European Preventive Restructuring

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arrangements under the EU legislative instruments listed in Article 31 par. 1) beyond that what would be mandatory under those instruments. In legislative practice, this would be done via an exemption from the Directive's stay similar to that which will have to be enacted with respect to financial collateral (see Article 6 par. 14). The lobbying game which the financial industry regularly plays can therefore continue in the implementation exercises in the individual Member States.

Article 7 par. 6 sets three limits to those extensions. First, under the first sentence of subparagraph one, the extension would only be available where a corresponding safe-harbour exists in national insolvency law. This is actually a sensible proposition as it would reduce opportunities for regulatory arbitrage between preventive restructuring frameworks and formal insolvency proceedings. Second, to the extent that the debtor's counterparty ends up being "in the money" after the netting arrangement has run its course, i.e. if the resulting net amount is owed by the debtor to the counterparty, the stay shall nevertheless apply to the individual enforcement of that net amount against the debtor.[17] Unless, of course, its payment is secured by financial collateral, in which case see Article 6 par. 14.[18] Third and finally, under the second subparagraph, the extended protections may not apply to "contracts for the supply of goods, services or energy necessary for the operation of the debtor's business" unless they are exchange traded contract which may be readily replaced at current market value. It seems rather difficult to imagine what sort of a debtor would have close-out netting clauses built into its supply contracts (rather than hedging or other financial contracts) but where this is the case, the debtor's business would presumably be protected by means of an enactment along the lines of the second subparagraph. **49**

IV. Expiry of the stay (Article 7 par. 7)

Article 7 par. 7 mandates Member States to implement the Directive so that the expiry of the Directive's stay alone should not lead to the opening of formal insolvency proceedings which "could end in the liquidation of the debtor, unless *the other conditions* for such opening laid down by national law are fulfilled." (emphasis added). The expiry of the stay to which the provision relates refers to a case of expiry whereby the restructuring plan has not been adopted. **50**

The provision might above all serve as a reminder to Member States that, when adopting the Directive, they would be well advised to take account of the maximum time limit of the stay under Article 6 par. 8) and plan the framework's timeline accordingly so that the process of the adoption of the plan, including potential appeals, will fit into the stay's time limit. **51**

The italicised words supra in. par. 50 are a little curious because they seem to take for granted that the expiry of the Directive's stay will *always* be one of the conditions for **52**

Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts. 10 *Brooklyn Journal of Corporate*, *Financial & Commercial Law* 15 (2015).

[17] If the result of the netting operation runs the other way, the net amount will be owed by the counterparty to the debtor. This will be of no consequence in the present context, except perhaps as a welcome contribution towards the debtor's restructuring financing needs.

[18] Since an enactment of the additional protections under Article 7 par. 6 would go beyond the extent of the mandatory safe-harbours awarded to close-out netting by the instruments listed in Article 31 par. 1, an argument can be made that even if the resulting net claim were to be secured by financial collateral, that financial collateral would not need to enjoy the exemptions from the Directive's stay described supra, in art 6 par. 14. It would be an exciting practical experiment in political economy to see whether the financial industry lobby in any Member State wishing to take this legislative approach to Article 7 par. 6 would win or lose in its opposition to it.

the opening of formal insolvency proceedings. Naturally, this need not be so. Otherwise, the provision is unsurprising – one would naturally assume that whatever conditions for the insolvency order national law prescribes would need to be met irrespective of whether the Directive's stay has been previously invoked or not. On the other hand, the provision of Article 7 par. 7 would certainly not prevent Member States from legislating, for example, that the expiry of the stay without the adoption of the plan will procedurally operate as a presumption of debtor's insolvency (which the debtor might be able to rebut using such means as national insolvency law may allow).

V. Set-off

53 The Directive does not mention set-off at all – either in the operative provisions or in the Recitals. It will therefore be entirely upon the Member States to decide whether they should regulate the issue and how. The policies and approaches diverge widely[19] – from the flat-out prohibition of set-off of pre-commencement debts in the US Bankruptcy Code's automatic stay on the one hand (§ 362(a)(7)) to the mandatory and automatic conduct of set-off under the English Insolvency Act 1986 on the other (Section 323). Each choice, i.e. the potential prohibition of set-off of pre-commencement claims against the debtor attempting a restructuring within the Directive's framework, as well as the opposite approach to the issue, will have its costs and its benefits.

54 It will be useful if Member States make a conscious decision on the issue, rather than being silent on it because they have forgotten to address it.

55 The other thing that Member States should not forget about is consistency. A divergence in rules applicable to set-off between the preventive restructuring framework on the one hand and formal insolvency proceedings on the other is likely to invite regulatory arbitrage – just as divergence on any other key topic of insolvency policy will do.

[19] Wood, *Principles of International Insolvency*, 2007, p. 403.

Chapter 3
Restructuring plans

Article 8
Content of restructuring plans

1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:

(a) the identity of the debtor;

(b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;

(c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;

(d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;

(e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;

(f) where applicable, the identity of the practitioner in the field of restructuring;

(g) the terms of the restructuring plan, including, in particular:

(i) any proposed restructuring measures as referred to in point (1) of Article 2 (1);

(ii) where applicable, the proposed duration of any proposed restructuring measures;

(iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;

(iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;

(v) the estimated financial flows of the debtor, if provided for by national law; and

(vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;

(h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.

2. Member States shall make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. The check-list shall include practical guidelines on how the restructuring plan has to be drafted under national law.

The check-list shall be made available in the official language or languages of the Member State. Member States shall consider making the check-list available in at least one other language, in particular in a language used in international business.

Recitals: 42

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A. Purpose of the norm

1 Article 8 of the Directive lays down minimum standards for the content of a restructuring plan.

B. Minimum content of the plan

2 A restructuring plan that is proposed to the parties that are to be affected by the plan, must contain the information that is necessary for the affected parties to make an informed decision on the restructuring plan. It should enable them, as well as the judicial or administrative authority at the confirmation stage, to assess whether the proposed restructuring is necessary, the terms of the restructuring are adequate, proportionate and fair, and whether the proposed procedure (for example, with respect to the class formation and voting) meets the required standards of fairness.

3 The Directive leaves Member States a considerable degree of flexibility. Pursuant to Article 8 par. 1 of the Directive, a restructuring plan should contain at least the information referred to in that provision. Member States may require that additional information and explanations are included in the restructuring plan.[1]

4 The required information can roughly be divided into four categories: (i) information regarding the (financial situation of the) debtor, (ii) a description of the parties that are to be affected by the restructuring plan, (iii) the terms of the plan, and (iv) a statement concerning the prospects of the restructuring.

I. Information regarding the (financial situation of the) debtor

5 The restructuring plan should refer to the identity of the debtor. In this respect, although the Directive does not require this explicitly, it makes sense to, where the debtor is part of a group of companies, to also include in the restructuring plan relevant information regarding the (restructuring of the) group.

6 The restructuring plan should furthermore include information about the debtor's assets and liabilities at the time of submission of the restructuring plan, including a

[1] Recitals, par. 42.

valuation of the assets. Member States are not obliged to require that the restructuring plan is accompanied by an expert opinion regarding the value of the assets which need to be indicated in the plan.[2]

The restructuring plan should also contain a description of the economic situation of the debtor and the position of workers, as well as a description of the causes and the extent of the difficulties of the debtor. **7**

Where a practitioner in the field of restructuring has been appointed, the restructuring plan should indicate the identity and, presumably, contact details of the practitioner in the field of restructuring.[3] **8**

II. Affected parties

The restructuring plan should clearly identify the affected parties as well as their claims or interests that are to be covered by the restructuring plan. Restructuring plans under the Directive are not necessarily collective plans that affect all creditors and equity holders. The Directive allows for restructuring plans that target only certain (groups of) capital providers. The term 'affected parties' is defined in Article 2 par. 1 no. 2 of the Directive as: "creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders,[4] whose claims or interests, respectively, are directly affected by a restructuring plan." The affected parties can be named individually or described by categories of debt, in accordance with national law. **9**

As a restructuring plan under the terms of the Directive does not have to include and affect all creditors or, where applicable, equity holders, the restructuring plan should clarify which capital providers are not affected by the restructuring plan. This should be accompanied by a description of the reasons why it is proposed not to affect their rights. The parties that are not to be affected by the restructuring plan may be named individually or described by categories of debt in accordance with national law. **10**

Pursuant to Article 9 par. 2 of the Directive, Member States must ensure that affected parties have a right to vote on the adoption of a restructuring plan. Member States may, however, choose to exclude the parties referred to in Article 9 par. 3 of the Directive from the right to vote.[5] Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of the plan. **11**

The Directive prescribes that Member States must ensure that affected parties are treated in separate classes, with the possible exception of restructuring plans where the debtor is an SME.[6] These classes must, in accordance with Article 9 par. 4 of the Directive, reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. Pursuant to Article 8 par. 1 lit. d) of the Directive, the restructuring plan must, where applicable, contain information on the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class. Where **12**

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[2] Recitals, par. 42. On valuation, *cf.* Article 14.

[3] Article 8 par. 1 lit. f) of the Directive.

[4] On the inclusion or exclusion of equity holders from the (adoption and confirmation of) restructuring plans, *cf.* Article 11 par. 10 et seq.; Article 12 par. 10 et seq.

[5] Pursuant to Article 9(3), Member States may exclude the following parties from the right to vote: (a) equity holders; (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

[6] *Cf.* Article 9 par. 4 of the Directive. Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes. On class formation, *cf.* Article 9 par. 36 et seq.

Article 10 par. 1 lit. d) of the Commission Proposal required the rationale for the class formation to be included in the restructuring plan, this is modified to (mere) optionality under the Directive. Member States may require the plan proponent to include in the restructuring plan, the criteria according to which creditors have been grouped into classes in the restructuring plan.[7]

13 Member States must ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in accordance with Article 8 par. 1 lit. c) of the Directive. Member States must also ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.[8]

III. Terms of the plan

14 The restructuring plan must set out the terms of the proposed restructuring measures.[9]

15 This means that, in terms of Article 1 par. 2 no. 1 of the Directive, the restructuring plan must set out the measures aimed at restructuring the debtor's business. This may include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements.[10]

16 The permitted content of the restructuring measures is not subject to prescriptive rules under the Directive. This is fortunate as the law should offer a maximum degree of flexibility in this respect. What is acceptable and permissible in a restructuring plan is very much a commercial decision that should be left to the debtor and the affected parties as much as possible and is ultimately indirectly determined and scrutinized by the applicable confirmation criteria.[11]

17 The restructuring plan must indicate, where applicable, the proposed duration of the proposed restructuring measures set out in the plan.

18 With respect to employees, the restructuring plan must include the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law. Where applicable, the restructuring plan must also set out the overall consequences as regards employment, such as dismissals, short-time working arrangements or similar.

19 If provided for by national law, the restructuring plan must also contain the estimated financial flows of the debtor.

20 Furthermore, the restructuring plan should contain information on any new financing that is anticipated as part of the restructuring plan, including the reasons why the new financing is necessary to implement the plan.[12] Article 2 par. 1 no. 7 of the Directive provides that the term 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan

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[7] Recital 42.

[8] *Cf.* Article 15 par. 2 of the Directive.

[9] Article 8 par. 1 lit. g) of the Directive.

[10] *Cf.* Article 2 par. 2 et seq.

[11] *Cf.* Tollenaar, par. 8.5. See also Mennens, Het dwangakkoord buiten surseance en faillissement, Onderneming en Recht, nr. 118, Deventer 2020 (hereinafter: "Mennens"), chapter 7, where she also deals with certain limits of what may be included in the plan under Dutch, English and US law.

[12] *Cf.* Article 2 par. 37 et seq., Article 10 par. 25 et seq., Article 17.

and that is included in that restructuring plan.[13] Pursuant to Article 17 of the Directive, such new financing is provided with a 'safe harbour', but Member States may provide that that only applies if the restructuring plan has been confirmed by a judicial or administrative authority.[14]

IV. Statement relating to the prospects of the restructuring

The restructuring plan must include a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan.[15] This statement may be given by the person responsible for proposing the plan,[16] but Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring, if such a practitioner is appointed. **21**

C. Checklists

The Commission Proposal provided that Member States would be obliged to make model restructuring plans available online.[17] The Directive does not go as far as that and (merely) requires the Member States to make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. **22**

The check-list must include practical guidelines on how the restructuring plan has to be drafted under national law. The check-list must be made available in the official language or languages of the Member State and Member States must consider making the check-list available in at least one other language, in particular in a language used in international business. **23**

D. Third-party releases

In many cases of companies that seek debt relief through a restructuring plan, the claims that are to be compromised under the restructuring plan are guaranteed by other companies within the same group. The possibility to allow restructuring plans to release or amend guarantees provided by other companies within the same group, without the guarantor being subject to a reorganization process itself, may be very important for the success of the restructuring.[18] **24**

The Directive is silent on the release of third-party guarantees in a restructuring plan. This was a deliberate, but unfortunate choice.[19] But the Directive does not prevent Member States from including a regime on the release of third party guarantees either. **25**

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[13] *Cf.* Article 2 par. 37 et seq.

[14] *Cf.* Article 17.

[15] Article 8 par. 1 lit. h) of the Directive.

[16] *Cf.* Article 8 par. 1 lit. g) of the Commission Proposal.

[17] Article 8 par. 2 of the Commission Proposal.

[18] On the release of third-party guarantees, *cf.* Veder/Thery, The Release of Third Party Guarantees in Pre-Insolvency Restructuring Plans, in: Faber/Schuijling/Vermunt (eds.), *Trust and Good Faith Across Borders*, Liber Amicorum Prof. Dr. S.C.J.J. Kortmann, Series Law of Business and Finance, volume 15, 2017, p. 259 *et seq*. See also Tollenaar, par. 8.11; Mennens, par. 7.7.

[19] Commission Staff Working Document, Impact Assessment accompanying the document "Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks,

26 The possibility of effecting a (partial) release or amendment of third party (upstream) guarantees as part of a restructuring plan, without the guarantor having to go through parallel proceedings, is to be welcomed. It is an essential instrument to safeguard the continuity of subsidiaries in a group of companies that have provided guarantees for credit extended to a company within the group whose debts are to be restructured under a restructuring plan. Operating subsidiaries that are jointly and severally liable for the holding company's debts by way of personal guarantees might be even more severely affected in case they are forced to enter parallel restructuring proceedings only to reflect at their level the measures that have already been adopted by the same creditors at the holding company's level.

27 The Dutch legislator has included a regime for the restructuring of group guarantees in the bill for the Dutch scheme, the Wet Homologatie Onderhands Akkoord (WHOA).

28 The bill provides that a restructuring plan may also amend the rights of creditors against legal entities that form a group with the debtor that proposes the restructuring plan, provided that:[20]

- the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;
- the relevant legal entities are in a state in which it can reasonably be assumed that they will not be able to continue paying their debts as they fall due
- the relevant legal entities have approved the proposed amendment or the plan is proposed by a restructuring expert; and
- the court would have jurisdiction if these legal entities were to propose their own plan.

Article 9
Adoption of restructuring plans

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

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

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

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

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

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or

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second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU", SWD(2016) 357 final, 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.", and p. 74: "Finally, the majority of the Member States were opposed to any rules on third party releases."

[20] *Cf.* proposed Article 372 of the Dutch Bankruptcy Act. An (informal) English translation of the WHOA legislation is available at www.reser.nl.