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

6.1 Introduction: the JCOERE Context

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

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

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

[2] Title 11, United States Code, which is referred to as the Bankruptcy Code. Chapter 11 deals with reorganisation. See < https://www.govinfo.gov/app/collection/USCODE> accessed 29 October 2019.

[3] UK Companies Act 2006, part 26.

[4] Irish Companies Act 2014, part 10. See generally for a discussion of the Irish Examinership process Lynch, Marshall and O'Ferrall: *Corporate Insolvency and Rescue* (Butterworths, 1996) and Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012). See also O'Donnell and Nicholas: *Examinership (*Londsdale Law Publishing, 2016).

[5] It should be noted, however, that the UK Scheme of Arrangement is not covered under the EIR Recast as it is technically a company law procedure arising as it does out of the Companies Act 2006, Part 26. In addition, Irish company law contains a similar scheme of arrangement provisions, see Irish Companies Act 2014, ss 449-455. Irish legislation also includes a Scheme of Arrangement process which is very similar to the UK process. This is included in Part 9 of the Companies Act 2014. See further I Lynch Fannon and G N Murphy, Corporate Insolvency and Rescue (2nd edn, Bloomsbury Professional 2012) Chapter 14.

[6] "Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project: Jurisdiction Questionnaire" available in Annex 2 of this Report and available online from < https://www.ucc.ie/en/jcoere/research/jcoere-jurisdiction-research-questionnaire/>.

[7] European Commission DG Justice Grant Agreement 800807 – JCOERE – JUST-AG-2017/JUST-JCOO-AG-2017, Annex 1 Part B Workpackage 2 – Methodology.

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The responses to the questionnaire have helped to determine what preventive restructuring frameworks are already present in the contributing jurisdictions and how they relate to the terms of the PRD. These questions were contained in part I of the questionnaire. Secondly, the responses have helped to determine existing rules in Member States, in addition to those in the Directive, which pertain to the stay/moratorium; cram-down provisions; workers; and the protection of rescue financing. Finally, part III of the questionnaire revealed a number of emerging procedural issues that may also present obstacles to co-operation; these will be considered in Chapter 8 of this Report. Only the first half of Part III of the questionnaire will be discussed in Chapter 8 of this Report; the second half of Part III refers to the role of judicial and administrative authorities, which is more relevant to Report 2. The purpose of this Chapter 6 is to explore the responses to Part I of the JCOERE questionnaire.

6.2 Introducing the Irish Examinership Procedure

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

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

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

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

6.3 Methodology

The research method for this project was described in some detail in Chapter 1. The analysis in Chapters 6, 7, and 8 uses the comparative legal methodology to draw relevant functional comparisons between Member States' restructuring frameworks and their underlying insolvency law systems. Comparative

[8] Irene Lynch Fannon, Jane Marshall, and Rory O'Ferrall, *Corporate Insolvency and Rescue* (Butterworths 1996); Irene Lynch Fannon and Gerard Nicholas Murphy, *Corporate Insolvency and Rescue* (Bloomsbury 2012); John O'Donnell, *Examinerships* (Londsdale 2016).
[9] Companies Act 2014, s 520.
[10] [2008] 3 IR 253 [260].

law has a number of purposes. It can increase knowledge and understanding, which in turn can act as an aid to the domestic legislator in pursuit of legal reform. At an international, or supranational level such as the institutions of the EU, knowledge of comparative law can help to find solutions to questions of how to unify and harmonise laws.[11] Comparative law provides a "richer range of model solutions" by examining the solutions to similar legal problems devised in a number of legal systems.[12] The PRD has done this to some extent by adopting and adapting successful pre-existing provisions from different legal systems. By identifying fundamental differences, it is possible to forecast conflicts that could arise in court cooperation due to the differences in legal systems.

6.4 JCOERE Approach to Comparative Legal Analysis

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

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

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

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

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[11] Matthias Siems, *Comparative Law* (CUP 2014) 2-4.
[12] Konrad Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, OUP 1998) 15.
[13] *idem* 3.
[14] *idem* 34-35.
[15] *idem* 15.
[16] Ralf Michaels, 'The Functional Method' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 339-382, 356-357.
[17] Konrad Zweigert and Hans-Jurgen Puttfarken, 'Critical Evaluation in Comparative Law' (1974) 5 Adel L rev 343, 345.
[18] Siems (n 11) 27.
[19] See John Bell, 'Path Dependence and Legal Development' (2013) 87 Tul L Rev 787 and Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000) 86 Iowa L Rev 601.

6.5 General Context of Preventive Restructuring: Questionnaire Part I

This Report began with a brief introduction to the project aims and context, followed by a discussion of academic commentary pertaining to preventive restructuring, as the context for the exploration of the challenges of judicial cooperation. The second chapter presented a discussion of challenging terminology, in other words, the same or similar terms, which carry different meanings across the EU. This chapter evolved out of the team's experience of comparative qualitative research. The third chapter briefly introduced the EIR Recast and the enhanced obligation to co-operate and the fourth chapter explored academic debate around the concept of preventive restructuring and its associated substantive provisions. The fifth chapter set out the evolution of the PRD and its underpinning aims and purposes. Chapters 6, 7, and 8 of this Report will present a synthesis of the responses to the questionnaires[20] that were completed by contributors from 10 different jurisdictions throughout the EU. This will be presented as a thematic analysis.

6.5.1 Functions and Aims of Preventive Restructuring

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

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

6.5.2 Legislative Frameworks of the Contributing Jurisdictions in Context

JCOERE Questionnaire Questions 1 and 2:

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

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

[20] See Annex 2 of this Report for the questionnaire distributed to the contributors.
[21] Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 22.
[22] See Chapter 3 of this Report, section 3.6.
[23] Included in Annex A of the EIR Recast are France's *Sauvegarde, Sauvegarde accélérée,* and *Sauvegarde financière accéléré*; Germany's *Insolvenzverfahren*; Italy's *Concordato preventive* and *Accordi di ristrutturazione*; The Netherlands *surséance van betaling*; Romania's *Concordatul preventive* and its ad hoc mandate; Spain's *Procedimiento de homologación de acuerdos de refinanciación,* and *Procedimiento de acuerdos extrajudiciales de pago*; Poland's *PostČpowanie naprawcze*, *Upadłość obejmująca likwidacjČ,* and *Upadłość z możliwością zawarcia układu*; Austria's the UK's Company Voluntary Arrangement and Administration procedures (Schemes are not in Annex A); the Irish Examinership Procedure (equally Schemes are not in Annex A). Interstingly, the Austrian *Unternehmensreorganistionsgesetz* (URG) is not present in Annex A and as Denmark is not a party to the EIR, their insolvency and rescue procedures would not be included.

a) Ireland[24]

As noted in section 6.1.1 above, the principles underpinning the main Irish preventive restructuring proceeding, Examinership, closely align to those underpinning the PRD. In addition, Irish law contains provisions that are broadly similar to the English company law Scheme of Arrangement, originally provided in the Companies Act 1963 as amended by the Companies Act 2014.[25] While a few cases arose in relation to the constitution of classes for the purposes of approving a scheme between 1963-1990,[26] … the Examinership procedure has been much more significant as a preventive restructuring process.[27] It should be noted that the Irish Scheme, like the English Scheme, is not included in Annex A of the EIR Recast. … Examinership, by contrast, is.

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

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

b) Italy[29]

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

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

[24] The Irish Country Report was provided by Professor Irene Lynch Fannon and Aoife Finnerty (Research Assistant on the JCOERE Project Team) of University College Cork, Ireland and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire, section 12.1.
[25] Irish Companies Act 2014, ss 449-455.
[26] These are described Lynch-Fannon & Gerard N Murphy (n 8) chapter 14. See for example *Re Pye (Ireland) Ltd (No 1)* (12 November 1984), HC, Costello J and (ex tempore, 22 November 1984) SC, (1963–1993) ICLR 320 (HC), (1984) Irish Times, 23 November (SC); and *Re John Power & Sons Ltd* [1934] IR 412. More recent Irish cases on UK style Schemes of Arrangement include *Re Millstream Recycling Ltd* [2009] IEHC 571 and *Re: Ballantyne RE Plc & Companies Act 2014* [2019] IEHC 407.
[27] In 2014 there were 18 reported and completed examinerships, 19 in 2015, and 15 in 2016. When considering the viability of a rescue process generally, the comparative figures for liquidations are 68, 50 and 32 to the 3rd Quarter of 2016 and 299, 251 and 346 receiverships. See the 2017 statistics here <http://www.insolvencyjournal.ie/stats> accessed 12 December 2019. In this period there was one completed scheme of arrangement in *Re Millstream Recycling Ltd* [2009] IEHC 571. It should be noted that during the recession the rescue of companies became even more important. The Irish Times notes that 'Of the 420 companies that had an examiner appointed between 2007 and 2016, some 56 per cent of them are now back on their feet.' Peter Hamilton, 'Majority of Companies Entering Examinership since Crash Survived' (Irish Times 3 July 2017).
[28] Lynch Fannon, Marshall, & O'Ferrall (n 8); Lynch Fannon and Murphy (n 8). Thomas B Courtney, et al (eds), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2015). O'Donnell (n 8). For an early discussion of this legislation see Irene Lynch Fannon, 'Goodman International and the 1990 Companies (Amendment) Act.' (1991) (Spring) DLI 2. See also Irene Lynch Fannon, 'Saving Jobs at What Cost? Consideration of the Companies (Amendment) Act 1990' (1994) Irish Law Times 208 and 'Reform in Haste: Repent at Leisure. A Consideration of the Company Law Reform Group, 1993' (1994) Irish Law Times 189.
[29] The Italian Country Report was provided by the Universita degli Studi di Firenze and Dr Iacopo Donati (Post-Doctoral Researcher) and Niccolo Usai (Junior Researcher), with input from Professors Lorenzo Stanghellini and Andrea Zorzi and is available Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.2.
[30] See the Explanatory Report of the Delegated Law n. 155/2017 and the Italian Supreme Court's decision, section I, 07 April 2017, n. 9061.
[31] See the Explanatory Report of the Delegated Law n. 155/2017 and the Italian Supreme Court's decision, section I, 13 June 2016, n. 12119.
[32] See the Explanatory Report of the Delegated Law n. 155/2017.
[33] CCI, art 40.

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

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

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

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

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

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

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

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

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

[34] CCI, art 377 and following.
[35] CCI, art 86.
[36] CCI, art 6.
[37] CCI, art 27. In this respect the CCI implemented only partially the principles of the Enabling Law 155/2017.
[38] CCI, art 356.
[39] CCI, art 84-120.
[40] CCI, art 57-64.
[41] CCI, art 61.
[42] The 10% threshold can also be reached by buying credits after the proceeding is opened.
[43] CCI, art 90.

restructuring agreement are the temporary stay on enforcement actions at the request of the debtor; an intra-class cram-down; priority for new financing (not over secured creditors, as in the *concordato preventivo*); and a stay on recapitalisation obligations.[44]

c) Romania[45]

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

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

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

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

d) France[50]

[44] The obligation to recapitalise refers to a rule that is triggered if a company's net asset falls below zero. In order to protect creditors, the recapitalization of the company is a condition to continue trading and the violation of such duty exposes the directors of the company to actions by creditors and the relevant stakeholders (this concept recalls, with differences, the wrongful trading doctrine, which the Directive makes reference to). During the preventive restructuring procedure, the business may be continued without directors being liable to the company and its stakeholders.

[45] The Romanian Country Report was provided by Judge Nicoleta Mirela Nastasie and Dr Cristian Draghaci of University Titu Maiorescu, available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.3.

[46] "Public creditor" is a term used to define a budgetary creditor. Usually budgetary claims are significant, as typically value and budgetary creditors vote against any kind of pre-insolvency arrangement, restructuring plan or reorganization insolvency plan.

[47] 'Codul Insolventei Adnotat', The World Bank Group and Romanian Ministry of Justice, in the Program "Întărirea mecanismului insolvenței în România*"* financed by BIRD 2011-2016, 9 <www.just.ro/wp-content/uploads/2016/03/Cod-adnotat-FINAL.docx> accessed 18 November 2019.

[48] Law no 85/2014 on preventing insolvency and insolvency proceedings (The Insolvency Code), arts 10-15.

[49] Law on pre-insolvency and insolvency proceedings no 85/2014, art 5(17).

[50] The French Country Report was provided by Dr Emilie Ghio of Birmingham City University with the assistance of Dr Paul Omar, technical research coordinator of INSOL Europe is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.5.

Three main preventive restructuring procedures are currently used in France. The three main procedures that satisfy the definition of preventive restructuring in France are the (1) *mandate ad hoc,*[51] (2) *conciliation,*[52] and (3) *procédure de sauvegarde.*[53] The latter is included in Annex A of the EIR Recast. There are an additional two procedures that are subsets of the *sauvegarde* and available only as a conversion of the conciliation procedure.[54]

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

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

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

1. *Mandat ad hoc*

[51] Regulated by Articles L611-1 to L611-16 of the Commercial Code.
[52] *ibid*.
[53] Regulated by Articles L620-1 to L628-10 of the Commercial Code. See the debate as to whether the safeguard procedure should come within the scope of the Directive. For authors saying it will not be encompassed by the Directive, see R Dammann and M Boché-Robinet, 'Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France' (2017) 22 Recueil Dalloz < http://www.dirigerentempsdecrise.com/assets/fichiers/RECUEIL22-05_CHRONIQUE_Mise%20en%20page%201.pdf> accessed 16 August 2019.
[54] The two procedures that are subsets of the *sauvegarde* are the accelerated financial safeguard (*sauvegarde financière accélérée*) (SFA) and the accelerated safeguard (*sauvegarde accélérée*)). Unless otherwise specified, any reference to *sauvegarde* will be to the main procedure. If referring to one of the subset procedures, this will be clearly stated.
[55] Law No 84-148 of 1 March 1984; Law No 85-98 of 25 January 1985 focused on insolvency law and Law No 85-99 of 25 January 1985 regulated office-holders.
[56] Law No 2005-845 of 26 July 2005. See P Omar, 'The Progress of Reforms to Insolvency Law and Practice in France' in K Gromek Broc and R Parry (eds.), *Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer 2004) 51-78.
[57] Ordinance No 2008-1345 of 18 December 2008.
[58] Law No 2010-1249 of 22 October 2010. See also P Omar, 'Preservation and Pre-Packs à la Française: The Evolution of French Insolvency Law after 2005 (2011) 22(8) ICCLR 258.
[59] Ordinance No 2014-326 of 12 March 2014. For an in-depth account of the *sauvegarde accélérée*, see S Danjon 'La procédure de sauvegarde accélérée' (Master Thesis, Université de Reims Champagne-Ardenne 2016) <https://dumas.ccsd.cnrs.fr/dumas-01317161/document> accessed 9 January 2020.
[60] Law No 2016-1547 of 18 November 2016.

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

2. Conciliation

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

3. *Sauvegarde*

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

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

e) The Netherlands[65]

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

Until the WHOA comes into force, the only preventive restructuring procedure currently available in the Netherlands is the suspension of payment.[68] The suspension of payment is available to corporate debtors and aims to facilitate the continuation of imminently insolvent, but viable, companies. It is

[61] Commercial Code, art L620-2.
[62] Article L621-9 of the Commercial Code.
[63] Commercial Code, art L621-10 and L621-11.
[64] Law no 2019-486 of 22 May 2019.
[65] The Dutch Country Report was provided by Gert-Jan Boon, legal researcher and lecturer at the University of Leiden in the Netherlands and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.8.
[66] In 2014 a first draft bill was presented, the *Wet Continuïteit Ondernemingen II* (Business Continuation Act II). The public consultation led to ample response and led to a revised draft bill – the WHOA – that was made available for a public consultation. The WHOA and an explanatory memorandum is available here: <https://www.internetconsultatie.nl/wethomologatie>. An unofficial translation of the WHOA has been prepared by several law firms, see for instance: <https://www.debrauw.com/wp-content/uploads/2013/11/20180108-WHOA-unofficial-translation.pdf>. In July 2019 the Minister for Legal Protection presented a revised text of the WHOA to Parliament. This text is available here: <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/08/tk-nader-rapport-wet-homologatie-onderhands-akkoord>; with an unofficial translation available here: <https://www.debrauw.com/cerp/>. The translated articles of the WHOA in this report have been taken from this translation.
[67] Explanatory note to the WHOA (2019) 4; *Kamerstukken II* 2018/19, 33 695, nr 18, 3.
[68] Dutch BA, art 214.

available at the request of the debtor and provides for a moratorium, which is confined to non-secured creditors. The aim is to provide the debtor with the time needed to reorganise the business, thereby allowing it to regain its viability. Suspension of payment can be requested when the debtor expects (or foresees) an inability to continue paying debts.[69] Upon receipt of the request, the suspension of payment is automatically granted for a provisional period provided certain formal requirements are met.[70] Following this provisional period, the court will decide if granting a final suspension of payment is warranted in the circumstances.[71]

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

f) Spain[73]

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

g) Austria[80]

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

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[69] Article 214(1) Dutch BA states that (provisional) suspension of payment can be granted of payment to the debtor who expects (foresees) that he will be unable to continue the payment of his debts.

[70] The Dutch BA gives no specified time for this provisional suspension of payment. Court procedural rules state that within two to four months after granting the provisional suspension of payment,a hearing will be held regarding granting the final suspension of payment. See Dutch BA, art 215(2) and 2.3.1 Procesreglement verzoekschriftprocedures insolventiezaken rechtbanken (2019) <https://www.rechtspraak.nl/SiteCollectionDocuments/Procesreglement-verzoekschriftprocedures-insolventiezaken-rechtbanken-2019.pdf> accessed 27 October 2019.

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

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

[73] The Spanish Country Report was completed by Dr Antonio Sotillo Marti of the Departamento de Derecho mercantil "Manuel Broseta Pont" of Universitat de Valencia, Spain and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.10. Thanks also to Nuria Bermejo, Senior Researcher in Derecho Privado, Social y Económico of the Faculty of Law, Universidad Autónoma de Madrid and Professor Francisco Garcimartin, Chair Professor of Private International Law at Universidad Autónoma de Madrid, for their review and last-minute contributions to the Spanish parts of this Report.

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

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

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

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

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

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

[80] The Austrian Country Report was completed by Dr Susanne Fruhstorfer, partner at Taylor Wessing and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.4.

[81] *Bundesgesetzblatt* ("BGBl") 1997/114.

h) Poland[82]

The purpose of restructuring in Poland is to avoid bankruptcy (insolvent liquidation) by enabling the debtor to successfully restructure through an arrangement with creditors. With respect to remedial proceedings, there is a further purpose, namely to safeguard the legitimate interests of creditors while restructuring the debtor.[83] Each restructuring procedure – there are currently four types - of a collective type is centred around the adoption of an arrangement plan that must be voted upon by the debtor's creditors and approved by a competent court. The current legislative framework in Poland is set in the Restructuring Law Act of 15 May 2015[84] ("RL"). Any company that is at risk of insolvency[85] or is already insolvent[86] can commence restructuring by way of a court application, with the exception of arrangement approval proceedings, where a court accepts the previously created plan by way of a private process.[87] In the three other restructuring proceedings, a court will appoint a supervisor after commencing the procedure. The debtor will continue to manage the business (debtor in possession) with oversight from the supervisor, with the exception of remedial proceedings where, by default, the court will appoint an administrator to take over management of the debtor's business. There are four types of restructuring proceedings covered by the RL: (i) arrangement approval proceedings; (ii) accelerated arrangement proceedings; (iii) arrangement proceedings; and (iv) remedial proceedings. The first two proceedings can also be conducted in limited form where a (partial) arrangement can cover some creditors, which are key/have a fundamental influence on the debtor's business. This leaves other creditors unaffected.

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

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

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

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[82] The initial Polish Country Report was completed by Sylwester Zydowicz, Partner at Taylor Wessing and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.9; thanks also to Michał Barłowski of Wardynski & Partners, Warsaw Poland for significant additional input at short notice.

[83] RL, art 3.

[84] Consolidated text, Journal of Laws of 2019, item 243, with subsequent amendments.

[85] RL, art 11.

[86] RL, art 6.

[87] RL, art 223:

"1. The court shall issue a decision on approval of an arrangement within two weeks from the date of filing an application for arrangement approval.

2. A decision on arrangement approval shall indicate the basis for the jurisdiction of Polish courts. If Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on bankruptcy proceedings applies (OJ L 141 of 5 June 2015, page 19), the decision shall also specify whether the proceedings are main or secondary proceedings."

[88] Act of 28 February 2003 of Bankruptcy law (Consolidated text, Journal of Laws of 2019, item 498, with subsequent amendments).

[89] Act of 30 August 2019 amending the Act - Bankruptcy Law and some other acts (Journal of Laws of 2019, item 1802), published on 23 September 2019.

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

i) Germany[92]

Germany does not currently provide any type of preventive restructuring along the lines of what the Directive on Restructuring and Insolvency envisages. However, from 1927 to 1999 there was a preventive restructuring framework available (the "*Vergleichsordnung*"), which provided a collective procedure aimed at a debt restructuring agreement that could be confirmed based on a majority vote of unsecured creditors and a statutory minimum payoff to creditors. Since 1999, however, the German insolvency framework has featured a unitary procedure (the "*Insolvenzverfahren*") that includes a restructuring plan option inspired by US Chapter 11 for both insolvent debtors and debtors nearing insolvency. A major reform in 2012 created a so-called umbrella (interim) proceeding option (the "*Schutzschirmverfahren*") as a privileged path guaranteeing that the debtor will remain in possession while negotiating a plan. In both 1999 and 2012, the legislator deliberately decided against providing any separate preventive framework. Thus, all that is left is a preventive process for financial institutions (following the financial crisis) and a bond restructuring option, if provided for in the terms of the bond. The PRD will require the German legislator to design new procedural options and a legislative proposal is expected in the first half of 2020.

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

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

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

[90] See website: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2824 – document word "2824-uzas.docx".
[91] See website: http://acuria.eu.
[92] The German Country Report was provided by Professor Dr Stephan Madaus of Martin Luther University, Halle-Wittenberg and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.7.
[93] InsO, s 217.
[94] Georg Streit & Fabian Burk, 'Restructuring and Insolvency in Germany: Overview' (2018) Practical Law Company available from <https://uk.practicallaw.thomsonreuters.com/2-501-6976?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 September 2019.
[95] InsO, s 17 – defined as lacking more than 10% of the funding needed during the coming 21 days to meet its obligations, and it is not foreseeable that the financial gap will be less than 10% in the short term.
[96] InsO, s 18.

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

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

j) Denmark[97]

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

k) England and Wales[98]

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

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

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[97] The Danish Country Report was provided by Line Langkjaer, Assistant Professor at Aarhaus University in Denmark and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.6.

[98] The English and Welsh Country Report was provided by Dr Jennifer L. L. Gant, post-doctoral researcher on the JCOERE Project at University College Cork, Ireland with the assistance of Dr Paul Omar, technical research coordinator of INSOL Europe and is available in Annex 3 Contributor Responses to the JCOERE Questionnaire of this Report, section 12.11.

[99] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (the "Cork Report").

[100] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 12.

[101] *idem* 14.

[102] Cork Report (n 99) 202-203.

[103] *idem* 202-203.

[104] Jennifer L. L. Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 115; Finch & Milman (n 100) 15.

[105] *A Revised Framework for Insolvency Law* (Cmnd 9175, 1984).

[106] See for example T H Jackson, *Logic and Limits of Bankruptcy* (Harvard University Press 1986); and D G Baird and T H Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interest: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U Chi L Rev 97.

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

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

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

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

6.6 Conclusion

The forgoing chapter introduced the JCOERE Questionnaires, their purpose and function, as well as the approach taken to gathering the information from the contributing jurisdictions: Ireland, Italy, Romania, France, The Netherlands, Denmark, Germany, Austria, Poland, Spain, and England and Wales. This Chapter also expanded on the comparative law methodology adopted in the analysis of the questionnaire

[107] England and Wales Companies Act 2006, s 895(2).
[108] Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 588-589.
[109] See Recital 16 of the EIR Recast:
"This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors."
[110] Administration is a procedure provided for in the English and Welsh Insolvency Act 1986, schedule B1. The pre-pack is a practitioner devised process, but it is governed by guidelines set out by R3, the Statement of Insolvency Practice 16 (SIP 16).
[111] David Christoph Ehmke, Jennifer L. L. Gant, Gert-Jan Boon, Line Langkjaer, Emilie Ghio, 'Restructuring Europe – The EU Preventive Restructuring Framework: a Hole in One? A Comparative Study on the Occasion of the 10th Anniversary of the INSOL Europe Younger Academics Network of Insolvency Law' (2019) 28(2) IIR 184.
[112] Finch & Milman (n 100) 373-374.
[113] Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016) and *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016); and *Insolvency and Corporate Governance: Government Response* (August 2018).

responses, as well as certain challenges encountered in the synthesis of this part of the project. The questionnaires themselves were divided into three sections and Chapter 6 has dealt with the initial interrogation of existing preventive restructuring frameworks in the contributing member states, as well as the aims and functions of insolvency and restructuring in the jurisdictions. This has in some cases included a brief history where relevant.

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

Chapter 7 will deal with Part II of the questionnaire, which concerned substantive aspects of preventive restructuring, while Chapter 8 will deal with the first part of Part III, which looked at procedural matters. The second part of Part III of the questionnaire deals with the role of judicial and administrative authorities, which will be discussed in Report 2 of the JCOERE Project. The next chapter will discuss more specific aspects of the existing preventive restructuring and restructuring procedures set out above, with a specific focus on whether they contain any of the common modern elements of preventive restructuring, such as those included in the US Chapter 11, the Irish Examinership, and the PRD. The next chapter will focus on six specific substantive areas: the stay or moratorium (Article 6); adoption of restructuring plans (Article 9); confirmation of restructuring plans, including the exercise of majority rule within classes (Article 10); the cross-class cram-down and the relevant fairness tests for assessing the impact on dissenting creditors (Article 11); workers (Article 13); and the protection of interim and new financing along with the potential for priority in repayment (Article 17). The next chapter will examine what provisions, if any, the contributing jurisdictions have that align with these provisions and any plans for the introduction of such provisions or for amendments to their current systems.