Global Practice Insolvency Course 2023/2024 | Case Study I

By	J.R.R. den Hollander-Arntz LLM MSc
Date	13 November 2023
Re	GIPC | Case Study I | Reorganisation Flow Management

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 no, why not?

1.1. Mainstream literature on organisational failure tends to explain organisational failure on the basis of either (i) <u>external</u> factors (i.e. the perspective that the organisational environment *determines* success or failure) or (ii) <u>internal</u> factors (i.e. the *voluntaristic* perspective that holds that principal decision makers and their actions/perceptions are root-causes of organisational failure).[1] As outlined in the paper by Mellahi and Wilkinson, scholars have long relied on either one or the other perspective, whereas Mellahi and Wilkinson advocate that in every situation there is a certain interplay between internal and external factors contributing to performance of an organisation. Hence, they propose an integrated framework to accommodate both the deterministic and the voluntaristic perspective.

1.2. The interplay of internal and external factors also seems apparent in the case of Flow Management. From the onset of the financial distress at the end of 2013, however, Flow management's leadership seemed rather focused on internal dynamics to explain the financial downturn of the company without clearly considering if and how external developments had to be factored in. In any case, leadership did not seem to reflect extensively on the contributory role of the organisational environment on the failure of Flow Management, for instance by explicitly questioning how Flow Management was embedded in its environment and if its strategy was still aligned with the competitive landscape. In other words, Flow Management's leadership primarily seemed to take an inside looking out perspective, rather than outside looking in. They repeatedly indicated to stakeholders that operationally the business was well-placed to deliver performance and that the downturn could mainly be explained by internal causes unrelated to performance, such as administrative mistakes in the bookkeeping of the company and a spread sheet miscalculation regarding cost prices.

1.3. If that were really the case, it is difficult to see why the financial decline of the organisation continued after 2013 and 2014. Flow Management's leadership did not seem to consider that the external environment also may have been detriment to the organisational performance.[2] From an industrial organisation perspective, they did not clearly appear to consider the possibility of a changing environment, the (un)availability of resources for the organisation or the potential change in relationship between the organisation and stakeholders.[3]

1.4. In respect of the latter, a study by Pajunen has demonstrated that stakeholders' influence on the organisation (and vice versa) must not be underestimated; it requires proper and continuous management.[4] Looking at the dynamics between Flow Management and the banks – very significant stakeholders of the organisation – and in particular the lengthy discussions around a standstill which was only signed in the course of August 2014, it looks like the leadership may have been neglective in this regard. There

1 Mellahi, K., & Wilkinson, A. (2004). Organisational failure: a critique of recent research and a proposed integrative framework. *International Journal of Management Reviews*, 5(1), p. 21.
2 Ibid, p. 23.
3 Ibid, p. 23.
4 Pajunen, K. (2006). Stakeholder Influences in Organisational Survival. *Journal of Management Studies*, 43(6), p. 1283.

was much delay and uncertainty in pushing for a solution together with stakeholders, such as the signing of a standstill and the replacement of leadership. This could have easily led to i.a. a negative spiral, thereby impacting the chance of a successful turnaround. As was the case with Flow Management, where the company could not capitalise on the momentum it had in February 2014 and soon after was confronted with friction amongst the banks, i.e. their primary counterparts and stakeholders.

1.5. The management had difficulty to successfully identify the causes of the distress, as follows from the fact that the decline persisted for many years from 2013 onwards. This may very well be explained by the composition of management team, the duration of their tenures and their (in)ability to think 'outside the box', resulting from groupthink and/or upper echelon dynamics, as well rigidity due to the threats.[5] The CEO and CFO sat on the board well before the decline set in. This could also explain the apparent aim to regain status by constantly focusing on the positive prospects. At the same time, they did not explore the question if the existence of organisational failure went further back, thereby failing to facilitate learning and strategic renewal. Psychodynamic factors (e.g. denial and rationalization) within the management team could have also contributed to this behaviour, as these can lead to a cognitive inertia to identify root-causes of failure and adapt the organisation's strategy consequently.[6]

1.6. For completeness, this does not mean that Flow Management completely ignored the external context (e.g. population). In the course of 2014, it decided among other things to evaluate and reassess its business-mix. However, no real follow up was reported and the business ultimately continued to struggle in terms of business performance. Flow Management furthermore faced difficulties in implementing the agreed price increases and cutbacks. That shows that Flow Management was not sufficiently equipped to make an operational turnaround.

1.7. Last but certainly not least, one of the most important reasons for the organisational underperformance seemed to be the information provision at senior management level. The information flow appeared inadequate and did not enable the leadership (and stakeholders) to identify and analyse the decisive factors for the financial distress, and to articulate a turnaround strategy.[7] This was also acknowledged in 2014, when the leadership announced to improve the management information system. However, with the benefit of hindsight it must be concluded that year on year, the management continued to present positive outlooks, which were never met. One must therefore wonder how it was possible that there was such a continuous mismatch between the communicated prospects and reality. Flaws in the management information system likely played a role and, as such, were detriment to the organisational performance. The management information system will also have impaired the company's ability to adopt new strategies to navigate out of the distress.

1.8. It is unsure whether a better management information system as well as a more generic approach towards turnaround, that includes an environmental analysis and intensive stakeholder management, would have prevented the financial distress of Flow Management. After all, it could very well be that the external circumstances faced by the company were so severe that these could never be overcome. Reference is made to the school of Organisational Ecology, that proclaims that organisational failure can be caused by mere outside factors such as the community in which the organisation is embedded, organisation age and organisation life cycle dynamics. The problem in this case is, however, that the causes for Flow Management's distress were not explicitly

---

[5] Mellahi, K., & Wilkinson, A. (2004). Organisational failure: a critique of recent research and a proposed integrative framework. International Journal of Management Reviews, 5(1), p. 28-31.

[6] Hodgkinson P.G. and Wright, G. (2002). Confronting strategic inertia in a top management team: learning from failure. *Organisation Studies*, 24, 949-977.

[7] Adriaanse, J.A.A., & Kuijl, J.G. (2006). Resolving Financial Distress: Informal Reorganisation 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. 141-142.

and extensively investigated, so it was never clarified what circumstances led to the failure of the organisation. Tackling the issues in the information flow and a more comprehensive root-cause analysis would definitively have improved the chances for success.

2. 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*?

2.1. In general, a big plus of informal reorganisation as compared to more formal alternatives is that it tends to be *flexible*, *silent* and *controlled*, as clarified below.[8]

2.2. An informal reorganisation allows for a tailormade approach of restructurings and case-specific solutions.[9] The debtor and its creditors can – amongst them – mutually agree what remedies are most appropriate to address the specific problems faced by the organisation in distress. That can include, but is not limited to, the provision of new money by important creditors to facilitate and bridge the turnaround, for which the relevant creditor is rewarded accordingly (e.g. through additional securities and/or senior ranking of claim(s)).

2.3. Further, informal reorganisations are not public by default, unlike most formal bankruptcy proceedings. Allowing the restructuring to enter the public domain can create a self-fulfilling prophecy of bankruptcy, as most stakeholders will be inclined to act instantly to try to collect their debts in any way possible thereby diminishing the chance of a successful turnaround.[10]

2.4. Lastly, in informal reorganisations the distressed debtor remains in charge. The leadership of the company can progress the reorganisation independently without any court-appointed official working alongside them or even in their place. That can ultimately result in a higher pay-out for involved creditors.[11]

2.5. The downside of informal reorganisations is that they generally are 'unprotected'. If the debtor cannot retain or restore the confidence in the business amongst its creditors, things may spiral quickly towards formal bankruptcy proceedings as creditors will often attempt to secure their own interests instead of the joint interests (although their recovery value may be less as compared to informal reorganisation). On that (insolvency) end of the spectrum, there are two proceedings in the Netherlands: suspension of payment proceedings and bankruptcy proceedings. Suspension of payment proceedings are aimed at allowing the debtor to make a turnaround through the offering of a composition plan (as more elaborately outlined in paragraph 9 below), while bankruptcy proceedings are designed to orderly wind down an organisation.

2.6. Since 1 January 2021, the Netherlands also offers a third alternative, in between informal and formal reorganisation proceedings. It is called the *Wet Homologatie Onderhands Akkoord* ('WHOA' or 'Dutch Scheme'). The WHOA is of a hybrid nature as it essentially accommodates out-of-court restructurings, but at the same time facilitates court-involvement to increase deal certainty. Core features are:

a. Debtor-in-possession: the debtor remains in control during the entire process as it retains the authority to control and dispose of its assets.

b. Moratorium: a debtor can request the court to grant a 'cooling-off period' (*afkoelingsperiode*) of maximum eight months to preclude unwilling creditors from enforcing their rights and invoke termination clauses in relevant contracts.

---

[8] Ibid, p. 145.
[9] Ibid, p. 145.
[10] Ibid, p. 146.
[11] Ibid, p. 147.

c. Plan offering: the WHOA is entirely geared towards accommodating out-of-court restructurings. As such, not only debtors are allowed to propose restructuring plans, but also so-called court-appointed restructuring experts (i.a. lawyers, auditors) at the request of the creditors.

d. Dual tracks: to maximise deal certainty, a debtor can choose between a public and non-public WHOA track. The public track is included in Annex A of the European Insolvency Regulation and thereby automatically recognised in other EU Member States, while the non-public track is not. On the other hand, the private track is entirely *in camera* and thus not known to the public which can be beneficial to the process. This again shows that the WHOA is at the interface of informal reorganisations and formal bankruptcy proceedings, and it is at the debtor's discretion to determine what track is best suited for a specific restructuring.

e. Plan contents: the WHOA offers maximum flexibility and as such does not prescribe the plan's contents. A plan can basically entail anything, like debt waivers, debt-for-equity swaps and restructurings of contractual obligations. This is all up to the debtor and/or restructuring experts. The WHOA does, however, extensively provide procedural safeguards (information sharing, voting process, timelines etc.) that must be adhered to. If violated, the plan generally cannot be ratified by the court.

f. Cross class cram down: all creditors and shareholders whose rights are restructured under the restructuring plan, are eligible to vote. Voting is done in classes, based on similarity of new and existing rights of creditors. If approved by at least one class, the plan can be submitted to the court for confirmation. Once confirmed by the court, creditors are bound by the plan, irrespective of their votes and their rank. For deal certainty, the WHOA allows all stakeholders to seek a court's opinion on substantive and procedural aspects of the plan process at any time (i.e. 'you snooze, you lose'). Court decisions, including court confirmation of the plan, cannot be appealed.

2.7. As the WHOA combines various elements of in- and out-of-court restructurings to maximise deal certainty, many see it as a very promising tool for restructurings. Like other out-of-court restructurings, it is however key that a debtor commits to the process in a timely manner. Whether or not a consensual out-of-court restructuring or WHOA is ultimately feasible, is largely driven by the facts. This will among other things depend on the prospects of the distressed debtor and the question whether it is able to cover running costs during the reorganization process. If that is not the case, the debtor will be forced to apply for more formal alternatives such as suspension of payments or bankruptcy proceedings.

3. Were the turnaround/reorganisation approaches as presented in the reading material (see e.g., Adriaanse & Kuijl, 2006, Pajunen, 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.

3.1. In their paper, Adriaanse and Kuijl distinguish four phases of business restructurings, aimed at restoring operational and financial health of the company as well as regaining confidence amongst the company's stakeholders: (i) stabilising, (ii) analysing, (iii) repositioning and (iv) reinforcing.[12]

(i) Stabilising. In the stabilising phase, it is basically all hens on deck to free up cash and increase the cashflow imminently. This can be achieved by i.a. cutbacks in expenditures, stock optimalisation and management of accounts receivable. In the case of Flow Management, the company quite quickly

[12] Ibid, p. 140.

managed to agree non-enforcement by the banks on the outstanding loans (pending final report from a turnaround specialist as mentioned below). It did not take any further immediate action, but swiftly proceeded to analysis of the distress.

(ii) Analysing. In this phase, the company should (re)consider its longer-term strategy to turnaround and draw up a substantiated restructuring/business plan, i.a. to restore stakeholder confidence. This requires a thorough post-hoc strategic and financial analysis of the company to ensure business performance going forward, a viability assessment of the business and cash-flow projection on the short and long term. Flow Management periodically issued forecasts, mainly reflecting projected annual profits and losses. As appropriate, Flow Management also engaged a turnaround consultancy agency to help assess and confirm the viability of the business. On the other hand, with reference to the answer under 1., Flow Management did not thoroughly investigate or consider all factors that could have contributed to the failure of the business, in particular the operational performance of the company. Soon after it became apparent that the company was facing difficulties, leadership concluded that this mainly resulted from internal administrative causes (bookkeeping and miscalculations). As such, that compromised the outcomes of the phases (iii) and (iv) as reflected hereafter, and thereby the restructuring.

(iii) Repositioning. In the repositioning phase, Flow Management proceeded to initialize retrenchment actions following from its primary restructuring plan to restore confidence in the company. This comprised of (a) agreeing on price increases with its main clients, (b) laying off 130 staff members and (c) realising savings on the expenses relating to its fleet. If furthermore announced to improve management information systems and replace the CFO and later the CEO. Shortly thereafter, a CRO was also appointed. Flow Management furthermore aimed to recover by (a) articulating a revised strategy, (b) evaluate the business-mix offered by the company and (c) sell all shares held in the capital of non-Benelux companies and divestment of some non-Benelux branches.

(iv) Reinforcing. Unfortunately, Flow Management did not manage to implement the envisaged restructuring actions in a timely manner. As such, it encountered difficulties in the reinforcing phase. Well into the restructuring process, Flow Management did manage to secure a capital injection by its shareholder Lease Group Holding United Kingdom Ltd., who was also put under pressure by the banks. However, as Flow Management failed to expeditiously implement the anticipated restructuring actions, (some of) the private capital providers remained hesitant to work towards a joint solution for financial restructuring and reinforce the company's balance sheet. Flow Management only managed to agree a financial restructuring in July 2015, well over 18 months after the restructuring process was launched. While the Company (again) expected to yield positive net profits in 2016, it had incurred significant operational losses post-completion of the transaction. Moreover, the restructuring had not increased third-party interest in buying the business as a going concern. It is therefore questionable whether Flow Management has been successful in reinforcing the restructuring.

3.2. Adriaanse and Kuijl have furthermore empirically identified factors that determine the success of a restructuring. These basically entail (i) active attitude by the company and sponsors to make the informal reorganisation work, (ii) involvement of most important stakeholders in the process, (iii) an adequate and speedy process, (iv) transparency

regarding the financial situation and (v) an equity raise.[13] In the Flow Management reorganisation, it appeared that the aspects (iii) and (iv) could not be met entirely: a steady progress of the turnaround could not be achieved and the information flow was flawed.

3.3. Looking at the Flow Management restructuring from another angle, it seems that Flow Management did not consider adopting a simultaneous approach of retrenchment and recovery (see 2.1. above) but rather sequentially. The paper by Schmitt and Raisch demonstrates that a turnaround process can benefit from a concurrent approach.[14] Flow Management was primarily focused on cost-savings. It did not not really consider strategic repositioning until it was well underway in the restructuring process. Schmitt's and Raisch's study shows that retrenchment and recovery can be complementary to each other and pursued simultaneously, e.g. cost cuttings can free up funds to implement strategic repositioning, thereby enabling a distressed organisation to turnaround more efficiently. This may have led to an increased chance of a successful turnaround of Flow Management's business.

3.4. Additionally, Flow Management had difficulties to positively reinforce the turnaround through stakeholder engagement. In his paper, Pajunen provides a classification of stakeholders for analysing purposes and articulates several propositions in relation to stakeholder management, reflecting the importance of stakeholder engagement for a successful turnaround.[15] From Pajunen's paper, one could derive that in existence-threatening crises, it is key to secure the continuing support of governing stakeholders, by:

a. open and frequent communication between them and the managers of a distressed company;

b. personal relationships between governing stakeholders and said managers;

c. management's unlocked brokerage position between governing stakeholders;

d. consensus on long-term goals between governing stakeholders; and

e. governing stakeholders' association with good firm performance.[16]

3.5. Looking at the interactions between banks A and B on the one hand and banks C and D on the other, Flow Management has not succeeded to (re)gain their confidence and support. An important factor that ties into this is – again – information supply. Numerous times did Flow Management have to rectify outlooks. There was no real consensus amongst these stakeholders on the next steps (due to a difference in positions), and they had little trust in the company's management. These factors were all detrimental to gain stakeholder support and should have been more top of mind for Flow Management's leadership.

4. As 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?

4.1. There could have been various reasons for banks C and D to attempt to frustrate or undermine Flow Management's reorganisation process. A first and likely explanation is that banks C and D were gaming on a better outcome and creating leverage in their negotiations with Flow Management as well as banks A and B. After all, any out-of-court restructuring would require their cooperation. As such, the undermining

---

13 Ibid, p. 149.

14 Schmitt, A., Raisch, S. (2013). 'Corporate Turnarounds: The Duality of Retrenchment and Recovery', *Journal of Management Studies*, 50(7) p. p. 216-1244.

15 Pajunen, K. (2006). Stakeholder Influences in Organisational Survival. *Journal of Management Studies*, 43(6), p. 1279.

16 Ibid, p. 1279-1283.

behaviour displayed by banks C and D could have led to an improved (relative) position and made them even more important stakeholders vis-à-vis Flow Management and banks A and B, i.e. real governing stakeholders.[17] Among other things, such position would merit a more detailed discussion with Flow Management and enable banks C and D to exert more influence, e.g. for nominating candidates for key positions, and improve their information position to further the banks' interests.[18]

4.2. This behaviour can be seen as opportunistic rather than rational. After all, if banks C and D would really hold out on a rescue attempt and terminate their loans (and initiate enforcement subsequently) that would almost certainly end any prospects of a successful turnaround and likely spiral into Flow Management's liquidation. Hence, this would also destroy any advantages that banks C and D had envisaged by holding out on the negotiations and very well lead to a worse outcome than a consensual deal.

4.3. At the same time, the behaviour demonstrated by banks C and D could have also served more rational purposes. At some point, the banks lost confidence in Flow Management because of continuous downturn. It was also evident that the information provided by Flow Management to its financial creditors was inaccurate and flawed. Putting Flow Management under pressure by threatening to walk away from any further attempts to reach an out-of-court solution, could have incentivized Flow Management to put in extra effort to get a deal over the line, for instance by improving information sharing (i.e. providing the banks with reasonable and timely access to any relevant information that enabled them to properly evaluate Flow Management's financial position and any restructuring proposals in that regard).

4.4. Finally, by acting in the way they did, banks C and D may have also sought to provoke a response by banks A and B to consider buying them out. In fact, banks A and B also investigated the possibilities for a debt buy-out following the disengagement of banks C and D in March 2014, but it never came to a transaction in the end.

4.5. Against this background and assuming no intercreditor arrangements apply that can be invoked to demand the banks' cooperation, I – as counsel to banks A and B – would first try to be a voice of reason and reiterate that a coordinated joint approach is in the interest of all creditors, including banks C and D. Such approach would preserve value of the company and ultimately ensure a higher pay-out as compared to a liquidation scenario. An uncoordinated, individual approach increases the likelihood of a failed attempt to rescue Flow Management, and consequently evaporate any advantages that the banks had anticipated.[19] After all, such approach usually provokes similar actions by other creditors.[20]

4.6. Additionally, I would argue that a coordinated response is a sensible and reasonable request given that the relative positions amongst banks may be reversed in future situations.[21] Banks C and D should therefore be prepared to support an attempt to turn Flow Management's business around and preserve the investments made by the banks to the extent possible.

4.7. If this would not elicit a more cooperative attitude, as a last resort I would look at options to launch court proceedings for interim relief measures, either aimed at prohibiting banks C and D to enforce – e.g. under prevailing Dutch law principles of reasonableness and fairness (*redelijkheid en billijkheid*) – or even demanding cooperation. Such proceedings could however also increase Flow Management's exposure, as the distress will become known the public domain. That could harm deal chances and therefore should be considered carefully in view of all relevant circumstances.

---

[17] Ibid, p. 1276.
[18] Ibid, p. 1277.
[19] Statement Of Principles For A Global Approach To Multicreditor Workouts II, *Insol International*, p. 8.
[20] Ibid, p. 9.
[21] Ibid, p. 7.

5. 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 Flow Management (explicit or implicit)?

5.1. In the reorganisation process of Flow Management, one can identify the first, second, third, fourth, fifth and sixth principle. This is explained in greater detail below.

5.2. The first principle sets out to promote cooperation amongst relevant creditors to give sufficient time (i.e. a 'standstill') to the debtor to allow for (a) providing and evaluating relevant information and (b) contemplating and assessing proposals to resolve the debtor's financial difficulties, unless inappropriate under the given circumstances. To give out-of-court restructurings only a slight chance of success, it is imperative to adopt a coordinated and joint approach towards the restructuring. The rationale being that allowing the out-of-court restructuring of the debtor to succeed is ultimately in the interest and for the benefit of all stakeholders. Pressing for payment in an uncontrolled manner is likely to harm the rescue operation and destroy value for the joint creditors as a result. In the case of Flow Management, the group of relevant creditors is comprised of banks A, B, C and D. Their cooperation is required to ensure the debtor's tenable future as a going concern. The banks seem to have taken note of this incentive to collaborate and thereby to preserve value and explicitly worked towards a standstill agreement from the beginning of the reorganisation process. At some points in time, however, banks C and D also went against the stream and undermined the standstill negotiations. The case clearly shows that if the banks do not act together, the process is immediately impaired and takes much longer to yield a result (if any). Due to this back and forth between banks C and B and banks A and B, it ultimately took until August 2014 to execute the standstill agreement. It cannot be ruled out that this delay had a detrimental impact on the reorganisation and, as such, the recovery of the banks' claims.

5.3. Flow Management's reorganisation also clearly demonstrates the second principle. This principle holds that all relevant creditors (i.e. the banks) should refrain from any enforcement actions towards their debtor and to maintain status quo. Should the banks have proceeded to enforce their rights, Flow Management's rescue attempt would almost certainly have ended instantly. In that scenario, the balance would quickly shift from a joint approach towards an individual approach, which not only bears the risk of spiralling out of control but also generally has a negative impact on the value of the company. An agreed standstill creates a window for the debtor's management to present turnaround proposals knowing it will not immediately be undermined. This is also apparent in the Flow Management case. In June 2014, banks C and D threatened to cancel their credit, and immediately the reorganisation process was under threat of derailment. As soon as banks C and D did commit to the process shortly thereafter, the shareholder was willing to make a deposit and Flow Management's financial restructuring proposal was accepted by the relevant creditors. This proposal held i.a. that mandatory repayments were deferred and working capital and other loans were extended, default interest was no longer charged and incurred defaults were waived. These all are undertakings typically included in standstill agreements. Later, when the financial restructuring agreement was signed in July 2015, the agreement was also appropriately aligned with the relative positions of the relevant creditors.

5.4. The third principle proclaims that the debtor should not take any action that could adversely affect the prospective return to the relevant creditors as compared to when the standstill period commenced. During the reorganisation, Flow Management at some point (October 2014) granted additional security amounting to EUR 10 million in relation to tax returns, but it is not apparent that this favoured one or more banks over others. There was also a repayment of EUR 25 million on additional working capital loans in January 2015. If that repayment was only for the benefit of some banks (e.g. C and D), but not all, that could contravene the third principle.

5.5. The fourth principle entails that a coordinated response towards the debtor best serves the interests of relevant creditors in a rescue operation. Pursuant to the fourth principle, this can be achieved by formation of a representative committee to engage with the debtor on behalf of the relevant creditors, with the assistance of advisors. As the number of relevant creditors in this case was very manageable with aligned interests, the restructuring did not require the formation of a representative 'steering' committee to coordinate responses towards the debtor. However, with reference to paragraph 5.3 above, coordinating responses was also key in the Flow Management case, as disengagement of relevant creditors (i.e. banks C and D) negatively impacted the case.

5.6. Crucial for the success of any reorganisation process is the adequate provision of, and reasonable and timely access to, any relevant information pertaining to the debtor, to allow for proper evaluation of the debtor's financial position and any reorganisation proposals. This is stipulated by the fifth principle. A very relevant provision for this case and not sufficiently appreciated by Flow Management. Relevant creditors are very much dependent on information provided by the company to assess and evaluate any restructuring proposals, and reliability is key. In the case of Flow Management, however, financial information, such as financial outlooks, proved to be unreliable. This could have had a devastating impact on creditor confidence, thereby putting a joint solution at risk. It is imperative that creditors can not only properly assess their position towards the debtor, but also evaluate and consider any reorganisation proposals submitted to them for the debtor's benefit.

5.7. Building on this point, creditors will need to consider the outcome of a consensual restructuring as compared to the result from formal bankruptcy proceedings or other options. To that end, the sixth principle stipulates that any intercreditor arrangement should also reflect applicable law and the relative positions of relevant creditors. In Flow Management's restructuring, it can be assumed that governing law is included in the restructuring agreement, but this was not made explicit. The case did however explicitly reflect that relative positions were adopted in the agreement.

5.8. The seventh principle holds that all information provided by the debtor concerning the restructuring should be distributed amongst all relevant creditors equally and be treated as confidential (unless already publicly available). This is particularly relevant in the context of i.a. traded debts and bonds. This does not apply to Flow Management, but notwithstanding confidentiality is important and can serve the process. It is unclear whether relevant parties entered any kind of confidentiality arrangement.

5.9. Finally, the eight principle lays down that, in case of any new money provided during or post standstill period, the repayment of such funding should be accorded senior ranking as compared to other claims. The rescue of Flow Management did not entail any new money, but rather debt write-offs (in full or in part) of existing loans.

6. 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?

6.1. As a starting point, it should be noted there is no clear definition and meaning of "soft law" and "soft law instruments".[22] Some argue the difference between hard and soft law is not clear-cut, but rather a continuum, with hard law (such as conventions, treaties and domestic laws) providing binding and precise obligations on one end and political arrangements – soft law – on the other.[23] The driving forces behind soft law are what

[22] Wessels, B. & Boon, J.M.G.J. Soft law instruments in restructuring and insolvency law: exploring its rise and impact. *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur*, 2019, p. 53.

[23] Ibid, p. 54.

Wessels and Boon call 'standard-setting organisations', and their working product is generally not of a (legally) binding nature.[24]

6.2. However this may be, standard-setting organisations have contributed to a noticeable increase in the development of soft law instruments in the field of restructuring and insolvency law over recent years.[25] Well-known examples of such organisations are the United Nations Committee on International Trade Law (UNCITRAL), the World Bank Group, INSOL International and the International Insolvency Institute (III).[26]

6.3. UNCITRAL has developed various soft law instruments, most significantly the Model Law on Cross Border Insolvency (Model Law). The Model Law is primarily developed for use by states to implement or update insolvency legislation in a harmonised and fair manner. However, the Model Law has not been adopted by the Netherlands (although it is used as a reference for further progressing Dutch insolvency legislation).[27]

6.4. The Model Law and similar principles developed by e.g. the World Bank[28] are not designed for use in specific restructurings but rather for legislative development by states and primarily focus on cooperation and communication in cross-border insolvency cases. Other organisations such as INSOL International and III have developed soft law instruments more geared towards use in restructuring cases (i.e. the Statement of Principles and the Guidelines for Coordination of Multinational Enterprise Groups).[29]

6.5. In addition, in the European context, a valuable body of soft law is the Instrument on Business Rescue as laid down by the European Law Institute, providing recommendations to further the business restructuring framework in Europe (not only addressed at governmental bodies, but also restructuring professionals).[30] Similar to what was once called 'the London approach', these best practice rules and recommendations are all intended to better facilitate corporate workouts in order to increase the likelihood of success for the benefit of all stakeholders involved as compared to a formal insolvency procedure.[31]

6.6. Importantly, the fact that soft law instruments are of a non-binding nature, does not mean that these instruments have no impact. In fact, there are various examples of soft law instruments having been applied in US, UK and Dutch case law.[32] Soft law can also transform into hard law or be adopted as guiding principle to extend hard law.[33]

6.7. Generally, however, given the non-binding nature it is very difficult if not impossible to impose soft law instruments (such as the Statement of Principles) on other parties if rejected by creditors holding out on a specific business rescue attempt. In that case, one may explore other 'soft' approaches (thus leaving aside more formal strategies such as litigation):

a. Depending on the circumstances, it can be advised to partner up with other creditors to form a coordination committee ensuring alignment amongst the relevant creditors that are willing to work towards a solution and adopt a coordinated approach towards negotiations with the debtor and other stakeholders.

---

[24] Ibid, p. 54.
[25] Ibid, p. 55.
[26] Ibid, p. 55.
[27] Ibid, p. 55.
[28] The World Bank Principles for Effective Insolvency and Creditors Rights Systems (2016), at https://openknowledge.worldbank.org/entities/publication/de2cc5c4-c1ec-55eb-ad20-d27e916d000f, accessed on 13 November 2023.
[29] Wessels, B. & Boon, J.M.G.J. Soft law instruments in restructuring and insolvency law: exploring its rise and impact. *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur*, 2019, p. 58.
[30] Ibid, p. 58.
[31] Santen, B.P.A. & Verhoef T.J.M.L. (2006). Surseance van betaling: nooit meer dan een stok achter de deur. *Tijdschrift voor insolventierecht*, paragraph 4.
[32] Wessels, B. & Boon, J.M.G.J. Soft law instruments in restructuring and insolvency law: exploring its rise and impact. *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur*, 2019, p. 145-160.
[33] Ibid, p. 62.

b. In parallel, the committee or one or more creditors individually can explore whether it would be feasible to negotiate a debt buy-out against an appropriate discount with the hold-out creditor. This usually has an upside for all parties involved: if commercially workable, the hold-out creditor receives quick money (above liquidation value) and the creditor(s) taking over the debt make sure that an out-of-court workout remains viable and increase their standing.

c. If the hold-out creditor would be unwilling to agree on a debt buy-out, the other creditor(s) could consider repaying the full amount to the hold-out creditor or providing alternative security for repayment of its claims, provided (i) that would keep an out-of-court rescue attempt afloat and (ii) the expected return in a corporate workout would still exceed the return in a liquidation scenario. Naturally, the other creditors will have to factor in that there is a risk such approach may also provoke other creditors to act opportunistically and pursue a similar repayment (arrangement).

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

7.1. The restructuring agreement entered into on the 4 July 2015 essentially facilitated a debt-for-equity swap. First, all assets held by the holding company Flow Management Holding B.V. (Flow Management Holding) were pushed down to a new shell subsidiary – an empty sub holding company called Flow Management II B.V. (Flow Management II) – to prepare for and facilitate a transfer of all shares in Flow Management's operating companies to the banks in one go.

7.2. It was agreed that the banks and several board members would take over the shares in Flow Management II. Likely, a new special purpose vehicle (SPV) was incorporated that could act as receiving party in the transfer of shares in the capital of Flow Management II. The shareholdings of the various consortium banks in said SPV would then reflect the relative positions on a *pro rata parte* basis, so that their potential return is proportionate to their investments and haircuts incurred. In view of the amount of outstanding debt in relation to the estimated asset value in a liquidation scenario, the Flow Management II shares were likely worth zero and transferred to the consortium (through the SPV) for nil consideration.

7.3. The banks further agreed to a partly waiver of their outstanding claims, subject to receipt of the shares in Flow Management II. Banks C and D agreed to a write-off of their additional working capital claim (i.e. EUR 32.5 million), whereas all banks jointly accepted a write-off of approximately 29% (i.e. EUR 97.5 million). EUR 240 million of interest-bearing debt remained outstanding vis-à-vis the consortium. This evidences that the working capital claims held by the consortium ranked senior to the claims held by banks C and D in relation to the additional working capital debt. Furthermore, the deal held that the EUR 55 million non-working capital related loan was also waived in full. Given that the deal reflected the relative positions of the claims amongst each other, these loans ranked junior to the working capital loans. That also leads to conclude that the first-ranking security rights were vested in respect of the (primary layer of) working capital debt. The working capital debt that remained outstanding after the write-offs (i.e. EUR 240 million as mentioned) presumably mirrored the expected proceeds the banks would have received in case of a forced sale of all the pledged assets, (similarly to out-of-court restructuring instruments such as the Dutch Scheme[34]). Hence, this two-step debt-for-equity approach comprising of (i) transfer of the shares in Flow Management to the consortium and (ii) waiver of significant amount of debt ultimately led to a rightsizing of Flow Management's capital structure.

[34] See article 384 Dutch Bankruptcy Act.

7.4. The agreed restructuring arrangement further entailed that all claims held against Flow Management Holding by the banks and the shareholders were waived, and vice versa. This balance sheet clean-up (including intercompany loans) facilitated a solvent wind-down of Flow Management, thereby limiting the risk of any insolvency proceedings. By doing so, the risk was reduced that insolvency practitioners would be appointed who could scrutinize the restructuring arrangements – and the share transfer of Flow Management II in particular – and potentially seek to claw back the shares in Flow Management II, unwinding the restructuring as a consequence.

7.5. It was further agreed that Flow Management Holding would be liquidated in an undisclosed manner. Under Dutch law, all liquidation proceedings but one are public, referred to as a 'turboliquidation' (*turboliquidatie*). A company is only eligible for turboliquidation if there are no assets left in the company.[35] Immediately after the shareholders resolution to liquidate the company is passed – in this case to be taken by Lease Group Holding UK Limited (Lease Group Holding) – the company ceases to exist.

7.6. The restructuring as agreed also demonstrated the belief of all (voluntarily committed) stakeholders that a sale of the business as a going concern would yield most value for all involved as compared to other options, such as piecemeal liquidation of the company (e.g. from an executory sale of the pledged assets). That even applies to the shareholder, Lease Group Holding, who was already out of the money and did not receive any return in the restructuring scenario. Lease Group Holding could have easily driven this consensual restructuring to the ground, but was probably incentivized to cooperate to i.a. limit its own exposure (e.g. banks would waive claims and not call for any further equity commitments from the shareholder/sponsor etc.) and limit exposure of the other branches (real estate/lease and truck repair).

7.7. In terms of prospects, this deal is structured as a lay-up for a subsequent non-distressed sale of the Flow Management business as a going concern. This can be done in various ways, i.a. through a open market sale to a third-party buyer or through an initial public offering. In any event, while there are credit providers that adhere to outspoken loan-to-own strategies, this does not apply to most of the mainstream banks and the most likely scenario is that the consortium will want to exit rather sooner than later (but for the right price).

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

8.1. The Flow Management restructuring process had touchpoints with a multitude of different jurisdictions and consequently could have been a can of worms in terms of legal and non-legal issues. Notwithstanding, the company managed to complete the restructuring process successfully. The workout was not so much an operational restructuring as a financial restructuring, more in particular a reorganisation of the debt-side of the balance sheet. This entailed debt waivers from the banks and an exit of the existing shareholder (replaced by the banks) and finally waivers of intercompany claims. In essence, the company thus remained the same from a business point of view, but with a different holding structure and significantly less debt.

8.2. While the end-result appears relatively straightforward, it is not all what it seems. The restructuring process covered a three-year timespan and involved many operational and financial elements, often of a cross-border nature. In this regard, the following cross-border aspects can be highlighted:

a. Pre-restructuring, the shares in the Dutch entity Flow Management Holding B.V. (Flow Management Holding) were held by a UK entity Lease Group Holding UK Limited (Lease Group Holding), which in turn was owned by a US family (vehicle)

[35] Article 2:19 para 4 Dutch Civil Code.

and two UK investment funds. Hence, the shareholder base was multi-jurisdictional. Not only could this have had an impact from a stakeholder point of view in terms of different cultural habits and expectations, but also from a legal point of view, for instance from a tax perspective (e.g. withholding and corporate income tax). The same may apply post-restructuring, after the shares in Flow Management were transferred to a consortium of banks as well as members of the board.

b. By extension, if the consortium was comprised of banks incorporated in different jurisdictions, they would have been subject to different regulatory regimes. In that case, the impact of such regimes, in terms of information sharing, the possibility to sit on informal creditor committees etc., will have been considered.

c. The main operations of the company were embedded in the Flow Management branch of the business headed by Flow Management Holding, covering six relevant markets and jurisdictions (Netherlands, Spain, France, Australia, South Africa and USA). Two affiliated ventures, real estate and lease and truck repair, were domiciled in the Caymans and Sweden respectively. As such, many cultures and backgrounds came together in the Flow Management concern. These all had to be respected and accommodated to unlock business performance and also may have demanded a tailormade approach towards each of these regions to navigate through the restructuring. From a legal structuring point of view, tax considerations (e.g. transfer pricing, fiscal unity provisions, tax treaties against double taxation etc.) will certainly have been relevant for setting up the initial structure. The change of control post-restructuring could also have a tax impact and was likely assessed.

d. The centre of main interest (COMI) was in the Netherlands. Under the European Insolvency Regulation[36] (EIR), the COMI is presumed to be the Member State where the debtor has its registered office. For Flow Management (Holding), that would be the Netherlands.[37] However, that presumption can be rebutted under certain circumstances, e.g. if the interests are administrated in a different jurisdiction on a regular basis (in an ascertainable way for third parties). Hence, determining a COMI for group companies can be difficult. At the same time, it is rather important for a restructuring process to identify and/or remedy the risks associated with group companies involved in the restructuring process being exposed (in varying degrees) to local insolvency proceedings that could potentially undermine the corporate workout. It was therefore key that parties had a clear view om applicable COMI's and the impact of the reorganisation process on COMI.

e. Building on this, the Flow Management subsidiaries were all incorporated under different laws. That could bring about a range of mandatory filing requirements. In other words, some jurisdictions may stipulate that a debtor must file for insolvency under certain prescribed conditions (e.g. minimum solvency rates), whereas other jurisdictions may leave that more up to the board of a company (threatened by directors' liability). This must have been an important element to consider when designing or progressing Flow Management's workout, to avoid that a subsidiary at some point was declared bankrupt and things took a turn for the worse. More generally, any company should address the topic of directors' liability appropriately and consider what safeguards to implement in different jurisdictions to protect local officers in the context of the restructuring.

f. If a group company would slide into insolvency proceedings and an insolvency practitioner is appointed, this may leave certain elements of the restructuring exposed, e.g. in terms of claw back risk/annulment of legal acts. For example, if Flow Management Holding would have been declared bankrupt following the transfer

[36] See Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848, accessed on 13 November 2023.

[37] Ibid, see preambles 27 and 28.

of the Flow Management II shares, a bankruptcy trustee could have tried to reverse that transaction if the bankruptcy trustee would find that the transaction prejudiced the Flow Management Holding's joint creditors. As the restructuring was effectuated between multiple jurisdictions, these claw-back risks would have to be reviewed from a cross-border angle.[38]

g. By extension, in any cross-border restructuring it is vital to identify if and where creditors can take any recovery action against the company that could endanger the restructuring process (e.g. court-permitted seizures of important assets) and pre-empt such actions if possible.

h. In the case of Flow Management, the senior debt provided by the consortium for working capital was secured by rights of pledge. The requirements for validly vesting such rights of pledge can vary depending on the types of secured assets as well as their location. This is, for instance, quite relevant if rights of pledge were vested on moveable assets such as cars, as the *lex rei sitae* then may apply (pursuant to private international law). Enforcement of these rights of pledge may lead to similar questions from a legal and operational point of view. If applicable, this is something Flow Management and the banks would have been mindful of in the execution of the restructuring.

i. As mentioned, the financial restructuring of Flow Management entailed a transfer of Flow Management to a new shareholder base and, as such, a change of control. Such change of control could trigger merger approval issues and could require antitrust filings. It could also lead to additional Anti-Money Laundering, Source of Funds and UBO-filing requirements.

j. Flow Management employed approximately 3.000 employees at the time of the restructuring. Employees are important stakeholders as they are key to a business' operational performance. Depending on the anticipated impact of the restructuring – which would be limited in case of a mere change of ownership – they should be included in the process. At the same time, a company should of course be mindful of the confidentiality of the process. In any case, it is recommended and, in most cases, even required to involve a works council in the process and ask for advice/input on the envisaged corporate rescue plan.

k. The reorganisation undoubtedly encompassed a substantial amount of transaction documentation. That includes, but is not limited to, non-disclosure agreements, the standstill agreement, the restructuring agreement and probably a share purchase agreement in relation to the shares in Flow Management II's capital. Considering the many stakeholders operating across borders and potential risk of litigation, it is important to make an appropriate choice of law and choice of forum in anticipation of any disputes. More in general, a financial restructuring like Flow Management's can trigger disputes pre- and post-completion in a wide array of jurisdictions. This is something to consider in the strategy of stakeholder management.

l. From an operational perspective, Flow Management had to manage that the new shareholders post-completion were acknowledged by the organisation. The new ownership could even have constituted a change in external environment, such as regulatory frameworks. The new owners also could have taken on a different cultural approach compared to the previous US and UK owners, and potentially steered the company in a different direction operationally. In that situation, any company would need some time to transition and get acquainted with the new stakeholders and to embed in a new external context.

[38] Ibid, see article 16.

9. 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]

9.1. The fourth scenario contemplated by Flow Management and its stakeholders in October 2014 pertained to filing for a moratorium or, as it is generally called in a Dutch context, suspension of payments proceedings (*surseance van betaling*, SoP). Reflecting on Flow Management's situation from a Dutch perspective, the following applies.

Dutch SoP

9.2. According to Dutch legal standards, a debtor is eligible to apply for an SoP if it is foreseen that the debtor will not be able to continue to pay its debts as and when they fall due.[39] In other words, an SoP can only be applied for if it is expected that the debtor will encounter liquidity shortfall in the near future, but is not yet experiencing such shortfall. If the debtor is already beyond the point of being able to satisfy due and payable debts, the debtor is – according to Dutch legal standards at least – not eligible to apply for an SoP or moratorium but rather for bankruptcy.

9.3. Notwithstanding, Dutch courts will immediately grant a 'provisional' SoP following receipt of an application. This is done *ex parte* and without assessing if the debtor meets the requirements as outlined above. At the same time, an administrator (*bewindvoerder*) will be appointed to look after the interests of the debtor's joint creditors.

9.4. Immediately following the granting of an SoP, the debtor loses the sole power to dispose of and administer its assets. This means that during the SoP the debtor cannot perform any legal acts without the consent of the administrator(s).[40]

9.5. Given that an SoP is automatically granted on a provisional basis without further assessment of the debtor's financial situation (and thus without determining whether or not the debtor meets the relevant thresholds) – as reflected above – a court will also straightaway set a hearing date to take a further decision on whether or not to grant a so-called 'definitive' SoP, thereby prolonging the SoP protection.[41] At this hearing the debtor, the administrator, the creditors and a supervisory judge are heard, after which the creditors can vote on the granting of the definitive SoP. The definitive SoP is not allowed if a qualified majority of the creditors votes against it. In that case, or if the SoP is revoked by the court for other reasons, a debtor is declared bankrupt nine times out of ten (which can even be the case if no bankruptcy filing is pending).[42]

9.6. SoP proceedings have been designed to allow breathing space for the debtor and restore financial health through financial restructuring, i.e. by agreeing a composition plan (*surseanceakkoord*) with relevant creditors. To allow the debtor some time to get its affairs in order and draw up said plan, the debtor can no longer be forced to pay its due and payable debts during the SoP. Even more so, prejudgment attachments are also lifted after a definitive suspension of payments is granted.[43]

9.7. A rather significant downside of the SoP in the Dutch system, however, is that certain types of (important) creditors are not affected by an SoP. In other words, these creditors are not precluded from demanding payments and enforcing their rights under an SoP. The most notable types of creditors in this respect are: i) secured creditors (e.g. with rights of pledge or mortgage); ii) creditors with a preferential right (e.g. Dutch Tax Authorities); and iii) creditors with a claim under a lease purchase contract.[44]

---

[39] Article 214 para 1 Dutch Bankruptcy Act.
[40] Article 228 Dutch Bankruptcy Act.
[41] Article 215 para 2 Dutch Bankruptcy Act.
[42] Article 218 para 5 Dutch Bankruptcy Act and article 242 para 4 Dutch Bankruptcy Act.
[43] Article 230 Dutch Bankruptcy Act.
[44] Article 232 Dutch Bankruptcy Act.

Consequently, SoP's have – in practice – frequently proven ineffective to achieve corporate workouts and are in fact only suited for specific situations:[45] namely cases that entail the restructuring of ordinary, non-secured claims against the debtor and where a debtor has sufficient liquidity to cover claims and running costs vis-à-vis higher ranked creditors (that may be restructured on a consensual basis in parallel).

9.8. While preferential and secured claims cannot be restructured in an SoP, as reflected above, there is a possibility that the court instates a so-called 'cooling-off period' (*afkoelingsperiode*). This may be done at the request of any interested party or *ex officio*, for a period of maximum four months in total.[46] During this period third parties are not allowed to seek recourse against assets belonging to the debtor or to claim such assets, unless permitted by the court or the supervisory judge. This means among other things that secured creditors with a right of summary execution (*separatisten*) and holders of a retention of title, for example, cannot exercise their rights during the cooling-off period.

9.9. In addition, the court may order tailor-made interim relief measures regarding matters that are not provided for by law, for instance to facilitate a proper voting process on the composition plan in the SoP. This may be done at any stage of the SoP.[47]

9.10. As highlighted above, the SoP is primarily designed as a financial restructuring tool and, as such, revolves around the (possible) offering of a composition plan. A plan can only be offered by a debtor.[48] There is no mandatory outline for a composition plan and is essentially form-free, so long as aimed at (unsecured) debt covered under the SoP. If a proposed composition plan is adopted by a qualified majority of the creditors (both in terms of claim value and headcount) and confirmed by the court, it is binding to all the creditors who are covered under the SoP (i.e. ordinary, unsecured creditors).[49] If the composition plan is rejected, the SoP is revoked and often followed by bankruptcy proceedings (see also paragraph 9.5).

<u>Considerations</u>

9.11. Against the backdrop of the above, calling for a moratorium (SoP) was not the best option for Flow Management at the time.

9.12. In the first place, the financial restructuring envisaged (and later agreed) primarily concerned secured debt. The company faced a sizeable, secured debt arrangement amounting to EUR 360 million and EUR 55 million respectively that pressed heavily on the company's bottom-line, creating the need for reorganisation. An SoP could not have been used to come to a secured debt restructuring (e.g. write-off) on an involuntary basis. Consequently, the company always would have needed the upfront commitment from secured creditors to a restructuring otherwise an SoP would be fated from the start. In the case of Flow Management, unsecured claims (such as trade creditors claims and claims arising from lease contracts) were left untouched for business continuity purposes. Hence, there was no real upside or added value to enter an SoP from a restructuring perspective.

9.13. The only scenarios in which it would have made sense to consider filing for an SoP, is (i) if the company would have wanted to restructure unsecured debt after all, or (ii) if Flow Management would have been in dire need of a brief cooling-off period to fend against secured creditors. But again, this would have only yielded temporary relief, as an SoP would not have made any sense without cooperation of secured creditors anyway.

---

[45] See legislative history, *Dutch House of Parliament (Tweede Kamer)*, 2018–2019, 35 249, no. 3, at https://zoek.officielebekendmakingen.nl/kst-35249-3.html, accessed on 13 November 2023, p. 3.

[46] Article 241a Dutch Bankruptcy Act.

[47] Article 225 Dutch Bankruptcy Act.

[48] Articles 214 para 3 and 252 Dutch Bankruptcy Act.

[49] Articles 268, 268a, 272 and 273 Dutch Bankruptcy Act.

9.14. Secondly, while filing for SoP would not have had a real upside, it could have had a significant detrimental impact on the Flow Management restructuring. An SoP is a public insolvency procedure. A restructuring always attracts a lot of attention and concern amongst stakeholders, such as employees and trade creditors. This leads to noise and distraction and makes it more difficult to control the reorganisation process than when a workout is led on a consensual, confidential basis by relevant creditors. That could have had a severe impact on Flow Management's chances to get the restructuring through.

9.15. Further, an SoP also would have meant that Flow Management's leadership had to onboard a court-appointed administrator, thereby yielding a certain amount of control to an external party and making the company much less flexible in the restructuring. The administrator's cooperation and consent basically would have been required for every step in the process, including but not limited to the sale and transfer of the business as contemplated in the moratorium scenario ('option 4').

9.16. Finally, SoPs generally tend to have a detrimental effect on asset value. As such, any company should tread lightly and only progress to an SoP if there are no alternatives. That was not the case with Flow Management, where secured creditors were still willing to explore and commit to a consensual restructuring at the time.

9.17. By extension, filing for an SoP brings about a significant chance that the company ends up in bankruptcy proceedings, e.g. if an administrator or court would find that there is no viable turnaround perspective or if candidate third-party buyers would take their chances and hold back on buying the company from an SoP to try to buy the company from bankruptcy against an even steeper discount. Therefore, it would have been a risky endeavour for Flow Management to apply for SoP, even if it would have made sense from a restructuring perspective (which it did not).

* * *