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

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

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

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

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

---

[1] See Annex 2 of this Report for the full JCOERE Questionnaire Mapping the Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project.

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

[3] It should be noted that the content of this Chapter relies on the responses of the contributors from the jurisdictions that the JCOERE Team has investigated at the time that the JCOERE Questionnaires were fully answered in November 2019. Therefore, the views expressed in this chapter a based on the information provided to the JCOERE Team.

[4] By extension and in relation to the overall JCOERE hypothesis, the scope available for implementation, the controversial nature of the substantive provisions, and the challenges to implementation may also indicate some difficulties that courts may encounter in efforts to cooperate in cases of cross-border restructuring. This will be the focus of JCOERE Report 2.

[5] PRD, art 6(1):

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

[6] See Chapter 5 of this Report section 5.2.4.

[7] Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (Oxford University Press 2019) 147.

The content of this document represents the views of the author only and is his/her sole responsibility.
The European Commission does not accept any responsibility for use that may be made of the information it contains.
This report is funded by the European Union's Justice Programme (2014-2020). Project no. 800807.

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

The purpose of Question 3 was to establish the different ways in which the jurisdictions approached the stay prior to the PRD and to ascertain what changes would be required to implement it. Variances in the duration of the stay across jurisdictions can be problematic in a cross-border insolvency; the result can be the favouring of lower ranking creditors, which no longer have an economic interest, over in-the-money creditors, which are essentially prevented from exercising their enforcement rights.[8] This is unlikely to be problematic following implementation in light of the maximum durations specified in articles 6(6) and 6(8); however, it is a good example of the way in which creditors in cross-border insolvency matters can be treated differently where there is a failure to closely harmonise the relevant provisions.

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

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

---

[8] *idem* 147-151.

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

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

[11] PRD, art 6(3):

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

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

[12] PRD, art 6(4):

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

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

[14] PRD, art 6(5):

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

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

[16] PRD, art 6(7):

> "Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where

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

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

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

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

JCOERE Questionnaire Question 3.1:

Article 6 of the Directive states that:

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

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

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

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

In Ireland,[23] the stay, described as "court protection", commences upon receipt of the petition for examinership by the relevant court and applies to all creditor claims against the company and any other

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."

[17] PRD, art 6(8):
"The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.
Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings."

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

[19] Austrian Country Report, page 1.

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

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

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

[23] Irish Country Report, page 2.

proceedings relating to the company which can only be commenced with leave of the court.[24] It lasts for up to 70 days, with the possibility of an extension of up to 30 days for the examiner to complete his / her report.[25] Under s. 534(4) the court may extend the stay, if the report has been submitted but the court has not yet adjudicated on it, however, no maximum duration is specified in the legislation for this extension. In contrast to the Scheme of Arrangement in England and Wales, the parallel Irish legislation does provide for a stay on request of relevant parties.[26] There is no maximum time limit associated with the stay within the Scheme of Arrangement.[27]

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

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

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

A moratorium is available in one form or another in all five of the preventive restructuring procedures in France.[39] For conciliation and the ad hoc mandate, a debtor can apply to the court for a moratorium

[24] Irish Companies Act 2014, s 520(5).
[25] See Irish Companies Act 2014, s 520 & 543(3-4). Court protection will cease earlier than 70 days should the petition be withdrawn or refused by the court (s 520(2)).
[26] Irish Companies Act 2014 s 451(2)(3); the parties which can request a stay are laid out in s.451(3), namely, the company, its directors, any creditor or member of the company and the liquidator, if the company is in liquidation.
[27] Irish Companies Act 2014 s 451(2); "the court may, on the application of any of the following persons ...stay all proceedings or restrain further proceedings against the company for such period as the court sees fit."
[28] Spanish Country Report, page 2.
[29] Law 22/2003 of 9 July, art 5a and 235.
[30] Law 22/2003 of 9 July, art 5(4)(e).
[31] Italian Country Report, page 2.
[32] Decree No 14 of 12th January 2019 – Codice della crisi d'impresa e dell'insolvenze (CCI), art 54 para 2.
[33] CCI, art 54, para 3.
[34] This is confined to judicial liens, leaving unaffected all other forms of securities registered within the same timeframe prior to the *concordato* proposal.
[35] CCI, art 20.
[36] Dutch Bankruptcy Act (*Faillissementswet*) 1896 (Dutch BA), art 214.
[37] Dutch BA, art 230(1).
[38] Dutch BA, art 232. It is questionable if these exclusions could be justified under art 6(4)(a-b).
[39] French Country Report, page 2.

of up to two years if creditors attempt to enforce their rights while proceedings are pending.[40] Where conciliation is converted into a *sauvegarde accélérée* or *sauvegarde financière accélérée*, a general stay arises, which can endure for up to 3 months for the former and 1 month for the latter. For the standard *sauvegarde*, a stay arises automatically for up to 18 months during the observation period and any renewals.[41]

In Romania,[42] a moratorium does not arise automatically under the ad-hoc mandate, but in practice creditors are expected to accept a moratorium along with the mandate proposals. A debtor may request a provisional stay against forced execution under the preventive concordat.[43] Once the preventive concordat has been approved, a stay of individual enforcement actions arises automatically with a duration of no more than eighteen months.[44] Where a provisional stay is already in place, it is practice not to apply the additional stay under art 29 para 1.

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

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

Similarly, while Germany does not currently have a preventive restructuring procedure, the InsO insolvency plan does provide for a statutory moratorium upon the decision to commence proceedings and this cannot be lifted until the procedure is complete.[54] In interim proceedings, the court can decide

[40] Code Civil, art 1343-5.
[41] Code Commercial, arts L621-3, L622-7 and L622-28.
[42] Romanian Country Report, page 2.
[43] Law 85/2014, art 25 para 1.
[44] Law 85/2014, art 29-30.
[45] Polish Country Report, page 2. Additional thanks should be extended to Michał Barłowski of Wardynski & Partners, Warsaw Poland for significant additional input at short notice.
[46] RL, art 151.
[47] RL, art 260(1) & 279.
[48] RL, art 312.
49 Unless, as is the case with the Dutch exemptions, it can be justified under art 6(4)(a-b).
[50] Danish Country Report, page 1.
[51] The Danish Bankruptcy Act, Consolidated Act No 11 of 6 January 2014, as amended by Act No 84 of 28 January 2014, Act No 737 of 25 June 2014, Act No 573 of 4 May 2015, Act No 550 of 30 May 2017, Act No 1555 of 19 December 2017 and Act No 58 of 30 January 2018 (Danish BA), s 17.
[52] Danish BA, s 12(c).
[53] Danish BA, s 12(c)(5). As is the case with the Netherlands and Poland, this will either need to be amended or justified under art 6(4)(a-b).
[54] Thomas Hoffman and Isabel Giancristofano, 'Germany: Corporate Recovery and Insolvency 2019' (ICLG.com 2019) available from <https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/germany> first accessed 16/09/2019. The InsO provides for the possibility of agreeing an insolvency plan that can perform a similar function to a preventive restructuring plan, namely the preservation of the company as a legal entity by using similar mechanisms, such as the sale of the debtor's business, an operational restructuring based on an insolvency plan in which the debtor's business is continued, and financial restructurings. Georg Streit and Fabian Burk, 'Restructuring and Insolvency in Germany: Overview' (Practical Law Company 2018) <https://uk.practicallaw.thomsonreuters.com/2-501-6976?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 September 2019.

whether to issue a stay up to the commencement of proceedings, but can later revoke this decision if necessary, though this rarely happens.

7.2.3 Summary of Implementation Requirements for Article 6(1)

The responses to the questionnaire as to what the implementation requirements to align with the PRD may be, in addition to commentary from other sources, has led to the following conclusions. Italy appears to be generally compliant with the PRD, including article 6(5). and although Dutch law is not currently in line, the Dutch legislator has already begun the process of introducing the desired reform.[55] The WHOA will likely be compliant with the provisions on the stay, including its non-applicability to employees in line with article 6(5).[56] It appears that the remaining Member States may require amendments ranging from minor to significant in order to implement the PRD, the majority of which seem to relate to the duration of the stay. The introduction of a maximum duration, including extensions of 12 months, will likely be required in Poland, Romania and France. Currently, the stay in an Irish examinership extends to all creditors, which will include employees. Thus, Ireland may need to either amend the provisions of the stay to exclude workers or utilise the derogation from the second paragraph of article 6(5) in order to comply with the PRD.[57] Also the stay in an Italian *concordato preventivo* extends to all creditors, employees included. In this regard, the Italian social security entity (INPS) provides for a fund that covers workers' claim. For this reason, Italy may not need to amend its legislation pursuant to article 6(5). Romania may need to ensure that the exceptions provided for either comply with article 6(2) or article 6(4), as will Poland. Assuming Denmark implements a preventive restructuring framework similar to its existing insolvency proceedings, it may reconsider the exemption relating to fixed charge holders and the provision for regular payment of secured creditors.[58] Germany may choose to emulate some of its existing stay provisions from the InsO insolvency plan procedure in its preventive restructuring framework, but at the time of writing this Report, the intended direction of the changes is not clear. It appears that Austria will need to introduce a stay as part of its preventive restructuring process, which it could potentially map from its insolvency procedures.[59] Spain will possibly need to provide for judicial extension of the stay. Finally, it is envisioned that the UK will introduce a new moratorium in the next set of insolvency reforms.[60] This will likely be modelled on the moratorium available under Administration,[61] however, to align with the PRD, its duration will likely have to be limited in line with articles 6(6) and 6(8).[62]

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

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

JCOERE Questionnaire Question 3.2:

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

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

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

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

---

[63] PRD, art 6(9):
"Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:
(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;
(b) at the request of the debtor or the practitioner in the field of restructuring;
(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.
Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.
Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted."

[64] Irish Companies Act 2014, s 535; there are no specific conditions attached to this similar to those listed in Art 6(9)(a-b).

[65] Irish law does not have specific provisions for the court to lift a stay where creditors would be unfairly prejudiced or where the stay would give rise to the insolvency of a creditor, but these arts are optional. With that said, s 520(5) does allow for the commencement of proceedings by leave of the court, which could also amount to a lifting of the stay in relation to specific creditors / claims.

[66] It could be argued that the wording of s 451(2) - "on such terms as seem just" and "for such period as the court sees fit" - suggests that the court is empowered to lift the stay. Essentially, were the court no longer of the view that the stay was just, then it would be unlikely that the court would see fit for it to continue.

[67] CCI, art 55 paras 3-4.

[68] Law no 85/2014, art 35.

article 6(9)(a), as the creditors can also file for termination, which would be likely in a situation where the plan is likely to fail.

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

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

In Poland, the general rule is that a stay lasts for the duration of restructuring proceedings, specifically until a court order accepting an arrangement becomes final. This is when stayed enforcement proceedings are discontinued *ex lege.*[71] Since in the accelerated arrangement proceeding and arrangement proceeding automatic stay does not cover the right to enforce claims from collateral by a secured creditor, the judge commissioner supervising restructuring proceedings may, upon application of the debtor or court supervisor, release objects or rights constituting collateral from enforcement, but only if the debtor requires a secured asset for business.[72] The total length of such release from enforcement cannot exceed three months. The RL regulates situations where restructuring proceedings may be discontinued before creditors vote on an arrangement (for example, if continuation of proceedings is detrimental to creditors or it is clear from the case that an arrangement will not be executed or, in the case of arrangement and remedial proceedings, the court discontinues proceedings if the debtor fails to cover post opening debt or costs of proceedings[73]). However, there are no provisions *per se* that directly relate to the lifting of a stay and reflect all of situations covered by article 6(9) of the Directive.

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

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

The responses to the questionnaire on the requirements arising for jurisdictions by virtue of the PRD have led to a number of tentative conclusions. The pending legislation in Italy and the WHOA in Netherlands appear to align with article 6(9), thus no other amendments should be needed.[76] The Irish examinership procedure appears to be broadly in line, however, it may be wise for the Irish legislature to make it explicit that the debtor or insolvency practitioner can request that the stay be lifted, even though the effect of the current legislation is very similar. Romania may need to create the ability for the court to lift the stay without simultaneously terminating the procedure and, potentially, also legislate for the conditions under which the stay should be lifted. France will likely either need to introduce new procedures or amend a current one, in order to provide for the court to lift the stay. Arguably, this is

[69] Commercial Code, art L611-10-3.
[70] Law 22/2003 of 9 July, art 5(4) bis.
[71] RL, art 170.
[72] See, for example RL art 260(2).
[73] See details in RL arts 324-333.
[74] Dutch BA, art 215a(1)
[75] Dutch BA, art 242(1).
[76] WHOA, art 376(10) seems to focus primarily on the ground stated in art 6(9)(a) of the PRD. It appears to provide for the lifting of the stay by the district court.

also the case in Denmark, Germany and Poland, which appear to lack provisions for the court to lift a stay. In Spain, the stay can be lifted if the assets are no longer needed to continue the business activities. Accordingly, these Member States may well need to consider this at the implementation stage. In Austria, although there is no stay in the restructuring procedure, its stay in insolvency does provide for the court of execution to exercise its discretion in relation to granting extensions to the stay.[77] Finally, the 2018 UK government response to the Insolvency Service's Insolvency and Corporate Governance Consultation provides a recommendation that creditors should be able to object in court to a stay and to apply to have it lifted;[78] if this comes to fruition, it will be broadly in line with article 6(9), but further amendments will likely be necessary to include conditions outlined in 6(9)(a-b).

7.3 The Adoption of Restructuring Plans (Article 9)

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

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

Article 9(1)[79] provides for the adoption of restructuring plans and the full article sets out conditions under which such plans should be adopted. Article 9(2)[80] provides for the right of creditors to vote on the adoption of restructuring plans; it provides that only "affected parties" have the right to vote and mandates the exclusion of unaffected parties from voting.[81] Article 9 contains a provision on the classification of creditors for voting purposes - article 9(4)[82] - which requires creditors to be grouped in "separate classes which reflect sufficient commonality of interest based on verifiable criteria". At a minimum, the Member State must have secured and unsecured creditors. These voting rights and creditor classifications are subject to judicial or administrative body approval.[83] Interestingly, article 9(4) also provides for specific protection to be conferred on "vulnerable creditors", such as small suppliers. Perhaps this reflects the importance of SMEs to the economy of the EU, something which was discussed in Chapter 5. An intra-class cram-down, in other words, a majority system of voting, is provided for in article 9(6); the PRD has permitted jurisdictions to retain or introduce their desired voting majority for a restructuring plan to be carried by vote, provided that the majority required does

[77] Austrian Insolvency Code, s 11(3).
[78] Government Response para 5.40.
[79] PRD, art 9(1):

> "Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Art 4, debtors have the right to submit restructuring plans for adoption by the affected parties.
> Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans and provide for conditions under which they may do so."

[80] PRD, art 9(2): "Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan. Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan."
[81] PRD, art 9(3):

> "Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:
> (a) equity holders;
> (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or
> (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law."

[82] PRD, art 9(4):

> "Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.
> Member States may also provide that workers' claims are treated in a separate class of their own.
> Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.
> Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers."

[83] PRD, art 9(5):

> "Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.
> Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph."

not exceed 75%.[84] Finally, and for the sake of completeness, article 9(7),[85] allows for the replacement of a formal vote by an agreement with the requisite majority should Member States so desire.

There are four parts to Question 4. Question 4.1 focuses on whether the participating jurisdictions provide voting right to affected parties and if so, the similarity between these provisions and the PRD. Question 4.2 relates to the classification of creditors, paying specific attention to whether domestic legislation divides creditors into separate classes and if so, what classes are recognised by each jurisdiction. Question 4.3 pertains to judicial or administrative authority oversight of the process; it considers the extent to which the relevant judicial or administrative authority in each jurisdiction is involved in the examination and confirmation of voting rights and classes. Finally, Question 4.4 focuses on intra-class cram-down, in other words, the majority required in each jurisdiction for creditor approval of a restructuring plan with a view to comparing with the terms of the PRD.

There is scope for unequal treatment of creditors depending on the jurisdiction; varying majorities required for intra-class cram-down are permitted, with some jurisdictions requiring a simple majority and others requiring 75%. The same creditor may be classified differently in different jurisdictions, as some may simply have 2 classes - secured and unsecured - and others may sub-divide this further.

7.3.2 Jurisdictional Contributions: Voting Rights and Exclusions (Article 9(1))

JCOERE Questionnaire Question 4.1:

> *Article 9(2) requires that Member States to* "ensure that affected parties have a right to vote on the adoption of a restructuring plan", *allowing for certain exclusions from this rule in 9(3).*
>
> a. *Does your jurisdiction provide voting rights to affected parties of a restructuring plan and what, if any, exclusions are permitted? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with Article 9(2-3) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(2-3).*

In Ireland, the examiner is obliged to have the agreement of at least one class of impaired creditors prior to court confirmation of a restructuring proposal.[86] This agreement is expressed via formal vote.[87] The legislation creates no express exclusions, although it is possible that parties may be excluded from voting where they are not considered to be creditors.[88] As such, Irish law appears to comply with article 9(2) of the Directive.[89] Section 540(1) specifically refers to "members or creditors summoned" to consider the proposals; when read in conjunction with s.541(4) – proposal must be approved by at least 1 class of creditors *impaired* by the proposal. Creditors which are unimpaired will still vote on the plan but the significant threshold for progress to the approval stage is that a class of impaired creditors consents. Furthermore, only those impaired by the restructuring plan have a right to be heard at the

[84] PRD, art 9(6):

> "A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.
> Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class."

[85] PRD, art 9(7): "Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority."

[86] Irish Companies Act 2014, s 541(4). A creditor's claim against a company is impaired if the creditor receives less in payment of the claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner (s 539(5)).

[87] Irish Companies Act 2014, s 540 pertains to creditor and member consideration of the proposal and provides that "[p]roposals shall be deemed to have been accepted by a meeting ... a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted… in favour".

[88] For example, in *Re SIAC Construction Limited* [2014] IESC 25, [2014] ILRM 357 a particular creditor, the Polish Roads Authority, was excluded by the examiner on the basis that outstanding litigation generated uncertainty regarding whether the party was in fact a creditor. The court nevertheless agreed to hear submissions from the party

[89] Per the Irish Companies Act 2014, s 540 of the Irish Companies Act 2014, affected parties have a right to vote on the examiner's proposal.

court hearing to confirm the proposal according to s.543(1).[90] Similar to the framework in England & Wales, creditors are also afforded voting rights in the Irish Scheme of Arrangement.[91]

Italian law provides for voting rights for all creditors affected by the plan in the *accordi di ristrutturazione ad efficacia estesa*.[92] Voting rights are afforded to all unsecured creditors in the *concordato preventivo*.[93] Article 109 CCI excludes four types of creditors from voting on the plan; secured creditors that will be satisfied in full and paid immediately under the terms of the confirmed *concordato*, related parties of the debtor,[94] creditors that purchased their claims within the year preceding the commencement of the procedure and any creditor with a conflict of interest.[95] Interestingly, the plan may postpone full reimbursement of secured creditors for a period not longer than 2 years from the date confirmation of the composition (Art. 86 CCI). When the debtor utilises this option, secured creditors are entitled to vote on the plan, although the plan provides for full reimbursement of their claim, only for the difference between principal plus interest and the present value of the proposed stream of payments under the plan (thus, not for the entire face value of their claims).[96] As a result, it is unclear if the law complies with the Directive; although not expressly provided, the Directive seems to base its provisions on the implicit assumption that each affected creditor is entitled to cast its vote for the full value of its claims.

Romanian law also provides for affected parties to have the right to vote on a restructuring plan. Specific parties are excluded from voting, namely creditors which, directly or indirectly, control, are controlled or are under joint control with the debtor and the restructuring plan offers them more than what they would receive in case of bankruptcy. The debtor provides the list of creditors for the preventive concordat; accordingly, the debtor has flexibility in identifying which creditors will be involved.

In France, affected parties are afforded the right to vote in the *sauvegarde* procedure.[97] Creditors unaffected by the restructuring plan or those who benefit from a *fiducie* agreement (*bénéficiaires d'une fiducie*) cannot vote on the adoption of the plan.[98] Social and tax authorities cannot vote, as they cannot be members of a class. They are, however, invited to negotiate on the plan and can grant a debt cancellation or rescheduling. In conciliation, there is no formal voting *per se,* however, before the court can sanction an agreement via homologation, it must hear from the relevant parties to the agreement.[99]

Strictly speaking, in Spanish *refinancing agreements* creditors have no voting rights, but the right to subscribe to the agreement.[100] Claims of especially related persons within the meaning of article 93(2) of the Spanish Insolvency Act (e.g., shareholders of the debtor, other companies of the group, etc.), will not be taken into consideration for the formation of the majorities. However, these creditors will be affected by the agreement. Since refinancing agreements only affect financial claims, non-financial creditors, that is, workers, commercial and public creditors, do not take part in the adoption of these agreements. Nevertheless, workers and commercial creditors can voluntarily adhere to them, but their claims will not be taken into consideration for the formation of the abovementioned majorities (Additional Provision 4th (1) of the Spanish Insolvency Act). In the case of *extra-judicial payment compositions*, in principle, only unsecured creditors have voting rights, since they are affected by the plan. Secured claims will only be affected by the plan when they voluntarily decide to vote for it (articles 238 and 238 bis of the Spanish Insolvency Act).

As discussed previously, Denmark does not have a preventive restructuring framework within the meaning of the PRD. With that said, its restructuring framework in insolvency has many of the key

---

[90] Other individuals may be permitted to make submissions, but their right to be heard is not guaranteed.
[91] Irish Companies Act 2014 s 450-453.
[92] CCI, art 61.
[93] CCI, art 109. It should be noted that under Italian law, equity holders are excluded from voting.
[94] This includes any creditors that belongs to the same group of companies as the debtor
[95] Secured creditors will have the opportunity to wave their privilege, entirely or in part, just for the purposes of that procedure, in order to be able to cast their vote for the part of their claims that became unsecured.
[96] Their vote is accounted just for the difference between principal plus interest and the present value of the proposed stream of payments under the plan, not for the entire face value of their claim.
[97] Bondholders are to be consulted in one general meeting of all bondholders in relation to all bonds; they vote in a general meeting on the plan that has already been adopted by the relevant creditors' committees.
[98] Commercial Code, arts L626-30-2 & L626-32, respectively.
99 The relevant parties include the conciliator, some representatives of the company, the debtor and creditors
[100] Ley 22/003 of ninth July on Insolvency, additional provision 4(1).

features of preventive restructuring frameworks in other jurisdictions and, indeed, the PRD.[101] As such, the relationship between the system in Denmark and article 9 will be discussed on the assumption that Denmark will map its current insolvency framework to preventive restructuring. Danish law affords affected parties – creditors, which will not be paid be in full or at all - the ability to vote on a restructuring plan.[102] Secured creditors are excluded from voting except for the amount of their claim that is unsecured.[103] Related parties are also excluded from voting on the restructuring plan.[104] Creditors with contested claims may be considered ineligible to vote by the Bankruptcy Court if the contested claim is decisive for the adoption of the plan.[105] If the plan consists of a compulsory composition, all creditors whose claims are written down are considered affected; this is limited, however, as a compulsory composition cannot include secured or preferential creditors.[106]

Polish law as a rule grants the right to creditors affected by restructuring proceedings to vote on an arrangement plan[107] (employment-related receivables and secured creditor receivables - to the extent that such receivables cannot be satisfied from collateral - will participate in an arrangement only if a creditor explicitly agrees to do so). Separate regulations apply to proceedings where a partial arrangement plan is to be adopted if a secured creditor can be bound to participate in an arrangement, irrespective of its decision).[108]In practice, the voting right is related to creditors whose claims have been entered in an approved table of claims or to creditors present at an assembly of creditors with proof of those claims who can also be admitted to vote at the meeting. Creditors who are close relatives, equity holders (when meeting certain qualifications) and creditors holding claims acquired by way of transfer and/or endorsement after the opening of restructuring proceedings are excluded from voting.[109] Not covered are therefore provisions of non-compulsory article 9(3)(b) of the Directive. At this point it is yet unclear what legislative changes will be proposed to amend the RL and the BL to render them compliant with the Directive.

In the Netherlands, a vote is required by all affected parties for an out-of-court composition.[110] Where there is a suspension of payment – which excludes secured and preferential creditors – the restructuring plan will be voted on by affected creditors.[111] When a claim is disputed and consequently the right of the creditor to vote, the court will adjudicate on the validity of claim.[112]

Austrian law empowers creditors to vote in a restructuring plan in the course of insolvency proceedings, but not in the course of a preventive restructuring proceeding (URG). Similar to Italy and Denmark, secured creditors do not have voting rights except if the hold a partially secured claim, in which case their vote relates solely to the unsecured part.

Similarly, Germany provides voting rights for impaired creditors and shareholders in its insolvency restructuring plan proceedings (InsO).

In England and Wales, both the Scheme of Arrangement and the CVA provide voting rights to approve the relevant plan.[113] There are no exclusions specified in the legislation. However, in practise the English courts have approved plans where ’out of the money’ creditors have not been included in a class of creditors.

---

[101] In some instances, the only difference between Danish restructuring and preventive restructuring in other jurisdictions is the end purpose; the purpose of the Danish framework is to enable the debtor to exit insolvency, whereas preventive restructuring is to enable the debtor to avoid becoming insolvent in the first place. As such, in order to access restructuring in Denmark, the debtor must be insolvent, making it different to the PRD.
[102] Danish BA, ss 13 d (1) & 120 (1).
[103] Danish BA, s 120(2).
[104] Danish BA, s 13 d (3).
[105] Danish BA, s 13 d (2).
[106] Danish BA, s 13 d (4) and section 10 a (2). A ccompulsory composition (*tvangsakkord*) is a legally regulated restructuring procedure, in which the amount that the debtor has to pay to the creditors is reduced.
[107] RL, art to be read in conjunction with art 150.
[108] RL, arts 180 - 188.
[109] RL, arts 107, 116, & 109.
[110] An out-of-court composition requires full support of the creditors, save in limited circumstances, which are discussed in paragraph 7.3.8.
[111] Dutch BA, arts 232 & 252.
[112] Dutch BA, art 267.
[113] English and Welsh Companies Act 2006, s 899(1); and Insolvency Act 1986, s 4(1) & 4(1A).

7.3.3 Summary of Implementation Requirements

A combination of the responses received by the JCOERE project and other commentary has led to the following provisional conclusions regarding the changes necessitated by the PRD: It is likely that countries such as Austria will have to make substantial changes to their legislation in order to comply with article 9. As discerned from the responses to the questionnaire, Austria does not provide voting rights for creditors in preventative restructuring; however, it is likely that Austria will opt to require the maximum limit majority of 75% in number and value of the claims as the basis for consent to pre-insolvency restructuring plans. Germany may also choose to borrow from its InsO insolvency plan provisions to provide voting rights in a new preventive restructuring framework aligning with the PRD. As the Dutch 'suspension of payment' can be interpreted to afford voting rights to all creditors - not just those affected by the proposed restructuring plan – the WHOA contains the necessary changes.[114] Italy France, Romania, Poland, Denmark and Ireland seem to have no need to amend their legislation.[115] Poland may decide to clarify exactly which creditors are excluded from voting in line with the PRD. It is likely that the UK will align any new framework with provisions of the Scheme in terms of voting,[116] which will be compliant with the PRD.

7.3.4 Jurisdictional Contributions: Class Formation (Article 9(4))

JCOERE Questionnaire Question 4.2:

> *Article 9(4) requires that Member States treat affected parties in separate classes,* "which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law."
>
> a. *Does your jurisdiction provide for the separation into classes of those parties affected by a restructuring plan?*
>
> b. *What classes does your jurisdiction recognise?*
>
> *Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> c. *Will your jurisdiction have to make changes to comply with Article 9(4) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(4).*

In Ireland, s.536(f) of the Companies Act 2014 states that the examiner's report must contain a "list of the creditors of the company…the nature and value of any security held…and the priority accorded...to any such creditor". In line with the usual rules of ranking for liquidation, creditors can be divided into preferential, secured and unsecured creditors. They may be further subdivided into categories at the discretion of the examiner. There is a clear distinction between super-preferential, preferential, secured and unsecured claims. The common law rules on class formation, which exist in Ireland and England and Wales in the context of Schemes of Arrangement, also apply to examinership and add an additional layer to class formation.[117]

In the Italian *concordato*, the debtor can form different classes based on the legal position of the creditor - senior and junior - and their commonality of interest.[118] The creation of separate classes for secured and unsecured creditors is not mandated; secured creditors will be unaffected by the plan because they are paid in full, therefore they will not be entitled to vote and there is no need to include them in a "class". Instead, Italian law mandates the formation of the following classes:

(i) tax and social security claims that are not going to be paid in full;

[114] Voting creditors and shareholders are defined as those whose rights are amended as a result of the restructuring plan.
[115] As articulated above, Denmark is included assuming it extends its current restructuring process to preventive restructuring. Refer to the note regarding the insolvency and restructuring framework in Denmark in section 7.3.2 of this Chapter.
[116] Government Response (n 60) para 5.135.
[117] See *Re Pye (Ireland)* [1985] IEHC 62 and *Re Millstream Recycling* [2010] IEHC 538. See also Irene Lynch Fannon and Gerard Murphy *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury 2012) 548 & 627-632.
[118] For example, creditors benefitting from a third-party personal guarantee are not in the same position as those not having such guarantee, although they have the same ranking vis-a-vis the debtor.

(ii) creditors whose claim is assisted by guarantees provided by third parties;

(iii) creditors that are not going to be paid entirely in cash under the plan; and

(iv) in case of a competing plan, the proposing creditors and their related parties.

All unsecured creditors - including secured creditors for the unsecured part of their claim – may be included in one single voting class. It is important to note, however, that secured and priority creditors, although not forming a voting class for the part unaffected by the plan, are always treated separately from one another.

In the *accordo di restrutturazione dei debiti*, there is no class formation and the plan is binding only on consenting creditors. In the *accordo di restrutturazione dei debiti ad efficacia estesa*, there is class formation in order to bind minority creditors by the agreement reached by the majority of creditors in the same class.

Romanian law does not provide for the separation of creditors into classes in the preventative restructuring process but does have classes for insolvency proceedings. The classes are secured (receivables with preference rights), salary claims, budget receivables, indispensable claims (receivables belonging to essential suppliers) and other unsecured claims.

Interestingly, during the *sauvegarde* procedure in France, class formation is done on the nature of the business of the creditor, as opposed to the type of the claim. Three classes of creditors exist - financial institutions, major trade creditors and bondholders - into which creditors are organised based on their relationship with the company, as opposed to the type of debt.[119] The *Loi Pacte*, however, authorises the introduction, via an Ordinance, of "true" classes of creditors, which it is envisioned with bring France in line with the PRD.[120]

Similarly, Denmark does not specifically separate creditors into classes for the purpose of voting, but the restructuring plan cannot entail a compulsory composition of secured creditor claims that are higher ranked than ordinary unsecured creditors in bankruptcy proceeding. So a compulsory composition will only affect the ordinary unsecured creditors that then vote in one pool. Since the voting does not take place in classes there is no need to separate them.

While the Netherlands does not have separation of creditors for the purpose of voting, it does recognise different types of creditors for the purpose of ranking. The WHOA, however, will address this issue, once passed.

The German insolvency procedure provides for the division of creditors into classes on the basis of economic interests and the creditors' status in law. Classes include shareholders if they are impaired.

Austria differentiates between secured, unsecured creditors and subordinated creditors in both insolvency and restructuring procedures.[121]

Spain distinguishes financial creditors which are all creditors that are not public creditors, workers or commercial creditors (suppliers), and non-financial creditors and in some cases uses different procedures for different types of creditors. Banks and credit institutions are an example of financial creditors; however, shareholders having lent money to the company will also be considered financial creditors. In extra-judicial payment compositions, Spanish law has unsecured and secured creditor classes, although, in principle, secured claims are not affected by extra-judicial payment compositions. However, these creditors can voluntarily decide to take part on these agreements, voting in favour of them. The effects will be extended to other secured creditors when the requisite majorities of creditors vote in favour. In the case of refinancing agreements, secured creditors holding financial liabilities can be affected by the plan and, therefore, are entitled to subscribe to it. The effects can be extended to dissenting or non-voting creditors with the requisite majorities. Strictly speaking, in both frameworks,

[119] According to the French Commercial Code, art L626-30 the classes of creditors are (i) financial institutions, (ii) major trade creditors and (iii) bondholders. This applies to companies of a certain size i.e. companies with more than 150 employees or an annual turnover of over €20 million per art L626-9, making reference to art 162 of Decree n°2005-1677 of 28 December 2005.

[120] *Loi Pacte*, art 196(1).

[121] Markus Fellner, 'Restructuring and Insolvency: Austria' (Thompson Reuters 2011) <https://uk.practicallaw.thomsonreuters.com/4-385-2603?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 26 October 2019.

creditors do not vote in classes. However, majorities for secured claims are calculated taking into account the total value of secured liabilities.

In Poland, the organisation of creditors into classes is optional in that legislation provides for a right, but no obligation, to form classes. The formation of classes may be based on the following criteria (non–exclusive list):[122]

(i) among creditors entitled to claims under employment and who have agreed to be covered by an arrangement;

(ii) farmers entitled to claims under contracts for delivery of products from their own farm;

(iii) creditors whose claims are secured by a debtor's property with mortgage, pledge, registered pledge, tax lien and/or maritime mortgage, as well as by the transfer to the creditor of ownership of an asset, claim and/or another right, and who have agreed to be covered by the arrangement;

(iv) creditors who are partners and/or shareholders of a debtor that is a capital company, with shares and/or stock of the company ensuring at least 5% of votes at the shareholders' meeting or the general meeting of shareholders, even if they are entitled to claims specified in subsections 1-3.

In addition, more favourable debt restructuring proposals can be addressed to such creditors who have granted new financing post-opening of restructuring proceedings that is required for executing an arrangement.

To make the RL compliant with article 9(4) of the Directive, an amendment to the RL would need to make the division of creditors into classes mandatory. In case of partial arrangements, it seems that amendment of the RL would need to primarily provide for the formation of classes explicitly. Under the current RL it is unclear whether this right - even on a non-compulsory basis - can be derived from existing RL provisions.

In England and Wales, the "essential requirement" of class formation for the Scheme of Arrangement is that classes are comprised of "only of those persons whose rights … are sufficiently similar to enable them to properly consult and identify their true interests together."[123] Thus, where creditors have different interests, separate classes should be convened and where they have similar interests, they should be grouped together. In the CVA, specific classes are not identified in the same way. Rather, a composition will be approved if a majority of at least three quarters in value of the creditors voting is achieved.

7.3.5 <u>Summary of Implementation Requirements</u>

From the responses to the JCOERE questionnaire and discussions in various other fora, the following has been deduced in relation to the potential changes necessitated by the introduction of the PRD. There may be widespread scope across Member States for the introduction of specific provisions to protect or strengthen the position of vulnerable creditors in line with article 9(4).[124] Aside from that, it can be suggested that Ireland will have no changes to make. The WHOA should result in the Netherlands being compliant with the Directive, as article 374 regulates creditor class composition in a way that aligns with the PRD.[125] The UK proposal for a restructuring plan suggests applying an approach similar to the current Scheme of Arrangement framework, which is widely considered to be fit for purpose and in terms of voting rights, compliant mostly as it is.[126] More extensive changes may be needed in the

[122] RL, art 161.

[123] *Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole* [2011] EWHC 3746 (Ch) para 44.

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

[125] WHOA, art 374:

> "Creditors and shareholders are allocated in different classes if the rights they would have in the event of liquidation of the debtor's assets in bankruptcy or the rights they are offered on the basis of the restructuring plan are so different that there is no comparable position. In any event, creditors or shareholders who, in accordance with Title 10 of Book 3 of the Civil Code, another law, or a set of rules or agreement based thereon rank differently in relation to the recovery of the debtor's assets, are allocated in different classes." (unofficial translation)

[126] Government Response (n 60) 70

remaining Member States. As with the previous question, Germany and Austria will likely need to extend their similar provisions within insolvency to a preventative restructuring framework or devise a new framework entirely. In addition, Austria currently intends to create a new class of "worthy creditors" that will include groups such as small suppliers. Spain should perhaps consider the lack of clarity in how classes of creditors are established in order to align with the terms of the PRD. It appears that Denmark will have to provide for voting to take place in classes in its new preventive restructuring framework, as Poland will likely have to make this an obligation in its existing framework.[127] The classification of creditors and voting rights based on these classes may form areas of scrutiny for Romania. Similarly, France may need to amend how it classifies creditors; as extracted from the response to the questionnaire, however, the *Loi Pacte*.[128] Although Italian law does not expressly provide for separation of secured and unsecured creditors, this result is substantially achieved in practice, except for a very limited number of cases. In reality, whenever a plan provides for class formation, the applicable criteria under the Italian law, namely commonality of interests and homogenous legal position of creditors placed in each class, ensure that secured and unsecured creditors are put in different classes. A possible conflict with the PRD may only arise when the law permits the submission of a plan without forming classes, since in such cases the above criteria do not apply and, as a result, secured creditors are treated and may vote on the plan for their possible deficiency claim (i.e., the part of the claim that exceeds the value of the collateral and, thus, it treated as unsecured) at the same terms as unsecured creditors. The same may occur when secured creditors are entitled to vote due to the rescheduling of their claims pursuant to Art. 86 CCI (see above).

7.3.6 Jurisdictional Contributions: Examination of Voting Rights and Class Formation by Authority (Article 9(5)

JCOERE Questionnaire Question 4.3:

> *Article 9(5) allows for judicial or administrative examination of voting rights and the creation of classes when a request for confirmation of a plan is submitted and, further, allows Member States to "*require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage…"
>
> a. *Does your jurisdiction provide for the examination, confirmation, approval or otherwise of the voting rights and separation into classes of affected parties for the purpose of approving a restructuring plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*
>
> b. *Will your jurisdiction have to make changes to comply with Article 9(5) and if so, please describe any currently suggested changes to your provisions considering the enactment of Article 9(5).*

Irish law mandates that the Examiner's report, which is subject to court approval, must contain *inter alia* the proposals placed before creditor meetings, the outcome of each vote and the list of the company's creditors including their priority (separation into classes).[129] Therefore, while there is not a separate approval of the voting procedure and classification of creditors, the confirmation of the report encompasses their approval, presumably complying with article 9(5). In applying Irish case law, MacCann and Courtney state that the court will only confirm a scheme if it is satisfied that the classes were properly constituted, amongst other criteria.[130] An individual creditor can object to court confirmation of the Examiner's proposal under s.543(1)(a) - material irregularity at the meeting - which could encompass the failure of the Examiner to correctly classify that creditor.[131] Outside the Examinership procedure the Irish Scheme is broadly similar to the framework in England & Wales, in

[127] As discussed previously, Polish law currently has classes, but they are optional.
[128] *Loi Pacte*, art 196(1).
[129] Irish Companies Act 2014, s 536. Classification of creditors is the responsibility of the Examiner.
[130] Lyndon MacCann and Thomas Courtney, *The Companies Acts 1963 – 2006* (Bloomsbury 2008) 396 in relation to *Re Colonia Insurance (Ireland) Ltd.* [2005] 1 IR 497 and *Re John Power and Sons Ltd* [1934] 412.
[131] See John O'Donnell and Jack Nicholas, *Examinerships* (2nd edn, Lonsdale 2016) 136: they argue that such an error or misclassification would have to be determinative i.e. the proposal would not have been accepted by the particular class of creditors, had the particular creditor(s) been correctly classified. The other grounds for objection are laid out in s 543(1)(b)-(d).

that there is no provision which specifically mandates the examination of voting rights and class formation, but there is court sanction of the compromise.[132] However, Irish law has been amended to eliminate the need for the first court hearing approving the holding of meetings which is still required under s 896 of the Companies Act (UK) 2006.[133]

In the Italian *concordato preventive,* the law requires an examination of the formation of classes at an earlier stage than confirmation, per article 9(5) of the PRD. The court verifies the criteria used to form the relevant classes before starting the voting process and subsequently re-evaluates such criteria in the confirmation hearing. Article 48 CCI, which regulates court confirmation of the *concordato* plan approved by creditors, allows the judge to verify the correctness of the procedure, including the formation of classes. Article 61 CCI provides a control on the formation of classes when the court is asked to confirm the agreement thereby allowing for the extension of its effects to the dissenting minority (*accordo di ristrutturazione ad efficacia estesa*).[134] These provisions reflect, with no significant difference, the provision contained in the current Italian insolvency law.[135]

Romanian law provides for mandatory judicial examination of the voting process for approval of the concordat, which is submitted by the administrator after its approval by the creditors.[136] The judge homologates the preventive concordat and issues a resolution in the council's chamber, after summoning and hearing the concordat administrator.

The French *sauvegarde* system is a little more complex; strictly speaking, there is no examination, confirmation or approval of the classification of affected parties for the purpose of approving a restructuring plan in *sauvegarde* proceedings. With that said, voting rights can be amended, which presupposes an examination. Decisions made by the administrator regarding the value of votes can be referred to the court for adjudication, should a dispute arise.[137] Once the plan has been adopted, the court will ensure that the interests of all creditors are sufficiently protected.[138] It is interesting to note that there is some discord in France relating to the 2014 reforms, which afforded the administrator the power to calculate creditors' rights in light of subordination agreements. It has been argued that there is a lack of objective criteria attached to this power.[139]

Austria has provisions for the examination of voting rights, but the legislation does not currently require a formal class formation, relying instead on the natural division of secured, unsecured, and subordinated, although as noted above there is an intention to create a new class of "worthy creditors" in upcoming reforms. While it does not specifically have a mechanism for "class formation", the system of differentiating classes of creditors is functionally equivalent. Creditors with disputed or conditional claims are allowed to vote initially and if the result varies based on those votes, then the insolvency judge conducts a preliminary examination and hearing of the parties (article 93 of the Insolvency Code) and adjudicates the matter.

Germany has the relevant structures for a restructuring plan approval, but only in insolvency, not preventative restructuring. Within the insolvency plan procedure there is a requirement that courts verify the fairness of class formation and voting.

---

[132] Irish Companies Act 2014, s 453(2)(c).

[133] s 896(1) provides that "The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs."

[134] CCI, art 47 & 85. Pertains to the *accordi di ristrutturazione ad efficacia estesa*

[135] CCI, arts 182-bis & 182-septies.

[136] Law no. 85/2014, art 28 (1).

[137] Commercial Code, art L626-30-2 para: Creditors may have contracts with the debtor which contain clauses regulating how their vote on the plan will be exercised. Creditors who benefit from a guarantee or a subordination agreement must notify the administrator. The administrator will take into account the benefits accruing to the creditor when deciding on the value of the vote and will notify the creditor before the meeting takes place. For bondholders, the same voting rules apply as the ones for the creditors' committees, however, the value of their vote is determined without reference to the value of any accessory security given by the debtor by which they may benefit.

[138] Commercial Code, art L626-31. "Adopted" means the plan has been adopted by each of the creditors' committees and where applicable, by the general meeting of bondholders (and shareholders' meeting in case of a debt-to-equity swap).

[139] A Droege Gagnier and A Dorst, 'France: quo vadis? France is Keen to Reform its Security and Insolvency Law' (2018) 12 Insolvency and Restructuring International 24, 25.

Denmark has provisions relating to the confirmation / examination of voting rights within insolvency; the Danish Bankruptcy Court examines and confirms the creditors which are eligible to vote, a decision which is not subject to appeal.

In the Netherlands, the debtor and creditors will verify the claim themselves in an out-of-court composition. Where there is a dispute, they refer the matter to dispute resolution, either in or out of court. When the suspension of payment has been granted, the creditor must submit his claim to the insolvency practitioner for verification.[140] Where the insolvency practitioner disputes the claim, the creditor will be consulted for more information in the first instance; for claims which remain disputed, the court or supervisory judge will decide.[141] In general, the admission of claims for the purpose of voting is not performed by a judicial or an administrative authority per article 9(5) of the Directive.

Polish Restructuring law provides for a simplified process – in relation to bankruptcy (liquidation insolvency) proceedings under the BL – of examining creditors who have the right to participate in proceedings and thereby exercise voting rights during an assembly of creditors. Different rules apply depending on the type of restructuring proceedings:

(i) in arrangement and remedial proceedings, a voting right results from the inclusion of claims in a table of claims. The parties may object to entry of claims in the table to the judge-commissioner;[142]

(ii) in accelerated arrangement and arrangement approval proceedings, every claim reported to the debtor prior to the opening of restructuring proceedings accrues voting rights if;

  (a) this claim was confirmed by the debtor; or

  (b) the judge-commissioner admits a claim, which is when the claim is subject to a condition precedent or is disputed by the debtor, but its existence is probable[143] (i.e. there are grounds to believe that a claim exists and is justified).

If the assembly of creditors accepts an arrangement, a hearing takes place to confirm an arrangement plan. Prior to the hearing, written reservations can be submitted to the court,[144] which will be resolved during a hearing.

If an arrangement plan is in breach of the law or is considered to be grossly unfair to those creditors who have voted against it and have made reservations, the court may refuse its approval. Indirectly, this acts as a verification of the classification of creditors in an arrangement.[145] It is therefore unclear whether an amendment of the RL will be required. If so, this will be to make it explicit that a court has an obligation to analyze creditor voting rights and formation into classes as provided by article 9(5) of the Directive.

Extra-judicial payment compositions in Spain are verified by a mediator (in the case of business) or by a notary (in the case of consumers). These professionals are responsible for verifying the fairness of the procedure and that the requisite majorities have been met in order to confirm an agreement.[146] Refinancing agreements are confirmed (homologated) by the court,[147] thus it is the judge's duty to verify the fairness of these agreements.[148]

In England and Wales, it is the applicant's responsibility to ensure that classes are constituted properly for the purposes of approving a Scheme, however, the court will give due consideration to the identification of classes.[149] The Scheme has three stages. First, there is an application for an order that meeting should be summoned at which time it is decided as to whether further meetings should be

---

140 Dutch BA, art 257(1).
141 Dutch BA, arts 258, 259 & 267.
142 RL, art 91.
143 RL, art 107(3).
144 RL, art 164.
145 RL, art 165(2).
146 Law 22/2003 of 9 July, art 238.
147 Law 22/2003 of 9 July, art 238.
148 Law 22/2003 of 9 July, additional disposition 4 part 6.
149 Practice Statement (Companies: Scheme of Arrangement) [2002] 1 WLR 1345 as cited in Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 581.

summoned. Secondly, scheme proposals are presented to a meeting, are voted upon, and if approved by the requisite majority in number and value of 75%, the Scheme proceeds to the third and final stage. During the final stage, the court's sanction must be obtained.[150] During this third stage, the court is concerned:

> "(1) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (2) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (3) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present, or, being present, did not vote in favour of the proposals) receive impartial consideration."[151]

It is at this third stage that a court will consider issues of fairness, including that the views and interests of affected creditors who may not have voted in favour of the scheme.[152] During the first stage, the court will also look at whether the creditors as a whole have interests that are aligned closely enough to be considered together or whether they are so dissimilar as to render it impossible for them to consult together on the aspects of the plan.[153] Following *Re Hawk Insurance*, the court will not take a mechanical approach to determining the composition of a class, but will instead look at the scheme's impact on the substantive rights of different creditors.[154]

7.3.7 Summary of Implementation Requirements

The responses to the JCOERE questionnaire and contributor views on what will be required to implement the PRD have led to a number of tentative conclusions. Ireland, Denmark, Romania[155] and Italy will likely require no changes in light of article 9(5) of the Directive. France may implement the required changes via the The *Loi Pacte*, the amendment to which was discussed in the previous section. Consideration may need to be given to the legislation in Austria and the requirements on the examination and confirmation / approval of class formation and voting rights in the PRD. Poland may wish to amend its legislation in order to provide for the confirmation of class formation at an earlier stage. The WHOA will likely ensure that the Netherlands is compliant with the PRD as it seems to provide for *ex officio* examination of class formation by a relevant authority. A request that the court adjudicates on the class formation and voting rights prior to voting on the plan can be made by the debtor or the expert.[156] In addition, it appears that creditors and shareholders may dispute their class or voting rights with the debtor, or in court.[157] England and Wales already provide court heavy approval process in its Scheme of Arrangement, which is likely to be adopted in similar fashion should the Government Response yield restructuring reform introducing a plan procedure, although the court heavy procedure is contrary to the spirit of the PRD.

7.3.8 Jurisdictional Contributions: Intra-Class Cram-Down (Majority Voting) (Article 9(6&7)[158]

JCOERE Questionnaire Question 4.4:

---

[150] *Re BTR Plc* [2000] 1 BCLC 740, 742 and *Re My Travel Group Plc* [2005] 2 BCLC 123, para 8.
[151] *Re Hawk Insurance Co Ltd* [2002] BCC 300, 511 (b-g).
[152] *idem* para 12 as cited in van Zweiten (n 149) 577.
[153] van Zweiten (n 149) 581.
[154] *RE Hawk Insurance Co Ltd* [2002] BCC 300 and *Re UDL Holdings Ltd* [2002] 1 HKC 172.
[155] Refer to the note regarding the framework in Denmark in section 7.3.2 of this Chapter.
[156] WHOA, art 378(1), which provides for the option that the debtor or the plan expert requests the court to assess the validity, for instance, of the class formation and voting rights.
[157] WHOA, arts 383(9) (with debtor), 383(8) & 384(2)(c) (in court) respectively.
[158] PRD, art 9(6):

> "A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.
> Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class."

Article 9(6) includes a compulsory intra-class cram-down element:

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

The optional provisions are that member states may provide that a majority in number in each class must also agree. In addition, the majority can be set down by member states but cannot be higher than 75%. Article 9(7) provides that formal votes can be replaced by an agreement with the requisite majority.

a. *Does your jurisdiction have intra class cram down provisions in existing preventive restructuring proceedings? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive.*

b. *Will your jurisdiction have to make changes to comply with Article 9 of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 9(4).*

Ireland has provisions which provide for the vote to be carried by a majority within each class; s.540(4) provides that "[p]roposals shall be deemed to have been accepted by a meeting of …a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted… in favour". As such, Ireland utilises a system of simple majority i.e. in excess of 50%. Irish legislation does not have a system of replacing formal voting with a less formal, expression of majority agreement. The proposal in the Scheme of Arrangement becomes binding on a class of creditors once a special majority is reached, in other words, 75% by value.[159]

In Italy, the plan in a judicial composition with creditors is approved if the majority by value of creditors entitled to vote have approved the plan.[160] If a single creditor holds a majority of the value of all the claims entitled to vote,[161] then there must also be approval by a majority of the number of creditors in the class.[162] In addition to that requirement, in case of class formation, the approval of the plan requires that the majority of the number of classes have approved the plan (a class is deemed to have approved the plan when the majority by value of the creditors included therein have voted favourably). With respect to restructuring agreements, binding dissenting creditors within a class, the class is deemed to have approved the plan if 75% by value of creditors have approved it.[163]

In Romania, preventive restructuring plans (preventive concordat) can be adopted and confirmed by creditors' votes representing at least 75% of the value of the accepted and uncontested claims, reflecting the maximum threshold set out in the PRD.

In France, there is no need for a cram-down mechanism in the conciliation or ad hoc mandate proceedings, as they are voluntary in nature; in other words, they are negotiations with particular creditors, which are willing participants in the process. In the *sauvegarde* proceedings - for the purpose of the plan becoming binding on all members of a particular class once it is confirmed by the court – the plan must be approved by a majority of two-thirds of the number of claims.[164]

---

[159] Irish Companies Act 2014, s 453(2)(a). The 75% majority refers to a "number representing at least 75 per cent in value of the creditors or class of creditors ... present and voting either in person or by proxy at the scheme meeting". (Irish Companies Act 2014, s 449(1))
[160] CCI, art 109 para 1.
[161] This requirement also applies in case a restructuring plan does *not* envisage the formation of classes.
[162] The PRD mandates that the majority required by a Member State shall not be higher than 75%. There could be situations where, based on the specific circumstances of the case, the majority required by Italian law is higher than 75% by amount e.g. when a creditor has a claim of 60% by amount, and there are two other creditors each having a claim of 20% by amount, under the Italian rules the class may be deemed to have approved only if a majority representing 80% by amount is reached.
[163] CCI, art 61 sets an identical provision in this respect.
[164] Commercial Code, art L636-31.

In the Austrian voluntary reorganisations and self-administered reorganisation (debtor in possession), a reorganisation plan requires a majority of unsecured creditors holding more than 50% of the aggregate claims of those unsecured creditors present at the hearing.[165]

Within Germany's insolvency procedure, a simple majority within individual classes by value and number will succeed in the individual class approving a plan.

Danish insolvency law – for the purpose of the plan becoming binding on all affected creditors once it is confirmed by the court – has a system of majority rule in that it mandates that a restructuring plan is adopted if the majority does not oppose it.[166] It is worth bearing in mind that Danish law does not mandate voting in classes, therefore the "cram-down" is not intra-class, so to speak. Voting is formal and confirmation is always needed.[167]

Similarly, in Poland, an arrangement is adopted by the assembly of creditors if there is a majority of voting creditors who hold a total of at least two-thirds of the sum of claims owed to voting creditors. If voting on an arrangement takes place in classes of creditors, an arrangement shall be adopted if in each group the majority of voting creditors in such group is in its favour, with a total of at least two-thirds of the sum of claims owed to voting creditors from that group. This is not so, however, during arrangement approval proceedings where an arrangement shall be accepted if the majority of creditors entitled to vote on an arrangement having a total of at least two-thirds of the sum of claims that give the right to vote on an arrangement are in its favour. Furthermore, if the vote takes place in classes of creditors, it shall be adopted, if, in each group, the majority of creditors entitled to vote on an arrangement from this group have a total of at least two-thirds of the sum of claims vested in creditors from that group eligible to vote on an arrangement. There are provisions regulating a cross-class cram down mechanism,[168] which state that an arrangement will be adopted by an assembly of creditors despite failure to obtain the required majority in some groups of creditors. This is if creditors with a total of two-thirds of the sum of claims vested with creditors entitled to vote on an arrangement have voted for the arrangement, and when creditors from the group or groups that have been against the arrangement are satisfied on the basis of an arrangement to a degree not less favourable than in the case of bankruptcy proceedings (liquidation insolvency). Even if the concept of a cross-class cram down is recognised by the RL, a view prevails that the RL will need to be amended to comply with article 9 of the Directive, in particular, due to the wording of its section 4 that sets minimum requirements related with the enactment.

As discussed previously, currently there is no separation of classes in the Netherlands for voting, however dissenting creditors in the suspension of payment may still be bound by a restructuring plan in certain circumstances. There is also a limited exception where dissenting creditors in an out-of-court composition can be bound if there is abuse of power by the creditor(s) in not approving the composition, it can become binding on them.[169] In suspension of payment, a cram-down is available when at least a simple majority of the relevant creditors representing not less than half of the accepted claims vote in favour.[170] A restructuring plan can also be confirmed if:

i) three quarters of the relevant creditors who appeared, voted in favour of the restructuring plan; and

ii) the rejection of the restructuring plan results from one or more creditors having voted against it who could not have arrived at such voting conduct with good reason, taking into consideration all circumstances, in particular the amount that they may be expected to receive if the debtor were liquidated instead.

An intra-class cram down provision is available in Spain if certain majorities are met; these range from 51% to 80% depending on the procedure in question. If the requisite majority is met, then dissenting

[165] Friedrich Jergitsch and Carmen Redmann, 'Restructuring & Insolvency Austria' (Getting the Deal Through 2018) <https://gettingthedealthrough.com/area/35/jurisdiction/25/restructuring-insolvency-2019-austria/ > accessed 10 December 2019.
[166] Danish BA, s 14 (2).
[167] Danish BA, s 13 e.
[168] RL, art 119(3).
[169] Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7799 (*Payroll*) at 3.5.2 and 3.5.3.
[170] Dutch BA, art 268. "Relevant creditors" refers to recognised and admitted creditors

creditors within that class will be bound. In the case of refinancing agreements, the effects can be extended to dissenting and non-voting creditors when certain legal requirements are fulfilled, and the agreement is approved or confirmed by the Court ("homologación").[171] Among these requirements, the agreement has to be subscribed by a certain majority of financial claims. This majority depends on the content of the agreement and the type of claims affected by it (non secured/secured claims). In the case of non-secured claims, a) the agreement has to be subscribed by at least 60 % of the financial claims, when it imposes on these claims either (i) a postponement of less than five years, or (ii) its conversion on participating loans for the same period of time[172] (b) the agreement has to be subscribed by at least 75 % of the financial claims, when it imposes on these claims (i) a postponement of five years or more, but never beyond ten years; (ii) a write-off or release; (iii) a debt-equity swap; (iv) the conversion on participating loans for five years or more, but never beyond ten years, or (v) a payment by transfer of assets (Additional Provision 4th (3) (b)).[173] In the case of *secured claims*, to extend the effects of the agreement to dissenting and non-voting creditors, it has to be subscribed by at least 65 % of financial secured claims, when the agreement contains any of the provisions described under (a), or by at least 80 % of financial secured claims, when it contains any of the provisions described under (b). Similar rules are applicable in the case of *extra-judicial payment compositions* (articles 238 and 238 bis of the Spanish Insolvency Act). However, no confirmation ("homologación") is required to extend the effects. The adoption of the agreement with the abovementioned majorities is sufficient to make it binding for the dissenting or non-voting creditors (articles 238 (1) bis and 240 of the Spanish Insolvency Act).

In England and Wales both the CVA and the Scheme of Arrangement have intra-class cram-down i.e. majority rule within classes.[174] The CVA becomes binding on the company and all of the unsecured creditors – not secured creditors – if it has passed the 75% by value threshold.[175] The Scheme of Arrangement requires a majority of the creditors and members in each class, provided that the majority represents 75% by value of the claims of the relevant creditors.[176]

7.3.9 Summary of Implementation Requirements

From the responses received to the questionnaire, it can be tentatively concluded that the majority of Member States – Ireland, England and Wales, and France– are unlikely to require amendments to their existing legislation. As Spain allows for confirmation majorities above 75% in some circumstances it may need to consider amendments in line with the PRD majorities. As discussed above, they all appear to adopt majority rule within classes of creditors, which allows a plan to be approved. Austria currently intends to adopt a 75% majority for its new preventive restructuring proceeding. Denmark and Poland appear not to need amendments over those discussed in the previous question. As articulated previously, Italy may need to amend the rules relating to single creditors which hold the majority of the value of the overall amount of claims entitled to vote, as it can result in a higher percentage than 75% being required for approval. Germany might consider mapping their existing rules on creditor and member voting processes in insolvency to preventive restructuring, as part of any overall reforms. It looks as though the WHOA will amend Dutch law in line with article 9(6) of the Directive, in that it should provide for voting in separate classes and outline the required majorities. Finally, it would seem wise for Romania to introduce new provisions regulating majority in the value of creditors' claims or interests to be obtained in each voting class. The UK currently uses the maximum limit of majority, which looks like will also be adopted should the Government Consultation and Response yield reform that produces a preventive restructuring plan procedure.

7.4 The Confirmation of Restructuring Plans (Article 10)

Article 10 regulates the confirmation of restructuring plans by the relevant authorities; it makes court or administrative authority confirmation mandatory if certain criteria are present, thereby seeking to protect affected parties. While a goal of the PRD was to increase flexibility within preventive restructuring procedures, it is key to the EU proposals that a layer of formality and protection exists

[171] Law 22/2003 of 9 July, additional provision 4(1).
[172] Law 22/2003 of 9 July, additional provision 4(3)(a).
[173] Law 22/2003 of 9 July, additional provision 4(3)(b).
[174] English and Welsh Insolvency Act 1986, s 5.
[175] "Unsecured creditors who were entitled to vote" also refers to creditors who would have been entitled to vote if they had notice
[176] English and Welsh Companies Act 2006, s 899.

where creditors or employees may be negatively affected by the restructuring plan. As was the case with article 9, article 10 forms an important part of the cross-class cram-down provisions in article 11. It also regulates the circumstances in which a judicial or administrative authority can confirm a plan - further protecting the interests of creditors - and mandates that a plan can be rejected by the relevant authority should it not have a reasonable prospect of success.

7.4.1 The Purpose of Article 10 in the PRD (Question 5)

Article 10(1) lays out the conditions, which if present, mandate that the restructuring plan must be subject to judicial or administrative authority review and confirmation. All restructuring plans which affect dissenting creditors, which feature new finance, or which involve the loss of 25%, or more, of the workforce must be confirmed by the relevant authority before becoming binding. Article 10(2) requires Member States to clearly articulate the circumstances in which the relevant authority can confirm a plan. A plan can only be confirmed if it has been adopted in line with article 9, if there is equal treatment for creditors with similar interests in the same class, if there has been compliance with national law in relation to the notification of relevant parties and where applicable, if any necessary new finance does not unfairly prejudice the interests of creditors. The plan must also satisfy the best-interest-of-creditors test for dissenting creditors, if its confirmation is challenged on this ground. The 'best interest of creditors test' under the PRD means:

"…that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors."[177]

Article 10(3) provides that Member States must empower judicial or administrative authorities to reject a plan if it would not have a reasonable prospect of success, in other words, prevent the insolvency of the debtor or ensure the viability of the business. Finally, article 10(4) seeks to promote efficiency within the process by mandating that, where relevant authority confirmation is required, the decision is taken in an efficient manner.

Question 5 of the questionnaire had two parts; first, it investigated what circumstances, if any, trigger automatic court or administrative body oversight of a restructuring plan in the various jurisdictions and it examined the extent to which, if at all, these domestic provisions comply with the requirements in article 10(1). Secondly, it inquired as to what the domestic rules are for the confirmation of a restructuring plan and whether courts or administrative bodies are empowered to reject a plan on particular grounds.

The existence of copious options within article 10 may lead to greater court or administrative authority oversight in some Member States than others; some jurisdictions require that all restructuring plans are confirmed by the relevant authority, whereas others mandate confirmation in the circumstances outlined by the PRD.

7.4.2 Jurisdictional Contributions: Conditions for Obligatory Court Confirmation of Restructuring Plans (Article 10(1))[178]

JCOERE Questionnaire Question 5.1:

Article 10(1) provides that:

[177] PRD, recital 52 and as defined in art 2(1)(6):
"a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed".

[178] PRD, art 10(1):
"Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:
(a) restructuring plans which affect the claims or interests of dissenting affected parties;
(b) restructuring plans which provide for new financing;
(c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law."

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

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

a. *Does your jurisdiction provide conditions under which restructuring plans must be approved by administrative or judicial authorities? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*

b. *Will your jurisdiction have to make changes to comply with Article 10(1) of the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment of the Article 10(1).*

In Irish examinership, all proposals are subject to court approval, therefore those which affect the claims of dissenting affected parties, those which provide for new financing and those which involve the loss of more than 25% of the workforce are all automatically subject to court confirmation.[179] The Irish Scheme of Arrangement framework is similarly regulated in that the compromise must be court sanctioned in order to be binding.[180]

The Polish RL provides for an arrangement plan to be confirmed by a court and thereby binding on participating creditors,[181] including dissenting creditors who have voted against the arrangement plan. There are, however. no specific criteria as provided in detail by Directive article 10(1). If it turns out that any of the situations covered by the above article are part of an arrangement plan and negative conditions for a court not approving an arrangement are absent, a court will approve an arrangement plan.[182]

So too is the legal position in Romania, where restructuring plans are automatically subject to judicial approval and must be confirmed by the syndic judge before becoming binding.

In the Netherlands, court confirmation is required in order to bind the relevant parties in both the suspension of payment and the WHOA preventive restructuring framework. In the suspension of payment, the court will consider the composition for confirmation – *homologatie* - once the composition has been accepted by the creditors in accordance with article 268 or 268a DBA.[183] Accordingly, court confirmation is an integral part of the suspension of payment proceeding. Article 386 WHOA requires court confirmation of a plan to make it generally binding on all (dissenting) creditors and shareholders. Article 383(1) WHOA enables the debtor, or plan expert (where relevant), to submit the composition for court confirmation, when at least one class of creditors has adopted it.

The situation in Italy is slightly different; judicial oversight is mandatory in order for any plan to be binding on creditors per article 48 CCI.[184] The requirement, however, is that the court must validate the process that led creditors to approve the plan and verify the legal compliance and economic feasibility of the restructuring plan. Where the debtor has filed for confirmation, any interested party may lodge an objection within 10 days before the confirmation hearing (*concordato preventivo*), or within 30 days from the publishing date of the debt restructuring agreement in the public register (*accordo di ristrutturazione dei debiti*). The court, after deciding on the objections, must confirm the agreement by way of a judgment.[185]

[179] Irish Companies Act 2014, s 541.
[180] Irish Companies Act 2014, s 453(1) & (2)(c).
[181] RL, art 166.
[182] RL, art 164.
[183] Dutch BA, arts 269b(1) & 271.
[184] As CCI, art 56 (*accordi in esecuzione di piani attestati di risanamento*) does not bind dissenting creditors, it does not provide for any court confirmation. The judicial involvement is merely potential, being limited in case of a subsequent insolvent liquidation of the debtor.
[185] The new *accordi di ristrutturazione dei debiti* reflects the prevailing case law, which used to admit judicial assessment on the content of the plan, although the “old” law used to entrust this assessment to creditors with the informative support of the independent expert and the insolvency practitioner (*commissario giudiziale*).

Denmark also has comparable regulations in that all restructuring plans, which contain an element of a business transfer or compulsory composition, must be confirmed by the court.[186] The degree to which the court examines the proposal depends on the factual circumstances of each case. Parties affected by the plan can object to its confirmation generating a court examination of the basis for the objection.[187]

In France, the court will hear from the relevant parties, consider the opinion of the Public Prosecutor and rely on the economic, social and environmental assessment drafted by the administrator before sanctioning a *sauvegarde* plan in accordance with article L628-8.[188]

In a conciliation procedure, the court can confirm the plan in two ways:

(i) *constater l'accord* if the parties to the agreement request it; or

(ii) *homologuer l'accord* if the debtor requests it and if certain conditions are met, namely the debtor is not insolvent ('en cessation des paiements'), the provisions of the agreement aim to ensure the viability of the going concern of the company and the agreement does not affect the interests of creditors who are not parties to it.[189]

Austrian insolvency law requires that all plans are subject to court confirmation. This, however, is not extended to plans in the preventive restructuring framework.

Germany is similar in that it has comparable requirements in insolvency proceedings. The court is required to examine the plan to determine if any procedural mistakes were made in the submission or in context, as well as assessing the viability of the plan. If the court accepts the plan, the plan will then be forwarded to the individual in charge of its implementation.

In Spain, whether there are conditions for approval by administrative or judicial authorities depends on the type of plan or procedure in question. Refinancing agreements must be approved by a court. However, the extra-judicial payment composition is initiated by the debtor with a request to a registrar or an official list of mediators or before a notary public to appoint an insolvency mediator.[190] In the case of business, the framework is initiated before the Commercial Register (*Registro Mercantil*). In the case of consumers, it is initiated before a notary. The Register has to appoint a mediator. The Notary can supervise the framework by himself or appoint a mediator.

In England & Wales, the CVA procedure requires the nominee to report to the court on the prospect of success of the arrangement or composition. Court approval is not required for the CVA unless an application is made on foot of a disagreement about the contents of the plan.[191]

In relation to Schemes of Arrangement under the Companies Act 2006 (Part 26), the court is involved:[192]

(i) At the first hearing, it must decide whether to convene meetings of members and/or creditors to vote on the scheme.[193] The court will base its decision on whether the scheme

---

[186] Danish BA, s 13 e. As previously noted, restructuring plans refer to insolvency restructuring and not preventive restructuring, however, the process appears to be quite similar to preventive restructuring frameworks in other jurisdictions. Arguably, the main difference is that the Danish system attempts to support the exit of debtors from insolvency, not the prevention of them entering insolvency in the first place.

[187] Per Betænkning 1512/2009 om rekonstruktion mv. P. 237 and 388, objections must be presented at the last court meeting regarding the creditors' adoption of the plan. The relevant creditor(s) cannot object at a later date.

[188] The assessment specifies the origins, severity and nature of the company's financial difficulties (Article L623-1 of the Commercial Code). For the SA, the sanctioning of the plan takes place in the same manner as for a *sauvegarde* procedure, after approval has been obtained from the relevant creditors and bondholders. The court will have three months to approve the plan, or else it terminates. See art L628-8 of the Commercial Code. For the SFA, creditors have only 8 days to discuss and approve the plan, while the court has to approve the plan within 1 month following approval by the creditors per art L628-10.
Per Commercial code, art L626-9, the court will hear from the debtor, the administrator, the creditors' representative, the supervising creditors and the employees' representatives i.e. the relevant parties.

[189] Commercial Code, art L611-8. Per Commercial Code, art L611-9, in order to sanction the plan through *homologation*, the court will hear from the debtor, the creditors which are part of the plan, workers' representatives, the conciliator, the Public Prosecutor and any other person(s) that the court deems necessary. *Homologation* confers more legal advantages than a *constatation* – for example priority for new financing – but it renders the court's decision public, which is not the case of a *constatation.*

[190] Allen and Overy, 'Restructuring Across Borders – Spain: Corporate Restructuring and Insolvency Procedures' (2018) 5-9 < http://www.allenovery.com/expertise/practices/restructuring/Pages/Spain-corporate-restructuring.aspx> accessed 26th October 2019.

[191] English and Welsh Insolvency Act 1986, s 4A(3-4).

[192] For the Scheme of Arrangement, the procedural requirements for implementation are set out in part 49 and Practice Direction 49A of the Civil Procedure Rules 1998, Chapter 21 of the Chancery Guide and Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345.47

[193] English and Welsh Companies Act 2006, s 896(1).

has the general support sufficient to have a prospect of success and whether the class design is correct.[194]

(ii) At the second hearing, it must decide whether to sanction the scheme if the scheme has been approved per section 899(1) of the Companies Act 2006. This will consider if the approval of the scheme is reasonable, if each class was fairly represented by those attending the meeting and the statutory majority acted bona fide and whether there has been compliance with the relevant statutory provisions.[195]

At the second hearing, the court will also consider whether the Scheme is fair to all creditors bound by it, including those who voted against it.[196]

7.4.3 Summary of Implementation Requirements

It can be tentatively concluded from the analysis of the responses of contributors to the JCOERE questionnaire that the majority of Member States will not require amendments to domestic legislation in order to comply with the PRD, namely Ireland, Italy, Romania, Denmark, Poland, Spain, France and England and Wales.[197] As has been the case with a number of other aspects of the questionnaire, Germany and Austria may well need to introduce, or extend existing provisions, to allow for court confirmation of restructuring plans in preventative restructuring.

7.4.4 Jurisdictional Contributions: Conditions for Refusal to Confirm a Plan (Article 10(2))[198]

JCOERE Questionnaire Question 5.2:

*Article 10(2)(a-e) provides for a number of conditions under which a restructuring plan can be confirmed by judicial or administrative authorities (see Appendix A), while 10(3) requires Member States to ensure that administrative authorities can refuse to confirm a plan where the plan "*would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business."

a. *Are there conditions specified for judicial or administrative confirmation and are such authorities also empowered to refuse to confirm a plan? Please specify and describe the relevant legislative provisions or rules and how they compare with the terms of the Directive.*

b. *Will your jurisdiction have to make changes to comply with the Directive? If so, please describe any currently suggested changes to your provisions considering the enactment Article 10 of the Directive provisions in this context.*

Following the analysis of the responses to the questionnaire and contributor views on what the implementation requirements may be to align jurisdictional frameworks with the PRD, a number of

---

194 *Re Savoy Hotel Ltd* [1981] Ch 351 and *Re T & N Ltd* [2005] 2 BCLC 488 respectively.

195 *Re Anglo-Continentalk Supply Co Ltd* [1922] 2 Ch 723; relevant statutory provisions include correct notice of the court convened meetings, proper despatch of the explanatory statement and the relevant majority in number and value of the appropriate classes passed a resolution to approve the scheme.

196 The meaning of "fairness" in the context of the Scheme of Arrangement reflects the requirements of the CVA as not being 'unfairly prejudicial'. See Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (4th edn, LexisNexis 2017) 195, citing the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96: "The Court will look to ensure that the procedure has been carried out correctly and also that the Scheme is fair to all creditors bound by it, including those who voted against it. The meaning of 'fairness' in this context has a very similar meaning to 'fairness' when considering claims that a CVA is 'unfairly prejudicial'."

197 The UK Government's proposal for a new restructuring procedure largely adopts the same approach as the Scheme, thus the two levels of court approval will also apply to it. While the CVA falls outside of much of the PRD, the UK's plans for introducing a preventive restructuring may make considering the CVA in this context a moot point.

198 PRD art 10(2):

"Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:
(a) the restructuring plan has been adopted in accordance with art 9;
(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;
(d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;
(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.
Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground."

tentative conclusions can be drawn based on current knowledge and commentary from these and various other fora. In Ireland, the court can only confirm a proposal from the examiner provided it complies with the conditions in s.541(4).[199] Irish law compels the examiner to supply a copy of the proposal to any interested party upon written application (s.534(5)(c)) and Irish law mandates that the appointment of an examiner is adequately publicised under (s.531(2)(3)), thereby notifying interested parties that the process has commenced. Section 539(1)(d) states that the examiner's proposals "must provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment". The courts are free to reject a proposal according to s.541(3). Although Irish legislation does not specifically provide for the rejection of a proposal by the court on the grounds that it "would not have a reasonable prospect of preventing the insolvency of the debtor" – article 10(3)) – the Irish courts have demonstrated that it must be the case that the prospect of the company surviving (and consequently the proposal succeeding) is a relevant criterion, given the very purpose of the examinership process.[200] Under Irish law the examiner will not be appointed in the first place unless the court is satisfied that there is a reasonable prospect that the company will survive as described in s. 509(2) of the Companies Act 2014. This is part of the mandatory threshold test. legislation does not require that creditors must be better off in examinership than they would be in a liquidation, however it does appear, from case law, to have the "next-best-alternative scenario", which satisfies the best-interests-of creditors test. In *Re McInerney Homes* the court refused to confirm the plan from the Examiner because the dissenting creditors demonstrated that they would do better under long-term receivership.[201] There are no conditions specified in the legislation which enable the court to refuse to sanction the Scheme of Arrangement over and above a lack of approval from the specified majority.

In the Italian *concordato preventivo*, article 48, par. 3, CCI expressly requires the court to verify legal compliance, including the voting procedure; class formation; and notification – and the economic feasibility of the plan (*i.e.*, whether the plan will likely succeed).[202] Under article 48, par. 7, CCI, if the Court does not confirm the plan and the debtor is insolvent, it will open an insolvency liquidation proceeding at the request of one of the parties (including the public prosecutor).[203] The Italian framework does not spell out the duty of the Court to assess whether the new financing is necessary to implement the restructuring plan and does not unfairly prejudice creditors' interest, although the Court is required to refuse confirmation of the plan when there is evidence of fraudulent activities. (It must be considered that those new financings that are not necessary to implement the plan and/or unfairly prejudice the interest of creditors cannot be deemed *per se* fraudulent)

In the Austrian insolvency procedure, the court is empowered to refuse a plan if the benefits granted to the debtor in the plan are not appropriate under the circumstances, or if the plan conflicts with the common interests of insolvency creditors, or if the creditors are going to receive less than 30% of their claims as a result of dishonesty, recklessnes. Finally, the court will not confirm a plan if there is excessive burden or delay in filing the application for insolvency proceedings.[204]

In implementing the PRD, Germany could draw from their insolvency plan procedure used in the InsO restructuring route under the unified procedure[205] and case law. In the restructuring aspect of the German Insolvency code, an order for debtor in possession management aimed at agreeing a restructuring plan can be repealed by the court in three circumstances. Firstly, the court shall repeal the order if the majority of the creditors' assembly requests that this is done. Secondly, if a creditor with a right to separate satisfaction requests that the order is repealed and that there are now circumstances which could place

[199] Section 541(4) provides that the court cannot approve the proposals unless the proposal has been approved by at least one class of affected (impaired) creditors, and that the court is satisfied that the proposal or compromise is fair and equitable to any dissenting class of creditors or members and the court is satisfied that the compromise is not unfairly prejudicial to any interested party. Finally the court must be satisfied that the purpose of the proposal or compromise is not the avoidance of payment of tax due.

[200] See *Re Tivway Ltd* [2009] IEHC 494; [2010] 3 IR 49 and *Re Clare Textiles Ltd* [1993] 2 IR 213.

[201] *McInerney Homes Ltd v Cos Acts 1990* [2011] IESC 31 (22 July 2011).

[202] This provision puts on a legislative footing the requirements established in recent case law, as Art. 180 of the previous Italian insolvency law was unclear in this regard.

[203] Where "parties" refs to one or more creditors, the Public Prosecutor or the debtor itself.

[204] Austrian Insolvency Code, s 154.

[205] See Chapter 6, section 6.4.2 (g) for a description of the InsO unified procedure and the insolvency plan.

creditors at a disadvantage as a result of the management of the debtor in possession.[206] The debtor can also ask for such an order to be repealed or the debtor requests it, but only if the "envisaged restructuring no longer has prospects of success."[207] It would, however, need to extend the grounds for refusal known in German insolvency law to include further conditions in the PRD, such as a feasibility test.

Denmark has three mandatory grounds, which if present, must result in the rejection of a restructuring plan:[208]

(i) First, the court examines if there have been procedural violations or if the debtor and insolvency practitioner have given incomplete information. Any errors must have had the potential to influence the voting in order for the Court to reject the plan.[209]

(ii) Second, the court examines if the restructuring proposal contains provisions that are contrary to the rules of law or statutory provisions in the Bankruptcy Act.[210]

(iii) Third, the court must reject the plan if a creditor has been granted an advantage outside of the restructuring plan to influence the voting of the plan.

The court *may* also reject the plan if it is disproportionate to the debtor's financial position; in other words, this is a determination of whether the creditors will be better off in liquidation (best-interests-of-creditors test).[211] The Supreme Court has held that the Bankruptcy Court should also reject the plan if its purpose is solely to discharge the debtor from personal debt (debt that continues to exist after bankruptcy proceeding have ended) as opposed to the continuation of a business, even if the plan fulfils the best-of-interest test.[212] It is worth noting that the prospect of success is not one of the mandatory factors assessed by the court in its decision, though it can form part of the consideration.

In the Netherlands, the court should have regard to several factors when confirming or rejecting a plan in the suspension of payment, namely:

(i) if the assets of the estate exceed the amount stipulated in the composition;

(ii) if performance of the composition is insufficiently secured;

(iii) if the composition was realized by fraudulent acts or undue preference of one or more creditors or other unfair means, regardless of whether the debtor or any other party co-operated therein; and

(iv) if the remuneration and disbursements of the experts and the insolvency practitioner have not been paid to the insolvency practitioner or if no security has been provided for.[213]

Although the suspension of payment does not provide for separation of classes, the court can reject a plan if it is unfair to creditors on the basis of Dutch BA Art 272(3).[214] The DBA does not provide an explicit best-interest-of-creditors test for the suspension of payment. However, putting forward a composition that violates this test may be a reason for rejecting the confirmation on the basis of article 272(3) Dutch BA.[215] The test is performed both upon request and *ex officio*. The regulations pertaining to the suspension of payment do not specify what must be included in the plan; where relevant, the plan may include new finance to facilitate the restructuring. However, the fact that the interest of (certain)

[206] InsO, s 270(2)(2).
[207] InsO, s 270b(4).
[208] The list of grounds mandating the rejection of a plan is exhaustive in that it must occur is one of the three grounds has been met. This limitation on the court is explained by the legislator; it was noted that rejection of a restructuring plan that has been approved by a majority of creditors should be the exception because the (majority of the) creditors should have the final say on the adoption of a restructuring plan.
[209] Danish BA, s 13 e (3)(i)
[210] For example, if the plan encompasses claims that cannot be affected by a compulsory composition.
[211] *Betænkning* 1512/2009, 389
[212] U2019.1859H and U2018.3090H
[213] Dutch BA, art 272(2). Per art 272(3), the court can refuse the confirmation of a composition on any other ground either upon request or *ex officio*. Per the Court of Appeal Amsterdam decision of 8 November 1938, ECLI:NL:RBAMS:1938:69, this can be because when the composition would be unfair to creditors.
[214] The Dutch BA has specific rules for informing creditors of the suspension of payment and the proposed restructuring plan and failure to adhere can be a reason for rejecting the confirmation on the basis of Dutch BA, art 272(3). The rules are laid out in Dutch BA, arts 215, 253, 256(1-2).
[215] This has been argued, for instance, by RD Vriesendorp and FMJ Verstijlen, 'Enige opmerkingen over Polak-Wessels, Insolventierecht' (2004) 6603 WPNR 1020.

creditors are unfairly prejudiced can be a ground for refusal per article 272(3) Dutch BA.[216] The legislation does not refer to the prospect of preventing insolvency as a condition for confirming the plan, however, the court may reject the plan if performance of the composition is insufficiently secured as stated in article 272(2)(2) DBA.[217]

In Poland, the RL provides for conditions whereby a court has either a duty or right to refuse confirmation of an arrangement plan, while the rule is that it will confirm an arrangement plan if it has been accepted by an assembly of creditors.[218] The court will reject an arrangement if it violates the law; in particular, if it provides for state aid contrary to regulations or if it is clear that the arrangement will not be executed.[219] A court may refuse to approve an arrangement if its conditions are grossly unfair to creditors who voted against it and submitted reservations to the arrangement.[220] A court will discontinue restructuring proceedings if it determines that an arrangement has not been adopted due to lack of a required majority.[221] In arrangement approval proceedings and in accelerated arrangement proceedings the court will refuse approval of an arrangement if the sum of disputed claims entitled to vote on an arrangement exceeds 15% of total claims entitled to a vote on an arrangement.[222] In view of the implicit obligation imposed by Directive article 10(2) where the condition for confirmation must be "*clearly specified and include at least*"… the RL may well require a rewording of its provisions. That would probably also apply in view of Directive article 10(3).

In Romania, the syndic judge can only refuse to confirm a plan if the amount of claims challenged and/or disputed in court exceeds 25% of the total amount of claims and/or the preventive concordat was not approved by the required majority of creditors.[223] The viability of the plan is not analysed by the judicial authority, as there are no provisions which empowers a judge to refuse a plan on the grounds that it would not have a reasonable prospect of success.

In France, the court can only confirm a plan through *homologation* in the conciliation procedure if certain conditions are met, including that the agreement aims to ensure the viability of the company.[224] When sanctioning a plan through *constatation*, the power of the judge is quite limited leading to the contention by some that the judge has quite a "passive" role in such cases.[225] Should the court refuse to proceed with the homologation, the debtor can appeal the decision.[226] Because the conciliation is consensual in nature, if the agreement is not sanctioned by the court, it is only binding on those who expressed agreement.

In the *sauvegarde* procedure, the plan includes an economic, social and environmental assessment, which states the recovery prospects of the company.[227] Where there is a "serious possibility for the company to be rescued", the court will confirm the *sauvegarde* plan.[228] It appears that the judge can amend a plan, and therefore refuse the original one based on the wording of article L626-14 of the Commercial Code. However, French law provides scant detail regarding the reasons why a plan can be amended or rejected.[229] The law states that if no solution is found, the court can refuse a plan and open liquidation proceedings or judicial reorganisation proceedings (*redressement judiciaire*) after hearing the relevant parties.[230]. The tribunal can also do so if the debtor becomes insolvent while the plan is

---

[216] See for instance Court of Appeal Amsterdam 8 November 1938, ECLI:NL:RBAMS:1938:69, in which it is stated that a request for confirmation can be rejected when the composition would bring great unfairness to creditors.
[217] It may also be a ground for refusal under Dutch BA, art 272(3).
[218] RL, art 164.
[219] RL, art 165.
[220] *ibid*.
[221] RL, art 165(5).
[222] RL, art 165(3).
[223] Creditors who represent not less than 75% of the amount of accepted and undisputed claims.
[224] Commercial Code, art L611-8.
[225] Y Muller, 'Le contrat judiciaire en droit privé' (Doctoral thesis, Paris I 1995). Amongst the limited powers of the judge is the ability to refuse the *constatation* if the agreement is illegal, particularly if it violates public order; see B Faucher, 'La conciliation judiciaire' (Doctoral thesis, Paris 2 1980) 388 and B Gorchs, 'Le contrôle judiciaire des accords de règlement amiable' (2008) Revue de l'arbitrage 45.
[226] Commercial Code, art R611-42.
[227] Commercial Code, art L626-2.
[228] Translated from "*une possibilité sérieuse pour l'entreprise d'être sauvegardée*"; Commercial Code, art L626-1.
[229] This article uses the wording "[i]n the judgment sanctioning or amending the plan…"
[230] Commercial Code, art L622-10; the relevant parties are the debtor, the administrator, the creditors' representative, the supervising creditors, the workers' representatives and the Public Prosecutor. For the legal provisions regarding the *liquidation judiciaire*, see Commercial Code, arts L640-1 et seq. and for legal provisions regarding the *redressement judiciaire*, see arts L631-1 et seq.

being implemented.[231] For a SA/SFA, the Commercial Code states that the court can terminate the procedure if it does not approve the plan. However, specific conditions for rejection are not listed.[232] In contrast to the *sauvegarde* procedure, however, the court cannot convert the procedure into another procedure such as liquidation or judicial reorganisation; failure to adopt a plan brings the process to an end.

In Spain, non-voting and dissenting creditors can contest the refinancing plan before the judge invoking that the plan imposes a "disproportionate sacrifice" on them. In the case of extra-judicial payment compositions, non-voting and dissenting creditors can invoke before the judge the disproportionate nature of the measure

In England and Wales, the CVA requires the nominee to assess whether the plan has a reasonable prospect of success. If the plan is challenged under IA 1986 s 4A(3), the court can decide to order a decision of the company meeting to have effect instead of the decision at the creditors' meeting.[233] The requirements/conditions for approval of a Scheme of Arrangement have already been outlined above, however, technically, a court could refuse to sanction a Scheme even if the preconditions have been met (statutory requirements, meetings and majority approvals, and that sufficient information was available to inform the vote), and will do so if it is not satisfied that the Scheme is fair to creditors generally,[234] and particularly that the majority has not taken advantage of its position.[235]

7.4.5 Summary of Implementation Requirements

Given the foregoing description of the contributing jurisdictions, it can be tentatively concluded that all Member States will need to amend their legislation in some shape or form in order to comply with the PRD. Ireland will likely need to codify the best-interests-of-creditors test, in order to ensure compliance with article 10(2)(d) and to articulate the relationship between this test and the unfair prejudice criterion[236] in the Irish legislation and case law. Furthermore, the legislature may wish to make it explicit that the prospect of survival of the company is a ground for court refusal of the plan, although the courts have always considered it to be a criterion for confirmation. Romania may need to consider the introduction of the prospect of success of the plan as a mandatory condition for confirmation. The situation seems similar for Denmark, Germany and Austria. Italy will likely need to make two modifications to its legislation. First, a provision will need to be introduced to mandate a judicial assessment on compliance with the requirements set forth under article 10(2)(e) PRD regarding new financing (no unfair prejudice to the interests of creditors). Secondly, Italy may need to refine the conditions for confirmation in CCI article 48, para 3, which appear to be more stringent than those set forth in the PRD requiring positive verification of economic feasibility, instead of refusal to confirm "a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business". This is in contrast with the underlying goal of reducing the judicial role in the context of preventive restructuring. Spanish law allows for non-voting and dissenting creditors to contest the plan, although there does not appear to be a specific 'best-interest-of-creditors' test, which Spain may need to implement. In France, the best-interest-of-creditors test criterion may be an area of concern; although under the law, courts currently have to verify that the interests of all creditors are sufficiently protected. It has been argued that the best interest-of-creditors test criteria may be "more challenging for French courts". [237] For the Netherlands, confirmation of a restructuring plan is possible, but not explicitly in situations where the restructuring plan involves new financing or loss of more than 25% of the workforce. As such, an amendment to the WHOA may be required. Furthermore, as was contended previously, the suspension of payment framework is only

[231] Commercial Code, art L622-27.
[232] Commercial Code, art L628-8.
[233] Insolvency Act 1986, s 4A(6); the court can also make any other order it sees fit.
[234] Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 585.
[235] See *Re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614, per Nazareth K 625B.
[236] As described in PRD, art 11.
[237] Commercial Code, art L626-31 pertains to protection of creditors' interests. Droege Gagnier and Dorst argue that it may be "more challenging for French courts [as they] suppose a concrete simulation and calculation of the business: (1) in an ongoing concern scenario; and (2) in an isolated asset disposal, whatever is more favourable while taking into consideration the complex ranking of each dissenting creditor. Such an exercise means, in practice, that the debtor should provide the court with a report established by an accounting expert and will add a challenge in terms of costs and timing; Gagnier & Dorst (n 139) 26.

partially in line with article 9 of the Directive; the knock-on effect is that it may not be completely in line with article 10, as appears to be the case with a number of the jurisdictions.[238] It seems clear that the current law in England and Wales does not comply with the Directive. However, the planned preventive restructuring procedure from the Government appears likely to grant the court absolute discretion to confirm or reject a restructuring plan.[239]

7.5 Cross-Class Cram-Down (Article 11)

The cross-class cram-down is a particularly controversial concept in preventive restructuring in the European Union, with few jurisdictions having anything that resembles it in their current frameworks. This has been, however, a focus of the Commission since the 2014 Recommendation. It has evolved through the various iterations of the PRD and is now a complex provision with numerous derogations. The cross-class cram-down, by its very nature, reduces the power of creditors in their ability to enforce their rights under the contracts agreed with the debtor, although insolvency procedures do this as a matter of course due to their collective nature. The cross-class cram-down, however, goes a step further by forcing a whole class of creditors to abide by a plan, which they have rejected, once it is approved by other classes. That said, without a cross-class cram-down, it may be difficult rescue some businesses, leaving liquidation as the only other alternative. It is unsurprising therefore, that this particular provision attracted significant debate;[240] in particular, the test which should be applied to guarantee the fairness of a restructuring plan binding dissenting creditors was a matter of debate. [241] This diversity of opinions is evident when one considers the changes made to article 11 by the Council, which appeared to favour a "relative priority rule (RPR)".[242] Given the different formulations permitted under the PRD, there is a possibility that the potentially diverse treatment of creditors may make it difficult to come to an agreement on a plan if one jurisdiction favours more powerful creditors by applying an APR.

7.5.1 The Purpose of Article 11 in the PRD (Question 6)

The purpose of Question 6 is to determine whether jurisdictions have a cross-class cram-down and how they operate. In addition, the Directive offers a number of choices for Member States to use as a test of fairness for dissenting creditors, which if implemented in different ways among the Member States may lead to differential treatment of creditors across borders. Question 6 of the Questionnaire focusses on several aspects of the cross-class cram-down; namely if the jurisdiction has cross-class cram-down, how the jurisdiction deals with dissenting classes (APR, RPR, hybrid) and finally, whether the jurisdiction applies an "unfair prejudice test" and if not, how it assesses the fairness of a plan.

Article 11, while referring to parts of articles 9 and 10, primarily provides a mechanism for a cross-class cram-down in preventive restructuring frameworks. The wording of article 11(1) is obligatory: "Member States *shall* ensure that a restructuring plan which has not been approved by affected parties… *may* be confirmed by a judicial or administrative authority…" if certain criteria are met. In effect, this binds an entire class of creditors against their vote. The justifications for this rule, as well as arguments against, were discussed in Chapter 4 of this report. In short, this is a controversial provision which was changed at the last minute, ostensibly, to bring it in line with the Chapter 11 cross-class cram-down.[243] Regardless, given the wide scope of implementation prospects for Member States, this provision may make harmonisation difficult and furthermore be an obstacle to cooperation if different jurisdictions provide varying levels of protection for those dissenting classes of creditors. Aspects of court cooperation will be discussed further in JCOERE Report 2.

[238] In the Netherlands, the debtor can propose a restructuring plan and the voting on the plan will be done before the supervisory judge (or if none is appointed, before the court) per the Dutch BA, arts 214(3) and 252. If the plan is adopted, the supervisory judge (or court) will set the date for a hearing by the court to decide on the confirmation of the restructuring plan per Dutch BA, arts 269b and 270. In this way, the adoption of the restructuring plan is verified, although no *ex officio* examination takes place of the creditor's rights or the formation of classes.
[239] Government Response (n 60) 70. There will also be a right to appeal following court confirmation.
[240] See Chapter 5.
[241] The Absolute Priority Rule ("APR"), Relative Priority Rule ("RPR"), and Unfair Prejudice Test.
[242] PRD, art 11(1)(c) provides that dissenting voting classes should be treated *at least as favourably* as any class of the *same* rank and *more favourably than any junior class.*
[243] There are certainly arguments that the approach of the PRD is not as close to the American version as it sets out to be.

7.5.2 Jurisdictional Contributions: Existence of a Cross-Class Cram-Down (Article 11(1)(a-b))[244]

JCOERE Questionnaire Question 6.1

Article 11(1)(a-b) provides for the application of a cross-class cram-down in the adoption of restructuring plans:

"Member States shall ensure that a restructuring plan which is not approved by affected parties as provided for in Article 9(4) in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils" certain conditions Articles 10(2) and (3).

a. *What is the current position regarding a cross-class cram-down for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, specifically Art 11(1)(a-b).*

b. *Will your jurisdiction have to make changes to comply with the Directive? If so please describe any currently suggested changes to your provisions in light of the enactment of Article 11(1)(a-b) of the Directive.*

Irish law provides for a cross-class cram-down in terms that closely align with the PRD in that court confirmed proposals will be binding on all classes of creditors.[245] As outlined previously, Irish legislation broadly complies with articles 10(2) & 10(3) and also mandates that a plan cannot be confirmed unless at least one impaired class of creditors has accepted the proposal, which appears to be in line with article 11(1)(b).[246] There is no cross-class cram-down within the Scheme of Arrangement procedure.

Italy also has a cross-class cram-down mechanism under the judicial composition procedure, where such classes are constructed.[247] If a majority of the number of classes vote in favour of a plan under the judicial composition, then a plan can be confirmed, overcoming the dissent of one or more classes.[248] The Italian provision is considerably more restrictive than the conditions to be satisfied under 11(b) in the PRD (and thus in contrast with the PRD),[249] in that, besides a majority of the number of classes, the majority by value of the claims must be reached. If the debtor opts not to form classes, then "only" a majority in value of the total amounts of claims needs to be reached. A dissenting creditor, either within a dissenting class or holding 20% of the total amount of voting claims, can object to the cross-class cram down - and consequently the court confirmation - on the grounds that the plan fails to satisfy the 'best

[244] PRD, art 11(1):

"Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in art 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:
(a) it complies with art 10(2) and (3);
(b) it has been approved by:
(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;"

[245] Irish Companies Act 2014, s 541(7). As outlined, court confirmation is dependent upon the proposals being adjudged as fair and equitable to any affected class of creditors (or members) that has rejected the plan and that the plan is not unfairly prejudicial to any interested party per the Irish Companies Act 2014, s 541(4)(b).

[246] Irish Companies Act 2014, s 541(4).

247 This is currently optional but is customary.

[248] CCI, art 109.

[249] Andrea Zorzi, 'The Italian Insolvency Law Reform' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492422&download=yes> accessed 12 December 2017, 33-34 .

interest of creditors test'. Interestingly, the plan can be confirmed without the agreement of the debtor, which appears to be contrary to the PRD, with the sone exception of procedures involving non-SMEs.[250]

In the Netherlands, neither the out-of-court composition, nor the suspension of payment, has a cross-class cram-down. However, the WHOA will introduce the relevant provisions and implement the criteria of article 11(1)(b).[251] The WHOA also provides for the circumstances in which a court should reject a plan; these primarily relate to issues of fairness in the treatment of creditors under the plan, with a clear connection to the importance of preserving priority of entitlements. Without specifying the APR by name, the new Dutch act is enshrining it in their legislation.[252] However, there are provisions for deviation described below.

The Polish Restructuring law contains a provision similar, but not as detailed, to the cross-class cram-down Directive rules already covered above. There is, however, no specific provision addressing the need for particular judicial confirmation of a cross-class cram-down other than the principle that a court generally approves an arrangement and will not confirm it in defined situations, including a situation when it breaches the law.[253] A court cannot confirm an arrangement plan that has not been accepted in the first place by an assembly of creditors.[254]

The German jurisdiction has a cross-class cram-down in its regular insolvency procedures. If a class of creditors rejects a plan under the restructuring route, the class may still be bound if a majority of classes accepted the plan and the requisite tests are met. Appeals against a court order confirming a plan stay its implementation unless the court of appeals orders the plan to become effective.

As previously articulated, in Romania, creditors are not organised into classes, instead the preventive restructuring procedure relies on a majority of 75% by claim value to confirm a plan; accordingly, a cross-class cram-down is not possible.[255] Similarly, as Denmark does not have creditor classes, the foundation for a cross-class cram-down does not yet exist.

Spain does not currently employ a cross-class cram-down in either its refinancing agreements or its extra-judicial payment compositions. These two procedures allow simply for a majority rule based on a range of circumstances that affect the percentages of majority by value applied along with judicial or administrative approval. These can bind dissenting creditors within a class, including secured creditors.

Neither Austria nor the UK currently has an explicit statutory cross-class cram-down mechanism. However, the UK the courts have approved Schemes where votes have not been given to "out-of-the-money" creditors.[256] Similarly, France has no cross-class cram down in any of its preventive restructuring procedures. It is likely, however, that the *Loi Pacte* of May 2019, referenced in previous sections, will be utilised to introduce the cross-class cram-down (article 196(2)).[257]

7.5.3 Summary of Implementation Requirements

Based on the responses of our JCOERE contributors and other commentaries, it is believed that the following represents the next steps for Member States. Ireland currently provides for a cross-class cram-down similar to the PRD. Poland will need to introduce judicial confirmation of plans, which do not have the approval of all classes after expanding the conditions during which a cross class cram down can take place. At present, dissenting classes can be overruled following a rule covered by law, and then court confirmation is required as is in the case of any arrangement plan. The amendments to Dutch law contained in the WHOA will satisfy the conditions laid down in article 11, so the Netherlands will have no need to further amend its law. It is questionable if Italy will need to amend its position to come into line with the PRD. On the one hand, requiring approval of the majority of voting claims, which is not provided for in the Directive and which operates jointly with the other requirements relating to the number of classes, in addition to requiring the approval of the majority of classes, could be unduly

[250] CCI, art 48; the wording of the PRD is "upon the proposal of a debtor or with the debtor's agreement" with the derogation that Member States may limit the requirement to have the debtor's agreement to only SMEs.
[251] WHOA, art 383(1)(2).
[252] WHOA, art 384(4)(a).
[253] RL, art 165(1).
[254] See PRD, recital 54.
[255] Law 85/2014 on preventive insolvency proceedings, art 27(5).
[256] See *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).
[257] The following arts of the Commercial Code would need to be amended include: arts L626-9, L626-18, L626-30-2, and L626-31.

restrictive when compared with the Directive. On the other hand, since article 11(1) sets a list of minimum conditions for the confirmation via cross-class cram-down, there may be no impediment to having a more restrictive structure. As was the case with previous articles, it is likely that Germany will adapt the current cram-down provisions in their InsO insolvency plan to meet the needs of the new restructuring framework, thereby implementing the requirements of the PRD. Romania and Denmark will need to make extensive changes to comply with the Directive, owing to the fact that they do not have creditor classification The Spanish and Polish legislature will need to make changes to include other classes of creditors and to ensure that the cross-class cram-down is available against specific types of classes of dissenting creditors. France, Austria and the UK will have to introduce provisions to align with article 11. In England & Wales, the UK Government proposal on a new restructuring plan refers to the introduction of a cross-class cram-down. The proposal currently recommends that dissenting classes of creditors in this new procedure, most importantly those who are out-of-the-money, may be bound to an arrangement that is in the best interests of all stakeholders.[258] This is the most likely approach for it, assuming the UK needs to adopt the PRD at all.

7.5.4 Jurisdictional Contributions: Dissenting Creditors and Conditions for Approval (Article 11(1)(c)[259] and 11(2)[260]

JCOERE Questionnaire Question 6.2:

Article 11 offers options for dealing with affected and dissenting classes of creditors in a cross-class cram-down. Under Art 11(1)(c), one of the conditions for approval by a judicial or administrative authority of a cross-class cram-down is if the plan:

"…ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class."

A derogation from this condition is also offered in 11(2):

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

a. *If your jurisdiction provides for a cross-clam down, how does it treat dissenting classes of creditors? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular 11(1)(c) and 11(2).*

b. *Will your jurisdiction have to make changes to comply with the treatment of classes of creditors in the cross-class cram-down? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11(1)(c) and 11(2) of the Directive.*

In view of the derogations available to Member States in article 11, it is unlikely that jurisdictions will have to make substantial changes based on article 11(1)(c) alone. Instead, it is more likely that amendments will be required by virtue of the complete absence of a cross-class cram-down mechanism, as above, or because the jurisdiction is neither in line with article 11(1)(c) nor either of the derogations.

---

258 Government Response (n 60) 69.

259 PRD, art 11(1)(c) otherwise known as a "relative priority rule":

"(1) Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in art 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:
(a)…
(b)…
(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class;"

260 PRD, art 11(2) commonly referred to as an "absolute priority rule":

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

Accordingly, the summary of implementation requirements which usually follows each question will be combined for questions 6.2 (section 7.5.4) and 6.3 (section 7.5.5).

In Ireland, the conditions for approval of the cram-down of dissenting creditors does not refer to either an absolute or relative priority rule. There is, however, a requirement for the proposal to be "fair and equitable" to dissenting classes of creditors.[261] Aspects of Irish law do appear to vary from the provisions in the Directive. However, there is a derogation available to Member States as described below.

While Romania does not currently require classes for preventive restructuring and consequently no underpinning foundation for a cross-class cram-down, it has adopted conditions for confirmation of a plan that could be considered in line with article 11(1)(c) and / or 11(2). There are conditions for cramming down creditors in a reorganisation procedure and dissenting creditors can object to the syndic judge if these conditions are not satisfied. Similar to the wording in Irish law, though not in application, dissenting categories of creditors must be given "fair and equitable treatment" under the plan.[262] Fair and equitable treatment is present if certain conditions are met simultaneously: (a) no dissenting creditor receives less than they would have received in a liquidation; (b) no creditor receives more than the total amount of their claim; (c) no creditor with a lower ranking than the dissenting creditor receives more than it would receive in liquidation and the plan provides the same treatment for each claim within a distinct category, unless the holder of a claim consents to a less favourable treatment for its claim.[263]

The Italian jurisdiction has a presumed APR, in that a plan is not permitted to alter the normal ranking of priorities. That said, it has often been deemed as admissible to leave some value to the shareholders notwithstanding the fact that creditors have not been paid in full, which seems fundamentally contrary to the APR.[264] It could be said that the Italian jurisdiction has adopted a hybrid RPR and APR system, as in order to ensure the success of restructuring plans, shareholders are incentivised. Recent reforms have mandated regard for equity holders when devising a restructuring plan that envisages the continuation of the business with the same entrepreneur.[265] It is still unclear, however, if APR applies with respect to restructuring value; if so, it also unclear if it applies solely to creditors or includes equity holders. When the plan provides for the direct continuation of the business, the most recent trend in case law seems to be to distinguish between the value of the estate and the proceeds generated by the direct continuation of the business. While the value of the estate should be distributed amongst creditors according to their ranking, the value of the proceeds generated by the activity may be distributed more widely. [266] This appears very similar, in its economic results, to the outcome of the joint application of the RPR and best-interest-of-creditors test. Undoubtedly, when the CCI enters into force, it will make it easier to allow the allocation of part of the restructuring value to equity holders, contrary to a strict interpretation of the APR. However, neither the "old" Italian Insolvency Law, nor the "new" CCI spell out any criteria to distribute among creditors and shareholders the value of the proceeds generated by the direct continuation of the business. In this respect, while the lack of clarity within the Italian framework needs to be addressed, the judicial composition seems to be compatible with the derogation and discretion within article 11(1)(c). Functionally, however, the rule currently being applied in Italy does not adequately reflect the APR as set out in the PRD, as it allows for the allocation of value to shareholders before all other senior classes have been fully paid.[267]

The Dutch WHOA has wholly adopted the concept of absolute priority in its preventive restructuring framework. This has been incorporated – with a caveat for deviations – through one of the grounds under which the court can refuse to confirm a plan, if:

> " At the request of one or more creditors or shareholders eligible to vote, who did not themselves approve the restructuring plan and were allocated in a class which did not approve the

[261] Irish Companies Act 2014, s 541(4)(b)(i).
[262] Law 85/2015, art 139(1)(D).
[263] Law 85/2014, art 139(2). The ranking of claims / statutory order of priority is set out in art 138(3) of the Law 85/2014.
[264] Court of Milan, Insolvency Section, 3rd November 2016.
[265] CCI, art 84 para 2.
[266] Most recently, Court of Appeal of Venice, 27 June 2019.
[267] While this allocation of value to equity holders does not adhere strictly to the APR in art 11(2), this treatment of equity holders is not necessarily contrary to the PRD as recital 57 states "Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders."

restructuring plan or whose admittance to the vote was wrongfully refused and who should have been allocated in a class which did not approve the restructuring plan, the court will refuse a request for court confirmation of a restructuring plan which was not approved by all classes, or if

(a) the distribution of the value realised with the restructuring plan deviates from the ranking in the case of recourse against the debtor's assets in accordance with Title 10 of Book 3 of the Civil Code; another law; or a set of rules or agreements based thereon, to the detriment of the class that did not approve unless there are reasonable grounds for such deviation and the creditors or shareholders concerned are not harmed in their interests as a result; (…).”[268]

Thus, the proposed WHOA already complies with one of the tests offered for plan confirmation with a cross-class cram-down.

The Polish test focuses on dissenting creditors satisfied by an arrangement on terms not less favourable than in bankruptcy proceedings (i.e. liquidation insolvency). There are no sophisticated tests in the Polish Restructuring law such as those in the Directive - the RPR in 11(1)(c) or the APR derogation in 11(2). Since the above provisions set a certain minimum, it seems that the RL will need to be amended.

As Spain does not currently provide for a cross-class cram-down in its legislation, the fairness of impairing the rights of dissenting creditors is not considered, although the current majority rule provisions do allow the court to consider whether a plan imposes a disproportionate sacrifice to dissenting or non-voting creditors. It is not yet clear what test the Spanish legislator will adopt when it comes to implement the PRD.

In France, the *Loi Pacte* provides that the ordinance which will be passed to implement the Directive must merely take into account subordination agreements, which is vaguer than the rules in the PRD, namely APR, RPR and unfair prejudice test. At present it is unclear what approach will be favoured in France. On the one hand, given the emphasis on priorities in the insolvency law, APR could be logical. With that said, the French approach, by its very nature, requires some degree of flexibility; accordingly, avoiding a strict priority rule would also be logical.

Germany adopted a strict adherence to the APR and the best-interests-of-creditors test to test the veto of a class when reforming its insolvency law in 1999. It also requires a majority of classes to support a plan. As noted by the German contributor, it does, however, remain unclear which of the rules – APR or RPR – Germany will adopt for preventive restructuring.

As discussed previously, Denmark does not currently have any framework which resembles cross-class cram-down, therefore it does not have ARP or RPR.

The current proposal from the UK aligns with the APR. The suggested approach as described by the Government is based on the expressed notion that strong creditor protections are essential to create the right conditions for business. As such, the safeguarding of creditor interests through respect for and application of the ordinary order of priority in liquidation and administration, is considered desirable. Interestingly, however, the court will be empowered to confirm a restructuring plan at odds with the APR where the non-compliance is (1) necessary to achieve the restructuring; and (2) just and equitable in the circumstances.[269]

The Government Response notes that the two-stage test creates a high threshold to permit deviation from the APR and that the basic principle remains that absolute priority will be followed in most cases.[270] However, as with jurisdictions with robust restructuring processes, the APR may simply be a starting point in some cases.

[268] WHOA, art 384(4)(a).
[269] Government Response (n 60) 71-72.
[270] *idem* 72.

7.5.5 Jurisdictional Contributions: Question 6.3 – Unfair Prejudice Test (Article 11(2) para 2)[271]

JCOERE Questionnaire Question 6.3:

> *Article 11 goes on to provide the following regarding an 'unfair prejudice' test.*
>
> "Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."
>
> a. *If your jurisdiction provides for a cross-clam down, does it apply a similar test in the current state of your jurisdiction's legal framework? If not, is there a different approach adopted by your jurisdiction in the context of the cross-class cram-down? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of the Directive, in particular this derogation at the end of Article 11.*
>
> b. *Is your jurisdiction likely to avail of this 'unfair prejudice' test derogation? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 11 of the Directive.*

The final paragraph of Article 11 offers a further derogation from what has been termed the Relative Priority Rule in Article 11(1)(c) and its primary derogation to the Absolute Priority Rule in Article 11(2). This paragraph introduces criteria in which a dissenting class of creditors must not be unfairly prejudiced by the restructuring plan.

Ireland contains a provision similar to this derogation in that the test for the court when confirming a plan is that it is not "unfairly prejudicial to the interests of any interested party".[272] This obligation is borne by the examiner, in other words, it is the responsibility of the examiner to defend the scheme and prove it is not unfairly prejudicial. In assessing this criterion, the court will consider the effect of the proposal and of alternatives on that class. The court balances the outcome of the process for these classes against the overall goal of the process and the long-term benefits of the continuation of trade of the debtor. As such, there may be circumstances where a dissenting creditor could have done better under liquidation, but the proposal will still be considered "fair and equitable".[273] This concept has been well-developed through the courts in Ireland, which have used this test to prevent large and secured creditors from acting solely in their own best interests to the detriment of the collective of creditors and other stakeholders.[274] As such, the Irish unfair prejudice test appears to be in line with the final derogation in article 11 as it automatically forms part of every court confirmation.[275]

The Italian framework does not explicitly provide for an "unfair prejudice test", nor is it likely to in the future. It does, however, refer to the insolvency liquidation procedure as a "comparator scenario" for the application of the best-interests-of-creditors test.[276] This does not appear to reflect the Directive, which includes equity holders in the test criteria.[277]

The current French *sauvegarde* procedure provides a mechanism through which fairness is ensured by assessing whether the interests of creditors are protected, so French law does have some characteristics

---

[271] PRD, art 11(2) paragraph 2, often referred to as the "unfair prejudice test":

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

[272] Irish Companies Act 2014, s 541(4)(b)(ii).

[273] As discussed in section 7.4.4, Ireland appears to have a "best-interests-of-creditors test" in line with recital 49.

[274] See *Re McInerney Homes Ltd and Ors* [2011] IESC 31 and *Re Mount Wolseley Hotel Golf & Country Club & Ors & Companies Acts* [2014] IEHC 24.

[275] The common law test of fairness, which applies to the Scheme of Arrangement in England & Wales, may also be relevant to the Irish situation. See the later paragraph in this section where unfair prejudice in England & Wales is discussed.

[276] CCI, art 112, para 1.

[277] See the 'next best alternative' scenario as set out in the PRD, recital 49 and art 2 para 1(6) (although this latter provision only makes reference to creditors, there are several elements in the PRD signalling that the best interest of creditors test applies also to equity holders).

that could be adapted to comply with the implementation of the Directive with regards to the treatment of dissenting classes of creditors.

German insolvency procedures currently adhere to APR in its insolvency procedures, but it is not yet clear if they will adapt an unfair prejudice test when they come to create their restructuring framework.

A number of Member States do not have, nor are likely to avail of the "unfair prejudice test" derogation. As discussed, the Netherlands already has a clear connection to the APR in their new WHOA, so an unfair prejudice test is unnecessary to comply with the PRD. Poland, Austria and Romania do not currently envisage the adoption of this test and it is not yet clear what direction Spain will take.

In England and Wales, while there is currently no statutory cross-class cram-down, both the CVA and the Scheme have mechanisms through which fairness is assessed by reference to unfair prejudice as derived from statute[278] and the common law. Case law in England and Wales has had to deal with questions of unfairness, particularly in relation to the CVA given that the voting takes place among the whole collective of creditors without separation into classes, which has led certain creditor groups to pursue their own interests in a contentious manner.[279] The Scheme has built in protections against such actions by separating creditors into classes whose interests align and requiring a 75% voting threshold.[280] However, the Court will still assess the fairness of a Scheme. The meaning of 'fairness' in the context of the Scheme has a very similar meaning to 'fairness' when considering claims that a CVA is 'unfairly prejudicial', so reference may be made to case law surrounding fairness of a CVA when considering the same for a Scheme.[281] So, the English framework already contains concepts, largely defined in case law, that align with the unfair prejudice test in the PRD. Regarding the potential cross-class cram-down in the new restructuring plan, given its modelling on the current Scheme of Arrangement, it is likely that the new framework will contain the same test.

7.5.6 Summary of Implementation Requirements for Questions 6.2 and 6.3

From discussions with the respondents to the questionnaire, the following appears to be the state of play in the various jurisdictions. Ireland appears to have no need to amend its position, as its legislation appears to be in line with the second derogation in article 11(2) i.e. the unfair prejudice test. The same can be said for the Netherlands, where the WHOA will be in line with first derogation in article 11(2), i.e. the APR. The remaining jurisdictions require amendments to align with the PRD. Italy, although usually considered to adhere to APR, has certain features which are in line with RPR; as such, this vagueness or uncertainty within the law will likely need to be addressed by the legislature in order to be assured that it complies with the PRD. The remaining jurisdictions need to choose which approach they will take to legislating for the introduction of the cross-class cram-down.[282] For example, assuming Romanian law maps its conditions for confirmation of a restructuring plan to a cross-class cram-down, it should reflect a species of the RPR in line with article 11(1)(c).[283] Germany, Austria, Poland, France, Denmark, Spain, England & Wales are all in a similar position in that their legislatures will have to choose which system to utilise when legislating for the cross-class cram-down.

7.6 Protection of New and Interim Financing

7.6.1 The Purpose of Article 17 in the PRD (Question 8)

Arguably, the protection of new and interim financing is a particularly contentious issue across Member States. For a restructuring plan to be successful, however, it often requires a new injection of money or at least some input of funds while the plan is under negotiation and being implemented. In order for lenders to engage in lending at a time of a company's financial difficulty, some kind of incentive is needed. As noted in the PRD:

[278] The CVA can be challenged under Insolvency Act 1986, s 6 "on grounds of unfair prejudice or material irregularity".
[279] See *IRC v Wimbeldon Football Club Limited* [2005] 1 BCLC 365; *SISU Capital Find Ltd v Tucker* [206] BCC 463; *Primacom Holding GmbH* [2013] BCC 201; *Re Greenhaven Motors* [1999] 1 BCLC 635; *HMRC v Portsmouth City FC* [2011] BCC 149; and *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] BCC 500.
[280] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 436-437.
[281] *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 All ER 96.
[282] The jurisdictions, which do not currently have a cross-class cram-down, are discussed in section 7.5.3.
[283] As Romania already has a starting point that will satisfy the RPR, it is unlikely to adopt the APR or the unfair prejudice test.

> "The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures."[284]

As a result, article 17 has introduced several options whereby new and interim financing can be protected to varying degrees, depending on the choices made in implementation. It should be remembered that where there is a provision of financing under a plan, the confirmation of a court should also be required, which gives at least some oversight that can balance out the benefits given to lenders in these circumstances.[285]

The minimum protection required is from any declaration that new and interim financing is void, voidable, or unenforceable[286] and that grantors should not incur civil, administrative or criminal liability on the ground that "such financing is detrimental to the general body of creditors."[287] The PRD goes on to offer higher levels of protection, which are optional for implementation. First, Member States can limit the protection of article 17(1) to new financing associated with a restructuring plan that has been confirmed by a judicial or administrative authority and to interim financing that has been under *ex ante* control.[288] The PRD offers an additional limitation where by protection can be excluded if interim financing is granted after the debtor has essentially become insolvent, i.e. unable to pay its debts as they fall due.[289] Thus, Member States are allowed to restrict the protection for interim financing to only those circumstances where there is only a "likelihood of insolvency" and the debtor is still well within this pre-insolvency area. The PRD finally provides the option to grant a super-priority to financers who provide new and interim financing.[290]

The questionnaire targeted mainly article 17(1) and whether there was any protection at all for financiers in terms of both its integrity and lenders' protection from liability for lending to debtors in financial difficulty. Additionally, it queried whether there was any priority for lenders who provided such financing, in similar form to 17(4). It should be noted that while not all jurisdictions currently provide explicit priorities for repayment of new and interim financing, a number of jurisdictions place these debts within the remit of expenses of the procedure, which generally are paid before other debts are, giving them a notional priority.

7.6.2 Jurisdictional Contributions: Question 8 – Existence of Protection or Priority for Interim Financing (Article 17(1)&(4))[291]

JCOERE Questionnaire Question 8:

[284] PRD, recital 66.
[285] PRD, art10(1)(b).
[286] PRD, art 11(1)(a).
[287] PRD, art 11(1)(b).
[288] PRD, art 11(2).
[289] PRD, art 11(3).
[290] PRD, art 11(4).
[291] PRD, art 17(1) & (4):

> "(1) Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:
> (a) new financing and interim financing shall not be declared void, voidable or unenforceable; and
> (b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.
> …
> (4) Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims."

Article 17 provides that "Member States shall ensure that new financing and interim financing are adequately protected." *This includes protecting it from claims that it is detrimental to the general body of creditors, but also includes an option to provide a "super-priority" in 17(4).*

a. *What is the current position regarding new and interim financing for the approval of restructuring plans in your jurisdiction? Please specify relevant legislative provisions or rules and describe the terms of these provisions and how they compare with the terms of Article 17 of the Directive*

b. *Will your jurisdiction have to make changes to comply with Article 17 in the context of preventive restructuring? If so, please describe any currently suggested changes to your provisions considering the enactment of Article 17 of the Directive.*

In Ireland, new and interim financing appears to be protected by the legislation and the courts - through a series of decisions – however, the degree to which this protection for new financing has been availed of in more recent times, is questionable. Normally new financing is part of the debt-equity swap incorporated in the compromise or restructuring arrangement.[292] According to s 554(3), costs "which have been sanctioned by … the court shall be paid in full and … before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company". The legislation makes no specific distinction between new and interim finance, instead any costs of the examiner - with prior court approval - are have priority ranking in subsequent liquidation. This section is considered to have been "specifically designed to encourage loans" to be made to a company, giving "a formal statutory assurance to anyone who lends money to a company during the protection period that he will be repaid in full".[293] In *Re Atlantic Magnetics* the Supreme Court took the view that the court sanctioned costs of the examiner, in this case the repayment of money borrowed "would clearly rank in priority to any claim of any form or secured creditor".[294] The legislation was subsequently amended to rank such sanctioned costs of the examiner "after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company" (s 554(4)).[295] The Irish Scheme of Arrangement mirrors the Scheme in England and Wales and as such, contains no statutory provisions granting preferential treatment to new finance.

Austrian law provides for limited protection for new and interim financing under the "URG" in the form of an exemption from avoidance actions for "*Überbrückungsmaßnahmen*" – legal actions necessary to continue the business – and "*Reorganisationsmaßnahmen*" – legal actions described in the plan and executed during the pending proceedings or 30 days thereafter. "*Reorganisationsmaßnahmen*" are not deemed to be subordinated claims.[296]

In Germany, interim finance is commonly repaid before proceedings are terminated in insolvency proceedings. New financing under a plan is claw-back-safe, or "good faith provided" and may enjoy a privilege in later insolvency proceedings, if provided for in the plan.[297]

No specific new finance provisions exist in Danish law. With that said, a financier may provide new finance, which can, in principle, be secured with a security right. Where new financing or a security agreement is entered into during the restructuring proceeding, with the consent of the restructuring administrator, the claim will be privileged.[298] It is worth noting, however, that a security or

[292] *Re Goodman International* (28 January 1991), HC, Hamilton P, (1963–1993) Irish Company Law Reports 623. For commentary see Irene Lynch Fannon, 'Saving Jobs-At What Cost? Consideration of the Companies (Amendment) Act 1990' (Irish Law Times 1994) 208.
[293] Blayney J in *Re Don Bluth Entertainment* [1994] 3 IR 141, [1994] 2 ILRM 436, 440.
[294] [1993] 2 IR 561, 577. This meant that money, which was alleged to be secured by a fixed charge, could be used by an examiner to obtain a loan.
[295] See also *Re Don Bluth Entertainment Ltd* [1994] 3 IR 141 where the Supreme Court, overturning a High Court decision, ruled that a loan had to be repaid in full in the currency in which it was given i.e. American Dollars, as distinct from repaying the Irish Punt equivalent when examinership ended, the difference between the two figures being approximately £200,000. According to the Court, to repay anything other than the full amount in dollars as of the date of payment would not fulfil the requirements of what was then s 29(3) 3 of the Irish Companies Act 1990.
[296] URG, art 20.
[297] InsO, s 264-265.
[298] Danish BA, s 94

financing agreement with the consent of the administrator is not automatically protected from avoidance actions.

French law has provided protection for new and interim financiers, in that such providers will have priority over claims of creditors ("*privilege de conciliation"*) that arose before the date of the opening of the *conciliation* proceedings, if the company is subsequently placed into *sauvegarde* proceedings.[299] The condition is that the court has sanctioned the agreement through *homologation*.[300] New financers cannot have any debt write-off, debt-for-equity swap or debt rescheduling via creditor vote imposed upon them.[301] The latest reforms have extended the protection to new money made available during the negotiation phase (conciliation), which was not the case before 2014. Lenders can now extend credit while discussions are on-going, and the privilege will vest once the agreement is confirmed by the court (*homolgation)*. The reforms have also strengthened the protection of new money when subsequent insolvency proceedings are opened.[302] In such situations, new debts cannot be rescheduled by a court-imposed plan.[303] Since the 2016 reforms, a rescheduling and write-off of claims can no longer be imposed upon those creditors within a plan, which has been approved by a two-third majority of a creditors' committee.[304] This also applies to finance granted in favour of a debtor after the opening of an accelerated *sauvegarde* or a financial accelerated *sauvegarde* (SFA) if the proceedings are not successfully completed by a court-sanctioned plan.

Italian law protects new and interim financing in both restructuring agreements and judicial composition with creditors.[305] Specifically, new and interim financing enjoys priority over unsecured creditors in the context of subsequent insolvency procedures, it cannot be declared void, voidable or unenforceable and the financiers cannot be subject to criminal or civil liability (article 324 CCI).[306] Priority in the case of subsequent insolvency proceedings will not vest where the debtor knowingly provided false information and the financier was aware of this fact.

There is no special protection in Dutch law for interim finance in the suspension of payment framework; accordingly, interim finance provided during the suspension may be subject to transaction avoidance actions in subsequent bankruptcy proceedings.[307] The WHOA, if passed, will not grant super priority status to new and interim financing. It will, however, increase protection for interim financing by ensuring that it is not considered prejudicial to the general body of creditors, assuming certain conditions are satisfied.[308] The proposed article 42a of the WHOA aims to prevent application of transaction avoidance, which is contained in article 42 of the Dutch BA.[309]

The Polish RL preferentially treats financing provided to a debtor covered by restructuring proceedings subject to compliance with detailed conditions.[310] The preference lies that such financing and other acts

---

[299] Financiers are those who make credit available within the terms of the restructuring agreement for the purposes of ensuring the continuation of the company's business during the conciliation period. "Claims of creditors" refers to claims other than super-priority salary claims and court fees and expenses

[300] Commercial Code, art L611-11.

[301] This is one of the differences between the mandate ad hoc and conciliation; if a conciliation agreement is sanctioned by the court, creditors benefit from certain protection in subsequent *sauvegarde* procedure i.e. against certain clawback actions. For example, if the rescue of the debtor fails, the court cannot impose any write-off, debt for equity swap or debt rescheduling through the voting mechanism on the providers of new finance.

[302] Either *sauvegarde* proceedings or judicial reorganisation proceedings (*redressement judiciaire*).

[303] Commercial Code, art L626-20, as strengthened by art 20 of the Ordinance of 2014.

[304] Commercial Code, art L626-30-2, as amended by art 99 of Law n 2016-1547 of 18 November 2016.

[305] CCI, art 99 para 1 and art 101 para 1.

[306] The conditions are as follows; with respect to interim financing, the debtor has filed a petition for such protections on the grounds of the need to ensure the continuation of the business and avoid a significant damage to the value of the estate and the judge has authorized such petition. With respect to new financing, the court-confirmed plan provides for such financing.

[307] During the suspension of payment, it is the responsibility of the (existing) financers, the debtor and the insolvency practitioner to decide on the payment of such debts.

[308] WHOA, art 42a states that "A legal act performed after the debtor has filed a statement with the court registry as referred to in Article 370(3), or a plan expert has been appointed by the court in accordance with Article 371, may not be annulled on the grounds of the previous article, if the court has granted authorisation for that legal act at the request of the debtor."

[309] As new finance provided under a confirmed restructuring plan is exempt from the paulian action (application of transaction avoidance), the amendment does not apply to it.

[310] RL, art 129:

> "1. The following actions taken by the debtor or the administrator shall require authorisation from the creditors' committee and shall otherwise be null and void:
>
> > 1) encumbering the arrangement and/or remedial estate by mortgage, pledge, registered pledge and/or maritime mortgage to secure claims not covered by the arrangement;

cannot be subject of a claw back action (treated as ineffective - concept based on *actio pauliana*) if subsequent bankruptcy proceedings are opened after restructuring proceedings and financing granted under a facility, loan, security, guarantee, letter of credit or any other type of financing under an arrangement is ranked in the first category of satisfaction of claims in case of subsequent bankruptcy proceedings.[311] The application of such preference is subject to compliance with conditions set by the RL (*inter alia* filing of a simplified motion to open bankruptcy proceedings within three months from the date when a ruling on setting aside of the arrangement plan has become final).

Romanian law provides protection for new financing in the context of pre-insolvency proceedings. In the mandate ad-hoc, the arrangement agreed with the creditors in the course of out-of-court negotiations will not be voided by the court or declared fraudulent, provided that it was made in good faith i.e. (i) was likely to result in the financial recovery of the debtor and (ii) was not intended to prejudice some creditors.[312] The ad-hoc agent is entitled to propose a wide range of debt restructuring measures to creditors and the ad-hoc agreement contains the privileges and guarantees accompanying the debts.[313] In order to safeguard the debtor's business, however, the ad-hoc agent can propose limiting the effect of these guarantees and privileges in favour of essential lenders for restructuring.[314] In the Preventive Concordat, patrimonial - i.e. civil - liability of the directors and other interested parties cannot be incurred if good faith conditions are met.[315] The draft of the Preventive Concordat must include a recovery plan, which specifies the means by which the debtor will successfully restructure.[316] If new funds are to be granted during the concordat term, the priority of these amounts upon distribution, after payment of the procedural expenses, shall be specified. Interim financing is not regulated in pre-insolvency proceedings, however, is it not forbidden either.

In Spain, refinancing agreements that include the extension of available credit or the amendment or extinction of its obligations, cannot be revoked as long as the terms of the agreement respond to a feasibility plan that permits the continuity of employment or of the business in the short or the medium term, thus protecting additional financing under such plans.[317] In addition, in those refinancing agreements in which it is foreseen to resort to resources generated by the total or partial continuation of the business, the proposal shall also be accompanied by a feasibility plan that specifies what those necessary resources are, the means and conditions of obtaining them, and any commitments to these provided by third parties. The claims granted to the insolvent debtor to finance the feasibility plan shall be settled under the terms established under the agreement.[318] Thus, the provision of additional finance is at least protected from being challenged in the event that it is included in a restructuring plan. The Spanish system therefore provides certainty for lenders who may choose to lend under a restructuring

---

2) transferring ownership of an asset and/or the right to secure claims not covered by the arrangement;
3) encumbering the arrangement and/or remedial estate by other rights;
4) taking out commercial and/or cash loans;
5) concluding the lease contract for the debtor's undertaking and/or an organised part thereof and/or other similar contract.

2. The sale by the debtor of real estate property and/or other assets worth more than PLN 500,000 shall require authorisation from the creditors' committee and shall otherwise be null and void.
3. The creditors' committee may grant authorisation to conclude a commercial loan agreement and/or cash loan agreement and/or establish security interest referred to in section 1 subsections 1-3 when it is necessary to preserve its ability to pay the current restructuring costs and fulfil other obligations arising after opening of the restructuring proceedings and/or to conclude and perform the arrangement, and it has been guaranteed that the funds will be transferred to the debtor and used in the manner prescribed by the creditors' committee resolution and the established security interest is adequate to the granted commercial and/or cash loan.
4. The actions referred to in section 1 performed with the consent of the creditors' committee shall not be regarded as ineffective in relation to the bankruptcy estate."

[311] RL, art 342.
[312] Law no 85/2014, art 117(3).
[313] These include debt relief, rescheduling or partial reductions, the continuation or termination of ongoing contracts, personnel redundancy or an abstention by the creditor from improving its position vis-à-vis other creditors through guarantees or preferential treatment as well as any other actions it may deem necessary per art 13(3).
[314] Examples of such limitations could include limiting the right of creditors to pursue, preference, interest and penalties.
[315] The good faith conditions are that in the month before payment were ceased, the payments were made in good faith under an arrangement with the creditors, concluded pursuant to out of the court negotiations for debt restructuring, provided that such arrangement was likely to lead to financial recovery of the debtor and was not intended to prejudice and/or discriminate some creditors.
Patrimonial liability is explained in the terminology Chapter 2 section 2.11.
[316] Law no 85/2014, art 24 (2); the plan must specific:

"…[t]he actions by which the debtor [will] overcome the financial difficulty, such as: increase in the share capital, debt to equity swap, taking a bank loan, bond or similar borrowing, including shareholder loans, creation or termination of branches or operating units, sale of assets, creating causes of privilege; if new funds are to be granted during the concordat term, the priority of these amounts upon distribution, after payment of the procedural expenses shall be specified".

[317] Law 22/2003 of 9 July, art 71 bis.
[318] Law 22/2003 of 9 July, art 100(5).

plan and as the super priority aspect of article 17(4) is optional, this appears to satisfy the provision of adequate protection under the PRD.

Priority is granted under Spanish Insolvency Act for new financing foreseen in refinancing agreements: 50% of the value of the new financing will be considered as administrative expenses in subsequent insolvency proceedings (article 84) and the rest of the value can benefit of a general priority (article 91).

England and Wales do not have priority for new and interim finance within either the Scheme of Arrangement or the CVA. There is, however, a framework which prioritises rescue financing by giving it statutory protection and construing it as an expense of administration, however, this is specific to administration procedures.

7.6.3 Summary of Implementation Requirements

Countries including Ireland, Italy, Spain, Romania, Poland and the Netherlands are not likely to have to make (further) changes to comply with the PRD. The government response to the Insolvency and Corporate Governance Consultation from the United Kingdom recognised the necessity for formally giving priority to interim and new financing, however, their plan was dropped following on from negative feedback during the consultation process. As such, England and Wales will likely need to introduce a provision to comply with the Directive. Germany and Austria may also need to introduce frameworks to provide protection for new and interim finance. Denmark may need to introduce protection from avoidance actions for new financiers, assuming it implements a similar system to its current insolvency restructuring. Because interim financing is not specifically referred to in article L611-11 of the Commercial Code, France may decide to include it in the Ordinance, thereby amending its legislation.

7.7 Workers (Article 13)[319]

The normal labour and employment law rules will continue to apply to employees affected by preventive restructuring procedures as they stand alongside the PRD. These include 5 EU social Directives specifically referred to in article 13 of the PRD that relate to employees affected by employer insolvency and the actions that might be taken by a company in financial distress that impact on employee rights and entitlements. The Acquired Rights Directive[320] requires the automatic transfer of employment contracts upon the transfer of a going concern or part of a going concern, even if that business transfer to a new owner occurs out of what are deemed liquidation procedure as long as the business of the undertaking is continuing as an independent economic entity.[321] The Collective Redundancies

---

[319] Per art 13 (1):

> "Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:
> (a) the right to collective bargaining and industrial action; and
> (b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:
> (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;
> (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;
> (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with art 9, or for confirmation by a judicial or administrative authority in accordance with art 10;
> (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC."

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

[321] See the Case C-126/16 *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* (2017) where it was found that a (partial) going concern sale arranged through a Dutch pre-pack connected to a liquidation procedure under the Dutch Insolvency Code would not be protected by the insolvency exception to the automatic transfer of employment contracts set out in art 5(1) of the Acquired Rights Directive because the pre-pack as conceived was not with a view to liquidation (but with a view to continuing at least a part of the business of the undertaking). For a short discussion on the Dutch position, see Rick Aalbers, Jan Adriaanse, Gert-Jan Boon, Jean-Pierre van der Rest, Reinout Vriesendorp, and Frank van Wersch, 'Does Pre-Packed Bankruptcy create Value? An Empirical Study of Post-Bankruptcy Employment Retention' (2019) 28(3) IIR (forthcoming).
For a catalogue of case law on this question with the evolution of approach from a contrary view in the first case on this topic, Case 135/83 *HBM Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, to cases where the sale of a business of the undertaking may occur in a liquidation procedure, but because a business or part of a business of the undertaking continues, the compulsory transfer of employment contractswill still apply, see the following non-exhaustive list of cases: Case C-362/89 *D'Urso and ors v Ercole Marelli Eletromeccanica Generale SpA and ors* [1991] ECR I4105; Case C-472/93 *Spano and Others*

Directive[322] sets out participation and consultation obligations if a certain number of employees are at put at risk of redundancy. The Employers in Insolvency Directive[323] requires each Member State to create a guarantee fund that protects a limited amount of employee wages and entitlements in the event of their employers' insolvency. In addition, the EU has passed a number of directives that aim to protect employees' rights to bargain collectively and add certain additional requirements for information and consultation obligations by employers. There are two mentioned in article 13 of the PRD which include the Information and Consultation Framework Directive[324] and the Works Councils Directive.[325]

It is important to remember that regardless of which Member State is running a principal insolvency or restructuring proceeding, the employment law of each individual Member State will continue to apply to those employees working within its borders, unless otherwise provided for in a legal employment contract. The aforementioned social policy directives that attempt to approximate the treatment of employees when faced with the financial difficulties of their employers or other changes to the organisational environment of their employer

Article 13 on Workers was a late addition to the Directive. Early during the inter-institutional negotiations, European Economic and Social Committee and the European Parliament Committees on Employment and Social Affairs both expressed concern that the Directive did not explicitly address the position of workers, nor did it give them any protection compared with other creditors. article 13 serves to remind the Member States that their new or reformed restructuring frameworks should continue to adhere to both "Union and national labour law" as implemented in the Member States. The interinstitutional discussions did make clear the importance of workers' rights and the ability for workers to both participate and for their entitlements to be protected in an employers' insolvency, as evident in their exclusion from the stay in article 6(5), though this can be derogated from if payment of claims is guaranteed at a similar level of protection.

Contributors were asked to assess what the current position of workers in their jurisdictions currently is. As all Member States are bound by the same minimum standards arising from the 5 aforementioned Directives, with some exceptions stemming from domestic differences, such as priorities and the level of development of collective bargaining, the position in each Member State is largely the same. While there are some differences in approach in domestic legislation, it is unlikely that these differences will inhibit the development of preventive restructuring frameworks as regardless of what jurisdiction opens main proceedings, the domestic law and protections governing workers will continue to apply in each Member State. For this reason, this Report will not offer an in-depth discussion of workers' rights in the context of the PRD and its relevance to the JCOERE Project.

7.8 Conclusion: Benchmarking to the Directive

As evident in the foregoing sections, the Member States that have contributed to the JCOERE Questionnaire as of October 2019 vary significantly in terms of (1) the existence of preventive restructuring procedures; (2) the provisions common to preventive restructuring, which may currently be associated with insolvency or insolvent restructuring or reorganisation procedures; and (3) the view of certain key concepts and principles that are common to preventive restructuring. Chapter 7 has explored specific provision arising from the PRD as an incoming European framework Directive as a focal point of examining preventive restructuring procedures generally among the EU Member States and the JCOERE contributing jurisdictions. The key provisions explored included the stay or moratorium, its existence and duration with extensions in the contributing jurisdictions in either

v Fiat Geotech and Fiat Hitachi [1995] ECR I-4321; Case X319/94 *Jules Dethier Equipement SA v Jules Dassy* [1998] ECR I-1061; Case C-399/96 *Europieces SA, in liquidation v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I-6965; Case C-29/91 *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189; and Joined Cases C-171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] ECR I-1253. For a discussion of this European case law in the context of the insolvency exception in the Acquired Rights Directive and the rescue culture, see Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 139-144.

[322] Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225/6.

[323] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.

[324] Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

[325] Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122/28.

preventive or insolvent restructuring procedures as well as whether this stay was revocable by a court (article 6(1) and (9)).

With a view to, in particular, investigating the complicated and challenging cross-class cram-down provision, the rules pertaining to both the adoption and confirmation of restructuring plans had to be examined. With regard to adoption, this necessarily included the ability to vote on a plan as well as what conditions were present that could exclude certain creditors from voting (article 9(2-3)). It was also important to explore how classes were formed and, in some cases, if at all beyond recognising the difference between secured and unsecured creditors (article 9(4)) as well as whether there was provision for the judicial or administrative examination of voting rights prior to the approval of a plan (article 9(5). Finally, and crucially, this question explored whether with a simple or super majority rule within individual classes of creditors the adoption of a plan would be allowed, often called an intra-class cram down (article 9(6).

Confirmation criteria related to restructuring plans was also interrogated in the questionnaire with responses dealing with the conditions under which a plan would have to be confirmed by a judicial administrative authority and whether the current provisions in the contributing jurisdictions included at least the criteria set out in article 10(1). Additional conditions were set out in 10(2) that can also require judicial or administrative approval, which contributors also gave their views on in relation to their current and planned or hypothetical implementation of restructuring frameworks, including whether they provided or would provide for the ability for an authority to refuse to confirm a plan under 10(3).

One of the key and most controversial provisions in the PRD is the cross-class cram-down, and few jurisdictions have this already in a preventive restructuring procedure and not all even have it in their insolvent restructuring procedure. Therefore, this provision may be one of the most challenging ones to implement in the time period allotted for putting into place domestic legislation in line with the PRD. Article 11(1) provides an obligatory provision for a cross-class cram-down, but provides a myriad of options for testing the fairness of this as against dissenting creditors, seeming to prefer a “relative priority rule” as set out in article 11(1)(c) with a derogation set out to utilise an “absolute priority rule” in 11(2). Finally, another separate test is provided in the second paragraph of 11(2) that describes an “unfair prejudice test”. Many EU jurisdictions favour an absolute priority rule already, while Ireland, for example, has already been applying a kind of relative priority test that relies as well on whether creditors are unfairly prejudiced. There is a lot of debate in the relative value of these rules and whether the more flexible of these lead to morally hazardous circumstances that could be abused by powerful lenders and unscrupulous debtors.

There was also a brief exploration of article 13 in relation to workers, which specifies five social Directives that all jurisdictions should continue to apply in relation to the development of preventive restructuring frameworks. These directives include the Works Councils and Information and Consultation Directives, the Collective Redundancies, Acquired Rights, and Employers in Insolvency Directives. Given the fact that these Directives have already been implemented within the Member States, the additional admonition does little to change the status quo.

Finally, the provision of interim financing in article 17 has been recognised as an absolutely vital element for the success of preventive restructuring plans. When a company finds itself in temporary financial distress, it is axiomatic that it will need money from somewhere to be able to continue with negotiating a plan and to implement it. As such, the provision of protection from claw-back manoeuvres, liability for lending, as well as the potential to apply a super priority to such loans in repayment is a vital piece of the restructuring puzzle. The contributing jurisdictions already take a varied approach to this concept, with views that it, along with aspects of the cross-class cram-down could lead to abuse of process and moral hazard. However, it is also widely accepted that this is an unavoidable aspect of preventive restructuring if the Member States are to create or adjust procedures that will be effective at rescuing companies in states of likelihood of insolvency in the near future.

7.9 Chapter 8: Mapping of Preventive Restructuring Frameworks and the EU Directive Part II Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The next Chapter 8 will explore the first half of Part III of the JCOERE questionnaire. The next chapter begins with an exploration of the thresholds of insolvency in the contributing jurisdictions as this gives a perspective on the accessibility of preventive restructuring along the stream of financial difficulty. Secondly, Chapter 8 will explore contributor responses to the implementation of article 5 Debtor in Possession. This requires Member States to provide a debtor in possession procedure while making provisions for the involvement of an insolvency practitioner either on a case-by-case basis, or in certain specified circumstances. The next chapter will also look at the interplay of article 8 of the EIR Recast, which provides absolute protection for rights *in rem* for assets located in a jurisdiction other than the jurisdiction of primary proceedings. This has been viewed as potentially conflicting with the cross-border aspects of preventive restructuring as it could lead to differential treatment of rights *in rem* holders as between the jurisdiction of preliminary proceedings and other jurisdictions recognising and deferring to those proceedings.