and amounts to several millions of euro, and that the banks will also have to explain afterwards to their regulatory bodies respectively.

Most importantly though, debt equity swaps of this scale enable swift and effective asset, financial and managerial restructuring of the entire group of companies, that in effect will re-start under new shareholders and managers. At the same time, organizational changes of this scale should be closely monitored since *“organization ecology suggest that, because of structural inertia, organizations tend not to change and, when they do, they respond slowly to environmental threats and opportunities, and they are more likely to disband than adapt. Simply put, change often leads to failure”.[[33]](#footnote-33)* This is perhaps the only reasonable explanation to the transfer of shares of Flow Management II BV to certain board members, including the CRO, of Flow Management, which left me puzzled otherwise, as it involves inherent conflict of interest; to ascertain stabilization following the changes implemented through the July 2015 Restructuring agreement.

1. **Which (potential) legal and/or non-legal cross border issues – if any – do you recognise in the Flow Management restructuring process?**

As mentioned above, the most important legal cross border issue to consider would have been the transfer of shares of subsidiaries set up in six different jurisdictions, to the heavily regulated financial institutions that form the consortium of banks. However, this issue is surpassed by transferring them first to Flow Management II BV, a special purpose vehicle set up especially for this cause, and then transferring the shares of this company alone to the consortium of banks and certain board members. At the same time this solution ensures also that no other purely legal jurisdictional issues will arise in the subsidiaries, whose shareholder will change from one Dutch company to another[[34]](#footnote-34).

This same model ensures also that most likely there won’t be any corporate tax cross border implications either, other than those related to the shares acquisition transaction as such. It should be noted at this point that this case study does not mention the country of registration and operation of the four banks, neither does it mention the nationality of those board members that have become the new shareholders of the company.

As concerns the banks especially there may be tax implications also in relation to the claims cancellation and the debt write off. Similar tax implications should also be considered on behalf of the shareholder of Flow Management that will also be called to cancel claims and write off debts. In any case, it is advisable to seek professional advise by an international tax expert on cross border tax implications.

Another cross border consideration when transferring shares is the registration of any pledges attached to them to the new shareholder, as well as any impairment to the right of enforcement of these pledges. Once again, since in this case the shares are transferred from one Dutch company to another, I can’t see any potential cross border issue arising there either.

1. **In October 2014 four scenarios have been drawn up. Why was or wasn’t calling for a moratorium (see scenario 4) a good option given the situation at that time? [you are allowed to give your opinion based on your own countries’ Bankruptcy Act; be as detailed as possible]**

By October 2014 that these scenarios were drawn up, Flow Management was already in financial distress for about a year, while its management has not presented yet any complete reorganization plan. Admittedly, this delay in reorganising the group led in increasing losses, both recorded and forecasted, and to an imminent liquidity shortage. At the same time the consortium banks, and most likely all other creditors by that time, were disappointed with the progress of the reorganisation.

The advantages of a moratorium for Flow Management at that stage, and in general when applied right before issuing restructuring proposals to creditors and other stakeholders, are as follows:

* To prevent an imminent liquidity shortage that can lead to cessation of all commercial activity;
* To increase cash flow and savings that can be used to re-finance in part or in whole from the company’s own funds;
* To calculate more accurately the amount of historic debts of the company and to use this analysis to formulate debt restructuring plans;
* To calculate the value of debt of each creditor on the same specific point in time (the commencement of the moratorium), so as to identify the most influential creditors in an imminent vote of the creditors’ committee for the adoption of a restructuring plan;
* To facilitate time for negotiating with creditors without any one of them exerting pressure for repayment of their debt specifically in advance of all other;
* To prevent effecting any transactions, wither by the debtor or the creditors, that would constitute voidable transactions in a liquidation scenario that might follow.

At the same time, since a moratorium is considered an extreme measure imposed on all creditors, it bears certain risks attributed mainly to the reaction of the varying stakeholders working with the company, that can be summarised as follows:

* judgement creditors, in an attempt to secure their debts, may look to enforce their collateral on movable and immovable property of the company (issue writ of movables and/ or writ of possession for any judgement debt and move in to enforce it; issue confiscation orders), with the risk of depriving the company of core assets for its operations and frustrating its commercial activities. Depending on the jurisdiction and the procedure encompassing this moratorium, such enforcement of claims against the company’s assets may or may not be legal at that time. For example, in a liquidation scenario in Cyprus, that naturally a moratorium on payments applies, any acts or omissions of the debtor or any creditors that alienate company property, whether by transfer, sale or the registration of securities, are voidable once the liquidation of the company has commenced (that is retrospectively from the date of filing the liquidation petition at Court, rather than the date of the liquidation order). However, in examinerships, that is a formal in-court restructuring procedure, a moratorium on payments against historic debts apply from the date that the examinership petition is filed at Court, yet a judgement creditor may still proceed to create a new security against certain company property, or enforce the collateral they already have, between the date of the filing of the examinership petition and the issuance of a court order for the protection of the company against such actions, which may in fact delay for some days, mainly due to delays in court hearing procedures.
* A moratorium may also trigger enforcement by suppliers with retention of title rights, which will show up at the company’s premises to collect their assets, likely frustrating trade.
* In this specific case of Flow Management there are also cross border issues to be considered in a moratorium scenario. More specifically, the moratorium and any protection against collateral enforcement by creditors encompassed therein, will not be automatically recognised nor enforced in all of the 6 jurisdictions that the subsidiaries of Flow Management are operating. Now as concerns the subsidiaries in the Netherlands, Spain and France, such a moratorium could be recognised and enforced by application of the recast insolvency regulation (EU)2015/848. However, as concerns the subsidiaries in the USA, Australia and South Africa, that are outside the European Union, one would have to look at their respective legislations adopting the UNCITRAL Model Law on Cross-Border Insolvency (1997) and related provisions therein on the recognition of foreign insolvency proceedings.

1. Mellahi K. & Wilkinson a. (2004), *Organizational Failure: a critique of recent research and a proposed integrative framework,* International Journal of Management Reviews, 5(1), p. 22 [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Ibid. This article provides also a good analysis of the voluntaristic view to organizational failure and organizational psychology in particular, attributing such failure to the perception and reactions of the organization’s management. It should be noted, however, that the voluntaristic view has been criticised at times on its over-reliance on internal factors. [↑](#footnote-ref-3)
4. Ibid. page.30 [↑](#footnote-ref-4)
5. Pajunen, K. (2006), *Stakeholder influences in Organizational Survival,* Journal of Management Studies, 43(6), [↑](#footnote-ref-5)
6. The Arrears Management Directive (2015), Central Bank of Cyprus. https://www.centralbank.cy/en/legal-framework/licensing-supervision/regulations-directives/directives-regulations-and-guidelines-which-govern-the-operation-of-banks/directive-on-arrears-management [↑](#footnote-ref-6)
7. https://www.centralbank.cy/en/statistics [↑](#footnote-ref-7)
8. Andriaanse, J.A.A., & Kuijl, J.G. (2006), *Resolving Fictional Distress: Informal Reorganization in the Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?*, Review of Central and East European Law, 31(2), p. [↑](#footnote-ref-8)
9. Schmitt, A., Raisch, S. (2013) *Corporate Turnarounds: The Duality of Retrenchment and Recovery,* Journal of Management Studies, 50(7) p. 1218. [↑](#footnote-ref-9)
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34. Although the country of registration of Flow Management II BV is not explicitly mentioned in the case study, it is implied by the initial ‘BV’ in its title. [↑](#footnote-ref-34)