

The EU Preventive Restructuring Framework: in Extra Time? ¹

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Abstract

In 2019, the EU adopted the Preventive Restructuring Directive to introduce harmonisation enabling viable enterprises and entrepreneurs that are in financial difficulties to have access to effective national preventive restructuring frameworks so that they can continue operating. A harmonised standard to deal with distressed debt and allow for early restructurings was seen as a key component for a competitive and integrated European capital market. In this context, the authors came together in a comparative piece entitled ‘Restructuring Europe –The EU Preventive Restructuring Framework: a Hole in One?’ that mapped selected jurisdictions’ (Denmark, France, Germany, the Netherlands and the United Kingdom) preventive restructuring frameworks against the background of the Directive’s objectives and provisions. Eighteen months later and as the implementation period is coming to an end, this article revisits those findings and offers a comparative update on the implementation process. This article also includes additional perspectives on the impact that recent events, such as the COVID-19 Pandemic, had and are having on the nature and progress of the Member States towards the introduction and improvement of preventive restructuring frameworks.

Keywords: restructuring; insolvency; comparative law; pre-insolvency; Preventive Restructuring Directive.

1. Introduction

In hindsight, the origins of what came to be the Preventive Restructuring Directive² have gradually developed, emerging from a policy statement (Communication) of 2012 and the Recommendation of 2014 that followed.³ In the wake of the fallout occasioned by the Global Financial Crisis of 2008, the themes of these policy documents suggested that Member States should strongly consider improving their insolvency and restructuring frameworks to address modern challenges and needs. These were the need for more upstream procedures and early warning systems, the perennial spectre of consumer insolvencies, and the upskilling of the support frameworks for the insolvency sector. Response to the Recommendation was muted, with some Member States declining to consider it, while others felt they had sufficiently robust tools in their armoury to deal with possible future tests of economic and structural resilience.⁴ This led to the European Commission launching the initiative, which eventually saw the PRD enacted, by the formation of an Experts’ Group in Restructuring and Insolvency in 2018,⁵

¹ The law in this article is stated as at 30 September 2021.

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

³ Commission Communication ‘A New European Approach to Business Failure and Insolvency’ COM (2012) 742; Commission Recommendation C(2014) 1500 final of 12 March 2014 on a new approach to business failure and insolvency *OJ 74/65*. See further: Gert-Jan Boon and Stephan Madaus, ‘Toward a European Business Rescue Culture’, in: Jan Adriaanse and Jean-Pierre van der Rest (eds.), *Turnaround Management and Bankruptcy: A Research Companion (Routledge Advances in Management and Business Studies)* (Routledge 2017) 238.

⁴ Directorate-General Justice & Consumers of the European Commission, ‘Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency’ (30 September 2015).

⁵ The authors ought to disclose that one of their number, Paul J. Omar, was a member of (and remains an observer to) this group.

preceded by the commissioning of reports on the implementation of the (Recast) European Insolvency Regulation⁶ and an assessment of the environment for insolvency and restructuring across Europe.⁷

The text adopted by the Council and Parliament is quite a different creature from the proposal of the Commission, leaning on deliberations with, among others, the Experts' Group. In substance, though, the essence of the PRD is to institute a mechanism for preventive restructuring on an 'adopt or adapt' basis. As a result, those Member States without such procedures could simply transpose the PRD as a whole, while others with existing and/or analogous mechanisms could fine tune their procedures. Other measures address discharge for honest entrepreneurs, training and standards to enhance court and practitioner competency and a few miscellaneous (though very important) provisions. While some have drawn analogies with similar proceedings, especially the US Chapter 11 procedure,⁸ the complexity of the text and the plethora of options for variation it contains reduced the level of harmonisation it could ultimately obtain, making it quite a unique proposition in contrast to its initially proposed form. It is also this complexity that has required the transposition process to contain, perhaps for the first time in European Union (EU) history, the option for an extension to the usual two-year period given of an extra year.⁹ While the PRD left considerable flexibility for national implementation, the message was clear and ambitious: The Member States were called upon to prepare to introduce a modern restructuring framework.

In 2019, in light of this complexity and the likely long duration of the transposition process, which would then be followed by a perhaps equally long bedding in stage, the authors embarked on a series of observations initiated by the publication of an article entitled 'Restructuring Europe – The EU Preventive Restructuring Framework: a hole in one?'¹⁰ The article explores the progress of the debtor- and restructuring- friendly PRD in five different European jurisdictions (Denmark, France, Germany, the Netherlands, and the United Kingdom). This article, which follows up and updates the previous one, will chart the comparative progress of these Member State reforms toward the implementation of the PRD. Although several jurisdictions have hastened their reforms in the last 18 months, such as the Netherlands, Germany, and arguably the UK, most Member States have opted for the one-year extension, therefore, many of the reforms are not likely to be implemented until July 2022. As this article will demonstrate, the COVID-19 pandemic has been blamed by some for the delay but it has equally been an incentive to introduce more flexible procedures to ensure the rescue of viable businesses that are facing the financial distress caused by lockdowns, restrictions, and other unforeseen economic consequences of the pandemic.

The following discussion will build on the progress of the subject jurisdictions within the four themes explored in the previous article by examining, first, the progress of the introduction of up-stream or preventive restructuring mechanisms and the incentives to use such a process. It will then discuss the presence of and approach to the cram-down mechanism against creditors who dissent to a plan. Finally, it will explore the comparative developments within the culture of rescue in the five jurisdictions under examination.

⁶ Council Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] *OJL 141/19* (EIR Recast).

⁷ See for example Burkhard Hess, Paul Oberhammer, and Thomas Pfeiffer, et al, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' (JUST/2011/JCIV/PR/0049/A4, University of Heidelberg and University of Vienna 2012) and Gerard McCormack, Andrew Keay, and Sarah Brown, *European Insolvency Law: Reform and Harmonisation* (Edward Elgar 2017).

⁸ Gerard McCormack, 'The European Restructuring Directive and Stays on Creditor Enforcement Actions' (2021) 30(S1) *International Insolvency Review* S67.

⁹ Reinhard Bork, 'Adopting the Directive: Member States "in Particular Difficulties"' (2021) 84(Summer) *Eurofenix* 18.

¹⁰ David Ehmke, Jennifer L L Gant, Gert-Jan Boon, Line Langkjaer, and Emilie Ghio, 'The European Preventive Restructuring Framework: A Hole in One?' (2019) 28(2) *International Insolvency Review* 184 (Hole in One). This was preceded/accompanied by a shorter analytical summary in *Eurofenix* '10 Years of YANIL: Restructuring across Europe and the EU Directive on Restructuring and Insolvency' (2019) 76(Summer) *Eurofenix* 34.

2. Comparative Progress toward Preventive Restructuring

The PRD has had a clear impact on the substantive insolvency laws across Europe. Each of the jurisdictions have revised or are in the process of revising their ‘state of the art’ to align, to varying degrees, with the minimum requirements of the PRD. Two of the jurisdictions that will be discussed, The Netherlands and Germany, were quick to introduce new mechanisms, though the WHOA¹¹ had been in the works for a few years prior to its introduction in 2021. The German StaRUG¹² was also introduced in 2021 with comparable rules to the WHOA. France has recently introduced an Ordinance¹³ intended to implement the PRD, and while Denmark has not yet introduced implementing legislation, a number of changes have been made to incentivise the use of rescue procedures. Finally, although the UK is no longer a member of the EU, it has arguably followed the ethos of the PRD quite closely in its most recent reforms, perhaps with the aim of remaining a competitive restructuring jurisdiction despite the uncertainty that Brexit introduced to the enforceability and recognition of UK procedures.

2.1 Early Restructuring Mechanisms

The PRD provides for an early preventive restructuring process that should be made available when a company finds itself likely to become insolvent,¹⁴ though the definition of this likelihood is left to the determination of Member States.¹⁵ At the time of the authors’ original article in 2019, the UK still edged out the restructuring competition by offering the Scheme of Arrangement, a procedure that is not technically an insolvency procedure, sitting as it does within the Companies Act 2006 and available to solvent and insolvent companies alike. However, although the UK has now introduced a new restructuring plan that largely reflects the provisions of the PRD,¹⁶ the Dutch WHOA, German StaRUG, and new French reforms arguably introduce credible competition in terms of the efficiency of process and, due to Brexit, their ease of access and certainty of recognition and enforcement of judgments within the EU under the Recast EIR.

The introduction of the WHOA as an implementation of the PRD was a huge step forward for the Netherlands. Previously, the Netherlands merely provided a procedural stay of enforcement, the *surseance van betaling*,¹⁷ that could be used as breathing space to try to reach an agreement or composition with unsecured creditors. The procedure was quite limited in scope, with fairly prescriptive options for a specific up-stream or preventive procedure aimed at rescuing a viable company.¹⁸ Although it was available to imminently insolvent companies, in practice, it did not provide an effective procedure for restructuring. The WHOA has introduced an entirely new paradigm into the preventive restructuring possibilities in the Netherlands,¹⁹ which although initially not intended to implement the PRD,²⁰ goes a long way toward introducing a viable early restructuring mechanism that puts gives it a competitive edge in the EU’s restructuring market. The WHOA introduces a debtor-in-possession procedure available to companies that

¹¹ *Wet homologatie onderhands akkoord*.

¹² *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen, Unternehmensstabilisierungs- und –restrukturierungsgesetz – StaRUG*.

¹³ Ordinance no. 2021-1193 amending Book VI of the Commercial Code <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044044563>> accessed 3 October 2021.

¹⁴ PRD, Art 1(1)(a).

¹⁵ PRD, Art 2(2)(b).

¹⁶ UK Companies Act 2006, Part 26A.

¹⁷ DBA Art 214 et seq.

¹⁸ The Dutch corporate restructuring and insolvency regime is primarily laid down in the Dutch Bankruptcy Act (*faillissementswet*; ‘DBA’).

¹⁹ See Explanatory Memorandum to Draft Bill Implementing Act PRD 2019 (*Memorie van Toelichting bij het Voorontwerp Implementatiewet richtlijn herstructurering en insolventie*), 2 April 2021, 1-2 <<https://internetconsultatie.nl/herstructurering>>.

²⁰ This changed in April 2021 when a draft bill was presented to provide limited amendments to further align the WHOA with the PRD, see Draft bill Implementing Act PRD 2019 (*Voorontwerp Implementatiewet richtlijn herstructurering en insolventie*), 2 April 2021 <<https://internetconsultatie.nl/herstructurering>>.

foresee a likelihood of insolvency. The procedure supports limited court involvement through which a restructuring plan can be adopted by a majority that can then be confirmed by a court.²¹

At the time of the authors' last investigation, Germany offered its debtors an insolvency plan procedure under the *Insolvenzordnung* (InsO) of 1999, available for debtors who were unable to pay their debts,²² over-indebted,²³ or likely to become unable to pay their debts.²⁴ In Germany, the StaRUG is available to debtors who are likely to be unable to pay their debts within 24 months as an alternative to the insolvency plan procedure. In this case, the debtor has voluntary access to both procedures. However, as soon as a debtor becomes over-indebted or unable to pay its debts, the debtor will typically be under an obligation to file for insolvency, unless the debtor can show probable cause that continuation of the StaRUG procedure is in the best interest of its creditors.²⁵ The procedure allows a debtor to attempt to remedy its pending financial crisis at an early stage and outside of formal insolvency proceedings. It is broadly in line with the provisions of the PRD and presents a competitive option in the EU's restructuring industry.

France has been considered a restructuring friendly jurisdiction for quite some time as its insolvency regime's traditional aim has always been geared toward the rescue of ailing businesses in order to preserve employment. French law continues to rely on procedures such as the *mandat ad hoc*, *conciliation*,²⁶ and the various iterations of the *sauvegarde* procedure,²⁷ all of which are available prior to insolvency (*cessation of paiements*). However, in practice, businesses often still wait too long to utilise the procedures due to a desire to avoid the stigma of insolvency. While these procedures at the time of the authors' 2019 article were already close in nature to the provisions of the PRD,²⁸ France has nonetheless introduced a PRD-implementing Ordinance of 15 September 2021. The Ordinance acknowledged that the French system already largely complied with the PRD and, therefore, the availability of preventive procedures has mostly remained similar, although the Ordinance has introduced some changes that aim to increase efficiency further and comply with other obligatory provisions of the PRD, such as the length of the procedures).

Denmark still provides a plan procedure, the *Rekonstruktion*, that is only available during insolvency. However, in May 2021 in response to the expected impact of the COVID-19 Pandemic on Danish businesses, the plan procedure was amended.²⁹ Most of the changes had already been recommended by the Danish Bankruptcy Council to increase the efficiency of the Danish Restructuring Regime.³⁰ The amendments introduce a fast-track procedure for business transfers that allows for a more efficient corporate rescue potentiality. The fast track procedure is available within a four-week window during which viable businesses may attempt to rescue themselves from financial distress through voluntary and informal out-of-court workouts while avoiding the complexity and stigma of commencing an insolvency procedure.

The UK has long been a haven for corporate rescue and restructuring, a position that it has tried to bolster further with the introduction of a new restructuring plan modelled on the scheme of arrangement.³¹ The UK was fairly quick to introduce this new procedure, incentivised to some

²¹ DBA Art 369 et seq.

²² InsO s 17.

²³ InsO s 19.

²⁴ InsO s 18.

²⁵ InsO s 15b and StaRUG s 33.

²⁶ Commercial Code Arts L611 et seq.

²⁷ Commercial Code, art L620-1.

²⁸ Reinhard Dammann, 'The Commission Insolvency Proposal and its Impact on Creditors' Study by the Directorate General for Internal Policies of the European Union (European Parliament 2017) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU\(2017\)583155_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf)> last accessed 24 January 2019.

²⁹ Bekendtgørelse nr 775 af 3 maj 2021.

³⁰ Earlier attempts to legislative changes had never received sufficient support by major stakeholders and therefore never formally put forward as legislative proposals Betænkning nr 1555 om Ansattes retsstilling under insolvensbehandling, 190-200.

³¹ Provided by the Corporate Insolvency and Governance Act 2020 (CIGA 2020), which introduced Part 26A of the Companies Act 2006.

extent by the economic impact of the COVID-19 pandemic. The new restructuring plan aligns in many characteristics with the PRD and supplements the rescue toolkit that the authors' discussed in their 2019 article. The threshold for using the new restructuring plan is somewhat stricter than for traditional schemes. The new restructuring plans are only available to companies that are likely to encounter financial difficulties,³² reflecting the idea of the likelihood of insolvency and reflects many of the preventive provisions contained in the PRD. The main missing feature that places the new restructuring plan at a competitive disadvantage to the other new procedures that have been introduced in 2021 is the uncertainty of recognition or enforcement given that, due to Brexit, it will not be included in under the umbrella of the EIR Recast.

The EU-UK relationship is now regulated by the 'EU-UK Trade and Cooperation Agreement' (24 December 2020), which was implemented in the UK via the European Union (Future Relationship) Act 2020.³³ These documents, however, fail to replicate the seamless and straightforward system for the recognition of civil and insolvency judgments outlined by the Brussels Recast Regulation 2012³⁴ and the EIR Recast. Further, these 2020 trade and relationship agreements fail to make any mention of the procedure for the recognition of restructuring and insolvency proceedings between ex-partners. This omission means that the insolvency and restructuring industry has *de facto* been affected by a 'hard *Brexit*',³⁵ despite some emergency regulation enacted in the area by the UK government.³⁶ Thus, the UK's seemingly unassailable dominance as a restructuring hub in the EU has now been thrown into doubt, particularly now that jurisdictions such as Germany and the Netherlands have introduced mechanisms that could clearly compete with the Scheme even pre-Brexit.

2.2 Incentives to Enter a Preventive/Early Restructuring Mechanism

There are a number of incentives that can encourage early entry into restructuring negotiations to ensure the preservation of assets and value and to maximise the potential for rescuing the company from its financial distress. The earlier that a company engages with this process when it foresees financial difficulties, the more assets it is likely to have to support a turnaround and to convince creditors to cooperate for the benefit of the collective and equitable satisfaction of creditors. If a company waits too long and must enter into an official procedure due to an event of insolvency, even though that procedure may lead to a restructuring of a sort, procedural cost will be incurred and information about the debtor's condition will circulate, to which some degree of reputational stigma will be attached. If the restructuring eventually fails, the debtor has to carry the procedural and reputational costs without the benefit of a reorganised capital structure. Therefore, the availability in general of restructuring procedures at an early stage of financial distress is a key incentive for their utilisation.³⁷ While France, the UK, and to some extent the Netherlands, provided pre-insolvency restructuring options before, as well as Germany which always allowed for an early voluntary use of the insolvency regime, all jurisdictions have now improved this position to either reflect the 'likelihood of insolvency' threshold provided in the PRD or in case of Germany, now clearly defines the entry for voluntary access to both the restructuring and the insolvency procedure. Only Denmark so far

³² Companies Act 2006, s 901A.

³³ European Union (Future Relationship) Act 2020 c 29 <<https://www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm>> last accessed 31 August 2021.

³⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

³⁵ K Stephenson, 'Addressing Post-Brexit Limitations of Cross-Border Recognition of Restructuring and Insolvency Proceedings in Europe' (2021) 18(1) Int CR 1, 1.

³⁶ *The Insolvency (Amendment) (EU Exit) Regulations 2019* and *The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019* ('Insolvency Brexit Regulations'); further amended by *The Insolvency (Amendment) (EU Exit) Regulations 2020*.

³⁷ Compare also European Law Institute (ed Part I), and Bob Wessels, Stephan Madaus and Gert-Jan Boon (eds Part II), *Rescue of Business in Europe* (Oxford University Press 2020), Recommendation 1.21, 157-159.

maintains a restructuring procedure that is only available if a company has become insolvent, though this may well change in the near future as they come to implement the PRD.

Another key element for the debtor to enter into a restructuring procedure is that the debtor stays in possession. To incentivise early recourse to restructuring mechanisms, the PRD allows the debtor's shareholders to retain a stake in the restructured company or, even more importantly for directors, the chance to stay on the company's the board after having manoeuvred the company out of the rapids. The PRD is designed as a debtor-in-possession (DiP) framework, where the debtor should remain fully or at least partially in control of its assets and the day-to-day activities.³⁸ The UK provides for a full debtor in possession for its new restructuring plan and old schemes, as well as for its CVA, although the administration procedure and the associated pre-pack, once submitted, lead to the displacement of the board of directors with an insolvency practitioner. This position is arguably more draconian than most other jurisdictions in continental Europe along the spectrum of DiP. At the same time, practitioners have devised a debtor-in-possession administration procedure, known as 'light-touch administration', in which existing management remains in place.³⁹

On the other side of the Channel, France is renowned for its DiP procedures, which continues to include the *mandat ad hoc*, the *conciliation*, and in principle, the *sauvegarde* procedure (the latter, however, require the appointment of an administrator). The Dutch WHOA allows the debtor to remain in full possession. This is also the case when a plan expert assists in the drafting and negotiating of a restructuring plan, which is similar to the nature of the administrator appointed under the French *sauvegarde*. Germany has facilitated and continuously strengthened the DiP option in its previous offerings of insolvency procedures and the StaRUG is designed exclusively as a DiP procedure, though a restructuring expert can be appointed to support and supervise the process. Denmark, however, requires the appointment of an administrator for the *rekonstruktion* procedure along with a qualified accountant to provide new and updated balance sheets. These appointments previously resulted in soaring costs, which were particularly burdensome to small and medium sized enterprises. The 2021 reforms, however, removed the mandatory requirement to appoint an accountant, leaving it open to the debtor whether or not to do so. In summary, none of the pre-insolvency or restructuring procedures surveyed in the jurisdictions of this study remove the debtor from control, though some do require the appointment of some kind of expert to assist in the process.

A stay on enforcement actions can also act as an incentive for the use of a procedure at an earlier stage, as it allows for respite from creditor claims. When the authors were writing in 2019, the PRD represented a drastic innovation for all of the five countries analysed due to its use of the threshold of the 'likelihood of insolvency' for a stay on enforcement outside of formal insolvency, the only exception perhaps being France, which already provided a clear pre-insolvency offering that required that a company *not* be insolvent in order to use it (*sauvegarde*). However, since then the Netherlands, Germany, and the UK have introduced procedures that closely reflect this early threshold and allow for a stay upon the debtor's application as a part of those procedures. In the case of the UK, this short moratorium is not automatic, but available through a petition from the interested party. Although the initial period is quite short (20 days), it can be extended to up to one year with the creditors' consent. The use of automatic stays of individual enforcement procedures at earlier stages of a company's distress has been criticised due to its risks of strategic use from unscrupulous debtors. In order to address both debtor and creditor concerns, the PRD provides for a generous set of options under Article 6, though they are limited in time to four months, with an extension of up to one year only. It has yet to be seen as to whether effective safeguards will be established to overcome these risks or if, indeed,

³⁸ PRD, Art 5.

³⁹ See discussion of the *Debenhams* case in E Vaccari, 'Corporate Insolvency Reforms in England: Rescuing a "Broken Bench"? A Critical Analysis of Light Touch Administrations and New Restructuring Plans' (2020) 31(12) ICCLR 645.

these risks will lead to the abusive use of these mechanisms. The availability of a limited and potentially selective stay only upon the debtor's application instead of an automatic stay, however, can also be a strength of the procedure for the debtor who wants to restructure its financial obligations without creating distraction for the operative business.

It should be noted that, although Denmark has not introduced a pre-insolvency procedure at the time of writing, it has introduced a number of incentives for debtors to use the restructuring options that are available. The new fast-track procedure provides for a speedier option and allows the debtor to replace the formal voting meeting and court confirmation with the decision by the court appointed insolvency practitioner, reducing some of the formalities and associated costs. Finally, the rules on automatic conversion from restructuring to liquidation were amended to incentivise the use of restructuring by providing a controlled time out for the debtor to attempt a rescue without risking automatic conversion. Thus, even though it has not yet introduced its implementing legislation, Denmark is clearly following the trend toward incentivising the use of restructuring over liquidation where possible.

2.3 Cramming Down Dissenting Creditors by a Majority Vote

The PRD includes majority voting within classes⁴⁰ along with the potential to include a cross-class cram down to bind dissenting classes of creditors.⁴¹ Majority voting to approve a plan is fundamental in a case where there are a variety of stakeholder with diverse interests to avoid the potential for hold-outs. According to Article 11 of the PRD, a cross class cram down is available against dissenting classes as long as there is an affirmative vote of one creditor class 'in-the-money' and affected by the plan. Furthermore, it is required that a dissenting class receives equal payment to equal-ranking classes and a higher satisfaction quota than more junior classes, introducing a species of relative priority.⁴² The Member States can derogate from this default rule and require compliance with the well-known absolute priority principle instead.⁴³

The approach to the cross-class cramdown has undergone some fairly significant changes in alignment with the PRD. The Netherlands now provides for a cross-class cramdown against dissenting creditors along with the application of a relaxed absolute priority rule in the WHOA.⁴⁴ Similarly, the German StaRUG also allows for a cross-class cramdown, which is equally available in the insolvency plan procedure, though it generally remains conditional upon the application of absolute priority with some limited and well-justified deviations. In France, Ordinance no. 2021-1193 introduces classes of creditors to vote on the *sauvegarde* plan in such a way that their composition now aligns with the PRD. In addition, the Ordinance introduces the possibility of a cross-class cramdown mechanism in Article L626-32, a novelty for the French regime, which, despite its wide-ranging options for restructuring, had not included this possibility before. The French cross-class cramdown is, however, predicated on the application of an absolute, rather than relative, priority rule, though this is counterbalanced by some discretion of the court to consider the specific situation of the creditors.

Out of the five countries evaluated in the previous article, the UK provided for the earliest restructuring option to bind (secured and unsecured) creditors of a (still solvent) debtor with the Scheme of Arrangement. The new restructuring plan under Part 26A, however, backtracks the threshold to a likelihood of insolvency, which arguably turns it into a procedure that is only available in a pre-insolvency situation, unlike its big brother which can ostensibly be used at any time by a company. The new restructuring plan does, however, rectify a major missing piece to the Part 26 Scheme, providing for a cross-class cramdown to bind dissenting classes

⁴⁰ PRD, Art 9.

⁴¹ PRD, Art 11.

⁴² PRD, Art. 11 para 1 lit. c

⁴³ PRD, Art 11(2) (last paragraph).

⁴⁴ DBA, Art 384(4).

of creditors, much like the other new restructuring procedures in the Netherlands, Germany, and France, although the requisite majority is set highest at 75% in the case of the UK and Germany (both without headcount majority)

In Denmark, generally only unsecured creditors can be bound to a plan while fully secured creditors may not be affected by a plan and still enforce their claim once the proceeding is complete. At the time of writing, this remains the same, despite the recent amendments to the Danish restructuring procedure. Considering the high level of collateralization in Denmark a key element for successful restructuring is still missing, at least when the debtor is confronted with a dispersed credit structure. At the time of writing, it is being considered how and if significant changes to the Danish regulation on floating charges should be made and whether amendments regarding the effect of the debtor's insolvency should also be considered to incentivize and promote business rescue, but it is yet to be seen how this incentive will be introduced.

2.4 The 'Rescue' or 'Restructuring Culture'

A restructuring-friendly environment in which the entry into a restructuring procedure is not perceived as failure but as a chance for a 'fresh start' has significant value for a firm in financial distress. In a restructuring-hostile environment, where the debtor is branded with the stigma of insolvency, the chance is higher that customers, creditors, business partners, and employees will leave the debtor than in a restructuring-friendly environment. In such a restructuring-hostile environment, the debtor will, thus, try to avoid insolvency as long as possible so as to not incur the (immense) indirect costs. A chilling effect on entrepreneurial activity may also be associated with inflated costs of 'failure'.

The PRD clearly sends out a signal to develop a restructuring-friendly policy in Europe. Traditionally, all five countries have had a rather creditor-friendly insolvency regime, with France having probably the most profound orientation towards business rescue for the sake of retaining jobs, a position only strengthened in the new reforms. In contrast, while the UK insolvency regime tends to set the interest of creditors first, the CVA, pre-pack, and the scheme of arrangement in particular have encouraged early (and still solvent) restructurings in the mutual interest of creditors and debtors before the debtor was unable to pay its debt. The new Part 26A restructuring plan has gone a step further along this path by introducing more debtor-friendly aspects such as the cross-class cramdown, which can be used in conjunction with the standalone moratorium provided under the CIGA 2020.

Both Germany and the Netherlands have since 2019 legislatively embraced the pre-insolvency restructuring policy in their rapid and fulsome new StaRUG and WHOA. The Netherlands is a particularly interesting case as it had not introduced any significant legislative reforms in this area for several decades, so arguably the time was also ripe for it. Practitioners in the Netherlands, however, have been quite creative in working around the lack of a comprehensive restructuring procedure and have created various opportunities for restructuring companies in financial distress, such as the use of a Dutch-style pre-pack,⁴⁵ though associated uncertainties due to legal challenges limited the effectiveness of the procedure. Thus, the WHOA, has become a valuable and as it seems quite a successful addition for corporate restructuring.⁴⁶ Although only in force since January 2021, there has been a promising uptake of WHOA cases. While the StaRUG compares in many aspects to the already established insolvency plan procedure, it is certainly a very important addition especially for financial restructurings with considerable flexibility for a selective procedure as compared to the collective insolvency plan

⁴⁵ Though the pre-pack suffered a setback due to Case C-126/16 *First Steps Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] ECLI:EU:C:2017:489, which is being revisited in the case of *Heiploeg* (Case C-237/20)

⁴⁶ Compare also Hole in One and J M G J Boon, 'Mapping Preventive Restructuring Frameworks and the EU Preventive Restructuring Directive for the JCOERE Project, Country Report The Netherlands', JCOERE Project, May 2020 <https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/TheNetherlands_FINAL_PDF.pdf>.

procedure., e.g., the option to exclude certain parties, such as suppliers, from the restructuring and to ask for a stay only applicable to certain parties, which can be a valuable option to protect the operative business and the debtor's reputation.

For Denmark, the possibility to restructure a business using insolvency tools such as cram-downs and a moratorium at a time when the debtor is not yet insolvent and possibly even out of court is a very new, and in the light of EU rescue policy, a welcoming thought. Although Denmark has certainly introduced what are being viewed as useful and rescue-friendly amendments, there is as yet no public information about its approach to implementing the PRD. With that said, the Danish legislator estimates that the amendments provided for during the COVID 19-pandemic to the restructuring framework should result in as many as 500 insolvency restructuring proceedings that prior to the amendments would have been liquidation proceedings. It is, however, worth noting that the failure of the success of the legal framework is not only explained by the associated high costs and a bureaucratic and lengthy system, but also in the difficulty of providing adequate financial means to overcome the liquidity problems during the proceeding and obstacles to accessing funds for a compulsory composition. It will be interesting to see how the Danish legislator meets these challenges in its implementation of the PRD.

3. Comment

At the outset of the transposition process, few could anticipate what would ensue. The literature and commentary largely welcomed the text of the PRD, looked at its complexities and suggested that careful deliberation was necessary in order to achieve the desired implementation of what can be viewed as the first European Union-wide initiative for the creation of a substantive procedure since the Banking and Insurance Directives.⁴⁷ Unlike the EIR Recast, whose contribution to the field was to regulate the private international aspects of cross-border procedures, the PRD was always intended to be a fully functioning alternative to contemporary domestic insolvency procedures, although the (deliberate?) use of the directive form was designed to see it embedded within domestic law alongside or instead of some of these procedures. This 'Trojan Horse' model would result in a more or less uniform preventive restructuring regime being available in all Member States, which, despite the variations it could contain, would enhance the certainty of cross-border investors. A very laudable aim, indeed.

In the period following the publication of the authors' last survey of these five jurisdictions, what has resulted has been the many social and economic changes that have impacted the speed with which the implementation has occurred and potentially the form that these reforms have taken. Whereas some have pushed through reforms as quickly as possible (for better or for worse) that certainly touch on some of the policy focus of the PRD, the technical detail of implementation has been delayed until 2022 by most EU jurisdictions, apart from the majority of those surveyed in this article. Where there may have been some hesitancy to adopt the more flexible options of the PRD for fear of abuse by debtors (though there has certainly been some courageous changes in this area) the dire needs of small and medium enterprises, particularly in the wake of the lockdowns enforced as a result of the COVID-19 pandemic, have necessitated a broader and, for lack of a better word, more compassionate approach for those who have faced losing everything. It will be interesting to see, in the final phase of transposition, whether these approaches also find their way into the full implementation strategies or if the more flexible

⁴⁷ Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings *OJ 110/28* as replaced by Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) *OJ 335/1*; Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions *OJ 125/15*.

and debtor friendly safety nets will simply be a temporary anomaly associated with the sudden shock precipitated by the COVID 19 pandemic.⁴⁸

Of note, however, is the possible tension between measures responding to the pandemic and those that will need to be crafted because of the complexity of the PRD text. This might yet result in policy options with possible profound consequences for the uniform implementation of the PRD. Some of the policy choices that are regarded as particularly acute have been addressed by the IMF in a document produced in 2021,⁴⁹ which essentially advises a greater regard for the avoidance of divergence in the models chosen, particularly in the area of stays, plan preparation, formation and adoption processes as well as on issues such as new finance and the treatment of equity, so as not to imperil creditors' rights or produce uncertain outcomes in cross-border cases. In the view of the IMF, there is a great risk if Member States, relying on their own domestic policy leanings, choose options that reduce the intended beneficial effect of the harmonisation initiative. Too much choice, it seems, could be a bad thing after all.

It is also of harmonisation that one must speak of in the end, as the European Commission has launched a new process building up to a further instrument in the insolvency law field. Building on the perceived success of the EIR Recast and the anticipated success of the PRD, DG Justice has taken the lead in a project inaugurated in October 2020 arising from the work of the Experts Group on Restructuring and Insolvency and has identified possible avenues to pursue towards the convergence of insolvency law rules within the EU. Areas of interest announced for this initiative include the prerequisites for commencement of proceedings, including a definition of insolvency; avoidance actions and the effects of claw-back rights; asset-tracing frameworks; directors' duties in the vicinity of insolvency; the position of secured creditors and the balance between secured creditors and other stakeholders; as well as the issue of court expertise and the training of judges.⁵⁰

At time of writing, the Experts' Group (which has been reconstituted for this purpose) has been working for over six months. Across the totality of their meetings, the work has proceeded on two levels, firstly identifying, among the many topics put forward, those proposals that could command broad support within the group itself. Second, thinking more strategically to the likely adoption process, the experts are conscious of the need to anticipate what measures Member States would accept as being sufficiently imperative to warrant convergence in the rules across the Single Market. A final consideration shaping the outcomes and product of the deliberations is the form that measures might take, some perhaps more suitable for (or more acceptable in the guise of) a Recommendation, with others perhaps requiring an approach analogous to that for the PRD.

Although there is acute awareness of the sensitive nature of restructuring and insolvency law, being not just legal tools, but ones with economic and social consequences, and which interface with many other key aspects of domestic law, the push given by the PRD to developments in this field and the need to make progress whilst the topic remains top of the agenda, not least because of concerns about the security and resilience of business and economic activity in a post-pandemic world, means that there is likely to be a text that emerges in 2022, though its adoption may not come for a little while. In this context, some concern can be expressed that this text follows too closely on the final stages of PRD transposition and will coincide with the

⁴⁸ See Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer L. L. Gant, Line Langkjaer, and Eugenio Vaccari, 'The EU Harmonisation Process: A New Rhetoric in the Wake of the COVID-19 Pandemic' (2021) IIR <<https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1432>>.

⁴⁹ See José Garrido *et al.*, 'Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive' (WP/21/152) (IMF Working Paper, 2021).

⁵⁰ European Commission Inception Impact Assessment, 'Enhancing the convergence of insolvency laws', Ares(2020)6591479, 11 November 2020, 1ff.

critical time of its coming into use. Further 'disruption' from another transposition process to domestic law might not be wholly welcome to the Member States.

4. Conclusion

In conclusion, the PRD is a major text, not just as a preventive restructuring framework, but also as part of the emerging and wide-ranging toolkit stakeholders expect of a modern and developed insolvency and restructuring system. While national transposition efforts may embrace different speeds and will vary to suit domestic policy, overall, the initiative can be commended as one that has brought preventive restructuring into the clear light of day, normalising it as part of modern insolvency techniques. The detail of the actual transpositions that have been examined here has revealed the concerted effort by those Member States that have achieved transposition early. The proposals implemented as well as the independent UK reforms have been fairly ambitious, sending out a promising signal for a new restructuring culture in Europe. Given the many options offered by the PRD, it is a complex exercise to place the reforms into the domestic law carefully to positively benefit all stakeholders. This may not be true for all Member States, particularly those electing for the extension, not because of the perceived difficulty of transposition, but because there may be more fundamental issues to do with the robustness of their domestic restructuring and insolvency laws and frameworks. Nonetheless, the PRD initiative, which the authors intend to examine again, is certainly one that will enable more creative approaches to the rescue of viable businesses, which should continue to promote better preventive restructuring regimes in Europe. This can only be a good thing!