



The position of secured creditors in plan proceedings

Maksejõuetusõiguse revisjon – uut maksejõuetusõiguses
Pankrotiseaduse 30 aastat

Tartu

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Overview

1. Class Formation
2. The 'Best Interest of Creditors' Test



1. Class Formation



Class formation

Art. 8 (1) lit. d Directive (EU) 1023/2019

“Member States shall require that restructuring plans submitted for [...] confirmation by a judicial or administrative authority [...] contain at least the following information:

[...]

- (d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;”



Class formation

Art. 9 (4) lit. d Directive (EU) 1023/2019

“ Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, **creditors of secured and unsecured claims shall be treated in separate classes** for the purposes of adopting a restructuring plan.”

Background: Art. 10 (2) lit. b:

“creditors with sufficient commonality of interest **in the same class are treated equally**, and in a manner proportionate to their claim”

➤ Expanding the scope of plan measures → need to reflect unequal creditor interests



Class formation

Two selections in a plan proposal:

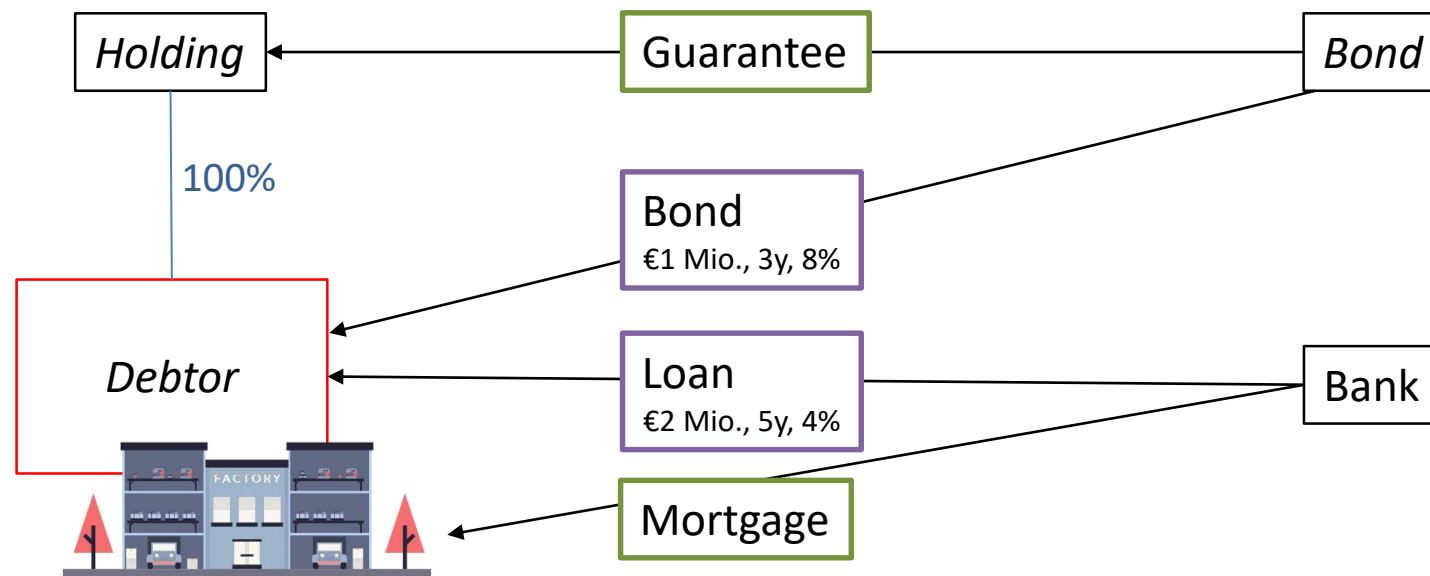
1. Select „**parties** [...] as well as **their claims or interest** covered by the plan“ [Art. 8(1) lit. c]
 2. Select affected right for **equal treatment** under the plan → class formation
- Selection → discrimination → justification under non-discrimination principles

[Limiting the potential scope of the MSE-One-Class-Exception in Art. 9(4)]

Class formation

The treatment of secured creditors

- Two secured creditors → same class = same treatment?





Class formation

The treatment of secured creditors

1. The duality of rights for the same economic interest

- Secured claim against the debtor
- Security rights/interest/lien against the debtor or a third party

2. Fully secured or only partially secured → deficiency claim

- No election [see § 1111(b) US Bankruptcy Code] → potentially three different claims

➤ Class formation?



Class formation

The treatment of secured creditors

1. Same class for secured (part of the) claim and the security interest
 - “Sufficient commonality of interest” [Art. 9(4)]
 - More difficult in countries that require class formation by the type of legal rights (eg Germany)
2. Separate treatment of deficiency claim → unsecured claim
3. Separate classes for different secured claims
 - One class for secured bondholders (→ same issuance)
 - One class for mortgage-holding bank



2. The 'Best Interest of Creditors' Test



The ‘Best Interest of Creditors’ Test

Art. 10 (2) lit. c Directive (EU) 1023/2019

“(d) where there are **dissenting creditors**, the restructuring plan satisfies the **best-interest-of-creditors test**;

Defined in Art. 2 (1) no. 6:

“‘best-interest-of-creditors test’ means a test that is satisfied if **no dissenting creditor would be worse off** under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, **or in the event of the next-best-alternative scenario** if the restructuring plan were not confirmed”



The 'Best Interest of Creditors' Test

The treatment of secured creditors

1. Identify the value to be received under the plan

- Amend and extend → additional value for delayed payment?
- Haircut → cash payment? At which date(s)?



The 'Best Interest of Creditors' Test

The treatment of secured creditors

1. Identify the value to be received under the plan
2. Identify the value to be received in the next-best-alternative scenario
 - a) Which scenario **is most likely** "if the restructuring plan were not confirmed"
 - Insolvency proceedings? → piecemeal liquidation? → Going concern sale?
 - Alternative / competing restructuring plan?
 - Going concern sale outside of formal proceedings?
 - Equity solution?→ Scenario analysis and probability assessment (→ legal task! → legislative selection?)
 - b) Identify the value to be received in this scenario
 - Value of the collateral in the relevant scenario



The 'Best Interest of Creditors' Test

The treatment of secured creditors

1. Identify the value to be received under the plan
2. Identify the value to be received in the next-best-alternative scenario
3. Compare the value to be received

➤ Perspective?

Ex ante or ex post assessment?

The '*Sears*' problem

→ Arg. expectations on the day of the petition / plan proposal



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Thank you.