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Schemes of Arrangement: A Comparative Analysis

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Background

On 22 November 2016 the European Commission published a proposal for a directive "on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU".[1] The proposed directive will be referred to as the "directive" even though is only still a proposal.[2]

The directive contains provisions in the area of substantive insolvency law, which are subdivided into three main themes: i) "preventive restructuring procedures", ii) discharge for entrepreneurs and iii) measures to increase the efficiency of insolvency procedures in general.

The proposed directive succeeds the non-binding recommendation of the Commission on "a new approach to business failure and insolvency" of 12 March 2014.[3] The Commission evaluated the effects of the recommendation after a period of only 18 months and concluded

[1] COM(2016) 723 final.
[2] See on the proposed directive also B. Wessels, On the genesis of the Proposal for a Restructuring Directive, NTHR 2017/1; H. Eidenmüller, Contracting for a European Insolvency Regime, Law Working Paper No 341/2017, January 2017; G. McGormack, Corporate Restructuring Law – A second chance for Europe? European Law Review (forthcoming); Maria-Thomais Epeoglou, Comments on Commission's Proposal for a Directive on Preventive Restructuring Frameworks and Second Chance for Entrepreneurs: The Third Step to the European Cross-border Insolvency Saga, International Corporate Rescue (2017), Issue 1; European Banking Federation, Position paper on the Commission's Proposal for a Directive on preventive restructuring frameworks and second chance of 22 November 2016 – COM(2016) 723 final, 21 February 2017; Business Europe, Comments on Proposal on EU insolvency and second chance, 27 February 2017; Association for Financial Markets in Europe (AFME), Response to the European Commission's proposal for a Directive on preventive restructuring frameworks and second chance, 7 March 2017; N.W.A. Tollenaar, The EU's proposals; Good, but they could have been better, Global Turnaround, November 2016; S.C.E.F. Moulen Janssen, Verslag van het congres "EYES on Insolvency", FIP 2017/2; S.C.E.F. Moulen Janssen, Schemes of tomorrow, Global Turnaround, February 2017 and U. Schlegel, Der Teufel steckt im Detail, INDat, 2017/1, p. 26 e.v.
[3] C(2014) 1500 final. See on the recommendation also, amongst others, Ian F. Fletcher and Bob Wessels, *Harmonisation of Insolvency Law in Europe,* preadvies voor de Nederlandse Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2012; G. McGormack, Business restructuring law in Europe: making a fresh start, Journal of Corporate Law Studies, 17:1, 167 – 202; G. McCormack, A. Keay, S. Brown and J. Dhalgreen, Study on a new approach to business failure and insolvency, January 2016, JUST/2014/JCOO/PR/CIVI/0075; Mihaela Carpus Carcea et. al., The Economic Impact of Rescue and Recovery Frameworks in the EU, European Economy Discussion Paper 004, September 2015; S. Madaus, The EU Recommendation on Business Rescue: Only Another Statement or a Cause for Legislative Action across Europe, (2014) Insolvency Intelligence 81; H. Eidenmüller and K. van Zwieten, Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency, (2015) 16 E.B.O.R. 625 and N.W.A. Tollenaar, *Het pre-insolventieakkoord, grondslagen en raamwerk*, diss. Groningen, Deventer: Kluwer 2016, chpt. 9.

that the Member States had only partially implemented it.[4] In its Capital Markets Union Action Plan the Commission therefore announced its intention to convert the recommendation into binding legislation.[5] This resulted in the proposed directive.[6]

In the directive the Commission opted for minimum harmonisation rather than full harmonisation. The Member States are enabled "to go beyond'' the provisions in the directive.[7] It will often be difficult to determine whether a deviation goes beyond or falls short of the minimum standards laid down in the directive.

Key characteristics of the procedure

The preventive restructuring procedure that the Commission envisages is a plan procedure, i.e. a procedure in which a plan to amend the capital structure of the debtor is proposed to and vote on by the capital providers and can be imposed on dissenting parties subject to certain requirements. The term "preventive" expresses the purpose of the procedure to avoid insolvency. To achieve that purpose, the procedure can be initiated at a time when the debtor is not yet insolvent.[8]

The new type of procedure proposed by the Commission differs from traditional insolvency proceedings in that the provided plan mechanism is available on a more or less "stand alone" basis and has been stripped of most of the measures that typically surround a plan mechanism embedded in a fully-fledged insolvency process, such as divestment of the debtor, appointment of an office holder, an automatic stay accompanied by general publicity, powers to redress unlawful conduct, and so forth. In principle, the debtor remains in

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[4] Evaluation of the implementation of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, dated 30 September 2015; see also G. McGormack, Business restructuring law in Europe: making a fresh start, Journal of Corporate Law Studies, 17:1, p. 172 who queries whether Member States were given enough time to give effect to the March 2014 Recommendation. He suggests that the Commission planned a legislative instrument at the outset. In the same vein G. McGormack, Corporate Restructuring Law – A second chance for Europe? European Law Review (forthcoming): *"There is a suspicion that the political imperatives of the Capital Markets Union project pushed the Commission into legislative mode and such action is perhaps premature."*
[5] Action Plan on Building a Capital Markets Union, COM(2015) 468 final.
[6] See for the institutional background of the directive the explanatory memorandum that accompanies the proposal, and in the literature, amongst others, B. Wessels, On the genesis of the Proposal for a Restructuring Directive, NTHR 2017/1; G. McGormack, Corporate Restructuring Law – A second chance for Europe? European Law Review (forthcoming); and Maria-Thomais Epeoglou, Comments on Commission's Proposal for a Directive on Preventive Restructuring Frameworks and Second Chance for Entrepreneurs: The Third Step to the European Cross-border Insolvency Saga, International Corporate Rescue (2017), Issue 1, all with references to the relevant policy documents.
[7] Page 16 of the Explanatory Memorandum.
[8] Recital 17 and article 4 (1).

possession.[9] De procedure is intended to be as fast, efficient and flexible as possible. The Commission seeks to achieve this by limiting formalities and court involvement.[10]

The proposed preventive restructuring procedure is inspired by the UK scheme of arrangement and the plan procedure contained in Chapter 11 of the US Bankruptcy Code. The similarities with the UK scheme of arrangement include: i) the ability to limit the scope of the plan to only a subset of the capital providers, ii) the availability of the plan procedure outside formal fully fledged insolvency proceedings and iii) the requirement that a plan can only be proposed by or with the consent of the debtor.[11] A notable difference is that the directive provides for a cram down mechanism. The UK scheme of arrangement lacks such mechanism.[12] The Commission imported the ability to cram down dissenting classes from Chapter 11. Unsurprisingly, therefore, the criteria for cram down are strongly based on the American system. In particular, the directive prescribes application of the well-known absolute priority rule. Under the American system, and subject to the expiry of a certain exclusivity period, creditors do have the right to propose a plan without consent of the debtor being required. This element of the American system the Commission chose not to take over.

Hence, the Commission designed a procedure which can be seen as a mixture of the American and English systems.

<u>The high-level steps of the process</u>

The directive does not contain detailed provisions on the steps of the process. Nevertheless, it is possible to discern what the main steps of the process would look like in high level terms.

[9] Article 5.
[10] Article 4.
[11] Under English law creditors, too, have the right to propose a scheme (Companies Act 2006, s 897). However, for a scheme to be sanctioned outside a formal insolvency procedure, consent of the debtor is required (Re Savoy Hotel Ltd [1981] 3 All ER 646). Therefore, outside a formal insolvency procedure, it is *de facto* only the debtor who can propose a scheme. See also J. Payne, *Schemes of Arrangement*, Cambridge University Press, 2014, p. 21 and 33. The directive proposes a similar requirement of consent of the debtor; see articles 4(4) and 11(1). Once a formal insolvency procedure, i.e. administration, has been opened, creditors and the administrator can propose and implement a scheme without consent of the debtor being required. The directive does not make this distinction between inside and outside insolvency.
[12] In this paper I use the term cram down to refer to the ability to impose a plan over the objections of one or more dissenting classes. The directive refers to this using the tongue breaker “cross-class cram-down” (see article 2(8)). I prefer to use the shorter term “cram down” which corresponds to the terminology used in American practice, where this term has its origin.

The debtor can directly propose a plan to its creditors, without any application to a court being required.[13] There is no court test at entry. Unlike in Chapter 11, prior court approval of a disclosure statement is not required (and probably not even permitted).[14] Voting takes place in classes. Voting does not require any meetings to take place or formal procedures to be followed and can happen electronically.[15] Member States can provide that an agreement with the requisite majority qualifies as a vote.[16] A vote amongst all addressees of the plan then need not be held. After the vote, the plan has to be confirmed.[17] The Impact Assessment underlying the recommendation of the Commission of 12 March 2014 suggested that confirmation be dealt with in writing without need for a hearing.[18] The confirmation decision must be given within a period of 30 days.[19] This does not leave much time for a hearing. The confirmation decision must be subject to appeal,[20] which, in my view, is undesirable.[21] The directive does require that appeals are resolved expeditiously.[22] In addition, an appeal may not suspend the implementation of a plan.[23] However, where an appeal succeeds, the court must either set the plan aside or award damages to dissenting creditors payable by the debtor or by the creditors who voted in favour.[24] This will mostly mean that, in practice, the plan cannot or will not be implemented as long as the confirmation decision has not become final and is still subject to appeal.[25]

Pending the procedure the court may, at the request of the debtor, order a general stay against all creditors or a specific stay against one or more individual creditors seeking to enforce their claims.[26]

The directive appears to allow for the possibility for the court to make binding determinations at an early stage of the procedure, i.e. before the vote, on issues regarding the plan that

[13] Recital 18.
[14] § 1125(b) US Bankruptcy Code (*acceptance of a plan may not be solicited unless there is a written disclosure statement approved by the court as containing adequate information*).
[15] Article 28.
[16] Article 9(5).
[17] Article 10.
[18] Impact Assessment accompanying the Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014) 61 final, p. 37 - 38.
[19] Article 10 (4).
[20] Article 15(1).
[21] N.W.A. Tollenaar, *Het pre-insolventieakkoord, grondslagen en raamwerk*, diss. Groningen, Deventer: Kluwer 2016, par. 8.2.1.
[22] Article 15(2).
[23] Article 15(3).
[24] Article 15(4).
[25] European Banking Federation is also critical and suggests that article 15(4)(b) be deleted; EBF Position paper on the Commission's Proposal for a Directive on preventive restructuring frameworks and second chance of 22 November 2016 – COM(2016) 723 final, 21 February 2017.
[26] Article 6.

create uncertainty and can be resolve before the vote, such as class formation and valuation.[27]

The right to propose a plan

The directive grants the right to propose a plan to the debtor only. It provides that preventive restructuring procedures shall be available "on application by debtors, or by creditors with the agreement of debtors."[28] The requirement that an application of a creditor requires consent of the debtor means that, *de facto*, only the debtor can propose a plan.

The directive provides that debtors must have access to preventive restructuring procedures where there is a "likelihood of insolvency."[29] The criterion "likelihood of insolvency" is intended to make intervention possible at an earlier stage than is possible with the criterion "imminent insolvency".[30]

Permitted content of a restructuring plan

The directive does not contain detailed provisions on the permitted commercial content of a plan. The plan can provide for a wide range of measures, including an extension or reduction of debt, a debt for equity swap, a sale of assets or business units and so forth.

The plan can bind all types of capital providers, including secured and preferential creditors and shareholders. It does not have to include all capital providers but can be limited to a subset, for example the financial creditors, and leave other parties, for example the trade creditors, unaffected.[31] Parties who are not included or involved in the adoption of the plan are not bound by its terms.[32]

Whilst claims of workers cannot be affected by a stay (unless they are guaranteed under a scheme established under directive 2008/94/EC),[33] the directive does appear to allow for the

[27] Recital 25.
[28] See article 4(4) and article 11(1).
[29] Article 4(1).
[30] Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law, November 2016, p. 59.
[31] See recital 24. This has been inspired by and is seen as one of the great advantages of the UK scheme of arrangement.
[32] Article 14.
[33] Article 6(3).

possibility to compromise workers' claims under the terms of the plan. This means that where the debtor is unable to pay redundancy payments that may become due under national labour law, the debtor has the ability to restructure these liabilities to fit its financial means through a plan.

The directive contains a few provisions on the non-commercial content of the plan. This includes the identity of the affected and non-affected parties, the class formation, a valuation and a reasoned statement on the feasibility of the enterprise issued by the proponent of the plan.[34]

The directive is silent on the possibility to restructure under the terms of the plan claims of creditors against third parties, e.g. claims against group companies that have issued guarantees. This omission is deliberate.[35] The lack of the ability to deal with third party liabilities is a shortcoming. This will be felt particularly in the restructuring of cross-border groups. If one is unable to include liabilities of foreign guarantors in the plan of the principal debtor, one has to initiate separate plan procedures in respect of each of the foreign guarantor entities. Those foreign procedures will often have to be initiated in the foreign jurisdictions in which the relevant foreign entities are established.[36] The separate procedures will then be dealt with by different courts in different countries under different applicable laws. The additional complexity, delay and costs that this gives rise to will mostly be prohibitive.[37]

[34] Article 8(1).
[35] Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law, November 2016, p. 56: *"Where valid concerns were advanced by stakeholders, certain sub-options were not retained: this is the case with the rule on the release of third party guarantees."* See also pages 71 – 74 of the report in which the Commission explicitly takes the advantages of "third party releases" into consideration. The discussion concludes with the observation that *"the majority of the Member States were opposed to any rules on third party releases."*
[36] The scope of the Insolvency Regulation has been expanded to include pre-insolvency proceedings; see article 2(1) of the recast Insolvency Regulation, EU 2015/848. The jurisdiction of the courts of the Member States to render decisions in the context of pre-insolvency proceedings that fall within the ambit of the Regulation will be determined by the location where the debtor has its centre of main interests (COMI). COMI has to be established on an entity per entity basis. It is assumed to be located at the place where the debtor has its registered office; see article 3 of the recast Insolvency Regulation. It is unclear whether the preventive procedures envisaged in the proposed directive will fall under the scope of the recast Insolvency Regulation. Recital 13 of the recast Insolvency Regulation states that confidential procedures are excluded from its scope. Is remains to be clarified whether the preventive procedures envisaged in the proposed directive are to be qualified as "confidential" for this purpose. See in this regard also the Report from the Fifth and Sixth meetings of the Expert Group on Restructuring and Insolvency Law 24 – 25 May 2106, p. 2.
[37] See in this regard also the Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law, November 2016, p. 35 en 52 where the Commission notes that because of the aforementioned reasons no plan with respect to a cross border group has yet been implemented in more than two jurisdictions. See also R. van Galen and S. Madaus, *Corporate Rescue,* Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht – NVRII, 2012.

Voting on and acceptance of a plan

Voting takes place in classes. The classes must be formed in such a way "that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest".[38] The word "interests" in the phrase "claims or interests" refers to equity interests not to interests in general.

Conspicuously, the directive provides that Member States must ensure that affected creditors have the right to vote, while this right "may also" be granted to affected shareholders.[39] The special position that shareholders are given under the directive can only be explained against the background of the opposition that some Member States have to cram down of shareholders.[40] This opposition is warranted where there is only a "likelihood of insolvency" but unwarranted where the debtor is or inevitably will become insolvent and the shareholders are offered under the terms of the plan what they are entitled to on the basis of their rank (which will often be nothing).[41] It can be useful to grant the right to vote to parties who are out-of-the-money, which shareholders are the first to become. The reason for this is that, where the relevant out-of-the-money class votes in favour of the plan, cram down of that class with the associated judicial valuation is not required.[42]

For the purpose of class formation the Member States may provide that secured claims may be divided into secured and unsecured claims based on collateral valuation.[43] For voting purposes the national laws must in any event provide for rules for dealing with claims of related parties and contingent or disputed claims.[44]

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[38] Article 9(2). The wording in this article does not explicitly express that not only existing rights but also the new rights that the parties are offered under the plan are to be taken into account for the purpose of class formation. This is however expressed in the definition of "class formation" in article 2(6).
[39] Article 9(1); see also article 12.
[40] Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law, November 2016, p. 69: "*… treatment of shareholders raises some sensitive constitutional concerns about the protection of the right to property (…) in many Member States shareholders rights are seen as being essentially different than creditors' rights."* See in the same vein pages 70 - 71 of the report.
[41] N.W.A. Tollenaar, Het pre-insolventieakkoord, grondslagen en raamwerk, diss. Groningen, Kluwer 2016, par. 3.4.7, 3.6, 4.1, 8.9.6 and 8.9.7.
[42] N.W.A. Tollenaar, Het pre-insolventieakkoord, grondslagen en raamwerk, diss. Groningen, Kluwer 2016, par. 8.7.2.2.
[43] Recital 25 and article 9(2). The question then arises on the basis of which valuation standard the value of the collateral should be determined; see N.W.A. Tollenaar, *Het pre-insolventieakkoord, grondslagen en raamwerk*, diss. Groningen, Deventer: Kluwer 2016, par. 4.3.5 and 6.7.
[44] Idem.

A plan is deemed to be adopted if each and every class votes in favour. A class has voted in favour if the parties within the class who have voted in favour hold a majority in amount of not higher than 75% of the claims or interests in the relevant class.[45] The majority requirement does not include a head count. This is to be welcomed.[46] The Commission deliberately chose for a majority requirement only in amount, without a head count, to ensure that "parties have a say on the adoption of the plan that is proportionate to the stakes they have in the business."[47]

The required majority in amount may not be greater than 75% of the amount of claims or interests in each class.[48] In order to avoid the problem of absenteeism, it is better to express the required majority as a percentage of the claims or interests of the parties who participated in the vote, rather than as a percentage of the claims or interests of the entire class.[49] The directive appears to allow the Member States the freedom to do so.[50]

Confirmation and cram down under the proposed directive

The criteria that the Member States lay down for confirmation must be "clearly specified".[51] The directive prescribes a number of conditions that the confirmation and cram down criteria adopted by the Member States shall at least include. These mandatory conditions follow the American system whereby certain requirements apply for the confirmation of all plans and certain additional requirements apply for cramming down a plan over the objections of one or more dissenting classes.

For the confirmation of any plan at least two conditions must be satisfied. The first is the "best interest of creditors test." [52] The directive defines this to mean that "no dissenting

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[45] Article 9(4).
[46] N.W.A. Tollenaar, *Het pre-insolventieakkoord, grondslagen en raamwerk*, diss. Groningen, Deventer: Kluwer 2016, par. 8.8.1; G. O'Dea, *Schemes of arrangement*, Oxford University Press, 2012, p. 6 and p. 109; J. Payne, Schemes of *Arrangement*, Cambridge University Press, 2014, p. 61 et. seq.; World Bank, Principles for Effective Insolvency and Creditor/Debtor Regimes, Revised 2015, p. 26, principle C.14.3.
[47] Recital 26. See also the Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law, November 2016, p. 70.
[48] Article 9(4).
[49] It frequently occurs that parties do not participate in the vote out of lack of interest, although they may support or are not oppose to the plan as such. If the majority requirement is expressed as a percentage of the total claims, rather than as a percentage of the total claims of those participating, absenteeism of disinterested parties can cause the plan to fail even though an overwhelming majority of those participating voted in favour.
[50] See also G. McGormack, Corporate Restructuring Law – A second chance for Europe? European Law Review (forthcoming).
[51] Article 10(2).
[52] Article 10(2)(b).

creditor would be worse off under the restructuring they would be in the event of liquidation, whether piecemeal or as a going concern."[53] This is materially similar to the best interest of creditors test under US law. The second condition amounts to a feasibility test: the court must be able to refuse confirmation where the plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.[54] This test is similar to the feasibility test under US law. A difference is that the feasibility test under US law does not necessarily require the plan to provide for continuation of the business, but also allows a plan to provide for an alternative solution, such as a controlled liquidation or wind-down. This flexibility is lacking in the directive.

For confirmation of a non-consensual plan, the directive requires that at least two additional conditions are met.

The first additional requirement for cram down is that the plan has been accepted by at least one class of affected creditors other than a class which, on the basis of the "valuation of the enterprise" and the normal liquidation priorities, is not entitled to any value.[55] In other words, the plan has to be accepted by at least one affected class that is, briefly stated, in-the-money. For the purpose of determining whether an accepting class is in-the-money or not, the question arises whether the phrase "valuation of the enterprise" refers to the liquidation value or the reorganisation value of the enterprise. Article 13(2) and recital 30 of the directive suggest that one should look at that value of the enterprise as a going concern "in the longer term". Although unfortunately worded, this appears to point to the reorganization value.

A further mandatory requirement that the directive prescribes for cram down, is that the absolute priority rule is satisfied.[56] The directive expressly uses and defines this term as such.[57] De directive defines the absolute priority rule to mean "that a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan."[58] The content of the absolute priority rule as defined in the directive is materially similar to the corresponding rule in the American system. A difference is that in the American system the absolute priority rule applies only to

[53] Article 2(9).
[54] Article 10(3).
[55] Article 11(1).
[56] Article 11(1)(c).
[57] Article 2(10): *"'absolute priority rule' means that a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan."*
[58] Article 2(10).

dissenting classes of unsecured creditors and shareholders, whilst under the directive the absolute priority rule applies to all types of capital providers.[59]

Recital 28 of the directive states that, as a corollary to the absolute priority rule, no class of creditors may receive more than the full amount of its claims. This however does not reappear in the operative provisions of the directive.

The directive does not contain a rule similar to the no unfair discrimination test nor does it contain separate rules for cramming down dissenting classes of secured creditors, as contained in US law.

[59] The definition only refers to dissenting classes of “creditors” and fails to refer to dissenting classes of equity providers (e.g. a class of holders of preference shares). I assume that this is an unintended ommission.

2. The UK scheme of arrangement

Background

Large restructurings of financial debt under English law are often effected by schemes of arrangement.[60] In essence, schemes are compromises or arrangements between a company and certain of its creditors by which the dissenting minority in each class of affected creditors is bound by the restructuring proposed by the scheme.

The scheme is not a formal insolvency procedure and there is no need for a company to be insolvent for a scheme to be available to it (indeed, schemes are often used for solvent mergers and acquisitions). Furthermore, the subject matter of the restructuring proposed by the scheme is not restricted and can include amendments to payment terms and debt-for-equity swaps.

The statutory regime that governs schemes is contained in only five short sections of the Companies Act 2006; many of the rules that apply to schemes are derived from judge made case law.

Schemes are available to companies that have a sufficient connection with England. This can include companies that have assets, a centre of main interests (COMI) or an establishment in England or that have entered into finance documents that are governed by English law and that have a jurisdiction clause in favour of the English courts. Recent years have seen the continuing lowering of this jurisdictional threshold.

Pre-scheme restructuring negotiations

A scheme is a pre-negotiated restructuring procedure to the extent that the court is only involved at the end of the process after the terms of the restructuring have been negotiated and the support of the key creditors have been obtained. These restructuring negotiations take place against the backdrop of scheme law (that is, what can be imposed on creditors

[60] Unless indicated otherwise, references in this memorandum to schemes are to creditor schemes of arrangement (that is, comprises or arrangements between a company and its creditors rather than between a company and its members).

against their wishes) and the alternatives to the scheme (usually administration, which is considered to be unattractive and value destructive).

Affected creditors and approval thresholds

The company is free to select the creditors with whom it wishes to enter into the scheme. Only these creditors are affected by the scheme; the creditors who do not enter into the scheme are not bound by it.

A scheme involves majority voting in each class of affected creditors. If (i) 75% in value; and (ii) a majority in number, of each class of affected creditors present and voting in person or by proxy vote in favour of the restructuring proposed by the scheme (and the court subsequently sanctions the scheme) then the dissenting minority in each class and the company are bound. However, the rights of creditors in a dissenting class will not be affected by the scheme. This means that, while it is possible to use a scheme to cram down dissenting creditors within a class, there is no cross-class cram down (unlike in Chapter 11 proceedings in the United States).

Process

A scheme essentially involves:

- the selection by the debtor of the creditors who are to be parties to the scheme (that is, those whose rights are to be affected);

- the grouping of such creditors into classes by reference to their pre-scheme rights and their rights under the restructuring to be approved by the scheme;

- an application by the debtor to the court (at which point the scheme documentation including the explanatory statement and terms of the scheme is filed with the court) seeking an order for the convening of meetings of each affected class of creditor (this order will be granted after a "convening hearing");

- the holding of and voting at each class meeting (the "scheme meetings");

- if the requisite majorities are achieved, an application by the debtor to the court for an order sanctioning the scheme (this order will be granted after the "sanction hearing"). The court will satisfy itself that the statutory requirements have been met, that the majorities at the class meetings were not acting for some collateral or improper purpose and that the scheme is otherwise fair as between the creditors (although the court is slow to override the views and wishes of the majorities who voted in favour of the scheme); and

- the delivery of the court order (from the sanction hearing) to the Registrar of Companies (this is the date on which the scheme takes effect).

Creditors who are out of the money

Creditors who are out of the money can be left out of the scheme (they are not made parties to the scheme) but the debtor company will then need to implement the restructuring by selling the debtor's assets and business to a newco and leaving the out of the money creditors behind in the debtor company, which will file for liquidation. Valuation evidence is required to establish whether creditors are out of the money. This valuation is undertaken by reference to an appropriate comparator (what would the creditors concerned received if the scheme were not sanctioned which is likely to be recoveries in the event of a going concern sale of the debtor's assets and business in an administration).

Moratorium and court protection

There is no moratorium when an application to court for approval of a scheme is made. This means that the scheme does not itself stay legal proceedings brought by creditors against the company. In large financial restructurings a moratorium is not required as financial creditors consider that forcing an insolvency will result in a worse recovery than under the scheme.

If court protection is required, administration is the corporate insolvency procedure that is typically used. Administration involves the appointment of officers of the court and is generally regarded as value destructive. Administration can be combined with the scheme when an asset sale is required in which case administrators will be appointed to effect the sale when the scheme is approved.

Shareholder scheme

If there is also to be a restructuring of the debtor's share capital and the usual corporate procedures are inadequate, there needs to be separate scheme for shareholder. The UK does not have a unitary restructuring procedure for dealing with debt and equity (such as Chapter 11 in the United States). However, often a shareholder scheme is not required.

The proposed reforms – the restructuring plan

In August 2018 the UK government announced that, as part of its proposed legislative changes to the corporate insolvency framework, it intends to introduce a new restructuring tool called the "restructuring plan". The restructuring plan is broadly modelled on the scheme but will be different in the following respects:

- The voting threshold for each class will be 75% by value. There will be no majority in number test. Instead, a connected party subtest will be introduced that will require "more than half of the total value of unconnected creditors to vote in support".

- Cross-class cram down will be permitted. This means that if at least one class of impaired creditors vote in favour and the "absolute priority rule" is followed, the court can sanction the plan. The absolutely priority rule is that the dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution. The court can also sanction the plan if the absolute priority rule is not met, but where this non-compliance is:

    - necessary to achieve the aims of the restructuring; and

    - just and equitable.

- In order for the court to assess whether the absolute priority rule has been met, it will consider the “next best alternative for creditors”. Often administration will be the comparator, but liquidation may sometimes be the only realistic alternative.

Although the restructuring plan is a new tool, the government’s proposal that the case law on schemes should apply to it will introduce an element of familiarity and certainty into the new regime. Nevertheless, the reference to the “next best alternative” is likely to open up litigation in many cases, with the courts having to take a commercial view on valuation. This could increase the volume of disputes that are required to be settled by the courts.

It is notable that the EU’s draft directive on insolvency, restructuring and second chance published in November 2016 includes a restructuring plan with cross-class cram down. It is expected that the final directive on at least some of these measures will be enacted before the next European elections in May 2019, which would mean, given its impending departure from the EU, that the UK is unlikely to be obliged to implement it. Although they do not refer to the EU’s draft directive, the measures proposed by the UK government are likely to help to ensure that the UK does not fall behind the EU regime.

3. Irish examinership

Background

Schemes of arrangement similar to those under English law have been available as an insolvency restructuring tool in Ireland since 1963[61]and the *sufficient connection* test, to include companies registered outside of Ireland, has brought Irish schemes into line with those in England as of 2014[62]. The principal reason that such schemes have not, since 1990 at least when examinership was introduced into Irish law[63], been utilised for this purpose is that examinership is, from debtors' perspective, a much more flexible process. Examinership was loosely modelled on chapter 11 in the US, incorporating as it does the debtor in possession concept. The key features of examinership are as follows.

- It may be commenced by the debtor company, its board of directors, a shareholder holding at least 10% of the company's voting shares or a creditor[64]

- A moratorium with respect to creditor actions commences upon filing[65].

- The process lasts for a maximum of 100 days plus such additional time as the court requires in order to consider proposals for a scheme of arrangement[66].

- The test that must be met in order to have the court appoint an examiner is that the company is insolvent and there is a reasonable prospect of survival if placed into examinership[67].

- The examiner does not usually have executive powers, but rather is tasked with formulating proposals for a scheme of arrangement.

61. Section 201 Companies Act 1963
62. Section 220 Companies Act 2014
63. Companies (Amendment) Act 1990
64. Section 571 (1) Companies Act 2014
65. Section 520 (1) Companies Act 2014
66. Section 520 (2) Companies Act 2014
67. Section 509 (1) and (2) Companies Act 2014

- Debtor in possession financing, ranking ahead of a floating charge, can be obtained on foot of the examiner's certificate.

- Proposals for a scheme of arrangement usually entail fresh investment and writing down of debt.

- The proposals for a scheme of arrangement are required to be approved by a majority in number and value of at least one class of creditors whose interests would be impaired by the proposals[68].

- Once such creditor approval has been obtained, court approval is required and is dependent upon no affected party being unfairly prejudiced[69]. This, broadly speaking, means that no creditor must be treated less favourably than in a liquidation/receivership.

The process has proven to be an effective and relatively inexpensive one, which has facilitated the rescue of both small businesses and very large ones[70].

<u>Pre-scheme restructuring negotiations</u>

Examinership schemes cannot be pre-packed in the strict sense, although much of the preparatory work can be, and frequently is, done in advance. In practical terms the process can be condensed into, in a best case scenario, about four weeks. The best known case in point was the Eircom case[71] in which junior and senior secured creditors entered into a lock up agreement which facilitated an extremely smooth, quick and effective process.

<u>Affected creditors and approval thresholds</u>

Proposals for a compromise or scheme of arrangement formulated by the examiner are required to be put to the company's shareholders and to all classes of a company's creditors. The examiner will generally formulate classes of creditors by reference to their priority in a

68. Section 540 (4) Companies Act 2014
69. Section 541 (4) (b) Companies Act 2014
70. Such as Eircom in which €1.7bn of debt was written off
71. Eircom Limited & Ors & the Companies (Amendment) Act 1990 Record Number 2012/175COS

winding-up scenario, although many other reasons for formulation of classes have been successfully deployed by examiners.

The examiner's proposals are deemed to be accepted by a meeting of the creditors or a class of creditors when a majority in number and value of any class has voted, either in person or by proxy, in favour of the proposals[72]. One class of creditors whose interests or claims would be impaired by the proposals is required only[73]. Once accepted, the proposals will be set down for consideration by the court[74]. Procuring such a class vote does not usually, given the flexibility the examiner has in this regard, pose a difficulty.

Once approved by the court, the proposals are binding on all the members and creditors affected by the proposals and also on the company, subject to any modifications which may be implemented by the court.[75] The court may confirm the proposals if they are fair and equitable in relation to any affected members or creditors which have not accepted the proposals and are not unfairly prejudicial to those parties' interests. This, broadly speaking, means that no creditor may be treated less favourably than in liquidation or receivership.

Process

The process of examinership will involve the following;

- The appointment of an examiner is by way of petition presented to the Circuit or High Court by any of the following;
    - The company
    - The board of directors of the company
    - Any secured, unsecured, contingent or prospective creditor
    - Members representing 10% or more of the paid-up voting share capital of the company

72. Section 540 (4) Companies Act 2014
73. Section 540 (4) Companies Act 2014
74. Section 541 (1) Companies Act 2014
75. Section 541 (6) Companies Act 2014

- In making an order appointing an examiner, the court must be satisfied that the company is or is about to become insolvent and there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern if placed into examinersihp[76].

- Once appointed, an examiner will set about formulating proposals for a scheme of arrangement, which typically involve the introduction of new money and writing down of historic debt.

- These proposals will be put to the company's members and the various classes of the company's creditors in meetings convened by the examiner. The proposals must be approved by at least one class of creditors whose interests or claims would be impaired by the implementation of the proposals.

- These proposals are included in the report prepared by the examiner, which is set down for consideration by the court as soon as possible after receipt of the report by the court[77]. At the hearing, the following persons may appear and be heard[78];

    - The company concerned

    - The examiner

    - Any creditor whose claim or interest would be impaired if the proposal were implemented

    - The directors of the company

- At the hearing, the court may confirm, refuse to confirm, or confirm subject to modifications, the proposals for compromise or scheme of arrangement put forward by the examiner. Creditors who voted against the proposals, and who wish to prevent them from being implemented can be heard at this hearing.

76. Section 509 (2) Companies Act 2014
77. Section 541 (1) Companies Act 2014
78. Section 541 (2) Companies Act 2014

- The Court, as mentioned, must be satisfied that no creditor is being unfairly prejudiced by the proposals.

- Once the proposals have been confirmed by the court, they will come into effect from the date fixed by the court, which date may not be later than 21 days from the date of the proposals' confirmation[79].

Creditors who are out of money

Provided the proposals for a scheme of arrangement are approved by at least one class of creditors, disgruntled creditors do not have a veto over the proposals. If those creditors are demonstrably out of money, they are therefore not unfairly prejudiced by the proposals and should not be in a position to object successfully to court approval of the proposals.

Moratorium and court protection

For a period of 70 days from the date of the petition (which period can be extended by a further 30 days), the creditors of the company are prevented from taking action to enforce any judgements or any security against the company[80]. During this period of court protection, no winding-up proceedings may be commenced, no receiver may be appointed, no attachment or execution against assets, no attempt to repossess goods under hire purchase or retention of title agreement will be allowed, and no steps may be taken against any third party liable for any debt of the company.

If a receiver has been appointed to the company for a continuous period of at least three days prior to the presentation of the petition, the court may not hear the petition[81].

79. Section 542 (3) Companies Act 2014
80. Section 543 (3) Companies Act 2014
81. Section 512 (4) Companies Act 2014

4. The Spanish scheme

Background

During the last few years, the Spanish Insolvency Act (22/2003) has experienced several reforms that have introduced significant amendments. These reforms have been especially focused on enhancing the Spanish scheme as an expedited and efficient instrument to restructure highly leveraged debtors and to secure their viability in the medium term. The Spanish scheme is, in its most basic sense, a collective refinancing agreement which is sanctioned (*homologado*) by the insolvency court.

Class cram down

Among other substantial benefits (e.g., ring-fence protection and fresh-money benefits) the key effect of the Spanish scheme is the ability to cram down dissenting creditors if certain additional majorities are achieved. These majorities depend on the content of the refinancing agreement and whether the dissenting creditors are secured or unsecured as per the table below:

Court-sanctioned refinancings	**Majority**	**Affected debt**	**Cram down of secured creditors**	**Contents**
Standard	51%	Financial debt	N/A.	Claw-back protection
Reinforced (Basic)	60%	Unsecured financial debt and deficiency claims[82]	No	Grace period < 5 years Conversion of debt into PPL with a term < 5 years
	65%	Secured financial debt by value of security[83]	Yes	
Reinforced	75%	Unsecured financial debt and deficiency	No	5 years < Grace

[82] Residual amount of any secured claim that exceeds the value of the collateral.
[83] Being that value the lower of (a) the value of the claim held by the creditor; (b) 9/10 of the reasonable value of the collateral; or (c) the maximum secured liability agreed.

Court-sanctioned refinancings	Majority	Affected debt	Cram down of secured creditors	Contents
(Advanced)		claims		period < 10 years
	80%	Secured financial debt by value of security	Yes	Write-offs 5 years < Conversion of debt into PPL with a term < 10 years Debt for equity/asset swap Convertible obligations/financial instrument conversion Payments in kind

Credits held by specially related parties (in general terms, shareholders and directors) are excluded and do not have the right to vote, but the effects of the Spanish scheme will be still extended to them. In contrast, non-financial creditors (e.g., commercial and public debt creditors) can also voluntarily adhere to the refinancing agreement but cannot be crammed down in the context of a court-sanctioned agreement.

It is important to note that the list of potential effects that may be imposed on holdout creditors is narrowly construed and limited to the effects identified in the "Contents" column above, and does not include the typical 'crammable' effects of restructurings, such as change of debtor or third-party security release.

Third party releases

The Spanish scheme applies to each debtor on a company-to-company basis. This means that the effects of the Spanish scheme do not have an impact on joint-obligors and guarantors and, therefore, dissenting creditors affected by a grace period or write-off at the principal obligor level will maintain their rights with regard to such joint-obligors and guarantors. Thus, any third party releases require the consent of the beneficiaries at each entity and obligors and third-party guarantees must be separately covered by the Spanish scheme. In order to overcome such limitation, the vast majority of Spanish schemes are becoming group schemes where not only the principal debtor files for court sanction, but also the subsidiaries and affiliates that are obligors and guarantors of such debts

Moratorium

During the Spanish scheme negotiations, the debtor may file a "pre-insolvency petition" also known as "5bis petition". This 5bis petition waives the debtor from its obligation – and prevents the creditors from using their right – to file an insolvency petition during a maximum period of 4 months until the Spanish scheme is reached.[84] During this 4-month period, the 5bis petition shall stay any enforcement proceedings (i) commenced by any creditors against collateral necessary for the continuity of the debtor's business activity; or (ii) commenced by creditors holding financial liabilities when creditors holding at least 51% of the financial liabilities have expressly supported the commencement of negotiations to enter into the scheme.

In addition, the Court's admission of the Spanish scheme's filing will stay any enforcement against any collateral of the debtor's (regardless whether it is necessary or not for its continuity). However, this stay will only affect those enforcement proceedings commenced by creditors that may eventually be affected by the scheme (whether as parties or "crammed" holdouts").

Speed/process

Any party to the scheme of arrangement is entitled to file the Spanish scheme with the relevant insolvency Court. The homologation request shall include: (i) the refinancing agreement recorded in a public deed; (ii) the auditor's certifications on the majority thresholds; (iii) the debtor's viability plan; and (iv) the independent experts' reports and the certificate of the shareholders' resolution approving the debt-to-equity swap (both where applicable).

[84] This provision, set out under Section 5bis of the Spanish Insolvency Act, allows the debtor's directors to extend negotiations with their creditors by up to six months (two months from becoming aware of the insolvency, plus three months to negotiate after the 5bis notice, plus one month to file the petition in the event that the negotiations are unsuccessful).

Through the Court's admission writ, the Court will publicize the scheme to any interested party and will provide stay of individual enforcement proceedings as stated above. If the statutory requirements are met, the Court will sanction the scheme within 15 days from its admission and extend the effects to holdouts. Once approved, the Court will publicize the homologation order, so any affected holdout creditor can challenge the Spanish scheme within the following 15 days.

The Spanish scheme becomes effective for its parties from its date of execution and to holdout creditors from the date of the Court's sanction. The time lapse until the Court sanctions the Spanish scheme varies widely from one case to another and mostly depends on the complexity of the scheme and the specific insolvency Court's workload.

<u>Fairness test</u>

The Court will sanction the Spanish scheme to the extent that the statutory requirements are met without assessing whether the scheme is convenient for the debtor's financial viability. The Court will only conduct a "fairness test" if a dissenting creditor challenges the homologation arguing the "disproportionate sacrifice" imposed on it by the scheme. With respect to the "disproportionate sacrifice" concept, the lack of a statutory definition has made it necessary for Spanish case law to develop a definition. In a nutshell, some rulings have settled two contrasting criteria to ascertain whether the sacrifice imposed on dissenting creditors is disproportionate: (i) if the dissenting creditors have suffered a worsening of their position with respect to what they reasonable expected to receive in the absence of restructuring if the debtor's business was liquidated or sold as a going concern (the 'liquidation test'), or (ii) if the dissenting creditors are treated less favourably than supporters of the agreement that would be junior to them under normal insolvency priority rules. Some other rulings have found elements of disproportionate sacrifice in workouts where there is lack of proportionality between the effects of the refinancing on the creditors and on the debtor (i.e., if the refinancing is not proportional with the objectives pursued) or where the business plan is not feasible.

<u>Debt-for-equity swaps and shareholders scheme</u>

The Spanish legislator has tried to enhance debt-for-equity swaps within Spanish restructurings. These efforts have encompassed a broad scope of the Spanish law that range from insolvency laws, to commercial, corporate and tax regulations. However, it is important to note that, under Spanish law, and contrary to what happens in some other jurisdictions, the cramdown of the equity always requires the approval of shareholders, even when they have no economic interest. This fact can jeopardize Spanish restructurings and provide leverage to shareholders when facing negotiation in distressed situations, notwithstanding the fact that their share value at risk is zero, or close to zero.

New money" privilege

One of the measures introduced by the recent insolvency reforms in Spain in order to promote out-of-court restructurings is the privilege granted to new cash injections or 'new money' provided through the Spanish schemes as a mechanism to facilitate the viability of debtors in situations of financial distress:

- -50% of the pre-petition claim will be allowed as an administrative expense (with a super-priority over any other pre-petition claim except claims secured with in-rem collateral) with a super-priority status over any other pre-petition claim;
- 50% of the pre-pretition claim will be allowed as a general privileged claim (junior to administrative expenses and in-rem secured claims, but senior to general ordinary unsecured creditors).

It is important to note that this privilege does not apply to cash injections made available by a specially related person (through a share capital increase, credit facilities, or acts or transactions with similar purposes).

Despite the above, the general view in the market is that the Spanish legislator could have taken a step further in line with the European Directive Proposal on Preventive Restructuring Frameworks, and included a complete and systematic regulation and protection of 'interim financing' or post-petition financings (like, for instance, the DIP financing regime in the US) in order to provide debtors with the ability to finance their working capital requirements during the insolvency proceedings along with the direct and indirect costs related to such proceedings.

5. The proposed new Dutch scheme

Introduction

On 5 September 2017, the Dutch Ministry of Security and Justice published a revised draft bill (the Act on the confirmation of a private restructuring plan in order to prevent insolvency) aiming to introduce scheme-like pre-insolvency proceedings in the Netherlands.[85] The draft bill is a revised version of an earlier draft and addresses several concerns that were raised during an earlier consultation stage. It is expected that the Bill will be submitted to Parliament at the end of 2018 and will enter into force in the course of 2019.

Current situation

The Netherlands currently lacks an effective restructuring procedure. The main reason for this is that the available mechanism binds neither shareholders nor secured or preferential creditors. It can only bind ordinary unsecured creditors, making it ineffective for many cases. Another significant drawback of the current restructuring mechanism is that it is only available in formal, more comprehensive proceedings with the associated negative stigma.

As a result of the shortcomings of the current system, in the past numerous Dutch companies have availed themselves of the English scheme of arrangement and American Chapter 11 proceedings to restructure their debts.[86] It is anticipated that with the new Dutch scheme as proposed in the draft bill, Dutch companies will no longer need to revert to foreign procedures for the purpose of implementing a restructuring.

[85] The official Dutch text of the draft bill and the explanatory notes on it can be found at the website of the Dutch government: https://www.internetconsultatie.nl/wethomologatie. An unofficial English translation of the draft bill can be found at RESOR's website: http://www.resor.nl/.

[86] Examples of Dutch companies that have used an English scheme of arrangement include Magyar Telecom B.V. (Re Magyar Telecom BV (2013) EWHC 3800 (Ch.) and Van Gansewinkel Groep B.V. (Re Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) (Snowden J, 22 July 2015)). Examples of Dutch companies that have used American Chapter 11 proceedings include: Almatis B.V. (Re: Almatis BV et al., case number 10-12308-mg, in the U.S. Bankruptcy Court for the Southern District of New York), Versatel Telecom International N.V. (Re: Versatel Telecom International N.V, case number 02-13003 (RDD), in the U.S. Bankruptcy Court for the Southern District of New York) and Global Telesystems Europe B.V. (Re: Global Telesystems Europe B.V., case number 01-11280 (EIK) in the U.S. Bankruptcy Court for the District of Delaware).

Key characteristics

The pre-insolvency proceedings contemplated in the draft bill are to a large extent similar to the English scheme of arrangement with a few notable differences.

Like the English scheme, the plan can be implemented outside formal insolvency proceedings. The debtor remains in possession. The procedure remains confidential until the confirmation decision has been delivered. The plan can bind all types of creditors and shareholders. It need not include all, but can be directed to only a subset of them. It may also include third party releases.

The draft bill also contains certain features of Chapter 11 of the US Bankruptcy Code. Notably, the new Dutch scheme will feature a cross-class cram down mechanism similar to that under the US Chapter 11 system.

Overview of the procedure in high-level terms

The procedure is generally designed to avoid unnecessary court involvement and to be as swift, efficient and flexible as possible. To prevent the self-fulfilling prophecy triggered by negative publicity, the procedure is not surrounded with mandatory general publicity but remains private.

The debtor may simply proceed to propose a plan to its creditors and to solicit their votes. There is no court test at entry. No prior court approval of a disclosure statement is required. No convening hearing is necessary. At least 8 days after the plan has been submitted, a vote takes place. Votes can be cast electronically. No formal meetings need to be held. Within 14 days following the vote a confirmation hearing takes place. The decision has to be delivered “as soon as possible” thereafter. The decision is final and not subject to appeal. The entire process can be completed from beginning to end, if need be, within four to five weeks.

The right to propose a plan

A debtor[87] who foresees his inability to continue paying his debts as they fall due can propose a plan to his creditors.[88] A creditor has the right to require the debtor to propose a plan. If the debtor subsequently fails to propose a plan within 30 days that has a reasonable prospect of being confirmed, the creditor can request the court to appoint an expert who will then have the right to propose a plan, to the exclusion of the debtor.

Permitted content of a plan

The draft bill does not contain any explicit restrictions or prescriptions as to the commercial content of the plan. The permitted commercial content indirectly follows from the confirmation criteria. The draft bill allows the debtor a large degree of freedom. It is up to the debtor to decide the content of the plan and to whom he offers it. The plan can include a wide range of measures, including an extension or reduction of debt, a debt for equity swap, a sale of assets and so forth. The plan can bind all types of creditors and shareholders, including preferential and secured creditors. It need not include all creditors, but can be limited to a subset. Parties who are not included or involved in the adoption of the plan are not bound by its terms. The plan does not have to be limited to a principle debtor, but can also include third parties that are liable for debts of the debtor (e.g. guarantors).[89]

The plan must include all information that creditors and shareholders need to be able to form an informed view of the plan. This includes the proposed division in classes, the financial consequences of the plan and a comparison between the value realized in the event the plan succeeds and the value of the debtor's assets when liquidated in bankruptcy.[90]

Class formation and acceptance

Creditors and shareholders whose rights are to be amended under the plan have the right to vote.[91] Voting takes place in classes. Creditors and shareholders who have interests or rights or who would receive rights under the plan that are so different that they cannot be said to be

[87] Under the draft bill a debtor cannot be a natural person who does not run a business.
[88] Article 370.
[89] Article 369 (7) and 370 (2).
[90] Article 373 and article 374.
[91] Article 378 (2).

in a comparable position, must be placed into different classes. Creditors or shareholders that have a different rank in bankruptcy must in any event be placed in different classes.[92]

A class of creditors has accepted the plan if those voting in favour represent at least two thirds in amount of the total claims of those who have cast their vote within the class. Similarly, a class of shareholders has accepted the plan if the shareholders who voted in favour represent at least two thirds of the issued capital held by those who voted in that class. No head count applies.

Early determinations

In order to promote the efficiency of the process and to provide certainty as early in the process as possible, the proponent of the plan may request the court to issue binding determinations before the plan is put to vote on matters of uncertainty, such as jurisdiction, class formation, valuation and so on.

Confirmation and cram down

The debtor may file a request with the court to confirm the plan, if at least one class has accepted it. The confirmation hearing must be held within fourteen days after the filing of the request. The court must deliver a decision "as soon as possible" after the hearing. In the interest of finality and speed, the decision is not subject to appeal.

As in the American system, the draft bill distinguishes between confirmation criteria that apply if all relevant classes have accepted the plan (consensual plan), and additional criteria that apply if one or more classes have not accepted the plan (cram down).

The main economic requirement for confirmation of a consensual plan is that individual creditors under the plan receive rights with a value that is not materially lower than the amount that they would expectedly have received upon liquidation in bankruptcy.

The main economic requirement for confirmation of a plan over the objection of a dissenting class (cram down) is that the members of the relevant dissenting class have the right under

[92] Article 374.

the plan to choose between either i) a distribution in non-cash with a value equal to their share in accordance with their rank of the reorganisation value or ii) a distribution in cash equal to their share in accordance with their rank of the liquidation value. The first option amounts to the equivalent of the American *absolute priority rule.* The second option protects senior creditors' exit rights. Unlike what is the case under the American system, under the proposed Dutch bill creditors in a dissenting class cannot be forced to surrender their right to liquidate and to continue financing the business against their majority will at terms imposed by the court.

Flanking measures

The draft bill provides for a number of flanking measures to enable the debtor to successfully implement a plan. The draft bill provides for a stay for a period of up to four months. The stay is not granted automatically, as in Chapter 11, but only upon request of the debtor. The stay can be directed against an individual creditor seeking to enforce its claim, or against the creditors generally.

The draft bill contains provisions that enable the debtor to preserve valuable contracts and to shed onerous ones. *Ipso facto* and change of control provisions are rendered inoperative. The debtor may terminate onerous contracts by written notice. Upon termination the counterparty receives a damages claim for non-performance, which can be subsequently restructured under the terms of the plan.

The draft bill further contains a provision that protects security granted for emergency funding against claw-back actions.

The draft bill proposes a general provision that gives the court the power to order specific measures in departure of mandatory statutory provisions in order to facilitate bespoke, tailor made solutions where required.

International aspects

The Dutch Ministry of Justice is currently contemplating a dual track system with two variants of the procedure. One variant would be public and fall within the ambit of the EU Regulation. The other variant would be confidential and fall outside of the scope of the EU Regulation.

The jurisdiction of the Dutch court to apply the confidential procedure, falling outside of the EU Regulation, would be based on a “sufficient connection” test which would be very broad. The recognition of the confidential procedure outside of the Netherlands, would depend on the domestic private international law of the country in which recognition is sought.

This dual track system would allow the proponent of the plan to choose whichever variant works best in the given case in terms of jurisdiction and recognition.