INSOL International

Reforms in selected EU Member States in light of the Directive on preventive restructuring frameworks

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INSOL SPECIAL REPORT

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Contents

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Acknowledgement

INSOL International is delighted to publish this Special Report titled “Reforms in selected EU Member States in light of the Directive on preventive restructuring frameworks” by Sigrid Jansen (*Fellow, INSOL International*), Simon Aarts, Dave Hillen and Géza Orbán, Allen & Overy, The Netherlands, with contributions from colleagues in the various Allen & Overy offices in Europe.

In 2014, the European Commission (EC) adopted a Recommendation on a new approach to business failure and insolvency, encouraging EU Member States to introduce a framework that allows for the restructuring of viable companies in financial difficulty. The main aim of the Recommendation was to improve the functioning of the internal market. However, the Recommendation did not achieve its aim as only a handful of countries introduced new restructuring frameworks as recommended by the EC.

As a result, in 2016 the EC proposed to introduce a Directive laying down certain minimum rules that must be achieved in order to facilitate the rescue of viable businesses in financial difficulty. After two years of negotiations, the resultant Directive 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 came into force on 16 July 2019.

While the Directive has four parts, this report focuses on Titles II and IV of the Directive. Title II (preventive restructuring frameworks) describes the rules that a preventive restructuring framework should contain to provide debtors in financial difficulty with early and effective access to procedures that facilitate a restructuring plan. Title II further describes the rules of adoption of a preventive restructuring framework by creditors and possible confirmation by a judicial or administrative authority. Title IV (measures to increase the efficiency of restructuring, insolvency and discharge procedures) introduces supplementary measures to increase the efficiency of a restructuring plan.

This excellent report sets out the current and future restructuring options in selected EU Member States in light of the Directive. It therefore not only focuses on restructuring options currently available under existing legislation, but also includes proposals for reform. This report also provides insight into the available options in each jurisdiction in order to assess whether or not the various EU countries are compliant with the current Directive of the EC. The eight EU members states covered are Belgium, France, Germany, Italy, Poland, Spain, The Netherlands and the United Kingdom.

INSOL International sincerely thanks the Allen & Overy team, and Sigrid Jansen specifically, for leading this technical project and bringing it to a conclusion by providing this excellent Special Report.

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Reforms in selected EU Member States in light of the Directive on preventive restructuring frameworks

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1. Introduction

1.1 Background

1.1.1 European Union developments

The free flow of capital and cross-border investments are fundamental principles of the European Union (EU). The EU has therefore deployed an initiative for a capital markets union (CMU) to further integrate the capital markets of the 28 EU Member States and facilitating cross-border investment. The European Commission (EC) is of the opinion that a true single capital market leads to efficiency gains and supports the EU's ability to fund growth.

According to the EC, an important step towards a capital market union is "breaking down barriers that are blocking cross-border investments". The EC identified the various, divergent insolvency laws of the EU as one of the key barriers blocking cross-border investments, describing it as one of "the most important bottlenecks preventing the integration of capital market". For this reason, the EC intends to address this issue as part of the reforms carried out in relation to the CMU and has, therefore, proposed a directive for preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (the Directive).

A well-functioning insolvency framework benefits trade and investment, supports to create and preserve jobs and could help to absorb economic shocks and is, for that reason, an essential part of a good business environment. However, the presence of 28 divergent national insolvency laws in the EU is negatively impacting investors' willingness to invest. As a result of deviating insolvency laws, investors intending to invest in cross-border companies have to incur high costs to assess the risk of lengthy and complex insolvency procedures in different Member States. Indeed, the options, elements and conditions for preventive restructuring procedures differ substantively between the various EU Member States. This is particularly unhelpful in view of the increasingly interconnected single market, where companies are more and more cross-border orientated in respect of client base, supply chain, scope of activities, investors and capital base. A higher degree of harmonisation is, therefore, essential to take away the uncertainty around insolvency laws.

The negative effect of different insolvency rules is recognised by various stakeholders within the EU market. Many investors mention the uncertainty regarding the different insolvency rules as a main reason for not investing or entering into a business relationship outside their own country. A large number of market participants noted that the diversity of insolvency laws across the EU negatively impacts confidence in cross-border investment. From the point of view of banks, "the widespread divergence in Member States' insolvency regime

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constitutes a key deterrent to cross-border investment." Pension funds and other financial intermediaries are of the view that "diverging national insolvency regimes create an obstacle to the investment in the EU." Central banks see "a clear link between coherent insolvency rules and a CMU" and therefore support a reform of insolvency frameworks to remove obstacles to cross-border investments. Member State governments and business associations are, however, more cautious on the impact of diverging national insolvency regimes and have reservations regarding the feasibility of reforms because of the complex connection with other areas of civil law that are purely national and motivated by the (political) preferences of a specific EU Member State (for example, the treatment of employees).

In addition, a recognised problem is that companies in financial difficulty which do not have access to early restructuring options in their own jurisdiction, currently have an incentive to relocate their centre of main interest to a jurisdiction which has more favourable restructuring options. Such a shift usually involves additional costs to both the company and the creditors. For instance, debtors have costs to effectuate the shift of their company and creditors are faced with a different insolvency regime and must assess the recovery of their debts in a different jurisdiction.

The Directive is an essential instrument in removing the problems and uncertainties described above. The Directive aims to increase harmonisation throughout the EU and to co-ordinate the divergent insolvency laws in such a way that viable companies in financial difficulty have proper access to preventive restructuring procedures. The key objective is for the EU Member States to have in place key principles on effective preventive restructuring, resulting in reduced length and the associated costs of restructuring procedures while increasing their quality. The ultimate gain would be to break down an important barrier to the free flow of capital and cross-border investment within the EU and to further strengthen the development of a CMU.

1.1.2 Chronological overview

The Directive is the next step of co-ordination in the area of restructuring in the EU. The Directive is preceded by several other developments and initiatives:

- In 2002, the EC Regulation (EC) 1346/2000 on insolvency proceedings came into effect (the Original Regulation). The Original Regulation was adopted to co-ordinate issues of cross-border insolvency. The Original Regulation established rules for the commencement of insolvency proceedings in the EU and the automatic recognition and co-operation between the different EU countries. The Original Regulation did not purport to harmonise insolvency laws across the EU or in any given jurisdiction.

- In 2012, the EC issued a communication for "A new European approach to business failure and insolvency" (the Communication). The Communication described several areas where differences between national insolvency laws potentially hampered an efficient insolvency legal framework in the EU internal market.[2]

[2] Communication, para1, last sentence.

- In 2014, the EC adopted a recommendation on a new approach to business failure and insolvency (the Recommendation). A recommendation is a non-binding instrument. The Recommendation encouraged EU countries to introduce a framework that allows for the restructuring of viable companies in financial difficulty. The aim of the Recommendation was to improve the functioning of the internal market.

- In 2015, the first action under the Communication was the amendment of the Original Regulation by adopting Regulation (EU) 2015/848 on insolvency proceedings (the Recast Regulation). The changes enacted by the Recast Regulation included discouragement of abusive forum shopping, expansion to cover pre-insolvency procedures and the introduction of new and enhanced co-operation and co-ordination tools. Similar to the Original Regulation however, the Recast Regulation resolves conflicts of jurisdiction and laws in cross-border insolvency proceedings; it does not harmonise insolvency laws across the European Union.

- The Recommendation did not lead to a consistent change in the facilitation of restructuring of viable companies in financial difficulty. Only a handful of EU countries introduced new standards to restructure companies in the way it was encouraged by the EC.

In 2016, therefore, the EC transmitted a proposal for the Directive. Other than a recommendation, a directive imposes obligations on EU countries. The Directive lays down certain minimum rules that must be achieved, but each EU country is free to decide how to implement these directives into their national law. The Directive substantially reinforces the Recommendation by imposing minimum standards each EU country must achieve in order to facilitate the rescue of viable businesses in financial difficulty. For instance, the Directive introduces specific types of insolvency procedures. The Directive therefore goes beyond the scope of the Recommendation in imposing rules to increase the efficiency of all types of insolvency procedures.

Over the course of two years there were intensive discussions on the text of the Directive. During these discussions, the feedback of the EU countries and the European Parliament were taken into account to ensure that the Directive would receive the support of all EU Member States. As a consequence, the final text of the Directive is a compromise between the initial position of the Commission and the position of various EU countries.

1.2 Objective of Directive

The objective of the proposed Directive is threefold:

- to ensure that viable enterprises in financial difficulty have access to effective national preventive restructuring frameworks, enabling them to continue operations;

- that honest insolvent or over-indebted entrepreneurs have a second chance after a full discharge of debt after a reasonable period of time; and

- that the effectiveness of restructuring, insolvency and discharge procedures is improved, in particular with a view to shortening their length.

This report focuses on the principles and rules imposed to achieve effective national preventive restructuring frameworks, as described above.

The Directive aims to achieve further harmonisation of national insolvency laws and to impose minimum standards which each EU country must introduce in its national insolvency law. Furthermore, the intention of the EC is to enhance the rescue culture in the EU. The Directive identifies multiple components which must be present in each EU country's minimum legal framework:

- efficient possibilities for early restructuring;
- improving chances of negotiation via a stay of enforcement actions (moratorium);
- debtor-driven restructuring with continuation of a debtor's business;
- preventing dissenting minority creditors and shareholders from jeopardising the restructuring effort, while safeguarding their interests; and
- increasing restructuring plans' chances of success.

1.3 Important provisions contained in the Directive

The Directive has four parts: general provisions (Title I), preventive restructuring frameworks (Title II), second chance for entrepreneurs (Title III) and measures to raise the efficiency of restructuring, insolvency and second chance (Title IV). This report focuses on Titles II and IV.

Title II (Preventive restructuring frameworks) describes the rules that a preventive restructuring framework should contain to give debtors in financial difficulty early and effective access to procedures that facilitate a restructuring plan. Title II describes the rules of adoption of a preventive restructuring framework by creditors and possible confirmation by a judicial or administrative authority.

Title IV (Measures to increase the efficiency of restructuring, insolvency and discharge procedures) introduces supplementary measures to increase the efficiency of a restructuring plan.

The following key topics can be identified in these two titles:

(a) Early restructuring options available

The ultimate objective is that EU countries establish an effective preventive restructuring framework for debtors. The preventive restructuring framework should enable a debtor to restructure its debt or business and avoid insolvency.[3] Any involvement of a judicial or administrative authority with the preventive restructuring framework should be limited to the extent possible.[4] Further, the debtor (or creditor with a debtor's consent) should be able to open the preventive restructuring procedure.[5]

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[3] Article 4, sub 1.
[4] *Idem*, sub 3.
[5] *Idem*, sub 4.

To ensure that restructuring procedures are effective, Member States may provide for additional measures for debtors that have sentences for serious breaches of accounting or bookkeeping obligations. Also, Member States may introduce a viability test, provided that such a test has the purpose of excluding debtors who do not have a prospect for viability and can be carried out without detriment to the debtors' assets. Finally, the number of times that a debtor can apply for a preventive restructuring may be limited within a certain period.

(b) Debtor-in-possession

To incentivise debtors to apply for a preventive restructuring at an early stage of financial difficulties and reflect the early nature of the procedure,[6] Member States should introduce a debtor-in-possession type procedure. In such a debtor-in-possession procedure, a debtor remains in control of its assets and the day-to-day operation of its business.[7] The appointment of a restructuring practitioner to play a role in the preventive restructuring procedure should be optional, not the starting point.[8]

(c) Individual enforcement actions to be stayed and insolvency proceedings to be suspended

To preserve the value of the debtor's estate and support the negotiations on a restructuring plan, Member States should introduce a measure to stay individual enforcement actions of creditors.[9] Concerns that creditors might be negatively affected by the stay are addressed by provisions on the duration of the stay, the judicial or administrative approval and conditions for the renewal or lifting of the stay.

The duration of the initial stay should be limited to four months.[10] However, there should be an option to extend the initial stay or grant a new stay with judicial or administrative approval, provided that (i) progress has been made on the restructuring plan and (ii) the continuation of the stay does not unfairly prejudice the rights of the affected parties.[11] In any event, the stay should not exceed twelve months.[12]

There are circumstances under which a stay should not be granted, or should be lifted to protect the interest of affected parties.[13] Also, workers' outstanding claims are exempted from the stay to the extent Member States do not provide for an appropriate protection by other means.

The scope of the stay should include:

(i) any obligation for a debtor to file for insolvency under a Member State's national law that arises during the period of the stay.[14] However, in the event that a debtor becomes unable to pay his debt as it falls due during the

6 Directive, Rec 18a.
7 Article 5. lid 1.
8 *Idem*, lid 2.
9 Article 6, sub 1.
10 *Idem*, sub 4.
11 *Idem*, subs 5, 6.
12 *Idem*, sub 7.
13 *Idem*, subs 8, 9; Exp Memo, under 5, bullet: detailed explanation of the specific provisions of the proposal.
14 Article 7, sub 1.

stay period, a judicial or administrative authority should be enabled to decide on whether to continue the stay or open the requested insolvency procedure;[15]

(ii) withholding performance or termination by creditors of executory contracts to the detriment of the debtor for debts that came into existence prior to the stay;

(iii) *ipso facto* clauses. Creditors should be prevented from terminating an executory contract solely by reason of the debtor's entry into restructuring negotiations.[16] However, certain exceptions may be applied by Member States to essential contracts which are necessary for the continuation of the debtor's day-to-day business.[17] In addition, debtors should continue to be able to make payments in the ordinary course of business.[18] In summary, on the basis of Article 7, Member States are required to ensure that a debtor is not obliged (or threatened) to open other types of insolvency procedures during the stay and it should have the continued performance of contracts with suppliers and other creditors maintained, provided that it fulfils its obligations thereunder.

(d) Restructuring plan

The Directive introduces various minimum standards of information that should be in a restructuring plan.[19] Most notable are the required information on (i) the classes into which the affected parties have been grouped,[20] (ii) the terms of the plan[21] and (iii) reasoned statements on the viability of the business and expected success of the restructuring.[22] Member States may require additional information, provided it does not place a disproportionate burden on the debtor.

Member States must impose conditions for a restructuring plan to become adopted and binding. Member States must ensure that any creditor affected by the restructuring plan has a right to vote on the restructuring plan.[23] The parties affected by the restructuring plan should be treated in separate classes and the class formation should be examined by a judicial or administrative authority.[24] The classes must be formed in such way that each class compromises claims or interests with rights that are sufficiently similar.[25] As a minimum, secured creditors should always be treated separately from unsecured creditors.[26] Finally, the required majority for the adoption of a restructuring plan should not be higher than 75% in the amount of claims or interests in each class.[27]

Member States should ensure that a restructuring plan is confirmed by a judicial or administrative authority to make it binding and specifies the conditions for

15 *Idem*, subs 2, 3.
16 *Idem*, subs 4, 5.
17 *Idem*, sub 4.
18 *Idem*, sub 6.
19 Article 8, sub 1.
20 *Idem*, sub 1 (under d).
21 *Idem*, sub 1 (under f).
22 *Idem*, sub 1 (under b, g).
23 Article 9, sub 1.
24 *Idem*, sub 3.
25 *Idem*, sub 2.
26 Explanatory Memo, under 5, bullet: detailed explanation of the specific provisions of the proposal.
27 Article 9, sub 4.

such confirmation. A judicial or administrative authority's approval is required if the restructuring plan (i) affects the interests of dissenting parties, or (ii) provides new financing.

Shareholders should be limited in their ability to obstruct the adoption of the restructuring plan, provided that their legitimate interests are protected.[28]

The debtor's business should be valued by an authority if the restructuring plan is challenged on the basis of an alleged breach of (i) the "best interests of creditors" test, or (ii) the conditions for a cross-cramdown under Article 11(1)(b)(ii).[29]

Restructuring plans that are confirmed by an authority should be binding upon each party identified in the plan. The creditors who are not involved in the voting on the restructuring plan, should not be affected by the plan.[30]

(e) Cross-class cram-down

Member States should introduce an option to have a restructuring plan confirmed by an authority in the event that such restructuring plan is not supported by the required majority in each affected class and, therefore, not adopted. The option to (cross-) cram-down hold-out creditors will help to implement a restructuring plan, even though certain creditors within a class, or an entire class of creditors, as the case may be, votes against the restructuring plan. To protect the interests of the dissenting classes, Member States must ensure that the restructuring plan meets the following conditions:

(i) it is compliant with certain formal requirements;[31]

(ii) it is approved by:

A) a majority of voting classes (of which at least one of those classes is a secured creditor or senior to the ordinary unsecured creditors' class); or, failing that,

B) at least one voting class 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, can be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law; and

(iii) it ensures that dissenting voting classes are treated at least as favourably as any other class of the same rank and more favourably than any junior class;

(iv) no class can receive or keep more than full amount of its claims or interest.

28 Article 12.
29 Article 13.
30 Article 14.
31 Article 10, subs 2 and 10, sub 3.

(f) Protection for new financing

The success of a restructuring plan may often depend on the financing available to the debtor to support the operation of its business during restructuring negotiations (interim financing) and implementation of the restructuring plan after its confirmation (new financing).

Member States should ensure that such financing is adequately protected.[32] This can be achieved by ensuring that new or interim financing is not voidable or unenforceable in a subsequent insolvency procedure[33] and that financing providers (lenders) are able to receive priority above creditors that would otherwise have equal or superior claims, at a minimum, in a subsequent insolvency.[34]

Member States should also introduce minimum requirements for transactions in close connection with a restructuring plan. Again, the obligation for Member States here is to ensure that any transactions carried out to further negotiations or implementation of a restructuring plan is not voidable or unenforceable.[35] The transactions that in any event should enjoy protection are (i) fees and costs of adopting the restructuring plan, (ii) professional advice on any aspect of the restructuring plan, (iii) workers' wages for work already carried out, (iv) necessary and reasonable payments made in the ordinary course of business and (v) transactions outside the ordinary course of business but closely connected with negotiations for a restructuring plan.[36]

2. Summary of the position in selected Member States

The purpose of this special report is to set out the current and future restructuring options in selected EU Member States in light of the Directive. This report will therefore not only focus on restructuring options currently available under existing legislation, but also include proposals for reform.

Furthermore, this report will provide insight into the options per jurisdiction in order to assess whether or not the various EU countries are compliant with the current proposal of the EC. In order to make the results more accessible to the reader, the results are presented in a schematic way, comparing the various EU countries (see paragraph 3 below).

The restructuring options of the following EU Member States are reviewed and described in this report:

- Belgium
- France
- Germany
- Italy

32 Article 16.
33 *Idem*, sub 1.
34 *Idem*, lid 2.
35 Article 17, sub 1.
36 *Idem*, subs 2, 4.

- Poland
- Spain
- The Netherlands
- The United Kingdom

2.1 BELGIUM

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

In Belgium there is not a single, all-encompassing instrument that allows the restructuring of a company outside a formal court supervised insolvency procedure. Belgian legislation does not have a formal pre-pack mechanism or the scheme of arrangement as found in the legislation of other countries. However, the Belgian Insolvency Act of 11 August 2017 (as incorporated in Book XX of the Belgian Code of Economic Law, hereafter referred to as the Belgian Insolvency Act) contains a number of mechanisms which facilitate the out-of-court restructuring of companies:

- The detection and follow-up of companies in financial distress by chambers of the Commercial Court dedicated to companies in distress (*kamers voor ondernemingen in moeilijkheden / chambres des entreprises en difficulté*);

- The appointment of a company mediator (*ondernemingsbemiddelaar / médiateur d'entreprise*) in order to facilitate the reorganisation of the company or of all or part of its assets or activities;

- The appointment of a court appointed delegate / judicial administrator (*gerechtsmandataris / mandataire de justice*) and a provisional administrator (*voorlopig bewindvoerder / administrateur provisoire*) in the event of serious misconduct of the debtor company.[37] And

- The conclusion of an amicable arrangement outside of judicial reorganisation proceedings (see below) with two or more creditors.

The Belgian Insolvency Act contains two important court supervised restructuring proceedings:

- Creditors can participate in Belgian *judicial reorganisation proceedings*, aimed at preserving, under court supervision, the continuity of all or part of a company in distress or all or part of its activities by (i) allowing the negotiation of an amicable arrangement, (ii) allowing the conclusion of a collective reorganisation agreement, or (iii) providing for a transfer of all or part of the debtor company's activities to one or more third parties.

- For completeness, it is noted that creditors can also participate in Belgian *bankruptcy proceedings*, which are opened at the request of the debtor or at the request of a third party (such as a creditor or the public prosecutor). According to Belgian law, a company is in a state of bankruptcy if it (i) faces a durable cessation of payments and (ii) has lost the trust of its creditors. A bankruptcy trustee will be appointed and will be in charge of managing the bankrupt's estate by liquidating the assets of the bankrupt company and distributing the proceeds in accordance with the rights of the creditors.

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[37] This is not a restructuring procedure *sensu stricto* but nevertheless comprises a mechanism that facilitates the out-of-court restructuring of companies.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The Belgian legislator is currently not in the process of adopting new restructuring or insolvency legislation. However, Belgian insolvency legislation was recently amended by the Law of 17 August 2017, which entered into effect on 1 May 2018.

The preparatory works to the recent law amending the Belgian Insolvency Act explicitly refer to the proposed directive and confirm that the new legislation is broadly aligned with the proposed directive:

> "The main objective of the draft law is to make all insolvency legislation coherent and to incorporate it into the Code of Economic Law as a rational whole. At the same time, the draft aims to thoroughly modernise existing insolvency law and to bring it into line with European standards. A high-performance and predictable insolvency law is an asset for every country. The draft aims to adopt the best practices that exist in the world while ensuring that procedures are transparent and highly effective. *The draft is also broadly in line with the draft directive on preventive restructuring frameworks and the second chance.*"[38]

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out-of-court instrument).

(a) Judicial reorganisation proceedings in Belgium

Creditors can participate in Belgian judicial reorganisation proceedings, which are opened at the request of the debtor company. The purpose of judicial reorganisation proceedings is to preserve, under court supervision, the continuity of all or part of a company in distress, or all or part of its activities. It grants a company in distress protection against its existing creditors by allowing it either (i) to negotiate an amicable arrangement, or (ii) a collective reorganisation agreement, or (iii) by providing for a transfer of all or part of the debtor company's activities to one or more third parties. These restructuring mechanisms are discussed in further detail below.

(b) The detection and follow-up of companies in financial distress by chambers of the Commercial Court dedicated to companies in distress (kamers voor ondernemingen in moeilijkheden / chambres des entreprises en difficulté)

Dedicated chambers of the Commercial Court are tasked with detecting and tracing companies in financial difficulties. Their task is (i) to preserve the continuity of the (activities of the) companies in distress and (ii) to protect the creditors' rights.

If a company is identified by the clerk's office of the Commercial Court as being in financial distress, the Court may decide to further investigate the matter and to invite the debtor company to explain the current financial situation of the

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[38] *De Kamer*, doc 54; 2407-001; draft Act dated 20 April 2017, p 4 (own emphasis).

company. This hearing is entirely confidential and occurs behind closed doors. The court will inquire about the financial situation of the company and about the causes of the financial difficulties. The court is not allowed to provide restructuring advice and will usually refer the debtor company to professional advisors. The court may also suggest to have a company mediator appointed (see below). A report is drawn up at the end of the proceedings. The court may decide to refer the case to the public prosecutor for purposes of opening bankruptcy proceedings.

(c) The appointment of a company mediator (ondernemingsbemiddelaar / médiateur d'entreprise)

Upon request of the debtor company, the court may appoint a company mediator in order to facilitate the reorganisation of the company, or of all or part of its assets or activities.

The company mediator's assignment is to prepare and facilitate the conclusion of (i) an amicable arrangement with two or more creditors, (ii) a collective reorganisation agreement, or (iii) the transfer or all or part of the activities of the debtor company to a third party.

(d) The appointment of a court appointed delegate / judicial administrator (gerechtsmandataris / mandataire de justice) and a provisional administrator (voorlopig bewindvoerder / administrateur provisoire)

In the event of serious misconduct of the debtor company, the public prosecutor or any third party with a legitimate interest may request the court to appoint a judicial or a provisional administrator. The court will determine the specific assignment of these persons, but usually the judicial administrator is tasked with the opening of judicial reorganisation proceedings and the provisional administrator is tasked with taking over (part of) the management of the debtor company.

(e) The conclusion of an amicable arrangement outside of judicial reorganisation proceedings

A company in distress may enter into an amicable arrangement with two or more of its creditors in view of the restructuring of all or part of its activities. To the extent that the amicable arrangement (i) has been agreed upon for the purpose of remedying the company's financial situation or reorganising the business, (ii) contains a confidentiality clause, (iii) contains a severability clause and (iv) has been filed with the clerk's office of the Commercial Court, the amicable arrangement is protected against the claw-back rules that would otherwise apply if the debtor company is later declared bankrupt.

Furthermore, the court may order that the claims listed in the amicable arrangement are enforceable to the benefit of the creditors that have entered into such amicable arrangement with the debtor company.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

The Belgian judicial reorganisation proceedings aimed at either (i) allowing the negotiation of an amicable arrangement, (ii) allowing the conclusion of a collective reorganisation agreement, or (iii) providing for a transfer of all or part of the debtor company's activities to one or more third parties, are recognised as an insolvency procedure within the meaning of article 2, section 4 of the European Insolvency Regulation and are included in Annex A of the European Insolvency Regulation.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

A judicial reorganisation can be obtained if the continuity of the debtor company is threatened in the short or medium term. For example, if the net assets have fallen below half of the authorised share capital due to losses incurred, the going concern of a company is considered to be threatened.

The fact that the debtor company is already in a *de facto* state of bankruptcy does not preclude it from requesting to open judicial reorganisation proceedings.

Recently, the Belgian Insolvency Act was given a broader scope of application. The Belgian legislator has introduced a new concept known as an "enterprise" (*onderneming / entreprise*) which covers all entities involved in commercial or entrepreneurial activity. An "enterprise" includes all legal entities (including non-profit organisations) and physical persons exercising a profession in an independent manner (including liberal professions[39]).

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

(a) Judicial reorganisation proceedings

In principle, judicial reorganisation proceedings are opened at the request of the debtor company. However, in the event of serious misconduct on the part of the debtor company, a creditor or the public prosecutor may request the court to appoint a judicial or a provisional administrator who can be tasked with opening of judicial reorganisation proceedings.

In addition, please note that in certain limited circumstances (for example, if the debtor is in a state of bankruptcy without having requested a judicial reorganisation procedure, or if the collective reorganisation plan is not approved by the court or the creditors) judicial reorganisation proceedings with the specific purpose of transferring all or part of the debtor's assets or activities to third parties under court supervision (see more details under (14) below) can be opened at the request of the public prosecutor, a creditor or any other person with an interest in acquiring (part of) the debtor's assets or activities.

[39] A liberal profession is defined in art I.1, 14° of the Belgian Code of Economic Law as any undertaking whose activity primarily consists in providing, independently and under its own responsibility, intellectual services requiring prior and continuous training and which is subject to a code of ethics which is subject to enforcement by or by virtue of a disciplinary body designated by law. Examples are attorneys at law, architects, accountants, medical doctors, etc.

(b) The detection and follow-up of companies in financial distress by chambers of the Commercial Court dedicated to companies in distress

The detection and follow-up of companies in financial distress by the chambers of the Commercial Court is a procedure solely driven by the court and by the clerk's offices of the court.

(c) The appointment of a company mediator

The appointment of a company mediator can only be requested by the debtor company.

(d) The appointment of a judicial and a provisional administrator

Any third party with a legitimate interest, such as creditors and the public prosecutor, may request the appointment of a judicial or a provisional administrator if there was serious misconduct on the part of the debtor company. The appointment of a provisional administrator can only be requested if judicial reorganisation proceedings are in place.

(e) The conclusion of an amicable arrangement outside of judicial reorganisation proceedings

In principle, an amicable arrangement is entered into by a debtor company. However, in the event of serious misconduct on the part of the debtor company, a creditor or the public prosecutor may request the court to appoint a judicial or a provisional administrator who can be tasked with further negotiating and entering into an amicable arrangement outside of judicial reorganisation proceedings.

(7) Is there a viability test?

The Belgian Insolvency Act does not contain a general viability test for opening judicial reorganisation proceedings. Provided that the continuity of the debtor company is threatened in the short or medium term, a debtor cannot be denied entry to judicial reorganisation proceedings (unless this would constitute an abuse of rights).

In order to avoid abusive or consecutive requests to open judicial reorganisation proceedings, the Belgian Insolvency Act contains three correction mechanisms:

- If the request is made by a debtor who has already requested and obtained the opening of a judicial reorganisation procedure *less than three years before*, the judicial reorganisation procedure can only be opened if it involves the transfer, under judicial authority, of all or part of the debtor's assets or activities.

- If the request is made by a debtor who has already requested the opening of a judicial reorganisation procedure *less than six months before*, the general rule that a request for judicial reorganisation has "suspensory effect" (according to which the debtor shall be protected during the course of the reorganisation proceedings from being declared bankrupt, from being dissolved if it is a legal person or from creditor-induced enforcement measures *vis-à-vis* its movable or immovable property, as further explained below under (9)) does *not* apply (unless the court decides otherwise in a reasoned decision).

- If the request is made by a debtor who has already requested and obtained the opening of a judicial reorganisation procedure *more than three but less than five years before*, the new judicial reorganisation procedure cannot impact the rights obtained by the creditors during the previous reorganisation procedure.

Although having sufficient liquidity is not an explicit legal requirement for opening a judicial reorganisation procedure, courts will in practice assess the debtor's cash and liquidity position when they receive the following documents that should be attached to the debtor's request for opening judicial reorganisation proceedings: (i) an accounting statement containing the debtor's assets and liabilities and including a recent profit and loss account and (ii) a budget estimating revenue and expenditure for the duration of the requested judicial reorganisation procedure.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

The opening of judicial reorganisation proceedings does not in itself affect the status of the debtor, its ability to transact or its existing legal obligations. Subject to certain exceptions (such as the appointment of a provisional administrator, as explained below under (13)), the management of the debtor remains in principle in charge, albeit under the (limited) supervision of a judge appointed by the Commercial Court.

(9) Is there a stay on individual enforcement actions?

The opening of judicial reorganisation proceedings implies a court-ordered suspension period (a moratorium), during which enforcement measures against the company's assets (for debts incurred before the judgment opening the judicial reorganisation proceedings) will be suspended. During the suspension period, the debtor company cannot be declared bankrupt or be liquidated.

However, (i) pledges on receivables which have been specifically pledged to the benefit of third parties will not be affected by a judicial reorganisation and (ii) pledges or security assignments of bank accounts and financial instruments that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will not be affected by the opening of judicial reorganisation proceedings and can – subject to certain conditions – be enforced despite any such proceedings.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

Notwithstanding any contractual provision stating otherwise, the request or opening of the judicial reorganisation procedure does not terminate current agreements or the obligations contained therein. *Ipso facto* clauses have no effect to the extent they automatically terminate the contract in case of a request or opening of a judicial reorganisation procedure.

Moreover, a contractual default of the debtor prior to the granting of the suspension under the reorganisation procedure does not constitute a ground for the creditor to terminate the contract, insofar as the debtor remedies this default by performing the contract within a period of 15 days as from the approval of the suspension after having been given a notice of default by the creditor who participates in the reorganisation proceedings.

(11) What are the options for new interim financing (with super priority status)?

During judicial reorganisation proceedings it is possible for the debtor to obtain new interim financing with first ranking security. The judicial reorganisation procedure does not prevent issuing new security over available assets of the debtor. Securities issued during the suspension period of the reorganisation proceedings cannot be clawed back by a bankruptcy trustee in a subsequent bankruptcy proceedings on the basis that these securities comprise mortgages or pledges that have been issued on or after the moment of cessation of payment by the debtor. Please note that other claw-back grounds still exist.

New debts incurred during the suspension period are not subject to suspension. These debts will be super-privileged with first rank status for payment (subject to certain limitations), meaning that they will be paid by preference over any other debts of the debtor in (i) subsequent bankruptcy proceedings, (ii) subsequent liquidation of the debtor, or (iii) judicial reorganisation proceedings with the purpose of transferring the debtor’s assets or activities under court supervision. To achieve a super priority status, (i) the debts must correspond to claims of contracting parties for the services rendered by the latter *during* the judicial reorganisation procedure (regardless whether or not they arise from new obligations of the debtor or from contracts in existence at the time of the opening of the proceedings) and (ii) a close link must exist between the failure to successfully complete the judicial reorganisation procedure on the one hand and the opening of the bankruptcy proceedings, subsequent liquidation of the debtor, or judicial reorganisation proceedings with the purpose of transferring the debtor’s assets or activities under court supervision, on the other hand. As an exception to the super priority status, creditors holding a right *in rem* will nevertheless receive priority in the payment of the proceeds from the realisation of the underlying assets to which the right *in rem* applies (unless the creditor whose claims have achieved super priority status can show that the services rendered by him have contributed to maintaining the right *in rem* or to maintaining the underlying assets in the company’s estate).

Tax and social security debts and contributions and debts (with the exception of their accessories such as interest payments) are also considered having such first rank status in the aforementioned cases.

(12) Are other restructuring-related transactions protected?

The restructuring measures that are included in a restructuring plan which is approved by the court as part of the judicial reorganisation proceedings, are in general protected from claw-back risks in a later bankruptcy of the debtor.

As a general rule, any payments made in the framework of judicial reorganisation proceedings for debts that have not matured, cannot be challenged by a bankruptcy trustee in later bankruptcy proceedings. This implies that payments made by the debtor in execution of the approved restructuring plan are protected from claw-back. The same applies to new security issued during the suspension period of the judicial reorganisation proceedings (see above under (11)).

However, the following remains subject to claw-back by a bankruptcy trustee: (i) acts or payments that are fraudulently made in the suspect period to the detriment of creditors' rights (*actio pauliana*) and (ii) acts or payments in the suspect period whereby assets have been given away for free, or whereby a considerable difference exists between the consideration received and the value of the transferred asset.

Furthermore, as a result of the bankruptcy of the debtor, the restructuring plan is automatically withdrawn and shall have no further effect going forward (that is, the creditors of the bankrupt debtor cannot request the bankruptcy trustee to honour the payment obligations included in the restructuring plan).

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

In principle, yes. The opening of judicial reorganisation proceedings does not divest a debtor of its assets. The current management of the debtor and the board of directors remains in charge of the management of the company, albeit under the limited supervision of the court. However, in the event of serious misconduct on the part of the debtor, the court may appoint a provisional administrator who can be tasked with taking over (part of) the management of the debtor.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

The Belgian Insolvency Act provides for three types of judicial reorganisation: (i) an amicable arrangement with two or more creditors, (ii) a collective agreement with the debtor's creditors and (iii) a transfer of all or part of the debtor's activities under court supervision.

A distressed debtor is in principle free to choose the type of judicial reorganisation. The debtor can amend its choice during the course of the judicial reorganisation proceedings. For example, an amicable arrangement with two creditors can be transformed into a collective agreement, or to finally end up in a court supervised transfer to a third party.

(a) An amicable arrangement

A debtor can negotiate an amicable arrangement with two or more of its creditors in the framework of the judicial reorganisation proceedings and under the supervision of a judge. The Belgian Insolvency Act does not specify the restructuring measures that can be the subject of an amicable arrangement and thus may include haircuts, debt-for-equity swaps, amendments of contracts or claims, recourse rights, etc.

The amicable arrangement is only binding upon the creditors who are parties to the amicable arrangement. Once approved by the court, the amicable arrangement is protected against claw-back risks in a later bankruptcy of the debtor.

(b) A collective agreement

Within the framework of judicial reorganisation proceedings aimed at obtaining a collective agreement with a debtor's creditors, a debtor must draw up a detailed reorganisation plan describing the financial situation, the difficulties encountered, the proposed reorganisation measures, etc. The Belgian Insolvency Act stipulates that the reorganisation plan must mention the proposed payment deadlines, the haircuts on the outstanding debts (in principal and interest), amounts, penalties and costs due. It can also include a debt-for-equity swap or a differentiated arrangement for certain types of claims, etc. A haircut cannot result in a payment of less than 20% of the principal amount of the outstanding debt. The Belgian Insolvency Act contains certain limitations, primarily in view of protecting employees of the debtor. The implementation period of the reorganisation plan cannot exceed five years as of the date of approval of the plan by the court.

The reorganisation plan is subject to the approval of a meeting of creditors and of the court. The reorganisation plan is approved by the meeting of creditors if (i) it is approved by the majority of the creditors and (ii) the creditors represent at least one half of the outstanding principal amounts. The reorganisation plan can bind creditors who have a contractual lien over specific assets, pledgees, mortgagees and the so-called creditor-owners, provided that (i) interest is paid on the principal amount of their outstanding debts and (ii) their rights are not suspended for more than 24 months as of the filing of the petition. No other measures can be imposed on such creditors without their individual agreement.

(c) A court supervised transfer

A debtor who is subject to judicial reorganisation proceedings can also envisage a court supervised transfer of all or part of its assets or activities to a third party.

A transfer can take place with or without the approval of the debtor. At the request of the public prosecutor, a creditor or even a third party interested in the acquisition of all or part of the debtor's assets or activities, the court can order in certain circumstances a forced and court supervised transfer, for example, (i) if the debtor is in a state of bankruptcy and has not filed for judicial reorganisation proceedings, or (ii) if the judicial reorganisation proceedings have failed. In such case, a judicial administrator will be appointed to organise the transfer to a third party under court supervision.

The transfer is binding upon all creditors, subject to certain exceptions.

(15) Do creditors vote in separate classes and, if so, what are the criteria for class formation?

Creditors will not be separated into different classes for the purpose of voting on the reorganisation plan as part of the judicial reorganisation aimed at obtaining a collective agreement with the debtor's creditors.

(16) Can equity holders be included?

As a matter of principle, equity holders are as such not included in the restructuring plan. They have no impact on or leverage in the restructuring negotiations during the judicial reorganisation (as opposed to bankruptcy and liquidation proceedings).

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

See the answer to (21).

(18) What are the voting requirements (head count test / majority in value test)?

The approval of the reorganisation plan is subject to a double majority rule. The reorganisation plan is approved by the meeting of creditors if:

- it is approved by the majority of the creditors; and

- the creditors represent at least half of the relevant outstanding principal amounts.

Creditors who do not participate in the voting will not be taken into account for determining the required majorities, nor are their claims.

(19) Does the instrument provide for cram-down of dissenting creditors?

Yes. As mentioned above, creditors will not be separated in different classes for purposes of the voting. Therefore, the reorganisation plan will be binding upon a dissenting creditor who has voted against the plan, as long as the double majority requirements are met and subject to the limitations set out above (for secured creditors: the maximum reorganisation measures for secured creditors in the plan are (i) subject to the payment of interest on the principal debt amount and (ii) limited to a maximum suspension of 24 months). These limitations are important as they imply that certain creditors will not be bound by the reorganisation plan unless they have voted in favour of the plan.

Please note that for voting purposes, a creditor is only considered a secured creditor *to the extent* its claim has been secured by a right *in rem* at the time of the opening of the judicial reorganisation procedure. The creditor will not be considered a secured creditor for that portion of its claim which is not secured by a right *in rem*.

(20) Does the instrument provide for cross-class cram-down?

As mentioned above, creditors will not be separated in different classes for purposes of the voting.

(21) Is the restructuring instrument binding upon all affected parties?

(a) An amicable agreement

As the amicable agreement envisages an arrangement with two or more of the debtor's creditors to the debtor's choice, other creditors can evidently be excluded from the scope of said amicable agreement. The amicable agreement binds the debtor and binds the creditors who have explicitly agreed thereto.

(b) A collective agreement

The approval of the reorganisation plan makes it binding on all creditors included in the reorganisation proceedings.

The reorganisation proceedings have a binding effect on the claims which were disputed but which have been judicially recognised after the approval of the reorganisation plan. Said claims must be paid in the manner and to the extent determined by the approved plan for claims of the same nature (an amendment to the reorganisation plan is therefore not required).

Furthermore, the reorganisation proceedings have a binding effect on non-disputed claims that were not included in the request for reorganisation. In case the creditor of the non-included claims was not duly informed during the suspension, such creditor must be paid in the manner and to the extent determined by the approved plan for similar claims (an amendment to the reorganisation plan is therefore not required). The non-included claims of the duly informed creditor must be paid, again, in the manner determined for claims of the same nature but only *after* the reorganisation plan has been carried out.

Unless the reorganisation plan expressly provides otherwise, its full execution releases the debtor from all claims contained therein in full and definitively.

The plan, in principle, does not benefit the co-debtors and the guarantors of personal securities. The position of a creditor with regard to the plan does not prejudice the rights of the creditor against the third party that has provided security. As an exception to this rule, the plan however does benefit the natural person who has provided free personal security for the debtor and whose request that the court rule that the amount of personal security is manifestly disproportionate to the possibility (at the time of the granting of the suspension) of repayment of the debt by the debtor, has been granted.

(c) A court supervised transfer

The court supervised transfer is binding upon all parties. As a result of the sale of the movable or immovable property to one or more third parties, the creditors' rights are transferred to the sale price.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

Yes.

If the purpose of the judicial reorganisation procedure is to negotiate an *amicable arrangement*, the obtained amicable arrangement is submitted to the court for approval. By approving the amicable arrangement, the court declares the amicable arrangement enforceable.

If the purpose of the judicial reorganisation procedure is to obtain a *collective agreement*, the proposed collective agreement is submitted to the court for approval. The court has no authority to make changes to the proposed collective agreement, nor can the plan be made subject to certain conditions. The court can only refuse approval on the grounds that the formalities specified in the Belgian Insolvency Act have not been respected, or on the basis that a provision of mandatory law has been infringed. However, the court has the power to award the debtor an opportunity to remedy non-conformity with the formalities or a provision of mandatory law.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example no creditor worse off test, an absolute priority rule)?

The judicial reorganisation procedure involving a *transfer* of all or part of the debtor company's assets or activities to a third party must be *ordered and authorised* by a court judgment and hence always involves confirmation by the court.

(a) An amicable arrangement

As mentioned above, the amicable arrangement is only binding on the parties who have entered into the agreement with the debtor. The amicable arrangement does not bind creditors who have not explicitly agreed to the amicable agreement.

(b) A collective agreement

As mentioned, creditors have to vote on the reorganisation plan that is the subject of the collective agreement that the debtor intends to conclude with its creditors. Creditors are protected by the double majority rule: a reorganisation plan is approved by creditors if (i) it is approved by the majority of the creditors and (ii) the creditors represent at least half of the relevant outstanding principal amounts. In calculating the majorities, no account will be taken of the creditors that have not participated in the voting procedure.

The collective agreement may provide for a differentiated treatment of creditors. Nevertheless, the treatment of public creditors enjoying a general privilege should not be less favourable than that accorded to the best treated ordinary creditors in the suspension.

During the procedure of judicial reorganisation, a creditor may still establish a conventional or legal security over the available assets of the debtor. As stated before, securities issued during the suspension period (moratorium) of the reorganisation proceedings are protected from any claw-back and cannot be challenged by a bankruptcy trustee in subsequent bankruptcy proceedings.

Furthermore, creditors cannot impose conservatory attachments on the assets of the debtor during the suspension period. Equally, creditors cannot proceed with enforcement of seized assets. An exception exists for enforcement proceedings where there is a fixed date for the forced public sale of the assets; under certain circumstances, the creditor may proceed with such enforcement notwithstanding the judicial reorganisation proceedings.

Lastly, the judicial reorganisation proceedings have no impact on creditors with (i) pledges on receivables, (ii) pledges or security assignments of bank accounts and (iii) financial instruments (as explained above). Similarly, close-out netting agreements are not affected by the opening of judicial reorganisation proceedings.

(c) A court supervised transfer

A transfer (“sale”) of all or part of the activities of a debtor under judicial reorganisation proceedings occurs under strict court supervision.

In seeking and obtaining offers from interested third parties, the judicial administrator is legally obliged to ensure, as a priority, the preservation of all or part of the company’s activities, taking into account the creditors’ rights.

In the event of a transfer of moveable or immovable property of the debtor, certain secured creditors (such as preferential creditors and mortgagees) may request the court to make the transfer subject to certain conditions, such as a minimum sale price.

Upon the transfer of movable or immovable property of the debtor to a third party, the creditors’ rights are transferred to the price resulting from such sale.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

(a) An amicable arrangement

When assessing the submitted amicable agreement between the debtor and two or more of its creditors, the court (and its delegates) only has authority to approve the *whole* amicable agreement upon performing a marginal control and assessment. As such, the court will not have the authority to take any decisions with respect to the valuation that was prepared in connection with the amicable arrangement.

(b) A collective agreement

When assessing the proposed collective reorganisation plan submitted to the court for approval, the court has no authority to make any changes – nor can the court make the reorganisation plan subject to certain conditions. The court is only entitled to refuse a reorganisation plan if the formal conditions of the Belgian Insolvency Act have not been complied with, or if the reorganisation plan is contrary to public policy. A differentiated treatment of creditors does not constitute a ground for refusal. However, the court has the power to allow the debtor to remedy such issues. As such, the court will not have the authority to take any decisions with respect to the valuation that was prepared in connection with the reorganisation plan.

(c) A court supervised transfer

The transfer of all or part of the assets or activities of the debtor in judicial reorganisation proceedings is a process that is under strict scrutiny of the court and its delegate, the judicial administrator. The judicial administrator will be responsible for organising and carrying out the transfer in the name and on behalf of the debtor. The judicial administrator will choose the assets to sell, compare the sales proposals received, decide on the preferred third party and on the type of sales process (a public or private sale). The judicial administrator will also verify whether the proposed sales price equals at least the fire sale value of the assets or activities (that is, the probable value in the event of a compulsory liquidation during bankruptcy or liquidation proceedings). The judicial administrator will report to the court, who will authorise the sales transaction(s). If there are several similar proposals, the court will give preference to the proposal that takes into account the employees of the debtor. As such, the court and the judicial administrator will have significant authority with respect to the valuation of the sales transactions effected under the judicial reorganisation proceedings.

(25) Is appeal possible?

(a) An amicable arrangement

The Belgian Insolvency Act does not expressly mention that appeal proceedings are possible. It is also not entirely clear whether an amicable agreement approved by the court can be terminated by the contracting parties pursuant to Belgian contract law.

(b) A collective agreement

If the court disapproves a collective agreement, the debtor or any other party who is involved in the legal proceedings may lodge an appeal against such judgment.

(c) A court supervised transfer

The Belgian Insolvency Act does not explicitly stipulate the remedies that are available against a judgment holding a court supervised transfer. However, it is generally accepted that an appeal is possible.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Yes. As mentioned above, the court will be involved in all restructuring measures that are discussed above. In Belgium there is no restructuring instrument that allows the restructuring of a company outside a formal court supervised insolvency procedure (except for certain limited restructuring measures discussed above).

(27) Is there a statutory basis to appoint a restructuring expert?

Yes. As mentioned above, one of the novelties of the revised Belgian Insolvency Act is the appointment of a company mediator who facilitates the restructuring of a debtor. The Belgian Insolvency Act does not stipulate specific requirements which the company mediator must fulfil. In practice, a company mediator will be someone with the necessary experience in restructuring matters (for example, a bankruptcy trustee, a lawyer, an accountant, etcetera).

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

In Belgium, a director must observe various general duties in relation to their management of a company. A director may be held liable if the director breaches any of those duties and thereby causes damage to the company or any third party.

First, a director is contractually obliged to a company to properly fulfil their mandate to manage that company,[40] as well as under a general duty of care not to harm the company or any other third party.[41] Intentional or negligent acts or omissions may lead to personal liability. Liability will be assessed according to the minimum standard of a normal, prudent and diligent director with the same professional qualifications, thus allowing the director a reasonable degree of latitude. As for the director's contractual obligation to properly manage the company, a director is not expected to be clairvoyant; a court must always show considerable deference in trying to assess what a prudent and diligent director would have done in the same circumstances.

In addition, each director is *vis-à-vis* the company and third parties are jointly and severally liable for all damage resulting from the non-compliance with the Belgian Code of Companies and Associations (CCA) and the company's articles of association.[42]

Aside from the general duties mentioned above, the CCA and the Belgian Criminal Code contain a number of provisions that specifically deal with a director's liability in the context of a company's bankruptcy or insolvency.

Noteworthy:

- *Failure to file for bankruptcy*: The directors of a company are required to file for bankruptcy within one month after the company has ceased to pay its debts, that is, when it can no longer pay its main creditors in a timely

40 CCA, art 2:56.
41 Belgian Civil Code, art 1382.
42 CCA, art 2:56.

fashion.[43] Any failure to do so may trigger civil and criminal liabilities of the directors (including liability for the debts incurred by the debtor company). The obligation to file for bankruptcy will be suspended if the indebted company's directors have filed for judicial reorganisation for as long as the suspension period continues to apply.

- *Gross errors contributing to bankruptcy*: Directors, former directors, and all other persons who had actual authority to manage and administer the company's business may be jointly and / or severally liable for all or part of the debts of the company to the extent there is a deficit of the company's liabilities as against its remaining assets (which will almost always be the case). This liability will only apply insofar as it is found that these persons committed an apparent gross error that contributed to the bankruptcy.[44] The concept of an "apparent gross error" implies that a court will need to show great deference in assessing the director's conduct and that it may not substitute its own judgment in hindsight for that of the directors, made in light of the facts available at the time.

- *Founders' liability*: The CCA provides that the founders (who may be directors) of a company can be held jointly and severally liable for (part of) the company's debts if the company is declared bankrupt within three years of its incorporation and if the company's capital, at the time of incorporation, was clearly insufficient for a normal operation of the intended business activity for at least two years.[45] The company's financial plan, which is legally required to incorporate a company, will be an important tool to ascertain the founders' liability in this respect.

- *Decrease of net assets*: If, as a result of losses, the net assets of the company have dropped below 50% of the share capital, the directors must convene a shareholders' meeting. That meeting must be held within two months of the time the loss is ascertained, or should have been ascertained, by the directors.[46] At the meeting, the shareholders must decide whether or not the company is to be wound up. . The board of directors must prepare a special report to either propose remedial actions or the dissolution of the company to the shareholders.

- *Wrongful trading*: The Belgian Insolvency Act provides that directors and *de facto* directors can be held personally or jointly and severally liable for (part of) the remaining debts of the bankrupt company in the event that those directors, prior to the bankruptcy, knew or should have known that there was no reasonable prospect to continue the company's activities and to avoid a bankruptcy and provided they failed to act as normal, prudent and diligent directors in the same circumstances.[47] The liability for wrongful trading only applies in the context of a bankruptcy procedure and does not apply in the context of a judicial reorganisation. The fact the director, in a period pre-dating the bankruptcy, tried to save the continuity of the company by means of initiating judicial reorganisation proceedings, will not be held against him. Indeed, in view of the clear objective of the legislator to give the reorganisation of companies in difficulty every opportunity to survive,

43 Belgian Insolvency Act, art 102.
44 *Idem*, art 225
45 CCA, art 7:18, 2°.
46 *Idem*, art 7:228.
47 Belgian Insolvency Act, art. 227.

there is no strict treatment of directors who are still trying to save the company by means of initiating a judicial reorganisation proceeding, albeit in vain.

(b) Restructuring expert

As mentioned above, the debtor may request the appointment of a company mediator to assist with the restructuring of the company. The company mediator does not interfere with the (daily) management of the company.

The Belgian Insolvency Act does not contain specific provisions regulating the liability of the company mediator. However, if it can be established that a company mediator has made mistakes that have caused damages, such company mediator can be held liable based on general rules of tort law. There is not a legal threshold, but in practice it is not easy to successfully hold a company mediator or administrator liable.

2.2 FRANCE

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

There is a wide range of preventive restructuring instruments which can be used in France where a company encounters financial or other difficulties. The principal restructuring regimes which are available in France in respect of a company with its centre of main interests in France, are:

- special mediation (*mandat ad hoc*);
- conciliation proceedings (*conciliation*);
- reorganisation proceedings (*redressement judiciaire*);
- safeguard proceedings (*sauvegarde*);
- accelerated safeguard proceedings (*sauvegarde accélérée*) and accelerated financial safeguard proceedings (*sauvegarde financière accélérée*); and
- liquidation proceedings (*liquidation judiciaire*).

In many instances a restructuring will be implemented in France using a combination of the above regimes in order to take advantage of specific matters available under a particular regime, including for example treatment of a particular class of creditors or new money measures.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

No, France is not currently in the process of introducing new restructuring instruments.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out-of-court instrument).

(a) Special mediation

The special mediation procedure is a confidential pre-insolvency procedure which is most often used initially when a company in France is experiencing difficulties. It consists of the appointment by the court of a special mediator (*mandataire ad hoc*) who will have the specific task of assisting the company in its discussions / negotiations with its creditors. The special mediator will report to the president of the court on the economic and financial situation of the company and seek to help the company to come to an arrangement with its main creditors with a view to preserving the company as a going concern. In practice, the appointment of a special mediator can be used by companies in financial difficulties as a preliminary step for the implementation of other preventive restructuring proceedings, notably conciliation proceedings.

(b) Conciliation proceedings

The aim of conciliation proceedings is to legally sanction the terms of an arrangement agreed between a company and its main creditors. Under conciliation proceedings, the company can, with the help of a conciliator appointed by the court, renegotiate in a confidential manner its debts with its main creditors. The company will be required to provide details of its financial, economic and social situation, including its financing requirements. The conciliator's task is to seek agreement between the company and its main creditors and the conciliator may be assisted by experts when reporting on the company's economic and financial situation. In practice, a conciliator may also be appointed to implement, before the court, an agreement reached between the company and its main creditors in special mediation, or if there is any concern that the company is in fact insolvent such that a special mediator cannot be appointed, as an alternative to the opening of formal collective reorganisation proceedings is insolvent for less than 45 days or as condition to the opening of accelerated safeguard proceedings.

(c) Reorganisation proceedings

Reorganisation proceedings are court-based, collective insolvency proceedings which aim to achieve the following objectives: the survival of the company, the preservation of its activities and employment and discharge of its liabilities. It is not to maximise returns for lenders or other creditors. The objectives of reorganisation proceedings will therefore influence the decision of a court to adopt a continuation plan and / or a sale plan to avoid if possible a liquidation of the company if there is any chance to preserve or minimise the impact on employment.

(d) Safeguard proceedings

Safeguard proceedings were introduced in France in 2006 and are inspired by the US Chapter 11 procedure. The objective of safeguard proceedings is to enable debtors that are in financial distress, but not yet insolvent, to reorganise and restructure under the court's protection and arrange for a global negotiation with financial creditors, main suppliers and public authorities in order to ensure that the company continues to operate and maintain employment. Safeguard proceedings are court-based pre-insolvency collective proceedings which largely follow the insolvency reorganisation proceedings regime with some exceptions. Safeguard proceedings allow companies to obtain the suspension of judicial proceedings, rescheduling of their debt and, subject to certain conditions, to write off debt. Over the last decade, safeguard proceedings have been used successfully in a number of high profile restructurings in France.

(e) Accelerated safeguard proceedings and accelerated financial safeguard proceedings

The aim of accelerated safeguard proceedings and accelerated financial safeguard proceedings is to combine the confidential pre-insolvency proceedings of conciliation with special fast-track safeguard proceedings for all creditors (accelerated safeguard proceedings) or financial creditors only (accelerated financial safeguard proceedings). Any direct access to the accelerated safeguard proceedings or accelerated financial safeguard proceedings is strictly prohibited, since the law provides that conciliation proceedings should be opened first. As conciliation proceedings are purely contractual proceedings, the process is consensual; no cram-downs can be imposed. Therefore, the company or the conciliator has no power to compel the creditors to agree to a plan negotiated by some creditors of a company and can file for:

- accelerated financial safeguard proceedings: if the nature of the company's indebtedness (as set out in its accounts) mainly consists of financial debt held by financial creditors (and bondholders, if any), the company may request the court to open accelerated financial safeguard proceedings which will be limited to these creditors adopting the plan;

- accelerated safeguard proceedings: accelerated safeguard proceedings will cover all the creditors of the company (not just financial creditors) whose indebtedness arose prior to the opening of these proceedings, together with any person with whom the company has an on-going contract or lease.

Accelerated financial safeguard proceedings allow for the cram-down of dissenting creditors consulted in the committee or bondholders' meeting (if any) and a fast-track restructuring process, since only those debtors are consulted.

Accelerated safeguard proceedings also allow for the cram-down of dissenting creditors consulted in the two committees, but cannot impose grace periods on creditors who are not members of committees unless they have agreed to its terms.

In practice, applications made before the court more often relate to accelerated financial safeguard proceedings rather than accelerated safeguard proceedings.

(f) Liquidation proceedings

The aim of liquidation proceedings is to liquidate an insolvent company whose reorganisation appears obviously impossible, by selling its business as a whole or per branch of activity, or its assets.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

Reorganisation proceedings, safeguard proceedings, accelerated safeguard proceedings, accelerated financial and safeguard proceedings are available as main proceedings under the European Insolvency Regulation. Special mediation and conciliation proceeding are not currently listed as either a main or secondary proceeding for the purposes of the European Insolvency Regulation.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

For the purposes of each of the above regimes it is crucial to determine whether or not the company is solvent or insolvent at any given time. A company is "insolvent" (*en état de cessation des paiements*) if it is not able to meet its payment obligations on the date on which they fall due for payment with its available assets, taking into account any grace periods granted to that company for payment by a creditor. This is a cash flow test and not a balance sheet test.

(a) Special mediation

A request to appoint a special mediator may only be made if the company is solvent and facing difficulties when filing for such appointment. In practice, the court usually requests the legal representatives of the company to certify that the company is solvent.

(b) Conciliation

Conciliation proceedings are available to any company that encounters legal, economic or financial difficulties, actual or anticipated, and is not insolvent or has been insolvent for less than 45 days.

(c) Reorganisation proceedings

The court will order the opening of reorganisation proceedings if it can be shown that the company is insolvent and has not ceased its activities or is capable of continuing its business. Any company which is insolvent will have 45 days to apply to the court to start reorganisation proceedings or, if it prefers a confidential setting, conciliation proceedings, or, if the company's reorganisation is manifestly impossible, judicial liquidation. The directors of the company will have to explain to the court why and when the company has become insolvent and what its financial / economic prospects are. The main point will be to assess whether there is a business in the company which can be continued or sold outside of the company.

(d) Safeguard proceedings

Safeguard proceedings, under the court's protection, are available to a company that is solvent and faces difficulties (financial or otherwise) which it cannot overcome. The company does not have to demonstrate that those difficulties will or may lead to its insolvency. The court will assess whether the conditions for the opening of safeguard are met and, if the company fails to demonstrate that its difficulties can only be overcome under the court's protection, then the court will invite the company to request the appointment of a conciliator (and therefore the opening of conciliation proceedings) or reorganisation or liquidation proceedings if the company is insolvent for less than 45 days.

(e) Accelerated safeguard proceedings and accelerated financial safeguard proceedings

Conditions to open accelerated safeguard proceedings or accelerated financial safeguard proceedings are different from the standard safeguard proceedings. The company must (i) be subject to on-going conciliation proceedings, (ii) have drawn up a restructuring plan to ensure the sustainability of its business, (iii) have obtained from the creditors affected by the plan sufficiently wide support for the proposed restructuring so as to make the adoption of the plan likely within a maximum period of three months and (iv) either publish consolidated financial accounts or have its accounts certified by a statutory auditor or certified public accountant and meet one of the thresholds set by decree n°2014-736 of 30 June 2014.[48] Importantly, there is no requirement for a company to be solvent if it requests the opening of accelerated safeguard proceedings (or

[48] 20 employees, revenues of EUR 3 million, or total net assets of EUR 1,5 million.

accelerated financial safeguard proceedings), provided it is in conciliation proceedings and was not insolvent for more than 45 days when it initially requested the opening of conciliation proceedings.

(f) Liquidation proceedings

Liquidation appears to be the only proceedings available when the debtor is insolvent and its reorganisation appears obviously impossible.

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

A request for the opening of special mediation, conciliation, safeguard proceedings, accelerated safeguard proceedings and accelerated financial safeguard proceedings may only be made by the legal representative of the company (that is, the board of directors or the president of the board). These proceedings cannot be initiated by a creditor of the company.

Where the conditions to open applicable proceedings are met, reorganisation proceedings and liquidation proceedings must be initiated by the debtor and can also be initiated by the Public Prosecutor or a creditor, whatever the nature of its debt and regardless of the amount of its claim. A creditor's application must be supported by information setting out the financial situation of the company and, in particular, evidence that the company is insolvent.

(7) Is there a viability test?

(a) Special mediation, conciliation and safeguard

There is no viability test *per se* for the opening of special mediation or conciliation. If the company becomes insolvent during the special mediation or safeguard proceedings or it becomes clear that a safeguard plan to continue the business of the company is not possible, then these proceedings will end and the company may be placed in conciliation proceedings, reorganisation proceedings or, if its reorganisation is "manifestly impossible", in judicial liquidation.

Any restructuring arrangement reached between the parties during the conciliation proceedings may be either:

- simply acknowledged *(constaté*) by the president of the court. This option does not involve publicity, but implies that the creditors having granted new money facilities in the framework of such conciliation proceedings waive their right to priority of payment and to protection against the risk of the workout agreement being rescinded; or

- formally approved (*homologué*) at the request of the company by the Commercial Court provided that:

  (i) the company is not insolvent and the restructuring arrangement reached by the parties puts an end to the company's insolvency;

  (ii) the terms and conditions of the arrangement are such as to ensure that the company's business will continue; and

(iii) the arrangement does not affect creditors who are not parties to it.

New money facilities granted within this court approval process benefit from a statutory priority of payment should the company subsequently file for insolvency. The arrangement remains confidential, but the formal approval must be recorded in a full judgment accessible to the public and is therefore subject to be challenged by a third party or appealed. Employees' representatives must be informed by the debtor of the terms and conditions of the restructuring agreement and be invited to attend the court hearing ruling on such agreement.

(b) Accelerated safeguard proceedings and accelerated financial safeguard proceedings

It is a condition of the opening of accelerated safeguard proceedings or accelerated financial safeguard proceedings, that the company must have drawn up a restructuring plan to ensure the sustainability of its business and have obtained from the creditors affected sufficiently wide support for the proposed restructuring plan so as to make the adoption of the plan likely within a maximum period of three months.

(c) Reorganisation proceedings and safeguard proceedings

Where the applicable creditors' committees and bondholders' meeting (if any) have voted in favour of a continuation plan in reorganisation proceedings, or a safeguard plan in safeguard proceedings, the court must consider whether there is a serious possibility of the company continuing its business as a result of the implementation of that plan.

(d) Liquidation proceedings

Should a debtor become insolvent and its rescue appears to be impossible, the company has to file for liquidation proceedings in order to liquidate the company by selling its business, as a whole or per branch of activity, or its assets.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

(a) Special mediation and conciliation proceedings

The period for which the special mediator can be appointed is not limited by law. It will usually be for three months and may be extended for further periods. Since 1 July 2014, the court decision appointing the special mediator must be communicated to the statutory auditors of the company (if any).

The conciliation procedure is for an initial period of four months maximum, but this period may be extended by the court at the conciliator's request for a further month (the period of time allocated to the parties to negotiate within a conciliation proceeding excludes the period of time the court needs to approve the agreement). A new conciliation proceeding cannot be opened within a three-month period after the end of a previous one.

(b) Reorganisation proceedings

The court will open an observation period for the purpose of assessing whether or not the company can continue as a going concern, or if the business can be sold. The observation period will be for an initial period of up to six months. This period can be extended once for six months and, in exceptional circumstances, can be extended further one more time at the Public Prosecutor's request for an additional six months and so may last up to 18 months from the date of the judgment opening the reorganisation proceedings (*jugement d'ouverture*). At the end of the observation period, the court will, at its discretion, either accept or reject the recommendations of the administrator and may choose one of the following options:

(i) the continuation of the business of the company pursuant to a reorganisation scheme proposed by the debtor (*plan de redressement*), or a competing alternative reorganisation scheme proposed by a creditor;

(ii) the transfer of the business in accordance with a transfer scheme (*plan de cession*) which can provide for the transfer of all or part of the assets of the company, provided that the transferred parts of business are not isolated assets and may be operated autonomously; or

(iii) the liquidation of the company.

At any time during the observation period, the court will be able to order the transfer of all or part of the company's business or the start of liquidation proceedings if there is no plan, or if the proposed plans are clearly not sufficient to lead to its reorganisation.

(c) Safeguard proceedings

The consequences of opening safeguard proceedings are generally those of reorganisation proceedings (observation period, suspension of claims, freezing of enforcement of security, continuation of existing / continuing contract).

During the observation period, a report on economic and employment issues is prepared (*bilan économique et social*). During this period, the company and its creditors will seek to come to an arrangement for the setting up of a "safeguard scheme" (*plan de sauvegarde*). Creditors' committees will be established as per the reorganisation proceedings principles and can also submit an alternative safeguard scheme.

The company will continue to manage its business (although it will usually be assisted by an administrator to facilitate management). If the company becomes insolvent during the safeguard proceedings, or should it become clear that no safeguard continuation plan is possible, then the company will go into reorganisation proceedings (or if the company is insolvent and if its reorganisation is "manifestly impossible" (*manifestement impossible*), into judicial liquidation).

There are a number of key differences between safeguard proceedings and reorganisation proceedings. In the case of safeguard proceedings there are:

- no “hardening periods” because the company is solvent and transactions entered into during the proceedings cannot subsequently be challenged;
- neither part nor all of the business can be sold without the consent of the management of the company;
- better protection is granted to company directors; and
- safeguard proceedings may terminate at any time during the observation period if the company’s difficulties have disappeared (the safeguard plan therefore becoming unnecessary).

(d) Accelerated safeguard proceedings and accelerated financial safeguard proceedings

A conciliator may be appointed as an administrator during accelerated safeguard proceedings or accelerated financial safeguard proceedings. Trade suppliers are expressly excluded from the accelerated (financial) safeguard proceedings and therefore they continue to be paid within the time periods contractually agreed. The plan must be approved by the court within three months from the opening of the accelerated safeguard proceedings. In an accelerated (financial) safeguard proceedings this delay is reduced to one month (with a possible extension of one month). The financial institutions’ committee has a 20- to 30-day period to revert on each “draft” plan submitted by the company. At the company’s or administrator’s request, the supervisory judge can increase or reduce this period, by a period of not less than eight days.

(9) Is there a stay on individual enforcement actions?

(a) Special mediation and conciliation proceedings

No. The appointment of a special mediator or conciliator does not result in any automatic suspension or stay or freeze of judicial or legal proceedings, or impinge on creditor rights and remedies.

In regard to special mediation proceedings in practice, the special mediator is likely to request creditors to agree to a standstill during the special mediation period so as to ensure that the company remains solvent and to facilitate negotiations with the company’s main creditors.

In regard to conciliation proceedings, there is a possibility of seeking extensions of payment periods (*délais de paiement*) of up to two years under article 1244-1 of the French Civil Code, where a claim is filed by a creditor during (i) the conciliation negotiation phase, or (ii) the implementation phase (that is, after the workout agreement has been approved by the court). The possibility of seeking an extension for payment of up to two years is also available as a general matter of French law, including when special mediation proceedings have been opened.

(b) Reorganisation proceedings

Yes. With regard to reorganisation proceedings, during the observation period, creditors (subject to very limited exceptions) are barred from filing any actions against the company to obtain payment for claims which arose prior to the court order opening the reorganisation proceedings.

Neither the debtor nor the administrator may pay any claims arising before the judgment opening the reorganisation proceedings, with the exception of the payment by set-off of related debts (*dettes connexes*) if the conditions for this are met. Claims arising after the order commencing reorganisation proceedings which are not incurred either for the purposes of progressing the proceedings or for the purpose of the previous observation period, or in return for a service provided to the debtor, cannot be paid.

Neither the debtor nor the administrator are entitled to make any disposition of the company's assets or payments (outside the ordinary course of business) or grant any mortgage, charge or pledge or compromise, or compound any claim of the company, without the authorisation of the court.

As a general rule (and subject to limited exceptions), enforcement of security interests granted by the company are frozen following the opening of insolvency proceedings. It does not prevent creditors from exercising other guarantees and security interests granted by other persons (to the extent such other members are not subject to French insolvency proceedings).

Secured assets form part of the insolvent estate. Neither the company nor the administrator can dispose of the assets of the company without the authorisation of the court. However, subject to this restriction, the debtor or the administrator may use charged assets as if they were not subject to that charge, save only that any proceeds of sale of the charged assets must be deposited to a special account held by the Deposit and Consignment Bank (*Caisse des Dépôts et Consignation*). Once they have been so deposited, these sums cease to be available for the financing of the business during the observation period.

If there are assets belonging to third parties in the company's possession at the date of opening of reorganisation proceedings which are identified and individualised, those third parties can bring an action to repossess those assets which must be made within three months from publication of the court order opening reorganisation proceedings (or safeguard proceedings). If those assets belong to third parties in accordance with a retention of title clause, such retention of title arrangement must have been agreed between the parties in writing and accepted by no later than the date of delivery of the assets. The assets can be retained if the company pays the price in full and immediately or in instalments, with the agreement of the relevant seller.

(c) Safeguard proceedings, accelerated safeguard proceedings and accelerated financial safeguard proceedings

Yes. The consequences of opening safeguard proceedings are generally those of reorganisation proceedings, with some limited exceptions in connection with accelerated safeguard proceedings and accelerated financial safeguard proceedings.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

As a general rule, any contractual provision whereby payment can be accelerated on the opening of special mediation proceedings, conciliation proceedings, safeguard proceedings, accelerated (financial) safeguard proceedings or reorganisation proceedings, or the appointment of a special mediator, conciliator or administrator, is deemed to be null and void.

In addition, any contractual provision providing that the fees of any advisor to a creditor will be borne by the company solely as a result of the opening of special mediation proceedings, conciliation proceedings, safeguard proceedings, accelerated safeguard proceedings and accelerated financial safeguard proceedings, or reorganisation proceedings or the appointment of a special mediator, conciliator or administrator (over and above a threshold amount fixed by *arrêté*), is deemed to be null and void.

In respect of reorganisation proceedings, only the administrator can elect to carry on with continuing or existing contracts (*contrats en cours*) (for example, leases) that are necessary for the continuation of the activities of the company. *Ipso facto* provisions are also deemed null and void in *ad hoc* proceedings. Creditors are therefore prohibited from accelerating a loan, or terminating an on-going contract, by the sole reason of the opening of *ad hoc* proceedings (or of any filing for that purpose). More generally, any contractual provision increasing the debtor's obligations (or reducing its rights) by that sole same reason is also null and void.

(11) What are the options for new interim financing (with super priority status)?

In respect of conciliation proceedings, new money providers who make credit available within the terms of the court approved arrangements during the negotiation phase, or for the purposes of ensuring the continuation of the company's business during the conciliation period, will have priority over the claims of creditors (other than super priority salary claims and court fees and expenses) which arose prior to the date of the opening of the conciliation proceedings if the company is subsequently placed into safeguard proceedings, reorganisation proceedings or judicial liquidation. Similar provisions also apply to suppliers of new services or assets for such purposes. These provisions do not apply to shareholders making contributions in respect of share capital increases.

Further to the 2014 Ordinance, this new money privilege for contribution in cash or services is extended to include new money made available during the conciliation proceedings before the approval by the court (*homologation*) of the restructuring plan.

According to L.622-17 of the French Commercial Code (which also applies to reorganisation proceedings), the preferred creditors will only be paid in priority if their posterior debts were incurred for the purposes of the reorganisation proceedings, or in return for a service provided to the debtor during the observation period.

(12) Are other restructuring-related transactions protected?

No, there are no specific rules protecting restructuring-related transactions.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

(a) Special mediation and conciliation proceedings

Management of the company remains in the hands of the chairman and the board; in practice, however, they are likely to follow the recommendations of the special mediator or conciliator.

(b) Reorganisation proceedings

In reorganisation proceedings, the company is, in principle, entitled to remain in charge of the management of that part of its business that has not been transferred to the administrator by the court's decision, or that has not been taken over by the administrator pursuant to the terms of the insolvency law. The court, however, may appoint an administrator to assist (rather than to only supervise, as in the case of safeguard proceedings) the company in the management of its business.

In contrast to safeguard proceedings, the court can also require the administrator to take over, in whole or in part, the management of the business. In practice, the administrator will exercise significant control over management decisions (including cash-outs). The "*Loi Macron*" imposes the appointment of a second administrator and a second creditors' representative in the opening judgments of proceedings against debtors presenting some complexity features, that is, debtors belonging to a group of companies within which several companies are under insolvency proceedings, a number of secondary establishments, or amount of turnover (details of the number and amount are to be specified by decree). Special rules also apply to small companies. The court will appoint a representative of the creditors (*mandataire judiciaire*) and a bankruptcy judge (*juge commissaire*) to preside over the administration. The court will also invite the employees to appoint a representative (*représentant des salariés*). The court can also appoint one to five controllers (*contrôleurs*) among the creditors who ask to be appointed as such. The controllers are entitled to be informed of the procedure and will be asked to give their opinions before any important decision is taken. Such controllers also have the power to take certain actions. In reorganisation proceedings only, the acts of management that the debtor is entitled to undertake in the ordinary course of its business, are subject to prohibitions concerning the entering into of certain transactions (such as transactions at an undervalue, preferences, termination of contracts and payment of debts arising before the opening of the reorganisation proceedings).

(c) Safeguard proceedings and accelerated (financial) safeguard proceedings

In safeguard proceedings, the company will continue to manage its business (although it will usually be assisted by an administrator to facilitate management).

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

(a) Special mediation and conciliation proceedings

Any specific measures, such as the ones mentioned above, may be proposed as part of the restructuring plan, but will need to be approved by each affected creditor or party.

(b) Reorganisation proceedings, safeguard proceedings and accelerated (financial) safeguard proceedings

Any specific measures, such as the ones mentioned above, may be proposed as part of the restructuring plan but will need to be approved by the relevant committee and then approved by the court as part of the plan. One of the main difficulties of the French preventive procedures is the general inability to oust a non-consenting shareholder. Although there are a limited number of circumstances where a French court could initiate a forced sale of the shares of a shareholder, this is very much the exception and not the general rule. If a shareholder has made a shareholder loan to a company, it will be invited to be part of the financial institutions committee for the purpose of voting on any plan. In practice, shareholders retain considerable nuisance value throughout a restructuring procedure.

(15) Do creditors vote in separate classes and, if so, what are the criteria for class formation?

(a) Special mediation, conciliation proceedings

No. Each affected creditor has an individual right to vote and creditors' committees are not constituted.

(b) Reorganisation proceedings and safeguard proceedings

Yes. For companies whose accounts have been certified by an auditor or established by a public accountant and that employ 150 salaried employees or whose turnover is in excess of EUR 20 million, the 2005 Law envisages the formation of two committees of creditors.

The first committee comprises financial institutions (*établissement de crédits*) or any similar institutions and the second committee comprises trade suppliers (trade creditors with more than 3% of the total trade claims). Shareholders who have made loans to the company may also be invited by the administrator to be members of the financial institutions committee. The administrator may also request the establishment of creditors' committees, even if the thresholds above are not met, to avoid having to consult with creditors individually.

Bondholders are not represented on the financial institutions' committee but will be requested to vote on the plan in a separate bondholders' general meeting.

Each member of a creditors' committee and each bondholder, if any, must inform the administrator of the existence of any agreement which makes the exercise of its vote subject to conditions of a third party, or the purpose of which is the partial or total payment by a third party of its claim, as well as of any subordination arrangement.

(c) Accelerated (financial) safeguard proceedings

Yes, generally the safeguard regime for creditors' committees applies to accelerated safeguard proceedings for all creditors and to the accelerated (financial) safeguard proceedings for all financial creditors and bondholders, if any.

(16) Can equity holders be included?

Yes, but see above under (14).

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

Yes, in special mediation and conciliation proceedings but not within the same class of creditors or debt. For equity holders, please see above under (13).

(18) What are the voting requirements (head count test / majority in value test)?

(a) Special mediation and conciliation proceedings

Each creditor votes individually and the consent of each creditor will be needed to implement a restructuring plan affecting that creditor.

(b) Reorganisation proceedings and safeguard proceedings

The plan proposed must be approved by the requisite quorum of the two creditors' committees and the bondholders' general meeting. This quorum is a two-thirds majority of the total amount of debt claims at the date of the court order opening the safeguard proceedings held by members of that committee who have voted on the company's proposal. The French court must also review the administrator's report and the plan to ensure that there is a serious possibility of the company continuing its business. The plan can involve new money and / or debt conversion.

Where the plan is approved by the relevant committees and bondholders in general meeting, if any, this will bind all members of that committee and bondholders if the plan is approved by the court.

(c) Accelerated safeguard proceedings and accelerated financial safeguard proceedings

The same rules as for safeguard proceedings apply generally to accelerated safeguard proceedings and accelerated financial safeguard proceedings.

(19) Does the instrument provide for cram-down of dissenting creditors?

(a) Special mediation and conciliation

No. The appointment of a special mediator or conciliator does not result in any cram-down of dissenting creditors in those proceedings. Each affected creditor's individual consent is required to implement a restructuring plan that affects it and which was negotiated during special mediation or conciliation proceedings and there is no power to cram-down a dissenting creditor in these proceedings.

(b) Reorganisation proceedings, safeguard proceedings, accelerated safeguard proceedings and accelerated (financial) safeguard proceedings

Yes. Reorganisation proceedings, safeguard proceedings and accelerated (financial) safeguard proceedings may be used to cram-down dissenting creditors. Where the plan is approved by the relevant committees and bondholders in general meeting, if any, this will bind all members of that committee if the plan is approved by the court. The court approved plan will not be binding on creditors who are not members of the committees unless they have agreed to its terms, but the court can impose grace periods on creditors who are not members of committees of up to 10 years. The court cannot impose a term-out plan to new money providers benefiting from the super senior status attached to conciliation proceedings under the safeguard plan, unless they agree otherwise.

(20) Does the instrument provide for cross-class cram-down?

Not as a general rule. As regards financial creditors other than bondholders, this will depend on the terms of the proposed restructuring plan and the value of different classes of debt held by members of the financial institutions committee. Note that bondholders vote separately in one general meeting of all bondholders, notwithstanding any contractual terms to the contrary in the relevant bond documentation.

(21) Is the restructuring instrument binding upon all affected parties?

(a) Special mediation and conciliation proceedings

Where the special mediator's mission results in agreement between the interested parties, this will often be followed by a formal restructuring plan approved by the court. It may involve the conversion of the special mediation procedure into conciliation proceedings with a view to the court formally approving the restructuring agreement (*Protocole*) and giving other protections to creditors available under those proceedings. In the case of conversion from special mediation to conciliation proceedings, the special mediator will often be appointed by the court as the conciliator in those proceedings.

Any restructuring arrangement reached between the parties during conciliation proceedings may be approved (*homologué*) at the request of the company by the Commercial Court, provided that:

(i) the company is not insolvent and the restructuring arrangement reached by the parties puts an end to the company's insolvency;

(ii) the terms and conditions of the arrangement are such as to ensure that the company's business will continue; and

(iii) the arrangement does not affect creditors who are not a party to it.

(b) Reorganisation proceedings and safeguard proceedings

Where the plan is approved by the relevant committees and bondholders' general meeting (if any), this will bind all members of that committee if the plan is approved by the court. In addition to considering whether there is a serious possibility of the company continuing its business, the court must take into account whether the interests of other creditors are sufficiently protected in deciding whether or not to approve the proposed plan. The court approved plan will not be binding on creditors who are not members of the committees unless they have agreed to its terms, but the court can impose grace periods on such creditors of up to 10 years. The court cannot impose a term-out plan to new money providers benefiting from the super senior status attached to conciliation proceedings under the safeguard plan, unless they have agreed otherwise.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

(a) Special mediation and conciliation proceedings

The opening of special mediation and conciliation proceedings requires a formal court order. In special mediation a restructuring plan negotiated does not require formal court approval. In practice, any restructuring arrangement reached between the parties during special mediation is often approved by the company opening conciliation proceedings for this purpose.

Under conciliation proceedings, a restructuring agreement may be (a) acknowledged (*constaté*) by the President of the court, or (b) formally approved (*homologué*) at the request of the company by the Commercial Court following the opening of conciliation, provided that (i) the company is not insolvent and the restructuring arrangement reached by the parties puts an end to the company's insolvency, (ii) the terms and conditions of the arrangement are such as to ensure that the company's business will continue and (iii) the arrangement does not affect creditors who are not parties to it.

Since the 2014 Ordinance, the workers' council or the staff representative (*delegué du personnel*) will be informed by the company of the content of the arrangement when its approval (*homologation*) is requested. In such cases, the decision of the President and the arrangement between the parties will remain confidential.

Once the conciliation agreement is approved by a Commercial Court judgment, the court judgment is filed with the applicable Commercial Court as a measure of publicity, while the content of the agreement remains confidential. The court approval of the agreement reached during the conciliation proceedings will provide protection to creditors in respect of certain lender liability issues; the most recent legislation provides that, except in the case of fraud, the date on which a company can be deemed by the court to be insolvent cannot be a date prior to the date of the court judgment approving the agreement reached during the conciliation proceedings.

(b) Reorganisation proceedings, safeguard proceedings and accelerated (financial) safeguard proceedings

Yes, a formal court order is required approving the restructuring plan and / or sale plan.

(c) Liquidation proceedings

Yes. Liquidation proceedings last until the liquidator finds that no more proceeds can be expected from the sale of the company's business or assets and requests the Court to close the liquidation. In addition, if the liquidator has not requested to close the liquidation after two years as from the opening of liquidation proceedings, any creditor can request the court to order the liquidator to close the liquidation. Liquidation closes when the business (as a whole or branch by branch) and any residual assets have been sold and the proceeds distributed to the creditors by order of priority.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example no creditor worse off test, an absolute priority rule)?

(a) Special mediation and conciliation proceedings

Creditors' rights cannot be infringed or affected in special mediation or conciliation proceedings without the consent of the affected creditor.

(b) Reorganisation proceedings, safeguard proceedings and accelerated (financial) safeguard proceedings

Upon approving a restructuring plan after approval of the creditors' committees and bondholders in a general meeting (if any), the court must ensure that the interests of all creditors affected by the plan are satisfactorily protected. In the absence of creditors' committees, or in the absence of approval of the plan by the committees, all creditors will be consulted individually on whether to accept any moratorium, debt reduction or conversion into capital.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

Under each French restructuring proceeding, decisions are taken in proceedings on the basis of valuations prepared during the applicable proceedings.

(25) Is appeal possible?

(a) Special mediation

The Commercial Court order refusing the opening of special mediation can be appealed by the debtor within 10 days as from the notice of the decision.

No provision provides that an appeal can be lodged if the Commercial Court order grants the opening of special mediation but refuses to appoint the special mediator chosen by the debtor. According to French scholars, the debtor could lodge an appeal since he has a sufficient interest in order to lodge an appeal.

French law generally provides that court orders in relation to special mediation can be challenged by a third party. No provision relating to insolvency law expressly prohibits a third party from challenging an order opening special mediation. It could be considered that an order may be challenged by a third party within 10 days as from when the decision is rendered. However, since special mediation is a confidential proceeding, it is unlikely that a third party will challenge the order within the time limits and / or can demonstrate having a sufficient interest in order to challenge the order (under limited conditions).

(b) Conciliation proceedings

The Commercial Court order opening the conciliation can be appealed by the Public Prosecutor within 10 days as from the notice of that decision.

The Commercial Court order refusing the opening of conciliation can be appealed by the debtor within 10 days as from the notice of that decision.
As for special mediation and subject to the same principles, third parties may seek to challenge the order opening conciliation proceedings. However, recent French case law demonstrates that effective third party challenge to set aside the proceedings will be difficult in practice.

(c) Reorganisation proceedings (safeguard proceedings and accelerated (financial) safeguard proceedings)

In the event the application to open reorganisation proceedings is made by the debtor, the court may hear representations from the debtor and the employees' representative. However, unless a judge specifically invites a creditor to make representations during the hearing, creditors are generally not entitled to attend the hearing or make representations on the opening of the proceedings.

Where the application to open insolvency proceedings is made by a creditor, the above rules apply, with the exception that the applicant creditor is entitled to attend the hearing and make representations as to whether the proceedings should be opened.

The debtor, applicant creditor and public prosecutor are entitled to appeal a decision opening insolvency proceedings. The appeal must be lodged within 10 days of the decision opening proceedings being notified to the parties to the application.

In addition, it is possible to bring third party opposition proceeding (*tierce-opposition*). Accordingly, third parties who are not entitled to bring an appeal may file a third party opposition to the decision opening insolvency proceedings if they hold a specific interest in the case. Such proceedings must be filed within 10 days of the date of publication of the judgment in the official gazette (the BODACC - *Bulletin officiel des annonce civiles et commerciales*). According to French case law, third parties have to demonstrate a personal and direct interest in the case that is distinct from the creditors' interest, or to prove fraud, in order to be entitled to contest the decision opening insolvency proceedings.

The setting up of (and the decisions voted on by) the creditors' committees and bondholders' meeting can be challenged within 10 days following the date of the vote by filing a claim with the clerk of the Commercial Court. A creditor will only be entitled to challenge the decision taken by the creditors' committees and bondholders' meeting to which it belongs.

Under safeguard proceedings, the appeal procedure in relation to the reorganisation proceedings applies correspondingly.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Yes, all of the above proceedings provide for early court involvement.

(27) Is there a statutory basis to appoint a restructuring expert?

No. It is not uncommon for the debtor or the lenders to appoint a chief restructuring officer for the purposes of negotiating and / or implementing a restructuring. However, this is contractual and not enshrined in any legislation. The French court may appoint five controllers (*contrôleurs*) and other experts for specific purposes in preventive proceedings.

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

The administrator, the creditors' representative, the scheme commissioner, the controller, a liquidator or the public prosecutor may bring proceedings against directors (including members of the management board), shadow directors and former directors of the company seeking a contribution to the company's assets. Sums recovered as a result of these proceedings will be added to the company's insolvent estate.

The term "directors" is interpreted widely to include shadow or *de facto* directors (*dirigeants de fait*). In accordance with case law and French commentators, shadow directors are "persons who, without having the quality of being legal directors, have positively intervened in the direction and management of the legal entity, with all sovereignty and independence, in order to directly influence the same in a determined manner."

Potential actions against directors include:

(i) Deficiency of assets (*responsabilité pour insuffisance d'actifs*)

A director may be held personally liable for all or part of the debts of the company if he has committed a proven error in the operation of the business and if such error contributed to the company having insufficient assets to cover its liabilities.

Action for mismanagement (other than mere negligence) is widely interpreted in France. Mismanagement could include operating a business which is obviously loss-making for a long period of time or using / misusing the assets of the company for the benefit of another company in which the relevant director has an interest.

(ii) Personal bankruptcy (*faillite personnelle*)

Personal bankruptcy is a “professional” sanction (that is, not a financial one), decided at the sole discretion of the court. The two main consequences of personal bankruptcy are (i) a prohibition on managing, operating or controlling, directly or indirectly, any business and (ii) a prohibition on accessing certain professional activities as well as a deprivation of certain civic rights.

(iii) Criminal bankruptcy (*banqueroute*)

Directors (including shadow directors) may also incur criminal liability under numerous provisions of the French Commercial Code (notably in the event of a fraudulent bankruptcy). Those who are found guilty of criminal bankruptcy may be subjected to a maximum of five years imprisonment and / or a fine of a maximum amount of EUR 75,000. A director may be found guilty of criminal bankruptcy if (i) he has misappropriated or concealed all or part of the company’s assets, or (ii) he has fraudulently increased the company’s liabilities.

(iv) Tort actions

Tort actions (for damages) could be brought against directors (including shadow directors) if they have committed a fault which has resulted in damages.[49]

(b) Restructuring expert

Not usually, but potentially could include liability as a shadow director or in tort.

[49] On the basis of the French Civil Code, art 1240.

2.3 GERMANY

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

Germany has advanced in-court insolvency and restructuring procedures set out in the German Insolvency Code (*Insolvenzordnung* – InsO). The law was influenced by a conceptual change from a simple liquidation approach to a rescue culture and was last revised in 2012 by the ESUG[50]-reform. Restructuring procedures are not only available for illiquid and overindebted debtors but also for debtors that are only under threat of becoming illiquid; they can to some extent be used to a similar effect as pre-insolvency proceedings in other jurisdictions. The InsO includes powerful restructuring tools such as insolvency plans, protection from enforcement, debt-to-equity-swaps, haircuts, cross-class cram-downs, or protection for new financing. They can be used in debtor-in-possession proceedings (called "self-administration"). The more pro-active debtors and creditors can use this to create a voluntary "pre-pack".

Due to the current absence of a formal out-of-court restructuring framework, we set out below those restructuring instruments contained in the German Insolvency Code that are in line with the Preventive Restructuring Framework Directive which has been closely followed by the German Ministry of Justice.

With the adoption of self-administration and the insolvency plan, the restructuring of a debtor company to maintain and continue the business has become an equal ranking objective in addition to the liquidation of the company and the satisfaction of all creditors out of the liquidation proceeds. Whether the insolvency plan is set up for liquidation or restructuring purposes is the autonomous decision of the debtor's creditors in the creditors' assembly.

Since the ESUG-reforms of 2012, German in-court insolvency and restructuring procedures have been well received in the market, in particular by international investors. The objectives of the new law are to:

(a) strengthen the influence of creditors (for example, with the introduction of a preliminary creditors' committee (*vorläufiger Gläubigerausschuss*) and in regard to the choice of an insolvency administrator or custodian); and

(b) to further improve the self-administration and plan procedure (for example, by amending the capital structure by allowing a debt-to-equity swap, limiting the appeal rights against the insolvency plan and introducing the "protective shield" procedure (*Schutzschirmverfahren*).

The "protective shield" procedure is designed as a (fast-track) insolvency plan procedure to be prepared within a maximum of three months by a debtor in (preliminary) self-administration and vested with the power to impose a moratorium-like effect on its creditors (following the US Chapter 11 model). Although the market had already called for a pre-insolvency framework, the

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50 Act to Further Facilitate the Restructuring of Companies (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen)* of 7 December 2011.

legislator held on to the “protective shield” procedure as a formal insolvency procedure and as a compromise.

In 2018, the German legislator also introduced statutory rules facilitating the management of group insolvencies.[51] In line with the new group insolvency concept of the Recast European Insolvency Regulation (EIR), the aim of the reformed law is to provide a framework for restructuring a group on the basis of a co-ordination plan (*Koordinationsplan*) for the insolvent group of companies and to ringfence viable subsidiaries. The German law on group insolvencies even goes beyond the scope of the EIR as it allows (i) for a concentration of insolvency proceedings of members of a group before the same court (and even the same judge) and (ii) for the same insolvency practitioner to act as administrator (*Insolvenzverwalter*) in all of the insolvency proceedings over group companies (subject to a special administrator being appointed in cases where there are conflicts of interest). German group insolvency law is currently considered one of the most advanced group insolvency regimes worldwide.

The picture of German restructuring culture is completed by a well-developed market practice of using consensual, out-of-court and non-formal restructuring instruments with market actors who have the necessary experience in this field (being turnaround management firms, specialised law firms, specialised auditor firms and rescue-friendly insolvency practitioners and custodians). As part of out-of-court restructuring, the relevant parties would usually conclude a consensual restructuring agreement which, in case of failed consensus, can be used as a pre-pack for an insolvency plan and which can then be approved by a simple majority vote.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The German legislator is currently preparing the implementation of the Preventive Restructuring Framework Directive, though no drafts have yet been made available to the public. The Preventive Restructuring Framework Directive will require changes to German law, but not necessarily as part of the Insolvency Code. It will then benefit from many years’ practical experience during which many instruments very similar to the ones contemplated in the Directive have been tested on all levels in the market (for example, insolvency / restructuring plan, debtor-in-possession, creditor groups, (cross-class) cram-down, debt-to-equity swap).

At present we are discussing the findings of a five year retrospective evaluation of the ESUG-reform which assesses the new restructuring tools (including self-administration, the insolvency plan, protective shield proceedings, (cross-class) cram-down voting, debt-to-equity swaps) on the continuing path to a modern restructuring culture.[52] We expect the outcome of the evaluation to be part of another milestone reform combined with and triggered by the Preventive Restructuring Framework Directive and its transformation into German restructuring and insolvency law. In the last two years the German restructuring experts and stakeholders took a very active but also diverse role in the

51 Act for the Facilitation of the Management of Group Insolvencies (*Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen*) of 13 April 2017.

52 The so-called *ESUG-Evaluation*. The international World Bank Ease of Doing Business Report 2019 ranks the German insolvency law on rank 4 (p 173).

discussions and genesis of the Directive and it was a hot topic at many restructuring symposia.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out of court instrument).

The German Insolvency Code contains several rescue-orientated restructuring instruments. They are available to debtors who are facing pending illiquidity (*drohend zahlungsunfähig*),[53] or are over-indebted (*überschuldet*)[54]. Except for "protective shield" proceedings, they are also available to debtors who are already illiquid (*zahlungsunfähig*)[55]. These in-court rescue instruments may be summarised as follows:

(a) Self-administration (*Eigenverwaltung*)[56]

Self-administration allows the debtor's management to stay in control of the business, supervised by a court-appointed custodian (*Sachwalter*, also sometimes called trustee, monitor or supervisor in English texts). The court usually grants the request for self-administration if no circumstances are known that would lead to the expectation that the self-administration is detrimental to the debtor's creditors.

If the request for self-administration is not evidently without prospect of success, the court will refrain from installing a preliminary insolvency administrator, leaving the debtor in so-called preliminary self-administration (*vorläufige Eigenverwaltung*), that is, allowing its management to stay in control of the business during the preliminary proceeding (usually up to three months between filing and the opening of the insolvency proceedings).[57] The aim is to prevent disruptive effects to the debtor's business due to a displacement of management after filing.

In addition, self-administration facilitates the implementation of a "pre-pack". The existing management would draft an insolvency plan. They often draft the insolvency plan on the basis of a restructuring agreement which they negotiated with the stakeholders prior to filing and which is supported by not necessarily all, but at least the majority of the supporting stakeholders (for example, finance parties, large trade creditors, credit insurers, shareholders, potential fresh money providers and new investors). It is important to note that if there is still enough time, management will always try to implement a restructuring agreement with the debtor's main creditors and would only trigger insolvency and use self-administration (as a formal proceeding) if the consensual plan has failed, or has not received the full support of all required creditors. If important creditors are holding out, the debtor usually loses its "going-concern prognosis" and thereby usually become over-indebted (*überschuldet*), or, as the case may be, illiquid (*zahlungsunfähig*), which triggers the filing for insolvency in the form of (preliminary) self-administration.

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53 InsO, s 18.
54 *Idem*, s 19.
55 *Idem*, s 17.
56 *Idem*, ss 270 *et seq*.
57 *Idem*, s 270a.

The debtor may also apply to the insolvency court for permission to raise additional financing or create liabilities which are liabilities of the estate and will therefore be satisfied prior to unsecured insolvency creditors as part of the main insolvency proceedings (*Masseverbindlichkeiten*).

(b) Insolvency plan proceedings (Insolvenzplanverfahren)[58]

The insolvency plan proceeding is a structured and sophisticated cram-down procedure based on US Chapter 11 proceedings. It allows the debtor and / or the insolvency administrator to set-up and agree an insolvency plan (*Insolvenzplan*). The purpose of this plan may be either to save the debtor company or its business, or to accommodate for a controlled liquidation and distribution of an (insolvent) debtor's assets to its creditors. The plan may also be used to deviate from parts of the insolvency procedure itself.

Voting on the plan takes place in different creditor classes with a simple majority (50% + x) *per capita* and by value within each class.[59] A cram-down of whole classes ("cross-class cram-down") is possible, in particular if the dissenting classes are "out of the money", that is, (i) they would not fare better without the insolvency plan, (ii) no other creditor with a lower ranking receives any value out of the plan and (iii) the majority of involved classes have voted in favour of the plan.[60]

The plan may include any type of arrangement generally admissible under corporate law.[61] The law explicitly permits the inclusion of the debtor's shareholders in the plan (as a separate class) and provides for a state-of-the art debt-to-equity swap procedure which has already been used in practice numerous times. If a debt-to-equity swap is part of a plan, the equity would usually be cut down as far as required to absorb the incurred losses (often down to zero) and would thereafter be increased by issuing new shares to existing creditors who are swapping their debt into equity.[62] Insolvency law overwrites the usually required 75% majority vote under corporate law, requiring only simple majorities for the plan as described above. The right of shareholders to subscribe in the new equity is often waived as part of the plan and in case the class consisting of shareholders dissents, it can be crammed down (essentially if the shareholders are "out of the money").[63]

The plan may include various other provisions regarding corporate and / or financial restructuring, for example haircuts, debt or asset push-downs and push-ups, extension of payment schedules and protected new financing.

After the debtor in self-administration (or the insolvency administrator) has presented the court with a plan proposal, the court has to review the plan within two weeks with respect to:

(i) the proper class formation;

58 *Idem*, ss 217 *et seq*.
59 *Idem*, s 244.
60 *Idem*, s 245.
61 *Idem*, s 225a.
62 *Idem*, s 225a, para 2, sentence 3.
63 *Idem*, s 245, para 3 (prohibition to obstruct).

(ii) whether the plan evidently has no prospect of success to obtain approval by the debtor's creditors; or

(iii) whether the claims of the creditors can evidently not be satisfied.[64]

If the court has not rejected the plan, it will ask, *inter alia*, the creditors' committee and the debtor or the insolvency administrator (depending on who presented the plan) to provide their opinion on the plan within two weeks.[65] Afterwards the court schedules a creditors' assembly to discuss the plan and to vote on the plan in the respective creditors' classes. The voting mechanism provides for cram-down and cross-class cram-down – see (15) and (18)-(20) below for further information.

Once the relevant majority of the voting parties has approved the plan, the court can only reject the requested confirmation of the plan if the provisions regarding the content and procedural steps to obtain the approval have not been satisfied.[66] Regarding appeal see (25). The confirmed plan is binding on all parties it affects, regardless of whether or how they voted on the plan.[67] If and to the extent the plan does not provide for a claim's satisfaction, that claim is discharged.[68] After confirmation of the plan the court will close the proceedings. Depending on the size of the proceeding, a well-organised debtor may generally be able to obtain a confirmed plan within as little time as three to six months.

(c) "Protective shield" proceedings (Schutzschirmverfahren)

"Protective shield" proceedings are a special form of preliminary self-administration which can provide for a moratorium of up to three months after the debtor has filed for insolvency, in order to allow the debtor's management to work on an insolvency plan (see (b) above).[69] Debtors can apply for a "protective shield" if they are over-indebted or under threat of becoming illiquid (but not yet illiquid). The main advantage of the protective shield proceeding is that the debtor can propose its own custodian (which facilitates the implementation of a "prepack") and the court has to grant the debtor upon its request the right to create liabilities that are liabilities of the estate and will therefore be satisfied prior to unsecured insolvency creditors as part of the main insolvency proceedings (*Masseverbindlichkeiten*).[70]

(d) Group co-ordination proceedings (Koordinationsverfahren)

Group co-ordination proceedings are aimed at facilitating the efficient coordination and rescue of a whole group of companies (*Konzern*).[71]

Corporate rescue usually becomes more complex and harder to achieve if more than one group member has filed for insolvency. Groups of companies are often sophisticated corporate structures which are economically highly

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64 *Idem*, s 231.
65 *Idem*, s 232.
66 *Idem*, s 250.
67 *Idem*, s 254-254b.
68 *Idem*, s 227.
69 *Idem*, s 270b.
70 *Idem*, s 270b, para 3, sentence 1.
71 *Idem*, ss 3a *et seq*, 269a *et seq* and 269d *et seq*.

interdependent. The insolvency of one legal entity has the potential to cause a "domino effect" of further insolvencies within the group.

The German legislator recently introduced rules to mitigate the coordination risks associated with separate insolvency proceedings over German group companies. They resemble the rules on group insolvencies already included in the Recast EIR if insolvent group members in more than one member state are involved:

(i) Insolvency proceedings over group companies can now be pooled at the same group insolvency court (*Gruppengerichtsstand*) and even with the same judge.[72] In addition, various Federal States have recently introduced provisions allowing for a concentration of group insolvency proceedings before a (single) special insolvency court within the district of selected courts of appeal (*Oberlandesgerichte*).

(ii) All involved insolvency courts have to consult on appointing the same person as insolvency administrator within each of the insolvent group companies if it is in the interest of the creditors[73] and (only in cases of potential conflicts of interests) a special (supervising) insolvency administrator can be appointed.[74] A preliminary creditors' committee can propose a candidate for the office of an insolvency administrator (by unilateral vote)[75] and before the appointment of an insolvency administrator by the insolvency court the preliminary creditors' committee has to be heard.[76]

(iii) On request of a creditors' committee the insolvency court can appoint a group creditors' committee (*Gruppengläubigerausschuss*) which functions as a common forum for all involved creditors (the latter is not foreseen by the EIR).[77]

(iv) Each debtor within the group can now apply for the opening of group co-ordination proceedings and the appointment of a co-ordinator (*Verfahrenskoordinator*).[78] The co-ordinator is an independent mediator whose aim is to propose a (non-binding) co-ordination plan (*Koordinationsplan*) which would usually include a set of rules and guidelines for a co-ordinated approach between the involved group companies.

(v) The provisions on group insolvencies also apply to self-administration, meaning a debtor who has the support of the relevant stakeholders may successfully initiate and complete these proceedings.[79]

Despite the sophisticated rescue instruments described above, in practice debtors will still often first try to reach an amicable restructuring agreement with their creditors and shareholders out of court. If such consensual (that is, consent

72 *Idem*, ss 3a *et seq*.
73 *Idem*, s 56b, para 1, sentence 1.
74 *Idem*, s 56b, para 1, sentence 2.
75 *Idem*, s 56b, para 2, sentence 1.
76 *Idem*, s 56b, para 2, sentence 2.
77 *Idem*, ss 56b and 269c.
78 *Idem*, ss 269d *et seq*.
79 *Idem*, s 270d.

from 100% of the relevant stakeholders) restructuring turns out to be impossible, they may consider the alternative of a (compulsory) plan. There have even been restructurings where, when the consensual agreement out of court became unattainable, the debtor and its supporting creditors used the agreement which they had tried to conclude outside court proceedings as a precedent for the plan ("pre-pack").

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

Yes, as all rescue-oriented instruments outlined above are part of insolvency proceedings and such are specifically listed in Annex A of the EIR.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

Insolvency plans (whether as part of self-administration or ordinary proceedings) are available to debtors who are either illiquid, over-indebted or pending illiquid. They are available to legal and natural persons, as well as to partnerships. The same is true for self-administration and group insolvency proceedings.

The "protective shield" (*Schutzschirm*), which gives the debtor special protection during a period of up to three months to devise a plan before the court officially opens insolvency proceedings, may be used by debtors who are either over-indebted or pending illiquid (but not yet illiquid).[80]

Some legal entities like financial institutions, insurance companies or state entities are subject to special restructuring provisions instead.

For group insolvencies please see under (3) and (14).

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

A debtor may propose a plan and may apply for self-administration as well as for "protective shield" proceedings.[81] If the proceeding is not a self-administration proceeding, the insolvency administrator may also propose a plan. A creditors' assembly may order the insolvency administrator to prepare a plan.

(7) Is there a viability test?

Yes. The court will deny opening of proceedings altogether if the debtor has insufficient funds.[82] The court will also deny the application for self-administration, if self-administration would be to the detriment of the creditors.[83] In addition, to use the "protective shield" the debtor has to provide a reasoned statement from a tax advisor, auditor, lawyer or similarly qualified person, which shows that the debtor is over-indebted or under threat of becoming illiquid (but is not yet illiquid) and that the restructuring it seeks has a chance of being

80 *Idem*, s 270b.
81 *Idem*, s 218 (regarding who may propose plans), ss 270 *et seq* (regarding self-administration and "protective shield").
82 *Idem*, s 26.
83 *Idem*, s 270.

successful.[84] Finally, the court will dismiss an insolvency plan if there is no chance that the creditors will accept it or the court will confirm it, or if the claims ascribed to the creditors in the plan obviously cannot be fulfilled. [85] The court may also dismiss the plan for violating procedural law. The court is supposed to give its decision within two weeks after having been presented with the insolvency plan. The person who presented the insolvency plan may appeal the court's decision.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

Offering an insolvency plan to creditors and shareholders does not in itself affect the status of the debtor, its ability to transact or its existing legal obligations. However, the plan can only be voted upon and confirmed as part of insolvency proceedings, which in themselves have various practical and legal consequences and effects on the debtor (for example, a stay on enforcement (see (9)), potential avoidance actions being initiated by an administrator or custodian, avoidance of *ipso facto* clauses (see (10)), special termination rights for certain contracts, such as leases). As the plan is a part of insolvency proceedings, there is either an insolvency administrator (who takes over the debtor's business) or (in the case of self-administration) a custodian appointed (who supervises the debtor). Additionally, the approved and confirmed plan will affect the debtor and its creditors legally and economically depending on its content.

(9) Is there a stay on individual enforcement actions?

Yes. During preliminary proceedings, the court may order a stay on individual enforcement. The stay covers all ongoing and future formal enforcement proceedings. Set-off is also restricted in certain circumstances.[86] For limitations on the termination of executory contracts see (10).

If the debtor is using "protective shield" proceedings, the court has to order the stay upon the debtor's request.[87]

Once the court has opened the main proceedings, any security a creditor has obtained through enforcement proceedings during or in the month prior to interim proceedings becomes void retroactively.[88]

The debtor in self-administration or insolvency administrator may liquidate assets in favour of the secured creditors if and to the extent he is in possession of secured assets,[89] otherwise the secured creditors can in general enforce their security on their own. They may also halt individual enforcement proceedings regarding real estate under certain circumstances, including if the enforcement

84 *Idem*, s 270b, para 1, sentence 3.
85 *Idem*, s 231.
86 *Idem*, s 96.
87 *Idem*, s 270b, para 2, 2nd half of third sentence and s 21, para 2, No 3.
88 *Idem*, s 88, para 1.
89 *Idem*, ss 165 *et seq*.

would endanger an insolvency plan or unduly hinder the utilisation by the estate.[90]

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

As a rule, *ipso facto* clauses in contracts trying to circumvent or deviate from the statutory insolvency law are void.[91] This applies to all variants of insolvency proceedings; it is not specific to insolvency plans.

(11) What are the options for new interim financing (with super priority status)?

There are three options to give new interim financing priority status:

(a) During preliminary proceedings (including "protective shield"), the debtor may request the court to vest it with the power to create liabilities against the estate (*Masseverbindlichkeiten*). Such claims rank after certain costs, but have priority over ordinary (unsecured) insolvency claims. The court has to grant the debtor's request for such power if the debtor is using "protective shield" proceedings.[92] During main insolvency proceedings, all financing raised by the debtor or an administrator will automatically be in the form of liabilities against the estate (*Masseverbindlichkeiten*).

(b) Insolvency plans may include a provision for a credit umbrella agreement (*Kreditrahmen*) under which any new credit may benefit from a priority ranking.[93] The priority is over ordinary (unsecured) insolvency claims in a later insolvency. The priority is granted in insolvency proceedings that are opened within three years after main proceedings were closed, and while the implementation of the insolvency plan is still under supervision.

(c) More often in practice, a super priority for new or new interim financing will only be achieved contractually by agreeing first ranking security over available assets for such financing or by entering into an inter-creditor agreement with secured creditors to provide prior ranking security for the fresh money. The validity of the new security is comparatively safe from claw-back if it is granted in exchange for and in a timely manner with the new financing. However, there is no statutory super-privilege for fresh money (no "priming" as in US Chapter 11). In addition, there is no "priming" of security rights.

An important interim financing measure is the pre-financing of insolvency money (*Insolvenzgeldvorfinanzierung*) for employees. Under the applicable social security scheme, the Federal Employment Agency (*Bundesagentur für Arbeit*), which is financed by a contribution of each employer, usually pays employees' wages for a period of up to three months prior to opening of main proceedings. Such payments are almost always pre-financed by banks and savings institutions within the period after filing and before opening of main proceedings. The banks are re-paid from the money provided under the applicable social security scheme. The relevant state entity will file a corresponding insolvency claim in the insolvency proceedings.

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90 Act regarding the Enforcement concerning Real Estate (*Zwangsversteigerungsgesetz*), s 31d.
91 InsO, s 119.
92 *Idem*, s 270b, para 3.
93 *Idem*, ss 264-266.

(12) Are other restructuring-related transactions protected?

Restructuring-related transactions generally benefit from the same protections granted to all transactions, namely they are protected from avoidance rights if they can be considered cash-transactions.[94]

While claims from shareholder loans are usually subordinated during insolvency proceedings, claims may be protected from this effect if the creditor of such claims only became a shareholder of the debtor's company to rescue the company or corporation (for example, after swapping part of its debt into equity).[95] The protection will then hold until the company has been rescued successfully.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

Yes, it can be. Insolvency proceedings may be debtor-in-possession proceedings if the debtor requests it (so-called self-administration (*Eigenverwaltung*)). The court usually grants the request for self-administration if no circumstances are known that would lead to the expectation that the self-administration is detrimental to the debtor's creditors. The "protective shield" is always a debtor-in-possession proceeding.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-to-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

The debtor is largely free to determine the specific content and form of the insolvency plan, as well as the terms and conditions thereof – as long as they are able to obtain the required majority votes of the debtor's creditors. For example, the plan may include provisions regarding corporate and / or financial restructuring, including debt-to-equity swaps and other changes to the shareholder structure, haircuts, debt or asset push-downs and asset push-ups, extension of payment schedules and new financing. Amendments of contracts and claims are possible in some specific ways, for example payment or repayment of a debt may be structured differently from what it was originally.

There are some provisions that facilitate amending or discharging employment-related contracts (including labour contracts) if the debtor is the employer or terminating leases if property of the debtor is sold or if the debtor is the tenant and wishes to terminate the lease.[96] These provisions apply in any proceedings; they are not specific to restructuring.

The German legislator has recently introduced provisions into the Insolvency Code concerning group insolvencies. These provisions allow for opening the insolvency proceedings of all group companies in one place, with the same judge being responsible for all of them.[97] The definition of "group" for this is very wide – even a partnership and its limited liability partner may constitute a group. The same restructuring expert may be appointed as custodian (or insolvency

94 *Idem*, s 142.
95 *Idem*, s 39, para 4.
96 *Idem*, ss 190-113 and 120-128.
97 *Idem*, s 3a.

administrator) for all insolvent group members (subject to special (supervising) insolvency administrators or custodians in case of conflicts of interest).[98] Different insolvency courts and administrators for companies of the same group are encouraged to co-operate.[99] A co-ordination plan may be established and implemented.[100] These provisions help stabilise the group and allow the parties to the insolvency proceedings to realise the added value that stems from the individual debtors being part of a larger group. For more on group proceedings see also (3)0 above.

(15) Do creditors vote in separate classes and if so, what are the criteria for class formation?

Yes. Class formation is based on the types of claim involved.[101] Classes include:

(a) secured claims to the extent the plan affects them;

(b) ordinary insolvency claims;

(c) the various types of subordinated claims;

(d) shareholdings;

(e) employee claims (optional); and

(f) small claims (optional).

The plan may differentiate more finely between different types of classes if that is appropriate. The criteria for class formation must be laid out in the plan.

A creditor may be divided into separate classes in relation to the same claim, for example, because its claim is partially secured and partially unsecured.

(16) Can equity holders be included?

Yes, equity holders can be included in an insolvency plan. In relation to the shareholders, the plan may include any provision permitted under corporate law.[102] This includes, for example, changes to the shareholding structure, debt-to-equity-swaps or the continuation of a debtor entity that would otherwise be dissolved due to insolvency.

In accordance with the class formation rules described under (15), in case an equity holder also holds claims or other rights against the company (for example, shareholder loans) they cannot be placed in the same class for those claims or rights as for their equity rights. See also the description of insolvency plans under (3)0 above.

98 *Idem*, s 56b.
99 *Idem*, s 269a-c.
100 *Idem*, s 269h.
101 *Idem*, s 222.
102 *Idem*, s 225a.

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

No. All insolvency creditors automatically take part in the proceeding. Whether or not a creditor or an equity holder is allowed to vote on the plan depends on whether or not the insolvency plan affects their claim or legal right or position. If the plan affects a certain claim, the holder of that claim is allowed to vote. Claims not affected by the plan do not have a voting right.[103] Claims against the estate (*Masseschulden*) do not give their creditors a right to vote, as they may not be affected by the plan but have to be paid in full. Disputed claims give a right to vote only insofar as this is agreed or court-ordered in the voting meeting.[104]

(18) What are the voting requirements (head count test / majority in value test)?

The voting requirements are twofold:[105]

(a) For each class of claims, the majority of the creditors who have cast their votes must have consented to the plan (majority *per capita*).

(b) Additionally, for each class of claims the sum of the claims of the creditors who have consented to the plan has to be more than half of the sum of the claims of the creditors in that class who voted on the plan (majority of total claims).

See (20) for voting requirements in case of a cross-class cram-down.

(19) Does the instrument provide for cram-down of dissenting creditors?

Yes. See (18) for the majorities required to cram-down dissenting creditors within a group, and (20) for a cross-class cram-down.

(20) Does the instrument provide for cross-class cram-down?

Yes.[106] A class is deemed to have consented to the plan if:

(a) its claims will likely not be treated worse than if there was no plan ("no creditor worse off" test);

(b) its creditors will participate adequately in the economic value which the creditors are supposed to receive; and

(c) the majority of the voting classes have consented to the plan.

Adequate participation of a class means that:

(i) no other creditor will receive more than the full amount of its claim;

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[103] *Idem*, ss 237 and 238 for insolvency creditors; ss 217, 222, 225a, 238a and 243 for equity holders.
[104] *Idem*, s 237, para 1, 1st sentence and s 77, para 2.
[105] *Idem*, s 244.
[106] *Idem*, s 245.

(ii) neither a creditor with a lower ranking claim nor the debtor nor a person holding the debtor's shares receives an economic value (absolute priority rule test); and

(iii) no creditor with the same ranking is better off than the dissenting creditors (no less favourable treatment test).

Shareholders are deemed to participate adequately if no creditor will receive more than the full amount of its claim and no equal ranking shareholder will be better off than the dissenting shareholders.[107]

(21) Is the restructuring instrument binding upon all affected parties?

Yes. A court-sanctioned insolvency plan is binding on all creditors and shareholders who were entitled to vote.[108] Once the court's confirmation of the insolvency plan has become final (that is, without the possibility of appeal) the plan grants a title for enforcement against the debtor and any person who has acceded to the insolvency plan as surety (for example, shareholders, group companies or any other third party), to all creditors who have claims against the debtor that the debtor had not disputed.[109]

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

Yes, self-administration, protective shield proceedings and insolvency plans (including group co-ordination plans under German law) are court ordered or confirmed. Before the court gives its decision regarding confirmation of an insolvency plan it must hear the custodian or insolvency administrator, the creditors' committee (if appointed) and the debtor.[110] See also paragraph *(b)* under (3). Most other restructuring instruments have similar requirements.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example no creditor worse off test, an absolute priority rule)?

For any insolvency plan, the following checks and balances are in place:

- All claims within the same group must be treated equally unless all affected participants agree.[111]
- Any agreement with a participant in the proceedings through which that participant receives an advantage "on the side", is null and void.[112]
- Creditors and shareholders may ask the court to not confirm the plan if they have objected to the plan during the hearing regarding the plan and they will probably be worse off due to the plan compared to a situation with no plan

[107] *Idem*, s 245, para 3.
[108] *Idem*, s 254.
[109] *Idem*, s 257.
[110] *Idem*, s 248, para 2.
[111] *Idem*, s 226, para 1.
[112] *Idem*, s 226, para 3.

(for which they have to offer reasonable proof during the voting session at the latest).[113]

- The person designing the plan may counter such objections by including baskets for cases where a creditor is made worse off by the plan compared to their situation without the plan. See also (25) below.

See also under (18) to (20) regarding cram-down rules (including the absolute priority rule and the no creditor worse off test).

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

It is the obligation of the person presenting the plan to include all information the court and the voting parties need to make informed decisions. This includes information on the claims, the estate and the estate in case of liquidation.[114] If the creditors are supposed to be satisfied from the revenues generated by the debtor's business as a going concern, the insolvency plan has to include an overview of assets and liabilities and their value in case the plan becomes effective, as well as certain information regarding expected income and expenses.[115] Additionally, while not expressly required by law, it is best practice to include information on liquidation values for the no creditor worse off test (see (20) above).

(25) Is appeal possible?

Yes.[116] Creditors, shareholders and the debtor may appeal the court decision regarding confirmation of the plan. For their appeal to be admissible, the petitioner has to offer reasonable proof during the voting session that they would be considerably worse off with the plan than without the plan, and appeal the court decision within two weeks. The court may also proclaim in advance that such appeal is only admissible if the petitioner also objected to the plan in writing (at the latest during the voting session) and voted against the plan. The court will reject the appeal, *inter alia*, if the plan includes a basket for cases where participants are able to prove that they were indeed worse off. There are further provisions available in case the general interest of a speedy implementation of the plan supersedes the petitioner's interest.[117] It is generally possible for the debtor to appeal the opening of insolvency proceedings, but this is practically very rare. The petitioner can appeal against a decision denying the opening of insolvency proceedings.[118] Creditors, the creditors' assembly or the (preliminary) creditors' committee can also appeal against self-administration and protective shield proceedings.

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[113] *Idem*, s 251.
[114] *Idem*, ss 219-221, 229, 230.
[115] *Idem*, s 229.
[116] InsO, s 253 and German Code of Civil Procedure, s 569, para 1.
[117] InsO, s 253, para 4.
[118] *Idem*, s 34, para 1.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Early court involvement prior to filing is not foreseen. However, for larger restructurings the debtor will often try to find out who the relevant judge will be and ask them to discuss the insolvency proceedings (including who could be become insolvency administrator or custodian) and / or the insolvency plan, before any formal application is made. Judges are not obliged to co-operate with this request and some do indeed refuse to do so. After filing the court is involved, in particular with respect to the insolvency plan, as outlined above, while the debtor-in-possession (for self-administration) or the insolvency administrator (for ordinary proceedings) is responsible for running the operational business.

(27) Is there a statutory basis to appoint a restructuring expert?

Yes. If the insolvency plan is part of self-administration, a custodian is appointed who monitors the debtor's business decisions (and a preliminary custodian during interim proceedings).[119] Otherwise, an insolvency administrator is appointed who takes over the debtor's business at the latest after the court has opened insolvency proceedings. Insolvency administrators and custodians must be suitably qualified to handle the individual case at hand. They must also be individual persons being independent of the creditors and the debtor. There is no specific formal qualification required, though these practitioners are usually formally qualified as lawyers, business managers, auditors or similar professions.

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

The members of the board of directors may be personally liable towards the company if they fail to properly perform their duties to the company.[120]

It should be noted that the greatest insolvency-related liability risks that managing directors usually face arise from continuing the business without filing for insolvency, even though their company or corporation is illiquid or over-indebted. Illiquidity and over-indebtedness are both grounds for mandatory insolvency filings. Delaying a mandatory insolvency filing is a criminal offence and also creates civil liability for damages.[121] Possibly even more importantly, managing directors are liable for any payment made while their company is in a state of illiquidity or over-indebtedness, unless the payment was one a reasonable business person (considering the interest of the creditors as a whole) would have made.[122] The German Federal Court of Justice interprets this exemption in a very rigid way.

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[119] *Idem*, ss 270c and 270a, para 1, 2nd sentence.
[120] See, eg, German Code for Limited Liability Companies, s 43.
[121] See, eg, InsO, s 15a.
[122] See, eg, German Code for Limited Liability Companies, s 64.

Compared to these risks, any possible risks in relation to preparing an insolvency plan are much less prevalent.

That said and as very recently rendered by the German Federal Court of Justice, managing directors leading the company through self-administration proceedings are under the same duty of care and liability as any insolvency administrator (see below).

(b) De facto directors

Depending on the circumstances, third parties who are not members of the board of directors, but who do act as if they were, may be held liable on the basis that they performed acts of management. The conditions to be considered a shadow director are very case-specific but the main theme is that the shadow director has assumed a management role towards third persons (for example, creditors).

(c) Custodian or insolvency administrator

The custodian or insolvency administrator is liable for damages to all parties to the proceedings if they negligently or intentionally violate the duties incumbent on them under the Insolvency Code. They have to fulfil their duties with the care of a proper and diligent insolvency practitioner.[123]

[123] InsO, ss 60 and 61.

2.4 ITALY

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

By introducing instruments that cater for specific needs, the Italian reforms of the last decade have enhanced the flexibility for debtors and creditors to find solutions to prevent insolvencies. These instruments have also decreased the need for intervention by public authorities.

The Italian insolvency matter is currently regulated by Royal Decree no. 267 of 16 March 1942 (as subsequently amended and supplemented, the Italian Bankruptcy Law), but will be soon replaced by the thorough systematic reform described in paragraph 2 below.

In order to avoid insolvency, a debtor may currently either (i) enter into an out-of-court recovery plan (*piano di risanamento*)[124] (Recovery Plan) or (ii) enter into, and file a request for the approval (*omologazione*) of a debt restructuring agreement (*accordo di ristrutturazione dei debiti*)[125] (Debt Restructuring Agreement).

In addition, there is a hybrid restructuring instrument in Italy which is a preliminary in-court procedure that can lead either to a full in-court insolvency procedure or to a Debt Restructuring Agreement. This instrument is called a pre-insolvency workout agreement "with reservation" (*concordato preventivo con riserva*)[126] (Simplified *Concordato Preventivo*).

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The Italian insolvency reform was approved by the Italian Parliament at the beginning of 2019 and is expected to come into force – in relation to the matters of interest for this paper – on 15 August 2020 (the Italian Crisis and Insolvency Code).

The Italian Crisis and Insolvency Code aims to reorganise bankruptcy-related matters by amending some aspects of, among others, the Recovery Plan, the Debt Restructuring Agreement and the Simplified *Concordato Preventivo*. In addition, the Italian Crisis and Insolvency Code introduces a new restructuring instrument known as "early warning" procedure (*procedura di allerta e di composizione assistita della crisi*) (the Early Warning Procedure).

Pending entry into force of the Italian Crisis and Insolvency Code, the Italian Parliament approved Law no 20/2019, on the basis of which a draft legislative decree was published on 23 December 2019 to amend certain provisions of the Italian Crisis and Insolvency Code.

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124 Italian Bankruptcy Law (IBL), art 67, para 3, sub-para (d).
125 *Idem*, art 182-*bis*.
126 *Idem*, art 161, para 6.

(3) Provide a short description of the restructuring instruments and explain the purpose of the instruments (including whether it is an insolvency process or out–of-court instrument).

(a) Early Warning Procedure

The purpose of the Early Warning Procedure is to detect a deteriorating business development at an early stage and signal to the debtor the need to act as a matter of urgency in order to avoid insolvency and to continue its business activities.

In general, the Early Warning Procedure will be available to non-listed small and medium companies (SMEs) that generally are not in a position and do not have resources to seek the help of specialised consultants or advisors.

From a procedural perspective, it consists of a bi-phasic procedure that may be activated –in the event of repeated current and / or prospective breaches such as to constitute a crisis situation (*stato di crisi*) – by the statutory board (*collegio sindacale*) or auditors (*revisori*), by certain public creditors (tax authority (*Agenzia delle Entrate*), national pension fund (*INPS*) and collection agents (*agente della riscossione*)). or voluntarily by the same SME, if it wishes to benefit from certain reward measures granted to those who face the situation of crisis at an early stage.

The reporting will lead the SME to a panel of three independent professionals, who will advise it in restructuring its debt and solving financial difficulties. This panel of professionals will be appointed by the crisis settlement bodies (so-called *Organismi di Composizione della Crisi*, the OCRI) set up at the Chamber of Commerce on the recommendation of such Chamber, the court and the commercial association to which the relevant SME belongs. In this regard, the draft legislative decree provides that such commercial association has to choose from a shortlist of three professionals prepared by the debtor.

If the situation of crisis should be confirmed after appropriate verifications by such board, the latter will support the SME in identifying the most appropriate measures to overcome the crisis. In the event of failure, the SME will initiate a procedure during which the panel of professionals will actively assist the SME in negotiations with its creditors and, eventually, seek rapid access to an alternative restructuring procedure (such as a Debt Restructuring Agreement or a Simplified *Concordato Preventivo*) or a bankruptcy procedure.

In general terms, the Early Warning Procedure is an out-of-court procedure characterised by privacy and confidentiality. However, the SME can apply to the court to obtain certain protective measures such as a stay of enforcement actions by the SME’s creditors.

(b) Recovery Plan

The Recovery Plan is a legal instrument aimed at restructuring a company’s indebtedness by, among other things, amending and / or confirming the terms and conditions of existing financings. It generally consists of a three- or five-year business and financial plan, accompanied by a cash flow forecast.

The Recovery Plan is prepared by the company, generally with the support of business and financial advisors. In the context of the execution of such plan, the company usually enters into an agreement with its main creditors (the Recovery Agreement) to express in a binding text what the Recovery Plan provides for from a more economic perspective.

No judicial control or approval is needed and, therefore, no application has to be made to the court or other public authorities. Creditors are free to assess and accept the debtor's proposal as creditors cannot be crammed down.

Recovery Plans do not require the consent of a specific majority of all outstanding claims, but an independent expert (generally an external auditor) must certify the feasibility of the Recovery Plan and the truthfulness of the debtor's business (and accounting) data that form the basis for the Recovery Plan. If certified, this exempts the acts carried out in execution of such plan from a possible claw-back action.

The plan is not subject to mandatory publication in the companies register, but a debtor may voluntarily decide to publish it in the companies register in order to benefit from a certain tax regime.

(c) Debt Restructuring Agreement

The Debt Restructuring Agreement consists of a consensual agreement between a debtor experiencing financial distress (*stato di crisi*) and creditors representing at least 60% of the debtor's total indebtedness.

Debt Restructuring Agreements are freely negotiable between the debtor and its creditors and may include a wide range of provisions such as the rescheduling of debts, partial debt discharge, transfer of assets to creditors, conversion of debt into equity and refinancing of the company. Once the agreement is negotiated and signed between the relevant parties, the debtor has to request the court's approval (*omologazione*) and apply for its publication in the companies register.

Debt Restructuring Agreements have to provide for the satisfaction of claims of consenting creditors in the agreed proportions and the claims of non-consenting creditors in full. The claims should be satisfied either within 120 days from the court's approval in respect of any receivables due and payable on such date or within 120 days from the relevant due date in respect of any receivable not due and payable at the date of the court's approval.

Italian law requires that an independent expert certifies the feasibility of the agreement and, in particular, the debtor's ability to pay non-consenting creditors.

In general, the Debt Restructuring Agreement is binding only upon the consenting parties and there is no cram-down mechanism. However, the Italian Bankruptcy Law provides for:[127]

(i) a specific form of Debt Restructuring Agreement, whereby the distressed company – owing at least half its total debts by value to financial institutions

[127] Such provisions were introduced to tackle so-called minority abuse and hold-out behaviour of financial institutions. In practice, it occurred that financial institutions with smaller exposures withdrew from the negotiations, creating a knock-on effect that jeopardised the possibility of reaching an agreement.

– may identify one or more categories of financial creditors[128] having a comparable juridical and economical position and ask that the effects of the Debt Restructuring Agreement are extended to all non-consenting financial institutions belonging to the same category[129] (the Special Debt Restructuring Agreement); and

(ii) the operation of the cram-down mechanism in the event a temporary moratorium agreement has been entered into with financial institutions. In particular, upon the occurrence of certain conditions and circumstances (including the delivery of a certificate by an independent expert), the effects of such moratorium agreement could be extended also to other financial institutions originally not being a party to the moratorium agreement (subject to certain limitations and without prejudice to the financial creditor's / creditors' right to challenge) (the Moratorium).

In both the Special Debt Restructuring Agreement and the Moratorium, the cram-down mechanism operates only to the extent that the creditors which have been "forced" to join are satisfied to a greater extent than in a potential bankruptcy alternative and "forced" creditors cannot be required to maintain credit lines or provide new financing.

The Italian Crisis and Insolvency Code, however, will extend the two cram-down effects described above also to other creditors, not being financial institutions, it being provided that, in relation to the Special Debt Restructuring Agreement, the same must provide for the continuation of the activity by the debtor.

(d) Simplified Concordato Preventivo

The Simplified *Concordato Preventivo* is a preliminary in-court procedure where the court grants a debtor a term (up to 120 days or, under some circumstances, 180 days) by which the debtor, free from any enforcement proceeding or challenge by its pre-existing creditors (*t*hat is, whose claims arose prior to filing of the Simplified *Concordato Preventivo*), can file a request for either (i) approval of a Debt Restructuring Agreement or (ii) admission to a full-fledged workout agreement with creditors (*concordato preventivo*) by submitting the relevant documentation (for example, workout plan, workout proposal, etcetera). If the Debt Restructuring Agreement is not signed within the abovementioned term, or the court does not admit the debtor to a fully-fledged workout agreement with creditors, in-court insolvency proceedings would commence if a bankruptcy petition is filed by a creditor, the debtor itself or the public prosecutor.

The Italian Crisis and Insolvency Code provides that the court can grant to the debtor a term of up to 60 days (or in some circumstances, 120 days), thus reducing by half the terms currently set by the Italian Bankruptcy Law.

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128 '"Financial creditors"' do not include shareholders.

129 This is subject to (i) all creditors of such category having been kept informed of the restructuring plan and its negotiations, (ii) them having been in a position to participate in good faith (*buona fede*) in the negotiations, and (iii) a qualified majority of financial institutions belonging to the same category providing their consent to the agreement.

(4) Do the instruments qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

The Recovery Plans are not included in Annex A of the European Insolvency Regulation.

Debt Restructuring Agreements are included in Annex A of the European Insolvency Regulation.

The Simplified *Concordato Preventivo* is not expressly included in the abovementioned annex; however, the procedure can lead to procedures which are included in the mentioned annex (that is, a Debt Restructuring Agreement, a full-fledged workout agreement with creditors (*concordato preventivo*) or, in the worst case scenario, a bankruptcy proceeding (*fallimento*)).

II. AVAILABILITY

(5) To whom is the restructuring instruments accessible?

The preventive restructuring instruments mentioned above are available only to commercial entrepreneurs (*imprenditori commerciali*)[130] having certain dimensional thresholds and who are in a state of crisis (*stato di crisi*) or unable to timely and regularly meet their obligations when they become due.

Public entities (*enti pubblici*), banks and insurance / companies and natural persons are covered by different and specific legislation.

The Italian Crisis and Insolvency Code introduces a co-ordinated and consolidated insolvency law to be applied to all types of debtors (professionals, consumers, commercial entrepreneurs, agricultural entrepreneurs) – except for some specific categories (for example, public entities, banks, insurance companies) – experiencing a likely or real insolvency situation.

Early Warning Procedures will be available to SMEs.

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

Only the debtor has a right to initiate a preventive restructuring instrument.

In addition to the debtor, the Early Warning Procedure can also be initiated by the statutory board (*collegio sindacale*), auditors (*revisori*) and / or certain public creditors (tax authority (*Agenzia delle Entrate*), national pension fund (*INPS*) and collection agents (*agente della riscossione*)).

(7) Is there a viability test?

A debtor cannot be denied access to preventive restructuring instruments if the dimensional thresholds are met and the necessary documentation is submitted.

[130] Italian Bankruptcy Law, art 1.

In Debt Restructuring Agreements, the court has to assess whether all the legal requirements have been fulfilled (for example, completeness of the submitted documentation, the debtor's ability to pay non-consenting creditors, etcetera).

In Early Warning Procedures, the panel of professionals has to assess whether the debtor can overcome its state of crisis. If that is not the case, such panel has to inform the public prosecutor accordingly, which in turn is entitled to file for the opening of the judicial liquidation proceeding (as bankruptcy proceedings will be re-named in the Italian Crisis and Insolvency Code) against the insolvent debtor.

In a Simplified *Concordato Preventivo*, the court only verifies that all the relevant documentation (that is, list of creditors and financial statements) has been submitted by the debtor.

The Italian Crisis and Insolvency Code provides that – in the context of the Special Debt Restructuring Agreement and the Moratorium – the court should also verify that creditors who are "forced" to join are satisfied to a greater extent than in a potential bankruptcy alternative.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

Entering into a Recovery Agreement (based on a Recovery Plan) or a Debt Restructuring Agreement does not in itself affect the status of the debtor, its ability to transact or its existing legal obligations. However, both are binding upon the debtor and generally provide for a number of limitations which are restrictive on the company's ability to freely operate its own business from a financial, industrial and economical perspective. Any breach of the provisions included therein would cause a trigger event and the consequent right for the creditors to terminate the relevant agreement.

The filing of a Simplified *Concordato Preventivo* does not, in general, affect the status of the debtor. However, the court's prior approval is required to carry out acts and transactions which exceed the ordinary course of business (for example, entering into a settlement agreement, a loan agreement, acknowledging a debt, pay pre-existing creditors, etcetera).

In addition, the company cannot be declared bankrupt during a Simplified *Concordato Preventivo*. The Italian Crisis and Insolvency Code is to introduce a similar general suspension of bankruptcy applications under the Debt Restructuring Agreement.

Further, upon entry into of a Debt Restructuring Agreement or a Simplified *Concordato Preventivo*, until the approval thereof by the court, rules governing the reduction and loss of share capital are not applicable.[131]

The Italian Crisis and Insolvency Code further introduces a number of incentives to debtors if they promptly invoke Early Warning Procedures (for example,

[131] *Idem*, art 182*sexies*.

reduction of interests accruing on tax authority debts, exemption from criminal liabilities, etcetera).

As discussed further below, entering into a Debt Restructuring Agreement and the filing of a Simplified *Concordato Preventivo* will trigger a stay on enforcement and certain other judicial actions.

(9) Is there a stay on individual enforcement actions?

In Debt Restructuring Agreements, subject to a very few exceptions (for example, enforcement of financial collateral arrangements), no enforcement and / or seizure procedures can be started or continued within a 60-day period following the publication of the agreement on the companies register; neither is a debtor entitled to make any payment to pre-existing creditors (that is, whose claims arose prior to the request for approval) during this stay period.

In addition, during negotiations of the Debt Restructuring Agreement, the debtor – upon satisfaction of certain conditions – may request the court to issue a ruling prohibiting commencement or continuation of interim or foreclosure proceedings and to obtain the registration of judicial pre-emption rights against the debtor's estate.

The rules governing the Simplified *Concordato Preventivo* provide for a stay which operates automatically, beginning from the filing of such a request and lasting until the court approves the Debt Restructuring Agreement.

The Italian Crisis and Insolvency Code provides that the stay of enforcement actions is not automatic but has to be asked for by the debtor, both in the Debt Restructuring Agreement and in the Simplified *Concordato Preventivo*, and that the stay can last for up to 12 months. The stay can also be asked for by the debtor in the context of the Early Warning Procedure, for up to 6 months.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

The effects of *ipso facto* clauses are uncertain because there is no statutory prohibition on *ipso facto* clauses in the Italian Bankruptcy Law with reference to the Recovery Plan, the Debt Restructuring Agreement and the Simplified *Concordato Preventivo*.

However, it is maintained by scholars that the initiation of a restructuring procedure (that is, Recovery Plan, Debt Restructuring Agreement and Simplified *Concordato Preventivo*) does not constitute grounds on its own for terminating pending agreements (thatis, not fully executed by both parties) if the relevant restructuring procedure provides for the continuation of the business activity and not for its liquidation; thus, it would require one or more additional breaches in order to terminate the relevant pending agreement.

The Italian Crisis and Insolvency Code provides that the activation of an Early Warning Procedure will not constitute grounds for terminating pending agreements or for revoking the bank credit lines granted.

In sum this means that *ipso facto* clauses are not enforceable.

(11) What are the options for new interim financing (with super priority status)?

There are several options for new interim financing.

Claims arising out of loans granted to implement a court approved Debt Restructuring Agreement have super priority status (*prededucibili*). [132]

Super priority is furthermore granted to 80% of the shareholder loans (which, in general terms, are regarded as subordinated) that have been granted to the company to implement a court approved Debt Restructuring Agreement.

In addition, companies that file for a Simplified *Concordato Preventivo* or request the approval of a Debt Restructuring Agreement:

(a) may request the court to authorise the execution of a new super priority facility agreement (pending the approval by the Court) provided that an expert, once it has verified the company's financial needs up until the approval of by the court, certifies that such facility is aimed at the best resolution for the creditors (*la migliore soddisfazione dei creditori*); and

(b) can be authorised by the court to incur further indebtedness in the form of emergency financing, provided such financing is required to meet the urgent financing needs of the company's business. In this case, the petition will have to:

   (i) specify the use of the financing;

   (ii) state that other sources of financing are not available; and

   (iii) state that the company would face imminent and irreparable financial damage without such new financing. The court may also authorise new interim borrowing without an expert's certification. The court in lieu may accept summary statements regarding the plan and the financing proposal.

(12) Are other restructuring-related transactions protected?

Acts, payments and guarantees carried out in execution of a Recovery Plan certified by an expert, or in execution of a Debt Restructuring Agreement approved by the court, are exempt from insolvency avoidance actions if the plan fails and the debtor is declared bankrupt.[133]

In the Simplified *Concordato Preventivo*, the debtor necessitates the court's approval to carry out acts exceeding the ordinary course of business. The court's approval determines that the acts and / or payments carried out following such authorisation are exempted from insolvency avoidance actions. Third party claims arising as a result of acts legally performed by the debtor are ranked with super priority (*prededucibili*).

[132] *Idem*, art 182.
[133] *Idem*, art 67.

The Italian Crisis and Insolvency Code provides that the agreement entered into at the end of the Early Warning Procedure produces the same effects as a Recovery Plan, thus exempting it from insolvency avoidance actions.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

The preventive restructuring instruments do not divest the debtor of its decision-making rights.

However, in the Simplified *Concordato Preventivo*, the debtor has to be authorised by the court to carry out acts / transactions that are not in the ordinary course of business (for example, entering into settlement agreements, loan agreements, acknowledgment of a debt, etcetera).

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt- for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

Save for the Simplified *Concordato Preventivo* where the debtor merely requests the court to grant a term by which deciding whether to file for a full-fledged workout agreement with creditors or for the approval of a Debt Restructuring Agreement, the preventive restructuring instruments take the form of an agreement between the debtor and its creditors. Thus, the terms and conditions of such agreements are freely negotiable between them, and may include each of the abovementioned measures.

(15) Do creditors vote in separate classes and, if so, what are the criteria for class formation?

Of the preventive restructuring instruments dealt with in this paper, the only one in which the debtor can form creditors classes is the Special Debt Restructuring Agreement, whereby the debtor may ask that the effects of the Debt Restructuring Agreement be extended to financial institutions that have not agreed to the contents of the Debt Restructuring Agreement, provided that some legal conditions are met (please refer to (3)).

As mentioned above under (3), the Italian Crisis and Insolvency Code renders the provisions of such sub-proceeding applicable also to creditors different from financial institutions and, thus, classes could be formed generally in the Debt Restructuring Agreement.

The classes have to be formed in accordance with creditors' similar legal position and economic interests and may be formed solely for the purpose of the operability of the cram-down mechanism, since there is no voting mechanism.

(16) Can equity holders be included?

Yes, equity holders can be included.

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

Creditors and equity holders can freely be included or excluded from the preventive restructuring instruments, it being understood that in Debt Restructuring Agreement the agreement has to be entered into with at least 60% of the creditors.

The proceeding introduced by a Simplified *Concordato Preventivo* affects all creditors automatically.

(18) What are the voting requirements (head count test / majority in value test)?

The preventive restructuring instruments dealt with in this paper do not provide for any voting mechanisms.

(19) Does the instrument provide for cram-down of dissenting creditors?

The Special Debt Restructuring Agreement and the Moratorium provide for two types of cram-down mechanisms (please refer to (3)(i) and (3)(ii)).

The Simplified *Concordato Preventivo* can lead to a fully-fledged workout agreement with creditors proceeding (*concordato preventivo*) which provides for a cram-down mechanism, but the proceeding itself does not provide for a cram-down mechanism.

No cram-down mechanism is applicable to creditors whose claims are deemed having super priority status.

The other preventive restructuring instruments do not provide for any cram-down mechanism.

(20) Does the instrument provide for cross-class cram-down?

No, the preventive restructuring instruments do not provide for cross-class cram-down.

(21) Is the restructuring instrument binding upon all affected parties?

The agreement signed in accordance with the relevant restructuring instrument is binding upon all consenting parties.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

The Debt Restructuring Agreement requires court approval of the agreement negotiated and signed between the debtor and the consenting creditors.

The Simplified *Concordato Preventivo* requires court confirmation that (i) the submitted documentation is complete and (ii) no request for a Simplified *Concordato Preventivo* has been filed in the previous two years.

The Recovery Plan and the Early Warning Procedure do not require any judicial and / or administrative confirmation.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example no creditor worse off test, an absolute priority rule)?

Under a Recovery Plan and a Debt Restructuring Agreement there is no cram-down mechanism (save for the Special Debt Restructuring Agreement) and as a result non-consenting creditors cannot be obliged to follow the terms and conditions provided for in the agreement. Additionally, under the Simplified *Concordato Preventivo*, additional checks and balances are in place in the form of a third party monitoring the debtor's estate and thereby indirectly protecting the creditor's interests.

Under the Early Warning Procedure, a panel of professionals assist and advise the debtor on restructuring its debt and solving its financial difficulties. If this procedure fails, such panel and the OCRI have to notify the failure to the public prosecutor who can file for a judicial liquidation[134] if the debtor is insolvent and the dimensional thresholds are met.

Under the Recovery Plan and the Debt Restructuring Agreement a third and independent expert has to certify the truthfulness of the company data and the feasibility of the underlying recovery / restructuring plan. In addition, in the Debt Restructuring Agreement, the expert has to certify also that the debtor is able to satisfy the claims of non-consenting creditors either within 120 days from the court's approval in respect of any receivables due and payable on such date or within 120 days from the relevant due date in respect of any receivable not due and payable at the date of the court's approval.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

There is no specific statutory rule in respect of valuations prepared in connection with the restructuring instrument. However, more generally, under the Debt Restructuring Agreement, the court must verify that the submitted documentation is complete before approving the agreement (including valuations), and under a Simplified *Concordato Preventivo*, the court is entitled to withdraw admission to the request if the debtor acts unlawfully (such as carrying out acts exceeding the ordinary course of business without the court's authorisation).

(25) Is appeal possible?

Yes, appeal is possible under the Debt Restructuring Agreement either before the approval (objection) or after such approval (complaint).

Before the approval, any creditor and all those who have a qualified interest may lodge an objection within 30 days of the publication of the Debt Restructuring Agreement in the companies register.

[134] The Italian Crisis and Insolvency Code will change the name of the actual bankruptcy proceeding (*fallimento*) to "judicial liquidation".

As long as the 30-day period has not expired, the Debt Restructuring Agreement cannot be approved.

After the judgment on the approval of the Debt Restructuring Agreement, the debtor (if the approval is denied) or those who have filed an opposition (if the approval is granted) may challenge such judgment by means of a complaint before the Court of Appeal within 15 days from the publication of the judgment in the companies register. It is uncertain whether anyone who has not lodged an objection can lodge a complaint.

The complaint may contain procedural defects or any other breach of the procedures rules (provided that it is of substantial importance for the purposes of the approval); on the other hand, complaints concerning failure to declare bankruptcy in the context of pending restructuring proceedings are inadmissible, given that any such grievances must be made by means of a complaint against the rejection decree (and not against the approval).

The Italian Crisis and Insolvency Code provides that the complaint has to be filed within 30 days, thus increasing the period in which it is possible to proceed with the filing of the complaint. In addition, it provides that the Court of Appeal's judgment can be challenged before the Supreme Court within 30 days from the notification of such judgment.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

In the Early Warning Procedure, the debtor is entitled to ask the court to grant some protective measures (for example, stay of enforcement actions).

In the Debt Restructuring Agreement, the debtor is entitled – under some circumstances – to request the court to grant the stay of enforcement actions during the negotiations and before formalising the agreement.

In the Simplified *Concordato Preventivo*, the court can be involved by the debtor for authorisation to carry out acts that fall outside the ordinary course of business[135] or for suspension of pending agreements.

(27) Is there a statutory basis to appoint a restructuring expert?

Yes, Italian law provides that the debtor must appoint a third independent expert who certifies the plan in the context of a Debt Restructuring Agreement and a Recovery Plan.

In the Early Warning Procedure, the debtor must activate the OCRI which appoints the panel of professionals with the task to assist and advise the debtor. If the debtor declares, during such crisis settlement, that it intends to submit a request for approval of a Debt Restructuring Agreement, the panel of professionals has the task of verifying the truthfulness of the debtor's business (and accounting) data.

[135] Italian Bankruptcy Law, art 161, para 7.

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

Generally, managing directors can be jointly and severally liable towards the company, individual shareholders, creditors and / or third parties for damages resulting from the failure to comply with their duties imposed on them by law. The liability of the directors can be of a criminal and / or civil nature.

The Italian Bankruptcy Law[136] provides that the provisions regarding preferential bankruptcy (*bancarotta preferenziale*) and simple bankruptcy (*bancarotta semplice*) do not apply to payments and transactions made, among other things, under the protective umbrella of a Recovery Plan or a Restructuring Plan.

Also, payments and financing authorised by the court in the context of the proceeding introduced by a Simplified *Concordato Preventivo* are exempt from the application of the criminal law provisions regarding simple bankruptcy and preferential bankruptcy.

The Italian Crisis and Insolvency Code provides for some exemptions from criminal liability for debtors who initiated an Early Warning Procedure promptly.

(b) Experts

The expert may be subject to criminal liability if it exposes false information or fails to report relevant information.[137]

The complexity of the expert's task also exposes him to civil liability on the basis of the general principles of the Italian legal system towards both the debtor and the creditors or any other relevant party.

The liability towards the debtor is of a contractual nature; the expert should therefore be liable when it has not used, in the performance of its duties, the diligence required by Article 1176, paragraph 2 of the Italian Civil Code. In addition, some scholars consider Article 2236 of the Italian Civil Code to be applicable, which limits liability for wilful misconduct (*dolo*) and gross negligence (*colpa grave*) only in the event that the task of the expert involves the solution of technical problems of particular difficulty.

In relation to civil liability towards creditors, it is debated among scholars whether it is a contractual liability *latu sensu* or a non-contractual (*extracontrattuale*) liability for having made creditors rely on a certification that does not comply with the applicable law.

[136] *Idem*, art 217*bis*.
[137] *Idem*, art 236*bis*.

2.5 POLAND

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

There are four types of restructuring proceedings available under Polish law:

(a) fast-track arrangement approval proceedings (*postępowanie o zatwierdzenie układu*) (Fast-Track Proceedings);

(b) accelerated arrangement proceedings (*przyspieszone postępowanie układowe*) (Accelerated Arrangement Proceedings);

(c) arrangement proceedings (*postępowanie układowe*) (Arrangement Proceedings); and

(d) remedial / rehabilitation proceedings (*postępowanie sanacyjne*) (Remedial Proceedings; Fast-Track Proceedings, Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings are jointly referred to as Polish Restructuring Proceedings).

They may serve as preventive restructuring instruments because they can be initiated when there is a threat of insolvency, but they may also be commenced subsequently, after a debtor has already become insolvent.[138]

Polish Restructuring Proceedings were introduced in 2016 by the newly-enacted Polish Restructuring Law and must be distinguished from standard bankruptcy liquidation proceedings, which are regulated under different legislation dedicated exclusively to bankruptcy.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

Currently there are no plans to introduce new restructuring instruments or to significantly amend the existing ones, as Polish Restructuring Proceedings are generally in line with the Preventive Restructuring Framework Directive.

During the pending legislative process connected with the Preventive Restructuring Framework Directive, representatives of the Polish government adopted a similar view and argued that only minor amendments to the Polish Restructuring Law will be required.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out-of-court instrument).

The purpose of all Polish Restructuring Proceedings is to avoid the bankruptcy of the debtor. This may be done through the restructuring of the obligations of the debtor by an arrangement with the creditors and, only in the case of Remedial Proceedings, also through undertaking remedial actions. Moreover,

[138] Polish Restructuring Law, Art 6.

the legitimate rights of the creditors must be secured during the entire process.[139]

It is also possible to satisfy the creditors by way of passing a so-called "liquidation arrangement" under which the debtor's estate must be liquidated.[140] Such route is sometimes pursued when the debtor does not intend to continue running its business and at the same time the rules and deadlines in relation to liquidation under the Polish Bankruptcy Law are not satisfactory to the debtor and the creditors.

Polish Restructuring Proceedings may be divided into out-of-court and in-court instruments as follows:

(a) Out-of-court instruments – Fast-Track Proceedings

These are mostly out-of-court restructuring proceedings, in which the debtor, with the assistance of an arrangement supervisor – who is a licensed restructuring advisor hired by the debtor to assist it with Fast-Track Proceedings (for more information regarding arrangement supervisors, please see (27)) – prepares the arrangement proposals and organises the voting on the arrangement without the involvement of the court. On the basis of the arrangement, the debtor may restructure its debt by applying various restructuring measures, such as a deferral of the maturity of claims, a division of repayment into instalments, haircuts, debt-for-equity swaps, or amendments to contracts and claims. The arrangement has to be subsequently approved by the court. After it is approved by the court, it becomes legally binding on all creditors whose claims are covered by the arrangement.

(b) In-court instruments – Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings

These are exclusively in-court restructuring proceedings initiated by filing a petition with the court.

The debtor's choice of a particular type of in-court restructuring proceeding is mainly driven by specific features of each of the proceedings and how they correspond to the current state and needs of the debtor's business. Accelerated Arrangement Proceedings are the fastest and least burdensome, but also offer the lowest level of protection against creditors. Remedial Proceedings are the most burdensome, where the default option is that the debtor is deprived of its right to operate its business, but with the greatest level of protection against creditors. Arrangement Proceedings are considered a middle ground between Accelerated Arrangement Proceedings and Remedial Proceedings. Accordingly, the main differences between these proceedings include the scope of the debtor's control over the management of its business, the level of the debtor's protection against creditors and how fast and burdensome the proceedings are.

Another important distinction is linked to the amount of claims, which are disputed by the debtor. Certain types of Polish Restructuring Proceedings may only be conducted if the amount of claims disputed by the debtor do not exceed a certain level. In contrast, other Polish Restructuring Proceedings may be

[139] *Idem*, Art 3, s 1.
[140] *Idem*, Art 159.

conducted only if that threshold is exceeded. Accordingly, Fast-Track Proceedings and Accelerated Arrangement Proceedings may only be conducted if the total amount of disputed claims entitling creditors to vote on the arrangement does not exceed 15% of the total amount of all (both disputed and undisputed) claims entitling creditors to vote on the arrangement. On the other hand, Arrangement Proceedings may only be conducted if this 15% threshold is exceeded. Finally, the 15% threshold test does not apply to Remedial Proceedings, which may be conducted regardless of the amount of disputed claims.

There are more detailed differences between each of the Polish Restructuring Proceedings, which will be highlighted throughout this paper.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

Each of the Polish Restructuring Proceedings qualifies as an insolvency procedure under the European Insolvency Regulation.

As the Polish Restructuring Law came into force after the European Insolvency Regulation was formally enacted, certain amendments were required to include Polish Restructuring Proceedings in the scope of the European Insolvency Regulation. The amendments to Annex A to the European Insolvency Regulation, made in accordance with Regulation 2017/353 of 15 February 2017 replacing Annexes A and B to Regulation 2015/848, altered its content to reflect changes in Polish law and added Polish Restructuring Proceedings to the list of insolvency proceedings.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

Polish Restructuring Proceedings are available to a debtor that is insolvent or is threatened with insolvency.[141] The insolvency test of the debtor is the same as in Polish Bankruptcy Proceedings, that is, either the test of illiquidity or over-indebtedness has to be satisfied. A debtor is deemed illiquid if it is unable to meet its financial obligations as they fall due (which can be presumed when the delay in payments exceeds three months). A debtor is deemed over-indebted if the sum of the debtor's financial liabilities (excluding the future and conditional liabilities and liabilities under certain shareholder loan agreements) exceeds the value of its assets, and this situation continues for longer than 24 months (which can be presumed on the basis of the debtor's balance sheet). Each of the presumptions referred to above can be rebutted.

A debtor is threatened by insolvency if its financial condition indicates that it might become insolvent in the near future.

Polish Restructuring Proceedings are open to debtors that are entrepreneurs (both legal persons and natural persons who practise an independent profession or carry on a business), commercial companies that are not engaged in any economic activity, partners in commercial partnerships who are liable for the

[141] *Idem*, Art 6.

obligations of the partnership without any limitation with their entire property, and partners in professional partnerships.

There are several entities that are excluded from participation in Polish Restructuring Proceedings: the State Treasury (but not State-owned companies), local government units, banks, insurers and investment funds.

The principles governing the restructuring of banks and investment firms are laid down in the Polish Act on the Bank Guarantee Fund, Deposit Guarantee Scheme and Resolution which implements the Bank Recovery and Resolution Directive (2014/59/EU).

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

In principle, Polish Restructuring Proceedings may only be initiated by a debtor.[142] In contrast, Remedial Proceedings may be initiated by either a debtor or one or more of its full-recourse creditors (that is, a creditor who is entitled to seek enforcement of its claims from all the debtor's assets).[143] Full-recourse creditors, however, may only apply for the commencement of Remedial Proceedings if the debtor is already insolvent. Public authorities cannot initiate Polish Restructuring Proceedings in respect of a debtor *ex officio*.

The court is bound by a debtor's choice for a specific type of Polish Restructuring Proceeding requested in its application. The court will, however, dismiss the application if the debtor applies for the opening of a specific type of Polish Restructuring Proceedings that is not appropriate for its current situation, as well as for failing to meet the specific conditions set out in the provisions of the Polish Restructuring Law regulating the relevant type of Polish Restructuring Proceeding.

(7) Is there a viability test?

Yes. In order to protect creditors' rights and legitimate interests, the court will refuse to open Polish Restructuring Proceedings if the effect of such proceedings would harm the debtor's creditors. A debtor's application to commence Arrangement Proceedings or Remedial Proceedings will also be rejected if the court is not satisfied that the debtor has the ability to cover, on an on-going basis, the costs of the proceedings and the liabilities that arise after their opening.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

Under Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings, from the day on which these proceedings are opened:

[142] *Idem*, Art 7.
[143] *Idem*, Art 283.2.

- the debtor or the compulsory manager (as discussed further under (13)) cannot perform the debtor's obligations, which are covered by virtue of law by the arrangement;[144]

- it is forbidden to establish new security interests over the debtor's assets to secure claims, which came into existence before the day on which the restructuring proceedings were opened (this does not apply to the types of security interest which require perfection in the form of registration in the relevant register, provided that an application to register such security interest was filed at least six months before the day on which the petition to open the relevant restructuring proceedings was filed);[145] and

- it is forbidden for lessors to terminate rental or leasehold contracts for the premises where the debtor operates its business, unless it is accepted by the creditors' council (which is an optional body which may be established in the in-court types of Polish Restructuring Proceedings by the judge-commissioner (i) on his own initiative if the judge-commissioner considers it necessary, or (ii) if requested to do so by the debtor, at least three creditors or a creditor or creditors representing at least one-fifth of the total amount of the claims; it consists of selected creditors and is designed to enhance the position of the creditors by, among others, granting the creditors' council a right to approve certain actions of the debtor or of the compulsory manager, which without that approval would be considered null and void) or unless such contract is terminated because the debtor is not performing its obligations, which are not covered by the arrangement, after the day on which the restructuring proceedings were opened or on the grounds of a default, which occurred after the restructuring proceedings were opened. Under certain conditions, these provisions also apply to, among others, credit facility agreements, guarantees and letters of credit.[146]

Apart from the general outcomes of the initiation of the restructuring instrument described above, there are also a number of detailed consequences affecting particular aspects of the restructuring proceedings, such as, for example:

- set-off limitations intended to prevent creditors from artificially enhancing their position in the restructuring proceedings;

- a number of detailed provisions referring to the effects of initiating restructuring proceedings on close-out netting provisions or on members of payment and securities settlement systems; and

- in Remedial Proceedings, the hardening periods may affect the validity of transactions entered into prior to the initiation of Remedial Proceedings.[147]

Finally, as discussed further below, the entry into Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings will each trigger a stay on enforcement.

[144] *Idem*, Arts 252,273 and 297.
[145] *Idem*, Arts 246, 273 and 295.
[146] *Idem*, Arts 256, 273, and 297.
[147] *Idem*, Art 304.

(9) Is there a stay on individual enforcement actions?

The regulation of stay on individual enforcement actions depends on the particular type of Polish Restructuring Proceedings.

Under the out-of-court Fast-Track Proceedings, there is no stay on enforcement actions apart from the short period of time between the day on which the court approves the arrangement and the day on which that approval becomes effective.[148] In contrast, there are stay regulations for all in-court Polish Restructuring Proceedings (that is, Accelerated Arrangement Proceedings,[149] Arrangement Proceedings[150] and Remedial Proceedings[151]).

Under Accelerated Arrangement Proceedings and Arrangement Proceedings, as a general rule, there is a stay on individual enforcement actions on the date of the opening of the restructuring proceedings in relation to enforcement proceedings initiated before the opening of the restructuring proceedings and concerning claims covered by virtue of law by the arrangement. Under Remedial Proceedings, the same rule applies, but it is extended to all claims, irrespective of whether they are covered by virtue of law by the arrangement or not.

In addition, there is a ban on initiating new enforcement proceedings after the day of the opening of the restructuring proceedings.

Furthermore, under Accelerated Arrangement Proceedings and Arrangement Proceedings, a secured creditor may enforce its rights, but the enforcement may only be aimed at an encumbered asset and not at the debtor's estate as a whole. Under these two types of Polish Restructuring Proceedings, the judge-commissioner may, following a relevant motion of the debtor or the court supervisor, under certain conditions stay enforcement proceedings concerning claims not covered by virtue of law by the arrangement (including secured claims), but in any event for no longer than three months, provided that the enforcement is aimed at an asset, which is indispensable for the proper operation of the debtor's business.[152] These rules also apply to Fast-Track Proceedings in the short period of time between the day on which the court approves the arrangement and the day on which that approval becomes effective.[153] In practice, judge-commissioners tend to follow the motions of the debtors or the court supervisors and stay the enforcement proceedings, but such practices have been encountered in the early stage of Arrangement Proceedings and Remedial Proceedings, that is, during preliminary proceedings to secure assets, where a similar stay mechanism is envisaged (no preliminary proceedings to secure assets is available under Accelerated Arrangement Proceedings or Fast-Track Proceedings); practice outside of preliminary proceedings to secure assets, does not seem settled.

Finally, solely under Remedial Proceedings, taking enforcement actions aimed at assets falling within the scope of the debtor's estate is strictly forbidden after the day of the opening of these proceedings, even if such action is initiated by a

[148] *Idem*, Art 224, s 2.
[149] *Idem*, Art 259.
[150] *Idem*, Art 278.
[151] *Idem*, Art 312.
[152] *Idem*, Arts 260, and 279.
[153] *Idem*, Art 224, s 2.

secured creditor.[154] The restrictions regarding enforcement actions are therefore more severe under Remedial Proceedings than under other types of Polish Restructuring Proceedings.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

Contractual provisions securing a right for one party to amend or terminate the contractual relationship with the other party in the case that a petition to open restructuring proceedings is filed regarding that other party, or in the case where restructuring proceedings are opened regarding that other party, are ineffective. This rule applies both to court-based (that is, Accelerated Arrangement Proceedings,[155] Arrangement Proceedings[156] and Remedial Proceedings[157]) and out-of-court (that is, Fast-Track Proceedings[158]) Polish Restructuring Proceedings.

(11) What are the options for new interim financing (with super priority status)?

New interim financing with super priority status may be granted during the course of all types of Polish Restructuring Proceedings.

Claims arising under a financing (i) indicated in the arrangement approved in Polish Restructuring Proceedings and (ii) granted in relation to the execution of that arrangement, obtain super priority status – they are prioritised under Polish Bankruptcy Law and fall within the first category of claims satisfied during the bankruptcy liquidation proceedings. However, this occurs only if (i) the debtor files a bankruptcy petition within three months from the day the setting aside of that arrangement becomes effective and (ii) later the debtor is declared bankrupt on the grounds of that petition. Other types of claims falling within the first category of satisfaction include employees' claims, alimonies and pension payments. The only categories of claims that rank ahead of the first category of claims are the costs of the bankruptcy proceedings and other liabilities of the bankruptcy estate (the so-called "zero category"). The claims arising under such new financing do not, however, take priority over the claims of a secured creditor in relation to the asset over which that secured creditor has security.[159]

Moreover, security interests securing claims arising under new financing granted during the relevant restructuring proceedings are not subject to hardening periods under the Polish Bankruptcy Law and may not be challenged on these grounds if that security interest was created with the approval of the creditors' council (or if the creditors' council has not been appointed – with the approval of the judge-commissioner). This rule is not limited only to security interests securing claims under financings which fulfil the abovementioned requirements necessary to fall within the first category of claims under the Polish Bankruptcy Law.

Finally, the claims of creditors who provide new financing during Polish Restructuring Proceedings may be restructured on preferential terms. As a

[154] *Idem*, Art 312, s 4.
[155] *Idem*, Art 247.
[156] *Idem*, Art 273.
[157] *Idem*, Art 297.
[158] *Idem*, Art 225, s 1.
[159] *Idem*, Art 342.

general rule, the terms of the restructuring of claims must be equal for all creditors. However, as an exception, creditors who made available to the debtor or who undertook to make available to the debtor a new financing in the form of a credit facility, bonds, a bank guarantee, a letter of credit or any other financial instrument after the opening of the restructuring proceedings may receive preferential treatment regarding the terms of the restructuring of their claims, provided that that financing is indispensable for the execution of the arrangement.[160]

(12) Are other restructuring-related transactions protected?

In all court-based Polish Restructuring Proceedings (that is, Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings) transactions, including: (i) encumbering assets falling within the scope of the arrangement / remedial estate with a mortgage, pledge, registered pledge or maritime mortgage to secure claims not covered by the arrangement; (ii) transferring the ownership of assets or rights to secure claims not covered by the arrangement; (iii) encumbering the assets falling within the scope of the arrangement / remedial estate with other rights; (iv) obtaining a loan or credit facility; and (v) concluding an agreement for the lease of the debtor's business, its organised part or other similar agreement, are protected from claw-back risks if the debtor is declared bankrupt; provided that they are approved by the creditors' council or the judge-commissioner (if the creditors' council is not appointed).[161]

Moreover, any receivables incurred during the relevant restructuring proceedings as a result of actions of the compulsory manager or of the debtor, which were taken after the day on which the restructuring proceedings were opened and which did not require the consent of the creditors' council or of the court supervisor (or if that consent was required – after obtaining that consent) are prioritised, provided that the debtor was declared bankrupt on the grounds of a simplified petition for bankruptcy (which can be filed if an arrangement is disapproved by the court or the restructuring proceedings are formally discontinued). These claims fall within the first category of claims satisfied during the bankruptcy liquidation proceedings.[162] The details regarding the first category of claims – the so-called "zero category" – and the relationship between the claims falling within the scope of the first category and the claims of the secured creditors, are described under (11).

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

As a general rule, yes. However, the scope in which a debtor remains in possession depends on the type of Polish Restructuring Proceeding.[163]

In Fast-Track Arrangement Proceedings, which take place mainly outside court, the debtor retains full control over its assets and manages the business on its own. The debtor is required to hire an arrangement supervisor to closely monitor and facilitate the proceedings. The arrangement supervisor should be informed

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160 *Idem*, Art 162.
161 *Idem*, Arts 129 and 139.
162 *Idem*, Art 342, s 1, point 1.
163 *Idem*, Art 67.

of all issues surrounding the restructuring and its operations, but he has no official power over the debtor until the court approves the arrangement. In the interim period between the issuance of the court's decision to approve the arrangement and the moment at which it becomes final and binding, any action exceeding the scope of the debtor's ordinary business will require the consent of the arrangement supervisor.

In Accelerated Arrangement Proceedings and Arrangement Proceedings, the debtor manages the estate on its own but the court *ex officio* appoints a court supervisor to oversee its management. The court supervisor has to provide the court with monthly reports on the status of the restructuring. In addition, the consent of the court supervisor is required for matters which fall outside the scope of normal administration. Any action effected without such consent is automatically void. In exceptional circumstances, the court has the right to deprive the debtor of control over its assets and appoint a compulsory manager.

In Remedial Proceedings, the debtor is deprived of the right to manage its business and a compulsory manager takes control of the restructuring estate. However, if the personal participation of the debtor or its representatives is required for the effectiveness of Remedial Proceedings, and at the same time they give a warranty of the proper exercise of the administration, the court may decide that for the benefit of the process, the debtor will retain control over its business. In such case, the debtor cannot enter into material transactions without the court supervisor's consent.

The debtor may have some influence on the appointment of the court supervisor or compulsory manager over the restructuring estate. As a rule, if the debtor proposes a candidate who is supported by creditors that represent more than 30% of the total claims, the court will be bound by such candidacy. The court has a right to reject the proposed candidate if it believes that there are sufficient reasons to do so.

At a later stage of the proceedings, the court supervisor or compulsory manager can be replaced, when the court is requested to do so either:

(a) by the supervisor or compulsory manager concerned;

(b) by the debtor supported by the creditor(s) representing more than 30% of the total amount of claims covered by the arrangement;

(c) after the supervisor or compulsory manager lost his licence; or

(d) pursuant to the resolution of the creditors' council.[164]

For more information regarding the creditors' council, please see (8).

[164] *Idem*, Art 28.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

Polish Restructuring Proceedings are aimed at restructuring the debtor's liabilities under an arrangement which is approved by the relevant majority of creditors.

The arrangement proposals include the proposed methods of debt restructuring, ways of securing the creditors' claims and methods of satisfying the creditors' claims. They may provide for various restructuring measures, in particular a deferral of the maturity of claims, a division of repayment into instalments, haircuts, debt-for-equity swaps, or amendments to contracts and claims.
In principle, Polish Restructuring Proceedings have an individual character and are not available for the restructuring of the holdings. For example, if the group consists of five companies, five separate restructuring proceedings will have to be opened. However, the court may order the joint examination of cases of debtors who are members of the same capital group. The joined cases are then examined by the same judge-commissioner and the court may decide to appoint one court supervisor or compulsory manager and one creditors' council for all the joined cases. However, the joint proceedings end up with a separate arrangement being adopted for each debtor.

(15) Do creditors vote in separate classes, and if so, what are the criteria for class formation?

Yes. Although there is no obligation to divide the creditors into classes, it is possible that the arrangement proposals provide for the division of creditors into classes covering individual categories of interests. In practice, in most restructuring proceedings the creditors are divided into classes.

In particular, the following groups of creditors can form a separate class of creditors:

(a) creditors that hold claims under employment relationships and who expressly consented to the arrangement covering them;

(b) farmers who hold claims under contracts for delivering agricultural products;

(c) creditors whose claims are secured with security interests *in rem* over the debtor's property who expressly consented to the arrangement covering them; and

(d) creditors that are shareholders of a debtor holding the company shares which represents at least 5% of votes at the shareholders' meeting.

The conditions of the restructuring have to be the same for creditors included in the same class, unless the creditor expressly consents to less favourable conditions.[165] If the creditors have not been divided into classes, the terms of the arrangement must be the same for all the affected creditors, unless the creditors expressly consent to less favourable conditions.

[165] *Idem*, Art 162.

(16) Can equity holders be included?

Yes. The equity holders can be covered by the arrangement. Frequently, these are the persons that may face a heavier burden of the restructuring than others. However, equity holders that are: (i) holding companies; (ii) companies or partnerships affiliated with the debtor that have more than 20% of votes at the debtor's shareholders' meeting; and (iii) individuals who represent more than 25% of the debtor's share capital, are not entitled to vote at the creditors' meeting on matters concerning the arrangement.

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

In general, the arrangement covers all the full-recourse claims towards the debtor that arose before Polish Restructuring Proceedings were opened, together with accrued interest and the conditional claims, if the condition was met during the performance of the arrangement.[166] There is no formal procedure for the admission of such claims. If the arrangement has been approved by the court, it is binding on all affected creditors and no creditor may exclude itself from it.

There are certain types of claims that cannot be covered by the arrangement, unless the creditor grants its consent to do so. These include claims under employment relationships and claims that are secured by the debtor's assets property by a mortgage, pledge, registered pledge, tax lien and maritime mortgage, to the extent that they are covered by the value of those assets encumbered by that security interest.

Another exception covers claims towards the debtor under a reciprocal agreement which have not been performed in full or in part before the commencement of the restructuring proceedings. Such claims will be covered by the arrangement only if the performance of the other party under that agreement is divisible and only to the extent to which the other party has fulfilled that performance and has not received a reciprocal performance from the debtor.[167]

In addition, under Fast-Track Proceedings and Accelerated Arrangement Proceedings, it is possible to adopt the partial arrangement. For more information on partial arrangements, please see (21).

(18) What are the voting requirements (head count test / majority in value test)?

In principle, the arrangement is voted on at the creditors' meeting. The voting requirements consist of a majority in value test and a head count test. The arrangement is approved when a majority of the voting creditors (more than 50% of the voting creditors in number), which represent at least two-thirds of the total claims participating in the voting, vote in favour of the arrangement.[168] In Fast-Track Proceedings, the required majority is calculated by reference to the total value of claims held by the creditors who are entitled to vote (that is, not only voting creditors, but all creditors who are entitled to vote). If the voting is

[166] *Idem*, Art 150.
[167] *Idem*, Art 150.
[168] *Idem*, Art 119.

conducted in groups of creditors, the same requirements apply to voting in groups of creditors within a given group. Even if one class of creditors voted against the arrangement, it can still be approved, when the majority of voting creditors representing two-thirds of the total claims of voting creditors in the case of Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings and representing two-thirds of the total claims of creditors who are entitled to vote in the case of Fast-Track Proceedings has voted in favour of it, unless the dissenting class of creditors would be satisfied to an extent which is less favourable than expected in the event of Polish Bankruptcy Proceedings.

Additionally, the quorum required for the approval of the arrangement by the creditors' meeting is one-fifth of the creditors entitled to vote in the creditors' meeting. This quorum does not apply to Fast-Track Proceedings.

There are some differences in the voting requirements regarding a partial arrangement. The partial arrangement is approved if a majority of creditors (in number) that cast a valid vote, representing at least two-thirds of the claims of the creditors covered by the partial arrangement and which are entitled to vote, voted in favour of adopting the partial arrangement. For more information on partial arrangements, please see (21).

(19) Does the instrument provide for cram-down of dissenting creditors?

Yes. Provided that the voting requirements described under (18) have been met, an arrangement can be accepted by the relevant majority of creditors and be binding also on those creditors who voted against it.

(20) Does the instrument provide for cross-class cram-down?

Yes. As indicated under (18): (i) there is no obligation to divide the creditors into classes for the purposes of voting on the arrangement; and (ii) if the creditors are divided into classes, the arrangement may be adopted, even if the dissenting class of creditors voted against it, if the requirements set out under (18) are met.

(21) Is the restructuring instrument binding upon all affected parties?

Yes. A court-approved arrangement is binding on all creditors whose claims are covered by the arrangement, even if they are not included in the inventory of claims[169] (the inventory of claims must include all claims against a debtor which are covered by virtue of law by the arrangement, as described in (17). Depending on the type of restructuring proceedings, it is prepared by the arrangement supervisor, court supervisor or compulsory manager, based on the debtor's accounting books, other records and entries in land and mortgage registers and other registers. The creditors may challenge the accuracy of the inventory by filing objections). However, the arrangement does not bind the creditors who were not disclosed by the debtor and who did not participate in the restructuring proceedings.[170]

169 *Idem*, Art 166.
170 *Idem*, Art 166.

In general, the debtor is responsible for submitting the arrangement proposals. However, after the commencement of Polish Restructuring Proceedings, an arrangement proposal may also be submitted by: (i) the creditors' council; (ii) the court supervisor or the compulsory manager; or (iii) a creditor or a group of creditors holding at least 30% of the total claims covered by the arrangement.[171]

The debtor may submit an arrangement proposal concerning only certain types of its obligations, the restructuring of which has a material impact on the continued operation of the debtor's enterprise. This institution, which is called a "partial arrangement", is available only under Fast-Track Proceedings and Accelerated Arrangement Proceedings. Partial arrangements usually cover the claims of the major creditors such as financial institutions and main suppliers. The arrangement proposals must not provide any benefits to the creditors whose claims are covered by the partial arrangement which reduce the possibility of satisfying claims that are not covered by the partial arrangement.

The criteria on the basis of which the claims are divided should be objective, clear and economically justified. These are the exemplary claims that may be covered by the partial arrangement:

(a) claims that arose regarding financing the debtor's activity with credit facilities, loan facilities and other similar instruments;

(b) claims that arose under contracts which are essential to the operation of the debtor's business;

(c) claims secured by a mortgage, pledge, registered pledge, treasury pledge or maritime mortgage established over property or rights which are necessary to operate the debtor's business; or

(d) highest value claims.

If the creditors' claims are secured by collateral established over a debtor's estate and the arrangement proposal presented by the debtor provides for their full satisfaction, or satisfaction to a degree which is not lower than what the creditor could expect if it enforced its collateral, the consent of such creditor is not necessary to cover claims with a partial arrangement.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

Yes. The arrangement adopted by the creditors' meeting requires court approval.[172] The arrangement is examined by a court during a hearing which can be scheduled no earlier than one week following the day on which the creditors' meeting that adopted the arrangement came to an end. During this period, participants in Restructuring Proceedings may file written objections against the arrangement.

171 *Idem*, Art 155.
172 *Idem*, Art 164.

The court may not amend the provisions of the arrangement or return the case for reconsideration. If the court determines that the arrangement has not been adopted by the required majority, it will discontinue the proceedings. An arrangement which has not been approved by the court has no legal effect on the parties.

The court will not grant its approval on the arrangement if:

- it violates the applicable law, in particular the regulations on state aid;
- it is clear that it will not be executed (which can be presumed if the debtor failed to comply with its obligations which arose after the commencement of the restructuring proceedings); or
- the disputed claims under Fast-Track Proceedings and Accelerated Arrangement Proceedings exceeded 15% of the total claims.

See further under (23) for additional reasons for the court not to grant its approval of the arrangement.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example no creditor worse off test, an absolute priority rule)?

Following an assessment of the arrangement, the court may refuse to approve it based on the grounds referred to under (22). The court has a right to examine the arrangement's financial impact on the creditors and refuse to approve the arrangement if its conditions are grossly unfair to the creditors who voted against it and submitted its reservations concerning the arrangement.

As stated under (15), if the creditors have been divided into classes, the group of creditors that voted against the arrangement should be satisfied to the extent which is not less favourable than in the event of Polish Bankruptcy Proceedings.

The creditor may request the court to revoke the arrangement if the debtor does not perform the provisions of the arrangement, or it is obvious that the arrangement will not be duly performed in the future.[173]

It is also worth noting that, in the first place, the court shall refuse to open the restructuring proceedings if it is convinced that the effect of such proceedings would be detrimental to the creditors.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

Depending on the type of proceedings, the restructuring plan, which is one of the key documents prepared during the restructuring, is drawn up either by an arrangement supervisor, the court supervisor or a compulsory manager (who reports to the court) in co-operation with the debtor. It includes valuations such as:

[173] *Idem*, Art 176.

(a) information on the production capacity of the debtor's enterprise;

(b) a description of the methods and sources of financing; and

(c) projected gains and losses for the next five years.

The restructuring plan may also contain an indication of the value of the debtor's enterprise. It is mainly based on the data presented in the financial statements and the information provided by the debtor. Following an analysis of the debtor's current situation and its future prospects, the author of the restructuring plan tailors suitable restructuring measures.

In general, the person drafting the restructuring plan is responsible for the adequacy of the information contained in it. However, the debtor is responsible for providing the restructuring supervisor with complete and truthful information, subject to criminal liability for providing information which is false or for withholding any relevant information.[174] The restructuring supervisor is not liable for the accuracy of the information submitted by the debtor who was advised of potential criminal liability.[175]

The judge-commissioner who manages the restructuring proceedings supervises the actions of the court supervisor and compulsory manager and admonishes them for any misconduct they may commit. The court and the judge-commissioner may conduct evidentiary proceedings. However, an expert opinion may not be used as evidence, except for a situation in which there is a need to prove the circumstances justifying the objection as to the inventory of claims.[176] However, the participants of the proceedings may provide the court with private expert evidence.

Under Fast-Track Proceedings, the debtor files an application for the approval of the arrangement which includes a report from the arrangement supervisor that contains a current list of the debtor's property with an estimate of its components.

In addition, under Accelerated Arrangement Proceedings, in the application for opening proceedings, the debtor has to provide the court with the current list of its property with an estimate of its components.

(25) Is appeal possible?

Yes, a court's decision concerning an arrangement may be appealed against within 14 days.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Yes, in the case of Accelerated Arrangement Proceedings, Arrangement Proceedings and Remedial Proceedings, which are proceedings entirely held in-court from the moment a relevant petition for their initiation is filed with the court. After the petition to open restructuring proceedings is filed, the court may either

[174] *Idem*, Art 36.
[175] *Idem*, Art 41.
[176] *Idem*, Art 196.

open the relevant restructuring proceedings or refuse to open them. The court will open the relevant restructuring proceedings if the restructuring instrument is accessible to the debtor (please see (5) for more details) and if there are no grounds for refusing to open the proceedings. The court will refuse to open:

- Accelerated Arrangement Proceedings, Arrangement Proceedings or Remedial Proceedings on the grounds that the effect of such proceedings would be detrimental to the creditors; or

- Arrangement Proceedings or Remedial Proceedings on the grounds that a debtor's ability to pay ongoing costs of the proceedings and to perform obligations which arose after the opening of the proceedings is not probable.

Moreover, under Arrangement Proceedings and Remedial Proceedings, the court may order the debtor's assets to be secured during preliminary proceedings, which may take place after the petition to open restructuring proceedings is filed with the court but before the court decides to open, or refuses to open, the restructuring proceedings.

It is different in the case of Fast-Track Proceedings, which are primarily conducted out-of-court by the debtor and an arrangement supervisor who is hired by the debtor to assist with organising and facilitating Fast-Track Proceedings. In this type of proceeding the court is involved only at the last stage of Fast-Track Proceeding, solely for the purposes of approving the arrangement, which was already accepted by the creditors during the out-of-court phase of the proceedings.

(27) Is there a statutory basis to appoint a restructuring expert?

As described in detail under (13), in particular types of Polish Restructuring Proceedings, arrangement supervisors, court supervisors and compulsory managers must be appointed. These roles may be taken by:

- a natural person who has the full capacity for juridical acts and is a licensed restructuring advisor;

- a commercial company whose partners or shareholders who are liable for that company's obligations without limitation with their entire property, are licensed restructuring advisors; or

- a commercial company whose members of the management board representing the company are licensed restructuring advisors.

A court supervisor and a compulsory manager are appointed by the court, whereas an arrangement supervisor is hired directly by the debtor on a contractual basis. The court will replace a court supervisor or a compulsory manager, among others, (i) on the basis of a resolution of the creditors' council or (ii) at the debtor's request with attached written consent of the creditor or creditors jointly holding more than 30% of the total amount of claims. Nevertheless, each restructuring expert has to be independent from the debtor and make a written representation confirming that he is not connected to the debtor, that is, by confirming that he is not the debtor's creditor, debtor, spouse, relative, employee, etcetera.

To become a licensed restructuring advisor, one has to fulfil several requirements, for example:

- having a university master's degree (or equivalent) obtained in an EU member state, Switzerland or EFTA member state being a party to the agreement on the European Economic Area;

- having at least three years' experience within the preceding 15-year period in managing a bankruptcy estate or managing an enterprise or an organised part of an enterprise in an EU member state, Switzerland or EFTA member state being a party to the agreement on the European Economic Area; and

- passing a state exam prepared by a committee appointed by the Polish Minister of Justice.

VII. LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Members of the management board

There are several separate legal bases for the potential personal liability of members of the management board in a situation in which the company is insolvent. In general, there is no legal obligation to file an application to open Polish Restructuring Proceedings. However, under Polish Bankruptcy Law, a debtor is obliged to file an application for bankruptcy within 30 days after the grounds for declaring bankruptcy arise (that is, when the company is insolvent – please see (5) above). Members of the management board are liable for any damage caused by their failure to file an application within the time limit. They are released from the liability if they prove that the restructuring proceedings have been opened or an arrangement has been approved in Fast-Track Proceedings.

Another legal basis for the management board members' liability for a company's debt arises under the Polish Commercial Companies Code. Members of the management board of the limited liability company may be liable for the company's debt in the event of ineffective enforcement proceedings.[177] This liability is triggered if as a result of enforcement proceedings against a limited liability company, its creditor is not satisfied in full. In such a scenario, the management board members are jointly and severally liable for that company's obligations. They can release themselves from this liability if they can prove that within the time limit an application for bankruptcy was filed, or that the restructuring proceedings were commenced, or that they are not responsible for failing to file the application for bankruptcy within the time limit, or that they are not responsible for the failure to commence the restructuring proceedings, or that the creditors have not suffered any damage despite the fact that the application for bankruptcy or the application to commence the restructuring proceedings were not filed within the prescribed time period. Moreover, the management board members will not be liable for a failure to file an application for bankruptcy if enforcement by way of receivership,

[177] Polish Commercial Companies Code, Art 299.

or by way of a sale of the enterprise, was pursued and the obligation to file an application for bankruptcy arose during the time when such enforcement was pursued.

There is also a risk of potential criminal liability for members of the management board for not filing the application for bankruptcy on time,[178] for actions resulting in the selective satisfaction of creditors[179] and for actions undertaken to harm creditors' interests.[180] Members of the management board are also liable for not satisfying the information obligations for which they are responsible under Polish Restructuring Proceedings.

(b) Restructuring expert

Arrangement supervisors, court supervisors and compulsory managers are liable for any damage incurred as a result of the improper performance of their duties.[181] They are obliged to conclude an insurance agreement covering their civil liability for any damage incurred in relation to the performance of their duties.

178 *Idem*, Art 586.
179 Polish Criminal Code, Art 302.
180 *Idem*, Art 300 and 301.
181 Polish Restructuring Law, Art 25.

2.6 SPAIN

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

As a consequence of the financial crisis, a high rate (over 90%) of insolvent entities ended up in liquidation, placing a high burden on the Spanish insolvency courts. Since 2011, the Spanish legislator has therefore created different pre-insolvency proceedings to avoid companies falling into insolvency court processes. Under Spanish Law 22/2003, of 9 July 2003, on Insolvency (the Spanish Insolvency Law), as amended since 2011, there are four different types of preventive restructuring instruments currently available:

(a) The pre-insolvency period foreseen under Article 5*bis* of the Spanish Insolvency Law (the Pre-Insolvency Period). The Pre-Insolvency Period grants the debtor a four-month period to negotiate with its creditors either (i) a refinancing agreement or (ii) an advance proposal of arrangement between creditors (*propuesta anticipada de convenio*) and during such period the debtor is released from its obligation to file for insolvency.

(b) The refinancing agreements foreseen under the Fourth Additional Provision of the Spanish Insolvency Law (for example, the so-called Spanish scheme (the Spanish Scheme)), which are mainly focused on financial creditors and which are filed by the insolvency debtor or any of its financial creditors with the courts in order to obtain judicial sanction (*homologación*) of the agreement in order: (i) to protect the agreement against any eventual claw-back action; and (ii) to cram-down dissenting financial creditors.

(c) The refinancing agreements foreseen under Article 71*bis* of the Spanish Insolvency Law (the 71*bis* Refinancing Agreement), which are aimed at all types of creditors but cannot be filed with the courts to cram-down dissenting creditors (although, if certain conditions are met, can benefit from claw-back protection). These proceedings do not require the debtor to be insolvent, neither current nor imminent, so technically the 71*bis* Refinancing Agreement does not qualify as a pre-insolvency proceeding.

(d) Finally, out-of-court payment agreements (*acuerdo extrajudicial de pagos*) (Out-of-court Payment Agreement) allow small businesses (or individuals) experiencing financial difficulties to negotiate and reach an agreement with creditors regarding certain payment obligations to avoid insolvency, with the assistance of an insolvency mediator (*mediador concursal*).

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The Spanish legislator is currently reviewing the existing insolvency instruments. On 6 March 2017 a proposal for a legislative royal decree approving the consolidated text of the Spanish Insolvency Law was published (*Propuesta de Real Decreto Legislativo por el que se aprueba el Texto Refundido de la Ley Concursal*). Although not yet approved, this proposal could be used as the basis of any new, future proposal. This proposal includes a separate section for all the pre-insolvency instruments mentioned in the previous section and no additional instruments are added. The purpose of this text is to clarify and systematise existing law.

Moreover, by means of an order dated 28 September 2018 and in the Preventive Restructuring Framework Directive, the Spanish Ministry of Justice has created a special section of the general commission of legislation for preparing a report and a legislative proposal on pre-insolvency law and, in particular, on measures to increase the efficiency of the Spanish insolvency proceedings and the benefits of waiving unfulfilled liabilities. The purpose of this process is threefold:

(a) introducing greater degrees of flexibility both in the negotiation process with creditors and in the design of the agreement;

(b) introducing a viability test in order to avoid the legal instrument being used in circumstances where there is no chance of a viable restructuring of the debtor; and

(c) providing a greater degree of legal security to those who participate.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out–of-court instrument).

(a) Pre-Insolvency Period

Article 5*bis* of the Spanish Insolvency Law provides that in the case where the debtor notified the Commercial Court (*Juzgado de lo Mercantil*) that it has started negotiations with its creditors to obtain their approval regarding (i) a refinancing agreement, or (ii) an advance proposal of arrangement between creditors (*propuesta anticipada de convenio*), the debtor's obligation to file an application for voluntary insolvency[182] is suspended for three months (with an additional month to submit such application if the negotiations do not result in an agreement between the debtor and its creditors and the debtor is still insolvent). Following notification to the court and during such four-month period, creditors can only initiate enforcement actions against assets of the debtor that are not necessary for its daily business activity (which is decided by the judge on a case-by-case basis). Enforcement of security rights over necessary assets could be initiated, but in that case these will be immediately suspended. The Pre-Insolvency Period is specifically useful to provide directors of the debtor with a protected framework in which they can negotiate with creditors, as otherwise directors would need to file for insolvency if the debtor is in an insolvency

[182] The debtor has a duty to request the insolvency within two months from the date it has become aware, or should have become aware, of its insolvency status.
In relation to the above, the circumstances where a debtor is deemed to know (or ought to know) that it is insolvent are as follows:
- there has been an unsuccessful enforcement of a creditor's claim against the debtor due to the lack of freely available assets for an attachment;
- the debtor is in general default in the payment of its current payment obligations;
- there are attachments and pending enforcement proceedings over assets that affect the debtor's estate generally;
- the debtor performs a concealment or unlawful disposal of assets (*alzamiento o liquidación apresurada o ruinosa de bienes*); or
- there is a general default in the debtor's tax, social security and salaries payment obligations within the previous three months.

situation for more than two months and neglecting such obligation may lead to personal liability for the directors in the subsequent insolvency.

(b) The Spanish Scheme

Spanish Schemes are aimed at financial creditors (who are either secured creditors for the value of their claims covered by the security interests granted in their favour, or unsecured creditors). A Spanish Scheme can be judicially sanctioned (*homologado*) if the following requirements are met:

- the agreement must be entered into by 51% (by value) of creditors holding the debtor's financial indebtedness;[183]
- the agreement must significantly increase the available credit, or modify or extinguish the debtor's liabilities (by extending the maturity period of the liabilities or by being substituted for its obligations by others) and be based on a viability plan that allows the debtor to continue with its activity in the short to medium term;
- the auditor of the debtor must issue a certificate stating that the required majorities have been met; and
- the agreement must be entered into before a public notary.

Once sanctioned by the Court, the Spanish Scheme is binding on dissenting creditors and protected against future claw-back or any other challenge actions, provided that the applicable majorities are met (depending on the measures taken against unsecured dissenting creditors: at least 60% or 75% of financial creditors).

A Spanish Scheme can also provide for the release / amendment of claims held against third-party guarantors. However, the release / amendment of these claims cannot be extended to dissenting creditors. As such, dissenting creditors, regardless of the court sanction (*homologación*) of the Spanish Scheme, will maintain their claims and rights against third-party guarantors in full.

Finally, as regards the effects that can be extended to dissenting secured creditors, it must be noted that different positions have been held by Spanish case law. In this regard, there is certain case law that supports the view that the effects described in the Spanish Insolvency Law are only illustrative and therefore further effects (such as the release of security interests or the reorganisation or corporate restructuring of the debtor) can be extended to dissenting creditors. On the other hand, there is case law supporting the view that the foreseen effects are limited and, as such, these are the only effects that can be extended to dissenting creditors.

Additionally, as regards the possibility of challenging a Spanish Scheme, any dissenting financial creditor is entitled to challenge such scheme. Any challenge must be brought no later than 15 days after the publication of the court order

[183] In order to calculate the number of creditors (by value) that have supported the agreement the court will consider that syndicated loans have supported the refinancing agreement for the full value of the syndicated loan if at least 75% of the syndicate lenders (by value) vote in favour (but if the relevant syndicated agreement provides a lower majority for these purposes such lower majority will apply instead of this 75% rule).

sanctioning the scheme in the Spanish Official Gazette. Creditors can only challenge the scheme on the grounds that: (i) the required majority of creditors did not support the agreement; or (ii) the effects of the scheme on dissenting creditors are disproportionate (*sacrificio desproporcionado*) or there is an unfair treatment. This unfair treatment is defined by Spanish courts as: (i) a situation in which the creditor has a worse result than in the case of the liquidation of the debtor; and (ii) a situation in which the relevant creditor has a position which is not equivalent to other creditors with similar rights.

(c) 71bis Refinancing Agreements (not judicially sanctioned)

The Spanish Insolvency Law also grants claw-back protection to the refinancing agreements which are aimed at all the debtor's creditors, provided that they meet the criteria listed in Article 71*bis* of the Spanish Insolvency Law. No court approval is required and it is not possible to extend the effects foreseen under the relevant agreement to dissenting creditors.

In principle, refinancing agreements under the scope of Article 71*bis* of the Spanish Insolvency Law would imply a higher level of confidentiality than a Spanish Scheme. As the effects foreseen under the agreement cannot be extended to dissenting creditors, there is no particular process for challenging the agreement (although within an eventual insolvency of the debtor these agreements could be subject to challenge on the grounds that the statutory conditions were not met and therefore can be subject to claw-back). Finally, and as noted above for Spanish Schemes, a refinancing agreement under the scope of Article 71*bis* of the Spanish Insolvency Law can also facilitate a corporate restructuring of the debtor. Moreover, it is not required that the debtor be in a pre-insolvency situation.

(d) Out-of-court Payment Agreements

This option was introduced by Spanish Law 14/2013 of 27 September 2013. It allows small businesses (or individuals) experiencing financial difficulties to negotiate and reach an agreement with creditors to fulfil certain payment obligations and avoid insolvency. This procedure is available to debtors who meet certain criteria as set out below.

In the case of individuals who are in an insolvency situation, or would not be able to fulfil their payment obligations in the future, it is required to prove that the total debt owed is not in excess of EUR 5 million. In regard to other legal entities that are in an insolvency situation, it is required that the company has fewer than 50 creditors, debts of less than EUR 5 million and assets worth less than EUR 5 million. Essentially, the Out-of-court Payment Agreement is designed for individuals and SMEs.[184]

The Out-of-court Payment Agreement is initiated by the debtor with a request to the commercial registrar (if the debtor is registered in the commercial registry) or before a notary public (in all other cases) to appoint an insolvency mediator

[184] An Out-of-court Payment Agreement is not available primarily where: (i) criminal offences have occurred in relation to the development of the business activity; (ii) accountancy duties have been breached; (iii) the debtor has, in the preceding five years: (a) been declared insolvent; (b) obtained the judicial sanction of a refinancing agreement; or (c) entered into an Out-of-court Payment Agreement with its creditors; (iv) the debtor is negotiating a refinancing of its debt; or (v) the debtor has already been declared insolvent by a court.

(*mediador concursal*). The insolvency mediator must be appointed from an official list of mediators. Once the mediator is appointed, the commercial registrar or the public notary, as the case may be, must notify the appointment of the mediator (and thereby the fact that an Out-of-court Payment Agreement has been initiated) to the court that would be competent to declare the debtor insolvent (the court where the debtor's centre of main interests or corporate address is located). The appointment of the insolvency mediator results in a negotiation process between the debtor and its creditors, with the mediator facilitating the negotiations. While an insolvency mediator is appointed, the procedure is of a debtor-in-possession nature.

Within 10 days of being appointed, the insolvency mediator must summon the debtor's creditors to a meeting. At least 20 days prior to this meeting taking place, the insolvency mediator will send to the creditors (with the debtor's consent) the debtor's planned proposal for the payment of its debts (which may contain one of the following measures: stays of payments, discharge of debt, debt-for-equity swaps, debt–for-asset swaps or the conversion of debts).

In the 10 calendar days following submission of the proposal, creditors are entitled to file alternative proposals, or propose amendments to the proposal circulated by the insolvency mediator.

If the agreement is approved by the requisite number of creditors,[185] the agreement will be publicly announced in the Public Insolvency Registry (*Registro Público Concursal*). If the agreement is not approved and the debtor is insolvent, the insolvency mediator must file a request with the relevant court that the debtor be declared insolvent. The insolvency mediator must also request the debtor's declaration of insolvency if the agreement was approved but the debtor subsequently breached its terms.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

The following proceedings qualify as insolvency proceedings under and are included in Annex A of the European Insolvency Regulation: (i) the Spanish Scheme; (ii) the Out-of-court Payment Agreement; and (iii) the Pre-Insolvency Period.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

All restructuring instruments, except the Out-of-court Payment Agreement, are open to debtors who are in a state where it can reasonably be foreseen that it will be unable to continue to pay its debts. This includes both legal persons and natural persons.

[185] At least 60% of the creditors by value that would be affected by the agreement (or 75% cent by value depending on the measures that are purported to be imposed on dissenting creditors by the agreement) must support the plan. Secured creditors are included in the voting thresholds for the value of their claims that exceed the value of the secured creditor's security. However, an Out-of-court Payment Agreement may not affect debts owing to public institutions.

The Out-of-court Payment Agreement is designed for individuals and SMEs. As such, it is only available to individuals who are insolvent[186] (or are not be able to meet their payment obligations in the future) and who can prove that the total debt owed is not in excess of EUR 5 million. In addition, the Out-of-court Payment Agreement is open to legal entities who are insolvent and who have fewer than 50 creditors, debts of less than EUR 5 million and assets worth less than EUR 5 million.

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors, creditors and / or public authorities?

The 71*bis* Refinancing Agreement and the Spanish Scheme require the consent of both the debtor and the debtor's creditors (with the percentages described in 0 above). Under the Spanish Scheme regime, a judicial sanction can be requested by a debtor or any of the creditors who are a party to the agreement. The communication of a Pre-Insolvency Period and the initiation of an Out-of-court Payment Agreement, can only be made by a debtor.

(7) Is there a viability test?

For the Spanish Scheme, the 71*bis* Refinancing Agreement and the Out-of-court Payment Agreement, a viability plan is required that states that the refinancing agreement will significantly increase the available credit, or modify or extinguish the debtor's liabilities, either by extending the maturity period or by substituting its obligations by others and as such allowing the debtor to continue with its activity in the short- to medium-term.

However, provided that the debtor meets the entry requirements described under (5), a debtor cannot be prevented from initiating the Pre-Insolvency Period on the mere ground that it is in such financial difficulties that it is no longer economically viable or capable of being readily restored to economic viability.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

The Pre-Insolvency Period, Spanish Scheme and 71*bis* Refinancing Agreement do not in themselves affect the status of the debtor, its ability to enter into new agreements or its existing legal obligations. During the negotiations, the debtor's management retains its power and authority to manage the debtor's business and activities (which may include the sale of assets or parts of its business).

Under the Spanish Scheme and 71*bis* Refinancing Agreement, however, a steering committee or a group of similar professionals can be appointed to monitor the debtor's business. In addition, the obligation of the debtor to file an

[186] Insolvency is defined as occurring when the insolvent debtor cannot comply regularly and in a timely manner with its due obligations. Insolvency can be "current" or "imminent". "Imminent" insolvency is a legal concept introduced by the Insolvency Law and is defined as being when the insolvent company foresees that it will not be able to comply regularly and in a timely manner with its obligations, but there is no other guidance on how this determination should be made.

application for voluntary insolvency and the possibility of the creditors requesting the insolvency of the debtor, are suspended for four months.

As discussed further below, entry into the Pre-Insolvency Period, Spanish Scheme and 71*bis* Refinancing Agreement each triggers a stay on enforcement and other actions.

The Spanish Insolvency Law does not restrict the sale to, or the participation of, the debtor's financial creditors to these sale processes, regardless of the undergoing restructuring process.
Under the Out-of-court Payment Agreement the debtor may continue its labour, business and professional activities; however, it may not perform any act of administration and / or disposal that exceeds the acts or operations inherent to its business or trade activity.

Finally, during the term of the negotiations, the accrual of interest is suspended.

(9) Is there a stay on individual enforcement actions?

(a) Pre-Insolvency Period

During the four-months of the Pre-Insolvency Period, only assets that are not essential for the debtor's activities can be enforced. Enforcement proceedings may be initiated in respect of essential assets, but once a Pre-Insolvency Period is initiated, such enforcement proceeding must immediately be suspended.

(b) Out-of-court Payment Agreement

Once negotiations are initiated, enforcement proceedings are precluded or suspended (as the case may be) for three months. Secured (or "specially privileged") creditors are exempt from this moratorium and may commence or continue (as the case may be) enforcement proceedings in respect of both essential and non-essential assets of the debtor's business. However, enforcement proceedings in relation to essential assets may be commenced, but not pursued during the moratorium and are suspended immediately for the duration of the moratorium (three months).

(c) Spanish Scheme

Individual enforcement actions will be suspended between the filing of the sanction request and the actual sanction by the court.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

There is no general prohibition on *ipso facto* clauses relating to the Pre-Insolvency Period, Spanish Scheme, 71*bis* Refinancing Agreement and Out-of-court Payment Agreement. As a result, counterparties are generally free to amend, suspend or terminate their contract. Nevertheless, the circumstances of a particular case may result in a judge deciding otherwise (that is, that it is unreasonable to amend, suspend or terminate in that particular case).

(11) What are the options for new interim financing (with super priority status)?

New interim financing with super priority status is possible by creating a first ranking security over available assets for the new financing. New security agreed during a Spanish Scheme cannot be clawed back. New security agreed under the 71*bis* Refinancing Agreement can only be clawed back by the insolvency administration, that is, the insolvency administrator (not creditors), on the grounds that the statutory conditions described in (3) have not been complied with. Further, in a subsequent insolvency, 50% of the new money provided in a 71*bis* Refinancing Agreement or a Spanish Scheme, will rank as super privileged claims.

(12) Are other restructuring-related transactions protected?

It is unclear whether restructuring-related transactions are protected. Although there are not a significant number of decisions in this regard, Spanish courts have considered that the protection may extend to any other transactions that are required for the implementation of the agreement and which are already foreseen or provided for in the relevant agreement.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

Yes. Within all the restructuring instruments the debtor is not divested of its assets and no liquidator or administrator is appointed. This is true regardless of the fact that in the case of an Out-of-court Payment Agreement, an insolvency mediator (*mediador concursal*) is appointed and in the case of the 71*bis* Refinancing Agreement and the Spanish Scheme, an independent expert can be appointed at the request of the debtor and / or the creditors.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

(a) Pre-Insolvency Period

The Pre-Insolvency Period is granted in order to negotiate with creditors (i) a refinancing agreement, or (ii) an advance proposal of arrangement between creditors (*propuesta anticipada de convenio*). Please see the rest of this paragraph for the measures that can be taken under the refinancing agreements.

Regarding the potential measures that can be taken under an advance proposal of arrangement between creditors, the Spanish Insolvency Law[187] establishes that the arrangement can include stays of payment and / or any discharge of debt. It could also include, for all or some creditors, or even only for one kind of creditor (except for public creditors), alternatives to the stays and discharges, such as conversions of debt to equity, subordinated credits, convertible bonds, into profit-participating loans (*préstamos participativos*), or loans with capitalisable interests. The Spanish Corporate Law is applicable to the adoption of any shareholders' resolutions or minutes required.

[187] Spanish Insolvency Law, Art 100.

In addition, the arrangement might include the sale of an asset or even the productive unit as a whole,[188] and the assignment of assets or rights as payment (insofar as they are not required for the continuity of the company and the value of the assets / rights is equal to or lower than the relevant claims).

(b) The 71bis Refinancing Agreement and the Spanish Scheme

A restructuring agreement under the 71*bis* Refinancing Agreement takes the form of a contract between the debtor and the creditors and / or shareholders. As such, the debtor is largely free to determine the specific content and form of the agreement, as well as the terms and conditions thereof. For example, an agreement may include haircuts or other forms of variation of claims, or a debt-for-equity swap may also be included in a restructuring plan. Any rules relating to the adoption of shareholders' resolutions or minutes, whether by law, contract or found in the Articles of Association of the company, are applicable.

(c) The 71bis Refinancing Agreement

Group restructurings are also possible, but the percentage of creditors agreeing to the refinancing have to be complied with both in the group as a whole, and in each company.

Finally, and as noted above for Spanish Schemes, a refinancing agreement under the scope of Article 71*bis* of the Spanish Insolvency Law can also envisage a corporate restructuring of the debtor.

(d) The Spanish Scheme

However, if the intention of the parties is to bind the dissenting creditors, depending on the percentage of creditors who agreed to the refinancing agreement, they will be bound by different provisions:

- Where at least 60% of financial creditors (by value) enter into the agreement, unsecured dissenting creditors will be bound by provisions concerning: (i) stays of payment with periods not higher than five years; and (ii) conversion of debts into profit participating loans (*préstamos participativos*), with a term not exceeding five years. As regards secured dissenting creditors, in order for them to be bound by these measures at least 65% of secured financial creditors (by value) must have supported the refinancing agreement.

- Where at least 75% of financial creditors (by value) enter into the agreement, unsecured dissenting creditors will be bound by provisions concerning: (i) stays of payment with periods higher than five years but lower than 10 years; (ii) any discharge of debt; (iii) conversion of debt to equity; (iv) conversion of the debts into profit participating loans (*préstamos participativos*), with a term higher than five years but lower than 10 years; and (v) transfer of assets or rights to the creditors in payment for all or part of their debt. As regards secured dissenting creditors, in order for them to be bound by these measures, at least 80% of secured financial creditors (by value) must have supported the refinancing agreement.

[188] A productive unit is an organised grouping of resources which has the objective of pursuing an economic activity.

A refinancing agreement can also provide for the release / amendment of claims held against third-party guarantors. However, the release / amendment of these claims cannot be extended to dissenting creditors. As such, dissenting creditors, regardless of the court sanction (*homologación*) of the Spanish Scheme, will maintain their claims and rights against third-party guarantors in full.

As regards the effects that can be extended to dissenting secured creditors, it must be noted that different positions have been held by Spanish case law. In this regard, there is certain case law that supports that the effects described in 0 and 0 above above are only illustrative and therefore further effects (as the release of security interests or the reorganisation or corporate restructuring of the debtor) can be extended to dissenting creditors. On the other hand, there is other case law supporting that the effects foreseen under (a) and (b) above are limited and, as such, these are the only effects that can be extended to dissenting creditors.

(e) Out-of-court Payment Agreement

The debtor's planned proposal for the payment of its debts may contain one of the following measures:

- stays of payments for a period of up to 10 years;
- discharge of debt;
- debt–for-equity swaps;
- debt–for-asset swaps (provided that the relevant goods or assets are not necessary for the continuation of the debtor's business activity); or
- the conversion of debts into, among other things, profit participating loans (*préstamos participativos*) for a period of up to 10 years.

(15) Do creditors vote in separate classes and, if so, what are the criteria for class formation?

Under Spanish Law there are no classes as such. However, within the 71*bis* Proceedings and the Spanish Schemes there are two classes of creditors that vote separately, secured and unsecured creditors.

Moreover, although it is not codified in the Spanish Insolvency Law, Spanish courts are starting to admit / allow the creation of perimeters of debt which are affected by the measures, by leaving out the restructuring part of the debt, as long as there are compelling reasons to form these perimeters.

(16) Can equity holders be included?

Yes, in the 71*bis* Refinancing Agreement equity holders can be included, although rarely to be repaid, but to be part of other kinds of agreements such as capital increases, further securities, etcetera.

Within the Spanish Scheme equity holders can be included if they hold financial indebtedness (although, if the equity holders are special related persons (that is, 10% of the equity in non-listed companies and 5% in listed companies) they would not be taken into account to calculate the majorities required).

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

As stated above, in the Spanish Scheme there is a trend to create different perimeters of debt, that can be included or excluded; although the suitability of these perimeters must be well-founded.

(18) What are the voting requirements (head count test / majority in value test)?

The voting requirements only consist of a majority in value test (depending on the result which is sought there are different thresholds, as already explained).

In the Spanish Scheme and the 71*bis* Payment Agreement, the majority in value test is carried out by an auditor. In fact, within the Spanish Scheme the Auditor's report has to be filed before the court together with the judicial sanction request.

(19) Does the instrument provide for cram-down of dissenting creditors?

No, not under the 71*bis* Refinancing Agreement because the effects foreseen under the agreement cannot be extended to dissenting creditors.

Yes, within the Spanish Scheme. Once it is sanctioned by the Court, the Spanish Scheme is binding on dissenting financial creditors if the majorities are met (at least 60% or 75% of financial creditors (by value) who entered into the agreement).

In order for the out-of-court payment plan to become effective at least 60% of the creditors by value that would be affected by the agreement (or 75% by value depending on the measures that are purported to be imposed on dissenting unsecured creditors by the agreement) must support the plan. Once the majorities are met, the plan will be binding on dissenting creditors, with the sole exception of the dissenting secured creditors for the amount of the credit that is actually secured, which will be bound only if 65% (or 80% by value depending on the measures that are purported to be imposed on dissenting unsecured creditors by the agreement) of the creditors affected support the plan.

(20) Does the instrument provide for cross-class cram-down?

Yes, in the same terms included in (19) above, but just from secured creditors to unsecured creditors. This means that the unsecured creditors cannot cram-down the secured creditors.

(21) Is the restructuring instrument binding upon all affected parties?

Yes, it is binding on all the parties who have expressly agreed to the refinancing agreement and the Out-of-court Payment Agreement and also on those creditors that have been crammed down as set out in (19).

If a refinancing agreement entered into under the scope of Article 71*bis* of the Spanish Insolvency Law is breached, remedies provided for under the relevant refinancing agreement would apply (for example, the possibility of terminating / accelerating the agreement, enforcing security interests, etcetera).

If the court-sanctioned Spanish Scheme is eventually breached by the debtor, any creditor (regardless of whether said debtor acceded to the Spanish Scheme or not) would be entitled to request a court order declaring that the debtor has breached the Spanish Scheme. In a case where such an order is finally obtained, it would be possible to request the insolvency declaration of the debtor and / or to bring enforcement proceedings in respect of claims that were subject to the Spanish Scheme.

If the Out-of-court Payment Agreement is breached, the insolvency mediator would have to request the declaration of insolvency proceedings in respect of the company.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

(a) Pre-Insolvency Period

No, but the debtor has to notify the Commercial Court (*Juzgado de lo Mercantil*) about starting negotiations with its creditors. The court subsequently issues a resolution on the filing of the communication. The court clerk subsequently publishes such resolution in the Public Insolvency Registry (*Registro Público Concursal*).

(b) The Spanish Scheme

Yes, the insolvency debtor or any of its financial creditors (that have entered into the agreement) have to file the Spanish Scheme at the court to obtain judicial sanction (*homologación*). The court will sanction the Spanish Scheme if the requirements described under (2) are met. Between the request and the actual sanction of the court, enforcement proceedings are suspended.

(c) 71bis Refinancing Agreements

No, these refinancing agreements do not require judicial sanction.

(d) Out-of-court Payment Agreement

No, but the Out-of-Court Payment Agreement is initiated by the debtor with a request to the commercial registrar (if the debtor is registered in the commercial registry) or before a notary public (in all other cases).

Once the agreement is approved by the requisite number of creditors and registered at the commercial registrar or notarised, as the case may be, the agreement will be announced in the Public Insolvency Registry (*Registro Público Concursal*).

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example, no creditor worse off test, an absolute priority rule)?

Under all Spanish restructuring procedures there is an initial check and balance by way of i) the majorities required to approve the refinancing agreement and cram-down other creditors and ii) the statutory conditions and the limitation on the measures that can be agreed in each particular case (for example, limitations to the stays and discharges).

Under the Spanish Scheme there is an additional check and balance ensuring secured creditors cannot be crammed down by the unsecured creditors. In addition, the court resolution sanctioning the agreement can be challenged up to 15 days after the announcement of the court order sanctioning the scheme is published in the Spanish Official Gazette. The challenge must be on the grounds that i) the required majority of creditors did not support the agreement, or ii) the effects of the scheme on dissenting creditors are disproportionate (*sacrificio desproporcionado*).

Under the 71*bis* Refinancing Agreement, within an insolvency proceeding the insolvency administrator (not the creditors) can initiate a claw-back action, but only on the grounds that the statutory conditions described under (3) have not been complied with.

Under the Out-of-court Payment Agreement, the agreement can be challenged by the creditors that have not been called to the creditors' meeting, the creditors that have not voted and the creditors that have opposed the agreement no later than 10 days after the publication of the agreement in the Public Insolvency Registry (*Registro Público Concursal*). The challenge must be on the grounds that: i) the required majority of creditors did not support the agreement; ii) the statutory conditions and the limitations to the measures have not been complied with; or iii) the effects of the agreement on dissenting creditors are disproportionate (*sacrificio desproporcionado*).

Furthermore, each Spanish restructuring procedure has a check and balance in place in the form of a third party monitoring the debtor's estate and thereby indirectly protecting the creditor's interests. Under the Spanish Scheme and 71*bis* Refinancing Agreement creditors (and debtors) can request the appointment of an independent expert to report on the fair and achievable nature of the feasibility plan, on the proportionality of the collateral according to normal market conditions at the moment of signing the agreement, as well as any other issue that, when appropriate, is foreseen by the applicable rules. Under the Out-of-court Payment Agreement the insolvency mediator appointed monitors the process.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

Under the Spanish Scheme, once the agreement has been filed for judicial sanction, the court only grants the sanction after prior confirmation that all the requirements included under (2) above are met, including the viability plan, the auditor's certification and the potential report of the independent expert.

Under the 71*bis* Refinancing Agreement or Out-of-court Payment Agreement, the court does not analyse the valuations unless a creditor challenges the potential agreement on the grounds that not all the requirements were met, or if the effects of the agreement were disproportionate (*sacrificio desproporcionado*).

(25) Is appeal possible?

Under the Pre-Insolvency Period appeal is not possible because it is merely a communication acknowledging the filing of the communication.

Under the Spanish Scheme, creditors may challenge the sanctioning of the agreement until the judge has ruled on the matter. Appeal is not possible.

Under the 71*bis* Refinancing Agreement, agreements are not subject to court approval and therefore not directly appealable. However, as previously mentioned, the insolvency administrator (not the creditors) can initiate a claw-back action on the grounds that the statutory conditions described in (3) have not been complied with. The judgment resolving the claw-back action is subject to appeal.

Under the Out-of-court Payment Agreement, creditors may challenge the approval of the agreement and appeal is possible against the judge's judgment on the challenge by the creditors.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

(a) Pre-Insolvency period

The court issues a resolution acknowledging the filing of the communication and agrees the publication of the resolution in the Public Insolvency Registry. The court also applies the moratorium in the on-going enforcement proceedings. The court does not participate in the negotiations with the creditors in any way.

(b) The Spanish Scheme

Yes. The court will be involved in the following situations: i) confirm that all the requirements have been met; ii) agree the suspension of the enforcement; iii) judicially sanction the agreement; iv) agree to extend the effect of the agreement to the dissenting creditors; or v) conduct and decide in any challenge filed by other creditors.

*(c) 71*bis *Refinancing Agreement and Out-of-court Payment Agreement*

In both cases, the court does not intervene unless a creditor or an insolvency administrator challenges the potential agreement.

(27) Is there a statutory basis to appoint a restructuring expert?

Yes. Within the Spanish Scheme and the 71*bis* Refinancing Agreement, both the debtor and the creditors may request the appointment of an independent expert to report on the fair and achievable nature of the feasibility plan, the proportionality of the collateral according to normal market conditions at the moment of signing the agreement, as well as any other issues that, when appropriate, are foreseeable by the applicable rules. The independent expert must be appointed from an official list of experts by the commercial registrar of the place where the debtor's corporate address is located. It is possible to appoint just one independent expert for all the companies of a group if the refinancing agreement refers to all the companies.

Yes. The Out-of-court Payment Agreement is initiated by the debtor with a request to the commercial registrar (if the debtor is registered in the commercial registry) or before a public notary (in all other cases) to appoint an insolvency mediator (*mediador concursal*). The insolvency mediator must be appointed from an official list of mediators. Once the mediator is appointed, the commercial registrar or the public notary (as relevant) must notify the appointment of the mediator (and thereby the fact that an Out-of-court Payment Agreement has been initiated) to the court that would be competent to declare the debtor insolvent (the court where the debtor's centre of main interests or corporate address is located).

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

Where the debtor has been placed into liquidation proceedings, or there has been a proposal for a composition plan that provides for a reduction of claims by more than one third, or a deferral of payments by more than three years, the insolvency judge will have to qualify the insolvency as "fortuitous" (*concurso fortuito*) or "culpable" (*concurso culpable*). In this scenario, it will be presumed (as a rebuttable presumption) that directors have acted in bad faith or their wilful misconduct caused or aggravated the debtor's insolvency situation if they breached their duty to file for insolvency when it was necessary to do so. Please note that the Pre-Insolvency Period and the Out-of-court Payment Agreement exonerate the management from filing this request for a period of four months, but the other instruments do not.

If proceedings are finally qualified as "culpable", directors could, among other things i) be prevented from managing third-party assets for a period of between two and 15 years; or ii) be required to pay to the creditors, either in whole or in part, the amount of the claims that have not been repaid after the liquidation of the insolvent debtor.

(b) De facto directors

Depending on the circumstances, third parties who are not members of the board of directors, but who act as if they were, may be held liable as (co-)policy makers or on the basis that they performed acts of management. According to the prevailing case law, once somebody is recognised as a shadow director (which is determined on a case-by-case basis), it is very likely that they will be treated as manager directors and therefore incur at least some liability.

(c) Legal expert / insolvency mediator

Legal experts / insolvency mediators are appointed by the Commercial Registry (or the notary). According to the Spanish Insolvency Law, their liability is in line with the liability risk of that of an insolvency administrator / liquidator.

2.7 THE NETHERLANDS

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

Currently, the options to restructure financially distressed but viable businesses in the Netherlands outside insolvency, are limited. Outside formal insolvency proceedings a (financial) restructuring of a business is only possible on a consensual basis with the support of all parties to the restructuring, meaning that every minor hold-out creditor, or even equity holders, could frustrate the process. A debtor in financial distress could also apply for the suspension of payments proceedings (*surséance van betaling*). The suspension of payment proceedings seek to protect a company from its unsecured, non-preferential creditors if the company is unable to meet its liabilities and / or obligations when they fall due, by imposing a court ordered standstill, provided that there is a reasonable prospect of the company being able to survive by being able to (partially) satisfy its creditors. For various reasons the suspension of payment proceedings have proven ineffective in order to restructure distressed companies, especially if these have been financed with secured debt.

The available options are about to improve substantially with the introduction of an out-of-court restructuring instrument named the Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet homologatie onderhands akkoord* or WHOA). The WHOA is aimed at restructuring a company's debts outside formal insolvency proceedings and will most likely become the new standard for restructuring financially distressed companies in the Netherlands. Therefore, this contribution will focus on the WHOA.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The Dutch legislator is in the process of introducing the WHOA, which is an out-of-court restructuring instrument enabling companies in financial distress to restructure their debts without the need to initiate formal insolvency procedures (such as bankruptcy or suspension of payment). Currently, the proposal is being reviewed by the Dutch Parliament and it is expected that the WHOA will enter into force in early 2021.

The WHOA is inspired by the United States Chapter 11 procedure and the English Scheme of Arrangement, with considerable attention to European bankruptcy law developments. Therefore, the WHOA builds upon the most favourable and modern provisions and developments in restructuring law. Due to a long consultation and amendment period, the expectation is that the WHOA will be fully adjusted to the needs of current global restructuring practice. Reactions from the legal and financial industry are very positive. The WHOA is generally in line with the Preventive Restructuring Framework Directive. However, the WHOA is not fully compliant with all aspects of the Preventive Restructuring Framework Directive. The legislator intends to implement such directive through an amendment of the suspension of payments proceedings (described above). This process has not yet started and no draft Bill is available yet.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out-of-court instrument).

The WHOA introduces provisions into the Dutch Bankruptcy Code (*Faillissemenswet* or DBC) which allow a company to offer an extrajudicial restructuring plan to its creditors and shareholders. The purpose of such a restructuring plan could be to either prevent the debtor from going insolvent, or to accommodate a controlled liquidation and distribution of an (insolvent) debtor's assets to its creditors. Once approved and confirmed by the relevant percentage of creditors and the court, the restructuring plan will be binding on all creditors and shareholders involved in the restructuring plan. Subject to certain safeguards, creditors and shareholders who have voted against the restructuring plan could be (cross-) crammed down and thus also be bound by the restructuring plan.

Similar to the purpose of the Preventive Restructuring Framework Directive, the (main) goal of the WHOA is to introduce a preventive restructuring procedure enabling debtors in financial difficulties to restructure at an early stage and avoid insolvency. Moreover, the WHOA provides for the option of discharging debts so as to give honest but insolvent entrepreneurs a second chance to restart a viable business. Another objective is to introduce the possibility of cramming down dissenting creditors or shareholders who may otherwise harm the interests of the other parties involved in the company (including other creditors and employees) by unduly delaying or blocking a restructuring. Finally, the WHOA could be used to accelerate the winding-up and distribution of a debtor's assets via a restructuring plan outside bankruptcy.

In principle, the WHOA will apply to all legal entities and natural persons with their registered office or place of residence in the Netherlands. Banks and insurance companies are excluded.

The starting point under the WHOA is that the debtor first tries to reach an amicable restructuring plan with its creditors and shareholders. The alternative of a compulsory restructuring plan under the WHOA may be considered if such consensual (that is, 100% consent from all relevant stakeholders) restructuring turns out to be impossible.

A restructuring plan under the WHOA can be proposed by a debtor that may reasonably expect it will not be able to continue paying its due and payable debts (the debts as they fall due). Upon commencement of the preparation of a restructuring plan, the debtor must submit a written declaration at the registry of the competent court (the Restructuring Plan Declaration). The Restructuring Plan Declaration can be examined by the creditors and shareholders of the debtor who are entitled to vote on the restructuring plan. Alternatively, a restructuring plan can also be initiated by the creditors, shareholders or the works council or worker's representation of a debtor by requesting the competent court to appoint a restructuring expert who will then prepare a restructuring plan on behalf of the debtor. The debtor itself may also apply for the appointment of a restructuring expert, for example if the debtor deems itself incapable of preparing a restructuring plan.

The WHOA provides that the restructuring plan may amend the rights and claims of all creditors and shareholders involved. In principle, the debtor (or the restructuring expert, as the case may be) is free to determine the restructuring plan's content and structure. In doing so the debtor has a wide range of options, for example it can defer or partially release payment obligations, amend the terms of debt instruments or offer debt for equity swaps. The WHOA also provides the debtor with the option to amend the terms of onerous contracts, for example lease or long-term supply agreements, provided that the counterparties are not required to accept this (and cannot be crammed down). If the counterparties do not accept an amendment, the debtor can terminate such contracts and include any damage claims resulting from the termination in the general restructuring plan.

A restructuring plan can apply to all creditors and shareholders of a company, or it can be limited to a certain category of creditors, for example secured creditors. Other than the rights of employees, the restructuring plan may lead to an amendment of the rights of any creditor or shareholder, including preferential and secured creditors, guarantors and co-debtors. As a result, the WHOA also provides proper options for group restructurings.

Creditors and shareholders who have dissimilar, incomparable rights (for example, secured creditors versus unsecured creditors and senior versus subordinated creditors) must be placed in separate classes. Insofar as this requirement is met, the class formation is very flexible and largely up to the debtor. The restructuring plan can be concluded without the consent of the entire group of affected creditors. This prevents single or small groups of creditors from delaying or blocking the restructuring plan (holdouts). Voting on the restructuring plan takes place within the different classes and only creditors and shareholders whose rights are affected are entitled to vote on the restructuring plan. The majorities required for a particular class to consent to the proposed restructuring plan are a two-thirds majority in value of the outstanding capital (for a class of shareholders) and a two-thirds majority in value of outstanding claims (for a class of creditors). If at least one class of creditors voted in favour of the restructuring plan, the debtor or restructuring expert can request the court to confirm the restructuring plan, provided that lower ranking creditors can never cram-down higher ranking creditors (that is, no "cram-up" is possible, only a cram-down). The court will consider whether any grounds apply on the basis of which it must reject the restructuring plan, but if this is not the case the court will confirm the restructuring plan. After confirmation, the restructuring plan will be binding on all creditors and shareholders involved in the restructuring plan. Appeal against the confirmation is not possible.

The WHOA provides for several features which enhance deal certainty, including the option to request the court for a preliminary judgment on a variety of issues. Moreover, upon request the court can issue special orders on the basis of which emergency funding (or so-called DIP financing) could be provided, or other legal acts that are required to continue the debtor's business. Such funding or performance of legal acts are then exempted from annulment on the basis of a fraudulent conveyance (*actio pauliana*). Moreover, the debtor may under certain circumstances request a moratorium (*afkoelingsperiode*) for a maximum period of eight months, which will in principle prevent any creditor from enforcing its claims against assets of the debtor during the restructuring phase. In addition, *ipso facto* clauses are suspended to prevent these from interfering with the restructuring plan.

In the explanatory notes to the WHOA, the Dutch legislator has indicated there are initiatives to form a group of specialised judges to consider restructuring requests under the WHOA. This approach will ensure a high level of expertise and quality of the relevant judges and achieves the objectives of legal certainty and effectiveness of the procedures under the WHOA.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

The WHOA can provide for restructurings that stretch beyond Dutch borders. The WHOA will provide debtors and creditors with an option, at the beginning of the process, to choose whether or not the restructuring plan will fall under the scope of the European Insolvency Regulation or to remain domestic in nature.[189]

If the debtor opts to let the proceeding fall under the European Insolvency Regulation, the proceeding will benefit from automatic recognition across all EU Member States. However, in accordance with the terms of the European Insolvency Regulation, only debtors that have their centre of main interest (COMI) in the Netherlands will then be eligible to conduct a restructuring under the WHOA. Furthermore, the proceeding will have to be publicly announced in accordance with article 24 of the European Insolvency Regulation.[190] Should the debtor wish the proceeding to remain domestic in nature and let domestic private law principles govern the question of recognition in other jurisdictions, the proceeding will still be a court process and the Restructuring Plan Declaration will also be required, but will progress in private with the parties not benefiting from automatic recognition across all of the EU Member States. Instead, in order to gain such recognition the parties will have to rely on the private domestic law principles of other jurisdictions. In this situation jurisdiction could be based on the domicile of the applicant or the affected party (being the debtor) or otherwise a "sufficient connection" with the Netherlands on other grounds, which is very broad and does not require the COMI of the debtor to be located in the Netherlands.[191]

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

The WHOA is open to a debtor that is in a position where it is reasonably likely that it will not be able to continue paying its liabilities.[192] Included in this definition of a debtor are both legal persons and natural persons, provided that the latter practises an independent profession or carries on a business.[193] Excluded from the WHOA are banks and insurers, as these entities are covered by specific legislation such as the Dutch Intervention Act (*Interventiewet*) and the Bank Recovery and Resolution Directive (2014/59/EU). A debtor whose restructuring plan has been voted down, or has been rejected by the court within a period of three years prior to the initiation of the WHOA, is also excluded.[194]

[189] Dutch Bankruptcy Code, Art 369, para 6.
[190] *Idem*, Art 370, para 4.
[191] Dutch Civil Code, Art 3.
[192] Dutch Bankruptcy Code, Art 370, para 1.
[193] *Idem*, Art 369, para 1.
[194] *Ibid*.

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors creditors and / or public authorities?

A debtor is authorised to initiate the WHOA and prepare and offer a restructuring plan.[195] However, creditors, shareholders and / or the works council or worker's representation of the debtor may request the court to appoint a restructuring expert who can prepare and offer a restructuring plan on behalf of and to the exclusion of the debtor (although in the case of SMEs, a plan can only be approved with a debtor's consent or court consent, see (23).[196] A court may only appoint a restructuring expert if it is in the interest of the joint creditors of the debtor to do so and if it is reasonably expected that the debtor would otherwise go insolvent in the near future. The debtor and applying party will be given the opportunity to express their views on the appointment of the restructuring expert. A debtor may itself also request the court to appoint a restructuring expert to prepare a restructuring plan on its behalf, for example if it deems itself incapable of preparing such a restructuring plan. After the appointment of a restructuring expert, the debtor has an obligation to provide the restructuring expert with all documents and information necessary to fulfil its task. Any fees and expenses of the restructuring expert are payable by the debtor. Public authorities cannot initiate the WHOA or request the court to appoint a restructuring expert solely because of their public status. However, this does not prevent a public authority that is a creditor and / or shareholder of the debtor exercising the rights it has as a creditor and / or shareholder.

(7) Is there a viability test?

No. Provided that a debtor meets the entry requirements described under (5), a debtor cannot be denied entry to the WHOA, for example on the mere ground that it is in such financial difficulties that it is no longer economically viable or capable of being readily restored to economic viability. However, a court may deem initiating the WHOA in such circumstances to be an abuse of power.[197] A right may be abused, among other things, when it is exercised for no purpose other than to damage another person, or for another purpose than for which it is granted, or when the use of it, given the disparity between the interests which are served by its effectuation and the interests which are damaged as a result thereof, cannot reasonably be accepted. A court may *ex officio* establish whether this is the case.[198]

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

Offering a restructuring plan to creditors and shareholders does not in itself affect the status of the debtor, its ability to transact or its existing legal obligations. Certain consequences apply only in situations and scenarios specifically mentioned in the DBC.

[195] *Idem*, Art 370.
[196] *Idem*, Art 371.
[197] Dutch Civil Code, Art 3:13.
[198] Dutch Bankruptcy Code, Art 384, para 2 under i.

(9) Is there a stay on individual enforcement actions?

Yes, the debtor or the restructuring expert can request the court to order either an individual or general stay (*afkoelingsperiode*), provided that (a) the debtor has submitted a Restructuring Plan Declaration and (b) the debtor has proposed a plan, or undertakes to propose a plan within two months, or where the court has appointed a restructuring expert.[199] The stay is for a period of four months and during such period (i) enforcement actions of third parties are suspended, provided these parties have been informed about the stay or are aware of the preparations for a plan, (ii) the court can be requested by the debtor or the restructuring expert, if appointed, to lift attachments and (iii) applications for suspension of payment proceedings and bankruptcy are suspended. The court must grant the request for a stay if there is *prima facie* evidence that (i) such stay is necessary to continue the debtor's business during the preparation of a plan and (ii) it is in the interest of the creditors and would not materially prejudice the interests of third parties whose actions are suspended during the moratorium.[200] The initial four-month period can be extended by a maximum of four months if the restructuring plan has been approved by the relevant creditors and has been submitted for approval with the competent court.[201] The court can terminate the moratorium if the criteria mentioned above are no longer met.

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

Ipso facto clauses relating to the preparation of a restructuring plan are not enforceable. Preparing a restructuring plan cannot be used as a reason to amend, suspend or terminate a contract.[202] This does not however prevent a creditor from relying on contractual provisions relating to pre-existing (payment) defaults, unless a stay is imposed (see under 9) and security has been provided to that creditor.[203]

(11) What are the options for new interim financing (with super priority status)?

New interim financing with security is possible by creating first ranking security over available assets for the new financing. The validity of the new security cannot be challenged if it is granted after the date of filing the Restructuring Plan Declaration and the competent court has, at the request of the debtor, approved such new security. The court will approve it if (i) the new financing and new security are necessary to continue the business as a going concern during the preparation of the restructuring plan and (ii) at the moment the approval from the court is given, it must be reasonably expected that the interests of the joint creditor group of the debtor are served with the new financing and related security and the transaction is not detrimental to the interests of any individual creditor.[204]

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199 *Idem*, Art 376, para 2.
200 *Idem*, Art 376, para 4.
201 *Idem*, Art 376, para 5.
202 *Idem*, Art 373, para 3.
203 *Idem*, Art 373, para 4.
204 *Idem*, Art 42a.

(12) Are other restructuring-related transactions protected?

Each transaction that is entered into by the debtor after the date of filing the Restructuring Plan Declaration and that is approved by the competent court (which it will do if the two conditions described under (11) are fulfilled) is protected from claw-back risk, even if the restructuring plan fails and the debtor has to file for bankruptcy.[205] In addition, any set-off (i) after a Restructuring Plan Declaration and (ii) in the context of a continuation of the financing, cannot be nullified on the basis of bad faith,[206] which protects the continuation of revolving credit facilities and overdraft / current account facilities.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

Yes. The WHOA does not divest a debtor of its assets and no liquidator or administrator is appointed. The WHOA can therefore be seen as a debtor-in-possession procedure. However, if a restructuring expert has been appointed the restructuring expert can, to the exclusion of the debtor, prepare and offer a restructuring plan,[207] notwithstanding the fact that the debtor can submit its own plan to the restructuring expert with the request that the restructuring expert also put that concurring plan up for a vote.[208] The variant of the WHOA where a restructuring expert is appointed can therefore be more properly described as a semi-debtor-in-possession procedure or semi-creditor-in-possession procedure, albeit that management of the company's estate will always remain with the management of the debtor.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt-for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

A restructuring plan takes the form of a contract between the debtor and the creditors and / or shareholders that is subsequently sanctioned by the court.[209] As such, the debtor or restructuring expert is largely free to determine the specific content and form of the restructuring plan, as well as the terms and conditions thereof. For example, a restructuring plan may include haircuts. A restructuring plan may also propose to amend future recourse rights, provided that those future recourse rights relate to or arise out of or in connection with claims that under the proposed restructuring plan are varied or amended.[210]

A debt-for-equity swap may also be included in a restructuring plan. Any rules relating to the adoption of shareholders' resolutions or minutes, whether by law, contract or found in the articles of association of the company, are not applicable to the adoption of the restructuring plan.[211]

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205 *Ibid*.
206 *Idem*, Art 54.
207 *Idem*, Art 371, para 1.
208 The explanatory memorandum indicates that in such a situation it is preferable if the restructuring expert and the debtor could agree on one single plan for voting, but if that is not possible both plans can be put up for voting. If both plans are subsequently approved by at least one class of 'in the money' creditors, the restructuring expert will have the final say in which plan is submitted to the court for approval.
209 *Idem*, Arts 370, 384.
210 *Idem*, Art 370, para 2.
211 *Idem*, Art 370, para 5.

Group restructurings are also possible, provided that (i) the rights of the creditors against those group companies that are to be varied or amended are guaranteeing or otherwise securing claims against the debtor, (ii) it is likely that those group companies will not be able to continue to pay their debts, (iii) the relevant group companies have agreed to the proposed restructuring plan or a restructuring expert has been appointed, and (iv) the court would have had jurisdiction over those group companies if they had themselves initiated the WHOA.[212]

Finally, the WHOA allows for a debtor to propose to its counterparties an amendment of their contract. If such proposal is not accepted by the counter-party, the contract may be terminated taking into account a notice period effective as of the confirmation of the restructuring plan by the court (a three-month notice period will be deemed acceptable).[213] The restructuring plan may then propose to amend or vary any liabilities or claims for damages arising out of such a termination.

(15) Do creditors vote in separate classes and, if so, what are the criteria for class formation?

Yes. Creditors and shareholders will need to be divided into different classes if they currently hold rights, or will acquire rights under the proposed restructuring plan, that are so different that a comparable position between the various creditors and shareholders cannot be deemed to exist.[214] In any event, creditors or shareholders who would rank differently in insolvency proceedings should be divided into different classes. Accordingly, a class cannot be composed of both secured and unsecured creditors given their different rank in an insolvency proceeding of the debtor. This class formation test is a minimum requirement.

Provided that in each additional formed class the class formation test is still met, a debtor may decide to form more classes of creditors or shareholders. A creditor may for the same claim be divided into separate classes, for example because its claim is partially secured and partially unsecured. If the classes of creditors and shareholders are not properly formed, a court must refuse to sanction the proposed restructuring plan.[215]

(16) Can equity holders be included?

Yes, equity holders can be included in a restructuring plan. In accordance with the class formation test described under (15), in a case where an equity holder also holds claims or other rights against the company (for example, shareholder loans) they must be placed in the same class as other unsecured creditors and not in the class for their equity rights.

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

Yes. In principle (and provided that the class formation test described under (15) is still met) a debtor is free to decide whether to include or exclude creditors and / or shareholders from the WHOA and the restructuring plan. However, every

[212] *Idem*, Art 372.
[213] *Idem*, Art 373.
[214] *Idem*, Art 374.
[215] *Idem*, Art 384.

creditor or shareholder whose rights will be affected by the restructuring plan must be included in the WHOA for it to have effect against that creditor or shareholder. In addition, creditors or shareholders may not be excluded from the WHOA if it would result in unfair treatment without a proper justification of some creditors or shareholders *vis-à-vis* other creditors or shareholders. In the same vein, if a class of creditors or shareholders is subdivided into one or more separate classes, they may only be treated differently if there is a proper and reasonable justification for this distinction. In addition, the class treated less favourably must also vote in favour of the restructuring plan with an overwhelming majority to express their implicit consent to the different treatment aimed at under the restructuring plan.[216]

(18) What are the voting requirements (head count test / majority in value test)?

The voting requirements only consist of a majority in value test. For a class of creditors to be deemed to have voted in favour of a restructuring plan, a group of creditors representing at least two-thirds of the total amount of the claims held by the creditors of that class who have cast their vote, must have voted in favour of the restructuring plan.[217] For a class of shareholders to be deemed to have voted in favour of a restructuring plan, a group of shareholders representing at least two-thirds of the issued capital held by the shareholders of that class who have cast their vote, must have voted in favour of the restructuring plan.[218] In the case where depositary receipts of shares have been issued, the debtor or restructuring expert may invite the holders of these receipts to vote instead of the shareholder. The same applies in the case of shares that have been encumbered with a right of usufruct.

(19) Does the instrument provide for cram-down of dissenting creditors?

Yes. Provided that the voting requirements described under (18) have been met, a class can be deemed to have voted in a favour of a restructuring plan despite not every creditor or shareholder having voted in favour thereof. In light of this possible horizontal cram-down, the WHOA provides for appropriate protection for creditors who may be disproportionately affected or deprived of their rights without their consent (described under 23).

(20) Does the instrument provide for cross-class cram-down?

Yes. Provided that at least one class of creditors who in a liquidation scenario would be deemed "in the money" has voted in favour of the proposed restructuring plan, a petition may be filed to the court to sanction the restructuring plan. The court may sanction the restructuring plan despite not every class of creditors or shareholders having voted in favour thereof.[219] In light of this possible vertical cram-down, the WHOA provides for appropriate protection for creditors that may be disproportionately affected or deprived of their rights without their consent, such as a "best interest of creditors" test and a relative priority rule (described under 23).

216 *Idem*, Art 384.
217 *Idem*, Art 381, para 7.
218 *Idem*, Art 381, para 8.
219 *Idem*, Art 383, para 1.

(21) Is the restructuring instrument binding upon all affected parties?

Yes. A court-sanctioned restructuring plan is binding on all creditors and shareholders who were entitled to vote.[220] After the court's judgment on the sanctioning of the restructuring plan, such judgment grants a title for enforcement against the debtor, any persons who have acceded to the restructuring plan as sureties and to all creditors who have claims against the debtor that the debtors had not disputed (in so far as the nature of the rights that the creditors acquire under the restructuring plan do not preclude this).[221]

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

Yes. If at least one class of creditors voted in favour of the restructuring plan, the debtor or restructuring expert can request the court to confirm the restructuring plan. For that purpose the court will schedule a hearing date within 8 to 14 days following submission of the final restructuring plan by the debtor. Creditors and shareholders that voted against the restructuring plan could use this term to submit written requests to the court to dismiss the restructuring plan on the (limited) grounds provided in the WHOA. Additionally, there are certain grounds on the basis of which the court can or must reject the restructuring plan (these are discussed under (23)).[222]

If the court eventually rules that there are no grounds to reject the restructuring plan, it will confirm the restructuring plan. Following court confirmation, the restructuring plan is binding on all creditors and shareholders included in the restructuring plan and entitled to vote, so implying that the creditors and shareholders who did not vote or voted against the restructuring plan are also bound by it.[223]

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example, no creditor worse off test, an absolute priority rule)?

The initial check and balance is performed by the court. Any restructuring plan will have to be confirmed by the court and the court must reject such restructuring plan on its own initiative if:

- the debtor is not insolvent (in a position where it is reasonably likely that it will not be able to continue paying its liabilities);

- the debtor or the restructuring expert has not complied with the procedural and information requirements to creditors and shareholders with voting rights to form an informed opinion on the restructuring plan, unless these creditors and shareholders confirm they accept the plan;

- there is an inadequacy (i) in the information included in the restructuring plan, (ii) the class composition, or (iii) the voting procedure, unless the

[220] *Idem*, Art 385.
[221] *Idem*, Art 386.
[222] *Idem*, Art 384.
[223] *Idem*, Arts 385, 386.

shortcoming would not reasonably have led to a different outcome of the voting;

- a creditor or shareholder should have been admitted to vote on the plan for a different amount, unless that decision would not reasonably have led to a different outcome of the vote;

- performance of the restructuring plan is not sufficiently guaranteed;

- the debtor requires new financing for the restructuring which is detrimental to the joint creditors;

- the restructuring plan is the result of fraud, undue preference of one or more voting creditors or shareholders, or any other unfair means, irrespective of whether it was with the co-operation of the creditor or any other party;

- the fees and disbursements of the court appointed experts are not paid or secured; or

- there are other (compelling) reasons that may oppose the confirmation of the restructuring plan.[224]

In addition, the WHOA provides for a "best interest of creditors" test and a relative priority rule (RPR). On the basis of these rules, the court has a discretion to reject a restructuring plan under the following circumstances:

- the "best interest of creditors" test – at the request of creditors or shareholders who have voted against the restructuring plan, or who have wrongly been denied the opportunity to vote and there is *prima facie* evidence that these creditors or shareholders are worse off under the restructuring plan than the payment they would expect to receive upon liquidation of the debtor's assets in bankruptcy;[225] or

- the relative priority rule – if not all classes have accepted the restructuring plan and if so requested by one or more creditors or shareholders who have voted against the restructuring plan and that are part of a class that has not accepted the restructuring plan (or who were wrongly excluded from voting and should have been placed in a class that did not accept the plan), if either:

    - the value that is distributed under the restructuring plan is distributed in derogation from the statutory order of priority of creditors or a contractual arrangement to the disadvantage of the class that did not accept the plan, unless a reasonable ground exists for such derogation and the interests of the said creditors or shareholders are not prejudiced; or [226]

224 *Idem*, Art 384, para 2.
225 *Idem*, Art 384, para 3.
226 *Idem*, Art 384, para 4.

- the said creditors have not been provided with the right to opt for a cash payment equal to the amount they would have expected to receive in cash upon liquidation of the debtor's assets in bankruptcy. [227]

These rules entail that a cross-class cram-down of lower ranking creditors is possible under the WHOA. A cross class cram-down of higher ranking creditors is in principle not possible, unless: (i) there is a good reason and the higher ranking class is not disadvantaged and (ii) the higher ranking creditors are offered the option to receive a cash payment equal to the amount they would have received in a bankruptcy scenario with the liquidation of the debtor's assets.

Certain exceptions apply to the aforementioned rules where the debtor qualifies as an SME under Dutch law. In that case a restructuring plan may be confirmed by the court (and become binding upon dissenting voting classes) with the debtor's consent only. However, if a debtor does not have any reasonable grounds to withhold its approval, a court order can replace the required board approval from an SME adopting a restructuring plan proposed by a restructuring expert. SMEs under Dutch law for this purpose are entities with (i) less than 75 employees, (ii) annual revenue below EUR 15 million and (iii) a total balance sheet value of not more than EUR 12 million.

Finally, the court is, at the request of the debtor or the restructuring expert or on the basis of its own authority, also authorised to issue special orders or make such other arrangements that are in its view required to protect the interest of the creditors or shareholders.[228] One of the things a court could do in this respect (if no restructuring expert is appointed) is to appoint an observer with the task of supervising the preparation of the restructuring plan and paying particular attention to the interests of the creditors and shareholders entitled to vote. The observer will inform the court when it becomes clear that the debtor is unable to prepare a restructuring plan or that the interests of the joint creditors are harmed. After having heard the debtor and the observer, the court can take any measures it finds appropriate, including the appointment of a restructuring expert (if such expert has not yet been appointed).[229]

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

In principle, a debtor or restructuring expert should make sure that a restructuring plan contains all information required by the creditors and shareholders to form an informed opinion of the restructuring plan. This includes the following information on valuations in the restructuring plan:

- the expected value of the assets and activities of the debtor if the agreement is reached;
- the proceeds that can be expected to be realised in the event of liquidation of the debtor's assets in bankruptcy; and

[227] *Ibid*.
[228] *Idem*, Art 379.
[229] *Idem*, Art 380.

- the valuation principles used in the calculation of the values described in the bullets above.[230]

The WHOA provides that the debtor or restructuring expert may request the court to rule on aspects that are considered to be important to reaching agreement on the restructuring plan, before the restructuring plan is actually put to vote. This includes a preliminary ruling of the court in respect of all valuation information in the restructuring plan. In this way, the debtor or restructuring expert has an opportunity to ask the court to rule on the valuations prepared in connection with the restructuring plan, including the valuation principles used.[231]

The court may appoint one or more experts to assess and issue a report on whether information in the restructuring plan on values and valuation principles is correct. The expert's report will have to contain a reasoned opinion on the reliability of the information and will be freely available to the creditors and shareholders that are entitled to vote.[232] This right to an expert opinion is not only available to the court in the stage before the restructuring plan is put up to vote, but also later in the process when the court actually decides on the confirmation of the restructuring plan.[233]

(25) Is appeal possible?

No, there is no possibility of appealing the confirmation of a restructuring plan.[234]

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Yes. The court will be involved in the following situations:

(a) the suspension of bankruptcy applications;[235]

(b) confirmation that transactions can be entered into;[236]

(c) applying a stay on enforcement actions (moratorium);[237]

(d) issues that can be relevant for the content or agreement on the restructuring plan, such as the formation of classes, voting, content of information, valuation principles; [238] and

(e) the termination of long term contracts.[239]

The court is, at the request of the debtor or the restructuring expert or on the basis of its own authority, also authorised to issue special orders or make such other arrangements that are in its view required to protect the interest of the

[230] *Idem*, Art 375, para 1.
[231] *Idem*, Art 378, para 1.
[232] *Idem*, Art 378, para 5.
[233] *Idem*, Art 384, para 6.
[234] *Idem*, Art 369, para 10.
[235] *Idem*, Art 3d.
[236] *Idem*, Art 42a.
[237] *Idem*, Art 376.
[238] *Idem*, Art 378.
[239] *Idem*, Art 384.

creditors or shareholders.[240] One of the things a court could do in this respect (if no restructuring expert is appointed) is to appoint an observer who will keep the court informed about the progress and process on a regular basis.[241]

(27) Is there a statutory basis to appoint a restructuring expert?

Yes. Creditors, shareholders and / or works council or worker's representation who believe that the debtor will not be able to continue to meet its liabilities, are also authorised to request the competent court to appoint a restructuring expert who will prepare and offer the restructuring plan. Similarly, a debtor who believes it is not capable of preparing a restructuring plan itself, may also apply for the appointment of a restructuring expert. When the restructuring expert is appointed, the debtor is no longer authorised to offer a plan to the creditors and shareholders itself. The debtor is entitled to submit a plan to the restructuring expert, requesting that the plan be presented for voting (see also (14) above).[242]

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

(a) Managing directors

The members of the board of directors may be personally liable towards the company (but not to shareholders or creditors) if they fail to properly perform their duties to the company. The extent of directors' duties under Dutch law is established by applying the principles of reasonableness and fairness under section 2:9 of the Dutch Civil Code (2:9 DCC). In principle, this is a joint and several liability. Individual directors may exculpate themselves, for instance by proving that the matter concerned did not fall within their field of responsibilities. In determining whether or not personal liability is incurred, the test applied by the courts, based on section 2:9 DCC, would (in summary) be whether, taking into account all relevant circumstances, a prudent director acting with proper care could be expected to have taken the same action as the director in question did. If evidently not, then personal liability may be incurred. Clearly, there must be "evident" negligence. The courts will look at whether all circumstances and reasonably foreseeable risks were properly taken into consideration by the director in question and whether the director in question ensured that he was properly informed when taking the action concerned.

Another important legal basis for directors' liability is in tort. In addition to liability for tort relating to environmental pollution, fraudulent conveyance of assets or a misleading prospectus, a director can be held liable for wrongful trading. Dutch courts have held in numerous cases that a director who entered into a transaction on behalf of an insolvent company can be held personally liable. Dutch courts have held that a tort is committed against a creditor where a director enters into a contract on behalf of the company and at the time of the conclusion of the contract he knows, or reasonably ought to know, that the company will be unable to perform the obligations arising out of that contract (or

[240] *Idem*, Art 379.
[241] *Idem*, Art 380.
[242] *Idem*, Art 371.

to perform those obligations within a reasonable period of time) and that the company will not have assets against which the creditor may have recourse.

Given the possible court involvement in preparing and offering the restructuring plan, it is our view that the risk of personal liability of managing directors towards the company or third parties can be very remote if the court's involvement for authorisation of the restructuring plan is requested at the right time. This may mean that very careful directors will seek confirmation or approval from the court for every transaction that they enter into during the period when they are preparing for a restructuring plan.

A specific liability may exist *vis-à-vis* the tax authorities for tax claims that remain unpaid and for pension claims *vis-à-vis* the relevant pension fund if the company's bankruptcy is a result of mismanagement. A statutory presumption of liability exists when the board of managing directors has failed to inform the tax authorities and the pension fund in time that the company would be unable to pay certain specific tax claims and pension claims. In our view, this notification obligation continues to exist.

(b) De facto directors

Depending on the circumstances, third parties who are not members of the board of directors, but who do act as if they were, may be held liable as (co-) policy makers or on the basis that they performed acts of management. As the conditions to be considered for a shadow director are very case specific, it is impossible to set out a standard rule under which a third person will be considered a shadow director. Although the decision to opt for any specific restructuring scenario and restructuring plan is first and foremost the responsibility of management, supervisory directors and even shareholders may face liability if they have not acted in accordance with their respective responsibilities. Though shareholders would not typically owe any duties of care to the company or its stakeholders, under certain specific circumstances such duty of care may arise when shareholders are aware that management is neglecting its duties towards the creditors of the company, but do not intervene – as they could easily have done – to redress this.

(c) Restructuring expert

The restructuring expert is appointed by the court. The liability risk for a restructuring expert is explicitly stipulated in the Dutch Bankruptcy Code and is in line with the liability risk of that of a general bankruptcy trustee.[243]

[243] *Idem*, Art 371(11).

2.8 UNITED KINGDOM

I. PREVENTIVE RESTRUCTURING FRAMEWORK (DESCRIPTION / AIM)

(1) Which preventive restructuring instruments are currently available in your jurisdiction?

There is a range of restructuring options available to companies within the United Kingdom. This section will not deal with the special procedures available to financial institutions and utility companies (among others). Companies can restructure outside of any formal procedure or instrument, such as via a consensual arrangement with creditors or formally via a scheme of arrangement under the Companies Act 2006 (Scheme). Debtors may also restructure via a company voluntary arrangement (CVA) or, where used as a restructuring or recovery rather than a winding-up tool, within an administration (Administration), both of which fall under the Insolvency Act 1986.

(2) Is your jurisdiction in the process of introducing new restructuring instruments in line with the purpose of the proposed directive?

The UK government has consulted stakeholders (in May 2016[244] and March 2018[245]) seeking views on certain amendments to the existing restructuring framework in the United Kingdom and in August 2018 published a response[246] to both consultations and setting out proposals for reform. The government has proposed a new "Restructuring Plan" and a standalone moratorium which, taken together, would achieve many of the requirements laid down by the proposed directive. If implemented as detailed in the government response, the Restructuring Plan and moratorium would provide a preventive restructuring option to debtors which would be a debtor-in-possession procedure with the ability to effect a cross-class cram-down (something not currently available as a matter of English law) and there would be an option for debtors to benefit from a pre-insolvency moratorium and a prohibition on *ipso facto* clauses by reason of entry into the Restructuring Plan and more broadly.

The government proposals are still at an early stage and it is not possible to say with any certainty whether they will be implemented in the form currently set out, or at all.

Given the uncertainty surrounding the proposed amendments, the remainder of this report will focus on those procedures that are currently available to debtors as a matter of English law.

(3) Provide a short description of the restructuring instrument and explain the purpose of the instrument (including whether it is an insolvency process or out of court instrument).

(a) Scheme of Arrangement

A Scheme is a formal arrangement between a company and its creditors and / or shareholders or a class of them. It is provided for under Part 26 of the Companies Act 2006. A company will make a proposal to its creditors or

244 For a link to this consultation document, click here.
245 For a link to this consultation document, click here.
246 For a link to this response, click here.

shareholders, who will be separated into classes depending upon their differing rights against the company to then vote on such proposal; if the requisite majorities in each class (as discussed below) vote in favour of the proposal then the compromise will be binding upon all relevant creditors or shareholders whether or not they voted on the scheme and, where they did vote, regardless of whether they voted in favour or against. It is therefore useful as a tool where the company has the broad support of creditors or shareholders but cannot get unanimity to support a particular course of action. Whilst not an insolvency process, a Scheme can be utilised by companies in financial distress and, indeed, companies who are already in a formal insolvency process; it can also be used by a completely solvent company and is often used to effect mergers or takeovers of public companies. A Scheme requires court involvement and oversight and at least two court hearings will be required before a Scheme is binding on creditors and / or shareholders.

(b) Company Voluntary Arrangement

A CVA is a process which has some similarities to a Scheme in that it enables a company to reach a binding arrangement with its creditors; however, it is provided for under the Insolvency Act 1986 and must be carried out under the supervision of an insolvency practitioner who initially acts as the nominee while the plan is being formulated and put to the creditors and later, if the proposal is accepted, acts as the supervisor overseeing the implementation of the CVA. Unlike a Scheme, a CVA requires practically no court involvement, other than filing requirements. One big difference between a Scheme and a CVA is that a CVA cannot be utilised to bind secured or preferential creditors against their will and with a CVA all creditors will vote as a single group, rather than being divided into classes based on the difference in their rights as discussed further below. CVAs also cannot be used to affect the rights of shareholders.

(c) Administration

Administration is a process under the Insolvency Act 1986 under which an insolvency practitioner is appointed as administrator of the debtor company and usually takes control of the company and its assets. It is a collective rehabilitation procedure under which a company can be rescued, reorganised or its business and assets realised under the protection of a statutory moratorium. Although in many of its applications it could not be said to be a preventive restructuring framework, where it is used as a restructuring tool to effect a “pre-packaged administration sale”, it bears some similarities to a preventive restructuring framework as envisaged by the proposed directive. A “pre-packaged administration sale” or “pre-pack” is used to describe a sale of the assets or business of an insolvent company which is negotiated and agreed prior to the company entering formal insolvency proceedings, such that a sale can be effected immediately upon or very soon after the insolvency process is commenced and which causes minimal disruption to the underlying business and assets. Administration appointments can be made out-of-court by the filing of specified documents or the appointment may be made by the court. An administration may also be subject to supervision by the court.

(4) Does the instrument qualify as an insolvency procedure under the European Insolvency Regulation (Regulation 2015/848 (recast))?

A Scheme is not an insolvency procedure under the European Insolvency Regulation but both CVAs and Administrations are.

II. AVAILABILITY

(5) To whom is the restructuring instrument accessible?

(a) Scheme of Arrangement

A Scheme is available to any company that is liable to be wound up under the Insolvency Act 1986; this includes both companies incorporated in the United Kingdom and foreign companies. In the case of a foreign company, the court must establish that there is “sufficient connection” to England and Wales before it will be willing to exercise its discretion in relation to sanctioning a scheme of arrangement in relation to such a company. In many cases, this is on the basis of English law finance documents. There are no entry requirements related to the financial condition of the debtor company.

(b) Company Voluntary Arrangement

A CVA is currently available to any company that is: (i) registered in England, Wales and Scotland; (ii) incorporated in an EEA state other than the United Kingdom; or (iii) incorporated outside of the EEA but with its centre of main interests (COMI) in a member state other than Denmark. There is an additional test under the European Insolvency Regulation that the COMI or an establishment be in the UK. These tests may change post-Brexit. Although CVAs are provided for under the Insolvency Act 1986, it is not a pre-requisite that the company be insolvent or unable to pay its debts; however, in practice, a company is likely only to propose a CVA where it has some degree of financial distress.

(c) Administration

As with a CVA, Administration is currently available to any company that is: (i) registered in England, Wales and Scotland; (ii) incorporated in an EEA state other than the United Kingdom; or (iii) incorporated outside of the EEA but with its COMI in a member state other than Denmark. There is an additional requirement under the European Insolvency Regulation that the COMI or an establishment be in the UK. These tests may change post-Brexit. An Administration may be commenced by the company, its directors, a qualifying floating charge holder (being a holder of a charge which includes a floating charge over all or substantially all of the assets of the company) or one or more creditors. Except in the case of appointment by a qualifying floating charge holder, it will be necessary to demonstrate or make a statutory declaration to the effect that the company is or is likely to become unable to pay its debts, whereas a qualifying floating charge holder only needs to demonstrate or make a statutory declaration to the effect that the qualifying floating charge is enforceable in accordance with its terms.

(6) Who can initiate a preventive restructuring instrument in your jurisdiction, for example debtors creditors and / or public authorities?

(a) Scheme of Arrangement

A Scheme may be initiated by the debtor company, any creditor or shareholder of the debtor company, the liquidator (where the company is in liquidation) or the administrator (where the company is in administration). Although creditors and shareholders have standing to make an application to court to propose a Scheme, the procedural requirements (such as preparing an explanatory statement setting out detailed information about the company, its financial position, future financial forecasts and much more) are such that it is unlikely that a creditor or shareholder will have the information necessary to actually make the application, such that in practice applications are usually made the debtor company or any incumbent liquidator or administrator.

(b) Company Voluntary Arrangement

If the debtor company is not in liquidation or administration then the directors of the debtor company are permitted to make a proposal for a CVA. Where a company is in administration or liquidation then only the administrator or liquidator (as appropriate) may propose a CVA.

(c) Administration

Administration can be triggered by the debtor company; the directors of the debtor company; the holder of a qualifying floating charge; or one of more creditors of the company. In the case of the debtor company, its directors or a qualifying floating charge holder, the appointment of an administrator can be effected without an application to the court and simply by the filing of documents and adherence to other procedural requirements. If it is not desired to make an out-of-court appointment then the directors, the company or the qualifying floating charge holder can make an application to court and this is the only route open to a creditor who is not a qualifying floating charge holder.

(7) Is there a viability test?

There is no legally required viability test for a Scheme or a CVA, although creditors are unlikely to sanction either a Scheme or a CVA unless there is a prospect of the company being viable following the procedure. Where there is an application to court for the appointment of an administrator, the court must be satisfied that the company is or is likely to become unable to pay its debts and that the administration order is reasonably likely to achieve the purpose of the administration. The administrator must perform his functions with the objective of rescuing the company as a going concern unless the administrator considers that this is not reasonably practicable, or that some other course of action would achieve a better result for the company's creditors as a whole; if the administrator can neither rescue the company as a going concern nor achieve a better result for the creditors as a whole than would be achieved in a liquidation then the administrator can realise the company's property in order to make a distribution to one or more secured or preferential creditors. As such, there is no requirement that the company be viable to enter into an administration.

III. CONSEQUENCES OR EFFECTS OF INITIATION OF THE RESTRUCTURING INSTRUMENT

(8) What are the consequences or effects of the initiation of the restructuring instrument?

Proposing a Scheme or a CVA to creditors and / or shareholders does not in itself affect the status of the debtor, its ability to transact or its existing legal obligations; however, many contracts contain termination provisions that may be triggered by the initiation of either a Scheme or a CVA and there is currently nothing to prohibit the operation of these termination provisions as a matter of English law (though the government's proposals – as discussed above – would prohibit the termination of contracts for the sole reason of entry into the restructuring plan). Once Administration has been triggered, the administrator takes custody or control of all the property to which the administrator thinks the company is entitled and displaces the authority of the directors to deal with the property. Given that the primary purpose of administration is the rescue of the company as a going concern, the administrator may operate the company for a period such that day-to-day operations continue. As with a Scheme or CVA, many contracts will contain provisions allowing the counterparty to terminate the contract upon entry into administration and there is currently nothing in legislation that would prevent this. As discussed further below, the entry into administration will trigger a stay on enforcement and other actions.

(9) Is there a stay on individual enforcement actions?

(a) Scheme of Arrangement

There is not usually a moratorium in the case of a Scheme. However, in recent years schemes of arrangement have been used to bring about an effective moratorium on creditor action through the use of so called "scheme-lite" arrangements, whereby a scheme of arrangement will include within its terms an effective stay and when passed by the requisite majorities this stay is then binding on all members of the relevant classes of creditors. Furthermore, during the *Vinashin* restructuring,[247] the English court found that it had the ability to stay legal proceedings in aid of a scheme of arrangement and, on the facts, the court was prepared to exercise its discretion to stay legal proceedings brought by dissenting creditors so as to give breathing space for a scheme to be implemented. It was crucial to the court being willing to grant the stay that a sufficient majority of creditors had entered into a binding contractual commitment to implement the restructuring.

(b) Company Voluntary Arrangement

There is no automatic moratorium in connection with a CVA. However, "small companies" (as defined in the Insolvency Act 1986) can obtain an optional moratorium of up to 28 days from the date of filing certain documents with the court. This moratorium can be extended for a further two months with creditor consent. To obtain the moratorium, the nominee for the CVA must certify that he believes the proposal for the CVA has a reasonable prospect of success and the company is likely to have available funds in order to carry on its business during

[247] *BlueCrest Mercantile BV v Vietnam Shipbuilding / Industry Group FMS Wertmanagement AOR v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm).

the voluntary arrangement. In practice, the small company moratorium is rarely used.

(c) Administration

Upon presentation to the court of an administration application or the filing of a notice of intention to appoint an administrator out of court, an interim moratorium does trigger a stay on individual enforcement action and the opening of other insolvency procedures. This moratorium is then continued in nearly identical terms at the point the company actually enters administration. The administration moratorium prohibits (i) the enforcement of security over the company's property (except that security constituting financial collateral may still be enforced); (ii) the repossession of goods in the company's possession under a hire-purchase agreement; (iii) the exercise of a right of forfeiture by peaceable re-entry by a landlord over rental property; and (iv) the institution or continuation of any legal process against the company, except (in each case) with the consent of the administrator or the permission of the court. It does not prevent the exercise of self-help remedies such as set-off or contractual termination. This moratorium applies for the duration of the administration.

(d) Proposed Reforms

If the UK Government's reform proposals are implemented then it would be possible for all companies (except financial institutions and other market participants) to obtain a 28-day moratorium (which could be extended by a further 28 days and even further with creditor consent) prior to entering into any restructuring process, either formal or informal; the imposition of such moratorium would be dependent upon the relevant company meeting certain eligibility tests (the current suggestion is that the company is already, or imminently will be, in financial difficulty and not having been in an insolvency process or subject to a moratorium in the preceding 12 months) and the maintenance of certain qualifying conditions throughout the moratorium (company has a prospect of becoming a going concern, there is sufficient creditor support to make a rescue more likely than not and the company has sufficient funds to carry on through the moratorium).

(10) What are the consequences of the restructuring instrument for *ipso facto* clauses?

There is no general prohibition on *ipso facto* clauses as a matter of English law such that counterparties are generally free to terminate or amend their contracts where the contract contains a right to do so upon entry into any restructuring or insolvency process. There are two exceptions to this: firstly, any purported termination or amendment must not offend the anti-deprivation principle; and secondly, suppliers of "essential services" (broadly gas, electricity, water, communication / IT services etcetera) cannot terminate a supply contract solely by reason of a company entering administration or the approval of a CVA.

If the government's proposed reforms (as discussed above) are implemented then there would be a general prohibition on the operation of *ipso facto* clauses such that suppliers in contracts for the supply of goods and services could never terminate a contract on the basis of the counterparty having entered formal insolvency proceedings, pre-insolvency procedures or a restructuring plan, though termination on other grounds, including non-payment, giving notice as specified in the contract or any other ground specified in the contract, will still be permitted. It is expected that certain financial contracts will be exempt from this regime such that it would remain permissible to terminate those contracts on the sole ground that the counterparty has entered into some sort of insolvency or pre-insolvency procedure. The move to prohibit the operation of *ipso facto* clauses would represent a complete departure from the current position in the United Kingdom and much criticism has been made of this proposal on the basis that it fetters freedom of contract and would not adequately protect suppliers. It remains to be seen whether this proposal is indeed taken up either in its current or an amended form.

(11) What are the options for new interim financing (with super priority status)?

Other than the administration expenses regime (discussed below), there is no statutory mechanism by which new interim financing can be obtained by a debtor and be given super priority status. That said, where a debtor requires new financing, either on an interim basis or otherwise, provided that the creditors agree that the financing is required and consider that the business is viable, an arrangement can often be made with them whereby they consent to such new financing being given super priority status. Very often in cases where interim or new financing is required, it will be provided by the existing creditors or a sub-set of them. The existing and new lenders will typically enter into an inter-creditor agreement which will govern the rights between them and there may be restrictions on the ability of the new super senior lenders to commence any enforcement action without the consent of the senior creditors, particularly where the super senior debt is for a relatively small amount when compared with the senior debt. Any new form of interim finance is subject to the normal avoidance and claw-back provisions and is offered no special protection.

If during the course of an administration the administrator considers that new financing is required in order to fund the operating costs of the business during the administration, the administrator may borrow in order to meet such costs. Although such funding would not be given priority over the holders of fixed charge security, the financing would be treated as an expense of the administration and would therefore have priority to the claims of floating charge holders.

The UK Government consultation (mentioned above) did seek views on whether amendments were necessary to the UK legislative framework to permit the provision of new super-senior interim financing. The proposals explored by the consultation did not, generally speaking, receive support from respondents and, as such, there are no proposals at present to make any legislative amendments in this area.

(12) Are other restructuring-related transactions protected?

No special protections are offered to any transactions simply because they are entered into as part of a restructuring process undertaken by way of Scheme, CVA or Administration. All transactions are vulnerable to claw-back under the usual rules. These include transactions that constitute a preference to an existing creditor, transactions at an undervalue, vulnerable floating charges and transactions defrauding creditors.

IV. CONTENT OF RESTRUCTURING INSTRUMENT AND PROCESS

(13) Is the restructuring instrument a debtor-in-possession procedure?

(a) Scheme of Arrangement and CVA

These are generally debtor-in-possession proceedings; however, both a scheme and a CVA can be proposed by a company in liquidation or administration, in which case the insolvency practitioner will have displaced the usual management of the company prior to the Scheme or CVA. Although during a CVA the directors remain in office, the CVA proposals will be put together and the CVA implemented under the supervision of an insolvency practitioner officeholder who is at first the nominee and subsequently becomes the supervisor, if the proposals are accepted.

(b) Administration

An insolvency practitioner, acting as administrator, is a mandatory part of any administration and this will generally displace the usual management of the debtor company; however, it is possible for the administrators to appoint directors or authorise an officer of the company, either generally or specifically, to exercise management power, such that the existing management may retain some powers over the company (albeit with the oversight of the administrator). Where administration is used to effect a pre-pack sale, the original management of the debtor will often continue although they will become directors and officers of the newly formed purchasing company.

(14) What are the measures that can be taken under the restructuring instrument (haircuts, debt for-equity swaps, amendments of contracts / claims, group restructuring, recourse rights)?

Schemes and CVAs are extremely flexible as they are essentially mechanisms to implement a commercial deal reached between a company and its creditors. They can therefore be used to effect haircuts, debt-for-equity swaps (though shareholder consent may also be required for this in order to disapply pre-emption rights) and amendments to contracts or claims. Schemes and CVAs relate to a particular company and, as such, cannot be used by one company to bring about a restructuring of a whole group; however, it is common for a number of group companies to propose a Scheme or CVA on essentially the same terms and using the same documentation in order to bring about a whole group restructuring. In addition, it is common for a Scheme or CVA to be conducted at the level of the borrower and for there to be a related release or amendment to rights under any guarantees, even where the guarantors are not themselves entering into a Scheme or CVA.

Where a restructuring is effected through a pre-packaged administration sale, it is common for the restructuring to include reductions of debt or haircuts (there will often be a reduced amount of senior debt and junior debt may be left behind in the old group structure rather than being transferred to the new group structure) and there may be debt-for-equity swaps, whereby the newly formed holding company will be incorporated by the existing lenders. Furthermore, the group may be restructured in so far as an administration sale may trigger the operation of releases of intra-group guarantees and / or security. Administration cannot be used in itself to effect amendments of contracts or claims without the consent of the counterparty, but could be used in conjunction with a Scheme or CVA.

(15) Do creditors vote in separate classes and if so, what are the criteria for class formation?

(a) Scheme of Arrangement

When proposing a scheme of arrangement, the debtor company must divide creditors and / or members into separate classes. The English courts have determined that there ought to be fewer rather than greater numbers of classes in order not to give small creditors particular “hold-out” value to demand terms that are disproportionate to their claims, while recognising that it would not be equitable to necessarily treat all creditors as forming part of the same class. The test is therefore that creditors and / or members should form a single class unless their rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest. As a minimum, this generally means that secured creditors will form a separate class to unsecured creditors and shareholders will also form a separate class but may also mean that, even among the body of secured creditors, there could be more than one class where contractually senior creditors form a different class to contractually subordinated or more junior secured creditors. When considering class constitution the company must consider the rights that creditors and / or shareholders have against the company, rather than whether the particular interests of one or more creditors makes it less or more likely that they will support the Scheme, though the interests of creditors or shareholders can be considered by the court when it is asked to exercise its discretion as to whether to sanction a scheme when asking whether the votes approving the scheme were cast by creditors or shareholders who fairly represented the relevant class. Class composition is determined at an early stage of the Scheme (that is, at the first court hearing, seeking permission to call the creditor and / or member meeting).

(a) Company Voluntary Arrangements

In contrast to a Scheme, under a CVA all creditors vote together in a single class. However, it is important to note that a CVA cannot affect the rights of a secured creditor or a preferential creditor without their consent. Furthermore, a CVA can be challenged on the basis of unfair prejudice if one group of creditors is treated differently to others.

(b) Administration

Voting plays a less important role in an administration, although an administrator can seek decisions from creditors on certain matters. In certain circumstances administrators must put forward proposals which creditors have a right to vote to approve or not and creditors can appoint committees to monitor and assist the administrator. When voting on whether to accept the administrator’s proposals or not and on other matters where the administrator seeks a decision from creditors, creditors vote as a single class and decisions will be approved when a majority in value of creditors have voted in favour but will not be so passed if those voting against include more than half in value of the creditors to whom notice of the vote was delivered who are not persons connected with the company.

(16) Can equity holders be included?

Schemes can alter the rights of both creditors and shareholders. The effects of a CVA are limited to creditors and do not extend to shareholders. Under a pre-packaged administration sale, the shareholders will typically be left behind in the old group structure or, if they consent to the restructuring and agree not to challenge the pre-pack, they may be offered equity in the new holding company structure.

(17) Can creditors (and / or equity holders) be included or excluded from the instrument at will?

Under a Scheme, the debtor company can select those creditors and / or shareholders that will be impacted by the Scheme proposals and it will be only those creditors or shareholders that will be asked to vote on the Scheme. By contrast, in a CVA, creditors vote together as one class (excluding secured creditors) and, as such, notice of the CVA should be sent to all creditors who all have a right to vote even if the proposal does not directly impact them.

(18) What are the voting requirements (head count test / majority in value test)?

Before a court can consider whether to exercise its discretion to sanction a Scheme, it must be voted upon and approved by each class of affected creditors and / or shareholders. In order to be approved by a particular class, a majority in number (that is, more than 50 per cent) representing at least 75 per cent in value of those present and voting (either in person or by proxy) of that class must vote in favour of the Scheme.

To become effective, a CVA must be approved by the requisite majorities at shareholders' and creditors' meetings; broadly, this is more than 50 per cent in value of the members present and voting (where the value is determined by reference to the number of votes conferred on each member by the company's articles) and more than 75 per cent in value of the creditors present and voting (where votes are calculated according to the amount of the creditor's debt but excluding any secured claims). There is an additional requirement for the creditors' meeting whereby a CVA will not be approved if more than half of the total value of the unconnected creditors vote against the CVA (the Connected Creditor Test). Where creditors approve the arrangement but shareholders do not, the CVA may still become effective but shareholders have an opportunity to challenge the CVA in court.

As mentioned above, there is no voting as such in an administration, but where the administrator seeks decisions from creditors, they will be made where a simple majority, by value, approve the decision but will not be so passed if those voting against include more than half in value of the creditors to whom notice of the vote was delivered who are not persons connected with the company.

(19) Does the instrument provide for cram-down of dissenting creditors?

Yes, provided that the voting requirements set out above have been met, the Scheme or CVA will be binding upon creditors and / or shareholders (as applicable) who voted against it.

(20) Does the instrument provide for cross-class cram-down?

No, there is currently no mechanism under English law to effect a cross-class cram-down. This would be available if the UK government legislates in accordance with its proposals as set out under its response to the two consultations mentioned above.

(21) Is the restructuring instrument binding upon all affected parties?

Once a Scheme has been voted on and approved by each class of creditors and / or shareholders, a court hearing will take place where the court will consider, among other things, whether the statutory voting majorities have been reached and whether it should exercise its discretion to sanction the Scheme. The court will consider a broad range of factors in determining whether to exercise its discretion which will include whether those creditors and / or shareholders voting in favour of the Scheme fairly represented the relevant class and whether they were acting in good faith; this allows the court to consider whether there were any ancillary interests that motivated a particular creditor to vote in favour of the Scheme in a way which represents an oppression of the minority creditors or shareholders. The court will also consider more broadly whether the terms of the Scheme are fair. Having carried out this assessment, the court may disregard or discount votes cast in favour of the Scheme by creditors or members who have a special interest and are not fairly representative of the class as a whole. If such discounting or disregarding of votes means that the statutory majorities are no longer met, this may lead to the court refusing to exercise its discretion to sanction the Scheme, but that is by no means the inevitable consequence. However, assuming that the court is satisfied that the required formalities have been met and that it is proper to exercise its discretion and does sanction the scheme, it will be binding upon all affected parties once the scheme document is registered at Companies House.

Once approved by the requisite majorities as set out above, a CVA will bind every person who would have been entitled to vote on it at the relevant meeting but, as mentioned above, it cannot bind a secured or preferential creditor without their consent.

V. CONFIRMATION / CHECKS AND BALANCES

(22) Does the restructuring instrument require confirmation by a judicial or administrative authority?

Yes, in the case of a Scheme (as detailed above) but not in the case of a CVA. In an Administration, the administrator will take decisions without court confirmation but there is a power to seek directions if the administrator is unclear as to the extent of his powers.

(23) Which checks and balances are in place to protect the legitimate interest of creditors (for example, no creditor worse off test, an absolute priority rule)?

Under a Scheme, the court has broad discretion as to whether to sanction a Scheme and part of its consideration is whether the Scheme is fair and whether the requisite majorities have been reached by creditors voting in favour who genuinely represent the class in question and whether an honest man in the position of the creditors could reasonably be expected to have voted in favour of the Scheme. Courts have increasingly made it clear that the sanctioning of a Scheme is not simply a rubber-stamping exercise but must involve a serious examination by the court of the proposed arrangement and full disclosure by the debtor company and its advisers of any material information. There are no statutorily prescribed protections such as the “no creditor worse off test” or an absolute priority rule; however, the court will consider whether the proposals are fair when compared with the next best or most likely alternative to a Scheme.

As with a Scheme, there are no statutorily imposed protections associated with a CVA and, unlike in a Scheme, there is no requirement for court sanction or oversight. The Connected Creditor Test is one means of protection, requiring a majority of independent creditors to support the CVA in order for it to be approved; therefore, CVAs cannot simply be forced through by a connected majority creditor. There is also a right of appeal (as discussed below) if a creditor or shareholder considers that its interests have been unfairly prejudiced.

(24) Does the judicial or administrative authority involved take decisions in respect of valuations prepared in connection with the restructuring instrument?

Court approval is only required in connection with a Scheme. It is very likely that valuation evidence will be placed before the court and such evidence is likely to be taken into consideration by the court when deciding whether to exercise its discretion to sanction the scheme and when determining whether the Scheme is fair.

In a pre-packaged administration, the administrator (and not the court) will take the decision regarding the valuation of the company and therefore the price for the sale.

(25) Is appeal possible?

During a Scheme, there are at least two opportunities for creditors, shareholders or other interested parties to appear before the court to raise concerns or objections (that is, at the court hearing convening the meetings and at the sanction hearing). Although in theory it is possible to appeal against the convening or sanction orders, it is rare in practice as most challenges are made at the court hearing and objections dealt with there.

A CVA can be challenged by application to the court by creditors, shareholders, the CVA nominee or the liquidator or administrator of the company (if applicable) on the grounds that it unfairly prejudices the interests of a creditor, member or contributory of the company, or if there has been some material irregularity with respect to the voting procedure. Generally, such a challenge must be made within 28 days of the result of the meeting being reported to the court. However, a person who was not given notice of the creditors’ meeting has 28 days from the day he or she became aware that the meeting had taken place to bring such a challenge. If the court is satisfied that either of the grounds for challenge are met then it may either revoke or suspend any decision approving the CVA or give directions for the holding of a further vote on an amended proposal or the original proposal.

In a pre-packaged administration, a creditor or other interested party could bring proceedings against the administrator for failure to obtain a proper price but this is rare in practice.

VI. SUPERVISION (CLASS FORMATION / VALUATION METHODS)

(26) Does the restructuring instrument provide for early court involvement?

Yes, in a Scheme, before the proposals are sent to creditors and / or shareholders, there will be a court hearing to examine the proposed class constitution and to make an order for the sending of documents to creditors and / or shareholders and convening the required scheme meetings for the purpose of having a vote on the proposals.

There is generally no court involvement during a CVA.

Courts may be involved in an Administration where an administrator can seek directions from the court and a creditor or member can apply to the court to claim that an administrator has acted so as to unfairly harm its interests or proposes to do so.

(27) Is there a statutory basis to appoint a restructuring expert?

Not for a Scheme, which is instead subject to supervision and approval by the courts.

Yes for a CVA; a nominee must initially be appointed to oversee the drawing up of the proposal and the voting procedure. If a CVA is approved then the nominee will become the CVA supervisor who will oversee the implementation of the CVA.

Yes in an Administration, where an insolvency practitioner is appointed.
All CVA nominees / supervisors and administrators must be qualified to act as insolvency practitioners in relation to a CVA or administration (as applicable). This means the individual must have passed relevant professional examinations and have relevant experience as well as being a member of the relevant recognised professional bodies who regulate the sector. Insolvency practitioners act as individuals although they are often employed by accountancy firms. In any event, they are always independent of the debtor entity.

VII LIABILITIES

(28) What are the potential liabilities in connection with the preparation of a preventive restructuring instrument for managing directors and restructuring experts?

There are no liabilities that are specifically or solely connected with the preparation of a Scheme, CVA or the appointment of administrators, nor does the opening of any of these procedures offer any special protection for directors or officeholders. Liability for directors (and sometimes shadow directors) can arise in connection with the financial difficulty of the debtor company. There are five main areas of concern: (i) wrongful trading; (ii) fraudulent trading; (iii) misfeasance; (iv) disqualification from being a director for being “unfit”; and (v) the duty to creditors where the company is or may be insolvent.

(a) Wrongful Trading

There is an obligation on directors, upon becoming aware (or from the time that they should be aware) that an insolvent liquidation or administration of the company cannot reasonably be expected to be avoided, to do everything possible to minimise the potential losses of the company's creditors. A failure to take such measures as are required could result in the directors or shadow-directors being personally liable for certain debts and liabilities of the company. The steps that a director will be required to take will depend upon the circumstances. In some instances it will mean ceasing to trade and / or seeking to place the company into insolvency proceedings immediately; in others it might be appropriate for the directors to continue trading with a view to trading out of insolvency or achieving a better result for creditors. The opening of a procedure will not, in itself, offer directors any special protection.

(b) Fraudulent Trading

Claims may be brought against directors for wrongful trading where a company goes into liquidation or administration and it appears that any of the business of the company has been carried on with the intent to defraud creditors of the company or for any fraudulent purpose. As with wrongful trading, any person who was knowingly party to the carrying on of the business in that manner could be ordered to make a personal contribution to the assets of the company. In addition to requiring a contribution, fraudulent trading constitutes a criminal offence.

(c) Misfeasance

An action for misfeasance can be founded against present and former directors, officers and insolvency officeholders of a company. It applies where any relevant person has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of fiduciary duty or other duty in relation to the company, the direct consequence of which is the misapplication or loss of assets. Directors have a duty to promote the success of the company for the benefit of its members / shareholders, however, where a company is or is likely (meaning probable) to become insolvent, the directors also have a duty to consider the interest of creditors. If found guilty of misfeasance, the relevant person can be compelled to repay, restore or account for the money or property or any part of it (with interest) as the court thinks just or contribute a sum to the company by way of compensation.

(d) Disqualification

This applies to directors and shadow directors. A court will make a disqualification order, which can apply for between two and 15 years, where it is satisfied that an individual was a director or shadow director of a company which became insolvent during the time of his holding office and if the court is satisfied that the person's conduct as a director is such that the person in unfit to be concerned in the management of a company.

(e) Insolvency officeholders

When acting as administrator and properly exercising his function as such, an administrator acts as agent of the company to which he is appointed; consequently the administrator is not personally liable in relation to contracts entered into on the company's behalf but will be liable on contracts if entered into by the administrator in his own name. However, an administrator may be liable in tort or conversion (notably where he wrongfully withholds consent to allow a creditor to enforce security or the owner of goods in the company's possession to repossess such goods). An administrator may also be personally liable for breach of statutory duty where he fails to properly distribute property in accordance with the statutory order of priorities.

3. Comparative table

In the pages that follow (Annex A), a comparative table setting out a condensed version of the preceding pages is provided. The purpose of the comparative table is to be able to determine the differences between the various jurisdictions at a glance.

ANNEX A – COMPARATIVE TABLE

Green	Compliant with the Directive
Yellow	Depends or uncertain whether compliant with the Directive
Orange	Not compliant with the Directive

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain	The Netherlands	United Kingdom
Insolvency process (rather than out-of-court instrument)?	No (preventive restructuring framework)	Instruments with in-court and out-of-court elements available	Instruments with in-court and out-of-court elements available	Yes	No (out-of-court instrument)	Yes (there are three in-court instruments and one out-of-court instrument)	Yes (there are out both in-court and out-of-court instruments)	No (out-of-court instrument)	No (out-of-court instrument)
Debtor-in-possession procedure?	Yes	Yes (unless in the event of serious misconduct by the debtor)	Yes (generally)	Yes	Yes	Yes (however the scope in which a debtor remains in possession depends on the type of the proceedings; in remedial proceedings, the debtor is deprived of the right to manage its business)	Yes	Yes	Yes
Initiation only open to debtors (rather than also creditors or public authorities)?	No (Member States (MS) can provide open to creditors and public authorities)	Depends (on type of restructuring measure)	Yes (generally)	Depends	Yes (but qualified lenders can start the early warning procedure)	Yes (except for the remedial proceedings which are also open to full-recourse creditors)	The consent of the debtor is always necessary (the sanction of the Spanish Scheme can also be requested by the debtors)	No (open to debtors and creditors / shareholders / works council)	Yes (including liquidator / administrator)
Viability test?	Yes (open to MS to maintain or introduce)	No (but there are three correction mechanisms to avoid abusive or consecutive judicial reorganisation proceedings)	Yes (generally for the purposes of the court approving a restructuring agreement)	Yes	Yes (the test is carried out by an independent expert and, in debt restructuring agreements, also by the court after the agreement is signed)	Yes	Yes (in the Spanish Scheme, the 71*bis* Refinancing Agreement and the Out-of-Court Payment Agreement) No (in the Pre-Insolvency Period)	No (although abuse of right doctrine applies)	No

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain	The Netherlands	United Kingdom
Stay of individual enforcement actions?	Yes (maximum of 12 months)	Yes (maximum of six months)	No, in relation to special mediation and conciliation procedure. However, creditor can request court stay (max two years) on creditor actions Yes, in relation to safeguard and reorganisation proceedings, subject to limited exceptions	Yes	Yes (if requested, save for the Recovery Plan)	Yes (there is a stay in in-court instruments whose details vary depending on the type of the in-court instrument; there is only a limited technical stay in the out-of-court instrument)	Yes (in the Spanish Scheme - once the sanction has been requested - the Pre-insolvency Period and the Out-of-Court Payment Agreement) No (for the 71*bis* Refinancing Agreement)	Yes (maximum of four months and four months extension)	Not usually (unless a "small company" and stay is sought)
Ipso facto clause bans?	Yes	Yes	Yes	Yes	Yes	Yes	No (although it is subject to the court´s criteria)	Yes	No
New or interim finance available?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Super-priority status for new or interim finance?	MS's law	Yes (but subject to conditions)	Yes (in conciliation and safeguard procedures, subject to certain conditions and limitations)	Depends	Yes (for Debt Restructuring Agreements, but some limitations for shareholders loans)	Yes (although claims arising under new or interim financing do not take priority over the claims of a secured creditor in relation to the asset over which that secured creditor has security)	Yes (limited)	Yes (over available non-encumbered assets)	No
Carve-out / protection restructuring-related transactions?	Yes (general avoidance law carve-out)	Yes (but certain exceptions apply)	No	Depends	Yes (general avoidance law carve-out if court grants its approval)	Yes (super-priority status, but without taking priority over secured creditors, or protection from claw-back risks)	Yes (although with certain requirements)	Yes (general preference law carve-out if court grants its approval)	No
Is a restructuring plan / scheme an option?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain	The Netherlands	United Kingdom
Group restructuring?	Uncertain	Yes	No	Yes / Depends	Yes	No	Yes	Yes (for guarantee claims and if instrument would have been open to that group company as well)	Only for guarantee claims
Amendment of recourse rights?	Uncertain	Yes	No	Depends	No (there is no automatic amendment)	Yes	Yes	Yes	Yes (guarantees can be released if closely related)
Separate class formation?	Yes (substantially similar)	No	No, in relation to special mediation and conciliation procedures) Yes, in relation to safeguard and reorganisation procedures, provided certain requirements are met and certain exceptions	Yes	No (except for the special debt restructuring agreement)	Yes (optional)	Yes (between secured and unsecured credits)	Yes (comparable position criterion)	No
Voting requirements?	Yes (majority)	Yes Approval by majority of the creditors present at voting (who represent at least half of the relevant outstanding principal amounts)	No, in relation to special mediation and conciliation procedures plans, where individual creditor approval is required Yes, in relation to safeguard and reorganisation procedures where committees are established: 66$^{2}/_{3}$ of total amount of debt voted per committee and (if applicable) all bondholders in general meeting. If no committee is established: a 10-year term can be imposed by the court, subject to various conditions)	Yes (number and value majority in each class)	No	1/2 of the voting creditors representing 2/3 of the total claims participating in the voting + additional quorum: 1/5 of the creditors entitled to vote in the creditors' meeting In fast-track proceedings, the required majority is calculated by reference to the total value of claims held by the creditors who are entitled to vote	Yes (except for the request of the Pre-insolvency Period)	Two-thirds of the creditors (value of claims) Two-thirds of the shareholders (issued share capital)	Creditors – more than 50% by value Shareholders – more than 75% by value but CVA can be effective even if voting threshold not achieved

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain	The Netherlands	United Kingdom
Equity holders included?	Yes (MS may choose to include equity holders)	No	No (but equity holder consent is required for a debt-for-equity swap)	Depends	Yes	Yes (although, some of the equity holders are excluded from voting at the creditors' meeting)	No (but potentially included in the 71*bis* Refinancing Agreement)	Yes	No
Free to include / exclude creditors / equity holders at will?	Yes (provided class formation test is met in every new class so formed)	Yes	Yes (but equity holder consent is generally required for a debt-for-equity swap)	No	Yes	No (in general, the arrangement covers all the debt that arose before the proceedings were opened; however, there are certain types of claims which cannot be covered by the arrangement)	Yes	Yes (provided class formation test is met in every new class so formed)	No
Cram-down?	Yes (if voting requirements have been met)	Yes	Yes (The plan binds all members of the committees and the bondholders under safeguard, accelerated safeguard, accelerated financial safeguard and reorganisation procedures)	Yes	No (except for the special debt restructuring agreement)	Yes (if voting requirements have been met)	Yes (Spanish Scheme and Out-of-Court Payment Agreement) No (71*bis* Payment Agreement)	Yes (if voting requirements have been met)	Yes (if voting requirements have been met)
Cross-class cram-down?	Yes (but appropriate protection for classes who voted down and, only if MS opt for this, for SME only with approval from the debtor)	No (creditors are not separated in classes for voting)	No	Yes	No	Yes (but certain protection for the creditors who voted down)	Yes (within Spanish Scheme and Out-of-Court payment agreement, but only from secured to unsecured creditors, not the opposite way)	Yes (but appropriate protection for classes who voted down)	No (only vote as a single class but cannot bind secured or preferential creditors without their consent)

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain		The Netherlands	United Kingdom
Binding on all affected parties?	Yes	Yes	No, in relation to conciliation, special mediation and conciliation procedures, where individual creditor approval is required Yes, in relation to safeguard and reorganisation procedures where committees are established or the court imposed. All members of financial and trade creditor committees (and bondholders)	Yes	No (except for cram down effects)	Yes	Yes		Yes	Yes
Confirmation by a judicial or administrative authority?	Yes	Yes	Yes	Yes	Only in debt restructuring agreements	Yes (sanctioning by the court)	Yes (in the Spanish Scheme)	No (in the other instruments, unless challenged)	Yes (sanctioning by the court)	No
No creditor worse off-test?	Yes	No	Yes, in relation to special mediation and conciliation procedures Yes, generally, in relation to members of each credit committee in safeguard and reorganisation procedures No, not in relation to financial and non-financial creditors under accelerated financial safeguard procedures	Yes	Only in special debt restructuring agreements	Yes	Yes (at least in the initial steps, but there are instruments to protect the rights of the creditors)		Yes	No

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain	The Netherlands	United Kingdom
			In relation to safeguard and reorganisation procedures, the court must check that the interests of creditors are satisfactorily protected in approving the continuation plan						
Absolute priority rule?	Yes (and relative priority rule)	Yes	No	Yes	No	No	Yes in the Spanish Scheme and the 71*bis* Refinancing Agreement	Yes, but with limited exceptions for relative priority	No
Judicial / administrative involvement in valuations?	Yes	Depends (No in relation to a court supervised transfer) (Yes in relation to an amicable arrangement and collective agreement)	Only oversight	Yes	Only under debt restructuring, the court evaluates the feasibility of the underlying plan Under a special debt restructuring agreement, the court has to evaluate whether creditors are better satisfied than in a judicial liquidation	Only oversight	Yes (in the Spanish Scheme) No (in the other instruments, unless challenge)	Only oversight	No
Possibility of appeal?	Yes	Depends (No, in relation to an amicable arrangement) (Yes, in relation to collective agreement and court supervised transfer)	Appeal / third party challenge to opening of collective proceedings is very limited in practice	Yes	Yes (only in debt restructuring agreements)	Yes	Direct appeal for the Out-of-Court Payment Agreement No appeal in the Pre-Insol-vency Period and the Spanish Scheme Indirect appeal through a potential claw-back action	No	Yes
Early court involvement?	Uncertain	Yes	Yes	Depends / Uncertain	Yes (upon request)	Yes (except for out-of-court proceedings where the court only subsequently approves the arrangement accepted by the creditors)	Yes (for certain specified events and upon request)	Yes (for certain specified events and upon request)	No

Element	Directive	Belgium	France	Germany	Italy	Poland	Spain		The Netherlands	United Kingdom
Restructuring specialist?	Yes	Yes	No (but debtor may appoint chief restructuring officer contractually / court can appoint controllers and experts)	Yes	Only in early warning procedure	Yes	Yes (upon request of the debtor or the creditors in the Spanish scheme and the 71 bis Refinancing Agreement. Always in the Out-of-Court Payment Agreement)		Yes (upon request of the debtor, the court or the creditor / shareholders / works council)	Yes
Insolvency proceeding (European Insolvency Regulation)?	Yes	Yes	Yes, in relation to safeguard, accelerated safeguard, accelerated financial safeguard, reorganisation and judicial liquidations procedures) No, in relation to special mediation and conciliation	Yes	Only debt restructuring agreements	Yes	Yes (Pre-Insolvency Period, Out-of-Court Payment Agreement and Spanish Scheme)	No (71*bis* Refinancing Agreement)	Possible (parties can opt for an EIR version or a non-EIR version)	Yes

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