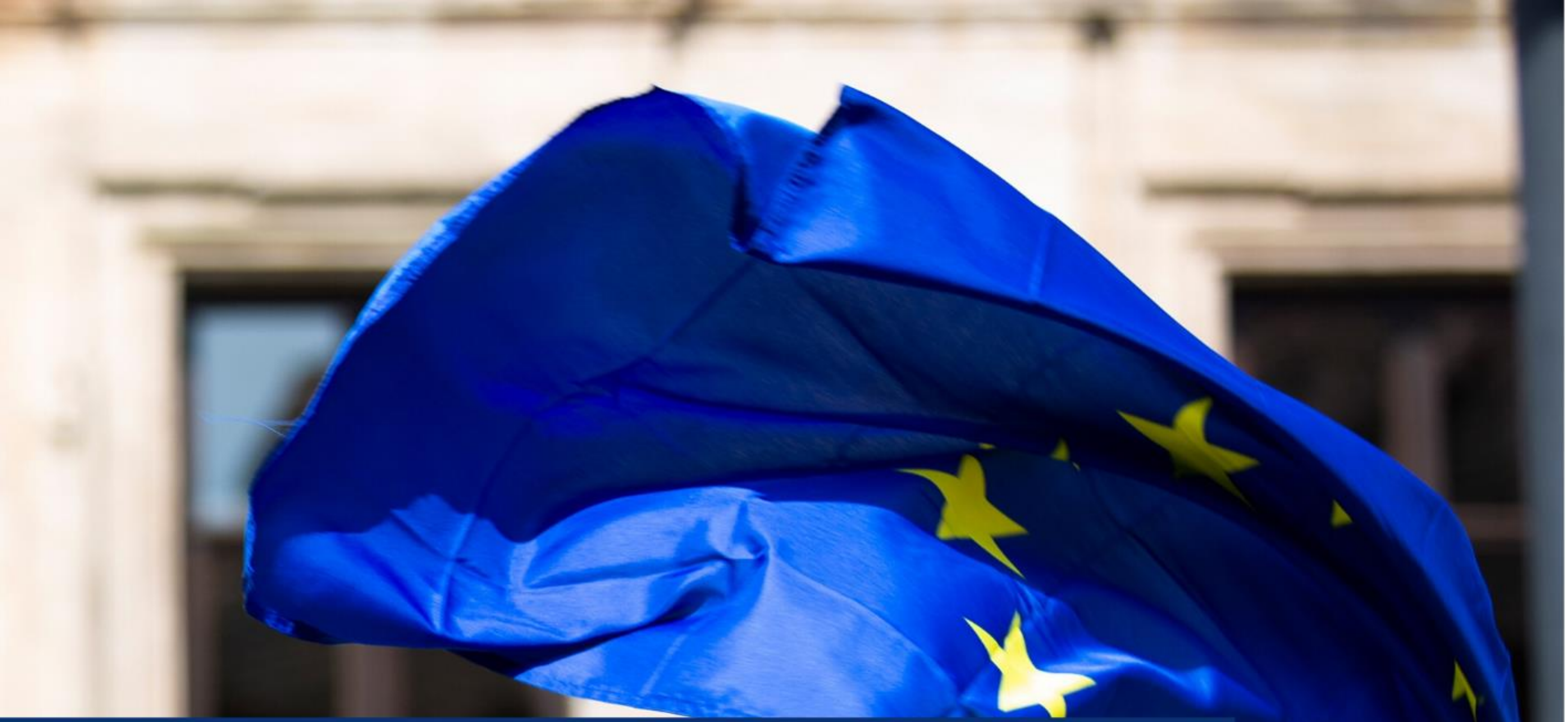

JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 1

Identifying substantive rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations

University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

UNIVERSITÀ DEGLI STUDI FIRENZE

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Judicial Co-operation Supporting Economic Recovery in Europe (JCOERE)

DG Justice Programme Project No. 800807

Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations

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Acknowledgements

The progress of the JCOERE Project (800807) from its commencement in December 2018 to the present has been intense, challenging and inspiring. The first JCOERE Report is now presented here in 9 Chapters. This considers the existing preventive restructuring frameworks in a number of member states in the European Union together with the reforms proposed in the Preventive Restructuring Directive passed in June 2019 (1023/2019). The publication of the JCOERE 1 Report could not be more timely, in that it sets out the context across Europe against which preventive restructuring frameworks will be implemented in accordance with the Directive. It also captures the debate around core concepts in restructuring, including the threshold of insolvency at which time restructuring processes are available, the imposition of a stay against creditors and other claimants, cram-down and cross-class cram-down, and the mechanism for approving restructuring schemes. There is much in this report that will be of interest to all those practising and researching in this area. JCOERE will now continue on to consider obligations regarding court to court co-operation in this context, which will form the subject matter for JCOERE Report 2.

As Principal Investigator, I would like to formally acknowledge the splendid work of our core team here at UCC. Dr Jennifer L. L. Gant, Aoife Finnerty and Molly O'Connor have all worked extremely well together and in collaboration with me to produce an excellent piece of work. Their team-work is second to none. In addition, I extend our thanks to all of our partner teams and their leaders, Dr Paul Omar and Caroline Taylor at INSOL Europe; Professor Lorenzo Stanghellini, Professor Andrea Zorzi, Dr Iacopo Donati, and Niccoló Usai at UNIFI; and Judge Nicoleta Nastasie, Dr Cristian Drăghici, Professor Ioana Panc, Professor Smaranda Angheni and Ioana Duca at UTM for their help and support.

I am also grateful to our Advisory Board members, in particular the Honourable Judge Michael Quinn and his judicial assistant Lorna Reid (and before that the Honourable Judge Caroline Costello), Adjunct Professor Jane Marshall, Professor Gerry McCormack and Dr Emilie Ghio, all of whom have given generously of their time at our project meetings in Cork, Florence and Copenhagen. We also extend our thanks to the other members of our Board, Declan Walsh and The Honourable Judge Anthony Collins, whose support will continue to be important into the next phase.

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Professor Dr Irene Lynch Fannon, 14 January 2020.

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1. Chapter 1: Introduction to JCOERE Report 1

1.1 Introduction

Globalisation has seen the rise of the multi-national corporation. Now business can be done between companies separated by vast distances, crossing many jurisdictions. This is accompanied by an inevitable complication of modern-day business laws, particularly when these complex, interwoven business connections are met by financial difficulties or the insolvency of one or more of the companies involved. As the European Union continues to integrate further while containing different jurisdictions, these issues are both more complex and more demanding in a European setting. It is therefore vital that there is an effective and efficient means of resolving cross-border insolvencies in Europe. Similarly it is important to include a legal framework which aims to facilitate the restructuring of viable companies in order to protect the European economy.[1] It is not surprising, then, that in the last two decades or so we have seen the emergence of considerable discussion around the methodology of co-operation and in turn the development of rules and guidelines aimed at facilitating the effective co-ordination of cross-border insolvency procedures. Similarly, more recently we have seen the emergence of a pan European debate on corporate rescue. The JCOERE project is concerned with cross-border co-operation between courts and practitioners in insolvency, with particular emphasis on rescue processes.

While elsewhere courts devise protocols for co-operation on a case by case basis, the EU undertook to create a harmonised framework within which court-to-court co-operation could occur. The European Insolvency Regulation (Recast)[2] sets out rules that streamline the management of cross-border insolvency law cases and contains a direct obligation for courts to co-operate with both insolvency practitioners and with other courts with a view to maximising the efficiency of insolvency procedures. In addition, there is an obligation on insolvency practitioners to co-operate with each other and with courts in other jurisdictions.[3] The new emphasis on rescue has introduced another complex dimension into this already challenging context.

Insolvency and corporate rescue (or recovery) has recently been the subject matter of focussed policy debate in the European Union, driven by a number of economic and related policy concerns that are described in Chapters 4 and 5 of this Report. There are two strands to the European approach examined by the JCOERE Project, the first concerning the growing demand for harmonisation of various legal principles surrounding corporate rescue and the second placing the new rescue imperative into the context of cross-border co-operation in insolvency law generally. Given the range of legal areas upon which insolvency law touches, and differences in the underlying principles and purposes of rescue, it will be difficult to achieve EU wide harmonisation. As will be seen in the debates described in Chapter 4, and in the subsequent Chapters 6-8 on substantive principles, various Member States are starting from very different points, both in terms of law and underlying theory. For example, some jurisdictions favour a more traditional creditor wealth maximisation model, whilst on the other hand, in other jurisdictions rescue is viewed as a valuable means of preserving jobs and protecting local communities. The new Preventive Restructuring Directive[4] (the “PRD”) is an attempt to harmonise approaches to preventive restructuring frameworks in EU jurisdictions and to introduce such measures in jurisdictions that do not yet have them. However, as will be discussed in this Report, and in particular in Chapter 5, which

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[1] This sentiment was echoed in a presentation during the INSOL Europe Annual Congress held in Copenhagen in September 2019 by a representative from the International Monetary Fund, Natalia Stetsenko, who said that Preventive Restructuring Frameworks (PRF) are needed for real economic growth and financial sector health. Further, the IMF recommends/prefers early/timely debt restructuring with hybrid mechanisms having minimum court involvement.

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L 141/19 (the “EIR Recast”).

[3] *ibid.* Articles 42-44 and 56.-57. See further *infra* n. 24.

[4] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the “PRD”).

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describes the evolution of the PRD, the scope of derogation and lack of obligatory provisions are unlikely to achieve close harmonisation. Yet the EU must continue with attempts to provide preventive solutions to complex business networks throughout Europe. The continued integration of the single market means that there must be some harmonisation at the end stages of a business entity.

This JCOERE Report 1 identifies substantive and procedural rules in preventive restructuring frameworks (either those which have already been introduced in some European jurisdictions at this point, or in the PRD) which may present challenges to a harmonised approach to implementation and consequently to cross border co-operation. The JCOERE Report 2 will continue to develop the enquiry regarding courts, judicial and administrative authorities, and procedural rules and consider how these factors may affect court-to-court co-operation generally, while also benchmarking the utilisation and awareness of best practice guidelines for court-to-court co-operation in preventive restructuring. As the research has continued, the importance of explaining some of these challenges by reference to legal culture has become clear. This will be addressed in our second Report.

1.2 The Preventive Restructuring Directive (PRD): Benchmarks from other jurisdictions.

The PRD introduces a number of concepts that are new to many Member States.[5] Anecdotal evidence points to the influence of Chapter 11[6] and the UK Scheme of Arrangement[7] in the drafting of the PRD, although neither process is mentioned in the negotiation or in any of the official documentation associated with the PRD. There is an additional European procedure that already closely aligns with the PRD, with the exception of the emphasis which we see in the PRD, on reduced court formality. The Irish Examinership procedure is a preventive restructuring (and insolvency) procedure that has existed since 1990. It was modelled on Chapter 11 of the US Bankruptcy Code, much like the PRD, but without the extensive compromises that accompanied the final version of the PRD.[8] The procedure contains most of the features included in the PRD and adopts a robust approach to rescue. It is also included in Annex A of the EIR Recast so the co-operation obligations apply.

The provisions in the PRD emulate the US Chapter 11 to some extent, but there are stark differences between the provisions of the PRD and the English Scheme of Arrangement, despite anecdotal evidence that the Scheme was an influence in the drafting process of the PRD. Notably, the Scheme does not provide for a cross-class cram-down.[9] The Scheme also does not provide for a moratorium on enforcement actions. In addition, the Scheme is not considered an insolvency procedure deriving as it does from UK Company Law and is therefore not included in Annex A of the EIR Recast. This fact also raises the question as to whether other new preventive restructuring procedures will actually find their way into Annex A, or if they will emulate the UK approach, keeping out of Annex A and avoiding the restrictive Centre of Main Interest (COMI) test attached to recognition under the EIR Recast.[10] If a procedure does not sit within Annex A, then the issue of judicial co-operation under the EIR Recast also becomes a moot point, following instead the rules under Brussels I or private international laws of recognition and enforcement.[11]

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[5] A full discussion of the commentary and context of specific provisions of the PRD is contained in Chapter 4 while a detailed exposition of the PRD and its evolution is contained in Chapter 5 of this Report.

[6] United States Code, Chapter 11, Title 11 (the "Bankruptcy Code").

[7] UK Companies Act 2006, part 26. Irish legislation also includes a Scheme of Arrangement process which is very similar to the UK process. This is included in Part 9 of the Companies Act 2014. See further I Lynch Fannon and G N Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012) Chapter 14.

[8] Examinership was part of a series of measures aimed to update and modernise the entire landscape of company law in Ireland in the 1990s. This seems to have been part of an increasingly successful strategy to attract foreign direct investment instituted by successive Irish governments. Although Ireland is a committed member of the EU in terms of legal policy, particularly as regards financial and commercial law and practice, Ireland has always posed the question internally of itself as to whether it is closer to "Boston or Berlin" Jim Dunne, 'Boston or Berlin?' (The Irish Times Jun 23 2001) <https://www.irishtimes.com/news/boston-or-berlin-1.314552> accessed 4th October 2019.

[9] While the Scheme does not provide for a statutory cross-class cram-down, a similar outcome is achieved in practice as noted by Riz Mokal at the INSOL Europe Annual Congress in Copenhagen in September 2019, in the Scheme of Arrangement *the debtor chooses not to propose the inclusion of other creditors which accomplishes the same thing as a cross-class cram-down.*

[10] This idea was floated during a presentation by Walter Nijnens at the Inaugural YANIL Conference at 10 Years in Copenhagen on 24th. September 2019, noting that in order to sit in Annex A, procedures must satisfy a number of conditions, which the PRD does not necessarily require of any newly introduced preventive restructuring frameworks. See further Recital 16 of the EIR Recast 848/2015.

[11] Or possibly not assisted by either legal framework in terms of enforcement. See the CJEU German Graphic case "it is conceivable that … there are some judgments which will not come within the scope of application" of either regime. Case C-292/09 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECLI:EU:C:2010:7. See further English decisions considering the interplay between the EIR Recast 848/2015 and the EU Judgements Regulation Council Regulation 44/2001 *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) 44 and *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

The substantive and procedural issues envisaged as possible obstacles to co-operation in cross-border preventive restructuring may be complex and raise issues fundamental to insolvency law including principles of fairness and the justifications for collective action. However, there is already a wealth of case law emanating from globally significant jurisdictions such as some states in the US, the UK and Singapore that could help to identify solutions. In addition, in taking a critical position regarding preventive restructuring and the complexities inherent in such systems again, the US, and the UK are important jurisdictions.[12] Ireland should be added as a jurisdiction which might provide assistance regarding this latter issue being an EU and EUROZONE jurisdiction that has been doing preventive restructuring with its examinership procedure for 30 years. With three decades to work out the problems, engage in incremental reform, and decide cases that fill in the grey areas, Ireland presents a useful case study for other EU Member States engaging in the drafting of their own preventive restructuring frameworks subsequent to the passing of the PRD. It is from this benchmark that the JCOERE project examines the potential for preventive restructuring frameworks to create difficulties for court-to-court co-operation under the EIR Recast.

1.3 JCOERE Project Summary

As stated, the JCOERE Project, funded by the European Commission's DG Justice Programme (2014-2020),[13] addresses two aspects of the EU's strategy regarding corporate rescue and market integration. The Commission's strategy is described in the Recommendation setting out A New Approach to Business Failure.[14] Subsequently, the Explanatory Memorandum accompanying the Proposal[15] for the PRD describes its key policy objective as reducing the "most significant barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks." [16] It aims to facilitate Member States putting in place key principles that underpin effective preventive restructuring. Further policy objectives leading to the preventive restructuring frameworks recommended by the Proposal were intended to:

> "help increase investment and job opportunities in the single market, reduce unnecessary liquidations of viable companies, avoid unnecessary job losses, prevent the build-up of non-performing loans, facilitate cross-border restructurings, and reduce costs and increase opportunities for honest entrepreneurs to be given a fresh start."[17]

While the PRD has been through several iterations and compromises to arrive at the final version passed in June 2019,[18] these policy objectives remained central to its drafting. The Commission repeated its explicit concern with regard to the impact on capital markets that inefficient, unharmonized restructuring might have, including the impact on the prevalence of non-performing loans:

> "Preventive restructuring frameworks should also prevent the build-up of non-performing loans. The availability of effective preventive restructuring frameworks would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector."[19]

Further, the Commission stated that:

> "The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal

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[12] There are a number of other significant differences between the widely used Scheme and the framework proposed in the PRD, which will be discussed in Chapter 7.

[13] Project No. 800807/JUST-JCOO-AG-2017. The content of this document represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

[14] Commission Recommendation C (2014) 1500 final of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L74/65 (the "Recommendation").

[15] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the "Proposal") including the Explanatory Memorandum.

[16] *idem*, Explanatory Memorandum 5-6.

[17] *ibid*.

[18] See further Chapters 4 and 5.

[19] PRD, extract from recital 2.

> market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs."[20]

The interface between the co-operation obligations imposed on courts and judges in the Recast Regulation and the envisaged preventive restructuring procedures in the Directive highlight the challenges that an effective cross-border modern insolvency system will face.[21] There have been dramatic changes over the last few decades, more so than in many other fields of law, which is particularly significant given the centuries during which the only focus of insolvency reform had been on refining liquidation mechanisms. In recent decades, insolvency law has evolved from maximising liquidation outcomes to developing alternative solutions of rescuing the debtor.[22] Rescue frameworks as they have operated in Member States, such as Ireland and the UK, can, however, conflict with traditional insolvency law principles such as equality of treatment of creditors, transparency, and predictability.[23] The academic debate outlined in Chapter 4 illustrates the depth of theoretical differences regarding restructuring which exists in the European Union. This is undoubtedly reflected in legal systems.

As described in the Introductory section, the Project will produce two Reports, JCOERE 1 and JCOERE 2. This Report is the first of these (reflecting the goals of Workpackage 2 of the Project) and will accordingly concentrate on the nature of substantive and procedural obstacles to co-operation[24] that may be raised by rules applicable to complex preventive restructuring or rescue regimes as envisaged by the PRD. The enquiry includes an interrogation of pre-existing systems such as the Irish Examinership[25] process, the French *sauvegarde*, and the Spanish and Austrian reorganisation and restructuring procedures, as well as the approaches of other jurisdictions included in the Project Consortium, which include Italy and Romania. The UK is also considered as a benchmarking exercise given its popularity as a restructuring destination and the anecdotal evidence of its influence on the drafting of the PRD. Other jurisdictions were included as it became apparent that they were important, either because the jurisdiction quickly introduced a process in response to the discussions surrounding the PRD (for example the Netherlands) or at the other end of the spectrum seem reluctant to depart from traditional insolvency principles and approaches (for example Germany). The Project was in a position to include additional countries from Eastern Europe in particular Poland and from Scandinavia (Denmark). These are all considered in Chapters 6-8.

Obstacles to co-operation in this context are derived from the potential effects of the envisaged approval processes within the PRD. These include the introduction of the 'cram-down' provisions described in the PRD, whereby creditors dissenting to a restructuring plan can be forced to comply with it have become a focus of dissenting views. Financing rules are also problematic[26] as are approval processes generally. The PRD also introduces two tests of fairness; the best interests of creditors test and the concept of "unfair prejudice." Again, these are a focus of debate at present. Many insolvency codes

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[20] PRD, recital 8.

[21] Jan Adriannse, 'The Uneasy Case for Bankruptcy Legislation and Business Rescue' in Michael Veder and Paul Omar (eds), *Teaching and Research in International Insolvency Law: Challenges and Opportunities* (INSOL 2015); Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68 MLR 713.

[22] Christoph Paulus, Stathis Potamitis, Alexandros Rokas, and Ignacio Tirado, 'Insolvency Law as a Main Pillar of the Market Economy – A Critical Assessment of the Greek Insolvency Law' (2015) 24(1) IIR 1.

[23] Irene Lynch Fannon and Gerard N Murphy, *Corporate Insolvency and Rescue* (Bloomsbury 2012) Chapter 1.

[24] Relevant obligations included in Articles 42-44 and 56 and 57 of the Regulation. Note the language is mandatory. Article 42 states that the court "shall co-operate" … "to the extent that such co-operation is not incompatible with the rules applicable to each of the proceedings." It also details the form of co-operation:

> "For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.
>
> 2. In implementing the co-operation set out in paragraph 1, the courts, *or any appointed person or body acting on their behalf*, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.
>
> 3. The co-operation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern: (a) coordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) coordination of the conduct of hearings; (e) coordination in the approval of protocols, where necessary."

Article 43 applies the same obligation to insolvency practitioners to co-operate with courts "to the extent that such co-operation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest". Similarly, Article 56 applies the same set of obligations in a group context to insolvency practitioners and Article 57 applies a similar obligation to courts in a group context.

[25] Irish Companies Act 2014, part 10 "Examinerships".

[26] Re Atlantic Magnetics Ltd [1993] 2 IR 561; Re Holidair [1994] 1 IR 416.

require the courts to consider principles of equality between creditors and it is difficult to see how co-operation could continue when there are differences in cross-border creditor treatment, particularly when all creditors regardless of jurisdiction are included in a single proceeding under a foreign preventive restructuring framework. In the absence of a secondary proceeding convened to protect domestic interests, creditors subject to a foreign proceeding may find their rights treated less favourably then they might have been in a domestic proceeding. This is mitigated to some extent in some jurisdictions where a more robust application of the unfair prejudice test allows for the exclusion of creditors who are considered to be "out-of-the-money" in any event.[27]

JCOERE Report II is due under Workpackage 3 of the Project. This will be more focussed on the courts, and judicial and administrative authorities, charged with approving and implementing restructuring plans. The second Report will also consider the application of best practices for co-operation cross-border insolvency cases; judicial awareness of existing obligations and guidelines and judicial practise in this area. Workpackage 4 of the JCOERE Project will proactively engage with the judiciary across Europe through INSOL Europe as well as additional networks to raise awareness and inform experience of best practice in this area.

1.4 Methodology of the JCOERE Project

The JCOERE Project relies heavily on the comparative law method, focussing on the functional equivalencies between the provisions of the PRD as compared to similar provisions among the Member States. A detailed discussion of the methodology employed for the analysis of the project's findings will be set out in Chapter 6 while a brief overview of the approach for the research associated with Report 1 will be set out here.

As adumbrated above, the chosen jurisdictions include Ireland (as an apparent leader in the European field in terms of restructuring frameworks), the UK (due to its success as a jurisdiction in relation to restructuring practise) as common law countries and a range of civil law jurisdictions. It is likely that the common law experience contrasted with the differences in civil law countries will be more significant as we move on to Report 2 (Workpackage 3). Denmark was added as a Scandinavian counterpart with the interesting characteristic of not being bound by the EIR Recast. Poland was added as a significant Eastern European economy (with a continued focus also on judicial practise). Finally, Austria was included because it has become apparent that the frequency of cross-border issues arising in that jurisdiction seems to be high (unsurprising perhaps given its central European location).

In terms of practical methodology JCOERE has benefitted enormously from its inclusion of INSOL Europe as a member of the Consortium. INSOL Europe has provided a platform through which the project has collaborated with contributors and engaged with turnaround professionals, practising lawyers, and members of the judiciary.

The research employs multiple methodologies common to the discipline of legal doctrine, in addition to the comparative law method. The discussion, comparison, and interpretation of academic and legal texts are the main research objects for the contextual chapters of this Report, which provide underpinning commentary and criticism around the topic of preventive restructuring. This approach also underpins the later qualitative research undertaken, which provides the material for the comparative analysis. The various interpretations of texts and concepts will be considered and analysed with a view to identifying functional equivalencies by questioning perceived similarities and differences of specific provisions within preventive restructuring frameworks.[28]

The JCOERE project has also undertaken qualitative research for Report 1 through questionnaires answered by practitioners and academics specialising in insolvency and restructuring among the 11 aforementioned different EU jurisdictions. These questionnaires investigated each of the contributing jurisdictions' current preventive restructuring frameworks, practices, and underlying principles in light of the PRD. Due to the nature of this it was found that multiple interactions with the jurisdictional contributors were necessary. Both the interpretations of the questionnaire questions and different

[27] Irene Lynch Fannon, 'Examinership: Approval of Schemes — Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as Amended)' (2015) 1 Commercial Law Practitioner; see also Irene Lynch Fannon and Thomas B Courtney (eds), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2015).
[28] Mark van Hoecke (ed), Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Hart 2011) 4.

approaches to responding to those questions made it difficult to create a report that fully aligned the content of each jurisdiction so that the level of detail and depth were commensurate. In addition to providing their initial responses to the questionnaire, jurisdictional contributors were also asked to engage in a reflective comparative process. This included requests to respond to additional queries to add clarity or depth in light of other responses and a request to review the team's interpretation of the answers when written into the Chapters of the Report. The contributors were also asked for a final review of content accuracy of Chapters 6-8 that pertained to the questionnaire along with any final queries.

The questionnaires were divided into three parts, the analysis of which are set out in three later Chapters of this Report (6, 7, and 8). The first part of the questionnaire gives a general background to preventive restructuring in the jurisdictions. The second, and most technical part of the questionnaire, focussed on substantive rules, in particular those that could be perceived as controversial in some way, for example, those which create conflicts or undermine legal rights. Contributors were asked to explain what was already present in their national laws in terms of each specified provision and what, if any, changes their jurisdiction would need to make to comply with the PRD. These provisions are described with reference to the corresponding articles in the following section on the structure of the Report and the description of the content of Chapters 6, and 7. The third part of the questionnaire then focussed on procedural matters, such as the emphasis on the debtor in possession model and the relative involvement and control of insolvency practitioners; the conflict between the guarantee of the protection of rights in rem under the EIR Recast and possible interference in preventive restructuring frameworks. These matters will be discussed in Chapter 8 of this Report along with the response to an additional question concerning thresholds of insolvency. This third part of the questionnaire also interrogated the role of judicial or administrative authorities; constitutional limits on judicial co-operation; examples of judicial co-operation; and training and competency requirements, but these responses will form a part of JCOERE Report 2 as they deal with procedural obstacles that could interfere with court-to-court co-operation.

The responses to the questionnaires provide the material for a comparative analysis, which will help to establish issues of failed or successful harmonisation under the PRD as well as identifying discrepancies in definition and perception of similar concepts by establishing functional equivalencies.[29] The divergence in understanding and application among the Member States may provide a field of issues upon which the obligation to co-operate can be lost or impeded.

1.5 Structure of the Report

This first Report of the JCOERE Project examines the aforementioned substantive and procedural issues through a narrative that includes academic commentary to contextualise the substantive discussions. As described it includes a synthesis of answers to a questionnaire and an exposition of the PRD itself. This Report is comprised of 9 Chapters.

This first Chapter has offered a brief introduction to the JCOERE Project highlighting the principle questions and concepts. The second Chapter will give a presentation of certain terms relating to preventive restructuring frameworks encountered by the project, which carry different meanings in different jurisdictions. Given the difficulty of aligning difficult concepts across cultural and language lines, it is hoped that this Chapter on Terminology will add to the insights generated by the Report. The third Chapter will then give an introduction to the European Insolvency Regulation and its Recast, focusing on how it will work in relation to preventive restructuring frameworks as well as introducing and describing the court-to-court co-operation obligations.

Chapter 4 focuses on the development of preventive restructuring globally and will introduce key concepts along with criticism and commentary rooted in the robust theoretical debate surrounding them. The fifth Chapter then offers an exposition of the evolution of the PRD from the first attempt at EU legislation in this area in a Communication of 2011.

The sixth, seventh and eighth Chapters focus on an analysis of the questionnaire responses from the contributor jurisdictions, focussing on the key provisions identified in the PRD and described above

[29] See for example Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (trans Tony Weir, 3rd edn, OUP 1998).

with a view to identifying true functional equivalence in the similarities and differences exposed by the analysis.

Chapter 6 will discuss the responses given to part 1 of the questionnaire with an analysis of the general context of preventive restructuring in the contributing jurisdictions. Chapter 7 will then examine the responses discussing substantive preventive restructuring provisions in the context of those specified provisions set out in the PRD:

- Article 6 – Stay of Individual Enforcement Actions;
- Article 9 – Adoption of Restructuring Plans;
- Article 10 – Confirmation of Restructuring Plans;
- Article 11 – Cross-class Cram-down;
- Article 13 – Workers; and
- Article 17 – Protection of New Financing and Interim Financing.

Chapter 8 will then examine the responses to the first half part three of the questionnaire, which deals with specific procedural aspects of preventive restructuring in domestic process and in the PRD. The topics covered here include:

- Thresholds of insolvency;
- The involvement of insolvency practitioners in restructurings (Article 5 – Debtor in Possession); and
- Rights *in rem*.

The final Chapter will reflect on the findings of the normative, doctrinal, and comparative research along with findings through discussions and workshops with professionals and judges at various events.

1.6 Transition Chapter 2: Terminology

Chapter 2 of this Report will set out commonly used terms (in English) but will also explore some of the discrepancies in the meaning of some terms that are used by several jurisdictions, but at times have slightly (or in some cases) significantly different meanings. The starting point for most of the terms in the next Chapter will be how they are defined in European law, mainly under the PRD and the EIR Recast. The purpose of this Chapter is to try to dispel some of the confusion about commonly used, but sometimes differently understood, insolvency, rescue, and (preventive) restructuring terms.

2. Chapter 2: Preventive Restructuring Terminology

2.1 Introduction to Chapter

This Chapter is an amalgamation of the JCOERE Team's experience with interpreting, analysing, and synthesising different jurisdictions' perception of what are quite similar concepts. The necessity of this Chapter became apparent when different understandings of the same or similar terms arose during the analysis of the contributor responses to the JCOERE Questionnaire. These differences go beyond simple differences of language. Often, the same term has subtle differences - and occasionally significant differences – in meaning across the contributing Member States, which can cause confusion and conflict when trying to communicate in a comparative context. Moreover, in a practical cross-border restructuring case we would expect these problems to be exacerbated. Better understanding of these nuances can only help to encourage and facilitate more wide-spread understanding and co-ordination of procedures, communication between practitioners, and increased efficiency within procedures. Rather than being a comprehensive legal glossary, this Chapter is designed to provide the reader with some context to the Report, with specific reference to preventive restructuring.

2.2 Rescue (Corporate and Business), Rehabilitation, Reorganisation, Restructuring, and Preventive Restructuring

2.2.1 Corporate Rescue

A broad understanding of corporate rescue processes includes "statutory corporate insolvency procedures that offer an alternative to liquidation procedures."[1]

Corporate rescue is generally understood as referring to the rescue of a corporate entity in its entirety although "a major intervention …[is]...necessary to avert the eventual failure of the company."[2] In all cases it is typical that the company retains the same corporate personality, but both the debt and equity structures of the company will be reorganised. Even though it is common to see some continued ownership of the underlying business entity, equity structures will change in many restructurings.[3]

2.2.2 Business Rescue

Business rescue refers to a situation where one or more *businesses* of the company or corporation (as a separate economic entity) is saved, often by selling it to a new corporate owner through an asset sale, thus changing the ownership of the business. This term is sometimes also used to refer to the rescue of the corporate entity, which has been known to cause confusion. This Report distinguishes between the rescue of the corporate entity and the rescue of the underlying business entity.

2.2.3 Rehabilitation

Rehabilitation is an umbrella term that refers to a variety of procedures aiming to rescue the corporate entity or the business or businesses of that entity in order to preserve the economic benefits of an ongoing concern, including the preservation of employment. The concept is derived in part from a communitarian vision of insolvency law that places an emphasis on encouraging the survival of viable independent economic entities to the benefit of a variety of stakeholders.[4]

2.2.4 Reorganisation

[1] Rebecca Parry, 'Introduction' in Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International 2004) 1-17, 2.
[2] A Belcher, *Corporate Rescue* (Sweet & Maxwell 1997) 12.
[3] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (CUP 2017) 197.
[4] *idem* 35-36.

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A reorganisation is a process designed to revive a financially or economically troubled or insolvent firm by means of financial measures, which are often tied to operational changes at the same time. The CODIRE Report[5] helpfully separated these measures into those aimed at dealing with assets as opposed to those aimed at dealing with liabilities.

i. Operational reorganisation will often include reorganisational measures on the asset side of a company which can include the sale of a business. The business may then be owned by an entirely new set of investors. Such a transaction, while similar to liquidation, is undertaken to preserve value that would otherwise be lost in a liquidation.[6] An asset focussed reorganisation may also include the sale of non-strategic assets and changes in the workforce. Changes in the workforce are often also referred to as an operational reorganisation.

ii. A financial reorganisation tends to deal with the liabilities of a company in which financial terms of credit exposures might be amended to create a less onerous situation for the debtor; including a possible change in interest rate; postponement of debt; debt write-downs; the treatment of loan covenants; new contributions from shareholders or third parties; and debt-for-equity swaps.[7] The latter will naturally lead to changes in the original ownership of the corporate entity as indicated in 2.2.a above as the ownership of the company shares will change hands.

A reorganisation will often include measures that deal with both financial and operational problems in a combination of the measures set out above.

2.2.5 Restructuring

In the PRD:

> "Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes."[8]

Article 2(1) states:

> "'restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements."

2.2.6 Preventive Restructuring

In the PRD:

> "Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole."[9]

2.3 Pre-insolvency

Pre-insolvency refers to the financial circumstances of a company that are definitionally prior to a Member State's threshold of insolvency, often predicated on the balance sheet or cash flow tests. The

[5] L Stanghellini, et al., *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018). See also <https://www.codire.eu/>
[6] *idem*.53-54.
[7] *idem* 56-59.
[8] PRD, recital 2.
[9] *ibid*.

PRD relies on a "likelihood of insolvency" but leaves the definition of this to the Member States. The term is not mentioned in the PRD or in the Recommendation, but is mentioned three times in the Proposal for a Preventive Restructuring Directive, in which it is stated that "pre-insolvency procedures must be available at the earliest where there is a likelihood of insolvency, …[and]…procedures must include all or a significant part of a debtor's creditors and must be public."[10] In France, for example, pre-insolvency is prior to *cessation of paiements*, which is the inability of a company to meet its liabilities with the available assets.[11] The JCOERE Project adopts a technical interpretation of pre-insolvency processes that refers to all situations where no additional or alternative *formal* insolvency process has commenced.

2.4 Homologation

Homologation refers to judicial confirmation of a restructuring plan proposed in the preventive restructuring procedure in order to make it binding.[12] From the contributor responses, this term appears to mean the same thing in the Netherlands, France, Spain, and Romania. It is interesting to note this word is not generally used in English speaking countries.

2.5 Concordat, Composition, Arrangement, and Plan

2.5.1 Concordat

In Romania, the preventive concordat is a contract between the debtor and particular creditors, which requires judicial approval. It has a similar meaning in Italy; the concordat (*concordato preventivo*) refers to a judicial composition with creditors. From research conducted on the project, it appears that the term "concordat" is particular to those two jurisdictions.

2.5.2 Composition

In England and Wales:

> "A composition is an agreement in settlement of a claim which is in doubt, dispute, or difficulty of enforcement. It involves no transfer of assets or change of any kind in the structure of the company or the rights of its members *inter se* vis a vis creditors."[13]

In the Netherlands, a composition is an agreement between the debtor and its creditors. It is also referred to as a restructuring plan.

2.5.3 Arrangement

In Ireland, an "arrangement", in relation to a company, includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both methods. The same statutory provision describes a compromise or arrangement proposed between a company and its creditors (or any class of them) or its members (or any class of them). In Ireland, the term "Scheme of Arrangement" has also been used to refer to a compromise reached by an Examiner under the Examinership process.[14] For this reason, the "Scheme of Arrangement" based in company law is sometimes referred to as a "statutory Scheme of Arrangement".[15] This latter arrangement is based on the same legal provisions as the English Companies

[10] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the "Proposal") including the Explanatory Memorandum, 9.
[11] What constitutes a situation of *cessation de paiements* is not straightforward and has been debated by courts and commentators over the years, in particular the accounting basis of the concept. Following the introduction of the Law of 1967, French case law was referring to the concept of *cessation de paiements* as an essentially accounting-based notion, reliant on a comparison of available assets to meet the due liabilities. Yet, many courts have departed from this accounting view and have interpreted elements of the concept, such as what constitutes an asset and a liability and whether the debt is in fact due. Solely relying on the balance sheet test would not necessarily be a true reflection of the reality of the business.
[12] France, Romania, Italy, Austria, the Netherlands all gave similar definitions for this term, however, the grounds for court confirmation vary within the jurisdictions.
[13] *Mercantile Investment & General Trust Co v International Co of Mexico* [1893] 1 Ch 484, 491, cited in *Re Guardian Assurance Co* [1917] 1 Ch 431 per Younger J, 443, as cited in Kristin van Zweiten, *Goode on Insolvency of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 49.
[14] See generally, I Lynch Fannon and G Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012) chapters 12 and 13.
[15] *ibid* chapter 14.

Act of 1948, upon which the English Scheme of Arrangement was based. This is now contained in the Companies Act 2006. In England and Wales, an authoritative definition is as follows: “an arrangement is a compromise or arrangement that has been submitted to the court for approval under Pt 26 of the Companies Act 2006.”[16] This term is used in the Scheme of Arrangement and in the Company Voluntary Arrangement in England and Wales.

In Romania, an arrangement is a compromise between the debtor and one or several of its creditors, in order to overcome the financial difficulties, which the debtor faces.

2.5.4 Restructuring Plan

Per the PRD, Article 8 - Content of Restructuring Plan:

> “1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:
>
> (a) the identity of the debtor;
>
> (b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;
>
> (c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
>
> (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;
>
> (e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;
>
> (f) where applicable, the identity of the practitioner in the field of restructuring;
>
> (g) the terms of the restructuring plan, including, in particular: (i) any proposed restructuring measures as referred to in point (1) of Article 2(1);
>
> (ii) where applicable, the proposed duration of any proposed restructuring measures;
>
> (iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;
>
> (iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;
>
> (v) the estimated financial flows of the debtor, if provided for by national law; and
>
> (vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;
>
> (h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.”

2.6 Examiner, Receiver, Trustee, and Administrator, PIFOR

[16] van Zweiten (n 12) 50.

2.6.1 Examiner

In Ireland, "an examiner means an examiner appointed under section 509" of the Irish Companies Act. It is essentially an insolvency practitioner appointed to "the company for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under this Part."[17] The provision goes on to state that:

> "The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern." [18]

The Irish examiner is similar to the Dutch 'plan expert' referred to in 2.6 f.[19]

In Austria's preventive restructuring framework, the professional responsible for the process is also called an examiner. The examiner must be independent from creditors and the company (including not being a competitor of the company).

2.6.2 Judicial Commissioner

In Italy, the court nominates an insolvency practitioner as c*ommissario giudiziale* (which translates as a judicial commissioner), whose role is to inform the court of any misconduct by the debtor or any situation, which may impact the restructuring process negatively. The c*ommissario giudiziale* provides independent information to creditors to facilitate their assessment of the proposal. After court confirmation of the plan, the c*ommissario giudiziale* can implement it by adopting the measures that the debtor was supposed to (but did not) adopt under its terms.[20]

2.6.3 Receiver

Under the UK Insolvency Act 1986, Receiver means:

> "(a) a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or (b) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property."[21]

In Ireland a receiver includes, "a receiver and manager of the property of a company" or can be "a manager of the property of a company" or simply a manager of "part of the property of the company" or simply a receiver only of the income arising from that property.[22]

2.6.4 Trustee

A Trustee is the professional responsible for debtor-in-possession insolvency proceedings in Germany.

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[17] Irish Companies Act 2014, s 509(1).
[18] *ibid* s 509(2)
[19] The legislative history of the Irish Examinership process is that it was originally part of a major reform Bill presented as the Companies Bill 1987. However, with the immanent collapse of the AIBP group in late summer of 1990, the examinership legislation was extracted from the full Bill and passed as the Companies (Amendment) Act 1990. The remainder of the legislation was passed as the Companies Act 1990 later that year. All of this legislation is now consolidated in the Companies Act 2014. It would seem that it (and other parts of this legislation) were modelled on US codes. It is interesting to note that the term Examiner appears in the Chapter 11 process as follows:

> "Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest or the U.S. trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the U.S. trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a)."

'Chapter 11: Bankruptcy Basics' (United States Courts 2019) <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> accessed 4th January 2020. The first Irish Examinership was a resounding success rescuing AIBP and a significant part of the Irish Beef Processing industry.
[20] CCI, art 44, para 1b.
[21] UK Insolvency Act 1986, s 29(2). Note following amendment in the Enterprise Act 2002, the appointment of a receiver and manager is not generally available under English law unless this relates to an appointment on foot of a charge over real property.
[22] Irish Companies Act 2014, s 2(9).

In the common law a trustee is not usually a professional position but refers to a person appointed as a trustee under a trust which can arise in many different contexts and is not specifically confined to insolvency. It is not necessary for a trustee to be qualified as such.

However, under US Bankruptcy Law, and Chapter 11 in particular, the debtor in possession is placed in the position of a fiduciary but the presiding official is the US trustee.[23] It is also envisaged that in certain cases, a case trustee can also be appointed, this is sometimes referred to as an examiner. The latter performs monitoring functions in the US system, which is a lesser role than that occupied by an Irish turnaround professional appointed as examiner.[24]

2.6.5 Administrator

Under the Insolvency Act 1986 in England and Wales, an "administrator" of a company means a person appointed under [schedule B1] to manage the company's affairs, business and property.[25] An administrator is an officer of the court.[26] Finally, a person may be appointed as administrator of a company only if he is qualified to act as an insolvency practitioner in relation to the company.[27]

In Romania and Germany, the administrator is the professional responsible for the preventive concordat and insolvency proceeding, respectively. However, a key distinction between the English administrator and the administrator in Romania and Germany is that only in England and Wales does the administrator fully step into the shoes of the company management, taking over business decisions entirely.

In France, an administrator (*administrateur judiciaire*) is tasked with supporting the company in the first instance but may have a more specific role, which is outlined as part of his appointment.

2.6.6 Insolvency Practitioner

In England and Wales, insolvency practitioners must have passed the Joint Insolvency Exam Board and have acquired a minimum of 600 hours of insolvency experience over the previous three years, subject to a minimum of 150 hours per annum, of which half must be work of a type reserved to insolvency practitioners under the Insolvency Act 1986.[28]

In Ireland, an insolvency practitioner is a liquidator or examiner regulated under s 633 of the Companies Act 2014. Receivers are not currently regulated under this legislation.[29]

In Romania, the Insolvency Practitioner carries out insolvency proceedings, voluntary or amicable liquidation procedures, as well as pre-insolvency proceedings provided by law, including financial supervision or special administration measures. In the Netherlands, "insolvency practitioner" is a generic term used for court appointed actors in insolvency proceedings.[30] In Italy, insolvency practitioners need to be signed in a public registry held by the Ministry of Justice.[31] In order to be eligible, it is necessary to attend regular training sessions and to be qualified as a lawyer, accountant, auditor or to have managed or supervised a company (in the latest case, showing adequate entrepreneurial abilities).

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[23] "Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the US trustee or bankruptcy administrator (discussed below), such as monthly operating reports. 11 USC §§ 1106, 1107; Fed R Bankr P 2015(a)." See 'Bankruptcy Basics' (n 18).

[24] "Although the appointment of a case trustee is a rarity in a Chapter 11 case, a party in interest or the US trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a Chapter 11 case. The court, on motion by a party in interest or the US trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 USC § 1104(a)." See 'Bankruptcy Basics' (n 18).

[25] UK Insolvency Act 1986, schedule B1, para 1(1).

[26] *idem* para 5.

[27] *idem* para 6.

[28] 'Making a Career as an Insolvency Practitioner' (R3 2019) <r3.org.uk/media/documents/publications/professional/Making_a_Career_Brochure_V2.pdf> accessed 14 November 2019.

[29] See further proposals to regulate receivers in the 'Company Law Review Group Annual Report 2018' (CLRG 2019) <http://www.clrg.org/CLRG/Publications/CLRG-Annual-Report-2018.pdf > accessed 12 December 2019.

[30] This includes the *bewindvoerder*, i.e. the joint administrator in suspension of payments proceedings and the *curator* i.e. liquidator in bankruptcy proceedings.

[31] CCI, art 356.

2.6.7 Plan Expert (The Netherlands)

The so-called '*herstructureringsdeskundige*' is an expert appointed by the court on the request of either the debtor or creditors. The plan expert prepares and offers a plan to (some of) the creditors and shareholders. The plan expert is required to perform his tasks effectively, impartially, and independently.[32]

2.6.8 PIFOR (Practitioner in the Field of Restructuring)

In the PRD:

> "'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:
>
> (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;
>
> (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;
>
> (c) taking partial control over the assets or affairs of the debtor during negotiations."[33]

2.6.9 The Observer (The Netherlands)

The observer is a court appointed supervisor that can only be appointed when a plan expert has not yet been appointed. Its task is to supervise the realisation of the restructuring plan and, in so doing, take into account the interests of all creditors.[34]

2.7 Pledge, Mortgage, Charge, and Floating Charge

2.7.1 Pledge

A pledge is given as security for the fulfilment of a contract or the payment of a debt and is liable to forfeiture in the event of failure. In Italy, generally, the pledge is possessory but, pursuant to the recent Law n. 119/2016, it can also be, by derogation, non-possessory (meaning that the debtor does not lose the powers of management that he has over the specific asset).

In the Netherlands, a right of pledge can be vested on transferable assets, except on registered property. With a pledge, the pledgee obtains security over the assets for claims until they are paid in full, meaning that the pledgee can sell the pledged goods if the debtor is in default. The proceeds of the sale may be used to repay the outstanding debt in accordance with the ranking of the pledge.

2.7.2 Charge (Fixed)

> "A fixed charge is a charge over a particular asset where the chargee controls any dealing or disposal of the asset by the chargor. A fixed charge ranks before a floating charge in the order of repayment on an insolvency."[35]

2.7.3 Mortgage

"A mortgage is a debt instrument, secured by the collateral of specified real estate property, that the borrower is obliged to pay back with a predetermined set of payments."[36]

In the Netherlands, a right of mortgage can be vested on transferable assets that are registered property. A mortgage is established by a notarial deed which will be included in the public register. The mortgagee obtains security over the assets for claims until they are paid in full, meaning that the mortgagee can sell the asset when the debtor is in default. The proceeds of the sale may be used to repay the outstanding debt in accordance with the ranking of the mortgage.

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[32] WHOA, art 371(1) & (6).
[33] PRD, art 2(1)(12).
[34] WHOA, art 380(1).
[35] 'Fixed Charge' (Practical Law Glossary 2019) <https://uk.practicallaw.thomsonreuters.com/0-107-5768?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 14 November 2019.
[36] 'Mortgage' (Investopedia 2019) <investopedia.com/terms/m/mortgage.asp> accessed 14 November 2019.

2.7.4 Floating Charge

In England and Wales and Ireland, floating charges can be understood with reference to case law. In *Illingsworth v Houldsworth*, Lord MacNaghten stated:

> "[a floating charge] is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."[37]

According to Romer LJ, if a charge had the following 3 characteristics, it would be floating:

> "(i) If it is a charge on a class of assets of a company present and future;
>
> (ii) If that class is one, which in the ordinary course of the business of the company, would be changing from time to time; and
>
> (iii) If you find that by the charger it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets I am dealing with."[38]

In other words, a floating charge can be understood as a charge over assets owned by a company, which allows the charged assets to be bought and sold or otherwise dealt with, during the course of a company's business without reference to the chargeholder, provided that the company is not insolvent. The floating charge crystallises – i.e. becomes fixed - if there is a default or other equivalent event.

Although floating charges developed out of the common law, they do also exist in some other European jurisdictions, for example, Denmark.

2.8 Non-performing Loans

> "A nonperforming loan (NPL) is a sum of borrowed money upon which the debtor has not made the scheduled payments for a specified period. Although the exact elements of nonperformance status vary, depending on the specific loan's terms, 'no payment' is usually defined as zero payments of either principal or interest."[39]

In the context of European banking law, NPLs or, rather, NPEs (exposures) are exposures which are not necessarily past due, as suggested in the definition, but also "unlikely to pay" (to be paid) whilst not yet past due.

2.9 Interim and New Financing

2.9.1 Interim Financing

In the PRD:

> "'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business"[40]

2.9.2 New Financing

In the PRD, "'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan."[41]

2.10 Supervising Judge, Syndic Judge, Notary

[37] [1904] AC 355.
[38] *Re Yorkshire Woolcombers Association* [1903] 2 Ch 284.
[39] 'Non-Performing Loans' (Investopedia 2019) <https://www.investopedia.com/terms/n/nonperformingloan.asp> accessed 14 November 2019.
[40] PRD, art 2(1)(8).
[41] PRD, art 2(1)(7).

These terms arose from specific jurisdiction reports and are explained by the contributors of those jurisdictions. This section is not intended to be a comprehensive description of all administrative authorities involved in restructuring, but will give context for the substantive Chapters to follow. Report 2 will provide a more complete consideration of administrative authorities.

2.10.1 Supervising Judge

A supervising judge is the judge who has the duty to supervise debtor's actions and to authorise its extraordinary actions, if still in possession, and to oversee the procedural and substantial fairness of the procedure. In the Netherlands a '*rechter-commissaris'*, is a judge that is tasked with supervision of the insolvency proceedings, such as tasks.[42] In Italy, after verifying the economic feasibility and legal compliance of the plan, the Tribunal with jurisdiction nominates the *giudice delegato*. (S)he has supervisory powers. In France, a supervisory judge is systematically appointed during the opening order of safeguard proceedings.

2.10.2 Syndic Judge

A syndic judge is a judge with specific powers in bankruptcy and insolvency proceedings in Romania.

2.10.3 Notary

In Spain, a notary is a civil servant who intervenes in certain situations to provide legal certainty. (S)he is the competent authority to examine the requests for extra-judicial payment compositions in relation to natural persons only. A mediator performs this role for extra-judicial payment compositions for corporate entities. In the common law, a notary has a significantly different meaning referring to a person who attests to the veracity of certain documents.

2.11 Patrimonial Liability

Patrimonial liability is a form of civil liability and is a common term in Civil Law jurisdictions; it can just be referred to as "liability".

2.12 Retention of Title

In England and Wales and Ireland, a retention of title clause is a clause that prevents ownership of goods transferring to a purchaser until a seller has been paid in full. While a purchaser may possess the goods in question, legal title has not passed and so the goods are subject to being recovered by a seller should payment terms not be met. However, depending on the nature of the asset and the rights purportedly exercised by the seller, the retention of title clause may be deemed to be a charge and therefore void for want of registration as such.

In the Netherlands, a retention of title is the right of the seller that the title to the goods sold shall remain with the seller and will only be passed to the buyer when the full purchasing price is paid and received by the seller.[43] In Italy, it refers to a contractual provision, which delays the transfer of the property right on a certain asset up until the payment of the last instalment.

While the definition is essentially the same across most jurisdictions, these rights may be treated differently in insolvency, i.e. the right to repossess is not necessarily absolute. In common law countries, the retention of title clause was originally viewed as a European construct which did not translate exactly into the common law, hence the inadvertent creation of a charge described above.

2.13 Right in Rem

In rem is "a Latin term meaning "against a thing." An *in rem* proceeding adjudicates the rights to a particular piece of property for every potential rights holder, even potential rights holders who are not named in the lawsuit. Generally, an *in rem* proceeding must be commenced in the jurisdiction where the subject property is located. The presence of the subject property in the forum state usually satisfies any due process concerns for binding out-of-state claimants to the court's judgment. However, notice of the suit still must be given to all individuals known to have interests therein."[44] This understanding

[42] Dutch Bankruptcy Act, art 64.
[43] Dutch Commercial Code, art 3:92.
[44] 'In Rem' (Practical Law Company 2019)

seems to be commonly accepted amongst our contributors.

2.14 Extra-judicial Payment

In Spain, an extra-judicial payment is one that is obtained as a result of an out-of-court procedure.

2.15 Unsecured, Secured, Preferential, and Subordinated Creditors

2.15.1 Secured Creditor

A general definition of secured creditor is as follows:

> "A secured creditor is any creditor or lender associated with an investment in or issuance of a credit product backed by collateral. Secured creditors have a first-order claim on the pay-outs of a distressed credit investment. If a borrower defaults on a secured credit product the secured creditors have a legal right to the secured asset used as collateral which can be seized and sold to pay off remaining obligations."[45]

Secured creditors are those creditors with a security rights, (a right of pledge or mortgage). In France, secured creditors also include those "secured" by law, for example, employees or tax authorities.

2.15.2 Unsecured Creditor

A general definition of unsecured creditor is as follows:

> "An unsecured creditor is an individual or institution that lends money without obtaining specified assets as collateral. This poses a higher risk to the creditor because it will have nothing to fall back on should the borrower default on the loan. If a borrower fails to make a payment on a debt that is unsecured, the creditor cannot take any of the borrower's assets without winning a lawsuit first."[46]

In addition to this definition which refers to loans, the term "unsecured creditors" also refers to all suppliers of goods, services, utilities and so on who have no collateral or contractual arrangements to secure payment. This can also include involuntary creditors such as tort creditors. Unsecured creditors – also ordinary creditors – are those creditors without a security (a right of pledge or mortgage). Again, this seems to be a commonly accepted understanding.

In France, unsecured creditors are called *créanciers chirographaires.* They do not have a collateral on specific assets but rather benefit from the *droit de gage general*, which means that the creditors have an overall "right of pledge," which guarantees payment of the claims from all of the estate of the debtor, rather than from specific assets. This essentially guarantees a base line right over the entire estate rather than over specific assets to which the debt is associated.[47]

2.15.3 Preferential Creditor

Preferential creditors are generally understood as creditors with a state created priority which gives the creditor priority rights over other creditors.

Preferred creditors may take many different forms or classes, each with a claim that may take precedence over another claimant depending on the jurisdiction. They include:

- Employees: Workers at a bankrupt company who are owed pay for work that has been performed (wages) are the top preferred creditor. Preferential status can also attach to outstanding payments under working time legislation.
- Tax and revenue authorities: Government authorities such as tax authorities may be paid before anyone else (after employees).
- Environmental remediation: When bankrupt companies that have been found to have

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<https://uk.practicallaw.thomsonreuters.com/8-520-2353?transitionType=Default&contextData=(sc.Default)> accessed 15 November 2019.

[45] 'Secured Creditor' (Investopedia 2019) <https://www.investopedia.com/terms/s/secured-creditor.asp> accessed 15 November 2019.

[46] 'Unsecured Creditor' (Investopedia 2019) <https://www.investopedia.com/terms/s/unsecured-creditor.asp> accessed 15 November 2019.

[47] See French Civil Code, art 2284: "Anyone who has a personal obligation is bound to fulfil his commitment on all his movable and immovable property, present and to come." And art 2285: "The debtor's property constitutes the common pledge of his creditors; and the price is distributed among them by contribution, unless there are legitimate legal preferences between the creditors."

caused environmental damage as a result of their business operations, the clean-up costs may receive preferential treatment by the courts in some jurisdictions.

- Tort victims: Victims of such a civil wrong may be given preferred creditor status in some jurisdictions based on their status as an involuntary creditor. Since tort victims did not make the choice to become a creditor to a bankrupt entity, they are generally not penalized. Otherwise these creditors are unsecured creditors.

The following jurisdictions are considered as examples.

In Ireland preferential creditors are recognised in s 621 of the Companies Act 2014. Primarily these creditors are the State in relation to tax debts and employees in relation to outstanding payments. In the UK these were abolished by the Enterprise Act 2002. However, the UK government has indicated an intention to reinstate Crown Preference in its next budget.[48]

In the Netherlands, preferential creditors hold claims, which are given a preference by law and rank higher than unsecured creditors. There are three types of preferential creditors:

(i) the Dutch employee insurance agency (UWV);

(ii) the tax authority; and

(iii) employees with a salary claim that arose prior to the bankruptcy.

2.15.4 Subordinated Creditors (Subordinated Debt)

In the Netherlands, subordinated creditors are creditors that have subordinated their claims to rank after those of ordinary (unsecured) creditors. In France, their repayment depends on the prior repayment of other creditors.

In Austria, subordinated creditors are typically shareholders who granted loans to the debtor, which are regarded as a substitute of equity. Subordinated claims result either from the law – equity replacing loans of shareholders – or from an agreement and are only taken into account after full satisfaction of the creditors of the insolvency proceedings. Subordinated claims feature in the Austrian frameworks. This term is understood similarly elsewhere.

A typical description of subordinated debt is: "Debt that is unsecured and/or ranks for interest and repayment after the senior debt of a company."

For example, subordinated debt may rank below senior debt in the following ways:

- "Repayment of principal.
- Interest margins.
- Security: Senior, second lien and mezzanine debt will typically share the same security package (normally held by a security trustee), which means that the security granted by the borrower and any other obligors will be granted in favour of all the lenders under each of those instruments of debt. However, the intercreditor agreement between the lenders will provide that senior debt will be repaid first from the proceeds of any enforcement of security, followed by second lien debt, followed by mezzanine debt.
- Intercreditor terms: Terms in an intercreditor agreement (or any other financing agreement) by which one creditor (or group of creditors) agrees to subordinate itself in any way to another creditor (or group of creditors) are all examples of what is termed contractual subordination."[49]

2.16 Self-Administration and Debtor in Possession

2.16.1 Self-Administration

[48] 'Changes to Protect Tax in Insolvency Cases' (HMRC Policy Paper 2019) <https://www.gov.uk/government/publications/changes-to-protect-tax-in-insolvency-cases> accessed 6th January 2020.

[49] This is not an exhaustive list. 'Subordinated Debt' (Practical Law Company 2019) <https://uk.practicallaw.thomsonreuters.com/7-107-7330?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 15 November 2019.

Self-administration refers to debtor-in-possession in Germany. In Austria, it refers to the debtor itself administering the assets involved in the insolvency proceedings (under the supervision of an insolvency administrator).

2.16.2 Debtor in Possession

An insolvency or restructuring procedure in which "debtors…remain totally, or at least partially, in control of their assets and the day-to-day operation of their business."[50]

2.17 Court Protection, Stay, and Moratorium

2.17.1 Court Protection

In Ireland, this is the term used to refer to a stay or moratorium. It applies to all creditor claims against the company and any other proceedings relating to the company can only be commenced with leave from the court.[51]

2.17.2 Stay

Though sometimes the terms are used interchangeably, the stay and the moratorium are explained separately below, as the responses received from some contributors indicated that the words were sometimes understood differently.

A stay generally refers to the statutory or otherwise stopping of debt enforcement claims as well as at times other claims against a debtor company.

In Romania, this is the term used to refer to suspension of all forced execution procedures. In Germany, it refers to a stay of enforcement actions. Austria considers the stay to mean that claims of debt execution against the debtor by unsecured creditors are inadmissible. In the Netherlands, the stay and moratorium mean the same thing; a (temporary) suspension of any legal action of creditors to enforce or recover a claim, unless they have obtained permission. In Italy, it refers to a protective measure against creditors' enforcement action, the goal of which is to preserve the going concern - in case of a restructuring procedure - or to ensure a liquidation of the assets in an orderly manner. In Italy, a stay does not hinder litigation, only enforcement and precautionary measures. In Spain, only individual enforcement actions against assets that are necessary for the continuation of the business are stayed, others can be if certain circumstances are present.[52]

2.17.3 Moratorium

In Romania, this is the term used to refer to postponement of payment of public and private debts due, established by law for a certain time or for the period of existence of special circumstances. In Austria, a moratorium only applies to credit institutions in that it consists of the closure of an institution for payment transactions and the prohibition of accepting payments in cash or by bank transfers.

2.18 Intra- and Cross-class Cram-Down

2.18.1 Intra-class Cram-down

This refers to the approval of a plan by a class of creditors if a majority of creditors within that class votes in favour. The majority binds the minority to the plan, once confirmed by the relevant authority.

2.18.2 Cross-class Cram-down

As defined in the PRD, a cross-class cram-down refers to a:

"restructuring plan which is not approved by affected parties in every voting class but is

[50] PRD, art 5(1).
[51] Irish Companies Act 2015, s 520(5).
[52] In the case of assets that are not necessary for the continuation of the business, individual actions will only be stayed when the negotiations that may lead to the adoption of a refinancing agreement are supported by 51 % of financial claims and creditors agreed not to enforce their claims during the negotiations. In the case of secured claims, foreclosure proceedings are stayed until the adoption of an extra-judicial payment composition, or the filing of a confirmation request for a refinancing agreement, or the end of the three months period foreseen in art 5(5) bis of the Spanish Insolvency Act for the adoption of a refinancing agreement or an extra-judicial payment composition. Public claims are not affected by the stay.

confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement and becomes binding upon dissenting voting classes."[53]

2.19 Absolute Priority

As defined in the PRD, the absolute priority rule aims to:

> "…protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule')."[54]

2.20 Relative Priority

The following is largely accepted as being a relative priority rule under the PRD:

> "dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class…"[55]

2.21 Unfair Prejudice

Article 11(2) of the PRD states that in relation to confirmation of plans and the operation of a cross class cram down provision:

> "Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."

In the Irish Examinership procedure, unfair prejudice is one of the concepts used in the test provided for in the legislation which guides the court in confirming a rescue.[56] Section 541 of the Companies Act 2014 provides that on presentation by the Examiner of the compromise or arrangement, the court shall not confirm any proposals unless "at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals" and it is satisfied that "the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation" and the proposals are not "unfairly prejudicial" to the interests of any interested party..."[57]

Under the UK Insolvency Act 1986, "any creditor who was entitled to vote at the creditors' meeting may apply to court to challenge the CVA on grounds of unfair prejudice or material irregularity."[58] "Where…a group of creditors' uses its votes to deprive a creditor or group of their rights against third parties, while preserving its own rights, the courts are likely to find that unfair prejudice was suffered."[59] Similarly, the court will assess a Scheme of Arrangement and will approve only if it is "satisfied that the scheme does not operate unfairly between groups and will ask whether an intelligent and honest member of the class could reasonably have approved the proposal."[60]

Under the WHOA, unfair prejudice means judicial review of a restructuring plan where the court will assess if the restructuring plan provides unfair preferential treatment of one or more creditors or shareholders over other creditors or shareholders.

2.22 Best Interest of Creditors

Under the PRD, "satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed."[61] This test has also

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[53] PRD, art 11(1).
[54] PRD, recital 55.
[55] PRD, art 11(1)(c).
[56] Companies Act 2014, s 541(4)(b)(ii).
[57] See generally John O'Donnell and Jack Nicholas, *Examinerships* (Roundhall 2016) and Lynch Fannon & Murphy (n 13) chapters 12 and 13.
[58] Finch & Milman (n 3) 436-437.
[59] *Re a Debtor (No 101 of 1999)* [2001] BCLC 54 and *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] BCC 500.
[60] Finch & Milman (n 3) 411; *Re Linton Park Plc* [2008] BVV 17 and *RAC Motoring Services Ltd* [2000] 1 BCLC 307.
[61] PRD, recital 52.

been developed in Irish law.[62]

2.23 Conclusion and Transition

This Chapter has introduced some commonly used terms as well as jurisdictional specific terms in order to dispel some of the confusion associated with them. The next Chapter will explore the way in which cross-border insolvencies are regulated within the EU. This will include some background on the development of the European Insolvency Regulation (Recast) through a series of failed treaties and conventions beginning in the 1970s. The key features and function of the EIR Recast will also be described as well as the influence it has had on choice of forum in the European Union. This leads on to issues of substantive harmonisation in the EU. The PRD aims to address harmonisation of restructuring measures. A consideration of the interface between the EIR Recast and the PRD leads on to the prospect that some preventive restructuring frameworks may effectively avoid inclusion in Annex A of the EIR Recast. This could potentially lead to the development of procedures that will compete across jurisdictions due to the ability to choose a forum without reference to the EIR Recast. Chapter three provides background commentary on the regulation of cross-border insolvency generally, while highlighting some of the issues that could arise depending upon the characteristics of the preventive restructuring frameworks that are eventually implemented.

[62] Lynch Fannon & Murphy (n 13) (Page No?) and Irene Lynch Fannon, 'Examinership: Approval of Schemes — Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as Amended)' (2015) 1 Commercial Law Practitioner; *Re SIAC Construction Limited* [2014] IESC 25, [2014] ILRM 357

3. Chapter 3: The Regulation of Cross-Border Insolvency and Restructuring in the EU

3.1 Introduction: Cross-Border Insolvency in the EU

Insolvency law has a millennia old history, with some regimes tracing the roots of rules regulating the relationship between debtors and creditors as far back as the Hammurabi dynasty in Babylon in around 2250 B.C.[1] As commerce has developed over the centuries, so have the laws regulating the relationship between debtors and creditors.[2] The institutions of insolvency are said to have been transmitted to modern European commerce by bankers in Lombardy, Italy. The term 'bankruptcy' is said to be derived from *banca rotta,* a Latin phrase from ancient Rome that refers to the breaking of an insolvent trader's bench to prevent him from continuing his business.[3] The needs of modern commerce – long-distance travel to and from the *foires* of the Champagne region of France; long-term credit terms; and the physical difficulty of transporting literally hard currency - led to the rules of the *lex mercatoria* in the Middle Ages. This provided certainty for commercial transactions and became the foundation for Western commercial law and, by extension, cross-border insolvency rules.[4] Over the centuries, insolvency has evolved from a purely punitive process to a process whereby unlucky entrepreneurs (and individuals) could achieve a second chance at their business models. However, the stigma of bankruptcy and insolvency has faded to different degrees among the Member States of the European Union, leading to a fair variety of approaches in insolvency frameworks. The multiplicity of approaches and the increased prevalence of cross-border insolvency cases led to actions in the EU aimed at both coordinating and harmonising insolvency and restructuring law. The latter of these aims has thus far been the most difficult to achieve owing to the jurisdiction specific characteristics of the underlying aims and approaches to resolving business distress among the Member States.

3.2 History and Development of European Insolvency Coordination

A number of conventions on cross-border insolvency were agreed among a selection of jurisdictions before the European Insolvency Regulation (Recast) as it is now known.[5] The development of the European Community in 1957 set the groundwork for simplifying the formalities governing reciprocal recognition and enforcement of judgments, which came into force in the Brussels Convention of 1968.[6] The first European Preliminary Draft Insolvency Convention[7] came out of a working group in the 1970s and was aimed at establishing a single jurisdiction to deal with insolvency matters. This was a common theoretical idea (which had engendered considerable debate) among American insolvency academics, in addition to one or two academics at this side of the Atlantic[8]. It included conflicts of law rules that

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[1] L Levinthal, 'The Early History of Bankruptcy Law' [1918] U Pa L Rev 223, 230.
[2] Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (4th edn, LexisNexis 2017) 7.
[3] Paul Omar, *European Insolvency Law* (Ashgate 2004) 3.
[4] Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 84.
[5] Paul J Omar, 'Genesis of the European Initiative in Insolvency Law' (2003) 12(3) IIR 147, 147.
[6] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 25 September 1968 [1972] OJ L 299/ 32, replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.
[7] Draft Convention E Comm Doc 3.327/1/XIV/70-F on bankruptcy, winding-up, arrangements, compositions and similar proceedings [1976] (Preliminary Draft Insolvency Convention).
[8] See for example Lynn M LoPucki, 'Co-operation in International Bankruptcy: A Post Universalist Approach' (1999) (84)3 Cornell L Rev 696; 'The Case for Cooperative Territoriality in International Bankruptcy' (1999-2000) 98 Mich L Rev 2216; 'Universalism Unravels' (2005) 79 Am Bankr L J 143; Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Mich L Rev 2178; Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276; 'Universalism and Choice of Law' (2005) 23 Penn St Int'l L Rev 625; 'Locating the Eye of the Financial Storm' (2006-2007) 32 Brook J Int'l L 1019; 'A Comment on Universal Proceduralism' (2010) 48 Colum J Transnat'l L 503; Edward J Janger, 'Universal Proceduralism' (2007) 32 Brook J Int'l L 819; 'Virtual Territoriality' (2010) 48 Colum J Transnat'l L 401; 'Reciprocal Comity' (2011) 46 Tex Int'l L J 441; Robert K Rasmussen, 'Where are all the Transnational Bankruptcies? The Puzzling Case for Universalism' (2007) 32(3) Brook J Int'l L 983; Edward S Adams and Jason K Fincke, 'Coordinating Cross-border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43; Alexander M Kipnis, 'Beyond UNCITRAL:

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were intended to deal with the assertion of jurisdiction by more than one court.[9] The insolvency convention went back to the drawing board several times for a number of reasons, including the accession of new Member States to the EU.[10] Despite over a decade of work on the insolvency convention, it was abandoned in 1985 after the failure to agree on a second draft.[11]

In 1984, the Council of Europe tried its hand at introducing an insolvency convention. In their draft, the principle of universality espoused by the convention drafted in the 70s, was mitigated by introducing more territorial concepts. This would allow-for domestic law to trump the law of the leading insolvency jurisdiction, in some cases. It introduced a variety of territorial rights, such as the ability of the liquidator to exercise rights abroad, the rights of creditors to lodge claims abroad, and by suggesting prescriptions about the possibility of opening a secondary insolvency proceeding.[12] The Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention)[13] was introduced in 1995, but it failed for lack of universal adoption and ratification.[14]

An ad hoc working party was convened in the European Community by the Community Ministers of Justice in the early 1990s under the chairmanship of Manfred Balz. In 1995, a new 'Convention on insolvency proceedings was introduced,' which contained the possibility of opening secondary proceedings,[15] adopting the deviation from universality first introduced by the Istanbul Convention. It was in this draft convention that the modern version of the European Insolvency Regulation[16] emerged. This was accompanied by the Virgos Schmit Report,[17] which explained the strategy behind the convention and the historical reasons for it. This Convention was more complete than the Istanbul Convention, but it did not obtain the signature of all Member States – the United Kingdom was the only dissentient.[18]

At the turn of the millennium, the European Parliament recognised that the time was likely ripe for another attempt at coordinating insolvency, so it instructed the Commission to convert the Insolvency Convention into a regulation and to use the Virgos Schmit Report as the basis for an explanatory memorandum.[19] Given the decades of work in trying to come up with a European method of dealing with cross-border insolvencies, the passing of the EIR was not a shock. The initiative aimed to improve and speed up cross-border insolvency proceedings as well as improve the functioning of the internal market. Among the many elements of the Regulation the idea of cross border judicial co-operation was included. The Regulation was accepted by all Member States, including the UK, and was adopted on 29th May 2000, and published on 30th June 2000. It was largely similar to the original proposals and came into effect on 31st May 2002.[20]

In 2012 the time came to review the EIR,[21] a task undertaken by a group of scholars from the University of Heidelberg and the University of Vienna.[22] The rapporteurs agreed that shortcomings of the EIR concerned its scope, jurisdiction, secondary proceedings, the publicity of secondary proceedings, and the lack of rules relating to groups of companies.[23] The recast of the EIR was therefore conceived with the intention of further embracing the rescue culture; dealing with groups of companies; and considering IT facilities. Among the options presented, it was decided to modernise the existing regulation while

Alternatives to Universality in Transnational Insolvency' (2008) 36(2) Denv J Int'l L & Pol'y 155; Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.

[9] Omar (n 5) 149.

[10] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 14.

[11] See the E Comm Doc III/D/72/80 (Draft Convention); Paul J Omar, 'Genesis of the European Initiative in Insolvency Law' 12(3) IIR 147, 154-155.

[12] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 14.

[13] European Convention ETS No 136 on Certain International Aspects of Bankruptcy [1990] (Istanbul Convention).

[14] Omar (n 3)155-157.

[15] Bork & Mangano (n 10) 14-15.

[16] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 (hereafter referred to as the "EIR").

[17] Miguel Virgos and Etienne Schmit, 'Report on the Convention on Insolvency Proceedings' (Council of the European Union 1996).

[18] Bork & Mangano (n 10) 15; Omar (n 3) 161.

[19] Bork & Mangano (n 10) 15.

[20] Omar (n 3) 162-163; Bork & Mangano (n 10) 15.

[21] Required by EIR Art 46, which states that "no later than 1 June 2012 and every five years thereafter, the Commission shall present to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation."

[22] Burkhard Hess, Paul Oberhammer, and Thomas Pfeiffer, et al, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' (JUST/2011/JCIV/PR/0049/A4, University of Heidelberg and University of Vienna 2012) (Heidelberg-Luxembourg-Vienna-Report).

[23] Bork & Mangano (n 10) 16-17.

preserving the balance between creditors and between the competing principles of universality and territoriality.[24] The EIR Recast was passed on 20th May 2015.[25]

3.3 The Key Features of the EIR Recast

The EIR contains rules that provide procedural uniformity for European cases in the area of insolvency law (relating to both corporate and personal insolvency) and related procedures. It sets out the parameters for establishing Member State jurisdiction, choice of law, and the recognition and enforcement of foreign insolvency judgments.[26] (The JCOERE project relates to corporate entities only).

The EIR applies to companies whose Centre of Main Interests (COMI) is in a Member State of the European Union. It is designed to provide uniform rules regarding choice of jurisdiction (forum) and choice of law. Generally, the country possessed of the COMI has exclusive jurisdiction to open main insolvency proceedings and these must be given immediate, full, and unqualified recognition in every other affected Member State. As to choice of law, the general principle (although there are important exceptions) is that the law of the Member State within which main proceedings are opened will govern the conduct and effect of the insolvency proceedings.[27] By providing full and unqualified recognition, the EIR applies the concept of limited universality, meaning that the proceeding is universal and produces enforceable effects throughout the EU, including over the authority of the insolvency professional and over all creditors of the entity in the whole of the EU. The limited aspect of the EIR is associated with the provisions in the EIR which recognise the ability of parties to open a secondary proceeding in another Member State.[28] Primarily, secondary proceedings are intended to protect local creditors whose claims might be treated differently in the primary proceedings due to differences in legal frameworks.[29] To support this aim, the Regulation also provides for choice of law provisions in relation to certain specific issues.

The effectiveness of the EIR in curbing forum shopping between EU jurisdictions also depends to some extent on the harmonisation of substantive rules. Where there are significant differences in legal frameworks and no "gatekeeping" devices present to prevent it, debtors and their practitioner advisors are likely to select a jurisdiction that most benefits their particular situation and outcome goals.[30] There are debates surrounding the concept of choice of forum. It could be said that the flexibility of an effective procedure in one jurisdiction will benefit the EU economy overall, as well as those professionals of a jurisdiction who run such procedures.[31] On the other hand, there is a view that choice of forum is driven by the search for particularly favourable legal frameworks. In academic debates, choice of forum is sometimes associated with claims that it engenders a 'race to the bottom' but not all commentators agree that this is a noticeable effect. The purpose of the EIR is to prevent abusive forum shopping, where an entity has no real connection to a particular jurisdiction. The COMI test determines the selection of a jurisdiction by the debtor. It must be borne in mind that the requirement to apply the COMI test and establish jurisdiction only applies to procedures listed in Annex A of the EIR and this is repeated in the EIR Recast.

Prior to the passing of the Recast EIR, a number of Member States had also developed supplementary legislation or rules that required national courts to cooperate with foreign insolvency courts where main proceedings had been opened.[32] Codes and best practice guidelines were also developed in the time between the passing of the original EIR and its Recast.[33] The EIR Recast refers to these guidelines in

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[24] Commission Staff Working Document Impact Assessment SWD (2012) 416 final accompanying the document Revision of Regulation (EC) 1346/2000 on insolvency proceedings [2012].
[25] Bork & Mangano (n 10) 23.
[26] *idem* 25.
[27] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325, 339.
[28] Bork & Mangano (n 10) 15; Emilie Ghio, 'Cross-border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2019) 29(12) ICCLR 713, 722.
[29] Ghio (n 28) 722-723.
[30] Bork & Mangano (n 10) 92.
[31] Gerard McCormack, 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Priv Int L 41, 48 and 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) CLJ 169.
[32] Bork & Mangano (n 10) 199.
[33] See for example the European Communication and Co-operation Guidelines for Cross-Border Insolvency of 2007 (CoCo Guidelines); the EU Cross-Border Insolvency Court-to-Court Co-operation Principles and Guidelines of 2014 (Judge Co Guidelines); and The III/ALI Global Principles for Co-operation in International Insolvency Cases.

Recital 20.[34] It was however determined that the Recast regulation should also contain a prescription of an extended obligation for courts to cooperate and communicate.[35] As such it introduced Articles 41-44 and Articles 56 and 57 into the Recast EIR. These are based on Art 4 of the Treaty of the European Union (TEU) and the principles of sincere co-operation and mutual trust, which in turn aim to establish an area of freedom, security, and justice, and on the provision concerning judicial co-operation in civil matters.[36]

Regardless of whether a procedure is included in Annex A of the EIR Recast, continued differences in insolvency and restructuring frameworks will continue to provide a broader menu of choices to cross-border enterprises in the EU. Entities will continue to either shift COMI within the rules of the EIR Recast, or to utilise frameworks that are not included within the Regulation if they provide an easier means of access along with better potential outcomes. We would view this as particularly true of rescue frameworks. These continued differences stem from the difficulty mentioned at the beginning of this Chapter that the EU has had in its harmonisation attempts regarding insolvency law frameworks.

3.4 The Harmonisation Debate over European Insolvency and Restructuring

Harmonisation has been a topic of debate in the EU since the creation of the European Economic Community in 1957. It is a process in which diverse elements, in this case the laws of Member States, are combined or adapted to each other to form a coherent whole, while also retaining their individuality.[37] Uniform and harmonised laws help to avoid conflicts of law situations, so harmonisation efforts tend to be practical in nature.[38] However, unification and harmonisation can only be achieved if approved by the EU Member States.[39].

In our context, harmonisation of insolvency law in the EU has continued to be a topic of discussion. In 2010, INSOL Europe prepared a report discussing the need and feasibility of harmonisation of insolvency law.[40] This report was presented to the European Parliament Committee on Legal Affairs and advocated substantive harmonisation in several areas of insolvency law, including thresholds, filing, verification, rescue plans, ranking and priority, among many others. Beyond supporting improvements in procedure connected with the EIR Recast, the INSOL report also appeared to support real harmonisation of insolvency law across the EU.[41] The INSOL report argued a familiar point, that the differences in insolvency frameworks between the Member States are an incentive for firms to forum shop in order to use the most convenient and financially beneficial insolvency framework and venue, regardless of the location of their assets or activities.[42] The INSOL report also contended that forum shopping jeopardises transparency and legal predictability while decreasing the chances of restructuring insolvent firms.[43] What followed, however, was primarily the reform of cross-border insolvency *procedural* rules in the EIR Recast, rather than introducing any harmonised substantive rules. The PRD is an example of a more ambitious harmonisation project:

> "The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including the preservation and creation of jobs."[44]

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[34] Bob Wessels, 'Themes of the Future: Rescue Businesses and Cross-Border Co-operation' (2014) 27(1) Insolv Int 4, 8.
[35] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: the Enemies of Co-operation in European Cross-Border Cases' (2017) 26(3) IIR 314, 314-315.
[36] Treaty on the Functioning of the European Union (TFEU) Art 67 and 81.
[37] Martin Boodman, 'The Myth of Harmonisation of Laws' (1991) 39(4) American J Comp L 699, 700-701 citing the *Oxford English Dictionary* Volume 5, 98 ("harmony").
[38] John Goldring, 'Unification and Harmonisation of the Rules of Law' (1978) 9 Fed L Rev 284, 285.
[39] *idem* 286.
[40] INSOL Europe, 'Harmonisation of Insolvency Law at EU Level' (European Parliament DG Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs 2010).
[41] Paul Omar, 'Modern Prospects for European Insolvency Law Harmonisation' (15 September 2019) <https://www.globelawandbusiness.com/blog/modern-prospects-for-european-insolvency-law-harmonisation> accessed 9th December 2019.
[42] Federio M Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 Eur Bus Org L Rev 175, 176.
[43] INSOL Europe (n 40) 26-27.
[44] PRD, recital 8. See also Horst Eidenmuller and Kristin van Zweiten, 'Restructuring the European Business Enterprise: the European Commission's Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16 Eur Bus L Rev 625, 650.

By pursuing a harmonisation strategy, the Commission is acting in line with its prior policies.[45] Harmonisation is also a "remedy against negative externalities produced by domestic legislations of Member States."[46] If insolvency laws were harmonised in the EU, regulatory arbitrage and forum shopping at the expense of creditors and other stakeholders would be reduced. In addition, all creditors would know in advance with certainty which rules would apply in the case of their debtor's default.[47] A drive towards wholesale harmonisation may, however, effectively ignore the jurisdiction specific characteristics of individual Member States, including local interests and needs.[48] Therefore, sometimes for good reason, harmonisation of insolvency has been considered impractical and unfeasible. However, in order to introduce an effective EU wide restructuring regime aimed at rescuing distressed businesses, some level of harmonisation is needed to discourage forum shopping and reduce the knock-on effects that this has on creditors and other stakeholders.[49]

On the other hand, one could take the view that it has long been recognised that harmonisation of traditional insolvency proceedings is not politically feasible.[50] The Commission's aim of harmonising restructuring processes seems to be driven mainly by the goal of creating equal refinancing conditions for all businesses in Europe under financial distress.[51] While the Commission's initial Proposal for a Preventive Restructuring Directive[52] created a set of minimum principles, upon which a preventive restructuring framework could be built among the Member States it became clear, however, through the draft iterations of the PRD, that significant political resistance was met, which is reflected in the compromised version that was eventually passed. [53]

The overall result of the implementation of the PRD is likely to be quite far from a fully harmonised position, with the consequence that debtors may continue to suffer from an uneven playing field when it comes to the prospect of achieving a value-preserving restructuring when facing financial distress.[54] The options provided for in the PRD means that there will be divergences in design choices among the Member States.[55] This will likely result in a raft of new preventive restructuring frameworks[56] that meet the PRD's minimum standards but remain quite different given the scope afforded to implementation. Criticisms of the PRD are reflected in the following statement:

> "At the end of the day, it appears that the drafters of the Directive sought to address pressures and objectives which are too divergent to be coherent. The preventive proceedings, as initially envisaged, were largely inspired by the second-generation Chapter 11 restructurings, but also by the British Schemes of Arrangement, while keeping in tune with the lessons derived from the law and economics movement."[57]

As a result, where possible, debtors may choose to shop for the most convenient and beneficial forum for their restructuring services.

3.5 Jurisdiction in Cross-Border Restructuring Cases: Forum Shopping.

Nevertheless, one of the key aims of the EIR Recast is to reduce abusive forum shopping:

> "It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a

[45] Horst Eidenmuller and Kristin van Zweiten *idem* 651.
[46] Mucciarelli (n 42) 197.
[47] *ibid.*
[48] Alberto Alesina and Enrico Spolaore, 'On the Number and Size of Nations' (1997) 112 Quarterly J Econ 1030.
[49] Gert-Jan Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders' (2018) 27 IIR 150, 165.
[50] Vasile Rotaru, 'The Restructuring Directive: a Functional Law and Economics Analysis from a French Law Perspective' (2019) Working Paper published by Droit et Croissance.
[51] Horst Eidenmuller, 'Contracting for a European Insolvency Regime' (2017) 18 Eur Bus Org L Rev 273, 275.
[52] Proposal for a directive COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD).
[53] Jennifer Payne, 'Restructuring Reform in Europe: the European Commission's draft Directive' (2017) March JIBFL 149, 149-150; Horst Eidenmuller, 'Contracting for a European Insolvency Regime' (2017) 18 Eur Bus Org L Rev 273, 286.
[54] Eidenmuller & van Zweiten (n 45) 652.
[55] *idem* 651.
[56] Reinhard Bork, 'Preventive Restructuring Frameworks: A "Comedy of Errors" or "All's Well that Ends Well?" (2017) 14(6) ICR 417, 425..
[57] Rotaru (n 50) 20.

> more favourable legal position to the detriment of the general body of creditors (forum shopping)."[58]

The EIR Recast, however, has been unable to definitively preclude forum shopping given the often-liberal interpretation of COMI by some national courts. This can happen in circumstances when forum shopping is perceived as a means to increase the chances of a successful and efficient restructuring, which is in the interests of all creditors.[59]

In other systems such as the US, choice of forum can be key for the debtor to maximise returns to creditors and shareholders, as well as to avoid costs associated with considerable court oversight. Other elements such as the control by the debtor and the balance of favour between creditors (mainly the secured creditors) and debtors are factors in forum choice.[60] The choice of a forum is governed by jurisdictional rules that dictate the level of association that a debtor must have with a jurisdiction in order to use its insolvency procedures. Where such rules are lax, it is more likely that debtors will try to utilise the most favourable jurisdiction for the resolution of their financial difficulties.[61] However, gatekeeping rules are only effective if they cover the procedures that attempt to circumvent them:

> "…those who want a special legal regime governing loss distribution when a firm fails or closes at the same time it defaults to creditors must expect to see in bankruptcy many cases that do not belong there, and many cases outside bankruptcy that belong in bankruptcy."[62]

Applying this analysis to the European context, even though the aim of the EIR Recast is to avoid this kind of forum shopping, if it is possible to create a flexible rescue procedure that meets all of the criteria of the PRD while keeping the procedure outside of the remit of the EIR Recast, a jurisdiction may well choose to do so. This decision would be in order to compete with jurisdictions such as the UK, which continues to benefit from global restructurings utilising the Scheme of Arrangement. In relation to the UK prior to Brexit the Scheme of Arrangement was not covered by the EIR Recast and this is therefore a perfect example of the problem raised in this section.

Recital 13 of the PRD refers to the EIR Recast by claiming that the PRD should be "fully compatible and complementary to that Regulation by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness."[63] This Recital also recognises that in order to achieve compatibility with the EIR Recast, the procedures created in implementation of the PRD provisions may also be included in Annex A of the EIR Recast, and therefore subject to the test of COMI. However, Annex A has several specific parameters to be satisfied for the inclusion of procedures in it, such as the requirement that proceedings be public and collective. This means that all or a significant proportion of creditors should be included as long as the proceedings do not affect the claims of creditors who are not involved.[64] Further, procedures in Annex A should also be those in which assets and affairs of a debtor are subject to control or supervision by a court.[65] The provisions of the PRD do not necessarily include these same parameters, which gives jurisdictions implementing the PRD the ability to create procedures that do not satisfy the Annex A criteria and therefore fall outside of it.

It has been shown that the non-inclusion in Annex A of a procedure may lead to greater use of an effective and efficient procedure throughout the EU and globally as the COMI test does not have to be met. The UK Scheme of Arrangement is a prime example of a procedure that has benefited from extensive use by many different jurisdictions. This is partly due to the fact that it is effective and fast,

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[58] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19, recital 5.

[59] See *Re Codere Finance (UK) Ltd* (2015) EWHC 3778 (Ch):

> "In a sense, of course…what is sought to be achieved in the present case is forum shopping… In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts, but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."

[60] Westbrook 'Theory and Pragmatism' (n 61) 460.

[61] For a general discussion on choice of forum and forum shopping, see Douglas Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 U Chi L Rev 815 and Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am Bankr L J 457 and 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2279.

[62] Baird (n 61) 819.

[63] PRD, recital 13.

[64] EIR Recast, art 2 (1).

[65] EIR Recast, art 1(1)(c).

but also widely accessible because it does not require COMI, only a "sufficient connection" to the UK to establish jurisdiction. While the absence of the Scheme from Annex A means that they will not have EU wide recognition, it also means that UK courts have "a wider jurisdictional base in that they may sanction schemes where the relevant foreign company has a 'sufficient connection' with the UK even though its COMI may not be in the UK."[66] Sufficient connections have been found in circumstances that appear to be tenuous, such as relying on the extension of credit facilities containing English choice of law and jurisdiction clauses.[67] Thus, there are clear benefits to not fitting within the EIR Recast. Where the EIR Recast does not apply, there are other legal methods of recognising and enforcing decisions on insolvency cases in European, private international, and domestic law.

3.6 Recognition and Enforcement: Including Restructuring Frameworks in Annex A

There are two main schemes of recognition and enforcement for civil and commercial proceedings available to companies in the EU, which are mutually exclusive when it comes to insolvency proceedings. The Brussels 1 Regulation applies to civil and commercial proceedings while specifically excluding insolvency and analogous proceedings from its remit.[68] Instead, these insolvency proceedings are governed by the EIR.[69] However, the term "analogous proceedings" is not that helpful as the EIR does not expressly define what could be proceedings related to or analogous to insolvency.[70] This uncertainty has not been fully resolved by case law.[71]

The UK has managed to utilise the Brussels 1 Regulation to increase the effectiveness of Schemes of Arrangement. However, there are gaps[72] between these two Regulations, and the Scheme of Arrangement does not appear to fit neatly under either. No one is being sued in a Scheme, so it is difficult to fit it within Brussels I, as it is technically a procedure of UK company law, governed by Part 26 of the Companies Act 2006. Because it is not an insolvency procedure but a procedure based in company law, it is specifically excluded under Recital 16 which states that the EIR Recast will not cover "proceedings that are based on general company law not designed exclusively for insolvency situations" as these "should not be considered to be based on laws relating to insolvency." In contrast, the EIR Recast clearly states that:-

> "This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation: a debtor is totally or partially divested of its assets and an insolvency practitioner appointed."[73]

It will also apply where the assets of a debtor are subject to court control or supervision;[74] if a temporary stay is granted to enable negotiations.[75] It adds a further line that potentially brings procedures enacted subsequent to the PRD within the EIR Recast:

> "Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities."[76]

The non-inclusion of a procedure in Annex A[77] will explicitly limit the application of the EIR Recast. If a restructuring process is not in Annex A, the Regulation will not apply.[78] Despite its non-inclusion in the EIR, the global use of the English Scheme has proved advantageous to the UK, allowing it to become a global hub for insolvency and restructuring. There is nothing in the PRD that requires that the new procedures are entered into Annex A. For example, if the new restructuring procedure is derived from

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[66] Gerard McCormack, 'Reconciling European Conflicts and Insolvency Law' (2014) 15 EBOR 309, 319.
[67] *Re Drax Holdings Ltd* [2004] WLR 1049.
[68] See Brussels 1 Regulation, art 1(2)(b).
[69] See Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR 1-767.
[70] McCormack (n 66) 315.
[71] Case 133/78 *Gourdain v Nadler* [1979] 3 CMLR 180.
[72] McCormack (n 66) 317.
[73] EIR Recast, art 1(1)(a).
[74] EIR Recast, art 1(1)(b).
[75] EIR Recast, art 1(1)(c).
[76] EIR Recast, art 1(1)(c) – first sub paragraph.
[77] EIR Recast, art 2(4) and also referred to in art 1(1)(c) second sub paragraph.
[78] Case C-461/11 *Ulf Kazimierz Radziejewski*.

a nation's company law framework, as opposed to its insolvency framework,[79] the framework will not be covered by the EIR Recast.

If the aim of the Commission was to ensure that the EIR Recast and the PRD dovetail perfectly, the discussion in the previous paragraphs, and the example of the UK Scheme of Arrangement, raises questions over this policy goal. In contrast, however, the Irish Examinership, and the French Sauvegarde are covered by Annex A and the EIR Recast. This issue has been considered by some commentators,[80] but will be discussed further in JCOERE Project Report 2.

That said, there are many benefits to being included under the EIR Recast that go beyond simply competing in the global restructuring market, as it provides certainty and foreseeability of outcomes, which as aforementioned, provides a positive environment for effective co-operation and communication in cross-border restructuring cases.

While the PRD is unlikely to lead to the complete harmonisation of preventive restructuring frameworks, allowing for the flexibility that it does, means Member States will be able to adapt their restructuring frameworks to the real conditions of their markets. As noted by Berkowitz, Pistor, and Richard:

> "…the economic efficiency of insolvency law depends on the economic conditions and characteristics of the financial markets of each country, as well as the sophistication of the institutions and actors involved in the restructuring of a viable business."[81]

Accordingly, the argument could be made that too much harmonisation in this area could have a counterproductive effect on Member State economies, as it would not be possible to fully adapt the frameworks to domestic economic conditions. Regardless, there is likely to be some harmonisation around a common core of the PRD,[82] and the introduction in general of more effective and efficient restructuring frameworks will be good for the economy of the EU.

3.7 Conclusion

Chapter 3 has explored the history and background of cross-border insolvency and the developments in coordination of cross-border insolvency cases over time. In the EU, this culminated in the introduction most recently of the EIR Recast, which aims to coordinate cross-border cases procedurally without introducing any aspects of substantive harmonisation of insolvency law. The PRD, however, is the first attempt of the EU to introduce harmonisation in what is essentially insolvency-like procedures aimed at preventing formal insolvency. Chapters 6,7, and 8 address potential divergences in the Member States.

3.8 Chapter 4: Context of Preventive Restructuring in the EU

Chapter 4 will explore the evolution of preventive restructuring in the EU, as it has emerged out of normal insolvency frameworks. This will include an analysis of the underlying insolvency law theories. As the idea of a collective procedure occurring prior to insolvency is fundamentally contrary to traditional insolvency law principles, there are many debates and controversies among academics. These will be discussed in detail. The more controversial provisions include the stay or moratorium, aspects of majority decision-making, and cross-class cram-down. Apart from the obvious impairment of creditors rights and whether that is indeed fair, the justification of compelling dissenting classes of creditors (cram-down) has created a tremendous amount of controversy. This may also cause significant differences in the frameworks implementing the PRD which must be introduced by the end of 2021.

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[79] Dominik Skauradszun and Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' (2019) 16(4) ICR 193, 200.
[80] Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Preventive Restructuring Directive and the Recast European Insolvency Regulation.' (2019) 77 Eurofenix 22.
[81] Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 European Economic Rev 165.
[82] Rotaru (n 50) 23.

4. Chapter 4: Context of Preventive Restructuring in the EU

4.1 The Evolution of Corporate Rescue and the European Rescue Culture

The modern concept of corporate rescue has existed in some Member States for many decades, since the 1960s in some places. This development is associated with a realisation that, in terms of resolving corporate financial distress, what actually mattered for the benefit of national economies was the continued existence of a viable company or its business and the associated benefits to individuals and communities.[1] Today, corporate rescue is associated with the rehabilitation of companies that are on the brink of collapse in order to salvage individual undertakings, restore production capacity, preserve employment, and ensure the continuation of investment and capital rewards.[2] The idea of corporate rescue has, however, been met with controversy and debate as to what the ultimate benefit of rescuing a company might be. Issues include whether rescue 'works' in the long term, the extent to which the rights of pre-existing creditors' are abridged, and the anticompetitive effects of rescue.[3] Nonetheless, rescue is now accepted in many jurisdictions and has been identified as a specific policy goal in the European Union, reflected in the PRD.[4]

This Chapter will explore the conceptual development of preventive restructuring and pre-insolvency procedures; it will examine the arguments supporting these ideals, and their conceptual problems. The views presented hereunder are not necessarily the opinions of the JCOERE Project Team, unless otherwise stated, rather the chapter represents the attempt of the project to canvas academic opinions. The Chapter will continue by exploring the evolution of preventive restructuring in the European Union, which will connect with the content of Chapter 5. The provisions that may present obstacles to judicial co-operation, either because of their implementation or because of conflict with underlying legal principles in individual Member States, will be explored, providing a clear link to Chapters 6-8. More specifically, the academic commentary surrounding the stay; majority rule in voting; and the concept of the cross-class cram-down, including absolute and relative priority, will be considered. The theoretical issues surrounding the priority for interim or rescue financing during a restructuring plan will also be explored. In addition, this Chapter will consider the typical tests that form part of the confirmation process under the PRD~~,~~ namely the 'best interests of creditors' and the 'unfair prejudice' standards. Finally, this Chapter concludes with a transition into Chapter 5, which discusses the evolution of the PRD since the 2014 Recommendation on a New Approach to Business and Insolvency.[5]

4.2 Preventive Restructuring: Principles and Context

4.2.1 Insolvency Theory

The objective of traditional insolvency law which relies on collective processes is based on the idea that all (unsecured) creditors are treated proportionately, and a collective execution is directed against all of the property of the debtor for the common benefit, while at the common expense of all creditors.[6] If all creditors acted in a purely self-interested manner, rushing to satisfy their claims before others, the result would be the destruction of collective value.[7] In the context of rescue this can lead to the destrunction

[1] Paul Omar, *European Insolvency Law* (Ashgate 2004) 11.
[2] *idem* 13.
[3] I Lynch Fannon and GNM Murphy, *Corporate Insolvency and Rescue* (Bloomsbury Professional 2012) chapters 12 – 14.
[4] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the "PRD").
[5] Commission Recommendation C(2014) 1500 final of 12 March 2014 on a new approach to business failure and insolvency OJ L 74/65.
[6] Louis Edward Levinthal, 'The Early History of Insolvency Law' (1918) 66(3) U Penn L Rev 223, 225.
[7] Rolef J de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Tow Common Problems: Common Pool and Anticommons' (2012) 21(2) IIR 67, 69; This has the hallmarks of a common pool problem as in insolvency, a debtor's assets are a part of a common pool of assets which, without certain controls over creditors who lay claim to them, would be dissipated: Jay Lawrence Westbrook,

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of a potentially viable business.[8] In the absence of co-ordination and information, the best option for a rational creditor would be to exercise its individual enforcement rights as soon as possible.[9] A collective system, which controls the assets of a debtor as part of a common pool for the benefit of all stakeholders is required.[10] This collective system addresses the "failure of collective autonomy" afflicting a company in financial crisis and supplies the "reflective capacity" that the company would otherwise lack. It also aims to limit the ability of individuals to enforce their legal rights against the debtor and the exertion of "authority and practical leverage."[11] As noted by Jay Westbrook:

> "Only a single system operating under a single set of overall rules can achieve…unified results. A single system cannot be legally effective unless it controls assets and binds stakeholders throughout the market."[12]

Therefore, the insolvency mechanism limits the ability of creditors to reach assets in specific situations to the benefit of the collective of creditors, providing a mechanism whereby creditors can act in concert.[13] However, this limitation must be balanced with the need to ensure credit markets are not undermined, which requires that there is a reliable mechanism of execution in the event that a debtor fails to meet its obligations.[14] There are a number of theories which have attempted to explain and justify the use of collective procedures to determine or resolve a company's financial distress.

The classic theory that has underpinned the development of insolvency law frameworks and the measure of fairness in the apportionment of distributions is the Creditors' Bargain Theory. This theory takes the view that the objective of insolvency law is to provide a collective debt mechanism for the creditors of an insolvent entity and therefore, the legitimacy of an insolvency procedure depends on its ability to maximise the value of the debtor's estate for distributions.[15] The creditor's bargain also claims that pre-insolvency entitlements should be impaired in insolvency, only when necessary to maximise the net asset distribution to the collective of creditors, but not to accomplish strictly distributional goals.[16] Insolvency laws based on the creditors' bargain tend to be hostile toward the redistribution of wealth post-insolvency.[17] It could be argued, therefore, that there is inherent tension between the creditors' bargain and modern regulations on corporate rescue and restructuring.[18] As a result, a number of other theories have been developed over the past four decades.

Jackson recognised that insolvency rules often require the sharing of assets with other creditors, in some cases with shareholders, and other third parties, justified often on the basis of equity, wealth redistribution, or appeals to communitarian values. This led him to introduce a richer version of the creditors' bargain, in which all participants share the risks of business failure attributable to certain 'common disasters.' The theory is nuanced by the presumption that these common disasters and the redistributional influence that they have had on the development of insolvency rules would be explicitly included in the hypothetical *ex ante* bargain, as long as the costs of implementing these redistributional rules would not outweigh the benefits to creditor wealth maximisation.[19] Where the simple creditors' bargain was premised on the idea that redistribution of wealth in insolvency is inconsistent with maximising the objectives of the collective by strictly adhering to pre-insolvency entitlements, the enhanced theory accepts rules that provide for redistribution to shape the insolvency process. Distributional objectives are entirely congruent with the goal of maximising the welfare of the group.[20] This is, however, still limited to a few specific types of creditors and continues to ignore the more

'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276, 2285; T H Jackson, 'Of Liquidation, Continuation, and Delay: An Analysis of Insolvency Policy and Non-Insolvency Rules' (1986) 60 ABLJ 399, 402.

[8] Donald R Korobkin, 'Rehabilitating Values: A Jurisprudence of Insolvency' (1991) 91(4) Columbia L Rev 717, 718.

[9] Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (OUP 2019) 12.

[10] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276, 2289; see also Thomas Jackson, *The Logic and Limits of Insolvency* (HUP 1986) 11.

[11] Donald R Korobkin, 'Contractarianism and the Normative Foundations of Insolvency Law' (1993) 71 Tex L Rev 541, 549.

[12] Westbrook (n 10) 2285.

[13] Douglas G Baird, 'The Uneasy Case for Corporate Reorganisations' (1986) 15(1) J Legal Studies 127, 133.

[14] Douglas G Baird, 'A World without Insolvency' (1987) 50(2) Law and Contemporary Problems 173, 176.

[15] Jackson (n 10) 2-3.

[16] Robert E Scott, 'Through Insolvency with the Creditors' Bargain Heuristic' (1986) 53 U Chi L Rev 690, 692.

[17] Carlson (n 16) 457.

[18] Karen Gross, *Failure and Forgiveness: Rebalancing the Insolvency System* (Yale University Press 1999) 138. See also Scott (n 17) 691.

[19] Thomas H Jackson & Robert E Scott, 'On the Nature of Insolvency: an Essay of Insolvency Sharing and the Creditor's Bargain' (1989) 75(2) Virginia L Rev 155, 157.

[20] *idem* 202.

idiosyncratic insolvency stakeholders.[21] Insolvency is a messy business and involves far more stakeholders than those contractually connected to the business in difficulty. As Carlson notes:

> "The debtor is not the only exile from the bargaining table. Non-creditors who experience disutility are also not permitted into the bargain. For example, employees at will who lose their jobs have no status in the bargain. Neither do shopkeepers and restaurateurs who served these fired employees. Families and friends have no status. And public outrage over the spectacle is worth nothing.[22]
>
> The universe of those with legally cognizable claims in no way conforms with the universe of those who are harmed by an insolvency. In wealth maximisation, all preferences backed by wealth are honoured, whether or not those preferences are reflected in a cause of action recognised by state law."[23]

Elizabeth Warren recognised that the distributional issues arising in insolvency have an inherent give-and-take character; for example, when a secured creditor enforces against an insolvent estate, this often defeats, at least partially, the collective rights of unsecured creditors who will not get their full contractual due.[24] Warren's "traditionalist" approach considers issues of fairness in the treatment of creditors and whether a creditors' bargain style of approach is really the right approach to the policies informing insolvency law. She challenges the creditors' bargain, redefining it as an argument about economic rationality, in which the aim of the policies underpinning insolvency law are to make sure assets are dealt with to achieve the highest value in their use.[25] Warren argues that the central job of insolvency law should be to apportion the losses of the debtor's default, and that "a variety of factors impinge on the difficult policy decision of where to let those losses fall."[26] Warren also claims that neither the simple nor enhanced creditors' bargain could justify or account for corporate rehabilitation, restructuring, and rescue.

4.2.2 Shifting from Liquidation to Rehabilitation, Restructuring, and Rescue

Given the focus on corporate rescue over the last several decades, there are now clearly two separate goals when one considers resolving financial distress: to rescue the economic entity, or to ensure an equitable distribution of the company's assets upon liquidation. The former relies on the ability to 'rehabilitate' a company, which implies a reorganisation rather than a liquidation; the success of the procedure is defined in terms of particular economic outcomes, with the economic entity surviving as a going concern or continuing long enough to maximise dividends to creditors.[27] In contrast the criteria against which the success of a process such as liquidation is measured are more stratightforward and ascertainable.

It could certainly be argued that, given the many competing interests in a restructuring procedure, a more nuanced and thoughtful approach is more appropriate than a straightforward and, ultimately, economic framework. The traditional approach described by Warren allows for the consideration of 'non normal' stakeholders such as workers, which Baird agrees are not always protected adequately, though he considers that their protection is something that should sit outside of an insolvency framework.[28]

Warren suggests that an insolvency law should also be designed to keep viable businesses from closing even though certain stakeholders with legitimate legal interests may want it to close.[29] In other words, an insolvency framework should also provide for rescue, rehabilitation, and restructuring where relevant, to protect the greater interests of the company and its stakeholders. Further, the rules that

[21] *idem* 204.
[22] Carlson (n 16) 475. "Employment at will" refers to the employment relationship in the United States in which the employer and employee are entitled to walk away at any time. European and UK employment relationships are regulated, requiring in most cases a written set of employment terms at the least as well as certain requirements for giving notice and notice periods. That said, employees will still not find themselves at the bargaining table in many European jurisdictions so will still fall into the category of "non-creditors who experience disutility" in the insolvency of a company.
[23] Carlson (n 16) 476.
[24] Elizabeth Warren, 'Insolvency Policy' (1987) 54(3) U Chi L Rev 755, 789-790.
[25] *idem* 802.
[26] *idem* 810.
[27] Korobkin (n 8) 772-773.
[28] Douglas G Baird, 'Loss Distribution, Forum Shopping, and Insolvency: A Reply to Warren' (1987) 54 U Chi L Rev 815, 815.
[29] *idem*, 828.

govern a failing business should also be crafted such that the process of saving the business has a limited effect on the value of that business.[30] In other words, insolvency and rescue rules should not be overly onerous or costly.[31] Maximising value for the collective also means reducing strategic behaviour associated with individual creditors and debtors pressing whatever advantage they may have in the process, creating "prisoners' dilemmas" by the exploitation of superior information or greater bargaining power.[32] While these characteristics are undoubtedly key to an efficient system that retains value in the debtor for maintaining itself as a going concern or at least maximising distributions in a liquidation, the policies underpinning these characteristics do not fully explain how to achieve the aims in practice.

4.2.3 Communitarianism in Insolvency and Restructuring

Donald Korobkin offers a competing normative explanation of insolvency law that is a value-based account.[33] In his view, this is necessary because the creditors' bargain model is "limited by the economic account's vision of insolvency law as a mechanism for achieving superior economic returns,"[34] which limits choices to economic outcomes only.[35] Insolvency law has, however, emerged as a system with varied contours and dimensions that satisfy interests that go well beyond simple wealth maximisation.[36] Further, a purely economic account does not explain the provision for reorganisation that is present in most insolvency systems. Rather, the economic account he argues "…demonstrates only that its own economic model is incapable of recognising noneconomic values essential to a vindicating explanation of corporate reorganisation."[37]

Korobkin begins by altering how one should view the estate of an insolvent entity to include rehabilitative opportunities. Rather than viewing it solely as an economic object, he maintains that the view should also include the dynamic character of the estate. Essentially, the insolvent estate is the potential of the corporation as it exists. It provides the framework within which the future of the corporation can be debated, shaped and determined.[38] Rather than viewing the enterprise solely as a profit-making entity, Korobkin takes into account its individual character reflected in the choices of decision-makers. "Through these decisions, the enterprise is realised as a moral, political, social, and economic agent."[39] If one considers the enterprise in these terms, it becomes difficult to then justify a pure creditor wealth maximisation aim for corporate insolvency.

Korobkin offers an alternative to the economic account in his value-based account, which also includes noneconomic outcomes. Where the economic account views insolvency law as a response to an economic problem of debt collection, the value-based account is founded on the concern to which insolvency law is actually addressed: "[i]nsolvency law is a response to the problem of financial distress – not only as an economic, but as a moral, political, personal, and social problem that affects its participants."[40] This alternative view easily encompasses reorganisation and restructuring, and by extension, preventive restructuring. It recognises that the outcomes of financial distress, such as a foreclosure by a secured creditor, has more than just an economic impact on the company involving also moral, political, personal and social issues. These conflicts tend to be intractable as they involve the competition of "diverse human values that are fundamentally incommensurable."[41] These human values cannot be reduced to purely economic terms and are thereby at odds with basic assumptions of economic theory, upon which the economic account of insolvency is based.[42] Given the higher level of

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[30] Elizabeth Warren, 'Insolvency Policymaking in an Imperfect World' (1993) 92 Mich L Rev 336, 344.
[31] *idem* 346.
[32] A prisoner's dilemma is a theory that says that rationally acting individuals will not act in a manner that is in their collective interest if they are not able to communicate with each other and co-ordinate their actions. See A Rapoport and AM Chammah, *Prisoner's Dilemma* (University of Michigan Press 1965).
[33] Korobkin (n 8) 721.
[34] *idem* 737.
[35] *idem* 738.
[36] *idem* 739.
[37] *idem* 740.
[38] *idem* 770.
[39] *ibid*.
[40] *idem* 762.
[41] *idem* 765.
[42] *ibid*; see generally, Jeffrey L Harrison, 'Egoism, Altruism, and Market Illusions: The Limits of Law and Economics' (1985) 33 UCLA L Rev 1309, 1329-1330: "Conventional Economic theory assumes that needs or wants are reducible. Essentially there is some common

complexity that reorganisation and restructuring present procedurally, a purely economic account does not explain fully or justify the use of such procedures. Reorganisations and restructurings aim to rehabilitate a company, rather than to liquidate it, with the success of such a procedure predicated on the corporation surviving as a going concern or at least existing long enough to maximise distributions to creditors.[43] Financial distress forces participants to make difficult choices between values that cannot be fully reduced to pure economic terms and corporate rehabilitation (reorganisations or restructurings) attempts to correct financial distress and resolve those choices.[44]

Korobkin's "insolvency choice" theory is a similar communitarian approach to the creditors' bargain model based on a hypothetical situation in which the principles of an insolvency system are selected by participants. The participants in the insolvency choice model are not limited to creditors, but include all persons in a society impacted by an insolvency.[45] The aim is to define a "procedure of choice that satisfies basic notions of fairness" while ensuring that these principles do not "offend our most strongly considered judgments about how society ought to respond to the problem of financial distress."[46] All of the parties to the agreement stand equally with each person holding only a potential interest in the principles by which society responds to enterprises in financial distress.[47] This approach argues that insolvency should respond to more than the exclusive problem of collecting debt[48] and consider problems associated by other parties affected by financial distress. For example, creditor wealth maximisation would often lead to the sale of the business to distribute proceeds to creditors. This outcome would not necessarily satisfy the needs of employees or their dependents.[49]

Korobkin adopts a principle of rational planning, which aims to maximally satisfy the parties' aims by applying rational guidelines to regulate the aims of those represented in the bargain when an enterprise is in financial distress.[50] When it becomes impossible to satisfy one stakeholder without frustrating another, the principle of rational planning benefits the parties in a worse off position (more vulnerable) over those who are in more advantageous positions.[51] To a certain extent, Korobkin's approach better explains the current insolvency and restructuring frameworks in most modern legal systems. The preferential treatment of some parties in both insolvency frameworks and social policy regulation is a clear departure from normal priorities, but meets a social need to protect more vulnerable parties.[52] While this concept does not fit neatly within the definition or collective principles of insolvency law, it does allow such a framework to satisfy a broader set of needs than strict adherence to contractual entitlements and priorities and embraces rehabilitation.

4.3 Rehabilitation of Companies in Financial Distress

This section discusses the many competing viewpoints within the European insolvency academy on the purpose and value of rehabilitation and restructuring as well as their underlying theoretical principles. These discussions should lend context to some of the conflicting viewpoints amongst different Member States on the more controversial provisions of the PRD.

Some European commentators are overly resistant to corporate rescue. These commentators present the following argument: The rehabilitation of a company aims to reduce the economic effect of a financial disaster.[53] A fundamental justification for reorganisations and restructuring is that an entity is usually worth more if kept intact than if sold piecemeal. One of the common justifications for restructuring over liquidation is the achievement of a going concern sale. It has been argued, however, that the same

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denominator – utility – that can be used to compare all wants or needs. If all wants and needs are reduced to a single component, on can easily assume infinite interchangeability".

[43] Michael J Roe, 'Insolvency and Debt: A New Approach to Corporate Reorganisation' (1983) Colum L Rev 527, 534-536.
[44] Korobkin (n 8) 773.
[45] Korobkin (n 11) 554.
[46] *idem* 553-553.
[47] *idem* 554.
[48] *idem* 556.
[49] *idem* 579.
[50] *idem* 582.
[51] *idem* 584.
[52] For other theories of corporate insolvency that have not been discussed in this report, see for example: Barry E Adler, 'A Theory of Corporate Insolvency' (1997) 72 New York University L Rev 343 and 'The Creditors' Bargain Revisited' (2018) 166 Uni Pennsylvania L Rev 1853; Lynn M LoPucki, 'A Team Production Theory of Insolvency Reorganisation' (2004) 57(3) Vanderbilt L Rev 741; Thomas H Jackson, 'A Retrospective Look at Insolvency's New Frontiers' (2018) 166 U Pa L Rev 1867; and see the "Authentic Consent Model" proposed by Riz Mokal in Chapter 3 of *Corporate Insolvency Law: Theory and Application* (OUP 2005) 61-90.
[53] Nathalie D Martin, 'Noneconomic Interests in Insolvency: Standing on the Outside Looking In' (1998) 59 Ohio State L J 429, 436.

outcome can be achieved in liquidation, as the businesses of an entity are often sold on as going concerns as a part of the liquidation process. The argument continues that the only difference between this and a reorganisation is that a liquidation involves an actual sale of the assets to a third-party buyer, while a reorganisation only involves a hypothetical sale.[54] Therefore it is argued that sale as a going concern is not necessarily a valid justification for opting for a restructuring over liquidation.[55] But equally it is our view that this is not an argument *against* restructuring.

The proposition that a going concern sale can be achieved as easily through liquidation ignores a few possibilities. The first is the forced sale aspect of liquidation; a restructuring has the advantage of avoiding a discount in value that would be inherent in a forced sale. A liquidation process aimed at converting assets into cash within a fixed timeframe will often generate less than what one would expect for the same assets at market value. As Tollenaar observes, prices during a liquidation are reduced due to compressed timelines, inadequate information, and negative publicity.[56] He goes on to state, therefore, that the added value of a restructuring is not a going concern surplus, rather it is the difference between the value that creditors attribute to the enterprise and the price that a third party is actually prepared to pay for it as a going concern. Essentially, supporting liquidation over restructuring relies on a hypothesis that the assets are worth more to the claimant creditors than they would be to third parties.[57] Again, this is not an argument against restructuring. Furthermore, it ignores a second and important possibility that restructuring will allow for additional value to be extracted from the assets or business through new investment and new management.

Rehabilitation, reorganisation, and restructuring may all have the benefit of protecting jobs and job security. While workers may be repaid as a priority in a liquidation, they may also be out of a job. "Those who have nothing to sell but their labour remain in the weakest possible bargaining position."[58] A significant benefit of maintaining a company as a going concern is the protection of workers and maintenance of job security. Tollenaar, however, maintains that neither the rescue of a business nor the preservation of jobs should be the objective of a restructuring plan, which in some views is simply considered an alternative instrument aimed at debt enforcement.[59] The continuation of the business is rather a consequence of a restructuring plan allowing the creditors to preserve and realise the value of the business as a going concern when that leads to the best recovery outcome.[60] While there are arguments on both sides of this complex and lively debate, the EU has definitively endorsed rescue and has developed a preventive restructuring framework that aims to protect jobs, preserve viable businesses, encourage harmonisation, and protect the common capital markets.

As outlined in Chapter 1 of this Report, the EU policy objectives included the goals of preventing unnecessary liquidations, avoiding unnecessary job losses and a number of capital related objectives such as preventing the build-up of non-performing loans. It is this latter interface with capital markets that is re-iterated by Commission spokespeople – "reducing the risk of loans becoming non-performing in cyclical downturns and mitigating adverse impacts on the financial sector."[61]

4.4 Defining Preventive Restructuring

Restructuring and insolvency (liquidation) proceedings address different problems. Insolvency law responds to the insufficiency of the debtor's assets by providing a collective debt enforcement mechanism in the interests of all creditors aimed at preventing disorganised dissipation of assets by creditors acting in their own self-interest. A pre-insolvency restructuring procedure deals with a situation in which assets may be, but are not necessarily, sufficient to satisfy all creditor debt. Academic debate seems to differ in the understanding of what is entailed in a pre-insolvency restructuring with some assuming there is a sufficiency of assets in all cases. This leads to a theoretical proposition that states that a collective procedure that impairs creditors' rights in a restructuring is unjustified. In Germany where a restructuring plan can occur within a formal insolvency procedure, this has led to a

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[54] Baird (n 13) 139.
[55] Tollenaar (n 9) 47.
[56] *idem* 48-50.
[57] Jackson (n 10) 214.
[58] E F Schumacher, *Small is Beautiful – A Study of Economics as if People Mattered* (first published 1973, Vintage 2011) 67-68.
[59] Tollenaar (n 9) 69-70.
[60] Tollenaar (n 9) 70.
[61] PRD, recital 2. See also remarks made by Assistant Commissioner Salla Saastamoinen, Director for Civil and Commercial Justice at DG Justice and Consumers, at EIRC – INSOL Conference, Brussels June 7th, 2019.

distinction being made between restructuring post (formal) insolvency and restructuring pre-insolvency;[62] the former is where all creditors have already been locked into a collective proceeding and are unable to exercise individual enforcement rights against the collective assets of the debtor and in the latter, it is assumed (perhaps wrongly by those making this distinction) that the debtor is solvent.[63] This leads to an overemphasis on a not very controversial rule, namely a majority rule principle, which ensures that assets can be used efficiently without the need for unanimous agreement, as unanimity would give each party a veto right to a restructuring plan and potentially leading to assets being left unused.[64] For effective restructuring to occur, jurisdictions will include at least a majority rule criteria in order to overcome hold-out creditors.

The assumption that restructuring involves a non-insolvent situation contrasts with the position in other jurisdictions; for example, in France, Ireland, and the UK, restructuring is available where the company is insolvent (but not in liquidation) or *tending* towards insolvency. Therefore, the EU reframed the EIR to ensure that rescue and restructuring frameworks can also be subject to the procedural rules of the EIR Recast. (This is already the case with some restructuring processes including the French *sauvegarde* procedure and the Irish Examinership, amongst others). This aligns with the developments of the rescue culture over the last decade or so. The EIR Recast specifically includes:

> "…public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation, or liquidation…
>
> Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities."[65]

By including restructuring procedures as a part of insolvency law, the EIR Recast, can stretch to include the new restructuring tools that will be developed subsequent to implementation of the PRD.[66] By including tools that can be used outside of formal insolvency, the legislator appears to be accepting that the definition of insolvency now extends beyond what has been traditionally accepted as insolvency. It has been argued that this approach defines insolvency proceedings instead as "not the material insolvency of the debtor, but rather whether the proceedings attempts to solve a common pool problem of the creditors."[67] An alternative approach which resonates with the view of the CJEU is that rescue and restructuring proceedings can operate in a situation where the company is technically but not formally insolvent – i.e. in an insolvency process – or is likely to be insolvent. The nature of a particular proceeding was at issue in a relevant CJEU case that actually revolved around the application of Article 5(1) of the Acquired Rights Directive,[68] which exempts liquidation proceedings from the automatic transfer of employment contracts upon the transfer of a business. The decision clearly differentiates between insolvency proceedings that result in the liquidation of the business and those insolvency related proceedings that allow the business to continue operating while undergoing reorganisation or restructuring.[69] The key difference is that the business continues in the latter circumstances.[70] Thus, there appears to be a different understanding among the legislature and the courts, as well as among academic and professional commentators, of the meaning of insolvency, how broadly it should be defined and whether it should include restructuring, particularly if that is taking place in a pre-insolvency situation. Nevertheless, the PRD has provided for an inclusive framework which envisages a range of restructuring tools.

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[62] Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus L Rev 615, 633.
[63] Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus L Rev 615, 633.
[64] *ibid*.
[65] EIR Recast, art 1(1). Art 1 of the original EIR included "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator." It is unusual, therefore, to find the Irish Examinership included in Annex A, as is the Italian *concordat preventivo*.
[66] Madaus (n 64) 616.
[67] Horst Eidenmuller, "What is an Insolvency Proceeding?" (2018) 92 Am Bankr L J 53, 68.
[68] Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L82/16.
[69] C126/16 *Federatie Nederlandse Vakvereniging v Smallsteps BV* [2017] ECLI:EU:C:2017:489 paras 48-51.
[70] Madaus (n 64) 617.

As previously articulated, reorganisations and restructurings aim to rehabilitate a company, with success of such a procedure predicated on the corporation surviving as a going concern.[71] Arguably, this does not consider the distinct possibility that the interested parties might be better off as a group if the firm's assets were put to a different use.[72] Douglas Baird, has questioned whether the complicated nature of restructuring and the risks for under-compensation and strategic game-playing by the parties are worth the benefits.[73] Financial distress forces participants to make difficult choices between values that cannot be fully reduced to pure economic terms and corporate rehabilitation … attempts to correct financial distress and resolve those choices.[74] As Madaus observes, modern restructuring frameworks offer more than traditional liquidation procedures; they offer planned solutions in which debtors may, for example, offer payments from future income or shares to creditors in exchange for debt.[75] He goes on to state that, while giving access to creditors based on their unpaid claim is not unjustified or difficult to construct, the practise does deviate from liquidation priorities. It abandons the restrictions on the current collective assets; the mechanism at play is not dependent on insufficient available assets, if payments are predicated on future available income.[76] While perhaps startling to some commentators, this reality is generally the purpose of restructuring pre-insolvency.

A debtor-centric view of corporate reorganisation is that corporate reorganisation procedures should provide a "breathing space" for entities in financial difficulties by preventing creditors serving their individual interests by destroying a firm by selling it off piecemeal resulting in job and asset dissipation.[77] This has been viewed as giving a debtor certain substantive rights in insolvency that they did not have outside of the procedure, i.e. to delay repaying its creditors.[78] The PRD defines restructuring as:-

> "measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements;"[79]

In addition to financial restructuring of a corporate entity that retains its full integrity, the wording of the PRD appears to include a process that aims to adjust the business (going concern) of a corporate entity through either financial restructuring or reorganisational activities, which includes the sale of assets or parts of businesses with the objective of enabling the enterprise to continue.[80] Another crucial technique in a financial restructuring is a debt for equity swap, which reduces a distressed firm's fixed liabilities while strengthening its equity base.[81]

The PRD also offers some guidance on what it means by the term, "preventive":

> "Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole."[82]

Thomas Jackson notes that preventive restructurings are in no way different than restructurings that occur during an insolvency procedure, as they have to meet the same objectives and deal with the same

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[71] Roe (n 64) 534-536.
[72] Baird (n 13) 34
[73] *idem* 139.
[74] Korobkin (n 8) 773.
[75] Madaus (n 64) 621.
[76] *ibid*.
[77] Baird (n 13) 133. The phrase 'breathing space' has been consistently used in the Irish context, where the legislative framework was borrowed from Ch 11 of the US Bankruptcy Code. See further Lynch Fannon & Murphy (n 3) chapters 12 and 13 for a description of the case law.
[78] Douglas G Baird & Thomas Jackson, *Problems and Materials on Insolvency* (Little & Brown 1985) 31-35.
[79] PRD, art 2(1)(1).
[80] Horst Eidenmuller, 'Contracting for a European Insolvency Regime' (2017) 18 Eur Bus Org L rev 273, 281.
[81] *ibid*; see also Jonathan McCarthey, 'Something Old, Something New? The Potential Impact of the EU Preventive Restructuring Directive through an Irish Case Study' (2019) 16(6) ICR 1, 2.
[82] PRD, recital 2.

problems.[83] If insolvency proceedings are characterised by the co-ordination of the collective of creditors, rather than the actual insolvency of the debtor, then preventive restructuring frameworks will clearly satisfy the same goal.[84]

> “Regardless of their form, public or confidential, with or without the debtor’s dispossession, concerning all or only some of the creditors, if the contemplated proceedings provide an answer to the problem of co-ordination, then preventive proceedings are but a variation on the same theme. It follows that they are justified only with respect to the same objectives, that is, maximising the value of the company’s assets in the interest of all stakeholders and promoting the efficient distribution of resources in the economy”[85]

The EU has, through the PRD, introduced a restructuring framework that should be available during (what has been often described as) “pre-insolvency”, as it refers to ~~a~~ “likelihood of insolvency”:

> “This Directive lays down rules on: preventive restructuring frameworks available for debtors in financial difficulties where there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor.”[86]

The PRD leaves “likelihood of insolvency” and “insolvency” to be defined by reference to the national law of the Member States.[87] The PRD aims to catch firms at a stage that precedes formal insolvency, but it is not entirely clear how far in advance restructuring procedures should be made available. The PRD stipulates that a restructuring framework should be available:

> “…when it appears likely that their insolvency can be prevented, and the viability of the business can be ensured. A restructuring framework should be available *before* a debtor becomes insolvent under national law, namely before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator.” (emphasis added)

The further “upstream” that procedures are accessible, however, the greater the possibility that restructuring frameworks could be misused. The PRD attempts to resolve this matter in Recital 24:

> “In order to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.”

This does not, however, inform debtors how the likelihood of insolvency is to be determined, only that it should be circumstances in which the debtor is still outside of functional insolvency. European commentators have made much of these issues and have argued that pre-insolvency and preventive restructuring may, in reality, just refer to what are functionally insolvency proceedings as the circumstances are broadly the same, requiring the facilitation of collective enforcement. Further, it is argued that these proceedings should perhaps be available at a time when the insolvency of a debtor is so predictable that any other alternative is pointless. It may be reasonable to suggest that the time to initiate a restructuring procedure is when the debtor’s management is constrained by the company’s indebtedness to such a degree that they begin to favour short term over long term solutions, with detrimental effects on the long-term sustainability of the company.[88] In reality, however, preventive restructuring can be used in less constrained circumstances.[89]

The term “pre-insolvency” could therefore be a misnomer, as such proceedings are not usually used unless a company is already in financial difficulties. Accordingly, a pre-insolvency proceeding may still be regarded as an insolvency proceeding. The term is often used simply to refer to proceedings taking place outside of what would be considered traditional and formal insolvency procedures, essentially

[83] See Jackson (n 10) 210.
[84] Eidenmuller (n 68) 19: “What matters therefore is not the material insolvency of the debtor, but rather whether the proceedings attempts to solve a common pool problem of the creditors.”
[85] Vasile Rotaru, ‘The Restructuring Directive: a Functional Law and Economics Analysis from a French Law Perspective’ (2019) Working Paper published by Droit et Croissance 15.
[86] PRD, art 1(1)(a).
[87] PRD, art 2(2)(a&b).
[88] Rotaru, (n 86) 16.
[89] See for example Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) and Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014). See also for example, Examinerships as described by Lynch Fannon & Murphy (n 3).

identifying it as different in a procedural sense.[90] This is distinct from a situation where the debtor is not in financial difficulty to the extent that it could amount to insolvency in the near future.[91]

4.5 Preventive Restructuring in Europe

As will be described in detail in Chapter 5 of this report the PRD had a long and arduous journey through EU institutions and experts' groups to becoming a Directive. The Commission began with a Recommendation[92] in 2014 on A New Approach to Business Failure and Insolvency which was made following a range of consultative documents including a report from INSOL Europe on the desirability and practicability of harmonising national insolvency laws in Europe.[93] This Report surveyed seven Member States – France, Germany, Italy, Poland, Spain, Sweden, and the UK, but interestingly not Ireland which had a fully developed restructuring process along the lines of what became the PRD – to identify the differences in current restructuring procedures. These included when formal reorganisation procedures could be initiated and how reorganisations or restructurings were proposed, voted on, and sanctioned. The differences between Member States created an uneven playing field, in which some debtors had better prospects of restructuring than others, thereby incentivising forum shopping. Further, it was reported that the differences in frameworks also acted as a barrier to the adoption of restructuring plans in cross-border cases.[94] The INSOL Europe report went on to recommend a number of areas to harmonise. A parliamentary Resolution reflecting many of the INSOL Europe Report's recommendations was passed on 15th November 2011.[95] Insolvency law harmonisation then found its way into the Commission's second Communication on the Single Market Act, identifying it as a priority action for "the strengthening of the internal market".[96] This was quickly followed by the Commission's first substantive response in the Communication on "A New European Response to Business Failure and Insolvency", which is explored in detail in Chapter 5.[97] Post-2014, a Commission funded project based at the University of Leeds surveyed Member States' legislative frameworks providing information to the Commission on the existence of national restructuring frameworks.[98]

It should be noted that the Commission's activity in this area came against the backdrop of the financial and sovereign debt crises of the late-2000s.[99] This is evident from the wording in the introduction to the Communication of 2012, in which it called for a "European response to create an efficient system to restore and reorganise a business so that they can survive the financial crisis…"[100] This placed the emphasis more on recovery and rescue, than on liquidation and dissolution.

While a number of Member States have introduced preventive restructuring procedures over the last few decades, few of them were introduced as a result of the 2014 Recommendation. Ireland had already been using its Examinership procedures since the 1990s and France had been formulating preventive restructuring frameworks at a rate of two or three reforms or new procedures per year.[101] The aim of the 2014 Recommendation was to encourage Member States to put in place frameworks to efficiently restructure viable enterprises to promote entrepreneurship, investment, and employment, while reducing obstacles to the smooth functioning of the internal market.[102] Despite this, the response of Member States

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[90] Tollenaar (n 9) 4.
[91] Tollenaar (n 9) 4.
[92] Recommendation (n 5).
[93] Giorgio Cherubini, Neil Cooper , Daniel Fritz, Emmanuelle Inacio, Katarzyna Ingielewicz, Guy Lofalk, Miriam Mailly, David Marks, Anna Maria Pukszto, Barbara FH Rumora Scheltema, Robert Van Galen, Miguel Virgos, Bob Wessels & Nora Wouters (INSOL Europe Authors) *Harmonisation of Insolvency Law at EU Level* (PE 419.633 European Parliament, Directorate General for Internal Policies: Policy Department C: Citizen's Rights and Constitutional Affairs, Legal Affairs 2010).
[94] *idem* 17.
[95] *Report with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law* (A7-0355/2011, European Parliamentary Committee on Legal Affairs 2011).
[96] Communication from the Commission COM(2012) 573 final to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 3 October 2012 Single Market Act II – Together for New Growth.
[97] *ibid*.
[98] See Gerard McCormack, Andrew Keay, and Sarah Brown, *European Insolvency Law: Reform and Harmonization* (Elgar 2017) for a full accounting of the outcomes of the Leeds project.
[99] Horst Eidenmuller and Kristin van Zweiten, 'Restructuring the European Business Enterprise: the European Commission's Recommendation on a New Approach to Business Failure and Insolvency' (2015) 16 Eur Bus L Rev 625, 636.
[100] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee COM(2012) 724 final of 12 December 2012 on a new European approach to business failure and insolvency 2.
[101] McCormack, et al (n 101) 230-231.
[102] Recommendation (n 99) recommendation 1.

was both inconsistent and incomplete; when evaluated by the Commission,[103] it concluded that the Recommendation had not succeeded in "facilitating the rescue of businesses in financial difficulty".[104] As a result, negotiations began on the development of a harmonising directive that would introduce a preventive restructuring framework to all of the EU Member States.

Following the Commission's evaluation of the Member States' response to the call for legislative action on the back of the 2014 Recommendation,[105] a new Action Plan on Building a Capital Markets Union was passed, which set out the legislative intention to pass a Directive that would deal with early restructuring, stating that "the initiative will seek to address the most important barriers to the free flow of capital, building on national regimes that work as well."[106] A year later the Proposal for a Directive[107] was published and began its journey through the EU institutions.

The Proposal aimed to:

> "Remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. This Directive aims at removing such obstacles by ensuring that viable enterprises in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating."[108]

Although the Recital 1 was revised during the negotiations period, it encompasses the same themes, making an important statement about the problems associated with differences in national laws and the related effect on the proper functioning of the internal market. In addition, preventive restructuring frameworks were intended to "prevent the build-up of non-performing loans",[109] an aim that was maintained in the final Directive.

The PRD was influenced by 422 different inputs from a range of sources.[110] In 2015, a group of 22 experts was convened to assist the Commission in drafting the provisions and with coordinating the different inputs received.[111] There were also meetings with more than 250 representatives of national governments and Parliaments, workers unions, consumers' organisations, and other interested economic actors.[112] Given the high level of involvement from a broad range of stakeholders and experts, it is perhaps unsurprising that the result was what some regard as "a highly complex text".[113] For example, commercial and central banks tend to be in favour of harmonising insolvency proceedings and reducing the length of statutory moratoria, while workers' unions and the representatives from SME organisations favoured harmonisation aimed at enhancing business rescue and diminishing the fixed costs of proceedings.[114] European institutions also adopted different positions during the negotiations; the Commission aimed at a high degree of harmonisation of restructuring frameworks based on Chapter 11 and the English Scheme of Arrangement.[115] The European Parliament took a more cautious approach

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[103] 'Evaluation of the Implementation of the Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency' (Directorate-General Justice & Consumers of the European Commission 30 September 2015).
[104] Eidenmuller & van Zweiten (n 102) 625; See also Reinhard Bork, 'Preventive Restructuring Frameworks: A "Comedy of Errors" or "All's Well that Ends Well?" (2017) 14(6) International Corporate Rescue 417.
[105] Eidenmuller (n 81) 275.
[106] Communication from the Commission to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Regions COM(2015) 468 final of 30 September 2015 on an action plan on building a capital markets union 25.
[107] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the "Proposal").
[108] Proposal, recital 1.
[109] Proposal, recital 2; PRD, recital 3.
[110] For information on working groups, see the webpage on 'Transparency' (European Commission 2019) <https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency_en> accessed 7th January 2020.
[111] For information about the meetings, see the webpage on 'Convergence of insolvency frameworks within the European Union - the way forward' (European Commission: Justice and Consumers 2016) <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30874> accessed 7th January 2020. See also Annex 1 of this Report, where some of the Expert Group discussions are summarised.
[112] For the data and numbers, see the 'Public Consultation: Building a Capital Markets Union' (European Commission: Banking and Finance 2015) <https://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm> accessed 7th January 2020.
[113] Rotaru (n 86) 57.
[114] Gert-Jan Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders' (2018) 27(2) IIR 150.
[115] See Mark J Roe, 'Three Ages of Insolvency' (2017) 7 Har Bus L Rev 187 and Sarah Paterson, 'Reflections on English Law Schemes of Arrangement in Distress and Proposals for Reform' (2018) 15(3) Eur Company and Financial L Rev 472.

with a view to preserving the interests of the affected workers, while the European Council tried to retain the greatest possible flexibility for national legislators.[116]

4.6 Specific Restructuring Provisions as Potential Causes of Conflict in Co-Operation

The PRD offers a restructuring framework with a range of options for the Member States among several obligatory provisions. Fundamentally, the PRD gives the debtor the right to propose a plan when there is a likelihood of insolvency, while protecting the debtor from creditors by staying enforcement actions. The PRD does not specify precisely what a restructuring plan can contain but it does give a general list of information that should be included.[117] The restructuring plan can bind all creditors or be limited to affected creditors, leaving the rest unaffected by the plan.[118] Voting takes place in classes that must be formed in accordance with a sufficient commonality of interest. A plan can then be adopted if the requisite voting majority is reached.[119] The PRD also provides for a cross-class cram-down, which essentially means that ~~a~~ dissenting classes can be bound by the plan if certain criteria are present.[120] While the PRD aims to reduce court and practitioner involvement, it requires this involvement in certain specified circumstances, providing a minimum level of protection against the moral hazard associated with a complex restructuring plan that is overseen only by the debtor and forced upon dissenting creditors.[121]

Many of these preventive restructuring provisions have controversial aspects relating to their effect on creditors' rights and may present points of contention and obstacles to co-operation where differences can be allowed to persist between Member States. Academic commentary emanating from the Netherlands, Germany and other Member States underlines this potential for a difference and dissonance. Among the more controversial provisions that will be discussed in the sections that follow are the stay of enforcement actions;[122] the ability to bind dissenting creditors and classes of creditors;[123] how to ensure dissenting classes are treated fairly (what rule to apply);[124] and the protection and priority afforded to interim or new rescue financing.[125] These concepts have garnered a great deal of academic debate and created significant controversy among the Member States, creating a wealth of literature presenting conflicting and contrasting view points on the benefits, disadvantages, and fairness justifications for the application of such provisions in a preventive restructuring situation. While the JCOERE Project has explored other provisions of the PRD with its contributors, they do not carry the same controversy than do those discussed below. The following subsections will examine each of these concepts in turn and the scholarly debate that surrounds them.

4.6.1 The Stay of Individual Enforcement Actions

A stay or moratorium refers to the halting of individual enforcement actions, as well as other claims in some cases. The full provision of the moratorium is set out under Article 6 of the PRD and will be discussed in more detail in Chapter 7 of this Report. The PRD Recitals set out the concept underlying the provision:

> "A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations."[126]

The stay is at the core of the ability to supplant individual creditors' contractual remedies with a

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[116] From the perspective of the French negotiators from the CIRI, Clément Tiret, 'Retour sur les débats intervenus autour de la directive Insolvabilité au sein des institutions européennes' (2019) 3(16) RPC as cited in Rotaru (n 86) 3.
[117] See PRD, art 8
[118] Tollenaar (n 120) 67.
[119] *idem* 68-69; PRD, art 9 details the mechanisms of class formation and majority voting.
[120] PRD, art 11.
[121] See PRD, art 5 in relation to practitioner involvement and art 10 for the criteria requiring court confirmation.
[122] PRD, art 6.
[123] PRD, arts 9-11.
[124] See in particular PRD art 11(1)(c) (the so-called "relative priority rule"), 11(2) (the "absolute priority rule"), and the last paragraph of the section following 11(2) specifying an "unfair prejudice test".
[125] PRD, art 17.
[126] PRD, recital 32.

collective system of distribution.[127] It is viewed as the "archetypal vehicle of rational planning" and as playing an "essential role in framing insolvency discourse."[128] When creditors enforce their rights unilaterally against the debtor's property, their actions may prevent the possible realisation of other aims that could be far more important than the satisfaction of the best interest of an individual creditor. While the better aims may be unknown at the outset, the stay allows those aims to be realised and articulated without risking the value of the business in the process. It could be uncertain in the beginning whether the corporation has a realistic prospect of survival and if it does, what the "relative importance is of the aims that may be frustrated by its demise." An automatic stay prevents creditors from determining the final content of a restructuring plan before all of the relevant facts have emerged.[129]

A stay also prevents the un-co-ordinated rush to grab assets through non-insolvency remedies. Without a stay, it would be impossible to co-ordinate between stakeholders if their separately rational actions resulted in an outcome that is suboptimal for the stakeholders as a whole.[130] The stay therefore allows for a collective approach to be taken.[131] A co-ordinated action could then hypothetically maximise the value of the debtor's assets to the benefit of the collective as a whole and ensure an efficient distribution of the value should liquidation be the end result.[132]

There are also those who recognise some potential for abuse within the stay. For example, a stay may not incentivise the use of a procedure in a case where a restructuring would not be value-maximising. Managers of a non-viable business may seek to use a procedure with a stay for some strategic purpose, or there may be an incentive for a viable debtor to use a procedure if it wishes to "shake-off" liabilities that it is currently capable of servicing.[133] Such abuse can be mitigated, however, by the ability for creditors to apply to lift the stay in certain circumstances, as well as the option for Member States to provide that authorities can refuse to grant the stay. Generally, though, the stay is considered a key provision that allows for the successful completion of preventive restructuring plans. Were it possible to continue actions during the negotiation of a plan, they could imperil the success of a restructuring by impairing the value of assets available.[134]

4.6.2 The "Intra-Class" Cram-Down (or Majority Rule)

The application of a majority rule within individual classes of creditors can allow for the maximisation of the debtor's assets in the interest of all creditors, which helps to justify interference with contractual rights for dissenting creditors. Creditors are viewed by some as being best placed to identify their best interests, therefore, applying a majority rule is a reasonable approach because it shows that creditors have been adequately protected in a way that is commonly accepted in democratic society. While not all creditors have the same interests, by placing them in classes where interests are aligned, the possibility of unfairly expropriating a group of creditors with a different set of interests is removed.

If unanimity is required to approve a plan, any individual voting creditor essentially has a veto right that can prevent a plan from coming into effect. If one or more creditors fail to consent in a situation of unanimity, then there will be a "hold-out" position, in which a creditor can try to leverage a higher proportionate share in exchange for their consent to the plan.[135] As such a share is obtained at the expense of consenting creditors, every creditor has an incentive to withhold their consent to avoid the reduction of their proportionate share in favour of a hold-out creditor, preventing the plan from coming into effect.[136] Thus the application of majority rules in the confirmation of an insolvency plan helps to prevent

[127] Thomas H Jackson, 'Of Liquidation, Continuation, and Delay: An Analysis of Insolvency Policy and Non-insolvency Rules' (1986) 60 Am Bankr L J 399, 412.
[128] Korobkin (n 8) 778.
[129] Korobkin (n 11) 598-599.
[130] Jackson (n 132) 412.
[131] The situation described here is an example of the "prisoner's dilemma" discussed within the Law and Economics academy. See Rotaru (86) 26.
[132] Douglas Baird and Thomas Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Insolvency' (1984) 51 U Chi L Rev 97 and Korobkin (n 8) 778.
[133] Sarah Paterson, 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' (2014) LSE Law, Society, and Economy Working Papers 27/2014, 18 and Eidenmuller & van Zweiten (n 102) 633.
[134] Eidenmuller & van Zweiten (n 102) 646.
[135] This is termed in academic circles as the "tragedy of the anti-commons". See James M Buchanan and Yong Jo Yoon, 'Symmetric Tragedies: Commons and Anticommons' (2000) 43 J L & Econ 1, 4.
[136] Tollenaar (n 9) 14.

"individualistic behaviour from harming the interests of the group." [137] In common insolvency law parlance, this majority rule is often called a cram-down or intra-class cram-down.

A key criterion that justifies a democratic approach to plan approval is that no party should be worse off under the plan than without it.[138] Further:

> "Plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities, and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than what they would likely receive in a liquidation proceeding."[139]

The PRD provides that if a creditor challenges a plan, it can be confirmed only if it meets the "best interests of creditors" test. This states that no dissenting creditor can be worse off under the plan than they would be in a liquidation *or* in the next best alternative, should a plan not be confirmed.[140] While concern is expressed that this fairness criterion is insufficient, the PRD mitigates this danger by requiring that voting rights and class formation can be examined by a judicial or administrative authority, if a request for confirmation is submitted.[141] In addition, Member States are required to have judicial or administrative confirmation of plans if they affect the interests of dissenting parties, embedding formal oversight in the process that can mitigate any potential unfairness.[142]

4.6.3 The Cross-class Cram-down

Arguably, the presence of the cross-class cram-down in article 11 of the PRD is a tremendous advance in European restructuring law as it potentially facilitates value- and employment-preserving restructuring of distressed but viable enterprises that might otherwise go into liquidation.[143] From an economic perspective, once the plan being imposed on dissenting classes ensures the maximisation of value of the debtors' assets and provided no creditors' interests are unjustifiably sacrificed, it is reasonable to accept its confirmation.[144] In the absence of a cross-class cram-down mechanism, classes of creditors would effectively be able to leverage to limit their losses to the detriment of other classes of creditors, for which the adoption of a plan may be more important, such as classes with a lower tolerance for losses. "It follows that the rejection of the plan by a class of creditors must not preclude its adoption as long as other safeguards against the unfair treatment of recalcitrant creditors…offers sufficient protection."[145]

There are also some significant conceptual issues with priority rules that aim to assess fairness within a cross-class cram-down. While the term "absolute priority" seems to have an accepted definition derived from American restructuring law, in practice this is viewed only as a starting point, which can be diverted from if the outcome would be better for the collective of creditors.[146]

The Commission's approach to the cross-class cram-down initially followed Chapter 11, requiring that the plan be approved by at least an "in-the-money" class other than the shareholders, where the value breaks between a going concern sale and a liquidation. This test aligns the interests of all stakeholders as they benefit from all gains and suffer all losses connected to the decision that is at stake, although such a test also encourages a war on valuation.[147] The final PRD addressed some of the criticism from the Member States, leading to a cross-class cram-down based on the German model, which gave the provision some predictability.[148] This model does not preclude a majority rule over dissenting classes,

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[137] *idem* 61.
[138] *idem* 65.
[139] World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* Revised 2015, 26.
[140] PRD, art 10(2)(d) – "best interests of creditors" is defined in PRD, art 2(1)(4) as "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." See also Eidenmuller (n 81) 282.
[141] PRD, art 9(5).
[142] PRD, art 10(1)(a).
[143] Ignacio Tirado and Riz Mokal, 'Has Newton had his Day? Relativity and Realism in European Restructuring' (2019) Winter Eurofenix 20, 21.
[144] Rotaru (n 86) 36.
[145] *ibid*.
[146] Ignacio Tirado, Keynote Address "Relative vs Absolute Priority", INSOL Europe Academic Forum, 26th September 2019, Copenhagen Denmark.
[147] Rotaru (n 86) 38.
[148] PRD, art 11(1)(b).

which requires the provision of sufficient protection of creditors by reference to rules of fair treatment and respect for the order of priorities.[149] The derogations from Article 11 and its terms then allow for the application of the overriding test of unfair prejudice.[150]

The absolute priority rule "provides that in a reorganisation, senior owners are paid in full before junior owners are paid anything." This rule is common in all or most insolvency systems. Much has been made of the fact that this is a default position in the US Insolvency code, however, while absolute priority remains a fixed principle that forms the foundation of the American restructuring procedure, departures from this rule are commonplace in practice.[151] The procedure allows parties to negotiate a settlement that tolerates a deviation from the default position. As a result, the rule of absolute priority only comes into play when it is protecting a class that dissents from a plan.[152] This approach is also reflected in the Irish Examinership process.[153]

There are also economic efficiency rationales for respecting priority rules. All stakeholders have an interest in a company as they all participate in its financing in some fashion, whether directly or indirectly through labour. The order of priority ascribed to these interests defines the cost for the debtor of each layer of financing. Respecting priorities also avoids encouraging some stakeholders to engage in strategic activities to create conditions that favour themselves to the detriment of other stakeholders. It also increases the predictability of the treatment of all creditors with the concomitant impact of reducing the costs of financing. Finally, it ensures that the distribution in some way measure up to pre-insolvency entitlements by indicating default entitlements, but without impeding a negotiation for redistribution, if needed, to secure a plan to rescue a viable business.[154] The respect of priorities reflects the concept of the "absolute priority rule."[155]

There are also economic justifications for deviations from absolute priority. For example, if junior investors run the business and have private information and expertise, often described as firm-specific human capital, then a portion of the value of the business may be inextricably linked to their participation. This is particularly the case for small businesses. Allowing junior investors to participate in the distributions from reorganisation, even if they are technically out-of-the-money, appears to be a price that senior investors in the United States are willing to pay in order to ensure their co-operation.[156] This is not usually the case for the reorganisations of larger companies, however, in which equity holders do not have similar expertise or value to the company and are often wiped out. At times, junior investors can exercise enough power to reach a deal with senior investors in order to avoid unnecessary dissipation of value that can be caused by the delays in negotiation. It was noted by Baird that "a world in which absolute priority is not respected is one in which entrepreneurs have less access to capital."[157] This is clearly a criticism in the ability of parties to negotiate too far away from pre-contractual entitlements during a reorganisation, if it is not absolutely necessary to preserve value in the company.[158]

Arguably, the academic debate regarding the retention of the absolute priority rule does not reflect the issues in practise. The PRD, in its description of the approval process and the provision of the cross-class cram-down in article 11, addresses both legal frameworks and practise in existence in Member States. It also reflects the concerns expressed in this regard by commentators and experts.

[149] Rotaru (n 86) 38.
[150] Article 11 in full sets out a number of criteria and provides for countervailing derogations. Bork (107) 422.
[151] Douglas G Baird and Donald S Bernstein, 'Absolute Priority, Valuation Uncertainty, and the Reorganisation Bargain' (2006) 115 Yale L J 1930, 1930; see also Allen C Eberhart, et al, 'Security Pricing and Deviations from the Absolute Priority rule in Insolvency Proceedings' (1990) 45 J Fin 1457 and Julian R Franks and Walter N Torous, 'An Empirical Investigation of US firms in Reorganisation' (1989) 44 J Fin 747.
[152] Korobkin (n 11) 622.
[153] See Irene Lynch Fannon, 'Guest Editorial' (2019) 27(3) IIR 1. See also Stephen Lubben, 'The Overstated Absolute Priority Rule (2016) 21(4) Fordham Journal of Corporate & Financial Law 580.
[154] Rotaru (n 86) 44.
[155] *idem* 43.
[156] Baird & Bernstein (n 159) 1937-1938.
[157] *idem* 1940.
[158] Baird goes on to discuss the intricacies of modern business practice and the application of absolute priority and its deviations. The depth of this discussion is outside the scope of this Report. See Baird & Bernstein (n 159) 1944 onward for more detail on how valuation uncertainty affects the ability to negotiate a reorganisation within the confines of absolute priority. See also Lucian Arye Bebchuck, 'Ex Ante Costs of Violating Absolute Priority in Insolvency' (2002) 57(1) J Fin 445.

The European relative priority rule is seen as a means of facilitating restructuring negotiations, while the absolute priority rule is seen by some as being too rigid and counterproductive by giving certain classes of creditors a "harmful lever of extortion".[159] There are four further problems with the APR suggested by Mokal and Tirado. First, the APR subjects approval to a requirement that may be completely unrealistic; the debtor's estate may lack sufficient value to pay dissenting creditors fully, making the cram-down impossible and causing the plan to fail. Secondly, it incentivises dissent on the basis of a possible "free-ride"; members of a class may sufficient support elsewhere, thereby having an incentive to vote against the plan in the hopes of receiving full payment. Third, the aforementioned incentive to hold-out risks backfiring as creditors in multiple classes may have similar incentives to hold-out, potentially leading to rejection of the plan. Finally, it makes it difficult to give any value to equity holders, which is viewed as problematic for small and medium sized companies[160] as noted above.[161]

Unsurprisingly, the APR while operating as a starting point from which negotiations and bargaining begins, it does not feature as an absolute rule in any restructuring framework that operates as a genuine corporate rescue device.[162]

As noted by the CODIRE Project Team:

> "The relative priority rule is a preferred alternative to the 'absolute priority rule' familiar in US restructuring practice. The absolute priority rule makes it a precondition for confirmation of a plan rejected by one or more classes of affected stakeholders that members of each dissenting class would receive the full face-value of their claims before the members of a lower class receive, or retain, anything. This approach is defective. It incentivises dissent from the plan so long as the dissentients expect the plan to receive sufficient support from claimants in other classes. Such dissentients would expect to free-ride on others' sacrifice by being paid in full while those others accepted a haircut. This makes confirmation of the plan less likely, however, since each class might in this way have some such incentive to dissent."[163]

The European concept of the RPR reflects pre-existing practise in some Member States. As with the US Chapter 11, the starting point is an absolute priority rule pre-existing the relevant domestic processes. Negotiating the rescue plan and reaching agreement is done with full recognition and management of pre-insolvency entitlements. These domestic processes tend to include formal approval of the plan, before becoming effective. This stage is similarly envisaged in the PRD. It has been claimed, however, that there is a moral hazard in allowing for divergence from absolute priority, derived in part from allowing shareholders to retain shares while writing down creditors, upending priority rules. This is viewed as unfair; it should be noted, however, that in practice shareholders rarely benefit.[164] For these commentators, the question may be how to balance this moral hazard with the benefit to the economy of rescues of viable businesses and all of the associated benefits.[165]

The introduction of the European version of RPR has caused considerable consternation in some quarters, claiming that it will lead to arbitrary results and value destroying uncertainty.[166] These criticisms have been roundly rebuffed by the highly respected authors of two reports.[167] On the one hand, if the aim is to better safeguard the interests of all stakeholders negotiating a plan in an optimal setting for such negotiation, then an RPR in the way it is drafted in the PRD seems understandable. On the other hand, it has been viewed as blurring the initial bargaining positions of creditors. The argument continues that the existence of an RPR approach broadens the scope of agreements beyond what can

[159] Lorenzo Stanghellini, Riz Mokal, Christoph Paulus, and Ignacio Tirado, 'Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law (CODIRE)' (Wolters Kluwer 2018) 46.
[160] Tirado & Mokal (n 150) 22.
[161] Baird & Bernstein (n 159) 1937-1938.
[162] See generally Lynch Fannon & Murphy (n 3) chapters 12 and 13. See also Payne (n 90).
[163] Lorenzo Stanghellini, Riz Mokal, Christoph Paulus, and Ignacio Tirado, 'Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law' (Wolters Kluwer 2018) 46.
[164] R J de Weijs, A L Jonkers, and M Malakotipour, 'The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR)' (2019) Centre for the Study of European Contract Law Working Paper Series No. 2019-05, 15. See generally O'Donnell and Nicholas: *Examinerships* (Londsdale Law Publishing, 2016)
[165] See further Bob Wessels and Stephan Madaus, *Instrument of the European Law Institute – Rescue of Business in Insolvency Law* (September 6, 2017) (ELI Project); Tirado & Mokal (n 150) 20.
[166] de Weijs, Jonkers, & Malakotipour (n 173) 17.
[167] ELI Project (n 174) and CODIRE Project (n 171).

reasonably be discussed under time pressures, as each creditor has an incentive to try and win a bit more from the agreement as the priority rules become negotiable.

Furthermore, the wording of the APR in the PRD has been viewed as providing enough flexibility to ensure the effective agreement of restructuring plans. There is leeway for national legislators to assess the meaning of “full satisfaction” and “equivalent means” according to Recital 55:

> “Member States should have discretion in implementing the concept of ‘payment in full’ including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected.”

This should make it possible to pay junior creditors as soon as senior creditors have been given sufficient additional security or payment in kind that equates to what they are owed, in other words, not necessarily in cash.[168] In addition, the PRD allows for exceptions to the APR if they are equitable, which is reflected in recital 56:

> “Member States should be able to derogate from the absolute priority rule, for example where …essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors.”

If the aim of the PRD is to create proceedings that save companies, however, then a relative priority rule may be helpful, as it can allow a plan to be confirmed even when some creditors do not believe in the existence of the restructuring value and oppose the proposed plan. An application of the RPR as drafted in the PRD may help restructuring practitioners to reach an agreement that seems reasonable, while saving the debtors’ company in spite of the opposition of creditors.[169] Fundamentally, this seems to be a remnant of the debtor or creditor focussed debate within corporate rescue.

The absolute vs relative priority argument presents a challenge for comparative law because it raises fairly serious reactions among academics in certain jurisdictions, which makes finding a compromise difficult.[170] Some of this is due to legal culture, which ascribes moral hazard to flexible debtor in possession restructuring procedures. This argument is associated with the debate described above between insolvency and pre-insolvency.[171] For example, some of the contributors to the JCOERE Questionnaire took a strict interpretation, discussing only pre-insolvency restructuring even if they had a basic restructuring procedure that essentially fulfilled the same purpose. This issue goes beyond the challenges of comparative law, to the challenge of debating new and largely untested concepts within the civil law systems of most of the EU. These concepts are often discussed at cross-purposes with common law jurisdictions, such as Ireland and the UK, which have-judicially developed standards for assessing fairness to dissenting creditors. It would seem, therefore, that the requirement in article 11 for approval of a plan by a judicial or administrative authority approval where the plan has not been accepted by every class anticipates difficulties and reflects practise. However, again we find in debates that scepticism regarding the judicial function emerges in this latter context. These issues, which we believe are reflective of legal culture will be considered in detail in the JCOERE Report 2.

4.6.4 Protection and Priority of Rescue Financing

The PRD presents a number of justifications for the protection and prioritisation of rescue financing. The PRD recognises that the success of a restructuring plan often depends on financial assistance: first, to support the operation of the business during the negotiations. Second, financial assistance supports the implementation of the restructuring plan following its confirmation. For this reason, the PRD aims to protect interim and new financing by making it exempt from avoidance actions in a subsequent insolvency proceeding.[172] In so providing, the PRD recognises that the availability of necessary

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[168] Reinhard Dammann and Vasile Rotaru, ‘Premières Réflexions sur la Transposition de la Future Directive sur les Restructurations Préventives’ (Dalloz Actualité : Le Quotidien de Droit 2018) <https://www.dalloz-actualite.fr/revue-de-presse/premieres-reflexions-sur-transposition-de-future-directive-sur-restructurations-prev#.XdesK-j7QuU> accessed 22 November 2019.
[169] Rotaru (n 86) 49.
[170] This was discussed and debated in some detail by Reinhard Dammann, Christoph Paulus, and Francisco Garcimartin during the ‘Directive on Preventive Restructuring Frameworks: Relative or Absolute Cramdown’ session at the INSOL Europe Annual Congress on 27th September 2019, Copenhagen, Denmark.
[171] See section 4.4 of this Chapter.
[172] PRD, recital 66.

financing could be jeopardised if national insolvency laws allow such financing to be subject to avoidance actions, or to civil, administrative, or criminal sanctions.[173]

Interim financing occurs prior to a restructuring plan being confirmed, therefore limitations should not be applied so as to encourage a fully successful restructuring process. It is defined explicitly as:

> "any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business."[174]

New financing is defined as "any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan."[175]

According to the PRD, both interim and new financing should be protected from avoidance actions and personal liability at a minimum. In order to encourage new lenders to take the enhanced risk of investing in a viable debtor in temporary financial distress may require other incentives, such as giving priority to financing over unsecured claims in subsequent insolvency procedures, at the least.[176] To reduce potential for abuse, the financing should at least be limited to that which is immediately necessary for the continued operation or survival of the enterprise, or to preserve or enhance value pending confirmation of a plan.

The availability of such financing can be justified by the fact that debtors in financial distress will find it difficult to acquire new financing if they cannot offer reliable security, thus offering priority or protection may incentivise rescue lending. It is unlikely that lending institutions will be prepared to lend new money if there is a risk of not getting that money back, should the restructuring plan fail. "Security can be provided by rights *in rem* but if the debtor has no assets in which it can offer a priority right, subsequent insolvency proceedings would suffice."[177] The concept of a super-priority for rescue financing raises certain complex questions, however, particularly if financing is coming from an existing creditor, which may benefit from an improved priority position in a pre-existing claim as part of the restructuring plan. [178]

Priority rights place some creditors in a better position than those already owed debts by the company. As the *pari passu* is a key tenet of insolvency law, deviance from this norm must be justified. This has been done by reference to the argument that restructuring efforts are worthy of being supported through fresh money and that there is an economic necessity to protect new financing.[179] The Directive resolved this in a number of ways, for example some protections are provided by requiring court or administrative approval for plans that include priority for new or interim financing.[180] While giving priority to new financing clearly interferes with standard priorities in insolvency and treats new financiers more favourably than other creditors, the rescue of viable businesses and the associated benefits~~,~~ is seen as an overarching justification.

4.7 Summary and Conclusion: Implementation and Conflicts

This Chapter explored the theoretical underpinnings of insolvency law as it has evolved to accommodate aims going beyond simple liquidation. Beginning with the creditors' bargain theory and progressing through alternatives, such as traditionalism and communitarianism, which more closely reflect the evolution of insolvency and corporate rescue, rehabilitation, and now preventive restructuring. The conceptual evolution of preventive restructuring within the EU was then discussed in terms of contrasting academic and scholarly commentary on the subject. A brief discussion of the evolution of the PRD was then presented, which will be discussed in greater detail in the next chapter. Finally, the more controversial provisions, namely the moratorium, majority rule, cross-class cram-down, and

[173] PRD, recital 67.
[174] PRD, art 2(1)(8).
[175] PRD, art 2(1)(7).
[176] PRD, recital 68.
[177] Bork (n 107) 422.
[178] Horst and Van Zweiten (n 99) 633.
[179] *Ibid.*
[180] See Chapter 7 of Report.

priority of rescue financing, were introduced and discussed in terms of their worth, fairness to creditors and cost or benefit to rescue generally.

4.8 Chapter 5: Exposition of the Preventive Restructuring Directive

The next chapter will give a full exposition of the PRD, beginning with the 2011 report presented to the Commission by the Committee on Legal Affairs and continuing with the 2014 Recommendation on a New Approach to Business and Insolvency.[181] It considers the journey from these early communications to the PRD, as it is now. The next chapter will examine the various inter-institutional discussions and the Proposal's progress through the EU, focusing on the provisions, which resulted in the greatest compromises in the final text. These provisions will primarily include the stay, the cram-down and cross-class cram-down, and the protection of new financing. The work in Chapter 5 satisfies a key task of Workpackage 2 of the JCOERE project.

[181] Commission Recommendation C(2014) 1500 final of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L 74/65.

5. Chapter 5: Exposition of the Preventive Restructuring Directive

5.1 Introduction

5.1.1 Context of Exposition within the JCOERE Project

Chapter 5 of this Report provides a detailed exposition of the evolution of the Preventive Restructuring Directive,[1] which at the commencement of the JCOERE Project was still only a Proposal for a Directive on Preventive Restructuring.[2] As the PRD came into effect on 20th June 2019 and has now entered the implementation period, which is due to end on 17th July 2021,[3] this task became more challenging. However, this challenge allowed the JCOERE Project team the opportunity to fully assess the institutional changes that occurred prior to the finalised PRD with a clear picture of the compromise eventually achieved. This legislative process adumbrated the difficulties that there may be in the harmonisation of implementation of the PRD across the Member States, given the competing values apparent in the final drafting. This Chapter will describe the progress of the Directive through various EU Institutions and will highlight the significant changes that have occurred along the way, providing a background against which the contributor responses to the JCOERE Questionnaires can be discussed in Chapters 6, 7, and 8.

5.1.2 Presentation of the Chapter

The journey of the PRD began in 2011 going through many levels of EU negotiations until finding its current state as a Directive. The JCOERE Project has identified a collection of the provisions in the PRD that may present obstacles to judicial co-operation. These rules are also the subject matter of the JCOERE Questionnaire Mapping the Preventive Restructuring Frameworks and the EU Directive, the responses to which will be discussed and analysed in Chapters 6 and 7 of this Report. The articles of the PRD, upon which the JCOERE Project focuses are articles 6, 9, 10, 11, 13, and 17.

For the purpose of this Chapter, the conceptual foundations of these articles will be discussed as they developed over time and through various institutional changes into their final form.[4] These concepts include the stay of individual enforcement actions; the protection of new finance; decreased court formality; and the cross-class cram-down. The stay and the protection of new financing are clearly now enshrined in articles 6 and 17 respectively. The cross-class cram-down and its connected rules regarding the adoption and confirmation of restructuring plans are set out in articles 9-11, while article 11 contains the mechanics of the provision as well as some of its most controversial characteristics. Articles 9 and 10 will be discussed only insofar as they relate to article 11 in this Chapter. Finally, court involvement, whether this amounts to decreased court formality or otherwise depending on jurisdiction, is considered under article 4, but really is present as a concept in all of the aforementioned articles. This will be discussed insofar as it has developed within the various provisions. The conclusion of this Chapter will then offer a brief synopsis of how the articles under scrutiny have changed from the Proposal to the PRD.

Section 5.2 begins with the report presented by the Committee on Legal Affairs – a committee of the European Parliament – to the European Commission in 2011, continues with the Communication from the Commission to the Parliament in 2012 and concludes with the Recommendation and accompanying

[1] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the "PRD").
[2] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the "Proposal").
[3] PRD, art 34.
[44] There was little discussion of art 13 on Workers during these interinstitutional negotiations as this appeared at a very late stage in the drafting, so will not form a focus of this Chapter.

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Impact Assessment put forward by the Commission in 2014. By detailing this 3-year process, the intention is to give a clear overview of the steps preceding the Commission Proposal in 2016. Accordingly, this Chapter is split into three distinct parts:

(i) Section 5.2 – the historical context of the Directive (pre-Proposal);
(ii) Section 5.3 – the Commission Proposal (2016); and
(iii) Sections 5.4 & 5.5 – the negotiation process for the final Directive (post-Proposal).

5.2 Historical Context

5.2.1 Committee on Legal Affairs Report (2011)[5]

In 2011, the Committee on Legal Affairs issued a series of recommendations on insolvency proceedings in the EU to the Commission and with that report, began a journey towards the final Directive and indeed towards elements of the Recast Insolvency Regulation of 2015.[6] Amongst the other reasons for the proposed changes contained within the 33 recitals, the Committee noted that:[7]

(i) the (then) variances between national insolvency frameworks could lead to "forum shopping" by businesses and as such, there was a need to prevent abuse in order to benefit the internal market;[8]

(ii) whilst full harmonisation was not possible, there some areas of insolvency law where harmonisation would be worthwhile and achievable;[9]

(iii) there was significant difficulty in insolvency proceedings where the process involved a group of companies. At that time, the commencement of multiple separate insolvency proceedings in different jurisdictions was likely, as opposed to a co-ordinated approach, which led to more monetary losses for the parties involved and greater impediments to recovery;[10]

(iv) the interlinking of national insolvency registers would allow relevant parties and courts to determine whether insolvency proceedings have been opened in another Member State; and[11]

(v) the (then) lack of harmonisation with regard to the ranking of creditors was problematic and that a higher priority for employees' claims was necessary.[12]

The report went on to suggest that the European Parliament advocated harmonisation in the following five areas:

- certain aspects of the opening of insolvency proceedings;
- certain aspects of the filing of claims;
- aspects of avoidance actions;
- general aspects of the requirements for the qualification; and
- work of liquidators and aspects of restructuring plans.

The Parliament considered that the conditions under which insolvency proceedings could be opened should be harmonised via directive. The report supported harmonisation of, amongst other areas, the

[5] European Parliament Committee on Legal Affairs, 'Report with recommendations to the Commission on insolvency proceedings in the context of EU company law' (2011) A7-0355/2011 ("Legal Affairs Report").
[6] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L 141/19 (the "EIR Recast").
[7] Much of the content of the recitals focused on employees and employment law, which are not considered to be particularly relevant to the conversation at hand, except for (v), which pertains to employees as a class or creditors.
[8] Legal Affairs Report, recitals A & B.
[9] Legal Affairs Report, recital C. Later in the Legal Affairs Report, it became apparent that the areas were certain aspects of the opening of insolvency proceedings and the filing of claims, aspects of avoidance actions and restructuring plans and the qualifications and role of liquidators.
[10] Legal Affairs Report, recitals P & Q.
[11] *idem* recital R.
[12] *idem* recital AB.

ability of companies themselves to initiate insolvency proceedings, the timely initiation of proceedings in order to allow for rescue, and the ability of the debtor to open proceedings if they are insolvent or likely to be.[13] Part 1.5 of the report proposed harmonisation of aspects of restructuring plans, including that debtors and liquidators may present a restructuring plan as an alternative to complying with statutory rules, that such plans must contain all relevant information enabling creditors to make a decision and that the plan must be approved (or rejected) by the relevant court.[14] Also noteworthy is part 2.4., where the European Parliament considers that article 32 of the Insolvency Regulation[15] should provide for an unequivocal duty of communication and co-operation, not only between liquidators, but also between courts.

5.2.2 Commission Communication 'A New Approach to Business Failure' (2012)[16]

Following on from this report, the Commission responded to the Parliament in the form of a Communication, dated 12 December 2012. In this document, "A new European approach to business failure and insolvency", the Commission identified six key areas where national differences could create "legal uncertainty and an 'unfriendly' business environment". They cited second chance for honest entrepreneurs; discharge periods that discourage a second chance; different rules on opening proceedings leading to varying chances for restructuring; unfulfilled expectations of creditors for different categories of debtors; uncertainty regarding procedures to file and verify claims for creditors; and the promotion of restructuring plans. Of key importance to the Commission as evidenced by the section dedicated to it was the situation faced by small and medium enterprises (SMEs). The report noted the importance of giving businesses in that sector a second chance and suggested four key ways in which SMEs could be supported: prevention (of bankruptcy due to high cost of restructuring), second chance, out-of-court settlements, and in-court procedures.

The report concluded with the 'steps to be taken,' namely:

(i) Modernisation of the EU Regulation on insolvency proceedings;

(ii) Adoption of the European Entrepreneurship Action Plan;

(iii) Country-specific recommendations inviting Member States to update their insolvency laws;

(iv) Impact assessment of the differences in national insolvency laws; and

(v) Public consultation on the issues identified in the document.

5.2.3 Commission Recommendation and Impact Assessment (2014)[17]

Subsequent to the Communication to the Parliament, the Commission drafted a Recommendation dated 3rd March 2014 and entitled 'A new approach to business failure' and an accompanying Impact Assessment. It was the view of the Commission at that time that the EU was still facing the single largest economic crisis in its history and that consequently, improving the efficiency of insolvency laws was critical to supporting economic recovery, given the record numbers of bankruptcies across Member States.[18] The objective of the Commission, according to the Recommendation, was to "ensure that viable enterprises in financial difficulties…have access to national insolvency frameworks, which enable them to restructure at an early stage with a view to preventing their insolvency…"[19] It was argued that preventing insolvency would maximise the value to the economy as a whole, benefit those connected with businesses at risk of insolvency, such as creditors, employees and owners, and contribute to saving jobs.[20] The Commission also sought to give honest bankrupt entrepreneurs a "second chance", which it viewed as potentially increasing self-employment rates in Member States, amongst other benefits.[21]

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[13] *idem* part 1.1.
[14] *idem* part 1.5.
[15] Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 (the "EIR").
[16] Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee COM(2012) 742 final of 12 December 2012 on a new European approach to business failure and insolvency [2012] OJ C 271/ 55.
[17] Commission Recommendation C(2014) 1500 final of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L 74/65 (the "Recommendation").
[18] Commission, 'Impact Assesment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency' [2014] (Staff Working Document) SWD (2014) 61 final 1 ("Impact Assessment of Recommendation").
[19] Recommendation, recital 1.
[20] Recommendation, recital 1 & 12.
[21] *ibid*.

Variances in both how Member States treated restructuring and the national rules on a second chance for honest entrepreneurs led to a reluctance on the part of businesses to expand across the European Union, either by virtue of the increased costs or uncertainty as to their level of exposure in other Member States, and very different recovery rates for creditors.[22] As such, the Commission believed that:

> "the creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment."[23]

The Recommendation noted that SMEs, in particular, would benefit from the Recommendation as paying high restructuring costs was not feasible for such companies, something which reflected the position taken by the Commission in 2012 in its Communication to the Parliament.[24]

Key to the Recommendation of the Commission were the following points:

- Flexibility of procedures, namely limiting the need for court formalities to where they are necessary and proportionate;[25]
- Provision for a stay of individual enforcement actions;[26]
- Protection of the interests of dissenting creditors, namely that the court should reject any restructuring plan which would likely reduce the rights of dissenting creditors below what they could reasonably expect to receive, were the debtor's business not restructured;[27] and
- Provision for "second chance", namely that provisions should be made for a full discharge of debt after a specified period of time.[28]

Part I of the Recommendation lays out its objectives, namely to encourage Member States to establish efficient restructuring frameworks, which it was submitted would, in turn, promote entrepreneurship, investment and employment and reduce "obstacles to the smooth functioning of the internal market."[29] The aims of the Recommendation are also contained in Part I and are to lower the costs of assessing risks of investing in other Member States; to increase recovery rates for creditors; and to remove difficulties in restructuring cross-border groups of companies, respectively.[30]

Part III of the Recommendation set out the Commission's position on preventative restructuring frameworks, which covered a number of areas. Section 6 lists common principles or elements which should be part of all national insolvency frameworks, namely:

(i) the availability of early restructuring for debtors likely to become insolvent;
(ii) the debtor retaining control over the day-to-day business operations;
(iii) the availability of a stay of individual enforcement action;
(iv) cram-down; and
(v) protection for new financing.[31]

Sections 7 through 9 reflect the intention laid out in recital 17, namely that Member States should adopt a less rigid approach to insolvency proceedings by confining the involvement of national courts to where such involvement is necessary and proportionate; by ensuring that debtors need not formally open court proceedings in order to begin the process of restructuring their business; and by ensuring that the

[22] *idem* recital 4.
[23] *idem* recital 8.
[24] *idem* recital 13.
[25] *idem* recital 17.
[26] *idem* recital 18; the recommendation was that the stay should be available for a period of no more than four months initially, in order to balance the rights of creditors.
[27] Recommendation, recital 19.
[28] *idem*, recital 20; it was felt that this particular aim would help to combat the "social stigma" and legal consequences of an on-going inability to pay off debts. Part IV of the Recommendation concerns "second chance" provisions; the Commission recommended that entrepreneurs should be fully discharged of their debts within three years from either the date on which implementation of a payment plan began or the date on which the court approved the opening of bankruptcy proceedings (section 30). Per s 32, however, Member States are entitled to introduce more stringent provisions in certain circumstances, for example to discourage entrepreneurs who have acted in bad faith or failed to adhere to a repayment plan, or to safeguard the livelihood of the entrepreneur by allowing him / her to keep certain assets.
[29] Recommendation, s 1.
[30] *ibid*.
[31] *idem* s 6.

appointment of a mediator or supervisor be done on a case by case basis, as opposed to being mandatory.[32]

The importance placed by the Commission on the stay of individual enforcement actions is highlighted in sections 10 through 14. It is recommended that debtors should have the right to request a stay where individual actions may hamper the restructuring process.[33] A stay should be granted in all circumstances where there is widespread, though not necessarily universal, support amongst creditors for the process and the plan has both a reasonable prospect of being implemented and of preventing the insolvency of the debtor.[34] The Commission also seeks to strike a balance between the rights of debtors and creditors by limiting the duration of the initial stay to 4 months and the total duration (with extensions) to 12 months.

Section 18 of the Recommendation provides for the introduction (or retention) of provisions which empower courts to confirm restructuring plans that are supported by the majority of classes of creditors, once due regard is given to the claims of the respective classes of creditors, i.e. cross-class cram-down. Sections 21 through 23 set out the approach that Member States should adopt in relation to court confirmation of restructuring plans, with section 22 stating that the law on court confirmations should be clear. It sets minimum requirements, including that the restructuring plan does not reduce the rights of dissenting creditors below what they would reasonably be expected to receive in the absence of restructuring and that any new financing is both necessary and does not unfairly prejudice the interest of dissenting creditors.[35] Section 26 recommends that court approved restructuring plans should be binding upon every affected creditor, in other words “cram-down”.

Finally, sections 27 through 29 deal with protection for new financing during the restructuring process; the Commission recommends that new financing, contained in the agreed restructuring plans and approved by a court, should not be declared void as an act detrimental to the general body of creditors and that in the absence of any justified exception to the rules protecting new finance, providers of new financing should be exempt from civil and criminal liability relating to the restructuring process.[36]

The Impact Assessment accompanying the Recommendation[37] identified three general policy objectives of the Recommendation, namely to contribute to the smooth functioning of the internal market by enabling restructuring of viable businesses (and liquidation of unviable ones); to enhance the survival prospects of firms in difficulty; and to minimise investment decisions being made on foot of national insolvency laws.[38] The Impact Assessment also identified a number of specific objectives, including to reduce the cost of restructuring in Member States with inefficient rescue processes and reduce the cost to creditors resulting from the relocation of debtors.[39] The Impact Assessment also identified two viable policy options for the Recommendation: a Commission recommendation to Member States or a Directive. Both would aim to deal with introducing minimum standards for preventative restructuring frameworks and second chance.[40]

The Commission considered the first policy option of maintaining the status quo and the fourth of a fully harmonised procedure to be unsuitable, as they would, respectively, fail to achieve the objectives set out by the Commission and would be a disproportionate response to the issues identified. Within sub-options 2 and 3, the Impact Assessment identified a number of sub-options.[41] For the purposes of this Report, the sub-options under the stay or moratorium, protection of new financing, plan approval by a majority of creditors (cram-down), and less court formality within preventative restructuring will be analysed.

a) The Stay

The sub-options laid out under the moratorium were that:

[32] *idem* ss 7-9.
[33] *idem* s 10.
[34] *idem* s 11; this section applies to Member States which impose certain conditions on the granting of a stay.
[35] Recommendation, s 22 (c)(d).
[36] *idem* ss 27-29.
[37] Impact Assessment of Recommendation.
[38] *idem* 26.
[39] *idem* – see table of specific objectives.
[40] *idem* 27.
[41] *idem* see table of sub-options for Options 2 and 3, 27-28.

1. a stay would be granted automatically against all creditors;
2. a stay would be granted at the request of the debtor;
3. a stay of short, limited duration would be granted at the request of the debtor.

In the analysis of the impacts of the policy options for the stay, sub-option (3) was considered to be the most appealing as it was felt that it struck the best balance between the interests of all parties involved. A stay of limited duration was viewed to reduce the length of the restructuring procedure, thereby limiting the detriment caused to creditors, but also providing for the possibility of extension in certain circumstances.[42] What is interesting to note about sub-options (2) and (3) is that both referred to a stay *at the request of the debtor* and under sub-option (2) it was noted that countries such as Ireland, which has an "automatic stay in place", would need to provide for a stay on request.[43] In contrast, the PRD, which will be discussed in more detail later in this Report, only provides for the existence of a stay for the benefit of debtors. It does not specify that the stay must be at the request of the debtor, thereby seeming to contradict the link between the sub-option and the benefit to the effectiveness of the procedure identified by the Impact Assessment.[44]

b) Protection of New Financing

Two sub-options were provided under the heading of new financing,[45] namely:

1. Super-priority status for new financiers;
2. Exempting approved new financing from avoidance actions except in the case of fraud. Member States may also grant super-priority status.

Sub-option (2) was considered to be the preferable option as it was contended that it provided "the necessary incentives and support for restructuring plans to be successful, without unduly affecting the rights of existing creditors."[46] It was felt that where the rights of creditors were impacted, these were proportionate if the alternative was to be the liquidation of the debtor.[47]

c) Cram-Down

Three sub-options were identified under the heading 'Plan approval by a majority of creditors':[48]

1. A majority of creditors could be bound by a majority in the same class, but Member States may exclude secured creditors from majority voting;
2. A minority of creditors in any class could be bound by a majority of creditors in the same class, with decisions made by formal voting;
3. A minority of creditors in any class could be bound by a majority of creditors in the same class without the need for a formal voting process, provided the debtor can prove the majority support.

Sub-option (3) was considered preferable, as it was opined that it would ensure that secured creditors could also be bound by the plan, thereby promoting greater likelihood that a restructuring process would succeed, as secured creditors are critical to the restructuring process.[49] Furthermore, it was the position of the Impact Assessment that such a policy would increase efficiency by reducing the time and cost with organising formal voting but not at the expense of proper oversight. As is evident, the option did not outline a mechanism for cross-class cram-down; instead, it merely gave scope for Member States to make provisions for cram-down (majority rule within classes) in the concluding paragraph. Interestingly

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[42] *idem* 30-32.
[43] *ibid*; Arguably, to state that Ireland has an "automatic stay in place" was somewhat misleading, rather the Irish legal position is that a company receives court protection for a limited duration on foot of the presentation of a petition for the appointment of an examiner by the relevant court. As a petitioner the debtor can initiate the process applying for the appointment of an examiner and hence the commencement of the stay. Other potential petitioners include creditors, employees or contributories. In all cases the stay will be imposed pending the hearing but will be lifted in the petition to grant an examiner is not granted or is subsequently denied following a full hearing.
[44] See Impact Assessment of Recommendation 30: "The stay should be on request by the debtor, so that debtors who are able to continue to pay their debts as they fall due and do not need a stay can negotiate in confidentiality with those creditors which they need to involve."
[45] Impact Assessment of Recommendation 30.
[46] *idem* 37; It should be noted that as part of its analysis, the Commission commented on the impact that granting super-priority to new finance would have on the property rights of some creditors. The Impact Assessment noted that the granting of super-priority to new finance may lead to a limitation in the exercise of the right to property of dissenting creditors.
[47] Impact Assessment of Recommendation 37.
[48] *idem* 28.
[49] *idem* 35.

as was noted earlier, section 18 of the Recommendation does provide for cross-class cram-down, which it could be argued results in some inconsistency between the two related documents. Article 11 of the Directive also includes a provision for cross-class cram-down, thus it is seemingly more in line with the Recommendation.

d) Decreased Formality

Two sub-options were provided under the heading 'Reducing the formalities relating to court proceedings': [50]

1. A flexible framework, providing for more limited court involvement save in certain circumstances (e.g. it is necessary to prevent abuse);
2. A flexible framework, providing for more limited court involvement save in certain circumstances, but which requires courts to rule in principle in written procedure.

The position of the Impact Assessment was that sub-option (2) was the most suitable as it balanced the need to reduce costs of restructuring with protecting the procedural right of parties. It is interesting to note the view in the Impact Assessment that Member States, such as Ireland and the Netherlands, would need to "make possible that courts are not seised when negotiations start, but at a later stage when the prospects of a restructuring plan are also more tangible."[51]

5.2.4 Conclusion

The response of the Member States to the Recommendation and accompanying Impact Assessment was lacklustre. An evaluation of the Recommendation was carried out by the Directorate-General Justice & Consumers of the European Commission in 2015,[52] with 24 countries from 28 taking part. There are two points worth making in relation to this Evaluation; the first relates to the language utilised and the second relates to the findings.

First, the language employed in the Evaluation is quite vague; in Part 1, it was noted that "a few Member States [had] undertaken reforms which, in some cases, resulted in legislation implementing the Commission's Recommendation".[53] Although examples of such Member States were provided in Part 1, it was noted that "in most cases" the legislation only partially implemented the Recommendation.[54] One could contend that language such as "a few", "in some cases" and "in most cases" lacks the specificity and analytical quality that one would expect from an evaluation, particularly one where the goal was to assess the impact of a Commission Recommendation. Instead, it is submitted that the Evaluation tends more towards being a discussion of the position of the respondents on some aspects of insolvency law.

The Evaluation does give some insight into the ways in which Member States were partially compliant with the Recommendation, somewhat mitigating against the vagueness in Part 1. With that said, however, the analysis of the legal position in the Member States only served to highlight their lack of engagement. Consider the stay, for example, as was highlighted earlier the Recommendation advocated for the availability of a stay of short, limited duration at the request of the debtor. Yet at the time of the Evaluation, there was no possibility of a stay in Austria and a number of countries, including Romania and Belgium, provided for a stay of indefinite length.[55] On the matter of protection for new financing, the Recommendation advocated for approved new financing being exempt from avoidance actions except in the case of fraud and for the option for Member States to grant super-priority status. At the time of the Evaluation, a number of Member States including Luxembourg and Sweden offered no special protection to new financiers in subsequent insolvency proceedings.[56] Furthermore, in both examples, some of the responding Member States were absent from analysis.

[50] *idem* 28.
[51] *idem* 38. As will be evident upon discussing the final wording of the PRD, Ireland and other Member States with similar provisions are unlikely to have to make changes to national law.
[52] Directorate-General Justice & Consumers of the European Commission, 'Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on A New Approach to Business Failure and Insolvency' (2015.
[53] *idem* 1.
[54] *ibid.*
[55] *idem* 3.
[56] *idem* 4.

Following on from the lack of legislative activity among the Member States following its Recommendation, the Commission established the Expert Group on Restructuring and Insolvency Law, which met a number of times throughout 2016. It was comprised of over 20 leading academics and practitioners from 12 EU countries and its function was to discuss various aspects of insolvency law and more specifically, to focus on how the Commission Recommendation could be amended, thereby making it more effective across the EU and leading to more legal certainty.[57] A full discussion of the meetings of the Expert Group is contained in Annex 1 of this Report. However, one aspect of discussion around the stay was particularly relevant for the purposes of this Report. Some of the experts had "strong concerns" that the stay would be open to abuse and they referred to the "moral hazard problem" on more than one occasion.[58] There was clear divergence between the experts as to whether the stay should be automatic and general. Those experts who expressed concern regarding abuse stated that the stay should be neither automatic nor general, whereas other members were of the view that the stay should be automatic at first, otherwise it would be "cumbersome for a court to determine if there are reasonable prospects of success of the restructuring".[59] The reference to the moral hazard problem is interesting, as it highlights, once again, how differing traditions and cultures lead to very different opinions on how the law should function.

5.3 The Commission Proposal

In November 2016 the Commission issued its Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. One of the main justifications given by the Commission for proposed directive was similar to the justification given for the Recommendation circa four years previously. Uncertainty regarding local insolvency rules and/or the risk of a complex and costly restructuring as a result of national systems were the primary reason for the reluctance of investors to expand outside their own country.[60] It was the view of the Commission that:

> "[a] higher degree of harmonisation in insolvency law is thus essential for a well-functioning single market and for a true Capital Markets Union" as "increased convergence of insolvency and restructuring procedures would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress".[61]

5.3.1 The Stay

Article 6 and 7 of the Commission Proposal pertained to the stay, with the latter detailing the consequences of a stay of individual enforcement and the former giving the mechanics of the provision. Article 6(1) stated:

> "Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent that such a stay is necessary to support the negotiations of a restructuring plan."

Article 6(2) provided for the stay to extend to all types of creditors and to be general in nature or limited to particular creditors.[62] Articles 6(4)-6(7) pertain to the duration of the stay; article 6(4) placed a maximum time limit of four months on the (initial) stay and 6(5) granted Member States the ability to provide for extensions, or the granting of a new stay, if the negotiations were progressing and the extension was not unfairly prejudicial.[63] 6(7) placed a time limit of 12 months on the total duration of the stay, including extensions and renewals. Articles 6(8) and 6(9), respectively, outlined the conditions for the lifting of the stay by a judicial or administrative authority and mandated Member States to

[57] Minutes Expert Group Meeting – 14 January 2016 3: "[t]he view shared by the majority of the experts is to focus on how the Insolvency Recommendation may be improved as to provide more legal certainty and more binding force in Member States."
[58] Broadly speaking, moral hazard occurs when a party takes increased risks because they are aware that another party will bears the cost of those risks. See Minutes Expert Group Meeting 14 June 2016, 3 and Minutes Expert Group Meeting 11 July 2016, 3.
[59] Minutes Expert Group Meeting 14 June 2016, 3-4.
[60] Proposal, 2.
[61] Proposal, 2.
[62] Proposal, art 6(3) excluded workers' claims from the scope of s 6(2) except where Member States ensure that the claims are protected to the same extent as they would be under the national interpretation of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.
[63] Proposal, art 6(6) adds an additional condition to the granting of an extension, namely the "strong likelihood" that the plan will be adopted.

provide for the judicial or administrative authority refusing or lifting the stay at the request of creditors unfairly prejudiced by the stay.

Article 7(1) and 7(2) apply to insolvency proceedings with the former stating that any obligation to file for insolvency under national law is suspended for the duration of the stay and the latter dictating that a general stay prevents the opening of insolvency procedures at the creditors' request.[64] Article 7(4) specified that Member States should prevent affected creditors from withholding performance or terminating or modifying executory contracts to the detriment of the debtor for debts occurring prior to the stay.[65] Article 7(5) specified that Member States should prevent creditors from withholding performance or terminating or modifying executory contracts solely by reason of the debtor's entry into restructuring negotiations, a request for a stay, the ordering of the stay, or any similar event connected to the stay.[66] Article 7(6) dictated that Member States must ensure that debtors are not precluded from paying certain claims, namely those of creditors unaffected by the stay and those that arise after the stay is granted and reoccur throughout the stay. Lastly, article 7(7) stated that Member States should ensure that debtors are not required to file for insolvency procedures if the conditions laid down by national law are met, not solely because the stay period has expired without a plan agreed.

5.3.2 Protection for New Finance

Article 16 pertained to the protection of new finance. Article 16(1) stipulated that new and interim finance should be "adequately encouraged" and specifically, that it should not be declared void or unenforceable in subsequent insolvency proceedings, unless other criteria were met.[67] Article 16(2) mandated that new or interim financiers should be ranked senior to unsecured creditors. Furthermore, it stated that Member States may decide to grant priority status to new and interim finance in subsequent insolvency proceedings. Finally, article 16(3) absolved new and interim financiers from criminal and civil liability in subsequent insolvency proceedings unless the transactions were fraudulent or carried out in bad faith.

5.3.3 Cross-Class Cram-Down

Article 11 of the Commission Proposal related to cross-class cram-down, with article 11(1) providing for a restructuring plan to be binding on dissenting creditors once it was approved by a judicial or administrative authority and complied with three criteria:

a) Compliance with article 10(2);[68]

b) Approval of at least one class of affected creditors[69] and any other class, which would not receive any payment if liquidation occurred; and

c) Compliance with the absolute priority rule.

Article 11(2) gave Member States latitude to decide the number of affected classes which would be required to approve the restructuring plan in order to cram-down on dissenting creditors.

5.3.4 Decreased Court Formality

Article 4(3) applied to decreased formality within restructuring processes. It stated:

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[64] Proposal, art 7(3) provides an exception to art 7(1) as follows: "[w]here the debtor becomes illiquid and therefore unable to pay his debts as they fall due during the stay period … Member States shall ensure that restructuring procedures are not automatically terminated and that, upon examining the prospects for achieving an agreement on a successful restructuring plan within the period of the stay, a judicial or administrative authority may decide to defer the opening of insolvency procedure and keep in place the benefit of the stay of individual enforcement actions."

[65] Proposal, art 7(4) went on to state; "Member States may limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business."

[66] There is currently a variety of approaches among Member States in relation to these so-called *ipso facto* clauses. See Jason Chuah and Eugenio Vaccari (eds), *Executory Contracts in Insolvency Law* (Elgar 2019) for a detailed discussion on this topic.

[67] Fraudulent transactions or those carried out in bad faith.

[68] Proposal, art 10(2) stated; Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following: (a) the restructuring plan has been adopted in accordance with art 9 and has been notified to all known creditors likely to be affected by it; (b) the restructuring plan complies with the best interest of creditors test; (c) any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

[69] Aside from equity-holders.

"Member States shall put in place provisions limiting the involvement of a judicial or administrative authority to where it is necessary and proportionate so that rights of any affected parties are safeguarded."

5.4 The Consultation Process

Throughout 2017 and 2018, various bodies expressed opinions and, in some cases, suggested specific amendments to the proposal. Broadly speaking, these submissions are considered chronologically, however, some bodies, such as the Council via the Justice and Home Affairs Council, held a number of debates throughout the aforementioned time period.[70] As will become evident, the Council had the greatest impact on the content of the final Directive and as such, its amendments are discussed in considerably more detail than the amendments proposed by other various committees, such as the European Economic and Social Committee and the European Parliament Committee on Employment and Social Affairs. It would seem that much of the impact of amendments from these committees seemed to be increasing the degree to which workers were referenced in the final text. One key aspect to take away from the consultation process was the considerable weakening of the provision mandating the decrease in court formality, something which was supported by a number of parties to the consultation process.

5.4.1 European Economic and Social Committee[71]

In early 2017, mandatory consultation with the European Economic and Social Committee (henceforth "the EESC") took place. In general, the Committee expressed support for the proposal, in particular, noting its preference that the EU not be afraid to move towards the maximum possible harmonisation. The Committee did, however, seem to have concerns regarding the degree to which the proposal protected the rights of workers. As such, most of its recommendations pertained to worker protection. However, there are some points to note in relation to decreased court formality and the stay, which are outlined below.[72]

The Committee strongly supported the "marginal role granted to the courts" at point 1.10 of the EESC Opinion and supported limiting the role of the courts to "intervene only in cases of necessity" in the insolvency process. At point 1.7 the Committee contended that members of the judiciary should have "appropriate common training and extensive experience" which would enable them to work in this area.[73] This is reflective of the concerns of members of the judiciary that have been expressed in

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[70] In the interest of expediency, a number of bodies / committees which commented on and/or proposed amendments to the Commission Proposal have been removed from the main body of the Chapter. A fuller discussion of those submissions is available in Annex 1 of this Report. These submissions are: the opinions of the national parliaments (Annex 1, para 10.6.2) and the opinion from the Committee of the Regions (Annex 1, para 10.6.5).

[71] European Economic and Social Committee, 'Opinion: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' (Business Insolvency) INT/810 ("EESC Opinion").

[72] For example, at point 1.5 of the EESC Opinion, the Committee recommended that workers attain the status of priority creditors in all Member States and that employees and unions must be involved throughout the process including having the ability to make alternate proposals and refer an expert (point 4.2.4). At point 1.3 of the EESC Opinion, the EESC insisted that the final text;
provide for mandatory consultation by company management with employees prior to and during the negotiation process,
give greater importance to workers' interests early in the restructuring process, and
make specific reference to Article 5(2) of Directive 2001/23 to protect the rights of workers.
It is worth noting that there is an error in the Committee opinion, as point 1.3 actually advocates for reference to be made to "Article 5(2) of Directive 2011/23" The correct Directive is Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82/16, art 5(2) of which reads:

> "Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:
>
> (a) notwithstanding art 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer(7), and, or alternatively, that,
>
> (b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business."

[73] At 4.5.1 of the EESC Opinion, the Committee stated that it would be helpful if the aforementioned training was "organised directly be the Commission (including through agencies)".

JCOERE several meetings. Furthermore at point 4.2.8 of the EESC Opinion, it was noted that the objective was "to reduce action taken by judicial / administrative authorities" which, in the view of the EESC, were too frequently called upon prematurely "to solve insolvency issues using drastic measures."[74] Regarding the stay, the Committee advocated for abuse of the insolvency process (the "tactical use of insolvency procedures to avoid legal liability and deny workers their rights") to be an illegal practice, which critically, they argued, should render a stay unattainable.[75]

5.4.2 The European Central Bank[76]

In mid-2017, the European Central Bank issued its opinion on the proposal; while the ECB broadly welcomed the proposed directive, it did express reservations in relation to certain aspects. In stark contrast to the Member States, the ECB lamented the lack of harmonisation in what it considered to be key areas of insolvency law such as a definition of insolvency, the conditions for opening insolvency proceedings, the ranking of insolvency claims and avoidance actions and cited the need for "more ambitious action" to be taken.[77] In relation to the stay, in particular, the ECB expressed concern about the unintended consequences of the directive.[78] At para 1.7 it was noted that:

> "…the consequences and scope of the stay, such as whether the stay of individual enforcement actions also applies to assets of the debtor pledged as collateral for claims of the creditor, need to be carefully assessed also from the perspective of its possible impact on regulatory capital requirements, and in particular from the perspective of risk mitigation techniques under Regulation (EU) No 575/2013 of the European Parliament and of the Council."[79]

No attempt was made to further harmonise the aforementioned areas in light of the opinion of the ECB. As such, one could opine that perhaps the "considerable legal and practical challenges" associated with further harmonisation, as identified by the ECB in its Opinion, were considered too great by the Parliament and Council.

5.4.3 European Parliament Committees: Committee on Legal Affairs[80]

The Committee on Legal Affairs issued an extensive report on the Commission proposal in September 2017. The Committee suggested a significant number of amendments to the proposal, 85 in total and demonstrated a tendency towards more conservativism in its approach to issues such as the stay and decreased court formality.[81]

a) The Stay

Amendments 39 to 51 applied to articles 6 and 7. At Amendment 39, the Committee proposed attaching the conditions that the "obligation of the debtor to file for insolvency under national law" had not yet arisen and that there was a likelihood of being able to save the company from insolvency to the availability of the stay under article 6(1).[82] At Amendment 40, the Committee attempted to limit the stay to only those creditors that were "participating in the negotiation of a restructuring plan"[83]

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[74] The JCOERE 2 Report will return to this issue, along with the role of the judiciary/ administrative authority envisaged in art 11 of the Directive regarding confirmation of plans which include cross-class cram-down.
[75] EESC Opinion points 4.2.3 & 1.9.
[76] European Central Bank 'Opinion on a proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' (Communication) CON/2017/22 OJ C 236/02 ("ECB Opinion").
[77] ECB Opinion para 1.2.
[78] Essentially, the ECB was concerned that financial institutions may suffer unintended consequences as a result of the impact that the stay may have on financial contracts with commercial entities.
[79] ECB Opinion para 3.
[80] European Parliament Committee on Legal Affairs, Report of 22 September 2017 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016)0723 – C8-0475/2016 – 2016/0359(COD) ("Report by Committee on Legal Affairs").
[81] The Committee on Legal Affairs proposed no amendments to the protection of new financing. The amendments proposed to cross-class cram-down were not included in the final draft. The Committee advocated for the amendment of article 11(1)(b) to require that the restructuring plan be approved by "the majority of classes of affected creditors," as distinct from "at least one class of affected creditors" contained in the proposal. The Committee proposed amending article 11(2) as follows: "Member States may vary the minimum number of affected classes required to approve the plan laid down in point (b) of paragraph (1) to the extent that that minimum number covers still the majority of classes."
[82] Report by Committee on Legal Affairs 29. The Committee also sought to amend art 6(5) – conditions for granting an extension to the stay – to include the same condition, namely that the obligation of the debtor to file for insolvency under national law had not yet arisen.
[83] Report by Committee on Legal Affairs 29.

Arguably, however, creditors who are not participating in the negotiation process could be the most likely creditors to initiate proceedings against the debtor, if it appears as though they may be disadvantaged by the process. Interestingly, the Committee also attempted to reduce the maximum duration of the stay from four months to two and the total duration of the stay including extensions from twelve months to six via Amendments 41 and 46.[84] Furthermore, the Committee also attempted to insert the following after article 6(7):

> "The total duration shall be limited to two months if the registered office of the company has been transferred to another Member State within a three-month period prior to the filing of a request for the opening of restructuring proceeding."

It appears that none of the amendments that the Committee put forward in relation to article 6, were adopted. The Committee also proposed a number of changes to article 7[85] but it appears, however, that none of these were integrated into the final draft either.[86]

b) Decreased Court Formality

The Committee sought to weaken to position of the Commission on decreased court formality by replacing the word "shall" with "may" in article 4(3);[87] as such, the requirement for Member States to put provisions in place to limit formality to where it was necessary and proportionate was no longer present. This is one area where the position of the Committee was reflected in the final text of the PRD, as the word "may" remained in article 4(6).[88]

5.4.4 European Parliament Committees: Employment and Social Affairs ("EMPL")[89]

In December 2017, the European Parliament Committees on Employment and Social Affairs and on Economic and Monetary Affairs issued opinions on the Proposal. The EMPL opinion mirrored much of the concern expressed by the EESC earlier in the same year, namely that workers had not been adequately considered in the proposed directive. As such, the Committee went on to suggest a number of changes to the proposed text. Amendments 1 – 24 proposed by the EMPL Committee, were to the recitals of the Proposal, suggesting either the insertion of a new recital or the amendment of an existing one. Amendments 25 – 64 applied to articles of the Proposal, all with a view to strengthening the position of workers.[90]

Although many of the EMPL Committee proposals were not specifically adopted by the Parliament, the revised article 8(1)(g) includes a specific reference to the arrangements for informing and consulting the employees' representatives and the overall consequences for employees e.g. dismissals, changes to working arrangements. Arguably, this indicates that the canvassing for greater protection of employees carried out by various parties did have some impact on the final wording of the PRD.

In the following section, this Report will consider the amendments proposed by the EMPL Committee to the key areas relevant to this report, namely the stay and protection of new finance. The proposed

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[84] Report by Committee on Legal Affairs 30 & 32.

[85] Amendments 47 – 51 applied to art 7 of the Proposal and again, one could argue that that there was evidence of a tendency towards conservatism. The Committee on Legal Affairs advised amending art 7(1) to provide that the stay not apply in situations where the debtor was obliged to file for insolvency under national law and proposed deleting art 7(2), which limited the right of creditors' to open insolvency proceedings during the stay, See the Report by Committee of Legal Affairs 32. The Committee also proposed deleting art 7(3):

> "Member States may derogate from paragraph 1 where the debtor becomes … unable to pay his debts as they fall due during the stay period. In that case, Member States shall ensure that restructuring procedures are not automatically terminated and that, upon examining the prospects for achieving an agreement on a successful restructuring plan within the period of the stay, a judicial or administrative authority may decide to … keep in place the benefit of the stay...".

The Committee also proposed deleting art 7(6): "Member States shall ensure that nothing prevents the debtor from paying in the ordinary course of business claims of or owed to unaffected creditors and the claims of affected creditors that arise after the stay is granted and which continue to arise throughout the period of the stay."

[86] Article 7(6) was removed, but the wording features in recital 39 of the PRD instead. Article 7(4) was reworded once more before the final text, so neither the Committee recommendations nor the original proposal text remained. The other amendments, 47-49, were not accepted.

[87] Committee on Legal Affairs Opinion p. 26.

[88] Article 4(6); "Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded."

[89] European Parliament Committee on Employment and Social Affairs, Opinion of 5 December 2017 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016)0723 – C8-0475/2016 – 2016/0359(COD) ("Opinion of EMPL Committee").

[90] See Annex 1 for a more thorough discussion of the amendments relating to workers' rights.

amendments pertaining to decreasing court involvement in insolvency matters were quite minor and there were no amendments proposed to cross-class cram-down.[91]

a) The Stay

Few amendments proposed by EMPL applied to the stay of individual enforcement.[92] The Committee did, however, propose one interesting amendment in that it advocated for employees to be specifically excluded from the types of creditors who could be affected by a stay of individual enforcement:

> "Member States shall ensure that a stay of individual enforcement actions may be ordered in respect of all types of creditors, including secured and preferential creditors **but excluding workers**."

In justifying this change, the Committee acknowledged the protection for workers contained in article 6.3; however, it was their view that workers needed to be expressly excluded.[93]

b) Protection of New Financing

The Committee sought to reduce the protection afforded to new finance by removing article 16(2) from the proposed directive. The justification the Committee offered was their belief that it constituted "a super-privilege for actors providing new and interim financing", which it was argued could result in "downgrading of other creditors including workers", thereby reducing the "remaining substance of the concerned enterprise, thereby further endangering workers". Despite the concerns expressed by the Committee, article 17(4) of the Directive gives Member States the ability to treat the providers of new or interim financing with priority in the context of subsequent insolvency procedures.

5.4.5 European Parliament Committees: Economic and Monetary Affairs ("ECON")[94]

Broadly speaking, the changes proposed by the Committee on Economic and Monetary Affairs focused on strengthening the position of smaller entrepreneurs, vulnerable creditors and workers and occasionally on providing for more assurances that restructuring processes would be successful.[95] The ECON Committee Opinion embodied an attempt towards balancing competing interests with successful restructuring, particularly in the areas of focus of this report. The bulk of the relevant amendments applied to the stay; as such, it and decreased court formality are discussed below.[96]

a) Stay

Amendments 51 – 56 pertained to article 6 of the proposal. The Committee wished to amend article 6(1) to mandate Member States to specify "[p]articular conditions … in order to ensure that such a stay is necessary" and advocated for mandating Member States to require that debtors benefiting from a stay

[91] The is worth noting that the EMPL Committee proposed amendments to cram-down, as opposed to cross-class cram-down in Amendments 45 through to 48. Generally speaking, the proposed amendments were to provide for further protection of workers; for example, the amendment of art 9(4) added "the workers class" after the reference to "each and every class", a proposal that was not adopted by the Parliament. It was also suggested that art 9(1) be amended to specifically include workers in the creditors that should have the right to vote on the adoption of a restructuring plan and including the caveat that parties must be "duly informed about the procedure and its potential consequences for the company". The original art 9(1) read: "Member States shall ensure that any affected creditors have a right to vote on the adoption of a restructuring plan." The amendment read: "Member States shall ensure that the procedures provided for in national law allow creditors, including workers affected by a waiver plan, to have a right to vote on the adoption of the restructuring plan, after having been duly informed about the procedure and its potential consequences for the company." The Committee also proposed amending art 9(2) to state, in much stronger terms, that workers should have a privileged position by replacing "Member States may also provide that workers are treated in a separate class of their own" with "Taking into account that workers are a class of preferential creditors, except in duly justified circumstances, Member States shall also ensure that outstanding wage claims for active workers and pension claims for retired workers are treated in a separate preferential class of their own, and shall guarantee the priority of such claims" The original wording of the article, now art 9(4), was retained, however.

[92] The EMPL Committee did propose removing the phrase "in principle" from recital 34, thereby changing it to "Given the need to ensure an appropriate level of protection of workers, Member States should exempt workers' outstanding claims …from any stay of enforcement irrespective of the question whether these claims arise before or after the stay is granted."

[93] The proposed art 6(3) stated: "Paragraph 2 shall not apply to workers' outstanding claims except if and to the extent that Member States ensure by other means that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC."

[94] European Parliament Committee on Economic and Monetary Affairs, Opinion of 7 December 2012 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016)0723 – C8-0475/2016 – 2016/0359(COD) ("ECON Committee Opinion").

[95] See, as discussed later, the inclusion of a requirement that Member States require that debtors benefiting from a stay are "viable".

[96] For the sake of efficiency, the minor amendment to art 17 (protection of new finance) and the amendments to cram-down are discussed in Annex 1.

were "viable".[97] The proposed amendment to article 6(2) attempted to make it a condition of limited stays rather than general and to ensure that they do not "endanger the efficiency and success of the restructuring plan".[98] The focus of the Committee on balancing the rights of affected parties with ensuring that the success of the restructuring process was evident in amendments such as this. In Amendment 53, the Committee attempted to exclude the claims of "micro and small enterprises" in addition to workers' claims from being covered by the stay.[99] In Amendments 54 and 55, the ECON Committee attempted to reduce the duration of the initial stay to between 3 and 6 months and the maximum duration, including extensions, to 9 months.[100] It is curious that the Committee would, on the one hand, seek to increase the maximum duration of the (initial) stay while, on the other hand, attempting to decrease the maximum duration, including extensions. In any event, neither of the proposed changes to the duration of the stay, or indeed the other changes proposed by the ECON Committee, were accepted for the final text. The final amendment sought by the ECON Committee to article 6 was the specific inclusion in article 6(9) of the suffering of financial difficulties by a "vulnerable creditor" as a justification for the stay being lifted or refused by the judicial or administrative authority and the statement that "[a]n unfair prejudice shall be deemed to exist at least where a creditor or class of creditors is facing considerable economic difficulties."[101] As was the case with the other amendments to article 6, they were not incorporated.[102]

b) Decreased Court Formality

The ECON Committee Opinion suggested amending article 4(3) to replace "shall" with "may", thereby making it optional for Member States to limit judicial involvement. As was noted earlier, the final wording of article 4 reflected this position.[103] In addition, as noted earlier, this issue, together with the requirements regarding the involvement of a judicial/ administrative authority for approval of a plan which includes cross-class cram-down under article 11 (mentioned at 5.6 below) will be returned to in the second JCOERE Report.

5.5 Council of the European Union

Throughout 2017 and 2018, the Council considered the proposed directive. In a note from the Presidency to Coreper and the Council in May 2017, it was stated that the objectives of the proposal had received broad support from ministers at an informal meeting of the Justice and Home Affairs Council.[104] In the same note however, the President of the Council emphasized the need for flexibility in the implementation of the provisions within individual Member States. The Working Group tasked with reviewing the Proposal highlighted two areas which required greater scrutiny: the role of the national courts in insolvency matters and debtor in possession.[105]

Regarding the role of the courts, the Council was quick to point out that judicial or administrative authority involvement did not always equate to a less efficient procedure; instead it was the position of many delegations that the role of the judiciary in such matters was to act as an impartial safeguard.[106] As a result, the Council suggested that the proposal should be written in such a way as to allow Member States that desired decreased formality to do so, without making decreased formality a requirement for all Member States. At this point, it now appeared that committees within the Parliament – Legal Affairs

[97] ECON Committee Opinion 32.
[98] Originally, art 6(2) read; Member States shall ensure that a stay … may be ordered in respect of all types of creditors, including secured and preferential creditors. The stay may be general … or limited, covering one or more individual creditors, in accordance with national law".
[99] ECON Committee Opinion 33:

> "Paragraph 2 shall not apply to micro and small enterprise claims and workers' outstanding claims except if and to the extent that Member States ensure by other means that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC."

[100] ECON Committee Opinion 33-34.
[101] Resultingly, the amended art 6(9) would have read:

> "Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay … or a vulnerable creditor would encounter financial difficulties, the judicial or administrative authority may decide not [to] grant … or may lift a stay already granted in respect of that creditor or class of creditors, at the request of the creditors concerned. An unfair prejudice shall be deemed to exist at least where a creditor or class of creditors is facing considerable economic difficulties."

[102] As none of the amendments proposed to art 7 were accepted in the final draft, they have been discussed in Annex 1.
[103] See discussion on the Report by the Committee of Legal Affairs.
[104] Council of the European Union, Policy Debate of 19 May 2017 on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU File 2016/0359 (COD) 2 ("Policy Debate 19 May 2017").
[105] *idem* 2-5; It is worth noting that the Working Group had only considered arts 1 – 9 at this point in time.
[106] *idem* 3.

and ECON – and the Council were opposed to mandatory decreased court formality. It is therefore unsurprising that the final wording reflected this position. Arguably, however, if Member States wished to decrease court involvement in insolvency matters, they could do so without the need for "encouragement" from a directive. As such, it is questionable whether the overall goals of the Proposal have now been nullified. It is interesting to note that the discussion around court involvement was not set in the broader context of the obligations to co-operate included in the EIR Recast.

In the period between May and November 2017, the Working Group identified three more areas in need of further consideration by Council, namely viability of the debtor, cross-class cram-down and second chance for honest entrepreneurs.[107] In relation to cross-class cram-down, it was noted that a majority of Member States considered there to be a need for provisions which allow the confirmation of a restructuring plan by a judicial or administrative authority in the event of the plan not being supported by a majority in one or more classes of creditors. With that said however, there were Member States which were hesitant to create such provisions; as such, further discussion on the area was considered beneficial.

In May 2018, the Council adopted a partial position (general approach)[108] on the proposed directive, however the position only pertained to Titles III, IV and V, thereby excluding the stay, cross-class cram-down, protection of new financing and decreased court formality. [109] The major development in the consultation process took place in October 2018, when the Council reached a full general approach on the proposed directive. The President, in an 87-page letter to the Council and Permanent Representatives Committee, highlighted a number of specific elements of compromise, including the stay and cross-class cram-down.[110] It was noted, however that there were still Member States in disagreement with the proffered compromises though a majority had accepted them.[111]

5.5.1 The Stay

There was considerable difference of opinion within Member States regarding the stay, some having a preference for short stays in the interest of creditors and others favouring a longer or indefinite stay in order to maximise the possibility of a successful restructure.[112] Even with the agreement on the stay, however, there was a clear, and in many cases, successful attempt by the Council to inject more latitude for the individual approaches of Member States into the PRD. Article 6(1) was amended to include an express provision allowing Member States the option to legislate for the refusal of a stay by a judicial or administrative authority in certain circumstances.[113] It could be argued, however, that this provision merely makes explicit what was already implicit in the wording of the first paragraph.[114] The Council also inserted 2b – now article 4 – into the Directive, which reads:

> "Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:
>
> (a) where enforcement is not likely to jeopardise the restructuring of the business; or
>
> (b) where the stay would create unfair prejudice to the creditors of those claims."

The Council also proposed amending the conditions under which the stay can be lifted – now article 6(9) – to include where one or more creditors or classes of creditors would be unfairly prejudiced by

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[107] Council of the European Union, Policy Debate of 30 November 2017 on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU File 2016/0359 (COD) ("Policy Debate 30 November 2017").
[108] Council of the European Union, Partial General Approach of 16 May 2018 of the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU File 2016/0359 (COD).
[109] Neither the partial general approach not the general approach really addressed employee interests / employees as a class of creditors.
[110] Council of the European Union, General Approach of 24 September 2018 of the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU File 2016/0359 (COD) 3-6.
[111] *idem* 6.
[112] *idem* 4.
[113] "Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective set out in the first subparagraph."
[114] The first paragraph of art 6(1) specifically refers to "a stay of individual enforcement actions *to support the negotiations of a restructuring plan"*[emphasis added] It would seem implicit therefore, that were the stay not to achieve this aim, that it could be rejected.

the stay, where provided for by national law. The Council inserted another paragraph into article 6(9), which read:

> "Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority."[115]

Finally, as there are circumstances where national law requires a debtor to submit the restructuring plan to a judicial or administrative authority within 8 months, the Council attempted to insert article 6(7a) into the final text of the directive, however the Parliament declined to do so:

> "By way of derogation from paragraph 7, where, according to national law, the restructuring plan is to be submitted within eight months from the start of the initial stay … to a judicial or administrative authority for confirmation, Member States may provide that that stay is extended until the plan is confirmed."

Although there were changes made by the Council to most of the subsections of article 7, these were largely of a minor nature. The substantial change made by the Council to article 7 was the insertion of article 6(6):

> "Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.
>
> The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value."

5.5.2 Protection of New Finance

With respect to the protection of new finance, the Council proposed some changes to (the then) article 16.[116] It sought to give individual Member States more control through the newly created article 17(2) and (3), which state respectively:

> "Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.
>
> Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due."

It also rewrote the article 16(2)[117] which arguably has the effect of increasing the protection for new financiers:

> "Member States may afford grantors of new or interim financing the right to receive payment with priority in the context of subsequent liquidation procedures in relation to other creditors that would otherwise have superior or equal claims to money or assets. In such cases, Member States shall rank new financing and interim financing at least senior to the claims of ordinary unsecured creditors."

This was rewritten as follows:

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[115] The Council also attempted to grant Member States the ability to provide for a minimum period during which the stay could not be lifted, however this was not included in the final text.
[116] This was art 16 in the Commission draft and in the submission from the Council, however, the compromise text was renumbered as 17.
[117] Now art 17(4).

"Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims"

Arguably, the removal of the obligation on Member States ranking new financiers as "at least senior" to ordinary unsecured creditors leaves it at the protection of the new finance at discretion of the Member State, as the only obligation is that new financing and interim financing "are adequately protected". As noted above, article 17(4) merely states that Member States *may* provide that new financiers have priority in subsequent insolvency proceedings, not that they must. As such, it will be interesting to see if certain Member States only implement the basic requirement, for example, that generally, new financing cannot be declared void or unenforceable and that new financiers be exempt from liability but then make no changes to the priority of claims coming from new financiers in subsequent insolvency proceedings.

5.5.3 Cross-Class Cram-Down

The Council sought extensive changes to article 11. Some of these could be described as linguistic changes such as amending article 11(1)(a) to replace "fulfils the conditions in article 10(2)" with "complies with article 10(2)" and replacing the word "vary" with "increase" in article 11(2). However, the majority of changes were quite significant and offer considerable leeway to member states, in particular for those member states such as Ireland, which had operated a robust cross-class cram-down provision in the past. [118] To article 11(1) alone, the Council proposed nine different changes, one of which was outlined above. For clarity, the entirety of the Council's amended article 11(1) is below to enable proper comparison with the final text:[119]

(1) Member States shall ensure that a restructuring plan which is not approved by **all voting classes** of affected parties **as provided for in Article 9(4)**, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or (…) with the debtor's agreement, and become binding upon (…) dissenting **voting** classes where the restructuring plan **fulfils at least the following conditions**:

(a) **it complies with** Article 10(2);

(b) **it** has been approved by **the required voting classes of affected parties in accordance with paragraph 2;**

(c) it complies with the fairness test in accordance with paragraph 2a;

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests;

By derogation from the first subparagraph, Member States may limit the requirement for the debtor's agreement to cases where debtors are SMEs."

The final wording of the first paragraph is not exactly what the Council proposed, but it is more similar to its amendment than the original proposal; instead of "approved by all voting classes of affected parties as provided for in Article 9(4)…" it reads "approved by affected parties, as provided for in Article 9(6), in every voting class". The insertion of the word "voting" in relation to "dissenting voting classes" and the insertion of "fulfils at least the following conditions" remain in the final text.[120]

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[118] General Approach; Note from the Presidency to Permanent Representatives Committee and the Council dated 24/09/2018 File 2016/0359 (COD) p.65-6.

[119] The wording of the Commission proposal was as follows; "Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement and become binding upon one or more dissenting classes where the restructuring plan: (a) fulfils the conditions in art 10(2); (b) has been approved by at least one class of affected creditors other than an equity-holder class and any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied; (c) complies with the absolute priority rule."

[120] Paragraph 1 of the final text reads; "Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in art 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions…".

The wording of article 11(1)(b) provides for a declining set of requirements providing that a plan can be confirmed by a court where the plan:

> "has been approved by:
>
> a. a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; *or, failing that,*
>
> b. at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going-concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;"[121]

This final text is almost identical to the amendments proposed by the Council if one reads article 11(1)(b) in conjunction with paragraph 2, as the Council instructed in its amendment. The only substantial difference is that in the final text, the order of the two conditions is reversed and the words "failing that" have been inserted after the first condition, thereby giving it priority that it did not have in the Council amendment.

The final wording of article 11(1)(c) adopted some but not all of the amendment proposed by the Council in that it provides for ensuring "that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class".[122] The remainder of the amendment to 11(1)(c) via the newly inserted 11(2a), specifically that Member States require "a dissenting voting class of affected creditors is satisfied in full by the same or equivalent means if a more junior class is to receive any payment or keep any interest under the restructuring plan" was reformulated as a derogation instead (article 11(2)).[123] The scheme proposed by the Council therefore allows Member States to allow for the confirmation of plans where very little by way of consent has been secured. There is in fact a cascading set of requirements, allowing Member States to proceed to a robust restructuring framework, but also allowing for a more conservative approach for some member states. The view of the JCOERE Project Team is that this may amount to a failure of the policy goals of harmonisation and minimising the opportunities for forum shopping. The final wording of article 11(1)(d) and the derogation for SMEs in the PRD is the same as the amendments proposed by the Council.

The final paragraph of amendment 11(2a), namely that Member States may derogate from the earlier paragraph where it is necessary to achieve the aims of the restructuring plan as long as it is not unfairly prejudicial to affected parties, is now the second paragraph of article 11(2) in the Directive. The Council also tried to insert article 11(2b) which stated that "Article 10(3) shall apply *mutatis mutandis*", however this amendment was not included in the final text.

As has been demonstrated, the Council proposed quite considerable changes to the Commission text. In September 2018, the relevant bodies (the Parliament, the Council and the Commission) agreed to enter into interinstitutional negotiations, more commonly referred to as "a trilogue". The purpose of a trilogue is "to reach a provisional agreement on a text acceptable to both the Council and the Parliament";[124] as such, members of the three bodies took part in the negotiation. In March 2019, the Parliament voted to approve the compromise wording of the PRD. In a short debate, which took place the day before the vote, MEP Cofferati lamented the missed opportunity to ensure that the most vulnerable were properly protected, namely workers.[125] In his view, it would have been appropriate to extend the rights of workers to approve or reject restructuring plans concerning the organisational aspects of the company, such as plans involving layoffs and changes to working conditions. He also stated that employees should be

[121] PRD, art 11(1)(b).
[122] PRD, art 11(1)(c). The Council amendment in its General Approach (n 110) mandated reading art 11(1)(c) in conjunction with art 11(2a).
[123] PRD, art 11(2): "By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan."
[124] 'Interinstitutional Negotiations for the Adoption of EU Legislation' (European Parliament Ordinary Legislative Procedure 2019) <http://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html> accessed 9th January 2020.
[125] Translated from European Parliament Debates 27 March 2019.

treated preferentially compared to all other classes and opined that it should be mandatory for Member States to provide for a separate class for creditors. The Rapporteur responded that she was satisfied that the right approach was for employees to have the same protection as any other creditor. Strictly speaking, it is not correct to state that employees have the same protection as any other creditor, given that new financiers may receive preferential treatment. With that said, it may be a consequence of translating the response from German to English that this distinction was lost.

5.6 Conclusion

As of 20th June 2019, the final draft of the Directive was signed and was published in the Official Journal on 26th June with the implementation deadline set for 17th July 2021.[126] As has been demonstrated throughout this Chapter, many aspects of the Directive have seen substantial changes between its inception and its signing in 2019. Article 4(6) has transformed from being a clear requirement on Member States to decrease court formality to being a suggestion.[127] The primary amendment to article 6(1) was the inclusion of the second paragraph giving Member States the option to provide for judicial or administrative authorities refusal of a stay where it was viewed to be unnecessary where it would not support the negotiation of a restructuring plan.[128] Arguably, however, the insertion of this paragraph is of limited value; it is implied in the first paragraph of article 6(1) that the purpose of the stay is that it supports the negotiations of the restructuring plan, therefore is should only be granted in circumstances where it supports the negotiation process. Article 6(9)(a) was reformulated to make explicit that the stay can be lifted where it no longer fulfils the objective of supporting the negotiations on the restructuring plan and gave the original (a) as an example of such a case.[129] Article 6(9)(d), which states that if the stay gives rise to the insolvency of a creditor, it can be lifted where this is provided for under national law, was added. Again, the strength of this amendment is questionable; if it only applies in Member States where it is already a legal provision, then arguably, nothing is changing. Furthermore, it is possible that such provisions do more harm than good to the overall goal of harmonisation, It neither requires Member States who have these provisions to remove them, nor Member States who do not have them to introduce them.

The redrafting of article 11 is particularly significant regarding debates which had raged concerning the issue of priorities. The derogations provided allow for a broad range of practices and solutions to emerge once implementation has occurred.

As discussed previously, the primary changes to article 17 came from the Council, namely the insertion articles 17(2) and (3) and the rewriting of article 17(4); however, the wording of these articles means that their implementation can be classed as optional, rather than mandatory. Accordingly, one must once again question the degree to which the PRD achieves the central aim of harmonisation of the law across Member States if the protection for new finance may be significantly stronger in some jurisdictions than others.

5.7 Transition Chapter 6: Mapping the Preventive Restructuring Frameworks and the EU Directive: Part 1 – Introduction and Methodology

Chapter 6 will introduce the core research aspects of the JCOERE Project: The JCOERE Questionnaire. Split into 3 parts, Chapter 6 will focus on the first part, which discusses the current preventive restructuring frameworks in each of the contributing Member States. The Chapter begins by providing a benchmark to an already well-used and robust preventive restructuring procedure that has existed in Ireland since 1990. Chapter 6 will then provide a more detailed discussion of the research methodology employed in the JCOERE Project, as well as illuminating some of the challenges encountered by the team. It will also provide some general context for preventive restructuring as a background to the discussion of the responses from the first part of the questionnaire. Finally, the first part of the

[126] PRD, art 34.
[127] Article 4(6) states that Member States "*may*" put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded."
[128] Article 6(1); "Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph."
[129] "[I]f it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations".

questionnaire responses will be described, essentially setting out what each contributing jurisdiction currently has in terms of preventive restructuring frameworks.

6. Chapter 6: Mapping the Preventive Restructuring Frameworks and the EU Directive: Part 1 – Introduction and Methodology

6.1 Introduction: the JCOERE Context

The previous Chapter discussed the introduction of the Directive on Restructuring and Insolvency (the "PRD")[1] through the various EU institutions. As described in Chapter 1 the PRD has been said to have been influenced by the perceived success of the US Chapter 11 procedure.[2] Another widely held perception is that the PRD aims to help Member States to emulate what already exists in the United Kingdom in the Scheme of Arrangement ("SoA"),[3] but the PRD provisions differ in fairly significant ways from the Scheme. What appears to be less well-known is that the Irish Examinership[4] procedure functions in a way that is far closer in function to the intention and provisions of the PRD, with some exceptions. The idea underpinning the JCOERE Project was inspired in part by the fact that the Irish Examinership process has been doing much of what the PRD intends since it was introduced in 1990 and it has been well-used by companies of many types and sizes over the last thirty years. The Irish Examinership and the UK SoA are both well-developed preventive restructuring procedures, the latter being used often by non-UK companies in order to take advantage of its flexibility and efficiency.[5] It is curious that similar attention has not been paid to the Irish Examinership procedure, given its similar, and in some cases, more progressive attributes, such as the availability of a cross-class cram-down.

The purpose of the JCOERE questionnaire[6] is to explore substantive and procedural rules arising in the context of preventive restructuring, which may be considered obstacles to cooperation between the courts of the Member States.[7] The questionnaire has focused on specific substantive rules arising in a typical restructuring process, which may be problematic to cooperation. This Report will focus on the substantive provisions of preventive restructuring in the contributing jurisdictions and how they measure up to the new PRD. Report 2 will then look at these and other matters in the specific context of court-to-court cooperation. Contributors to this part of the Report include those partnered on the JCOERE Project: Ireland (University College Cork), Italy (Università degli Studi di Firenze), and Romania (Universitatea Titu Maiorescu). Contributors from several other Member States have also taken part: Germany, The Netherlands, Spain, France, Austria, Poland, Denmark, and the United Kingdom (for comparative purposes).

The responses to the questionnaire have helped to determine what preventive restructuring frameworks are already present in the contributing jurisdictions and how they relate to the terms of the PRD. These questions were contained in part I of the questionnaire. Secondly, the responses have helped to determine existing rules in Member States, in addition to those in the Directive, which pertain to the stay/moratorium; cram-down provisions; workers; and the protection of rescue financing. Finally, part

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1 Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the "PRD").
2 Title 11, United States Code, which is referred to as the Bankruptcy Code. Chapter 11 deals with reorganisation. See < https://www.govinfo.gov/app/collection/USCODE> accessed 29 October 2019.
3 UK Companies Act 2006, part 26.
4 Irish Companies Act 2014, part 10. See generally for a discussion of the Irish Examinership process Lynch, Marshall and O'Ferrall: *Corporate Insolvency and Rescue* (Butterworths, 1996) and Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012). See also O'Donnell and Nicholas: *Examinership (*Londsdale Law Publishing, 2016).
5 It should be noted, however, that the UK Scheme of Arrangement is not covered under the EIR Recast as it is technically a company law procedure arising as it does out of the Companies Act 2006, Part 26. In addition, Irish company law contains a similar scheme of arrangement provisions, see Irish Companies Act 2014, ss 449-455. Irish legislation also includes a Scheme of Arrangement process which is very similar to the UK process. This is included in Part 9 of the Companies Act 2014. See further I Lynch Fannon and G N Murphy, Corporate Insolvency and Rescue (2nd edn, Bloomsbury Professional 2012) Chapter 14.
6 "Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project: Jurisdiction Questionnaire" available in Annex 2 of this Report and available online from < https://www.ucc.ie/en/jcoere/research/jcoere-jurisdiction-research-questionnaire/>.
7 European Commission DG Justice Grant Agreement 800807 – JCOERE – JUST-AG-2017/JUST-JCOO-AG-2017, Annex 1 Part B Workpackage 2 – Methodology.

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III of the questionnaire revealed a number of emerging procedural issues that may also present obstacles to co-operation; these will be considered in Chapter 8 of this Report. Only the first half of Part III of the questionnaire will be discussed in Chapter 8 of this Report; the second half of Part III refers to the role of judicial and administrative authorities, which is more relevant to Report 2. The purpose of this Chapter 6 is to explore the responses to Part I of the JCOERE questionnaire.

6.2 Introducing the Irish Examinership Procedure

The Irish Examinership process is a classic and modern example of a rescue process with all of the key operative provisions provided in the PRD.[8] Accordingly, it provides the JCOERE Project with an ideal benchmark. The early cases often referred to three significant features of the legislation; the first has been characterised in judicial pronouncements as providing 'breathing space' for failing companies to find new investment and to agree a compromise with their creditors. While the PRD does not use this exact terminology, it was referred to in the Explanatory Memorandum preceding the Proposal and the Impact Assessment published on 22nd November 2016, and in the General Approach published by the Council of the European Union on 24th September 2018. In Ireland, this is a description of the stay or moratorium whereby the court orders the appointment of an examiner to the company and the company is put under the protection of the court for a period of time.[9] A second purpose that seemed to motivate the courts in appointing an examiner to attempt rescue and supporting the operation of the legislation was the preservation of jobs. This is also a clear focus in the PRD as all iterations, including the proposal, the ancillary, explanatory, and assessing documents mention job preservation as a key factor in promoting the introduction of restructuring frameworks throughout the EU.

Third, the perception also expressed at the time of the introduction of the Examinership procedure that the aggressive securitisation practises of banks were precipitating business failure. Examinership was presented as an alternative to the drastic solution of appointing a receiver and manager and a subsequent liquidation. A fairly recent iteration of these goals is found in *Re Traffic Group Ltd*,[10] in which Clarke J described that purpose in the following terms:

> "It is clear that the principle focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

This quote closely resembles the purposes of the PRD. Furthermore, 30 years' worth of case law in Ireland could be instructive for jurisdictions implementing their own frameworks for preventive restructuring subsequent to the PRD, although there are also systemic and institutional characteristics that underpin the success of the Irish Examinership procedure that should be considered. These characteristics are revealed when in-depth comparisons are drawn between systems and the specific provisions of the PRD.

6.3 Methodology

The research method for this project was described in some detail in Chapter 1. The analysis in Chapters 6, 7, and 8 uses the comparative legal methodology to draw relevant functional comparisons between Member States' restructuring frameworks and their underlying insolvency law systems. Comparative law has a number of purposes. It can increase knowledge and understanding, which in turn can act as an aid to the domestic legislator in pursuit of legal reform. At an international, or supranational level such as the institutions of the EU, knowledge of comparative law can help to find solutions to questions of how to unify and harmonise laws.[11] Comparative law provides a "richer range of model solutions" by examining the solutions to similar legal problems devised in a number of legal systems.[12] The PRD

[8] Irene Lynch Fannon, Jane Marshall, and Rory O'Ferrall, *Corporate Insolvency and Rescue* (Butterworths 1996); Irene Lynch Fannon and Gerard Nicholas Murphy, *Corporate Insolvency and Rescue* (Bloomsbury 2012); John O'Donnell, *Examinerships* (Londsdale 2016).
[9] Companies Act 2014, s 520.
[10] [2008] 3 IR 253 [260].
[11] Matthias Siems, *Comparative Law* (CUP 2014) 2-4.
[12] Konrad Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, OUP 1998) 15.

has done this to some extent by adopting and adapting successful pre-existing provisions from different legal systems. By identifying fundamental differences, it is possible to forecast conflicts that could arise in court cooperation due to the differences in legal systems.

6.4 JCOERE Approach to Comparative Legal Analysis

The JCOERE Project utilises a comparative law methodology to determine what preventive restructuring (or restructuring) procedures currently exist in the contributor Member States and the proposals being considered in light of the PRD. The comparative law methodology provides a paradigm, through which international exchanges can be facilitated by the "gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma."[13]

Comparative methodology is often said to begin with a principle of functionality. Every legal system tends to face the same problems, but while their resolution can be quite different, the results may often be quite similar. Therefore, it is important not to look at a foreign law by reference to concepts contained in one's own familiar legal system; rather, it is important to find a neutral means of describing the problem that relies solely on the function of the law in question. Comparative law must, therefore, focus on a concrete legal problem and its resolution. [14] Even where legal solutions do not appear to exist in a foreign system, it is important to think around the problem and look at other areas of a legal system for existing solutions that may have been incorporated in an entirely different way.[15] In relation to the EU, seeking for functional equivalences makes it possible to compare common law and civil law systems, despite the fundamental differences in legal origin and culture.[16]

There are some limits to functionalism depending on the systems being compared. If legal systems are too different, drawing effective comparisons may be impossible if they are actually incomparable.[17] Fortunately, for EU Member States, there is a common enough history with all legal systems based on reasonably familiar legal families (common law, French and German civil law, and Roman Law) that the systems can be effectively compared.[18] The different approaches to similar problems can also be explained by the path dependent nature of legal development. There are differences in the social and economic histories of individual jurisdictions, which influence the direction taken to resolve similar legal problems. In recognising these fundamental differences in culture, as a part of the comparative law paradigm, it becomes easier to explain why those differences persist and, perhaps, find a unifying solution.[19] In fact, any harmonising Directive is based on the premise that such a solution is possible.

The JCOERE methodology has examined the functional equivalences of specific substantive provisions common to preventive restructuring procedures: the stay of enforcement actions; adoption and confirmation rules relating to restructuring plans; intra- and cross-class cram-downs; the treatment of workers; and the protection of new and interim financing. By looking for functional equivalences, assumptions based on terminology can be avoided as the key determinants are conceptual rather than linguistic. Contributors were asked to explain their own systems and provisions within this paradigm. This revealed a number of differences in terminology, definition and perception, which sometimes made drawing clear comparisons challenging.

6.5 General Context of Preventive Restructuring: Questionnaire Part I

This Report began with a brief introduction to the project aims and context, followed by a discussion of academic commentary pertaining to preventive restructuring, as the context for the exploration of the challenges of judicial cooperation. The second chapter presented a discussion of challenging terminology, in other words, the same or similar terms, which carry different meanings across the EU. This chapter evolved out of the team's experience of comparative qualitative research. The third chapter briefly introduced the EIR Recast and the enhanced obligation to co-operate and the fourth chapter explored academic debate around the concept of preventive restructuring and its associated substantive

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[13] *idem* 3.
[14] *idem* 34-35.
[15] *idem* 15.
[16] Ralf Michaels, 'The Functional Method' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 339-382, 356-357.
[17] Konrad Zweigert and Hans-Jurgen Puttfarken, 'Critical Evaluation in Comparative Law' (1974) 5 Adel L rev 343, 345.
[18] Siems (n 11) 27.
[19] See John Bell, 'Path Dependence and Legal Development' (2013) 87 Tul L Rev 787 and Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000) 86 Iowa L Rev 601.

provisions. The fifth chapter set out the evolution of the PRD and its underpinning aims and purposes. Chapters 6, 7, and 8 of this Report will present a synthesis of the responses to the questionnaires[20] that were completed by contributors from 10 different jurisdictions throughout the EU. This will be presented as a thematic analysis.

6.5.1 Functions and Aims of Preventive Restructuring

Preventive restructuring is a concept largely derived from the focus on corporate and business rescue in insolvency law frameworks, thus many of the underpinning values and intentions apply. As noted in Chapter 4, there are a number of common principles that underpin the insolvency regimes of Europe. [21]

While Member States place different values on these underlying principles, they tend to be common throughout the EU. The flexibility in the Directive is likely to allow the Member States to maintain their fundamental positions on this continuum, which along with conflicts with underlying principles, procedural differences, and court discretion, may cause obstacles to cooperation where creditors are treated less favourably in a jurisdiction to which a court is being asked to defer.

6.5.2 Legislative Frameworks of the Contributing Jurisdictions in Context

JCOERE Questionnaire Questions 1 and 2:

1. Please specify existing legislative frameworks (if any) in your jurisdiction that provide for the preventive restructuring of companies, specifying the relevant legislation, legislative provisions, and/or rules that regulate the framework along with the date of implementation.
2. What are the stated functions and aims of your jurisdictions' preventive restructuring frameworks? Please refer to legislative policy documents or from your jurisdiction where relevant, statements in the legislation or statements by courts in applying the legislation (e.g. the Cork Report in the UK).

Generally, recognition of insolvency or insolvency related procedures is viewed by courts as obligatory and automatic if a procedure sits within Annex A of the EIR Recast. As noted in Chapter 3 of this Report,[22] while the PRD envisions that all restructuring frameworks will be included in Annex A, this can only be done if they satisfy its inclusion criteria. If the frameworks eventually developed are not included in Annex A, then they will not be subject to the EIR Recast and its enhanced obligation to cooperate, which the JCOERE Project is interrogating. Unless otherwise noted, all of the procedures mentioned in the following Chapters 6, 7, and 8 are also included in Annex A of the EIR Recast, thus will be subject to the enhanced obligation to cooperate.[23] This section of Chapter 6 will give a brief introduction to the preventive restructuring frameworks in the contributing jurisdictions, along with their context and any planned changes. Where plans include consideration of the inclusion in Annex A, these plans will also be discussed.

a) Ireland[24]

As noted in section 6.1.1 above, the principles underpinning the main Irish preventive restructuring proceeding, Examinership, closely align to those underpinning the PRD. In addition, Irish law contains provisions that are broadly similar to the English company law Scheme of Arrangement, originally provided in the Companies Act 1963 as amended by the Companies Act 2014.[25] While a few cases arose

[20] See Annex 2 of this Report for the questionnaire distributed to the contributors.
[21] Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 22.
[22] See Chapter 3 of this Report, section 3.6.
[23] Included in Annex A of the EIR Recast are France's *Sauvegarde, Sauvegarde accélérée,* and *Sauvegarde financière accéléré*; Germany's *Insolvenzverfahren*; Italy's *Concordato preventive* and *Accordi di ristrutturazione*; The Netherlands *surséance van betaling*; Romania's *Concordatul preventive* and its ad hoc mandate; Spain's *Procedimiento de homologación de acuerdos de refinanciación*, and *Procedimiento de acuerdos extrajudiciales de pago*; Poland's *PostČpowanie naprawcze*, *Upadłość obejmująca likwidacjČ,* and *Upadłość z możliwością zawarcia układu*; Austria's the UK's Company Voluntary Arrangement and Administration procedures (Schemes are not in Annex A); the Irish Examinership Procedure (equally Schemes are not in Annex A). Interstingly, the Austrian *Unternehmensreorganistionsgesetz* (URG) is not present in Annex A and as Denmark is not a party to the EIR, their insolvency and rescue procedures would not be included.
[24] The Irish Country Report was provided by Professor Irene Lynch Fannon and Aoife Finnerty (Research Assistant on the JCOERE Project Team) of University College Cork, Ireland and is available to view on the JCOERE website.
[25] Irish Companies Act 2014, ss 449-455.

in relation to the constitution of classes for the purposes of approving a scheme between 1963-1990,[26] … the Examinership procedure has been much more significant as a preventive restructuring process.[27] It should be noted that the Irish Scheme, like the English Scheme, is not included in Annex A of the EIR Recast. … Examinership, by contrast, is.

The Irish Examinership procedure was introduced in 1990 under the Companies (Amendment) Act 1990 and subsequently amended in 1999 following a report of the Company Law Review Group, which criticised some of its most radical aspects. This legislation has now been consolidated in Part 10 of the Companies Act 2014. Since its introduction in 1990, the examinership process has been considered in numerous cases decided by the Irish High Court, Court of Appeal and Supreme Court and has been the subject of extensive academic commentary.[28]

In light of the similarities between examinership and the PRD, the responses to the questionnaire primarily focus on examinership procedures; however, where relevant aspects of the scheme of arrangement will also be noted.

b) Italy[29]

The Italian legal framework on preventive restructuring has recently undergone an extensive reform. The "*Codice della crisi d'impresa e dell'insolvenza*" (hereinafter the "CCI") is due to come into force on August 14th, 2020. This new framework has three main objectives; first, it aims to increase recovery in pre-insolvency procedures in the interests of creditors.[30] Second, it aims to enable healthy firms in financial difficulty to restructure at an early stage, to avoid insolvency, and to continue their activities.[31] Finally, the Italian framework aims to reduce the duration and costs of the procedures.[32] To achieve these objectives, the Italian legislature has enacted the Delegated Law No. 155/2017, providing guidelines for the CCI.

Italy has established a "modular" approach to pre-insolvency and insolvency procedures, creating a basic, single procedure, which will vary in its approach and outcome depending on the specific case under examination.[33] Referring legislation has focused on a number of specific issues including:

i. the efficiency of the proceeding and the empowerment of institutional bodies with supervisory and control powers to take the initiative;[34]

ii. prioritizing those proposals that allow the business to recover from the crisis as a going concern (not necessarily with the same entrepreneur) and that are able to ensure that the best interest of the creditors are protected;[35]

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[26] These are described Lynch-Fannon & Gerard N Murphy (n 8) chapter 14. See for example *Re Pye (Ireland) Ltd (No 1)* (12 November 1984), HC, Costello J and (ex tempore, 22 November 1984) SC, (1963–1993) ICLR 320 (HC), (1984) Irish Times, 23 November (SC); and *Re John Power & Sons Ltd* [1934] IR 412. More recent Irish cases on UK style Schemes of Arrangement include *Re Millstream Recycling Ltd* [2009] IEHC 571 and *Re: Ballantyne RE Plc & Companies Act 2014* [2019] IEHC 407.

[27] In 2014 there were 18 reported and completed examinerships, 19 in 2015, and 15 in 2016. When considering the viability of a rescue process generally, the comparative figures for liquidations are 68, 50 and 32 to the 3rd Quarter of 2016 and 299, 251 and 346 receiverships. See the 2017 statistics here <http://www.insolvencyjournal.ie/stats> accessed 12 December 2019. In this period there was one completed scheme of arrangement in *Re Millstream Recycling Ltd* [2009] IEHC 571. It should be noted that during the recession the rescue of companies became even more important. The Irish Times notes that 'Of the 420 companies that had an examiner appointed between 2007 and 2016, some 56 per cent of them are now back on their feet.' Peter Hamilton, 'Majority of Companies Entering Examinership since Crash Survived' (Irish Times 3 July 2017).

[28] Lynch Fannon, Marshall, & O'Ferrall (n 8); Lynch Fannon and Murphy (n 8). Thomas B Courtney, et al (eds), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2015). O'Donnell (n 8). For an early discussion of this legislation see Irene Lynch Fannon, 'Goodman International and the 1990 Companies (Amendment) Act.' (1991) (Spring) DLI 2. See also Irene Lynch Fannon, 'Saving Jobs at What Cost? Consideration of the Companies (Amendment) Act 1990' (1994) Irish Law Times 208 and 'Reform in Haste: Repent at Leisure. A Consideration of the Company Law Reform Group, 1993' (1994) Irish Law Times 189.

[29] The Italian Country Report was provided by the Universita degli Studi di Firenze and Dr Iacopo Donati (Post-Doctoral Researcher) and Niccolo Usai (Junior Researcher), with input from Professors Lorenzo Stanghellini and Andrea Zorzi and is available on the JCOERE website.

[30] See the Explanatory Report of the Delegated Law n. 155/2017 and the Italian Supreme Court's decision, section I, 07 April 2017, n. 9061.

[31] See the Explanatory Report of the Delegated Law n. 155/2017 and the Italian Supreme Court's decision, section I, 13 June 2016, n. 12119.

[32] See the Explanatory Report of the Delegated Law n. 155/2017.

[33] CCI, art 40.

[34] CCI, art 377 and following.

[35] CCI, art 86.

iii. attributing defined responsibilities to insolvency practitioners and advisors and weakening the statutory priorities that such professionals used to enjoy in relation to their fees accrued in the context of or in connection to the restructuring;[36]

iv. ensuring that judges will be properly specialized in the field of insolvency;[37] and

v. providing for the creation of a public register containing a list of professionals, who could also be organized as associations or companies, having the requirements to act as court-appointed insolvency practitioners in the context of pre-insolvency and insolvency procedures.[38]

There are three procedures in the new Italian framework that satisfy the definition of preventive restructuring: the *concordato preventivo* (preventive concordat),[39] the *accord di ristrutturazione dei debiti* (debt restructuring agreement),[40] and the *accordi di ristrutturazione ad efficacia estesa* (debt restructuring agreement binding on dissenting creditors).[41]

The *concordato preventivo* (judicial composition with creditors) allows a distressed company to avoid opening an insolvency liquidation proceeding by means of an agreement with a majority of its creditors. The plan is proposed by the debtor, and in some cases by the creditors if they represent at least 10% of the indebtedness, which is known as a competing plan.[42] A competing plan can only be submitted in response to a procedure initiated by the debtor. Competing plans are not admissible if an independent expert certifies that the debtor's proposal ensures the payment of at least 30% of the unsecured claims.[43] Upon request by the debtor at court filing, the judicial composition features an automatic stay on enforcement actions; priority for new financing (priority cannot, however, trump secured creditors); termination of executory contracts; intra- and cross-class cram-down; and a stay on recapitalisation obligations. After the approval of the plan by the required majority of creditors, it becomes binding only after judicial confirmation, which will rely on an expert's report certifying that (1) the financial and economic data used in the plan are truthful as to the current situation, and reliable as to the prospects, and (2) that the plan is feasible, and, if implemented, suitable to overcome the crisis.

The *accordo di restrutturazione dei debiti* (debt restructuring agreement) allows for the confirmation of an out-of-court agreement reached by the debtor with at least 60% by value of a company's creditors, supported by an expert's report confirming that the agreement can ensure the full payment of non-consisting creditors. The key features of this debt restructuring agreement are a temporary stay on enforcement actions, which is automatically granted by the court upon request by the debtor; priority for new financing (not including secured creditors); and a stay on recapitalisation obligations.

Finally, the *accordo di ristrutturazione ad efficacia estesa* (debt restructuring agreement binding on dissenting creditors) also allows for the confirmation of an out-of-court agreement. The differentiating feature is that it is also binding on dissenting creditors. The debtor may form one or more classes of creditors on the basis of commonality of interest and an equivalent ranking. All creditors included in a class are bound by effects of the agreement if at least 75% of the total amount of creditors of the relevant class have consented; this results in the remaining 25% of non-consenting creditors being bound. There is no cross-class cram-down provision, meaning that if the 75% threshold is not reached in a certain class, the creditors remain unaffected by the agreement. The key features of this alternative debt restructuring agreement are the temporary stay on enforcement actions at the request of the debtor; an intra-class cram-down; priority for new financing (not over secured creditors, as in the *concordato preventivo*); and a stay on recapitalisation obligations.[44]

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[36] CCI, art 6.
[37] CCI, art 27. In this respect the CCI implemented only partially the principles of the Enabling Law 155/2017.
[38] CCI, art 356.
[39] CCI, art 84-120.
[40] CCI, art 57-64.
[41] CCI, art 61.
[42] The 10% threshold can also be reached by buying credits after the proceeding is opened.
[43] CCI, art 90.
[44] The obligation to recapitalise refers to a rule that is triggered if a company's net asset falls below zero. In order to protect creditors, the recapitalization of the company is a condition to continue trading and the violation of such duty exposes the directors of the company to actions by creditors and the relevant stakeholders (this concept recalls, with differences, the wrongful trading doctrine, which the Directive makes reference to). During the preventive restructuring procedure, the business may be continued without directors being liable to the company and its stakeholders.

c) Romania[45]

Like many Member States, Romania was influenced by the economic crisis of 2009, which in turn influenced the modern development of insolvency, corporate rescue and restructuring procedures. The Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009 had the aim of providing a buffer against the wave of insolvencies, which were not necessarily justified by a real cessation of payments. These early reforms, however, were not as effective as hoped. After the Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009 came into force, it was foreseeable that the insolvency claims would be drastically reduced for a period of at least 6 months afterward. Unfortunately, the effectiveness of the concordat was minimal. The debtors preferred to file for insolvency and financial institutions were resistant to the procedure, resulting in a slow take-up of the concordat. Against this background, Romania introduced revised versions of the ad-hoc mandate and preventive concordat procedures in 2014, which seems to have improved the position of the concordat. While this law was intended to protect the interest of both debtors and creditors, the Law No 85/2014 is more creditor friendly.

The law contains concrete pre-insolvency instruments aimed at obtaining the amicable negotiation of claims through the ad hoc mandate and the conclusion of a preventive concordat. Reforms may include continuing the flow of interest for secured creditors; simplifying the approval of the arrangement; and introducing the private creditor test, which also allows public creditors to vote on a concordat project.[46] The shorter duration of pre-insolvency proceedings and their greater flexibility should encourage the parties to use pre-insolvency procedures when the business has a temporary and repairable shortfall in liquidity.[47] Pre-insolvency procedures aim to restructure the company through a conventional restructuring of debts subject to negotiations with creditors. Unfortunately, the debtor's protection against potential enforcement procedures from the non-adherent creditors is less effective. For this reason, most debtors prefer to open insolvency proceedings and propose a reorganisation plan to fully benefit from the protection against enforcement.

The ad-hoc mandate[48] is a confidential procedure initiated at the request of the debtor in financial difficulty. An ad-hoc agent is then designated by the court and negotiates with creditors to reach an agreement between (one or more of) them and the debtor with the aim of overcoming the debtor's financial difficulties.

The preventive concordat[49] is a contract between the debtor and creditors that hold at least 75% of accepted and undisputed value of claims, which is homologated by the syndic judge. The debtor proposes a workout and recovery plan with the aim of covering the creditors' claims and the creditors, in turn, support debtor's efforts to overcome the financial distress. The concordat procedure is opened only at the request of the debtor. The most important effect of its approval is that an insolvency procedure against the debtor cannot be opened during the concordat period.

d) France[50]

Three main preventive restructuring procedures are currently used in France. The three main procedures that satisfy the definition of preventive restructuring in France are the (1) *mandate ad hoc,*[51] (2) *conciliation,*[52] and (3) *procédure de sauvegarde*.[53] The latter is included in Annex A of the EIR Recast.

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[45] The Romanian Country Report was provided by Judge Nicoleta Mirela Nastasie and Dr Cristian Draghaci of University Titu Maiorescu, available on the JCOERE website.
[46] "Public creditor" is a term used to define a budgetary creditor. Usually budgetary claims are significant, as typically value and budgetary creditors vote against any kind of pre-insolvency arrangement, restructuring plan or reorganization insolvency plan.
[47] 'Codul Insolventei Adnotat', The World Bank Group and Romanian Ministry of Justice, in the Program "Întărirea mecanismului insolvenței în România" financed by BIRD 2011-2016, 9 <www.just.ro/wp-content/uploads/2016/03/Cod-adnotat-FINAL.docx> accessed 18 November 2019.
[48] Law no 85/2014 on preventing insolvency and insolvency proceedings (The Insolvency Code), arts 10-15.
[49] Law on pre-insolvency and insolvency proceedings no 85/2014, art 5(17).
[50] The French Country Report was provided by Dr Emilie Ghio of Birmingham City University with the assistance of Dr Paul Omar, technical research coordinator of INSOL Europe is available on the JCOERE website.
[51] Regulated by Articles L611-1 to L611-16 of the Commercial Code.
[52] *ibid*.
[53] Regulated by Articles L620-1 to L628-10 of the Commercial Code. See the debate as to whether the safeguard procedure should come within the scope of the Directive. For authors saying it will not be encompassed by the Directive, see R Dammann and M Boché-Robinet, 'Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France' (2017) 22 Recueil Dalloz <http://www.dirigerentempsdecrise.com/assets/fichiers/RECUEIL22-05_CHRONIQUE_Mise%20en%20page%201.pdf> accessed 16 August 2019.

There are an additional two procedures that are subsets of the *sauvegarde* and available only as a conversion of the conciliation procedure.[54]

Arguably, the French model is one of the most advanced preventive restructuring models in the European Union, although it has continually reformed its legislative frameworks, sometimes without enough time to fully test the procedures in practice. Relative to many other jurisdictions, France has given an early priority to business recue, unless the business is in such a dire situation that liquidation could be the only foreseeable outcome. The French model of insolvency and preventive restructuring has, since the recession of the 1980s, tended to favour the rescue of businesses in order to preserve employment, at times to the detriment of creditors and saving functionally non-viable businesses. Three new insolvency laws were passed during the 1980s, one of which introduced a pre-insolvency process for the first time.[55] These laws placed the focus on reorganisation, rather than liquidation with the aim of protecting employment. The focus on employment preservation has changed over the last couple of decades, however, the importance of job preservation is still a clear aim of the French rescue culture.

In 2005, French insolvency law was reformed once again.[56] The major change brought about by the Law of 2005 was the introduction of a new procedure called safeguard (*procédure de sauvegarde*), designed as a hybrid of the American Chapter 11 model and pre-existing French judicial rescue procedure. It was conceived as a preventive restructuring mechanism designed to encourage upstream rescue, since companies could avail of it before they were officially insolvent (*en cessation de paiements*). The safeguard was amended by the Ordinance of 2008,[57] which addressed its main flaws and amended again in the immediate wake of the financial crisis in 2010, to introduce a variant of *sauvegarde* called *sauvegarde financière accélérée* (SFA).[58] The SFA drew on the practice of pre-pack administrations in the UK. The Ordinance of 2014 extensively reformed French insolvency law with a view to: (i) favouring preventive measures; (ii) strengthening the efficiency of pre-insolvency proceedings; and (iii) increasing the rights of creditors in insolvency proceedings. Another variant on the *sauvegarde* procedure was also introduced, the *sauvegarde financière* (SA).[59]

The most recent round of amendments occurred in 2016; a law on the Modernisation of 21st Century Justice focused on the promotion of the rescue culture, the enhancement of confidentiality during proceedings, the ring-fencing of new monies during restructuring, and the improvement of transparency and impartiality.[60] Some of the amendments included the removal of the need for notification of the employees' council or representatives during the opening of *mandat ad hoc* or *conciliation;* the exclusion of a judge in a prior *mandat ad hoc* or *conciliation* from acting in any subsequent *sauvegarde* of the same debtor; and the facilitation of the extension of the observation period in a *sauvegarde* by a further six months on application.

1. *Mandat ad hoc*

The *mandat ad hoc* is flexible and not subject to overly heavy regulation. As it is preventive in nature, it is a condition that the company cannot be in a *cessation de paiements* at the time of proposed entry. In the *mandat ad hoc* a court can appoint an ad hoc representative at the request of a debtor, which can also suggest the name of a particular representative. The Commercial Court defines the extent and scope of the *mandataire's* responsibilities. The ad hoc representative plays a similar role to a conciliator in a conciliation procedure, albeit he is not bound by the same procedural rules that apply to the conciliation procedure.

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[54] The two procedures that are subsets of the *sauvegarde* are the accelerated financial safeguard (*sauvegarde financière accélérée*) (SFA) and the accelerated safeguard (*sauvegarde accélérée*)). Unless otherwise specified, any reference to *sauvegarde* will be to the main procedure. If referring to one of the subset procedures, this will be clearly stated.

[55] Law No 84-148 of 1 March 1984; Law No 85-98 of 25 January 1985 focused on insolvency law and Law No 85-99 of 25 January 1985 regulated office-holders.

[56] Law No 2005-845 of 26 July 2005. See P Omar, 'The Progress of Reforms to Insolvency Law and Practice in France' in K Gromek Broc and R Parry (eds.), *Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer 2004) 51-78.

[57] Ordinance No 2008-1345 of 18 December 2008.

[58] Law No 2010-1249 of 22 October 2010. See also P Omar, 'Preservation and Pre-Packs à la Française: The Evolution of French Insolvency Law after 2005 (2011) 22(8) ICCLR 258.

[59] Ordinance No 2014-326 of 12 March 2014. For an in-depth account of the *sauvegarde accélérée*, see S Danjon 'La procédure de sauvegarde accélérée' (Master Thesis, Université de Reims Champagne-Ardenne 2016) <https://dumas.ccsd.cnrs.fr/dumas-01317161/document> accessed 9 January 2020.

[60] Law No 2016-1547 of 18 November 2016.

2. *Conciliation*

A conciliation procedure is conducted under the supervision of a *conciliateur*, appointed by the court at the request of the debtor. The objective is the negotiation of an agreement between the debtor and its main creditors, which is then sanctioned by the court (*constatation* or *homologation*). Once reached, the agreement has the force of a normal contract but the step of sanctioning by the court through *homologation* makes the agreement public and all creditors are informed.

3. *Sauvegarde*

The *sauvegarde* can be opened at the request of a debtor, provided it is not in *cessation de paiements.*[61] The objective is to obtain a moratorium on claims during the observation period (*période d'observation*). The judgment opening safeguard proceedings appoints (i) an insolvency judge (*juge commissaire*) who oversees the whole procedure;[62] (ii) an administrator (*administreur*) who supervises and/or assists the management in the preparation of a safeguard plan (*plan de sauvegarde*); (iii) a creditors' representative (*mandataires judiciaires*) who represents the creditors' interests and assesses the proofs of claims. They are designated by the insolvency judge who can be assisted by supervising creditors (*créanciers contrôleurs*) whom the insolvency judge appoints.[63]

In terms of current and future developments in France, the "*Loi Pacte*"[64] introduced in May 2019 allows the French Government to legislate by means of an Ordinance in order to transpose the Directive.

e) The Netherlands[65]

In 2012, the Minister of Security and Justice presented a legislative agenda for reform of the Dutch Bankruptcy Act, including a legislative proposal for what is called the *Wet homologatie onderhands akkoord* (Act on confirmation of extrajudicial restructuring plans, hereafter "the WHOA"). On July 5th 2019, the Dutch Minister for Legal Protection presented this Bill, which is likely to be adopted by the Parliament in 2020 and enter into force in 2020/2021.[66] The WHOA provides for a proceeding inspired by the US Chapter 11 Bankruptcy Code (Restructuring Proceeding) and the UK Scheme of Arrangement. While the WHOA is drafted in line with the PRD, a separate legislative proposal will be prepared to implement the Directive with respect to a preventive restructuring proceeding. It appears from the Minister's announcement that this will be achieved by amending the Dutch *surseance van betaling* (suspension of payment proceeding).[67]

Until the WHOA comes into force, the only preventive restructuring procedure currently available in the Netherlands is the suspension of payment.[68] The suspension of payment is available to corporate debtors and aims to facilitate the continuation of imminently insolvent, but viable, companies. It is available at the request of the debtor and provides for a moratorium, which is confined to non-secured creditors. The aim is to provide the debtor with the time needed to reorganise the business, thereby allowing it to regain its viability. Suspension of payment can be requested when the debtor expects (or foresees) an inability to continue paying debts.[69] Upon receipt of the request, the suspension of payment is automatically granted for a provisional period provided certain formal requirements are met.[70]

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[61] Commercial Code, art L620-2.
[62] Article L621-9 of the Commercial Code.
[63] Commercial Code, art L621-10 and L621-11.
[64] Law no 2019-486 of 22 May 2019.
[65] The Dutch Country Report was provided by Gert-Jan Boon, legal researcher and lecturer at the University of Leiden in the Netherlands and is available on the JCOERE website.
[66] In 2014 a first draft bill was presented, the *Wet Continuïteit Ondernemingen II* (Business Continuation Act II). The public consultation led to ample response and led to a revised draft bill – the WHOA – that was made available for a public consultation. The WHOA and an explanatory memorandum is available here: <https://www.internetconsultatie.nl/wethomologatie>. An unofficial translation of the WHOA has been prepared by several law firms, see for instance: <https://www.debrauw.com/wp-content/uploads/2013/11/20180108-WHOA-unofficial-translation.pdf>. In July 2019 the Minister for Legal Protection presented a revised text of the WHOA to Parliament. This text is available here: <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/08/tk-nader-rapport-wet-homologatie-onderhands-akkoord>; with an unofficial translation available here: <https://www.debrauw.com/cerp/>. The translated articles of the WHOA in this report have been taken from this translation.
[67] Explanatory note to the WHOA (2019) 4; *Kamerstukken II* 2018/19, 33 695, nr 18, 3.
[68] Dutch BA, art 214.
[69] Article 214(1) Dutch BA states that (provisional) suspension of payment can be granted of payment to the debtor who expects (foresees) that he will be unable to continue the payment of his debts.
[70] The Dutch BA gives no specified time for this provisional suspension of payment. Court procedural rules state that within two to four months after granting the provisional suspension of payment,a hearing will be held regarding granting the final suspension of payment. See Dutch BA, art 215(2) and 2.3.1 Procesreglement verzoekschriftprocedures insolventiezaken rechtbanken (2019)

Following this provisional period, the court will decide if granting a final suspension of payment is warranted in the circumstances.[71]

In practice, this proceeding is perceived as a forerunner for requesting the opening of bankruptcy proceedings.[72] Besides the suspension of payment, there are no specific formal or pre-insolvency restructuring proceedings available. With that said, it is worth noting that, in practice, the Dutch bankruptcy proceeding is often used to facilitate the restructuring of insolvent debtors.

f) Spain[73]

The purpose of preventive restructuring in Spain is twofold: first, to reach an agreement between the debtor and its creditors that will allow for the restructuring of debts. The second aim is to save the company, enabling it to continue its economic activity, and preserve jobs. There are two preventive restructuring procedures in the Spanish framework that try to meet these purposes.[74] First, Spain provides for refinancing agreements that may be proposed to financial creditors before the commencement of insolvency procedures, which may be approved by a judge and kept confidential if the agreement meets certain requirements.[75] Spain also provides for extra-judicial payment compositions, which may be offered to creditors of both legal and natural persons prior to the initiation of insolvency proceedings.[76] Both of these procedures are the result of more recent reforms; the 2013 reform introducing the regulation of extra-judicial payment compositions,[77] the 2014 reform on the refinancing and restructuring of corporate debts,[78] and the 2015 reform on urgent measures in insolvency proceedings.[79] Both refinancing agreements and extrajudicial payment compositions must be approved by a judge.

g) Austria[80]

The function and aims of the Austrian preventive restructuring framework is to reorganise enterprises in financial trouble before they become insolvent. It is presumed that reorganisation is necessary when the equity ratio is less than 8% and the fictitious debt amortization period is more than 15 years. Currently, the Austrian preventive restructuring framework is provided in the Act on Reorganisation of Enterprises (*Unternehmensreorganistionsgesetz* (“URG”)).[81] The URG has not been popular, however, having had only 3 or 4 cases since it was introduced. Its underutilisation has been attributed to the lack of stay of enforcement actions; its high costs; and the fact that most enterprises do not qualify for preventive restructuring as they are already insolvent.

h) Poland[82]

The purpose of restructuring in Poland is to avoid bankruptcy (insolvent liquidation) by enabling the debtor to successfully restructure through an arrangement with creditors. With respect to remedial proceedings, there is a further purpose, namely to safeguard the legitimate interests of creditors while restructuring the debtor.[83] Each restructuring procedure – there are currently four types - of a collective type is centred around the adoption of an arrangement plan that must be voted upon by the debtor’s creditors and approved by a competent court. The current legislative framework in Poland is set in the

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<https://www.rechtspraak.nl/SiteCollectionDocuments/Procesreglement-verzoekschriftprocedures-insolventiezaken-rechtbanken-2019.pdf> accessed 27 October 2019.

[71] The final suspension of payment will be granted for a maximum of 1.5 years (Dutch BA, art 223(1)).

[72] See for instance *Kamerstukken II* 2001/02, 24 036, nr 238, 1.

[73] The Spanish Country Report was completed by Dr Antonio Sotillo Marti of the Departamento de Derecho mercantil “Manuel Broseta Pont” of Universitat de Valencia, Spain and is available on the JCOERE website. Thanks also to Nuria Bermejo, Senior Researcher in Derecho Privado, Social y Económico of the Faculty of Law, Universidad Autónoma de Madrid and Professor Francisco Garcimartin, Chair Professor of Private International Law at Universidad Autónoma de Madrid, for their review and last-minute contributions to the Spanish parts of this Report.

[74] Contained in the Ley 22/2003, de 9 de julio, Concursal, “BOE” núm 164, de 10/07/2003.

[75] Ley 22/2003, art 5 bis, 71 bis, and additional provision 4.

[76] Ley 22/2003, art 231-242 bis.

[77] La Ley 14/2013 de 27 de septiembre que introdujo la regulación del acuerdo extrajudicial de pagos.

[78] La Ley 17/2014 de 30 de septiembre de refinanciación y reestructuración de deudas empresariales.

[79] La Ley 9/2015 de 25 de mayo de medidas urgentes en material concursal.

[80] The Austrian Country Report was completed by Dr Susanne Fruhstorfer, partner at Taylor Wessing and is available on the JCOERE website.

[81] *Bundesgesetzblatt* (“BGBI”) 1997/114.

[82] The initial Polish Country Report was completed by Sylwester Zydowicz, Partner at Taylor Wessing and is available on the JCOERE website. Thanks also to Michał Barłowski of Wardynski & Partners, Warsaw Poland for significant additional input at short notice.

[83] RL, art 3.

Restructuring Law Act of 15 May 2015[84] ("RL"). Any company that is at risk of insolvency[85] or is already insolvent[86] can commence restructuring by way of a court application, with the exception of arrangement approval proceedings, where a court accepts the previously created plan by way of a private process.[87] In the three other restructuring proceedings, a court will appoint a supervisor after commencing the procedure. The debtor will continue to manage the business (debtor in possession) with oversight from the supervisor, with the exception of remedial proceedings where, by default, the court will appoint an administrator to take over management of the debtor's business. There are four types of restructuring proceedings covered by the RL: (i) arrangement approval proceedings; (ii) accelerated arrangement proceedings; (iii) arrangement proceedings; and (iv) remedial proceedings. The first two proceedings can also be conducted in limited form where a (partial) arrangement can cover some creditors, which are key/have a fundamental influence on the debtor's business. This leaves other creditors unaffected.

Irrespective of the above, restructuring of a debtor's business viewed from a commercial perspective can also take place during bankruptcy (liquidation insolvency) as covered by the Bankruptcy Law[88] "BL" through a prepared liquidation procedure (pre-packaged sale of business as a going concern or of its organised part or substantial assets). In such a case the sale is executed by a receiver on terms previously approved by a court after debtor bankruptcy proceedings have been opened. In general, after the opening of restructuring proceedings (this does not apply to arrangement approval proceedings) the debtor can no longer pay the receivable claims covered by an arrangement. Therefore, in some, but it would seem not all, restructuring proceedings, enforcement or security proceedings are stayed. Once an arrangement is adopted by the creditors and approved by the court, it needs to be implemented; this process is overseen by a court nominated a supervisor.

If a debtor is insolvent, each of its executive directors is required to file for a declaration of bankruptcy; failure to do so may result in personal liability. This is not the case in any of the restructuring proceedings. If concurrent motions are filed, in other words, one for the opening of bankruptcy proceedings and one for restructuring proceedings, a court will give priority to opening restructuring proceedings.

While it is commonly accepted that a revised Bankruptcy law and the entry into force of the Restructuring law in 2016 had a positive effect on the market and that many businesses used the new procedures to avoid bankruptcy declaration, it is clear after three years that certain changes are necessitated. This may well be done together with enactment of the PRD. Pre-pack procedures under the Bankruptcy law have already been amended,[89] and will enter into force on 24 March 2020, whereby the aim of reform is to promote this method of restructuring under rules of the Bankruptcy law.

The original aims and goals of the Restructuring law of 2016 may be found in the justification of the draft act.[90] Statistics show that not all of its aims were met in practice.[91]

i) <u>Germany</u>[92]

Germany does not currently provide any type of preventive restructuring along the lines of what the Directive on Restructuring and Insolvency envisages. However, from 1927 to 1999 there was a preventive restructuring framework available (the "*Vergleichsordnung*"), which provided a collective procedure aimed at a debt restructuring agreement that could be confirmed based on a majority vote of

[84] Consolidated text, Journal of Laws of 2019, item 243, with subsequent amendments.
[85] RL, art 11.
[86] RL, art 6.
[87] RL, art 223:

"1. The court shall issue a decision on approval of an arrangement within two weeks from the date of filing an application for arrangement approval.
2. A decision on arrangement approval shall indicate the basis for the jurisdiction of Polish courts. If Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on bankruptcy proceedings applies (OJ L 141 of 5 June 2015, page 19), the decision shall also specify whether the proceedings are main or secondary proceedings."

[88] Act of 28 February 2003 of Bankruptcy law (Consolidated text, Journal of Laws of 2019, item 498, with subsequent amendments).
[89] Act of 30 August 2019 amending the Act - Bankruptcy Law and some other acts (Journal of Laws of 2019, item 1802), published on 23 September 2019.
[90] See website: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2824 – document word "2824-uzas.docx".
[91] See website: http://acuria.eu.
[92] The German Country Report was provided by Professor Dr Stephan Madaus of Martin Luther University, Halle-Wittenberg and is available on the JCOERE website.

unsecured creditors and a statutory minimum payoff to creditors. Since 1999, however, the German insolvency framework has featured a unitary procedure (the "*Insolvenzverfahren*") that includes a restructuring plan option inspired by US Chapter 11 for both insolvent debtors and debtors nearing insolvency. A major reform in 2012 created a so-called umbrella (interim) proceeding option (the "*Schutzschirmverfahren*") as a privileged path guaranteeing that the debtor will remain in possession while negotiating a plan. In both 1999 and 2012, the legislator deliberately decided against providing any separate preventive framework. Thus, all that is left is a preventive process for financial institutions (following the financial crisis) and a bond restructuring option, if provided for in the terms of the bond. The PRD will require the German legislator to design new procedural options and a legislative proposal is expected in the first half of 2020.

While Germany does not yet provide a truly preventive proceeding, their insolvency law does provide for the possibility of proposing a restructuring plan. The *Insolvenzordnung* of 1999 (the "InsO") provides a unified insolvency procedure with three paths, one of which is an insolvency plan[93] through which there is a possibility to agree a plan with creditors. This can preserve the company as a legal entity by waiving certain residual claims owed to debtors of the company through the plan. The plan also aims for higher and quicker repayments to debtors than would otherwise be available in a liquidation.[94]

It should be noted that in Germany, filing for insolvency is mandatory for the managing directors of corporations within three weeks of the occurrence of the circumstances of insolvency. It is in these circumstances that an insolvency plan can be initiated. Such circumstances include the inability of the debtor to meet most of its payment obligations as they become due.[95] This illiquidity is presumed if the firm has ceased making debt repayments entirely. The procedure is also available if there is an impending illiquidity, which applies if the debtor has voluntarily filed for insolvency proceedings; it assumes that if the debtor has filed, it will not be able to make its repayment obligations.[96] It is also available if the debtor's liabilities exceed its assets (the 'balance sheet test'). While it is the case that the plan is only available if a firm meets the criteria for insolvency, German law also allows the parties to stipulate separate agreements in accordance with their respective needs, allowing private party autonomy to agree to restructuring plans. That said, there is no procedure available prior to definitional insolvency in Germany.

The sale of assets comprising the viable part of a business of an insolvent debtor is the dominant aim in any business insolvency in Germany that features a going concern business. Insolvency law is geared towards keeping businesses alive until their viability is tested by the administrator and creditors in the first general meeting of creditors. If an investor is identified and a purchase negotiated, the contract requires the confirmation of a creditor body, either the creditor committee or – in small cases – their general meeting. The assets are transferred under the contract while any liability stays with the debtor. Some contracts are, however, transferred as well, in particular lease and labour contracts.

In practice, plan proceedings are rare; statistically, they were present in less than 2 per cent of all insolvency proceedings. They are a little more relevant, however, in cases where large companies are concerned where a plan is often at least considered as a relevant solution. Overall, however, viable businesses are most commonly saved by a transfer of viable assets by the administrator in a sale of assets rather the under a plan.

The principal content of a plan is not restricted by law. It may contain a restructuring of the balance sheet, a transfer of assets or simply propose a solution to some issues in dispute in a regular insolvency liquidation. The latter has become more frequent recently, leading to plans that do not prevent a liquidation but instead streamline the process.

[93] InsO, s 217.
[94] Georg Streit & Fabian Burk, 'Restructuring and Insolvency in Germany: Overview' (2018) Practical Law Company available from <https://uk.practicallaw.thomsonreuters.com/2-501-6976?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 September 2019.
[95] InsO, s 17 – defined as lacking more than 10% of the funding needed during the coming 21 days to meet its obligations, and it is not foreseeable that the financial gap will be less than 10% in the short term.
[96] InsO, s 18.

j) <u>Denmark</u>[97]

Denmark does not currently provide any type of truly preventive restructuring procedures along the lines of what the PRD envisages. Its current insolvency framework provides for a restructuring proceeding that aims to overcome insolvency by negotiating a plan, which consists of either a compulsory composition or for the debtor's assets to be sold as a going concern. Functional insolvency is, however, required to utilise this procedure.

k) <u>England and Wales</u>[98]

The UK's modern insolvency law regime was designed in response to the Cork Committee's Report.[99] The committee was convened as a response to deficiencies identified in the UK's insolvency law framework, as well as in response to pressure from the UK's accession to the ECC, which required that the UK be able to negotiate with other Member States on a draft EEC Insolvency Convention.[100] It is within the Cork Report that the UK's first foray into corporate rescue, as opposed to focussing on efficient corporate liquidation, was introduced. The broad philosophy of Cork represented a movement toward stricter control of directors, but also in favour of an increasing emphasis on rehabilitation of a company in distress.[101] The underpinning justification for an emphasis on rehabilitation was given as "business is a national asset and, that being so, all insolvency schemes must be aimed at saving businesses."[102] Further, Cork recognised that saving businesses could mean reducing unemployment as the previous focus on liquidation was the "kiss of death for [the company] and the creator of unemployment."[103] Cork's broad policy approach was aimed at rehabilitation, but the resulting Insolvency Act of 1986 did not go as far as he perceived was necessary to achieve the rehabilitation of economically viable companies.[104] This was despite the stated aims and principles being endorsed in a subsequent Government White Paper in 1984.[105]

The Enterprise Act 2002 effected some highly significant changes that brought the UK insolvency framework closer in line with Cork's vision; it reduced some formalities, took some power away from the secured creditor (abolishing receiverships), and repealed the Crown preference. The Enterprise Act opened the way for the development of the Pre-Pack by making it possible for out-of-court administrator appointments. This in turn opened the way for more the development of more effective preventive frameworks. One key aspect of UK insolvency law is that it generally still adheres to the principle of creditor wealth maximisation, with some departures. [106]

There are two procedures available in the UK that can be used before a debtor enters into a state of insolvency. The Scheme of Arrangement in the Companies Act 2006, Part 26 and the Company Voluntary Arrangement (CVA), which is contained in the Insolvency Act 1986, Part 1 and Schedule A1. The Scheme of Arrangement has been on the Company Law books in the UK since the Victorian age and the Joint Stock Companies Act of 1870. It does not appear in Annex A of the EIR Recast as it is of Company Law rather than Insolvency Law origin. The CVA was part of a raft of reforms to the Insolvency Act 1986 that were implemented via the Enterprise Act 2002 and does form a part of Annexe A.

The Scheme of Arrangement specifically aims to coordinate an arrangement with the company's creditors, which includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those

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[97] The Danish Country Report was provided by Line Langkjaer, Assistant Professor at Aarhus University in Denmark and is available on the JCOERE website.
[98] The English and Welsh Country Report was provided by Dr Jennifer L. L. Gant, post-doctoral researcher on the JCOERE Project at University College Cork, Ireland with the assistance of Dr Paul Omar, technical research coordinator of INSOL Europe and is available on the JCOERE website.
[99] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (the "Cork Report").
[100] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 12.
[101] *idem* 14.
[102] Cork Report (n 99) 202-203.
[103] *idem* 202-203.
[104] Jennifer L. L. Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 115; Finch & Milman (n 100) 15.
[105] *A Revised Framework for Insolvency Law* (Cmnd 9175, 1984).
[106] See for example T H Jackson, *Logic and Limits of Bankruptcy* (Harvard University Press 1986); and D G Baird and T H Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interest: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U Chi L Rev 97.

methods.[107] The CVA is a composition between the company and its creditors in satisfaction of the company's debts or a scheme of arrangement of its affairs. A CVA typically involves either a sale of assets and a distribution of the proceeds to creditors, or a continuance of trading under which the company makes periodic payments from its trading income to the supervisor of the CVA for distribution in accordance with its terms.[108] It is used mainly as a vehicle for trading and though it rarely succeeds in saving the business of the company, it is still available to a debtor company outside of a state of insolvency, so should qualify as preventive in nature if used in such circumstances. The Scheme of Arrangement is specifically excluded from the EIR Recast as being a process based in company law.[109] This would equally apply to the Irish statutory scheme of arrangement which is also excluded from Annex A of the Regulation.

Both of these procedures are often used in the context of a pre-pack administration in order to take advantage of the associated additional benefits,[110] such efficiency, secrecy, and control with the ability to appoint an administrator out-of-court, delaying the required formalities till the last minute. The pre-pack is a procedure within which a number of things can happen, such as the restructuring of the company, the rescheduling of debt, and the selling of businesses of the company.[111] While fundamentally the pre-pack is still an insolvency procedure, it has grown in popularity and in parallel with a focus on pre-insolvency or "up-stream" procedures. It now serves an important role in recovery and contingency planning,[112] thus qualifies in some degree as a preventive restructuring procedure, although the overarching administration procedure does have an insolvency requirement, so it is not strictly pre-insolvency. That said, it does often operate to prevent corporate failure.

It should be noted that a recent government consultation on insolvency law reform in the UK has presented a recommendation for a new restructuring plan that pretty closely aligns with the Directive, but it is probably not necessarily *because* of the Directive, apart from the UK recognising a need to continue being competitive in terms of restructuring in Europe given its departure from the EU.[113]

6.6 Conclusion

The forgoing chapter introduced the JCOERE Questionnaires, their purpose and function, as well as the approach taken to gathering the information from the contributing jurisdictions: Ireland, Italy, Romania, France, The Netherlands, Denmark, Germany, Austria, Poland, Spain, and England and Wales. This Chapter also expanded on the comparative law methodology adopted in the analysis of the questionnaire responses, as well as certain challenges encountered in the synthesis of this part of the project. The questionnaires themselves were divided into three sections and Chapter 6 has dealt with the initial interrogation of existing preventive restructuring frameworks in the contributing member states, as well as the aims and functions of insolvency and restructuring in the jurisdictions. This has in some cases included a brief history where relevant.

6.7 Chapter 7: Mapping of Preventive Restructuring Frameworks and the EU Directive Part II – Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

Chapter 7 will deal with Part II of the questionnaire, which concerned substantive aspects of preventive restructuring, while Chapter 8 will deal with the first part of Part III, which looked at procedural matters.

[107] England and Wales Companies Act 2006, s 895(2).
[108] Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 588-589.
[109] See Recital 16 of the EIR Recast:
> "This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors."

[110] Administration is a procedure provided for in the English and Welsh Insolvency Act 1986, schedule B1. The pre-pack is a practitioner devised process, but it is governed by guidelines set out by R3, the Statement of Insolvency Practice 16 (SIP 16).
[111] David Christoph Ehmke, Jennifer L. L. Gant, Gert-Jan Boon, Line Langkjaer, Emilie Ghio, 'Restructuring Europe – The EU Preventive Restructuring Framework: a Hole in One? A Comparative Study on the Occasion of the 10th Anniversary of the INSOL Europe Younger Academics Network of Insolvency Law' (2019) 28(2) IIR 184.
[112] Finch & Milman (n 100) 373-374.
[113] Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016) and *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016); and *Insolvency and Corporate Governance: Government Response* (August 2018).

The second part of Part III of the questionnaire deals with the role of judicial and administrative authorities, which will be discussed in Report 2 of the JCOERE Project. The next chapter will discuss more specific aspects of the existing preventive restructuring and restructuring procedures set out above, with a specific focus on whether they contain any of the common modern elements of preventive restructuring, such as those included in the US Chapter 11, the Irish Examinership, and the PRD. The next chapter will focus on six specific substantive areas: the stay or moratorium (Article 6); adoption of restructuring plans (Article 9); confirmation of restructuring plans, including the exercise of majority rule within classes (Article 10); the cross-class cram-down and the relevant fairness tests for assessing the impact on dissenting creditors (Article 11); workers (Article 13); and the protection of interim and new financing along with the potential for priority in repayment (Article 17). The next chapter will examine what provisions, if any, the contributing jurisdictions have that align with these provisions and any plans for the introduction of such provisions or for amendments to their current systems.

7. Chapter 7: Mapping of Preventive Restructuring Frameworks and the EU Directive: Part II – Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

7.1 Introduction to Part II of the Questionnaire Mapping Preventive Restructuring Frameworks

Part II of the JCOERE Questionnaire,[1] Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive, asks the contributors to examine their preventive restructuring frameworks in relation to specific provisions that are contained in the Preventive Restructuring Directive,[2] describe them and identify what changes, if any, will be needed to bring their legal provisions into line with the Directive. Some Member States do not have any preventive restructuring frameworks. Accordingly, when that was the case, it was requested that the contributors respond with reference to comparable frameworks, such as restructuring procedures within insolvency.[3] The following sections will take a thematic approach to analysing the responses from the various contributors in relation to the specified provisions.[4]

7.2 The Stay of Individual Enforcement Actions (PRD Article 6)[5]

As noted in Chapter 5 of this Report, the stay of enforcement actions has been a focus of the Commission since the Recommendation of 2014 in an effort to improve restructuring and insolvency law.[6] This focus has followed through into the various iterations of the Directive and is enshrined in article 6 of the PRD. Agreeing to the nature of the stay in the new Directive was challenging, however, due to the significant differences in views of the Member States on the appropriate balance between benefits to the debtor to disadvantages to the creditors, which is apparent mainly in the debate surrounding the duration of the stay that would be provided by the Directive. The longer a stay is in place, the more money creditors will lose in terms of opportunity costs, such as the interest they could gain by investing it differently or the value of using that money sooner to support a supplier's ongoing business. If a creditor is 'out-of-the-money', there is no loss to them, hence an adverse impact that is balanced against 'in-the-money' creditors.[7]

7.2.1 The Purpose of Article 6 in the PRD (Question 3)

The purpose of Question 3 was to establish the different ways in which the jurisdictions approached the stay prior to the PRD and to ascertain what changes would be required to implement it. Variances in the duration of the stay across jurisdictions can be problematic in a cross-border insolvency; the result can be the favouring of lower ranking creditors, which no longer have an economic interest, over in-the-

[1] See Annex 2 of this Report for the full JCOERE Questionnaire Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project.
[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18 (the "PRD").
[3] It should be noted that the content of this Chapter relies on the responses of the contributors from the jurisdictions that the JCOERE Team has investigated at the time that the JCOERE Questionnaires were fully answered in November 2019. Therefore, the views expressed in this chapter a based on the information provided to the JCOERE Team.
[4] By extension and in relation to the overall JCOERE hypothesis, the scope available for implementation, the controversial nature of the substantive provisions, and the challenges to implementation may also indicate some difficulties that courts may encounter in efforts to cooperate in cases of cross-border restructuring. This will be the focus of JCOERE Report 2.
[5] PRD, art 6(1):

> "Member States shall ensure that debtors may benefit from a stay of individual enforcement to support the negotiations of a restructuring plan in a preventive restructuring framework."
> "Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph."

[6] See Chapter 5 of this Report section 5.2.4.
[7] Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (Oxford University Press 2019) 147.

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money creditors, which are essentially prevented from exercising their enforcement rights.[8] This is unlikely to be problematic following implementation in light of the maximum durations specified in articles 6(6) and 6(8); however, it is a good example of the way in which creditors in cross-border insolvency matters can be treated differently where there is a failure to closely harmonise the relevant provisions.

Question 3 has two parts; first, it focuses on whether the jurisdiction has a stay in preventive restructuring proceedings (article 6(1)) and if so, the relevant legislative provisions. Secondly, it focuses on article 6(9), i.e. whether the jurisdiction provides for the removal of the stay by a judicial or administrative authority and the conditions relevant to the removal. Article 6(1) of the PRD obliges Member States to provide for a stay of individual enforcement actions, however, the second paragraph gives Member States the option to provide that judicial or administrative authorities can refuse a stay if it is unnecessary or would not support the negotiation of a restructuring plan.[9] The second paragraph has the potential to create some inequality across Member States; it may lead to situations where a debtor can avail of a stay in one Member State, where the stay is automatic for example, but not in another, where the stay can be refused by a judicial or administrative authority. This could influence the choice of forum as far as that choice is available under the provisions of the EIR Recast.

Article 6(2)[10] provides that the stay shall cover all types of claims; it may cover all creditors or be limited to only certain creditors.[11] As was noted in Chapter 5, the Council added article 6(4)[12] which permits Member States, where justifiable, to exclude certain claims in "well-defined circumstances".[13] Article 6(5)[14] specifically excludes the claims of workers, unless by derogation workers claims are stayed, but provides that in this case payments to workers must be guaranteed in the relevant preventive restructuring framework to a similar level of protection which they otherwise enjoy. The stay is set at an initial duration of four months and article 6(6)[15] is extendable up to 12 months only in well-defined circumstances.[16] Where the procedure does not fulfil notification requirements under Annexe A of the

[8] *idem* 147-151.

[9] The second paragraph of the PRD, art 6(1) reads; "Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph." This paragraph was added by the Council during the negotiation phase.

[10] PRD, art 6(2):
"Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims."

[11] PRD, art 6(3):

> "Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.
>
> Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay."

Article 6(5) specifically excludes the claims of workers, unless by derogation workers claims are stayed, but that payments to workers are otherwise guaranteed in the relevant preventive restructuring framework to a similar level of protection.

[12] PRD, art 6(4):

> "Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:
> (a) enforcement is not likely to jeopardise the restructuring of the business; or
> (b) the stay would unfairly prejudice the creditors of those claims."

[13] This must be where (a) enforcement is not likely to jeopardise the restructuring of the business; or (b) the stay would unfairly prejudice the creditors of those claims.

[14] PRD, art 6(5):

> "Paragraph 2 shall not apply to workers' claims.
>
> By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection."

[15] PRD, art 6(6): "The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months."

[16] PRD, art 6(7):

> "Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:
> (a) relevant progress has been made in the negotiations on the restructuring plan;
> (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or
> (c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor."

EIR Recast and the debtor has moved its COMI within three months after filing for preventive restructuring, the four-month maximum duration period applies.[17]

Article 6(9) provides for the option of giving judicial or administrative authorities the power to lift a stay if it no longer supports the negotiation of a restructuring plan, or at the request of a debtor or relevant professional. Following the inter-institutional negotiations, two additional subsections were added, thereby allowing for current variances amongst Member States to remain; the subsections allow for the stay to be lifted where creditors are unfairly prejudiced by the stay or if the stay would result in a creditor's insolvency

If procedures with a stay are set within Annex A of the EIR Recast, then the stay granted would be a robust pan-EU stay. If new procedures are not set within Annex A, then the stay can only be 4 months under article 6(8). Already we can see the potential for forum shopping depending on whether member states choose to keep their procedures outside of Annex A or place the procedures within Annex A.

7.2.2 Jurisdictional Contributions: Existence of the Stay (Article 6(1-8)

JCOERE Questionnaire Question 3.1:

Article 6 of the Directive states that:

"Member States shall ensure that debtors may benefit from a stay of individual enforcement to support the negotiations of a restructuring plan in a preventive restructuring framework."

a) *Does your jurisdiction provide for a stay of individual enforcement actions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of your jurisdiction's stay or moratorium and how it compares with the terms of Article 6(1-8) of the Directive.*

b) *Will your jurisdiction have to make changes to comply with Article 6 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(1-8) of the Directive.*

Of the respondent jurisdictions,[18] two, namely Austria[19] and the UK[20] do not provide for a stay of enforcement actions in their preventive restructuring procedures. The UK provides alternative mechanisms, which are only available through an administration procedure, which is not a pre-insolvency procedure.[21] The remaining jurisdictions approach the stay in a variety of ways.[22]

In Ireland,[23] the stay, described as "court protection", commences upon receipt of the petition for examinership by the relevant court and applies to all creditor claims against the company and any other proceedings relating to the company which can only be commenced with leave of the court.[24] It lasts for up to 70 days, with the possibility of an extension of up to 30 days for the examiner to complete his / her report.[25] Under s. 534(4) the court may extend the stay, if the report has been submitted but the court has not yet adjudicated on it, however, no maximum duration is specified in the legislation for this extension. In contrast to the Scheme of Arrangement in England and Wales, the parallel Irish legislation

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[17] PRD, art 6(8):

"The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings."

[18] See Chapter 6 of this Report section 6.1.

[19] Austrian Country Report, page 1.

[20] England and Wales Country Report, page 3.

[21] England and Wales do not have a stay associated with either the CVA or the Scheme of Arrangement, however, these procedures are often conceived of through a pre-pack or administration procedure, so that they can derive benefit from the moratorium available under Administration. The CVA does, upon request, provide a stay for small and medium sized companies. It has also been common practise for courts to approve injunctions against enforcement actions during Schemes of Arrangements, amounting to what is functionally a stay.

[22] Note that where preventive restructuring procedures are not available, a jurisdiction's insolvent restructuring or plan proceedings will be discussed as an example.

[23] Irish Country Report, page 2.

[24] Irish Companies Act 2014, s 520(5).

[25] See Irish Companies Act 2014, s 520 & 543(3-4). Court protection will cease earlier than 70 days should the petition be withdrawn or refused by the court (s 520(2)).

does provide for a stay on request of relevant parties.[26] There is no maximum time limit associated with the stay within the Scheme of Arrangement.[27]

Spain[28] provides for an automatic stay in relation to negotiations relating to refinancing and out of court payment agreements.[29] According to article 5(5) of the Spanish Insolvency Act, the debtor has three months to reach an agreement with his creditors. If no agreement is reached after three months, during the fourth month the debtor must file for bankruptcy if he is insolvent. During this time, actions are also stayed.[30] Thus, actions can be stayed up to 4 months.

In Italy[31] the stay of enforcement actions takes several different forms; in the *concordato preventivo*[32] and the a*ccordo di ristrutturazione dei debiti*[33] a debtor is entitled to request a stay, which is automatically granted by the court until a hearing takes place within 30 days (or within 45 days by extension of the court). At the hearing, the stay may be confirmed by the court and its duration is extended until the court confirms or rejects the plan. A type of stay applies to judicial liens on real estate in that they are unenforceable against the debtor, if registered within 90 days prior to the date when the same debtor has filed for *concordato preventivo.* Technically speaking it is not a stay – but rather a case of automatic unenforceability – however, it serves a similar purpose to the stay, since the registration of judicial liens is possible only in the context of a foreclosure.[34] The stay in an Italian *concordato preventivo* extends to all creditors, employees included, however, the Italian social security entity (INPS) provides for a fund that covers workers' claim. A stay can also be requested under the *procedimento di composizione assistita della crisi*[35] for a period of 90 days, extendable to 180.

The Dutch suspension of payment[36] is a stay that is granted upon application to the court under that procedure, which is effective against unsecured creditors only. It endures as long as the suspension is in effect, which is up to 1.5 years maximum with an initial provisional period of 2 plus 2 months, although the final suspension can be extended indefinitely.[37] These provisions allow for a stay outside of the terms of the PRD. The Dutch BA also excludes certain classes of creditors, namely secured and preferential, appearing to conflict with article 6(2), unless an article 6(4) justification can be made.[38] The Dutch stay does not stay pending proceedings or prevent the commencement of new proceedings, but this appears to be in line with Art 6(1) of the Directive, which refers only to a stay in relation to individual enforcement procedures. If the proceedings referred to in the Dutch BA are not enforcement proceedings, this is not in conflict.

A moratorium is available in one form or another in all five of the preventive restructuring procedures in France.[39] For conciliation and the ad hoc mandate, a debtor can apply to the court for a moratorium of up to two years if creditors attempt to enforce their rights while proceedings are pending.[40] Where conciliation is converted into a *sauvegarde accélérée* or *sauvegarde financière accélérée,* a general stay arises, which can endure for up to 3 months for the former and 1 month for the latter. For the standard *sauvegarde*, a stay arises automatically for up to 18 months during the observation period and any renewals.[41]

In Romania,[42] a moratorium does not arise automatically under the ad-hoc mandate, but in practice creditors are expected to accept a moratorium along with the mandate proposals. A debtor may request

[26] Irish Companies Act 2014 s 451(2)(3); the parties which can request a stay are laid out in s.451(3), namely, the company, its directors, any creditor or member of the company and the liquidator, if the company is in liquidation.
[27] Irish Companies Act 2014 s 451(2); "the court may, on the application of any of the following persons ...stay all proceedings or restrain further proceedings against the company for such period as the court sees fit."
[28] Spanish Country Report, page 2.
[29] Law 22/2003 of 9 July, art 5a and 235.
[30] Law 22/2003 of 9 July, art 5(4)(e).
[31] Italian Country Report, page 2.
[32] Decree No 14 of 12th January 2019 – Codice della crisi d'impresa e dell'insolvenze (CCI), art 54 para 2.
[33] CCI, art 54, para 3.
[34] This is confined to judicial liens, leaving unaffected all other forms of securities registered within the same timeframe prior to the *concordato* proposal.
[35] CCI, art 20.
[36] Dutch Bankruptcy Act (*Faillissementswet*) 1896 (Dutch BA), art 214.
[37] Dutch BA, art 230(1).
[38] Dutch BA, art 232. It is questionable if these exclusions could be justified under art 6(4)(a-b).
[39] French Country Report, page 2.
[40] Code Civil, art 1343-5.
[41] Code Commercial, arts L621-3, L622-7 and L622-28.
[42] Romanian Country Report, page 2.

a provisional stay against forced execution under the preventive concordat.[43] Once the preventive concordat has been approved, a stay of individual enforcement actions arises automatically with a duration of no more than eighteen months.[44] Where a provisional stay is already in place, it is practice not to apply the additional stay under art 29 para 1.

In Poland,[45] in three out of four restructuring procedures: accelerated arrangement proceedings, arrangement proceedings and remedial proceedings, the enforcement of pre-opening claims is stayed with the opening of restructuring proceedings. This does not apply *ex lege* to creditor claims not participating in an arrangement. [46] The most notable exception from the stay, apart from claims stemming from employment contracts, are claims secured by rights *in rem* during accelerated arrangement proceedings and arrangement proceedings to the extent that such claim can be satisfied from the collateral. Such creditors can enforce their claims from the object constituting collateral[47]. This rule does not apply to remedial proceedings where all claims are stayed.[48] The above principles do not comply with article 6(2) of the Directive, and this is in relation to three out of four restructuring proceedings covered by the RL.[49]

While Denmark[50] does not provide a preventive restructuring procedure that satisfies the definition of the Directive, it does have a stay mechanism in its insolvency and restructuring procedures. It is possible that the stay in the Danish insolvency procedures will be transferred into the framework that Denmark will create to implement the Directive, however, it is not certain at this point. In restructuring proceedings,[51] a stay arises automatically and covers all claims and lasts for as long as the procedure continues (up to 11 months).[52] This may conflict with article 6(5) unless Denmark avails of the derogation, as it includes workers' claims. Floating charge holders can seek execution in the debtor's invoices, i.e. claims of the debtors as against third parties, but the debtor cannot sell or make use of assets belonging to the floating charge holder. Denmark permits secured creditors to request regular payments while the stay is in place, possible contraventions of article 6(2).[53]

Similarly, while Germany does not currently have a preventive restructuring procedure, the InsO insolvency plan does provide for a statutory moratorium upon the decision to commence proceedings and this cannot be lifted until the procedure is complete.[54] In interim proceedings, the court can decide whether to issue a stay up to the commencement of proceedings, but can later revoke this decision if necessary, though this rarely happens.

7.2.3 Summary of Implementation Requirements for Article 6(1)

The responses to the questionnaire as to what the implementation requirements to align with the PRD may be, in addition to commentary from other sources, has led to the following conclusions. Italy appears to be generally compliant with the PRD, including article 6(5). and although Dutch law is not currently in line, the Dutch legislator has already begun the process of introducing the desired reform.[55] The WHOA will likely be compliant with the provisions on the stay, including its non-applicability to

[43] Law 85/2014, art 25 para 1.
[44] Law 85/2014, art 29-30.
[45] Polish Country Report, page 2. Additional thanks should be extended to Michał Barłowski of Wardynski & Partners, Warsaw Poland for significant additional input at short notice.
[46] RL, art 151.
[47] RL, art 260(1) & 279.
[48] RL, art 312.
49 Unless, as is the case with the Dutch exemptions, it can be justified under art 6(4)(a-b).
[50] Danish Country Report, page 1.
[51] The Danish Bankruptcy Act, Consolidated Act No 11 of 6 January 2014, as amended by Act No 84 of 28 January 2014, Act No 737 of 25 June 2014, Act No 573 of 4 May 2015, Act No 550 of 30 May 2017, Act No 1555 of 19 December 2017 and Act No 58 of 30 January 2018 (Danish BA), s 17.
[52] Danish BA, s 12(c).
[53] Danish BA, s 12(c)(5). As is the case with the Netherlands and Poland, this will either need to be amended or justified under art 6(4)(a-b).
[54] Thomas Hoffman and Isabel Giancristofano, 'Germany: Corporate Recovery and Insolvency 2019' (ICLG.com 2019) available from <https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/germany> first accessed 16/09/2019. The InsO provides for the possibility of agreeing an insolvency plan that can perform a similar function to a preventive restructuring plan, namely the preservation of the company as a legal entity by using similar mechanisms, such as the sale of the debtor's business, an operational restructuring based on an insolvency plan in which the debtor's business is continued, and financial restructurings. Georg Streit and Fabian Burk, 'Restructuring and Insolvency in Germany: Overview' (Practical Law Company 2018) <https://uk.practicallaw.thomsonreuters.com/2-501-6976?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 September 2019.
[55] *Wet homologatie onderhands akkoord* (Act on the Confirmation of Extrajudicial Restructuring Plans) (WHOA).

employees in line with article 6(5).[56] It appears that the remaining Member States may require amendments ranging from minor to significant in order to implement the PRD, the majority of which seem to relate to the duration of the stay. The introduction of a maximum duration, including extensions of 12 months, will likely be required in Poland, Romania and France. Currently, the stay in an Irish examinership extends to all creditors, which will include employees. Thus, Ireland may need to either amend the provisions of the stay to exclude workers or utilise the derogation from the second paragraph of article 6(5) in order to comply with the PRD.[57] Also the stay in an Italian *concordato preventivo* extends to all creditors, employees included. In this regard, the Italian social security entity (INPS) provides for a fund that covers workers' claim. For this reason, Italy may not need to amend its legislation pursuant to article 6(5). Romania may need to ensure that the exceptions provided for either comply with article 6(2) or article 6(4), as will Poland. Assuming Denmark implements a preventive restructuring framework similar to its existing insolvency proceedings, it may reconsider the exemption relating to fixed charge holders and the provision for regular payment of secured creditors.[58] Germany may choose to emulate some of its existing stay provisions from the InsO insolvency plan procedure in its preventive restructuring framework, but at the time of writing this Report, the intended direction of the changes is not clear. It appears that Austria will need to introduce a stay as part of its preventive restructuring process, which it could potentially map from its insolvency procedures.[59] Spain will possibly need to provide for judicial extension of the stay. Finally, it is envisioned that the UK will introduce a new moratorium in the next set of insolvency reforms.[60] This will likely be modelled on the moratorium available under Administration,[61] however, to align with the PRD, its duration will likely have to be limited in line with articles 6(6) and 6(8).[62]

7.2.4 Jurisdictional Contributions: Removal of Stay by Authority (Article 6(9)[63]

JCOERE Questionnaire Question 3.2:

Article 6(9) sets out a mandatory provision allowing for the removal of the stay by a judicial or administrative authority under certain conditions.

[56] WHOA, art 369(4) & 376.
[57] The derogation in the second paragraph of art 6(5) allows the extension of the stay to employee claims as long as those claims are guaranteed by the Employers' Insolvency Fund which protects the entitlement claims of employees affected by both the Scheme of Arrangement and Examinership procedures, as well as other insolvency procedures affecting employee claims. The claims guaranteed will have to amount to a similar level of protection as a stay not applying to workers' claims at all, per art 6(5), if Ireland is to make use of this derogation.
[58] The likelihood, according to the rapporteur, is that the exemption relating to regular payments will need to be modified or left out of a new framework as the depletion in assets could interfere with the running of the business, in conflict with art 6(4)(a). In addition, the lack of exemption would not unfairly prejudice the secured creditor (art 6(4)(b)) as it could rely on art 6(9) in the alternative.
[59] In Austrian insolvency proceedings, all enforcement actions are stayed for a period of six months and until the beneficiary applies to recommence their claim, with the exception of enforcement actions for secured creditors, except if the discharge of a claim by a secured creditor could endanger the continuation of the business of the debtor. Enforcement proceedings can only be continued after the elapse of the six-month period and on application of the beneficiary.
[60] See the recent consultation and the government's response; Insolvency Service (BEIS), A Review of the Corporate Insolvency Framework (May 2016) ("Consultation"); Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016) ("Consultation Response"); and Insolvency and Corporate Governance: Government Response (August 2018) ("Government Response").
[61] English and Welsh Insolvency Act 1986, sch B1.
[62] Naturally, this will only be obligatory should the UK remain in the EU; with that said, it may be advisable to align closely to the PRD in order to present a competitive insolvency marketplace.
[63] PRD, art 6(9):

> "Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:
> (a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;
> (b) at the request of the debtor or the practitioner in the field of restructuring;
> (c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
> (d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.
> Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.
> Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted."

> a. *If your jurisdiction provides for a stay, does it also provide for its removal by judicial or administrative authorities and under what conditions are authorities empowered to remove it?*
>
> b. *Will your jurisdiction have to make changes to comply with Article 6(9) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(9).*

While Irish examinership law broadly reflects article 6 of the Directive, the ability to refuse a stay is connected to a challenge to the petition itself, rather than to the stay, which is procedurally different than the wording of the article. Examinership does provide that a court has the option to wind up the company or *make any order it sees fit*, which would logically extend to removing a stay if deemed necessary.[64] There is also a provision allowing for a debtor to withdraw the petition - thereby ending the stay - which could be said to comply with 6(9)(b). The effect of the stay under the examinership procedures has largely been the same as the intended effect of article 6(9) in the PRD, though the removal of the stay is possible by the refusal or ending of the overall procedure.[65] The legislation pertaining to the Scheme does not specify the means by which the stay can be lifted by the court, or if it can be.[66]

In Italy, the incoming legislation provides for the right of the debtor, insolvency practitioner, or creditors to require the court to lift the stay in the event of fraudulent conduct or when the restructuring plan is unlikely to be successful, the latter complying with 6(9)(a).[67] The legislation goes a bit further than the Directive by also extending the ability to request the lifting of the stay to creditors.

The stay in Romania is connected to the preventive restructuring procedure and will endure as long as the preventive concordat continues. There are options for discontinuing the concordat (and the stay) if the debtor has severely breached its obligations or where creditors file a petition to end the procedure. Severe breaches include favouring creditors with unfair prejudice, concealing assets and making payments which put the ongoing business at risk.[68] The stay and the procedure are connected and the conditions for termination are fairly similar to those set out in article 6(9)(b); they may also satisfy article 6(9)(a), as the creditors can also file for termination, which would be likely in a situation where the plan is likely to fail.

In France, a stay granted for conciliation can be lifted by the relevant court if the provisions of the conciliation are not implemented by the parties.[69] There is, however, nothing currently in the French legislation that allows for the lifting of a stay by a judicial or administrative authority in relation to the *sauvegarde* procedure.

In Spain, the stay can be lifted if it is shown that the assets are not necessary for continuing the business activities.[70]

In Poland, the general rule is that a stay lasts for the duration of restructuring proceedings, specifically until a court order accepting an arrangement becomes final. This is when stayed enforcement proceedings are discontinued *ex lege.*[71] Since in the accelerated arrangement proceeding and arrangement proceeding automatic stay does not cover the right to enforce claims from collateral by a secured creditor, the judge commissioner supervising restructuring proceedings may, upon application of the debtor or court supervisor, release objects or rights constituting collateral from enforcement, but only if the debtor requires a secured asset for business.[72] The total length of such

[64] Irish Companies Act 2014, s 535; there are no specific conditions attached to this similar to those listed in Art 6(9)(a-b).
[65] Irish law does not have specific provisions for the court to lift a stay where creditors would be unfairly prejudiced or where the stay would give rise to the insolvency of a creditor, but these arts are optional. With that said, s 520(5) does allow for the commencement of proceedings by leave of the court, which could also amount to a lifting of the stay in relation to specific creditors / claims.
[66] It could be argued that the wording of s 451(2) - "on such terms as seem just" and "for such period as the court sees fit" - suggests that the court is empowered to lift the stay. Essentially, were the court no longer of the view that the stay was just, then it would be unlikely that the court would see fit for it to continue.
[67] CCI, art 55 paras 3-4.
[68] Law no 85/2014, art 35.
[69] Commercial Code, art L611-10-3.
[70] Law 22/2003 of 9 July, art 5(4) bis.
[71] RL, art 170.
[72] See, for example RL art 260(2).

release from enforcement cannot exceed three months. The RL regulates situations where restructuring proceedings may be discontinued before creditors vote on an arrangement (for example, if continuation of proceedings is detrimental to creditors or it is clear from the case that an arrangement will not be executed or, in the case of arrangement and remedial proceedings, the court discontinues proceedings if the debtor fails to cover post opening debt or costs of proceedings[73]). However, there are no provisions *per se* that directly relate to the lifting of a stay and reflect all of situations covered by article 6(9) of the Directive.

In the Dutch provisional suspension of payment, creditors can apply to set the suspension of payments aside (within 8 days of the judgment), but only based on the ground that the court lacked international jurisdiction based on the EIR Recast.[74] Dissenting creditors in the final suspension of payment can appeal the relevant judgment, again within 8 days. Otherwise, the moratorium ends when the suspension is withdrawn at the recommendation of the supervisory judge, at the request of the insolvency practitioner, at the creditors' request or by the court *ex officio*.[75] The latter of these options presents a number of conditions subsequent to which the court can exercise its power to end the moratorium, including bad faith, prejudicing creditors or that maintaining the suspension is no longer desirable, which broadly align with the conditions set out in article 6(9)(a-b). The requirement not to prejudice creditors also aligns with article 6(9)(c), but there is no explicit provision for lifting a stay if it will lead to a creditors' insolvency, though this may also be covered in the other conditions set out in the Dutch BA.

7.2.5 Summary of Implementation Requirements (Article 6(9))

The responses to the questionnaire on the requirements arising for jurisdictions by virtue of the PRD have led to a number of tentative conclusions. The pending legislation in Italy and the WHOA in Netherlands appear to align with article 6(9), thus no other amendments should be needed.[76] The Irish examinership procedure appears to be broadly in line, however, it may be wise for the Irish legislature to make it explicit that the debtor or insolvency practitioner can request that the stay be lifted, even though the effect of the current legislation is very similar. Romania may need to create the ability for the court to lift the stay without simultaneously terminating the procedure and, potentially, also legislate for the conditions under which the stay should be lifted. France will likely either need to introduce new procedures or amend a current one, in order to provide for the court to lift the stay. Arguably, this is also the case in Denmark, Germany and Poland, which appear to lack provisions for the court to lift a stay. In Spain, the stay can be lifted if the assets are no longer needed to continue the business activities. Accordingly, these Member States may well need to consider this at the implementation stage. In Austria, although there is no stay in the restructuring procedure, its stay in insolvency does provide for the court of execution to exercise its discretion in relation to granting extensions to the stay.[77] Finally, the 2018 UK government response to the Insolvency Service's Insolvency and Corporate Governance Consultation provides a recommendation that creditors should be able to object in court to a stay and to apply to have it lifted;[78] if this comes to fruition, it will be broadly in line with article 6(9), but further amendments will likely be necessary to include conditions outlined in 6(9)(a-b).

7.3 The Adoption of Restructuring Plans (Article 9)

Article 9 pertains to the adoption of restructuring plans and regulates the classification of creditors and the voting rights enjoyed by creditors during the negotiation of a restructuring plan. The rules surrounding the classification of creditors and the related voting rights form a fundamental part of the cross-class cram-down set out later in the PRD, arguably one of its more controversial features.

7.3.1 The Purpose of Article 9 in the PRD (Question 4)

[73] See details in RL arts 324-333.
[74] Dutch BA, art 215a(1)
[75] Dutch BA, art 242(1).
[76] WHOA, art 376(10) seems to focus primarily on the ground stated in art 6(9)(a) of the PRD. It appears to provide for the lifting of the stay by the district court.
[77] Austrian Insolvency Code, s 11(3).
[78] Government Response para 5.40.

Article 9(1)[79] provides for the adoption of restructuring plans and the full article sets out conditions under which such plans should be adopted. Article 9(2)[80] provides for the right of creditors to vote on the adoption of restructuring plans; it provides that only "affected parties" have the right to vote and mandates the exclusion of unaffected parties from voting.[81] Article 9 contains a provision on the classification of creditors for voting purposes - article 9(4)[82] - which requires creditors to be grouped in "separate classes which reflect sufficient commonality of interest based on verifiable criteria". At a minimum, the Member State must have secured and unsecured creditors. These voting rights and creditor classifications are subject to judicial or administrative body approval.[83] Interestingly, article 9(4) also provides for specific protection to be conferred on "vulnerable creditors", such as small suppliers. Perhaps this reflects the importance of SMEs to the economy of the EU, something which was discussed in Chapter 5. An intra-class cram-down, in other words, a majority system of voting, is provided for in article 9(6); the PRD has permitted jurisdictions to retain or introduce their desired voting majority for a restructuring plan to be carried by vote, provided that the majority required does not exceed 75%.[84] Finally, and for the sake of completeness, article 9(7),[85] allows for the replacement of a formal vote by an agreement with the requisite majority should Member States so desire.

There are four parts to Question 4. Question 4.1 focuses on whether the participating jurisdictions provide voting right to affected parties and if so, the similarity between these provisions and the PRD. Question 4.2 relates to the classification of creditors, paying specific attention to whether domestic legislation divides creditors into separate classes and if so, what classes are recognised by each jurisdiction. Question 4.3 pertains to judicial or administrative authority oversight of the process; it considers the extent to which the relevant judicial or administrative authority in each jurisdiction is involved in the examination and confirmation of voting rights and classes. Finally, Question 4.4 focuses on intra-class cram-down, in other words, the majority required in each jurisdiction for creditor approval of a restructuring plan with a view to comparing with the terms of the PRD.

There is scope for unequal treatment of creditors depending on the jurisdiction; varying majorities required for intra-class cram-down are permitted, with some jurisdictions requiring a simple majority and others requiring 75%. The same creditor may be classified differently in different jurisdictions, as some may simply have 2 classes - secured and unsecured - and others may sub-divide this further.

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[79] PRD, art 9(1):

> "Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Art 4, debtors have the right to submit restructuring plans for adoption by the affected parties.
> Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans and provide for conditions under which they may do so."

[80] PRD, art 9(2): "Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan. Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan."

[81] PRD, art 9(3):

> "Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:
> (a) equity holders;
> (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or
> (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law."

[82] PRD, art 9(4):

> "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.
> Member States may also provide that workers' claims are treated in a separate class of their own.
> Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.
> Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers."

[83] PRD, art 9(5):

> "Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.
> Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph."

[84] PRD, art 9(6):

> "A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.
> Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class."

[85] PRD, art 9(7): "Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority."

7.3.2 Jurisdictional Contributions: Voting Rights and Exclusions (Article 9(1))

JCOERE Questionnaire Question 4.1:

> *Article 9(2) requires that Member States to* "ensure that affected parties have a right to vote on the adoption of a restructuring plan", *allowing for certain exclusions from this rule in 9(3).*
>
> a. *Does your jurisdiction provide voting rights to affected parties of a restructuring plan and what, if any, exclusions are permitted? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with Article 9(2-3) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(2-3).*

In Ireland, the examiner is obliged to have the agreement of at least one class of impaired creditors prior to court confirmation of a restructuring proposal.[86] This agreement is expressed via formal vote.[87] The legislation creates no express exclusions, although it is possible that parties may be excluded from voting where they are not considered to be creditors.[88] As such, Irish law appears to comply with article 9(2) of the Directive.[89] Section 540(1) specifically refers to "members or creditors summoned" to consider the proposals; when read in conjunction with s.541(4) – proposal must be approved by at least 1 class of creditors *impaired* by the proposal. Creditors which are unimpaired will still vote on the plan but the significant threshold for progress to the approval stage is that a class of impaired creditors consents. Furthermore, only those impaired by the restructuring plan have a right to be heard at the court hearing to confirm the proposal according to s.543(1).[90] Similar to the framework in England & Wales, creditors are also afforded voting rights in the Irish Scheme of Arrangement.[91]

Italian law provides for voting rights for all creditors affected by the plan in the *accordi di ristrutturazione ad efficacia estesa*.[92] Voting rights are afforded to all unsecured creditors in the *concordato preventivo*.[93] Article 109 CCI excludes four types of creditors from voting on the plan; secured creditors that will be satisfied in full and paid immediately under the terms of the confirmed *concordato*, related parties of the debtor,[94] creditors that purchased their claims within the year preceding the commencement of the procedure and any creditor with a conflict of interest.[95] Interestingly, the plan may postpone full reimbursement of secured creditors for a period not longer than 2 years from the date confirmation of the composition (Art. 86 CCI). When the debtor utilises this option, secured creditors are entitled to vote on the plan, although the plan provides for full reimbursement of their claim, only for the difference between principal plus interest and the present value of the proposed stream of payments under the plan (thus, not for the entire face value of their claims).[96] As a result, it is unclear if the law complies with the Directive; although not expressly provided, the Directive seems to base its provisions on the implicit assumption that each affected creditor is entitled to cast its vote for the full value of its claims.

Romanian law also provides for affected parties to have the right to vote on a restructuring plan. Specific parties are excluded from voting, namely creditors which, directly or indirectly, control, are controlled

[86] Irish Companies Act 2014, s 541(4). A creditor's claim against a company is impaired if the creditor receives less in payment of the claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner (s 539(5)).
[87] Irish Companies Act 2014, s 540 pertains to creditor and member consideration of the proposal and provides that "[p]roposals shall be deemed to have been accepted by a meeting ... a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted… in favour".
[88] For example, in *Re SIAC Construction Limited* [2014] IESC 25, [2014] ILRM 357 a particular creditor, the Polish Roads Authority, was excluded by the examiner on the basis that outstanding litigation generated uncertainty regarding whether the party was in fact a creditor. The court nevertheless agreed to hear submissions from the party
[89] Per the Irish Companies Act 2014, s 540 of the Irish Companies Act 2014, affected parties have a right to vote on the examiner's proposal.
[90] Other individuals may be permitted to make submissions, but their right to be heard is not guaranteed.
[91] Irish Companies Act 2014 s 450-453.
[92] CCI, art 61.
[93] CCI, art 109. It should be noted that under Italian law, equity holders are excluded from voting.
[94] This includes any creditors that belongs to the same group of companies as the debtor
[95] Secured creditors will have the opportunity to wave their privilege, entirely or in part, just for the purposes of that procedure, in order to be able to cast their vote for the part of their claims that became unsecured.
[96] Their vote is accounted just for the difference between principal plus interest and the present value of the proposed stream of payments under the plan, not for the entire face value of their claim.

or are under joint control with the debtor and the restructuring plan offers them more than what they would receive in case of bankruptcy. The debtor provides the list of creditors for the preventive concordat; accordingly, the debtor has flexibility in identifying which creditors will be involved.

In France, affected parties are afforded the right to vote in the *sauvegarde* procedure.[97] Creditors unaffected by the restructuring plan or those who benefit from a *fiducie* agreement (*bénéficiaires d'une fiducie*) cannot vote on the adoption of the plan.[98] Social and tax authorities cannot vote, as they cannot be members of a class. They are, however, invited to negotiate on the plan and can grant a debt cancellation or rescheduling. In conciliation, there is no formal voting *per se*, however, before the court can sanction an agreement via homologation, it must hear from the relevant parties to the agreement.[99]

Strictly speaking, in Spanish *refinancing agreements* creditors have no voting rights, but the right to subscribe to the agreement.[100] Claims of especially related persons within the meaning of article 93(2) of the Spanish Insolvency Act (e.g., shareholders of the debtor, other companies of the group, etc.), will not be taken into consideration for the formation of the majorities. However, these creditors will be affected by the agreement. Since refinancing agreements only affect financial claims, non-financial creditors, that is, workers, commercial and public creditors, do not take part in the adoption of these agreements. Nevertheless, workers and commercial creditors can voluntarily adhere to them, but their claims will not be taken into consideration for the formation of the abovementioned majorities (Additional Provision 4th (1) of the Spanish Insolvency Act). In the case of *extra-judicial payment compositions*, in principle, only unsecured creditors have voting rights, since they are affected by the plan. Secured claims will only be affected by the plan when they voluntarily decide to vote for it (articles 238 and 238 bis of the Spanish Insolvency Act).

As discussed previously, Denmark does not have a preventive restructuring framework within the meaning of the PRD. With that said, its restructuring framework in insolvency has many of the key features of preventive restructuring frameworks in other jurisdictions and, indeed, the PRD.[101] As such, the relationship between the system in Denmark and article 9 will be discussed on the assumption that Denmark will map its current insolvency framework to preventive restructuring. Danish law affords affected parties – creditors, which will not be paid be in full or at all - the ability to vote on a restructuring plan.[102] Secured creditors are excluded from voting except for the amount of their claim that is unsecured.[103] Related parties are also excluded from voting on the restructuring plan.[104] Creditors with contested claims may be considered ineligible to vote by the Bankruptcy Court if the contested claim is decisive for the adoption of the plan.[105] If the plan consists of a compulsory composition, all creditors whose claims are written down are considered affected; this is limited, however, as a compulsory composition cannot include secured or preferential creditors.[106]

Polish law as a rule grants the right to creditors affected by restructuring proceedings to vote on an arrangement plan[107] (employment-related receivables and secured creditor receivables - to the extent that such receivables cannot be satisfied from collateral - will participate in an arrangement only if a creditor explicitly agrees to do so). Separate regulations apply to proceedings where a partial arrangement plan is to be adopted if a secured creditor can be bound to participate in an arrangement, irrespective of its decision).[108]In practice, the voting right is related to creditors whose claims have been entered in an approved table of claims or to creditors present at an assembly of creditors with proof of those claims who can also be admitted to vote at the meeting. Creditors who are close relatives, equity

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[97] Bondholders are to be consulted in one general meeting of all bondholders in relation to all bonds; they vote in a general meeting on the plan that has already been adopted by the relevant creditors' committees.
[98] Commercial Code, arts L626-30-2 & L626-32, respectively.
99 The relevant parties include the conciliator, some representatives of the company, the debtor and creditors
[100] Ley 22/003 of ninth July on Insolvency, additional provision 4(1).
[101] In some instances, the only difference between Danish restructuring and preventive restructuring in other jurisdictions is the end purpose; the purpose of the Danish framework is to enable the debtor to exit insolvency, whereas preventive restructuring is to enable the debtor to avoid becoming insolvent in the first place. As such, in order to access restructuring in Denmark, the debtor must be insolvent, making it different to the PRD.
[102] Danish BA, ss 13 d (1) & 120 (1).
[103] Danish BA, s 120(2).
[104] Danish BA, s 13 d (3).
[105] Danish BA, s 13 d (2).
[106] Danish BA, s 13 d (4) and section 10 a (2). A ccompulsory composition (*tvangsakkord*) is a legally regulated restructuring procedure, in which the amount that the debtor has to pay to the creditors is reduced.
[107] RL, art to be read in conjunction with art 150.
[108] RL, arts 180 - 188.

holders (when meeting certain qualifications) and creditors holding claims acquired by way of transfer and/or endorsement after the opening of restructuring proceedings are excluded from voting.[109] Not covered are therefore provisions of non-compulsory article 9(3)(b) of the Directive. At this point it is yet unclear what legislative changes will be proposed to amend the RL and the BL to render them compliant with the Directive.

In the Netherlands, a vote is required by all affected parties for an out-of-court composition.[110] Where there is a suspension of payment – which excludes secured and preferential creditors – the restructuring plan will be voted on by affected creditors.[111] When a claim is disputed and consequently the right of the creditor to vote, the court will adjudicate on the validity of claim.[112]

Austrian law empowers creditors to vote in a restructuring plan in the course of insolvency proceedings, but not in the course of a preventive restructuring proceeding (URG). Similar to Italy and Denmark, secured creditors do not have voting rights except if the hold a partially secured claim, in which case their vote relates solely to the unsecured part.

Similarly, Germany provides voting rights for impaired creditors and shareholders in its insolvency restructuring plan proceedings (InsO).

In England and Wales, both the Scheme of Arrangement and the CVA provide voting rights to approve the relevant plan.[113] There are no exclusions specified in the legislation. However, in practise the English courts have approved plans where 'out of the money' creditors have not been included in a class of creditors.

7.3.3 Summary of Implementation Requirements

A combination of the responses received by the JCOERE project and other commentary has led to the following provisional conclusions regarding the changes necessitated by the PRD: It is likely that countries such as Austria will have to make substantial changes to their legislation in order to comply with article 9. As discerned from the responses to the questionnaire, Austria does not provide voting rights for creditors in preventative restructuring; however, it is likely that Austria will opt to require the maximum limit majority of 75% in number and value of the claims as the basis for consent to pre-insolvency restructuring plans. Germany may also choose to borrow from its InsO insolvency plan provisions to provide voting rights in a new preventive restructuring framework aligning with the PRD. As the Dutch 'suspension of payment' can be interpreted to afford voting rights to all creditors - not just those affected by the proposed restructuring plan – the WHOA contains the necessary changes.[114] Italy France, Romania, Poland, Denmark and Ireland seem to have no need to amend their legislation.[115] Poland may decide to clarify exactly which creditors are excluded from voting in line with the PRD. It is likely that the UK will align any new framework with provisions of the Scheme in terms of voting,[116] which will be compliant with the PRD.

7.3.4 Jurisdictional Contributions: Class Formation (Article 9(4))

JCOERE Questionnaire Question 4.2:

> *Article 9(4) requires that Member States treat affected parties in separate classes,* "which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law."
>
> a. *Does your jurisdiction provide for the separation into classes of those parties affected by a restructuring plan?*
>
> b. *What classes does your jurisdiction recognise?*

[109] RL, arts 107, 116, & 109.
[110] An out-of-court composition requires full support of the creditors, save in limited circumstances, which are discussed in paragraph 7.3.8.
[111] Dutch BA, arts 232 & 252.
[112] Dutch BA, art 267.
[113] English and Welsh Companies Act 2006, s 899(1); and Insolvency Act 1986, s 4(1) & 4(1A).
[114] Voting creditors and shareholders are defined as those whose rights are amended as a result of the restructuring plan.
[115] As articulated above, Denmark is included assuming it extends its current restructuring process to preventive restructuring. Refer to the note regarding the insolvency and restructuring framework in Denmark in section 7.3.2 of this Chapter.
[116] Government Response (n 60) para 5.135.

Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.

c. *Will your jurisdiction have to make changes to comply with Article 9(4) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(4).*

In Ireland, s.536(f) of the Companies Act 2014 states that the examiner's report must contain a "list of the creditors of the company…the nature and value of any security held…and the priority accorded...to any such creditor". In line with the usual rules of ranking for liquidation, creditors can be divided into preferential, secured and unsecured creditors. They may be further subdivided into categories at the discretion of the examiner. There is a clear distinction between super-preferential, preferential, secured and unsecured claims. The common law rules on class formation, which exist in Ireland and England and Wales in the context of Schemes of Arrangement, also apply to examinership and add an additional layer to class formation.[117]

In the Italian *concordato*, the debtor can form different classes based on the legal position of the creditor - senior and junior - and their commonality of interest.[118] The creation of separate classes for secured and unsecured creditors is not mandated; secured creditors will be unaffected by the plan because they are paid in full, therefore they will not be entitled to vote and there is no need to include them in a "class". Instead, Italian law mandates the formation of the following classes:

(i) tax and social security claims that are not going to be paid in full;

(ii) creditors whose claim is assisted by guarantees provided by third parties;

(iii) creditors that are not going to be paid entirely in cash under the plan; and

(iv) in case of a competing plan, the proposing creditors and their related parties.

All unsecured creditors - including secured creditors for the unsecured part of their claim – may be included in one single voting class. It is important to note, however, that secured and priority creditors, although not forming a voting class for the part unaffected by the plan, are always treated separately from one another.

In the *accordo di restrutturazione dei debiti*, there is no class formation and the plan is binding only on consenting creditors. In the *accordo di restrutturazione dei debiti ad efficacia estesa*, there is class formation in order to bind minority creditors by the agreement reached by the majority of creditors in the same class.

Romanian law does not provide for the separation of creditors into classes in the preventative restructuring process but does have classes for insolvency proceedings. The classes are secured (receivables with preference rights), salary claims, budget receivables, indispensable claims (receivables belonging to essential suppliers) and other unsecured claims.

Interestingly, during the *sauvegarde* procedure in France, class formation is done on the nature of the business of the creditor, as opposed to the type of the claim. Three classes of creditors exist - financial institutions, major trade creditors and bondholders - into which creditors are organised based on their relationship with the company, as opposed to the type of debt.[119] The *Loi Pacte*, however, authorises the introduction, via an Ordinance, of "true" classes of creditors, which it is envisioned with bring France in line with the PRD.[120]

Similarly, Denmark does not specifically separate creditors into classes for the purpose of voting, but the restructuring plan cannot entail a compulsory composition of secured creditor claims that are higher ranked than ordinary unsecured creditors in bankruptcy proceeding. So a compulsory composition will

[117] See *Re Pye (Ireland)* [1985] IEHC 62 and *Re Millstream Recycling* [2010] IEHC 538. See also Irene Lynch Fannon and Gerard Murphy *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury 2012) 548 & 627-632.

[118] For example, creditors benefitting from a third-party personal guarantee are not in the same position as those not having such guarantee, although they have the same ranking vis-a-vis the debtor.

[119] According to the French Commercial Code, art L626-30 the classes of creditors are (i) financial institutions, (ii) major trade creditors and (iii) bondholders. This applies to companies of a certain size i.e. companies with more than 150 employees or an annual turnover of over €20 million per art L626-9, making reference to art 162 of Decree n°2005-1677 of 28 December 2005.

[120] *Loi Pacte*, art 196(1).

only affect the ordinary unsecured creditors that then vote in one pool. Since the voting does not take place in classes there is no need to separate them.

While the Netherlands does not have separation of creditors for the purpose of voting, it does recognise different types of creditors for the purpose of ranking. The WHOA, however, will address this issue, once passed.

The German insolvency procedure provides for the division of creditors into classes on the basis of economic interests and the creditors' status in law. Classes include shareholders if they are impaired.

Austria differentiates between secured, unsecured creditors and subordinated creditors in both insolvency and restructuring procedures.[121]

Spain distinguishes financial creditors which are all creditors that are not public creditors, workers or commercial creditors (suppliers), and non-financial creditors and in some cases uses different procedures for different types of creditors. Banks and credit institutions are an example of financial creditors; however, shareholders having lent money to the company will also be considered financial creditors. In extra-judicial payment compositions, Spanish law has unsecured and secured creditor classes, although, in principle, secured claims are not affected by extra-judicial payment compositions. However, these creditors can voluntarily decide to take part on these agreements, voting in favour of them. The effects will be extended to other secured creditors when the requisite majorities of creditors vote in favour. In the case of refinancing agreements, secured creditors holding financial liabilities can be affected by the plan and, therefore, are entitled to subscribe to it. The effects can be extended to dissenting or non-voting creditors with the requisite majorities. Strictly speaking, in both frameworks, creditors do not vote in classes. However, majorities for secured claims are calculated taking into account the total value of secured liabilities.

In Poland, the organisation of creditors into classes is optional in that legislation provides for a right, but no obligation, to form classes. The formation of classes may be based on the following criteria (non–exclusive list):[122]

(i) among creditors entitled to claims under employment and who have agreed to be covered by an arrangement;

(ii) farmers entitled to claims under contracts for delivery of products from their own farm;

(iii) creditors whose claims are secured by a debtor's property with mortgage, pledge, registered pledge, tax lien and/or maritime mortgage, as well as by the transfer to the creditor of ownership of an asset, claim and/or another right, and who have agreed to be covered by the arrangement;

(iv) creditors who are partners and/or shareholders of a debtor that is a capital company, with shares and/or stock of the company ensuring at least 5% of votes at the shareholders' meeting or the general meeting of shareholders, even if they are entitled to claims specified in subsections 1-3.

In addition, more favourable debt restructuring proposals can be addressed to such creditors who have granted new financing post-opening of restructuring proceedings that is required for executing an arrangement.

To make the RL compliant with article 9(4) of the Directive, an amendment to the RL would need to make the division of creditors into classes mandatory. In case of partial arrangements, it seems that amendment of the RL would need to primarily provide for the formation of classes explicitly. Under the current RL it is unclear whether this right - even on a non-compulsory basis - can be derived from existing RL provisions.

In England and Wales, the "essential requirement" of class formation for the Scheme of Arrangement is that classes are comprised of "only of those persons whose rights … are sufficiently similar to enable

[121] Markus Fellner, 'Restructuring and Insolvency: Austria' (Thompson Reuters 2011) <https://uk.practicallaw.thomsonreuters.com/4-385-2603?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 26 October 2019.
[122] RL, art 161.

them to properly consult and identify their true interests together."[123] Thus, where creditors have different interests, separate classes should be convened and where they have similar interests, they should be grouped together. In the CVA, specific classes are not identified in the same way. Rather, a composition will be approved if a majority of at least three quarters in value of the creditors voting is achieved.

7.3.5 Summary of Implementation Requirements

From the responses to the JCOERE questionnaire and discussions in various other fora, the following has been deduced in relation to the potential changes necessitated by the introduction of the PRD. There may be widespread scope across Member States for the introduction of specific provisions to protect or strengthen the position of vulnerable creditors in line with article 9(4).[124] Aside from that, it can be suggested that Ireland will have no changes to make. The WHOA should result in the Netherlands being compliant with the Directive, as article 374 regulates creditor class composition in a way that aligns with the PRD.[125] The UK proposal for a restructuring plan suggests applying an approach similar to the current Scheme of Arrangement framework, which is widely considered to be fit for purpose and in terms of voting rights, compliant mostly as it is.[126] More extensive changes may be needed in the remaining Member States. As with the previous question, Germany and Austria will likely need to extend their similar provisions within insolvency to a preventative restructuring framework or devise a new framework entirely. In addition, Austria currently intends to create a new class of "worthy creditors" that will include groups such as small suppliers. Spain should perhaps consider the lack of clarity in how classes of creditors are established in order to align with the terms of the PRD. It appears that Denmark will have to provide for voting to take place in classes in its new preventive restructuring framework, as Poland will likely have to make this an obligation in its existing framework.[127] The classification of creditors and voting rights based on these classes may form areas of scrutiny for Romania. Similarly, France may need to amend how it classifies creditors; as extracted from the response to the questionnaire, however, the *Loi Pacte*.[128] Although Italian law does not expressly provide for separation of secured and unsecured creditors, this result is substantially achieved in practice, except for a very limited number of cases. In reality, whenever a plan provides for class formation, the applicable criteria under the Italian law, namely commonality of interests and homogenous legal position of creditors placed in each class, ensure that secured and unsecured creditors are put in different classes. A possible conflict with the PRD may only arise when the law permits the submission of a plan without forming classes, since in such cases the above criteria do not apply and, as a result, secured creditors are treated and may vote on the plan for their possible deficiency claim (i.e., the part of the claim that exceeds the value of the collateral and, thus, it treated as unsecured) at the same terms as unsecured creditors. The same may occur when secured creditors are entitled to vote due to the rescheduling of their claims pursuant to Art. 86 CCI (see above).

7.3.6 Jurisdictional Contributions: Examination of Voting Rights and Class Formation by Authority (Article 9(5)

JCOERE Questionnaire Question 4.3:

> *Article 9(5) allows for judicial or administrative examination of voting rights and the creation of classes when a request for confirmation of a plan is submitted and, further, allows Member States to* "require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage…"

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[123] *Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole* [2011] EWHC 3746 (Ch) para 44.
[124] "Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers."
[125] WHOA, art 374:
> "Creditors and shareholders are allocated in different classes if the rights they would have in the event of liquidation of the debtor's assets in bankruptcy or the rights they are offered on the basis of the restructuring plan are so different that there is no comparable position. In any event, creditors or shareholders who, in accordance with Title 10 of Book 3 of the Civil Code, another law, or a set of rules or agreement based thereon rank differently in relation to the recovery of the debtor's assets, are allocated in different classes." (unofficial translation)

[126] Government Response (n 60) 70
[127] As discussed previously, Polish law currently has classes, but they are optional.
[128] *Loi Pacte*, art 196(1).

> a. *Does your jurisdiction provide for the examination, confirmation, approval or otherwise of the voting rights and separation into classes of affected parties for the purpose of approving a restructuring plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with Article 9(5) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(5).*

Irish law mandates that the Examiner's report, which is subject to court approval, must contain *inter alia* the proposals placed before creditor meetings, the outcome of each vote and the list of the company's creditors including their priority (separation into classes).[129] Therefore, while there is not a separate approval of the voting procedure and classification of creditors, the confirmation of the report encompasses their approval, presumably complying with article 9(5). In applying Irish case law, MacCann and Courtney state that the court will only confirm a scheme if it is satisfied that the classes were properly constituted, amongst other criteria.[130] An individual creditor can object to court confirmation of the Examiner's proposal under s.543(1)(a) - material irregularity at the meeting - which could encompass the failure of the Examiner to correctly classify that creditor.[131] Outside the Examinership procedure the Irish Scheme is broadly similar to the framework in England & Wales, in that there is no provision which specifically mandates the examination of voting rights and class formation, but there is court sanction of the compromise.[132] However, Irish law has been amended to eliminate the need for the first court hearing approving the holding of meetings which is still required under s 896 of the Companies Act (UK) 2006.[133]

In the Italian *concordato preventivo*, the law requires an examination of the formation of classes at an earlier stage than confirmation, per article 9(5) of the PRD. The court verifies the criteria used to form the relevant classes before starting the voting process and subsequently re-evaluates such criteria in the confirmation hearing. Article 48 CCI, which regulates court confirmation of the *concordato* plan approved by creditors, allows the judge to verify the correctness of the procedure, including the formation of classes. Article 61 CCI provides a control on the formation of classes when the court is asked to confirm the agreement thereby allowing for the extension of its effects to the dissenting minority (*accordo di ristrutturazione ad efficacia estesa*).[134] These provisions reflect, with no significant difference, the provision contained in the current Italian insolvency law.[135]

Romanian law provides for mandatory judicial examination of the voting process for approval of the concordat, which is submitted by the administrator after its approval by the creditors.[136] The judge homologates the preventive concordat and issues a resolution in the council's chamber, after summoning and hearing the concordat administrator.

The French *sauvegarde* system is a little more complex; strictly speaking, there is no examination, confirmation or approval of the classification of affected parties for the purpose of approving a restructuring plan in *sauvegarde* proceedings. With that said, voting rights can be amended, which presupposes an examination. Decisions made by the administrator regarding the value of votes can be referred to the court for adjudication, should a dispute arise.[137] Once the plan has been adopted, the court

[129] Irish Companies Act 2014, s 536. Classification of creditors is the responsibility of the Examiner.
[130] Lyndon MacCann and Thomas Courtney, *The Companies Acts 1963 – 2006* (Bloomsbury 2008) 396 in relation to *Re Colonia Insurance (Ireland) Ltd.* [2005] 1 IR 497 and *Re John Power and Sons Ltd* [1934] 412.
[131] See John O'Donnell and Jack Nicholas, *Examinerships* (2nd edn, Lonsdale 2016) 136: they argue that such an error or misclassification would have to be determinative i.e. the proposal would not have been accepted by the particular class of creditors, had the particular creditor(s) been correctly classified. The other grounds for objection are laid out in s 543(1)(b)-(d).
[132] Irish Companies Act 2014, s 453(2)(c).
[133] s 896(1) provides that "The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs."
[134] CCI, art 47 & 85. Pertains to the *accordi di ristrutturazione ad efficacia estesa*
[135] CCI, arts 182-bis & 182-septies.
[136] Law no. 85/2014, art 28 (1).
[137] Commercial Code, art L626-30-2 para: Creditors may have contracts with the debtor which contain clauses regulating how their vote on the plan will be exercised. Creditors who benefit from a guarantee or a subordination agreement must notify the administrator. The administrator will take into account the benefits accruing to the creditor when deciding on the value of the vote and will notify the creditor before the meeting takes place. For bondholders, the same voting rules apply as the ones for the creditors' committees, however, the value of their vote is determined without reference to the value of any accessory security given by the debtor by which they may benefit.

will ensure that the interests of all creditors are sufficiently protected.[138] It is interesting to note that there is some discord in France relating to the 2014 reforms, which afforded the administrator the power to calculate creditors' rights in light of subordination agreements. It has been argued that there is a lack of objective criteria attached to this power.[139]

Austria has provisions for the examination of voting rights, but the legislation does not currently require a formal class formation, relying instead on the natural division of secured, unsecured, and subordinated, although as noted above there is an intention to create a new class of "worthy creditors" in upcoming reforms. While it does not specifically have a mechanism for "class formation", the system of differentiating classes of creditors is functionally equivalent. Creditors with disputed or conditional claims are allowed to vote initially and if the result varies based on those votes, then the insolvency judge conducts a preliminary examination and hearing of the parties (article 93 of the Insolvency Code) and adjudicates the matter.

Germany has the relevant structures for a restructuring plan approval, but only in insolvency, not preventative restructuring. Within the insolvency plan procedure there is a requirement that courts verify the fairness of class formation and voting.

Denmark has provisions relating to the confirmation / examination of voting rights within insolvency; the Danish Bankruptcy Court examines and confirms the creditors which are eligible to vote, a decision which is not subject to appeal.

In the Netherlands, the debtor and creditors will verify the claim themselves in an out-of-court composition. Where there is a dispute, they refer the matter to dispute resolution, either in or out of court. When the suspension of payment has been granted, the creditor must submit his claim to the insolvency practitioner for verification.[140] Where the insolvency practitioner disputes the claim, the creditor will be consulted for more information in the first instance; for claims which remain disputed, the court or supervisory judge will decide.[141] In general, the admission of claims for the purpose of voting is not performed by a judicial or an administrative authority per article 9(5) of the Directive.

Polish Restructuring law provides for a simplified process – in relation to bankruptcy (liquidation insolvency) proceedings under the BL – of examining creditors who have the right to participate in proceedings and thereby exercise voting rights during an assembly of creditors. Different rules apply depending on the type of restructuring proceedings:

(i) in arrangement and remedial proceedings, a voting right results from the inclusion of claims in a table of claims. The parties may object to entry of claims in the table to the judge-commissioner;[142]

(ii) in accelerated arrangement and arrangement approval proceedings, every claim reported to the debtor prior to the opening of restructuring proceedings accrues voting rights if;

  (a) this claim was confirmed by the debtor; or

  (b) the judge-commissioner admits a claim, which is when the claim is subject to a condition precedent or is disputed by the debtor, but its existence is probable[143] (i.e. there are grounds to believe that a claim exists and is justified).

If the assembly of creditors accepts an arrangement, a hearing takes place to confirm an arrangement plan. Prior to the hearing, written reservations can be submitted to the court,[144] which will be resolved during a hearing.

If an arrangement plan is in breach of the law or is considered to be grossly unfair to those creditors who have voted against it and have made reservations, the court may refuse its approval. Indirectly, this

[138] Commercial Code, art L626-31. "Adopted" means the plan has been adopted by each of the creditors' committees and where applicable, by the general meeting of bondholders (and shareholders' meeting in case of a debt-to-equity swap).
[139] A Droege Gagnier and A Dorst, 'France: quo vadis? France is Keen to Reform its Security and Insolvency Law' (2018) 12 Insolvency and Restructuring International 24, 25.
[140] Dutch BA, art 257(1).
[141] Dutch BA, arts 258, 259 & 267.
[142] RL, art 91.
[143] RL, art 107(3).
[144] RL, art 164.

acts as a verification of the classification of creditors in an arrangement.[145] It is therefore unclear whether an amendment of the RL will be required. If so, this will be to make it explicit that a court has an obligation to analyze creditor voting rights and formation into classes as provided by article 9(5) of the Directive.

Extra-judicial payment compositions in Spain are verified by a mediator (in the case of business) or by a notary (in the case of consumers). These professionals are responsible for verifying the fairness of the procedure and that the requisite majorities have been met in order to confirm an agreement.[146] Refinancing agreements are confirmed (homologated) by the court,[147] thus it is the judge's duty to verify the fairness of these agreements.[148]

In England and Wales, it is the applicant's responsibility to ensure that classes are constituted properly for the purposes of approving a Scheme, however, the court will give due consideration to the identification of classes.[149] The Scheme has three stages. First, there is an application for an order that meeting should be summoned at which time it is decided as to whether further meetings should be summoned. Secondly, scheme proposals are presented to a meeting, are voted upon, and if approved by the requisite majority in number and value of 75%, the Scheme proceeds to the third and final stage. During the final stage, the court's sanction must be obtained.[150] During this third stage, the court is concerned:

> "(1) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (2) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (3) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present, or, being present, did not vote in favour of the proposals) receive impartial consideration."[151]

It is at this third stage that a court will consider issues of fairness, including that the views and interests of affected creditors who may not have voted in favour of the scheme.[152] During the first stage, the court will also look at whether the creditors as a whole have interests that are aligned closely enough to be considered together or whether they are so dissimilar as to render it impossible for them to consult together on the aspects of the plan.[153] Following *Re Hawk Insurance*, the court will not take a mechanical approach to determining the composition of a class, but will instead look at the scheme's impact on the substantive rights of different creditors.[154]

7.3.7 Summary of Implementation Requirements

The responses to the JCOERE questionnaire and contributor views on what will be required to implement the PRD have led to a number of tentative conclusions. Ireland, Denmark, Romania[155] and Italy will likely require no changes in light of article 9(5) of the Directive. France may implement the required changes via the The *Loi Pacte*, the amendment to which was discussed in the previous section. Consideration may need to be given to the legislation in Austria and the requirements on the examination and confirmation / approval of class formation and voting rights in the PRD. Poland may wish to amend its legislation in order to provide for the confirmation of class formation at an earlier stage. The WHOA will likely ensure that the Netherlands is compliant with the PRD as it seems to provide for *ex officio* examination of class formation by a relevant authority. A request that the court adjudicates on the class formation and voting rights prior to voting on the plan can be made by the debtor or the expert.[156] In

[145] RL, art 165(2).
[146] Law 22/2003 of 9 July, art 238.
[147] Law 22/2003 of 9 July, art 238.
[148] Law 22/2003 of 9 July, additional disposition 4 part 6.
[149] Practice Statement (Companies: Scheme of Arrangement) [2002] 1 WLR 1345 as cited in Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 581.
[150] *Re BTR Plc* [2000] 1 BCLC 740, 742 and *Re My Travel Group Plc* [2005] 2 BCLC 123, para 8.
[151] *Re Hawk Insurance Co Ltd* [2002] BCC 300, 511 (b-g).
[152] *idem* para 12 as cited in van Zweiten (n 149) 577.
[153] van Zweiten (n 149) 581.
[154] *RE Hawk Insurance Co Ltd* [2002] BCC 300 and *Re UDL Holdings Ltd* [2002] 1 HKC 172.
[155] Refer to the note regarding the framework in Denmark in section 7.3.2 of this Chapter.
[156] WHOA, art 378(1), which provides for the option that the debtor or the plan expert requests the court to assess the validity, for instance, of the class formation and voting rights.

addition, it appears that creditors and shareholders may dispute their class or voting rights with the debtor, or in court.[157] England and Wales already provide court heavy approval process in its Scheme of Arrangement, which is likely to be adopted in similar fashion should the Government Response yield restructuring reform introducing a plan procedure, although the court heavy procedure is contrary to the spirit of the PRD.

7.3.8 Jurisdictional Contributions: Intra-Class Cram-Down (Majority Voting) (Article 9(6&7)[158]

JCOERE Questionnaire Question 4.4:

> *Article 9(6) includes a compulsory intra-class cram-down element:*
>
> "A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class."
>
> *The optional provisions are that member states may provide that a majority in number in each class must also agree. In addition, the majority can be set down by member states but cannot be higher than 75%. Article 9(7) provides that formal votes can be replaced by an agreement with the requisite majority.*
>
> a. *Does your jurisdiction have intra class cram down provisions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive.*
> b. *Will your jurisdiction have to make changes to comply with Article 9 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 9(4).*

Ireland has provisions which provide for the vote to be carried by a majority within each class; s.540(4) provides that "[p]roposals shall be deemed to have been accepted by a meeting of …a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted… in favour". As such, Ireland utilises a system of simple majority i.e. in excess of 50%. Irish legislation does not have a system of replacing formal voting with a less formal, expression of majority agreement. The proposal in the Scheme of Arrangement becomes binding on a class of creditors once a special majority is reached, in other words, 75% by value.[159]

In Italy, the plan in a judicial composition with creditors is approved if the majority by value of creditors entitled to vote have approved the plan.[160] If a single creditor holds a majority of the value of all the claims entitled to vote,[161] then there must also be approval by a majority of the number of creditors in the class.[162] In addition to that requirement, in case of class formation, the approval of the plan requires that the majority of the number of classes have approved the plan (a class is deemed to have approved the plan when the majority by value of the creditors included therein have voted favourably). With

[157] WHOA, arts 383(9) (with debtor), 383(8) & 384(2)(c) (in court) respectively.
[158] PRD, art 9(6):
"A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.
Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class."
[159] Irish Companies Act 2014, s 453(2)(a). The 75% majority refers to a "number representing at least 75 per cent in value of the creditors or class of creditors ... present and voting either in person or by proxy at the scheme meeting". (Irish Companies Act 2014, s 449(1))
[160] CCI, art 109 para 1.
[161] This requirement also applies in case a restructuring plan does *not* envisage the formation of classes.
[162] The PRD mandates that the majority required by a Member State shall not be higher than 75%. There could be situations where, based on the specific circumstances of the case, the majority required by Italian law is higher than 75% by amount e.g. when a creditor has a claim of 60% by amount, and there are two other creditors each having a claim of 20% by amount, under the Italian rules the class may be deemed to have approved only if a majority representing 80% by amount is reached.

respect to restructuring agreements, binding dissenting creditors within a class, the class is deemed to have approved the plan if 75% by value of creditors have approved it.[163]

In Romania, preventive restructuring plans (preventive concordat) can be adopted and confirmed by creditors' votes representing at least 75% of the value of the accepted and uncontested claims, reflecting the maximum threshold set out in the PRD.

In France, there is no need for a cram-down mechanism in the conciliation or ad hoc mandate proceedings, as they are voluntary in nature; in other words, they are negotiations with particular creditors, which are willing participants in the process. In the *sauvegarde* proceedings - for the purpose of the plan becoming binding on all members of a particular class once it is confirmed by the court – the plan must be approved by a majority of two-thirds of the number of claims.[164]

In the Austrian voluntary reorganisations and self-administered reorganisation (debtor in possession), a reorganisation plan requires a majority of unsecured creditors holding more than 50% of the aggregate claims of those unsecured creditors present at the hearing.[165]

Within Germany's insolvency procedure, a simple majority within individual classes by value and number will succeed in the individual class approving a plan.

Danish insolvency law – for the purpose of the plan becoming binding on all affected creditors once it is confirmed by the court – has a system of majority rule in that it mandates that a restructuring plan is adopted if the majority does not oppose it.[166] It is worth bearing in mind that Danish law does not mandate voting in classes, therefore the "cram-down" is not intra-class, so to speak. Voting is formal and confirmation is always needed.[167]

Similarly, in Poland, an arrangement is adopted by the assembly of creditors if there is a majority of voting creditors who hold a total of at least two-thirds of the sum of claims owed to voting creditors. If voting on an arrangement takes place in classes of creditors, an arrangement shall be adopted if in each group the majority of voting creditors in such group is in its favour, with a total of at least two-thirds of the sum of claims owed to voting creditors from that group. This is not so, however, during arrangement approval proceedings where an arrangement shall be accepted if the majority of creditors entitled to vote on an arrangement having a total of at least two-thirds of the sum of claims that give the right to vote on an arrangement are in its favour. Furthermore, if the vote takes place in classes of creditors, it shall be adopted, if, in each group, the majority of creditors entitled to vote on an arrangement from this group have a total of at least two-thirds of the sum of claims vested in creditors from that group eligible to vote on an arrangement. There are provisions regulating a cross-class cram down mechanism,[168] which state that an arrangement will be adopted by an assembly of creditors despite failure to obtain the required majority in some groups of creditors. This is if creditors with a total of two-thirds of the sum of claims vested with creditors entitled to vote on an arrangement have voted for the arrangement, and when creditors from the group or groups that have been against the arrangement are satisfied on the basis of an arrangement to a degree not less favourable than in the case of bankruptcy proceedings (liquidation insolvency). Even if the concept of a cross-class cram down is recognised by the RL, a view prevails that the RL will need to be amended to comply with article 9 of the Directive, in particular, due to the wording of its section 4 that sets minimum requirements related with the enactment.

As discussed previously, currently there is no separation of classes in the Netherlands for voting, however dissenting creditors in the suspension of payment may still be bound by a restructuring plan in certain circumstances. There is also a limited exception where dissenting creditors in an out-of-court composition can be bound if there is abuse of power by the creditor(s) in not approving the composition, it can become binding on them.[169] In suspension of payment, a cram-down is available when at least a

[163] CCI, art 61 sets an identical provision in this respect.
[164] Commercial Code, art L636-31.
[165] Freidrich Jergitsch and Carmen Redmann, 'Restructuring & Insolvency Austria' (Getting the Deal Through 2018) <https://gettingthedealthrough.com/area/35/jurisdiction/25/restructuring-insolvency-2019-austria/ > accessed 10 December 2019.
[166] Danish BA, s 14 (2).
[167] Danish BA, s 13 e.
[168] RL, art 119(3).
[169] Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7799 (*Payroll*) at 3.5.2 and 3.5.3.

simple majority of the relevant creditors representing not less than half of the accepted claims vote in favour.[170] A restructuring plan can also be confirmed if:

i) three quarters of the relevant creditors who appeared, voted in favour of the restructuring plan; and

ii) the rejection of the restructuring plan results from one or more creditors having voted against it who could not have arrived at such voting conduct with good reason, taking into consideration all circumstances, in particular the amount that they may be expected to receive if the debtor were liquidated instead.

An intra-class cram down provision is available in Spain if certain majorities are met; these range from 51% to 80% depending on the procedure in question. If the requisite majority is met, then dissenting creditors within that class will be bound. In the case of refinancing agreements, the effects can be extended to dissenting and non-voting creditors when certain legal requirements are fulfilled, and the agreement is approved or confirmed by the Court ("homologación").[171] Among these requirements, the agreement has to be subscribed by a certain majority of financial claims. This majority depends on the content of the agreement and the type of claims affected by it (non secured/secured claims). In the case of non-secured claims, a) the agreement has to be subscribed by at least 60 % of the financial claims, when it imposes on these claims either (i) a postponement of less than five years, or (ii) its conversion on participating loans for the same period of time[172] (b) the agreement has to be subscribed by at least 75 % of the financial claims, when it imposes on these claims (i) a postponement of five years or more, but never beyond ten years; (ii) a write-off or release; (iii) a debt-equity swap; (iv) the conversion on participating loans for five years or more, but never beyond ten years, or (v) a payment by transfer of assets (Additional Provision 4th (3) (b)).[173] In the case of *secured claims*, to extend the effects of the agreement to dissenting and non-voting creditors, it has to be subscribed by at least 65 % of financial secured claims, when the agreement contains any of the provisions described under (a), or by at least 80 % of financial secured claims, when it contains any of the provisions described under (b). Similar rules are applicable in the case of *extra-judicial payment compositions* (articles 238 and 238 bis of the Spanish Insolvency Act). However, no confirmation ("homologación") is required to extend the effects. The adoption of the agreement with the abovementioned majorities is sufficient to make it binding for the dissenting or non-voting creditors (articles 238 (1) bis and 240 of the Spanish Insolvency Act).

In England and Wales both the CVA and the Scheme of Arrangement have intra-class cram-down i.e. majority rule within classes.[174] The CVA becomes binding on the company and all of the unsecured creditors – not secured creditors – if it has passed the 75% by value threshold.[175] The Scheme of Arrangement requires a majority of the creditors and members in each class, provided that the majority represents 75% by value of the claims of the relevant creditors.[176]

7.3.9 Summary of Implementation Requirements

From the responses received to the questionnaire, it can be tentatively concluded that the majority of Member States – Ireland, England and Wales, and France– are unlikely to require amendments to their existing legislation. As Spain allows for confirmation majorities above 75% in some circumstances it may need to consider amendments in line with the PRD majorities. As discussed above, they all appear to adopt majority rule within classes of creditors, which allows a plan to be approved. Austria currently intends to adopt a 75% majority for its new preventive restructuring proceeding. Denmark and Poland appear not to need amendments over those discussed in the previous question. As articulated previously, Italy may need to amend the rules relating to single creditors which hold the majority of the value of the overall amount of claims entitled to vote, as it can result in a higher percentage than 75% being required for approval. Germany might consider mapping their existing rules on creditor and member voting processes in insolvency to preventive restructuring, as part of any overall reforms. It looks as though the WHOA will amend Dutch law in line with article 9(6) of the Directive, in that it should provide for

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170 Dutch BA, art 268. "Relevant creditors" refers to recognised and admitted creditors
171 Law 22/2003 of 9 July, additional provision 4(1).
172 Law 22/2003 of 9 July, additional provision 4(3)(a).
173 Law 22/2003 of 9 July, additional provision 4(3)(b).
174 English and Welsh Insolvency Act 1986, s 5.
175 "Unsecured creditors who were entitled to vote" also refers to creditors who would have been entitled to vote if they had notice
176 English and Welsh Companies Act 2006, s 899.

voting in separate classes and outline the required majorities. Finally, it would seem wise for Romania to introduce new provisions regulating majority in the value of creditors' claims or interests to be obtained in each voting class. The UK currently uses the maximum limit of majority, which looks like will also be adopted should the Government Consultation and Response yield reform that produces a preventive restructuring plan procedure.

7.4 The Confirmation of Restructuring Plans (Article 10)

Article 10 regulates the confirmation of restructuring plans by the relevant authorities; it makes court or administrative authority confirmation mandatory if certain criteria are present, thereby seeking to protect affected parties. While a goal of the PRD was to increase flexibility within preventive restructuring procedures, it is key to the EU proposals that a layer of formality and protection exists where creditors or employees may be negatively affected by the restructuring plan. As was the case with article 9, article 10 forms an important part of the cross-class cram-down provisions in article 11. It also regulates the circumstances in which a judicial or administrative authority can confirm a plan - further protecting the interests of creditors - and mandates that a plan can be rejected by the relevant authority should it not have a reasonable prospect of success.

7.4.1 The Purpose of Article 10 in the PRD (Question 5)

Article 10(1) lays out the conditions, which if present, mandate that the restructuring plan must be subject to judicial or administrative authority review and confirmation. All restructuring plans which affect dissenting creditors, which feature new finance, or which involve the loss of 25%, or more, of the workforce must be confirmed by the relevant authority before becoming binding. Article 10(2) requires Member States to clearly articulate the circumstances in which the relevant authority can confirm a plan. A plan can only be confirmed if it has been adopted in line with article 9, if there is equal treatment for creditors with similar interests in the same class, if there has been compliance with national law in relation to the notification of relevant parties and where applicable, if any necessary new finance does not unfairly prejudice the interests of creditors. The plan must also satisfy the best-interest-of-creditors test for dissenting creditors, if its confirmation is challenged on this ground. The 'best interest of creditors test' under the PRD means:

"…that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors."[177]

Article 10(3) provides that Member States must empower judicial or administrative authorities to reject a plan if it would not have a reasonable prospect of success, in other words, prevent the insolvency of the debtor or ensure the viability of the business. Finally, article 10(4) seeks to promote efficiency within the process by mandating that, where relevant authority confirmation is required, the decision is taken in an efficient manner.

Question 5 of the questionnaire had two parts; first, it investigated what circumstances, if any, trigger automatic court or administrative body oversight of a restructuring plan in the various jurisdictions and it examined the extent to which, if at all, these domestic provisions comply with the requirements in article 10(1). Secondly, it inquired as to what the domestic rules are for the confirmation of a restructuring plan and whether courts or administrative bodies are empowered to reject a plan on particular grounds.

The existence of copious options within article 10 may lead to greater court or administrative authority oversight in some Member States than others; some jurisdictions require that all restructuring plans are

[177] PRD, recital 52 and as defined in art 2(1)(6):

> "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".

confirmed by the relevant authority, whereas others mandate confirmation in the circumstances outlined by the PRD.

7.4.2 Jurisdictional Contributions: Conditions for Obligatory Court Confirmation of Restructuring Plans (Article 10(1))[178]

JCOERE Questionnaire Question 5.1:

> *Article 10(1) provides that:*
>
> "Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:
>
> (a) restructuring plans which affect the claims or interests of dissenting affected parties; (b) restructuring plans which provide for new financing; (c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law."
>
> a. *Does your jurisdiction provide conditions under which restructuring plans must be approved by administrative or judicial authorities? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with Article 10(1) of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 10(1).*

In Irish examinership, all proposals are subject to court approval, therefore those which affect the claims of dissenting affected parties, those which provide for new financing and those which involve the loss of more than 25% of the workforce are all automatically subject to court confirmation.[179] The Irish Scheme of Arrangement framework is similarly regulated in that the compromise must be court sanctioned in order to be binding.[180]

The Polish RL provides for an arrangement plan to be confirmed by a court and thereby binding on participating creditors,[181] including dissenting creditors who have voted against the arrangement plan. There are, however. no specific criteria as provided in detail by Directive article 10(1). If it turns out that any of the situations covered by the above article are part of an arrangement plan and negative conditions for a court not approving an arrangement are absent, a court will approve an arrangement plan.[182]

So too is the legal position in Romania, where restructuring plans are automatically subject to judicial approval and must be confirmed by the syndic judge before becoming binding.

In the Netherlands, court confirmation is required in order to bind the relevant parties in both the suspension of payment and the WHOA preventive restructuring framework. In the suspension of payment, the court will consider the composition for confirmation – *homologatie* - once the composition has been accepted by the creditors in accordance with article 268 or 268a DBA.[183] Accordingly, court confirmation is an integral part of the suspension of payment proceeding. Article 386 WHOA requires court confirmation of a plan to make it generally binding on all (dissenting) creditors and shareholders. Article 383(1) WHOA enables the debtor, or plan expert (where relevant), to submit the composition for court confirmation, when at least one class of creditors has adopted it.

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[178] PRD, art 10(1):
"Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:
(a) restructuring plans which affect the claims or interests of dissenting affected parties;
(b) restructuring plans which provide for new financing;
(c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law."
[179] Irish Companies Act 2014, s 541.
[180] Irish Companies Act 2014, s 453(1) & (2)(c).
[181] RL, art 166.
[182] RL, art 164.
[183] Dutch BA, arts 269b(1) & 271.

The situation in Italy is slightly different; judicial oversight is mandatory in order for any plan to be binding on creditors per article 48 CCI.[184] The requirement, however, is that the court must validate the process that led creditors to approve the plan and verify the legal compliance and economic feasibility of the restructuring plan. Where the debtor has filed for confirmation, any interested party may lodge an objection within 10 days before the confirmation hearing (*concordato preventivo*), or within 30 days from the publishing date of the debt restructuring agreement in the public register (*accordo di ristrutturazione dei debiti*). The court, after deciding on the objections, must confirm the agreement by way of a judgment.[185]

Denmark also has comparable regulations in that all restructuring plans, which contain an element of a business transfer or compulsory composition, must be confirmed by the court.[186] The degree to which the court examines the proposal depends on the factual circumstances of each case. Parties affected by the plan can object to its confirmation generating a court examination of the basis for the objection.[187]

In France, the court will hear from the relevant parties, consider the opinion of the Public Prosecutor and rely on the economic, social and environmental assessment drafted by the administrator before sanctioning a *sauvegarde* plan in accordance with article L628-8.[188]

In a conciliation procedure, the court can confirm the plan in two ways:

(i) *constater l'accord* if the parties to the agreement request it; or

(ii) *homologuer l'accord* if the debtor requests it and if certain conditions are met, namely the debtor is not insolvent ('en cessation des paiements'), the provisions of the agreement aim to ensure the viability of the going concern of the company and the agreement does not affect the interests of creditors who are not parties to it.[189]

Austrian insolvency law requires that all plans are subject to court confirmation. This, however, is not extended to plans in the preventive restructuring framework.

Germany is similar in that it has comparable requirements in insolvency proceedings. The court is required to examine the plan to determine if any procedural mistakes were made in the submission or in context, as well as assessing the viability of the plan. If the court accepts the plan, the plan will then be forwarded to the individual in charge of its implementation.

In Spain, whether there are conditions for approval by administrative or judicial authorities depends on the type of plan or procedure in question. Refinancing agreements must be approved by a court. However, the extra-judicial payment composition is initiated by the debtor with a request to a registrar or an official list of mediators or before a notary public to appoint an insolvency mediator.[190] In the case of business, the framework is initiated before the Commercial Register (*Registro Mercantil*). In the case of consumers, it is initiated before a notary. The Register has to appoint a mediator. The Notary can supervise the framework by himself or appoint a mediator.

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[184] As CCI, art 56 (*accordi in esecuzione di piani attestati di risanamento*) does not bind dissenting creditors, it does not provide for any court confirmation. The judicial involvement is merely potential, being limited in case of a subsequent insolvent liquidation of the debtor.

[185] The new *accordi di ristrutturazione dei debiti* reflects the prevailing case law, which used to admit judicial assessment on the content of the plan, although the "old" law used to entrust this assessment to creditors with the informative support of the independent expert and the insolvency practitioner (*commissario giudiziale*).

[186] Danish BA, s 13 e. As previously noted, restructuring plans refer to insolvency restructuring and not preventive restructuring, however, the process appears to be quite similar to preventive restructuring frameworks in other jurisdictions. Arguably, the main difference is that the Danish system attempts to support the exit of debtors from insolvency, not the prevention of them entering insolvency in the first place.

[187] Per Betænkning 1512/2009 om rekonstruktion mv. P. 237 and 388, objections must be presented at the last court meeting regarding the creditors' adoption of the plan. The relevant creditor(s) cannot object at a later date.

[188] The assessment specifies the origins, severity and nature of the company's financial difficulties (Article L623-1 of the Commercial Code). For the SA, the sanctioning of the plan takes place in the same manner as for a *sauvegarde* procedure, after approval has been obtained from the relevant creditors and bondholders. The court will have three months to approve the plan, or else it terminates. See art L628-8 of the Commercial Code. For the SFA, creditors have only 8 days to discuss and approve the plan, while the court has to approve the plan within 1 month following approval by the creditors per art L628-10.

Per Commercial code, art L626-9, the court will hear from the debtor, the administrator, the creditors' representative, the supervising creditors and the employees' representatives i.e. the relevant parties.

[189] Commercial Code, art L611-8. Per Commercial Code, art L611-9, in order to sanction the plan through *homologation*, the court will hear from the debtor, the creditors which are part of the plan, workers' representatives, the conciliator, the Public Prosecutor and any other person(s) that the court deems necessary. *Homologation* confers more legal advantages than a *constatation* – for example priority for new financing – but it renders the court's decision public, which is not the case of a *constatation.*

[190] Allen and Overy, 'Restructuring Across Borders – Spain: Corporate Restructuring and Insolvency Procedures' (2018) 5-9 <http://www.allenovery.com/expertise/practices/restructuring/Pages/Spain-corporate-restructuring.aspx> accessed 26th October 2019.

In England & Wales, the CVA procedure requires the nominee to report to the court on the prospect of success of the arrangement or composition. Court approval is not required for the CVA unless an application is made on foot of a disagreement about the contents of the plan.[191]

In relation to Schemes of Arrangement under the Companies Act 2006 (Part 26), the court is involved:[192]

(i) At the first hearing, it must decide whether to convene meetings of members and/or creditors to vote on the scheme.[193] The court will base its decision on whether the scheme has the general support sufficient to have a prospect of success and whether the class design is correct.[194]

(ii) At the second hearing, it must decide whether to sanction the scheme if the scheme has been approved per section 899(1) of the Companies Act 2006. This will consider if the approval of the scheme is reasonable, if each class was fairly represented by those attending the meeting and the statutory majority acted bona fide and whether there has been compliance with the relevant statutory provisions.[195]

At the second hearing, the court will also consider whether the Scheme is fair to all creditors bound by it, including those who voted against it.[196]

7.4.3 Summary of Implementation Requirements

It can be tentatively concluded from the analysis of the responses of contributors to the JCOERE questionnaire that the majority of Member States will not require amendments to domestic legislation in order to comply with the PRD, namely Ireland, Italy, Romania, Denmark, Poland, Spain, France and England and Wales.[197] As has been the case with a number of other aspects of the questionnaire, Germany and Austria may well need to introduce, or extend existing provisions, to allow for court confirmation of restructuring plans in preventative restructuring.

7.4.4 Jurisdictional Contributions: Conditions for Refusal to Confirm a Plan (Article 10(2))[198]

JCOERE Questionnaire Question 5.2:

*Article 10(2)(a-e) provides for a number of conditions under which a restructuring plan can be confirmed by judicial or administrative authorities (see Appendix A), while 10(3) requires Member States to ensure that administrative authorities can refuse to confirm a plan where the plan "*would

[191] English and Welsh Insolvency Act 1986, s 4A(3-4).

[192] For the Scheme of Arrangement, the procedural requirements for implementation are set out in part 49 and Practice Direction 49A of the Civil Procedure Rules 1998, Chapter 21 of the Chancery Guide and Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345.47

[193] English and Welsh Companies Act 2006, s 896(1).

[194] *Re Savoy Hotel Ltd* [1981] Ch 351 and *Re T & N Ltd* [2005] 2 BCLC 488 respectively.

[195] *Re Anglo-Continentalk Supply Co Ltd* [1922] 2 Ch 723; relevant statutory provisions include correct notice of the court convened meetings, proper despatch of the explanatory statement and the relevant majority in number and value of the appropriate classes passed a resolution to approve the scheme.

[196] The meaning of "fairness" in the context of the Scheme of Arrangement reflects the requirements of the CVA as not being 'unfairly prejudicial'. See Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 195, citing the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96: "The Court will look to ensure that the procedure has been carried out correctly and also that the Scheme is fair to all creditors bound by it, including those who voted against it. The meaning of 'fairness' in this context has a very similar meaning to 'fairness' when considering claims that a CVA is 'unfairly prejudicial'."

[197] The UK Government's proposal for a new restructuring procedure largely adopts the same approach as the Scheme, thus the two levels of court approval will also apply to it. While the CVA falls outside of much of the PRD, the UK's plans for introducing a preventive restructuring may make considering the CVA in this context a moot point.

[198] PRD art 10(2):

> "Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:
> (a) the restructuring plan has been adopted in accordance with art 9;
> (b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
> (c) notification of the restructuring plan has been given in accordance with national law to all affected parties;
> (d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;
> (e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.
> Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground."

not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business."

a. *Are there conditions specified for judicial or administrative confirmation and are such authorities also empowered to refuse to confirm a plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*

b. *Will your jurisdiction have to make changes to comply with the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment Article 10 of the Directive provisions in this context.*

Following the analysis of the responses to the questionnaire and contributor views on what the implementation requirements may be to align jurisdictional frameworks with the PRD, a number of tentative conclusions can be drawn based on current knowledge and commentary from these and various other fora. In Ireland, the court can only confirm a proposal from the examiner provided it complies with the conditions in s.541(4).[199] Irish law compels the examiner to supply a copy of the proposal to any interested party upon written application (s.534(5)(c)) and Irish law mandates that the appointment of an examiner is adequately publicised under (s.531(2)(3)), thereby notifying interested parties that the process has commenced. Section 539(1)(d) states that the examiner's proposals "must provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment". The courts are free to reject a proposal according to s.541(3). Although Irish legislation does not specifically provide for the rejection of a proposal by the court on the grounds that it "would not have a reasonable prospect of preventing the insolvency of the debtor" – article 10(3)) – the Irish courts have demonstrated that it must be the case that the prospect of the company surviving (and consequently the proposal succeeding) is a relevant criterion, given the very purpose of the examinership process.[200] Under Irish law the examiner will not be appointed in the first place unless the court is satisfied that there is a reasonable prospect that the company will survive as described in s. 509(2) of the Companies Act 2014. This is part of the mandatory threshold test. legislation does not require that creditors must be better off in examinership than they would be in a liquidation, however it does appear, from case law, to have the "next-best-alternative scenario", which satisfies the best-interests-of creditors test. In *Re McInerney Homes* the court refused to confirm the plan from the Examiner because the dissenting creditors demonstrated that they would do better under long-term receivership.[201] There are no conditions specified in the legislation which enable the court to refuse to sanction the Scheme of Arrangement over and above a lack of approval from the specified majority.

In the Italian *concordato preventivo*, article 48, par. 3, CCI expressly requires the court to verify legal compliance, including the voting procedure; class formation; and notification – and the economic feasibility of the plan (*i.e.*, whether the plan will likely succeed).[202] Under article 48, par. 7, CCI, if the Court does not confirm the plan and the debtor is insolvent, it will open an insolvency liquidation proceeding at the request of one of the parties (including the public prosecutor).[203] The Italian framework does not spell out the duty of the Court to assess whether the new financing is necessary to implement the restructuring plan and does not unfairly prejudice creditors' interest, although the Court is required to refuse confirmation of the plan when there is evidence of fraudulent activities. (It must be considered that those new financings that are not necessary to implement the plan and/or unfairly prejudice the interest of creditors cannot be deemed *per se* fraudulent)

In the Austrian insolvency procedure, the court is empowered to refuse a plan if the benefits granted to the debtor in the plan are not appropriate under the circumstances, or if the plan conflicts with the common interests of insolvency creditors, or if the creditors are going to receive less than 30% of their

[199] Section 541(4) provides that the court cannot approve the proposals unless the proposal has been approved by at least one class of affected (impaired) creditors, and that the court is satisfied that the proposal or compromise is fair and equitable to any dissenting class of creditors or members and the court is satisfied that the compromise is not unfairly prejudicial to any interested party. Finally the court must be satisfied that the purpose of the proposal or compromise is not the avoidance of payment of tax due.

[200] See *Re Tivway Ltd* [2009] IEHC 494; [2010] 3 IR 49 and *Re Clare Textiles Ltd* [1993] 2 IR 213.

[201] *McInerney Homes Ltd v Cos Acts 1990* [2011] IESC 31 (22 July 2011).

[202] This provision puts on a legislative footing the requirements established in recent case law, as Art. 180 of the previous Italian insolvency law was unclear in this regard.

[203] Where "parties" refs to one or more creditors, the Public Prosecutor or the debtor itself.

claims as a result of dishonesty, recklessnes. Finally, the court will not confirm a plan if there is excessive burden or delay in filing the application for insolvency proceedings.[204]

In implementing the PRD, Germany could draw from their insolvency plan procedure used in the InsO restructuring route under the unified procedure[205] and case law. In the restructuring aspect of the German Insolvency code, an order for debtor in possession management aimed at agreeing a restructuring plan can be repealed by the court in three circumstances. Firstly, the court shall repeal the order if the majority of the creditors' assembly requests that this is done. Secondly, if a creditor with a right to separate satisfaction requests that the order is repealed and that there are now circumstances which could place creditors at a disadvantage as a result of the management of the debtor in possession.[206] The debtor can also ask for such an order to be repealed or the debtor requests it, but only if the "envisaged restructuring no longer has prospects of success."[207] It would, however, need to extend the grounds for refusal known in German insolvency law to include further conditions in the PRD, such as a feasibility test.

Denmark has three mandatory grounds, which if present, must result in the rejection of a restructuring plan:[208]

(i) First, the court examines if there have been procedural violations or if the debtor and insolvency practitioner have given incomplete information. Any errors must have had the potential to influence the voting in order for the Court to reject the plan.[209]

(ii) Second, the court examines if the restructuring proposal contains provisions that are contrary to the rules of law or statutory provisions in the Bankruptcy Act.[210]

(iii) Third, the court must reject the plan if a creditor has been granted an advantage outside of the restructuring plan to influence the voting of the plan.

The court *may* also reject the plan if it is disproportionate to the debtor's financial position; in other words, this is a determination of whether the creditors will be better off in liquidation (best-interests-of-creditors test).[211] The Supreme Court has held that the Bankruptcy Court should also reject the plan if its purpose is solely to discharge the debtor from personal debt (debt that continues to exist after bankruptcy proceeding have ended) as opposed to the continuation of a business, even if the plan fulfils the best-of-interest test.[212] It is worth noting that the prospect of success is not one of the mandatory factors assessed by the court in its decision, though it can form part of the consideration.

In the Netherlands, the court should have regard to several factors when confirming or rejecting a plan in the suspension of payment, namely:

(i) if the assets of the estate exceed the amount stipulated in the composition;

(ii) if performance of the composition is insufficiently secured;

(iii) if the composition was realized by fraudulent acts or undue preference of one or more creditors or other unfair means, regardless of whether the debtor or any other party co-operated therein; and

(iv) if the remuneration and disbursements of the experts and the insolvency practitioner have not been paid to the insolvency practitioner or if no security has been provided for.[213]

[204] Austrian Insolvency Code, s 154.
[205] See Chapter 6, section 6.4.2 (g) for a description of the InsO unified procedure and the insolvency plan.
[206] InsO, s 270(2)(2).
[207] InsO, s 270b(4).
[208] The list of grounds mandating the rejection of a plan is exhaustive in that it must occur is one of the three grounds has been met. This limitation on the court is explained by the legislator; it was noted that rejection of a restructuring plan that has been approved by a majority of creditors should be the exception because the (majority of the) creditors should have the final say on the adoption of a restructuring plan.
[209] Danish BA, s 13 e (3)(i)
[210] For example, if the plan encompasses claims that cannot be affected by a compulsory composition.
[211] *Betænkning* 1512/2009, 389
[212] U2019.1859H and U2018.3090H
[213] Dutch BA, art 272(2). Per art 272(3), the court can refuse the confirmation of a composition on any other ground either upon request or *ex officio*. Per the Court of Appeal Amsterdam decision of 8 November 1938, ECLI:NL:RBAMS:1938:69, this can be because when the composition would be unfair to creditors.

Although the suspension of payment does not provide for separation of classes, the court can reject a plan if it is unfair to creditors on the basis of Dutch BA Art 272(3).[214] The DBA does not provide an explicit best-interest-of-creditors test for the suspension of payment. However, putting forward a composition that violates this test may be a reason for rejecting the confirmation on the basis of article 272(3) Dutch BA.[215] The test is performed both upon request and *ex officio*. The regulations pertaining to the suspension of payment do not specify what must be included in the plan; where relevant, the plan may include new finance to facilitate the restructuring. However, the fact that the interest of (certain) creditors are unfairly prejudiced can be a ground for refusal per article 272(3) Dutch BA.[216] The legislation does not refer to the prospect of preventing insolvency as a condition for confirming the plan, however, the court may reject the plan if performance of the composition is insufficiently secured as stated in article 272(2)(2) DBA.[217]

In Poland, the RL provides for conditions whereby a court has either a duty or right to refuse confirmation of an arrangement plan, while the rule is that it will confirm an arrangement plan if it has been accepted by an assembly of creditors.[218] The court will reject an arrangement if it violates the law; in particular, if it provides for state aid contrary to regulations or if it is clear that the arrangement will not be executed.[219] A court may refuse to approve an arrangement if its conditions are grossly unfair to creditors who voted against it and submitted reservations to the arrangement.[220] A court will discontinue restructuring proceedings if it determines that an arrangement has not been adopted due to lack of a required majority.[221] In arrangement approval proceedings and in accelerated arrangement proceedings the court will refuse approval of an arrangement if the sum of disputed claims entitled to vote on an arrangement exceeds 15% of total claims entitled to a vote on an arrangement.[222] In view of the implicit obligation imposed by Directive article 10(2) where the condition for confirmation must be "*clearly specified and include at least*"… the RL may well require a rewording of its provisions. That would probably also apply in view of Directive article 10(3).

In Romania, the syndic judge can only refuse to confirm a plan if the amount of claims challenged and/or disputed in court exceeds 25% of the total amount of claims and/or the preventive concordat was not approved by the required majority of creditors.[223] The viability of the plan is not analysed by the judicial authority, as there are no provisions which empowers a judge to refuse a plan on the grounds that it would not have a reasonable prospect of success.

In France, the court can only confirm a plan through *homologation* in the conciliation procedure if certain conditions are met, including that the agreement aims to ensure the viability of the company.[224] When sanctioning a plan through *constatation*, the power of the judge is quite limited leading to the contention by some that the judge has quite a "passive" role in such cases.[225] Should the court refuse to proceed with the homologation, the debtor can appeal the decision.[226] Because the conciliation is consensual in nature, if the agreement is not sanctioned by the court, it is only binding on those who expressed agreement.

In the *sauvegarde* procedure, the plan includes an economic, social and environmental assessment, which states the recovery prospects of the company.[227] Where there is a "serious possibility for the

[214] The Dutch BA has specific rules for informing creditors of the suspension of payment and the proposed restructuring plan and failure to adhere can be a reason for rejecting the confirmation on the basis of Dutch BA, art 272(3). The rules are laid out in Dutch BA, arts 215, 253, 256(1-2).
[215] This has been argued, for instance, by RD Vriesendorp and FMJ Verstijlen, 'Enige opmerkingen over Polak-Wessels, Insolventierecht' (2004) 6603 WPNR 1020.
[216] See for instance Court of Appeal Amsterdam 8 November 1938, ECLI:NL:RBAMS:1938:69, in which it is stated that a request for confirmation can be rejected when the composition would bring great unfairness to creditors.
[217] It may also be a ground for refusal under Dutch BA, art 272(3).
[218] RL, art 164.
[219] RL, art 165.
[220] *ibid*.
[221] RL, art 165(5).
[222] RL, art 165(3).
[223] Creditors who represent not less than 75% of the amount of accepted and undisputed claims.
[224] Commercial Code, art L611-8.
[225] Y Muller, 'Le contrat judiciaire en droit privé' (Doctoral thesis, Paris I 1995). Amongst the limited powers of the judge is the ability to refuse the *constatation* if the agreement is illegal, particularly if it violates public order; see B Faucher, 'La conciliation judiciaire' (Doctoral thesis, Paris 2 1980) 388 and B Gorchs, 'Le contrôle judiciaire des accords de règlement amiable' (2008) Revue de l'arbitrage 45.
[226] Commercial Code, art R611-42.
[227] Commercial Code, art L626-2.

company to be rescued", the court will confirm the *sauvegarde* plan.[228] It appears that the judge can amend a plan, and therefore refuse the original one based on the wording of article L626-14 of the Commercial Code. However, French law provides scant detail regarding the reasons why a plan can be amended or rejected.[229] The law states that if no solution is found, the court can refuse a plan and open liquidation proceedings or judicial reorganisation proceedings (*redressement judiciaire*) after hearing the relevant parties.[230]. The tribunal can also do so if the debtor becomes insolvent while the plan is being implemented.[231] For a SA/SFA, the Commercial Code states that the court can terminate the procedure if it does not approve the plan. However, specific conditions for rejection are not listed.[232] In contrast to the *sauvegarde* procedure, however, the court cannot convert the procedure into another procedure such as liquidation or judicial reorganisation; failure to adopt a plan brings the process to an end.

In Spain, non-voting and dissenting creditors can contest the refinancing plan before the judge invoking that the plan imposes a "disproportionate sacrifice" on them. In the case of extra-judicial payment compositions, non-voting and dissenting creditors can invoke before the judge the disproportionate nature of the measure

In England and Wales, the CVA requires the nominee to assess whether the plan has a reasonable prospect of success. If the plan is challenged under IA 1986 s 4A(3), the court can decide to order a decision of the company meeting to have effect instead of the decision at the creditors' meeting.[233] The requirements/conditions for approval of a Scheme of Arrangement have already been outlined above, however, technically, a court could refuse to sanction a Scheme even if the preconditions have been met (statutory requirements, meetings and majority approvals, and that sufficient information was available to inform the vote), and will do so if it is not satisfied that the Scheme is fair to creditors generally,[234] and particularly that the majority has not taken advantage of its position.[235]

7.4.5 Summary of Implementation Requirements

Given the foregoing description of the contributing jurisdictions, it can be tentatively concluded that all Member States will need to amend their legislation in some shape or form in order to comply with the PRD. Ireland will likely need to codify the best-interests-of-creditors test, in order to ensure compliance with article 10(2)(d) and to articulate the relationship between this test and the unfair prejudice criterion[236] in the Irish legislation and case law. Furthermore, the legislature may wish to make it explicit that the prospect of survival of the company is a ground for court refusal of the plan, although the courts have always considered it to be a criterion for confirmation. Romania may need to consider the introduction of the prospect of success of the plan as a mandatory condition for confirmation. The situation seems similar for Denmark, Germany and Austria. Italy will likely need to make two modifications to its legislation. First, a provision will need to be introduced to mandate a judicial assessment on compliance with the requirements set forth under article 10(2)(e) PRD regarding new financing (no unfair prejudice to the interests of creditors). Secondly, Italy may need to refine the conditions for confirmation in CCI article 48, para 3, which appear to be more stringent than those set forth in the PRD requiring positive verification of economic feasibility, instead of refusal to confirm "a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business". This is in contrast with the underlying goal of reducing the judicial role in the context of preventive restructuring. Spanish law allows for non-voting and dissenting creditors to contest the plan, although there does not appear to be a specific 'best-interest-of-creditors' test, which Spain may need to implement. In France, the best-interest-of-creditors test criterion may be an area of concern; although under the law, courts currently have to verify that the interests of all creditors are sufficiently protected. It has been argued that the best interest-of-creditors

[228] Translated from "*une possibilité sérieuse pour l'entreprise d'être sauvegardée*"; Commercial Code, art L626-1.
[229] This article uses the wording "[i]n the judgment sanctioning or amending the plan…"
[230] Commercial Code, art L622-10; the relevant parties are the debtor, the administrator, the creditors' representative, the supervising creditors, the workers' representatives and the Public Prosecutor. For the legal provisions regarding the *liquidation judiciaire*, see Commercial Code, arts L640-1 et seq. and for legal provisions regarding the *redressement judiciaire*, see arts L631-1 et seq.
[231] Commercial Code, art L622-27.
[232] Commercial Code, art L628-8.
[233] Insolvency Act 1986, s 4A(6); the court can also make any other order it sees fit.
[234] Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 585.
[235] See *Re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614, per Nazareth K 625B.
[236] As described in PRD, art 11.

test criteria may be "more challenging for French courts". [237] For the Netherlands, confirmation of a restructuring plan is possible, but not explicitly in situations where the restructuring plan involves new financing or loss of more than 25% of the workforce. As such, an amendment to the WHOA may be required. Furthermore, as was contended previously, the suspension of payment framework is only partially in line with article 9 of the Directive; the knock-on effect is that it may not be completely in line with article 10, as appears to be the case with a number of the jurisdictions.[238] It seems clear that the current law in England and Wales does not comply with the Directive. However, the planned preventive restructuring procedure from the Government appears likely to grant the court absolute discretion to confirm or reject a restructuring plan.[239]

7.5 Cross-Class Cram-Down (Article 11)

The cross-class cram-down is a particularly controversial concept in preventive restructuring in the European Union, with few jurisdictions having anything that resembles it in their current frameworks. This has been, however, a focus of the Commission since the 2014 Recommendation. It has evolved through the various iterations of the PRD and is now a complex provision with numerous derogations. The cross-class cram-down, by its very nature, reduces the power of creditors in their ability to enforce their rights under the contracts agreed with the debtor, although insolvency procedures do this as a matter of course due to their collective nature. The cross-class cram-down, however, goes a step further by forcing a whole class of creditors to abide by a plan, which they have rejected, once it is approved by other classes. That said, without a cross-class cram-down, it may be difficult rescue some businesses, leaving liquidation as the only other alternative. It is unsurprising therefore, that this particular provision attracted significant debate;[240] in particular, the test which should be applied to guarantee the fairness of a restructuring plan binding dissenting creditors was a matter of debate. [241] This diversity of opinions is evident when one considers the changes made to article 11 by the Council, which appeared to favour a "relative priority rule (RPR)".[242] Given the different formulations permitted under the PRD, there is a possibility that the potentially diverse treatment of creditors may make it difficult to come to an agreement on a plan if one jurisdiction favours more powerful creditors by applying an APR.

7.5.1 The Purpose of Article 11 in the PRD (Question 6)

The purpose of Question 6 is to determine whether jurisdictions have a cross-class cram-down and how they operate. In addition, the Directive offers a number of choices for Member States to use as a test of fairness for dissenting creditors, which if implemented in different ways among the Member States may lead to differential treatment of creditors across borders. Question 6 of the Questionnaire focusses on several aspects of the cross-class cram-down; namely if the jurisdiction has cross-class cram-down, how the jurisdiction deals with dissenting classes (APR, RPR, hybrid) and finally, whether the jurisdiction applies an "unfair prejudice test" and if not, how it assesses the fairness of a plan.

Article 11, while referring to parts of articles 9 and 10, primarily provides a mechanism for a cross-class cram-down in preventive restructuring frameworks. The wording of article 11(1) is obligatory: "Member States *shall* ensure that a restructuring plan which has not been approved by affected parties… *may* be confirmed by a judicial or administrative authority…" if certain criteria are met. In effect, this binds an entire class of creditors against their vote. The justifications for this rule, as well as arguments against, were discussed in Chapter 4 of this report. In short, this is a controversial provision which was changed at the last minute, ostensibly, to bring it in line with the Chapter 11 cross-class cram-down.[243]

[237] Commercial Code, art L626-31 pertains to protection of creditors' interests. Droege Gagnier and Dorst argue that it may be "more challenging for French courts [as they] suppose a concrete simulation and calculation of the business: (1) in an ongoing concern scenario; and (2) in an isolated asset disposal, whatever is more favourable while taking into consideration the complex ranking of each dissenting creditor. Such an exercise means, in practice, that the debtor should provide the court with a report established by an accounting expert and will add a challenge in terms of costs and timing; Gagnier & Dorst (n 139) 26.

[238] In the Netherlands, the debtor can propose a restructuring plan and the voting on the plan will be done before the supervisory judge (or if none is appointed, before the court) per the Dutch BA, arts 214(3) and 252. If the plan is adopted, the supervisory judge (or court) will set the date for a hearing by the court to decide on the confirmation of the restructuring plan per Dutch BA, arts 269b and 270. In this way, the adoption of the restructuring plan is verified, although no *ex officio* examination takes place of the creditor's rights or the formation of classes.

[239] Government Response (n 60) 70. There will also be a right to appeal following court confirmation.

[240] See Chapter 5.

[241] The Absolute Priority Rule ("APR"), Relative Priority Rule ("RPR"), and Unfair Prejudice Test.

[242] PRD, art 11(1)(c) provides that dissenting voting classes should be treated *at least as favourably* as any class of the *same* rank and *more favourably than any junior class.*

[243] There are certainly arguments that the approach of the PRD is not as close to the American version as it sets out to be.

Regardless, given the wide scope of implementation prospects for Member States, this provision may make harmonisation difficult and furthermore be an obstacle to cooperation if different jurisdictions provide varying levels of protection for those dissenting classes of creditors. Aspects of court cooperation will be discussed further in JCOERE Report 2.

7.5.2 Jurisdictional Contributions: Existence of a Cross-Class Cram-Down (Article 11(1)(a-b))[244]

JCOERE Questionnaire Question 6.1

> *Article 11(1)(a-b) provides for the application of a cross-class cram-down in the adoption of restructuring plans:*
>
> "Member States shall ensure that a restructuring plan which is not approved by affected parties as provided for in Article 9(4) in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils" certain conditions Articles 10(2) and (3).
>
> a. *What is the current position regarding a cross-class cram-down for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, specifically Art 11(1)(a-b).*
>
> b. *Will your jurisdiction have to make changes to comply with the Directive? If so please describe any currently suggested changes to your provisions in light of the enactment of Article 11(1)(a-b) of the Directive.*

Irish law provides for a cross-class cram-down in terms that closely align with the PRD in that court confirmed proposals will be binding on all classes of creditors.[245] As outlined previously, Irish legislation broadly complies with articles 10(2) & 10(3) and also mandates that a plan cannot be confirmed unless at least one impaired class of creditors has accepted the proposal, which appears to be in line with article 11(1)(b).[246] There is no cross-class cram-down within the Scheme of Arrangement procedure.

Italy also has a cross-class cram-down mechanism under the judicial composition procedure, where such classes are constructed.[247] If a majority of the number of classes vote in favour of a plan under the judicial composition, then a plan can be confirmed, overcoming the dissent of one or more classes.[248] The Italian provision is considerably more restrictive than the conditions to be satisfied under 11(b) in the PRD (and thus in contrast with the PRD),[249] in that, besides a majority of the number of classes, the majority by value of the claims must be reached. If the debtor opts not to form classes, then "only" a majority in value of the total amounts of claims needs to be reached. A dissenting creditor, either within a dissenting class or holding 20% of the total amount of voting claims, can object to the cross-class cram

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[244] PRD, art 11(1):

"Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in art 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:
(a) it complies with art 10(2) and (3);
(b) it has been approved by:
(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;"

[245] Irish Companies Act 2014, s 541(7). As outlined, court confirmation is dependent upon the proposals being adjudged as fair and equitable to any affected class of creditors (or members) that has rejected the plan and that the plan is not unfairly prejudicial to any interested party per the Irish Companies Act 2014, s 541(4)(b).

[246] Irish Companies Act 2014, s 541(4).

247 This is currently optional but is customary.

[248] CCI, art 109.

[249] Andrea Zorzi, 'The Italian Insolvency Law Reform' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492422&download=yes> accessed 12 December 2017, 33-34 .

down - and consequently the court confirmation - on the grounds that the plan fails to satisfy the 'best interest of creditors test'. Interestingly, the plan can be confirmed without the agreement of the debtor, which appears to be contrary to the PRD, with the sone exception of procedures involving non-SMEs.[250]

In the Netherlands, neither the out-of-court composition, nor the suspension of payment, has a cross-class cram-down. However, the WHOA will introduce the relevant provisions and implement the criteria of article 11(1)(b).[251] The WHOA also provides for the circumstances in which a court should reject a plan; these primarily relate to issues of fairness in the treatment of creditors under the plan, with a clear connection to the importance of preserving priority of entitlements. Without specifying the APR by name, the new Dutch act is enshrining it in their legislation.[252] However, there are provisions for deviation described below.

The Polish Restructuring law contains a provision similar, but not as detailed, to the cross-class cram-down Directive rules already covered above. There is, however, no specific provision addressing the need for particular judicial confirmation of a cross-class cram-down other than the principle that a court generally approves an arrangement and will not confirm it in defined situations, including a situation when it breaches the law.[253] A court cannot confirm an arrangement plan that has not been accepted in the first place by an assembly of creditors.[254]

The German jurisdiction has a cross-class cram-down in its regular insolvency procedures. If a class of creditors rejects a plan under the restructuring route, the class may still be bound if a majority of classes accepted the plan and the requisite tests are met. Appeals against a court order confirming a plan stay its implementation unless the court of appeals orders the plan to become effective.

As previously articulated, in Romania, creditors are not organised into classes, instead the preventive restructuring procedure relies on a majority of 75% by claim value to confirm a plan; accordingly, a cross-class cram-down is not possible.[255] Similarly, as Denmark does not have creditor classes, the foundation for a cross-class cram-down does not yet exist.

Spain does not currently employ a cross-class cram-down in either its refinancing agreements or its extra-judicial payment compositions. These two procedures allow simply for a majority rule based on a range of circumstances that affect the percentages of majority by value applied along with judicial or administrative approval. These can bind dissenting creditors within a class, including secured creditors.

Neither Austria nor the UK currently has an explicit statutory cross-class cram-down mechanism. However, the UK the courts have approved Schemes where votes have not been given to "out-of-the-money" creditors.[256] Similarly, France has no cross-class cram down in any of its preventive restructuring procedures. It is likely, however, that the *Loi Pacte* of May 2019, referenced in previous sections, will be utilised to introduce the cross-class cram-down (article 196(2)).[257]

7.5.3 Summary of Implementation Requirements

Based on the responses of our JCOERE contributors and other commentaries, it is believed that the following represents the next steps for Member States. Ireland currently provides for a cross-class cram-down similar to the PRD. Poland will need to introduce judicial confirmation of plans, which do not have the approval of all classes after expanding the conditions during which a cross class cram down can take place. At present, dissenting classes can be overruled following a rule covered by law, and then court confirmation is required as is in the case of any arrangement plan. The amendments to Dutch law contained in the WHOA will satisfy the conditions laid down in article 11, so the Netherlands will have no need to further amend its law. It is questionable if Italy will need to amend its position to come into line with the PRD. On the one hand, requiring approval of the majority of voting claims, which is not provided for in the Directive and which operates jointly with the other requirements relating to the

[250] CCI, art 48; the wording of the PRD is "upon the proposal of a debtor or with the debtor's agreement" with the derogation that Member States may limit the requirement to have the debtor's agreement to only SMEs.
[251] WHOA, art 383(1)(2).
[252] WHOA, art 384(4)(a).
[253] RL, art 165(1).
[254] See PRD, recital 54.
[255] Law 85/2014 on preventive insolvency proceedings, art 27(5).
[256] See *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).
[257] The following arts of the Commercial Code would need to be amended include: arts L626-9, L626-18, L626-30-2, and L626-31.

number of classes, in addition to requiring the approval of the majority of classes, could be unduly restrictive when compared with the Directive. On the other hand, since article 11(1) sets a list of minimum conditions for the confirmation via cross-class cram-down, there may be no impediment to having a more restrictive structure. As was the case with previous articles, it is likely that Germany will adapt the current cram-down provisions in their InsO insolvency plan to meet the needs of the new restructuring framework, thereby implementing the requirements of the PRD. Romania and Denmark will need to make extensive changes to comply with the Directive, owing to the fact that they do not have creditor classification The Spanish and Polish legislature will need to make changes to include other classes of creditors and to ensure that the cross-class cram-down is available against specific types of classes of dissenting creditors. France, Austria and the UK will have to introduce provisions to align with article 11. In England & Wales, the UK Government proposal on a new restructuring plan refers to the introduction of a cross-class cram-down. The proposal currently recommends that dissenting classes of creditors in this new procedure, most importantly those who are out-of-the-money, may be bound to an arrangement that is in the best interests of all stakeholders.[258] This is the most likely approach for it, assuming the UK needs to adopt the PRD at all.

7.5.4 Jurisdictional Contributions: Dissenting Creditors and Conditions for Approval (Article 11(1)(c)[259] and 11(2)[260]

JCOERE Questionnaire Question 6.2:

Article 11 offers options for dealing with affected and dissenting classes of creditors in a cross-class cram-down. Under Art 11(1)(c), one of the conditions for approval by a judicial or administrative authority of a cross-class cram-down is if the plan:

"…ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class."

A derogation from this condition is also offered in 11(2):

"By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan."

a. *If your jurisdiction provides for a cross-clam down, how does it treat dissenting classes of creditors? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular 11(1)(c) and 11(2).*

b. *Will your jurisdiction have to make changes to comply with the treatment of classes of creditors in the cross-class cram-down? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11(1)(c) and 11(2) of the Directive.*

In view of the derogations available to Member States in article 11, it is unlikely that jurisdictions will have to make substantial changes based on article 11(1)(c) alone. Instead, it is more likely that amendments will be required by virtue of the complete absence of a cross-class cram-down mechanism, as above, or because the jurisdiction is neither in line with article 11(1)(c) nor either of the derogations.

[258] Government Response (n 60) 69.

[259] PRD, art 11(1)(c) otherwise known as a "relative priority rule":

"(1) Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in art 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a)…

(b)…

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class;"

[260] PRD, art 11(2) commonly referred to as an "absolute priority rule":

"(2) By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan."

Accordingly, the summary of implementation requirements which usually follows each question will be combined for questions 6.2 (section 7.5.4) and 6.3 (section 7.5.5).

In Ireland, the conditions for approval of the cram-down of dissenting creditors does not refer to either an absolute or relative priority rule. There is, however, a requirement for the proposal to be "fair and equitable" to dissenting classes of creditors.[261] Aspects of Irish law do appear to vary from the provisions in the Directive. However, there is a derogation available to Member States as described below.

While Romania does not currently require classes for preventive restructuring and consequently no underpinning foundation for a cross-class cram-down, it has adopted conditions for confirmation of a plan that could be considered in line with article 11(1)(c) and / or 11(2). There are conditions for cramming down creditors in a reorganisation procedure and dissenting creditors can object to the syndic judge if these conditions are not satisfied. Similar to the wording in Irish law, though not in application, dissenting categories of creditors must be given "fair and equitable treatment" under the plan.[262] Fair and equitable treatment is present if certain conditions are met simultaneously: (a) no dissenting creditor receives less than they would have received in a liquidation; (b) no creditor receives more than the total amount of their claim; (c) no creditor with a lower ranking than the dissenting creditor receives more than it would receive in liquidation and the plan provides the same treatment for each claim within a distinct category, unless the holder of a claim consents to a less favourable treatment for its claim.[263]

The Italian jurisdiction has a presumed APR, in that a plan is not permitted to alter the normal ranking of priorities. That said, it has often been deemed as admissible to leave some value to the shareholders notwithstanding the fact that creditors have not been paid in full, which seems fundamentally contrary to the APR.[264] It could be said that the Italian jurisdiction has adopted a hybrid RPR and APR system, as in order to ensure the success of restructuring plans, shareholders are incentivised. Recent reforms have mandated regard for equity holders when devising a restructuring plan that envisages the continuation of the business with the same entrepreneur.[265] It is still unclear, however, if APR applies with respect to restructuring value; if so, it also unclear if it applies solely to creditors or includes equity holders. When the plan provides for the direct continuation of the business, the most recent trend in case law seems to be to distinguish between the value of the estate and the proceeds generated by the direct continuation of the business. While the value of the estate should be distributed amongst creditors according to their ranking, the value of the proceeds generated by the activity may be distributed more widely. [266] This appears very similar, in its economic results, to the outcome of the joint application of the RPR and best-interest-of-creditors test. Undoubtedly, when the CCI enters into force, it will make it easier to allow the allocation of part of the restructuring value to equity holders, contrary to a strict interpretation of the APR. However, neither the "old" Italian Insolvency Law, nor the "new" CCI spell out any criteria to distribute among creditors and shareholders the value of the proceeds generated by the direct continuation of the business. In this respect, while the lack of clarity within the Italian framework needs to be addressed, the judicial composition seems to be compatible with the derogation and discretion within article 11(1)(c). Functionally, however, the rule currently being applied in Italy does not adequately reflect the APR as set out in the PRD, as it allows for the allocation of value to shareholders before all other senior classes have been fully paid.[267]

The Dutch WHOA has wholly adopted the concept of absolute priority in its preventive restructuring framework. This has been incorporated – with a caveat for deviations – through one of the grounds under which the court can refuse to confirm a plan, if:

> " At the request of one or more creditors or shareholders eligible to vote, who did not themselves approve the restructuring plan and were allocated in a class which did not approve the restructuring plan or whose admittance to the vote was wrongfully refused and who should have

[261] Irish Companies Act 2014, s 541(4)(b)(i).
[262] Law 85/2015, art 139(1)(D).
[263] Law 85/2014, art 139(2). The ranking of claims / statutory order of priority is set out in art 138(3) of the Law 85/2014.
[264] Court of Milan, Insolvency Section, 3rd November 2016.
[265] CCI, art 84 para 2.
[266] Most recently, Court of Appeal of Venice, 27 June 2019.
[267] While this allocation of value to equity holders does not adhere strictly to the APR in art 11(2), this treatment of equity holders is not necessarily contrary to the PRD as recital 57 states "Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders."

been allocated in a class which did not approve the restructuring plan, the court will refuse a request for court confirmation of a restructuring plan which was not approved by all classes, or if

> (a) the distribution of the value realised with the restructuring plan deviates from the ranking in the case of recourse against the debtor's assets in accordance with Title 10 of Book 3 of the Civil Code; another law; or a set of rules or agreements based thereon, to the detriment of the class that did not approve unless there are reasonable grounds for such deviation and the creditors or shareholders concerned are not harmed in their interests as a result; (…).”[268]

Thus, the proposed WHOA already complies with one of the tests offered for plan confirmation with a cross-class cram-down.

The Polish test focuses on dissenting creditors satisfied by an arrangement on terms not less favourable than in bankruptcy proceedings (i.e. liquidation insolvency). There are no sophisticated tests in the Polish Restructuring law such as those in the Directive - the RPR in 11(1)(c) or the APR derogation in 11(2). Since the above provisions set a certain minimum, it seems that the RL will need to be amended.

As Spain does not currently provide for a cross-class cram-down in its legislation, the fairness of impairing the rights of dissenting creditors is not considered, although the current majority rule provisions do allow the court to consider whether a plan imposes a disproportionate sacrifice to dissenting or non-voting creditors. It is not yet clear what test the Spanish legislator will adopt when it comes to implement the PRD.

In France, the *Loi Pacte* provides that the ordinance which will be passed to implement the Directive must merely take into account subordination agreements, which is vaguer than the rules in the PRD, namely APR, RPR and unfair prejudice test. At present it is unclear what approach will be favoured in France. On the one hand, given the emphasis on priorities in the insolvency law, APR could be logical. With that said, the French approach, by its very nature, requires some degree of flexibility; accordingly, avoiding a strict priority rule would also be logical.

Germany adopted a strict adherence to the APR and the best-interests-of-creditors test to test the veto of a class when reforming its insolvency law in 1999. It also requires a majority of classes to support a plan. As noted by the German contributor, it does, however, remain unclear which of the rules – APR or RPR – Germany will adopt for preventive restructuring.

As discussed previously, Denmark does not currently have any framework which resembles cross-class cram-down, therefore it does not have ARP or RPR.

The current proposal from the UK aligns with the APR. The suggested approach as described by the Government is based on the expressed notion that strong creditor protections are essential to create the right conditions for business. As such, the safeguarding of creditor interests through respect for and application of the ordinary order of priority in liquidation and administration, is considered desirable. Interestingly, however, the court will be empowered to confirm a restructuring plan at odds with the APR where the non-compliance is (1) necessary to achieve the restructuring; and (2) just and equitable in the circumstances.[269]

The Government Response notes that the two-stage test creates a high threshold to permit deviation from the APR and that the basic principle remains that absolute priority will be followed in most cases.[270] However, as with jurisdictions with robust restructuring processes, the APR may simply be a starting point in some cases.

7.5.5 Jurisdictional Contributions: Question 6.3 – Unfair Prejudice Test (Article 11(2) para 2)[271]

[268] WHOA, art 384(4)(a).
[269] Government Response (n 60) 71-72.
[270] *idem* 72.
[271] PRD, art 11(2) paragraph 2, often referred to as the “unfair prejudice test”:
“Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.”

JCOERE Questionnaire Question 6.3:

Article 11 goes on to provide the following regarding an 'unfair prejudice' test.

"Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."

a. *If your jurisdiction provides for a cross-clam down, does it apply a similar test in the current state of your jurisdiction's legal framework? If not, is there a different approach adopted by your jurisdiction in the context of the cross-class cram-down? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular this derogation at the end of Article 11.*

b. *Is your jurisdiction likely to avail of this 'unfair prejudice' test derogation? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11 of the Directive.*

The final paragraph of Article 11 offers a further derogation from what has been termed the Relative Priority Rule in Article 11(1)(c) and its primary derogation to the Absolute Priority Rule in Article 11(2). This paragraph introduces criteria in which a dissenting class of creditors must not be unfairly prejudiced by the restructuring plan.

Ireland contains a provision similar to this derogation in that the test for the court when confirming a plan is that it is not "unfairly prejudicial to the interests of any interested party".[272] This obligation is borne by the examiner, in other words, it is the responsibility of the examiner to defend the scheme and prove it is not unfairly prejudicial. In assessing this criterion, the court will consider the effect of the proposal and of alternatives on that class. The court balances the outcome of the process for these classes against the overall goal of the process and the long-term benefits of the continuation of trade of the debtor. As such, there may be circumstances where a dissenting creditor could have done better under liquidation, but the proposal will still be considered "fair and equitable".[273] This concept has been well-developed through the courts in Ireland, which have used this test to prevent large and secured creditors from acting solely in their own best interests to the detriment of the collective of creditors and other stakeholders.[274] As such, the Irish unfair prejudice test appears to be in line with the final derogation in article 11 as it automatically forms part of every court confirmation.[275]

The Italian framework does not explicitly provide for an "unfair prejudice test", nor is it likely to in the future. It does, however, refer to the insolvency liquidation procedure as a "comparator scenario" for the application of the best-interests-of-creditors test.[276] This does not appear to reflect the Directive, which includes equity holders in the test criteria.[277]

The current French *sauvegarde* procedure provides a mechanism through which fairness is ensured by assessing whether the interests of creditors are protected, so French law does have some characteristics that could be adapted to comply with the implementation of the Directive with regards to the treatment of dissenting classes of creditors.

German insolvency procedures currently adhere to APR in its insolvency procedures, but it is not yet clear if they will adapt an unfair prejudice test when they come to create their restructuring framework.

A number of Member States do not have, nor are likely to avail of the "unfair prejudice test" derogation. As discussed, the Netherlands already has a clear connection to the APR in their new WHOA, so an

[272] Irish Companies Act 2014, s 541(4)(b)(ii).
[273] As discussed in section 7.4.4, Ireland appears to have a "best-interests-of-creditors test" in line with recital 49.
[274] See *Re McInerney Homes Ltd and Ors* [2011] IESC 31 and *Re Mount Wolseley Hotel Golf & Country Club & Ors & Companies Acts* [2014] IEHC 24.
[275] The common law test of fairness, which applies to the Scheme of Arrangement in England & Wales, may also be relevant to the Irish situation. See the later paragraph in this section where unfair prejudice in England & Wales is discussed.
[276] CCI, art 112, para 1.
[277] See the 'next best alternative' scenario as set out in the PRD, recital 49 and art 2 para 1(6) (although this latter provision only makes reference to creditors, there are several elements in the PRD signalling that the best interest of creditors test applies also to equity holders).

unfair prejudice test is unnecessary to comply with the PRD. Poland, Austria and Romania do not currently envisage the adoption of this test and it is not yet clear what direction Spain will take.

In England and Wales, while there is currently no statutory cross-class cram-down, both the CVA and the Scheme have mechanisms through which fairness is assessed by reference to unfair prejudice as derived from statute[278] and the common law. Case law in England and Wales has had to deal with questions of unfairness, particularly in relation to the CVA given that the voting takes place among the whole collective of creditors without separation into classes, which has led certain creditor groups to pursue their own interests in a contentious manner.[279] The Scheme has built in protections against such actions by separating creditors into classes whose interests align and requiring a 75% voting threshold.[280] However, the Court will still assess the fairness of a Scheme. The meaning of 'fairness' in the context of the Scheme has a very similar meaning to 'fairness' when considering claims that a CVA is 'unfairly prejudicial', so reference may be made to case law surrounding fairness of a CVA when considering the same for a Scheme.[281] So, the English framework already contains concepts, largely defined in case law, that align with the unfair prejudice test in the PRD. Regarding the potential cross-class cram-down in the new restructuring plan, given its modelling on the current Scheme of Arrangement, it is likely that the new framework will contain the same test.

7.5.6 Summary of Implementation Requirements for Questions 6.2 and 6.3

From discussions with the respondents to the questionnaire, the following appears to be the state of play in the various jurisdictions. Ireland appears to have no need to amend its position, as its legislation appears to be in line with the second derogation in article 11(2) i.e. the unfair prejudice test. The same can be said for the Netherlands, where the WHOA will be in line with first derogation in article 11(2), i.e. the APR. The remaining jurisdictions require amendments to align with the PRD. Italy, although usually considered to adhere to APR, has certain features which are in line with RPR; as such, this vagueness or uncertainty within the law will likely need to be addressed by the legislature in order to be assured that it complies with the PRD. The remaining jurisdictions need to choose which approach they will take to legislating for the introduction of the cross-class cram-down.[282] For example, assuming Romanian law maps its conditions for confirmation of a restructuring plan to a cross-class cram-down, it should reflect a species of the RPR in line with article 11(1)(c).[283] Germany, Austria, Poland, France, Denmark, Spain, England & Wales are all in a similar position in that their legislatures will have to choose which system to utilise when legislating for the cross-class cram-down.

7.6 Protection of New and Interim Financing

7.6.1 The Purpose of Article 17 in the PRD (Question 8)

Arguably, the protection of new and interim financing is a particularly contentious issue across Member States. For a restructuring plan to be successful, however, it often requires a new injection of money or at least some input of funds while the plan is under negotiation and being implemented. In order for lenders to engage in lending at a time of a company's financial difficulty, some kind of incentive is needed. As noted in the PRD:

> "The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or

[278] The CVA can be challenged under Insolvency Act 1986, s 6 "on grounds of unfair prejudice or material irregularity".
[279] See *IRC v Wimbeldon Football Club Limited* [2005] 1 BCLC 365; *SISU Capital Find Ltd v Tucker* [206] BCC 463; *Primacom Holding GmbH* [2013] BCC 201; *Re Greenhaven Motors* [1999] 1 BCLC 635; *HMRC v Portsmouth City FC* [2011] BCC 149; and *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] BCC 500.
[280] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 436-437.
[281] *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96.
[282] The jurisdictions, which do not currently have a cross-class cram-down, are discussed in section 7.5.3.
[283] As Romania already has a starting point that will satisfy the RPR, it is unlikely to adopt the APR or the unfair prejudice test.

unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures."[284]

As a result, article 17 has introduced several options whereby new and interim financing can be protected to varying degrees, depending on the choices made in implementation. It should be remembered that where there is a provision of financing under a plan, the confirmation of a court should also be required, which gives at least some oversight that can balance out the benefits given to lenders in these circumstances.[285]

The minimum protection required is from any declaration that new and interim financing is void, voidable, or unenforceable[286] and that grantors should not incur civil, administrative or criminal liability on the ground that "such financing is detrimental to the general body of creditors."[287] The PRD goes on to offer higher levels of protection, which are optional for implementation. First, Member States can limit the protection of article 17(1) to new financing associated with a restructuring plan that has been confirmed by a judicial or administrative authority and to interim financing that has been under *ex ante* control.[288] The PRD offers an additional limitation where by protection can be excluded if interim financing is granted after the debtor has essentially become insolvent, i.e. unable to pay its debts as they fall due.[289] Thus, Member States are allowed to restrict the protection for interim financing to only those circumstances where there is only a "likelihood of insolvency" and the debtor is still well within this pre-insolvency area. The PRD finally provides the option to grant a super-priority to financers who provide new and interim financing.[290]

The questionnaire targeted mainly article 17(1) and whether there was any protection at all for financiers in terms of both its integrity and lenders' protection from liability for lending to debtors in financial difficulty. Additionally, it queried whether there was any priority for lenders who provided such financing, in similar form to 17(4). It should be noted that while not all jurisdictions currently provide explicit priorities for repayment of new and interim financing, a number of jurisdictions place these debts within the remit of expenses of the procedure, which generally are paid before other debts are, giving them a notional priority.

7.7 Jurisdictional Contributions: Question 8 – Existence of Protection or Priority for Interim Financing (Article 17(1)&(4))[291]

JCOERE Questionnaire Question 8:

> *Article 17 provides that* "Member States shall ensure that new financing and interim financing are adequately protected." *This includes protecting it from claims that it is detrimental to the general body of creditors, but also includes an option to provide a "super-priority" in 17(4).*
>
> a. *What is the current position regarding new and interim financing for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 17 of the Directive*

[284] PRD, recital 66.
[285] PRD, art10(1)(b).
[286] PRD, art 11(1)(a).
[287] PRD, art 11(1)(b).
[288] PRD, art 11(2).
[289] PRD, art 11(3).
[290] PRD, art 11(4).
[291] PRD, art 17(1) & (4):
"(1) Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:
(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and
(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.
…
(4) Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims."

b. *Will your jurisdiction have to make changes to comply with Article 17 in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 17 of the Directive.*

In Ireland, new and interim financing appears to be protected by the legislation and the courts - through a series of decisions – however, the degree to which this protection for new financing has been availed of in more recent times, is questionable. Normally new financing is part of the debt-equity swap incorporated in the compromise or restructuring arrangement.[292] According to s 554(3), costs "which have been sanctioned by … the court shall be paid in full and … before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company". The legislation makes no specific distinction between new and interim finance, instead any costs of the examiner - with prior court approval - are have priority ranking in subsequent liquidation. This section is considered to have been "specifically designed to encourage loans" to be made to a company, giving "a formal statutory assurance to anyone who lends money to a company during the protection period that he will be repaid in full".[293] In *Re Atlantic Magnetics* the Supreme Court took the view that the court sanctioned costs of the examiner, in this case the repayment of money borrowed "would clearly rank in priority to any claim of any form or secured creditor".[294] The legislation was subsequently amended to rank such sanctioned costs of the examiner "after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company" (s 554(4)).[295] The Irish Scheme of Arrangement mirrors the Scheme in England and Wales and as such, contains no statutory provisions granting preferential treatment to new finance.

Austrian law provides for limited protection for new and interim financing under the "URG" in the form of an exemption from avoidance actions for "*Überbrückungsmaßnahmen*" – legal actions necessary to continue the business – and "*Reorganisationsmaßnahmen*" – legal actions described in the plan and executed during the pending proceedings or 30 days thereafter. "*Reorganisationsmaßnahmen*" are not deemed to be subordinated claims.[296]

In Germany, interim finance is commonly repaid before proceedings are terminated in insolvency proceedings. New financing under a plan is claw-back-safe, or "good faith provided" and may enjoy a privilege in later insolvency proceedings, if provided for in the plan.[297]

No specific new finance provisions exist in Danish law. With that said, a financier may provide new finance, which can, in principle, be secured with a security right. Where new financing or a security agreement is entered into during the restructuring proceeding, with the consent of the restructuring administrator, the claim will be privileged.[298] It is worth noting, however, that a security or financing agreement with the consent of the administrator is not automatically protected from avoidance actions.

French law has provided protection for new and interim financiers, in that such providers will have priority over claims of creditors ("*privilege de conciliation*") that arose before the date of the opening of the *conciliation* proceedings, if the company is subsequently placed into *sauvegarde* proceedings.[299] The condition is that the court has sanctioned the agreement through *homologation*.[300] New financers cannot have any debt write-off, debt-for-equity swap or debt rescheduling via creditor vote imposed

[292] *Re Goodman International* (28 January 1991), HC, Hamilton P, (1963–1993) Irish Company Law Reports 623. For commentary see Irene Lynch Fannon, 'Saving Jobs-At What Cost? Consideration of the Companies (Amendment) Act 1990' (Irish Law Times 1994) 208.
[293] Blayney J in *Re Don Bluth Entertainment* [1994] 3 IR 141, [1994] 2 ILRM 436, 440.
[294] [1993] 2 IR 561, 577. This meant that money, which was alleged to be secured by a fixed charge, could be used by an examiner to obtain a loan.
[295] See also *Re Don Bluth Entertainment Ltd* [1994] 3 IR 141 where the Supreme Court, overturning a High Court decision, ruled that a loan had to be repaid in full in the currency in which it was given i.e. American Dollars, as distinct from repaying the Irish Punt equivalent when examinership ended, the difference between the two figures being approximately £200,000. According to the Court, to repay anything other than the full amount in dollars as of the date of payment would not fulfil the requirements of what was then s 29(3) 3 of the Irish Companies Act 1990.
[296] URG, art 20.
[297] InsO, s 264-265.
[298] Danish BA, s 94
[299] Financiers are those who make credit available within the terms of the restructuring agreement for the purposes of ensuring the continuation of the company's business during the conciliation period. "Claims of creditors" refers to claims other than super-priority salary claims and court fees and expenses
[300] Commercial Code, art L611-11.

upon them.[301] The latest reforms have extended the protection to new money made available during the negotiation phase (conciliation), which was not the case before 2014. Lenders can now extend credit while discussions are on-going, and the privilege will vest once the agreement is confirmed by the court (*homolgation).* The reforms have also strengthened the protection of new money when subsequent insolvency proceedings are opened.[302] In such situations, new debts cannot be rescheduled by a court-imposed plan.[303] Since the 2016 reforms, a rescheduling and write-off of claims can no longer be imposed upon those creditors within a plan, which has been approved by a two-third majority of a creditors' committee.[304] This also applies to finance granted in favour of a debtor after the opening of an accelerated *sauvegarde* or a financial accelerated *sauvegarde* (SFA) if the proceedings are not successfully completed by a court-sanctioned plan.

Italian law protects new and interim financing in both restructuring agreements and judicial composition with creditors.[305] Specifically, new and interim financing enjoys priority over unsecured creditors in the context of subsequent insolvency procedures, it cannot be declared void, voidable or unenforceable and the financiers cannot be subject to criminal or civil liability (article 324 CCI).[306] Priority in the case of subsequent insolvency proceedings will not vest where the debtor knowingly provided false information and the financier was aware of this fact.

There is no special protection in Dutch law for interim finance in the suspension of payment framework; accordingly, interim finance provided during the suspension may be subject to transaction avoidance actions in subsequent bankruptcy proceedings.[307] The WHOA, if passed, will not grant super priority status to new and interim financing. It will, however, increase protection for interim financing by ensuring that it is not considered prejudicial to the general body of creditors, assuming certain conditions are satisfied.[308] The proposed article 42a of the WHOA aims to prevent application of transaction avoidance, which is contained in article 42 of the Dutch BA.[309]

The Polish RL preferentially treats financing provided to a debtor covered by restructuring proceedings subject to compliance with detailed conditions.[310] The preference lies that such financing and other acts cannot be subject of a claw back action (treated as ineffective - concept based on *actio pauliana*) if subsequent bankruptcy proceedings are opened after restructuring proceedings and financing granted

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[301] This is one of the differences between the mandate ad hoc and conciliation; if a conciliation agreement is sanctioned by the court, creditors benefit from certain protection in subsequent *sauvegarde* procedure i.e. against certain clawback actions. For example, if the rescue of the debtor fails, the court cannot impose any write-off, debt for equity swap or debt rescheduling through the voting mechanism on the providers of new finance.

[302] Either *sauvegarde* proceedings or judicial reorganisation proceedings (*redressement judiciaire*).

[303] Commercial Code, art L626-20, as strengthened by art 20 of the Ordinance of 2014.

[304] Commercial Code, art L626-30-2, as amended by art 99 of Law n 2016-1547 of 18 November 2016.

[305] CCI, art 99 para 1 and art 101 para 1.

[306] The conditions are as follows; with respect to interim financing, the debtor has filed a petition for such protections on the grounds of the need to ensure the continuation of the business and avoid a significant damage to the value of the estate and the judge has authorized such petition. With respect to new financing, the court-confirmed plan provides for such financing.

[307] During the suspension of payment, it is the responsibility of the (existing) financers, the debtor and the insolvency practitioner to decide on the payment of such debts.

[308] "A legal act performed after the debtor has filed a statement with the court registry as referred to in Article 370(3), or a plan expert has been appointed by the court in accordance with Article 371, may not be annulled on the grounds of the previous article, if the court has granted authorisation for that legal act at the request of the debtor."

[309] As new finance provided under a confirmed restructuring plan is exempt from the paulian action (application of transaction avoidance), the amendment does not apply to it.

[310] RL, art 129:

> "1. The following actions taken by the debtor or the administrator shall require authorisation from the creditors' committee and shall otherwise be null and void:
>
> 1) encumbering the arrangement and/or remedial estate by mortgage, pledge, registered pledge and/or maritime mortgage to secure claims not covered by the arrangement;
> 2) transferring ownership of an asset and/or the right to secure claims not covered by the arrangement;
> 3) encumbering the arrangement and/or remedial estate by other rights;
> 4) taking out commercial and/or cash loans;
> 5) concluding the lease contract for the debtor's undertaking and/or an organised part thereof and/or other similar contract.
>
> 2. The sale by the debtor of real estate property and/or other assets worth more than PLN 500,000 shall require authorisation from the creditors' committee and shall otherwise be null and void.
>
> 3. The creditors' committee may grant authorisation to conclude a commercial loan agreement and/or cash loan agreement and/or establish security interest referred to in section 1 subsections 1-3 when it is necessary to preserve its ability to pay the current restructuring costs and fulfil other obligations arising after opening of the restructuring proceedings and/or to conclude and perform the arrangement, and it has been guaranteed that the funds will be transferred to the debtor and used in the manner prescribed by the creditors' committee resolution and the established security interest is adequate to the granted commercial and/or cash loan.
>
> 4. The actions referred to in section 1 performed with the consent of the creditors' committee shall not be regarded as ineffective in relation to the bankruptcy estate."

under a facility, loan, security, guarantee, letter of credit or any other type of financing under an arrangement is ranked in the first category of satisfaction of claims in case of subsequent bankruptcy proceedings.[311] The application of such preference is subject to compliance with conditions set by the RL (*inter alia* filing of a simplified motion to open bankruptcy proceedings within three months from the date when a ruling on setting aside of the arrangement plan has become final).

Romanian law provides protection for new financing in the context of pre-insolvency proceedings. In the mandate ad-hoc, the arrangement agreed with the creditors in the course of out-of-court negotiations will not be voided by the court or declared fraudulent, provided that it was made in good faith i.e. (i) was likely to result in the financial recovery of the debtor and (ii) was not intended to prejudice some creditors.[312] The ad-hoc agent is entitled to propose a wide range of debt restructuring measures to creditors and the ad-hoc agreement contains the privileges and guarantees accompanying the debts.[313] In order to safeguard the debtor's business, however, the ad-hoc agent can propose limiting the effect of these guarantees and privileges in favour of essential lenders for restructuring.[314] In the Preventive Concordat, patrimonial - i.e. civil - liability of the directors and other interested parties cannot be incurred if good faith conditions are met.[315] The draft of the Preventive Concordat must include a recovery plan, which specifies the means by which the debtor will successfully restructure.[316] If new funds are to be granted during the concordat term, the priority of these amounts upon distribution, after payment of the procedural expenses, shall be specified. Interim financing is not regulated in pre-insolvency proceedings, however, is it not forbidden either.

In Spain, refinancing agreements that include the extension of available credit or the amendment or extinction of its obligations, cannot be revoked as long as the terms of the agreement respond to a feasibility plan that permits the continuity of employment or of the business in the short or the medium term, thus protecting additional financing under such plans.[317] In addition, in those refinancing agreements in which it is foreseen to resort to resources generated by the total or partial continuation of the business, the proposal shall also be accompanied by a feasibility plan that specifies what those necessary resources are, the means and conditions of obtaining them, and any commitments to these provided by third parties. The claims granted to the insolvent debtor to finance the feasibility plan shall be settled under the terms established under the agreement.[318] Thus, the provision of additional finance is at least protected from being challenged in the event that it is included in a restructuring plan. The Spanish system therefore provides certainty for lenders who may choose to lend under a restructuring plan and as the super priority aspect of article 17(4) is optional, this appears to satisfy the provision of adequate protection under the PRD.

Priority is granted under Spanish Insolvency Act for new financing foreseen in refinancing agreements: 50% of the value of the new financing will be considered as administrative expenses in subsequent insolvency proceedings (article 84) and the rest of the value can benefit of a general priority (article 91).

England and Wales do not have priority for new and interim finance within either the Scheme of Arrangement or the CVA. There is, however, a framework which prioritises rescue financing by giving it statutory protection and construing it as an expense of administration, however, this is specific to administration procedures.

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[311] RL, art 342.
[312] Law no 85/2014, art 117(3).
[313] These include debt relief, rescheduling or partial reductions, the continuation or termination of ongoing contracts, personnel redundancy or an abstention by the creditor from improving its position vis-à-vis other creditors through guarantees or preferential treatment as well as any other actions it may deem necessary per art 13(3).
[314] Examples of such limitations could include limiting the right of creditors to pursue, preference, interest and penalties.
[315] The good faith conditions are that in the month before payment were ceased, the payments were made in good faith under an arrangement with the creditors, concluded pursuant to out of the court negotiations for debt restructuring, provided that such arrangement was likely to lead to financial recovery of the debtor and was not intended to prejudice and/or discriminate some creditors.
Patrimonial liability is explained in the terminology Chapter 2 section 2.11.
[316] Law no 85/2014, art 24 (2); the plan must specific:

> "…[t]he actions by which the debtor [will] overcome the financial difficulty, such as: increase in the share capital, debt to equity swap, taking a bank loan, bond or similar borrowing, including shareholder loans, creation or termination of branches or operating units, sale of assets, creating causes of privilege; if new funds are to be granted during the concordat term, the priority of these amounts upon distribution, after payment of the procedural expenses shall be specified".

[317] Law 22/2003 of 9 July, art 71 bis.
[318] Law 22/2003 of 9 July, art 100(5).

7.7.1 Summary of Implementation Requirements

Countries including Ireland, Italy, Spain, Romania, Poland and the Netherlands are not likely to have to make (further) changes to comply with the PRD. The government response to the Insolvency and Corporate Governance Consultation from the United Kingdom recognised the necessity for formally giving priority to interim and new financing, however, their plan was dropped following on from negative feedback during the consultation process. As such, England and Wales will likely need to introduce a provision to comply with the Directive. Germany and Austria may also need to introduce frameworks to provide protection for new and interim finance. Denmark may need to introduce protection from avoidance actions for new financiers, assuming it implements a similar system to its current insolvency restructuring. Because interim financing is not specifically referred to in article L611-11 of the Commercial Code, France may decide to include it in the Ordinance, thereby amending its legislation.

7.8 Workers (Article 13)[319]

The normal labour and employment law rules will continue to apply to employees affected by preventive restructuring procedures as they stand alongside the PRD. These include 5 EU social Directives specifically referred to in article 13 of the PRD that relate to employees affected by employer insolvency and the actions that might be taken by a company in financial distress that impact on employee rights and entitlements. The Acquired Rights Directive[320] requires the automatic transfer of employment contracts upon the transfer of a going concern or part of a going concern, even if that business transfer to a new owner occurs out of what are deemed liquidation procedure as long as the business of the undertaking is continuing as an independent economic entity.[321] The Collective Redundancies Directive[322] sets out participation and consultation obligations if a certain number of employees are at put at risk of redundancy. The Employers in Insolvency Directive[323] requires each Member State to create a guarantee fund that protects a limited amount of employee wages and entitlements in the event of their employers' insolvency. In addition, the EU has passed a number of directives that aim to protect

[319] Per art 13 (1):

> "Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:
> (a) the right to collective bargaining and industrial action; and
> (b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:
> (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;
> (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;
> (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with art 9, or for confirmation by a judicial or administrative authority in accordance with art 10;
> (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC."

[320] Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16 ("Acquired Rights Directive").

[321] See the Case C-126/16 *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* (2017) where it was found that a (partial) going concern sale arranged through a Dutch pre-pack connected to a liquidation procedure under the Dutch Insolvency Code would not be protected by the insolvency exception to the automatic transfer of employment contracts set out in art 5(1) of the Acquired Rights Directive because the pre-pack as conceived was not with a view to liquidation (but with a view to continuing at least a part of the business of the undertaking). For a short discussion on the Dutch position, see Rick Aalbers, Jan Adriaanse, Gert-Jan Boon, Jean-Pierre van der Rest, Reinout Vriesendorp, and Frank van Wersch, 'Does Pre-Packed Bankruptcy create Value? An Empirical Study of Post-Bankruptcy Employment Retention' (2019) 28(3) IIR (forthcoming).
For a catalogue of case law on this question with the evolution of approach from a contrary view in the first case on this topic, Case 135/83 *HBM Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, to cases where the sale of a business of the undertaking may occur in a liquidation procedure, but because a business or part of a business of the undertaking continues, the compulsory transfer of employment contractswill still apply, see the following non-exhaustive list of cases: Case C-362/89 *D'Urso and ors v Ercole Marelli Eletromeccanica Generale SpA and ors* [1991] ECR I4105; Case C-472/93 *Spano and Others v Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321; Case X319/94 *Jules Dethier Equipement SA v Jules Dassy* [1998] ECR I-1061; Case C-399/96 *Europieces SA, in liquidation v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I-6965; Case C-29/91 *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189; and Joined Cases C-171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] ECR I-1253. For a discussion of this European case law in the context of the insolvency exception in the Acquired Rights Directive and the rescue culture, see Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 139-144.

[322] Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225/6.

[323] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.

employees' rights to bargain collectively and add certain additional requirements for information and consultation obligations by employers. There are two mentioned in article 13 of the PRD which include the Information and Consultation Framework Directive[324] and the Works Councils Directive.[325]

It is important to remember that regardless of which Member State is running a principal insolvency or restructuring proceeding, the employment law of each individual Member State will continue to apply to those employees working within its borders, unless otherwise provided for in a legal employment contract. The aforementioned social policy directives that attempt to approximate the treatment of employees when faced with the financial difficulties of their employers or other changes to the organisational environment of their employer

Article 13 on Workers was a late addition to the Directive. Early during the inter-institutional negotiations, European Economic and Social Committee and the European Parliament Committees on Employment and Social Affairs both expressed concern that the Directive did not explicitly address the position of workers, nor did it give them any protection compared with other creditors. article 13 serves to remind the Member States that their new or reformed restructuring frameworks should continue to adhere to both "Union and national labour law" as implemented in the Member States. The interinstitutional discussions did make clear the importance of workers' rights and the ability for workers to both participate and for their entitlements to be protected in an employers' insolvency, as evident in their exclusion from the stay in article 6(5), though this can be derogated from if payment of claims is guaranteed at a similar level of protection.

Contributors were asked to assess what the current position of workers in their jurisdictions currently is. As all Member States are bound by the same minimum standards arising from the 5 aforementioned Directives, with some exceptions stemming from domestic differences, such as priorities and the level of development of collective bargaining, the position in each Member State is largely the same. While there are some differences in approach in domestic legislation, it is unlikely that these differences will inhibit the development of preventive restructuring frameworks as regardless of what jurisdiction opens main proceedings, the domestic law and protections governing workers will continue to apply in each Member State. For this reason, this Report will not offer an in-depth discussion of workers' rights in the context of the PRD and its relevance to the JCOERE Project.

7.9 Conclusion: Benchmarking to the Directive

As evident in the foregoing sections, the Member States that have contributed to the JCOERE Questionnaire as of October 2019 vary significantly in terms of (1) the existence of preventive restructuring procedures; (2) the provisions common to preventive restructuring, which may currently be associated with insolvency or insolvent restructuring or reorganisation procedures; and (3) the view of certain key concepts and principles that are common to preventive restructuring. Chapter 7 has explored specific provision arising from the PRD as an incoming European framework Directive as a focal point of examining preventive restructuring procedures generally among the EU Member States and the JCOERE contributing jurisdictions. The key provisions explored included the stay or moratorium, its existence and duration with extensions in the contributing jurisdictions in either preventive or insolvent restructuring procedures as well as whether this stay was revocable by a court (article 6(1) and (9)).

With a view to, in particular, investigating the complicated and challenging cross-class cram-down provision, the rules pertaining to both the adoption and confirmation of restructuring plans had to be examined. With regard to adoption, this necessarily included the ability to vote on a plan as well as what conditions were present that could exclude certain creditors from voting (article 9(2-3)). It was also important to explore how classes were formed and, in some cases, if at all beyond recognising the difference between secured and unsecured creditors (article 9(4)) as well as whether there was provision for the judicial or administrative examination of voting rights prior to the approval of a plan (article 9(5)). Finally, and crucially, this question explored whether with a simple or super majority rule within

[324] Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.
[325] Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122/28.

individual classes of creditors the adoption of a plan would be allowed, often called an intra-class cram down (article 9(6)).

Confirmation criteria related to restructuring plans was also interrogated in the questionnaire with responses dealing with the conditions under which a plan would have to be confirmed by a judicial administrative authority and whether the current provisions in the contributing jurisdictions included at least the criteria set out in article 10(1). Additional conditions were set out in 10(2) that can also require judicial or administrative approval, which contributors also gave their views on in relation to their current and planned or hypothetical implementation of restructuring frameworks, including whether they provided or would provide for the ability for an authority to refuse to confirm a plan under 10(3).

One of the key and most controversial provisions in the PRD is the cross-class cram-down, and few jurisdictions have this already in a preventive restructuring procedure and not all even have it in their insolvent restructuring procedure. Therefore, this provision may be one of the most challenging ones to implement in the time period allotted for putting into place domestic legislation in line with the PRD. Article 11(1) provides an obligatory provision for a cross-class cram-down, but provides a myriad of options for testing the fairness of this as against dissenting creditors, seeming to prefer a “relative priority rule” as set out in article 11(1)(c) with a derogation set out to utilise an “absolute priority rule” in 11(2). Finally, another separate test is provided in the second paragraph of 11(2) that describes an “unfair prejudice test”. Many EU jurisdictions favour an absolute priority rule already, while Ireland, for example, has already been applying a kind of relative priority test that relies as well on whether creditors are unfairly prejudiced. There is a lot of debate in the relative value of these rules and whether the more flexible of these lead to morally hazardous circumstances that could be abused by powerful lenders and unscrupulous debtors.

There was also a brief exploration of article 13 in relation to workers, which specifies five social Directives that all jurisdictions should continue to apply in relation to the development of preventive restructuring frameworks. These directives include the Works Councils and Information and Consultation Directives, the Collective Redundancies, Acquired Rights, and Employers in Insolvency Directives. Given the fact that these Directives have already been implemented within the Member States, the additional admonition does little to change the status quo.

Finally, the provision of interim financing in article 17 has been recognised as an absolutely vital element for the success of preventive restructuring plans. When a company finds itself in temporary financial distress, it is axiomatic that it will need money from somewhere to be able to continue with negotiating a plan and to implement it. As such, the provision of protection from claw-back manoeuvres, liability for lending, as well as the potential to apply a super priority to such loans in repayment is a vital piece of the restructuring puzzle. The contributing jurisdictions already take a varied approach to this concept, with views that it, along with aspects of the cross-class cram-down could lead to abuse of process and moral hazard. However, it is also widely accepted that this is an unavoidable aspect of preventive restructuring if the Member States are to create or adjust procedures that will be effective at rescuing companies in states of likelihood of insolvency in the near future.

7.10 Chapter 8: Mapping of Preventive Restructuring Frameworks and the EU Directive Part II Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The next Chapter 8 will explore the first half of Part III of the JCOERE questionnaire. The next chapter begins with an exploration of the thresholds of insolvency in the contributing jurisdictions as this gives a perspective on the accessibility of preventive restructuring along the stream of financial difficulty. Secondly, Chapter 8 will explore contributor responses to the implementation of article 5 Debtor in Possession. This requires Member States to provide a debtor in possession procedure while making provisions for the involvement of an insolvency practitioner either on a case-by-case basis, or in certain specified circumstances. The next chapter will also look at the interplay of article 8 of the EIR Recast, which provides absolute protection for rights *in rem* for assets located in a jurisdiction other than the jurisdiction of primary proceedings. This has been viewed as potentially conflicting with the cross-border aspects of preventive restructuring as it could lead to differential treatment of rights *in rem* holders as between the jurisdiction of preliminary proceedings and other jurisdictions recognising and deferring to those proceedings.

8. Chapter 8: Mapping of Preventive Restructuring Frameworks and the EU Directive Part III Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

8.1 Introduction to Part III of the Questionnaire Mapping Preventive Restructuring Frameworks

Part III of the JCOERE Questionnaire Mapping the Preventive Restructuring Frameworks and the EU Directive examines specific procedural aspects that may arise in relation to preventive restructuring frameworks, whether in current domestic processes, new domestic processes, or processes which will be introduced as a result of implementing the provisions of the PRD.[1] The questions in this part of the questionnaire focus on aspects of the PRD that relate to procedural matters. As an example, this includes the requirement for the appointment of insolvency practitioners in restructuring processes as set out in article 5 Debtor in Possession. It also explores the interface between provisions in the EIR Recast on the protection of rights *in rem* and the provisions in the PRD on both intra- and cross-class cram-down. In addition, a question about insolvency and restructuring thresholds was raised with the contributors. Differences between Member States on this issue may affect the commencement of preventive restructuring processes leading to difficulties with the operation of the EIR Recast. Part III of the questionnaire also queried certain procedural aspects relating directly to challenges to court-to-court co-operation. However, this Chapter will confine itself to rules deriving directly from the PRD, leaving those that deal with the characteristics of the courts and judiciaries throughout the Member States to be discussed in the JCOERE Report 2.

This Chapter seeks to satisfy the second need addressed by the JCOERE Project: *viz.* identifying procedural rules associated with preventive restructuring that could present as obstacles to judicial co-operation. The topics discussed in this Chapter are informed, in part, by strong concerns expressed in some member states regarding what is perceived to be the potentially abusive nature of restructuring or rescue processes. Throughout the Chapter these concerns will be balanced against the clear policy imperatives expressed by the European Commission for the need to introduce rescue processes throughout the EU.

Further, the flexibility of involving insolvency practitioners as described in article 5 of the PRD may also be problematic, both in terms of the perception of oversight of a potentially morally hazardous process, as well as the nature of court co-operation extending as it tends to do through communication between practitioners and the courts. The flexibility of article 5 appears to make it possible to have an entirely debtor-run restructuring procedure without the aid of an insolvency practitioner. In such cases, court co-operation may be difficult as there will not be practitioners representing all jurisdictions between which co-operation is needed. Finally, where practitioners are officers of the court the cooperative relationship will potentially be different from those jurisdictions who have insolvency practitioner who are not as there will be differing levels of obligation and trust between courts and practice.

Rights *in rem* also cause a potentially difficult problem in the way foreign security rights are protected by article 8 of the EIR Recast, a protection that does not extend to local creditors of a cross-border proceeding. In other words, wherever a preliminary proceeding is opened, the secured creditors in that jurisdiction will not have the same protection as secured creditors in foreign jurisdictions under the same proceeding by operation of the absolute protection provided by article 8. While these differences and inequities may not prevent recognition of a preliminary proceeding that is within Annex A of the EIR

[1] European Commission DG Justice Grant Agreement 800807 – JCOERE – JUST-AG-2017/JUST-JCOO-AG-2017, Annex 1 Part B section 1.2 “The needs Addressed by this Project.”

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Recast, it could give judges pause when they consider the need to cooperate in relation to local claims that are stayed or otherwise impeded by a foreign preliminary proceeding.

8.2 The Threshold for Insolvency and Restructuring

EU Member States adopt a range of gatekeeping approaches for companies to access insolvency and restructuring procedures. These differences start range from having no threshold test at all to having a restrictive approach setting out express debt percentages, sometimes at a very low threshold, that define when a company can and at times *must* file under a relevant procedure. The academic debate in this area revolves around the potential for abusing flexible restructuring procedures that could allow a company to use them simply to escape some of their debt obligations by holding its creditors hostage to a procedural cram-down. On the other side of this moral hazard is the potential for using flexible restructuring procedures to try to save hopelessly insolvent companies, wasting court time and causing greater hardship for creditors. Currently, there does not seem to be any agreement between the Member States on this issue, but where different approaches to insolvency and restructuring thresholds persist, it could lead to the unequal treatment of creditors from one jurisdiction to another, with some being roped into procedures much earlier or potentially too late, causing delay in payment and expenses for creditors.

There also appears to be a lack of a pan-European acceptance of preventive restructuring, which can, to some extent, be attributed to the varying strictness of insolvency thresholds, which are in turn linked to the distrust of debtors generally. The PRD introduces a seemingly flexible test of entry, which has caused ample debate in academic circles. As discussed at length in Chapter 4 of this Report, there are questions as to whether a collective proceeding occurring prior to insolvency can actually be justified when one considers the principles that govern the justification of collective insolvency proceedings generally. The question, then, is why might the differing threshold tests of insolvency make a difference in relation to court-to-court co-operation? How available and accessible should preventive restructuring be when balanced against the moral hazard and potential for abuse feared by many academic commentators?

There are certain thresholds determining functional insolvency that a debtor must generally meet in order to access insolvency procedures. The same applies to a number of existing preventive restructuring procedures. The PRD sets the "likelihood of insolvency" as the threshold at which preventive restructuring procedures should be available:

> "This Directive lays down rules on: (a) preventive restructuring frameworks available for debtors in financial difficulties where there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor."[2]

Generally, insolvency is determined by reference to a company's inability to pay its debts,[3] which different Member States assess by reference to a variety of criteria. The inability to pay debts is often assessed through two common insolvency threshold tests: the balance sheet and cash flow tests. The balance sheet test refers to a situation where a companies' liabilities exceed the value of its assets.[4] Under this test, any number of companies may be definitionally insolvent at many points during their lifecycle, however, this does not necessarily mean the company cannot continue as a viable enterprise if these situations of imbalance are temporary in nature. The cash flow test is simply the debtor's inability to pay its debts as they fall due. As noted in Chapter 4, the PRD aims to make restructuring procedures available to debtors prior to circumstances in which a debtor would be considered insolvent. This raises the question of what is meant by "pre-insolvency" in a preventive restructuring context.[5] It is sufficient to point out here that the definitions for "likelihood of insolvency" have been left entirely to the national law of Member States,[6] which may result in procedures in different jurisdictions that can be used at a diverse number of points along the stream of financial distress. A key determination must be where on the stream of financial distress "pre-insolvency" begins and to find this, it must first be determined the threshold at which insolvency procedures are available to a debtor company.

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[2] PRD, art 1(1)(a).
[3] Kristin van Zweiten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 134-135.
[4] *idem* 167-176.
[5] The concept of pre-insolvency was discussed in greater detail in Chapter 4 of this Report.
[6] PRD, art 2(2)(a&b).

8.2.1 Threshold of Insolvency and Restructuring in the Contributing Jurisdictions

JCOERE Questionnaire Question (Additional):

> *How does your jurisdiction define the "threshold for insolvency", for example, is it when a company is unable to pay its debts, when liabilities exceed assets, or something else? How does this threshold then relate to your restructuring framework as described in your response to our questionnaire?*

In Ireland, the Scheme of Arrangement can be used in circumstances of solvency or insolvency, so there is no relevant threshold to consider.[7] The threshold for insolvency for Examinership is that the company is, or is likely, to become unable to pay its debts,[8] so it can be used notionally in either solvency or insolvency, which facilitates its use for preventive restructuring objectives in line with the PRD.

In Austria, the threshold for insolvency is either illiquidity or over-indebtedness. Illiquidity is assumed when a debtor is unable to repay debts that are due within a reasonable time, essentially the "cash-flow test". Further, illiquidity is presumed if a company is unable to immediately liquidate assets in order to pay its liabilities, even if there are sufficient assets to cover the debts. Illiquidity was recently given definition by the Austrian Supreme Court, which found that if a company defaults on more than 5% of its due debts, it will be presumed to be illiquid. Over-indebtedness is essentially defined as the balance sheet test mentioned above, tempered by the requirement that there is no positive forecast for the continued existence of the company. The value of assets over liabilities is determined by actual or potential sales of those assets under normal circumstances, rather than liquidation value. The "positive forecast" is predicated on the ability of the company to fulfil all due liabilities within the current and following financial year.

Denmark defines insolvency based on the cash flow test: *when the debtor is unable to meet its liabilities as and when they fall due, unless such inability must be deemed to be only temporary*.[9] The Danish insolvency threshold does include what is sometimes referred to as "anticipated insolvency". A debtor is considered insolvent when it is inevitable that the debtor in the near future will not be able to pay his debts.[10] Spain takes a similar approach, deeming a company insolvent if the debtor cannot meet debts due, whether or not the inability to pay is only on a temporary basis. Impending insolvency is when a debtor has not yet stopped paying, but it is foreseeable that it will eventually be unable to do so.[11]

The threshold for insolvency in the Netherlands depends on the insolvency proceeding. In a bankruptcy, a liquidity test is applied. When the debtor is unable to pay its debts (in practice there should be two outstanding debts, of which at least one is due and payable) in order to be declared bankrupt.[12] For the suspension of payment, a liquidity test is applied; this is identified as the debtor in circumstances in which it foresees that it will not be able to continue to pay its debts as and when they become due and payable.[13]

In England and Wales, both the CVA and Scheme of Arrangement can be used prior to the debtor becoming functionally insolvent by reference to the balance sheet or cash flow tests. The Scheme of Arrangement can be used for the reorganisation of a solvent or insolvent company so there is no threshold test to be applied, which also explains why it remains a procedure available under the Companies Act 2006, rather than under the Insolvency Act 1986. It only needs court approval of an arrangement agreed between the company and its creditors or a class of them.[14] The CVA may also be made whether or not the company is insolvent or likely to become insolvent,[15] so there is no threshold test here either. However, if the Scheme or the CVA is being used in the context of an Administration

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[7] Irish Companies Act 2014, chapter 1, part 9. See further Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury 2012) chapter 8; and L McCann and Thomas B Courtney (eds), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2015) chapter 9 on Mergers and Acquisitions.
[8] Irish Companies Act 2014, s 509(1).
[9] Danish BA, s 17(2).
[10] Betænkning II nr 606/1971 om konkurs og tvangsakkord, 72.
[11] Spanish Bankruptcy Code, art 2.
[12] Dutch BA, art 1 and 6(3).
[13] Dutch BA, art 214(1).
[14] England and Wales Companies Act 2006, s895(1).
[15] England and Wales Insolvency Act 1986, part I.

procedure, which often happens so that a moratorium is available, then the company will need to meet the relevant threshold, which is that the debtor is or is likely to become unable to pay its debts.[16]

The threshold for insolvency in France is defined as "*cessation de paiements*". Article L631-1 of the Commercial Code defines "*cessation de paiements*" as the inability of a company to meet its payable liabilities with the assets available ("*l'impossibilité de faire face au passif exigible avec [l']actif disponible*"). This concept is important as it is from the moment the business satisfies this criterion that some preventive restructuring procedures become closed to the debtor. The ad hoc mandate is only available to debtors that are not in *cessation de paiements*. The conciliation procedure is only available to debtors, which have not been in *cessation de paiements* for more than 45 days.[17] The safeguard procedure is also unavailable to debtors in *cessation de paiements*.[18] However, what constitutes a situation of *cessation de paiements* is not straightforward and has been the subject of debate in the courts and among commentators over the years, in particular the accounting basis of the concept. Following the introduction of the Law of 1967,[19] French case law referred to the concept of *cessation de paiements* as an essentially accounting-based notion, reliant on a comparison of available assets to meet the due liabilities.[20] Yet, many courts have departed from this accounting view and have interpreted elements of the concept, such as what constitutes an asset[21] and a liability[22] and whether the debt is in fact due.[23] Overall, some courts have disputed the purely accounting nature of the concept and stated that it is, rather, a concept which takes into account the treasury of the business and which includes "dynamic elements" of the company's life that are not reflected in the accounts, such as temporary credits and the use of occasional overdrafts. Solely relying on the balance sheet test, therefore, would not be a true reflection of the reality of the business.[24]

German insolvency law defines insolvency as the inability to pay debt as it falls due.[25] Case law further explains that the relevant inability must extend to more than 10 per cent of debt over more than 3 weeks. Any cessation of payment indicates unequivocally the inability to pay. In addition, German law offers two further insolvency tests for specific debtors. First, the debtor can initiate insolvency proceedings early (in order to use it for a restructuring).[26] Here, any foreseeable inability to pay suffices. Case law provides that the forecast may include a timeframe of up to two years in the future, for example, at the time a bond is to fall due. Secondly, any limited liability company (corporation) is insolvent under a balance sheet test once it has no prospect of continuation (viability test).[27] So balance sheet insolvency in itself does not suffice anymore (since 2008) in order to prevent a duty to file for insolvency due to a crash in market value of relevant assets as experienced in 2008. Only a balance sheet insolvent corporation that is also unable to continue trading would be insolvent under sec. 19 InsO and thereby be required to file.[28] Any future preventive restructuring framework would interfere with the purpose of section 18 of the InsO (voluntary petition). It would probably not be available for debtors that are already unable to pay their debt. Corporations in the process of promising restructuring negotiations protected by the new framework would probably not be seen as being unable to continue trading, so no conflict should arise there. Currently, two ideas dominate the discussion in Germany: (1) Access to any preventive tool would be based on a foreseeable inability to pay that is combined with a minimum requirement for liquidity to finance the restructuring, or (2) access to any preventive tool would not include a separate test; instead these tools (stay, plan) would only have non-collective effects, thus guiding viable debtors to them while more troubled debtors (requiring collective redress) would need to file for insolvency plan proceedings. Which of these ideas will become law or whether both or none of them are adopted was, at the time of this questionnaire, impossible to forecast. Indeed, given the current

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[16] *idem* schedule B1, para 11(a).
[17] Commercial Code, art L611-4.
[18] Commercial Code, art L621-1.
[19] Law No 67-563 of 13 July 1967.
[20] See C Saint-Alary-Houin, *Droit des Entreprises en Difficulté* (Montchrestien 2001) para 344.
[21] See *e.g.* Cassation Commerciale, 22 January 2002, RJDA 2002.5 no 516; Cassation Commerciale, 17 May 1989, Bull Civ IV no 152.
[22] See *e.g.* Cassation Commerciale, 22 June 1993, D 1993.somm.366; Cassation Commerciale, 8 March 1994, RJDA 1994.7 no 847; CA Nancy, 20 May 1987, JCP 88 éd E.II.15114; Cassation Commerciale, 22 February 1994, Bull Civ IV no 75; CA Aix, 16 April 1985, D 1987.somm.389; CA Paris, 18 February 2000, Cah Dr Aff (actualité jurisprudence) 170.
[23] See the 'due and demanded' doctrine, cf Cassation Commerciale, 17 June 1997, RJDA 1997.11 no 1393.
[24] CA Aix, 5 June 1987, D.1988.somm.41.
[25] InsO, s 17.
[26] InsO, s 18.
[27] InsO, s 19.
[28] InsO, s 15(a).

obligatory nature of filing for insolvency in Germany, the introduction of a flexible but robust procedure such as the PRD has been controversial.

In Poland, insolvency is defined by article 11 of the BL[29] and covers both liquidity and asset to liabilities tests. Meeting any one of the two implies that a debtor is insolvent and that its representatives have a duty to file for a declaration of bankruptcy. On the other hand, restructuring proceedings can also be opened in relation to an already insolvent debtor. A court will not open restructuring proceedings if their effect is detrimental to creditors. Moreover, in the case of arrangement and remedial proceedings, the court will not open proceedings if a debtor's ability to pay current costs of proceedings and obligations arising after opening has not been rendered credible."[30] There is no specific test for restructuring proceedings not to be opened in case of deep insolvency.

In the new Italian code (CCI), insolvency is defined as the debtor's inability to meet its obligations as they fall due, a situation which usually manifests itself in defaults or other signs[31] According to well-established case law, a firm that is being wound up, either piecemeal or as a going concern, may be declared insolvent only provided that its debts exceed the value of its assets, a balance sheet test. When the proceeds of the assets of a non-insolvent liquidation are assessed as sufficient to pay all creditors in full, the company may not be declared insolvent although not able to pay claims as they fall due, relying on a cash-flow test. The CCI also distinguishes between insolvency and crisis; the latter is defined as the situation of economic and financial difficulty making it probable that the debtor will become insolvent from a cash flow standpoint.[32] Crisis manifests itself as the inadequacy of *prospective* cash flow to meet planned obligations as they fall due. That said, both the judicial composition with creditors (*concordato preventivo*) and to debt restructuring agreement (*accordo di ristrutturazione dei debiti*) are available to debtors that are either in a crisis or in an insolvency situation, as described above. Therefore, it is not necessary for businesses to be insolvent in order to be able to access these procedures, being in a "crisis" situation is sufficient. This approach seems to be aligned with the PRD, which requires, under art. 4, par. 1, that "Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure".

In Romania, insolvency is understood as insufficiency of cash available to pay the undisputed, liquid and enforceable debts, as follows: (a) The debtor is presumed insolvent when it fails to pay its debt to the creditor after sixty (60) days from the due date; this presumption is relative; (b) Insolvency is imminent when the debtor is proven unable to pay its debts when due, out of the cash available on the due date.[33] The threshold value is defined as the minimum amount that the claim must meet in order to allow a petition for opening of the insolvency proceeding to be filed.[34] Romanian law contains a positive definition of insolvency, it introduces the criterion of over-indebtedness as a ground for opening the proceeding. It is defined as the so called *"imminent illiquidity"*; this is established if the debtor will be unable to satisfy the claims when they become due. Romanian law also defines a threshold for pre-insolvency proceedings, which is applicable to debtors in financial difficulty.[35] A debtor is undergoing financial difficulty if, despite fulfilling or an ability to fulfill its obligations when due, it has a low short term liquidity ratio and/or a high long term indebtedness ratio, which may adversely affect its possibility to fulfill its contractual obligations by means of the resources generated from operations or the resources attracted from the financial activity.[36]

The balance sheet test and cash flow tests are common among the contributing jurisdictions in the assessment of functional insolvency, which then allow a debtor to access the relevant insolvency procedures. However, the current state of affairs at the time of writing does not dispel the questions as to how a "likelihood of insolvency" will be determined under the Member States' national restructuring frameworks at implementation time. As noted in Chapter 4, there are certain principles at play when a debtor accesses a collective procedure, a term that also applies to the new preventive restructuring procedures. It remains to be seen how the insolvency principles that justify collective action will be

29 BL, art 11.
30 Art. 8 of the RL.
31 CCI, art 2, para 1(b).
32 CCI, art 2, para 1(a).
33 Law no 85/2014, art 5(29).
34 Law no 85/2014, art 5(72).
35 Law no 85/2014, art 6.
36 Law no 85/2015, art 5(27).

reconciled with the use of collective preventive restructuring procedures when a debtor is not technically or functionally insolvent. However, given the approach of some of the contributing jurisdictions, for example Italy, which differentiates insolvency and "financial crisis", and Austria, which tempers a finding of insolvency with a viability forecast, an aligned access to restructuring frameworks is unlikely to be created with the implementation of the PRD, which means not all restructuring frameworks will be available to the same debtors at the same points in their financial distress.

8.3 Insolvency Practitioners in Preventive Restructuring (Article 5 – Debtor in Possession)

8.3.1 Purpose and Spirit of Article 5: Debtor in Possession (Qn 9)

Article 5 aims to encourage the development of a debtor in possession ("DiP") style of restructuring procedure along the lines of what the American Chapter 11 provides (and which the Irish Examinership has fully adopted). Essentially, DiP should limit the control that an insolvency practitioner, where appointed, or other body might exercise over the daily decision-making and activities of a company, to merely advising on aspects of the restructuring plan, rather than replacing the company management or taking control of the running of the business of the company. As such, the question seeks to determine the level of involvement required by insolvency practitioners in a restructuring and circumstances under which those requirements arise. Critically, the PRD states the following:

(1) "Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business." [37]

This section clearly emphasises that a debtor should remain in control of the business during the restructuring proceeding, meaning that they continue to make decisions about how assets will be allocated, as well as any decisions about how the business should run. Essentially, a restructuring proceeding *could* proceed under the PRD framework without the involvement of a practitioner at all, depending on the circumstances. Article 5 goes on to state:

(2) "Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case."[38]

This second sub-section presents an optional appointment by judicial or administrative authority of an insolvency practitioner when it is considered necessary, which gives Member States some flexibility in determining what may necessitate that appointment. An appointment then becomes an obligation in certain specified minimum circumstances: (a) where a general stay is granted, and the authority decides a practitioner is necessary to safeguard party interests; (b) where a cross-class cram-down is required for confirmation; or (c) where it is requested by the debtor or by a majority of the creditors.[39]

The Directive emphasises the fact that a preventive restructuring procedure is essentially characterised by a true "debtor-in-possession" element, reflecting the framework of the American Chapter 11 procedure. Debtor in possession refers to a situation wherein a corporate debtor has filed under an insolvency or, in this case, preventive restructuring procedure, while the pre-petition management remain in control of the assets and the business of the company.[40] While this element is not particularly contentious in itself, article 5 also provides an option to, where necessary, have a judicial or administrative authority appoint an insolvency practitioner on a case by case basis. By predicating such an appointment on the vague criteria of "where necessary", article 5(2) gives fairly wide discretion for Member States to choose when the appointment of an insolvency practitioner will be necessary. However, it has been noted that the spirit of article 5 aims to avoid the practitioner (or indeed courts) being involved in all cases involving a restructuring plan. The following recitals of the PRD support this idea. In relation to court involvement, recital 29 states:

[37] PRD, art 5(1).
[38] PRD, art 5(2).
[39] PRD, art 5(3) (a-c).
[40] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press 2017) 231.

> "To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures. Where this Directive is implemented by means of more than one procedure within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive with the aim of achieving an effective restructuring. Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures."[41]

In relation to practitioner involvement, recital 30 states:

> "To avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business. The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations."[42]

These two recitals seem to indicate a preference towards court and practitioner involvement only when strictly necessary, in other words, when their involvement benefits the best interests of creditors and the efficiency of the restructuring process. While IP and Court supervision and/or involvement in all cases may not be factually contrary to the wording of article 5 of the PRD, it may be that the underlying intentions of the provisions surrounding court and practitioner involvement are lost if involvement is required in all cases. That said, the nature of some procedures - the Irish Examinership, for example - are such that the mandatory involvement of both practitioners and courts is justified due to the robust nature of the procedures themselves. If considered on a case-by-case basis, there would always be justification for the involvement of IPs and courts, thereby aligning with both the provisions of article 5 and the recitals set out above.

There are different views about the latitude that Member States have been given to derogate on the case-by-case appointments of an insolvency practitioner. The scope of the derogation in the PRD is vague and appears to allow for a blanket appointment of an insolvency practitioner, however there are also strong grounds to maintain that a mandatory appointment of an insolvency practitioner in all cases may not be compliant with the PRD. Thus, the PRD may set a ceiling to the scope of such derogation, which might preclude a domestic provision mandating the appointment of an IP in all circumstances. The wording of the article, however, does not make this clear. A further relevant consideration is that if the EU had wished to allow a general derogation from the "case-by-case appointment rule", it likely would have just added a paragraph along the following lines: "Member States may derogate from paragraph 2" (as has been done with respect to other optional provisions).[43] Without a clear statement in the operational provision, however, the ambiguity will allow for a much wider scope of implementation than may have been intended.

Article 5 also provides an obligation to appoint of a "practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan" in at least the three specific cases set out above. There are some problems with the timing inferred by this provision. At the time that a plan is being negotiated and drafted, it may not be evident that a cross-class cram-down will be a necessary

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[41] PRD, extract from recital 29.
[42] PRD, recital 30.
[43] Thank you to the Italian team at Universite degli Studi di Firenze for their explanation of this argument in relation to the spirit of article 5(2).

part of the process, so the mandatory nature of the appointment may not become apparent until after the negotiation has begun. Furthermore, there are a range of circumstances that are not described as requiring the appointment of an IP, but which are currently included as criteria for obligatory appointment by some of the Member States, as will be discussed below.

The purpose of question 9 of the JCOERE questionnaire was to determine the level of practitioner involvement in current restructuring proceedings in the contributing jurisdictions and the depth of their roles in controlling the enterprise. While the appointment of an insolvency professional does not necessarily take a debtor out of possession, the power retained by the debtor will depend on the level of power transferred to an insolvency practitioner in such cases.

8.3.2 Jurisdictional Contributions (Article 5 – Debtor in Possession)

JCOERE Questionnaire Question

> *Article 5 includes an option for the involvement of an insolvency practitioner in relation to preventive restructuring processes.*
>
> a. *What is the current position regarding insolvency practitioners in restructuring processes in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 5 of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with the requirements regarding the involvement of insolvency practitioners in relation to preventive restructuring processes?*

While the Irish Scheme of Arrangement could be carried out without the assistance of an insolvency practitioner, as is the case Scheme of Arrangement in the England and Wales this is unlikely (see below). Critical to the examinership procedure is the appointment of an examiner by the court, if the court declined to appoint, then the procedure comes to an end.[44] Therefore, a question can be raised regarding the requirement that an examiner be appointed in all cases. Article 5(3) goes on to state, however, "that Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, *at least* in the following cases" which include when a stay is imposed, when cross-class cram-down is used or when the appointment is requested. The Irish legislation provides for the appointment of an examiner, pursuant to a court petition (which is equivalent to a request). The framework also includes a mandatory stay and the use of cross-class cram-down. In that context the particular procedure cannot have these features without the appointment of an IP. In totality, therefore, there seems to be compliance.

In Italy, when a debtor files for a *concordato preventivo*[45]the court is required to nominate an insolvency practitioner who, before the confirmation of the plan, is entrusted with the role of monitoring and overseeing the debtor, as well as supporting creditors in their assessment of the proposal through the provision of independent information. After the confirmation, the insolvency practitioner may be vested with the power to enforce the plan in case of non-spontaneous implementation by the debtor (see below). Recent reforms (by means of Art. 118) have also widened the power of the IP in cases of non-implementation of a (confirmed) restructuring plan. The IP's powers in this instance will generally include all those normally reserved to the shareholders' meeting. The *concordato* has many characteristics that align well with the provision of the PRD. In the *concordato*[46] an insolvency practitioner is required to inform the court of any misconduct of the debtor or any other circumstance that might have a negative impact on the restructuring process. The insolvency practitioner is not given a right of administration in this case, leaving the debtor in control of the running of the business. Any operations falling outside of ordinary business activity, however, may need *a priori* authorisation by a judge.[47] For the debt restructuring agreement, unless an involuntary liquidation petition has been filed, the court is not required to nominate an insolvency practitioner. This circumstance is not unusual, as the

[44] The examiner is regulated under the Irish Companies Act 2014, s 519 – in short, an examiner must possess the same qualifications as a liquidator in order to act as an examiner.
[45] CCI, art 44 para 1b: *commissario giudiziale*.
[46] Pursuant to CCI, art 118 para 4, after the confirmation of a *concordato* plan, if the insolvency practitioner detects that the debtor is unduly omitting or delaying the implementation of the plan, it must be reported to the court, which can authorise the IP to carry out the acts needed to implement the plan.
[47] CCI, art 44, para 4.

filing of a confirmation request for a debt restructuring agreement can also aim to block the petition for involuntary liquidation but it is not the norm. The insolvency court previously had discretion on the appointment of an insolvency practitioner in cases of restructuring agreements, which were binding on dissenting creditors, with a view to ensuring that the negotiations were made in good faith and lawful.[48] It is unclear if following the recent reforms that will enter into force in 2020. With regard to the PRD, the *concordato preventivo* does not appear to be fully in line with the requirements to "assist the debtor and creditors in negotiating and drafting a plan" as the role in the Italian procedure is largely one of oversight only. Also, the mandatory appointment of an insolvency practitioner in all cases is unlikely to comply with article 5(2) given the limited scope of the derogation (see above).

All Romanian restructuring processes require the appointment of an expert or administrator and are therefore more restrictive than the provisions of the PRD article 5. The practitioners do not take over the business, rather the management stays in control; as such, the Romanian pre-insolvency procedures are "debtor in possession" mechanisms. However, the training of these crises' managers leaves much to be desired, as the practitioner generally knows far less about the management of a business than the former management of those businesses. As such this is supervision without a sound basis in business knowledge. This has often resulted in a loosely managed reorganisation ultimately resulting in an insolvency.

The French conciliation and ad hoc mandate procedures, the insolvency professionals do not interfere with the management of the company. The Directors remain in place and in control of the assets and the day to day operations of the business. A conciliator may not necessarily be a practitioner in insolvency but rather may be appointed by the court provided that they have experience that is likely to facilitate the course of the proceedings. This is conditional on them having not received any remuneration from either the debtor or its creditors in the 24 months prior to opening proceedings. The role of the conciliator is to help the debtor reach an agreement with its main creditors in order to end the financial difficulties of the company.[49] Similarly, a debtor remains in possession during the safeguard and related procedures, but the administrator is appointed to supervise and/or assist the management while preparing the plan.[50] The *Loi Pacte* will introduce an obligation for the court to justify the choice of administrator and of the creditors' representative, in order to bring the French framework closer in line with the PRD, article 5(2); this will amend the Commercial Code in respect of the mandate ad hoc, conciliation, and the *sauvegarde*.

In Germany, insolvency practitioners are always appointed in insolvency proceedings, even if the debtor remains in possession, and this is likely to apply to any newly introduced preventive restructuring procedure. Such practitioners act as a supervisor and may be authorised to co-sign or approve acts of the debtor, which conflicts with the debtor-in-possession concept to some extent. The position appears to be similar in Austria. The provisions of 5(2) allow for an appointment *when necessary*, therefore while the blanket requirement for the appointment of an insolvency practitioner may not be in conflict with the PRD, it is contrary to the spirit of the compromise that led to the drafting of article 5(2), which aimed at preventing an insolvency practitioner being blindly involved in all cases.

In the Netherlands, the suspension of payment procedure always requires the appointment of an insolvency practitioner, who conducts the administration of the debtor's affairs together with the debtor.[51] For any act of disposal related to the estate, the debtor must have the co-operation, authorisation, or assistance of the insolvency practitioner.[52] Where the debtor fails to appropriately include the insolvency practitioner in its decision-making, the insolvency practitioner can do whatever is necessary to prevent any loss in the estate,[53] which will not be liable for obligations entered into by the debtor after the commencement of the suspension of payment without the involvement of the insolvency practitioner.[54] These provisions appear to make the suspension of payment a procedure that

[48] Art 182 *septies* para 4 of the previous Insolvency Law; the recently enacted provision CCI, art 61 regarding the *accordi di ristrutturazione ad efficacia estesa* (debt agreement binding on dissenting creditors) has extended the scope of this procedure, making it available also to bind dissenting creditors, but has not replicated the provision empowering the court to appoint an IP (thereby making the possibility to appoint an IP uncertain in the new framework).
[49] Commercial Code, article L611-7.
[50] Commercial Code, L622-1.
[51] Dutch BA, Art 215(2) and 228.
[52] Dutch BA, Art 228.
[53] Dutch BA, art 228(1).
[54] Dutch BA, art 228(2).

essentially removes the debtor from full possession of the decision-making of the company, given the onerous results should the debtor fail to comply. The WHOA will provide for a proceeding in which, in principle, no involvement of an insolvency practitioner is required, except for those situations noted in article 5(3) of the PRD. In line with article 5(2), the Netherlands has provided a few exceptions that will require the involvement of a practitioner. A creditor, shareholder, works council, or the debtor may request the appointment of a so-called 'plan expert' (*herstructureringsdeskundige*')[55] to propose a restructuring plan. The expert will negotiate a restructuring plan with the creditors and shareholders for the debtor.[56] There is also a provision that allows the court upon request or at its own discretion to take specific measures necessary for the protection of the interests of the creditors and shareholders.[57] This could include the appointment of a specific practitioner in the field of restructuring called the 'observer'.[58]

For the Netherlands, as mentioned above, in the suspension of payment proceeding a joint administrator is appointed by the court when the proceeding is commenced.[59] This allows the debtor to be in partial possession during the full suspension of payment proceeding.[60] This proceeding therefore meets the requirements of article 5(3). When the debtor is no longer able to meet current and new obligations as they fall due, the joint administrator will ask for conversion of the suspension of payment proceedings in bankruptcy proceedings, which ends a phase where the debtor is in possession. As proposed in the WHOA, appointment of either an observer or a plan expert is possible in the three circumstances mentioned in article 5(3), when the proceeding is commenced by the debtor. In those cases where a plan expert has not (yet) been appointed, the court will – in line with article 5(3)(i) – consider the appointment of an observer. Its appointment is not obligatory, but will be subject to whether or not the court considers it necessary to safeguard the interest of creditors. [61] Furthermore, when setting the date for the hearing on confirmation of a restructuring plan that involves a cross-class cram-down, the court will appoint an observer in case no plan expert or observer has yet been appointed (in line with article 5(3)(ii)).[62] The court will appoint a plan expert in particular in those cases where the WHOA is commenced at the request of a creditor, shareholder or works council. In this case the plan expert will be involved for the full proceeding.[63] The request to appoint a plan expert may also be made at a later, when the debtor commenced the WHOA. This request can also be made by the debtor (in line with article 5(3)(i)).[64]

In Poland, the involvement of an insolvency practitioner is governed by the RL; in each restructuring proceeding, an individual who has passed a state exam and is entered on a list of restructuring advisers can act in any of the four restructuring proceedings and perform different roles in them depending on the type of proceeding (such persons also act as receivers during bankruptcy proceedings).[65] In approval arrangement proceedings, a restructuring advisor acts as an arrangement supervisor and the debtor enters into an agreement with the restructuring advisor which defines its duties.[66] In accelerated arrangement and arrangement proceedings, the court nominates a court supervisor in a decision opening proceedings,[67] whereas in remedial proceedings the debtor, as a rule, loses possession and the court appoints an administrator who takes over administration of a remedial estate and manages it independently in favour of the debtor. If the success of remedial proceedings requires involvement of the debtor or his representatives, a court may permit a debtor to administer all or part of an undertaking if a guarantee of proper performance and no exceeding of ordinary administrative tasks is provided.[68] In accelerated arrangement and simple arrangement proceedings, a court supervisor approves acts

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[55] The original Dutch text refers to '*herstructureringsdeskundige*', which could be translated into 'restructuring expert' or 'plan expert'.
[56] WHOA, art 371(1).
[57] WHOA, art 379(1).
[58] WHOA, art 376(9), 380 and 383(4). See also the explanatory memorandum to the WHOA (2019) 40-41 and 66-67 <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/08/tk-nader-rapport-wet-homologatie-onderhands-akkoord> accessed 12 December 2019. In accordance with WHOA, art 381(1), the observer's task is to supervise the realization of the restructuring plan and, in so doing, to take into account the interests of all creditors. Once the court appoints a so-called 'plan expert', the observer will be removed (WHOA, art 380(3)).
[59] Dutch BA, art 215(2).
[60] Dutch BA, art 228.
[61] WHOA, arts 376(9), 379 and 380. See also the explanatory memorandum to the WHOA, 2019, p. 24 and 61-62.
[62] WHOA, art 383(4).
[63] WHOA, art 371(1). See also the explanatory memorandum to the WHOA (2019) 43-44.
[64] WHOA, arts 371(1) and 370(5). See also the explanatory memorandum to the WHOA (2019) 21.
[65] Companies with the involvement as representatives of restructuring advisers are also allowed to be appointed as insolvency practitioners.
[66] RL, art 210.
[67] RL, art 233(1&2).
[68] RL, ss 3, 51, 52, 53, and 288.

exceeding ordinary administration.[69] In arrangement approval proceedings, the conclusion of an agreement with an arrangement supervisor does not limit the debtor in management of his property.[70] In addition, debtor sale of real estate or other assets worth more than PLN 500,000 always requires authorisation of the creditors' committee or is otherwise invalid[71] It seems that the Polish Restructuring law is already compliant with article 5 of the Directive.

The appointment of a restructuring administrator and a restructuring accountant is mandatory for the opening of the restructuring proceedings in Denmark.[72] The debtor remains in possession during the restructuring proceedings and continues to control the day-to-day operations of the business. The debtor is not, however, entitled to enter into any transactions of material significance without the consent of the restructuring administrator.[73] The restructuring administrator can take over the management of the debtor if a majority of the creditors do not vote against such a takeover or if it necessary to protect the value of the business. Both of the takeover options are examined and confirmed by the Bankruptcy Court.[74] While Denmark does have a debtor in possession style of procedure, some changes are necessary to align with the directive. The current Danish frameworks requires the appointment of an insolvency practitioner, which may not be in the spirit of the case-by-case basis enshrined in the PRD. In addition, the forced takeover option in the Danish framework appears to be in conflict with the requirement to ensure that the debtor stays in control, at least in part.

The extra-judicial payment composition in Spain provides for the appointment of an independent insolvency mediator in commercial cases; this is a professional who must meet certain personal requirements and who receives remuneration as governed in express rules.[75] Refinancing agreements do not require independent expert professionals as the procedures are developed and directed by the judicial authority. In view of article 5 of the PRD, the Spanish legislator will need to introduce procedures that leave the debtor in possession with the simple involvement or supervision in an advisory capacity of insolvency practitioners. However, in all these cases, the debtor can be considered to be in possession, as control of the business is retained.

For both the Scheme of Arrangement and the CVA in England and Wales, insolvency practitioners play an important role, but they do not take over the running of the business as they would in an administration, leaving the debtor in possession. The new restructuring plan is likely to reflect the framework already provided by the Scheme of Arrangement. However, the provisions in the PRD state that an insolvency practitioner shall be assigned where there is a general stay, cross-class cram-down, or at the request of the creditor or debtors, so the new restructuring plan may need to account for this aspect should Brexit not occur.

It should be noted that article 5(3) has some obligatory provisions that all Member States will need to accommodate. Namely, that a practitioner shall be appointed in a minimum of three circumstances: where there is a moratorium; when there is a cross-class cram-down; or at the request of the debtor or creditors. While a number of the Member States require the appointment of a practitioner in all restructuring circumstances, that does not necessarily deprive the debtor of possession and therefore is not contrary to this article. It depends entirely on the role assigned to that practitioner and what freedoms the debtor's management continues to wield during the process. The appointment under article 5(3) may not (fully) transfer the right to administer the debtor's affairs to the insolvency practitioner appointed. article 5(2)2 only states that the IP tasks include "taking partial control over the assets or affairs of the debtor during negotiations", without providing further details on the actual scope of such powers. So indeed, the preconditions mentioned here may only lead to a practitioner with powers similar to where the debtor remains in possession but under the supervision and some co-administrative powers of the insolvency practitioner. However, in those Member States that allow a full absence of practitioner guidance, these three elements will need to be incorporated.

[69] RL, s 39.
[70] RL, s 36.
[71] RL, s 129(2).
[72] Danish BA, s 11(a).
[73] Danish BA, s 12.
[74] Danish BA, s12(a) & 12(b).
[75] Law 22/2003 of 9 July, arts 232 *et seq.*

The JCOERE Report 2 will explore in more depth the issues surrounding the responsibilities and requirements for the involvement of insolvency practitioners in the context of

8.4 Rights in Rem (Question 10)

8.4.1 Introduction to the Concept of a Right *in Rem*

Before the question as to whether the EIR Recast and the provisions of the PRD conflict with regards to the treatment of rights *in rem*, it is important first to define what is meant by this phrase. Conceptually, it seems to differ from jurisdiction to jurisdiction, but if one looks to original fundamental concepts, it can be defined thus:

> "Rights in rem may be defined in the following manner – 'rights residing in persons and availing against other persons generally.' Or they may be defined thus: 'Rights residing in persons, and answering to duties incumbent upon other persons generally. By a crowd of modern civilians, *jus in rem* has been defined as follows: '*facultas homini competens, sine respect ad certam personam,*' a definition I believe invented by Grotius."[76]

More simply stated, a right in rem is a "right against a thing", meaning that it pertains to the rights held over a specific piece of property, such as a house in the case of a mortgage. Following the evolution of the concept of the legal person residing in a corporate entity, rights in rem are also now held by lenders and banks who engage in secured lending, which establishes a right owned by the person of the lending entity over the property against which the funds are secured.

8.4.2 Contributor Definitions of a Right *in Rem*

JCOERE Questionnaire Question 10.1

How are rights in rem *defined in your jurisdiction? Please describe a type of right in rem which arises in insolvency proceedings.*

In most jurisdictions, rights are classified as either real (*in rem*) or personal. Possession and ownership of a chattel are considered real rights with the main significance being that they survive the insolvency of the entity against which they are asserted so that the asset can be held against or reclaimed from the administrator or other insolvency practitioner in charge of the procedure. Goode explains that the distinction between real and personal rights may also be expressed as the distinction between property and obligation, i.e., between what I own and what I am owed.[77] The common law in Ireland and elsewhere has always maintained this distinction strictly. A contract to transfer an asset is not the same as an actual transfer. Until the actual transfer is made, the transferee has no proprietary interest in the asset, merely a contractual right to have it transferred. So, if the transferor becomes insolvent before executing the transfer, the transferee's status is just that of an unsecured creditor. The impact of this distinction is lessened by the intervention of equity and the development of equitable real rights under the common law, drawing a potential distinction to treatment of rights *in rem* in civil law countries, which do not generally use equity to extend interpretation and definition in law. Thus, in equity, the agreement to transfer is treated as if it was an actual transfer and the proprietary interest that is created is as effective as a transfer at law except that it will be defeated by a *bona fide* purchaser for value without notice of the interest. Equitable proprietary rights play an important part in the creation of security in the provision of finance in commercial transactions.[78]

The Italian jurisdiction defines rights *in rem* in line with what has been set out above: rights purported to bind a certain asset to guarantee the reimbursement of a certain claim.[79] The French define it similarly as a right attached to an object or property, such as a fixed charge or a mortgage. The Dutch add that

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[76] John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (first published in 1885, 4th edn, John Campbell (ed), The Lawbook Exchange Ltd 2005) a cited in A Kocourek 'Rights in Rem' (1919-1920) 68 U Pa L Rev 322.
[77] R M Goode, *Commercial Law* (Penguin 1995) 31. See also R M Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433.
[78] Caterina Gardiner 'National Report on the Transfer of Movables in Ireland' in Wolfgang Faber & Brigitta Lurger (eds) *National Reports on the Transfer of Movables in Europe: Volume 2* (Sellier Publishers 2009) 165-166.
[79] In Italy, rights in rem include a *pegno* (pledge), which is a right on a moveable asset granted by the debtor or by a third party, as a collateral for credit; an *ipoteca* (mortgage), a right on an immoveable asset or on some goods included in public registries as a guarantee for credit; and some special liens provided for by banking law.

such property rights cannot be infringed by a third party. The Polish definition aligns with that quoted above by Austin, including that such rights are effective against everyone (*erga omnes)* and cover typical rights *in rem* such as a hypothec, registered pledge, treasury pledge, pledge under civil law, maritime mortgage. The RL and BL also treats claims secured by a transfer of ownership of an asset, claim or other right to a creditor as a secured claim."[80] The Romanian and Spanish position largely reflects all of these elements. The most obvious right *in rem* that exists in insolvency is what most jurisdictions would consider a retention of title clause, wherein a creditor retains title over the property that has been delivered to the debtor but has not yet been paid for. While this may seem a simple means of protecting property by keeping it outside of the cumbersome collective recovery procedure, not every jurisdiction treats this as a right *in rem*. For example, in the Netherlands, a retention of title clause does not bestow upon the creditor a right *in rem*,[81] whereas in the UK it is accepted that the purpose of a retention of title clause is to protect the property by keeping it outside of an insolvency procedure. In Romania, however, a hybrid approach is taken in which a creditor benefitting from a retention of title clause will be able to make its claim as a creditor holding a mortgage-like preference rather than by exercising the prerogatives of the property right on the subject matter of the clause.[82] In order to avail of this, such a clause must be registered before the commencement of insolvency. In contrast, were such a clause treated like this in the UK (viewed as a charge and required to be registered), the clause would be rendered inoperable and the goods would be deemed to have been transferred and form a part of the insolvency estate. While the scope of this Project does not extend to a detailed analysis of the different treatment of retention of title clauses among the Member States, this is an important example of how the same legal mechanism can be treated very differently in different national systems.

8.4.3 A Right *in Rem* under the EIR Recast

The EIR Recast discusses rights *in rem* in the Recitals, which is instructive in terms of how the concept is viewed under the Regulation:

> "There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of a right in rem should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security."[83]

Thus, a right *in rem* clearly covers those cases in which security is held against collateral, such as fixed and floating charges in common law legal systems and other securities in civil law legal systems; essentially, this segregates those creditors from the operation of an insolvency procedure and allows such security holders to exercise their rights against the relevant collateral. Recital 69 goes on to recommend that the holders of a right *in rem* should also be exempt from the operation of a stay or moratorium.

Rights *in rem* will often have procedural rights attached to them by virtue of the agreement granting the security, such as the right of a floating charge holder to proceed with a receivership or other type of insolvency procedure. Such procedures are governed by the law of the Member State in which preliminary proceedings are commenced insofar as they pertain to "the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem*."[84] This indicates that a rights holder may have exercised their security in another Member State prior to the opening of preliminary proceedings, but has been unable to obtain full repayment locally, leaving them to rely on the outcome of preliminary insolvency proceedings and the law governing it to recover what remains.

Finally, article 8 of the EIR Recast provides that:

[80] RL, art 151.
[81]In Dutch law, a right of retention does not qualify as a right in rem. Therefore, it is argued that a Dutch right of retention falls outside the scope of Article 8 EIR (2015). See further Dutch Country Report, page 8.
[82] Law no 85/2014, art 123 para 6; See Romanian Country Report, page 5.
[83] EIR Recast, recital 68.
[84] EIR Recast, art 7(2)(i).

> "The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings."[85]

The article goes on to specify the particulars of what rights are implicated, including:

> "(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
>
> (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
>
> (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
>
> (d) a right in rem to the beneficial use of assets."[86]

Some would interpret this as effectively placing rights *in rem* outside of the reach of insolvency and restructuring procedures when those rights reside in a Member State other than the state of preliminary proceedings,[87] with the consequence in principle being that the holder of the assets, although a part of the estate, will retain his rights in respect of the asset in question. Such a creditor should therefore be able to exercise the right to separate the security from the estate and, where necessary, realise the asset individually to satisfy his claim.[88] That said, an alternative view is that article 8(1) specifies the *opening of insolvency proceedings* as shielding rights in rem from those procedures qualifying under article 1 of the EIR Recast. A restructuring plan is not, in effect, an opening of insolvency proceedings. It is a separate measure with a separate mechanism for recognition and enforceability of judgments set out in article 32. While article 8 will protect creditors with a right *in rem* on assets of the debtor situated abroad, it would depend on the applicability of the EIR Recast to preventive restructuring plans. It is just a matter of whether Member States will or will not implement the PRD using a proceeding already included in that Annex or will activate the process to have it included therein. article 1(1) leaves this decision effectively to Member States. However, if the new preventive restructuring processes are scheme-like, deriving from company law, article 8 will not be able to provide protection as the EIR Recast would not cover such procedures.[89] This view asserts that an interpretation of article 8 along these lines would not shield rights *in rem* on foreign assets from a restructuring at all.

On the other hand, where a restructuring is carried out under a new procedure added to Annex A of the EIR Recast it would seem that rights *in rem* held in relation to assets situate in a second jurisdiction will be outside the restructuring process. And to be clear, the idea of article 8 shall not be expanded to any restructuring in proceedings not listed in Annex A.[90]

The EIR does not itself define rights *in rem* in any detail and individual Member States may have different definitions for such a concept. There is a potential conflict between these provisions of the EIR Recast and the operation of provisions under the Preventive Restructuring Directive, if they purport to interfere with the ability of the holders of rights *in rem* to exercise their rights fully outside of relevant insolvency procedures. As noted in the Italian response, the provision of article 8 of the EIR Recast, since it allows to foreclose on a collateral situated in a different Member State, may pose a contrast between the restructuring framework under which a plan has been conceived and the other Member State's rules on the enforcement of security rights (rights *in rem*).[91]

8.4.4 Rights *in Rem* under the PRD

The PRD has introduced a number of provisions that may imperil rights *in rem* subject to restructuring procedures. For example, the stay of individual enforcement actions may potentially interfere with the

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[85] EIR Recast, art 8(1).
[86] EIR Recast, art 8(2).
[87] Automatically recognised under EIR Recast, arts 19-21
[88] See Romanian Country Report, page 5.
[89] See German Country Report, page 4.
[90] Thank you to Professor Stephan Madaus for his synopsis of this viewpoint, which is common among German commentators.
[91] See Italian Country Report, page 6.

ability of a right holder to enforce its rights within the time frame stipulated by the contract. While a hindrance to enforcement, this does not affect property rights; by contrast, the majority rule provisions for the adoption of restructuring plans, and most significantly, the cross-class cram-down against dissenting classes of creditors have the potential to deprive rights holders of their full rights to repayment. The Directive does not give any particular special treatment to the position of secured creditors or rights *in rem* holders, as they are to be treated in a class and subject to a plan as agreed under the relevant procedure. This means that a plan may have the effect of impairing a secured creditor's rights, depending on the priority rules applied. For example, the plan is agreed such that it deviates from absolute priority, a secured creditor may not benefit from full repayment whole more junior creditors are receiving something, which certainly impairs the rights they would normally have in a liquidation procedure. While theoretically restructuring procedures must respect the provision of article 8 of the EIR Recast and should not include secured creditors, the Directive appears to allow for the impairment of the rights of secured creditors,[92] depending on how the frameworks are implemented within the Member States. That said, from a pragmatic perspective, excluding an important preferential creditor from the negotiations and approval of a preventive restructuring plan may lead to the ineffectiveness of the plan as a whole.[93]

8.4.5 Jurisdictions Allowing Potential Impairment of Rights *in Rem*

JCOERE Questionnaire Question 10.2:

Given the interaction of Article 8 of the Recast Insolvency Regulation (see Annex B) on the protection of rights in rem and Article 11 of the Preventive Restructuring Directive allowing for a cross-class cram-down, there is a potential conflict between the protection of rights in rem and the application of a cross-border cross-class cram-down. *Consider Article 8 in Annex B and Article 11 in Annex A and indicate whether or not this conflict is present in your jurisdiction. Please provide examples, reference to policy, principles, and legislative texts where relevant.*

a) *Ireland*

In Ireland, the most common exercise of a right *in rem* is the right of a secured lender to appoint a receiver over an asset or assets of a debtor. A receiver can either be court-appointed or appointed by a debenture holder, the latter being considerably more common; where it is the latter, the terms of the debenture (contract) will dictate the circumstances that give rise to his appointment. It is common to have a receiver appointed as a receiver-manager, despite the fact that this right has been severely curtailed under English law. A receiver-manager takes control of the business, effectively suspending the powers of the directors, and realises the assets in order to repay the creditor. Alternatively, he manages the business in order to salvage some or all of it. The debenture holder has a contractual right to appoint the receiver. Irish law, however, permits the displacement of the receiver by the appointment of an examiner provided that the receiver has not been in situ for more than 3 continuous days. [94] In this regard, the ability of a secured lender to exercise its rights over a secured asset is compromised by a rescue procedure. Whilst this might give rise to a conflict between the examinership procedure, the EIR Recast article 8 and the fact that examinership is registered in Annex A, this conflict will only arise in relation to assets situate outside the jurisdiction.

b) *Italy*

[92] See Romanian Country Report, page 5.
[93] *ibid*.
[94] It is often the case that the company as debtor in possession applies to have an examiner appointed as a defensive mechanism to the appointment of a receiver. Per Irish Companies Act, s 512(4) "The court shall not give a hearing to a petition if a receiver stands appointed … for a continuous period of at least 3 days prior to the date of the presentation of the petition." This short "window of opportunity" has occasionally given rise to last minute petitions by companies for the appointment of an examiner; in *Re Belohn & Merrow Ltd* [2013] IEHC 157 for example, the Receiver was appointed to Merrow Ltd – the sole registered shareholder of Belohn Ltd – on a Friday and when they became aware of this on the following Sunday, the directors of Merrow Ltd petitioned the court *ex parte* for the appointment of an examiner.

Italian law also provides for the automatic creation of certain rights *in rem* when parties enter into particular transactions or relationships. These liens concern, for instance, some tax claims and costs incurred to enforce against an asset in the context of a litigation. There are also cases in which creditors will automatically enjoy a general priority over all of the assets of a debtor. These are not technically considered rights *in rem* under the Italian framework, as the collateral is not represented by a specific asset or a collection of indefinite assets; rather, it is extended over an entire estate. Further, it is contended that these should not be considered rights *in rem* under the EIR Recast either

The Italian moratorium extends to secured claims if granted upon the filing of a petition for judicial composition with creditors or the confirmation of a restructuring agreement.[95] Deferral of payment under the plan, which provides for the continuation of the business, may last for a maximum of 2 years after confirmation.[96] This deferral of payment of secured claims may be imposed overcoming the dissent of relevant classes through a cross-class cram-down.

It is also permitted in general under the Italian restructuring frameworks for the debtor to create a plan that pays a secured claim less than its face value, provided that a payment of at least equal value of the collateral is granted, essentially a case in which the creditor would be in no worse position if it were faced instead with liquidation. The deficiency in the claim can then be treated as an unsecured claim (described as a "bifurcation"). Significantly, the consent of the affected secured creditors is *not* required under the Italian framework. This is clearly out of keeping with the protection intended by article 8 of the EIR Recast.

The right to enforce against the secured asset situated within the territory of another Member State, a right protected under article 8 of the EIR Recast, may allow the relevant secured creditor to use that asset as a hostage, whenever the disposal value (*i.e.*, the value the debtor would bear to replace the asset) is significantly higher than the market value (*i.e.*, the value the creditor would obtain foreclosing on the asset), and thereby obtain a higher recovery by threating foreclosure. This adds costs to the struggling business in terms of the need to replace the asset and potentially loss of revenue during the intervening period, which may threaten the success of a restructuring plan. In addition, the protection of article 8 may put the creditor with the asset outside of the primary jurisdiction in a much stronger position than a creditor with property in the jurisdiction of procedure; article 8 does not offer the same protection in the latter case. Such a dynamic, especially if applicable on a plurality of assets or if the disposal value is much higher than the market value (in case of "tailor-made" assets etc.) will erode the margins available to successfully achieve a restructuring. The view of the Italian respondent is that this is clearly at odds with the purposes of the preventive restructuring framework.

German insolvency law continues to respect security rights in terms of a priority in access to the value of encumbered assets. The process of liquidating the asset outside of insolvency proceedings and thus controlling its timing is only granted to the secured creditor where the asset is immovable, or the creditor is currently in possession of a moveable asset. If, however the debtor was in possession of a moveable asset, the right to foreclose is assigned to the insolvency practitioner who may sell the asset with proceeds going to the secured creditor, less a deduction of legal costs. Still, even the enforcement of security rights outside of insolvency proceedings can be stayed in favour of securing a going concern of the debtor's business in Germany. A German insolvency plan may even permanently modify security rights provided that the secured debtor agrees or receives the value achievable in a liquidation.

According to Romanian insolvency legislation, the secured creditors have a general priority where the proceeds obtained from the sale of their duly perfected collateral are concerned. This is provided that such proceeds first satisfy taxes, fees, costs, expenses arising from the sale of the assets and claims of secured creditors which arise after the opening of the insolvency procedure (including the principal, interests and ancillary rights). If the secured creditors are not fully satisfied following the sale of their collateral, the outstanding amounts will be deemed to be unsecured claims.

[95] CCI, art 54 para 2.
[96] CCI, art 86 – only one year under the Insolvency Code, art 186 *bis*, although a longer deferral is allowed if secured creditors are given the opportunity to vote on the plan and the plan is confirmed by the court (possibly overcoming the dissent of the relevant classes of secured creditors, if the proposals complies with the requirements for cross-class cram-down). Under CCI, art 86 due to entry into force on August 2020, a deferral of payment is allowed for a period of up to 2 years and, in all cases, secured creditors are entitled to vote on the plan (thus, no deferral of secured claims beyond 2 years seems to be allowed under the new rules).

The Austrian, Polish, Spanish, and Dutch positions are quite similar to the German approach. Rights cannot be infringed in an insolvency or restructuring, without express and unanimous consent by the secured creditors. Currently in France, there is no conflict in French insolvency law, though this could change following the implementation of a law under the *Loi Pacte*, which does not currently indicate if there will be a conflict with the protection of rights *in rem* under article 8. Similarly, if the UK introduces a new restructuring framework following on from the consultation, there may be a conflict with article 8 and the eventual introduction of the cross-class cram-down, depending on the nature of the rights that are permitted to be infringed in a plan. As the UK does not currently espouse a cross-class cram-down element, this conflict is not at issue. However, given the willingness of the UK government to introduce this provision and its current application of majority rule in the Scheme of agreement, which can affect secured creditors, it is not likely that this conflict will be problematic in the UK. Further, given that the scheme is not covered by the EIR, the protection of rights *in rem* would not extend to plans derived under this procedure in any event. As the EIR Recast does not apply to Denmark, there is no conflict.

Effectively, a cross-border restructuring in which a lender has a right in rem in a second jurisdiction, will access to the assets covered by the right be limited by the absolute terms of Art 8 of the EIR? Is this a significant practical issue?

8.5 Conclusion and Transition

Chapter 8 has given a synopsis of the first half of Part III of the JCOERE Questionnaire, focussing on thresholds of insolvency, debtor in possession as set out under article 5 of the PRD, and the interrelationship between article 8 of the EIR Recast protection rights *in rem* and the potential to impair secured creditors rights under the PRD. The concept of thresholds of insolvency is important as it is at this cusp that the availability of a preventive restructuring procedure over an insolvency procedure will be possible. Where these differ across Member State lines, other more flexible jurisdictions may be more attractive, leading to potential COMI shifting. While the PRD aims to reduce court and practitioner involvement, it has made this aspect broad in scope. This means that Member States have discretion to choose a higher level of involvement of courts, authorities, and practitioners, perhaps more than the spirit of the PRD may have initially intended. Finally, while the protection of rights *in rem* seem to be absolute under the EIR Recast as it relates to foreign property, the wording of the regulation does not necessarily cover secured property in the primary insolvency jurisdiction, which will mean potentially differential treatment of secured creditors across borders. As the PRD was aiming to approximate and harmonise Member State laws in preventive restructuring, the broad scope given to adopt its provisions may potentially fail to achieve this aim.

The next Chapter will offer a simple conclusion of the discussions had in this Report to summarise the main ideas and findings.

9. Chapter 9: Conclusion of the JCOERE Project Report 1

9.1 Introduction

The first Report of the JCOERE Project has presented the context within which the project's overall investigation of court-to-court co-operation in cross-border restructuring cases arises. It has considered preventive restructuring frameworks among the Member States along with that provided in the new Preventive Restructuring Directive. In order to fully understand the substantive and procedural issues associated with preventive restructuring frameworks that may cause obstacles to effective court-to-court cooperation, it was necessary to first explore how these are reflected in the contributing jurisdictions, within the PRD, and also within the debates and commentary surrounding the more controversial provisions common to advanced preventive restructuring frameworks. This first Report from the JCOERE project has therefore dealt with core substantive rules and some procedural aspects arising directly from preventive restructuring legal frameworks so that the overall JCOERE hypothesis may be addressed and considered in the second Report. This hypothesis is that given existing experience with restructuring (e.g. the Irish Examinership[1] and the English Scheme of Arrangement) obstacles to court cooperation will arise from substantive rules which are particular to preventive restructuring and that in addition, some of these problems pertain to existing procedural obstacles which will be exacerbated in the preventive restructuring context.

This Report contains 7 substantive chapters ranging from exploring issues arising from the comparative methodology adopted in the study, to the consideration of important concepts such as the regulation of cross-border insolvency and restructuring and on to academic commentary and debates around preventive restructuring. Since the financial crisis of 2006/07 there have been many changes to insolvency and restructuring frameworks at national level within the EU. However, these changes had remained broadly domestic in nature rather than achieving any substantive convergence of legal frameworks within the EU. It is a commonly shared belief that substantive harmonisation in insolvency law will always be difficult to achieve due to the range of differences in legal frameworks which are impacted by, or linked to, insolvency systems. Exceptionally, the PRD introduced an opportunity to harmonise one aspect of insolvency law, namely preventive restructuring. Chapters 4 and 5 of the Report describe the policy discussions surrounding this significant step in the EU.

Following on from that discussion, the three core chapters of this report, namely Chapters 6-8, present a synthesis and comparative discussion of the various jurisdiction-based contributors' responses to the JCOERE Questionnaire which focussed on the state of play regarding restructuring in each jurisdiction. Based on the experience of some European jurisdictions with restructuring, in particular in Ireland and the UK some key aspects of the PRD were used to formulate the JCOERE Questionnaire.

Following our research and analysis of the questionnaire responses, we argue that although the PRD represents an attempt to harmonise approaches to preventive restructuring and to introduce such measures in jurisdictions that do not yet have them, the scope of derogation, and the differences in views at domestic policy level regarding the more controversial provisions, mean that it is unlikely to achieve close harmonisation upon implementation throughout the Member States. The following Chapter will summarise the chief findings in this Report.

9.2 Summary of Findings

9.2.1 <u>Preventive Restructuring Terminology</u>

Chapter 2 of this Report set out commonly used terms (in English) but also explored some of the discrepancies in the meaning of some terms that are used by several jurisdictions, but at times have slightly (or in some cases) significantly different meanings. There is no need to summarise this

[1] Irish Companies Act 2014, part 10 "Examinerships".

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Chapter's findings here, apart from pointing out that these terms were identified by the contributors who responded to the JCOERE Questionnaire. During the analysis of these responses, it became clear that sometimes seemingly similar terms are used in different jurisdictions to mean different things, which could present challenges to harmonisation and could also cause confusion when communicating across borders. Three aspects of the PRD which we considered seem to have engendered quite a bit of confusion in a comparative context. These are the threshold question, namely when the preventive restructuring procedure will be available and whether this ought to be available in situations which are described in some jurisdictions as pre-insolvency. The consequent characterisation restructuring as preventive or pre-insolvency seems to cause both linguistic and conceptual difficulties. A second area relates to the involvement of the IP in a debtor in possession model of rescue. Some contributors seem to see this as a binary issue, either the IP is in control or the debtor is in control, whereas this was not seen in such binary terms by others. Finally, the involvement of a court or administrative authority has engendered considerable divergence of opinion.

9.2.2 The Regulation of Cross-Border Insolvency and Restructuring in the EU

The Chapter on the regulation of cross-border insolvency and restructuring in the EU explored the way that cross-border insolvencies are currently regulated within the EU along with a description of this development over time. By the time the EIR Recast was passed, there had been multiple attempts to agree to insolvency conventions that would aid in cross-border insolvencies, beginning in the 1970s. These attempted conventions often failed due to a lack of unanimity among the states negotiating them. It took the EU Institutions negotiating together to create a regulation that could begin to co-ordinate complex insolvency procedures across the Member States.

While the EIR and its Recast did not harmonise insolvency or restructuring frameworks in any substantive sense, they have succeeded in creating a regulatory framework that helps to manage complex cross-border cases efficiently by introducing rules of jurisdiction and instituting rules about the universal nature of primary proceedings, with the option to file secondary domestic proceedings where viewed as necessary to protect domestic interests. Thus, the key features of the EIR Recast include rules of procedural uniformity, the application of the COMI test to establish primary jurisdiction, and the scope of application of the Regulation by reference to procedures situated in Annex A. These provisions aimed in part to prevent forum shopping, though the COMI test can still allow for shifts if certain criteria are met.

Legitimate forum shopping is not likely to be further reduced without real substantive harmonisation within the EU. However, empirically throughout this first stage of our research it did not seem to be the case that whatever the level of forum shopping there currently is in the EU was a barrier to co-operation in insolvency matters.

The effect of the EIR Recast seemed to be clearly understood in the surveys and discussions which we conducted with members of the judiciary and practising professions. All in all, the EIR Recast seemed to have achieved its policy aims. The provisions on recognition are clear. As for co-operation, it did not seem that the issue of positive co-operation and consequently the obligations imposed by the EIR Recast arose frequently in reality. It is not clear how the PRD at the moment how will affect this status quo.

9.2.3 The Context of Preventive Restructuring in the EU

Chapter 4 examined the theoretical and conceptual development of preventive restructuring, pre-insolvency, and some of the more controversial provisions common to advanced preventive restructuring procedures. This Chapter began with a discussion of the theoretical framework within which preventive restructuring has developed, beginning as it does from a basis in insolvency law and theory. It considered the well-known creditors' bargain theory introduced by Thomas Jackson and Douglas Baird. The traditionalist insolvency theory is then contrasted with the creditors' bargain as it relates to rescue and rehabilitation goals, while the communitarian and insolvency choice theories developed by Korobkin set the scene for a more stakeholder oriented approach, which it could be said more closely reflects the aims of preventive restructuring with its emphasis on job protection and the broader policy issues relating to capital markets as outlined by the EU. A discussion of the justification for corporate rehabilitation is given, focusing on the commonly accepted reasoning that more value can be saved if economic entities are kept intact, rather than sold off piecemeal as would be done in a straight liquidation.

Within the theoretical context, the conceptual evolution of preventive restructuring within the EU was discussed in terms of contrasting academic and scholarly commentary on the subject. One of the key debates in this area revolves around the conceptual problems associated with the use of a collective proceeding for a company in financial distress when that company is not actually formally insolvent. As described above in relation to Chapter 2 the threshold question revolves around the idea that the justification for imposing a collective proceeding in an insolvency (or insolvent restructuring) procedure arises from the fact that the assets are insufficient and would otherwise be dissipated in an inefficient manner to the detriment of all creditors. When a company is not yet formally in a situation of insufficient funds, this justification is not obvious to some commentators. However, this problem may be mitigated by the fact that some view "pre-insolvency" as essentially an insolvency situation in which the likely outcome is a formal insolvency unless a restructuring takes place. It is our view that there is a debate being conducted at cross-purposes aggravated by misunderstandings and mistranslations of different legal systems, a problem inherent in comparative contexts. The Chapter goes on to discuss the definition of preventive restructuring as it is set out in the PRD, which includes pre-insolvency as well as situations where there is "a likelihood of insolvency"[2] with the distinction being only that the procedure instead takes place outside of what would be considered formal insolvency procedures. This question is the subject matter of contributor responses which are described in Chapter 8. It will be returned to in the second JCOERE Report.

A brief discussion of the evolution of the PRD was also presented to lend additional context to the exposition of the PRD discussed in Chapter 5. This section discusses some of the earlier influences on the introduction of preventive restructuring occurring outside of the institutional negotiations, particularly a report by INSOL Europe. It also explains some of the background influences leading to the introduction of a harmonising directive for preventive restructuring frameworks, namely the financial crisis.

The more controversial provisions were discussed in terms of the debate and commentary surrounding them. These include the stay or moratorium; intra-class cram-down; cross-class cram-down; and the protection and priority of new and interim financing. The stay or moratorium is considered a central aspect of preventive restructuring as it avoids the rush to court by creditors for a period of time while negotiation can take place. While true that a stay interferes with creditors' rights and potentially creates a means of abusing the procedure, this is mitigated by the obligation to provide a means to lift a stay. The protection of new and interim financing is also considered a somewhat controversial provision as it also interferes with creditor priorities. However, this provision has been recognised in established processes as being necessary to ensure the success of a restructuring plan. By providing that new financing will not be subject to normal insolvency rules such as avoidance actions and existing priority rules, new lenders can be encouraged to provide funds.

Majority rule within classes is also justified as to require unanimity would give stronger creditors a right of veto over a restructuring plan. The cross-class cram-down has provided European insolvency academics with a rich field of debate around the relative values of absolute as opposed to relative priority. While the academic debate continues and is likely to influence lawmakers in some jurisdictions, the PRD allows a broad scope to adopt either of these tests in addition to a test of unfair prejudice. Absolute priority is supported as it preserves pre-insolvency entitlements and prevents an erosion of creditors' rights by trying to force through a plan. However, absolute priority in its pure form is viewed as too rigid in an effective restructuring framework. Thus, the Commission introduced a relative priority rule, although it would seem that this differs from what is considered relative priority in the United States, according to some. Regardless of the unresolved nature of the debate, the PRD provides for a menu of choices to ensure the fairness of cramming down a plan against dissenting creditors, including one of relative priority.

[2] PRD, art 4(1):
"Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity. "

The consideration of these four controversial provisions provide context for both the discussions in the exposition of the directive in Chapter 5 as well as for the focus of the JCOERE Questionnaire, discussed in Chapters 6-8.

9.2.4 Exposition of the Preventive Restructuring Directive

As outlined in Chapter 5, the PRD, which came into effect on 20th June 2019 and is due for implementation by 17th July 2021, is the culmination of years of communication and negotiation between the various EU institutions. Its primary specific goal was to harmonise certain aspects of EU insolvency and preventive restructuring law with an overall aim of promoting and encouraging cross-border investment and company expansion. This aim was somewhat unsurprising given the financial upheaval within the EU at this time. To achieve agreement from the various member states, however, considerable compromises had to be made, some of which may have arguably weakened the overall goal of the Directive. Chapter 5 outlines the historical development of the PRD, with the goal of giving a clear context for Chapters 6 – 8 and in particular, to explain some of the perceived resistance to change within some member states.

The Chapter highlights the changes made by the various bodies to the Commission Proposal (2016) by the time the Directive was signed in 2019, however, the historical analysis actually begins with a report presented to the European Commission by the European Parliament Committee on Legal Affairs in 2011. This interaction, in addition to the response from the Commission in 2012 and the Commission Recommendation in 2014, presents the background for the subsequent Commission Proposal. Many of the key aims and goals of the Directive were stated and repeated throughout the process. The difficulty in harmonising law of this nature across the Member States, is explained in the context of the more 'controversial' aspects of the PRD, namely, the stay of individual enforcement actions, the protection of new finance, decreased court formality, and the cross-class cram-down. Examining the development of the articles relevant to these provisions provides important background for Chapters 6 – 8.

As implementation of the Directive is not due until 2021 it is difficult to predict how the controversial provisions as outlined in Chapters 4 and 5 will impact on recognition and co-operation under the EIR Recast. With regards to implementation, there is also a prospect that new frameworks may avoid inclusion in Annex A of the EIR Recast in order to retain flexibility to attract cross-border restructuring cases. As the PRD does not require that all frameworks are included in the Annex, nor does it require that the Annex A criteria are satisfied by the frameworks, there is scope for Member States to effectively avoid the more restrictive COMI tests should they avoid inclusion. Such procedures could be introduced to compete with the UK Scheme of Arrangement, which is not an Annex A procedure, and which post-Brexit may no longer be a preferred jurisdiction, opening the way for competing procedures, such as the Irish Examinership and new Dutch WHOA procedure. (That said, the Irish Examinership procedure as with the French *sauve garde procedure* is listed in Annex A). Despite the potential lack of harmonisation of restructuring frameworks and the continued possibilities for forum shopping outside of the EIR Recast, the introduction of more efficient restructuring frameworks will still be beneficial to the EU as a whole.

9.2.5 The JCOERE Questionnaire: Chapters 6-8

Chapters 6-8 of this Report provide a synthesis of the 11 contributors' responses to the JCOERE Questionnaire, the purpose of which was to explore substantive and procedural rules arising in the context of preventive restructuring, which may be challenging in terms of cross-border restructuring cases and in terms of harmonisation and implementation of the PRD. The challenges these present to court-to-court co-operation will be discussed in Report 2 of the JCOERE Project. The questionnaire focused on specific substantive (and procedural) rules arising in a typical restructuring process, particularly those that seem controversial in nature. These three chapters focussed on the substantive provisions of preventive restructuring in the contributing jurisdictions and how they measure up to the new PRD, with some discussion of procedural issues in Chapter 8.

Chapter 6 began by introducing the methodology surrounding the use of the questionnaire which began with the responses to the JCOERE Questionnaire. However, we also followed up a number of times for clarifications and additions in light or the original responses, along with a final review and approval. This was needed due to the challenging nature of comparative law in the context of multiple jurisdictions as well as engaging with contributors from different professional backgrounds. We hope that the fact we engaged with follow up dialogue from our contributors enriches the comparative methodology which the report adopted. The responses to part I of the questionnaire were also discussed in Chapter 6, which interrogated the existing preventive restructuring frameworks in the contributing Member States as well as the aims and functions of their insolvency and restructuring systems. These responses have helped to determine how each jurisdiction's preventive restructuring (or insolvent restructuring) frameworks relate to the terms of the PRD.

Part II of the JCOERE Questionnaire[3] queried the substantive aspects of preventive restructuring, asking the contributors to examine whether specific PRD-style provisions existed in their preventive restructuring frameworks, describe them, and identify what changes, if any, would be needed to bring their legal provisions into line with the PRD. While some Member States did not have truly preventive procedures, with restructuring instead occurring during an insolvency proceeding, the contributors were asked to respond with reference to comparable frameworks. The Member States that have contributed to the JCOERE Questionnaire vary significantly in terms of (1) the existence of preventive restructuring procedures; (2) the provisions common to preventive restructuring, which may currently be associated with insolvency or insolvent restructuring or reorganisation procedures; and (3) the perspective on certain key concepts and principles that are common to preventive restructuring.

The key provisions explored in Part II of the questionnaire as synthesised in Chapter 7 included the stay or moratorium, its existence and duration including extensions, as well as whether this stay was revocable by a court. The cross-class cram-down also generated an important discussion, which required a discussion of the various criteria required for confirmation and approval under the PRD. Rules pertaining to both the adoption and confirmation of restructuring plans had to be examined, including the ability to vote on a plan as well as what conditions were present that could exclude certain creditors from voting; including principles surrounding class formation and recognition; the examination of voting rights; and the application of majority rule within classes. These were necessary precursors to consider leading up to the discussion of the cross-class cram-down. Few jurisdictions provide for a cross-class cram-down in a preventive restructuring procedure and not all even have it in their insolvent restructuring procedure. This provision appears therefore to be one of the greater challenges to implementation. A current academic debate revolves around the menu of rules that can be applied to confirm a plan against dissenting classes of creditors. There are a variety of opinions on which rules are appropriate and most jurisdictions have not yet decided which they will apply when they come to implement the PRD.

The provision of interim and new financing was also queried with the contributors as this is a vital element for the success of preventive restructuring plans. The provision of protection from claw-back manoeuvres, liability for lending, as well as the potential to apply a super priority to such loans in repayment is a vital piece of the restructuring puzzle. The contributing jurisdictions take a varied approach to this concept, with views that it, along with aspects of the cross-class cram-down could lead to abuse of process and moral hazard. However, it is also accepted by others that this is an unavoidable aspect of preventive restructuring if the Member States are to create or adjust procedures that will be effective at rescuing companies from insolvency.

Part III of the JCOERE Questionnaire examined specific procedural aspects that could arise in relation to preventive restructuring frameworks. This part of the questionnaire was divided into two parts, the second of which will be dealt with in JCOERE Report 2 (the role of judicial or administrative authorities). Chapter 8 focussed on the jurisdictional approaches to the threshold of insolvency, which is important as it is at this cusp that the availability of, and accessibility to, a preventive restructuring procedure over an insolvency procedure will be possible. A right of *locus standi* in relation to preventive restructuring frameworks may therefore differ despite the fact that the PRD aims at harmonisation in this area. It also discussed contributor responses in relation to the requirement for insolvency practitioners in restructuring processes, for which there is currently a range of approaches, some, such as Ireland and Italy, requiring a practitioner to be appointed under all circumstances. Chapter 8 also explores whether the perceived legislative conflict between the EIR Recast on the protection of rights *in rem* and the introduction in the PRD of provisions that potentially interfere with these rights in both

[3] See Annex 2 of this Report for the full JCOERE Questionnaire.

the intra- and cross-class cram-down may produce a conflict in practice that could also interfere with the obligation to co-operate. While the protection of rights *in rem* seem to be absolute under the EIR Recast as it relates to foreign property, the wording of the regulation does not necessarily cover secured property in the primary insolvency jurisdiction, which will mean potentially differential treatment of secured creditors across borders. As the PRD was aiming to approximate and harmonise Member State laws in preventive restructuring, the broad scope given to adopt its provisions may potentially fail to achieve this aim. Where these differ across Member State lines, other more flexible jurisdictions may be more attractive, leading to potential COMI shifting.

9.3 Conclusion and Introduction to JCOERE Report 2

Report 1 has explored preventive restructuring in relation to existing domestic provisions and as presented within the PRD through discussion of academic and scholarly commentary and debate, a survey of specialists in 11 jurisdictions, and a synthesis of responses to establish where serious divergences may exist. Such divergences are not only challenges to implementation but may also challenge the recognition provisions under the EIR Recast because of the potential exclusion of restructuring frameworks from Annex A. Once outside the EIR Recast the obligations for co-operation as specified in the Regulation are not applicable. However, even if domestic preventive restructuring provisions are included there will be challenges to court-to-court cooperation arising from the provisions we have discussed in this report. These issues will be further considered in the second JCOERE Report.

10. Annex 1: Additional Submissions Contributing to the Exposition of the Preventive Restructuring Directive

The following are submissions from various groups and committees which contribute to the rich conversation about the PRD; however, when these contributions were included in Chapter 5 itself, it was felt that they compromised its flow and clarity. As such, they have been included here in Annex 1 for readers who wish to delve further into the development of the PRD.

10.1.1 <u>The Experts Group on Restructuring and Insolvency Law (2016)</u>

Following on from the lack of reaction to its Recommendation, the Commission established the Expert Group on Restructuring and Insolvency Law – hereafter 'the Expert Group' or 'the Group'– which met a number of times throughout 2016. It was comprised of over 20 leading academics and practitioners from 12 EU countries and its function was to discuss various aspects of insolvency law and more specifically, to focus on how the Commission Recommendation may be amended, thereby making it more effective across the EU and leading to more legal certainty.[1]

The first meeting of the Expert Group took place on 14th January 2016, at which the members discussed the need for a definition of insolvency, the early warning system and directors' liability and disqualification. Much of the material discussed at that meeting was outside the scope of this particular report; interestingly, however, on the issue of a common definition of insolvency, the Expert Group did not view the matter in the same way as the European Central Bank, as discussed previously, in that there was no consensus amongst the members as to the need for a common definition.[2]

Amongst other matters, the issues of protection for new financing and the stay of individual enforcement actions were considered at the second meeting of the Expert Group. There was no consensus amongst the members as to the extent to which new financing should be protected, however concern was expressed that secured creditors may be prejudiced by the preferential treatment of new financiers in subsequent insolvency proceedings. One interesting point to note was the contention that the protection of new financing should have a time limit, after which such finance would not receive preferential treatment if new insolvency proceedings were commenced. On the issue of the stay, the Group emphasized the importance of the restructuring plan having a "reasonable prospect of the success", stating that this should be the test used by the courts in considering the application. On other aspects, such as whether the stay should be automatically ordered or on specific request of the debtor, there was a lack of consensus amongst the participants.

A more comprehensive discussion relating to the stay took place at the third meeting of the Group; the experts were of the view that a debtor should be able to request a stay where individual enforcement actions would negatively impact on the restructuring process, however it was thought by some members that the stay should only be granted in circumstances where the negotiations have a reasonable prospect of success and do not unfairly prejudice creditor's interests.[3] Interestingly, on the matter of the duration of the stay, the Group disagreed with the Recommendation – and consequently, the eventual text of the Directive – on the duration of the stay, as members advocated for a duration of two months instead of four. In terms of lifting the stay, the Group was of the view that the stay could be lifted at the request of

[1] Minutes Expert Group Meeting – 14/01/2016 p.3; "[t]he view shared by the majority of the experts is to focus on how the Insolvency Recommendation may be improved as to provide more legal certainty and more binding force in Member States."
[2] Those who were in favour of a common definition were of the view that it would increase legal predictability and consistency in early restructuring across Member States. Those opposed to a common definition viewed it as unnecessary for accessing early restructuring, instead many viewed consistency in the elements which trigger restructuring as the best way forward.
[3] The use of the word "only" is added by the author, as it seems to be implied in the meeting minutes but not expressly stated.

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a majority of the creditors involved in the restructuring process or by a single (class of) creditor(s) if it was unfairly prejudicial. The issue of decreased court involvement / greater flexibility within the restructuring process was also discussed with a majority of the Group opining that debtors should be able to begin restructuring without the need to immediately open court proceedings, but with the appointment of a "competent and well-trained" mediator or supervisor.

At the fourth meeting of the Expert Group, the members discussed a number of key points including cram-down and protection of new finance.[4] It is worth noting at this point that it was unclear if the Group reached a consensus on many of the issues discussed, as the report often refers to "some members" as opposed to "the experts", "the majority of members" or "the Group". On the issue of cram-down, the Group were in favour of a provision which would allow Member States to avoid "a hold out from 'out-of-the-money' shareholders"; as such, the members discussed 'cross-class cram-down' with "appropriate safeguards" as one mechanism of avoiding such a 'hold out'.[5] The Group appeared to have quite a comprehensive discussion on the matter of protection for new financing. They discussed granting super-priority status to new financing subject to court confirmation and while some members were in favour of this approach, there was a divergence of views regarding how this should be reflected in the law;

> "some members of the group expressed … that the new instrument should not entail too many details on this issue, just providing for a general rule on protection of new finance in case of liquidation...others were in favour of providing for more details, in order for the [Member State] to be able to implement correctly the legislation."[6]

The experts advocated for a distinction to be made between 'new financing' and 'interim financing', however, they stopped short of agreeing definitions of new and interim finance. Instead, some of the members opined that interim finance should be understood as "the money necessary to enable the debtor to negotiate a plan with its creditors". Some members of the group went on to suggest that interim financing should receive some protection, just not super-priority status. The Expert Group then proceeded to identify some key questions related to new and interim financing:

- When should protection be granted for interim financing; should it be the date of the hearing for granting the stay, or when a mediator has been appointed by a court, or any step which indicates clearly that the debtor has entered into a restructuring process?
- Should protection be granted for 'new equity money'?
- Should the protection of new financing be granted for a limited period?

Little of the content of meetings 5 and 6 of the Group is relevant for the purposes of this report, however the stay was discussed once again.[7] The majority of the Group advocated for a stay of short duration, which would not exceed 4 months save in exceptional circumstances, where there would be a possibility of extension. It is interesting to note that the Group theorised that longer time periods "would just create unwanted incentives for debtors without raising the chances of agreement in practice".

[4] The matters of the stay and judicial involvement were also discussed but former discussion was limited to whether the stay should only apply to past unpaid claims or to both unpaid claims and current obligations and the latter to judicial involvement in the context of the confirmation of a restructuring plan, where it appeared to be the view of the experts that court confirmation was necessary is all cases where there was interference with the rights of dissenting creditors.
[5] The Group also proposed an alternative solution; a provision "by which the liability of directors and/or shareholders may be sought in subsequent insolvency proceedings if there is an attempt to reach an agreement bearing in mind that in preventive restructuring it remains difficult to assess whether shareholders would be out-of-the money in case of liquidation(as the debtor should not be insolvent to enter into a preventive restructuring process under the scope of the future instrument)."
[6] Expert Group Meeting 4, 4
[7] The conversation regarding whether future EU restructuring matters could come within the scope of the recast insolvency regulation was interesting, as the Group noted the requirement within the recast EIR that proceedings be public. The Group expressed concern that this requirement that the restructuring procedure be conducted in "public" could undermine one of key factors which determines the success of a preventive restructuring process namely the confidentiality of the negotiations. The importance of preventing debtors and certain creditors from forum shopping was also highlighted.

Meeting 7 saw the Group revisit the issues of the stay, cram-down and protection for new finance, amongst a number of other matters. The experts, once again, reaffirmed their position that the stay should be short – an initial period of three months[8] – and extended in the case of complex restructurings. As outlined earlier, it was interesting to note the "strong concerns" of certain experts that the stay would be open to abuse and their reference to the "moral hazard problem".[9] There was divergence between the experts as to whether the stay should be automatic and general. The same experts who expressed concerned regarding abuse also stated that the stay should be neither automatic nor general, whereas other members were of the view that the stay should be automatic at first, otherwise it would be "cumbersome for a court to determine if there are reasonable prospects of success of the restructuring". The Group also unanimously agreed that nothing should prevent the debtor from paying his creditors during the stay period.

Cram-down was discussed as one possible mechanism of ensuring that the adoption of a restructuring plan would not be unreasonably prevented by certain parties in the context of the treatment of out of money shareholders in the restructuring process.[10] From the perspective of this report, it was interesting to see that some of the Group were hesitant to make cramming down in such cases mandatory and noted constitutional issues such as "infringement of property rights" as potential conflict. On the issue of priority of the financier, the Group agreed that new and interim finance should be encouraged via provisions to exempt them from avoidance actions in subsequent insolvency proceedings and from civil and criminal liability in subsequent insolvency, unless there was fraud. There was, however, no consensus on whether the regulation needed more specifics regarding the ranking of new financiers in subsequent insolvency proceedings, e.g. they should be ranked senior to unsecured creditors, they should receive priority status, etc.[11]

At the 9th and final meeting of the Expert Group,[12] the issues of the stay and cram-down were revisited.[13] On the matter of the stay, the position of the Group appeared to be largely the same as it had been in previous meetings.[14] They reiterated their concerns on the link between the "moral hazard problem" and the length of the (extension of the) stay and advocated, once again, for the duration of the stay to be of a limited period and that any extension would be "granted under stricter conditions". On the issue of cross-class cram-down, the Group definitively summarised its position as one of being in favour of cramming down on dissenting creditors "as long as the best interest of creditors test is respected" and in favour of cross-class cram-down "as long as at least one class of creditors votes for the plan and the absolute priority rule is respected". The experts also, once again, raised the issue of the protection of property rights in relation to shareholders, however, where the shareholders form a class for the purposes of voting, they should be subject to cross-class cram-down rules.

Lastly, the Group, once again, discussed the matter of confidentiality in the negotiation process. There was no consensus amongst the experts as to whether confidentiality should be mandatory in the process. Some experts viewed confidentiality in the negotiation of restructuring plans as essential to ensuring that the success of the restructuring plan was not compromised. As such, it was their view that confidentiality should be guaranteed.[15] Interestingly, other members opined that once there is court

[8] This duration was most desirable according to the majority.
[9] Broadly speaking, moral hazard occurs when a party takes increased risks because they are aware that another party will bears the cost of those risks.
[10] Other mechanisms included shareholders' liability in cases where they reject the restructuring plan frivolously and preventing the out of money shareholders from voting.
[11] Some of the experts viewed better protection for new financing to be necessary to ensure the success of a restructuring plan. Others were hesitant to mandate more increased protection for new finance because of "potential repercussion to securities, credit markets and capital requirements for banks".
[12] At meeting 8, the Expert Group discussed rules for group companies, 'safe harbour' provisions relating to avoidance actions and new rules on second chance, however, none of these issues are directly linked to the specific focus of this report.
[13] Protection for interim financing was also briefly discussed, as well as a number of other issues not directly relevant to this report such as, Ipso Facto clauses, third party releases and minimum standards for Insolvency Practitioners.
[14] With that said, comments from individual experts were minuted. One expert was of the view that protection from avoidance actions for interim financing should only be given when the negotiations yield a court confirmed plan. This view did not appear to be popular with other members.
[15] It is worth noting that the "problematic issue of the relationship of this legislative instrument with EIR" was also highlighted in the context of this discussion.

involvement, there would be publicity/opening of proceedings for the purposes of Insolvency Regulation and as such, confidentiality should not always be applicable. Furthermore, they added that a requirement for confidentiality may conflict with other laws, for example where the debtor is subject to laws for listed companies.[16]

10.1.2 National Parliament Submissions to the European Parliament

The first opinion on the Commission proposal to be received by the European Parliament came from Dáil Éireann, the Irish Parliament, via article 6 of Protocol (No. 2), which states:

> "Any national Parliament …may …within eight weeks from the date of transmission of a draft legislative act …send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft …does not comply with the principle of subsidiarity."[17]

In line with the internal workings of the Dáil, a Joint Committee was created to consider if the proposed directive complied with the principles of subsidiarity and proportionality.[18] It found that the proposed directive was in conflict with the aforementioned principles on a number of grounds. At 3.2, the Committee opined that the proposal breached the principle of subsidiarity in seeking to harmonise the substantive law of Member States and specifically referenced what it described as the "prescriptive approach on both substantive and procedural aspects" of insolvency law. The Committee referenced the requirement that Member States provide for preventive restructuring frameworks contained in article 4, the "detailed conditions for Member States to fix a stay on enforcement actions pending restructuring" contained in article 6 and the minimum conditions for cross-class cram-down contained in article 11. The Committee acknowledged that although Irish law already had many of the features contained in the proposed directive, its approach was quite different on some of the more prescriptive provisions; as such, the Committee opined that the proposal may affect the delicately-struck balance between debtors and creditors, which individual Member States strike with "reference to specific cultural, social and economic factors".

At 3.4 the Committee expressed concern about the goal of the proposed directive to limit the involvement of the courts in insolvency matters. First, it expressed its unease at the use of the words "necessary" and "proportionate", opining that these words are open to a range of interpretations. Arguably, however, this flexibility of interpretation by the individual Member State contradicts the concern relating to the "prescriptive approach" taken by the proposal, which the Committee expressed earlier in the submission. Consistent with the concerns expressed by the Expert Group, the Committee noted the impact that the insolvency process can have on the property rights of creditors which, without a high level of judicial oversight, may raise questions as to consistency of the proposal with Bunreacht na hEireann (the Irish Constitution).[19]

Interestingly, at 3.7, the Committee expressed concern that the independence of the judiciary, provided for by the Irish Constitution, may be compromised by the requirements for specialised training of judges and for Member States to ensure that proceedings are dealt with in an efficient manner.[20] One could argue, however, that the qualification contained in article 25, namely "[w]ithout prejudice to judicial

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[16] It is worth noting that some experts differentiated between the adoption of a restructuring plan and the contents of that plan for the purposes of confidentiality.

[17] Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality

[18] The Joint Committee is comprised of members of the Dáil (Parliament) and the Seanad (Senate).

[19] The Irish Constitution explicitly safeguards property rights; see arts 40.3.2 & 43. Citing the distinguishing of business and personal debts in relation to sole traders, the Committee also noted the potential for the property rights of lending institutions to be affected if they no longer have full recourse against both the entrepreneurial and non-entrepreneurial assets of a sole trader. In view of the concern expressed for the rights of lending institutions, it is somewhat ironic that Irish law provides for the displacement of a receiver – generally appointed by a financial institution – if examinership proceedings are commenced within a designated timeframe, thereby denying the financial institution full recourse. In that way, Irish law already quite substantially affects the rights of financial institutions. Also, it is worth noting that the link made between constitutional property rights and financial institutions is quite tenuous, as Irish constitutional rights do not attach to an entity, only to an individual.

[20] The Committee contended this on the basis that Irish law does not dictate how the courts operate.

independence", should alleviate any related concerns. The Committee also viewed the requirement to collect data on the relevant procedures, contained in article 29, to be unduly arduous, as "a significant number of informal arrangements are made …between debtors and creditors, no details of which are maintained".

In total, national submissions were received from Germany, Spain, Portugal, Italy and the Czech Republic. Germany, through the Bundesrat, issued a lengthy opinion.[21]

10.1.3 EMPL – Workers' Rights

As outlined earlier in Chapter 5, the EMPL Committee proposed multiple amendments with a view to strengthening the position of workers. For example, the EMPL Committee advocated for a specific reference to "workers representatives" in Recitals 13[22] and 16[23] and for a specific reference to the right of workers in Recital 2.[24] The Committee also sought to create new recitals such as:

> "(1) All workers should have the right to protection of their claims in the event of the insolvency of their employer, as set out in the European Social Charter."
>
> "(3a) The Member States should examine the possibility of devising mechanisms to prevent excessive or abusive recourse by employees to experts at the expense of an undertaking, since such recourse would ultimately have a negative impact on the financial situation of the undertaking."
>
> "(3c) Special treatment should be accorded to retired workers whose pensions depend, entirely or in part, on company pension plans, and who might be harmed by early restructuring"

Interestingly, when amending Recital 35 – rights of workers where a restructuring plan entails a transfer of part of undertaking or business – the Committee advocated for specific account to be taken of "the rulings handed down by the Court of Justice, as Advocate-General Mengozzi recently pointed out in his conclusions in Case C126/16" i.e. the Estro case.

The Committee proposed amending article 3 to include "workers and their representatives" in the parties that should have access to early warning tools and argued for the inclusion of two new paragraphs within that article, which would guarantee access to information for employees' representatives and the ability of employees to communicate concerns.[25] Article 8(1), which governs the content of restructuring plans, was amended by the Committee to mandate the inclusion of the impact of the restructuring plan on all types of pensions of retired and current workers, on the working conditions and remuneration of workers and on subsidiaries and subcontractors. The insertion of a new article, 8(1a) was also proposed, which sought to consider employees a preferential class:

> "Workers' claims or other rights shall not be affected by restructuring plans and the workers class shall take priority. Exceptionally, contractual conditions may be renegotiated in early

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[21] The Bundesrat is the legislative forum comprised of the 16 Federal States.

[22] "Small and medium enterprises, especially when facing financial difficulties, **as well as workers representatives**, often do not have the resources to hire professional advice, therefore early warning tools should be put in place to alert debtors to the urgency to act."

[23] "The earlier the debtors or **the workers' representatives** can communicate concerns about an undertaking's worrying situation or financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in case of a business whose viability is permanently impaired, the more orderly and efficient the winding-up process. Clear information on the available preventive restructuring procedures as well as early warning tools should therefore be put in place to incentivise debtors who start to experience financial problems to take early action **and to empower the workers concerned so that they are able to take an active role in the restructuring process**."

[24] "In the restructuring process the rights of all parties involved should be protected, including **those of workers**."

[25] Art 3(2a); "Member States shall ensure that employees' representatives have full access to information and are consulted if action needs to be taken" and art 3(3a):

> "Member States shall ensure that workers' representatives are able to communicate concerns to debtors and entrepreneurs about the difficulties the undertaking is in and the urgent nature of those difficulties; Member States shall ensure that workers' representatives are in a position to have recourse to an independent expert of their choice in accordance with national law and practices, giving an access to relevant, up-to-date, clear, concise and user-friendly information regarding the financial situation of the business and the different restructuring strategies being envisaged, including transfer to worker ownership; Member States shall also ensure that the tax, social security, competition and audit authorities are able under national law to be able to flag any worrying financial developments as soon as possible."

restructuring processes at company level between the management and the workers' representatives if this serves the normal continuation of business activity and maintenance of jobs."[26]

10.1.4 ECON – Article 7

Amendments 57 – 61 of the report from the Economic and Monetary Affairs Committee pertained to article 7 of the Commission proposal[27]; the Committee attempted to rewrite article 7(2)[28] to confine "all creditors" to those "involved in the negotiation of the restructuring plan" and to add "with the exception of workers, in accordance with article 6(3)" to the end of the article. Similar to the proposed amendment to article 6(9), ECON attempted to strengthen the position of creditors in article 7(3)[29] and 7(4) by inserting the condition of not causing "severe financial difficulties to creditors"[30] to (i) the stay, or suspension of the opening of insolvency proceedings and (ii) the prevention of the modification (including withholding performance, termination or acceleration) by creditors of executory contracts.[31] The Committee attempted to soften the requirement on Member States to prevent creditors from modifying executory contracts via a contractual clause[32] by changing the wording form "shall ensure" to "may require". None of the changes proposed by ECON were adopted in the final text, thus the protection afforded to creditors remained largely as it was before.

The Report proposed only one change to article 17, the replacement of the word "may" with "shall" in article 17(3);

> "Member States shall require the transactions referred to in point (e) of paragraph 2 to be approved by a practitioner in the field of restructuring or by a judicial or administrative authority in order to benefit from the protection referred to in paragraph 1."[33]

Point (e) was removed from the final text, thus the amendment was rendered moot.

Similar to EMPL, ECON proposed no amendments to article 11, but did propose five to article 9. Generally speaking, these amendments attempted to strengthen to position of workers and vulnerable creditors.[34] The Report proposed specifying "workers" in the types of creditors who should have a right to vote on a restructuring plan and added that creditors should have "full knowledge of the consequences" of the restructuring plan.[35] ECON also amended article 9(2) to provide that Member States "shall" provide that workers are treated in a class of their own, as opposed to that they "may" do so, as per the original proposal and inserted a reference to "specific rules supporting separate class formation for vulnerable creditors, such as small suppliers and micro and small enterprises" at the end.[36] Few of the amendments proposed were accepted in the final text, however, given that article 9(4)

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[26] The amended art 9(2) also refers to employees as preferential creditors.
[27] Amendment 61 was to the original art 7(6), which was subsequently from the final text, so just Amendments 57 - 60 will be considered
[28] Pertains to the prevention of the opening of insolvency proceedings during the stay by creditors.
[29] The derogation from art 7(1); "Where the obligation of the debtor to file for insolvency under national law arises during the period of the stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay"
[30] ECON Report 35:

> "Member States may derogate from paragraph 1 where the debtor becomes illiquid and therefore unable to pay his debts as they fall due during the stay period. In that event, a judicial or administrative authority shall have the power to defer the opening of the insolvency procedure and to keep in place the benefit of the stay of individual enforcement actions, on condition that it does not cause severe financial difficulties to creditors, in order to examine the prospects for achieving an agreement on a successful restructuring plan or an economically viable business transfer, within the period of the stay."

[31] The Committee further amended art 7(4) to include "any supplies where a suspension of deliveries would lead to the company's activities coming to a standstill" as the definition or meaning of an executory contract.
[32] "…that creditors may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay."
[33] ECON Report p. 44. For clarity, "point (e)" is one of the "[t]ransactions enjoying the protection referred to in paragraph 1" per art 17(2); "transactions such as new credit, financial contributions or partial asset transfers outside the ordinary course of business made in contemplation of and closely connected with negotiations for a restructuring plan".
[34] For example, ECON added the following to att 9(6); "Member States shall guarantee that in the case of lack of collaboration of other creditors, the workers' restructuring plan may be presented to the competent administration or court and adopted without the consent of non-cooperative creditors."
[35] ECON Report, 39.
[36] ECON Report, 39.

requires now Member States to put appropriate measures in place “to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers”, it appears that the Committee may have had success on that particular point.[37]

10.1.5 Committee of the Regions

In October 2017, the Committee of the Regions expressed its opinion on the proposal and drafted seven amendments to the proposed directive. Generally speaking, these amendments pertained to the rights of workers or their involvement in the insolvency process. The COR also made a number of policy recommendations, many of which were quite general in nature such as “creating new opportunities” i.e. facilitating start-ups and “access to finance” for start-ups. The COR did, however, express specific concern about what it considered to be the “current inability to harmonise Member States’ legal systems relating to insolvency proceedings; it was the view of the Committee that the directive would not “make a meaningful contribution to increasing the number of start-ups remaining on the market for longer than two to three years”.[38]

[37] Art 9(4); Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.
[38] Opinion COR – 12/10/2017 – 342/47

11. Annex 2: Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Jurisdiction Questionnaire

11.1 Introduction

Thank you for agreeing to contribute to our report mapping the Preventive Restructuring Processes and the new EU Directive[1] as part of the JCOERE Project.

The JCOERE Project (Judicial Co-Operation supporting Economic Recovery in Europe), (Project Number 800807) funded by the EU Justice Programme (2014-2020), will identify obstacles to judicial co-operation presented by both existing domestic restructuring frameworks and the implementation of the Directive. JCOERE is focused on the strengthened co-operation and communication obligations imposed on the courts in the Recast Insolvency Regulation,[2] specifically in the context of preventive restructuring processes.

The Project will explore substantive and procedural rules arising in the context of preventive restructuring, which we consider may present obstacles to co-operation. It will focus on specific substantive rules arising in a typical restructuring process, such as the commencement of secondary proceedings to protect a creditor's interests in the face of the 'cram-down' provisions. The question of whether it is reasonable for a court in the second state to decline jurisdiction becomes more immediate in such circumstances. In addition, the project will explore the challenges that procedural rules might present to co-operation. In short, our hypothesis is that the obligations imposed on courts to cooperate may be challenged in the context of radical restructuring processes.

A key element of the first JCOERE Project Report is to map existing restructuring processes and the Directive, focussing on specific provisions in several EU Member States. Firstly, it will include those partnered on the JCOERE Project: Ireland (University College Cork), Italy (Università degli Studi di Firenze), and Romania (Universitatea Titu Maiorescu).[3] Secondly, contributors from several other Member States have agreed to take part: Germany, The Netherlands, Spain, France, and the United Kingdom (for comparative purposes). Other jurisdictions may be added if contributors are identified and available to participate.

The purpose of this mapping exercise is to firstly determine what preventive restructuring frameworks are already present in the contributing jurisdictions and how they relate to the terms of the Directive. Secondly, the mapping exercise will determine existing rules in member states, in addition to those in the Directive regarding key areas of interest for the project. These include the stay/moratorium; cram-down provisions; the protection of rescue financing; and rights *in rem*. Additional issues which seem to have emerged as being important during the discussions on the Directive are rights accorded particularly

[1] We refer to the current iteration published on 28 March 2019 of P8-T-Prov(2019)0321 Increasing the Efficiency of Restructuring, insolvency and discharge procedures: European Parliament legislative resolution 28 March 2019 on the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency, and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016.0359(COD)) (Ordinary Legislative Procedure – First Reading) (the 'Directive').
[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the 'Recast Regulation'), Article 42-44 and Articles 57-59 (see Appendix B).
[3] INSOL Europe is also partnered on the JCOERE Project but represents a network of the jurisdictions that will be contributing.

The Arrow ➡ indicates for you to type your answer in the adjacent space.

to employees and court or judicial approval processes. In addition, the Questionnaire will focus on a number of emerging procedural issues which also may present obstacles to co-operation.

The following questions are intended to assist you in focusing on the particular areas of interest that are key to the JCOERE Project. Please provide references in footnotes to your jurisdiction's legislation or professional rules, where relevant, as well as any other texts or information referred to when providing your report. This will assist us in further research during the project.

If there are questions that are irrelevant to your jurisdiction, please answer with "not applicable".

Appendix A contains the full text of each of the relevant Articles drawn from the iteration of the Directive published on 28 March 2019. Appendix B includes the relevant Articles from the Recast Regulation 848/2015.

Please complete your report directly in the table of questions below but limit your responses to **500 words** for each question and/or sub-question (excluding footnotes). Please submit your answers to Jennifer Gant at jennifer.gant@ucc.ie by **15st June 2019**.

11.2 The Questionnaire

Part 1: General Context of Preventive Restructuring

The Preventive Restructuring Directive in its current iteration as of 28th March 2019 gives EU Member States a suggested framework and options for approaching the development and improvement of preventive restructuring procedures aimed at creating a more effective European rescue culture and improving the prospects of economic recovery at an earlier stage in the life cycle of companies. The Directive states in Article 4(1) that:

> *"Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity."*

The first part of this questionnaire aims to investigate your jurisdiction's current preventive restructuring frameworks, practices, and underpinning principles in light of the Directive. Please consider Article 4(1) set out above as you discuss the current provisions in place in your jurisdiction and whether they comply fully with this Article. The complete Article 4 is set out in Appendix A.

1	Please specify existing legislative frameworks (if any) in your jurisdiction that provide for the preventive restructuring of companies, specifying the relevant legislation, legislative provisions, and/or rules that regulate the framework along with the date of implementation. (Please note that there will be specific questions in Part II and Part III in relation to specific substantive and procedural rules so there is no need for a high level of detail on these specific aspects here in Part I).
➡	
2	What are the stated functions and aims of your jurisdictions' preventive restructuring frameworks? Please refer to legislative policy documents or from your jurisdiction where relevant, statements in the legislation or statements by courts in applying the legislation (e.g. the Cork Report in the UK).[4]
➡	

[4] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

Part II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The JCOERE project focuses on a selection of provisions found in restructuring processes by type. The following questions are directed at these provisions (Articles 6, 9, 10, 11, 13, and 17).

Introduction to Part II

The provisions typically found in most effective restructuring processes and which are also present in the Directive include first that the debtor remains in possession; second, that individual enforcement actions are stayed in order to provide the debtor with "breathing space; third the adoption of restructuring plans (cram-down) and cross-class cram-down; and the protection of new and interim financing.

The full text of each Directive Article is set out in the Appendix A for your ease of reference.

The following questions are based on the assumption that your jurisdiction has preventive restructuring frameworks. If this is not the case, please write "not applicable" as your answer.

3	**Article 6: Stay of Individual Enforcement Actions**
3.1	Article 6 of the Directive states that: "*Member States shall ensure that debtors may benefit from a stay of individual enforcement to support the negotiations of a restructuring plan in a preventive restructuring framework.*"
	c) Does your jurisdiction provide for a stay of individual enforcement actions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of your jurisdiction's stay or moratorium and how it compares with the terms of Article 6(1-8) of the Directive.
	d) Will your jurisdiction have to make changes to comply with Article 6 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(1-8) of the Directive.
3.2	Article 6(9) sets out a mandatory provision allowing for the removal of the stay by a judicial or administrative authority under certain conditions.
	c. If your jurisdiction provides for a stay, does it also provide for its removal by judicial or administrative authorities and under what conditions are authorities empowered to remove it?

➡	
	d. Will your jurisdiction have to make changes to comply with Article 6(9) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(9).
➡	
4	**Article 9: Adoption of Restructuring Plans** Article 9(1) provides for the adoption of restructuring plans: *"Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties."* The full Article sets out conditions under which such plans should be adopted, including the creditors' right to vote on the adoption of restructuring plans, the creation of creditor classes for voting purposes, and an intra-class cram-down.
4.1	Article 9(2) requires that Member States to *"ensure that affected parties have a right to vote on the adoption of a restructuring plan",* allowing for certain exclusions from this rule in 9(3).
	c. Does your jurisdiction provide voting rights to affected parties of a restructuring plan and what, if any, exclusions are permitted? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
➡	
	d. Will your jurisdiction have to make changes to comply with Article 9(2-3) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(2-3).
➡	
4.2	Article 9(4) requires that Member States treat affected parties in separate classes, *"which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law."*
	d. Does your jurisdiction provide for the separation into classes of those parties affected by a restructuring plan? e. What classes does your jurisdiction recognise? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
➡	

	f. Will your jurisdiction have to make changes to comply with Article 9(4) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(4).
4.3	Article 9(5) allows for judicial or administrative examination of voting rights and the creation of classes when a request for confirmation of a plan is submitted and, further, allows Member States to *"require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage…"*
	c. Does your jurisdiction provide for the examination, confirmation, approval or otherwise of the voting rights and separation into classes of affected parties for the purpose of approving a restructuring plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	d. Will your jurisdiction have to make changes to comply with Article 9(5) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(5).
4.4	Article 9(6) includes a compulsory intra-class cram-down element: *"A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class."* The optional provisions are that member states may provide that a majority in number in each class must also agree. In addition, the majority can be set down by member states but cannot be higher than 75%. Article 9(7) provides that formal votes can be replaced by an agreement with the requisite majority.
	c. Does your jurisdiction have intra class cram down provisions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive.
	d. Will your jurisdiction have to make changes to comply with Article 9 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 9(4).
5	**Article 10: Confirmation of Restructuring Plans**

5.1	a. Article 10(1) provides that: b. *c. "Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:* *d.* *(a) restructuring plans which affect the claims or interests of dissenting affected parties; (b) restructuring plans which provide for new financing; (c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law."*
	c. Does your jurisdiction provide conditions under which restructuring plans must be approved by administrative or judicial authorities? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	d. Will your jurisdiction have to make changes to comply with Article 10(1) of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 10(1).
5.2	Article 10(2)(a-e) provides for a number of conditions under which a restructuring plan can be confirmed by judicial or administrative authorities (see Appendix A), while 10(3) requires Member States to ensure that administrative authorities can refuse to confirm a plan where the plan "*would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business."*
	c. Are there conditions specified for judicial or administrative confirmation and are such authorities also empowered to refuse to confirm a plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	d. Will your jurisdiction have to make changes to comply with the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment Article 10 of the Directive provisions in this context.
6	**Article 11: Cross-class Cram-down**
6.1	Article 11(1)(a-b) provides for the application of a cross-class cram-down in the adoption of restructuring plans:

	"*Member States shall ensure that a restructuring plan which is not approved by affected parties as provided for in Article 9(4) in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils*" certain conditions Articles 10(2) and (3).
	c. What is the current position regarding a cross-class cram-down for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, specifically Art 11(1)(a-b).
➡	
	d. Will your jurisdiction have to make changes to comply with the Directive? If so please describe any currently suggested changes to your provisions in light of the enactment of Article 11(1)(a-b) of the Directive.
➡	
6.2	Article 11 offers options for dealing with affected and dissenting classes of creditors in a cross-class cram-down. Under Art 11(1)(c), one of the conditions for approval by a judicial or administrative authority of a cross-class cram-down is if the plan: "*…ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.*" A derogation from this condition is also offered in 11(2): *"By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan."*
	c. If your jurisdiction provides for a cross-clam down, how does it treat dissenting classes of creditors? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular 11(1)(c) and 11(2).
➡	
	d. Will your jurisdiction have to make changes to comply with the treatment of classes of creditors in the cross-class cram-down? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11(1)(c) and 11(2) of the Directive.
➡	
6.3	Article 11 goes on to provide the following regarding an 'unfair prejudice' test.

	"Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."
➡	
	c. Is your jurisdiction likely to avail of this 'unfair prejudice' test derogation? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11 of the Directive.
➡	
7	**Article 13: Workers** Article 13 provides for the protection of workers in the context of preventive restructuring, stating that *"Members States shall ensure that individual and collective workers' rights, under Union and national labour law…are not affected by the preventive restructuring framework."*
	a. What is the current position regarding workers in the context of preventive restructuring in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 13 of the Directive.
➡	
	b. Will your jurisdiction have to make changes to comply with the treatment of workers in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions in light of the enactment of Article 13 of the Directive.
➡	

8	**Article 17: Protection for New Financing and Interim Financing** Article 17 provides that "*Member States shall ensure that new financing and interim financing are adequately protected*." This includes protecting it from claims that it is detrimental to the general body of creditors, but also includes an option to provide a "super-priority" in 17(4).
	c. What is the current position regarding new and interim financing for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 17 of the Directive
	d. Will your jurisdiction have to make changes to comply with Article 17 in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 17 of the Directive.
	Part III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive
9	**Article 5: Debtor in Possession**
	Article 5 includes an option for the involvement of an insolvency practitioner in relation to preventive restructuring processes.
	c. What is the current position regarding insolvency practitioners in restructuring processes in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 5 of the Directive.
	d. Will your jurisdiction have to make changes to comply with the requirements regarding the involvement of insolvency practitioners in relation to preventive restructuring processes?
10	**Rights *in Rem***
10.1	How are rights *in rem* defined in your jurisdiction? Please describe a type of right in rem which arises in insolvency proceedings.

10.2	Given the interaction of Article 8 of the Recast Insolvency Regulation (see Annex B) on the protection of rights *in rem* and Article 11 of the Preventive Restructuring Directive allowing for a cross-class cram-down, there is a potential conflict between the protection of rights *in rem* and the application of a cross-border cross-class cram-down. Consider Article 8 in Annex B and Article 11 in Annex A and indicate whether or not this conflict is present in your jurisdiction. Please provide examples, reference to policy, principles, and legislative texts where relevant.
➡	
11	**The Role of Judicial or Administrative Authorities.**
	Many of the Articles in the Directive refer to judicial or administrative authorities exercising power or authority in various ways. However, there can be a significant difference in the characteristics of *judicial* and *administrative* authorities, whether within a single jurisdiction or in a cross-border situation. What authority is empowered to confirm, approve, or examine plans and other aspects of preventive restructuring frameworks, such as those referred to in the questions in Part II above? From whence is their authoritative competence derived? If an administrative authority is involved are these subject to procedural rules which are similar to procedural rules to which courts are subject?
12	In your jurisdiction, are there specific constitutional parameters present that delimit the freedom of judicial communication generally? For example, a constitutional provision that requires that justice is administered in public?
➡	
13	In your jurisdiction, are there examples of judicial cooperation in case law, focusing on the issues set out in Part II of this questionnaire.
➡	
14	In your jurisdiction, what are the training and competency requirements for insolvency judges?
➡	

15	If you have any further comments to provide in relation to the research being conducted on this project, including any other potential contributors from jurisdictions not listed in the introduction above, please do so below.

Please accept the JCOERE Team's sincere thanks for the time and effort you have put into this questionnaire. We will keep you updated as to our progress. If you encounter any issues of clarity or require more time to complete your report, please contact Dr Jennifer L. L. Gant at jennifer.gant@ucc.ie.

JCOERE Team

Additional Questions following Initial Responses

AQ1	Given that our project focuses on the judiciary and that we have noted in our ongoing research that Member States place different relative value on national court judgements, we would like to know what weight or value is placed on the decisions made by courts in terms of their persuasiveness in subsequent cases and any influence on how the law develops in relation to judicial influence, if at all. It would be helpful if you could give examples of your national courts' treatment of previous judgements in practice if possible.
	As a common law system, Ireland relies on the principle of stare decisis, which required lower courts to follow the decisions made by higher courts. Judges also have a broader interpretative role than their civil law counterparts, which gives them a pseudo-legislative function at times when their decisions fill in ambiguities and gaps left by the legislator.
AQ2	How does your jurisdiction define the "threshold for insolvency", for example, is it when a company is unable to pay its debts, when liabilities exceed assets, or something else? How does this threshold then relate to your restructuring framework as described in your response to our questionnaire?

Appendix A: Preventive Restructuring Framework Directive

Articles Relevant to the Questionnaire

Article 4:

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

(a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or

(c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or

(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, that does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or

(c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. 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.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

(a) restructuring plans which affect the claims or interests of dissenting affected parties;

(b) restructuring plans which provide for new financing;

(c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

(a) the restructuring plan has been adopted in accordance with Article 9;

(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;

(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;

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

(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a) it complies with Article 10(2) and (3);

(b) it has been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going-concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

Article 13

Workers

1. Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

(a) the right to collective bargaining and industrial action; and

(b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:

(i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;

(ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;

(iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;

(c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Appendix B

Excerpt from the European Insolvency Regulation (Recast)

Article 8

Third parties' rights in rem

1.The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2.The rights referred to in paragraph 1 shall, in particular, mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right *in rem* to the beneficial use of assets.

3.The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.

Article 42

Cooperation and communication between courts

1.In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

2.In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3.The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of the insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols, where necessary.

Article 43

Cooperation and communication between insolvency practitioners and courts

1.In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

(a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;

(b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and

(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings; to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.

2.The cooperation referred to in paragraph 1 may be implemented by any appropriate means, such as those set out in Article 42(3).

Article 44

Costs of cooperation and communication

The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.

Article 57

Cooperation and communication between courts

1.Where insolvency proceedings relate to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interest. For that purpose, the courts may, where appropriate, appoint an independent person or body to act on its instructions, provided that this is not incompatible with the rules applicable to them.

2.In implementing the cooperation set out in paragraph 1, courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with each other, or request information or assistance directly from each other, provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3.The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the assets and affairs of the members of the group;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols where necessary.

Article 58

Cooperation and communication between insolvency practitioners and courts

An insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies:

(a) shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings; and

(b) may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed; to the extent that such cooperation and communication are appropriate to facilitate the effective administration of the proceedings, do not entail any conflict of interest and are not incompatible with the rules applicable to them.

Article 59

Costs of cooperation and communication in proceedings concerning members of a group of companies

The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.

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