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RESEARCH ARTICLE

The European Union preventive restructuring framework: A hole in one?

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Abstract

While traditionally (Continental) Europe has not been known for an in particular debtor- or restructuring-friendly insolvency practice, in recent decades, important reforms were implemented that would foster restructurings in Europe. In this article, we comparatively look a the status quo of insolvency and restructuring practice in five different European countries (Denmark, France, Germany, Netherlands, UK). We place our observations into the context of the preventive restructuring directive, to be implemented within the next two years after its publication on 26 June 2019. The directive leaves quite some room implementation, from a watered-down restructuring tool with high access threshold to a pre-insolvency debtor-friendly US-style restructuring procedure.

1 | INTRODUCTION

The perception of insolvency and restructuring law in Europe has been subject to significant changes in recent years, with a fresh breeze coming from national reforms, topped by a radical and substantive reform as reflected in the European Union (EU) Directive on restructuring and insolvency ("Directive").[1] For decades, the (continental) European understanding of insolvency was merciless.

[1]Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172. This article, derived from a comparative study on the occasion of the 10th anniversary of the INSOL Europe Younger Academics Network of Insolvency Law was written at a time only the confirmed text was available but has been updated to reflect the provisions of the Directive as adopted.

The troubled debtor's directors were threatened with strict liability and, in some jurisdictions, even criminal punishment for a failure to file for an insolvency procedure. This would almost always lead to the dissolution of the debtor and the (piece-meal) liquidation of its assets. The stigma of insolvency was firmly attached to the insolvent debtor.

Compared with the United States,[2] it has taken some time for the European paradigm of insolvency and restructuring procedures to accept that they should be a tool to facilitate a going-concern rehabilitation of the business and to grant the debtor a second chance for the benefit of value maximisation. Legal reforms in the recent years were aimed at establishing a more restructuring-friendly culture in Europe, espousing a rescue culture for insolvency frameworks.[3] The underlying proposition is that a timely and cooperative restructuring, incentivised by carrots rather than sticks, should create a surplus in contrast to a delayed in-court insolvency procedure, a surplus that could be shared among the parties involved.

In this article, following a short description of the background of the Directive in Section 2, an analytical overview of the state of the art of restructuring practice in five European countries (Denmark, France, Germany, the Netherlands, and the United Kingdom) will be provided in Section 3, prior to which the key elements necessary for a successful restructuring will be extracted and explained. These key elements also reflect the main obstacles to be overcome in agreeing the contents and approach in the Directive and its eventual legislative counterpart as is demonstrated in a comparative review of the position in Section 4. In Section 5, an analysis of the findings set out herein linked to the Directive is given, followed by a brief conclusion and commentary on the issues present as seen from the authors' points of view.

2 | THE EU DIRECTIVE ON A PREVENTIVE RESTRUCTURING FRAMEWORK

Improving the ability of companies to restructure at an early stage has been a focus of the rescue culture since it was introduced. The financial crisis of 2007/2008 brought this into sharp relief as corporate insolvency became rampant, with a high attrition rate across the EU of businesses failing to recover from their financial difficulties. The years that followed saw many reforms among the Member States, leading to divergences in the approach to restructuring, preventive or otherwise. In 2014, the EU was

> *facing the biggest economic crisis in its history leading to record numbers of bankruptcies in most Member States,*[4]

[2]The U.S. Chapter 11 Bankruptcy Code (reorganisation proceeding) was introduced in 1978. It introduced the debtor-in-possession model, which has inspired legislators across the world. For the international take of Chapter 11, see, for instance, Bob Wessels and Rolef de Weijs (eds), *International Contributions to the Reform of Chapter 11 U.S. Bankruptcy Code* (European and International Insolvency Law Studies Volume 2) (Eleven International Publishing 2015).

[3]See Bob Wessels, “On the future of European Insolvency Law” in Rebecca Parry (ed), *European Insolvency Law: Prospects for Reform* (INSOL Europe 2014), 131–158; Gert-Jan Boon and Stephan Madaus, “Toward a European Business Rescue Culture” in Jan Adriaanse and Jean-Pierre van der Rest (eds), *Turnaround Management and Bankruptcy: A Research Companion* (Routledge Advances in Management and Business Studies) (Routledge 2016), 238–258.

[4]Commission Staff Working Document Executive Summary and Impact Assessment SWD(2014) 62 final *Accompanying the document* Commission Recommendation on a new approach to business failure and insolvency C(2014) 1500 final, 2.

justifying the need to reinforce the rescue and recovery culture to support economic recovery, which resulted in the publication of a Recommendation.[5] The 2014 Recommendation aims at improving conditions and incentives for preventive restructuring of viable businesses and firms.

The Recommendation was based largely on a stakeholder approach, citing the need to protect not only the secured creditor but also unsecured creditors, employees, owners, and the economy as a whole. The aim was to try to bring alignment between the diverse preventive restructuring procedures among the Member States, but it was not seen as effective as few Member States appeared to make any changes as a result of its passing.[6] Thus, a more robust approach was needed to encourage substantive harmonisation among the Member States, leading to a proposal for a Directive ("Proposal") in 2016.[7] Since then, the EU institutions[8] and experts' groups both at EU level hosted by the EU institutions, and at member state level, have discussed the contents of the Proposal and in particular the nature of its main foci: the encouragement of early restructuring; the moratorium; the possibility of debtor-in-possession procedures; the cram-down; new financing; and reducing court formalities.

This Proposal also shifted in its underpinning justification to wording that reflects the Action Plan on Building a Capital Markets Union,[9] which is evident in its statement that

> *a higher degree of harmonisation in insolvency law is thus essential for a well-functioning single market and for a true Capital Markets Union.*[10]

This shift goes from the benefits to the economy and economic stakeholders as well as a general focus on promoting the rescue culture, to justifying these goals by reference to capital investment, the support of stronger and more liquid capital markets, and diversified sources of funding for EU businesses with a view to deepening financial integration, lower costs of credit, and an increase in the EU's competitiveness.[11] This shift demonstrates a lean towards a more neo-liberal economic underpinning justification for financial and commercial regulation in the EU. Although some of the European Parliament's requests have been accepted, many of which attempted to dial back from the neo-liberal economic influence, the General Approach[12] from the Member States of the Council have largely been respected.[13] This resulted in the adoption of the Directive on June 20, 2019.

[5]Commission Recommendation C(2014) 1500 final on a new approach to business failure and insolvency [12.03.2014] OJ: JOL_2014_074_R_0065_01 ("Recommendation").

[6]Horst Eidenmuller, "Contracting for a European Insolvency Regime" (2017) 18 *European Business Organisation Law Review* 273, 275–276.

[7]Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016) 723 final 2016/0359 (COD) (Strasbourg 22.11.2016) ("Proposal").

[8]See the Report by the European Parliament (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)) on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance, and measures to increase efficiency and restructuring, insolvency, and discharge procedures and amending Directive 2012/30/EU [21.08.2018] and the Report by the Council of the European Union 2012/30/EU (2016/0359(COD)) on a Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance, and measures to increase efficiency and restructuring, insolvency, and discharge procedures and amending Directive 2012/30/EU—the General Approach [01.10.2018] ("Council Report").

[9]Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee, and the Committee of the Regions COM(2015)468 final Action Plan on Building a Capital Markets Union [30.09.2015].

[10]Proposal, above note 7, 2.

[11]Idem.

[12]See Council Report (above note 8).

[13]Ibid., Confirmation of the final compromise with a view to agreement [17.12.2018], 3–5.

There were several key points of compromise. First, the debtor-in-possession aspect faced challenges by the European Parliament, which wanted the mandatory appointment of an insolvency practitioner in at least some cases. This wish has been included in the compromise text, while trying to give Member States the greatest flexibility possible in its transposition. The moratorium, cross-class cram-down, and protection for new financing, despite some initial resistance by the European Parliament, have largely been kept. These three aspects of the Directive will be discussed in the country reports below. The confirmed text has aimed to give Member States sufficient flexibility to choose their approach to implementing the agreed principles, though time will tell. Though much of the confirmed text has made its way through to final approval and passage as a Directive, there remains the implementation with Member States being given 2 years from July 2019 to adopt new procedures or adapt existing ones to comply with the Directive.

3 | COUNTRY REPORTS

The Directive will have impact on substantive insolvency laws across the EU. In order to establish how it will impact legislation in Member States, this section will introduce the "state of the art" with regard to restructuring of distressed businesses. Based on the confirmed text available at the time of writing, the country reports will elaborate for its jurisdiction(s) on

1. the development of the restructuring culture;
2. the available legal tools to support the restructuring of insolvent companies; and
3. venues for improvement of restructuring laws.

We will discuss country reports for Denmark, Germany, France, the Netherlands, and the United Kingdom.

3.1 | Denmark

The Danish insolvency regime was introduced in 1872 as a debt collection tool and is still—in 2019—mostly functioning as an enforcement measure more than a tool for rescuing viable, yet insolvent, businesses. Danish Insolvency Law provides for two formal insolvency proceedings. The traditional liquidation procedure (*konkurs*), which has existed since 1872, and a plan proceeding (*rekonstruktion*).[14] The plan proceeding was introduced in 2011 and succeeded the former *suspension of payments*, which had provided for a formal in-court debtor-in-possession procedure since 1975. In contrast to the *suspension of payments*, the primary goal of the plan proceeding is to rescue viable business, however not necessarily to "save the debtor."[15] In 2015, a simplified business transfer "fast track" procedure was proposed, to encourage efficient and cheaper business rescues in the form of business transfers.[16] Despite reasonable arguments, the proposal has not been approved by the Danish Parliament.

[14]Restructuring in the form of a going concern sale is possible during the liquidation process and the regulation on workers' rights "is more flexible in bankruptcy than in restructuring and out of court proceedings, which incentivises sales during bankruptcy proceedings." See more Betænkning nr. 1555/2015 om Ansattes retsstilling under insolvensbehandling, s 183–200.

[15]Betænkning nr. 1512/2009 om rekonstruktion mv, 55–56. Suspension of payments was considered a tool that could facilitate creditor solutions such as creditors' compositions: Betænkning nr. 983/1983 om betalingsstandsning, 7.

[16]Betænkning nr. 1555 om Ansattes retsstilling under insolvensbehandling, 190–200.

Rekonstruktion is a "plan proceeding" whereupon opening all individual enforcement measures, including enforcement of secured credit, are stayed.[17] The stay provides time for the debtor, along with an appointed restructuring administrator and appointed accountant, to draft the restructuring plan, which must include at least one of the following elements: a sale of the business, a compulsory composition, a suspension of payments, or a combination of the three.[18] The plan may include many other elements such as debt for equity swaps, operational changes, or individual sales of assets, but such elements cannot stand alone in the formal proceeding.

Opening of the *rekonstruktion* proceeding requires a company to be insolvent. Insolvency is proven by a simple cash-flow test, but it occurs from the time there is a qualified likelihood that the debtor will become unable to pay future debt. The proceeding is therefore theoretically available to the debtor at a relatively early stage.

A restructuring plan is binding upon all creditors unless a majority of the affected creditors vote against it and provided the bankruptcy court confirms the plan.[19] However, the framework provides no possibility to "cram-down" fully secured or preferential creditors, and in practice, the compulsory element of the plan mostly affects small ordinary creditors, that is, suppliers.[20] Secured credit can, however, be transferred to the buyer of the business without consent of the secured creditor if the transferal of the business is based on a court-based valuation of the secured asset.[21]

The amendments in 2011 were greatly anticipated by practitioners. New provisions on compulsory transfer of executory contracts, annulment of a former repealed contract, possibility of avoidance actions within the restructuring proceeding, and abandoning the requirement of minimum percentages in compulsory compositions were seen as keystones for future successful restructurings.[22] Despite good intentions, the new framework has, however, not been as successful as expected. Less than 3% of all formal insolvency procedures opened in Denmark are restructuring procedures.[23]

One of the reasons for the limited success is the in-built deadlines and associated costs. The process of drafting the plan is often a lengthy and costly process.[24] The legislative framework allows the procedure to last up to a year. Within this timeline, a preliminary *proposal* of the plan should be presented 4 weeks after the opening, and the *actual* plan must be presented and approved at a creditors' meeting at the bankruptcy court. The Danish Bankruptcy Act requires that the proposal must be available for the creditors at least 14 days in advance and this mandatory deadline and mandatory meetings, along with the formal requirements of the plan, have been criticised as hindering a fast and efficient business transfer because the transfer cannot be effectuated before the creditor and court approval meetings. This risk of delaying the transfer potentially results in higher costs and a lower price for the business, which is to the detriment of both the debtor and the creditors.[25] The mandatory appointment of a supervising and active restructuring administrator and a qualified accountant who must provide new and updated balance sheets and value the debtors' assets adds to the expenses.

[17]Danish Bankruptcy Act, § 12c. There are few exemptions from the stay, that is, credit secured by receivables can be enforced during the proceeding.

[18]Ibid., §§ 10, 10a, and 10b.

[19]Ibid., § 13d.

[20]Ibid., § 10c. The undersecured credit is treated as unsecured. Preferential creditors will not be affected by a haircut: § 10a (2)–(3).

[21]Ibid., § 14c (4).

[22]Jens Paulsen, "5 år med Rekonstruktion," *ET* 2017.23.

[23]Danish Statistics (2012–2015); Paulsen (above note 22).

[24]There are no official numbers on remuneration and costs, but a small survey done by KPMG in 2012 showed that on average, the restructuring costs are DKK 1.3 million. See further KPMG, *Præsentation for Konkursrådet 11. oktober 2012.*

[25]Betænkning nr. 1555 om Ansattes retsstilling under insolvensbehandling, 190.

When restructuring small- and medium-sized businesses, the expenses are an especially major concern and can be a sole reason for the debtor not entering a formal proceeding.[26]

The failure of a restructuring procedure is not only explained by the associated high costs and a bureaucratic and lengthy system but also in the difficulty of providing adequate financial means to overcome the liquidity problems and obstacles to accessing funds for a compulsory composition.[27]

These difficulties are at least partly caused by the option to secure credit by a general floating charge. Floating charges were introduced as financial collateral in Danish law in 2006, and the floating charge can cover almost all the debtor's assets, that is, receivables, inventory, and intellectual property. The charge crystallises when insolvency procedures against the chargor are commenced and from this point, the debtor cannot dispose or make use of the secured assets without payment to, or consent from, the charge holder. This leaves the debtor-in-possession and the attempt to restructure the company at the mercy of the charge holder. A floating charge does not only restrain the debtor's operations during the insolvency proceeding. In only 7% of bankruptcy proceedings commenced over a debtor that have granted a floating charge to a charge holder have the proceeding resulted in distributions to the nonsecured creditors.[28] The shortage of liquidity or free assets reduces the chances of providing funds for a composition.

Regardless of the failure to provide a legal framework that not only theoretically facilitates business rescue, viable businesses do survive, not through formal procedures but through voluntary, informal out-of-court contractual agreements between the debtor and its major creditors, that is, financial institutions or business sales to a company group member prior to filing for a formal liquidation proceeding. There are no options in the law for a subsequent court approval of such a contractual agreement or a business sale, and there is a high risk of ex ante avoidance actions and liability for the directors and advisors involved in such transactions. Yet these risks seem to be overshadowed by the fact that the informal out-of-court restructuring is nonpublic, more cost efficient, and less bureaucratic. This is even more acute when the debtor's assets are fully secured by a floating charge or other collateral because only the security right holder's consent is required.

With the major reform in 2011, Danish insolvency law is moving towards a more rescue-friendly culture, but there are still steps to be taken. The Danish insolvency regime is still, regardless of the reform in 2011, unquestionably very creditor oriented and leaves all formal and informal restructuring attempts in the hands of the creditors.[29] A step forward would be the possibility of a court approval of an out-of-court restructuring agreement to shed light and add due process on the silent life of the out-of-court proceedings as well as a "miniprocedure" governing smaller businesses to reduce cost and time. More importantly, a possibility to restructure secured credit more effectively could be the necessary step to be taken on the path of more successful restructurings.[30]

3.2 | France

Traditionally, French insolvency law has been geared towards the rescue of ailing businesses and the preservation of employment, often prioritised over the situation of creditors.[31] Over the last 20 years

[26]Paulsen, above note 22, s 10.

[27]These difficulties are not only problematic in the in-court proceedings but just as relevant in the out-of-court proceedings.

[28]Retsudvalget 2011–12, REU alm del Bilag 244, 7.

[29]Ulrik Rammeskow Bang-Pedersen *et al.*, *Rekonstruktion – teori og praksis* (København Jurist- og Økonomforbundets Forlag, 2011), 23–25.

[30]Articles 9–11, Proposal (above note 7).

[31]See Rebecca Parry, "Introduction" in Katazyna Gromek Broc and Rebecca Parry (eds), *Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer 2004), 1–18, 1.

in particular, several reforms have been passed, introducing new restructuring procedures and updating existing ones in order to make them more efficient. The focus has increasingly been placed on urging companies to be aware of arising financial difficulties and to act to remedy the situation at an early stage.[32]

A brief history of successive French insolvency legislation helps uncover the fact that pre-insolvency proceedings play a key role in the French system. As early as 1967, the roots of modern insolvency law were laid down, where a "twin-track" system[33] was implemented. A business could either be rescued or liquidated. It is noted that the 1967 regime is perhaps one of the earliest articulations of the concept of rescue, although Chapter 11 of the U.S. Bankruptcy Code is more famous and has been "much admired and much emulated across the world."[34]

In the 1980s, three new insolvency laws were passed, one of which introduced a preinsolvency process for the first time.[35] These laws placed the focus on reorganisation, rather than liquidation. They introduced alert procedures, designed to oblige managers of a company showing signs of weakness to explain how they were planning on resolving growing difficulties. In 2005, important insolvency law reforms reached the statute book.[36] The major novelty of the Law of 2005 was the introduction of a new procedure called safeguard (*procédure de sauvegarde*). Modelled on Chapter 11 of the U.S. Bankruptcy Code, the safeguard procedure leaves the "debtor-in-possession" while a safeguard plan is negotiated. Following a rather low take-up of the procedure, the Ordinance of 2008[37] addressed the main flaws of the safeguard proceedings.

In 2010 and 2014, two "pre-pack" procedures were created, the accelerated financial safeguard (*sauvegarde financière accélérée*)[38] and the accelerated safeguard (*sauvegarde accélérée*),[39] which are both variations of the safeguard procedure. The Ordinance of 2014, in particular, extensively reformed French insolvency law with a view to

1 favouring preventive measures;
2 strengthening the efficiency of preinsolvency proceedings; and
3 increasing the rights of creditors in insolvency proceedings.

Finally, in 2016, Law no. 2016-1547 on the Modernisation of 21st Century Justice focused on the promotion of the rescue culture; the enhancement of confidentiality; the ring-fencing of new monies during restructuring; and the improvement of transparency and impartiality.[40]

As a result of these laws, the foundation of a "second-chance" culture has been laid down in France over the last 20 years. The introduction of several rescue-oriented reforms has resulted in a

[32]Marie-Jeanne Campana, "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France" in Gromek Broc and Parry (eds), above note 31, 21–50, 34.

[33]Law no. 67-563 of 13 July 1967. See Paul Omar, "A Reform in Search of a Purpose: French Insolvency Law Changes (Again!)" (2014) 23 *International Insolvency Review* 201, 201.

[34]Idem.

[35]Law no. 84-148 of 1 March 1984; Law no. 85-98 of 25 January 1985, focused on insolvency law; and Law no. 85-99 of 25 January 1985, regulated office holders. See Paul Omar, "The Progress of Reforms to Insolvency Law and Practice in France" in Gromek Broc and Parry (eds), above note 31, 51–78.

[36]Law no. 2005-845 of 26 July 2005.

[37]Ordinance no. 2008-1345 of 18 December 2008. See Paul Omar, "French Insolvency Law: Remodelling the Reforms of 2005" (2009) 6 *International Company and Commercial Law Review* 225.

[38]Law no. 2010-1249 of 22 October 2010.

[39]Ordinance no. 2014–326 of 12 March 2014.

[40]Articles 99 IV 1°, 99 III; 99 VI 2°, 99 IV 3° a) and 99 VI 1° a°, Law no. 2016-1547 of 18 November 2016. See also Articles L611-3, L611-6, L611-11, L621-1, L621-4, L641-1, and L642-2, Commercial Code.

comprehensive and sophisticated legislation on business recovery. At a stage prior to insolvency, two procedures are available to businesses in France: the *ad hoc* mandate (*mandat ad hoc*) and the conciliation (*conciliation*). They are referred to as preventive proceedings (*prévention*) and can only be opened when the debtor is *not* insolvent. These procedures have developed in practice, mostly as a result of the practice of the Commercial Court in Paris in the 1990s,[41] and were formally enshrined in the Law of 1984.[42] *Ad hoc* mandate and conciliation proceedings are initiated by the debtor who requests the President of the Commercial Court to appoint a mediator (either a *mandataire ad hoc* or a *conciliateur*) who will assist the company when negotiating a contractual agreement with its main creditors.

The *ad hoc* mandate is a very flexible procedure, free from many legal formalities. The objective is to invite the main creditors to consider debt rescheduling or debt cancellation or the injection of new financing into the business. There is no statutory limit for the process, and the *mandataire* does not have any management responsibility. An *ad hoc* mandate does not have any cram-down effect and does not trigger an automatic stay on enforcement actions.

In a conciliation, a conciliator (*conciliateur*) is appointed by the Court. His powers are partly set out by statute and partly by the President of the Court. The conciliator may suggest any proposal that is relevant to the preservation of the business, the pursuit of economic activity, and the maintenance of employment.[43] A conciliator can, at the request of the debtor and after consultation of the various creditors, be entrusted with selling the business. An agreement should be reached within a period not exceeding 4 months.[44] The Court must then ratify the agreement if it does not prejudice nonsignatory creditors.[45] Some commentators have argued that one of the main flaws of the procedure is this lack of cram-down effect on dissenting creditors,[46] whose claims are merely suspended for the duration of the implementation of the scheme.[47]

The main difference between the *ad hoc* mandate and the conciliation proceedings is that, in a conciliation, creditors benefit from some protection against the risk of future claw-back and new money is offered a super-priority if the debtor then files for insolvency.[48]

The Law of 2005 consecrated the importance of rescue and second chance by introducing safeguard proceedings (*procédure de sauvegarde*). Constructed on the model of Chapter 11 of the U.S. Bankruptcy Code, the procedure was designed as an anticipatory rescue procedure. The idea behind the introduction of such procedure was to shift the emphasis on rescue to a time before the debtor becomes insolvent.

Article L620-1 of the French Commercial Code sets out the qualifying criteria for commencing safeguard proceedings. Originally, the Law of 2005 required that a company should show that it was facing difficulties that it was not able to overcome, the nature of which was such as to lead to a payment failure situation (*cessation de paiements*).[49] The Ordinance of 2008 amended and relaxed the criterion for entering into safeguard proceedings; safeguard proceedings can now be

[41]See Cécile Dupoux and David Marks, "Chapter 11 à la Française: French Insolvency Reforms" (2004) 1 *International Corporate Rescue* 74.

[42]Conciliation was then called *règlement amiable*.

[43]Article L611-7, Commercial Code.

[44]Ibid., Article L611-6.

[45]Ibid., Article L611-8.

[46]Paul Omar, "Pre-Packs à la Française and Cross-Channel Influence" (2011 Spring) *Eurofenix* 28.

[47]Article L611-10, Commercial Code.

[48]Ibid., Article L611-11.

[49]Ibid., Article L631-1. A French company is considered insolvent when due debts exceed available assets and therefore, finds itself in a payment failure situation.

> *open[ed] on request by the debtor … who, without being in a payment failure situation, can show that he is encountering difficulties which he is not in a position to overcome.*

As a result, the debtor does not need to show that the financial difficulties he is experiencing will lead to a payment failure situation anymore.[50] The safeguard procedure is implemented by a court judgment at the request of the debtor and the court appoints an administrator (*administrateur judiciaire*),[51] whose role is to supervise or assist the debtor in the performance of its management operations.[52] The judgment to open safeguard proceedings also triggers an automatic moratorium (*période d'observation*) under the protection of which the debtor is permitted to propose a recovery plan (*plan de sauvegarde*).[53]

Although the safeguard procedure has been advertised as a "panacea for the ills of French business,"[54] its success has been limited, with a rather low take-up in the years following its introduction.[55] Commentators have argued that this was due to the flaws of the procedure, prior to the 2008 amendments, including the narrow criterion of entry into safeguard proceedings, as well as the stigma of insolvency that still prevails in France and that results in debtors delaying the filing for safeguard proceedings or preferring the lack of publicity offered by more informal procedures.[56] At that stage, companies are often already in a payment failure situation and therefore do not qualify anymore.

Following the major impact of the global financial crisis, more insolvency law reforms were passed. In 2010, a new "pre-pack" procedure called the accelerated financial safeguard (*sauvegarde financière accélérée*) was introduced. Designed as a "pre-pack" variation of the safeguard, the procedure is available to debtors who have initiated conciliation proceedings, who can demonstrate that they qualify for the opening of a safeguard procedure and who are required to have creditors' committees formed for the purposes of approving a rescue plan. Additionally, a rescue plan is required that is believed to be supported by a majority of financial creditors and/or bondholders.[57] The court takes into consideration the views of the conciliator on the progress of the conciliation and the likelihood of adoption of the draft plan by the relevant parties.[58]

In 2014, following the prolonged devastating impact of the global financial crisis on the French economy and the continued underemployment in France, the Government prompted a review of insolvency law.[59] In addition to improving the way the safeguard procedure was working, the Ordinance of 2014 created a new procedure for companies facing financial difficulties, the accelerated safeguard (*sauvegarde accélérée*). The procedure is similar to the accelerated financial safeguard in

[50]However, some commentators have noted that the amendment of the entry criterion is more theoretical than actual, because the debtor must still prove financial difficulties to the court: See Jean-Luc Vallens, "Flexibility in France" (2009 Summer) *Eurofenix* 22.

[51]Article L621-4, Commercial Code. If a company is below a certain threshold fixed by decree of the Council of State (*Conseil d'Etat*), the court does not have to appoint an administrator. The reforms of 2008 enhanced the role of directors who can propose an administrator to the court: Article 14, Ordinance of 2008.

[52]Article L622-1, Commercial Code.

[53]Ibid., Article L620-1.

[54]See Omar, above note 37, 225. See also Pierre-Michel Le Corre, "Présentation générale du projet de réforme des entreprises en difficulté: de l'avant-projet au projet de loi de sauvegarde des entreprises" (2004) *Gazette du Palais* 56–57.4.

[55]Marie-Hélène Monsèrié-Bon and Corinne Saint Alary-Houin, *La loi de sauvegarde des entreprises: nécessité et intérêt d'une réforme annoncée* (Recueil Dalloz, 2008), 941 noted 500 procedures in 2006 and 506 in 2007.

[56]Ibid., 942. Some 2,500 conciliations and *ad hoc* mandates are reported annually: Thierry Montéran, "Pour améliorer le droit des entreprises, osons la réforme" (24 January 2008) 24 *Gazette du Palais* 3.

[57]Article L628-1, Commercial Code.

[58]Ibid., Article L628-2.

[59]See Philippe Pétel, "Entreprises en difficulté: encore une réforme!" (1 May 2014) 18 *La Semaine Juridique* 20.

the sense that it is available to debtors who have been engaged in a conciliation procedure and who can demonstrate that they have drafted a plan that is likely to result in the continuation of the business.[60]

The accelerated (financial) safeguard procedure is somewhat similar to the UK pre-pack administration in terms of speed although it is a plan procedure (instead of a business sale). The accelerated (financial) safeguard allows for a speedy pre-pack to be drafted as the procedure must be completed within a maximum of 3 months from the date of the opening judgment,[61] which would benefit from a cram-down effect and will only involve financial institutions and bondholders in the case of the accelerated financial safeguard.[62]

French debtors benefit from a modern and efficient restructuring regime that offers several options for rescuing their businesses before insolvency. In particular, France offers various preventive restructuring procedures and over the years, has introduced a debtor-in-possession regime, a cram-down element, a moratorium on enforcement actions, and the possibility for debt for equity swap into its legislation. As a result, France already has a number of procedures that satisfy the provisions set out in the Directive.[63] It is worth noting that France also complies with Article 25 of the Directive, which requires that

> *members of the judiciary and of other competent authorities are properly trained and specialised in restructuring, insolvency and second chance matters.*

First of all, the *ad hoc* mandate and conciliation proceedings are conducted under the supervision of a court-appointed practitioner, a *conciliateur* or a *mandataire ad hoc* who are specialised practitioners. So is the *administrateur judiciaire* in a safeguard proceeding. Additionally, since March 2016, specific commercial courts have been created, which have exclusive jurisdiction over conciliation and safeguard proceedings, if the debtor meets certain criteria.[64] Most notably, the same specifically designated commercial courts will be competent for the procedures for the opening of insolvency proceedings in accordance with acts of the EU relating to insolvency proceedings or for procedures that arise from the presence within the court's jurisdiction of the centre of main interest of the debtor.

3.3 | Germany

Within the last two decades, Germany has made some significant progress in the development of its law for insolvency and restructuring. Coming from a very restrictive and restructuring-hostile approach, in which filing for insolvency almost always was synonymous with forced administration, the dissolution of the debtor's company, the liquidation of its assets, and with the debtor being branded as a failed entrepreneur, the German insolvency law was steadily reformed to become more restructuring friendly. The underlying idea that the going-concern value of the debtor should be preserved for the benefit of its creditors inspired the *Insolvenzordnung* (InsO) of 1999.[65] The reform of the German Bond Law (*Schuldverschreibungsgesetz*) in 2009 and the ESUG reforms of the

[60]Article L628-1, Commercial Code.

[61]Ibid., Article L628-8.

[62]See Patrick Rossi *et al*., "Réforme du droit des entreprises en difficulté" (April 2014) *Bulletin* n°258-1, 9.

[63]Above note 1.

[64]Article L721-8, Commercial Code, introduced by Law no. 2015-990 of 6 August 2015.

[65]The InsO replaced the *Konkurs*- and the *Vergleichsordnung*.

Insolvenzordnung in 2012 brought some important innovations. Gradual reforms would follow within the next years. This way, the German law was equipped with some valuable tools for restructurings.

For in-court insolvency procedures, the *Insolvenzordnung* provides a restructuring and reorganisation option (*Planverfahren*) as an alternative to the liquidation of the debtor's business. This option was considerably strengthened as part of the ESUG reforms. The debtor may apply for a debtor-in-possession procedure and, thus, may be given a second chance to lead the business to a brighter future under the protection of a defensive insolvency procedure, protected against individual enforcement by a stay.[66] A restructuring plan may be put to a binding majority vote of the creditors so as to reorganise the debtor's capital structure, by, for example, reducing or prolonging the debt or to swap debt into equity. A cross-class cram-down is possible in the case that the majority of classes approve the plan and that the absolute priority rule applies.[67] During a so-called umbrella procedure, which may precede the opening of the insolvency procedure, the debtor has the privilege to draft such a restructuring plan while the debtor remains in possession as the rule.[68]

For out-of-court restructurings, the reform of the German Bond Law was a major step in the right direction. Up until 2009, the restructuring of bond debt would have required the unanimous consent of all creditors. Collective action clauses for the amendment of payment terms were prohibited.[69] In case of a dispersed lending structure for bond debt, coordination and cooperation problems would, therefore, often make bond debt restructurings out-of-insolvency impossible. With the volume of bond debt as a source for corporate finance becoming increasingly important, the reform in 2009 was a long overdue innovation.[70] Albeit an increase in bond financing, banks continue to play a big role in German corporate finance. Relationship lending in a very concentrated credit structure, often with a *Hausbank* as single/main financial creditor for especially small- and middle-sized enterprises, provides an explanation for why restructurings in Germany—typically in form of standstills/rescheduling of debt (instead of substantial haircuts)—often work out quite smoothly absent a restructuring-friendly law.[71] Informal arrangements generally require stable lending relations and a significant commitment/investment of creditors.[72]

Despite a clear trend towards a more restructuring-friendly legal environment in Germany, there remain several key obstacles on the way towards a truly efficient restructuring regime in Germany. First, there is no (solvent) restructuring procedure available under German law without a threshold for the opening of the procedure. A German insolvency procedure may only be opened in case of

[66]See §§ 270–285, InsO.

[67]For an analysis of the debt-to-equity swap, newly introduced as a restructuring option with the ESUG reforms, see Annika Wolf, *Promoting an Effective Rescue Culture with Debt-Equity-Swaps?* (Nomos 2015).

[68]The debtor may initiate the umbrella procedure only in case of imminent cash-flow insolvency or balance-sheet insolvency. The umbrella procedure is limited to a period of 3 months. See § 270b, InsO. Compare with the exclusivity period for the debtor-in-possession under U.S. Bankruptcy Law (max. 18 months): sections 1121(b) and 1121(d)(2)(B), Chapter 11, U.S. Bankruptcy Code.

[69]Exit consents, as they have been a regular tool to circumvent the vote buying prohibition of section 316(b), Trust Indenture Act in the United States, have not featured as a prominent restructuring strategy in Germany. In 2014, the German Federal Court of Justice clarified that exit consents are void, because they would violate the equal treatment clause of the German Bond Law. See BGH, II ZR 381/13 (1 July 2014). Compare with *Marblegate Asset Management LLC v Education Management Corporation No. 15-2124-cv(L)* (Second Circuit, 17 January 2017).

[70]For a more elaborate discussion of the German Bond Law, see David Ehmke, *Bond Debt Governance* (Nomos 2018), 285–294.

[71]See CODIRE-Report, *German National Findings (2 July 2018) Contractualised Distress Resolution in the Shadow of the Law*, 8.

[72]See, for example, Lawrence Goldberg, "Relationship Lending: A Survey of the Literature" (2004) 56 *Journal of Economics and Business* 315.

(imminent) cash-flow insolvency or balance-sheet insolvency.[73] If the debtor applies for insolvency, the debtor will have handed over the reins to the insolvency court and regularly to the insolvency practitioner.[74] Neither can the debtor exit the procedure on its own, nor can the debtor be sure that its application for a debtor-in-possession procedure will be approved. In practice, the vast majority of insolvency procedures—especially for smaller debtors—remain to be administered by an insolvency practitioner. The German approach is all too often that "one should not put the fox in charge of the henhouse."[75]

Absent a convincingly attractive option to file for insolvency for many debtors, that is, absent a good prospect to be rewarded with a carrot, the debtor is threatened with a stick under German law. Not only does the debtor face liability for delayed insolvency.[76] The debtor may be subject to criminal charges.[77] It is for these reasons that debtors regularly wait until the point of no return to file for insolvency, long enough to exploit any possible opportunity for out-of-court turnarounds. The harsh punishment that may follow an insolvent debtor's misbehaviour in parallel with the frequency of forced administration procedures (instead of debtor-in-possession restructurings) still contribute towards the stigma of insolvency, which itself can be a powerful deterrent for debtors and directors to file for insolvency.[78]

Second, out-of-court restructurings are being inhibited by the insolvency law itself as well as by ambiguity in the German tax law, so that many German debtors are incentivised to try to find a solution all by themselves. A threat to creditors and debtors alike has been the very strict German avoidance law. A creditor's cooperation in restructuring negotiations exposing its knowledge of the debtor's precarious financial situation regularly puts any future transactions with such creditor at the risk of avoidance and recovery. A recent reform of the avoidance law in 2017 has lessened but not removed this problem from the parties' calculation.[79] The creditor's cooperation and especially the advancement of new credit in times of financial distress continue to be a risky undertaking considering that the creditor may find itself subject to avoidance (and possibly even liability) if a court finds the creditor's cooperation to have disadvantaged other creditors.[80]

Another obstacle to successful restructurings out-of-court is the risk that a debt relief negotiated between creditors and a debtor may be treated as a taxable benefit. The legal treatment of a debt relief is still uncertain. Although the creditors might be willing to make concessions for a value-maximising debt restructuring that should increase their chance to be repaid their adjusted debt claim

[73]See §§ 17 (cash-flow insolvency), 18 (imminent cash-flow insolvency), and 19 (balance-sheet insolvency), InsO.

[74]According to § 80, InsO, the insolvency administrator assumes control of the debtor's business with the opening of the insolvency procedure.

[75]For a discussion of the debtor-in-possession option in German insolvency law, see Stephan Madaus, "Zustand und Perspektiven der Eigenverwaltung in Deutschland" (2015) *KTS Zeitschrift für Insolvenzrecht* 115.

[76]See §§ 15a (1)–(3), InsO; § 64, Gesetz betreffend die Gesellschaften mit beschränkter Haftung; §§ 93(5), (1)–(3), Aktiengesetz; §§ 823 (2) and 826, Bürgerliches Gesetzbuch.

[77]See §§ 15a (4)–(5), InsO; §§ 283, 283a, 283b, 283c, and 283d, Strafgesetzbuch.

[78]For a discussion of the stigma of insolvency and the extra-legal corporate rescue in Germany, see Christoph Paulus, "Die Insolvenz als Sanierungschance– ein Plädoyer" (2005) 34(4) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 309.

[79]§ 133, InsO (wilful creditor discrimination). As a consequence of the 2017 reform, the avoidance period was shortened to 4 years for most cases. Moreover, creditor concessions, for example, a prolongation of the (re-)payment period, will trigger a rebuttable assumption that the creditor had no knowledge of the debtor's imminent cash-flow insolvency. With this reform, the lawmaker has reversed a long history of court decisions that had continuously expanding the scope of § 133, InsO. For a critical analysis of the German avoidance regime, see CODIRE-Report, *Final Report (3 July 2018) Contractualised Distress Resolution in the Shadow of the Law*, 12–13.

[80]The uncertainty regarding the avoidance/liability for cooperating creditors has been named as a major deficit of the German law in CODIRE-Report, above note 71, 8.

postrestructuring, creditors would understandably be less willing to agree to a restructuring to the benefit of the German treasury.[81]

Germany has certainly made progress in the development of its insolvency law. Considering that the lending structure continues to be rather concentrated, it may be well argued that the insolvency law does not have to follow suit with the debtor-friendly U.S. model of Chapter 11, which finds its justification in the absence of coordinated creditor action so that the debtor itself must be incentivised to file for the opening of the U.S. bankruptcy procedure.[82] However, it would be in the best interests of the creditors if especially obstacles for an out-of-court restructuring option would be removed so that at least contractual arrangements for coordinated creditor action could effectively compensate for the lack of an early court-light restructuring option.

3.4 | The Netherlands

When looking at the law at the books, the Dutch Bankruptcy Act ("DBA") may seem restructuring hostile. The available tools for restructuring a distressed business are limited. Besides suspension of payment (*surseance van betaling*), there are no specific formal or preinsolvency restructuring proceedings available. In addition, several core elements that have been emphasised by the EU legislator for fostering a European business culture are not yet present.[83] The DBA does not provide for a debtor-in-possession, where, with limited court involvement, a restructuring plan can be adopted by a majority, following a cross-class cram-down of dissenting classes, which may be confirmed by the court. Nor is it possible to request a temporary stay of individual enforcement actions when there is only a likelihood of insolvency. Still, within the existing legal framework, a well-established insolvency practice has emerged, also providing for the rescue of businesses in distress.[84]

The DBA provides for three formal insolvency proceedings:

1 bankruptcy (*faillissement*)[85];
2 suspension of payment[86]; and
3 personal debt rescheduling (*schuldsanering natuurlijke personen*).[87]

Only the former two proceedings are available for corporate debtors. Suspension of payment aims at facilitating the continuation of (imminently) insolvent, but viable, companies, which can be requested only by the debtor. This proceeding provides for a stay of the nonsecured creditors, providing the debtor with time to reorganise the business in order to regain viability.[88] In practice, this proceeding

[81]Ibid., 6. See also the controversial Decision by the Federal Tax Court: Decision GrS 1/15 (28 November 2016).

[82]See David Skeel, "An Evolutionary Theory of Corporate Law and Corporate Bankruptcy" (1998) 51 *Vanderbilt Law Review* 1325 for a comparison of the ex ante-oriented German system of corporate and corporate insolvency law, evolving in response to a rather concentrated lending and ownership structure, and the ex post-oriented U.S. system, evolving in response to a rather dispersed lending and ownership structure.

[83]Recommendation, above note 5, Recital 1 and Recommendation 6; Proposal, above note 7, Recitals 16–31. See also Boon and Madaus, above note 3, 238–258.

[84]See Reinout Vriesendorp and Rick van Dommelen, "Inventory Report on The Netherlands" in European Law Institute (eds), *Rescue of Business in Insolvency Law* (OUP 2019).

[85]Article 1 *et seq.*, DBA.

[86]Ibid., Article 214 *et seq.* Because the proceeding has limited use in realising a restructuring in practice, it will be discussed only to a limited extent.

[87]Ibid., Article 284 *et seq.*

[88]Ibid., Article 214 *et seq.*

is perceived as a forerunner for requesting the opening of formal insolvency proceedings.[89] Bankruptcy is directed at the liquidation of the debtor, and commencement of bankruptcy can be requested by the debtor and the creditors. In practice, the insolvency practitioner (*curator*) in bankruptcy will pursue a (partial) going-concern sale where the company is perceived to be still (partly) viable and where this is in the best interest of the creditors.

In addition to formal insolvency proceedings, the debtor may propose an out-of-court composition to its creditors (*buitengerechtelijk akkoord*). This requires full support of the creditors, which limits its use significantly. Hold-out creditors many times prevent such a composition. However, limited exceptions have been accepted to the consensual nature of an out-of-court composition. This is the case when the creditor makes abuse of his power to reject an out-of-court composition[90] or pursues to be paid a larger part of his claim compared with the out-of-court composition (which the creditor rejected).[91]

Furthermore, banks will usually play a significant role because the Dutch financial market is characterised by a limited group of large banks and availability of alternative sources of financial means is limited. Within formal insolvency proceedings, it is also possible to propose a composition.[92] When the quorum is met, and the composition is confirmed by the court, it becomes binding on all ordinary unsecured creditors. Therefore, it is also referred to as a compulsory composition (*dwangakkoord).*[93]

In recent years, several attempts have been made to reform the DBA, also aiming at improving the options for restructuring. In 2007, a proposal for full reform of the DBA was presented, which would have introduced more restructuring tools, including a Dutch scheme of arrangement.[94] However, in 2011, this proposal for substantive reform of the DBA was rejected as a substantive legislative reform was considered unfeasible at that time. Following the rise of insolvency proceedings, the market would require a reliable insolvency law. Instead, the minister presented in 2012 a legislative programme for the recalibration of specific elements of Dutch insolvency law.[95] One of the three pillars[96] of this programme regards the introduction of more effective tools to promote restructuring of distressed businesses and will bring forward three legislative proposals. It includes

1 a Dutch pre-pack (*Wet Continuïteit Ondernemingen I*, "WCO I");
2 a Dutch scheme of arrangement (*Wet homologatie onderhands akkoord ter voorkoming van faillissement*, "WHOA"[97]) for a debtor when there is a likelihood of insolvency; and
3 specific measures for an insolvency practitioner to provide for more effective and timely resolution of insolvency proceedings (*Wet versterking doelmatigheid faillissementsprocesrecht*).

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

[90]The Netherlands Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7799 (*Payroll*), 3.5.2 and 3.5.3. The abuse of power exception is available under exceptional circumstances only. The situation that a creditor is aware of the pressing financial situation debtor or an imminent bankruptcy will in general not justify the exception. Neither is a majority of creditors that are willing to accept the out-of-court composition sufficient to characterise the rejection of another creditor as abuse of power.

[91]The Netherlands Supreme Court 24 March 2017, ECLI:NL:HR:2017:485 (*Mondia/V&D*), 3.4.3 and 3.4.4.

[92]Articles 138 and 252 *et seq.*, DBA for, respectively, bankruptcy and suspension of payments.

[93]Ibid., Articles 145, 268(1) and 332(2)(3) for, respectively, bankruptcy, suspension of payments, and personal debt discharge. This will only regard the unsecured creditors. With secured or preferential creditors, a consensual agreement may be pursued.

[94]Commissie Kortmann, *Voorontwerp Insolventiewet* (2007).

[95]*Kamerstukken II* 2010/11, Aanhangsel nr. 1014; *Kamerstukken II* 2012/13, 29 911, nr. 74.

[96]The other two pillars consider combatting insolvency fraud and modernising Dutch insolvency law.

[97]This can be translated as "Act on the confirmation of a private restructuring plan in order to prevent bankruptcy." In an earlier draft, the proposal was called WCO II.

The legislative process of these three bills is currently pending, (draft) bills for WCO I and WHOA have been presented.[98] Meanwhile, legal practice has been effective in finding ways to provide for a functional and effective restructuring practice.[99] In many cases, the insolvency practitioner will pursue a debt-for-equity swap of the insolvent company's assets to ensure continuation of the business. Furthermore, also since 2011, a Dutch pre-pack has been developed. It follows the U.K. example but is not yet based on statutory law.[100] Except for several district courts,[101] the courts approve of this approach and assist with appointing or indicating a provisional insolvency practitioner and supervisory judge in the phase where a pre-packaged deal is being prepared.

In 2017, the Court of Justice of the European Union (CJEU) gave a preliminary ruling on the pre-pack that was applied with respect to the Dutch Estro Groep. After the transfer of the business to Smallsteps B.V., only a part of the workers was offered a new job. The CJEU stated that this pre-pack was prepared before the declaration of insolvency but put into effect afterwards. It concluded that the Dutch pre-pack, which is considered an insolvency proceeding, was not ultimately aimed at liquidation and did not take place under (adequate) supervision of a competent public authority. Therefore, the workers' protection in Articles 3 and 4 of the Transfer of Undertakings Directive (“Directive”)[102] is applicable (without the exception of Article 5(1) in the case of insolvency). Consequently, all workers are considered to have been transferred along with the undertaking to Smallsteps B.V., the buyer.[103]

In subsequent cases, Dutch district courts had to decide on the application of Article 5 of the Directive in pre-packs. The courts concluded, following a restrictive interpretation of the preliminary ruling of the CJEU, that a pre-pack in these two cases fall within the scope of Article 5 of the Directive.[104] Therefore, employees did not automatically transfer along with the business to the buyer.[105]

The current state of Dutch law limits the timely restructuring of businesses in distress a number of ways. First of all, no preventive restructuring proceedings are available. Attempts for out-of-court

[98]In September 2018, the minister provided the latest update on the progress with these legislative processes, see *Kamerstukken II 2017/18,* 33 695, nr. 17.

[99]For instance, the World Bank has ranked the Netherlands top 10 for many years in its global Doing Business reports. The 2019 report is available at <http://www.doingbusiness.org/en/reports/global-reports/doing-business-2019>. For a critical review on the applied methodology in these reports, see University of Leeds, *Study on a New Approach to Business Failure and Insolvency* (2018), 32–41, available at <https://ec.europa.eu/info/sites/info/files/insolvency_study_2016_final_en.pdf>.

[100]See, for instance, Nicolaes Tollenaar, “Faillissementsrechters van Nederland: geef ons de pre-pack!” (2011) 23 *TvI*; Harold Koster, “Herstructurering bij insolventie: naar de pre-pack plus!”(2013) 7 TvI; Peter Vas Nunes, “Do the rules on transfer of undertaking apply in a ‘pre-pack’ insolvency? A Dutch court asks the ECJ for guidance (NL)” (2016) 1 *European Employment Law Cases.*

[101]Because the pre-pack is not based on statutory law, not all district courts approve of this approach, it has resulted in forum shopping within the Netherlands. This was the case with the Estro Groep. Prior to applying to the court for a pre-pack, Estro Groep moved its registered seat from Utrecht to Amsterdam: District Court Midden-Nederland 24 February 2016, ECLI:NL: RBMNE:2016:954, 2.9. The aforementioned bill WCO I also aims to resolve this issue.

[102]Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ 2001 L 82, 16.

[103]CJEU, 22.6.2017, C-126/16—*Federatie Nederlandse Vakvereniging v. Smallsteps BV*, ECLI:EU:C:2017:489, 61. The CJEU followed the Opinion of Advocate General Mengozzi, 29.7.2017, Case C-126/16—*Federatie Nederlandse Vakvereniging v. Smallsteps BV*, ECLI:EU:C:2017:241.

[104]District Court Noord-Holland 12 October 2017, ECLI:NL:RBNHO:2018:8423, 5.8, 5.9, 5.14, and 5.20–5.22; District Court Gelderland 1 February 2018, ECLI:NL:RBGLD:2018:447, 4.8.

[105]These cases led to ample discussion, see: Ilan Spinath, “De beperkte reikwijdte van het Smallsteps-arrest” *MvO* 2017/10.6; Leonard Verburg, “Smallsteps en de ruimte voor een (voorbereide) doorstart uit faillissement” *TvCu* 2018/3; Willem Bouwens, “Het voetspoor van Smallsteps” *TvI* 2018/4; Jessie Pool, “De eerste toepassingen van Smallsteps in Nederland” *TvI* 2018/39; Ilan Spinath, “Niet wrijven in de vlek” *TvI* 2018/53.

restructurings are many times not successful as dissenting creditors, in principle, cannot be bound to a composition and can force a debtor into bankruptcy proceedings. Second, there is limited room to facilitate a pre-pack following the preliminary ruling of the CJEU. Furthermore, in order to restructure the debtor's assets and liabilities, the debtor faces a concentrated financing market where alternative sources of financial means are limited. This may limit the chances for a successful restructuring.

The introduction of preventive restructuring proceedings, as envisaged under both the Directive and the Dutch draft bill WHOA, would be welcome additions for the Dutch restructuring toolbox. It will provide for debtor-in-possession proceedings, increased room for a stay, and cross-class cramdown of dissenting classes.

3.5 | United Kingdom

The United Kingdom has long been a haven for corporate rescue and restructuring, but it has not always facilitated flexible procedures that cater to a variety of stakeholders, which in recent years, it has come to do. It was partly as a result of the United Kingdom's accession to the EU that it began to espouse the rescue culture in order to make itself an attractive potential member and to align its market with other Member States.[106] From that time, it has built itself into a preferred jurisdiction for many corporate restructuring processes, due to its useful procedures and the judiciary's flexible views on jurisdiction. From the 1970s, the United Kingdom has gone from a creditor wealth maximisation[107] focused insolvency system to a jurisdiction that has come to embrace corporate rescue, having realised that the economic benefits of preserving a viable company was an equally important consideration to maximising distributions.[108]

This realisation was further espoused by the esteemed Cork Committee, whose report[109] was followed by the Insolvency Act 1986, as amended by the Enterprise Act 2002, which introduced the United Kingdom's first corporate rescue-orientated procedures.[110] It is out of the Enterprise Act reforms that procedures that can be viewed as at least notionally preventive in nature evolved: company voluntary arrangements (CVAs)[111] and the new administration procedure.[112] The latter was rendered more effective and preventive through the practitioner devised pre-pack version of administration. Corporate rescue has now given way to some extent to a focus on prevention. Procedures such as the CVA, pre-pack, and the scheme of arrangement ("SoA"),[113] discussed below, are now often used in anticipation of insolvency.[114] It is questionable, however, exactly how preventive in nature the former two are, given the formal requirements of using these procedures.

[106]Jennifer Gant, *Balancing the Protection of Business and Employment in Insolvency: an Anglo-French Perspective* (Eleven International Publishing 2017), 113.

[107]For a discussion of this important insolvency theory, see Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Beard Books 2001).

[108]Jennifer Gant, "Social Policy and Insolvency: Struggles towards Convergence" (2014) 2(4) *Nottingham Insolvency and Business Law e-Journal* 49, 53.

[109]Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (1982) Cmnd. 8558; see Paul Omar and Jennifer Gant, "Corporate Rescue in the UK: Ten Years after the Enterprise Act 2002 Reforms" (2016) 24 *Insolvency Law Journal* 40 for more detailed discussion of the Cork era and its impact on corporate rescue in the United Kingdom.

[110]Company Voluntary Arrangements (Part I, Insolvency Act 1986); Administration (Part II and Schedule B1, Insolvency Act 1986); Receivership (Part III, Insolvency Act 1986, though this is largely repealed by the Enterprise Act 2002 save for certain circumstances).

[111]Part I and Schedule A1, Insolvency Act 1986.

[112]Ibid., Parts II, III and Schedule B1.

[113]Part 26, Companies Act 2006.

[114]John Tribe, "Companies Act Schemes of Arrangement and Rescue: The Lost Cousin of Restructuring Practice" (2009) 24(7) *Journal of Business & Financial Law* 386, 386.

The Enterprise Act 2002 ushered in the age of administration, which was quickly co-opted by practitioners to create a practice-based procedure aimed at quick (and sometimes dirty) restructurings based on an administration procedure that is fully pre-planned prior to a brief entry into the formality of the procedure.[115] The development of the pre-pack was facilitated significantly by an introduction by the Enterprise Act reforms of out-of-court appointments, making it possible to avoid a court procedure until the last minute.[116] The pre-pack is a procedure within which a number of things can happen, such as the restructuring of the company, the rescheduling of debt, and the selling of businesses of the company. It offers secured creditors:

> *a high level of control and certainty, making it a very attractive alternative to any protracted formal insolvency process.[117]*

Although fundamentally, the pre-pack is still an insolvency procedure, it has grown in popularity and in parallel with a focus on preinsolvency or "up-stream" procedures. It now serves an important role in recovery and contingency planning,[118] thus qualify in some degree as a preventive restructuring procedure.

As an administration procedure, a pre-pack must satisfy the same criteria but benefits from the ability to appoint an administrator out-of-court, delaying the required formalities until the last minute. In most cases, the company will already be insolvent, having insufficient assets to discharge its debts and liabilities,[119] taking place within insolvency rather than in its shadow. However, it does offer the benefit of a moratorium,[120] which makes it a valuable mechanism within which to commence other procedures that may not benefit from a moratorium, such as the CVA and SoA, but that provide preventive options to companies in financial distress.[121]

A CVA is an agreement made between a company and its creditors as a composition in satisfaction of the company's debts.[122] A CVA can be agreed whether or not the company is insolvent or likely to become insolvent[123] but is often conceived through an administration or pre-pack procedure so that the company can benefit from a moratorium,[124] preventing the issuance of insolvency proceedings[125] or other legal proceedings[126] that may be instituted to exercise contractual remedies for the debts owed.[127] The absence of a moratorium has been seen as a limiting factor for the up-stream use of a CVA as insolvency practitioners may use these from within the more formal administration

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[115]Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018), 492; Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017), 371.

[116]Omar and Gant, above note 109, 56.

[117]Stephen Harris, "The Decision to Pre-Pack" (2004) *Recovery* (Winter) 26.

[118]Finch and Milman, above note 115, 373–374.

[119]Section 123, Insolvency Act 1986.

[120]Ibid., Schedule B1, paragraphs 42–44.

[121]van Zwieten, above note 115, 491.

[122]Section 1, Insolvency Act 1986.

[123]Ibid., section 1(1).

[124]John Tribe, "Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy" (2009) 5 *Journal of Business Law* 454, 472.

[125]Schedule B1, paragraph 42, Insolvency Act 1986.

[126]Ibid., Schedule B1, paragraph 43.

[127]Note that there is a small company moratorium available for the CVA since it was introduced in the Insolvency Act 2000, amending the Insolvency Act 1986 in Schedules 1A and A1, but this has been rarely used since 2003, according to the Insolvency Service, *A Review of the Corporate Insolvency Framework* (25 May 2016), 2–16.

or pre-pack procedures. However, although this seems a reasonable approach to take, it has been shown that most insolvent companies have frequently opted for a stand-alone CVA.[128]

A CVA would be no different than an informal workout without the possibility of binding all creditors to the agreement. Although it does not, without agreement, affect the rights of secured creditors, unsecured creditors with voting rights will be bound by a majority decision whether they have approved the agreement or not.[129] The agreement is essentially "crammed down" upon them against their will.[130] One might expect that cram-down aspect of the CVA is an attractive aspect that would encourage an increased use of the procedure, but the uptake of the CVA has been low since 1986, despite the introduction of more flexibility over this period.[131] On its own, a CVA is usually used as a means of trading and rarely preserves the business for the company itself, though it can facilitate the disposal of the businesses on more favourable terms.[132] Given this tendency, it is questionable whether its use truly promotes *preventive* restructuring if, as a result of its general use, the company ceases to exist.

The United Kingdom also has one of the most sought after "up-stream" preventive restructuring procedures in its famed SoA,[133] which has its roots in Victorian legislation.[134] The SoA is derived from company law,[135] rather than insolvency law, and can be used by solvent or insolvent companies. As such, it presents a more comprehensive opportunity to rehabilitate a company at an earlier stage of financial difficulty. The SoA allows a "compromise or arrangement" to be agreed between a company and "its creditors, or any class of them." One significant benefit of the SoA is that it can modify the rights of shareholders and creditors without their consent as once the voting exceeds the requisite threshold, it binds all affected parties.[136] In addition, because a SoA does not require the company to be insolvent to be instigated, directors can remain in place without the interference of an insolvency practitioner, taking a debtor-in-possession approach to restructuring.[137] The SoA can be truly preventive in nature, whereas the pre-pack still requires certain formalities, including that a company is insolvent or approaching insolvency,[138] in order to utilise it.

The SoA is, however, also a complex, expensive, and time-consuming procedure[139] and has been used on few occasions for domestic insolvencies.[140] Schemes require court approval, adding to the time and expense, so have often been used by companies having complex capital structures involving secured debt so that the "cram-down" aspect can be used against dissenting creditors whose rights cannot be overridden in a CVA.[141] Once sanctioned, the scheme will be binding on all creditors or the class of creditor affected, the company itself, and the liquidator if relevant. However, creditors

[128]Peter Walton, Chris Umfreville, and Lézelle Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (Report Commissioned by R3) (May 2018), paragraph 4.1.2.1.

[129]Section 4(3)–(4), Insolvency Act 1986.

[130]van Zwieten, above note 115, 596–597.

[131]Finch and Milman, above note 115, 425.

[132]van Zwieten, above note 115, 588–589.

[133]Sections 895–901, Companies Act 2006.

[134]Joint Stock Companies Act 1870.

[135]Part 26, Companies Act 2006; David Milman, "UK Restructuring Law Review 2016" (2016) 383 *Company Law Notes* 1, 2.

[136]van Zwieten, above note 115, 411.

[137]Ibid., 412.

[138]Per Schedule B1, paragraph 27, Insolvency Act 1986, unless the application is made by the holder of a floating charge per Schedule B1, paragraph 14, Insolvency Act 1986.

[139]Tribe (above note 114).

[140]van Zwieten, above note 155, 412.

[141]Ibid., 575–576.

outside of the scheme are not bound and retain their contractual enforcement rights.[142] That said, the scheme has evolved from a method of compromising or settling creditors' claims to allowing for a court directed procedure to produce a plan with various potential outcomes, including the sale or disposal of the business, merger or demerger of companies, restructuring capital, debt, and other obligations, among many other options. This flexibility and versatility of the scheme, as well as its overall effectiveness, have made it a sought-after procedure for many cross-border insolvencies.[143]

Although the United Kingdom already has a number of procedures that satisfy the provisions set out in the Directive, including the availability of the preventive restructuring schemes generally, the availability of moratoria, the requirement for restructuring plans, the availability of the cram-down, and the protection of interim financing, the last few years have seen a number of additional recommendations for reform. In 2017 and 2018, consultations on insolvency and corporate governance were undertaken that made some recommendations for reform of U.K. insolvency procedures. This includes the introduction of a preadministration moratorium for financially distressed companies while they consider their options for restructuring. There has also been a recommendation to introduce a new restructuring plan that would enable cross-class cram-downs upon all dissenting classes of creditors if court approval is given and to prohibit the enforcement of *ipso facto* clauses,[144] all of which are also present in the Directive.

The European Insolvency Regulation ("EIR") (and its Recast)[145] has been largely beneficial for the United Kingdom because for decades, London has been viewed as a leading legal and financial services centre. The passage of the EIR further facilitated a shift of European restructuring activities to the United Kingdom following the passage of the EIR.[146] One of the most popular procedures for foreign entities shopping for restructuring procedures in the United Kingdom is the SoA. The English judiciary has been keen to allow the English/Welsh jurisdiction to be used by foreign companies wishing to restructure, often allowing jurisdiction to be found on scant evidence.[147] However, following Brexit, depending on the kind of relationship the EU and the United Kingdom have once all is said and done, much of this is likely to change.

Directly applicable EU law such as the EIR and its Recast may be "converted" into U.K. Law but in such a way that the law can be accommodated within the U.K. legal system.[148] Without this conversion, any EU regulations would simply fall away. There are a number of practical issues associated with directly applicable regulations to be converted that would no longer operate because the United Kingdom was no longer a Member State. One of the challenges that has been recognised is where a regulation is based on reciprocal arrangements, which may not be secured as part of the United

[142]Ibid., 586.

[143]Paul Omar, "The Impact of Brexit on Cross-Border Restructurings" in Jennifer (ed), *The Rise of Preventive Restructuring Schemes: Challenges and Opportunities* (Papers from the INSOL Europe Academic Forum Annual Conference, Warsaw, Poland, 4–5 October 2017) (INSOL Europe 2018), 109–129, 120.

[144]Elizabeth McGovern, Monika Lorenzo-Perez and Kerry Goodleff, "A Shift in Focus: Rescuing Viable Companies" (Reed Smith Global Restructuring Watch, 26 October 2018), available at <https://www.globalrestructuringwatch.com/>.

[145]Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L 160/1; Regulation (EU) No. 848/2015 of 20 May 2015 (OJ 2015, L141/19) on insolvency proceedings (EIR).

[146]Gerard McCormack, "Jurisdictional Competition and Forum Shopping in Insolvency Procedures" (2009) 68(1) *Cambridge Law Journal* 129.

[147]Milman, above note 135, 2.

[148]The European Union (Withdrawal) Act was passed in late 2018. The mechanisms for withdrawal are discussed in the Government Briefing 7793 2 Paper by Jack Caird, *Legislating for Brexit – The Great Repeal Bill* (House of Commons Library, May 2017); for an experts view on the impact of Brexit on Cross-Border Insolvency, see also the "CERIL Statement 2018-2 on Cross-border Restructuring and Insolvency post-BREXIT" (12 December 2018), available at <http://www.ceril.eu/publications/ceril-report-2018-2-on-cross-border-restructuring-and-insolvency-post-brexit/>.

Kingdom's post-Brexit relationship with the EU. If such arrangements are not secured, then maintaining legislation that relies upon them, such as the Recast EIR, may no longer be in the best interests of the United Kingdom.[149] As a result, future U.K. insolvency proceedings would no longer be recognised automatically in the EU because the United Kingdom will no longer be a Member State as stipulated in the EIR Recast. The EIR would therefore no longer work for the United Kingdom regardless of what legislation the U.K. government introduces to correct this inadequacy.[150] While true that the Scheme of Arrangement does not fall under the EIR Recast as it is a UK Company's Act 2006 procedure, the Directive is introducing the potential for competition in restructuring with other Member States. Without some guarantee of reciprocity, as is provided by the EIR Recast, the UK may lose its attraction as a restructuring destination, and if the UK does introduce a new procedure for preventive restructuring, its non-inclusion in Annex A of the Recast EIR will not bode well for the UK's power in the field of restructuring in Europe.[151] It is yet to be seen how this situation might be resolved to the benefit of the U.K. restructuring market.

Directives, however, having been implemented into U.K. legislation will continue to apply.[152] But equally, following Brexit may be amended or repealed depending on their fit with the policy interests at play. The impact of Brexit, given the timeline of October 31, 2019, as the final exit date, means that

1. it is highly unlikely that the Directive will ever find its way into U.K. legislation; and
2. the flexibility of U.K. restructuring procedures may be lost to EU Member States seeking to use them due to the disapplication of the EIR and its Recast.

Though this will not apply to the SoA, the Directive is introducing procedures that jurisdictions such as the Netherlands and Germany are already seizing, which means greater competition with the United Kingdom as a destination for restructuring. Although the United Kingdom already has many procedures in place that reflect what the Directive is proposing, the greatest obstacle to its continued development in line with the EU rescue culture must certainly be its pending divorce from the Union.

4 | COMPARATIVE REVIEW

The country reports on the "state of the art" of restructuring law and practice in Denmark, France, Germany, the Netherlands, and the United Kingdom have shown quite a diversity of approaches. In this section, the findings will be compared and linked to the Directive. This section will mainly focus on four broad clusters for a comparative review:

1. the availability of an early restructuring mechanism;
2. the possibility to bind dissenting creditors by a majority vote;
3. the incentives to enter a preventive/early restructuring mechanism; and

[149]Department for Exiting the EU Report, paragraph 3.3.

[150]Stephen Leslie, "The Repeal Bill-How Great is it for Restructuring and Insolvency Professionals?" (LexisNexis Randi, 11 August 2017) available at <https://blogs.lexisnexis.co.uk/randi/the-repeal-bill-how-great-is-it-for-restructuring-insolvency-professionals/>.

[151]Gerard McCormack and Hamish Anderson, "The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom" in Gerard McCormack and Hamish Anderson (eds), *The Implications of Brexit for the Restructuring and Insolvency Industry: A Collection of Essays* (INSOL International 2017), 3–21.

[152]Jack Caird and Vaughne Miller, *The European Union (Withdrawal) Bill: Retained EU Law* (House of Commons Library 2017), available at <researchbriefings.files.parliament.uk/documents/CBP-8136/CBP-8136.pdf>.

4 the "restructuring culture," that is, the soft indicators such as the stigma of insolvency versus the spirit of a second chance/fresh start.

4.1 | The availability of an early restructuring mechanism

The Directive provides for an early restructuring option, which shall be available in the "likelihood of insolvency; a term which is, in fact, quite open for definition by the Member State."[153] In our five-country analysis, the United Kingdom is the country that provides for the most effective restructuring procedure at a very early stage in time, largely because it is not technically an insolvency procedure, sitting as it does within the Companies Act 2006. The SoA, which has featured prominently in Europe in forum shopping cases, is available without any threshold for commencement, that is, it offers a restructuring option for still solvent debtors. The CVA, similarly, does not require the debtor to be insolvent, though it would not bind secured or preferential creditors. Although these two procedures are often entered via an administration or pre-pack procedure, they still offer a noninsolvent restructuring solution.

Although the SoA has been viewed as more effective, French law provides two procedures prior to insolvency that are conceptually closer to the Directive, providing more extensive restructuring tools than the scheme.[154] The *Mandat ad hoc* and *conciliation* are not, however, equipped with the tools of binding dissenting creditors. A fully equipped restructuring procedure is available with the *sauvegarde* procedure, which may be entered upon the experience of financial difficulties. A threshold for entry exists, even though it is not high. In practice, nonetheless, many businesses wait too long due to a desire to avoid the stigma of insolvency.

In Denmark, the definition of insolvency applies quite broadly so that the debtor may enter the available restructuring procedure, *Rekonstruktion*, at an early stage in time, although insolvency is still required. In Germany, the debtor must be (imminent) cash-flow insolvent or balance-sheet insolvent to enter a court-supervised restructuring procedure. Also, the umbrella procedure requires imminent cash-flow or balance-sheet insolvency to be opened, that is, is not available for solvent debtors. In the Netherlands, finally, there is no effective restructuring procedure available given that the suspension of payments (*surseance van betaling*) only affects ordinary unsecured creditors. The effective pragmatism in designing a pre-pack without legislative support worked for quite a while until the CJEU limited the extent to which such procedures can be used when it impacts the workforce.

4.2 | The possibility to bind dissenting creditors by a majority vote

The Directive would come with a mechanism to bind dissenting creditors (and members) by a qualified majority vote in each class.[155] Such a mechanism to bind creditors is paramount in case of dispersed and loose lending relations whereas a cooperative restructuring without a mechanism to bind dissenting creditors may still work out quite smoothly in case of concentrated relationship lending. According to the Directive, the affirmative vote of one creditor class "in-the-money" and affected by the plan as well as by a simple majority of classes shall be sufficient for a cross-class cram-down

[153]Directive, above note 7, Article 4(1).

[154]Reinhard Dammann, *The Commission Insolvency Proposal and its Impact on Creditors' Study by the Directorate General for Internal Policies of the Union* (European Parliament 2017), available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf>.

[155]Directive, Article 9.

after closer examination by a competent authority and only in case that the absolute or relative priority rule applies. The Member States may increase the number of classes necessary for a cross-class cram-down.[156]

Out of the five countries evaluated, the United Kingdom provides for the earliest restructuring option to bind (secured and unsecured) creditors of a (still solvent) debtor with the SoA. The preventive restructuring mechanism would go a few steps further. Not only would a majority be entitled to bind a dissenting minority so as to overcome the free rider dilemma in restructuring negotiations, but a minority of all creditors, that is, the majority of just one class, would also be able to bind the majority of dissenting creditors in all other classes. Such a tool features in other insolvency regimes as well. The Directive's mechanisms seem to be modelled after the U.S. Chapter 11 procedure in this regard.

Currently, Germany allows for a cross-class cram-down for an insolvent debtor in case that the absolute priority rule is complied by and that a majority of classes approves the plan. In France, dissenting secured and unsecured creditors may be bound by a majority vote to a restructuring plan under the *sauvegarde* procedure. However, there is no cross-class cram-down mechanism, yet it has been mentioned as a point for improvement by the European Parliament.[157] In Denmark, only unsecured creditors can be bound to a plan whereas secured creditors may not be affected by a plan and still enforce their claim once the proceeding is complete. Considering the high level of collateralisation in Denmark, a key element for successful restructurings is missing, at least in the case that the debtor is confronted with a dispersed credit structure. In the Netherlands, a court-confirmed composition in a bankruptcy or suspension of payments proceeding binds dissenting ordinary unsecured creditors. Currently, no such procedure exists to bind dissenting creditors in the pre-insolvency phase, but legislation is pending in this respect.

4.3 | The incentives to enter a preventive/early restructuring mechanism

An early entry into restructuring negotiations is regularly associated with a win–win situation for the parties involved. The debtor should possess sufficient assets for a turnaround, and the need for relatively small concessions may increase the creditors' willingness to cooperate. The best incentive to enter a restructuring procedure for the debtor and its creditors at an early point in time is a good prospect for a successful restructuring agreement. Once an official restructuring procedure is initiated, procedural costs are incurred and information about the debtor's evaluation that a restructuring is necessary circulates. If the restructuring eventually fails, the debtor has to carry the procedural and reputational costs without the benefit of a reorganised capital structure. The start of restructuring negotiations, thus, comes as a risky investment that will only pay off if there is a sufficient/high probability of success.

Although in a concentrated relationship lending structure, restructuring can work very well without a formal procedure, a more dispersed or rather loose lending structure requires a more formal approach, such as a mechanism to bind dissenting creditors, which may also promote the involved parties to restructure in the shadow of such laws. Such a tool is thus a key incentive for the initiation of a restructuring procedure for the debtor. If the debtor sees no real prospect to succeed with its restructuring offer, the debtor will be incentivised to delay any formal procedure and opt for more risky

[156] Ibid., Article 11.

[157] DG for Internal Policies, Policy Department for Citizens' Rights and Constitutional Affairs, *Study on the Commission Insolvency Proposal and its Impact on the Protection of Creditors* (June 2017), 7, available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf>.

turnaround strategies with a lower expectation value than a successful restructuring regime could offer. As discussed in the previous subsection, all countries except the Netherlands provide such a mechanism for restructuring proceedings, although legislation is pending in this respect. Although the Danish regime allows for a binding majority vote, it limits the binding effect to unsecured creditors with no mechanism available to bind secured creditors, which however often hold a substantial share of companies' debt, making cooperative restructurings a tough business.

Another key element for the debtor to enter into a restructuring procedure is that the debtor stays in possession. The debtor's incentive is not simply that the restructuring is successful but that the debtor (its shareholders) will have a stake in the restructured company or, even more important, that the directors with supposedly the best information and ability to influence the restructuring will have a chance to stay on board after they having maneuvered the company through rough sea. The EU preventive restructuring framework is modelled as a debtor-in-possession procedure.[158] The SoA and the CVA are debtor-in-possession procedures for a debtor still able to pay its debts, that is, if they are not paired with the administration procedure.

In France, the debtor stays in possession during the *mandat ad hoc*, the *conciliation*, and, in principle, also during the *sauvegarde* procedure. The court, however, will appoint an administrator to assist and possibly supervise the debtor during the *sauvegarde* procedure. In Germany, there is a debtor-in-possession option. The vast majority of cases are still being handled in forced administration, but the debtor-in-possession option becomes more popular, especially for larger insolvencies. In Denmark, the appointment of an administrator is mandatory for the *rekonstruktion* procedure. In the Netherlands, the debtor's best chance for a successful restructuring is currently a cooperative prepack. Legislation is being prepared to introduce a debtor-in-possession procedure.

A stay on enforcement or priority for fresh capital are crucial features of most insolvency regimes, that is, when there is a high scarcity of resources, lack of liquidity, and when the incentive to rush to enforcement is high. They are, however, less important for an early (still solvent) restructuring and may even be easily misused by the debtor if not subject to diligent control by a court or organised creditor action. Considering the above, the Directive for a preventive restructuring framework would push the boundaries further than in any of the five countries analysed once the threshold of the "likelihood of insolvency" is fulfilled. Not only would the debtor stay in possession and be equipped with powerful and flexible tools of a binding vote and cram-down for a financial restructuring. The debtor would also be in a position to initiate a stay[159] and to seek priority for fresh capital.[160]

Taking into account that the opening of the EU's preventive restructuring framework should also stay the debtor's obligation to file for regular insolvency, there is a risk that not only debtors with a good prospect enter the preventive restructuring framework but also hopeless debtors will give it a last shot in the preventive restructuring regime, stay creditors' action, and dilute old claims with new priority debt. It has yet to be seen as to whether effective safeguards will be established to overcome these risks. The preventive restructuring framework will most certainly give the debtor a huge incentive to enter the procedure. It may, however, also increase the bargaining power of the debtor substantially and thus disadvantage its creditors, especially in case of concentrated lending relations, unfairly. None of the five countries in this analysis provides for a debtor-in-possession restructuring procedure that comes with such broad insolvency powers of priority financing and a stay for the debtor when there is only a likelihood of insolvency and absent diligent court oversight and/or supervision by an administrator.

[158]Proposal, Article 5.

[159]Ibid., Article 6.

[160]Ibid., Article 16(2).

For the creditors, there is another incentive to be considered for their cooperation, in addition to the previously mentioned need for an effective and binding restructuring procedure: Is their concession or is their capital provided as an investment into the stabilisation of their debtor and would their cooperation, which may result in a theoretically lower return (haircut), decrease their risk, as it would also decrease the debtor's risk to eventually fail? Taxation of debt reliefs and extensive claw-back provisions can make restructurings outside of a formal insolvency procedure hard, if not sometimes impossible, in particular, when creditors have to fear that their concessions will be consumed by the treasury or make them vulnerable for claw-back actions. Similarly, those parties involved in a complex restructuring out of a formal insolvency procedure, that is, lawyers, accounts, consultants, and essentially also those parties responsible for the ongoing business, that is, employees and business partners, should be less willing to cooperate if their payment is subject to extensive claw-back and avoidance actions. The Directive asks the Member States to remove such hurdles for successful restructurings.[161]

In Germany, the lawmaker has just recently reformed its avoidance law, which was for long a serious deterrent for creditors, business partners, and so forth to assist a debtor in the restructuring out of formal insolvency. In the Netherlands and Denmark, no specific new finance provisions exist, whether in or out-of-court. The financier may grant new finance, which, in principle, can be secured with a security right. Where new financing is entered into by the insolvency practitioner in a bankruptcy proceeding, this will rank high. In France, the conciliation proceeding protects new financing and protects against avoidance actions, in the case of the opening of subsequent insolvency proceedings. In the United Kingdom, an administrator or liquidator can raise new finance on the unencumbered assets of the debtor company. Such funding will have a priority over all other claims, apart from fixed charges, and will be treated as an expense in the administration (or pre-pack). In schemes of arrangement and CVAs proceeding outside of the operation of an administration or pre-pack procedure, raising finance is a matter of agreement between the debtor company and its creditors.[162]

Another quite decisive factor especially for the debtor's calculation as to whether she or he should enter in a restructuring procedure is the "restructuring culture" or the "stigma of insolvency," a factor to be discussed in the following subsection.

4.4 | The "restructuring culture"

The last point in this comparative section is a soft factor that translates into hard economic value. A restructuring-friendly environment, that is, an environment where the request for a restructuring is seen not as failure but as the start of a new beginning, has a significant value for the firm. In a restructuring-hostile environment, where the debtor is branded with the stigma of insolvency, the chance is higher that customers, creditors, business partners, and employees will leave the sinking ship than in a restructuring-friendly environment. In such a restructuring-hostile environment, the debtor will, thus, try to avoid insolvency as long as possible so as to not incur the (immense) indirect costs. A chilling effect on entrepreneurial activity may also be associated with inflated costs of "failure."

The Directive clearly sends out a signal for a very restructuring-friendly policy in Europe. One may even question as to whether the agenda is set just a little bit "too debtor friendly," that is, gives the debtor too much power, which the debtors can use to strengthen its bargaining position and may

[161]For the claw-back/avoidance question, see Directive, Articles 16(1) and 17.

[162]James Roome, Tom Bannister, and Emma Simmonds, *Restructuring and Insolvency in the UK (England & Wales): Overview* (Practical Law Company 2017), 19.

even exploit its creditors in desperate situations. This criticism may be voiced considering that most European countries still have a rather ex ante-oriented financing structure with strong relationship lenders.

Traditionally, all five countries analysed have had a rather creditor-friendly insolvency regime, probably as a response to relationship lending, with France having probably the most profound orientation towards the rescue of the business for the sake of employment protection and social integration. Although the U.K. insolvency law (administration and liquidation) sets the interest of creditors first and is not particularly debtor friendly, the existence the scheme of arrangement in particular has encouraged early (and still solvent) restructurings in the mutual interest of creditors and debtors before the debtor was unable to pay its debt. Germany has reformed its insolvency laws within the last two decades, with some significant improvements towards a more restructuring-friendly environment. The insolvency practice, nonetheless, awaits further improvements, and the Directive would mean a substantial change.

In both Denmark and the Netherlands, a mechanism is missing, which can bind dissenting secured and unsecured creditors to a restructuring plan (outside a formal insolvency proceeding). For the Netherlands, the Directive is a valuable and important force for proceeding with national legislative efforts to introduce further restructuring tools. For Denmark, the possibility to restructure a business using "insolvency tools" such as cram-downs and a moratorium at a time when the debtor is not yet insolvent and possibly even out of court is a very new, and in the light of rescuing, welcoming thought. In addition to this, the Directive will finally set the need for amendments of the existing restructuring regime on the political agenda. The law following the implementation of the directive, then, may also inspire a new thinking of restructuring, not simply as failure and end of the enterprise but as the chance for a new beginning.

5 | CONCLUSION

The Directive leaves so much open to the Member States that the effects of the directive's implementation are difficult to foresee. Minimum harmonisation requirements may not lead to the convergence envisaged by the Recommendation or the early discussions on the purpose of the Directive and its eventual form as a Preventive Restructuring Directive. The wording in the Directive tends to take an almost optional approach, using the word "may" instead of something more prescriptive that would present a more obligatory implementation parameter. The impression left by the wording in the Articles is vague and even voluntary. These watered-down provisions can be traced to the hesitancy of Member States to take on obligatory changes from the EU given the legal culture-laden aspects of the approach to insolvency and preventive restructuring generally.

The Directive does tend to codify what has been considered best practices across the Member States. Although this does not change much in relation to pre-existing preventive restructuring frameworks in a number of EU countries, it does set a baseline for those jurisdictions that do not yet have such effective regimes, to improve their approach. For example, in Germany, it will prompt fairly massive reform (if they take a more obligatory approach to its implementation) in the introduction of a preinsolvency procedure with a species of cross-class cram-down. Similarly, for the Netherlands, even the minimum framework set in the Directive will create a new standard, given that jurisdiction's previous emphasis on liquidation (going-concern sale) outcomes. In addition, as the Directive introduces debtor led restructuring processes, a debtor may be encouraged to forum shop. However, the Directive introduces procedures that may also have the effect of lessening the degree of forum shopping as the competition for effective preventive restructuring procedures will also be lessened should Member States engage in a thorough implementation process in line with the Directive.

The question remains, however, as to whether the Directive has introduced provisions of an obligatory enough nature to go beyond what was set out in the original Recommendation, which did not see a major change among the Member State. If the Recommendation failed to encourage reform, will a watered-down Preventive Restructuring Directive allowing massive margins of appreciation in its implementation result in member state implementation that actually bridges the gap between procedures, fomenting European harmonisation in member state approaches to preventive restructuring? Or will Member States whose regimes are already quite different from the Directive seek to maintain their status quo as far as possible, implementing the provisions in the least disruptive manner possible? Given the current text is merely a confirmed compromise with a view to agreement, it is yet to be seen how its implementation in the Member States will affect preventive restructuring frameworks in Europe and the EU's goal to harmonise in this area as far as possible.

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