

Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project: Jurisdiction Questionnaire

Introduction

Thank you for agreeing to contribute to our report mapping the Preventive Restructuring Processes and the new EU Directive¹ as part of the JCOERE Project.

The JCOERE Project (Judicial Co-Operation supporting Economic Recovery in Europe), (Project Number 800807) funded by the EU Justice Programme (2014-2020), will identify obstacles to judicial co-operation presented by both existing domestic restructuring frameworks and the implementation of the Directive. JCOERE is focused on the strengthened co-operation and communication obligations imposed on the courts in the Recast Insolvency Regulation,² specifically in the context of preventive restructuring processes.

The Project will explore substantive and procedural rules arising in the context of preventive restructuring, which we consider may present obstacles to co-operation. It will focus on specific substantive rules arising in a typical restructuring process, such as the commencement of secondary proceedings to protect a creditor's interests in the face of the 'cram-down' provisions. The question of whether it is reasonable for a court in the second state to decline jurisdiction becomes more immediate in such circumstances. In addition, the project will explore the challenges that procedural rules might present to co-operation. In short, our hypothesis is that the obligations imposed on courts to cooperate may be challenged in the context of radical restructuring processes.


A key element of the first JCOERE Project Report is to map existing restructuring processes and the Directive, focussing on specific provisions in several EU Member States. Firstly, it will include those partnered on the JCOERE Project: Ireland (University College Cork), Italy (Università degli Studi di Firenze), and Romania (Universitatea Titu Maiorescu).³ Secondly, contributors from several other Member States have agreed to take part: Germany, The Netherlands, Spain, France, and the United Kingdom (for comparative purposes). Other jurisdictions may be added if contributors are identified and available to participate.

The purpose of this mapping exercise is to firstly determine what preventive restructuring frameworks are already present in the contributing jurisdictions and how they relate to the terms of the Directive. Secondly, the mapping exercise will determine existing rules in member states, in addition to those in the Directive regarding key areas of interest for the project. These include the stay/moratorium; cram-down provisions; the protection of rescue financing; and rights *in rem*. Additional issues which seem to

¹ We refer to the current iteration published on 28 March 2019 of P8-T-Prov(2019)0321 Increasing the Efficiency of Restructuring, insolvency and discharge procedures: European Parliament legislative resolution of 28 March 2019 on the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency, and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016.0359(COD)) (Ordinary Legislative Procedure – First Reading) (the 'Directive').

² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the 'Recast Regulation'), Article 42-44 and Articles 57-59 (see Appendix B).

³ INSOL Europe is also partnered on the JCOERE Project but represents a network of the jurisdictions that will be contributing.

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have emerged as being important during the discussions on the Directive are rights accorded particularly to employees and court or judicial approval processes. In addition, the Questionnaire will focus on a number of emerging procedural issues which also may present obstacles to co-operation.

The following questions are intended to assist you in focusing on the particular areas of interest that are key to the JCOERE Project. Please provide references in footnotes to your jurisdiction's legislation or professional rules, where relevant, as well as any other texts or information referred to when providing your report. This will assist us in further research during the project.

If there are questions that are irrelevant to your jurisdiction, please answer with "not applicable".

Appendix A contains the full text of each of the relevant Articles drawn from the iteration of the Directive published on 28 March 2019. Appendix B includes the relevant Articles from the Recast Regulation 848/2015.

Please complete your report directly in the table of questions below but limit your responses to **500 words** for each question and/or sub-question (excluding footnotes). Please submit your answers to Jennifer Gant at jennifer.gant@ucc.ie by **15th June 2019**.



The Questionnaire

Part 1: General Context of Preventive Restructuring

The Preventive Restructuring Directive in its current iteration as of 28th March 2019 gives EU Member States a suggested framework and options for approaching the development and improvement of preventive restructuring procedures aimed at creating a more effective European rescue culture and improving the prospects of economic recovery at an earlier stage in the life cycle of companies. The Directive states in Article 4(1) that:

“Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.”

The first part of this questionnaire aims to investigate your jurisdiction’s current preventive restructuring frameworks, practices, and underpinning principles in light of the Directive. Please consider Article 4(1) set out above as you discuss the current provisions in place in your jurisdiction and whether they comply fully with this Article. The complete Article 4 is set out in Appendix A.

1	<p>Please specify existing legislative frameworks (if any) in your jurisdiction that provide for the preventive restructuring of companies, specifying the relevant legislation, legislative provisions, and/or rules that regulate the framework along with the date of implementation.</p> <p>(Please note that there will be specific questions in Part II and Part III in relation to specific substantive and procedural rules so there is no need for a high level of detail on these specific aspects here in Part I).</p>
	
2	<p>What are the stated functions and aims of your jurisdictions’ preventive restructuring frameworks? Please refer to legislative policy documents or from your jurisdiction where relevant, statements in the legislation or statements by courts in applying the legislation (e.g. the Cork Report in the UK).⁴</p>
	

⁴ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

Part II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive



The JCOERE project focuses on a selection of provisions found in restructuring processes by type. The following questions are directed at these provisions (Articles 6, 9, 10, 11, 13, and 17).






Introduction to Part II






The provisions typically found in most effective restructuring processes and which are also present in the Directive include first that the debtor remains in possession; second, that individual enforcement actions are stayed in order to provide the debtor with “breathing space; third the adoption of restructuring plans (cram-down) and cross-class cram-down; and the protection of new and interim financing.

The full text of each Directive Article is set out in the Appendix A for your ease of reference.





The following questions are based on the assumption that your jurisdiction has preventive restructuring frameworks. If this is not the case, please write “not applicable” as your answer.





3	Article 6: Stay of Individual Enforcement Actions
3.1	<p>Article 6 of the Directive states that:</p> <p style="text-align: center;"><i>“Member States shall ensure that debtors may benefit from a stay of individual enforcement to support the negotiations of a restructuring plan in a preventive restructuring framework.”</i></p>
	<p>a) Does your jurisdiction provide for a stay of individual enforcement actions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of your jurisdiction’s stay or moratorium and how it compares with the terms of Article 6(1-8) of the Directive.</p>
	
	<p>b) Will your jurisdiction have to make changes to comply with Article 6 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(1-8) of the Directive.</p>
	
3.2	<p>Article 6(9) sets out a mandatory provision allowing for the removal of the stay by a judicial or administrative authority under certain conditions.</p>
	<p>a. If your jurisdiction provides for a stay, does it also provide for its removal by judicial or administrative authorities and under what conditions are authorities empowered to remove it?</p>






	
	b. Will your jurisdiction have to make changes to comply with Article 6(9) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 6(9).
	
4	<p>Article 9: Adoption of Restructuring Plans</p> <p>Article 9(1) provides for the adoption of restructuring plans:</p> <p><i>“Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.”</i></p> <p>The full Article sets out conditions under which such plans should be adopted, including the creditors’ right to vote on the adoption of restructuring plans, the creation of creditor classes for voting purposes, and an intra-class cram-down.</p>
4.1	Article 9(2) requires that Member States to <i>“ensure that affected parties have a right to vote on the adoption of a restructuring plan”</i> , allowing for certain exclusions from this rule in 9(3).
	a. Does your jurisdiction provide voting rights to affected parties of a restructuring plan and what, if any, exclusions are permitted? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with Article 9(2-3) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(2-3).
	
4.2	Article 9(4) requires that Member States treat affected parties in separate classes, <i>“which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law.”</i>
	<p>a. Does your jurisdiction provide for the separation into classes of those parties affected by a restructuring plan?</p> <p>b. What classes does your jurisdiction recognise? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.</p>
	





	c. Will your jurisdiction have to make changes to comply with Article 9(4) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(4).
	
4.3	Article 9(5) allows for judicial or administrative examination of voting rights and the creation of classes when a request for confirmation of a plan is submitted and, further, allows Member States to <i>“require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage...”</i>
	a. Does your jurisdiction provide for the examination, confirmation, approval or otherwise of the voting rights and separation into classes of affected parties for the purpose of approving a restructuring plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with Article 9(5) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(5).
	
4.4	Article 9(6) includes a compulsory intra-class cram-down element: <i>“A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.”</i> The optional provisions are that member states may provide that a majority in number in each class must also agree. In addition, the majority can be set down by member states but cannot be higher than 75%. Article 9(7) provides that formal votes can be replaced by an agreement with the requisite majority.
	a. Does your jurisdiction have intra class cram down provisions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive.
	
	b. Will your jurisdiction have to make changes to comply with Article 9 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 9(4).
	
5	Article 10: Confirmation of Restructuring Plans


5.1	<p>Article 10(1) provides that:</p> <p><i>“Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:</i></p> <p><i>(a) restructuring plans which affect the claims or interests of dissenting affected parties; (b) restructuring plans which provide for new financing; (c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law.”</i></p>
	<p>a. Does your jurisdiction provide conditions under which restructuring plans must be approved by administrative or judicial authorities? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.</p>
➡	
	<p>b. Will your jurisdiction have to make changes to comply with Article 10(1) of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 10(1).</p>
➡	
5.2	<p>Article 10(2)(a-e) provides for a number of conditions under which a restructuring plan can be confirmed by judicial or administrative authorities (see Appendix A), while 10(3) requires Member States to ensure that administrative authorities can refuse to confirm a plan where the plan <i>“would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.”</i></p>
	<p>a. Are there conditions specified for judicial or administrative confirmation and are such authorities also empowered to refuse to confirm a plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.</p>
➡	
	<p>b. Will your jurisdiction have to make changes to comply with the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment Article 10 of the Directive provisions in this context.</p>
➡	
6	Article 11: Cross-class Cram-down
6.1	<p>Article 11(1)(a-b) provides for the application of a cross-class cram-down in the adoption of restructuring plans:</p>

	<p>“Member States shall ensure that a restructuring plan which is not approved by affected parties as provided for in Article 9(4) in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils” certain conditions Articles 10(2) and (3).</p>
	<p>a. What is the current position regarding a cross-class cram-down for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, specifically Art 11(1)(a-b).</p>
	
	<p>b. Will your jurisdiction have to make changes to comply with the Directive? If so please describe any currently suggested changes to your provisions in light of the enactment of Article 11(1)(a-b) of the Directive.</p>
	
6.2	<p>Article 11 offers options for dealing with affected and dissenting classes of creditors in a cross-class cram-down. Under Art 11(1)(c), one of the conditions for approval by a judicial or administrative authority of a cross-class cram-down is if the plan:</p> <p><i>“...ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.”</i></p> <p>A derogation from this condition is also offered in 11(2):</p> <p><i>“By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.”</i></p>
	<p>a. If your jurisdiction provides for a cross-clam down, how does it treat dissenting classes of creditors? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular 11(1)(c) and 11(2).</p>
	
	<p>b. Will your jurisdiction have to make changes to comply with the treatment of classes of creditors in the cross-class cram-down? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11(1)(c) and 11(2) of the Directive.</p>
	
6.3	<p>Article 11 goes on to provide the following regarding an ‘unfair prejudice’ test.</p>

	<p><i>“Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.”</i></p>
	<p>a. If your jurisdiction provides for a cross-class cram down, does it apply a similar test in the current state of your jurisdiction’s legal framework? If not, is there a different approach adopted by your jurisdiction in the context of the cross-class cram-down? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular this derogation at the end of Article 11.</p>
	
	<p>b. Is your jurisdiction likely to avail of this ‘unfair prejudice’ test derogation? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11 of the Directive.</p>
	
7	<p>Article 13: Workers</p> <p>Article 13 provides for the protection of workers in the context of preventive restructuring, stating that <i>“Members States shall ensure that individual and collective workers’ rights, under Union and national labour law...are not affected by the preventive restructuring framework.”</i></p>
	<p>a. What is the current position regarding workers in the context of preventive restructuring in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 13 of the Directive.</p>
	
	<p>b. Will your jurisdiction have to make changes to comply with the treatment of workers in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions in light of the enactment of Article 13 of the Directive.</p>
	

8	<p>Article 17: Protection for New Financing and Interim Financing</p> <p>Article 17 provides that “<i>Member States shall ensure that new financing and interim financing are adequately protected.</i>” This includes protecting it from claims that it is detrimental to the general body of creditors, but also includes an option to provide a “super-priority” in 17(4).</p>
	<p>a. What is the current position regarding new and interim financing for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 17 of the Directive</p>
	
	<p>b. Will your jurisdiction have to make changes to comply with Article 17 in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 17 of the Directive.</p>
	
	<p>Part III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive</p>
9	<p>Article 5: Debtor in Possession</p>
	<p>Article 5 includes an option for the involvement of an insolvency practitioner in relation to preventive restructuring processes.</p>
	<p>a. What is the current position regarding insolvency practitioners in restructuring processes in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 5 of the Directive.</p>
	
	<p>b. Will your jurisdiction have to make changes to comply with the requirements regarding the involvement of insolvency practitioners in relation to preventive restructuring processes?</p>
	
10	<p>Rights <i>in Rem</i></p>
10.1	<p>How are rights <i>in rem</i> defined in your jurisdiction? Please describe a type of right in rem which arises in insolvency proceedings.</p>
	

10.2	<p>Given the interaction of Article 8 of the Recast Insolvency Regulation (see Annex B) on the protection of rights <i>in rem</i> and Article 11 of the Preventive Restructuring Directive allowing for a cross-class cram-down, there is a potential conflict between the protection of rights <i>in rem</i> and the application of a cross-border cross-class cram-down.</p> <p>Consider Article 8 in Annex B and Article 11 in Annex A and indicate whether or not this conflict is present in your jurisdiction. Please provide examples, reference to policy, principles, and legislative texts where relevant.</p>
	
11	The Role of Judicial or Administrative Authorities.
	<p>Many of the Articles in the Directive refer to judicial or administrative authorities exercising power or authority in various ways. However, there can be a significant difference in the characteristics of <i>judicial</i> and <i>administrative</i> authorities, whether within a single jurisdiction or in a cross-border situation.</p> <p>What authority is empowered to confirm, approve, or examine plans and other aspects of preventive restructuring frameworks, such as those referred to in the questions in Part II above? From whence is their authoritative competence derived?</p> <p>If an administrative authority is involved are these subject to procedural rules which are similar to procedural rules to which courts are subject?</p>
12	<p>In your jurisdiction, are there specific constitutional parameters present that delimit the freedom of judicial communication generally? For example, a constitutional provision that requires that justice is administered in public?</p>
	
13	<p>In your jurisdiction, are there examples of judicial cooperation in case law, focusing on the issues set out in Part II of this questionnaire.</p>
	
14	<p>In your jurisdiction, what are the training and competency requirements for insolvency judges?</p>
	

15	If you have any further comments to provide in relation to the research being conducted on this project, including any other potential contributors from jurisdictions not listed in the introduction above, please do so below.
	

Please accept the JCOERE Team's sincere thanks for the time and effort you have put into this questionnaire. We will keep you updated as to our progress. If you encounter any issues of clarity or require more time to complete your report, please contact Dr Jennifer L. L. Gant at jennifer.gant@ucc.ie.

JCOERE Team

Appendix A: Preventive Restructuring Framework Directive

Articles Relevant to the Questionnaire

Article 4:

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

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

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.
2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.
3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:
 - (a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;
 - (b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or
 - (c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

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

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

- (a) enforcement is not likely to jeopardise the restructuring of the business; or
- (b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

- (a) relevant progress has been made in the negotiations on the restructuring plan;
- (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or
- (c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

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

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State

within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

- (a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;
- (b) at the request of the debtor or the practitioner in the field of restructuring;
- (c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions;
or
- (d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

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

Member States may provide for a minimum period, that does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

- (a) equity holders;
- (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or
- (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

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

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

- (a) restructuring plans which affect the claims or interests of dissenting affected parties;
- (b) restructuring plans which provide for new financing;
- (c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

- (a) the restructuring plan has been adopted in accordance with Article 9;
- (b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
- (c) notification of the restructuring plan has been given in accordance with national law to all affected parties;
- (d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;
- (e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

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

- (a) it complies with Article 10(2) and (3);
- (b) it has been approved by:
 - (i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
 - (ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going-concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;
- (c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and
- (d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

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

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

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

Article 13

Workers

1. Member States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

- (a) the right to collective bargaining and industrial action; and
- (b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:
 - (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;
 - (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;
 - (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;
- (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

- (a) new financing and interim financing shall not be declared void, voidable or unenforceable; and
- (b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

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

Appendix B

Excerpt from the European Insolvency Regulation (Recast)

Article 8

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immovable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall, in particular, mean:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
- (d) a right *in rem* to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.

Article 42

Cooperation and communication between courts

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

2. In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

- (a) coordination in the appointment of the insolvency practitioners;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) coordination of the conduct of hearings;
- (e) coordination in the approval of protocols, where necessary.

Article 43

Cooperation and communication between insolvency practitioners and courts

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

- (a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;
- (b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and
- (c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings; to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.

2. The cooperation referred to in paragraph 1 may be implemented by any appropriate means, such as those set out in Article 42(3).

Article 44

Costs of cooperation and communication

The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.

Article 57

Cooperation and communication between courts

1. Where insolvency proceedings relate to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interest. For that purpose, the courts may, where appropriate, appoint an independent person or body to act on its instructions, provided that this is not incompatible with the rules applicable to them.

2. In implementing the cooperation set out in paragraph 1, courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with each other, or request information or assistance directly from each other, provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

- (a) coordination in the appointment of insolvency practitioners;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the assets and affairs of the members of the group;
- (d) coordination of the conduct of hearings;
- (e) coordination in the approval of protocols where necessary.

Article 58

Cooperation and communication between insolvency practitioners and courts

An insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies:

- (a) shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings; and
- (b) may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed; to the extent that such cooperation and communication are appropriate to facilitate the effective administration of the proceedings, do not entail any conflict of interest and are not incompatible with the rules applicable to them.

Article 59

Costs of cooperation and communication in proceedings concerning members of a group of companies

The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.